

**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.**

Motion for Court to Order Defendants to Meet Constitutional Mandate to Ensure All New Mexico Public School Students Have the Opportunity to be College and Career Ready And Supporting Memorandum

Introduction

Over a year ago, this Court ruled that New Mexico's system of education violates the New Mexico Constitution by failing its students, and ordered the State to put in place a new "scheme" so that all students -- including students from low-income families, Native American students, English language learner students and students with disabilities -- have the opportunity to be college and career ready. In light of this Court's findings about the huge educational gaps in our current system and the low educational outcomes of our students, the State must take immediate and extraordinary steps to fulfill the mandates of this Order. Indeed, a complete overhaul and transformation of our school system is required to comply with the constitutional mandate.

Plaintiffs are returning to Court now because the State has not taken the immediate and substantial steps necessary, continues to fail our students, and continues to neglect its constitutional obligation to ensure that all of New Mexico's students get the education to which they are entitled. Students continue to languish in schools that do not have basic instructional materials, sufficient transportation, technology, programs, and services required to ensure that students who are considered "at-risk" are prepared for college or career. Rather than continuing its half-measures, the State must rise to this occasion and develop, fund and implement a far-reaching transformative plan that actually fulfills our students' constitutional rights to teachers, programs, services, materials and transportation essential for them to be ready for college or career.

This Court ruled that New Mexico's culturally and linguistically diverse students are just as capable of success as students across the country. New Mexico has a wealth of expertise and knowledge on what it takes to ensure that our English language learners, Native American students, Hispanic students, special education students, and low-income students are prepared for college, career and civic life. Yet, the Court found that our State has made choices – programmatic and financial choices – which have deprived our students of the educational opportunities necessary for success, leaving our schools without the resources necessary to sufficiently educate our children. For years, due to the State depriving our schools of basic funding and support, New Mexico has been rated at the very bottom nationally for reading and math proficiency, graduation rates, college remediation rates and children's likelihood for success. Consequently, this Court found: "[T]he education being provided to at-risk children is resulting in dismal outcomes whether measured by test scores, graduation rates, or need for college-level remedial courses.... Simply put, the outputs reflect a systemic failure to provide an

adequate education as required by the New Mexico Constitution.” Decision and Order, July 20, 2018, at 45 (hereinafter “Decision and Order”). This Court ruled that this neglect must stop and that the State is obligated under the New Mexico Constitution to provide our students with the educational opportunities necessary for them to be college and career ready. The Court’s rulings were not appealed and thus constitute the law of the case with which the State must comply.

This Court’s Rulings

On July 20, 2018, after hearing eight weeks of testimony and considering the thousands of documents entered into evidence, this Court issued a comprehensive Decision and Order finding that Defendants, the Public Education Department and the State of New Mexico - both the executive and legislative branches, have failed New Mexico’s public school students by not providing them with a sufficient and uniform system of education as mandated by the New Mexico Constitution. This Court enjoined the Defendants to come into compliance by April 15, 2019, ordering the State:

to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career. Reforms to the current system of financing public education and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every public school in New Mexico would have the resources necessary for providing the opportunity for a sufficient education for all at-risk students. The new scheme should include a system of accountability to measure whether the programs and services actually provide the opportunity for a sound basic education and to assure that the local districts are spending the funds provided in a way that efficiently and effectively meets the needs of at-risk students.

Decision and Order at 74 – 75. In this case, “at-risk students” refers to four student groups: English language learners, special education students, Native American students, and students from low-income families. *Id.* at 2. “In New Mexico, the number of school aged children who qualify for at least one of these at-risk factors is no small number. Students who come from low-income families are 71.7 percent of the student population. English Language Learners constitute

14.4 percent of all students statewide. Native Americans students are 10.6 percent of the student population. Finally, 14.8 percent of the students in New Mexico have a disability.” *Id.* at 2-3 (citations omitted).

The Court’s ruling is systemic and comprehensive. Considering all four student groups, the Court analyzed the lack of adequate educational “inputs,” ruling that all major inputs are lacking: (1) basic materials – meaning instructional materials, textbooks and technology; (2) curriculum – meaning programs and services that meets the needs of our students, such as smaller class size, Pre-Kindergarten programs (“Pre-K”), summer school, afterschool programs, reading specialists, social services and English language learning programming; and (3) experienced and well-trained teachers, which includes funding to pay for adequate numbers of teachers, funding for recruiting and retaining effective teachers, especially for special education, science and bilingual education, and funding for teacher training. *Id.* at 26-37; *see also* Findings of Fact and Conclusions of Law (hereinafter “FFCL”) #266. The Court also ordered that the State must ensure that highly effective teachers are in schools with large numbers of at-risk students. *See, generally*, Decision and Order at 32-35. The Court held that although the State had passed laws which set forth the requirements for a multicultural education for our students – such as the Indian Education Act, the Hispanic Education Act, and the Bilingual Multicultural Education Act – the State has failed to comply with these laws. *See* FFCL ##3019-3029. Moreover, the Court held that failure to comply with the New Mexico Indian Education Act in and of itself deprives Native American students of a constitutionally sufficient education system. *See generally* Decision and Order at 28. The Court emphasized that the State’s failure to ground our education system in a multicultural framework violated the law and our students’ rights to a sufficient education. *Id.* at 17-18.

Finally, the Court ruled that this lack of educational inputs has resulted in inadequate “outputs,” *i.e.*, test results, graduation rates and the need for remedial courses in college, with an overall finding that the public school system of education is constitutionally inadequate:

The majority of New Mexican fourth, eighth, and eleventh graders are not proficient in math or reading. On average, they are three years behind grade level. For low-income, Native American, and ELL students, proficiency levels in reading and math in the fourth, eighth, and eleventh grades are much worse, with only 4 to 15 percent of these students being proficient. These outcomes have continued over time unabated.

Decision and Order at 37 - 38. “The evidence of both student outputs and State 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 pursue post-secondary education or a career.” *Id.* at 37. The Court gave the State until April 15, 2019 to correct these constitutional violations.

In December of 2018, the Court issued its Findings of Fact and Conclusions of Law, providing greater detail to its July 2018 Decision and Order. Here, the Court specified how the State has not adequately invested in full day Pre-K, after school programs, summer school, smaller class sizes, comprehensive reading programs, nurses, counselors, social workers, programming for English Learners, compliance with the Indian Education Act and the Bilingual Multicultural Education Act, a culturally relevant curriculum, culturally competent programming, funding to pay for more teachers and to address recruitment and retention problems, funding and resources for students with disabilities, transportation, instructional materials and technology. *See generally* FFCL. The Court cited the extensive evidence provided by educational experts, such as superintendents, school finance experts, experts on Native American education, and experts on the educational needs and rights of English language learners, special education students, English Learners and students from low-income families. *Id.*

The extensive findings are an indictment of the massive shortfalls of our school system and paint a picture of the substantial task in front of the state: nothing short of transformational change.

On February 14, 2019, the Court entered its Final Judgment and Order, reiterating that the State has violated the Constitutional rights of at-risk students and that issuing an injunction against the State in which the State had until April 15, 2019 to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career. Final Judgment and Order at 3 - 4. The State did not appeal that Final Judgment and Order and thus it is the law that the State must follow.

