STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

LOUISE MARTINEZ, *et al.*,

Plaintiffs,

v. No. D-101-CV-2014-00793

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

Defendants.

Consolidated with

WILHELMINA YAZZIE, *et al.*,

Plaintiffs,

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

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

Defendants.

DECISION & ORDER

Introduction

This decision starts with recognition of the importance of education to our democracy. The fundamental nature of education is embedded in our State Constitution which places the following obligation on the State:

> A uniform system of free public schools sufficient for the education of and open to all children of school age in the state shall be established and maintained.

N.M. Const. art. XII, § 1. *See also Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 389, 901, 801 N.E.2d 326, 327, 769 N.Y.S.2d 106, 107 (2003) (*CFE II*) (recognizing the importance of education which is embodied in the New York State Constitution). As Justice Brennan wrote,

> [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when selected groups are denied the means to absorb the values and skills upon which our social order rests.

Plyler v. Doe, *457 U.S. 202*, 221 (1982).

This case calls upon the Court to determine if New Mexico is living up to is constitutional obligation to provide a sufficient education for those children characterized as at-risk. These children include those children who come from economically disadvantaged homes, those children who are English Language Learners, those children who are Native American, and those children with a disability. In New Mexico the number of school aged children who qualify for at least one of these at-risk factors is no small number. Students who come from low-income families are 71.6 percent of

the student population.[1] English Language Learners constitute 14.4 percent of all students statewide. Native American students are 10.6 percent of the student population. Finally, 14.8 percent of the students in New Mexico have a disability. P-2401 at 53.[2] Of the students in New Mexico 27.2 percent are food insecure, and many of these children receive the only meals they get at school.[3] Among the adverse consequences of such hunger are problems in school like low test scores and higher rates of discipline. P-1664 at 31; Wallin 6/20/17 at 54. New Mexico ranks 50 (only Mississippi ranks lower) in school-aged children living in poverty (28.5 percent) or qualifying for a free or reduced lunch (68.2 percent). New Mexico also has a higher proportion of students who are English Language Learners than any state except California (15.8 vs. 22.8 percent). P-2803 at 18-20. These at-risk students are the school children whose lives, not just as students but also as adults, are directly affected by New Mexico's education system and its funding decisions.

[1] These figures are from the 2015-16 Report Card for the Albuquerque Public Schools and are statewide numbers for that year.

[2] Record citations in the decision are as follows: Plaintiffs' Exhibits are cited as P-#; Defendants' Exhibits are cited as D-#. Where there was a difference between the document pagination and the exhibit pagination, the Court has used the document page reference. Transcript references have the witness's surname, the date of the testimony and the page of the transcript, e.g. Doe, 6/30/17 at p. #; depositions are cited to deponent's name, date of deposition and page of deposition transcript.

[3] There are students who leave school on Friday with no prospect of getting another meal until Monday at breakfast when school resumes. In one district, for example, but for private philanthropy which allows the schools to put food in these students' backpacks, these students would go hungry for the entire week-end. Space, 6/29/17 at 173-74; Wallin 6/20/17 at 54.

The Court is aware that a sizeable portion of the state budget goes to fund the public school system.[4] For example in Fiscal Year ("FY") 17, 44 percent of the recurring appropriations went to public education. *See* Smith, 7/26/17 at 170. Even though a large percent of the state appropriations go to public education, one witness calculated that New Mexico ranks 41st in state spending per student. P-2803 at ¶ 25.

General History of State Constitutional Litigation of Education Clauses

Every state constitution, but one[5], has some form of education clause.[6] There are four states, including New Mexico, that require that the education be adequate or sufficient.[7] Three states require that the education be high quality, and nine states require that it be suitable. Martha M. McCarthy & Paul T. Deignan, *What Legally Constitutes an Adequate Public Education?: A Review of Constitutional, Legislative, and Judicial Mandates* 120-26 (1982).

[4] It is not really surprising that New Mexico (or any state) spends almost half of its budget on education. As the old saw goes, "State and local governments, however, are basically school districts with police departments. Education accounts for more than half the state and local work force; protective services like police and fire departments account for much of the rest." Paul Krugman, "We don't Need No Education," https://www.nytimes.com/2018/04/23/opinion/teachers-protest-education-funding.html. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), *overruled on other grounds, Employment Division v. Smith*, 494 U.S. 872 (1990) ("Providing public schools ranks at the very apex of the function of a State.").

[5] Mississippi is the lone exception; however, Mississippi has an education clause but any obligation is subject to terms set by the legislature. This has caused some commentators to disclaim that Mississippi has an education clause. *See* Allen W. Hubsch, The Emerging Right to Education Under State Constitutional Law, 65 Temp. L. Rev. 1325, 1343-48 (1992) (listing each state's education clause).

[6] Joshua Kagan, A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses, 78 N.Y.U. L. Rev. 2241, 2265 (2003).

[7] These terms – sufficient and adequate – are used interchangeably throughout this Decision.

This case raises a challenge as to the adequacy of the education being provided public school students who are Native American, English language learners, economically disadvantaged, or who have a disability. The Plaintiffs[8] challenge 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.

It is helpful to the analysis of the complex issues presented by this case to briefly discuss the history of school finance litigation. The present case is part of what is commonly called the third wave of cases challenging school financing. Amy L. Moore, When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts, 41 U. Tol. L. Rev. 545, 586 (2010).[9] *See also* Spencer C. Weiler, Ph.D., Luke Cornelius, Ph.D. & J.D., and Edward Brooks, Ed.D, Examining Adequacy Trends in School Finance Litigation, 345 Ed. Law Rep. 1 (September 7, 2017).

[8] Defendants again challenge the standing of Plaintiffs to bring suit. For the reasons stated in previous orders, this argument is rejected. This case represents a systemic challenge to the funding of public schools. Thus, individual claims are representative in nature. Further, school districts have the right to sue under NMSA 1978 § 22-5-4E, and the Court remains of the opinion that the districts demonstrated they have been injured by the inadequacy of the funding. Further, even if the Districts do not have standing, the school boards and the parents do have standing. There was sufficient evidence that their children suffered as a result of inadequate programs to assist them and that the parents were also harmed by some of the practices about which they complain.

[9] Moore describes the waves as follows:

> The waves are typically described as a first wave consisting of equality claims including reliance upon the Federal Equal Protection Clause of the Fourteenth Amendment, a second of equality claims based upon the state equal protection clauses, and the third and present wave of adequacy claims based upon state education constitutional claims.

Moore, 41 U. Tol. L. Rev. at 547, n. 9.

The initial wave of challenges to public school funding raised issues under the federal equal protection clause, and that wave ended with the decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The second wave of challenges was based on the clauses in most state constitutions interpreted to be equivalent to the equal protection clause. In addition to the more general equal protection clauses, many state constitutions also have equality clauses specific to schools. "Many state provisions [including New Mexico's] guarantee equality in specific or limited instances . . . requiring 'uniform' or 'thorough and efficient' public schools[.]" Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1196 (1985).

For example, in *Robinson v. Cahill*, 62 N.J. 473, 513, 303 A.2d 273, 294 (1973), the New Jersey Supreme Court held unconstitutional the state's school financing scheme under the New Jersey constitution provision requiring a "thorough and efficient" education. As the New Jersey court stated regarding the intention of the constitutional framers: "[W]e do not doubt that an equal educational opportunity for children was precisely in mind." *Id.* *See also Serrano v. Priest*, 487 P.2d 1241, 1265 (Cal. 1971) (recognizing that the school funding scheme was inadequate under the state equal protection clause and the education clause because it relied on property taxes which discriminated unfairly against the poor). The second wave lasted from 1973 to 1989 and shifted the legal argument

from equality to equity. The cases in the second wave "placed less emphasis on equal protection and focused more on the wording of the education clauses in state constitutions." Spencer C. Weiler, Ph.D., Luke Cornelius, Ph.D. & J.D., and Edward Brooks, Ed.D, Examining Adequacy Trends in School Finance Litigation, 345 Ed. Law Rep. 1, 3 (2017). Second wave plaintiffs sought "either horizontal equity among school districts, such that per-pupil revenues were roughly equalized by the state, or fiscal neutrality, such that the revenues available to a school district would not depend solely on the property wealth of a particular school district." William S. Koski, Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation, 117 Colum. L. Rev. 1897, 1903-04 (2017).

The second wave was replaced by the third wave in 1989:

> [T]he third wave, which began with the Montana, Kentucky, and Texas decisions in 1989 and continues to the present, involves the adequacy theory of school finance litigation. Under the adequacy theory, the plaintiffs, relying on the State Constitutions' Education Clauses argue that the finance system is unconstitutional because some schools lack the money to meet minimum standards of quality.

Carlee Poston Escue, Ph. D, et. al., Some Perspectives on Recent School Finance Litigation, 268 Ed. Law Rep. 601, 602–03 (2011) (footnotes omitted). Within this wave "more recent litigation has sought to define qualitatively the substantive education to which children are constitutionally entitled." Koski, 117 Colum. L.

Rev. at 1901. In 2010 one commentator observed: "Since 1989-- the start of the third wave of education litigation--twenty-five different states have struggled with constitutional challenges to their education system." Moore, 41 U. Tol. L. Rev. at 563.

Court reaction to adequacy challenges has varied.[10] Some courts have taken a position of total deference to the legislature. "Eight states declined to enter the debate either in whole or in part, claiming that setting educational policy, and even deciding if educational policy is constitutional, is a purely legislative decision. These states made cases against intrusion largely because of stated beliefs that courts should not be defining adequacy." Moore, *id.* at 564-65.[11]

The Court is of the opinion that such an approach does not fulfill the Court's duty to interpret and enforce the State Constitution. *See generally* Order Denying Defendants' Motion to Dismiss, filed November 14, 2014. As stated by one commentator: "These clauses create positive state duties (such as the legislature's

[10] One commentator has summed up the philosophical differences espoused by the two sides to these disputes:

> *This 'next generation' of educational rights litigation is also a manifestation of the political and policy rift in the education policy arena between those who blame poor student performance on systemic failure to provide students with equitable and adequate resources and those who emphasize the inefficiency of state, local, and collectively bargained policies that stifle administrative discretion and family choice. Armed with hotly contested social science research on both sides, advocates are asking the courts to dive deep into some of the most difficult ideological and empirical educational reform questions of today.*

Koski, 117 Colum. L. Rev. 1897.

[11] According to Moore, these states include: Alabama, Florida, Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island. See *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002); *Coalition. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996); *Committee. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996); *Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009); *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 181 (Neb. 2007); *Oklahoma Educ. Ass'n v. Oklahoma*, 2007 OK 30, 24, 158 P.3d 1058, 1066; *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995).

obligation to provide an adequate education), rather than negative rights (such as freedom from government regulation of speech) guaranteed by the U.S. Constitution." Kagan, 78 N.Y.U. L. Rev. at 2258. For a variety of reasons, Kagan concludes that state courts should aggressively assure that state legislatures live up to their state constitutional obligations. *Id.* As stated by another commentator, "[W]hen a citizen sues the state on the theory that the state has failed to fulfill its constitutional obligation to provide for adequate education, the judiciary has the institutional duty to interpret the education clause to determine whether the state has complied with its constitutional obligation." William F. Dietz, Manageable Adequacy Standards in Education Reform Litigation, 74 Wash. U. L.Q. 1193, 1194 (1996).

Most courts do not hesitate to say whether the state constitution is being met. Moore, 41 U. Tol. L. Rev. at 565. This is not to say, however, that such courts do not show deference to the legislature. The deference they demonstrate might run from allowing the legislature to define adequacy to using an existing definition of adequacy given by the legislature, even if the Court might prefer another definition. Moore, *id.* at 566. As stated by Dietz, "[T]he proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature and the education bureaucracy have adopted for themselves in

the form of accreditation standards or statutory statements of educational goals." Dietz, 74 Wash. U. L.Q. at 1194.

