IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MACKENZIE JOHNSON,

Plaintiff-Appellee

v.

S. Ct. No. S-1-SC-39961
Ct. App. No. A-1-CA-39732
Dist. Ct. No. D-202-CV-2020-00121

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

Defendants-Appellants

Appellant's Brief in Chief

Court of Appeals Decision: May 23, 2023
Second Judicial District Court Decision: April 9, 2021
Hon. Benjamin Chavez

Attorney for Defendant-Appellant
Board of Education for the
Albuquerque Public Schools
Roxie Rawls-De Santiago
Walsh Gallegos Treviño Kyle &
Robinson, P.C.
500 Marquette Ave., NW, Suite 1310
Albuquerque, NM 87102
(505) 243-6864
(505) 843-9318 (facsimile)
rdesantiago@wabsa.com

ORAL ARGUMENT REQUESTED: Pursuant to Rule 12-319(B)(1) NMRA, Defendant-Appellant Board of Education for Albuquerque Public Schools requests oral arguments on this appeal.

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

I. STATEMENT OF COMPLIANCE

This Brief in Chief was prepared utilizing Word, Microsoft Office 16. The body of this Brief in Chief is less than 35 pages and was prepared using 14-point Times New Roman, a proportional-spaced typeface. In addition, the body does not exceed 11,000 words. Defendant-Appellant certifies that this Petition complies with NMRA 12-305, 12-318 and 12-502.

II. SUMMARY OF PROCEEDINGS:

A. Nature of Case: As the District Court noted, Defendant-Appellant ("Appellant") in this case "acknowledges the egregiousness of the allegations and the severe consequences such alleged conduct could have on students and on public education in general. This [case] however, is limited by the specific claims brought, and by the parameters of the specific law invoked in this lawsuit." RP 160, Dist. Ct. Order. In the present case, rather than seek relief under one of several viable and available legal avenues, Plaintiff-Appellee ("Appellee") opted to file her lawsuit under the New Mexico Human Rights Act ("NMHRA"), despite this Court previously holding that the NMHRA does not apply to academic programs. Appellant requests that this Court re-affirm its holding in *Human Rights Commission of New Mexico v. Board of Regents of University of New Mexico College of Nursing*, 1981-NMSC-026, 95 N.M. 576 ("*Regents*"). In *Regents*, this Court established an exception to the definition of "public accommodation" under

the NMHRA for schools when it concerns the manner and method of administering their academic programs. *Regents,* 1981-NMCA-026. Both at the time the present complaint was filed in 2020, and when this Court decided *Regents* in 1981, the term "public accommodation" was defined in the NMHRA as "any establishment that provides or offers its services … to the public… ."[1] NMSA 1978, § 28-1-2(H) (2003) and NMSA 1978, § 28-1-2(G) (1978). This Court in *Regents* considered the historical and traditional meanings of what constitutes a public accommodation, and then held that when engaging in administering its academic program, the University of New Mexico was not a public accommodation and therefore not subject to the NMHRA. *Regents*, 1981 NMSC-026, ¶ 11, 95 N.M. at 577. The District Court correctly applied this exception to the public accommodation definition established in *Regents* when it granted Appellant's motion to dismiss. RP 30-36. The Court of Appeals, however, erroneously reversed the District Court's decision. *Johnson v. Board of Education for Albuquerque Public Schoos* ,2023-NMCA-069, ¶ 18, --N.M.—("*Johnson*").

---

[1] In 2023 the definition was amended to include "any governmental entity." See NMSA 1978, § 28-1-2(H) (2023). That change became effective June 16, 2023 and therefore does not apply to this case because statutes are to be construed as prospective rather than retroactive. For a statute to apply retroactively, there must be a clear legislative intent by the legislature to the contrary. *See Wilson v. N.M. Lumber & Timber Co.*, 1938-NMSC-040, ¶ 13, 42 N.M. 438, 442-443 ("The Legislature evidenced no intention that the amended act should be retroactive. We must, therefore give it only prospective effect in accordance with the general rule.").

B. Course of Proceedings: Plaintiff-Appellee filed a complaint alleging violations of the NMHRA, specifically, NMSA 1978, § 28-1-7(F) (2019), against Defendant Board of Education of Albuquerque Public Schools ("APS" or "Appellant") and Mary Jane Eastin ("Eastin"). RP 1-11. APS filed a motion to dismiss in District Court arguing a public school was not a public accommodation based on the academic program exception outlined in this Court's decision in *Regents.* RP 30-36. The District Court granted the motion to dismiss on April 9, 2021. RP 159-174. Plaintiff appealed, and, on May 23, 2023, the Court of Appeals reversed and remanded this case to the District Court for further proceedings consistent with its decision. *Johnson*, 2023 NMCA 069, ¶ 18.

