Date: August 17, 2018
Prepared By: Gudgel
Purpose: Brief the Committee on the recent Decision and Order issued by Judge Singleton in the *Yazzie* and *Martinez* lawsuits.
Witness: Rachel S. Gudgel, Director, LESC
Expected Outcome: Improved understanding of the Decision and Order.

Yazzie and Martinez v. State of New Mexico: July 20, 2018 Decision and Order

Judge Sarah Singleton issued a Decision and Order on July 20, 2018, which is not a final judgment, in the consolidated *Yazzie* and *Martinez* lawsuits. The plaintiff in the cases asked the court to determine whether New Mexico is meeting its constitutional obligation to provide an adequate, sufficient education to at-risk students – i.e. socioeconomically disadvantaged children, English learners, Native American students, and children with disabilities. Judge Singleton generally ruled in favor of the Plaintiffs, finding the state has violated the Education Clause, the Equal Protection Clause, and the Due Process Clause of the New Mexico Constitution – i.e. the rights of at-risk students have been violated by the state, which failed to provide them with a uniform statewide system of free public schools sufficient for their education. Judge Singleton's Decision and Order notes, on page 25, after a brief review of state and federal statutes, 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, and that New Mexico has failed to meet this obligation.

Remedy

Judge Singleton's Decision and Order declared the following:

- The state has violated the Education Clause, the Equal Protection Clause, and the Due Process Clause of the New Mexico Constitution.
- More specifically, the state has violated the rights of at-risk students by failing to provide them with a uniform statewide system of free public schools sufficient for their education.
    - The state has failed to provide at-risk students with programs and services necessary to make them college- or career-ready;
    - The funding provided has not been sufficient for all school districts to provide the programs and services required by the New Mexico Constitution; and
    - PED has failed to meet its supervisory and audit functions to assure school districts are spending money provided to them to most efficiently achieve the needs of providing at-risk students with the programs and services needed for them to obtain an adequate education.

Injunctive Relief

Judge Singleton issued an injunction, ordering the executive and Legislature to "create a funding system that will meet the constitutional requirements." She noted she is not persuaded that it would be enough to simply redistribute the current appropriations more efficiently. Contrary to Plaintiffs' requests for immediate injunctive relief, Judge Singleton gave the state until April 15, 2019 "to take immediate steps" to ensure New Mexico schools have the resources necessary to give at-risk students - economically disadvantaged students, ELs, Native American students, and students with disabilities – the opportunity to obtain a uniform and sufficient education that prepares them for college and career. Reforms should address shortcoming of the current system by ensuring, as part of the process, that every school has 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 local school districts are spending the funds provided in a way that efficiently and effectively meets the needs of at-risk students.

Order

Judge Singleton's Decision and Order is not a final judgment. The Order section of the Decision and Order sets out a timeline of events dependent on whether any party intends to seek an appeal to Judge Singleton or not.

Intent to Appeal. Each party was given 28 days from July 20, or until August 17, to notify the District Court informally that it will seek an appeal. If a party intends to seek an appeal, each party will then have an additional 28 days from the date of submission of the notice of intent to appeal, or until September 14 at the latest depending on when the notice of intent to appeal was submitted, to submit to the District Court proposed findings of fact and conclusions of law. Findings of fact and conclusions of law are proposed facts that the judge found to be true and the conclusions of law the judge reached regarding those facts. This allows a losing party to know how and why the judge reached his decision and whether an appeal is warranted. It appears the District Court will review any additional information provided and then enter its findings of facts and conclusions of law and provide further instructions regarding submission of a judgement.

No Intent to Appeal. If no party indicates an intent to appeal, the Decision and Order sets out the process for a final judgment. The Plaintiff will be required to draft a proposed joint judgment, which will then be shared with the Defendants within 28 days of the expiration of the time for giving a notice of intent to appeal, or no later than September 14. The parties will be allowed an additional 28 days, or until October 12 depending on when the Plaintiff share the draft judgment with the Defendants, to reach an agreement on draft proposed judgment language and, if an agreement cannot be reached by October 12, the Plaintiffs will be required to submit their proposed judgment to the District Court. There appears to be a technical issue with the timeline proposed in the Order. The order sets out a 28-day period between approximately September 14 and October 12 for the parties to negotiate the language of the judgment (this period may be a bit earlier depending on when the draft judgment is shared with the Defendants); however, it also requires the Defendants to

submit a redlined version of the Plaintiff's proposed judgment no later than 28 days from the expiration of the time for giving notice of an intent to appeal, or no later than September 14, making it practically impossible for Defendants to have sufficient time to review the draft judgment or for the parties to negotiate language.

