STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT COURT

No. D-1113-CV-2025-00281

K12 VIRTUAL SCHOOLS L.L.C.,
a Delaware limited liability company,

Plaintiff,

v.

BOARD OF EDUCATION FOR THE
GALLUP-MCKINLEY COUNTY SCHOOLS,

Defendant.

MOTION FOR IMPOSITION OF URGENT PROVISIONAL REMEDIES UNDER THE NEW MEXICO UNIFORM ARBITRATION ACT, INCLUDING ISSUANCE OF TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND FOR EXPEDITED HEARING

Plaintiff K12 Virtual Schools, L.L.C. ("K12"), by and through its undersigned counsel, and pursuant to NMSA 1978, § 44-7A-9(a) and Rule 1-066 NMRA, moves this Court for entry of provisional remedies to protect the effectiveness of the agreed upon arbitration proceeding contained in Section 22.2 of the Educational Products and Services Agreement between Gallup-McKinley County School District and K12 Virtual Schools L.L.C. ("the Contract"). These remedies include the entry of a temporary restraining order and/or preliminary injunction, to maintain the *status quo* pending arbitration, against the Gallup-McKinley County School District, a political subdivision of the State of New Mexico acting through the Board of Education for the Gallup-McKinley County Schools and its designees (together the "District"), and to enjoin the District from further breaching the Contract, including from terminating the Contract in violation of its terms and seeking to award a new contract to another educational services provider pursuant to an improperly issued Request for Proposals ("RFP"), all in violation of the Contract.

INTRODUCTION

As more fully set forth in the for Application for Provisional Remedies Under New Mexico Uniform Arbitration Act and/or Preliminary Injunctive Relief Pending Arbitration (the "Application") and affidavits and exhibits attached thereto, all of which are incorporated by reference herein, the District, at the behest of the Superintendent of Schools, Mr. Mike Hyatt ("Superintendent Hyatt"), intends to cancel the Contract and award a new educational services contract to a different provider, in violation of the express terms of the Contract and based solely upon the improper and unethical personal motivations of Superintendent Hyatt. As detailed in the Application, Mr. Hyatt applied for a position with K12, including requesting a salary of $235,000.00, in clear violation of the New Mexico Government Conduct Act, NMSA 1978 Sections 10-16-1 to -18 ("GCA"), and the New Mexico Procurement Code, NMSA 1978 Sections 12-1-28 through 13-1-199 ("Procurement Code"). When K12 declined to hire Superintendent Hyatt for the position, he immediately embarked upon a course of action the sole purpose of which has been to impede K12's ability to perform under the Contract and to cause the Contract to be terminated, actions profoundly detrimental to the interests of the K12, the citizens of McKinley County and the children and their families receiving educational services under the Contract. The District, at the behest of Superintendent Hyatt, now intends to implement a Contract termination process in violation of the law and the express terms of the Contract at its upcoming meeting on May 16, 2025, at 9:45 am, leading, under a pending RFP process, to the improper awarding of a new educational services contract to a different provider.

These actions, and those more fully detailed in the Application, are in direct violation of the plain terms of the Contract. Such actions are also illegal, in violation the Procurement Code and the Open Meetings Act, and are being undertaken by the District at the behest of Superintendent Hyatt in flagrant violation of his duties and responsibilities as Superintendent of

Schools and the GCA. If not halted immediately, both K12 and the students who are being served under the Contract will suffer irreparable harm that cannot be cured. This motion should be granted to prevent further Contract breaches by the District and preserve the *status quo* pending arbitration.

POINTS AND AUTHORITIES

I. K12 SATISFIES THE LEGAL STANDARD FOR GRANTING PROVISIONAL REMEDIES UNDER THE NEW MEXICO ARBITRATION ACT.

The Contract provides for arbitration and, accordingly, K12 has simultaneously filed a demand for arbitration with the American Arbitration Association ("AAA"). This Court nonetheless has authority, prior to the appointment of an arbitrator, to order and enter provisional remedies, like exigent injunctive relief, to maintain the *status quo* of the parties and "to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action." NMSA 1978, § 44-7A-9(a).[1] The party requesting the provisional remedies prior to appointment of the arbitrator must only show "good cause" for the provisional remedies requested. *See id.* K12 has filed its Application and this Motion solely to maintain the *status quo* and halt the District's improper conduct until the arbitrator, once empaneled, can address the claims set forth in the Demand for Arbitration on the merits. Preventing continued improper conduct by the District until an arbitrator is appointed constitutes good cause and warrants issuance of an order granting the provisional remedies sought by K12 herein. *See e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,* 756 F.2d 1048, 1053-54 (4th Cir. 1985) (where a dispute is subject to mandatory arbitration, "a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow

[1] The Act makes clear that the filing of a request for provisional remedies, including this motion, is not a waiver of K12's right to enforce the arbitration proceeding. NMSA 1978, § 44-7A-9(c).

formality.' The arbitration process would be a hollow formality where the arbitral award when rendered could not return the parties substantially to the *status quo ante.*").

