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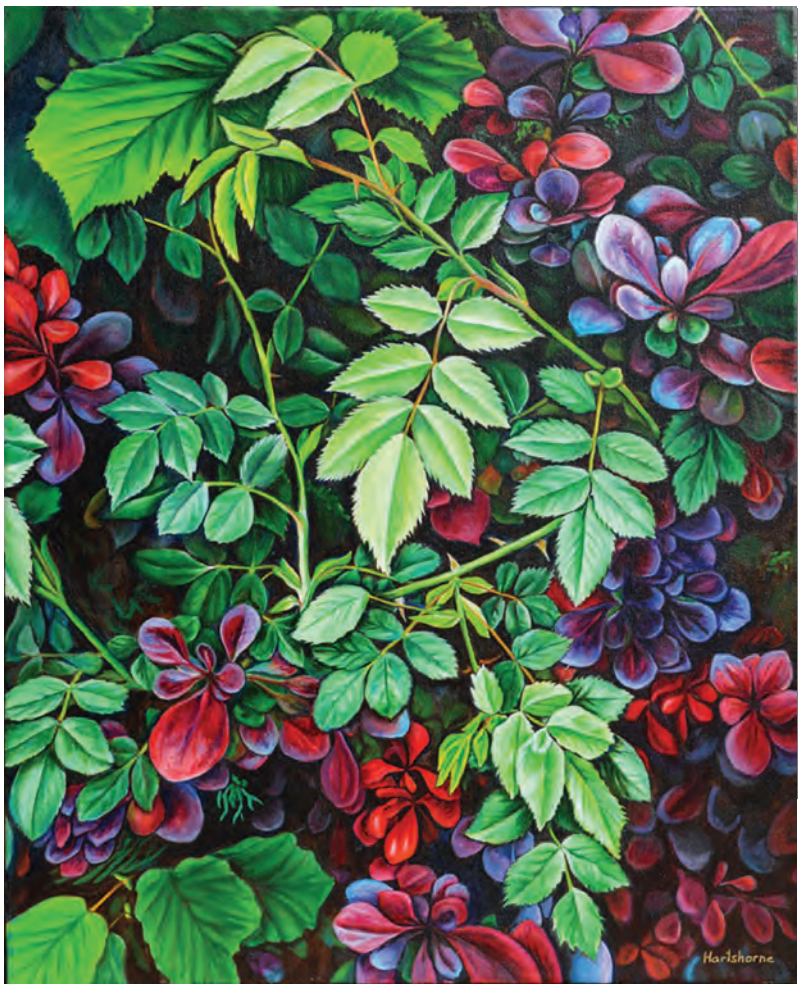

The Bloom is of the Rose, by Sarah Hartshorne

Inside This Issue

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For more details and to register, call 505-797-6094

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For more details and to register, call 505-797-6022

24
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About Cover Image and Artist: The focus of Sarah Hartshorne's work has been on capturing the unique in the ordinary, the beauty in the mundane. Like the impressionists, she paints in oil from everyday life and the world around her, sharing what often goes unnoticed and exploring the play of light and shadow.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Reference and circulation hours: Monday-Friday 8 a.m.-4:45 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Judicial Nominating Commission

COVID-19 Meeting Announcement

In light of the pandemic and in an effort to protect the health and safety of everybody involved, Dean Sergio Pareja, chair of the Judicial Nominating Commission, has decided that the upcoming judicial nominating commission meetings will occur exclusively by Zoom (videoconferencing platform). Members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing. Although there has never been a New Mexico Judicial Nominating Commission hearing via Zoom before, Dean Pareja believes that it is the best way to proceed under the circumstances. It will protect the health and safety of everybody involved and is likely to result in broader public participation than if the hearing were to be held in person. Commissioners, applicants, and members of the public will all use the same link to join the meeting. If you would like the Zoom invitation emailed to you, please contact Beverly Akin by email at akin@law.unm.edu or refer to the individual announcements or visit lawschool.unm.edu/judsel/index.html.

New Mexico Court of Appeals

Announcement of Vacancy

One vacancy on the New Mexico Court of Appeals will exist as of May 30 due to the retirement of Judge Linda M. Vanzi effective May 29. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Sergio Pareja, chair of the Appellate Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website, http:// lawschool.unm.edu/judsel/application.php, or emailed to you by emailing the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for May 21 at 5 p.m. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Appellate Court Judicial Nominating Commission will begin at 9 a.m. (MT) on June 29 by Zoom to interview applicants for the position The commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.
Join Zoom Meeting: https://unm.zoom.us/j/97810986796
Meeting ID: 978 1098 6796
Password: 707616.

First Judicial District Court

Applicant Announcement

Seven applications were received in the Judicial Selection Office, for the judicial vacancy in the First Judicial District Court due to the creation of the additional judgeships by the legislature. The names of the applicants in alphabetical order: Kathleen McGarry Ellenwood, E. Craig Hay III, Michael R. Jones, Pierre Luc Levy, Linda Martinez-Palmer, Joseph P. Walsh and Morgan Holly Wood. The First Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. (MT) on June 2 and will occur exclusively by Zoom. The commission meeting is open to the public and members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing.
Join Zoom Meeting: https://unm.zoom.us/j/98647114320
Meeting ID: 986 4711 4320
Password: 707616

Second Judicial District Court

Applicant Announcement

Thirteen applications were received in the Judicial Selection Office, for the Judicial Vacancy in the Second Judicial District Court due to the creation of two additional judgeships by the legislature. The names of the applicants in alphabetical order: Steven Diamond, Bruce C. Fox, Joseph William Gandert, Jason Robert Greenlee, Lelia Lorraine Hood, Jennifer Rose Kletter, Anthony Wade Long, Clifford M. McIntyre, Megan Kathleen Mitsunaga, Joseph Anthony Montano, Clara Marissa Moran, Michael Larry Rosenfield and Lucy Boyadjian Solimon. The Second Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. (MT) on June 1 and will occur exclusively by Zoom. The commission meeting is open to the public and members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing.
Join Zoom Meeting: https://unm.zoom.us/j/98068227250
Meeting ID: 980 6822 7250
Password: 707616

Third Judicial District Court

Applicant Announcement

Nine applications were received in the Judicial Selection Office, for the Judicial Vacancy in the Third Judicial District Court due to the creation of an additional Judgeship by the Legislature. The names of the applicants in alphabetical order: Heather Chavez, Mark D'Antonio, Casey Fitch, Richard Jacquez, Isabel Jerabek, Robert Lara Jr., Jeanne H. Quintero, G. Alexander Rossario and Stephanie Marie Zorie. The Third Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. (MT) on June 10 and will occur exclusively by Zoom. The Commission meeting is open to the public and will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing.

Professionalism Tip

With respect to the courts and other tribunals:

I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit.

Join Zoom Meeting: https://unm.zoom.us/j/99992961248
Meeting ID: 999 9296 1248
Password: 707616

Twelfth Judicial District Court

Applicant Announcement

One application was received in the Judicial Selection Office, for the Judicial Vacancy in the Twelfth Judicial District Court due to the creation of an additional Judgeship by the Legislature. The name of the applicant: Ellen Rattigan Jessen. The Twelfth Judicial District Court's Nominating Commission is scheduled to begin at 9 a.m. (MT) on June 11 and will occur exclusively by Zoom.

Application Extension

A vacancy on the Twelfth Judicial District Court will exist in Alamogordo, New Mexico as of May 20 due to the creation of an additional judgeship by the legislature. Inquiries regarding additional details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. Due to the fact that we only received one application to fill this vacancy, the deadline to apply has been extended to 5 p.m. May 28. Please consider applying. The Judicial Nominating Committee will meet beginning at 9 a.m. on June 11 will occur exclusively by Zoom. The Commission meeting is open to the public and members of the public will be able to ask questions and make comments through Zoom during the "public participation" portion of the hearing.
Join Zoom Meeting: https://unm.zoom.us/j/95498591747
Meeting ID: 954 9859 1747
Password: 707616

Bernalillo County Metropolitan Court

New Landlord-Tenant Settlement Program

A mediation program specifically for people involved in landlord-tenant disputes was launched earlier this month. The Landlord-Tenant Settlement Program will give landlords and tenants the opportunity to work out business agreements beneficial to both sides. To be eligible, participants must have an active landlord-tenant case in the Metropolitan Court. The service is free, and parties in a case will work with a volunteer settlement facilitator specially trained in housing matters. Many of the facilitators are retired judges and experienced attorneys who will provide services pro bono. Those interested in participating in the Landlord-Tenant Settlement Program or serving as a volunteer settlement facilitator are asked to contact the court's Mediation Division at: 505-841-8167.

State Bar News

COVID-19 Pandemic Updates

The State Bar of New Mexico is committed to helping New Mexico lawyers respond optimally to the developing COVID-19 coronavirus situation. Visit www.nmbar.org/covid-19 for a compilation of resources from national and local health agencies, canceled events and frequently asked questions. This page will be updated regularly during this rapidly evolving situation. Please check back often for the latest information from the State Bar of New Mexico. If you have additional questions or suggestions about the State Bar's response to the coronavirus situation, please email Executive Director Richard Spinello at rspinello@nmbar.org.

Board of Editors

Seeking Applications for Open Positions

The Board of Editors of the State Bar of New Mexico has open positions. Both lawyer and non-lawyer positions are open. The Board of Editors meets at least four times a year (in person and by teleconference), reviewing articles submitted to the Bar Bulletin and the quarterly New Mexico Lawyer. This volunteer board reviews submissions for suitability, edits for legal content and works with authors as needed to develop topics or address other concerns. The Board's primary responsibility is for the New Mexico Lawyer, which is generally written by members of a State Bar committee, section or division about a specific area of the law. The State Bar president, with the approval of the Board of Bar Commissioners, appoints members of the Board of Editors, often on the recommendation of the current Board. Those interested in being considered for a two-year term should send a letter of interest and résumé to Evann Laird at elaird@nmbar.org. Apply by June 30.

Board of Bar Commissioners

Client Protection Fund Commission

The Client Protection Fund Commission is a statewide body whose purpose is to promote public confidence in the administration of justice and the integrity of the legal profession by investigating complaints and reimbursing losses caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of New Mexico. The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission for the remainder of an unexpired term through Dec. 31, 2021. Active status attorneys in New Mexico who would like to serve on the Commission should send a letter of interest and brief resume by June 10 to Kris Becker at kbecker@nmbar.org or fax to 505-828-3765.

New Mexico Judges and Lawyers Assistance Program

We're now on Facebook! Search "New Mexico Judges and Lawyers Assistance Program" to see the latest research, stories, events and trainings on legal well-being!

Recovery Possibilities - Canceled Until Further Notice

This support group explores non-traditional recovery approaches and has a focus on meditation and other creative tools in support of the recovery process from addiction of any kind. For more information, contact Victoria at 505-620-7056.

People with Wisdom - Canceled Until Further Notice

The purpose of this group is to address the negative impact anxiety and depression can have in people's lives and to develop the skills on how to regulate these symptoms through learning and developing several different strategies and techniques that can be applied to their life. Contact Tenessa Eakins at 505-797-6093 or teakins@nmbar.org for more information.

Monday Night Support Group

- June 1
- June 8
- June 15

As of March 30, this group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam at pmoore@nmbar.org or Briggs Cheney at BCheney@DSC-LAW.com and you will receive an email back with the Zoom link.

Employee Assistance Program

Managing Stress Tool for Members

A negative working environment may lead to physical and mental health problems, harmful use of substances or alcohol, absenteeism and lost productivity. Workplaces that promote mental health and support people with mental disorders are more likely to reduce absenteeism, increase productivity and benefit from associated economic gains. Whether in a professional or personal setting, most of us will experience the effects of mental health conditions either directly or indirectly at some point in our lives. The NM Judges and Lawyers Assistance Program is available to assist in addition to our contracted Employee Assistance Program (EAP). No matter what you, a colleague, or family member is going through, The Solutions Group, the State Bar's FREE EAP, can help. Call 866-254-3555 to receive FOUR FREE counseling sessions per issue, per year! Every call is completely confidential and free For more information, https://www.nmbar.org/jlap or https://www.solutionsbiz.com/Pages/default.aspx.

UNM School of Law

Law Library Hours Spring 2020

Through May 16

Building and Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	Closed.
Reference	
Monday–Friday	9 a.m.–6 p.m.

Other Bars

Christian Legal Aid

Fellowship Luncheons and Breakfasts

Christian Legal Aid invites members of the legal community to fellowship luncheons/breakfasts which are an opportunity for current attorney volunteers, and those interested in volunteering, to meet to learn about recent issues NMCLA attorneys have experienced in providing legal counseling services to the poor and homeless through the NMCLA weekly interview sessions. They are also opportunities to share ideas on how NMCLA volunteer attorneys may become more effective in providing legal services to the poor and homeless. Upcoming dates are: June 4 at noon at Japanese Kitchen; and Aug. 12 at 7 a.m. at Stripes at Wyoming and Academy. For more information, visit nmchristianlegalaid.org or email christianlegalaid@hotmail.com

Albuquerque Bar Association's

2020 Membership Luncheons

- June 9: Damon Ely, Bill Slease, and Jerry Dixon presenting on malpractice an insurance issues (1.0 EP)
- July 7: Judge Shannon Bacon (1.0 G)
- Sept. 15: Douglas Brown presenting on a small/family business update (1.0 G)

Please join us for the Albuquerque Bar Association's 2020 membership luncheons. Lunches will be held at the Embassy Suites, 1000 Woodward Place NE, Albuquerque from 11:30 a.m.-1 p.m. The costs for the lunches are $30 for members and $40 for non-members. There will be a $5 walk-up fee if registration is not received by 5 p.m. on the Friday prior to the Tuesday lunch. To register, please contact the Albuquerque Bar Association's interim executive director, Deborah Chavez at dchavez@vancechavez.com or 505-842-6626. Checks may be mailed to PO Box 40, Albuquerque, NM 87103.

Other News

Texas Tech University School of Law

New Degree – Master of Science in Energy

Texas Tech University is launching a new degree this fall. The Master of Science in Interdisciplinary Studies (MSIS) in Energy, with courses offered by instructors from the Petroleum Engineering Department, the National Wind Institute, the Energy Commerce Department in the Rawls College of Business, and the School of Law. It is designed primarily for working professionals but is open to all. The courses will be offered online, with only one or two in-person weekend visits to the Texas Tech campus during each semester. The degree can be earned in one year. Each semester unit (consisting of three courses) will cost $14,000 for a total degree cost of $42,000. The first cohort begins this Fall, and applications are being accepted now. A brochure for the degree program is attached for your review and information. You can also find out more information by visiting the website at www.depts.ttu.edu/gradschool/Programs/energy/.

Staying Healthy and Calm During Stressful Times

Learning how to remain calm in times of stress will not only have immediate soothing effects; it can also, over time, help you lead a healthier, happier life.

FOCUS ON WHAT IS IN YOUR CONTROL. Follow **everyday preventive actions** to keep you and your family healthy. Keep informed, but avoid excessive exposure to mass media and social media.

MAINTAIN CONSISTENCY AMIDST CHANGE. If you are working an adjusted schedule or teleworking, continue to maintain a regular sleep cycle. Adapt your exercise routine at home if you're not attending your regular fitness class or going to the gym.

REMAIN IN THE PRESENT. If you find yourself worrying about something that hasn't happened – and may never happen – tune into the sights, sounds, tastes and other sensory experiences in your immediate moment. Log into **MyStressTools**, your free online resilience-building resource, which includes Relaxation Music, Guided Meditations and mindfulness tools.

STAY CONNECTED. Talk to family and trusted friends about what you are feeling. While heeding social distancing warnings, be careful not to completely isolate.

