TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00062-CV

Mike Morath, in his Official Capacity as Commissioner of Education and/or his Successor, Appellant[1]

v.

La Marque Independent School District; Nakisha Paul, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Dr. Edna Courville, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Dr. Richard Hooker, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Edward Crawford, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; and Terry Pettijohn, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-15-005833, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Mike Morath, in his Official Capacity as Commissioner of Education (the Commissioner) appeals from the trial court's order denying his plea to the jurisdiction. La Marque

[1] Michael Williams was the Commissioner of Education when the underlying suit was filed. Williams's successor, Mike Morath, has been automatically substituted as a party. *See* Tex. R. App. P. 7.2(a).

Independent School District and its trustees, Nakisha Paul, Edna Courville, Richard Hooker, Edward Crawford, and Terry Pettijohn (collectively the District), sued the Commissioner challenging his revocation of the District's accreditation status; alleging ultra vires, contract, and constitutional claims; and seeking temporary and permanent injunctions enjoining the Commissioner from closing the district and annexing it to Texas City Independent School District. The Commissioner filed a plea to the jurisdiction asserting sovereign immunity.[2] In separate orders, the trial court denied both the District's request for temporary injunction and the Commissioner's plea to the jurisdiction. For the reasons that follow, we reverse the trial court's order denying the Commissioner's plea to the jurisdiction and dismiss the District's claims for lack of subject matter jurisdiction.[3]

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[2] The District initially filed suit in Galveston County and sought a temporary restraining order. After the trial court denied the District's request for a temporary restraining order, the case was transferred to Travis County by agreement of the parties, the Commissioner filed his plea to the jurisdiction, and the request for temporary injunction and plea were set for hearing.

[3] In a separate appeal, the trustees challenged the trial court's order denying their request for a temporary injunction. In our opinion issued this same day in cause number 03-16-00052-CV, Nakisha Paul, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Dr. Edna Courville, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Dr. Richard Hooker, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; Edward Crawford, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District; and Terry Pettijohn, Individually and as an elected Board Member of the La Marque Independent School District Board of Trustees and as a resident and taxpayer of the La Marque Independent School District, v. Mike Morath, in his Official Capacity as Commissioner of Education and/or his Successor, we vacate the trial court's order denying the request for temporary injunction and dismiss.

BACKGROUND

School District Accreditation

Because the District challenges the Commissioner's revocation of its accreditation and his actions to close and annex the District, we begin with an overview of school district accreditation. The Commissioner is required annually to determine the accreditation status of each school district in Texas. Tex. Educ. Code § 39.052(a); 19 Tex. Admin. Code § 97.1055(a)(1) (Texas Education Agency, Accreditation Status).[4] A district's accreditation rating is composed of two components, academic and financial. Tex. Educ. Code § 39.052(b). Academic standards are statutorily established, and financial standards are established by Texas Education Agency (TEA) rules. *See id.* §§ 39.053 (setting out academic performance standards), .082 (requiring Commissioner to develop and use uniform system with indicators and point system to assess financial rating for accreditation); 19 Tex. Admin. Code § 109.1001 (Financial Accountability Ratings). The Commissioner has adopted the Financial Integrity Ratings System of Texas (FIRST) to assess financial ratings for accreditation. *See* 19 Tex. Admin. Code § 109.1001(a)(4). FIRST requires school districts to provide copies of their annual audit reports to TEA no later than 150 days after the close of the district's financial year. Tex. Educ. Code § 44.008; 19 Tex. Admin. Code § 109.1001(d)(1). Districts must also self-report financial data through the Public Education Information Management System (PEIMS). 19 Tex. Admin. Code § 109.1001(a)(7), (d)(2). TEA uses this data in calculating the financial accountability indicators for districts. *See id.*

[4] All cites to Title 19 of the Texas Administrative Code are to rules promulgated by the Texas Education Agency.

§ 109.1001(d)(1), (2), (e) (setting out indicators established by Commissioner). In 2013, the legislature directed TEA to amend its rules implementing financial accreditation ratings by March 1, 2015, to add financial solvency indicators to the accreditation rating system. *See* Act of May 26, 2013, 83d Leg., R.S. ch. 211, § 49, 2013 Tex. Sess. Law Serv. 899, 927–28 (codified at Tex. Educ. Code § 39.082). TEA promulgated amended rules that went into effect on August 6, 2015. *See* 40 Tex. Reg. 2724 (2015), *adopted* 40 Tex. Reg. 4877 (2015) (codified at 19 Tex. Admin. Code § 109.1001).

