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MONTANA EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CASCADE

SHAUNA YELLOW KIDNEY, as next friend of C.Y.K. and S.Y.K.; CAMMIE DUPUIS-PABLO and ROGER PABLO, as next friends of K.W.1, K.W.2, K.D., K.P.1, and K.P.2; HALEIGH THRALL and DURAN CAFERRO, as next friends of A.E., D.C., and C.C.; AMBER LAMB, as next friend of K.L.; RACHEL KANTOR, as next friend of M.K.1, and M.K.2; CRYSTAL AMUNDSON and TYLER AMUNDSON, as next friends of C.A. and Q.A.; JESSICA PETERSON, as next friend of A.C.; and DAWN SKERRITT, as next friend of S.S. and M.S; on behalf of themselves and all others similarly situated, FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION OF MONTANA; CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION; ASSINIBOINE AND SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION, MONTANA; NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, MONTANA; LITTLE SHELL TRIBE OF CHIPPEWA INDIANS OF MONTANA; and CROW TRIBE OF MONTANA Plaintiffs, vs. MONTANA OFFICE OF PUBLIC INSTRUCTION; ELSIE ARNTZEN, in her official capacity as the Superintendent of Public Instruction; MONTANA BOARD OF PUBLIC EDUCATION; and DARLENE SCHOTTLE, in her official capacity as Chairperson of the Montana Board of Public Education, Defendants.	Cause No. DDV-21-0398 Hon. John W. Parker **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

The people who in 1972 approved the Montana Constitution's Indian Education Clause, Art. X, section 1(2), and who in 1999 enacted the Indian Education For All (IEFA) Act, § 20-1-501, MCA (hereinafter the "Indian Education Provisions" or "Provisions"), expressed their clear and unambiguous intent that *every* Montana public school student will learn about the distinct and unique cultural heritage of American Indians. Achieving that salutary purpose, however, requires that state education agencies and their officials—the Defendants herein—perform the constitutional and statutory duties assigned to them, as otherwise these Provisions can be eviscerated and largely rendered nugatory (which is precisely what is occurring). This lawsuit seeks to ensure that the intent of the Provisions is effectuated.

STANDARD OF REVIEW

Montana is a notice-pleading state and requires only that a complaint set forth a "short, plain statement of the claim." M. R. Civ. P. 8. When considering a motion to dismiss under M. R. Civ. P. 12(b)(6), "all well-pleaded allegations and facts in the complaint are admitted and taken as true, and the complaint is construed in a light most favorable to plaintiff." *Sinclair v. Burlington N. & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 2000 P. 3d 36 (citation omitted). Rule 12(b)(6) motions are disfavored and rarely granted. *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 32 P.3d 1250. A court should not grant dismissal unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle them to relief. *Poeppel v. Flathead Cnty.*, 1999 MT 130, ¶ 17, 294 Mont. 487, 982 P.2d 1007. Plaintiffs have met their burden by pleading factual allegations in their Amended Complaint that unequivocally withstand Defendants' motion to dismiss.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable.[1]

A. Plaintiffs Have Case-Or-Controversy Standing.

To establish case-or-controversy standing, a plaintiff must show that the plaintiff "has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining that action." *Weems v. State*, 2019 MT 98, ¶ 9, 395 Mont. 350, 440 P.3d 4 (internal quotation marks omitted). The alleged injury must be "concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; . . . redressable; and distinguishable from injury to the public generally." *Bullock v. Fox*, 2019 MT 50, ¶ 31, 395 Mont. 35, 435 P. 3d 1187. "A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." *Weems*, ¶ 9. When an "alleged injury 'is premised on the violation of constitutional and statutory rights, standing depends on whether the constitutional or statutory provisions . . . can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 11, 389 Mont. 122, 406 P.3d 427 (internal citation omitted).

1. Plaintiffs Properly Allege Injuries-In-Fact.

Defendants cite to a few of Plaintiffs' alleged injuries and then baldly claim that all of Plaintiffs' factual averments are "not cognizable," "vague," or "conclusory." Defs.' Br. at 3-4. Defendants fail to cite a single case which finds that the injuries alleged by the Plaintiffs are

[1] Defendants challenge the standing of only the Individual Plaintiffs and not the Tribal Plaintiffs. Therefore, this Court should deem Defendants' motion as a partial motion to dismiss. Further, if the Court finds that any Individual Plaintiffs lack standing, the case should proceed on behalf of the remaining Individual Plaintiffs and the Tribal Plaintiffs. *See Knows His Gun v. Montana*, 866 F.Supp.2d 1235,1235-38 (D. Mont. 2012) (allowing some plaintiffs with standing to pursue their claims even where others lacked standing to do so).

insufficient to establish claims upon which relief can be granted, nor can such a case be found. The Individual Plaintiffs have set forth specific types of harm – including the loss of their Article X right to an education that "recognizes the distinct and unique cultural heritage of the American Indians" and the loss of a similar right under the IEFA, as well as ostracization, racism, stereotyping, bullying, feelings of danger, lack of cultural awareness, and discrimination – that they have suffered and are continuing to suffer. Pls.' Am. Compl., ¶¶ 10, 11, 14, 15, 18, 19, 22, 23, 26, 27, 30, 31, 34, 35, 38, 39, and 40.