GET SUPPORT. If you or any family member is feeling particularly anxious or could benefit from an objective ear, reach out to your EAP for added professional assistance.

Call anytime 24/7 at 866-254-3555 to schedule an appointment or video visit.

If you've been seeing an EAP counselor and are restricting your travel and social interactions, consider transitioning to video or telephonic sessions.

Call your affiliate provider directly or call 866-254-3555.

For more information, visit *www.solutionsbiz.com*

The Solutions Group

Legal Education

May

27 **The Paperless Law Firm – A Digital Dream**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

27 **How to Practice Series: Probate and Non-Probate Transfers**
4.0 G, 2.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **Animal Cruelty Issues: What Juvenile and Family Court Judges and Practitioners Need to Know (2019)**
2.0 G
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **Grandparents Raising Grandchildren: Critical Legal and Social Issues (2019)**
1.5 G
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

28 **JLAP Town Hall: Are You Scared S**tless? Let's Talk! (2019)**
1.5 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Surviving White Collar Cases: Prosecution and Defense Perspectives (2019)**
5.5 G, 1.5 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

29 **Valuation of Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Inadequate Medical Care, Rape and Solitary Confinement: How to Obtain Accountability for Civil Rights Violations During a Pandemic**
6.5 G
Live Webinar
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

June

3 **Bridge the Gap Mentorship Program CLE (Civil Attorneys, DAs/PDs)**
5.0 G, 1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

5 **Bridge the Gap Mentorship Program CLE (Government Attorneys)**
5.0 G, 1.0 EP
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

8 **Special Issues in Small Trusts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Text Messages & Litigation: Discovery and Evidentiary Issues**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **2020 Health Law Legislative Update**
2.6 G
Live Replay Webcast
Center for Legal Education of NMSBF
www.nmbar.org

19 **Realizing the Promise of Individualized Sentencing In Federal and State Courts**
5.5 G, 1.0 EP
Live Webinar
New Mexico Criminal Defense Lawyers Association
www.nmcdla.org

23 **The Ethics of Bad Facts and Bad Law**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Notice of Possible Event Cancellations or Changes:
Due to the rapidly changing coronavirus situation, some events listed in this issue of the Bar Bulletin may have changed or been cancelled after the issue went to press. Please contact event providers or visit www.nmbar.org/eventchanges for updates.

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location/course type, course provider and registration instructions.

July

8 **Selection and Preparation of Expert Witnesses in Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Drafting Employment Agreements, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

10 **Drafting Employment Agreements, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **2020 Family and Medical Leave Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

30 **Charitable Giving Planning in Trusts and Estates, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

31 **Charitable Giving Planning in Trusts and Estates, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

August

7 **"Boilplate" Provisions in Contracts: Overlooked Traps in Every Agreement**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13 **Lawyers Ethics in Real Estate Practice**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Reps and Warranties in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **2020 Trust Litigation Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective May 1, 2020

UNPUBLISHED OPINIONS

A-1-CA-37009	State v. V Dimas	Affirm	04/27/2020
A-1-CA-37441	State v. T Herrera	Affirm	04/27/2020
A-1-CA-35071	State v. C Lukasik	Affirm	04/29/2020
A-1-CA-37615	State v. J Manning	Affirm	04/29/2020
A-1-CA-37999	State v. M Martinez	Affirm	04/30/2020

Effective May 8, 2020

PUBLISHED OPINIONS

A-1-CA-37544	State v. N George	Reverse	05/04/2020
A-1-CA-36942	State v. F Little	Affirm/Reverse/Remand	05/06/2020

UNPUBLISHED OPINIONS

A-1-CA-36350	J V v. Winston Brooks	Affirm	05/04/2020
A-1-CA-37865	B Andrade Pizano v. E Velarde	Affirm	05/04/2020
A-1-CA-37918	Conversatorship of the Estate of A Contreras v. B Contreras	Affirm	05/04/2020
A-1-CA-37924	City of Roswell v. F Lucero	Affirm	05/04/2020
A-1-CA-38112	State v. R Perrin	Affirm	05/04/2020
A-1-CA-38133	V Innis v. C Smoley	Affirm	05/06/2020

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-066
No. A-1-CA-36283 (filed May 16, 2019)

AMY J. LAW,
Appellant-Petitioner,
v.
NEW MEXICO HUMAN SERVICES DEPARTMENT,
Appellee-Respondent.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
SARAH M. SINGLETON, District Judge

Certiorari Denied, August 1, 2019, No. S-1-SC-37786.
Released for Publication November 12, 2019.

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Opinion

M. Monica Zamora, Chief Judge.

{1} This appeal raises the issue of whether the New Mexico Human Services Department (HSD) has jurisdiction to adjudicate discrimination claims pursuant to Title II of the Americans with Disabilities Act of 1990 (ADA Title II), 42 U.S.C. § 12132 (2012), and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794(a) (2012), in an administrative services proceeding. The Director of the Medical Assistance Division (MAD) of HSD dismissed Amy J. Law's (Petitioner) demand for a fair hearing regarding her request for what she characterizes as a "reasonable accommodation" in Medicaid transportation services, because Petitioner's case was not an "adverse action" within the meaning of HSD, 8.352.2.10 NMAC (defining adverse action), and the Human Rights Bureau of the New Mexico Department of Workforce Solutions would be a "more appropriate venue" for the case. The district court affirmed MAD's decision to dismiss. Petitioner appeals the district court's dismissal order, asserting that it was contrary to law, given MAD's obligation to prevent discrimination on the basis of disability. This Court granted certiorari to review the district court's order, pursuant to Rule 12-505 NMRA.

{2} We affirm the district court's order, concluding that MAD does not have the authority to decide and adjudicate violations of ADA Title II or Section 504. In light of our conclusion, we need not address Petitioner's additional arguments that (1) she was not required to exhaust administrative remedies with the Managed Care Organization (MCO) prior to requesting a fair hearing on her claim, and (2) MAD violated her due process rights under the Fourteenth Amendment to the United States Constitution. *See Hillman v. Health & Soc. Servs. Dep't*, 1979-NMCA-007, ¶ 4, 92 N.M. 480, 590 P.2d 179 (declining to reach a due process argument raised in a medical services appeal based on "the principle that a court will not decide constitutional questions unless necessary to a disposition of the case").

BACKGROUND[1]

{3} Petitioner is a member of UnitedHealthcare, an MCO that contracts with HSD to administer the provision of Medicaid benefits and services to eligible members. One of the Medicaid-eligible services Petitioner uses is non-emergency medical transportation. UnitedHealthcare, as the MCO, contracts with LogistiCare to provide those transportation services, and LogistiCare makes the transportation arrangements with various providers. As relevant to this appeal, although Petitioner and her counsel made several written requests for "reasonable accommodation," only two of those documents were made part of the record on appeal, Petitioner's January 2016 letter request and her counsel's June 2016 letter request, both sent to the MCO. In her January 12, 2016 handwritten letter, Petitioner made the following request of the MCO:

> One company of your choosing, dependable and timely, with decent vehicles, to provide service for all my arranged medically necessary rides; [t]he driver shall be female; [t]he same driver for all legs of trips within a day; to have an assigned driver (or a select few drivers for rotation) to provide my transportation requirement.

In February 2016 Petitioner sent a follow-up letter to LogistiCare. The MCO's e-mail response to Petitioner stated that the MCO and LogistiCare were "unable to meet [her] request for reasonable accommodations" and asked the MCO representative to provide Petitioner with "the reimbursement mileage form, as member refuses to call LogistiCare for standard accommodations." The MCO also sent letters to Petitioner in March and April 2016 in response to two grievances she filed,[2] advising her that "LogistiCare cannot guarantee a female driver at all times," and noting that "[i]f you will

[1]The Court's policies and procedures require that the factual and procedural background are verified in the case record prior to signing and filing of an opinion.

[2]Petitioner's March 10, 2016 and March 24, 2016, grievances are referenced in the MCO's letters to Petitioner, but are not included in the record on appeal.

allow LogistiCare to use providers other than Safe and [Care] they would have a greater opportunity to accommodate your request." In late April 2016 LogistiCare sent another letter to Petitioner, in response to her April 13, 2016 request,[3] that the MCO provide her with transportation services in which other passengers are not male. LogistiCare's response, citing to 49 C.F.R. Subtitle A, Part 38 (1991, as amended through 2014), stated that there was "no reference to reasonable accommodation standards in the ADA [Title II] related to the assignment of one transportation provider to a person, the gender of an assigned driver, other riders in the vehicle, or a requirement that the same driver be assigned to a person for all trips in one day." LogistiCare's response also explained that because "company policy prevents discrimination against any individual on the basis of . . . gender . . . LogistiCare will not be able to screen transportation providers or drivers on the basis of your stated preferences[,]" and "cannot guarantee the gender of any members with whom you may share a ride." The letter further advised Petitioner that she could "choose to take advantage of LogistiCare's gas reimbursement program [whereby a] family member or friend may receive gas reimbursement for transporting you to your health care appointments if that is a more convenient way to arrange your transportation."

{4} On June 16, 2016,[4] Petitioner's counsel sent a written "reasonable accommodation request" for similar transportation-related accommodations to the MCO, "pursuant to (1) Section 504 of the Rehabilitation Act of 1973 and its regulations, 29 U.S.C. §§ 701[-796 (2018); 45 C.F.R. §§ 84.4 . . ., and (2) Title II of the [ADA] and its regulations, 42 U.S.C. § 12132; 28 C.F.R. § 35.130 [(2016)]." A courtesy copy of the request was provided to HSD. Counsel requested that Petitioner "receive her transportation services exclusively from female drivers, and that she be the sole occupant of the vehicle (or at the least without male occupants)." Further, counsel's request stated that Petitioner's "disabilities are such that failure to receive that accommodation has caused and continues to cause her to miss important, medically necessary health care services." On August 18, 2016, the MCO responded to Petitioner's counsel: "The requested reasonable accommodation is denied at this time, based upon the member's failure to provide any information that would enable [the MCO] to evaluate the request to determine whether or not under the circumstances it is a reasonable request." It does not appear from the record that HSD responded separately to counsel's letter, although HSD's compliance officer was listed as a recipient of a courtesy copy of the letter.

Administrative Proceedings

{5}On August 30, 2016, Petitioner requested a fair hearing "to appeal the failure of [the MCO] and [HSD] to grant her a reasonable accommodation in Medicaid transportation services."[5] The MCO moved to dismiss the request for fair hearing and argued, without conceding that the matter was an "adverse action" for which Petitioner may request a fair hearing, that Petitioner failed to exhaust the MCO appeal process, which is a prerequisite for requesting a fair hearing. *See* 8.352.2.11(B) NMAC (MCO's grievance procedures). Petitioner argued in response, citing no legal authority, that "government programs—especially those receiving federal funds—for persons with disabilities are established by federal law; and are binding on both HSD and [its MCO]"; "the requirement that MCO members exhaust their internal appeals procedures as a prerequisite to seeking a Fair Hearing clearly applies only to the medical necessity of services per se;" and "a Request for a Reasonable Accommodation is a legal matter[,] which the MCO's internal appeals procedures are ill-suited to review."

{6}The Administrative Law Judge (ALJ) recommended dismissing the matter on the ground that the denial of Petitioner's "request for reasonable accommodations in obtaining non-emergency medical transportation . . . clearly does not meet the definition of an adverse action for which an administrative hearing through the Fair Hearings Bureau is available." The ALJ relied on 8.352.2.10 NMAC (defining "adverse action" to include denial or reduction of service, or failure to approve a service in a timely manner) and 8.352.2.11 NMAC (discussing the "right to an HSD administrative hearing" when MAD has taken an "adverse action") in concluding that Petitioner's claim "falls outside the authority of the Fair Hearings Bureau." MAD's Director agreed with the ALJ's conclusion and recommendation and dismissed the matter without conducting a hearing. The Director based her decision on "the fact that the case does not meet the definition of an adverse action and that a more appropriate venue would be the New Mexico Human Rights Bureau."

District Court Proceedings

{7}Pursuant to Rule 1-074 NMRA, Petitioner filed an appeal with the district court. She argued that under 42 C.F.R. § 431.53(a) (2009), which requires MCO's to "ensure necessary transportation for beneficiaries to and from providers[,]" her request for a fair hearing must be granted. She further argued that denial of the requested accommodation fits within two categories of "adverse action": (1) "[t]he denial or reduction by [a beneficiary's MCO (*and* MAD)] of an authorized service," and (2) "the failure of MAD . . . or the MCO to approve a service . . . in a timely manner." 8.352.2.10(A), (D) NMAC. Moreover, Petitioner argued that denial of her requested accommodation amounted to discrimination on the basis of disability in violation of Section 504, ADA Title II, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. HSD argued in response that Petitioner "did not supply any basis or justification for her request[,]" and the matter did not qualify as an adverse action because there was no reduction or denial of transportation services. *See* 8.352.2.10 NMAC. Additionally, HSD argued that "[c]laims of discrimination in public accommodations based on physical or mental disability are the exclusive province of the New Mexico Human Rights Commission under the New Mexico Human Rights Act, [NMSA 1978, §§ 28-1-1 to -15 (1969, as amended through 2007)]." Finally, the HSD argued that MAD lacked jurisdiction over Petitioner's claim because Petitioner failed to follow the grievance process for the MCO, which comports with due process requirements.

{8}The district court affirmed MAD's decision, citing as supportive authority *Martinez v. New Mexico State Engineer Office*, 2000-NMCA-074, ¶ 27, 129 N.M. 413, 9 P.3d 657, and stating:

> In the same manner [as the plaintiff in *Martinez*], while [Petitioner] sought a fair hearing for denial of

[3]Petitioner's April 13, 2016, letter to the MCO is referenced in LogistiCare's letter to Petitioner, but is not included in the record on appeal.

[4]The May 23, 2016, letter from Petitioner to the MCO, which is referenced in counsel's June 16, 2016, letter to the MCO, was not made part of the record on appeal.

[5]Petitioner states the reason for the administrative appeal somewhat differently in her briefing in this Court: "to contest [the] MCO's *denial* of her request for a reasonable accommodation in access[ing] Medicaid services, and the [HSD's] *failure to* [*respond* to] her complaints about her need for the [requested] reasonable accommodation." (Emphases added.) Because neither party argues that a different standard should apply to each alleged action or respective party, we analyze both actions in the same manner for purposes of this appeal.

> services, clearly within the authority of HSD's administrative hearing process, she made the claim under Section 504 and ADA [Title II]. [Petitioner] has not shown any explicit language in HSD's governing statutes or rules that give it authority to decide and adjudicate violations of the ADA [Title II] or Section 504. Therefore, HSD properly dismissed the case.

The district court did not address Petitioner's due process claim or MAD's conclusion that the New Mexico Human Rights Bureau was the proper venue for Petitioner's claim of disability discrimination.

{9} Petitioner filed a motion for rehearing—arguing, in relevant part, that *Martinez* was misapplied because that case involved ADA Title I (employment), rather than ADA Title II (programs of public entities), and did not address Section 504 or other statutes "impl[ying]" authority of state agencies to adjudicate discrimination claims—which the district court denied. Petitioner filed a petition for writ of certiorari with this Court, which we granted.

DISCUSSION

{10} Our review of an administrative decision appealed to the district court is by writ of certiorari. *Georgia O'Keeffe Museum v. Cty. of Santa Fe*, 2003-NMCA-003, ¶ 25, 133 N.M. 297, 62 P.3d 754; *see* Rule 12-505(A)(1) NMRA (stating that the Court of Appeals reviews district court decisions that address administrative proceedings pursuant to Rule 1-074 or NMSA 1978, Section 39-3-1.1 (1999)); *see* Rule 12-505(B) ("A party . . . may seek review of the [district court's] order by filing a petition for writ of certiorari with the Court of Appeals[.]"). We review the decision of the district court acting in its appellate capacity. *See* § 39-3-1.1(E) ("A party to the appeal to district court may seek review of the *district court decision*." (emphasis added)).

