

1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: April 24, 2018

4 **NO. A-1-CA-35204**

5 **STATE OF NEW MEXICO ex rel.**

6 **HECTOR BALDERAS, Attorney General,**

7           Plaintiff-Appellee,

8 v.

9 **ITT EDUCATIONAL SERVICES, INC.,**

10          Defendant-Appellant.

11 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

12 **Valerie A. Huling, District Judge**

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1 **OPINION**

2 **VARGAS, Judge.**

3 {1} In this consolidated appeal, ITT Educational Services, Inc., d/b/a ITT Technical  
4 Institute (ITT) appeals the district court’s order denying its motion to compel  
5 arbitration, as well as its order compelling compliance with subpoenas served on  
6 counsel for ITT students by the Attorney General. On appeal, ITT claims that the  
7 Attorney General is bound by provisions in student enrollment agreements requiring  
8 that any dispute related to a student’s enrollment be arbitrated and further requiring  
9 that any information related to the arbitration remain confidential. We conclude that  
10 under the specific circumstances of this case, enforcement of the agreement to  
11 arbitrate and accompanying confidentiality clause against the Attorney General is  
12 contrary to public policy and we affirm.

13 **BACKGROUND**

14 {2} The State of New Mexico, through its Attorney General (State) filed suit  
15 against ITT, claiming violations of the New Mexico Unfair Practices Act (UPA)  
16 arising out of alleged misrepresentations to students about ITT’s nursing program and  
17 its financial aid process. ITT filed a motion to compel arbitration, asking the district  
18 court to order the State to arbitrate individually for each student, “all claims seeking  
19 restitution or other relief on behalf of any ITT students in accordance with the

1 arbitration provision in the students' enrollment agreements with ITT[.]” ITT’s  
2 enrollment agreement requires that “any dispute arising out of or in any way related”  
3 to the agreement, “including without limitation, any statutory, tort, contract or equity  
4 claim” be resolved by binding arbitration. ITT argued that, notwithstanding that the  
5 State was not a party to the enrollment agreement, it was required to arbitrate because  
6 its claims were derivative of student claims or alternatively, were brought in a  
7 representative capacity on behalf of students. Following a hearing, the district court  
8 denied ITT’s motion to compel arbitration. ITT appealed the district court’s denial  
9 pursuant to the New Mexico Uniform Arbitration Act, allowing for an appeal from  
10 an order denying a motion to compel arbitration. NMSA 1978, § 44-7A-29(a)(1)  
11 (2001).

12 {3} During discovery, the State served subpoenas duces tecum on two private  
13 attorneys (attorneys) who had each represented ITT students in prior arbitration  
14 proceedings against ITT conducted in accordance with the requirements of the  
15 enrollment agreements. The subpoenas served on the attorneys required that, for any  
16 proceeding against ITT in which they were counsel for an ITT student, they produce  
17 the following material:

- 18 1. All pleadings, decisions, or verdicts, filed, entered or issued in  
19 any arbitration proceeding involving [ITT] and ITT students in New  
20 Mexico;

1 2. All written discovery, including but not limited to, answers to  
2 interrogatories, and admissions and accompanying requests for  
3 admissions, produced or provided by [ITT] during arbitration between  
4 ITT and ITT students;

5 3. All testamentary evidence gathered or produced during arbitration  
6 proceedings between [ITT] and [ITT] students . . . including but not  
7 limited to, transcripts of depositions, transcripts of hearings or the  
8 contact information of any court reporter transcribing any hearings if the  
9 transcripts were not delivered or provided to you, affidavits, and written  
10 statements;

11 4. All documents produced or provided by [ITT];

12 5. All documents produced or provided by your clients[.]

13 ITT objected to the subpoenas pursuant to Rule 1-045(C) NMRA, asserting that  
14 disclosure of the requested materials would violate the confidentiality clauses of the  
15 enrollment agreements, requiring that “[a]ll aspects of the arbitration proceeding, and  
16 any ruling, decision or award by the arbitrator, will be strictly confidential.” ITT  
17 instructed the attorneys to refrain from disclosing the materials listed in the  
18 subpoenas absent a court order.