C. Summary of Facts Relevant to Issues Presented for Review: In her complaint, Plaintiff-Appellee alleged that while she was enrolled in APS, and more specifically, while in the classroom of her teacher, Defendant Mary Jane Eastin, she was subjected to discriminatory treatment. RP 1-11, Comp. ¶ 32 and ¶ 48. The facts, which for purposes of a motion to dismiss are not in dispute, are as follows: On October 31, 2018, while in a class and during class time, Defendant Eastin cut off three inches of hair from a Native American student (not the Plaintiff) and sprinkled it on that student's desk. RP 1-11, Comp.¶ 22 and ¶ 27. Defendant Eastin then turned to Plaintiff, who is also Native American, and in an apparent reference to a blood smear on her face, worn as part of Plaintiff's

Halloween costume, asked, "What are you supposed to be, a bloody Indian?" RP 1-11, Comp. ¶ 32. Following these events, Plaintiff alleged she "no longer felt welcome in the school environment at APS." RP 1-11, Comp. ¶ 35.

III. LEGAL ARGUMENT

ISSUE 1: Did the Court of Appeals err when it determined that a public school in New Mexico is a public accommodation under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 15 (1969, as amended through 2019), and therefore amenable to suit thereunder?

A. Applicable Standard of review: When the trial court grants a motion to dismiss based on Rule 1-012(B)(6) of the New Mexico Rules of Civil Procedure for failure to state a claim, the reviewing court applies a *de novo* standard. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97. A motion to dismiss tests the legal sufficiency of the complaint and all facts pled therein are taken as true. Id. (*citing Valdez v. State*, 2002-NMSC-028, 132 N.M. 667). Motions to dismiss are appropriately granted when the claim asserted is legally deficient. *Delfino,*2011-NMSC-015, ¶ 9, 150 N.M. 97.

B. Preservation of Issues: All issues raised here were preserved in the Appellant's motion to dismiss and reply filed at the District Court and in its Answer Brief filed in the Court of Appeals. BIC 3, 17; RP 30-36, 110-114.

C. Legal Analysis:

The New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to 15 (2019) (NMHRA) 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. NMSA 1978, § 28-1-7 (2019). At issue in this case 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." [2]

---

[2] In 2023 the 28-1-7 was amended to include section (M) to apply to "a governmental entity or a public contractor." See NMSA 1978, § 28-1-7(M) (2023). Amendments are applied prospectively rather than retroactively. *See* note 1 above.

NMSA 1978, §28-1-2(H) (2007) the version of the statute that applies to Appellee's claim, 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 NMHRA, which is a question of law, and requires construing that phrase in concert with legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043. ¶ 10-11, 309 P.3d 1047, 1050 (citations omitted).

To understand and give effect to legislative intent, consideration of the statute's history and background is appropriate. *Tucson Electric Power Co. v. Taxation and Revenue Dep't*, 2020-NMCA-011, ¶ 8, 456 P.3d 1085, 1988. We start there as well. 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; RP 36. 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. RP 36. The list did not include public schools or similar public educational institutions but did include public libraries. RP 36. By 1969, this enumerated list was out of step with then existing commercial enterprises. So, when the Legislature replaced Public Accommodations Acts with

the NMHRA, the Legislature 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(G) (1978); *Regents,* 1981-NMSC-026, ¶¶ 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, like the Public Accommodations Act in New Mexico, that federal law did not list public schools. *See* 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 and public schools continue to not be covered by Title II.

Importantly, the historical change in New Mexico law from an enumerated list to a generic clause discloses nothing to show a 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 exclusion of entities was recognized and considered by this Court in *Regents* to support its holding 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.

Applying the rule of *ejusdem generis*, Appellant is 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")

(citations omitted*); see also* NMSA 1978, 12-2A-20(A)(2) ("the meaning of a general work or phrase following two or more specific words or phrases may be limited to the category established by the specific words or phrases.")

Reviewing the application of the NMHRA in a different context and in the only other published opinion directly addressing the term "public accommodation", the Court of Appeals has stated that "[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, LLC v. Willock*, 2012-NMCA-086, ¶ 18, 284 P.3d 428, *aff'd*, 2012-NMSC-040. However the Court of Appeals views the modern business establishments, Appellant here is not the functional or legal equivalent of businesses, nor do they reflects modern enterprises, nor the sort of commercial entities typically and historically constituting public accommodations. Public schools are instead constitutionally mandated governmental, educational entities. *See* N.M. Const. art. XII, § 1 ("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 maintained and established."). Schools cannot turn away children who live within the district and they must provide students with a sufficient education as well as comply with all the established statutory regulations to feed, transport and provide to school-aged children special education services as needed. *See generally* NMSA

1978, Chapter 22. Public schools are political subdivisions that receive most of their funding from government sources and do not charge for the academic services they provide to eligible school-aged children. *See e.g.,* NMSA 1978, § 22-1-2 (R); NMSA 1978, § 22-1-4(A); NMSA 1978, §22-8-14; NMSA 1978, § 22-9-2. Appellant is not the functional or legal equivalent of businesses nor the sort of entities constituting public accommodations under the NMHRA.

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 to the Appellant. This Court should, therefore, uphold the District Court's determination that Appellant is not a business or a public accommodation under the NMHRA and reverse the decision of the Court of Appeals to the contrary.

ISSUE 2: Does the decision of the Court of Appeals conflict with this Court's holding in *Regents*.

