STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

LOUISE MARTINEZ, individually
and as next friend of her minor children
AN. MARTINEZ, AA. MARTINEZ,
AR. MARTINEZ, and AD. MARTINEZ; *et al.*,
Plaintiffs,

vs. **No. D-101-CV-2014-00793**

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

Consolidated with

WILHELMINA YAZZIE, individually
and as next friend of her minor child,
XAVIER NEZ; *et al.*,
Plaintiffs,

vs. **No. D-101-CV-2014-02224**

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

YAZZIE PLAINTIFFS' REPLY CONCERNING THEIR MOTION TO ORDER DEFENDANTS TO MEET THE CONSTITUTIONAL MANDATE TO ENSURE THAT NEW MEXICO PUBLIC SCHOOL AT-RISK STUDENTS HAVE THE OPPORTUNITY TO BE COLLEGE AND CAREER READY

In 2018, this Court held that the education system in New Mexico violates the New Mexico Constitution because the State has failed to "provide every student with the opportunity to obtain an education that allows them to become prepared for career or college." Decision and Order at 25, 59. This Court ruled that the State knows what programs and services improve educational outcomes for at-risk students yet the State has failed to make those programs and services available to all at-risk students. *Id.* at 29 - 30, 45. This Court also ruled that the State has

passed laws requiring a specific standard of education but those laws have not been funded or implemented and, thus, students continue to go without the educational programs and services mandated by these laws. *Id*. at 28, 45. This Court's ruling is based on evidence from 23 focus districts[1], statewide data, and local and national experts about the education of Native American, English language learner, special education and low-income students. In entering an injunction and maintaining jurisdiction, this Court found that "[n]either [the school] children nor the Court can rely on the good will of the Defendants to comply with their duty. It is simply too easy 'to conserve financial resources' at the expense of 'our constitutional resources.'" *Id.* at 74 (citations omitted). This Court enjoined the Defendants "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." *Id.* at 59. Because Defendants have not put in place a comprehensive plan to provide all at-risk students the programs and services necessary for them to be college and career ready, which includes complying with the New Mexico Indian Education Act and Bi-Lingual Multicultural Education Act, the State continues to violate the constitutional rights of New Mexico's at-risk students.

Defendants fundamentally mis-construe and attempt to minimize the magnitude and significance of the Court's ruling when they write that the ruling "detail[s] a number of issues with the system in place during trial in 2017." Defendants' Response at 1. If that is all this case were about – "a number of issues in 2017," then the State could simply change a few things that were put in place by the previous administration and call their job done. Indeed, this seems to be the State's approach. However, this case is not about any particular administration or any particular political party in charge. Rather, the judge looked at evidence from 2008-2017 and

[1] Rather than considering evidence from all 89 school districts, this Court granted the State's motion to limit the district level evidence in this case to 23 "focus districts."

ruled that the entire system of education in New Mexico is unconstitutional because it fails to provide at-risk students the opportunity to be college and career ready. Considering that at-risk children in New Mexico make up about 80% of the student body, to actually provide this vast majority of students with the opportunities to which they are constitutionally entitled is going to take a complete transformation of the State's school system, rather than the patchwork of weak remedies Defendants propose: un-doing a few policies put in place by the last administration, making a few "philosophical shifts" and adding some dollars to the school budget that does not even get us back to 2008 levels when adjusted for inflation.

I. Funding for Public Schools Remains Insufficient to Meet the Constitutional Requirement that At-Risk Students have the Opportunity to be College and Career Ready.

No matter how Defendants may try to play with the budget numbers, here are 10 indisputable facts about the State's efforts since the Court's Decision and Order:

1. Per student expenditures for the 2019/2020 school year are less than per student expenditures in 2007/2008, when adjusted for inflation.

2. The State has not added any money or resources for special education since the Court ruled.

3. The State has only added $7 million for bi-lingual programming to an originally inadequate pot of $36 million – in order to marginally increase the number of students served – but nothing has been done to increase the amount of funding per student for bi-lingual programming so that schools can improve their bi-lingual programming.

4. The State has added only $4 million to the Indian Education Fund, with no investments made in infrastructure and capacity building to actually implement the Indian Education Act, which is a constitutional mandate.

5. The increase that the State made to the at-risk factor of the funding formula still does not provide even 25% more funding for each at-risk student, and still uses the inappropriate census poverty level as the poverty measure and therefore does not count most of our children who are from low-income families and in need of extra support.

6. Almost all of the additional money that the legislature appropriated for public school funding in 2019 was spent on mandated salary increases and fixed costs, not on programs for at-risk students.

7. Even with last year's salary increases, teacher salaries are still not back to 2008 levels when adjusted for inflation, leaving many hundreds of classrooms without qualified teachers.

8. The State still has not created, implemented and funded a system that actually covers the costs of instructional materials for all school districts.

9. The State still has not created, implemented and funded a system that actually covers the cost of transportation for all school districts.

10. The PED continues to have approximately 70 unfilled vacant positions and lacks sufficient skilled personnel and resources to create and implement an adequate accountability system and continues to lack the capacity to provide districts with technical assistance or support to implement a multi-cultural educational framework that complies with the Indian Education Act, the Hispanic Education Act, and the Bi-lingual Multicultural Education Act.

Rather than recognize any of these indisputable facts, Defendants center their argument on a budgetary falsehood – that there was a $448 million increase (16%) in the appropriation for K-12 schools between last year and this year. As shown below, that claim is inaccurate and mis-leading, as are the State's claims about the increases in operational and below-the-line funding. And even with the increased funding to schools appropriated during the 2019 legislative session, overall school funding still is not back to 2007/2008 levels when adjusted for inflation. *See* Affidavit of Dr. Stephen Barro (hereinafter "Dr. Barro Aff.") ¶16, attached as Exhibit AA.

The overall school budget from last year to this year did not increase by $448 million because a substantial portion of the purported increase has not been made available to districts and schools. Over $182 million of the added funding was contingent on districts signing up for longer school years under programs labeled Extended Learning Time (ELTP) and K-5 Plus, but the actual sign-up rates by the districts were low because of unreasonably strict program requirements and insufficient lead time for district implementation, leaving at least $111 million

unclaimed. *See Id.* ¶6. The true year-to-year increase in spendable dollars from 2018 to 2019 (taking other held-back funds into account) appears to be only about 13%. *Id.* **¶7.**

A one-year 13% increase from School Year 2018/2019 to School Year 19/20 does not even restore the total state appropriation to the inadequate funding levels of 2007-08. Dr. Barro Aff. **¶8**, Exhbit AA. Had the full 16% increase for 2019-20 materialized, it would have barely restored pre-recession real spending. *Id.* When one takes into account the $111.2 million of K-5 Plus/ELTP money that districts did not receive, the *spendable* appropriation is 2.2 % below 07/08 levels. *Id.* Thus, the recovery since 2007/2008 remains incomplete, let alone moving beyond 2008 levels when the education system was also insufficiently funded. *Id.*

Perhaps most importantly, per student expenditures have not increased since the 07/08 school year. The State's real (inflation-adjusted) spending per K-12 student peaked in 2007-08, fell sharply during the great recession, and stayed well below the pre-recession level until this year. *Id.* ¶9. Indeed, between 2007-08 and 2019-20, the nominal appropriation per student only rose by 1.4 % but when one takes into account the $111.2 million of K-5 Plus/ELTP money that districts did not receive, the *spendable* appropriation per student is 2.0 % below 07/08. (The total appropriation per student (inflation-adjusted), was $10,021 in 2007-08. This compares with a nominal 2019-20 appropriation per student of $10,162 and a spendable appropriation per student of $9,818.) *Id.*[2]

A. Operational Funding

Contrary to the assertions made by the State, public school operational funding – known as the State Equalization Guarantee (SEG) – did not increase by $491 million from last year to

[2] Given this actual decline in per student expenditures since 07/08, it is disingenuous for the Deputy Director of the Legislative Finance Committee to inform state policy makers and the public that "appropriations grow while student enrollment falls. *See, e.g.* Exhibit BB, page 12.

