

# COVID-19 Does Not Suspend School Districts' Obligations to Special Needs and At-Risk Students

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## Introduction

- ❑ PED allows districts to return small groups of Pre-K through 3rd grade, special education and at-risk students for in-person instruction, even during remote learning, but leaves the ultimate decision to the districts. School decisions about serving those students during this time is particularly challenging and has resulted in at least one important court decision about which school leaders should be aware.



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## ***Hernandez v. Grisham – Background Facts***

- ❑ This lawsuit was filed on September 16, 2020 against the Governor, the Secretary of Education, and the Secretary of Health, and not against any individual school district.
- ❑ The Plaintiffs in this case are:
  - ❑ Ms. Woodworth who is the parent of a child with a disability under the IDEA, on an IEP and eligible to receive special education services.
  - ❑ Mr. and Mrs. Hernandez who are the parents of four school age children (ages 8-15) in Lea County.
  - ❑ Mr. Gallegos who is a State Representative and Board Member on the Eunice Public Schools BOE.
- ❑ Plaintiffs sought certification as a class.



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## ***Hernandez v. Grisham – Legal Claims***

- ❑ Constitutional:
  - ❑ Equal Protection Right.
  - ❑ Substantive Due Process Right to a Free Appropriate Public Education (FAPE).
  - ❑ Procedural Due Process Right.
- ❑ Individuals with Disabilities Education Act (IDEA) Right to a Free Appropriate Public Education (FAPE).



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## ***Hernandez v. Grisham* – First Ruling (10/14/20)**

- ❑ The *Hernandez I* decision is on the Plaintiff's Emergency Motion for a Temporary Restraining Order. The decision is 83 pages long.
- ❑ TROs are predictive. State acknowledged that not all students with disabilities will succeed in a remote learning environment. Reentry guidance allows schools to provide in-person learning to special needs children "pursuant to their IEPs during remote instruction."
- ❑ State argues that Plaintiffs must exhaust administrative remedies under IDEA by filing complaints against their local school district.
- ❑ State argues: "the school districts district is actually the proper defendant in this case." "[T]he grievance here is that the LEA is not doing what it's permitted to do under the applicable public education department guidelines."



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## ***Hernandez v. Grisham*– First Ruling (10/14/20)**

- ❑ Court refused to certify a class.
- ❑ Court concludes that the Constitutional claims are unlikely to succeed on the merits because:
  - ❑ The reentry guidance is rationally related to a legitimate State interest;
  - ❑ Plaintiffs have not demonstrated that a discriminatory purpose motivated the Defendants' reentry guidance;
  - ❑ Defendants have not denied adequate public education to the Plaintiffs;
  - ❑ Reentry guidance is quasi-legislative.



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## ***Hernandez v. Grisham – First Ruling (10/14/20)***

- ❑ Court granted Woodworth a TRO because the Court found she is likely to succeed on her claim that her IEP violates the IDEA.
- ❑ “Woodworth’s child has ‘an individual education program (IEP)’ and ‘has not been provided with many’ of her IEP services “since school was shut down.”
- ❑ “Woodworth’s daughter has ‘regress[ed]’ since schools closed for in person instruction and ‘is now failing in her courses.’”



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## ***Hernandez v. Grisham– First Ruling (10/14/20)***

- ❑ Secretary Stewart ordered to direct Woodworth’s daughter’s school district to amend her IEP to ensure that the IEP is reasonably calculated to ensure she receives educational benefits, and so that she receives a FAPE under the IDEA.
- ❑ “[T]he Court is not instructing the Defendants to fully re-open schools, which could increase the risk of COVID-19 transmission. Instead, the Court concludes that, in spite of the ongoing pandemic, Secretary Stewart must provide Woodworth’s daughter with a ‘free and appropriate public education’ as the IDEA requires. This might include in person instruction provided in small groups, with appropriate precautions including social distancing. In such circumstances, the educational benefit to the child would outweigh the relatively low risk of contagion.”



