

CAUSE NO. \_\_\_\_\_

<b>PROGRESO INDEPENDENT SCHOOL DISTRICT,</b>	§	
<i>Plaintiff</i>	§	<b>IN THE DISTRICT COURT</b>
	§	
	§	
v.	§	
	§	_____ <b>JUDICIAL DISTRICT</b>
<b>MICHAEL L. WILLIAMS, TEXAS COMMISSIONER OF EDUCATION, in his official capacity, MICHAEL BERRY, DEPUTY COMMISSIONER OF EDUCATION, in his official capacity, and TEXAS EDUCATION AGENCY,</b>	§	
<i>Defendants</i>	§	<b>TRAVIS COUNTY, TEXAS</b>
	§	
	§	

**PLAINTIFF’S ORIGINAL PETITION FOR DECLARATORY JUDGMENT, REQUESTS FOR TEMPORARY RESTRAINING ORDER, TEMPORARY AND PERMANENT INJUNCTION, AND MOTION TO DENY SUPERSEDEAS ON APPEAL OF ANY INJUNCTIVE RELIEF GRANTED AGAINST DEFENDANTS**

TO THE HONORABLE DISTRICT JUDGE PRESIDING:

Plaintiff, Progreso Independent School District (PISD), brings this action against Defendants Michael L. Williams, in his official capacity as Texas Commissioner of Education (Commissioner); Michael Berry, in his official capacity as Deputy Commissioner of Education, and Texas Education Agency (TEA), for declaratory relief under the Texas Declaratory Judgment Act (TDJA); for a temporary restraining order, a temporary injunction, and permanent injunctive relief; and a motion to deny supersedeas on appeal, of any injunctive relief ordered against Defendants, as follows:

**I.  
SUMMARY**

1. This case is about whether the State of Texas should displace the democratically-elected Board of Trustees at PISD and appoint a board of managers. PISD is a school district in

the Rio Grande Valley that admittedly had serious governance and financial control problems in 2013 and earlier. In 2013, the TEA completed a special accreditation investigation that identified these issues, and assigned a management team of two conservators (the “Management Team”) to direct full compliance by the Board of Trustees and administration. Since that time, a majority of the Board of Trustees has turned over through elections, and the newly elected members had no involvement whatsoever with the prior issues and concerns identified in the TEA’s investigations. Over the past two years, the new Board of Trustees and PISD administration have been working closely with the TEA and the Management Team to address all of the identified problems and to ensure that the District is operating effectively and in compliance all of its legal obligations. In addition, PISD has completed a comprehensive District Recovery Plan to address the issues raised by the TEA, and it has completed, or will soon complete, all additional remedial measures identified by the TEA and the Management Team. Furthermore, PISD currently meets all academic and financial accountability standards set forth in state law. PISD’s financial status is healthy. PISD also recently hired a new Superintendent, Martin Cuellar, who is fully certified by the State Board of Educator Certification to be a superintendent in Texas and who is fully qualified to lead the District. The Management Team did not express any objections to the hiring of Cuellar prior to the Board’s decision. Moreover, there are no allegations whatsoever that since December 2013, the current PISD Board or anyone else at the District has engaged in any wrongful, unlawful, or improper behavior or failed to comply with the directives of the Management Team. In short, the District is operating in compliance with state law based on the leadership of the democratically-elected Board of Trustees and the new Superintendent.

2. Despite all of the improvement at PISD under the leadership of the current Board in conjunction with the Management team, and despite the fact that the District is in full

compliance with all academic and financial accountability standards, the Commissioner and the Deputy Commissioner have determined that: (i) the District's accreditation status should be lowered to "Accredited-warned" for the 2014-2015 school year; (ii) that the democratically-elected Board of Trustees and the new Superintendent should be removed and that an outside board of managers should be installed, along with an interim superintendent selected by the Commissioner. There is no basis in fact or law for lowering of the District's accreditation status for the 2014-2015 school year, removing the Board of Trustees and appointing a board of managers, or replacing the current superintendent.

3. Plaintiff brings this *ultra vires* suit against the Commissioner and the Deputy Commissioner because both have acted outside of their statutory authority and discretion in the decisions to: (i) lower the accreditation rating of PISD for the 2014-2015 school year; (ii) suspend all powers granted by state law to the elected Board of Trustees of PISD; and (iii) replace the elected Board of Trustees with a board of managers appointed by the Commissioner. Defendants rely on Tex. Educ. Code (TEC) §§ 39.052(d) and 39.057(d) in lowering the accreditation rating of PISD for the 2014-2015 school year to "Accreditation-Warned." These statutes limit the circumstances when the Commissioner can lower a district's accreditation status, none of which apply to PISD. In addition, the Defendants rely on TEC §§ 39.057(d), 39.102(a)(9), and 39.102(b) for purported authority to appoint a board of managers, but these statutes do not authorize the Commissioner to appoint a board of managers for PISD at the present time. Furthermore, the Defendants' actions of lowering PISD's accreditation rating and appointing a board of managers are based on a special accreditation investigation that was conducted in violation of the law and the prior imposition of the Management Team that was also conducted in violation of the law. Accordingly, the Defendants

actions of lowering PISD's accreditation rating and appointing a board of managers are arbitrary and capricious, and without a rational basis in fact or law.

4. Plaintiff seeks a declaratory judgment declaring that the Defendants have acted outside of or in excess of their statutory authority and discretion in lowering the PISD accreditation status for the 2014-2015 school year to "Accredited—Warned," and in appointing a board of managers to replace the elected PISD Board of Trustees; a temporary restraining order and a temporary injunction prohibiting the Defendants from posting an agenda for a meeting of the PISD Board of Trustees with an agenda item to install a board of managers, and from installing a board of managers to replace the elected Board of Trustees of PISD during the pendency of this action; an order denying supersedeas on appeal as to any temporary restraining order or temporary injunction entered by this Court, during the pendency of this action; and that after final trial, that such temporary injunction be made permanent, along with entry of an order denying supersedeas on appeal as to such permanent injunction; and for attorney's fees and costs under the TDJA, Tex. Civ. Prac. & Rem. Code § 37.009

## **II. DISCOVERY CONTROL PLAN**

5. Plaintiffs will conduct discovery under Level 2 pursuant to Texas Rule of Civil Procedure 190.3.

## **III. PARTIES**

6. Plaintiff is Progreso Independent School District, a local governmental entity entirely located in Hidalgo County, Texas, with its principal office at P.O. Box 610 Progreso, TX 78579;

7. Defendants are Michael L. Williams, in his official capacity as Texas Commissioner of Education, Michael Berry, in his official capacity as Deputy Commissioner of Education, and the Texas Education Agency (TEA), an agency of the State of Texas. All defendants may be served with process at the TEA's principal office, 1701 N. Congress, Austin, Texas 78701. Issuance of citations is requested at this time.

#### IV. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this suit and over the Defendants, as to Plaintiff's claims for declaratory and prospective injunctive relief, under the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code § 37.003, and the common law of the State of Texas, as previously determined by the Texas state courts, including but not limited to *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-372 (Tex.2009). The only relief requested by Plaintiff against Defendants is prospective injunctive and declaratory relief. Plaintiff does not seek any monetary relief other than costs and attorney's fees, as may be equitable and just, as authorized by Tex. Civ. Prac. & Rem. Code § 37.009.

9. Venue is proper in Travis County, Texas, as this is a suit against TEA, a Texas state agency, and the Commissioner of Education.

#### V. EVIDENTIARY APPENDICES<sup>1</sup>

<b>APPENDIX A:</b> No. 000001-239	Letter of Commissioner of Education, September 23, 2015, including all attachments
<b>APPENDIX B:</b> No. 000239-864	Appeal of Progreso ISD, October 7, 2015, of Commissioner's decisions announced in September 23, 2015 letter, including all attachments. (Note that exhibits to letter Bates separately labeled as PISD BOM in original.)

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<sup>1</sup> All appendices are Bates labeled with the prefix "PISD BOM LIT" to refer to Progreso ISD board of managers litigation. Some documents also have other Bates labels on them that were used in prior administrative or litigation proceedings.

<b>APPENDIX C:</b> No. 000865-891	TEA Preliminary Special Accreditation Investigation Report dated Oct. 10, 2014
<b>APPENDIX D:</b> No. 000892-907	PISD Letter October 29, 2014, to TEA, response to Preliminary Special Accreditation Investigation Report dated Oct. 10, 2014
<b>APPENDIX E:</b> No. 000908-912	PISD letter August 3, 2015, response to Management Team July 2015 Quarterly Report
<b>APPENDIX F:</b> No. 000913	Commissioner letter, August 26, 2015, continuing Management Team appointment
<b>APPENDIX G:</b> No. 000914-921	Public information request to TEA seeking documents regarding quarterly and annual reviews pursuant to TEC §39.108 and TEC §39.111(b), and TEA response.
<b>APPENDIX H:</b> No. 000922-924	Commissioner letter October 27, 2015, notice of formal review conference, PISD appeal of decisions to lower accreditation rating and appoint a Board of Managers for PISD
<b>APPENDIX I:</b> No. 000925-927	Commissioner letter November 2, 2015, delegation authority for formal review conference to Deputy Commissioner Berry, and limiting formal review conference to only one of the issues raised in the PISD appeal of the lowered accreditation rating and appointment of Board of Managers
<b>APPENDIX J:</b> No. 000928-931	Letter of Deputy Comm. dated Dec. 30, 2015, denying PISD's informal and formal appeals of the TEA decisions lowering the PISD accreditation status and appointing board of managers. Letter of Commissioner dated December 30, 2015, appointing a Board of Managers and Interim Superintendent.
<b>APPENDIX K:</b> No. 000932-939	Affidavits of PISD Board President Juan J. Ramos, Jr., and PISD Superintendent Martin Cuellar.
<b>APPENDIX L:</b> No. 000940-944	TEA's Special Investigation Procedures, revised as of June 2013
<b>APPENDIX M:</b> No. 000945-946	Letter dated October 22, 2015 requesting name clearing hearing for Trustees

<b>APPENDIX N:</b> No. 000947-970	Presentation made to TEA by PISD counsel at appeal hearing on November 3, 2015
<b>APPENDIX O:</b> No. 000971	Email from counsel to TEA
<b>APPENDIX P:</b> No. 000972	Notice of board of managers meeting for January 7, 2015

## VI. FACTS

### **A. November 2013 Special Accreditation Investigation and Appointment of a Management Team**

10. In August of 2013, the TEA initiated a Special Accreditation Investigation (SAI) of PISD in response to the indictment and arrest of two district employees and a board member related to allegations of bribery and corruption and in response to a request from the then superintendent for assistance. The TEA investigated the District's management, accounting and reporting of federal and state funds and issued its preliminary report on October 18, 2013, finding numerous violations of federal and state law. PISD did not contest the findings contained in the preliminary SAI report. (App. A 1, 6-35)<sup>2</sup>

11. On November 4, 2013, TEA issued its final SAI report, which found that the PISD Board of Trustees had failed to perform its duty to govern, administer, and oversee the management of the District's funds. (App. A 1, 6-35)

12. On January 16, 2013, the Commissioner sanctioned PISD based on the November 2013 SAI final report by appointing a Management Team consisting of two conservators to direct the PISD Board of Trustees in its oversight and governance of the District. (App. A 36-38)

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<sup>2</sup> All references to documents will refer to the Appendix letter and the page number by Bates number prefix PISD BOM LIT.

PISD did not contest the appointment of the Management Team as a sanction based on the November 2013 SAI final report.

### **B. Progress and Change at PISD**

13. The Management Team began working at PISD in February 2014. Pursuant to the Commissioner's appointment letter, the Management Team's first task was "Developing a plan of improvement within the first 90 days that is reasonably calculated to address each identified causal factor or barrier. The improvement plan will include directives for specific, measurable actions the district must take, including specific measurable targets for improvement as well as timelines for completion for each recommendation." (App. A 37) The Management Team never drafted the improvement plan, as directed by the Commissioner.

