

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT**

LOUISE MARTINEZ, *et al.*,

Plaintiffs,

v.

No. D-101-CV-2014-00793

THE STATE OF NEW MEXICO; *et al.*,

Defendants.

Consolidated with

WILHELMINA YAZZIE, *et al.*,

Plaintiffs,

v.

No. D-101-CV-2014-02224

THE STATE OF NEW MEXICO, *et al.*,

Defendants.

YAZZIE PLAINTIFFS' CLOSING BRIEF

I. INTRODUCTION

The *Yazzie* Plaintiffs include ten Native American and Hispanic children from low-income families who have been neglected by New Mexico's public education system. They come from Gallup-McKinley (*Yazzies*), Albuquerque (*Martinezes*), Grants-Cibola (*Lenos*), Gadsden (*Sanabrias*), and Peñasco (*Dominguezes*). Each would like the opportunity to attend college or pursue a career. Each would like to better understand how to participate in New Mexico's political and economic life as adults. But unless there is a dramatic change now in New Mexico's educational system, they will likely finish their educations without sufficient skills and knowledge to allow them to achieve these fundamental goals. The *Yazzie* Plaintiff children are but 10 out of over 200,000 children who are suffering substantial educational harm in New Mexico's deficient public educational system.

The *Yazzie* Plaintiffs also include six school districts that are denied the funds and services they need to provide students, especially economically disadvantaged, English language learner, and Native American ("at-risk") students, the basic educational opportunities necessary for them to attend college, pursue a career and participate fully in political and economic life. Gallup-McKinley, Santa Fe, Moriarty-Edgewood, Rio Rancho, Cuba, and Lake Arthur have struggled just to keep the doors open and the lights on over the past seven years, and cannot provide a sufficient education to their at-risk students with current funds.

These parents and school districts became plaintiffs in this lawsuit because of their desire to change the status quo and improve New Mexico's educational system for all children. The evidence of both student outcomes and State efforts (inputs) presented at trial proves that the vast majority of New Mexico's at-risk children finish each school year without the basic literacy and math skills needed to continue their education or pursue a career and most end up unable to

meaningfully participate in and contribute to society. The Court heard evidence at trial that when children are not able to read after third grade they tend to fall further behind each year because they cannot keep up with the reading in all their subjects (first learn to read, then read to learn). Tellingly, New Mexico continues to have one of the lowest graduation rates in the nation.

The evidence also showed that the inadequately funded programs and services currently supported by Defendants in a few districts are insufficient to address the educational needs of New Mexico's children and districts do not have the money to provide these programs on their own. The undisputed evidence also showed that with sufficient educational opportunities, our students' outcomes would look very different. In sum, Plaintiffs proved that the State is not complying with Article XII, Section 1 of the New Mexico Constitution because it fails to provide "a uniform system of free public schools sufficient for the education" of New Mexico students, especially "at-risk" students. Consequently, the Court should grant Plaintiffs the relief set forth at the end of this brief.

II. THE STATE HAS A CONSTITUTIONAL DUTY TO ENSURE THAT ALL CHILDREN ARE PROVIDED THE OPPORTUNITY TO SUCCEED IN COLLEGE, PURSUE A CAREER, AND PARTICIPATE IN OUR POLITICAL AND ECONOMIC LIFE.

For this Court to determine *whether* Defendants have violated their constitutional duty, it must first determine *what* that duty is. Based on the sources discussed in the Trial Brief, caselaw from other states, the New Mexico's Legislature's own study to answer this question, New Mexico's statutes, and the undisputed evidence from educators and experts on both sides, it is clear that the constitutionally-mandated public education system must provide every child, regardless of socio-economic, language or racial/ethnic status, the opportunity to succeed in college, pursue a career and participate in our political and economic life. This duty can be more briefly stated as the obligation to ensure that all children have the opportunity to be college, career and civics ready,

or “CCC-Ready”.

This constitutional duty and the applicable burden of proof is discussed in *Yazzie* Plaintiffs’ Trial Brief, filed June 5, 2017, at 3-15. As explained there, the plain-meaning of our Constitution’s terms, the Constitution’s history, New Mexico’s statutes and the cases from other states all support the interpretation of New Mexico’s constitutional educational mandate as requiring the State to provide all students the opportunity to be CCC-Ready. These parts of that brief are incorporated by reference herein. Further, the more-detailed review of some of these sources discussed below strengthens this conclusion.

A. This Court should adopt the standard adopted by courts from other states interpreting similar constitutional educational mandates.

The leading case articulating the state’s duty is *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). In *Rose*, the court interpreted the Kentucky constitutional mandate to “provide an *efficient* system of common schools throughout the State.” *Id.* at 189 (emphasis added). The Court decided that in order to fulfill the constitutional obligation the state must provide “each and every child” with programs and services that give them the opportunity to attain “at least the seven following capacities:”

- (i) **sufficient** oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) **sufficient** knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) **sufficient** understanding of governmental processes to enable the student to understand the issues that affect his or her community, State, and nation;
- (iv) **sufficient** self-knowledge and knowledge of his or her mental and physical wellness;
- (v) **sufficient** grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) **sufficient** training or preparation for advanced training in either academic or

vocational fields so as to enable each child to choose and pursue life work intelligently; and

(vii) **sufficient** levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 212 (emphasis added).

Many other state courts have adopted similar standards to enforce similar constitutional educational requirements. Massachusetts adopted the *Rose* standard to define that state's constitutional duty and found that the Commonwealth had failed to provide its children with an education that met the *Rose* standard. *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516, 554 (Mass. 1993). The *McDuffy* court determined that Massachusetts' 340-year-old Constitution required the state to prepare children "to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts." *Id.* at 548. "[U]nder our republican government, it seems clear that the minimum of this education can never be less than such as is **sufficient** to qualify each citizen for the civil and social duties he will be called to discharge" *Id.* at 555 (emphasis added). The Court held this was an evolving standard that had to change over time to keep up with "the demands of a modern society" or it would atrophy. *Id.* Likewise, the Kansas Supreme Court expressly adopted the *Rose* capacities as "minimal standards" to implement the Kansas Constitution's mandate for a "suitabl[y]" financed system of public education. *Gannon v. State*, 319 P.3d 1196, 1236 (Kan. 2014).

Adopting a standard very similar to the *Rose* standard, the North Carolina Supreme Court defined that state's constitutional guarantee of a "sound basic education" as one that will provide each student at least sufficient abilities and knowledge in reading, writing, speaking English, mathematics, and academic and vocational skills generally to be able to succeed in college or a

career and to participate in civic life. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). Similarly, the Washington Supreme Court defined the basic state duty to provide an “ample” education as the constitutional minimum or floor and explained that it extends

beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. Education plays a critical role in a free society.... The constitutional right to have the State make ample provision for the education of all (resident) children would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.

McCleary v. State of Washington, 269 P.3d 227, 246-7 (Wash. 2012) (citations omitted). The Court then expressly held that Washington’s constitution required the school system to provide opportunities for all students to develop the knowledge and skills necessary to:

- (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

Id. at 522-524. The Court held that the “education” required by its Constitution included those things “all students should know and be able to do at each grade level” and adopted as constitutionally mandatory the specific standards that had been adopted by statute and regulation in nine separate content areas, including reading, math, science, writing, communication, social studies, the arts, health and fitness, and educational technology. *Id.*

In sum, the cases interpreting comparable constitutional requirements from other states show that the proper standard to be applied in this case is that the education provided by Defendants must be uniform and sufficient to ensure that all children can develop the skills

necessary to be college, career, and civics ready when they finish their public school education.¹

B. The New Mexico Legislature’s study of the requirements of the Constitution’s education clause supports the adoption of the CCC-Ready (or *Rose*) standard.

In 2006, the New Mexico Legislature commissioned an independent, non-partisan study to determine the cost of providing all New Mexico public school students with a sufficient education. On January 17, 2008, the American Institutes for Research (“AIR”) completed its 16-month study and provided its report to the Legislature (the “AIR Report”), Exs. P-1816-JL and P-1817-JL (AIR Study Vols. 1-2). To determine what a sufficient education would cost, AIR first had to determine the necessary elements of the constitutional mandate. AIR did this by consulting legislators, educators, business officials, community representatives, taxpayers, superintendents, parents, and other interested individuals, and by conducting town hall meetings and surveys across the state. The elements adopted by the AIR Report were derived largely from New Mexico statutes and regulations, 1978 NMSA, §22-1-1.2 and NMAC 6.30.2 (later repealed). Ex. P-1816-JL at 9-10, 35-37.

The AIR Report concluded that New Mexico’s public education system needed to provide students “a multicultural education, diverse and highly qualified teachers, necessary supports to achieve these goals, and a range of enhancement opportunities offered in local communities” sufficient to allow high school graduates to become “successful, productive members of their communities, the nation, and the world” by acquiring the knowledge and skills generally to:

- 1) Demonstrate proficiency in the English language
- 2) Develop an understanding of cultures, and become competent in at least one language in addition to English

¹ See Trial Brief, note 2 for a compilation of cases articulating states’ constitutional educational duties.

- 3) Understand and apply:
 - a) language arts
 - b) mathematics
 - c) science
 - d) social studies
 - e) arts education
 - f) modern, classical, and native languages
 - g) health education
 - h) physical education
 - i) career readiness
- 4) Integrate and demonstrate all areas of knowledge through reading, writing, speaking, listening, and other means of communication
- 5) Develop and apply logical reasoning and creative thinking
- 6) Identify, access, evaluate, and utilize information in a variety of ways
- 7) Understand the principles of financial management

The AIR Report concluded that “students graduating from New Mexico high schools should have the requisite skills to enable entry into community college and/or entry into the work force **without** remedial needs.” (emphasis added). To accomplish this, the State’s system of public education needed to implement the following 10 standards:

- 1) **21st Century Skills** to provide each student with the thinking and doing skills they need to thrive in the 21st century...includ[ing] mastery of core subjects, adopting learning skills, such as higher order and critical thinking, and using information and communication technology to develop these learning skills.
- 2) **Arts** to promote student learning through performance, reflective thinking, and problem solving...[and] understanding of culture and history in all grades.
- 3) **Career Readiness** to integrate the areas of technological literacy, leadership and interpersonal skills, entrepreneurship, ethical workplace behaviors, and technical problem solving into all curricula.
- 4) **Health Education** to provide the opportunity to motivate and assist all students to maintain and improve their health, prevent disease, and reduce health-related risk behaviors.
- 5) **Reading/Language Arts** to direct children in learning to read and listen for comprehension, write and speak for expression, and access literature and media.

- 6) **Mathematics** to provide students the opportunity to master the concepts of numbers and operations, algebra, geometry, measurement, data analysis, and probability.
- 7) **Modern, Classical, and Native Languages** to support the use of a student's primary or home language, as appropriate, for teaching and learning, while the student acquires proficiency in English.
- 8) **Physical Education** to provide the opportunity for all students to learn and develop the skills, knowledge, and attitudes necessary to personally decide to participate in a lifetime of healthful physical activity.
- 9) **Science and Society** to prepare students to understand ways in which science and society influence each other and how scientific understanding impacts decisions at multiple levels.
- 10) **Social Studies** to encourage students to celebrate the rich and diverse contributions of peoples of many backgrounds, emphasize shared heritage, and reflect the inclusion and recognition of culture as it defines individuals, groups, and societies.

Ex. P-2970 (Levin Decl.), Decl. Ex. B.

C. New Mexico statutes and regulations support a standard that requires the opportunity to be CCC-Ready.

The New Mexico Education Code begins with the significant legislative finding that “no education system can be **sufficient** for the education of all children unless it is founded on the sound principle that every child can learn.” 1978 NMSA, §22-1-1.2(A) (emphasis added). Further, the Legislature required that student improvement in reading, writing, and literacy “must remain a priority of the State,” *Id.* at §22-1-1.2(E). The Legislature also found that “the system must meet the needs of **all** children by recognizing that student success for **every** child is the fundamental goal.” *Id.* at §22-1-1.2(A) (emphasis added).

