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The Cost of Education: An In Depth Look Into Texas's Education Funding System Over the Last Two Decades

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THE COST OF EDUCATION: AN IN DEPTH LOOK INTO TEXAS’S EDUCATION FUNDING SYSTEM OVER THE LAST TWO DECADES

By *Hannah Elsaadi*[†]

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I. ABSTRACT

This Article will analyze the Texas school finance system, evaluate its challenges, and propose reforms to simplify it. Although the Texas Legislature repeatedly promotes the idea that education is a priority, there is a long history of controversy over many aspects of education, particularly funding. Thus, to fully understand the current funding and legislative dilemma, Part III will analyze the current funding scheme. Part IV will examine the history of the finance system culminating in February 2013 when a Texas District Court ruled the current school finance system is unconstitutional due to claims of adequacy and a finding that the funding process is essentially a statewide property tax.¹ The issues of adequacy, state property tax, and efficiency, as well as specific solutions for each, will be discussed in Part V. Instead of attempting to amend the current funding plan so that it will be constitutional by meeting the former criteria, Part VI advocates abandoning the current funding scheme for something completely different. This Article will not provide or promote a definitive solution to the issue, however, it will prove that the Texas Legislature’s approach to education funding for the last two decades has been unhurried and incomplete. As a result, both schools and students have been seriously and

1. Press Release, Tex. Sch. Fin. Sys. Ruled Unconstitutional, Plano Indep. Sch. Dist. (Feb. 4, 2013), http://www.pisd.edu/documents/PressRelease02-04-2013_DietzRuling.pdf.

negatively affected by this unhurried trial-and-error system.² Thus, instead of trying to fix an already broken system, this Article will emphasize the importance of a major structural change for school funding.

II. INTRODUCTION

An education is one of the most valuable investments a government can make into its own future. Aside from providing a basic intellectual foundation, an education also teaches life skills including critical thinking, deduction, and accountability, which helps to nurture children and develop them into responsible and invested citizens.³ Consequently, the United States Government places a high importance on its citizens' education, particularly with respect to children.⁴ Even though the Federal Government repeatedly advances the notion that education is a priority, it leaves most of the administration to the states.⁵

Many states have grappled with the predicament of education funding.⁶ Over the last thirty years, much litigation on school funding has resulted in a varied assortment of policy revisions from states including Texas, Kentucky, Massachusetts, and New Hampshire.⁷ Texas has been a key figure in these financing debates, and even though the legislature has struggled to find a financing system that passes constitutional scrutiny, "important lessons can be learned from Texas's massive legislative brainstorming sessions."⁸

Texas prioritizes public education for a variety of civic, philanthropic, and financial reasons.⁹ Civically, the Texas Constitution endorses the idea that "education of all is necessary to preserve our rights and liberties."¹⁰ Altruistically, there are a number of principled reasons and as Texas's Judge Dietz states, "the reason that four-fifths

2. See generally Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 GEO. J. ON POVERTY L. & POL'Y 1 (2004).

3. Kah Ying Choo, *Education as Top Priority: The Challenges of Education Reform*, EDUC. REFORM, <http://www.education-reform.net/priority.htm> (last visited Aug. 29, 2015); see *Education*, GLOBAL PARTNERSHIP FOR EDUC., <http://globalpartnership.org/education> (last visited Jan. 1, 2015).

4. See Manali Oak, *Why is Education So Important?* BUZZLE (Sept. 19, 2013), <http://www.buzzle.com/articles/why-is-education-so-important.html>.

5. Austin Pennington, *The Texas Education Agency and the Robin Hood Plan: Is Stealing From the Rich Really Giving More to the Poor?*, 12 TEX. TECH. ADMIN. L.J. 389, 391 (2010-2011); accord Magda Derisma, *Opposing Views: The Divide in Public Education Funding—Property Tax Revenue*, 34 CHILD. LEGAL RTS. J. 122, 122 (2013), http://www.luc.edu/media/lucedu/law/students/publications/clrj/pdfs/vol34_1.pdf.

6. See generally, Pennington, *supra* note 5, at 398–99.

7. Pennington, *supra* note 5, at 398–99.

8. Dyson, *supra* note 2, at 4.

9. JUDGE JOHN K. DIETZ, "THE TIME TO SPEAK IS NOW" PART II 6 (Feb. 4, 2013), <http://www.katyisd.org/dept/communications/Documents/Dietz%20Remarks.pdf>.

10. *Id.* at 7.

of Texans shoulder the responsibility of educating the other fifth of [the] population, is . . . because we collectively realize the role of education in our own lives.”¹¹ Generally, the more educated citizens are the greater their income will be, meaning that fewer citizens will require public assistance and the economy will be more vibrant as people have more money to spend.¹² As a result, the Texas Legislature deemed the public school system to guarantee 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,” both locally and nationally.¹³

III. CURRENT EDUCATION FUNDING

A. *Generally*

During the 2013–2014 school year, Texas public schools enrolled 5,151,925 students, nearly a 19% increase from ten years prior when enrollment was 4,328,028.¹⁴ These schools derive their power from the Texas Constitution which states that because “a general diffusion of knowledge . . . [is] essential to the preservation of the liberties and rights of the people,” the legislature has a duty to “establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”¹⁵ This means that the Constitution makes it 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.”¹⁶ This constitutional provision sets three standards for the legislature to follow including adequacy, suitability, and efficiency.¹⁷

B. *Local Funding*

The majority of public education funds come from local property taxes which “generate billions of dollars for Texas public schools.”¹⁸ Aside from schools, local property taxes also provide funds for roads, streets, fire protection, and police departments.¹⁹ The largest portion

11. *Id.*

12. *Id.*

13. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 788 (Tex. 2005).

14. *Enrollment in Texas Public Schools 2013-14*, TEX. EDUC. AGENCY, http://tea.texas.gov/acctres/enroll_index.html (last updated Nov. 25, 2015) (Anthony Grasso et al. eds., 2014).

15. *Neeley*, 176 S.W.3d at 788.

16. *See* TEX. CONST. art. VII, § 1 (West, Westlaw through 2015).

17. *Neeley*, 176 S.W.3d at 752–53.

18. *FIN. ALLOCATION STUDY FOR TEX.*, TEX. COMPTROLLER OF PUB. ACCOUNTS., PUB. EDUCATION FUNDING IN TEXAS (2013), <http://fastexas.org/about/funding.php> [hereinafter *FIN. ALLOCATION STUDY*].

19. *Property Tax System Basics*, TEX. COMPTROLLER OF PUB. ACCTS., <http://www.window.state.tx.us/taxinfo/proptax/basics.html> (last visited Feb. 3, 2015).

of property taxes goes toward school funding, and in 2013 alone, “school district property tax levies totaled an estimated \$25 billion . . . represent[ing] fifty-five percent of all property tax levied.”²⁰ The taxation rate is set by local entities, and taxes are “assessed on property according to values set by county appraisal districts.”²¹ School districts are the local entities that receive the education portion of the property tax and they are responsible for dividing funding between schools.²² The overarching property taxes devoted to school funding are subdivided into two segments: (1) a Maintenance and Operations tax (“M&O”) and (2) an Interest and Sinking tax (“I&S”).²³ Although all districts can levy M&O taxes, only districts whose citizens have voted in favor of education bonds can levy I&S taxes.²⁴ State law provides local districts with separate tax rate caps for each portion of the local property taxes.²⁵

Local governments use the M&O portion of local property taxes for daily operations funding, including salaries, utility bills, insurance, fuel, and other operations costs.²⁶ For most Texas districts, the statewide cap for M&O taxes is \$1.17 per \$100 property value.²⁷ Under the State’s Foundation School Program (“FSP”), Tier I, Tier II, and the Property Tax Relief Fund calculations are used to determine the M&O portion of property taxes.²⁸

The I&S portion of local property taxes is “used to pay debt service on any bonds issued to fund the construction of schools[, technology,] and other facilities.”²⁹ A bond is a “contract to repay borrowed money with a low cost interest rate over time,” comparable to a mortgage.³⁰ Schools sell bonds in order to raise revenue to finance capital

20. FIN. ALLOCATION STUDY, *supra* note 18.

21. SUSAN COMBS, TEX. COMPTROLLER OF PUB. ACCOUNTS, *YOUR MONEY AND THE TAXING FACTS* 7 (Aug. 2012), http://www.texas transparency.org/Special_Features/Reports/pdf/TexasItsYourMoney-TaxingFacts.pdf.

22. See Caroline M. Hoxby & Ilyana Kuziemko, *Robin Hood and His Not-So-Merry Plan: Capitalization and the Self-Destruction of Texas’s School Finance Equalization Plan 2* (Nat’l Bureau of Econ. Research, Working Paper No. 10722, 2004), <http://www.nber.org/papers/w10722>.

23. FIN. ALLOCATION STUDY, *supra* note 18.

24. See TEX. EDUC. AGENCY OFF. OF SCH. FIN., *SCHOOL FINANCE 101: FUNDING OF TEX. PUBLIC SCH.* 8 (Jan. 2013), <http://www.google.com/url?sa=t&rct=j&q=&eesrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Ftea.texas.gov%2FWorkArea%2FDownloadAsset.aspx%3Fid%3D2147511834&ei=KT3-VMHrNomvyQT-IIKoAQ&usg=AFQjCNFiBsGbx-LKGyF4kgLaRSr5hdy2wg&sig2=38Qh4hoMBqYQ722kB1Jozw>, [hereinafter *School Finance 101*].

25. COMBS, *supra* note 21, at 3.

26. FIN. ALLOCATION STUDY, *supra* note 18.

27. COMBS, *supra* note 21, at 3.

28. *Glossary of Education Related Terms*, AUSTIN INDEP. SCH. DIST. (2011), <https://www.austinisd.org/legislature/glossary-education>.

29. FIN. ALLOCATION STUDY, *supra* note 18.

30. *Frequently Asked Questions*, FRENSHIP INDEP. SCH. DIST., <http://www.frenship.us/cms/lib3/TX01917862/Centricity/Domain/1714/2014%20Bond%20-%20Frequently%20Asked%20Questions.pdf> (last visited Aug. 29, 2015).

projects such as renovations, equipment, land purchases, technology infrastructure, building construction, facility additions, and other items specifically related to facilities.³¹ Bonds cannot be used for operating costs (covered by the M&O tax) such as salaries, “utility bills, supplies, fuel, and insurance.”³² To sell a bond and gain immediate additional funding that the taxpayers will pay over time, school districts must have voter approval.³³ By agreeing to the bond, voters agree to pay this debt in the I&S portion of their property taxes until the debt is paid. This payment even applies to taxpayers who did not own a business or live in the district when the bond was approved.³⁴ Thus, as “the district’s tax base grows larger, the percentage of the bonds paid for by each taxpayer declines.”³⁵

Bonds help districts secure funding that they otherwise would not have; but because they are decided on by voters, many districts located in property-poor areas do not have I&S taxes because bonds never receive the necessary voter approval.³⁶ Regardless of whether or not a district levies I&S taxes, in order to give additional state funding, the State uses each district’s I&S tax rate (even if it is zero) to calculate the facilities funding portion of the FSP.³⁷

Although property taxes are the primary way local governments receive funding, there are differing opinions as to whether these taxes are the best source of funding for local school districts.³⁸ Proponents of the idea “base their arguments on its practical applications, the effect that it has on civic engagement and the courts’ decision to support state autonomy on education issues.”³⁹ Alternatively, opponents raise numerous counterpoints to the use of property taxes.⁴⁰ The first argument centers on the fact that “this type of funding creates disparities in the quality of education that is available to children in poor communities.”⁴¹ Additionally, opponents of using property taxes to fund education believe that because citizens, particularly those with children, are inclined and incentivized to live in areas with good schools there is an “increased workforce and potential boost in the productivity of the region,” further adding to the inequity.⁴²

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 792 (Tex. 2005).

37. *AUSTIN INDEP. SCH. DIST.*, *supra* note 28.

38. *Derisma*, *supra* note 5, at 122.

39. *Id.* at 123.

40. *Id.*

41. *Id.* at 122.

42. *Id.* at 123.

