Court of Appeals of New Mexico
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Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MACKENZIE JOHNSON,

Plaintiff-Appellant

v.

Board of Education for the
Albuquerque Public Schools
And Mary Jane Eastin,

Defendant-Appellees

9-1-SC-39961

Ct. App. No. A-1-CA-39732
Dist. Ct. No. D-202-CV-2020-00121

Appeal from the Second Judicial District Court, County of Bernalillo,
The Honorable Benjamin Chavez, District Court Judge

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ORAL ARGUMENT REQUESTED: Pursuant to Rule 12-319(B)(1) NMRA, Defendants-Appellees jointly request oral argument on this appeal.

SUPREME COURT OF NEW MEXICO
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Elizabeth A. Garcia, Chief Clerk of the Supreme Court
of the State of New Mexico

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II. STATEMENT OF COMPLIANCE

This Answer brief was prepared utilizing Word, Microsoft Office 16. The body of this Answer brief is less than 35 pages and was prepared using 14-point Times New Roman, a proportional-spaced typeface. Appellees certify that this Answer Brief complies with Rule 12-305 and Rule 12-318.

III. SUMMARY OF PROCEEDINGS

Appellees do not contest the allegations contained in the Nature of the Case (Brief in Chief, Sec. III.A, pp. 4-5) or the Course of the Proceedings (Brief in Chief Sec. II.B, pp. 5-6) as outlined by the Appellants in the Summary of Proceedings section of their Brief in Chief. Because these sections fairly outline the proceedings as they have occurred, pursuant to Rule 12-318(B), Appellees will not restate said information.

A. The Disposition in the District Court

The District Court properly analyzed the issues presented in the motions to dismiss by relying on statutory interpretation rules and applicable, controlling case law to determine that events occurring in a public school while a class is in session do not constitute a "public accommodation" as that legal term is used and applied under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 28-1-15 (2021) (hereinafter NMHRA) (RP 159-174). As was done by the Supreme Court

in prior examination of the term public accommodation pursuant to the New Mexico Human Rights Act, the District Court first reviewed the plain language of the statute, then the statutory history of the NMHRA and then reviewed controlling case law in determining that Appellees' attempts to distinguish between an academic program at a university setting and an academic program in public school setting are not supportable by New Mexico jurisprudence. The District Court properly reasoned, in part, that the caselaw does not support such a legal distinction between universities and public schools, nor does it define "academic programs" in the administration thereof, because the controlling factor in Regents was not the selective nature of the program, but rather the academic setting. *See* Human Rights Comm'n of N.M. v. Bd. of Regents of Univ. of N.M. Coll. Of Nursing, 1981-NMSA-026, 95 N.M. 576 (hereinafter Regents). The District Court engaged in a thorough and independent analysis to evaluate the applicability of the NMHRA as required. *See* Elane Photography, LLC v. Willock, 2012-NMCA-086, ¶18, 284 P.3d 428, 436, aff'd, 2013-NMSC-040, ¶ 18, 309 P.3d 53. The District Court's reasoning was consistent with, and not an expansion of, the analysis established in Regents.

The District Court also properly determined that Defendant APS is not a public accommodation because it is not engaged in commerce and business activity which is open to the public at large. RP 171. Relying on the Constitutional mandate of

free education for the state's children, on New Mexico law construing the legislative history and plain language of the NMHRA, as well as applicable caselaw, the District Court properly determined that public schools are not engaged in commerce and business activity with the public at large and, as such, are not public accommodations under the NMHRA. RP 171-174.

The District Court also ruled on the applicability of the NM Tort Claims Act but that issue was not included in the Docketing Statement or Brief in Chief filed by the Appellant. Appellee assumes that argument is waived and does not respond thereto.

B. Summary of the Facts

The basic allegations, contained in the Complaint and in the Brief in Chief ("BIC"), are not in dispute, although they are highly editorialized. For purposes of a motion to dismiss, the pertinent and controlling facts are that on October 31, 2018, a Cibola High School teacher, Ms. Eastin, referred to Ms. Johnson, who was a student in her class and is Native American, as a "bloody Indian" in front of her 11th grade Advanced Placement English class. RP 4-6. Ms. Eastin uttered the comment after she had initiated her lesson for the day in which she would ask students questions aloud. Those who answered correctly were given marshmallows while those who did not were given dog food. RP 4-5.

