

**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' MEMORANDUM BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS, TO STRIKE PLAINTIFF'S COMPLAINT FOR INJUNCTIVE
RELIEF AND FOR ATTORNEY'S FEES AND COSTS**

I. INTRODUCTION

Plaintiff is challenging the action of the Board of Education for Gallup-McKinley County Schools (the "School District") in declining to enter into a contract with Plaintiff to provide transportation (school buses) services to Plaintiff, as a State-chartered charter school. *See* Complaint at ¶¶ 1 and 9. As a remedy, Plaintiff seeks an order of the Court granting a preliminary injunction to compel the School District to enter into the contract for transportation services to run buses for a charter school. *See* Complaint at ¶ 22. However, Plaintiff's claims for relief are subject to dismissal with prejudice for lack of subject matter jurisdiction and for lack of any available remedy. Defendant Hyatt is not an appropriate party for this action and should be dismissed. In addition, the pleading itself should be stricken from the Court's docket as being an insufficient pleading for the purpose of seeking injunctive relief as an extraordinary

remedy.

Moreover, Plaintiff's bad faith is clearly demonstrated by Plaintiff's action to bring this lawsuit against the School District to seek extraordinary relief from the Court knowing that the bringing of this action is contrary to law as Plaintiff's action is not legally supported and is rendered void, as a matter of law, for a violation of the Open Meetings Act by Plaintiff.

II. STANDARD OF REVIEW

Dismissal is proper under RULE 1-012(B)(1) NMRA when the court lacks subject matter jurisdiction over the complaint. Dismissal is also proper under RULE 1-012(B)(6) NMRA when the law does not support the viability of a legal claim under the facts presented in the complaint. *Stoneking v. Bank of America, N.A.*, 2002-NMCA-42, ¶ 4, 132 N.M. 79, 80-81, 43 P.3d 1089, 1090-91 (N.M. Ct. App. 2002), *citing Wallis v. Smith*, 2001-NMCA-17, ¶ 6, 130 N.M. 214, 215, 22 P.3d 682, 683 (N.M. Ct. App. 2001); *see Etuffiaga v. Valdez*, 1989-NMSC-080, ¶ 9, 109 N.M. 205, 208, 784 P.2d 24, 27 (N.M. 1989); *Three Rivers Land Co. v. Maddoux*, 1982-NMSC-111, ¶ 13, 98 N.M. 690, 692-93, 652 P.2d 240, 242-43 (N.M. 1982), *overruled on other grounds by Universal Life Church v. Coxon*, 1986-NMSC-086, 105 N.M. 57, 728 P.2d 467 (N.M. 1986). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the facts that support it. *Wallis, supra*, at ¶ 6, 130 N.M. at 215, 22 P.3d at 683.

With regard to dismissal for lack of subject matter jurisdiction, New Mexico courts have held that subject matter jurisdiction is "the power to adjudicate the general questions involved in the claim and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a valid cause of action." *Ping Lu v. Educ. Trust Bd. of New Mexico*, 2013-NMCA-010, ¶ 8, 293 P.3d 186, 188 (N.M. Ct. App. 2012), *quoting Gonzales v. Surgidev*

Corp., 1995-NMSC-036, ¶ 12, 120 N.M. 133, 138, 899 P.2d 576, 581 (N.M. 1995) (internal quotation marks omitted); and citing *Lyndoe v. D.R. Horton, Inc.*, 2012-NMCA-103, ¶ 12, 287 P.3d 357, 361 (N.M. Ct. App. 2012) (defining subject matter jurisdiction as the “power of a court to hear and determine cases”). “The only relevant inquiry in determining whether the court has subject matter jurisdiction is to ask whether the matter before the court falls within the general scope of authority conferred upon such court by the constitution or statute.” *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 254, 208 P.3d 896, 899 (N.M. 2009) (alteration, internal quotation marks, and citation omitted); see *Marchman v. NCNB Tex. Nat’l Bank*, 1995-NMSC-041, ¶ 27, 120 N.M. 74, 83, 898 P.2d 709, 718 (N.M. 1995) (a “court has subject matter jurisdiction in an action if the case is within the general class of cases that the court has been empowered, by constitution or statute, to hear and determine”); see also 2 James W. Moore, *Moore’s Federal Practice* § 12.30, at 12–35 (3d ed. 2010) (“subject matter jurisdiction [motions] challenge[] the court’s statutory or constitutional power to adjudicate the case”). Here, this Court lacks subject matter jurisdiction over Plaintiff’s claims against Superintendent Hyatt.

