

Making Texas Public Education More Efficient: Taxpayer Savings Grant Program

Testimony by Joseph L. Bast
to the Texas Senate Committee on Education
August 24, 2012

Madam Chairman, honorable members of the Senate Committee on Education, and friends and colleagues, it is my honor to be here today to testify on how a particular school reform proposal, called the Taxpayer Savings Grant Program, would enable the state to comply with its constitutional mandate to “establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

My qualifications to appear here today include:

- I am the founder and publisher of *School Reform News*, a 15-year-old national public policy newspaper that surveys show is read by 50% of state legislators in the U.S. I have read, edited, and sometimes written myself approximately 200 articles a year, every year, for 15 years, about 3,000 so far.
- I am coauthor of four books with Dr. Herb Walberg, a leading authority on school reform,¹ and editor of two more books by Dr. Walberg, most recently *Tests, Testing, and Genuine School Reform* (Hoover Institution Press, 2011).
- I have written or coauthored more than a dozen policy studies on various aspects of school reform, including four Texas-specific studies in 2011 specifically relevant to this case.²
- My writing on school reform has appeared in five peer-reviewed journals: *Phi Delta Kappan*,

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² Joseph Bast, Herbert Walberg, and Bruno Behrend, "How Teachers in Texas Would Benefit from Expanding School Choice," *Policy Brief* (The Heartland Institute, April 2011); John Merrifield and Joseph Bast, "Budget Impact of the Texas Taxpayer Savings Grant Program," *Policy Brief* (The Heartland Institute and the E.G. West Institute for Effective Schooling, April 2011); John Merrifield and Joseph Bast, "Taxpayer Savings Grants: Reply to Fuller," *Policy Brief* (Heartland Institute and the E.G. West Institute for Effective Schooling, June 10, 2011); Joseph L. Bast, "Corrections to Fiscal Note for Taxpayer Savings Grants Program," *Policy Brief* (Heartland Institute, June 8, 2011).

The Cato Journal, The Journal of Private Enterprise, Independent Review, and Economics of Education Review.

- In 2011, I worked with Dr. John Merrifield, an authority on the economics of education in Texas,³ and other experts to produce reports on the fiscal impact of the Taxpayer Savings Grant Program (TSGP) on the Texas state budget and on teachers.

Parts of my written testimony are taken verbatim from publications I wrote or coauthored, primarily but not exclusively those cited in footnote #2. My testimony today does not necessarily reflect the opinions or views of The Heartland Institute and is not intended to influence the passage of legislation.

In my testimony today I will explain ...

- what is the Taxpayer Savings Grant Program?
- how many students are likely to participate if such a program were available?
- what impact would the program have on the state's budget?
- how would students and parents benefit?
- how would teachers benefit? and finally,
- how would these impacts combine to improve the overall efficiency of Texas's system of free public schools?

1. What is the Taxpayer Savings Grant Program?

A bill to create the Taxpayer Savings Grant Program, as it was submitted to Prof. Merrifield and me for analysis in 2011, read as follows:

1. Any parent or legal guardian of a school-age child who resides in Texas and is entering kindergarten or attended a public school for all of the academic year prior to their participation in this program, who is willing to help the State of Texas save money by accepting less than the average per-pupil maintenance and operations expenditure in the

³ John Merrifield, Ph.D. is a professor of economics at the University of Texas at San Antonio and director of the E.G. West Institute for Effective Schooling. He is the author of four books, including *The School Choice Wars*, *School Choices*, and *Parental Choice as an Education Reform Catalyst: Global Lessons*. Dr. Merrifield is editor of the *Journal of School Choice*. Dr. Merrifield has written 45 articles published in peer-reviewed journals and several book chapters in his primary teaching and research fields of education economics, urban and regional economics, environmental and natural resource economics, and public finance. He received his Ph.D. in economics from the University of Wyoming in 1984.

district in which they reside, may receive reimbursement from the state for tuition paid for enrollment of said child at a private school in the amount of actual tuition or sixty percent of the state average per-pupil maintenance and operations expenditure, whichever is less, and the gratitude of the State of Texas.

2. Within 45 days of the passage of this Act, the Comptroller shall adopt rules solely to effectuate reimbursement and prevent fraud in financial transactions under this program. Such rules shall include the method for counting Taxpayer Savings Grant students in the Foundation School Program and the consequent savings therefrom. No funds from the Available School Fund shall be used for Taxpayer Savings Grants.

An amended version of the bill was submitted in the Texas House of Representatives as HB 33 on June 7, 2011.

By reimbursing parents and legal guardians for “the amount of actual tuition costs or sixty percent of the state average per-pupil maintenance and operations expenditure, whichever is less,” the state expects to save money every time a child is moved from a public to a private school. The TSGP limits participation to the parents of a child who “resides in Texas and is entering kindergarten or attended a public school for all of the academic year prior to their participation in this program.” This means children who are already enrolled in private schools are not eligible for the tuition assistance.

Eligibility to participate in the program is not limited to students from low-income families, or who attend failing public schools, or to one or a certain number of cities or school districts. The proposal also does not rule out allowing parents to add their own money to the savings grant in cases when private-school tuition exceeds the amount of the grant.

2. Enrollment Projections

If the Taxpayer Savings Grant Program were implemented, how many students would switch from public to private schools? Prof. Merrifield and I addressed this question in depth in a policy brief jointly published in April 2011 by The Heartland Institute and the E.G. West Institute for Effective Schooling.⁴

On June 6, 2011, the Texas Legislative Budget Board (LBB) released a fiscal note on the TSGP bill.⁵ LBB’s report updated information on state average per-pupil M&O expenditures and reported the Comptroller’s Office has estimated its administrative costs to be \$4.8 million annually to implement the program, but took issue with other parts of our methodology. My

⁴ Merrifield and Bast, *supra* note 2.

⁵ Legislative Budget Board, Austin, Texas, “Fiscal Note, 82nd Legislature 1st Called Session – 2011,” June 6, 2011.

testimony today updates the original analysis conducted by Prof. Merrifield and me using LBB's new M&O estimate, and I will address the other methodological questions later.

Demand Side Response

Barry R. Chiswick and Stella Koutroumanes, in research published in 1996 and still regarded as seminal, used regression analysis to determine that a \$1 reduction in private school tuition in 1990 (the year of their data) increased the probability of choosing a private school by 0.0021 percent.⁶ Prof. Merrifield and I consulted with the authors and updated their formula using the Consumer Price Index to adjust for inflation, arriving at a new C&K coefficient of 0.00125.

The LBB put current average per-pupil M&O expenditures at \$8,801. The TSGP would offer parents a maximum grant of 60 percent of the per-pupil M&O amount, or \$5,281 or the cost of private-school tuition, whichever is less. Since average private-school tuition exceeds \$5,281,⁷ we assume nearly all parents would qualify for the maximum grant amount. Multiplying the C/K coefficient by the amount of the grant shows the TSGP would increase the probability of private school enrollment by 6.6 percent ($5,281 \times 0.0000125 = 0.0660$).

