

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

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

CASE NO. D-101-CV-2014-00793

Plaintiffs,

vs.

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

Defendants.

– ***Consolidated with*** –

WILHELMINA YAZZIE, individually and as
next Friend of her minor child, XAVIER NEX,
et al.,

CASE NO. D-101-CV-2014-02224

Plaintiffs,

vs.

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

Defendants.

**THIRD AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by their counsel, bring this Third Amended Complaint against Defendants, and
allege as follows:

INTRODUCTION

1. Plaintiff children attend public schools across New Mexico and are identified as economically disadvantaged and/or as English Language Learner (“ELL”) students or

former ELLs and/or students with disabilities. Plaintiff children are among the most vulnerable student populations in the State and find themselves trapped in a desperate situation with few educational opportunities to succeed in the classroom, resulting from a school funding system that pays little regard for their actual needs, an education system that ignores the longstanding bilingual and multicultural history of this State, and arbitrary school accountability and teacher evaluation systems that bring no relief but instead drive teachers away from the neediest students.

2. Accordingly, Plaintiffs bring this action for declaratory and injunctive relief to enforce Plaintiffs' rights to a uniform and sufficient education under article XII, section 1 of the New Mexico Constitution ("the Education Clause"). Plaintiff economically disadvantaged and ELL students further allege that their equal protection and due process rights have been violated.
3. A sufficient education is a fundamental right under the New Mexico Constitution and requires, at a minimum, an education "founded on the sound principle that every child can learn and succeed" and sufficient to "meet the needs of all children" through a "multicultural education system" with "quality and diverse teachers," "proper assess[ment], place[ment] and monitor[ing]," and a "rigorous and relevant curriculum that prepares them to succeed in college and the workplace." NMSA 1978 § 22-1-1.2(A), (B) (2007); NMSA 1978 § 22-23-1.1(C) (2004).
4. The quantitative insufficiency of the school finance system is principally grounded in the arbitrary and inadequate funding for at-risk students that irrationally excludes the learning needs of economically disadvantaged students as a group; the arbitrary and insufficient bilingual multicultural funding for ELL students; the arbitrary and

insufficient funding for Native American students; the arbitrary and insufficient funding for students with disabilities; and Defendants' failure to ensure resources allocated for at-risk students reach those students in need. The system of public school finance for these students is not designed or adequately supported to fulfill the qualitative mandate of New Mexico's Education Clause.

5. Further contributing to the constitutional violations are the State's educational "reform" efforts, including the irrational, non-transparent, and ill-conceived school and district grading system and the irrational and punitive teacher evaluation system, both of which impede the State's implicit duty of providing effective monitoring of schools, districts, and teachers to ensure students access a sufficient education.
6. Further contributing to the deprivation of Plaintiffs' constitutional rights is Defendants' failure to ensure the appropriate implementation of the Bilingual Multicultural Education Act, the Hispanic Education Act, the Indian Education Act, the Children of Spanish Descent Clause requiring "perfect equality" (N.M. Const., art. XII, § 10) and the Spanish Teacher Training Clause under article XII, section 8 of the New Mexico Constitution.
7. Further contributing to the deprivation of Plaintiffs' constitutional rights is Defendants' failure to ensure the appropriate implementation of state laws and regulations intended to provide students with disabilities access to a sufficient education.
8. The constitutional violations bear out in deplorable student achievement results across grade levels and on college entrance exams, especially for economically disadvantaged and ELL students. Less than one-half of fourth graders achieved proficiency in reading and math. When it comes to fourth-grade students with disabilities, only 15.5% reached proficiency in reading, and 16.7% reached proficiency in math. Three-quarters of ELL

eighth-grade students failed to reach proficiency in reading in 2012-13, and approximately 85% failed to reach proficiency in math, compared to approximately 40% and 60% failure rates, respectively, of all eighth-grade students the same year; furthermore, when it comes to eighth-grade students with disabilities, 22% reached proficiency in reading, and only 12.6% reached proficiency in math.

9. Further, stark achievement gaps exist and persist between Caucasian students and their Latino, Native American, and African American peers, between economically disadvantaged students and non-economically disadvantaged students, and between ELL and non-ELL students.
10. In the 2012-13 school year, approximately 67% of Caucasian students achieved “proficient” or above in reading on the NMSBA, while only 45.9% of Latino students, 34.7% of Native American students, and 48.6% of African American students reached the same level. The percentage of students with disabilities who reached proficiency never rose above 16.6% in either reading or math. During the same school year, the State’s graduation rate for Latino, Native American, and African American students was approximately ten percentage points lower than the rate for Caucasian students.
11. By virtually any measure, the students who are most at-risk in New Mexico are languishing without the educational opportunities they need to achieve their full potential and instead are being pushed out of the very system meant to educate them. For those fortunate enough to graduate and go on to college, approximately fifty percent require remediation.
12. The consequences for failing to educate appropriately Plaintiff children and other students like them will not only be felt by those students unable to fulfill their dreams and

their full potential, but also greater New Mexico which continues to bear the brunt of past failures. As more fully set forth herein, Defendants fall woefully short of their constitutional obligations to provide Plaintiff children a sufficient education.

JURISDICTION AND VENUE

13. The Court has original jurisdiction to hear these claims under Article VI, Section 13 of the New Mexico Constitution, NMSA 1978 § 44-6-2 (1975), and NMSA 1978 § 44-6-13 (1975).
14. Venue is proper under NMSA 1978 § 38-3-1(G) (1988).

PARTIES

Plaintiffs

15. Plaintiff Louise Martinez is an individual and parent and/or natural guardian of minor Plaintiff children Ar. Martinez and Ad. Martinez. Plaintiff children Ar. Martinez and Ad. Martinez attend public schools in Albuquerque Public Schools.
16. Plaintiff Blaender Aviles is an individual and parent and/or natural guardian of minor Plaintiff children Ir. Aviles, I. Aviles and Is. Aviles. Plaintiff children Ir. Aviles, I. Aviles and Is. Aviles attend public schools in Albuquerque Public Schools.
17. Plaintiff Esperanza Briones is an individual and parent and/or natural guardian of minor Plaintiff children D. Briones and L. Briones. Plaintiff children D. Briones and L. Briones attend public schools in Gadsden Independent School District.
18. Plaintiff Ismael Ramirez is an individual and parent and/or natural guardian of minor Plaintiff children J. Ramirez and R. Ramirez. Plaintiff children J. Ramirez and R. Ramirez attend public schools in Gadsden Independent School District.

19. Plaintiff Christina Aispuro is an individual and parent and/or natural guardian of minor Plaintiff children D. Aispuro and J. Aispuro. Plaintiff children D. Aispuro and J. Aispuro attend public schools in Las Cruces Public Schools.
20. Plaintiff Gisela Alderete is an individual and parent and/or natural guardian of minor Plaintiff children R. Alderete and L. Alderete. Plaintiff children R. Alderete and L. Alderete attend public schools in Las Cruces Public Schools.
21. Plaintiff Israel Martinez is an individual and parent and/or natural guardian of minor Plaintiff children S. Martinez, E. Martinez, D. Martinez and A. Martinez. Plaintiff children S. Martinez, E. Martinez, D. Martinez and A. Martinez attend public schools in Las Cruces Public Schools.
22. Plaintiff Liliana Garcia is an individual and parent and/or natural guardian of minor plaintiff child A. Ruiz. Plaintiff child A. Ruiz attends public schools in Las Cruces Public Schools.
23. Plaintiff Lanicelia Apachito is an individual and parent and/or natural guardian of minor Plaintiff children J. Apachito and L. Apachito. Plaintiff children J. Apachito and L. Apachito attend public schools in Magdalena Municipal School District.
24. Plaintiff Roberto Sanchez is an individual and parent and/or natural guardian of minor Plaintiff children R. Sanchez, C. Sanchez and A. Sanchez. Plaintiff children R. Sanchez, C. Sanchez and A. Sanchez attend public schools in Santa Fe Independent School District.
25. Plaintiff Rayos Burciaga is an individual and parent and/or natural guardian of minor plaintiff child L. Valenzuela. Plaintiff child L. Valenzuela attends public schools in Santa Fe Independent School District.

26. Plaintiff Jodi Edaakie is an individual and parent and/or natural guardian of minor Plaintiff children A. Cachini and T. Cachini. Plaintiff children A. Cachini and T. Cachini attend public schools in Zuni Public Schools.
27. Plaintiff Dion Seleccion is an individual and parent and/or natural guardian of minor Plaintiff children D. Seleccion and K. Seleccion. Plaintiff children D. Seleccion and K. Seleccion attend public schools in Zuni Public Schools.
28. Plaintiff Maribel Castillo is an individual and parent and/or natural guardian of minor Plaintiff children J. Arras and C. Arras. Plaintiff children J. Arras and C. Arras attend public schools in Española Public School District.
29. Plaintiff Juan Campos is an individual and parent and/or natural guardian of minor plaintiff child I. Campos. Plaintiff child I. Campos attends public school in Española Public School District.
30. All Plaintiffs and Plaintiff children reside and attend public schools in New Mexico. Each plaintiff child is an economically disadvantaged student (based on eligibility for the National School Lunch Program under the National School Lunch Act), an English Language Learner (“ELL”) student pursuant to state law as determined by the New Mexico English Language Proficiency Assessment (“NMELPA”), a former ELL student, or a former student with disabilities. Plaintiff children also include Native American and Latino/Hispano school children. Each plaintiff child has been harmed by the denial of a sufficient education as further described below in the paragraphs below.