Finally, twelve states have provided a definition of adequacy. Moore, 41 U. Tol. L. Rev. at 566.[12] Of these twelve some have stated the definition in broad sweeping terms:

> At its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities.

Abbott v. Burke (Abbott II), 149 N.J. 145, 693 A.2d 417, 428 (1997).[13] Other courts, such as the seminal case in this type of education litigation, *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989), adopted specific criteria:

> (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

[12] Moore identifies those states as Arizona, Connecticut, Idaho, Kentucky, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming. *Id.* at n. 191.

[13] While such a definition certainly contains laudable goals, it does little to inform the legislature as to what is needed to meet the constitutional requirement.

> (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.

Other states have used the *Rose* criteria or ones similar thereto as a basis for their own definitions of adequacy. *See, e.g.*, *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417, 442 (1997); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 381 (NC 2004), *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (SC 1999).[14]

Another example of a court which provided the legislature with specific criteria is *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). *Campbell* provided a detailed list, including a student assessment requirement that the state had to implement.[15] As one court stated of its constitutional education clause:

> It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. Education plays a critical role in a free society.... The constitutional right to have the State make ample provision for the education of all (resident) children would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.

[14] The *Rose* approach is not without its critics. As one commentator on the *Rose* decision stated, "it is unclear how a court can seriously claim that such a manufactured pronouncement is within its power as interpreter of the constitution. When a court starts from scratch to create its own laundry list of fundamental goals for public education, the conclusion seems inescapable that the court is legislating, which is an unacceptable violation of the separation of powers." Dietz, 74 Wash. U.L.Q. at 1211–12.

[15] The assessment was one element of adequacy inputs because "the court made the pedagogic judgment that setting goals and holding students and schools to those goals has constitutional significance. Low test scores by themselves would not indicate inadequacy, but the complete failure to assess student progress would." Kagan, 78 N.Y.U. L. Rev. at 2255-56.

McCleary v. State of Washington, 269 P.3d 227, 246-7 (Wash. 2012) (citations & quotation marks omitted). Taken together, 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 our society. Moore, 41 U. Tol. L. Rev. at 569. While it is hard to argue with this as the ultimate goal of education, this Court questions its utility as a basis for directing legislative or administrative action.

One example of an adequacy challenge that further refines the standards for defining adequate is found in the decades long school litigation from New York. In the 2003 opinion form the New York Court of Appeals, the highest court in New York, the court defined an adequate education as requiring the state to teach "skills fashioned to meet a practical goal: meaningful civic participation in contemporary society." *CFE II*, 801 N.E.2d 326, 330. The court clarified that the education article required the state to provide "a meaningful high school education." *Id.* at 337. "Third, the court restated its emphasis on educational inputs [e.g., teachers and facilities] as the primary measure of adequacy, but clarified the connection of inputs to outputs [e.g., test results and graduation rates] . . . The plaintiffs' showing of both inadequate inputs and outputs led the court to presume that the inadequate inputs caused the inadequate outputs. Considering school drop-

out rates and test scores, the court found that the state did not successfully rebut this showing." Kagan 78 N.Y.U. L. Rev. at 2248 (summarizing holding).

As noted by Kagan, there are other methods of defining adequacy besides providing detailed lists. For example, the courts could "use existing legislative or executive standards to define and measure adequacy; order the legislature or executive branch to decide upon a definition and measurement; come up with its own list of required outputs; or come up with its own list of inputs." Kagan, 78 N.Y.U. L. Rev. at 2248. *See, e.g. McCleary,* 269 P.3d 227, 249-50 (adopting as constitutionally required under the Washington adequacy clause the specific standards that had been adopted by statute and regulation in nine separate content areas, including reading, math, science, writing, communication, social studies, the arts, health and fitness, and educational technology.)

It is this Court's opinion that adoption of the *Rose* standard, as urged by the Plaintiffs, is inappropriate. It fails to recognize the legislature's role in setting the definition of adequacy and oversteps a court's proper role in state constitutional interpretation. As will be shown below, the legislature has already adopted statutory provisions which appropriately define adequacy for purposes of this litigation. This court will use those statutory definitions in determining whether the State, primarily through the Public Education Department ("PED"), has met its obligation.

Before turning to the issue of the statutory criteria, however, the Court wishes to discuss the burden of proof and standard of review. It is unclear what the burden of proof is in a case like this. In the Court's opinion this case is primarily a challenge to administrative action in failure to comply with the Constitution and statutes enacted to achieve the constitutional requirement. This would be an "as applied" challenge. In addition there is a challenge to the legislatively adopted funding formula. This would amount to a facial challenge.

In terms of the administrative challenge, New Mexico law is replete with authority that applies a presumption of regularity to administrative action. *See, e.g., State v. Myers*, 1958-NMSC-059, ¶ 14, 64 N.M. 186, 326 P.2d 1075, which stated:

> [W]e must presume that the action of the state engineer is correct. We find ourselves in agreement with the authority cited by the State and appearing in 73 C.J.S. Public Administrative Bodies and Procedure § 205, p. 556:
> 'On review of the acts or orders of administrative bodies, the courts will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable; presumptions will not be indulged against the regularity of the administrative agency's action.'

See also Pickett Ranch, LLC v. Curry, 2006-NMCA-082, ¶ 53, 140 N.M. 49, 139 P.3d 209 (applying the presumption that administrative action is correct).

This presumption of regularity even has some applicability in cases involving constitutional questions. *See, e.g., Pinnell v. Board of County Com'rs of*

Santa Fe County, 1999-NMCA-074, ¶ 29, 127 N.M. 452, 459, 982 P.2d 503, 510, holding:

> [R]ational-basis scrutiny represents the least stringent level of scrutiny. It requires that a statute's classification be rationally related to a legitimate governmental interest. . . . Unlike the other levels of scrutiny, the rational-basis standard requires that a plaintiff bear the burden of proof and that the state action bears a strong presumption of validity.

(Citations omitted). *Pinnell*, however, dealt with an equal protection challenge that did not involve a fundamental right.

As to the facial challenge to the funding formula, New Mexico also has a plethora of cases saying that a challenger of a statute must prove beyond reasonable doubt that the statute is unconstitutional. *See, e.g., Titus v. City of Albuquerque*, 2011-NMCA-038, ¶ 38, 149 N.M. 556, 252 P.3d 780. Because those cases did not deal with fundamental rights, those cases are not applicable and will not be discussed or used in the Court's analysis.

The Court believes that the burden of proof associated with claims that a fundamental right has been impinged is more applicable than the above discussed cases. While the Court has found no New Mexico cases that deal with the burden of proof issue in a case involving the burden of proof in a challenge under the Education Clause, there are cases from other jurisdictions that have determined this issue. As with almost every aspect of this case, the cases are not uniform.

For purposes of illustrating the different approaches, the Court will review cases from South Dakota and Washington. *Davis v. State,* 804 N.W.2d 618, 628 (S.D. 2011), stated that the school finance system would be upheld unless "the unconstitutionality of the act is clearly and unmistakably shown and there is no reasonable doubt that it violates fundamental constitutional principles."

On the other hand, the Washington Court adopted a standard that recognized that "the legislature has the responsibility to augment the broad educational concepts under [the Education Clause] by providing the specific details of the constitutionally required 'education.'" The Washington Supreme Court also recognized that there is a "*right* of Washington children to receive an education." This right to an education is a positive constitutional right. *McCreary v. State,* 269 P.3d 227, 246-48 (Wash. 2012). Because of this positive constitutional right, the court adopted the standard of review which asked "whether the state action achieves or is reasonably related to achieve the 'constitutionally prescribed end.'" *Id.* at 248. This standard requires "the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty." *Id.* In the Court's opinion, the Washington standard is more consistent with the Court's duty to interpret and enforce constitutional mandates, as previously ruled by the Court in declining to dismiss this case. In the Court's opinion, this standard must be met by proof that complies with the preponderance-of-the-evidence standard. *See, e.g.*,

United Nuclear Corp. v. Allendale Mut. Ins. Co., 1985-NMSC-090, ¶ 14, 103 N.M. 480, 709 P.2d 649.

Based on this analysis the Court rejects any argument that the Plaintiff must prove the government's actions were unconstitutional beyond a reasonable doubt. The Court also rejects the argument that the State must meet a strict scrutiny test in justifying its actions. Rather the Court will determine 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.

Relevant Statutory Authority[16]

General Education Statutes

The legislature has found that "no education system can be sufficient for the education of all children unless it is founded on the sound principle that every child can learn and succeed[.]" NMSA 1978 § 22-1-1.2 (2015). The legislature also made findings that the key to success is having a multicultural education system that

> (1) attracts and retains quality and diverse teachers to teach New Mexico's multicultural student population;
> (2) holds teachers, students, schools, school districts and the state accountable;

[16] There are numerous other state and federal statutes dealing with education which are not cited in this section. This discussion is not intended to be inclusive. Any other statutes relevant to this decision will be discussed as needed later in this decision.

(3) integrates the cultural strengths of its diverse student population into the curriculum with high expectations for all students;
(4) recognizes that cultural diversity in the state presents special challenges for policymakers, administrators, teachers and students;
(5) provides students with a rigorous and relevant high school curriculum that prepares them to succeed in college and the workplace; and
(6) elevates the importance of public education in the state by clarifying the governance structure at different levels.

Section 22-1-1.2(B). The legislature also recognized the importance of an accountability system for students and teachers. Section 22-1-1.2(D).

PED has a duty to prescribe courses of instruction and requirements for graduation and standards for all public schools. NMSA 1978 §22-2-2(D) (2004). This includes prescribing standards for "curriculum, including academic content and performance standards." NMSA 1978 22-2-8(A) (2003). The PED "shall establish a statewide assessment and accountability system that is aligned with the state academic content and performance standards." NMSA 1978 § 22-2C-4(A) (2015). In order to graduate, a student must demonstrate "competence in the subject areas of mathematics, reading and language arts, writing, social studies and science, . . . based on a standards-based assessment or assessments or a portfolio of standards-based indicators established by the department by rule." NMSA 1978 § 22-13-1.1 (2017).[17]

[17] PED has adopted the Common Core Standards in English Language Arts and Math and requires that students demonstrate they meet these standards by achieving a certain score on the PARCC test. Skandera, 9/2/16 Depo. Des. at 77; 118. Science performance is measured by the Standardized Based Assessment. End-of-course tests are used to demonstrate competency in social studies. Ex. D-0138 at 4.

NMSA 1978, § 22-2C-4.1(A) requires "[t]he department [to] establish a readiness assessment system to measure the readiness of every New Mexico high school student for success in higher education or a career."

The State has requirements regarding class load, teaching load, length of school day, staffing patterns, subject areas and purchases of instructional materials, but the legislature has allowed districts to obtain a waiver of these requirements due to funding constraints. The waiver provision has been in place since 2009 and extends to the 2018-19 school year, according to the legislative history. NMSA 1978 § 22-1-10 (2016).

In the 1970's New Mexico adopted a funding formula to finance public education. As stated in NMSA 1978 § 22-8-25(A) (2017): "The state equalization guarantee distribution is that amount of money distributed to each school district to ensure that its operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost." This formula has been amended over 80 times. Numerous statutes address this formula plus the numerous factors that go into this formula. P-0087, p. 10. *See, e.g.*, NMSA 1978 §§ 22-8-25, 22-8-20, *et seq.*, 22-8-23, *et seq.*, 22-8-24, 22-8-26, 22-8-29, *et seq.* In addition, there are state and federal funds not directly covered by the funding formula. *See, e.g.*, NMSA 1978 §§ 22-8-43, 22-8-44, 22-8-45.