this year.[3] This can best be explained by starting with the presentation made by the Deputy Director of the Legislature's Legislative Finance Committee, Charles Sallee. In his Powerpoint (Exhibit BB, page 11) Sallee details a supposed $491 million added to public school formula funding (SEG) which is broken down by him as follows:

K-5 Plus and Extended Learning Programs	$182.4
Teacher Salary Raises	$116.0
Increase for At-risk Students	$113.2
Other Salary Raises	$46.3
Instructional Materials	$30.0
Fixed Costs/Insurance/Retirement	$17.3
Increase to Bilingual Multicultural Factor	$7
New Rural Population Funding	$5.2
Other Formula Changes	- $26.3
Supposed Total	$491.1 million

However, as explained above, at least $111 million of the K-5 Plus and Extended Learning Program money was not used because it was only available to districts if they added programs and met unrealistic statutory requirements. Dr. Barro Aff. ¶12, Exhibit AA. That brings the $491 million down to $380 million. Moreover, the $30 million in instructional materials was not all new money, and it was just moved from middle of the line to above-the-

[3] New Mexico's system of funding the State's school district is centralized and depends largely on the Legislature's annual appropriation for the State Equalization Guarantee (the "SEG"). The SEG is the basic amount of funding provided for each school district based on the number of units the district generates. The SEG is used for general operating costs, which includes teacher salaries, and fixed costs such as health insurance and retirement. The SEG for each district is determined by figuring out the number of "units" in each district and multiplying the number of units by the unit value. The unit value is determined by taking the total number of dollars appropriated for the SEG and dividing it by the total number of units – i.e. student count adjusted for particular characteristics that impact the unit value. Each student is assigned a particular number of units, based on the basic unit value, with the amount being adjusted for the characteristics of the student, including grade level, whether the student requires special education services, and whether the student is considered "at-risk." Thus, for operational funding, each district receives funds equal to its total number of units multiplied by the unit value. *See* LESC SEG Computation Illustration, Attached as Exhibit CC.

line. *Id.* And $30 million of the $182 million for K-5 Plus/ ELTP was also in the budget last year, just in a different place, also reducing the new money available to $340 million. *Id.* ¶15.

Thus, PED's claim that the SEG appropriation increased by $491 million (19%) between FY19 and FY20 is not true. Response at 2. When $111 million that was not available for spending is subtracted, the true year-to-year increase is less than 13%, which is not enough to restore the FY08 level of funding. Dr. Barro Aff., Exibit AA,¶ 13.[4] Moreover, as explained above, other money put into the SEG was already in the school budget the year before, just in a different place, also lowering the impact of the increase in the SEG.

This year, using the money appropriated through the SEG, school districts were required to raise all teacher salaries by 6% and to further raise entry Level I teachers from $36,000 to $41,000 a year (a 14% raise); entry Level II teachers from $44,000 to $50,000 (a 14% raise); and entry Level III teachers from $54,000 to $60,000 (an 11% raise). *Id.* ¶18. Each district, therefore, also had to adjust its salary scales to make similar percentage raises across the board, in order to maintain the fairness of their salary schedules. According to Charles Sallee's powerpoint, "The PED/LESC/LFC consensus estimate for teacher salary increases was $116 million, or a 9 percent increase over the $1.3 billion that districts and charters spent on teacher salaries and benefits in FY19." Sallee Power Point at 18, Exhibit BB. Clearly, if districts had to give raises of 11-14%, an overall increase in the SEG to cover an average of 9% raises was not enough. Dr. Barro Aff. ¶19, Exhibit AA.

[4] Contrary to the State's argument, in fact, FY20 funding increases have not restored inflation-adjusted spending to FY08 levels. The U.S. Bureau of Economic Analysis's (BEA) price index for state and local government expenditures is the most appropriate index to use for these spending-trend calculations. *See* Dr. Barro Aff. ¶16, Exhibit AA. Using the BEA Index, and taking into account the shortfall in ELTP and K-5 Plus funding, it becomes clear that FY20 funding still remains below the insufficient FY08 level. *Id.*

Because the amount allotted last year for increased compensation did not fully cover the pay raises triggered by the State's mandates, some districts ended up having to spend money supposedly earmarked for at-risk students to pay for mandated general salary increases instead. *See* ¶6 of Affidavits of Superintendents from Focus Districts, attached to Plaintiffs' Motion as Exhibits B - K, and S – V. While increasing teacher pay is important to recruiting and retaining qualified teachers for New Mexico's classrooms, this Court's decision focused on the need to better serve low-income, non-English-proficient, special education and Native American students. Thus, sufficient funds must be provided for districts to do this -- not just to raise salaries. The diversion of at-risk funds was caused first, by the State's failure to appropriate enough money to actually cover the costs of the salary increases and basic programming, and secondly, by Defendants' failure to require that at-risk money be used only to support services for at-risk students. Indeed, the State still has not funded and instituted the accountability system that this Court deemed critical for ensuring the needs of at-risk students are met. Decision and Order at 75.

Oddly, while on the one hand, the State seems to argue that the Districts should not have used their at-risk operational funding to give mandated pay raises to teachers (*see* Response at 11 – 12), in the very next paragraph, the State seems to argue that it was a good use of SEG at-risk funds to pay teacher salaries. Response at 12. Defendants fail to address the real problem: the state did not appropriate enough money for BOTH salary increases and additional programming and services, nor did it mandate that these funds had to be targeted on programs and services for at-risk students. That is what the Court order and the constitution require.

Turning to the at-risk factor, which is part of the SEG, the State relies on a typo in the Court's findings of fact and conclusions of law to say, incorrectly, that "the State adopted the

Court's recommended [at-risk] index factor." (Response at 13.) Those present at the trial or familiar with the record in this case know that Plaintiffs put forth undisputed evidence from Dr. Stephen Barro that it would be reasonable for the at-risk factor to provide 25 – 50 % more funding per at-risk student and he testified to the common practice of other states defining poverty to include all children who qualify for free or reduced-price lunch, not just children who live in families who fall at or below the very restrictive census poverty level. *See* Dr. Barro Trial Testimony, 7/6/17 at 97 – 113, and Trial Exhibit P-2803. There was no evidence at trial about making the at-risk factor .25, which would result in a considerably smaller increase than the 25-50% about which Dr. Barro testified. *Id.* The Court wrote in its findings of fact and conclusions of law that "Dr. Barro presented expert testimony on funding for at-risk students. The Court finds this testimony to be persuasive and the following findings are adopted based on such testimony." FFCL #2214. The very next finding is that "[i]t would be reasonable to increase 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 free or reduced priced lunch (FRPL)." FFCL #2215. Considering that the court is relying on Dr. Barro's testimony for this statement and that it cites to Dr. Barro's exhibits for this statement, it is clear that what the Court meant in this finding was that it would be reasonable for the at-risk factor to provide 25-50% more funding per at-risk student.

Currently, the at-risk factor is set at .25 and this yields only about 17 % more funding per at-risk student, whereas it would take an at-risk factor of .37 to produce 25 % more spending per at-risk student. Dr. Barro Aff. ¶24, Exhibit AA. Even with 25% more fudnding per at-risk student, however, we would still be at the minimum needed to deal with the challenges facing low-income, ELL and other at-risk students. *Id.* And we would still need to expand the definition

of poverty to include all children who qualify for free or reduced-price lunch to meet the Court's statement about reasonableness.

Another part of the SEG is funding for bi-lingual programming. The Court ruled that there was insufficient funding for ELL students and bi-lingual programming. *See* FFCL ## 297 *et. seq.* However, according to the Legislature's Legislative Education Study Committee (LESC), the increase of $7 million to the bilingual multicultural factor only provides funding for 3,000-9,000 additional students, which, at most, would get us back to funding the number of students we funded in 2014, without increasing the amount of funding per student necessary for sufficient bi-lingual programming. *See* LESC Post-session Review, page, 10, attached as Exhibit DD.

