

FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

LOUISE MARTINEZ, individually 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.

**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING
EDUCATIONAL OUTCOMES FOR NATIVE STUDENTS**

This litigation arises from the appalling condition of New Mexico's public schools. Across the board, those schools are failing our children. That failure is nowhere more acute than with the Native American students living in New Mexico and depending on the State to provide the adequate public education guaranteed to them by our constitution. The summary judgment evidence plainly demonstrates that the State has failed to provide a public school system sufficient for the education of Native American students. Plaintiffs are thus entitled to judgment in their favor on this issue and an order providing a meaningful remedy.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Facts Concerning the Educational Outcomes of Native American Students

1. There is substantial disparity between the educational outcomes of New Mexico Caucasian students and those of Native American students. According to the New Mexico Standard Based Assessment ("NMSBA") tests administered from 2007 to 2014, during that time

period between 62.4% and 71.1% of Native American fourth graders did not demonstrate proficiency in reading. *See* Exhibit 1, ¶ 7.¹ Thus, during those eight years, the *highest* level of reading proficiency shown by Native American fourth graders was 37.6%.

2. During the same time period, Native American fourth graders failed to show proficiency in math at a rate between 66.5% and 74.8%. *Id.*, ¶ 10. The highest level of proficiency achieved by Native American fourth graders over those eight years was thus 33.5%.

3. Native American eighth graders from 2007 to 2014 fared slightly better than their fourth grade counterparts in reading, failing to show proficiency in reading at a rate between 45.5% and 57.9%. *Id.*, ¶ 8. The highest level of reading proficiency achieved by these students during those eight years was 54.5%.

4. In math, Native American eighth graders from 2007 to 2014 did considerably worse than the fourth graders, showing a lack of proficiency at a rate between 70.9% and 75.9%. *Id.*, ¶ 11. The highest level of proficiency in math shown by these students over that period was thus 29.1%.

5. The percentage of Native American students in the eleventh grade during the same time period that did not score proficient ranged from 51.7% to 69.4%. *Id.*, ¶ 9. The highest rate of reading proficiency achieved by these students was thus 48.3%.

6. The same eleventh grade Native American students, from 2007 to 2014, failed to test proficient in math at a percentage between 67% and 79.4%. *Id.*, ¶ 12. The highest rate of math proficiency achieved by this group was thus 33%.

¹ As the Court is aware, the parties have reached several stipulations concerning educational outcomes in New Mexico based on the testing administered by the State. For the sake of brevity, Exhibit 1 contains the portions of those stipulations concerning educational outcomes for Native American students.

7. The results of the PARCC testing begun in 2014 are even more dismal. In 2014-2015, 86.5% of Native American fourth graders did not score proficient or better in reading. *Id.*, ¶ 61.

8. The 2014-2015 PARCC test showed that 89% of Native American fourth graders did not score proficient or better in math. *Id.*, ¶ 64.

9. Native American eighth graders failed to score proficient or better in reading at an 86.1% clip on the same test. *Id.*, ¶ 62.

10. Native American eighth graders also failed to score proficient or better in math at a 90.2% rate on the 2014-2015 PARCC test. *Id.*, ¶ 65.

11. The same test showed that 73.3% of Native American eleventh graders did not score proficient or better in reading. *Id.*, ¶ 63.

12. Native American eleventh graders failed to score proficient or better in math at an astonishing 95.4% rate on the same test. *Id.*, ¶ 66.

13. These numbers are the lowest in the State. From 2007 to 2014, the percentage difference between all New Mexico fourth graders and Native American fourth graders scoring proficient or better in reading ranged from 14% to 16.9%. *Id.*, ¶ 37.

14. During the same time period, the achievement gap between all New Mexico fourth graders and Native American fourth graders scoring proficient or better in math ranged from 12.1% to 16.1%. *Id.*, ¶ 40.

15. The percentage difference between all New Mexico eighth graders and Native American eighth graders scoring proficient or better in reading ranged from 9.7% to 16.9% over the same eight years. *Id.*, ¶ 38.

16. The math proficiency gap between all New Mexico eighth graders and Native American eighth graders between 2007 and 2014 ranged from 12.5% to 14.2%. *Id.*, ¶ 41.

17. The gaps between all New Mexico eleventh graders and Native American eleventh graders are similar. During that time period, the reading proficiency gap between those groups of students ranged from 7.8% to 18.4%. *Id.*, ¶ 39.

18. The math proficiency gap between all New Mexico eleventh graders and Native American eleventh graders during the same time period ranged from 9% to 16.2%. *Id.*, ¶ 42.

19. The gaps between Caucasian and Native American students are even larger. From 2007 to 2014, the reading proficiency gap between Caucasian fourth graders and Native American fourth graders ranged from 29.7% to 33.7%. *Id.*, ¶ 43.

20. The math proficiency gap between Caucasian and Native American fourth graders during the same time ranged from 28.5% to 32.4%. *Id.*, ¶ 46.

21. From 2007 to 2014, the reading proficiency gap between Caucasian eighth graders and Native American eighth graders ranged from 22.8% to 32%. *Id.*, ¶ 44.

22. During the same time period, the math proficiency gap between Caucasian and Native American eighth graders ranged from 29.1% to 32.4%. *Id.*, ¶ 47.

23. From 2007 to 2014, the reading proficiency gap between Caucasian and Native American eighth graders ranged from 22.1% to 35.6%. *Id.*, ¶ 45.

24. The math proficiency gap between Caucasian eleventh graders and Native American eighth graders during the same time ranged from 26.3% to 34.6%. *Id.*, ¶ 48.