The State has an obligation to "supervise all schools and school officials coming under its jurisdiction, including taking over the control and management of a public school or school district that has failed to meet requirements of law or department rules or standards," and to "determine policy for the operation of all public schools and vocational education programs in the state." NMSA 1978 § 22-2-2(C) (2004).

Statutes re English Language Learners ("ELL")

In the Bilingual Multicultural Education Act the legislature found:

> L. the Bilingual Multicultural Education Act will ensure equal education opportunities for students in New Mexico. Cognitive and affective development of the students is encouraged by:
> (1) using the cultural and linguistic backgrounds of the students in a bilingual multicultural education program;
> (2) providing students with opportunities to expand their conceptual and linguistic abilities and potentials in a successful and positive manner; and
> (3) teaching students to appreciate the value and beauty of different languages and cultures.

NMSA 1978 § 22-23-1.1 (2004). NMSA 1978 § 22-8-18(B), dealing with program cost calculation applies to bilingual multicultural education and states: "It is the responsibility" of the local board or governing body of a charter school "to determine its priorities[,]" and it further provides that funds are discretionary with the local board or charter governing body, "provided that the program needs as enumerated in this section are met[.]" Bilingual programs are not necessarily the same as programs for English Language Learners. The federal Equal Educational

Opportunities Act ("EEOA") declares unlawful "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f). Title III of the Every Student Succeeds Act, P.L. 114-95, §§ 3001-3004 (December 10, 2015), 129 Stat. 1802, deals with English Language Acquisition and is a federal grant program that deals with English Learners. Among other purposes, this statute is to help all English learners attain English proficiency and high academic levels. Section 3102.

While not limited in scope to ELL students, the Hispanic Education Act is to "provide for the study, development and implementation of educational systems that affect the educational success of Hispanic students to close the achievement gap and increase graduation rates. . . ." NMSA 1978, §22-23B-2(A) (2010). This Act recognizes the importance of bilingual and multicultural school programs by requiring PED to report on the number of such programs. NMSA 1978, § 22-23B-6 (2015).

Also of interest in this regard are the New Mexico Constitution's provisions regarding Spanish. Section 8 of Article XII requires the legislature to provide for the training of teachers "so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state . . . ."

Section 10 of Article XII states that students of Spanish descent shall "enjoy perfect equality with other children in all public schools and educational institutions of the state[.]"

State Statute Regarding Native American Students

New Mexico Indian Education Act ("NMIEA") of 2003, 1978 NMSA, §22-23A-1, *et seq.* (2005), provides in relevant part that the statutory purpose is to:

> A. ensure equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials for American Indian students enrolled in public schools;
> B. ensure maintenance of native languages;
> C. provide for the study, development and implementation of educational systems that positively affect the educational success of American Indian students;
> D. ensure that the [public education department] partners with tribes to increase tribal involvement and control over schools and the education of students located in tribal communities;
> ***
> F. provide the means for a formal government-to-government relationship between the state and New Mexico tribes and the development of relationships with the education division of the bureau of Indian affairs and other entities that serve American Indian students;
> G. provide the means for a relationship between the state and urban American Indian community members to participate in initiatives and educational decisions related to American Indian students residing in urban areas;
> H. ensure that parents; tribal departments of education; community-based organization; [public education department]; universities; and tribal, state and local policymakers work together to find ways to improve educational opportunities for American Indian students;
> I. ensure that tribes are notified of all curricula development for their approval and support. . . .

NMSA 1978 § 22-23A-2 (2003).

Authority Regarding Economically Disadvantaged Students ("ED")

There are a number of programs which are intended to benefit economically disadvantaged students.[18] For example there are programs providing free and reduced price meals, National School Lunch Program (7 CFR part 210) and the School Breakfast Program (7 CFR part 220). Section 9 of the National School Lunch Act, as amended, and sections 3 and 4 of the Child Nutrition Act of 1966, as amended, require schools participating in any of the programs and commodity schools to make available, as applicable, free and reduced price lunches and breakfasts. Title I of the Elementary and Secondary Education Act ("ESEA") provides assistance to local education agencies with high percentages of children from low-income families.

The State Equalization Guarantee ("SEG") deals with "at-risk" students through the assignment of additional program units. To calculate the at-risk rate the school determines the three year average percentage of students (members) "used to determine its Title I allocation, a three-year average of the percentage of membership classified as English language learners using criteria established by

[18] According to the Annie E. Casey Foundation Kids Count Data Center, in 2014 30 percent of New Mexico children were living at or below the federal poverty level. This compares unfavorably to a national average of 22 percent. In fact in that year New Mexico's rate of childhood poverty ranked as the highest in the country. Yazzie Stips, ##1346, 1347

the federal office of civil rights, and a three-year average of the percentage of student mobility." Section 22-8-23.3(B).

Statutes regarding Students with Disabilities

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". P-2798, ¶ 15. Under ESEA the same academic and achievements standards apply to all students, except those with the most significant cognitive disabilities. *Id.* at ¶ 19. Students with significant cognitive disabilities may be held to "Alternative Achievement Standards" but not more than one percent of the total student population may be held to these standards. *Id.* All other students with a disability are to receive an education that "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d).

The education clause of the New Mexico Constitution states: "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. A reading of the education clause authorities from other states, the New Mexico Constitutional Education Clause, and the relevant statutes

convinces the Court that the State 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. As will be discussed below, New Mexico has failed to meet this obligation.

ARTICLE XII, SECTION 1 EDUCATION CLAUSE CLAIMS

The Evidence Demonstrates that the Education Provided to At-Risk Students Is Inadequate

Educational Inputs

Educational inputs include components such as quality of teaching, curricula, school buildings, text books, personnel, supplies, and similar factors. *See* Kagan, 78 N.Y.U. L. Rev. at 2244. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 317, 631 N.Y.S.2d 565, 570, 655 N.E.2d 661, 666 (1995) [*CFE I*] outlined the essential inputs:

> Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

This list of essentials should, in the Court's opinion, be updated to include computers and related infrastructure.

Educational inputs and outputs must both be considered when determining whether the education provided is constitutionally adequate. *CFE II*, 100 N.Y.2d at 903, 801 N.E.2d at 328, held that a Plaintiff in an adequacy case must prove that the state provided inadequate inputs and then must correlate these failures to inadequate outcomes. If the State makes a showing of adequate outputs despite the evidence of inadequate inputs, then State may overcome liability.

The evidence presented during the trial in the present case did not show a systemic failure to provide adequate physical facilities in general. As the Court observed during the trial, this case was not about failure to provide adequate school buildings. Nor is the case about pencils,[19] desks, or chairs. The Court will focus its consideration of inputs on instrumentalities such as instructional materials and computer access. Finally, the Court will address the most critical input – quality of teaching.

Instructional Materials

The State provides a stipend to purchase textbooks. Numerous superintendents and the director of the New Mexico Coalition of Education Leaders testified that the funding for instructional materials was inadequate. Cleveland, 7/11/17 at 199, 208-213, 215; Chiapetti, 6/28/17 at 46, 156; Sullivan, 7/12/17 at 201-205; Lewis, 6/30/17 at 139-140; Space, 6/29/17 at 159; Garcia,

[19] The Court does note, however, that there was testimony that teachers use personal funds to buy supplies and educational materials. Martinez, 6-14-17 at 179-80.

6/15/17 at 85-86; Valdez, 7/6/17 at 17-18, 26-17, 84-23; Chavez, 7/7/17 at 84; Rounds, 7/12/17 at 71-73, 111. Funding cuts have prevented schools from purchasing adequate and up-to-date textbooks.[20] The instructional materials stipend is insufficient and many districts have to supplement PED funds with their own operational funds. Garcia, 6/12/17 at 70-72; Perry, 6/29/17 at 33. Other districts are forced to make copies of textbooks and workbooks. Martinez, 6/14/17 at 179-80 (Espanola). Some parents testified that there were no textbooks for their children to bring home. 10/26/17 Louise Martinez Depo. Des. 28-29 (APS); 10/26/17 Edaakie Depo. Des. 12 (Zuni).

There is also a lack of access to technology in some districts, particularly rural districts. In Zuni, for example, this lack has compromised students' ability to take on-line tests (such as PARCC) or on-line courses, and it hinders students' ability to become educated in technology. *See Yazzie-Stips ##1325, 1326.* According to Superintendent Cleveland, those children who do not have access to technology are handicapped. Cleveland, 7/11/17 at 214.

The lack of appropriate instructional materials for Native American students presents its own problems. The New Mexico Indian Education Act requires that the State provide "culturally relevant instructional materials for American Indian

[20] On account of fiscal difficulties many schools have had to utilize the waiver program authorized by Section 22-1-10. Allowing a school to avoid the requirement to purchase textbooks that have been determined by PED to be the most appropriate for teaching the mandated curriculum does not alter the fact that funding for instructional materials is inadequate. Adopting a waiver provision does not absolve the State of it constitutional obligation to provide an adequate education, a component of which is adequate teaching materials.

students enrolled in public schools[.]" NMSA 1978 §22-23A-2(A). In the Court's opinion, this statute sets forth the legislative determination of what constitutes a constitutionally adequate education for Native American children in New Mexico public schools; thus, failure to comply with the NMIEA amounts to a violation of the constitution's adequacy clause.[21] *Cf. United States v. Cleveland*, 507 F.2d 731, 741 (7th Cir. 1974) (citing *Krilich v. United States*, 502 F.2d 680 (7th Cir. 1974), *repudiated by Johnson v. United States*, 805 F.2d 1284 (7th Cir. 1986)). There was expert testimony that PED has not provided such materials. P-2881 at ¶ 52. PED does not have information about which districts have the statutorily required educational materials. Phillips, 7/27/17 at 126-27.

The Indian Education Act is premised on the idea that a culturally relevant education is to be produced through the cooperation of the schools and the tribal communities. This goal has not been realized in most of the districts with significant Native American student populations. P-2881 at ¶¶ 27-34; Space, 06/29/17 at 131-33; Lewis, 06/30/17 at 184; Perry, 06/29/17 at 47. PED has failed to fill the three regional Indian Education Department positions which would be instrumental in effectuating this purpose. P-2881 at ¶¶ 31-34; P-2935. There has

[21] The Court notes that there are also federal requirements that deal with Native American English Learners. The Court, however, is not prepared to say that a federal requirement equates to a state constitutional requirement. This reluctance does not change the Court's determination of inadequacy which is based on the New Mexico statute.

been a failure to develop the government-to-government relationships needed to achieve the statutory goals under the Indian Education Act. P-2881 at ¶¶ 56-58.

Based on the tour of certain schools by their school-visit-experts, the defense argues that the instructional resources are adequate. If this case were about buildings and lighting, the Court might agree with Defendants' argument, but as stated above, this is not what this case is about. In the Court's opinion most of the defense school-visit-experts' testimony and investigation was irrelevant to the issues presented. These experts did not determine how current the textbooks were, the sufficiency of the quantities of the textbooks, the appropriateness of the textbooks to the work being done, or the instruction needed by at-risk students. These aspects of what constitutes adequate instructional materials go to the heart of the adequate material issue, and it was ignored by the defense experts.