{11} "This Court applies the same statutorily defined standard of review as the district court." *Miller v. Bd. of Cty. Comm'rs*, 2008-NMCA-124, ¶ 16, 144 N.M. 841, 192 P.3d 1218 (alteration, internal quotation marks, and citation omitted). "The district court may reverse an administrative decision only if it determines that the administrative entity acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by substantial evidence in the whole record; or if the entity did not act in accordance with the law." *Id.* (alteration, omission, internal quotation marks, and citation omitted). "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M 97, 61 P.3d 806. We, however, will not defer to the agency's or the district court's conclusions of law, which are reviewed de novo. *Id.*

{12} When presented with a question of statutory construction, our Supreme Court observes the following general principles: (1) "the plain language of a statute is the primary indicator of legislative intent" and it gives "the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent[;]" (2) the Court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written[;]" (3) the Court will "give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them[;]" and (4) when "several sections of a statute are involved, they must be read together so that all parts are given effect." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citations omitted).

I. Non-Discrimination Principles of ADA Title II and Section 504 Apply to MAD and Its Provision of Necessary Transportation for Beneficiaries

{13} The Medicaid program, established by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 to 1396w-5 (2012), is a joint federal-state program created to provide "medical assistance" to needy families and individuals. 8.200.400.9 NMAC. States that have elected to participate in the Medicaid program, including New Mexico, must comply with federal statutes and regulations. *See* 42 U.S.C. § 1396a(a)(1), (10)(A); NMSA 1978, § 27-2-12(A) (2006). HSD is "charged with the administration of all the welfare activities of the state[.]" NMSA 1978, § 27-1-3 (2007). MAD, a division within HSD, is the state agency responsible for administering the medical assistance programs. *See* § 27-2-12; 8.200.400.9 NMAC.

{14} As relevant here, the federal Medicaid statute defines "medical assistance" to include non-emergency medical transportation. 42 U.S.C. § 1396a(70); *see* 42 C.F.R. § 431.53(a) (2009) (requiring state plan to "[s]pecify that the Medicaid agency will ensure necessary transportation for beneficiaries to and from providers"). Consistent with federal regulations, New Mexico's Medicaid program covers expenses for transportation services that the MAD "determines are necessary to secure covered medical . . . examinations and treatment for . . . [an] eligible recipient." 8.324.7.9 NMAC (citing 42 C.F.R. § 440.170 (2016) (defining transportation services)).

{15} Petitioner argues that federal law generally prohibits a state agency from discriminating against an individual on the basis of disability, and that this prohibition applies in the context of fulfilling the obligation to provide non-emergency medical transportation.[6] The law clearly supports Petitioner's argument. *See State, ex rel. Children, Youth & Families Dep't v. John D.*, 1997-NMCA-019, ¶ 15, 123 N.M. 114, 934 P.2d 308 ("The legislative history of the ADA [Title] indicates the purpose of the ADA's Title II was to extend the non-discrimination policy contained in the Rehabilitation Act (which applied only to entities receiving federal funding) to *all* actions of state and local governments."). She further argues that discrimination prohibited by ADA Title II and Section 504 extends to a denial of the ability to benefit from the program in a manner that is not as effective as, or more limited than, that enjoyed by others utilizing the program. *See* 45 C.F.R. § 84.4(b)(i)-(iii), (vii) (2005) (Section 504); 28 C.F.R. § 35.130(b)(1)(ii)-(iii) (ADA Title II).

{16} Specifically, ADA Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see* 28 C.F.R. § 35.130(b)(7)(i) (requiring public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability"). In this same vein, Section 504 states: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. § 794(a); *see* 29 C.F.R. § 32.4 (2003); 45 C.F.R. § 84.4 (2005); 34 C.F.R. § 104.51 (2000). Because neither party argues that the non-discrimination principles of ADA Title II and Section 504 require distinct analysis in this case, we will address them together. *See Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 726 (10th Cir. 2011) ("Because the language of ADA Title II and the Rehabilitation Act

[6]We need not and do not reach the question of whether the MCO or LogistiCare are state actors for purposes of being bound by the statutes and regulations applied to HSD because "a fair hearing is guaranteed by an extensive regulatory and statutory framework which does not incorporate a state action requirement." *Hyden v. Human Servs. Dep't*, 2000-NMCA-107, ¶ 15, 130 N.M. 19, 16 P.3d. 444.

is substantially the same, we apply the same analysis to both." (alteration, internal quotation marks, and citation omitted)). We now turn to the question of whether MAD has the authority to adjudicate claims asserted pursuant to ADA Title II and Section 504 in its administrative fair hearings.

II. Our Legislature Did Not Grant MAD the Authority to Adjudicate Claims Brought Pursuant to ADA Title II and Section 504

{17} Petitioner contends that MAD discriminated against her based on her disability when she was refused benefits by the MCO for non-emergency transportation to and from medical providers because the MCO failed or refused to accommodate her specific requests. *See* 42 C.F.R. § 431.53(a). HSD argues that MAD is authorized to determine whether a reduction or denial of services or failure to approve a service in a timely manner, constituting an adverse action, was improperly or unreasonably taken against Petitioner, but does not have the authority to adjudicate whether an action was taken in violation of ADA Title II or Section 504.

{18} Federal Medicaid law provides that, where a "claim for medical assistance under the plan is denied or not acted upon with reasonable promptness," a state is required to "provide for granting an opportunity for a fair hearing before the [HSD]." 42 U.S.C. § 1396a(a)(3); *see* 42 C.F.R. § 431.220(a)(1) (2016) ("The State agency must grant an opportunity for a hearing to . . . [a]ny individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility or for covered benefits or services, or issued a determination of an individual's liability, or has not acted upon the claim with reasonable promptness[.]"); 42 C.F.R. § 431.201 (2016) ("For purposes of this subpart: 'Action' means a termination, suspension of, or reduction in covered benefits or services, or a termination, suspension of, or reduction in Medicaid eligibility or an increase in beneficiary liability[.]").

{19} New Mexico law implementing the Medicaid program provides that a "recipient of assistance or services under any provision of the Public Assistance Act . . . may request a hearing in accordance with regulations of the board if: (1) an application is not acted upon within a reasonable time after the filing of the application; (2) an application is denied in whole or in part; or (3) the assistance or services are modified, terminated or not provided." NMSA 1978, § 27-3-3 (1991); *see* 8.352.2.10 NMAC (defining "adverse action" as including the two theories a petitioner relies on, i.e., denial or reduction of service, and failure to approve a service in a timely manner); 8.352.2.11 NMAC (providing that MAD must grant an administrative hearing, pursuant to 42 C.F.R. § 431.220(a) and Section 27-3-3 when MAD has taken, or intends to take, an adverse action against a claimant as defined in 8.352.2.10 NMAC).

{20} HSD argues that in order for MAD to have authority to adjudicate Petitioner's claims, they must fall within one of the types of matters listed in 8.352.2.10 NMAC, Section 27-3-3, or 42 C.F.R. § 431.220(a), which they do not. We agree with HSD. Petitioner's argument rests on the assumption, for which Petitioner cites no law, that HSD's obligation to comply with the requirements of Section 504 and ADA Title II equates with an obligation to "enforce" those requirements by adjudicating claimed violations of those requirements in an HSD fair hearing. "Compliance" and "enforcement" are distinct concepts. *Compare Webster's New Int'l Dictionary* (unabridged) 465 (3d ed. 2002) (defining "compliance" as "conformity in fulfilling formal or official requirements" or "cooperation promoted by official or legal authority or conforming to official or legal norms"), *with Black's Law Dictionary* 645 (10th ed. 2014) (defining "enforcement" as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement"). And a statutory obligation to *comply* with federal anti-discrimination law does not itself constitute authority to *enforce* that law through adjudication of claims arising under that law.

{21} Looking to the plain language of 8.352.2.10 NMAC (defining adverse action), decisions regarding the manner or circumstances of a Medicaid beneficiary's non-emergency medical transportation do not in and of them themselves amount to a reduction, termination, or refusal to provide medically necessary services, as they are properly within the State's authority. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985) ("The federal Medicaid Act . . . gives the [s]tates substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.' " (quoting 42 U.S.C. § 1396a(a)(19)). The MCO was prepared to provide transportation to Petitioner or, alternatively, was willing to reimburse transportation expenses incurred by family members or friends. But Petitioner refused, insisting on the provision of a female driver, the same driver for all legs of a given trip, and the absence of any male passengers in the vehicle transporting her. The MCO informed her that it would not be possible to uniformly comply or to guarantee compliance with her stated conditions, and advised of its own countervailing concerns that accommodating Petitioner's requests might necessitate discrimination against its drivers or would-be passengers. We agree that the claims asserted by Petitioner do not arise out of an adverse action contemplated under State law and corresponding regulations, as they do not involve a denial or reduction in services or failure to approve a service in a timely manner. *See* Section 27-3-3; 8.352.2.10 NMAC.

{22} In *Martinez*, we considered "whether the New Mexico State Personnel Board is [authorized] to adjudicate statutory disability discrimination claims in administrative just cause termination proceedings." *Martinez*, 2000-NMCA-074, ¶ 1. In answering that question in the negative, we determined that "[t]he [Personnel] Board is a public administrative body created by statute [and is t]herefore . . . limited to the power and authority expressly granted or necessarily implied by statute, which expressly defines its duties." *Id.* ¶ 22 (citations omitted). This Court held that neither the statute nor the regulations promulgated under the Personnel Act by the Board, nor the Human Rights Act, "expressly grant[ed] the Board the power to resolve claims of discrimination raised by an employee challenging an agency's adverse personnel action." *Id.* ¶ 24. This Court concluded that had the Legislature intended a sharing of authority between the Personnel Board and the Human Rights Commission, it would have expressly conferred it, or established a procedural method for doing so that would not conflict with the authority of the Human Rights Bureau. *Id.* ¶ 26. "In the absence of explicit language in the Personnel Act and the Board Rules, we conclude that the authority to decide whether a violation of the ADA [Title II] or the [Human Rights Act] has occurred rests exclusively with those administrative agencies, such as the EEOC and the [New Mexico Human Rights Commission], who have express statutory authority to adjudicate such claims and have specialized knowledge and expertise in preventing and remedying unlawful discrimination." *Id.* ¶ 27.

{23} Similarly, in this case, neither the Public Assistance Act nor the Medicaid Act relied on by Petitioner expressly grants MAD the power to resolve discrimination claims raised by a Medicaid beneficiary challenging an agency's denial or inaction in response to a request for accommodation. Nor is any such power vested in MAD by any regulations promulgated under State law. This Court has upheld "the longstanding principle that administrative agencies are bound by their own regulations." *Saenz v. N.M. Dep't of Human Servs., Income Support Div. ex rel. Human Servs. Dep't*, 1982-NMCA-159, ¶ 14, 98 N.M. 805, 653 P.2d 181; *Hillman*, 1979-NMCA-007, ¶ 5. "Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute." *In re Application of PNM Elec. Servs.*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147; *Martinez*,

2000-NMCA-074, ¶ 22 (citing *In re PNM Elec. Servs.* for this proposition). Because HSD and MAD are created by statute, their enforcement authority through adjudication in an HSD fair hearing is limited to that expressly stated or necessarily implied by the law governing the right to an HSD fair hearing. *See Martinez*, 2000-NMCA-074, § 22.

{24} Petitioner argues that *Hyden* controls our analysis. We disagree. In that case the claimant refused to accept conventional in-network medical services offered by the MCO and the MCO refused to cover alternative medical services offered by an out-of-network provider, despite proof that the conventional therapies employed by the in-network providers had proven ineffective, if not harmful, to claimant in treating her conditions. *See Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-107, ¶¶ 5, 7-8, 130 N.M. 19, 16 P.3d 444. In *Hyden*, as in the case before us, MAD's Director found that no action was taken to terminate, suspend or reduce benefits, and no delay or denial of an application for Medicaid occurred, and thus dismissed the claimant's claim. *Id.* ¶¶ 11-12. In reversing the Director's decision, we concluded: "[A] take-it-or-leave-it offer of treatment that in fact is ineffective or harmful to the recipient is equivalent to a 'denial' or 'non-provision' of medically necessary services." *Id.* ¶ 16. This Court held that the claimant was entitled to a fair hearing under the governing statutes and regulations to determine whether the MCO "has contracted with providers having the necessary qualifications to provide [the p] etitioner with appropriate treatment." *Id.*

{25} *Hyden* is distinguishable from this case because the transportation service provided by the MCO is not, in itself, medically necessary treatment; rather, it is an ancillary service intended to secure access to a medically-necessary treatment. Although Petitioner argues that a lack of appropriate transportation led to the denial of her necessary medical services, the MCO's inability to accede to the type of specialized, mostly gender-based transportation requests made by Petitioner clearly does not amount to the take-it-or-leave-it treatment offer addressed in *Hyden*. The MCO in this case offered Petitioner different transportation service providers and offered to reimburse a family member or friend for transportation services in an effort to cooperate with Petitioner and satisfy her transportation needs. Moreover, unlike the claimant in *Hyden* who provided additional information regarding the harm and ineffectiveness of her treatment, Petitioner here "fail[ed] to provide any information that would enable [the MCO] to evaluate the request to determine whether or not under the circumstances it is a reasonable request." In failing to accommodate Petitioner, the MCO did not deny coverage for the services altogether so as to require MAD to provide a fair hearing. *See* § 27-3-3; 8.352.2.10 NMAC.

{26} When viewed in light of the whole record, and particularly in light of MAD's lack of authority to adjudicate discrimination claims, the agency's decision to deny Petitioner's request for a fair hearing was not unreasonable, without a rational basis, or contrary to law. *See Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17. We therefore affirm the Director's dismissal.

III. The Director's Erroneous Determination That the Human Rights Bureau May Adjudicate ADA Title II and Section 504 Claims Does Not Affect Our Holding

{27} Petitioner challenges MAD's conclusion that the Human Rights Bureau was a "more appropriate venue," arguing that the Human Rights Bureau does not have the statutory authority to determine discrimination claims on the basis of disability outside the employer context. *See* NMSA 1978, § 28-1-7 (2004) (prohibiting unlawful discrimination under the Human Rights Act in public accommodations, housing, and employment). HSD argues that the scope of LogistiCare's transportation service is a "public accommodation" within the meaning of the Human Rights Act, which falls within the jurisdiction of the Human Rights Bureau. We agree that MAD's Director erroneously determined that Petitioner's claims could be brought before the Human Rights Bureau under the Human Rights Act, but for a different reason. Because Petitioner has not asserted a claim under that Act; rather, her claim was brought pursuant to federal law—ADA Title II and Section 504.

{28} To the extent Petitioner asks this Court to impose statutory authority on the MAD to adjudicate discrimination claims because it is "necessarily implied by statute," *see Martinez*, 2000-NMCA-074, ¶ 22, we decline to do so. The plain language of the state law and regulations governing the Medicaid program, applied as written, precludes such a result. *See generally High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5 ("The [C]ourt will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." (internal quotation marks and citation omitted)).

{29} Although MAD is not required to provide a fair hearing under these circumstances, Petitioner is free to pursue her claim for meaningful access to benefits using the grievance procedures provided for in the federal statutes and regulations corresponding to her discrimination claim. Concluding that the erroneous determination regarding the proper venue has no effect on the outcome of this appeal and that MAD otherwise lacks implied authority to adjudicate Petitioner's claims, we affirm the dismissal of Petitioner's claim.