Although Defendants are unable to understand the depth and gravity of these immense injuries, the injuries are proper injury-in-fact allegations that are demonstrably sufficient, particularly under Rule 12(b)(6)'s deferential pleading standard, to satisfy case-or-controversy standing. *See Weems*, 2019 MT 98, ¶ 14 (finding standing for case-or-controversy purposes of claims to go forward for adjudication where plaintiffs are "plainly impacted" by a statute at issue); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (for standing purposes, an allegation of injury-in-fact consists of a sufficiently concrete interest in the outcome of the case); *accord Barnum Timber Co. v. U.S. Environmental Protection Agency*, 633 F.3d 894, 898 (9th Cir. 2011) (a specific, concrete, and particularized allegation of harm is sufficient to demonstrate the injury-in-fact element of [case-or-controversy] standing at the pleading stage).

2. The Injuries Are Traceable to Defendants.

The second case-or-controversy standing requirement is causation, which requires that the alleged injuries be "fairly traceable" to a defendant's injurious actions or conduct. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80, ¶ 32. Causation or traceability may be established "even if there are multiple links in the chain… as long as the chain is not hypothetical or tenuous." *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020)

(internal quotations and citations omitted). Plaintiffs need only allege facts demonstrating that defendants' acts or omissions are "substantial factor[s] in causing Plaintiffs' injuries." *Id*. Further, causation or traceability may be established even if a defendant was one of multiple sources of the injury. *WildEarth Guardians v. U.S. Dep't of Ag.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[s]o long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."). This authority easily disposes of Defendants' arguments, Defs.' Br. at 4-6, that Montana school districts or "other students" are the injurers of Plaintiffs; even if school districts or other students are at fault, that does not defeat Defendants' status as injurers.

Defendants' argument, Defs.' Br. at 4-6, that the IEFA imposes no obligations on them is belied by the plain language of the statute itself. As discussed more fully below, the IEFA expressly provides that "*every* educational agency and *all* educational personnel *will* work cooperatively with Montana tribes." § 20-1-501(2)(b), MCA (emphasis added). "Will" is clearly a mandatory term, and the terms "every" and "all" are universally inclusive, not limitative, and there is no evidence of any legislative intent to exclude state agencies or state officials from within the ambit of those commands.

Further, even if school districts have their own obligations under the Indian Education Provisions, that does not negate the obligations of Defendants.[2] It is hardly unusual for a legislature to assign different duties to different levels of government; indeed, Montana's entire educational

[2] Defendants make the outlandish claim that the "IEFA statute notably contains no mention of Defendants when it says it is the intent of the legislature that 'every educational agency and all educational personnel will work cooperatively with Montana tribes.'" Defs.' Br. at 5, *citing* § 20-1-501(2)(b), MCA. The IEFA statute does not define "educational agency," but the Office of Public Instruction (OPI) and Montana Board of Public Education (MBPE) are "educational agenc[ies]" under any plain understanding of the term, and Defendants Arntzen and Schottle surely are "educational personnel."

system depends on state and local agencies fulfilling their respective duties. *See, e.g., Wandering Medicine v. McCulloch*, 2014 WL12588302, *4 (D. Mont. Mar. 26, 2014) (noting that even though counties have certain duties to ensure the right to vote, the Montana Secretary of State "has the 'responsibility to obtain and maintain uniformity in the application, operation and interpretation of election laws.'")

In sum, Plaintiffs' alleged injuries are sufficiently traceable to Defendants' acts and omissions. *See Nw. Env't Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 967–68 (D. Or. 2006) (case-or-controversy "'fairly traceable' element does not require that a plaintiff show to a scientific certainty" at the pleading stage that plaintiff's injury is the direct result of defendant's acts and the "fairly traceable" requirement 'is not equivalent to a requirement of tort causation'"). As further discussed below, Defendants have failed multiple obligations under the Indian Education Provisions. Because of these failures, implementation of the Provisions is incomplete, inconsistent, or non-existent, and both the Individual Plaintiffs and Tribal Plaintiffs are harmed as a result. Unlike the cases Defendants cite such as *Allen v. Wright*, 468 U.S. 737, 758 (1984) (holding that it was "entirely speculative … whether the withdrawal of a tax exemption from a particular school would lead the school to change its policies"), and *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (holding that Plaintiffs' allegations that an action might "encourage" or "discourage" behavior" were "purely speculative"), there is nothing "attenuated" or "speculative" about the line of causation between Defendants' acts and omissions and Plaintiffs' injuries here. To the contrary, Defendants are directly and substantially responsible for Plaintiffs' injuries.

