IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MCKENZIE JOHNSON,

Plaintiff-Appellant,

v.

9-1-SC-39961

Ct. App. No. A-1-CA-39732

Dist. Ct. No. D-202-CV-2020-00121

BOARD OF EDUCATION FOR
ALBUQUERQUE PUBLIC SCHOOLS
And MARY JANE EASTIN,

Defendants-Appellees.

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

PLAINTIFF-APPELLANT MCKENZIE JOHNSON'S BRIEF-IN-CHIEF

Charles S. Parnall
David M. Adams
Parnall & Adams Law
2116 Vista Oeste NW,
Suite 403
Albuquerque, NM 87120
P: (505) 600-1417
F: (505) 910-4466

Leon Howard
Maria Martínez Sánchez
Preston Sanchez
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103
T: (505) 266-5915
F: (505) 266-5916

Sovereign Hager
Verenice Peregrino Pompa
NM Center on Law and Poverty
924 Park Ave. SW, Ste C
Albuquerque, NM 87102
T: (505) 255-2840

Counsel for Plaintiff-Appellant McKenzie Johnson

Request for Oral Argument: Pursuant to Rule 12-319 (B)(1) NMRA, Plaintiff-Appellant McKenzie Johnson requests oral argument on this appeal.

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

New Mexico Caselaw **Page(s)**

Federal Cases

Other

II. STATEMENT OF COMPLIANCE

This document was prepared using Microsoft Word 2013. The body of this brief is less than 35 pages long. It was printed in 14-point Times New Roman, a proportionally-spaced typeface. Undersigned counsel certifies that it complies with Rule 12-213 NMRA.

III. SUMMARY OF PROCEEDINGS

A. The Nature of the Case

This case concerns liability under the public accommodation provision of the New Mexico Human Rights Act ("NMHRA" or "the Act"), NMSA 1978, §§ 28–1–1 to -15 (2021), arising from an incident during which Defendant-Appellee Mary Jane Eastin ("Ms. Eastin"), an employee of Defendant-Appellee Board of Education for Albuquerque Public Schools ("Defendant-Appellee APS" or "APS") referred to Plaintiff-Appellant McKenzie Johnson ("Ms. Johnson") as a "bloody Indian" immediately after cutting three inches of hair from the head of another Native American student against her will. These incidents occurred in front of Ms. Johnson's entire11th grade Advanced Placement English class Complaint, RP 1 - 12.

This appeal seeks review of the Second Judicial District Court of New Mexico's ("District Court") order dismissing Ms. Johnson's claims. Order Granting Motion to Dismiss, RP 159 - 174. The District Court held that APS was not liable for Ms. Eastin's racist comment under the public accommodation provision of the New Mexico Human Rights Act. Order, RP 159 - 174. Ms. Johnson submits two

issues for review by the New Mexico Court of Appeals, as set forth in her Docketing Statement and Argument, Section IV, below.

B. The Course of Proceedings

On January 8, 2020, Ms. Johnson filed her Complaint in the District Court, alleging racial discrimination pursuant to the public accommodations provision of the New Mexico Human Rights Act. Complaint, RP 1 - 12. On February 13, 2020, Defendant-Appellee APS filed its Motion to Dismiss NMHRA Claims ("APS Motion to Dismiss"), and Ms. Eastin filed her Motion to Dismiss for Failure to State a Claim on February 24, 2020 ("Eastin Motion to Dismiss"); collectively "Motions to Dismiss". The District Court's granting of those Motions to Dismiss are the subject of this appeal. APS Motion to Dismiss, RP 30 - 36; Eastin Motion to Dismiss, RP 48 - 54.

Ms. Johnson filed her Response to the Motions to Dismiss ("Response") on March 20, 2020. Response, RP 57 - 70. Ms. Eastin filed her Reply to Response to Motion to Dismiss for Failure to State a Claim ("Eastin Reply") and Notice of Completion of Briefing on April 7, 2020. Eastin Reply, RP 89 – 93; Eastin Notice of Completion, RP 94 - 96. APS filed its Reply in Support of its Motion to Dismiss ("APS Reply") on April 9, 2020, and its Notice of Completion of Briefing on April 13, 2020. APS Reply, RP 100 – 114; APS Notice of Completion, RP 135 - 137. Following notice, the District Court held the hearing on the Motions to Dismiss on

February 11, 2021. Notice of Hearing, RP 155 - 156; Transcript of Hearing, Tr. 1 - 57. After the parties presented oral argument at the February 11 hearing, the District Court entered its Order Granting Motion to Dismiss ("Order") on April 9, 2021, as detailed further in Section III (C) below. Order, RP 159 – 174.

Ms. Johnson filed her Notice of Appeal to the New Mexico Court of Appeals on May 7, 2021 and her Docketing Statement on June 4, 2021. Notice of Appeal, RP 178 - 195; Docketing Statement, RP 196 - 209.

C. The Disposition in the District Court

On April 9, 2021, the District Court entered its Order Granting Motion to Dismiss, RP 159-174. The District Court held that APS was not liable for Ms. Eastin's racist conduct under the public accommodation provision of the NMHRA, NMSA 1978, §§ 28–1–1 to -15 (2021). Order, RP 159-174.