A. Applicable Standard of review: When the trial court grants a motion to dismiss based on Rule 1-012(B)(6) of the New Mexico Rules of Civil Procedure for failure to state a claim, the reviewing court applies a *de novo* standard. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97. A motion to dismiss tests the legal

sufficiency of the complaint and all facts pled therein are taken as true. *Id.* (citing *Valdez v. State*, 2002-NMSC-028, 132 N.M. 667). Motions to dismiss are appropriately granted when the claim asserted is legally deficient. *Delfino*, 2011-NMSC-015, ¶ 9, 150 N.M. 97.

B. Preservation of Issues: All issues raised here were preserved in Appellant's motion to dismiss and reply filed in the District Court and in its Answer Brief filed in the Court of Appeals. RP 30-36, 100-114.

C. Legal Analysis:

In *Regents*, this Court was asked to determine whether the University of New Mexico, in administering its academic program, was a public accommodation within the meaning of the NMHRA, NMSA 1978, §§ 28-1-1 to 15 (1978). *Human Rights Commission of New Mexico v. Board of Regents of University of New Mexico College of Nursing*, 1981-NMSC-026, ¶ 6, 95 N.M. 576, 577. 624 P.2d 518, 519 ("*Regents*"). As discussed above, the Supreme Court reviewed the historical and traditional use of the term "public accommodation" to discern legislative intent and the meaning of the term, and held that the University was not a public accommodation within the meaning of the NMHRA. In deciding that the University's academic program was not a public accommodation, the *Regents* Court stated, "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 as public accommodations subject to the Human Rights Act." *Regents*, 1981-NMSC-026, ¶ 14. In other words, because universities were not included in the enumerated list of the 1955 Public Accommodations Act (RP 36), and because there was no evidence of legislative intent to the contrary, the Court determined that the legislature did not intend for universities to be considered a "public accommodation" under the revised brief definition for a "public accommodation" used in the 1969 version of the NMHRA. *See* NMSA 1978, § 28-1-2(G) (1978). The definition of "public accommodation" did not change from 1969 until 2023, after Appellee filed her complaint. *See* NMSA 1978, § 28-1-2(G) (2023).

Inexplicably, when asked to address the question of whether a public school classroom engaged in administering a lesson as part of its academic program comes within the definition of a "public accommodation" pursuant to the NMHRA, the Court of Appeals arrived at an outcome entirely different from *Regents*. The Court of Appeals rejected this Court's precedential holding in *Regents*, writing that: "Although one interpretation of historic New Mexico Supreme Court precedent suggests otherwise, *see Hum. Rts. Comm'n of N.M. v. Bd. of Regents of Univ. of N.M. Coll. Of Nursing (Regents)*, 1981-NMSA-026, ¶ 11, 95 N.M. 576, 624 P.2d 518 (determining a state university not to be a public accommodation within the meaning of the NMHRA), we conclude differently

based on the plain language of the NMHRA, the differing circumstances of this case and our Supreme Court's own language declaring *Regents*' limited prospective application, even to the very state university at issue therein." *Johnson*, 2023-NMCA-069, ¶ 1 (*emphasis added*). Each of these stated reasons fail scrutiny, as outlined below.

1. The Court of Appeals Impermissibly Rejected the Application of *Regents.*

The *Regents* Court ended its decision by stating, "[t]his opinion should be construed narrowly and is limited to the University's manner and method of administering its academic program." *Regents*, 1981-NMSC ¶ 16. Since *Regents*, the "public accommodation" definition has been addressed only once in over thirty years. In 2012, the Court of Appeals addressed the issue of public accommodation in *Elane Photography,* 2012-NMCA-086.[3] *Elane Photography* involved a photographer who refused to provide services to a same-sex couple based on her religious beliefs about marriage. *Elane Photography*, 2012-NMCA-086. In determining that the photographer's services for pay fell within the public

[3] The decision of the Court of Appeals in *Elane Photography* was appealed to the Supreme Court, but the defendant did not contest its public accommodation status under the NMHRA before the Supreme Court. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 1, 309 P.3d 53, 58; see also NMSA 1978, § 12-2A-16(A) (1997) ("An amendment or repeal of a civil statute or ruled does not affect a pending action or proceeding or a right accrued before the amendment or repeal takes effect.").

accommodation definition of the NMHRA, the appeals court held that the change from an enumerated list to a definition for public accommodation was meant to reflect modern commercial life and to include establishments that typically operate a business in contemporary public commerce. *Elane Photography*, 2012-NMCA-066, ¶ 18. Using the closing limiting language in *Regents*, the Court of Appeals in *Elane* apparently concluded that courts could and should independently evaluate the applicability of the NMHRA to other non-traditional, non-historic types of business in all future cases. *Elane Photography,* 2012-NMCA-086, ¶ 12. In turn, in this case, the Court of Appeals relied not only on the limiting language of *Regents* to the administration of an academic program at the University of New Mexico, but also on the independent evaluation requirement of *Elane* to piece together its rationale that could justify the conclusion that public schools were a public accommodation. *Johnson*, 2023-NMCA-069, ¶ 6. Therefore, according to the Court of Appeals when applying both *Regents*' and *Elane*'s limiting language, *Regents* necessarily had no application at all in this case because it does not involve a university academic program.

