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## A Watershed Moment in the Education of American Indians: A Judicial Strategy to Mandate the State of New Mexico to Meet the Unique Cultural and Linguistic Needs of American Indians in New Mexico Public Schools

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# A WATERSHED MOMENT IN THE EDUCATION OF AMERICAN INDIANS: A JUDICIAL STRATEGY TO MANDATE THE STATE OF NEW MEXICO TO MEET THE UNIQUE CULTURAL AND LINGUISTIC NEEDS OF AMERICAN INDIANS IN NEW MEXICO PUBLIC SCHOOLS

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\* Preston Sanchez is an attorney at the New Mexico Center on Law and Poverty in Albuquerque, New Mexico, where he has worked primarily on high-impact litigation known as *Yazzie/Martinez v. State of New Mexico*. In 2017, Mr. Sanchez, along with a team of attorneys who represent the Yazzie Plaintiffs, tried the *Yazzie/Martinez* case over eight weeks before the First Judicial District Court, demonstrating statewide systemic failures that have historically denied Native American, low-income, and English language learner students a meaningful education. In a 75-page opinion, the district court judge found that New Mexico children are not given a sufficient opportunity to prepare for the rigors of college and the workforce. Since 2018, Mr. Sanchez has helped to build and lead a coalition of educators, policy makers, tribal leaders, and community members to advocate for a wholesale transformation of public schools, beginning with fully funding and enforcing education laws that were intended to respect and recognize the historical, social, and political institutions of New Mexico's culturally and linguistically diverse people. Mr. Sanchez (Dine, Jemez, and Laguna Pueblos) edicates this publication to current and future leaders of New Mexico who dare to use their social, legal, political, and cultural influence to better the future of our Native American children.

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In 2014, several families and school districts sued the State of New Mexico for failing to provide all students a constitutionally sufficient system of education in violation of Article XII, Section 1 of the State Constitution. In the summer of 2017, the landmark case, *Yazzie/Martinez v. State of New Mexico (Yazzie v. State)*<sup>1</sup> was tried before the First Judicial District Court.

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*Yazzie/Martinez v. State of New Mexico* case by conducting a study on Indigenous English Learnings. Additionally, she and her collaborators have completed a manuscript documenting the history of bilingual education in New Mexico. Dr. Blum Martinez is co-PI on the English Language Learner Pipeline grant, funded by the New Mexico Higher Education Department. Her recent publications include a co-authored chapter entitled, *Preparing Teachers of Bilingual Students*, in EDUCATION, IMMIGRANT STUDENTS, REFUGEE STUDENTS, AND ENGLISH LEARNERS; *In Retrospect, Revitalizing the Cochiti Language: A Proposal for Community Re-Engagement in Collective Spirit and Mutual Respect*, and with co-author Trisha Moquino, *Keres Children's Learning Center: The Search for a Linguistically and Culturally Appropriate Education*.

1. See Trial Brief for Plaintiff at 1, *Yazzie v. State*, No. D-101-CV-2014-02224,

The Plaintiffs now await a court ruling that, if successful, would guarantee all New Mexico students a sufficient educational opportunity that prepares them to attend college, pursue a career, and participate fully in economic and political life. A particular aspect of the *Yazzie* case addresses the history of systemic discrimination experienced by American Indians, that intentionally sought to destroy their cultural ways of life, and the State's ongoing failure to address their unique cultural and linguistic needs.

Part I of this paper seeks to explore the various political, cultural, educational and legal underpinnings leading to *Yazzie*. Part II examines the history of forced assimilation of American Indians in education and the current impact of systemic discrimination of American Indian students in New Mexico. Part III examines current state and federal laws that pertain to the education of American Indians. Part IV examines the trial and litigation as it pertains to *Yazzie*. Part V briefly explores the various solutions and policy recommendations for improving New Mexico's education system for American Indians.

#### I. A LOOK AT NEW MEXICO: POLITICS, DEMOGRAPHICS, CULTURE, AND STUDENT OUTCOMES

Since its acceptance into the Union in 1912, New Mexico has been a minority-majority state, with Hispanic and Native American families and communities comprising the majority. Presently, in 34.5 percent of New Mexico homes, a language other than English is spoken, which means that many children learn English at school.<sup>2</sup> Those who speak Spanish make up

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2017 WL 3780960, at \*1 (N.M. Dist. filed June 5, 2017) (consolidated with, *Martinez v. State*, whereby plaintiffs contend a lack of sufficient means to receive a proper education for Native American, Hispanic, and English Learner students). The New Mexico Center on Law and Poverty (NMCLP) represents the *Yazzie* Family Plaintiffs, which includes five Native American and Hispanic families whose children are low-income and/or English learners; also represented by NMCLP are the six *Yazzie* Plaintiff Districts, which include Lake Arthur, Gallup-McKinley, Santa Fe, Cuba, Moriarty-Edgewood, and Rio Rancho. Simultaneously, the Mexican American Legal Defense and Education Fund (MALDEF), raising similar claims of constitutional insufficiency, in addition to substantive due process and equal protection claims, filed a separate lawsuit, *Martinez v. State*, on behalf of ten separate families. The two cases were consolidated early on and eventually tried together. The State of New Mexico, which includes the State Legislature, the Public Education Department (NMPED) and its Secretary of Education were all named Defendants. This article does not address the claims brought by the *Martinez* Plaintiffs.

2. U.S. CENSUS BUREAU, PERCENT OF PEOPLE 5 YEARS AND OVER WHO SPEAK A LANGUAGE OTHER THAN ENGLISH AT HOME 1 (2016), <https://cdn.census.gov/ipeds/data/r100/2016/tables/00101.pdf>.

the largest other-than-English language group. However, the seven indigenous languages—Diné, Apache, Keres, Tewa, Tiwa, Towa, and Zuni—are still spoken in many of their respective communities.<sup>3</sup> Since statehood, there have been contending views on how best to educate the majority of New Mexico students.<sup>4</sup> There are those who insist on an English-only assimilationist policy, however, throughout its history, many Hispanic and Native American communities have resisted these efforts and have fought to gain the respect for and maintenance of their languages, cultures, and ways of life.<sup>5</sup>

This article focuses on those Native American children who come from communities where their languages are still spoken and who struggle in an educational system that does not honor nor consider their learning needs.

#### A. Political Climate

The agonizing need to transform the public education system in New Mexico has brewed for over a decade. Every year, two underlying themes remain constant: poor student outcomes and inadequate state funding. In 2008, for instance, an independent study by the American Institutes for Research concluded that New Mexico schools were underfunded by about \$335 million,<sup>6</sup> which, when adjusted for inflation, is over \$600 million today. Further, just this year, the Annie E. Casey Foundation's Kids Count Report, which measures child wellbeing in six categories among all fifty states, ranked New Mexico's "education" the worst in the nation.<sup>7</sup> Over the years, however, state legislation aimed at addressing these general issues has proven ineffective or piecemeal at best. Two bills, for example, that would have fully-implemented the recommendations published in the American Institutes for Research (AIR) report, such as sufficiently funding education, died in legislative committee hearings. All similar funding-sufficiency bills thereafter met a similar fate. Year after year, it seems, partisan politics, governor vetoes, and the never-ending fight for scarce resources are often to

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3. See N.M. PUB. EDUC. DEP'T, TRIBAL EDUCATION STATUS REPORT 2014-2015, at 24, <https://webnew.ped.state.nm.us/bureaus/indian-education/reports/>.

4. See JOHN B. MONDRAGON & ERNEST S. STAPLETON, *Public Education in New Mexico*, U. N.M. PRESS, 21-23 (2005).

5. *Id.*

6. Jay G. Chambers, et. al, *An Independent Comprehensive Study of the New Mexico Public School Funding Formula* AM. INST. FOR RES. vii (2008), <https://www.air.org/sites/default/files/downloads/report/An-Independent-Comprehensive-Study-New-Mexico-Public-School-Funding-Formula-2008.pdf>.

7. *New Mexico KIDS COUNT Profile*, N.M. VOICES FOR CHILDREN, <https://www.nmvoices.org/archives/11728> (last visited July 12, 2018, 9:25 PM).

blame for the continued, broken system of education.

Overlaying this political gridlock is the question of how best to educate the majority of the 335,000 children attending one of the eighty-nine—mostly rural and high-poverty—public school districts. Policy makers and educators have generally considered the linguistic and cultural backgrounds of students and their families as impediments, rather than assets on which to build. For the most part, the educational responses to the needs of students have consisted of academic remediation.

### B. Demographics

Overall, Hispanic students make up almost 50 percent of state public school students while Native Americans make up 11 percent.<sup>8</sup> Approximately 70 percent of all students are designated low-income, which is by far the largest student-population in the state and one of the highest percentages nationally.<sup>9</sup>

New Mexico serves the second or third largest population of English learners (ELs) in the nation.<sup>10</sup> It is no surprise that the majority of ELs are Spanish-speaking, reflecting student profiles across the nation.<sup>11</sup> However, in contrast to many states, New Mexico serves a large number of Native American English Learners (NAEL), whose status as ELs derives from federal *Lau* guidelines<sup>12</sup> that identify Native American students from indigenous-speaking communities and whose English language use retains influence from those languages. Further, for many NAELs who are native English speakers, their use of the English language does not reflect the use of English required in schools.<sup>13</sup> More will be said about this complex

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8. NEW MEXICO PUBLIC EDUCATION DEPARTMENT, SCHOOL DISTRICT REPORT CARD 2016-17: ALBUQUERQUE PUBLIC SCHOOLS 1 (2018), [http://webed.ped.state.nm.us/sites/conference/2017%20District%20Report%20Cards/001\\_ALBUQUERQUE\\_PUBLIC\\_SCHOOLS\\_DRC2017\\_.pdf](http://webed.ped.state.nm.us/sites/conference/2017%20District%20Report%20Cards/001_ALBUQUERQUE_PUBLIC_SCHOOLS_DRC2017_.pdf) [hereinafter DISTRICT REPORT CARD]

9. *See id.*

10. *See* Yazzie Plaintiffs' Statement of Stipulated Undisputed Material Facts at Nos. 1150-1154, *Martinez v. State*, No. D-101-CV-2014-00793 (N.M. Dist. April 19, 2017); *see also* DISTRICT REPORT CARD, *supra* note 8, at 1.