CONCLUSION

{30} Based on the foregoing, we affirm the district court's decision.

{31} IT IS SO ORDERED.
M. MONICA ZAMORA, Chief Judge

I CONCUR:
JULIE J. VARGAS, Judge

LINDA M. VANZI, Judge, concurring in the result.

VANZI, Judge, concurring in the result.

{32} I concur in the result affirming the district court's conclusion that HSD/MAD properly dismissed Petitioner's administrative appeal. Petitioner's request for "reasonable accommodation" and her claim that she suffered "adverse action" entitling her to an HSD/MAD fair hearing both are expressly predicated on her allegation that failure to provide transportation services in the specific manner she outlined contravenes Section 504 and ADA Title II.

{33} There is no dispute that Petitioner has rights under Section 504 and ADA Title II, nor any dispute that HSD/MAD must comply with those statutes. But this does not equate to a conclusion that HSD has legal authority to enforce these federal statutes through adjudication of claims arising under them in an HSD/MAD fair hearing, as Petitioner contends. *See In re Application of PNM Elec. Servs., Div.*, 1998-NMSC-017, ¶ 10 ("Statutes create administrative agencies, and agencies are limited to the power and authority that is expressly granted and necessarily implied by statute.").

{34} Petitioner argued (here and in the district court) that HSD, "as part of its overall obligations to enforce the anti-discrimination requirements of Section 504, ADA Title II, and their implementing regulations—is specifically required by the regulations to have 'grievance procedures' that provide for the 'prompt and equitable resolution of complaints alleging any action that violates those requirements." Both 45 C.F.R. § 84.7 (Section 504) and 28 C.F.R. § 35.107(b) (ADA Title II) require that entities to which Section 504 and the ADA Title II apply must establish grievance procedures for resolution of complaints "alleging any action prohibited by this part." 28 C.F.R. § 35.107(b). However, although Petitioner stated, "It appears that [HSD] has never adopted any such procedures[,]" she did not argue for reversal on this basis. *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."); *see also Sandoval v. Baker Hughes*

Oilfield Operations, Inc., 2009-NMCA-095, ¶ 65, 146 N.M. 853, 215 P.3d 791 ("It is the duty of the appellant to provide a record adequate to review the issues on appeal."). Regardless, the authority of HSD/MAD to adjudicate matters in an HSD/MAD fair hearing is still limited to the authority expressly stated or necessarily implied by the law governing the right to a fair hearing. *In re PNM Elec. Servs., Div.*, 1998-NMSC-017, ¶ 10; *Martinez*, 2000-NMCA-074, ¶ 22. For the foregoing reasons, I agree with the district court's conclusion that "HSD properly dismissed the case" because Petitioner failed to identify any statute or rule authorizing HSD "to decide and adjudicate violations of the ADA [Title II] or Section 504[,]" and I agree with the result in this case affirming the district court on this point. I cannot concur, however, in the Majority's dicta, especially its statements concerning the jurisdiction of the Human Rights Bureau. I also take issue with some of the Majority's characterizations of the arguments, the record, and the law.

The Majority's Dicta

{35} The district court affirmed the dismissal of Petitioner's administrative appeal solely on the basis of Petitioner's failure to identify any statute or rule authorizing HSD "to decide and adjudicate violations of the ADA [Title II] or Section 504." The court did not address any other issue, including MAD's statement that "a more appropriate venue would be the New Mexico Human Rights Bureau"; HSD's contention that Petitioner's claim is within "the exclusive province of the New Mexico Human Rights Commission"; or whether Petitioner's claim meets the definition of an "adverse action" for which there is a right to an HSD/MAD fair hearing.

{36} This Court ordinarily does not consider issues not ruled on by the district court. *See*, *e.g.*, *Batchelor v. Charley*, 1965-NMSC-001, ¶ 6, 74 N.M. 717, 398 P.2d 49 (declining to review issue where appellant failed to meet the burden "to show that the question presented for review was ruled upon by the trial court"); *Luevano v. Grp. One*, 1989-NMCA-061, ¶ 7, 108 N.M. 774, 779 P.2d 552 (stating, in declining to address issues, that "[a]n appellant has the burden of showing that a question presented for review on appeal was ruled upon by the trial court"). The sole ground on which the district court relied in affirming the dismissal of Petitioner's administrative appeal fully resolves this appeal, and I see no reason to decide any issue the district court did not rule on. Accordingly, I would not reach out to conclude, as the Majority does, that "the claims asserted by Petitioner do not arise out of an adverse action contemplated under State law and corresponding regulations, as they do not involve a denial or reduction in services or failure to approve a service in a timely manner[,]" Maj. Op. ¶ 21, and that "the MCO did not deny coverage for the services altogether [for purposes of] requir[ing] MAD to provide a fair hearing." *Id.* ¶ 25.

{37} Of greater concern is the Majority's conclusion that "MAD's Director erroneously determined that Petitioner's claims could be brought before the Human Rights Bureau under the Human Rights Act[.]" Maj. Op. ¶ 27. This statement constitutes a pronouncement about the scope of the jurisdiction of the Human Rights Bureau in a case in which resolution of the issue "has no effect on the outcome of this appeal." Maj. Op. ¶ 29. In other words, it is pure dicta. *See*, *e.g.*, *Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 22 n.8, 116 N.M. 52, 860 P.2d 182 (statements "unnecessary to decision of the issue before the Court" are dicta, "no matter how deliberately or emphatically phrased"); *Kent Nowlin Constr. Co. v. Gutierrez*, 1982-NMSC-123, ¶ 8, 99 N.M. 389, 658 P.2d 1116 ("Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law."). I cannot concur. *See Porter v. Robert Porter & Sons, Inc.*, 1961-NMSC-010, ¶ 18, 68 N.M. 97, 359 P.2d 134, ("[O]n appeal this Court will not make useless orders nor grant relief that will avail appellant nothing, and neither will it decide questions that are abstract, hypothetical or moot[.]").

The Majority's Characterizations

{38} The Majority states that Petitioner's arguments here and in the district court include that "MAD violated her due process rights under the Fourteenth Amendment of the United States Constitution[,]" Maj. Op. ¶ 2, and that "denial of [the] requested accommodation amounted to discrimination on the basis of disability in violation of Section 504, ADA Title II, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Id.* ¶ 7. I question the Majority's implicit conclusions that Petitioner preserved and sufficiently developed an argument for reversal based on the Due Process Clause of the Fourteenth Amendment. To the extent Petitioner can be said to have done so, however, her argument is that the Fourteenth Amendment Due Process Clause affords the *procedural* right to be heard, not that she was deprived of the *substantive* right to be free from discrimination, a right the Fourteenth Amendment does not guarantee in the Due Process Clause, but rather in the Equal Protection Clause. The Majority's statement that it does not address this argument does not obviate the obligation to ensure that what is stated in the opinion accurately characterizes the arguments, the record, and the law.

{39} The Majority's statement in footnote 6 disclaiming the need to "reach the question of whether the MCO or LogistiCare are state actors for purposes of being bound by the statutes and regulations applied to HSD[,]" Maj. Op. ¶ 15 n.6, suggests an erroneous understanding of the state-action doctrine and the reason for the statement in *Hyden* the Majority quotes. The Fourteenth Amendment, by its terms, proscribes conduct by state actors (as distinct from private actors). *See* U.S. Const. amend. XIV § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). In *Hyden*, the district court affirmed the dismissal of Hyden's administrative appeal "on the ground that the MCO was not a state actor, and therefore, the MCO's actions did not trigger a right to procedural due process." 2000-NMCA-107, ¶¶ 1, 14. Hyden argued on appeal to this Court that "this case can be resolved without reaching the constitutional issues on which the district court based its ruling" because state statutes and regulations provide the right to a fair hearing she asserted. *Id.* ¶ 15.

{40} The issue of state action was relevant in *Hyden* only because the district court's decision rested on its conclusion that "medical review decisions that result in a reduction, suspension or termination of benefits . . . do not trigger constitutionally protected due process rights" because the decision-maker is not a state actor. *Id.* ¶ 14 (internal quotation marks omitted). Here, where the Majority states that it does not address the due process argument and there is no argument that Petitioner was not entitled to an HSD/MAD fair hearing based on lack of state action, the Majority's state-action commentary is irrelevant and inapt, and its reliance on *Hyden* misplaced. Errors and mischaracterizations that do not alter the result are errors and mischaracterizations just the same, and we have an obligation to avoid them.

{41} The Majority states that "*Hyden* is distinguishable from this case because the transportation service provided by the MCO is not, in itself, medically-necessary treatment." Maj. Op. ¶ 25. Although I agree with the Majority that the inability to guarantee Petitioner's specific requests in every instance is different from the take-it-or-leave-it offer addressed in *Hyden*, Maj. Op. ¶ 25, the principal reason Petitioner is wrong in contending that *Hyden* controls the analysis here is that *Hyden* does not address whether rights arising under Federal anti-discrimination statutes may be adjudicated in an HSD/MAD fair hearing. And the conclusion that no law authorizes adjudication of claims arising under Section 504 and the ADA Title II in an HSD/MAD fair hearing fully resolves this appeal.

LINDA M. VANZI, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-067
No. A-1-CA-37339 (filed June 4, 2019)

STATE OF NEW MEXICO ex rel.
CHILDREN, YOUTH & FAMILIES
DEPARTMENT,
Petitioner-Appellant,
v.
TANISHA G. and ISSAC G.,
Respondents-Appellees.
IN THE MATTER OF DAMIAN G.,
Child.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
JOHN J. ROMERO, District Judge

Released for Publication November 12, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} The district court dismissed with prejudice the New Mexico Children, Youth and Families Department's (CYFD) abuse and neglect petition against Tanisha G. (Mother) and Issac G. (Father, and collectively, Parents) for failure to timely adjudicate the petition within sixty days as required by Rule 10-343 NMRA and NMSA 1978, Section 32A-4-19(A) (2009) of the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -35 (1993, as amended through 2018). CYFD appeals the district court's dismissal and contemporaneous refusal to grant CYFD's oral motion for an extension of time pursuant to Rule 10-343(D). We affirm.

BACKGROUND

{2} CYFD took Child, then age four, into custody on January 26, 2018, after the Bernalillo County Sheriff's Office executed a warrant for Father's arrest, leaving no caregiver in the home to care for Child. On January 30, 2018, CYFD filed an abuse and neglect petition alleging that Mother was homeless and had left Child in Father's care, and that Mother had tested positive for certain controlled substances. CYFD further alleged that the conditions in Father's home were dangerous. A CYFD investigator provided a detailed description, stating that the home was heated by a single space heater and was very cold; that the home was "extremely cluttered[] and in disarray"; that there was uneaten old, moldy food on the kitchen counter and no clean place for Child to sleep; and that drug paraphernalia (needles and pipes) were found inside the home and in the yard, and potentially dangerous tools ("axes[,] hatchets, screwdrivers, and knives") were strewn throughout the yard. Father argued that the police had "torn up" the home when executing the warrant and CYFD's impressions were inaccurately based on conditions as altered by the police.

{3} Parents were served with the petition on February 6, 2018. By that time, Father had been released from custody and the charges against him dropped; his arrest was apparently the product of mistaken identity. The following day, Parents attended a custody hearing before a special master, who, in compliance with the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 to 1963 (2018), and Rule 10-315(D) NMRA, asked about Parents' Native American ancestry to determine whether ICWA applied in this case. *See* 25 C.F.R. § 23.107(a) (2018) (stating that state courts must ask whether participants in a custody proceeding know or have reason to know that the child is an Indian child). Father testified about his Native American ancestry, stating that his mother is "Navajo-Apache," that his maternal grandmother was "full" and his maternal grandfather was "half." Based on this testimony, the special master found that there was "reason to know" that Child is an Indian child and that ICWA applies. *See* § 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"); NMSA 1978, § 32A-1-4(L) (2016) (same). CYFD's attorney stated that it would "abide" by the ICWA finding. The district court adopted the special master's recommendations, as set forth in an order prepared by CYFD during the hearing, and entered a temporary custody order on February 8, 2018, which included a finding that Child is an Indian child. The court further ordered that "[b]ecause there is reason to know [C]hild meets the definition of Indian child as set forth in ICWA, the [c]ourt shall treat [C]hild as an Indian child subject to [ICWA] unless and until it is determined on the record that [C]hild does not meet the definition of an Indian child under applicable law." The custody order stated that Child shall remain in CYFD's custody pending adjudication.

{4} In the ensuing seventy-seven days, the parties appeared for three hearings: a status conference on February 27, 2018, and two adjudicatory hearings that had been set for April 2, 2018, and April 24, 2018,

respectively. The district court declined to commence the adjudication on either April 2 or April 24, however, because although CYFD had mailed ICWA notices to several tribal entities on February 8, 2018, and the tribal entities had received those notices shortly thereafter, CYFD had not filed proof of service to establish receipt in the record.

{5} On April 25, 2018, Parents filed separate motions to dismiss, arguing that CYFD had failed to commence the adjudication within sixty days as required by the Abuse and Neglect Act. Section 32A-4-19(A) (stating that "[t]he adjudicatory hearing in a neglect or abuse proceeding shall be commenced within sixty days after the date of service on the respondent"); *see also* Rule 10-343(A) (same). CYFD finally filed proof of service of the ICWA notices on April 26, 2018, but filed no response to either of the motions to dismiss.

{6} The district court heard the motions to dismiss on the morning of May 24, 2018, at which time CYFD orally moved for an extension of time to commence the adjudicatory hearing. The district court denied CYFD's request, noting that the court and parties had attempted multiple times to commence the adjudication, that CYFD's failure to comply with ICWA's notice requirements had precluded the court from timely adjudicating the matter, that the court had reminded CYFD that the time limits were running, and that CYFD had failed to file a motion to extend the time limits when the parties were last in court.[1] The district court granted the Parents' motions to dismiss the petition with prejudice.

{7} Hours later, Father filed an emergency motion for contempt of court, stating that arrangements had been made for Child to be reunited with Parents at 11:15 a.m., but CYFD refused to return Child. The district court conducted an emergency hearing at 3:00 p.m., during which CYFD stated that it intended to file a motion to reconsider or, alternatively, to stay the judgment. The district court admonished CYFD for keeping Child without jurisdiction and ordered reunification before 5:00 p.m. that day, which occurred. CYFD appeals the district court's dismissal order.

DISCUSSION

I. The District Court Did Not Err in Applying ICWA

{8} We review de novo the "interpretation of ICWA and its relationship to our state statute on abuse and neglect." *In re Esther V.*, 2011-NMSC-005, ¶ 14, 149 N.M. 315, 248 P.3d 863. CYFD asserts that the district court erred in applying ICWA to these proceedings because Child is not an "Indian child." However, CYFD stipulated to the special master's finding at the custody hearing that there was "reason to know" Child is an Indian child and did not appeal the resulting custody order. *See* § 32A-4-18(I) (stating that a party aggrieved by a custody order "shall be permitted to file an immediate appeal as a matter of right"); Rule 10-315(I) (stating that a custody order may be appealed as provided by Section 32A-4-18(I)); Rule 12-206.1(C) NMRA (stating that an appeal of a custody order shall be initiated within five days after the order is entered). CYFD, instead, made two oral challenges to that finding after the deadline for appeal had passed, neither of which was sufficient to comply with the standard set forth in the applicable federal regulation, 25 C.F.R. § 23.107, which required the district court to

> [c]onfirm, by way of a report, declaration, or testimony included in the record that [CYFD] or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership)[.]