Aside from local property taxes, certain districts have access to additional funds they can use to help finance schools.⁴³ Types of additional income include the revenue acquired from bond or real property sales and the proceeds of capital leases, as well as any revenue made through “shared-services agreements, tuition and fees, [and] facility rentals when designated to go to school districts.”⁴⁴

A third source of revenue is applicable to districts employing a sales tax that deem the recipient be local school districts.⁴⁵ This tax serves as additional funding even though it is restricted to only two percent and the process for receiving the tax revenue is inefficient (businesses collect the tax, submit it to the Comptroller’s office, and the Comptroller’s office, returns the portion back to the local government for division to school districts).⁴⁶

A fourth way districts, mostly wealthy ones, receive revenue is through private foundations.⁴⁷ These foundations are treated as public charities and are treated “in the same way as a donation to a food bank or disaster relief.”⁴⁸ This relatively new trend segregates rich and poor districts even more and by decreasing a donor’s taxes, thereby reducing the amount of general tax revenues collected, “federal and state governments are in effect subsidizing the charitable activity of parents who donate to their child’s school.”⁴⁹

C. State Funding

Although most funds come from local taxes, public education funding at the state level is still a huge expense and “constitutes one of the largest categories of state spending, accounting for 29% of all state appropriations and 42% of all appropriations made out of the general revenue” in 2012–2013.⁵⁰ In 2013 alone, Texas sent nearly \$19.7 billion, paid through several funds, to be distributed to local school districts.⁵¹ The aid Texas provides is divided into three categories: a foundation system, a recapture system, and a guaranteed revenue system.⁵²

43. FIN. ALLOCATION STUDY, *supra* note 18.

44. *Id.*

45. COMBS, *supra* note 21, at 3.

46. *Id.*

47. Morgan Smith, *Robin Hood an Accepted Reality for Texas Schools*, TEX. TRIB. (Dec. 2, 2011), <https://www.texastribune.org/2011/12/02/robin-hood-accepted-reality-texas-schools/>.

48. Rob Reich, *Not Very Giving*, N.Y. TIMES, (Sept. 4, 2013), http://www.nytimes.com/2013/09/05/opinion/not-very-giving.html?_r=0.

49. *Id.*

50. FIN. ALLOCATION STUDY, *supra* note 18.

51. *Id.*

52. Hoxby & Kuziemko, *supra* note 22, at 6–7.

1. The Foundation System

The foundation system set out in the Texas Constitution to “establish . . . the amount of state and local funding due to school districts under Texas school finance law and provide . . . the state’s share of funding to districts” is the Foundation School Program (“FSP”).⁵³ The Texas Education Agency (“TEA”) administers the FSP, and its main goal is to make certain that all districts receive “substantially equal access to similar revenue per student at similar tax effort considering all state and local tax revenues of districts after acknowledging all legitimate student and district cost differences.”⁵⁴ The funds allocated to the FSP are the largest item in the state budget and are comprised of 25% of revenue from the oil production tax, natural gas production tax, and other state occupation taxes.⁵⁵ The FSP is comprised of “two main components, operations funding (which is tied to a district’s M&O tax effort) and facilities funding (which is tied to a district’s I&S tax effort).”⁵⁶

a. Facilities Funding Component

This portion of the FSP is “state money that has been allocated for school construction and related expenses.”⁵⁷ This part of state aid is used to provide “sufficient support for districts to maintain, build, and renovate the classrooms necessary for adequate education.”⁵⁸ The facilities funding component of the FSP aims to give financial assistance to districts that have acquired debt associated with school facilities; it includes two separate programs to “equalize interest and sinking fund (I&S) tax effort which include the Existing Debt Allotment and the Instructional Facilities Allotment.”⁵⁹

b. Operations Component

To reduce disparities in funding, Texas uses the operational component of the FSP to determine the amount of funding the State should give each district depending on its wealth.⁶⁰ To make this determination, Texas evaluates each district’s M&O tax rate (set individually by the district up to a certain cap) and, from there, the State allocates money by either “supplementing property-poor district tax revenues with state funds through the Foundation School Program (FSP) under

53. *School Finance 101*, *supra* note 24, at 7.

54. *Id.*

55. FIN. ALLOCATION STUDY, *supra* note 18.

56. AUSTIN INDEP. SCH. DIST., *supra* note 28.

57. *Id.*

58. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *5 (Tex. Dist. Ct. Aug. 28, 2014).

59. AUSTIN INDEP. SCH. DIST., *supra* note 28; *School Finance 101*, *supra* note 24, at 8.

60. *See Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 758 (Tex. 2005).

Chapter 42 of the Education Code, [or] by a recapture scheme under Chapter 41 of the Texas Education Code.”⁶¹ The operations component of the FSP consists of three basic parts: Tier I, Tier II, and Target Revenue.⁶²

i. Tier I

Tier I of the FSP gives school districts a certain amount of funding, called a basic allotment, per student based on an amount set by statute that can be adjusted depending on fluctuations within a particular school district’s compressed tax rate.⁶³ Additionally, certain adjustments are given to take into account “district-specific characteristics” for districts that meet certain criteria such as districts with low population, districts that provide transportation to their students, and districts that initiate construction for new instructional facilities and therefore need funding to make debt service payments on these facilities (called the Instructional Facilities Allotment Program).⁶⁴

After this number is calculated, the allotment is adjusted “based on how much it costs to educate students in that region of the state.”⁶⁵ The figure comes from the Cost of Education Index (“CEI”), which is a multiplier assigned to each district in order to “compensate for geographic and other cost differences beyond the control of the district.”⁶⁶ This figure was set in 1991 to account for varying economic circumstances in different school districts and was based on a variety of factors including district size, location in a rural county, teacher salaries in bordering districts, and the proportion of low-income students in the district.⁶⁷ Tier I of the Texas school funding formula still uses the CEI index that was created in 1991 as the index has not been updated since then.⁶⁸

In order to compute a school district’s Tier I funding, the basic adjusted allotment amount is multiplied by the number of students in average daily attendance to compute a school’s Tier I funding.⁶⁹ Average daily attendance is calculated by adding the number of days that all students attended school in a six-week period and dividing that number by the total number of days students could possibly attend in the six-week time frame.⁷⁰ This number is then added to the results of

61. *Id.*

62. AUSTIN INDEP. SCH. DIST., *supra* note 28.

63. *Id.*; *School Finance 101*, *supra* note 24, at 7, 11.

64. *School Finance 101*, *supra* note 24, at 7, 11, 37.

65. *Id.* at 12.

66. *See* AUSTIN INDEP. SCH. DIST., *supra* note 28.

67. Dyson, *supra* note 2, at 12.

68. *School Finance 101*, *supra* note 24, at 12.

69. *Id.* at 11.

70. *Id.* at 11–12.

all the other six-week periods in the previous school year and divided by six.⁷¹

This Tier I figure gives districts the overall figure of how much total school funding they should receive through a combination of both local taxes and state funds. The next step for school districts is to calculate how much of the Tier I figure must come from their own local property tax revenue.⁷² The number they calculate that must come from their own revenue is called the Local Fund Assignment (“LFA”).⁷³ The more property wealth within a district, the higher the LFA, and therefore, the less state funding the district will receive.⁷⁴

ii. Tier II

Tier II of the Foundation School Program (“FSP”) aims to “supplement the basic funding provided by Tier I” by giving districts that cater to students who are generally more expensive to educate more funding to assist with the additional costs of educating those children.⁷⁵ This tier of the FSP makes certain that school districts receive a guaranteed amount of state and local funds per student in weighted average daily attendance (“WADA”) for every “cent of tax effort above the tax effort required to meet the LFA,” up to the capped total.⁷⁶

The figure used to determine how much more funding a school will receive for certain categories of children is called WADA. WADA is calculated by taking the Tier I entitlement and subtracting any allotments (including a transportation allotment or new instructional facilities allotment) in addition to subtracting 50% of the CEI adjustment.⁷⁷ This gives an adjusted Tier I figure which is divided by the school district’s basic allotment to give WADA.⁷⁸ WADA also takes into consideration additional factors, called weights, which are “numerical formulas that also represent program costs” for programs that cost additional money, including special education, compensatory education, bilingual education, gifted and talented education, career and technology education, and public education grants.⁷⁹ These different weights suggest that for the purposes of school funding, individuals who are a part of these special groups are counted as a full student, plus some.⁸⁰ For example, “low-income students are counted as 1.2

71. *Id.* at 12.

72. *Id.* at 18.

73. *Id.*; AUSTIN INDEP. SCH. DIST., *supra* note 28.

74. AUSTIN INDEP. SCH. DIST., *supra* note 28.

75. *School Finance 101*, *supra* note 24, at 7.

76. *Id.* at 21.

77. *Id.*

78. *Id.*

79. Dyson, *supra* note 2, at 12.

80. AUSTIN INDEP. SCH. DIST., *supra* note 28.

students, and students who do not speak English are counted as 1.1 students.”⁸¹

Because districts are stuck with their Tier I figure, the only way to obtain additional funds is to “raise the ratio of their WADA to pupils.”⁸² Therefore, both property-rich and property-poor districts have heightened perverse incentives to increase this ratio in order to obtain additional revenue.⁸³

iii. Target Revenue

This source of state funding was given to school districts in response to the 2006 state mandate that called for school districts to reduce their M&O tax rates by two-thirds.⁸⁴ To ensure districts did not lose money due to this cut, the Texas Legislature assured each district that it would receive at least as much revenue per weighted student that it would have received in the 2005–2006 school year.⁸⁵ Currently, the state uses revenue per WADA student at the compressed tax rate (calculated by multiplying the individual district’s 2005 M&O tax rate by 0.66) to determine Target Revenue. This means that a district with a previous M&O tax rate of \$1.50 in 2005 would have a compressed rate of \$1.00 now.⁸⁶ Most districts that receive state funding currently receive their funding through this Target Revenue System as opposed to the Tier I or Tier II formulas. Together, the Operations portion (comprised of Target Revenue, Tier I, & Tier II allotments) and the facilities funding portion comprise the FSP.⁸⁷ The FSP is funded by the Foundation School Fund (“FSF”), and is the mechanism used to transfer funds between state and local districts and whereas the FSP is the program for allocation of state funds, the FSF is the actual account the money comes from.⁸⁸ The FSF is funded by a variety of sources including revenues from the state lottery (approximately \$1 billion per year), revenues arising out of natural resource production and utilities including the oil production tax, natural gas production tax, and the gas, water, and electric utility tax (approximately \$1 billion per year), and Chapter 41 recapture (approximately \$1 billion per year).⁸⁹

2. The Recapture System: The “Robin Hood” Plan

Texas’s recapture system is a source of much chagrin for many Texas school districts and has been litigated repeatedly since its incep-

81. *Id.*

82. Hoxby & Kuziemko, *supra* note 22, at 41.

83. *Id.*

84. *School Finance 101*, *supra* note 24, at 8.

85. *See id.*

86. *Id.*

87. *Id.*

88. AUSTIN INDEP. SCH. DIST., *supra* note 28.

89. RESEARCH FOUNDATION TTARA, AN INTRODUCTION TO SCHOOL FINANCE IN TEXAS 4 (Jan. 2012), <http://www.ttara.org/files/document/file-4f1732f763446.pdf>.

tion in 1993.⁹⁰ Upon commencement of Texas's recapture system, it was coined "The Robin Hood Plan" because "[s]imilar to the legend of Robinhood who 'robbed from the rich and gave to the poor' the law 'recaptured' property tax revenue from property-wealthy school districts and distributed those in property-poor districts in an effort to equalize the financing of all districts throughout Texas."⁹¹

Recapture is the state program used to ensure that "a district's property wealth per student does not exceed certain levels, known as equalized wealth levels."⁹² The state determines a school district's wealth level based on the value of taxable property within the district "divided by the number of students in weighted average daily attendance."⁹³ In 2013, school districts whose wealth per student exceeded the statutorily set equalization wealth level of \$319,500 were subject to recapture provisions found in Chapter 41 of the Texas Education Code.⁹⁴

The goal of recapture is to decrease the inequalities in funding per student between a property-rich district and a property-poor district by requiring a property-rich district to share with a poorer district.⁹⁵ The recapture system "places a cap on the maximum allowable tax revenue [that can be collected] on a per-student basis . . . [and] then takes the amount of tax revenue collected over the statutory cap and redistributes the money to property-poor districts to allow for wealth equalization."⁹⁶

Although districts who are deemed to be Chapter 41 districts are required "to send part of [their] local tax revenue to the state for redistribution to school districts with a lower taxable property wealth," under Chapter 41, these districts may choose one of five ways in order to equalize wealth levels:⁹⁷ "(1) consolidation; (2) detachment by annexation; (3) purchase of attendance credits; (4) contract for education of non-residents; (5) tax base consolidation."⁹⁸ A district may choose to utilize only one of these options or it can use a combination of options.⁹⁹ Property-poor districts receiving revenue via option four will have a reduced FSP payment from the state "to reflect the receipt of this revenue from the Chapter 41 district."¹⁰⁰

90. Pennington, *supra* note 5, at 390.

91. *Robin Hood plan*, WIKIPEDIA, http://en.wikipedia.org/wiki/Robin_Hood_plan (last visited Sept. 30, 2014).

92. AUSTIN INDEP. SCH. DIST., *supra* note 28.

93. 19 TEX. ADMIN. CODE § 62.1071(a), at 17 (2015) (Tex. Educ. Agency, Manual for Districts Subject to Wealth Equalization), tea.texas.gov/WorkArea/DownloadAsset.aspx?id=25769811276; TEX. EDUC. CODE ANN. § 42.302 (West 2015).

94. § 62.1071(a), at 19.