Reasonable Curricula

At-risk students begin school with certain disadvantages which are not the making of the school system. This fact does not, however, mean that at-risk students cannot learn if given proper support. Sallee, 7/21/17-a.m. at 21. Various programs have been shown to provide such support. These include quality full-day pre-K, which addresses the issue of at-risk students starting school behind other children (Berliner, 6/12/17 at 138-39, 144-47; Sallee, 7/21/17-a.m. at 89); summer

school which addresses the loss of skills over the school break[22] (Berliner, 6/12/17 at 140, 148); after school programs, smaller class sizes, and research-based reading programs (*id.*; Sallee, 7/21/17-a.m. at 90). The efficacy of these programs has been recognized (5/10/17 Stip. 11; P-2797 at 20-21), but unfortunately they have not been funded to the extent that all at-risk children can participate in such programs.[23] Sallee, 7/21/17-a.m. at 26-27, 82-84; Abbey, 7/25/17 at 90-91, 101; Grossman, 6/14/17 at 19; Yturralde, 6/30/17 at 9-10; Rounds, 7/12/17 at 102-03; Space, 6/29/17 at 170-71; Cleveland, 7/11/17 at 185; P-0255 at 5 (K-3 Plus lowers achievement gap); P-0327 at 9 (after school programs can improve student outcomes).

Contrary to Defendants' argument, current funding through the at-risk formula and Title I does not provide the money needed to educate at-risk students and to offer these programs. Sallee, 7/21/17-a.m. at 67, 71-72. Indeed, the fact that so many schools have had to seek waivers of the maximum class size requirement due to financial constraints demonstrates that these programs are not adequately funded. *See* Stewart 6/20/17 at 157-58; 262-63; Sanders, 7/10/17 at 217-218; Cleveland, 7/11/17 at 159-160, 162-163, 212, 221; Sullivan, 7/12/17 at 195-196, 271-272. This demonstrates a lack of reasonable curricula for at-risk students.

[22] One such program is K-3 Plus. This type of program extends the time in school for kindergarteners and students in the early grades by extending the instructional year P-0255 at 5. In FY 16 there were 70,343 eligible students for K-3 plus, of whom only 19,383 participated. P-1671 at 60.

[23] For example, in FY 2017 full-day pre-K was estimated to be available to only 3641 four-year-olds out of a total eligible population of 12,278 four-year olds. P-1671 at 60.

An aspect of a reasonable curriculum for students who are not proficient in English is a program to assist such students in learning English. Such programs are required by state statute, federal statute, and by the state constitution. *See* NMSA 1978 § 22-23-1.1 (2004) (dealing with bilingual programs); 20 U.S.C. § 1703(f) (requiring "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs"); Title III of the Every Student Succeeds Act, P.L. 114-95, §§ 3001-3004 (December 10, 2015), 129 Stat. 1802 (dealing with training to provide high quality language instruction programs to acquire English proficiency); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (requiring effective language assistance programs for Native American English Learners). New Mexico is not meeting these requirements. Blum-Martinez, 6/27/17-a.m. at 44, 53-54, 58, 63-64, 80, 82. Many district witnesses testified that they do not have the funds to provide adequate services for ELL students. Garcia, 6/15/17; Rounds, 7/12/17 at 114-117.

The PED lacks sufficient monitoring programs to determine if ELL students are receiving adequate assistance. The Director of the Bilingual Multicultural Education did not know which schools were providing programs for ELLS, and she also testified that PED was not tracking the number of Native American English Learners to determine if they were timely acquiring English. Pelayo, 7/24/17-am at 48. Nor is PED tracking the training given to teachers who teach

ELL students. Pelayo, 7/24/17-am at 94. PED has not provided a framework for districts to use in providing multicultural education. Sleeter, 6/21/17 at 30-31.

Quality of Teaching & Related Issues

As quoted above, a student is entitled to "minimally adequate teaching of reasonably up-to-date basic curricula . . ., by sufficient personnel adequately trained to teach those subject areas." *CFE I*, 86 N.Y.2d at 317, 655 N.E.2d at 666. This aspect of the input inquiry is, in the mind of the Court, the most critical. *See* P-2799 at ¶ 13. As testified by Deputy Secretary Aguilar, highly effective teachers are "key" to improving proficiency and these teachers need to be allocated to schools serving the most at-risk students. *See* Aguilar, 8/4/17 at 63-64. *See also* Yturralde testimony that effective teachers are one of the most important components of a student's education and can have a positive effect on narrowing the achievement gap. Yturralde, 6/30/17 at 53.

The Court has no doubt that there are many teachers in New Mexico who daily make "commendable, even heroic efforts" to educate our public school children. *See CFE II*, 100 N.Y.2d at 909, 801 N.E.2d at 333, 769 N.Y.S.2d at 113. Nevertheless, the Court in this case is charged with determining whether at-risk students are getting the benefit of adequate teaching.

The evidence shows that school districts do not have the funds to pay for all the teachers they need. Gadsden, one of the better performing school districts in

the state, has had to eliminate over 53 classroom positions and 15 essential teachers since 2008. Yturralde, 6/10/17 at 23, 242-244. Rio Rancho, another well-performing district, had 28 classrooms without teachers in 2016-17. Cleveland, 7/11/17 at 228. Rio Rancho also had to reduce 41 positions which caused class sizes to be increased which adversely impacted at-risk students. Cleveland, 7/11/17 at 221.

While the evidence is in dispute, the Court believes the weight of the evidence leads to the conclusion that the quality of teaching for at-risk students is inadequate. Unfortunately, in New Mexico high poverty schools have a disproportionately high number of low-paid, entry level teachers. Sallee, 7/21/17-a.m. at 37-38; Fuller, 7/13/17 at 55-59. It is well-recognized that inexperienced teachers are systematically less effective than experienced teachers. P-2799 at ¶ 15.a; Fuller, 7/13/17 at 43. As concluded by Dr. Rothstein, schools with "high rates of student poverty or other education needs have persistent, serious difficulty recruiting and retaining qualified, skilled teachers." P-2799 at ¶ 12.a. According to Rothstein, high-need schools have lower quality teachers, on average. P-2799 at ¶ 12.b. High poverty schools and high ELL schools have teachers with lower average evaluation scores, and fewer teachers are rated effective or better than there are in schools with low poverty rates and low ELL percentages. P-2799 at ¶ 22; Fuller, 7/13/17 at 63.

Across New Mexico in 2015 only 75 percent of the teachers stayed at the same school for the next school year. Fuller, 7/13/17-a.m. at 41. Teacher turnover has a negative impact on student achievement. *Id.* at 42.

Teacher evaluations in New Mexico are conducted through a system known as NMTEACH, which was adopted by PED regulation after the legislature twice refused to enact it via statute. P-2799 at ¶ 26. The original system has been modified annually. *Id.* Teacher evaluations in New Mexico may be contributing to the lower quality of teachers in high-need schools. In general, punitive teacher evaluation systems that penalize teachers for working in high-need schools contribute to problem in this category of schools. *Id.* at ¶ 12.c. Value added methods, such as New Mexico's was, that place a 50 percent or higher weight on student achievement are "seriously flawed." *Id.* at ¶ 12.d. The evidence indicated that this weight was lowered in 2017.[24] There was much evidence that teachers were unhappy with NMTEACH and had little faith in its validity. Teacher distrust of the evaluation system could lead to lower retention rates.

The evidence is conflicting on whether or not NMTEACH is a valid evaluation system. What is clear is that the system does not use any metric to evaluate whether or not a teacher is effectively serving ELL students or whether or

[24] There was also criticism of NMTEACH for not taking into account student demographics – such as poverty and students who were ELL. There was also evidence that in 2012 the United States Department of Education would not allow student demographics to be used in teacher evaluations. *See* Fuller, 7/13/17-a.m. at 107. It is certainly reasonable for PED to decide it did not want to risk the federal funding New Mexico receives by adopting a criterion that the USDOE would find objectionable.

not a teacher is providing culturally relevant instruction to a Native American student, both of which are statutory requirements. Montano, 7/19/17 at 19, 21, 29.

Low teacher pay is also an impediment to recruiting and retaining teachers in schools with high at-risk populations. PED has agreed with this proposition and has awarded some districts funds to pay relatively small stipends for a teacher to work in a high at-risk population school. Wolkoff, 8/13/17-a.m. at 60; P-1959-MM at 6; P-2975-EF at ¶ 56. It would appear, however, that no effort has been made to evaluate the effectiveness of PED's efforts to achieve equitable distribution of effective teachers or recruitment and retention of teachers in high poverty or low-performing schools. P-2975-EF at ¶ 58. Again, there is conflicting evidence regarding whether or not New Mexico has low teacher pay, but the more persuasive evidence is from Dr. Fuller. Defendant's expert was often contradicted by PED's own reports. Dr. Fuller found that New Mexico offers one of the lowest wages for teachers in the country. P-2975-EF at ¶ 52. The opinion that there was a need to increase teacher salaries in order to recruit and retain effective teachers in schools with a high percentage of at-risk students was voiced by the superintendents who testified. Chiapetti, 6/28/17 at 93, 96-97, 123-124; Garcia, 6/12/17 at 106-107; Garcia, 6/15/17 at 50-51; Martinez, 6/ 14/ 17 at 184; Rounds, 7/12/17 at 107, Sullivan, 7/12/17 at 200-01 ; Cleveland, 7/11/17 at 169.

The evidence, although conflicting, demonstrates it is difficult to recruit teachers in rural areas and to obtain teachers in special education, STEM, and bilingual education. Garcia, 6/12/17 at 95-96. Some districts have difficulty maintaining a sufficient number of TESOL-endorsed teachers because of an inability to compete with neighboring districts. Martinez, 6/14/17 at 204.

Another part of the quality teaching input is adequate training. There was much testimony that there are inadequate funds to adequately train teachers. Further, the SEG factor that deals with training – T&E index – fails to follow the statutory criteria and is inadequately funded. These factors adversely impact the ability to have effective teachers in school with high at-risk populations. P-0087 at 16, 30, 37; P-0318 at 5; Abbey, 7/25/17 at 43; Sallee, 7/21/17-a.m. at 111-112; 7/21/17-p.m. at 33 ; Stewart, 6/20/17 at 147-148, 156; Rounds, 7/12/17 at 81.

Lack of sufficient funding or sufficient numbers of teachers has also led to larger class sizes in some districts. Rio Rancho Public Schools, Albuquerque Public Schools ("APS"), and Magdalena Municipal Schools have all had to increase class sizes. [*See* Coleman, 6/22/17 at 146; Perry, 6/29/17 at 18-19**;** Cleveland, 7/11/17 at 221.

"[S]maller class sizes are associated with higher achievement, higher earnings," and increased high school and college graduation rates. Belfield, 6/13/17-am at 46-47. ELL students, who need more attention, benefit from smaller class sizes. Dr. Kathy Escamilla testified that there is no support for the proposition that class sizes do not matter for ELL students and explained that a low student-teacher ratio of 15-to-1 is ideal for improved language acquisition. *See* Escamilla, 6/26/17 at 35. The use of waivers demonstrates that funding is insufficient to allow all districts to maintain the smaller sizes recommend by experts and required by statute.

Educational Outputs

Standardized Tests

The evidence of both student outputs[25] 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. Indeed, overall New Mexico children rank at the very bottom in the country for educational achievement. *See* Yazzie- Stips ## 1166-1223. The majority of New Mexican fourth, eighth, and eleventh graders are not proficient in math or reading. On average, they are three years behind grade level.

[25] For purposes of this decision the Court has considered as "outputs" test results, graduation rates, and frequency of need for remedial courses in college. *See, e.g., Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 903, 801 N.E.2d 326, 328 (2003).

