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' RESPONSE TO STATE'S MOTION TO DISMISS

In the middle of March, 2020, just as the State was entering the throes of a global pandemic, closing schools and colleges, and facing a major public health and economic crisis, the State filed a motion to dismiss this lawsuit, seeking to remove this Court's authority to ensure that the State is meeting its constitutional obligations to New Mexico's children who are at risk of failing. The State does not claim that it has done its job to substantially reform the school system. The State does not assert that the school system is constitutionally sufficient, providing at-risk students with the opportunity to be ready for college and career. Instead, the State argues in its motion that it has taken a few scattershot steps forward and should be trusted to get the job done in the years ahead.

As this Court learned through the evidence presented at trial, trusting the State to comply with its constitutional duties has been a failing strategy for New Mexico's students. As this Court ruled, over many years the State has consistently shortchanged at-risk students' constitutional rights, especially the rights of Native Americans, in order to advance other budget priorities. Consequently, the governments of Tribal Nations across the State have voiced opposition to the State's motion to dismiss and expressed dismay at the State's continued attempts to skirt its obligations to Native American students. *See* Statements from All Pueblo Council of Governors, Navajo Nation, Mescalero Apache Nation, and Jicarilla Apache Nation, attached as Exhibits A, B, C and D.

Now, more than ever, as the near future of New Mexico's economy is uncertain, it is crucial for this Court to exercise its authority to enforce its prior orders and ensure that the State lives up to its constitutional obligation to provide a uniform and sufficient public school system that prepares children for college and careers. The Court must ensure that at-risk students are not once again shortchanged in favor of other non-constitutional budget priorities. Not only is this a constitutional imperative, but making our children college and career ready – as ordered by this Court -- is essential to diversify New Mexico's economy and free the state from the destructive boom and bust cycles of the oil and gas economy.

In July of 2018, this Court ruled that the State was violating the constitutional rights of at-risk students to a sufficient and uniform education and enjoined the State "to create a funding system that will meet the constitutional requirements." Decision and Order at 74. This Court's rulings were never appealed and thus have the full force of law. "The determinative issue for the Court's purposes is whether at the end of the process sufficient moneys have been allocated to provide the necessary programs to provide an adequate education for at-risk students." *Id*. at 58.

The Court's directive was clear: the State must "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." Decision and Order at 74. The Court went on to order: "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." *Id.* at 74 – 75.

> Without denigrating the difficulty Defendants and the legislature will face in meeting their constitutional duty, the Court observes that it is their duty to provide a constitutionally adequate system regardless of whether an injunction is entered. While that task is not an easy one, it is one that Defendants already bear. The school children who are now caught in an inadequate system and who will remain there if an injunction is not entered will be irreparably harmed if better programs are not instituted. Neither these 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 resoruces at the expense of our constitutional resources.

Id. at 74 (quotations and citations omitted).

Consequently, this Court enjoined the State to create a "constitutionally adequate system" – that includes a funding system, programs, teachers, and an accountability system -- to ensure that all at-risk students have the educational programs necessary for them to be ready for college or career. The point of the injunction was to bring the education system into compliance with the New Mexico Constitution. Although the State has the obligation to do this even without the injunction, the Court decided that on the basis of the State's abysmal track record, it could not be

trusted to fulfill this obligation on its own without an injunction. As discussed below, the Court ordered the State to address specific areas of educational dysfunction, such as insufficient instructional materials and technology, insufficient programs and curricula, insufficient teacher capacity, and rampant disregard for state educational laws such as the Indian Education Act. Because the Court ruled that constitutionally "adequate" or "sufficient" means an education that gives students the opportunity to be college or career ready, it is demonstrably clear that the State certainly has not yet complied with this Court's injunction and the constitutional mandate. It cannot be deemed to have complied with this Court's orders until it shows that the necessary programs and reforms are being provided to ALL at-risk students to ensure that they have the opportunity to be college and career ready.

Although the State effectively admits in its motion that it has not fulfilled the duties set forth in the Court's orders and at most has barely begun to implement an unfocused scattershot of changes, the State nonetheless asks this Court to dismiss this case under Rule 1-060(B)(5), NMRA because it claims it has "satisfied" the Court's orders. The State bases its entire argument on a staggering misreading and minimization of the extensive declaratory and injunctive relief ordered by this Court. In reality, the Court called for nothing less than a complete systems change and a complete fulfillment of the Constitutional mandate. The State bases its misreading on one element of the Court's injunction that is taken out of context. The State wrongly claims that since it could not possibly have changed the entire education system by April 15, 2019 – the date on which the Court would begin keeping tabs on the State -- the entire Decision and Order, Findings of Fact and Conclusions of Law, and Final Judgment and Order merely require that the State start some efforts by April 15, 2019. The State argues that because it has now taken a few steps toward reform, the Judgment has been "satisfied" and the

case should be dismissed. But this ignores all the elements of remedial relief set forth in the Decision and Order, Findings of Fact and Conclusions of Law, and Final Judgment and Order, and, most importantly, completely ignores the Court's decision to retain jurisdiction over the case to ensure the timely implementation of all the reforms ordered. Decision and Order at 75, Judgment and Order at ¶¶ 6-7.

In order to move toward substantial compliance with its constitutional obligations **before** the April 15, 2019 deadline, the State could have done the following: 1) enacted a complete overhaul of the educational funding and accountability system to ensure that it is fulfilling its constitutional mandate; 2) developed a plan that thoroughly analysed the cost and steps for providing all the necessary services and programs to all at-risk students; and 3) appropriated all the funds necessary to pay all these costs or at least enacted a structure to implement and fund those full costs as soon as possible.[1] But the State did not do these things. Instead, the State continued in its piecemeal approach, and refused to pass legislation or provide funding that substantially moves toward fulfilling its constitutional mandate, or even to develop a plan that outlines how the State will come into compliance in the future.

On June 28, 2019, Plaintiffs filed a Notice with this Court demonstrating the State's lack of compliance. On October 31, 2019, Plaintiffs filed a Motion for the Court to Order Defendants

[1] Indeed, the *Yazzie* Plaintiffs did this analysis and planning. With expert involvement, the *Yazzie* remedy platform was created and presented to Defendants. It sets forth short and long terms steps necessary to meet every aspect of the Court's ruling, along with the approximate cost involved. See *Yazzie* Remedy Platform, attached to Plaintiffs' 6/28/19 Notice to the Court as Exhibit 1. Additionally, Native American education experts and leaders have developed a Tribal Remedy Blueprint which outlines the steps necessary for the State to comply with the Indian Education Act and provide a uniform and sufficient education for Native students. *See* Tribal Remedy Blueprint, attached as Exhibit E. This Blueprint has been approved by all 23 tribal nations in New Mexico. However, both the *Yazzie* Remedy Platform and the Tribal Remedy Blueprint have been ignored by Defendants. In fact, Defendants suddenly broke off all remedy discussions with Plaintiffs in July 2019 without any credible explanation.

to Meet Constitutional Mandate to Ensure All New Mexico Public School Students have the Opportunity to be College and Career Ready (*Yazzie* Plaintiffs' Compliance Motion), asking the Court to order the State to develop a plan to show how it will finally provide a constitutionally sufficient education system. Rather than developing such a plan, or meeting its constitutional mandate, Defendants have instead opted to seek dismissal.

In sum, the State has demonstrably not "created a funding system that meets the constitutional requirements," (Decision and Order at 74), nor a new system of programs, accountability and management that, all together, "ensur[e], 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." *Id*. Even Defendants do not argue that they have done that. But until that is done, the injunctive relief ordered by the Court remains unsatisfied and this Court's jurisdiction remains essential to ensuring that the State fulfills its constitutional obligations to its public school students.

I. ON THE BASIS OF THE CONSTITUTIONAL INSUFFICIENCY OF NEW MEXICO'S EDUCATIONAL SYSTEM IN THE AREAS OF INSTRUCTIONAL MATERIALS, CURRICULA, PROGRAMMING, TEACHER CAPACITY, FUNDING AND ACCOUNTABILITY, THIS COURT ENJOINED THE STATE TO CREATE A SYSTEM THAT MEETS THE CONSITUTIONAL REQUIREMENT THAT AT-RISK STUDENTS HAVE THE OPPORTUNITY TO BE COLLEGE AND CAREER READY. THE STATE HAS NOT DONE SO.

Defendants argue that this Court should dismiss the case because Defendants have "fundamentally changed the circumstances for at-risk students in New Mexico's public education system" and "substantially complied with the directives set out in the Injunction." Motion at 5–6. However, Defendants cannot show they have done that. Instead, the evidence provided by the *Yazzie* Plaintiffs, attached to their October 31, 2019 Compliance Motion, demonstrates that very little if anything has changed for at-risk students in New Mexico's public education system since the Court ruled.

Rather than relying on this Court's extensive Findings of Fact and Conclusions of Law, from which Defendants cherry-picked a few mis-cited examples, Plaintiffs here will rely on this Court's original Decision and Order and Final Judgment and Order which clearly delineate the Court's major conclusions and the injunctive relief which have not been fulfilled or even significantly addressed by the State.

The 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. These are the massive failings that the State must address in order to obtain the relief it now seeks in its motion. The magnitude and importance of this ruling could not be greater. Education is fundamental to our system of democracy. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (cited in this Court's Decision and Order at 2).

At trial, Plaintiffs challenged "as inadequate both the public school funding formula and the implementation of programs to meet statutory mandates which are designed to achieve the constitutional requirement." Decision and Order at 5. Following eight weeks of testimony from experts, educators and parents and presentation of thousands of exhibits, this Court ruled in favor of Plaintiffs on both issues – the funding formula is inadequate and the implementation of programs is inadequate. Consequently, to be relieved of its duties under the Court's injunction,

the State will have to show that the funding formula is now adequate to ensure all students have the opportunity to be college and career ready **and** the State's implementation of programs is now adequate to ensure that all students have the opportunity to be college and career ready. In addition, the Court ruled that the following New Mexico statutes related to education must be fully implemented in order to comply with the State Constitution:

1978 NMSA, § 22-1-1.2 (2015) (every child can learn and succeed)

1978 NMSA, § 22-1-1.2(B) (multi-cultural education system)

1978 NMSA, § 22-1-1.2(D) (accountability system for students and teachers)

1978 NMSA, § 22-2-2(D) (2004) (PED duty to prescribe courses, standards and graduation requirements

1978 NMSA, § 22-2-8(A) (standards for curriculum, academic content and performance)

1978 NMSA, §22-2C-4 (statewide assessment and accountability system aligned with academic content and performance standards)

1978 NMSA, § 22-13-1.1 (2017) (competency requirements for graduation)

1978 NMSA, § 22-2C-4.1(A) (readiness assessment system to measure readiness for success in college or career)

1978 NMSA, § 22-1-10 (class size, teaching load length of school day, staffing patterns, subject areas and purchases of instructional materials and waiver of these requirements)

1978 NMSA, § 22-8-25(A) (funding formula)

1978 NMSA, §§ 22-8-43, 44 and 45 (state and federal funds not under funding formula)

1978 NMSA, § 22-2-2(C) (PED supervisory power over schools, and districts and determining policy)

1978 NMSA, § 22-23-1.1 (2004) (Bilingual Multicultural Education Act)

1978 NMSA, § 22-23B-6 (2015) (Hispanic Education Act)

NM Constitution, Article XII, Section 8 (training teachers to be proficient in both English and Spanish)

1978 NMSA, §§ 22-23A-1, *et seq* (2005) (NM Indian Education Act)

Decision and Order at 17 - 24. This Court also discussed federal statutes for ELL, low-income and disabled students. *Id.* at 20 – 24. The State has not even attempted to show, and indeed, it cannot show, that it has complied with these statutory mandates.

This Court has also been very clear about its role in assuring that the State lives up to its obligation to provide a uniform and sufficient education system. Referring to an article by now-Supreme Court Justice Elena Kagan, this Court affirmed "that state courts should aggressively assure that state legislatures live up to their state constiutional obligations. Kagan, 78 N.Y.U.L.Rev. at 2258." *Id.* at 8 – 9. Because the right to education is a positive (rather than prohibitory) constitutional right, the Court adopted a standard that "requires the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty…." *Id*. at 16 - 17 (citations omitted). **Consequently, the Court retained "jurisdiction over this matter to issue such orders and take such further actions as may be necessary to timely remedy the determinations set forth in the Decision and Order and Findings of Fact and Conclusions of Law issued by this Court and to effectuate all relief granted in this case." Final Judgment and Order at ¶ 6.**

A. The State Has Not Complied with this Court's Ruling as to Instructional Materials and Technology

This Court found that funding for instructional materials is insufficient because schools do not have enough money to purchase adequate, up-to-date materials; the instructional materials fund is insufficient because districts have to supplement instructional materials funds with their own operational funds; there are not enough textbooks for children to bring home; and schools are forced to make copies of textbooks and workbooks. Decision and Order at 27. The Court also found that there is a lack of appropriate instructional materials for Native American students, and

that the New Mexico Public Education Department ("PED") (the state agency responsible for K-12 education in New Mexico) does not have information about which districts have statutorily-required educational materials. Decision and Order at 27 – 28. The State has yet to show that this is no longer the case.

This Court also found that there is a lack of access to technology – including computers and related infrastructure -- in some districts, particulary rural districts. *Id.* at 25 and 27. The State has not addressed this problem and has done nothing to improve access to technology and related infrastructure for students living in rural areas. Now, with the current Covid-19 crisis, this inequity has become even more of an issue with students in rural areas, particularly Native American students, at home and unable to participate in remote learning while schools are closed. This would not be the case if the State had complied with this Court's ruling from almost two years ago.

In its motion, the State does not attempt to show that it has fulfilled this Court's requirements concerning access to up-to-date culturally responsive instructional materials and access to technology, including computers and necessary infrastructure. In fact, technology is not mentioned anywhere in its motion, and instructional materials only get a few lines (see Motion at 38 – 39), with Defendants mentioning an increase to the instructional materials appropriation with no analysis or even attempt to show that the money is now sufficient to meet the Court's rulings. According to 14 of the 23 Focus Districts, the money appropriated for instructional materials continues to be insufficient to actually cover the costs of instructional materials. *See* Affidavits from Superintendents, attached to *Yazzie* Plaintiffs Compliance Motion as Exhibits B – K, and S - V.

B. **The State Has Not complied with this Court's Ruling as to Native American students**.

This Court held that the NM Indian Education Act, 1978 NMSA, §§ 22-23A-1, *et seq*. ("NMIEA") sets forth what is required for a constitutionally adequate education for Native American children and that the goals of the NMIEA have not been realized in the districts with significant Native American student populations. Decision and Order at 28. The Court found that this, in part, includes providing a culturally relevant education, filling the Indian Education Division (IED) positions in the PED to effectuate this purpose, and develop the government to government relationships between the PED and the tribal governments necessary to achieve the statutory goals. *Id*. at 28–29. The State has yet to show that this has been done.

Indeed, the State has not come close to meeting the requirements of the NM Indian Education Act, providing culturally relevant instructional materials to all Native students, and providing essential technology to all Native students. In fact, Defendants continue to go without an Assistant Secretary of Indian Education – a key position to ensure that the Indian Education Act is fulfilled. Plaintiffs provided the Court with ample evidence and legal analysis to show that Native students' education remains constitutionally deficient. *See Yazzie* Plaintiff's Compliance Motion at 7-14; *see also Yazzie* Plaintiffs' Reply to Defendants' Response to *Yazzie* Plaintiffs' Compliance Motion at 28-32. In their motion, Defendants provide little or no evidence to rebut these dismal facts about education for Native students. The arguments in their motion highlight that for more than a decade they have provided only piecemeal legislation and projects, instead of major public education reforms.

The Court acknowledged that the systemic deficiencies impacting Native students, generally, are historic in origin. *See* FFCL ##497-511. Understandably, overcoming these issues requires long-term planning and targeted, sustainable investments. In contrast, Defendants'

motion provides a generic list of actions that: 1) merely highlights possible future projects, a few PED meetings, and small, untargeted increases in the NMIEA fund (Motion at 26-28); 2) touts modest low-impact state legislation that do not directly address any major issue identified by the Court (Motion at 25 - 26); and 3) omits any evidence to show student impact, sustainability, or effectiveness of anything they claim to have done (Motion at 24-28).

Also, Defendants falsely claim a $10 million appropriation (Senate Bill 280, Capital Outlay Expenditures, Public School Finance Authority) as an action taken by the State to remedy teacher retention (Motion at 27), when in fact those funds were not a direct legislative appropriation, but are funds for which districts may apply only if they can supply matching funds. See SB 280 (2019) at 287. In Cuba Schools, for example, where dilapitated teacher-housing units need to be knocked down and rebuilt, the State will allocate funding to cover only 30% of the cost while Cuba must furnish the remaining 70% from its own source of funds to get the State funds. *See* Declaration of Dr. Karen Sanchez Griego, Superintendent of Cuba Indepdendent School District, Attached as Exhibit F.

Defendants claim they "have demonstrated real, statewide initiatives to improve collaboration with tribes and education for Native American students and have provided significant increases in related funding. Accordingly, Defendants have complied with the Injunction's requirements regarding Native Amerian students…." Motion at 28. But again "improvement" and "increases" are not the test. The test is whether the State has remedied the deficiencies identified by the Court: do all Native students have access to culturally relevant programs and instructional materials? Do schools now have enough money for every child to have the necessary teachers, programs, text books, and computer devices and infrastructure? The Court needs to maintain its jurisdiction until the State demonstrates it has passed this test for

Native students, and fulfilled its constitutional mandate.

C. The State Has Not Complied with this Court's Ruling as to Necessary Curricula and Programs

The Court found that there are certain programs which support increased learning by at-risk students but which have "not been funded to the extent that all at-risk children can participate." Decision and Order at 30. "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, smaller class sizes, and research-based reading programs." *Id.*at 29 – 30. This Court found that funding through the State's at-risk index (a component of the State Equalization Guarantee ("SEG") funding formula for distribution of funds to the state's school districts) and Title I of the federal Elementary and Secondary Education Act does not provide enough money to fund these programs.

The State has yet to show that this has changed and that these programs are now fully funded. Instead, the State continues to argue that small improvements and increases are enough, rather than showing that the State has actually met the requirements of the Constitution to ensure that all students have the opportunity to be college and career ready, which requires access to programs that give them that opportunity.

Starting with preK, Defendants describe increases in dollars and numbers of classrooms, without showing the unmet need. In fact, thousands of at-risk children continue to go without the opportunity to access quality full day preK, and, even according to Defendants, there are 24 districts that do not offer preK. Motion at 41 (saying that 65 out of 89 school districts offer preK). Likewise, when the State discusses "extended learning" in its motion, it only mentions increases in funding and participation with no analysis of the large numbers of at-risk students who still do not have access to any type of extended learning opportunities. Motion at 42–45.

Moreover, contrary to the State's assertion, neither the Extended Learning Time Program (ELTP) nor the K5 Plus program had the participation or growth that the State claims. *See* Declaration of Dr. Stephen Barro, ¶¶19 - 21, attached as Exhibit G.

Defendants do not mention after-school progams at all in their motion. Concerning class size, Defendants argue that they have not renewed the legislation which waived class size maximums and then claim they have "worked to address" the underlying causes of the reliance on class size waivers, again with no information about current class sizes in New Mexico, and how many students are in classrooms with too many students. Motion at 38. As for literacy programs, the State relies on two federal grants – one for $40 million over 5 years, meaning $8 million a year, and one for $20 million over 3 years, meaning about $7 million a year -- a total of $15 million a year for literacy for the next 3 years, and then $8 million a year for two more years. Motion at 46. This amount is less than what the State used to appropriate for this purpose (through the Reads to Lead program) which was found by the Court to be an insufficient amount. FFCL ## 236–265; *see also* Plaintiff's Compliance Motion at 21–30, and Reply at 15–22 for the evidence of the State's continuing failure to meet the constitutional minima as to curricula and programs.

D. The State Has Not Complied with this Court's Ruling as to ELL students.

The Court held that New Mexico is not meeting the requirements of state and federal statutes and the New Mexico Constitution for English Language Learning ("ELL") students, and that many districts do not have the funds to provide them adequate services. Decision and Order at 31. The Court also found that "PED lacks sufficient monitoring programs to determine if ELL students are receiving adequate assistance," and that PED "did not know which schools were providing programs for ELLs," or "tracking the number of Native American English Learners to

determine if they were timely acquiring English," or "tracking the training given to teachers who teach ELL students," or "provid[ing] a framework for districts to use in providing multicultural education." Decision and Order at 31 – 32. The State has yet to show that this has changed.

Defendants' motion minimizes the Court's rulings and findings pertaining to ELL students. Motion at 21. In an effort to absolve itself of the necessity for further state action, Defendants proffer a list of purported remedial actions, which are partial and without any measurable outcomes and that are nearly identical to the list contained in Defendants' Response to Yazzie Plaintiffs' Compliance Motion at 19-21. In their Compliance Motion, Plaintiffs have already addressed the inadequacy of those purported actions. *See Yazzie* Plaintiffs' Compliance Reply at 32-35.

Absent from Defendants' motion is evidence of a system that ensures all ELL students a sufficient education in accord with the constitutional standard, as measured by both inputs and outputs. The State does not show that it is now in compliance with federal and state law; that all ELL students now have access to qualified ELL instructors, adequate programs, and ELL curriculum; or that the State is now tracking ELL students. Defendants also do not show that any investments were made to address the statewide shortage of qualified ELL instructors. Instead, Defendants mention a small amount of increased funding to expand bilingual programs without explaining how those amounts were determined to be sufficient, or their measurable impact on ELL students. Motion at 21-22. Although Defendants claim that districts are now reporting that 98% of all ELL students are now in ELL programs (Motion at 23), Defendants say nothing about the quality of those programs – whether those programs comply with federal and state law – or the impact on ELL student learning. Again, the State asks the Court to take its word that programs for ELL students are now being tracked but provides no evidence that this is so or

whether performance (outputs) of ELL students is improving in New Mexico.

E. The State Has Not Complied with this Court's Ruling as to Students with Disabilities.

The Court required sufficient funding for students with disabilites ("SWDs"): "Plaintiffs' expert witness and Senator Stewart testified that there is insufficient funding for SWDs. Plaintiffs' expert also identified certain problems with special education funding and provision in New Mexico. The Defendants failed to rebut this evidence. The State can have no valid, much less compelling, reason for underfunding programs for students with disabilities." Decision and Order at 65. Indeed, since this Court's rulings, the State has not made **any** changes to the sections of the funding formula that pertain to students with disabilties, meaning that no additional resources have been appropriated for these students. Dr. Barro Declaration,¶ 28, attached as Exhibit G.

Defendants' motion displays a complete lack of understanding of what is needed to educate students with disabilities, with such bizarre statements as "special education funding is specifically contemplated under Special Education Division ("SEG") funding." Motion at 29. Plaintiffs have no idea what this means. Likewise, to say that "specific special education funding will decrease as fewer students are pulled out of general education classrooms," (*id*.) is an unsupported, untrue statement. Special education provided in general education settings, if done properly, is not necessarily any cheaper than segregated special education classes. But more importantly, Defendants have not shown that they have done anything to ensure that more special education children will actually be provided an appropriate educational program in more inclusive general education settings. Likewise, Defendants say that they are "expecting" to implement a multi-layered system of support programs next year (Motion at 30); but they cannot say that this has been put in place or even that they have actually made the plans and obtained

the staff and funding to do so. Finally, Defendants' inclusion of Career Technical Education in its special education section (*id.* at 31) only illustrates that the State continues to operate under the illegal illusion that special education students do not have the right and the ability to be college ready like all other students, instead of being funneled off into vocational education jobs. The State has a lot of work to do before it will be able to show that special education students are receiving a constitutionally sufficient education.

F. The State Has Not Complied with the Court's Ruling as to Low-Income Students.

Students from low-income families who qualify for free or reduced price lunch are the largest group of at-risk students addressed by this Court's rulings. See Decision and Order at 2-3. Economically disadvantaged students have a constitutional right to educational programs and services that will give them the opportunity to be college and career ready. *Id.* at 74; Final Judgment and Order at 2 – 3. Yet, students from low-income families are barely mentioned in the State's motion to dismiss, which demonstrates how little the State has done or intends to do to address the educational challenges facing low-income students.

A 20-page section of the motion deals with at-risk students (pp. 14-34). The first of its of four parts, headed "at-risk students generally," covers such general topics as assessments, attendance, community schools, Career and Technical Education, and an anti-hunger initiative. However, even the State admits that the Community Schools Act will only operate "subject to the availability of funding" (Motion at 18) and does not mention that only $2 million was appropriated for the program (*see* LFC's Public School Suport and Related Appropriations for FY 20, Line 76, attached as Exhibit H). And, while Defendants admit that the CTE program is only a "pilot program," (Motion at 19), they neglect to mention that the overall funding for the program was only $3 million. *See* LFC's Public School Suport and Related Appropriations for

FY 20, Line 75, attached as Exhibit H. The other three parts of this section in the State's motion deal with three specific types of at-risk students: English langauge learners (ELLs), Native Americans, and students with disabilities. There is no mention at all of students from low-income families. Nowhere do Defendants describe actions taken to address the grave educational disadvantages these students face. Whereas Defendants at least discuss in their motion ELLs, Native Americans, and students with disabilities, there is no comparable discussion on how the State intends address those who are economically disadvantaged. What makes this void especially consequential is that low-income or poor students are the largest at-risk group in New Mexico. It is simply not credible for the state to claim compliance with the Court's injunction regarding at-risk students when it cannot enumerate any actions taken to help the largest at-risk group – low-income students.[2]

G. The State Has Not Complied with the Court's Ruling as to Quality of Teaching and Related Issues

This Court held that quality teaching is the "most critical" educational input, and that "quality teaching for at-risk students in inadequate." Decision and Order at 32 and 33. This Court found that "school districts do not have funds to pay for all the teachers they need" (*id*. at 32), and that "high poverty schools have a disproportionately high number of low-paid, entry level

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[2] Defendants' argument that improvements in education in general are beneficial for at-risk students (Motion at 34) misses entirely the rationale for providing extra resources and supplemental services to students with extra needs. It may well be true that an across-the-board increase in resources would have some beneficial effects for all students, including those who are poor or ELL or have disabilities. However, at-risk students would likely fall further behind other students if the state used money for general purposes only, rather than specifically to serve at-risk students. The reason that school systems throughout the United States provide extra resources for economically and otherwise disadvantaged students is that they understand that such students require substantially more services, hence substantially more funding, than students who are not at-risk to reach any given level of academic performance. *See* Dr. Barro Declaration ¶ 32, attached as Exhibit G.

teachers" who are "systematically less effective than experienced teachers." Decision and Order at 33. The Court also found that "no effort has been made to evaluate the effectiveness of PED's efforts to achieve equitable distribution of effective teachers or recruitment and rentention of teachers in high poverty or low-performing schools." *Id.* at 35. The Court further found it is "difficult to recruit teachers in rural areas and to obtain teachers in special education, STEM and bilingual education," and that "[s]ome districts have difficulty maintaining a sufficient number of TESOL-endorsed teachers because of an inability to compete with neighboring districts." *Id.* at 36. The Court also found that insufficient funds for both quality teacher-training programs and the SEG factor that is supposed to pay school districts based on teacher training but which fails to follow statutory criteria all have "an adverse impact" on the ability to have effective teachers in schools with high at-risk populations. *Id*. at 36. This Court also found that "[l]ack of sufficient funding or sufficient numbers of teachers has also led to larger class sizes in some districts." *Id.* at 36. The State has yet to show that these issues have been resolved.