95. Dyson, *supra* note 2, at 14.

96. Pennington, *supra* note 5, at 390.

97. AUSTIN INDEP. SCH. DIST., *supra* note 28.

98. *See* Dyson, *supra* note 2, at 12–14.

99. *School Finance 101*, *supra* note 24, at 29.

100. *Id.*

Recapture is a source of contention and one argument against it states that there is a deadweight loss that naturally occurs under recapture resulting from the disincentive to improve school standards or property values as any financial returns that are made will be confiscated by the state.¹⁰¹ This disincentive leads to capitalization occurring when individuals are deterred from residing in a property-rich district, and therefore, property prices fall thus re-equilibrating the market causing the state to receive significantly less income than it expected.¹⁰² To make this money back, the state may need to “lower the threshold at which recapture occurs.”¹⁰³ As a result, Robin Hood has obliterated nearly \$81 billion of wealth.¹⁰⁴

3. Other State Funds: Guaranteed Revenue

Although the FSP and recapture represent a large majority of the state funds, there are many other state funds that also contribute to school funding, including the Permanent School Fund, the Available School Fund, and the Property Tax Relief Fund.¹⁰⁵

a. Permanent School Fund

The Texas Constitution set up the Permanent School Fund (“PSF”) in 1854 that set aside public, state-owned land and mineral rights, royalty earnings, and stocks and bonds for the purpose of school funding.¹⁰⁶ The Texas Government distributes any interest earned, fines on unpaid and late royalties, or commercial leasing revenues that come from PSF investments to Texas school districts on a per-pupil basis based on average daily attendance per district.¹⁰⁷ Because the drafters intended for this to be an infinite revenue source, the Constitution places strict guidelines on the fund’s investment and withdrawal mandating that the only funds that can be spent are interest funds generated on the account.¹⁰⁸ These restrictions on withdrawal and investment are still in place and since the time the Constitution was drafted, the PSF’s principal amount has not lowered, and in 2014, the PSF was accounted at \$36.3 billion.¹⁰⁹

101. Hoxby & Kuziemko, *supra* note 22, at 46.

102. *Id.* at 10.

103. *Id.*

104. *Id.* at 1–2.

105. AUSTIN INDEP. SCH. DIST., *supra* note 28.

106. RESEARCH FOUNDATION TTARA, *supra* note 89, at 5.

107. *Permanent School Fund*, TEX. GEN. LAND OFF. (2015), <http://www.glo.texas.gov/what-we-do/state-lands/permanent-school-fund/>.

108. *Id.*

109. TEX. EDUC. AGENCY, TEX. PERMANENT SCH. FUND: COMPREHENSIVE ANNUAL FIN. REPORT (2014), <http://tea.texas.gov/index4.aspx?id=2147489178&>.

b. Available School Fund

The Constitution mandates that the interest on the PSF accounts be transferred into the Available School Fund (“ASF”) so that the ASF fund can disburse payments to all school districts for “each eligible student enrolled.”¹¹⁰ Additionally, one-quarter of all revenue produced by the state motor fuels tax is allocated to the ASF fund.¹¹¹ Part of the ASF is sent directly to districts to fund textbooks and technology, while the remainder of the funds operates to finance the FSP.¹¹² Whereas some state education funds are capped or restricted for certain districts depending on their property wealth, “all districts, regardless of property wealth, are eligible to receive ASF funds,” but distributions count against the amount of aid a district will receive from the state.¹¹³

c. Property Tax Relief Fund

Unlike most of the other funds dedicated to school funding that were established in the Constitution, the Property Tax Relief Fund was not established until 2006.¹¹⁴ This fund was established in order to provide supplementary revenue to school districts that were mandated to cut M&O property tax rates by one-third. The source of funds comes from revenues gained from changes in the “state franchise tax, cigarette and tobacco taxes, and the tax on the sale of used motor vehicles.”¹¹⁵

D. Federal Funding

Although limited, school districts also receive funding from the federal government.¹¹⁶ In fact, “19 cents of every dollar Texas receives” from the federal government supports public education.¹¹⁷ In 2013, this translated into \$4.97 billion in federal funding through various grants and formulas including No Child Left Behind (NCLB)-Title 1, Individuals with Disabilities Education Act, Child Nutrition Program, and other such as other formula grants, the American Recovery and Reinvestment Fund and Education Jobs Fund.¹¹⁸

E. Implications of the Complexity of Funding Formulas

As a result of the highly technical and complex funding formulas, a large percentage of citizens are unaware about how schools are

110. TEX. GEN. LAND OFF., *supra* note 107.

111. FIN. ALLOCATION STUDY, *supra* note 18.

112. AUSTIN INDEP. SCH. DIST., *supra* note 28.

113. *School Finance 101*, *supra* note 24, at 41.

114. *Id.* at 7.

115. FIN. ALLOCATION STUDY, *supra* note 18.

116. *Id.*

117. *Id.*

118. *Id.*

funded or why they do not have enough money to operate.¹¹⁹ Studies show that fewer than 10% of people are able to actually estimate how much money is spent per year on each student in Texas's public schools.¹²⁰ This is problematic for two reasons.¹²¹ First, because there are so many different local entities with different taxing authority and different laws and rates, finding the information can be challenging; and even if information is found, it is quite difficult to understand the flow of funding.¹²² Second, it is likely that most legislators do not fully have the taxation or economics background to be able to understand the current funding scheme which is largely problematic.¹²³

Although Texas now requires districts and schools to publicly disclose certain legal and administrative information, the information is vague and only the calculated number is shown—not the numbers within the formulas.¹²⁴ There must be transparency, not just for experts or individuals who spend countless hours researching to understand, but rather for all taxpayers.

IV. HISTORY OF TEXAS'S SCHOOL FUNDING SYSTEM

A. *Historical Overview of Education System*

Texas has a long history of prioritizing its children's education.¹²⁵ In fact, even in 1836 when Texas declared its independence from Mexico, one of the reasons cited was that despite the Mexican government's limitless resources, it neglected to institute a public education system.¹²⁶ Four years later, Texas developed its own law regarding public education.¹²⁷ The Texas Legislature continued to expand and revise the system during the latter part of the 19th century.¹²⁸ Many of these expansions were put in the Texas Constitution of 1876, including the establishment of funds used to help fund schools including a Permanent School Program and Fund.¹²⁹ A second part of the development included providing individual localities with increased authority to

119. FIN. ALLOCATION STUDY, *supra* note 18.

120. Paul DiPerna, *Texas K-12 & School Choice Survey*, FRIEDMAN FOUND. FOR EDUC. CHOICE 24 (Apr. 23, 2013), <http://www.edchoice.org/wp-content/uploads/2015/07/Texas-K-12-School-Choice-Survey1.pdf>.

121. *See generally* COMBS, *supra* note 21.

122. *Id.*

123. *See* KRISTEN DE PEÑA, THROWING MONEY AT EDUCATION ISN'T WORKING 14–16 (State Budget Solutions, a Sunshine Review Project 2012), http://sbs2.eresources.ws/doclib/201209111_SBSEducationReport911.pdf.

124. *See generally* COMBS, *supra* note 21.

125. *See An Overview of the History of Public Education in Texas*, TEX. EDUC. AGENCY, http://tea.texas.gov/About_TEA/Welcome_and_Overview/An_Overview_of_the_History_of_Public_Education_in_Texas/ (last visited Aug. 29, 2015).

126. TEX. CONST. art. VII, § 1, interpretive cmt. (West, Westlaw through 2015).

127. Pennington, *supra* note 5, at 391.

128. *Id.*

129. *Permanent School Fund*, *supra* note 107.

regulate their own schools.¹³⁰ These localities became school districts, and at the start of the 20th century there were 526 districts.¹³¹ In 1949, the state legislature passed the Gilmer-Aikin Act creating the Texas Education Agency ("TEA"), which provided that "eighty percent of education funding would come from state tax revenues."¹³²

B. *Development of the Funding Dilemma*

1. Generally

For over forty years, the Texas Legislature has tried to find a solution to the lack of funding for public schools.¹³³ Although the legislature has amended and rewritten the education funding laws multiple times, Texas courts have struck them all down. Each time a court ruled against a funding system, the legislature met to brainstorm solutions.¹³⁴ Although a couple of these sessions led to drastic changes in funding policies, most of the sessions have ended without resolution, but rather a quick-fix solution which will only temporarily rectify the situation.¹³⁵

2. Early Litigation and Legislation

The first major school finance lawsuit in Texas was *Rodriguez v. San Antonio Independent School District*.¹³⁶ In *Rodriguez*, children living in a property-poor school district sued the district arguing, "school funding based on local property taxes was unconstitutional given that the funding system favored wealthier communities and did not allow for equal education opportunities[.]" thus violating the Equal Protection Clause of the Fourteenth Amendment.¹³⁷ This case was appealed to the United States Supreme Court, who overturned the case in a five-four decision declaring that education did not qualify as a fundamental right, and thus, the property tax method was deemed acceptable.¹³⁸ Even though the Supreme Court ruled in favor of the State, this case served as the catalyst for school finance reform in Texas.¹³⁹ The publicity put a spotlight on the Texas Legislature and pressured policymakers to "address the ubiquitous inequalities in school finance."¹⁴⁰

130. *An Overview of the History of Public Education in Texas*, *supra* note 125, at 2.

131. *Id.*

132. Pennington, *supra* note 5, at 391.

133. Dyson, *supra* note 2, at 7.

134. *See id.* at 7-9.

135. *See id.*

136. Pennington, *supra* note 5, at 391; *See Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971).

137. Derisma, *supra* note 5, at 123.

138. Pennington, *supra* note 5, at 391.

139. 19 TEX. ADMIN. CODE § 62.1071(a), at 17.

140. Dyson, *supra* note 2, at 7.

In addition to serving as the catalyst for school finance reform, the *Rodriguez* case also prompted a slew of equity suits instigated by property-poor school districts in the 1980s and 1990s.¹⁴¹ These districts were led by the Edgewood Independent School District in four separate lawsuits decided in 1989, 1991, 1992, and 1995.¹⁴² Each of these cases centered on students in poor school districts who claimed that the State's method of financing schools violated the Texas Constitution because it was inefficient and the Constitution requires an efficient school system.¹⁴³ In *Edgewood I*, the plaintiffs presented evidence of dramatic inequities between school districts ranging from \$2,112 per pupil in some districts to \$19,333 per pupil in others.¹⁴⁴ The Texas Supreme Court agreed with the students and ruled that all children, no matter whether they live in a poor or rich district, must have "substantially equal opportunity to access educational funds."¹⁴⁵ Responding to the court's decision, the Texas Legislature proceeded to enact a new system of school finance in 1990.¹⁴⁶ This system was challenged again in *Edgewood II*, and in 1991, the Supreme Court held the new funding system unconstitutional once again.¹⁴⁷

In an effort to make the funding scheme constitutional after its second loss, the Texas Legislature "attempted to create county education districts which melded existing school districts together to create taxing units with property values per students that were closer to parity."¹⁴⁸ This was challenged and failed again in *Edgewood III* because it created an ad valorem tax, thus violating the Texas Constitution.¹⁴⁹ An ad valorem tax amounts to a state tax when it fully controls "the levy, assessment, and disbursement of revenue, either directly or indirectly," leaving little to no discretion to local districts.¹⁵⁰

3. Passage of Senate Bill 7: Texas's Robin Hood Plan

Not wanting to continue the vicious cycle of litigation, the legislature met with the goal of creating a finance system that would ensure that no Texas school district exceeded the limit of property wealth allotted per student.¹⁵¹ To do this, the finance system needed to provide "all

141. § 62.1071(a), at 17.

142. *Id.* at 8; *See also* *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *see also* *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *see also* *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *see also* *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 497 (Tex. 1992).

143. *Robin Hood plan*, *supra* note 91.

144. Dyson, *supra* note 2, at 7–8.

145. *Id.* at 8.

146. Hoxby & Kuziemko, *supra* note 22, at 6.

147. *See also* *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

148. Dyson, *supra* note 2, at 8.

149. *Id.*

150. *Id.* at 8, n.33.

151. *See An Overview of the History of Public Education in Texas*, *supra* note 125.

school districts with ‘substantially equal access to similar revenue per student at similar tax effort.’”¹⁵² In other words, the legislature passed Senate Bill 7 with a goal that wealthier districts did not have a sizably larger amount of funding compared to poorer districts.

