NO. 04-1144

IN THE SUPREME COURT OF TEXAS

SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF EDUCATION, *ET AL.*,

Appellants,

v.

WEST ORANGE-COVE C.I.S.D, *ET AL.*, ALVARADO I.S.D., *ET AL.*, EDGEWOOD I.S.D., *ET AL.*,

Appellees.

On direct appeal from the 250th Judicial District Court of Travis County, Texas

BRIEF OF APPELLEES

EDGEWOOD, YSLETA, LAREDO, SAN ELIZARIO, SOCORRO, SOUTH SAN ANTONIO, LA VEGA, KENEDY, HARLANDALE, BROWNSVILLE, PHARR-SAN JUAN-ALAMO, SHARYLAND, MONTE ALTO, EDCOUCH-ELSA, LOS FRESNOS, RAYMONDVILLE, HARLINGEN, JIM HOGG COUNTY, LA FERIA, ROMA, SAN BENITO, and UNITED INDEPENDENT SCHOOL DISTRICTS

David G. Hinojosa
SBN 24010689
Nina Perales
SBN 24005046
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
140 E. Houston Street, Suite 300
San Antonio, TX 78205
(210) 224-5476/ (210) 224-5382 Fax
ATTORNEYS FOR EDGEWOOD ISD, *et al.*
APPELLEES

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Preliminary Statement

After four previous school finance cases, a group of twenty-two property-poor, predominantly minority school districts (the "Edgewood Appellees") ask this Court once again for relief. Edgewood Appellees are before the Court again because the State raised the bar of academic standards with a more challenging curriculum but provided their districts with disproportionately fewer and insufficient resources—for both classroom instruction and for the construction of classrooms in which that instruction takes place. Even property-rich districts, which access substantially greater revenue than property-poor districts, filed suit against State Appellees ("State") alleging they lack the resources to provide an adequate education to their students. At the conclusion of almost six weeks of testimony and with a record that included over 7,000 exhibits, the trial court found the system in disrepair and ultimately, unconstitutional for both property-rich and property-poor districts. This judgment comes ten years after this Court found the school finance system to be minimally constitutional—and only when compared to the grossly inefficient and inadequate system of the past. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) ("*Edgewood IV*").

This Court has long recognized the value of resources in providing a quality education: "The amount of money spent on a student's education has a real and meaningful impact on the education opportunity offered that student." *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989) ("*Edgewood I*"). Shirley Neeley, the Texas Commissioner of Education, noted, "everything you do costs money." RR23:216. At a time when the State claims to be ratcheting up the required curriculum and graduation

requirements for the all of the students of Texas (WOC Ex. 678 at 9-10), the State refuses to provide property-poor districts with the resources to meet those new challenges, especially the resources needed to educate high-cost children that are low-income, special education, and limited-English-proficient ("LEP"). CR4:924; FF296.

Rather than meeting their financial commitment made to the Court in *Edgewood IV*, the State retreated not only from those promises, but from the constitutional standards and principles established by the Texas Supreme Court. *See Edgewood IV,* 917 S.W.2d 717. The State now attempts to minimize the education guaranteed by our Texas Constitution, and lauds a system in which a school district is rated "acceptable" when: more than 75% of the district's students fail the state-mandated test; more than 25% of the district's students drop out; and more than sixty percent of the district's students fail to graduate (EDG Ex. 606 at 52). The State is also untroubled by the fact that, in some years, no money is allocated for new facilities for property-poor districts.

The Courts acknowledge "that education is perhaps the most important function of state and local governments." *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* 826 S.W.2d 489, 494 (Tex. 1992) *("Edgewood III")* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 1972) and *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)). The system the State calls "adequate," "efficient," and "suitable" can only be so if this Court determines that the established constitutional duties and standards no longer exist and that providing a quality education to all Texas children is an unimportant and wavering function of our government. This Court should affirm the trial court's

holdings addressed in this brief[1] and uphold the well-established standards of the Texas Constitution.

Statement of Facts[2]

All children in Texas, regardless of socioeconomic status, must meet the same educational standards set forth by the State. CR4:962; FF574. Of the 4.3 million schoolchildren in Texas in 2002-03, almost fifteen percent were limited-English LEP and over fifty percent were economically disadvantaged. CR4:874; FF68. African-American and Latino schoolchildren accounted for 97% of the total growth in student population and economically disadvantaged children account for 90% of the total growth. *Id.*

The State of Texas recognizes that LEP and economically disadvantaged students require specialized education and guarantees such through an "efficient system ... 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 . . . .*" TEX. EDUC. CODE § 42.001(a) (Vernon's Supp. 2002) (emphasis added); *see also* CR4:944; FF438. Further, state policy dictates that "[t]he public school finance system of this state shall adhere to a standard of neutrality... after acknowledging all **legitimate** students and district cost differences." TEX. EDUC. CODE § 42.001(b); CR4:944; FF441 (emphasis added). Thus, the state recognizes that certain students have special educational needs and that those needs should be met by the state through an efficient system, which addresses the additional costs associated with meeting

[1] Edgewood Appellees do not seek affirmance of the trial court's adverse ruling on Edgewood Appellees' claims regarding efficiency of maintenance and operations funding; Edgewood Appellees appealed that ruling in Docket No. 05-0148.

[2] Edgewood Appellees offer these additional facts to clarify information that was either missing or mis-stated in the State Appellants' Brief and provide further facts within the Argument section, when appropriate.

those special needs. Among those "legitimate" needs identified by the state are the educational needs of children from low socioeconomic backgrounds, serviced through the compensatory education allotment and LEP children serviced through the bilingual education allotment.

Compensatory Education

"The intended purpose of compensatory education is to provide additional investments in human capital for low income students to compensate for the higher investments in human capital afforded to more advantaged populations." CR4:957; FF540. Some common characteristics of economically disadvantaged children include low levels of parental education; inadequate housing with very few, if any, resources; parental unemployment or underemployment; poor access to health care; and insufficient resources. CR4:958; FF546. The more intense the poverty and the number of economically disadvantaged students in a given district, the greater the obstacles districts face when trying to provide a quality education. CR4:958; FF547.

According to state policy, compensatory education funds are designated as funds for supplemental programs and services designed to eliminate (not simply reduce) any disparity in student performance on the TAKS and to eliminate disparities in high school completion rates. TEX. EDUC CODE § 29.081. The state provides districts with compensatory education funds based on the number of students who qualify for the federally-subsidized free and reduced-price lunch programs. *Id.* § 42.152(a).

Bilingual Education.

The State recognizes that "mastery of basic English language skills is a prerequisite for effective participation in the state's educational program." *Id.* § 29.051. The State

further mandates that "[p]ublic schools are responsible for providing a full opportunity for all students to become competent in speaking, reading, writing, and comprehending the English language" and that bilingual education can meet the needs of students whose primary language is other than English and "facilitate their integration into the regular school curriculum." *See id.*

> "Therefore, in accordance with the policy of the state to ensure equal educational opportunity to every student, and in recognition of the educational needs of students of limited English proficiency, this subchapter provides for the establishment of bilingual education and special language programs in the public schools and provides supplement financial assistance to help school districts meet the extra costs of the programs."
>
> *Id.*

Each district enrolling twenty or more LEP students in the same grade level, must offer a bilingual or special language program. *Id.* § 29.053. Teachers assigned to a bilingual or to a special language program must receive appropriate certification from the State Board for Educator Certification. Funds allocated under the state's bilingual education allotment "may be used only for program and student evaluation, instructional materials and equipment, staff development, supplemental staff expenses, salary supplements for teachers, and other supplies required quality instructions and smaller class size." *Id* § 42.153.

Funding of the Compensatory and Bilingual Education Allotments.

"Ten years before the enactment of HB72 (in 1984), the Governor's Office of Educational Research and Planning (GOERP) published a report on restructuring school funding with the goal of improving vertical equity in the system, i.e. leveling the playing field for students with different needs and abilities." CR4:945; FF447. Based upon data from a program-by-program cost audit of 42 school districts of varying size that had been

nominated as exemplary by 1,500 educational leaders, the in-depth cost analysis of all state and local funds spent by these districts yielded a recommendation for a "beginning" bilingual weight of 0.15 for bilingual education programs, with an increase to 0.40 in two years. CR4:945; FF448; *see also* EDG Ex. 409 at 6, "Honorable Paul Colbert Expert Report, The Development of the Texas School Finance System: A History of Inadequacy and Inequity, 2004 (recognizing those same recommendations for compensatory education). The Legislature defeated the Governor's bill based on the recommendations and arbitrarily set the bilingual allotment at $50/student and the English as a second language allotment at $12.50/student. *Id.*; FF449 *see also* EDG Ex. 409 at 6 (setting the compensatory allotment at only $37.50/student).

In 1985, the state convened a school finance working group, consisting of educators and legislators, that recommended a minimal weight of ".4"[3] for both the bilingual[4] and compensatory education[5] allotments to meet the academic standards in place at that time. CR4:945; FF453. Instead of adopting the recommended weights, the state arbitrarily set the compensatory education weight at ".2"[6] (CR4:958; FF107) and the bilingual education weight at ".1". CR4:877; FF83. The weights have not been updated since 1985, although

[3] In essence, a .4 weight would be the rough equivalent of forty-percent added to the adjusted basic allotment. In the calculation of "WADA" for Tier 2 purposes, the .4 weight would be the rough equivalent of a student being worth 1.4, rather than 1.0.

[4] The "bilingual education allotment" provides funds for each student in average daily attendance who qualifies as limited-English proficient and is enrolled in a bilingual or English as a Second Language program. TEX. EDUC. CODE § 42.153(a). Edgewood Appellees refer to these students, collectively, as "LEPs".

[5] The "compensatory education allotment" provides funds for each student in average daily attendance who qualifies for the Free and Reduced Price Lunch program. TEX. EDUC. CODE § 42.152(a). Edgewood Appellees refer to these students collectively as "economically disadvantaged students".

[6] The State's implementation of "compensatory education set-asides," whereby the State sets aside twenty percent of the compensatory education funds for property-poor districts, essentially reduces their allotment to ".18." CR4:958; FF542.

the State has consistently raised the standards it expects high-need schoolchildren to meet. *Id.*

In 2004, a study conducted by Texas A&M University for the Joint Select Committee on Public School Finance produced a compensatory education allotment of $1,960/student and a bilingual education allotment of $1248 to bring those special need students up to the low outcome standards of that study.[7] *See* CR4:958; FF545; CR4:897; FF83. Even in that study, the computations did not include drop-outs due to the implausibility of the state's own reported drop-out figures. CR4:958; FF545. As explained in the study:

> "One outcome measure that *we would ideally have included* in our cost function is a measure of the completion rates of students or of the dropout rate. We examined the TEA measures for this variable but in the end found this variable not to be useful. *The basic problem is that the TEA variable indicates a very low dropout rate, one so low as to not be believable.*"
>
> State EX. 15889-0009 (emphasis added).

Property-poor districts, such as those included in Edgewood Appellees, must educate a much higher percentage of these special needs students than property-wealthy districts CR4:959; FF549. The Edgewood focus districts'[8] LEP enrollment ranged from 14.9% in Jim Hogg County I.S.D. to 59.9% in Laredo I.S.D. CR4:949; FF484. The economically disadvantaged populations in the Edgewood focus districts ranged from 71.5% in Socorro I.S.D. to 96% in Edgewood I.S.D. *Id.* at 959; FF549. Six out of the ten Edgewood focus districts enrolled over 30% LEP students and over 90% economically disadvantaged

[7] The equivalent "weight" for the "least-cost" district identified in that study "would produce weights of 0.38 for compensatory education and 0.24 for bilingual education. Of course, if a lower basic allotment than the "least-cost district" level were calculated, the weights would be higher." *See* EDG Ex. 409 at 7.

[8] By agreement of the parties, Edgewood Appellees designated eight districts as representative of the Edgewood Intervenors and the State designated two districts from the Edgewood Intervenors as focus districts. CR4:859; FF5.

children. CR4:949, 959; FF484, 549. Thus, insufficient funding for economically disadvantaged students is disproportionately borne by low wealth districts such as Edgewood Appellees. CR4:959; FF549.

Facilities Financing

In 1997, the State removed facilities financing from the "equalized" and wealth-sharing system of Tier 2. Unlike the former system, wealthy districts now retain all of the revenue generated through Interest and Sinking ("I&S") tax rates and poor districts are relegated to *sum certain* appropriations through a new "Tier 3," meaning that when all of the appropriation is claimed, no more Tier 3 funds can be distributed by the TEA. CR4:936-937; FF389, 394 citing EDG Ex. 396 at 20.

Under Tier 3, the Legislature established the Instructional Facilities Allotment (IFA) in 1997 to help offset the costs associated with constructing new instructional facilities. TEX. EDUC. CODE ANN. §§ 46.001 *et seq.* This program guarantees a specific yield per ADA, currently $35 per penny[9] of local tax effort, for servicing "new" (rather than existing) debt incurred to finance instructional facilities for districts accepted into the program. *Id.* IFA financing includes "new" debt incurred to cover construction, acquisition, renovation or improvement of instructional facilities. *Id.* Whereas the State's contribution to the Tier 1 basic allotment and the Tier 2 guaranteed yield is "fully funded", facilities funding is limited to the availability of state funds and the amount appropriated by the Legislature in each biennium. CR4; FF386.

[9] The State misrepresents this yield as $50 in its Appellants' Brief at 80.

Districts apply for facilities funds and funds are applied first to the qualifying districts ranked lowest in wealth per Average Daily Attendance (ADA) based on certain formulas. *See* TEX. EDUC. CODE § 46.006. Appropriations for new facilities under IFA plunged from an initial appropriation of $200 million in the first biennium of its existence to a mere $20 million in the 2003-2004 biennium. CR4:938; FF396. Whereas all qualifying districts who applied for funding during the first biennium received IFA funds for new facilities, in the 2003-04 biennium, only 16 of over 300 districts who applied received IFA funds. See EDG Ex. 407, attached as App. A.

In 1999, the Legislature instituted a second program for facilities financing known as the Existing Debt Allotment (EDA).[10] Whereas IFA funds apply to debt payments for new instructional facilities debt, EDA funds apply to pre-existing debt. CR4:936; FF388. Under EDA, districts apply for revenue equalization in the form of a guaranteed yield of $35 per penny per ADA of tax effort related to their bonded debt. *Id.* The State will equalize up to only 29 cents of tax effort for existing debt payments under this program, subject to availability of funds for the current biennium. TEX. EDUC. CODE § 46.304. EDA, like IFA, does not guarantee equal access to facilities funds and is contingent upon legislative appropriation. CR4:939; FF401-02.