Defendants' motion does not address the Court's first concern – whether districts now have enough money to pay for all the teachers they need. And it does not address the Court's second concern – whether high poverty districts have a disproportionate number of inexperienced teachers. While the State prides itself on having 93 fewer teacher vacancies than before, it neglects to realistically acknowledge the large number of vacancies that remains. Likewise, while it is true that the State gave teachers raises, the State cannot show that the raises now make New Mexico competitive with surrounding states, or that the raises make the teaching profession competitive with other professions in New Mexico as explained in greater detail in *Yazzie* Plaintiffs' Compliance Motion and Reply. Furthermore, the State has not added any additional days to teachers' contracts to provide additional professional development, nor has the

State added any money to the SEG to ensure that all teachers acquire sufficient professional development. In fact, all that Defendants do mention is a few new professional development programs for STEM. But Defendants do not document how many teachers and students STEM training affects, do not even mention other professional development, such as working with special education students or ELL students, and do not mention the continued shortages of TESOL-endorsed teachers who are necesseary to provide our ELL students with a sufficient education. Clearly, compliance with this Court's rulings on teachers is still a long way off.

H. The State Has Not Complied with this Court's Ruling as to Educational Outputs

"A review of the evidence concerning student outputs leaves this Court with no doubt that the education being provided to at-risk children is resulting in dismal outcomes whether measured by test scores, graduation rates or college remediation rates, or need for college-level remedial courses… . These outputs demonstrate that the education system is not providing the type of education the legislation required in Section 22-1-1.2(B) ('every child can learn and succeed'). Simply put, the outputs reflect a systemic failure to provide an adequate education as rqeuired by the New Mexico Constitution." Decision and Order at 46 (citations omitted).

The State has yet to present any evidence that this has changed since the Court ruled; in fact, Defendants fail to mention outputs at all in their motion – they present no evidence or argument that anything has improved in terms of graduation rates, college remediation rates, or test scores. This is because the evidence does not exist. Until the State can show significant improvements for our students' preparedness for college or career, the State will have a very hard time showing that they have met the constitutional standard of ensuring that all students have the opportunity to be college or career ready.

"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." Decision and Order at 37. "[T]he majority of New Mexico's children cannot read or do math at grade level" and "[a]t risk children have significantly higher rates of non-proficiency." *Id.* at 38. "In the last three years, the highest rate of proficiency in reading for low-income students was 21.5 percent; Native American students attained 17.6 percent proficiency; and ELL students attained 4.3 percent proficiency. Overall, the proficiency rates in math from the past three years are worse, with low-income students only 14.5 percent proficient, Native students 10.4 percent proficient, and ELL students 6 percent proficient." *Id.* at 39. In rejecting Defendants' argument that growth is what matters, the Court held, "For the educational outputs to overcome the failure to provide adequate educational inputs, more than nominal growth must be shown – real improvement in proficiency should be demonstrated. The Defendants have not shown this." *Id.* at 40. This remains true today.

"New Mexico continues to have one of the lowest high school graduation rates in the country…. New Mexico has consistentldy had low graduation rates, ranging from 54 to 70 percent." *Id.* at 41. At-risk students have even lower graduation rates. *Id.* at 42.

"Of the students who do go to college, many need substantial remedial help." *Id.* "About half of the students who graduate from high school and go to college need remedial courses. Therefore, the evidence demonstrates that overall half of the students are not college ready." *Id.* at 42.

"The Court finds unpersuasive the Defendants' argument that no new funding is needed because its programs are working as shown by the fact that at-risk students' performances are improving. The at-risk students are still not attaining proficiency at the rate of non at-risk students, and the programs being lauded by PED are not changing this picture. Further,

participation in the programs lauded by PED is limited. Frequently, the LFC and LESC found that PED failed to provide verifiable evidence that its programs were working. Many of the programs cited by the State… have only minimal participation by the schools in the state. Other programs have inadequate funding to fully achieve their goals… . While these programs may be worthwhile, their coverage is too limited and their funding is too ephemeral to justify the State's failure to comply with the constitutional mandate. Similarly, while the defense argues that the State ESSA Plan is evidence that the education offered is sufficient, it was admitted that it could not be known whether the Plan would accurately project future growth." Decision and Order at 44 (citations omitted). In sum, the State has yet to show that these outcome deficits have been erased or improved, or that anything substantial has changed as to the educational outputs of at-risk students.

I. The State Has Not Complied with this Court's Ruling as to Funding and Accountability.

1. Funding

In terms of money and the funding formula, the Court held that "there is insufficient funding to maintain necessary programs for at-risk students." *Id.* at 52. Even though the State has increased funding and made changes to the SEG funding formula since the Court ruled, the State has yet to show that there is now sufficient funding to create and maintain necessary programs for at-risk students. In arguing that it has made significant changes to the funding system by adding extended learning time and increasing the at-risk index, Defendants neglect to mention that the total funding for the extended learning programs is only 5.5% of total school spending, and that only 1.3% is actually attributable to new funding available for the past school year. *See* Dr. Barro Declaration,¶19, attached as Exhibit G. Lenghthening the school year is a worthy idea, but a funding increment of just over one percent for that purpose, added atop the existing

financial structure, hardly qualifies as sufficient change. Moreover, not nearly all at-risk students are being provided a longer school year.

Likewise, the increase in the SEG's at-risk index from .13 at the time of trial to .25 (2019-2020) or even .30 (2020-2021) is a quantitative change in a formula factor rather than a qualitative or sufficient change in the funding system. "This falls short of the 25 percent extra funding per student that many experts deem minimaly adequate for the at-risk group. To generate 25 percent extra funding per student at risk, the SEG formula's at-risk increment would have to be set at .37." Dr. Barro Declaration,¶22, attached as Exhibit G. Most importantly, as explained in the *Yazzie* Plaintiffs' Compliance Motion, because the additional money appropriated through the at-risk index was used to pay for mandated salary increases and not for programs and services for at-risk students, the programmatic funding "change" for at-risk students did not actually occur, nor can the State document an increase in qualified teachers for at-risk students.

Moreover, the at-risk index of the funding formula now, as at time of trial, is calculated on the basis of students from a family with income below the very low federal poverty line, which includes only the poorest New Mexican families, leaving out entirely all other low-income students, notwithstanding the educational disadvantages that many such students face. Most other states that have a low-income factor in their funding formulas count as "low income" all students eligible for free or reduced-price school lunch (FRL). *Id.,* ¶24. The group so defined is much broader than the narrow, sub-poverty group New Mexico recognizes, as it includes students with family income up to 185 percent of the federally defined poverty line. In recent years, the number of New Mexico students eligible for FRL has been about 2.3 times as large as the number of Census-defined poor students for whom the SEG formula provides extra funding. Declaration of Dr. Stephen Barro, ¶24, attached as Exhibit G. New Mexico has declined to adopt

a definition based on FRL, or any definition broader than the Census poverty count, even though the Court's definition of "at risk" clearly embraces a broader range of low-income students than does the present SEG at-risk factor. *See* Decision and Order at 3 (listing children who qualify for free or reduced lunch as being one of the groups of students who are at-risk).

This disparity between resources for FRL-eligible students versus the SEG's sub-poverty at-risk students has consequences. Districts and schools face a dilemma: should they use at-risk funds to provide extra services only to students who fit the narrow SEG poverty definition, and not serve the rest of the low-income population; or should they spread the already insufficient at-risk funds thinly over the larger low-income group, likely leaving services too meagre to yield discernible educational improvements. If there really had been "fundamental change" in the school finance system, it would have included recasting the SEG formula's at-risk factor to take New Mexico's large number of economically disadvantaged students into account and then fully funding the SEG to pay for the cost of the services these children need.[3]

In terms of funding for the remaining groups of at-risk students, the State has not added any provisions to the SEG funding formula or new sufficient special funding targeted at Native

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[3] The money appropriated through the at-risk index is now being spread even thinner by the State's recent announcement that school districts can use the money for programs and services for at-risk students as defined by this lawsuit – *i.e.*, low-income, special education, ELL and Native American students – even though the statutory definition of the at-risk index only includes students who live at or below the federal poverty level, students who are mobile (*i.e.*, change schools), and ELL students. Compare NMSA 22-8-23.3(B) (defining at risk as below poverty, ELL and mobile) with PED's April 24, 2020 Memorandum to Districts, attached as Exhibit I (adding special education, Native American and students eligible for FRL to at-risk students). Plaintiffs are concerned about these changes for two reasons: (1) adding these students administratively without the commensurate increase in funding by the Legislature just spreads educational resources that are already much-too-thin even thinner; and (2) since special education students have a separate section in the funding formula that is supposed to cover the extra resources necessary for different levels of special education students, that is the part of the formula that should be revised to address the particular and varying needs of special education students, rather than lumping them in with other at-risk students.

American, special education, or ELL students. First, to provide 25% more funding for each Native student would require a revision of the funding formula sufficient to generate $57.5 million. Dr. Barro Declaration, ¶31, attached as Exhibit G. Obviously the State's meager $7 million in total funding for Indian Education does not come close to the money needed to provide adequate services to Native American students. *Id*. Second, the State has done **nothing** to generate more money for special education students. That part of the funding formula is the same as it was when the Court ruled, meaning districts have no additional resources for students with disabilities. *Id*., ¶28. Third, although ELL students are represented in the SEG formula's at-risk factor, there are no provisions to ensure that they receive their fair share—or any share—of the insufficient funds currently generated by that factor. Further, while ELL students may also have some services paid for under the bi-lingual ("BMEP") factor in the SEG funding formula, the State has not increased that factor to generate increased funds for ELL students. Further, since English-speakers learning another language are also served in bi-lingual programs, ELL students only receive a fraction of the funding available under this factor. *Id.,*¶27 .

The State's claim that it has made "fundamental change" due to an increase in total funding for 2019-20 is clearly false in light of the fact that the increase (12.9 percent) is a catch-up effort, following years during which real (*i.e.*, inflation-adjusted) school support languished at its post-recession depths. *Id.,* ¶34 [4] The growth in inflation-adjusted total funding from its post-

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[4] The state claims that it increased total funding by more that 16 percent between 2018-19 and 2019-20, but that figure includes the aforementioned ELTP and K-5 Plus funds that were actually not available to most districts and schools, and hence were of little value to students in 2019-20. Moreover, the 12.9 percent year-to-year funding increase cited above has not been adjusted to reflect the inflation that occurred between the two school years. According to the state-local government price index cited above, the July 1, 2019 price level was 1.9 percent higher than the July 1, 2018 level. Taking this small but not trivial price change into account, the year-to-year rate of increase in real, inflation-adjusted spending is not the 12.9 percent figure

recession low point (2011-12) to 2019-20 amounts to an average annual increase of only about 1.6 percent—hardly a remarkable or "game changing" rise in real school support. Dr. Barro Affidavit, ¶34, attached as Exhibit G. [5]

The same applies to the 2019-20 increase in teacher salaries, which the state also cites as evidence of fundamental change (Motion at 49). While average salaries are estimated to have risen by 10 to 11 percent between 2018-19 and 2019-20, this increase is also actually just a catch-up, following years during which real, inflation-adjusted teacher salaries were held at their post-recession lows. Even now, inflation-adjusted teacher salaries are just barely above the 2007-08 level, which means that teachers' standards of living have not improved significantly from where they were 12 years ago. *Id.,* ¶35. Moreover, contrary to Defendants' claim, Plaintiffs use the 2007-08 State education expenditure level merely as a benchmark for some progress, not as a legally-required level of sufficient spending. Indeed, Plaintiffs believe the

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cited above, but rather just 10.8 percent. Even a single year's inflation makes a difference. *See* Dr. Barro Declaration, ¶34, attached as Exhibit G.

[5] The state has challenged Plaintiffs' findings that total and per-student spending for public schools have **not** returned, as of 2019-20, to levels reached in 2007-08. Defendants rely on an affidavit from Hipolito Aguilar, a former PED official in the Martinez administration, who wrongly asserts that Plaintiffs did not use the correct inflation measure. He argues, unfathomably, that using a price index that reflects costs of state-local government services, such as public education, is not appropriate, but that expenditures should instead be adjusted by applying an index of prices of groceries, clothing, housing, entertainment, personal care, and other goods that families purchase for their own use—*i.e.*, a consumer price index. As explained by Dr. Stephen Barro, a school finance expert and economist, Mr. Aguilar's critique is flatly wrong and the index that Plaintiffs applied, the price index for State and Local Government Consumption Expenditures produced by the Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce, is the most appropriate extant index to use for adjusting school spending for inflation. *See* Dr. Barro Declaration, ¶¶ 6 – 16, attached as Exhibit G.

Constitution requires spending levels far beyond those of 2007-08. [6]

Plaintiffs agree that the 2019-20 education expenditure and teacher salary increases, if they are maintained through the upcoming Special Legislative Budget Session, aimed at reducing budget increases enacted in the last Session, are important, but only partial, steps towards financial sufficiency. The last two years' expenditure and teacher salary increases should be viewed as first small steps toward repair of a system that the State left to degrade over an extended period, rather than as fundamental system changes or as substantial satisfaction of the Court's mandates.

2. Accountability and Oversight

Significantly, in rejecting Defendants' argument that because they cannot control the school districts' spending they are not responsible for the failure to provide programs that would amleriorate the education gap sufferd by at-risk students, the Court held that the PED has unlawfully chosen to abandon its statutory oversight role. Decision and Order at 52. The Court

[6] The state misconstrues the purpose and import of Plaintiffs' analysis of the trend in school spending between 2007-08 and 2019-20. In school year 2007-08 New Mexico's real (inflation adjusted) school funding, both total and per student, reached its high point. Subsequently, real school funding declined substantially during the Great Recession, was held well below the pre-recession level for years, long after the recession ended, and still falls short, as of 2019-20, of fully recovering to where it was 12 years ago. Dr. Barro Declaration, ¶16, attached as Exhibit G. The purpose of Plaintiffs' analysis of this trend is to document the State's slow and incomplete recovery to a level of school support that New Mexico had reached in the past, that was far less than adequate even in 2008.

Contrary to assertions in Defendants' motion (pp. 4, 10), Plaintiffs do *not* view restoration of the 2007-08 real funding level as a "benchmark" or "proxy" for compliance with the Court's orders; nor do they agree that restoration of that funding level—when and if it occurs—would satisfy the constitutional requirement for sufficient funding of the schools. In 2007-08 New Mexico's educational performance was poor, just as it is now. Restoring the 2007-08 level of real spending per student would be a long overdue step in the right direction, but resource levels considerably above those that prevailed in 2007-08 would be needed to raise student performance to the level of the Constitution's sufficiency requirement.

further ruled that PED's authority is "broad enough"... "to review and assure that districts are using the money provided by the State to provide programs to assist at-risk students." Decision and Order at 52. But the Court found that "PED has failed to monitor or audit the districts' spending of their annual funding." *Id.* at 53. Despite this Court's ruling, the State still has not developed or implemented an accountability system that would ensure that money going to the school districts for at-risk students is spent on at-risk students and that the money is sufficient to provide programming for all at-risk students. The State has not required, through an accountability system, that the money generated through the at-risk index be spent on programs and services for at-risk students and the State has not established an accountability system to ensure that this occurs. In order to establish a foundation for accountability, the State would first need to clarify the students to be served, delineate the services to be provided, and then establish a system of reporting and monitoring to ensure that the at-risk funds are actually being directed to these programs and teachers for at-risk students. *See* Dr. Barro Declaration, ¶¶ 37 – 46, attached as Exhibit G. Without this, there can be no "fundamental change" and this Court's rulings will not be satisfied.

Important during this time of economic trouble in New Mexico, the Court held that "as a legal matter, lack of funds is not a defense to providing constitutional rights. . . .[F]inancial constraints do not allow states to deprive persons of their constitutional rights. . . . [O]ur need to conserve financial resources may not be implemented by depleting our constitutional resources." *Id.* at 55 – 56 (citations omitted). "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 constiutional magnitude are secondary, and the legislature may not yield to them until

constitutionally sufficient provision is made for elementary and secondary education." Decision and Order at 56 (quotations and citations omitted). Given the current economic downturn in New Mexico, Plaintiffs are more concerned than ever that the State will sacrifice our students' rights in order to conserve money; thus, it is especially important now that this Court maintain jurisdiction to safeguard our students' rights.[7]

II. DEFENDANTS HAVE NOT "SATISFIED" THIS COURT'S RULINGS ON DECLARATORY AND INJUNCTIVE RELIEF AS REQUIRED BY RULE 60(B)(5)

Defendants ask the Court to dismiss this case under the first clause of Rule 1-060(B)(5), NMRA – the satisfaction of a judgment clause. Rule 60(B) generally addresses the process and grounds for obtaining relief from a judgment or order due to newly discovered mistakes, fraud or evidence. Rule 60(B)(5), relied on here by Defendants, provides in relevant part:

> B. Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and on such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; ….

Id. A Rule 60(B) motion for relief from judgment is an extraordinary remedy and may be granted only in exceptional circumstances. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000); see *V.T.A., Inc v. Airco, Inc.*, 597 F.2d 220, 223 n.7 (10th Cir. 1979). The

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[7] Moreover, a recent decision by the United States Department of Education shows that for many years the State has cheated school districts with large numbers of Native American students out of millions of federal dollars, and orders that this practice must stop effective this coming school year. See April 15, 2020 Letter from US DOE to NM PED, attached as Exhibit J. Under this ruling, the State may try to reduce current SEG appropriations by approximately $50 million, lowering the unit value, and leaving all the other districts with even less money than they thought they would have. This ruling from USDOE further necessitates this Court retaining jurisdiction to ensure that, while the State can no longer cheat certain Districts out of their federal money, the State does not try to make other Districts pay for its mistake.

motion may not be used as a substitute for direct appeal. *See Servants of Paraclete*, 204 F.3d at 1009. Here, Defendants did not appeal any of this Court's rulings and cannot achieve a review of those rulings through their motion.

Defendants' reliance on this clause of Rule 60(B)(5) is misplaced factually and legally. [8] First, as demonstrated throughout this Response, Defendants have not come close to substantially satisfying the various requirements set forth in this Court's orders. In its Decision and Order this Court declared that Defendants violated the Education Clause, Equal Protection Clause and Due Process Clause of the New Mexico Constitution. Decision and Order at 70. More specifically, this Court declared:

> Defendants have violated the right of at-risk students by failing to provide them with a uniform statewide system of free public schools sufficient for their education.
>
> a. The Defendants have failed to provide at risk students with programs and services necessary to make them college or career ready;
>
> b. The funding provided has not been sufficient for all districts to provide the programs and services required by the Constitution;
>
> c. The Public Education Department has failed to meet its supervisory and audit functions to assure that the money that is provided has been spent so as to most efficiently achieve the needs of providing at-risk students with the programs and services needed for them to obtain an adequate education.

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[8] Oddly, the one New Mexico case on which Defendants rely for the proposition that under Rule 60(B)(5) the case should be dismissed if the judgment has been satisfied -- *State ex rel. King. V. B & B Inv. Grp., Inc,* 2014-NMSC-024 – has nothing to do with satisfaction of a judgment, and does not even mention that principle or Rule 60.

Defendants' reliance on *Montoy v. State* for this point is also erroneous. As discussed more fully below, *Montoy* resulted in a dismissal of the case rather than a remand to the district court for two express reasons: 1) the case had been going on for many years ricocheting back and forth between the district court and the supreme court, and 2) the funding formula on which the district court had based its decision was replaced by an entirely new formula which would take three years to be implemented and for which there was no evidence yet as to the effect it would have on public education funding. *Montoy*, 282 Kan. 9, 26–27, 138 P.3d 755, 765-766 (2006). Neither of these reasons has any bearing on Defendants' Rule 60(B)(5) argument here.

Id. at 70 – 71.

Given the "importan[ce of] education … for school children in New Mexico, particularly at-risk children," the Court decided that nothing other than an injunction "would provide meaningful relief" to remedy these substantial constitutional violations. Decision and Order at 71. Recognizing the "tension between giving the Defendants and the legislature sufficient guidance to allow them to comply and usurping the policy making role that is appropriately the legislature's function," the Court nonetheless ruled that an injunction was necessary because it "is simply too easy [for Defendants] to conserve financial resources at the expense of our constitutional resources." *Id.* at 74 (quotations and citations omitted).

In a section headed "Injunctive Relief" the Court carefully considered all the factors required to issue an injunction and it decided that an injunction was justified. *Id.* at 71-75. The Court entered its injunction against 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 74. To this end the Court ruled that it was giving the State the opportunity "to create a funding system that will meet the constitutional requirements." *Id.* The Court's injunction stated: "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." *Id*. at 74 – 75.

This injunctive relief was expressly repeated in the Final Judgment and Order issued in this case. There, the Court ordered:

> 3. As set forth in the Decision and Order and Findings of Fact and Conclusions of Law, Defendants are hereby enjoined as follows:
>
> a. An injunction is hereby issued enjoining the Defendants to take immediate steps, by no later than 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. 7/20/18 Decision and Order at 74. (FF&CL 3206)
>
> b. It is the State's duty to provide a constitutionally adequate system regardless of whether an injunction is entered. 7/20/18 Decision and Order at 74. (FF&CL 3207)
>
> c. The school children who are now caught in an inadequate system and who will remain there if an injunction is not entered will be irreparably harmed if better programs are not instituted. 7/20/18 Decision and Order at 74. (FF&CL 3208)
>
> d. The Defendants must comply with their duty to provide an adequate education and may not conserve financial resources at the expense of our constitutional resources. 7/20/18 Decision and Order at 74. (FF&CL 3209)
>
> e. 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 as soon as practicable every public school in New Mexico would have the resources, including instructional materials, properly trained staff, and curricular offerings, necessary for providing the opportunity for a sufficient education for all at-risk students. 7/20/18 Decision and Order at 74-75. (FF&CL 3210)
>
> f. 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. 7/20/18 Decision and Order at 75. (FF&CL 3211.

Final Judgment and Order (Feb. 14, 2019), at pp. 3-5.

To ensure that the State complied with its orders, the Final Judgment and Order also ruled:

> 6. The Court retains jurisdiction over this matter to issue such orders and take such further actions as may be necessary to timely remedy the determinations set forth in the Decision and Order and Findings of Fact and Conclusions of Law issued by this Court

> and to effectuate all relief granted in this case. ….
>
> 7. Any discovery needed in aid of enforcing this judgment shall be conducted pursuant to the Rule of Civil Procedure, Rule 1-069(B). After April 15, 2019, any party may file with the Court a report about whether it believes Defendants are in compliance with this Court's Orders. Upon receipt of any such report, the Court will issue an order setting forth the process by which it will address any issues raised by such report.

Id., at pp. 5-6.

In light of the detailed, extensive and broad scope of the Court's rulings, findings, analysis and injunction to remedy Defendants' constitutional violation of at-risk students' educational rights, Defendants' argument that all the Court ordered was for Defendants to start to make some changes by April 15, 2019 simply makes no sense. The Court recognized that under the separation of powers doctrine it is the duty of the Executive and Legislative branches to remedy the Court's declaration and implement its injunction to correct the State's constitutional violations, and it is the duty of the Court to ensure that this is done expeditiously. *Id.* The Court specified in great detail what needed to be done and left it to Defendants in the first instance to determine how the remedy should be implemented. In order to monitor the progress of Defendants' actions the Court retained jurisdiction and allowed any party to seek discovery and file reports on the progress of compliance after April 15, 2019. There would have been no need to retain jurisdiction, allow discovery, or consider compliance reports if the Court intended to end its jurisdiction merely upon the State taking a few preliminary actions in a few areas. Satisfying this Court's injunction requires comprehensive educational reform that demonstrates substantial improvement of student outcomes so these students are actually college and career ready. The State makes no claim that this has happened. Because Defendants have not substantially satisfied this Court's express orders, there is simply no basis to dismiss this action on that ground.

Alternatively, if Defendants meant to invoke the last clause of Rule 60(B)(5) ("it is no longer equitabile that the judgment should have prospective application"), this argument is also misplaced. The last clause of this Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." *Rufo* v. *Inmates of Suffolk County Jail,* 502 U.S. 367, 384 (1992).

The leading case analyzing this third clause of Rule 60(B)(5) in New Mexico is *Jackson v. Los Lunas Cmty. Program,* 880 F.3d 1176 (10th Cir. 2018). Under the ruling in *Jackson*, a party seeking modification of an injunction under the Court's equitable power

> bears the burden of showing that "a significant change either in factual conditions or in law" warrants revision of the decree. Changed factual circumstances may warrant modification of a consent decree when the changed circumstances "make compliance with the decree substantially more onerous," when "a decree proves to be unworkable because of unforeseen obstacles," or when "enforcement of the decree without modification would be detrimental to the public interest."
>
> Conversely, a court should deny a party's request for a modification under Rule 60(b)(5) if the party merely establishes that "it is no longer convenient [for the moving party] to live with the terms of a consent decree." Furthermore, a modification should be denied "where a party relies upon events that actually were anticipated at the time it entered into a decree."