The PED has a duty to prescribe requirements for graduation and standards for all public schools. 1978 NMSA, §§22-2-2(D) and 22-2-8(A). Specifically, PED is charged with adopting academic content and performance standards in math, reading, language arts, science, and social studies. *Id.* at §22-2C-3. Prior to 2010, PED had content and performance standards in place for

these subjects, and measured student achievement using the Standardized Based Assessment (SBA).² In 2010, New Mexico adopted the Common Core Standards in English Language Arts (ELA) and Math and now determines whether students meet these standards with the PARCC test. Skandera, Dep.Desig. at 77:16-17; 118:6-7. The State continues to measure performance in science with the SBA and uses an end-of-course exam for social studies. Ex. D-0138 at 4.

To ensure students get to be CCC-Ready, beginning in the primary school years all New Mexico public school students are expected to demonstrate proficiency in math, reading, language arts, science, and social studies. Proficiency on 4th and 8th grade tests are good predictors of college and career readiness at graduation. *See Contreras*, 6/19/17-a.m. at 13:14-25; 22:4-25, 23:23-24:10; *Wallin*, 6/20/17 at 35:24-36:13. Further, the State mandates graduation requirements for New Mexico students in statute. 1978 NMSA, §22-13-1.1. In addition to specific course requirements, the State requires that 11th grade students pass or demonstrate proficiency on the PARCC test in ELA (reading and writing) and math to graduate. *Id.* at §22-13-1.1(N); *see also* D-0138; *Ruszkowski*, 7/17/17 at 76:17-77:1. To graduate, students must also pass the SBA in science and pass an end of course exam in social studies. 1978 NMSA §22-13-1.1(N). By adopting all these proficiency requirements, the State has, in effect, adopted the CCC-Ready standard for sufficiency.

Finally, for Native American children, as part of the process of giving them the opportunity to be CCC-Ready, the State must also implement the New Mexico Indian Education Act and work with the Tribes to provide Native students the opportunity to attain an understanding of their tribal culture and their role in it.

² “Content standard” means what students should know and be able to do in content areas at each grade level. NMAC 6.29.1.7.AC. “Performance standard” means the statement of a standard that describes the specific level of mastery expected in achieving the New Mexico content standards with benchmarks and performance standards. NMAC 6.29.1.7.BP.

D. The parties agree that New Mexico’s system of public education must provide every child the opportunity to be CCC-Ready.

The witnesses at trial agreed that the purpose of K-12 public education is to produce high school graduates who have the necessary knowledge and skills to participate in a rapidly-changing, democratic society by successfully transitioning to a post-secondary institution (without needing remedial coursework) and/or entering the workforce and competing in the labor market. *See* Ex. P-2794 at ¶¶9, 24; Aguilar, 8/4/17 at 21:5-15; Ruszkowski, 7/17/17 at 61:8-11; Garcia, 6/12/17 at 59:14-60:4, 61:18-62:4; Suina, 6/26/17-p.m. at 80:9-22; Grossman, 6/14/17 at 8:4-9:8; Chiapetti, 6/28/17 at 52:10-15; Rounds, 7/12/17 at 59:23-60:8; Sullivan, 7/12/17 at 172:9-21, 280:7-19. Indeed, NMPED Acting-Secretary Ruszkowski concluded that successful completion of primary and secondary education sets the trajectory for a child’s economic success over the course of her life. 7/17/17 at 89:21-90:5. Equally important is the need for students to acquire the knowledge and skills to vote intelligently and understand their rights and responsibilities as taxpayers. Lenti, 7/26/17 at 63:8-23; Rounds, 7/12/17 at 60:24-61:2. The knowledge and skills that students need to enter college or the workforce are nearly identical (for example, the ability to read, do basic math, and utilize technology are the same for college and career, and the Common Core Standards recognize this). Contreras, 6/19/17-a.m. at 146:20-147:25; Rounds, 7/12/17 at 60:9-23; Garcia, 6/15/17 at 97:20-98:20, 101:21-103:2; Grossman, 6/14/17 at 9:9-10:9; Cleveland, 7/11/17 at 178:19-180:13; Sullivan, 7/12/17 at 172:9-14.

Proficiency in the core subject areas, as measured by the SBA and the PARCC, means that a student has mastered the academic content at grade-level. *See* NMAC 6.29.1.7.BU; Contreras, 6/19/17 at 40:19-41:17, 41:25-42:21; Ruszkowski, 7/17/17 at 72:21-73:1, 77:6-12. Witnesses on both sides testified that students who demonstrate “proficiency” in the core academic subjects throughout their K-12 educational careers are generally prepared to transition to a four-year, post-

secondary institution or enter the workforce. Contreras, 6/19/17 at 76:3-10; Lenti, 7/26/17 at 61:4-62:13; Ruszkowski, 7/17/17 at 72:21-73:1; Wallin, 6/20/17 at 35:24-36:13; Skandera, Dep.Desig. at 77:22-78:7, 118:10-14.

III. THE EVIDENCE INDISPUTABLY SHOWS THAT THE VAST MAJORITY OF NEW MEXICO STUDENTS ARE NOT COLLEGE, CAREER AND CIVICS READY.

By any outcome measure, too many New Mexico students are not achieving college, career and civic readiness. New Mexico children rank at the very bottom in the country for educational achievement and have the lowest likelihood of success among their national peers. *See* Yazzie-Stips ##1166-1223. The majority of fourth, eighth, and 11th graders in this state are not proficient in math or reading. On average, they are three years behind grade level. Berliner, 6/12/17 at 247:25-248:7; *See* Ex. D-4570 at 5. For low-income, Native American, and ELL students, proficiency levels in reading and math in the fourth, eighth, and 11th grades are startlingly worse, with proficiency rates in the alarmingly low range of 4%-15%. Sadly, these abysmal student outcomes have continued over time unabated.

The thousands of stipulated facts in this case – which describe statewide and focus district educational outcomes – document students’ lack of proficiency on both the SBA and the PARCC over a seven-year period. Yazzie-Stips ##1-994; *see also* Exs. P-2401–P-2423 (focus district report cards 2014-16); *see also* Exs. P-2945 (Gadsden) at 8-9; P-2946 (Zuni) at 3-10; P-2960 (Cuba) at 3-10; P-2961 (Jemez) at 3-10; P-2962 (Bernalillo) at 3-9; D-5045 (2017 PARCC results) at 2-5. Consequently, it is not surprising that only 70 percent of the students graduate from high school, and that those students who do go on to higher education need substantial college remediation help. The parties also agree that students who require remedial courses in colleges are less likely to complete a degree or certification program. Yazzie-Stips, ##1029, 1258. The data for our

students documents the blatant constitutional insufficiency of New Mexico's education system.

A. SBA & PARCC proficiency data are evidence of insufficiency.

Year after year, New Mexico's SBA and PARCC results show that the majority of New Mexico's children cannot read or do math at grade level. Yazzie-Stips, ##1-6. In other words, over half of all New Mexico students are not progressing to the next grade with the tools they need to succeed. This problem is exacerbated over time as children move through the educational system; by the time they reach 11th grade, children who are not proficient have substantial learning deficits. Garcia, 6/12/17 at 91:18-93:14. At-risk children perform much worse, with significantly higher rates of non-proficiency. Yazzie-Stips, ##7-36. In 2014-15, with the adoption of PARCC, students fared even worse with over 66% of students **not** proficient or CCC-Ready, again with at-risk students performing worse with 73-98% not being CCC-Ready. *Id.* at ##55-78. The educational outcomes are even worse for Native American students in New Mexico. *See id.* at ##7-12, 37-48, 61-66.

These outcomes are unacceptably low. In the last three years, the highest rate of proficiency in reading for low-income students was 21.5%; Native American students attained 17.6% proficiency; and ELL students attained 4.3% proficiency. Ex. D-5045 at 4. Overall, the proficiency rates in math from the past three years are worse, with low-income students only 14.5% proficient, Native students 10.4% proficient, and ELL students 6% proficient. *Id.* at 5.

PED Secretary Ruszkowski testified that this level of non-proficiency -- 72% of students not proficient in reading on the PARCC -- is not "sufficient." 7/17/17 at 73:22-74:2. Further, Secretary Ruszkowski noted that if the State does not improve proficiency for its students, the State will not be able to ensure that students are CCC-Ready. *Id.* at 85:18-23. Plaintiffs' witnesses testified that based on statewide academic data, including non-proficiency data, New Mexico

students are not CCC-Ready. *See, e.g.*, Garcia, 6/12/17, 62:15-63:17; Martinez, 6/14/17 at 251:22-252:5; Ex. P-2794 at ¶73; Rodriguez, 6/21/17 at 134:10-135:7; Sanders, 7/10/17 at 187:20-189:18; White, DepDesig at 72:21-73:12.

B. The State's graduation rates are evidence of insufficiency.

The parties agree that it is highly unlikely that a student who does not graduate from high school is college or career ready. Lenti, 7/26/17 at 60:22-25; Garcia, 6/12/17 at 62:16-63:17; Cleveland, 7/11/17 at 178:19-181:15. New Mexico has consistently had low graduation rates, ranging from 54%-70%. Yazzie-Stips, ##995-1001; *see also* Ex. P-0152-G. Native American students graduate at much lower rates, ranging from 45%-65% between 2008-2014. Yazzie-Stips, ##1002-1008. In the past decade, it has been rare that even two-thirds of New Mexico's seniors graduate.

C. The State's college remediation rates are evidence of insufficiency.

Even students who graduate from high school in New Mexico are not necessarily CCC-Ready. *See* Ex. P-085 at 95; Contreras, 6/19/17-a.m., 47:1-15. The parties agree that students who have to take remedial coursework when they get to college are not CCC-Ready. Lenti, 7/26/17, 62:3-6; Skandera, Dep.Desig. at 51:4-7; Ex. P-2793 at ¶13; Belfield, 6/13/17-a.m. at 22:8-19, 30:9-24; Martinez, 6/14/17 at 225:5-11; Garcia, 6/15/17 at 115:12-20; Contreras, 6/19/17a.m. at 45:6-13. Thus, given that the parties stipulated that about half of the students who graduate from high school and go to college need remedial courses (Yazzie-Stips, ##1024-1028; *see also* Ex. P-2794 at ¶62), it is undisputed that these students are not CCC-ready. The LFC reported that in 2012, the college remedial rate was 68% for Hispanic students and 79% for low-income students. Yazzie-Stips, ##1256; *see also* Ex. P-0183 at 6. Finally, the LFC reports that 59% of Native American students need college remediation courses. *Id.*

IV. THE STATE'S SYSTEM OF EDUCATIONAL INPUTS AND RESPONSE TO THE NEEDS OF NEW MEXICO'S STUDENTS, ESPECIALLY AT-RISK STUDENTS, IS INSUFFICIENT AND NON-UNIFORM.

New Mexico's rich cultural heritage results in a highly diverse student population that includes large numbers of Native American students, English language learners and children who come from families that do not have much money, though they have an abundance of perseverance, ties to the land and community traditions. New Mexico's unique student population is 71.6% low-income, 10.6% Native American, and 14.4% ELL. Ex. P-2401 at 53. One in four New Mexico children live in high poverty areas;³ these children may live in high crime neighborhoods, and they may be exposed to environmental risks in their home. Wallin, 6/20/17 at 43:1-8; Ex. P-1667 at 1. New Mexico children also face higher rates of adverse childhood experiences, particularly when it comes to violence or abuse, parental incarceration, and parental use of drugs and alcohol. Wallin, 6/20/17 at 52:10-14, 6-12; Ex. P-1669 at 13. Further, 27% of children in New Mexico are food insecure, meaning that they do not know where their next meal is coming from; they wake up hungry; and the meals they get in school may be the only meals they get for the day, all of which are associated with problems in school. Ex. P-1664 at 31; Wallin, 6/20/17 at 54:1-23.

New Mexico children face higher hurdles to success and more serious challenges at much greater rates than many of their peers in other states. Wallin, 6/20/17 at 15:15-19; *see also* Ex. P-0127-O at 26. However, the challenges faced by New Mexican students are not an excuse for Defendants' failure to meet their constitutional responsibility to educate **all** children. Far from it. To meet these challenges, the State must provide better education programs and services. In order to meet its constitutional obligation to provide a uniform system sufficient for the education of **all**

³ High poverty area means a census track that has a greater than 30% poverty rate. Wallin, 6/20/17 at 43:19-25.

children, the State must utilize its knowledge of what these students need and ensure that they have the opportunity in every school district to have their educational needs met. In New Mexico, and across the nation, it is undisputed what at-risk children need in school.

