

**STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT COURT**

HOZHO ACADEMY CHARTER SCHOOL,

Plaintiff,

v.

No. D-1113-CV-2018-00456

GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT
and MICHAEL HYATT, in his capacity as Superintendent of
Gallup-McKinley County School District,

Defendants.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION**

COMES NOW Defendant Board of Education for the Gallup-McKinley County Schools and Defendant Michael Hyatt, as Superintendent of Schools for the Gallup-McKinley County Schools (combined as "School District"), by and through their attorneys of record Cuddy & McCarthy, LLP (Andrew M. Sanchez), responds to application of preliminary injunction contained in Plaintiff's Complaint for Declaratory and Injunctive Relief ("Complaint")..

I. PROCEDURAL HISTORY

Plaintiff filed its Complaint for Declaratory and Injunctive Relief ("Complaint") on August 15, 2018, which was served on Defendants on August 17, 2018. The Court scheduled a hearing for August 24, 2018 on August 17, 2018. Defendants filed their Motion to Dismiss; to Strike Plaintiff's Complaint for Injunctive Relief and for Attorney's Fees and Costs and their

Memorandum Brief in support on August 23, 2018. In providing this Response, the Defendants do not waive any arguments for dismissal or striking Plaintiff's Complaint.

II. ARGUMENT

A. LEGAL STANDARD:

The standard in New Mexico for granting injunction relief, “a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.” *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (N.M. Ct. App. 1993), citing *Tri-State v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986); see *CNSP, Inc. v. City of Santa Fe*, 2018 WL 816262, at *3 (D.N.M. Feb. 9, 2018). “However, a movant has a heightened burden if a preliminary injunction falls within one of these three disfavored categories: ‘(1) preliminary injunctions that alter the *status quo*; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits.’” *Id.*, quoting *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (*en banc*). Here, Plaintiff fails to meet any of the requirements of *LaBalbo*; a preliminary injunction would disrupt the *status quo* and Plaintiff would recover all the relief sought in the action. All these factors favor denial of granting injunctive relief. Therefore, the Court should deny Petitioner's Application for a preliminary injunction and for all other injunctive relief.

B. PLAINTIFF CANNOT MEET THE REQUIREMENTS FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

1. Irreparable Injury.

Plaintiff holds no statutory right to transportation services from the School District, as such, it has suffered no injury much less an irreparable injury. Plaintiff's implication that Plaintiff's students are already using the School District's bus transportation services and that a preliminary injunction will not change the *status quo* is absolutely disingenuous and misleading. See Complaint at ¶ 17. "The object of the preliminary injunction is to preserve the *status quo* pending the litigation of the merits. This is quite different from finally determining the cause itself." *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 9, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (N.M. Ct. App. 2000), quoting *Penn v. San Juan Hosp. Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975); see *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 633 F. Supp. 2d 1257, 1267 (D.N.M. 2008) ("[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.")(quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). "[T]he *status quo* is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001)(internal quotation marks omitted). "In determining the *status quo* for preliminary injunctions, [a] court looks to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights." *Id.*

The pre-litigation *status quo* between Plaintiff and the School District is that Plaintiff is a new charter school that has not yet opened for the education of any students. See Complaint at ¶¶ 6 and 15; Exhibit 1, Affidavit of Bond at ¶¶ 4 and 5 and Exhibit 2, Affidavit of Hyatt at ¶¶ 4 and 5. In addition, the School District has never provided transportation school bus services to

Plaintiff and a preliminary injunction would grant Plaintiff all the relief sought at trial contrary to law. See Exhibit 1, Affidavit of Bond at ¶¶ 4 and 5 and Exhibit 2, Affidavit of Hyatt at ¶¶ 4 and 5. If Plaintiff's students have been serviced by the School District's transportation, it is because they are students of the School District, and the students will continue to be served as students of the School District¹. However, Plaintiff is a stand-alone and separate public school system in and of itself responsible to its own operations and student services in conjunction with the Public Education Commission pursuant to Section 22-8B-9(A) of the Charter School Act. See Complaint at ¶¶ 1 and 6; Exhibit 1, Affidavit of Bond at ¶¶ 1, 2, 3, 10 and 11 and Exhibit 2, Affidavit of Hyatt at ¶¶ ¶¶ 1, 2, 3, 10 and 11. Therefore, Plaintiff has not and will not suffer any injury much less an irreparable injury to qualify for extraordinary injunctive relief. As such, this factor clearly favors the School District, and the application for a preliminary injunction must be denied.