Despite this landmark ruling by the Court over 15 months ago, the State still has not taken the necessary steps to ensure that at-risk students have the programs and services needed for success. The State has not even provided the plaintiffs a plan on how to come into compliance with the Court's Orders, let alone begun to implement that plan.¹ Just last week, 6 months after it was supposed to comply with the Court's ruling, the PED issued a letter to the districts announcing how it plans to comply with the Court's order by having the districts (1) establish equity councils by 12/9/9; (2) complete *Martinez / Yazzie* readiness assessment for the next school year; (3) implement a culturally and linguistically responsive framework by 6/30/20 and (4) submit and implement 90-day plans focused on the at-risk students identified in the lawsuit. *See* October 22, 2019 PED letter to districts, attached as Exhibit A. The letter is glaringly lacking in any mention of how the PED or the districts or the schools are supposed to

¹ After the State unilaterally stopped negotiations with the Plaintiffs in July 2019, the Yazzie Plaintiffs submitted an IRPA request to PED requesting documents relating to a plan to implement this Court's decision. PED admitted that there are records of a plan, but refused to produce any plans, citing attorney-client privilege.

implement any programs or services or actually address any educational gaps without the necessary funding or staff or expertise. The letter also is reminiscent of many other years in the history of education in New Mexico where districts are told to document what they are doing to address the needs of at-risk students, without providing districts the resources to actually meet those needs in a way that gives students the opportunity to be college or career ready. Without the cooperation of all branches of government, and a well-developed plan to transform our education system – one that details the necessary steps, a time frame for fully funding and implementing those steps, and the staffing needed for implementation – the State will continue to operate as it has for years – starting with last year’s budget, making a few adjustments, with some steps forward and some steps backwards, and, in the end, leaving us with a system of education that continues to fail massively our students.

I. The State continues to violate the rights of Native American students by not meeting the mandates of the New Mexico Indian Education Act.

New Mexico has failed the 33,000 Native American students who attend public schools. Four out of five of New Mexico’s Native American students are **not** proficient readers, and nine out of ten are **not** proficient in math. Decision and Order at 39. While New Mexico overall has the lowest high school graduation rates in the country, Native American students graduate at much lower rates than the state average. *Id.* at 42. And for the low percentage of Native Americans who do go to college, most require college remediation courses, showing the inadequacy of their K-12 education. *Id.* at 43. Defendants are well aware of these abysmal educational outcomes for Native students. Consequently, in 2003 the State passed the New Mexico Indian Education Act to remedy the public school system’s failure of Native students. *Id.* at 22, FFCL ##536-537. Yet, 16 years later, Defendants have not implemented the New Mexico

Indian Education Act and the school system continues to fail Native American students. Decision and Order at 27 - 28.

“Defendants have failed to provide Native American students with a constitutionally sufficient education” (FFCL #3073) because the State is not providing Native students an education that “meets their unique cultural and linguistic needs and adequately prepares them for college and career.” *Id.* at pp. 575 – 576. “Defendants have a constitutional duty to ensure that the New Mexico Indian Education Act is fully complied with and enforced and that its purposes are fully effectuated.” *Id.* #3066. A violation of the Indian Education Act is a violation of Article XII, Section 1 of the New Mexico Constitution.” *Id.* #3067. “Defendants have a duty to ensure that the 23 Indian Education districts [that is, districts on or near tribal lands with high numbers of Native students] have sufficient resources, including funding, to fully implement the New Mexico Indian Education Act.” *Id.* #3069. “[T]he Assistant Secretary of the Indian Education Division has a duty to advise districts on the allocation of resources in order to meet the needs of Native American students.” *Id.* #3070. Further, “Defendants have a duty to provide school districts with sufficient technical assistance, guidance, monitoring and oversight on the implementation of the New Mexico Indian Education Act,” (*Id.* #3071) and “[t]he regional office of the Indian Education Division must be fully staffed in order to carry out the duties required of the IED and PED under the New Mexico Indian Education Act.” *Id.* #3072.

The Court based these holdings on extensive evidence presented to the Court concerning the abysmal educational outcomes of Native American students statewide as well as the current impact that 100 years of federal policies has had on the educational needs of American Indians. Assimilation policies beginning in the 1880s, authorizing the forceful removal of Native children from their tribal communities and their placement in federal boarding schools, were intended to

destroy indigenous languages, cultural identity and, ultimately, end tribal sovereignty and treaty rights. Similarly, the federal termination policy declared in the 1940s was meant to terminate the sovereign status of federally recognized tribes, yet again, through the annihilation of tribal culture and way of life. Importantly, throughout both policy eras, westernized education and curriculum were used as mechanisms to achieve total assimilation of Native children, where the neglect and desecration of their cultural and linguistic identities occurred in the classroom. *See* FFCL ##497 -511. “New Mexico’s Native American students share a legacy of historical trauma and a set of well-recognized, but chronically unmet, educational needs.... [It] is important to be knowledgeable of this legacy so as to appreciate the need to meet the requirements of the NMIEA.” *Id.* #496.

In 2003, the New Mexico Legislature, acknowledging that decades of poor academic outcomes among Native children were the result of their unmet cultural and linguistic needs, passed the New Mexico Indian Education Act [“NMIEA”]. *Id.* #530, #536. “The [NMIEA] sets forth the legislative determination of what constitutes a constitutionally adequate education for Native American children [and] failure to comply with it amounts to a violation of the State Constitution’s adequacy clause.” *See Id.* #538, #3065-75. The NMIEA in part, requires the State to: provide a culturally and linguistically relevant education, including access to relevant materials, curriculum, and structured and sustainable learning environments and opportunities; study, develop, and implement educational systems that positively affect educational success for Native students; ensure Native students a seamless transition into post-secondary education institutions; maintain native languages; encourage community and parental engagement in public school curriculum; and ensure tribally-driven policy implementation and collaboration. Defendants admit to being in violation of the duties imposed upon them by the NMIEA,

including the failure to provide sufficient funding and technical assistance to the 23 Indian Education districts to fully implement it. FFCL. ##539-62, 622, 628.

The Court found that New Mexico and the PED have failed to ensure that the following resources are sustainable and systemic: a pipeline program to increase the number of Native American teachers; teachers that have access to culturally-relevant training; and a curriculum and pedagogy that is culturally relevant and responsive to Native American student needs. *Id.* ##467, 527. The Court also found that the State fails to account for the binary education system—one that incorporates the indigenous perspective into the core curriculum—valued by the local tribes and that the delivery of curriculum and pedagogy still takes a one-sided approach. *Id.* #526. The Court identified the programs, services and social supports necessary for Native students to succeed academically:

- a. early childhood learning program that focuses on their cultural roots (FFCL ##17, 18, 522);
- b. a culturally relevant curriculum and instructional materials (pre-K to 12) that blends contemporary standards with language, culture, and cultural protocols (FFCL ##513, 522);
- c. a strong cultural competency program, through the year, that allows for non-Native American teachers and administrators to have a sense of belonging in an indigenous community (*id.* #522.);
- d. Native American teachers and administrators, and the need for a Native American teacher/administrator pipeline; teachers that have access to culturally-relevant training; and a curriculum and pedagogy that is culturally relevant and responsive to Native-Student needs (*id.* ##474, 513, 522, 527);

- e. Engagement of Native American families (FFCL #513);
- f. a tribal language program, which is useful for both teaching students their tribal language and for incorporating the English language (*id.* #513, 522);
- g. a positive relationship between the State, school districts in collaboration with local surrounding tribes to develop an **education plan** (*id.* ##513, 522.);
- h. Instructional materials that are specific to meet the cultural needs of Native American students (*id.* ##513, 522.);
- i. Access to social workers and counselors to address out-of-school issues (*id.* #271);
- j. Access to technology & high speed internet in areas on or near tribal lands (*id.* ##325, 651, 2158-62);
- k. state support, including funding and technical assistance and guidance, to support Native American student success and education (*id.* #522.);
- l. Adequate Transportation for Districts on or near tribal lands, which includes transportation for after-school activities, and access to extended learning opportunities (*id.* ##182, 197-198);
- m. Access to College and Career Readiness Programs for Native students on or near tribal lands. *Id.* ##631, 2072-73.