Jackson, 880 F.3d at 1194 (internal citations omitted).[9] Here, the State has not borne its burden to show and cannot show that the commencement of a few program and funding changes warrants dismissal of the Court's injunction. As discussed above, Defendants still have control over the way they implement the Court's injunction, but, having not appealed this Court's rulings, they cannot ignore or alter the Court's determination of what the New Mexico Constitution requires. In addition, Defendants must substantially and durably remedy the

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[9] Obviously, the major federalism concerns expressed in *Jackson* (and the cases cited therein) are not germane here.

constitutional violations found by the Court. The problem here is that Defendants have not done so and are not even making substantial progress.

Until Defendants have cured the constitutional violations found by the Court, there is no basis under Rule 60(B)(5) for terminating the Court's jurisdiction to enforce compliance. Faced with this question in *Jackson*, the Court ruled that before terminating the Court's jurisdiction:

> we must answer two questions: first whether the state has achieved compliance with the federal-law provisions whose violation the decree sought to remedy; and second, whether the State would continue that compliance in the absence of continued judicial supervision.
>
> * * *
>
> In summation, if Defendants here can show they are no longer violating the class members' federal rights, and the district court has reason to believe Defendants' compliance with federal law is durable, then "continued enforcement of the District Court's original order[s] is inequitable within the meaning of Rule 60(b)(5), and relief is warranted."

Jackson, 880 F.3d at 1200 and 1203, respectively (internal citations omitted)

Because the State cannot show (and has not shown) that it is no longer violating the constitutional rights of at-risk students to a sufficient education, by having established a durable system of finance, programs and accountability that ensure all at-risk students have the opportunity to be college and career ready, the State has not satisfied the Judgment and this Court's on-going authority is necessary to ensure that the Constitution is upheld.

III. GUIDANCE FROM OTHER STATES SHOWS THAT THIS COURT NEEDS TO MAINTAIN JURISDICTION UNTIL DEFENDANTS HAVE COMPLIED WITH THE COURT'S INJUNCTION TO BRING NEW MEXICO'S PUBLIC SCHOOL SYSTEM INTO COMPLIANCE WITH THE NEW MEXICO CONSTITUTION.

All of the cases that Defendants cite from other states to support their position that this case should be dismissed actually support Plaintiffs' position that this Court should: 1) maintain jurisdiction, 2) order Defendants to develop a comprehensive remedial plan, and 3) order Defendants to fully fund and implement that plan as soon as possible to create a constitutionally

sufficient school system. These cases and the ones cited by Plaintiffs at the end of this section all demonstrate the crucial monitoring and enforcement roles that this Court needs to play in the compliance/implementation phase of the case.

To start, Defendants' reliance on the Kansas case, *Montoy v. State*, is misplaced since the *Montoy* Court maintained jurisdiction over the case for years and issued multiple decisions which finally resulted in the Kansas legislature and governor enacting a funding formula and adequate funding that was based on the actual cost of providing a constitutionally adequate education to its students. Before the decision cited by Defendants, the sufficiency of the constitutional remedy was adjudicated repeatedly by the district and appellate courts. In 2005 the Kansas Supreme Court decided that the most recent efforts by the Governor and Legislature were still not constitutionally sufficient:

> This case requires us to review recent school finance legislation to determine whether it complies with our January 3, 2005, opinion and brings the state's school financing formula into compliance with Article 6, § 6 of the Kansas Constitution. We hold that it does not.
>
> * * *
>
> We agree … that although [the new legislation] does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education. It is clear that the legislature did not consider what it costs to provide a constitutionally adequate education, nor the inequities created and worsened by [the new legislation]. At oral arguments, counsel for the State could not identify any cost basis or study to support the amount of funding provided by [the new legislation], its constellation of weightings and other provisions, or their relationships to one another.
>
> …
>
> As of this time, the legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use [local funding] to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts… .
>
> We conclude that, on the record before us, a continuing lack of constitutionally adequate funding together with the inequity-producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still falls short of the standard set by Article 6, § 6 of the Kansas Constitution.

Montoy v. State, 279 Kansas 817, 818, 839 - 840 (2005).

After this decision, in 2006, the State's actions were found finally to comply with the Constitution. The Court rigorously reviewed the steps the State took in order to reasonably and systemically assure itself that the constitutional mandate had been fulfilled:

> There is no question that the legislature has substantially responded to our concerns that the funding formula failed to provide adequate funding for students in middle-sized and large districts with a high proportion of minority and/or at-risk and special education students and that the special education, bilingual, and at-risk student weighting factors were distorted by the lack of any actual cost basis.
>
> The legislature also responded to our concerns about the equitable distribution of funding…What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education.
>
> Our prior orders have made it clear that we were concerned that the then existing financing formula was distorted and provided disparate funding because it was based on former spending levels with little or no consideration of the actual costs and present funding needs of Kansas public education.
>
> The legislature has responded to this concern. The legislature has undertaken the responsibility to consider actual costs in providing a suitable system of school finance by commissioning the LPA to conduct an extensive cost study, creating the 2010 Commission to conduct extensive monitoring and oversight of the school finance system, and creating the School District Audit Team within LPA to conduct annual performance audits and monitor school district funding as directed by the 2010 Commission. In addition, the new legislation contains numerous provisions designed to improve reporting of costs, expenditures, and needs.
>
> These new components provide the fundamental framework for a cost-based funding scheme in which the legislature will be regularly provided with the relevant, accurate information necessary to meet its constitutional obligation to provide and maintain a suitable system of financing of Kansas public schools.
>
> We also find that the LPA Cost Study Analysis was considered by the legislature in making the decisions that underlie the formula changes in S.B. 549 and, thus, the legislature was responsive to our prior orders to consider actual costs…
>
> …
>
> As previously noted, in response to our orders, the legislature has amended the school finance formula three times. The most recent changes made in S.B. 549 have now so fundamentally altered the school funding formula that the school finance formula that was at issue in this case no longer exists. It has been replaced with a fundamentally different funding scheme ….

Montoy v. State (Montoy IV), 282 Kan. 9, 21-25, 138 P.3d 755, 763-765 (2006).

Thus, unlike New Mexico, after many years of resistance, Kansas ultimately implemented a constitutionally adequate and completely new funding and accountability scheme, based on a professional study that determined the actual cost of providing a sufficient education to Kansas students. Because Defendants in New Mexico have not done such a study, and have not developed a new funding and accountability scheme based on actual program costs, New Mexico today is not in the same posture as Kansas and certainly has not complied with this Court's injunction.

Defendants also mis-rely on *C.F.E. v. State of New York*, a case in which the Court had ruled more than a decade earlier that the State was violating the constitutional rights of New York students by failing to provide a sound basic education. *CFE v. New York*, 861 N.E. 2d 50, 56 (2006). Weeks after that initial ruling, the governor created "the New York State Commission on Education Reform, charged with recommending to the Executive and the Legislature, education financing and other reforms that would ensure that all children in New York State have an opportunity to obtain a sounds basic education." *Id*. at 57 – 58. As the *C.F.E.* court explains, over the next decade, the governor tried to have the recommendations of that Commission plus additional reforms enacted into law. Some policy makers pushed for less; other advocates pushed for more. In the end, the Court "declare[d] that the constitutionally required funding for the New York City School District included, as demonstrated by this record, additional operating funds in the amount of $1.93 billion, adjusted with reference to the latest version of the GCEI and inflation since 2004." *Id.* at 63.

Thus, while Defendants in this case are correct that the *C.F.E*. court discussed the deference due to the legislature and the executive branches, the Court also recognized "it is the

province of the Judicial branch to define, and safeguard, rights provided by the … Constitution, and order redress for violation of them." *Id.* at 64. The *C.F.E.* court was not shy to adopt a specific dollar amount that was a minimal amount to be expended to meet the constitutional obligations of public school students, and the Court was able to rely on an extensive study, conducted by the Governor's Commission on Education Reform to issue this Order:

> We do not believe that Governor Pataki's proposed State Education Reform Plan was unreasonable. In particular, we do not find irrational the Governor's acceptance of the Board of Regents approach to identifying successful schools with the S & P weighting for students with special needs and the cost-effectiveness filter. As a result, we do not find unreasonable the assertion that $2.5 billion in additional revenues statewide (equating to $1.9 billion in New York City) was a valid determination of the cost of providing a sound, basic education in New York City. There is substantial record support for that statement.

Id.

In New Mexico, the Governor has convened no such task force; the State has conducted no such study; and the Defendants have presented no evidence to the Court about what it would cost to provide all New Mexico students with a sufficient education. Instead of doing any of these things, Defendants come to this Court less than two years after the initial ruling, and ask the Court to dismiss the case, with no evidence that Defendants have assessed what it will take for the State to comply with the Constitution, with no comprehensive implementation plan, and with no demonstration of remedies in place in every district for all at-risk students.

Defendants' reliance on an Ohio educational adequacy case, *DeRolph v. State,* is also in error.[10] There, years after the initial ruling of unconstitutionality, the Court maintained jurisdiction to ensure that the State fulfilled its constitutional obligations. Starting in 1997, the

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[10] The citation that Defendants give for the *DeRolph* case appears to be wrong. Undersigned counsel can locate no *DeRolph* case with the citation Defendants provide, but instead have found multiple other *DeRolph* cases which will be discussed here. However, since the year Defendants use is 1997, perhaps they are referring to *DeRolph I*, 677 N.E. 2d 733 (1997), in which the education funding system was found unconstitutional.

Ohio Court held the public school funding system unconstitutional:

> Ohio's elementary and secondary public school financing system violated Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." In *DeRolph I*, this court admonished the General Assembly to create a new school-funding system, but otherwise provided no specific guidance as to how to enact a constituitonal school-funding system.
>
> Three years later, after the General Assembly had enacted various changes to the school-funding system, this court again determined that the school-funding system was unconstitutional…[T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools but rather a thorough and efficient system of common schools. As in *DeRolph I*, the majority did not provide specific guidance to the General Assembly as to how to enact a constitutional school-funding system.

DeRolph v. Ohio, 97 Ohio St. 3d 434 (2002) (citations and quotations omitted). In maintaining jurisdiction five years after the initial finding of unconstitutionality, the Court was "aware of the difficulites that the General Assembly must overcome and that is why we have been patient." *Id.* at 435.

> To date, the principal legislative response to *DeRolph I* and *DeRolph II* has been to increase funding, which has benefitted many school children. However, the General Assembly has not focused on the core constitutioanl directive of *DeRolph I*: a complete systematic overhaul of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient as explained in *DeRolph I, DeRolph II* and the accompanying concurrences.

Id.

Finally, just as this Court found that a lack of funds is no excuse for failing to fulfill constitutional obligations, the *DeRolph* Court wrote:

> We realize that the General Assembly cannot spend money that it does not have. Nevertheless, we reiterate that the constiutional mandate must be met. The Constitution protects us whether the state is flush or destitute. The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio

> Constituiotn, and all othe provisions of the Ohio and United States Constitutions protect and guard us at all times. Harman Stidger, a delegate from Stark County said, "If we should leave everyting to the Legislature, why not adjourn this Convention sine die, at once?" The same could be said of this court and the Ohio Constitution.

Id. at 436 – 437. Thus, *DeRolph* stands for the proposition that years after the Court's initial ruling, and despite infusing new funds into the school system, the Court will maintain jurisidiction until the Defendants have actually overhauled the system and complied with the constitutional requirements.

Defendants' mis-use of the New Jersey education reform litigation is especially egregious. Defendants quote part of one sentence in the case – "we are limited in our ability to order releif in this matter" (Motion at 48) -- and neglect to point out that what the court was referring to was limiting relief to the plaintiff class:

> Although we are sympathetic to the difficulties that the State's failure to abide by its statutory formula for education funding has caused to children in districts statewide, we are limited in our ability to order relief in this matter. We can grant relief in litigants' rights only to the plaintiff class of children from Abbott districts for whom we have a historical finding of constitutional violation and for whom we had specific remedial orders in place through *Abbott XX.* Accordingly, for the State's undisputed failure to adhere to the specific relief authorized in *Abbott XX,* our present disposition granting relief and ordering full funding of SFRA in FY 2012 can reach no broader than to the plaintiffs granted relief in the earlier proceedings in these school funding cases, namely the schoolchildren of the Abbott districts.

Abbott v Burke, 20 A.3d 1018, 1025 (N.J. 2011). [11] Far from being about the limitations on the

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[11] "[N]early twenty years have passed since this Court found that the State's system of support for public education was inadequate as applied to pupils in poorer urban districts." *Abbott v. Burke,* 119 *N.J.* 287, 295 (1990) (*Abbott II*). Finding that more severely disadvantaged pupils require more resources for their education, the Court held that the State must develop a funding formula that would provide all children, including disadvantaged children in poorer urban districts, with an equal educational opportunity as measured by the Constitution's thorough and efficient clause. *Id.* at 374, 384-86. A later decision added that the funding needed to be coupled to a set of educational program standards. *Abbott v. Burke,* 136 N.J. 444 (1994) (*Abbott III*).

court's power to order relief (as Defendants incorrectly assert), the *Abbot* case demonstrates the Court's on-going obligation to hold the State's feet to the fire. In *Abbot*, after the State made a plea similar to the one Defendants make here – trust us – the Court was disappointed to find that the State could not be trusted to meet its constitutional obligations on its own and, once again, the Court had to be more involved and directive.

Contrary to Defendants' citation to this case, the New Jersey Supreme Court rejected defendants' arguments that they had acted in good faith and done the best they could, that financial constraints precluded the State from providing more money to education, and that the Court should defer to the State's funding decisions. Instead of deferring to the State's funding decisions, the *Abbot* Court held, once again, after 20 years and broken promises by the State, that it had on-going jurisdiction to ensure that the State funds schools constitutionally:

> We hold that the Appropriations Clause creates no bar to judicial enforcement when, as here, 1) the shortfall in appropriations purports to operate to suspend not a statutory right, but rather a constitutional obligation, 2) which has been the subject of more than twenty court decisions or orders defining its reach and establishing judicial remedies for these plaintiffs for its breach, 3) where the harm being visited is not some minor infringement of the constitutional right but a real, substantial, and consequential blow to the achievement of a thorough and efficient system of education to the plaintiff pupils of the Abbott districts, and 4) where the formula the State has underfunded was one created by the State itself, and made applicable to the plaintiff pupils of Abbott districts, in lieu of prior judicial remedies, by this Court on application by the State based on specific representations that the statutory scheme of SFRA would be fully funded at least as to the Abbott pupils, and fully implemented as to those districts. In those circumstances, the State, having procured judicial relief based on specific representations, will not be heard to argue that the Appropriations Clause power leaves the plaintiff children of the Abbott districts without an effective remedy.

Abbott v Burke, 20 A.3d 1018, 1024-1025 (N.J. 2011).

Finally, Defendants mis-construe the education cases from Massachusetts which, like all the other cases relied on by Defendants, actually support Plaintiffs' position here. In 1973, the Massachusetts Court held:

> [T]he Massachusetts Constitution imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live. It shall be declared also that the constitutional duty is not being currently fulfilled by the Commonwealth. Additionally, while local governments may be required, in part, to support public schools, it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate.

McDuffy v. Sec. of Exec. Office of Educ., 615 N.E. 2d 516, 621 (Mass. 1993). After that ruling, the State passed the Education Reform Act, and for the first time, took responsibility for the school system, rather than leaving it to localities and their property taxes:

> The act eliminated the central problem of public school funding that we identified as unconstitutional in *McDuffy.* See *Doe* v. *Superintendent of Schs. of Worcester,* 421 Mass. 117, 129 (1995) ("The question before the court in *McDuffy* . . . was whether the Massachusetts school-financing system was constitutional, and the court held that it was not"). Specifically, the act eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources, and unable to rely on sufficient or predictable financial or other assistance from the Commonwealth. The act established for the first time a "[f]oundation budget" for each and every Massachusetts school district, derived from a complex formula designed to account for the number and needs of the children residing in each district. The defendants have described the foundation budget as the State's estimate of the "*minimum* amount needed in each district to provide an adequate educational program" (emphasis added).

Hancock v. Comm'r of Educ, 822 N.E. 2d 1134, 437-438 (Mass. 2005). Thus, when a few districts came back to the State 12 years later and urged the Court to find that the mandates of the original decision in *McDuffy* had not been fulfillled, the Court declined to do so, finding that a substantial new system had been put in place since *McDuffy. Id*. This was not a finding that the Court does has no role to play in enforcing the Constitution, as Defendants would like this Court to believe. Instead, the *Hancock* Court found that the state had actually substantially and fundamentally changed the education system by putting in place, for the first time, a statewide system of funding and accountability that addressed the needs of all students across the State.

Generally, many state courts, including in New Mexico, have maintained jurisdiction over State Defendants until their duty of implementing a system that meets the constitutional standards as defined by the judiciary were satisfied. *See, e.g., Zuni Pub. Sch. Dist. v. State*, No. CV-98-14-II, Partial Summary Judgment at 3 (11th Jud. Dist. N.M. Oct. 1999) (reserving jurisdiction, the Court noted that it would review the State's plan and might "later impose further appropriate sanctions or conditions for failure to establish and implement an adequate and constitutional funding system."); *McCleary v. State,* 269 P.3d 227, 231 (Wash. 2012) ("This court defers to the legislature's chosen means of discharging its article IX, section 1 duty but retains jurisdiction over the case to help facilitate progress in the State's plan to fully implement the reforms by 2018."); *Gannon v. State*, 309 Kan. 1185, 1199, 443 P.3d 294, 303 (2019) (retaining jurisdiction since 2014 to ensure the State has met its "burden to satisfactorily demonstrate that its proposed remedy is reasonably calculated to address the constitutional violations identified and comports with previously identified constitutional mandates."); *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010) and *Connecticut Coal. for Justice in Educ., Inc. v. Rell*, 2016 WL 4922730, at *4 (Conn. Super. Ct. Sept. 7, 2016) ("The court has to decide if the state is keeping its promise about education. If it isn't, the court has to decide what to do about it."); *Claremont Sch. Dist. v. Governor*, 143 N.H. 154, 157, 725 A.2d 648, 649 (1998) (requiring the State to now meet judicial standards of adequacy after five years since the court's ruling without making changes to the current system*);* *Campbell Cty. Sch. Dist. v. State,* 2008 WY 2, ¶ 2, 181 P.3d 43, 48 (Wyo. 2008) (issuing decisions in 1995 and 2001and "clarifying the constitutional mandate to be met by legislation," while maintaining jurisdiction to ensure the legislature "responded to our decisions and its constituency by developing and refining a comprehensive, sophisticated system that meets the

complex demands of delivering a thorough and efficient education to the individualized needs of Wyoming students in the 21st century."); *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 649, 599 S.E.2d 365, 397 (2004) (finding the State funding system did not provide adequate resources for the opportunity for a sound basic education and ordering the State to correct funding deficiencies and assigning a Superior Court to monitor compliance); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 WL 844055, at *30 (Mont. Dist. Apr. 15, 2004), *aff'd in part, vacated in part*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, ("The Court also notes that it would be appropriate for it to exercise continuing jurisdiction over this case so as to avoid unnecessary, costly delays and complications absent continuing jurisdiction.").

This Court was aware of the many cases around the country – cited both in the State's Motion and in this Response – in which the Court maintained jurisdiction over the State for years and monitored the State's efforts to transform its unconstitutional school system. Accordingly, this Court followed suit, ruling that the "Court retains jurisdiction over this matter to issue such orders and take such further actions as may be necessary to timely remedy the determinations set forth in the Decision and Order and Findings of Fact and Conclusions of Law issued by this Court and to effectuate all relief granted in this case." Final Judgment and Order at 5.

CONCLUSION

At the same time as Plaintiffs are seeking an Order from this Court requiring Defendants to develop and implement a comprehensive plan that contains action steps, staffing and funding necessary to achieve compliance as soon as possible, Defendants here seek to be relieved from any further accountability associated with their failing public school system. This Court looked at evidence going all the way back to 2008 and found, based on educational inputs and outputs, that New Mexico's educational system has been failing students for years. The ramifications of

this Court's decision and orders could not be more important; and the case will not be finished until the transformation of our failing school system is complete. As this Court ruled, it is not an easy job for the State to develop a constitutionally compliant school system, but it is the State's obligation and it must be done. And, as this Court has also ruled, it is this Court's role to monitor and enforce compliance with its carefully articulated injunctive relief.

Considering that the State had not fulfilled its duties before this case was filed, it certainly cannot be left on its own to fulfill its duties now that the Court has found that the State is violating at-risk students' constitutional rights. Rather than spending its time drafting long motions to dismiss, the State could have been developing a compliance plan for this Court. Until such a plan has been developed and implemented and 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 Orders. Therefore, this Court should deny Defendants' motion and grant Plaintiffs' pending motion for a Court-approved implementation plan to remedy the State's constitutional violations.

Respectfully Submitted,

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Attorneys for Yazzie Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, a true copy of this response brief was e-filed and served through the Court's e-filing system upon all counsel of record.

/s/ Gail Evans
GAIL EVANS

All Pueblo Council of Governors Responds to the State of New Mexico's Dismissal of the Yazzie/Martinez Court Ruling

YAZZIE PLAINTIFFS EXHIBIT A
Response to Motion to Dismiss

March 27, 2020
(https://www.apcg.org/uncategorized/all-pueblo-council-of-governors-responds-to-the-state-of-new-mexicos-dismissal-of-the-yazziemartinez-court-ruling/), Uncategorized

FOR IMMEDIATE RELEASE
March 27, 2020
Contact: Alicia Ortega, APCG@indianpueblo.org

All Pueblo Council of Governors
Respond to the State of New Mexico's Dismissal of the Yazzie/ Martinez Court Ruling during the COVID-19 Pandemic

As the State of New Mexico filed a motion to dismiss the landmark Yazzie/Martinez lawsuit during a time of distress, Pueblo leadership call the action premature and completely unacceptable

(Albuquerque, NM) – As leadership of New Mexico's Pueblos have become inundated with responding to the COVID-19 Public Health Crisis, Pueblo leadership was blindsided and shocked with dismay to hear that the State of New Mexico has filed for a motion to dismiss the 2018 Yazzie/Martinez Landmark Education Lawsuit on the claim that orders have been sufficiently met. The most unsettling for Pueblo leadership, is this legal move coming at a time of sheer uncertainty during the critical State of Emergency each Pueblo has declared and as the state and nation respond to one of the most challenging times in history.

Pueblo leadership has unanimously agreed with the Court's decision that the State of New Mexico has failed to provide Native children with an equitable education through the public education school system and has not provided them with the kind of education guaranteed and envisioned under the State's Constitution. As the State argues in its motion that increased at-risk funding over the past two legislative sessions and modifying programs for English language learners, Native American students, low-income students and students with disabilities is substantially enough to comply with the Court's order, Pueblo leadership disagrees and feel this action is premature and completely unacceptable.

The Pueblo Leadership agree, Governor Lujan Grisham and the State deserve gratitude and appreciation for the preventative measures and proactive response to the COVID-19 pandemic. However, for Native students ordered to stay at home and with the recent closure of all New Mexico schools for the remainder of the academic year, learning at home is nearly impossible because of a lack of reliable internet. It is virtually non-existent in many tribal communities. The Pueblos now feel COVID-19 has disproportionately widened the already existing opportunity gap due to the lack of critical education infrastructure in Pueblo communities.

"The State has a long way to go to comply with the Court's ruling that found New Mexico's education system constitutionally insufficient. The current circumstances only make the situation worse and hearing that the State has no regard for what our communities are faced with during a state of emergency is disheartening. Our Native children deserve justice and the right to an equitable education, similar to the one afforded to non-Native students. This means complying with the NM Indian Education Act as well as other laws that require a culturally responsive curriculum, a well-trained teacher workforce, language preservation, appropriate consultation with tribal communities and especially now during the COVID-19 pandemic, broadband infrastructure." – Chairman J. Michael Chavarria, All Pueblo Council of Governors

Since the decision was rendered, Pueblos agree that there has not been any real meaningful collaboration or consultation with Pueblo leadership to discuss detailed plans to address Native American teacher shortages, culturally relevant curriculum, and the lack of social and behavioral health services – all of which are glaringly noted in the Court's Findings of Fact andConclusions of Law.

The Pueblo Leadership strongly urge Governor Michelle Lujan Grisham and the State of New Mexico to reconsider this motion and engage in government-to-government discussion with the Pueblos to solve the issues noted in the lawsuit when Pueblos are not in a State of Emergency. The Pueblo leadership stand by their position that the State support funding levels sufficient enough to provide Native children and generations to come with an education that results in a decent paying job, a prosperous life, and a personal sense of academic achievement without compromising Native languages and culture.

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DEPARTMENT OF DINÉ EDUCATION
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Jonathan Nez
President

Myron Lizer
Vice-President

NNBEMA-609-2020

RESOLUTION OF THE
NAVAJO NATION BOARD OF EDUCATION

Relating to Education; Opposition to the New Mexico Public Education Department's (NMPED's) Dismissal of the Yazzie/Martinez Lawsuit

WHEREAS:

1. The Department of Diné Education (hereinafter the "Department") is the administrative agency within the Navajo Nation with responsibility and authority for implementing and enforcing the educational laws of the Navajo Nation. 2 N.N.C. § 1801 (B); 10 N.N.C. § 107 (A). The Department is under the immediate direction of the Board. 10 N.N.C. § 107 (B).

2. The Navajo Nation Board of Education (hereinafter the "Board") is the education agent in the Executive Branch for the purposes of overseeing the operation of all schools serving the Navajo Nation. 10 N.N.C. § 106 (A). The Board carries out its duties and responsibilities through the Department of Diné Education. 10 N.N.C. §106 (G)(3). In addition, "the Board [has the] general power to monitor the activities of all Bureau of Indian Affairs funded schools and local community school boards serving the Navajo Nation…" 10 N.N.C. § 106 (G)(1).

3. On July 20, 2018, First Judicial District Judge Sarah Singleton ruled the state has failed in its constitutional mandate to provide English-language learners and special-education, Native American and low-income students a sufficient education that prepares them for college and career. The court's ruling held:
   a) The state has failed to comply with state and federal laws regarding the education of Native American and ELL students, including the New Mexico Indian Education Act, Bilingual Multicultural Education Act, and the Hispanic Education Act, which has resulted in an inadequate education system for New Mexican students.
   b) In violation of the state constitution, the state has failed to provide students with the programs and services that it acknowledges prepare them for college and career. Such programs and services include: quality PreK, K-3 Plus, extended learning, dual language, culturally and linguistically relevant education, social services, small class sizes, and sufficient funding for teacher recruitment, retention, and training.

c) Lack of funds is not an excuse for denying New Mexico's students a sufficient education. The state must come up with the necessary funding to meet New Mexico students' right to a sufficient education.
d) The PED has failed to meet its oversight functions to ensure that all students are receiving the programs and services they need.