2. The threatened injury to Plaintiff does not outweigh the damage the injunction will cause the School District.

There is no need or authority for granting injunctive relief, and the issuance of a preliminary injunction would deprive the School District of its statutory control over its own operations, employees, facilities, equipment and its educational environment to provide, at the School District's expense and to the detriment of its own students, transportation services that are not required under State law to be provided to Plaintiff.

¹ The New Mexico Public School Code provides that "a free public education shall be available to any school-age person who is a resident of this state and has not received a high school diploma or its equivalent." N.M. Stat. Ann. § 22-1-4(A) (2003). It is clearly established law that public education students do not have a constitutionally protected right to a public education. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973). Such interests are "are not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975), citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The School District is simply unable to provide transportation for Plaintiff this school year or into future school years. *See* Exhibit 1, Affidavit of Bond at ¶ 6 and Exhibit 2, Affidavit of Hyatt at ¶ 6. The current resources of the School District cannot support the expansion of transportation routes to serve the School District's McKinley Academy, our other schools and Plaintiff. *Id.* In addition, the School District has increased school autonomy with start and end times for each school this school year. *See* Exhibit 1, Affidavit of Bond at ¶ 7 and Exhibit 2, Affidavit of Hyatt at ¶ 7. These varied start and end times, in and of itself make it impossible for the School District to service any new schools, including Plaintiff. *Id.* Providing transportation now does not allow the time, busses, or human resource to service the needs of a state charter within boundary of the School District. *See* Exhibit 1, Affidavit of Bond at ¶ 7 and Exhibit 2, Affidavit of Hyatt at ¶ 7.

If there is a requirement to service Plaintiff by order of the Court, the School District would not be able to service all of its own students with their transportation needs. *See* Exhibit 1, Affidavit of Bond at ¶ 8 and Exhibit 2, Affidavit of Hyatt at ¶ 8. The School District would also have to change most, if not all, the school bus schedules for 8000 students and families in the middle of a school year and inform parents that some of these students will no longer receive bus service as expected. *Id.* The School District would also have to change the start and end times of each of the School District's 34 schools. *See* Exhibit 1, Affidavit of Bond at ¶ 9 and Exhibit 2, Affidavit of Hyatt at ¶ 9. These changes would cause mass disruption and chaos within the School District and it would affect the schedule of every individual family who has students at Gallup-McKinley County Schools. *Id.*

Without an immediate need on the part of Plaintiff that would not disrupt the *status quo* any injunctive relief granted by this Court would only serve to damage the authority of the

School District to control its own facilities, equipment and environment for students and staff. In addition, injunctive relief would undermine the School District's efforts and duty to maintain a safe environment for the education of students by and through its own operations of its transportation services. As such, this factor clearly favors the School District, and the application for a preliminary injunction must be denied.

3. The issuance of a preliminary injunction will be adverse to the public's interest.

It is clearly in the public interest for the families, students and staff to have confidence in the public education of their children by the School District in ensuring that the education environment is free from unnecessary disruption and is safe for school employees and students by devoting its own resources to the transportation of its own students. The issuance by this Court of any injunctive relief will actually undermine the public interest and divert public funds and resources from the School District to provide to a charter school who is responsible for its own operations and finances under Section 22-8B-9(A) of the Charter School Act. *See* Complaint at ¶¶ 1 and 6; Exhibit 1, Affidavit of Bond at ¶¶ 1, 2, 3, 10 and 11 and Exhibit 2, Affidavit of Hyatt at ¶¶ ¶¶ 1, 2, 3, 10 and 11.. Therefore, this factor also favors the School District and requires that the Court deny Plaintiff's application for preliminary injunction and all other requests for injunctive relief.

4. There is no substantial likelihood of Petitioner prevailing on the merits.

As set forth in the School District's Motion to Dismiss, to Strike the Complaint and for Attorney's Fees and Costs incorporated herein in its entirety, Plaintiff cannot demonstrate any deprivation of any statutory right to have bus transportation services provided by the School District. With no right at stake, Plaintiff is not entitled to any relief even if it prevailed at trial.

Moreover, Plaintiff's conduct has been outrageous and bars any relief by this Court and entitles the School District to its attorney's fees and costs for having to defend this action.