Supply Side Response

According to the U.S. Department of Education, private schools in Texas enrolled approximately 235,241 students in 2007-08. We estimate the Taxpayer Savings Grants Program would increase private school enrollment by approximately 300,000 in the first year and 350,000 in the second year. So private schools will need to more than double their capacity.

It is reasonable to wonder whether private school capacity would grow fast enough to accommodate so many students switching from public to private schools. We are confident this would occur for three reasons:

1. The "inputs" needed to expand existing schools or create new schools are plentiful.⁸

The private K-12 schooling sector constitutes a very small part of an education marketplace that

⁶ B.R. Chiswick and S. Koutroumanes, "An Econometric Analysis of the Demand for Private Schooling," *Research in Labor Economics*, Vol. 15 (1996), pp. 209-237. Since this article was published, Stella Koutroumanes has changed her name to Stella Hofrenning.

⁷ Enrollment -weighted average tuition for all private schools in the U.S. was \$8,549. U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2009*, Table 59. Adjusted for inflation, average tuition would be approximately \$9,030 in 2011-12.

⁸ This discussion is taken from Merrifield and Bast, *supra* note 2, pp. 11-14.

includes public pre-kindergarten and K-12 schools, public and private technical and business training, and public and private higher education.⁹ Therefore, even if they were to grow rapidly, private K-12 schools would have little effect on wages or rent.

The TSGP may not increase the total amount of schooling demanded, but merely reallocate the shares of the public and private sectors.¹⁰ Resources would be released from the public sector in amounts roughly equal to their acquisition by the private sector.

Introduction of competition and choice in the delivery of other public services has led to more efficient use of resources.¹¹ If education savings grants bring the same effect to schooling, the same number of children could be taught with fewer resources than are currently used, resulting in less demand and lower prices for those resources.

Charter school management companies have become very skillful in opening new schools. They have systems in place to recruit boards of directors, principals, and administrators; choose curriculum; find and renovate space; buy insurance; and register with government authorities.

2. The TSGP would generate sufficient revenue to fund rapid expansion.

The TSGP would bring approximately \$1.6 billion of new money to private schools in the first year and \$1.8 billion in the second year, a revenue flow sufficient to attract new investment making rapid expansion possible.

$(\$5,281 \times 350,000 = \$1.85 \text{ billion in the second year; } \times .85 \text{ in the first year (during scale-up) } = \$1.57 \text{ billion, 2 years total } = \$3.4 \text{ billion}).$

3. Capacity expanded to meet demand in cities with similar school choice programs.

Experience in other states and in the Edgewood School District in San Antonio demonstrates that private schools can increase their capacity quickly, certainly in the 15 months that would pass between enactment of the TSGP and the start of the second year. Neither Milwaukee nor Edgewood saw significant increases in tuition following adoption of scholarship programs.

⁹ See Chiswick and Koutroumanes, *supra* note 5, p. 217.

¹⁰ Increased expenditures for educational activities at home may increase the tendency to homeschool, which might reduce the demand for formal schooling, though homeschooling currently has a very small share (2 percent) of the market. But parochial schools have shown a superior ability to keep low-income students from dropping out, which would increase the number of students enrolled in schools by a similarly small amount.

¹¹ See Charles Wolf, Jr., *Markets or Governments: Choosing between Imperfect Alternatives* (Cambridge, MA: The MIT Press, 1988).

* * *

Because the rapid increase in demand for private schooling is unlikely to outpace that sector's ability to expand, we project tuition prices will rise by no more than 4 percent of the difference between average private school tuition and the amount of the education savings grant.

Real-World Experience

We tested Chiswick and Koutroumanes' estimate of the demand for school choice and our determination that school supply would expand sufficiently to meet the new demand against the real-world experience of two existing school choice programs. The first, the Milwaukee Parental Choice Program (MPCP), currently enrolls more than 20,000 students. Scholarships are capped at \$6,442, about 45 percent of per-pupil public spending for Milwaukee Public Schools (MPS).¹²

Prior to 1998-99, the cap on the number of choice scholarships and restrictions on schools eligible to participate in the program meant the rate at which parents chose to switch to private schools wasn't a reliable indicator of parental interest. In 1995, religious schools were allowed to enter the program, but court challenges to the program were not resolved until 1998. In the 1998-99 school year, enrollment jumped to 5,740, or approximately 5.75 percent of MPS enrollment. The following year, enrollment was 7,596, approximately 7.62 percent of MPS enrollment. By 2009-10, enrollment was 20,042, about 24.41 percent of MPS enrollment.¹³

A second real-world school choice program is the CEO Horizon Edgewood Tuition Voucher Program (ETV). From 1998 to 2008, that program provided privately funded vouchers to parents and guardians in the Edgewood, Texas school district to allow them to enroll their children in private schools. The tuition grant amount ranged from \$2,000 to \$4,700 and varied according to grade level and whether the school was inside or outside the Edgewood school district. To stay within the program's \$52.4 million budget, the 2004-05 to 2007-08 scholarship funding had to be confined to continuing scholarship users.¹⁴

In the first year of the ETV program, 770 students received scholarships, a number equal to 5.8 percent of enrollment in Edgewood public schools. In year two, participation rose to 888

¹² John Robert Warren, "Graduation Rates for Choice and Public School Students in Milwaukee, 2003-2009," School Choice Wisconsin, 2011, in "Sources" to introduction by Susan Mitchell, p. 1, <http://www.schoolreform-news.org/article/29370>.

¹³ MPS and MPCP enrollment from Wisconsin Department of Public Instruction, http://dpi.wi.gov/lbstat/mps_enr.html and <http://dpi.wi.gov/sms/geninfo.html> ("Overall Membership and Payment History"). Note that state estimates differ from numbers reported by the MPS and other sources, which use different methods that include or exclude charter schools, contract schools, part-time students, etc. We use the latest state statistics for both MPS and MPCP enrollments.

¹⁴ John Merrifield, Nathan Gray, Yong Bao, and Hiran Gunasekara, "An Evaluation of the CEO Horizon, 1998-2008 Edgewood Tuition Voucher Program," August 31, 2009, <http://www.schoolreform-news.org/article/29359>.

students, 6.8 percent of public school enrollment. Participation rose steadily to 15.9 percent in 2003-04, the year before scholarships stopped being offered to new students, and then gradually fell as the program was phased out.¹⁵

The second-year enrollment rate of 6.8 percent from the Edgewood ETV program multiplied by the number of public school students in Texas produces a projection of **341,340 students** using the TSGP to enroll in private schools.

The C&K coefficient of 6.6% multiplied by the total school-age population of Texas¹⁶ produces a projection of **346,826 participating students**.

The second -year enrollment rate of 7.62 percent from the Milwaukee program multiplied by the number of public school students in Texas produces a projection of **382,501 participating students**.

To summarize, we found that between 341,340 and 382,501 students would use the TSGP to enroll in private schools during the second year of the program. This represents an increase in private school enrollment of between 145 percent and 163 percent. Between 6.6 percent and 7.6 percent of students now in public schools would transfer to private schools.

What about Strategic Behavior?

The TSGP restricts eligibility to students entering kindergarten or first grade or who have been enrolled in a public school for an entire school year. Some parents might withdraw their children from private schools and put them in public schools for one year, only to move them *back* to private schools a year later in order to qualify for the grants. Can we forecast how many parents might engage in such strategic behavior?