11. *See* NAT'L CTR. FOR EDUC. STATISTICS, ENGLISH LANGUAGE LEARNERS IN PUBLIC SCHOOLS, [https://nces.ed.gov/programs/coe/indicator\\_cgf.asp](https://nces.ed.gov/programs/coe/indicator_cgf.asp), (last updated April 2018).

12. *See Lau v. Nichols*, 414 U.S. 563, 567 (1974) (noting federal guidelines to school districts that educate English Learners).

13. *See* T. Peele-Eady, *Constructing Membership Identity Through Language and Social Interaction: The Case of African American Children at Faith Missionary Baptist Church*, 42 ANTHROPOLOGY & EDUC. Q. 54-75 (2011); *see also* MARY J.

linguistic situation below.

In New Mexico, 73 percent of all American Indians reside in rural and small towns.<sup>14</sup> Most Native American students attend public schools in twenty-three of the eighty-nine school districts,<sup>15</sup> which are typically located on or near tribal lands, where infrastructure such as paved roads, internet connectivity, medical care, and supermarkets are not easily accessible.<sup>16</sup> Those children whose homes are in more remote and isolated places often ride the bus to school for up to ninety minutes one way. In the not-so-distant past, some schools ran overnight dorms where children could stay when inclement weather would not permit buses to travel on unpaved roads. Over the years, these dorms have closed due to a lack of funding.

In the rural areas, school is often the most consistent contact that indigenous families have with the culture of the wider society. Historically, relations between school and Native American communities have been fraught with difficulties and misunderstandings.<sup>17</sup> It is important to remember that, during the federal policy eras of Indian Termination and Assimilation, education and schools were used as the mechanism to “kill the Indian and save the man.” Another reason American Indians (and Alaska Natives) remain misunderstood or forgotten, according to the First Nations Development Institute, is because “they are often left out of major data-collection efforts,” which means they are often invisible to funders and policymakers.<sup>18</sup> Regularly, an asterisk, as opposed to a data point, is used to demark the existence of American Indians in data displays that involve racial and ethnic categories, which is generally due to insufficient sample sizes, large margins of error, and other issues specific to statistical significance and

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SCHLEPPEGRELL, *THE LANGUAGE OF SCHOOLING* 24-26 (2004). *See generally* SHIRLEY BRICE Heath, *WAYS WITH WORDS: LANGUAGE, LIFE, AND WORK IN COMMUNITIES AND CLASSROOMS* (1996); GAUDALUPE VALDÉS, *CON RESPETO: BRIDGING THE DISTANCES BETWEEN CULTURALLY DIFFERENT FAMILIES AND SCHOOLS: AN ETHNOGRAPHIC PORTRAIT* (2015).

14. *See* Sarah Dewees & Benjamin Marks, *Twice Invisible: Understanding Rural Native America*, FIRST NATIONS DEV. INST. 1, 5 (April 2017), <https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2017/May%202017/May%208/Twice%20Invisible%20-%20Research%20Note.pdf>.

15. *See* NEW MEXICO PUBLIC EDUCATION DEPARTMENT, *TRIBAL EDUCATION STATUS REPORT 2016-2017* 48 (2017), <https://webnew.ped.state.nm.us/wp-content/uploads/2018/01/IED-2016-2017-TESR-11.15.17final-edits.pdf>.

16. *See generally* Dewees & Marks, *supra* note 14, at 6.

17. *See generally* Mondragon & Stapleton, *supra* note 4, at 21-23.

18. *See* Dewees & Marks, *supra* note 14, at 2.

validity.<sup>19</sup>

*C. Unique Cultural and Linguistic Needs of New Mexico Students:*

Despite poverty and poor school achievement data, it is imperative to understand the strengths that many Hispanic and Native American families and communities maintain. As stated previously, Spanish and indigenous languages continue to be used as the languages of the home in 34.5 percent of homes.<sup>20</sup> Research on bilingual individuals and communities is clear: when children are supported to further develop their first language, they are more likely to succeed in developing the second. Moreover, if students can study in a substantive dual language program, where both the native language and English are supported and developed through academic content, children will outperform those in monolingual programs. It is important to remember that, for the most part, individual bilingualism reflects on the dual language communities in which bilinguals live. Therefore, schools and other public institutions must consider the families and communities when developing educational policies.

Hispanic and Native American communities have existed in New Mexico for hundreds of years.<sup>21</sup> Since colonial times, the church has played a critical role in the language, literacy and culture of Hispanic communities—and continues to this day—where small Hispanic villages scattered throughout the state are often organized around a Catholic church.<sup>22</sup> Local indigenous communities, despite overwhelming pressure from the federal and state governments, have continued to function by providing structure, identity, and a belief system that has sustained their way of life for centuries.<sup>23</sup> Because the Diné and Apache people, for example, have lived in family settlements, intergenerational interaction has been the norm, and has allowed for the transmission of language and culture to younger members.<sup>24</sup> More

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19. *Id.*

20. U.S. CENSUS BUREAU, *supra* note 2, at 1.

21. *See generally* Rick Hendricks, *Franciscan Ritual in Seventeenth-Century New Mexico: Possession of Churches*, <http://newmexicohistory.org/people/franciscan-ritual-in-seventeenth-century-new-mexico-possession-of-churches>, (last visited Sep. 26, 2018).

22. *See generally* Elizabeth Pauls & Laura Thompson, *Southwest Indian*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Southwest-Indian>, (last visited Sep. 26, 2018)

23. *See generally* Dewees & Marks, *supra* note 14, at 6.

24. *See generally* Pauls & Thompson, *supra* note 22.



recent *Latinx*<sup>25</sup> immigrant communities have been established across the state, consolidating families into Spanish-speaking neighborhoods, where extended family, community, or religious organizations offer the newly arrived needed support.

The settlement patterns and living arrangements described above mean that many New Mexican families live within or in close proximity to extended family. Sustained and continuous intergenerational interactions have offered stability and a familial and cultural sense of belonging to its members.<sup>26</sup> Participation in cultural practices and celebrations gives younger generations opportunities to learn and become leaders in their communities.<sup>27</sup> Further, many families continue traditional farming and ranching that strengthen the ties to the land. For many, a deep sense of place has been maintained across hundreds of years. This is especially true in the rural areas of the state, that are far from the cities and towns where interactions with a more modern way of life and economy have loosened familial and agricultural practices.<sup>28</sup>

Despite the changes some communities face, language and culture continue to be important identity markers. Even young *Latinx* and Native American youth recognize the importance of language and culture, and request the older generations to help them continue learning their heritage languages and cultures.<sup>29</sup>

In the case of indigenous youth, learning and knowing the heritage language and culture are critical to preserving the integrity of indigenous nations for the future. As these young people mature and take on leadership positions in their communities, it is imperative that they are able to uphold the governing and judicial structures of their communities. Moreover, it is the future leaders of these sovereign nations who will carry on the cultural

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25. Because Latino connotes a male person/Latina a female, the x is used to include both. The x also considers those from the LGBT and transgendered communities.

26. See Dewees & Marks, *supra* note 14, at 6.

27. See *id.*

28. See *id.*

29. Tiffany S. Lee, *Language Identity, and Power: Navajo and Pueblo Young Adults' Perspectives and Experiences with Competing Language Ideologies*, 8 J. OF LANGUAGE, IDENTITY & EDUC., 307-320 (Nov. 18, 2009); *Recovery and Preservation of Native American Languages in Albuquerque, New Mexico: Hearing on H.R. 4766 Before the H. Comm. on Educ. and the Workforce*, 109TH CONG. (2006) (statement of Christine P. Sims); Rebecca Benjamin et al., *Language Revitalization Efforts in the Pueblo de Cochiti: Becoming "Literate" in an Oral Society*, (1996), reprinted in *INDIGENOUS LITERACIES IN THE AMERICAS: LANGUAGE PLANNING FROM THE BOTTOM UP* (Nancy Hornberger ed., 1996).

beliefs and ceremonial traditions that continue to bind members to one another.

The cultural and linguistic strengths that many *Latinx* and Native American families possess, however, are often seen as failings by educational systems. Although bilingual-multicultural education programs have been available to all New Mexico schools since the late 1960's, most school administrators and teachers are not educated to work in such programs, and they often misunderstand and misdiagnose the difficulties that bilingual students face in monolingual and monocultural settings.<sup>30</sup> A case in point is the linguistic profile of Native American English learners.

In recognition of the particular circumstances in which many Native children live, the federal definition of "Limited English Proficient" includes Native American students,<sup>31</sup> or Native American English Learners (NAEL students), as they are referred to throughout this article. NAEL students are often the offspring of parents who spoke their native language, but had to learn English in school. As is still the case, these parents were taught by teachers who had little to no understanding of how to develop a second language in their students.<sup>32</sup> Unfortunately, the parents, in many instances, were able to learn enough English to get by in school, but were often unsuccessful with the kind of English needed to succeed in more advanced academic uses of language.<sup>33</sup> Thus, the parents' English is a more informal, oral-based English, which may be influenced by the native language. For many Native American children, this is the English they learn at home and bring to school. The isolation, both physical and social, that indigenous communities face particularly in rural areas means that the only real access they have to more academic uses of English is in school and in books.

In the first two grades of elementary education, children who are English learners may prove more successful in learning basic decoding skills (learning to read), allowing them to keep up with their native English-speaking peers. However, by the third grade, texts typically become more difficult and the focus is on learning content through reading (reading to

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30. See New Mexico Center on Law and Poverty, *Yazzie v. State of New Mexico*, (Jan. 10, 2018), <http://nmpoertylaw.org/wp-content/uploads/2018/01/Yazzie-Closing-Brief-Summary-2018-01-09.pdf>.

31. No Child Left Behind Act, 115 Stat. 1425, 1961 (2002).

32. See Catherine Snow, et. al., *English Language Learners and Reading Difficulties*, <http://www.readingrockets.org/article/english-language-learners-and-reading-difficulties>, (last visited Sep. 27, 2018).

33. See *id.*

learn),<sup>34</sup> and this is where many English learners begin to fall behind because of their lack of familiarity with the complex structures and vocabulary needed for academic content. Thus, children appear to have reading difficulties, when actually, their challenges are language-based. Given the ignorance of most educators about language issues, Native children are often misdiagnosed as poor readers and placed in remedial reading programs or worse, learning-disabled classes. These two “remedies” effectively cut children off from any opportunities for exposure to, and practice with, the ways in which language is used in academic content, which is what they badly need.<sup>35</sup>

#### D. Student Outcomes

Furthermore, the unique linguistic and cultural assets that New Mexico indigenous communities are known for are typically misunderstood or perceived as irrelevant to their educational success. To the contrary, however, when these cultural differences are neglected or suppressed—as is the case historically and a significant challenge today—the effect on their outcomes in K-12 education have been calamitous. Further, the quality of education received by students during their K-12 years, generally, has the potential to determine their future outcomes in post-secondary education, the workforce, and in life.