Education programs are not interchangeable. K12 has developed this program over the past five (5) years into a large and successful virtual education program. The teachers, the curriculum, the content and the on-line platform belong to K12. *See* Contract § 14. Only one year remains under the initial Contract term. Attempting to substitute a new provider, on short notice, for the rapidly approaching new school year will not maintain the *status quo.*

II. K12 ALSO SATISFIES THE REQUIREMENTS FOR GRANTING A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION.

A temporary restraining order is properly issued by a court if it "clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result." *See* Rule 1-066(B)(1) NMRA. To obtain a preliminary injunction, K12 must show: (1) it will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood that K12 will prevail on the merits. *LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993) (citation omitted). K12 can demonstrate all four of these factors and, thus, this motion should be granted.

A. K12 Will Suffer Irreparable Injury Unless A Temporary Restraining Order And/Or Preliminary Injunction Is Granted.

"'Irreparable injury' is an injury . . . for which compensation cannot be measured by any certain pecuniary standard." *State ex rel. State Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128. Said differently, "[d]amages are an inadequate remedy if they are difficult to calculate." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc*., 281 S.W.3d 215, 229 (Tex. App. 2009). Typically, "loss of goodwill and other intangibles" are

"injuries to which a dollar value may not easily be assigned." *Id. See, e.g., Royal Int'l Optical Co. v. Texas State Optical Co.*, 92 N.M. 237, 239, 586 P.2d 318, 320 (Ct. App. 1978) (trial court issued restraining order to prevent dilution of trade name and business reputation). The phrases "irreparable injury" and "no adequate remedy at law" tend to overlap. *State ex rel. State Highway & Transp. Dep't of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128.

Here, first, K12 will suffer an incalculable loss of "goodwill" and dilution of its trade name and business reputation if the Contract were to be improperly cancelled.[2] These are "injuries to which a dollar value may not easily be assigned." It is axiomatic that the value of K12's "goodwill" and its credibility in the virtual education market are based in large part upon its reputation. Considering that such irreparable reputational injury would be the result of wholly contrived and untrue breach of contract claims asserted against K12 by Superintendent Hyatt, vindictively and based solely upon improper and unethical personal motives, maintaining the *status quo* until these claims can be arbitrated is fully justified. Should the District cancel the Contract through an improper process and prior to arbitration, effectively foreclosing K12's contractual right to cure alleged breaches, to the outside world it will appear that the Contract was cancelled for cause, when in fact K12 will prove at arbitration that there is no legitimate cause to cancel the Contract. It would be impossible to quantify the harm to K12's reputation and goodwill if that were to happen.

In addition, the Contract includes an exclusivity clause which states that "the School District shall not procure goods and services from a third party that are otherwise included in the Educational Products and Services provided by K12 under this Agreement." Contract § 6.1.1. The issuance by the District of the RFP to award a contract for these services to a different

[2] The Board has explicitly acknowledged in the Contract that K12 possess a valuable trade name, reputation and "goodwill." *See* Contract at § 14 and Ex. B.

provider, before K12 had been afforded its full right to "cure" alleged breaches, was a clear, direct and egregious violation by the District of the express exclusivity provision of the Contract. Without an injunction, the District's conduct would irreversibly alter the *status quo*. Where, as here, the parties are contractually bound to resolve unresolved disputes in arbitration, such a fundamental alteration of the *status quo* constitutes irreparable harm to K12. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Brady, supra.*

This Court should also consider the irreparable harm that would be suffered by students currently enrolled in the program, and their families, if the District is not stopped from precipitously and improperly terminating the Contract. The Destinations Career Academy of New Mexico ("NMDCA") currently has over 4,200 students from around the state, many from rural areas without a nearby "bricks & mortar" school. The NMDCA student body is very diverse, including 60.1% Hispanic/Latino, 13.2% Native American and 3.1% African American. Many of NMDCA's students and their families have selected this virtual education option because of the flexibility it provides, and because their traditional "bricks & mortar" school did not meet their needs.[3] Particularly after COVID and the struggles students around New Mexico faced with completing courses, many NMDCA students enroll in the program with a shortage of credits, and NMDCA has helped them to get caught up and succeed. A sudden and arbitrary termination of this Contract by the District means that many students would face the difficult decision of returning to a traditional "bricks & mortar" school or re-integrating into another virtual school option with different teachers and curricula, and for many they would lose the support structure that NMDCA has provided for several years. Indeed, a recent parent satisfaction survey shows that in overall satisfaction, parents on average rated the program high