19 {4} The State filed a motion to compel the production of the documents requested  
20 by the subpoenas, arguing that, as an investigative agency, it is entitled to discover  
21 information relating to the arbitration proceedings that could constitute impeachment  
22 or pattern or practice evidence, notwithstanding the confidentiality clause.

1 {5} ITT raised two objections to the release of the information. First, ITT asserted  
2 that allowing discovery of materials arising from the arbitration could lead to a  
3 violation of its students' right to privacy. Further, ITT claimed that the informal  
4 nature of arbitration rendered parties less guarded than those engaged in litigation,  
5 creating a public interest in keeping arbitration proceedings confidential. In  
6 considering ITT's concerns at the hearing on the State's motion to compel, the district  
7 court acknowledged the importance of student privacy, but noted, "I understand  
8 confidentiality agreements. I understand arbitration agreements between parties. . . .  
9 I don't have a problem with the concept of the confidentiality agreement, but I do  
10 have a problem with using it as a shield." When ITT was unable to provide authority  
11 supporting the district court's power to enforce a confidentiality clause to deprive an  
12 investigative or enforcement agency like the Attorney General of discovery that may  
13 be relevant to a claim brought pursuant to its statutory authority, the district court  
14 granted the State's motion to compel.

15 {6} The parties stipulated to the entry of a protective order, protecting information  
16 related to ITT's students and staff, trade secrets, and sensitive commercial,  
17 proprietary, or financial information. The order established extensive measures to  
18 safeguard the integrity and confidentiality of the information disclosed through  
19 discovery, requiring that all confidential materials be labeled and protected from

1 disclosure to anyone not intimately involved in the case. ITT obtained the district  
2 court's certification for an interlocutory appeal of its order compelling discovery and  
3 timely sought relief in this Court. Alternatively, ITT sought review through a writ of  
4 error.

5 {7} This Court initially granted ITT's writ of error. A writ of error is the procedural  
6 vehicle used to invoke the collateral order doctrine in New Mexico. *See Carrillo v.*  
7 *Rostro*, 1992-NMSC-054, ¶ 25, 114 N.M. 607, 845 P.2d 130. The collateral order  
8 doctrine is generally disfavored, and as a result, courts have limited its application in  
9 an attempt to avert piecemeal appeals. *See Williams v. Rio Rancho Pub. Schs.*, 2008-  
10 NMCA-150, ¶ 7, 145 N.M. 214, 195 P.3d 879. Pretrial orders concerning discovery,  
11 particularly orders compelling discovery, are not collateral orders warranting review  
12 under a Rule 12-503 NMRA writ of error. *King v. Allstate Ins. Co.*, 2004-NMCA-  
13 031, ¶ 19, 135 N.M. 206, 86 P.3d 631. Because this matter is more properly raised by  
14 interlocutory appeal, we now quash the writ of error, grant ITT's application for  
15 interlocutory appeal, and affirm the district court.

## 16 **DISCUSSION**

### 17 **Standard of Review**

18 {8} ITT's appeal requires us to consider the enforceability of the arbitration  
19 provision and accompanying confidentiality clause in its student enrollment

1 agreement with respect to the State’s UPA claims. We review the interpretation of  
2 any relevant contract terms de novo. *Shah v. Devasthali*, 2016-NMCA-053, ¶ 10, 371  
3 P.3d 1080. Further, “[w]hether a contract is against public policy is a question of law  
4 for the court to determine from all the circumstances of each case,” considering both  
5 statutory and judicial expressions of public policy. *Castillo v. Arrieta*, 2016-NMCA-  
6 040, ¶ 15, 368 P.3d 1249 (alteration, internal quotation marks, and citation omitted).  
7 Questions of law are also reviewed de novo. *See Davis v. Devon Energy Corp.*, 2009-  
8 NMSC-048, ¶ 12, 147 N.M. 157, 218 P.3d 75. Finally, “[w]e apply a de novo  
9 standard of review to a district court’s denial of a motion to compel arbitration[,]” as  
10 well as to the applicability and construction of a contractual provision requiring  
11 arbitration. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107  
12 P.3d 11.