Summary of Argument

Each of the State's jurisdictional challenges fails. Constitutional adequacy is not a non-justiciable political question and can be measured through the application of sound legal principles, which the State has not followed. Even if constitutional "adequacy" is found to

[10] IFA and EDA will be collectively referred to as "Tier 3" for the remainder of the brief.

be non-justiciable, the fact that the Court found the public school system constitutionally inefficient in *Edgewood I* and *II* and then established the outer bounds of efficiency in *Edgewood IV*, demonstrates that a judicially manageable legal standard exists for "efficiency." Further, the districts do have a right of action and standing to sue the State under Article VII, section 1, as established by the four previous school finance cases and an application of the facts in the current case to the principles set forth by this Court.

The State erroneously proffers and argues that the Court should import a "rational basis" standard to evaluate the challenged school finance system -- a standard derived from and only applied in equal protection cases. This Court should not turn away from determining the extent to which the Legislature has met its obligation under Article VII, section 1 simply because the Legislature keeps failing to meet its constitutional obligations.

The trial court correctly determined that the current accountability rating system fails to properly measure whether the State is providing for a general diffusion of knowledge. Regardless of which specific standards this Court employs in measuring adequacy, the current system does not enable property-poor school districts to provide all of their students a general diffusion of knowledge.

The trial court also correctly ruled that Edgewood Appellees, because they are property-poor districts, are unable to provide a general diffusion of knowledge to their students with the current level of funding allocated by the State, particularly in light of the fact that they enroll a disproportionately greater number of low-income and LEP children. The Legislature's funding of the public school system has never been based on true educational needs, especially for the special-needs populations. Further, as property-poor districts, they receive disproportionately low revenues for maintenance and operations.

Finally, the trial court properly determined that the school finance system does not provide property-poor school districts with sufficient and equitable funds for facilities to provide each of their students an adequate education. Since 1997, the State has lost ground with respect to providing equitable and adequate facilities financing for property-poor districts, while at the same time the State has provided greater access and revenue opportunities to property-rich districts. This Court should affirm the trial court's judgment.[11]

ARGUMENT

I. STANDARD OF REVIEW.

A trial court's conclusion of law is a legal question, to be reviewed *de novo*. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2001); *Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 503 (Tex. App. 1997). On appeal, the higher court independently evaluates the trial court's legal conclusions to determine whether the trial court properly applied the law to the facts in reaching its legal conclusion. *See State v. $217,590.00 in United States Currency*, 18 S.W.3d 631, 634 (Tex. 2000); *Pickens v. Pickens*, 62 S.W.3d 212, 215 (Tex. App. 2001); *Templeton v. Dreiss*, 961 S.W.2d 645, 656 n.8 (Tex. App. 1998).

II. ARTICLE VII, SECTION 1 OF THE TEXAS CONSTITUTION.

Central to this appeal is Article VII, section 1 of the Texas Constitution, which states:

> A general diffusion of knowledge being essential to the preservation of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

TEX. CONST. VII, § 1.

[11] With the exception of the trial court's ruling concerning the equitable distribution of maintenance and operations revenue for property-poor districts, which is briefed in Edgewood Appellants' Brief under Docket No. 05-0148.

In *Edgewood I*, after a thorough examination of the intent behind Article VII, section I, this Court concluded that the Legislature's duty to provide a system of free public schools must: "make suitable provision for an efficient system for the essential purpose of a general diffusion of knowledge." *Edgewood I*, 777 S.W.2d at 394. The Court stated that the Legislature, in carrying out its duty under Article VII, section 1, must meet three standards: "First, the education must be adequate; that is, the public school system must accomplish that 'general diffusion of knowledge...essential to the preservation of the liberties and rights of the peoples.' Second, the means adopted must be 'suitable.' Third, the system itself must be 'efficient'." *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003). The Court also affirmed its role in judging whether those standards have been met. *Id.* at 563-64.

A. Legal Standard for Adequacy.

An adequate education is defined as the "education needed to participate fully in the social, economic, and educational opportunities available in Texas." *Id.* at 580 (quoting *Edgewood IV*, 917 S.W.2d at 736). Further, the State's duty to provide a general diffusion of knowledge must reflect the "changing times, needs, and public expectations" of the people of Texas. *Id.* at 581 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.14). And although the State may establish the components of what constitutes a general diffusion of knowledge, it cannot set the standard "so low as to avoid its constitutional obligation to provide a suitable provision for a general diffusion of knowledge." *Edgewood IV*, 917 S.W.2d at 730 n.8.

The courts determine whether the Legislature has fulfilled its duty to provide a general diffusion of knowledge to all Texas students in the public school system. *See West*

Orange-Cove, 107 S.W.3d at 563-64; *Edgewood I*, 777 S.W.2d at 394; *accord Edgewood IV*, 917 at 736. In doing so, the Court should determine whether the decisions by the legislature "as a whole meet the standard set by the people in Article VII, § 1." *West Orange-Cove*, 107 S.W.3d at 583.

B. Legal Standard for Efficiency.

A system of public free schools must be both qualitatively efficient and financially efficient in order to survive constitutional challenge. *Edgewood IV*, 917 S.W.2d at 729 (quoting *Edgewood I*, 777 S.W.2d at 397). Financial efficiency focuses on the "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." *Id.* Qualitative efficiency requires that the school finance system provide the resources necessary for school districts to provide a general diffusion of knowledge to every child. *Id.*; TEX. CONST. art. VII, §1. In providing a public school system, according to the Texas Constitution, the State must provide an "efficient" system, not one that is "cheap," "inexpensive," or even "economical." *Edgewood I*, 777 S.W.2d. at 395.

"The Constitutionally imposed state responsibility for an efficient education system is the same for all citizens regardless of where they live." *Edgewood I*, 777 S.W.2d at 396. The *Edgewood I* Court declared that if the Legislature does not satisfy its constitutional duty to meet the efficiency and suitability standards, it is the Court's duty to say so. *Id.*; *see also West Orange-Cove*, 107 S.W.3d at 563-64.

The State must provide all districts with substantially equal access to the operations and facilities funding necessary for a general diffusion of knowledge. *Id.* at 746 (citing

Edgewood I, 777 S.W.2d at 397). That is, access to revenue for both the instruction and the "classrooms where that instruction takes place" must satisfy the legal efficiency standards. *See Edgewood IV*, 917 S.W. 2d at 726. Thus, the Texas public school system must be efficient in how it provides revenue to all districts for maintenance and operations and for facilities.

C. Legal Standard for Suitability.

The means adopted by the Legislature must be "a suitable regime that provides for a general diffusion of knowledge." *West Orange-Cove*, 107 S.W.3d at 571. The Legislature has the right to determine the "methods, restrictions, and regulations..." of the education system. *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). "While the Legislature has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds." *Id.* at 730 n.8 (citation omitted). "[I]f the Legislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas, the "suitable provision" clause would be violated." *Id.* at 736.

III. THE TRIAL COURT PROPERLY FOUND IN FAVOR OF EDGEWOOD APPELLEES' CLAIMS UNDER ARTICLE VII, § 1 OF THE TEXAS CONSTITUTION.

After three previous rounds of school finance litigation, when the Legislature has been ordered by the courts to fulfill its constitutional duty, the State suddenly asks this Court to reverse itself and decide that claims under Article VII section 1 are non-justiciable and lack a private right of action. In its argument, the State goes far beyond advocating the

separation of powers among branches of government by demanding that this Court separate itself from judicial review altogether.

This Court has long recognized that the three elements of a constitutional system of public schools provide measurable standards to review the Legislature's actions. *West Orange-Cove*, at 563; *Edgewood I*, 777 S.W.2d at 394; *accord Edgewood IV*, 917 S.W.2d at 736. This Court has ruled upon the efficiency and suitability of the system on three previous occasions and established clear, measurable legal standards. *See generally Edgewood I*, 777 S.W.2d 391; *Edgewood II*, 804 S.W.2d 491; and *Edgewood IV*, 917 S.W.2d 717. There is simply no reason for this Court to reverse course and decline to consider the claims in this case.

A. Questions Regarding the "Efficiency" and "Adequacy" of Texas's Public School System are Justiciable.

This Court previously determined that claims brought under Article VII, section 1 of the Texas Constitution are justiciable. *See Edgewood I*, 777 S.W.2d at 394. In three separate opinions, the Texas Supreme Court considered and decided the issue whether the State fulfilled its duties in providing an efficient and suitable public school system under Article VII, section 1 of the Texas Constitution. *See generally Edgewood I*, 777 S.W.2d 391, *Edgewood v. Kirby*, 804 S.W.2d 491 (Tex. 1990) ("Edgewood II"), and *Edgewood IV*, 917 S.W.2d 717. In the latest school finance case, the Court re-affirmed the standards it uses to evaluate whether the Legislature has met its constitutional obligation. *West Orange-Cove*, 107 S.W.3d at 563-64. Caught in a predicament in which the Legislature has once again failed to fulfill its duties and meet the standards established by the Court, the State now

demands that this Court withdraw itself from judging whether those standards have been met.

This Court previously decided that it is responsible for deciding whether the Legislature has met the standards of "efficiency," "suitability," and "adequacy" ,*id.*, and that the issue of adequacy is justiciable. *Id.* at 581-82.[12] In *Edgewood I*, this Court reviewed at length why it is important for Texas to have an "efficient" system of public education and why the "efficiency" of the system can and must be determined by the Court. 777 S.W.2d at 394-397. Ultimately, the *Edgewood I* Court declared that the standards of efficiency, suitability, and a "general diffusion of knowledge" must be measured by the Court when called upon to do so. *Id.* at 394 (citing *Williams v. Taylor*, 19 S.W. 156 (Tex. 1892)). In *Edgewood II*, this Court once again determined that the Legislature failed to satisfy its constitutional duty to provide an efficient and suitable system. 804 S.W.2d at 491. And in *Edgewood IV*, this Court applied standards of efficiency and declared that the system narrowly met the constitutional test. 917 S.W.2d at 726.

In fact, the Court in *West Orange-Cove* recognized the strong force of stare decisis in the in the Edgewood line of cases:

> For fourteen years the Legislature has worked to bring the public school finance system into conformity with constitutional requirements as declared by this Court. To announce now that we have simply changed our minds on matters that have been crucial to the development of the public education system would not only threaten havoc to the system, but would, far more importantly, undermine the rule of law to which the Court is firmly pledged.
>
> 107 S.W.3d at 585.

[12] State Appellants readily concede this point in their *Defs' Plea to the Jurisdiction and in the Alternative Motion for Summary Judgment.* CR1:077.

The fact that school districts have presented these constitutional issues to the Texas Supreme Court on five separate occasions does not dictate the conclusion that these issues are non-justiciable political questions. If such reasoning were applied to other cases, today we would not reap the benefits of integrated schools, the expansion of voting rights, and other important civil rights issues. It is the State's failure to meet its constitutional obligations that brings these lawsuits before the Court.

The questions of adequacy, efficiency, and suitability also survive under a *Baker v. Carr* analysis. Whether a political question exists because of "a textually demonstrable constitutional commitment of the issue to a coordinate political department" does not rest solely on the issue of whether a specific branch is assigned a duty. *See Baker v.* Carr, 369 U.S. 186, 211-217 (1962) (finding that matters customarily deemed "political questions," such as foreign relations and the status of Indian affairs, may justify judicial determination upon inquiry into the facts).

Simply because the Legislature is assigned the duty to provide an efficient and adequate system of public education does not convert the issue into a non-justiciable political question. Given the critical role of public education in ensuring the welfare of Texas, and this Court's prior involvement in school finance litigation, this case merits judicial consideration.

Edgewood Appellees do not ask this Court to make policy decisions. As stated above, this Court recognizes that its involvement in school finance litigation is limited to determining whether the Legislature has met its constitutional duty in providing an efficient, suitable, and adequate system. *West Orange-Cove*, 107 S.W.2d at 563-64. Edgewood

Appellees ask this Court only to review the Legislature's actions against those existing constitutional standards.

The second *Baker* test urged upon this Court by the State would find a non-justiciable political question when there exists "a lack of judicially discoverable and manageable standards for resolving it" *See Baker*, 369 U.S. at 217; this test too does not fit the case at hand. The Texas Supreme Court has repeatedly decided that the Texas school finance system is both efficient and inefficient. *See generally Edgewood I*, 777 S.W.2d 391, *Edgewood II* 804 S.W.2d 491, and *Edgewood IV* 917 S.W.2d 717. The Court also has defined the standards for an adequate education and stated that those standards "must reflect changing times, needs, and public expectations." *West Orange-Cove*, 917 S.W.2d at 572 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.8). As the facts in this case show, the Court can readily discover further standards for adequacy—if necessary—and manage those standards effectively for the purpose of resolving constitutional challenges.

As the United States Supreme Court stated in *Baker*, "The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker*, 369 U.S. at 217. Similarly, this appeal does not fail simply because it involves a review of the political action and inaction of the Legislature. Without this Court's review of the Legislature's actions, there will be no check against inequality and the denial of adequate resources to fund public education in the state.

B. Even if This Court Declares that the Question of "Adequacy" is a Non-Justiciable Political Question, the Well-Established Standards for Evaluating Efficiency Should not be Disrupted.

State Appellants mischaracterize the history of previous challenges to the school finance system. *See* Appellants' Br. at 30. The Courts have not "long considered" the "efficiency" of the public school system to present non-justiciable political questions. *Id.* at 30-31. In fact, the State did not even defend a challenge to the system in *Mumme v. Mars* on those grounds precisely because it was *not* a political question; In *Mumme*, the Court *never even considered* whether the claim was a political question. *See generally Mumme*, 40 S.W.2d 31.

As the State concedes in its brief, "this Court was able to assess the efficiency of the school finance system by reference to a clear standard: similar access to similar revenues at similar levels of tax effort." Appellants' Br. at 31 (quoting *Edgewood IV*, 917 S.W.2d 717, 768 (1995) (Spector, J., dissenting)). Edgewood Appellees agree that this standard for measuring efficiency provided the courts with a manageable standard by which to judge the constitutional efficiency of the system[13]. Plainly, questions of the efficiency of the public school system are justiciable and there is no reason for the Court to abandon its own sound precedent should it declare "adequacy" to be a political, non-justiciable question.

C. Article VII, §1 Provides a Private Right of Action.

On three separate occasions in the last 15 years, the Texas Supreme Court ruled upon Article VII, section 1 claims; today the State argues that the provision does not provide a right of action because it is not "self-executing."

[13] Edgewood Appellees do note that the Court in *Edgewood IV* and *West Orange-Cove* did incorporate an additional analysis of whether the system provided an efficient system up to a level of "adequacy."