During negotiations there were three main constraints the legislature faced: (1) the fact Texas law prohibits statewide recapture and therefore the state cannot take back excess revenue from districts; (2) that it would be “fiscally prohibitive” to ensure that districts have exact equal expenditures; and (3) there is a statutory limit of \$1.50 per \$100,000 in value for property taxes.¹⁵³ The combination of these factors led to the 1993 passage of Senate Bill 7, serving as the foundation for what came to be known as, “The Robin Hood Plan.”¹⁵⁴

Under Senate Bill 7, the legislature devised a two-tiered system.¹⁵⁵ The first tier mandated that school districts cap their property taxes at \$1.50 per \$100 of assessed property value for maintenance and operations.¹⁵⁶ This did not apply to school districts that were already over that limit (they could continue to tax at that rate).¹⁵⁷ Additionally, the property tax cap did not apply to taxes assessed to pay for bond packages for facility construction or renovation.¹⁵⁸ The second tier limited districts to M&O revenues that did not exceed a statewide rate per weighted student.¹⁵⁹ The legislature initially set this amount at \$280,000 and districts that profited in excess of this rate were given five options to remedy the situation: “(1) consolidation with another district; (2) detachment of territory; (3) purchase of average daily attendance credit; (4) contracting for the education of nonresident students; or (5) tax base consolidation with another district.”¹⁶⁰ Because wealth was confiscated from the wealthy districts and given to their poor counterparts, many referred to this piece of legislation as the “Robin Hood” bill.¹⁶¹

Only a year later, this system faced another challenge in *Edgewood IV*, but contrary to all previous suits, in 1995, the *Edgewood IV* court held that the new Robin Hood system was constitutional.¹⁶² Even though the state was triumphant, the victory came with a judicial

152. 19 TEX. ADMIN. CODE § 62.1071(a), at 17.

153. Dyson, *supra* note 2, at 11.

154. Pennington, *supra* note 5, at 393.

155. *Id.* at 394.

156. *Robin Hood plan*, *supra* note 91.

157. *Id.*

158. *Id.*

159. See Memorandum from Haynes & Boone LLP & Bracewell & Giuliani LLP on the Tex. Supreme Court’s Op. in Neeley et al. v. West Orange-Cove et al. to W. Orange-Cove Plaintiffs, Tex. Sch. Coal. Membership & Other Interested Parties 2 (Nov. 28, 2005), <http://www.pisd.edu/news/documents/WOCSummary.pdf>.

160. Pennington, *supra* note 5, at 393–94, 407.

161. Dyson, *supra* note 2, at 11.

162. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995).

warning.¹⁶³ The court warned that because the state's cost in providing education (i.e. a general diffusion of knowledge as required by the state Constitution) will increase, districts will have to increase the amount they tax citizens accordingly.¹⁶⁴ As a result, sooner or later districts may be obligated to tax at the statutory cap just to meet state standards.¹⁶⁵ In effect, this would likely compel a capped property tax rate to serve "as a floor as well as a ceiling" and would thus become an ad valorem or state property tax.¹⁶⁶

4. Transition Following Robin Hood and More Litigation 2003–2011

Although there were no significant changes to the finance structure between the years 1997 and 2004, there were multiple legislative debates, resulting in slight amendments and additions.¹⁶⁷ In 1997, the Texas Legislature amended the state finance plan by adding a third tier providing for construction or the purchase of new facilities.¹⁶⁸ Two years later, the legislature "increased the wealth per weighted student that districts may retain to \$295,000,"—\$15,000 higher than when the 1993 Senate Bill 7 was enacted.¹⁶⁹ Even with the slight increase in WADA, because of other circumstances including less state funding and increased operations costs, many districts were forced into implementing salary freezes, firing nonessential workers, and increasing the quantity of kids in each classroom.¹⁷⁰ Recognizing that the funding system was beginning to experience the same trouble that the Texas Supreme Court had foreshadowed in *Edgewood IV*, in September 2001, the Governor appointed a committee to conduct extensive research on the Texas public school funding situation.¹⁷¹

School districts became increasingly frustrated as budgets grew tighter, and in response, the legislature increased the WADA to \$300,000 for the 2001–2002 school year and to \$305,000 for the 2002–2003 school year.¹⁷² The minor increases in WADA were not enough to relieve many districts, and in April 2001 school districts filed a lawsuit, *Neely v. West Orange-Cove*, asserting two key arguments: (1) the finance system had become an unconstitutional state-wide property tax; and (2) the finance system did not give districts the

163. Dyson, *supra* note 2, at 10; *History of 'Robin Hood' Finance System*, PLANO INDEP. SCH. DIST., <http://www.pisd.edu/news/advocacy/robin.hood.shtml> (last visited Dec. 20, 2014).

164. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 738 (Tex. 1995).

165. Dyson, *supra* note 2, at 10.

166. *Id.*; *Meno*, 917 S.W.2d at 738.

167. PLANO INDEP. SCH. DIST., *supra* note 163.

168. Dyson, *supra* note 2, at 15.

169. PLANO INDEP. SCH. DIST., *supra* note 163.

170. Dyson, *supra* note 2, at 5.

171. PLANO INDEP. SCH. DIST., *supra* note 163.

172. *Id.*

funding they need to “sufficiently provide for a constitutionally adequate education.”¹⁷³

The plaintiffs in *West Orange-Cove* contended that the M&O cap of \$1.50 per \$100 of assessed valuation constituted an unconstitutional state property tax because districts lacked “meaningful discretion” in deciding their own rates.¹⁷⁴ The plaintiffs’ argument centered around the belief that they were forced to tax at the maximum-capped rate solely in order to meet state requirements.¹⁷⁵ This lack of resources forced districts into eliminating teachers’ positions, cutting programs, and increasing class sizes just to keep schools afloat.¹⁷⁶ The court agreed with the plaintiffs’ claims and declared the state’s finance system unconstitutional, stating that it was “not even a ‘close question’ as to whether districts have meaningful discretion to set their local property tax rates.”¹⁷⁷

The plaintiff school districts’ second claim centered on inadequacy.¹⁷⁸ Plaintiffs claimed that even though the districts were taxing at the maximum-capped rate, their funding was inadequate to provide students with a “meaningful opportunity to meet the state’s academic standards.”¹⁷⁹ Therefore, the plaintiffs alleged that the legislature was not fulfilling its responsibility to provide for a general diffusion of knowledge—as required by the Texas Constitution—because the state’s academic standards could not be met with the funds being provided.¹⁸⁰ District Judge John Dietz also ruled in favor of the 300 school district plaintiffs on this claim, stating that the school finance system was inadequate and amounted to an unconstitutional state property tax, and gave the legislature one year to address the situation.¹⁸¹ Although the state immediately appealed the decision, the legislature met in May 2005 but still did not reach a resolution.¹⁸²

The Texas Supreme Court accepted the case and was disinclined (unlike the lower court) to buy the plaintiffs’ adequacy argument due to the fact that many school districts were spending money on swimming pools and alternative classes like film while claiming they could not provide funding for mandated remedial reading.¹⁸³ For the court to declare the school system inadequate as a violation of Article VIII,

173. Memorandum from the Haynes & Boone, *supra* note 159, at 2.

174. *Id.*

175. Dyson, *supra* note 2, at 10.

176. *Id.* at 5.

177. Memorandum from Haynes & Boone, *supra* note 159, at 1.

178. *Id.* at 2–3.

179. *Id.* at 2.

180. *See id.* at 4–6.

181. 2005 *Special Session on School Finance*, PLANO INDEP. SCH. DIST. (July 21, 2005), <http://pisd.edu/news/advocacy/2005.special.session.reports.shtml> [hereinafter 2005 *Special Session on School Finance*].

182. *See id.*

183. *See* Memorandum from Haynes & Boone, *supra* note 159; *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 811 (Tex. 2005).

school districts had the burden to prove why it was impossible for them to pay lower teachers' salaries; in other words, school districts had the burden of proving why there was no choice.¹⁸⁴ School districts could not meet this burden, and the Texas Supreme Court held that even though there was a great deal of evidence pointing toward inadequacy including: (1) the large number of districts struggling to maintain accreditation with increasing standards; (2) a demographically diverse and changing student population; (3) fewer qualified teachers; (4) growing teacher turnover and attrition; (5) increasing numbers of limited English proficient and economically disadvantaged students; (6) the higher costs of educating special needs students; and (7) more rigorous curriculum and testing standards, the system was not yet inadequate but was on the edge, drifting toward inadequacy.¹⁸⁵

After hearing both claims, on November 22, 2005, the *West Orange-Cove* court held that although the finance system did not qualify as inadequate at that time, because the court found it amounted to an unconstitutional state property tax, the finance system was unconstitutional.¹⁸⁶

Heeding the court's warning in *West Orange-Cove* that "continued improvement will not be possible absent significant change," the legislature met in late 2005, early 2006, to brainstorm a solution.¹⁸⁷ The legislature was unsuccessful and two months later, Governor Rick Perry called a special session on school finance.¹⁸⁸ At this legislative session, Perry offered the Educational Excellence and Equity Plan as a remedy to the finance problem.¹⁸⁹ Perry's plan had four main components: (1) it would split a district's tax base and have different caps for residential and commercial property; (2) it would provide slight relief to taxpayers by lowering the residential taxpayers' cap to \$1.25 thereby reducing taxes by \$0.25 for residential property owners per \$100 of property value; (3) it would eliminate recapture; and (4) it would improve the financial accountability program. Additionally, the plan proposed implementing a business-margins tax and using its revenues in combination with revenues from increased cigarette taxes to supplement the funding districts receive from their local property taxes.¹⁹⁰ Lastly, the Bill provided for Additional State Aid for Tax

184. *Neeley*, 176 S.W.3d at 812.

185. Memorandum from Haynes & Boone, *supra* note 159, at 3.

186. *Id.* at 10; 2006 *Special Session on School Finance*, PLANO INDEP. SCH. DIST. (Nov. 2005–Aug. 2006), <http://www.pisd.edu/news/advocacy/special.session.reports.shtml> [hereinafter 2006 *Special Session on School Finance*].

187. 2005 *Special Session on School Finance*, *supra* note 181; 2005 *Texas Supreme Court Ruling on School Finance System*, PLANO INDEP. SCH. DIST., <http://www.pisd.edu/news/advocacy/supreme.court.ruling.shtml> (last visited Aug. 30, 2015).

188. 2004 *Special Session on School Finance*, PLANO INDEP. SCH. DIST. (Apr. 2004–May 2004), <http://pisd.edu/news/advocacy/2004.special.session.reports.shtml> [hereinafter 2004 *Special Session*].

189. *Id.*

190. *Id.*

Reduction (“ASATR”) to ensure that the mandated reduction in taxes did not negatively impact students.¹⁹¹ ASATR provided that whatever funds the district lost from property tax money resulting from the mandated tax reduction, the state would make up for the loss.¹⁹²

The legislature intended for this new plan to “provide state aid for school districts to replace any local funding which was lost in the tax compression program.”¹⁹³ The legislature knew that although the adjustments would temporarily shelter the state from litigation, the adjustments were not permanent fixes as there was “no infusion of new money to the district . . . [and] no way to raise additional revenue.”¹⁹⁴ Through adopting parts of this plan Robin Hood survived, notwithstanding the adjustments made by the new legislation.¹⁹⁵

Just as expected, the business-margins tax and state’s revenues were not enough to substitute the district’s previous local property tax revenue taken away by Perry’s plan.¹⁹⁶ As a result, the state ended up paying more money out of its pocket to individual districts than it had expected, requiring the state to make some big budget cuts in 2011.¹⁹⁷ The legislature immediately created a bill removing the Hold Harmless funding provision and cut substantial funding from students, particularly students receiving ASATR.¹⁹⁸ Additionally, to conserve money and return to the process where school districts will once again be funded exclusively through Tier I and Tier II, the Target Revenue System—the program where districts receive the majority of state funds—was repealed in 2011, with the repeal not anticipated to take effect until the 2017–2018 school year.¹⁹⁹

V. CURRENT PUBLIC SCHOOL FINANCE LITIGATION AND DEBATE

A. District Court Litigation: February 2013

History has a way of repeating itself, and after the 2011 budget cuts, school districts were in a worse position than before.²⁰⁰ As a result, over 600 Texas school districts from both property-poor school and

191. *Finance: ASATR* (Additional State Aid for Tax Reduction)*, PLANO INDEP. SCH. DIST., http://pisd.edu/news/advocacy/documents/PISD_Leg2013_Finance.pdf (last visited Dec. 20, 2014).

192. *Id.*

193. *Williams v. Sterling City Indep. Sch. Dist.*, No. 11-12-00035-CV, 2014 WL 5315054, at *5 (Tex. Ct. App. Oct. 16, 2014).

194. *2004 Special Session*, *supra* note 189.

195. Pennington, *supra* note 5, at 396.

196. *Finance: ASATR* (Additional State Aid for Tax Reduction)*, *supra* note 191.

197. *See id.*

198. *See id.*

199. *See Finance: ASATR* (Additional State Aid for Tax Reduction)*, *supra* note 191.