Defendants

31. Defendant State of New Mexico is responsible for enacting laws that form the New Mexico public school system.

32. Defendant New Mexico Public Education Department (“PED”), under article XII, section 6 of the New Mexico Constitution and legislation enacted thereunder, supervises schools and school officials and “determine[s] policy for the operation of all public schools.” The New Mexico Public Education Department holds its principal place of business in the Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501.
33. Hanna Skandera, in her official capacity as the Secretary-Designate of Public Education (“Secretary-Designate”), is the chief state school officer and executive officer of the PED. The Secretary is the “governing authority and shall have control, management, direction of all public schools,” and her principal place of business is the Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501. NMSA 1978, Section 22-1-1(A) (2006).

GENERAL ALLEGATIONS

New Mexico Constitutional and Statutory Provisions Related to the Fundamental Right to a Sufficient Education

34. The New Mexico Constitution both explicitly and implicitly recognizes the fundamental right to a sufficient education. Adopted in 1911, article XII, section 1 of the New Mexico Constitution (“the Education Clause”) states that “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.”
35. The importance of the fundamental right to a sufficient education in New Mexico cannot be understated. New Mexico’s Constitution requires that all students of school age attend school. There are severe penalties written in statute for the failure to attend. A series of education statutes and regulations govern who may graduate, and who may be suspended or expelled. A series of education statutes and regulations also govern, albeit

ineffectively, school and district accountability, teacher evaluations, and teacher pay and due process rights, among many other areas.

36. Furthermore, level of education often informs several democratic ideals and values, with higher levels of education finding a correlation to voter registration and participation; fewer public welfare services; lower rates of criminal activity and imprisonment; higher rates of home ownership; and economic freedom and empowerment. Education has the potential to level the playing field between the “haves” and the “have-nots” and open doors of opportunity.
37. Two additional constitutional clauses, article XII, section 10 Children of Spanish Descent Clause and article XII, section 8 Spanish Teacher Training Clause, also create constitutional protections for student languages and cultures in the State.
38. The Children of Spanish Descent Clause provides that “[c]hildren of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools . . . and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions in the state.” N.M. Const. art. XII, § 10.
39. The Spanish Teacher Training Clause states that “[t]he legislature shall 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.” N.M. Const. art. XII, § 8.
40. New Mexico’s educational goals, which can aid courts in interpreting the State’s constitutional duties under the qualitative component of the Education Clause, are codified in the Public School Code. The “Legislative findings and purpose of the Public

School Code” state 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 and that the system must meet the needs of all children by recognizing that student success for every child is the fundamental goal.”¹

41. In its findings of the Public School Code, the Legislature further states “that the key to student success in New Mexico is to have a multicultural education system,” which includes, among other things, “attract[ing] and retain[ing] quality and diverse teachers,” “integrat[ing] the cultural strengths of its diverse student population into the curriculum with high expectations,” and “rigorous and relevant curriculum that prepares them to succeed in college and the workplace.”²
42. Reflective of the State’s constitutional protections for non-Caucasian and non-English speaking children, New Mexico codifies in statute the State’s goals for bilingualism and multiculturalism, and enacts specific educational program goals through the Hispanic Education Act, the Indian Education Act, and the Bilingual and Multicultural Education Act. These statutes, among others, and the above-identified constitutional provisions further inform the interpretation of the qualitative meaning of the Education Clause.
43. The legislative purpose of the Hispanic Education Act (“HEA”) is to implement systems that “affect the success of Hispanic students to close the achievement gap and increase graduation rates,” encourage parental involvement, and “provide mechanisms for parents, community and business organizations, public schools, school districts, charter schools . . . [etc.] to improve educational opportunities for Hispanic students for the purpose of closing the achievement gap.” NMSA 1978 § 22-23B-4 (2010). To achieve the State’s

¹ NMSA 1978 § 22-1-1.2 (2007).

² *Id.*

legislative goals, the HEA creates a Hispanic Education Liaison and an advisory council to advise the Secretary of Education on Hispanic education issues, and a yearly status report on progress towards goals. NMSA 1978 § 22-23B-4(B)(5), (6) (2010).

44. The purpose of the Indian Education Act (“IEA”) is to “ensure equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional material for American Indian students enrolled in public schools,” and “ensure maintenance of native languages.” NMSA 1978 § 22-23A-2(A), (B) (2003). The IEA was intended to address longstanding inequities in the educational system for Native American students, and the maintenance of language and culture is specifically identified as being critical to Native American student education. Another purpose is to “ensure that the [PED] partners with tribes to increase tribal involvement and control over schools and the education of students located in tribal communities.” NMSA 1978 § 22-23A-2(D) (2003).
45. For Native American students enrolled in public schools, equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials are required to satisfy the goals of the IEA. NMSA 1978 § 22-23-1.1(K) (2004).
46. The IEA creates an Act-specific funding source, requires annual education status reports, and creates the Indian education division and Indian education advisory council in furtherance of these objectives. NMSA 1978 § 22-23A-5 to -8 (2007).
47. The Bilingual and Multicultural Education Act (“BMEA”) sets forth the “state’s bilingual multicultural education goals for all students, including that English Language Learners [are to] (1) become bilingual and biliterate . . . and (2) meet state academic content

standards and benchmarks.” The BMEA is meant to “ensure equal educational opportunities for students;” is grounded in a bilingual teacher training constitutional mandate and legislative recognition that “districts do not fully understand how to properly assess, place, and monitor students;” and demands that state and local education agencies provide accountability measures, professional development, parent program choice and English training, bilingual curriculum, and culturally relevant learning environments and materials. NMSA 1978 § 22-23-1.1 (2004).

48. In 1989, New Mexico was one of the first, and is currently one of the only, states to adopt an "English Plus" resolution, officially endorsing multilingualism, “promot[ing] the concept that all members of our society have full access to opportunities to effectively learn English plus develop proficiency in a second or multiple languages” and that “survival in the twenty-first century our country needs both the preservation of the cultures and languages among us and the fostering of proficiency in other languages on the part of its citizens.” House Joint Memorial 16, Thirty-Ninth New Mexico Legislature (1989).
49. Reflective of the State’s constitutional protections for all students, New Mexico codifies in statute the State’s goals for special education, and enacts specific educational program goals through Section 22-13-5 of the NMSA. Section 22-13-5 states that “[s]chool districts shall provide special education and related services appropriate to meet the needs of students requiring special education and related services.” NMSA 1978 § 22-13-5 (2004). Services “include, but are not limited to, evaluating particular needs, providing learning experiences that develop cognitive and social skills, arranging for or providing related services as defined by [PED] and providing parent education.” *Id.*

50. Defendant PED is required to develop “[r]ules and standards . . . for the provision of special education in the schools and classes of the public school system in the state” and it “shall monitor and enforce the rules and standards.” *Id.*
51. The stated objective of the rules promulgated by PED to implement Section 22-13-5 of the NMSA is “to assist public agencies in appropriately identifying and providing educational services for children with disabilities and gifted children. . . [and] (a) to ensure that all children with disabilities and gifted children have available a free appropriate public education which includes special education and related services to meet their unique needs; (b) to ensure that the rights of children with disabilities and gifted children and their parents are protected; (c) to assist public agencies to provide for the education of all children with disabilities and gifted children; and (d) to evaluate and ensure the effectiveness of efforts to educate those children.” 6.31.2.6 NMAC.
52. The State has mandated that “[a]ll children with disabilities aged 3 through 21 or who will turn 3 . . . including children with disabilities who have been suspended or expelled from school, have the right to a free appropriate public education that is made available by one or more public agencies in compliance with all applicable requirements of 34 CFR Secs. 300.101 and 300.120 and these or other department rules and standards.” 6.31.2.8 NMAC.
53. As more fully set forth below, the mandates of the Children of Spanish Descent Clause, the Spanish Teacher Training Clause, the HEA, the IEA, the BMEA, and state special education laws and regulations remain largely aspirational and unfulfilled.

New Mexico Student Population

54. During the 2013-14 school year, New Mexico enrolled 336,980 public school students in 89 districts and 855 schools (including charter schools).
55. New Mexico has an exceptionally challenging student population that is predominantly minority, and is becoming increasingly impoverished.
56. Latinos comprise approximately 60% of all enrolled students, followed by Caucasians at 25%, Native Americans at 10%, African Americans at 2%, and Asian/Pacific Islanders at 1%.
57. The number of economically disadvantaged students has increased considerably over the years and now accounts for 68% of all New Mexico public school children, an increase of over ten percent in the last decade. The school districts attended by Plaintiff children contain comparable or higher rates of low income enrollment, from approximately 65% in Las Cruces to almost 90% in Zuni in the 2012-13 school year.
58. ELL students now represent approximately 16%, or 1 out of every 6, public school students in New Mexico.
59. In 2012-13, there were 42,004 students with disabilities ages 6-21 enrolled in New Mexico, constituting 13.9% of total enrollment, up from 41,534 in the previous year. Even though student enrollment has increased over time, the number of students identified with disabilities has decreased.