25. Given these numbers, it should not be surprising that New Mexico's Native American students have low high school graduation rates. From 2008 to 2014, those rates are: 45%, 58%, 61%, 56%, 65%, 64%, and 62%. *Id.*, ¶¶ 1002-1008.

26. The graduation rates from 2008 to 2014 for Caucasian students are noticeably higher: 64%, 75%, 76%, 73%, 78%, 77%, and 76%. *Id.*, ¶¶ 1009-1015.

27. Those Native American students who do graduate are often poorly prepared for college. Very few Native American students take AP courses or exams. The following is a list of the percentage of New Mexico high school graduates who were Native American that took an AP exam while in high school for the years indicated: 2002 – 5.3%; 2007 – 4.7%; 2011 – 4.7%; and 2012 – 5.6%. *Id.*, ¶¶ 1042-1045.

28. For the same years, the percentage of New Mexico high school graduates having taken an AP exam while in high school who were Caucasian were: 2002 – 49.8%; 2007 – 43.9%; 2011 – 38.8%; and 2012 – 36.6%. *Id.*, ¶¶ 1046-1049.

29. There are similar disparities in the ACT test results of Native American and Caucasian students in New Mexico. The ACT's College Readiness Benchmarks – broadly characterized as English, math, reading, and science – “reflect the level of preparation needed for students to have at least a 50% chance of achieving a grade of B or higher, or at least a 75% chance of a grade of C or higher, in typical entry-level, credit-bearing college English Composition, Algebra, Social Science, and Biology Courses.” *Id.*, ¶ 1253.

30. For the years indicated, the percentages of New Mexico Native American high school graduates who took the ACT and met three or more ACT college readiness benchmarks were: 2011 – 7%; 2012 – 11%, 2013 – 10%; 2014 – 9%; and 2015 – 10. *Id.*, ¶¶ 1068-1072.

31. During the same years, the percentages of Caucasian New Mexico high school graduates who took the ACT and met three or more ACT college readiness benchmarks were: 2011 – 48%; 2012 – 49%; 2013 – 50%; 2014 – 51%; and 2015 – 51%. *Id.*, ¶¶ 1073-1077.

II. Facts Concerning the Educational Outcomes of English-Learning Native American Students

32. It is hard to imagine these numbers realistically getting much worse. But for English Language Learning students, or ELL students, they do. Between 2007 and 2011, the percentage of all ELL fourth graders, including Native American ELL students, who did not score proficient or above in reading ranged from 65.4% to 74.1%. *Id.*, ¶ 19.

33. During the same time, the percentage of all ELL fourth graders who did not score proficient or above in math ranged from 71.5% to 73.8%. *Id.*, ¶ 22.

34. From 2007 to 2011, the percentage of all ELL eighth graders who did not score proficient or above in reading ranged from 54.3% to 77.7%. *Id.*, ¶ 20.

35. The percentage of all ELL eighth graders who did not score proficient or above in math during the same time ranged from 79.8% to 84.5%. *Id.*, ¶ 23.

36. From 2007 to 2011, the percentage of all ELL eleventh graders who did not score proficient or above in reading ranged from 71.9% to 84.1%. *Id.*, ¶ 21.

37. During the same time, the percentage of all ELL eleventh graders who did not score proficient or above in math ranged from 85.1% to 86.6%. *Id.*, ¶ 24.

38. The 2014-2015 PARCC testing numbers for ELL students are perhaps the most sobering of all. That testing showed that 92.9% of current ELL fourth graders were not proficient in reading and that 94.7% of them were not proficient in math. *Id.*, ¶¶ 73, 76.

39. In the same testing, 96.6% of current ELL eighth graders did not score proficient or better in reading and 97.5% of them did not score proficient in math. *Id.*, ¶¶ 74, 77.

40. 93.6% of current ELL eleventh graders did not score proficient or better in reading on the 2014-2015 PARCC test and 97% of those students did not score proficient or better in math on the same test. *Id.*, ¶¶ 75, 78.

41. Many of these ELL students are Native American, and two districts in particular provide a snapshot of that student population: Gallup-McKinley County Schools and Zuni Public Schools. The first has the largest number and the second the highest percentage of Native American students in the State. *Id.*, ¶ 1131.

42. In Gallup-McKinley County Schools, the percentage of ELL students went from 44.5% in 2007-2008 to 28% in 2014-2015. *Id.*, ¶ 361. The percentage of Native American students in the district went from 81.6% in 2007-2008 to 79% in 2014-2015. *Id.*, ¶ 362.

43. The proficiency numbers for ELL students in Gallup-McKinley County Schools – nearly all of whom are Native American – are generally in line with the numbers for ELL students statewide. Between 2008 and 2011, the percentage of for fourth grade ELL students in the district who did not score proficient in reading ranged from 72.9% to 82.6%. *Id.*, ¶ 379. The non-proficiency math percentages for the same students during the same time ranged from 73.4% to 79.7%. *Id.*, ¶ 381.

44. From 2011 to 2014, the percentage of fourth grade ELL students in the district who did not score proficient or better in reading ranged from 87.5% to 91%. *Id.*, ¶ 383. The non-proficiency rates during that time for the same fourth grade students ranged from 76.8% to 86%. *Id.*, ¶ 385.

45. Between 2008 and 2011, the percentage of eleventh grade ELL students in the district who did not score proficient or better in reading ranged from 67.1% to 87.4% and who did not score proficient or better in math ranged from 86.1% to 92.8%. *Id.*, ¶¶ 380, 382.

46. Between 2011 and 2014, the percentage of eleventh grade ELL students in the district who did not score proficient or better in reading ranged from 87.8% to 96.4% and who did not score proficient or better in math ranged from 86.7% to 90.9%. *Id.*, ¶¶ 384, 386.

