

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 on January 5, 2000

JUSTICE HECHT, joined by CHIEF JUSTICE PHILLIPS and JUSTICE OWEN, dissenting.

A party need not argue in the trial court, in order to later argue on appeal, that claims are not ripe for adjudication or that a party lacks standing to assert them. An appellate court may consider, in the first instance, challenges to ripeness and standing and other such prerequisites to subject matter jurisdiction, which is essential to a court's power to decide a case.¹ Indeed, an appellate court *must* examine such issues, even if on its own initiative, to ensure that its decision on the merits is not merely advisory.² The court of appeals therefore erred in concluding that WISD's ripeness and

¹ See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-446 (Tex. 1993) ("TAB"); See also *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

² See *TAB*, 852 S.W.2d at 444-446; *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

standing arguments were not properly preserved for consideration on appeal.³

However, when an appeal is interlocutory, as this one is, an appellate court must be especially careful in determining subject matter jurisdiction in the first instance because the plaintiff has not had an opportunity either to amend his pleadings, as he would have had if the issue had been raised in the trial court by special exceptions or otherwise,⁴ or to demonstrate jurisdiction on a complete record, as he would have had in a trial on the merits.⁵ As we explained in *Texas Association of Business v. Texas Air Control Board*:

A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.⁶

We raised the issue of standing sua sponte in *TAB* following trial on the merits and a final judgment, and to determine the issue we looked not only to the pleadings but to the entire record.

In the case now before us, the plaintiffs have had no opportunity either to amend their pleadings in response to special exceptions or to present a full record. WISD challenged subject matter jurisdiction in the trial court, but only because of the plaintiffs' failure to exhaust their

³ 971 S.W.2d 199, 200.

⁴ *TAB*, 852 S.W.2d at 446; 2 MCDONALD TEXAS CIVIL PRACTICE § 8:18 (1992).

⁵ *TAB*, 852 S.W.2d at 446; 2 MCDONALD, *supra* note 4, § 8:15.

⁶ *TAB*, 852 S.W.2d at 446.

administrative remedies, not because of a lack of ripeness or standing. The only hearing held was on WISD's motion. With the case in this posture, we must determine ripeness and standing not only by construing the plaintiffs' original petition in their favor, and considering the evidence offered at the hearing on WISD's motion to dismiss for failure to exhaust administrative remedies, but also by considering the possibility that the plaintiffs can amend their pleadings or offer evidence at a trial on the merits to show ripeness and standing. In dismissing the plaintiffs' claims in this case for lack of ripeness, the Court does none of these things. Accordingly, I dissent.

The plaintiffs sued WISD to enjoin it from implementing a policy, used by no other Texas school district, of retaining children in grades one through eight for failing one of two standardized tests, the Texas Assessment of Academic Skills test, or the Iowa Basic Skills Test. The plaintiffs assert three claims, two of which the Court dismisses for lack of ripeness. One is that the retention policy will have a racially discriminatory impact in violation of equal rights and due course of law provisions of the Texas Constitution. The other is that retention will necessarily result in disclosure of test results (since it will be obvious that a child was not promoted) in violation of the privacy requirements of section 39.030(b) of the Texas Education Code.⁷ (The plaintiffs' third claim, that the retention policy was adopted in violation of the Open Meetings Act,⁸ remains pending in the trial court).

⁷ "The results of individual student performance on academic skills assessment instruments administered under this subchapter are confidential and may be released only in accordance with the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). However, overall student performance data shall be aggregated by ethnicity, sex, grade level, subject area, campus, and district and made available to the public, with appropriate interpretations, at regularly scheduled meetings of the board of trustees of each school district. The information may not contain the names of individual students or teachers."

⁸T EX. GOV'T CODE §§ 551.001-.146.

For a claim to be ripe, injury must have occurred or be likely to occur, rather than being contingent or remote.⁹ Plaintiffs concede that when they filed suit, no child had yet been retained, and thus they had not yet been injured. The Court concludes that the injury the plaintiffs claim they will suffer is not imminent because it is uncertain whether children will fail the standardized test, and if they do, whether remediation efforts to avoid retention, such as summer school, will not succeed.

The plaintiffs alleged in their original petition that in the prior year, nearly half the students in the grades to which the new retention policy would apply, had failed the standardized test they were given, and that the failure rates for white, Hispanic, and African-American students were 33%, 49%, and 57%, respectively. Taking these assertions as true, it is likely that some students will continue to fail the test in the future, and absent other efforts, that some disparity in pass rates among racial groups will persist. Thus, the Court is simply wrong when it concludes that WISD students' performance on the standardized tests is too contingent for the harm plaintiffs allege to be likely.