Unfortunately, the various metrics of academic achievement in New Mexico<sup>36</sup> indicate that American Indian students have struggled to succeed academically for far too long.

Based on New Mexico Standard Based Assessment (“NMSBA”) from 2007 to 2014, between 62.4 percent and 71.1 percent of Native American fourth graders did not demonstrate proficiency in reading,<sup>37</sup> while 66.5 percent to 74.8 percent were non-proficient in math.<sup>38</sup> In the same period, 51.7 percent to 69.4 percent of all Native eleventh grade students were not

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34. ANNIE E. CASEY FOUNDATION, EARLY WARNING! WHY READING BY THE END OF THE THIRD GRADE MATTERS 1, 9 (2010), [https://www.aecf.org/m/resourcedoc/AECF-Early\\_Warning\\_Full\\_Report-2010.pdf](https://www.aecf.org/m/resourcedoc/AECF-Early_Warning_Full_Report-2010.pdf) (explaining “reading to learn”).

35. *Id.* at 23.

36. *See generally* Yazzie Plaintiffs’ Statement of Stipulated Undisputed Material Facts, *Martinez v. State of New Mexico*, No. D-101-CV-2014-02224 (N.M. Dist. argued, April 19, 2017) (detailing several stipulations the parties reached during discovery concerning educational outcomes in New Mexico based on the testing administered by the State) [hereinafter Yazzie Plaintiff’s Statement].

37. *See id.* at No. 7.

38. *See id.* at No. 10.

proficient in reading<sup>39</sup> and 67 percent to 79.4 percent were not in math.<sup>40</sup> Even worse, in 2015, after transitioning away from the NMSBA test, the results of the Partnership for Assessment of Readiness for College and Careers (PARCC) Exam showed that 86.5 percent of Native American fourth graders were not proficient in reading and 89 percent in were not proficient in math.<sup>41</sup> The PARCC exam results were the same or similar for both eighth and eleventh grade Native American students in both math and reading.<sup>42</sup>

Based on these statistics, it is almost impossible to imagine that student outcomes could fare any worse, but they in fact do with regard to NAELs. Two districts in particular provide a snapshot of that student population: Gallup-McKinley County Schools and Zuni Public Schools, which serve, respectively, the largest number and the highest percentage of Native American students in the state.<sup>43</sup>

In Gallup, between 2008 and 2011, 72.9 percent to 82.6 percent of Gallup's fourth grade EL students were not proficient in reading, while 73.4 percent to 79.7 percent were not proficient in math.<sup>44</sup> By 2014, non-proficient reading scores among Gallup's fourth grade EL students reached 95.6 percent and 96.3 percent in math.<sup>45</sup> Their eleventh grade counterparts did no better, with non-proficiency rates of 95 percent in reading and 97.1 percent in math.<sup>46</sup>

Zuni Public Schools produced similar results. From 2007-2011, 49.4 percent to 67.4 percent of Zuni's fourth grade EL students were not proficient in reading and 52.1 percent and 65.2 percent were not proficient in math.<sup>47</sup> From 2011-2014, the percentage of eleventh grade EL students that did not score proficient or better in reading ranged from 84.2 percent to 100 percent, while 100 percent failed to achieve math proficiency or better during those three years.<sup>48</sup>

Further, college-readiness indicators in New Mexico public schools also

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39. *See id.* at No. 9.

40. *See id.* at No. 12.

41. *See id.* at Nos. 61, 64.

42. *See id.* at Nos. 62, 63, 65, 66.

43. *See id.* at Nos. 362, 962.

44. *See id.* at Nos. 379, 381.

45. *See id.* at Nos. 411, 413.

46. *See id.* at No. 414 (identifying the academic proficiency scores of all EL students in Gallup).

47. *See Id.* at Nos. 979 & 981.

48. *See id.* at Nos. 984, 986.

show that American Indian students are unprepared for post-secondary educational opportunities. The Native graduation rate, for example, from 2008-2014, ranged between 45 percent at the lowest to 65 percent at the highest.<sup>49</sup> Meanwhile, only 7 percent to 11 percent of Native students, at most, met three or more ACT college readiness benchmarks<sup>50</sup> on the American College Testing (ACT) test between 2011 and 2015.<sup>51</sup> Equally important to this continuum of student outcomes is the fact that, in 2013, 18 percent of American Indians in New Mexico were unemployed, which was higher than all other racial and ethnic groups.<sup>52</sup>

One question that often arises when analyzing these statistics is: *What do consistently abysmal student outcomes among Native students, such as failing standardized test scores and high dropout rates, say about the quality of public education in New Mexico?*

On the one hand, the State Defendants' lead witness on Indian Education, Keith Moore, would admit that the long-standing statistics for American Indians infers the system is broken. "[It] is not serving the Indian kids very well."<sup>53</sup> However, Mr. Moore would avoid pinning blame on the State for failing to maintain a sufficient education system by suggesting that the academic failure among most Native students in New Mexico is largely due to "intergenerational poverty, broken homes, and broken families."<sup>54</sup>

While some national statistics support the notion that American Indians suffer from higher rates of poverty than non-Native Americans, the truth is that tribal communities in New Mexico do not share in these experiences that Mr. Moore articulated so generally.<sup>55</sup> In truth, the statements made by Mr. Moore reflect the stereotype held and perpetuated by many in this society, and further demonstrates his ignorance about New Mexico indigenous communities. During his testimony, Mr. Moore could not identify any of the seven indigenous languages spoken locally nor the names of more than three

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49. *See id.* at Nos. 1002-1008.

50. *See id.* at No. 1253. *See generally Measuring College and Career Readiness: The Class of 2009*, ACT 3-5 (Aug. 2009).

51. *See Yazzie Plaintiffs' Statement, supra* note 10, at Nos. 1068-1072.

52. NEW MEXICO DEPT. OF WORKFORCE SOLUTIONS, NEW MEXICO 2015 STATE OF THE WORKFORCE REPORT: A REPORT HIGHLIGHTING NEW MEXICO'S CURRENT AND FUTURE WORKFORCE 21 (2015), <https://gonm.biz/uploads/documents/2015SOTW.pdf>.

53. Transcript of Record at 53:10, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued July 7, 2017).

54. *Id.* at 27.

55. *Id.* at 70-3.

of the state's twenty-two tribal nations that speak them.<sup>56</sup> He admitted to knowing nothing about their families, schools, teachers, education programs, employment rates, or economic conditions; nor did he make any effort to meet with any tribal leaders or school district administrators to find out.<sup>57</sup>

According to the *Yazzie* Plaintiffs, the fact that Native students chronically underperform all other demographic groups by all academic measures in New Mexico reflects not only the catastrophic impact of the State's failure to meet their educational needs, but also independently evidences the system's constitutional insufficiency.<sup>58</sup> An interpretation of the State Constitutional standard, the *Yazzie* Plaintiffs have argued, that holds these outcomes to be "sufficient" would, in effect, maintain the gap that separates most Native students from ever achieving career, college, and lifetime success.

## II. A HISTORICAL OVERVIEW OF SYSTEMIC DISCRIMINATION AND FORCED ASSIMILATION OF AMERICAN INDIANS

Relevant to the legal claims made by the *Yazzie* Plaintiffs is the current impact that federal policies have had on the educational needs of American Indians. Notwithstanding the broad cultural, historical, linguistic, and governmental diversity between the twenty-two tribal nations in New Mexico, Native students throughout the State share a legacy of historical trauma and a set of well-recognized, but chronically unmet, educational needs.

American Indians demonstrated ample resilience against the various governmental entities that sought to assimilate (or "civilize") them through some configuration of formal education. Missionaries, for example, tried but failed to "civilize and Christianize" American Indians for centuries.<sup>59</sup> Similarly, from 1778-1871, Native Americans resisted the U.S. government's attempts to fully convert them from hunters to farmers (or

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56. *Id.* at 27.

57. *Id.* at 33-37.

58. See *Yazzie* Plaintiffs' Second Statement of Stipulated Undisputed Material Facts at 7-12, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued April 19, 2017) (all Native Student proficiencies, 2007-14), 19-24 (NAEL proficiencies, 2007-2011), 37-42 (comparative proficiencies, 2007-14), 61-66 (Native Student non-proficiency rates 2014-15), 73-78 (NAEL non-proficiency rates 2014-15), 1002-1015 (comparative graduation rates, 2008-14), 1042-1049 (comparative AP testing rates, 2002, 07, 11, 12); 1068-1077 (comparative ACT testing, 2011-15).

59. Comm. On Lab. And Pub. Welfare, *Indian Education: A National Tragedy*, S. Rep. No. 91-501, at 10 (1969).

agriculturalists) via treaties, which legally authorized promises of educational opportunity, such as providing “teachers” and an annual “civilization fund,” in exchange for a billion acres of land.<sup>60</sup> These legal promises purportedly meant to create trust and responsibility between the two governments, the Federal Government admits, were really intended to achieve its “desire to divest the Indian of his land and resources.”<sup>61</sup> Unfortunately, many of the 370-plus treaties entered into with tribal nations by the United States during this Territorial period would include provisions for the education of American Indian children.<sup>62</sup>

Furthermore, emanating from the Doctrine of Manifest Destiny came the first of several efforts to dissolve Indian lands legislatively through the Dawes Severalty Act of 1887, which provided individual Indians an allotment of land. Intending to break up tribal structures, the Allotment period would severely deplete the tribal land base by 90 million acres.<sup>63</sup> Simultaneously, the federal government began developing the boarding school system with the intent to separate native children from their tribal communities, strip them of their tribal customs, mores, and languages, and “prepare [them] for never again returning to [their] people.”<sup>64</sup> Authorized by Congress, the Secretary of Interior would deny food and subsistence to families that resisted submitting their children to federal schooling.<sup>65</sup> The federal boarding school system would desecrate, in varying degrees, the traditional culture and language of many tribal nations across the United States for almost a century.

