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Eight Things Texans Ought to Know about the Supreme Court's School Finance Decision

On May 13, 2016, the Texas Supreme Court handed down a decision in *Morath, et al. v. Texas Taxpayer and Student Fairness Coalition, et al.* The case was the seventh appeal to the Texas Supreme Court since the 1980's that asked the state Supreme Court to decide whether Texas schools were funded in a way that met the requirements of the Texas Constitution, including:

> **Article VII, Section 1**
>
> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.
>
> **Article VIII, Section 1-e**
>
> No State ad valorem taxes shall be levied upon any property within this State.

The Court determined that the current school finance system was constitutional, despite its flaws. Summaries of the opinion can be found online, including an article by Dr. Catherine Clark in the June 2016 edition of the *Texas Lone Star* and a summary titled *Supreme Court Upholds Constitutionality of School Finance System*,[1] posted online by TASB Legal Services. The purpose of this article is not to summarize the opinion, but to point out aspects of the decision that may affect our state going forward.

1. The opinion will be binding precedent for future state court actions.

The Court's opinion was delivered by Justice Don Willett on behalf of a unanimous court. This means that although the justice and his staff prepared and delivered the opinion, the opinion was not his personal message. The opinion represented the decision of all nine justices, including the five justices who wrote or joined separate concurring opinions. By concurring, the five justice expressed agreement with the majority opinion, but wrote to add additional insights of their own. Consequently, the majority opinion belongs to the Court and is binding precedent in future cases, even if none of the current justices are sitting on the court at the time of a future appeal.

[1] tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/constitutionality_of_sch_finance_case.pdf.

What does it mean for the decision to be *precedent*? Precedent is a prior reported opinion of a court of appeals—in this case, the state's highest court—which establishes a rule of law when the same legal question is presented in the future. Any future school finance case would have to follow the contours of the Supreme Court's opinion in the case. Absent a very rare decision to overturn prior precedent, which could be done only by the Supreme Court itself, the facts of future cases may change but the legal standards, such as the Court's standards of review or interpretations of constitutional language, will have to follow this opinion.

2. The opinion is final and not subject to appeal.

The Court's opinion is an interpretation of whether the facts (i.e., the state school finance system) met a constitutional standard based on the language of the Texas Constitution. For purposes of interpreting the state constitution, the Supreme Court of Texas is the ultimate legal authority. The case did not present a question of federal law that would give grounds for an appeal to the United States Supreme Court.

3. Despite many admonitions to the Legislature, the opinion contains no enforceable mandate for change and provides for no future monitoring by the courts.

The Court began and ended its opinion by acknowledging the complexity of Texas' school finance system, and its importance to the future of Texas. In the words of the Court, "Good education is good policy." The Court went on to observe:

"Texas's more than five million school children deserve better than serial litigation over an increasingly Daedalean 'system.' They deserve transformational top-to-bottom reform that amounts to more than Band-Aid on top of Band-Aid. They deserve a revamped, nonsclerotic system fit for the 21st century . . . ."

"Our Byzantine school funding 'system' is undeniably imperfect, with immense room for improvement . . . ."

"Our Constitution endows the people's elected representatives with vast discretion in fulfilling their constitutional duty to fashion a school system fit for our dynamic and fast-growing State's unique characteristics. We hope lawmakers will seize this urgent challenge and upend an ossified regime ill-suited for 21st century Texas."

These are inspiring words, but they are unenforceable without a mandate to the Legislature. Significantly, the Court declined to grant the trial court continuing jurisdiction over the case, which would have allowed the trial court to reopen the constitutional issues in light of new evidence. The Court concluded, "There is no basis for continuing jurisdiction where a take-nothing judgment . . . has been rendered on appeal." In other words, this case is truly over, and the school districts lost.

4. Without a judicial mandate, the Legislature has every option available, including cutting funds to Texas schools.

For a host of reasons, the Texas Legislature has traditionally been slow to respond with structural change or significant increases to school funding absent a judicial mandate. In its decision, the Court includes a chart showing the six preceding school finance appeals and the legislative response. In the four instances when the Court found the system unconstitutional, either due to inefficiency or a statewide property tax, the Legislature responded with bills that restructured the finance system and increased state funding for schools. After the two appeals when the Court did not strike down the system as unconstitutional, however, no Legislative response occurred. This was true even though the Court clearly urged the Legislature to do more. For example, in 1995, in the fourth and final appeal in the *Edgewood* school finance challenges, in holding the school finance system constitutional, the Court observed that its "judgment in this case should not be interpreted as a signal that the school finance crisis in Texas has ended." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995) (Edgewood IV). Nevertheless, the structure of our state's system of school finance has not been substantially updated since that time.

Going forward, Texas may be facing potentially lower state revenue due to a decline in oil and gas revenue. The Additional State Aid for Tax Reduction (ASATR), which helped some school districts and represented approximately one percent of state foundation school program funds, was eliminated in 2017. The Legislature continues to rely on local property taxes to cover an increasing share of the cost of public education. In the absence of a Supreme Court mandate, schools do not have a judicial shield against funding cuts.