IV. STANDARD OF REVIEW AND PRESERVATION

Appellees concur with Appellant, that the standard of review in this appeal is *de novo.* The District Court's Order granted Appellees' separate Motions to Dismiss under Rule 1-012(B)(6) (RP 159-174); BIC at pp. 10 §1, 18, 19 §1, 30 §f; *see also* Butler v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-084, ¶ 6, 140 N.M. 111 ("We review a district court's grant of a motion to dismiss *de novo*, accepting as true all of the appellant's well-pleaded allegations.") (citation omitted). A motion to dismiss tests the legal sufficiency of the complaint, while the facts as pled are taken as true. Madrid v. Village of Chama, 2012-NMCA-071, ¶18, 283 P.3d 871). Therefore, the motions to dismiss, and this appeal, test the law of the claim, not the facts. Id. at ¶18. Here, what constitutes a "public accommodation" under the NMHRA and whether the academic program exception applies to the facts as presented is a determination of law which is reviewed *de novo*. This same standard of review applies to all issues presented herein.

Appellees concur that all arguments contained in the Brief in Chief were preserved below. (BIC at pp. 3, 17). Similarly, all arguments presented in this Answer Brief were preserved below and were contained in the Motions to Dismiss filed by Appellees and in the separate replies filed in support of the Motions to Dismiss the New Mexico Human Rights Act Claims. RP 30-36, 48-54, 89-93 and 110-114.

V. ARGUMENT

The New Mexico Human Rights Act generally prohibits discrimination in certain practices based on protected characteristics such as race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation and physical or mental handicap. Relevant to this Appellant's claim is NMSA 1978, §28-1-7(F) which makes unlawful discriminatory practices by "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, spousal affiliation or physical or mental handicap; provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation."

NMSA 1978, §28-1-2(H) defines "public accommodation" as "any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private." This appeal hinges on the meaning of "public accommodation" as defined by the New Mexico Human Rights Act. Because "public accommodation" is a legal term, the Court must look

to the relevant statutes and case law for a definition. *See* Trinity Universal Ins. Co. v Cowan, 945 S.W.2d 819, 823 (Tex. 1997).

Issue 1: Public schools are not a "public accommodation" as that term is defined by the New Mexico Human Rights Act, NMSA 1978, §28-1-2(H)

This appeal hinges on the meaning of "public accommodation" as defined by the New Mexico Human Rights Act. The statute generally defines public accommodation as "any establishment that provides or offers its services, facilities, accommodations or goods to the public," with certain exceptions. See NMSA 1978, § 28-1-2(H) (2007) (defining public accommodation).

The word "accommodation" by itself is a non-legal term that means "[a] convenience supplied by someone; esp., lodging and food." *Black's Law Dictionary* (11th ed. 2019); *Merriam-Webster* (2020). Under such a broad definition, public schools may be an "accommodation," as they provide services in the form of education. But the inquiry does not end there, as such a possibility does not automatically transform public schools into "public accommodations," as that term is legally applied and interpreted. Legally, the phrase "public accommodation" first appeared around the late 1800s and came into widespread use with the passage of the Civil Rights Act of 1964. *See* Hargo v. Meyers & Ludecke, 4 Ohio C.C. 275 (Circuit Ct. Ohio 1889) (quoting state civil rights statute that defined "places of public accommodation"). Because "public

accommodation" is a legal term, the Court must look to the relevant statutes and case law for a definition. *See* Trinity Universal Ins. Co. v Cowan, 945 S.W.2d 819, 823 (Tex. 1997).

1. Plain meaning of the NMHRA definition of "public accommodation" does not apply to public schools.

The NMHRA defines a public accommodation as "any establishment that provides or offers its services, facilities, accommodations or good to the public…" NMSA 1978, 28-1-2(H). Thus, the New Mexico Human Rights Act ("NMHRA") makes it an unlawful discriminatory practice for any person in any public accommodation to "make a distinction" on the basis of a protected category when "offering or refusing its services, facilities, accommodations or goods." NMSA 1978, § 28-1-7(F) (2019).

The plain meaning rule should generally be applied with caution where, as here, differences of opinion may exist concerning a statutes' meaning. State ex rel. Helman v. Gallegos, 1997-NMSC-023, ¶¶ 2, 23, 871 P.2d 1352. However, in those instances, the statutory text must be read as a whole and in harmony with other statutes that concern the same subject matter. Dept. of Game and Fish v. Rawlings, 2019-NMCA-018, ¶ 6, 436 P.3d 741 (citations omitted).

In reviewing the New Mexico Constitutional mandate for public schools and Chapter 22 of the New Mexico Statutes, it is evident that a public school is not like

other entities that can be considered a public accommodation. Rather, in New Mexico public schools, the methods and manners of administering schools' academic programs, district governance via a school board, the supervision of school employees, public school funding sources and how such funding can be used, as well as virtually every other aspect of public school operations are set forth in governing statute. *See generally* Chapter 22 of New Mexico Statutes. Combined, these statutes demonstrate that a public school is not like any other "establishment" that can be and has been considered a public accommodation.

2. Historical treatment of the legal term "public accommodation"

If the statutory uniqueness of a public school does not fully distinguish it from other public accommodations, the courts may consider the historical nature of the statute as guidance and should construe the language of the statute in a manner consistent with its historical application. Human Rights Comm'n of N.M. v. Bd. of Regents of Univ. of N.M. Coll. of Nursing [hereinafter Regents], 1981-NMSC-026, ¶¶ 9, 14, 95 N.M. 576.