See also Affidavit from Mescalero Apache Tribe, attached as Exhibit R.

Compliance with the Court’s Order for providing Native American students the necessary resources to meet their needs requires nothing less than urgent legislative action, targeted investments and state planning, in collaboration with Native American educational leaders, school districts, higher education institutions and the New Mexico Indian Affairs Department—all under the direction of tribal leadership. *See e.g.* Affidavit from Mescalero Apache Tribe,

attached as Exhibit R. The results of the 2019 Legislative Session, however, evidence the same ongoing neglect of Native American student needs as seen in prior years. That is, no education legislation or public school finances were aligned to the Court’s findings or targeted to address Native students’ most basic educational needs. House Bill 5 and Senate Bill 1—the State’s most significant education bill(s) to become law in FY 2019/2020—did nothing to target Native student success or increase funding for necessary services and programs in districts located on or near tribal lands. In fact, public schools were forced to expend about 90-95% of new state basic operational funding (under the State Equalization Guarantee (“SEG”)) on mandatory salary increases and increased fixed costs. *See* Affidavits from School Districts, attached hereto as Exhibits B – K. This left very little, if any, funding to address student needs identified in the NMIEA. Instead, a number of key legislative initiatives designed to target the most urgent and long-term needs of Native American students were disregarded. House Bills 670 and 516, for example, would have targeted funding to address the comprehensive need for: access to high-speed internet, afterschool and extended learning opportunities, culturally relevant curriculum and materials, a Native American teacher pipeline, social services, professional development, and community planning initiatives. However, these bills failed to garner the support of leadership or pass even one chamber.

Further, given the complicated challenge in satisfying the requirements of the NMIEA, the New Mexico Public Education Department will require greater capacity so that it can provide the districts more support than it is currently able to provide. The Court found that PED’s Indian Education Division, and its three regional offices, for example, lack the capacity and expertise to fully implement the NMIEA and to address the academic and community challenges affecting Native student success in the 23 Indian Education districts. FFCL #554-61. Additionally, many

of these challenges, such as the shortage of teachers and English language learner instructors, require solutions that exceed PED's current staffing, focus and authority. Thus, a broader solution for building the necessary capacity to ensure Native students are provided a constitutionally sufficient education requires support from New Mexico's Institutions of Higher Education and tribes, as well as greater monitoring of district compliance with the NMIEA.

Since Judge Singleton's ruling, rather than begin the transformation necessary to provide Native students a sufficient education, the State simply added \$4 million to the Indian Education Fund, and then put out requests for proposals for grants for the districts to implement programs in accordance with the NMIEA. The State also amended the NMIEA to require districts to conduct a needs assessment of Native American students and then implement a systemic framework to meet those needs. Allocating an insufficient amount of funding to each district—each of which has different Native-student population numbers and geographical challenges—to develop programs and conduct a needs assessment does not come close to fulfilling the many requirements of the NMIEA. Moreover, the PED remains understaffed because of unfilled vacancies, including a vacancy for the PED Assistant Secretary of Indian Education.

In the current school year, Superintendents across New Mexico are unable to fulfill the requirements of the Indian Education Act, which is particularly egregious in Districts with large Native American student populations, on or near tribal lands, such as Gallup, Cuba, and Zuni. *See* District Affidavits from Gallup / McKinley Superintendent Mike Hyatt, Cuba Superintendent Dr. Karen Sanchez-Griego and Zuni Chief Financial Officer Martin Romine, attached as Exhibits C, G, and K; *see also* Declarations from Plaintiffs Yazzie and Leno, attached as Exhibits L and M. While these districts' students are 80% or more Native, they continue to go without a curriculum, basic materials and a teaching work force that meets the needs of their students. The

State continues to act with no framework or comprehensive plan to remedy the issues and provide for sufficient professional development, curriculum implementation, student services, and sustainable funding to come into compliance with the New Mexico Indian Education Act. At the very least, by now, the State should have a comprehensive plan, created with Tribal input, showing how it intends to come into compliance with the NMIEA.

II. The State continues to violate the rights of English language learner students by not complying with New Mexico statutes, federal law, and the New Mexico constitution.

New Mexico has failed more than 40,000 students who are English language learners (“ELL”). While ELL students, like all students, have a constitutional right to a sufficient education that gives them the opportunity to be college and career ready, almost **no** ELL students (only about 5 percent) are proficient in reading or math. Decision and Order at 39.

The Court ruled that the State is violating the constitutional rights of ELL students by providing insufficient funding and programming for them (FFCL #297), and not adhering to the State’s duties to ensure that they are adequately prepared for college or career. *Id.* #3032. The State has a duty to ensure that all ELL students have an adequate language acquisition program that complies with state and federal law and that ELL students continue to receive content-area education at their grade level in their native language, if necessary, while they are learning English. *Id.* ## 3032, 3034. The State also has a duty to ensure that the school districts are complying with laws intended to protect English language learners. *Id.* ##3036-3038. The Court held that Defendants have not met any of their duties under federal or state law. *Id.* ##3055–3059. The State fails ELL students by failing to ensure that they are in English language acquisition programs and are provided the substantive learning content areas necessary to prepare them for college and career. *Id.* ##3060–3062.

The Court based its ruling on extensive evidence about the requirements of federal and state law concerning English language acquisition programs and the lack of such programs in New Mexico’s schools. Several experts, as well as PED staff and school district personnel, testified about the lack of resources for ELL programs and materials, the lack of ELL and bilingual programs and educational opportunities, and the lack of monitoring by the PED of the districts. The Court found that a language acquisition program for ELL students must include:

1. A clearly articulated program across all grade levels that demonstrates growth in student outcomes;
2. Well qualified and prepared teachers and administrators;
3. Culturally responsive curriculum and materials that include materials, aligned to the curriculum, to teach language as well as content area materials;
4. Opportunities to learn the language;
5. Opportunities to use language to learn content; and
6. Parent engagement opportunities.

FFCL #317. Additionally, programs for Native American English Learners must address the unique needs of Native American students, and therefore those programs must also have expertise in indigenous education and the learning of indigenous students. *Id.* #328. Both of Plaintiffs’ experts on this topic, Dr. Cathy Escamilla and Dr. Rebecca Blum Martinez, examined various school districts in New Mexico, and found in **all** of the districts studied a serious shortage of trained teachers, programs, and resources for ELL programs. *Id.* ##340–376.

“The PED fails to monitor and support districts and schools in their education of ELL students.” *Id.* #376. While it is the Bilingual and Multicultural Education Bureau (“BMEB”) that is responsible for monitoring the districts’ bilingual programs, most ELL students are in districts

without any bilingual programs, and PED's BMEB does not monitor what, if any, services those students are getting. FFCL ##382, 392. Moreover, "[t]he state has never evaluated whether the funding that school districts receive is enough to implement effective programs for ELLs." FFCL #383. And the State's director of the BMEB agreed that "districts appear to spend far more [of their limited local funds] on their bilingual programs than allocated [State funds]." *Id.* #386.

New Mexico lacks teachers who are certified in Teaching English to Speakers of Other Languages (TESOL) as well as bilingual-endorsed teachers, both of which are necessary for educating the large percentage of ELL students. *Id.* ##319, 304, 327-28, 353, 369-70, 372, 722, 726. In addition, there is a lack of instructional materials for ELL students, as well as a lack of lack of professional development for teachers working with our ELL students. *See* District Affidavits attached as Exhibits B - K. The districts in New Mexico are still unable to meet the needs of ELL students. *Id.*; *see also* Declarations from Plaintiffs Yazzie and Leno, attached as Exhibits L and M. In order to address the State's failings for ELL students, the State must increase the funding available for English language acquisition programs, increase the capacity of our educators to teach ELL students, and provide actual assistance and oversight to the districts to ensure that ELL students' education complies with federal and state law.