Special education funding is also part of the SEG. Despite the Court's ruling that the State had failed to provide adequate resources and programming for special education services (FFCL #2349, Decision and Order 59, 65 - 66), there has been absolutely no increase in funding for special education since this Court's Decision and Order. *See* Dr. Barro Aff. ¶25, Exhibit AA; *see also* Exhibit DD, pages 45 – 57 (LESC's Public School Support and Related Appropriations for FY20 which shows no increases in funding for special education funding).

B. "Below-the-line" Funding

Thus, while the State's first claim – that the SEG increased by 19% is false, its next statement – that there was a significant increase in "below the line" funding for instructional materials and Native American and ELL students is also misleading. (Response at 2, and repeated at 12-13). In fact, the non-SEG portion of public school funding actually declined between FY19 and FY20. *See* Dr. Barro Aff. ¶20, Exhibit AA. Significantly, a reading program that was funded below-the-line, listed as Early Reading Initiatives, was eliminated and not

replaced. It cost $8.8 million. A $4 million appropriation for "Interventions and Support for Students, Teachers, Struggling Schools and Parents" was eliminated. An after-school and summer enrichment program was eliminated. College preparation, career readiness and drop-out prevention funding was eliminated. *Id.,* ¶*26; and see* Exhibit DD, page 46, lines 60, 62 and 68. Moreover, while the governor called for $64 million below the line to fund PreK, only $39 million was included in the budget, showing that PreK was not fully funded by the legislature. *See LESC* Public School Support and Related Appropriations for FY 20, attached as Exhibit EE, Line 66.

C. "Middle-of-the-Line" Funding – Transportation, Instructional Materials and the Indian Education Fund

A third area of the State's budget for public schools is sometimes referred to as "middle-of-the-line" and involves funding for certain critical educational needs related to this case: instructional materials, transportation and the Indian Education Fund. This section of the budget is different from the below-the-line appropriations because these funds are distributed without a grant application from the districts. This area of the budget is also different from the above-the-line or SEG portion of the budget because it is not distributed based on the number of units in each district, but rather on different calculations for each line item. In its response brief, the State fails to address transportation, even though the Court found that transportation funding was insufficient (FFCL # 2151 – 2157) and even though several of the affiants supporting Plaintiffs' motion testified that districts still have insufficient funding for transportation. *See* Affidavits from Superintendents of Focus Districts Rio Rancho, Santa Fe, Moriarty-Edgewood, Cuba, Taos, Jemez Vally, Pojoaque, attached to Plaintiffs' Motion as as Exhibits B (¶16); D (¶17); E (¶17); G (¶18); J (¶19); T (¶18); and U (¶17). Defendants also cannot justify why the Indian Education

Fund was increased by only a few million dollars. Such an increase does not show compliance with the Indian Education Act, and as set forth below, far more is needed than a few million more dollars in that fund. Defendants have an obligation to develop an IEA implementation plan and then fund the implementation of the Act, not simply throw a few million dollars into a fund and claim success. Finally, while it is true that overall, instructional materials funding increased last year, Defendants still have not created a system which ensures that districts have the money necessary to buy sufficient instructional materials. Again, increasing the pot of money without a plan and an accounting of how much money is actually required does not comply with the constitutional mandate of ensuring a sufficient education.

II. Defendants Have Not Addressed the Court's Findings and Conclusions Regarding Students with Disabilities.

The Court could not have been more clear: "Special education funding in New Mexico is not sufficient to meet the needs of special education students." FFCL #2349, Decision and Order 65 - 66. "State law requires school districts to provide special education programs to children with disabilities regardless of cost." FFCL #3005. The Court held that Defendants are not providing districts with the resources needed to comply with state and federal law in order to ensure that each student with a disabilty receives a free and appropriate education and related services that gives them the opportunity to be ready for college or career. *Decision and Order* at 24 – 25 and 64 - 65. However, as shown above, Defendants have not increased resources and services available for students with disabilities since the Court's ruling. So, Defendants are left with the feeble argument that their inadequate efforts to improve the education of general education students would also benefit students with disabilities. To support this inadequate claim, Defendants cite to the Court's findings of fact and conclusions of law which contradict

their position (FFCL ##2255 – 2260). Response Brief at 21.[5] These findings discuss the benefit of targeted, funded programming, but the State has provided no additional targeted funded programming for special education students. Indeed, just as Senator Mimi Stewart testified at trial, the State has ignored the needs of special education students and the State's position now, in its Response brief, illustrates more of the same. The State is ignoring the law that mandates that "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." FFCL #2323. The State will continue to fail special education students so long as it takes the position that their needs can be met without explicitly designing and funding a special education program for each and every one of them.

Many of the Court's findings concerning the State's failure to comply with the state Constitution and federal law for students with disabilities concern problems with funding, and the State has not redressed any of them. Specifically, the Court addressed issues around an unpredictable and inflexible funding scheme for special education (FFCL ##2325, 2327, 2328), as well as inadequate supervision and oversight on how special education funds are spent (FFCL #2339), a lack of funding to pay ancillary personnel necessary for students with disabilities (FFCL ##2341, 2342, 2352); inadequate money for curriculum and supply money for special

[5] FFCL ##2255 – 2260 read in relevant part: 2255. Defendants principal education finance experts Dr. Erik Hanushek and Dr. David Armor both testified that increased spending on specific programs can improve the outcomes of the students who receive that programming. 2256…[B]oth testified that the State should not cut funding for education, including for programs such as PreK. 2257 – 2258. …PED's Deputy Secretary of Policy and Programs… testified that there exists a positive causal relationship between money spent on specific educational programs and staffing preferences and the students who are the recipients of those interventions. 2259. … [S]ince 2003, the New Mexico Legislature has made certain changes to the tax laws which… reduced revenue in the state by hundreds of millions of dollars a year. 2260. There are a number of sources of possible revenue [which the State could enact]….

education classrooms (FFCL #2343); insufficient funding for smaller class sizes which would benefit special education students (FFCL #2344); insufficient funding for professional development opportunities to have special education students join the general education setting (FFCL #2346); and a lack of funding for tutoring for special education students(FFCL #2348). Further, the Court recognized a host of problems concerning the failure to identify children with disabilities (FFCL #2329); a lack of well trained individuals to diagnose autism (FFCL #2330); low standards for diagnosticians (FFCL #2331); a shortage of bilingual psychologists, educational diagnosticians, and special education teachers leading to under- and mis-identification of ELL students with disabilities (FFCL #2332); and an over-placement of students with disabilities outside of the general education setting (FFCL #2333). Nothing in the State's Response brief or the attached affidavit from Deputy Secretary Bobroff supplies any information or evidence about how the State has redressed any of these systemic issues which deny special education students their right to a constitutionally sufficient education.[6]

Most importantly, special education students have the right to be college and career ready like all other students. FFCL #3003, Decision and Order at 25. While the Court addressed the specific abysmal educational outcomes of special education students (FFCL ##2355 – 2360), the State has said nothing about improved educational outcomes for special education students, let alone begun to address the grave achievement disparities between special education students and

[6] Likewise, to simply state that salary increases have "significantly reduced vacancies for special education teachers," (Response at 21) with no proof or numbers to back up that position falls far short of demonstrating compliance with the Court's mandate. And, "re-thinking" how to support children with disabilities" and starting a "Project Autism" (Response at 22) ,while well-intentioned, do not meet the mandates of the Constitution or the Court's order without the requisite resources to provide more than philosophical support.

regular education students. The PED and the Districts cannot address these problems because their funding and resources for special education students has not changed.

III. Defendants Continue to Violate the Rights of Students from Low-Income Families

Despite this Court's decision in July 2018, the State continues to fail to ensure all low-income students have the opportunity to be college and career ready by ensuring they have access to the programs and services that improve eductional outcomes. Slight increases in the number of children served or the amount of funding for programs do not fulfill this Court's mandate that all at-risk children have this opportunity. Decision and Order at 29 - 30, 45 FFCL #5. Notably, this Court held that the State's educational system is constitutionally insufficient even after hearing evidence about the State's small and incremental increases in funding for programs or in the number of students served. Decision and Order at 29 – 30, 43 – 46, FFCL #2242. Yet, this is the approach the State continues to take.

