IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
No. 31,363

PING LU; JILL MCKEON; RICHARD MCKEON; STEPHEN SPENCER; SPENCER STOPA; and JUDY C. WINNEGAR, on their own behalf and on behalf of a class of similarly situated persons, et al.,

Plaintiffs-Appellants,

v.

THE EDUCATION TRUST BOARD OF NEW MEXICO; THE EDUCATION PLAN TRUST OF NEW MEXICO; and THE STATE OF NEW MEXICO

Defendants-Appellees

Appeal from the First Judicial District Court
Santa Fe County
The Honorable Stephen D. Pfeffer
District Court No. D-101-CV-2009-02051

ANSWER BRIEF OF THE STATE OF NEW MEXICO

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INTRODUCTION

The decision of the District Court should be affirmed. First, Appellants' argument on implicit repeal is misguided. Second, Appellants misconstrue the Education Trust Act. Third, State liability under the Education Trust Act leads to inequitable results. Fourth, public policy counsels against State liability under the Act. Finally, Appellants had other remedies besides damages remedies against the State.

BACKGROUND

Appellants have generally set forth accurately the background of 529 programs and the facts leading to their complaint and appeal, but the State does want to draw the Court's attention to a few facts in the record that provide a fuller picture.

First, although Appellants correctly note that New Mexico residents get additional tax advantage from participating in New Mexico's 529 plans that they would not receive had they invested in other States' 529 plans, this does not mean that New Mexicans invest only in New Mexico's 529 plans; nor does it mean that only New Mexicans invest in New Mexico's 529 plans. New Mexico's 529 plans

are open to any parents seeking tax-advantaged college savings. Of the six named Plaintiffs, only four are residents of New Mexico.[1]

Second, Appellants refer to two investment "tracks" that accountholders may choose. In addition to these, accountholders may invest in particular funds "a la carte," instead of choosing one of the investment "tracks."[2] One of these, the Intermediate Term-Bond Portfolio, was invested solely in the Oppenheimer Core Bond Fund.[3] Accountholders who chose this option are members of the class, despite not having chosen a portfolio explicitly described as "conservative."

Third, there is some tension in facts asserted by Appellants. They note the conclusion of a financial analyst "that investors had been unaware of the risks" taken by Oppenheimer,[4] but they allege that the State knowingly accepted these risks. The New Mexico 529 plans overseen by the Education Trust Board were the investors. The class members did not and do not hold direct interests in the affected fixed-income investments.[5] If all allegations are taken as true, it is the 529

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[1] [RP 370-71].
[2] [RP 375-76, ¶ 22].
[3] [RP 144].
[4] [BIC 8]; *see also* [RP 383, ¶ 48].
[5] [RP 378].

plans, not the class members, who were the investors taken unaware referred to by the analyst.

Finally, Appellants do not mention important language in the agreements they signed. The participation agreements for both of the 529 plans note in bold type that there is "No Guarantee of Principal or Income; No Insurance."[6] While this sort of language is typical in investment agreements, the agreements go further. The participation agreements incorporate the plan descriptions.[7] The plan descriptions, again in bold type, make clear the following:

> Under New Mexico law, neither the New Mexico 529 Program, the Board, any member of the Board or the State of New Mexico insures any Account or guarantees any rate of return or any interest rate on any Contribution, and *neither the New Mexico 529 Program, the Board, any member of the Board or the State of New Mexico is liable for* ***any loss*** *incurred by any person* as a result of participating in the New Mexico 529 Program.[8]

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[6] [RP 59, 122].

[7] [RP 57, 122].

[8] [RP 79, 142] (emphasis added, but all quoted text is emphasized in original).

SUMMARY OF THE ARGUMENT

The District Court was correct to dismiss the State from the suit and correctly recognized the limited source potential recovery. The Court should therefore affirm.

First, Appellants' argument that the District Court's construction of the Education Trust Act[9] is incorrect. When a specific statute controls over a general statute, this does not implicitly or explicitly repeal the general statute.

Second, the Education Trust Act clearly limits the sources of potential recovery for any action arising under the Act or any contract entered into pursuant to the Act. This is even clearer when the contract at issue is a college investment agreement such as those at issue in this case. If the Court looks behind the Appellants' pleading, it will see that this is really a breach of fiduciary action that sounds in tort (and for which the State has not waived immunity). The Act, as correctly construed by the District Court, provides an additional layer of protection should parties such as Appellants try to plead their way

[9] NMSA 1978, § 21-21K-1 *et seq.*

around the fundamental nature of this action by styling it a breach of contract.

