NATIVE AMERICAN BUDGET & POLICY INSTITUTE

# Victory for New Mexico Schools:

## Court Rules in *Yazzie/Martinez* Case that Every Child Has a Right to a Sufficient Public Education under New Mexico's Constitution


**Jasmine Yepa**
Research Analyst, J.D.
Native American Budget and Policy Institute

**Regis Pecos**
Co-Director
Leadership Institute

**Cheryl Fairbanks**
Executive Director
Native American Budget and Policy Institute

**Dr. Carnell Chosa**
Co-Director
Leadership Institute



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*"A watershed moment for Indian Education in New Mexico"*

- Regis Pecos

## A MILESTONE FOR INDIAN EDUCATION – *Yazzie v. State of New Mexico*

The First Judicial Court has now confirmed and declared what countless reports have found over the years, commissioned by the Executive, by Congress, and by the State of New Mexico: the current public education system is failing Native American students. The *Yazzie* decision is a watershed moment in the state's history and is monumental in Indian education history.

New Mexico ranks last in many national education reports. The current system is in crisis because of the state's unwillingness to reform public education. New Mexico ranks lowest among the states in child well-being in reports by Annie E. Casey Foundation. Even more alarming is the status of Native American students in our state. Native students are falling further and further behind in reading, math and science because of the continuation of a failed education policy and a lack of understanding and implementation of the New Mexico Indian Education Act (2003) by key state education officials. What has been known and voiced by education advocates is now judicially affirmed.

The court ruled that: [1]

1. The State of New Mexico, New Mexico Public Education Department (NMPED), and the Secretary of the NMPED have violated the Education Clause, the Equal Protection Clause, and the Due Process Clause of the New Mexico Constitution.

2. Defendants have violated the rights of "at-risk" students -- specifically English Language Learners (ELL), Native American Students and economically disadvantaged students -- by failing to provide them with a uniform statewide system of free public schools sufficient for their education.

    a. The state has failed to provide these students with programs and services necessary to make them college or career ready;

[1] *Yazzie, et al. v. State of New Mexico*, *et al.,* No. D-101-CV-2014-02224, First Judicial District, Decision & Order (Jul. 20, 2018) at 70-71.

b. The funding provided is not sufficient for all districts to provide the programs and services required by the Constitution; and

c. The Public Education Department has failed to meet its supervisory and audit functions to assure that money provided to districts is spent most efficiently to achieve the needs of providing ELL, Native American and economically disadvantaged students an adequate education.

Pertinent sections from the court's decision will be reviewed and explained in this paper.

## THE INDIAN EDUCATION LANDSCAPE IN NEW MEXICO

In heroic efforts over the years, Tribal leaders and advocates have labored and struggled to make inroads to build the education foundation and framework that exists today. Their advocacy is exemplified by the development and adoption of an Indian education policy and the creation of an Indian education division. Past leaders also saw the enactment of the New Mexico Indian Education Act (2003) that provides for an Assistant Education Secretary of Education, an NMIEA Advisory Council, and an NMIEA fund. Not only did they amend statutes to make Indian languages a part of the Heritage language family, but also forced the state to acquiesce to the sovereign Indian nations to develop proper criteria and standards to certify Native language teachers. Despite such headway in regaining control of the education for our future tribal generations, resources fell short to fulfill the promise of this vision.

### Policies of Assimilation

The immense efforts of past visionaries have been further thwarted with the federal education policy of No Child Left Behind and recent education reform initiatives under the state Martinez Administration that have emphasized high stakes testing and teacher evaluations that do not account for the culture, languages and history of Native American children, and have all but marginalized the foundation and framework that gave so much promise for Native students.

Tribal advocates fought to fundamentally shift the educational framework away from Indian Education policies that began in the 1890's with federal assimilation policy and the boarding school era. At that time, federal assimilation policies were used as a mechanism to "kill the Indian and save the man", thereby contributing to the annihilation of Native American languages, culture and tradition, and enabling the forced assimilation of Native Americans into mainstream American society. The federal government's failure to assimilate Indians into American culture, however, led to a shift in 1934 when the federal government, under the Johnson O'Malley Act, contracted with the states for the education of Native American students. This shift resulted in the forced integration of Indian students into public schools. Today, 90% of all Indian students in New Mexico are enrolled in public schools.