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## ***Hernandez v. Grisham – First Ruling (10/14/20)***

Other Key Quotes:

- ❑ “[T]he IEP declined to provide Woodworth’s daughter with any in person services due to a misinterpretation of ‘state health regulations.’”
- ❑ “Given her lack of progress under remote instruction, it is likely that Woodworth’s daughter’s IEP is not ‘reasonably calculated to ensure she receive educational benefits.’”
- ❑ “Here, because Woodworth’s daughter is not progressing under remote instruction, it is likely that she could demonstrate on the merits that she is not receiving a FAPE in violation of the IDEA.”



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## ***Hernandez v. Grisham – Second Ruling (11/05/20)***

This Second Ruling is on Defendants’ Motion to Dismiss—

- ❑ Plaintiffs voluntarily dismissed the State and Secretary Kunkel.
- ❑ Court concludes Plaintiffs have standing to sue Secretary Stewart, reasoning:
  - ❑ “[T]he PED has issued the reentry guidance and controls the reentry process.”
  - ❑ “New Mexico law explicitly authorizes the PED to issue the Reentry Guidance.”
  - ❑ “The PED is vested with the powers and duties related to the control, management, and direction of all public schools in this state.”
  - ❑ “The PED determines the policies for the operation of all public schools.”



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## **Hernandez v. Grisham – Second Ruling (11/05/20)**

- ❑ Court concludes Plaintiffs have standing to sue Governor Grisham, reasoning:
  - ❑ “Governor Grisham has supreme executive power and a duty to take care that New Mexico’s laws are faithfully executed.”
  - ❑ The Court cites to the Governor’s “heavy involvement in the State’s education policy.”
  - ❑ “[T]he Governor can direct the PED to amend the reentry guidance.”



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## **Hernandez v. Grisham – Second Ruling (11/05/20)**

- ❑ Other Key Quote:
  - ❑ “The Court disregards the Plaintiffs’ bare allegations of improper motive as to Governor Grisham -- that the school closures ‘were done in retaliation for punitive purposes based upon a perception that these communities were defying the authority of the Governor.’”



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## Hernandez v. Grisham – Third Ruling (12/23/20)

- ❑ Summary Judgment:
- ❑ This dismisses the Constitutional Claims. In dismissing these claims, the Court reasoned:
  - ❑ “Summary administrative action is justified in emergency situations to protect public health and safety, and the reentry guidance is quasi-legislative.”
  - ❑ “Neither [the Governor nor Secretary] have infringed on the Plaintiffs’ fundamental rights, nor deprived the Plaintiffs of life, liberty, or property in a manner so arbitrary that the actions shock the conscience.”
  - ❑ The Governor and Secretary “have not infringed upon the Plaintiffs’ fundamental rights.”
  - ❑ “Limiting in-person interactions in an effort to mitigate the pandemic’s spread -- is neither egregious nor outrageous.”
  - ❑ “The reentry guidance is rationally related to the Defendants’ legitimate state interest in stopping COVID-19’s spread.”
  - ❑ “[T]here is no genuine issue of material fact that a discriminatory purpose motivated the defendants’ reentry guidance.”



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## Hernandez v. Grisham – Third Ruling (12/23/20)

- ❑ Are Woodworth’s IDEA claims moot, because Woodworth’s IEP team reconvened following *Hernandez I* to create a new IEP for Woodworth which aims to provide her with a FAPE under the IDEA?
- ❑ Court rules: “Woodworth’s IDEA claims are moot, because her updated November 3, 2020, IEP does not contain purely legal errors.”
  - ❑ “In *Hernandez I*, the Court concluded that J.W.’s September 10, 2020 IEP ‘contains ‘purely legal’ errors,’ therefore, the Court ordered Secretary Stewart to instruct J.W.’s LEA to amend her IEP ‘so that the amended IEP is ‘reasonably calculated to enable [Woodworth’s daughter] to make progress.’”