The predecessor statute to the NMHRA, the Public Accommodations Act, listed specific establishments that were then considered public accommodations. Public Accommodations Act, N.M. Laws 1955, ch. 192, § 5. The list included typical business establishments of the early 20th century such as inns, taverns, places to

eat, drink, and stay, places of entertainment, and methods of transportation open to the public. The list did not include public schools or similar public educational institutions. Id. By 1969, this enumerated list was out of step with existing commercial enterprises. So, when the Public Accommodations Acts was replaced with the NMHRA in 1969, it included a more generic definition of public accommodation as "any establishment that provides or offers its services, facilities, accommodations or goods to the public." NMSA 1978, § 28-1-2(H) (2007); Regents, 1981-NMSC-026 at ¶¶ 9, 14.

At the time the NMHRA was adopted, the legal term "public accommodation" had come into widespread use with the passage of the Civil Rights Act of 1964. The Civil Rights Act resulted in the codification of seven (7) federal statutes referred generally as Title I through Title VII, with each one addressing a different subsection of civil rights. Civil Rights Act of 1964, P. L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)). Title II addresses "public accommodations" specifically and, similar to the Public Accommodations Act in New Mexico, that federal law did not list public schools. 42 U.S.C. §2000a(b). Title II defines public accommodations as establishments that affect commerce and it further enumerates establishments that provide lodging, establishments which sell food for consumption, retail establishments, gasoline

stations, and entertainment establishments. 42 U.S.C. §2000a(b) and §2000a(c). That definition remains in place today.

Public schools are addressed separately in various other sections of the Civil Rights Act unrelated to public accommodations, including Titles IV and VI. Title IV specifically addresses equal protection in public schools and institutions of higher education prohibiting discrimination on the basis of race, color, national origin, language, sex, religion and disability. 42 U.S.C. §2000d *et seq.*; *see* Keyes v. School Dist. No. 1, Denver Colo., 413 U.S. 189, 93 S.Ct. 2686 (1973). Title IV is administered through the Federal Department of Justice's Educational Opportunities Section which handles complaints of discrimination in education much like the NM Department of Workforce Solutions, Labor Relation Division, Human Rights Bureau. The Educational Opportunities Section receives complaints, conducts investigations and has enforcement authority, including the ability to sue school districts for discriminatory actions.[1] Title IV is essentially the functional equivalent of the NMHRA but applies solely to academic settings. Title VI prohibits discrimination based on race, color and national origin by agencies that receive any public funds, including public schools. 42 U.S.C 2000d *et seq.*

[1] See: https://www.justice.gov/opa/pr/justice-department-reaches-settlement-remedy-severe-racial-harassment-black-and-asian DOJ settlement of a school district to address race discrimination, including the school's persistent failure to respond to reports of race-based harassment by district staff and other students.

This statutory distinction between educational entities and public accommodations in the federal antidiscrimination laws, found in the Civil Rights Act, further supports of the position that public schools are not encompassed within the legal definition of public accommodations as that term is used in the parallel state anti-discrimination law, the NMHRA.

Furthermore, the historical change in New Mexico law from an enumerated list to a generic clause, shows no legislative intent to include new types of establishments or entities that were not previously included in the original list. Regents, 1981-NMSC-026, ¶14. Public schools were not included in the explicit enumeration defining public accommodation under the old Public Accommodations Act, and they were not included with the newer definition in the NMHRA. N.M. Laws 1955, ch. 192, § 5. This fact was applied by the Supreme Court in Regents to support a finding that the university's nursing program was not a public accommodation. *See* Regents, 1981-NMSC-026, ¶ 14 ("We do not feel that the legislature, by including a general, inclusive clause in the Human Rights Act, intended to have all establishments that were historically excluded, automatically included in the ordinary and usual sense of the words."). The historical use and meaning of the statutory term public accommodation, both in state and comparable federal law, clearly demonstrate the exclusion of public schools from within such definition.

3. Academic programs are also excluded from the term public accommodation within the NMHRA

Appellant's complaint centers on an APS teacher's conduct while she was administering a lesson to her 11th grade class. (See BIC at 8 ¶3). This crucial and undisputed fact supports the legal determination made by the District Court that the events occurred within the context of the administration of an academic program. New Mexico case law does not define academic program as a legal concept within the context of the NMHRA. *See generally* Regents.

