

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0753
=====

WACO INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

LESTER AND COQUE GIBSON, REV. JOE N. BEDFORD, A'DRANA GOODEN AND
CLARA COBB, RESPONDENTS

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS
=====

Argued January 5, 2000

JUSTICE ENOCH delivered the opinion of the Court, joined by JUSTICE BAKER, JUSTICE ABBOTT, JUSTICE HANKINSON, JUSTICE O'NEILL, and JUSTICE GONZALES.

JUSTICE HECHT filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS and JUSTICE OWEN joined.

The court of appeals asserted jurisdiction over this interlocutory appeal, but concluded that it could not decide Waco Independent School District's standing and ripeness challenges to the plaintiffs' case for the first time on appeal because WISD did not properly preserve them for review.¹ We held in *Texas Association of Business v. Texas Air Control Board (TAB)*, however, that subject matter jurisdiction challenges cannot be waived, and may be raised for the first time on appeal.²

¹ 971 S.W.2d 199.

² 852 S.W.2d 440, 445 (Tex. 1993).

Because standing and ripeness are components of subject matter jurisdiction,³ the court of appeals erred in failing to consider Waco Independent School District's jurisdictional challenge. Although jurisdiction over interlocutory appeals is generally final in the court of appeals, this Court has jurisdiction to consider whether the court of appeals properly determined its own jurisdiction.⁴ Because we conclude that the plaintiffs' claims are not ripe, we vacate the court of appeals' judgment and affirm the trial court's dismissal for want of jurisdiction of all but the plaintiffs' claim of an Open Meetings Act violation.⁵

In 1997, WISD adopted a student-promotion policy requiring students in first through eighth grades to obtain a satisfactory score on one of two standardized assessment tests to advance to the next grade. Under the policy, WISD administered the Iowa Test of Basic Skills (ITBS) to first and second graders, and the Texas Assessment of Academic Skills Test (TAAS) to third through eighth graders. The policy mandates satisfactory performance on the test in addition to satisfactory performance in attendance and on the school curriculum. Students who do not meet WISD's standard on the test attend a thirty-day intense acceleration summer program based on the students' individual needs. At the program's end, students take released versions of the TAAS. Students who then meet WISD's standard will be promoted. If students still do not meet the standard, they can

³ See *Patterson v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998).

⁴ See *Lesikar v. Rappeport*, 899 S.W.2d 654, 655 (Tex. 1995).

⁵ The trial court dismissed all of the plaintiffs' claims except for a claim that WISD adopted the contested policy in violation of the Texas Open Meetings Act. WISD has not challenged that part of the judgment, and it is not before us.

take an Assessment Credit by Examination test in reading and math. Students that pass this test are then promoted. Students are retained only after these efforts are unsuccessful.

The Gibsons sued for injunctive relief on their own behalf to prevent WISD from implementing the plan. The suit alleges that minority students in the district will be harmed because they will fail the exams in disproportionate numbers and therefore be retained under the new policy. The Gibsons argue that retention will unfairly burden minority WISD students because it identifies and stigmatizes them as a "failure." The suit also alleges that the policy violates the Equal Rights and Due Course of Law provisions of the Texas Constitution,⁶ violates confidentiality provisions of the Texas Education Code,⁷ and was adopted in violation of the Open Records Act⁸ and Open Meetings Act.⁹ WISD alleged in its answer that the Gibsons do not have standing because they are suing on their own behalf, not as representatives of their children. WISD also asserted that the case is not ripe for adjudication because when the Gibsons sued, WISD had not released the results of the assessment tests and therefore had not retained any students.

WISD moved to dismiss for want of jurisdiction, asserting that the Gibsons failed to exhaust their administrative remedies at the Texas Education Agency before suing in district court as the Education Code requires.¹⁰ WISD did not reassert in its motion that the plaintiffs lacked standing

⁶T EX. CONST. art. I, § 3; art. I, § 19.

⁷T EX. EDUC. CODE § 39.030.

⁸T EX. GOV'T CODE § 552.101.

⁹ *Id.* § 551.002.