14. After the Management Team failed to complete an improvement plan in violation of the Commissioner's directives, PISD completed its own District Recovery Plan in June of 2014. (App. A 171-186) The District has completed all of the items set forth in the District Recovery Plan.

15. At the time of the appointment of the Management Team, the Board of Trustees was in the midst of a highly contested election cycle, and elections were successfully held on May 10, 2014. The election resulted in of three new Trustees—Juan J. Ramos, Jr., Juan Garcia, Jr., and Leo Rodriguez. After the election, the Board of trustees was successfully reorganized and new Board officers were elected by the Trustees at a Special meeting held on May 19, 2014. (App. A 164)

16. In July of 2014, the former superintendent left the District, and the Board appointed an Interim Superintendent, Dr. Ismael Cantu.

17. Over the next several months, the Board of Trustees and Interim Superintendent worked with the Management Team in completing the District Recovery Plan. On October 16,



2014, the Management Team reported that “considerable improvement in the district has taken place since the interim superintendent came on board and we would like to see this continue.” (App. A 138)

18. In their March 31, 2015 quarterly report, the Management Team for the first time provided an “Exit Strategy and Timeline” with an anticipated exit date of August 31, 2015. (App. A 92) Thus, as of March 31, 2015, the Management Team was expecting to finish its assignment as of August 31, 2015.

19. PISD held a general election for Trustees in May of 2015, which resulted in the election of two new Trustees, Alejandro Alanis, and Luis E. Lopez. As a result, five of the seven Board members have been elected since any of the events that were the subject of the two SAIs.

20. Only two current Trustees serving on the PISD Board held their office prior to May of 2014. Raul Martinez and Juan T. Vela were both elected to the Board in 2010, and these Trustee places will be subject to a general election in May of 2016.

21. On June 25, 2015, the Board of Trustees selected Martin Cuellar as the finalist for the superintendent position. (App. A 72) Cuellar is fully certified as a Superintendent by the Texas State Board for Educator Certification. (App. B 783)

22. The Management Team refused to participate in the hiring and selection of the superintendent, despite being authorized to do so and despite invitations from the Board to participate. Moreover, the Management Team had the authority to issue a directive to the Board regarding the selection process, to direct the hiring of a specific individual, or to prohibit the Board from hiring Cuellar, if they wished to do so. However, the Management Team remained silent during the selectin process.

23. On July 9, 2015, the Management Team issued its quarterly report. In that report, the Management Team reversed its plans for an exit, identified purported concerns regarding the Board that were based on misstated facts and unfounded allegations, critiqued the Board for hiring Cuellar due to his purported “limited experience,” and recommended that the Commissioner appoint a board of managers. (App. A 68-73) The Management Team stated, “A review of the board’s actions over the past year, concerns over district finances and the board’s inattention to district finances leaves us with no choice but to request that a board of managers be put in place as soon as possible.” (App. A 73)

24. On August 3, 2015, Mr. Cuellar sent a response to the TEA addressing the Management Team’s quarterly report. (App. E 908-912) In his response, Mr. Cuellar addressed the various inaccuracies and inconsistencies in the Management Team’s report. For example, Mr. Cuellar addressed the factual inaccuracies in the Management Team’s report regarding an issue with bids for a roofing project. In addition, Mr. Cuellar took issue with the Management Team’s criticisms of his hiring, particularly in light of the fact that the Management Team had been invited to participate in the superintendent selection process but had declined. In addition, Mr. Cuellar recommended that the Commissioner reject the recommendation of the Management Team. Mr. Cuellar stated:

Since the initial TEA intervention, the Progreso Independent School District has elected five new Board Members; paid off all outstanding items; hired a new Superintendent and Business Manager; balanced its budget; maintained the recommended fund balance in its general fund; reestablished controls over its special fund and grant expenditures; completed an outside compensation study and will have completed the process of its implementation with the upcoming school year; replaced its financial management software, made necessary personnel adjustments; fully cooperated with multiple audits and law enforcement data requests, and maintained fully acceptable accountability ratings for all of its campuses.

Based on these changes and the progress of the District, Mr. Cuellar suggested that it was time for the Management Team to be withdrawn from the District, as proposed by the Management Team in March of 2015.

25. On August 26, 2015, the Commissioner responded to Mr. Cuellar. The Commissioner stated, “After a review of the management team's quarterly report and your response to the quarterly report, my decision is for Ms. Hermelinda Romeros and Mr. Richard Clifford to continue as the management team currently appointed to Progreso ISD.” (App. F 913)

### **C. Second Special Accreditation Investigation**

26. In addition to the first SAI that was completed in November 2013, the TEA began a second SAI in December of 2013 relating to additional allegations of improper conduct at the District. However, Defendants failed to get proper approval from the Commissioner for the second SAI and failed to issue a formal notice to the District, as required by law and TEA policy.

27. All of the TEA field work for the second SAI was completed in December 2013. A preliminary report related to the second SAI was submitted to the District on October 10, 2014. (App. C 865-891) The preliminary report noted instances of misconduct by PISD’s former board of trustees and former superintendent that occurred in 2013 and before. The TEA failed to provide ISD with an opportunity for an informal review of the preliminary findings, despite the fact that an opportunity for an informal review is required by law and TEA’s own policies. PISD did not contest the findings set forth in the preliminary report for the second SAI. (App. D 892-907.) Despite no contest from PISD, the TEA did not issue a final report in 2014.

28. After more than 19 months after completion of the field work and more than 10 months after the preliminary report for the second SAI was issued, Associate Commissioner Dr. Lisa Dawn-Fisher issued the final report for the second SAI on August 24, 2015. (App. A 39-66) As with the first SAI, the second SAI made findings of alleged misconduct and malfeasance by

PISD's prior board members and by PISD's former superintendent from 2013 and earlier time periods. The second SAI final report did not make any findings relating to deficiencies occurring after 2013 or make any findings regarding act or omission by any current Board member or the current PISD administration since the appointment of the Management Team in January of 2014.

29. The second SAI report included various corrective actions that the TEA expected to be implemented. (App. A 58-59) Many of the required "corrective actions" had already taken place at the District in the intervening 19 months since the fieldwork for the second SAI was completed, and well before the final SAI report was issued. (App. B 286-302)

30. Despite the fact that none of the misconduct identified in the second SAI related to current board members or the current administration, and despite the fact that the report did not consider the progress and changes that had occurred at the District since 2013, Dr. Dawn-Fisher nevertheless recommended that Commissioner lower the District's accreditation status to "Accredited-warned" and appoint a Board of Managers. (App. A. 59)

**D. Commissioner's Preliminary Decision to District's Accreditation Status and Appoint a Board of Managers**

31. On September 23, 2015, the Commissioner issued a letter to the District (cited herein as Commissioner's "preliminary decision") setting forth his preliminary decision to lower the accreditation status of the District to "Accreditation-Warned," to appoint a Board of Managers to displace the democratically-elected Board of Trustees, and to appoint a new superintendent. (App. A 1-5) The Commissioner issued this letter without complying with TEC 39.111(b) and 39.108 by failing to conduct quarterly and annual reviews to first determine whether continuation of the Management Team was necessary and whether a lack of improvement justified the additional interventions and sanctions described in his September 23, 2015 letter.

32. The Commissioner based his preliminary decision on the findings of the first and second SAI reports and the concerns contained in the report the Management Team dated July 9, 2015. The Commissioner relied on the first SAI report for his preliminary decision, even though he had already sanctioned the District based on the findings of in that report by appointing a Management Team in January 2014. The Commissioner also relied on the findings in the second SAI of “misconduct, malfeasance, and neglect by both the district’s board of trustees and the former superintendent,” even though all such allegations and findings related to conduct by former board members and former administrators dating from periods prior to December 2013. Nothing in the second SAI final report implicated any current PISD Board member or the current administration in any wrongdoing or improper conduct.

33. As for the Commissioner’s reliance on the assertions contained in the Management Team’s quarterly report dated July 9, 2015, the Commissioner could not cite any unlawful or improper actions by the Board of Trustees. Rather, the Commissioner cited to the following issues in the management team’s report:

- the management team has had to disallow four actions taken by the board in public meetings;
- the lone finalist selected by the board for superintendent has limited experience in the leadership of a school district;
- the board persists in its efforts to provide a pay increase to employees despite the management team's direction to the contrary;
- the board awarded a roofing contract to a bidder with the knowledge that the bid contained an addition error of \$110,000 and did not meet the bid specifications;
- the board continues to be split and there is limited consensus building among the board; and the board meetings are poorly attended by board members, with the April 2015 meeting requiring cancellation due to lack of a quorum.

#### **E. District's Response and Additional Documentation Regarding District Improvement**

34. In its formal response to the Commissioner, dated October 7, 2015, the District set forth the many reasons why each of these alleged concerns is either based on misstatements of fact and/or simply disagreements with the business judgment of the current Board of Trustees. (App. B 240-260)

35. For example, the Commissioner cites four purported instances of the Management Team having to “disallow four actions taken by the board in public meetings,” although only two such instances are identified in the Management Team’s various quarterly reports. Moreover, even those two instances simply show that the Board followed the Management Team’s instructions, which were issued after the Board took otherwise lawful and proper action on the subject matter in question. (App. B 251-252)

36. Similarly, the Management Team criticized the Board’s appointment of Mr. Cuellar based on his lack of experience, despite the fact that Mr. Cuellar is fully certified by the Texas State Board for Educator Certification to be a Superintendent and has significantly more experience than other superintendents who the TEA has expressly authorized to serve as leaders of school districts by granting those superintendents waiver from the certification requirements that would otherwise apply. (App. B 250-251)

37. The Commissioner’s reliance on the alleged poor attendance and absenteeism at Board meetings was also unfounded. Since the election of three new Board Members in May 2014, there has been only one instance (out of more 25 meetings) when a board meeting was cancelled for the lack of a quorum. (App. B 246-247) This means that the Board had a quorum rate greater than 95% of its Board meetings over the relevant time period. The Commissioner has not identified any harm that resulted to the operations of PISD or the proper functioning of the PISD Board of Trustees, or in the governance of PISD, from the cancellation of one Board

meeting in a calendar year, for lack of a quorum. Absenteeism by elected officials at meetings is not grounds for removal of an elected official from office under Tex. Local Gov't Code §87.013(a), which are limited to incompetency, official misconduct, or intoxication on or off duty caused by consumption of alcohol.

38. The additional factual responses to the Management Team's unfounded concerns are set forth in detail in the District's formal response to the Commissioner's decision, and are incorporated by reference herein. (App. B 245-252)

39. The District's October 7, 2015 response also set forth the legal arguments as to why the Commissioner was not authorized to lower the District's accreditation status and appoint a Board of Managers for the reasons he cited in his preliminary decision letter. (App. B 240-258) These arguments are discussed in detail below.

40. In addition to its formal response to the Commissioner, the District also provided a detailed Update to District Recovery Plan Progress Report, dated October 5, 2015, to Ron Rowell, TEA's Director of School Governance and the TEA manager who oversees the Management Team. (App. B 261-285) In this update report, the District detailed all of the remedial actions completed by the District as part of its District Recovery Plan, including board reorganization; board training; reorganization of key District personnel; compliance with criminal history background checks; reviews of policies and practices and strategic planning; procurement of support services from the Region One Education Service Center; completion of numerous tasks and objectives regarding increasing financial controls, preparation of financial statements, and completing annual financial audits; and increasing transparency.

41. On October 7, 2015, the District also submitted a response to second SAI final report to Dr. Lisa Dawn-Fisher, the Associate Commissioner of School Finance and the author of

the second SAI final report. (App. B 286-500) In its response, the District detailed all of its actions to address each of the corrective actions set forth in the second SAI final report. (App. B 287-301) Many of the corrective actions were already completed as part of the broader recovery and improvement efforts at the District prior to the issuance of the second SAI final report. As set forth in its response, the District is currently in the process completing the few remaining corrective actions that were not already addressed.