Pursuant to RULE 1-012(B)(6) NMRA, a Court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” The Court accepts all well-pleaded factual allegations as true and determines “whether the plaintiff might prevail under any state of facts provable under the claim.” *Sambrano v. Savage Arms, Inc.*, 2014-NMCA-113, ¶ 4, 338 P.3d 103, 104 (N.M. Ct. App. 2014) (internal quotation marks and citation omitted). “Dismissal on 12(B)(6) grounds is appropriate only if the plaintiff is not entitled to recover under any theory of the facts alleged in their complaint.” *Delfino v. Griffo*, 2011-NMSC-015, ¶ 12, 257 P.3d 917, 922 (N.M. 2011), quoting *Callahan v. N.M. Fed’n of Teachers–TVI*, 2006–NMSC–010, ¶ 4, 139 N.M. 201, 204, 131 P.3d 51, 54 (N.M. 2006). “The existence of a legal duty is a question of law

for the courts.” *Id.*, citing *Edward C. v. City of Albuquerque*, 2010–NMSC–043, ¶ 14, 148 N.M. 646, 650, 241 P.3d 1086, 1090 (N.M. 2010), *overruled on other grounds in*, *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 2014–NMSC–014, ¶¶ 19–20, 326 P.3d 465, 473 (N.M. 2014). “A motion to dismiss can be granted only if there is a total failure to allege some matter essential to the relief sought.” *Am. Fed’n of State v. State*, 2013–NMCA–106, ¶ 6, 314 P.3d 674, 676 (N.M. Ct. App. 2013), citing *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 1978–NMCA–117, ¶ 3, 92 N.M. 297, 299–300, 587 P.2d 444, 446–47 (N.M. Ct. App. 1978);

The standard is even higher for the granting of extraordinary relief. “Injunctions are harsh and drastic remedies that should issue only in extreme cases of pressing necessity and only where there is no adequate remedy at law.” *Insure New Mexico, LLC v. McGonigle*, 2000–NMCA–018 ¶ 7, 128 N.M. 611, 614, 995 P.2d 1053, 1056 (N.M. Ct. App. 2000), quoting *Hill v. Community of Damien of Molokai*, 1996–NMSC–008, ¶ 51, 121 N.M. 353, 369, 911 P.2d 861, 877 (N.M. 1996) (quoting *Padilla v. Lawrence*, 101 N.M. 556, 562, 685 P.2d 964, 970 (N.M. Ct. App. 1984)). As set forth in detail below, Plaintiff has not met this standard of review and Defendant’s Motion to Dismiss should be granted dismissing the Complaint with prejudice and denying all requests for injunctive relief.

II. ARGUMENT

A. THERE IS NO RELIEF AVAILABLE TO PLAINTIFF, AS A MATTER OF LAW.

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 school¹. 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 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

1 “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).

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, and the Defendants’ Motion to Dismiss with prejudice should be granted.