The Court of Appeals explains its rejection of *Regents* using an erroneous legal construct and two distinguishing circumstances, each of which are both faulty in their own right and collectively, resulting in an incorrect application of the law. First, in rejecting any application of *Regents* to the present case, the Court of

Appeals relied on the legal construct that allows for the reconsideration — and, here, outright rejection — of this Court's precedent. Specifically, the Court of Appeals cites to *State v. Travarez* for the proposition that while the Court of Appeals must generally follow Supreme Court precedent, "in appropriate situations we may consider whether Supreme Court precedent is applicable." *State v. Travarez*, 1983-NMCA-003, ¶ 5, 99 N.M. 309. In its application to this case, however, the Court of Appeals misreads *Travarez*. That case more accurately stands for the proposition that the lower appellate court may consider the precedential value of a prior holding only when there are recent legislative enactments that bring into question this Court's prior decision. *Travarez*, 1983-NMCA-003, ¶ 5, 99 N.M. 309, 311. Critical here is the fact that there is **no** intervening change in legislative enactments that would give the Court of Appeals any reasoned basis to ignore this Court's holding in *Regents* and to summarily decide not to apply it as precedent. The definition of public accommodation remained unchanged from the NMHRA's enactment until 2023. Other changes to the NMHRA from enactment until present day have primarily served the purpose of including additional protective classifications like sexual orientation, gender identity and pregnancy. *See* NMSA 1978, § 28-1-7 (2004) and § 28-1-7(2020). But, nothing in the legislative history of the NMHRA gives any indication of a change in the covered entities, and the Court of Appeals cites to none before

summarily holding that it can determine whether the *Regents* precedent is applicable. *See Aguilera v. Board of Educ. of Hatch Valley Schools*, 2006-NMSC-015, ¶ 22, 139 N.M. 330, 336 ("We discern no legislative intent from this textual history to effect the kind of change now suggested by Plaintiff… ."). The Court of Appeals had no valid legal basis on which to reject this Court's clear holding in *Regents* and decide it no longer had precedential value.

This impermissible rejection of precedent is not dissimilar to the Court of Appeals decisions in other cases where the Supreme Court has determined an inappropriate restriction was applied. For example, in *Aguilera v. Board of Educ. of Hatch Valley Schools*, the Court of Appeals engaged in a strictly plain meaning interpretation of the phrase "just cause" to find that the school had no authority to discharge an employee. *Aguilera,* 2005-NMCA-069, 137 N.M. 642. There, the Court of Appeals reviewed the history of the act as it related to the phrase "just cause" then indicated that the statutes were clear and unambiguous, and that no mistake or absurdity warranted departure from the plain language of the act. *Aguilera,* 2005-NMCA-069, ¶ 26. This Court reversed stating, "we determine that the plain meaning interpretation of the 'just cause' definition is not appropriate, but instead we look to judicial interpretations of 'just cause' prior to the time the Legislature defined the terms to inform our construction of the statute." *Aguilera,* 2006-NMSC-015, ¶ 2. To support their reversal of the Court of Appeals, the

Supreme Court indicated that there was no discernable legislative intent to support the holding of the Court of Appeals which would effect such a radical change in the law, especially where the legislature is presumed to be aware of existing case law. *Aguilera,* 2006-NMSC-015, ¶ 22, 24. The *Aguilera* Court commands that "in the absence of a clear legislative directive to abandon existing law, we continue to apply it." *Aguilera,* 2006-NMSC-015, ¶ 22, 24. The same limitations should apply to the Court of Appeals' rejection of the precedential value of *Regents*.

To support its claim that the precedent of *Regents* no longer applied, the Court of Appeals points to two distinguishing factors (as opposed to recent legislative enactments), a constitutional mandate in existence since 1911 and a limited application of the terms "administration of academic programs" as the phrase was used in *Regents*. *Johnson*, 2023-NMCA-069, ¶ 6. With regard to the Constitutional mandate, the Court of Appeals states in a single line that Appellant "provides a constitutionally mandated function; that is, the provision of secondary education to primarily minor residents. *See* N.M. Const. art. XII, § 1." *Johnson*, 2023-NMCA-069, ¶ 6. However, the Court provided no explanation as to how the cited Constitutional mandate to provide education makes the Appellant more comparable to a private photographer engaged in a purely commercial enterprise as in *Elane* than a university engaged in the provision of nursing education as in *Regents*. Appellant contends that it is that very same constitutional mandate that

most distinguishes public schools from entities typically considered public accommodations under the NMHRA. RP 30-36. Mtn. to Dismiss. Statutes and controlling regulations bear out this distinction. *See generally* Chapter 22 of New Mexico Statutes and Title 6 of the NM Administrative Code. In New Mexico, the methods and manners of administering public schools' academic programs, district governance via a publicly elected 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 statutes and regulations. *See generally* Chapter 22 of New Mexico Statutes and Title 6 of the NM Administrative Code. An entire state agency, the New Mexico Public Education Department, is tasked with ensuring public schools comply with these statutes and regulations and to ensure that the core missions of public schools, the administration of their academic programs, are faithfully implemented. *See* NMSA 1978, § 22-2-1(2004) and § 22-2-2 (2004). Unlike any other governmental agency, aside from the three branches of government, no other entity other than public schools is established by the Constitution and ordered by the Constitution to offer its services, for free, to every child who lives within its geographic boundaries. *See* NMSA 1978, § 22-12A-3 (2019). This constitutional mandate is in clear contrast to private businesses that can and do refuse to serve customers as long as they do so for non-discriminatory reasons. *See Elane*