4. On February 14, 2019, First Judicial District Court Judge Sarah Singleton issued a final ruling in *Yazzie/Martinez v. State of New Mexico,* where the court found that the state has violated students' constitutional rights to a sufficient education and ordered the state to provide educational programs, services, and funding to schools to prepare students so they are college and career ready.

5. On March 13, 2020, the New Mexico Public Education Department ("NMPED") filed a Motion to Dismiss and Memorandum of Entry of Order of Satisfaction of Injunction and Dismissal of Action regarding the *Yazzie/Martinez v. State of New Mexico* lawsuit. In the State of New Mexico's Motion to Dismiss, the state still acknowledged it continues to violate students' right to a sufficient education. The court hearing on the state's motion to dismiss is March 27, 2020.

6. The Board finds that the State of New Mexico's recent and past actions clearly demonstrate that it has continued to fail to meet the requirements of the *Yazzie/Martinez v. State of New Mexico* court order and continues to violate of the rights of all students, especially Navajo students' right to a sufficient education.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Navajo Nation Board of Education strongly opposes the State of New Mexico's dismissal of *Yazzie/Martinez v. State of New Mexico* lawsuit and requests that Navajo Nation leadership to express demand that the state withdraw its motion to dismiss, including taking any appropriate legal action on behalf of the Navajo Nation.

C E R T I F I C A T I O N

I hereby certify that the foregoing resolution was duly considered by the Board of Education of the Navajo Nation at a duly called meeting at Window Rock, Arizona (Navajo Nation) at which a quorum was present, motion by Priscilla B. Manuelito and seconded by Andrea K. Thomas and that the same was passed by a vote of 9 in favor; 0 opposed; 0 abstained, this 24th day of March 2020.

Priscilla B. Manuelito, President
Navajo Nation Board of Education

YAZZIE PLAINTIFFS EXHIBIT C
Response to Motion to Dismiss

MESCALERO Apache TRIBE

P.O. Box 227
101 Central Avenue
Mescalero, New Mexico 88340
Office: (575) 464-4494
Fax: (575) 464-9191

April 30, 2020

Honorable Governor Michelle Lujan Grisham,

The Mescalero Apache Tribe convened a series of community institutes in August and September of 2019 to formally engage students, parents, teachers, program directors, cultural leaders and members of the Tribe to respond to the pressing challenges in education highlighted in the findings of the landmark decision in *Yazzie/Martinez v. State of New Mexico*. This litigation and historic ruling affirmed that every child in New Mexico has a right to a sufficient education under the New Mexico Constitution.

The Council, Vice-President, and I led the effort to develop recommendations that are culturally and linguistically appropriate and central to the education vision and blueprint that we collectively aspire to for our children. We developed recommendations focused on policy, program, budget, proposed amendments to existing statutes, and legislative appropriations for tribal based programs as part of a Tribal Remedy Framework for the 2020 legislative session. These recommendations were driven by our vision to fulfill the sacred trust and responsibility for our children, our parents, our community and Tribal Nation. On November 4th, 2019, the Council unanimously passed Resolution 19-127 to join the All Pueblo Council of Governors, Jicarilla Apache and Navajo Nation in our support for the Tribal Remedy Framework containing our priorities and recommendations.

We had great hope that this landmark decision would finally lead to the State addressing the long history of broken promises and neglect as documented by countless studies including the state's own commissioned initiatives. We had great hope believing in the legal system and that the legal system would hold the executive and the legislature accountable for what they failed to do own their own.

Many generations of Mescalero Apache people gave their lives to protect our lands and way of life resisting the impositions of western models of education designed to assimilate us using the children and education as a means to accomplish the goals of acculturation. The last great wars of resistance ended with our forefathers. Our late President Wendell Chino often reminded all of us that, "our people made the biggest down payment to secure our homelands for all future generations along with education and health care for our people for as long as the waters flow and grass grows." That down payment is the real estate that is now New Mexico and the United States of America.

This pandemic has exposed generations of broken promises. Our Navajo and Pueblo brothers and sisters are dying because of the conditions and circumstances resulting from the failures and missed opportunities of policymakers to address the needs of our people. The digital divide, the lack of internet access is compounding the educational needs of our children. A continuation of the violations delineated in the *Yazzie/Martinez* decision. In two legislative sessions, the State of New Mexico has failed two make any meaningful targeted investments for our children; no explicit language to guide investments to address the needs of our at-risk Native American children, no explicit and focused investments for Native American language teachers and programs, no comprehensive investment to address relevant curriculum and instructional material development, no explicit and focused investments for our Native American children with special needs, no explicit language for Native teacher development, administrators and educational leader capacity building. None of the major programs contained in the Tribal Remedy Framework passed this session including essential tribal programs as we prioritized for the Mescalero Apache Tribe. There has been no significant consultation with the Public Education Department. We still do not have an Assistant Secretary of Indian Education, a violation of the Indian Education Act.

It would be a violation of our sacred trust to our children, the next generation of leaders of the Mescalero Apache to not oppose your position to ask the court to dismiss the lawsuit. Until our recommendations are addressed, we cannot rest to hold the State accountable to fulfill its obligations. To date, we feel very strongly, that it has failed. It is unconscionable given what this pandemic has exposed. It is what legislators in one of the hearings this past session called, "a perpetuation of the injustice and inequities in the education of our Native American children."

Respectfully,

Gabe Aguilar
President

YAZZIE PLAINTIFFS EXHIBIT D
Response to Motion to Dismiss

THE JICARILLA APACHE NATION

P.O. BOX 507 • DULCE, NEW MEXICO • 87528-0507

RESOLUTION OF THE LEGISLATIVE COUNCIL

GOVERNMENT
RE: In Protest of New Mexico Public Education Department's Request to Dismiss the Yazzie/Martinez Lawsuit

Resolution No. 2020-R-089-04

WHEREAS, the Jicarilla Apache Nation ("JAN") is recognized as a sovereign Indian Tribe under the 1934 Indian Reorganization Act on the Jicarilla Apache Reservation in Northern New Mexico; and

WHEREAS, in 1955 the Jicarilla Apache Nation entered into an agreement with the New Mexico Public Education Department ("NMPED") to construct the first public schools within the Jicarilla Apache Nation Reservation boundaries known as the Dulce Independent School District ("DISD") to educate its children; and

WHEREAS, DISD is one of eighty-nine (89) public school districts in New Mexico with 95% Native American student enrollment; and

WHEREAS, DISD schools identified as a low performing school district consecutively for the past three (3) years due to the lack of required educational programs, lack of sufficient textbooks, lack of technology equipment, lack of teachers with appropriate endorsements, low academic performance, high percentage of absenteeism and tardiness, high percentage of behavioral issues, low graduation rate impacting college and career readiness opportunities in post-secondary programs; and

WHEREAS, NMPED has continued to fail in upholding their constitutional obligation to afford all children the right to an equitable educational opportunity in providing professional technical assistance and guidance to improve DISD's current low performing status; and

WHEREAS, NMPED has failed to implement an effective program monitoring and evaluation system of state and federally funded programs such as Title I, Title III, Title VI, JOM, Impact Aid, New Mexico Indian Education Act, Special Education and Bilingual/Multicultural Education Act to ensure the accountability of these programs meet regulatory mandates; and

WHEREAS, NMPED has not provided support with programmatic strategies to recruit and retain highly qualified teachers in DISD with endorsements needed to work with at-risk students; and

WHEREAS, the JAN through Jicarilla Apache Department of Education ("JADE") has requested numerous meetings with NMPED to discuss recommendations in developing strategic plans to improve DISD's current academic status on behalf of its Jicarilla Apache children has not been honored by NMPED; and

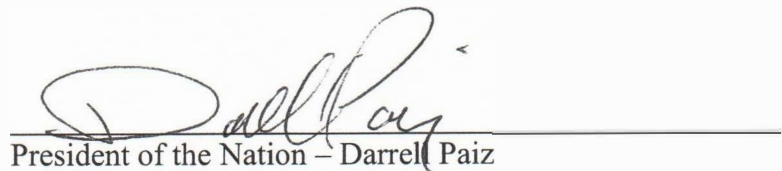
WHEREAS, the NMPED has failed to acknowledge the New Mexico Tribe/State Collaboration Act resulting in the deterioration of our trust and partnership with NMPED; and

WHEREAS, the JAN recognizes NMPED has a statutory obligation to exercise its authority over school districts to require the money that is allotted be used for programs known to advance the educational opportunities for at-risk students with highly qualified staffing.

NOW, THEREFORE, BE IT RESOLVED, the Legislative Council of the Jicarilla Apache Nation requests the Courts to uphold the initial court ruling by Judge Singleton; and

BE IT FURTHER RESOLVED, the Legislative Council of the Jicarilla Apache Nation supports Representative Derrick Lente and other New Mexico Legislative Representatives protesting NMPED's request to dismiss the Yazzie/Martinez Lawsuit; and

BE IT FINALLY RESOLVED, the Legislative Council of the Jicarilla Apache Nation supports Judge Singleton's statement in her Order that the New Mexico Constitution requires the State to provide every student with the opportunity to obtain an education that allows them to become prepared for career or college through educational instructional materials, equipment, programs, staffing and funding for all students.

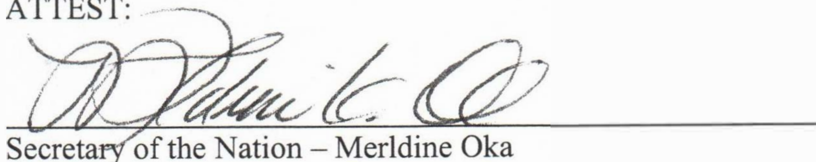


President of the Nation – Darrell Paiz

CERTIFICATION

The foregoing Resolution was enacted by the Legislative Council of the Jicarilla Apache Nation on the ***3rd day of April, 2020, by a vote of 8 for, 0 against, and 0 abstained***, at a duly called meeting at which a quorum of the Legislative Council were present.

ATTEST:



Secretary of the Nation – Merldine Oka

YAZZIE PLAINTIFFS EXHIBIT E
Response to Motion to Dismiss

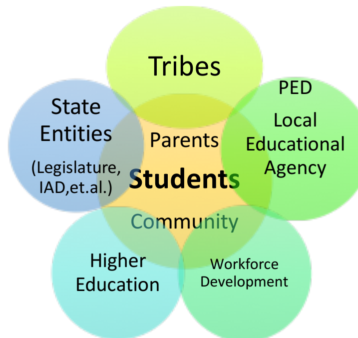
NEW MEXICO TRIBAL *YAZZIE/MARTINEZ* REMEDY FRAMEWORK

WORKING GOVERNMENT-TO- GOVERNMENT

2019-2020

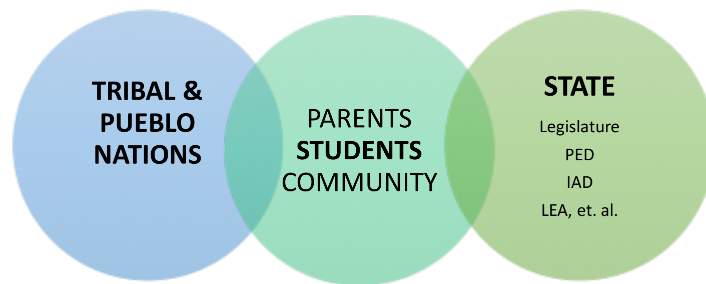
EDUCATIONAL AND FUNDING PRIORITIES IN RESPONSE TO THE *YAZZIE/MARTINEZ V. STATE OF NEW MEXICO EDUCATION CASE* JOINTLY DEVELOPED BY THE SOVEREIGN NATIONS OF NEW MEXICO: NAVAJO NATION, MESCALERO APACHE TRIBE, JICARILLA APACHE NATION, ALL PUEBLO COUNCIL OF GOVERNORS INCLUDING PUEBLOS OF ACOMA, COCHITI, ISLETA, JEMEZ, LAGUNA, NAMBE, OHKAY OWINGEH, PICURIS, POJOAQUE, SAN FELIPE, SAN ILDEFONSO, SANDIA, SANTA ANA, SANTA CLARA, SANTO DOMINGO, TAOS, TESUQUE, ZIA, AND ZUNI.

These educational and funding priorities resulted from a year-long process of Community Institutes designed to engage tribal leadership, students, parents, and community members. They were developed collaboratively with State/Tribal educational stakeholders. To address the unmet needs of Native American students will require a collaborative process that involves those entities listed on the graphic below.



These priorities supported by State and Federal law, are in compliance with the Indian Education Act, in accordance with the findings of the *Yazzie/Martinez* case, and are consistent with the PED Operating Commitments and Guiding Philosophy (See *Identity, Equity, and Transformation*, PED Memorandum, September 16, 2019 and NMPED: Developing the Navajo Education Blueprint: A response to the *Yazzie/Martinez*, October 17, 2019).

The following demonstrates the government-to-government relationship affecting Native American students, parents, and communities:



SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
Equitable, culturally relevant learning environment for Indian Students. IEA 22-23A-2(A).	Only 2 percent of all teachers in the state are Native American. *Yazzie* at ¶ *326.* Defendants do not allocate sufficient funding to the twenty-three Indian Education districts for the purpose of implementing the New Mexico Indian Education Act…According to the Assistant Secretary of the Indian Education Division and to several witnesses, PED allocates $25 thousand, based on grant approval, to each school district that serves a significant Native American student enrollment, for purposes of implementing the New Mexico Indian Education Act. This is an insufficient amount for purposes of fully complying with the NMIEA. *Yazzie* at ¶¶ 622-626. Schools must provide Native American students, including Native American English learners, the same quality of education that is provided to non-Native American students by incorporating into the	• Provide funding for Regional Education Cooperatives (RECs) to contract with local/tribal experts to provide culturally and linguistically appropriate teacher training, health, behavioral and mental health and social services to Native American students and Native students and Native Student with special needs. ($150,000.00) • Funding for the Native American Students Program in the College Arts and Sciences to Support to support a master's program including indigenous studies and leadership to support the development and implementation of a culturally relevant high school curriculum. • Navajo Culture and Curriculum Materials Development and Education Center ($800,000.00 Navajo Tech. Univ. **Recurring)** • Navajo Language and Culture Curriculum Materials Development Materials	**HB 516** **HB 516** **HB 516** **HB 670**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters.	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	classroom culturally relevant curriculum that contains the historical contributions made by indigenous people... *Yazzie* at ¶ 475.	Development Center ($2.5M **Nonrecurring)**		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Maintenance of Native Language. IEA,22-23A-2(B). [Native American Language Teacher Development and Certification]	Language is necessary for the continuation of the culture and traditions of indigenous tribes; there is no substitute. *Yazzie* at ¶ 486. New Mexico's system of education does not provide Native American students the necessary programs and services that meet their unique cultural and linguistic needs. ¶ 523. It is important for Native American English learners (NAEL) to have Native American teachers because they have the ability to relate to and interact with NAEL students effectively, do serve as English proficient models to students, and are likely to remain	• Native Languages unit value • Funding for American Indian language, research, and teacher training. • Funding for professional development for language teachers • Funding for professional development of Language Coordinators and Tribal Directors • Navajo Culture and Curriculum Materials Development and Education Center ($800,000.00 Navajo Tech. Univ. **Recurring)** • Navajo Language and Culture Curriculum Materials Development Materials Development Center ($2.5M **Nonrecurring)** • Funding for Curriculum, Material Development Center for Zuni to establish and	**(New Legislation, amendments to existing statutes)** **HB 516** **HB 516** **HB 516** **HB 516** **HB 670**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	employed at the school. *Yazzie* at ¶323.	Educational Center ($350,000.00 reoccurring funding). • Funding for Zuni (A:shiwi) College for Teacher Prep Program ($150,000.00 reoccurring funding). • Funding for Zuni Language Teacher Prep Program ($150,000.00 reoccurring funding). • Operational funding for Zuni (A:shiwi) College to develop a Zuni language program ($100,000.00 reoccurring funding).		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters.	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Development of Systems that Positively Affect Academic Success of Indian Students. IEA, 22-23A-2(C)	New Mexico's system of education does not provide Native American students the necessary programs and services that meet their unique cultural and linguistic needs. *Yazzie* at ¶ 523. Defendants admit that PED has not developed any educational systems that are specifically targeted at improving the	• Establish an American Indian Education Institute to improve American Indian education student recruitment and retention. (UNM) • At-Risk Provisions for Navajo Community Based Programs (*requires amendment to Community Schools Act to include explicit language for Tribes and Pueblos to develop wrap around service models).*	**HB 516** **HB 250** **Amendments to existing Statute** **HB 516**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	success of Native American students. *Yazzie* at ¶ 560. Defendants do not staff the IED in a way that would enable it to study, develop, and provide guidance on effective systems of education for Native American students. *Yazzie* at ¶ 598.	• Funding to American Indian Student Services for: student recruitment and retention; summer bridge programs; academic, cultural, and financial advisement. **UNM** • Funding for American Indian Student Support Services, to provide student support, academic and financial advisement, and student retention and internships. • Funding for the College of Education's American Indian programs. • Establish a Native American Public Education Commission authorized to establish Native American Charter schools in collaboration with PED and local public school districts	**HB 516** **HB 516** **Amend current statutes**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

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NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
School Governance. IEA, 22-23-2(D).	Defendants' lead expert on Indian Education admitted that the system of education as applied to Native Americans in New Mexico is broken and not sufficient. *Yazzie* at ¶529 New Mexico does not provide any evaluation or oversight into the efforts made by PED to improve academic performance of Native American children. *Yazzie* at ¶ 525. Witnesses from districts located on or near tribal lands, where Native American students' culture and language is most prevalent, testified that an institutionalized, culturally-relevant program for Native American students, as required by the NM Indian Education Act, is nonexistent or piecemeal at best. *Yazzie* at ¶ 630.	• Funding for the American Indian education leadership education specialist and administrative licensure programs to increase the number of American Indian school administrators. (**UNM**) • Recurring funding to Pueblos, Mescalero, and Jicarilla tribal departments of education for ($150,000 each reoccurring) ~ Development of Education Blueprint ~ Development of Governance Template ~ Monitoring and Evaluation ~ Professional Development ~ Early Childhood Education and Care Program Development Recurring funding to Navajo Education Department ($500,000) • Development of Education Blueprint • Development of Governance Template • Monitoring and Evaluation • Professional Development	**HB 516, HB 250** **New legislation** **New legislation**	<u>NM STATE LAW</u> **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the <u>Yazzie et. al. v. State of New Mexico.</u>* Adopted and Approved on 11/6/2019.

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
		• Early Childhood Education and Care Program Development		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

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NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
Cooperation among Navajo tribes across AZ, UT, NM. IEA, 22-23-2(E).	Defendants have not provided a means for formal government-to-government relationship between the Tribes and the State. *Yazzie* at ¶ 3083.	• Funding for the Southwest Indian Law Clinic at the School of Law (SILC) to expand and include Indian education policies and laws and provide legal and technical support to Pueblos and Tribes in the development of policy protocols, tribal and university agreements, and memoranda of understanding. ($393,000.00) **UNM)** • PED must consult and collaborate with Pueblos, Tribes, and Nations in the development of a needs assessment and accountability tool in to meet the amendments to the Indian Education Act • Recurring funding for Navajo Technical University, establish a new Regional Education Cooperative Center within current REC state framework - Navajo REC, NTU ($150,000.00)	**HB 516** **HB 250** **HB 516** **HB 670**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
Formal Government to Government Relations IEA, 22-23A-2(F).	Defendants have not fulfilled their duty to provide a means for formal government-to-government relationship between the Tribes and the State. *Yazzie* at ¶ 588.	• Every LEAs with a high number of Native American students should negotiate and implement a Memorandum of Agreement with each tribe to cover issues such as communication, truancy, Family Education Rights and Privacy Act (FERPA 20 U.S.C. § 1232g), funding, programming, and services specific to Native American students. • All LEAs must fully comply with the Indian Policies and Procedures (PL-561) and with HB 250 for an annual assessment, in the development of priorities to guide resource investment in collaboration with Tribes in full compliance with provisions outlined in HB 250.	**HB 250** **LEAs must comply with provisions in HB 250 to coordinate and collaborate in conducting an annual assessment and delineate shared responsibilities and accountability enhanced by using MOAs, MOUs and agreements.** **HB 250**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
Relations with Urban Indian Community IEA, 22-23A-2(G)	--	• All LEAs must have an Indian Education Department to work with the Indian Education advisory council to fully implement the provisions of the IEA in alignment with the *Yazzie/Martinez* findings to address the needs of urban Indian students • Recommendation that all urban public schools have an Indian Education Department to advocate for urban Native American students to be able participate in initiatives and educational decisions affecting them. • Through the Native American student needs assessment, accountability and governance framework, each school district shall produce the data on services provided to Native students statewide in compliance with all *Yazzie/Martinez* recommendations fully applied to Urban Indian Students and utilize the government-to-government framework to strengthen the response of	**HB 250** **HB 516**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.

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		LEAs to meet the needs of Urban Students, parents, and community.		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Collaboration: Parents, Schools, Tribes, Higher Education working together to find ways to improve educational opportunities for American Indian students. IEA 22-23A-2(H).	Native American students enrolled in public schools are not receiving adequate academic engagement, rigor, and the preparation necessary for them to experience the same levels of success as non-Native American students; and the public school curriculum and staffing do not reflect Native American student culture and identity. As a result, Native American students who graduate from a public high school in New Mexico and enter a post-secondary institution are in great need of remediation courses and linguistic support; and, similarly, Native American students who enter the workforce often lack writing, public speaking and computation skills. *Yazzie* at ¶ 667. Defendants admit that PED has not developed any educational systems that are specifically targeted at improving the	• **PED**, LEAs must work collaboratively with Tribes to fulfill the provisions under the IEA and fully comply with the *Yazzie/Martinez* findings. • LEAs and Tribes must work cooperatively, collaboratively, and strategically aligning student interest with school programs aligned with higher education programs and workforce development strategies. • Tribes have developed recommendations for recurring operational budgets at the tribal school district levels and higher education to comprehensively respond to the glaring absence of programs to respond to these challenges. • In order to have "equitable and culturally relevant learning environments'" Section (A) for Native American students,	**HB 516** **HB 250** **HB 516** **New Legislation (College Readiness, Internship programs, Educational leadership programs, Operation Graduation, and Trauma Informed Schools)** **HB 250**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	success of Native American students. *Yazzie* at ¶ 560.	substantive collaboration by all stakeholders from Section "(H)" must be adhered to. • Southwest Indian Polytechnic Institute (SIPI)-- funding for dual credit and transfer support services and scholarships. ($100,000.00) • SIPI-- funding for existing early childhood teacher preparation program. ($250,000.00) • SIPI-- funding for existing behavioral health/social work program. ($200,000.00) • SIPI-- funding for existing summer bridge program. ($200,000.00) • Increased funding to build public health capacities and self-determination to		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019

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NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
		address health disparities, to promote prevention, and to project lifespan health needs as demographic shifts occurs at the Center for Native American Health ($696,534.00) • New Mexico Highlands Educational Leadership program. ($625,000.00)		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Tribes Notified of Curricula Development for Approval/Support. IEA, 22-23A-2(I).	Defendants have not fulfilled their duty to ensure that tribes are notified of all curricula development for approval and support. *Yazzie* at ¶ 603. Textbooks, [] continue to marginalize Native Americans and the economic, political and historical contributions made by indigenous people to New Mexico are absent or minimal resulting in students developing a limited perception about the role that Native Americans play in State and Federal government. *Yazzie* at ¶ 463	• State must fully fund tribal Departments of Education as proposed by Tribal leaders to develop the capacity to have a meaningful response to requests for culturally linguistic relevant curriculum (CLR). ($150,000.00 per Pueblo, Navajo Nation, and Apache Tribes) • Establish curriculum and materials development centers (UNM- $550,000.00; NTU/A:shiwi- $2.5 million; Mescalero - $1,500,000.00; • Fully fund curriculum of materials development center programs. (UNM - $500,000.00; Mescalero	**New Legislation proposed to fund Departments of Education.** **HB 670** **HB 516**		

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		$350,000.00; NTU/A:shiwi - $800,000.00). • Fully comply with IEA, *Yazzie/Martinez* findings, and STCA.		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Agreement regarding alignment of BIA and state assessment programs. 22-23A-2(J)	--	• Develop formal agreements to develop a comprehensive alignment of all school systems and their assessment of academic performance to align responses for increasing the success of all Native American students.	**HB 250**		
Parental Involvement (IEA, 22-23A-2(K).	Schools must provide Native American students, including Native American English learners, the same quality of education that is provided to non-Native American students by incorporating into the classroom a culturally relevant curriculum that contains the historical contributions made by indigenous people; opportunities for cross- cultural experiences, where Native American and non- Native American students can interact meaningfully; ***and opportunities for Native American parents to engage in their child's education***. *Yazzie*	• PED, LEAs, and Tribes must actively engage in developing innovative strategies to address the long history of policies and laws that have disengaged parent's involvement in the education of their children. (NM Highlands University, Ben Lujan Leadership Institute $100,000.00)	**HB 516 Proposal to establish a Parent Institute to support PED, LEAs and Tribes**		