In order to determine whether a constitutional provision is self-executing, the Court may review whether a sufficient rule is present by which the duty imposed may be enforced or to protect the right given. *See Motorola, Inc. v. Tarrant County Appraisal Dist.* 980 S.W.2d 899, 902 (Tex. App. 1988) (citing *Mitchell County v. City Nat'l Bank of Paducah*, 91 Tex. 361, 43 S.W. 880, 883-884 (Tex. 1898).

This Court has already determined that Article VII, section 1 supplies sufficient rules; those are the standards of "adequacy", "efficiency", and "suitability." *See West Orange-Cove*, 107 S.W.3d at 563-64 (citing *Edgewood I*, 777 S.W.2d at 394; *accord Edgewood IV*, 917 S.W.2d at 736). Since its decision in *Edgewood I*, the Court has consistently found that Article VII, section 1 places an affirmative duty on the Legislature to establish and provide for the public free schools. *See* 777 S.W.2d at 394. When the Legislature fails to abide by the standards set out by this Court, the Court must step in and say so. *Id* In this case, Edgewood Appellants filed their claims based on the State's failure to meet its constitutional duty of providing for a general diffusion of knowledge in an "efficient" and "suitable" manner. CR1:136.

D. Edgewood Appellees Have Standing to Sue.

Edgewood Appellees, a number of whom are the original plaintiff school districts in the first Edgewood case, have maintained challenges to the Texas school finance system without either the State or the courts ever having suggested that property-poor school districts lack standing. Even in the absence of a State argument that school districts lack standing, the Court was certainly free to raise the issue *sua sponte* and chose never to do so. *Id.* (citing *Texas Ass'n of Bus. V. Texas Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993) (holding that standing issues may be raised for the first time on appeal.)) Despite the

State's failure to raise the standing issue in the first *West Orange-Cove* case, the dissent did address the districts' standing. *Id.* at 587-591. This Court correctly ruled that the school districts do not lack standing to sue, *id.* at 583-84, yet the State marshals that same failed argument in this appeal.

The State argues that because school districts are governmental entities, they "*generally* do not possess the right to assert challenges to the constitution. *See* Appellant Br. at 43. In order for a plaintiff to have standing, the party must be "personally aggrieved, regardless of whether it is acting with legal authority..." quoting *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) (citing *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Pledger v. Schoelkopf*, 762 S.W.2d 145, 146 (Tex. 1988) (emphasis in original) (omitting quote concerning capacity)).

Edgewood Appellees meet the requirements for standing because they have demonstrated, "a real controversy between the parties, which . . . will be actually determined by the judicial declaration sought." *Id.* at 662 (citing *Texas Ass'n*, 852 S.W.2d at 446; quoting *Board of Water Engineers v. City of San Antonio*, 283 S.W.2d 722, 724 (Tex. 1955)). As the Court correctly determined in *West Orange-Cove*, the plaintiff school districts in this case share a similar controversy with the appraisal district in *Nootsie*, and, likewise, possess the constitutional right to assert challenges—even as governmental entities. 107 S.W.2d at 583-84.

In this case, even though Edgewood Appellee school districts are tasked by the State to accomplish the mission of providing a general diffusion of knowledge, the Legislature still retains the constitutional duty of providing a suitable provision for a general diffusion of knowledge. *West Orange-Cove*, 107 S.W.3d at 584. Edgewood Appellees assert that the

State is failing in its constitutional duties, thereby impeding the school districts' ability to deliver a general diffusion of knowledge. Like *Nootsie*, in which this Court held that a political subdivision of the state has standing to sue the state when it is charged with implementing an unconstitutional policy, Edgewood Appellees are aggrieved and assert this real controversy between themselves and the State. *See Nootsie,* 925 S.W.2d at 662. This Court's resolution of the claims raised in the appeal will settle the controversy between the Appellees and the State. Therefore, Edgewood Appellees do have standing to sue under Article VII, section 1 of the Texas Constitution.

Finally, it is the law of this case that school districts have standing to bring their claims under Article VII, §1 and that such claims are justiciable and do not present political questions. The "law of the case" doctrine is "the principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages." *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). The doctrine ensures uniformity of decisions and preserves judicial economy and efficiency by narrowing the issues in successive stages of the litigation. *Id.*

This appeal is squarely before the Court following the remand of this case to the trial court in the prior *West Orange-Cove* decision; in that decision, this Court expressly stated that school districts have standing to bring suit under the Texas Constitution. *See West Orange-Cove*, 107 S.W.3d at 584. Moreover, after ruling that the plaintiff school districts had standing for their constitutional claims, the Supreme Court remanded the case to the trial court "for further proceedings *consistent* with [its] opinion." *Id.* at 585 (emphasis added). The trial court denied the State's plea to the jurisdiction on issues of standing and non-

justiciability consistent with this Court's previous ruling. Defendants' arguments on standing and non-justiciability seek to re-litigate issues already decided by this Court.

IV. THE TRIAL COURT PROPERLY DECLARED THE EDUCATIONAL SYSTEM OF TEXAS CONSTITUTIONALLY INADEQUATE, INEFFICIENT, AND UNSUITABLE.

All Texas schoolchildren are entitled to an education that will ensure the preservation of democracy and the economic well-being of Texas. CR4:862; FF19. The State recognizes the Court's definition of a general diffusion of knowledge, defining it as the central part of the mission of the Texas education system as follows:

> 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 knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens."

TEX. EDUC. CODE § 4.001; CR4:862; FF19; *West Orange-Cove*, 107 S.W.3d at 584 n.124 (noting that "the Legislature has expressly defined the mission of the public school system, including school districts, to accomplish a general diffusion of knowledge").

The Legislature does not have a "goal," but a duty, to provide a general diffusion of knowledge to all Texas schoolchildren. *See West Orange-Cove*, 107 S.W. 2d at 563-564 (citing *Edgewood IV*, 917 S.W.2d at 726). As the Court has noted, the Legislature "must accomplish 'that general diffusion of knowledge...essential to the preservation and liberties and rights of the people.'" *Id.* at 563 (quoting TEX. CONST. art. VII, § 1).

The State recognizes that "education is a cumulative enterprise and that districts cannot wait until the standards are ratcheted up to make the necessary investments." CR4:968; FF38. Whatever purpose an accountability rating might serve for the State, it does not ensure that all Texas schoolchildren have access to an adequate education, i.e. a "general

diffusion of knowledge," that will enable each child to "participate fully in the social, economic, and educational opportunities available in Texas." *See Edgewood IV*, 917 S.W.2d at 736. On the contrary, the trial court repeatedly found the shortcomings of the accountability rating system, which allows many children to slip through the cracks while still accrediting the school districts. Furthermore, the various input and output measures cited by the trial court substantiate the its conclusion that the State , fails to provide access to an adequate education to the children in property-poor districts and to those who have special educational needs[14]. *See generally* CR4:851-981 (Findings of Fact and Conclusions of Law).

A. Rational-Basis is not the Proper Legal Standard for Reviewing Constitutional Claims Under Article VII, § 1.

In its brief, the State urges the Court to adopt rational-basis as the standard by which to evaluate claims under Article VII, § 1 (Appellants' Br. at 47-64). Edgewood Appellees agree rational-basis is the correct standard of review for equal-protection challenges that do not involve a protected class or fundamental right, *See e.g. Richards v. LULAC*, 868 S.W.2d 306, 310-311 (Tex. 1993), but this is not an equal-protection case. The Court's well-established practice of reviewing the underlying components of the system to determine whether the system, as a whole is adequate, efficient, and suitable. The trial court found the public school finance system incapable of providing all Texas public school students a general diffusion of knowledge and, therefore, inadequate, unsuitable, and inefficient CR4:842.

[14] If the system is inadequate and inefficient for West Orange-Cove Plaintiffs, many of whom are property-rich districts, then by logical reference, the system is inadequate and inefficient for the property-poor districts of Edgewood Appellees. The trial court found that for the same reasons that West Orange-Cove Plaintiffs do not have access to funds for maintenance and operations to provide an adequate education, Edgewood Intervenors also proved their claim—strengthened by the disproportionate number of special need students, the increased difficulty in the recruitment and retention of qualified teachers; and the structural disparity in access to revenue for property-poor districts.

The Court noted in *Edgewood IV* that the qualitative efficiency mandate is explicit in the Texas Constitution. 917 S.W.2d at 729, TEX. CONST. art. VII, § 1Therefore, the analysis used to examine qualitative efficiency should be no different than what the Court has used when reviewing financial efficiency; to hold otherwise would result in a higher standard of review for a mandate implicit under Article VII, § 1 than for one expressed explicitly.

The State attempts to support its 11th hour injection of rational-basis review by pointing to one word- "arbitrary"- in one case concerning an equal protection claim regarding the suitability standard of Article VII. *See Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme*, 40 S.W.2d at 36 ("The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen"). However, even in the *Mumme* case, the Court went on to state that the court will review legislative determinations "if the act does not have a *real relation to the subject and object of the Constitution.*" *Id.* (emphasis added). Simply because select equal-protection cases have cited to *Mumme* "for the proposition that legislative classifications must be non-arbitrary," (Appellants' Br. at 48) (citations omitted), the State now posits- irrespective of the subsequent *Edgewood* jurisprudence- that the term "arbitrary" triggers equal-protection rational-basis review of all standards and duties and should be adhered to in the instant case by this Court.

> "The dissent argues that this Court's construction of Article VII, § 1 since *Edgewood I* and perhaps dating back to *Mumme v. Marrs* necessarily draws the judiciary into making detailed policy decisions about the elements of an adequate education. We reiterate that the Constitution requires, not that courts make such policy decisions, but that they determine, in a proper case, whether the Legislature on the whole has discharged its constitutional duty."

West Orange-Cove, 107 S.W.3d at 585. Clearly the Court does not see *Mumme* as a case that curtails its current analytical approach.

Furthermore, as discussed above, the deference the judiciary affords to acts of the Legislature, in the school finance framework particularly, is well-documented. The Court recognizes its responsibility is to decide whether the Legislature has satisfied constitutional standards, not to make policy choices of its own. *Edgewood IV,* 917 S.W.2d at 726. In other words, "the Legislature has the sole right to decide *how* to meet the [constitutional] standards...and the Judiciary has the final authority to determine *whether* they have been met." *West Orange-Cove*, 107 S.W.3d at 563-64.

"Once policy choices have been made by the Legislature, it is the Judiciary's responsibility in a proper case to determine whether those whether those choices *as a whole* meet the standard set by the people in Article VII, § 1." *Id.* at 583 (emphasis added). Indeed, it is this approach that best characterizes this Court's examination of the constitutionally-mandated system of free public schools.

> "By express constitutional mandate, the legislature must make 'suitable' provision for an 'efficient' system for the 'essential' purpose of a 'general diffusion of knowledge.' While these are admittedly not precise terms, they do provide a standard by which this court must... measure the constitutionality of the legislature's actions...If the system is not 'efficient' or not 'suitable,' the legislature has not discharged its constitutional duty and it is [the court's] duty to say so."
>
> *Edgewood I*, 777 S.W.2d at 394.

Not once in fifteen years has the Court mention rational-basis review as the means to evaluate the constitutionality of the school finance system. As we have seen throughout the modern Texas school finance cases, the process the courts undertake to monitor the actions taken by the Legislature is careful, inapposite of the standard advocated-for by the State.

After the Court declared in *Edgewood I* that legislative efforts must culminate in an efficient system of free public schools throughout the state, it employed a thorough analysis of those efforts to determine the constitutionality of the resulting system. 777 S.W.2d at 398

The Court returned to the concept of efficiency in *Edgewood IV* and continued its well-established protocol of reviewing legislative acts and their corresponding effects on the public school finance system as a whole. *See generally Edgewood IV*, 917 S.W.2d 717. Although it found the system narrowly constitutionally efficient, *Id.* at 725, in its discussion of efficiency the Court made several references to the Legislature's obligations regarding a "general diffusion of knowledge."[15]

It continued to similarly address other areas of the school finance system pertinent to the present case. For example, the Court commentary on supplementation described it as an ever-changing concept stating, "[W]hat the Legislature today considers to be 'supplementation' may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge." *Id.* at 732. "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." *Id.* at 733 n.14. It is evident the *Edgewood IV* Court issued these caveats to inform the Legislature that supplementation -- like all other features of a school finance system -- are subject to the judiciary's review to determine the system's constitutionality. Rational-basis review is unnecessary and would undoubtedly hamper those efforts.

[15] Edgewood Appellees note that the Court did so even though claims of what constitutes a general diffusion of knowledge were not litigated in that case. *See generally Edgewood IV*, 917 S.W.2d 717.

Rational-basis review cannot encompass whether the Legislature has violated *Edgewood IV's* prohibition on defining "general diffusion of knowledge" so low as to be unconstitutional, or its requirement that educational provisions keep pace with "changing times, needs, and public expectations." 917 S.W.2d at 733 n.14. The imposition of rational-basis review would prevent courts from making those necessary determinations.

B. The Trial Court Properly Abandoned the Accountability Rating System as the Touchstone for Measuring Whether an Adequate Educational System Exists.

The State must provide both an accredited education and a general diffusion of knowledge for all Texas children. *West Orange-Cove*, 107 S.W.2d at 581. Previously, the *Edgewood IV* Court acknowledged that a general diffusion of knowledge could exceed an accredited education and vice-versa. *917 S.W. 2d at 730 n.8.*

Contrary to what the State asserts, the Court did not choose the accountability system *instead of* the mission statement in the Education Code as the standard for a general diffusion of knowledge. *See* Appellants' Br. at 65. The Court found that the accountability system provided for a general diffusion of knowledge, but there was no ruling concerning the mission statement and its relationship to a general diffusion of knowledge[16]. *See Edgewood IV*, 917 S.W2d at 730. As the trial court correctly determined, the State's mission statement is grounded in a general diffusion of knowledge and is one that must be accomplished for all children, not merely sought or perceived as an "aspirational" goal. *See* CR4:862; FF19-21 (citing *West Orange-Cove*, 107 S.W.3d at 584, n.124 ("the Legislature has expressly defined

[16] In *Edgewood IV*, no evidence was presented to determine whether the accountability system for a general diffusion of knowledge.

the mission of the public school system, including school districts, to accomplish a general diffusion of knowledge")).

The State argues that Edgewood Appellees' academically acceptable rating, alone, leads to a conclusion that the districts are providing each of their students with a general diffusion of knowledge, and that the Court should defer to the Legislature for policy decisions. The State misconstrues the trial court's findings and the evidence presented by Edgewood Appellees.