B. PLAINTIFF HAS FAILED TO ESTABLISH SUBJECT MATTER JURISDICTION OVER ANY CLAIM AGAINST DEFENDANT HYATT.

Without establishing jurisdiction over any claim against the Superintendent of Schools, the Court lacks subject matter jurisdiction to grant any form of relief, including extraordinary relief in the form of a preliminary injunction against Defendant Hyatt, and he should be dismissed as a party. Under the language of the Public School Code at Section 22-5-4(J), the

Board of Education of the School District has the exclusive authority and is ultimately responsible for the expenditure of any and all public money under a contract according to the provisions of the Procurement Code. Moreover, the Board of Education has the statutory authority under the New Mexico Public School Finance Act, N.M. Stat. Ann. §§ 22-8-1 to -47 (1967, as amended through 2017) to safeguard, control and appropriate public funds associated with the School District. *See* N.M. Stat. Ann. §§ 22-8-38 and 22-8-40 (1978). As such, a requirement to expend or receive public funds under contract allocated to the School District to provide transportation services to a charter school must be acted upon and approved by the Board of Education, not the Superintendent of Schools. Therefore, there is no provision of law to compel the Superintendent to provide transportation to Plaintiff requiring the dismissal of Defendant Hyatt as a party.

C. PLAINTIFF HAS FAILED TO ESTABLISH THE SUBJECT MATTER JURISDICTION OF THE COURT AS A RESULT OF A VIOLATION OF THE OPEN MEETINGS ACT.

A review of the publicly available agendas and minutes of the governing body for Plaintiff gleans certain observations. It is clear that the governing body of Plaintiff took no formal action to seek a transportation contract from the School District or authorize one of the members of the governing body (Plaintiff's own legal counsel) to be retained to bring litigation against the School District. The lack of any formal actions by the governing body at a duly-called open meeting of the governing body are violations of the New Mexico Open Meetings Act, N.M. Stat. Ann. §§ 10-15-1 to 10-15-4 (2013) ("OMA"). As a result, either the governing body of Plaintiff has acted outside of duly-called open meetings or its board member, who is also legal counsel, has been acting independently without the authority of the governing body. Either way the current actions of Plaintiff are contrary to law and are rendered null and void, as a matter

of law. *See* N.M. Stat. Ann. § 10-15-1(B) (2013) and N.M. Stat. Ann. § 10-15-3(A) (1997); *see also* *Swinney v. Deming Bd. of Educ.*, 1994-NMSC-039, ¶ 8, 117 N.M. 492, 494, 873 P.2d 238, 240 (N.M. 1994) (any attempt by a local board of education to take an action which is in conflict with a state statute, the action would be “*ultra vires* and void” and will not prevail).

More important, the New Mexico Court of Appeals held that the authority of a policy-making body to take action on its behalf that is delegated to one individual or a subcommittee of the governing body is contrary to and violates the provisions of the Open Meetings Act and is not legally permitted. *See New Mexico State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶ 75, 382 P.3d 923, 943 (N.M. Ct. App. 2016), *cert. denied* (N.M. July 20, 2016); N.M. Att’y Gen. Op. 90–27 (1990); and Attorney General’s Open Meetings Act *Compliance Guide*, p. 9 (8th ed. 2015). As such, one member of Plaintiff’s governing body acting as Plaintiff’s legal counsel taking official action that is within the exclusive authority of Plaintiff’s governing body to include all matters related to public funds applicable only to the Board of Education under the Public School Finance Act is illegal and void under the OMA. *See* N.M. Stat. Ann. § 10-15-1(B) (2013) and N.M. Stat. Ann. § 10-15-3(A) (1997). As such, Plaintiff has failed to establish the subject matter of the Court to bring this action and dismissal is appropriate. *See Frederick v. Federal-Mogul, Inc.*, 2008 WL 5220693, *6 (E.D.Mich. 2008) (“When a defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction.”) (citing *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002)).