Plaintiff's legal argument for relief rests entirely upon a regulation of the New Mexico Public Education Department ("PED"), and it cannot support the weight Plaintiff places on it. *See* Complaint at ¶ 8. As background, there are only two means under the Charter Schools Act by which a charter school can be chartered to operate as a public school². The school can be a locally-chartered charter school where the local school board of the school district in which the charter school operates is the "chartering authority" *See* N.M. Stat. Ann. § 22-8B-2(B) (2015). Alternatively, the charter school can have the Public Education Commission as its "chartering authority" and be a State-chartered charter school. *See* N.M. Stat. Ann. § 22-8B-2(B) and (C) (2015). As such, if the charter school is locally-chartered, the local school district provides certain support to the charter school, but if the charter school is State-chartered it will be the PED that provides the support. Here, the Plaintiff is trying to gain the support of a locally-chartered charter school while remaining a State-chartered charter school.

The statutory authority for § 6.43.4 NMAC relevant to this Motion derives from the provisions of the New Mexico Charter Schools Act, N.M. Stat. Ann. §§ 22-8B-1 to -17.1 (1999, as amended through 2015). *See* § 6.43.4.3 NMAC (Statutory Authority). The PED regulation finds its origin from the provisions of Section 22-8B-4 of the Charter Schools Act. One provision provides that "[a] **locally chartered charter school shall** negotiate with a school district to provide transportation to students eligible for transportation The school district, in conjunction with the charter school, may establish a limit for student transportation to and

² "In the [Public School Code], the Legislature defined 'public school' to include a charter school.' Section 22-1-2(L). The Legislature also made clear in Article 8B of Chapter 22 of the [Charter Schools Act] that charter schools are public schools and must comply with the same requirements applicable to public schools, except as otherwise provided." *Kreutzer v. Aldo Leopold High Sch.*, 2018-NMCA-005, ¶ 36, 409 P.3d 930, 937 (N.M. Ct. App. 2018).

from the charter school site not to extend beyond the school district boundary.” N.M. Stat. Ann. § 22-8B-4(I) (2011) (emphasis added). The determinative language of the Act, however, is “locally chartered charter school”. Here, Plaintiff (Hózhó Academy) is a State-chartered charter school. *See* Complaint at ¶ 1. As such, this provision does not apply to the Plaintiff, as a matter of law, nor would any regulation premised on this provision of the Act.

The second provision provides that “[a] charter school is a public school that **may** contract with a school district or other party for provision of financial management, food services, **transportation**, facilities, education-related services or other services. The governing body shall not contract with a for-profit entity for the management of the charter school.” N.M. Stat. Ann. § 22-8B-4(R) (2011) (emphasis added). Here, the regulation that Plaintiff relies upon is consistent with both provisions, but it does not provide Plaintiff the relief it seeks.

The regulation provides that “[a] local school district shall negotiate with a charter school to provide transportation to eligible students.” § 6.43.4.8 NMAC. The language that only “eligible students” may be provided transportation is consistent with the statute by which the only eligible students to be provided transportation by a local school district are those who are students at a locally-chartered charter school. As such, Plaintiff is not entitled to relief because it is a State-chartered charter school and its students are not eligible students.

If the regulation is interpreted as Plaintiff interprets it as expanding the provisions of the Charter Schools Act to now make State-chartered charter schools eligible for transportation from local school districts, such an interpretation would be clearly inconsistent with the provisions of Section 22-8B-4(I) of the Act. As a result, the Court must “apply the general rule that a statute prevails over an inconsistent regulation.” *State v. Bowden*, 2010-NMCA-070, ¶ 12, 148 N.M. 850, 853, 242 P.3d 417, 420 (N.M. 2010), *citing Jones v. Employment Servs. Div. of Human*

Servs. Dep't, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 99, 619 P.2d 542, 544 (N.M. 1980); *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 10, 140 N.M. 49, 55, 139 P.3d 209, 215 (N.M. Ct. App. 2006). As such, the only applicable provision of the Act governing the obligations of the School District as to school bus transportation for any charter school is Section 22-8B-4(R).