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	at ¶ 475.			NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
College Readiness 22-23A-4.1	"Defendants have failed to provide at-risk students with programs and services necessary to make them college or career ready." *Yazzie* at ¶ 3187. Native American students enrolled in public schools are not receiving adequate academic engagement, rigor, and the preparation necessary for them to experience the same levels of success as non-Native American students; and the public school curriculum and staffing do not reflect Native American student culture and identity. As a result, Native American students who graduate from a public high school in New Mexico and enter a post-secondary institution are in great need of remediation courses and linguistic support; and, similarly, Native American students who enter the	• Ensure that tribal departments of education are eligible to receive resources for the development of community based education programs to provide after-school and summer school student services. • Provide recurring funding for replicating College Horizons innovative College Readiness program designed for Native American students. ($1,000,000.00) • Establish internships for career exploration for high school students and college students ($400,000.00 modeled after the SFIS Leadership Institute Internship framework) • Establish an Education Professionals Leadership Program (EPLP) in partnership with UNM, the SFIS Leadership Institute, and	**Amend current At-Risk Legislation** **New Legislation and Appropriations (College Horizons Framework, Leadership Institute Internship Framework, Education Professionals Leadership Program)**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	workforce often lack writing, public speaking and computation skills. *Yazzie* at ¶ 667.	Harvard University Honoring Nations Program. ($491,125.00 recurring funding) • Align student, parent, community, tribal, school, higher education, workforce development, and apprenticeship programs. • Increase in funding for Borderlands/Ethnic Studies. (NMSU $179,000.00)		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3-Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Equitable, culturally relevant learning environment for Indian Students. IEA 22-23A-2(A).	**At-Risk:** At-risk students – low income, Native Americans, English language learners, and children with disabilities – face the greatest educational disparities due to the State's failure to provide a sufficient education. All students – even those who are at risk – can learn if provided with adequately funded programs that have been shown to enhance academic achievement. This potential was demonstrated by testimony from State officials. *Yazzie* at ¶ 2.	• Establish tribal community-based programs for after-school and summer school extended student services • Amend current statute to ensure that Tribes are eligible to receive recurring dollars to fully implement community-based education programs. • PED, LEAs, Higher Education, Program providers, and Tribes must develop a comprehensive approach, including trauma informed practices, to respond to the social, behavioral/mental health challenges that Native American Students face and	**Amendments to At-Risk Statutes** **New Legislation (recurring dollars to Tribes)** **HB 250** **HB 516**		

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		fund school and community-based programs (using Community Schools wrap-around service framework) • PED, LEAs and Tribes must develop culturally relevant practices such as Restorative Justice and Peacemaking to dealing with discipline issues, truancy, and the high dropout rate that continues to disrupt the education of Native American Students and results in the students being pushed out of school and into the prison pipeline.		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Equitable, culturally relevant learning environment for Indian Students. IEA 22-23A-2(A).	**Technology Access:** Given certain geographical challenges, including rural isolation factors, NAEL students in New Mexico may not have ample opportunities to interact with different kinds of English because their school locations often lack access to technology and instructional materials. *Yazzie* at ¶ 325. Being proficient in technology is an essential skill for students…Those children who	• Startup funding and reoccurring appropriations must be provided to invest in the infrastructure to address the glaring need for technology access in tribal communities and schools as a high priority to address the magnitude of the digital divide. ($18.7 million) • The State must invest in the development of education resources centers/libraries as a conduit for technology access	**HB 670** **HB 516**		

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	do not have access to technology are handicapped. *Yazzie* at ¶ 2161.	for students and community members. ($63 million)		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Equitable, culturally relevant learning environment for Indian Students. IEA 22-23A-2(A).	**Special Ed:** The Individuals with Disabilities Education Improvement Act (IDEIA), part B and the Elementary and Secondary Education Act (Every Child Succeeds Act) (ESEA) apply to school age children with disabilities. Under IDEIA each child with a disability is entitled to a free and appropriate public education. *Yazzie* at ¶ 2321. Dr. Margaret McLaughlin, a leading expert in special education policy, testified that the special education funding system in New Mexico is overly complex and lacks the flexibility and predictability that allows districts to implement new programs or adjust individual IEPs as student needs change. *Yazzie* at ¶ 2327. Having tutoring opportunities is important for special education students but there is no funding	• Legislation must be introduced to establish a taskforce to examine the scope of challenges associated with Native American students with disabilities and develop a comprehensive response addressing policy, program, budgets, and statutory changes where necessary or new legislation as called for. Recent examples of the unfair treatment endured by students with disabilities and their parents compel immediate action to address these issues. • PED, LEAs, and Tribes on behalf of the students with disabilities must work collaboratively to develop strategies to strengthen the relationship between teachers and schools with parents and tribal education advocates utilizing protocols, MOUs, MOAs, and/or School/Tribal Agreements in support of	**New Proposed Legislation** **HB 250**		

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	in New Mexico to provide tutoring to special education students. Special education funding in New Mexico is not sufficient to meet the needs of special education students. *Yazzie* at ¶¶ 2348-2349.	students with disabilities to address their unique needs.		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Developing a Systematic Framework in collaboration…with social service providers. NM IEA 22-23-A-10	**Social Workers:** 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. *Yazzie* at ¶ 266. Access to counseling and social workers in schools helps low-income children be successful… [H]aving social workers and counselors in schools is necessary to address any out-of-school issues that Native American children may face.	• The State must fully fund the identified programs in HB 516 to enhance the opportunities for recruitment, retention, and certification of Native American social workers, counselors, health professionals, and non-instructional staff to address the underrepresentation of these professionals as reflected in the findings. • In the spirit of educational sovereignty and affirming tribal core values, the State and Tribal social services and behavioral health workers	**HB 516**		

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	Yazzie at ¶ 271.	must work collaboratively to create, enhance, and implement, culturally, and linguistically relevant services to ensure effective student educational success and racial equity.		NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance.	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Services to be provided to meet the needs of Indian students NM IEA §22-23A-11(D)(3)-(4)	**Counselors:** 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 IEA. *Yazzie* at ¶ 496. Student counseling, mentoring, and monitoring programs have been shown to reduce high school dropout rates and increase graduation rates to produce fiscal benefits that greatly exceed program costs. *Yazzie* at ¶ 270. …[A]ccess to counseling and social work in schools helps	• The State must fully fund programs to produce certified culturally competent counselors as recommended in HB 516 to address the lack of professionally responsive services.	**HB 516**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	low-income children be successful. The State's expert on Indian Education…testified that having social workers and counselors in schools is necessary to address any out-of-school issues that Native American children may face. *Yazzie* at ¶271.			NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance.	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Services to be provided to meet the needs of Indian students NM IEA §22-23A-11(D) (3)-(4)	**Health:** High-performing schools have strong non-academic supports, including counseling, social workers, nurses, and health clinics within schools. *Yazzie at* ¶ 272. The status of public education in New Mexico is among the lowest across fifty states, with the overall state of well-being for New Mexico's children ranked number 49 out of the 50 states on key indicators such as …health, and family and community. *Yazzie* at ¶ 656.	• Provide access to nurses, counselors, and social workers in all schools, ensuring culturally and linguistically responsive services. (Native American Social Workers Institute, NM Highlands- $250,000.00; Center for Native American Health, UNM - $552,000.00) • Provide funding to the Community Behavioral Health Division of the College of Medicine for Native American suicide prevention; clinical and community- based prevention, intervention and research and technical assistance to public schools and tribal communities to address the increase in suicides in Native American youth. (Native American	**HB 516** **New Legislation Establishing a Taskforce to Identify Best Practices for Health, Behavioral/Mental Health currently funded through grants that can be replicated and institutionalized like Circles of Care and Systems of Care, Youth Suicide Prevention, Advancing Wellness & Resiliency in**		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
		Suicide Clearing House, UNM - $450,000.00)	**Education, and the Butterfly Healing Center.**	NM STATE LAW **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)** Assessment, Accountability & Governance.	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the Yazzie et. al. v. State of New Mexico.* Adopted and Approved on 11/6/2019.
Services to be provided to meet the needs of Indian students NM IEA §22-23A-11(D)(3)-(4)	**Extended Learning:** Extended learning time, like summer school, is valuable to all students, but especially to low-income students. *Yazzie* at ¶162. Superintendent Space testified that Grants-Cibola offers after school activities, including tutoring, to all students, but the programs are only accessible to students with personal transportation. Often the district's Native American children who live on the reservation lack access to these programs because they have to find personal transportation. *Yazzie* at ¶ 198.	• Funding for infrastructure for tribal libraries to establish tribal-based after school and summer school programs to ensure Native Students have access to extended learning time and support, including K-12, credit recovery, and internship programs. • Provide adequate and sufficient funding to LEAs for permanent programs such as afterschool and extended summer learning, with sufficient and consistent staff who are provided development and training to deliver cultural and academic services for students thus building the trust and confidence for Native American parents to enroll their children.	**HB 670** **Amendments to existing statutes.** Amendment to current statute to authorize and mandate funding to LEAs to be contacted with tribal education departments for tribal-based after school and summer school programs to ensure Native Students have access to extended learning time and support, including K-12, credit		

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
			recovery, and internship programs.		
	Early Childhood • Early childhood education for children 3 and 4-year old (Pre-K) is an important component to providing a sufficient education and equitable educational opportunities. *Yazzie* at ¶ 6. • Students who attend Pre-K have higher achievement test scores, repeat grades far less often, needless special education, graduate from high school at substantially higher rates, and are more likely to graduate. *Yazzie* at ¶ 67. • According to administrators in the twenty-three Indian Education districts, the following resources, programs and services are necessary to meet both the academic and unique cultural needs of Native Americans enrolled in New Mexico	• Tribes must retain full authority to establish their own criteria standards, and assessment tools for early childhood programs while having full access to state resources for implementation. • Resources must be provided to tribes to develop and implement the design for early childhood programs for the maintenance and enhancement of language and culture. • Resources must be provided to tribal education departments to conduct a needs assessment for infrastructure needs and planning and design for construction of new early childhood education facilities where necessary in all Native American communities. • Develop a tribal community-based certificate/degree program for Early Childhood educators/providers to obtain a certificate or degree while	**Provide $150,000.00 to Tribal Education Departments to comprehensively develop strategies for implementing these recommendations**	<u>NM STATE LAW</u> **NM Constitution** Const. Art. 12, § 1, NM -Education Clause, describing education rights of students in NM public schools. **NM Indian Education Act (2003)** NMSA 1978, § 22-23A-2 -Education rights for Native American students in public schools. **Bilingual/Multicultural Act (2004)** NMSA 1978, § 22-23-1 -The right to include and celebrate multilingualism and multiculturalism in public school curriculum. **Intergovernmental Agreements (1990)** NMSA 1978, § 22-23-1 **State Tribal Collaboration Act (2009)** NMSA 1978, § 11-18-3- Requirements of state government to consult and collaborate with Indian tribes on state policy matters. **HB 250 amended the Indian Education Act (2018)**	**All Pueblo Council of Governors:** Resolution No. APCG 2019-25, *Supporting the Education Institute Yazzie Remedy Recommendations for the 2020 Legislative Session*. Adopted and Approved on 08/22/19. **Mescalero Apache Tribe:** Resolution No. 19-127, Adopted and Approved on 11/4/2019. **Navajo Nation Laws:** Sovereignty in Education Act of 2005 (Title 10) and the Dine School Accountability Plan **Jicarilla Apache Nation:** Resolution No. 2019-R-288-11, *An Action Relating to Native American Education; Supporting the Claims Brought by the Plaintiffs in the <u>Yazzie et. al. v. State of New Mexico.</u>* Adopted and Approved on 11/6/2019.

SIGNIFICANT EDUCATIONAL CHALLENGES					
NM Indian Education Act	**Yazzie Findings (Citing Findings of Facts and Conclusions of Law)**	**Tribal Recommendations**	**Remedies/ Appropriations**	**Accountability & Compliance**	**Educational Sovereignty: Tribal Laws/ Resolutions**
	public schools: b. A culturally- relevant curriculum from Pre-K to grade 12, which requires a blend of contemporary standards within a curriculum that focuses on language, culture, cultural protocols, and orientation. *Yazzie* at ¶ 522.	working full-time. • Development and implementation of a parenting curriculum which provides culturally specific training for tribal communities through native values and native belief systems.		Assessment, Accountability & Governance	

YAZZIE PLAINTIFFS EXHIBIT F
Response to Motion to Dismiss

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.

DECLARATION OF PLAINTIFF CUBA SCHOOL DISTRICT SUPERINTENDENT DR. KAREN SANCHEZ GRIEGO

I, DR. KAREN SANCHEZ GRIEGO (Ed.D), being duly worn, state as follows:

1. The following is true and correct to the best of my knowledge and belief about Cuba School District ("Cuba") for the 2020 and 2021 school years.
2. Cuba owns 11 housing units ("Teacherages"), which are made available for school staff, including teachers, to live in.

3. The Teacherages are meant to help reduce the cost of living for school staff that often cannot find a place to live within the town of Cuba and must commute from a nearby town.
4. In order to hire and retain more teaching staff, Cuba must be able to provide adequate housing as a recruitment incentive for teachers who reside out of state or in other areas of New Mexico.
5. Currently, Cuba’s Teacherages are old, dilapidated and are in need of maintenance, renovation and, in most cases, must be rebuilt.
6. In the 2019-20 SY, Cuba submitted an application to the Public School Finance Authority (PSFA) and was awarded total net state amount for $435,483 in Outside of Adequacy Appropriations, a significant portion of which would have covered the cost of providing minimal maintenance for three Teacherages.
7. Capital funding for Teacherages falls outside of the capital adequacy standards and, therefore, are considered Outside of Adequacy Appropriations.
8. Per the PSFA, Cuba is required to match Out of Adequacy capital funding costs by 70%, which resulted in us having access to only 30% of the net award, for a total of $130,645.
9. For 2020-21, Cuba will not be able to afford maintenance or renovation to any of the 11 existing Teacherages or to rebuild new Teacherages, because we do not have sufficient funds, or the ability to leverage other sources of funds, to satisfy the PSFA’s 70% matching requirement.

I declare under penalty of perjury under the laws of the State of New Mexico that the above statements are true and correct to the best of my knowledge, that if called upon to do so I will competently testify thereto, and that this declaration was executed electronically on APRIL 30, 2020.

/s/ *Karen Sanchez Griego*

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Dr. KAREN SANCHEZ GRIEGO (Ed.D)

YAZZIE PLAINTIFFS EXHIBIT G
Response to Motion to Dismiss

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.,*
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WILHELMINA YAZZIE, individually
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XAVIER NEZ, *et al.,*
Plaintiffs,

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

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

Declaration of Dr. Stephen Barro

Declarant, Dr. Stephen Barro, deposes and states as follows:

1. My name is Stephen Barro. I am over 18 years of age, and I reside in Sandoval County, New Mexico. I am competent to make this Declaration. Everything contained in this Declaration is true.

2. I testified at trial as an expert witness in the above captioned case. My expertise lies in the areas of public school finance and New Mexico's funding formula and public school budget. I have a PhD in economics from Stanford University. Before retiring, I was active for more than 30 years

as a school finance researcher and analyst, first at the RAND Corporation and then at my own research and consulting firm in Washington, DC.

3. Since the trial in the summer of 2017, I have remained current on changes to New Mexico's public school funding formula, student demographics and the public school budget. I have done this through reviewing documents publicly available on New Mexico legislature's website, as well as through obtaining documents from the Public Education Department through Inspection of Public Records requests.
4. I have reviewed the Defendants' Motion and Memorandum for Entry of Order of Satisfaction of Injunction and Dismissal of Action. It is my opinion that Defendants have made numerous incorrect, misleading and/or inaccurate statements in their motion.
5. It is my opinion that Defendants have not fundamentally changed the state's system for financing public schools. It is also my opinion that the state has failed to develop and implement the new accountability system the court deemed essential for ensuring that at-risk students receive the resources and services they need.

HOW TO ADJUST SCHOOL SPENDING FOR INFLATION

6. The state has challenged Plaintiffs' findings that total and per-student spending for public schools have not returned, as of 2019-20, to levels reached in 2007-08. In an affidavit attached to the state's motion to dismiss, Mr. Hipolito Aguilar, a former PED official, asserts that plaintiffs did not use the right inflation measure. He argues, unfathomably, that school spending should be adjusted for inflation by applying an index made up of prices of groceries, clothing, housing, entertainment, personal care, and other goods that families purchase for their own use – i.e. a consumer price index. His opinion, which lacks a basis in economics, is that such an index would be more suitable than an index of the prices of goods and services that state and local governments buy to provide public

services, specifically including public education. The latter type of index – the price index for State and Local Government Consumption Expenditures produced by the Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce, is the inflation measure that I have used in my analysis, and is the most appropriate index to use for adjusting school spending for inflation.

7. Mr. Aguilar's notion of how to adjust school spending for inflation is incorrect. His affidavit shows a lack of understanding of what it means to adjust for price changes (inflation) pertaining to a *specific* category of spending or to a *specific* economic sector, as opposed to adjusting for price changes in general. The applicable principle is that the prices to consider when adjusting specific expenditures for inflation are those of the goods and services that those expenditures are buying. By applying an index of sector-specific prices to data on a sector's spending, one can quantify increases or decreases over time in the *real resources* available to that sector.

8. To illustrate what it means to adjust the expenditures of a specific sector for inflation, consider an example from a non-education field: health care. To determine the trend in real (inflation-adjusted) health care spending, one would use a health-care price index—one that takes into account the cost (compensation) of medical personnel, the cost of drugs, the cost of operating hospitals, and so forth. Applying a general consumer price index to health care spending would yield a wildly misleading impression of the trend in real health care resources because, as is very well known, health care prices have been increasing far more rapidly than prices in general. The same is true, albeit to a lesser degree, of public education, which also has faced cost increases greater (for reasons explained below) than the increases in consumer prices.

9. The consumer price index (CPI) produced by the Bureau of Labor Statistics (BLS) is a good measure of the prices of goods and services that households consume, but these are very different from the items—mainly personnel services—on which public school systems spend their money.

Because the CPI captures the prices of household purchases, it is suitable for analyzing trends in workers' real earnings and in families' standards of living. But school systems do not buy the same kinds of things as households. Rather, they spend their operating money mainly to compensate teachers, aides, counselors, administrators, maintenance workers, and other personnel and, to a much lesser extent, to buy instructional materials, supplies, utilities, and so forth. There is no reason to expect prices of items on the latter list—that is, mainly the costs of compensating school personnel—to change at the same rate as prices of items in the average household budget.

10. An ideal index for adjusting current public school expenditures for inflation would be composed solely of the prices of things that school systems purchase to operate their schools – mainly, as already noted, the services of teachers and other school staff. Because no such index exists, the question is which available and well-validated index approximates it most closely. The two major arguments for choosing the BEA price index for state and local government consumption expenditures are these: First, public education is a dominant state-local service, especially in New Mexico. Therefore, much of the price information embodied in the state-local government price index consists of prices paid for resources used by public schools. Second, current expenditures for other state-local services, like those for public education, consist in large part of compensation of public employees which is generally well-correlated with compensation of education staff. For both reasons, the BEA price index for state-local government consumption expenditures is the established price index that best approximates the index we would ideally want to apply to expenditures of public schools.
11. Mr. Aguilar mischaracterizes the aforesaid state-local government price index, claiming that it includes gross investment (capital) as well as current outlays [¶11-¶13]. This misconception is

understandable, as the BEA produces two different indices of state-local government spending with similar names. These are (a) the index called "Government consumption expenditures and gross investment: state and local" (BEA index identifier A829RD3Q086SBEA), and (b) the index labeled "State and local government consumption expenditures" (BEA index identifier A991RG3Q086SBEA). The first does include gross investment (capital) costs but the second does not, and the second index, which pertains to state-local consumption (i.e., current) expenditures, is the one I used.

12. Mr. Aguilar's assertion in ¶14 that "In general, economists conducting analyses of inflation rely on data provided by the Bureau of Labor Statistics" and specifically on the CPI [¶15-¶17], seems to indicate a lack of familiarity with the diverse inflation measures that economists use to address different issues. Even when examining inflation affecting households, economists do not necessarily use the CPI. For example, the U.S. Federal Reserve Board, which is responsible for monitoring and controlling inflation, prefers an index of consumer prices that is more comprehensive than the CPI, namely BEA's Personal Consumption Expenditure price index (PCE). When looking at economic growth and business cycles, economists use a much broader inflation index than the CPI, namely, the price deflator for gross domestic product (GDP). It is true, as Mr. Aguilar says [¶10], that the price index for state and local government expenditures is not "typically" used to calculate inflation rates but that is only because questions about inflation in state-local government spending arise much less frequently than questions concerning inflation affecting consumer spending and GDP.

13. Mr. Aguilar is also correct that the price index for state and local government expenditures increased more rapidly than the consumer price index from 2008 to 2020 [¶18]. This is exactly what economic theory tells us to expect. As the famous late economist William Baumol

explained in the 1960s in formulating his theory of the "cost disease," service sectors with low productivity growth, such as public education, have to match salary increases in sectors with higher productivity growth, and since the former cannot offset salary increases with productivity gains, their costs rise more rapidly than costs in the general economy. It would be remarkable—and at variance with economists' understanding of inflation—if costs in a labor-intensive service sector like state and local government—and in public education in particular—did not grow more rapidly than costs in the general economy. This is one reason why a general price index like the CPI is not appropriate to apply to expenditures for public schooling.

14. In sum, the BLS CPI index that Mr. Aguilar thinks should be used to adjust New Mexico's public school spending for inflation is not suitable for that purpose because it does not reflect prices of the things school systems buy. Using the CPI would yield a distorted impression—specifically, a significant understatement—of the rate at which costs of personnel and other resources purchased by school systems have increased between 2008 and 2020. While the BEA price index for state and local government expenditures is not a perfect measure of inflation in school spending, it comes the closest among extant inflation indices to the ideal measure; hence it is the most appropriate index to use for comparing real school spending in different years. It is far better suited for that purpose than any consumer price index or any index of inflation in the general economy.
15. There is, however, one important, legitimate use of the CPI index related to the current litigation, namely, to adjust teacher salaries for inflation to show how the purchasing power of those salaries has changed over the years. The CPI is the right choice for this purpose because it reflects the prices of things teachers buy for themselves and their families; hence, it can be used to calculate how the real standard of living of New Mexico teachers has been changing. As I

showed in my affidavit attached to the Yazzie plaintiffs' October 31, 2019 motion for compliance, paragraphs 22-23, New Mexico's average teacher salary, adjusted for inflation according to the CPI, has just barely recovered in 2020 to what it was before the Great Recession, 12 years ago.

16. To avoid any ambiguity as to how I calculated the change in inflation-adjusted school spending between 2007-08 and 2019-20, I present here the full detail of the data and calculations. First, regarding inflation, I used BEA's quarterly data to select price index values for the date most closely preceding the beginning of each school year. Those values reflect prices at the times when school systems finalize their hiring and purchasing decisions for the coming year. Thus, for school year 2007-08 I used the BEA state-local price index value for July 1, 2007, and for school year 2019-20 I used the value for July 1, 2019. The respective index values, taken directly from BEA's price index table, are 88.399 and 115.429 (2012 = 100). The ratio of the latter to the former is 1.306, signifying a cumulative price increase of 30.6 percent over the relevant period.[1] As to expenditures, according to the after-session reports on appropriations published by the Legislative Finance Committee (LFC), the total state *recurring* appropriation for public schools was $2,484.7 million in 2007-08 and $3,251.2 million in 2019-20.[2] However, the latter figure requires an adjustment. Of the $182 million included in the 2019-20 appropriation for two new extended-school-year programs, ELTP and K-5 Plus, only a minor

[1] I do not know where Mr. Aguilar obtained the different (lower) cumulative inflation rates, supposedly for the same index, that he presents in ¶18, as they do not seem to derive from the published BEA table.
[2] The appropriation data for 2019-20 are from New Mexico Legislative Finance Committee*, Legislating for Results: Post-Session Review, Fifty-Fourth Legislature, Second Session,* April 2020. The FY20 recurring appropriation figure shown here has been adjusted upwards, for purposes of comparison with the earlier year, to include $39 million in pre-K funding that the 2020 legislature transferred out of the public school recurring appropriation. The appropriation data for 2007-08 are from *State of New Mexico, Legislative Finance Committee, 2008 Post-Session Review*, March 2008.

fraction, about $71 million, has been made available to districts for spending in 2019-20.[3] Districts have been unable to access the remaining $111 million to buy the things they need to run their schools.[4] Subtracting the unspendable $111 million from the $3,251.2 million appropriation yields an adjusted, spendable 2019-20 appropriation figure of $3,140.2 million. The ratio of this amount to the 2007-08 figure is 1.264, signifying a 26.4 percent increase in spendable dollars between the two years. Because prices increased more rapidly than spending during the same period—30.6 percent, as compared with 26.4 percent—inflation-adjusted spending declined. To be precise, the state's inflation-adjusted recurring appropriation for public schools is 3.2 percent lower in 2019-20 than it was in 2007-08.[5]

17. I note that the question of whether 2020 spending exceeds 2008 spending is relevant only for determining whether New Mexico has at last, after twelve years, restored support for its public schools to the level that prevailed before the Great Recession. Even if the answer were "yes"—which it is not—that would not imply that 2020 spending is adequate. School year 2007-08 was not a golden age in New Mexico education. The state's students performed poorly by national standards back then, just as they do today. In school year 2007-08 New Mexico's real (inflation adjusted) school funding, both total and per student, reached its high point. Subsequently, real school funding declined substantially during the Great Recession, was held well below the pre-

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[3] The Extended Learning Time Program (ELTP) provides funding to lengthen the school year by 10 days. The K-5 Plus program, which has more restrictive requirements, supports 25 days of extra schooling preceding the start of the regular school year.

[4] The unspendable $111 million has been relegated to a newly established Education Reform Fund, to be re-appropriated for unspecified purposes in some unspecified future years.

[5] Alternatively, if one includes *nonrecurring* as well as recurring appropriations in the calculation, the total appropriation figure for 2007-08 becomes $2,500.6 million, and the total for 2019-20 (less the unspendable $111 million) becomes $3,175.5 million. The ratio of the latter to the former is 1.270, signifying a 27.0 percent increase in unadjusted funding between the two years. That translates, after adjusting for the 30.6 percent increase in prices, into a 2.8 percent decline in the inflation-adjusted spendable appropriation between 2007-08 and 2019-20.

recession level for years, long after the recession ended, and still falls short, as of 2019-20, of fully recovering to where it was twelve years ago. Restoring the 2007-08 level of real spending would certainly be a noteworthy step in the right direction, but not enough to support an adequate education for all New Mexico children.