25 C.F.R. 23.107(b)(1); *see also* Rule 10-315(F)(1) (same); *cf. State, ex rel. Children, Youth & Families Dep't v. Nathan H.*, 2016-NMCA-043, ¶ 19, 23, 370 P.3d 782 (holding, despite an initial determination to the contrary, that ICWA did not apply because the Navajo Nation determined the children were not eligible for enrollment).

{9} As an initial matter, CYFD's challenges to the ICWA finding were made in April and May 2018, well after the sixty-day time limit to hold the adjudicatory hearing had expired, and are therefore procedurally deficient, as we discuss more fully below. In substance, they also fail. At the April 24, 2018 hearing, CYFD made an offer of proof regarding its investigator's efforts to speak with Child's paternal grandmother, and the district court correctly found that the proffer was inadequate to comply with the standard set forth in 25 C.F.R. § 23.107(b)(1). CYFD made no proffer in support of its May 24, 2018 challenge. Consequently, we conclude that CYFD's challenges to the district court's ICWA determination present no basis for reversal.

II. The District Court Did Not Err in Denying CYFD's Oral Motion for an Extension of Time

{10} CYFD further argues that the district court improperly denied its oral request for an extension of time to commence the adjudicatory hearing. The Abuse and Neglect Act and the rules applicable to this proceeding mandate that the adjudicatory hearing be commenced within sixty days after the date of service on Parents or "the petition *shall* be dismissed with prejudice." Section 32A-4-19(D) (emphasis added); Rule 10-343(E)(2) (same). While Rule 10-343(D) allows for extensions of time to commence an adjudicatory hearing, CYFD's May 24, 2018, oral motion for an extension occurred more than 100 days after Parents were served and the district court concluded that Rule 10-343 afforded it no discretion to consider CYFD's request. We review for abuse of discretion the district court's decision to dismiss the petition for abuse and neglect and to deny CYFD's motion for extension of time. *See State, ex rel. Children Youth & Families Dep't v. Arthur C.*, 2011-NMCA-022, ¶ 23, 149 N.M. 472, 251 P.3d 729. The district court's application of the children's court rules, however, presents a pure question of law that we review de novo. *Id.* ¶ 10.

{11} Rule 10-343 has undergone a series of revisions over the last decade and we address for the first time the current iteration, adopted in 2015, which sets forth the procedure for parties seeking an extension of time to commence the adjudication and the remedies available to the district court in the event of noncompliance with the time limits. Rule 10-343(D), (E); *cf. Arthur C.*, 2011-NMCA-022, ¶¶ 12-14 (discussing 2009 version of Rule 10-343, which made dismissal for noncompliance with the adjudicatory time limit discretionary). We begin with the procedural requirements of the rule, which states in relevant part:

> The motion [for an extension of time] shall be filed within the applicable time limit prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limit if it is based on exceptional circumstances beyond the control of the parties or trial court which justify the failure to file the motion within the applicable time limit.

Rule 10-343(D). The applicable time limits are found in Rule 10-343(A), which requires that an adjudicatory hearing be commenced within sixty days from four possible accrual dates, including, as relevant here, the date that Parents were served with the abuse and neglect petition. *See* Rule 10-343(A)(1). Although Rule 10-343(D) requires that a motion for an extension be filed within the applicable sixty-day period to commence an adjudicatory hearing, the rule also contemplates

[1]The district court mistakenly believed that Parents were served with the petition on February 26, 2018, when in fact they had been served on February 6, 2018, which meant that the sixty-day time limit ran on April 9, 2018.

that the motion may be filed within ten days after the expiration of that time limit under a "grace period" for exceptional circumstances.

{12} Subsection (E) of Rule 10-343 goes on to provide the district court with two instructions for addressing non-compliance with the time limits. The first, Rule 10-343(E)(1), affords the district court discretion to deny an "untimely" motion for extension of time or grant the motion and impose other sanctions or remedial measures as appropriate. The second, Rule 10-343(E)(2), is nondiscretionary and states that "[i]n the event the adjudicatory hearing on any petition does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice." This case highlights an apparent conflict in the rule where the motion for an extension is made after the ten-day grace period. Rule 10-343(E)(1) and (E)(2) appear to provide conflicting instructions to the district court—the former allows the district court to consider and grant the motion, while the latter requires dismissal.

{13} We are required to read these two Subsections, (E)(1) and (E)(2), *in pari materia*, however, and not as contrary to one another. *See State v. Stephen F.*, 2006-NMSC-030, ¶ 17, 140 N.M. 24, 139 P.3d 184 (noting the same rules of construction that are applied to statutes are used to construe rules of procedure). A compatible reading turns on the construction and parameters of what an "untimely" motion is. An interpretation that views "untimely" to mean any motion filed after day sixty for purposes of Subsection (E)(1) would render Subsection (E)(2)'s mandatory dismissal language meaningless. Consequently, there must exist an outer boundary for an "untimely" motion within the meaning of Subsection (E)(1), and we find guidance in the rule itself. The rule defines a timely motion as one filed within the applicable time limit for commencing an adjudicatory hearing, but allows for motions to be filed up to "ten (10) days *after the expiration of the applicable time limit*." Rule 10-343(D) (emphasis added). Thus, motions filed within the grace period are defined by the rule as "untimely," but are nevertheless contemplated under exceptional circumstances. In contrast, the rule does not address or expressly authorize any motion for an extension filed after the ten-day grace period for any reason. This omission leads us to conclude that the rule does not allow the district court to consider a motion for an extension after the ten-day grace period has expired. Motions filed within the ten-day grace period are therefore the only "untimely" motions for which the district court has discretion to grant or deny under Rule 10-343(E)(1). Our interpretation furthers timely adjudication on the merits, which serves the fundamental interests of parents and children in these proceedings. *See State ex rel. Children, Youth & Families Dep't v. Browind C.*, 2007-NMCA-023, ¶ 23, 141 N.M. 166, 152 P.3d 153 (stating that the Abuse and Neglect Act's "paramount concern is the health and safety of the child"); *State ex rel. Children, Youth & Families Dep't v. Maria C.*, 2004-NMCA-083, ¶ 24, 136 N.M. 53, 94 P.3d 796 ("[T]he parent-child relationship is one of basic importance in our society . . . sheltered by the Fourteenth Amendment against the [s]tate's unwarranted usurpation, disregard, or disrespect." (internal quotation marks and citation omitted)).

{14} CYFD's oral motion for an extension in this case does not meet the definition of an "untimely" motion for purposes of Rule 10-343(E) because it was filed more than 100 days after Parents were served, well outside the ten-day grace period set forth in Rule 10-343(D). Consequently, as the district court correctly observed, it lacked discretion under the rule to consider the motion. The district court properly applied Rule 10-343(E)(2)'s mandate and dismissed this case with prejudice for failure to timely commence the adjudicatory hearing.

{15} Finally, we briefly address CYFD's assertion that the district court "was . . . inexplicably dismissive of [CYFD]'s concerns for Child's welfare, which is not only an abuse of discretion, but demonstrates a conscious disregard by the [district] court of its statutory duty to ensure that 'a child's health and safety shall be the paramount concern.' " Contrary to CYFD's characterization, however, we note that the district court heard from Father's attorney that the conditions in the home had been remedied. The guardian ad litem (GAL) reiterated that Parents' attorneys had suggested that the home was now clean and safe for Child. The GAL stated that Child and Parents share a strong bond and that Child was suffering from anxiety due to his separation from Parents. The GAL believed it was safe to return Child to Parents. Moreover, the criminal allegations against Father, which had brought Child into CYFD's custody in the first place, were a product of mistaken identity and had been dismissed months earlier. Based upon this testimony, we disagree with CYFD's characterization that the district court disregarded Child's health and safety.

CONCLUSION

{16} For the foregoing reasons, we affirm.

{17} IT IS SO ORDERED.
MEGAN P. DUFFY, Judge

WE CONCUR:
JENNIFER L. ATTREP, Judge
KRISTINA BOGARDUS, Judge

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-068
No. A-1-CA-35994 (filed July 29, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THOMAS CHAVEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
CHARLES W. BROWN, District Judge

Certiorari Denied, September 6, 2019, No. S-1-SC-37874.
Released for Publication November 12, 2019.

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Opinion

J. Miles Hanisee, Judge.

{1} Defendant Thomas Chavez, a convicted sex offender, appeals the district court's order that his supervised probation be continued for an additional two and one-half years following his initial, mandatory five-year probationary term under NMSA 1978, Section 31-20-5.2(B) (2003). Defendant argues that the district court's order should be reversed because (1) the statute is void for vagueness, or (2) the State failed to meet its burden under the statute of proving to a reasonable certainty that Defendant should remain on probation for an additional period of time. We conclude that, as a matter of first impression, Section 31-20-5.2(B) is not void for vagueness. We also conclude that the appropriate standard of review for whether the State met its burden is abuse of discretion. The district court did not abuse its discretion in concluding that the State proved to a reasonable certainty that Defendant should remain on probation, and we affirm.

BACKGROUND

{2} In 2007, Defendant pled guilty to two counts of criminal sexual contact of a minor (CSCM) and contributing to the delinquency of a minor. Defendant was sentenced to twenty-two and one-half years' imprisonment, all but five of which were suspended. In accordance with Section 31-20-5.2(A), Defendant was also sentenced to an indeterminate period of supervised probation of not less than five and not more than twenty years. *See id.* ("When a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised probation for a period of not less than five years and not in excess of twenty years."). Defendant was placed on probation beginning on September 6, 2011, but was not released from prison until the end of 2013 because he did not have a place to reside upon being paroled, and a bed was not available at a halfway house until then.

{3} In April 2016, near the end of Defendant's initial five-year period of probation, the State filed a motion under Section 31-20-5.2(B) requesting that Defendant remain on probation for an additional two and one-half years. The district court held hearings on the State's motion in August and September 2016. The State highlighted that Defendant accumulated "over a hundred offenses" related to his Global Positioning System (GPS) electronic monitoring that occurred while he was on probation, as well as the fact that Defendant served two years of parole in custody, which reduced the period of time Defendant served on probation within the community. The State also pointed out that during his interview for his pre-sentence report (PSR), Defendant stated that if he was stressed, he could recidivate.

{4} Defendant argued that "the State has not presented sufficient evidence to prove to a reasonable certainty that [he] should remain on probation." Defendant emphasized that his probation had never been revoked. Defendant acknowledged that his probation officer filed reports on two GPS violations and sanctioned him with fifty-two hours of community service, but argued that with respect to the first written-up GPS violation, Defendant did not know his GPS unit was out of contact with the larger monitoring system. Regarding the second written-up GPS violation, Defendant argued that, although his location was unknown for thirty-four minutes in the middle of the night because his GPS unit's battery had died, he plugged it in as soon as he realized it was dead, and, lacking his own transportation, he could not have gone anywhere during the time his GPS unit was offline.

{5} Defendant asserted that the State did not provide the district court with "behavioral type facts . . . for why [Defendant] is in need of more rehabilitative services." Defendant also contested his probation officer's conclusion that he would benefit from continued probation, arguing, "[I] think the State can make that argument for every single person on probation. . . . [T]hat's not what the burden is here for the State and that's not what the purpose of probation is. The statute doesn't say the [district c]ourt should look and see if somebody could benefit from another two and one-half years of probation. [Defendant] has almost wholly complied with his term of probation, and he's done it pretty well." Finally, Defendant discounted his statement during his PSR interview that if stressed he might recidivate, arguing that since then he has taken advantage of mental and physical health care to manage his stress, and that he has registered as a sex offender as required every quarter.

{6} At the conclusion of the hearings, the district court acknowledged that "[i]n some ways, the [d]efendant always gets hammered . . . [I]f the [d]efendant[is] doing well on conditions of release, then [the State] argue[s,] 'Hey, it's working, therefore

we need to . . . keep him on it. If he's not doing well, it shows we need to keep him on it.' So that's one of those things which carries . . . very little weight as far as what you look at." Nonetheless, the district court found that "[t]here were two violations" and granted the State's motion although "Defendant has made progress[.]" The district court then ordered Defendant to remain on probation for another two and one-half years with the same terms and conditions as before, but eliminated GPS monitoring. Defendant's timely appeal followed.

DISCUSSION

I. Section 31-20-5.2(B) Is Not Void for Vagueness

{7} Section 31-20-5.2(B) provides:

> A district court shall review the terms and conditions of a sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, the district court shall also review the duration of the sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation.

Defendant challenges the last sentence of this provision as void for vagueness, arguing that it does not provide "guidance . . . as to the factors a court should rely upon" in deciding whether a defendant should remain on probation. Defendant elaborates that it is "unclear . . . what the State must prove to continue [Defendant] on probation[,]" and that "[t]he [L]egislature did not properly define the measure by which to [decide] extensions brought under Section 31-20-5.2(B)."

{8} The State responds that "a reasonable and practical construction of the language contained in Section 31-20-5.2(B) provides adequate guidance as to a district court's determination as to duration of a sex offender's probation." The State contends that "Section 31-20-5.2(B) is a sentencing provision that, like other sentencing provisions, the Legislature intended to be broad; and it provides a district court with the discretion to consider a myriad of factors in determining whether a sex offender should remain on supervised probation after the initial five-year period." Specifically, the State argues, the phrase "reasonable certainty" from Section 31-20-5.2(B) is an "objective standard of proof" that provides "a workable guideline for a district court to determine whether to continue a sex offender's supervised probation." Similarly, the State argues that the phrase "should remain on probation" is a "workable guideline for a district court to objectively apply under the facts and circumstances in each case." According to the State, the broad discretion that Section 31-20-5.2(B) grants district court judges does not make the statute impermissibly vague.

A. Standard of Review

{9} A vagueness challenge to the constitutionality of a statute is grounded in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. *See* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); *Kolender v. Lawson*, 461 U.S. 352, 353-54 (1983) ("We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification."); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982) ("A law . . . may . . . be challenged on its face as unduly vague[] in violation of due process. . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." (internal quotation marks and citation omitted)); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). "We review a vagueness challenge de novo in light of the facts of the case and the conduct which is prohibited by the statute." *State v. Smile*, 2009-NMCA-064, ¶ 17, 146 N.M. 525, 212 P.3d 413 (internal quotation marks and citation omitted). "[B]ecause there is a strong presumption of constitutionality underlying each legislative enactment, [the d]efendant has the burden of proving the statute is unconstitutional beyond all reasonable doubt." *Id.* (alteration, internal quotation marks, and citation omitted). Defendant can meet this burden in two ways:

> He can either demonstrate that the statute fails to allow individuals of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited, or he can demonstrate that the statute permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application.

Id. ¶ 18 (alteration, internal quotation marks, and citation omitted). Here, Defendant advances his challenge based only on the second prong of the vagueness analysis—that is, he contends that Section 31-20-5.2(B) "permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement" of that which the statute permits. *See Smile*, 2009-NMCA-064, ¶ 18 (internal quotation marks and citation omitted).

{10} "Appellate courts have a duty to construe a statute in such a manner that it is not void for vagueness if a reasonable and practical construction can be given to its language." *State v. Duttle*, 2017-NMCA-001, ¶ 13, 387 P.3d 885 (internal quotation marks and citation omitted). Determining whether Section 31-20-5.2(B) is vague requires us to engage in statutory interpretation, which we review de novo. *See Duttle*, 2007-NMCA-001, ¶ 14. "Our ultimate goal in statutory construction is to ascertain and give effect to the intent of the Legislature." *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022 (internal quotation marks and citation omitted). "The legislative history of the statute, including historical amendments, and whether it is part of a more comprehensive act, is instructive when searching for the spirit and reason the Legislature utilized in enacting the statute." *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (citation omitted). "We begin by looking first to the words chosen by the Legislature and the plain meaning of the Legislature's language." *Duttle*, 2017-NMCA-001, ¶ 14 (internal quotation marks and citation omitted). "When a statute contains language which is clear and unambiguous, the appellate courts must give effect to that language and refrain from further statutory interpretation." *Id.* (alteration, internal quotation marks, and citation omitted). In reviewing a statute to determine whether it is unconstitutionally vague, "[t]he statute must be read and considered as a whole so as to ascertain its legislative intent, and the statute's words and phrases are to be considered in their generally accepted meaning." *State v. Segotta*, 1983-NMSC-092, ¶ 5, 100 N.M. 498, 672 P.2d 1129. "All of the provisions of a statute, together with other statutes in pari materia [on the same subject], must be read together to ascertain legislative intent." *Davis*, 2003-NMSC-022, ¶ 12.