[3] The virtual education option is also attractive to students and their families where in-school "bullying" is a concern.

at 4.5 out of 5. Clearly, the program's students and their families would suffer irreparable harm from the abrupt and unwarranted cancellation of the Contract.

B. The Actual And Threatened Injury Outweighs Any Damage The Preliminary Injunction Might Cause To The District.

The Contract is in place and the programs and services provided thereunder are operating as intended. The students enrolled in the program are receiving the educational benefits that they have received for the past five (5) years pursuant to the Contract. The District agreed to arbitrate any and all disputes arising in connection with the Contract. Superintendent Hyatt's false claims of contract breaches by K12 are arbitrable disputes, as are the questions whether the District's termination process has violated the Contract, and whether the District will have breached the Contract by awarding a new contract to a different provider pursuant to the RFP, which the District issued in violation of the Contract and the Procurement Code. The threatened injury to K12 and to the students in the program and their families greatly outweighs any perceived harm that simply preserving the *status quo* might cause to the District. Under all of the circumstances, the harm to K12 and the children and families in the program greatly outweighs the contrived need for the drastic and unwarranted action being contemplated by the District.

C. Issuance Of A Preliminary Injunction Will Not Be Adverse To The Public's Interest.

As discussed above, the public's interest – in particular, the interests of the program's students and their families – would be best served by maintaining the *status quo* and allowing the program to continue to operate as it has done successfully for the past five (5) years, pending arbitration of the current disputes as agreed to by the parties. The program operated successfully and without any major deficiencies or disruptions up to the point when K12 declined to hire Superintendent Hyatt. It is axiomatic that the public interest is not best served by terminating a

successful education program based solely upon false and contrived alleged Contract breaches fabricated by Superintendent Hyatt based upon improper and unethical personal motives.

D. There Is A Substantial Likelihood That K12 Will Prevail On The Merits At Arbitration.

There can be no legitimate dispute that the District has breached the Termination provisions of the Contract. Section 12.1, Termination for Cause, provides as follows:

> Except as otherwise provided herein, the Parties shall use good faith efforts to resolve all disputes relating to this Agreement as set forth in Section 22; however, either Party may terminate this Agreement for cause at any time with ninety (90) days' prior written notice to the other Party. Termination for cause shall mean the breach of any material term or failure to fulfill any material condition, term, provision, representation, warranty, covenant or obligation contained in this Agreement, and a failure to cure such a breach within forty-five (45) days after receiving written notification from the terminating Party.

The District has breached these contractual provisions. On or about April 1, 2025, Superintendent Hyatt sent a letter to K12 stating, in part, that "the Board of Education for the Gallup-McKinley Schools is terminating the Agreement for cause…. This termination of the Agreement is effective on June 30, 2025." This same letter of April 1, 2025 advised K12 ***for the first time*** of alleged material breaches of the Contract. However, Superintendent Hyatt had no authority to issue the April 1 purported termination notice. The Contract is between the District and K12. Superintendent Hyatt is not a party to the Contract nor does he have any authority to terminate the Contract. Under the New Mexico Open Meetings Act, official actions, such as terminating this Contract, can only be taken by the Board at a public meeting. NMSA 1978 Section 10-15-1(B) ("All meetings of a quorum of members of any board…of any…district or political subdivision, held for the purpose of …taking any action within the authority of …any board…ae declared to be public meetings open to the public at all times."); *see also Kleinberg v. Bd. Of Educ. Of Albuquerque Pub. Schools,* 1988-NMCA-014 ("It is equally clear…that the

board's 'final action' concerning the termination of a contract is to be taken at an open meeting.")

The District has now acknowledged that Superintendent Hyatt lacked the authority to send the April 1, 2025 "termination letter." Agenda item 3.A of the Board's agenda for the upcoming May 16, 2025 Special Meeting proposes to "Ratify the actions of the Administration [Superintendent Hyatt] to provide notice to Stride Inc/K12 of material breaches of the contract and to demand a remedy." Furthermore, the meeting agenda indicates that this and other agenda items regarding the Contract will be presented by Deputy Superintendent Jvanna Hanks II, not by Superintendent Hyatt as would normally be the case. This demonstrates not only that Superintendent Hyatt lacked authority to issue the April 1 "termination letter," but that the District now understands that Superintendent Hyatt had a conflict of interest when issuing the letter, further invalidating his *ultra vires* action.