New Mexico School Finance Structure

Education Program Funding

60. The 1974 Public School Finance Act (the “Public School Finance Act” or “PSFA”), codified in NMSA 1978 § 22-8-1 et seq. (2013), provides the majority of funding received by New Mexico public schools, through the Public School Fund.

61. Revenues for New Mexico's schools consist of approximately 66% state funds, 17% local funds, and 17% federal funds. Nearly all state-level school district operational funds are distributed through the Public School Fund, which derives its revenue from three sources: the General Fund, the Current School Fund, and the Federal Mineral Leasing Revenue. From the Public School Fund, PED distributes the State Equalization Guarantee Distribution ("SEG"), transportation distribution, and supplemental distribution. NMSA 1978 § 22-8-14 (2007). PED controls and supervises budgets for all public schools. NMSA 1978 § 22-8-4 (1988).
62. The SEG is the school funding formula, and the primary way that New Mexico distributes state funding to school districts. It represents the amount of money the State guarantees to provide the district to defray its program costs, and comprises 90% of operational revenue for school districts.
63. To calculate the SEG, the PED determines a school district's program costs, which is the amount of money assumed under the State's formula to be necessary for a particular district to provide its particular student population with educational services. The formula starts with a certain amount of base funding for each district, then provides additional funding for factors intended to address other costs, such as size, geographic location, and specific student characteristics. The computation results in a total number of "program units" for each district. The average SEG is approximately \$3,673.
64. In the Program Cost Calculation, the State acknowledges that program costs "include[] the cost of early childhood, special, bilingual, multicultural, fine arts and vocational education and other remedial or enrichment programs." NMSA § 22-8-18 (1974, as amended through 2014).

65. With twenty-four factors, New Mexico's funding formula has the second most formula components of the states that employ a foundation or base funding formula. Despite having been amended more than eighty times since its inception, the formula has never been based on actual student need and costs and fails to allocate sufficient resources for students who are most at risk and more expensive to educate.
66. In addition, Defendants do not ensure that funds earmarked for special populations are actually expended on those populations. A sufficient education requires that Defendants ensure that those additional resources are used to provide educational opportunities for those students. A brief discussion of some of the relevant formula components and other funding sources follows.

At-Risk Funding

67. Students from economically disadvantaged families often lack educational capital in the home and in the community and, therefore, require additional educational programs and resources in order to access a quality education, meet the rising performance standards, and achieve their full potential. Plaintiff children lack access to such compensatory and accelerated programs, which include but are not limited to research-based, high-quality preschool, tutoring, summer school, class size reduction, and extended day programs.
68. The New Mexico legislature recognizes that supplemental funding is necessary for students who are "at-risk" of performing poorly in school or dropping out of school, and included an at-risk index in the school funding formula. The at-risk index is .0915. NMSA§ 22-8-23.3 (2002). Essentially, the at-risk index adds only .0915 units to a districts total program units, which pales in comparison to many other states. This index is expected to increase to .106 in July 2015, but that increase is inconsequential when

compared to the gravity of the educational needs identified in Plaintiffs' claims. *See* 2014 N.M. Laws, ch. 55 (H.B. No.19), § 1.

69. Moreover, unlike several other states, New Mexico does not base its at-risk funding on the number of students eligible for free-and-reduced priced meals under the National School Lunch Act, even though well-established research demonstrates that those students are at high risk for school failure and require greater per-pupil funding. Instead, the index is calculated using a three-year average of three different school district characteristics: the percentage of membership used to determine its Title I allocation, the percentage of ELL students, and the percentage of student mobility in the district. *See id.*
70. A 2011 joint study of the school finance formula by the New Mexico Legislative Finance Committee (“LFC”) and the Legislative Education Study Committee (“LESC”) (the “2011 LFC Study”) concluded that the current at-risk formula failed to address adequately the cost difference for educating at-risk students, was too complex and imprecise, and resulted in the unfair allocation of at-risk funding among school districts serving those students. The 2011 Study recommended that the at-risk index should pay a cost differential of at least .15 for the percentage of students who qualify for free and reduced lunch—although that recommended figure was unrelated to the sufficiency mandate of the Education Clause.
71. Similarly, the LFC in its report to the Fifty-First Legislature Second Session in 2014 (the “2014 LFC Report”) noted that only 3% of total public education formula funding is directed to students at-risk of failing, despite the large percentage of these students in the State. The LFC again recommended increasing the amount of funding directed toward serving at-risk students.

72. Despite the repeated recommendations of the LFC, and contrary to the practices in the majority of states, New Mexico uses an at-risk measure that is imprecise and underfunds and excludes economically disadvantaged students.
73. In addition to the insufficiency of the at-risk index, revenues delegated at the discretion of the PED further highlight the need to fund the education of at-risk students. Often referred to as “below the line” funding, this revenue is used to create special grant programs by the Secretary of Education, and is available by grant application only.
74. These grant programs sometimes target at-risk students, including economically disadvantaged students, but only benefit certain at-risk students attending certain schools in certain districts that are fortunate enough to be selected by the PED. Meanwhile, other at-risk students’ needs—including those of several Plaintiff children—remain unmet.
75. Finally, state programs targeted toward at-risk students are underfunded. For example, approximately 63,000 students are eligible for Kindergarten Three Plus, a state-funded extended school year program for low income students enrolled in kindergarten through the third grade. However, funding for the program has decreased drastically in recent years and current funds only support approximately 13,000.
76. Because the amount of funds distributed through the at-risk index is too low and imprecise, and because “below the line” funding does not uniformly provide services for all at-risk students, state funding for economically disadvantaged students does not cover the cost of, and is unrelated to, a “uniform system of free public schools sufficient for the education of” economically disadvantaged students.
77. The arbitrary and insufficient funding for economically disadvantaged students often forces districts to choose between shortchanging these students or redirecting funds away

from programs that are necessary for districts to provide other student groups with a sufficient education. In Las Cruces Public Schools, for example, where the district has been very deliberate about implementing research-based programs targeting at-risk students that have proven benefits, it has not been able to expand those programs so that all eligible students in the district may benefit. Of course, simply redirecting an insufficient pool of resources from one group of students (for example, gifted and talented students who may not include significant numbers of low income students) to economically disadvantaged students would likely lead to the deprivation of a sufficient education for those gifted students who require those programs to succeed and achieve their full potential.

78. Economically disadvantaged students are, thus, denied the necessary quality compensatory education services they need to achieve their full potential and the state standards and expectations set for all students. For example, on information and belief, Zuni Public Schools is unable to hire additional teachers to reduce class sizes for its at-risk students. Tutoring has been drastically reduced due to budget cuts, even though more and more students are struggling and need additional one-on-one assistance to avoid falling farther behind.
79. Due to lack of funding, Magdalena Municipal School District was forced to cut teaching positions (increasing class sizes), eliminate almost all classroom aides (increasing student-teacher ratios), and drastically reduce its summer school and tutoring programs.
80. In Albuquerque Public Schools, many teachers buy their own classroom supplies, textbooks for students are limited, and there is insufficient access to technology and

computers for all students. Classrooms are also overcrowded and unsupported by current facilities.

81. In Santa Fe Independent School District, at-risk students have less access to qualified counselors because of funding cuts that required many counseling positions to be eliminated.

Bilingual, Multicultural Education and ELL Funding

82. Defendants define an ELL student as “a student whose first or heritage language is not English and who is unable to read, write, speak, or understand English at a level comparable to grade level English proficient peers and native English speakers.” NMSA 1978 § 22-23-2(E) (2007). ELL students require additional and/or modified educational services above and beyond the general education program in order to receive a sufficient education. For example, they require teachers who have received specialized training and professional development, appropriate materials and textbooks in the students’ native language, proper assessments to monitor the academic learning of the English language, and summer school so that ELL students do not lose their English skills.
83. Defendants recognize that supplemental funding is necessary for ELL students to achieve proficiency in and learn academic English and, in turn, to access a quality education, meet the rising performance standards, and achieve their full potential. However, that funding was arbitrarily set and remains woefully inadequate to ensure ELL students acquire a sufficient education.
84. The State recognizes the unique needs of ELL students pertaining to their language development and makes funding available through Bilingual Multicultural Education Programs (“BMEPs”). BMEPs “shall be provided to meet the identified educational and

linguistic needs of linguistically and culturally different students, including Native American children, and other students who may wish to participate, in grades K-12, with priority to be given to programs in grades K-3.” NMSA 1978 § 22-23-2 (2007); 6.29.1 NMAC. BMEPs use two languages, including English and a student’s home or heritage language, as a medium of instruction in the teaching and learning process.