At trial Plaintiffs presented comprehensive evidence of the insufficiency of the State's current system of educational programs, staffing, supports and funding. Recognizing that implementation of that system is shared by PED and the State's 89 school districts and funded by the Legislature, Plaintiffs demonstrated at trial that the primary drivers of the ongoing constitutional injury to New Mexico children are under the direct control of PED and the Legislature, *not* the districts. As set forth in this section, the insufficiency of inputs stems directly from PED's failure to ensure that every district provides educational programs designed to help low-income, ELL and Native children and from the State's failure to fully fund these programs and services in the districts. The effects of this mismanagement are compounded by PED's use of harmful teacher evaluation policies and overall resistance to reforms that would enable districts to deliver an education which passes constitutional muster and which have been supported by the LFC and LESC.

A. PED does not exercise its authority to ensure that programs and services sufficient to meet the needs of at-risk students are provided in the districts.

The Public Education Department ("PED") is at the heart of the State's violation of the constitutional mandate. The PED is an agency lacking an institutional understanding of what its duties to students are under the New Mexico Constitution, and what college and career readiness actually means for the divergent and overlapping groups who make up the State's at-risk student population. Burrell, 7/18/17 at 33:22-35:5; Spencer, Dep.Desig. at 45:3-23, 49:1-25. Unlike many other states which rely on local property taxes to support public education, fundamentally all funding for districts' operations in New Mexico comes from the PED either through the State

Equalization Guarantee (“SEG”) – a flawed allocation formula that distributes operational funds to each district – or from federal funds. Ex. P-87 at 10-21. PED controls how all these funds are expended by the districts: the SEG funds are distributed by PED through an annual process of approving each district’s budget and the federal funds are distributed by PED through a process of approving the grants to each district. Burrell, 7/18/17 at 13:10-15:12; Ex. P-71. Notably, LFC Deputy Director Charles Sallee testified that PED is already vested with sufficient budgetary authority under the SEG to withhold approval of a district’s SEG allocation if the PED determined that the district was not spending its money in accordance with the State Constitution. Sallee, 7/21/17-a.m. at 115:21-116:25, 121:11-122:8. PED is also required to monitor or audit the use of these SEG and federal funds, something that it does not do sufficiently and which inures to the detriment of at-risk students. Burrell, 7/18/17 at 23:25-24:12; Ex. P-87 at 35-49.

At trial the evidence from the LFC, LESC and superintendents proved that PED: 1) fails to distribute sufficient funds to the districts to provide the programs and services needed by the State’s students, especially at-risk children; 2) fails to monitor and hold districts accountable for how they spend their annual appropriation; 3) fails to employ sufficient audits of the SEG adjustment factors, teacher and experience (“T&E”) index and the ever-expanding number of below-the-line programs; and 4) fails to carry out its duties with the transparency, data sharing, technical assistance and guidance that is necessary for a successful relationship with the Legislature and districts.

The State blames the districts for the terrible performance outcomes of the State’s children and claims it cannot provide more funding or exercise more control over districts’ spending. But the evidence demonstrated that the funds disbursed by PED are insufficient to serve the needs of the State’s students and that PED fails to exercise existing budgetary control over districts’ use of their annual appropriation to ensure the constitutional mandate of sufficiency and the many SEG

adjustment factors, including the at-risk index, are being met. Beginning with the 2011 joint LFC/LESC study “Evaluation of the Public School Funding Formula,” the two legislative committees concluded that “the accountability function of PED is insufficient, resulting in unfair, inaccurate, and inequitable distribution of public resources.” Ex. P-87 at 5.

B. There are insufficient programs and services for at-risk students provided across the state, violating constitutionally required sufficiency and uniformity.

The State has failed to provide programs and services to New Mexico’s at-risk students despite the fact that the State knows that early childhood education, extended learning time, evidence-based literacy instruction, health and social services, smaller class sizes, fine arts and PE greatly improve student outcomes.⁴ Even when the State does provide these programs and services, it only serves a fraction of the students who need them. Without the opportunity to access programs and services that improve educational outcomes, at-risk students are not receiving a sufficient education. Sanders, 7/10/17 at 303:12-304:3; *see also* Ulibarri, Dep.Desig. at 89:22-90:3.

1. The State does not provide most at-risk children the opportunity to attend early childhood education.

Indisputably, early childhood education significantly improves outcomes for at-risk children. *See* Appendix A at ##1-5, 11. Nonetheless, the State provides insufficient funds for most at-risk four-year-olds in New Mexico to have an opportunity to participate in a PreK program. In fact, the State admits that low-income students have fewer opportunities to access PreK than their

⁴ Indeed, Plaintiffs presented so much evidence as to the efficacy of these programs and services that the Court told Plaintiffs that she had heard enough and more evidence would be cumulative. To facilitate the Court’s access to this testimony Plaintiffs have created a catalogue of these programs, services and testimony. *See* Appendix A regarding these programs and services.

non-disadvantaged peers. Lenti, 7/26/17 at 32:16-19. The LFC estimates that over 9,000 four-year-olds in New Mexico – about one-third of four-year-olds in the state – do not have access to *any* type of PreK program, whether it’s CYFD, PED, or Head Start – full-day or half-day. Ex. P-1671 at 60; *see also* Wallin, 6/20/17 at 63:7-66:19.

Full-day PreK is an element of a high-quality program and has proven to be more effective and pragmatic for at-risk children and their families than half-day programs. Wallin, 6/20/17 at 67:21-68:10; Garcia, 6/12/17 at 77:16-78:9; Perry, 6/29/17 at 23:22-24:5; Yturralde, 6/30/17 at 9:17-25; Hale, Dep.Desig. at 155:20-156:3; Webster, Dep.Desig. at 128:16-129:9, 145:3-7; Rea, 7/28/17 at 148:16-149:3. Though high-quality, full-day PreK can close the achievement gap for low-income children by Kindergarten, only 3,641 four-year-olds are estimated to receive full-day PreK through CYFD or PED in fiscal year 2017, leaving 23,359 four-year-olds without access to a full-day PreK program. *See* Appendix A at #1; Ex. P-1671 at 60. Because the State does not even track the socioeconomic status of the students who are served by PreK, it is impossible to know how many at-risk students are actually benefiting from the programs offered. P-2797 at 17; *see also* Yazzie-Stips #1080. Finally, Dr. Goetze found that neither CYFD nor PED PreK programs in New Mexico offer all the necessary elements of a high-quality PreK program, such as transportation, highly qualified direct service staff, and full-day. Ex. P-2797 at 18.

Superintendents testified to the lack of access to early childhood education, noting that not all students who need full-day PreK in their districts are able to enroll and that some districts do not have a PreK program at all. Garcia, 6/15/17 at 53:17-54:24; Grossman, 6/14/17 at 19:6-12, 25:6-16; Martinez, 6/14/17 at 217:10-19; Space, 6/29/17 at 158:2-6, 170:19-171:10; Chiapetti, 6/28/17 at 71:12-15; Perry, 6/29/17 at 53:18-25 (10 out of 28 children have access to PreK); Sanders, 7/10/17 at 192:13-22, 193:12-14; Cleveland, 7/11/17 at 185:3-8; Sullivan, 7/12/17 at 180:7-25; Rounds, 7/12/17 at 103:18-22.

Acknowledging the positive effects PreK has for all children, the State has conducted analyses to determine how much it would cost to provide full-day PreK to all four-year-olds. Ex. P-0236 at 41. Yet, neither the PED nor LFC have a plan to implement and fully fund PreK. Stewart, 6/20/17 at 258:4-13. In fact, from FY 2015 to FY 2018, funding and enrollment in PreK have remained flat. P-1671 at 60; P-1676 at 2; *see also* Wallin, 6/20/17 at 70:11-71:7.

2. The State does not provide extended learning opportunities to all at-risk students.

The State and experts have found K-3 Plus to be a very effective program for at-risk students. *See* Appendix A at #15. Nonetheless, the State provides districts insufficient funds for the program and it serves only 28% of eligible students.⁵ The LFC has estimated that 52,206 additional students are in need of K-3 Plus. Ex. P-1671 at 60; Wallin, 6/20/17 at 71:12-73:6; *see also* Garcia, 6/12/17 at 79:4-8 (all the children who need K-3 Plus are not getting it due to lack of funding). Yet funding for K-3 Plus has remained flat or decreased from FY 2015 to FY 2018. P-1676 at 3; Wallin, 6/20/17 at 70:14-22. In fact, in June 2017 the PED cut the number of children who receive K-3 Plus by 4,000-5,000 students, forcing districts like Albuquerque, Santa Fe, and Las Cruces to reduce the number of students who could participate. Stewart, 6/20/17 at 168:20-169:4; Garcia, 6/15/17 at 57:10-22; Coleman, 6/22/17 at 130:19-21. When the State defunds K-3 Plus (or any other below-the-line programs), districts have difficulty finding the funding elsewhere to provide the program. Chiapetti, 6/28/17 at 78:14-20; Adams, Dep.Desig. at 85:5-8. This leaves at-risk students without access to extra learning time, resulting in fewer students performing at grade level. Stewart, 6/20/17 at 171:15-172:11.

⁵ According to the LFC, 70,343 students are eligible for K-3 Plus and 19,383 received it in FY16. Ex. P-1671 at 60.

Further, current PED administrative burdens of the K-3 Plus program prevent some districts from participating. For example, because funding for the program is based on a per pupil amount, small school districts, like Lake Arthur, do not have enough students to generate enough funding to pay for teachers for the program and therefore have never been able to offer it. Grossman, 6/14/17 at 20:17-21:5. The K-3 Plus program is also operated on an application basis, so districts do not find out whether they will be funded until late in the fiscal year (Coleman, 6/22/17 at 130:22-131:2), making it difficult to enroll students and secure a teacher in time, leaving many districts unable to provide the program even if they are granted funding. Ex. P-2797 at 39:1-12; Adams, Dep.Desig. at 83:11-17.

In addition to the K-3 Plus shortages, Districts have had to cut summer and afterschool programs, including tutoring, due to lack of funding. Stewart, 6/20/17 at 173:2-11; 174:24-176:4; 177:5-16; Perry, 6/29/17 at 33:21-34:22; Yturalde, 6/30/17 at 81:2-6 (testifying that tutoring will run out); Chiapetti, 6/28/17 at 77:9-15. Losing these programs has a detrimental effect on students. Perry, 6/29/17 at 15-16. Even when districts do have a summer or afterschool program, not all students who need it have access to it. Garcia, 6/15/17 at 127:1-14; 125:6-8; Sullivan, 7/27/17 at 184:6-15 (specific to K-3 Plus). Although summer school and afterschool programs are vital to Gallup's students, the district cannot afford to provide both programs. Chiapetti, 6/28/17 at 77:16-18, 78:10-13. Further, districts often cannot provide afterschool or summer school programs even though students want to participate because the districts cannot afford the transportation for the students. Chiapetti, 6/28/17 at 143:14-17, 224:10-225:13; Space, 6/29/17 at 158:14-22, 149:11-14 (students have to provide their own transportation home if they want to participate in afterschool programs). Although credit recovery programs help keep high school students on track to graduate, the State does not provide sufficient funding statewide. Stewart, 6/20/17 at 178:10-12; Cleveland, 7/11/17 at 193:22-195:6; Hale, Dep.Desig. at 149:14-19. Finally, credit recovery programs,

another type of extended learning program that helps keep high school students on track to graduate, do not receive sufficient State funding to serve the children who could benefit from them. Stewart, 6/20/17 at 178:10-12; Cleveland, 7/11/17 at 193:22-195:6; Hale, DepDesig. at 149:14-19.

There is no dispute as to these shortages. The State has acknowledged that low-income students have fewer opportunities to access summer programs and tutoring compared to their non-disadvantaged peers. Lenti, 7/26/17 at 32:16-19.