Based on a district's performance under the academic and financial components, the Commissioner shall either assign the district an accreditation status or revoke the accreditation and order closure of the district. Tex. Educ. Code § 39.052(c); 19 Tex. Admin. Code § 97.1055(a)(1), (2). The accreditation ratings are Accredited, Accredited-Warned, and Accredited-Probation. Tex. Educ. Code § 39.051; 19 Tex. Admin. Code § 97.1055(a)(1), (2), (3).[5] If a district fails to meet either statutory academic standards or financial standards as provided by TEA rule, or if considered appropriate by the Commissioner, the Commissioner shall, to the extent he determines necessary, take actions to intervene or sanction a district. Tex. Educ. Code § 39.102(a). Such actions include appointing a conservator to oversee the district's operations and—if the district has an accreditation status of Accredited-Warned or Accredited-Probation and fails to meet academic indicators under section 39.054(e) or fails to meet financial accountability standards—appointing a board of managers

[5] Under TEA rules, if a district fails either component for two consecutive years, it is assigned an Accredited-Warned status. 19 Tex. Admin. Code § 97.1055 (b). If it fails for three consecutive years, it is assigned an Accredited-Probation status. *Id.* § 97.1055(c). After four consecutive years of unacceptable accountability ratings, its accreditation is revoked, and it is designated Not Accredited-Revoked. *Id.* § 97.1055(d).

to exercise the powers and duties of the district's board of trustees. *Id.* § 39.102(a)(7), (9); *see id.* § 39.054(e). Further, if for two consecutive years a district has received a rating of Accredited-Warned or Accredited-Probation, has failed to meet academic indicators under section 39.054(e), or has failed to meet financial accountability standards, the Commissioner may order closure of the district and annex it to one or more adjoining districts. *Id.* § 39.102(a)(10); *see id.* § 39.054(e).

Revocation of La Marque's Accreditation

In recent years, the District has experienced serious academic and financial difficulties. From 2011 to 2014, it failed either its financial or academic rating. As a result, it received a status of Accredited-Warned in 2012 and a status of Accredited-Probation in 2013.[6] In 2014, the District failed its academic accountability rating, and the Commissioner designated the District Not Accredited-Revoked and ordered it closed and annexed to Texas City Independent School District effective July 1, 2015. *See id.* § 13.005 (providing for effective date of annexation). The District requested and obtained an informal review of the decision. *See id.* § 39.151(a) (requiring Commissioner to provide process for district to challenge decision related to accountability rating), (b) (providing that Commission must appoint committee to make recommendations to Commissioner); 19 Tex. Admin. Code § 157.1123 (Informal Review).

[6] At the hearing, TEA's Associate Commissioner for Accreditation and School Improvement explained that although TEA issued no academic ratings in 2012 because of the implementation of a new standardized test, TEA warned the District that it had earned an Accredited-Warned status and would receive an Accredited-Probation status in 2013 if it failed to meet either its academic or financial accountability rating that year.

Following the review, but prior to the Commissioner's issuing a final decision, the District and the Commissioner entered into an Abatement Agreement. *See* Tex. Educ. Code § 39.151 (d) (requiring Commissioner to make final decision after considering recommendation of committee and providing that final decision is not appealable).

In the Abatement Agreement, the parties agreed to abate the informal review process for one year, until the District received its 2015 ratings. They further agreed that if the District failed either its preliminary academic or financial rating in 2015, the Commissioner would appoint a board of managers to exercise all of the powers and duties of the board of trustees and a superintendent to serve during the term of the board of managers. *See id.* § 39.102(9); 19 Tex. Admin. Code § 109.1001(k). They further agreed that if the District received a final failing academic or financial rating, the Commissioner would assign it a status of Not Accredited-Revoked and order its closure. *See* Tex. Educ. Code § 39.102(10); 19 Tex. Admin. Code § 109.1001 (k)(2), (3). The District also waived its right to appeal the Commissioner's decision to the State Office of Administrative Hearings (SOAH) and agreed that the Commissioner's decision in the informal review was to be made in his sole discretion and would be final and unappealable. *See id.* § 39.152 (providing for appeal to SOAH of Commissioner's decision to close district).

On January 29, 2015, the District submitted its financial data. On May 22, 2015, the Commissioner published proposed amendments to Rule 109.1001, *see* 40 Tex. Reg. 2724, which became effective on August 6, 2015, *see* 40 Tex. Reg. 4877. On August 8, 2015, TEA released preliminary accountability ratings, which assigned the District a failing financial rating. *See* 19 Tex. Admin. Code § 109.1001(k) (providing that TEA will issue preliminary rating by August 8 of each

year). The District filed an appeal, which was denied. *See* 19 Tex. Admin. Code § 109.1001 (l) (providing procedure for appeal of preliminary rating); *see also id.* § (k)(2), (3) (providing that TEA will issue final rating 31 days after preliminary rating or 60 days after any appeal). In September, the Commissioner notified the District that he was appointing a board of managers. *See* Tex. Educ. Code § 39.102(a)(9). The District sought and obtained a formal review of the decision to appoint a board of managers. *See* 19 Tex. Admin. Code §§ 157.1131–.1137 (providing for formal review of Commissioner's decision to assign board of managers). In October 2015, TEA issued final accountability ratings, which assigned the District a failing financial rating. In November 2015, the Commissioner notified the District that he was assigning the District a 2014 accreditation status of Not Accredited-Revoked and ordering closure of the District effective July 1, 2016, and that under the Abatement Agreement, his decision on the District's accreditation status was final and unappealable.[7] The Commissioner further informed the District that he was not inclined to reverse his decision to appoint a board of managers but would defer such appointment at that time and instead appoint a conservator to oversee the District's operations. *See* Tex. Educ. Code § 39.102(a)(7). In December, the Commissioner notified the District that he had decided to move forward with his decision to appoint a board of managers and that he was assigning a 2015 accreditation status of Not Accredited-Revoked and ordering the District closed effective July 1, 2016.[8] Later that month, he ordered closure and annexation. The District requested and

[7] The 2014 designation completed the informal review process that was abated by agreement.