Rather than take these necessary steps, the State has done too little to address the major findings of the Court: (1) programming for ELL students is inadequate; (2) professional development for teachers of ELL students is inadequate; (3) there are insufficient materials for ELL students; (4) ELL students are placed in remedial reading classes instead of ELL programs; and (5) PED lacks sufficient monitoring capacity to determine if ELL students are receiving adequate assistance. FFCL #425.

III. The State continues to violate the rights of special education students.

New Mexico has failed our students with disabilities. Students with disabilities have a constitutional right to an education that gives them the opportunity to be college or career ready, and with the exception of all but the most severely disabled students, students with disabilities should reach reading and math proficiency levels, graduation levels, and college readiness levels on par with all other students. This has certainly not been the case, or even the expectation, in New Mexico. The Court ruled that this must change.

The Court held that the State is violating the constitutional rights of special education students by not providing them with an education that prepares them for college and career. Decision and Order at 25. The Court held that the State must comply with federal education statutes concerning students with disabilities in order to comply with the New Mexico Constitution's education clause. *Id.* at 24-25. General federal education statutes apply equally to students with disabilities, and mandate the same academic and achievement standards for all students, except the 1% of all students with the most severe cognitive disabilities. FFCL #2997–#3001. The Court held that districts do not have the necessary resources to provide special education students a sufficient education and that the state also lacks adequate accountability measures and adequate expertise to ensure special education students receive the education to which they are entitled. Decision and Order at 65 – 66.

Under federal law, it is the responsibility of NMPED to ensure that each child with a disability receives a free and appropriate special education and related services that are individually tailored to meet the needs of the child and which provide a meaningful educational benefit. 20 U.S.C. §1400(d). To the maximum extent possible, the special education supports and services must be provided in the general education classroom, *i.e.*, in the least restrictive

environment (LRE). 20 U.S.C. §1400(d). While the NMPED may delegate this responsibility to its districts, the State retains responsibility for supporting its local districts in meeting the obligations under federal law and in providing general supervision over its districts to ensure that procedures and substantive requirements of the law are being met.

Federal law requires that the State ensure that all students with disabilities are properly identified so that an individualized education plan can be put in place and implemented. “By all indications, New Mexico’s districts have had difficulty in evaluating students for eligibility for special education. There is evidence of lack of capacity (*i.e.*, adequately trained and available evaluation personnel) in some areas of the state and a lack of strong NMPED leadership and/or technical support to districts, particularly the smaller and more remote ones, in meeting obligations under child find provisions.” McLaughlin Trial Testimony Exhibit P-2798 at 7. Since the Court’s ruling, the State has done nothing to improve how districts identify students with special needs.

As defined by federal law in the 2004 Individuals with Disabilities Education Improvement Act (“IDEIA”), a student with a disability is entitled to special education that is individually designed and addresses those areas of a student’s disability that are adversely impacting learning. The essential function of the federally-mandated Individualized Educational Plan (“IEP”) is to set out a plan for pursuing academic and functional advancement of a child. Among the very important provisions in the 2004 IDEIA law is the requirement that the content of the child’s IEP specify how “the child (will be) involved in and progress in the general education curriculum” [§614(b)(2)(A)(ii)], “how the child’s disability affects the child’s involvement and progress in the general education curriculum” [§614 (d)(1)(A)(i)(I)(aa)], and a statement of the program modifications or supports for school personnel that will be provided for

the child “to be involved in and make progress in the general education curriculum” [§614 (d)(1)(A)(i) (IV)(bb)]. An IEP for a child with a disability, regardless of the nature or severity of the disability, must be designed to give the child access to the general education curriculum based on a state’s academic content standards for the grade in which the child is enrolled, and includes instruction and supports that will prepare the child for success in college and careers.

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>

This access is required regardless of a child’s placement and requires individualized and differentiated instruction and access to accommodations and other supports including direct intensive instruction. Since the Court’s ruling, the State has done nothing to address the reasons why it has failed students in this regard—which include the way in which special education funds flow to districts and schools, the lack of special education and related services personnel, the lack of training of teachers in teaching special education students, lack of small group and/or individualized instruction, lack of actual educational accommodations, lack of access to assistive technologies, and generally inadequate general education. *See* McLaughlin Trial Testimony, P-2789 at 31 - 32.

Finally, the State must ensure that students with disabilities across the State achieve the same educational outcomes as students without disabilities—meaning that the special education that the State provides actually gives students with disabilities the opportunity to be college and career ready. Currently, students with disabilities “are performing considerably below their nondisabled peers in reading, math, and science. The average graduation rate for these students also lags behind their typical peers.” *Id.* at 9. This will not stop unless and until the State corrects the problems of inadequate identification and inadequate education of students with disabilities, as mandated by this Court.

In order for special education students in New Mexico to actually get an education that prepares them for college or career, major changes are necessary. The State will have to address and improve the expertise and resources for special education, from the PED all the way to the services and programs provided in the schools, all of which will take a large infusion of new funding. The State will need to address the overall lack of professionals in the state trained to work with students with disabilities, including teachers, diagnosticians, social workers, speech language pathologists, occupational therapists, physical therapists, etc. The State will have to address the overall failure of the education system to integrate special education students into the general education classroom, through models of inclusion and individualized instruction. Indeed, the State will have to actually focus its attention on fixing the deficiencies in special education, something it has not done to date. ²

Rather than address these findings and take steps to come into compliance with the Court's ruling and the Constitution, the State has not done anything new to address the needs of special education students and the violation of their constitutional rights. The State has not provided additional funding for special education programs and services; the State has not increased the capacity of PED to provide technical assistance and oversight to special education services in the districts; the State has not begun to put in place a system that would ensure all

² At trial, Senator Mimi Stewart was asked: Why do you believe that this management training for teachers who teach special education students isn't happening? A: Well, they took away all the professional development money. There is not an emphasis from this state or focus on special education. You know, there's just hardly anybody who pays attention to it." Senator Stewart's 6/20/17 Trial Testimony, TR-197. Later, Senator Stewart testified: "Also, special ed classrooms hardly get any supply money. They don't get curriculum money. They are kind of a step-sister to the whole system. So it's not like they don't need the same kind of supplies and professional development and salaries commensurate with their work and salary increases over the years, they are just as important in our system. And yet, you know, there is just no focus on special education..." Senator Stewart's 6/20/17 Trial Testimony, TR-198.

teachers are trained in how to work with special education students; the State has not developed new programs to address the needs of special education students or the lack of true accommodations and education in the general education setting; the State has not made any changes that would ensure more access to ancillary services such as occupational therapists and speech language pathologists. Several bills were introduced during the last legislative session to address the needs of special education students and none of these bills made it out of a single committee. Consequently, the major deficiencies identified by the Court continue in the districts today, because the Districts are still unable to provide their special education students with the required teachers, ancillary services and programs. *See* District Affidavits, attached as Exhibits B – K; *see also* Declaration from Plaintiff Sanabria, attached as Exhibit N. The State is clearly out of compliance with this Court’s Order that it take immediate action to ensure that special education students receive the education that prepares them for college or career.

IV. The State continues to violate the rights of students from low-income families, and continues to fail to provide the programs and services necessary for all at-risk students.