3. Plaintiffs' Injuries Are Redressable.

Finally, case-or-controversy standing requires that the alleged injuries are "of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28,

¶ 46, 394 Mont. 167, 434 P.3d 241 (citation omitted). This requirement is also known as redressability. *See Bullock*, 2019 MT 50, ¶ 31. A request for statutory interpretation generally meets this requirement, *Doty v. Montana Comm'r of Political Practices*, 2007 MT 341 ¶ 21, as does a request for declaratory relief that a defendant's acts or omissions are unlawful. *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶ 17, 379 Mont. 142, 347 P.3d 1287. These are precisely the remedies Plaintiffs here seek, and that this Court has the authority to grant under §§ 27-8-101 *et seq.*, and §§ 27-19-101 *et seq.*, MCA.

Defendants' arguments, Defs.' Br. at 7-8, that Plaintiffs seek broad programmatic relief or agency judicial supervision are erroneous. Plaintiffs, as discussed below, seek merely declarations of the existence of Defendants' constitutional and statutory obligations with respect to the Indian Education Provisions, as well as declarations that Defendants have not complied and must comply with those obligations. Nor does relief potentially available to Plaintiffs under other statutes and causes of action to which Defendants refer, Defs.' Br. at 8-9 (*e.g.*, civil rights claims), preclude the relief sought in this case for purposes of determining case-or-controversy standing. Defendants cite no authority for the proposition that merely because a remedy might be available under a different theory, the court must dismiss a properly pled claim.

B. Plaintiffs Have Prudential Standing.

In addition to case-or-controversy standing, plaintiffs in Montana courts must satisfy prudential standing requirements. *Bullock*, 2019 MT 50, ¶ 28.[3] Defendants confine their lack-of-prudential-standing argument to Plaintiffs' claims under the Indian Education Clause. Defendants

[3] Weighing against prudential standing policy limitations is "the importance of the question to the public" and where "the statute at issue would effectively be immunized from review if the plaintiff were denied standing." *Heffernan*, ¶ 33 (citations omitted). Both factors weighing against dismissal on the basis of prudential standing are present here.

rely on two of six tests set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), for determining whether claims are precluded from judicial review because they raise non-justiciable political questions. Defendants argue that the Montana Constitution commits the Indian Education Clause to the Legislature, and that the Indian Education Clause lacks judicially discoverable and manageable standards. Defs.' Br. at 9-13. Neither argument has merit.

1. The Indian Education Clause Is Self-Executing and Not Committed to the Legislature.

The Indian Education Clause is self-executing. Non-self-executing constitutional clauses typically include a specific directive to the legislature. As Defendants correctly note, "[t]o determine whether a provision is self-executing, [courts] ask whether the Constitution addresses the language to the courts or to the Legislature." Defs.' Br. at 10. For example, Mont. Const. art. X, §1(3) provides: "*The legislature shall* provide a basic system of free quality public elementary and secondary schools." (emphasis added).

However, in clear contrast to § 1(3), the Indian Education Clause provides no directive to the Legislature. Rather, it provides that the entire *state* "recognizes the distinct and unique cultural heritage of the American Indians and is *committed* in *its* educational goals to the preservation of their cultural integrity." Mont. Const. art. X, § 1(2) (emphasis added). This command is self-executing. Indeed, in *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 58, 769 P.2d 684, 693 (1989), *amended*, 236 Mont. 44, 784 P.2d 412 (1990), the Court, after noting that Section § 1(2) "establishes a special burden in Montana for the education of American Indian children," expressly "invite[d] the attention of the Legislature *and the executive branch* to Montana's failure to meet the federal equalization requirements." (emphasis added).

Moreover, the Legislature itself has recognized that *the state* has undertaken a binding commitment to implement the Indian Education Clause. The Preamble to the IEFA declares:

"WHEREAS, as part of *the state's* educational guarantees, the people of Montana in 1972 included Article X, section 1(2), in the state constitution, recognizing the distinct and unique cultural heritage of American Indians and expressing *the state's* commitment to preserve that cultural integrity through education." Mont. H.R. 528, 56th Leg. Sess. (Apr. 29, 1999) (emphasis added). The Montana Supreme Court recognized this same imperative in *Columbia Falls Elementary Sch. Dist. No. 6. v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257: "The District Court concluded that *the State* has failed to recognize the distinct and unique cultural heritage of American Indians and that it has shown no commitment in its educational goals to the preservation of Indian cultural identity, *as demanded by Article X, Section 1(2).*" ¶ 35 (emphasis added).