The record in this case demonstrates how and why the rating system fails to ensure that each child has access to, and receives, an adequate education. The State concedes that it uses only three indicators to determine a district's accountability rating.[17] *See* Appellants' Br. at 13. By the State's own admission, the accountability system is only one limited indicator of the quality of the education students receive in Texas. RR25:152-53. The State also admits that a districts' rating is associated with the performance of a campus or a school district, not the performance of the individual student. RR25:163-64. In fact, not every child takes the TAKS exam and those who do not will not be included in the accountability rating system. *See* RR25:184.

1. The TAKS Indicator Does Not Ensure That Each Child has Access to and Receives an Adequate Education.

Not only is the accountability rating system a limited measure that fails to ensure all children have access to and can receive an adequate education, the standards set for each subject area on the "TAKS" exams do not have to be met in order for a district to receive an "academically acceptable" rating. For example, a district only needs 25% of its students to

[17] Those indicators are: district TAKS/SDAA scores, "completion" rates, and "drop out" rates. *Id.*

meet the proficiency level on the science exam to qualify for an "academically acceptable" rating for that subject. RR25:168. However, under the newly created "required improvement" provision, if a district had 7% of its students pass the science test in 2003, and 16% pass in 2004, that district would still achieve an "academically acceptable" rating.[18] RR25:169-170. Therefore, according to the State's position in this appeal, a district whereby *84% of the children fail to demonstrate proficiency*[19] *in science*, would still be "accredited" and, thereby, be considered to have provided a general diffusion of knowledge to its students.[20]

The trial court correctly determined that the low passing rates for students and the low standards for accountability ratings ensure that most districts are rated "academically acceptable," and they do not reflect a minimal level of adequacy. CR4:865; FF32. For example, the low cut–scores on the TAKS do not reflect reasonable proficiency in the subject areas. *See* CR4:865, FF31. For example, an 11th grade student only needs to answer 24 out of 55 questions (43.6%) correctly on the science test and only 25 out of 60 (41.7%) on the math exam to "pass." *Id.* The State provided no evidence that the cut-scores ensure that a student has access to and receives an adequate education. Although the State may have its reasons to implement low standards for its rating system, such standards cannot substitute for

[18] The State reasons that the 9% improvement over the last year, added to the 16% pass rate in the current year, will take the district to 25% in 2005. *Id.*

[19] The State accountability expert admits that if a student fails a TAKS exam, that student is not proficient in that subject. RR25:168.

[20] Similarly, a district may have less than a 75% completion rate and still be academically acceptable under the required improvement; thus allowing for more than 25% of the 4-year cohort to drop out and still be "academically acceptable". RR25:188. The same "required improvement" can be said for the annual drop-out rate, whereby a district fails to even meet the minimal drop-out rate. *Id.*

fulfilling the Legislature's duty to provide for a general diffusion of knowledge. CR4:865; FF32.

2. The "Completion" Rate Does Not Ensure That Each Child has Access to and Receives an Adequate Education.

The State incorrectly asserts that the "completion" rate indicator reflects "[t]he number of students who complete high school." *See* Appellants' Br. at 14. A student does not need to complete high school in order to be included in the "completion" rate. ALV Ex. 9031 at 14. In fact, on page 15 of their brief, the State admits that a "completer" includes students who failed to graduate with their 9th grade cohort and either obtained a General Education Development ("GED") certificate by the following spring or re-enrolled in high school the following fall. *Id. See also* EDG Ex. 606 at 42-43.

The State also erroneously asserts that the TAKS passage rates, "in conjunction with the high-school completion rates, comprehensively accounts for student mastery of the full curriculum." *See* Appellants' Br. at 61. The "completion" rate does not measure whether the students in a campus or district actually *completed* anything. *See* CR4:185. This means that if a student fails a grade level or more—and conceivably could fail every subject—and re-enrolls in the fall following their 9th grade cohort's graduation, that student is still included in the "completion" for accountability purposes. *See id.* Regardless of whether a student fails to demonstrate proficiency in the classroom and fails to graduate, in the eyes of the State, that student is still a "completer."

The record in this case concerning the high school "completion" rate demonstrates how such a measure fails to ensure that all Texas children have access to and receive an adequate education. Edgewood Appellants do not seek to substitute their own policy choice

for that of the State in relying on a completion rate for its accountability rating purposes. Rather, Edgewood Appellants point out that the record supports the trial court's conclusion that an academically acceptable rating is not equivalent to delivering an adequate education.

3. The "Dropout" Indicator Does Not Ensure That Each Child has Access to and Receives an Adequate Education.

The State mistakenly argues that the trial court substituted its preferred method of measuring dropouts over the State's method, masking its "factual sufficiency" argument as a "legal argument." *See* Appellants' Br. at 61. The trial court concluded that the evidence on Texas's measure of "dropouts" precludes a finding that an academically acceptable rating is the equivalent of a general diffusion of knowledge. CR4:971. The trial court did not substitute its own method and policy choices, and the record supports the trial court's legal conclusion.

The trial court found evidence that "over the last decade, the high school graduation rate in Texas... has consistently been less than 75% for all students, and less than 70% for minority students. CR4:971; FF650. The trial court also found that the State's use of "leaver codes" tends to understate the State's dropout rate. CR4:971; FF651. The State's definition of non-dropout "leavers" includes thousands of students who left the district without expressing any intent to enroll in school elsewhere and thousands more who left the school system for other reasons but are not identified as "dropouts".[21] EDG Ex. 606 at 30. Testimony from the State confirmed that TEA does not track students to determine if they ever enroll in another Texas public school for calculation of the "dropout" rates. *Id.* at 39.

[21] *See also* RR20:107, Dr. Cortez explaining part of the problem with the codes, "if a neighbor or some adult says that they think that Juanita and her family [are]is returning back to Mexico, that is considered to be legitimate documentation."

The State also admitted that students who withdraw and say they will enter a GED program, regardless of whether the students actually enroll, will be classified as non-dropouts.[22] *Id.* at 40.

The State's own witness, Dr. Lori Taylor, found TEA's reported dropout rate "so low as to not be believable." STATE Ex. 15889-0009. As with the other two state indicators, the record supports the trial court's conclusion that plaintiffs rebutted the presumption that an "academically acceptable" rating equals the delivery of a general diffusion of knowledge. Such an indicator certainly does not measure whether all Texas children have access to and receive an adequate education.

4. Other measures in the accountability system do not provide evidence that Edgewood Appellants are able to provide their students an adequate education.

The State identified the "gold performance" standards in the accountability system as being "additional indicators" listed in the accountability system, but as they readily admit, these are not included as part of the ratings. *See* Appellants' Br. at 13. For the year 2001-02, none of the Edgewood Appellee-designated focus districts received a "Gold Performance Acknowledgment" for "college admission." *See* 2001-02 AEIS Reports, EDG Exs. 4 (Ysleta); 62 (Edgewood); 113 (South San Antonio); 130 (San Elizario); 170 (Pharr-San Juan-Alamo); 217 (Laredo); 235 (Edcouch Elsa); 294 (Jim Hogg County). On the contrary, Edgewood Appellees perform poorly under those other "indicators". *Id.* S*ee also* EDG Ex. 459 at 4 and 5, attached as App. B (showing the average SAT/ACT scores of Edgewood focus districts ("ED" districts) and the 4% of students scoring at or above the criterion for SAT/ACT college entrance exams compared to the 54% of "Non-Ed" districts).

[22] Dr. Dvorak further stated that she would change the leaver codes related to expulsion and health care facilities if given the power. *Id.* at 50.

The evidence with respect to the three indicators of the accountability system, taken as a whole, supports the trial court's conclusion that an academically acceptable rating does not demonstrate the delivery of a general diffusion of knowledge. The trial court properly concluded that as a matter of law, the accountability ratings fail to provide a proper measure of whether all Texas children are provided access to an adequate education.

5. The fact that many students escape the accountability system provides further evidence that the system fails to provide for a general diffusion of knowledge.

The undisputed evidence from the State revealed how many students escape the accountability system, providing further support for the trial court's conclusion that the system fails to ensure all students have access to and receive an adequate education. The State admits that not all of a district's students are included within a district's accountability rating. RR25:174. For example, students who leave a campus or district after October 31 of a school year and take the TAKS in the following Spring are not included in the accountability system for either the sending or the receiving campus or district. RR25:180. These "mobile students" tend to be minority, low-income, or migrant students and will be excluded from the districts' ratings. RR25:179-80.

Further, although the State claims to disaggregate data for accountability purposes and to hold districts "accountable" for the performance of each subgroup (White, Hispanic, African-American, and Economically Disadvantaged), the State provides many exceptions. The State confirmed that at least 30 students for each subgroup must take the TAKS or the State will excuse that subgroup's performance for accountability purposes as a subgroup. RR25:174-75. For example, if a campus or district had 29 Hispanic students taking the

mathematics exam and all of those students failed, the State would not consider their performance for accountability purposes as a subgroup.[23] *Id.*

These additional undisputed facts provide further evidence to rebut the presumption that the state's accountability system provides for a general diffusion of knowledge to all of the children in Texas. These policy decisions of the State fail to provide a measure of who has access to and receives an adequate education.

C. Even under *Mumme*, the evidence supports the trial court's judgment that the State fails to satisfy its duties of adequacy and suitability.

Even under the narrow *Mumme* test, which Edgewood Appellants maintain is not the proper test for whether the State has satisfied its duty of "adequacy," the state's three accountability measures are insufficient because they bear no "*real relation to the subject and object of the Constitution*[24]." *See Mumme,* 40 S.W.2d at 36 (emphasis added). The object of Article VII, section 1 of the Texas Constitution is to provide for a general diffusion of knowledge for all Texas children. TEX. CONST. art. VII, §1. The trial court found, and the evidence supports, the conclusion that the accountability measures present a limited relation

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[23] Additionally, a subgroup of 30-49 students must comprise at least 10% of the students taking a subject area test at the campus or district level, otherwise the State will exclude that subgroup for accountability purposes, regardless of how poorly they perform as a subgroup. *See* RR25:178-79. For example, the evidence showed that a campus had 370 total students and 35 African-American students failed the TAKS test in a particular subject area, the State would exclude their performance as a subgroup for "accountability" purposes. *Id.*

[24] Appellants are wrong to insist on using the federal rational basis standard, disregarding the fact that "[t]he states are free to accept or reject federal holdings and to set for themselves such standards as they deem appropriate so long as the state action does not fall below the minimum standards provided by the federal constitutional protections." *Whitworth v. Bynum*, 699 S.W.2d 194, 196 (Tex. 1985) (citations omitted). "Unlike the federal standard, Texas courts look beyond the stated rationale for legislation and examine its true factual basis." *HL Farm Corp. v Self*, 877 S.W.2d 288, 293-94 (Tex. 1994) (Doggett, J., dissenting) (citing *Texas Woman's Univ. v. Chayklintaste*, 530 S.W.2d 927, 928 (Tex.1975) (upholding rule after reviewing uncontradicted expert testimony and analysis contained in professional journals as to its rationality and efficacy); *Humble Oil & Refining Co. v. City of Georgetown*, 428 S.W.2d 405 (Tex. App.--Austin 1968t) (overturning ordinance limiting size of gasoline delivery trucks by considering actual economic consequences and relying on expert's testimony that the regulation did not promote safety)). This Court acknowledges its scrupulous standard as the "Texas rational basis test," *Whitworth*, 699 S.W.2d at 197, *HL Farm Corp.*, 877 S.W.2d at 293, and notes that "[j]ustice requires that a court must have authority to go beyond [legislation] which is valid on its face and inquire into the facts surrounding its enactment." *Glenn Oaks Utilities, Inc. v. City of Houston*, 340 S.W.2d 783, 784 (Tex. 1960). Plainly, the *Mumme* test goes beyond the mere "any possible legislative reason" proffered by the State. *See* Appellants' Br. at 49.

to meeting standards arbitrarily set so low so that each district can achieve those measures. *See supra,* Section IV A-B and CR4:865; FF32.

Not only do the limited accountability indicators fail to ensure an adequate education for all children, they also represent unsuitable means by which to ensure that each student is provided with a general diffusion of knowledge as required by the Texas Constitution. *See West Orange-Cove*, 107 S.W.3d at 580-81.

D. Other States' Courts Support the Trial Court's Ruling.

As this Court did in *Edgewood IV*, the Supreme Court of Kansas also recognized that state "accreditation standards may not always adequately define a suitable education." *See Montoy v. State of Kansas*, 102 P.3d 1160, 1164 (Kan. 2005) ("Montoy II"[25]) (citing *Montoy v. State of Kansas*, 62 P.3d 228 (Kan. 2003); s*ee also Montoy v. State of Kansas*, No. 99-C-1738, 2003 WL 22902963 at 40 (Kan. Dist. Ct. Dec. 2, 2003) (the district court recognized that school districts were accredited, despite groups such as LEP students, poor children, and others failing the standardized tests at alarming rates.) The *Montoy II* Court eventually found that the state failed in its duty to provide an adequate education to all children of Kansas. *Id.*

In North Carolina, the state defendants argued that they satisfied their constitutional duty to provide a *sound basic education* under "Level II" of the state accountability system, but the Supreme Court of North Carolina rejected that standard as too low to fulfill the state's obligation. *Hoke County Bd. of Educ. v. State of North Carolina*, 599 S.E.2d 365, 382 (N.C. 2004). The Court of Appeals of New York also refused to accept the state's standardized test as a proper measure of a "sound basic education" in declaring that the state failed to fulfill its

[25] The supreme court issued this brief opinion so the 2005 legislature could begin resolving the issues. A formal opinion is to be filed at a later time.

constitutional obligation to provide an adequate education. *See Campaign for Fiscal Equity v. State of New York*, 801 N.E.2d 326 (N.Y. 1995) ("C.F.E.").

Likewise, the Supreme Court of Montana recognized that the accreditation system established by the state did not fulfill its responsibility to provide an adequate, quality education. *Columbia Falls Elem. Sch. Dist. No. 6 v. Montana* 109 P.3d 257, 262 (Mont. 2005) (citing *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 692 (Mont. 1989) (the accreditation standards establish a minimum upon which quality education can be built' but 'do not fully define either the constitutional rights of students or the constitutional responsibilities of the State of Montana for funding its public elementary and secondary schools.).