In 1928, the Meriam Report (the Report) brought to the congressional forefront overdue attention to these inhumane practices occurring in the name of Indian Education. Interestingly, many of the educational practices and conditions seen today, that are associated with academic underachievement and poor functioning schools for Native students, were clearly acknowledged then.

Prepared by Lewis Meriam and the Brookings Institute of Washington D.C., the Report issued findings that derived from a detailed investigation into the economic, health, education, and social conditions for American

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60. *Id.* at 11.

61. *Id.* at 9.

62. Mondragon & Stapleton, *supra* note 4, at 21.

63. S. Rep. No. 91-501, at 150.

64. *Id.* at 12

65. *Id.*

Indians in the 1920s.<sup>66</sup> The Report condemned the separation of Native children from their tribal lands and their permanent placement in off-reservation boarding schools.<sup>67</sup> Its major conclusions held that Indians: (1) were excluded from the management of their own affairs, and (2) received poor quality health and education services.<sup>68</sup>

Notably, American Indian culture at that time was still deemed primitive, inferior, and its people as having failed to “[adjust] to the economic and social system of the dominant white civilization.”<sup>69</sup> Despite its prejudicial viewpoints, the Report spawned a newfound perspective about the unique needs of American Indians:

The most fundamental need in Indian education is a change in point of view. . . . The Indian educational enterprise is peculiarly in need of the kind of approach that recognizes this principle: that is, less concerned with a conventional school system and more with the understanding of human beings.<sup>70</sup> . . . A standard course of study, routine classroom methods, traditional types of schools, even if they were adequately supplied-and they are not-would not solve the problem. The methods of the average public school in the United States cannot safely be taken over bodily and applied to Indian education. Indian tribes and individual Indians within the tribes vary so much that a standard content and method of education, no matter how carefully they might be prepared, would be worse than futile.”<sup>71</sup> . . . The Indian educational program cannot simply take over the traditional type of school; it must set up its own objectives, finding out in general and for each reservation or tribal group the things that need to be done. It cannot too positively be stated that mere schooling, of the unrelated academic type, is not the educational answer to the Indian problem.<sup>72</sup>

Addressing the “Indian Problem,” it urged, created the need for highly qualified teachers and pre-service training that would familiarize educators with the geographical, cultural and linguistic differences of Native students:

The surest way to achieve the change in point of view that is imperative in Indian education is to raise the qualifications of

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66. *Id.*

67. *Id.* at 13.

68. *Id.*

69. Lewis Meriam, et al., *The Problem of Indian Administration*, INST. FOR GOV'T RESEARCH 3 (1928).

70. *Id.* at 346.

71. *Id.*

72. *Id.* at 349.



teachers and other employees.<sup>73</sup> . . . In many of the positions, however, it is not so much higher entrance salaries that are needed as high qualifications and a real salary schedule based upon training and successful experience.<sup>74</sup> “There is [also] a need for a definite program of pre-service training for Indian school work.<sup>75</sup> . . . Too frequently a teacher is deposited at an Indian school with no previous knowledge whatever of Indian life, of the part of the country where the work is located, or of the special conditions that prevail.<sup>76</sup>

The Report also identified an opportunity for curriculum specialists and teachers to develop a culturally relevant curriculum. This new curriculum could replace the “old-time Civil Government, long since abandoned in better American public schools and especially meaningless for the Indian, who needs to have his own tribal, social and civic life used as the basis for an understanding of his place in modern society.”<sup>77</sup>

The Report deemed culturally relevant materials and instructional strategies to be equally important needs of American Indians:

There is such a chance to build up for the Indian schools reading material that shall have some relation to Indian interests, not merely Indian legends, which are good and susceptible of considerable development, but actual stories of modern Indian experiences . . .<sup>78</sup>

Soon after the Report broke ground, Congress enacted the Indian Reorganization Act of 1934, often referred to as the “Indian New Deal,” ending the Allotment period and supporting increased management by tribal leaders of their own governmental affairs.<sup>79</sup> During this Progressive Period, Congress passed the Johnson O’Malley Act, which, according to Dr. Joseph Suina, an Indian Education historian, was a key piece of legislation that allowed the Federal Government, through contractual agreements with States, to delegate certain responsibilities of Indian Education to public schools.<sup>80</sup> By 1944, however, this initial and very temporary wave of progress for American Indians was seen as a departure from previous

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73. *Id.* at 347.

74. *Id.*

75. *Id.* at 366.

76. *Id.* at 367.

77. *Id.* at 372.

78. *Id.*

79. S. Rep. No. 91-501, at 13.

80. *Id.* at 32.

governmental initiatives to “civilize” American Indians.<sup>81</sup> In order to advance Indian civility, as the Federal Government saw it, it would need to forcefully remove Native children from their reservations and place them in boarding schools and withdraw services from federally recognized tribes. Almost immediately, the “coercive assimilation of the American Indian” would return yet again.<sup>82</sup> By 1950, the primary goals of the Termination Era were in full effect—to repeal tribes’ federal recognition status and eliminate them and their federal trust land.<sup>83</sup>

In the early 1960s, the new presidential administration openly criticized the educational practices of the previous federal government and called for a reorganization of federal education programs. Concurrently, Congress’ enactment of certain legislation, including the Economic Opportunity Act, which focused mostly on federal schools, allowed for greater funding and tribal autonomy over Indian Education. Arizona’s Rough Rock Demonstration School, for instance, located on the Navajo reservation, committed to providing students a culturally relevant and responsive education, and the “development of local community.”<sup>84</sup> It became a symbol of “Indian participation and control and educational innovation.”<sup>85</sup> Even still, however, very little was done systemically to improve, reconstruct or refashion the “organizational structure” that had cultivated assimilation practices from the beginning.<sup>86</sup>

The severe harm afflicting American Indians during the Termination Era was covered in great detail by the Kennedy Report of 1969, which gave deserving attention to the toll that decades of forced assimilation had on American Indians since the passage of the Allotment Act in 1887. The Report sternly warned Congress that the federal prerogatives around Indian education and, generally, the social welfare of Tribes were clearly a departure from the virtues of American democracy. The federal termination policies of the 1950s, it states, resulted in what some would describe in the 1960s as “Termination Psychosis,” a syndrome whereby Native Americans “exhibited an all-pervading suspicion of Government motives in Indian affairs.” They were “confused, disoriented, and filled with anxiety and worry . . . the termination policy had told the Indian tribes that if they

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81. *Id.* at 13-14.

82. *Id.* at 14.

83. *Id.*

84. *Id.* at 177.

85. *Id.* at 16.

86. *Id.* at 15-17.

demonstrated economic progress they would be punished by a withdrawal of Federal services.”<sup>87</sup> The 1960s, it summarizes, started and ended with the same problem unresolved: “to seek a new policy which would alleviate Indian termination fears and reorganize the Bureau of Indian Affairs so that it could effectively provide an exemplary educational program for Indians.”<sup>88</sup>

Furthermore, the aforementioned treaties that mandated federal boarding schools in all states and territories included New Mexico.<sup>89</sup> As a result, children from the twenty-two tribal nations of New Mexico underwent long-term, detrimental experiences with education systems similar to those associated with federal schools nationwide, which included forced assimilation practices and the intentional neglect of their unique cultural and linguistic needs.<sup>90</sup> By the mid-1950s, new federal legislation allowed for greater relationships to form between the tribes and state governments, which meant that state public schools would experience greater enrollment rates of Native children. Public Law 280, for example, transferred federal jurisdiction over legal matters arising on Indian lands to state governments.<sup>91</sup> Additionally, the Johnson O’Malley Act, which provided federal funding incentives to public schools for the education of American Indians, increased the enrollment of Native students into the state’s public schools after World War II. By 1966, New Mexico’s public schools enrolled 61 percent of the entire population of New Mexico’s Native students.<sup>92</sup> By 2002, New Mexico public schools served the “great majority” of the state’s Native American population.<sup>93</sup>

Interestingly, in 1975, when forced-assimilation practices were abandoned, New Mexico began grappling with the question of how best to include and educate Native students in its public schools. To adequately address what the State identified at the time as Native students’ “special educational needs,” New Mexico created the Indian Education Division (IED).<sup>94</sup>

Despite the establishment of the IED office, however, public education

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87. *Id.* at 14.

88. *Id.* at 17.

89. Mondragon & Stapleton, *supra* note 4, at 64.

90. *See id.* at 64-66.

91. S. Rep. No. 91-501, at 14 (1969).

92. Mondragon & Stapleton, *supra* note 4, at 66-67.

93. *Id.* at 67.

94. STATE DEPT. OF ED. ET AL., NATIVE AMERICAN STUDENT SUCCESS 8 (1999).

services, educational practices, and student outcomes among New Mexico's Native students would not fare much better, for several reasons provided below, than the school systems of the preceding decades. Even today, the history of forced assimilation and the resulting trauma on American Indians is still callously ignored—even by some state officials. Recently, in fact, tribal leaders openly criticized NMPED's acting Secretary of Education, Christopher Ruszkowski, when he announced during a charter school conference that: "This is a country built over the last 250 years on things like freedom, choice, competition, options, going west, Manifest Destiny — these are the fundamental principles of this country."<sup>95</sup>

*A. The Current Impact of Forced Assimilation on the Academic Success of American Indians*

The impact of forced-assimilation practices and systemic discrimination that occurred throughout the history of Indian Education has had long-term effects on the tribal communities of New Mexico. The abysmal student outcomes seen among American Indians in New Mexico public schools today are but one effect. Nearly forty years after the Kennedy Report was published, numerous New Mexico reports have shed light on the conditions within Indian Education, adding context to the educational practices and services undermining the academic success of Native students.

In 1989, the State Department of Education and the University of New Mexico published the "Practitioners' Views of Indian Education," which gave educators a voice to share their perspective about the challenges affecting Native students in the classroom.<sup>96</sup> The following six themes, it reported, operate simultaneously to create barriers to Native student success: Native American students are culturally different from their educators; educators lack sufficient information about their culture and values; teaching methods and daily routines do not match student skills, abilities, and learning patterns; that some Native students experience low self-esteem and high rates of absenteeism; Native students experience prejudice and low academic expectations set by some educators; and, lastly, that there is insufficient input from Native educators about educational matters and insufficient research is

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95. Andrew Oxford, *Pueblo Leaders Decry Public Education Chief's 'Manifest Destiny' Comment*, SANTA FE NEW MEXICAN (Dec. 22, 2017), [http://www.santafenewmexican.com/news/education/pueblo-leaders-decry-public-education-chief-s-manifest-destiny-comment/article\\_da7cd5bf-4102-5f2f-9bf0-c5692dc49e73.html](http://www.santafenewmexican.com/news/education/pueblo-leaders-decry-public-education-chief-s-manifest-destiny-comment/article_da7cd5bf-4102-5f2f-9bf0-c5692dc49e73.html).