200. Kiah Collier, *2011 Budget Cuts Still Hamper Schools, Data Shows*, TEX. TRIB. (Aug. 31, 2015), <https://www.texastribune.org/2015/08/31/texas-schools-still-feeling-2011-budget-cuts/>.

property-rich school districts, responsible for educating three-fourths of Texas students, brought suit against the state.²⁰¹ These districts claimed that the school finance system was unconstitutional on grounds of inadequacy and because it amounted to a state property tax.²⁰²

In a last ditch effort to prevent an unconstitutional ruling, the Texas Legislature passed several bills, some of which restored nearly \$3.4 billion of the \$5.4 billion budget cuts made in 2011, as well as adjusted testing and graduation standards.²⁰³ As a result of the legislature's actions, "[o]n June 19th, 2013, the court granted a motion to reopen the evidence to consider the impact of the 2013 legislation and held a ten-day evidentiary hearing."²⁰⁴

Much to the chagrin of Texas legislators, on February 4, 2013, after twelve weeks of trial, Judge Dietz took "only moments" to agree with the school district plaintiffs.²⁰⁵ The court came to its ruling based on both evidence admitted at main trial and when evidence was reopened.²⁰⁶ Judge Dietz ruled in favor of the school districts holding that based off of evidence of performance measures, including EOC exams, SATs, ACTs, STAAR, graduation rates, and drop-out rates, Texas public schools were "not accomplishing a general diffusion of knowledge."²⁰⁷ Therefore, because "funding was inadequate and that there were wide discrepancies in state support received by school districts in wealthy parts of Texas versus those in poorer areas," the Judge ruled in favor of the school districts on their claim of adequacy.²⁰⁸

On the plaintiffs' second claim, Judge Dietz held that the finance system was reminiscent of an income tax, expressly forbidden by the state constitution.²⁰⁹ The court held that, because plaintiffs have lost meaningful discretion to set their M&O rates, "[t]heir current rates effectively serve as a floor (because they cannot lower taxes without further compromising their ability to meet state standards and requirements) and a ceiling (because they are either legally or practically unable to raise rates further)."²¹⁰

201. See Will Weissert, *Texas School System Finance Plan Unconstitutional, Judge Rules*, HUFFINGTON POST (Feb. 5, 2013, 8:55 AM), http://www.huffingtonpost.com/2013/02/05/texas-school-system-finance-plan_n_2622002.html.

202. Press Release, *supra* note 1.

203. Collier, *supra* note 200.

204. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *1 (Tex. Dist. Ct. Aug. 28, 2014).

205. Tovia Smith, *Judge Rules Texas' School-Funding Method Unconstitutional*, NPR (Feb. 4, 2013 9:02 PM), <http://www.npr.org/2013/02/04/171113168/judge-rules-texas-school-funding-method-unconstitutional>.

206. *Tex. Taxpayer & Student Coal.*, 2014 WL 4243277, at *1.

207. *Id.* at *5.

208. Weissert, *supra* note 201.

209. See *id.*; *Tex. Taxpayer & Student Coal.*, 2014 WL 4243277, at *1.

210. *Tex. Taxpayer & Student Coal.*, 2014 WL 4243277, at *3.

Additionally, the Court held that the school-funding system was constitutionally inefficient because all students did not have “substantially equal access” to the funds necessary to meet constitutional adequacy standards.²¹¹ Thus, “because the money is insufficient and because it is not distributed fairly,” the state’s funding methods were found to be unconstitutional.²¹²

Many legislators were upset with Dietz’s ruling including Education Commissioner, Michael Williams, stating, “[S]tate leaders, not a single judge,” should be determining school-finance policy.²¹³ Similarly, Attorney General Greg Abbott stated, “[A]n appeal of Judge Dietz’s decision is all but certain, and it could be years before the case is ultimately resolved.”²¹⁴ In fact, in mid-2014, the Texas Attorney General “attempted to remove Dietz from the case, when he filed a recusal motion that questioned Dietz’s impartiality based on a series of emails sent to school district lawyers.”²¹⁵ This motion was dismissed a few weeks later.²¹⁶

B. Adequacy Issue

1. Generally

The Texas Constitution specifies that the legislature must provide a “general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.”²¹⁷ This standard is also known as “adequacy.”²¹⁸ Courts have reaffirmed that the legislature has a “constitutional duty to provide adequate funding for our public educational system . . . and this duty is enforceable in court.”²¹⁹ While the court has not described exactly what qualifies as an “adequate” school finance system, it has said that adequate plans concentrate “on providing sufficient educational opportunities to all children and ensuring the effectiveness of the education system’s financing based on the performance of school districts.”²²⁰ In other words, adequacy centers on the idea that “all students must reasonably be given a meaningful opportunity to meet the state’s academic standards.”²²¹

211. *Id.*

212. Smith, *supra* note 205.

213. Morgan Smith, *AG to Appeal School Finance Ruling to Supreme Court*, TEX. TRIB. (Sept. 26, 2014), <http://www.texastribune.org/2014/09/26/judge-issues-school-finance-ruling/> [hereinafter *AG to Appeal School Finance Ruling to Supreme Court*].

214. Smith, *supra* note 205.

215. *AG to Appeal School Finance Ruling to Supreme Court*, *supra* note 213.

216. *Id.*

217. Pennington, *supra* note 5, at 412.

218. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753 (Tex. 2005).

219. *2005 Texas Supreme Court Ruling on School Finance System*, PLANO INDEP. SCH. DIST., <http://www.pisd.edu/news/advocacy/supreme.court.ruling.shtml> (last visited Aug. 30, 2015).

220. Pennington, *supra* note 5, at 400.

221. Memorandum from Haynes & Boone, *supra* note 159, at 2.

While the State continuously asserts that adequacy is a non-justiciable political question, the courts have rejected this argument.²²² This is important because had the court said that a legislature had no duty to provide adequate education, “the issue of adequacy would have been permanently off the table . . . [meaning] that the legislature would know its duty to provide an adequate education would be meaningless because the duty would not be enforceable in court.”²²³ Additionally, even though the State repeatedly tries to get the court to use a rational-basis standard of review, the court rejects this approach stating that the Constitution “does not allow the legislature to structure a public school finance system that is inadequate, inefficient, or unsuitable, regardless of whether it has a rational basis or even a compelling reason for doing so.”²²⁴ Rather, the Court opted for an “arbitrariness” standard of review stating that there are many ways the standards can be met, but that they must be met.²²⁵

Adequacy issues are not exclusive to Texas, but rather adequacy has been cited as a national issue.²²⁶ Even though the United States spends more money on funding education “than the spending of France, Germany, Japan, Brazil, the United Kingdom, Canada, and Australia combined,” U.S. student test scores are considerably lower than in other countries.²²⁷ For example, in 2010 on the same math and science tests, U.S. students scored an average of 474 and 489 respectively out of 600 possible points, while Canadian students scored an average of 527 and 534, and Finnish students scored 548 and 563 respectively on the same tests.²²⁸ In fact, in 2013 the “US was ranked 17th in the latest authoritative global survey of education, ranking behind Finland, South Korea, Japan, United Kingdom, Switzerland, [and] Canada” (Texas being in the bottom half of the United States).²²⁹ When comparing the poor academic performance of US students with the “massive investment of federal education programs amounting to \$120 billion a year,” there appears to be a discrepancy.²³⁰

Although each state approaches the adequacy subject differently, three of the most notable legislative approaches occurred in Kentucky, Massachusetts, and New Hampshire.²³¹ Kentucky’s plan, the

222. *2005 Texas Supreme Court Ruling on School Finance System*, *supra* note 219.

223. Memorandum from Haynes & Boone, *supra* note 159, at 4.

224. *Id.* at 5 (quoting *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784 (Tex. 2005)).

225. *Id.*

226. DE PEÑA, *supra* note 123, at 4–5.

227. *Id.*; *A Look at Education Spending*, ONLINE COLLEGES, <http://www.onlinecolleges.net/10-things-we-now-know-about-education-spending/> (last visited Aug. 29, 2015).

228. DE PEÑA, *supra* note 123, at 5.

229. DIETZ, *supra* note 9, at 4–5.

230. Choo, *supra* note 3.

231. Pennington, *supra* note 5, at 400–02.

Kentucky Education Reform Act (“KERA”), equalized wealth distribution and transferred power to local schools and school districts giving them discretion to make decisions about spending and curriculum.²³² Even though it gave freedom to local districts, KERA also implemented a system of assessment standards with rewards and sanctions that hold the districts accountable.²³³

In comparison, Massachusetts’s plan, the Massachusetts Education Reform Act (“MERA”), contains all of the same principles as KERA including “wealth redistribution, performance assessment, and local autonomy,” but it differs from KERA in that there is not a ceiling on the amount of property taxes that property-rich districts can mass.²³⁴ As long as districts meet state standards they are able to keep any excess revenue they collect.²³⁵

A third example of a legislative approach to adequacy issues was in New Hampshire, which ultimately failed because the plan left out any type of assessment standards.²³⁶ Accordingly, this approach allowed school districts to receive increased funds even when they performed poorly.²³⁷

In order to help create somewhat uniform standards the United States Department of Education implemented the No Child Left Behind Act (“NCLB”).²³⁸ This act was intended to guarantee states additional federal funding to school districts as long as they met certain standards, including a uniform four-year graduation rate formula among other stipulations.²³⁹ The Department of Education instituted the NCLB Act over ten years ago and the results since then have been less than optimal.²⁴⁰ Rather than increasing academic performance, because of its “misguided reliance on one-size-fits-all testing, labeling, and sanctioning schools, [the NCLB Act] has undermined many education reform efforts” by forcing teachers to focus on teaching the limited skills tested and thus narrowing the curriculum to exclude all other information. The NCLB Act has severely damaged the equality

232. *Id.* at 401.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 402.

238. *A Uniform, Comparable Graduation Rate*, U.S. DEPARTMENT OF EDUC. 1 (Oct. 2008), <http://www2.ed.gov/policy/elsec/reg/proposal/uniform-grad-rate.pdf>.

239. GreatSchools Staff, *What the No Child Left Behind law means for your child*, <http://www.greatschools.org/gk/articles/no-child-left-behind/> (last visited Oct. 4, 2015).

240. Lisa Guisbond et al., *NCLB’s Lost Decade for Educational Progress: What Can We Learn from this Policy Failure?*, NAT’L CENTER FOR FAIR & OPEN TESTING 1 (Jan. 2012), http://fairtest.org/sites/default/files/NCLB_Report_Final_Layout.pdf.

and equity of school funding and had the most drastic and unfortunate effect on the poor.²⁴¹

2. Current Adequacy Issues

Judge Dietz's February 2013 ruling that the Texas state finance system had become unconstitutional on adequacy grounds was reminiscent of his ruling in the district court case *West Orange-Cove* nearly ten years earlier. In that case, Judge Dietz discussed the structural deficiencies in the state finance plan, including the high quantity of state school districts and the administrative costs delegated to these overhead agencies, which "make it impossible to reduce costs through economies of scale."²⁴² The facts of the 2013 case similarly mirrored the plaintiffs' complaints in *West Orange-Cove* as well as *Edgewood IV*.²⁴³ In *Edgewood IV*, plaintiffs claimed the high costs of providing an education "to economically disadvantaged and English language learner students exceed[ed] the funding provided through the current system."²⁴⁴ In *West Orange-Cove*, the court found that low-income families accounted for 90% of student growth.²⁴⁵ The court's February ruling emphasized the impact of a rapidly growing, economically disadvantaged population because of the increased costs associated with educating this class of students derived from the requirement of additional language programs, increased security measures in areas of high crime, bilingual teachers, and many other costs not provided by M&O funds.²⁴⁶

Thus, based on the current taxing scheme, a school that caters to primarily wealthier students—many of whom do not need the additional resources—receives the same amount of funding per student as a property-poor school comprised of primarily students that require these additional and expensive measures.²⁴⁷ These variables, in addition to relentless state demands for increased curriculum, accreditation, and testing standards, place Texas schools in a precarious position and require them to meet the increased standards all without receiving additional funding.²⁴⁸ Additionally, the court stated that, although money invested wisely affects student progress, it is only a small part of the solution and "structural changes . . . [are] also neces-

241. See Valerie Strauss, *What was missing – unfortunately – in the No Child Left Behind debate* (July 17), <https://www.washingtonpost.com/blogs/answer-sheet/wp/2015/07/17/what-was-missing-unfortunately-in-the-no-child-left-behind-debate/>.

242. Memorandum from Haynes & Boone, *supra* note 159, at 7 (quoting *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d, 746, 757 (Tex. 2005)).

243. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *4 (Tex. Dist. Ct. Aug. 28, 2014).

244. *Id.*

245. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 796 (Tex. 2005).