The underpinnings of assimilationist policies remain active even today. New Mexico's current Public Education Department Secretary Designate Christopher Ruszkowski recently stated that the core values drawn from Manifest Destiny are "fundamental principles of this country". Many leaders, Native and non-Native, denounced Ruszkowski's comments, pointing out the blatant disrespect these words hold for Native Americans. However, the insensitivity towards Native language, culture and history by state education leaders and other local education departments continues today in education policy. Thus, the *Yazzie* lawsuit has become the pivotal force for a large-scale movement for educational justice and equality for all disadvantaged children in the state of New Mexico.

### *Yazzie* as a Watershed Moment

Judge Singleton, presiding in the *Yazzie* lawsuit, issued her Decision and Order on July 20, 2018. The ruling finds that the State of New Mexico has failed to provide a sufficient public education to Native American students, in violation of the state's constitution.

Never before has there been such a declaration of educational rights for Native American students in any legal case in New Mexico history. The ruling affirms that the state is constitutionally responsible for ensuring that all Native American students, English language learners, and low-income students have an equal opportunity to succeed.

This decision is a defining moment in a long struggle to reform New Mexico public education and to ensure that students are receiving a sufficient multicultural education that reflects New Mexico history and culture.

## THE *YAZZIE* RULING: PUBLIC EDUCATION SUFFICIENCY

The court's ruling starts by recognizing the importance of education to our democracy and describing the fundamental nature of education is embedded within the New Mexico State Constitution that places the obligation on the state to establish and maintain "a uniform system of free public schools **sufficient** for the education of and open to all children of school age." This is known as the *education clause* of the state Constitution.[2]

The *Yazzie* litigation revolves around one main question: Is New Mexico providing students with a constitutionally sufficient education system - one that adequately prepares them to be college and career ready? The answer from the court is: no. In making this determination, the court reviewed other state cases, the New Mexico Constitutional Education Clause, and certain public education laws enacted by the New Mexico Legislature.

The following sections of this paper will explain the pertinent contents of the *Yazzie* ruling:

[2] Id. at 1-2.

## I. Standard of Sufficiency

The court's decision begins by reviewing the history of school adequacy cases across the country that have offered various methods for determining whether an education system is preparing school children to be members of civil, cultural and economic society.

The court looks to public education statutes that have been enacted by New Mexico in order to determine educational sufficiency. According to state statute, "no education can be sufficient for the education of all children unless it is founded on the sound principle that every child can learn and succeed" and "the key is to have a multicultural education plan that:

1) attracts and retains quality and diverse teachers to teach New Mexico's multicultural student population;
2) holds teachers, students, schools, districts and state accountable;
3) integrate cultural strengths of its diverse student population into curriculum with high expectations for all students;
4) recognizes that cultural diversity in the state represents special challenges for policymakers, administrators, teachers, students;
5) provides students with a rigorous and relevant high school curriculum that prepares them to succeed in college and the workplace; and
6) elevates the importance of public education in the state by clarifying the governance structure at different levels."[3]

**English Language Learners**

The court points to federal and state law that pertain to the educational needs of English Language Learner (ELL) students.

Under New Mexico's Bilingual Multicultural Education Act, for example, the Legislature mandated that the Act must ensure "equal education opportunities for students in New Mexico" and that "Cognitive and affective development of students is encouraged by:

(1) using the cultural and linguistic backgrounds of the students in the bilingual multicultural education program;
(2) providing students with opportunities to expand their conceptual and linguistic abilities and potentials in a successful and positive manner; and
(3) teaching students to appreciate the value and beauty of different language and cultures."[4]

[3] Id. at 17.
[4] Id. at 20.

Additionally, the court ruling recognizes that ELL students are entitled to certain protections and programs under the federal Equal Educational Opportunities Act (EEOA), which declares unlawful "*the failure by an education agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs*;"[5] Title III of the Every Student Succeeds Act (ESSA), which is meant to ensure ELL students are provided English language acquisition programs; and Title VI of the Civil Rights Act of 1964, which requires effective language assistance programs for Native American English learners. Importantly, the court declares that New Mexico is not meeting these requirements.