Under both the Indian Education Clause and the IEFA, it is the state that has the responsibility, not solely the State Legislature.[4] Defendants, the very agencies charged under Montana law with providing public education in Montana, are asking this Court for permission to evade a significant portion of their constitutional and statutory duties. This Court should not grant this request.[5]

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[4] Based on this authority, Defendants' argument that the Indian Education Clause is "purely aspirational," Defs.' Br. at 12, must be rejected. Notably, in arguing that the Clause is "purely aspirational," Defendants focus exclusively on the word "goals." *See* Defs.' Br. at 11-12. But that argument ignores the actual wording, which states: "The state . . . is *committed in* its educational goals…" (Emphasis added.) The Constitution creates a commitment, not merely a goal.

[5] Even assuming, *arguendo*, that the Indian Education Clause is not self-executing, Plaintiffs' claims here nevertheless are justiciable. For example, in *Columbia Falls*, which involved a constitutional section (art. X, § 1(3)) which has a clear directive to the legislature, the Court nevertheless deemed the case justiciable because "once the Legislature has acted, or 'executed,' a provision… that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls*, ¶ 17. "[A]lthough the [constitutional] provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution.'" *Columbia Falls*, ¶ 18. The IEFA's enactment supports the same result here.

2. There Are Sufficient Judicial Standards for Plaintiffs' Indian Education Clause Claims.

"Where there is … a lack of judicially discoverable and manageable standards for resolving" an issue, the issue is not properly before the judiciary under prudential standing requirements. *Bullock,* 2019 Mont. 50, ¶ 44. Citing that principle, Defendants contend that Plaintiffs "ask this Court to impose a massive compliance regime dependent on several branches of government," and "improperly require this Court to make policy determinations" about public school education in Montana. Defs.' Br. at 12-13. Not true.

This case is a run-of-the-mill constitutional and statutory construction case, and nothing in it requires the Court to make a policy determination. Plaintiffs interpret the Indian Education Provisions one way and Defendants interpret them another, and this Court must determine based on well settled principles of construction which interpretation is valid. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2017) (rejecting political question lack-of-judicial-standards argument and finding that resolution of claims merely entails careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute at issue because "[t]his is what courts do"). Deciding such cases has been "the province and the duty of the judicial department" since *Marbury v. Madison*, 5 U.S. 137, 177 (1803), a function that Montana courts have long performed. *See, e.g., Montana Auto. Ass'n v. Greeley*, 193 Mont. 378, 632 P.2d 300 (Mont. 1981) (interpreting a state statute and finding a portion of it unconstitutional); *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (holding unconstitutional a state statutory scheme that denied same-sex employees from receiving insurance coverage).

This is not, as Defendants appear to suggest, a complicated case, but even if it were, courts routinely resolve (and must resolve) complicated cases based on the same settled principles that govern simple cases. *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005), *cert. denied*, 546

U.S. 1137 (2006) ("The crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions'") (citation omitted). Defendants may wish to evade judicial scrutiny, but the time has come for a court to rule on the legality of their actions.

C. A Justiciable Controversy Is Not Limited to the School Funding Context.

True, *Helena Elementary* and *Columbia Falls* involved funding, but nothing in those cases held—or even implied—that a violation of the Indian Education Provisions is limited to a remedy in the form of increased funding from the Legislature. To the contrary, as discussed below, the Provisions were intended to ensure that "every educational agency and all educational personnel" will perform certain tasks. *See* § 20-1-501(2)(b), MCA (emphasis added). This lawsuit seeks nothing more than to enforce and implement constitutional and legislative intent. Enforcing and implementing that intent requires both funding by the Legislature *and* appropriate action by educational agencies and educational personnel. Whereas *Helena Elementary* and *Columbia Falls* dealt with the former, this case deals with the latter. *See* Pls.' Am. Compl., ¶ 105 (Committee report noting the "sad results" of lack of implementation of the IEFA were: "(1) lack of funding for the programs' implementation; and (2) *absence of an adequate oversight mechanism*." (emphasis added)).

II. Plaintiffs State Claims Upon Which Relief Can Be Granted.

Defendants' Rule 12(b)(6) arguments require this Court to examine only whether Plaintiffs' claims are adequately stated. *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 857 (1983). The Court's adequacy determination is limited to an examination of the contents of the complaint. *Meagher v. Butte-Silver Bow City & Cnty.*, 2007 MT 129, ¶ 15, 337

Mont. 229, 160 P.3d 552. Additionally, the effect of a Rule 12(b)(6) motion to dismiss is that all the well-pleaded allegations in the complaint are admitted as true; therefore, it should not be dismissed "unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id*. (citation omitted). As Plaintiffs will show next, all claims in the Amended Complaint are adequately stated.

