IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MCKENZIE JOHNSON,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

S-1-SC-39961

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

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

PLAINTIFF-APPELLANT MCKENZIE JOHNSON'S REPLY BRIEF

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
María 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

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STATEMENT OF COMPLIANCE

The body of this brief exceeds the page limit set forth in Rule 12-318(F)(2) NMRA. As required by Rule 12-318(A)(1)(C) NMRA, we certify that this brief complies with Rule 12-318 (F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 4080 words. The brief was prepared and the word count determined using Microsoft Word Office Professional Plus 2013.

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Introduction

The question in this case is whether New Mexico's public school children are protected from discrimination by a public school teacher under the public accommodation provision of the New Mexico Human Rights Act (NMHRA). An Albuquerque Public School (APS) teacher referred to Plaintiff-Appellant Johnson as a "bloody Indian" moments after the teacher cut another Native American student's hair against her will. The NMHRA's current public accommodation provision was enacted by the NM legislature with the intent that its clear language be broadly applied. Defendant-Appellees' Answer Brief relies on federal law that is immaterial to New Mexico's distinct statutory scheme and misapplies the "administration of an academic program" standard from *Hum. Rts. Comm'n of New Mexico v. Bd. of Regents of Univ. of New Mexico Coll. of Nursing* ("*Regents*"), as excluding K-12 schools from the definition of a "public accommodation." 1981-NMSC-026, 95 N.M. 576. This is incorrect for the reasons that follow.

The NMHRA has a broad definition of the term "public accommodation." "'Public accommodation' means *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 1978 § 28-1-2 (H) (emphasis added). By its very nature this definition is inclusive. In fact, the NM legislature eliminated an enumerated list

of specific establishments from the definition in 1969 in favor of the broad definition currently in place and retained just one narrow exception for private clubs. At that time, the New Mexico Legislature could have explicitly excluded public entities and schools like other states have done, but it did not. The plain meaning of the NMHRA's definition of "public accommodation" demonstrates that the legislature intended for the harm suffered by Plaintiff-Appellant Johnson in this case to be actionable.

In addition to the plain meaning, the New Mexico Supreme Court reminds lower courts to avoid injustices and to engage in statutory interpretation that aligns with the "obvious spirit or reason" of the statute. *State v. Maestas*, 2007-NMSC-001, ¶ 9, 140 N.M. 836 (quoting *State v. Davis*, 2003–NMSC–022, ¶ 6, 134 N.M. 172). Preventing the discrimination endured by Plaintiff-Appellant Johnson and providing a viable remedy for this type of discrimination is precisely what the spirit of the public accommodation provision of the NMHRA was intended to address. Defendant-Appellees incorrectly rely heavily on *Regents*, a short, limited opinion, which held that matters within the administration of an academic program *in the university setting*, are not covered by the public accommodation provision of the NMHRA. *Regents*, 1981-NMSC-026, ¶ 15. The *Regents* standard does not apply to the public K-12 setting but even under this standard, Plaintiff-Appellant Johnson's claims should not be dismissed.

I. The NMHRA's public accommodation definition does not exclude public schools because its definition is broad and public schools are not bona fide private establishments.

Plaintiff-Appellant Johnson's Brief in Chief addresses why the plain meaning rule as applied to the NMHRA's definition of "public accommodation" supports a finding that a public school can constitute a public accommodation pursuant to an individualized analysis of the alleged facts. Despite this, Defendant-Appellees spend significant time discussing and directing the Court's attention to definitions of "public accommodation" found in myriad laws outside the NMHRA to distract this Court from the plain meaning and clear intent of the statute at hand. **[AB 10-13]**. Notably, Defendant-Appellees dwell on the fact that "[p]ublic schools are addressed separately in various other sections of the [federal] Civil Rights Act unrelated to public accommodations, including Titles IV and VI" and conclude without legal authority or explanation that this necessarily means 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." **[AB 14 -15]**.