In support of its proposition that the State has satisfied its duty to provide an adequate education simply because it has an accountability system, Texas relies heavily upon the latest Massachusetts school finance case, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) ("*Hancock*"). If any comparisons can be made between *Hancock* and the school finance cases in Texas, the similarities would be limited to Texas's plight in *Edgewood IV*. In *Hancock*, the Supreme Court considered the sole issue of "whether, within a reasonable time, appropriate legislative action has been taken to provide public school students with the education required under the Massachusetts Constitution. *Id.* at 1146. Like *Edgewood IV*, the Supreme Court compared the current system to the dismal system of the past, and, most importantly, found that the gaps in funding available to property-poor districts had been substantially reduced over time. *Cf. id.* at 1138; *see also infra* at Section IV(E)(3) (regarding further evidence of available revenues in *Hancock*).

However, the Massachusetts case does not provide a basis upon which to hold the current Texas system constitutional. After noting the gains in funding to property-poor school districts in Texas, the Court in *Edgewood IV* only found the Texas system to be minimally acceptable, with the guiding principle set forth that "[s]urelyTexas can and must do better *See Edgewood IV*, 917 S.W.2d at 726. Today, the State has failed to move forward.

Moreover, the Texas Constitution, the duties imposed by this Court, and the issues presented in this case differ from those in Massachusetts. The trial court in this case did not make comparable findings considered relevant by that Supreme Court: the court did not find substantial improvements of student performance in the Edgewood Appellee districts; the court did not find poor leadership and administration; and the current conditions in Edgewood Appellee districts are not comparable to property wealthy districts and statewide averages. *Cf. Hancock*, 822 N.E.2d at 1149.

E. The Trial Court Properly Included Educational Inputs as a Measure in Concluding that the State Violated Article VII, § 1.

Edgewood Appellants urge this Court to affirm the trial court's analysis of the "inputs" as measures for determining whether the State fulfilled its constitutional duties under Article VII, section 1. *See West Orange-Cove*, 107 S.W.3d at 585 (The court's role is to "determine, in a proper case, whether the Legislature on the whole has discharged its constitutional duty."). As stated in Section IV (A-D) of this brief, the State's accountability system fails to provide for a general diffusion of knowledge to all public schoolchildren in Texas. For courts to determine "whether" and "how" the State failed to provide an adequate,

suitable, and efficient education to all Texas children, courts should measure the inputs and the "*true* outputs"[26] of the system, and rule on the system as a whole.

1. Given the Changes in the State's Educational System, the Trial Court Correctly Considered Inputs in Measuring the State's Duties Against the Constitutional Standards.

The trial court recognized that the State's phase-in of the new curriculum requirements, the replacement of the TAAS exam with the TAKS exam, and the adoption of the Recommended High School Program (RHSP)[27] as the default graduation program resulted in significant new costs for the districts. CR4:959; FF50. However, the Legislature made these changes to the accountability system without ascertaining the cost for school districts to implement these changes or whether they had the funding capacity to do so. CR4:959; FF50.

The trial court examined the inputs of the system in order to determine whether all Texas children have access to and receive an adequate education through instructional resources and funding. The State admits that inputs are "all the aspects of the educational system that enable a student to learn and to render a certain level of performance." *See* Appellants' Br. at 70. Whether "all children" have access to and receive an adequate education through suitable and efficient means turns on the availability of inputs to school districts serving those children, not on the low measures of the accountability system.

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[26] These "true outputs" include, but are not limited to, actual data depicting and comparing graduation rates, student achievement, and dropout rates in order to determine more properly whether all children are provided an adequate education (as opposed to the "outputs" under the accountability system, which only set low thresholds for all districts to pass).

[27] The RHSP includes requirements that students earn the following: 4 credits of English, 3 ½ credits of social studies; 3 credits of math and science; 2 credits of foreign language; 1 ½ credit of physical education; 1 credit of technology applications; 1 credit of fine arts; ½ credit of economics; ½ credit of speech; and ½ credit of health education. TEX. ADMIN. CODE § 74.11.

The trial court considered access to a qualified teacher as one of the inputs in determining whether all children have access to an adequate education. The trial court noted studies demonstrating the effect of teacher quality on student achievement and learning, including a strong relationship between teacher certification and achievement. CR4:878; FF89. The trial court found that Texas data showed "that students who are in schools with a greater proportion of uncertified teachers or teachers teaching out-of-field (i.e., teaching a subject matter for which they are not certified) score lower on and are more likely to fail the Texas assessment tests." CR4:879; FF90.

The trial court also noted the importance of teachers in light of the recently changing and expanding curriculum and graduation requirements. The implementation of the new curriculum under the Texas Essential Knowledge and Skills ("TEKS") and the adoption of the RHSP required districts to invest in professional and staff development as well as the recruitment and retention of qualified teachers in areas such as math and science. CR4:869; FF49. The trial court found a severe shortage or undersupply of qualified teachers in Texas, especially in science, computer science, math, foreign language, special education, and bilingual education. *Id.* CR4:879; FF92. The shortage of qualified teachers was found to be "more severe in low-achieving districts and districts serving greater proportions of low-income and minority students." CR4:879; FF94.

The trial court further noted how the high attrition and turnover of teachers cause a lack of "continuity in the students' educational program" and that "attrition is lowering the level of teacher experience, which is one of the qualities linked to student achievement and mentoring." CR4:880; FF96. Low-performing schools and schools serving higher

proportions of economically disadvantaged and minority students were most affected by higher turnover rates. *Id.*

The State itself acknowledged the importance of many inputs in providing a general diffusion of knowledge.[28] For example, by providing an acceptable level of resources in libraries, the "learner will access information easily and frequently...; evaluate the validity, relevancy, and accuracy of information; use that information in the synthesis of ideas and development of products; and make meaningful connections between classroom learning and information skills." CR4:963; FF583 (citing TEX. ADMIN. CODE §§ 4.1-4.7). A state study found, among other findings,[29] that "on average, over 10% more students in schools with librarians met minimum TAAS expectations in reading than in schools without librarians." CR4:965; FF591, citing EDG Ex. 603 at 2-3. The trial found the libraries of Edgewood Appellees very insufficient. *See* CR4:966-68; FF594-620.

2. Insufficient Funding for Inputs is Even More Pronounced for Property-Poor districts and Special Need Children.

The Court recognizes that under an efficient system, the State may deviate from the distribution of funds to districts for legitimate matters such as cost differences related to area market forces and "atypical" or disadvantaged students. *See Edgewood I*, 777 S.W.2d at 398. The State recognizes that LEP students and economically disadvantaged students cost more to bring up to the State standards and provides cost-adjustments ("weights") to reduce the performance gaps. *See* TEX. EDUC CODE §§ 42.152:153. However, the State's

[28] *See infra*, Section V, regarding the importance of school facilities.
[29] These additional findings include: schools with librarians were 2 ½ more times likely that those schools without librarians, where at least 90% of the students met minimum TAAS reading standard; and for libraries to have the greatest impact on student performance, libraries need to be staffed, at minimum, with both a librarian and an aide. *Id.*

calculation of the weights depends on the resources it has chosen to allocate to the children, not on a true assessment of the additional costs associated with educating economically disadvantaged and LEP children. CR4:876-872; FF78, 83. Given the "changing times, needs, and public expectations" of today's world, *see Edgewood IV*, 917 S.W.2d at 732, n.14, and the insufficient funding for special need students and the students in property-poor districts, the system of today is emblematic of the system described in *Edgewood I*:

> "The present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency."
>
> 777 S.W.2d at 395.

The State has never considered the true cost of providing an adequate education when determining the funding level for special need students, and has, instead, ignored those studies and arbitrarily reduced the funding. *See supra* at 5-7.

The latest cost-analysis study conducted in 2004 for the Joint Select Committee on Public School Finance showed that the costs of bringing special need students to the low standards of that study far exceeded the current state allocations.[30] CR4:958; FF545.

Prior studies recommended cost-adjustments for these special need students that would add an additional 40 percent to the cost of a regular education, but they were never adopted. *See supra* at 6-7. These findings are consistent with previous studies and reflect the minimal amounts necessary to meet the most basic standards.

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[30] That study, among other faults noted by the trial court, called for the funding only necessary for districts to achieve a 55% passing rate under the 2 standard error of measurement (SEM) below the proficiency level (on the reading and math sections (CR4:914; FF63) and excluded dropouts in its computations. CR4:958; FF545

a. Under-funding for Economically Disadvantaged Students

The trial court made numerous findings supporting its conclusion that the compensatory education weight is insufficient to provide economically disadvantaged students with an adequate education. *See generally* CR4:876-877, 957-962; FF78-81, 540-578. "The current compensatory education weight was set prior to the implementation of the TAKS standards and has proven to be substantially insufficient to allow school districts to offer adequate compensatory education programs and services to their economically disadvantaged and at-risk students in order to meet the current educational standards." CR4:959; FF552. Consequently, great disparities exist in the level of academic achievement between economically disadvantaged students and non-economically disadvantaged students on the TAKS. CR4:960; FF557.

The historical under-funding of economically disadvantaged children is also evident from the fact that although Anglo students passed the TAAS all-tests-taken standard at a rate of 84% in 1997 and ended in 2002 with a 92.5% TAAS passing rate, economically disadvantaged students never eclipsed the 80% mark for the TAAS all-test-taken standard, ending at a mere 78.2%. CR4:962; FF574.

The limited success on TAAS for minorities and economically disadvantaged students did not translate to success on the TAKS test. Comparing the first-time test-takers of the TAAS in 1993-94 to the first-time test-takers of the TAKS in 2002-03, the economically disadvantaged students in 1993-94 passed at rates of more than 10% higher across each comparable subject area. CR4:962; FF574. Under the TAKS, the State's accountability expert openly admitted that the existing achievement gaps grew significantly. RR25:190-91.

Statewide, in the 2002-03 administration of the TAKS, for the all-tests-taken standard at 2 SEM below panel recommendation, just over half (53%) of the economically disadvantaged students in Grade 5 met the standard; only 56% met the standard in Grade 8; and a mere 36% met the standard in Grade 11. CR4:959; FF553. In the 2003-04 TAKS exam, at 1 SEM below panel recommendation, less than one-half (49%) of the economically disadvantaged students in Grade 5 met the standard and only one-half (50%) of those in Grade 8 met the standard. CR4:960; FF554.

Statewide results for the at-risk students[31] paint an even more disturbing picture of student performance on the 2003-04 TAKS test. For Grade 5, the at-risk students passed at only 32% versus 77% for the non at-risk students; for Grade 8, only one out of three at-risk students (33%) met the standard for all-tests versus 82% for the non-at-risk students; and for Grade 11, only 52% of the at-risk students met the standard versus 89% for the non-at-risk students. CR4:960; FF555. The trial court found that the insufficiency of the compensatory education weight is also evident from the alarming retention rates of economically disadvantaged students at the elementary and secondary level. CR4:960; FF558. For example, from the 1996-97 school year to the 2001-02 school year, the economically disadvantaged student retention rate at the elementary level increased by 29% from 2.8% to 3.6% (CR4:960; FF559) and was 100% higher than the rate for non-economically disadvantaged children (3.6%: 1.8%). CR4:961; FF562. At the secondary level in 2001-02, economically disadvantaged students in grades 7-12 were retained at a rate approximately

[31] "At-risk" students refer to students that are at-risk of dropping out, including but not limited to students retained in their grade level, PK-3 students who did not perform satisfactorily on a readiness test, and other students identified by the State. *See* TEX. EDUC. CODE § 29.081(d).

75% greater than Texas children overall (economically disadvantaged: 9.3%; not economically disadvantaged: 5.3%). CR4:961; FF556.

The ever-increasing number of economically disadvantaged students in Texas public school districts, coupled with the insufficient compensatory education allotment, severely hamper districts' effort to reduce and prevent drop-outs and to provide an adequate education to those students intended to benefit from compensatory education funding. CR4:959; FF551. The insufficient weight does not afford districts the opportunity to provide the necessary programs and services identified in Texas state policy, including, but not limited to, summer school, materials and tutoring, smaller class sizes, pre-school, and intensive after-school math and science programs for disadvantaged students. CR4:959; FF550.

Due to the insufficient funding for the education of economically disadvantaged students, these students drop out of school at significantly higher rates than other students and do not acquire an adequate education. CR4:961; FF568. Even using the State's official definition of a "dropout," which has been criticized for greatly underestimating the actual loss of students from the school system (*see supra* at Statement of Facts), the disparities between economically disadvantaged dropout rates and the State's averages are significant. CR4:961; FF569. For the Class of 2002, economically disadvantaged students in Texas had a dropout rate 63% greater than the state average[32] (economically disadvantaged: 9.1%; state average: 5.6%). CR4:961; FF571.

Due to the inadequate weights for economically disadvantaged students, the trial court found that "Texas school districts—especially districts with a substantially

[32] The "state average" would include a significant percentage of students who are economically disadvantaged so the true gap is not evident from these figures.

disproportionate share of economically disadvantaged and at-risk students like the Edgewood [Appellees]—cannot provide a quality education to students who are economically disadvantaged and must choose between several necessary programs."[33] *Id.*

b. Under-funding for limited-English proficient students.

The trial court also made numerous findings supporting its conclusion that the bilingual education weight is insufficient to provide LEP students with an adequate education. *See generally* CR4:944-957; FF437-539. The trial court found that "the current cost adjustment for bilingual education has been grossly insufficient since its inception and does not provide the resources necessary to provide LEP students with an adequate education." CR4:945; FF445. The State set the current bilingual program weight prior to the implementation of the TAAS and TAKS standards and it has proven to be substantially insufficient to allow school districts to offer adequate bilingual education/ESL programs to their LEP students in order to meet educational standards. CR4:946; FF460.

The trial court also found that the 0.1 weight for bilingual education in Texas falls well below the weights in other states. CR4:946; FF456-57 (State experts Dr. Craig Wood and Dr. Lori Taylor noting that additional costs of bringing LEP students to state average performance standards were 100% above basic costs, compared to Texas's 10%).

The poor performance of LEP students in Texas schools is partly based on the serious bilingual teacher shortage in Texas. CR4:947; FF461. The court noted that LEP students

[33] The insufficient compensatory education weight affects all districts serving economically disadvantaged and at-risk students, although far more pronounced in property-poor districts who serve disproportionate numbers. *See* App. C & D "Comparison of State Comp Ed" Table IX-Economically Disadvantaged Students; Table XII- At-Risk Students." (Sample 1 was a group of seven school districts with less than 20% economically disadvantaged students; Sample 2 was a group of seven Edgewood Intervenor districts with more than 80% economically disadvantaged children.)

must have a qualified teacher in order to receive an adequate education and meet their learning needs. CR4:950; FF487. Bilingual teachers must have specialized skills, in addition to the full preparation of a non-bilingual certified teacher.[34] The additional knowledge and skills required of bilingual educators signify the additional time, effort, and expense needed to prepare a bilingual teacher. *Id.* Due to the insufficient bilingual weight, Edgewood Appellees are unable to effectively recruit and retain fully certified bilingual teachers. CR4:949; FF485.