¹⁰T EX. EDUC. CODE § 7.057

or that the case was not ripe for adjudication. Although WISD did not include its subject matter jurisdiction challenge in its motion, the record before the trial court is replete with the district's assertions that the Gibsons' claim was not ripe. After a hearing, the trial court granted WISD's motion on all of the Gibsons' claims except the alleged Open Meetings Act violation. The Gibsons then perfected this interlocutory appeal. WISD responded to the appeal by adding standing and ripeness challenges to its original assertion that the Gibsons failed to exhaust their administrative remedies before suing in district court.

The court of appeals reversed and remanded, holding that the Gibsons proved their claims fell within exceptions to the exhaustion of remedies requirement, and that the trial court therefore had jurisdiction over the dispute.¹¹ The court of appeals, however, did not consider the merits of WISD's standing and ripeness challenges because "WISD failed to raise either of these issues in its motion to dismiss [the Gibsons'] suit," and because "the court below neither expressly nor impliedly ruled on ripeness or standing."¹² Thus the court concluded that standing and ripeness were not properly preserved for its review. We disagree. We decided in *TAB* that because subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal.¹³ Thus, ripeness and standing components of subject matter jurisdiction cannot be waived. Consequently, the court of appeals erred in failing to reach the merits of WISD's jurisdictional complaint.

¹¹ See *Gibson*, 971 S.W.2d at 203-04.

¹² *Id.* at 200.

¹³ See *Texas Ass'n of Bus.*, 852 S.W.2d at 445.

While WISD raises several challenges to the trial court’s jurisdiction, the ripeness issue is dispositive. In *Patterson v. Planned Parenthood of Houston*, we considered the parameters of the ripeness doctrine in Texas.¹⁴ In *Patterson*, we noted that “[r]ipeness, like standing, is a threshold issue that implicates subject matter jurisdiction, and like standing, emphasizes the need for a concrete injury for a justiciable claim to be presented.”¹⁵ While standing focuses on the issue of *who* may bring an action,¹⁶ ripeness focuses on *when* that action may be brought.¹⁷

Under the ripeness doctrine, we consider whether, *at the time a lawsuit is filed*, the facts are sufficiently developed “so that an injury has occurred or is likely to occur, rather than being contingent or remote.”¹⁸ Thus the ripeness analysis focuses on whether the case involves “uncertain or contingent future events that may not occur as anticipated or may not occur at all.”¹⁹ By focusing on whether the plaintiff has a concrete injury, the ripeness doctrine allows courts to avoid premature adjudication, and serves the constitutional interests in prohibiting advisory opinions.²⁰ A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or

¹⁴ See *Patterson*, 971 S.W.2d at 442-44.

¹⁵ *Id.* at 442 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)).

¹⁶ See *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626-27 (Tex. 1996).

¹⁷ See *Patterson*, 971 S.W.2d at 442.

¹⁸ *Id.*

¹⁹ *Id.* (citing 13A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3532, at 112 (2d ed. 1984)).

²⁰ See *Patterson*, 971 S.W.2d at 442-43.

hypothetical facts, or upon events that have not yet come to pass.²¹ Because that is the case here, the trial court did not have jurisdiction to hear this dispute.

When this lawsuit was filed, no student in the WISD had been retained or given notice of retention under the challenged policy because the TAAS and ITBS test results were not yet available. The only notices that WISD sent out were notices of possible retention if the students did not meet all requirements for promotion. Thus, at the time this suit was filed, the alleged harm to the students caused by retention was still contingent on uncertain future events, *i.e.*, the students' performance on the standardized tests and, if necessary, in WISD's remediation program. Moreover, the impact the Gibsons presumed was only hypothetical when the suit was filed; it may not occur as anticipated, or may not occur at all. There is simply no allegation that the Gibsons have suffered a concrete injury. Without a concrete injury from the WISD policy, the Gibsons have failed to show that the trial court had jurisdiction to decide this controversy.