3. Evidence-based literacy instruction is necessary but is available only to some students in some districts.

Children who cannot read by the end of third grade are four times more likely to dropout. Yazzie-Stips ##1104-1105; *see also* Ex. P-342 at 1. Yet, only one in four children in New Mexico reads at grade level by third grade. Ex. P-2401 at 55. The State's response to this crisis has been to provide a below-the-line program called Reads to Lead ("RTL") which offers some districts funding to hire reading coaches and specialists. In 2012, when the program was first implemented, only 12 districts received funding from RTL through a limited and competitive grant application process. Yazzie-Stips ##1126, 1128. In 2013-2014, the State changed its approach and provided every district about \$50,000, which was enough to provide only one reading coach for each district. Stewart, 6/20/17 at 151:18-152:9; Yazzie-Stips ##1130; Grossman, 6/14/17 at 46:8-25. Then in the 2016-17 school year, the State shifted gears again, made the grant competitive, and provided funds only to those districts that had improved their reading scores. That meant PED defunded districts whose scores stayed the same or decreased, requiring those districts to eliminate their reading specialists. Grossman, 6/14/17 at 45:4-22, 100:3-12 ("When did reading become a select skill that is only funded to certain school districts?"); Martinez, 6/14/17 at 169:5-12; Adams, Dep.Desig. at 84:22-85:19; Hale, Dep.Desig. at 51:19-52:7. Now, only 45 districts receive any

funding at all from RTL. Ex. P-3016 at 123-124. When Gallup did not receive RTL in 2016-17 it chose to allocate some of its limited budget to keep its few reading tutors; but with or without RTL funds Gallup could not afford a sufficient number of reading specialists to reach all its at-risk students. Chiapetti, 6/28/17 at 80:9-82:5; *See also* P-3016 at 123.

There is a strong correlation between the State's failure to fund programs to teach students how to read and students' proficiency scores. Yet the State's budgets have not included sufficient funds for RTL specialists for all at-risk children or to train teachers with the proven strategies needed to teach reading and provide them instructional materials. Stewart, 6/20/17 at 160:2-8. Further, districts do not receive enough SEG funding (above-the-line) to provide the kind of professional training teachers need to teach reading. Stewart, 6/20/17 at 156:1-13.

4. School-based health and social services are not available to all at-risk students.

The vast majority of students in New Mexico are at-risk and need services like counselors, social workers, and nurses. Both Plaintiffs' and Defendants' witnesses testified that these supports help improve school and student academic performance. *See* Appendix A at ##29-31, 34-36. Yet, most districts do not have sufficient funding to make these services available to all at-risk students. Further, many districts have had to eliminate counselors, nurses, and social workers and/or reduce their time in the district due to budget cuts. Yturralde, 6/30/17 at 9:13-16, 105:11-20, 6/29/17 at 97:22-98:19; Perry, 6/29/17 at 19:21-20:22, 97:17-24; Space, 6/29/17 at 152:21-154:19; Ramirez, 6/21/17 at 225:16-226:8, 232:8-19; Chiapetti, 6/28/17 at 91:4-16, 89:7-19, 89:23-90:16, 90:19-22; Garcia, 6/12/17 at 101:14-102:4; Chavez, 7/7/17 at 75:10-12, 93:15-25; Rounds, 6/12/17 at 103:23-104:15; Sullivan, 7/12/17 at 190:1-21, 191:6-7, 191:11-192:7; Grossman, 6/14/17 at 24:15-20, 137:19-138:1; Martinez, 6/14/17 at 161:23-162:15; Hale, Dep.Desig. at 152:14-153:17, 156:4-15, 156:23-157:18; Salas, Dep.Desig. at 45:7-10.

5. Fine arts and PE, although mandatory, are not sufficiently funded.

State law requires that fine arts and PE be provided as part of the K-12 curriculum and specifically includes fine arts education and physical education in the funding formula. *See* Appendix A at ##40-41. These types of programs help students stay in school and improve graduation and achievement rates. Berliner, 6/12/17 at 241:16-242:8. Even though art, music and PE are mandated by law and are fundamental to a child's education, the State has failed to sufficiently fund districts so that they are able to provide these programs to all students, including at-risk children. Districts have had to reduce the number and quality of these programs in response to budget cuts or have had to eliminate other positions to maintain limited fine arts and PE programs. Sullivan, 7/12/17 at 190:1-7; Chiapetti, 6/28/17 at 82:6-18, 87:12-25; Garcia, 6/12/17 at 114:8-14; Space, 6/29/17 at 167:24-168:12, Grossman, 6/14/17 at 24:10-12, 26:21-27:6; Hale, Dep.Desig. at 148:20-149:13; Lujan, Dep.Desig. at 95:17-96:12. The superintendent of Magdalena testified that cuts to these programs have detrimentally affected Native American students in the district. Perry, 6/29/17 at 17:15-24.

6. State funding is not sufficient to allow smaller class size for at-risk children.

In recognition of their significant impact on students, the State has legislated requirements for maximum class size, class load, length of school day, staffing patterns, subject areas, and purchases of instructional materials. *See* Appendix A at #44. But repeatedly the Legislature has failed to provide districts with enough funds to implement these important measures and, instead, has enacted waivers of these requirements due to financial constraints. 1978 NMSA, § 22-1-10; Stewart 6/20/17 at 157:6-14. The Legislature has done this because it does not provide districts with enough money to pay for even their basic programs. Stewart, 6/20/17 at 157:24-158:8, 259:20-23, and 262:12-263:4. As a result, districts have had to increase their pupil-to-teacher

ratios, with some districts going over 10% of the statutory limit. *Id.* at 157:24-158:20. Obviously, this has a detrimental effect on student performance, especially for at-risk students. In fact, the PED found that waiving class size and other requirements “. . . could have a significant negative impact on student achievement, particularly with students in need of additional assistance, instructional time, and individualized interventions.” Ex. P-122 at 2. The PED’s analysis of the class-size waiver bill noted that it may have significant impact on student performance in math, reading, and language arts “and decreased learning time may affect student learning.” Ex. P-122 at 2-3.

Likewise, Plaintiffs’ witnesses testified that smaller class sizes are essential for at-risk students, especially in the early grades. *See* Appendix A at #45. Some districts, like Santa Fe, have decided to cut or limit other necessary programs and services in order to maintain smaller class sizes for some students. Garcia, 6/12/17 at 114:1-14; *see also* Hale, Dep.Desig. at 150:13-151:14. But due to budget constraints many other districts have had great difficulty providing at-risk students smaller classes and have had to increase their class sizes instead. Perry, 6/29/17 at 18:11-19:2; Sanders, 7/10/17 at 210:2-9, 217:19-218:6; Cleveland, 7/11/17 at 159:23-160:4, 162:10-163:5, 212:20-24, 221:8-15; Sullivan, 7/12/17 at 195:4-196:3, 271:14-272:7.

C. The State’s education inputs for ELL and Native American students are woefully insufficient to meet the needs of these children.

Plaintiffs established at trial that the State’s inputs for ELL students are not sufficient and do not meet longstanding federal and expert standards. To avoid duplication, *Yazzie* Plaintiffs refer the Court to the Closing Brief of *Martinez* Plaintiffs for the evidence of ELL students’ needs generally and the State’s insufficient efforts. Plaintiffs also established at trial that the State’s education system fails to meet the needs of Native American students and that PED is not complying with the Indian Education Act. These failures are addressed in Section V, below.

D. Underlying all these deficiencies is the State's failure to provide school districts with enough money to provide the necessary programs and services.

1. Increased funding for programs, staffing and services in New Mexico would improve educational outcomes, especially for low-income, Native American, and ELL students.

As discussed above, Plaintiffs presented extensive evidence on the specific types of programs, services and staffing that New Mexico's diverse student body needs in order to meet the State's constitutional mandate. Obviously, providing these programs to all the children who need them will cost additional money. The cost is necessary, however, since, Plaintiffs and Defendants agree that many of these key programs and services have substantial positive impacts on the educational achievement of at-risk children. Belfield, 6/13/17-a.m. at 46:7-47:18; Ex. P-2793 (Belfield Decl.) at ¶17, ¶¶110-127, Tbls. 11-12; Hanushek, 8/3/17-p.m. at 69:1-25; Lenti, 7/26/17 at 33:12-35:11, 42:5-9.

Defendants' witnesses not only failed to present evidence rebutting the positive causal relationship between educational funding and student achievement, but ultimately agreed with the testimony of Plaintiffs' witnesses that money *does in fact matter* when it comes to improving student educational achievement and attainment. Notably, Defendants' principle education finance experts and PED's former Deputy Secretary for Policy and Programs, conceded that a positive causal relationship exists between money spent on specific programs and staffing preferences and the outcomes of the students who are the recipients of those interventions. Armor, 7/31/17-p.m. at 93:13-21; Hanushek, 8/3/17-p.m. at 38:6-39:17; Lenti, 7/26/17 at 65:15-22.

2. The State has failed to enact legislation and appropriate funds necessary to meet the needs of at-risk students.

Current and former superintendents testified that New Mexico's overall appropriation for

education is so woefully deficient that districts do not have the funding to maintain necessary programming, staffing and services for at-risk students, as nearly all of their appropriation goes to pay for fixed costs. Garcia, 6/12/17 at 70:9-24, 87:15-88:7; Garcia, 6/15/17 at 75:21-76:07, 176:6-17; Grossman, 6/14/17 at 54:13-18; Rounds, 7/12/17 at 79:21-80:15, 135:7-14; Sullivan, 7/12/17 at 278:14-280:3; Cleveland, 7/11/17 at 293:3-295:5. In fact, one superintendent testified that he “[prays] for cooler summers and warmer winters” because he lacks the funds to properly heat and cool his buildings. Grossman, 6/14/17 at 52:16-54:21.

As for cash reserves, which are necessary for districts to maintain favorable bond ratings and corresponding low interest rates, superintendents testified that districts rely on those cash reserves for cash flow due to unpredictable State payments and an array of emergencies and unanticipated costs throughout the year, often leaving districts with the Hobson’s choice to either fund necessary programming or suffer a credit rating downgrade or risk defaulting on their bond obligations. Garcia, 6/12/17 at 80:15-81:25, 82:8-83:21; Garcia, 6/15/17 at 92:23-93:10, 94:11-95:4; Grossman, 6/14/17 at 36:12-37:2, 64:2-8, 81:23-83:6; Cleveland, 7/11/17 at 199:23-200:1, 210:16-20, 217:3-218:4; Sullivan, 7/12/17 at 209:11-211:1.

On the threshold question of whether the State provides sufficient funding to New Mexico school districts to meet the needs of at-risk students, Plaintiffs’ witnesses, including a member of the Legislature, answered a resounding “no.” Stewart, 6/20/17 at 165:23-166:16, 208:12-16; Rounds, 7/12/17 at 71:3-9, 74:1-10, 84:2-15; Grossman, 6/14/17 at 76:7-10. Consistent with this testimony, witnesses also testified about the funding failures of both the Legislature (for not providing sufficient funding for at-risk students) and the Governor (for vetoing legislation that included some increased funding and reforms).

Further corroborating this evidence of insufficient funding, the AIR Study, completed in 2008 and updated in 2009, determined that there was substantial underfunding of education across

all New Mexico districts, with particularly large funding shortfalls found in rural and remote locations. Ex. P-1816-JL; Ex. P-1817-JL; Ex. P-1818-JL; Ex. P-2970 (Levin Decl.) at ¶13, Exs. 1-2. This deficient funding continues to the current day, with education funding now lower than it was in 2008 when adjusted for inflation. P-2803 (Barro Decl.) at ¶¶44-46.

Finally, the evidence showed that the annual education appropriation under the SEG funding formula is not derived from a consideration of the actual needs of New Mexico's school children, but is based simply on the prior year's education appropriation. Ex. P-2803 at ¶90(a). In addition, the SEG, by design, is insufficiently responsive to single-year influxes in students, which can result in annual appropriations to districts that are not tailored to the educational needs of their students. Burrell, 7/18/17 at 20:25-21:14.

In addition to the failure to provide enough general SEG funds to provide a sufficient education to at-risk children, longtime LESC member Senator Mimi Stewart also testified about specific deficiencies in funding for: 1) professional development for teachers; 2) class size reductions; 3) transportation; 4) extended learning opportunities; 5) ancillary personnel; 6) special education/tutoring. 6/20/17 at 142:25-143:18, 147:1-148:3, 157:6-14, 164:22-24, 173:2-7, 195:5-13, 206:11-17, 207:21-24. Former superintendent and current director of the NM Coalition of Education Leaders Stan Rounds added to this list of funding deficiencies: 7) instructional materials, 8) "below-the-line funding", and 9) pay for teachers to move between tiers per the SEG's T&E index. 7/12/17 at 71:14-73:3, 81:11-83:2, 111:2-6. *See also* P-2957.