Although administration of an academic program has not been defined by the NMHRA, courts in New Mexico have construed academic programs broadly, to include activities of a school that are supported or affected by teachers. See, e.g., Aguilera v. Bd. of Educ. of Hatch Valley Schs., 2006-NMSC-015, ¶¶13, 15, 139 N.M. 330 (referring to the effect of retaining certain teachers on the "overall academic program" of the school system); *see also* Regents *supra* at ¶1 (receiving a failing grade in a clinical nursing program and refusal to permit retaking of course included in the ambit of administration of an academic program). Courts in other jurisdictions similarly apply a broad interpretation of the term. See e.g. Andrews v. Monroe City Sch. Bd., No. 65 11297, 2016 WL 148506, at *11 (W.D. La. Apr. 14, 2016) (unpublished) (meaning course offerings, including administration of and placement into); Miller v. Maryville Coll., No. 3:13-CV-306-

TAV-HBG, 2015 WL 5165292, at *7 (E.D. Tenn. Sep. 3, 2015) (unpublished) (meaning a program of instruction resulting in a degree or similar certification); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 152-53 (5th Cir. 1998) (including disciplinary code).

The fact that alleged misconduct may not be authorized but occurred within the context of the administration of the academic program does not alter the analyses above. See e.g. Celaya v. Hall, 2004–NMSC–005, ¶ 25, 135 N.M. 115 (explaining that a public employee's "scope of duties" under the Tort Claims Act is not limited to acts officially requested, required, or authorized because such an interpretation of the Act "would render all unlawful acts, which are always unauthorized, beyond the remedial scope of the TCA[,]" and stating that the Act "clearly contemplates" immunity for "employees who abuse their officially authorized duties, even to the extent of some tortious and criminal activity"). Appellants argue extensively, and without legal support, that because the comments made were discriminatory, the conduct could not be part of an academic program. (BIC, p. 27-29). However, this argument is simply not supportable in law or fact. Indeed, in Regents, the court determined the events occurred within the context of an academic program because it involved the issuance of a grade and ability to retake a class, even though plaintiff's allegations, if true, would have constituted racial discrimination. 1981-NMSC at ¶ 1.

The focus is not on the actions that occurred, as Appellant appears to argue, but rather the context in which they occurred. Lawsuits are filed against individuals who perform their jobs badly or even unacceptably, but that does not change the nature of the context in which the bad acts occurred. *See* Risk Management Div., Dept. of Finance and Administration v. McBrayer, 2000-NMCA-104, 14 P.3d 43. In that case, the court determined that even where a professor brutally attacked, sexually assaulted and then tried to kill one of his students, the events occurred within the context of his work as a professor. Id., 2000-NMCA at ¶ 20. Appellants acknowledge that the McBrayer case dealt with the scope of duties under the tort claims act, whereas here the common law scope of employment standard would apply. However, the case does illustrate clearly that a job done badly does not change the fact the events occurred within the context of the duties of the employee. *See also* Medina v. Fuller, 1999-NMCA-011, 971 P.2d 851 (analyzing scope of employment versus scope of duty under the tort claims act and holding that a sheriff involved in an automobile accident was acting within scope of employment).

In this case, the alleged discriminatory action took place as part of a classroom activity. This is supported by the very facts outlined in Appellant's Brief stating "Ms. Eastin initiated her lesson where she would ask student …" BIC, Sec. D, pg. 8. The plaintiff in Regents similarly tried to distinguish the academic program by

referring to it as a program offering "teaching, for pay, of people to be nurses." Regents, 1981-NMSC-026, ¶¶ 1, 8. The Court disagreed and found that it was the administration of the academic program that was controlling. Applying this same logic to the unfortunate events in question, it is evident they fall under the administration of an academic program, which is not a public accommodation. For that reason, even though the Appellees' academic program may have been implemented badly, the District Court's determination that NMHRA's public accommodation provision is not applicable to these facts was correct and should be affirmed. (RP 171 ¶3).

Should this Court look to any other state for guidance, it should look to Kansas. That state's Supreme Court followed the New Mexico Regents decision and held that "public schools are not places of public accommodation." Kansas Comm'n on Civil Rights v. Topeka Unified Sch. Dist. No. 501, 755 P.2d 539, 543-44 (Kan. 1988). As the Kansas Court noted, even when examining the status of public schools, whether or not an entity is a public accommodation depends on context and a school's academic program is not within such context:

> Under some circumstances, a school may become a place of public accommodation; for example, when a school sponsors an activity open to the general public. It would then wrongfully discriminate if it limited entrance to the event on the basis of race or sex. However, this is not the case when the alleged discriminatory activity centers on educational policies or access to specific schools.

Id. at 544.

The Court could also look to any of a number of other jurisdictions that have similarly and properly held that public schools are not public accommodations. *E.g.*, Haskins v. President & Fellows of Harvard Coll., No. 993405, 2001 WL 1470314, at *3 (Mass. Super. Ct. Sep. 18, 2001) (unpublished); Harless by Harless v. Darr, 937 F. Supp. 1351, 1354 (S.D. Ind. 1996) ("Public schools do not purport to be open to the general public in the ways that, for example, hotels, restaurants, and movie theaters (all establishments explicitly covered by Title II) do"); Gilmore v. Amityville Union Free Sch. Dist., 305 F. Supp. 2d 271, 278-79 (E.D.N.Y. 2004) (citing Harless).