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## **Hernandez v. Grisham – Third Ruling (12/23/20)**

- ❑ Court cites to “The TJ Parks Letter” from the Secretary:
  - ❑ “I ... direct the district reconvene the IEP team for Ms. Woodworth’s daughter and review whether the IEP provides the student with a free appropriate public education under the applicable legal standard as articulated in *Endrew F.* I further direct the district ensure that the IEP team and parent receive a copy of the Public Education Department’s Reentry Guidance. The Reentry Guidance allows the district to provide students with disabilities in-person instruction in small groups (5:1 student/teacher ratio). The Reentry Guidance permits in-person instruction for students with disabilities even when a school district is in the remote instruction category. This option has been available to the district since August 3, 2020. I therefore request the IEP team consider the Reentry Guidance during its review of the student’s IEP.”



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## **Hernandez v. Grisham – Third Ruling (12/23/20)**

- ❑ Having addressed the State legal issues, “remedies for violations of FAPE must be individualized and proceed via the administrative process.”
- ❑ The Court rejects other IDEA legal arguments against the Governor and Secretary, reasoning:
  - ❑ “The LRE provision’s text indicates that remote instruction does not violate the IDEA’s presumption against removing children with disabilities from the regular educational environment.”
  - ❑ “The IDEA’s legislative history indicates that remote instruction is a ‘regular educational environment’ under the LRE provision when children without disabilities are receiving a remote education.”



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## ***Hernandez v. Grisham – Third Ruling (12/23/20)***

- ❑ Where does this leave the local school district and school board?
  - ❑ “Some children with IEPs can receive a FAPE through remote instruction; some cannot. Regardless, the IDEA requires funding recipients to provide children with disabilities with a FAPE, even if that means providing in-person learning during a pandemic.”



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## ***Hernandez v. Grisham – Current Status***

- ❑ The case was appealed to the Tenth Circuit on December 23, 2020.
- ❑ Appeal is pending.



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## Duty to Provide a FAPE during COVID-19?

- ❑ Not Waived.
- ❑ "A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)." 34 C.F.R. § 300.101(a).
- ❑ FAPE means "special education and related services that— ... Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324." 34 C.F.R. § 300.17(d).



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## ***Andrew F. v. Douglas County Sch. Dist. RE-1, 69 IDLER 174 (U.S. 2017)***

- ❑ Unanimous Supreme Court decision.
- ❑ Outlined what "Free Appropriate Public Education" means for students who are not expected to perform at grade level.
- ❑ IEP is to be:
  - ❑ "Appropriately ambitious,"
  - ❑ Include "challenging objectives,"
  - ❑ "Individually crafted," and
  - ❑ "Reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."
- ❑ IEP members must be prepared to give a "cogent and responsive explanation" of their proposed programs and services in every IEP.



## What did the State Permit (Timeline)? March 12-April 3, 2020

- ❑ March 12-April 3, 2020: New Mexico Schools to Temporarily Close.
  - ❑ Measures were taken after six presumptive positive tests of COVID-19.
  - ❑ "All New Mexico public schools shall close beginning March 16, 2020 and shall not reopen until April 6, 2020 due to the public health emergency already declared in Executive Order 2020-004." Executive Order 2020-005.
  - ❑ No services owed to the general student population.
  - ❑ Some school districts provided resources to students/families.
  - ❑ Some school districts provided remote instructional services.



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## Duty: March 12-April 3, 2020

*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, 76 IDELR 77 (U.S. Dept. of Educ., March 12, 2020).*

- ❑ "If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time."
- ❑ "If an LEA continues to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 CFR §§ 104.4,104.33 (Section 504) and 28 CFR § 35.130 (Title II of the ADA))."