85. In order to qualify for bilingual funding, school districts must submit for approval a BMEP plan with the PED. Districts have discretion to select one or more of the following program models to meet their students’ educational needs: dual language immersion, maintenance, enrichment, heritage, and transitional.
86. According to public documents, in the 2012-13 school year, 62 of 89 districts participated in BMEPs, serving 16.6% of the State’s student population. However, only 52.3% of the State’s ELLs were enrolled in BMEPs, a 4% decrease in enrollment from 2007-2008. In 2011–2012, the number of districts participating in BMEPs decreased slightly from the previous year, and has remained the same since that time. The PED attributed the decrease in the number of BMEP-participating districts to the lack of highly-qualified teachers with bilingual endorsements.
87. Defendants essentially provide bilingual funding to districts through weighted pupil mechanisms that add on 50% of the educational costs of a general education student through the funding formula, but only up to a maximum of four hours based on full-time equivalency.
88. The limitation in this distribution arbitrarily shortchanges district programs, defeating the purpose of the BMEA. For example, a district with a two-hour BMEP program only receives units added to its total program units based on 50% of one-third (two hours) of

the full-time equivalency of six hours. In many cases, the cost of implementing BMEPs far exceeds the funding New Mexico provides, which prevents districts from participating or forces them to shoulder all or most of the program costs.

89. The total BMEP funds allocated to districts and charters in 2012-13 was \$35.2 million, less than half of the \$74.2 million spent by districts and charters on total operational funds for BMEPs.
90. The limited availability of funds through the at-risk index and the BMEA, accompanied by unnecessary restrictions on funding, frustrate and impede educators' efforts to provide a uniform and sufficient education to their ELL students. For example, on information and belief, Santa Fe Public Schools is unable to fill positions with certifications in bilingual and Teaching English to Speakers of Other Languages ("TESOL") teachers, as required by state law. As a result, classrooms serving ELL students are overcrowded or are taught by full-time substitute teachers. In addition, ELL students with special needs are not timely assessed because there is only one Spanish speaking diagnostician for the district. ELL students who qualify for special education do not receive instruction from bilingual or even TESOL-endorsed special education teachers. On information and belief, teachers in both Albuquerque Public Schools and Santa Fe Public Schools frequently have to translate their own benchmark tests, and there is no special education curriculum in Spanish in Albuquerque Public Schools.
91. In Gadsden Independent School District, parental and community engagement, which is critical for student success, is lacking, especially for families of ELL students.
92. On information and belief, many districts are unable to offer or implement programs to maintain native languages after a student is no longer classified as a "current" ELL.

Special Education Funding

93. Defendants define a “[c]hild with a disability” as a “child who meets all requirements of 34 C.F.R. Sec. 300.8 and who:
- (a) is aged 3 through 21 or will turn 3 at any time during the school year;
 - (b) has been evaluated in accordance with 34 CFR Secs. 300.304-300.311 and any additional requirements of these or other public education department rules and standards and as having one or more of the disabilities specified in 34 CFR Sec. 300.8 including intellectual disability, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, emotional disturbance, orthopedic impairment, autism, traumatic brain injury and other health impairment, a specific learning disability, deaf-blindness, or being developmentally delayed as defined in paragraph (4) below; and who has not received a high school diploma; and
 - (c) at the discretion of each local educational agency and subject to the additional requirements of Paragraph (2) of Subsection F of 6.31.2.10 NMAC, the term ‘child with a disability’ may include a child aged 3 through 9 who is evaluated as being developmentally delayed and who, because of that condition, needs special education and related services.” 6.31.2.10 NMAC
94. Students with disabilities require additional educational programs and resources in order to access a quality education, meet rising performance standards, and achieve their full potential. State law requires school districts to provide special education programs to children with disabilities regardless of cost. School districts must provide all children

with disabilities a free, appropriate education in the least restrictive environment pursuant to an individualized education plan (“IEP”).

95. The New Mexico legislature recognizes that supplemental funding is necessary for students with disabilities. The SEG generates revenue for special education based on the number of students per service level. The formula has four classification levels for students with disabilities in K-12 (A, B, C, and D), and also defines units for three- and four-year olds through the PSFA, Section 22-8-21 NMSA 1978. Students classified at the A or B level receive an additional 70% of the unit value, students classified as C-level receive an additional 100% of the unit value, and students classified as D-level receive an additional 200% of the unit value.
96. In addition to generating revenue based on students weighted by service level, the SEG funds additional staff to serve those students.
97. New Mexico’s special education spending per student ranks 39th nationally, and state funding for special education, which includes gifted students, has decreased by approximately \$32 million since 2009. The State’s decrease in funding resulted in violations of federal requirements under the Individuals with Disabilities Education Act (“IDEA”). As a result, the State has jeopardized future federal funding for students with disabilities in the State.
98. Because the SEG funding for students with disabilities is insufficient and unrelated to actual student need, it fails to meet the constitutional requirement for a “uniform system of free public schools sufficient for the education of” students with disabilities.
99. The arbitrary and insufficient funding for students with disabilities often forces school districts to choose between shortchanging students with disabilities or redirecting funds

away from other necessary programs, thereby preventing denying a sufficient education to the district's other students.

100. Insufficient funding has deprived students with disabilities from accessing qualified service providers, especially for ELL students with disabilities who require instruction, materials, and resources in their native languages, because their school districts do not have the resources to effectively recruit and retain qualified service providers.
101. Lack of funding has also contributed to significant delays, backlogs, and errors in the proper identification of students.
102. For example, parents of disabled children are often unable to obtain the initial evaluation to determine eligibility for special education in New Mexico and, in some areas such as Albuquerque, it can take up to one full school year for an initial evaluation, assessment, and the placement via IEP to be completed. In many rural areas, necessary related services are not available and this directly results in children being sent home, disciplined and otherwise excluded from education.
103. Due to the arbitrary structure of the State's school finance system, school districts' identification procedures and educational services for students with disabilities are based on availability of financial resources and not need. Special education identification rates range from 0% to 52% and school districts with the lowest percentage of identified students with disabilities tend to have the highest poverty rates. Gadsden and Española, for example, have only 10.4% and 10.8% of students who qualify for special education respectively, two points lower than the state average. These low identification rates are highly suspect because lower income levels are typically associated with worsening

health outcomes, which in turn, lead to more students requiring special education services.

104. PED does not follow state law and regulations to offer meaningful monitoring, oversight, or technical assistance to ensure that districts are using resources properly and needed services are in place and provided. In a special investigation ordered by the State Auditor, an independent auditor identified multiple violations of federal grant requirements, procurement violations, and lack of fiscal oversight, reflecting PED's lack of oversight and monitoring overall, which deprives New Mexican students with disabilities their fundamental right to a sufficient education.

Native American Funding

106. Native American children in the public school system generate funds for public education through various programs which districts may use to meet their educational needs, including the New Mexico Indian Education Act. Native American students in twenty-three participating districts also benefit from Native American Bilingual and/or Educational Programs.
107. On information and belief, there are many restrictions on the use of these funds, preventing districts from providing sufficient compensatory and cultural programs to Native American students. The State of New Mexico also supplants state funding under the PSFA with federal funds, further limiting and restricting funds available to provide equal educational opportunities for Native American students.
108. Further, on information and belief, the State has misallocated monies intended to implement the IEA, hindering access to needed compensatory and cultural programs for Native American students.

Pre-Kindergarten Funding

109. Research has proven that high-quality pre-kindergarten (“pre-K” or “preschool”) programs are critical to closing the achievement gap for economically disadvantaged, ELL and minority students, with some research showing that pre-K programs have closed the gap by 60%. Economically disadvantaged, ELL and minority students often begin school far behind their peers in terms of their cognitive, social, and emotional development, and require intensive preschool programs at an early age in order to accelerate their academic learning and prevent them from falling behind other students. High-quality preschool programs are especially important in New Mexico where eleven percent of children ages 0 to 4 live in extreme poverty, and fifty percent live below the Federal Poverty Line.
110. Defendants recognize that high-quality preschool programs are essential for raising school performance and advancing governmental interests and school readiness. Defendants created New Mexico’s PreK Initiative in 2005. NMSA 1978 § 32A-23-8 (2005). New Mexico PreK serves four-year olds, and funding through the program is not available for three-year olds.
111. New Mexico PreK Initiative is funded by both PED and the Children, Youth, and Families Department (“CYFD”). 6.30.9 NMAC; 8.18.2 NMAC. According to the CYFD, in 2012-13, \$19,214,600 was appropriated to serve 5,331 four-year olds – purportedly less than the appropriation for 2008-09, despite the State’s growing poverty rate among three- and four-year olds in the state.
112. Despite the need for quality preschool programs, services and funding through New Mexico PreK are limited. Program funding is awarded on a competitive basis.

Eligibility is not directly based on the income level of a family, and not all economically disadvantaged students and ELL students have access to services. Under the state statute, services may only be provided by public schools or eligible providers on a per-child reimbursement rate in (1) communities with the highest percentage of public elementary schools that are designated as Title 1 schools *and* (2) that serve the highest percentage of public elementary students who are not meeting the proficiency component required for calculating adequate yearly progress.

113. Although recent action taken by the State of New Mexico indicates a small increase in pre-K funding, both enrollment and funding for the program have decreased over time. Other state-supported programs offering early childhood education for at-risk students have also been virtually eliminated due to budget cuts.
114. As a result of insufficient funding for preschool programs, the quality of preschool programs suffer and school districts cannot provide quality preschool programs to three- and four-year-old students requiring such (including all ELL and economically disadvantaged students) because they are far behind other students when entering school. In 2012, only 16% of the State's total population of 4-year old children enrolled in New Mexico Pre-K. According to a report released by New Mexico Voices for Children, New Mexico ranks 44th nationally in preschool enrollment for three- and four-year olds.
115. There are also insufficient funds for districts to provide multicultural preschool programs and conduct parental engagement, for example, to address historical concerns in Native American families about taking children out of the home at younger ages.