Berliner, 6/12/17 at 247:25-248:7; *See* Ex. D-4570 at 5. For low-income, Native American, and ELL students, proficiency levels in reading and math in the fourth, eighth, and eleventh grades are much worse, with only 4 to 15 percent of these students being proficient. The stipulated facts in this case - which describe statewide and focus district educational outcomes - prove students' lack of proficiency on both the SBA and the PARCC over a seven-year period. Yazzie-Stips ## 1-994; *see also* P-2401 to P-2423 (focus district report cards 2014-16); *see also* P-2945 (Gadsden) at 8-9; P-2946 (Zuni) at 3-10; P-2960 (Cuba) at 3-10; P-2961 (Jemez) at 3-10; P-2962 (Bernalillo) at 3-9; D-5045 (2017 PARCC results) at 2-5. These outcomes have continued over time unabated.

New Mexico's SBA and PARCC results show that the majority of New Mexico's children cannot read or do math at grade level. Yazzie-Stips, ##1-6.[26] At-risk children have significantly higher rates of non-proficiency. Yazzie-Stips, ##7-36. From 2011 to 2014, the percentage of ED students statewide scoring proficient in reading on the SBA was around 40 percent, while approximately 50 percent of all students statewide achieved proficiency. P-2878 ¶ 41. In 2015, after adoption of the PARCC, this achievement gap persisted: less than 30 percent of ED

[26] From 2007 through 2014, an average of only 50 percent of New Mexico students statewide were proficient in reading, and an average of only 40 percent of students were proficient in math. [***See* 5-10-17 Stip. ¶¶ 41, 46**.] After PARCC was adopted in 2015, these statistics dropped even further: approximately 35 percent of students were proficient in reading, while less than 20 percent were proficient in math. [**P-2878 at ¶¶41, 46**.] By 2016 less than 40 percent of students were proficient in reading, and only 20 percent of all students were proficient in math. [***Id***.] Thus, overall the standard test scores support a conclusion that most students in New Mexico are not receiving an adequate education.

students scored proficient in reading, while the student average remained above 30 percent. *Id*. Similarly, in 2016, only 30 percent of ED students achieved proficiency in reading, while 37 percent of all students achieved proficiency. *Id*. at 14, 82. From 2012 to 2016, fewer than 20 percent of ELL students performed at a proficient level in reading, whereas approximately 45 percent of all students performed at a proficient level. *Id*. ¶ 41. From 2012 to 2016, fewer than 20 percent of all SWDs scored at a proficient level in reading, as compared to approximately 45 percent for the total student population. *Id.*

In 2014-15, with the adoption of PARCC, students fared even worse with over 66 percent of students not proficient, again with at-risk students performing worse with 73 to 98 percent not being proficient. Yazzie-Stips, at ##55-78. The educational outcomes are even worse for Native American students in New Mexico. *See id.* at ##7- 12, 37-48, 61-66.

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. Ex. D-5045 at 4. 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 5. While there was testimony that scores are lower whenever a different testing system is instituted,

the 2017 PARCC scores did not demonstrate improvement or that even the majority of students were proficient in English and math. The 2017 PARCC scores, s*ee* D-5045 at 2-3, show that only 28.6 percent of students statewide are proficient in English, and only 19.7 percent are proficient in math. The 2017 scores show that only 43.3 percent of all eleventh graders are proficient in English, a decline of 1.2 percent from 2015, and only 8.3 percent of eleventh graders are proficient in Math, a decline of 1.3 percent from 2015. *Id.* at 4-5.

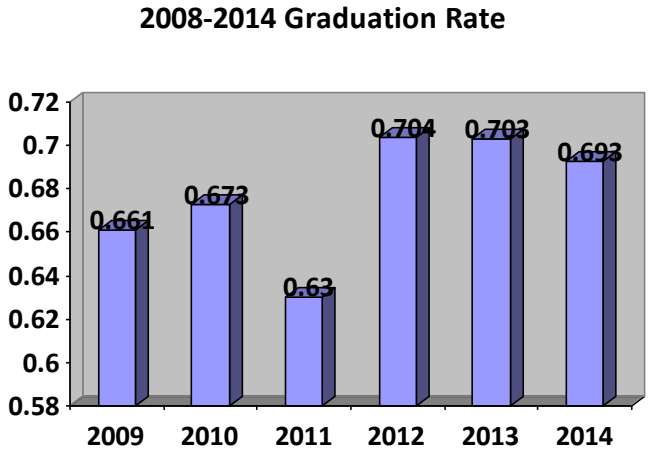
Defendants argue that proficiency on test scores and even differences between at-risk student scores and other student score are not what matter. Rather Defendants urge the Court to find that the educational outputs are sufficient because there has been growth or improvement in at-risk student scores. Even Defendants recognize that despite growth, New Mexico has not yet overcome the low proficiency scores. Aguilar, 8/4/17 at 62. Further, New Mexico is not happy with the students' growth rate. Aguilar, 8/4/17 at 63. Thus, the Defendants' argument that growth is what matters is insufficient to carry the day. 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.

The majority of children are not demonstrating proficiency based on these test scores. Adoption of the PARCC tests has not improved academic outcomes

for at-risk students nor has it appreciably closed the achievement gap between at-risk students and other students. P-2878 ¶ 34. These outputs are too poor to excuse the Defendants from liability.

Graduation Rates

New Mexico continues to have one of the lowest high school graduation rates in the country. In 2013-14 New Mexico had the lowest graduation rate in the United States. Yazzie-Stips, #1246. New Mexico has consistently had low graduation rates, ranging from 54 to 70 percent. Yazzie-Stips, ##995-1001; *see also* P-0152-G. Evidence of graduation rates among all students shows the following rates for the years 2009 to 2014.



See 4-14-17 Stip. ¶¶ 995-1001. The rates of graduation include students who have not attained proficiency in the various subjects, as measured by tests, but who have been allowed to graduate by Alternative Demonstration of

Competency ("ADC"), under which students need to show competency, not proficiency, through a combination of course work, course exams, acceptance to any college, works of art, job performance, and other factors. *See*, *e.g.*, P-1318; P-3002 (NMAC 6.19.7.10).

Native American students graduate at much lower rates, ranging from 45 to 65 percent between 2008 and 2014. Yazzie-Stips, ##1002-1008. For the same period, ED students graduation rates ranged from 56.4 to 64.8 percent; SWD from 46.8 to 66.0 percent, and ELL from 55.6 to 65.8 percent. P-0152-G.

College Remediation

Of the students who do go to college, many need substantial remedial help. *See* Ex. P-0085 at 95; Contreras, 6/19/17-a.m. at 47. Witnesses for both sides testified that students who have to take remedial coursework when they get to college are not college-ready. Lenti, 7/26/17 at 62; Skandera, Depo. Des. at 51; Ex. P-2793 at ¶ 27; Belfield, 6/13/17-a.m. at 22, 30; Martinez, 6/14/17 at 225; Garcia, 6/15/17 at 115; Contreras, 6/19/17-a.m. at 44-45. About half of the students who graduate from high school and go to college need remedial courses. Yazzie-Stips, ## 1024-1028; *see also* Ex. P-2794 at ¶ 62. Therefore, the evidence demonstrates that overall half of the students are not college-

ready. The LFC reported that in 2012, the college remedial rate was 68 percent for Hispanic students and 79 percent for low-income students. Yazzie- Stips, ##1256; *see also* Ex. P-0183 at 6. The LFC also reported that 59 percent of Native American students need college remediation courses. *Id.* Further, college students who require remedial courses are less likely to complete a degree or certification program. Yazzie-Stips, ##1029, 1258.

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 student 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. *See, e.g.*, Sallee, 7/21/17-am at 92; P-2533 at 2 (proficiency is down in schools getting grant funding like PPE, and truancy is increasing); P- 2988 at 81; Lenti, 7/26/17 at 52-53 (number of "F" schools have increased; 66 percent of schools saw no change or a decrease in their grade). Further, participation in the programs lauded by PED is limited. Pahl, 7/20/17 at 96-97 (starting in 2017-18 school year only one district will be allowed to participate in UVA); Montoya, 7/20/17 at 223-24. Frequently, the LFC and LEFC found that PED had failed to provide verifiable evidence that its programs were working. *See* P-2533. Many of the

programs cited by the State, such as Teachers Pursuing Excellence and Principals Pursuing Excellence, have only minimal participation by the schools in the state. D-5078; D-5077. Other programs have inadequate funding to fully achieve their goals. For example, Reads to Lead does not allow for hiring reading teachers, and funding cuts have been made to this program. Abbey, 7/25/17 at 100-01; Stewart, 6/20/17 at 149-52; Coleman, 6/22/17 at 128-30. 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. Ruszkowski, 7/17/17 at 194.[27]

It is not a sufficient answer to this systemic problem of poor outcomes by at-risk students to urge, as Defendants do, that the problems are caused by socio-economic factors not attributable to the school system. While the initial cause of the poor outcomes may not be the schools, steps can be taken

[27] In *CFE II* the court was asked to excuse the State's past failure to provide an adequate education on account of reforms proposed or undertaken after the trial of the case. In rejecting this argument, the Court stated:

> All of these initiatives promise, but await, demonstrable outcomes. We are, of course, bound to decide this case on the record before us and cannot conjecture about the possible effect of pending reforms, at least when determining whether, on the evidence gathered over four years and presented during the seven-month trial, a constitutional violation exists.

100 N.Y.2d at 927, 801 N.E.2d at 346. The same logic compels a conclusion that the Defendants cannot justify the dismal outputs based on inputs that consist of unproven programs and future plans.

by the educational system to overcome the adverse impacts of a student's background. As recognized by the legislature in Section 22-1-1.2, every child can learn and succeed. This conclusion is supported by the evidence. *See also* Garcia, 6/15/17 at 137-38; Yturralde, 6/29/17 at 113, 253-54; Perry, 6/29/17 at 42-43; Ruszkowski, 7/17/17 at 61-62, 195; Armor, 7/31/17 at 83; Aguilar, 8/4/17 at 59-60. The evidence demonstrated that money spent on classroom instruction programs such as quality pre-K, K-3 Plus, extended school year, and quality teachers can all improve the performance of at-risk students and overcome the gap caused by their backgrounds. *See generally* Rothstein, 8/1/17 at 123-27. The Court rejects Defendants' experts' conclusions that additional resources cannot improve achievement. The experts' conclusions were based on incomplete analysis. *See* P-2963, ¶¶ 12, 14, 15, 25-28; Rothstein, 7/10/17 at 105-108. Further, these conclusions are belied by the empirical evidence of improved performance and reduction in the education gap for children who participate in quality programs. See discussion of various programs, *supra* at p. 29-30.

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 need for college-level remedial courses. As will be discussed in the next section of this decision, the dismal nature of these outputs continues despite the institution of programs started by the PED. The defense claim that the PED programs are working to cure the deficits in student outputs is not borne out by the evidence. These outputs demonstrate that the education system is not providing the type of education the legislation required in Section 22-1-1.2(B). Simply put, the outputs reflect a systemic failure to provide an adequate education as required by the New Mexico Constitution. *See, e.g., CFE II*, 100 N.Y.2d at 903, 801 N.E.2d at 328, 769 N.Y.S.2d at 108 (upholding the trial court finding that the outputs reflected a systemic failure).

Money Does Matter

Since the 1970's New Mexico for the most part has centrally funded public education. The main vehicle for funding school operations is the State Equalization Guarantee funding formula ("SEG") which provides about 89 percent of the state and local funding for schools. P-2803 at ¶ 10.

The SEG distributes money based on numbers of students, called units, with different factors for different grade levels. Additional units are awarded for special education students depending on the level of special need. Other factors

in the formula include a fine arts program unit, teacher training and experience, school size, and physical education. Of particular concern in this case are the at-risk factor and the bilingual factor.