42. As set forth in the District's response to the Commissioner's preliminary decision letter, in its progress report to Mr. Rowell on the District's Recovery Plan, and in its response to Dr. Dawn-Fisher regarding the second SAI final report, the District has provided extensive and undisputed evidence of its effective actions in the past two years to address the problems that existed in 2013 and in prior years to improve the operations and governance of the District.

43. On October 22, 2015, counsel for the District sent a letter to the Commissioner requesting a name-clearing hearing on behalf of six of the PISD Trustees: Alejandro Alanis (elected May 2015); Juan M. Garcia, Jr. (elected May 2014); Luis E. Lopez (elected May 2015), Raul Martinez (reelected May 2013); Juan J. Ramos, Jr. (elected May 2014); and Leo Rodriguez (elected May 2014). (App. M 945-946) The Commissioner's false allegations contained in his September 23, 2015 letter and the Commissioner's decision to lower the District's accreditation status and appoint a Board of Managers have harmed and will continue to harm the reputation of these individuals among the citizens, taxpayers, and voters of Progreso ISD, their constituents. The named Trustees requested "a public hearing, to be conducted by Texas Education Agency, at [the Commissioner's] direction, to be held at Progreso ISD, to provide the Trustees with an meaningful opportunity to publicly refute any and all false allegations contained in your letter of



September 23, 2015, as well as in the documents attached to this letter for the purposes of clearing their names and reputations before their constituents in Progreso ISD.”

44. Counsel for the TEA verbally informed counsel for PISD in November of 2015 that the Trustees would not receive the requested name-clearing hearing. Defendants have made no further response to the letter requesting a name-clearing hearing by these elected Trustees.

#### **F. TEA’s Review and Final Decision**

45. In response to the District’s appeal, the Commissioner scheduled formal review of his decision for November 3, 2015. (App. H 922-924) The Commissioner limited the attendance at the formal review on behalf of the District to five individuals and prohibited a quorum of the Board from attending. Furthermore, notice of the formal review stated, “The scope of the review is limited to the appointment of a board of managers to the district, the district's lowered accreditation status, and the finding that the district has failed to comply with the management team's directives.” (App. H 922-924)

46. On November 2, 2015, counsel for the District received a “Delegation of Authority” in which the Commissioner made the following delegation:

As Commissioner of Education, I hereby delegate to Michael Berry, Deputy Commissioner for Policy and Programs, the authority to decide and sign the final order regarding my letter dated September 23, 2015, in which I announced my finding that the Progreso Independent School District has not been compliant with the management team directives, my intention to lower the district's accreditation rating and to appoint a Board of Managers. Mr. Berry will preside over the informal review of my finding that the district has not been compliant with the management team directives, and the formal review of my intention to lower the district's accreditation rating and the appointment of a Board of Managers.

(App. I 927)

47. On November 3, 2015, the Deputy Commissioner conducted the formal review of the Commissioner’s decisions, along with approximately 10 other TEA employees. The District was represented by Board President, Jay Ramos, Jr.; Board Secretary, Alejandro Alanis; Superintendent Martin Cuellar; and Mr. O’Hanlon and Mr. Gibson as counsel to the District. The District’s counsel went through a presentation that addressed not only the purported limitations on scope of the review, as well as the factual and legal arguments as to why the Commissioner’s preliminary decision was neither warranted nor lawful. (App. N 947-970)

48. On December 30, 2015—more than two years after any of the alleged improper conduct by the former Board members and administration identified in the two SAI reports—the Deputy Commissioner issued a letter denying the PISD appeal of the Commissioner’s preliminary decisions. In his letter, the Deputy Commissioner made the final decision to lower the 2014-2015 accreditation rating and to appoint a board of managers to replace the elected Board of Trustees. The Deputy Commissioner stated:

The board of managers is being appointed on the basis of the lowered accreditation status resulting from the Special Accreditation Investigations (SAI) reports. This intervention is authorized because the district has a current accreditation status of Accredited-Warning, because the findings in the second SAI warrant the intervention, and because the district has had a management team for at least two consecutive school years, including the current school year. TEC §§39.102(a)(9), 39.057(d) and 39.102(b).

(App. J 928-929)

49. Notably, the Deputy Commissioner also stated, “I decline to make a finding that the district has not been responsive to or compliant with the prior interventions and sanctions imposed, and therefore, the appointment of the board of managers is not based upon such finding.” (App. J 928) Thus, the Deputy Commissioner could not have based his decision to lower PISD’s accreditation rating on any such finding.

50. Importantly, the Deputy Commissioner’s decision to overturn the Commissioner’s preliminary finding of a lack of responsiveness and compliance by the District undermines one of the primary reasons and legal authority cited by the Commissioner for appointing the board of managers. In his preliminary decision, the Commissioner relied on the responsiveness and compliance finding to support appointing a board of managers pursuant to TEC §39.102(b) and 19 TAC §§97.1059(b)(3) and 97.1073(e)(1). (App. A 3) Because the Deputy Commissioner’s final decision did not include this finding, Defendants can no longer rely on this justification for their decision.

51. In his final decision, the Deputy Commissioner also stated, “My decisions regarding the lowered accreditation status and appointment of the board of managers are final and not appealable.” (App. J 929) The Deputy Commissioner further stated, “The management team’s appointment will remain active until the board of managers is installed, at which time the management team’s appointment will be suspended.” (App. J 929)

52. On December 30, 2015, the Commissioner issued a letter naming five persons as the board of managers to replace the elected PISD Board of Trustees, and naming Dr. Ismael Cantu as Interim Superintendent of PISD. (App. J 930-31) Note that Dr. Cantu is the same person who previously served as the Interim Superintendent prior to Cuellar being hired. The Commissioner also stated, “The current management team’s appointment will remain active until the board of managers is installed, at which time the management team’s appointment will be suspended.” (App. J 931)

53. Counsel for the TEA informed PISD’s counsel that Defendants are planning to post a notice for the first organizational meeting of the board of managers on January 4, 2015, with the first organizational meeting and installation of the board of managers to occur as early

as Thursday, January 7, 2015. (App. O 971) A notice and agenda for a public meeting was posted at the instruction of the TEA on January 4, 2015, noticing a meeting of the board of managers for January 7, 2015. (App. P 972) The agenda includes the swearing in of the board of managers, election of officers for the board of managers, and various other administrative matters. (App. P 972) The notice and agenda was signed by Ronald Rowell, the Director of School Governance at the TEA and the person who oversees the Management Team.

54. PISD has exhausted all available administrative remedies under the Texas Education Code and Chapters 97 and 157 of the Texas Administrative Code, regarding the final SAI report issued on August 24, 2015, and the Commissioner and Deputy Commissioner's decisions announced in their letters dated December 30, 2015.

## **VII. LEGAL ANALYSIS OF DEFENDANTS' ACTIONS**

### **A. Defendants Lack Authority to Lower District's Accreditation Status**

55. Chapter 39 of the Texas Education Code (TEC) governs the Defendants' actions in lowering the District's accreditation status and appointing a board of managers. In his preliminary decision, the Commissioner cited two separate provisions of the TEC as purportedly authorizing the lowering the District's accreditation status, TEC §§ 39.052(d) and 39.057(d). In his final decision, the Deputy Commissioner did not cite the legal authority for his decision to lower the PISD accreditation rating for the 2014-2015 year. He only stated that the lowered accreditation rating resulted "from the Special Accreditation Investigation (SAI) reports." As will be discussed below, the two statutory provisions cited in the preliminary decision do not authorize the Defendants to lower the District's accreditation status based on the SAI reports.

- i. TEC § 39.052(d) Does Not Authorize the Defendants to Lower the District's Accreditation Status Because the District Meets the TEA's Accreditation Standards.**

56. TEC § 39.052 sets forth the statutory authority for the Commissioner to determine the accreditation status for each district for each year. TEC §39.052(a) states, “Each year, the commissioner shall determine the accreditation status of each school district.” TEC §39.052(b) sets forth the performance metrics and other factors that the Commissioner is to consider in determining a school district’s accreditation status for a particular year. Section 39.052(b) requires the Commissioner consider the district’s student academic achievement indicators and the district’s financial accountability rating in determining accreditation status. According to the most recently released financial and academic ratings, PISD is rated for 2015 academic accountability purposes as having “Met Standard” in all academic categories as it has consistently done for each of the prior 10 years. (App. B 604-607) Additionally, PISD had a 2014-15 FIRST rating of “Pass.” (App. B. 684-85) PISD currently meets the academic and fiscal standards applicable to school districts in this State. In short, PISD has met performance standards under Section 39.052(b)(1).

57. TEC § 39.052(c) states: “Based on a school district’s performance under Subsection (b), the commissioner shall: (1) assign each district an accreditation status; or (2) revoke the accreditation of the district and order closure of the district.” As demonstrated above, based upon its performance under the applicable accountability standards, PISD has been and would be rated as fully accredited by the TEA for the 2014-15 school year, but for the Defendants’ decision to lower the District’s rating.

58. TEC §39.052(d) states:

A school district's accreditation status may be raised or lowered based on the district's performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this subchapter.

59. It is clear from the plain language of the statute that the Commissioner’s ability to raise or lower the district’s accreditation status must be based on the performance of the district or one of more of its campuses under the accreditation standards and statutory requirements set forth in Chapter 39, Subchapter C, Accreditation—namely, the student achievement indicators set forth in TEC §39.053 and performance standards set forth in §39.054. There is nothing in Section 39.052 that authorizes the Commissioner to lower a district’s accreditation status based on anything other than express accreditation standards set forth in Subchapter C.

60. PISD’s most recent academic and financial accountability ratings set forth under Chapter 39 and Commissioner’s rules for the 2014-2015 school year were “Met Standard” in all academic categories, and a 2014-2015 School FIRST rating of “Pass.” Therefore, the Defendants’ lack authority to lower PISD’s accreditation rating for 2014-2015 under Section 39.052(d).

61. In addition, the Commissioner’s preliminary decision cites 19 TAC § 97.1055(a)(7) as grounds for lowering the District’s accreditation. (App. A 2-3) 19 TAC § 97.1055(a)(7) states: “An accreditation status may be raised or lowered based on the district’s performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this chapter or other applicable law.” 19 TAC § 97.1055(a)(7) simply mirrors the language set forth in Section 39.052(d).

62. In choosing to lower the District’s accreditation status, Defendants fail to cite any accreditation standard set forth in Chapter 39, Subchapter C, that the District has failed to meet.

63. The Defendants’ are not authorized to lower the PISD accreditation rating for the 2014-2015 school year based on TEC § 39.052, and any such action constitutes an *ultra vires* act.

**ii. TEC § 39.057 Does Not Authorize the Defendants to Lower the District's Accreditation Status Under the Facts of this Case.**

64. In his preliminary decision, the Commissioner also cited TEC §39.057(d) as purportedly authorizing his decision to lower the accreditation status. (App. 2-3) Section 39.057(d) states, “Based on the results of a special accreditation investigation, the commissioner may: (1) take appropriate action under Subchapter E; (2) lower the school district's accreditation status or a district's or campus's accountability rating; or (3) take action under both Subdivisions (1) and (2).”

65. The Commissioner's rules set forth how the findings of an SAI are to be considered and weighed in determining whether an accreditation change is justified under Section 39.057(d). First, 19 TAC § 97.1055(b)(1) authorizes the Commissioner to lower a district's accreditation rating based on the district's academic and financial accountability ratings, which do not support a lowering of an accreditation status in this case, as shown above.

The Commissioner's preliminary decision cites 19 TAC §97.1055(b)(2)(B)(ii), which states:

Notwithstanding the district's performance under paragraph (1) of this subsection, a district shall be assigned Accredited-Warned status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052. Such action is generally required by the following circumstances: ... (B) after investigation under TEC, §39.056 or §39.057, the commissioner finds: ... (ii) the district otherwise exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation.