Importantly, a district's accountability rating is not affected by the poor performance of LEP students as a sub-group, because they are not one of the sub-groups disaggregated for ratings' purposes. RR10:13. Looking at the TAKS scores in Texas, the court found large achievement gaps between LEP students and non-LEP students.

In 2002-03, almost 7 out of 10 (68.2%) LEP students in Grade 5 failed to meet the State's standards on the TAKS tests; almost 8 out of 10 (75.7%) LEP students failed to meet the standards in Grade 8; and more than 8 out of 10 (84.8%) LEP students in grade 11 failed to meet the state's standards. Overall, almost 7 out of 10 LEP students in Texas (68%) failed to meet state standards in the 2003 Spring TAKS administration. CR4:947; FF463.

In the second year of the TAKS administration, LEP students continued to have great difficulty meeting the State's standards. For the year 2003-04, over 7 out of 10 (73%) LEP students failed to meet the grade 5 standards; almost 8 out of 10 (79%) failed to meet the grade 8 standards; and almost 8 out of 10 (76%) failed to meet the standards for the exit level grade 11 assessment. CR4:947; FF464.

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[34] These skills are noted in the additional 60 items required on the Bilingual Generalist exam when compared to the Generalist exam on the official Texas Examination of Educator Standards.

The trial court further found that the insufficiency of the bilingual funding weight is also evident in the retention rates at the elementary and secondary levels. CR4:948; FF467. From 1996-97 to 2001-02, the LEP retention rate at the elementary level increased 44%, from 2.7% to 3.9%. *Id.*; FF468. In the 2001-02 school year, LEP elementary students were retained at a rate 56% greater than other students. *Id.*; FF471. For grades 7-12, LEP students were retained at a rate almost 100% greater than all other students. *Id.*; FF476.

The trial court also found that the "academic lag of LEP students has a cumulative effect, causing an academic gap and contributing to the high dropout rates." CR4:948; FF477. Even using the highly-criticized state data regarding dropouts, LEP students dropped out of school at a rate 77% greater than other students. CR4:949; FF480.

c. Under-funding for Property-poor districts.

The trial court declared the following in favor of Edgewood Appellees:

> "that the current funding capacity of the Texas school finance system fails to provide Intervenor districts with sufficient access to revenue to provide for a general diffusion of knowledge to their students, in violation of the efficiency, suitability and adequacy provisions of Article VII, section 1 of the Texas Constitution, particularly when taking into account (1) the inadequacy of the weight adjustments for bilingual, economically disadvantaged, and other special needs students and (2) the greater burden borne by Intervenor districts of the inadequacy of those weights, given their student populations, which are disproportionately LEP and economically disadvantaged."

CR3:844. (Final Judgment). In support, the trial court issued numerous findings indicating that although all plaintiff and intervenor districts proved their adequacy case, the court recognized the even greater obstacles facing property-poor districts such as Edgewood Appellees in delivering an adequate education. [35]

[35] For example the trial court found offer a broader competitive curriculum; recruit, hire, train, and retain more highly qualified teachers and aids with the funds necessary to ensure higher graduation rates and college readiness of

The trial court found that the "educational deficiencies resulting from the inadequacy of the system are apparent in the levels of student performance, particularly in correlation with district wealth and student socioeconomic status." CR4:962; FF576. Not only does the State provide property-poor districts access to far less revenue than property-rich districts, Edgewood Appellees also must educate greater proportions of higher-cost students, such as low-income and limited-English proficient children, and have greater difficulty in recruiting and retaining qualified teachers. CR4:943; FF435. Coupled with the numerous other findings by the trial court (*see e.g.* Edgewood Appellants' Br. Section IV(B) at 20-22) and findings concerning facilities financing for property poor districts (*see supra* Section V), these factors collectively strengthen the court's conclusion that Edgewood Appellees proved their constitutional adequacy, efficiency and suitability claims.

Under any legal standard, these facts support the trial court's conclusion that as a matter of law, the funding for property-poor districts and special need students is unsuitable and inefficient to provide a general diffusion of knowledge to those students.

3. Other States include inputs as measures for determining whether or not their public education systems meet constitutional standards.

Many other state courts consider inputs in determining whether legislatures have met their constitutional duty to provide adequate, efficient, and suitable educational systems and the basis for each of their decisions is very similar to the trial court's ruling in this case.

The Supreme Court of Kansas recently concluded, "that we need look no further than the legislature's own definition of suitable education to determine that the standard is not

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student s exiting the system; provide enrichment opportunities to their students; meet state and federal mandates on accountability and achievement; provide drop-out prevention programs to at-risk students; and provide to each of their students an opportunity to receive an adequate education. CR4:962; FF577; *see also* FF547, 549, 622, 623, 629, 646, and 670.

being met under the current financing formula." *Montoy II*, 102 P.3d at 1164. The Court found that the financing statute failed to provide adequate funding for a suitable education for the high-minority, high at-risk plaintiff districts, basing part of its ruling on the fact that the "financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure... distorted the low enrollment, special education, vocational, bilingual education, and the at-risk weighting factors."[36]

In *Hoke County Bd. of Educ. v. North Carolina*, the Supreme Court of North Carolina held that the legislature's school financing statutes violated the state constitutional mandate to provide an adequate education, even with an accountability system in place. 599 S.E.2d 365 (N.C. 2004). In finding that the state failed to provide the funding necessary for districts to provide a sound education to all of their students, the Court looked at a number of inputs and their relation to the outputs, including the number and availability of adequate teachers, available funding, and resources for at-risk students. *Id.* at 386-87.

Likewise, the Supreme Court of New York ruled that the state failed to provide the students of New York City with a constitutionally adequate education. *C.F.E.,* 801 N.E.2d 326. The Court reviewed the various inputs to determine whether the state provided access to a sound education for all children, including "teaching, facilities, and instrumentalities of learning". *Id.* at 328. The Court also looked at the outputs, such as graduation rates and test scores in declaring the system unconstitutional. *Id.* at 336-40.

[36] The Kansas Supreme Court also based part of its ruling on a state-directed study finding that the "formula and funding levels were inadequate to provide what the legislature had defined as a suitable education." *Id.*

The Supreme Court of Montana also considered the educational inputs of the Montana school system in recently holding that the state defendants failed to provide a constitutionally adequate system. *Columbia Falls Elem. Sch. Dist. No. 6 v. Montana* 109 P.3d 257, 262 (Mont. 2005) ("Unless funding relates to needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards, then the funding is not related to the cornerstones of a quality education").

In *Hancock*, the Massachusetts Supreme Court based its decision primarily on the fact that the state completely overhauled its financing system so that "spending gaps between districts based on property wealth have been reduced or even reversed."[37] *Hancock*, 822 N.E.2d at 1147. The Court also considered other inputs in its evaluation of the Legislature's obligations, including the existence of extended day programs, libraries, and teacher development programs, among others.[38] *Id.* at 1150.

The weight of the evidence in this case supports the trial court's ruling that the system is constitutionally inadequate, inefficient, and unsuitable. The trial court properly considered both educational inputs and outputs in declaring that the State failed to provide a general diffusion of knowledge for all Texas schoolchildren in an efficient and suitable manner.

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[37] The court found that per pupil funding in high poverty districts was four percent higher than spending in low poverty districts, a marked reversal from 1993 when high poverty districts received almost $300 more per pupil. *Id.* at n.22.

[38] The Massachusetts court also found that state spending in the high poverty focus districts doubled and that facilities were being built and upgraded, along with equipment and supplies, none of which was found by the trial court in this case. *Id.* at 1152.

V. THE TRIAL COURT CORRECTLY CONCLUDED THAT FUNDING FOR SCHOOL FACILITIES IN TEXAS IS CONSTITUTIONALLY INEFFICIENT.

A. The Texas School Finance System Fails to Efficiently Provide Access to Facilities Funding for Property-Poor School Districts.

This Court recognizes that facilities are as important as instruction in the public school system:

> "An efficient system of public education requires not only classroom instruction, but also the classrooms where that instruction is to take place. These components of an efficient system—instruction and facilities—are inseparable."

Edgewood IV, 917 S.W. 2d at 726 (Tex. 1995).

In *Edgewood IV*, the Court found the system only minimally acceptable when compared to the system in the past. *Edgewood IV*, 917 S.W.2d at 726. Because of an evidentiary void in the area of facilities financing, the system was declared constitutional. *Id.* at 725. The Court signaled to the Legislature that the school finance crisis had not ended. *Id.* Instead of heeding the Court's warning and minding the admonition that "[s]urely, Texas can and must do better," *id.* at 726, for property-poor districts, the Legislature turned back the clock on facilities financing.

The trial court's exhaustive findings on the State's facilities financing for property-poor districts reflect the substantial evidence supporting the conclusion that the current facilities financing system for Edgewood Appellees is inefficient and unsuitable.

At the time of *Edgewood IV*, the State provided all districts access to "equalized" revenue for maintenance and operations and facilities through Tier 2. *See id.* at 746. The Court found that the State retained a greater percentage of the revenue for the system by capturing all of the revenue from property-rich districts in excess of the equalized wealth

level, then at $280,000 per students.[39] *Id.* at 734-35. The State also maintained a greater number of students within the "equalized" system by guaranteeing a yield for each penny of tax effort. *Id.* at 731. Even with these "equitable" components in the system, the Court found the system only "minimally acceptable when viewed through the prism of history" and only because of a factual void on the issue of facilities. *Id.* at 726.

Unlike the school finance system upheld in *Edgewood IV*, there is no equalized wealth level or recapture (revenue-sharing) of funds under the new "Tier 3". CR4:936; FF389. The State removed facilities funding and the tax revenue generated by property-rich districts from the revenue-sharing system of Tier 2 and established new and separate provisions *intended* to finance facilities. CR4:935-36; FF382, 389. Today, property-rich districts retain all of the substantial revenue generated from local I&S taxes while property-poor districts taxing at the same rates generate substantially lesser funds.[40] *Id.*

As the trial court found, funding for facilities under Tier 3 is limited in many respects, providing an unsuitable and inefficient system for property-poor districts. Unlike the state's contributions under Tier 1 and 2 of the old and new system, the availability of IFA funds for new awards and EDA funds under Tier 3 is limited to appropriations by the Legislature in each biennium. CR4:936; FF386. Because the Tier 3 funding requires the districts to pass construction bonds in order to qualify for funding, some districts are too poor to even make

[39] Excluding the revenue generated by wealthy districts under the hold-harmless provisions, which were to be phased out by the State (*see Edgewood IV*, 917 S.W.2d at 728) but subsequently were permanently written into statute. RR14:61-62.

[40] For example, Alamo Height I.S.D., located within the metropolitan area as property-poor Edgewood I.S.D., can "fund a bond of approximately $75 million with a tax effort of 7 to 8 cents, but Edgewood I.S.D., without any assistance from the state, could fund only a $5 million bond with that same tax effort." CR4:937; FF390.

the effort to assess their facilities and hold bond elections , and thus, never even apply. CR4:937; FF393.

The State has substantially under-funded IFA appropriations since 1999. CR4:937; FF396. After the first two years of the program when $200 million was appropriated, school district demand for IFA funding has exceeded the appropriations in the range of $25- $50 million. CR4:937; FF396. Because of insufficient appropriations, not all property-poor districts applying for funds have received IFA assistance since the beginning of the program in 1997. CR4:936; FF387.

For the 1999-2000 biennium, $150 million was appropriated for IFA but in the first year, only 87 out of 160 districts applying for IFA received IFA funds for new projects. CR4:938; FF396. In the second year of the biennium, only 83 out of 245 districts received IFA funds. *Id.* For the 2003-2004 biennium, the Legislature failed to appropriate any IFA funds for new projects in the first year of the biennium, and districts that applied received no funding (CR4:938; FF397), effectively terminating the program for any new facilities financing for property-poor districts. In the second year of the biennium, "the Legislature appropriated only $20 million for new IFA projects, contingent on a surplus in EDA funding." CR4:938; FF398; *see also,* 2003 TEX. SESS. LAW SERV. Ch. 201, § 69 (Vernon's 2004); STATE EX. 16060 at D-001491A (Wisnoski Report).

Demand for IFA funds exceeded appropriations by $100 million, or 5 times the amount made available by the Legislature. *Id.* "As a result, only 16 out of the more than 300 IFA applicants received IFA funding, the last having a wealth per ADA of a mere $63,302." CR4:938:FF399. "Property-poor Edgewood Appellee focus districts such as Pharr-San Juan-

Alamo ISD ($67,733/ADA), South San Antonio ISD ($86,777/ADA), Socorro ($91,703/ADA), and Ysleta ISD ($101,152/ADA) were shut out of new IFA funding in 2003-04. *Id.* *See also* App. A.

The State limits IFA for property-poor districts in other ways. Regardless of a districts' need, a property-poor district is only eligible for a maximum of $250 per ADA. TEX. EDUC CODE § 46.005. For Edgewood I.S.D., a facilities assessment in 2001 identified $145 million in needs, including: ensuring compliance with Americans with Disabilities Act; adding classrooms; replacing roofs; upgrading lighting, heating, ventilation and air-conditioning systems; improving technology infrastructure; and constructing new schools to replace schools greater than 45 years old. CR4:927; FF325-26. Despite their needs, Edgewood I.S.D. qualified for a maximum of "approximately $49 million because of the limitations on the qualifying amount per ADA." CR4:928; FF328. Even after two bond proposals, Edgewood I.S.D. cannot meet all of its needs because of the limitations of the IFA program. CR4:928; FF329. Edgewood I.S.D. cannot pass a bond for the remaining $47 million without state assistance, because its property wealth is so low that such a tax would exceed the $0.50 cap on I&S rates. *Id.*

The trial court recognized the risk districts refuse to take—in "hoping" that EDA will roll forward in the next biennium—by passing bond proposals contingent upon receipt of IFA. CR4:940; FF408. The State itself acknowledged that the appropriations for EDA may be insufficient and amended the Education Code to allow the State to reduce the $35 per penny guaranteed level to a level that funds all districts eligible for EDA based on the appropriation. CR4:939; FF403-04 citing TEX. EDUC. CODE § 46.034(d). The trial court

found that "Because there is no guarantee that the Legislature will roll EDA forward to cover debt payments from this biennium, property-poor districts cannot afford to take the risk of issuing bond debt for school facilities." CR4:936; FF388.

