

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

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

Plaintiffs,

vs.

No. D-101-CV-2014-00793

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

Defendants.

Consolidated with

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

Plaintiffs,

vs.

No. D-101-CV-2014-02224

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

Defendants.

**MARTINEZ PLAINTIFFS' OPPOSED MOTION FOR ENTRY OF SCHEDULE
FOR DISCOVERY AND ENFORCEMENT PROCEEDINGS**

Plaintiffs Louise Martinez, *et al.*, (*Martinez Plaintiffs*) respectfully move the Court for entry of a schedule to govern further proceedings in the case. The Court entered its Decision and Order on July 20, 2018 and ordered Defendants, by “April 15, 2019, to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career.” Order at 74. Because Defendants have not complied with the Court’s order, pursuant to Rule 1-069(B), NMRA, and the Court’s Final Judgment and Order, *Martinez Plaintiffs* request

that the Court establish a schedule for discovery and, if necessary, further proceedings to enforce the Court's injunction.

BACKGROUND

A. The Court's Order and Judgment

On July 20, 2018, after over four years of litigation, including months of trial testimony and extensive briefing, this Court ruled that Defendants, in contravention of the Education Clause of the New Mexico Constitution, had “violated the rights of at-risk students by failing to provide them with a uniform statewide system of free public schools sufficient for their education.” (July 20, 2018, Decision and Order (“Decision and Order”) at 70). The Court further held that Defendants had violated the Equal Protection Clause and Due Process Clause of the New Mexico Constitution by failing to provide an adequate education to English language learner and economically disadvantaged students, and to students with disabilities. *Id.* at 64-66.

In light of these findings, the Court entered an injunction that gave Defendants until “April 15, 2019, to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career.” *Id.* at 74. The Court also stated that it would retain jurisdiction over this matter in “order to assure that these steps are taken.” *Id.* at 75.

The Court entered its findings of fact and conclusions of law on December 20, 2018. *See* Court's Findings of Fact and Conclusions of Law And Order Regarding Final Judgment, December 20, 2018 (“Findings of Fact and Conclusions of Law”).

On February 14, 2019, the Court entered its Final Judgment and Order, which included the declaratory and injunctive relief from the July 20, 2018, Decision and Order “enjoining the Defendants to take immediate steps, by no later than April 15, 2019, to ensure that New Mexico

schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career.” Final Judgment and Order at 3-4. The Court reminded Defendants that they “must comply with their duty to provide an adequate education and may not conserve financial resources at the expense of our constitutional resources.” *Id.* at 4 (citing Decision and Order at 74). The Court ordered Defendants to make reforms that ensure that “every public school in New Mexico [has] the resources, including instructional materials, properly trained staff, and curricular offerings, necessary for providing the opportunity for a sufficient education for all at-risk students.” *Id.* at 4-5 (citing Decision and Order at 74-75). The Court also enjoined Defendants to “include a system of accountability to measure whether the programs and services actually provide the opportunity for a sound basic education and to assure that the local districts are spending the funds provided in a way that efficiently and effectively meets the needs of at-risk students.” *Id.* at 5 (citing Decision and Order at 75).

With regard to monitoring compliance with its orders and judgment, the Court stated that after “April 15, 2019, any party may file with the Court a report about whether it believes Defendants are in compliance with this Court’s Orders. *Id.* at 6. Furthermore, the Court stated that upon “receipt of any such report, the Court will issue an order setting forth the process by which it will address any issues raised by such report.” *Id.* Defendants ultimately elected not to appeal the Final Judgment and Order.

B. Defendants’ Response

The 54th New Mexico Legislature held its first session from January 15 to March 16,

2019.¹ Although the Legislature appropriated more funds for public education,² Defendants neither ensured that the funds would go to at-risk students nor made the programmatic changes required by the Court. For example, none of the laws that the New Mexico Legislature passed dealt with programming for students with disabilities.³ The Legislature passed no legislation that provides dedicated funding for programming for English language learners.⁴ The New Mexico Legislative Education Study Committee (LESC) reported after the session that “PED [New Mexico Public Education Department] staff indicate it is unlikely many school districts or charter schools will expand bilingual programming.”⁵

School districts appear to be using additional school funding to pay for increases in teacher pay. The LESC explained that “some school district and charter school officials have reported that most of the additional revenue for FY20 will be used to pay for increases to existing employee pay and benefits, rather than for new programs directed at improving outcomes for at-risk students.” *Id.* at 3. And while the Legislature also approved legislation that

¹ See “Highlights of the Fifty-fourth Legislature First Session, 2019,” New Mexico Legislative Council Service, June 2019, <https://www.nmlegis.gov/Publications/Session/19/highlights.pdf> (accessed August 14, 2019).