D. THE COMPLAINT SHOULD BE STRICKEN AS AN INSUFFICIENT PLEADING FOR INJUNCTIVE RELIEF.

Injunctions are subject to RULE 1-066 NMRA and the application for such extraordinary relief must be more comprehensive than a complaint. While there is no New Mexico case law on

this issue, federal case law is persuasive and provides guidance on this issue. It is undisputed that RULE 1-066(A)(2) NMRA mirrors FED.R.CIV.P. 65(a)(2) and as such the reasoning the federal case of *James Luterbach Const. Co, Inc. v. Admakus*, 781.2d 599 (7th Cir. 1986) is applicable. In a footnote, the court stated that, “as a matter of professional practice, counsel who seek temporary relief usually should make a motion for a preliminary injunction separate from the prayer for relief contained in the complaint.” *Id.*, 781.2d at 603 n.1. The court went on to state that “RULE 65(a)(2) of the Federal Rules of Civil Procedure seems to require a separate motion for temporary relief when it refers to ‘an application for a preliminary injunction’.” *Id.* The court also cited to C. Wright & A. Miller, *Federal Practice and Procedure* § 2949 (1973) to support its contention that a preliminary injunction is appropriately requested by motion (The 2018 version of the practice guide remains the same). General assertions, such as those contained in a complaint’s prayer of relief and in allegations of a complaint under a notice pleading standard are insufficient to grant extraordinary injunctive relief. *See K-2 Ski Co. V. Head Ski Co.*, 467 F.2d 1087, 1088-89 (9th Cir. 1972). As such, the Complaint should be stricken under Rule 1-012(F) NMRA for being an insufficient pleading for seeking a preliminary injunction.

E. REQUEST FOR ATTORNEY’S FEES AND COSTS.

This action was filed in bad faith and for inappropriate purposes riding roughshod over the rights of the School District and requiring the expenditure of public monies without legal support to defend this action. As such, the claims against the School District for an impermissible remedy clearly demonstrates bad faith conduct for causing vexation and unnecessary costs and fees. *See Atwell v. Gabow*, 2007 WL 1395313, at *1 (D. Colo. May 9, 2007) (counsel should be prepared to address the factual and legal basis for the claims and prepared to certify the steps undertaken to investigate and research them under Rule 11 purposes); *see also State ex rel. King v. Advantageous Community Services, LLC*, 2014-NMCA-

076, ¶ 13, 329 P.3d 738, 742 (N.M. Ct. App. 2014); *State ex rel. New Mexico Highway & Transportation Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 4, 856 P.2d 1148, 1151 (N.M. 1995).

New Mexico courts “have inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. King v. Advantageous Community Services LLC*, 2014-NMCA-076, ¶ 13, 329 P.3d 738, 742 (N.M. Ct. App. 2014), quoting *State ex rel. New Mexico Highway & Transportation Dep't*, 1995-NMSC-033, ¶ 11, 120 N.M. at 4, 856 P.2d at 1151 (internal quotation marks and citations omitted). “The policy behind a district court’s inherent authority is the need to prevent abusive litigation practice and preserve the integrity of the judicial process.” *Advantageous Comm. Servs.*, 2014-NMCA-076, ¶ 13, 329 P.3d at 742, quoting *Harrison v. Board of Regents of University of New Mexico*, 2013-NMCA-105, ¶ 24, 311 P.3d 1236, 1243 (N.M. Ct. App. 2013) (internal quotation marks omitted). Accordingly, “a New Mexico court has inherent authority, independent of any statute or rule, to award attorney fees in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation.” *Advantageous Comm. Servs.*, 2014-NMCA-076, ¶ 13, 329 P.3d at 742, quoting *Baca*, 1995-NMSC-033, ¶ 12, 120 N.M. at 5, 856 P.2d at 1152. Here, the Court should award the School District its costs and fees in having to defend a clearly frivolous lawsuit filed simply to cause vexation and to achieve some form of settlement from the School District. Moreover, additional sanctions should be imposed to prevent Plaintiff and its legal counsel from engaging in this conduct in the future.

III. CONCLUSION

WHEREFORE Defendants respectfully move this Court for an order granting Defendant’s Motion to Dismiss and Strike. For the reasons set forth above, the Board of

Education and Superintendent of Schools request granting of this Motion and for any other additional relief the Court feels is appropriate.

Respectfully submitted,

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GALLUP-MCKINLEY COUNTY SCHOOLS AND
MICHAEL HYATT, AS SUPERINTENDENT OF
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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:

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