CAUSE NO. D-l-GN-16-002211

VIRGINIA DIANE LEWIS, Individually and as Next Friend to C.J.L.; CLAUDIA ELENA DE LEON, Individually and ads Next Friend to D.F.G. and P.E.G.; JENNIFER RUTH RUMSEY, Individually and as Next Friend to K.L.O.; and JENNIFER TAYLOR, Individually and as Next Friend to C.M.T., *Plaintiffs*	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
v.	§	
MIKE MORATH, in his official capacity as Commissioner of the Texas Education Agency, *Defendant.*	§	98TH JUDICIAL DISTRICT

DEFENDANT'S PLEA TO THE JURISDICTION

To The Honorable Judge of This Court:

COMES NOW Defendant Texas Education Agency ("**TEA**") Commissioner Michael Morath, in his official capacity, and files his plea to the jurisdiction and shows the Court as follows:

I.
PLEA TO THE JURISDICTION

A. Introduction

Plaintiffs are parents of third, fifth, and eighth grade schoolchildren from around the state who allege the standardized tests administered in spring 2016 did not comply with a 2015 legislative directive that assessments adopted or developed under TEX. EDUC. CODE §39.023(a) must be designed to be completed within new specified time limits. As discussed herein, the Agency complied with this statute by making modifications intended to shorten all the relevant assessment instruments so that 85% of the students in grades three through five would be able to complete the test in two hours and 85% of the students in grades six through eight would be able

to complete the assessment instruments in three hours, while still maintaining valid and reliable assessment instruments. The Agency also collected timing data on all the shortened assessment instruments in order to assess whether any assessment instrument needs additional modification.

Further, the Plaintiffs in this lawsuit have not been harmed. The students associated with the plaintiffs are in third, fifth, and eighth grades. There are no specific state-mandated consequences for third grade students who do not pass the assessments. For students in the fifth and eighth grades, advancement to the next grade generally requires that the student pass the relevant assessment instruments. Additionally, prior to retaining the student, the student must be offered at least two additional opportunities to retake the test as well as accelerated instruction. *See* TEX. EDUC. CODE §28.0211. If the student fails the examination three times, the student may still be advanced to the next grade based on the decision of a grade placement committee. TEX. EDUC. CODE §28.0211(e). However, this year the initial results of the assessments were not ready in time for districts to perform the accelerated instruction. Therefore, the Commissioner waived these requirements for practical reasons only, and not because there are any questions about the reliability of the results. Consequently, no students were required to be retained under state law. Regardless of when the results became available, the Agency believes that additional accelerated instruction is a benefit rather than a harm to students.

Further, there is no allegation any of the plaintiffs failed or were specifically harmed by the allegedly noncompliant test—or even that the length of the test affected the child's performance in any way. Because Plaintiffs' pleading fails to state essential jurisdictional facts, this case should be dismissed. Further, because Plaintiffs fail to allege (and cannot assert) a legally redressable injury, the Court lacks jurisdiction and should dismiss the case with prejudice.

B. Facts

Standardized tests play a vital role in the administration of the Texas public school system. Texas law requires administration of standardized tests designed to assess students' essential knowledge and skills. TEX. EDUC. CODE § 39.021, *et seq*. Student performance on standardized testing also allows TEA to assess the effectiveness of school districts, charter schools, and campuses in educating Texas schoolchildren. *Id.* The current system of state assessments, adopted by the Texas Legislature in 2009, is the "State of Texas Assessments of Academic Readiness," or STAAR, which took effect in 2012.

In 2015, the Texas Legislature adopted House Bill 743 ("**HB 743**"). *See* Exhibit B (engrossed bill). As Plaintiffs describe, the bill consisted of two components: 1) a requirement that TEA ensure the validity and reliability of each instrument "before [it] may be *administered*"; and 2) a requirement that each assessment "*adopted or developed*" be *designed* so that most (but not all) students can complete the tests according to new time criteria.[1] *See* HB 743, amending Texas Education Code 39.023 (emphasis added). The Legislative Budget Board estimated a one-time cost of $800,000 for fiscal year 2016 for "grade 3 through 8 assessment instruments [to] be redesigned to meet the time limits required by the bill…." *See* Exhibit C, Fiscal Note, at 2. Significantly, the Legislative Budget Board noted that, "The bill would make no appropriation but could provide the legal basis for an appropriation of funds to implement the provisions of the bill." *Id.* at 1. The legislature provided no such appropriation.