Prof. Merrifield and I estimated that the *maximum* percentage of parents with children already in private schools who would engage in this sort of behavior would fall in the same range – 6.6 percent to 7.6 percent – as our estimate of the percentage of parents with children in public schools choosing to send their children to private schools. We arrived at this conclusion by asking: Is it likely that parents paying tuition to enroll their children in private schools are more or less sensitive to the price of tuition than parents with children in public schools? Common sense says the answer must be less, since by choosing to pay tuition at their current levels they have already signaled by their choice that the high price of choosing a private schools is not an obstacle to making that choice. Therefore, the TSGP enrollment rate found for parents with

¹⁵ Ibid.

¹⁶ The total population of K-12 students in Texas in 2011-12 is estimated to be 5,254,940 in 2011-12 (5,019,699 students attending public schools and 235,241 students attending private schools). This estimate is based on 2009-10 enrollment figures from the U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2009*, Table 15, citing Private School Universe Survey, 2007-2008, and updated by 2 percent a year for each of two years.

children in public school must be the highest estimate for the percentage of parents who might move their children from private to public schools for a year in order to take advantage of the TSGP later.

Our analysis shows strategic behavior could reduce savings to state taxpayers by no more than 10 percent. Our estimates of total enrollment change and its impact on the state budget take this strategic behavior into account.

3. Impact on the State's Budget

The TSGP allows parents and guardians of school-age children to apply for a grant equal to tuition at a private school or 60 percent of the state average per-pupil maintenance and operations (M&O) spending, whichever is less.

Per-pupil annual M&O expenditures of \$8,801 minus an average TSGP grant of 60 percent of this amount (\$5,281) equals \$3,520, the amount the state of Texas would save every time a student uses the TSGP to leave the public school system.

This calculation is easier than what appears in estimates of the net costs of some other types of choice programs because Texas has a Foundation School Program that equalizes per-pupil spending on M&O, whereas other costs such as interest and sinking fund are funded with local bonds and some state appropriations.¹⁷

The effect on a school district of a student transferring to a private school would be identical to the effect of a student transferring out of the school district. The effect on the state treasury would be a savings equal to the difference between the amount that would have been spent had the students remained in the public schools and the cost of the grants.

Combining this cost saving calculation with the enrollment estimates presented earlier creates three preliminary estimates of taxpayer savings under the TSGP *in its second year*:

Second-Year Savings

\$1,201,516	Assuming Edgewood ETV enrollment rate (6.8%)
\$1,220,827	Assuming C&K coefficient (6.6%) applied to all students
\$1,346,403	Assuming Milwaukee program enrollment rate (7.62%)

Enrollment and savings are likely to be less in the first year of the TSGP as parents learn about the program and new schools are started. Enrollment in the first year of the Edgewood program was 86.7 percent of second-year enrollment. *If the first year* of the TSGP is the same, then we can forecast the following savings to Texas taxpayers:

¹⁷ Texas Education Agency, Office of School Finance, *School Finance 101: Funding of Texas Public Schools*, April 2010, <http://www.clyde.esc14.net/users/0015/docs/TEA.pdf>.

First-Year Savings

\$1,041,714	Assuming Edgewood ETV enrollment rate (6.8%)
\$1,058,457	Assuming C&K coefficient (6.6%) applied to all students
\$1,167,331	Assuming Milwaukee program enrollment rate (7.62%)

Since the state of Texas operates under two-year budgets, it is useful to state the projected savings on a biennial basis:

Biennial Savings

\$2,243,230	Assuming Edgewood ETV enrollment rate (6.8%)
\$2,279,284	Assuming C&K coefficient (6.6%) applied to all students
\$2,513,734	Assuming Milwaukee program enrollment rate (7.62%)

In short, the state of Texas would save between \$2.2 billion and \$2.5 billion during the first two years of the TSGP.

A table on the last page of my testimony forecasts the budgetary effects of the TSGP for 12 years. It takes into account some small changes in enrollment and savings that the analysis I just presented doesn't, but the numbers I just reported are very close to what a more thorough analysis supports.

LLB Objections

The previously reported fiscal note by the Texas Legislative Budget Board (LBB) dramatically and without any justification lowered the projected enrollment changes from our estimates, assumed the state would lose federal funds for each student who moves to a private school, and claimed a delay in savings, combined with the state having to make savings grant payments to parents immediately, would result in a negative impact on the state during the first two years of the program.

I replied to the LBB with a report issued on June 8, and haven't yet received explanations for the low enrollment rate or removal of federal funds. Regarding the "delay in savings" problem, we understand a relatively easy legislative fix would be to expedite the "settle-up" process so savings appear in the same fiscal year as expenses. A version of the TSGP bill submitted after LBB issued its report authorized the Comptroller to adopt rules affecting payment schedules. Here is the language:

The Comptroller shall adjust payments in order to reconcile amounts due to all schools

within the same fiscal year, or one month after, so that savings accruing within the program are recovered and reallocated to the public schools in the same fiscal year.

3. Benefits to Students and Parents

Allowing parents to choose which schools their children attend is a powerful way to promote student achievement as well as reduce spending.¹⁸ Parents respond to school choice by becoming more involved in their children's education, which is strongly correlated improved academic success.¹⁹ Parents who are empowered by school choice – who know their concerns are being taken seriously, and who are welcome to participate in their schools' management – respond by becoming educational partners with teachers and administrators.

Students who attend schools of choice learn more, have higher attendance and graduation rates, and are more likely to go on to college. These benefits come about because the diversity in teaching methods and school management that choice allows closely reflects the diversity of learning styles and interests of students and parents.

School choice can also reduce spending. As Dr. Walberg wrote recently, "Schools that must compete with one another for students, funding, and teachers, even if that competition is muted and indirect, are less able to tolerate the waste and featherbedding that often accompany monopolies in a wide range of enterprises."²⁰

In 2010, voucher and scholarship tax credit programs operating in 12 states and the District of Columbia enrolled nearly 200,000 children.²¹ The oldest of these programs, operating in Milwaukee, was begun in 1990 and enrolls approximately 20,000 students. These programs have been carefully studied by many scholars, who find positive effects on academic achievement, retention, student and parent satisfaction, and other measures.

Dr. Walberg conducted a comprehensive survey of the literature on the effects of school choice for a book published in 2007.²² A table appearing in that book is reproduced below as Table 2.

¹⁸ See Herbert Walberg and Joseph Bast, *Education & Capitalism*, Hoover Institution, 2003.

¹⁹ Sam Redding, *Parents and Learning*, Geneva, Switzerland: International Bureau of Education, 2000, www.illinoisparents.org/pr/English/Booklets/Parents%20and%20Learning.pdf.

²⁰ Herbert J. Walberg, "Transformational Innovation in K-12 Education: Achieving More, Spending Less in Schools, Districts, and States," The Heartland Institute, 2011, pp. 7-8.

²¹ A. Campanella, M. Glenn, and L. Perry, *Hope for America's children: school choice year book 2010–11*, Alliance for School Choice, 2011.