² According to the State of New Mexico Legislative Education Study Committee (LESC), by the end of the 2019 first session, “[l]egislative appropriations for public education totaled \$3.249 billion, an increase of \$448 million from [fiscal year 2019].” See “2019 Post-Session Review,” New Mexico Legislative Education Study Committee at 3, May 2019, <https://www.nmlegis.gov/handouts/ALESC%20052919%20Item%202%202019%20Post-Session%20Review.pdf> (accessed August 10, 2019).

³ See *id.*

⁴ The General Appropriation Act (GAA) of 2019 “includes \$2.5 million to support English learners and bilingual education programs,” but PED may choose whether the funds are used for programming for English learners (ELs). See “2019 Post-Session Review,” New Mexico Legislative Education Study Committee at 3, May 2019, <https://www.nmlegis.gov/handouts/ALESC%20052919%20Item%202%202019%20Post-Session%20Review.pdf> (accessed August 10, 2019).

⁵ See “FY20 School District and Charter School Operating Budgets and Implementation Plan for Compliance with Consolidated Martinez and Yazzie Lawsuit,” New Mexico Legislative Education Student Committee at 1, June 26, 2019, <https://www.nmlegis.gov/handouts/ALESC%20062619%20Item%204%20-%20204.1%20Brief%20-%20Operating%20Budget.pdf> (accessed August 15, 2019).

repeals the K-3 Plus program and replaces it with K-5 Plus, extending the school year for kindergarten through fifth-grade students by 25 days, the newly-appropriated funds will provide programming for only approximately 23,000 of the 87,500 students that the Legislature intended to reach. *See* “2019 Post-Session Review,” LESC at 7. Since the July 20, 2018, Decision and Order, the New Mexico Public Education Department has promulgated no rules directly addressing issues facing students with disabilities other than adjusting rules to match updated federal regulations regarding due process rights.⁶ Additionally, the New Mexico Public Education Department has not made any changes to its regulations regarding English language development or bilingual multicultural educational programs since the July 20, 2018, Decision and Order.

LEGAL STANDARD

Rule 1-069 of the New Mexico Rules of Civil Procedure for the District Courts authorizes this Court to enforce its judgment through supplementary proceedings and allows for post-judgment discovery to effectuate enforcement of judgments. *See* Rule 1-069(B) NMRA (“the judgment creditor or a successor in interest may obtain discovery from any person ... in any manner provided in these rules.”).

This Court’s Final Judgment and Order entered on February 14, 2019 provides: “[a]fter April 15, 2019, any party may file with the Court a report about whether it believes Defendants are in compliance with this Court’s Orders.” Final J. & Order at 6, *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Feb. 14, 2019). Once it receives the report, the Court will “issue an order setting forth the process” to address the issues the report raises. *Id.*

The Court made plain its interest in enforcement of its judgment by retaining jurisdiction

⁶ The only change following the Court’s decision in July 2018 was to 6.31.2.13 NMAC. *See* 6.31.2 NMAC.

over the matter “to enforce compliance with its order.” *Id.* at 75. The Court’s “report” and “process” procedure implements Rule 1-069(B) and furthers the Rule’s information-gathering purpose.

ARGUMENT

Defendants have not complied with the Court’s final order and judgment – which ordered compliance by April 15, 2019. *Martinez* Plaintiffs now respectfully request a schedule for discovery and, if necessary, further proceedings to enforce the judgment.

A. *Martinez* Plaintiffs have reason to believe that Defendants are not in compliance with the Court’s orders and final judgment

The Court stated in its final judgment that a party may file a report “about whether it believes Defendants are in compliance with this Court’s Orders.” *See* Final Judgment and Order at ¶ 7. By all indications, Defendants have not complied with the Court’s final order and judgment.