Rather than construe *Human Rights Comm'n of New Mexico v. Bd. of Regents of Univ. of New Mexico Coll. of Nursing* 1981-NMSC-026 ("*Regents*") narrowly as the Court instructed in its opinion, the District Court broadened the exclusion from the statutory definition of "public accommodation" - beyond that established in *Regents* which was limited to a university's manner and method of administering its selective academic program - to exclude free public schools, despite their constitutional mandate to be open to all children of school age in the state. *See* Order, RP 165-173; N.M. Const. Art. XII, § 1. The District Court concluded that for

purposes of the NMHRA, a university setting is indistinguishable from a secondary public education setting, regardless of the constitutional mandate upon which the latter was established. Order, RP 171.

According to the District Court, "distinguishing public schools from universities appears to be immaterial." Order, RP 171. The District Court reasoned that the discriminatory and harmful insult directed at the minor-student "generally relate[s] to the administration of APS's academic program" and, therefore, held that APS is not a public accommodation within the meaning of the New Mexico Human Rights Act. Order, RP 171, 192.

D. Summary of Facts

This case is about protecting schoolchildren from discrimination perpetuated by the very professionals with whom we entrust to keep them safe. Complaint, RP 1-12. On October 31, 2018, Cibola High School ("CHS") teacher, Ms. Eastin, referred to Ms. Johnson, who is Native American, as a "bloody Indian" in front of her 11th grade Advanced Placement English class. *Id.*, at RP 4-6, ¶¶ 15, 32-33. Ms. Eastin uttered the unconscionable comment just moments after she cut off the braids of another female Native American student against her will in front of the same class. *Id.*, at RP 5, ¶¶ 24-31. At the time, Ms. Johnson was just 16 years old. *Id.*, at RP 1.

Defendant-Appellee APS is the public school district responsible for the operations of CHS. *Id.*, at RP 2, ¶ 3. Under the New Mexico Constitution, APS has

a duty to the public to provide a sufficient education and maintain a public school system open to all the children of school age in the state of New Mexico. N.M. Const. Art. XII, § 1. *Id.*, at RP 3, ¶¶ 9, 12.

On the morning of October 31, 2018 ("Halloween"), three CHS administrators, including the principal, visited Ms. Eastin's classroom. *Id.*, at RP 4, ¶ 17. As they entered, she pointed scissors at them and said that, as part of her lesson for the day, she would penalize students by forcing them to eat dog food if they answered her questions incorrectly. *Id.*, at RP 4, ¶ 18.

Later that same Halloween day, after the administrators left, Ms. Johnson arrived at Ms. Eastin's Advanced Placement English class dressed as Little Red Riding Hood. *Id.*, RP 200. Ms. Eastin initiated her lesson where she would ask students questions aloud and those who answered correctly were given marshmallows; those who did not were given dog food. *Id.*, RP 4-5, ¶¶ 18, 22.

At one point, Ms. Eastin approached the only other Native American student in the classroom with a box cutter. *Id.*, at RP 5, ¶ 23. The student, a young Navajo woman, had long hair combed into braids. *Id.*, at RP 5, ¶ 24. Ms. Eastin asked her if she liked her braids -- the student replied in the affirmative. *Id.* Ms. Eastin then suggested to the entire class that she was going to cut the young woman's hair with the box cutter. *Id.*, at RP 5, ¶25. Ms. Eastin put the box cutter down and exchanged it for a pair of scissors. *Id.*, at RP 5, ¶ 26. Ms. Eastin then cut approximately three

inches of the Native student's hair from her head and sprinkled it on the desk in front of her. *Id.*, at RP 5, ¶ 27.

Ms. Johnson, who sat at her desk nearby, was shocked and disturbed by the cultural implications and harm inflicted upon her fellow Native American classmate. *Id.*, at RP 5, ¶ 28. Upon witnessing this outrageous conduct, Ms. Johnson immediately felt unsafe. *Id.*, at RP 5, ¶ 29. The environment was hostile to the cultural mores and values of Native American students, especially given the sanctity of long hair in Navajo culture. *Id.*, at RP 5, ¶ 30.

Almost immediately, Ms. Eastin turned and stared directly at Ms. Johnson, who had fake blood on her cheek as a part of her costume and inquired, "What are you supposed to be, a bloody Indian?" *Id.*, at RP 5, ¶ 32. In response to the collective gasps from her fellow students, Ms. Eastin doubled down and stated, "What? She is bloody, and she is an ..." *Id.*, at RP 5, ¶ 33. Ms. Eastin stopped short of finishing her sentence and allowed her racist comments to linger. *Id.*, at RP 6, ¶ 34.

After these disturbing events, Ms. Johnson no longer felt welcome in her public school and her behavior fundamentally changed. *Id.*, at RP 6, ¶ 35. Ultimately, she felt compelled to transfer to another school, the Native American Community Academy (NACA), where she would not be discriminated against or demeaned on account of her Native American heritage. *Id.*, RP 201.