²² Herbert J. Walberg, *School Choice: The Findings*, Washington, DC: Cato Institute, 2007.

Table 2.					
Sufficiency of the Evidence for Positive School Choice Effects					
Form of choice	Point-in-time academic achievement	Value-added over-time achievement gains	Cost efficiency	Parent satisfaction, citizens; favorable regard, or both	Social integration, citizenship, or both
Charter schools	Conclusive	Conclusive	Conclusive	Conclusive	Suggestive
Vouchers	Conclusive	Conclusive	Conclusive	Conclusive	Suggestive
Private schools	Conclusive	Suggestive	Conclusive	Conclusive	Conclusive
Competition	Conclusive	Suggestive	Suggestive	Conclusive	Suggestive

Source: Herbert Walberg, *School Choice: The Findings*, Cato Institute, 2007, Table 7-1, p. 108.

Commenting on this table, Dr. Walberg wrote: “The evidence supports every single one of the 20 possible choice effects, and the evidence is conclusive rather than suggestive for 14. It is statistically improbable that these overall results arose by chance. The results are about as consistent as can be found in the social sciences, and it thus seems clear that school choice works.”²³

What about School Segregation?

Concern has been expressed that school choice programs may segregate students on the basis of race, ethnicity, socio-economic status, or ability level.²⁴ This is an inflammatory claim that cannot be supported by an objective review of the literature.

School segregation occurs in public schools throughout the U.S. due to the current system’s reliance on geographic assignment of students to schools – sorting by ZIP code – and its tendency to create school systems with only a few readily observable differences among schools except student body composition. Having no other basis on which to select a school, parents choose based on convenience (often distance from home) and race and socio-economic status.

A system of schools having significant differences in school pedagogy and subject themes, such as what would likely emerge under the TSGP, would produce sorting based on parental insights into what kinds of schools are best for their children, which in turn could have desegregating effects. Understanding that school choice can lead to greater racial integration and other types of sorting that benefit children is the reason school choice programs were created in many parts of the country to achieve integration without busing. For example, in Cambridge, Massachusetts, schools are encouraged to differentiate themselves to achieve, through choice, improved racial

²³ Ibid., p. 107.

²⁴ See John Merrifield and Joseph Bast, “Taxpayer Savings Grants: Reply to Fuller,” *Policy Brief*, Heartland Institute and the E.G. West Institute for Effective Schooling, June 10, 2011.

balance.²⁵

The impact of school choice programs specifically on African-American students has been closely studied. Researchers from Harvard University, the RAND Corporation, and the Urban Institute all found positive effects on student achievement, even in cases where white students showed no improvement.²⁶ Dr. Walberg writes, “In conclusion, the fact that African-American students benefit disproportionately from education vouchers rebuts concerns that school choice would be injurious to minorities.”²⁷

What about New Regulations on Private Schools?

While political liberals tend to worry that allowing school choice would result in segregation, political conservatives tend to worry that school choice would result in more regulations on participating private schools, undermining the very things that make them so successful today. The fear that “vouchers lead to more regulation of private schools” is expressed by many people in the school reform movement, and must not be taken lightly.

The TSGP was designed with this concern in mind. Its design raises several barriers to increased regulation of participating schools:

- *Multiple authorities for accreditation:* Only students attending accredited private schools would qualify for the grants, but the authors were careful to specify that schools can be accredited by “any accrediting association recognized by the commissioner to accredit nongovernmental schools in this state.”
- *Regulatory authority placed in the hands of the state comptroller:* State government education agencies have an inherent conflict of interest that tends to bias them against private schools. The TSGP bill specifies the “comptroller, in coordination with the commissioner of education, shall adopt rules to implement the Taxpayer Savings Grant Program....”
- *Regulations restricted to implementation and fraud:* Choice legislation should not create any new basis for regulating private schools. The TSGP bill gives the comptroller (not the Texas Education Agency) authority to adopt rules to implement the program, “including rules to prevent fraud in financial transactions under the program and to determine the net savings resulting from implementation of the program.”

The State of Texas already has the power to regulate private schools heavily, with or without the

²⁵ For other examples, see Walberg, *supra* note 20, pp. 47-49, and footnotes numbered 27-35, appearing on pp. 116-117.

²⁶ See Walberg, *supra* note 20, pp. 40-42.

²⁷ *Ibid.*, p. 42.

“cash nexus” created by school vouchers. Religiously affiliated schools are protected by the First Amendment against federal or state regulations that would interfere with their freedom of religion. Other schools are protected from over-regulation by the vigilance of parents, teachers, and private school administrators. That will not change.

Additional concerns about the effect of the TSGP on the autonomy of private schools were raised in 2011, so we asked one of the nation’s leading authorities on the matter, Dick Komer, a senior attorney with the Institute for Justice, to weigh in on it. He addressed these concerns in some detail in a memorandum that appears in Appendix 1.

4. Benefits to Teachers

The TSGP would benefit teachers at least four ways, starting with increasing their average annual compensation by as much as \$12,000.

1. TSGP would increase teacher compensation.

The current organization of public schools allows school districts to adopt personnel policies affecting all of the schools inside the district’s borders. This eliminates most competition among schools for students and for personnel and weakens the ability of teachers to negotiate for higher pay. Since private schools can’t receive public funding, most of them cannot afford to pay teachers attractive salaries.

Under the TSGP, private schools could afford to compete with public schools for teachers, and as a result they would bid up teacher compensation. How much? Previous research conducted by Prof. Merrifield allows us to estimate the effect.

Using data from 118 school districts in 48 counties in Texas, Prof. Merrifield found the smaller each district’s share of the teachers within a 25-mile radius, the higher teachers were paid, with all other variables held constant.²⁸ That difference is the pay increase attributable to competition. By allowing individual private schools to compete with public school districts for teachers and other staff, the bargaining power of the public school districts would decline, resulting in teacher raises ranging from \$2,173 in rural districts to as much as \$12,000 in a large urban district such as Houston.²⁹

2. TSGP would improve working conditions for teachers.

²⁸ See the literature review in John Merrifield, “Monopsony Power in the Market for Teachers,” *Journal of Labor Research*, Vol. 20, No. 3 (Summer 1999), pp. 377–91.

²⁹ Merrifield’s calculation cited on p. 5 of Bast, Walberg, and Behrend, *supra* note 2. Much of this discussion of how teachers would benefit under a TSGP is taken from that report.

Schools that compete for students *and teachers* have strong incentives to create a positive working environment for teachers. Schools that don't compete can tolerate lax security and unsafe conditions in classrooms and on school grounds.

How much better are working conditions for teachers in private schools than in public schools? A survey of teachers conducted by the U.S. Department of Education revealed private schools have dramatically better working conditions than public schools.³⁰ For example, one in five public school teachers reported being physically threatened in the previous year, versus only one in twenty private school teachers. One in eight public school teachers reported physical conflicts with students every day, while only one in 50 private school teachers reported such frequent conflicts.

Public school teachers are almost three times as likely as private school teachers to say they will retire as soon as they are eligible (33 percent versus 12 percent). Nearly twice as many public school teachers as private school teachers say they would leave immediately if they could find a higher paying job (20 percent versus 12 percent).