246. *Id.*

247. See *id.* at 756.

248. See *id.* at 789.

sary to ensure the system does not remain exposed to constitutional challenge.”²⁴⁹

This ruling satisfied both property-poor and property-rich districts. In property-rich districts, the current funding structure “forces them to fund other property-poor districts instead of supplementing their own district’s education funds.”²⁵⁰ This, unfortunately, forces most “schools to ‘lay off teachers and cut funding for scholastic programming.’”²⁵¹

Property-poor districts claim that the state’s finance system is inadequate even with wealth redistribution because the Robin Hood performance standards are unrealistic and unattainable for districts that are behind other districts in performance levels.²⁵² Many of these districts end up in a cycle where they are unable to improve their test scores because the finance system does not allow them the money or resources to catch up to the other districts. Thus, “any reward and sanction program is ineffective because the program does little to encourage improvement when the standards are impossibly high and sanctions will only push the underperforming district into further problems.”²⁵³ Furthermore, the accountability standards that are in place currently do “little to promote year-over-year improvement.”²⁵⁴

Lastly, because there is no limit to the amount of money a school district can raise through bonds for facilities and construction of new buildings, property-rich school districts are able to fund million dollar stadiums and facilities through raised I&S taxes, while still struggling to pay or retain teachers.²⁵⁵ Many property-poor districts are unable to acquire the electoral approval required to secure funding from bonds, and therefore, do not levy I&S taxes. This means that in addition to having the same M&O funding issues that the property-rich districts have, property-poor districts also have inadequate facilities. This facilities problem exacerbates issues “resulting from inadequate M&O funding because many districts are forced to use those scarce funds to make up for unfunded facility’s needs.”²⁵⁶

3. Does More Money Equal a Better Education?

Legislators’ opinions about the relationship between increased funding and increased education vary, but most agree: “the level of funding provided by the legislature must bear some relationship to the

249. Memorandum from Haynes & Boone, *supra* note 159, at 2.

250. Pennington, *supra* note 5, at 397.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 405.

255. See *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 792 (Tex. 2005); see generally Smith, *supra* note 205.

256. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *5 (Tex. Dist. Ct. Aug. 28, 2014).

costs associated with achieving certain levels of student performance.”²⁵⁷ Bill Ratliff, former Lieutenant Governor, argued that “[s]chool districts are being asked to make bricks without straw” and that they need money for smaller classes, additional one-on-one education opportunities like tutoring, and the hiring and enticing of quality teachers.²⁵⁸ Texas courts are reluctant to articulate a connection between increased funding and increased performance; but the Texas Supreme Court acknowledged that while additional school funding “does not guarantee better schools or more educated students,” it has acknowledged that “publication can and often does improve with greater resources just as it struggles when resources are withheld.”²⁵⁹ Furthermore, dumping large quantities of money into the system may only temporarily postpone constitutional challenges.²⁶⁰ One lobbyist comments that although there is a need for “more money to go into the classroom,” it is not “the same thing as needing more money period.”²⁶¹

The connection between academic achievement and increased funding is unclear, because ACT and graduation data “hardly correlates at all with education spending . . . a number of other factors other than spending must impact student success.”²⁶² For instance, although Texas consistently is in the top five spenders on school education, it was both below the national graduation rate and national ACT average. Therefore, in the words of Dr. John Merrifield, “educating children is not synonymous with directly funding school systems.”²⁶³

4. Solutions to Allow the Current System to Become Adequate

There are four potential solutions: (1) instead of one test, using multiple measures to evaluate performance; (2) hiring more qualified teachers; (3) reevaluating the Texas Education Agency processes; and (4) instituting an online state-funded public school system. Though no one solution is a complete fix, if solutions are used in conjunction, they may help the Texas education-funding dilemma. Overhauling the statewide standardized-testing and curriculum requirements to truly gauge academic growth would be one potential solution.²⁶⁴

First, Texas should utilize multiple measures to determine adequacy instead of relying only on a single standardized test score. State evidence at trial showed, “standardized test scores have steadily improved over time, even while tests and curriculum have been made

257. Dyson, *supra* note 2, at 35.

258. Neeley, 176 S.W.3d at 790; Smith, *supra* note 205.

259. Neeley, 176 S.W.3d at 788.

260. *Id.* at 754.

261. Smith, *supra* note 205.

262. DE PEÑA, *supra* note 123, at 6.

263. Pennington, *supra* note 5, at 404.

264. 2011 Legislative Priorities, PLANO INDEP. SCH. DIST., <http://pisd.edu/news/advocacy/2011.priorities.shtml> (last visited Dec. 20, 2014).

more difficult.”²⁶⁵ While this evidence is undisputed, it does not account for factors such as the limiting of curriculums to only tested skills.²⁶⁶ Use of multiple evaluation measures—instead of a “single-event high-stakes test”—allows the legislature to make more informed funding decisions.²⁶⁷ Other methods of evaluating a school’s adequacy include: (1) in person classroom assessments; (2) student/teacher evaluations; and (3) the addition of multiple styles of standardized testing instead of just one. This combination can provide educators additional indicators to prepare students for college.²⁶⁸ Therefore, one potential solution to the adequacy issue is to replace or amend these yearly performance tests to “provide more comprehensive measures of student learning [and] application skills.”²⁶⁹

Second, many schools—particularly in poorer districts—would be able to better meet the adequacy standard if they had more qualified and passionate teachers who were personally invested in helping the students.²⁷⁰ Teachers have personal contact and interactions with students, and “talented teachers possess the ability to improve individual student’s performance better than increased funding to a school district.”²⁷¹ The issue of competent teachers has been mentioned to the courts, and in *West Orange-Cove*, the 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.”²⁷² This issue has slowly unraveled to become increasingly pressing as many qualified teachers are required to teach “outside of their areas of expertise” have either retired, been laid off, or voluntarily switched careers for a better paying and more secure position.²⁷³ Additionally, “[t]here is evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.”²⁷⁴

As the system stands now, richer school districts have more resources to attract better teachers (i.e., increased technology, higher salaries, more local support), and therefore “people tend to live in areas with better schools . . . [thus] contribut[ing] to an increased workforce and potential boost in the productivity of the region.”²⁷⁵ If property-poor school districts had more resources to incentivize better

265. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 789 (Tex. 2005).

266. DE PEÑA, *supra* note 123, at 16.

267. 2011 *Legislative Priorities*, *supra* note 264.

268. *Neeley*, 176 S.W.3d at 788.

269. 2007 *Legislative Priorities*, PLANO INDEP. SCH. DIST., <http://pisd.edu/new/advocacy/2007.priorities.shtml> (last visited Dec. 20, 2014).

270. Dyson, *supra* note 2, at 33.

271. Pennington, *supra* note 5, at 404.

272. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 796 (Tex. 2005).

273. *Id.*

274. *Id.* at 789.

275. Derisma, *supra* note 5, at 123.

teachers to work at their schools, like increased benefits and a relatively equal salary to teachers with the same position and experience at other schools, there would be more competition for teaching positions at poorer schools, thereby weeding out any potentially poor performing or disengaged teachers.²⁷⁶ Judge Dietz recommends that there must be increased teacher training, hiring more teachers with understanding in hard content subjects, increased opportunities for tutoring and remediation, increased teacher evaluation and accountability standards, as well as outreach to ensure that “parents buy into this new program.”²⁷⁷ He states that an increased amount of \$2,000 per student (or \$10 to \$11 billion per year) should cover the changes.²⁷⁸

Thus, based off of testing standards and judicial advice, the state “should redirect its finance efforts to a plan emphasizing recruitment, retention, and placement of talented teachers in under-performing school districts.”²⁷⁹ Districts and leaders both local and statewide must “[f]oster the initiative, dedication, and creativity of teachers and encourage our principals and superintendents to innovate and to challenge all of our students to succeed.”²⁸⁰ Funding for the increased benefits and salaries could come from numerous sources including both state taxes and a separate portion of local taxes. No matter what the source of funding, “[i]f equal access is to be achieved, a teacher health insurance plan would play a major role in ensuring every district equal access to equally qualified and insured teachers.”²⁸¹

A third potential solution to the adequacy issue involves an in depth look into the Texas Education Agency (“TEA”) in order to amend performance review measures.²⁸² The TEA is the organization directly accountable for monitoring schools, and as such, even a slight modification of the TEA’s processes, policies, and guidelines could have huge implications for adequacy concerns.²⁸³ An example of one modification would be for the TEA to financially incentivize schools that demonstrate great academic growth.²⁸⁴ Another modification includes instituting a program to isolate the practices that advance performance rather than pushing more funding into low performance schools with the hopes that the funding will improve performance.²⁸⁵

276. Dyson, *supra* note 2, at 33.

277. DIETZ, *supra* note 9, at 5.

278. *Id.*

279. Pennington, *supra* note 5, at 404.

280. DIETZ, *supra* note 9, at 4.

281. Dyson, *supra* note 2, at 33.

282. 2005 Legislative Priorities, PLANO INDEP. SCH. DIST., <http://pisd.edu/news/advocacy/legislative.priorities.shtml> (last visited Dec. 20, 2014).

283. *See generally*, Pennington, *supra* note 5, at 411.

284. *Id.*

285. *Id.* at 390.

A fourth potential solution that would help increase state adequacy standards would be to implement a state-funded online school system, which could either serve as a primary or supplementary vehicle for education.²⁸⁶ This system would provide “equal access for all students to participate in an excellent online learning experience that could serve as an alternative or supplement to a traditional K–12 model.”²⁸⁷ Online education would allow students in all locations access to quality teachers while lessening the amount of money spent on overhead expenses.²⁸⁸ There are many variations on this one potential solution including requiring students to come to a certain mandated location to watch the online videos to ensure students are watching and not just opening the videos and not paying attention. A second variation would be using these types of online schools to only serve as supplementary education for students who, based on state testing standards, are in the bottom half of students in the state for a particular grade or subject. These online schools would increase “one-on-one learning” to help improve adequacy standards.

School choice, revamping TEA criteria and standards, refocusing from teaching only standardized testing material to teaching all material, and hiring qualified and invested teachers, would bring Texas schools closer to the adequate standard the Constitution requires.

C. *State Property Tax Issue*

1. Generally

Another repeatedly litigated issue is the issue of a state property tax.²⁸⁹ Although the legislature has not ever explicitly declared a state property tax, the *Edgewood III* court held that “when the State so completely controls the levy, assessment, and disbursement or revenue, either directly or indirectly, that the authority employed is without meaningful discretion, the tax is unconstitutional as a state tax.”²⁹⁰ This is shown when a majority of districts are forced to tax at the maximum-capped rate solely in order to meet all state required standards.²⁹¹

Although Article VIII, section 1-e of the Texas Constitution prohibits the State from levying a state property tax, it does require there be equity in school funding structures.²⁹² The idea of equity focuses

286. 2009 *Legislative Priorities*, PLANO INDEP. SCH. DIST., <http://pisd.edu/news/advocacy/2009.priorities.shtml> (last visited Dec. 20, 2014).

287. *Id.*

288. *See id.*

289. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 794 (Tex. 2005).

290. *Id.* at 795.

291. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 738 (Tex. 1995).

292. *Pennington*, *supra* note 5, at 399; *see* Memorandum from Haynes & Boone, *supra* note 159.

around implementing “equalized funding across school districts in an effort to level the playing field.”²⁹³ There are different ways that states handle the issue of equity.²⁹⁴ For example, Vermont operates under an equity-based school finance system, meaning that there is a state agency (similar to the Texas Education Agency) that “administers the redistribution of the excess revenues.”²⁹⁵ In other words, under Vermont’s funding structure, the state handles most of the school funding distribution as opposed to local governments.²⁹⁶ Texas, on the other hand, handles equity by capping the maximum amount of property taxes a district can levy per student in each district.²⁹⁷ As previously mentioned, the cap is “based on a per student amount and [the State] redistributes any excess amount of property tax to property poor districts.”²⁹⁸ Therefore, if “[p]roperty wealthy districts are able to access substantially more funding at all levels of the system,” the Texas school system will be in violation of the Texas Constitution as it cannot accomplish financial equity.²⁹⁹

2. Current State Property Tax Issues

This issue has been steadily increasing in importance since the late 1990s for many reasons.³⁰⁰ Although there have been periods where the State has given additional money to school districts, there have also been increasingly stringent mandates placed on school districts, including a change in minimum salary schedule and mandated insurance increase.³⁰¹ In order to meet the new requirements, schools are forced to use all additional money, plus some of their other funds, which in turn places the district in an even worse financial position than it was before the additional funding.³⁰² Aside from these new standards, schools have also had to deal with: “inflation, new nutrition mandates, changing demographics and student needs, payroll taxes, reduction in state money for educators’ insurance supplement, rapid enrollment growth, increased safety and security concerns, individual graduation plans, budget cuts, new high school graduation requirements, and the NCLB Act.”³⁰³ If the other state mandated requirements did not put Texas school districts in a worse financial position than before, these certainly did. For this exact reason, many of the

293. Pennington, *supra* note 5, at 399.

294. *See generally id.*

295. *Id.* at 400.

296. *Id.* at 399.

297. *Id.* at 390.

298. *Id.* at 402.

299. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *4 (Tex. Dist. Ct. Aug. 28, 2014).

300. 2004 *Special Session*, *supra* note 189, at 3.