[8] The Commissioner explained that the 2015 accreditation status formed a separate and independent basis for closure and annexation, in addition to the 2014 accreditation status and the District's failure to meet standards in 2015 as agreed in the Abatement Agreement.

obtained an informal review of its 2015 accreditation status. *See id.* § 39.151; 19 Tex. Admin. Code §157.1123. The Commissioner subsequently notified the District that his decision remained the same and informed the District of its right to appeal the 2015 closure decision to SOAH. *See* Tex. Educ. Code § 39.152; 19 Tex. Admin. Code § 157.1155. There is no evidence in the record that the District appealed to SOAH.

The District filed suit in Galveston County and sought a temporary injunction, which was denied. By agreement the suit was transferred to Travis County. The District sought a temporary injunction, and the Commissioner filed a plea to the jurisdiction. The trial court denied the plea to the jurisdiction, and this appeal followed.[9]

STANDARD OF REVIEW

Whether a trial court has subject matter jurisdiction is a question of law that we review de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When a plea to the jurisdiction challenges the pleadings, we look to the pleader's intent, construe the pleadings liberally in favor of jurisdiction, and accept the allegations in the pleadings as true to determine if the pleader has alleged sufficient facts to affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009); *Miranda*, 133 S.W.3d at 226. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing an opportunity to amend. *Miranda,* 133 S.W.3d at 227. When the plea

[9] As discussed above, the trial court's denial of the District's request for temporary injunction is the subject of a separate appeal. *See infra*, note 3.

challenges the jurisdictional facts, the trial court may consider any evidence the parties have submitted and must do so when necessary to resolve the jurisdictional inquiry. *Id.*; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

When, as here, the jurisdictional facts implicate the merits of the plaintiff's cause of action, the party challenging jurisdiction has a burden similar to that of a movant in a traditional summary judgment. *Miranda*, 133 S.W.3d at 227–28; *Good Shepherd Med. Ctr. v. State*, 306 S.W.3d 825, 831 (Tex. App.—Austin 2010, no pet.). If the evidence creates a fact issue as to jurisdiction, the trial court cannot grant the plea to the jurisdiction, and the fact issue must be resolved by the fact finder at trial. *Miranda*, 133 S.W.3d at 227–28; *University of Tex. v. Poindexter*, 306 S.W.3d 798, 807 (Tex. App.—Austin 2009, no pet.). On the other hand, if the evidence is undisputed or fails to raise a fact issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228; *Poindexter*, 306 S.W.3d at 807. We review the trial court's determination de novo, indulging every reasonable inference and resolving any doubts in the plaintiff's favor. *Miranda*, 133 S.W.3d at 228; *Poindexter*, 306 S.W.3d at 807.

Sovereign immunity protects the state from "the litigation and judicial remedies that would be available if the same acts were committed by private persons," *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 172 (Tex. App.—Austin 2013, no pet.), and thus encompasses two principles: immunity from suit and immunity from liability, *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323–24 (Tex. 2006). Immunity from suit prohibits suits against the state unless the legislature expressly grants consent. *Id.* at 324. By entering into a contract, the state waives its immunity from liability

but not its immunity from suit. *Id.* The state's sovereign immunity extends to various divisions of state government, including agencies. *Id.* Sovereign immunity from suit deprives a court of subject matter jurisdiction and therefore is properly asserted in a plea to the jurisdiction. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012); *Miranda*, 133 S.W.3d at 225–26.

The Commissioner's plea to the jurisdiction includes challenges to the District's ultra vires claims. While sovereign immunity bars actions against the state absent a legislative waiver, *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004), requests for declaratory relief that do not attempt to control state action do not implicate governmental immunity at all, *see Heinrich*, 284 S.W.3d at 372. Suits against governmental officials alleging that they "acted without legal authority or failed to perform a purely ministerial act" and seeking to compel the officials "to comply with statutory or constitutional provisions" fall within the "ultra vires" exception to governmental immunity because they "do not attempt to exert control over the state—they attempt to reassert the control *of* the state." *Id.* In addition, relief in an ultra vires suit is generally limited to prospective declaratory relief or injunctive relief restraining ultra vires conduct, as opposed to retroactive relief. *Id.* at 374–77. To determine whether a party has asserted a valid ultra vires claim, we construe the relevant statutory provisions, apply them to the facts alleged, and determine whether those facts constitute acts beyond the official's authority or establish a failure to perform a purely ministerial act. *See Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 701–02 (Tex. App.—Austin 2011, no pet.); *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 516 n.8 (Tex. App.—Austin 2010, no pet.) (quoting *Hendee v. Dewhurst*, 228 S.W.3d 354, 368–69 (Tex. App.—Austin 2007, pet. denied)) (when analyzing whether plaintiff

has alleged ultra vires acts, we construe statutes defining official's authority, apply provisions to pleaded and unnegated facts, and determine whether those facts fall within or outside that authority).