Multicultural Programs and Spanish-Speaking Provisions

116. The framers of New Mexico's constitution protected the State's unique, long-standing multilingual, multicultural tradition in the Children of Spanish Descent Clause and the Teacher Training Clause.
117. The PED has recognized in its annual Hispanic education status reports that New Mexico has a "unique responsibility to its Spanish-speaking students" because it is the only state in the union whose state constitution addresses the needs of such students.
118. However, there are no state funding provisions or grants available to districts to obtain language training or bilingual certification without spending additional money from their general funds to fulfill these constitutional mandates. On information and belief, many Spanish-speaking students attend class with teachers who are not proficient in the Spanish language and these students are unable to communicate effectively with their teachers. Defendants do next to nothing to ensure teachers are proficient in the Spanish language as required under Spanish Teacher Training Clause, much less to ensure "perfect equality" under the Children of Spanish Descent Clause. The State does a poor job of recruiting, training and retaining teachers who are able to speak Spanish and languages other than English.
119. The New Mexico legislature passed the BMEA to defray program costs and provide monitoring and training to ensure the implementation of multicultural programs. The PED has acknowledged that "culturally responsive teaching" is "especially important" to "bridge the achievement gap [and] increase graduation rates." However, the limited resources for BMEPs (discussed further above) often constrain the districts' services for helping students transition to English without taking into account the bicultural element of BMEP or students' retention of the native language.

120. For Native American children, cultural programs are vital to the continuance of tribal governance structure and cultural traditions. In fact, equitable and culturally relevant learning environments, educational opportunities, and culturally relevant instructional materials are required to satisfy the goals of the IEA. NMSA § 22-23-1.1(K). The PED recognizes that cultural competency is a goal of its efforts under the IEA in its annual report.
121. On information and belief, the Zuni School District's language and cultural programs are not geared toward preserving cultural language and learning for Latinos/Hispanos and Native Americans, and instead focus on standardized testing and textbooks.
122. The limited availability of funds through the at-risk index and the BMEA and restrictions on funding also frustrate and impede the districts' efforts to provide a uniform and sufficient multicultural education to their Native American and Latino students. On information and belief, in Zuni Public Schools, for example, there are insufficient technologies and materials to teach Zuni to students every day to give them the continuity required for fluency.
123. Likewise, Latino/Hispano Plaintiff students are often denied access to bicultural programs. The lack of a culturally relevant curriculum deprives many Latino/Hispano students of the essential resources needed to succeed in the classroom and on state standardized tests. Ultimately, Latino/Hispano students are denied the "perfect equality" guaranteed under the New Mexico Constitution.
124. The lack of a culturally sensitive environment, a culturally relevant curriculum, and resources to provide such multicultural programming deprives students of a sufficient education. As a result, New Mexican schools disproportionately send many African

American, Latino/Hispano, and Native American students to disciplinary programs, and eventually push those students out of school at grossly disproportionate rates.

125. Administrative reorganizations and budget reductions in the Bilingual Multicultural Education Bureau and the Indian Education Bureau and their respective advisory committees, and other Defendant administrative actions and omissions have prevented Defendants from carrying out state statutory requirements to provide sufficient monitoring, supervision, and accountability for effective implementation cultural and language program administered through the BMEA, the HEA, and the IEA.

State of New Mexico Education Funding Historically and Compared Nationally

126. The low funding for public education in New Mexico further exacerbates the State's failure to provide a sufficient education for Plaintiff children. Plaintiffs lack the political power to influence local policy and when districts have limited funds, districts are forced to fund programs for other groups of students while denying necessary educational services that would benefit Plaintiff students.
127. But even though Plaintiff children and other ELL and economically disadvantaged children are the student populations harmed most significantly by the current insufficient, low-quality education system, diverting limited funds from other students and programs would only worsen the insufficiency of the overall system. "Robbing Peter to pay Paul" is not the remedy sought by Plaintiffs.
128. In the 2014 legislative session, the New Mexico legislature appropriated approximately \$2.74 billion for public education, or 44% of the total state budget. Because of inflation, rising costs, and the growing population of at-risk students, the 2014 funding appropriation merely brings the State's current education budget closer to

the level of funding that existed in 2008. In 2008, a state-sponsored adequacy study conducted by the American Institutes for Research concluded that New Mexico underfunded its schools by approximately \$334 million. AIR, An Independent Comprehensive Study of the New Mexico Public School Funding Formula (2008), available at http://www.nmschoolfunding.org/pdf/AIR_Vol_I_Executive_Summary_-_NM_Public_School_Funding_Formula.pdf.

129. In 2011, New Mexico was one of only thirteen states that cut per-student funding by more than 10%. New Mexico ranks 37th in per-student funding, spending only an average of \$9,070 per student per year.
130. New Mexico also lags behind other states in average teacher pay. In 2011-2012, the National Average Starting Teacher Salary was \$36,141, but in New Mexico first-year teachers made only \$31,960, a decrease from the previous year and making New Mexico 38th among the States for starting teacher pay. New Mexico ranked 47th for average teacher salary in 2012-2013 (\$45,727 compared to \$56,689 nationally).
131. The low teacher pay severely impacts the State's ability to recruit and retain high-quality teachers in New Mexico and provide those teachers with high-quality professional development needed to provide Plaintiff children with a sufficient education. For example, on information and belief, Gadsden Independent School District is not able to provide the same level of training for English as a Second Language ("ESL") training as in previous years, despite the fact that the ELL enrollment in the district has grown. Due to uncompetitive pay, the district has an exceptionally difficult time recruiting qualified science and math teachers.

132. In addition, on information and belief, although requirements for teacher licensure require a year of mentoring for a teacher to advance from Level 1 to Level 2, the State eliminated all funding for teacher mentoring programs in 2008.
133. The slight raise in teacher salaries approved by the State legislature in 2014 (3%) will not impact significantly school districts' abilities to recruit and retain a high-quality teaching workforce needed to provide economically disadvantaged, ELL, students with disabilities, and other children with a sufficient education, especially when other "reform" efforts described below make the New Mexican teaching environment far less attractive and less supportive.

Rising Curriculum and Testing Standards and Education "Reform" Efforts That Hinder Student Access to a Sufficient Education

134. A sufficient educational system under the New Mexico Constitution requires a rigorous, culturally relevant curriculum, a testing system to ensure students are learning, and a fair and effective monitoring and evaluation system of teachers and student performance.
135. Although Plaintiffs recognize that Defendants have latitude in devising a rigorous curriculum, testing and accountability system, so too must Defendants devise such in a manner that effectively provides the resources necessary to help all students succeed. Defendants have failed to provide a culturally relevant curriculum (as described above), and a fair and effective monitoring and evaluation system of teacher and student performance.
136. The gravity of the problem cannot be understated. Despite the stark change in student demographics and high-need students, the State continues to ignore the educational needs of the growing populations of economically disadvantaged and ELL students, while increasing the rigor of testing and accountability requirements, among other "educational

reform” efforts—paying no mind to the overall negative effect on its duty to provide a uniform and sufficient education.

The Common Core

137. The academic, testing and graduation requirements in New Mexico are only expected to become more rigorous with the integration of the Common Core State Standards (“CCSS”), which the State adopted in 2010. CCSS are rigorous, new English Language Arts and Mathematics standards formulated by the National Governors Association Center for Best Practices and the Council of Chief State School Officers, and are meant to “prepare students for the demands of the modern workplace,” making students “globally competitive,” and adapting to the “landmark shift in expectations and requirements” for education in the 21st century.
138. PED has promulgated aggressive regulations amending the current English Language Arts and Mathematics standards to integrate the CCSS. 6.29.13 NMAC (“English Language Arts Common Core”); 6.29.14 NMAC (“Mathematics Common Core”). In 2011, New Mexico joined the Partnership for Assessment of Readiness for College and Careers (“PARCC”) consortium, working alongside 23 other states to develop and deliver a new assessment system in 2014–2015.
139. In 2012-13, the PED required teachers to teach CCSS standards in grades K-3 and retained current state standards for the SBAs in all grades except grade 3, which used a “bridge assessment” aligned to both New Mexico’s state standards and the CCSS. In 2013-14, all grades are expected to implement CCSS standards, and all tested grades will implement a “bridge assessment.” Purely CCSS-aligned PARCC assessments will reach

full scale implementation in 2014-2015 school year. The PED will require all districts to administer computer-based assessments.

140. On information and belief, the State has not provided sufficient funding for professional development and training to assist in transitioning to the highly rigorous CCSS, and the training made available by the State is not effective. Students also do not have sufficient access to computers and other technology in order to prepare for and take the tests. For example, on information and belief, there are insufficient computers in Albuquerque Public Schools to help ELL fourth graders become proficient in keyboarding for the test, much less to transition to take a standardized test by computer for the first time.

