



THE TEXAS PUBLIC EDUCATION CHALLENGE

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INTRODUCTION

This is the first in a trilogy of policy briefs discussing public education and taxes. In this brief, we discuss the challenge facing Texas in funding public education. We also explain why the Texas Supreme Court's recent decision in *West Orange-Cove II* requires increased state appropriations for public education.

PUBLIC EDUCATION IS A STATE RESPONSIBILITY

Texas Constitution, Article VII, Education, The Public Free Schools, Section 1, Support and Maintenance of a System of Public Free Schools, provides:

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

This provision requires the legislature to establish a system of public free schools and to provide for its support and maintenance.

As if they foresaw that funding education would be a matter of continuing public controversy, our founders went to the trouble to state the rationale for the provision in the provision itself—our liberties and rights rest on our system of public free schools.

In determining whether the legislature has done its constitutional duty regarding our public free schools, the Texas Supreme Court assesses 1) “adequacy” of funding; 2) “efficiency” of funding; and 3) “suitability” of the means of education. The requirement of “equity” in funding is a component of efficiency.

ADEQUACY

Texas is in the midst of a hot debate about public education. On the one side are those who argue that increasing per student spending is necessary to achieve more with our changing student demographic and to meet higher standards. On the other side are those who argue that we need more education for our money rather than more money for our education.

In its recent decision in *West Orange-Cove II*, the Supreme Court did not take a side, though each camp can point to supporting language. More important than what the Court said, however, is what the Court did. While the Court *talked* about alternatives to improving education other than increasing funding, the Court *ruled* that educational necessity had forced school districts to raise property tax rates all the way to the legal cap.

The Court found as a matter of fact that districts were without meaningful discretion not to tax and spend; indeed, the Court said that the lack of meaningful discretion was not even a close question:

Meaningful discretion cannot be quantified; it is an admittedly imprecise standard. But we think its application in this case is not a close question. The district court found that the plaintiffs’ “focus districts” for which evidence was offered “lack ‘meaningful discretion’ in setting their local property tax rates.” Contrary to the dissent’s assertion, this finding was supported by evidence other than conclusory opinions of district superintendents. The district court detailed evidence showing how the districts are struggling to maintain accreditation with increasing standards, a demographically diverse and changing student population, and fewer qualified teachers, while cutting budgets even further. The district court found that due to inadequate funding: 52.8% of the newly hired teachers in 2002 were not certified, up from 14.1% in 1996; more teachers were being required to teach outside their areas of expertise; and attrition and turnover were growing. The court cited the higher costs of educating economically disadvantaged students and students with limited English proficiency, noting that 90% of the growth in the student population has come from low-income families. And as set out in more detail above, the district court noted the increased curriculum, testing, and accreditation standards, and the increased costs of meeting them. These are facts, not opinions. The State defendants point to evidence of some discretionary spending on programs not essential to accreditation, but there is also evidence that such programs are important to keeping students in school.

(*West Orange-Cove II* at 80-81.)

Texas indeed has a tremendous task ahead. To begin with, Texas has a rapidly growing student population. By 2040, enrollment will roughly double. This growth is a major factor in the increasing cost of Texas’ public education system. Since 1999, average daily attendance has grown by more than half a million students—a 15% increase—with an average increase of 78,200, or 2%, each year. Hurricane Katrina undoubtedly accelerated this growth.

Those who argue education does not need additional resources point to the state’s growth in per student spending since 1980. The growth since 1980, however, was largely to move an under funded system forward. If Texas were spending today in inflation-adjusted expenditures per student what it was spending in 1980, Texas would rank 48th in the country in per student spending.

As it is, the latest statistics from the National Education Association (NEA) rank Texas 40th among the 50 states in current expenditures per student for 2004-05, about \$7,142 per student. Average spending per student across the nation was \$8,618—\$1,476 or 21% higher than in Texas. (NEA statistics are for operating local public schools and include such items as salaries for school personnel, student transportation, school books and materials, and energy costs, but exclude interest on debt and capital outlays for buildings, land, or equipment.)

In making comparisons among states, it is important to keep in mind that student demographics vary greatly. For instance, Texas is responsible for educating an unusually large and rapidly growing proportion of low-income students and children who do not speak English. In 1990, 39% of our students came from low-income families and 8% had limited English proficiency. In 2004, almost 55% came from low-income families and more than 15% had limited English proficiency. These students are more expensive to educate. At the same time, Texas is increasing its educational standards, requiring more of our students and teachers.

The Supreme Court focused on the importance of teachers, noting the increasing numbers of uncertified teachers and the increasing teacher turnover. Both relate to low pay. The latest statistics from the American Federation of Teachers (AFT) rank Texas 50th among the 50 states in the average salary of teachers compared to average private sector earnings in Texas. When Texas teachers quit, by and large they don't take teaching jobs in states that pay more. Rather, they take other jobs in Texas that pay more. Attracting and retaining the best teachers will require increasing teacher compensation.