The resolution of the jurisdictional issues in this case turns on statutory construction, which is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context or the plain meaning leads to absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). "We generally avoid construing individual provisions of a statute in isolation from the statute as a whole," *Texas Citizens*, 336 S.W.3d at 628, we must consider a provision's role in the broader statutory scheme, *see 20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008), and we presume that "the entire statute is intended to be effective," Tex. Gov't Code § 311.021(2). With these rules of review and construction in mind, we turn to the Commissioner's issues.

DISCUSSION

Ultra Vires Claims

In his first issue, the Commissioner argues that the trial court erred in denying his plea to the jurisdiction because the District failed to plead any proper ultra vires claims. We construe the District's pleadings to allege that the Commissioner committed four ultra vires acts. We address each in turn.

Removal of Board of Trustees and Appointment of Board of Managers

The District alleged that the Commissioner's removal of the trustees and appointment of a board of managers violated article V, section 24 of the Texas Constitution and provisions of Chapter 87 of the Local Government Code. Article V, section 24 provides that county officers may be removed from office for "incompetency, official misconduct, habitual drunkenness, or other causes defined by law . . . ." Tex. Const. art. V, § 24. Chapter 87 provides the procedure for removal of specified county officers for specified reasons. *See* Loc. Gov't Code §§ 87.012 (including trustee of independent school districts among officers subject to removal), .013 (specifying as grounds for removal incompetency, official misconduct, and intoxication on or off duty), .015–.019 (providing for petition for removal by state resident, citation and suspension of officer, trial, and appeal). The District does not dispute that its substandard accountability rating constitutes "other cause" under article V, section 24. *See Ross v. Texas Educ. Agency*, Civ. A. No. H-08-3049, 2009 U.S. Dist. LEXIS 89596, at *23 (S.D. Tex. Sept. 28, 2009), *aff'd*, 2011 U.S. App. LEXIS 2141 (5th Cir. Feb. 1, 2011) (concluding that Commissioner's appointment of board of managers as sanction under Education Code for poor performance qualified as "other causes defined by the law" under Texas Constitution). However, it contends that the Commissioner had no authority to remove the trustees and appoint a board of managers without following the procedure outlined in Chapter 87.

Based on the plain language of the applicable provisions, we cannot agree. *See Marks*, 319 S.W.3d at 663; *Pochucha*, 290 S.W.3d at 867. By its own terms, Chapter 87 applies to removal for incompetency, official misconduct, and intoxication. *See* Loc. Gov't Code § 87.013.

If the legislature had intended the Chapter 87 procedure to apply to other causes, as article V, section 24 does, it could have included "other causes" as a ground for removal. *See Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014) (citing *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) ("We presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.")). More importantly, the Commissioner is expressly authorized to appoint a board of managers to exercise the powers and duties of the trustees if a school district has a current accreditation status of Accredited-Probation, as in the District's case. *See* Tex. Educ. Code § 39.102(9); *see also Ross*, 2009 U.S. Dist. LEXIS 89596, at *1, *26 (upholding Commissioner's replacement of trustees with board of managers under predecessor to Education Code section 39.102). We therefore conclude that in complaining of the Commissioner's removal of the trustees and appointment of a board of managers, the District has failed to allege a proper ultra vires claim. *See Sunset Transp.*, 357 S.W.3d at 701–02; *Marks*, 319 S.W.3d at 663; *Pochucha*, 290 S.W.3d at 867.

Abatement Agreement

The District also alleged that the Commissioner acted without authority in entering into the Abatement Agreement with the District. The District argues that under sections 39.052 and 39.102 of the Education Code—which govern accreditation status, revocation, closure, and annexation—once the Commissioner revoked the District's accreditation, he was required to proceed with closure and annexation and had no authority to abate the revocation. The Commissioner counters that the District has no standing to challenge the Abatement Agreement because it has identified no injury traceable to the agreement. We agree. In Texas, the standing doctrine requires

a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. *Heckman*, 369 S.W.3d at 154. The plaintiff must be personally injured, and the injury must be "concrete and particularized, actual or imminent, not hypothetical." *Id.* (Quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008)). The plaintiff's alleged injury must be fairly traceable to the defendant's conduct, and it must be likely to be redressed by the requested relief. *Id.*

Here, had the parties not entered into the Abatement Agreement, the Commissioner would have proceeded with closure and annexation, and the same alleged harm would have occurred.[10] The District argues that had the revocation not been abated, it could have appealed to SOAH. However, in the Abatement Agreement, the District expressly waived its right to a SOAH appeal as to the 2014 rating, and it failed to appeal its 2015 rating to SOAH. Moreover, even if we were to construe the District's pleading as alleging a concrete injury traceable to the Commissioner's act of entering the Abatement Agreement, the District asked the trial court to enjoin the abatement, an impermissible—and at this point impossible—request for retroactive relief. *Heinrich*, 284 S.W.3d at 374–77 (holding that ultra vires claimant was entitled to prospective relief only because retrospective relief is generally barred by governmental immunity).[11] We therefore conclude

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[10] The District also alleged in the trial court that because of its Not Accredited-Revoked status, it would not receive funding for its last year of operation, and its students' diplomas would be invalid. However, there was undisputed evidence that the District received funding during the abatement, and the District offered no evidence that its students' diplomas were invalidated. The District does not address these allegations on appeal.