A. Defendants Have Not Addressed the Court's Findings about the Need for Early Childhood Education/PreK.

Defendants attempt to ignore this Court's findings that PreK "for 3 and 4-year olds [] is an important component of providing a sufficient education and equitable educational opportunities. Early childhood programs must be high quality to help at-risk students close the achievement gap." FFCL #6; *see also* FFCL #21. Further, a full-day program is a key factor in a high-quality program. FFCL #31. Far from being "super-constitutional" (Response at 22), Defendants must provide high quality PreK as a necessary step to achieve college and career readiness for at-risk students.

The fact remains that after 15 years of the NM PreK program, only about 35.6% of four-year olds are in a full-day NM PreK program. [7] (Only 4,587 4-year-olds are in a full-day PED program and approximately 3,700 4-year-olds are in a full-day CYFD program. *See* Exhibit GG (LFC Budget Recommendations, Vol III, FY 21 at 104-106, 110-116.[8]) In other words, about 15,000 four-year-olds in the state do not have access to a full-day program.

This is evidence that the State is doing more of the same—incrementally increasing funding and services with no comprehensive plan of how to proactively ensure that all four-year-olds have access to this effective educational opportunity immediately. This Court found that "[t]he New Mexico Legislature has the ability to ensure that every four-year-old has the opportunity to participate in PreK; to do that, it would need to increase funding substantially. Sallee, 7/21/17 a.m. at 71:13-17." FFCL #101. "However, there is no plan, timeline, or budgeted figures from the State to provide full-day PreK to every four-year-old in the state. Neither PED nor LFC have a plan to implement and fully fund PreK." FFCL ##102-03. These findings are still true today and show the State's disregard of this Court's authority.

With no plan and an arbitrary approach to funding and expanding access to full-day PreK, districts still do not have enough full-day slots for four-year-olds and have lengthy waitlists for students. *See* Affidavits from Supertintendents of focus districts, attached to

[7] At the time of trial, there were about 27,000 four-year-olds in each grade—that number has declined as birth rates have dropped. FFCL #84; Ex. FF (LFC Budget Recommendations, Vol I, FY21) at 100-101.The LFC notes that for FY 2019, the kindergarten membership fell by 3721. *Id.* Using 23,279 as the total number of 4-year-olds and 8,287 as the total number of four-year-olds in a full-day NM PreK program based on state data yields 35.6% of four-year-olds in a full-day program.

[8] Yazzie Plaintiffs arrived at this number by taking the total participation in CYFD PreK programs (3,779) and subtracting all of the half-day participants (72), equaling 3,707. Yazzie Plaintiffs recognize that there are likely 4-year-olds in the CYFD mixed age program that serves 135 students, but LFC has not disaggregated this number by age. *See* Exhibit GG (LFC Budget Recommendations, Vol III, FY 21) at 107.

Plaintiffs' Motion as Exhibits B (¶8) (Rio Rancho has 140 three-year-olds and 120 four-year-olds on waiting lists for PreK.); C (¶8) (Gallup does not offer PreK to all 4-year-olds and there is still a waiting list.); D (¶11)(Santa Fe needs facilities in order to provide more PreK.); E (¶8) (Moriarty-Edgewood's PreK program only serves 55 children out of about 180 four-year-olds in the district, and it needs more funding to expand the program.);G (¶8) (Cuba needs more funding in order to expand its PreK program.); H (¶8) (Magdalena needs more funding to address the PreK waiting list; all of the slots the district provides are half-day.); J (¶8) (Taos needs more funding to address the waitlist for PreK.); S (¶9) (Española was not able to expand PreK slots to four-year-olds in the district for the 2019-20 school year; it only serves 118 children in PreK—half of which are in half-day programs. To address the waitlist, the district needs more funding.); T (¶11) (Jemez Valley needs more money to expand PreK and to address the waitlist.); U(¶9) (Pojoaque needs more PreK funding to provide full-day slots for its students.) As a result, tens of thousands of four-year-olds lose this educational opportunity each year—one that, by itself, could substantially close the achievement gap for low-income students. FFCL #22.

B. Defendants Have Not Addressed the Court's Findings about the Need for Extended Learning Time/K-5 Plus.

In arguing that last year the State expanded K-3 plus to include two more grades and increased funding for it from $21 million to $120 million[9], Defendants fail to explain that despite this expansion in grades and funding, about the same number of students participated statewide this year. Ex. EE at pgs. 101-102 (LFC Budget Recommendations, Vol I, FY21). This is due to

[9] This is yet another factual error by the Defendants – the funding for K-3 Plus went from $30 million in 2019 to $120 million in 2020, and all of it was moved above the line, meaning a $90 million increase in potential funding for the program overall. *See* Exhibit DD, P. 46, Line 58.

the State's adoption of new statutory requirements for the program, and the State's failure to ensure school districts had enough time to apply for the program and to consult with their staff and communities about implementing the lengthened school-year program in their districts. Failing to comply with the State's requirements would mean that districts would have to pay the bill for the cost of the program themselves instead of getting reimbursed by the state. Defendants claim that the PED issued regulations to relax the strict requirements; however, these regulations were ineffective, as they went into effect in June 2019, long after districts had to decide whether they could comply with the strict K-5 Plus requirements and after their April 15, 2019 application deadline. This means that at the time districts were applying for the programs, flexibility in the program did not exist. Further, the emergency rules regarding K-5 Plus have expired, meaning the strict requirements regarding K-5 Plus are in effect again. *See* Ex. HH (Notice of Rule Expiration); *see also* Yazzie Plaintiffs' Motion, Ex. B (¶9) (Rio Rancho did not apply because it could not meet the original program requirements, and later when there was flexibility, there was insufficient time to develop a program.); Ex. E (¶9) (Moriarty-Edgewood did not apply for K-5 Plus because it could not meet program requirements.); H ¶9 (Magdalena had difficulty recruiting teachers for K-5 Plus.); Ex. K (¶7) (Zuni did not apply because of strict requirements and short time frame.); Ex. S (¶11) (Española could not apply for K-5 Plus because there was not enough time to recruit teachers.)

In addition, many districts determined that the amount they would receive from the State would not cover the cost of providing the program since they would be unable to adhere to all the requirements the State set out. This meant that districts would have to supplement the program from operational funding, and many districts had no money left to do so. *See* Yazzie Plaintiffs' Motion, Ex. C (¶7) (Gallup offers K-5 Plus in the district, but the amount they receive from state

does not cover the cost of the program.); Ex. D (¶11) (Santa Fe used $165,000 of its operational money to fund salaries of teachers where district did not meet K-5 Plus program requirements. Not all children who could benefit did because of difficulty in meeting requirements.); Ex. E (¶9) (Moriarty-Edgewood did not apply for K-5 Plus because it could not meet program requirements, and the funding from the state would not have covered actual cost of program. The district had no additional money to supplement cost.); Ex. F (¶7) (Lake Arthur did not apply for K-5 because the cost of the program would not have been covered; Lake Arthur cannot generate enough funding per student for this program because it is so small.); Ex. G (¶9) (Cuba applied for and received K-5 Plus, but has had to supplement the program from operational since the district does not receive enough funding from the state to implement it.); Ex. J (¶9) (Because of strict program requirements for K-5 Plus, Taos did not receive funding for all children who need it, and enrollment for the program will drop from 191 to 28 students.); Ex. T (¶12) (Because of the strict K-5 Plus requirements, Jemez Valley did not receive funding for all children who need program.); Ex. V (¶9) (Grants had to supplement K-5 Plus funding with operational funding because of the strict requirements from the State.).