Third, Appellants' construction would lead to inequitable results. It would allow Appellants to escape the language of the Act and the contracts into which they entered, at the expense of New Mexico taxpayers.

Fourth, Appellants' construction is against public policy. Because of the potential liability stemming from the size of the Trust, State liability would lead to the end of New Mexico's 529 programs. Additionally, State liability in this case would require an appropriation by the Legislature and potentially provoke a confrontation between the legislative and judicial branches of the State.

Finally, Appellants had other avenues of relief. Had the State rested on its fiduciary obligations instead of pursuing and achieving relief from Oppenheimer, mandamus would have been available to compel the State and the ETB to seek relief. And the Court should be mindful that the State and the Board did not rest on their obligations, but *did* pursue and achieve relief for the losses asserted in this case.

ARGUMENT

I. THERE IS NO IMPLIED REPEAL HERE.

The Education Trust Act does not implicitly repeal the general waiver of sovereign immunity for actions based on a valid written contract.[10] As an initial matter, although Appellants argued below that the Act does not provide an implicit *exception* to the waiver of immunity for suits based on a valid written contract,[11] they never argued that the State's (and the District Court's) construction amounts to an implicit *repeal*, and it is not clear that this argument was preserved.

Regardless, there is no broad implicit repeal here. The Act simply provides a specific immunity that overrides the general waiver in this particular instance, just as the specific waivers in the Tort Claims Act,[12] particularly those passed subsequent to the initial passage of that Act, do not repeal the general tort immunity provided in Section 44-4-4.

Appellants may argue that the difference between an implicit exception and an implicit repeal is illusory, but this argument fails. The disfavor of implicit repeal usually precedes a harmonization that

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[10] *See* NMSA 1978, § 37-1-23(A).
[11] [RP 474-76].
[12] NMSA 1978, § 41-4-1 *et seq.*

explains why two apparently incompatible statutes actually work together, even if the fit is not perfect. For example, in *Clothier v. Lopez*,[13] the Court found the conflicting statutes compatible, while at the same time acknowledging both the conflict between the statutes and that the more specific statute controlled.[14] While it is harder to reconcile the general waiver in Section 37-1-23 with the limitations placed on that waiver by the Education Trust Act, it should be noted that unlike the waiver of immunity for tort claims, which has not one, but two full subchapters and a whole agency dedicated to it,[15] the waiver of sovereign immunity for suits based on a valid written contract is expressed in a single subsection of the chapter dealing with statutes of limitation. The Legislature has not developed the contract waiver as fully as it has the tort waiver; consequently, there may be problems associated with the former that have been explicitly clarified by statute as regards the latter.

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[13] 103 N.M. 593, 711 P.2d 870 (1985).
[14] *Clothier*, 103 N.M. at 596 ("That section 38-3-1(G) is more specific than the Tort Claims venue provision as to the category of defendants covered counterbalances any weight in favor of section 41-4-18(B).").
[15] *See* NMSA 1978, § 15-7-1 *et seq.*; NMSA 1978, § 44-4-1 *et seq.*

Appellants use the implicit repeal argument as a jumping-off point to their argument that there is no implicit repeal because, under their reading, Section 21-21K-3, far from restricting State liability in this case, clarifies the availability of damages relief against the State. As discussed below, Appellants' argument fails.

II. STATE LIABILITY IS PRECLUDED BY THE ACT, AS MADE CLEAR IN THE PARTICIPATION AGREEMENTS.

The Legislature, in passing Section 21-21K-3(C), foreclosed damages remedies for losses of monies held in the Trust.[16] The subsection reads, in full:

> In no event shall any liability of, or contractual obligation incurred by, the program established pursuant to the provisions of the Education Trust Act obligate or encumber any of the state's land grant permanent funds, the severance tax permanent fund or any money that is a part of a state-funded financial aid program. Nothing in the Education Trust Act creates *any obligation, legal, moral or otherwise,* to fulfill the terms of any college investment agreement or prepaid tuition contract out of any source other than the education trust fund.[17]

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[16] Scenarios may be imagined in which other restitution remedies could come into play; e.g., a Board member or the program manager simply absconding with Trust funds might be subject to restitution remedies in conjunction with a criminal proceeding.

[17] NMSA 1978, § 21-21K-3(C) (emphasis added).