State Standardized Testing

141. All public school students, with few exceptions, must participate in the State’s standards-based assessment (“SBA”), which includes annual SBAs in grades 3 through 8 and grade 11, and “short-cycle assessments” in grades 9 and 10. N.M. Stat. Ann. § 22-2C-4; N.M. Admin. Code § 6.29.1. Students are rated as: “beginning step,” “nearing proficiency,” “proficient,” or “advanced.”
142. New Mexico schools must measure “higher education readiness” through a PED-created “readiness assessment system” that is aligned with state academic content and performance standards, college placement tests and entry-level career skill requirements. NMSA 1978 § 22-2C-4.1 (2008).

State Accountability

143. School district performance is measured and enforced through a public school accountability system approved by the legislature in 2011. The school accountability system is intended to measure student performance, as determined by student academic

achievement on statewide SBAs, and supplemented by graduation rate and attendance data.

144. Since 2011-2012, the PED has assigned each public school a rating of A, B, C, D, or F. NMSA § 22-2E-3. A school's grade depends upon current standing (percent proficient on SBA in math and reading), growth (growth of lowest 25% performers weighted equally with growth of highest 75%), opportunity to learn, graduation (calculated at four and five years), college and career readiness (participation and success on "college course," "career prep curriculum," or "college admission assessment"),³ and bonus points. Each calculation includes a "conditioning" component for the following factors, which "schools cannot reasonably be expected to control": gender, race/ethnicity, free/reduced price lunch, disability status, language status, full academic year status, school size, and prior performance.
145. Under the current system, parents of a student in a school that for two years has been F-rated have the right to transfer their child to another non-F-rated public school. NMSA § 22-2E-4. In addition to the A-F system, accountability ratings based on two mechanisms (accreditation and program/budget review) and three indicators (community representation, local accountability indicators, and statewide accountability indicators) affect a district's budget and accreditation. 6.29.1 NMAC.
146. Even if a school receives a D or F, that school can earn a passing grade through "School Grading Bonus Points" based upon student engagement, parent engagement, extracurricular activities, and truancy improvement. 6.19.8.9 NMAC.

³ Eligible CCR indicators for "participation" points include PSAT/NMSQT, SAT, ACT, Concurrent Enrollment/Dual Credit, AP, Career Pathway, PLAN, ACCUPLACER, COMPASS, and IB. Measures of success include, e.g., receiving a 3 or higher on an AP exam, or achieving the college readiness benchmarks set by the ACT.

147. The grading process, however, is highly technical, confusing, and results in inconsistent outcomes that ultimately harm students because it fails to convey clearly and effectively student proficiency, student growth, or school success. Indeed, a group of Los Alamos physicists, statisticians, and math experts reportedly encountered much difficulty in determining how one of the Los Alamos schools received a “C” under the state accountability system.⁴
148. In 2012-13, the vast majority of schools reportedly received a grade of “C” or less. 82 schools received an A grade, 224 received a B grade, 230 received a C-grade, 218 received a D grade, and 85 received an F. These grades play a significant role in community perceptions and affect a school’s ability to recruit, develop, and retain quality teachers (especially when combined with the ineffective teacher evaluation system described below); to recruit, develop and retain effective leaders; and to retain students, thus undermining Defendants’ duty to provide a uniform and sufficient education.
149. Wide fluctuations in grades suggest that they are not aligned to actual school performance. The PED has not made data related to the calculation of grades available, making it difficult for school districts to make instructional policy decisions that benefit students. There has been no indication that failing schools under the new system receive the necessary resources, support, or supervision from the State to ensure students access a sufficient education.

Teacher Evaluation System

⁴ See Robert Nott, “Los Alamos Scientists: School Grading System is Unclear,” The Santa Fe New Mexican, (Dec. 13, 2013), available at: http://www.santafenewmexican.com/news/education/los-alamos-scientists-school-grading-system-is-unclear/article_0c2103fa-a7b9-538b-b401-e56317d6c310.html

150. A sufficient education requires that all students have access to quality and diverse teachers. This requirement imposes upon Defendants the duty to ensure the State attracts and supports a quality and diverse teaching force, and a teacher evaluation system that fairly evaluates teachers with the end goal of providing a sufficient education to all students.
151. In New Mexico, teachers are evaluated and licensed pursuant to a three-tier licensure system, which was established in 2003. NMSA 1978 § 22-10A3 to -12. Until recently, teachers were rated as either meeting competency or not meeting competency under a statewide evaluation system based on teacher skills, training, and performance. 6.69.4 NMAC. On information and belief, this prior system was not applied in a manner to ensure a sufficient education and most schools rated most teachers as “meeting competency.”
152. In 2012, after failed attempts to achieve its objectives in the legislature, the Secretary-designate and PED adopted regulations to replace the previous binary system with a five-tier system that added the element of student achievement to the statewide evaluation system.
153. The new teacher evaluation system created by PED bases 50% of a teacher’s evaluation on student performance, defined primarily as on the SBA for those who teach subjects administered, and for those who do not, the school’s A-F grade. The remaining evaluation is also based on observations by school leaders, teacher attendance, and locally adopted, PED-approved measures.
154. The use of student performance in teacher evaluations remains a highly debatable topic due in substantial part to the lack of research demonstrating a strong correlation between

student teaching and student test scores. From one year to the next, a teacher may move from the highest-ranked top ten percent to the bottom ten percent without changing his or her teaching practices. Other teachers, who do not teach a subject for which a SBA exists, are rated based on the performance of other teachers in the school.

155. Although Plaintiffs do not complain of the mere use of student performance in teacher evaluations, the PED's evaluation system—including its 50% reliance on test scores—hinders Defendants' duty to provide a uniform and sufficient system for all students by unfairly evaluating good teachers and by not ensuring those teachers who need improvement have adequate support to improve their instruction.
156. The system also hinders school districts' teacher recruitment and retention efforts, especially in districts and campuses with higher populations of minority and at-risk students like those attended by Plaintiff children. On information and belief, quality teachers have requested transfers out of such schools, and they have refused transfers into such schools because of the punitive teacher evaluation system. Oftentimes, the most challenging students are left without experienced and well-trained teachers.
157. The new system further incorporates punitive measures and administrative burdens for teachers, taking away classroom learning and preparation time that would otherwise be used to help students succeed.
158. On information and belief, as a result of the teacher evaluation system, teachers in Albuquerque Public Schools often attend schools while sick and contagious to avoid being penalized on their evaluations. They spend disproportionate amounts of time completing paperwork required for their evaluations instead of planning for their classes or assisting students who need additional learning time outside of class.

New Mexico Student Performance

159. Defendants' duty to provide a sufficient education for all students extends to ensuring all students are presented with the educational opportunities they need to succeed both in the classroom and on the SBAs, to graduate college and be career ready, become effective in the global workforce, and to achieve their full potential. Not surprisingly, in light of the rising state standards and the arbitrary accountability measures, the arbitrary and inadequate funding for economically disadvantaged and ELL students, and the lack of a multicultural learning environment, the performance of economically disadvantaged, ELL, and minority students statewide indicates a failing, insufficient system.

State Standardized Tests

160. In New Mexico, a passing score on the NMSBA is rated as "proficient." As reported in the 2014 LFC Report, statewide data from the NMSBA for the 2012-13 show decreases in proficiency overall.
161. In the 2012-13 school year, a bare majority, approximately 50.6%, of all students achieved "proficient" or above in reading, including 66.9% of Caucasian students, 45.9% of Latino students, 34.7% of Native American students, 48.6% of African American students, 42.8% of low income students, and 20.4% of ELL students.
162. In math, only 42% of all students achieved a rating of "proficient" or above, including 58% of Caucasian students, 36.8% of Latino students, 29.1% of Native American students, 35% of African American students, 34.4% of low income students, and 18.6% of ELL students.
163. In science, 45.2% of all students achieved a rating of "proficient" or above, including 66.5% of Caucasian students, 39% of Latino students, 25.3% of Native American

students, 40.5% of African American students, 36.3% of low income students, and 15.2% of ELL students.

164. The percentage of Native American students scoring “at or above proficient” never rose above 35% in reading, math, or science between 2009 and 2013. Between 2011 and 2013, the percentage of ELL students achieving proficiency in math decreased at every grade level, and never reached above 35% for any grade level – including only 12% of sixth- and seventh-grade ELL students reaching proficiency in 2013.
165. Performance results for special education similarly reflect dismal outcomes. Special education math proficiency rates declined from an already dismal 15.5% in 2009 to 13.7% in 2013, coinciding with the decrease in special education funding in the corresponding time frame. In 2012-13, only 16.6% of students with disabilities reached proficiency in reading.
166. Special education proficiency rates are also far lower than the State’s overall rates. In FY 2013, the total population of students outperformed students with disabilities by approximately 30 points in both reading and math.
167. Similar dismal results on the NMSBA are found in Plaintiffs’ school districts.
168. In Albuquerque Public Schools, 52% of all students met proficiency on the 2013 NMSBA in Reading, including 71.1% of Caucasian students, 45.9% of Latino students, 38.5% of Native American students, 47.4% of African American students, 41.4% of low income students, 19.5% of ELL students, and students with disabilities ranged from 13.8% in the fourth grade, 15.6% in the seventh grade, and 18.6% in the eleventh grade.
169. In Gadsden Independent School District, 47.2% of all students met proficiency on the 2013 NMSBA in reading, including 64.9% of Caucasian students, 46.6% of Latino

students, 46.12% of Native American students, 47.8% of African American students, 47% of low income students, 26.4% of ELL students, and students with disabilities ranged from 10.3% in the fourth grade, 15.5% in the seventh grade, and 16.5% in the eleventh grade.