IV. ARGUMENT

A. Issue 1: Constitutionally mandated public secondary school is distinguishable from a selective university program

The District Court erred in granting Defendant-Appellees' Motions to Dismiss when it ruled that a university setting is indistinguishable from a secondary public education setting for purposes of the Act. The District Court misapplied *Regents* in reaching its conclusion that "the difference between public schools and University programs is unsupportable" despite the *Regents* Court's explicit direction that its holding be construed narrowly. Order, RP 171.

In reaching its conclusion, the District Court further erred by failing to independently evaluate the set of facts before it, as the New Mexico Court of Appeals directed in *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 12 ("Elane Photography") (directing courts to "independently evaluate the applicability of the NMHRA in all future cases"). *See also* Order, RP 171-173. The District Court did not properly consider the unique nature of the public school system in New Mexico, which unlike a selective university program, is constitutionally mandated to be open to all school-aged children. Order, RP 170 – 173; see also N.M. Const. Art. XII, § 5.

1. The Applicable Standard of Review

Under New Mexico law, dismissal is only proper under Rule 1-012(B)(6) for failure to state a claim when the law does not support the claim under the facts presented. *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214; *Castillo v. County*

of Santa Fe, 1988-NMSC-037, ¶ 4, 107 N.M. 204, 205-206. Under this standard, a motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *McCasland v. Prather*, 1978-NMCA-098, ¶¶ 5-6, 92 N.M. 192. In considering a Rule 1-012(B)(6) motion to dismiss, the court must accept all well-pleaded factual allegations as true, and it must resolve all doubts in favor of the sufficiency of the complaint. *Anadarko Petroleum Corp. v. Baca*, 1994-NMSC-019, ¶ 5, 117 N.M. 167; *Wallis*, 2001-NMCA-017, ¶ 6. The District Court erred when it concluded that Ms. Eastin's use of a racist term directed at Ms. Johnson fell within the scope of "administering an academic program" as that phrase was construed in *Regents*.

The Court of Appeals must conduct its review of the District Court's Order granting the Motions to Dismiss de novo. *Stoneking v. Bank of Am.*, N.A., 2002-NMCA-042, ¶ 4, 132 N.M. 79. The District Court's conclusions of law are not binding upon the New Mexico Court of Appeals, which may draw its own legal conclusions. *Trigg v. Allemand*, 1980-NMCA-151, ¶ 15, 95 N.M. 128.

2. Contentions of Plaintiff-Appellant

a. The public school system in New Mexico is unique and distinguishable from a university setting

The District Court erred in finding that for purposes of the NMHRA, the distinctions between APS and a university setting are "immaterial," and that the difference between public schools and university programs is "unsupported." Order,

RP 171. Contrary to the reasoning and decision of the District Court, the differences are evident and the programs are distinguishable.

APS is a public school district, and as a public school district, it is unique. APS operates pursuant to the New Mexico Constitution which mandates that "[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. Const. Art. XII, § 1. Further, under the New Mexico Constitution, "every child of school age and of sufficient physical and mental ability shall be *required* to attend a public or other school," N.M. Const. Art. XII, § 5 (emphasis added), and, where they attend public school, school aged children are also guaranteed a constitutional right to a sufficient education. N.M. Const. Art. XII, §§ 1 & 5. *See also Martinez et al. v. State; Yazzie et al. v. State (consolidated),* 1ST Jud. Dist. Ct. July, 2018, D-101-CV-2014-00793.

APS is open to the public at large and cannot limit who benefits from its services. All school-aged children of all capabilities and ethnic, racial, cultural, religious, and linguistic backgrounds can attend public school. APS also offers a wide array of services and accommodations to students and families, including early childhood education, transportation, gymnasiums, libraries, sporting events, classrooms, college-preparation and dual credit at higher education institutions, and extra-curricular activities – all of which are open to students enrolled in New Mexico

public schools statewide.

The university program at issue in *Regents* was not constitutionally mandated to open its doors to all people of a certain age. The program was limited to a certain number of students who met specific criteria. By its very nature, the university program at issue in *Regents* was distinctly selective,[1] exclusive, and not open to the entire community, in marked contrast to APS, a public school district that is mandated by our constitution to provide education to all school-aged students.[2]

APS and the constitutionally mandated education that it provides to the New Mexico citizenry is far different than that of a specific university program. The operations are clearly distinguishable. Unlike public secondary schools, no one is "required to attend" a university program. Unlike the university program in *Regents*, APS does not limit its programs to a certain number of students who meet specific criteria. Moreover, the state of New Mexico does not guarantee a constitutional right to a university education.

---

[1] In fact, the Court in *Fortier v. New Mexico Human Servs. Dep't*, 2017 WL 3017167 (D.N.M 2017), a case relied on by Defendant-Appellee Eastin, came to this exact conclusion in holding "[t]he 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." *Id*, at *11 (emphasis added). Response, RP 66.