By limiting the fulfillment of college investment agreements, such as those at issue here, to funds held in the Trust, the Legislature made clear that the State is not a guarantor of funds held in the Trust. As class members may not ask the Board to convert monies held in the Trust for the benefit of unaffected plan participants, the only monies to which Appellants are entitled are those monies in their individual accounts within the Trust—not the monies that they would have had but for the losses in any of the underlying funds.

A. Appellants Split the Relevant Statutory Provision, Rather Than Reading It as a Harmonious Whole.

As the District Court held, Section 21-21K-3(C) makes clear that the State cannot be held liable in this action. Appellants argue by breaking the subsection into separate sentences and analyzing them separately.[18] But as Appellants themselves argued below, "the canons of statutory construction require that the two sentences be read together, and in connection with other provisions of the Education Trust Act, to produce a 'harmonious whole.'"[19] The harmonious whole reveals clear limitations placed by the Legislature on under what circumstances

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[18] [BIC 16-17].
[19] [RP 474].

and to what extent actions taken pursuant to the act may encumber the public fisc.

Section 21-21K-3(C) provides that the 529 programs may not encumber "any of the state's land grant permanent funds, the severance tax permanent fund or any money that is part of a state-funded financial aid program."[20] It goes on to further specify that the terms of any college investment agreement, such as those at issue here, may be fulfilled only out of the Trust.[21]

Appellants parse these two sentences as dealing with entirely different types of obligations; i.e., contractual obligations as opposed to those beyond those made explicit in the contracts.[22] But the more natural reading, the one adopted by the District Court, is that the first

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[20] NMSA 1978, § 21-21K-3(C). It should be noted that the land grant funds, pursuant to N.M. CONST. art. XII, § 2, and the severance tax permanent fund, pursuant to a number of provisions, e.g., NMSA 1978, §§ 7-27-5.13, 21-21-20, are directed in whole (in the case of the land grant funds) and in part (in the case of the severance tax permanent fund) to educational purposes. If not even these education-related funds can be encumbered under the Education Trust Act, then *a fortiori*, nothing in the Act can permit the encumbrance of the general fund.

[21] NMSA 1978, § 21-21K-3(C).

[22] Even this construction does not work for Appellants; their case is premised on the State's implied obligations, not explicit obligations. [RP 221.]

sentence deals with restrictions on the general ability of the 529 plans to encumber the State's finances, while the second deals with still more specific restrictions on the ability of the college investment agreements (or prepaid tuition contracts) to similarly encumber the State's finances.

Obligations of the first kind may include not only college investment agreements, but contracts such as program management contracts into which the Board may enter pursuant to Section 21-21K-3(A), contracts with counsel, or even purchases of office supplies, as well as tort liabilities incurred. The second sentence deals only with the college investment agreements and prepaid tuition contracts; i.e., contracts pursuant to which monies are held in trust on behalf of those persons seeking tax-advantaged college savings.

The Court should not read a distinction into the fact that "liability" appears in the first sentence but not the second. "Liability" and "obligation" may be read interchangeably here. The Court "look[s] first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was

intended."[23] Neither "liability" nor "obligation" is defined in the Act, so the Court must look to the ordinary meaning. "Liability" is defined thusly:

> 1. The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment. . . . — Also termed *legal liability*. 2. (*often pl.*) A financial or pecuniary obligation; DEBT. . . .[24]

Compare this with "obligation:"

> 1. A legal or moral duty to do or not to do something. 2. A formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons. — Also termed *legal obligation*. See DUTY; LIABILITY.[25]

The ordinary meanings of these terms are very, very close. They are too close for Appellants' construction to hold. It is a distinction that relies on a fine parsing of definitions, when there is a clear distinction between the obligations that may arise because of activities collateral to the management of the Trust and the trust obligation itself.

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[23] *Oldham v. Oldham*, 2011-NMSC-7, ¶ 10, 149 N.M. 215, 219, 247 P.3d 736, 740 (quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-13, 146 N.M. 24, 206 P.3d 135).
[24] BLACK'S LAW DICTIONARY 925 (7th ed. 1999).
[25] *Id.* at 1102.

B. The College Investment Agreements Are Themselves Creatures of the Education Trust Act.

Appellants' construction also fails because it misreads the statute on an even more basic level. Appellants contend that the second sentence imposes no obligations "*above and beyond* those explicit in the Parents' contracts."[26] The statute provides that "nothing in the Education Trust Act creates any obligation, moral, legal or otherwise, to fulfill the terms of any college investment agreement or prepaid tuition contract out of any source other than the education trust fund."[27] The participation agreements cannot be separated from the Act, as they are creatures of the Act.[28] Without the Act, there are no college investment agreements. And as the authority for the college investment agreements comes explicitly from the Act, those agreements cannot create any obligation to fulfill their terms from any source other than the Trust.