PUBLIC SCHOOL FINANCE SYSTEM

18. Contrary to what Defendants repeatedly assert in their motion, with respect to the finance part of the system, and specifically the funding formula, nothing resembling fundamental change has occurred. The present funding formula not only has the same structure as the formula in effect in 2017 but also, for the most part, includes the same formula factors, defines them in the same way, and assigns them the same weights as did the pre-trial formula. The only two financially significant differences are that the 2019 legislature (a) added new formula factors to fund extensions of the school year, and (b) increased the weight assigned to the formula's at-risk factor. But as of 2019-20, these steps have had little effect on funding and services for at-risk students. As explained in the following paragraphs, neither one—nor the two in combination—comes close to "fundamentally changing" the school finance system.
19. *Extended School Year*. The new SEG formula factors provide funding for the Extended Learning Time Program (ELTP) and the K-5 Plus program, which allow, respectively, additions of 10 and 25 days to the school year. The state appropriation for 2019-20 included $182 million for these programs, which would have amounted to 5.5 percent of total public school funding had that money been made available to districts and schools. However, many districts and schools were either unable or unwilling to sign up for the extended-year programs, as a result of which only about $71 million of the amounts appropriated for those programs was made available in 2019-20. The state had already been providing $30.2 million in extended-year funding through the K-3

Plus program in 2018-19, so the share of the total 2019-20 appropriation attributable to *new* ELTP and K-5 Plus funding is only about $41 million, or less than 1.3 percent of total public school funding, was made available for use in 2019-20. Lengthening the school year is a worthy idea, but a funding increment that small, added atop the existing financial structure, hardly qualifies as fundamental change.

20. Regarding ELTP, the state cites the legislature's appropriation of $62.5 million for the program in 2019-20 but never mentions that 32 percent of this amount was not taken up by districts, and hence will not be spent this year.

21. With respect to K-5 Plus, the state's motion proclaims (p.44), that about $100 million was added in 2019 to the $21 million appropriated in the prior year for the predecessor K-3 plus program. What the state fails to report is that only a fraction—just 24 percent—of this appropriation was made available for school districts to spend in 2019-20. The rest was relegated to an "Education Reform Fund" for possible re-appropriation in some unspecified future years. Further, in an attempt to show that the SEG-based K-5 Plus program is serving many more students, the state's motion compares 2019-20 participation with K-3 participation back in 2013 (p. 45). In fact, according to the Legislative Finance Committee (LFC), the number of K-5 Plus participants in 2019-20, 21,139 students, is only 16 percent more than the 18,207 who participated in 2018-19, when the appropriation for the program was only one-sixth as large.[6]

22. *Increased At-Risk Weight*. The increase in the SEG formula's at-risk weight (unit increment) from .13 at time of trial to .25 for 2019-20 is a quantitative change in a formula factor rather than a qualitative, or fundamental, change in the system. Two points regarding the significance of this change are worth noting: First, the new .25 at-risk unit increment translates into about 17 percent

[6] Legislative Finance Committee, "Legislating for Results: Post-Session Review, Fifty-fourth Legislature, Second Session," April 2020, p. 157.

extra funding per at-risk student.[7] This falls short of the 25 percent extra funding per student that many experts deem minimally adequate for the at-risk group. To generate 25 percent extra funding per student at risk, the SEG formula's at-risk unit increment would have to be set at about .37.[8] Even the .30 unit increment that the legislature has approved for 2020-21 (which may not be realized, as state revenues are likely to contract) falls short of this requirement. Second, although the 2019-20 increase was less than adequate, that increase, were it actually being spent on at-risk students, would have had the potential to help at least some of them do better in school. But regrettably, that potential has not been realized. The state has not acted to ensure that districts and schools spend their at-risk funds to provide supplemental services to at-risk students. Consequently, some districts have been treating supposedly earmarked at-risk funding as general revenue, spending it not on specific services for at-risk students but rather on such things as districtwide salary increases. A factor that has facilitated this misallocation of at-risk funds is that the accountability system that Judge Singleton deemed essential for ensuring that funds are spent to serve at-risk students does not exist (see the discussion of accountability below). In sum, despite the court's emphasis on improving services for at-risk students, nothing resembling fundamental change in the treatment of at-risk students has occurred.

23. Judge Singleton listed four categories of at-risk students for whom the state needs to provide more resources and services: low-income students, English learners (ELs), students with disabilities, and Native American students. The following paragraphs summarize what the state claims to have done and what it has failed to do to address the needs of each group.

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[7] The SEG funding formula assigns different numbers of units (weights) to different categories of students. The average number of units assigned to each student who is neither at-risk nor a student with disabilities is about 1.48. Therefore, the 2019-20 at-risk unit increment of .25 translates into an extra fraction of funding per at-risk student of .25/1.48, which is .169, or about 17 percent.

[8] Because the average number of SEG allocation units per student not at risk and without a disability is 1.48 (see the preceding footnote), the unit increment required to generate 25 percent extra funding per at-risk student would be .25 x 1.48, or .37.

24. *Poor and low-income students*. The at-risk index in the funding formula now, as at the time of trial, takes into account only students from a family with income below the federal poverty line. It leaves out all other low-income students (for example, students from a family at, say, 150 percent of the poverty line) notwithstanding the grave educational disadvantages that many such students face. Most other states that include a low-income factor in their funding formulas count as "low income" all students eligible for free or reduced-price school lunch (FRL). The group so defined includes students with a family income up to 185 percent of the federal poverty line, and so is much broader than the narrow, sub-poverty group New Mexico recognizes. In recent years, the number of New Mexico students eligible for FRL has been about 2.3 times as large as the number of Census-defined poor students for whom the SEG formula provides extra funding.

25. Inexplicably, the lengthy section of the state's motion (pp. 14-34) that lists steps (mostly minimal) taken to improve services for at-risk students leaves out poor and low-income students entirely. It lists actions pertaining to all the other at-risk categories—ELs, students with disabilities, and Native Americans—but cites no initiatives, current or prospective, specifically aimed at helping students who are economically disadvantaged. What makes this void both surprising and consequential is that economically disadvantaged students are by far the largest at-risk group. Even according to the narrow SEG definition, poor students make up 28.8 percent of total 2019-20 state membership. The percentage that would qualify as low-income based on eligibility for FRL is over twice as high. In comparison, ELs account for 14.6 of student membership, students with disabilities make up 21.2 percent, and Native Americans make up somewhere around 10 percent. The state's motion cites no actions, or even plans, to provide services for low-income students that are different from, and more resource-intensive than, those provided to students in general; nor does it mention any steps to shift resources towards schools with higher concentrations of low-income students.

26. *English learners*. EL students are entitled to adequate services under federal and state law, but the judge's findings of fact indicate that adequate services were not being provided in many districts and schools. Although EL students are represented in the SEG formula's at-risk factor, there are no provisions to ensure that they receive their fair share—or any share—of the funds generated by that factor. The state's motion lists numerous actions allegedly taken to improve services for EL students (pp. 21-24), but a careful perusal of the list reveals that most of the listed items, except for an increase in funding for bilingual education, are changes in administrative and support functions, such as promulgation of new standards, revisions of assessment and reporting requirements, future professional staff development, and increased PED staffing.[9] Nowhere on the list does one find actions to strengthen direct services to help ELs become English proficient. The state does not claim, for instance, that it has caused districts to provide specific supplemental services, such as smaller class sizes or tutoring, for EL students having difficulty learning. Thus, while it would be incorrect to say the state has done nothing for ELs, it has not done much. For the most part, the supplemental EL services that expanded at-risk funding could pay for have yet to materialize.

27. A special issue affecting ELs is that some are served in Bilingual Multicultural Education Programs (BMEP), while others are not. The SEG formula factor for BMEP has not changed since trial – it continues to provide an extra 0.5 units, equivalent in 2019-20 to about $2,282, per full-time-equivalent (FTE) BMEP student. The state has not stipulated, however, that districts may use these funds only to cover the *excess* costs of bilingual programs—that is, costs exceeding those of "regular" school programs. Absent such a requirement, the purpose of the extra weighting is likely to be thwarted, as districts will be able to treat the extra BMEP allotments as part of general SEG

[9]The state's motion absurdly includes in its list of measures to help EL students a 2019-20 appropriation of $30 million for instructional materials. This was a state appropriation for instructional materials for districts and schools generally, not an amount earmarked for EL students.

funding. Note also that not all enrollees in BMEP are EL students; many are English speakers seeking to become proficient in a second language. Therefore, even if all BMEP funds were used additively, only a fraction would constitute extra support for the EL category of at-risk students.

28. *Students with disabilities*. Separate from its at-risk factor, the SEG funding formula provides extra weights (funding increments) for students with disabilities—a category that includes, as of 2019-20, about 21 percent of all New Mexico students.[10] The SEG weights for these students, which vary according to severity of disability, are the same now as at time of trial. The state has not increased these weights and so has not provided any significant additional resources for members of this major at-risk subgroup. Under federal law, districts and schools are obliged to provide appropriate services to students with disabilities without regard to the amounts of earmarked state and federal money they receive for that purpose. Each such student is entitled, as a civil right, to receive the services called for in his or her individual education plan (IEP). Judge Singleton found that students with disabilities were not receiving the required resources and services. These findings, coupled with the lack of any additional SEG funding for the disability category, imply that the state still is not providing students with the services they need.

29. To hold districts and schools accountable for fulfilling its obligation to students with disabilities, the state would have to collect and analyze data on the total resources each district and school devotes to special education, regardless of sources of funding. Lacking such a reporting system, the state cannot claim to have complied with Judge Singleton's directive regarding accountability for serving at-risk students—in this case, specifically students who are at risk because of their disabilities.[11]

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[10] According to PED's SEG fund allocation spreadsheet for 2019-20, total membership was 323,100 and the total number of students with disabilities (sum of disability categories A/B, C, DD, and 3Y-4Y DD) was 68,435. The latter amounts to 21.2 percent of the former.

[11] The state does collect partial data on costs of serving students with disabilities to complete its federally required annual Maintenance of Effort (MOE) report. However, the MOE reports capture only the salaries of special education staff for which PED has created separate, specialized occupational codes—

30. *Native American students*. Today, as at time of trial, there is no provision in the SEG funding formula for extra funding for Native American students, even though such students have markedly more severe educational needs, on average, than other student groups.[12] The state has provided some new funding outside the SEG for various bureaucratic structures and support activities pertaining to Indian education (State's Motion at 25-28) but nothing for direct instructional services specifically for Native American students. Thus, Native American students, who make up more than 10 percent of total public school membership, are not covered by the state's existing SEG at-risk provisions, inadequate as they may be, for directing extra resources to students with extra needs.

31. To appreciate the scale of needed funding, consider the following: The 2019-20 SEG formula provides one quarter (.25) of an extra unit per student counted as at-risk which, given the final unit value of $4,602, translates into about $1,150 incremental funding per at-risk student. To provide that same increment for each of the 33,755 Indian students reported in the state's Tribal Education Status Report would require an allotment of $38.8 million. To provide a more adequate supplement of 25 percent extra funding for each Native American student (i.e. an SEG unit increment of about .37) would require $57.5 million. In comparison, the state's motion lists a mere $7.0 million in Indian education funding (other than for teacher housing), little or none of which appears to be for direct instructional services (State's motion at 26 -27).

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for example, salaries of special education teachers, diagnosticians, speech therapists, and special education assistants. It does not even capture total compensation of the identified categories of special education staff because employee benefits are not disaggregated in the same way as salaries. Further, it does not capture any non-personnel expenses for special education and does not take account of services for students with disabilities provided by regular (i.e., not specially coded) school personnel. The last-mentioned item is especially important in light of the federal requirement to serve students with disabilities in "the least restrictive environment," which generally means in the regular classroom.

[12] Statistics demonstrating that both academic performance and graduation rates are lower for Indian students than for other racial/ethnic groups are presented in PED's Tribal Education Status Report for 2018-19.

32. The state's motion argues that improvements in education in general are beneficial for at-risk students (State's Motion at 34), but this argument misses entirely the rationale for providing extra resources and supplemental services to students with extra needs. It may well be true that an across the board increase in resources would have some beneficial effects for all students, including those who are poor or ELL or have disabilities. However, the learning impediments stemming from these conditions are such that at-risk students would be likely to fall further behind other students if the state used money for general purposes rather than specifically to serve students at risk. The reason that school systems throughout the United States provide extra resources for economically and otherwise disadvantaged students is that they understand that such students require substantially more services, hence substantially more funding, than more fortunate students to reach any given level of academic performance. This is why one must focus, when assessing how the state is serving at-risk students, on the *differential* between per-student spending in general and per-student spending for students in the at-risk groups. The key to reducing performance gaps between students who are and are not at-risk is to maintain and enlarge that differential. That requires, at a minimum, ensuring that funds nominally earmarked for at-risk students are, in fact, used only to provide supplemental services for students in the at-risk groups

33. A particularly pernicious extension of the same argument about general education improvement is the recent assertion by some state officials that using earmarked at-risk funds for general purposes is acceptable because at-risk students may derive some benefit from such improvement . What this argument amounts to is denial that any of the following are meaningful: (a) the legislature's designation of certain SEG funds for at-risk students, (b) the strengthened 2019 statutory language regarding accountability for uses of at-risk funds, and (c) the court's multiple findings and orders regarding the need to provide more resources specifically for at-risk students. The practical

implications of this denial became evident early this school year when multiple districts announced that they were using their increased allotments of at-risk dollars for general purposes. State officials, instead of deeming such uses illegitimate, endorsed the districts' actions. PED has shown no inclination to direct districts to spend earmarked at-risk funds only on supplemental services for at-risk students. Enforcing such a requirement is a necessary condition for compliance with the court's ruling regarding schooling for at-risk students.

TOTAL FUNDING AND TEACHER SALARIES

34. It could be that the state's claim of "fundamental change" is based not on specific revisions of the funding mechanism but rather on what the state touts as an extraordinary increase in total funding for 2019-20. However, the state has exaggerated the magnitude of that increase, not only in its motion but also in previous submissions and public pronouncements. The state claims that total funding went up by 448.2 million, or 16 percent, between 2018-19 and 2019-20, but that increase includes the unspendable $111 million portion of ELTP and K-5 Plus funding that districts and schools are unable to use this year (see paragraph 20 above). The true year-to-year change in funding, after netting out this unspendable amount, is $337.2 million, or 12.9 percent. This increase, which came in response to the court's ruling, should be viewed as a catch-up effort, following years during which real (inflation adjusted) school support languished at its post-recession depths. Moreover, even 12.9 percent is an overstatement, as it fails to take account of the inflation that occurred between this year and last year. Adjusting for this minor but not trivial bit of inflation (1.9 percent) brings the year-to-year change in inflation-adjusted total funding down to 10.8 percent. Looking at the matter differently, the growth in inflation-adjusted total funding from its post-recession low point (2011-12) to 2019-20 amounts to an average annual increase of only about 1.6 percent—hardly a remarkable or "game changing" rise in real school support.

35. The same applies to the 2019-20 increase in teacher salaries, which the state also cites as evidence of fundamental change (State's motion, p. 49). While average salaries are estimated to have risen by 10 to 11 percent between 2018-19 and 2019-20, this increase is also a catch-up, following years during which real, inflation-adjusted teacher salaries were held at their post-recession lows. Even now, the average New Mexico teacher salary, adjusted for changes in consumer prices, is just barely above the 2007-08 level, which means that teachers' standards of living have not improved significantly from where they were twelve years ago.
36. The 2019-20 expenditure and salary increases are important—albeit partial—steps towards financial adequacy. Both should be viewed, however, as repairs to a system that the state left to degrade over an extended period rather than as fundamental system changes.

ACCOUNTABILITY

37. The state has not yet acted to develop and implement the kind of accountability system that the court deemed critical for ensuring that earmarked at-risk funds are used to provide at-risk students the services they need. Judging by PED's newly issued guidance regarding statutorily required reporting on uses of at-risk funds, coupled with statements on the subject by high-ranking state officials, it does not appear that the state, left to its own devices, intends to introduce an adequate accountability system. The following paragraphs describe what such a system would have to look like to make it reasonably likely that the court-defined objective will be achieved.
38. As an initial premise, no one can be held accountable for using at-risk funds properly until proper use has been defined. By neglecting to do the latter, the state—specifically PED—has failed even to lay the foundation for an accountability system. The guiding principle has to be that earmarked at-risk funds may be spent only on *supplemental* services for at-risk students.

"Supplemental" means services in addition to those provided through regular school programs and over and above services provided to students not at risk. Absent this additivity requirement, districts and schools will remain free to treat at-risk money as part of general funding, and at-risk students will not be guaranteed the extra resources and services they need to succeed in school. Either the legislature or PED also will have to clarify the following subsidiary issues to let districts and schools know, in operational terms, how they are supposed to allocate and use at-risk funds:

39. *Scope of the obligation to serve at-risk students*. Among the as-yet unresolved questions are whether a district is obliged to serve at-risk students in all or only some of its schools, whether it must serve at-risk students at all or only some grade levels, and whether it must serve all types of at-risk students (low-income, EL, etc.) or may serve only selected types.

40. *Allocation among schools*. The statutory requirement for individual schools to report uses of at-risk funds implies that districts must apportion such funds among schools. Is this supposed to be done by formula? If so, how should a district count the number of low-income students in a school, given that the Census poverty indicator used in the SEG formula is not available below the district level?

41. *Selection of students for at-risk services.* The state needs to clarify whether, within a school, students should be selected for supplemental services based on indicators of at-risk status (e.g., family poverty), indicators of educational need (e.g., low proficiency in reading) , or some amalgam of the two.

42. *What services qualify as supplemental*? The state is likely to leave decisions about specific services to districts and schools, but to ensure that the purpose of at-risk funding is achieved, it must require that all services paid for with those funds be truly supplemental—meaning additive

to regular school services supported with general funds—and distinguishable, qualitatively or quantitatively, from services for the general student population.

43. *Schools with the highest at-risk concentrations*. Finally, special provisions are needed for schools in which overwhelming majorities of students qualify as at-risk—for example, schools on or near Indian reservations—because for those schools the notion of providing differentiated services for students at-risk and not at-risk makes no sense.

44. Once the now-missing foundation for accountability has been constructed, success in directing nominally earmarked at-risk funds to at-risk students will depend on how rigorous a reporting and monitoring system the state establishes.

45. A meaningful report for an individual school would present the following information for each activity that the school has supported with at-risk money:

- Which types of students were served and what services did they receive (e.g., after-school tutoring for 3rd graders having trouble learning to read)?
- How many students were served and how many hours of service did they receive?
- Who were the service providers (teacher, specialist, assistant, counselor, etc.), and what was their compensation?
- What other costs were incurred (non-personnel direct expenses, administrative and support costs)?
- What was the total cost of the activity and the cost per student served?
- What was the *excess* cost of the activity, compared with the cost of regular services the same students would otherwise have received?

44. The last item is especially important for ensuring that services paid for with at-risk funds are truly supplemental. In some instances, an entire activity, by its nature, will be fully supplemental (as in the case of after-school tutoring). In other cases, however, an activity will substitute for regular services the same students would otherwise have received as, for example, when students are "pulled out" of a class for part of a day to receive special services. In the latter instances, it would only be the extra, or excess, cost of the special services that would properly be chargeable to at-risk funds. For this reason, reporting of the excess costs as well as the total costs of each

service for at-risk students is essential to ensure that earmarked at-risk dollars do not supplant regular school funds.

45. One would expect to see in each school report a summation of the excess costs incurred for all activities the school conducts for its at-risk students. That total should, of course, be equal to or greater than the school's allotment of at-risk funds. Likewise, a district's report should add up the excess costs of supplemental services provided by all the district's schools plus costs for at-risk programs incurred by central district offices. The latter might include, as examples, costs of developing the programs, supervising their implementation in the schools, and measuring and analyzing program outcomes.

46. Regarding monitoring, the aforesaid reporting requirements would be pointless if there were no one at the receiving end—in PED—to review the reports, to interact with the districts and schools, and to verify what needs to be verified. These would be no trivial tasks. Not only would there be reports from 89 districts, but the statute specifically states that all individual schools—both district and charter schools—of which there are over 800, shall "identify the ways…in which [they] use funding generated through the at-risk index." It would take a substantial staff within PED to deal in any meaningful way with this multiplicity of reports.

47. Of course, the monitoring function extends well beyond reviewing reports. The PED office charged with overseeing uses of at-risk funds would have multiple responsibilities. It would be the office to formulate and disseminate rules regarding the proper uses of at-risk funds, to specify what the statutorily required district and school reports should contain, to train district and school officials who administer at-risk programs, to review the at-risk portions of districts' and schools' annual education plans, and to provide needed technical assistance. It would have to have capacity to conduct field visits, where necessary, to confirm that districts and schools are

interpreting the at-risk requirements correctly and that supplemental services are being delivered as claimed. It would have to be equipped and empowered to take corrective action when evidence emerges (one hopes rarely) that at-risk funds have been misused. There appears to be no extant entity within PED capable of performing all these functions. Substantial new capacity will have to be created at the state level to ensure that uses of at-risk money comport with legislative intent.

FURTHER DECLARANT SAYETH NOT.

I declare under penalty of perjury under the law of New Mexico that the foregoing is true and correct to the best of my information and belief.

April 30, 2020	*/s/ Stephen Barro*
DATE	STEPHEN BARRO

STATE OF NEW MEXICO

Report of the Legislative Finance Committee to the Fifty-Fourth Legislature

May 2019
For Fiscal Year 2020

FIRST SESSION
Post-Session Review

YAZZIE PLAINTIFFS EXHIBIT H
Response to Motion to Dismiss

2019 Post-Session Review

PUBLIC SCHOOL SUPPORT AND RELATED APPROPRIATIONS FOR FY20

(in thousands of dollars)

#	School Year 2018-2019 Preliminary Unit Value = $4,159.23 School Year 2017-2018 Final Unit Value = $4,115.60	FY19 OpBud	FY20 Executive Recommendation	FY20 LFC Recommendation	Laws 2019, Chapter 271	#
1	**PROGRAM COST**	$2,567,558.7	$2,646,377.6	$2,646,377.6	$2,646,377.6	1
2	Base Adjustment/Reversion Credit	($2,318.3)				2
3	*UNIT CHANGES*					3
4	Increase At-Risk Index from 0.130 to 0.250	$22,541.4	$113,177.9 [1]	$113,177.9 [1]	$113,177.9 [1]	4
5	Enrollment Growth Units		$12,258.9			5
6	Bilingual and Multicultural Education Programs (Exec: 0.5 to 0.6 factor, HAFC/SFC: additional units)		$6,954.5 [2]		$6,954.5	6
7	Set School Age Limit at 22			($6,129.0) [1]	($6,129.0) [1]	7
8	Prohibit School Size Adjustment within Large Districts (>2,000 MEM) - 3 yrs (SFC: 5 yrs)			($14,773.1) [1]	($9,041.6) [1]	8
9	New Rural Population Units - 3 yrs (LFC: 0.10, HAFC: 0.15, SFC: 5 yrs)			$5,788.4 [1]	$5,204.5 [1]	9
10	Extended Learning Time Factor (Exec: 183 days, LFC/HAFC/SFC: 190 days, afterschool, 80 PD hrs.)		$18,749.3 [1]	$62,497.5 [1]	$62,497.5 [1]	10
11	K-5 PLUS Formula Factor (All eligible schools can add 25 days)		$119,895.6 [1]	$119,895.9 [1]	$119,895.9 [1]	11
12	Eliminate Size Adjustment for Special Separate Schools of Alternative Education	($6,162.8)				12
12	Other Projected Net Unit Changes	($1,066.6)			($11,173.3)	12
13	*UNIT VALUE CHANGES*					13
14	Instructional Materials (Exec in Categorical)			$25,000.0	$30,000.0	14
15	Increase Employer Retirement Contributions (Exec: 0.5%, LFC: 1.0%, HAFC: 0.5%, SFC: 0.25%)		$8,500.0 [3]	$16,946.9 [3]	$4,250.0 [3]	15
16	Insurance	$2,794.3	$10,000.0	$9,014.0	$9,014.0	16
17	Fixed Costs		$4,000.0		$4,000.0	17
18	Minimum Wage for Public School Personnel (Exec: $12/hr, HAFC/SFC: $10/hr)		$5,950.5 [2]		$169.6	18
19	Raise Compensation for Teachers (Exec: 6.0%, LFC: 5.5%, HAFC/SFC: 6.0%)	$31,276.2	$77,753.0	$71,113.7	$77,753.0	19
20	Raise Compensation for Principals (Exec: 6.0%, LFC: 7.5%, HAFC/SFC: 6.0%)	$1,937.2	$6,225.4	$7,764.4	$6,225.4	20
21	Raise Compensation for Other School Personnel (Exec: 6.0%, LFC: 4.0%, HAFC/SFC: 6.0%)	$12,206.0	$37,694.4	$25,468.0	$37,694.4	21
22	Increase Teacher Minimum Salaries (LFC: $40k, $50k, $60k, Exec/HAFC/SFC: $41k, $50k, $60k)	$17,611.5	$48,063.1 [1]	$32,527.1 [1]	$38,217.4 [1]	22
23	Increase Principal Minimum Salaries (Exec/LFC/HAFC/SFC: $60k)		$757.5 [1]	$2,319.6 [1]	$2,215.6 [1]	23
24	**SUBTOTAL PROGRAM COST**	**$2,646,377.6**	**$3,116,357.6**	**$3,116,988.9**	**$3,137,303.4**	24
25	**Dollar Change Over Prior Year Appropriation**	$78,818.9	$469,980.1	$470,611.3	$490,925.8	25
26	**Percent Change**	3.1%	17.8%	17.8%	18.6%	26
27	LESS PROJECTED CREDITS (FY17 Actual: $65 million, FY18 Actual: $77 million)	($59,000.0)	($61,814.8)	($63,500.0)	($63,500.0)	27
28	LESS OTHER STATE FUNDS (From Driver's License Fees)	($5,000.0)	($5,000.0)	($5,000.0)	($5,000.0)	28
29	**STATE EQUALIZATION GUARANTEE**	**$2,582,377.6**	**$3,049,542.8**	**$3,048,488.9**	**$3,068,803.4**	29
30	**Dollar Change Over Prior Year Appropriation**	$80,568.9	$467,165.3	$466,111.3	$486,425.8	30
31	**Percent Change**	3.2%	18.1%	18.0%	18.8%	31
32	**CATEGORICAL PUBLIC SCHOOL SUPPORT**					32
33	TRANSPORTATION					33
34	Maintenance and Operations	$74,167.5	$65,158.0	$54,167.5	$56,397.9	34
35	Fuel	$12,979.0	$10,961.1	$12,979.0	$12,979.0	35
36	Rental Fees (Contractor-Owned Buses)	$9,194.4	$6,565.1	$9,194.4	$9,194.4	36
37	Transportation for Extended Learning Time (Exec: 183 Days, LFC/HAFC/SFC: 190 Days)		$823.7 [1]	$2,745.6 [1]	$2,745.6 [1]	37
38	Transportation for K-5 Plus		$3,744.0 [1]	$3,744.0 [1]	$3,744.0 [1]	38
39	Raise Compensation for Transportation School Personnel (Exec: 6.0%, LFC: 4.0%, HAFC/SFC: 6.0%)	$1,163.4	$3,567.6	$2,423.5	$3,567.6	39
40	**SUBTOTAL TRANSPORTATION**	**$97,504.3** [4]	**$90,819.5** [4]	**$85,254.0** [4]	**$88,628.5** [4]	40
41	SUPPLEMENTAL DISTRIBUTIONS					41
42	Out-of-State Tuition	$300.0	$300.0	$300.0	$300.0	42
43	Emergency Supplemental	$2,000.0	$3,000.0	$1,000.0	$1,000.0	43
44	INSTRUCTIONAL MATERIAL FUND (LFC in Program Cost)	$8,000.0 [4]	$21,900.0			44
45	Dual Credit Instructional Materials	$1,000.0	$2,000.0	$1,000.0	$1,000.0	45
46	Standards-Based Assessments (K-12 English Language Arts and Math)	$6,000.0	$6,000.0	$6,600.0	$6,000.0	46
47	INDIAN EDUCATION FUND	$1,824.6 [5]	$6,000.0	$2,500.0 [5]	$6,000.0	47
48	**TOTAL CATEGORICAL**	**$116,628.9**	**$130,019.5**	**$96,654.0**	**$102,928.5**	48
49	**TOTAL PUBLIC SCHOOL SUPPORT**	**$2,699,006.4**	**$3,179,562.3**	**$3,145,142.9**	**$3,171,731.9**	49
50	**Dollar Change Over Prior Year Appropriation**	$104,732.2	$480,555.8	$446,136.4	$472,725.5	50
51	**Percent Change**	4.0%	17.8%	16.5%	17.5%	51
52	**RELATED REQUESTS: RECURRING**					52
53	Regional Education Cooperatives	$1,038.0	$1,038.0	$1,039.0	$1,039.0	53
54	K-3 Plus Fund	$30,200.0				54
55	Public Pre-Kindergarten Fund	$29,000.0 [6]	$64,400.0	$39,000.0 [6]	$39,000.0 [6]	55
56	Early Literacy Initiatives	$8,837.0				56
57	Breakfast for Elementary Students	$1,600.0	$1,600.0	$1,600.0	$1,600.0	57
58	After School and Summer Enrichment Programs	$325.0	$1,000.0			58
59	Teacher Development and Evaluation System	$1,000.0 [7]	$2,000.0	$1,000.0 [7]	$1,000.0 [7]	59
60	STEAM Initiative (Science, Technology, Engineering, Arts, and Math Teachers)	$3,000.0	$6,000.0	$3,000.0	$5,000.0	60
61	Teacher and School Leader Preparation Programs	$1,000.0	$1,000.0			61
62	College Preparation, Career Readiness, and Dropout Prevention	$1,500.0	$1,500.0			62
63	Advanced Placement Test Fee Waivers and Training	$1,000.0	$1,500.0	$1,250.0	$1,500.0	63
64	Interventions and Support for Students, Teachers, Struggling Schools, and Parents	$4,000.0				64
65	Attendance Success Initiative (Truancy and Dropout Prevention)	$4,000.0	$6,000.0			65
66	Principal Professional Development and Mentorship (Principals Pursuing Excellence)	$2,000.0	$2,500.0	$2,500.0	$2,500.0	66
67	New Mexico Grown Fruits and Vegetables	$200.0	$400.0	$200.0	$200.0	67