Finding that some districts either cannot afford the risk or cannot secure financing in the absence of guaranteed state assistance (CR4:940; FF408), the trial court stated:

> "Extremely low property wealth districts like Pharr-San Juan-Alamo ISD and South San Antonio ISD, for example, cannot afford to take this gamble on EDA funding. Given their yields of approximately $7 to $8/ADA per penny of tax effort, they would have to adopt extremely high tax rates to fund the bonds on their own. That is why they will not issue their bonds without IFA assistance and do not risk the EDA roll forward."
>
> CR4:940; FF409.

Further evidence of the inefficiency of the system results from the State no longer recapturing the revenue generated by wealthy districts through I&S tax rates. CR4:936; FF389. This allows the revenue to escape the public school system and allows property-rich districts substantially greater access to larger amounts of revenue for facilities than property-poor districts, despite similar tax efforts. Hence, property-rich districts are able to tax low and spend high for facilities, while property-poor districts must tax high and spend low. *See* CR4:937; FF390. As in *Edgewood II*, today's State's system for facilities financing "insulates concentrated areas of property wealth from being taxed to support the public schools. The result is that substantial revenue is lost to the system." *See Edgewood II*, 804 S.W.2d at 497.

As a result, the trial court properly concluded that "[t]he property-poor Edgewood Intervenors lack adequate funds for, and do not have substantially equal access to funds for school facilities, and therefore do not have all the facilities essential to providing students a

learning environment in which to attain a suitable and adequate education." CR4:924; FF298.

1. The Division of Funding Responsibility Between the State and Property-Poor School Districts Does not Render the System Efficient.

The mere fact that the State divides funding responsibility between the State and local school districts does not render the system efficient in providing facilities funding to property-poor districts.[41] *See supra* at Section IIB.

State Appellees raise no error of law in this section of their brief and do not argue what the law is and how the trial court failed to apply the facts correctly with respect to whether shared responsibility for facilities financing is constitutionally efficient. *See $217,590.00 in United States Currency*, 18 S.W.3d at 634; *Pickens,* 62 S.W.3d at 215; *Templeton*, 961 S.W.2d at 656 n.8. Under section III(B) of their brief, the State never addresses the issue whether the State provides property-poor districts substantially equal access to similar revenue per pupil at similar tax effort (or any other legally-cognizable standard) but merely marshals facts—some inconsistent with the trial court's findings. Therefore, the State's argument is groundless and without merit.

2. Even if the Legislature Has Provided a Constitutionally Adequate Educational System, Its System for Funding School Facilities is Still Inefficient.

The State argues that because it fulfilled its duty in providing an adequate education, it automatically satisfies constitutional efficiency. This argument fails for many reasons. First, the trial court correctly determined that the system was inefficient and unsuitable for

[41] Exactly how, and to what extent, the State shares responsibility for facilities financing is addressed throughout Section IV of this brief.

property-poor districts, such as Edgewood Appellees, to provide a general diffusion of knowledge. CR3:843 (Final Judgment). This Court has repeatedly stated that the State must provide a system that is *both* "qualitatively efficient" and "financially efficient", thereby concluding that two separate measures must be met. *Edgewood IV*, 917 S.W.2d at 729-30. Since Edgewood Appellees are unable to provide for a general diffusion of knowledge, and that measure of knowledge must be met to satisfy the "qualitative" standard of an efficient system (*Id.* at 729), the State could not possibly have satisfied its duty to provide a "qualitatively" efficient system. *See supra* at 13.

Second, simply because the State provides a constitutionally adequate system does not mean that the system is efficient. A constitutionally "adequate" system is one that provides for a general diffusion of knowledge and merely describes the knowledge that is to be diffused. *See West Orange-Cove*, 107 S.W.3d at 563. Whether districts can even access the revenue to meet the costs of providing a general diffusion of knowledge requires an analysis of the 'qualitative" standard of efficiency of the system. *Edgewood IV*, 917 S.W.2d at 746. As stated throughout Section IV of this brief, the evidence supports the trial court's judgment that the system fails to provide property-poor districts with sufficient facilities funds to providing a general diffusion of knowledge to all of their students. *See also* CR4:924; FF278.

Third, even if the Court finds that property-poor districts have access to the funds necessary to provide a general diffusion of knowledge to their students, the efficiency inquiry cannot end there because the system still must satisfy the "financial" efficiency standard. *Edgewood IV*, 917 S.W.2d at 729. Hence, the Court must determine whether property-poor districts have access to the funds necessary to provide a general diffusion of knowledge

through "substantially equal access to similar revenue at similar tax efforts." *Id.* The evidence in the record supports the trial court's legal conclusion that not only are property-poor districts unable to not attain the sufficient revenue for facilities to provided an adequate education but that their access to facilities funding is substantially unequal through and higher tax efforts than property-rich districts, in violation of Article VII, section 1. *Cf. Edgewood IV*, 917 S.W.2d 717.

Furthermore, this Court can declare the Texas school finance system inefficient without addressing the costs of providing a general diffusion of knowledge. In *Edgewood I*, the Court held the system financially inefficient because the system failed to provide property-poor districts with substantially equal access to similar revenues at similar tax effort. *Edgewood I*, 777 S.W.2d at 397. The Court never considered the amount necessary to provide a general diffusion of knowledge. *See generally, id.* Similarly, in *Edgewood II*, the Court never determined whether the ninety-five percent of children within the "equalized system" had access to the funds necessary for a general diffusion of knowledge. *See Edgewood II*, 804 S.W.2d 491. The focus was on the disparate access to revenue available to the five percent of districts outside the "equalized system," as well as revenue from those districts that remained insulated from taxes to support the public schools. *Id.* Just as in *Edgewood I* and *II*, the Court in this case does not need to consider general diffusion of knowledge because the disparities are so overwhelming in facilities financing for property-poor districts compared to wealthy districts.

The State is also wrong to assert that simply because Edgewood Appellees are rated "academically acceptable", the districts have "the facilities essential to a general diffusion of knowledge and, as a matter of law, any disparity in facilities funding does not make the

system inefficient." *See* Appellants' Br. at 82-83. First, as stated earlier in this brief, an academically acceptable rating does not equate to a general diffusion of knowledge. *Supra* at Section IV.

Second, in *Edgewood IV*, the Court commenced its review of efficiency by looking at the M&O tax rates necessary to generate the revenue to provide an adequate education. *Edgewood IV*, 917 S.W.2d at 731-32. Having found that districts were able to provide an adequate education with their M&O funds, the Court then went on to discover further facts regarding facilities. The Court found that under Tier 2, "**all districts have access to equalized funding for facilities purposes**." *Id.* at 746 (emphasis added). The Court noted that "Tier 2 was designed to provide 'a guaranteed yield system of financing to provide all districts with substantially equal access to funds to provide an enriched program and *additional funds for facilities.*'" *Id.* (citing TEX. EDUC. CODE § 16.002(b) (emphasis in original)).

The Court then looked at the "equalized" revenue available for facilities and found the property-poor districts still had $0.19 of "equalized revenue" remaining to meet those needs. *Id.* The Court concluded, "Our search of the record reveals that the plaintiffs have not demonstrated that there is even one district that cannot presently provide the facilities necessary for a general diffusion of knowledge within the equalized program." *Id.* However, the Court followed its ruling with a warning to, and conceded by, the State:

> that if the cost of providing a general diffusion of knowledge rises to the point that a district cannot meet its operations and facilities needs within the equalized program, the State will, at that time, have abdicated its constitutional duty to provide an efficient school system...From the evidence, it appears that this point is near.

Id. at 747. (footnotes omitted.) The plaintiffs in *Edgewood IV* did not prevail only because the State's mere failure to devise a separate facilities component did not render the system inefficient. In fact, the Court went on to state the following:

> By vacating the district court's injunction, we do not imply that the system financing facilities is now and will continue to be constitutionally efficient. The districts must have substantially equal access to the funding for a general diffusion of knowledge for both operations and facilities needs. If the Legislature abdicates its duty with respect to either of these needs, we will have no choice but to hold that the school finance system is unconstitutional in its entirety.

Id. at n.37. This Court affirmed two of its sound precedents concerning facilities: one, that districts must have substantially equal access to funding for facilities, as well as operations; and two, that if the State fails to provide for *either*, it would render the entire system unconstitutional. *See id.* These well-established standards call for the Court to review the efficiency of the facilities financing system, whether or not the districts have the M&O revenue to provide for a general diffusion of knowledge.

In this case, the trial court determined that all districts no longer have access to equalized funding for facilities. CR4:936; FF389. Further, revenue generated by property-rich districts' I&S rates is no longer included within the wealth-sharing system as it was at the time of *Edgewood IV*. *Id.* As this Court stated in its last review of efficiency, "For the reasons discussed in our prior opinions, the Texas finance system under Senate Bill 7 could not be efficient as long as it denied access to the pools of wealth concentrated in the wealthiest districts." *Edgewood IV*, 917 S.W.2d at 739.

The changes in the school finance system's wealth-sharing provisions (to the detriment of Edgewood Appellees), combined with the expanding curriculum requirements, the increasing costs of a general diffusion of knowledge, and the substantial evidence of

Edgewood Appellees inability to have substantially equal access to facilities funding in order to provide a general diffusion of knowledge, the trial court correctly determined that the State breached its duty to provide facilities funding efficiently and suitably for Edgewood Appellees, and therefore, violated their obligation under the Constitution. *See* CR3:843.

Lastly, the trial court did confront the question whether the qualitative aspect of efficiency was satisfied and made many findings in support of its conclusion. *See generally* CR4:924-943; FF297-433. The trial court concluded that, for several reasons, "Tier 3 fails to provide "districts substantially equal access to the funding for a general diffusion of knowledge for both operations *and facilities needs.*"' CR4:936; FF384 (quoting *Edgewood IV*, 917 S.W.2d at 747 n.37 (emphasis added by trial court)). The court found that "[i]nadequate school facilities deprive students of an equal opportunity to meet state-defined standards and obtain a constitutionally adequate education." CR4:933; FF368.

The court further noted that "school building conditions have a measurable influence upon student learning" and affect "student achievement and teacher satisfaction and effectiveness." CR4:930; FF339-40. The State admitted that "[s]afe clean, well-maintained schools enhance student achievement and teacher satisfaction . . . ." CR4:930; FF342, citing EDG Ex. 398 at 1. Even after controlling for socioeconomic status, the undisputed evidence "showed a difference of between 5-17 percentile points between the achievement of students in poor condition buildings and those in standard condition buildings." CR4:930; FF341. The State itself agreed that facilities impact "day-to-day operations of the educational progress" and in support, cited to numerous studies.[42]

[42] "While the buildings, land and equipment do not make the school, they have a decided impact on the day-to-day operations of the educational process. In a 1998 [U.S.] Department of Education study of school districts in three

The trial court made numerous other findings concerning how the condition of the facilities in Edgewood negatively affected their ability to provide a general diffusion of knowledge. *See generally* CR4:923-942; FF297-433. Among those many findings supporting its judgment, the trial court found that "property-poor districts such as the Edgewood Appellees have been unable to provide adequate facilities for all the children in their districts. Sub-standard conditions include: overcrowded schools and classrooms; out-of-date buildings, equipment and fixtures; inadequate libraries, science labs, cafeterias, gymnasiums, and other school facilities." CR4:926; FF307.

The Court further found that the "inadequate school facilities deprive students of an equal opportunity to meet state-defined standards and obtain a constitutionally adequate education." CR4:933; FF368. For example, the State specified the knowledge and skills required of students in the core curriculum subject of science, including for high school students a mandate that "[t]he student, for at least 40% of instructional time, conducts field and laboratory investigations using safe, environmentally appropriate, and ethical practices." CR4:934; FF370-71 (citing 19 TEX. ADMIN CODE § 112.1, *et seq*). The State further requires students in elementary and middle school to conduct field and laboratory investigations. *Id.*; FF372. The State explained:

> *Good science facilities are necessary in order for teachers to provide the quality of instruction that is expected in today's education system.* As more demands are placed on our teachers to improve student performance and schools are held accountable for the level of student performance, the need for

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states, a positive relationship was found between school condition and both student achievement and behavior. Another study, conducted by the American Association of School Administrators, found that students who attended schools in poor condition scored on a standardized test, 5.5 percentage points below students who attended schools in fair condition and 11 percentage points below students who attended schools in excellent condition. Finally, a study of working conditions in urban schools, conducted by Corcoran, Walker and White, found that physical conditions have direct positive and negative effects on teacher morale, sense of personal safety, feelings of effectiveness in the classroom and on the general learning environment." CR4:930; FF343; EDG Ex. 397 at 1.

> modern, well-equipped science facilities becomes increasingly important. Research has proven that students learn and understand science concepts better when all of their senses are stimulated during the learning process. Nowhere can they acquire this level of understanding better than during laboratory and field investigations.
>
> Small laboratory rooms with overcrowded student workstations, a lack of safety equipment, and inadequate supplies and materials can no longer be tolerated in our schools.

CR4: 934-35; FF375 (citing EDG Ex. 547 at 1) (emphasis added)). "As a result of their inability to meet their facilities needs, some districts do not offer all their school students an adequate science lab, depriving students of the opportunity to conduct state-required laboratory investigations.[43]"

Ultimately, the Court correctly determined that "the property-poor Edgewood Intervenors lack adequate funds for, and do not have substantially equal access to, funds for school facilities, and therefore do not have all the facilities essential to providing students a learning environment in which to attain a suitable and adequate education." CR4:924; FF298.

3. A "Comparative Need" Analysis is Unnecessary.

The Supreme Court has never required a "comparative need analysis" in order to determine whether the State is providing an efficient finance system for school facilities. The legal standard for measuring the efficiency of the system is: whether the State provides all districts with substantially equal access to the operations and facilities funding necessary for a general diffusion of knowledge. *See supra* Section II(B) (citing *Edgewood IV*, 917 S.W.2d at746 (quoting *Edgewood I*, 777 S.W.2d at 397)).

[43] As one example, Edgewood Appellee focus district Monte Alto I.S.D. relies on a rolling cabinet that is brought into the classroom and only a couple of students perform the experiment while the other students in the class look on in its middle school. CR4:933; FF367.

The lone case referred to by the State in support of their proposition, *Edgewood IV*, requires Edgewood Appellees to show that only one of the Edgewood districts is unable to provide a general diffusion of knowledge to their students due to the inefficiency of the State's system for facilities financing. *See Edgewood IV*, 917 S.W.2d at 746-47 (the undisputed evidence is that all districts can presently meet their operations and facilities needs with funding provided by Tier 2). Under the Court's analysis, a district must present evidence of its own facilities "needs" and not compare those to the needs of other districts.