Likewise, there were similar issues with the extended learning time program. Time constraints prevented many districts from being able to plan and apply for ELTP and many districts did not receive enough funding from the state to fully implement it. *See* Yazzie Plaintiffs' Motion, Ex. B (¶11) (Rio Rancho applied for ELP for 3,000 students, but could not do more with time constraints and unclear guidance.); Ex. C (¶7) (Gallup has ELP in every middle and high school, but the amount the district receives from the state does not cover the cost of program.); Ex. F (¶8) (Lake Arthur did not apply for ELP because it did not have time to engage its community and staff.); Ex. G (¶11) (Cuba's funding for ELP does not cover the cost of the

program.); Ex. H (¶10) (Magdalena did not have community support for ELP and so it did not apply.); Ex. J (¶10) (Taos applied for ELTP, but did not receive enough funding to cover the cost of the program, and the district could not provide it to as many students who need it.); Ex. S (¶ 11) (Española withdrew its application for ELP when it became clear that funding from State would not cover the cost of implementing the program.); Ex. U (¶11) (Pojoaque applied for ELP for its schools, but it was not able to fund the program for all five schools.).

Notably, while Defendants tout the amount of money invested in these programs, they do not discuss the small number of students served by them or the amount of money that could not be spent. Defendants wrongly attempt to blame the districts for Defendants' own poor planning. Just like at trial, the State here blames the districts, families, and students for its own failure. But this Court has soundly rejected this illegitimate excuse before and should do so again now.

C. Defendants Have Not Addressed the Court's Findings about Research-Based Reading Programs.

While Defendants may like to believe otherwise, a federal grant for $40 million over 5 years comes nowhere close to addressing this Court's extensive findings about the lack of funding for literacy programs in New Mexico and our extremely poor educational outcomes on this most fundamental requirement of education – teaching children to read. This Court ruled in great detail about the need for comprehensive reading programs, as well as the need for professional development on how to teach reading, reading interventionists, and extended learning time essential to teaching reading. FFCL #237. This Court expressed obvious concern that only one in four children reads at grade level by 3rd grade and that those who do not are four times more likely to drop-out of high school. FFCL ##239, 241. This Court noted that the State

addressed this by providing every district enough money to hire one reading coach; then it cut funding and many districts got no money. FFCL ##252, 256.

This Court noted that budgets do not include enough funds for reading specialists for at-risk children, training for teachers with strategies proven as effective to teach reading, and instructional materials. FFCLt ##263 and 264. And while the State agreed at trial that it needs to do more to improve reading proficiency rates… and other reading intervention programs to increase reading proficiency (FFCL #265), thus far, the State's response has been to again cut the only line in the school budget targeted for reading intervention. Dr. Barro Aff., Exhibit AA, ¶26.

Thus, in the 2020 school year, students lost access to literacy programs and services because the State cut funding for them. The State argues that districts "chose" not to invest in literacy programs, when, in fact, the program, Reads to Lead, was defunded by the State. As a result, districts were forced to cut literacy specialists. *See e.g.* Yazzie Plaintiffs' Motion, Ex. B (¶7) (Rio Rancho cut two reading coaches because it lost Reads to Lead funding); Ex. E (¶7) (Moriarty had to cut two reading interventionists and one reaching coach because Reads to Lead was defunded.). Further, due to insufficient funding, other districts have no literacy specialists at all. *Id.* at Ex. T (¶10) (Jemez Valley is in dire need of literacy specialists); Ex. U (¶8) (Pojoaque is in dire need of literacy specialists.).

Defendants argue that the State is addressing its poor outcomes in reading proficiency by applying for and receiving a single $40 million five-year grant from the federal government for literacy. Presumably this means that the State will have about $8 million per year to spend on literacy programs. Evidence was provided in this case showing that when Reads-to-Lead was funded at $8.5 million in the 2012-13 school year, only 12 school districts and one charter school

received funding for literacy specialists. FFCL #249. Thus, this new grant will not provide sufficient funding to ensure all at-risk students have access to literacy specialists.

D. Defendants Have Not Addressed the Court's Findings about Social Services

Defendants argue that investing $2 million in community schools and $1.3 million for school-based health centers is sufficient to meet the Court's order. Response at 27. Again, the State claims that the money for social workers, counselors, and nurses can be found in at-risk funding; however, it has already been established that districts did not have any additional at-risk money to spend on these services, though they are desperately needed. Because of this miniscule investment in community schools and school-based health centers, districts have been unable to hire additional social workers, counselors, or nurses for their students. *See* Yazzie Plaintiffs' Motion, Ex. B (¶11) (Rio Rancho could not hire additional nurses, counselors or social workers.); Ex. C (¶9) (Gallup does not have enough nurses, counselors, or social workers for the general education population. The district needs 9 more full-time nurses, 2 part-time nurses, and one coordinator; it needs11 more college and career counselors.); Ex. D (¶13) (Santa Fe needs to hire 23 FTE nurses, 25 FTE social workers, and 25 FTE community school coordinators but does not have the funding to do so.); Ex. E (¶11) (Moriarty did not have money to hire more counselors, social workers, or nurses. The district needs four more counselors and two nurses.); Ex. F (¶9) (Lake Arthur is unable to hire any counselors or social workers for the 2019-20 school year; the district has no counselors or social workers for its students at all.); Ex. G (¶12) (Cuba lacks sufficient funding to hire a sufficient number of nurses, counselors and social workers.); Ex. H (¶11) (Magdalena could not hire additional nurses, counselors and social workers for SY 2019-20.); Ex. I (¶8) (Hatch was unable to hire additional nurses, counselors, or social workers

for the 2019-20 school year.); Ex. J (¶¶11-12) (Taos could not hire additional nurses, and needs three more counselors.); Ex. K (¶8) (Zuni could not hire any additional nurses, counselors or social workers due to insufficient funding.); Ex. S (¶13) (Española could not add additional social services.); Ex. T (¶8) (Jemez Valley lacks sufficient funding to hire enough nurses, social workers and counselors.); Ex. U (¶8) (To balance its budget, Pojoaque had to cut one social worker, in addition to other positions. The district needs social workers at every school; full-time nurses for elementary, and behavioral health specialists.); Ex. V (¶10) **(**Grants could not hire additional nurses, counselors, or social workers to expand services to address critical needs.)[10]

E. Defendants Have not Addressed the Court's Findings regarding Teacher Recruitment, Retention, Capacity Building and Class Size.

In Plaintiffs' Motion, Plaintiffs set forth the Court's findings concerning the substantial lack of trained, qualified and skilled teachers in the classrooms of at-risk children in New Mexico. As explained there, the Court found that the number of classes without permanent teachers at all and the classes with teachers who lacked the training, skill and experience to teach at-risk children were direct causes of the abysmal learning deficits for these children. It found that the salary, training and in-service professional development for teachers in New Mexico were insufficient to recruit and retain the qualified teachers needed for our children. And, as also explained in the Motion, the Court found that although the evidence is clear that smaller class size is essential to provide at-risk students the education to which they are constitutionally entitled, the chronic shortage of teachers, especially of qualified teachers, makes the statewide implementation of smaller class sizes impossible.

[10] Moreover, as noted above, certain below-the-line programs for dropout intervention and college and career readiness were cut during the last legislative session, meaning that school districts have fewer opportunities to hire counselors and social workers to help at-risk children.

In their Response, Defendants make essentially three arguments about why they believe they have adequately complied with the Court's orders. First, Defendants argue that the increase in teacher salaries authorized and funded by the Legislature in 2019 demonstrates sufficient compliance with the Court's orders. They further argue that Plaintiffs did not supply evidence to show that the increase in salaries was not enough to attract high school and college students into the teaching profession. They also argue that decreased enrollment in some districts means we need fewer new teachers, anyway. None of these arguments stands up to scrutiny or the evidence.

One of the clearest measures of the continuing shortage of teachers is the number of classrooms in New Mexico's schools that lack a permanent teacher altogether. In the current school year (2019-2020) there were 644 teacher vacancies and another 410 essential educator vacancies. Exhibit II, 2019 New Mexico Educator Vacancy Report, October 2, 2019, Southwest Outreach Academic Research Evaluation and Policy Center at NMSU - Excerpt.