[2] APS has approximately 84,000 students enrolled and is one of the largest school districts in the country. *Found at*: https://www.aps.edu/about-us on March 9, 2020. *See* Response, RP 66.

b. The District Court did not independently evaluate the facts

The District Court erred in reaching its decision because it did not "independently evaluate" the applicability of the NMHRA to the facts of the case before it. The District Court failed to properly consider that public schools are open to the school-aged public at large and public schools cannot limit who benefits from their services. All school-aged children of all capabilities and ethnic, racial, cultural, religious, and linguistic backgrounds can attend public school. Public schools offer a wide array of services and accommodations to students and families, including early childhood education, transportation, gymnasiums, libraries, sporting events, classrooms, college-preparation and dual credit at higher education institutions, and extra-curricular activities – all of which are open to students enrolled in New Mexico public schools statewide. That public schools do not directly charge students for their services, should be of no consequence.

Rather than engaging in an independent evaluation of the characteristics of New Mexico public schools, the District Court relied on and, in fact, expanded the reach of *Regents* and *Elane Photography* to further restrict the application of the NMHRA, thereby broadening its narrow definitional exclusion.

The Court misapplied *Elane Photography* to support a constricted interpretation of the definition of "public accommodation." In *Elane Photography*, a customer to a photography company alleged that the business had refused to offer

its services to her because of her sexual orientation in violation of the NMHRA. This court, in holding that the photography company was, indeed, a public accommodation, highlighted the solicitation and marketing characteristics of the company that demonstrated that it was a "business in public commerce."[3] *Elane Photography*, 2012-NMCA-086, ¶ 18.

This Court's ruling, however, did not *limit* the definition of public accommodation to establishments that operate a business or commercial enterprise. More importantly, this Court emphasized that New Mexico courts interpreting the public accommodation definition should "*independently evaluate* the applicability of the NMHRA in all future cases." *Id.*, ¶ 12 (emphasis added). Thus, rather than limiting the definition to businesses, this Court explicitly instructed future courts to engage in thorough and independent analyses of whether an entity is a public accommodation and is therefore prohibited from discriminating against the public.

c. The District Court improperly expanded the *Regents* exclusion from the definition of "Public Accommodation"

In reaching its decision, the District Court misapplied *Regents*. While *Regents* expanded the exclusion, its application was intended to be narrow. Rather than

[3] *Elane Photography* did not challenge the Court of Appeal's ruling on this point and the New Mexico Supreme Court accepted the Court's conclusion that the photography business was a "public accommodation" pursuant to the NHRA, *Elaine Photography*, 2013-NMSC-040, ¶ 13.

construe the opinion narrowly as the New Mexico Supreme Court instructed in its opinion, the District Court used the holding to improperly expand the exclusion to the definition of "public accommodation".

The NMHRA excludes from its definition of a "public accommodation" a "*bona fide private club* or other place or establishment that is *by its nature and use distinctly private*." NMSA § 28-1-2(H) (emphasis added). In *Regent*s, an African American nursing student brought claims pursuant to the NMHRA against the University of New Mexico for racial discrimination. The College of Nursing gave her a failing grade in her clinical nursing course and refused her an opportunity to retake the course, despite affording this opportunity to other students. In a short opinion with little reasoning, the New Mexico Supreme Court held that the university, *in that particular context*, was not a public accommodation.

The District Court's decision is contrary to general principles of applicable statutory construction and defies the specific instruction from the New Mexico Supreme Court in *Regents* that the holding in that case "should be construed narrowly and is limited to the University's manner and method of administering its academic program." *Regents,* 1981-NMSC-26, ¶ 16. It further applied a narrow reading of the definition, a broad reading of the exclusion, and no independent analysis of the facts before reaching its decision. As a result, the District Court erred in finding that the narrow exclusion applied to APS under the facts of this case. *See*

also Section IV(B)(2)(e), *infra*.

3. Preservation of Issues

Plaintiff-Appellant preserved Issue 1 for appeal by asserting these arguments in their Response to the Motions to Dismiss. Response, RP 57 – 70. Plaintiff-Appellant also preserved Issue 1 by asserting these arguments orally at the hearing on the Motions to Dismiss before the District Court on February 11, 2021. Transcript of Hearing, Tr. 1 – 57. Moreover, Plaintiff-Appellant's contentions concerning Issue 1 are generally set forth in the District Court's Order. Order, RP 159 – 174.

B. Issue 2: APS is a "Public Accommodation" as defined by the New Mexico Human Rights Act, NMSA 1978 § 28-l-2(H)

The District Court erred in granting the Motions to Dismiss when it ruled, outright, that Defendant-Appellee APS is not a public accommodation. Order, RP 159-174. The District Court largely and incorrectly relied on APS' s lack of commerce and business activity while it ignored the plain meaning and statutory construction of NMSA § 28-l-2(H) and the narrow holding in *Regents* that activity pertinent to the administration of academic programs, in the specific context presented in that case, was not covered by the NMHRA. Further, the District Court's holding wholly contradicts *Regents'* guidance that public universities may constitute public accommodations pursuant to the NMHRA under facts distinct from those

presented to the Court in 1981. *See Regents*, 1981-NMSC-026, ¶ 16. [4] Also, it ignores this Court's direction in *Elane Photography* to "independently evaluate the applicability of the NMHRA in all future cases," *Elane Photography,* 2012-NMCA-086, ¶ 12.