[11] Even if we were to conclude that the District had standing and sought permissible prospective relief, we would conclude that the Commissioner acted within his authority in entering the Abatement Agreement. Section 39.102 grants the Commissioner authority to take the actions of revoking accreditation and closing and annexing a district "*to the extent* the commissioner

that the District has not alleged a proper ultra vires claim against the Commissioner based on his entering into the Abatement Agreement. *See Heinrich*, 284 S.W.3d at 374–77; *Inman*, 252 S.W.3d at 304.

Retroactive Application of Rule 109.1001

The District also alleged that the Commissioner impermissibly applied amended Rule 109.1001 to the District retroactively and that, had the Commissioner applied the prior rule, the District would have passed its financial accountability rating. The District's contention that the Commissioner acted without authority in applying the amended rule rests on the premise that once the statutory deadline of March 1, 2015, for the promulgation of initial rules to implement changes to Education Code section 39.082 passed, the Commissioner was without authority to implement the rules, making them void. The District's contention that it would have passed under the prior rule

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determines necessary." *See* Tex. Educ. Code § 39.102 (a) (emphasis added). Given this grant of absolute discretion, suits against the Commissioner for actions under section 39.102 are barred by governmental immunity. *See Houston Belt & Terminal Ry. Co. v. City of Hous.*, ___ S.W.3d ___, No. 14-0459, 2016 Tex. LEXIS 234, at *18, *23 (Tex. Apr. 1, 2016) (governmental immunity bars suits complaining of exercise of absolute discretion).

Further, even if we were to construe section 39.102(a) as a grant of limited discretion, the Commissioner's discretion to take action "to the extent the he deems appropriate" would seem to encompass the authority to abate revocation to allow a district another opportunity to meet accreditation standards, and abating a revocation for such an opportunity does not conflict with the express statutory language. *See* Tex. Educ. Code § 39.102 (a). In light of the express statutory language and the purposes of the provisions governing accountability standards, even construing section 39.102(a) as a grant of limited authority, we would not conclude that the Commissioner acted outside of his authority. *See* 19 Tex. Admin. Code § 97.1053)(a)(2) (one purpose of Education Code Chapter 39 and subchapter 97 of TEA rules is to encourage district to improve academic and fiscal compliance performance); *Houston Belt & Terminal*, 2016 Tex. LEXIS 234, at *2 (holding that official with limited discretion acts ultra vires if he acts outside the bounds of his granted authority or if his acts conflict with law itself).

is based on the testimony of its chief financial officer (CFO), who reviewed data provided by the District prior to adoption of the amended rule and predicted that the District would pass the financial rating. The Commissioner argues that the District has failed to establish that the amended rule is retroactively applied to the District because the District has alleged no facts showing that it has a vested property right; that the amended rule made no difference in the District's rating; and that, in any event, he has authority under the general rulemaking authority delegated to him in section 39.082 to adopt and amend rules for the implementation of the financial accountability rating system.

The undisputed evidence showed that the District failed two of the indicators used to determine a financial accountability rating—the Data Quality Indicator and the Administrative Cost Ratio Indicator. The Chief School Financial Officer and Associate Commissioner of TEA (TEA's CFO) testified that the Data Quality Indicator assesses the quality of data provided by a district. She further testified that the Data Quality Indicator is significant because the Commissioner must rely on the data in making decisions concerning funding and in determining compliance with state and federal regulations regarding expenditure of public funds. It compares a district's PEIMS data to that in its annual financial report and allows a 3% variance. The District had an 11% variance and, as a result, received zero out of a possible 10 points. The District contends that under the prior rule, TEA looked only at the data column containing the amount of total funds, but that under the new rule it also looked at each separate fund type. Because the District made a "clerical" error and put fund amounts in the wrong data columns, it failed the financial accountability rating even though the amount stated in the total funds column was correct. Thus, the District contends, had TEA looked only at the total funds column, as in the past, it would have passed the financial rating.

TEA's CFO offered undisputed testimony that under both the prior and amended rules, the language of the indicator allowed the agency to analyze the data by fund type; that although agency officials had in the past focused on the total funds column, TEA's software had always looked at all fund type columns; and that the amended rule did not impose a new regulation to submit data. The District's CFO testified that the deficiency in the District's data was that numbers were placed in the wrong columns; that he did not know "how that would have come about"; that it was "almost intentionally not placing it in the right column"; that he relied on the District to provide accurate data; and that if he had known that the District's data was deficient, he would have reached "a different conclusion" about whether it would pass its financial rating.