### 13 **Discovery**

14 {9} ITT challenges the district court’s order granting the State’s motion to compel  
15 compliance with its subpoenas. Specifically, ITT argues that the Federal Arbitration  
16 Act (FAA) and public policy favoring arbitration require that the arbitration  
17 provision, including its confidentiality clause, be enforced to protect the subpoenaed  
18 materials from discovery, notwithstanding the State’s statutory authority to  
19 investigate probable violations of the UPA and enforce its provisions. The State



1 argues that the district court’s ruling was proper under our broad discovery rules and  
2 that it would be inappropriate to allow ITT to use the confidentiality clause to shield  
3 itself from the State’s investigation. We emphasize that we are not being asked to  
4 consider whether the information that was the subject of the State’s motion to compel  
5 is admissible, or in what way the State might be able to use the subpoenaed  
6 information, if at all. Our review is limited to whether the information requested in  
7 the State’s subpoenas is discoverable under our Rules of Civil Procedure. We  
8 conclude that under the specific circumstances of this case, it is.

9 **A. Privileges and Confidentiality**

10 {10} Before we address the merits of the parties’ arguments, we note that the parties  
11 have conflated the legally distinct concepts of confidentiality and privilege. “[F]or a  
12 privilege to exist in New Mexico, it must be recognized or required by the  
13 Constitution, the Rules of Evidence or other rules of this Court.” *Republican Party*  
14 *of N.M. v. N.M. Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 35, 283 P.3d 853  
15 (internal quotation marks and citation omitted). Thus, information that is confidential  
16 is not necessarily protected by a legally recognized privilege. *See Lakeland Times v.*  
17 *Lakeland Union High Sch.*, 2014 WI App 110, ¶ 52, 357 Wis. 2d 722, 855 N.W.2d  
18 904 (distinguishing confidentiality and privilege by defining privilege as “a legal  
19 right to refuse a valid subpoena for certain information” and confidentiality as a

1 method of “ensur[ing] that sensitive information is kept secret, a goal that may be  
2 reached with appropriate protective orders”); *see also Salerian v. Md. State Bd. of*  
3 *Physicians*, 932 A.2d 1225, 1242 (Md. Ct. Spec. App. 2007) (defining privilege as  
4 “legal protection given to certain communications and relationships” and  
5 acknowledging that because confidentiality is broader than privilege, information that  
6 is not protected by privilege can still be confidential information (internal quotation  
7 marks and citation omitted)); 81 Am. Jur. 2d *Witnesses* § 273 (2018)  
8 (“ ‘Confidentiality’ and ‘privilege’ are not synonymous, and are two compatible, yet  
9 distinct, concepts[.]”). “Information can be confidential and, at the same time,  
10 nonprivileged.” *Id.* This case does not implicate a constitutionally created or rule-  
11 based privilege, but rather contracted-for confidentiality.

12 **B. ITT’s Confidentiality Clause is Unenforceable as Against Public Policy in**  
13 **the Context of the State’s UPA Claims**

14 {11} ITT contends that the FAA and policy favoring arbitration mandate that we  
15 enforce the terms of the arbitration provision, including the confidentiality clause, to  
16 prevent the release of the information sought by the State. The State argues that it  
17 would be improper to allow ITT to use its confidentiality clause with students to  
18 shield itself from the State’s statutorily mandated investigation and enforcement  
19 obligations, authorized by the UPA.

1 {12} The Supreme Court of the United States has recognized that the purpose of the  
2 FAA is “to reverse the longstanding judicial hostility to arbitration agreements” and  
3 “to place arbitration agreements upon the same footing as other contracts.” *E.E.O.C.*  
4 *v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks and citation  
5 omitted); *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 51,  
6 304 P.3d 409 (acknowledging same); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-  
7 NMSC-033, ¶ 16, 150 N.M. 398, 259 P.3d 803 (acknowledging “the fundamental  
8 principle that arbitration is a matter of contract” (internal quotation marks and citation  
9 omitted)). “[T]he FAA preempts not only state laws that prohibit arbitration outright,  
10 but also state laws that stand ‘as an obstacle to the accomplishment and execution of  
11 the full purposes and objectives of Congress.’ ” *Strausberg*, 2013-NMSC-032, ¶ 55  
12 (quoting *Rivera*, 2011-NMSC-033, ¶ 17). It does not, however, “entirely displace  
13 state law governing contract formation and enforcement.” *Strausberg*, 2013-NMSC-  
14 032, ¶ 52; see *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (stating that  
15 the FAA’s purpose is “to make arbitration agreements as enforceable as other  
16 contracts, but not more so” (internal quotation marks and citation omitted)). As a  
17 result, arbitration provisions are subject to “generally applicable contract defenses,  
18 such as fraud, duress, or unconscionability.” *Rivera*, 2011-NMSC-033, ¶ 17 (internal  
19 quotation marks and citation omitted).