{11} Additionally, we review void-for-vagueness constitutional claims even when they are not preserved below. *State v. Laguna*, 1999-NMCA-152, ¶ 23, 128 N.M. 345, 992 P.2d 896. Defendant does not indicate how he preserved his vagueness challenge below nor does our review of the record so indicate, and thus we presume it was not preserved, although we nonetheless proceed to reviewing it.

B. Analysis

{12} To determine that Section 31-20-5.2(B) "permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application[,]" *Smile*, 2009-NMCA-064, ¶ 18, Defendant asks us to find two phrases from Section 31-20-5.2(B) unconstitutionally vague: "reasonable certainty" and "should remain on probation."

{13} Beginning with "reasonable certainty," we first look to its plain meaning. "Reasonable" is defined as "[f]air, proper, or moderate under the circumstances; sensible." *Reasonable*, Black's Law Dictionary (11th ed. 2019). "Certainty" is defined as "[t]he quality, state, or condition of being indubitable or certain, esp[ecially] upon a showing of hard evidence" or "[a]nything that is known or has been proven to be true." *Certainty*, Black's Law Dictionary (11th ed. 2019). In case law, "reasonable certainty" is typically used in the context of a probation violation hearing, in which we have held the term to mean "the [s]tate must introduce evidence that a reasonable and impartial mind would be inclined to conclude that the defendant has violated the terms of probation." *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. We are guided, if not bound by, *Leon*'s definition of the term "reasonable certainty" despite our recognition that Section 31-20-5.2(B) is part of the sentencing article of the criminal procedure chapter of the New Mexico Statutes Annotated. But given that the phrase "reasonable certainty" does not appear elsewhere within the sentencing article, we are unable to rely on other statutory sentencing provisions to help supply the plain meaning of "reasonable certainty."

{14} Next, looking to the intent of the Legislature, when the bill that was eventually codified as the amended Section 31-20-5.2(B) was being drafted, the initial draft did not specify the state's burden of proof. Indeed, the Fiscal Impact Report for the bill reflected feedback from the Office of the New Mexico Attorney General that, among other provisions it lacked, "[t]he procedure for review at two and one-half year intervals fails to address burden of proof[.]" Fiscal Impact Report, H.B. 2, 3, 4, and 8, 46th Leg., 1st Special Sess., 10 (N.M. Oct. 31, 2003) https://www.nmlegis.gov/ Sessions/03%20Special/firs/HB0002.pdf. The version of the bill that passed the Legislature ultimately specified that the burden of proof was "reasonable certainty." House Bills 2, 3, 4, 5, and 8, 46th Leg., 1st Special Sess., 19 (N.M. 2003) https://www.nmlegis.gov/Sessions/03%20Special/FinalVersions/house/HB0002.pdf. From this legislative history, it is clear that the Legislature considered and intended to use the phrase "reasonable certainty" to describe the State's burden of proof for whether a sex offender should remain on probation, one with which the State and some, if not all, probationers are familiar by virtue of its use in the probation revocation context.

{15} Guided as we are first by the words chosen by the Legislature, and aided by the manner in which our case law defines "reasonable certainty" in a circumstance which we view to present a similar inquiry, we conclude the plain meaning of "reasonable certainty" is clear. In resolving whether a probationer should remain on probation for additional time under Section 31-20-5.2(B), reasonable certainty means evidence that a reasonable and impartial mind would be inclined to conclude justifies that the sex offender should remain on probation. *See Leon*, 2013-NMCA-011, ¶ 36.

{16} We next assess the meaning of the phrase "should remain on probation." This time, our answer derives from the plain meaning of the words themselves, which are self-explanatory when considered within the overarching statute of which they are part. Moreover, in considering whether the plain language lacks sufficient applicatory guidance, Section 31-20-5.2(A) contains a list of relevant factors for a district court to consider in deciding the terms and conditions of a sex offender's supervised probation, once the district court has decided to either defer imposition or suspend any portion of a sex offender's sentence:

> (1) the nature and circumstances of the offense for which the sex offender was convicted or adjudicated;
> (2) the nature and circumstances of a prior sex offense committed by the sex offender;
> (3) rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;
> (4) the danger to the community posed by the sex offender; and
> (5) a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate district court personnel.

While the provision at issue, Section 31-20-5.2(B), is challenged by Defendant as impermissibly vague, we are obliged to read and consider Section 31-20-5.2 "as a whole so as to ascertain its legislative intent, and the statute's words and phrases are to be considered in their generally accepted meaning." *Segotta*, 1983-NMSC-092, ¶ 5. In doing so, we conclude that in deciding whether a sex offender should remain on probation under Section 31-20-5.2(B), the district court may remain guided by the relevant factors set forth in Section 31-20-5.2(A).

{17} Defendant argues that these factors "should no longer be relevant in deciding whether to continue probation" because two of the five are inapplicable to a post-incarceration probation-extension query. But beyond this bare-bones argument, Defendant advances no legal reason why the district court cannot, or should not, utilize the factors from Section 31-20-5.2(A), along with information—standard to any probationary inquiry—related to a defendant's performance on probation in deciding whether a sex offender should remain on probation under Section 31-20-5.2(B). We acknowledge that determining the terms and conditions of a sex offender's supervised probation is a somewhat different inquiry from deciding whether a sex offender should remain on probation, but both inquiries are part and parcel of the same overarching purpose of Section 31-20-5.2, which is to provide guidance to the district court in adjudicating a sex offender's indeterminate period of supervised probation. Because we must read "[a]ll of the provisions of a statute" together, *Davis*, 2003-NMSC-022, ¶ 12, we look to Section 31-20-5.2(A) in interpreting Section 31-20-5.2(B)'s "should remain on probation" language. We do not engage in further statutory interpretation of the phrase "should remain on probation," such as analysis of the Legislature's intent in including the phrase in the statute, since it is not ambiguous and its plain meaning is clear from the words themselves and the phrase's statutory context. *See Duttle*, 2017-NMCA-001, ¶ 14 ("When a statute contains language which is clear and unambiguous, the appellate courts must give effect to that language and refrain from further statutory interpretation." (alteration, internal quotation marks, and citation omitted)).

{18} Because "reasonable certainty" has a specific meaning that has been clearly defined by analogous case law, and "should remain on probation" has a clear plain meaning with applicable statutory standards, we decline to hold that Section 31-20-5.2(B) is so vague that "the statute permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application." *Smile*, 2009-NMCA-064, ¶ 18 (internal quotation marks and

citation omitted). First, by its very terms the statute does not permit its arbitrary and discriminatory enforcement. As we have discussed, "reasonable certainty" is defined in the case law. *See Leon*, 2013-NMCA-011, ¶ 36 (defining reasonable certainty in the context of probation violations). Second, the discretionary factors identified in Section 31-20-5.2(A) can also be utilized by district court judges in a consistent manner to evaluate whether a sex offender should remain on probation under Section 31-20-5.2(B). *See Duttle*, 2017-NMCA-001, ¶ 13 ("Appellate courts have a duty to construe a statute in such a manner that it is not void for vagueness if a reasonable and practical construction can be given to its language." (internal quotation marks and citation omitted)).

{19} Considered as part of the statute by which district courts make discretionary custodial or probationary determinations in the context of the uniquely pernicious offense of child sexual abuse, Section 31-20-5.2(B) simply cannot be read to lack "standard or guidelines" such that it encourages "subjective and ad hoc application." *See Smile*, 2009-NMCA-064, ¶¶ 18, 20-21 (describing the appellant's burden in challenging a statute on grounds of vagueness and concluding that the aggravated stalking statute was not unconstitutionally vague because it had "clear guidelines regarding what circumstances will escalate the misdemeanor crime to a felony offense[,]" and because the prosecutor's choice to charge the defendant with felony aggravated stalking "did not require any arbitrary discretion"); *see also Segotta*, 1983-NMSC-092, ¶ 8 (concluding that NMSA 1978, Section 31-18-15.1 (1979, amended 2009), a sentencing statute, was not void for vagueness simply because it asked the court "to exercise independent judgment if it determined that extraordinary mitigating or aggravating circumstances were present," and because the phrase " 'aggravating or mitigating circumstances' . . . has a long history and appears in the sentencing statutes of other states[,]" even though the statute did not directly define aggravating or mitigating circumstances); *State v. Greenwood*, 2012-NMCA-017, ¶ 46, 271 P.3d 753 (finding that NMSA 1978, Section 30-47-4(D) (1990) (abuse of a resident; criminal penalties) was not unconstitutionally vague because a "prosecutor, judge, or jury [can] distinguish between innocent conduct and conduct threatening harm," and thus it did not matter that the statute did not "require the neglect to occur within or by a person employed by a care facility" (internal quotation marks and citation omitted)); *Laguna*, 1999-NMCA-152, ¶ 33 (concluding that the distinction between the first and second degree offenses in the kidnapping statute was not unconstitutionally vague because it did not afford "too much discretion to the police and too little notice to citizens[,]" and an officer, prosecutor, judge, or jury would be able "to distinguish between innocent conduct and conduct threatening harm" (internal quotation marks and citations omitted)); *State v. Andrews*, 1997-NMCA-017, ¶ 13, 123 N.M. 95, 934 P.2d 289 (holding that the concealing identity statute, NMSA 1978, Section 30-22-3 (1963), which criminalized concealing one's true name or identity, was not so vague that it encouraged arbitrary or discriminatory law enforcement because "[t]he officer's inquiry is limited . . . to what is necessary to perform a lawful duty, which . . . was to check on the validity of the driver's license [and stating that t]he statute does not permit open-ended inquiry or inquiry without standards").

{20} Lastly, we also agree with the State that Section 31-20-5.2(B)'s broad grant of discretion to the district court, which is similar to that discretion granted by Section 31-20-5.2(A), or most any other sentencing statute, does not itself render the statute void for vagueness. After all, "New Mexico courts have long recognized that read in their entirety, the sentencing statutes evidence a legislative intent that the district court have a wide variety of options by which to sentence." *State v. Lindsey*, 2017-NMCA-048, ¶ 22, 396 P.3d 199 (alterations, internal quotation marks, and citation omitted). The district court's discretion under Section 31-20-5.2(B) to order a sex offender to remain on probation for another period of time, here two-and-one-half years, does not equate to an absence of guidance—statutory or otherwise—in making that decision. Accordingly, we hold that Section 31-20-5.2(B) is not void for vagueness.

II. The District Court Did Not Abuse Its Discretion in Ordering Defendant to Remain on Probation

{21} Defendant contends that "there was not substantial evidence to support the [district] court's order of continued probation." Specifically, Defendant argues that the "electronic monitoring mishaps" were ultimately dismissed by the district court as "unfounded" and that continuing Defendant on probation is not justified by his statement during his PSR interview that he might reoffend if he was under stress, given his completion of sex offender counseling. Defendant further argues that the State's argument that Defendant completed part of his probationary term while in custody and thus should continue on probation out of custody for a longer period of time "doubly punishe[s him] for having to wait for halfway house space to open up." Additionally, Defendant maintains that the district court's order that Defendant remain on probation was "not based upon any articulated factual findings."

{22} The State responds that the district court "relied primarily on Defendant's two [probation] violations" in ordering him to remain on probation, that sufficient evidence supports those two violations, and that the district court credited Defendant's overall compliance with counseling and made the "split ruling" that Defendant need not undergo GPS monitoring during his continued probation, and thus the district court appropriately considered the evidence presented at the hearing.

{23} We first decide the standard of review to apply when considering whether the district court erred in ordering Defendant to remain on probation pursuant to Section 31-20-5.2(B). We review a defendant's challenge to the terms and conditions of his probation for an abuse of discretion. *State v. Green*, 2015-NMCA-007, ¶ 9, 341 P.3d 10. Section 31-20-5.2(A) requires the district court to "conduct a hearing to determine the terms and conditions of supervised probation for [a] sex offender." Although Defendant does not challenge the terms and conditions of his probation, Defendant's challenge arises from Section 31-20-5.2(B), which requires the district court to "review the duration of the sex offender's supervised probation at two and one-half year intervals[,]" and states that "at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation." Additionally, we review sentencing for an abuse of discretion, and Section 31-20-5.2(B) is a sentencing statute. *See Lindsey*, 2017-NMCA-048, ¶ 22 (stating that sentencing is reviewed for an abuse of discretion). Given this statutory and jurisprudential context, we conclude that the applicable standard of review is abuse of discretion.

{24} "To establish an abuse of discretion, it must appear the district court acted unfairly or arbitrarily, or committed manifest error." *Green*, 2015-NMCA-007, ¶ 22 (alteration, internal quotation marks, and citation omitted). "[A] district court abuses its discretion when its decision is not supported by substantial evidence." *State v. Solano*, 2009-NMCA-098, ¶ 7, 146 N.M. 831, 215 P.3d 769 (internal quotation marks and citation omitted). Here, the district court found that "[t]here were two violations," and that although "Defendant has made progress," the district court nonetheless concluded that Defendant should remain on probation for another two and one-half years, with the same terms and conditions as before but without GPS monitoring. It does not appear from the district court's ruling that it relied upon the State's arguments regarding Defendant's statement during his PSR interview

that he could reoffend if under stress, or that because Defendant served part of his probation in custody, he should remain on probation longer.

{25} Substantial evidence supports the district court's finding of two violations of the terms and conditions of Defendant's probation. Defendant's probation officer filed reports on two GPS violations, and Defendant does not contest the district court's finding of two violations on appeal. Although with respect to one violation, Defendant argued during the hearing that he was not aware that his GPS unit was out of contact, and with respect to the other violation, Defendant argued that he plugged in his GPS unit as soon as he was realized it was dead, Defendant does not dispute the underlying violations. Defendant's probation officer also believed Defendant would benefit from continued probation. We recognize that such might often be the case when a defendant performs well on probation, but predominately good performance while on probation cannot be held to mandate a conclusion that probation should be terminated and not continued for a longer period of time. But more to the nature of our review on appeal, the State met its burden of proof of reasonable certainty by presenting this evidence during the hearing. Given this evidence, coupled with the fact that the district court both extended probation but also eliminated GPS monitoring in recognition of Defendant's progress, we cannot agree with Defendant that the district court abused its discretion by extending his sex offender probation for an additional period of two and one-half years.

CONCLUSION

{26} For the foregoing reasons, we conclude that Section 31-20-5.2(B) is not unconstitutionally vague, and we affirm the district court's granting of the State's motion for Defendant to remain on probation under Section 31-20-5.2(B).

{27} IT IS SO ORDERED.
J. MILES HANISEE, Judge

WE CONCUR:
JACQUELINE R. MEDINA, Judge
CYNTHIA A. FRY, Judge Pro Tempore

From the New Mexico Court of Appeals

Opinion Number: 2019-NMCA-069
No. A-1-CA-37230 (filed August 8, 2019)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
QUINTIN C.,
Child-Appellant.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
DANIEL A. BRYANt, District Judge

Released for Publication November 12, 2019.