47. The PARCC testing begun in 2014 provided worse results. According to that testing, 95.6% of fourth grade ELL students in Gallup-McKinley County Schools were non-proficient in reading and 96.3% of them were non-proficient in math. *Id.*, ¶¶ 411, 413.

48. Their eleventh grade counterparts did no better, with non-proficiency rates of 95% in reading and 97.1% in math. *Id.*, ¶¶ 412, 414.

49. Zuni Public Schools produced similar results. The percentage of Native American students in the district moved from 99.7% in 2007-2008 to 99% in 2014-2015. *Id.*, ¶ 962. Nearly all of those students are ELL students: the percentage of ELL students in the district in 2007-2008 was 98.9% and in 2014-2015 was 42%. *Id.*, ¶ 961.

50. From 2007 to 2011, the percentage of all ELL fourth graders in the district who did not score proficient in reading ranged from 49.4% to 67.4%. *Id.*, ¶ 979. The same students demonstrated non-proficiency in math during that time at percentage rates between 52.1% and 65.2%. *Id.*, ¶ 981.

51. From 2007 to 2011, the percentage of all ELL eleventh graders in the district who did not score proficient in reading ranged from 49.1% to 74%. *Id.*, ¶ 980. The non-proficiency rates in math for those students during that time ranged from 75% to 86.2%. *Id.*, ¶ 982.

52. From 2011 to 2014, the percentage of all ELL fourth graders in the district who did not score proficient or better in reading ranged from 85% to 87.7%. *Id.*, ¶ 983. At the same time, the percentage of those students who did not score proficient or better in math ranged from 75% to 96.8%. *Id.*, ¶ 985.

53. From 2011 to 2014, the percentage of all ELL eleventh graders attending Zuni Public Schools who did not score proficient or better in reading ranged from 84.2% to 100%. *Id.*, ¶ 984. The percentage of those students during the same time who did not score proficient or better in math ranged from 100% to 100%. *Id.*, ¶ 986.

54. Many of those school districts servicing Native American students lack adequate language resources for those students who need them. Española Public Schools, for example, lacks the resources it needs to provide ELL students with an individualized ELL program. Instead, the district must embed ELL content in the normal curriculum. *See* Exhibit 2, Excerpts of the Deposition of Myra Martinez, 167:22-168:12. That one-size-fits-all approach does not work for all students. *Id.*, 168:17-18.

55. Very few bilingual educators in New Mexico are teaching Native American students. As a result, Native American ELL students are not adequately served. *See* Exhibit 3, Excerpts of the Deposition of Rebecca Blum Martinez, 94:14-95:15.

56. Successful ELL programs typically share five core criteria: (1) administrative and home support; (2) a school environment conducive to learning; (3) high quality instructional personnel; (4) sufficient professional development to ensure that a school district is current on the state of the ELL education field; and (5) a curriculum designed and applied to ensure

coherence between English language instruction and Native language instruction. *Id.*, 43:13-45:19.

57. In recent years there has been very little progress in the English proficiency of Native American ELLs in New Mexico. *Id.*, 103:24-104:16. This issue has been the subject of national conversation, but the State has not been a part a part of it and has not, for example, sent any officials to conferences organized around this issue. *Id.*, 104:19-106:3.

58. Indeed, in New Mexico, Native American ELL students are typically ignored at the state and school district level. *Id.*, 107:5-108:4. It is an issue that demands the State's focus. *Id.*, 108:9-22.

59. There is limited understanding among educators about the complexities of second language learning. As a result, things like language difficulty and reading difficulty are often conflated, and ELL students are often taught with remedial reading materials rather than second language learning materials. *Id.*, 115:9-116:4.

60. Approaching language learning difficulties as though they are reading difficulties does little to solve either problem and, because of the intellectual simplicity of remedial reading materials, discourage ELL students from reading. *Id.*, 116:8-20.

61. There are things the State can do to address these problem. It can bring educators and administrators up to date on strategies and methods for teaching ELL students. *Id.*, 112:16-21. It can provide more effective materials to, for example, give ELL teachers ideas and strategies to help ELL students with project-based learning. *Id.*, 113:8-17.

62. The State can also engage school districts in an earnest conversation about the difference between a language acquisition issue and a reading issue and recognize that ELL

students will only develop greater language skills if they are provided the same kind of materials given to other students. *Id.*, 113:23-114:9.

63. Nationally, there are few ELL materials specifically directed at younger students, and none directed specifically to Native American ELL students. There are, however, curriculum developers now producing such materials, and they would be available for use with Native American ELL students if the State were to support the acquisition of those materials and include them on the state adoption list. *Id.*, 128:5-129:12.

64. Indeed, in the Zuni Public Schools district, at least one high school teacher purchases materials out of her own pocket for her students because the materials provided by the State do not adequately account for Native American perspectives. *See* Exhibit 4, Excerpts of the Deposition of Carlotta Martza, 34:2-37:23; 41:9-21.

65. Educators like Ms. Martza must construct their own curricula at their own expense despite the fact that the State undertook an effort in conjunction with the University of New Mexico, to develop both a curriculum that includes the history of all of the tribal nations in New Mexico and pueblo-specific curriculum that includes the history of those pueblos. *See* Exhibit 5, Excerpts of the Deposition of Natalie Martinez, 20:14-21:12. The State has not, unfortunately, fully developed or used those curricula. *Id.*, 21:13-22.