96. C. DAVID BEERS, PRACTITIONERS' VIEWS OF INDIAN EDUCATION IN NEW MEXICO: WE SEEK HARMONY 1, 1 (1989).

available about Indian education.<sup>97</sup>

In 1996, the New Mexico Indian Education Center for Excellence (NMIECE)<sup>98</sup> assessed the glaring educational needs of American Indian students attending five public school districts serving predominantly Native Americans.<sup>99</sup> The NMIECE identified the causes for their poor academic outcomes and the critical problems and concerns relative to their educational experiences. The NMIECE identified three underlying global causes for the problems in Indian education through hundreds of interviews from students, parents, tribal representatives, teachers, school administrators, board members, and school support staff. The three underlying global causes include the following: (1) the lack of parental and community involvement; (2) the lack of culturally and linguistically appropriate academic programming; and (3) difficulties financially and experientially in developing academic programming that matches Native learning styles and needs.<sup>100</sup> In fact, all five districts reported the lack of culture and language as one of three major issues undermining the success of their Native American students.<sup>101</sup> Additionally, NMIECE identified English language acquisition, language development skills, literacy and reading ability, and oral and written communication skills as “the major English language issues,” while preserving the native language and bilingual educational practices surfaced as Native language issues in every school district.<sup>102</sup>

Within the scope of “culture and language,” the participants were concerned with the “tremendous shortage of Native American professional staff to assist with the development and implementation of Native programs.” The participants’ finding was supported by the statistic that sixty-

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97. *Id.* at 6-24.

98. *See generally* NEW MEXICO INDIAN EDUCATION CENTER FOR EXCELLENCE, NMIECE STRATEGIC PLAN 1991-1996 (1991) (explaining that the NMIECE was established on July 1, 1990 and was funded by the New Mexico state legislature and twenty-two public school districts and tribes). The NMIECE brought together an unprecedented collaboration between public school superintendents, state education officials, tribal leaders, parents, and community Indian Education Advocates to facilitate systemic change that would promote equitable educational opportunity and quality for American Indian children.

99. *See id.* at 11-13 (explaining that the following schools serve a high-concentration of American Indian students and are located on or near tribal lands: Bernalillo Public Schools, Central Consolidated School District, (Grants) Cibola County Public Schools, Gallup McKinley County Schools, and Zuni Public Schools).

100. *Id.* at 6, 11-13.

101. *Id.* at Figure 4, 15-16.

102. *Id.* at 17.

six percent of all students in the five districts were Native, as compared to twelve percent of all certified personnel.<sup>103</sup> Additional concerns included “the lack of perceived educational relevance to Native culture, the lack of cultural awareness and sensitivity on the part of teachers, support staff, and administrators, and the lack of culturally relevant literature and instructional materials.”<sup>104</sup> The lack of cultural understanding among non-Indian teachers and administrators coupled with insensitivity to the cultural and linguistic backgrounds of native students led to students experiencing racial prejudice.<sup>105</sup>

In 1999, five state representatives<sup>106</sup> sponsored and passed House Memorial 43, which called for a statewide study about the “characteristics, status, and needs of school districts with a high population of Native American students” and a funding proposal that would “enable the State to effectively improve [Native] graduation success rates.”<sup>107</sup> The 1999 Report recommended the following policy and budget proposals for addressing Native student needs and challenges: (1) an increase in Native American educators and administrators; (2) an increase in college-readiness programs; (3) collaborative efforts between the state, districts, and tribal entities to address the need for a researched-based culture and language curriculum; (4) an assessment of Native student performance for purposes of identifying causes of and solutions to academic failure; and (5) a study about access to technology that would seek to ensure access is equitable.<sup>108</sup>

Many of the ongoing issues identified since 1989 were again identified in a 2010 study entitled *Indian Education in New Mexico 2025*,<sup>109</sup> which was conducted by the Indigenous Education Study Group (IESG) and led by

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103. *Id.* at 18.

104. *Id.* at 17.

105. *Id.*

106. *See* STATE DEP’T OF EDUC. COMM’N ON HIGHER EDUC. NATIVE AM. TRIBAL REPS, NATIVE AMERICAN STUDENT SUCCESS, Final Rep. 43, 1st Sess. at 1 (stating that the following State House Representatives introduced House Memorial 43: James Roger Madalena, Nick L. Salazar, Ray Begaye, Leo C. Watchman, Jr., and W. Ken Martinez).

107. *Id.*

108. STATE DEPT. OF ED., *supra* note 94, at 3-4.

109. EIGHT NORTHERN INDIAN PUEBLOS COUNCIL, INC. & INDIGENOUS EDUCATION STUDY GROUP, *INDIAN EDUCATION IN NEW MEXICO*, iv (2010), <https://sociology.unm.edu/people/faculty/profile/documents/NMIndianEdRpt2011Apr2411.pdf> (“According to population estimates, by 2025 it is projected that 84,710 American Indians will be 18 years & younger. For 2025, it is projected that the share of the 0-18 age group among AIAN’s will be 30.2 [percent]. This is a decline of 9.5 [percent] from year 2000.”)

University of New Mexico (UNM) associate professor Dr. Carlotta Penny Bird.<sup>110</sup> In its preface, the Report concludes that the “best practices in Indian education entail providing a culturally responsive education for Native students,” which “requires systemic reform and transformation in educational ideologies.”<sup>111</sup> Seeking to identify and learn from the schools where cultural responsiveness exists, the IESG would explore schools statewide to “investigate and determine a long-range plan for Indigenous education in New Mexico and among its tribal communities.”<sup>112</sup> Importantly, the harsh reality of poor standardized test scores among Native students is detailed in the Report’s quantitative findings, which the Report suggests is driven by high-stakes testing and its one-size-fits-all approach to learning while simultaneously denying students a culturally responsive education.<sup>113</sup> Further, using a rubric of seven criteria to examine the qualitative aspects of student learning, including educated person, pedagogy, curriculum, language, accountability, school climate, and vision, the IESG found that some teachers lacked the desire and/or training to become culturally responsive and indigenous-knowledge inclusive; community members expressed a need for native teachers; and parents called for equal partnerships with schools.<sup>114</sup>

Moreover, in every report over the last ninety years regarding Indian Education, the most significant issues called for school systems to honor, respect, and incorporate the students’ languages and cultures into their curriculum and instructional materials; strengthen and not destroy their family and social structures; increase the number of Native educators and administrators; improve teacher qualifications and expectations, not lower them; and provide resources to schools that serve Native students. Yet very few school systems today have addressed these systemic challenges in a sustainable manner.

There have been limited statewide recruitment efforts to build the capacity of Native American educational staff, even though there is wide agreement that teachers who reflect and understand the background of their students are important to helping students persevere in often-alien school environments. A New Mexico Public Education Department (NMPED) funded initiative,

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110. *See id.* (explaining that Dr. Carlotta Penny Bird is also the former Assistant Secretary of the Indian Education Division).

111. *Id.* at 4.

112. *Id.* at 1.

113. *Id.*

114. *Id.* at 15.

for example, meant to build Native teacher capacity, which was functional from 2003-2006, has suffered from a pattern of repeat failures since its inception; while a short-lived alternative—a statewide, systematic training program for non-Native educators to deliver culturally and linguistically relevant instruction—was discontinued in 2017 after one year.<sup>115</sup> The majority of Native students in New Mexico will go their entire K-12 educational experience without a Native educator or counselor.<sup>116</sup>

### III. REDRESSING A HISTORY OF FORCED ASSIMILATION AND SYSTEMIC DISCRIMINATION: EDUCATION LAWS PERTAINING TO THE EDUCATION OF AMERICAN INDIANS

Through the course of litigation, attorneys for the *Yazzie* Plaintiffs identified the connection between the injustices in Indian Education reported throughout history and the ongoing failures by the State to enforce the laws and policies meant to redress them. This symbiotic relationship of history, culture, and law, as the Plaintiffs demonstrated at trial, uncovered the institutional forces behind the widespread deficiencies undermining the educational success for American Indians in New Mexico today.

#### A. *New Mexico Indian Education Act (2003)*

Throughout the 1980s to the early 2000s, advocates and tribal leaders would no longer sit idle while the broken system of public education continued to deprive Native students of a cultural and meaningful education.<sup>117</sup> Several Native American members of the state legislature could not allow for this status quo to continue undisturbed.<sup>118</sup> In response to the glaring failures of Indian Education systems and institutions identified in both the Kennedy and Meriam reports, according to Regis Pecos,<sup>119</sup> a former

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115. Transcript of Record at 38, 58-59, 65-66, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. July 7, 2017); Trial Decl. of Christine Sleeter Submitted by Martinez Plaintiffs, Trial Exhibit P-2988 at 105, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. June 18, 2017); Transcript of Record at 151-152, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. July 27, 2017).

116. Transcript of Record at 14, 26, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. July 7, 2017).

117. *Id.* at 58-59, 77-78.

118. Ray Begaye, Former State Representative (Dist. 4) and Leonard Tsosie, Former State Senator (Dist. 22). See Celebrating New Mexico's Indian Education Act 2003—2018 (Jan. 25, 2018), <http://nmindianeducact.org/wp-content/uploads/2018/02/Indian-Act-Celebration-Program-1.pdf>.

119. As of 2018, Regis Pecos is the Chief of Staff to the State House of



four-term Executive Director of the State Office of Indian Affairs, a major priority at the state level was to articulate an educational policy that would guide the development of programs to address the linguistic and cultural needs of Native children.<sup>120</sup> That articulated framework became the foundation for the NMIEA.<sup>121</sup>

In 2003, the State fully acknowledged that low standardized test scores and academic underachievement among Native students were directly tied to their cultural and linguistic differences and therefore enacted the NMIEA.<sup>122</sup> The NMPED and its sub-agent, the Indian Education Division, became the primary entities responsible for ensuring that the Indian Education districts are in compliance with the NMIEA.<sup>123</sup> The NMIEA also provides for an Indian Education Advisory Council (IEAC), which advises the Secretary about NMIEA implementation.<sup>124</sup>

Significantly, the NMIEA requires that: (1) Native students be provided with culturally-relevant learning environments and educational opportunities; (2) students be provided with culturally-relevant instructional materials; (3) NMPED provide the school districts with substantive guidance regarding effective educational systems for Native students; and (4) the PED provide a means for a government-to-government relationship between the State and New Mexico's tribes.<sup>125</sup>

This key piece of legislation, according to local education experts and legislative advocates, was intended to redress historical trauma,<sup>126</sup> and ensure that the Secretary of NMPED and Assistant Secretary of Indian Education, along with school districts, worked collaboratively with tribal entities to

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Representatives Majority Floor Leader. *See Meet Our Board of Directors*, N.M. COMM. FOUND., <http://nmcf.org/about-us/our-board/> (last visited Sept. 27, 2018).