As Plaintiffs acknowledge, TEA advised in its Legislative Briefing Book that grade 3-5 tests could not be completely redesigned by the spring 2016 administration to meet the legislature's

[1] For grades 3-5, the test must be designed so that 85 percent of students will complete within 120 minutes; for grades 6-8, designed so that 85 percent will complete within 180 minutes. *See* Section 1, amending Section 39.023 to add subsection a-13.

new design requirements. *See* Petition at 47. Nonetheless, TEA took several immediate steps to comply with the new statutory requirements by reducing the length of each assessment while maintaining valid and reliable assessments. For the spring 2016 test, TEA removed all embedded field-test questions,[2] thereby reducing the length of each assessment by five to eight questions. *Id.* at 55. Although Plaintiffs characterize this as a "token gesture," it represents a significant reduction in the amount of material on the assessments (reducing the assessments in length by approximately 13-16%)—even though, as described below, the plain language of the statute did not require such a step for the 2016 administration. TEA also shortened the 2016 STAAR grade 4 and 7 writing tests so they will be completed in one testing administration instead of two administrations over two days. Finally, in order to verify future adopted or developed tests comply with the new legislation, TEA collected data during the spring 2016 test administration on the amount of time the students took to complete the assessments.[3] These data will then be used to determine whether further adjustment of the STAAR grades 3-8 assessments is needed and for future test designs. *See* Exhibit C.

Despite TEA's efforts, Plaintiffs complain of "TEA's deliberate refusal to comply with the completion time requirements of HB 743." *See* Plaintiff's Original Petition for Declaratory Judgment (the "Petition") at ¶ 21. Plaintiffs contend the Texas Legislature required TEA to amend every assessment before the next primary STAAR administration, in spring of 2016, and that beyond designing the test to comply with the new, shorter time criteria, the results of those design changes are proven achieve the new, shorter time criteria. *E.g.*, Petition at 55-56. Significantly, the

[2] Field-test questions are questions that are being developed and tested. Field test questions do not count towards the student's score.

[3] The amount of time that a student *takes* to complete an assessment is not the same as the amount of time the student *needs* to complete. When students are given a specified amount of time to complete an assessment, they may choose to use the entire amount of time allowed to complete the assessment.

legislature did not include the requirement that changes to the length of the STAAR test take place "before [it] may be administered," as mandated for evaluations of validity and reliability.[4] Clearly, timing data with sufficient sample sizes from the administration of the shortened test are necessary to inform ongoing agency assessment modifications and any design changes to ensure they achieve the desired time length outcomes.

The Commissioner Waives Retesting and Retention Requirements for 5th and 8th Graders

Plaintiffs' Petition emphasizes that students in grades five and eight are required to pass the state reading and math assessments in order to advance to the next grade, and that students who fail to pass are required to retake the assessments. *E.g.*, Petition at 32. As noted above, due to unrelated reporting delays from the state's testing vendor, Educational Testing Service, Commissioner Morath waived the requirement that fifth and eighth graders pass the standardized reading and math assessments for the 2015-16 school year in order to be promoted. *See* Exhibit A. Third grade students are not subject to retention requirements.

Plaintiffs' Allegations

According to Plaintiffs, their children are subject to a variety of consequences based on their presumed failure to pass STAAR assessments. For example, students in grades 5 and 8 who fail to pass STAAR are "subject to additional assessment opportunities (with the last opportunity occurring during the summer months)." *See* Petition at 32. This might include removal from recess or elective classes to prepare for the second attempt, or summer school to prepare for the third. Students who do not meet the passing standard "are subjected to "accelerated instruction" provided at the campus level," at which attendance is mandatory. *Id.* at 35. Sending students to summer

[4] The requirement to assess reliability and validity did not involve a complete re-design of the STAAR assessments, and, while they do not "concede" TEA's compliance, Plaintiffs do not challenge reliability or the validity in this suit. *E.g.*, Petition at 8, n 1.

school classes may interfere with summer vacations or an extracurricular "camp." *Id.* at 36-37. Students who have failed to meet standards might be required to take academic classes rather than participate in extra-curricular electives such as band or athletics. *Id.* at 44-45.