The only applicable provision of the Act (§ 22-8B-4(R)) related to transportation provides that the School District is **not required** to enter into a transportation contract with Plaintiff. The Act provides that the School District “may” contract with a charter school to provide transportation. *See* N.M. Stat. Ann. § 22-8B-4(R) (2011). Applying the accepted standards for statutory interpretation under the Uniform Statute and Rule Construction Act, N.M. Stat. Ann. §§ 12-2A-1 to -20 (1997), the term “may” when used in a statute “confers a power, authority, privilege or right” but when the term “shall” or “must” are used in a statute, they “express a duty, obligation, requirement or condition precedent.” N.M. Stat. Ann. § 12-2A-4(A) and (B) (1997); *see In re Estate of McElveny*, 2015-NMCA-080, ¶ 11, 355 P.3d 75, 79 (N.M. Ct. App. 2015), *aff'd in part, rev'd in part sub nom. Matter of Estate of McElveny*, 2017-NMSC-024, ¶ 11, 399 P.3d 919 (N.M. 2017). As such, it is within the exclusive authority and right of the Board of Education to determine if it will or will not contract for transportation with a State-chartered charter school. Any PED regulation to the contrary is ineffective, as a matter of law. Thus, the School District, in exercising its right and authority under the Charter Schools Act, has determined that it will not contract for transportation with Plaintiff. Therefore, there is no relief that can be granted to Plaintiff, as a matter of law. Therefore, there is no relief from the School District available to Plaintiff making it unlikely it will prevail at trial requiring the Court to dismiss Petitioner’s application for preliminary injunction with prejudice as to the School District.

C. GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT IS NOT A PROPER PARTY

Defendant Gallup-McKinley County School District should be dismissed as a party as it is not an entity capable of being sued. Under N.M. Stat. Ann. § 22-1-2(R) (2003), a school district is simply a geographical area and a “political subdivision of the state for the administration of public schools” Only local school boards “have the capacity to sue and be sued.” N.M. Stat. Ann. § 22-5-4(E) (2003). Therefore, Defendant Gallup-McKinley County School District should be dismissed as a named party as it is not a party or entity capable of being sued as a matter of law.

D. PLAINTIFF’S COUNSEL SHOULD BE DISQUALIFIED AS COUNSEL FOR PLAINTIFF.

In seeking to disqualify an attorney in any matter, “[s]pecific facts must be alleged and ‘counsel cannot be disqualified on the basis of speculation or conjecture. . . .’” *Quark, Inc. v. Power Up Software Corp.*, 812 F.Supp. 178, 179 (D. Colo. 1992) (quoting *FDIC v. Sierra Resources, Inc.*, 682 F.Supp. 1167, 1170 (D. Colo. 1987)). In addition, disqualification is a “drastic measure which courts should hesitate to impose except when absolutely necessary” because “disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.” *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982). Here, there is sufficient justification for such a disqualification.

As set forth in the Defendant’s Motion to Dismiss, there is no record of the governing body of Plaintiff ever retaining one of its own board members to be the school’s legal counsel. Even if the governing body for Plaintiff had taken official action under the Open Meetings Act, Plaintiff’s Counsel would have a conflict of interest that would prevent him from contracting

**ATTORNEYS FOR BOARD OF EDUCATION FOR THE
GALLUP-MCKINLEY COUNTY SCHOOLS AND
MICHAEL HYATT, AS SUPERINTENDENT OF
SCHOOLS**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2018, the foregoing pleading was electronically filed through the Court's Odyssey File and Serve, which caused the following parties or counsel of record to be served by electronic means:

Patrick T. Mason
Mason and Isaacson, P.A.
ATTORNEY FOR PLAINTIFF
Post Office Box 1772
104 East Aztec
Gallup, New Mexico 87305-1772
(505) 722 4463
p.mason@milawfirm.net

electronically filed on August 23, 2018
ANDREW M. SANCHEZ

STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT COURT

HOZHO ACADEMY CHARTER SCHOOL,

Plaintiff,

v.

No. D-1113-CV-2018-00456

GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT
and MICHAEL HYATT, in his capacity as Superintendent of
Gallup-McKinley County School District,

Defendants.