301. *Id.*

302. *Id.*

303. *Id.*

districts who have brought suit over this issue have argued that, because the state has not allotted enough money for districts to meet strict mandatory standards, it has left them “with little choice in how to spend local taxes or whether to raise them.”³⁰⁴

Additionally, by accessing funding through bonds, which property poor districts cannot, property rich districts have access to “substantially more funding at all levels of the system.”³⁰⁵

3. Solutions to the State Property Tax Issue

Although there are many potential solutions to this state property tax issue, the main constant between them all is that the legislature must develop a “long-term comprehensive school finance plan that will provide alternative sources of revenue that can adequately provide funds for public education.”³⁰⁶ This means that there must be long-term structural changes to the school funding system, and “any modifications to the finance system cannot be accompanied by mandates that would swallow the additional taxing capacity.”³⁰⁷

There are different ways this can be achieved including (1) adding additional ways for districts to raise money, (2) updating the Cost of Education Index, (3) making sure any additional state funds are not coupled with expensive state mandates, and (4) allowing districts to keep money over a certain level meaning that only a portion is redistributed.

One potential solution would be to create additional ways for districts to raise revenue, including additional taxing powers.³⁰⁸ This could include allowing districts access to significant additional taxing capacity over the capped rate.³⁰⁹

A second potential solution would be to update the Cost of Education Index (“CEI”) to account for inflation, as well as changes in the average cost of living in that specific area.³¹⁰ The CEI is used to provide school districts funding.³¹¹ This variable is not regularly updated, and as a result is outdated and should be regularly updated so that districts can get additional dollars based on adequate cost of living information.³¹² Without adjusting the CEI, “districts will have difficulty remaining competitive with teacher pay increases, utilities, and other inflationary costs.”³¹³

304. Smith, *supra* note 47.

305. Tex. Taxpayer & Student Coal. v. Williams, No. D-1-GN-11-00310, 2014 WL 4243277, *4 (Tex. Dist. Ct. Aug. 28, 2014).

306. 2004 *Special Session*, *supra* note 189, at 2.

307. Memorandum from Haynes & Boone, *supra* note 159.

308. Dyson, *supra* note 2, at 26.

309. Memorandum from Haynes & Boone, *supra* note 159, at 9.

310. 2011 *Legislative Priorities*, *supra* note 264.

311. RESEARCH FOUNDATION TTARA, *supra* note 89, at 9.

312. See 2004 *Special Session*, *supra* note 189.

313. 2007 *Legislative Priorities*, *supra* note 269.

Third, districts need to ensure that any additional funds that the State gives to districts must be significantly more than the funds required to implement any new mandates.³¹⁴ For example, if the state is willing to give schools an additional \$0.25 per child if schools add additional English-Spanish learning programs, it is vital that the money schools are receiving from the State is significantly higher than the cost of securing and implementing additional English-Spanish learning programs. Additionally, the legislature should provide “sufficient lead time to allow for effective planning and implementation” of programs.³¹⁵

Fourth, Texas could adopt a finance program like MERA in Massachusetts.³¹⁶ Like Texas’s current plan, Massachusetts also caps the amount of property taxes each district can collect per student. However, MERA also allows districts “to keep amounts above a certain level per student so that only a portion of the excess is redistributed to property-poor districts.”³¹⁷ Regardless of how the Texas Legislature decides to handle this state property tax issue, districts must have “meaningful discretion to reduce their tax rates without jeopardizing their abilities to provide constitutionally adequate educations.”³¹⁸

D. *Efficiency Issue*

1. Generally

The Texas Constitution also calls for an efficient public school system, including funding for the system, stating, “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 free public schools.”³¹⁹ The word *efficient* is important because the original Texas Constitution in 1845 did not include it, but rather only required the legislature to “make suitable provision[s] for the support and maintenance of public schools.”³²⁰ It was not until 1876 that the word *efficient* was added into the Constitution.³²¹

Although there is no exact definition of *efficient* as provided in the Constitution, *Edgewood I* held that “[t]here is no reason to think that ‘efficient’ meant anything different in 1875 [when Article VII, section 1 was written] from what it now means.”³²² *Efficient* denotes the “meaning of effective or productive of results and connotes the use of

314. 2005 *Legislative Priorities*, *supra* note 282.

315. *Id.*

316. Pennington, *supra* note 5, at 407.

317. *Id.*

318. 2005 *Texas Supreme Court Ruling on School Finance System*, *supra* note 219.

319. TEX. CONST. art. VII, § 1, interpretive cmt. (West, Westlaw through 2015).

320. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 801 (Tex. 2005) (Brister, J., dissenting).

321. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 752 (Tex. 1995).

322. *Neeley*, 176 S.W.3d at 752–53.

resources so as to produce results with little waste.”³²³ Although adequacy and efficiency are related, the idea of efficiency focuses on “equity in financing” whereas adequacy “addresses the sufficiency of the public education provided across districts in the state.”³²⁴ Efficiency is not completely synonymous with equity and “districts do not have to have substantially equal revenue for tax effort at all levels of funding.”³²⁵ Efficiency is comprised of two components, instruction and facilities, and both are inseparable.³²⁶

2. Current Efficiency Issues

Although this issue has been brought to court various times, most courts have ruled that for purposes of constitutionality, evidence of inadequate facilities does not, on its own, establish inefficiency.³²⁷ Plaintiffs must prove either that disparities in funding were unrelated to differing student needs or that certain districts were able to access far more revenue for essential facilities than others.³²⁸ Constitutional efficiency only mandates that both poor and rich school districts “must have substantially equal access to funding up to the legislatively defined level that achieves that constitutional mandate of a general diffusion of knowledge.”³²⁹ With the additional funding that property-rich districts are able to secure through bonds, in addition to the State’s failure to implement a statutorily required facilities funding provision into the school finance system, districts with low property wealth and districts with high property wealth have significantly different access to facilities funding, thereby adding to the system’s overall inefficiency.³³⁰

Part of the efficiency issue is the idea of economies of scale. For example, Tarrant County has twenty-one school districts and each independent district has its own management system.³³¹ Some argue that “[t]oo much money is spent on management and not enough on teachers.”³³² Furthermore, these individuals argue that the system is “not likely to change because each of the independent districts is not willing to give up their management and taxing authority over their little fiefdoms, even if it were to benefit the students.”³³³ The court in

323. *Id.*

324. Pennington, *supra* note 5, at 399.

325. *Meno*, 917 S.W.2d at 730.

326. *Id.* at 726.

327. *Id.* at 717.

328. *Neeley*, 176 S.W.3d at 792.

329. *Meno*, 917 S.W.2d at 730.

330. *Tex. Taxpayer & Student Coal. v. Williams*, No. D-1-GN-11-00310, 2014 WL 4243277, *6 (Tex. Dist. Ct. Aug. 28, 2014).

331. *Will private-school vouchers help or hurt public education in Texas?*, STAR-TELEGRAM (Aug. 24, 2014), <http://www.star-telegram.com/opinion/letters-to-the-editor/article3870413.html> [hereinafter *Private-school vouchers*].

332. *Id.*

333. *Id.*

West Orange-Cove notes that the large amount of school districts, high overhead costs of recapture, and other state funding mechanisms are not automatically unconstitutional, but “in the context of a proliferation of local districts enormously different in size and wealth, it is difficult to make the result efficient.”³³⁴

An additional issue related to efficiency is the complicated nature of the funding scheme.³³⁵ Between the two M&O mechanisms, the I&S tax, raising funds through bonds, formula funding, and many other funding instruments, it is “impossible for the finance system to be equalized to accomplish financial efficiency.”³³⁶

3. Solutions to the Efficiency Issue

There are many potential solutions to the efficiency issue including: (1) state funded online schools; (2) a consolidation of Texas school districts; (3) a more transparent and clear funding system; (4) mandated facilities funding; and (5) school choice options.

As discussed *infra* in the adequacy solutions portion of the paper, state-funded online schooling might also be a potential solution for the efficiency issue.³³⁷ Online school systems would provide more money for educational programs and it “would allow students to take online courses both within the normal day as well as outside of the regular campus schedule.”³³⁸

A second legislative solution would be for the legislature to mandate that the TEA re-divide school districts into bigger areas so that districts would theoretically be spending less money on oversight and administration.³³⁹ The court has commented on this issue stating that the large number of school districts was one of the main structural problems due to the “redundant staffing, facilities, and administration [that] make it impossible to reduce costs through economies of scale.”³⁴⁰ Currently, Texas has nearly 1,255 school districts. This is more than any other state in the country with California being next at 1,181 school districts and New York second at 950 school districts in 2014.³⁴¹ Additionally, while the national average for administrators is one for every 295 students, in Texas there is approximately one for

334. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 756 (Tex. 2005).

335. *Tex. Taxpayer & Student Coal.*, 2014 WL 4243277, at *4.

336. *Id.*

337. 2009 Legislative Priorities, *supra* note 286.

338. *Id.*

339. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 717 (Tex. 1995).

340. Memorandum from Haynes & Boone, *supra* note 159, at 7.

341. *Public Education in California*, BALLOTPEDIA, http://ballotpedia.org/Public_education_in_California (last visited Aug. 29, 2015); *see also Public Education in New York*, BALLOTPEDIA, http://ballotpedia.org/Public_education_in_New_York (last visited Aug. 29, 2015).

every 231 students.³⁴² Although this potential solution might help efficiency concerns, it would have some negative consequences. First, the time and resources it would take to completely re-divide and rezone school districts would be extensive. Second, more heavily populated school districts would still need a large quantity of administrators and therefore the few staff salaries and possible offices that would be closed down might not be worth all of the expended resources to combine districts. Lastly, larger school districts mean that there is less localized control. Localized control “results in more narrowly tailored metrics . . . and a better understanding of failure and success based on those metrics.”³⁴³ Although these negative consequences would likely occur, the cost of redistributing school districts and widening the administrator-student ratio will cut costs and outweigh the consequences.

A third structural change the legislature should implement is to make the funding structure less complicated and more transparent to all.³⁴⁴ The current school finance system is extremely unclear and difficult to understand. This “lack of transparency . . . directly contributes to wasteful and fraudulent spending and ultimately deprives students of an adequate education.”³⁴⁵ Education and the public school finance system must better explain where the money is coming from and what it is going to be spent on.³⁴⁶ This information is technically available as the State requires each school district to post its budget, but the information and tables are extremely confusing and do not have explanations for what information fits into which categories or what each category means. These three potential solutions are steps the legislature can take in order to make the school finance system more efficient.

A fourth structural change would be for the legislature to adopt a requirement that districts collect funding for facilities instead of forcing the tax payers to decide through votes whether or not they want to pass a bill of this nature.³⁴⁷ As the current system stands, many property-rich districts have substantially more funding through the use of local bonds. The Constitution does not prevent some districts from having substantially more income than others, rather, it just provides that all districts must have “a substantially equal opportunity to access” these funds.³⁴⁸ Therefore, because all districts have the capability to ask voters to vote on bonds for facilities funding, the fact that

342. *Public Education in Texas*, BALLOTPEDIA, http://ballotpedia.org/Public_education_in_Texas (last visited Aug. 29, 2015).

343. DE PEÑA, *supra* note 123, at 15.

344. *Id.*

345. *Id.* at 16.

346. *Id.* at 14.

347. *See generally* *Tex. Taxpayer v. Williams*, No. D-1-GN-11-003130 (200th Dist. Ct., Travis County, Tex. Aug. 28, 2014).

348. *Id.* at 2 (quoting *Edgewood I.S.D. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989)).

most tax payers in these property-poor districts will not approve a bill requiring them to pay more taxes, is constitutionally unimportant as long as all districts have the substantially equal opportunity to access these funds.³⁴⁹

A fifth structural change that would increase school funding efficiency would be to increase competition by allowing for school choice.³⁵⁰ This alternative has never been cited as a potential alternative in a court of law. One reason might be because “[n]ot a single attorney represented solely the interests of school students and their families.”³⁵¹ Rather, the attorneys represented primarily the school districts who, for obvious reasons, would be opposed to the idea of school-choice methods. These methods would make funding more challenging to acquire and would require school districts to make significant changes for fear of losing students and thus lose additional funding.³⁵² The majority opinion in *West Orange-Cove* even acknowledges that perhaps “public education could benefit from more competition, but [because] the parties ha[d] not raised [the] argument,” the court cannot address it.³⁵³ Therefore, in order to increase funding efficiency, school choice is an alternative which would bring students “broader educational options” as well as decreased taxes.³⁵⁴

Lastly, although there are legislative solutions to the efficiency problem, the TEA could additionally help improve school finance concerns using its own powers.³⁵⁵ One way the TEA could help improve finance programs would be to group districts together, similar to athletics groupings, in order to better evaluate performance and tax revenue.³⁵⁶ As the Texas Education Code is currently organized, it classifies the entire school system into areas called Educational Service Centers (“ESC’s”).³⁵⁷ These ESC’s are responsible for administering the school finance program.³⁵⁸ The TEA could use these ESC’s to set local standards and goals so that each ESC’s goals are realistic and attainable.³⁵⁹ The TEA can enforce these new standards through a reward and sanction program by granting “[g]reater autonomy to overachieving districts while stepping in and taking autonomy away from consistently underperforming districts.”³⁶⁰

349. *See id.*

350. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 802 (Tex. 2005) (Brister, J., dissenting)

351. *Id.*

352. *Id.*

353. *Id.* at 793.