The dearth of changes to law, programming, and funding that affect the education of English language learners and students with disabilities leads *Martinez* Plaintiffs to believe that Defendants are not in compliance with the Court’s orders and final judgment. *Martinez* Plaintiffs also believe that Defendants have not addressed the issues that cause the education of economically disadvantaged students to be inadequate.

First, Defendants do not appear to have addressed any issues concerning students with disabilities. In its Decision and Order, the Court noted that unrebutted testimony that there is “insufficient funding for SWDs [students with disabilities]” evidenced “systemic failures to fund the system.” Decision and Order at 65. The Court found in its findings of fact and conclusions of law that many districts have “chronic shortages” of teachers and specialists needed to educate students with disabilities sufficiently. Findings of Fact and Conclusions of Law at ¶¶ 2330,

2332, 2334. This shortage also affects the ability of districts to identify students with disabilities. Findings of Fact and Conclusions of Law at ¶¶ 2330-2331. The Court also found that New Mexico’s special education funding system does not allow districts flexibility in adjusting students with disabilities’ individual education programs. Findings of Fact and Conclusions of Law at ¶ 2327. However, none of the laws that the 54th New Mexico Legislature passed in its 2019 session increased funding for programming or services for students with disabilities. Additionally, the New Mexico Public Education Department has not made any rule changes that deal with special education or indicated efforts to increase the availability of funding for additional special education teachers and other necessary staff.

Second, Defendants do not appear to have taken appropriate steps to provide English language learners with a sufficient education. The Court found that Defendants are not meeting requirements under the state Constitution, state statutes and federal law with regard to providing appropriate instruction to English language learner students. *See* July 20, 2018, Decision and Order at 31. The increase in funding for Bilingual Multicultural Education Programs (BMEP) has not necessarily resulted in addressing any English language learner students’ needs. Appropriations may not reach English language learners because BMEP programming is not available in all districts and because not all BMEPs provide programming for English language learners.⁷ By the LESC’s estimates, only about 43% of New Mexico’s English language learner students in public schools are enrolled in BMEP. *See* LESC Post-Session Review at 10. However, even if BMEP served a greater proportion of English language learner students, the LESC reported in June 2019 that it was unlikely that districts would expand bilingual

⁷ Bilingual Multicultural Education Programs and other bilingual programs do not necessarily include English language development programming for English language learner students. *See* July 20, 2018, Decision and Order at 20 (“Bilingual programs are not necessarily the same as programs for English Language Learners.”).

programming. *See* Background at 4.

In addition, to *Martinez* Plaintiffs' knowledge, the New Mexico Public Education Department (PED) has not established new guidelines or efforts that improve monitoring of English language development programming. *See* LESC Post-Session Review at 12-13. This lack of monitoring by PED of districts' provision of English language development programming to English language learners evidences lack of compliance with the Court's Decision and Order. The Court found that the PED lacks sufficient monitoring and accountability programs "to determine if ELL [English language learner] students are receiving adequate assistance." Decision and Order (July 20, 2018) at 31. The Court found that PED did not know which schools were providing programming for English language learners and that PED did not track the professional development given to teachers who teach English language learner students. *Id.*

Third, Defendants also do not appear to have addressed issues facing economically disadvantaged students. The Court found that Defendants failed to provide economically disadvantaged students with a sufficient education in violation of the Equal Protection and Due Process clauses of the New Mexico Constitution. *See* Decision and Order (July 18, 2018) at 65-66. Among other issues facing economically disadvantaged students, the Court found that the State Equalization Guarantee funding formula's at-risk index, which excludes many economically disadvantaged students when calculating how many economically disadvantaged students are in a district, was one aspect of the education system proving that Defendants treat economically disadvantaged students and non-economically disadvantaged students dissimilarly.⁸ The New Mexico Legislature did not address this issue, even though it increased

⁸ *See* Findings of Fact and Conclusions of Law at ¶ 2319 ("The SEG's use of the Title I allocation for the number of economically disadvantaged students for calculating the at-risk units only accounts for students

the at-risk index multiplier. Other measures passed by the Legislature that could improve the educational opportunities for economically disadvantaged students by providing extended learning, such as K-5 Plus, do not appear to be reaching all economically disadvantaged students. *See* Background at 4-5 (K-5 Plus funds “will provide programming for only approximately 23,000 of the 87,500 students that the Legislature intended to reach.”).