Photography, 2012-NMSC-040, ¶ 54 ("The NMHRA does not prohibit a law firm, even one that is a public accommodation, from turning away clients whose views the firm disagrees or with whom it simply does not want to work. *See* § 28-1-7(F) (prohibited grounds do not include ideology or personal dislike)."). Despite these important distinctions, the Court of Appeals, without explanation summarily concluded that the unique nature of the Constitutional mandates made public schools more like the common commercial establishments which have traditionally and historically included in the definition of public accommodation. *Johnson*, 2023-NMCA-069, ¶ 6. This outcome abrogates the academic program exception created in *Regents* without elucidation. When deciding that the Constitutional mandate supports distinction from *Regents*, the Court of Appeals does not refer to any law, legislative history, case law, or facts. Rather, the summary decision remains unexplained and cannot legitimately provide a basis for overturning long-standing Supreme Court precedent.

Next, the Court of Appeals rejected the holding in *Regents* on the basis that the actions in this case did not arise from "any specific manner or method of administration, such as admission process," but rather from "spontaneous actions and remarks by a single teacher on a single day." *Regents*, 2023-NMCA ¶ 6. Again, the Court of Appeals does not explain this asserted distinction or why it makes any legal difference. It is difficult to comprehend how the school day

delivery of classroom instruction, faulty though it may have been, is more akin to a private photographer's actions for pay, than to a discretionary act by a public school teacher during the administration of an educational program as was the case in *Regents*. *See Elane Photography,* 2012-NMCA-086, ¶ 12. Even the Appellee has acknowledged that the actions fell within the scope of administration of academic programs. RP 3, Comp. ¶ 11 (alleging that "Defendant APS is a 'public accommodation' pursuant to the [NMHRA], as it pertains to the administration of public education to grade school students."). Yet the Court of Appeals summarily reached the opposite conclusion and did so without providing legal support of any type.

While *Regents*, like in all cases, may not provide an identical set of circumstances, these circumstances are akin to the instant case and the holding in that case is more closely aligned to the facts of this case than it is to *Elane Photography,* which bears no resemblance to the issues here, either in fact or law. Only a handful of other cases cite *Regents,* and other than *Elane Photography*, only one other case from New Mexico directly addresses public accommodations and also found that a public school is not a public accommodation under the NMHRA. *See Hall v. Albuquerque Public Schools*, 1998 WL 36030620 (writing "this Court concludes that APS' administration of its bilingual education program is not a

'public accommodation' within the meaning of the Human Rights Act.").[4] Thus, under *Regents* and its progeny, there is vastly more support for the exclusion of a public school from the definition of a public accommodation under the NMHRA than there is for rejection of *Regents* as precedent. In the present matter, the *Regents* precedent should apply and the decision of the District Court upheld.

2. The plain language argument advanced by the Court of Appeals fails to consider legislative intent.

Having dispensed with this Court's precedent in *Regents* as inapplicable, the Court of Appeals then went on to apply its own plain language statutory analysis to reach its own conclusion that a public school is a public accommodation under the NMHRA. In so doing, the Court of Appeals impermissibly includes words not found in of the statutory definition of public accommodation and further adds facts

---

[4] Other cases in New Mexico are: *Foster v. Gallup Police Department*, 2015 WL 13665394 (D.N.M. 2105) (dismissing employment discrimination claims for failure to exhaust administrative remedies); *Benavidez v. Sandia National Laboratories*, 212 F. Supp. 1039 (D.N.M. 2016) (dismissing employment discrimination claims under federal enclave doctrine); *Fortier v. N.M. Human Services Dept.*, 2017 WL 3017167 (D.N.M. 2017) (unpublished Federal Court decision dismissing claims under the NMHRA and holding that the DD Waiver is a social welfare program aimed at assisting the mentally disabled and not a commercial service to the public at large); *Kennicot v. Sandia Corp.*, 314 F. Supp. 3d 1142 (D.N.M. 2018) (employment discrimination case denying NMHRA claim based on federal enclave doctrine); *Ochieno v. Sandia National Laboratories*, 2019 WL 277751 (D.N.M. 2019) (dismissing employment discrimination claims under the NMHRA under the federal enclave doctrine);

not pled in the complaint. This unconventional application of the plain language rule of statutory construction failed to follow the basic tenets of the rule itself.