Under Appellants' construction, the second sentence of Section 21-21K-3(C) would read, 'Nothing in the Education Trust Act, *except the college investment agreement itself*, creates any obligation, legal, moral

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[26] [BIC 17].
[27] NMSA 1978, § 21-21K-3(C).
[28] NMSA 1978, § 21-21K-5.

or otherwise, to fulfill the terms of any college investment agreement or prepaid tuition contract out of any source other than the education trust fund." It is difficult to imagine the Legislature passing such language; let alone implying it by its adoption of the current language.

Appellants were on notice of this, as it is set out in the contracts they signed.[29] They seek not only to escape the limitations of the statute, but of the terms of the contracts they entered into.

C. The Act Makes Clear That This Case Is About Alleged Breach of Fiduciary Duty, for Which There Is No Waiver of Immunity.

The Board is the trustee for New Mexico's 529 plans. To the extent that this is not made clear in the Act, it is made clear in the Declaration of Trust.[30] Appellants brought their action as breach of contract, despite the fact that the relationship created by the contract is a trust relationship creating a fiduciary duty owed by the Board to Appellants—a fact recognized by Appellants in their Amended Complaint.[31]

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[29] *See* p. 3, *supra.*
[30] [RP 671-92].
[31] *See* [RP 391, ¶ 92].

But breach of fiduciary duty sounds in tort,[32] and there is no waiver in the Tort Claims Act for that tort; i.e., the conduct alleged here is not the sort of conduct for which the Legislature intended to waive immunity. This intent is reflected not only in the Tort Claims Act, but in Section 21-21K-3(C). This intent is also reflected by language used by the Board in the Declaration of Trust: 1) "[t]he Trustee shall have no liability even if such investments do not or may not produce income or are of a character or in an amount not considered proper for the investment of trust funds.";[33] 2) "The Trustee shall not be liable for following any direction given by, or any actions of, an investment manager . . . ."[34]

III. STATE LIABILITY WOULD LEAD (AND HAS LED) TO INEQUITABLE RESULTS.

If state liability is permitted under the Act, it will lead to inequitable results. In the briefing below, Appellants raised the possibility of indemnity or third-party claims that could be brought by

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[32] *See, e.g., Walta v. Gallegos Law Firm, P.C.*, 2002-NMCA-15,¶ 154, 131 N.M. 544, 556, 40 P.3d 449, 461 (referring to breach of fiduciary duty as a "basic tort").
[33] [RP 680].
[34] [RP 687].

the Board (and the State) to satisfy any judgment in favor of Appellants.[35] While such claims certainly might exist, their success—particularly their complete success—would not necessarily be assured, and the State would be wise to take a "wait-and-see" approach, rather than aggressively pursuing, as the State and the Board did here, the claims against its program manager, Oppenheimer.[36] This would lead to delayed recovery, as the State would need to know the scope of its liability before it could pursue any indemnification or third-party claims. The State could not compromise its claims in the face of potential eight or nine-figure unfunded liability. As a result, recovery on these time-sensitive investments[37] would be delayed, and the goals of families saving for college would be frustrated.

But the problems arising from permitting suits against the State (and for that matter, the Board) are not merely hypothetical. In this very case, New Mexico was not the only State affected by the losses in the Oppenheimer Core Bond Fund. Also affected were Illinois, Maine,

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[35] [RP 477].
[36] *See* [BIC 34-35].
[37] *See* [RP 477, ¶¶ 26-27].

Nebraska, Oregon, and Texas.[38] Although all of these States settled on similar terms with Oppenheimer, New Mexico is the only State that has been sued stemming from the Core Bond Fund. The different results in the other States are instructive. Distribution in other States was scheduled to begin (and did begin) in 2010.[39] Distribution in New Mexico is only now beginning, after having been delayed by this suit and another suit (which has since been dismissed).[40] As a result, families who had college expenses to meet in 2010 or 2011 or early 2012 will likely have had greater difficulty meeting those expenses than similarly situated families in Illinois, Maine, Nebraska, Oregon, and Texas, only because of the suits brought in New Mexico on their behalf. This bears repeating—*at least some members of the class are worse off as a result of this lawsuit than they would have been had there been no suit.* For these families, a partial recovery in 2010 would have been better than a potential complete recovery at some uncertain future date.