Defendant-Appellees' position is wholly unsupported and, in fact, controverted by the existence of Titles IV and VI of the Civil Rights Act (CRA). The federal scheme is completely different from our state NMHRA.[1] The CRA has

[1] The record in this case is rife with suggestions from Defendant-Appellees and the District Court that this case is better suited for federal court. *See* **[2-11-21 Tr. 5-6]** (District Court Judge inquiring about a "companion" federal

separate statutory provisions for schools and, thus, the narrowness of Title II's public accommodation definition makes sense in that context, as schools are covered in separate provisions of the larger statute. Here, no analogous Title IV or Title VI exists. This does not signal that New Mexico intended to make public school actors immune from discrimination liability under the NMHRA. It simply shows that New Mexico took a different, more expansive approach to its public accommodations provision.

Plaintiff-Appellant Johnson has already explained in her Brief in Chief why public schools, in certain contexts, fall under the plain meaning of "public accommodation" and will not rehash those arguments here. However, Plaintiff-

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case. **[2-11-21 Tr. 11]** (Defense counsel suggesting there should be federal claims); **[2-11-21 Tr. 28-29]** (Defense counsel suggesting this case should be in federal court). However, the NMHRA provides broader protections than federal law and the standard for establishing a violation is less demanding. *See. e.g.*, *Depaula v. Easter Seals El Mirador*, No. 14-CV-252, 2015 WL 12751708, at *6 (D.N.M. Jan. 27, 2015) (unpublished), (plaintiff must prove a pattern of discrimination). *See Sturdivant v. Blue Valley Unified Sch. Dist.*, USD 229, 469 F. Supp. 3d 1121 (D. Kan. 2020) (African American student failed to describe a pattern of violations to establish deliberate indifference on the part of a school district, as required to establish municipal liability under Titles IV and VI); *see also Brooks v. Skinner,* 139 F. Supp. 3d 869 (S.D. Ohio 2015) ("To hold defendants liable for racial harassment under Title VI, plaintiffs must establish: (1) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive plaintiffs of access to the educational opportunities or benefits provided by the school; (2) defendants had actual knowledge of the harassment; and (3) defendants were deliberately indifferent to the harassment.").

Appellant Johnson will add further context to her argument based on the following four points: (1) The NMHRA contains a broad definition of public accommodation; (2) the canons of statutory construction preclude reading additional exceptions into "public accommodation" when the definition under the statute contains only one exception (bona fide private clubs); (3) the conduct in question violates the spirit of the NMHRA; and (4) APS is open to the public.

1. The NMHRA is to be construed broadly.

The New Mexico Supreme Court has clearly held that while our state courts may rely upon the evidentiary methodology utilized by federal courts in adjudicating civil rights cases, this does not signify that New Mexico has "adopted federal law as [its] own." *Smith v. FDC Corp.*, 1990-NMSC-020, ¶ 9, 787 P.2d 433, 436. This point came into stark focus when, in 1969, New Mexico adopted a more expansive definition of "public accommodation" than what is found in Title II. Our legislature could have easily adopted Title II's definition of the term but it chose not to. This aligns with the historic trend across the country to expand the definition of "public accommodation" from clearly commercial entities, such as restaurants, bars, and hotels to other types of establishments. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657, 120 S. Ct. 2446, 2456 (2000). While Title II limits "public accommodation" to lodging, food, retail, entertainment, and gas, **[AB 13-14]**, the NMHRA encompasses "services, facilities, accommodations, or goods." NMSA 1978, § 28-1-7 (F). These

definitional differences are significant as they elucidate New Mexico's intent that our public accommodation provision be interpreted more broadly than its federal counterpart. Indeed, numerous states diverge from federal anti-discrimination law in their definition of "public accommodation." New Mexico, itself, made a conscious decision to broaden the NMHRA's "public accommodation" definition. If our legislature intended to limit the scope of the term to those establishments, it would have done so.

As to Defendant-Appellees' focus on business or commercial activities, Defendant-Appellee APS ignores the statute and its reliance on cases interpreting California's Unruh Civil Rights Act (Cal. Civ. Code, § 51) is misplaced. Unlike the NMHRA, California's Unruh provides that "[a]ll persons … are free and equal, and no matter what their [protected 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 (West 2016) (emphasis added). In stark contrast, the NMHRA applies to "any establishment" with the only exception being for bona fide private clubs.