120. Transcript of Record at 16-17, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. July 7, 2017).

121. *Id.* at 17-18.

122. *See* S.B. 115 Fiscal Impact Report (2003), <https://www.nmlegis.gov/Sessions/03%20Regular/firs/sb0115.pdf> (“Historically, Indian students have scored low on standardized tests and have consistently underachieved in the public schools, a phenomenon attributed primarily to linguistic and cultural differences. This bill addresses that issue and provides mechanisms intended to improve the success rate of Indian students in public schools.”).

123. Transcript of Record at 118, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. July 27, 2017).

124. N.M. STAT. ANN. § 22-23A-6 (West 2018).

125. N.M. STAT. ANN. § 22-23A-2(A)-(F).

126. Transcript of Record at 58, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued June 26, 2017).

address the unique, specialized needs of Native American students.<sup>127</sup> Through the force of law, the State of New Mexico and NMPED are required to ensure that native students are educated in culturally relevant learning environments and receive equitable and culturally relevant educational opportunities.<sup>128</sup>

*B. Federal English Learner Law and Policies Pertaining to the Education of Native American English Learners*

Over the course of fifty-plus years, certain laws and policies were developed that provided protection over the educational rights of English learners, including Native American English learners (NAEL) students. The ruling in *Lau v. Nichols*, where a group of Chinese American families sued the San Francisco Public School District alleging that the education provided to their Chinese speaking children in a language they did not understand (English) was not equal treatment, led to a nationwide requirement that all local educational agencies serving EL students were required to implement the *Lau* remedies.<sup>129</sup> Further, the District's failure to deliver a bilingual education violated both the equal protection clause of the 14th amendment and Title VI of the Civil Rights Act of 1964. In 1974, the U.S. Supreme Court ruled in favor of the families, saying: "[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>130</sup>

The *Lau* remedies serve as guidelines that "translate schools' legal obligation into pedagogical directives."<sup>131</sup> These guidelines outlined the following:

- EL students must be identified appropriately. The common practice is through a home language survey and an English language proficiency test.
- EL students must be placed in an appropriate, theoretically sound language program to assist them in the learning of English.

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127. *Id.* at 18.

128. *Id.* at 118-19, 122.

129. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. to Colleague (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

130. *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

131. James Crawford, *Summing up the Lau Decision: Justice is Never Simple*, LANGUAGE POL. WEB SITE & EMPORIUM (1996), <http://www.languagepolicy.net/articles/summing.htm>.

The guidelines proposed that when there were sufficient numbers of students with the same language, a bilingual program would be the best program.

- Students must be assessed to measure their progress toward English proficiency.
- Teachers who teach in these programs must have the professional background to work with English learners.<sup>132</sup>

Furthermore, federal EL funding is provided by Title III pass-through (or flow through) funds. Each state receives federal dollars based on the number of ELs in the state. Each district then must develop a plan for how these funds will be used. The plan must “improve the education of limited English proficient students by assisting children to learn English and meet challenging State academic content and student achievement standards. In carrying out activities with such funds, the entity shall use approaches and methodologies based on scientifically based research on teaching limited English proficient children.”<sup>133</sup>

Further, this plan cannot replace the regular curriculum or program, but must provide educational supports that are over and above the existing curriculum. To receive Title III funds, each district must submit a plan to the Public Education Department that either approves or disapproves the plan. The New Mexico’s Public Education Department (hereinafter “NMPED”) has oversight responsibilities over the districts to ensure that the funds are used appropriately. As stated in the mission of the Bilingual Multicultural Education Bureau (BMEB), the responsible entity within the PED, the BMEB’s duty is “to administer and enforce the provisions of the state Bilingual Multicultural Education Act (2004) and Title III, of ESEA.”<sup>134</sup>

The BMEB also has oversight of the state-funded Bilingual Multicultural Education Programs. The Bilingual Multicultural Education Act (BMEA) in its present form is the outgrowth of several revisions of the original act of 1972. The BMEA’s intent is two-fold: (1) to sustain and further develop children’s native or heritage language, and (2) to further develop students’ English such that they are successful academically.<sup>135</sup> These funds are focused on both Spanish-speaking and Native American students.

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132. MEMORANDUM FROM THE U.S. DEP’T. OF EDUC. TO OCR SENIOR STAFF (Sept. 27, 1991), <https://www2.ed.gov/about/offices/list/ocr/ell/september27.html>.

133. 20 U.S.C. § 6825 (2015).

134. English Language Acquisition, Language Enhancement, and Academic Achievement Act, N.M. STAT. ANN. § 22-23-4, §§ 6821-6871.

135. N.M. STAT. ANN. § 22-23-1.1; *see also* N.M. CODE R. § 6.32.2 (2018).

Like the Title III program, the BMEA requires schools or districts to submit a plan detailing how they will support students' native languages and how they will promote growth in English.<sup>136</sup> The number of dollars a school or district receives is predicated on the number of bilingual or EL students they have, which means that there is a weight factor of .50 units per each EL or bilingual student that each district is guaranteed, under New Mexico's funding formula.<sup>137</sup> As in Title III programs, educational entities must stipulate the numbers of teachers endorsed in either bilingual or TESOL (Teachers of English to Speakers of Other Languages) education. Only those with a bilingual endorsement can teach in a bilingual classroom.<sup>138</sup> Those with TESOL endorsements can teach in an all English classroom or in a specialized ESL (English as a second language) class, which is often achieved by pulling students from their regular classroom for special assistance.<sup>139</sup>

Furthermore, schools and districts can propose a one-hour, two-hour, or three-hour program. One-hour programs focus on providing students with one hour of native language instruction, two-hour programs provide one hour of native language and one hour of intensive English, and three-hour programs provide one hour of cultural studies in either language in addition to the native language and English.

#### IV. LITIGATION AND TIRAL

##### A. *State Constitution*

Every state has a constitution. Every state constitution includes a clause establishing a quality-defined system of public education, which the state legislature is charged to maintain. Arguably, a system of education that satisfies the provisions of the education clause is constitutionally sufficient. Article XII, section 1 of the New Mexico Constitution states: "A uniform system sufficient for the education of all school-aged children shall be established and maintained."<sup>140</sup>

Further, the State of New Mexico, including the legislative body and

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136. N.M. STAT. ANN. § 22-23-5.

137. SCH. BUDGET & FINANCE ANALYSIS BUREAU, N.M. PUB. EDUC. DEP'T, HOW NEW MEXICO SCHOOLS ARE FUNDED, 4-6 (2016), [https://webnew.ped.state.nm.us/wp-content/uploads/2017/12/SBFAB\\_home\\_How-New-Mexico-Schools-Are-Funded-4-7-16.pdf](https://webnew.ped.state.nm.us/wp-content/uploads/2017/12/SBFAB_home_How-New-Mexico-Schools-Are-Funded-4-7-16.pdf).

138. N.M. CODE R. § 6.32.2.

139. *See id.*

140. N.M. CONST. art. XII, § 1.

executive agencies, must ensure the guarantees articulated in the education clause are imposed. Together, these governing bodies enact and enforce the laws pertaining to public schools and education, including the resources to ensure their operation and maintenance. The state legislature is charged with enacting the state budget, including the Public School Fund, while the NMPED, an executive state agency, must ensure that school districts' "state equalization guarantee . . . is at least equal to the school district's program cost."<sup>141</sup> The NMPED is also ordained constitutional and statutory powers to oversee school district finances, as well as to propose and enforce administrative rules and regulations.<sup>142</sup>

Whether a state public education system survives constitutional muster in a legal challenge arising under the state constitution depends largely on how the Court defines the provisions of the education clause. Starting in 1989, Plaintiff parties in Kentucky, Montana, and Texas were among the first litigants to successfully demonstrate the State's failure to provide students in poorer school districts a legally adequate level of education, as required under the state constitution. In a landmark ruling, better known as *Rose v. Council for Better Education*, the Kentucky Supreme Court, a pioneer in defining standards for an adequate school system,<sup>143</sup> broadly interpreted "efficient" to mean that the system must afford all students the opportunity to develop the following seven delineated capacities:

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

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141. N.M. STAT. ANN. § 22-8-25 (West 2018).

142. N.M. CONST. art. XII, § 6; N.M. STAT. ANN. §§ 22-2-1, 22-2-2, 22-8-4 (West 2018).

143. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209-210 (Ky. 1989) (citing *Pauley v. Kelly*, 162 W.Va. 672, 705 (1979)) (examining where the Wyoming Supreme Court defined the provisions "thorough and efficient," to mean: "[the public education system] develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically," and further recognizing certain areas that each student should be able to develop to full capacity by the end of grade twelve.).

heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>144</sup>

Following this decision, many state courts adopted judicial standards identical or similar to *Rose*.<sup>145</sup>

Where the legal challenge is granted for review, the Court, within the purview of its judicial authority, is called to interpret the education clause and develop manageable standards to evaluate the constitutional claims and evidence in question. The burden of proof falls on the plaintiffs to demonstrate that the State has failed to satisfy its obligations under the State Constitution. Generally, the evidence in question—e.g. funding for programs and services, or inputs, and student performance, and outputs—among other factors, including maintenance and accountability, are evaluated under the standards developed by the Court.

#### B. *Uniform and Sufficient*

Neither the judicial, legislative, or executive bodies have ever defined or interpreted the education clause of the New Mexico Constitution. Much like New Mexico's education clause, fifteen other state constitutions contain the term "uniform."<sup>146</sup> In several cases, state courts have defined *uniform* to connote something approximating identical or equal. In Wisconsin, for instance, *uniform* means the equal distribution of resources on a per-pupil basis,<sup>147</sup> while the North Carolina Appeals Court uses the terms *uniform* and *equal* interchangeably.<sup>148</sup> However, some courts interpret *uniform* as not

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144. *Id.* at 212.