Jurisdiction. Judge Singleton noted the District Court is retaining jurisdiction for purposes of enforcing compliance with her order, though the judgement, when entered, should be considered final for the purpose of appeal.

Definition of Adequacy

Twelve states have provided a definition of adequacy, some in broad terms and some in very specific terms. Taken together, Judge Singleton noted that these cases seem to stand for the proposition that an adequate education is one that prepares school children to be functioning members of the civic, cultural, and economic aspects of society. The Plaintiffs had urged Judge Singleton to adopt the standards of adequacy adopted by the Kentucky court in *Rose* (the Rose Standard), which adopted the following specific criteria:

- Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- Sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- Sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- Sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- 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
- 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.

Judge Singleton refused to adopt the *Rose* standard, and noted doing so would fail to recognize the Legislature's rule in setting the definition of adequacy and oversteps a court's proper role in state constitutional interpretation. She also noted the New Mexico Legislature has already adopted statutory provisions that appropriately define adequacy for the purpose of the case and the Court used those definitions to determine whether the state, primarily through PED, has met its obligation.

Burden of Proof

Judge Singleton noted the Court used a preponderance of the evidence standard in deciding the case. Black's Law Dictionary defines preponderance of the evidence as the greater weight of the evidence; superior evidentiary weight, that, though not

sufficient to free the whole mind from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Black's notes this is the burden of proof in a civil trial in which a decision is made in favor of the party that, on the whole, has the stronger evidence, however slight that edge may be. Judge Singleton, then, noted she was faced with determining whether a preponderance of the evidence shows the administrative or legislative actions at issue achieve or are reasonably related to achieving the constitutional requirement of providing all school children with an adequate education.

Article XII, Section 1 Education Clause Claim

Judge Singleton found the evidence presented at trial demonstrates that the education provided to at-risk students is inadequate. She stated inputs and outputs should be considered when determining whether the education provided is constitutionally adequate; a plaintiff in an adequacy case must prove that the state provided inadequate inputs and then must correlate these failures to inadequate outcomes.

Educational Inputs

Judge Singleton focused her consideration of inputs on instrumentalities such as instructional materials and computer access.

Instructional Materials. Judge Singleton's decision notes school districts and parents testified that the amount of funds made available for instructional materials was inadequate, funding cuts have prevented schools from purchasing up-to-date textbooks, school districts supplement their instructional materials allocation with operational funds, some school districts make copies of textbooks and workbooks, students do not have textbooks to take home in some school districts, and there is a lack of appropriate instructional materials for Native American students. Additionally, Judge Singleton noted a lack of access to technology in some school districts, particularly rural school districts.

Reasonable Curricula. Judge Singleton acknowledged at-risk students begin school with certain disadvantages which are not the making of the school system but notes at-risk students can learn if given proper support. She outlined various programs that are targeted to at-risk students that have demonstrated results, including prekindergarten, summer school, smaller class sizes, and reading programs, but noted these program have not been funded at a level that would allow all at-risk children to participate in them.

Judge Singleton also noted the current at-risk factor of the funding formula and federal Title I funding do not provide the money needed to educate at-risk students and to offer these programs. She focused in on the fact that class-size waivers due to financial constraints demonstrates programs are not adequately funded and a lack of reasonable curricula for at-risk students. She also noted New Mexico is not meeting the requirements of the Bilingual Multicultural Education Act or federal law related to ELs (requiring appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs), Title III of ESSA (dealing with training to provide high quality language instruction programs to acquire

English proficiency), Title VI of the Civil Rights Act of 1964 (requiring effective language assistance programs for Native American ELs).

Focused on accountability, Judge Singleton noted PED lacks sufficient monitoring programs to determine whether ELs are receiving adequate assistance; PED did not know which schools were providing programs for ELs; PED was not tracking the number of Native American ELs to determine whether they were timely acquiring English; and PED was not tracking the training given to teachers who teach ELs.

Quality of Teaching. Judge Singleton stated, students "are entitled to 'minimally adequate teaching of reasonably up-to-date curricula...by sufficient personnel adequately trained to teach those subject areas.'" She noted this is the most critical aspect of the input inquiry and the Court was charged with determining whether at-risk students are getting the benefit of adequate teaching.