While the Court rejected the legal claim that present funding is constitutionally inadequate, the Court's opinion cannot be read as endorsing a policy of flat educational investment. To the contrary, the Court emphasized both that its review was limited to assessing absolute constitutional minimums and that public education is critical to the future of the state.

Moreover, in assessing the Court's decision regarding adequacy, one must keep in mind an extremely important detail. The Court's decision is based on spending in the 2003-2004 school year, state fiscal year 2004. The Court did not examine spending for 2004-2005 (state fiscal year 2005) or 2005-2006 (state fiscal year 2006), both lean years for public education.

In school year 2003-2004, the year the Court examined, non-federal operating expenditures totaled \$27.0 billion for Texas public schools. Maintaining the 2003-2004 level of funding—assuming 3.4% annual inflation and 2.2% annual enrollment growth—would require \$28.5 billion in 2004-05, \$30.1 billion in 2005-06, and \$31.8 billion by the 2006-07 school year.

EQUITY

The Court reiterated in *West-Orange Cove II* that for efficiency, 1) “districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort,” 2) though substantially equal access is required only up to the point of adequacy, 3) but even then the amount of unequal supplementation “cannot become so great that it, in effect, destroys the efficiency of the entire system.” This third point is often overlooked.

In *West-Orange Cove II*, the Court cited this language from *Edgewood IV*:

As long as efficiency is maintained, it is not unconstitutional for districts to supplement their programs with local funds, even if such funds are unmatched by state dollars and even if such funds are not subject to statewide recapture. We caution, however, that the amount of “supplementation” in the system cannot become so great that it, in effect, destroys the efficiency of the entire system. The danger is that what the Legislature today considers to be “supplementation” may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge.

(*Edgewood IV* at 73, emphasis added) As the emphasized language makes clear, it is not merely adequacy that must be maintained to allow for unequal local supplementation, it is efficiency. At some point, unequal local supplementation becomes so great that it destroys the efficiency of the system. Thus, there is an outside limit to how much inequity can be tolerated. While the Court did not find that that outside limit had yet been crossed, the Court’s discussion of equity suggests that it is unlikely to tolerate increased inequity. Also important to note: the Court assumes that recapture will continue.

FACILITIES

With regard to facilities, the Court noted that “[t]here is much evidence that many districts’ facilities are inadequate.” (*West Orange-Cove II* at 72.) The Court went on to conclude, however, that it lacked the evidence to determine whether districts had substantially equal access to revenue for facilities for an adequate system. The Court did not find facilities funding adequate or equitable. Rather, the court said it lacked the necessary evidence to decide the issue. (*West Orange-Cove II* at 73.) With ever increasing enrollment, unless the legislature increases funding for facilities, districts will have a strong claim for future litigation.

STATE PROPERTY TAX

West Orange Cove II turned on whether the state is imposing an unconstitutional state property tax. Texas Constitution, Article VIII, Taxation and Revenue, Section 1-e, Abolition of Ad Valorem Property Taxes, provides:

No State ad valorem taxes shall be levied upon any property within this State.

At the same time, Texas Constitution, Article VII, Section 3, Taxes for Benefit of Schools, authorizes the legislature “to pass laws for the assessment and collection of taxes in all school districts . . .” and provides for “an additional ad valorem tax to be levied and collected within all school districts for the further maintenance of public free schools”

The question then is when does an authorized local ad valorem tax become a prohibited state ad valorem tax? In *West Orange-Cove II*, the Court reaffirmed its ruling in *Edgewood III* that “[a]n ad valorem tax is a state tax . . . when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without

meaningful discretion.” (*West Orange-Cove II* at 78.) The Court also noted its caution from *Edgewood IV* that the rising costs of providing a constitutionally adequate education would eventually force some districts to tax at the maximum rate just to meet the standard – “in effect a floor as well as a ceiling.” (*West Orange-Cove II* at 78-79.) Finally, the Court held that today the floor has become a ceiling, and Texas has an unconstitutional state property tax. (*West Orange-Cove II* at 83.)

The Court’s holding rests on the factual finding that districts do not have adequate funds to pay for a general diffusion of knowledge without taxing at or near \$1.50. To turn what has become a state property tax back into a local property tax, the state must 1) provide districts additional state funds to use rather than property tax dollars; thereby, 2) creating meaningful discretion, meaning giving districts enough state money that the districts can truly choose not to tax up to the property tax cap.