Under New Mexico's motion to dismiss standard, a motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *McCasland v. Prather*, 1978-NMCA-098, ¶¶ 5-6, 92 N.M. 192; *see also* The Applicable Standard of Review, Section IV(B)(1), *infra*. Pursuant to the applicable standard, the District Court was required to have viewed the evidence in the light most favorable to Ms. Johnson and construed all facts presented by her as true. In so doing, the District Court would necessarily have found that a fact-finder could reasonably conclude that Ms. Eastin's racist comment does not constitute and/or was not within the scope of "the administration of academic programs," and, thus, Defendants-Appellees Eastin and APS are subject to the public accommodation provision of the NMHRA.

The District Court erred by failing to properly consider the individual facts before it, and by relying solely on one NMHRA public accommodation case that

---

[4] *See also* Heisey, Todd, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act?", 12 N.M.L. Rev. 541, 5454 (1982) ("Principles of statutory construction support a finding that the University is a public accommodation.").

held, under a very specific set of facts, that a university was not a public accommodation.

1. The Applicable Standard of Review

The applicable standard of review for Issue 2 is the same as for Issue 1, as stated more fully in Section IV (A) (1), *supra*. Briefly stated, the New Mexico Court of Appeals review of Issue 2 is *de novo*. *Stoneking v. Bank of Am.*, N.A., 2002-NMCA-042, ¶ 4, 132 N.M. 79, 80-81, 43 P.3d 1089, 1090-91. In conducting its review, the New Mexico Court of Appeals must accept all well-pleaded factual allegations as true, and it must resolve all doubts in favor of the sufficiency of the complaint. *Anadarko*, 1994-NMSC-019, ¶ 5, 117 N.M. 167; *Wallis*, 2001-NMCA-17, ¶ 6, 130 N.M. 214. The New Mexico Court of Appeals may draw its own legal conclusions. *Trigg*, 1980-NMCA-151, ¶ 15, 95 N.M. 128.

2. Contentions of Plaintiff-Appellant

a. APS is a "public accommodation" as defined by the New Mexico Human Rights Act, NMSA 1978 § 28-l-2(H)

The NMHRA 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*.

NMSA § 28-1-2(H) (emphasis added).

When engaging in statutory construction in New Mexico, our courts adhere to

the "plain meaning rule." Under this rule, "statutes are to be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason." *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836, 839 (quoting *State v. Davis*, 2003–NMSC–022, 134 N.M. 172).

A plain reading of this statutory definition encompasses public school districts: APS is a "public accommodation" as defined by the Act. APS is a public school district. It operates pursuant to the New Mexico Constitution which mandates that free public schools be open to all the children of school age in New Mexico. N.M. Const. Art. XII, § 1. Further, under the New Mexico Constitution, school-aged children are *required* to attend a public school and are guaranteed a constitutional right to a sufficient education. N.M. Const. Art. XII, §§ 1 & 5. *See also Martinez et al. v. State; Yazzie et al. v. State (consolidated),* 1ST Jud. Dist. Ct. July, 2018, D-101-CV-2014-00793. *See also*, Section IV(A)(2)(a), *supra.*

APS provides and offers its services, facilities, accommodations, and goods to the public – the education of all the children of school age in the state - as it is required to do pursuant to the New Mexico Constitution. Upon a plain reading of NMSA § 28-1-2(H), APS is a "public accommodation" subject to the New Mexico Human Rights Act.

b. APS does not fit within the statutory definition's exclusion for "distinctly private" organizations

There is only one narrow exclusion to the statutory definition of public accommodation: the exclusion for "bona fide private clubs" and other "distinctly private" organizations. This narrow exclusion is not applicable to APS under the facts of this case. APS is not a bona fide private club. APS is not, by its very nature and use, distinctly private. The statutory exclusion from the definition of "public accommodation," therefore, does not apply to APS under the facts of this case. *See also*, Section IV(A)(2)(a) and (b), *supra*.

c. Public Accommodations subject to the Act are not limited to businesses or commercial enterprises

The District Court erred in its reasoning that a "public accommodation" under the NMHRA is limited to "businesses" or "commercial enterprises." The constitutional mandate that APS be open to the public effectively precluded a finding that APS engaged in business or commercial enterprises. Order, RP 172. Such a narrow interpretation is unsupported by both the plain language of the statute and the case law interpreting it.

The definition of "public accommodation" does not include language that limits the term to businesses or commercial enterprises. In fact, neither "business" nor "commercial enterprises" appear anywhere in the text of the definition. Thus, to arrive at such a constrained definition, the District Court essentially reads additional

language into the statute.