The plaintiffs also alleged that WISD's retention policy "threatens to retain well over half its student population based on the results of a standardized test," and that WISD had already written "letters to parents warning them that their children are at risk of retention due to 'projected T.A.A.S. scores'". The Court concludes that this assertion does not allege likely harm because it does not consider the potential success of remediation efforts for students who fail the tests. This conclusion is wrong for three reasons. First, it refuses to take the plaintiffs' pleadings as true. The Court simply

⁹ *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998).

disagrees with the plaintiffs' assertions of harm. Second, the Court's conclusion ignores the fact that any child allowed to attempt remediation, such as by attending summer school, will be openly stigmatized as having failed the test, which the plaintiffs allege will violate the statutorily mandated confidentiality of test scores. A breach of confidentiality is part of the harm plaintiffs allege. Third, even assuming that plaintiffs must plead that remediation efforts will not avoid racially discriminatory retention, it fails to consider whether plaintiffs could do so.

The Court points to testimony by the plaintiffs' expert that he could not predict the future impact of the retention policy. There are three problems with this. First, the Court simply ignores other testimony by the same witness that based on his experience and test scores throughout the State, the policy would have a racially discriminatory effect. Second, the Court chooses to disregard testimony by WISD's witness agreeing that more Hispanic and black students would be retained, and that "this policy would have a disparate impact on the Hispanic and black community". The WISD witness — as the Court refuses to concede — concluded that the *policy*, which includes the summer remediation program, would result in a disparate impact, that more minority students than white students would be retained as a result. Neither witness excluded the effect of the remediation policy from their respective conclusions. The Court nonetheless claims that "there was no evidence in this record that minorities will fail to be remediated in disproportionate numbers in WISD's program," discounting the concession expressly made by WISD's witness by drawing an adverse, and awkward, inference. This approach hardly amounts to a search for "any evidence" supporting jurisdiction.¹⁰

¹⁰ *TAB*, 852 S.W.2d at 446. *Cf. Peek v. Equipment Service Co.*, 779 S.W.2d 802, 804 (Tex.1989)(courts presume in favor of jurisdiction unless lack of jurisdiction affirmatively appears on the face of the petition)(quoting *Smith v. Texas Improvement Co.*, 570 S.W.2d 90, 92 (Tex.Civ.App.--Dallas 1978, no writ).)

Finally, the Court fails to acknowledge testimony and evidence showing that remediation efforts will be optional, limited, and often expensive: optional, in that students need not avail themselves of remediation; limited, in that WISD's own hierarchy of preferences for placing students in its 30-day summer program contemplates the denial of that limited resource to those students it deems least likely to pass the TAAS requirement; and expensive, in that those who are denied or fail to gain promotion from the summer program must pay for the opportunity to take an examination for credit. For that matter, is not entirely clear that the summer remediation program will itself be free. The uncontradicted evidence in this case raises a prima facie case for jurisdiction; at the very least, the sparse record in this interlocutory appeal would raise a fact issue regarding ripeness.

More importantly, however, the Court's citation of such testimony is highly unfair to the plaintiffs, who adduced the testimony to show why they had not yet exhausted their administrative appeals, not why their claims were ripe. Never knowing that ripeness was an issue, since WISD never raised it, the plaintiffs offered no evidence on the issue. In this case, unlike *TAB*, jurisdiction cannot be determined on a full record. The Court does not consider whether the plaintiffs could have adduced evidence to demonstrate the ripeness of their claims when their case, which remains pending in the trial court, is further developed.

Because the Court dismisses the plaintiffs' claims as not being ripe, it does not consider the plaintiffs' standing to sue. The plaintiffs do not sue on behalf of their children; indeed, not all of the plaintiffs have children subject to the retention policy. Rather, the plaintiffs claim injuries of their own. Their original petition alleges:

Plaintiffs have been and will continue to be damaged and injured by

Defendant's conduct by having their children threatened with retention based on a stringent standard that does not exist elsewhere in the State of Texas; by the lowered self-esteem of their children who, having received passing grades in their course work, are threatened with retention based on the results of a single test; by having their children stigmatized as failures in violation of the confidentiality provisions of the Texas Education Code; [and] by Defendant's misuse of the statewide assessment program mandated to ensure *school accountability* and interpreting it to punish children for the failure of the educational system as opposed to taking responsibility for that failure

I need not determine whether these assertions demonstrate standing for the plaintiffs to sue on their own behalf, instead of on behalf of children likely to be retained. Absent special exceptions to the pleadings and a more complete evidentiary record, the Court simply cannot determine whether the plaintiffs can show standing in some way.

I would therefore hold that while WISD is entitled to raise issues of ripeness and standing for the first time in this interlocutory appeal, it has not shown that the plaintiffs have had a fair opportunity to plead or prove ripeness and standing and failed to do so, so that their claims must be dismissed.

The plaintiffs contend that they are not required to exhaust available administrative remedies because irreparable injury is imminent. WISD failed to establish that immediate administrative relief equivalent to injunctive relief is available to the plaintiffs, and thus did not meet its burden of showing that plaintiffs were required to exhaust administrative remedies.¹¹ I would not reach the plaintiffs' other exhaustion arguments. Accordingly, I would affirm the court of appeals' judgment remanding the case to the trial court for further proceedings.

¹¹ *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987).

Nathan L. Hecht
Justice

Opinion delivered: May 11, 2000