The cases that APS relies upon are inapplicable because Unruh applies only to business establishments, not any establishment like the NMHRA. For example, in *Brennon B. v. Superior Court of Contra Costa County*, the precise question before the court was "whether a public school district is a *business establishment* for

purposes of Unruh." 57 Cal. App. 5th 367, 369, 271 Cal. Rptr. 3d 320 (2020). Unruh requires business or commercial activity as an essential element to qualify as a public accommodation subject to the provisions of California's statute. The NMHRA contains no such language. It applies to "any establishment" that offers its goods or service to the public and it is not, nor should it be, limited to establishments engaged in primarily commercial or business activity.

2. Additional exceptions cannot be read into the NMHRA's definition of "public accommodation."

There is only one narrow exception to the NMHRA's public accommodation definition and that exception is limited to private clubs. The Legislature's decision to include one narrow exception to the general rule necessarily means that there are no others. The canon of statutory construction, *inclusio unius est exclusio alterius*, dictates that when a legislative body explicitly lists one or more exceptions to a particular statutory provision, additional exceptions are not to be implied into the statute. *See State ex rel. State Eng'r v. Lewis, 1996-NMCA-019*, ¶ 11, 910 P.2d 957, 960 ("[T]he inclusion of one thing is the exclusion of another."); *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Therefore, by excluding bona fide private clubs, the exclusion of public schools may not be implied.

3. Allowing Plaintiff's claims to proceed honors both the text and the spirit of the NMHRA in addition to adhering to *Elane Photography's* mandate that public accommodation claims be analyzed on a case-by-case basis.

The broad nature of the protections enshrined in the NMHRA supports liability for schools in certain circumstances. The Court must follow *Elane Photography, LLC v. Willock,* 2013-NMSC-040, and consider this matter on an individual basis, incorporating into its analysis the spirit and reason for the NMHRA and avoiding a holding that would broadly preclude students who are victims of heinous discriminatory conduct from ever bringing discrimination cases against public schools under the NMHRA – the New Mexican law established to provide relief to individuals who have been harmed as a result of that very conduct. Taken to its logical end, Defendant-Appellee's argument means that discrimination can rarely, if ever, be addressed by the NMHRA when the discriminatory conduct originates in a school setting. This argument and result flies in the face of *Regents*, on which Defendant-Appellees heavily rely. *Regents* did not hold that educational institutions are completely excluded from the definition of "public accommodation." Rather, the New Mexico Supreme Court held that its "opinion should be construed narrowly and is limited to the *University's* manner and method of administering its academic program." *Hum. Rts. Comm'n of New Mexico v. Bd. Of Regents of Univ. of N.M. Coll. Of Nursing*, 1981-NMSC-026, ¶ 16 (emphasis added).

4. APS is open to the public.

Despite Defendant-Appellees' assertions to the contrary, Defendant-Appellee APS is open to the public. While the New Mexico Constitution may not *mandate* that Defendant-Appellee APS provide its services to the public at large, Defendant-Appellee APS does in fact do so. In line with its mission statement, Defendant-Appellee APS offers a variety of free basic adult education services, including, GED, High School Diploma, Job Skills, and Life Skills, as well as adult literacy classes.[2] Defendant-Appellee APS also offers its "Getting Ahead Program"; a 16-session workshop for families of students in APS Title-1 Schools who wish to improve their economic stability.[3]

As to the New Mexico Human Rights Act, its current form represents a broadening of the prior statutory definition. Defendant-Appellee APS ignores the language of the Act and the legislative intent to broaden the Act's coverage, arguing that the Court should restrict the statutory definition of "public accommodation" to commercial or business establishments who offer goods and services to the entire population of New Mexico without geographic, age, or activity-based restrictions. In so arguing, Defendant-Appellee APS seeks to restrict the definition of public

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[2] *See Adult Basic Education Classes*, Title I, https://www.aps.edu/title-i/title-i-adult-basic-education-classes (last visited June 7, 2022).