Finally, this Court can consider Hall v. Albuquerque Public Schools, whereby the New Mexico District Court analyzed the public accommodation term within the context of an employment action. Hall v. Albuquerque Public Schools,1998 WL 36030620 *1. There, the Court determined that since the plaintiff was not opposing a discriminatory employment practice but rather the method in which the school was implementing an academic program (the bilingual program), plaintiff could not recover under the NMHRA as that program was not a public accommodation. There, as here, the conduct alleged in the underlying case occurred during the administration of an academic program, thus affirming that such a context is not a public accommodation.

Issue 2: Academic Programs as a whole, including public universities and public schools, are distinct from business entities.

Appellees contend that the key issue in this case is whether an academic program, as operated by Appellee APS and implemented by Appellee Eastin, is a public accommodation as that term is defined and applied under the New Mexico Human Rights Act. However, the Appellant attempts to factually distinguish the academic programs of a university from those of a public school and thereby make it somehow analogous to a standard commercial enterprise. The District Court considered the similarities and distinctions, as presented by Appellees, engaged in a thorough and reasoned analysis of the facts and law, and found they supported Appellees' motions to dismiss the claims under the New Mexico Human Rights Act NMSA 1978, §§ 28-1-1 to 28-1-15 (2021) (hereinafter NMHRA). That decision should be upheld as the distinctions attempted by Appellant simply do not support any determination other than the one made by the District Court.

1. Public schools are not open to the public at large.

The key allegations in this case involve a teacher's conduct during the course of instructing students in a public school classroom setting. (BIC at pp. 8 ¶4). Appellant's attempts to somehow distinguish between public schools and universities is not material to the analysis at hand. What is material is the fact that the alleged misconduct occurred in a setting that is not open to the public

generally, but rather, is designated to provide free academic instruction and educational services for eligible New Mexico children of a certain age.

Appellant is correct that public schools in New Mexico are mandated under the state constitution to provide a public education to all school-aged children. N.M. Const. art. XII, § 1. Appellant is incorrect, however, that public schools are open to the public at large and that the mandate transforms public schools into a public accommodation. Instead, this constitutional mandate makes public schools even more unique when compared to almost any other institution and makes all the difference in the analysis of this case.

In support of her argument, Appellant contends that public schools are distinguishable from a university setting for three reasons, and thus are inexplicably more like a commercial enterprise than a university. First, public school attendance is mandated by the New Mexico Constitution, whereas university attendance is a choice. (BIC §2A pp. 12-13). Second, universities select students based on specific criteria or benchmarks, whereas public schools are required to open their doors to all school age children in the State without any specific criteria required for enrollment. (Id. pp. 12-13). Third, APS provides a "wide array of services and accommodations" to students state-wide. (Id. at p.12). The District Court correctly determined that these distinctions are inconsequential in evaluating whether Appellees fall under the NMHRA's definition of a public

accommodation. (RP 171 ¶2). The lower court recognized that these contentions do not support Appellant's argument but, rather, they help show why public schools are not public accommodations under the NMHRA.

This Court, in Elane Photography, LLC v. Willock, 2012-NMCA-086, ¶¶ 16,18, 284 P.3d 428, 436, aff'd, 2013-NMSC-040, ¶ 18, 309 P.3d 53, clarified that businesses who offer services ***to the public at large*** constitute public accommodations. (*emphasis added*) (*citing* Nat'l Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33, 37 (N.J.Super.Ct.App.Div.1974) (for the proposition that "…that the hallmark of a place of public accommodation [is] that 'the public at large is invited [.]"). In the present matter, Appellants repeatedly, and without legal support, argue that the Constitutional mandate for public schools also means that such schools are open to the public at large. However, such arguments are without merit.

Public school districts and their employees provide educational services to school-age children who live in a specific area; they do not serve the public at large. As stated in the New Mexico Constitution, the role of public schools in the state of New Mexico is to provide "[a] uniform system of free public schools sufficient for the education of, and open to, *all the children of school age* in the state…" N.M. Const. art. XII, §1 (*emphasis added*). Pursuant to NMSA (1978) § 22-1-2(O) school-age children are defined as individuals between the ages of 5 and

21. Adults and the other members of the public at large are not offered the mandated educational services of the state's public school districts. Additionally, while public school districts may elect to enroll out-of-district transfer students, school-age children are only legally entitled to attend a public school within the school district in which the student resides. *See* NMSA 1978, §22-12A-3.