Judge Singleton noted school districts do not have the funds to pay for all the teachers they need and the quality of teaching for at-risk students is inadequate. High-poverty schools have a disproportionately high number of low-paid, entry level teachers; inexperienced teachers are systemically less effective than experienced teachers; areas with high rates of student poverty or other education needs have persistent, serious difficulty recruiting and retaining qualified, skilled teachers; high-need schools have lower quality teachers on average, high-poverty schools have teachers with lower evaluation scores and fewer teachers are rated effective or better than in schools with low-poverty and low-EL schools; teacher turnover was at 25 percent in 2015; NMTEACH may be contributing to the lower quality of teachers in high-need schools because it penalizes teachers for working in high-need schools, and NMTEACH may be leading to lower retention rates (Judge Singleton notes the evidence is conflicting on whether NMTEACH is a valid evaluation system, but highlights the system does not have a metric to determine whether a teacher is effectively serving ELs or Native American students); low teacher pay is an impediment to recruiting and retaining teachers in schools with high at-risk populations; it is difficult to recruit teachers in rural areas and to obtain special education, STEM, and bilingual and TESOL endorsed teachers; inadequate funds exist to train teachers; the training and experience (T&E) index fails to follow the statutory criteria and is inadequately funded; the use of class size waivers demonstrates funding is insufficient for school districts to maintain smaller sizes recommended by experts and required by statute.

Educational Outputs

Judge Singleton started by stating the evidence of both student outputs and state inputs presented at trial proves that the vast majority of New Mexico's at-risk children finish each school year without the basic literacy and math skills needed to pursue post-secondary education or a career. She used student performance on standardized tests, graduation rates, and college remediation rates to bolster this point.

Standardized Tests. Judge Singleton highlighted the persistence of a significant achievement gap and the fact that the outcomes have continued over time unabated. Judge Singleton rejected the state's argument that the court should focus on student growth rather than static student proficiency. For the educational outputs to

overcome the failure to provide adequate educational inputs, more than nominal growth needed to be proved by the state – real improvement in proficiency should be demonstrated. She found the state did not show this (PED staff admitted PED was not happy with the growth rates in student performance).

Graduation Rates. Judge Singleton focused on New Mexico's low graduation rate - New Mexico has one of the lowest graduation rates in the country. She also noted the state is graduating students who have not attained proficiency in the various subjects, as measured by tests, through an alternative demonstration of competency, which measures competency, not proficiency.

College Remediation. Of the students who do go to college, many need substantial remediation. Judge Singletons noted about 50 percent of high school graduates need remedial courses in college. The figure she relied on, however, is not an accurate figure. About 50 percent of high school graduates go to a New Mexico postsecondary institution and between 40 and 50 percent of those students need remedial classes, or 20 to 25 percent of recent high school graduates. Despite the misstated data, it is unlikely that a 20 to 25 percent remediation rate would result in a different outcome.

Conclusion on Outputs. In response to all of these outputs, Judge Singleton noted the PED's argument that no new funding is needed because its programs are working was unpersuasive. At-risk students are not attaining proficiency at the rate of non-at-risk students and the programs that PED lauded are not changing this fact. Participation in programs is limited and LFC and LESC have frequently found PED has failed to provide verifiable evidence that its programs are working. Judge Singleton also noted it is not a sufficient answer to the systemic problem of poor outcomes to urge that the problems are caused by socioeconomic factors not attributable to the school system; steps can be taken by the educational system to overcome the adverse impacts of a student's background. She noted it is left 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 the need for college-level remedial courses. The outputs demonstrate the education system is not providing the type of education state law requires and reflect a systemic failure to provide an adequate education as required by the New Mexico Constitution.

The Funding Formula and Funding Levels in General

The Funding Formula. Judge Singleton relied on LESC and LFC work that has noted the at-risk formula does not correctly steer resources needed to educate ELs and children living in poverty, which was consistent with expert testimony that found the at-risk factor of the formula only makes a small incremental difference in money received by a school district. She also noted criticism that the formula does not rely on the number of students who are entitled to free or reduced-fee lunch whose families earn at or below 180 percent of the federal poverty level (the formula uses a 100 percent FPL threshold). She raised additional compliance issues with the funding formula related to the T&E index, and as it relates to charter schools and the small school size factor.

Categorical Funding. Categorical and "below-the-line" (BTL) funding is noted to be insufficient to provide enough money to allow school districts to provide programs

and other resources needed by economically disadvantaged students and ELs. Additionally, Judge Singleton noted some BTL programs are not evidence-based and the capacity of some programs to achieve results for students is unknown. BTL funding is not consistent year to year, may be terminated, and is not generally available to all school districts, which creates uncertainty. She rejected the state's claim that more money would not improve the achievement of at-risk students (which she translated to a claim that money does not matter). She also discredited the position that no more money is needed because school districts are currently not spending what they are given, noting PED and others testified that school districts needed a cash balance of 5 percent for cash flow purposes, to maintain bond ratings, and to fund reimbursable grant programs.