A. The Indian Education Clause Claims.

Plaintiffs' claim under the Indian Education Clause is that the Clause imposes obligations on Defendants with respect to Indian education in Montana public schools, specifically, the recognition and preservation of the distinct and cultural heritage and integrity of American Indians. This claim is based on the Indian Education Clause's plain text: "The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity." Mont. Const. art. X, §1(2). This case seeks to compel Defendants to effectuate this constitutional commitment.

The importance of this constitutional commitment is buttressed by the courts' profound recognition of the significance of education in Montana. In *State ex rel. Bartmess v. Bd. of Trs.*, the Montana Supreme Court noted that education could be classified as a fundamental right under Montana's Constitution due to its "critical importance of developing the full educational potential of each citizen." 223 Mont. 269, 274, 726 P.2d 801, 804 (1986). *See also Helena Elementary Sch. Dist. No. 1 v. State*, No. ADV-85-370 (D. Mont. Jan. 13, 1988), *aff'd as modified*, 236 Mont. 44, 769 P.2d 684 (1989) (holding that because education "is a right expressly guaranteed in the Constitution… it is most assuredly a right 'without which other constitutionally guaranteed rights would have little meaning'" and is, therefore, fundamental.) In arguing that the Indian Education Clause is merely "aspirational," Defendants ask this Court to ignore the plain language of the

constitutional command. In fact, it is the responsibility of the Court not to nullify particular provisions of the constitution, but rather to ensure that they are given the force with which they were intended. "The authors of the Constitution used… term[s] advisedly, with a definite purpose. In construing a constitutional provision it is our duty to give meaning to every word, phrase, clause and sentence therein, if it is possible so to do." *State ex rel. Diederichs v. State Highway Comm'n*, 89 Mont. 205, 211, 296 P. 1033, 1035 (1931).

The District Court in *Columbia Falls* not only recognized the Clause's obligatory nature but unequivocally held that the State had violated the Clause, finding that despite what the Supreme Court had held in *Helena Elementary* regarding the state's "special burden," "it would appear that nothing has been done to effectuate" the Indian Education Clause. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 WL 844055, at *27 (Mont. Dist. Apr. 15, 2004), *aff'd in part, vacated in part,* 2005 MT 69, 326 Mont. 304, 109 P.3d 257. The District Court explained, "In reality, the State appears to be defenseless on Plaintiffs' claim that [the Indian Education Clause] has not been implemented by the State despite *the constitution's direction to do so*." *Id.* at 28 (emphasis added). Similar to the plaintiffs in *Helena Elementary* and *Columbia Falls*, Plaintiffs here seek proper construction of the Indian Education Clause.

B. The IEFA Claims.

Defendants' IEFA failure-to-state-a-claim argument consists of two contentions: (1) Plaintiffs have failed to allege a statutory violation by Defendants, and (2) Defendants lack authority to oversee IEFA compliance. Defs' Br. at 14-20. Both contentions are incorrect.[6]

[6] Plaintiffs expressly incorporate by this reference their argument, *infra*, in section II(C) (exhaustively setting forth Defendants' Indian Education Clause obligations pursuant to the Administrative Rules of Montana (ARM)).

The plain text of the IEFA defeats Defendants' contentions. The text contains the terms "intent," "every," "all," and "will" and imposes duties on "every educational agency" and "all education personnel." § 20-1-501, MCA. Defendants and their employees are clearly "educational agen[cies]" and "education personnel" within the plain meaning of those terms. The IEFA expressly refers to and incorporates the Indian Education Clause, which commits the state to recognize and preserve the cultural identity of American Indians through the state's educational system. Mont. Const. art. X, § 1(2).[7] Defendants' enumerated statutory duties include not only teaching "every Montanan" about the "distinct and unique heritage of American Indians in a culturally responsive manner" but also working "cooperatively with Montana tribes… when providing instruction." § 20-1-501, MCA. By alleging that Defendants have violated these statutory duties, Plaintiffs have set forth a claim that survives review under Rule 12(b)(6). *See* Pls.' Am. Compl., ¶¶ 112-159.

Defendants are the agencies and officials charged under Montana's Constitution and laws with providing and overseeing Montana's educational system, including implementation of the IEFA. Defendants assert that the Superintendent of Public Instruction (SPI) does not "possess independent authority to enforce IEFA" and that she has "limited enumerated powers and duties for the supervision of schools." Defs.' Br. p. 17. A plain reading of the statutes leads to a contrary conclusion. § 20-3-106, MCA (powers and duties of the SPI) provides that she "has the *general* supervision of the public schools and districts of the state and *shall* perform" certain duties.