These legal limitations demonstrate that public schools are open to only a certain population and not to the public at large as Appellant contends. Indeed, the public school education mandate is set forth in the New Mexico Constitution is, in part, exactly what sets public schools apart from commercial enterprises which are initiated outside of such a mandate. *See also* Fortier v. New Mexico Hum. Servs. Dep't, No. CV 16-482 SCY/WPL, 2017 WL 3017167, at *11 (D.N.M. Apr. 10, 2017) (writing that "…even under the expansive language of the NMHRA, New Mexico courts would not consider the DD Waiver to be a public accommodation. The DD Waiver is a social welfare program aimed at assisting the mentally disabled who meet specific eligibility criteria, *not a commercial service offered to the public at large*.") (emphasis added).

The District Court properly evaluated Appellant's claims under the appropriate standard and precedent and was correct in determining that Appellant's assertion that public schools are open to the public is not supportable. (RP 171 ¶2).

2. Public school districts and their agents do not constitute a business

The Constitutional mandate, the academic program, and other distinctions outlined above make public schools unlike commercial establishments typically covered by the NMHRA. As the New Mexico Court of Appeals opined with respect to the 1969 revision to state anti-discrimination laws, "[t]he NMHRA was meant to reflect modern commercial life and expand protection from discrimination to include most establishments that typically operate a business in public commerce." Elane Photography v. Willock, 2012-NMCA-086, ¶ 18, 284 P.3d 428, *aff'd*, 2012-NMSC-040.

In the present matter, Appellants attempt to contort the nature of a public school's activities to argue in their Brief in Chief that public schools are inherently commercial. This is an inaccurate and oversimplified representation of both the operations of a public school and the legal reasons for its varied operations. "School Districts" are defined in the New Mexico Public School Code NMSA 1978, § 22-1-2 (R) as "…an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes…." At NMSA 1978, § 22-1-2 (L), public schools are defined as "…that part of a school district that is a single attendance center in which instruction is offered by one or more teachers and is discernible as a building or group of buildings generally recognized as either an elementary,

middle, junior high or high school or any combination of those and includes a charter school."

By virtue of these statutes, school districts are plainly political subdivisions, not businesses. Additional evidence of this fact is that public school districts receive the majority of their funding from the State of New Mexico and the Federal government, under separate statutory schemas, and they do not (and cannot) charge for the academic services they provide to eligible school-aged children. *See e.g.* NMSA (1978) § 22-1-4(A) ("Except as provided by Section 24-5-2 NMSA 1978, and except as provided in Subsection H of this section, a free public school education shall be available to any school-age person who is a resident of this state and has not received a high school diploma or its equivalent."); NMSA (1978) §22-8-14 (Public school fund setting forth distribution of funds to school districts); NMSA (1978) § 22-9-2 ("Federal aid to education; state educational agency [:] The department shall be the sole educational agency of the state for the administration or for the supervision of the administration of any state plan established or funds received by the state by virtue of any federal statute relating to aid for education, school construction or school breakfast or lunch programs, except as is provided in Section 21-1-26 NMSA 1978 and as may otherwise be provided by law").

While school districts may generate some incidental revenue from secondary activities, such funds remain public monies. As such, the schools simply do not fall within either the traditional or expanded definition of commercial enterprises. The court's reasoning in Brennon B. v. Superior Ct. of Contra Costa Cnty., 57 Cal. App. 5th 367, 389, 271 Cal. Rptr. 3d 320, 338–39 (2020) is instructive on this point. In Brennon B., the plaintiff brought suit for disability discrimination against the school district under California's Unruh Civil Rights Act which, like the NMHRA, imposes liability for discrimination by business establishments. The Court, in determining that the school district was not a business establishment under Unruh, reasoned in part:

> The "overall function" of a public school district is not to "enhance" its "economic value." (O'Connor, supra, 33 Cal.3d at p. 796, 191 Cal.Rptr. 320, 662 P.2d 427.) While a public school district may provide some athletic facilities for the physical education of its students, these facilities are not the district's "principal activity and reason for existence." (Isbister, supra, 40 Cal.3d at p. 76, 219 Cal.Rptr. 150, 707 P.2d 212.) Nor do public school districts provide a "physical plant" for "patrons [to] use at their convenience" and for which they pay an annual membership fee. (Id. at p. 81, 219 Cal.Rptr. 150, 707 P.2d 212.) "Commercial transactions" with the general public are not "an integral part of [a public school district's] overall operations." (Warfield, supra, 10 Cal.4th at p. 622, 42 Cal.Rptr.2d 50, 896 P.2d 776.) The "attributes and activities" of a public school district are not "the functional equivalent of a classic 'place of public accommodation or amusement.' " (Curran, supra, 17 Cal.4th at p. 697, 72 Cal.Rptr.2d 410, 952 P.2d 218.) And whatever commercial activities a public school district may engage in (such as allowing school clubs or booster organizations to sell goods to raise funds for extracurricular student activities, or allowing school athletic departments to charge a small admission fee for student athletic events), "do not involve the sale of access to the basic" education that public

> school districts are charged by the state with delivering to every school-age child pursuant to state constitutional mandate. (Id. at p. 700, 72 Cal.Rptr.2d 410, 952 P.2d 218, italics omitted.) Public school districts do not "sell the right to participate" in the basic educational programs and services they deliver. (Randall, supra, 17 Cal.4th at p. 744, 72 Cal.Rptr.2d 453, 952 P.2d 261.)
>
> We thus conclude the decisions of our Supreme Court confirm what seems apparent from the historical origins of the Unruh Act, its legislative history and the scholarly commentary—that California's public school districts are not business establishments under the Act.