The Administrative Cost Ratio is a measure of a district's solvency and assesses the percentage of a district's overall budget spent on administrative costs. Although it was not a new indicator, according to TEA's CFO, the amended rule was "more generous" in that it increased the allowable percentage of administrative costs and revised the scoring system from a zero-or-10 points rating to a sliding scale. TEA's CFO offered undisputed testimony that the District had not passed this indicator since 2011, thus receiving zero points on that indicator each year; that in 2015, under the sliding scale measure, it received four out of a possible ten points; that its percentage of administrative costs went up in 2015; and that if it had maintained the same percentage in 2015 as it had in 2014, it would have received two additional points and would have passed its financial accountability rating, which it failed by only two points.

Article I, section 16 of the Texas Constitution, provides that "[n]o . . . retroactive law . . . shall be made." Tex. Const. art. I, § 16. This prohibition against retroactive laws has the dual

purpose of protecting people's reasonable, settled expectations and protecting against abuses of legislative power. *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010). Retroactivity alone does not make a statute unconstitutional. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 55 (Tex. 2014). There is no bright-line test for determining if a law is unconstitutional. *Robinson*, 335 S.W.3d at 145. Rather, in *Robinson*, the Texas Supreme Court instituted a balancing test that requires courts to consider (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings"; (2) "the nature of the prior right impaired by the statute"; and (3) "the extent of the impairment." *Id.* Although the *Robinson* court "determined that classifying a right or interest as 'vested' in order to determine whether it has been retroactively diminished or impaired in violation of the constitution has not yielded an efficient or predictable framework," *see Synatzske*, 438 S.W.3d at 56 (citing *Robinson*, 335 S.W.3d at 145), retroactivity claims, like all constitutional claims, must still be founded on an underlying property interest, *see Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015) ("Before any substantive or procedural due-process rights attach, [a plaintiff] must have a liberty or property interest that is entitled to constitutional protection. A constitutionally protected right must be a vested right, which is 'something more than a mere expectancy based upon an anticipated continuance of an existing law.'") (quoting *City of Dall. v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937) (internal citation omitted)); *Texas Educ. Agency v. American YouthWorks, Inc.*, ___S.W.3d ___, 2016 Tex. App. LEXIS 6198, 03-14-00283-CV & 03-14-00360, at *33–34 & n.84 (Tex. App.—Austin June 10, 2016, no pet. h.). On the facts before us, we conclude that the Commissioner's application of amended Rule 109.1001 was not impermissibly retroactive.

Assuming without deciding that the Commissioner's amended rule was applied retroactively, the District has no protected property right that was impaired by the Commissioner's application of the amended rule. Initially, we observe that the undisputed evidence showed that under the amended Administrative Costs Ratio Indicator, the District actually scored higher than it would have under the prior rule, precluding a finding of any harm or impairment of any right. As for the Data Quality Indicator, the undisputed evidence showed that under both rules, districts were required to submit accurate data in each fund type column, that TEA's software analyzed each fund type, and that the District's CFO admitted that his projection of success was erroneous because it was based on the District's deficient data. Thus, any expectation the District had of passing its financial rating was not reasonable or settled. *Robinson*, 335 S.W.3d at 145. Further, the District cites no basis for its having a protected right to submit inaccurate data or to be rated by any particular indicator—nor does it identify any other protected property right implicated by the amended rule—and we know of none. *See Klumb*, 458 S.W.3d at 15 (noting that constitutionally protected right must be vested and be more than mere expectancy based on continuance of existing law and concluding that plaintiffs had no vested property right to future retirement benefits at issue). As for the trustees' individual claims, having already concluded that the Commissioner did not act ultra vires in removing the trustees, we also conclude that the trustees have no protected property right in the offices they held. *See id.*; *Tarrant Cty. v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982) (officer has no vested right in office held by him and cannot complain of removal according to law).

Finally, we cannot agree with the District that the Commissioner's adoption of the amended rule after the deadline renders it void. The author of the legislation requiring the rule

amendment testified that because the Commissioner did not promulgate the rule by the statutory deadline it was "a nullity." However, to interpret the statutory deadline in such a way would lead to the absurd result that all any state agency would have to do to avoid implementing rules required by the legislature is fail to act by the statutory deadline. *See Marks*, 319 S.W.3d at 663. On the record before us, where the District has established no protected right so as to make the application of the amended rule retroactive, we conclude that the District has not stated a proper ultra vires claim based on the Commissioner's application of amended Rule 109.1001.[12] *See* Tex. Educ. Code § 39.082(h) (conferring broad rulemaking authority on Commissioner).

