2015

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

Hannah Elsaadi
Texas A&M University School of Law

Follow this and additional works at: https://scholarship.law.tamu.edu/journal-of-property-law

Recommended Citation
Available at: https://scholarship.law.tamu.edu/journal-of-property-law/vol2/iss3/1

This Student Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact areteen@law.tamu.edu.
THE COST OF EDUCATION: AN IN DEPTH LOOK INTO TEXAS'S EDUCATION FUNDING SYSTEM OVER THE LAST TWO DECADES

By Hannah Elsaadi†

I. ABSTRACT .............................................. 342
II. INTRODUCTION .......................................... 343
III. CURRENT EDUCATION FUNDING ....................... 344
A. Generally ........................................... 344
B. Local Funding ...................................... 344
C. State Funding ....................................... 347
   1. The Foundation System ............................ 348
      a. Facilities Funding Component ............... 348
      b. Operations Component ......................... 348
         i. Tier I ................................... 349
         ii. Tier II .................................. 350
         iii. Target Revenue .......................... 351
   2. The Recapture System: The “Robin Hood” Plan ............................................. 351
   3. Other State Funds: Guaranteed Revenue ....... 353
      a. Permanent School Fund ...................... 353
      b. Available School Fund ....................... 354
      c. Property Tax Relief Fund ..................... 354
D. Federal Funding ........................................ 354
E. Implications of the Complexity of Funding Formulas ....................................... 354

IV. HISTORY OF TEXAS’S SCHOOL FUNDING SYSTEM ...... 355
A. Historical Overview of Education System .......... 355
B. Development of the Funding Dilemma .............. 356
   1. Generally ....................................... 356
   2. Early Litigation and Legislation ............... 356
   3. Passage of Senate Bill 7: Texas’s Robin Hood Plan ........................................... 357

V. CURRENT PUBLIC SCHOOL FINANCE LITIGATION AND DEBATE ............................................. 362
A. District Court Litigation: February 2013 .......... 362
B. Adequacy Issue ....................................... 364
   1. Generally ....................................... 364
   2. Current Adequacy Issues ........................ 367

† J.D. Candidate, Texas A&M University School of Law, Spring 2016; B.B.A., Southern Methodist University, December 2012.
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

negatively affected by this unhurried trial-and-error system. 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. Consequently, the United States Government places a high importance on its citizens’ education, particularly with respect to children. Even though the Federal Government repeatedly advances the notion that education is a priority, it leaves most of the administration to the states.

Many states have grappled with the predicament of education funding. 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. 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.”

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

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. 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.” 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.” This constitutional provision sets three standards for the legislature to follow including adequacy, suitability, and efficiency.

B. Local Funding

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

11. Id.
12. Id.
15. Neeley, 176 S.W.3d at 788.
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].
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.” The taxation rate is set by local entities, and taxes are “assessed on property according to values set by county appraisal districts.”

School districts are the local entities that receive the education portion of the property tax and they are responsible for dividing funding between schools. 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”). Although all districts can levy M&O taxes, only districts whose citizens have voted in favor of education bonds can levy I&S taxes. State law provides local districts with separate tax rate caps for each portion of the local property taxes.

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. For most Texas districts, the statewide cap for M&O taxes is $1.17 per $100 property value. 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.

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.” A bond is a “contract to repay borrowed money with a low cost interest rate over time,” comparable to a mortgage. Schools sell bonds in order to raise revenue to finance capital...
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.
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.\textsuperscript{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.”\textsuperscript{44}

A third source of revenue is applicable to districts employing a sales tax that deem the recipient be local school districts.\textsuperscript{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).\textsuperscript{46}

A fourth way districts, mostly wealthy ones, receive revenue is through private foundations.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{49}

\section*{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.\textsuperscript{50} In 2013 alone, Texas sent nearly $19.7 billion, paid through several funds, to be distributed to local school districts.\textsuperscript{51} The aid Texas provides is divided into three categories: a foundation system, a recapture system, and a guaranteed revenue system.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{43} \textit{Fin. Allocation Study, supra} note 18.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Combs, supra} note 21, at 3.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} Morgan Smith, \textit{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/.
\item \textsuperscript{48} Rob Reich, \textit{Not Very Giving}, N.Y. TIMES, (Sept. 4, 2013), http://www.nytimes.com/2013/09/05/opinion/not-very-giving.html?
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Fin. Allocation Study, supra} note 18.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} Hoxby & Kuziemko, \textit{supra} note 22, at 6–7.
\end{itemize}
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”). 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.” 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. 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).”

a. Facilities Funding Component

This portion of the FSP is “state money that has been allocated for school construction and related expenses.” This part of state aid is used to provide “sufficient support for districts to maintain, build, and renovate the classrooms necessary for adequate education.” 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.”