Further, the court lays out the following findings which show that the PED has failed to monitor whether ELL students are receiving adequate services:[6]

1) Director of Bilingual Multicultural Education did not know which schools were providing programs for ELL students;
2) PED was not tracking Native American ELL students and their success;
3) PED was not tracking the training of ELL teachers;
4) PED has not provided districts a framework for providing multicultural education.

The importance of multicultural school programs and quality of teaching will be discussed later in this paper.

**New Mexico Indian Education Act**

With regards to the needs of Native American students, the court looks to the New Mexico Indian Education Act (2003),[7] the purpose of which is to:

1. Ensure equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials for American Indian students enrolled in public schools;
2. Ensure maintenance of native languages;
3. Provide for the study, development and implementation of educational systems that positively affect the educational success of American Indian students;
4. Ensure that the [public education department] partners with tribes to increase tribal involvement and control over schools and the education of students located tribal communities;
5. Provide the means for a formal government to government relationship between the state and New Mexico tribes and the development of relationships with the education division of the bureau of Indian affairs, and other entities that serve American Indian students;

[5] Id at 21.
[6] Id. at 31.
[7] Id. at 22.

6. Provide the means for a relationship with state and urban American community members to participate in initiatives and educational decisions related to American Indian students residing in urban areas;
7. Ensure that parents; tribal departments of education; community-based organization; [public education department]; universities; and tribal, state, and local policymakers work together to find ways to improve educational opportunities for American Indian students;
8. Ensure that tribes are notified of all curricula development for their approval and support…"

The statute, according to the court, sets forth what a constitutionally sufficient education for Native American children in New Mexico. In effect, the failure to correctly and adequately implement the NMIEA constitutes a violation of the New Mexico State Constitution.

The NMIEA is intended to provide students a culturally relevant education "through the cooperation of schools and tribal communities," which, according to the court, "has not been realized in most districts with significant Native American student populations." The court points to a lack of culturally appropriate instructional materials, consistent vacancies at the Indian Education Division, and a failure "to develop the government-to-government relationships needed to achieve the statutory goals under the [NMIEA]."[8]

## II. Educational Clause Claims

### Educational Inputs

The Court analyzes both state inputs and student outputs in determining whether the education provided is constitutionally sufficient. The Court states that the inputs, which include instructional materials, reasonable curricula, and quality of teaching, must be linked to the inadequate student outcomes.

***Instructional Materials***

Numerous experts and witnesses testified in *Yazzie* that the funding for instructional material is inadequate. District administrators testified that, due to statewide funding cuts, schools cannot purchase adequate and up-to-date textbooks. Some parents testified that their students did not bring home any textbooks due to lack of funding by the school to provide such material.[9] Further, many tribal communities do not have adequate internet services, which compromises students' success on on-line tests like PARCC or on-line courses offered to high school students.

[8] Id. at 28.
[9] Id. at 28.

One particularly detailed aspect of inadequate instructional materials is the lack of "culturally relevant instructional materials for American Indian students," as required by the NMIEA. Experts testified that PED has not developed or provided such materials.

Representatives at the recent Pueblo Convocation identified these same issues as paramount to addressing the issues of equity for Native American students. The lack of these materials makes it impossible to fully implement Native language programs without resources for appropriate instructional materials.

***Reasonable Curricula***

Importantly, the court finds that certain programs have been shown to provide support to "at-risk" students such as pre-K, smaller class sizes, extended learning time, and after school programs. However, these programs are not offered to all students and thus "demonstrates a lack of reasonable curricula for at-risk students".[10]

One example of the insufficiency of curricula is the lack of programs to assist English language learners. The issue is further exacerbated by a lack of qualified teachers trained in Native American languages and cultures.

***Quality of Teaching and Related Issues***

The court finds that the quality of teaching for at-risk students, including Native American students, is inadequate based on the following facts: [11]

1) Districts do not have adequate resources for high quality teachers.
2) Districts with high at-risk students have high low paying teachers.
3) High poverty areas and other needs have serious difficulty recruiting and retaining high quality teachers.
4) Districts with these characteristics have high teacher turnover.
5) Impact of teacher evaluation compounds the cycle of teachers in low performing schools.