170. In Las Cruces Public Schools, 52.4% of all students met proficiency on the 2013 NMSBA in reading, including 69.5% of Caucasian students, 47% of Latino students, 53.4% of Native American students, 54.3% of African American students, 46.7% of low income students, 20.3% of ELL students, and students with disabilities ranged from 15.7% in the fourth grade, 22.4% in the seventh grade, and 20% in the eleventh grade.
171. In Magdalena Municipal School District, 33.5% of all students met proficiency on the 2013 NMSBA in reading, including 61.7% of Caucasian students, 53.1% of Latino students, 7.9% of Native American students, 33.5% of low income students, and 1.9% of ELL students.
172. In Santa Fe Independent School District, 46.1% of all students met proficiency on the 2013 NMSBA in reading, including 65.7% of Caucasian students, 39.3% of Latino students, 42.8% of Native American students, 62.5% of African American students, 36.1% of low income students, 20.2% of ELL students, and students with disabilities ranged from 16% in the fourth grade, 13.6% in the seventh grade, and 14.3% in the eleventh grade.
173. In Zuni Public Schools, 29.2% of all students met proficiency on the 2013 NMSBA in reading, including 28.9% of Native American students, 28.3% of low income students, 17.1% of ELL students, and students with disabilities ranged from 7.7% in the fourth grade, 0% in the seventh grade, and 0% in the eleventh grade.

174. In Española Public School District, 43.9% of all students met proficiency on the 2013 NMSBA in reading, including 50.6% of Caucasian students, 42.3% of Latino students, 56.6% of Native American students, 43% of low income students, 25.5% of ELL students, and students with disabilities range from 11.10% in the fourth grade, 12.50% in the seventh grade, and 30% in the eleventh grade.

Graduation and Dropout Rates

175. Economically disadvantaged, ELL, minority students, and students with disabilities in New Mexico are also graduating at low rates and being pushed out of school at high rates, especially when compared to their peers.
176. New Mexico's graduation requirements include academic credit attainment and successful performance on high-stakes standardized tests. Passing the 11th grade SBAs is mandatory for graduation. 6.29.1 NMAC. As of 2010-2011, New Mexico students cannot receive "a diploma of excellence" if they have not "demonstrated competence in the subject areas of mathematics, reading and language arts, writing, social studies and science, including a section on the constitution of the United States and the constitution of New Mexico, 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 (2014).
177. For the class of 2012, 70.4% of students statewide reportedly graduated under the State's four-year cohort analysis, which likely overinflates graduation rates, including 77.5% of Caucasian students, 67.7% of Latino students, 65.3% of Native Americans, 69.3% of African Americans, 64.8% of low income students, and 65.8% of ELL students. In other

words, *nearly one-third* of New Mexico’s most challenging student populations *failed* to graduate.

178. In FY 2012, the graduation rate for students with disabilities was 56%.
179. For the same year, the U.S. Department of Education (“DOE”) reports that New Mexico has the second lowest graduation cohort rate in the country at 63%, with economically disadvantaged students, ELL students, and Native American students lagging behind the state rate by 7 percentage points, and students with disabilities lagging more than 10 points behind.
180. Similarly, New Mexico’s dropout rate is consistently higher than the national average, and the state has one of the highest dropout rates in the country at 6.9%, surpassed by only Arizona, Mississippi, and the District of Columbia.
181. New Mexico surpasses the national average with respect to Latino, Native American, and African American dropout rates as well. The national dropout rate for Latino students is 5%, compared to New Mexico’s rate at 7.2%. New Mexico’s dropout rate of 8.8% for Native American students is more than 2 points higher than the national rate of 6.7%. New Mexico’s dropout rate for African Americans is almost twice the national average of 5.5%.

College Readiness Indicators

182. Since the 2008-2009 school year, New Mexico schools have been required to measure “higher education readiness,” through a PED-created “readiness assessment system to measure the readiness of every New Mexico high school student for success in higher education or a career” that is aligned with state academic content and performance

standards, college placement tests and entry-level career skill requirements. NMSA 1978 § 22-2C-4.1 (2008).

183. Of the approximately 70% of New Mexican students who are fortunate enough to graduate, many are not properly prepared to enter postsecondary education.
184. In 2013, the PED reported significant participation and performance gaps on the National ACT. Only 40% of students took the ACT, including 51.5% of Caucasian students and 36.3% of Latino students; 14.6% enrolled in AP coursework, including 21.8% of Caucasian students and 12.4% of Latino students; 22.5% participated in Dual Enrollment, including 28.1% of Caucasian students and 20.6% of Latino students; 34% took the PSAT, including 39.9% of Caucasian students and 32.4% of Latino students; and 4.5% took the SAT exam, including 9.1% of Caucasian students and 2.4% of Latino students.
185. New Mexico's average ACT scores lag behind the national average in every subject area tested by the ACT. New Mexico students earned an overall score of "17" on the ACT exam, compared to the national average of "25." The largest gap in students achieving college readiness benchmarks was in mathematics, where only 33% of New Mexico's Class of 2012 graduates achieved the standard compared to 46% nationally. Within New Mexico, there are striking achievement gaps. For example, on the English section of the ACT, 78% of New Mexico's Caucasian students met the college readiness benchmarks compared to 49% of Latino students, 28% of Native American students, and 53% of African American students.⁵
186. In 2012, only 12.3% of New Mexico high school graduates taking an AP exam scored a three or higher. Although 46% of graduates who had taken an AP exam in New Mexico

⁵ See *The Conditions of College and Career Readiness: New Mexico*, ACT 4, 7 (2012), available at <http://www.act.org/newsroom/data/2012/states/pdf/NewMexico.pdf>.

were economically disadvantaged, only 37.8% of students achieving a three or higher were economically disadvantaged. Of those students graduating high school who had taken an AP exam, 36.6% were Caucasian but Caucasians constituted 44.5% of graduates scoring a 3 or higher. In contrast, Latinos comprised 45.5% of those graduating who had taken an AP exam were Latino, but only 39.7% of those graduating with a score of 3 or higher. Of those graduating high school, 11% identified as “American Indian/Alaska Native,” but only 5.6% of students graduating having taken an AP exam identified as American Indian/Alaska Native; and only 2.4% of those students graduating scored a 3 or higher. *Id.*

187. According to the LFC’s 2014 January report, the percentage of New Mexico high school graduates taking remedial courses in college has historically has hovered around 50% without improvement, and current remedial rates are even higher for Native American students (59%), Hispanic students (68%), and economically disadvantaged students (79%). Schools with the higher poverty rates tend to have higher remediation rates.
188. In FY 2012, only 40.8% of students with disabilities enrolled in higher education. Furthermore, only 71.5% enrolled in higher education were competitively employed.

Pursuant to the Declaratory Judgment Act, Plaintiffs assert the following causes of action.

FIRST CAUSE OF ACTION

DENIAL OF THE CONSTITUTIONAL RIGHT TO A SUFFICIENT EDUCATION UNDER ARTICLE XII, SECTION 1 OF THE CONSTITUTION OF THE STATE OF NEW MEXICO

189. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.

190. Defendants have failed to provide Plaintiff children with a uniform and sufficient education, both qualitatively and quantitatively, as mandated by the Education Clause.
191. In the quantitative sense, the primary cause of this constitutional violation is the arbitrary and inadequate New Mexico public school finance system, including the PSFA, pre-K funding, funding for bilingual multicultural programs and ELL students, and funding targeted at economically disadvantaged, at-risk, Native American students, and students with disabilities. This violation is compounded by Defendants' failure to monitor effectively the expenditure of targeted funds. In conjunction with the inadequate and arbitrary funding of critical programs for Plaintiff students, Defendants' arbitrary, unfair and ineffective accountability and teacher evaluation systems further deprive Plaintiff children of a qualitative sufficient education.
192. Further compounding the violation for ELL, Native American and Latino/Hispanic children, and children with disabilities, is Defendants' failure to implement appropriately and support fully the obligations and duties owed under other constitutional provisions and the State's own statutes and pronouncements, which inform the interpretation of the qualitative meaning of the Education Clause. Those constitutional provisions, statutes, and pronouncements include the Bilingual and Multicultural Education Act, Hispanic Education Act, the Indian Education Act, the Children of Spanish Descent Clause requiring "perfect equality" (N.M. Const. art. XII, § 10), the Spanish Teacher Training Clause (N.M. Const. art. XII, § 8), and state laws and regulations regarding special education.