Several superintendents confirmed the insufficiency of funding for transportation and instructional materials and how districts must use their SEG appropriation to supplement these funds, which leads to increases in class sizes and the reduction of vital programming for at-risk students. Cleveland, 7/11/17 at 191:18-192:1, 199:17-22, 208:8-213:17, 215:14-22; Chiapetti, 6/28/17 at 49:14-23, 79:4-18, 224:10-225:19; Sullivan, 7/12/17 at 201:24-203:7, 205:6-23; Lewis,

6/30/17 at 139:25-140:5; Space, 6/29/17 at 148:8-149:14; Garcia, 6/15/17 at 85:11-86:2; Valdez, 7/6/17 at 17:25-18:13, 26:6-17, 84:4-23; Chavez, 7/7/17 at 77:10-16, 80:11-81:16, 84:7-22.

In the face of funding deficiencies, reform legislation either failed to pass or was vetoed by the Governor. Such failed legislative efforts include: 1) increasing the at-risk index, 2) better calibrating the SEG's many adjustment factors to student need; 3) prioritizing funding for PreK and expanding K-3 Plus funding; 4) modifying the funding formula to align training and experience to the teacher three-tiered licensing system; and 5) requiring better PED oversight of district at-risk spending and below-the-line appropriations. Sallee, 7/21/17-a.m. at 67:23-68:22, 69:22-72:25, 81:3-16, 82:4-84:9, 84:16-85:4; Abbey, 7/25/17 at 42:15-44:22, 55:13-56:5, 57:4-16, 58:17-59:10, 61:8-20; P-401 at 6; P-402 at 5; D-3994 at 5.

In order to remedy many of the foregoing deficiencies in funding and better serve the needs of at-risk students, both Plaintiffs' and Defendants' witnesses offered an array of revenue-raising options that could be enacted via legislation or constitutional amendment: 1) access the general fund, land grant permanent fund and severance tax permanent fund; 2) increase gross receipts taxes; 3) slow down or reverse the corporate income tax reductions; 4) increase progressiveness of income tax structure; 4) open up local revenue-raising capabilities; 6) pass a tax on all internet sales; 7) increase consumption taxes on gasoline, alcohol and cigarettes; 8) repeal the capital gains tax deduction; 9) increase excise taxes on motor vehicles; 10) end gross receipt tax loopholes for extractive industries; and 11) reinstate the health care industry tax. Rounds, 7/12/17 at 84:25-87:22; Stewart, 6/20/17 at 265:2-267:5, 280:12-282:20; Abbey, 7/25/17 at 82:5-88:25; Smith, 7/26/17 at 168:6-172:17.

3. Deficiencies in the State's funding formula and the way the annual appropriation is derived also prevent districts from providing the requisite programming, staffing and services necessary for a sufficient education.

Plaintiffs' and Defendants' witnesses testified that deficiencies in the SEG distribution formula also prevent school districts from providing the requisite programming, staffing and services necessary to provide a sufficient education to New Mexico's students. Education finance expert Dr. Stephen Barro demonstrated through a series of analyses of PED data that: 1) SEG allocations to districts are only weakly related to district percentages of poor students (the highest poverty districts receive only two to three percent more SEG funding per student than the average district); and 2) there is no positive association at all between district percentages of ELLs and SEG funding per student. Ex. P-2803 (Barro Decl.) at ¶¶61-67, Charts 2-4, Tbls. 3-4.

Further analyses by Dr. Barro on the at-risk factor's unresponsiveness to student need revealed that:

- 1) the at-risk rate controls such a small portion of SEG funds that it provides very little increased funding to districts with high concentrations of at-risk students;
- 2) there is only a slight positive correlation between districts' at-risk rates and SEG funding per pupil;
- 3) the relationship between the at-risk rate and SEG funding per pupil is weak because of the low weight assigned to the at-risk factor;
- 4) for the 2014-16 school years the actual at-risk factor was only 5 - 6%, not the statutory 9 - 10%, because other formula factors generate an average of about 1.819 allocation units per student; and
- 5) assuming a fixed total of SEG funding, the whole effect of the at-risk factor was to redistribute only a minuscule portion of SEG funds — just 0.31, or \$7.25 million in 2014 — from one set of districts to the districts that need the funds.

Ex. P-2803 at ¶¶99-101, 103-106, 111-112, Tbls. 4-6.

Despite the relative ineffectiveness of the SEG to channel meaningful additional dollars to poor children, PED official Charles Burrell admitted that PED has neither evaluated whether the at-risk index should be increased based upon the cost of actually educating at-risk students, nor even what PED's duties to New Mexico students entail, especially at-risk students, under the

constitutional education mandate. 7/18/17 at 23:25-24:12, 33:22-35:5. Consistent with the recommendations of the foregoing 2011 joint study by the LFC and LESC (*see* P-87 at 3-4), Burrell admitted that he believed the at-risk factor should be increased to .15 from the current .106 and expanded to students eligible for free or reduced-price lunch (“FRPL”), rather than only including children living below the federal poverty line. 7/18/17 at 25:13-26:2; P-87 at 5. Burrell also conceded that: 1) some of the SEG’s components “do not effectively recognize the cost difference or fairly allocate funding for serving at-risk students;” 2) “the at-risk index is a broken funding mechanism that is too complex and misallocates funds even when calculated accurately;” and 3) “most other states allocate funds to at-risk students with more simple calculations that use federal data.” 7/18/17 at 26:14-28:8; P-87 at 11-13.

Also consistent with the LFC/LESC’s and Burrell’s criticisms of the at-risk index and other adjustment factors, other State witnesses testified on the unresponsiveness of the formula, affirming the critiques found in several LFC publications in recent years, and noted where the committee had recommended increasing the at-risk factor and modifying the small-school factor and teacher index to align training and experience to the three-tiered teacher licensing system. Sallee, 7/21/17-a.m. at 66:9-68:22, 75:6-77:14, 80:21-81:13, 84:16-85:4; Abbey, 7/25/17 at 37:16-40:16, 42:15-44:22, 55:13-57:6, 58:15-21; Ex. P-2806 (2008 LFC Rpt.); Ex. P-401 (2014 LFC Performance Guidelines) at 6; Ex. P-402 (2016 LFC Performance Guidelines) at 5; Ex. P-403 (2017 LFC Performance Guidelines) at 5; Ex. P-324 (2011 LFC Rpt.) at 6, 8; Ex. P-326 (2014 LFC Rpt.) at 11; Ex. D-3994 (2014 LFC Rpt.) at 9. On the issue of charter school use of the small-school adjustment factor to generate additional funding, Sallee testified that such use of the factor, which has been approved by PED, was inappropriate, if not illegal, and improperly diverted funds away from district schools’ at-risk populations. 7/21/17-a.m. at 75:11-76:14. Indeed, from 2008 to 2015 charter schools received 46% of additional dollars for education while educating

only 7% of the state's students. Ex. D-5074 at 32 (2016 LFC Charter School Eval.)

The unresponsiveness of the at-risk factor to the needs of at-risk students exists in the context of a revenue landscape in New Mexico that has steadily declined in overall education funding since 2008 when adjusted for inflation, a situation compounded by the fact that the SEG contains no adjustment mechanism for inflation. Ex. P-2803 at ¶¶44-50, Tbls. 4a, 4b, 5; Burrell, 7/18/17 at 15:13-17.

In the face of such a dire financial reality, Dr. Barro presented analyses demonstrating the reasonableness of both increasing the SEG's at-risk factor to somewhere between .25 and .50 and expanding student membership eligible for weighted funding from those families meeting federal Census poverty income limits to those students eligible for FRPL. Ex. P-2803 at ¶¶27-36, 113-120, Exs. C, G, Tbl. 7. Significantly, even Mr. Burrell admitted that the current funding formula's adjustment-weighted allocation scheme would better serve districts' needs if the total appropriation for education was increased. 7/18/17 at 36:13-37:7.

Dr. Levin testified that the SEG and its various adjustment factors were not calibrated to actual student need in New Mexico. 7/11/17 at 50:15-51:19; Ex. P-2970 at ¶¶16-18. Dr. Levin's analysis addressed the two fundamental questions of educational adequacy: 1) What does it cost to enable a public school system to provide all students with an adequate education? and 2) How can school systems allocate their resources equitably, such that all students are afforded an adequate education regardless of their need or circumstance? 7/11/17 at 11:4-25, 18:25-19:16; Ex. P-2970 at ¶16; Ex. P-1816-JL (AIR Study Vol. 1); Ex. P-1817-JL (AIR Study Vol. 2). In furtherance of those objectives, Dr. Levin, testified about the comprehensive costing-out model used in the AIR study which involved demographically-driven resource cost specifications for different types of New Mexico school districts created by professional judgment panels populated by a diverse group of the State's education experts. 7/11/17 at 19:17-30:14; Ex. P-2970 at ¶¶37-

70, Exs. B, C, Ex. 4. Dr. Levin testified about the methodological soundness of the hybrid costing-out model used in the AIR study by noting the several safeguards and review processes employed to ensure that the model generated efficient costing-out solutions for New Mexico students. 7/11/17 at 36:6-40:2; Ex. P-2970 at ¶¶71-92, Ex. 5. Dr. Levin also testified that the work of the professional judgment panels was guided by a “goals statement” that, as discussed above, articulated a definition of educational sufficiency that mirrors the *Rose*-oriented standard that Plaintiffs are seeking the Court adopt in this case. Ex. P-2970, Decl. Ex. B. In sum, this approach to educational funding is rationally linked to ensuring constitutional sufficiency, while the current method which is based on the prior year’s insufficient appropriation is not.

E. The State does not ensure that at-risk students have qualified and experienced teachers, even though they are necessary to improve educational outcomes.

At trial Plaintiffs proved the negative effects that New Mexico’s teacher compensation and evaluation system has on at-risk students, including a teacher turnover rate that is among the worst in the nation. Moreover, PED witnesses admitted problems with the effectiveness of the State’s teacher evaluation system, NM Teach, to ensure that teachers provide culturally relevant learning environments to at-risk students.

Dr. Jesse Rothstein testified that:

- 1) New Mexico is failing to ensure that at-risk students in “high need” schools are exposed to highly effective teachers;
- 2) policies that create rewards for teaching in high need schools can help address teacher quality problems in these schools and benefit students, in contrast to punitive teacher evaluation policies that penalize teachers working in high needs schools and have negative consequences for students;
- 3) New Mexico’s value-added model (VAM) is seriously flawed due to biases by differences in student assignments across teachers and schools; and
- 4) the State’s NM Teach system penalizes teachers particularly in high need schools relative

to those in low need schools.

Ex. P-2799 at ¶12(a)-(f), ¶¶32-66, Tbls. 5-10.

Notably, PED's former Deputy Secretary for Policy and Programs, Leighann Lenti, admitted that the VAM system used by the State doesn't account for student demographics, and she testified that she was not aware of PED having studied whether lower teacher accountability scores are associated with low funding for at-risk students. 7/26/17 at 47:20-48:18.

Plaintiffs' expert in educational administration, Dr. Ed Fuller, testified that there is a crisis level of teacher turnover in the state, and correspondingly lower student achievement — facts that as Dr. Fuller noted are well-known by the PED. 7/13/17 at 41:12-42:20, 49:13-53:14, 55:8-19, 57:9-60:13, 62:17-65:3, 116:23-119:17; Ex. P-2975-EF (Fuller Reb. Decl.), Figs. 4-5, 11, Tbls. 4, 9-11, 13. Dr. Fuller presented further evidence that NM Teach's biased and flawed methodology for evaluating teachers leads to lack of teacher confidence in the evaluations themselves, which only exacerbates teacher attrition. 7/13/17 at 103:23-107:1, 111:15-113:11.

Moreover, Matthew Montano, PED's Deputy Secretary in charge of educator quality, testified that NM Teach's rating system is devoid of any meaningful metric to evaluate the linguistic and cultural needs of ELL and Native student populations, and admitted that under NM Teach's current rubric a teacher can be rated as effective without even demonstrating an ability to appropriately serve ELL students or provide a culturally relevant learning environment for Native students. 7/19/17 at 19:1-6, 21:1-11, 29:6-13; Ex. D-3118. At the same time, PED has discontinued its program aimed specifically at instructing teachers how to teach culturally and linguistically necessary content to students. Montano, 7/19/17 at 21:12-15.