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Opinion

Megan P. Duffy, Judge.

{1} Child appeals his conviction for violating NMSA 1978, Section 30-20-13(D) (1981), which criminalizes willful interference with the educational process by threatening to commit any act that would disrupt the lawful mission, processes, procedures or functions of the school, arguing that the evidence is insufficient to sustain his conviction and that the statute, as applied to his speech in this case, violated his First Amendment rights. Because the record demonstrates that the mens rea element of this offense was evaluated under an incorrect general intent standard, we reverse and remand for a new trial.

BACKGROUND

{2} Child, age fourteen, and J.E., age eleven, were students at Capitan Middle School and High School. The school followed a four-day school week, and during the school bus ride home for the weekend on a Thursday afternoon, J.E. sat across the aisle from Child. J.E. saw that Child had a camera and asked Child to take his picture; Child did so. J.E. asked Child why he brought his camera to school, and Child responded, "I'm making a kill list." **{3}** J.E. was bothered by the statement and moved to a different seat. The next morning, he told his mother what had happened, and when school reconvened the following Monday morning, J.E. arrived at 7:15 a.m. and told the school principal, Patti Nesbitt, what Child had said on the bus. Ms. Nesbitt informed the school counselor, Theresa Kennedy, and the two of them spoke with Child that morning. Ms. Nesbitt informed Child that school officials had received a report about his "hit list"; Child corrected her and said that it was a "kill list."

{4} Child did not bring a weapon to school on Monday and when Ms. Nesbitt searched his camera, laptop, and Kindle, she discovered only four photos, all people Child stated were his friends. The photos did not include a photo of J.E. Ms. Nesbitt contacted Defendant's grandmother and Ms. Kennedy called the police. Ms. Nesbitt further testified that the police investigation took about four hours, which interfered with her normal duties.

{5} On January 31, 2018, the State filed a petition alleging that Child was a delinquent child and asserted two counts against him—Count 1 for attempt to commit aggravated assault with intent to commit a violent felony, contrary to NMSA 1978, Section 30-3-3 (1977) ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder[.]"), and Count 2 for violation of the school interference statute, contrary to Section 30-20-13(D). One day before trial, the State dismissed Count 1, concluding that it did not have sufficient evidence to prove that charge, and the parties proceeded with a bench trial on Count 2. The State called four witnesses: J.E., Ms. Nesbitt, Ms. Kennedy, and the police chief who participated in the investigation on the date of the incident. The defense called no witnesses. The district court found that Child had committed the delinquent act of violating Section 30-20-13(D) and sentenced him to two years' probation.

DISCUSSION

{6} Although Defendant challenges the sufficiency of the evidence to support his conviction, his argument fundamentally challenges whether the evidence in this case constitutes the charged offense. *See State v. Barragan*, 2001-NMCA-086, ¶ 24, 131 N.M. 281, 34 P.3d 1157 ("Although framed as a challenge to the sufficiency of evidence, [the d]efendant's argument requires us to engage in statutory interpretation to determine whether the facts of this case, when viewed in the light most favorable to the verdict, are legally sufficient to sustain a conviction[.]"), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110. The parties disagree on the standard required for conviction under Section 30-20-13(D), including what intent is required and whether the statute itself is unconstitutional as applied in this case because it criminally punishes speech. Thus, in order to evaluate the sufficiency of the evidence to support Child's conviction, we must first evaluate the statutory standard required to sustain a conviction. "Interpreting the relevant statute[] is a question of law, which we review de novo." *State v. Herbstman*, 1999-NMCA-014, ¶ 16, 126 N.M. 683, 974 P.2d 177. "After reviewing the statutory standard, we apply a substantial evidence standard to review the sufficiency of the evidence at trial." *State v. Chavez*, 2009-NMSC-035, ¶ 11, 146 N.M. 434, 211 P.3d 891.

I. Section 30-20-13(D)

{7} The Legislature enacted Section 30-20-13 in 1970, a time when states across the country were adopting similar statutory provisions in response to organized disturbances on college campuses. *See In re Jason W.*, 837 A.2d 168, 172-73 (Md. 2003) ("The broadening and focused application of trespass, disorderly conduct, or school disturbance laws was then a national phenomenon."); *id.* at 173 ("The focus in 1970 . . . was on riots and organized demonstrations and disturbances that actually impeded the schools from carrying out their administrative and educational functions."); *see also* Sheldon R. Shapiro, Annotation, *Participation of Student in Demonstration on or Near Campus as Warranting Imposition of Criminal Liability for Breach of Peace, Disorderly Conduct, Trespass, Unlawful Assembly, or Similar Offense*, 32 A.L.R. 3d 551 (1970). The statute originally focused on interference occurring in or at public buildings. *See State v. Silva*, 1974-NMCA-072, ¶¶ 2-3, 86 N.M. 543, 525 P.2d 903 (addressing the constitutionality of a prior version of Section 30-20-13(C) following a sit-in at the

Eastern New Mexico University president's office, where police arrested the defendant after the university president repeatedly requested that those present leave). But in 1981, the Legislature added Subsection (D), which provides:

> No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

Section 30-20-13(D). A violation of Subsection (D) is a petty misdemeanor. Section 30-20-13(F).

{8} In its nearly forty-year history, Subsection (D) has not been construed by an appellate court in New Mexico. Federal courts, however, have evaluated the provision in several recent cases when considering whether arresting officers had probable cause to arrest children for actions undertaken at school that interfered with school or educational functions. *See, e.g.*, *Scott v. City of Albuquerque*, 711 F. App'x 871, 873-74 (10th Cir. 2017) (discussing a middle school student's underlying arrest after leaving class early); *A.M. v. Holmes*, 830 F.3d 1123, 1148 (10th Cir. 2016) (discussing a middle school student's underlying arrest for "repeatedly fake-burping, laughing, and (later) leaning into the classroom"); *Castaneda v. City of Albuquerque*, 276 F. Supp. 3d 1152, 1158 (D.N.M. 2016) (discussing a student's underlying arrest, which occurred after student had forgotten about his in-school suspension and reported to his regularly scheduled class, after which a detective allegedly came to student's classroom, searched his backpack and pockets, handcuffed student with zip ties, and transported him to the juvenile detention center); *G.M. ex rel. B.M. v. Casalduc*, 982 F. Supp. 2d 1235, 1240 (D.N.M. 2013) (discussing a middle school student's underlying arrest after refusing multiple requests to stop texting in class).

{9} Our evaluation and interpretation of our school interference statute presents a question of law that we review de novo. *See Chavez*, 2009-NMSC-035, ¶ 10; *see also State v. Granillo*, 2016-NMCA-094, ¶ 13, 384 P.3d 1121 (stating that defining the mens rea applicable to the crime is a question of law that we review de novo). We are guided in our analysis by the longstanding, fundamental principle that "[a] criminal statute must be strictly construed and may not be applied beyond its intended scope for it is a fundamental rule of constitutional law that crimes must be defined with appropriate definiteness." *State v. Stephenson*, 2017-NMSC-002, ¶ 12, 389 P.3d 272 (alteration, internal quotation marks, and citation omitted). "Therefore, we will not read a criminal statute to apply to particular conduct unless the legislative proscription is plain." *Id.* (internal quotation marks and citation omitted).

A. Mens Rea

{10} We begin our statutory analysis by examining what mental state is required for conviction. Section 30-20-13(D) requires proof that a person "willfully interfere[d]" with the educational process by committing one of three acts set forth in the statute: (1) "committing," (2) "threatening to commit," or (3) "inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school." Defendant argues that the statute, by inclusion of the word "willfully," requires proof that he intended that his statement would create a disruption at school. The State argues that only general intent is necessary—that Defendant was aware of what he was doing when he made the threat and that there was no just cause or lawful excuse for making it. *See* 21 Am. Jur. 2d Criminal Law § 113 (2019) (footnote omitted) ("To prove general intent, the state is not obligated to prove an intent to violate a particular statute but rather the intent to do the criminal act that violated the statute; in other words, all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing."); *see also State v. Brown*, 1996-NMSC-073, ¶ 22, 122 N.M. 724, 931 P.2d 69 ("A general intent crime . . . requires only a conscious wrongdoing, or the purposeful doing of an act that the law declares to be a crime." (internal quotation marks and citation omitted)).

{11} In Section 30-20-13(D), the Legislature declared that a person who "willfully" interferes with the educational process is subject to criminal punishment. "Willfully" connotes an element of mens rea, but the Legislature's use of the word "willfully" in the statute is not dispositive of either specific or general intent—it has been used in both contexts within criminal statutes. *Compare State v. Elliott*, 2001-NMCA-108, ¶ 12, 131 N.M. 390, 37 P.3d 107 (holding that NMSA 1978, Section 31-3-9 (1999), which penalizes the "willful failure to appear," is not a specific intent statute because "[t]he crime of failure to appear does not require any intent to do a further action or achieve a further consequence"), *with Holguin v. Sally Beauty Supply Inc.*, 2011-NMCA-100, ¶¶ 18-19, 29, 150 N.M. 636, 264 P.3d 732 (evaluating statutory provision allowing a merchant to detain a customer who has willfully concealed merchandise and holding that the term "willfully" requires that the customer do more than merely put merchandise out of sight, it also requires a specific intent to convert merchandise without paying for it). Moreover, "willfully" does not enjoy a universal definition in New Mexico and has not otherwise been defined by statute or uniform jury instruction.[1] Nevertheless, "willfully" is regularly equated with the concept of intentional conduct. *See, e.g.*, *Anderson v. Territory*, 1887-NMSC-019, ¶ 3, 4 N.M. 213, 13 P. 21 (" 'Willfully' means that the act charged was intentionally done, and was not the result of accident or misfortune." (internal quotation marks and citation omitted)); *Willful, Black's Law Dictionary* (11th ed. 2019) (defining "willful" as "[v]oluntary and intentional, but not necessarily malicious"); *id.* (defining "willfulness" as "[t]he quality, state, or condition of acting purposely or by design; deliberateness; intention").

{12} Applying this meaning, Section 30-20-13(D) punishes "intentional interference" with the educational process, thus indicating that a violation of the school interference statute occurs when interference is the intended result, as opposed to an inadvertent or unintentional consequence. The Tenth Circuit Court of Appeals recently construed the intent requirement in Section 30-20-13(D) similarly, stating that the "New Mexico [L]egislature sought to bar conduct that was *designed to* 'interfere with the educational process,' rather than conduct that merely happened to have that effect." *Scott*, 711 F. App'x at 877; *id.* at 876 ("The word 'willfully' suggests that a violation occurs only when a person acts with the conscious objective of 'interfering with the educational process.' " (alteration omitted)). "In other words, it is not enough that a person simply commits an act that disrupts the functions of a school; to violate [S]ection 30-20-13(D), that person must act with the conscious purpose of interfering with the educational process." *Id.* at 876 (alterations, omission, internal

[1]State v. Billington, 2009-NMCA-014, ¶ 13, 145 N.M. 526, 201 P.3d 857 (" 'Willfully' denotes the doing of an act without just cause or lawful excuse." (quoting State v. Masters, 1982-NMCA-166, ¶ 8, 99 N.M. 58, 653 P.2d 889)); State v. Elliott, 2001-NMCA-108, ¶ 63, 131 N.M. 390, 37 P.3d 107 (same); State v. Rosaire, 1996-NMCA-115, ¶ 16, 123 N.M. 250, 939 P.2d 597 ("We interpret 'willfully,' as used in [NMSA 1978,] Section 33-2-46 [(1980)], to mean a conscious, purposeful failure to return within the time fixed as distinguished from an involuntary failure to return."), aff'd, 1997-NMSC-034, ¶ 15, 123 N.M. 701, 945 P.2d 66; State v. Elmquist, 1992-NMCA-119, ¶ 3, 114 N.M. 551, 844 P.2d 131 ("The term 'willful' has been defined as requiring proof that the person acted intentionally in the sense that he was aware of what he was doing."); State v. Sheets, 1980-NMCA-041, ¶ 48, 94 N.M. 356, 610 P.2d 760 ("To meet the willfulness requirement, all that is required is proof that the person acted intentionally in the sense that he was aware of what he was doing.").

quotation marks, and citation omitted)). We agree with this reading. So construed, Section 30-20-13(D) refers to a defendant's intent to "do some further act or achieve some additional consequence"—interference with the educational process—and therefore, Section 30-20-13(D) is a specific intent crime. *State v. Bender*, 1978-NMSC-044, ¶ 7, 91 N.M. 670, 579 P.2d 796 ("When the definition refers to [the] defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (internal quotation marks and citation omitted)).

B. Actus Reus

{13} The actus reus of the offense in this case is "threatening to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school." Section 30-20-13(D). Child argues that when Section 30-20-13(D) is used to punish threats, the statute unconstitutionally regulates speech. The State responds that Child's words constituted a "true threat" and are not constitutionally protected speech.

{14} While "[t]he First Amendment to the United States Constitution prohibits the government from enacting laws abridging the freedom of speech[,] . . . neither the United States nor the New Mexico Constitution[2] provides an absolute right to free speech." *Best v. Marino*, 2017-NMCA-073, ¶ 23, 404 P.3d 450 (stating that certain categories of speech are not protected by the First Amendment, including "advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent" (internal quotation marks and citations omitted)), *cert. denied*, 2019-NMCERT-___ (No. S-1-SC-36586, Aug. 31, 2017). True threats enjoy no constitutional protection, and to the extent Section 30-20-13(D) is used to punish true threats, as the State contends here, the statute does not run afoul of the First Amendment. *See State v. Garcia*, 2013-NMCA-005, ¶¶ 20-21, 294 P.3d 1256 (stating that conduct that constitutes a true threat "is outside the realm of First Amendment protection"); *see also Virginia v. Black*, 538 U.S. 343, 344 (2003) ("[T]he First Amendment permits a State to ban 'true threats,' which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals[.]" (citations omitted)).

{15} When a true threat is involved, the mens rea standard described above is what distinguishes criminal school interference from assault, also a petty misdemeanor. *See* NMSA 1978, § 30-3-1(B) (1963) (stating that "assault" consists of a "threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery"). Section 30-20-13(D) addresses the effect threats are intended to have upon the educational process, rather than the effect they have upon the person; as the State correctly observed, Section 30-20-13(D) "is designed to allow schools to teach and students to learn without interference." The State, having chosen to prosecute Child under Section 30-20-13(D) for school interference, must therefore prove that Child made a threat and that when making the threat, Child intended to interfere with the educational process.

II. Substantial Evidence

{16} Having clarified the standard for a conviction, we turn to the evidence presented at trial to determine whether Child's conviction is supported by sufficient evidence. The district court made thorough and detailed findings at the conclusion of trial and we begin by reviewing the district court's findings on the mens rea element:

> Turning to the mens rea issue, the court finds that . . . when you look at the UJI that talks about intent and mens rea, we are able to discern intent not merely from what is said or from testimony that would elicit what did you mean [and] what did you want, but we are able to look at all of the facts and circumstances in the case. And on the willfulness circumstance, the court finds these factors . . . in our evidence today sufficient to satisfy the burden beyond a reasonable doubt: Number one, the way the conversation occurred between [J.E.] and [Child] on the bus is such that there is this curious conversation going on about the camera. . . . And when you examine the time progression of that testimony, the conversation went to . . . "Why do you have the camera?" And our [Child] looks at the young man he just took a picture of, and he says, "I'm making a kill list." And I think that supports a willfulness standard in this case. Then, turning to the balance of it, when we get to school on Monday and we have a conversation about a "hit list," the correction is made to a "kill list." And so I find that . . . those two circumstances *demonstrate the willfulness and demonstrate the elements of general intent necessary* to support a finding that [Child] committed the delinquent act of violating [Section] 30-20-13(D).