A factor for at-risk students is allotted. The size of the factor has increased over time. P-2803 at ¶ 84. The at-risk factor is calculated by adding up the fractions of the students who are poor, English Language Learners, or mobile. Thus, the at risk factor considers students who qualify under Title 1 (children from families living at or below 100 percent of the federal poverty level), children who are English Language Learners, and children who are mobile as shown by a failure to remain in school for an entire year or consecutive years. This rate is multiplied by the statutorily assigned weight[28]to produce a district's at-risk index. This number is multiplied by the district's student membership which gives the number of at-risk units the district receives. *Id.* at ¶ 84.

The at-risk factor has been subject to much criticism. The LFC and LESC found that the at-risk formula did not correctly steer resources needed to educate English Language Learners and those children living in poverty. The same report found that other states use a higher factor and a more simplified method of channeling resources to these students. P-0087 at 3. These findings were consistent with the expert testimony of Stephen Barro who found that the at-risk

[28] The weight in 2013-14 was .0915 and in 2014-15 it was .106. P-2803 at ¶ 88.

formula made only a small incremental difference in money received by a district. P-2803 at ¶ 11. In addition, Barro criticized the at-risk factor for using only those students whose families lived at or below 100 percent of the federal poverty guideline rather than the number of students who were entitled to free or reduced lunch whose families earn at or below 180 percent of the federal poverty guideline.[29] Another criticism related to the comparison of the size of the at-risk factor in New Mexico to that used by some other states. Some other states assign a factor of 25 percent to at-risk students, while New Mexico assigns only a 10.6 percent factor.[30] P-2803 at ¶¶ 11. 19, 69. As the LFC/LESC study pointed out the rates used for at-risk calculations in other states range for five percent to 50 percent of students qualifying for the free or reduced lunch program. P-0087 at 13. *See also* Burrell, 7/18/17 at 25-8. New Mexico has one of the lowest rates used.

The SEG has been criticized in a legislative report as being too complex. P-0087 at 2. In addition, the formula has been criticized for not being in compliance with statute as it relates to charter schools and the teacher and experience factor. *Id.* at 3-4; Rounds, 7/12/17 at 82. The small school factor has

[29] For illustration purposes, the Court notes that in 2018 a family of four living at or below 100 percent of poverty earned $25,100 or less per year and a family of four living at 180 percent of poverty earned at or below $45,180 per year. Federal Poverty Guidelines, published in Federal registry of January 18, 2018, volume 83, number 12, at pp. 2642-44.

[30] This factor is nominal because according to the Barro testimony when the non-at-risk factors are considered, "the true funding increment per at-risk student is only 5.0 percent." P-2803 at ¶ 11.d.

also been criticized and has allowed some districts and charter schools to take advantage of the factor when its application is questionable, at best. For criticisms of the formula, see Sallee, 7/21/17-a.m. at 66-68, 75-77, 80-81, 84-85; Abbey, 7/25/17 at 37-40, 42-44, 55-57, 58; Ex. P-2806 (2008 LFC Rpt.); Ex. P-401 (2014 LFC Performance Guidelines) at 6; Ex. P-402 (2016 LFC Performance Guidelines) at 5; Ex. P-403 (2017 LFC Performance Guidelines) at 5; Ex. P-324 (2011 LFC Rpt.) at 6, 8; Ex. P-326 (2014 LFC Rpt.) at 11; Ex. D-3994 (2014 LFC Rpt.) at 9.

In addition to SEG funds, the State provides other funds. *See*, *e.g.*, P-1545. These funds are designated "categorical" or "below-the-line" ("BTL") funding. Unfortunately, these funds are insufficient to provide sufficient moneys to allow the districts to provide programs and other resources need by ED and ELL students. BTL funding is distributed via grants, for which districts must apply in many cases, and districts must use the funding for specific programming. Grossman, 6/14/17 at 44-45. LFC noted in 2014 that some BTL programs were not evidence-based, and that the capacity of some programs to achieve results for students was "unknown." P-1545; Rachel Gudgel, 10/27/16 Depo. Des. 34-35, 560-57.

BTL funding may vary annually and may be terminated for a fiscal year. These grants are generally not available to all districts. The uncertainty

surrounding this funding makes it difficult to use it for programs that should be sustained year-after-year. Garcia, 6/12/17 at 73; 6/15/17 at 79-80; Martinez, 6/14/17 at 168-170; Stewart, 6/20/17 at 148-150. Senator Stewart stated that the funding levels and inconsistency limit the effectiveness of the funded program because of the relatively small number of students it reaches. *Id*. at 149-151.

Defendants ostensibly took the position that adding more money to the educational system will not make any improvement to the achievements by at-risk students. This position was loosely translated to "Money Does Not Matter." This position was not in fact what was espoused by the defense witnesses. The witnesses admitted that funding for education was important and some went so far as to say that funding should not be cut.[31] Amor, 7/31/17-pm at 64-65; Hanushek, 8/3/17-pm at 40-42, 69. Further, Defendants' witnesses recognized that increased funding spent on the right programs or awarded to well-run schools could make a difference to student outcomes. Armor, 7/31/17-p.m. at 93; Hanushek, 8/3/17-p.m. at 38-39; Lenti, 7/26/17 at 65. In fact, Dr. Hanushek agreed that "[t]here's no doubt that money can make a difference to school outcomes, and there's no doubt that . . . there are times when [money] does matter." He suggested "focus[ing] on

[31] It is the Court's position that since 2008 state funding has been cut. For example, Table 4b to the Barro declaration (P-2803) shows that "New Mexico's general-plus-special expenditure per pupil began to decline in 2009-10, dropped sharply in 2010-11 and 2011-12[.]" *Id*. at ¶ 44. There were years when nominal dollars were cut, but also the funding has not kept up with inflation or increasing fixed costs such as insurance and utilities. Current funding as shown by the trial evidence demonstrates that the level of funding is lower than what it was in 2008. Rounds, 7/12/17 at 79-80; Sullivan, 7/12/17 at 278-80; Cleveland, 7/11/17 at 293-95; Barro Decl. P-2803 at ¶ 46 ("[T]he inflation-adjusted state appropriation per student as of 2014-15 remained about eight percent below its 2008-09 peak[.]"

how the money is spent as opposed to how much is spent." 8/3/17-p.m. at 9-10. Witnesses for both sides agreed on the need to spend money on programs that have been shown to meet the needs of economically disadvantaged students. Berliner, 6/12/17 at 238; Sallee, 7/12/17-am at 26-27; Abbey, 7/25/17 at 90-91, 101-103.

The Defendants also take the position that no more funding is needed because the districts are not spending the money that they are allocated now. This defense ignores the direct testimony about the need for more money, particularly for programs and services for at-risk students. It also glosses over the explanations which were given for the reason why some funds were retained, which testimony the Court credits. Numerous witnesses testified that a cash balance of approximately 5 percent was necessary for cash flow purposes and to maintain bond ratings. Aguliar, 8/4/17 at 145-165; Rounds, 7/12/17 at 132; Garcia, 6/12/17 at 80-83; Garcia, 6/15/17 at 92-95; Grossman, 6/14/17 at 36-37, 64, 81-83; Cleveland, 7/11/17 at 199-200, 210, 217-218; Sullivan, 7/12/17 at 209-211. Often Districts must reserve money to be able to cover costs while waiting for reimbursement from PED. Sallee, 7/21/17-a.m at 102-103. This is the case for Title I funds for which allocations to the districts are variable, which requires the Districts to maintain a cash fund balance. Aguilar 8/4/17 at 188-90.

The Court agrees with those witnesses who testified that there is insufficient funding to maintain necessary programs for at-risk students. A legislator and many superintendents so testified. Stewart, 6/20117 at 165-166, 208; Rounds, 7/12/17 at 71, 84; Grossman, 6/14/17 at 76.

PED also defends against any claim that it is responsible for failure to provide programs that would ameliorate the education gap suffered by at-risk students by claiming that it cannot control the districts' spending. In making this claim, PED reads its authority under the statutes too narrowly, and it forsakes its oversight role.[32] PED has a statutory obligation to "supervise all schools and school officials coming under its jurisdiction, including taking over the control and management of a public school or school district that has failed to meet requirements of law or department rules or standards," and to "determine policy for the operation of all public schools and vocational education programs in the state." NMSA 1978 § 22-2-2(C) (2004). This authority is broad enough for PED to review and assure that districts are using the money provided by the State to provide programs to assist at-risk students. PED approves the annual budget for each district and it approves federal grants to the districts. Deputy Director

[32] A similar argument was rejected by *CFE II*. Chief Judge Kaye reasoned:

> Various factors alleged by the State as causes of deficiencies in the schools—and rejected by us on the ground that the State has ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools—may be addressed legislatively or administratively as part of the remedy. We do not think such measures will obviate the need for changes to the funding system, but they may affect the scope of such changes.

100 N.Y.2d at 929, 801 N.E.2d at 347, 769 N.Y.2d at 128.

Charles Sallee testified that PED has budgetary authority under the SEG to withhold approval of a district's SEG allocation if the PED determined that the district was not spending its money in accordance with the State Constitution. Sallee, 7/21/17-a.m. at 115-16, 121-122. PED is also required to monitor or audit the use of these SEG and federal funds, but it fails to exercise this power sufficiently to determine that districts are using these funds as required for at-risk students. Burrell, 7/18/17 at 30-33; Ex. P-0087 at 35-49. As the LFC and the LESC have reported, PED has failed to monitor or audit the districts' spending of their annual funding. P-0087 at 32-37.[33]

Thus, on the issue of funding, there are two different problems contributing to the failure of the State to provide an adequate education to at-risk children. First the overall appropriation is insufficient to fund the programs necessary to provide an opportunity for all at-risk students to have an adequate education. Second there may be ways for the districts to more effectively and efficiently spend their funds, but PED fails to exercise its authority over the districts to

[33] The defense attempts to cast blame on the districts, even if accurate, would not absolve the State from responsibility. The State of New Mexico is the defendant. School districts are "an area of land established as a political subdivision of the state for the administration of public schools." NMSA 1978 § 22-1-2(R) (2015). The State is responsible for assuring that students receive an adequate education. This responsibility extends to assuring at all its political subdivisions are meeting this constitutional goal.

require that the money that is allocated is used for programs known to advance the educational opportunities for at-risk students.[34]

As to the first problem regarding the insufficiency of the appropriation, the Defendants' answer is that there is no more money available. First as a legal matter, lack of funds is not a defense to providing constitutional rights. In two cases in which the majority of the United States Supreme Court applied the rational basis standard of review,[35] the Court determined that a law cannot satisfy the rational basis standard of review based on a mere cost-saving rationale. *Plyler v. Doe*, 457 U.S. 202, 227 (1982). This rationale has also been used when the legislation at issue concerned a fundamental right. *Des Moines Register & Tribune Co. v. Iowa Dept. of Revenue*, 1984 WL 180951, at *19 (Iowa Dist. Dec. 26, 1984) (holding that where the law affected a fundamental right, the State's justification -- "fiscal necessity" – "[s]tanding alone, . . . is not sufficient.") As recognized by the Ninth Circuit:

> The City argues that it faces a financial crisis that prevents it from funding these programs, but federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir.1986), *cert.*

[34] The evidence presented shows that it would not be enough to simply redistribute the current appropriations more efficiently. The Court is persuaded by this testimony. Even the schools that do comparatively well, like the Gadsden Independent School District, still need more funding to improve the programs they can offer at-risk children. The former superintendent in Gadsden testified to many programs he had to eliminate when funding was cut. *See, e.g.*, Yturralde, 6/30/17 at 7, 10, 47, 58-59, 70-71, 101, 111.