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. 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

---

54. Id.
55. FIN. ALLOCATION STUDY, supra note 18.
57. Id.
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.\footnote{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.\footnote{72} The number they calculate that must come from their own revenue is called the Local Fund Assignment ("LFA").\footnote{73} The more property wealth within a district, the higher the LFA, and therefore, the less state funding the district will receive.\footnote{74}

\textbf{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.\footnote{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.\footnote{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.\footnote{77} This gives an adjusted Tier I figure which is divided by the school district’s basic allotment to give WADA.\footnote{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.\footnote{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.\footnote{80} For example, "low-income students are counted as 1.2

\begin{itemize}
  \item \textit{Id. at 12.}
  \item \textit{Id. at 18.}
  \item \textit{Id.; AUSTIN INDEP. SCH. DIST., supra note 28.}
  \item \textit{AUSTIN INDEP. SCH. DIST., supra note 28.}
  \item \textit{School Finance 101, supra note 24, at 7.}
  \item \textit{Id. at 21.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Dyson, supra note 2, at 12.}
  \item \textit{AUSTIN INDEP. SCH. DIST., supra note 28.}
\end{itemize}
students, and students who do not speak English are counted as 1.1 students.”

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.” Therefore, both property-rich and property-poor districts have heightened perverse incentives to increase this ratio in order to obtain additional revenue.

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. 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. 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. 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. 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. 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).

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.
tion in 1993. 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.”

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.” 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.” 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.

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. 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.”

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: “(1) consolidation; (2) detachment by annexation; (3) purchase of attendance credits; (4) contract for education of non-residents; (5) tax base consolidation.” A district may choose to utilize only one of these options or it can use a combination of options. 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.”

90. Pennington, supra note 5, at 390.
92. AUSTIN INDEP. SCH. DIST., supra note 28.
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.
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.\footnote{Hoxby & Kuziemko, supra note 22, at 46.} 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.\footnote{Id. at 10.} To make this money back, the state may need to “lower the threshold at which recapture occurs.”\footnote{Id. at 1–2.} As a result, Robin Hood has obliterated nearly $81 billion of wealth.\footnote{Id. at 1–2.}

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.\footnote{AUSTIN INDEP. SCH. DIST., supra note 28.}

\textit{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.\footnote{RESEARCH FOUNDATION TTARA, supra note 89, at 5.} 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.\footnote{Permanent School Fund, TEX. GEN. LAND OFF. (2015), http://www.glo.texas.gov/what-we-do/state-lands/permanent-school-fund/.} 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.\footnote{Id. at 1–2.} 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.\footnote{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.” Additionally, one-quarter of all revenue produced by the state motor fuels tax is allocated to the ASF fund. 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. 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.


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. 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.”

D. **Federal Funding**

Although limited, school districts also receive funding from the federal government. In fact, “19 cents of every dollar Texas receives” from the federal government supports public education. 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.

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 funded.
funded or why they do not have enough money to operate.\textsuperscript{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.\textsuperscript{120} This is problematic for two reasons.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{126} Four years later, Texas developed its own law regarding public education.\textsuperscript{127} The Texas Legislature continued to expand and revise the system during the latter part of the 19th century.\textsuperscript{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.\textsuperscript{129} A second part of the development included providing individual localities with increased authority to

\textsuperscript{119} Fin. Allocation Study, supra note 18.
\textsuperscript{121} See generally Combs, supra note 21.
\textsuperscript{122} Id.
\textsuperscript{123} 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.
\textsuperscript{124} See generally Comis, supra note 21.
\textsuperscript{126} Tex. Const. art. VII, § 1, interpretive cmt. (West, Westlaw through 2015).
\textsuperscript{127} Pennington, supra note 5, at 391.
\textsuperscript{128} Id.
\textsuperscript{129} Permanent School Fund, supra note 107.
regulate their own schools. These localities became school districts, and at the start of the 20th century there were 526 districts. 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.”

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. 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. 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.

2. Early Litigation and Legislation

The first major school finance lawsuit in Texas was *Rodriguez v. San Antonio Independent School District*. 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. 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. Even though the Supreme Court ruled in favor of the State, this case served as the catalyst for school finance reform in Texas. The publicity put a spotlight on the Texas Legislature and pressured policymakers to “address the ubiquitous inequalities in school finance.”