In assessing recent legislative proposals, the Court spoke bluntly:

Various legislative proposals during the past year to remedy perceived problems with the public education system and its funding would reduce the maximum ad valorem tax rate and allow it to be exceeded for certain purposes. While we express no view on the appropriateness of any of these proposals, we are constrained to caution, as we have before, that a cap to which districts are inexorably forced by educational requirements and economic necessities, as they have been under Senate Bill 7, will in short order violate the prohibition of a state property tax.

(*West Orange-Cove II* at 83.) In other words, if the school property tax has become an unconstitutional state property tax at \$1.50, it does not become constitutional merely because it has been compressed to whatever lower rate. What makes the school property tax an authorized local tax instead of a prohibited state tax is meaningful discretion for the district to tax or not to tax. Creating that meaningful discretion requires more state support for public education.

In *West Orange-Cove II*, while the Court does not quantify meaningful discretion, the Court looked at it in two ways. The Court first looked at meaningful discretion in terms of how much of the revenue potentially available at maximum tax rates was already being spent. The Court noted that “districts statewide are spending over 97% of the revenue that would be available if every district taxed at maximum rates, up from 83% in 1993-1994.” (*West Orange-Cove II* at 81.) Thus, 17% of untapped potential revenue in 1994 was considered meaningful discretion, while 3% in 2004 was not.

The Court then looked at meaningful discretion in terms of tax rates (but in doing so assumed equalized tax rates). The Court cites without criticism the trial court’s finding that \$0.15 of \$1.50—10% of the maximum—must be available for local supplementation. (*West Orange-Cove II* at 82.)

Taken together, these two ways of looking at meaningful discretion suggest as a guideline that if a district truly has the option to use or not use 10% of the maximum tax rate (assuming equalized rates), the district has meaningful discretion. Various legislative proposals have suggested allowing districts to access a certain number of pennies of tax rate each year. If the number does not equal 10% of the maximum rate, however, the tax would likely still be an unconstitutional state tax.

Some have raised the question whether this 10% must be equalized, suggesting that since it is for supplementation, it need not. This line of reasoning confuses equity with meaningful discretion. The 10% must be equalized, not as a matter of equity among districts, but because equalization is necessary to ensure that the discretion given to districts for local enrichment is meaningful.

As emphasized in *West Orange-Cove I*, the constitution prohibits a state ad valorem tax on “any property within this State,” meaning that if a single district lacks meaningful discretion, then the state is imposing an unconstitutional state property tax. (*West Orange-Cove I* at 13-14. “Thus, a single district states a claim under article VII, section 1-3 if it alleges that it is constrained by the State to tax at a particular rate.”)

Keeping this single-district doctrine in mind, consider these numbers. The poorest districts (those with wealth as low as \$20,000 per weighted student) can raise only \$2 per weighted student per penny of tax. The wealthier districts (some of which have more than \$1 million per weighted student) can raise \$100 or more per weighted student per penny of tax.

Assume that property tax rates were reduced to \$1.00, with an additional 10% (10 cents) in unequalized local enrichment allowed. Then the poorest districts would be able to raise \$20 per student from local property taxes (10 cents times \$2 per penny), equal to only an additional 4% on top of the revenue of roughly \$4,500 generated by the base rate. In contrast, the wealthiest districts would be able to raise \$1,000 or more per student (10 cents times \$100 per penny) from local property taxes, adding 20% in supplementary revenue. Under this scenario, the state would be imposing a state property tax in those poor districts because they would not be able to generate the amount of additional revenue necessary for meaningful discretion.

The outcome is the same looking at the system as a whole. In *West Orange-Cove II*, districts were spending 97% of available revenue in 2003-04, which the Court found was so high that there was no meaningful discretion left in the system. Under the scenario outlined above, districts would be spending 96% of available revenue, since the additional 10 cents, if unequalized, would generate only an additional \$1.2 billion – roughly 4% of a total state/local system of about \$28 billion. Districts would therefore be without meaningful discretion.

As noted, these are not equity principles, but state property tax principles. However, equity rules lead to the same conclusion—meaningful discretion dollars must be equalized. We know this from an argument between the dissent and the majority in *West Orange-Cove II*. The dissent argued that if Texas has a state property tax, the correct relief is merely to lift the tax cap. (*West Orange-Cove II*, dissent at 47-48.) The Court rejected the dissent’s position. The Court’s reasoning is critical to understanding why meaningful discretion pennies must be equalized.

Here is the important holding by the Court, part of the internal argument between the dissent and the majority:

The tax rate cap that makes the public education funding system a state property tax is also intended to keep the system efficient. The two roles of the cap are inseparable. To remove the cap to allow districts meaningful discretion in setting tax rates at higher levels would be to increase the revenue disparity among the property-rich and the property-poor districts, creating the financial inefficiency that the cap is intended to prevent.