1 {13} In New Mexico, the enforceability of a contract balances an individual’s  
2 freedom to enter into contracts with the public interest in restricting a person’s ability  
3 to enter into a contract that is contrary to public policy. *See First Baptist Church of*  
4 *Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 12, 345 P.3d 310; *see also*  
5 *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d  
6 1098 (recognizing New Mexico’s “strong public policy of freedom to contract that  
7 requires enforcement of contracts unless they clearly contravene some law or rule of  
8 public morals” (internal quotation marks and citation omitted)); *Acacia Mut. Life Ins.*  
9 *Co. v. Am. Gen. Life Ins. Co.*, 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11  
10 (“The right to contract is jealously guarded by [the C]ourt, but if a contractual clause  
11 clearly contravenes a positive rule of law, it cannot be enforced[.]”). “Public policy  
12 favoring the invalidation of a [contract] can be furnished either through statutory or  
13 common law.” *Berlangieri*, 2003-NMSC-024, ¶ 38.

14 {14} We have recognized public policy violations where the terms of a contract have  
15 been contrary to statutory provisions. *See First Baptist Church of Roswell*, 2015-  
16 NMSC-004, ¶ 15 (holding that contract waiving statutorily required interest on oil  
17 and gas proceeds payments was unenforceable as against public policy); *Berlangieri*,  
18 2003-NMSC-024, ¶ 53 (concluding that contract for liability release was contrary to  
19 the public policy established by the Equine Liability Act and therefore

1 unenforceable): *Acacia Mut. Life Ins. Co.*, 1990-NMSC-107, ¶ 11 (stating that a  
2 partnership agreement requiring indemnification of general partners by limited  
3 partner contravenes the Uniform Limited Partnership Act and is therefore  
4 unenforceable as against public policy); *DiGesu v. Weingardt*, 1978-NMSC-017, ¶ 7,  
5 91 N.M. 441, 575 P.2d 950 (finding a contract for a partial lease of a liquor license  
6 to violate public policy where partial leasing was prohibited by applicable regulations  
7 and statute expressly limited the number of liquor licenses to be issued by the state).  
8 “Whether a contract is against public policy is a question of law for the court to  
9 determine from all the circumstances of each case.” *Berlangieri v. Running Elk Corp.*,  
10 2002-NMCA-060, ¶ 11, 132 N.M. 332, 48 P.3d 70 (internal quotation marks and  
11 citations omitted).

12 {15} In this case, the question is whether enforcement of a confidentiality clause in  
13 a contract between parties violates public policy expressed by the Legislature in the  
14 UPA, where the confidentiality clause would prevent the State’s efforts to investigate  
15 and enforce the UPA against one of the parties to the contract. “Every statute is a  
16 manifestation of some public policy.” *First Baptist Church of Roswell*, 2015-NMSC-  
17 004, ¶ 12. In interpreting the UPA, “our primary goal is to give effect to the  
18 Legislature’s intent.” *Berlangieri*, 2003-NMSC-024, ¶ 42. “The starting point in  
19 statutory construction is to read and examine the text of the act and draw inferences

1 concerning the meaning from its composition and structure.” *Meridian Oil, Inc. v.*  
2 *N.M. Taxation & Revenue Dep’t*, 1996-NMCA-079, ¶ 12, 122 N.M. 131, 921 P.2d  
3 327 (internal quotation marks and citation omitted).