66. All of the deficiencies identified in the SAI final reports, including the second SAI report cited by the Commissioner, all occurred in 2013 and earlier years. (App. A 6-59.) Since that time, the majority of the Board has turned over; the District submitted and completed a District Recovery Plan (App. A 171-186); the Conservators reported that the District was making progress (App. A 89, 108, 131); the current Board of Trustees has undergone extensive

training (App. B 303-319); and the District has essentially completed all of the remediation steps identified in both of the SAI reports, as reflected in the updated reports sent to the TEA. (App. B 261-285, 286-302)

67. There is nothing in the SAI reports or the Management Team reports to suggest that any of the deficiencies cited in the SAI reports are continuing or persistent such that, if not addressed, they may lead to probation or a lowering of the District's accreditation.

68. Furthermore, after the review of the Commissioner's preliminary decision, the Deputy Commissioner effectively conceded in his December 30, 2015 letter that the District had been responsive to and compliant with the prior interventions and sanctions. The Deputy Commissioner did not make any findings regarding serious or persistent deficiencies to support any action taken under Section 39.057(d) and 19 TAC §97.1055(b)(2)(B)(ii).

69. In addition, TEC §39.057(d) and 19 TAC §97.1055(b)(2)(B)(ii) only authorize the lowering of an accreditation status based on the results of a special accreditation investigation, and they do not authorize Defendants to consider the quarterly reports of the Management Team in any such determination. In his preliminary decision, the Commissioner expressly relied on the Management Team's reports in lowering the District's accreditation rating. (App. A 2-3) Such reliance was an *ultra vires* act. The final decision by the Deputy Commissioner simply affirmed the preliminary decision to lower the PISD accreditation for 2014-2015, without any citation of the legal authority or factual basis for his decision. To the extent the Deputy Commissioner's final decision on the accreditation status is premised on the Management Team's report, it is likewise *ultra vires*.

70. In his preliminary decision, the Commissioner also claimed that the lowered accreditation status was justified under 19 TAC §97.1057(e), which states:



(e) In determining whether to impose a particular sanction under TEC, Chapter 39, or this subchapter, the commissioner may consider the costs and logistical concerns of the district, but shall give primary consideration to the best interest of the district's students. The sanction selected shall be reasonably calculated to address the district's or campus' deficiencies immediately or within a reasonable time, in the best interest of its present and future students. The following shall be considered as being contrary to the best interests of the district's students:

- (1) inefficient or ineffectual use of district funds or property;
- (2) failure to adequately account for funds; and
- (3) receipt of a substantial over-allocation of funds for which the district has failed to plan prudently in light of its obligation to repay the funds under TEC, §42.258.

This rule requires that the Defendants select a sanction that is “reasonably calculated” to address a deficiency “immediately or within a reasonable time.”

71. Given that all of the events that are the subject of the two SAI reports occurred in 2013 and earlier, and given that the Deputy Commissioner failed to find any non-compliance with previously imposed sanctions, or that previous interventions or sanctions had failed to remedy prior deficiencies identified in the two SAI reports, it is clear that the sanction of lowering the District's accreditation status is not “reasonably calculated” to address any such deficiencies immediately or within a reasonable time. The deficiencies relied upon by the Commissioner occurred long ago, and the Deputy Commissioner could not find any continuing deficiencies or noncompliance on the part of the District.

72. 19 TAC §97.1057(e) rule requires the Commissioner to consider the best interests of the District's current and future students (not past students), and sets forth the three factors designated as contrary to the best interests of the district's students. There is no evidence attached to the Commissioner's letter of September 23, 2015, to support a finding of inefficient or ineffectual use of PISD funds or property; failure to adequate account for PISD funds; or

receipt of a substantial over-allocation of funds for which the district has failed to plan prudently in light of its obligation to repay the funds, at any time after 2013.

73. Defendants had no basis, much less any reasonable basis as required by the rule, to determine that the lowering of the District's accreditation status was in the best interest of the District's present and future students.

74. In his preliminary decision, the Commissioner also cited to 19 TAC §97.1059(b)(1)(E), (2), (3), and (4) in lowering PISD's accreditation status. (App. 2-3) 19 TAC §97.1059(b) sets forth the standards for imposing accreditation sanctions, and states in relevant part:

(b) In making a determination under subsection (a) of this section, the commissioner shall consider the seriousness, number, extent, and duration of deficiencies identified by the Texas Education Agency (TEA), and shall impose one or more accreditation sanctions on a district and its campuses as needed to address:

(1) each material deficiency identified by the TEA through its systems for district and campus accountability, including: . . .

(E) the results of a special accreditation investigation under Texas Education Code, §39.057; . . .

(2) any ongoing failures to address deficiencies previously identified or patterns of recurring deficiencies;

(3) any lack of district responsiveness to, or compliance with, current or prior interventions or sanctions; and

(4) any substantial or imminent harm presented by the deficiencies of the district or campus to the welfare of its students or to the public interest.

75. In his preliminary decision, the Commissioner relied on the District's deficiencies identified in the second SAI report and in the Management Team's reports. (App. A 2-3) However, the reliance on the Management Team's report is not authorized by statute or rule and is a violation of law. Moreover, in making the final decision to uphold the lowered accreditation rating, the Deputy Commissioner did not cite to the Management Team's reports. Instead, he overturned the Commissioner's finding of a lack of responsiveness and compliance with prior

interventions, thereby rendering the Management Team’s reports, and the Commissioner’s reliance on those reports, inapplicable here.

76. In his preliminary decision, the Commissioner alleged that the material deficiencies were “ongoing and demonstrate the district’s failure to address previously identified deficiencies and establish a pattern of recurring deficiencies,” citing 19 TAC §97.1059(b)(2). However, the final decision by the Deputy Commissioner does not include any such finding, as there was no factual basis for the Commissioner to make a determination of any ongoing failures or deficiencies by the District. Indeed, neither the Commissioner nor the Deputy Commissioner identified any ongoing deficiency that had been previously identified in the SAI reports. As made clear by the District’s remediation efforts and supporting documentation, all such deficiencies have been addressed, which the Deputy Commissioner tacitly admitted in his final decision letter.

77. In the preliminary decision, the Commissioner also stated that the District had not been responsive to, or compliant with, the previously imposed interventions, citing 19 TAC §97.1059(b)(3). (App. A 3) This allegation was expressly overturned by the Deputy Commissioner’s final decision. (App. J 928)

78. In the preliminary decision, the Commissioner also stated that the deficiencies cited in the SAI reports demonstrated a “substantial and imminent threat to the welfare of the district’s students and to the public interest because the board has failed to ensure that public funds are protected from fraud, waste, and abuse,” citing 19 TAC §97.1059(b)(4). This unsupported determination had no basis in fact as to the time period after the initial sanction imposed on PISD—appointment of the Management Team in January of 2014. The deficiencies described in the SAI reports occurred two years ago or more prior to the preliminary decision.

Neither the Commissioner nor the Deputy Commissioner identified in their final decisions any imminent threat to the District's students, its finances, or public interest. There are absolutely no findings of any failure by the current board or current administration to protect District funds from fraud, waste, or abuse.

79. Indeed, the Defendants own leisurely pace in addressing the second SAI and seeking to impose the resulting sanctions belie their claim of a "substantial and imminent threat." It took the TEA more than 20 months after completing their field work for the TEA to issue the second SAI final report recommending a board of managers; another month for the Commissioner to issue his preliminary decision based on that report; and another three months for the Deputy Commissioner to issue a final decision. During all of this time, the Management Team was in place, and they never identified any failure by the District or the Board of Trustees to protect funds from fraud, waste, or abuse. Moreover, during all of this time, the District continued to meet all of the academic and financial accountability standards applied to all other schools in Texas. The notion that the appointment of a board of managers is necessary to address some "substantial and imminent threat" lacks any basis in fact.

80. The only rational conclusion that may be drawn is that the current level of TEA intervention—appointment of a Management Team—along with the newly elected Trustees and new administration in place since 2013, have restored the District to compliance with the applicable standards of conduct as to governance of the District by the elected Board of Trustees.

81. The Commissioner has not identified any current deficiencies at PISD of the accreditation standards, or any ongoing failure to address recurring deficiencies. There is also no material evidence, whether attached to the Commissioner's preliminary decision letter, to the Deputy Commissioner's final decision letter, or otherwise, that would provide a factual basis for

a finding of a lack of responsiveness or compliance with prior interventions or sanctions, or the current existence of any substantial or imminent harm to the welfare of the students or the public. In conclusion, there is no legal or factual basis for lowering the District's accreditation rating.

82. The Defendants' action of lowering PISD's accreditation rating for the 2014-2015 school year based on TEC § 39.057 constitutes an *ultra vires* act, as the decision was based on factors and information that do not authorize such action under by the applicable statutes and regulations. Furthermore, the decision was *ultra vires* in that it was not based on any violation of any state accreditation requirement for the 2014-2015 school year.

### **B. Defendants Lack Authority to Appoint a Board of Managers**

83. The Defendants cite to two provisions of Chapter 39, Subchapter E, as purportedly authorizing the decision to appoint a board of managers: Sections 39.102(a)(9) and 39.102(b).<sup>3</sup> (App. A 3; App J 928) As will be discussed below, neither of these two provisions authorize the appointment of a board of managers in this case.

#### **i. TEC §39.109(a)(9) Does Not Authorize the Defendants to Appoint a Board of Managers in this Instance.**

84. TEC §39.102(a)(9) states:

If a school district does not satisfy the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, or any financial accountability standard as determined by commissioner rule, the commissioner shall take any of the following actions to the extent the commissioner determines necessary: ...

(9) if a district has a current accreditation status of accredited-warned or accredited-probation, fails to satisfy any standard under Section 39.054(e), or fails to satisfy financial accountability standards as determined by commissioner rule, appoint a board of managers to exercise the powers and duties of the board of

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<sup>3</sup> In his final decision, the Deputy Commissioner also cites to TEC §39.057(d), which simply authorizes the commissioner to "take appropriate action under Subchapter E" based on the results of a special accreditation investigation. TEC §39.057(d) does not separately and independently authorize the appointment of a board of managers, and need not be addressed separately.

trustees.

85. Even presuming that the Defendants properly lowered the District's accreditation (which they did not), Section 39.102(a)(9) does not authorize appointment of a board of managers solely based on the lowering of the accreditation status. For Section 39.102(a)(9) to apply, a district must first fail to “the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, or any financial accountability standard as determined by commissioner rule.” Thus, even if PISD has a current accreditation status of “Accredited-warned” for 2014-2015, Section 39.102(a)(9) does not apply unless PISD also failed to meet the first statutory condition for applicability.

86. For the lowered accreditation status to justify appointment of a board of managers for PISD under Section 39.102(a)(9), the District must have also failed to “satisfy the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, or any financial accountability standard as determined by commissioner rule.” Here, the District has satisfied the accreditation criteria under 39.052, the academic performance standards under Section 39.053 and 39.054, and the TEA's financial accountability standard set forth in commissioner's rules, 19 TAC, Chapter 109, Subchapter AA, Division 1 (Pass for 2014-15). Accordingly, the Commissioner may not appoint a board of managers based on the current accreditation status of “Accredited-warned,” because the District satisfies the other requirements set forth in the beginning of section 39.102(a). This precludes application of subsection 39.109(a)(9) to PISD.

**ii. TEC § 39.102(b) Does Not Authorize the Defendants to Appoint a Board of Managers**

87. Defendants also rely on TEC §39.102(b) to appoint a board of managers. ( App. A 3, App. J 928) Section 39.102(b) states: “This subsection applies regardless of whether a district

has satisfied the accreditation criteria. If for two consecutive school years, including the current school year, a district has had a conservator or management team assigned, the commissioner may appoint a board of managers, a majority of whom must be residents of the district, to exercise the powers and duties of the board of trustees.”