(*West Orange Cove II* at 85.) Here, the Court says simply “removing” the cap (allowing unequalized supplementation) would create financial inefficiency because it would increase the revenue disparity. The Court comes to this conclusion even though it found funding adequate.

For the Court, the state has apparently reached the outside limit on inequity discussed in the equity section above. The state has come to the point where a larger revenue gap would be “so great that it, in effect, destroys the efficiency of the entire system.”

How does this square with the Court’s holding that unequal supplementation is permitted? The Court’s holding has several caveats. Unequal supplementation is permitted a) if each district is adequately funded; b) if inequity does not increase beyond the outside limit; and c) if each district has meaningful discretion in setting its property tax rate so that the property tax remains a local tax.

To put a total dollar number on this analysis, consider this example: At the maximum tax rate of \$1.50, with roughly a \$30 guaranteed yield, each district is now guaranteed \$4,500. If one reduces the maximum rate to \$1.00, but keeps revenue flat, the guaranteed yield would have to go to \$45 per penny to give each district \$4,500. Then, to create meaningful discretion, one would have to give an extra 10 cents equalized tax rate for supplementation, or \$450 per student. For 6 million weighted students, the total is \$2.7 billion. Average property wealth is about \$200,000 per student (\$20 per penny). Local property tax revenue would cover \$200 times 6 million of the total, or \$1.2 billion. Thus, the cost to the state of equalizing an additional 10 cents over a new rate of \$1.00 would be roughly \$1.5 billion.

CONSOLIDATION

Texas has 1,031 school districts. Is that too many? Or, perhaps the state has the right number, but the wrong lines? Of course, everyone the least bit familiar with public education knows of one or two districts that “should” be consolidated with a neighboring district. A careful review of the number of districts and their boundaries is certainly warranted. If nothing else, such a review would increase public confidence that the state has taken all possible steps to save money before increasing spending. Any consideration of consolidation, however, needs to proceed on a correct understanding of the problem.

The Texas Supreme Court has criticized the number of districts in the context of disparate property wealth per student. The focus of the Court’s concern has been on how the property wealth of the state has been allocated. (*West Orange-Cove II* at 11-14.) Because the Court’s concern is wealth per student, the solution is not to determine if we have too many small districts, but rather to determine if property wealth is evenly divided. The real issue is not whether smaller districts should be consolidated to make larger districts, but whether all districts should be reconfigured to produce more uniform property wealth per student.

Throughout the school finance litigation, the Court has asserted as an aside that the large number of districts means duplicative administrative costs and loss of economies of scale. In fact, however, the Court’s assertion is mere uninformed dicta. No evidence has ever been presented in any of the school finance litigation about the “best” size of a school district. Nor has the Court ever heard any evidence about steps the state has taken to achieve economies of scale without consolidation such as the use of regional Education Service Centers.

How large a district should be for optimal governance and administration is controversial. Both enrollment and density have to be considered. On both scores, some of our districts may be too small; others may be too large. The state should study that question and implement a thoughtful plan. After all the too-small districts are consolidated and the too-large districts divided, however, whether the state would save money has not been determined. In any event, the real issue with consolidation is how the tax base is divided per student. Consolidation that redraws district lines to evenly divide the tax base would be a tremendous step forward.

VOUCHERS

Contrary to the claims of some who embrace vouchers for private schools, the Court did not say that public education could benefit from more competition. Instead, the Court expressly found our system of public free schools suitable, and expressly said it had not addressed any argument about competition. (*West Orange-Cove II* at 74-76.)

The Texas Constitution requires “the support and maintenance of an efficient system of public free schools.” Diverting funds from public free schools to vouchers for private schools may be unconstitutional under this provision. Certainly local property tax dollars cannot be used to fund vouchers for private schools. Texas Constitution, Article VII, Section 3, expressly limits ad valorem taxation to the maintenance of “public free schools.”

In any event, vouchers are not the solution to our present challenge. However one feels about using public money for private schools, adequate support for our public free schools must come first if we are to maintain our democracy and prosperity.

EQUAL RIGHTS

Texas Constitution, Article 1, Bill of Rights, Section 3, Equal Rights, provides:

All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

While the Texas Supreme Court has said that an “efficient” system of public free schools only requires equal funding up to adequate funding, the Court has never been forced to confront whether our Bill of Rights allows the legislature to set up a system that favors some over others. Eventually it will.

Eventually, just as the doctrine of “separate but equal” schools fell, so too will the doctrine of “unequal but adequate” schools. The right to an education is fundamental. Providing an education is the state’s responsibility. In meeting its responsibility, the state cannot favor some over others. Texans, a free people, will ultimately not accept such discrimination.

The fight for an equal right to a public education has now consumed almost 50 years, and it will continue until the objective is achieved. Those who are fighting a rear guard action to maintain enclaves of privilege are on the wrong side of history.