As indicated in *Maestas*, 2007-NMSC-001, ¶ 9, such construction is frowned upon and would only conceivably be appropriate where the literal reading of the statutory language would lead to an "injustice, absurdity, or contradiction." In reaching its decision, the District Court did not find that a literal reading of the statutory definition would lead to any sort of "injustice, absurdity, or contradiction." Order, RP 164-173. And for good reason. Interpreting the NMHRA definition of "public accommodation" to include public school districts does not lead to any of those outcomes. In fact, protecting school-aged children from racist comments lobbed by those authorized to administer public education is a quintessential example of the type of discriminatory act that was at the heart of the "spirit or reason" for protection under the NMHRA, which is, in part, to prohibit discrimination in public accommodations "against protected classes of people." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 3.

Applying a fact-specific analysis, here, APS is a public accommodation. That public schools are open to the public at large and that public schools cannot limit who benefits from their services are of primary significance. All school-aged children of all capabilities and ethnic, racial, cultural, religious, and linguistic backgrounds can attend public school. Public schools offer a wide array of services and accommodations to students and families, including early childhood education,

transportation, gymnasiums, libraries, sporting events, classrooms, college-preparation and dual credit at higher education institutions, and extra-curricular activities – all of which are open to students enrolled in New Mexico public schools statewide. That public schools do not directly charge students for their services should be of no consequence.

If the constrained definition of "public accommodation" applied by the District Court is taken to its logical extreme, any establishment in New Mexico that provides services, facilities, accommodations or goods to the public, but is *arguably* not involved in business or commercial enterprise, would enjoy free reign to discriminate against any and all protected classes of people.

The District Court incorrectly reasoned that the legislature's decision in 1969 to not carry over the approximately 40 delineated accommodations[5] from the previous analogous statute enacted in 1955 weighed against finding that APS is a public accommodation in this case. The opposite, however, is true.

Had the legislature intended to permit discrimination by any entity that was not engaged in the exchange of commerce, it would have explicitly done so. While *Regents* acknowledged the 1955 statute could be referenced, the legislature's

[5] Public schools operate many of the delineated considerations from 1955, such as gymnasiums, food preparatory services, soda fountains, music and public halls, and libraries. *See* APS Motion to Dismiss, Ex. 1, RP 36.

removal of specifically-listed establishments that fall under the NMHRA evidences a plain intent to avoid the injustices that could result if it had continued to adhere to such a list. The amendment broadens the definition of public accommodation and indicates the legislature's intent to prohibit discrimination by more than those entities listed in the 1955 statute.

Ms. Eastin's conduct is the precise kind of conduct that that the spirit of the NMHRA is designed to address. The legislature's removal of delineated establishments under the definition of public accommodation coupled with *Elane Photography*'s directive to address acts of discrimination on a case-by-case basis are measures designed to avoid absurd results, such as the one at issue on this appeal. Under the district court's ruling, the NMHRA leaves a child who was called a racist term by a teacher in a public classroom with no recourse under the NMHRA but would allow a remedy for a person who attended a paid-instructional seminar and was called the same derogatory term by the seminar instructor - an absurd result.

d. The definition of "public accommodation" is not limited to businesses or commercial enterprises, however APS participates in its fair share

Even if the New Mexico Court of Appeals were to approve of the District Court's reasoning - that organizations must be engaged in business and commercial enterprise to qualify as public accommodations under the NMHRA - APS does engage in commercial enterprise, and thus, is a public accommodation under the Act.

Public education in New Mexico is vastly different from what it was in 1981 when *Regents,* discussed *infra,* was decided. Now, public schools compete for students within their own district and state charter schools: at stake is funding dependent upon a particular school's enrollment.[6] APS schools are in constant competition for resources.[7]

Further, should the District Court be reversed on this appeal, and this case proceed to discovery, Plaintiff-Appellant will establish that APS generates revenue, expends funding, contracts with entities for services such as food and transportation, and charges admission into school functions while engaging in the sales of food and other items at myriad school-related events. These types of activities fall into a category of classic business enterprise.

Finally, at least one court has held that public schools are "business establishments." The Northern District Court of California interpreted California's Unruh Civil Rights Act in a matter brought by an elementary school student with

---

[6] Holley, Marc J., Egalite, Anna J., and Lueken, Anna J., "Competition with Charters Motivates Districts: New political circumstances, growing popularity", Education Next, Fall 2013 / Vol. 13, NO. 4, https://www.educationnext.org/competition-with-charters-motivates-districts/.

[7] See APS Process for Grant Applications, found at https://www.aps.edu/about-us/policies-and-procedural-directives/procedural-directives/d.-fiscal-management/grants-and-applications-for-grants on April 4, 2022 and Grants and Applications for Grants, found at https://www.aps.edu/finance/grant-management-and-legislativeprojects/grant-wriiting/grant-process on March 20, 2020.

autism and ADHD that alleged disability discrimination against her school district and its actors. *K.T. v. Pittsburg Unified Sch. Dist.*, 219 F. Supp. 3d 970 (N.D. Cal. 2016). The Unruh Civil Rights Act states:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. Cal. Civ. Code § 51 (b).