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## Duty: March 12-April 3, 2020

*Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, 76 IDELR 104 (OCR, March 21, 2020).*

- ❑ “Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services – or even making decisions about how to provide services - IEP teams (as noted in the March 12, 2020 guidance) must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.”



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## What did the State Permit (Timeline)? April 6, 2020-End of School Year

- ❑ **April 6, 2020-end of school year:** New Mexico Schools to shift to a learn-at-home model under a Continuous Learning Plan.
- ❑ Measure taken March 27, 2020 after 136 confirmed positive COVID-19 cases.
  - ❑ Continuous learning to focus on critical standards and the skills needed for grade advancement.
  - ❑ Direct instruction limited:
    - ❑ Pre-K: 30 minutes.
    - ❑ Grades K-1: 45 minutes.
    - ❑ Grades 2-3: 60 minutes.
    - ❑ Grades 4-5: 90 minutes.
    - ❑ Grades 6-12: 30 minutes per teacher (3 hours max in a day).



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## Duty: April 6, 2020-End of School Year

NMPED FAQ (3/27/2020):

- ❑ "Individualized Education Programs (IEPs) may NOT be universally modified. There is no waiver from IDEA requirements, including IEP and eligibility timelines. Schools should take into consideration alternate methods for providing educational services to children with disabilities age 3-21 who are receiving IEP services, such as, teleservices, learning packets, or virtual/online lessons."
- ❑ "Special education teachers and related service providers will continue to work on IEP and evaluation paperwork within required timelines. IEP meetings may be held via phone or in another video conferencing format such as Zoom or Google Hangouts as appropriate."



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## Duty: April 6, 2020-End of School Year

NMPED FAQ (3/27/2020):

- ❑ "LEAs must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP."
- ❑ "PED recognizes there are students with complex needs for whom the virtual/on-line program may not be a feasible option, even with additional accommodations or modifications. The IEP team will need to discuss and document within the IEP or an addendum the agreed upon alternative plan for providing the requisite special education and related services to those students through Prior Written Notice (PWN)."



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## What did the State Permit (Timeline)? 2020-2021 School Year

- ❑ Remote
- ❑ Phase In to Hybrid
- ❑ Hybrid
- ❑ Full Reentry
- ❑ "What about Special Education? Special education services are expected to continue as stated in a student's Individualized Education Plan (IEP). In a Remote or Hybrid model, schools are encouraged to allow small groups of students with disabilities to access the school building in order to receive small group or individualized in-person services." *NMPED Back-to-School FAQs* (Updated July 23, 2020):



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## What did the State Permit (Timeline)? August 3-September 8, 2020

*NMPED Back-to-School FAQs* (Updated July 23, 2020):

1. Districts and schools may choose to begin remote learning opportunities as early as August 3, 2020. Schools may adjust their calendars to maximize in-person learning, if they so choose.
2. Districts and schools may begin a phased-in, hybrid approach on or after September 8, 2020. The phased approach will prioritize in-person learning for elementary students, gradually building to welcoming middle and high school students, as it is determined safe to do so.
3. Exceptions to the in-person delay include small group instruction for students receiving special education or early intervention (specifically those in need of support with literacy) services. ...



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## What did the State Permit (Timeline)? August 3-September 8, 2020

*NMPED Back-to-School FAQs (Updated July 23, 2020):*

4. Schools must still follow the requirements for reentry. The reentry guidance document published by PED is intended to serve as a framework for our districts and schools as they craft plans for school reentry that meet the unique needs and experiences of their communities, while keeping children, families, educators, and communities safe and healthy.
5. The PED will establish virtual professional development for districts and charter schools. The offerings will come at no cost to schools and will include targeted support, resources, and guidance for educators and families as we prepare for the remote and hybrid learning models.