The guiding principle for all statutory construction is to use the plain language of the statute as a primary indicator of legislative intent. *Baker,* 2013-NMSC-043, ¶ 11, 309 P.3d 1047, 1050 (citations omitted). The rule requires that courts look to the wording of the statute to determine the plain meaning of their use and rely on that plain language of the statute as the primary indicator of legislative intent. *Johnson*, 2023-NMCA-069, ¶ 7, (*citing Tucson Elec. Power Co.,* 2020-NMCA-011, ¶ 8 *and Baker,* 2013-NMSC-043, ¶ 11); *see also* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning."). If the plain meaning is evident, courts should refrain from further statutory interpretation. *Johnson*, 2023-NMCA-069, ¶ 7, (*citing Tucson Elec. Power Co.,*2020-NMCA-011, ¶ 8). Where the plain meaning is doubtful, ambiguous or if the literal application would lead to injustice, absurdity or contradiction the court would then seek to construe the statute according to the obvious spirit or reason for the legislation. *Johnson*, 2023-NMCA-069, ¶ 7, (*citing Baker,* 2013-NMSC-043, ¶ 11). In seeking to give effect to legislative intent and the plain language used, a review of the statute's history and background is appropriate. *Tucson Elec. Power Co.,* 2020-NMCA-011, ¶ 8.

a. Improper reliance on additional words

In applying the plain language rule to the case at hand, the Court of Appeals deviated significantly by substituting terms and relying on facts not alleged in the complaint. First, the Court of Appeals focused on the term "establishment" as defined in Webster's Third New International Dictionary and Black Law's Dictionary which includes as one synonym the word "institution." *Johnson*, 2023-NMCA-069, ¶ 9. Based on this, the Court of Appeals then concluded that "a public secondary school – even if merely potentially an establishment- is decidedly an institution." *Johnson*, 2023-NMCA ¶ 8. Although it acknowledged that the definition of an establishment in the 1968 version of Black's Law Dictionary "carries a more commercial orientation," the Court of Appeals nevertheless asserts that because the definition of "establishment" included "institution" as a synonym for the past five decades (going back to 1973 after the statutory definition was created in the NMHRA), it becomes somehow easy for the Court of Appeals to arrive at the conclusion that public schools are establishments and, therefore "public accommodations" under the NMHRA. A university is also clearly and institution but that fact evades the Court of Appeals in this discussion writing instead "there to be an absence of ambiguity, doubt, or for that matter contrary legislative intent, such as to make it necessary or justified to deviate from the ordinary meaning of 'establishment' or 'institution.'"

Courts are required to construe statutes as they find them and not amend or change them under the guise of construction. *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 15 (citing *Jones v. Holiday Inn Express*, 2014–NMCA–082, ¶ 19 (quoting 82 C.J.S. *Statutes* § 370 (2014)); *Gonzalez v. Performance Painting, Inc.*, 2013–NMSC–021, ¶ 53 (Daniels, J., specially concurring) (stating that "judges are not legislators"); *Martinez v. Sedillo*, 2005–NMCA–029, ¶ 7, 137 N.M. 103, 107 P.3d 543 ("We will not rewrite a statute."); *City of Albuquerque v. Sanchez*, 1970–NMCA–023, ¶ 5, 81 N.M. 272 ("[T]his is a situation which calls for legislative therapy and not judicial surgery."), *overruled on other grounds by State v. Ball*, 1986–NMSC–030, ¶ 39, 104 N.M. 176). Such an approach to statutory construction which reads additional language into the statute is judicially frowned upon and is only appropriate where the literal meaning would lead to an injustice, absurdity or contradiction. *See Tucson Electric Power Co.*, 2020-NMCA-011, ¶ 8, 456 P.3d 1085, 1088. The Court of Appeals' reliance on the term "institution" impermissibly adds language and meaning to the definition of "public accommodation" that the Legislature has never chosen to include and that is not otherwise supported by caselaw.

b. Improper reliance on unpled facts.

Next, the Court of Appeals also recites facts not pled in the complaint, then relies on these unpled "facts" to support its erroneous and novel determination that

the term "offer" was critical in this instance to the statutory definition of public accommodation. *Johnson*, 2023-NMCA-069, ¶ 10-13. Appellee's Reply Brief contended that Appellant offers a wide variety of services. Reply, 9-11. That the Court of Appeals placed great reliance on the arguments of Appellee regarding Appellant's provision of certain educational services to the "community as a whole" is evident. *Johnson*, 2023-NMCA-069, ¶ 13; Reply, 9-11. The Court of Appeals accepts and relies on these unpled fact by stating that Appellant offers a "wide array of services and accommodations to students and families" including "adult education services, such as GED and adult literary classes, provide[s] services to individuals well beyond school aged years." *Johnson*, 2023-NMCA-069, ¶ 10, ¶ 11 and ¶ 13. In contrast to the statements in the Reply Brief, the Complaint, which allegations are taken as true, alleged only that Appellant's "educational services are open to all students in the Albuquerque area who are in the appropriate age ranges for elementary, middle school and high school." RP 7, Comp. ¶ 46. And again, "APS provides its educations services to all children who are of grade school ages." RP 3, Comp. ¶ 12. The Court of Appeals thereby placed an inappropriate reliance on facts not "well-pled" which cannot be used to support their decision.

The Court of Appeals' consideration and reliance on these additional facts not pled in the complaint inappropriately converted the review from a motion to

dismiss standard to a motion for summary judgment standard, with no opportunity for the Appellant to respond. *See Delfino*, 2011-NMSC-015, ¶ 9, 150 N.M. 97. And it did so at the appellate level. In addressing a motion to dismiss, reviewing courts accepts all well-pled factual allegations of the complaint. *Id.* In addressing a motion for summary judgment, the reviewing court accepts evidentiary information submitted by the parties, determines first that there are no questions of fact and only then reviews the question of law applicable to the fact. *Delfino,* 2011-NMSC-015, ¶ 8. Here, the Court of Appeals accepted and relied on allegations not contained in the complaint and, more importantly, without any opportunity for the Appellant to respond, as would be typical in a motion for summary judgment process. *See* NMRA 1-056 (2023).