New Mexico has failed students from low-income families and in doing so has failed the vast majority (about 70%) of our students. Four out of five students from low-income families are not proficient in reading or math, and not surprisingly, four out of five students from low-income families who attend college need remedial classes because they are not prepared for college or career. The Court ruled that children from low-income families are constitutionally entitled to the opportunity to be college or career ready, just like their non-low-income peers. Despite this ruling, the State still has not provided the Districts with the resources and supports required to implement necessary programs and services to all students from low-income families, and the State continues to violate the rights of New Mexico’s low-income students. *See* District

Affidavits, attached as Exhibits B – K and Declarations from Plaintiffs Yazzie, Leno, Sanabria and Martinez, attached as Exhibits L – O.

“Children from families of lower socioeconomic status face serious challenges at greater rates than their peers. In New Mexico, this problem is particularly concerning because the State consistently has the first or second highest percentage of poverty in the country.” FFCL #1.

“Children from low-income families can and do learn and achieve at high levels if given the proper support and intervention.” *Id.* #2. “The obstacles facing at-risk students and their schools, while daunting, can be overcome if at-risk students are presented with [certain] quality programs and interventions.” *Id.* #3. “These include quality full day pre-K, which addresses the issue of at-risk students starting school behind other children; summer school which addresses the loss of skills over the school break; after school programs, small class sizes, and research-based reading programs.” FFCL #4 (citations omitted). “Defendants, however, have failed to provide students with educational inputs that are adequate to provide students with an education that prepares them for college and career. The State has recognized the efficacy of programs that can provide at-risk students with proper support but the State has not funded these programs to the extent that all at-risk children can participate in such programs.” *Id.* #5 (citations omitted).

Early Childhood Education

“Early childhood education for 3 and 4 year olds (PreK) is an important component of a sufficient education system.” *Id.* #6. Pre-K programs “are crucial to address the achievement gaps between low income and non-low income students, as well as with students of color and ELL students.” *Id.* #7. “One of the key recommended practices for a rigorous, articulated early learning policy is that programs should be at least a full school day to ensure that the program is intensive enough to achieve desirable cognitive outcomes.” *Id.* #31 (citations omitted). “Full-day

pre-K is more beneficial for children than half-day Pre-K as they receive more instructional time.” *Id.* at #49; *see also* ##51-56. Further, it is more difficult for low income children to attend half day pre-K programs rather than full day programs because working families have a difficult time finding transportation and child care after the half day program ends.” FFCL #50. Neither the CYFD nor PED Pre-K programs in New Mexico offer all the necessary elements of a high quality Pre-K program, such as transportation, highly qualified direct service staff, and full day. FFCL #57 (citation omitted).

“[M]any eligible students in New Mexico receive no Pre-K services because of insufficient slots and funding.” *Id.* #69. PED Pre-K classrooms “are funded by below the line funding that requires school districts to put in a grant application to PED for money for pre-K education.” *Id.* #71. “The per pupil Pre-K funding is inadequate to cover all the costs of Pre-K services... and districts have to supplement Pre-K funding with operating and/or Title I funds.” *Id.* #73. “Some districts do not participate because they cannot afford to subsidize the program with their operational budget or other funding sources.” *Id.* #79. In FY17, out of the 27,000 four-year-olds in New Mexico, only about 3,600 students had access to a full-day program and about 9,000 four-year-olds did not have access to any type of Pre-K program. *Id.* #90. Despite the effectiveness of Pre-K, the Legislature has adopted no plan to ensure all four-year-olds have access to a full-day program. *Id.* ##102–103.

The State has the ability to ensure that every four-year-old has the opportunity to participate in Pre-K; to do that, it would need to increase funding substantially. *Id.* #101. However, the Legislature failed to do that after the Court ruled. Instead, the State increased funding for Pre-K by \$10 million. Three- and four-year-olds throughout the state still lack access to high-quality, full-day Pre-K programs. Several school districts have waiting lists for

their Pre-K programs. For example, Rio Rancho has between 75-125 children on its Pre-K waitlist and 200 on its preschool waitlist and is only serving about 30% of those eligible for the program. *See* Affidavit of Rio Rancho Superintendent Dr. Sue Cleveland, attached as Exhibit B.

According to testimony given by the Secretary of Education to the Legislative Education Study Committee, at the beginning of the 2019-2020 school year, the PED was short by \$7 million in funding Pre-K applications from school districts. To the best of undersigned counsels' knowledge, this shortage was not remedied by the State, despite the Secretary's requests for additional funding for Pre-K for this school year.

The State is well aware that it could expand high-quality, full-day Pre-K and ensure universal access for all three- and four-year-olds within a few years if it developed a plan to do so and invested the money to make it happen. Instead, nearly 15 years after the inception of New Mexico Pre-K, the State continues to add minimal funding to the program year-after-year, barely expanding access, and ensuring that thousands of three- and four-year-olds lose the opportunity for quality Pre-K completely.

Extended Learning Time

“Extended learning time, like summer school, after school tutoring, and an extended school year are valuable for low income students, because they help close the achievement gap between low income and non-low income students. FFCL ##161–186. “Summer learning programs can reduce summer learning loss and close the achievement gap for low income students.” *Id.* #161. “Extended learning time through longer school days, longer school years, and tutoring have a positive causal effect on student achievement.” *Id.* #166. “[I]nvestment in an extended school year is one of the best ways to increase graduation rates in New Mexico.” *Id.*

#172. “Students who participate in after-school programs achieve higher grades in school and engage in less risky behaviors.” *Id.* #174.

“Districts across the state severely limit extended learning opportunities because the districts do not have the funds to provide after-school programs, tutoring, summer school, and similar opportunities to all students who need such services.” FFCL #187. “[S]ummer school for elementary students used to be free, but the Legislature is not giving the districts enough money for summer school programming and therefore there is no elementary summer school in the state anymore.” FFC. #189. The State also does not provide funding for after school tutoring. *Id.*

#200. “The State does not provide sufficient funding statewide for credit recovery programs for high school students.” *Id.* #209. “Even when districts do have a summer or afterschool program, it is limited due to funding.” *Id.* #194. The State does not pay for transportation for after-school programs and the districts cannot afford to cover the additional transportation costs. *Id.* #197.

This Court found that K-3 Plus is an effective program for at-risk students but that not all students have the opportunity to participate in the program. Decision and Order at 29-30. Lack of funding and structural barriers have prevented districts, schools, and students from accessing the K-3 Plus program in the past. FFCL ##118-128. During the 2019 Legislative session, the State appropriated enough funding for most at-risk K-5 graders to participate; however, it was a meaningless gesture since many districts were unable to meet the strict statutory requirements to access the funding, and administrative barriers still prevent districts from applying.³

³ With SB 1 and HB 5, the State moved K-5 Plus “above-the-line” into the operational funding part of the budget, with enough funding for all Kindergarten through fifth grade students who are low-income or in low performing schools and who are currently eligible for K-3 Plus to participate. LESC analysis of HB 5 at 3 <https://www.nmlegis.gov/Sessions/19%20Regular/LESCAnalysis/HB0005.PDF>. However, this funding remains largely inaccessible because the State placed strict requirements on districts to receive the funding and did not remove any of the administrative burdens that prevented districts

The State has argued that the statutory requirements for K-5 Plus ensure that the program is implemented with fidelity. However, in reality, because the program is so difficult to implement the way the Legislature set it up, PED has made *ad hoc* exceptions for some districts so they can provide the program to students, which circumvents the requirements in the statute. Where these exceptions are made, PED will not reimburse the district for the program, so the district has to cover the cost of the program out of its operational funding. *See e.g.*, Affidavit of Santa Fe Superintendent Dr. Veronica Garcia, Attached as Exhibit D at #11. In addition, because so many districts—especially small districts—are, in essence, precluded from participating in K-5 Plus due to the funding scheme, this creates a non-uniform system, favoring larger districts with the capacity and numbers to provide the program to some at-risk students. Overall, the statutory requirements in the new K-5 Plus program have resulted in fewer children having access to this extended learning program in many districts. In 2018, about 25,000 students in New Mexico had access to K-5 Plus, while in 2019, about 21,000 students had access to the program. *See* PED analyses, attached as Exhibit P and Q.