Without alleging any causal relationship between the *length* of the STAAR test and each child's implicit failure to pass the test, Plaintiffs ask the Court to declare, *inter alia*, that the STAAR tests were non-compliant and may not be used as a basis to retain or provide accelerated instruction to students or to determine a school or campus's accountability rating. *Id.* at ¶ 59. Plaintiffs further request that the Court enjoin TEA from using assessments for grades 3 through 8 to label any student's performance as "unsatisfactory," to require school districts to prescribe "accelerated instruction," or to determine a school district or campus's accountability or performance rating. *Id.* at 63. In essence, Plaintiffs ask the Court to throw the baby out with the bathwater—to judicially invalidate the 2016 STAAR test for every third- to eighth-grader, and to enjoin the TEA from using the test for any assessment purpose.

This motion requires this Court to determine if Plaintiffs' lawsuit should be dismissed in its entirety.

C. Legal Standard

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000). The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Id*. at 554. As an initial matter, the plaintiff must "allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Whether a plaintiff has alleged facts that affirmatively establish subject-matter jurisdiction, and whether undisputed evidence of

jurisdictional facts establish a trial court's jurisdiction, are both questions of law for the trial court to decide. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004).

When a defendant's plea to the jurisdiction challenges the plaintiff's pleadings, the court determines whether the plaintiff alleged facts that affirmatively demonstrate subject-matter jurisdiction. *Id*.; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009). To determine whether a plaintiff demonstrated a court's jurisdiction, a court looks to the facts alleged in the petition, construed in favor of the plaintiff, as well as any evidence submitted by the parties that is pertinent to the jurisdictional inquiry. *Miranda*, 133 S.W.3d at 226-27; *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Miranda*, 133 S.W.3d at 226-27. However, if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction should be granted without allowing the plaintiffs an opportunity to amend. *Id.* at 227; *Creedmoor-Maha*, 307 S.W.3d 505, 513 (Tex. App.—Austin, no pet. h.).

In deciding a plea to the jurisdiction, a court "is not required to look solely at the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland*, 34 S.W.3d at 555. If the defendant challenges the existence of jurisdictional facts, the trial court is required to consider relevant evidence to resolve the jurisdictional issue. *Heinrich*, 284 S.W.3d at 378 (citing *Miranda*, 133 S.W.3d at 227). If the jurisdictional challenge implicates the merits of the Plaintiffs' cause of action, the trial court must review the evidence presented with the plea in order to determine if a fact issue exists. *Miranda*, 133 S.W.3d at 227.

If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional

issue, the trial court must rule on the plea to the jurisdiction as a matter of law. *Id*. at 228; *Heinrich*, 284 S.W.3d at 378. If a trial court lacks subject-matter jurisdiction, it has no discretion and must dismiss the case. *Hampton v. University of Tex. M.D. Anderson Cancer Ctr*., 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, reh'g overruled). A court must determine at its earliest opportunity whether it has authority to allow the litigation to proceed. *Miranda*, 133 S.W.3d at 226.

In this case, even if the facts pled by the Plaintiffs are true, the Court lacks subject-matter jurisdiction to consider any of the claims Plaintiffs assert. As a general matter, sovereign immunity has not been waived to permit Plaintiffs to bring a declaratory judgment action in this case. Further, the Commissioner's decision not to retain or require retesting of students who do not meet passing standards has mooted Plaintiffs' claims relating to fifth and eighth graders—all but one of the Plaintiffs' children. And the Petition fails to allege that the remaining child, a third grader, failed to meet passing standards or, if so, will be subject to any consequence from his or her performance on the test. Further, the Petition is entirely devoid of any fact(s) demonstrating a causal relationship between the *length* of the test, as previously designed and administered in spring of 2016, and the harm (if any) experienced. Finally, declaring the spring 2016 STAAR test void would not only disrupt the statutory scheme of the educational system in Texas, but it also would not redress any injury alleged by any Plaintiff or their child; accordingly, Plaintiffs have failed to allege any legally-redressable injury that can properly form the basis of trial court jurisdiction in this case.