[3] *See Adult Basic Education Classes*, Title I https://www.aps.edu/title-i/title-i-adult-basic-education-classes and *Getting Ahead Program,* Shine Partnership, https://www.shineabq.org/getting-ahead (last visited June 7, 2022).

accommodation to exclude even traditional public accommodations if the establishment imposes restrictions by age, activity, or geographic location upon the goods or services that it offers to the public. An establishment is not required to serve the entire state, nor is it required to serve the entire public, to qualify as a public accommodation under the NMHRA.

As to its age-restriction argument, there is no requirement that the organization offer its services to persons of all ages to qualify as a public accommodation under the NMHRA. Public accommodations have traditionally included establishments that offer goods or services to an age-restricted public, including taverns and bars. *Boy Scouts of Am.*, at 2455-2456. An establishment is not exempt from the NMHRA simply because it limits its service to adults and not to children. *Id.*; *see also City of Albuquerque v. Sach*s, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24 (Albuquerque City Ordinance ch. 46 § 11-8-3(B) did not put defendant body-piercing shop in a position of violating the New Mexico Human Rights Act as a public accommodation under NMSA 1978, Section 28-1-2(H)).[4] There is no reason, per the statutory definition, legal authority, or logic for an

[4] Similarly, Defendant-Appellee APS's argument concerning a narrowly tailored social welfare program with specific eligibility criteria is unpersuasive. The DD Waiver at issue in *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), is distinguishable because it is narrow and subject to restrictive eligibility criteria, unlike APS which is open to the public at large.

establishment to be exempt from the NMHRA simply because it limits its primary services to school-aged children. Similarly, there is no requirement that the organization offer its services to every person in the state of New Mexico to qualify as a public accommodation under the NMHRA. A restaurant is not exempt from the NMHRA simply because it does not deliver food throughout the entire state. **[AB 23]**.

II. A teacher targeting a student with a racist epithet is not "administering an academic program."

While Plaintiff-Appellant Johnson does not concede that the "administration of academic programs" is the applicable standard for determining liability pursuant to the NMHRA in the public K-12 setting, even under that standard Plaintiff-Appellant Johnson prevails. Defendant-Appellees fail to cite precedent from New Mexico or elsewhere where a Court has classified egregious racist behavior directed at a student by a public school employee as part of the administration of an academic program. Referring to a student as a "bloody Indian" seconds after cutting another Native American student's hair against their will has nothing to do with the administration of an academic program and everything to do with the type of discrimination public accommodation provision was designed to protect against. Here, Defendant-Appellee Eastin utilized a racist epithet and committed a battery, which dehumanized and inflicted psychological trauma on young, impressionable, and vulnerable Native American students. How does this constitute part of an

academic program? The answer is: it does not. Defendant-Appellees argue that the discriminatory actions are irrelevant and that the only thing that matters is the context - i.e. that Defendant-Appellee Eastin's racist conduct occurred during an AP English lesson. **[AB 19]**. However, they fail to cite any relevant case law within the sphere of the NMHRA that supports their assertion. Instead, they look to an entirely different body of law that does not contemplate discrimination in any way. *Id.*

To be clear, Plaintiff-Appellant Johnson does not argue that the NMHRA covers *all* conduct by a teacher that could be considered discriminatory while teaching a lesson. But what is undoubtedly covered by the NMHRA is the targeting of a student with discriminatory conduct based on their race and ancestry, as was the case here. Assuming, *arguendo*, that the administration of an academic program is the standard for public schools, it would likely not be actionable for an African-American student to bring an NMHRA claim against a teacher for teaching a lesson on slavery that skimmed over the grotesque nature of that period in our nation's history. But an NMHRA claim certainly would be actionable if that same teacher turned to an African American student during the lesson and called them the N-word.