The reasoning in Brennan B. applies similarly here.

Though Appellant relies on another California case for the proposition that a public school is a commercial enterprise that case is easily distinguished from the facts at bar. [*See* Brief in Chief, pg. 26, discussing Unruh Act and citing K.T. v. Pittsburgh Unified Sch. Dist., 219 F. Supp. 3d 970 (N.D. Cal. 2016)]. While the court in K.T. did find that the public school was a business establishment, there the court was analyzing the Americans with Disabilities Act ("ADA") within the context of the Unruh Act and relying on yet another case from the Ninth Circuit that has held that any violation of the ADA necessarily menta a violation under the Unruh Act. Id. ("The Court will not take the bold step of suggesting that the ADA does not apply to public schools. Accordingly, it holds that public schools are business establishments…"). Also, in K.T., the allegations occurred over an extended period of time but multiple individuals and included allegations that the school staff verbally and physically abused a special education student and

involved federal and state law claims. The context of that case, with the inclusion of federal claims analysis, makes it inapposite here. Moreover, other California courts have held the opposite, including Brennan B.

For instance, one California state court examined the question, and it held that the "legislative history of the Unruh Civil Rights Act suggests the opposite result: local entities mainly engaged in providing public services are not within the purview of the act." Gregory v. Cty. of Los Angeles, No. B251945, 2014 WL 6610198, at *4-5 (Cal. Ct. App. Nov. 21, 2014) (unpublished). Notably, a federal court relied on this holding and in concluding that "a public elementary school, particularly in its capacity of providing a free education to a special needs preschooler, is similarly acting as a public servant rather than a commercial enterprise and is therefore not subject to the Unruh Act." Zuccaro v. Martinez Unified Sch. Dist., No. 16-cv-02709-EDL, 2016 WL 10807692, at *12-13 (N.D. Cal. Sep. 27, 2016) (unpublished).

Relying on Elane, Appellant asserts this Court has held that any entity with "solicitation and marketing characteristics" can constitute a business, and therefore a public accommodation, under the NMHRA. BIC, pg. 15 *citing* Elane Photography, 2012-NMCA-086, ¶18. Appellant also attempts to point to other pseudo-commercial functions a public school engages in the context of providing a free education to students, but does so without acknowledging that all these

services and actions are secondary to the key purpose of a public school, and in many cases, are statutorily mandated. For example, simply because public schools may compete with other schools for some funding (and students) does not make them a commercial enterprise simply because some public funding is tied to the number of students attending a particular school. Funding of public schools in New Mexico is governed by the Public School Finance Act and involves a myriad of funding mechanism and purposes. *See generally*, Public School Finance, 22-8-1 to 22-8-49; Zuni Pub. Sch. Dist. No. 89 v. State Pub. Educ. Dep't, 2012-NMCA-048, ¶ 3, 277 P.3d 1252; Forest Guardians v. Powell, 2001-NMCA-028, ¶ 27, 130 N.M. 368. Thus, all money that schools receive, from whatever source, are public funds. NMSA 1978, § 22-8-2(N) (2019). Any incentive to secure increased funding reflects educational, not commercial, motivation. *See* Livingston Bd. of Educ. v. U.S. Gypsum Co., 592 A.2d 655-56 (N.J. Super. Ct. 1991) (holding that a public school district "is a public entity and not a business enterprise" because "public education is the constitutional obligation of the Legislature" and "it is beyond doubt that school districts are state agencies fulfilling a state purpose"); Solis v. Laurelbrook Sanitarium & Sch., Inc., No. 1:07-CV-30, 2009 WL 2146230, at *7 (E.D. Tenn. July 15, 2009) (unpublished) (concluding that "activities for which the [public] schools earn money – does not transform the vocational program into a commercial enterprise"); Thaxton v. Medina City Bd. of Educ., 488 N.E.2d 136,

137 (Ohio 1986) (contrasting "'home-rule' city engaging in a business enterprise" with "public school boards acting within their usual governmental capacity").