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68	GRADS – Teen Parent Interventions	$200.0 [8]	$400.0	$200.0 [8]	$200.0 [8]	68
69	Teacher Professional Development and Mentorship (Teachers Pursuing Excellence)	$2,000.0	$2,500.0	$2,500.0	$2,500.0	69
70	Parent and Family Engagement		$1,450.0	$400.0		70
71	New Mexico Teacher Leadership Networks		$1,000.0	$400.0		71
72	English Learners and Bilingual Multicultural Education Program Support		$2,500.0	$2,500.0	$2,500.0	72
73	Teacher Supply Program		$5,000.0			73
74	School-Based Health Centers			$1,500.0	$1,350.0	74
75	Career Technical and Vocational Education and Apprenticeship Programs		$5,000.0	$1,000.0	$3,000.0	75
76	Community School Initiatives		$2,000.0		$2,000.0	76
77	Indigenous Education Initiatives				$1,000.0	77
78	Academic Engagement and Professional Development		$3,000.0			78
79	**TOTAL RELATED APPROPRIATIONS: RECURRING**	**$90,900.0**	**$111,788.0**	**$58,089.0**	**$64,389.0**	79
80	**Dollar Change Over Prior Year Appropriation**	$2,715.0	$20,888.0	($32,811.0)	($26,511.0)	80
81	**Percent Change**	3.1%	23.0%	-36.1%	-29.2%	81
82	**SUBTOTAL PUBLIC EDUCATION FUNDING**	**$2,789,906.4**	**$3,291,350.3**	**$3,203,231.9**	**$3,236,120.9**	82
83	**Dollar Change Over Prior Year Appropriation**	$107,447.2	$501,443.8	$413,325.4	$446,214.5	83
84	**Percent Change**	4.0%	18.0%	14.8%	16.0%	84
85	**PUBLIC EDUCATION DEPARTMENT**	**$11,246.6**	**$13,246.6**	**$14,497.6**	**$13,246.6**	85
86	**Dollar Change Over Prior Year Appropriation**	$181.3	$2,000.0	$3,251.0	$2,000.0	86
87	**Percent Change**	1.6%	17.8%	28.9%	17.8%	87
88	**GRAND TOTAL**	**$2,801,153.0**	**$3,304,596.9**	**$3,217,729.5**	**$3,249,367.5**	88
89	**Dollar Change Over Prior Year Appropriation**	$107,628.5	$503,443.8	$416,576.4	$448,214.5	89
90	**Percent Change**	4.0%	18.0%	14.9%	16.0%	90

	Detail on Categorical Appropriations	FY19 OpBud	FY20 Executive Recommendation	FY20 LFC Recommendation	Laws 2019, Chapter 271	
40	SUBTOTAL TRANSPORTATION	$97,504.3	$90,819.5	$85,254.0	$88,628.5	40
40.1	Plus: Public School Capital Outlay Fund (Other State Funds)	$2,500.0	$25,000.0	$22,500.0	$25,000.0	40.1
40.2	**TOTAL TRANSPORTATION**	**$100,004.3**	**$115,819.5**	**$107,754.0**	**$113,628.5**	40.2
44	INSTRUCTIONAL MATERIAL FUND	$8,000.0	$21,900.0	$0.0	$0.0	44
44.1	Plus: Public School Capital Outlay Fund (Other State Funds)	$4,500.0	$0.0	$0.0	$0.0	44.1
44.2	**TOTAL INSTRUCTIONAL MATERIAL FUND**	**$12,500.0**	**$21,900.0**	**$0.0**	**$0.0**	44.2
47	INDIAN EDUCATION FUND	$1,824.6	$6,000.0	$2,500.0	$6,000.0	47
47.1	Plus: Indian Education Fund (Other State Funds)	$675.4	$0.0	$2,000.0	$0.0	47.1
47.2	**TOTAL INDIAN EDUCATION FUND**	**$2,500.0**	**$6,000.0**	**$4,500.0**	**$6,000.0**	47.2
	Subtotal: Other State Funds	$7,675.4	$25,000.0	$24,500.0	$25,000.0	

Footnotes

1 Contingent on enactment of House Bill 5 or Senate Bill 1.
2 Contingent on enactment of other legislation.
3 Contingent on enactment of House Bill 501 or similar legislation.
4 Includes appropriations from the public school capital outlay fund. See Detail on Categorical Appropriations.
5 Includes appropriations from the Indian education fund balance. See Detail on Categorical Appropriations.
6 Includes $3.5 million from the Temporary Assistance for Needy Families (TANF) grant. In FY19 and prior years, the appropriation included $3.5 million from the TANF grant.
7 Includes $1 million from the educator licensure fund. In FY19, the appropriation included $1 million from the educator licensure fund.
8 Includes $200 thousand from the federal Temporary Assistance for Needy Families (TANF) grant. In FY19, the appropriation included $200 thousand from the TANF grant.
9 Contingent on enactment of Senate Bill 280.

STATE OF NEW MEXICO
PUBLIC EDUCATION DEPARTMENT
300 DON GASPAR
SANTA FE, NEW MEXICO 87501-2786
Telephone (505) 827-5800
www.ped.state.nm.us

RYAN STEWART, ED.L.D.
SECRETARY DESIGNATE OF EDUCATION

MICHELLE LUJAN GRISHAM
GOVERNOR

April 24, 2020

MEMORANDUM

TO: Local School Boards, Charter School Governing Bodies, Superintendents, Charter School Head Administrators, Chief Financial Officers, and Business Managers

FROM: Kara Bobroff, Deputy Secretary of Identity, Equity, and Transformation

RE: Education Plan Narratives regarding At-Risk Students and Program Units

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Background

Beginning with Fiscal Year 2021 (FY21), changes to the Public School Code (§22-8-6(E) NMSA 1978) require narratives from school districts and charter schools to be included in the Educational Plan submitted along with the school district or charter school's operating budget. These narratives should describe services and expenditures for at-risk students, including:

- identified services to improve academic success of at-risk students[1];
- services provided to students enrolled in extended learning[2] and K-5 Plus programs[3];
- supplemental services offered to ensure implementation of the Bilingual Multicultural Education Act, the Indian Education Act, and the Hispanic Education Act[4]; and
- the amount of program cost generated for services for students with disabilities and the spending of those revenues on services to students with disabilities[5].

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[1] §22-8-6(E)(2) NMSA 1978.
[2] §22-8-6(E)(3)(a) NMSA 1978.
[3] §22-8-6(E)(3)(b) NMSA 1978.
[4] §22-8-6(E)(5) NMSA 1978.
[5] §22-8-6(E)(6) NMSA 1978 provides in full that "a narrative describing the amount of program cost generated for services to students with disabilities and the spending of these revenues on services to students with disabilities … shall include the following:

(a) program cost generated for students enrolled in approved special education programs;
(b) budgeted expenditures of program cost, for students enrolled in approved special education programs, on students with disabilities;
(c) the amount of program cost generated for personnel providing ancillary and related services to students with disabilities;
(d) budgeted expenditures of program cost for personnel providing ancillary and related services to students with disabilities, on special education ancillary and related services personnel; and
(e) a description of the steps taken to ensure that students with disabilities have access to a free and appropriate public education".

Definition of an At-Risk Student

Districts and charter schools should use the following definition of "at-risk student" when designing their Educational Plan and budget for FY21:

An "at-risk student"[6] means a student who:

1. is designated an English language learner;[7]
2. is economically disadvantaged[8];
3. is Native American[9];
4. has a disability;[10] or
5. is highly mobile, as shown by a failure to remain in school for an entire year or consecutive years[11].

How the NMPED Calculates At-Risk Units

Under the provisions of §22-8-23.3 NMSA 1978, a school district or charter school is eligible to receive at-risk funding through the State Equalization Guarantee distribution if it establishes a plan that identifies services implemented to improve the academic success of at-risk students. The Educational Plan referenced above meets this requirement. The amount of funding received annually is based on the number of program units a school district or charter school generates from those students identified within the New Mexico Funding Formula as 'at-risk."

Calculating at-risk units is done by adding together the three-year rolling average of the following at-risk indices for each school district or charter school[12]:

(1) percentage of students used to determine its Title I allocation;

(2) percentage of membership classified as English Language Learners; and,

(3) percentage of student mobility.

The resulting number – **Three-Year Average Rate** - is used as follows:

Three-Year Average Total Rate X 0.3 = At-Risk Index[13]

The at-risk index is then used to calculate the at-risk units a school district or charter school is entitled to as follows:

At-Risk Index X MEM = Units

[6] For budget submission purposes.
[7] Using criteria established by the Office for Civil Rights of the United States Department of Education. Section 22-8-23.3(B) NMSA 1978, At-Risk Program Units. English learners are also identified as at-risk students in Judge Singleton's Final Judgement and Order, 2/14/19, p. 2.
[8] Section 22-8-23.3(B) NMSA 1978, At-Risk Program Units. Economically disadvantaged students are also identified as at-risk students in Judge Singleton's Final Judgement and Order, 2/14/19, p. 2.
[9] *Martinez* and *Yazzie* Final Judgement and Order, 2/14/19, p. 3.
[10] *Martinez* and *Yazzie* Final Judgement and Order, 2/14/19, p. 3.
[11] *Martinez* and *Yazzie* Decision and Order, 7/20/18, p. 47.
[12] §22-8-23.3(B) NMSA 1978.
[13] §22-8-23.3(B) NMSA 1978, as amended by House Bill 59 (2020 regular legislative session), effective July 1, 2020.

In this calculation, MEM is equal to the total district membership, including early childhood education, full-time-equivalent membership, and special education membership.

The at-risk index is recalculated annually[14].

How the PED Calculates Individual At-Risk Indices

The individual at-risk indices are calculated as follows[15]:

(1) Percentage of students used to determine Title I allocation:

- Title I index
  - This is determined by taking the number of students in a school district or charter school identified as Title I eligible and dividing by the total school district or charter school membership from the 40th day headcount.
  - The quotient is expressed in decimal form.

Title I Eligible Students ÷ 40-D Headcount = % of Title I Students

(2) Percentage of membership classified as English Language Learners:

- **The English Learner (EL) index**
  - This is determined by taking the number of students in a school district or charter school identified as English Learners and dividing by the total district membership from the 40th day headcount.
  - The quotient is expressed in decimal form.

Title I Eligible Students÷ 40-D Headcount = % of Title I Students

(3) Percentage of Student Mobility:

- **The Student Mobility index**
  - The mobility calculation is designed to account for students whose movement in and out of school impacts learning opportunity. While this may seem to be a complicated calculation it really is looking at the movement of students in and out of schools and addressing the effects on learning. This at-risk component captures the sum of current year enrollments from outside of New Mexico public schools, transfer of students both within and from outside of the school district or charter school, students transferring out of school district or charter school and those dropped from the roles for absences of ten days. This sum is then divided by the number of students initially enrolled for the year from New Mexico public schools minus any students withdrawn due to death.
  - The quotient is expressed in decimal form. This can be expressed as follows:
    - E1 – Initial enrollment for the current school year.

[14] §22-8-23.3(C) NMSA 1978.
[15] §22-8-23.3(B) NMSA 1978.

- E2 – Initial enrollment into NM public schools for the current school year after being enrolled elsewhere outside of a NM public school.
- R1 – Transfer within school district or charter school.
- R2 – Transfer from outside of the school district or charter school.
- R3 – Previously dropped from enrollment and returns without enrolling in another NM public school.
- W1 – Transfer to another NM public school
- W2 – Absent for 10 days, dropped from roles.
- WD – Withdrawn due to death.

$$[(E_2 + R_1 + R_2 + W_1 + W_2) - R_3] \div (E_1 - W_D) = \%\ \textbf{Mobility}$$

While this appears to be a complicated calculation it really is looking at the movement of students in and out of schools and addressing the effects on learning.

Conclusion

If you have any questions about Education Plan narratives regarding at-risk students and at-risk program units, then please email Mayra Valtierrez at mayra.valtierrez@state.nm.us. We appreciate all you do in to serve all of the State's students.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

YAZZIE PLAINTIFFS EXHIBIT J
Response to Motion to Dismiss

April 15, 2020

Honorable Ryan Stewart
Secretary of Education
New Mexico Public Education Department
300 Don Gaspar Avenue
Santa Fe, New Mexico 87501-2786

Dear Secretary Stewart:

Enclosed is a report concluding that New Mexico does not meet the requirements of section 7009(b) of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act (ESEA). As a result, the State is not eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July 1, 2019 through June 30, 2020 (State fiscal year (FY) 2020).

A copy of the certification and report is being sent to all school districts in New Mexico to inform them of their right to a hearing. The State or any local educational agency adversely affected by this action may request, in writing and within 60 days of the receipt of this notice, a hearing under ESEA sections 7009 and 7011(a) and 34 C.F.R. § 222.165. A request for a hearing must specify the issues of fact and law to be considered, and should be sent to: Marilyn Hall, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244, and with a copy emailed to Impact.Aid@ed.gov.

Sincerely,

Marilyn Hall
Digitally signed by Marilyn Hall
Date: 2020.04.15 08:42:30 -04'00'

Marilyn Hall
Director
Impact Aid Program

Enclosures
cc: New Mexico Superintendents

REPORT FOR THE YEAR JULY 1, 2019 - JUNE 30, 2020 (STATE FISCAL YEAR 2020) UNDER SECTION 7009(B) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709(b))

State – New Mexico

Section I. Background

A. Procedural History

The Director, School Budget and Finance Analysis Bureau, Public Education Department (PED), State of New Mexico (State), notified the U.S. Department of Education (Department) and all New Mexico school districts of the State's intention, under Section 7009(b) of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (ESEA), to take Impact Aid payments into consideration in the calculation of school aid for the period of July 1, 2019 to June 30, 2020 (State fiscal year (FY) 2020). The notice was by letter to this office dated December 31, 2018, and a memorandum to all school districts in the State with the same date. The Department received data in support of the request for certification under section 7009(b) by email on February 27, 2019. This data submission was timely submitted at least 120 days before the beginning of State FY 2020 on July 1, 2019, as required by 34 C.F.R. § 222.164(b)(2)(ii).

Subsequent to the February 2019 submission, on April 3, 2019, the New Mexico Governor signed Senate Bill 1, which made a substantial change to the State aid program for State FY 2020 and subsequent years. The Impact Aid Program (IAP) statute and regulations require that when a State makes substantial changes to its aid program, the State must submit projected data showing how the State's program will meet the disparity standard under the new aid formula, and must submit actual data soon as it is available. The projection must detail the assumptions made and come with an assurance of accuracy. Further, the State must assure that if final data do not demonstrate that it met the disparity standard for the fiscal year in question, the State will pay to each affected LEA the amount by which the State reduced State aid to the LEA. (ESEA section 7009(b)(3); 34 C.F.R. § 222.161(b)(2)).

The PED sent a letter dated May 16, 2019, requesting the ability to make estimated payments deducting Impact Aid, pursuant to 34 C.F.R. § 222.161(a)(6). In a letter dated June 25, 2019, the State submitted revised projected data that accounts for changes to the State aid formula in Senate Bill 1 with respect to the membership data, along with the assurance required by the Impact Aid regulations. The projected data is based on final revenues for FY 2018, the most recent year for which final data were available; it models the impact of Senate Bill 1 by adjusting or adding to the formula's student weights in accordance with the FY 2020 funding formula.

The Department granted the PED's request to make estimated payments deducting Impact Aid, by letter dated June 27, 2019. On that same date, the Department notified all Local Educational Agencies (LEAs) in the State of their opportunity to request a predetermination hearing within 30 days concerning the State's request, as provided in section 7009(c)(2) and 34 C.F.R. § 222.164(b)(5). Three LEAs requested such a hearing on a timely basis: Zuni School District

(ZSD), Gallup McKinley Counties School District (GMCSD), and Central Consolidated School District (CCSD). The predetermination hearing was held via teleconference on September 10, 2019. The three requesting LEAs participated, as well as individuals and representatives from several other LEAs.

A transcript was subsequently provided to all parties. During the hearing, the parties were given 15 days to submit post-hearing comments. Via email to all parties on September 11, 2019, this office granted an additional 15 days to submit post-hearing comments, making the deadline October 10, 2019. A joint LEA document was timely submitted by ZSD, GMCSD, and CCSD (collectively, "the LEAs"); the NM PED also submitted timely written comments.

B. The Disparity Test Analysis

A State aid program is determined to equalize expenditures amongst LEAs "if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs is no more than 25 percent." (34 C.F.R. § 222.162(a)). The regulations define "revenue" as including "only revenue for current expenditures." (34 C.F.R. § 222.161(c)). In performing this disparity test, a state must choose to compare current expenditures or revenues and must choose whether to exclude special cost differentials (funds designated to a district because of specific characteristics of that district or specific characteristics of students in that district). (34 C.F.R. § 222.162(d)). New Mexico has chosen the "adjusted revenue per mem" basis, i.e. the exclusion method on a revenue basis. (34 C.F.R. § 222.162(d)(3)). Under this test, the State first considers each LEA's revenue in the given fiscal year. Only revenue that can be used for current expenditures is considered. (34 C.F.R. § 222.161(c)).[1] Next, the State removes revenues for special cost differentials. These are funds associated with "pupils having special educational needs" or "particular types of LEAs." (34 C.F.R. § 222.161(c)(2)). Finally, the State divides this amount by an unweighted pupil count. (34 C.F.R. § 222.161(d)(3)). This is the amount of revenue per pupil that is then compared to the other LEAs to determine if the State aid program has equalized expenditures.

C. State School Finance Formula for FY 2020 and the State's Data Submission

The general rule for calculating the disparity test is to use data from the second-preceding fiscal year, if the same funding formula is in effect. (34 CFR 222.161(b)(1)). For FY 2020 the same program was not in effect in the second preceding fiscal year (which corresponds to school year 2017-18). Therefore, under the regulations, the State submitted for its membership data a combination of final 17-18 data, and projected data for FY 2020 to reflect the changes in State law. See 34 C.F.R. § 222.161(b)(2). For the revenues, it submitted final data from 2017-2018.

[1] The Impact Aid law defines ''current expenditures'' as: "expenditures for free public education, including expenditures for administration, instruction, attendance and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities, but does not include expenditures for community services, capital outlay, and debt service, or any expenditures made from funds awarded under part A of title I. The determination of whether an expenditure for the replacement of equipment is considered a current expenditure or a capital outlay shall be determined in accordance with generally accepted accounting principles as determined by the State." (ESEA section 7013(4)).

As we understand the New Mexico public school funding formula that is in effect for FY 2020, the State guarantees each school district 100 percent of a calculated program cost (need). The first step in the funding formula is to calculate each district's number of program units, calculated by multiplying basic education and early childhood units by a staffing cost multiplier, and adding program units that are associated with special categories of needs. The categories include early childhood education, grade levels of students, special education students, bilingual students, students considered to be at risk, district size and scarcity, enrollment growth factors, and an index for instructional staff experience and training. (NMSA 22-8-18.) For FY 2020, students considered to be at risk will receive a higher weighting in the formula than they have in previous years, resulting in more at-risk units. In addition, districts that receive funding for the K-5 Plus program (providing an early start to the school year) and Extended Learning Time program (which includes after-school programs and teacher professional development) receive additional instructional units based on the number of participating students; both of these programs are optional for school districts, which must apply for the funding. (SB 1 (2019)). The district's program cost is then determined by multiplying the district's instructional units by a set dollar figure per unit, which is established by the legislature. (NMSA 22-8-2 ("program cost"), 22-8-18).

Once each district's need is determined, the State subtracts 75 percent of the revenue raised from a uniform local mill levy, 75 percent of Federal forest reserve funds, and 75 percent of each district's eligible Impact Aid. (NMSA 22-8-25). Eligible Impact Aid will not include payments under Section 7003(d) for children with disabilities, payments under Section 7007 for construction, or 20% of the payments received for children living on Indian Lands, as required by the Impact Aid statute. (NMSA 22-8-25). The difference ("need" minus 75% of eligible local and Federal revenues) is the State's funding share for each district.

At the Department's request, the revised projected data that the State submitted in June 2019 included the additional weights for the K-5 Plus and the Extended Learning Time programs. The Department determined that these do not meet the criteria for exclusion as special cost differentials under 34 CFR 222.162(c)(2) because these are optional programs that are based on services provided rather than types of students or district factors. Thus, these amounts are properly included as revenue in the disparity test.

Section II. LEA Arguments, State response, and Department Analysis

We address each of the LEAs' arguments below, with a summary of the argument, the State's response, our analysis, and our decision regarding each. The Department's analysis below centers on whether a given fund should be excluded or included in the State's disparity test. A fund is generally excluded if it is not revenue for current expenditures or if it is considered a special cost differential. (34 C.F.R. § 222.162).

Our decisions may refer to the F-33 Local Education Agency Finance Survey (F-33) (available at https://nces.ed.gov/ccd/f33agency.asp); including the Documentation for the NCES Common Core of Data School District Finance Survey; and the National Center for Educational Statistics (NCES) *Financial Accounting for Local and State Systems* (NCES Handbook) (available at

https://nces.ed.gov/pubs2015/2015347.pdf). Both documents are created by divisions of the United States Department of Education. The primary purpose of the F-33 is "to provide revenue and expenditure data for all school districts in the United States" by surveying LEAs across the country through the Governments Division of the U.S. Census Bureau. The data is then submitted to the NCES. LEAs use the instructions provided in the F-33 form (available at the F-33 link above) when classifying funds as either revenue or expenditure. The NCES Handbook includes additional instructions and guidelines on this topic.

Our analysis also refers to the State PED's School Budget and Finance Analysis (SBFA) Stat Books, available at https://webnew.ped.state.nm.us/bureaus/school-budget-finance-analysis/stat-books/. In addition, we refer to the State PED Manual of Procedures, accessed at https://webnew.ped.state.nm.us/bureaus/school-budget-finance-analysis/manual-of-procedures-psab/. We cite to the pre-determination hearing transcript (Trans.), the post-hearing comments submitted by the State (State Post-Hearing) and those submitted by the LEAs (LEA Post-Hearing).

A. Funds that the LEAs argue should be included in the disparity test

As an initial matter, in response to the LEAs' arguments that certain funds should be added to the disparity test, the State argued that State revenues that are outside of the State-designated equalization guarantee ("SEG") should automatically be excluded from the disparity test. We reject that argument. Under the IAP statute and regulations, the disparity test is intended to capture all revenues for current expenditures; there is no narrow focus on only the revenues that the State decides to consider when it equalizes revenues among LEAs. If we were to adopt the State's argument, any State could pass the disparity test by choosing only a narrow range of revenues or expenditures to equalize, leaving a vast amount of other revenues "outside" of that program which in fact are disequalizing. Moreover, the fact that the Department has approved the State's submission in past years does not mean that we can ignore other existing revenues, if they should in fact be included as revenues, once we have been made aware of these other funds. The State argues that the Department's 1977 Federal Register comments on its program regulations support its position. (State Post-Hearing at 4). However, those comments clarified that only current expenditures and not capital outlay should be included in the test of a State's equalization for Impact Aid purposes; the Department was not distinguishing between what is labelled as "state equalization program" and what is not. (42 Fed Reg 15544 at 15546 (3/22/77)).