---

131. *Id.*
134. *See id.* at 7–9.
135. *See id.*
137. Derisma, *supra* note 5, at 123.
139. 19 *TEX. ADMIN. CODE* § 62.107(a), at 17.
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. These districts were led by the Edgewood Independent School District in four separate lawsuits decided in 1989, 1991, 1992, and 1995. 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. 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. 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.” Responding to the court’s decision, the Texas Legislature proceeded to enact a new system of school finance in 1990. This system was challenged again in Edgewood II, and in 1991, the Supreme Court held the new funding system unconstitutional once again.

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.” This was challenged and failed again in Edgewood III because it created an ad valorem tax, thus violating the Texas Constitution. 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.

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. 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.’ “\textsuperscript{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.\textsuperscript{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.”\textsuperscript{154}

Under Senate Bill 7, the legislature devised a two-tiered system.\textsuperscript{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.\textsuperscript{156} This did not apply to school districts that were already over that limit (they could continue to tax at that rate).\textsuperscript{157} Additionally, the property tax cap did not apply to taxes assessed to pay for bond packages for facility construction or renovation.\textsuperscript{158} The second tier limited districts to M&O revenues that did not exceed a statewide rate per weighted student.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{162} Even though the state was triumphant, the victory came with a judicial

\begin{footnotesize}
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.
161. Dyson, supra note 2, at 11.
\end{footnotesize}
warning. 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. As a result, sooner or later districts may be obligated to tax at the statutory cap just to meet state standards. 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.


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. In 1997, the Texas Legislature amended the state finance plan by adding a third tier for construction or the purchase of new facilities. 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. 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. 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.

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. 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 statewide property tax; and (2) the finance system did not give districts the
funding they need to “sufficiently provide for a constitutionally ade-
quate 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 sys-

tem unconstitutional, stating that it was “not even a ‘close question’ as
to whether districts have meaningful discretion to set their local prop-
erty tax rates.”177

The plaintiff school districts’ second claim centered on inade-
quacy.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 pro-
vided.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 situa-
tion.181 Although the state immediately appealed the decision, the leg-
islature 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 swim-
mimg 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,

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 Special Session on School Finance].
182. See id.
183. See Memorandum from Haynes & Boone, supra note 159; Neeley v. West Or-
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. 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.

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.

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. The legislature was unsuccessful and two months later, Governor Rick Perry called a special session on school finance. At this legislative session, Perry offered the Educational Excellence and Equity Plan as a remedy to the finance problem. 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. 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.
189. Id.
190. Id.
Reduction ("ASATR") to ensure that the mandated reduction in taxes did not negatively impact students. 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.

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." 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." Through adopting parts of this plan Robin Hood survived, notwithstanding the adjustments made by the new legislation.

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. 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. The legislature immediately created a bill removing the Hold Harmless funding provision and cut substantial funding from students, particularly students receiving ASATR. 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.

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. As a result, over 600 Texas school districts from both property-poor school and
property-rich school districts, responsible for educating three-fourths of Texas students, brought suit against the state.\textsuperscript{201} These districts claimed that the school finance system was unconstitutional on grounds of inadequacy and because it amounted to a state property tax.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{205} The court came to its ruling based on both evidence admitted at main trial and when evidence was reopened.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).”\textsuperscript{210}

\textsuperscript{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-finan_n_2622002.html.
\textsuperscript{202} Press Release, supra note 1.
\textsuperscript{203} Collier, supra note 200.
\textsuperscript{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.
\textsuperscript{206} Tex. Taxpayer & Student Coal., 2014 WL 4243277, at *1.
\textsuperscript{207} Id. at *5.
\textsuperscript{208} Weissert, supra note 201.
\textsuperscript{209} See id.; Tex. Taxpayer & Student Coal., 2014 WL 4243277, at *1.
\textsuperscript{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. Thus, “because the money is insufficient and because it is not distributed fairly,” the state’s funding methods were found to be unconstitutional.

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. 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.” 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.” This motion was dismissed a few weeks later.

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.” This standard is also known as “adequacy.” 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.” 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.” 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.”

211. Id.
212. Smith, supra note 205.
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.
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. 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.” 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.” 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.

Adequacy issues are not exclusive to Texas, but rather adequacy has been cited as a national issue. 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. 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. 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). 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.