Overall, the lack of information from the PED caused in part by the failure to make public more information about its efforts and Defendants’ failure to file a status report with the Court leaves *Martinez* Plaintiffs without sufficient information to analyze fully whether Defendants have complied with the Court’s orders. Based on the limited available information, *Martinez* Plaintiffs believe the above constitutes a non-exhaustive list of the ways in which Defendants have not complied with the Court’s orders. A schedule for discovery and compliance proceedings is necessary to allow Plaintiffs and the Court to understand if Defendants are in compliance with this Court’s order, and, if they are not, understand how to address the issues.

B. Setting a schedule or process for discovery and compliance proceedings would be appropriate under Rule 1-069 NMRA and the Court’s final judgment

As set forth above, Plaintiffs believe there is a significant question as to Defendants’ compliance with the Court’s order. Without a report outlining compliance (or the lack thereof) by Defendants, *Martinez* Plaintiffs have limited information as to what measures Defendants have taken in response to the Court’s final order and judgment.

This Court understood that this situation might arise and expressly provided for an order setting forth a discovery schedule necessary to address potential compliance issues. Final J. &

recognized by the United States Census as being at or below 100 percent of the federal measure of poverty, excluding many ED [economically disadvantaged] students whose households earn up to 185 percent of the federal poverty measure and are therefore eligible for FRL.”)

Order at 6. This Court's rules likewise provide a mechanism to address post-judgment compliance issues. As such, because information is necessary to determine Defendants' compliance with the Court's final order and judgment, discovery is appropriate pursuant to the Court's order and Rule 1-069(B).

Martinez Plaintiffs request that this Court acts pursuant to the text and purpose of Rule 1-069(B) to grant post-judgment discovery to assess whether Defendants are in compliance with the Court's injunction. *Martinez* Plaintiffs are fully prepared to meet and confer with Defendants to arrange for a mutually-agreeable schedule for discovery, including depositions and written discovery requests as needed. *Martinez* Plaintiffs respectfully request that this Court order Defendants to work with Plaintiffs regarding a discovery schedule such that reasonable discovery concerning Defendants' compliance with this Court's orders is obtained within 120 days.

While *Martinez* Plaintiffs are cognizant of the various demands on Defendants' time, the children of New Mexico deserve swift compliance with this Court's orders. As this Court understands, there is no time to waste:

The school children who are now caught in an inadequate system and who will remain there if an injunction is not entered will be irreparably harmed if better programs are not instituted. Neither these children nor the Court can rely on the good will of the Defendants to comply with their duty. It is simply too easy 'to conserve financial resource' at the expense of our 'constitutional resources.'

Decision & Order, at 74 (citing *Kadrmas v. Dickinson Pub. Sch.*, 402 N.W.2d 897, 905 (N.D. 1987) (concurring & dissenting opinion)).

CONCLUSION

For the foregoing reasons, *Martinez* Plaintiffs request that the Court grant post-judgment discovery regarding Defendants' compliance with the Court's injunction, based on a reasonable schedule to be completed in 120 days, pursuant to Rule 1-069(B) and the Court's final judgment.

Martinez Plaintiffs further request that the Court set a schedule for further proceedings, if necessary, to enforce the Court's injunction regarding public schools,

DATED: October 30, 2019

Respectfully Submitted,

By: /s/ Ernest Herrera
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CERTIFICATE OF CONFERENCE

I hereby certify that on October 29, 2019 counsel for *Martinez* Plaintiffs conferred via email with counsel for Defendants New Mexico Public Education Department, *et al.*, regarding the above *Martinez* Plaintiffs' Motion for Entry of Schedule for Discovery and Enforcement Proceedings. Counsel for Defendants responded on October 29, 2019, that they would consult with their client, but did not respond before the filing of this motion. I hereby certify that counsel for *Martinez* Plaintiffs also conferred regarding this motion on October 25, 2019, with counsel for *Yazzie* Plaintiffs. Counsel for *Yazzie* Plaintiffs indicated that they would file a separate motion.

/s/ Ernest I. Herrera
Ernest I. Herrera

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2019 a true and correct copy of the foregoing pleading was e-filed and served through the Court's e-filing system upon all counsel of record.

/s/ Ernest I. Herrera
Ernest I. Herrera