This ruling of the Court of Appeals is in direct conflict with the *Regents*' determination "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 as public accommodations subject to the Human Rights Act." *Regents*, 1981-NMSC-026, ¶ 14. The *Regents* decision is clear: if an establishment was not previously included in the prior lists, courts should not simply find that they are public accommodations subject to the NMHRA. And the limitations enunciated in *Elane Photography* requiring independent evaluation applied to "other non-traditional and non-historic types of business" do not apply

to public schools, which are neither non-historic nor non-traditional. *See Elane Photography,* 2012-NMCA-086, ¶ 12. Yet that is precisely what the Court of Appeals did here, wholly ignoring both the *Regents* decision and the plain language of the statute. The two decisions are irreconcilable and the Court of Appeals should be reversed.

3. The Court of Appeals rejected the traditional and historical analysis applied by the Supreme Court.

Finally, the Court of Appeals rejected entirely the *Regents* Court's determination that historically excluded establishments were not automatically included when the legislature opted to use a general, inclusive clause. *Regents,* 1981-NMSC-026, ¶ 16. *Regents* properly traced the use of public accommodation as a legal term, acknowledged and applied its distinct legal definition and found that universities were not included in the definition of public accommodation. This analysis was based on the historic exclusion of universities from common law discrimination laws, early civil rights laws, and the later specific inclusion of universities in some state and federal statutes. *Regents*, 1981-NMSC-026, ¶ 12-13. In addressing this identical language, the Court of Appeals determined *Regents* required an independent evaluation of non-traditional and non-historic types of businesses, in opposed to those historically pre-existing but excluded entities. *See Elane Photography*, 2012-NMCA-086, ¶ 12. The importance of considering the

historical and traditional context of a statute cannot be overlooked and such consideration is necessary to determining and giving full effect to the legislative intent. *Tucson Electric Power Co.,* 2020-NMCA-011, ¶ 8, (citations omitted). As our appellate courts have previously and repeatedly noted, the legislature is presumed to take existing law and case law into account when enacting new legislation, and absent a clear legislative change to an existing statute, "we presume that the Legislature continues to intend that the statute apply according to its original meaning." *Bd. of Comm'rs of Dona Ana County v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 23, 134 N.M. 283. The Court of Appeals' rejection of the *Regents* historical review is emblematic of their deviation from long accepted statutory construction principles.

In reviewing the statutory history of the NMHRA, the Court of Appeals acknowledged that public schools, like public universities were never included in the lists and definition of public accommodations under the 1955 Public Accommodations Act, the predecessor to the NMHRA. Yet, the Court of Appeals went on to determine that the *Regents* decision does not apply here because this case does not involve a state university. *Johnson,* 2023-NMCA-069, ¶ 6. They support their singular determination by summarily concluding that public schools are "similar enough" to public libraries, parks and transit, so much so that the court "feel[s] comfortable concluding that the Legislature did not intend to exclude

public secondary schools when the general statute was enacted in 1969. *Johnson*, 2023-NMCA-¶ 16. But public schools clearly existed when The Public Accommodations Act on 1955 was drafted and the legislature did not include them in that enumerated list. *See Swisher v. Darden*, 1955-NMSC-071, 59 N.M. 511 (discussing employment practices amidst the closure of segregated schools). This rational is not legally sound or a valid basis for rejecting established Supreme Court precedent.

Without relying on any specific change in the NMHRA, any case law, and without providing any additional explanation or legal citation the Court of Appeals explicitly reached the conclusion that the Legislature did not intend for public schools to be excluded stating, "We easily conclude there to be an absence of ambiguity, doubt, or for that matter, *contrary legislative intent*, such as to make it necessary or justified to deviate from the ordinary meaning of 'establishment or institution.'" *Johnson*, 2023-NMCA-069, ¶ 8. And later in the opinion, "We cannot conclude that our *Legislature did not conceive* of including constitutionally commended public institutions of learning, where services are offered to the public, when they created an enumerated list of accommodations." *Johnson*, 2023-

NMCA-069, ¶ 16. After correction to the final Decision,[5] the Court of Appeals next concluded that the Legislature "*did not intend to exclude*" public secondary schools when they enacted the more general statute in 1969. *Johnson*, 2023-NMCA-069, ¶ 16.

Next, the Court of Appeals turned to federal law for support and, citing to Title II of the Civil Rights Act, 42 U.S.C. § 2000a(b), which applies to "public accommodations" as defined therein, summarily held that it is "easy to conceive" how Title II could apply to public schools, citing two cases which apply not to public schools but to private organizations and their interactions with public schools. *Johnson*, 2023-NMCA-069. In reality, though, public schools are not amenable to suit under Title II and a review of caselaw under that federal statute does not produce any case of the sort so easily conceived of by the Court of Appeals. 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

---

[5] The original Decision of the Court of Appeals read, "we feel comfortable concluding the Legislature did intend to exclude…". Appellee filed a motion to correct the record which was granted on June 22, 2023. The published version does not reflect the correction and no revised version of the opinion was issued with the corrected language.

origin, language, sex, religion and disability. 42 U.S.C. §2000d *et seq*. Title IV is administered through the Federal Department of Justice's Educational Opportunities Section, handles complaints of discrimination in education much like the 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. Title IV is essentially the functional equivalent of the NMHRA but applies solely to academic settings. 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. Reliance on Title II language by the Court of Appeals was erroneous.