from participating before the new legislation passed. Further, the State was on notice from PED that only \$31.2 million of the \$119.9 million K-5 Plus would be spent in FY 2020. *Id.* In fact, only about \$29 million was spent on the K-5 Plus program in FY 2020. *Id.*

The new strict statutory requirements for districts to qualify for K-5 Plus include: (1) districts must keep students with the same teacher and the same cohort of students for the following school year; and (2) districts must implement the program school-wide. This means that in each grade, Kindergarten through Fifth, a district must recruit a teacher to teach K-5 Plus in the summer, recruit students to participate, and keep the groups of students and teachers together for the following school year. This is especially problematic if the K-5 Plus teacher is not TESOL endorsed, but is teaching ELL students. Further, if, for example, a district is able to recruit teachers in grades K-4 to teach K-5 Plus in a school, but is unable to recruit a 5th grade teacher for the program, the district is not eligible for the program. Many districts did not apply for the program because they were unable to recruit teachers and students to implement it in accordance with the statute.

Likewise, the State’s new Extended Learning Program (which includes additional professional development for participating schools) which was established via SB 1 and HB 5 during the 2019 legislative session is only available to one-third of the students in the state, meaning most students will not have access to extended learning time and most teachers still will not have access to sufficient professional development. The State did nothing to add more tutoring, summer or after-school programming, let alone an extended school year for all at-risk students.

Smaller Class Size

“[S]maller class sizes are associated with higher achievement, higher earnings, higher high school graduation rates, and higher college completion rates.” FFCL #215. “Students who are struggling academically or socially benefit from smaller class sizes because they get more differentiated instruction from their teachers.” *Id.* #216. “Because districts do not have the money to pay for teachers at the current statutory class size requirements, they are forced to increase class sizes and, in many cases, seek class size waivers from the state and exceed the State’s statutory maximum class sizes.” *Id.* #222. “The Legislature has granted these waivers to allow districts to ‘save money’ but students have paid the price: Class sizes are 7 – 10 percent larger, and students get less individualized attention from teachers as a result.” *Id.* #223.

Since the Court’s ruling, the State has continued its practice of failing to provide districts with sufficient funding to attract and retain sufficient numbers of teachers and assistants to bring the class sizes down to statutory maximums, let alone to bring them below statutory maximums for at-risk students who would benefit the most.

Research-Based Reading Programs

“Literacy programs and practices that are based on valid research are essential to ensure that low income students learn how to read at grade level.” *Id.* #236. “These programs include intensive professional development for teachers on how to teach reading, 90 minutes of reading instruction per day for students, and additional intervention and time for instruction if students are not successful.” FFCL #237. “Teachers must be trained to teach reading with direct, explicit, sequential, and systematic instruction. Additional intervention includes extended learning time and/or additional time with a reading interventionist.” *Id.* #238. “It is critical that children be proficient readers by the end of third grade in order to be successful for fourth grade and beyond.” *Id.* #239. “One in four children in New Mexico reads at grade level by third grade.” *Id.* #244. Districts have not had sufficient funding, either “below- the-line” through the Reads to Lead program, or above-the-line through SEG funding, to pay for reading specialists, to train teachers with the proven strategies needed to teach reading, or to provide them with instructional materials. *Id.* ##246–264.⁴ “There is a strong correlation between the State’s failure to fund programs to teach students how to read and students’ proficiency scores.” *Id.* #245. The PED “need[s] to be doing more to improve New Mexico’s reading proficiency rates.” *Id.* #265.

After the Court’s ruling, rather than expanding funding for reading specialists, and training for teachers on proven strategies needed to teach reading, the State cut the only source of funding for reading specialists – the Reads to Lead program – which was funded “below-the-line.” Moreover, while the State will argue that it expanded the funds available through the at-risk line of the funding formula, as explained in Plaintiffs’ notice to the Court and below, all of

⁴ The term “below-the-line” refers to categorical funding in the public school budget for which money is appropriated for a particular program and districts must apply for the money. The term “above-the-line” refers generally to money that is appropriated for general operational funding for the districts.

that additional funding was used to pay for required salary increases and did not go towards additional services and programs for students.

Social Services

“Defendants have failed to provide sufficient resources for counselors, social workers, and other non-instructional staff that all students, especially at risk students, need to succeed.” FFCL #266. “Most districts do not have sufficient funding to make social and health services available to all at-risk students. Many districts have had to eliminate counselors, nurses and social workers and/or reduce their time in the district due to budget cuts.” *Id.* #267. “High school support programs that provide additional mentoring and counseling can improve graduation rates. LFC staff has found that interventions like mentoring and counseling have strong evidence of effectiveness.” *Id.* #275.

The State has not taken any action to ensure that at-risk students would have access to social services in the upcoming school year. The State claims that the increases in the at-risk index would allow districts to hire social workers, counselors, and health professionals; however, it is clear from Districts’ budgets that there is no leftover at-risk funding to pay for these positions, much less hire the positions that have been cut over the past decade. LFC analysis of HB 5 at 7 <https://www.nmlegis.gov/Sessions/19%20Regular/firs/HB0005.PDF>.⁵ Most districts have been unable to hire any additional social workers, counselors, or health staff for at-risk

⁵ Additionally, during the 2019 legislative session, Representative Roybal Caballero introduced HB 121 that would have required all districts to develop a plan on how they would provide social services to students, along with an estimated cost of providing these services. Districts would have been required to submit plans to PED who would have reviewed and approved them. PED would then have requested funding from the Legislature at the next legislative session to ensure all districts could fund their plans and provide social services to at-risk students. This bill passed through the House, but died in the Senate Education Committee. Plaintiffs refer to this Bill as another example of a step the State should have taken, but didn’t, to come into compliance with the Court’s Order.

students. Due to a lack of funding, Districts continue to be unable to meet the social services needs of their students. *See* District Affidavits, attached as Exhibits B - K.

Quality of Teaching

“[T]he quality of teaching for at-risk students is inadequate. In New Mexico, high poverty schools have a disproportionately high number of low-paid entry level teachers.” FFCL ##670, 707. “Inexperienced teachers are systematically less effective than experienced teachers. Schools with high rates of student poverty or other education needs have persistent, serious difficulty recruiting and retaining qualified, skilled teachers.” *Id.* #671. “[A]s one of the most culturally, linguistically and ethnically diverse states in the country, every New Mexico teacher requires an understanding and ability to engage with students of many backgrounds to be effective.” *Id.* #672. “New Mexico is failing to ensure that at risk students in “high need” schools are exposed to highly effective teachers.” *Id.* #682. “Policies that create rewards for teaching in high need schools can help address teacher quality problems in these schools and benefit students... .” *Id.* #683. “School districts do not have the funds to pay for all the teachers they need.” *Id.* #697. [N]o effort has been made to evaluate the effectiveness of PED’s efforts to achieve equitable distribution of effective teaches or recruitment and retention of teachers in high poverty or low performing schools.” Decision and Order at 35. “Low teacher compensation is an impediment to recruiting and retaining teachers in schools with high at-risk student populations.” *Id.* #714. “[T]he State of New Mexico does not provide districts with sufficient funding to provide professional development for teachers.” *Id.* ##727, 728. “A central component of closing the achievement gap for at-risk students in New Mexico is effective professional development for ineffective teachers.” *Id.* #730. There is insufficient funding to provide teachers with adequate mentorship or professional development. *Id.* ##707–739.