The court concludes: "There is no effective metric to evaluate teacher effectiveness, providing relevant instruction to a Native American student even as there are statutory requirements."

**Educational Outputs**

The court finds that the evidence of both student outputs (i.e. student outcomes) and State inputs proves that students are not achieving the sufficiency standard. The overall statewide statistics in the core academic areas are low on average but the statistics in these areas for Native American students are especially low and at the bottom, according to state and national

[10] Id. at 30.
[11] Id. at 33.

reports. The lack of funding for educational inputs, according to the Court, directly affects our state's educational outputs.

In the last three years, the highest rate of proficiency in reading for low income students was 21.5 percent; Native American students attained 17.6 percent proficiency; and ELL students attained 4.3 percent proficiency. Overall the proficiency rates in math from the past three years are worse, with low-income students only 14.5 percent proficient, Native American students 10.4 percent proficient, and ELL students 6 percent proficient.[12]

New Mexico continues to have one of the lowest high school graduation rates in the country. In 2013-2014, New Mexico had the lowest high school graduation rate in the country. These rates range from 54-70 percent. Native American students graduate at much lower rates, ranging from 45 to 65 percent between 2008 to 2014.

The court reports that about half of the students who graduate from high school and go to college need remedial courses in our state, which means about half of the students arriving to college are actually not college-ready. Furthermore, college students who require remedial courses are less likely to complete a degree or certificate program.

With respect to these dismal truths about the current landscape on educational output in the state for Native students, it is clear there is a systemic failure to provide an adequate education as required by the New Mexico Constitution and reform must be supported.

**Money Does Matter**

According to the court, funding matters. That is, funding – along with adequate programs, resources and supports (described above) – matters to providing students a sufficient education system. Despite the contentions by the State of New Mexico that no more funding is needed for public schools, the court states that funding is insufficient to maintain the programs and resources necessary for students. The court expressly states that a "lack of funds is not a defense to providing constitutional rights." [13] Further, the court notes there are many sources of possible revenues that have not been enacted, such as accessing the permanent fund, restructuring gross receipts taxes, increasing progressive income taxes, instating an internet sales tax, increasing alcohol, cigarette and gasoline taxes, among many other options.[14]

## III. Remedies

The court's ruling declares that State Defendants have violated the Educational Clause and the Equal Protection and Due Process clauses of the State Constitution. More specifically, the state has failed to provide students with sufficient educational programs and services to make them

[12] Id. at 39-40.
[13] Id. at 54.
[14] Id. at 57.

college or career ready, funding has not been sufficient, and the state agency has failed to provide oversight to ensure funds have been spent effectively. [15]

According to the court order, the State Defendants have until April 15, 2019 "to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career."[16] Additionally, each party is given 28 days from the date of the ruling to informally notify the court of its intention to appeal the decision.

## WHY IS THE RULING SO SIGNIFICANT?

This ruling is particularly significant to Native American students, families and communities, affirming that all students have the ability to learn. Native American students are defined by the court as part of the group of students that are "at risk" of not being college and career ready because they are not receiving the programs, resources, and services necessary for a sufficient education. The state can no longer deny them equal educational opportunities, as was seen in past decades. The court in the *Yazzie* decision vindicates student's constitutional right to a multicultural and culturally relevant education.

The decision strongly affirms that our children are deserving of the justice and equality sought in the lawsuit. The state must now answer decades of inaction. Our Native American children are just as capable and have just as much potential as any other child. We must continue to fight for the constitutional right for a sufficient education for all children.

**What's next?**

Despite this win in Court, our work is not done. It has only just begun. The outcome of the case begins the call to action of all New Mexico tribes. It is now in our hands to organize a collective effort to ensure today's generation of Native American students, as well as, future generations obtain a sufficient education guaranteed to them by the New Mexico Constitution.

The outcome of the proceedings from the recent Pueblo Convocation, including the barriers identified and the recommendations articulated, could not have been timelier and will serve to guide the efforts moving forward.

The Pueblo recommendations for early childhood education, primary, secondary and higher education and the transfer of cultural knowledge are aligned with the Court's conclusion to fulfill the State's Constitutional obligation to Native American students.

The Court has spoken and it has spoken in our favor.

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[15] Id. at 70-71.
[16] Id. at 74.