D. Plaintiffs Do Not Establish A Viable Ultra Vires Claim So Their Claims Are Barred By Sovereign Immunity.

In a suit against state agencies and state officials, sovereign immunity generally deprives the trial court of jurisdiction. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007), *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). To proceed, the

plaintiff must either plead and prove a waiver of immunity, or plead and prove that sovereign immunity is inapplicable because the suit is not against the State, but rather against a state official acting *ultra vires*—that is, without legal authority. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009); *Creedmoor-Maha*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet. h.); *Combs v. City of Webster*, 311 S.W.3d 85, 94 (Tex. App.—Austin 2009, pet. denied). Here, Plaintiffs fails to plead facts that would constitute a waiver or sovereign immunity or a valid *ultra vires* claim. Therefore, this Court should dismiss this lawsuit for lack of jurisdiction.

1. The UDJA does not provide a waiver of immunity.

"[T]he UDJA does not establish subject matter jurisdiction. A declaratory judgment action is merely a procedural device for deciding matters already within a court's subject matter jurisdiction."[5] *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d at 266 (citing *State v. Morales*, 869 S.W.2d 941, 947 (Tex.1994)); *see also Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Consequently, in order for this Court to have subject matter jurisdiction, there must exist, outside the UDJA, a cognizable underlying cause of action over which the Court may validly exercise its jurisdiction.

2. The ultra vires exception to the State's sovereign immunity.

To assert a viable claim that fits within the *ultra vires* exception, the plaintiff "must allege, and ultimately prove, that the [defendant] officer acted without legal authority or failed to perform a purely ministerial act." *Heinrich*, 284 S.W.3d at 372; *accord Tex. Dep't of Ins. v. Reconveyance Servs., Inc.*, 306 S.W.3d 256, 258 (Tex. 2010) (per curiam); *Creedmoor-Maha*, 307 S.W.3d at 514; *Smith v. Abbott*, 311 S.W.3d 62, 80 (Tex. App.—Austin 2010, pet. denied). The suit cannot merely be complaining of the official's exercise of discretion. *Heinrich*, 284 S.W.3d at 372. Indeed, a

[5] By its terms, the UDJA allows "a court of record, *within its jurisdiction*," the power to declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. TEX. CIV. PRAC. & REM. CODE § 37.003(a) (emphasis added).

plaintiff that is attempting to restrain a state officer's conduct on the grounds that such conduct is unconstitutional "must allege facts that *actually constitute* a constitutional violation." *Creedmoor-Maha*, 307 S.W.3d at 516 (emphasis added). This *ultra vires* exception only permits prospective declaratory and injunctive relief. *Heinrich*, 284 S.W.3d at 380.

When a plaintiff fails to allege and prove conduct that is, in fact, *ultra vires*, the suit is one against the State, and the defendant's plea to the jurisdiction should be granted and the suit dismissed. *See, e.g.*, *Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n*, 600 S.W.2d 264, 265-66, 270 (Tex. 1980); *Short v. W. T. Carter & Bro.*, 126 S.W.2d 953, 959, 962-63, 965 (Tex. 1938). As shown below, that is the appropriate disposition here.

3. Plaintiffs Lack Standing because they have not been harmed, thus the Court Lacks Jurisdiction

A plaintiff must have standing to assert a claim that the court has jurisdiction to consider. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Standing requires a plaintiff show he has an injury fairly traceable to complained-of conduct of the defendant. *Id*. Without standing, the court lacks jurisdiction to consider the plaintiff's claim. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

a. The Commissioner's Decision Renders Plaintiffs' Claims Moot

Because assessment results were not available in time to deliver accelerated instruction (an issue completely unrelated to H.B. 743 or Plaintiffs' claims), Commissioner Morath announced on June 10th that the state will be removing student consequences attached to the STAAR test for fifth and eighth-grade students for the 2015-2016 school year. *See* Exhibit A. This includes cancellation of the June 21-22 fifth and eighth grade retest. *Id*. The Commissioner's decision

renders the claims moot for all of the Plaintiffs' children. *See* Petition at ¶ 3 (fifth grader), ¶ 4 (third grader[6] and fifth grader), ¶ 5 (fifth grader), and ¶ 6 (eighth grader).