III. Facts Concerning School Districts On or Near Tribal Lands

66. According to the Public Education Department, there are 23 New Mexico school districts on or near tribal lands or that serve a significant population of Native American students. These districts are: Albuquerque Public Schools, Aztec Municipal Schools, Bernalillo Public Schools, Central Consolidated Schools, Cuba Independent Schools, Dulce Independent Schools,

Española Public Schools, Farmington Municipal Schools, Gallup-McKinley County Schools, Grants-Cibola County Schools, Jemez Mountain Public Schools, Jemez Valley Public Schools, Los Lunas Public Schools, Magdalena Municipal Schools, Peñasco Independent Schools, Pojoaque Valley Public Schools, Rio Rancho Public Schools, Ruidoso Municipal Schools, Santa Fe Public Schools, Taos Municipal Schools, Tularosa Municipal Schools, and Zuni Public Schools.

67. The creation of a culturally-relevant, equitable learning environment for Native American students requires a fundamental ideological shift in the approach to educating those students. The current pedagogical methods must change. *See Exhibit 6, Excerpts of the Deposition of Francis Vigil, 175:23-176:7.*

68. Of the 23 Native American school districts identified above, very few are providing culturally-relevant, equitable education to their Native American students. Cuba Independent Schools serves approximately 540 students, and approximately 61% of them are Native American. *See Exhibit 7, Excerpts of the Deposition of Tony Archuleta, 63:13-25.* The district needs more bilingual and multicultural personnel to meet student needs. *Id.*, 15:24-16:17. The district has difficulty retaining teachers, and new teachers are typically unfamiliar with the Native American population the district serves. *Id.*, 17:19-18:2.

69. In addition to these challenges, Cuba Public Schools needs and wants more guidance from the State about collaboration with the tribes about the education of Native American students. *Ex. 6, 170:15-23.*

70. Española Public Schools struggles to recruit bilingual and TESOL-endorsed teachers. The district does not currently have an “Indian Education Director,” whose job is to

oversee programs and curriculum for Native American students and to work with the local tribal council on monitoring those programs. *Id.* 156:7-157:23.

71. Gallup-McKinley Schools provides educational services to approximately 9,000 Native American students, and approximately one-third of them are English language learners (“ELL”). *See* Exhibit 8, Excerpts of the Deposition of Pauletta White, 32:12-33:9. The Native American ELL students in the district have low rates of academic proficiency. *Id.*, 77:19-78:6.

72. The district does not provide a culturally-relevant curriculum to its 9,000 Native American students. For example, under the State’s Common Core standards, the students learn about American authors but do not study the writing of Native American authors. *Id.*, 78:7-79:2.

73. The State has failed to provide adequate guidance to administrators and teachers in the Grants-Cibola County Schools about the provision of a culturally-relevant education to Native American students and is generally not engaged in the effort to adequately educate those students. Ex. 6, 168:4-13. The district does not have a sufficient number of TESOL-endorsed teachers to meet the needs of its ELL population. *See* Exhibit 9, Excerpts of the Deposition of Marc Space, 247:12-248:1.

74. Jemez Valley Schools has a large number of Native American ELL students, typically ranging from 20% to 30% of the overall student population. *See* Exhibit 10, Excerpts of the Deposition of Susan Davis, 140:13-20. Despite this number, the district does not have a Title III funded program for those students. *Id.*, 44:5-16. It also does not have either a bilingual program or a separate ELL program, something for which the district lacks adequate funds. *Id.*, 138:9-19; 139:22-140:1.

75. Los Lunas Public Schools services approximately 587 Native American students, mostly from the Pueblo of Isleta. *See* Exhibit 11, Excerpts of the Deposition of Dana Sanders, 19:15-24. Staffing levels are insufficient. *Id.*, 83:5-13. In particular, the district does not have enough TESOL and Bilingual endorsed teachers to effectively serve its ELL students. *Id.*, 221:3-21. Indeed, the district does not have enough bilingual staff to qualify for separate bilingual funding from the State. *Id.*, 170:17-171:8. As a result, the district's bilingual education program is largely ineffective; the district needs to provide more individualized services to its ELL students, including smaller class sizes. *Id.*, 173:22-174:7.

76. Los Lunas Public Schools is largely unable to provide culturally-relevant educational opportunities to the Native American students in the district. The funding the district receives from the Indian Education Division is spent on substitute teachers and on online classes offered to those students. *Id.*, 186:21-187:13.

77. Pojoaque Valley Public Schools has a significant Native American population that it draws not only from its six neighboring pueblos, but from other parts of the State and even from other parts of the country. *See* Exhibit 12, Excerpts of the Deposition of Sondra Adams, 18:11-19:3. The district, like many, struggles to hire TESOL and bilingual endorsed teachers. *Id.*, 32:17-21. The district does offer Tewa language classes to its Native American students, but it does not offer any curriculum aimed specifically at those students. *Id.*, 34:12-20.

78. Though it maintains close contact with tribal officials concerning its Native American student population, the district fails to provide culturally-relevant, equitable education to those students because the programs in which those students are placed are deficit-based

programs. Ex. 6, 171:7-172:2. Deficit-based programs, which are reactionary rather than proactive, are non-cultural. *Id.*, 171:1-12.

79. Rio Rancho Public Schools does not offer substantive, culturally-relevant learning environments to its Native American students. Though it offers programs aimed at those students, such as tutoring and a powwow, those do not establish a culturally-relevant, equitable learning environment. *Id.*, 167:21-168:16.

80. Taos Municipal Schools provides math and literacy tutoring to its Native American services, but little else. *See* Exhibit 13, Excerpts of the Deposition of Melissa Sandoval, 77:5-16. As in other districts, those deficit-based programs are non-cultural. There is also a lack of government-to-government interaction and parental involvement concerning the education of the Native American students in the district. Ex. 6, 172:18-23.