Appellant's reliance on pseudo-commercial functions is an overly broad, and self-serving, reading of the cited cases. In actuality, in Elane Photography LLC, 2012-NMCA-086, at ¶18, this Court reasoned:

> Today, services, facilities, and accommodations are available to the general public through a variety of resources. Elane Photography takes advantage of these available resources *to market to the public at large and invite them to solicit services offered by its photography business*. As an example, Elane Photography advertises on multiple internet pages, through its website, and in the Yellow Pages. It does *not* participate in selective advertising, such as telephone solicitation, nor does it in any way seek to target a select group of people for its internet advertisements. Rather, Elane Photography *advertises its services to the public at large*, and anyone who wants to access Elane Photography's website may do so. We conclude that Elane Photography is a public business and commercial enterprise. The NMHRA was meant to reflect modern commercial life and expand protection from discrimination to include *most establishments that typically operate a business in public commerce*. (emphasis added).

While APS does engage in promotion of its schools, the services that it and its agents promote and provide, are not commercial nor available to the public at large. Instead, the statue mandates scope of the education services it provides are limited to eligible school-age children.

Somewhat similarly, universities compete for students and use marketing and advertisements to attract students of all ages. The fact that a university utilizes marketing does not render, and has not rendered, a university a public

accommodation under the NMHRA as it relates to their academic program. Thus, Appellant's assertion does not set out a legitimate or established legal basis for determining that the provision of some service automatically serves to create a commercial business for purposes of the NMHRA. Rather, the focus of the inquiry revolves around the nature of the service provided, in this case, a governmental entity's provision of a free academic program to eligible school-aged children. *See,* e.g., Hum. Rts. Comm'n of New Mexico v. Bd. of Regents of Univ. of New Mexico Coll. of Nursing, 1981-NMSC-026, ¶ 16. Logically speaking, if a university, which any eligible student of any age, from anywhere in the world can attend, and which uses marketing and advertisement directed to the public at large is not considered a public accommodation under the NMHRA, there is no legally cognizable basis to find that a public school district which provides services to a much smaller and finite group of young people, is a public accommodation simply because it sometimes uses marketing to promote its services.

This Court has made clear that "[t]he purpose of the NMHRA is to ensure that *businesses* offering services to the *general public* do not discriminate against protected classes of people…." Elane Photography, LLC, *supra* at §3. Appellees are not the functional or legal equivalent of businesses, or the sort of entities constituting public accommodations. Rather, it is indisputable that the services Appellees provide do not constitute a public accommodation or business. *See e.g.*

Hall v. Albuquerque Pub. Sch., No. CIV 97-1630 MV/DJS, 1998 WL 36030620, at *1 (D.N.M. June 22, 1998) (rejecting plaintiff's argument that APS is a public accommodation, noting in part that APS is not "…involved in housing, real estate or the sale of goods and services…" and concluding "...that APS' administration of its bilingual education program is not a 'public accommodation' within the meaning of the Human Rights Act") (*citation omitted*); *see also* Bd. of Regents of Univ. of New Mexico Coll. of Nursing, *supra* ¶14; Elane Photography, LLC, *supra* at ¶17 (providing examples of cases in sister circuits expanding the scope of commercial businesses considered public accommodations to include: a physician group, boating safety courses and membership, commodities exchange trading floor, barber shop, private dance school).

Applying the rule of *ejusdem generis*, Appellees are not encompassed in either the traditional or modern interpretation of businesses that constitute a public accommodation. *See, e.g.*, In re Gabriel M., 2002-NMCA-047, ¶ 16, 132 N.M. 124 ("The rule of *ejusdem generis* states that where general words in a statute follow a designation or enumeration of particular subjects, objects, things, or classes of the same general character, or kind, to the exclusion of all others, such general words are not to be construed in their widest extent, but are to be held as applying only to those things of the same general kind or class as those specifically mentioned") (*citing* Black's Law Dictionary 535 (7th ed.1999)).

Similarly, Title II's enumerated establishments and focus on operations that affect commerce support the idea that the commercial nature of an establishment is a critical element in determining whether the NMHRA applies. Public schools, as governmental entities, lack such commercial character.

Against the backdrop of existing precedent and legislative intent, the District Court correctly considered the obvious unique characteristics of public school districts and their agents, in tandem with the facts of the present case. Thus, the District Court correctly concluded that the public accommodation provision of the NMHRA does not apply in this context nor to the Appellees. This Court should uphold the Court's determination that Appellees are not a business or a public accommodation under the NMHRA.

VI. Conclusion

Appellees ask this Court to uphold the determination of the District Court granting the motions to dismiss. The facts as pled, and as undisputed herein demonstrate that an unfortunate event occurred in a classroom as part of a question and answer setting: the event occurred within the context of an academic program. The New Mexico Human Rights Act does not apply in this context because the academic program is not a public accommodation as that legal term is defined.

The legal sufficiency of the claims made is not supported by the law and should be dismissed.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2022, the foregoing was electronically filed with the Court and served on all counsel of record via the tylerhost system.

/s/ Roxie P. Rawls-De Santiago
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