88. Thus, Commissioner is only allowed to appoint a board of managers under Section 39.102(b) if the district has had a management team assigned “for two consecutive school years, including the current school year.”

89. The Commissioner has previously held that “year” for purposes of TEC §39.131(a)(9) means 12 months, and that an accreditation rating covers a one year period.<sup>4</sup>

Even if the Commissioner could consider whether the Board of Managers was invalidly appointed and whether its acts are invalid, the appointment of the Board of Managers was made in compliance with Texas Education Code section 39.131(a)(9). Petitioners are correct that “a year” means 12 months. Each accreditation rating is a rating that covers a one year period. When a rating of academically unacceptable or any other rating is given, it is a rating for a period of one year.

*Black v. Wilmer-Hutchins ISD*, TEA Docket No. 012-R2-1005, 2005 TX Educ. Agency LEXIS 49, \*6 (Tex. Comm’r Educ.2005). This is consistent with many other decisions of the Commissioner, and statutes, defining a “school year” as a consecutive 12 calendar month period. *See Kollmer v. Killeen I.S.D.*, TEA Docket No. 083-R1-701 (Comm’r Educ. 2002) (holding that teacher who worked for a partial school year beginning in January had not served for a “school year”); *Young v. Lipan ISD*, 1996 TX Educ. Agency LEXIS 161, TEA Docket No. 102-R1-492 (Comm’r Educ. 1996)( teacher who started teaching on January 15, 1996 completes full year of teaching at end of 1996-1997 school year).; *In re: Closure of North Forest ISD*, SOAH Docket No. 701-13-3749, TEA Docket No. 037-R8-04-2013 (SOAH 2013)(ALJ adopted the

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<sup>4</sup> TEC §§39.131 to 39.1323, redesignated to §§39.102-39.106, effective June 9, 2009.

commissioner's interpretation of "current school year" to refer to "the most recent school year for which there are finalized ratings," not the school year in progress); Tex. Gov't Code §821.001(15)(school year means 12 month period September 1-August 31). Amended Acts 2011, 82<sup>nd</sup> Leg., ch 80 (H.B. 2561), §§ 1 & 2, effective September 1, 2011 for the 2012-2013 school year.

90. The Management Team has not been assigned to PISD for two consecutive school years. The Management Team of two conservators was assigned by the Commissioner on January 16, 2014. The Management Team served for part of the 2013-2014 school year, served for the entire 2014-2015 school year, and has served for part of the 2015-2016 school year. The Management Team will have been appointed for two consecutive school years as the end of the 2015-2016 school year. At that point, and no sooner, the Commissioner may appoint a board of managers for PISD pursuant to Section 39.102(b), presuming the appointment is otherwise lawful.

91. The Commissioner's decision is based on a flawed and improper interpretation of the phrase "two consecutive school years" to mean that a Management Team has been in place for any portion of any two consecutive school years. Under this interpretation, a board of managers could be appointed so long as a conservator or management team had been assigned to a district for any portion of any two consecutive school years. This interpretation would mean a board of managers could be appointed after a conservator or management team had been assigned for as little as two days—the last day of school year 1 plus the first day of school year 2. That interpretation cannot be reconciled with the purpose of statute, which is to authorize the Commissioner to appoint a board of managers only after a district has been provided a sufficient period of time to remedy any deficiencies that led to the lesser sanction, such as a conservator or



management team. The Legislature has determined that a reasonable time for required improvement is two consecutive school years, not two days.

92. In short, Section 39.102(b) does not authorize the Defendants to appoint a board of managers because the District has not had a management team assigned for two consecutive school years.

**iii. Commissioner’s Rules Does Not Authorize the Defendants to Appoint a Board of Managers**

93. In his preliminary decision, the Commissioner also claimed that appointment of a board of managers was authorized by the Commissioner’s finding of the District’s lack of responsiveness and compliance with prior interventions and sanctions, citing TEC §39.102(b), 19 TAC §97.1059(b)(3) and 19 TAC §97.1073(e)(1).

94. 19 TAC §97.1073(e)(1) states, in relevant part, that the Commissioner “may appoint a board of managers” under TEC§39.102(a)(9) or (b) when prior appointments of a management team or conservator “have been ineffective to achieve the purposes identified in §97.1057 of this title (relating to Interventions and Sanctions; Lowered Rating or Accreditation Status).”

95. Given the Deputy Commissioner’s decision to overturn the Commissioner’s finding of a lack of responsiveness and compliance with prior interventions and sanctions, 19 TAC §97.1073(e)(1) no longer supports the appointment of a board of managers. Not surprisingly, the Deputy Commissioner did not cite to 19 TAC §97.1073(e)(1) in making his final decision.

96. In his preliminary decision, the Commissioner also claimed that the appointment of a board of managers was necessary encourage other school districts in Texas to their performance by eliminating poor academic, fiscal, and compliance performance, citing 19 TAC

§97.1053(a)(4), (5). (App. A 3) In short, the Commissioner claimed that the board of managers was appointed at PISD to teach other districts a lesson.

97. 19 TAC §97.1053(a) states in relevant part:

(a) The provisions of Texas Education Code (TEC), Chapter 39, and this subchapter shall be construed and applied to achieve the purposes of accreditation statuses assigned under TEC, §39.051 and §39.052, and the purposes of accreditation sanctions, which are to:

(4) encourage other districts or campuses to improve their performance so as to avoid similar action and to retain their accreditation; and

(5) improve the Texas public school system by eliminating poor academic, fiscal, and compliance performance by districts and campuses on the standards listed in §97.1059 of this title.

98. Nothing in 19 TAC §97.1053(a)(4) and (5) authorizes the Defendants to take factors into consideration in determining whether to appoint a board of managers other than those set forth in the law, including TEC §39.102(b). Furthermore, 19 TAC §97.1053(a) does not authorize the Defendants to appoint a board of managers to teach other schools a lesson or to make an example out of a district. Although 19 TAC §97.1053(a) recognizes that the general purpose of Chapter 39 and the Commissioner's rules are to encourage districts to improve performance and avoid sanctions, there is nothing in the statute of rules that says that a particular sanction against a given school district may be justified to teach other school districts a lesson, as the Defendants have admittedly done here.

99. The Commissioner does not have authority, by adopting a rule, to amend the requirements of TEC § 39.102(a)(9) or (b), as to the prerequisites for appointment of a board of managers. The consideration of this factor by the Defendants was an *ultra vires* act.

### **C. Defendants Failed to Follow the Law In Sanctioning PISD.**

100. Section 39.111(b) of the Texas Education Code states, "At least every 90 days, the commissioner shall review the need for the conservator or management team and shall

remove the conservator or management team unless the commissioner determines that continued appointment is necessary for effective governance of the district or delivery of instructional services.” Despite PISD’s repeated requests for documentation reflecting the quarterly reviews, Defendants have failed to provide such documentation. Accordingly, upon information and belief, PISD alleges that the Commissioner failed to conduct the quarterly reviews required by Section 39.111(b).

101. Section 39.108 of the Texas Education Code states, “The commissioner shall review annually the performance of a district or campus subject to this subchapter to determine the appropriate actions to be implemented under this subchapter. ... If the review reveals a lack of improvement, the commissioner shall increase the level of state intervention and sanction unless the commissioner finds good cause for maintaining the current status.”

102. Despite PISD’s repeated requests for documentation reflecting the annual reviews, Defendants have failed to provide such documentation. (App. G 914-921) Accordingly, upon information and belief, PISD alleges that the Commissioner has not conducted the annual reviews required by Section 39.108.

103. In addition, the Defendants’ additional sanction of appointing a board of managers is expressly based upon the finding of the second SAI report of deficiencies that existed prior to December 2013. (App. J 928) This second SAI was conducted in violation of state law.

104. TEC §39.058 requires that the TEA establish procedures for conducting on-site investigations under Chapter 39, such as the second SAI of PISD. TEC §39.058 states:

- (a) The agency shall adopt written procedures for conducting on-site investigations under this subchapter. The agency shall make the procedures available to the complainant, the alleged violator,

and the public. Agency staff must be trained in the procedures and must follow the procedures in conducting the investigation.

(b) After completing an investigation, the agency shall present preliminary findings to any person the agency finds has violated a law, rule, or policy. Before issuing a report with its final findings, the agency must provide a person the agency finds has violated a law, rule, or policy an opportunity for an informal review by the commissioner or a designated hearing examiner.

TEC §39.058. Thus, in conducting the second SAI, the TEA was required to follow the procedures adopted pursuant to TEC §39.058(a). In addition, the TEA was required to provide the opportunity for an informal review by the commissioner or a designated hearing examiner. Here, the TEA failed to do either of these two things.

105. The TEA has adopted formal written procedures for conducting on-site special accreditation investigations under Chapter 39, entitled the Special Investigation Procedures. (App. L 940-944) Special accreditation investigations by the Division of Financial Compliance (which conducted the second SAI) were subject to these procedures for conducting on-site investigations of school districts at this time.

106. Pursuant to the mandate of TEC §39.058, the TEA was required by law to follow the Special Investigation Procedures in conducting the second SAI at PISD. These procedures include, among other things:

- A recommendation for authorizing a special accreditation investigation must be made through the Monitoring, Investigations, and Interventions Steering Committee (MIISC) and by the Associate Commissioner of Education.
- The Deputy Commissioner then proposes the recommendation to conduct the special accreditation investigation to the Commissioner of Education for approval.
- Once approved, a written notice of the investigation is required to be sent to the district's superintendent, the complainant, and the board of trustees at least 5 working days period to conducting any formal investigative activities, including arriving on-site to the district.

- A preliminary report of a special accreditation investigation is issued pursuant to the procedures and 19 TAC Chapter 97, Subchapter DD, which contains the findings of fact and an explanation as to why the allegation is or is not substantiated.
- The TEA is also required to offer an informal review of the preliminary findings by the Commissioner of Education or the Commissioner's designee to be conducted in person at the TEA in Austin, Texas. "The informal review is to provide a single opportunity for individuals found to be in violation of school law, rule or policy to present information that may result in the revision, amendment, or modification of the findings before the Final Report is issued."
- "Once all informal reviews have been concluded, the TEA will make its findings final."

(App. L 940-944)

107. The TEA failed to follow its own Special Investigation Procedures and TEC §39.058 in conducting the second SAI. The TEA's failure to follow its own procedures violated TEC §39.058(a), which mandates that the agency "must follow the procedures in conducting the investigation."

108. With respect to the second SAI, there was no recommendation for the second SAI made by the Associate Commissioner through the Monitoring, Investigations, and Interventions Steering Committee and there was no approval of the second SAI by the Commissioner of Education, as required by the TEA's Special Investigation Procedures. In addition, the TEA failed to provide written notice of the second SAI investigation to PISD's superintendent and the Board of Trustees prior to conducting its investigative activities, including its on-site activities at the district in December 2013. Finally, the TEA did not offer an informal review of its preliminary findings in its preliminary report to the District, dated October 10, 2014, or otherwise. (App. C 869-870) All of these actions constituted violations of the TEA's Special Investigation Procedures and TEC §39.058(a), which mandates that the SAI must follow those procedures to be lawful.

109. In summary, the Defendants' failed to conduct the mandatory quarterly and annual reviews of the appointment of the Management Team and failed to conduct the second SAI in compliance with state law. Such conduct constituted *ultra vires* actions. For the Defendants to now impose a second set of higher level sanctions on PISD, given that the prior sanctions and the second SAI were conducted in violation of the law without providing the mandatory process to PISD, renders Defendants' decisions to lower the PISD accreditation rating and to replace the elected Board with a board of managers both unlawful and arbitrary and capricious.

110. As a result of the Defendants' failure to make the required quarterly determination that the continued appointment of the Management Team was necessary; the failure to provide anything in writing to PISD as to any continuing or new deficiencies on which the quarterly decisions for continuation of the Management Team were based; and by failing to conduct the second SAI in accordance with applicable procedures and law, the Defendants should be estopped from imposing additional sanctions on PISD based on these prior events.