However, rather than acknowledging the invalidity of the purported April 1 "termination notice," the District will attempt to "validate" Superintendent Hyatt's *ultra vires* action by purportedly ratifying it after the fact at the upcoming May 16 2025 Special Meeting. *See* Agenda item 3.A, above. While the District may have the ability to ratify the *ultra vires* action, the effect of doing so would not be retroactive. In *Palenick v. City of Rio Rancho,* 2012-NMCA-018, ¶ 9, *reversed on other grounds,* 2013-NMSC-029, the New Mexico Court of Appeals held:

> [N]o authority in New Mexico supports the [public body]'s attempt to retroactively make the prior invalid action valid and effective as of the date it was taken. Section 10-15-3(A) plainly states that no board action is valid if the action is not taken in accordance with Section 10-15-1. No provision in the [Open Meetings] Act states or implies that, when a public entity acts to "cure" an invalid employment termination by taking a later action, the later action can be applied retroactively. To permit retroactive application not only removes incentive to comply with the Act in employment termination circumstances, it undermines the Act and essentially renders Section 10-15-3(A) meaningless….We hold that the district court erred in determining that the City's November 14, 2007, resolution

> retroactively rectified, ratified, and approved the invalid December 13, 2006, action taken in violation of the Act thereby making the termination valid and effective as of December 13, 2006.

Regardless, Superintendent Hyatt's *ultra vires* April 1 "termination letter" clearly violated the Contract. The Contract provides expressly that upon receiving notice of an alleged material breach of the Contract, the allegedly breaching party has a right to a forty-five (45) day period in which to "cure" the alleged breach. *See* Contract at § 12.1, above. If the alleged breach is not cured within this forty-five (45) day period, then – and only then – may the non-breaching party terminate the Contract upon ninety (90) days' written notice. *Id.*

The purported termination process implemented by Superintendent Hyatt, which the District now seeks to validate through "ratification," clearly violated Section 12.1 of the Contract by notifying K12 that the contract was terminated and giving K12 the ninety (90) days' notice of termination, without affording K12 its contractually mandated forty-five (45) days to "cure" the alleged breaches. Superintendent Hyatt did not withdraw the April 1 "termination letter" even though K12 promptly notified him in writing of its intent to "cure" the alleged breaches. The proper remedy for Superintendent Hyatt's *ultra vires* and contractually invalid actions, if the District intends to initiate termination proceedings, is for the District, at a public meeting pursuant to the Open Meetings Act, to authorize the issuance of a new, proper, and contractually compliant notice of alleged breaches of the Contract by K12, affording K12 its contractual right to "cure" the alleged breaches within forty-five (45) days. As things now stand, the District has clearly breached the Contract and will continue to be in breach by proceeding pursuant to Superintendent Hyatt's *ultra vires* and contractually invalid April 1 letter.

In addition, K12 is likely to prevail at arbitration on its claim that the District breached the Contract by issuing an RFP. The issuance of this RFP expressly violated the exclusivity

clause in the Contract. *See* discussion in Section II.A., above. The Contract with K12 is for a minimum six-year term. It is therefore a violation of the Contract for the District to have issued the RFP seeking to enter into a new contract with a different provider for overlapping time periods, while the Contract with K12 is still in effect, and before it was validly terminated.

Furthermore, the RFP and the procedure being followed by the District in purporting to award a new contract to a different provider is in violation of the Procurement Code. The Procurement Code requires certain provisions to be included in an RFP. NMSA 1978 Section 13-1-112(A)(2), (3), (5) requires inclusion of: (i) contractual terms and conditions applicable to the procurement; (ii) form of disclosure of campaign contributions given by prospective contractors to applicable public officials; and (iii) the requirements for complying with any applicable in-state preference provisions as provided by law. The RFP that the District issued fails to comport with these requirements of the Procurement Code. K12 is therefore likely to prevail at arbitration on its claim that the District breached the Contract by improperly seeking to award a new contract to a different educational services provider during the term of its Contract with K12.

In addition, Section 22.1 of the Contract, Dispute Resolution Procedure provides:

> The Parties agree that they will, within a period not to exceed ten (10) days, attempt in good faith to settle all disputes arising in connection with this Agreement amicably and in the ordinary course of business…. If a dispute is not resolved in the ordinary course of business, the aggrieved Party may proceed to arbitration and/or invoke other remedies in accordance with this Agreement.