Additionally, one of the root causes of inequitable access to teachers in high-poverty districts is low teacher pay. Defendants' expert, Michael Wolkoff, hired to evaluate the adequacy of teacher compensation in New Mexico, admitted that targeted compensation for teachers in high-

poverty districts experiencing teacher shortages is a viable strategy for improving the effective recruitment and retention of teachers, a point on which PED agrees. 8/3/17-a.m. at 60:4-60:11; Ex. P-1959-MM (New Mexico Educator Equity Plan) at 6. But PED's actions are not commensurate with this admission, as it directs only small stipends to several districts for use in the recruitment of effective teachers. Fuller, 7/13/17 at 49:13-55:19, Figs. 3-5, Tbl. 4.

Current and former district superintendents testified in unison on the need for increased funding for teacher compensation in order for districts to recruit and retain effective teachers in schools with high at-risk student populations. Chiapetti, 6/28/17 at 93:13-24, 96:14-97:10, 123:25-124:10; Garcia, 6/12/17 at 106:9-107:7; Garcia, 6/15/17 at 50:1-51:19; Martinez, 6/14/17 at 184:4-25; Rounds, 7/12/17 at 107:14-25, Sullivan, 7/12/17 at 200:15-201:2; Cleveland, 7/11/17 at 169:1-15. They also were very critical of NM Teach, testifying that the PED program negatively impacts their ability to recruit and retain teachers for high-poverty schools and is detrimental to teacher morale. Garcia, 6/15/17 at 142:14-144:15; Martinez, 6/15/17 at 35:7-36:9; Cleveland, 7/11/17 at 230:22-231:12.

Finally, in line with their official reports and legislative guidelines, several LFC and LESC witnesses testified that: 1) the State's funding formula's T&E (teacher training and experience) Index was deficient; 2) the teacher pay scale is too low; 3) there are insufficient numbers of tutors for at-risk and special-ed students; and 4) teacher development are inadequate -- all of which exacerbate New Mexico's ongoing and accelerating failure to recruit and retain teachers, especially in high at-risk districts. Abbey, 7/25/17 at 43:3-7, 61:8-12; Sallee, 7/21/17-a.m. at 111:2-112:20; 7/21/17-p.m. at 12:19-17:10, 33:10-21; Stewart, 6/20/17 at 147:1-148:3, 156:1-13, 174:24-176:4, 204:11-206:17; Rounds, 7/12/17 at 81:11-83:2; Gudgel, Dep.Desig. at 102:25-104:14; Ex. P-401 (FY14 LFC Guidelines) at 6; Ex. P-403 (FY17 LFC Guidelines) at 5; Ex. P-87 (2011 LFC/LESC Report) at 4, 6, 16, 30, 36-37; Ex. P-318 (2015 LFC Rpt.) at 5, 34.

F. The PED fails to monitor the effectiveness of State funding.

PED does not have an understanding of its duties under the constitutional mandate and never articulated that mandate in the context of policies for at-risk students. Burrell, 7/18/17 at 33:22-35:5. PED also fails to direct and audit district spending in accordance with the Constitution's sufficiency mandate and the SEG's adjustment factors. Ex. P-87 at 38. These failures led the LFC and LESC to conclude that PED:

- 1) "does not have documentation of the methodology used to calculate the funding formula's initial unit value . . .;"
- 2) should "develop a written methodology to determine the initial unit value;"
- 3) should "develop a new audit unit that is of sufficient size and skill to meet current administrative requirements for responsibly administering the funding formula;" and
- 4) should implement performance-based budgeting to ensure that districts are using appropriation dollars to best serve at-risk students.

Ex. P-87 at 5-6, 37-39; Sallee, 7/21/17 -a.m. at 69:22-70:5, 78:16-21, 85:10-13.

PED's failure to employ meaningful audit procedures over how districts spend their SEG allocation extends to the SEG's T&E index: the LFC and LESC found that "the PED does not have a sufficient financial audit function to ensure that district membership and T&E indices are consistent with rule and statute." Ex. P-87 at 36-38. As for professional development of teachers who work in high-poverty and ELL schools, Mr. Sallee testified that the PED had not only discontinued much of the instructional audits of teachers who teach these students, but had also never addressed in those audits "time on task" nor lost learning time experienced by such students, despite being criticized by the LFC in the committee's official reports. 7/21/17-p.m. at 32:21-33:21; D-4477 (2016 LFC Program Eval.) at 9.

PED also fails to effectively monitor below-the-line programs for responsiveness to at-risk student need. The LFC's David Abbey admitted that below-the-line funding tends to dis-equalize

school funding and divert resources away from core educational needs and dilute funding that could be channeled through the SEG. Abbey, 7/25/17 at 50:20-51:19; Ex. P-2824 (2015 LFC Rpt.) at 383. The LFC has had concerns about PED's ability to effectively manage the almost two dozen below-the-line programs, as exemplified by what happened in 2014 when millions of dollars of earmarked appropriations remained unallocated by PED. 7/25/17 at 52:2-19; Ex. P-2824 at 383. The LFC has had concerns that many of the below-the-line programs do not directly support or are not targeted to support low-performing students, and that limited data from PED is available to even evaluate the effectiveness of many of the programs' appropriations. Abbey, 7/25/17 at 52:20-54:2, Sallee, 7/21/17-a.m. at 90:5-11, 91:20-92:12, 92:22-94:23, 98:14-24, 109:15-110:10; Gudgel, Dep.Desig. at 32:23-33:17, 34:2-35:25, 37:7-39:17, 56:10-20, 83:18-84:23, 90:15-91:10, 101:20-102:5; Ex. P-2533 (2015 Joint LFC/LESC Accountability Rpt.); Ex. P-1545 (2015 Criteria for Evaluating Public Ed. Funding).

PED's failure to effectively monitor below-the-line programs for responsiveness to at-risk student need extends to the agency's oversight of district class-size waivers. Despite being required by statute to monitor such waivers, Deputy Secretary Paul Aguilar testified that PED has neither promulgated rules nor policies to guide the Department in how it grants or denies district waiver requests, nor does it monitor the effects of those waivers on students. 8/4/17 at 197:13-201:19.

Finally, PED lacks organization, chronically provides inconsistent guidance to districts, and fails to provide relevant data to the Legislature in the context of administering below-the-line programs and NM Teach. The LFC and LESL found that "the State lacks a comprehensive document detailing all formula statutes, rules and reporting requirements creating a patchwork of guidance to local schools," and concluded that PED employs incorrect, inconsistent or even outdated guidance and technical assistance to districts in the areas of special education, the T&E

Index, bilingual program exam scoring, district strategic planning and several of the SEG's adjustment components. Ex. P-87 at 22-34. *See also*, Space, 6/29/17 at 230:24-233:19. Furthermore, the LFC has repeatedly received data late from PED or not at all during the committee's evaluations of the education budget and corresponding programs. Sallee, 7/21/17-a.m. at 94:24-95:18, 98:14-24; Sallee, 7/21/17-p.m. at 27:25-28:15; Abbey, 7/25/17 at 41:6-21.

PED's dysfunction and failure to mandate and monitor the districts for adherence with the Constitution's sufficiency clause contributes substantially to the educational deficiencies of at-risk children.

V. THE STATE FAILS TO PROVIDE A CONSTITUTIONALLY SUFFICIENT SYSTEM OF EDUCATION TO NATIVE STUDENTS.

In the words of Defendants' Indian Education expert, American Indians in New Mexico have endured a "broken system" of public education that "does not serve [them] well." Moore, 08/02/17 at 53:2-8, 65:10-17. Notwithstanding the broad cultural, historical, linguistic, and governmental diversity between the 22 Indian tribes in New Mexico, the State's Native students share a legacy of historical trauma and a set of well-recognized, but chronically unmet, educational needs.

Non-native systems of "educating" native children began with their forced removal from tribal lands and placement into federal schools where the destruction of their cultural and linguistic identities occurred in the classroom. Suina, 06/26/17 at 49:6-17. Education was an assimilation mechanism used to terminate Native cultures, languages, traditional governance, and ultimately, to repeal their federal recognition as tribes. *Id.* at 47:5-48:5; 54:11-56:14. In addition to student deaths, disappearances, and cultural displacements, *id.* at 49:18-51:23, these practices caused long-term damage that persists to this day:

[T]here has never been a come-together of the two entities, the school and the tribe,

the family. We have never enjoyed what middle class America has always enjoyed, and that is a continuation of home language, home values, home knowledge in the school. It's always been a severing – our home experience is at the doorstep of the school, and I think right now tribes are looking to find that connection.

Id. at 57:14-58:9.

By 1975, after forced-assimilation practices were abandoned, New Mexico finally began grappling with the question of how to include and educate Native students in its public schools. To address what the State identified at the time as Native students' "special educational needs," New Mexico created the Indian Education Division ("IED"). Ex. P-1782-FV at 13. But, as demonstrated at trial, over 40 years later the State's public education system still fails to meet those needs. Defendants are breaching legal requirements for educating Native students, neglecting to deliver basic services to school districts that serve significant Native populations ("Indian Education Districts"),⁶ and do not systematically provide Native students with the opportunity to become CCC-Ready. Taken alone, each of these failures renders the system insufficient under Article XII Section 1. Taken together, these failures constitute a crisis: every year a cohort of Native students exits New Mexico public schools without having received a sufficient opportunity to enjoy and pass on to future generations the virtues of academic success.

A. New Mexico's system of public education does not comply with legal requirements for the education of Native students.

In order to provide a constitutionally sufficient education to Native students, the State must comply with the New Mexico Indian Education Act ("NMIEA") of 2003, 1978 NMSA, §22-23A-2 and federal requirements pertaining to the education of Native American English Learners ("NAELs"). The NMIEA was developed to address the State's failure to sufficiently educate

⁶ Ex. P-0630-PA, see Glossary and Acronyms ("23 Districts").

Native students⁷ by addressing the cultural and linguistic needs of Native students (Pecos, 07/07/17 at 18:1-9) and mitigating the aforementioned historical traumas. Suina, 6/26/17 at 58:10-15, 59:14-62:9, 77:14-78:21. In addition, federal laws establish minimum legal requirements for ensuring the delivery of effective English-language programs to NAELs. Because the NMIEA and these federal requirements are meant to address the undisputed basic educational needs of Native students (Blum-Martinez, 06/27/17-a.m. at 18:18-19:18; Phillips, 7/27/12 at 117:23-118:6) and because a system of education that is not compliant with law cannot be sufficient, the violation of these laws should be viewed here as constitutional in scope. *See United States v. Cleveland*, 507 F.2d 731, 741 (7th Cir. 1974) (granting habeas corpus relief in part on the ground that “[n]on-compliance with a statute which has as one of its purposes the effectuation of a constitutional right” is constitutional in dimension).⁸ Especially when viewed in conjunction with the terrible educational inputs and outputs for Native students, Defendants’ failure to comply with these laws amounts to a constitutional violation.

1. The State’s education system does not comply with Section 22-23A-2(A) of the NMIEA, which requires culturally-relevant learning environments, opportunities and materials.

Section 2(A) of the NMIEA requires that “culturally relevant learning environments, educational opportunities and culturally relevant instructional materials [be provided] for

⁷ “Historically, Indian students have scored low on standardized tests and have consistently underachieved in the public schools, a phenomenon attributed primarily to linguistic and cultural differences. This bill addresses that issue and provides mechanisms intended to improve the success rate of Indian students in public schools.” *See* Fiscal Impact Report for SB 115, 2003 legislative session. <https://www.nmlegis.gov/Sessions/03%20Regular/firs/sb0115.pdf>

⁸ *See also, Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir. 1978) (holding that while the violation of a federal statute is not necessarily constitutional in scope, so as to give rise to a § 1983 claim, the violation of a statute that is based on “the unique legal relationship between the Federal Government and tribal Indians” is constitutional in dimension).

American Indian students enrolled in public schools.” 1978 NMSA, §22-23A-2(A). This requires that Native students enjoy “structured and sustainable learning environments and opportunities,” rather than mere isolated experiences. Ex. P-2881 at ¶¶ 19, 37. The PED defines “culturally-relevant” to require “programs or services [that] are planned, designed, implemented, and evaluated respecting and accounting for the client’s cultural and linguistic values and heritage.” Ex. D-3029 at 4. After reviewing extensive sworn-deposition testimony from witnesses describing the State’s purported implementation of the NMIEA, Plaintiffs’ Indian Education expert, Francis Vigil, identified a shortage of both culturally-relevant environments and opportunities, and culturally-relevant professional development and training for educators. Ex. P-2881 at ¶ 38. Based on these and other deficiencies, Mr. Vigil concluded that “the PED has failed to implement culturally relevant learning environments or educational opportunities for Native students.” Ex. P-2881 at 11. Defendants offered no expert testimony to rebut this evidence,⁹ and trial testimony by witnesses from several Indian Education Districts reaffirmed the absence of a system of culturally-relevant programming across all schools located on or near tribal lands. *See e.g.*, Space, 06/29/17 at 134:19-135:23; 137:17-22; Lewis, 06/30/17 at 147:17-148:423; Garcia, 06/12/17 at 111:7-112:15.