In holding that public schools were "business establishments" under the meaning of the statute, the California court stated that it would not "take the bold step of suggesting that the ADA does not apply to public schools. Accordingly, it [held] that public schools are 'business establishments' under the Unruh Act …" *Pittsburg Unified Sch. Dist.*, 219 F. Supp. at 983. Thus, even in accordance with the narrow definition applied by the District Court that would require business or commercial enterprise, APS is nonetheless a public accommodation.

e. The District Court misapplied *Regents*

The District Court's application of the holding in *Regents* to support its decision that a school district is not a "public accommodation" under the NMHRA is contrary to the express instruction of the New Mexico Supreme Court in its opinion. The holding in *Regents* was focused solely on the defendants' manner and method of administering their academic programs, not public schools that are

constitutionally mandated to be open to school-aged children.[8] In *Regents*, the university refused the plaintiff an opportunity to retake a course that she had failed, despite allowing other students to do so. Failing grades and the opportunity to retake a failed class relates specifically and directly to the method of administering an academic program. In the instant case, Ms. Johnson does not assert discrimination in the administration of an academic program. Rather, she claims that the blatantly racist conduct of an individual teacher within a classroom on school grounds is where the discrimination lies.

The New Mexico Supreme Court emphasized that its opinion in *Regents*

---

[8] The District Court similarly relied on *Hall v. Albuquerque Pub. Schs.*, 1998 WL 36030620, which also focused solely on the defendants' manner and method of administering their academic programs. *Hall* is an unpublished, non-binding opinion from the United States District Court for the District of New Mexico. In *Hall* a bilingual education teacher sued APS for retaliation under the NMHRA for having raised concerns about the school district's administration of its bilingual education program. The federal court determined that "APS's administration of its bilingual education program [was] not a 'public accommodation' within the meaning of the [NMHRA]." *Hall* at *2. The *Hall* holding, however, is inapposite to the facts of this case for the same reason that *Regents* is inapposite – Plaintiff-Appellant is not claiming discrimination based on the manner and method of APS's administration of its academic program.

In *Hall*, the court analyzed an APS program's relationship to a teacher as opposed to APS's relationship to the students to whom it must be open. In other words, there is no way to compare the relationship of a school district's bilingual program to a teacher, who had to meet specific eligibility criteria to attain her job, to a school district's relationship with a student, who must meet *no* criteria other than to be "school-aged." Accordingly, the holding in *Hall* is inapplicable to the instant matter.

"should be construed narrowly and is limited to the University's *manner and method of administering its academic program*." *Regents*, 1981-NMSC-026, ¶ 16. (emphasis added). The New Mexico Supreme Court "reserve[d] the question of whether in a different set of circumstances the University would be a 'public accommodation' and subject to the jurisdiction" of the NMHRA. *Id.*

In this case, Plaintiff-Appellant did not assert discrimination in the administration of an academic program. Her Complaint does not concern her grades, lack of opportunity to take any specific class, nor the AP English curriculum. The conduct at issue here is something that would *never* be advised in training on administering academic programs and is wholly unrelated to the method of administering an academic program.

Here, the discriminatory conduct at issue is the blatantly racist comments of an individual teacher towards a student within a classroom on school grounds. Ms. Johnson's Complaint focuses on the discriminatory conduct of what occurred in an APS classroom. The claim would be the same if the comment had been made in the school's gymnasium by the principal, coach or any other school personnel who is not technically "administering academic programs." Making racist comments to students is not a method of administering academic programs. To even claim so rings absurd. Protecting public school students from discriminatory comments uttered by school staff is well within the boundaries of the NMHRA and is further a matter of

human dignity and decency.

Additionally, the Districts Court's application of *Regents* fails to recognize or even acknowledge that the New Mexico Supreme Court has left open the possibility that a public university could fall under the "public accommodation" definition of the NMHRA. *See Regents*, 1981-NMSC-026, ¶ 16 (reserving the question of whether the University of New Mexico, under a distinct set of facts from those presented in that case, could be considered a "public accommodation" under the NMHRA). Public accommodation determinations must be made on a case-by-case basis. The District Court's holding that *Regents* stands for the proposition that public schools are not public accommodations completely ignores the question reserved in *Regents* and conflicts with its holding that a case-by-case analysis is required.

By the District Court's logic, anything and everything that occurs in a public school is to be construed as an "academic program" and, thus, excluded from the protections of the NMHRA. Such an interpretation effectively disregards the New Mexico Supreme Court's explicit directive in *Regents* to construe its opinion narrowly. *Id.*

Ms. Johnson is included in a large and unselected category of students to whom APS is constitutionally required to be open — not a collegiate student who has been admitted through a selective process. Further, the plaintiff in *Regents* contested her inability to repeat a course, which the Court deemed to be an issue

related to the "manner and method" of the program—not an overt instance of discrimination as is present here. The result reached in *Regents* has little bearing on the outcome of a proper public accommodation analysis under the facts of this case. *See also* Section IV(A)(2)(a), *supra.*

Given the stark differences between the university program in *Regents* and public school structure in APS, coupled with the explicit instruction of the *Elane Photography* Court to "independently evaluate the applicability of the NMHRA in all future cases," *Elane Photography*, 2012-NMCA-086, ¶ 12, the holding in *Regents* did not require the District Court to hold that APS is not a public accommodation.

f. The District Court misapplied the motion to dismiss standard.