81. There are, however, a few districts that, primarily through their own effort, have established programs helpful to Native American students. In particular, Bernalillo Public Schools has taken steps to engage the community and to provide the kind of educational opportunities that their Native American students have specifically asked for. *Id.*, 168:14-169:1. Those programs are producing better results, and are programs the State could learn from but has not. *Id.*, 169:2-19. Santa Fe Public Schools also provides an innovative summer program for Native American students. *Id.*, 177:13-178:8.

82. The State provides \$25,000.00 from the Indian Education Fund to each participating school district that serves Native American students. *See* Exhibit 14, Defendant's Proposed Stipulations.² The amount of that funding is not based on the number of Native

² The parties have not yet agreed to the language of this stipulation, and it is presented here in the format proposed by Defendants. It is only included to establish the uncontested fact that the State provides \$25,000.00 to each affected district. It is not intended to establish any other fact or to operate as any kind of admission by the State.

American students in the district; a district serving 9,000 Native American students receives the same amount as a district serving 200 Native American students.

IV. Facts Concerning the Educational Opportunities Provided by the State to Native American Students

83. The Indian Education Act, NMSA 1978, §§ 22-23A-1 to -8 (“the Act”) was passed in recognition of the fact that the State was failing Native American students and needed to do better. Specifically, the State recognized that Native American students had consistently underachieved in school and had done so in large part due to linguistic and cultural differences. *See* Exhibit 15, Fiscal Impact Report for SB 155 in the 2003 legislative session.

84. The Act requires that the State: (1) provide equitable and culturally-relevant learning environments to Native American students; (2) ensure the maintenance of native languages; (3) develop and implement systems that positively affect the educational success of Native American students; (4) partner with tribes to increase tribal involvement in and control of schools located in tribal communities; (5) cooperate with the States of Utah and Arizona and also with the Navajo Nation to address the unique issues of educating Navajo students; (6) encourage government-to-government relationships with the tribes in New Mexico; (7) establish a relationship with urban Native American community members to participate in initiatives and educational decisions related to Native American students living in urban areas; (8) work with parents, tribal education departments, and others to find ways to improve educational opportunities for Native American students; (9) notify tribes of curricula development for their approval and support; (10) encourage alignment with the Bureau of Indian Affairs to ensure that comparable information from federal and state sources is provided to parents and tribes; and (11)

encourage and foster parental involvement in the education of Native American students. *See* NMSA 1978, §§ 11-23A-2(A)-(K).

85. As a general matter, those officials charged with implementing the laws intended to provide quality (or at least adequate) education to Native Americans do not fully understand what those laws require. They also do not understand what Native American education is or what it should entail. Ex. 6, 18:19-19:4; Exhibit 16, Excerpts of the Deposition of Penny Bird, 50:24-51:9.

86. There is a lack of knowledge and information about the programs for Native American students funded by the State. Ex. 6, 181:9-182:1; 183:18-184:3. In particular, the State has failed to use any of the funds at its disposal to provide meaningful, culturally relevant learning environments for Native American students. *Id.*, 182:16-183:14; 184:25-185:16.

87. For Native American students, a culturally-relevant educational experience is one in which their cultural norms are respected and validated. *Id.*, 43:16-44:4. It should include learning about the historical impositions and inequities to which Native Americans in New Mexico have been subjected. *Id.*, 42:9-43:10.

88. The State does not currently provide to Native American students culturally-relevant instructional materials or curricula. *Id.*, 54:9-21. Such instructional materials, which can include personnel, exist; they just find no use in New Mexico. *Id.*, 55:4-56:18; 72:12-73:13.

89. The State has provided little to no guidance to New Mexico educators about how to provide culturally-relevant learning opportunities. *Id.*, 45:14-47:1. It has not, for instance, provided any culturally-responsive professional development to teachers or administrators. *Id.*,

68:4-69:14. Not surprisingly, the State has failed to provide culturally-relevant educational opportunities to Native American students. *Id.*, 53:15-54:1.

90. Similarly, the State has failed to provide Native American students with an equitable learning environment that includes an understanding of the relevant tribal culture. *Id.*, 58:14-59:13. Indeed, the State has not even engaged in a preliminary discussion of the importance of a particularized understanding of New Mexico's different Native American tribes. *Id.* 59:18-60:18.

91. The State has not made effective use of the data it has compiled concerning educational opportunities provided to Native American students. In particular, the State has not used that data to analyze those opportunities in a culturally-relevant way. *Id.*, 63:8-64:11.

92. The State has also not made any real effort to maintain native languages among Native American students. *Id.*, 85:12-87:16. While some native groups resist the inclusion of their language in an official curriculum, the State has made no effort to understand or work with that resistance. *Id.*, 80:18-82:12. The State has also not informed tribes of the opportunities to establish and maintain native language programs despite the existence of such opportunities. *Id.*, 82:22-83:24; 87:25-90:3.

93. Even faced with the Native American educational outcomes described above, the State has not developed or conducted sufficient study or research of educational systems that positively affect the education success of Native American students. *Id.*, 93:23-94-2. Instead, the State has prepared and issued Tribal Education Status Reports as required by the Indian Education Act. Those reports provide data on the educational outcomes for Native American

students, but do not cover the study, development, or implementation of beneficial education systems. *Id.*, 96:1-16.

94. The State is failing to adequately coordinate government-to-government relationships with New Mexico's tribes. The meetings happen only twice a year and are not well attended. *Id.*, 110:10-15; 76:7-22. They are also informal, lacking in substantive State participation, and not a meaningful attempt at collaboration. *Id.*, 110:21-111:22; 114:14-116:9.