354. *Id.* at 802.

355. Pennington, *supra* note 5, at 408–09.

356. *Id.* at 409.

357. *Id.*

358. *Id.*

359. *Id.* at 410.

360. *Id.* at 411.

VI. COMPLETELY NEW SOLUTIONS

Although the legislature could target the court's exact reasons for declaring the funding scheme unconstitutional and correct only those issues, it could also completely transform the public school funding structure. Completely transforming the funding system would mean that instead of only potentially putting a Band-Aid on the situation the legislature would invoke a more holistic solution. Two potential solutions include: (1) providing alternative means of revenue including additional forms of taxation and (2) providing school choice methods.

A. *Alternative Means of Revenue*

There are many potential ways for districts to raise revenue including: (1) a sales tax, (2) a property tax, (3) a flat education tax, and (4) an implementation of gambling options.

1. Sales Tax

One way to allow districts to raise additional education funds would be to raise the state sales tax and designate all the additional income be given to school districts.³⁶¹ Additionally, the legislature could also extend a sales tax to services, including auto, electronic, and furniture repairs, dry cleaning, daycare, new construction, and landscaping, real estate, accounting and legal services.³⁶² This tax could apply to sporting event admissions and entertainment events including concerts and rodeos, which in Texas alone, "could potentially yield over a hundred million dollars."³⁶³ This potential solution has generally failed to raise support within Texas for two main reasons. The first is that by adding a sales tax to services, a large number of companies would need to be brought into compliance, taking time, money, and energy, all of which will be taken out of the proceeds from the increased sales tax.³⁶⁴ The second reason why this solution has not gained popularity is that taxing services "may encourage Texans to seek professional services from out-of-state providers."³⁶⁵ Since many businesses have locations in multiple states it would be easy to assign those services that would normally be taxed in Texas to offices in other states, thus evading the tax.³⁶⁶

361. Dyson, *supra* note 2, at 22.

362. *Id.*

363. *Id.*

364. Kent A. Gernander, *Why Not Tax Legal Services* (Feb. 2001), <http://www2.mnbar.org/benchandbar/2001/feb01/prezpage-feb01.htm>.

365. *Id.*

366. Dyson, *supra* note 2, at 23.

2. Property Tax

Another potential solution to the funding problem would be for Texas to implement a state property tax.³⁶⁷ Since the current Texas Constitution does not allow for a state property tax, the legislature would need to repeal the amendment prohibiting the tax and replace it with a new one allowing statewide ad valorem taxes to fund public schools.³⁶⁸ Unfortunately, this solution has also not garnished much support for many reasons. The first is that a statewide property tax would give control over education funds to state bureaucrats instead of local school districts therefore breaking “apart the close relationships between the business community and local schools, to the detriment of both.”³⁶⁹ Additionally, “school boards and communities lose the opportunity to be meaningful partners in economic development.”³⁷⁰

One crucial aspect of both a state property tax and expanded sales tax is “the reapportionment of power from the local property districts to the state level.”³⁷¹ For this reason, many individuals oppose expanding the sales tax and implementing a statewide property tax because both taxes create more deadweight loss than the current structure thus making the school funding system even more inefficient.³⁷² Additionally, individuals argue that school-funding sources must be “stable and predictable,” which neither of the aforementioned taxes is because they “have the propensity to drop in times of a recession.”³⁷³

3. Flat Education Tax

Another potential solution would be for the state to implement a flat education tax. This solution means that taxpayers would pay the tax directly to the state and deduct those payments on their tax forms.³⁷⁴ Although this solution would lower property taxes, it is unclear whether this tax would “garner the necessary amount of funds given that compliance would be entirely voluntary for the individual taxpayer.”³⁷⁵ Additionally, to be feasible, there would need to be a Constitutional Amendment passed.³⁷⁶

367. *Id.* at 32.

368. Pennington, *supra* note 5, at 408.

369. 2004 *Special Session*, *supra* note 188.

370. *Id.*

371. Pennington, *supra* note 5, at 408.

372. *Id.*; Dyson, *supra* note 2, at 43.

373. Derisma, *supra* note 5, at 122.

374. Dyson, *supra* note 2, at 40.

375. *Id.*

376. *Id.*

4. Gambling Operations

Lastly, another potential solution would be to change Texas law to allow for certain gambling operations.³⁷⁷ Whatever potential solution the legislature decides to use must “substantially reduce the state’s reliance on local property taxes, which in turn eliminates recapture on a majority of school districts and greatly mitigates it for the remaining districts.”³⁷⁸

B. School Choice

Another structural change Texas could make to the funding system would be allowing parents to choose the school their children attend.³⁷⁹ Offering school-choice would incentivize public schools to “improve their performance,” as it would take away the monopoly they currently have over the education industry and would force them to compete.³⁸⁰

There are many different ways to provide school choice, but the most common are through: (1) a tax credit; (2) an education savings account; (3) a voucher system; or (4) a deduction or tax-credit scholarship.³⁸¹ School choice could be accomplished by giving school districts a “fixed rate for each student who chooses to attend that school, regardless of the school’s private or public designation.”³⁸² Additionally, the legislature could allow individual schools or school districts to decide what premium they would set above the rate the state pays them.³⁸³ This would mean that if a child’s parents want to pay more for a better education for their child they can and the school will still receive funding as well as the additional funding paid by the child’s parents.³⁸⁴ This change would create competition among schools and “encourage districts to perform well to attract more students.”³⁸⁵ This would in turn “force schools to operate more efficiently and offer better educational opportunities than their competitors in order to attract more students and in turn more funding.”³⁸⁶

One method of school choice is through a tax credit which would “allow an individual or business to reduce the final amount of a tax owed to government.”³⁸⁷ Under this plan, individuals or businesses would earn a tax credit, either full or partial, for contributing to edu-

377. *Id.* at 21.

378. 2004 *Special Session*, *supra* note 189.

379. Pennington, *supra* note 5, at 406.

380. Choo, *supra* note 3.

381. *What is School Choice?*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/What-is-School-Choice.aspx> (last visited Jan. 1, 2015).

382. Pennington, *supra* note 5, at 406.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 407.

387. DiPerna, *supra* note 120, at 32.

cational scholarship funds.³⁸⁸ A second method of school choice is through an education savings account (“ESA”).³⁸⁹ ESA allow parents who do not want their kids to attend public schools to “receive a payment into a government-authorized savings account with restricted, but multiple uses such as private school tuition, virtual education programs, private tutoring or savings for future college expenses.”³⁹⁰

A third school choice method is a voucher system thereby allowing parents to choose what type of school (private, public, or charter) they want their child to attend.³⁹¹ Under this plan, “tax dollars currently allocated to a school district would be allocated to parents in the form of a ‘school voucher’ to pay partial or full tuition for their child’s school.”³⁹² This gives parents the freedom to choose a private school for their children “using all or part of the public funding set aside for their children’s education.”³⁹³ Lastly, a fourth method of school choice is through individual tax credits or deductions where parents receive “state income tax relief for approved educational expenses[.]” including tuition, supplies, technology, transportation, and books.³⁹⁴

In order to avoid the state-control issues, Texas could use these funds as supplementary income and still rely on local property taxes to secure the majority of school funding. If this were the case and individuals paid property taxes and chose their kids’ schools, local citizens would feel more invested, rather than if all money came from Austin and schools were designated.³⁹⁵

Even though school choice is an option, it is also extremely controversial.³⁹⁶ Many opponents believe that vouchers would take money from public schools and give it to private schools that do not have to operate under the same standards as public schools.³⁹⁷ Furthermore, opponents argue that “schools would lose more money if students are allowed to leave the system.”³⁹⁸ Opponents also believe that school choice would benefit lower income families considerably more than they would the wealthy.³⁹⁹ Conversely, proponents for school choice argue that even though vouchers and other school choice methods would take some of the funding given to districts, “students using

388. *What is School Choice?*, *supra* note 381.

389. *Id.*

390. DiPerna, *supra* note 120, at 36.

391. *See id.* at 38.

392. *Id.*

393. *What is School Choice?*, *supra* note 381.

394. *Id.*

395. Pennington, *supra* note 5, at 406.

396. *Strengthening Public Schools*, TEX. FREEDOM NETWORK, http://www.tfn.org/site/PageServer?pagename=issues_public_schools_vouchers (last visited Jan. 1, 2015).

397. *Id.*

398. Terrence Stutz, *Texas House says no to private school vouchers*, DALL. MORNING NEWS (Apr. 2, 2013), <http://trailblazersblog.dallasnews.com/2013/04/house-says-no-private-school-vouchers.html/>.

399. *Private-school vouchers*, *supra* note 331.

vouchers would take only a proportional amount a school receives for any other student . . . meaning that fewer students mean fewer teachers, less overhead, and resulting costs.”⁴⁰⁰ Additionally, proponents for school choice argue that the added competition for students would force schools to be more efficient.⁴⁰¹

Even though for over twenty years the Texas Legislature has defeated school choice proposals, school choice is definitely a constitutionally potential solution for Texas.⁴⁰² Even though it is constitutionally possible in Texas to implement school choice methods, in 2013, both Republican and Democrat members of the House approved an amendment stating that funds cannot be used to support private schools.⁴⁰³ Even with all of the refusals, Michael Williams, the Texas Commissioner of Education, who also leads the TEA, believes that vouchers are a viable state option and is currently trying to bring them to Texas “through the back door.”⁴⁰⁴ In an application to the U.S. Department of Education, Williams proposed a voucher program for preschools that would fund them up to \$8,000 per child—all through federal grant funding.⁴⁰⁵ Although many legislators have been extremely vocal about dismissing his application, school-choice programs are viable options for the state to employ and they could serve as alternatives to the current funding-system chaos.

VII. CONCLUSION

The Texas School Finance System is one that is in desperate need of an overhaul. The constantly changing litigation and policies are convoluted and confusing. School districts are put in challenging positions where everyone is suffering. This is shown by the fact that Texas “is the only state that has been sued over its school finance system by [both] property rich and property poor districts at the same time.”⁴⁰⁶ There must be a system that allows poorer districts to “achieve more equitable funding, allowing for improved education opportunities, but [the new system can]not hinder the growth and development of education opportunities in property rich districts.”⁴⁰⁷

As it stands now, even if the February 2013 ruling is overturned, there is only so long that the current finance system will pass constitu-

400. *Id.*

401. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 802 (Tex. 2005) (Brister, J., dissenting).

402. *School Choice in Texas*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/school-choice/state/texas/> (last visited Aug. 30, 2015).

403. Stutz, *supra* note 398.

404. Charles Luke, *Texas education head refuses to let up on vouchers*, HOUS. CHRON. (Dec. 2, 2014), <http://www.chron.com/opinion/outlook/article/Texas-education-head-refuses-to-let-up-on-vouchers-5930598.php> (last visited Jan. 1, 2015).

405. *Id.*

406. Hoxby & Kuziemko, *supra* note 22, at 20.

407. Pennington, *supra* note 5, at 397.

tional muster. Districts are unable to “generate sufficient revenues to fund and provide an adequate education,” and to “successfully educate students,” there must be adequate funds for education.⁴⁰⁸ The courts have repeatedly warned the Texas Legislature that it needs to make structural changes to the finance system otherwise constitutional challenges will continue. Since the adoption of Senate Bill 7 (Robin Hood) in 1993, the legislature has only slightly adjusted the bill to make it Constitutional.⁴⁰⁹ This pattern of “putting a Band-Aid” on the problem has lasted since the inception of Robin Hood and even with all of the legislative sessions and discontent with the current system, “there is still no end in sight” and “if the past is any indication [any amendment to the funding system] will not last long, and public education will not change much.”⁴¹⁰ One Senator who sits on both the Texas Finance & Education committees advanced this sentiment after the February 2013 ruling stating that, “the judge said [the current system] was unconstitutional, but he did not prescribe any remedies” and that the legislature will “have to come up with a remedy that may not be a preferred one, but that . . . is constitutional.”⁴¹¹

This is exactly the same place that Texas was at in 2005 at the conclusion of *West Orange-Cove* when Judge Dietz stated, “it is the people of Texas who must set the standards, make the sacrifice, and give direction to their leaders as to what kind of education system they want.”⁴¹² Texans either want heightened standards and facilities and are willing to foot the bill for education or they do not, but “problems only get worse the longer [the legislature] wait[s].”⁴¹³

408. *Tex. Taxpayer v. Williams*, No. D-1-GN-11-003130, at *2 (200th Dist. Ct. Travis County, Tex. Aug. 28, 2014).; DE PEÑA, *supra* note 123, at 14.

409. Memorandum from Haynes & Boone, *supra* note 159, at 7.

410. *Id.*; see Dyson, *supra* note 2.

411. Smith, *supra* note 205.

412. DIETZ, *supra* note 9, at 8.

413. *Id.*