POSITION	**NUMBER OF VACANCIES**
Teachers	**644**
Educational/Instructional Assistants	258
Speech Language Pathologists	42
Counselors	37
Emotional/Behavioral Support Providers	26
Instructional Coaches	16
School Psychologists	14
Educational Diagnosticians	10

Administrators (Principals and Assistant Principals)	7
Total Vacancies	**1,054**

Id. at p. 3. In the prior school year, before the raises went into effect there were 740 teacher vacancies and 433 essential educator vacancies. *Id.* Although there was a decrease in vacancies from last year to this year, the absolute numbers of vacancies are still large and demonstrate that the raises were not sufficient to put a teacher in every classroom. These vacancies are in virtually every district in New Mexico and a large number of districts actually saw their vacancies increase from last year to this. *Id*. at p. 4. Since the teacher raises were enacted in March 2019 and went into effect for the 2019-2020 school year, there was plenty of time for them to attract new teachers into the classrooms if they were large enough to do so, but, obviously, they were not.

Defendants also try to justify their failure to substantially increase the number of teachers by claiming New Mexico does not need many new teachers because enrollment is decreasing in some districts. But, as the above-data show, any reduction of enrollment was not sufficient to erase the 644 teacher vacancies. Indeed, rather than reduce the need for new teachers, decreases in enrollment provide those districts which have reduced enrollment the opportunity to provide smaller class sizes. But Defendants' efforts to support smaller class size are inadequate. Although discontinuing the long-standing practice of allowing districts to waive statutorily mandated class sizes is a step in the right direction, Defendants have provided no plan to provide smaller class sizes for all at-risk students across the state. Indeed, as with so much of Defendants' approach to compliance with this Court's orders, they are relying on the districts to

figure this out for themselves and have not provided the districts with the guidance, mandates or, most importantly, the funding to accomplish this crucial reform.

Defendants also assert that Plaintiffs provided no evidence that the teacher raises authorized for the current year are not sufficient to compete with surrounding states for qualified teachers. The data flatly prove that teacher salaries in New Mexico are lower than in all neighboring states. *See* Exhibit JJ, NEA Rankings of the States - Table of salaries for all 50 states, page 49.[11] But the most appropriate measure of salary competitiveness is not a salary scale comparison with other states; it is a salary comparison with other occupations within New Mexico. High school and college students in New Mexico will certainly not choose to become teachers and will choose a different profession to pursue here if there is a large salary difference between that profession and teaching. As the most recent study by the United States Bureau of Labor Statistics shows, the new teacher salaries authorized by the Legislature for the current school year do not come close to the salaries of the large number of other comparable jobs available in New Mexico. *See e.g.* Exhibit KK, pages 1 - 4 from the 2018 State Occupational Employment and Wage Estimates – New Mexico, last reviewed on January 11, 2020, https://www.bls.gov/oes/2018/may/oes_nm.htm#00-0000. Until the salary levels for teachers in New Mexico approach those of other professions, New Mexico's best and brightest students will go into other fields and leave us with an insufficient number of smart high school and college students choosing to be trained in teaching PreK-12 classrooms, especially those with at-risk students.

[11] It is not surprising that last year's salary increases did not make New Mexico competitive with the surrounding states. The raises were barely enough to return teachers to the salary levels (adjusted for inflation) in place in the 2007/2008 school year. See, Dr. Barro Aff, ¶¶ 21-23, Exhibit AA.

Most importantly, of course, the teacher raises also do not address the need for our teachers to have substantially better training and experience in the methods needed to adequately teach at-risk students. As the Court found, New Mexico needs a great many teachers who are trained and experienced in bilingual, multicultural teaching methods for math, science, social studies and literacy, and special education. Defendants have provided no evidence whatsoever that the teacher raises have addressed this crucial need.

Instead, Defendants point to a prospective, but unknown, change in teacher evaluations and a drastically underfunded mandate for future teacher in-service professional development (HB 44) as leading to more trained and qualified teachers in our classrooms. But HB 44 only calls for a "framework" for professional development, without any specifics about how and when this will get done, and without sufficient money to get this done. And improved teacher professional development is no small project in New Mexico. There need to be contracts by each of the 89 school districts and the states' charter schools to hire teacher trainers to provide extensive bilingual, multicultural science, math, social studies and literacy in-service training. There are not sufficient resources to accomplish this for the foreseeable future. The Education Departments in New Mexico's higher education institutions are very small and lack the faculty to provide these services. *See, e.g.* Affidavit of Dr. Rebecca Blum-Martinez, **¶7,** concerning UNM, attached as Exhibit LL**.** Moreover, Defendants have no plan for how this in-depth, extensive, in-service professional development will be provided in all the districts serving at-risk students.[12]

In sum, Defendants' Response does not address the substantial work that needed to begin last year to create a teacher pipeline to recruit, train and retain talented teachers of at-risk

[12] Defendants also mention in their Response at page 16 a bill identified as HB 188 that supposedly addressed teacher licensure. But HB 188 was entitled "Motor Vehicle Excise Tax To State Road Fund" and died in committee.

students. This pipeline plan must: encourage more high school and college students to want to become teachers, supply them with the financial support to get them through college, provide incentives for them to teach in schools with at-risk students, and support them in those classrooms so they stay in those classes teaching at-risk students. Nowhere in Defendants' Response, nor in any of the Public Education Department's documents, is there a comprehensive, realistic, and adequately-funded plan to do what is necessary to create this teacher pipeline as soon as possible.

IV. Defendants Have Failed to Remedy the Systemic Neglect of Native American Students.

Contrary to Defendants' claim, Plaintiffs do not argue that compliance with the Court's Order requires Defendants and schools to engage in discriminatory hiring practices (Response at 17). Rather, Plaintiffs argue that: 1) fulfillment of the New Mexico Indian Education Act (NMIEA) requires targeted investments to increase the number of certified Native American teachers, administrators and bilingual and English learner instructors; 2) Defendants have not adequately funded or implemented the NMIEA; and 3) Defendants have not provided school districts the resources necessary to educate Native American students sufficiently and in compliance with NMIEA. Defendants do not have a credible response to Plaintiffs' arguments.

Defendants attempt to dilute their constitutional obligations to Native American children, which require far more than providing a culturally appropriate or sensitive education. Response at 17. The constitutional sufficiency standard articulated by this Court requires full compliance with the NMIEA because of the Act's comprehensive approach for increasing Native student success. FFCL ##536-38, 542. Several essential elements for achieving the law's purpose – requiring culturally relevant learning environments, educational opportunities, and instructional materials, and maintenance of [heritage] languages – require New Mexico to recruit and retain

many more Native educators and administrators skilled and trained to respond to the unique needs of Native children. See Plaintiffs' Motion, Exhibits R ¶¶ 7-13 and W ¶¶ 6-12. In fact, Court findings show "[non-Native] teachers in the Native districts do not have the expertise to respond to the challenges of educating Native students." FFCL #607. Native American English learners (NAELs), for example, require Native educators because they can relate to and interact with NAEL students effectively, serve as English proficient models, and are likely to remain employed at the school. FFCL #323.

While Defendants provide a description of PED's intentions to address Native student needs (s*ee* Deputy Secretary Bobroff's Affidavit, ¶¶ 50-52), they point to no evidence of implementation and ignore the need to produce many more Native educators and administrators, especially for schools where Native language and culture is predominant, such as Bernalillo, Cuba, Grants, Gallup, Jemez, Magdalena, Espanola, Pojoaque, Los Lunas, and Zuni. With only 2% of teachers in New Mexico's schools being Native (FFCL #326), Defendants must develop a comprehensive pipeline to bring highly skilled and trained Native teachers to these districts and to the Native students in urban districts. This can be done and was begun briefly many years ago from 2003-2006 when PED funded a Native teacher pipeline. FFCL #528.