In light of these differences in the experiences and opinions of public and private school teachers, it is hardly surprising that private school teachers are much happier with their teaching careers and plan to stay in the classroom longer than their public school counterparts.

3. TSGP would result in more money spent in the classroom.

Lack of competition leads to waste and inefficiency in every activity or industry, and K-12 education is not an exception. By encouraging schools to compete, TSGP would reward schools that minimize their spending on bureaucracy and overhead and devote more resources to supporting classroom teachers.

Texas spent \$47.8 billion on K-12 schools in 2007-08, but less than half that amount – \$23.3 billion – was spent on instruction.³¹ The number of nonteaching staff in Texas is nearly the same as the number of teaching staff – 316,392 versus 327,905.³² This is evidence of too much bureaucracy.

Private schools report spending more of their budgets – about 72 percent according to one study

³⁰ U.S. Department of Education, National Center for Education Statistics, "Schools and Staffing Survey (SASS)," <http://nces.ed.gov/surveys/sass/>, last visited February 16, 2011.

³¹ U.S. Department of Education, National Center for Education Statistics, "State Education Data Profiles," <http://nces.ed.gov/programs/stateprofiles/sresult.asp?mode=short&s1=48>, last visited February 16, 2011.

³² U.S. Department of Education, National Center for Education Statistics, *Common Core of Data (CCD), State Nonfiscal Survey of Public Elementary/Secondary Education, 1986-87 v.1c, 2008-09 v.1c*.

– on classroom instruction than do public schools, which rarely get above 60 percent.³³ For a state the size of Texas, that means billions of dollars more would go to teachers under the TSGP.

Another reason school choice would mean more money in classrooms is because schools in a competitive education industry would not have externally imposed budget caps. Classroom achievements that please parents would increase enrollments and budgets, thereby raising teachers' market value.

Under the current public school financing system, one school's or one teacher's gain comes at the expense of a different school or teacher. Under a school choice program that allows parents to add to the amount of their grants, as the TSGP does, the pie grows as parents are satisfied and are willing to invest more in a service they like.

Teachers, along with students, parents, and taxpayers, would benefit if a school choice program were to *change the incentives* of school administrators so some of the money now going to bureaucracy and nonteaching personnel went to teachers instead. This is already happening in private schools, where money is scarce and competition is keen. Teachers should support school choice because they stand to reap big rewards from the efficiency gains choice is likely to bring about.

4. Better matching of teachers, students, and parents.

We know children learn differently, parents look for different things in the schools they want for their children, and teachers have different strengths and weaknesses. So why do we have a school system that assigns children to schools based on where their parents live, rather than which schools are best for them?

Why do we require parents with very different views on what would be best for their children to nevertheless to send their children to "one size fits all" schools? And why should teachers be assigned to schools based on seniority or labor contracts rather than being encouraged to seek out (or even start) schools that are a "good fit" for their teaching style?

The TSGP would allow parents to choose the schools their children attend, bringing together teachers, students, and parents who want to learn together, rather than being thrown together by an educationally irrelevant variable such as their ZIP codes.

* * *

In conclusion, the TSGP would not hurt public school teachers. It would help them by making schools compete to hire them, leading to higher pay and better working conditions, less bureaucracy, and a better matching of teachers, students, and parents.

³³ Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, *Goldwater Institute Policy Report #213*, October 17, 2006.

5. Using the TSGP to Make Texas Public Schools More Efficient

The State of Texas is being sued by several groups of plaintiffs alleging it has failed to create “an efficient system of public free schools” as required by Article VII, Section 1 of the state’s constitution. I have read the plaintiffs’ petitions, in which school districts and others deplore a financing system that relies on out-of-date information on revenues and enrollment to allocate funds and combines “hold harmless” provisions with “Robin Hood” provisions in ways that ensure only the Texas Education Agency’s computers can determine the actual impact on a given school district of a change in state policies.

I agree in particular with this statement in the petition submitted by the Fort Bend Independent School District et al.,

The State must do what Texas courts have repeatedly and consistently said it must do: make fundamental, structural and lasting changes to ensure a state funding system that adequately and equitably funds public schools to the high standards established by both the Texas Constitution and the Texas Legislature without depriving local school districts of meaningful discretion over local property tax rates.

But the plaintiffs also make it clear that, short of the kind of structural reforms made by the Taxpayer Savings Grant Program, there can be no sustainable solution to the problems they describe.

Spending Adequacy

Most petitioners complain the state doesn’t send enough money to the school districts to meet their financial needs. Of course this is not a new concern, or one that is unique to Texas. But it is the wrong area on which to focus.

Total spending by all levels of government in Texas on public schools in 2008-09 was \$54.7 billion and total enrollment that year was 4,728,204, so average per-student annual spending that year was \$11,567.³⁴

Per-student spending on “free” public schools in Texas exceeds the average cost of private school tuition nationwide by about 26 percent, as shown in Table 3. National enrollment-weighted average private school tuition in 2008-09 was \$8,549. Tuition at Catholic and other religious schools was much lower than the average, and there is some evidence that tuition in Texas tends to be below the national average.

Critics of this sort of comparison say private school tuition doesn’t include charitable

³⁴ Texas State Comptroller, *Financial Allocation Study for Texas (FAST)*, Part 1, Exhibit 4, <http://www.fastexas.org/study/exec/exhibits/ex4.php>.

contributions and other sources of revenue, or adequately cover depreciation and other expenses needing to be paid in order for a school to be sustainable. But public school spending figures considerably understate true per-pupil spending by leaving out many expenses.³⁵ In the end, most experts agree private schools spend, on average, less than public schools and achieve superior results.

Table 3 Average Private School Tuition and Public School Per-Pupil Spending in Texas	
Type of School	Average Tuition/Spending
Elementary parochial schools (Texas)	\$3,983
Elementary independent schools (National)	\$15,945
Secondary parochial schools (Texas)	\$6,615
Secondary independent schools (National)	\$27,302
Enrollment-weighted for all private schools (National, 2008-09)	\$8,549
Public school per-pupil total spending (Texas, 2008-09)	\$11,567
<i>Sources:</i> Average tuition for parochial schools provided to the authors on March 8, 2011 by the Archdiocese of San Antonio; independent school tuition is U.S. national average from U.S. Department of Education, National Center for Education Statistics, <i>Digest of Education Statistics, 2009</i> , Table 59. Public school spending estimate is for 2008-09, from Texas Education Agency, <i>2009-10 Texas Public School Statistics, Pocket Edition</i> , http://ritter.tea.state.tx.us/perfreport/pocked/2010/pocked0910.pdf .	

The plaintiffs and the legislature need to confront the fact that many private schools produce a high-quality product spending much less than public schools currently spend. This is *prima facie* evidence that the problem with Texas’s school system is not one of inadequate funding, but misuse of available funds.

By allowing parents to choose higher-performing but lower-cost private schools for their children, the TSGP improves the quality of education while reducing state spending. It is perhaps the only structural reform that would allow the state to fulfill its duty to maintain an “efficient system of public free schools” without increasing taxes and spending.