[7] Defendants' reliance on *Dupuis v. Bd. of Tr.*, 2006 MT 3, ¶ 15, 330 Mont. 232, 237, 128 P.3d 1010, 1013, Defs.' Br. at 15, is wholly misplaced. The plaintiff in *Dupuis* sought judicial review of a decision by a school board on the grounds that the board's decision violated the school district's own internal policies. *See id*., 330 Mont. at 235 ("Dupuis argues that the Board violated Ronan School District Policies.") Although the plaintiff cited to the IEFA in support of her claim, the Court had no occasion to interpret the IEFA and certainly did not reach the issues regarding the extent to which the IEFA imposes duties on *state* agencies and personnel.

(Emphasis added). Those duties include distribution of BASE aid (which includes IEFA funding – § 20-9-306(2)(e), MCA), adopting and evaluating compliance with accreditation standards, recommending accreditation status to the MBPE, and maintaining curriculum guides for instructional programs. *Id.* As if that were not enough, the SPI is directed to "perform any other duty prescribed from time to time by this title, any other act of the legislature, or the policies of the board of public education." The duties of title 20, MCA, include those set forth by the IEFA. § 20-1-501, *et seq.*, MCA.

The MBPE likewise has clear obligations under the statutes. § 20-2-121, MCA. Indeed, Defendants admit that the MBPE "makes a final determination" with regard to the conditions for accreditation. Defs.' Br. p. 18. But the MBPE's responsibilities do not end there. The Board must "adopt standards of accreditation and establish the accreditation status" and "order the administration and distribution of BASE aid." *Id.* Finally, the MBPE must "perform any other duty prescribed from time to time by this title or any other act of the legislature." *Id.*

Accordingly, Defendants have broad general powers to oversee Montana's public education system. A critical component of that system, as set forth by the framers of the Montana Constitution and the Legislature, is Indian Education. Defendants' assertion that they lack general authority to oversee IEFA compliance is yet another example of their attempt to shirk responsibilities that are constitutionally and statutorily required.

Indeed, Defendants' own regulations confirm their authority over, and their duties regarding, implementation of the IEFA. For example, as discussed more fully below, Defendants oversee public school curricula content standards, and specifically have the authority to recommend and adopt these standards. ARM 10.55.601, ARM 10.53.101. The content standards

require school districts to incorporate the IEFA's American Indian history and cultural heritage requirements. ARM 10.53.102, ARM 10.53.909.

Moreover, Defendants oversee all public school funding, which includes IEFA funding. The mechanism crafted by the Legislature provides that (1) IEFA funds are allocated to OPI, (2) OPI then must decide how much of those funds a school district will receive, (3) each recipient of IEFA money is prohibited from "diverting it for any [other] purpose," and (4) at the end of the fiscal year, each recipient "shall file an annual report with the office of public instruction, in a form prescribed by the superintendent of public instruction, that specifies how the Indian education for all funds were expended." § 20-9-329, MCA. Incredibly, Defendants argue that "OPI's sole responsibility under § 20-9-329(4) consists of providing a form for school districts to file their annual report." Defs.' Br. at 16. In essence, then, Defendants contend that although the Legislature *requires* school districts to send yearly compliance reports to OPI, OPI is free to ignore them and has no duty to take remedial action even if the recipient has spent 100 percent of its IEFA money on a non-IEFA expenditure. That argument defies common sense. Surely, this carefully crafted process *necessarily imposes* a duty on OPI to scrutinize those reports to ensure that IEFA funds were not improperly diverted.[8]

Notwithstanding the fact that Defendants have clear legal duties under a plain reading of the IEFA statutes and implementing regulations, on numerous occasions, the Montana Supreme Court has concluded that a state agency has an implicit duty to carry out an implied function when

[8] As alleged in the Pls.' Am. Compl. (¶¶ 74-76), only 10 percent of school districts receiving IEFA funds detail in their annual reports how those funds were spent. Some districts may have used IEFA funds for books about marmots or for sports uniforms, but what is abundantly clear and disturbing from Defendants' Motion to Dismiss is not so much that OPI does not know how IEFA funds are spent, but that Defendants do not care how IEFA funds are spent. Surely this "see-no-evil" attitude cannot be what the Legislature intended when it required OPI to create a form for annual reporting.

necessary to implement its overall duties. *See, e.g., Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100 (holding that where a state agency was vested with the general authority to protect workers from occupational illness, the agency had a duty to warn workers of the dangers of asbestos, even though no such duty was expressly imposed by statute); *Ravalli Cnty. Fish & Game Ass'n*, 273 Mont. 371, 903 P.3d 1362 (1995) (holding that where a state agency had a duty under state law to regulate grazing consistent with environmental protection laws, the agency had a duty to conduct an environmental assessment before it authorized a permit holder to change from grazing cattle to grazing sheep, even though nothing in the statue expressly imposed that duty); *Jackson v. State*, 1998 MT 46, 287 Mont. 473, 956 P.2d 35 (holding that where a state agency had the general duty to disclose "medical and social histories" to adoptive parents, this implied the duty to disclose to adoptive parents the medical history of the birth parents, even though the statute did not expressly impose such a duty). A similar result is called for here: given that OPI distributes funds that cannot be diverted for any purpose other than IEFA expenditures and must create a form on which each recipient will confirm its expenditures, the only logical conclusion is that OPI must examine those forms and ensure compliance.