Arguably, results of the 2016 fifth and eighth grade STAAR tests still could result in the identification of 1) campuses or districts that are failing to meet academic standards and 2) students who are not meeting academic benchmarks. Neither outcome provides jurisdiction in this case. No campus or district has joined this lawsuit, and Plaintiffs lack standing to assert any potential claims they might have. (Indeed, Plaintiffs do not allege any factual basis for bringing any claim on behalf of any campus or district). If students are not meeting academic expectations, Plaintiffs assert they may be "subjected to" accelerated instruction to help them succeed academically. Assuming *arguendo* that additional instruction is a harm rather than benefit of standardized testing, it is *not* required by TEA or the Commissioner, but a decision left to the school district:

> **We encourage districts to use local discretion to determine on an individual basis whether accelerated instruction should be offered in the applicable subject area for students who did not pass the mathematics and/or reading assessments in March and/or May.** For the 2015-2016 school year, districts are not required to convene grade placement committees based solely on grade 5 and grade 8 STAAR results. Instead, you should use local discretion and all relevant and available academic information to make promotion/retention decisions for these students as you see fit, such as the recommendation of the teacher and the student's grade in each subject.

Commissioner's letter (Exhibit A). To the extent the STAAR test provides information about a school district or campus's performance, the school district or campus should be a Plaintiff; to the extent a Plaintiff contests accelerated instruction based (in part) on the STAAR Test, the district or campus should be the Defendant.

The only other student—the third grade child of Plaintiff De Leon—has no potential claim relating to the prospect of retesting or retention based on a failure to pass the spring 2016

[6] There were no student-level consequences for the third grade student for the Commissioner to waive. *See* TEX. EDUC. CODE §28.0211(a).

assessment. The pleading does not even affirmatively allege that this unnamed third-grader failed to meet STAAR standards[7]; accordingly, Plaintiffs fail to allege facts that could invoke the trial court's jurisdiction.

b. Plaintiffs allege no injury caused by the length of the test.

None of the Plaintiffs identify any injury to them which is fairly traceable to the amount of time taken to complete the STAAR test. (Indeed, Plaintiffs do not even specify which children purportedly failed to meet STAAR standards, merely making the cryptic allegation that "Each plaintiff has a child who has failed to pass one of the required 5th or 8th grade assessments." *See* Petition at ¶ 34.).

Plaintiffs fail to plead that the length of the STAAR assessment has any relationship with their child's presumable failure to meet STAAR standards. Standing requires a plaintiff show he has an injury fairly traceable to complained-of conduct of the defendant. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Without such a showing, Plaintiffs have failed to establish standing to complain that TEA administered the spring 2016 test before redesigning the STAAR system to meet the testing-time limits set by HB 743.

4. TEA's Actions Comport With the Law.

Plaintiffs complain that the STAAR assessments administered in spring 2016 do not meet the time requirements imposed by HB 743, which became effective in summer of 2015. Plaintiffs' interpretation ignores basic rules of statutory construction.

As pointed out by Plaintiffs, HB 743 consisted of two components—an evaluation of reliability and validity to be undertaken "[b]efore an assessment instrument adopted or developed

[7] Plaintiffs' suit alleges cryptically that "Each Plaintiff has a child who has failed to pass one of the required 5th or 8th grade assessments" and that "each. . . have received written or verbal threats that their children may be required to attend summer school…" *See* Petition at ¶34, 38. But the Petition fails to allege that the sole third-grade student failed to meet standards on the STAAR assessment or that the Agency required the student to be re-tested or retained.

under Subsection (a) may be *administered*" (a-11) and instructions that "an assessment instrument adopted or developed under Subsection (a) must be *designed* such that [the assessment meets new length requirements]" (a-12). Manifestly, the Texas Legislature was fully capable of setting forth standards it required *before administration* of the test, as it did with respect to the evaluation of reliability and validity required by subsection a-11. The fact that the legislature explicitly imposed one component of HB 743 before STAAR *administration* gives meaning to its omission of similar language regarding assessment *design*. That plain language interpretation gives harmony to the bill as a whole and comports with practical considerations—the legislature intended TEA to conduct the reliability and validity assessment before the next STAAR administration, but deliberately stopped short of imposing the same timeframe for test redesign.