On this point, the Texas Supreme Court seems ahead of the plaintiffs and the legislature. It held in 1995 that “money is not the only issue, nor is more money the only solution” to the state’s educational problems (*Edgewood IV*) and in 2005 that “improvements in education ... could be realized by eliminating gross wastes in the bureaucratic administration of the system” (*West Orange-Cove II*).

Administration and Bureaucratic Waste

³⁵ See Adam B. Schaeffer, “They Spend WHAT? The Real Cost of Public Schools,” *Policy Analysis* No. 662, Cato Institute, March 10, 2010, http://www.cato.org/pub_display.php?pub_id=11432.

As I reported earlier, less than half of what Texas spent on K-12 schools in 2007-08 actually went to instruction. The number of nonteaching staff in Texas is nearly the same as the number of teaching staff. A much higher percentage of spending by private schools finds its way into classrooms.

Inefficiency and bureaucracy are natural consequences of systems that aren't exposed to competition and consumer choice.³⁶ They are clumsy, expensive, and often ineffective substitutes for the natural processes in markets that otherwise reward responsible innovation and punish failure and laziness. Inefficiency is the result of resources – in this case, taxpayers dollars along with teachers and school buildings – remaining in the hands of people who aren't effectively managing them, rather than moving through purchase or even bankruptcy proceedings into the hands of those better able to meet the demands of consumers.

There is no line-item in a public school district's budget titled "waste" or "fraud." Instead, activities are undertaken and contracts signed that would not be approved if the district faced tough competition for students and funding from another school district nearby. The pressure to hold down costs is even more acute when individual schools compete, and when the marketplace is open to new entrants not bound by old ways of doing things.³⁷ Every line-item in a budget is then scrutinized to see if it helps or hurts the school's ability to attract and retain students.

The TSGP would create that kind of competition, and consequently would create the incentives needed to identify and eliminate "waste" and "fraud" from public school budgets, and from private school budgets as well. It would add only a trivial amount to the administrative expenses of the state – \$4.8 million a year, according to the Comptroller. This is less than 1 percent of the projected *savings* the program would create.

Accountability

Part of "efficiency" is ensuring that a quality service is delivered. The TSGP requires that participating schools be accredited, but experience suggests this won't satisfy critics who believe school choice cannot achieve the level of "accountability" that the myriad public laws and massive bureaucracies of the public sector have achieved. But this is profoundly anti-parent and is simply wrong.

Perhaps the strongest argument for overhauling K-12 funding and governance is that the supposed accountability of traditional public schools to taxpayers and more generally to the American people is a myth. The accountability that critics of choice fear losing has created a level of dysfunction and plummeting productivity "that threatens our very future as a Nation and

³⁶ James Q. Wilson, *Bureaucracy: What Government Agencies Do And Why They Do It*, Basic Books, 1991.

³⁷ John Merrifield, *The School Choice Wars*, R&L Communication, 2001.

a people.”³⁸ As more and more is spent, achieving virtually unchanged levels of utterly unacceptable measured performance, mounting anecdotal evidence points to plummeting levels of performance in the untested subjects.

Public education in America today is a system in crisis. It fails to graduate a quarter of the children it is supposed to serve; it fails to recruit, frustrates, or outright rejects talented people who would be great teachers and administrators; it produces test scores that put the U.S. behind most of the developed countries of the world; and it does all this while burning through taxpayer dollars at an unsustainable pace.

Against this background of public-sector “accountability,” the real accountability created by parental choice in education looks promising indeed. In a competitive education marketplace, schools that fail to satisfy parents *go out of business*, something so rare in the public sector that it generates headlines whenever it happens. In such a marketplace, teachers who are good *get paid more*, also something unheard of in public schools. Bad teachers *lose their jobs*, whereas in many public school systems they simply get transferred from one school to another, the infamous “dance of the lemons.”³⁹

Constitutionality

Regarding the constitutionality of school choice in Texas, the U.S. Supreme Court ruled in *Zelman v. Simmons-Harris* (2002) that tuition support for parents choosing private schools was constitutional even when the schools they chose were run by religious orders. The Texas Supreme Court ruled in *Edgewater IV* (1995) that the issue of whether to provide education either in whole or in part through a system of school choice was a question for the Legislature rather than the courts.

The *Zelman* opinion may be viewed at <https://supreme.justia.com/cases/federal/us/536/639/case.html>, An essay by Allen E. Parker on the constitutionality of school choice in Texas appears in Appendix 2.

TSGP: A Long-Term Solution

Why not entertain a reform proposal that changes the way educational services are delivered in Texas, from a public-sector monopoly where competition is forbidden, parents are ignored,

³⁸ National Commission on Excellence in Education, *A Nation at Risk*, Washington, DC: U.S. Department of Education, 1983, p. 5.

³⁹ Peter Schweizer, “The Dance of the Lemons,” *Hoover Digest*, Hoover Institution, January 30, 1999. For more about how public schools mistreat good teachers and tolerate bad ones, and how this would not be tolerated in a competitive education marketplace, see Joseph L. Bast, Herbert J. Walberg, and Bruno Behrend, “How Teachers in Texas Would Benefit from Expanding School Choice,” *Heartland Policy Brief*, The Heartland Institute, April 2011.

quality lags, and costs soar, to a dynamic marketplace where education service providers compete by satisfying parents and delivering high-quality services?

The Taxpayer Savings Grant Program is the pathway to that second vision.

The TSGP would save taxpayers billions of dollars in its early years, while expanding parental choice and benefitting students and teachers. It is also a long-term solution to the problems Texas faces in educating a growing population of multicultural and low-income students. We project taxpayer savings over the course of 12 years of \$31.0 billion. (See Table 4 in Appendix 3.) With slightly more optimistic assumptions about enrollment and the size of the grants issued, the state could see much larger savings over the course of 12 years.

Conclusion

The Taxpayer Savings Grant Program would reimburse parents and legal guardians for “the amount of actual tuition costs or sixty percent of the state average per-pupil maintenance and operations expenditure, whichever is less.”

Between 341,340 and 382,501 students would use the TSGP to enroll in private schools during the second year of the program. Private school enrollment would more than double, while between 6.6 percent and 7.6 percent of students now in public schools would transfer to private schools.

Taxpayers would save approximately \$2 billion in the first biennium following passage of the law. Students would benefit, as other school choice programs around the country have demonstrated how choice improves student achievement, retention, and other outcomes. Parents and teachers will be happier.

The Taxpayer Savings Grant Program would solve the problems identified by plaintiffs in the court case pending against the state by using markets to make the state’s school system more efficient, by *reducing* the cost of education while *increasing* its quality.

School choice is not a radical or new idea. It is being used by some 20 states and cities across the country to solve problems similar to those Texas is experiencing. A successful experiment with school choice took place right here in Texas, in the Edgewood school district, proving this is an idea that can work for Texas’s unique mixture of students.

Prof. Merrifield, my other coauthors, and I stand ready to provide you with additional research and commentary on the Taxpayer Savings Grant Program. Thank you again for inviting me here to testify today, and I am willing to answer any questions you may have.

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Appendix 1.

Do vouchers threaten private school freedom?