Similarly, Defendants' contention that it was the Legislature's intent to leave IEFA implementation solely to local entities is bereft of all rationality and authority. Merely because other provisions require "local school boards to review how funds are expended," *see* § 20-9-213, MCA, and boards of trustees must "require that all of its certified personnel satisfy the requirements for instruction in American Indian studies," § 20-1-503(1), MCA, does not negate Defendants' duties under the IEFA. As noted earlier, the state's educational system *inherently* imposes some duties on the local level and other duties on the state level. At this stage of the pleadings, it is clear that Plaintiffs have alleged abundant facts which, if proven true at trial, will

entitle them to relief, because these facts would demonstrate that Defendants are ignoring and evading their constitutional and statutory duties, express and implied.

C. The Due Process Claims.

1. The "Protected Interest" Test Generally.

It is now well settled that rights created by state law are subject to federal constitutional Due Process Clause protection. Whenever the state creates such a right, that right is protected against arbitrary deprivation by the Fourteenth Amendment. In that situation, state law creates the substantive liberty or property interest, but federal law determines what procedural safeguards attach to it. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (holding that "[a]lthough Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so" and, therefore, Ohio "may not withdraw that right" without affording procedural due process); *Mishler v. Nevada State Bd. of Medical Exam'rs*, 896 F.2d 408 (9th Cir. 1990) (holding that a state-created right to a medical license is protected against arbitrary deprivation by the Due Process Clause).

This principle was applied in *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987), regarding a Montana statute that set forth the conditions under which a prisoner was eligible for release on parole. The state statute (since amended) provided that the Parole Board "*shall* release on parole" a prisoner "when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community." *See Bd. of Pardons*, 482 U.S. at 376, citing § 46-23-201, MCA (emphasis added). Nothing in federal law required Montana to offer prisoners an opportunity for parole, the Court noted, but Montana had chosen to create a system in which prisoners had an expectation of parole once they satisfied the legislative criteria. *Id*. at 380 (holding that the Montana statute "made release mandatory upon certain findings"). Consequently, the

Court held, every prisoner denied parole was entitled by the Due Process Clause to be notified of the reasons why parole was denied. *See also Orozco v. Day*, 281 Mont. 341, 354, 934 P.2d 1009, 1016 (1997) (concluding that a Montana statute that awarded good time credits to prisoners created a liberty interest protected against arbitrary loss by the Due Process Clause).

The Court in *Board of Pardons* reached its conclusion based on two factors. First, Montana's parole statute contained mandatory language. *Id.* at 377-78 ("Significantly, the Montana statute . . . uses mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made") (citation omitted). Second, the legislative history of the statute, the Court said, demonstrated that the Legislature intended to provide an expectation of release when prisoners satisfied the criteria for parole. *Id*. at 381. *See McDermott v. Montana Dept. of Corr*., 305 Mont. 462, 29 P.3d 992, 996-97 (2001) (discussing *Bd. of Pardons*).

As these cases illustrate, a state creates a "protected interest" when it enacts a law or regulation that creates some "legitimate claim of entitlement." *Town of Castle Rock*, 545 U.S. at 757. The state-created right must be substantive, rather than merely procedural, and generally must be set forth in "mandatory" language. *Id*. at 760. *See also United States v. Guillen-Cervantes*, 748 F.3d 870, 872-73 (9th Cir. 2014); *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010) ("A regulation granting broad discretion to a decisionmaker does not create a [protected] interest.").