[35] The Court is aware that the New Mexico Supreme Court has characterized the level of scrutiny in *Plyler* as intermediate. *See Breen v. Carlsbad Muni. Schools*, 2005-NMSC-028, ¶ 21, 138 N.M. 331, 120 P.3d 413. A number of commentators have reached the same conclusion, but the language used in *Plyler* is that of rational basis.

> *denied,* 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987); *Lareau v. Manson,* 651 F.2d 96, 104 (2d Cir. 1981); *Smith v. Sullivan,* 611 F.2d 1039, 1043–44 (5th Cir.1980); *Battle v. Anderson,* 564 F.2d 388, 396 (10th Cir.1977); *Jackson v. Bishop,* 404 F.2d 571, 580 (8th Cir.1968).

Stone v. City & County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992), *as amended on denial of reh'g* (Aug. 25, 1992). This is true in the case of deprivation of a constitutional right to an adequate education. *See Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754 (N.H. 2002) (rejecting an administrative rule that excused district compliance with standards for fiscal reasons because the New Hampshire Constitution made it "the State's duty to guarantee the funding necessary to provide a constitutionally adequate education"); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (reasoning that lack of financial resources will not be an acceptable reason for failure to provide the best educational system"); *Rose*, 790 S.W.2d at 208 (stating that "neither the Kentucky General Assembly nor those individuals responsible for discharging the duties imposed on them by the state constitution ... can abrogate those duties merely because the monetary obligations becomes unexpectedly large or onerous").

As was observed by Justice Levine of North Dakota:

> Each of us is aware of the economic recession in our State. The energy and agricultural sectors are seriously depressed. We read and hear about the need to cut back, to pull in our belts. Nonetheless, our need to conserve financial resources may not be implemented by depleting our constitutional resources.

Kadrmas v. Dickinson Pub. Sch., 402 N.W.2d 897, 905 (N.D. 1987), *aff'd, Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) (Levine, J., concurring & dissenting from a majority decision that upheld a statute that required the indigent to pay for school bussing). Omit the reference to the agriculture sector from Justice Levine's quotation, and we could well be describing the situation in New Mexico.

A sufficient education is a right protected by the New Mexico Constitution. As such it is entitled to priority in funding. "Supporting an opportunity for a complete, proper, quality education is the legislature's paramount priority; competing priorities not of constitutional magnitude are secondary, and the legislature may not yield to them until constitutionally sufficient provision is made for elementary and secondary education." *Campbell*, 907 P.2d at 1279.

Second the remedy for lack of funds is not to deny public school children a sufficient education, but rather the answer is to find more funds. PED or the legislature may find ways to have the funding already allocated spent more efficiently, but the weight of the evidence present in the trial suggests that more money will have to be allocated to education. *See, e.g.*, Rounds, 7/12/17 at 84.

Various witnesses offer sources for more revenue. Here are some of the options, a portion of which represent reversal or deferral of reductions to the

revenue stream enacted relatively recently, and others which represent possible new sources of revenue (listed in no particular order):

> 1) access the general fund, land grant permanent fund and severance tax permanent fund;
> 2) increase or restructure gross receipts taxes;
> 3) increase progressiveness of income tax structure;
> 4) reinstate the health care industry tax;
> 5) pass a tax on all internet sales[36];
> 6) increase consumption taxes on gasoline, alcohol and cigarettes;
> 7) increase excise taxes on motor vehicles;
> 8) slow down or reverse the corporate income tax reductions;
> 9) repeal the capital gains tax deduction;
> 10) allow more local option taxes; and
> 11) consider gross receipts tax equivalent for extractive industries.

Rounds, 7/12/17 at 84-90; Stewart, 6/20/17 at 265-267, 280-282; Abbey, 7/25/17 at 82-88; Smith, 7/26/17 at 168-172. Some of these revenues could be realized through legislation and some would require constitutional amendment.[37]

Plaintiffs complain that the budgeting process is not based on the cost of what is needed to adequately educate each student, but rather the budgeting process begins with the prior year's appropriation. Burrell, 7/18/17 at 23-24, 33-35; Rounds, 7/12/17 at 74; *cf.* Levin, 7/11/17 at 50-51. As LFC Director David Abbey testified, annual budgets are determined by budget constraints. Abbey, 7/25/17 at 7. The Court is not convinced that a particular approach – i.e.

[36] Any questions about the constitutionality of such a measure were answered by the United States Supreme Court in *South Dakota v. Wayfair, Inc*.,___ U.S. ___, 138 S.Ct. 2080 (2018).

[37] The Court is aware from the testimony that some of these measures to realize additional revenues were adopted by the legislature but were not enacted because the Governor vetoed the items. It is undeniable that if the State is to meet its constitutional obligation to provide a sufficient education for all school-age children, the executive branch and the legislative branch will have to work cooperatively to achieve the constitutionally mandated result. If no consensus is achieved and the constitutional mandate is not met, the Court will apply appropriate remedies.

determining need as the base budget or using a prior budget – is constitutionally mandated. 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. The process used to get there is of secondary concern. As noted by the Colorado Supreme Court: "The court's task is not to determine whether a better financing system could be devised, but rather [it is] to determine whether the system passes constitutional muster." *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009) (internal quotations and citation omitted).

Similarly, the Court is not identifying possible sources of revenue because use of some or all of them is constitutionally mandated. The possible sources are listed to demonstrate other sources of funding do exist. It is the legislature's function to determine as a matter of policy which source or sources are best for New Mexico. Again, which source is chosen is not as important as the end result – a system that adequately educates at-risk children.

The Court wishes to address briefly the AIR Study, adoption of which Plaintiffs argue should be mandated. The Court disagrees with this approach. The legislature reviewed and rejected the AIR Study. This action was a reasonable reaction to the AIR study methodology, which struck the Court as being one where a collective wish list was compiled and then reduced based on

political reality. The legislature within its discretion may use the AIR study to fund the educational system, but such use is not constitutionally mandated. Whether or not the AIR Study conclusions were valid is a policy question to be determined by the legislature, not a constitutional questions to be decided by this Court.

Conclusion of Education Clause Claims

For the reasons given above, the Court concludes that Plaintiffs have proven their claims that the education system in New Mexico violates the New Mexico Constitution art. XII, § 1. The remedy for this violation will be discussed later in this decision.

ARTICLE II, SECTION 18 EQUAL PROTECTION CLAUSE & DUE PROCESS CLAIMS

Equal Protection Claims

The Martinez Plaintiffs also raise an equal protection clause claim. As mentioned above, the initial school funding cases raised issues under the federal equal protection clause. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), rejected the claim that wealth or lack thereof is a suspect class. *Rodriguez* also rejected the claim that a right to an education was a fundamental right protected under the United States Constitution. *Rodriguez* put an end to claims under the federal equal protection clause.

Thereafter cases were based on the clauses in most state constitutions interpreted to be equivalent to the equal protection clause. In addition to the more general equal protection clauses, many state constitutions also have equality clauses specific to schools. "Many state provisions guarantee equality in specific or limited instances . . . requiring 'uniform' or 'thorough and efficient' public schools[.]" Williams, 63 Tex. L. Rev. at 1196. *See also Serrano v. Priest*, 487 P.2d 1241, 1243 (Cal. 1971) (stating that the school funding scheme was inadequate under the state equal protection clause and the education clause because it relied on property taxes which discriminated unfairly against the poor). These cases tended to challenge the disparity between districts caused by funding that was tied to local property taxes. Koski, 117 Colum. L. Rev. at 1903-04. These types of claims are not applicable to New Mexico because the State, rather than local districts, provides most of the funding for schools. To overcome this distinction, the Martinez Plaintiffs have framed the issue not as one comparing districts but as one which compares education given to economically disadvantaged and ELL students to that given to non-ED and Non-ELL students.

New Mexico has applied its own standard to the State Constitution's equal protection clause. As explained by the Supreme Court:

> We have previously recognized that the Equal Protection Clause of the New Mexico Constitution affords 'rights and protections' independent of the United States Constitution. . . . While we take guidance from the Equal

> Protection Clause of the United States Constitution and the federal courts' interpretation of it, we will nonetheless interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate. In *Trujillo v. City of Albuquerque*, 110 N.M. 621, 629 n. 5, 798 P.2d 571, 579 n. 5 (1990) [*Trujillo I*], *overruled on other grounds by Trujillo III*, 1998–NMSC–031, ¶¶ 12, 19, 25, we stated that federal cases dealing with intermediate scrutiny do not control our development of intermediate scrutiny based on the New Mexico Constitution. Federal case law is certainly informative, but only to the extent it is persuasive. . . . In analyzing equal protection guarantees, we have looked to federal case law for the basic definitions for the three-tiered approach, but we have applied those definitions to different groups and rights than the federal courts.

Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413 (citations omitted). Thus, New Mexico would not be bound by *Rodriguez* unless the Court found it persuasive within the context of a case that raised an issue concerning New Mexico Constitution, art. XII, § 1.[38] Unlike the issue confronting the *Rodriguez* Court in which there was no federal constitutional right to an education, in this case the Court is squarely presented with a state constitutional right that guarantees a "uniform system of free public schools sufficient for the education[.]" NM Const., art. XII, § 1. Therefore, we are dealing with a constitutionally based, fundamental right that is of significant societal importance.

The first question that must be addressed in any equal protection case is "whether the legislation creates a class of similarly situated individuals who are

[38] This Court has previously ruled that on the issues presented it is not bound by cases citing to *Rodriguez. Order Denying Motion to Dismiss* (filed November 14, 2014).

treated dissimilarly." *Breen*, 2005-NMSC-028, ¶ 10. In this case there are two groups – students who are economically advantaged or ELLs and students who are not economically disadvantaged or ELLs. The discussion concerning the adverse treatment afforded the ED and ELL students discussed above in the sections on Educational Inputs and Educational Outputs demonstrates these students are treated dissimilarly.

The next step under *Breen* is to determine what level of scrutiny should be applied. *Id.* at ¶ 11. The three levels are rational basis, intermediate scrutiny, and strict scrutiny. *Id.* The Court has ruled out use of rational basis because "[r]ational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class." The determination that education is a fundamental right precludes use of the rational basis level of scrutiny.

In ruling on the Education Clause claim the Court employed an intermediate scrutiny basis of review. The current funding scheme failed to pass an intermediate scrutiny test. This means that the classification was not substantially related to an important governmental interest. *Id.* Singling out for adverse treatment a class of children who are economically disadvantaged or English language learners does not bear a substantial relationship to any legitimate purpose to be achieved by the various education statutes. If the class

created cannot pass the intermediate scrutiny test, then *a fortiori* the funding scheme would fail a strict scrutiny test. It is not necessary, however, to apply the strict scrutiny test.[39] Because Plaintiffs prevail when an intermediate scrutiny test is applied, there is no need to perform a strict scrutiny analysis. *See Griego v. Oliver*, 2014-NMSC-003, ¶ 55, 316 P.3d 865.

Defendants now argue that Plaintiffs must show animus in order to prevail. No New Mexico authority is cited for the proposition that animus must be shown in an equal protection case raised under the New Mexico Constitution, and the Court did not find this requirement in the equal protection cases it reviewed. Since no New Mexico authority has been cited for the proposition that under the state constitution equal protection clause animus must be shown to prove a violation, it is presumed that no New Mexico authority exists. *Johnson & Danley Const. Co., Inc. v. State ex rel. New Mexico Dept. of Transp.*, 2009 WL 6622940, *1 (N.M.App. 2009) (stating Plaintiffs cited no authority contrary to this proposition[;] . . . . we may presume that none exists.) *See In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (1984) (indicating that when

[39] The Court notes, however, that when confronted with a similar deprivation under the its Constitution, the Wyoming Supreme Court stated:

> Because the right to an equal opportunity to a proper public education is constitutionally recognized in Wyoming, any state action interfering with that right must be closely examined before it can be said to pass constitutional muster. Such state action will not be entitled to the usual presumption of validity; rather, the state must establish its interference with that right is forced by some compelling state interest and its interference is the least onerous means of accomplishing that objective.