In this case, the undisputed and substantial evidence in this case showed that Edgewood Appellees cannot presently meet their operations and facilities needs with funding provided by Tier 2 and "Tier 3[44]". CR4:924-942; FF297-433. The State now argues that the Court should dismiss its precedent with respect to facilities financing, despite its long record of recognizing the importance of facilities. *See* CR4:930; FF343; EDG EX. 397 at 1.

By its own admission, the State does not maintain information on school district facilities needs. CR4:924; FF299. However, the available estimates of facilities needs found by the trial court make it clear that Texas has long had substantial unmet school facilities needs.[45] CR4:925; FF300-306. The trial court found that the State's own Texas School Performance Review of Edgewood Appellee districts also have placed it on notice regarding the significant deficiencies in property-poor districts. CR4:928-930; FF333-338.

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[44] For simplicity purposes, Edgewood Appellees refer to the new facilities financing provisions collectively as "Tier 3" although the State did not actually establish an actual "tier."

[45] The court's findings included: the GAO revealing that 76.3% of Texas schools reported needing to spend additional funds to bring schools into good overall condition. EDG EX. 405 at 4854 (*School Facilities: America's Schools Report Differing Conditions*); the Texas Comptroller noting that 614 responding districts to a survey of their most pressing needs totaled $9.1 billion. EDG EX. 549. (*Current and Future Facilities Needs of Texas Public School Districts*); the National Education Association estimating that Texas's unmet school facilities needs totaled nearly 13.7 billion. EDG Ex. 588 at 11, Table 1. (*Modernizing Our Schools: What Will It Cost?*); and other researchers estimating that unmet needs for school infrastructure in Texas totaled nearly $9.5 billion.)

Further, Edgewood Appellees presented additional evidence of facilities needs across Texas and this evidence was incorporated by the trial court in its findings of fact and conclusions of law. In a study of educational capital[46] across 719 school districts conducted for the Joint Select Committee on Public School Finance, Dr. Lori Taylor found a dramatic variation in the educational capital of Texas school districts, ranging from less than $5,000 per pupil to over $100,000 per pupil. CR942; FF424; *see also* EDG EX 408 at 9. Dr. Taylor noted that the average Chapter 41 (property-rich) district had almost 60% more educational capital per pupil than the average Chapter 42 (property-poor) district. *Id.* at 10. The study further concluded that the patterns uncovered were "clearly inconsistent with the state's equity goals," *id.* at 11, evidencing the following: property-rich districts average more than 100 square feet per student than property-poor districts, *id.* at 9; poor students attend class in significantly older buildings than other students, *id.* at 7; and districts with large minority populations have older facilities. *Id.* at 11.

There was further evidence in the record of the facilities needs and comparable tax rates to meet those needs in various districts. For example, Northside I.S.D., a mid-wealth Chapter 42 district, passed a bond proposal in the amount of $439 million with an $0.11 I&S tax increase. EDG Ex. 578 at 163. Spring I.S.D., another mid-wealth Chapter 42 district, passed a bond proposal in the amount of $279 million with an I&S tax increase of $0.09. WOC Ex. 729 at 152-53. Austin I.S.D., a property-rich, Chapter 41 district is presenting a

[46] The study, entitled "Meeting Needs? A Survey of School Facilities in the State of Texas," defines "educational capital" as the per-pupil value of general purpose facilities and equipment, excluding teacherages and capital devoted to athletics. CR4:942; FF423.

bond proposal to its voters in the amount of $400 million with an expected tax increase of only $0.04, an I&S rate less than half the rate of Northside I.S.D. WOC Ex. 727 at 143.

By comparison, the undisputed evidence showed that Edgewood Appellee focus districts face dramatically higher I&S tax rates for comparable, or even less, needs. South San Antonio I.S.D. would need to raise its I&S tax rate $0.28 to cover its bond of $40 million, for which it failed to receive IFA assistance despite its very low property wealth. CR4:938-39; FF400. Ysleta I.S.D. approved a $250 million bond to address only a portion of its $550 million in facilities needs. CR4:339; FF400. However, because Ysleta did not receive IFA assistance due to the meager appropriation by the State, Ysleta would have to raise its I&S tax rate $0.41 to cover the issuance of the bonds. *Id.* Even with IFA assistance from the State, the property-poor district Edgewood I.S.D. will have to raise taxes almost $0.12 for the new debt of only $49 million. CR4:928; FF329.

Based on the evidence of the facilities needs of Edgewood Appellees, the disparate rates and dissimilar revenue, and insufficient funding by the State, the trial court correctly determined that property-poor districts like the Edgewood Intervenors lack the facilities essential to providing students a learning environment in which to attain a general diffusion of knowledge. *See Edgewood IV*, 917 S.W.2d at 747 n.37; CR4:943; FF443.

4. The Trial Court's Conclusion that the School Finance System is Constitutionally Inefficient as to Facilities is Supported by Legally Sufficient Evidence.

As stated above, the State must provide all districts with substantially equal access to the operations and facilities funding necessary for a general diffusion of knowledge. *Edgewood I*, 777 S.W.2d at 397. As described in Section IV of this brief, the trial court correctly determined that property-poor districts do not have substantially equal access to

facilities funding to meet their needs and provide a general diffusion of knowledge. The trial court, as in *Edgewood I* and *II*, looked at the disparities in the districts' ability to raise revenue. Concluding that there exist glaring disparities in access to revenue for facilities between property-rich and property-poor districts, along with other factors noted in its findings, the trial court concluded that the State's financing scheme rendered the system inefficient and unsuitable for Edgewood Appellees.

The State first argues that the trial court erred by looking at the "means" rather than the gap in access to facilities funds in reaching rendering its judgment. *See* Appellants' Br. at 87 n.59. In *Edgewood IV*, this Court reviewed the means in reaching its conclusion concerning facilities, such as the use of Tier 2 funds for facilities and the Legislature's measure of providing equalized funding to all districts for facilities. *See, e.g.,* 917 S.W.2d at 746. Certainly, looking at the means was necessary to render its decision concerning the suitability and efficiency of the system. *See supra* at 14.

Further, contrary to the State's conclusions, the trial court looked at both the means and the disparities in access to facilities funds in reaching its conclusion. *See* CR4:924-942; FF297-433 (Findings of Fact and Conclusions of Law concerning facilities); *see, e.g.,* FF391 (trial court found the system inefficient and unsuitable because of many factors including "the insufficient funding by the Legislature" for facilities financing.) In determining the extent of the inefficiency of the system, this Court has always looked at the means and the trial court followed suit in this case. *See generally Edgewood I*, 777 S.W.2d 391, *Edgewood v. Kirby*, 804 S.W.2d 491, and *Edgewood IV*, 917 S.W.2d 717.

The State also argues that the trial court's conclusion that the financing system for facilities is inefficient is unsupported by legally sufficient evidence. Appellant Br. at 87-88.

The State's argument fails not only because legally sufficient evidence exists in the record to support the trial court's judgment (*see, e.g.,* CR4:924-942; FF297-433), but also because its argument concerning Craig Foster's analysis is incomplete, inaccurate, and wrong.

The State claims that Foster determined that an $0.08 tax-rate gap exists in the between property-rich districts and property-poor districts in access to I&S rates. *See* Appellants' Br. at 89. The State also asserts that this $0.08 gap is less than the $0.09 in *Edgewood IV* and therefore, not so great that it renders the system unconstitutional. *Id.* at 90.

First, Foster's analysis of the disparity of tax rates between property wealthy and property-poor districts was based on "average" districts receiving assistance under the EDA program and "average" districts not receiving EDA. *See* ALV EX. 9045. By taking the mere "averages" of both sets of districts, Foster's analysis underestimates the true gap between the wealthiest and the poorest districts.

Second, this analysis assumes that EDA is available. For districts too poor to even afford to take the risk of not receiving EDA assistance,[47] the disparities would even be greater. For example, Edgewood Appellee district South San Antonio I.S.D. could not take the risk of EDA not being appropriated and rolled forward because it would force South San Antonio I.S.D. to face a tax increase of $0.28 without assistance (compared to the $0.07 had assistance been available) for its $40.5 million bond. CR4:938; FF400(a).

[47] "Because there is no guarantee that the Legislature will roll EDA forward to cover debt payments from this biennium, property-poor districts cannot afford to take the risk of issuing bond debt for school facilities." CR4:936; FF388.

The State also asserts wrongly that Foster's analysis applied to the maximum M&O and I&S tax rates, collectively. No such evidence exists in the record. During direct examination of the State's own witness, Mr. Wisnoski states that the $0.08 gap reflects a 38% differential of tax rates based on the I&S rates; he never asserted that the $0.08 gap reflected both I&S and M&O rates. *See* RR28:109-10. The $0.09 gap referred to in *Edgewood IV* concerned rates for M&O only, not I&S, so even then, the gap concerned only the M&O side. *See Edgewood IV*, 917 S.W.2d at 746 ("The evidence adduced at trial shows that the poorest districts in the State must levy a maintenance and operations tax of approximately $1.31 to provide the operations revenue necessary for a general diffusion of knowledge"). Though the *Edgewood IV* court found the $0.09 gap in M&O only "minimally acceptable," *id.* at 725-26, comparing the 38% differential to the former 6% differential in *Edgewood IV* as alleged by the State, provides further legally sufficient evidence to support the trial court's judgment.

Furthermore, Mr. Paul Colbert's analysis did include an analysis of tax rates regarding expenditures, revenue, and I&S tax rates. In his report, Mr. Colbert noted that at the time of *Edgewood IV*, Chapter 41 districts were limited to $28/WADA per penny of tax and property-poor districts were guaranteed up to a level of $20.55/WADA. EDG EX. 410 at 2. With the elimination of the equalized wealth level and recapture under the current system, Chapter 41 districts now benefit from an average wealth of $91/ADA per penny of I&S tax effort (based on a wealth level of $911,839), compared to the guaranteed yield of $35/ADA for districts with wealth levels of less than $350,000 per ADA. *Id.* The $10/ADA per penny advantage in *Edgewood IV* grew to at least $56/ADA under the current system. *Id.*

Mr. Colbert found that comparing similar debt service tax rates of $0.14 for the two sets of aforementioned districts, the wealthy districts access $786/ADA more than the other districts. *Id.* (For a district of 5,000 students, a wealthy district would have access to revenue greater than $3.9 million over a property poor district.) Plainly, an analysis of similar tax rates yielding grossly disparate revenues between the two sets of districts provides legally sufficient evidence that property-poor districts do not have substantially equal access to revenue for facilities.[48]

Dr. Albert Cortez analyzed the gap including facilities and instructional funding (EDG Ex. 425 at 8-9) and provides legally sufficient evidence that the system is inefficient. Comparing the average actual total revenue per pupil for the 5% of weighted students in the wealthiest districts to the 5% of weighted students in the poorest districts, Dr. Cortez concluded that—despite similar tax effort—the wealthy districts had $1,677 more per weighted student than the poor districts. RR20:110,115; EDG Ex. 425 at 9; EDG Ex. 543. Similarly, this Court relied on legally sufficient evidence involving a comparison of the expenditures between the 5% of students in the wealthiest districts and the 5% of students in the poorest districts. *See Edgewood I*, 777 S.W.2d at 392, 393. The *Edgewood I* Court ultimately concluded that they system violated the efficiency provision of Article VII, section 1.

[48] As Colbert further points out in his report, this analysis assumes districts actually received the yield of $35/penny. *Id.* Due to the insufficiency of IFA funds, only 15 districts received IFA funds for the 2003-04 school year. *Id.* For property-poor districts such as South San Antonio I.S.D. who did not receive state assistance, they would have yielded only about $7/ADA per penny based on their low property wealth, compared to the wealthy districts' average of $91/ADA. At a $0.14 tax rate, the $84/ADA advantage would yield a wealthy district of 5,000 students over $5,800,000 in facilities revenue compared to a district such as South San Antonio.

Thus, Edgewood Appellees presented substantial legally sufficient evidence to support the trial court's judgment. Based on the record, the trial court properly considered the facilities finance system, as a whole, inefficient and unsuitable.

Conclusion

The substantial evidence supports the trial court's judgment declaring the Texas public school system, as a matter of law, inadequate, inefficient, and unsuitable for Edgewood Appellees.

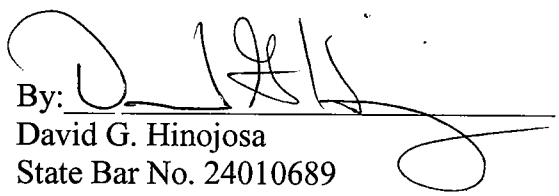
Edgewood Appellees respectfully request that the Texas Supreme Court affirm the trial court's judgment, other than the matters addressed in Docket No. 05-0148.

Prayer

This Court should affirm the trial court's ruling as requested by Edgewood Appellees and provide any further relief so entitled.

Dated: May 11, 2005

Respectfully Submitted,



By: _____

David G. Hinojosa
State Bar No. 24010689
Nina Perales
State Bar No. 24005046
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
140 E. Houston Street, Suite 300
San Antonio, TX 78205
(210) 224-5476 / (210) 224-5382 Fax

ATTORNEYS FOR EDGEWOOD ISD, *ET AL.*, APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this instrument was served on all counsel of record in accordance with Rule 9.5(e) of the Texas Rules of Appellate Procedure, and sent by electronic mail to each counsel this 11th date of May, 2005.

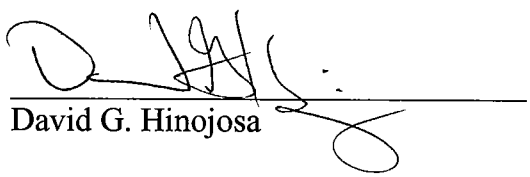
Greg Abbott, Attorney General for the State of Texas
R. Ted Cruz, First Assistant Attorney General
Jeffrey S. Boyd, Deputy Attorney General for Litigation
Toni Hunter, Chief, General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
VIA Certified Mail, Return Receipt Requested *Attorneys for Shirley Neeley, et al.*

Randall B. Wood
Ray, Wood, Fine & Bonilla, LLP
2700 Bee Caves Road
Austin, Texas 78746
VIA Certified Mail, Return Receipt Requested *Attorneys for the Alvarado Appellants*

George W. Bramblett, Jr.
Nina Cortell
Carrie L. Huff
Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
VIA Certified Mail, Return Receipt Requested *Attorneys for Appellants, et al.*

W. Wade Porter
Haynes and Boone
600 Congress Avenue, Suite 1600
Austin, Texas 78701-3236
VIA Certified Mail, Return Receipt Requested *Attorneys for Appellants, et al.*

Mark R. Trachtenberg
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
VIA Certified Mail, Return Receipt Requested *Attorneys for Appellants, et al.*



David G. Hinojosa