#### **D. Commissioner's Actions Arbitrary and Capricious**

111. In his preliminary decision letter of September 23, 2015, the Commissioner stated:

Both investigative reports identify numerous material deficiencies. 19 TAC §97.1059(b)(1)(E). Many of these material deficiencies are ongoing and demonstrate the district's failures to address previously identified deficiencies and establish a pattern of recurring deficiencies. 19 TAC §97.1059(b)(2). The district has not been responsive to, or compliant with, the previously imposed interventions. 19 TAC §97.1059(b)(3). The deficiencies cited in both reports demonstrate a substantial and imminent threat to the welfare of the district's students and to the public interest because the board has failed to ensure that public funds are protected from fraud, waste, and abuse. 19 TAC §97.1059(b)(4).

(App. A 2-3)

112. However, there are no findings in either SAI report relied on by the Commissioner for his findings or conclusions of “ongoing material deficiencies,” “failure to address previously identified deficiencies,” or that PISD “has not been responsive to, or compliant with, the previously imposed interventions,” during the 2014-2015 or current school year. There are also no findings in either SAI report as to any failure by the district to address previously identified deficiencies after 2013. There is also nothing in either SAI report to show that the district has not been responsive to or has been non-compliant with, prior TEA interventions. Neither report contains any findings that would support the conclusions that the Board has, since 2013, failed to ensure that public funds are protected from fraud, waste, and abuse. PISD ended the 2014-2015 school year with over a million dollars in surplus funds.

113. After the formal review process, the Deputy Commissioner agreed with the District and withdrew the Commissioner’s prior finding and stated, “I decline to make a finding that the district has not been responsive to or compliant with the prior interventions and sanctions imposed and, therefore, the appointment of the board of managers is not based upon such finding.”

114. The Deputy Commissioner’s decision to appoint a board of managers arbitrary and capricious given that Defendants have conceded that the District has been responsive and compliant with the prior interventions, including the imposition of the Management Team and the corrective actions resulting from the first and second SAIs.

## **VII.**

### **SUMMARY OF APPLICABLE STATUTES AND ADMINISTRATIVE REGULATIONS**

#### **A. PLAINTIFF’S ACCREDITATION RATING, 2014-2015: TEC §39.052(b), TEC §39.057(d), 19 TAC §97.1055(b)(2)(B)(ii), and 19 TAC §97.1059(b)**

115. The statutes and administrative regulation relied on in the Commissioner's preliminary decision to support the lowering of PISD's accreditation rating for the 2014-2015 school year are TEC §39.052(d), TEC §39.057(d), 19 TAC §97.1055(b)(2)(B)(ii), 19 TAC §97.1057(e), and 19 TAC §97.1059(b).<sup>5</sup> In his final decision, the Deputy Commissioner did not provide any factual or legal support for upholding the preliminary decision to lower the District's accreditation rating.

116. TEC §39.052(d) states:

(d) A school district's accreditation status may be raised or lowered based on the district's performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this subchapter.

117. As demonstrated above, the Defendants did not identify any accreditation performance standard set forth in Chapter 39, Subchapter C, that PISD failed to meet during the 2014-2015 school year.

118. Defendants also claim authority to lower the District's accreditation rating based on the second SAI pursuant to TEC §39.057(d) and 19 TAC §97.1055(b)(2)(B)(ii).

119. TEC § 39.057(d) states:

(d) Based on the results of a special accreditation investigation, the commissioner may:

- (1) take appropriate action under Subchapter E;
- (2) lower the school district's accreditation status or a district's or campus's accountability rating; or
- (3) take action under both Subdivisions (1) and (2).

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<sup>5</sup> In his preliminary decision, the Commissioner also cites to 19 TAC §97.1055(a)(7), which states, "An accreditation status may be raised or lowered based on the district's performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this chapter or other applicable law." Thus, 19 TAC §97.1055(a)(7) simply restates the authority established elsewhere in the Commissioner's rules, Subchapter EE regarding Accreditation Status, Standards, and Sanctions, or other "applicable law." It does not add any new or different grounds for sanctions.



120. Commissioner’s rule 19 TAC §97.1055(b)(2)(B)(ii) sets forth the requirements for lowering an accreditation pursuant to Section 39.057(d). 19 TAC § 97.1055(b)(2)(B)(ii) states:

(b) Determination of Accredited-Warned status.

(2) Notwithstanding the district's performance under paragraph (1) of this subsection, a district shall be assigned Accredited-Warned status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052. Such action is generally required by the following circumstances: ...

(B) after investigation under TEC, §39.056 or §39.057, the commissioner finds: . . .

(ii) the district otherwise exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation.

121. Thus, the Defendants were required to find that “serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation” for the Defendants to be authorized to lower the accreditation status of PISD. As demonstrated above, there is no basis for any such conclusion, which the Deputy Commissioner essentially conceded in his final decision dated December 30, 2015.

122. In his preliminary decision, the Commissioner also claimed that the lowered accreditation status was justified under 19 TAC §97.1057(e), which states:

(e) In determining whether to impose a particular sanction under TEC, Chapter 39, or this subchapter, the commissioner may consider the costs and logistical concerns of the district, but shall give primary consideration to the best interest of the district’s students. The sanction selected shall be reasonably calculated to address the district’s or campus’ deficiencies immediately or within a reasonable time, in the best interest of its present and future students. The following shall be considered as being contrary to the best interests of the district's students:

- (1) inefficient or ineffectual use of district funds or property;
- (2) failure to adequately account for funds; and
- (3) receipt of a substantial over-allocation of funds for which the district has failed to plan prudently in light of its obligation to repay the funds under TEC, §42.258.

123. As described above, there is no basis to conclude that a lowering of the District's accreditation status for 2014-2015 will address deficiencies that occurred during 2013 and earlier periods of time, that have already been corrected.

124. In his preliminary decision, the Commissioner also cites to 19 TAC §97.1059(b)(1)(E), (2), (3), and (4) in lowering PISD's accreditation status. 19 TAC §97.1059(b) sets forth the factors to be considered in imposing an accreditation sanction, and states:

(b) In making a determination under subsection (a) of this section, the commissioner shall consider the seriousness, number, extent, and duration of deficiencies identified by the Texas Education Agency (TEA), and shall impose one or more accreditation sanctions on a district and its campuses as needed to address:

(1) each material deficiency identified by the TEA through its systems for district and campus accountability, including:

(A) an accreditation status under §97.1055 of this title (relating to Accreditation Status);

(B) an academic accountability rating under §97.1001 of this title (relating to Accountability Rating System);

(C) a financial accountability rating under §109.1002 of this title (relating to Financial Accountability Ratings) or a financial audit or investigation;(D) program effectiveness under §97.1071 of this title (relating to Special Program Performance; Intervention Stages) or other law;

(E) the results of a special accreditation investigation under Texas Education Code, §39.057;

(F) the results of an investigative report under Chapter 157, Subchapter EE, of this title (relating to Informal Review, Formal Review, and Review by State Office of Administrative Hearings); complaint investigation; special education due process hearing; or data integrity investigation, including an investigation of assessment or financial data; or

(G) other information related to subparagraphs (A)-(F) of this paragraph.

(2) any ongoing failures to address deficiencies previously identified or patterns of recurring deficiencies;

(3) any lack of district responsiveness to, or compliance with, current or prior interventions or sanctions; and

(4) any substantial or imminent harm presented by the deficiencies of the district or campus to the welfare of its students or to the public interest.

125. These reasons why these factors do not authorize a lowering of the District's accreditation status for the 2014-2015 school year are set forth above.

**B. APPOINTMENT OF A BOARD OF MANAGERS: TEC §39.057(d), TEC §39.102(a)(9), and TEC §39.102(b).**

126. The statutes cited by the Defendants to support the appointment of a board of managers are TEC §39.057(d), TEC §39.102(a)(9), and TEC §39.102(b).

127. Section 39.057(d) states,

Based on the results of a special accreditation investigation, the commissioner may: (1) take appropriate action under Subchapter E; (2) lower the school district's accreditation status or a district's or campus's accountability rating; or (3) take action under both Subdivisions (1) and (2).

Thus, Section 39.057(d) simply authorizes the Commissioner to take action under Subchapter E, Accreditation Interventions and Sanctions, based upon a special accreditation investigation. It does not separately or independent authorize the appointment of a board of managers. TEC §39.102(a)(9) and TEC §39.102(b) are the two sections of Subchapter E relied upon by Defendants to appoint a board of managers.

128. TEC §39.102(a)(9) states:

(a) If a school district does not satisfy the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, or any financial accountability standard as determined by commissioner rule, the commissioner shall take any of the following actions to the extent the commissioner determines necessary:

...

(9) if a district has a current accreditation status of accredited-warned or accredited-probation, fails to satisfy any standard under Section 39.054(e), or fails to satisfy financial accountability standards as determined by commissioner rule, appoint a board of managers to exercise the powers and duties of the board of trustees.

129. Because PISD has met the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, and the financial accountability standard as determined by commissioner’s rule, TEC §39.102(a)(9) does not apply.

130. TEC § 39.102(b) states:

(b) This subsection applies regardless of whether a district has satisfied the accreditation criteria. If for two consecutive school years, including the current school year, a district has had a conservator or management team assigned, the commissioner may appoint a board of managers, a majority of whom must be residents of the district, to exercise the powers and duties of the board of trustees.

131. Because, the Management Team has not been assigned to PISD for the required “two consecutive school years, including the current school year,” as of the filing of this suit, the Defendants are not authorized to appoint a board of managers pursuant to Section 39.102(b).

132. In his preliminary decision, the Commissioner also cites to the following Commissioner’s rules: 19 TAC §97.1073(e)(1) and 19 TAC §97.1053(a)(4), (5). As stated above, these rules do not authorize appointing a board of managers in this case.

133. 19 TAC §97.1073(e)(1) states:

The commissioner may appoint a board of managers under TEC, §39.112, §39.102(a)(9) or (b), or §12.116(d)(1), as applicable, when:

(1) sanctions under subsection (b) or (c) of this section have been ineffective to achieve the purposes identified in §97.1057 of this title (relating to Interventions and Sanctions; Lowered Rating or Accreditation Status)

134. 19 TAC §97.1053(a) states:

(a) The provisions of Texas Education Code (TEC), Chapter 39, and this subchapter shall be construed and applied to achieve the purposes of accreditation statuses assigned under TEC, §39.051

and §39.052, and the purposes of accreditation sanctions, which are to:

(1) inform the parents of students enrolled in the district, property owners in the district, general public, and policymakers of the academic, fiscal, and compliance performance of each district or campus on the standards adopted by the commissioner of education under TEC, §39.052(b) and (c), and/or listed in §97.1059 of this title (relating to Standards for All Accreditation Sanction Determinations);

(2) encourage the district or campus to improve its academic, fiscal, and/or compliance performance by addressing each area of deficiency identified by the commissioner of education;

(3) enable the parents of students enrolled in the district, property owners in the district, general public, and policymakers to assist the district or campus in improving the district or campus performance by addressing each area of deficiency identified by the commissioner;

(4) encourage other districts or campuses to improve their performance so as to avoid similar action and to retain their accreditation; and

(5) improve the Texas public school system by eliminating poor academic, fiscal, and compliance performance by districts and campuses on the standards listed in §97.1059 of this title.

135. As shown above, there is no basis for the imposition of the additional sanctions of lowering the PISD accreditation rating for 2014-2015, or the appointment of a board of managers, pursuant to these provisions.