Campbell, 907 P.2d at 1266-67.

a party cites no authority in support of a proposition, we may presume that no such authority exists).

The only reference found to animus within the context of an equal protection case under the state constitution was in a dissenting opinion. *Rodriguez v. Brand W Dairy*, 2016-NMSC-029, ¶¶ 89-90, 378 P.3d 13 (Minzner, J. dissenting). The *Rodriguez* dissent criticized the majority opinion for not applying a standard that would, under the rational basis test, look to see if government regulation harbors animus toward a particular group. Given the failure of the majority to require a showing of animus despite the strong urging by the dissent, it appears to this Court that animus is not a requirement of equal protection analysis under New Mexico's interstitial approach to determining state constitutional rights.

This recognition is consistent with New Mexico's approach to statutory interpretation as evidenced in *New Mexico Corr. Dep't v. Am. Fed'n of State, County, & Mun. Employees, Council 18, AFL-CIO*, 2018-NMCA-007, ¶¶ 12-13, 409 P.3d 983, *cert. denied* (Oct. 24, 2017). In *AFSCME* the Court of Appeals declined "to read into the statute a requirement that there be evidence that anti-union animus was the underlying motivation" for discriminatory treatment of an employee. The statute was violated if the employer's decision discriminated because of the employee's union status. Proof of anti-union animus was not

required. The Court concludes that a showing of animus is not a requirement in this case.

Due Process Claims

The Due Process analysis is the same as the Equal Protection Clause analysis. *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 9, 118 N.M. 753 (recognizing: "The same standards of review are used in analyzing both due process and equal protection guarantees."). There is no need, therefore, to repeat the analysis as to ED and ELL students. The Court has previously ruled that the Due Process Clause would apply to students with disabilities.

Both Plaintiffs' expert witness and Senator Stewart testified that there is insufficient funding for SWDs. P-2798 ¶ 10; Stewart, 6/20/17 at 197-98, 207-08. 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. Contrary to what is argued by the defense, this evidence was not directed at matters which should be addressed by an IEP; this testimony dealt with systemic failures to fund the system.

Conclusion on Equal Protection and Due Process Claims

For the reasons given above the equal protection claims brought on behalf of students who are economically disadvantaged or English language learners are sustained. The Due Process claims brought on behalf of ED students, ELL students and students with disabilities are sustained.

REMEDY

The Plaintiffs ask for declaratory relief and for injunctive relief. The Plaintiffs also ask that the Court retain jurisdiction over the case to enforce its orders.

Yazzie Plaintiffs ask the Court to declare:

1. Defendants' system of public education is not sufficient to meet the needs of New Mexico's students, especially at-risk students, and violates Plaintiffs' rights under Article XII, Section 1 of the New Mexico Constitution by failing to provide them with a "uniform" statewide system of free public schools "sufficient" for their education;

2. Under Article XII, Section 1 of the New Mexico Constitution a "uniform" and "sufficient" system of public education is one that provides every student the programs, services and supports necessary for that student to have the opportunity to satisfy New Mexico's requirements for

graduation and upon graduation be ready to attend college, pursue a career and participate in the civic duties of our society;

3. Current years' levels of public school funding in New Mexico have not been sufficient to provide the programs and services necessary to meet the uniformity and sufficiency provisions of Article XII, Section 1 of the New Mexico Constitution;

4. The methods for distribution of public school funding in New Mexico have not satisfied the uniformity and sufficiency provisions of Article XII, Section I of the New Mexico Constitution as the funding distributed has not been sufficient for all districts to provide all necessary services and programs to at risk children.

Martinez Plaintiffs ask the Court to declare: "Defendants have violated the Education Clause, Equal Protection Clause, and Due Process Clause of the New Mexico Constitution."

As to injunctive relief, the Yazzie Plaintiffs request that the Court order Defendants to do as follows:

1. Develop within 60 days a comprehensive statewide plan and timetable to be approved by this Court, after consideration of Plaintiffs' comments on that plan, that will provide a uniform and sufficient

system of public education to all students in New Mexico. The plan shall:

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

b. describe the steps that will be taken to provide programs and services such as early childhood education, extended learning time, evidence-based literacy instruction, health and social services, smaller class sizes, fine arts, and PE to all at-risk children throughout the state no later than the beginning of the 2019- 2020 school year;

c. describe the steps that will be taken to bring New Mexico's public education system into compliance with the NM Indian Education Act, and to ensure that all Native American ELL students have access to the English language assistance programs required by Title VI and effective supplemental English acquisition programs in districts receiving Title III sub-grants;

d. describe the steps that will be taken to recruit, train and retain teachers to ensure that by the beginning of the 2019-2020 school year

there are sufficient numbers of properly trained, qualified teachers to provide at-risk children a constitutionally sufficient education in every school district in the state and that these properly trained, qualified teachers are assigned to and retained by the schools serving at-risk children.

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

3. Allocate sufficient funding, revise the formula for distributing funds to school districts, and ensure full and uniform implementation of the comprehensive statewide plan approved by this Court.

4. Monitor and measure the implementation of the comprehensive plan approved by this Court to ensure that: a) the plan is being fully and uniformly implemented statewide, b) every school in New Mexico has sufficient resources to implement that plan, and c) educational opportunities for at-risk students significantly increase statewide.

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

Martinez Plaintiffs ask for "an injunction requiring Defendants to immediately adopt policies to comply with the Constitution's requirements."

More specifically, Martinez asks for Defendants to be ordered "to take immediate steps to ensure that New Mexico schools have the resources necessary to give all students the opportunity to obtain a uniform and sufficient education that prepares them for college and career."

Declaratory Relief

Based on the evidence presented the Court will enter a declaratory judgment that declares as follows:

1. The Defendants have violated the Education Clause, the Equal Protection Clause, and the Due Process Clause of the New Mexico Constitution.

2. More Specifically, Defendants have 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.

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; and

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 and adequate education.

Injunctive Relief

In determining whether an injunction should be granted, Courts in New Mexico look at a variety of factors, including:

> (1) the character of the interest to be protected, (2) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (3) the delay, if any, in bringing suit, (4) the misconduct of the plaintiff if any, (5) the interest of third persons, (6) the practicability of granting and enforcing the order or judgment, and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.

Cunningham v. Gross, 1985-NMSC-050, ¶ 11, 102 N.M. 723, 699 P.2d 1075.

As to "the character of the interest to be protected," the opinion above demonstrates how important education is for school children in New Mexico, particularly at-risk children. *See Nov. 14, 2014 Order*, 5. The first factor weighs in favor of an injunction.

The second factor – the adequacy of an injunction as a remedy – also weighs in favor of Plaintiffs. There is no other remedy that would provide meaningful relief.

There was no delay in bringing suit, and any delay in litigating the case was either endemic to this sort of litigation or due to circumstances beyond anyone's

control. Therefore, the third factor is at least neutral with regard to an injunction.

The fourth factor – misconduct of plaintiff – is inapplicable because Plaintiffs were not at fault.

The fifth factor looks to the interest of third parties. In the Court's opinion third parties are served by an injunction. All current and future students and their families and the public as a whole are benefited by at-risk children receiving an adequate education. The State is benefited by an educated populace. *Nov. 14, 2014 Order*, 5-6.

The sixth factor – the practicability of granting and enforcing the order or judgment – is the factor that gives the Court the most pause. Crafting the injunction is not without its difficulties. There is a 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. As the New York Court of Appeals observed: "We are, of course, mindful . . . of the responsibility . . . to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing. . . . We have neither the authority, nor the ability, nor the will, to micromanage education financing." *CFE II*, 801 N.E.2d at 345.

Despite these challenges, numerous courts have entered injunctions in adequacy clause cases. *See, e.g.*, *Campbell County Sch. Dist.*, 907 P.2d at 1279

(directing the legislature to conduct a cost of education study and analysis to inform the creation of a new funding system for a "proper education which the Constitution requires be the best)*; CFE II*, 801 N.E.2d at 348-49 (stating that an injunction is "hardly extraordinary or unprecedented" and directing the State to ascertain the cost of providing a sound basic education in New York City, adopt reforms that would ensure that every school in NYC had resources necessary for providing an opportunity for a sound basic education, develop a system of accountability); *Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391, 397-98 (1989) (directing the legislature, "[i]n setting appropriations," to "establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an 'if funds are left over' basis."); *McCleary*, 269 P.3d at 261 (directing the legislature to "develop a basic education program geared toward delivering the constitutionally required education, and it must fully fund that program through regular and dependable tax resources."); *Seattle Sch. Dist . No. 1 of King County v. State*, 585 P.2d 71, 105 (directing the Legislature "to enact legislation compatible with this opinion" by a date certain). This factor, therefore, does not preclude granting injunctive relief.

The final factor weighs the hardship of an injunction on the Defendant against the hardship to the Plaintiffs if no injunction is entered. 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 resources" at the expense of "our constitutional resources."[40]

In entering an injunction, however, the Court does not want to ignore the deference that should be given the legislature and the executive branches and wishes to give them an opportunity to create a funding system that will meet the constitutional requirements. Therefore, the Defendants will be given until April 15, 2019, to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career. Reforms to the current system of financing public education and managing schools should address the shortcomings of the current system by ensuring, as a part of that process, that every public school in New Mexico would have the resources necessary for providing the opportunity for a sufficient education for all at-risk

[40] *See Kadrmas*, 402 N.W.2d at 905 (concurring & dissenting opinion).

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.[41]

In order to assure that these steps are taken, the Court will retain jurisdiction over this matter. It is, however, the Court's intent that the judgment entered as a result of this decision be final for purposes of appeal regardless of the fact that the Court is retaining jurisdiction to enforce compliance with its order. Therefore, the final judgment should contain appropriate language to convey the finality of the judgment. *See, e.g.*, NMRA 1-054(B).

ORDER

Each party will be given 28 days from the date this decision is accepted for filing to informally notify the Court and the other parties if it is thinking of appealing. This information may be conveyed informally by email. Email to the Court should be sent to sfedsms@nmcourts.gov. If any party indicates an intent to appeal, then all parties will have 28 days from the date that notification of intent to appeal is sent to submit to the Court proposed findings of fact and conclusions of law. These proposals should be filed and submitted. Thereafter

[41] *See CFE II*, 801 N.E.2d at 348.

the Court will enter its findings and conclusions and will provide further instructions regarding submission of a judgment.

If no party indicates an intent to appeal, then Plaintiffs shall jointly draft a proposed judgment. The proposed judgment will be circulated to defense counsel within 28 days of the expiration of the time for giving notice of an intent to appeal. The parties will confer on any changes suggested to the proposed judgment. No later than 28 days after the proposed judgment is sent to the defense counsel, Plaintiffs shall submit the proposed judgment to the Court. If the Defendants cannot approve the proposed judgment as to form, then no later than 28 days from the expiration of the time for giving notice of an intent to appeal, the Defendants shall submit to the Court a redlined version of the proposed judgment with Defendants' suggested changes.

All submissions to the Court should be in Word format to the email address appearing above.

Following entry of judgment, post-judgment motions, if any, consistent with this decision, will be entertained.

Sarah M. Singleton, Judge Pro Tem
Sitting by Designation

On the date of acceptance for efiling copies of the above decision were eserved on those registered for eservice in this matter.