5. The Court set a high bar for future cases by deferring to the Legislature.

The Court acknowledged that the Legislature's discretion regarding school finance was not unlimited, because legislation on school finance is subject to judicial review. That said, the Court set a standard of review that was as deferential as possible to the Legislature's judgment. The standard the Court selected to review the Legislature's finance choices was "reasonableness," meaning the Court would uphold any system that was not arbitrary. According to the Court, the constitution requires only a system that produces a general diffusion of knowledge, and the Court declined to rule that the Legislature had acted arbitrarily or unreasonably in producing that result. The Court's deferential standard represents a significant challenge for future potential school finance plaintiffs.

6. The Court rejected the idea that a dollar amount could be established as a constitutional floor for adequately funding a general diffusion of knowledge.

The Supreme Court rejected significant findings and conclusions of the trial court in favor of the plaintiff school districts because the Court rejected the trial court's fundamental approach to analyzing the adequacy of school funding. The Court rejected any analysis that focused on inputs to the system (i.e., how much money is spent per student) and instead focused on

outcomes in student achievement. Moreover, the Court rejected the idea that, relying on social science, courts could ever determine a minimum constitutional level of funding necessary to achieve a general diffusion of knowledge. "To determine as a matter of fact that specific funding levels are required to achieve the constitutional threshold of a general diffusion of knowledge, a court not only must find that a cost-quality relationship exists, but also must assign specific quantitative measures to that relationship . . . . We have never sanctioned a trial court's ordering the Legislature to spend a specific amount of money on the schools to achieve constitutional adequacy, as doing so would deprive the Legislature of the broad discretion the Constitution provides for such inherently political decisions."

The court specifically expressed "uncertainty as to the correlation between more money and better education." The Court flatly refused to impose a constitutional mandate on the Legislature for spending a certain amount of money in order to achieve a general diffusion of knowledge or even for determining for itself an appropriate amount of money needed to fund the system of education described in the Texas Education Code.

Consider the impact of this judgment on future school finance proceedings. First, the Court's decision casts a cloud on the core of the plaintiff school districts' adequacy and sufficiency case. The plaintiff school districts brought forward hours of expert testimony and volumes of data to make an essential point: the Legislature has not provided the funds necessary to achieve a diffusion of knowledge as defined by the Legislature's own standards in the Texas Education Code. If the Court will never accept an analysis that tests whether this is true, the future of adequacy claims in Texas is in grave doubt. Moreover, if the Court will consider only an adequacy analysis focused on outputs (student achievement), only data showing that the finance system perpetuates student failure will be grounds for a successful constitutional claim. The Court's standard creates the untenable situation that a generation of Texans would have to fail in order for a future adequacy challenge to succeed.

7. The Court set an even higher bar for any future constitutional claim on behalf of a subgroup, such as English Language Learner (ELL) students.

Assuming, then, that a future adequacy claim will be difficult to bring based on student outcomes across the entire state for all students, would it be more feasible to show an unconstitutional level of investment in a single student population that was struggling to meet state standards? The Court did not "foreclose completely" a ruling of constitutional inadequacy as to a student subgroup, but concluded that "the showing necessary for such a ruling would have to be truly exceptional." First, the Court said the state constitution called for a "general" diffusion, so that standard should be applied statewide, not by subgroup. Second the Court hesitated to open a floodgate of litigation based on the interests of specific subgroups. For the reasons explained above, the Court rejected the idea that more money would lead to better outcomes, and also rejected the idea (in the absence of proof) that money should be diverted from some students and given to others in the interest of a general diffusion of knowledge. "If the Plaintiffs are arguing that socioeconomically

disadvantaged and ELL students are entitled to a greater share of funding because performance gaps by themselves demonstrate a constitutional violation, we reject this argument . . . We have never interpreted our Constitution, under the adequacy requirement, to mandate equality of student achievement by district or student subgroup."

In sum, the Court's measure of adequacy will be outputs, but the fact that outputs show disparity among districts or subgroups will not demonstrate a constitutional failure.

8. Buried inside its opinion, the Court gave a big nod to private school choice.

The Court considered arguments presented by Intervenors complaining that the system was qualitatively inefficient because it did not produce a diffusion of knowledge with little waste. The Intervenors alleged structural inefficiencies leading to unsound, wasteful, and unproductive results. According to these parties, having public schools act as "monopolies," with a cap on charter schools and a mandate-driven system added to the inefficiency. They offered suggestions like "tuition equalization grants" that would allow "student-centered funding," in which public tax dollars would follow a student to the public *or private* school of the parents' choice. In other words, vouchers.

The Court stopped short of saying vouchers were constitutionally required. But the Court called the Intervenors' solutions "intriguing," and said, "We hope the Legislature will consider these and similar suggestions." These encouragements were offered despite the Court's repeated pledges throughout the opinion to avoid acting as a Super Legislature and usurping the judgment of elected officials.

So what happens next?

In conclusion, the Legislature has no mandate for change and basically unbridled discretion with regard to school finance. Meanwhile, the same Supreme Court that promised to be hands off in guiding legislative choices has green-lighted diverting public funds to private schools.

In the Court's own words, "While Texans may desire a public education system that produces even better results or better results more quickly, their remedy lies in the Legislature and thus in the privilege and duty that all Texans have to elect the legislators who will implement the policy choices they desire."

Recommendations are expected to come from the Texas Commission on Public School Finance, which was created by House Bill 21, passed during the 2017 special session.

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