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[38] [RP 1013, ¶ 4].
[39] *See* [RP 1015-16, ¶ 11].
[40] [RP 948-49, 967].

IV. STATE LIABILITY IN THIS CASE IS AGAINST PUBLIC POLICY.

Apart from the inequitable results described above, public policy further counsels against reversal of the District Court's decision. First, a ruling that the State may be held liable for losses in the 529 plans would likely lead to the termination of the State's 529 programs. Second, a finding of liability in this case could precipitate a confrontation between the judiciary and the Legislature.

A. If the State Can Be Held Liable, the Legislature Will Likely End the State's 529 Programs.

The losses suffered by the State's 529 programs and the families participating in it are enormous. Although, were the case to proceed, the State believes that Appellants' estimate of losses is excessive, it must be taken as true for the purposes of this appeal. Even a modest estimate of losses in this case would be in excess of $100 million.

But it must be remembered that the *potential* liability under Appellants' construction of the law is much greater. As a rough estimate, assume that only the two "tracks" are used, and that plan participants are roughly equally distributed. A comparison of RP 143 and RP 145 shows that the two "tracks" are not terribly different, particularly as it relates to the Core Bond Fund. Under the assumption

used, each of the portfolios comprises roughly one sixth of the corpus of the Trust. The Core Bond Fund comprised 60% of one portfolio and 20% of another. This translates to a total of approximately 13% of the total Trust invested in the Core Bond Fund.

Now, Appellants alleged $175 million or more as the losses, but because they include two other funds, an estimate of just Core Bond losses might be on the order of $150 million. The losses represented approximately 38% of the Core Bond Fund's value, which translates to a pre-loss value of about $240 million. If $240 million represented 13% of the Trust's holdings, the total value of the Trust is around $1.8 billion.

This calculation is a back-of-the-envelope estimate. Appellants used $2 billion as the Trust value at argument on the Board's motion to dismiss.[41] If the Court reverses, the State is potentially on the hook for that entire amount, should catastrophe strike. For comparison, total appropriations from the general fund for fiscal year 2013 are approximately $5.6 billion.[42] Appellants are asking the Court to expose the State to a potential liability—not the liability in this case, but that to which the State could potentially be exposed under this rule—of

[41] [Tr. 21, Nov. 12, 2009].
[42] H.B. 2 at 203, Reg. Sess. (2012) (enacted).

roughly a third of total appropriations for the State. This would be an absurd result.

The specter of this magnitude of unfunded liability cautions against overbroad reading of the waiver of immunity in Section 37-1-23(A). The contracts at issue in this case are simply not the type that the Legislature was thinking of when it passed Section 37-1-23. But in passing the Education Trust Act, the Legislature took steps to limit its potential liability under the college investment agreements to the monies in the Trust.

A comparison with the Tort Claims Act is again instructive. The Legislature limited per-incident liability.[43] It also created funds to purchase insurance[44] and to deal with tort liability incurred by the State.[45] The Legislature took no such actions on contract immunity, because typically the funds are already encumbered, whether via future assessments, in the case of bonds, or through the procurement code, in the case of the purchase of goods and services. It may be argued that

[43] NMSA 1978, § 41-4-19.
[44] NMSA 1978, § 41-4-22.
[45] NMSA 1978, § 41-4-23.

the Legislature did this because the State could protect its interests via contract terms, but this does not avail Appellants, as it was done here.[46]

But the 529 programs are fundamentally different. Here, funds are held in trust for persons—not just New Mexicans, but any person saving for college—and these monies are exposed to market risk, as well as the potential risk of negligence or other wrongdoing on the part of the program manager. If the Court rules that the State is exposed to those risks as well, rather than the remedies discussed in Section V below, the Legislature will no doubt step in, and an easy fix would be to wind down the 529 programs entirely.