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

222. 2005 Texas Supreme Court Ruling on School Finance System, supra note 219.
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{234} As long as districts meet state standards they are able to keep any excess revenue they collect.\textsuperscript{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.\textsuperscript{236} Accordingly, this approach allowed school districts to receive increased funds even when they performed poorly.\textsuperscript{237}

In order to help create somewhat uniform standards the United States Department of Education implemented the No Child Left Behind Act ("NCLB").\textsuperscript{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.\textsuperscript{239} The Department of Education instituted the NCLB Act over ten years ago and the results since then have been less than optimal.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{232} Id. at 401.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id. at 402.
  \item \textsuperscript{239} GreatSchools Staff, \textit{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).
  \item \textsuperscript{240} Lisa Guisbond et al., \textit{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.
\end{itemize}
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-

244. Id.
246. Id.
247. See id. at 756.
248. See id. at 789.
sary to ensure the system does not remain exposed to constitutional challenge.”

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.” This, unfortunately, forces most “schools to ‘lay off teachers and cut funding for scholastic programming.’”

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. 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. Furthermore, the accountability standards that are in place currently do “little to promote year-over-year improvement.”

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. 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.”

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

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.
costs associated with achieving certain levels of student performance.”

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. 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.”

Furthermore, dumping large quantities of money into the system may only temporarily postpone constitutional challenges. 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.”

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 must impact student success.” 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.”

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 gage academic growth would be one potential solution.

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.
more difficult." While this evidence is undisputed, it does not account for factors such as the limiting of curriculums to only tested skills. Use of multiple evaluation measures—instead of a “single-event high-stakes test”—allows the legislature to make more informed funding decisions. 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. 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.”

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. 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.” 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.” 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. Additionally, “[t]here is evidence of high attrition and turnover among teachers statewide, due to increasing demands and stagnant compensation.”

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.” If property-poor school districts had more resources to incentivize better

---

266. De Peña, supra note 123, at 16.
267. 2011 Legislative Priorities, supra note 264.
268. Neeley, 176 S.W.3d at 788.
270. Dyson, supra note 2, at 33.
271. Pennington, supra note 5, at 404.
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.\footnote{276}{Dyson, supra note 2, at 33.} 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.”\footnote{277}{DIETZ, supra note 9, at 5.} He states that an increased amount of $2,000 per student (or $10 to $11 billion per year) should cover the changes.\footnote{278}{Id.}

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.”\footnote{279}{Pennington, supra note 5, at 404.} 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.”\footnote{280}{DIETZ, supra note 9, at 4.} 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.”\footnote{281}{Dyson, supra note 2, at 33.}

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.\footnote{282}{2005 Legislative Priorities, PLANO INDEP. SCH. DIST., http://pisd.edu/news/advocacy/legislative.priorities.shtml (last visited Dec. 20, 2014).} 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.\footnote{283}{See generally, Pennington, supra note 5, at 411.} An example of one modification would be for the TEA to financially incentivize schools that demonstrate great academic growth.\footnote{284}{Id.} 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.\footnote{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. 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.” Online education would allow students in all locations access to quality teachers while lessening the amount of money spent on overhead expenses. 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. 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.” 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.

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. The idea of equity focuses

287. Id.
288. See id.
290. Id. at 795.
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.” There are different ways that states handle the issue of equity. 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.” In other words, under Vermont’s funding structure, the state handles most of the school funding distribution as opposed to local governments. Texas, on the other hand, handles equity by capping the maximum amount of property taxes a district can levy per student in each district. 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.” 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.

2. Current State Property Tax Issues

This issue has been steadily increasing in importance since the late 1990s for many reasons. 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. 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. 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.” 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.
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.”

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.”

### 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.” 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.”

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. This could include allowing districts access to significant additional taxing capacity over the capped rate.

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. The CEI is used to provide school districts funding. 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. Without adjusting the CEI, “districts will have difficulty remaining competitive with teacher pay increases, utilities, and other inflationary costs.”

---

304. Smith, *supra* note 47.
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.\footnote{2005 Legislative Priorities, supra note 282.} 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.\footnote{Id.}

Fourth, Texas could adopt a finance program like MERA in Massachusetts.\footnote{Pennington, supra note 5, at 407.} 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.”\footnote{Id. at 408.} 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.”\footnote{2005 Texas Supreme Court Ruling on School Finance System, supra note 219.}

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.”\footnote{TEX. CONST. art. VII, § 1, interpretive cmt. (West, Westlaw through 2015).} 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.”\footnote{Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 801 (Tex. 2005) (Brister, J., dissenting).} It was not until 1876 that the word efficient was added into the Constitution.\footnote{Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 752 (Tex. 1995).}

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.”\footnote{Neeley, 176 S.W.3d at 752–53.} Efficient denotes the “meaning of effective or productive of results and connotes the use of
resources so as to produce results with little waste.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{325} Efficiency is comprised of two components, instruction and facilities, and both are inseparable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{331} Some argue that “[t]oo much money is spent on management and not enough on teachers.”\textsuperscript{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.”\textsuperscript{333} The court in

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Pennington, \textit{supra} note 5, at 399.
\item Meno, 917 S.W.2d at 730.
\item Id. at 726.
\item Id. at 717.
\item Neeley, 176 S.W.3d at 792.
\item Meno, 917 S.W.2d at 730.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
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.”