Section 22-23A-2(A) also requires that Native Students be provided with culturally-relevant instructional materials that are “planned, designed, and evaluated” in accordance with

⁹ In their cross-examination of Francis Vigil, Defendants referred to a list from the 2013-2014 Tribal Education Status Report (“TESR”), purporting to describe 24 culturally-relevant “activities.” Vigil, 6/27/17 at 122: 6-23. But Defendants provided no further information about these activities, which included events such as “award assemblies,” and which included no activities whatsoever from the Gallup-McKinley School District, which has the greatest number of Native Students in New Mexico. Ex. P-1779-FV. Thus, there is no evidence that these 24 activities were “planned, designed, implemented, and evaluated respecting and accounting for [Native students’] cultural and linguistic values and heritage” as required by the NMIEA. Vigil, 6/28/17 at 22:2-25:4.

their “cultural and linguistic values and heritage.” Ex. P-2881 at ¶ 19. Defendants did not dispute Mr. Vigil’s expert testimony that the PED has not implemented such materials. *Id.* at ¶ 52. In fact, IED Director Latifah Phillips admitted that the PED does not gather data on whether districts are providing culturally-relevant instructional materials to Native Students. Phillips, 07/27/17 at 126:20-23, 127:6-128:3. Consequently, educators in the Indian Education Districts who aspire to cultivate cultural and linguistic learning are without an indigenous-based curriculum, and are limited to state-approved instructional and supplemental materials that largely dismiss the contributions made by Southwest Indians to U.S. history. *See, e.g.*, Ex. P-2800 at ¶¶ 112, 114, 119-124, 201(c), 206, 212(3), 215-16; Martza, Dep.Desig. at 34:2-37:23; 41:9-25; Space, 06/29/17 at 119:3-6, 122:13-123:21; Lewis, 06/30/17 at 151:16-152:12, 161:21-162:12.

2. The State does not provide for the study, development, and implementation of educational systems that positively affect academic outcomes for Native students, as required by Section 22-23A-2(C) of the NMIEA.

Section 22-23A-2(C) requires the PED to “provide for the study, development, and implementation of educational systems that positively affect the educational outcomes of American Indian students.” To comply with this mandate would require an adequately-staffed IED, capable of gathering information and evaluating the implementation and effectiveness of culturally-relevant educational systems in the school districts (if any such systems existed). Ex. P-2881 at ¶ 27. But it is undisputed that the three regional leadership positions that would provide the IED with the capacity to comply with § 22-23A-2 have been vacant for years. *Id.* at ¶¶ 31-34; Ex. P-2935. Nor could the IED Director point to any research or development of any educational systems specific to the education of Native students. Phillips, 07/27/17 at 132:19-134:22. Finally, Mr. Vigil’s undisputed expert testimony that “the PED is not studying or developing effective educational systems for Native students” (Ex. P-2881 at ¶¶ 27-34), found support in testimony by

Indian Education witnesses, who indicated that the IED had little to no involvement with their districts. *See e.g.* Space, 06/29/17 at 131:21-132:11; 132:25-133:8; Lewis, 06/30/17 at 184:6-8; Perry, 06/29/17 at 47:5-23.

3. Defendants fail to cultivate a formal government-to-government relationship with the Tribes, as required by Section 22-23A-2(F) of the NMIEA.

At the core of any effort to meet the educational needs of Native students is a formal government-to-government relationship between the State and the Tribes, which is “necessary to ensure that the Tribes are being recognized and respected as sovereign nations and collaborators on the subject of Indian Education.” Ex. P-2881 at ¶ 56. By definition, a system of education that fails to engage the Tribes as a co-sovereign fails to “respect” or “account for” for the Native students’ “cultural and linguistic values and heritage,” as required by the NMIEA. *Id.* at ¶ 19. In recent years, the ostensible government-to-government meetings have not been attended by New Mexico’s Governor or Secretary of Education and have treated Tribes as subordinates, rather than equal collaborators. *Id.* at ¶¶ 57-58. Additionally, despite unanimous disapproval by the Tribes, the PED recently proposed the elimination of two very prominent bilingual programs that are crucial for preserving heritage languages in public schools, and for fulfilling the purposes of the NMIEA. Pelayo, 07/24/17-pm at 74:24-76:09, 79:15-80:7; Pecos, 07/07/17 at 26:22-29:5. Such one-sided interactions do not comply with § 22-23A-2(F).

4. New Mexico’s system of public education does not meet federal requirements for educating NAELs.

Two sources of federal law establish legal requirements for educating English Language Learners (“ELLs”), including NAELs, in all public schools in New Mexico. Title VI of the *Civil Rights Act of 1964*, 20 U.S.C. § 1703(f), and associated regulations and case law compels the State

to provide appropriate guidance, monitoring, and oversight to school districts to ensure that all ELLs receive language assistance programs that:

- (a) are supported by an underlying educational theory that is recognized as sound by some experts in the field or considered a legitimate experimental strategy;
- (b) are reasonably calculated to implement effectively the underlying educational theory; and
- (c) succeed, after a legitimate trial, in producing results indicating that students' language barriers are actually being overcome within a reasonable period of time.

Ex. D-1224 at 5-6 (citing *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981)); Blum-Martínez, 6/27/17-a.m at 19:11-17. In addition, Title III of the *Elementary and Secondary Education Act of 1965*, 20 U.S.C. §§ 6821–6871, requires that the PED ensure that NAELs enrolled in school districts receiving Title III grants¹⁰ be provided with “high quality” language instruction programs that enable them to timely-acquire academic proficiency in English, and which supplement (not supplant) the language assistance programs required under Title VI.¹¹ Ex. D-1224 at 6-7; Blum-Martínez, 6/27/17-a.m. at 17:10-18:1; 18:25-19:10. Thus, Title VI requires effective language-assistance programs to be provided to NAELs in all New Mexico public schools, while Title III requires effective supplemental academic English-language acquisition programs be provided to NAELs at all school districts receiving Title III funds.

Far from meeting Title VI and Title III requirements, New Mexico public schools fail to provide any English-language “programs” to NAELs whatsoever. Blum-Martínez, 6/27/17-a.m. at

¹⁰ Of the six Indian Education Districts studied by Dr. Blum-Martinez, all but Jemez Valley School District receive Title III funding, thereby triggering the PED’s Title III duties. Blum-Martinez, 6/27/17-a.m. at 59:15-23.

¹¹ Title III requires the PED to ensure that grantee school districts provide high-quality professional development programs to educators in support of their efforts to help NAELs acquire English proficiency. *Id.*

44:20-23 (no English-language program for NAELs in Bernalillo School District); 53:7-16 (Cuba School District); 57:1-8 (Grants-Cibola); 63:18-22 (Jemez-Valley); 76:12-20 (Gallup-McKinley); 82:15-18 (Zuni). In lieu of such programs, NAELs are often dumped into pre-existing remedial reading or special education programs. Blum-Martinez, 06/27/17-am at 52:3-9; Perry, 06/29/17 at 43:22-45:1.

The PED's Director of Bilingual Multicultural Education, Icela Pelayo, admitted she did not know which school districts were not providing services to English-language learners (Pelayo, 7/24/17-am at 48:2-4), and is not assessing the percentage of NAELs that fail to timely-acquire English-language proficiency (*id.* at 48:5-21), and that her Bureau is not tracking the NAEL graduation rate. *Id.* at 49:5-12. Dr. Pelayo did not dispute Dr. Blum-Martínez's findings that the six native Districts lacked research-based, English-language acquisition programs for NAELs (*id.* at 54:14-17), that four of them placed NAELs into remedial reading classes (*id.* at 54:7-13), or that within these Districts there was a general lack of knowledge of Native communities, languages, and cultures. *Id.* at 55:19-22. When asked whether any of the six Districts had English-language assistance programs for NAELs, Dr. Pelayo testified that Zuni had a bilingual program that served NAELs,¹² but she did not know if other districts had English-language assistance programs. *Id.* at 57:13-21. Thus, it was undisputed at trial that NAELs do not receive the English-language assistance and acquisition programs as required by federal law. Ultimately, Defendants' failure to ensure that NAELs timely-acquire English-language proficiency means that NAELs will fail to timely-acquire academic proficiency. Pelayo, 07/24/17-am at 42:8-11; 64:6-16.

¹² As Dr. Blum-Martinez testified, a bilingual program is not an EL program. 6/27/17-a.m. at 82:15-18.

B. The State fails to provide basic educational services to Native students.

Native students need an education that prepares them for college and career opportunities and leadership roles within their tribal governments and communities. Suina, 06/26/17 at 80:9-22; Pecos, 07/07/17 at 10:7-22. Defendants' failure to comply with applicable legal requirements for educating Native students is part of a larger pattern of neglect. *See, e.g.*, Lewis, 06/30/17 at 180:15-181:3, 207:20-25; Space, 06/29/17 at 168:13-25; Chavez, 07/07/17 at 131:22-133:12; Chiapetti, 06/28/17, at 230:17-20; Lopez, Dep.Desig. at 38:7-39:11, 61:11-24. Cuts to transportation funds, for example, prevent Indian Education Districts, which typically cover large and rural geographical areas, from maintaining buses that meet students' needs. Ex. P-2957-RC. This means that tribally-located students who lack personal transportation are often excluded from athletics and afterschool, extra-curricular activities. Space, 06/29/17 at 158:14-159:1; Chiapetti, 06/28/17 at 224:10-225:13; Tapia, DepDesig. at 158:11-159:15.

Poor access to technology hinders these students from acquiring media-literacy and taking State-mandated online exams. *See e.g.*, Yazzie-Stips, ##13251326; Tapia, Dep.Desig. at 69:13-70:21. Funding cuts for instructional materials prevents these schools from obtaining adequate textbooks. Ex. P-2957-RC. Meager salary levels and employment incentives that do not compete with surrounding states result in high staff turnover and a reliance on long-term substitutes. *See, e.g.*, Lewis, 06/30/17 at 181:4-182:1; Space, 06/29/17 at 161:17-162:2; 167:11-23; Chavez, 07/07/17 at 72:19-22; 74:2-75:2, 75:3-18, 131:18-21; Chiapetti, 06/28/17 at 104:12-105:8. Early childhood education, a particular necessity for native children, is rarely available in the schools they attend. *See e.g.*, Space, 06/29/17 at 155:3-157:7; 157:22-158:6, 228:9-13; Garcia, 06/12/17 at 109:14-110:9. Sadly, for many Native students who would be "first generation" college-goers, college-preparation opportunities are woefully inaccessible. Lopez, Dep.Desig. at 22:22-23:23,

31:15-22, 34:2-37:4, 47:2-49:19, 53:2-54:23, 55:23-57:15, 57:21-58:24; 60:4-25; 65:15-66:7, 72:10-24; 84:3-86:16.

Finally, a unique need among Native students is Native instructional staff. Suina, 06/26/17 at 65:4-17; Ex. P-2800 at ¶¶ 125. The majority of Native students in New Mexico, however, will go their entire K-12 educational experience never having a Native educator or counselor. Pecos, 07/07/17 at 26:4-7. A PED-funded initiative meant to build the capacity of Native educators, which was functional from 2003-2006, has suffered from a pattern of repeat failures since its inception; while a short-lived alternative – a statewide, systematic training program for non-Native educators to deliver culturally and linguistically relevant instruction – was discontinued in 2017. Suina, 06/26/17 at 38:19-40:2, 58:20-59:13, 65:18-66:12; Ex. P-2988 at 105; Phillips, 07/27/17, at 151:22-152:24. Instead, individual districts struggle unsuccessfully to meet this need on their own. *See, e.g.*, Space, 06/29/17 at 116:18-117:4; Lewis, 06/30/17 at 153:7-153:16; 155:18-156:12, 160:4-161:2; Ex. D-3118.