B. A Finding of Liability in This Case Could Precipitate a Confrontation between the Judiciary and the Legislature.

Should the Court reverse, and should Appellants prevail in the ensuing proceedings, enforcement of any judgment will be problematic. Again, this case presents potential liability in the tens of millions of dollars. The Trust does not contain such reserves; nor should it. It is not a guarantor. Any satisfaction of the judgment would require an

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[46] *See* p. 3, *supra*; *see also Espinoza v. Town of Taos*, 120 N.M. 680, 684, 905 P.2d 718, 722 (1995) (refusing to find a breach of contract against a governmental entity where the contract expressly disclaimed the duty for the alleged breach).

appropriation by the Legislature, which might well balk at the size of the liability. The Legislature might well say, "Sorry, but the Court misunderstood the statute. We will not pay." This conflict between the Legislature and the Court can and should be avoided by affirming the District Court's understanding of the Education Trust Act, which recognizes that the Legislature would not expose the public fisc to this magnitude of potential liability.[47]

Appellants recast their argument below that inability to satisfy a judgment is no defense to liability, but that mischaracterizes the situation. Appellee is not a spendthrift private defendant; it is a sovereign, and while the New Mexico Supreme Court judicially abrogated the State's common-law sovereign immunity, it could not and would not abrogate all aspects of sovereignty—here, control over the public purse, which is given not to the Court, but to a coequal branch of government.

It is conceivable that the Legislature might accede to paying any judgment, but this would result in additional burdens on New Mexico taxpayers, whether in the form of reduced services—services that are

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[47] *See* [Tr. 18-20, Apr. 15, 2010].

already struggling in the wake of the same economic downturn that precipitated the Core Bond Fund losses—or increased taxes. But the Legislature may not accede. The Court cannot compel an appropriation. While interbranch comity might prevail in the case of a smaller breach of contract case, as the damages increase, the strength of such comity may well give way to legislators' duty to their constituents. Again, this can be avoided by recognizing that the Legislature would not expose the State to liability on the order of a third of total appropriations. The Court's choice here is between the overfine parsing of the Education Trust Act and a common-sense realization that no sane Legislature would intend the meaning Appellants set forth.

V. APPELLANTS ARE NOT DENIED A REMEDY BECAUSE OF THE DISTRICT COURT'S RULING.

Although not dispositive of the appeal, both because immunity may foreclose the possibility of remedies in some cases and because the availability of other remedies does not render unavailable a plaintiff's chosen remedy, the Court should not be concerned that Appellants had no other remedy available to them. First, had the Board and the State sat on their hands, Appellants would have been justified in seeking

mandamus. Second, Appellants achieved relief through the actions of the State and the Board.

First, although not available on the facts here, generally, mandamus is available to compel performance of a ministerial duty.[48] Now, mandamus is not available against the State, but it is available against the particular officers who have that ministerial duty. Here, the Board is charged by statute with the duty to act as trustee over the funds deposited by families saving for college.[49] While a trustee acts within its discretion, precluding mandamus for any particular act, mandamus is available to compel the use of discretion.[50] Here, though, the Board and the State were acting to try to recover the losses prior to the filing of suit.[51]

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[48] NMSA 1978, § 44-2-1, *et seq.*

[49] *See* NMSA 1978, §§ 21-21K-3(A), 21-21K-4.

[50] *See El Dorado at Santa Fe, Inc. v. Bd. of Cty. Comm'rs*, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976) ("Where he refuses or delays, mandamus will issue to compel acts committed to his discretion if the law requires him to act one way or another.")

[51] [RP 1013-14, ¶¶ 4-7] (on the investigation beginning in January 2009 and reaching of settlement in principle in May 2009); [RP 1] (complaint filed June 25, 2009).

Mandamus is analogous to the contract remedy of specific performance, and this explains the bond cases cited by Appellants.[52] Under a bond contract, there *is* a duty to pay a specific sum certain at specific times. It should also be noted that in the bond context, where there is a clear duty to pay specific sums and specific times, the Legislature has created a bond guarantee fund.[53] This is because, unlike the Education Trust, there is a clear and calculable dollar obligation. Under the Education Trust Act, the obligation is for the Board to act as trustee and perform specific enumerated duties pursuant to that role.

Second, Appellants have actual relief available to them through the State's settlement with Oppenheimer. Even assuming the losses pled are correct, the settlement represents a much better-than-average recovery for securities claims such as those ultimately at issue here; e.g., the Core Bond Fund losses.[54] This recovery shows the State and the Board fulfilling—not breaching—their duties to Appellants,

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[52] [BIC 29-31].
[53] NMSA 1978, § 6-12-15.
[54] *See* [RP 1558-79].

obviating the need in this case for the mandamus remedy discussed above.

The availability of these remedies, whether *in potentia* or in actuality, should ease any concerns the Court may have about affirming the District Court's ruling.

CONCLUSION

For the reasons stated above, the appeal should be denied and the District Court's ruling should be affirmed.

Respectfully submitted,

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