Since the Court’s ruling, the State raised the minimum salary levels and mandated a 6% salary increase for all teachers. This amount of increase did not make New Mexico competitive with other states and has not alleviated the difficulties in recruiting and retaining teachers in the state. Moreover, the State has done nothing to ensure that experienced teachers are placed in high poverty schools. The state continues to be without an incentive system to bring experienced teachers to hard-to-staff schools. Children in high poverty schools continue to be taught by new, inexperienced teachers, continuing the opportunity gap for children from low-income families.

V. In order to remedy the rights of low-income, special education, Native American and English language learning students, the State must transform how it funds education, and fully fund programs and services to meet the needs of all at-risk students.

“Defendants have failed to fund adequately programs necessary to provide an opportunity for all at-risk students to have an adequate education.” FFCL #2118. “[I]ndividual school districts do not have the funding necessary to maintain sufficient programming, staffing and services for at-risk students, because nearly all of their appropriation goes to pay for fixed costs.” *Id.* #2128. School districts also do not have sufficient funds for instructional materials, transportation, and technology. *Id.* #2129–2162.⁶ “[O]n the issue of funding, there are two different problems contributing to the failure of the State to provide an adequate education to at-risk children. First the overall appropriation is insufficient to fund the programs necessary to provide an opportunity for all at-risk students to have an adequate education. Second there may

⁶ This Court cited extensive evidence proving that funding for instructional materials was inadequate, thereby preventing school districts from purchasing necessary and up-to-date textbooks; the Court also found a lack of access to technology, particularly in rural districts. Decision and Order at 26 – 27. This Court emphasized a lack of culturally relevant instructional materials for American Indian students enrolled in public schools, which the State is required to provide under the N.M. Indian Education Act, NMSA 1978 §22-23A-2(A). The Court ruled that the NMIEA was the Legislature’s implementation of a constitutional mandate, and therefore, the failure to comply with the NMIEA is a violation of the Constitution’s adequacy clause. *Id.* at 27.

be ways for the districts to more effectively and efficiently spend their funds, but PED fails to exercise its authority over the districts to require that the money that is allocated is used for programs known to advance the educational opportunities for at-risk students.” Decision and Order at 53 – 54. “The evidence presented shows that it would not be enough to simply redistribute the current appropriations more efficiently.” *Id.* at 54.

“The determinative issue for the Court’s purposes is whether at the end of the process sufficient monies have been allocated to provide the necessary programs to provide an adequate education for at-risk students.” Decision and Order at 58. Importantly, this Court ruled: “lack of funds is not a defense to providing constitutional rights.” *Id.* at 54.

A sufficient education is a right protected by the New Mexico Constitution. As such it is entitled to priority in funding. Supporting an opportunity for a complete, proper, quality education is the legislature’s paramount priority; competing priorities not of constitutional magnitude are secondary, and the legislature may not yield to them until constitutionally sufficient provision is made for elementary and secondary education.

Id. at 56.

Since the Court’s ruling, the State did provide some additional money to the education budget, but the State has yet to actually fund the programs and services needed for at-risk students to fulfill the constitutional mandate. Far from it. Instead, it was business as usual at the Legislature, as if there hadn’t been a ruling holding the State in violation of students’ constitutional rights. While the State gave pay increases to teachers, the raises did not even get the base pay back to 2004 levels, the year that the three tiered system was introduced, when adjusted for inflation. And while the State did add \$113 million to the at-risk index, the districts had to use that money to pay for salary increases since the State did not provide enough money to cover the salary increases. So, the additional money that flowed through the at-risk index could not be used for programs and services for at-risk students. The State also cut several of its “below-the-line” programs that were meant for at-risk students – like the Reads to Lead program,

and Truancy and Drop-Out Prevention Counselors. Overall, the unit value—which is at the heart of funding per pupil—only increased by about 8%—clearly not enough to meet the many deficiencies outlined in the Court’s Orders.

The current funding mechanisms in the funding formula for funding for programs and services for at-risk students do not provide sufficient funds to allow districts to provide sufficient services and programs for students from low-income families, Native American students, English language learners, and special education students. A re-thinking of how New Mexico funds programs and services for at-risk students is required to ensure that all at-risk students are counted and that programs and services are available to all at-risk students at a level that will give them the opportunity to be college, career and civics ready. This will mean, *inter alia*, increases to the at-risk index, the bilingual index, the special education sections of the funding formula, and a completely different way of approaching funding to fully implement the Indian Education Act.⁷

In order to comply with the Court’s Decision and Order and the New Mexico Constitution, the State must fully fund all of the programs and services necessary for at-risk students, including Pre-K, extended learning opportunities, smaller class sizes, reading specialists and interventionists, social services, and developing the capacity of our teachers and

⁷ For example, currently, the bilingual factor does not generate the additional funds necessary for schools to provide sufficient ELL programming. *See* District Affidavits, attached as Exhibits B - K. Moreover, in order to increase the capacity and expertise of state bilingual education providers, the State must invest in Institutions of Higher Education so that they can do research and program development to (1) require TESOL (Teaching English to Speakers of Other Languages) and bilingual endorsements for College of Education teacher graduates; (2) develop comprehensive materials that meet the needs of ELL/bilingual students; and (3) provide Bilingual educator trainings and professional development. The State must also ensure that all teachers are provided with annual professional development in the teaching of ELL students. Finally, the State must increase the capacity at PED to provide technical assistance and monitoring of the education of all ELL students across the State. All of this will require additional funding.

ensuring that our most experienced teachers are with our at-risk students. The State must also make our teachers' salaries competitive with surrounding states and high enough to attract our youth to enter the teaching profession. Moreover, the State must fully fund transportation and culturally and linguistically relevant instructional materials. The State must also develop and fund the capacity of our State to meet the requirements of the Indian Education Act, the Bilingual Multicultural Education Act and the Hispanic Education Act. This means investing in our Institutions of Higher Education and other Centers to develop our bilingual and culturally responsive educator workforce and support staff, as well as culturally responsive curricula and the school system's ability to preserve and teach Native languages and culture. The State must also develop the capacity of the PED to provide technical assistance and support to the school districts to fully implement all of our current laws and the Constitution. The resources required are far more than appropriated so far, because the shortage is massive. Over the past 10 years this State starved school districts of funding and decimated the districts' capacity to provide a general education to all their students. The Legislature's appropriations for education in 2019 did not even bring districts back to their meager 2008 funding levels, when adjusted for inflation. So it is no surprise that Districts continue to be unable to provide at-risk students with the constitutionally required programs and services. *See* District Affidavits, attached as Exhibits B – K. A thorough and funded plan, which includes all of the necessary programmatic developments, along with how they will be made available to all at-risk students, is required to remedy the current unconstitutional public school system.

VI. The State has failed to implement an accountability system to ensure that at-risk students are receiving the programs and services necessary for them to be college and career ready.

“PED has a statutory obligation to ‘supervise all schools and school officials coming under its jurisdiction, including taking over the control and management of a public school or

school district that has failed to meet requirements of law or department rules or standards,’ and to ‘determine policy for the operation of all public schools and vocational education programs in the state.’” Decision and Order at 52 (citations omitted). “PED has failed to monitor or audit the districts’ spending of their annual funding.” *Id.* at 53. “PED does not have information about which districts have the statutorily required educational materials.” *Id.* at 28. “The PED lacks sufficient monitoring programs to determine if ELL students are receiving adequate assistance. The Director of Bilingual Multicultural Education did not know which schools were providing programs for ELLs and she also testified that PED was not tracking the number of Native American English Learners to determine if they were timely acquiring English. Nor is PED tracking the training given to teachers who teach ELL students. PED has not provided a framework for districts to use in providing multicultural education.” Decision and Order at 30 - 31. “[N]o effort has been made to evaluate the effectiveness of PED’s efforts to achieve equitable distribution of effective teachers or recruitment and retention of teachers in high poverty or low-performing schools.” *Id.* at 35.