The District has breached these contractual provisions by failing to use good faith efforts to resolve the disputes, and instead, to purposely interfere with K12's ability to perform and to "cure" alleged defects.

In sum, K12 is likely to prevail at arbitration on its claim that it is the District that has breached the Contract in numerous ways.

Additionally, K12 is likely to prevail at arbitration by refuting the District's contention that K12 has committed material breaches justifying termination under Section 12.1 of the Contract. The circumstances giving rise to the claim that K12 breached material terms of the Contract (after successfully performing under the Contact for some five (5) years - following the same procedures that are now being criticized by Superintendent Hyatt) in and of themselves suggest that K12 is likely to prevail on the merits at the arbitration. K12 performed successfully under the Contract for nearly five (5) years without any substantial deficiencies, receiving ***no*** prior notices of breach, and indeed with the wholehearted endorsement of Superintendent Hyatt.[4] Then, immediately after being turned down for a lucrative position with the company, Superintendent Hyatt began a transparently obvious course of action purposely and vindictively to interfere with K12's ability to perform under the Contract; followed by false claims of Contract breaches by K12; denial of K12's contractual right to "cure" the alleged deficiencies; leading ultimately to his demand that the District terminate the Contract and award a new contract to a different provider. These facts alone demonstrate a substantial likelihood that K12 will prevail at the arbitration on the question whether it has committed material breaches of the Contract.

Moreover, in New Mexico, termination of a contract has been found only when a party committed an uncured material breach which destroyed the purpose of the contract. *E.g.*, *Famiglietta v. Ivie-Miller Enterprises, Inc.*, 1998-NMCA-155, ¶ 14 (adopting rule that material breach allows avoidance of remaining performance). Generally, a breach of contract does not excuse the nonbreaching party of its obligation to perform, unless a breach is "material."

[4] *See* Affidavit of Randall Greenway.

KidsKare, P.C. v. Mann, 2015-NMCA-064, ¶ 20 ("A material breach of a contract excuses the non-breaching party from further performance under the contract.").

"[T]he materiality of a breach is a specific question of fact." *Famiglietta*, 1998-NMCA-155, ¶ 16 (citing *Lukoski v. Sandia Indian Management Co.*, 1988-NMSC-002, ¶ 3). Especially given the timing and suspicious circumstances of the "material breach" claims here, the question whether K12's alleged "breaches" were material is indeed a specific question of fact which only the arbitrator can decide. This is further reason why this Court should grant a TRO preserving the *status quo* until these issues can be arbitrated.

III. GOOD CAUSE EXISTS TO WAIVE THE REQUIREMENT FOR SECURITY.

Because K12 seeks injunctive relief solely to maintain the *status quo*, prohibiting the District from violating its contractual obligations, pending resolution of the parties' disputes in agreed upon arbitration, the District can claim no potential monetary damage as a result of the injunctive relief sought by K12. Accordingly, there is good cause to waive the security requirement of Rule 1-066(C) NMRA.

WHEREFORE, having demonstrated that it is entitled to a temporary restraining order and/or preliminary injunction and other preliminary remedies pending arbitration, K12 respectfully requests that the Court set a hearing on this Motion pursuant to Rule 1-066 NMRA and NMSA 1978 § 44-7A-6, and thereafter enter a temporary restraining order and preliminary injunction enjoining the District from terminating the Contract or initiating an RFP process until it complies with the termination provisions set forth in Section 12.1 of the Contract. Specifically, K12 seeks an injunction as follows:

i. The District is required to provide K12 with a new written notification of all alleged material breaches of the Contract and allowing 45 days thereafter to cure

any such alleged material breaches if the District wishes to pursue termination of the Contract;

ii. The District is enjoined from terminating the Contract until after the cure period has expired, and any such termination shall only be effective 90 days after the District provides K12 with its written notice of termination; and

iii. The District is enjoined from initiating an RFP process to replace K12 as a contractor unless and until it formally terminates the Contract as provided above.

Alternatively, K12 seeks an injunction enjoining the District from terminating the Contract or initiating an RFP process to replace K12 as a contractor pending arbitration.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By */s/ Nelson Franse*

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2025, I electronically filed the foregoing with the Clerk of the Court using the Court's electronic filing system, and served counsel for Defendant Board of Education for the Gallup-McKinley County Schools via electronic mail.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By ___*/s/ Nelson Franse*_____
Nelson Franse