As stated in Plaintiff-Appellant's statements of the Applicable Standard of Review, Sections IV(A)(1) and IV(B)(1), dismissal is only proper under Rule 1-012(B)(6) for failure to state a claim when the law does not support the claim under the facts presented. *Wallis v. Smith*, 2001 NMCA 17, ¶6, 130 N.M. 214, 22 P.3d 682; *Castillo v. County of Santa Fe*, 107 N.M. 204, 205-206 755 P.2d 48, 49-50 (1988). Under this standard, a motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *McCasland v. Prather*, 1978-NMCA-098, ¶¶ 5-6, 92 N.M. 192, 194, 585 P.2d 336, 338. In considering a Rule 1-012(B)(6) motion to dismiss, the court must accept all well-pleaded factual allegations as true, and it must resolve

all doubts in favor of the sufficiency of the complaint. *Anadarko Petroleum Corp. v. Baca*, 1994-NMSC-019, ¶ 5, 117 N.M. 167; *Wallis*, 2001-NMCA-017, ¶ 6

Here, a fact-finder could reasonably conclude that Ms. Eastin's conduct did not constitute "the administration of academic programs" and, thus, was subject to the public accommodation provision of the NMHRA. The racist comment does not relate to academics, school administration, class grades, student conduct, disciplinary action, or any other method of administering academic programs.

Making racist comments to students is not a "method of administering academic programs." Because a reasonable fact-finder could conclude that the racist comment is not related to the administration of academic programs, dismissal under Rule 1-012(B)(6) is improper.

3. Preservation of Issues

Ms. Johnson preserved Issue 2 for appeal by asserting these arguments in her Response to the Motions to Dismiss. Response, RP 57 – 70. She also preserved Issue 2 by asserting these arguments orally at the hearing on the Motions to Dismiss before the District Court on February 11, 2021. Transcript of Hearing, Tr. 1 – 57. Moreover, Ms. Johnson's contentions concerning Issue 2 are generally set forth in the District Court's Order. Order, RP 159 – 174.

V. STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Rule 12-319 (B)(1) NMRA, Ms. Johnson requests oral argument

on this appeal. The resolution of this appeal would be served by oral argument because of the important questions posed by this case concerning NMHRA public accommodation protections. Further, there is little guidance in existing case law from the appellate courts on the interpretation of the definition of "public accommodation" (*Regents* having been decided over 40 years ago while expressly leaving open questions) and significant public policy implications, the disposition of which oral argument would aid.

VI. CONCLUSION

The reasoning and decision of the District Court is in error. The District Court did not apply the plain meaning of the statutory definition of "public accommodation" as provided by the NMHRA, NMSA § 28–1–2(H) and, in fact, broadened the exclusion absent a legal basis. Further, in its application of precedent to the facts alleged in Plaintiff's Complaint, the District Court completely ignored the higher court directives and the vast differences between the facts in *Regents* and *Hall* and those of this case. These errors coupled with the misapplication of the motion to dismiss standard result in an improper narrowing of the coverage and impact of the New Mexico Human Rights Act's public accommodation provisions.

Considering all facts asserted in Plaintiff-Appellant's Complaint as true, she sufficiently pled facts upon which her claims for relief may be granted. APS falls squarely under the NMHRA's definition of public accommodation and Defendant-

Appellee Eastin's conduct falls within the type of discrimination the Act is designed to prevent. Finally, a ruling against Ms. Johnson would signify that school children, who are members of myriad protected classes and who have been subjected to any form of discrimination by the adults entrusted to care for them in the public school system, would have no recourse under the NMHRA. Such a reading of the law would solely serve to undermine the entire spirit of the law, which is surely an outcome that was never intended by the legislature.

Wherefore, Plaintiff-Appellant respectfully asks this Court to reverse the decision of the District Court, and hold that under the facts of this case, APS is a public accommodation subject to the provisions of the New Mexico Human Rights Act.

Respectfully Submitted

/s/ Leon Howard
Leon Howard
María Martínez Sánchez
Preston Sanchez
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103
T: (505) 266-5915
F: (505) 266-5916
lhoward@aclu-nm.org
msanchez@aclu-nm.org
psanchez@aclu-nm.org

/s/ David Adams
David Adams
Charles Parnall
Parnall and Adams Law
2116 Vista Oeste NW, Suite 403
Albuquerque, NM 87120
T: (505) 600-1417
F: (505) 910-4466
david@parnalladams.com
charles@parnalladams.com

/s/ Sovereign Hager
Sovereign Hager
Verenice Peregrino Pompa
NM Center on Law and Poverty
924 Park Ave. SW, Suite C
Albuquerque, NM 87102
T: (505) 255-2840
sovereign@nmpovertylaw.org
verenice@nmpovertylaw.org

Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon all counsel of record via the Odyssey filing system on this 4th day of April 2022.

/s/ Leon Howard
Leon Howard