95. The government-to-government meetings that have been held have not led the Public Education Department to modify any of its policies concerning the provision of educational opportunities to Native American students. *Id.*, 121:15-23; 122:14-18.

96. The State has failed to undertake any concrete measures to encourage and foster parental involvement in the education of Native American students. *Id.*, 136:14-138:1. This is true despite the fact that there are well-known methods for increasing such involvement that have met with success elsewhere. *Id.*, 138:2-18; 138:19-140:12.

97. Using similar methods, Zuni Public Schools has also achieved educational gains for Native American students. Notably, the Zuni school superintendent is himself Native American, which – along with its upward trending results – makes it an outlier in New Mexico. *Id.*, 169:20-170:14.

98. Since the passage of the Act in 2003, education outcomes for Native American students have remained stagnant. The State has seen virtually no return on what little investment it has made. *Id.*, 165:18-166:10. Ultimately, as it regards the educational opportunities presented to Native American students, the State is simply not doing enough, and what it does is often misguided or wrong. *Id.*, 126:21-127:8.

ARGUMENT AND AUTHORITY

Both the New Mexico Constitution and the Indian Education Act require the State to do more than it has done to educate Native American students. The dismal educational outcomes of those students are indisputable and direct evidence of the insufficiency of the education the State has provided and continues to provide. Those same outcomes also demonstrate the State's violation of the Indian Education Act, which provides an independent basis for judgment in Plaintiffs' favor.

I. THE EDUCATION PROVIDED TO NATIVE AMERICAN STUDENTS VIOLATES THE SUFFICIENCY REQUIREMENT OF ARTICLE XII, SECTION 1 OF THE NEW MEXICO CONSTITUTION.

The data do not lie, and they describe Native American educational outcomes that are not just bleak, but unacceptable. Indeed, they are unconstitutional. Article XII, Section 1 of the New Mexico Constitution provides, in its entirety: "A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." N.M. CONST., art. XII, § 1.

Constitutionally, the question is this: what does it mean for a public school system to be "sufficient for the education" of all New Mexican children? It is cynical indeed to suggest this language requires nothing more than the provision of school buildings, teachers, supplies, and curricula. The word "education" entails more than teaching; it entails teaching that actually results in learning. If the buildings, teachers, supplies and particularly the curricula provided by the State do not confer any meaningful educational benefit to New Mexico students, those students have not received the education our constitution guarantees to them.

New Mexico is not the only state to constitutionally guarantee a sufficient public education to its children. The Kentucky Constitution requires its legislature to “provide for an efficient system of common schools throughout the State.” KEN. CONST., § 183. In *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989), the Kentucky Supreme Court considered what that phrase qualitatively required of the state’s public education system and whether the state was meeting that obligation. On the first question, the court conducted a thorough review of the recorded Kentucky constitutional convention debates, precedent from both Kentucky and other jurisdictions, and expert opinion. The court held that an efficient and adequate system of public education must provide students with the following capabilities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Rose, 790 S.W.2d at 212,

Several states have adopted this standard for analysis of the constitutional guarantees of public education provided in their respective constitutions.³ In *Gannon v. State*, 319 P.3d 1196, 1236 (Kan. 2014), the Kansas Supreme Court described the *Rose* criteria as “minimal standards” by which to judge the adequacy of the public education system in that state. The Massachusetts

³ Plaintiffs have provided a more complete list in their Memorandum of Law in Support of Their Second Motion for Summary Judgment to Establish that the State Has Failed its Constitutional Duty to Provide New Mexico Children a Sufficient Education.

Supreme Court, in *McDuffy v. Sec. of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) did the same in determining that the State of Massachusetts had failed to comply with the constitutional mandate to provide an adequate public education to Massachusetts children.

The Connecticut Supreme Court has also adopted the *Rose* criteria in determining whether Connecticut's public education system complied with the constitutional mandate that the Connecticut legislature "cherish the interest of literature and the sciences" and

encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people.

N.H. CONST., pt. II, art. LXXXIII.

In *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1361 (Conn. 1997), the Connecticut Supreme Court interpreted this clause as establishing a "fundamental right" to a "constitutionally adequate public education." The court particularly emphasized that "[m]ere competence in the basics – reading, writing and arithmetic – is insufficient." *Id.* at 1365.

Other states have reached similar conclusions without expressly adopting the *Rose* criteria. The South Carolina Constitution requires the General Assembly to "provide for the maintenance and support of a system of free public schools open to all children in the State and [to] establish, organize and support such other public institutions of learning, as may be desirable." S.C. CONST., art. XI, § 3. The South Carolina Supreme Court has interpreted this provision to require "the General Assembly to provide the opportunity for each child to receive a minimally adequate education." *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 545 (S.C.

1999). More specifically, the South Carolina Supreme Court held that a minimally adequate education was one in which children were given

the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.

Id. at 534.

The Tennessee Constitution provides that the “General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.” TENN. CONST., art. XI, § 12. The Tennessee Supreme Court has held that this provision requires the legislature to “maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life.” *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 150-51 (Tenn. 1993).

The education clause in the New York Constitution provides that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST., art. XI, § 1. In *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 670 (N.Y. 1995) (*Campaign I*), the New York Court of Appeals held that this language “requires the State to offer all children the opportunity of a sound basic education.” The case came back to the Court of Appeals after remand. In its second opinion in the case, the Court of Appeals held that “whether measured by the outputs or the inputs, New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 341 (N.Y. 2003) (*Campaign II*). The court remanded the case a second time with

instructions that the state institute school funding reforms and “ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.” *Id.* at 353.