Dick Komer, Senior Attorney, Institute for Justice

June 16, 2011

I have worked at the Institute for Justice for the past 18 years, mostly part-time, almost exclusively in the area of school choice, but perhaps more importantly, prior to working at IJ I was a career civil rights attorney for the federal government. My final position, however, was not a career job, but a political one as Deputy Assistant Secretary for Civil Rights at the U.S. Department of Education. That previous incarnation ended with the commencement of the Clinton Administration.

I was the number two person at the Office for Civil Rights, which enforces the federal civil rights laws that educational recipients of federal funds become subject to when they accept federal financial assistance. I realize that this is a pretty unusual background for a lawyer at a libertarian law firm like IJ, but it does mean I am more familiar with federal civil rights laws than the average bear. [No doubt this background may make me suspect in the eyes of folks who don't trust the federal government, but quite frankly it actually means that I have a more solid basis for distrusting it than other people ever will.]

In any case, I have some modest familiarity with both federal civil rights law and school choice programs. It is not like IJ is a newcomer to school choice; we have been involved one way or another in the creation and/or defense of every school choice program enacted since 1990. And it is not like the question of federal regulations has never come up before. So let's start at the beginning.

Recent History of Concerns about Federal Intrusion

It appears that some observers have concluded that private schools that participate in school choice programs (or perhaps only the program contemplated by the Texas legislation) would be subject to the federal Individuals with Disabilities Education Act (IDEA) and have to provide a free and appropriate education to any students receiving a voucher. Under the current interpretation as I understand it this is simply mistaken. (If I am the one mistaken, then it is because the original interpretation has changed, because I am the source of the original interpretation.)

This question arose in 1990 when the original Milwaukee program was passed (the Milwaukee Parental Choice Program or MPCP). The Wisconsin Superintendent of Public Instruction, Herbert Grover, was charged by the legislation with administering the MPCP, but was a stout opponent of the Program. He issued proposed regulations or instructions to the potential participating schools stating that they would be subject to all the same requirements that federal

civil rights law, including the IDEA, imposed on public schools. This led the backers of the Program to get Senator Kasten to request an evaluation of that position from the U.S. Department of Education. The Department agreed to do so, and a task force was put together to answer the question.

The task force included members from the Office for Civil Rights (OCR), which enforces Title VI, Title IX, and Section 504, the Office of Special Education and Rehabilitative Services (OSERS), which administers the IDEA, and the Office of General Counsel (OGC), the Department's lawyers. The Deputy Secretary of Education who created the task force appointed the Deputy Assistant Secretary for Policy of the Office for Civil Rights to head it. That was me.

Voucher-Receiving Schools Still Private Schools

I prepared a memorandum concluding that no federal funds were used for the Program and that any participating schools were thus not recipients of federal financial assistance directly subject to the laws enforced by OCR. That memo also concluded that the schools remained private schools, and that the children were "parentally-placed private school students" under the IDEA, which meant that they were not entitled to a free and appropriate public education in their private schools.

Although I authored the memo, its conclusions were concurred in by OSERS and OGC, so its conclusions represented the official position not just of OCR but of the department as a whole. This report was sent to Senator Kasten by the Deputy Secretary as the Department's response, was filed by the defendants attorneys with the trial court, which accepted the conclusions and held that the private schools remained private schools if their students received vouchers and the kids were considered private school students for IDEA purposes. The Wisconsin Supreme Court ultimately adopted this position in its decision on final appeal in *Davis v. Grover*, upholding the constitutionality of the Program.

While I as an official of OCR had no authority to issue official interpretations of the IDEA, because that was OSERS job, the Assistant Secretary of Education, whose job it was to interpret the IDEA, and the General Counsel of the Department, whose job it was to review legal interpretations, concurred in my report, as did my boss, the Assistant Secretary for Civil Rights, as to those provisions OCR enforces.

Voucher Recipients Not Public School Students

The issue of how the IDEA applies to voucher programs arose again after Florida passed its McKay voucher program, which, as you know, is limited to children with disabilities, meaning that they are eligible for IEPs if enrolled in public schools. The question was again asked of OCR whether such students should be considered as public school students because they receive vouchers and the answer was again given that they were not, and that they were classified the same as if their parents placed them in private schools with their own money exclusively.

Consequently, unless there has been a more recent interpretation changing this conclusion of which I am not aware, when a parent uses a state-provided voucher to place his or her child in a private school that student is treated the same as when a wealthy parent does so using his or her own funds. The full panoply of Free Appropriate Public Education services and procedures do not apply to such students in private school, although of course they would apply anew if the student returned to public school.

On State Regulation of Private Schools

On the broader question of states actually imposing regulation on schools participating in school choice programs, I would note that to properly understand this issue one needs to know what sort of regulation any given state has already imposed on private schools. This varies considerably from state to state.

There is unquestionably a tendency for states to impose additional regulatory burdens on private schools whose students receive various forms of state aid, but what is rarely understood is that states can impose substantial regulatory burdens on private schools in the absence of any form of state assistance to the private schools' students and some states do. They do this on the basis of the state's interest in a well-educated citizenry, the same interest that justifies the compulsory education laws every state imposes. While the U.S. Supreme Court's decision in *Pierce v. Society of Sisters* from 1925 is rightly viewed as upholding the Constitutional right of parents to use private schools, that decision also spoke of the legitimate interest of the state in regulating the education received in those private schools.

Voucher programs vary dramatically in the extent of additional regulation they impose on private schools, and as libertarians we at IJ prefer less rather than more such regulation. But the MPCP itself imposes very significant regulations on the private schools, and such regulation was recently increased when the Democrats dominated all parts of the legislative process there. We expect that some of the increase will be rolled back now that the Democrats' political monopoly has been broken, but this history demonstrates the need for constant vigilance. But as a matter of comparison, the new Indiana program imposes far less intrusive regulation than the MPCP or the Cleveland Program upheld by the U.S. Supreme Court in *Zelman v. Simmons-Harris* in 2002 do. This is where the importance of current regulation comes in.

State Tests in Private Schools

The large majority of private schools in Indiana were required to administer the state tests (known as ISTEP) to their students long before the new voucher program was enacted. Indiana has long provided free transportation to private school students but as a condition for participating the private schools had to administer ISTEP. This was also the case in Cleveland, Ohio, when virtually all the private schools participating in the voucher program there were already required to administer the state tests. So, except for a relative handful of private schools in Indiana, the requirement to administer ISTEP duplicates a pre-existing requirement they are

already complying with. And we strongly suspect that as occurred with the Catholic schools in Cleveland, the performance of their students on the state tests will become one of their strongest selling points with the public at large. The Cleveland Catholic and Lutheran schools, which formed a large majority of the schools in the Cleveland Program, had been out-performing the local public schools on the state tests for years before enactment of the Program there, and local parents were well aware of that fact.

While we do not advocate for imposition of the state testing regime on private schools participating in voucher programs, we do believe that not all state tests are the same and a hideous danger to private schools' independence. Given the generally weak nature of these tests, due in part to the motivation of public schools not to look bad, students at private schools with decent academic programs will usually do just fine on the state tests. Again, our preference as libertarians is for as little state regulation as possible, and we believe the best form of accountability is to make schools accountable directly to the parents. But the political realities are that sometimes some regulation must be accepted, and so far we have not seen much evidence that what regulation has been imposed has devastated private education.