Defendants refer to the passage of HB 250 (2019), which amends the NMIEA to require schools to assess Native Student needs and to develop a systemic framework for improving their educational outcomes. *Id*. at 2-4. By law, schools must have certain culturally-based programs and supports in place to respond to the assessed needs of Native students, such as "bilingual/bicultural programs," "Indian language restoration programs" and "culturally responsive teaching." *Id.* at 5-7. The problem, however, is that after identifying needs, schools cannot comply with this law and provide the education Native students are entitled to unless the

State provides resources to address the Court's findings in a systematic and effective way. The State has no comprehensive plan to increase the number and capacity of Native educators, administrators and programs and services to be responsive to Native students' unique needs and the academic supports to which they are entitled. FFCL ##493, 495, 510, 512-13, 519, 527, 574, 607.

Defendants assert that non-native educators are capable of meeting Native student needs, "***if*** the necessary training, curriculum and resources are provided." Response at 17. This is true for the urban schools with high numbers of Native American students like Santa Fe and Rio Rancho where indigenous cultural resources are less available, but only "***if*** the necessary training, curriculum and resources are provided," which currently they are not. Statewide, however, the districts that serve significant Native student populations, including Rio Rancho and Santa Fe, lack sufficient funding for the necessary resources, training and curriculum to satisfy this condition. *See* Plaintiffs' Motion, Exhibits: B, ¶¶ 12, 17, 19; D, ¶¶ 14, 16, 18; *see generally* Plaintiffs' Motion, Exhibits C, G, H, J, K, S, T, U, and V.

Defendants wrongly object to Plaintiffs' argument that Native students require access to high-speed internet. Indeed, Defendants' position reflects a long-standing indifference to the ongoing, systemic neglect of Native children's needs statewide. Response at17. As the Court found, Native students who lack access to high-speed internet "are handicapped," which is particularly egregious in "rural schools," typically located on or near tribal lands. *See* Decision and Order at 27; see also Plaintiffs' Motion, Exhibit C, ¶16. Defendants now argue against funding such technology needs and last year they similarly failed to support this critical technology funding when they had the chance to do so during the 2019 legislative session. *See*

HB 670 (2019) [13]; Plaintiffs' Motion, Exhibits: R, ¶¶ 14-15; W, ¶¶ 13-14. This blatant neglect of Native education reinforces the urgent need for a Court-mandated implementation plan that includes step-by-step technology investments for tribal communities. *Id.*

Defendants also seek to downplay the constitutional significance of a fully staffed Indian Education Division ("IED") within PED with the capacity and expertise to respond effectively to the ongoing challenges within Native American districts. They wrongly argue that this is merely about "staffing vacancies and concerns about data collection." *Compare* FFCL # 606-07, 618 *with* Defendants' Response at 17-18. For one, this Court clearly established that IED's three regional offices, Assistant Secretary, and staff are "instrumental" for effectuating NMIEA requirements, including, in part, holding accountable all districts that receive Impact Aid and NMIEA funds, providing schools with technical assistance and training, and, now, meeting with school districts "at least twice [a year]" regarding HB 250's needs assessment. Decision and Order at 28; FFCL ##531-554, 561, 599, 619*;* HB 250 (2019), at 3 §(F). Second, the Court also found that IED's duty to "study, develop and implement ***educational systems*** that positively affect the educational success of [Native] students" rests on its ability to: gather, collect and analyze data; provide substantive guidance to districts; identify effective programs and services for students, including ESL programs; and, overall, ensure NMIEA compliance. FFCL ##514, 550, 560, 592-95, 598, 3021. The IED as it is currently constituted lacks sufficient capacity and expertise to meet these obligations. For example, it cannot determine whether Native students are being educated in culturally relevant learning environments, which instructional materials, if any, are being used by schools to educate Native students, or what percentage of Native students are provided culturally relevant materials as part of their education. FFCL ##556, 558-59. The

[13] House Bill 670, 2019 N.M. Legis. Sess.
https://www.nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=670&year=19

current IED continues to suffer from significant staff vacancies and and a full-time Assistant Secretary. *See* Exhibit MM. In short, it is another broken element of the "educational system that continues to marginalize Native American students [.]" FFCL ##463, 594, 628-29; See also Plaintiffs' Motion, Exhibits B ¶19; C ¶18; G ¶22; H ¶17; J ¶23; K ¶13; R ¶13; S ¶18; T ¶21; U ¶20; V ¶19; W ¶ 12.

Defendants' dismissive characterization of the need for increased funding to implement the NMIEA (Response at 18) reflects a grave misunderstanding about the comprehensive approach necessary to redress the "broken" education system for Native students. FFCL #529. For 2019-20, PED allocated between $50,000-$90,000 in NMIEA funds to each of the 23 school districts that applied. *See* Exhibit NN. In most districts, $90,000 will pay the salary, benefits and support for only one Full Time Employee (FTE). For districts serving high numbers of Native students, however, such as Gallup (with thousands of Native students), one FTE is utterly insufficient to address the needs of all these students. Native student success requires large investments in higher education, technology, transportation, and capacity-building initiatives targeted at schools serving Native students statewide, tribal communities, and the PED.

Finally, Defendants argue, without any evidence, that PED is meaningfully collaborating with tribes, school districts and parents on a variety of issues. Response at 18. On the contrary, more than half of all focus districts, the family plaintiffs, and several New Mexico tribes, submitted affidavits in this case showing that those efforts are nothing more than lip service and have no real effect. Native students, meanwhile, continue to fall through widening gaps that underlie a broken education system that cannot recover without a comprehensive plan from PED that addresses the needs and statutory and constitutional rights of Native students.

V. Defendants Have not Taken Immediate Action to Ensure English Language Learners Have the Resources and Programs Necessary for a Sufficient Education.

Rather than providing evidence of State initiatives having a positive impact on ELL education, Defendants merely refer to and "emphasize" certain legal requirements already owed to ELL students. *See* Response at 19-21. For example, Defendants mention "additional obligations for schools," "ELL students are everyone's responsibility," and "all teachers must receive more training and professional learning and development" without any evidence that anything is actually being done to provide more ELL programs, services and teachers to the students who need them. Response at 20. Defendants offer no evidence of effective, sufficient and sustainable efforts and merely asserts that a "philosophical change" has occurred. *See* Defendants' Exhibit G, ¶¶ 31-35. This philosophical change, however, is nothing more than a broad description of mostly prospective and contingent efforts, and pre-existing legal requirements for educating ELL students. *Id*. at ¶ 37(a)-(g); *see also* Dr. Blum-Martinez Aff., ¶¶ 8-12, Exhibit LL. There is simply no evidence of current program implementation. evaluation, funding and PED expertise and support. Defendants must develop a comprehensive plan to show how they will achieve compliance with state, federal, and constitutional requirements for ELL students. FFCL #3035 (concluding "New Mexico is not meeting these requirements.").

In addition, Defendants select several court findings and take them out of context to argue that teaching Native language is not required as part of their watered-down definition of an adequate ELL program. Response at 19-20. Defendants fail to discuss the many Court findings and expert conclusions on ELL student needs and basic program elements – e.g. materials, curriculum, training, certifications, language services, and accountability methods – presented at trial that demonstrate that an adequate EL program requires the inclusion of native language to assist Native American EL (NAEL) students in becoming proficient in academic subjects and English. *See* FFCL ##304, 305, 313, 317-319, 323, 328; *see also* FFCL #322 ("it is important for

schools to provide ELL students a language program that is relevant to their culture, in order to help them develop their linguistic abilities…[.]"); FFCL #324 ("NAEL students require … the integration of indigenous perspectives, cultural values, and recognition of the tribal languages as a resource"); FFCL #522 ("A tribal language program … is useful for teaching students their tribal language and incorporating the English language.").

Indeed, federal law requires an ELL program to be: a) supported by an underlying educational theory *recognized as sound by some experts in the field* or considered a legitimate experimental strategy; b) *reasonably calculated to implement effectively* the underlying educational theory; and c) a *success*, after a legitimate trial, in *producing results indicating that students' language barriers are actually being overcome within a reasonable period of time*. FFCL #3041. Expert evidence shows that the use of Native languages is effective at overcoming language barriers for NAELs within a reasonable time period. *See* Dr. Blum-Martinez Aff. ¶ 4, Exhibit LL.