Closure for Financial Performance

The District also alleged that the Commissioner acted ultra vires in taking steps to close the District for financial reasons. Section 39.102(a)(10) authorizes the Commissioner to "order closure of the district and annex the district to one or more adjoining districts under Section 13.054" if a district fails to meet accountability standards for two consecutive years. *See* Tex. Educ. Code § 39.102(a)(10). Section 13.054 provides the procedure by which the Commissioner may annex a school district that for two consecutive years has been rated as "academically unacceptable" to one or more adjoining districts. *See id.* § 13.054. The District argues that because section 39.102(a)(10) requires annexation "under Section 13.054," which applies to "academically unacceptable" schools, the Commissioner has no authority to revoke the District's accreditation and order its closure and

[12] The District also alleged that it was only through the impermissibly retroactive application of amended Rule 109.1001 that the Commissioner could appoint a conservator and superintendent. Because we conclude that the application of the amended rule was not impermissibly retroactive, we need not address this issue. *See* Tex. R. App. P. 47.1.

annexation based on its financial performance. Based on the plain language of the statutes, we cannot agree.

Section 39.102(10) provides that the Commissioner "shall . . . to the extent the commissioner determines necessary" take any of certain specified optional actions, including revoke the accreditation of and order closure and annexation of a school district that "for two consecutive years . . . has received an accreditation status of accredited-warned or accredited-probation, has failed to satisfy any [academic] standard under Section 13.054(e), or has failed to satisfy financial accountability standards as determined by commissioner rule." Tex. Educ. Code § 39.102(a) (10); *see id.* § 13.054(e). To read section 39.102(a)(10) as the District would have us construe it would render its reference to "financial accountability standards" meaningless and would directly contradict its express language. We "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous." *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008). Rather, we must presume that the legislature selected the language in section 39.102(a)(10) with care, that it chose the term "financial accountability standards" with a purpose in mind, and that it intended the entire statute to be effective. *See* Tex. Gov't Code § 311.021(2); *Crosstex Energy Servs.*, 430 S.W.3d at 390; *Texas Lottery Comm'n*, 325 S.W.3d at 635. Section 39.102(a)(10) can reasonably be interpreted to mean that, just as the Commissioner may revoke the accreditation of, close, and annex an academically unacceptable school district following the procedure outlined in section 13.054, he may also, under section 39.102(a)(10), revoke the accreditation of, close, and annex a school district based on its substandard financial performance following the same procedure. We conclude that the District has not alleged

a proper ultra vires act based on the Commissioner's acts to revoke its accreditation and order closure and annexation based on its financial performance. Having concluded that the District has failed to allege a proper ultra vires claim based on the Commissioner's removal of the trustees and appointment of a board of managers, entering into the Abatement Agreement, applying amended Rule 109.1001, or acting to close the District based on its financial performance, we sustain the Commissioner's first issue.

Contract Claims

In his second issue, the Commissioner argues that the trial court erred in denying his plea to the jurisdiction as to the District's contract claims. We have already concluded that the District has alleged no injury traceable to the Abatement Agreement and therefore lacks standing. *See Inman*, 252 S.W.3d at 304.[13] Therefore, we further conclude that the trial court lacked subject

[13] Further, even if we were to conclude that the District has standing, we would nonetheless conclude that its contract claims are barred by sovereign immunity. The District alleged that the Commissioner breached the Abatement Agreement by implementing amended Rule 109.1001 retroactively and/or by entering into the agreement knowing new regulations were going to be adopted and applied retroactively. The District also alleged that the contract was "illusory, void, voidable, and unenforceable, against public policy and/or the commissioner acted in bad faith." The District appears to argue that the trial court has jurisdiction to hear its contract claims under the Uniform Declaratory Judgments Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code § 37.001–.011. However, the UDJA does not enlarge the trial court's jurisdiction; rather, the underlying action against the state or its political subdivisions must be one for which immunity has been expressly waived. *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011). "[A] litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit." *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). Therefore, "sovereign immunity will bar an otherwise proper [U]DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived immunity." *Id.*

Although by entering into a contract a governmental entity "waives its immunity from *liability* for breach of the contract, [it] does not, merely by entering into a contract, waive immunity from *suit*." *Texas A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002); *General*

matter jurisdiction over the District's contract claims based on the Abatement Agreement. We sustain the Commissioner's second issue.

Constitutional Claims

In his third issue, the Commissioner challenges the trial court's denial of his plea to the jurisdiction as to the District's constitutional claims. The District alleged that Education Code section 39.152 and TEA rules implementing that section violate the open courts, due course of law, and separation of powers provisions of the Texas Constitution "insofar as they undertake to make final and un-appealable [ultra vires] decisions of the Commissioner."[14] *See* Tex. Const. art. I, §§ 13, 19, art. II, § 1. Section 39.152 of the Education Code and Rules 157.1151 through 157.1171 provide that a district may challenge a final decision by the Commissioner to close the district by appeal to SOAH. Tex. Educ. Code § 39.152; 19 Tex. Admin. Code §§ 157.1151–.1171 (State Office of

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Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001). Administrative agencies cannot waive immunity from suit, nor can those who have authority to contract on an agency's behalf. *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 858 (Tex. 2002). Legislative consent, either by statute or resolution, is required for a party to sue the State for claims based on a purported breach of contract. *Id.* at 860; *see* Tex. Civ. Prac. & Rem. Code § 107.001–.005 (party wishing to bring breach of contract claim can seek redress by asking legislature to waive immunity from suit). "A party may establish consent by referencing a legislative statute or a resolution granting express legislative permission." *Little-Tex Insulation Co.*, 39 S.W.3d at 594. The District has cited no statute or resolution providing consent for it to pursue its contract claims against the Commissioner, and we know of none. Absent such an express waiver of immunity, even if the District had standing to assert its contract claims, we would conclude the trial court lacked subject matter jurisdiction over the contract claims and erred in denying the Commissioner's plea to the jurisdiction as to those claims.