Judge Singleton also rejected PED's claim that the department is not responsible for school districts' failures to provide programs that would ameliorate the education gap suffered by at-risk students by claiming that the department cannot control school district spending. She stated PED read its statutory authority too narrowly and has forsaken its oversight role. The statutory obligation to supervise all schools and school officials, including taking over the control and management of a public school or school district that has failed to meet requirements of law or department rules or standards, and determining policy for the operation of all public schools and vocational and educational programs in New Mexico is broad enough for PED to review and assure that school districts are using their funds to provide programs to assist at-risk students. Judge Singleton also noted PED does not sufficiently monitor or audit the use of formula funds and federal funds to determine whether school districts are using these funds as required for at-risk students.

Conclusion. Judge Singleton noted the overall appropriation is insufficient to fund the programs necessary to provide an opportunity for all at-risk students to have an adequate education. While she acknowledged there may be ways for school districts to more effectively and efficiently spend their funds, she noted PED fails to exercise its authority over school districts to require the money that is allocated be used for programs known to advance the educational opportunities for at-risk students.

Lack of Funds. Lack of funds is not a defense to providing constitutional rights (where there is a fundamental right affected, financial constraints are not a good defense to violating that fundamental right). "A sufficient education is a right protected by the New Mexico Constitution and as such it is entitled to priority funding." Judge Singleton quoted the Wyoming court in *Campbell,* which stated, "...Competing priorities not of constitutional magnitude are secondary, and the Legislature may not yield to them until constitutionally sufficient provision is made for elementary and secondary education." This seems to suggest she will not be moved by an excuse that there is not enough money to give more to public education but would rather see other programs unfunded or underfunded or more revenue raised to meet the constitutional obligation – i.e. the remedy for a lack of funds is not to deny school children a sufficient education, but to find more funds.

The Court will be looking for a remedy that not only ensures funds are spent more efficiently, but that also makes more funds available. Judge Singleton noted she was persuaded by evidence that showed it would not be enough to simply redistribute the

current appropriations more efficiently. Page 57 of the Decision and Order outlines 11 potential funding sources, including:

- the general fund, land grant permanent fund, and severance tax permanent fund;
- increase or restructure gross receipts taxes;
- increase progressiveness of income tax structure;
- reinstate the health care industry tax;
- pass a tax on all internet sales;
- increase consumption taxes on gasoline, alcohol and cigarettes;
- increase excise tax on motor vehicles;
- slow down or reverse the corporate income tax reductions;
- repeal the capital gains tax deduction;
- allow more local option taxes; and
- consider gross receipts tax equivalent for extractive industries.

Judge Singleton did not mandate any potential solutions to the funding question and, noted it is the Legislature's function to determine as a matter of policy which source or sources are best for New Mexico. She, did, however, reject the Plaintiffs' requests that the AIR study should be mandated, noting the costing out methodology used, whereby a collective "wish list" was compiled then reduced based on political reality, had already been rejected by the Legislature, which was a reasonable reaction to the methodology used. Whether or not the AIR study was valid is a policy question for the Legislature, not a constitutional question to be decided by the Court.

Article II, Section 18 Equal Protection Clause and Due Process Clause Claims

Because of the constitutional guarantee to a "uniform system of free public schools sufficient for the education...," Judge Singleton concluded education is a constitutionally-based fundamental right that is of significant societal importance. She noted the first question that must be addressed in any equal protection claim is "whether the legislation creates a class of similarly situated individuals who are treated dissimilarly." This case deals with economically disadvantaged students and ELs. Judge Singleton relied on the argument under the Equal Protection Clause related to educational inputs and outputs to demonstrate these groups of students are treated dissimilarly.

The second question noted is what level of scrutiny to apply. Judge Singleton applied an intermediate scrutiny basis of review and noted the current funding scheme fails to pass an intermediate scrutiny test, meaning that the classification was not substantially related to an important government interest. She noted singling out for adverse treatment a class of children who are economically disadvantaged or ELs does not bear a substantial relationship to any legitimate purpose to be achieved by the various education statutes. She also noted the Plaintiffs do not need to show animus – a motive or intent to interfere with the exercise of a right – on the part of the state. She noted the Due Process analysis is the same as the Equal Protection analysis and results in the same conclusion.