Further, the legislature did not provide an appropriation to implement these provisions. Section 17.01 of the appropriations bill states:

> **Sec. 17.01. Contingency Rider.** It is the intent of the Legislature that appropriations made in this Act be expended only for purposes and programs specifically funded in the Act, and contingency appropriations made for legislation adopted by the Eighty-fourth Legislature be the sole source of funding for implementation of that legislation. No state agency or institution of higher education is required to reallocate or redistribute funds appropriated in this Act to provide funding for programs or legislation adopted by the Eighty-fourth Legislature for which there is not specific appropriation or contingency provision identified in this Act. General Appropriations Act, 84th Leg., R.S., ch. 1281, art. IX, § 17.01

Despite the lack of specific statutory direction to immediately implement these provisions and the lack of an appropriation, the Agency complied with the new provisions by shortening the length of the assessment instruments as described previously, and collected timing data to verify the extent to which the shortened assessments meet the objectives of the design requirements set forth by HB 743.

5. Because Plaintiffs identify no waiver of immunity and no ultra vires acts, their UDJA claims against the Commissioner are jurisdictionally barred.

Plaintiffs complain that TEA "acted outside its statutory authority adopting and utilizing assessments as part of the Chapter 39 statewide assessment system that were not in compliance with the statute." *See* Petition at ¶56. Plaintiffs have actually failed to allege any fact suggesting that TEA *adopted or developed* a statewide assessment since the June 2015 effective date of HB 743. Even if Plaintiffs factually supported their allegations, however, this Court should leave the matter to the legislative and executive branches, as the agency's alleged action or inaction are not properly subject to judicial review.

In Texas there is no inherent right to judicial review of agency orders. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Bacon v. Hist. Comm'n*, 411 S.W.3d 161, 173-74 (Tex. App.—Austin 2013, no pet.) ("One implication of these principles is that there is no general right to challenge or seek review of a state agency order or decision in Texas state court; to the contrary, state agency decisions generally cannot be challenged in court unless the Legislature has enacted a statute expressly authorizing such review."); *Creedmoor-Maha*, 307 S.W.3d 505, 515 (Tex. App.—Austin 2010, no pet.) (UDJA actions "that seek declaratory or injunctive relief against agency orders from which the legislature has not granted a right of judicial review" are barred by state sovereign immunity); *KEM Tex., Ltd. v. Texas Dep't of Transp*., No. 03-08-00468-CV, 2009 Tex. App. LEXIS 4894, at *8-18 (Tex. App.—Austin 2009, no pet.) (challenge to non-appealable agency order barred by sovereign immunity). There is no judicial review for the length of STAAR assessments.[8]

[8] This general principle is particularly appropriate under the facts of this case—the legislature imposed a new requirement that, according to Plaintiffs, requires a significant change to the tests. The Legislative Budget Board estimated a cost of $800,000 for this redesign, yet the legislature did not fund the task. If TEA has failed to comply with the statute, the legislature—not the trial court—is in the best position to hold the agency accountable for its

III.
CONCLUSION AND PRAYER

For all of the foregoing reasons, this Court should grant Defendant's plea to the jurisdiction, thereby dismissing all of Plaintiffs' claims, with prejudice.

Respectfully submitted,

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alleged action (inaction). Further, the executive branch has oversight over TEA. It is unnecessary—and inappropriate—for the judiciary to add a third branch of government.

CERTIFICATE OF SERVICE

I certify that on July 22, 2016, this document was served on the following counsel of record via File & ServeXpress:

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