## **VIII. CAUSES OF ACTION**

### **A. JUDICIAL PURUSANT TO THE TEXAS DECLARATORY JUDGMENT ACT**

136. Plaintiff PISD incorporates by reference all of the proceeding paragraphs of this Original Petition.

137. After a full trial on the merits, PISD requests the Court to enter a declaratory judgment under the Texas Declaratory Judgment Act, Chapter 37, Tex. Civ. Prac. & Rem. Code, declaring that:

- i. The Defendants do not have the authority or discretion under TEC §39.052(d) to lower PISD's accreditation rating for the 2014-2015 school year absent a determination that PISD has failed to meet the accreditation standards set forth in Chapter 39, Subchapter C, all of which PISD has met for the 2014-2015 school year;
- ii. The Defendants do not have the authority or discretion under TEC §39.057(d) or 19 TAC §97.1055(b)(2)(B)(ii) to lower PISD's accreditation rating for the 2014-2015 school year based on a special accreditation investigation absent a determination that PISD exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation;
- iii. The Defendants do not have the authority under TEC §39.057(d) or 19 TAC §97.1055(b)(2)(B)(ii) to consider the content of the report of a management team in making the determination to lower PISD's accreditation rating for the 2014-2015 school year;
- iv. Any determination that PISD allegedly exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the District's accreditation is not supported by any evidence, is arbitrary and capricious, and constitutes an *ultra vires* act;
- v. The failure of the Defendants to conform to the legal constraints imposed on them by specific statutory provisions as to the requirements to be met for a decision to lower the accreditation status of PISD for the 2014-2015 to "Accreditation—Warned," constitutes an *ultra vires* act that may be enjoined by this court;

- vi. The Defendants do not have the authority or discretion under TEC §39.102(a)(9) to appoint a board of managers to replace the elected Board of Trustees absent a finding that PISD failed to satisfy the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.0954, or any financial accountability standards as determined by commissioner's rule, all of which PISD has met for the 2014-2015 school year;
- vii. The Defendants do not have the authority or discretion under TEC §39.102(b) to appoint a board of managers to replace the elected Board of Trustees because PISD has not had a management team assigned for two consecutive school years, including the current school year;
- viii. The Defendants do not otherwise have the authority or discretion under the Texas Education Code or the Commissioner's rules to appoint to appoint a board of managers to replace the elected Board of Trustees of PISD;
- ix. The failure of the Defendants to conform to the legal constraints imposed on them by specific statutory provisions as to the prerequisites required by such statutes prior to the appointment or installation of a board of managers to replace the elected Board of Trustees of PISD, constitutes an ultra vires act that may be enjoined by this court; and
- x. The Defendants failed to follow the legal constrains and obligations imposed on them by specific statutory provisions in administering the sanctions of the Management Team and in conducting the second SAI, thereby precluding the TEA from relying on those unlawful actions in taking further action against PISD.

138. Declaratory relief is appropriate in this suit under Section 37.004(a), Tex. Civ. Prac. & Rem. Code because PISD is asking for the court to declare the validity of a specific construction of the statutes and rules discussed above and PISD's rights according to such a construction.

139. Declaratory relief is appropriate in this suit under Section 37.004(a), because Progreso ISD is asking the court to declare the validity of one or more specific constructions of the statutes and regulations discussed above, as applied to PISD by the Commissioner, and PISD's rights according to the proper construction of such statutes and regulations. PISD contends that the Commissioner's construction of the statutes and rules discussed above, as applied to PISD, is invalid, because it would authorize the Commissioner to impose sanctions on PISD for a time period as to which the Commissioner has not identified any violations of applicable law, and which are therefore not based on any compelling state interest, and are arbitrary and capricious. PISD contends that the Commissioner's constructions of the statutes and rules discussed above, under the facts to be proved at trial, and as applied to PISD by the Commissioner, in the act of lowering the PISD accreditation rating for the 2014-2015 school year, and/or the appointment or installation of a Board of Managers to replace the elected Board of Trustees, are erroneous, arbitrary, and capricious, and contrary to the plain meaning and statutory intent of the relevant statutes.

**B. TEMPORARY RESTRAINING ORDER, RULE 680, TEX. R. CIV. PROC.:**

140. Plaintiff PISD requests that Defendants be temporarily restrained from convening a meeting and installing a board of managers to replace the elected Board of Trustees of PISD, which action would cause immediate and irreparable harm to PISD, and its students, taxpayers, and voters, by the removal from office of the Trustees duly elected under Texas law to govern



PISD, under the provisions of the Texas Education and Election Codes. The injury of removal of the duly elected Board of Trustees is irreparable, other than by injunctive relief. Plaintiff is barred by sovereign immunity from seeking retrospective monetary damages from Defendants, nor is the injury of removal of the elected Board of Trustees such that a monetary value can be placed upon it.

141. If the Defendants are permitted to replace the elected Board of Trustees by a board of managers, PISD will have no meaningful opportunity to contest the actions of Defendants that are the subject of this suit, as the board of managers would immediately have plenary powers to withdraw the authority for the filing of this suit previously granted by the elected Board of Trustees. This would deprive PISD of all of its rights under Texas law to contest the decision to replace the elected Board of Trustees with a board of managers appointed by the Commissioner. The installation of the board of managers would, in effect, render this action moot, and would effectively deny PISD, its students, voters, and taxpayers, any remedy for any unauthorized act of Defendants. Appointment and installation of the board of managers would prevent PISD from exercising its rights under applicable law to contest the actions of Defendants that are the subject of this suit, in a judicial forum.

142. The appointment of an Interim Superintendent for PISD by the Commissioner, without any basis in the performance of the current Superintendent who was hired in July of 2015 without objection from the Management Team, will impose a substantial monetary burden on PISD by forcing it to pay for two qualified superintendents simultaneously. This monetary burden constitutes irreparable harm, because the Defendants contend that the doctrine of sovereign immunity will prevent PISD from recovering any funds expended by the District to

pay the compensation of the interim superintendent appointed by the Commissioner, even if such appointment should be ultimately declared invalid by the courts.

143. The Defendants cannot show that the requested injunctive relief preventing them from immediately removing the elected Board of Trustees of PISD and replacing it with an appointed board of managers, will foreseeably result in any harm to PISD, its students, taxpayers, voters, or to the public interest.

144. The current powers of the Management Team for PISD appointed by the Defendant Commissioner are entirely sufficient to prevent any act or omission by the elected Board of Trustees, or the current Superintendent and administrative staff, of PISD, that would cause harm or injury to the welfare of PISD, its current and future students, or to the public welfare, during the period of a Temporary Restraining Order (TRO). The balance of potential foreseeable harm from the granting of a TRO temporarily prohibiting the Commissioner from removing the elected Board of Trustees from office is in favor of PISD, since the Conservators already appointed by the Commissioner have the power to direct or to prohibit any action by the Board of Trustees, or by the Superintendent or a campus principal, under TEC §39.111(c). Defendants cannot show any immediate threat of harm to the PISD students, or the public, that requires the immediate removal of the elected Board of Trustees.

145. PISD agrees to post security in the amount and by the means to be determined by the Court as appropriate to protect Defendants, and the public, from any injuries that might be proximately caused by the granting of a TRO to Plaintiff, prohibiting the Commissioner from installing a board of managers prior to the date that this Court can hold a hearing on the Plaintiff's request for a temporary injunction.

146. To date, neither the elected Board of Trustees of PISD nor the Superintendent has taken an action that violated any direction from the Management Team, and neither the Board of Trustees nor the Superintendent have ever failed to take an action that they were directed to take by the Management Team. To the extent the elected Board of Trustees or Superintendent has ever taken an action that was later disapproved by the Management Team, this event occurred solely due to the failure of the Management Team to inform the Board or Superintendent of their directives and intentions before the action was taken or the Management Team's failure to participate in the decision-making process, despite being afforded every opportunity to do so.

147. The only powers over the PISD elected Board of Trustees and the Superintendent and campus principals that are denied to the Management Team under TEC §39.111(c), are actions that will not foreseeably occur prior to February of 2016, such as calling or cancelling or changing the date of district elections, or its polling places, or changing the number or method of selecting Trustees. A Management Team are also not authorized to set the district's tax rate (which has already been set for the 2015-2016 school year, as required by state law), or to adopt a district budget that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the elected Board of Trustees. The Management Team already approved the budget for the 2015-2016 school year previously adopted by the elected Board of Trustees. No district elections for Trustees are to be held until May of 2016. Defendants cannot show that there is currently any demonstrated or foreseeable need for the installation of a board of managers to take action during the next few months on matters that are not within the control of the Management Team.

148. Therefore, PISD requests the Court to enter a Temporary Restraining Order prohibiting the Commissioner from convening a meeting and installing a board of managers until

after a hearing on Plaintiff's Request for Temporary Injunction, to set the bond or amount of security Plaintiff is required to post as a condition of the requested TRO, as to which Plaintiff suggests that \$500.00 would be an appropriate amount; to set the date of the hearing on the requested Temporary Injunction at the earliest available date and to include findings and conclusions as to the basis for the issuance of such Temporary Restraining Order.

**C. TEMPORARY INJUNCTION, RULE 681, TEX. R. CIV. PROC.:**

149. Plaintiff incorporates by reference all of the preceding paragraphs of this Original Petition.

150. Plaintiff requests that, after notice and hearing, that the Defendants be temporarily enjoined from convening a meeting and installing a board of managers to replace the elected Board of Trustees during the pendency of this action, or until further order of the Court. The installation of a board of managers, replacing the elected Board of Trustees, would cause immediate and irreparable harm to PISD, and its students, taxpayers, and voters, by the removal from office of the Trustees duly elected under the provisions of Texas law to govern PISD, as provided by the Texas Education and Election Codes. If the Commissioner is permitted to replace the elected Board of Trustees by a board of managers, PISD will have no available means to contest the actions of Defendants that are the subject of this suit, as the board of managers would immediately have plenary powers to withdraw the authority for the filing of this suit or any other suit contesting actions by the Defendants as to PISD, authority for which was previously granted by the elected Board of Trustees. This would deprive PISD of all of its rights under Texas law to contest the decision to replace the elected Board of Trustees with a board of managers appointed by the Commissioner. The installation of the board of managers would, in effect, render this action moot. Installation of the board of managers would prevent PISD from

exercising its rights under applicable law to contest the actions of Defendants that are the subject of this suit, in a judicial forum. Appointment of an interim superintendent by the Defendants would impose a substantial monetary burden on PISD, by forcing it to pay the salaries of two superintendents during the same period of time, which additional funds Defendants contend PISD could never recover from Defendants.

151. PISD will demonstrate, at the hearing on its request for a temporary injunction, that it will probably prevail, on final trial on the merits, as to one or more grounds asserted above that the Defendant Commissioner is not currently authorized under applicable law, to remove the elected Board of Trustees of PISD, by installation of a Board of Managers appointed by the Commissioner.

152. The Commissioner cannot demonstrate that the granting of the requested temporary injunction would result in any harm to PISD, its current and future students, its taxpayers, voters, or the public welfare. The current powers of the Management Team for PISD appointed by the Defendant Commissioner are entirely sufficient to prevent any act or omission by the elected Board of Trustees, or the current Superintendent and administrative staff, of PISD, that would cause harm or injury to the welfare of PISD, its current and future students, or to the public welfare, during the period of a Temporary Injunction prohibiting the Defendant Commissioner from installation of a board of managers to replace the elected Board of Trustees, during the pendency of this action, or until further order of this Court. The balance of potential foreseeable harm from the granting of a temporary injunction prohibiting the Commissioner from removing the elected Board of Trustees from office by installation of a board of managers, is in favor of PISD, since the Management Team already has the power to direct or to prohibit any action by the Board of Trustees, or by the Superintendent or a campus principal, under TEC

§39.111(c). Defendants cannot show any immediate threat of harm to the PISD students, or the public, that requires the immediate removal of the elected Board of Trustees and its replacement by a board of manager.

153. Plaintiff agrees to post security in the amount determined by the Court as appropriate to protect Defendants, and the public, from any injuries that might be proximately caused by the granting of the Temporary Injunction requested by Plaintiff. Plaintiff asks the Court to hold a hearing on the requested Temporary Injunction on the earliest available date.