AFFDAVIT OF JEFF BOND

I, JEFF BOND, being first duly sworn upon oath, depose and state as follows:

1. My name is Jeff Bond, and I am the Transportation Director for Gallup-McKinley County Schools (GMCS) and have been in this position since August of 2013.
2. I am familiar with Plaintiff's Complaint, and I am generally familiar with the matters pertaining to this lawsuit.
3. I have been Transportation Director at all time relevant to the Complaint.
4. GMCS has never transported any students enrolled in Hozho Academy as it is a new charter school having never existed until this school year.
5. Of all the charter schools in the School District's area, the only charter school GMCS has provided transportation for was Uplift Charter. This charter closed in 2016 and that is when bussing was discontinued by the School District for all charter schools.
6. GMCS cannot provide transportation for Hozho Academy this school year, and I anticipate it will be unable to do so in the future. We do not have the capacity in busses or bus drivers due to our drastic expansion of transportation routes to serve GMCS's McKinley Academy and, as we have combined schools in the City of Gallup, we are required to provide more bus routes for these students who now live further from their school.

7. In addition, we have increased school autonomy with start and end times this school year. These varied start and end times, in and of itself make it impossible to service any new schools, including a new charter. These demands do not allow the time, busses, or human resource to service the needs of a state charter in our area.
8. If there is a requirement to service Hozho Academy by GMCS then we would not be able to service all of our students with their transportation needs as we are doing now. We would also have to change most, if not all, of our ~8000 transported students bus schedules in the middle of a school year and inform parents that some of these students will no longer receive bussing.
9. We would also have to change the start and end times of each our 34 schools in the middle of the school year. These changes would cause mass disruption and chaos in the GMCS school system schedule and it would affect the schedule of every individual family who has students in GMCS.
10. The State of New Mexico does not require that School Districts provide transportation to State Charter Schools as State Charters are their own LEA.
11. State Charter Schools can receive funding for Transportation from the State after their first year of school and they fulfill all requirements.

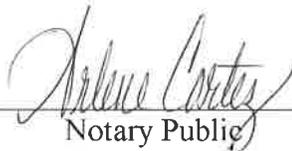

JEFF BOND

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2018 by

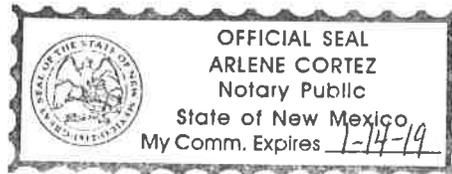


My commission expires:

1-14-19



Notary Public



**STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT COURT**

HOZHO ACADEMY CHARTER SCHOOL,

Plaintiff,

v.

No. D-1113-CV-2018-00456

GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT
and MICHAEL HYATT, in his capacity as Superintendent of
Gallup-McKinley County School District,

Defendants.

AFFDAVIT OF MIKE HYATT

I, MIKE HYATT, being first duly sworn upon oath, depose and state as follows:

1. My name is Mike Hyatt, and I am the Superintendent of Schools for Gallup-McKinley County Schools (GMCS) and have been in this position since December of 2016.
2. I am familiar with Plaintiff's Complaint, and I am generally familiar with the matters pertaining to this lawsuit.
3. I have been Superintendent at all time relevant to the Complaint.
4. As Plaintiff is a newly established charter school in Gallup, the School District has never before transported any students enrolled in Hozho Academy.
5. It has been more than two years since the School District provided transportation services to a charter school, which was a decision made by the previous membership of the Board of Education under different circumstances. The previous charter closed in 2016.
6. The School District is simply unable to provide transportation for Hozho Academy this school year or into future school years. The current resources of the School District cannot support the expansion of transportation routes to serve the School District's McKinley Academy, our other schools and Plaintiff.

7. In addition, we have increased school autonomy with start and end times this school year. These varied start and end times, in and of itself make it impossible to service any new schools, including a new charter. These demands do not allow the time, busses, or human resource to service the needs of a state charter in our area.
8. If there is a requirement to service Plaintiff by the School District would not be able to service all of our students with their transportation needs as we are doing now. We would also have to change most, if not all, of our ~8000 transported students bus schedules in the middle of a school year and inform parents that some of these students will no longer receive bussing.
9. The School District would also have to change the start and end times of each our 34 schools in the middle of the school year. These changes would cause mass disruption and chaos in the GMCS school system schedule and it would affect the schedule of every individual family who has students in GMCS.
10. The State of New Mexico does not require that School Districts provide transportation to State Charter Schools as State Charters are their own public schools eligible for their own allocation of public funds.
11. State Charter Schools can receive funding for Transportation from the State after their first year of school and they fulfill all requirements.


MIKE HYATT

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2018 by

Michael Hyatt

My commission expires:

1-14-19


Notary Public