Defendant-Appellees readily admit that a clear definition of "administration of academic programs" does not exist. Thus, they reference the "scope of duties" standard in the New Mexico Tort Claims Act (TCA) in an attempt to persuade this Court that "administration of academic programs" is akin to "scope of duties" where

public employees are immune from liability when they commit crimes and egregious conduct on the job. **[AB 16]**. However, Defendant-Appellees' reliance on *Celaya v. Hall*, 2004-NMSC-005 and *Dept. of Finance and Administration v. McBrayer*, 2000-NMCA-104 is misplaced. The true significance of those cases is the Courts' focus on the difference in terminology between the common law "scope of employment" standard from the TCA "scope of duties" standard:

> In...*McBrayer*, the Court of Appeals examined the reach of the "scope of duties" clause in even more detail, and again concluded that it represents a departure from the "scope of employment" standard and extends beyond officially authorized or requested acts.

Celaya, ¶ 24 (internal citations omitted).

Thus, if we take anything from *Celaya* and *McBrayer*, it is that this Court must analyze the "administration of academic programs" language for what it means within the context of the NMHRA as opposed to jamming it into a distinctly different standard in a wholly separate area of law. This, coupled with *Regents*' explicit statement that a different set of circumstances could render a public university a "public accommodation", clearly demonstrates that the Court has not interpreted the public accommodation provision of the NMHRA as a complete shield to teachers from all liability for anything done in a classroom or during a lesson.

Finally, it should be noted that the purpose of the TCA is to immunize, with exceptions, governmental entities from tort liability thereby *precluding* people from seeking relief against government tortfeasors. Conversely, the NMHRA was

established to actually *confer* rights – that is, to provide a pathway to relief for individuals who have suffered discrimination. The statutes are diametrically opposed with respect to their purpose – i.e. the withholding of rights on one hand and the conferral of rights on the other – and are, thus, an improper basis for comparison.

Defendant-Appellees attempt to piece together a definition of "administration of academic programs" by proffering the following examples, all of which, with the exception of *Regents*, are from non-NMHRA cases or from outside of New Mexico: retention of teachers; issuance of grades; offering and placement into courses; discipline; academic achievement; and programming that results in a degree. **[AB 16-17]** An academic program could also simply mean curriculum.[5]

Even if every one of these examples rightly fall within the definition of "administration of academic programs," they still do not advance Defendant-Appellees' argument that *Defendant-Appellee Eastin's conduct* falls within that same definition. When an educator directly targets a student with vile language based on their race and ancestry, even when that language is uttered inside a classroom during a lesson, the frame through which we view that conduct ceases to be that of an academic program and rightfully begins to be about discriminatory and

[5] *See Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 402 (4th Cir. 2001); *Marinello v. Bushby*, 1996 WL 671410, at *1 (N.D. Miss. Nov. 1, 1996). (unpublished); *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782, 803 (6th Cir. 1980).

illegal conduct against which the NMHRA was designed to protect. Moreover, Defendant-Appellee Eastin's actions were not:

- Covered by the school curriculum;
- Related to the retention of teachers;
- Related to the issuance of grades;
- Related to the offering and placement into courses;
- Related to discipline;
- Related to academic achievement; or
- Related to the achievement of a degree.

In short, even if "administering an academic program" is the appropriate standard for public K-12 actors to evade liability under the NMHRA, Defendant-Appellee Eastin was doing no such thing when she targeted Plaintiff-Appellant Johnson with a racist term shortly after cutting another Native American student's hair without her permission.

III. Conclusion

The reasoning by the District Court and arguments put forth by Defendant-Appellees are too far a departure from the plain meaning of "public accommodation" (NMSA 1978 § 28–1–2(H)) and offend the legislature's decision to move to a more broad, more inclusive definition. The analysis should end here.

However, with much attention centered on *Regents*, Plaintiff-Appellant Johnson has demonstrated that even under the standard applied in the university setting, she still has a likelihood of prevailing on the merits because Defendant-Appellee Eastin's conduct was not related to the administration of an academic

program. At this stage of the litigation, all facts alleged by Plaintiff-Appellant Johnson must be deemed true and, thus, the NMHRA provides a legal remedy to Plaintiff-Appellant Johnson.

Wherefore, Plaintiff-Appellant Johnson respectfully asks this Court to reverse the decision of the District Court, and hold that under the facts of this case, Defendant-Appellee APS is a public accommodation in this context and 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/ Charles Parnall
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 Johnson

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 8th day of June 2022.

/s/ Leon Howard
Leon Howard