In closing their historical review, the Court of Appeals errantly proclaimed, "Even in historical context, *public schools were seemingly contemplated by the Legislature* as among the types of establishments comprising a public accommodation. If a public secondary school official in their official capacity were to refuse services to an individual based on the individual's race, religion, or sexual orientation, then the NMHRA would surely apply." *Johnson*, 2023-NMCA-069, ¶ 18. To be clear, this case is *not* about the refusal to provide services to an

individual. This is a case about the manner in which the academic program is administered by the Appellant. Under these unique circumstances, the *Regents* precedent should apply and the Court of Appeals' decision to the contrary should be reversed.

Finally, the rejection of *Regents* and its reasoning ignores the fact that the exception created in that case was not to exempt the institution as whole, but only the administration of the academic program. This is what the limiting, closing language of *Regents* really speaks to. *Regents*, 1981-NMSC-026, ¶ 16. ("This opinion should be construed narrowly and is limited to the University's *manner and method of administering its academic program*. We reserve the question of whether in a different set of circumstanced the University would be a 'public accommodation' and subject to the jurisdiction of the Human Rights Commission.") (emphasis added). The academic program exception created in *Regents* was strikingly and entirely ignored by the Court of Appeals even though the complaint plainly centered on an APS teacher's conduct while she was administering a lesson to her 11th grade class. RP Comp. ¶¶ 18, 20, 22; BIC p 8 ¶ 3. This crucial and undisputed fact supports a legal determination that the events at issue occurred within the context of an academic program placing the allegations squarely within the ruling and analysis of *Regents*. The Court of Appeals

incorrectly rejected this important nuance and in doing so, rejected the core holding in *Regents*. Thus, the decision of the Court of Appeals should be reversed.

IV. PUBLIC POLICY SUPPORTS THE REVERSAL OF THE COURT OF APPEALS

As the District Court most succinctly notes in its Order, this case presents egregious allegations and severe consequences could result from the alleged conduct. RP 160, Dist. Ct. Order. But this case is at a Motion to Dismiss stage because the Plaintiff made an election to bring these claims under the New Mexico Human Rights Act and this Court is bound by that selection. RP 1-11. Despite having existed since 1969, there is not a single case where a teacher (or any other public school administrator) is found to have violated the NMHRA for conduct that occurs within the classroom in an educational setting. This is because *Regents* applies. Not only was the Court of Appeals' decision contrary to the direct ruling in *Regents*, is raises important public policy concerns in two distinct areas: the unique nature of the educational setting and the separation of powers between the Courts and the Legislature. As to separation of powers, the Court of Appeals' decision changes the definition of public accommodation to such a degree that it has impermissibly created a new form of relief under the NMHRA, expanding is application to every classroom across the State of New Mexico. The decision unilaterally and without a legal basis but it is also contrary to the traditional

application of the legal term public accommodation as used under the NMHRA. This unfounded and vast expansion of novel legal rights not only under the NMHRA, but of substantial public interest, violates separation of powers. It is the province of the Legislature to address these issues, not the Court of Appeals.

Speaking to the unique nature of the educational setting, even Plaintiff acknowledges the difficulty in the application of the NMHRA to an educational setting. See Reply, p 12 ("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."). The more difficult question resulting from this statement is, "where is the line drawn?" At what point does a discussion on the Conquitadores, native peoples and slavery, as an example, veer from history to discrimination and which view point determines the answer? Under the *Yazzie/Martinez* mandates, schools are required to have culturally relevant, responsive and appropriate pedagogy. *See Martinez/Yazzie v. State of New Mexico, et al*, D-101-CV-2014-00793. The difficulty in making these determinations is one of the primary reasons the exception of *Regents* should continue to apply. Difficult conversations that involve sensitive topic take place, and should rightly continue to take place, every day in classrooms across the State of New Mexico. Upholding the decision of the Court of Appeals will bring those important discussions to a stop.

The decision of this Court is about determining whether Plaintiff selected the appropriate law under which to bring her claims. Unfortunately, she did not and the Court of Appeals should be reversed.

V. CONCLUSION

Appellant request this Court reverse the decision of the Court of Appeals, uphold the ruling of the District Court and reaffirm its holding in *Regents* creating an exception to the New Mexico Human Rights Act for public schools in the manner and method of administering their academic program.

Respectfully Submitted:

By: /s/ Roxie P. Rawls-De Santiago
Roxie P. Rawls-De Santiago
Walsh Gallegos Trevino Kyle & Robinson PC
500 Marquette Ave., NW, Suite 1310
Albuquerque, NM 87102
(505) 243-6864
(505) 843-9318 (facsimile)
rdesantiago@wabsa.com
Attorneys for Defendant-Appellant APS

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2023, 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
Roxie P. Rawls-De Santiago