Below we address in turn each of the funds that the districts argue should be included, that are currently excluded in the State's submission.

1. Student Transportation

The districts argue that the transportation allocation should be included in the disparity test. The PED transportation allocation to each LEA is the combination of a base amount for each student in the LEA and a variable amount calculated in part on site characteristics, number of days of operation for the district, number of students transported, number of students with special needs, density of the district, and the number of miles the buses must travel. (See State Post-Hearing at 8). The districts argue that the transportation allocation should be included because "pupil

transportation services" are specifically included in the definition of current expenditures in ESEA section 7013(4), and that the adjustment factor outlined in NMSA 22-8-29.4, designed to ensure that the various transportation allocations do not exceed the appropriated amount, overrides the specific site-based factors in the formula. (Trans.53; LEA Post-Hearing at 9-13). The State counters that the site factors included in the variable amount, including density of the district and number of miles travelled, classify the fund as a special cost differential. (Trans.102-103, 129; State Post-Hearing at 7).

Under the IAP regulations, special cost differentials include funds associated with "pupils having special educational needs" and LEAs "affected by geographical isolation, sparsity or density of population…." (34 C.F.R. § 222.162(c)(2)). Although we agree that the NM transportation fund generally meets the federal definition of a revenue for current expenditures (ESEA 7013(4); F-33 Documentation, p.B-9, "transportation programs"), it appears that under State law the amounts that LEAs receive are determined in part based on site characteristics. (See NMSA 22-8-29.4 and the Manual of Procedures, PSAB Supplement 19, Transportation, available at https://webnew.ped.state.nm.us/wp-content/uploads/2017/12/SBFAB_Manual-of-Procedures-PSAB_PSaB19-Transportation.pdf).

While we agree that part of the transportation funding to New Mexico districts is based on special cost differentials (e.g. number of students in special education, and geographic factors of the district), we are unable to separate out how much of the funds are attributable to those special cost differentials. Therefore, because transportation funding is generally considered revenue for current expenditures, all of the transportation funds should be included in the disparity test. In future years, the State may wish to separate out the portion of the funding attributable to special cost differentials.

2. Instructional Materials

The districts argue that the fund for instructional materials (Section 22-15-5 NMSA) should be included as revenues in the disparity test, since these funds may be spent on operational funding, and many of the items that can be purchased with the funds are considered supplies. (Trans. 54, 137; LEA Post-Hearing at 7). The State argues that these revenues should be excluded as they are capital assets; the fund is allocated on a six-year cycle, and according to the State, the GASB labels library books with a useful life of more than a year as capital assets, and textbooks are similar to library books. (Trans. 107, 129; State Post-Hearing at 10).

For the year of analysis in question, the Instructional Materials fund could be used for "instructional materials," defined by NMSA 22-15-2 as "school textbooks and other educational media that are used as the basis for instruction, including combinations of textbooks, learning kits, supplementary material and electronic media." The fact that the fund may be used by some districts for a use that is categorized as a capital asset for State purposes would affect the disparity test if the State analyzed the districts on an expenditure basis, but on a revenue basis we must determine whether this fund is for current expenditures or not. We determine that it is. Instructional materials are current expenditures for purposes of the F-33 reporting (F-33 Documentation, p.B-9 "other programs."). Because instructional materials meet the definition of current expenditures under ESEA section 7013(4), the revenues for instructional materials meet

the definition of "revenues for current expenditures." The instructional material fund revenues should therefore be added to the disparity analysis.

3. Dual Credit Instructional Materials

The districts argue that the disparity test should include revenues from the Dual Credit Fund, which pays for the excess cost of instructional materials for students who are dual enrolled in a college program while in high school. (Trans.55; LEA Post-Hearing at 9; see 6.30.7.8(H)(15) NMAC). The State argues that these revenues are special cost differentials because they are paid only on the basis of a particular type of student, in this case students enrolled in a college program while in high school. The State also argues that districts must apply for this fund, and that including it in the equalization formula would serve as a disincentive to districts. (State Post-Hearing at 7; Trans. 104-105).

Under the IAP regulations (34 C.F.R. § 222.162(c)(2)), special cost differentials include funds associated with "pupils having special educational needs, such as… gifted and talented children…." Under the State law, it does not appear that the dual credit program is limited to a particular type of student, such as gifted and talented; rather these funds are paid to any students participating in a dual credit program. Thus, the program is similar to a State fund paid for students in an after-school program. Because these funds are not associated with students with special educational needs, we agree with the districts that these funds should be included in the disparity test.

4. NM Reads to Lead

The districts argue that NM Reads to Lead, a competitive grant that funds strategies to reduce the number of students reading below grade level, should be included in the disparity analysis. (Trans 56; LEA Post-Hearing at 14). The State argues they should be excluded because they are competitive grants and are outside of the equalization program, and because of the chilling effect that including them would have on the State's ability to make fair award decisions without considering the award's effect on the state's equalization. (State Post-Hearing at 8-9). The State further notes that including funds supplemental to the SEG would increase disparity because the funds are designed to "reflect costs that vary across entities." (State Post-Hearing at 9). The districts contend that the State has not provided a valid reason for excluding the funds from the disparity analysis, and that a chilling effect on grants is neither a reason for excluding these funds from the disparity test nor is the NM Reads to Lead fund a type of special cost differential.

As noted previously, a fund's exclusion from the SEG is not a reason to exclude it from the disparity analysis. Further, there is no federal rule against including competitive grants in the disparity analysis. The NM Reads to Lead funds meet the definition of "revenue for current expenditures" under ESEA section 7013(4) and 34 C.F.R. § 222.161(c). These revenues do not qualify as a special cost differential under 34 C.F.R. § 222.162(c)(2) because they are not given on the basis of a particular type of student or type of district; rather they are awarded based on planned activities and on reading score growth. (See https://webnew.ped.state.nm.us/bureaus/literacy-humanities/reads-to-lead/.) The funds therefore should be included in the disparity test.

5. Capital Improvements: SB-9 (Local and State) and HB-33

The Public School Capital Improvements Act ("SB-9"), allows for the collection of funds through local levies and state match funds, and is designed to fund capital improvements in schools. (NMSA 22-25-2 – 22-25-7 (1978)). The districts argue that although SB-9 funds are mainly used for capital improvements, they can also be used for operational expenditures including maintenance and supplies. They cite to NMSA 22-25-2, which provides that "capital improvements" includes expenditures for "maintenance." (LEA Post-Hearing at 17). As the State has chosen to use revenues and not expenditures in their disparity analysis, the districts argue that the entirety of the SB-9 fund should therefore be included. (LEA Post-Hearing at 20). The State contends that the majority of the SB-9 funds are used for capital outlay and therefore these funds are properly excluded from the disparity analysis. (State Post-Hearing at 11-13; Trans.105).

We agree with the districts that SB-9 funds should be included in the disparity analysis because they are revenues for current expenditures. Although the purpose of the SB-9 fund is clearly for "capital improvements," that term is defined broadly in the SB-9 State law to include "maintenance of public school buildings or public school or pre-kindergarten grounds, including the purchasing or repairing of maintenance equipment and participating in the facility information management system as required by the Public School Capital Outlay Act." (NMSA 22-25-2.) The State definition of "capital improvements" also includes computer software and hardware for student instructional use (NMSA 22-25-2), and those generally constitute "supplies" as defined in the Federal Uniform Guidance (2 CFR §200.94). For Impact Aid purposes the statutory definition of "current expenditures" includes "operation and maintenance of plant" as well as expenditures for instruction. (ESEA § 7013(4); 34 CFR § 222.161(c)). Because the State has chosen to calculate the disparity analysis on a revenue basis, all revenues for current expenditures must be included, regardless of how the fund is spent. Since SB-9 funds can be used for maintenance and supplies, which are current expenditures, the State and local revenues relating to this fund should be included in the disparity analysis.

We also find it relevant to note that we disagree with the State's argument that most of the funds are in fact used for capital purposes. We examined the State's SBFA Statbook, specifically the "Expenditures by Object Code" in Section C, representing actual expenditures for State FY 2018, and found that a majority of expenditures made from SB-9 local and State revenues, state-wide, were for maintenance and repair (object code 54315) and supplies, including software (object code 56000). Although these codes are included in the overall reporting category of capital expenditures for F-33 purposes, they meet the Impact Aid definition of revenues for current expenditures, and State law authorizes their use for current expenditures.

The Public School Buildings Act (HB-33) is similar to SB-9 funds in that it authorizes local school districts to levy mills for "capital improvements" (Section 22-26-3 NMSA 1978).The districts argue that HB-33 funds should be included in the disparity analysis because subsection (E) of the definition of "capital improvements" in NMSA 22-26-2 includes administering the projects undertaken pursuant to Subsections A and C of that section, including expenditures for "facility maintenance software, project management software, project oversight and district personnel specifically related to administration of projects funded by the Public School Buildings Act…." (Trans. 63-64). The State argues that HB-33 funds should be excluded as

capital expenses because the vast majority of the fund goes to capital assets, and because the administration of projects included in Subsection (E) is an ancillary charge that may be capitalized along with the other costs of the capital improvement project, consistent with the advice in the GASB. (Trans.106-107, State Post-Hearing at 12).

We agree with the State that HB-33 funds are properly excluded from the disparity analysis. Unlike SB-9, the authorized use of HB-33 funds under State law does not include general maintenance of school buildings, or software and hardware for student instruction. It does include costs for administering the capital projects, but those are limited to 5% of the total cost of the capital project (see definition of "capital improvements" in NMSA 22-26-2). Furthermore, we agree that, consistent with the GASB, districts can capitalize ancillary charges along with the other costs of the capital improvement project. We also note that a review of the State's SBFA Statbook shows that only a very small amount of total funds was spent by districts on maintenance of buildings, unlike the situation for SB-9 funds.

6. Certain Local Funding (Spaceport Gross Receipts Tax (GRT) Fund, Wind Farm Projects, Industrial Revenue Bond (IRB) Payment in Lieu of Taxes (PILT))

The districts argue that the revenue from the Spaceport GRT local funding to Dona Ana and Sierra County should be included in the disparity analysis as revenue for current expenditures because failing to include these revenues is potentially disequalizing. (See LEA Post-Hearing 21; Trans. 58). The Spaceport GRT Fund provides funds to Dona Ana and Sierra County, which the counties then transfer to the regional spaceport district; each county may retain up to 25% for spaceport-related projects, including spaceport-related educational opportunities. (NMSA 7-20E-25(D)). The districts also argue that "in lieu of tax revenues" (wind farm projects, IRB PILTS) qualify as revenues, and that excluding them from the disparity analysis is disequalizing because the revenues circumvent the tax revenues that would otherwise flow to the State for operational purposes and instead only benefit individual schools. (LEA Post-Hearing at 20-21; Trans. 58, 62-63).

The State argues that, with regard to the Spaceport funds, even though the county is choosing to use the retained portion of the Spaceport GRT revenue for spaceport-related educational opportunities, the county is not required to do so because the funds can be spent on any spaceport-related projects. The State argues that these funds are not revenues for current expenditures because they are not a compulsory charge levied on behalf of an LEA for current expenditures. To support its argument, the State cites to the IAP regulatory definition of "local tax revenue" at 34 CFR § 222.161(c), which defines local tax revenue as "compulsory charges levied by an LEA or by an intermediate school district or other local government entity on behalf of an LEA for current expenditures for educational services." (State Post-Hearing at 13). The State claims that "[t]he legislative history of equalization makes clear that the idea is to equalize funding through taxes that are generated by either the district or the state. Payments in lieu of taxes are not included and, under New Mexico law, would not be available to be included." (State Post-Hearing at 13; Transcript 103). With regard to the IRB PILTs, the State argues that revenues to school districts from this source are "payments from private companies to the LEA for the use of their land" and are not tax revenue. (State Post-Hearing at 14). The State argues

that because neither wind farm payments, nor the payments from IRB PILT are taxes, they should not be included in the disparity analysis. (State Post-Hearing at 13-14).

As we noted earlier, under the IAP statute and regulations, the disparity test is intended to capture all revenues for current expenditures. There is no narrow focus on local tax revenue (unlike the proportion analysis under 34 CFR 222.163, discussed below). A review of the PED Statbook shows that almost all the Spaceport and Wind Farm funds are used for current expenditures by the districts. Therefore, because these funds (the Spaceport GRT, Wind Farm Projects, IRB PILTs) meet the definition of "revenues for current expenditures," we agree with the districts that the State should add the revenue from these funds to the disparity analysis.

7. Ed Tech Equipment Act Bonds

The districts argue that proceeds from the Educational Technology Equipment Act ("Ed Tech") should be included in the disparity test because the state law allows for their use on technical support and training. (Trans. 65-66). The State argues that these are ancillary charges necessary to the related technology assets, which can be capitalized, citing NMSA 6-15A-1 (1978). (State Post-Hearing at 12-13).

The Ed Tech Act authorizes school districts to "create a debt . . . by entering into a lease-purchase arrangement to acquire education technology equipment." (NMSA 6-15A-2). Thus, the proceeds received from this Ed Tech fund are generated by the sale of bonds. For purposes of F-33 reporting, proceeds from bond sales are not classified as revenue, but as debt. (see F-33 instructions, Part VI). Therefore, these funds do not meet the Impact Aid definition of "revenues for current expenditures" and have been properly excluded from the disparity test.

B. Funds that the LEAs argue should be excluded from the disparity test

1. Refund of prior year's expenditures

The Districts argue that refunds of prior year's expenditures should not be included in the disparity test, citing the IAP regulations at 34 C.F.R. § 222.161, which exclude "the recovery of an expenditure" from the definition of "revenue." (LEA Post-Hearing at 47). The State argues that, under generally accepted accounting principles, if a refund and expenditure occur in the same year, then there is no "revenue" reported, but if the refund is for a prior year, it becomes general revenues available for current expenditures, citing to the PED Manual of Procedures, p. 38 and generally accepted accounting principles. (State Post-Hearing at 15). The State also cites the federal Uniform Guidance (2 C.F.R. § 200.302) to argue that State laws and procedures control how a State and LEA account for their funds, and therefore, the State should not be required to use a separate accounting method for their disparity test.

Under the NCES Handbook, a refund of a prior year's expenditures is classified as revenue (see NCES Handbook, 118), whereas a refund of a current year expenditure does not fall within the definition of revenue (see NCES Handbook, 118; F-33 Documentation, p.B-8, definition of "revenue": 'net of refunds and other correcting transactions.'). We agree with the State that these refunds of a prior year expenditure are properly included in the disparity test.

2. Indirect costs

The districts argue that indirect costs associated with a federal or state grant should be removed from the disparity test because they are the reimbursement of an expenditure, and the IAP definition of "revenue" in 34 C.F.R. § 222.161(c) specifically excludes the "recovery of an expenditure." (LEA Post-Hearing at 48; Trans.70). The State argues that these indirect costs, once reimbursed, become part of a general fund that may be spent as general revenue and should be considered revenue for current expenditure. (State Post-Hearing at 15-16).

Indirect costs are not a type of revenue but a classification of expenditure. For federal reporting purposes, once grant funds are spent, the portion of the grant that is used for indirect costs (e.g. administrative purposes) would constitute the reimbursement of an expenditure. When a district receives grant funds, however, the grant funds received do not have to be used for indirect costs, even though an indirect cost rate was included in a grant application. "Indirect costs" should not be broken out as a separate type of revenue and excluded from the disparity test; rather the entire grant is revenue to the district. Therefore, since PED has chosen to conduct the disparity test on a revenue basis, these indirect costs from federal and state grants are properly included in the disparity test.

3. Access Board (e-rate)

LEAs have the option to contract with certain vendors who provide lower rates for their services through the federal e-rate program. The amount of the discount is calculated based on the number of students in the LEA that receive free and reduced lunch. (See NCES Handbook at 58). LEAs have two options for reimbursement of the discount. The first option is to pay their vendor the full price of the service and then file for a direct deposit reimbursement through the Universal Service Administrative Company (USAC). The State counts these direct deposit reimbursements as revenue (State Post-Hearing at 15). The LEAs that do not follow this reimbursement method choose to have the USAC pay the vendors the reduced price initially. In these cases, the discount appears as a credit on the vendor's bill, and the LEA never pays the full price of the service – only the reduced price. The State does not count this credit as a revenue. Therefore, the State only considers discounts from e-rates as revenue if the LEA receives the discount as a reimbursement as opposed to a credit.

The districts argue that e-rates should be excluded for two reasons. First, referencing 34 CFR §222.161, which provides that "*revenue* …does not represent the recovery of an expenditure," they argue that the e-rate reimbursement is the recovery of an expenditure, and therefore should be excluded. Second, they argue that because the state chooses to consider the discount as revenue if the LEA receives it as a subsequent reimbursement, but not if the LEA chooses to pay the lower price in the first place, this is an arbitrary distinction that leads to misleading results and "elevates form over substance."

We agree with the districts that including e-Rate reimbursements, but not discounts, as revenue creates a misleading picture of the funds afforded as operating expenses to each district and creates a potential unfairness to districts who choose one method over another. E-Rate reimbursements thus should be excluded from the disparity test.

4. Fees and contract revenue from governmental agencies

The districts argue that fees from governmental agencies should be excluded from the disparity test because there is a liability created and a repayment expected, so they do not meet the Impact Aid definition of revenues for current expenditures. (LEA Post-Hearing at 50). The State addresses this issue along with refunds of prior year expenditures, arguing that if the amounts are received in a subsequent year, they qualify as revenue to the district.

The State treats fees from government agencies as a State revenue in their uniform chart of accounts, and prior F-33 reporting indicates that these amounts are being included as revenue from State sources. Assuming that these amounts do not represent the recovery of a current year expenditure, in which case they would not count as revenue, they appear to be revenues to the districts, which are properly included in the disparity test.

5. Insurance recoveries

The LEAs argue that insurance recoveries should be excluded from the disparity test because they are the recovery of an expenditure and are thus excluded from the definition of "revenues for current expenditures. (LEA Post-Hearing at 46; Trans. 73). The State argues that if the reimbursement is made in a year subsequent to the expenditure, it counts as revenue. (State Post-Hearing at 15).

The NCES handbook classifies insurance recoveries as an "extraordinary item" that is not included as operating revenue for purposes of F-33 reporting. (See NCES Handbook at 122). We agree with the districts that funds from this source should be removed from the disparity test.

C. Other Issues Raised by the LEAs

1. Disparity test by grade levels

The LEAs argue that the State should have separated out charter schools with similar grade levels and conducted the disparity test according to the procedure in the Appendix to subpart K of part 222 of the regulations, by making separate disparity calculations for different groups of LEAs that have similar grade spans. (See LEA Post-Hearing at 16). However, the regulations provide that the Secretary will calculate disparity in that manner "if a State requests it," 34 CFR 222.162(b), and in this case the State did not request that treatment.

2. Proportion of Impact Aid that can be taken into account by the State

The LEAs argue that the State should not be taking into account 75% of Impact Aid receipts for every district, because the proportion should be unique to each district; they argue that the State is only including the "yield controlled 0.5 mill levy, it is not taking any credit for the 2 Mill SB9 Levy or the up-to 10 Mill HB33 Levy." (LEA Post-Hearing at 51). Because we have determined that the State does not pass the disparity test for State FY 2020 (see below), this issue is not relevant to this determination. However, we provide our analysis of the issue here in case the State passes the disparity test in a future year and thus is able to take a proportion of Impact Aid payments into account in making State aid payments. Note that unlike the disparity test, which

uses all revenues for current expenditures, the calculation to determine the proportion of Impact Aid funds that can be taken into account by the State is limited to tax revenues.

The IAP regulations provide in 34 CFR 222.163:

> (a). . .a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.
>
> (b) (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

The State argues that the reason the proportion is 75% for every LEA in the State is because, pursuant to State law, 75% of local tax revenues are covered under the equalization program, and "there is only one local tax revenue for school district operating purposes." (SEA Post-Hearing at 17).

Although the regulations define the terms *Local tax revenues* and *Local tax revenues covered under a State equalization program* in 34 CFR 222.161(c), the question is whether there are any other "local tax revenues attributable to current expenditures for free public education," which is the operative phrase in 34 CFR 222.163(b)(1), for inclusion in the denominator of the proportion fraction. Because we determined above that the "2 Mill SB9 Levy" produces revenue to the districts that should be counted as revenues for current expenditures, we agree with the districts that those funds should be included in the denominator, for the proportion analysis. However, because we concluded that the proceeds from the "HB33 Levy" are for capital expenditures, they are not "attributable to current expenditures for free public education." Thus, those funds are properly excluded from the proportion calculation.

For any future year in which the State is authorized to take into account Impact Aid, it must calculate the proportion of Impact Aid funds that can be used to reduce State aid by including the SB9 revenues in the denominator of the proportion for each district.

3. Disparity test methodology in the Department's regulations

The LEAs urge the Department to change the methodology that is in the Appendix to 34 CFR part 222, subpart K, despite that fact that such methodology was upheld by the Supreme Court in the case of Zuni v US Department of Education, 550 U.S. 81 (2007). As the Department explained in the predetermination hearing, that issue is outside the scope of the hearing and of this determination. Department officials may not waive or alter regulatory requirements in an administrative proceeding.

4. Yazzie-Martinez State court decision

The LEAs argue that under the Impact Aid regulations, the Department should not certify the NM State aid program because it is no longer in effect following the decision in the Yazzie-Martinez Judgment (County of Santa Fe First Judicial District No. D-101-CV-2014-00793, 12/20/18). (see LEA doc p.54). The Impact Aid regulations provide in 34 CFR 222.161(a)(2) that:

> No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

Arguably, the court did determine that the State aid program violated the State constitution. However, it is not clear from either the decision of July 20, 2018, or that of December 20, 2018, whether the court held that the State aid program is no longer in effect. Given that we find that the State does not pass the disparity test for FY 2020, the issue is moot as to this fiscal year. For future fiscal years, however, we request that the State submit, along with any disparity test submission, a State legal opinion on this matter.

Section III. Description of Disparity Calculation

In a year where a State has substantially revised its State aid program, it may take into consideration Impact Aid payments in calculating State aid under section 7009(b) if the Secretary determines that the projected amount of per-pupil expenditures or revenues of the LEA with the highest per-pupil expenditures or revenues in the State did not exceed the projected per-pupil expenditures or revenues of the LEA with the lowest per-pupil expenditures or revenues by more than 25 percent.

As required by ESEA section 7009(b)(2)(B)(ii), we take into account the extent to which the State's program reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. First, we examined the weights used by the State in calculating instructional units to determine which of them qualify to be taken into account as special cost differentials under section 7009(b)(2)(B)(ii) and 34 C.F.R. § 222.162 (c)(2). The additional allocations listed in the PED's disparity test data, Table 3, meet these standards.

According to the State's June 25, 2019 projected data submission, the revenue per-pupil at the 95th percentile was $6,234 (Carlsbad) and the revenue per-pupil at the 5th percentile was $5,192 (Alamogordo). The resulting disparity was 20.1 percent in the State's submission.

However, the Department ran the disparity test excluding revenues from E-rate and insurance recoveries, and adding revenues from Transportation, Instructional Materials, Dual Credit, NM Reads to Lead, SB-9, Spaceport, Wind Farm, and IRB pilots, for the reasons explained above in section II (see revised disparity test, Enclosure). In making this determination, we disregarded LEAs with expenditures or revenues above the 95th percentile or below the 5th percentile of such revenues or expenditures in the State as required by the statute and regulations. (See ESEA 7009(b)(2)(B)(i) and 34 C.F.R. § 222.162(a)). With the changes noted above, the revenue per-pupil at the 95th percentile was $7,438 (Carlsbad) and the revenue per-pupil at the 5th percentile was $5,731 (Socorro). Because the resulting disparity is 29.79%, which is more than 25%, the

State does not pass the disparity test and is not certified to take into account Impact Aid in making State aid payments.

Section IV. Findings

Pursuant to delegation from the Assistant Secretary for Elementary and Secondary Education to the Impact Aid Program Director, the New Mexico State aid formula is not certified under section 7009 for FY 2020, because the revenue disparity percentage is not within the 25 percent disparity allowed under section 7009(b)(2).

Therefore, the State may not take into consideration Impact Aid payments when calculating State aid to districts for FY 2020.

The State or any local educational agency adversely affected by this action may request, in writing and within 60 days of the receipt of this notice, a hearing under ESEA sections 7009 and 7011(a) and 34 C.F.R. § 222.165. A request for a hearing must specify the issues of fact and law to be considered, and should be sent to: Marilyn Hall, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244, and with a copy emailed to Impact.Aid@ed.gov.

Report Approved and Issued By: ________________________________ ____________

Marilyn Hall, Director   Date
Impact Aid Program

Enclosure

Enclosure: Impact Aid Program Calculation of Disparity

This document is available online at https://impactaid.ed.gov/wp-content/uploads/2020/04/NM-FY-2020-Disparity-Analysis-after-7009-Determination.xlsx

The spreadsheet contains the following tabs:

- Disparity per Mem Table 1: Using the PED spreadsheet, IAP recalculated disparity using data from revised Table 2.
- 17-18 Revenue per Mem Table 2: Using the PED spreadsheet, IAP recalculated revenues using data from revised Table 4.
- 17-18 Adjustments Table 3: The PED spreadsheet showing special cost differentials. IAP made no changes.
- 17-18 Rev for Disparity Table 4: Using the PED spreadsheet, IAP recalculated revenues per LEA, using the data from Tab "Revenue Subtotal by LEA."
- Revenue Subtotal by LEA: Using the original PED spreadsheet of revenues by fund for each LEA, IAP recalculated revenues by deleting (in pink) E-rate and insurance recoveries, and adding (in green) Transportation, Instructional materials, Dual Credit, NM Reads to Lead, SB-9, Spaceport, Wind Farm, and IRB pilots. Additions were taken from the PED revenue data on tab "1718 revenues orig."
- 1718 revenues orig: The original PED spreadsheet showing all detailed revenues per LEA. IAP made no changes.