145. *See, e.g.*, *Davis v. State*, 804 N.W.2d 618, 627 (S.D. 2011); *Gannon v. State*, 319 P.3d 1196, 1236 (Kan. 2014); *McCleary v. State*, 299 P.3d 227, 231 (Wash. 2012); *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

146. *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 322 n. 63-64 (1991) (noting that state constitutions of Arizona, California, Colorado, Florida, Minnesota, New Mexico, Nevada, North Carolina, North Dakota, Oregon, Idaho, Indiana, South Dakota, Washington, and Wisconsin ("nearly uniform as practicable") all require a "uniform" system of free public schools.).

147. *Kukor v. Grover*, 436 N.W.2d 568, 577 (1989).

148. *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436, *cert. denied*, 361 S.E.2d

requiring equal spending, but rather uniform course requirements, textbooks, and teacher qualifications.<sup>149</sup> Unlike other states, however, the term *sufficient* is found only in the New Mexico Constitution.

The NMPED was forced to admit that it does not have a “working definition” of Article XII, section 1 of the New Mexico Constitution.<sup>150</sup>

### C. Trial

On June 12, 2017, four years after the complaint was filed, the parties tried *Yazzie* in the State’s First Judicial District Court. Through the course of an eight-week trial, over one hundred witnesses testified and over 3,000 exhibits were introduced to the Court.

Over five consecutive weeks, the Plaintiff parties presented evidence to the Court, showing that the vast majority of New Mexico’s at-risk children finish each school year without the basic literacy and math skills needed to continue their education, pursue a career, and thus participate meaningfully in and contribute to society. The general theory about the culprit behind these academic failures, the Plaintiffs argued, was essentially a concoction of inadequate educational programming and services to meet students’ educational needs, inadequate staffing and inadequate funding to address these challenges. Plaintiffs asserted that poor NMPED accountability, technical support, and professional development training contributed to students’ academic issues. The Court heard evidence showing that underfunded programs and services currently supported by Defendants in a few districts are insufficient to address the educational needs of New Mexico’s children, and that districts struggled to provide these programs on their own. The *Yazzie* Plaintiffs also demonstrated that with sufficient educational opportunities, the Plaintiff student outcomes, and student outcomes within the Plaintiff Districts, would look very different.

Following the Plaintiffs’ case-in-chief, the State Defendants were allotted three weeks to defend the Nation’s worst ranked education system. Their general theory of the case posited that the statewide academic failures among low-income, EL and Native American students were the result of: social dysfunctions attributed to poverty, cultural differences, and language barriers; parents who are not invested in their children’s education; bad

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71 (1987).

149. McUSIC, *supra* note 146, at 323.

150. Defendants’ Supplemental Answers to *Yazzie* Family Plaintiffs’ Amended First Set of Interrogatories at 2, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued 2015).

administrators who fail to place their best teachers in high-needs classrooms; ineffective educators who, they claim, have the greatest influence over student learning; and apathetic students, who “are not like empty vessels that you take a pitcher and pour knowledge into them.”<sup>151</sup> The Defendants essentially argued that claims about inadequate state resources were a superficial and proverbial request made by school officials and education advocates for “more money” to throw at problems, which, they claimed, are solely within the control of local school boards and district administrations. Furthermore, Defendants argued that school districts would have sufficient resources but for the mismanagement and/or ineffective allocation of operative funds towards salaries and other tangibles indirectly tied to education—instead of classroom learning.

#### *D. Addressing the Broken System of Indian Education*

The *Yazzie* Plaintiffs provided the court with a very comprehensive, fact-driven account about the significant relationship between a history of forced-assimilation practices and the cultural and linguistic needs of Native students, and the specific legislation meant to redress these harms, address their needs, and ensure them a meaningful education.

In doing so, the *Yazzie* Plaintiffs channeled the expertise of local education experts, which included tribal leaders, to lead the way. Also contributing to this legal strategy were fact witnesses, including experienced educators, elected officials, organizational leaders, and school district administrators, whose supporting testimony underscored the State education system’s ongoing neglect of Native American students. In the end, the court heard testimony from all facets of the education sector about the lack of culturally-relevant and culturally-responsive educational opportunities, the failure of schools to provide EL programs to NAEL students, and, overall, the lack of State support, technical assistance and guidance, and inadequate state resources for the twenty-three Indian Education districts.

At trial, Indian Education expert, Dr. Joseph Suina, a former governor of Cochiti Pueblo and UNM Professor, overviewed the history of forced integration of Native American children into federal and then state public schools and the current impact on their educational needs and academic achievement.<sup>152</sup> He described New Mexico Public Schools as a one-sided system that has never contributed to the success of American Indians.

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151. Transcript of Oral Argument at 89, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued May 22, 2017).

152. See *Yazzie* Plaintiffs’ Supplemental Expert Disclosure, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued Oct. 14, 2016).



“[T]here has never been a come-together of the two entities, the school and the tribe, the family. We have never enjoyed what middle class America has always enjoyed, and that is a continuation of home language, home values, home knowledge in the school. It’s always been a severing – our home experience is at the doorstep of the school, and I think right now tribes are looking to find that connection.”

That connection, he later explained, begins with the full implementation of the New Mexico Indian Education Act, which is a key piece of legislation meant to redress the historical trauma and create a connection between the State public schools and the tribes.<sup>153</sup>

The *Yazzie* Plaintiffs called Francis Vigil, a member of Zia Pueblo and former director of Indian Education at Espanola Public Schools, to testify about the State’s failure to achieve the purpose of the NMIEA. At trial, Mr. Vigil, who reviewed extensive sworn-deposition testimony from many witnesses describing the State’s purported implementation of the NMIEA, concluded that State Defendants had failed to: (1) Implement culturally relevant learning environments or educational opportunities for Native students;<sup>154</sup> (2) Culturally-relevant instructional materials that are “planned, designed, and evaluated” in accordance with their “cultural and linguistic values and heritage;<sup>155</sup> (3) Provide for the study, development, and implementation of educational systems that positively affect the educational outcomes of American Indian students;<sup>156</sup> and (4) Establish a formal government-to-government relationship between the State and the Tribes, which is “necessary to ensure that the Tribes are being recognized and respected as sovereign nations and collaborators on the subject of Indian Education.<sup>157</sup>

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153. *Id.*

154. Trial Declaration of Francis Virgil (hereinafter Virgil Declaration) at 11, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. June 26, 2017); see also N.M. STAT. ANN. § 22-23A-2(A) (requiring that “culturally relevant learning environments, educational opportunities and culturally relevant instructional materials [be provided] for American Indian students enrolled in public schools”). This requires that Native students enjoy “structured and sustainable learning environments and opportunities,” rather than mere isolated experiences. Virgil Declaration at 7, 12.

155. Virgil Declaration. at 6, 15; see also N.M. STAT. ANN. § 22-23A-2(A).

156. N.M. STAT. ANN. § 22-23A-2(C). To comply with this mandate would require an adequately-staffed IED, capable of gathering information and evaluating the implementation and effectiveness of culturally-relevant educational systems in the school districts (if any such systems existed). Virgil Declaration at 9, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. June 26, 2017).

157. N.M. STAT. ANN. § 22-23A-2(F); see also Virgil Declaration at 16, *Martinez v.*

Mr. Vigil's testimony found support from numerous witnesses who openly criticized the Indian Education Division for its failure to provide them the much needed technical assistance and support around effective implementation of NMIEA provisions.<sup>158</sup> At the time of trial, Plaintiffs produced evidence showing that all three IED regional offices of the Indian Education Division had been vacant for years,<sup>159</sup> thereby reinforcing a grave concern expressed by Mr. Regis Pecos: the lack of a fully staffed Indian Education Division to systematically monitor and enforce the provisions of the NMIEA.<sup>160</sup> These vacancies would likely explain the State's failure to comply with the various NMIEA provisions, including the development of a statewide culturally relevant curriculum.

At the time of trial, the contemporary-instructional materials and curriculum in New Mexico, according to testimony by Dr. Hayes Lewis, superintendent of Zuni Public Schools, failed to capture the life, history, and social-legal issues that indigenous people, including Zuni Puebloans, have experienced in New Mexico.<sup>161</sup> Dr. Christine Sleeter, a multicultural education expert for the *Martinez* Plaintiffs, who analyzed language arts, social studies, and history textbooks for cultural relevance value, found that only 10 percent, at most, of New Mexico textbooks contained images and contents specific to Native Americans.<sup>162</sup> Additionally, school teachers like Carlotta Martza from Zuni High School had regularly spent their own money for culturally relevant instructional materials to provide their students because the school books available to them are not relevant to their students' lived experiences.<sup>163</sup>

UNM Professor of Bilingual and TESOL (Teaching English to Speakers of Other Languages) Education, Dr. Rebecca Blum Martinez, was retained

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State of New Mexico, No. D-101-CV-2014-00793 (1st Dist. June 26, 2017).

158. See e.g., Transcript of Record at 134-35, 137, *Martinez, et al. v. State of New Mexico*, No. D-101-CV-2014-00793, (1st Dist. argued, June 29, 2017); *Id.* at 147-48 (June 30, 2017); *id.* at 111-12 (June 12, 2017).

159. Exhibit P-2935 (showing a website snapshot of three vacancies at the Indian Education Division).

160. Transcript of Record at 37-38, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued July 7, 2017).

161. *Id.* at 161-62, (June 30, 2017).

162. Trial Declaration of Christine Sleeter Submitted by Martinez Plaintiffs at 39, 61, 63, 65, 66-67, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued June 18, 2017).