154. To date, neither the elected Board of Trustees of PISD nor the Superintendent has taken an action that violated any direction from the Management Team, and neither the Board of Trustees nor the Superintendent have ever failed to take an action that they were directed to take by the Management Team. To the extent the elected Board of Trustees or Superintendent has ever taken an action that was later disapproved by the Management Team, this event occurred solely due to the failure of the Management Team to inform the Board or Superintendent of their directives and intentions before the action was taken or the Management Team's failure to participate in the decision-making process, despite being afforded every opportunity to do so.

155. The only powers over the PISD elected Board of Trustees and the Superintendent and campus principals that are denied to the Management Team under TEC §39.111(c), are actions regarding calling or cancelling or changing the date of district elections, or its polling places, changing the number or method of selecting Trustees, setting the district tax rate (which has already been set for the 2015-2016 school year, as required by state law), or adopting a district budget that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the elected Board of Trustees. The Conservators have already approved the budget for the 2015-2016 school year previously adopted by the elected Board. No

district elections for Trustees are to be held until May of 2016. If, in the future, the Commissioner determines that PISD needs to take some action regarding the District budget or Trustee elections that the elected Board of Trustees refuses to take, then the Commissioner could, at that time, apply to this Court to dissolve any temporary injunction prohibiting installation of a board of managers.

156. Therefore, Plaintiff requests that the Court set a hearing on its request for Temporary Injunction, and on its motion to deny supersedeas in case of any future appeal of a temporary injunction issued by this Court, and after notice and hearing, enter a Temporary Injunction prohibiting the Defendant Commissioner from installing a Board of Managers during the pendency of this suit, or until further order of this Court; setting the amount and method of security to be posted by Plaintiff as a condition of the issuance of the requested Temporary Injunction, which Plaintiff suggests should not exceed the amount of \$2,000; setting the amount of method of security to be posted by Plaintiff as a condition of the requested order to deny supersedeas in any future appeal of such a temporary injunction by Defendants; and setting a date for trial on the merits of this suit.

**D. MOTION TO DENY SUPERSEDEAS TO DEFENDANTS IN CASE OF APPEAL OF ANY INJUNCTIVE RELIEF**

157. Plaintiff moves the Court to issue an order denying Defendants the right to suspend any temporary injunction issued against Defendants and in favor of Plaintiff, upon the Defendants' filing of a notice of appeal as to any such temporary restraining order or temporary injunction, conditioned on posting by Plaintiff of security in an amount and by the method to be determined by the Court. Defendants have a pattern and practice of taking appeals from adverse rulings of trial courts awarding injunctive relief against them. Defendants have consistently claimed a right to suspend the enforcement of orders granting injunctive relief against them,

including but not limited to temporary or permanent injunctions. The effect of superseding judicial injunctive relief is to deny the party obtaining such relief from obtaining any effective judicial relief in the future. This is because the damage from the actions to be prevented by the award of injunctive relief is irreparable, even when the injunctive relief is only temporary.

158. Absent judicial relief, the past pattern of conduct by Defendants TEA and the Commissioner (and SBEC, a component of TEA), has been to claim the right to supersedeas regarding such injunctions, so they can proceed with the contested actions that are the subject of such suits (which actions have already been disapproved by a trial and/or appellate court), and where the taking of the enjoined actions by TEA or the Commissioner would in effect prevent any future effective judicial relief in the litigation contesting the actions of TEA or the Commissioner. See, e.g., *American Youthworks, Inc., et al. v. Texas Education Agency and Michael L. Williams, Commissioner of Education*, Cause No. D-1-GN-14-000672, 261<sup>st</sup> District Court, Travis County, Texas (appeal pending of temporary injunctions); *In re State Board for Educator Certification (SBEC)*, 411 S.W.3d 576 (Tex.App.—Austin 2013), 253 S.W.3d 802 (Tex. 2014) (denying mandamus, holding trial court had discretion to deny supersedeas); *Texas Education Agency and Michael L. Williams v. American Youthworks, et al.*, No. 03-14-00283-CV and No. 03-14-00360-CV; *Texas Education Agency and Michael L. Williams v. Honors Academy, Inc.*, No. 03-14-00360-CV, Third Court Appeals (interlocutory appeal of TEA and Commissioner argued September 24, 2015, decision pending).<sup>6</sup>

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<sup>6</sup> These identical Defendants argued to the Texas Supreme Court, in their Brief on the Merits on Petition for Review of *Williams v. Sterling City, et al.*, 447 S.W.3d 505 (Tex. App.—Eastland 2014, pet. granted), that for the plaintiff school districts to have a remedy as to the alleged ultra vires acts of the Commissioner, they were required to seek temporary injunctive relief to prohibit Defendants from requiring payment of the disputed payments demanded from the school districts. See Brief on the Merits of Appellants, *Williams v. Sterling City ISD, et al.*, pp. 25-30, at <http://www.search.txcourts.gov/Case.aspx?cn=14-0986>.



159. While the decision of the Texas Supreme Court in *In re State Board for Educator Certification (SBEC)*, involved a permanent injunction, the analogous provisions regarding a temporary injunction provide a trial court with even greater discretion to deny the Defendants' foreseeable attempt in this case to supersede any temporary injunction that this Court may grant in this action. Tex. R. App. Proc. (TRAP) 24.2(a)(5), 29.1 & 29.2. The relevant appellate rules provide Defendants with an adequate remedy for any abuse of judicial discretion denying supersedeas on appeal. "If the trial court refuses to permit the appellant to supersede the order, the appellant may move the appellate court to review that decision for abuse of discretion." TRAP, 29.2. Similarly, TRAP 24.2(a)(5), provides for appellate review the trial court's determination on whether or not to suspend enforcement of temporary injunctive relief. The Texas Supreme Court based its decision in the SBEC case on the doctrine of separation of powers, holding that a trial court must have the discretion to prevent administrative or executive action taken in violation of law or established rights, subject to judicial review for abuse of discretion. This is the only effective remedy when an administrative or executive act, if not temporarily restrained by the judiciary, will become a *fait accompli*, prior to final adjudication of the litigation contesting that action.

160. Therefore, Plaintiff PISD requests the trial court to set a hearing on both Plaintiff's request for a temporary injunction, and Plaintiff's motion to deny Defendants the right to supersede any injunctive relief that may be granted by the trial court, and to hear both the request for temporary injunction and the motion to deny Defendants the right to supersede on appeal any temporary injunction that may be granted, at the same hearing.

**E. PERMANENT INJUNCTION AND MOTION TO DENY SUPERSEDEAS ON APPEAL OF PERMANENT INJUNCTION:**

161. After full trial on the merits, PISD requests the Court to enter a permanent injunction prohibiting the Commissioner from lowering the PISD accreditation rating for the 2014-2015 school year and prohibiting the Commissioner from removing the elected Board of Trustees by appointment or installation of a board of managers.

162. PISD further requests the Court to issue an order to deny supersedeas to Defendants on appeal of any permanent injunction entered by this Court.

163. Plaintiff hereby incorporates by reference its Motion to Deny Supersedeas regarding any temporary injunction granted in this action, as to any permanent injunction this Court may issue after final trial on the merits, as set forth above.

**F. ATTORNEY’S FEES AND COSTS:**

164. After full trial on the merits, Plaintiff PISD requests the court enter an award of costs and attorney’s fees in favor of PISD and against Defendants, in such amounts as it may find are equitable and just under Tex. Civ. Prac. & Rem. Code § 37.009.

**IX.  
CONCLUSION AND REQUESTS FOR RELIEF**

For the foregoing reasons, Plaintiff Progreso ISD asks that Defendants Michael L. Williams, Texas Commissioner of Education in his official capacity; Michael Berry, Deputy Commissioner of Education in his official capacity; and the Texas Education Agency be cited to appear and answer, and that the Court take the following actions and grant the following relief:

- A. Grant a temporary restraining order, pursuant to Rule 680, Tex.R.Civ.Proc., restraining the Defendants from convening a meeting and installing a board of managers, until the Court holds a hearing on the Plaintiff’s Request for a Temporary Injunction;
- B. After notice and hearing on the Plaintiff’s Request for a Temporary Injunction, issue a temporary injunction pursuant to Rule 681, Tex. R. Civ. Proc., prohibiting the Defendants

from removing the elected Board of Trustees and installing a Board of Managers, during the pendency of this suit, or until further order of the Court; and

C. After notice and hearing on Plaintiff's motion to deny supersedeas on appeal, issue an order denying the Defendant Commissioner the right to supersedeas on appeal of any Temporary Injunction issued by this court, upon posting by Plaintiff of such security as the Court may require; and

D. After final trial on the merits:

1. Declare that Defendants' action lowering the accreditation rate of Plaintiff PISD for the 2014-2015 school year constituted an ultra vires action in violation of the Texas Education Code;
2. Declare that Defendants' action appointing or installing a board of managers for PISD was an ultra vires action in violation of the Texas Education Code;
3. Grant a permanent injunction prohibiting the Defendants from appointing a board of manager for PISD based on the evidence and legal authorities set forth in the Commissioner's letter of September 23, 2015, the Deputy Commissioner's final decision of December 30, 2015, and the Commissioner's letter of December 30, 2015;
4. Grant a permanent injunction prohibiting the Defendants from lowering the PISD accreditation rating for the 2014-2015 school year based on the evidence and legal authorities set forth in the Commissioner's letter of September 23, 2015, the Deputy Commissioner's final decision of December 30, 2015, and the Commissioner's letter of December 30, 2015;

5. Issue an order denying supersedeas on appeal to Defendants as to any final order or judgment issued by this Court, upon the posting by Plaintiff of such security as the Court may require;
6. Award Plaintiff PISD an amount of attorney's fees as the court finds to be equitable and just, to be paid by Defendants to Plaintiff;
7. Award Plaintiff PISD court costs as the court finds to be equitable and just, to be paid by Defendants to Plaintiff; and
8. Any other or further relief, in law or equity, that the Court determines the Plaintiff is entitled to receive.

Respectfully submitted,

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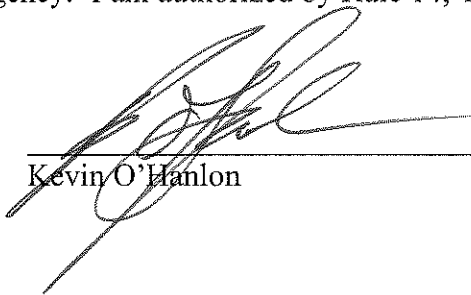
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**Attorneys for Progreso Independent School District**

**VERIFICATION**

State of Texas )(   
County of Travis )(

“My name is Kevin O’Hanlon, and I am an attorney duly licensed by the Supreme Court of Texas. I have served as General Counsel for Progreso Independent School District for the past ten years, and I am counsel of record for the Plaintiff in the above-styled and numbered action. I certify that the facts asserted in the foregoing Original Petition, including the facts asserted in support of the Application for a Temporary Restraining Order, and the Request for a Temporary Injunction, and the Motion to Deny Defendants Supersedeas on Appeal, are true and correct, and are either within my personal knowledge, or have been derived from documents prepared or maintained in the normal course of business by Progreso Independent School District, or the Texas Education Agency. I am authorized by Rule 14, Tex.R.Civ.Proc., to verify the foregoing pleading.”

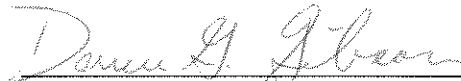


Kevin O’Hanlon

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of foregoing document (without appendices) was sent *via email*, on January 4, 2016, with a complete copy with appendices to follow by hand delivery, to:

Chris Jones, Attorney  
Texas Education Agency  
Office of Legal Affairs  
1701 N. Congress  
Austin, Texas 78701  
[cmjones@tea.state.tx.us](mailto:cmjones@tea.state.tx.us)

  
Darren G. Gibson