Although the Gibsons cannot show that a concrete injury *has occurred*, the ripeness analysis would allow them to demonstrate a concrete injury by showing that it is *likely to occur*.²² It is mere speculation in this case, however, that the alleged injury is likely to occur. The United States Supreme Court has suggested that the threat of harm can constitute a concrete injury, but the threat must be "direct and immediate" rather than conjectural, hypothetical, or remote.²³ To show that such injuries are likely to occur, for example, parties must demonstrate that the harm is imminent, but has

²¹ See *id.* at 443.

²² See *id.*

²³ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967).

not yet impacted them. The potential harm in this case is not imminent; whether WISD students will be retained remains contingent upon their performance on the standardized tests, *and*, if necessary, their subsequent performance in WISD's remediation efforts. Although it is well-documented that minority pass rates on the TAAS have been disproportionately lower than white students' pass rates, there was no evidence in this record that minorities will fail to be remediated in disproportionate numbers in WISD's program. While WISD's superintendent Roseanne Stripling, in answer to a question on cross-examination, stated that disproportionate numbers of minority students would be retained under the district's "policy," it is clear that she was referring to the results of the TAAS test, which all parties concede has a disproportionate impact, and not to the effort the district had adopted to remediate that problem.

The uncertainty of the policy's impact is evident in statements made at the hearing on WISD's motion to dismiss for lack of jurisdiction. Responding to WISD's assertion that the policy had not impacted any students when the Gibsons filed suit, the trial judge summarized the Gibsons' argument as the "impact's coming," and "[t]hey can feel it coming" The Gibsons' expert's testimony is similarly telling. When asked if he had considered the impact of WISD's policy, the expert cryptically responded, "*I cannot predict the future on that unless I know that the delivery systems are in order.*" These statements indicate that the concrete injury required by a ripeness inquiry has not developed here.

The procedural stance of this case arguably leaves the Gibsons without an opportunity to amend their pleadings or to demonstrate jurisdiction on a complete record, giving them only a "sparse record" with which to controvert WISD's subject matter jurisdiction challenges. But we

recognized in *TAB* that when an appellate court raises subject matter jurisdiction for the first time on appeal, litigants will not have an opportunity to cure defects.²⁴ As a safeguard then, we construe the petition in favor of the party asserting that the court has subject matter jurisdiction and review the entire record to ascertain if any evidence supports that assertion.²⁵ Having done so, the Court's decision still turns on the fact that *when the plaintiffs sued*, no test results were available, and no evidence of the probability of the remediation program's success or failure existed. With every available opportunity to generate record evidence opposing WISD's challenges, the Gibsons could not have done so because the evidence required to do so did not exist. Indeed, that is exactly why the claim is not ripe. Accordingly, because their alleged injury remains contingent on the results of both the test and, if necessary, the remediation program, the Gibsons' claim is not ripe for review. We note that the Gibsons are not irrevocably harmed by this dismissal. Because the case is dismissed without prejudice, if they choose, they can re-file and develop a record demonstrating that the claims have ripened, allowing a new suit to proceed.

The ripeness doctrine prevents premature adjudication of hypothetical or contingent situations. For this Court to eschew the ripeness doctrine and allow the trial court to determine the merits of the Gibsons' claim as it stood when filed, would create an impermissible advisory opinion. Neither this Court, nor the trial court, has the power to counsel a legal conclusion on a hypothetical or contingent set of facts.²⁶ Consequently, we vacate the court of appeals' judgment and affirm the

²⁴ See *Texas Ass'n of Bus.*, 852 S.W.2d at 446.

²⁵ See *id.*

²⁶ See *Patterson*, 971 S.W.2d at 444.

trial court's judgment dismissing this case for want of jurisdiction, except for the Gibsons' claim of an alleged Open Meetings Act violation.²⁷

Craig T. Enoch
Justice

Opinion delivered: May 11, 2000

²⁷ Because of the trial court's decision in this case, the Gibsons sought both review of WISD's policy at the Texas Education Agency and an accelerated appeal, at the Tenth Court of Appeals. We review only the court of appeals' determination of its own jurisdiction. The action before the Texas Education Agency has now been appealed to a Travis County district court, and remains pending there.