163. Deposition Transcript of Carlotta Martza with Designations at 40:21-41:25, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued Sept. 30, 2016).

by the *Yazzie* Plaintiffs to assess the quality of educational programming for Native American English Learners attending school in Gallup-McKinley, Grants-Cibola, Jemez Valley, Zuni, Cuba, and Bernalillo. At trial, Dr. Blum Martinez testified that none of the six districts, which were selected for analysis due to their high-concentrations of Native American students, provided NAEL students a sufficient EL program, which, technically, violates state and federal EL program requirements. Based on interviews of school district administrators, the EL program plans for NAELs, according to Dr. Blum Martinez, consisted primarily of assigning them to teachers who have a TESOL endorsement.<sup>164</sup> However, a closer look at conditions in the districts revealed that teachers with such endorsements were few and far between. One district that had 60 percent of NAELs, for example, had only two teachers with TESOL endorsements. Dr. Blum Martinez asked why these plans were approved, and why there was no oversight on the part of the PED. Clearly, the Plaintiffs argued, the NMPED had failed to provide the proper approvals and had ignored its responsibility to ensure the implementation of the Title III program.<sup>165</sup>

Only four of the Districts had state bilingual funding. Both Native American language teachers taught Navajo and Pueblo languages to their respective students, and these classes were functioning as bona-fide language classes. However, when asked about the English portion of their programs, district coordinators were initially confused by the question, and later remarked that the students were placed in classrooms with TESOL endorsed teachers. As stated earlier, given the lack of TESOL endorsed teachers, this could not be the case. And, as with the Title III programs, there was little oversight if any of the BMEA programs. The majority of the six districts' interactions with the BMEB was through email and focused on English proficiency and academic test score data.<sup>166</sup>

The *Yazzie* Plaintiffs further argued that Defendants' failure to comply

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164. Blum Martinez, 6/27/17-a.m. at 43-44 (noting that these endorsements are issued by the state after a candidate has completed twenty-four hours in appropriate coursework). Also, TESOL is Teaching English to Speakers of Other Languages, and requires considerable coursework in the theories and educational practices that contribute to the development of English as a second language. See also *TESOL (Teaching English to Speakers of Other Languages)*, N.M. PUB. EDUC. DEP'T, <https://webnew.ped.state.nm.us/bureaus/licensure/adding-endorsements/tesol/> (last visited Feb. 2, 2019).

165. See *Yazzie* Plaintiffs' Closing Brief at 37, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued Jan. 9, 2018).

166. Transcript of Record at 36-89, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued June 27, 2017). Space, 6/29/17 at 145-146; Chiapetti, 6/28/17 at 98; Blum Martinez, 6/27/17-a.m. at 84-85.

with applicable legal requirements for educating Native students is part of a larger pattern of neglect. Cuts to transportation funds, for example, prevent Indian Education Districts, which typically cover large and rural geographical areas, from maintaining buses that meet students' needs.<sup>167</sup> This means that tribally located students who lack personal transportation are often excluded from athletics and afterschool, extra-curricular activities.<sup>168</sup>

Poor access to technology hinders these students from acquiring media literacy and taking state-mandated online exams.<sup>169</sup> Statewide funding cuts for instructional materials prevent these schools from obtaining adequate textbooks. Meager salary levels and employment incentives that do not compete with surrounding states result in high staff turnover and a reliance on long-term substitutes.<sup>170</sup> Early childhood education, a particular necessity for native children, is rarely available in the schools they attend.<sup>171</sup> And, sadly, for many Native students who would be "first generation" college students, college-preparation opportunities, such as Pre-SAT/ACT testing sites, are woefully inaccessible.<sup>172</sup>

Many facts introduced by the *Yazzie* Plaintiffs about New Mexico's neglect of American Indians went largely undisputed. In fact, several State Defendant witnesses, including Keith Moore, were reluctant to disagree. In his expert report, Mr. Moore stated: "Our educational system, historically and as it exists today, has proven unable to respond to or meet the needs of American Indian students [.]"<sup>173</sup> On cross-examination, Mr. Moore further

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167. Trial Exhibit P-2957, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued 2017).

168. Transcript of Record at 158-59, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued June 30, 2017); Transcript of Record. at 224-25 (June 28, 2017); Deposition Transcript of Allan Tapia with Designations at 158-59, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued Aug. 10, 2017).

169. Deposition Transcript of Allan Tapia with Designations at 69-70, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued Aug. 10, 2017).

170. *See, e.g.*, Transcript of Record at 181-82 *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued June 30, 2017); Transcript of Record at 161-62; 167 (June 29, 2017); Transcript of Record at 72; 74-75, 131 (July 7, 2017); Transcript of Record at 104-05 (June 28, 2017).

171. *See* Transcript of Record at 155-58; 228 (June 29, 2017); Transcript of Record at 109-10 (June 12, 2017).

172. Deposition Transcript of Carmen Lopez with Designations at 22-23, 31, 34-37:4, 47-49, 53-58, 60; 65-66, 72; 84-86, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1<sup>st</sup> Dist. argued, Nov. 16, 2016).

173. Transcript of Record at 53, 65, *Martinez v. State of New Mexico*, No. D-101-

conceded that: “Education has the power to change lives; that quality education, coupled with economic opportunity, can change entire communities, states and nations; that American Indian students deserve our best; that every effort should be made to improve their academic performance in schools; and that American Indians ought to have access to good schools.” When questioned about the cultural and linguistic needs of students and adequate resources, Mr. Moore agreed that “adequate funding matters,” as does putting money into the “right programs” and into the hands of “high-level professionals,” and, ultimately, that the infusion of language and culture in schools “could certainly change [Native student] outcomes.”<sup>174</sup>

The *Yazzie* Plaintiffs further argued that the abysmal Native student outcomes reflect a broken Indian education system; because the NMIEA and these federal EL requirements are meant to protect Native students' rights and address their undisputed basic educational needs, the violation of these laws should be viewed as constitutional in scope. In addition to the definition of a constitutionally sufficient education, as posited by the *Yazzie* Plaintiffs—one that prepares students with the skills to participate actively in college and career opportunities and in an ever-changing democratic society—American Indian students must also be prepared with the knowledge, skills, and abilities to serve in tribal government and leadership roles. Therefore, the Plaintiffs would argue that a constitutionally sufficient education for Native American students requires the State to comply with the NMIEA of 2003, 1978 NMSA, §22-23A-2 and federal requirements under Title III of the Elementary and Secondary Education Act, and Title VI of the Civil Rights Act, which pertain to the education of NAELs. Additionally, the *Yazzie* Plaintiffs provided evidence to show that the State of New Mexico has consistently deprived the twenty-three Indian Education school districts, which are mostly located on or near tribal lands, of basic educational services.<sup>175</sup>

The Defendants' failure to comply with these laws, coupled with the terrible educational outcomes and inadequate resources for Native students, as the Plaintiffs have argued, surely amounts to a constitutional violation.

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CV-2014-00793 (1st Dist. argued Aug. 3, 2017).

174. Transcript of Record at 53-55 (Aug. 3, 2017).

175. See *Yazzie* Plaintiffs' Closing Brief at 37, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued Jan. 9, 2018).

## V. SOLUTIONS/SOCIAL POLICY RECOMMENDATIONS

*A. Educational Success for American Indians*

In part, the *Yazzie* case is the advent of a watershed opportunity for policymakers, community leaders, education stakeholders, parents, and educators to understand the various historical, political, and legal factors affecting the education of American Indians. What remains true today about Native success, as it has historically been, is that proficiency scores in reading and math, high school graduation, or college readiness do not fully define educational success for American Indian students. In addition to the three Rs and proficiency in the core subjects, Indian educational success also means preparedness for tribal leadership roles and governmental and communal duties.<sup>176</sup> It is imperative for Native students to develop positive, personal, and communal identities, which are intricately tied to their Native language and the traditions of their community. Developing and maintaining positive identities allows young people to take on leadership roles in their communities, which in turn contributes to the well-being of tribal communities.

Additionally, the Tribes know the meaning of educational success and can facilitate the development of indicators, which are both culturally and linguistically relevant and responsive, to measure student progress and overall educational outcomes. Therefore, state and tribal collaboration is of the utmost importance for American Indians to achieve educational success.

In anticipation of a court ruling in *Yazzie*, the New Mexico Center on Law and Poverty has brought together several convenings of state stakeholders to discuss and develop policy and funding recommendations. Stakeholders include leaders in Native American education, representative education specialists from state universities, representatives from community organizations, superintendents, social services experts and several attorneys from the Center. At each convening, experts in a particular educational issue have presented to the group, providing the necessary background for group discussion. Currently, many of the recommendations that are being considered by the broader coalition of stakeholders include the following:

- The New Mexico Public Education Department should ensure that the NMIEA, BMEB, and Title III ELL programs are fully effectuated within its own department and within every public school district.

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176. Transcript of Record at 80, *Martinez v. State of New Mexico*, No. D-101-CV-2014-00793 (1st Dist. argued June 26, 2017); Transcript of Record at 10 (July 7, 2017); Transcript of Record at 149-51 (June 30, 2017).

- The New Mexico State Legislature should review the NMPED annually to ensure that the NMPED is held accountable for its responsibilities.
- Each school district, its superintendent and school board must hold quarterly meetings with appropriate tribal officials to discuss the education of the Native American students in the district.
- Funding for the development of culturally responsive curricula for Native American students from each tribe and for all grades. Experts in Native American studies, curricular experts, and experts from each tribal community should work with State and NMPED support to develop this curriculum.
- Required coursework in teacher and administrator preparation programs that focuses on the significance of language and culture beginning in early childhood and continuing into adulthood; as well as focusing on the needs of American Indians and tribal communities.
- Adequate funding especially for those rural school districts that have additional needs such as bus expenses due to poor road conditions, better internet connectivity, curricular and library materials, teacherages (housing), and stipends for teachers with TESOL or bilingual endorsements that help to retain teachers in hard to reach communities.
- Access to culturally appropriate education for three and four year old children.
- Required collaboration and communication between tribal governments, PED, and the State of New Mexico.

In addition, New Mexico's nineteen Pueblos are working together to collectively identify the issues within the public education system that require both immediate and long-term solutions and the initiatives to improve the education for future generations. Most recently, the Santa Fe Indian School Leadership Institute recently held its annual Pueblo Convocation on July 8-10 of this year, where Pueblo governors and educational leaders presented on the work they and their communities have engaged in over the last ten years. The initiatives these communities have engaged in range from establishing native language and culture programs at different age levels to taking control of their schools and establishing higher education programs. Despite differences in the actual educational initiatives, the levels of development of each initiative and the various ways in which their initiatives have been established, several common themes emerged:

- All of the Pueblos had sought their direction from their own people, convening community meetings to establish their priorities.
- All of the Pueblos sought to define success on their own terms.
- All of the Pueblos maintained language and culture at the heart of

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each initiative.

- Education stakeholders from across the state and within local communities are perceived as necessary players in this process; they too are invited to participate.

At the time of this writing, the Plaintiff Parties to the *Yazzie/Martinez* lawsuit have not received a decision from the First Judicial District Court.