SECOND CAUSE OF ACTION

DENIAL OF THE RIGHT TO EQUAL PROTECTION UNDER ARTICLE II, SECTION 18 OF THE CONSTITUTION OF THE STATE OF NEW MEXICO

193. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.
194. New Mexico's equal protection clause provides that "[n]o person shall be . . . denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18.
195. A sufficient education is a fundamental right guaranteed by the New Mexico Constitution. A sufficient education is not only explicitly guaranteed under the Education Clause, but other constitutional provisions such as article XII, section 5 of the New Mexico Constitution reflect its fundamental significance by mandating that all students of school age attend school. With that fundamental right, comes a duty by Defendants to provide a system of education that enables all students to access the resources and opportunities they need to succeed.
196. The State of New Mexico identifies and classifies economically disadvantaged students as a specific class of students for reporting and accountability purposes. Plaintiff economically disadvantaged children are a class of students that is both disadvantaged and politically powerless, and they, as children, are unable to change their classification. For years, economically disadvantaged students and advocates have fought for equal educational opportunities needed to secure their fundamental right to a sufficient education, but instead, they have encountered an educational system that is largely unresponsive.
197. Plaintiff economically disadvantaged children are similarly situated to the other classes of students recognized by Defendants for purposes of determining at-risk funding, such as highly mobile students who are not economically disadvantaged, because the

economically disadvantaged students—as a result of their poverty levels—are also at risk of being retained in grade level and dropping out of school. However, Defendants have refused to base at-risk funding, in part, on the number of economically disadvantaged students for no reason except the political will to do otherwise. Accordingly, Plaintiffs challenge Defendants’ classification of at-risk students that fails to include economically disadvantaged students as a group through the at-risk index, despite their similar educational needs. Without those resources and accompanying educational opportunities, Plaintiffs are unable to acquire their fundamental right to a sufficient education. Defendants can offer no compelling reason or justification substantially related to an important government interest, much less a rational reason, for the exclusion.

198. Plaintiff ELL students are also classified as a specific class of students for reporting and accountability purposes. Like Plaintiff economically disadvantaged students, Plaintiff ELL students are a disadvantaged and politically powerless group, and they are unable to change their classification without the very educational opportunities that they complain of here.

199. Plaintiffs allege that Defendants provide a system of education that is uniform and sufficient for other similarly situated school-aged children but not for ELL and economically disadvantaged students. Unlike other similarly situated school age children, ELL and economically disadvantaged students are denied the basic educational opportunities and resources they need to acquire a sufficient education.

THIRD CAUSE OF ACTION

DENIAL OF THE RIGHT TO DUE PROCESS OF LAW UNDER ARTICLE II, SECTION 18 OF THE CONSTITUTION OF THE STATE OF NEW MEXICO

200. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully set forth herein.
201. New Mexico's due process clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law." N.M. Const. art. II, § 18.
202. Plaintiff students have a fundamental right to a sufficient education but they have been denied the due process in acquiring that right and the successive right to graduating with a high school diploma as established under state statutes.
203. Defendants have denied Plaintiff students' right to due process by a series of statutes and policies that irrationally and unreasonably deny economically disadvantaged and ELL students, and students with disabilities, access to the basic educational opportunities they need to acquire a sufficient education. These statutes and policies include but are not limited to: the denial of quality pre-K programs for all economically disadvantaged and ELL students, and students with disabilities; the implementation of an unfair and non-transparent teacher evaluation and school grading system that drives quality teachers and leaders away from classrooms and schools, and fails to ensure effective program implementation; and an arbitrary and inadequate school funding system that deprives ELL and economically disadvantaged students, and students with disabilities, of the resources and opportunities they need to acquire the knowledge and skills necessary to master Defendants' high-stakes standardized tests and fulfill graduation requirements to earn a high school diploma as set out in statute, including the enrollment and completion of at least one honors, dual-credit, distance learning, or Advanced Placement course. *See* N.M. Stat. Ann. § 22-13-1.1 (West 2012).

204. It is inconceivable and unconscionable that Defendants would irrationally deny such basic educational opportunities to economically disadvantaged and ELL students, and students with disabilities, needed to graduate.

ATTORNEY’S FEES AND COSTS

205. Plaintiffs request an award of reasonable attorney’s fees and costs as authorized under law and equity.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, and each of them, respectfully request that the Court:

- A. Declare that a sufficient education is a fundamental right under the New Mexico Constitution;
- B. Declare the New Mexico school finance system for funding the education of economically disadvantaged and ELL students and students with disabilities insufficient and in violation of the educational mandate of the New Mexico Constitution;
- C. Declare the New Mexico public education system’s teacher evaluation and district and state accountability grading systems insufficient and in violation of the educational mandate of the New Mexico Constitution;
- D. Declare Defendants’ failure to implement appropriately and support fully the obligations and duties owed to students under the Bilingual Multicultural Education Act, the Hispanic Education Act, the Indian Education Act, the Children of Spanish Descent Clause requiring “perfect equality” (N.M. Const. art. XII, § 10), the Spanish Teacher Training Clause (N.M. Const. art. XII, § 8), and Section 22-13-5 of the

- NMSA insufficient and in violation of the educational mandate of the New Mexico Constitution;
- E. Declare the exclusion of economically disadvantaged students as a group from targeted funding for at-risk students in violation of article II, Section 18 of the New Mexico Constitution;
 - F. Declare the deprivation of the fundamental right to a sufficient education and graduating with a high school diploma for ELL and economically disadvantaged students in violation of article II, Section 18 of the New Mexico Constitution;
 - G. Enjoin Defendants from giving force and effect to any school finance system unless it satisfies the principles of sufficiency established under New Mexico law and remedies the constitutional violations identified in the declaratory relief requested above;
 - H. Enjoin Defendants from discriminating against economically disadvantaged and ELL students, and students with disabilities by failing to provide the students with the necessary opportunities and resources they need to acquire a sufficient education and graduate from high school;
 - I. Retain jurisdiction until this Court is satisfied fully with the remedies enacted by Defendants;
 - J. Grant Plaintiffs reasonable and necessary attorneys' fees and costs as provided by law and equity; and
 - K. Grant such other and further relief as the Court may deem just and proper.

DATED: June 26, 2015

Respectfully Submitted,

By: /s/ Marisa Bono

Marisa Bono

**MEXICAN AMERICAN LEGAL EDUCATION AND
DEFENSE FUND, INC.**

*Marisa Bono
Texas State Bar No. 24052874
Ernest Herrera
New Mexico State Bar No. 144619
110 Broadway, Suite 300
San Antonio, Texas 78205
(210) 224-5476
(210) 224-5382 Fax
**Pro Hac Vice*

MUNGER, TOLLES & OLSON LLP
*E. Martin Estrada
California State Bar No. 223802
*Robert W. Gray, Jr.
California State Bar No. 294928
*Laura C. Zaragoza
California State Bar No. 301264
*Jesse M. King
California State Bar No. 301275
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
(213) 683-9100
(213) 687-3702 (Fax)
martin.estrada@mto.com
robert.gray@mto.com
laura.zaragoza@mto.com
jesse.king@mto.com
**Pro Hac Vice*

David P. Garcia
The Law Firm of David P. Garcia, PC
303 Paseo de Peralta
Santa Fe, New Mexico 87501-1860
(505) 982-1873
(505) 982-8012 Fax

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies she mailed a true and correct copy of the foregoing to:

Jeffrey J. Wechsler
Stephen S. Hamilton
Seth C. McMillan
Andrew S. Montgomery
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jwechsler@montand.com
shamilton@montand.com
smcmillan@montand.com
amontgomery@montand.com

John R. Munich
Jamie Boyer
STINSON LEONARD STREET LLP
7700 Forsyth Blvd., Suite 1100
St. Louis, MO 63105-1821
314-863-0800
john.munich@stinsonleonard.com
Jamie.boyer@stinsonleonard.com

Attorneys for Defendants

Gail Evans
Preston Sanchez
924 Park Ave., SW, Suite C
Albuquerque, NM 871 02
(505) 255-2840
gail@nmpoertylaw.org
preston@nmpoertylaw.org

Attorneys for all Yazzie family plaintiffs

TONY F. ORTIZ, LLC
Tony Ortiz
2011 Butolph, Suite 200
Santa Fe, NM 87505
(505) 986-2900
tony@tonyfortizlaw.com

*Attorney for Santa Fe Public School Board and
Moriarity-Edgewood School District Board of*

Education

THE ROSEBROUGH LAW FIRM, P.C.

Robert F. Rosebrough
101 West Aztec Ave., Suite A
P.O. Box 1027
Gallup, NM 87305-1027
(505) 722-91 21
bob@rosebroughlaw.com

*Attorney for Plaintiffs Wilhelmina Yazzie and
Xavier Nez, and Gallup/McKinley Public Sch. Dist.*

LOCKE LORD, LLP

Daniel I. Schlessinger
111 South Wacker Drive
Chicago, IL 60606
(312) 443-0700
dschlessinger@lockelord.com

Attorney for all Yazzie family plaintiffs

DANIEL YOHALEM ATTORNEY-AT-LAW

Daniel Y ohalem
1121 Paseo de Peralta
Santa Fe, NM 87501
dyohalem@aol.com
Attorney for all Yazzie family plaintiffs

CUDDY & MCCARTHY, LLP

Charlotte Hetherington
1710 Old Pecos Trail
P.O. Box 4160
Santa Fe. NM 87502-4160
(505) 988-4476
chetherington@cuddymccarthy.com

Attorney for Rio Rancho School Board of Education

On this 26th day of June, 2015.

/s/ Marisa Bono
Marisa Bono