Federally, the United States Supreme Court has applied similar reasoning in determining the qualitative requirements of federal education laws. In *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court determined that a deaf student received an “appropriate” education under the Education of the Handicapped Act, 20 U.S.C. § 1401, *et seq.*, without the provision of a sign language interpreter. *Rowley*, 458 U.S. at 209-10. In reaching that conclusion, the Court recognized that the phrase “free appropriate public education” as used in the Education of the Handicapped Act included

the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.

Id. at 201.⁴ This reasoning applies with equal force in interpreting the “sufficient for the education of” language in Article XII, Section 1. That constitutional guarantee is hollow if it does not guarantee an education that benefits the students.

Even in Iowa, where the state constitution includes no language concerning the quality of the public education the state is required to provide, the supreme court has recognized that the pertinent provision establishes a floor of some kind. In *King v. State*, 818 N.W.2d 1 (Iowa 2012), the court considered whether the failure to establish statewide standards violated the “education clause” of the Iowa Constitution, which reads: “The General Assembly shall encourage, by all

⁴ Congress legislatively superseded this “some benefit” standard by amending the Education of the Handicapped Act in 1997 to require the provision of a “meaningful benefit” to the child. See *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1231, n. 3 (9th Cir. 2008).

suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.” IOWA CONST., art. IX, div. 2, § 3. The court interpreted this clause as only a directive to the Iowa legislature to provide funding for public schools. *King*, 818 N.W.2d at 14-15. As the court noted, the clause did not even mandate the provision of free public education, much less a public education that meets some minimum standard. *Id.* at 15, 21.⁵

Specially concurring, Chief Justice Cady wrote to “explain [his] unwillingness at this time to more fully explore the constitutional claim of a public education in Iowa.” *Id.* at 36. Though concurring, Chief Justice Cady recognized that even the Iowa Constitution, which contains no language like the sufficiency language in Article XII, Section 1 of the New Mexico Constitution, would support a claim like the one raised by Plaintiffs here:

Of course, my rejection of the pleadings in the case as a basis to support a constitutional right necessarily leads to the question of what allegations would need to be pled to properly support the constitutional claim of a minimally sufficient public education. Assuming Justice Appel has articulated the source of a constitutional claim to a public education, the fighting issue turns to the meaning of a minimally sufficient education. This is an issue that is indeed difficult and one that I am admittedly without a specific answer at this time. . . . The point when a state’s educational system becomes minimally insufficient would be difficult to ascertain in the context of a constitutional analysis. Nevertheless, the analysis would need to generally center on the performance of the school system and its collective outcomes and be ultimately judged in relationship to other performance models over a period of years.

Id. at 39.

Thus, almost without exception, state supreme courts that have considered constitutional guarantees of public education have found that the guarantee, in order to be worthwhile, must include some quality component. This decisional uniformity exists despite what are in some cases significant linguistic differences in the pertinent constitutional provisions. The

⁵ The court ultimately held that the complaint before it did not state a claim upon which relief could be granted and presented nonjusticiable political questions. *King*, 818 N.W.2d at 35-6.

constitutions of New York, Tennessee, and South Carolina, which on their face simply provide for the creation and maintenance of a public education system without the use of any adjectives to describe that system, have both been interpreted by their respective high courts to require minimum educational standards. So, too, has the constitution of Connecticut, that includes much more specific detail about what the public education system in that state should provide to its citizens. All of this uniform authority is persuasive in interpreting Article XII, Section 1.

Applying this authority to the undisputed facts in this case demonstrates that the educational opportunities Defendants have provided to Native American students do not pass constitutional muster. By themselves, the proficiency gaps identified in Paragraphs 1 through 53 in the Statement of Undisputed Material Facts (“SUMF”) show that those students are not receiving a sufficient education.

The failure of the State to provide meaningful, culturally-relevant learning environments to Native American students (SUMF, ¶¶ 87-90) provides some context for those dismal proficiency numbers. The State has failed to provide culturally-relevant instructional materials and curricula to Native American students despite the fact that such materials and curricula exist. *See* SUMF, ¶ 88. The State has provided no real guidance to educators and administrators about how to provide culturally-relevant learning opportunities to Native American students. *Id.*, ¶ 89. The State has not engaged in even a preliminary discussion of the importance of a particularized understanding of New Mexico’s different Native American tribes much less taken concrete steps to provide Native American students with a learning environment that includes such understanding. *Id.*, ¶ 90.

The State's failure with Native American ELL students is even more complete. The reading and math proficiency numbers for ELL students are among the worst in the state. From 2007 to 2011, the high water mark for reading proficiency among fourth, eighth, and eleventh grade ELL students was 45.7%. *Id.*, ¶¶ 32, 34, 36. The highest level of math proficiency among the same students during the same time was 28.5%. *Id.*, ¶¶ 33, 35, 37.

The advent of PARCC testing provided numbers that can only be described as genuinely shocking. In 2014-2015, 7.1% of ELL students showed proficiency in reading. *Id.*, ¶ 38. Unbelievably, this is the highest percentage of proficiency shown by any grade level of ELL students in either reading or math. The same fourth grade group tested proficient at math at a 5.3% rate. *Id.* Only 3.4% of eighth grade ELL students showed reading proficiency and even fewer – 2.5% showed math proficiency. *Id.*, ¶ 39. Eleventh grade ELL students tested proficient in reading at a 6.4% rate and in math at a 3% rate. *Id.*, ¶ 40.