C. The State fails to produce Native students who are CCC-Ready.

That Native students chronically underperform all other demographic groups by all academic measures in New Mexico not only demonstrates the catastrophic impact of Defendants' failure to meet their needs, but also independently evidences the system's insufficiency.¹³ In the 2015-16 school year, 73% of Native students tested **not** proficient in reading and 90% tested **not** proficient in math. Ex. D-3065/P-1835 at 9. Only 63% of Native students in the 2015 cohort

¹³ *See Yazzie-Stips* at ¶¶ 7-12 (all Native Student proficiencies, 2007-14), 19-24 (NAEL proficiencies, 2007-2011), 37-42 (comparative proficiencies, 2007-14), 61-66 (Native Student non-proficiency rates 2014-15), 73-78 (NAEL non-proficiency rates 2014-15), 1002-1015 (comparative graduation rates, 2008-14), 1042-1049 (comparative AP testing rates, 2002, 07, 11, 12); 1068-1077 (comparative ACT testing, 2011-15).

graduated (*id.* at 19), despite PED's dubious acceptance of “alternative demonstrations of competency.” An interpretation of the constitutional standard that holds the inputs and these outcomes to be “sufficient” would, in effect, maintain the gap that separates most Native students from career, college, and tribal opportunities.

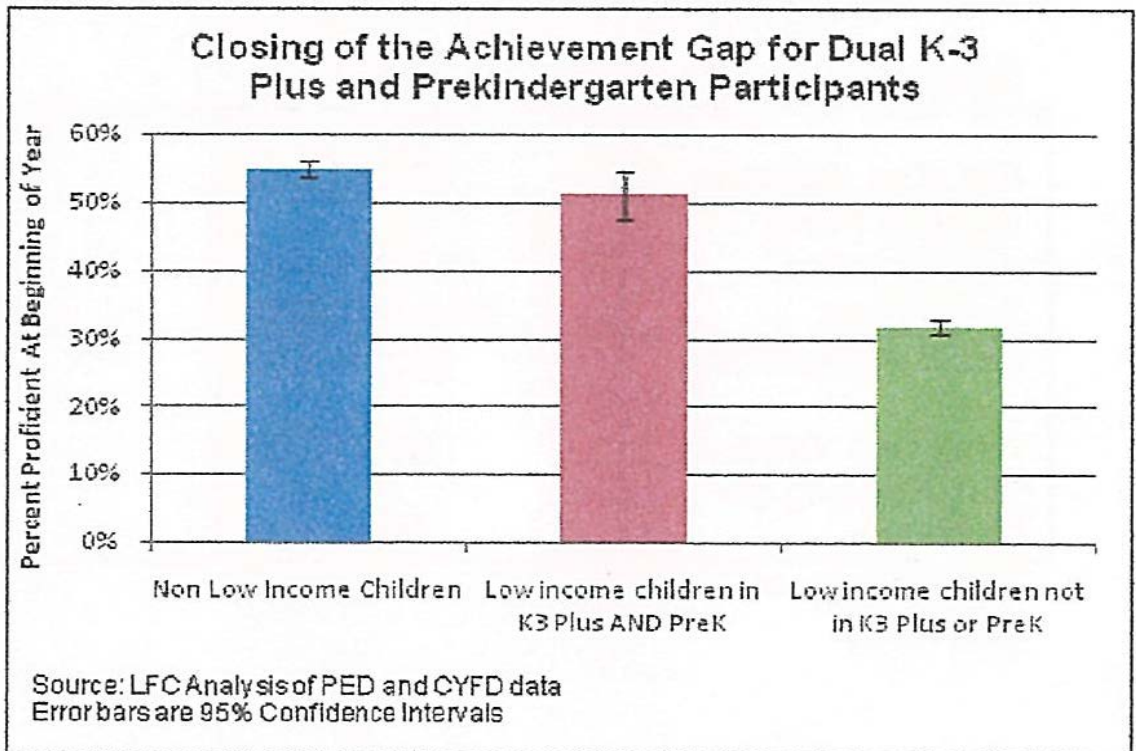
VI. THE STATE IS IN VIOLATION OF THE NEW MEXICO CONSTITUTION BY FAILING TO PROVIDE "A UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS SUFFICIENT FOR THE EDUCATION" OF ALL NEW MEXICO STUDENTS.

In order to meet its constitutional mandate, New Mexico must provide opportunities so that “students ... leave our schools ready for either post-secondary education or [have] the training to pursue some line of work so that they can be contributing members of society.” Garcia 6/12/17, at 59:19-60:4. In other words, to be CCC-Ready. These days, the same skills are needed to be college or career ready. *Id.* at 60:8-62:4; Berliner, 6/12/17 at 134:4-14. Given New Mexico’s appalling educational outcomes, especially for low-income, Native American and ELL students, and New Mexico’s failure to implement the very remedies it knows would address them, New Mexico is clearly not meeting its constitutional obligation to provide every student the opportunity to be CCC-Ready.

New Mexico knows what it takes to provide our public school students with sufficient opportunities to succeed. It is undisputed that high quality early childhood education, summer programs, after school programs, small class size, effective literacy programs, consistent experienced teachers, ethnic cultural responsive instruction, counselors, nurses and social workers have a huge impact on educational outcomes for low-income children. Berliner, 6/12/17 at 144-164. That is why the State has enacted limits on classroom size, enacted K-3 Plus and PreK, provided some funding for literacy coaches and teacher training, enacted the Indian Education Act,

made Fine Arts part of the funding formula, made P.E. a requirement in some grades, provided funding for some counselors, social workers, and nurses, acknowledged the need to attract and retain experienced teachers in high need districts with a stipend, and recognized the need for more supports and services in our schools. Now the State needs to do the difficult job of investing in the structure it has set up so that the districts and the schools can deliver the programs that the State is either requiring or suggesting, and deliver the services to all students who need them, not just some students in some districts.

New Mexico also knows how to close the achievement gap. Indeed, in August, the LFC issued a report showing that schools that provide low-income children both Pre-K and K3 Plus close the achievement gap and bring low-income children's reading proficiency rates up to those of non-low-income students:



[https://www.nmlegis.gov/Entity/LFC/Documents/Program Evaluation Reports/Final%202017%](https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Final%202017%)

[20Accountability%20Report%20Early%20Childhood.pdf](#) at 9. Thus, the State does have the answer – contrary to all the testimony we heard from the State that “there was no magic bullet” and “no state had determined how to close the achievement gap.” In fact, New Mexico has. Now we just need to make the investment and the commitment of those funds to make this happen. Only then will New Mexico meet its constitutional mandate of providing a uniform system sufficient for the education of all school aged children.

VII. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF TO REMEDY DEFENDANTS’ CONSTITUTIONAL VIOLATIONS

On the basis of the evidence adduced at trial and the legal authority set forth above, Plaintiffs are entitled to declaratory and injunctive relief to remedy Defendants’ constitutional violations.

A. Declaratory Relief

Plaintiffs request that this Court enter declaratory relief that:

1. Defendants’ system of public education is not sufficient to meet the needs of New Mexico’s students, especially at-risk students, and violates Plaintiffs’ rights under Article XII, Section 1 of the New Mexico Constitution by failing to provide them with a “uniform” statewide system of free public schools “sufficient” for their education;
2. Under Article XII, Section 1 of the New Mexico Constitution a “uniform” and “sufficient” system of public education is one that provides every student the programs, services and supports necessary for that student to have the opportunity to satisfy New Mexico’s requirements for graduation and upon graduation be ready to attend college, pursue a career and participate in the civic duties of our society;
3. Current years’ levels of public school funding in New Mexico have not been sufficient to provide the programs and services necessary to meet the uniformity and sufficiency

- provisions of Article XII, Section 1 of the New Mexico Constitution;
4. The methods for distribution of public school funding in New Mexico have not satisfied the uniformity and sufficiency provisions of Article XII, Section 1 of the New Mexico Constitution as the funding distributed has not been for all districts to provide all necessary services and programs to at risk children.

B. Injunctive Relief

Plaintiffs request that this Court enter an injunction requiring Defendants to take the following actions immediately to remedy their violations of Article XII, Section 1 of the New Mexico Constitution:

1. Develop within 60 days a comprehensive statewide plan and timetable to be approved by this Court, after consideration of Plaintiffs' comments on that plan, that will provide a uniform and sufficient system of public education to all students in New Mexico. The plan shall:
 - a. include provision of the services, resources, and supports necessary for all children in all districts, including low income, Native American and ELL students ("at-risk students"), to have the opportunity to be college, career and civics ready;
 - b. describe the steps that will be taken to provide programs and services such as early childhood education, extended learning time, evidence-based literacy instruction, health and social services, smaller class sizes, fine arts, and PE to all at-risk children throughout the state no later than the beginning of the 2019-2020 school year;
 - c. describe the steps that will be taken to bring New Mexico's public education

system into compliance with the NM Indian Education Act, and to ensure that all Native American ELL students have access to the English language assistance programs required by Title VI and effective supplemental English acquisition programs in districts receiving Title III sub-grants;

- d. describe the steps that will be taken to recruit, train and retain teachers to ensure that by the beginning of the 2019-2020 school year there are sufficient numbers of properly trained, qualified teachers to provide at-risk children a constitutionally sufficient education in every school district in the state and that these properly trained, qualified teachers are assigned to and retained by the schools serving at-risk children.
2. Implement this plan in accordance with the timetables approved by the Court.
 3. Allocate sufficient funding, revise the formula for distributing funds to school districts, and ensure full and uniform implementation of the comprehensive statewide plan approved by this Court.
 4. Monitor and measure the implementation of the comprehensive plan approved by this Court to ensure that: a) the plan is being fully and uniformly implemented statewide, b) every school in New Mexico has sufficient resources to implement that plan, and c) educational opportunities for at-risk students significantly increase statewide.
 5. Establish an effective system of accountability and enforcement to ensure that every child in New Mexico receives a sufficient education.

C. Retain Jurisdiction

Finally, Yazzie Plaintiffs ask this Court to retain jurisdiction to ensure that the relief described above is implemented promptly and in compliance with this Court's Orders.

Respectfully Submitted,

NM CENTER ON LAW AND POVERTY

By: /s/ Gail Evans

Gail Evans

Christopher Sanchez

Preston Sanchez

Lauren Winkler

924 Park Ave SW, Suite C

Albuquerque, New Mexico 87102

Phone: (505) 255-2840

Fax: (505) 255-2778

Attorneys for All Plaintiffs

By: /s/ Daniel Yohalem

Daniel Yohalem

Attorney at Law

1121 Paseo de Peralta

Santa Fe, New Mexico 87501

Phone: (505) 983-9433

Fax: (505) 989-4844

Attorney for Yazzie Family Plaintiffs

By: /s/ Mark Fine

Mark Fine

Fine Law Firm

220 Ninth Street NW

Albuquerque, NM 87102

(505) 243-4541

Attorney for the Yazzie Family Plaintiffs

By: /s/ Robert Rosebrough

Robert Rosebrough

THE ROSEBROUGH LAW FIRM, P.C.

101 West Aztec Ave., Suite A

P.O. Box 1027

Gallup, New Mexico 87305-1027

Phone: (505) 722-9121

Fax: (505) 722-9490

*Attorney for Plaintiffs Wilhelmina Yazzie and
Xavier Nez, and Gallup/McKinley Public School
District*

By: /s/ Tony Ortiz

Tony Ortiz

ORTIZ & ZAMORA, ATTORNEYS AT LAW, LLC

2011 Botulph Road, Suite 200

Santa Fe, NM 87505
Phone: (505) 986-2900
Fax: (505) 986-2911
*Attorney for Santa Fe Public School Board,
Moriarty-Edgewood School District Board of
Education, and Cuba Independent School District*

By: /s/ Charlotte H. Hetherington
Charlotte H. Hetherington
CUDDY & MCCARTHY LLP
Charlotte Hetherington
1710 Old Pecos Trail
P.O. Box 4160
Santa Fe, New Mexico 87502-4160
Phone: (505) 988-4476
Fax: (505) 954-7373
*Attorney for Rio Rancho School Board of Education
and Lake Arthur School District*

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2018, a true and correct copy of the foregoing pleading was e-filed and served through the Court's e-filing system upon counsel for the Defendants, and counsel for the Martinez plaintiffs.

By: /s/ Daniel Yohalem
Daniel Yohalem