(Emphasis added.) In finding that the willfulness element was satisfied, the district court focused on whether Child intended to make the statement—the general intent standard—rather than whether Child's intention in making the statement was to interfere with the educational process. The district court did not make any findings regarding Child's specific intent to interfere with the educational process. Certainly, the district court should not be faulted given the absence of any prior interpretation of Section 30-20-13(D) by a New Mexico appellate court. Nevertheless, given our interpretation of Section 30-20-13(D), it appears that an incorrect legal standard was applied to determine Child's guilt. *See State v. Gonzales*, 1999-NMCA-027, ¶ 9, 126 N.M. 742, 975 P.2d 355 ("It is a bedrock principle of appellate practice that appellate courts do not decide the facts in a case. Fact-finding is the task of the trial judge or the jury. Our role is to determine whether the lower court has applied the law properly.").

{17} "In a bench trial, the trial judge takes the place of the jury as the finder of fact[,]" and "[i]n this respect, the situation in this appeal is similar to an appeal predicated upon an error in an instruction of law given to a jury." *State v. Meisel*, 2011-Ohio-6426, ¶ 43 (holding that the trial court applied an incorrect legal standard to the elements of self-defense and reversing and remanding to the trial court to apply the correct law to the facts). In circumstances where the jury is incorrectly instructed on an element at issue in the case, our Supreme Court has said that "the error could be considered fundamental: The question of guilt would be so doubtful that it would 'shock the conscience' of this Court to permit the conviction to stand." *State v. Orosco*, 1992-NMSC-006, ¶ 9, 113 N.M. 780, 833 P.2d 1146. Further, " '[i]f an instruction is facially erroneous it presents an incurable problem and mandates reversal.' " *State v. Suazo*, 2017-NMSC-011, ¶ 26, 390 P.3d 674 (holding that the jury instruction misstated the mens rea element of second-degree murder and was therefore error requiring reversal (internal quotation marks and citation omitted)). Because the record indicates that the district court applied an incorrect legal standard to an essential element of this offense, we are compelled to reverse Child's conviction. *See, e.g.*, *State v. Wiborg*, 396 P.3d 258, 259-60 (Or. Ct. App. 2017) (reversing and remanding for a new trial after the appellate court concluded that "the trial court applied an incorrect legal standard with regard to [an] element of the offense and, thus, did not make a finding on

[2]The parties did not raise any argument under Article II, Section 7 of the New Mexico Constitution, or argue that it provides greater protection than its federal counterpart. *See State v. Gomez*, 1997-NMSC-006, ¶¶ 22-23, 122 N.M. 777, 932 P.2d 1 (discussing the interstitial approach to preserving a question under the New Mexico Constitution).

an element necessary to convict."); *Commonwealth v. Scott*, 176 A.3d 283, 292 (Pa. Super. Ct. 2017) ("The trial court erred by applying an incorrect legal standard and finding [the defendant] guilty[.] . . . Accordingly, [the court] must vacate the judgment of sentence and remand for a new trial.").

{18} Because we reverse, "we are required to determine whether sufficient evidence was presented to support [the] conviction[] to avoid double jeopardy concerns should the [s]tate seek to retry [Child]." *State v. Samora*, 2016-NMSC-031, ¶ 34, 387 P.3d 230; *State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 ("If we find that sufficient evidence was presented at trial to support a conviction, then retrial is not barred."). "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *State v. Salgado*, 1999-NMSC-008, ¶ 25, 126 N.M. 691, 974 P.2d 661 (internal quotation marks and citation omitted). Reviewing courts "view the evidence in the light most favorable to the guilty verdict[.]" *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. As with our review when defective jury instructions mandate reversal, we evaluate whether the evidence was sufficient to sustain a conviction not under the instructions that should have been given, but rather, under the erroneous jury instructions that were given. *See Dowling*, 2011-NMSC-016, ¶ 18.

{19} Applying the general intent standard pursuant to *Dowling*, we hold that sufficient evidence was presented at trial to support the conviction. *See id.* The district court made detailed findings about Child's initial statement on the bus and his actions when questioned about it on Monday morning, concluding that "all of those circumstances satisfy a concern that there might be a propensity to actually engage in that conduct." The State presented testimony that Child, after being asked why he had his camera at school and taking a picture of another student, said the reason he had his camera was that he was making a kill list. After J.E. reported the incident to the principal, Ms. Nesbitt, on Monday morning, she asked Child about it, saying there was a report of a "hit list." He corrected her and said, "No, it's a 'kill list.' " Ms. Nesbitt interpreted this to mean a list involving targets and that students might be in jeopardy. Ms. Nesbitt further testified that she took the statement seriously and felt she needed to call the police when Child corrected her from "hit list" to "kill list" and because a student was afraid and felt threatened. Further, as set forth above, the district court relied on Child's initial statement and his repetition and clarification of those words on Monday morning, without condition, explanation, or indication that he was not serious, to support a finding that Child willfully made his "kill list" statements. We agree with this analysis under the general intent approach employed by the district court. Viewing the evidence in the light most favorable to the verdict, we conclude that sufficient evidence supported the conviction, and retrial is therefore permissible.

CONCLUSION

{20} For the foregoing reasons, we reverse Child's conviction and remand for a new trial consistent with this opinion.

{21} IT IS SO ORDERED.
MEGAN P. DUFFY, Judge

WE CONCUR:
J. MILES HANISEE, Judge
JACQUELINE R. MEDINA, Judge

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The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program, approximately 20 hours per week, requiring the attorney to review, approve and negotiate agreements concerning traffic law violations. The attorney will also assist in areas of real estate and land use, governmental affairs, regulatory law, procurement, general commercial transaction issues, and civil litigation. The department's team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on matters before administrative tribunals and in New Mexico State and Federal courts. This is an excellent position for newly licensed attorneys seeking to establish themselves within the legal field of governmental affairs, or for more experienced attorneys desiring to provide public service. Attention to detail and strong writing skills are essential. Applicant must be an active member of the State Bar of New Mexico in good standing or able to attain bar membership within three months of hire. Salary will be based upon experience. Please submit a cover letter, resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

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The City of Albuquerque Legal Department is hiring an Assistant City Attorney to provide legal services to the City's Department of Municipal Development ("DMD"). The primary area of focus is public works construction law. The work includes, but is not limited to: contract drafting, analysis, and negotiations; regulatory law; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department DMD Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

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The New Mexico Public Defender Department (LOPD) provides legal services to qualified adult and juvenile criminal clients in a professional and skilled manner in accordance with the Sixth Amendment to United States Constitution, Art. II., Section 14 of the New Mexico State Constitution, Gideon v. Wainright, 372 U.S. 335 (1963), the LOPD Performance Standards for Criminal Defense Representation, the NM Rules of Professional Conduct, and the applicable case law. Contract Counsel Legal Services (CCLS) is seeking qualified applicants to represent indigent clients throughout New Mexico, as Contract Counsel. The LOPD, by and through CCLS, will be accepting Proposals for the November 1, 2020 – October 31, 2021 contract period. All interested attorneys must submit a Proposal by June 29, 2020 at 4:00 p.m. to be considered. For additional information, attorneys are encouraged to search the LOPD website (http://www.lopdnm.us) to download the Request for Proposals, as well as other required documents. Confirmation of receipt of the Request for Proposals must be received by email (ccls_RFP_mail@ccls.lopdnm.us) no later than midnight (MDT) on May 27, 2020.

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The Federal Public Defender for the District of New Mexico is seeking a full time, experienced trial attorney for the branch office in Las Cruces. More than one vacancy may be filled from this announcement. Federal salary and benefits apply. Applicant must have one year minimum criminal law trial experience, be team-oriented, exhibit strong writing skills as well as a commitment to criminal defense for all individuals, including those who may be facing the death penalty. Spanish fluency preferred. Writing ability, federal court, and immigration law experience will be given preference. Membership in the New Mexico Bar is required within the first year of employment. The private practice of law is prohibited. Selected applicant will be subject to a background investigation. The Federal Public Defender operates under authority of the Criminal Justice Act, 18 U.S.C. ' 3006A, and provides legal representation in federal criminal cases and related matters in the federal courts. The Federal Public Defender is an equal opportunity employer. Direct deposit of pay is mandatory. In one PDF document, please submit a statement of interest and detailed resume of experience, including trial and appellate work, with three references to: Stephen P. McCue, Federal Public Defender, FDNM-HR@fd.org. Reference 2020-04 in the subject. Writing samples will be required only from those selected for interview. Applications must be received by June 5th, 2020. Positions will remain open until filled and are subject to the availability of funding. No phone calls please. Submissions not following this format will not be considered. Only those selected for interview will be contacted.

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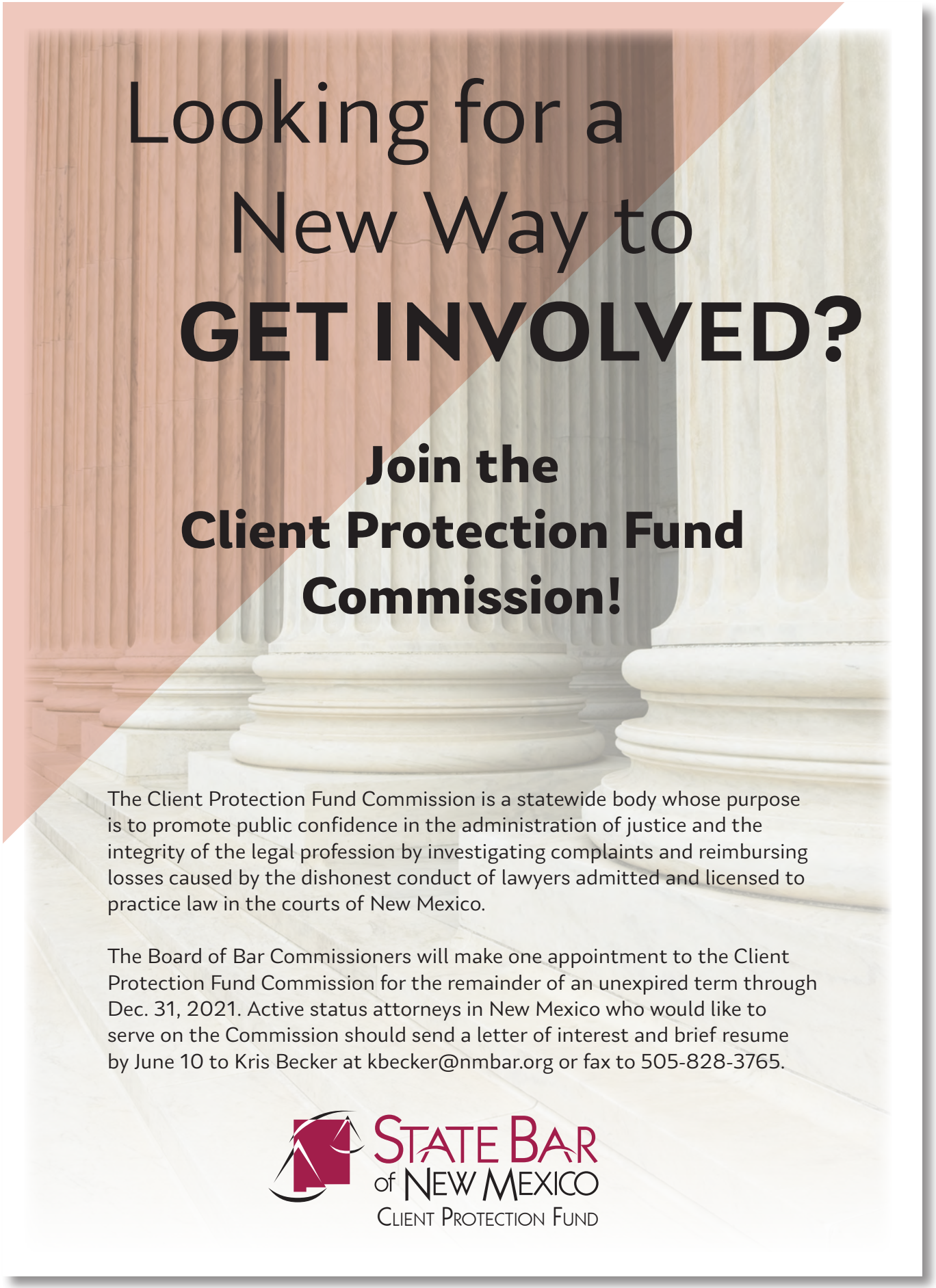

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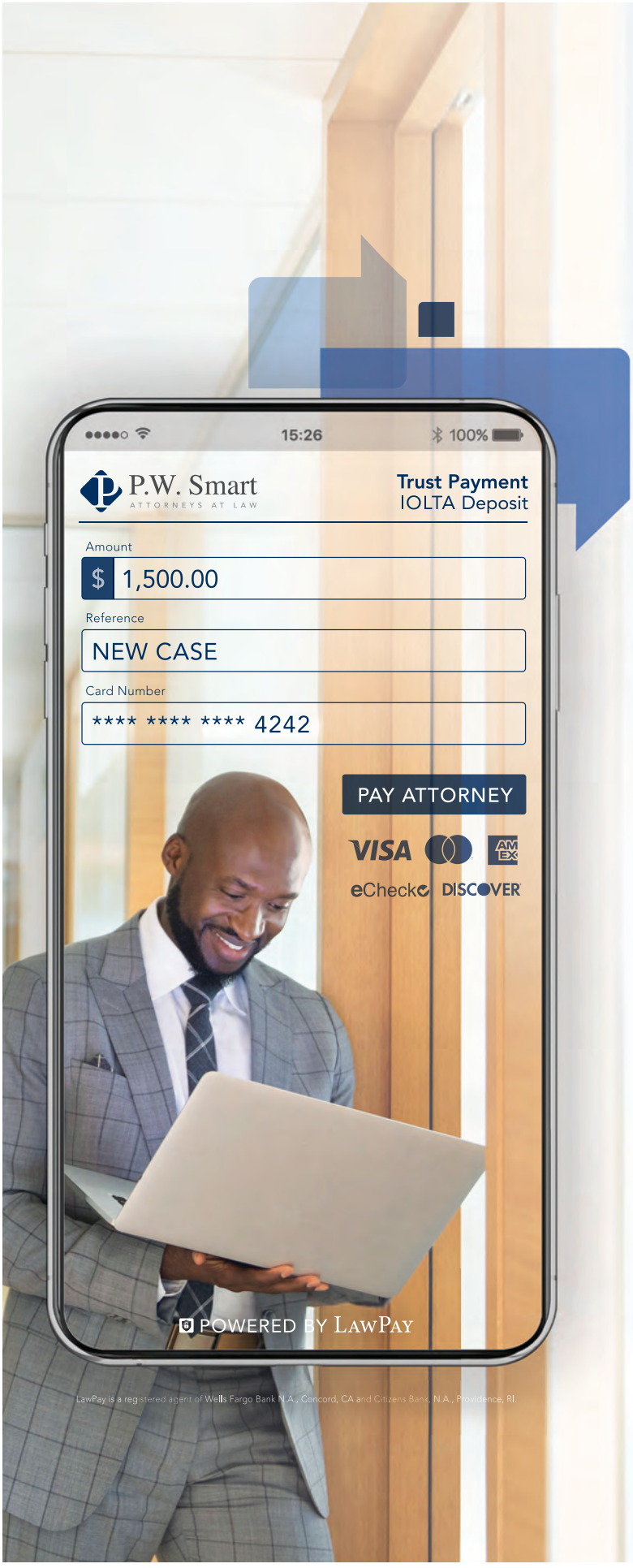

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