A large number of these ELL students are Native American. The performance of ELL students in the Gallup-McKinley County Schools and Zuni Public Schools districts, the districts with, respectively, the largest number of Native American students and the largest percentage of Native American students (*Id.*, ¶ 42), shows proficiency numbers in line with all ELL students across the State. *Id.*, ¶¶ 43-53. Particularly of note are the numbers for ELL students in the Zuni Public Schools district, a district comprised of *at least* 99% Native American students from 2007 to 2015. *Id.*, ¶ 49. The math proficiency numbers for eleventh grade ELL students in the district – virtually all of whom are Native American – from 2011 to 2014 are the most dismal in the entire state. Over those four years, *zero percent* of those students demonstrated math proficiency. *Id.*, ¶ 53.

Ultimately, there is simply no feasible argument to be made that an education system producing the outcomes for Native American students outlined above is sufficient for the education of those children. No reasonable standard of sufficiency could countenance such poor results. The State is failing our students, and that failure is particularly acute with our Native American students (and, as discussed above, especially Native American ELL students). Those students deserve more. And our constitution guarantees it to them.

II. THE EDUCATION PROVIDED TO NATIVE AMERICAN STUDENTS INDEPENDENTLY VIOLATES THE INDIAN EDUCATION ACT AND THUS OUR STATE CONSTITUTION.

The State's failure to comply with the Indian Education Act is further evidence of the State's failure to comply with the educational mandate of the New Mexico Constitution. The State's approach to the education of Native American students violates the Act in several specific ways. First, the State has not provided Native American students with equitable and culturally-relevant learning environments as contemplated by Section 22-23A-2(A). *See* SUMF, ¶¶ 71-76. This failure hampers the ability of those students to learn. The Act was passed in recognition of the fact that Native American students had consistently underachieved in school, largely due to linguistic and cultural differences. *See* SUMF, ¶ 83.

Section 22-23A-2(B) requires that the State provide education to Native American students that ensures the maintenance of native languages. The State has failed to do so in any effective way. *See* SUMF, ¶ 77. The State has not developed or conducted sufficient study or research of educational systems that positively affect the education success of Native American students as required by Section 22-23A-2(C). Instead, the State has simply issued reports that provide data on the educational outcomes for Native American students without any discussion

or investigation of the study, development, or implementation of beneficial education systems. *See* SUMF, ¶ 78.

The State has also done little more than go through the motions of establishing a formal and effective government-to-government relationship with any New Mexico tribe as required by Section 22-23A-2(F). The meetings the State has held addressed to this issue are informal, poorly attended, and lack substance. *See* SUMF, ¶ 79. They are not meaningful attempts at the kind of collaboration contemplated by the Act. *Id.* This is perhaps best evidenced by the fact that, despite the myriad failures of the public education system's offering to Native American students, none of the meetings between officials or employees of the Public Education Department and members of any New Mexico tribe have resulted in any changes in the Department's policies concerning the provision of educational opportunities to those students. *Id.*, ¶ 80.

Finally, the State has failed to adequately encourage and foster parental involvement in the education of Native American students as required by Section 22-23A-2(H). This is true despite the fact that well-known methods for increasing such involvement have been met with success elsewhere. *See* SUMF, ¶ 81.

Not surprisingly, the State is also failing to comply with the Act in the educational services it provides to Native American ELL students. In recent years, there has been no real improvement in their educational outcomes. *Id.*, ¶ 44. Indeed, according to the PARCC testing in 2014-2015, things have gotten much worse. Because New Mexico ELL educators conflate language acquisition difficulties with reading difficulties, and because the State has not provided ELL materials specifically directed to Native American students, the State has entirely failed to

provide a culturally-relevant, equitable learning environment to these students as required by Section 22-23A-2(A). SUMF, ¶ 46, 50.

These violations of the Act must be remedied if the State is to comply with the constitutional obligation to provide a sufficient system of education to Native American students. Earnest consideration of the issues faced by Native American ELL students, adequate training of ELL teachers, and the provision of materials specifically designed for Native American ELL students could all make a positive difference. *Id.*, ¶¶ 48-50. It is not enough for the State to pay lip service to the provision of sufficient educational opportunities to Native American students through the passage of the Act. The summary judgment evidence before the Court indicates that the State is failing to meet the requirements of its own dictates concerning those opportunities. Plaintiffs are thus entitled to judgment in their favor concerning the State's failure to provide a system sufficient for the education of Native American students and, more importantly, to an Order requiring meaningful compliance with that constitutional mandate.

CONCLUSION

Something must be done. Whatever efforts the State has made to provide a sufficient education to Native American students have failed. It is time for a different approach; one informed by culture and based on successful models that exist both in New Mexico and elsewhere. While the appropriation of additional resources could help, the constitution requires the State to do better with the resources that it has. Accordingly, Plaintiffs request that the Court enter an Order that requires Defendants to provide a sufficient system of public education to Native American students, thereby requiring a fundamental shift in the approach to the education of those students. Specifically, the Court should declare:

1. the educational outcomes of Native American students demonstrate that the State is not providing to those students a sufficient system of education;
2. in order to provide a sufficient system of education to Native American students, the State must fully and meaningfully comply with the Indian Education Act;
3. the State shall present to the Court a proposed remedy for full compliance with the Indian Education Act;
4. the Court will order implementation of the proposed remedy upon approval by Plaintiffs and the Court; and
5. the Court maintains jurisdiction to monitor the State's remedy plan and implementation for a minimum of two years, or for a longer period if necessary to ensure full compliance.

Dated: April 14, 2017

Respectfully submitted,

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I hereby certify that on April 14, 2017, a true copy of this pleading was e-filed and served through the Court's e-filing system upon counsel of record.

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