4 {16} The UPA represents New Mexico’s public policy in favor of preventing  
5 consumer harm and resolving consumer claims. *See Fiser v. Dell Comput. Corp.*,  
6 2008-NMSC-046, ¶ 9, 144 N.M. 464, 188 P.3d 1215. In furtherance of that policy,  
7 the State has been given broad statutory authority to investigate violations and  
8 enforce the provisions of the UPA. *Id.* ¶ 11 (identifying Consumer Protection  
9 Division of the Attorney General’s Office and its duty to “investigate suspicious  
10 business activities, informally resolve the complaints of dissatisfied consumers,  
11 educate citizens about their consumer rights, and file lawsuits on behalf of the public”  
12 as an example of “New Mexico’s fundamental public policy in ensuring that  
13 consumers have an opportunity to redress their harm”). Under the UPA, the State is  
14 responsible for enforcement of the Act. NMSA 1978, § 57-12-15 (1967). To that end,  
15 the Legislature has authorized the State, without the need to file a lawsuit, to serve  
16 an investigative demand for the production of documents on any person who might  
17 be in possession, custody or control of documents “relevant to the subject matter of  
18 an investigation of a probable violation of the [UPA.]” NMSA 1978, § 57-12-12(A)  
19 (1967) (allowing the state to request documentary evidence, including “any book,

1 record, report, memorandum, paper, communication, tabulation, map, chart,  
2 photograph, mechanical transcription or other tangible document or recording). While  
3 an investigative demand cannot be made for privileged matters, or matters which  
4 would not be required to be produced by a subpoena duces tecum,  
5 *see* § 57-12-12(C)(2), the Legislature’s authorization of such demands without  
6 litigation signals its intent to sanction the State’s broad authority to investigate  
7 violations of the UPA. Finally, the UPA allows the State to bring actions in its name,  
8 alleging violations of the UPA, if such “proceedings would be in the public  
9 interest[.]” NMSA 1978, § 57-12-8 (1977). Taking all of these things into account,  
10 including the fact that the information requested by the State does not implicate any  
11 privilege, we conclude that, under the circumstances of this case, it would be contrary  
12 to public policy to allow ITT to use the confidentiality clause with its students to  
13 shield itself from the State’s investigation and litigation authorized under the UPA.  
14 We also note that the district court entered a stipulated protective order to prevent any  
15 unwarranted disclosure of the confidential information produced in response to the  
16 State’s subpoenas. Consequently, the district court properly declined to enforce the  
17 confidentiality clause and granted the State’s motion to compel the production of the  
18 subpoenaed information.

1 **Arbitration**

2 {17} ITT also appeals the district court’s denial of its motion to compel arbitration,  
3 arguing that the State is bound by the enrollment agreement between ITT and its  
4 students because any claims the State has are brought in its derivative or  
5 representative capacity. We find no error on the part of the district court as ITT’s  
6 appeal of the order denying its motion to compel arbitration fails for the same reason  
7 as its appeal of the district court’s discovery order. The State’s broad authority to  
8 enforce the provisions of the UPA includes the statutory right to bring actions in its  
9 name, alleging violations of the UPA, if such “proceedings would be in the public  
10 interest[.]” Section 57-12-8(A). To compel the State to arbitrate actions for which the  
11 Legislature has granted it specific statutory authority “clearly contravenes a positive  
12 rule of law, [and] it cannot be enforced” under such circumstances. *Acacia Mut. Life*  
13 *Ins. Co.*, 1990-NMSC-107, ¶ 1. In light of our holding, we need not reach ITT’s  
14 argument that the State’s claims were derivative or representative, making it subject  
15 to the arbitration provision. The district court properly denied ITT’s motion to compel  
16 arbitration.

17 {18} In reaching our decision, we stress that our ruling in this case is based on the  
18 specific powers granted by the Legislature to the State under the UPA. We neither  
19 consider nor decide the propriety of a defendant’s use of an arbitration provision to



1 compel arbitration or a confidentiality clause to prevent the disclosure of information  
2 sought in a private suit brought under NMSA 1978, Section 57-12-10 (2005) of the  
3 UPA.

4 **CONCLUSION**

5 {19} For the reasons set out herein, we affirm the decision of the district court.

6 {20} **IT IS SO ORDERED.**

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**JULIE J. VARGAS, Judge**

9 **WE CONCUR:**

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**MICHAEL E. VIGIL, Judge**

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**J. MILES HANISEE, Judge**