[14] The District alleged both facial and as-applied constitutional challenges but in support of its allegations asserted only as-applied arguments and made no allegations that the statutes apply unconstitutionally to other districts. Accordingly, we address the constitutional arguments as as-applied challenges. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 701 & n.7 (Tex. 2014) (discussing differences between as-applied and facial challenges).

Admin. Hearings Substantial Evidence Review). They further provide that the decision of the administrative law judge (ALJ) is final and unappealable. Tex. Educ. Code § 39.152(c)(3); 19 Tex. Admin. Code § 157.1171(b). The District alleged that these provisions violate the separation of powers, open courts, and due course of law provisions by failing to provide for "judicial review of the Commissioner's actions and determination to appoint a board of managers and a new superintendent and other unlawful conduct by the Commissioner," including assigning to the District the accreditation status of Accredited-Probation.

The District's constitutional claims rest on its ultra vires allegations. Having already concluded that the District failed to allege a proper ultra vires claim against the Commissioner, we further conclude that the District's constitutional claims are not viable. Article I, section 13 provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. I, § 13. Article I, section 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id.* art. I, § 19. The open courts provision does not provide a plaintiff an absolute right to challenge agency action in court; rather, "[i]t is well settled that trial courts may review an administrative action only if a statute provides a right to judicial review, or the action adversely affects a vested property right or otherwise violates a constitutional right." *In re Office of the Att'y Gen.*, 456 S.W.3d 153, 157 (Tex. 2015); *see also Alphonso Crutch Life Support Ctr. v. Williams*, No. 03-13-00789-CV, 2015 Tex. App. LEXIS 12151, at *26–28 (Tex. App.—Austin Nov. 30, 2015, no pet.) (mem. op.)

(upholding grant of TEA's plea to jurisdiction as to claim based on open courts provision where statute expressly made ALJ's decision final and unappealable).

Here, the challenged provisions do not provide for judicial review in the district court but instead expressly provide that the decision of the ALJ is final, *see* Tex. Educ. Code § 39.152; 19 Tex. Admin. Code §§ 157.1151–.1171, and the District does not fall within the exceptions that allow for judicial review, *see In re Office of the Att'y Gen.*, 456 S.W.3d at 157. We have already concluded that the District pleaded no facts establishing that it has any protected property rights that are implicated by the Commissioner's application of amended Rule 109.1001, and the District's pleading identified no property interest that was alleged to be adversely affected by the Commissioner's actions.[15] *See Klumb*, 458 S.W.3d at 15 (concluding that plaintiffs' due course of law claim was facially invalid because they had no vested property right in benefits at issue).

As for the separation of powers clause, article II, section 1 provides that none of the three branches of the government "shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1. The District alleged that review of the Commissioner's ultra vires acts is reserved exclusively to the judicial branch and may not be delegated to the executive branch. However, by providing for review of the Commissioner's decision by SOAH and making the decision of the ALJ final, the legislature did not transfer an inherently judicial function to the executive or legislative branch. *See Little-Tex Insulation Co.*, 39 S.W.3d at 600 (in enacting chapter 2260 of Government Code, which sets out resolution process for contract claims against state, provides for review of agency decision by SOAH, and makes

[15] On appeal, the District offers no argument concerning its constitutional claims.

decision final and not appealable except for abuse of discretion, legislature did not transfer inherently judicial function to executive or legislative branch). We conclude that the District's constitutional claims are not viable and that the trial court erred in denying the Commissioner's plea to the jurisdiction as to these claims. *See Klumb*, 458 S.W.3d at 15; *In re Office of the Att'y Gen.*, 456 S.W.3d at 157; *Miranda*, 133 S.W.3d at 227–28; *Ashmore*, 635 S.W.2d at 422; *Alphonso Crutch*, 2015 Tex. App. LEXIS 12151, at *26–28. We sustain the Commissioner's third issue.

CONCLUSION

The District has failed to affirmatively allege facts that invoke the trial court's subject matter jurisdiction, and we are aware of no way in which they could cure these jurisdictional defects through amended pleadings. *See Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839–40 (Tex. 2007) (noting that opportunity to cure pleading defects is available only if it is possible to cure defects). Accordingly, we reverse the order of the trial court denying the Commissioner's plea to the jurisdiction and dismiss the District's claims for lack of subject matter jurisdiction.

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Reversed and Dismissed

Filed: June 24, 2016