An additional issue related to efficiency is the complicated nature of the funding scheme. 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.”

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. 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.”

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. 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.” 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. Additionally, while the national average for administrators is one for every 295 students, in Texas there is approximately one for

336. Id.
337. 2009 Legislative Priorities, supra note 286.
338. Id.
every 231 students.\footnote{Public Education in Texas, BALLOTPEDIA, http://ballotpedia.org/Public_education_in_Texas (last visited Aug. 29, 2015).} 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.”\footnote{De PEÑA, supra note 123, at 15.} 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.\footnote{Id.} 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.”\footnote{Id. at 16.} 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.\footnote{Id. at 14.} 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.\footnote{See generally Tex. Taxpayer v. Williams, No. D-1-GN-11-003130 (200th Dist. Ct., Travis County, Tex. Aug. 28, 2014).} 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.\footnote{Id. at 2 (quoting Edgewood I.S.D. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989)).} Therefore, because all districts have the capability to ask voters to vote on bonds for facilities funding, the fact that
most taxpayers 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.  

A fifth structural change that would increase school funding efficiency would be to increase competition by allowing for school choice. 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.” 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. 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. Therefore, in order to increase funding efficiency, school choice is an alternative which would bring students “broader educational options” as well as decreased taxes.

Lastly, although there are legislative solutions to the efficiency problem, the TEA could additionally help improve school finance concerns using its own powers. 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. As the Texas Education Code is currently organized, it classifies the entire school system into areas called Educational Service Centers (“ESC’s”). These ESC’s are responsible for administering the school finance program. The TEA could use these ESC’s to set local standards and goals so that each ESC’s goals are realistic and attainable. 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.”

349. See id.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{366}

\begin{itemize}
  \item \textsuperscript{361} Dyson, \textit{supra} note 2, at 22.
  \item \textsuperscript{362} \textit{Id.}
  \item \textsuperscript{363} \textit{Id.}
  \item \textsuperscript{364} Kent A. Gernander, \textit{Why Not Tax Legal Services} (Feb. 2001), http://www2.mnbar.org/benchandbar/2001/feb01/prezpage-feb01.htm.
  \item \textsuperscript{365} \textit{Id.}
  \item \textsuperscript{366} Dyson, \textit{supra} note 2, at 23.
\end{itemize}
2. Property Tax

Another potential solution to the funding problem would be for Texas to implement a state property tax. 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. 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.” Additionally, “school boards and communities lose the opportunity to be meaningful partners in economic development.”

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.” 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. 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.”

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. 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.” Additionally, to be feasible, there would need to be a Constitutional Amendment passed.
4. Gambling Operations

Lastly, another potential solution would be to change Texas law to allow for certain gambling operations. 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.”

B. School Choice

Another structural change Texas could make to the funding system would be allowing parents to choose the school their children attend. 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.

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. 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.” Additionally, the legislature could allow individual schools or school districts to decide what premium they would set above the rate the state pays them. 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. This change would create competition among schools and “encourage districts to perform well to attract more students.” 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.”

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.” 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.
382. Pennington, supra note 5, at 406.
383. Id.
384. Id.
385. Id.
386. Id. at 407.
387. DiPerma, supra note 120, at 32.
A second method of school choice is through an education savings account ("ESA"). 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." 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. 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." 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." 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.

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.

Even though school choice is an option, it is also extremely controversial. 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. Furthermore, opponents argue that "schools would lose more money if students are allowed to leave the system." Opponents also believe that school choice would benefit lower income families considerably more than they would the wealthy. 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.*
391. See *id.* at 38.
392. *Id.*
393. *What is School Choice?*, supra note 381.
394. *Id.*
397. *Id.*
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.\cite{400} Additionally, proponents for school choice argue that the added competition for students would force schools to be more efficient.\cite{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.\cite{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.\cite{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.”\cite{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.\cite{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.”\cite{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.”\cite{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-
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. 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. 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.” 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.”

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.” 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].”

410. Id.; see Dyson, supra note 2.
411. Smith, supra note 205.
412. DIETZ, supra note 9, at 8.
413. Id.