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## What did the State Permit (Timeline)? September 8, 2020 to Present

*NM Secretary of Education Memorandum (September 3, 2020):*

- ❑ "Schools and districts are eligible to return to in-person learning for elementary students after Labor Day if they:
  - are located in a county in the "green zone" on the public health map
  - have a PED approved reentry plan
  - have the superintendent or charter leader sign and return an assurance to abide by safety protocols outlined in PED guidance."
- ❑ No dates yet for Middle School and High School Students to Return.
- ❑ Small group instruction (5:1) for special education and PreK – 3<sup>rd</sup> grade permitted in red.



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## Duty: 2020-2021 School Year

*NMPED Special Education Services Reentry Guidance (July 2020).*

- ❑ “During this period of extended school closure and re-opening, the FAPE obligation includes:
  1. Reviewing the appropriateness of the Individualized Educational Program (IEP) in effect when a change in service delivery model occurs or when student progress monitoring indicates a lack of progress; and
  2. Addressing the need for compensatory education and/or recovery services if there is a loss of FAPE. Depending on the process adopted by the schools to re-open school buildings, these responsibilities may need to be revisited multiple times.”



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## Applicable Legal Concepts

- ❑ Nondiscrimination and Equal Educational Opportunity.
- ❑ FAPE.
  - ❑ Compensatory Education (equitable remedy for denial of FAPE).
  - ❑ ESY (based on needs of the child, not a remedy for a denial of FAPE).
  - ❑ New Concepts being introduced into our Lexicon.
    - ❑ Mitigation Services (preventative to offset the need for recovery services; not necessarily an individualized decision).
    - ❑ Recovery Services (after need is individually determined, not a remedy for a denial of FAPE).



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## Recovery Services

*NMPED Special Education Services Reentry Guidance (July 2020).*

- ❑ "Compensatory education is a remedy available under the IDEA for a denial of FAPE. Compensatory education services are traditionally awarded when schools have failed to meet their legal obligations."
- ❑ "In contrast, the impact of the school closure on the student's progress due to COVID-19 presents a different challenge because all students in the state were experiencing a different educational program regardless of disability."



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## Recovery Services

*NMPED Special Education Services Reentry Guidance (July 2020).*

- ❑ "NMPED recognizes that during this period of extended school closure and heightened health and safety needs, schools may not have been able to provide some specially designed instruction, related services, and supplementary aids and supports provided to students before the school closures. Although this may have occurred through no fault of the schools, the obligation to provide a student with a FAPE remains, and the student may require services to address the student's specific and unique needs."
- ❑ "NMPED has chosen to refer to these services as 'compensatory education and/or recovery services' to both acknowledge the uniqueness of the situation, but also to remind the schools that the compensatory education determination process remains the same."



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## Pandemic Pandemonium

- ❑ December 11, 2020—"State Announces Temporary School Closure after Winter Break...No in-person learning will be permitted during the weeks of January 4 and January 11, 2021. ...those operating small-group instruction in the remote stance may also begin welcoming their 5:1 groups of K-3 and Special Education students back to school beginning January 18, 2021."
- ❑ December 17, 2020—"WINTER BREAK REMINDERS"
  - In-person student services are not permitted from Jan. 4 through Jan. 17.
  - Exception: Students with disabilities may return for small-group (5:1) instruction."



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## Where do we stand now? Emergency Rules and Special Needs Students

- ❑ "Remote operating category" means "the instructional model that requires all students to engage in online learning, with limited possible exceptions for small groups of students with disabilities and students in grades pre-kindergarten through grade three to engage in in-person learning, such as students receiving special education services. The student to teacher ratio in small groups shall be provided in department guidance. Schools should take all practical measures to provide each student with a digital device and to provide support for in-home connectivity." 6.12.14.7(H) NMAC (N/E 12/3/2020; A/E 1/29/2021).