The Court found that the “PED has failed to provide districts with the technical assistance and expertise necessary to sufficiently educate New Mexico’s students.” FFCL #3130. For example, the Court found that the PED lacks capacity to implement the New Mexico Indian Education Act. *Id.* #606. This is, in part, because the Indian Education Division (IED) in PED, “simply does not have the capacity to study and develop effective education systems for Native American students, and the IED cannot be responsive to the needs of the communities that IED is intended to serve.” *Id.* at #602; *see also, id.* #3086. The Court also found that the PED has failed to meet its supervisory and audit functions in the budgeting process and that the “strength

of PED’s audit process ebbs and flows depending on staff levels and budget for the department.”
Id. #2286.

Since this ruling, the State has neither increased the capacity of the PED to work with the districts to ensure that at-risk students are getting the resources to which they are entitled, nor developed a method for tracking the programs and services being provided. The State has not even determined what it would take to ensure that PED has the resources it needs, and that the districts and schools have what they need to ensure that at-risk students are receiving a constitutionally sufficient education.⁸

VII. Conclusion – The State cannot comply with this Court’s Order unless and until it develops, implements and fully funds a plan to ensure that all at-risk students are receiving the programs and services necessary to be college and career ready.

Despite this massive, transformational ruling from the Court over a year ago, Defendants continue to go without a comprehensive plan—which includes the necessary programs and services, along with funding requirements, an implementation timeframe and accountability measures—to come into compliance with its constitutional obligation to provide all students with

⁸ Recently, despite the fact that PED lacks both adequate numbers of staff and sufficient staff with expertise, the Department only requested 10 additional staff for FY 2021. LESC Brief at Attachment at 1. <https://www.nmlegis.gov/handouts/ALESC%20092519%20Item%203%20.1%20-%20Brief%20-%20PED%20FY21%20Budget%20Request.pdf>. The number of FTE at PED remains below the number of FTE the Department had ten years ago: In FY 2009, the PED had 281 FTE; in FY 2019, the PED has 221 FTE. *Id.* at 3. Additionally, PED is unable to fill the positions it does have and has a 27% vacancy rate with 70 unfilled vacancies. *Id.*

The PED appears to know that it needs to increase its capacity and expertise in order to meet this Court’s Order. Originally, the PED’s budget request for the coming year included many more than just 10 new positions; however, the State Department of Finance and Administration (DFA) required PED to reduce its budget request to 10 new positions. *Id.* at 3. In fact, in PED’s “Request of Additional Positions Overview,” PED justified its appeal for more staff by outlining the goals it sought to achieve by increasing FTE in the department—all of which align with this Court’s ruling. *Id.*, Attachment at 1. But since DFA required PED to reduce its staffing budget request, PED will have to sacrifice several of these goals that could move the State towards compliance. *Id.*, Attachment at 2.

a sufficient education. This plan will require support from both the executive and legislative branches of government. While Judge Singleton was initially willing to defer to the State to implement her order without further instructions, other than getting it done by April 15, 2019, the State's failure to do so makes it imperative that the Court now order the State to take decisive, meaningful action, in the form of further injunctive relief.

April 15, 2019 has come and gone, and a new school year has begun in which students' constitutional rights continue to be violated by the lack of resources, services and programs in the schools to serve Native American students, English language learners, students with disabilities and students from low-income families. While Plaintiffs understand that this task cannot be done in a few months, at the very least, by now, the State should have acknowledged the scope of the work needing to be done and developed a comprehensive plan on how it will come into compliance with this Court's Order. Last June, Plaintiffs attempted to work with the State to develop such a plan, but after two meetings the State cut off those conversations abruptly without a credible explanation, and told Plaintiffs to feel free to go to Court for a remedy instead. That decision by the State has led to this Motion.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants as follows:

1. Develop within 60 days a comprehensive statewide plan and timetable which is agreeable to both sets of Plaintiffs, to be approved by this Court, that will provide a uniform and sufficient system of public education to all students in New Mexico. The plan shall specify the goals to be reached, along with the short term and long term steps to be taken to meet those goals, and whether action is required by the legislature, the PED or both, and shall:

- a. include provision of the services, resources, and supports necessary for all children in all districts, including low-income, Native American, special education and ELL students ("at-risk students"), to have the opportunity to be college, career and civics ready;

- b. describe the steps, including staffing and funding, 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, and smaller class sizes, to all at-risk children throughout the state no later than the beginning of the 2020- 2021 school year;

c. describe the steps, including staffing and funding, that will be taken to create and implement a multi-cultural framework, and to deliver culturally and linguistically appropriate instruction to all New Mexico public school students, as well as the funding required;

d. 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 the federal Title VI mandate and effective supplemental English acquisition programs in districts receiving federal Title III sub-grants, along with the funding required;

e. describe the steps that will be taken to bring New Mexico's public education system into compliance with federal Title III and New Mexico's Bilingual Multicultural Education Act, and to ensure that all ELL students have access to English language assistance programs required by federal law as well as access to content based instruction, and to provide the funding required;

f. describe the steps that will be taken to ensure that all students with special education needs are properly identified and provided an individualized education, which includes an education in the least restrictive environment and which gives special education students the opportunity to be college and career ready, just like all other students, as required by federal law, and to provide the funding required;

g. describe the steps that will be taken to recruit, train and retain teachers to ensure that 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;

h. describe a funding scheme that allocates sufficient funding and distributes that funding in a manner that ensures full and uniform implementation of the comprehensive statewide plan approved by this Court, including, but not limited to, the funds necessary to meet all of the programmatic areas described above, as well as the transportation and instructional materials needs of each school district;

2. Provide PED with the resources necessary to hire the experts and specialists necessary to work with Districts to come into compliance with the State's constitutional obligations to students;

3. Implement this plan in accordance with the timetables approved by the Court;

4. While developing and implementing this plan, take action by no later than March 15, 2020 to immediately direct resources to the public schools to increase the opportunities for at-risk students to be college and career ready, including but not limited to:

(a) provide sufficient funding and assistance so that all schools have basic instructional materials, transportation and technology;

- (b) increase professional development of all teachers in New Mexico to increase their capacity to work with at-risk students as defined by this lawsuit;
- (c) increase salaries of teachers so that New Mexico is competitive with surrounding states;
- (d) increase incentives for New Mexicans to be trained and licensed to teach at-risk students, especially in schools with high numbers of at risk students;
- (e) increase the funding that flows through the at-risk index of the funding formula so that school districts can provide services and programs for at risk students at a level greater than the current school year with services including but not limited to tutoring, reading specialists, social workers, counselors and nurses;
- (f) increase the funds for bi-lingual programming;
- (g) increase the funds for special education;
- (h) increase full day pre-K and extended learning opportunities for at-risk students.

5. 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) all at-risk students have the opportunity to be college and career ready;

6. Establish an effective system of accountability and enforcement to ensure that every child in New Mexico receives a sufficient education.

7. Any other relief that this Court deems necessary to fulfill the July, 2018 Decision and Order.

Respectfully Submitted,

/s/ Gail Evans

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2019, a true copy of this motion and supporting memorandum was e-filed and served through the Court's e-filing system all upon counsel of record.

/s/ Gail Evans
GAIL EVANS