There can be no doubt that an administration as anti-voucher as the Obama Administration has proved itself to be could reverse the long-standing interpretation I have described above, and it's also possible a reversal happened already when I wasn't looking. But to the best of my knowledge, students placed by their parents in private school do not subject those schools to the IDEA as if they were public schools. Private schools are subject to some or all of the Americans with Disabilities Act, although religious schools get various exemptions, but that Act applies regardless of whether a private school or its students participate in public aid programs.

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Appendix 2.

Texas Taxpayer Savings Grants, Courts, and the Constitution

by Allan E. Parker, J.D.
President of The Justice Foundation

The Texas Supreme Court

In *Edgewood IV*, the Texas Supreme court held that the issue of whether to provide education either in whole or in part through a system of school choice was a question for the Legislature rather than the courts, 893 S.W.2d 450, 463 (Tex. 1995). At the same time, the Court cast light upon its view of school choice if it were to be adopted by the Legislature. It appears certain that a system of school choice would be constitutional in Texas.

In 1995, the court majority (eight Justices) went to great lengths to say that education does not have to be provided solely by the State to be considered a valid means of education under the Texas Constitution:

In Senate Bill 7, the Legislature fulfills its mandate to provide a general diffusion of knowledge by establishing a regime administered by the State Board of Education. The [Texas] Constitution *does not require*, however, that the State Board of Education *or any state agency* fulfill this duty. As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by *any other means*. (emphasis supplied) (footnote 8, per Cornyn)

Finally, the Court has expressed its great desire on numerous occasions to defer to the Legislature in determining the method of establishing a suitable system. In fact, that was the reason for denying school choice as a *judicially imposed remedy*, (per Cornyn, citing *Edgewood I.*, *Edgewood II*) (See also *Mumme v. Marrs*, 40 S.W.2d 31, 35 (Tex. 1931) and *Love v. City of Dallas*, 40 S.W.2d 20 (Tex. 1931), but it would be acceptable if the Legislature adopted it.

The above analysis is consistent with a conservative judicial philosophy which would not impose a judicial remedy upon the Legislature but which would clearly uphold a school choice remedy voluntarily adopted by the Legislature as a legitimate means of financing public education.

After this decision in 1995, the Texas Senate adopted a pilot school choice program for twenty districts, but it was defeated in the House. In 1997, a pilot program for school choice for children in low performing schools was defeated in the Texas House on a 68-68 tie.

The U.S. Supreme Court

The U.S. Supreme Court has clearly established the constitutionality of school choice plans that include public benefits which the individual beneficiary may freely choose to use at religious schools. *Zelman v. Harris Simmons*, 536 U.S. 639 (2002).

Other cases upholding a school choice-type benefit include:

1. Financial assistance to students attending religious colleges, like Texas Tuition Equalization Grant Program: *Americans United for Separation of Church & State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. 1977) aff'd, 4 U.S. 803 (1977)
2. Tax credits to attend private school: *Mueller v. Allen* 463 U.S. 388 (1983)
3. Vocational rehabilitation tuition to attend a religious seminary: *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986).
4. Deaf interpreter at public expense even saying Lord's Prayer for student at Catholic school: *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2642 (1993).
5. Student groups cannot be denied equal access to student activity funds because they are Christians: *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995)
6. Government can provide neutral reading support even on religious school campus: *Agostini v. Felton*, 117 S.Ct. 1997 (1997).

Test for Constitutionality

School choice programs must meet four tests to survive constitutionality challenges:

- A. The financial assistance is available to a broad class of individuals defined without regard to religion.
- B. The benefit is intended for a public purpose, i.e. an educated citizenry. Saving taxpayers' money is also a secular purpose.
- C. The decision to attend a religious school is entirely voluntary, and thus religious schools are only indirect beneficiaries. No money goes to private schools directly, only if individuals voluntarily choose such schools.
- D. No financial incentives are created to attend private over public schools, nor are benefits limited to private school students, as was the case in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

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Appendix 3.

Table 4
Enrollment Changes and Taxpayer Savings:
Assuming Milwaukee Pick Up Rate and \$5,281 Savings Grant

Year	Year 1 2011-2012	Year 2 2012-2013	Year 3 2013-2014	Year 4 2014-2015	Year 5 2015-2016	Year 6 2016-2017	Year 7 2017-2018	Year 8 2018-2019	Year 9 2019-2020	Year 10 2020-2021	Year 11 2021-2022	Year 12 2022-2023
Migration of Students from Private to Public Schools												
% of private school students moving to public schools	5.7%	6.6%	8%	9.5%	11%	14%	16%	18%	20%	22%	24%	25%
# of private school students moving to public schools	13,503	2,023	3,293	3,529	3,529	7,057	4,705	4,705	4,705	4,705	4,705	2,352
# of private school students now eligible for savings grants	0	13,503	15,526	18,819	22,348	25,877	32,934	35,615	37,027	38,203	39,379	37,027
Public school cost, new private school students	\$115,746,288	\$88,650,242	\$110,223,112	\$129,631,905	\$148,266,521	\$197,148,425	\$214,252,798	\$228,415,106	\$235,868,952	\$242,080,491	\$248,292,030	\$215,704,094
Migration of Students from Public to Private Schools												
% of public school students moving to private schools	5.7%	6.6%	8%	9.5%	11%	14%	16%	18%	20%	22%	24%	25%
# of public school students moving to private schools	301,634	346,826	420,395	499,219	578,043	735,692	840,790	945,889	1,050,988	1,156,087	1,261,186	1,313,735
Public school cost, savings grants	\$1,592,926,809	\$1,831,588,317	\$2,220,107,051	\$2,636,377,123	\$3,052,647,195	\$3,885,187,340	\$4,440,214,102	\$4,995,240,865	\$5,550,267,628	\$6,105,294,391	\$6,660,321,154	\$6,937,834,535
Public school gross savings	\$2,654,676,926	\$3,052,415,978	\$3,699,898,155	\$4,393,629,059	\$5,087,359,963	\$6,474,821,772	\$7,399,796,310	\$8,324,770,849	\$9,249,745,388	\$10,174,719,927	\$11,099,694,466	\$11,562,181,735
Net savings	\$946,003,829	\$1,132,177,419	\$1,369,567,992	\$1,627,620,031	\$1,886,446,247	\$2,392,486,007	\$2,745,329,410	\$3,101,114,878	\$3,463,608,808	\$3,827,345,045	\$4,191,081,282	\$4,408,643,106
Cumulative savings	\$946,003,829	\$2,078,181,249	\$3,447,749,241	\$5,075,369,272	\$6,961,815,518	\$9,354,301,525	\$12,099,630,935	\$15,200,745,813	\$18,664,354,621	\$22,491,699,666	\$26,682,780,949	\$31,091,424,055
Notes: Students who migrate from private to public schools in the first year become eligible for savings grants in the second year, so in the second year they impose only the cost of the grant, \$5,143. After six years, approximately the same number of these students graduate/leave the public system as enter it, so the cost plateaus in the seventh year.												