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## Where do we stand now? Emergency Rules and Special Needs Students

- ❑ LOCAL SCHOOL DISTRICTS AND PUBLIC SCHOOLS OPERATING UNDER THE REMOTE OPERATING CATEGORY:
- ❑ "COVID-19 safe practices. ... If feasible, local school districts and public schools may permit school buildings to remain open for limited numbers of students and staff to continue in-person instruction and services for students in prekindergarten to third grade and for students with special needs, at a maximum ratio of five students to one teacher." 6.12.14.9(A)(3) NMAC (N/E 12/3/2020; A/E 1/29/2021).
- ❑ "COVID-19 safe practices. ... Transportation of Students. If feasible, local school districts and public schools shall transport students with special needs and students in prekindergarten through third grade who still may be physically attending school on a limited basis." 6.12.14.9(B) NMAC (N/E 12/3/2020; A/E 1/29/2021).



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## Prioritization of Students with Disabilities for In-Person Learning

- ❑ "As schools expand eligibility for in-person learning, PED encourages all schools to prioritize students with disabilities for in-person instruction. To the extent possible, PED encourages schools to make in-person learning services available to students with disabilities each day that the school building is open. The Department will consider requests from schools and districts for increased flexibility within the in-person learning limits that would enable the school or district to make in-person learning services available to students with disabilities on a greater percentage of school days. Information on the waiver process will come in a separate communication in the near future."



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## Where do we stand now? Emergency Rules and At-Risk Students

- ❑ SUPPORTS AND SERVICES FOR AT-RISK STUDENTS:
- ❑ "All local school districts and public schools in the **remote operating category** shall consider additional support for at-risk students, including . . . implementing small group instruction in order to meet students' individual learning needs . . . [and] considering bringing Special Education students to school for services that cannot be provided remotely or implemented during distance learning." 6.12.14.12(A) NMAC (N/E 12/3/2020).
- ❑ "All local school districts and public schools in the **hybrid operating category** shall consider additional support for at-risk students, including . . . prioritizing scheduling for English language learners, Native American students and students with disabilities . . . and consider allowing small groups of special education students to continue in-person instruction." 6.12.14.12(B) NMAC (N/E 12/3/2020).
- ❑ "All local school districts and public schools in the **full reentry operating category** shall consider additional supports for at-risk student[s], including considering all the regular aspects of schooling, such as designated English language development time for special education students . . . [and] implementing small group instruction in order to meet students' individual learning needs." 6.12.14.12(C) NMAC (N/E 12/3/2020).



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## Martinez/Yazzie Implications

- ❑ In December 2020, the *Martinez/Yazzie* plaintiffs filed a motion for further relief concerning PED's "failure to provide essential technology to at-risk public school students," stating that the COVID-19 pandemic "has exacerbated . . . opportunity gaps." The plaintiffs requested the court order the State to provide computers and high-speed internet access to at-risk students during the COVID-19 pandemic.
- ❑ PED responded that school districts have not utilized funding streams already in place for technology, and should do so before seeking redress from the court.
- ❑ The court has not yet ruled on this issue.
- ❑ School districts should continue to address the needs of at-risk students and ensure that all students are receiving the necessary programs and services.



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## ***Hernandez v. Grisham* – Other Findings with Implications for School Districts and School Boards**

- ❑ The Court's findings on the Impact of School Closures on Children—
  - ❑ "For some students, remote learning is not an effective model for learning."
  - ❑ "Online education for school age children 'is not a substitute for in-person learning and socialization in a school setting.'"
  - ❑ "School closures 'can lead to severe learning loss, and the need for in-person instruction is particularly important for students with heightened behavioral needs.'"



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## ***Hernandez v. Grisham* – Other Findings with Implications for School Districts and School Boards**

- ❑ "New Mexico has some of the lowest rates of broadband access in the nation."
- ❑ "New Mexico ranks forty-eighth nationally with respect to households with broadband internet."
- ❑ "Approximately twenty-six percent of households in New Mexico do not have broadband."
- ❑ "Further, nine percent of New Mexicans cannot purchase broadband, because they live in an area without broadband capacity."



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