Further, Defendants provide no evidence to show that PED has responded to an urgent issue causing NAELs to become Long-Term Els ("LTELs"). LTELs are ELLs who have been enrolled in public schools for at least 6 years and fail to attain English language proficiency. FFCL ##333-33.[14] NAELs have a greater risk of becoming LTELs because ELL teachers who are not familiar with second language learning fail to see the distinction between a language deficiency and illiteracy, NAELS have inconsistent access to ELL programs , and, often, NAELs are provided "watered-down" pedagogy and curriculum. FFCL #333-34. Consequently, NAELs are often misplaced in special education or remedial reading programs. *Id.* Defendants must take immediate action to address this educational malpractice.

[14] There are two Findings of Fact labeled "No. 333" on page 85 of the Court's Findings of Fact and Conclusions of Law. Both findings pertain to the statements made above.

Finally, Defendants claim that PED has increased funding, technical support and oversight for ELLs, without providing any evidence to show where, how, and when those efforts were undertaken. Response at 21. On the contrary, school districts are not aware of any below-the-line funding expended on ELL education or any additional oversight or technical support provided by PED, beyond their desktop monitoring of program and budgetary applications. *See* Plaintiffs' Motion, Exhibits B (¶¶15, 17, 19); C (¶¶11-12, 15, 17-18); D (¶¶14, 16, 18); E (¶¶19-20); F (¶¶13, 16); G (¶¶10, 15, 20-21); H (¶15-16, 17); I (¶¶9, 12, 14); J (¶¶7, 18, 20, 23); K (¶8, 12-13); S (¶¶12, 17-18); T (¶¶16-17, 21); U (¶¶15-16, 19-20); V (¶¶13, 15, 18-19).

VI. Plaintiffs' Motion Presents Extensive Evidence that It Is Now Time for The Court to Order Further Injunctive Relief since Defendants Have Not Created a System which Ensures All At-Risk Students Have the Opportunity to be College and Career Ready.

Rather than addressing the extensive evidence presented in Plaintiffs' motion, Defendants attempt to minimize it, or have the Court disregard it. For example, while Defendants repeatedly refer to the affidavits from a "handful" or "small percentage" (Response at 11) of the 89 districts, Defendants neglect to mention that the Court limited the evidence in this case to evidence from 23 "focus districts" identified by the Court, along with statewide evidence. Plaintiffs have attached affidavits from 14 of the 23 focus districts, as well as statewide evidence. This is more than 50% of the focus districts – not a small percentage. Further, if necessary, Plaintiffs are prepared to present evidence from all 23 focus districts concerning their on-going inability to meet the needs of at-risk students due to Defendants' failure to provide sufficient resources, programmatic opportunities and technical assistance. [15]

[15] Defendants further misconstrue Plaintiffs' motion when they argue that Plaintiffs filed the motion because Defendants failed to file a report with the Court (see Response at 5) or failed to provide them with a plan. Plaintiffs explained that they filed their motion only when it became clear that Defendants were not taking the necessary steps, or even planning the necessary steps,

Defendants do not understand the record in this case when they argue that because it is not a class action, Plaintiff Districts and Plaintiff Parents cannot speak for others in the system. Response at 10. The Court repeatedly made it clear that it was considering the system of education overall, *see e.g.* Decision and Order at 46 and 59, and that evidence from individual districts and individual families was being considered, along with the focus district and statewide evidence, to determine the sufficiency of the system. *See, e.g.,* FFCL ##2361 - 2642 concerning all family plaintiffs' and district plaintiffs' harm and standing to bring this case. The New Mexico Constitution requires a public school system that is sufficient for the education of all school age children, including all at-risk students.[16]

Further, Defendants try to rely on a procedural highlighting rule about exhibits to try to ignore the facts stated in the affidavits from the superintendents of 14 focus districts. All the affidavits from the districts follow a similar format and each shows that the basic requirements for low-income, special education, English learners and Native American students are still not being met due to a lack of resources, programmatic opportunities and technical assistance from the State. Because the entire affidavit from each district provides relevant evidence in support of this motion, the entire affidavit would need to be highlighted, which is clearly not required.

---

to come into compliance with the Constitution. The *Yazzie* Plaintiffs first notified the Court of their concerns in their June 2019 Notice -- informing the Court that the districts still did not have the resources to meet the needs of at-risk students. Subsequently, only after the State cut off settlement discussions, the *Yazzie* Plaintiffs returned to Court with this motion since it has become clear that the State is not going to come into compliance with the constitutional mandate and this Court's order without further injunctive relief.

[16] Defendants disparage the evidence submitted by the Plaintiff parents, about the education of their at-risk children, arguing that the parents do not have the ability to testify about the education of their own children. This is certainly not so. These parents testified at the trial in this case and they can continue to do so. Affidavits from family Plaintiffs stating that nothing has changed for their at-risk students are evidence that the State continues to violate the rights of at-risk students.

More importantly, nothing in Defendants' Response contradicts the evidence presented from these Focus Districts. Further, Defendants mistakenly refer to the superintendents from the 14 Focus Districts as "lay witnesses." Response at 6. School district superintendents are more than lay witnesses – they have expertise in education, in school systems and in whether their districts are able to provide a sufficient education to their students. That is what these witnesses testified to at trial and that is what they continue to testify about in their affidavits. Such testimony from superintendents is just as admissible now as it was at trial. *See e.g.* Decision and Order at 28 and 30 (district superintendent testimony concerning inability to meet the needs of at-risk students due to lack of funds provided by state).

Finally, while Defendants are correct that Plaintiffs are seeking injunctive relief similar to the relief requested in the post-trial briefing, timing is everything. Considering that the Court's April 15, 2019 deadline has now come and gone, it is now time for the Court to be more directive since, as the Court held, we cannot rely on the good will of Defendants to comply with their constitutional obligation. Decision and Order at 74. As Defendants admit, the Court stated a determination of what is sufficient is "better left to the legislature **at least in the first instance…**" Response at 8, citing FFCL # 2259 (emphasis added). Because Defendants have failed in the first instance, it is now time for further direction and intervention from the Court. because it is the Court's duty to ensure that the executive and legislative branches of government are complying with the Constitution. *See* Decision and Order 4 - 17 and 59 - 75.

In conclusion, Plaintiffs seek an Order from this Court requiring Defendants to present to the Plaintiffs for review and comment a comprehensive plan to then be approved by this Court that contains action steps, staffing and funding necessary to achieve compliance as soon as possible. Notably, nowhere in Defendants' response do they say that they have a plan. Surely,

given the size of the task at hand, and the necessity to work with many state agencies and actors, a plan is necessary. Plaintiffs have presented extensive evidence through the testimony of the focus districts' superintendents, expert witnesses and the reports from the Defendants themselves that despite an increase in public school funding last year, schools still do not have the resources they need to provide at-risk students with a constitutionally sufficient education. While the State continues to argue that it has done wonders for education since the Court ruled, the State's supporting evidence is purely political, not forensic. Until the State can prove that all children have the opportunity to be college and career ready, the State has not complied with this Court's Order. A plan showing how the State is going to get there is in order, especially because this Court's original deadline for compliance is long past due.

Respectfully Submitted,

/s/ Gail Evans
Gail Evans (*gail@nmpovertylaw.org)*
1025 ½ Lomas NW
Albuquerque, New Mexico 87102
505-463-5293

/s/ Daniel Yohalem
Daniel Yohalem (*DYohalem@aol.com*)
1121 Paseo de Peralta
Santa Fe, NM 87501
505-983-9433

/s/ Preston Sanchez
Preston Sanchez (*preston@nmpovertylaw.org)*
ACLU -- New Mexico
1410 Coal Ave., SW
Albuquerque, NM 87104
505-266-5915

/s/ Lauren Winkler
Lauren Winkler (*lauren@nmpovertylaw.org*)
New Mexico Center for Law and Poverty

924 Park Ave., SW, Suite C
Albuquerque, NM 87102
505-255-2840

Attorneys for Yazzie Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, a true copy of this reply brief was e-filed and served through the Court's e-filing system all upon counsel of record.

/s/ Gail Evans
GAIL EVANS