The Montana Supreme Court has decided several "protected interest" cases. It has found the presence of a protected interest when the statute "'sets out conditions under which the benefit *must* be granted or [when] the statute sets out the *only* conditions under which the benefit may be denied.'" *Kiely Constr., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 27, 312 Mont. 52, 64, 57 P.3d 836, 844 (citation omitted, emphasis in original). Even statutes that confer some

discretion on agency officials create a protected interest when that discretion is subject to "'significant substantive restriction.'" *Id.*, 57 P.3d at 844 (citation omitted). In *Boreen v. Christensen*, 267 Mont. 405, 884 P.2d 761, 767 (1994), for instance, the court held that an agency regulation authorizing termination of employment for "just cause" sufficiently limited the agency's discretion, thereby creating a property interest in continued employment protected against loss by the Due Process Clause. *See also Orozco*, 934 P.2d at 1016 (holding that the state's "good time credit" statute created a protected liberty interest because conferral of good time was mandatory in certain situations). On the other hand, state statutes that contain no mandatory language or which confer substantial discretion on agency officials do not create a protected interest. *See Germann v. Stephens*, 2006 MT 130, ¶ 31, 332 Mont. 303, 312, 137 P.3d 545, 551 (finding no entitlement to a liquor license where statute made issuance of the license "not a right, but a privilege" and vested substantial discretion to the licensing board); *Beasley v. Flathead Cnty.*, 2009 MT 121, 350 Mont. 177, 206 P.3d 915 (similar); *McDermott*, 29 P.3d at 998 (finding no protected interest where the statute contained no mandatory language.)

2. The Indian Education Provisions Create Protected Interests.

The language of the Indian Education Provisions, their history, and their implementing regulations make clear that every student attending public school in Montana has a guaranteed right under the Montana Constitution and under state statutory and regulatory law to an education that includes instruction on American Indian history and culture. This right is set forth in absolute terms, and no state agency or official has been conferred with any discretion to curtail or condition it. Thus, all three sources—the Indian Education Clause, the IEFA, and the implementing regulations—create protected interests.

In providing that "[t]he state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity," the Indian Education Clause creates a mandatory entitlement. As *Helena Elementary* holds, this Clause "establishes a special burden in Montana for the education of American Indian children which *must* be addressed as part of the school funding issues." (emphasis added); *see also Columbia Falls,* 2005 MT 69, ¶ 35; Carol Juneau & Denise Juneau, *Indian Education for All: Montana's Constitution at Work in Our Schools,* 72 MONT. L. REV. 111, 114 (2011) (noting that the Indian Education Clause "created an obligation for the public education system to provide culturally appropriate and accurate information to all students in Montana, both Indian and non-Indian."). As explained earlier, this is not an aspirational goal; this is a *commitment*.

The IEFA similarly contains specific mandatory language, including "intent," "every," "all," and "will." § 20-1-501, MCA. Equally as significant, the IEFA confers no discretion to agencies or officials to withhold or curtail these entitlements.

The legislative history demonstrates that both Provisions were *intended* to provide guarantees. With respect to the Indian Education Clause, *see, e.g.,* Montana Constitutional Convention Verbatim Transcript Vol. VI (March 9, 1972-March 16, 1972), Statement of Delegate Eck at1950-51 (noting that "a large number" of witnesses wanted state educational agencies to "recognize the importance and the real dignity of American Indians in the life of Montana" and that members of the Bill of Rights Committee and the Education Committee supported this amendment); *see also* Montana Constitutional Convention Verbatim Transcript Vol. VI (March 9, 1972-March 16, 1972), Statement of Delegate Schiltz, *id*. at 1951 (similar); Montana Constitutional Convention Verbatim Transcript Vol. VI (March 9, 1972-March 16, 1972), Statement of Delegate Johnson (stating that he had lived "in the area with the Indians all my life"

and that they "feel very strongly that education is a basic necessity" and that he "would very much like to see" this amendment adopted) *id*.; Montana Constitutional Convention Verbatim Transcript Vol. VI (March 9, 1972-March 16, 1972), Statement of Delegate Harper (explaining that our country has tried to help Black people improve their self-image and we should do "the same thing . . . for the red man," whose self-image "has been, in a sense, stomped in the dust. . . .And I think this little section will help more than any other one thing we have done or probably will do in writing this Constitution toward that end.") *id*.; Montana Constitutional Convention Verbatim Transcript Vol. VI (March 9, 1972-March 16, 1972), Statement of Delegate Harbaugh ("I'm very much in accord with the idea that the Indian culture ought to be upheld and that it ought to be protected as over against the dominant society.") *id*. at 1953.

The IEFA's legislative history is equally as clear and informative. Four years prior to the IEFA's passage in 1999, the Montana Senate passed Joint Resolution No. 11, which directed the Committee on Indian Affairs to evaluate the Indian Education Clause's implementation. The Committee surveyed 153 school districts, held public hearings, and determined that implementation was lacking or non-existent. *See* Committee on Indian Affairs, *To Promote a Better Understanding: The 1995-96 Activities of the Committee on Indian Affairs*, S. Rep., 55th Legislature, 13 (Mont. 1996). The IEFA was enacted with the express purpose of requiring full and proper implementation of the Indian Education Clause. *See also* Juneau and Juneau, 72 MONT. L. REV. at 116-117.

After the IEFA's enactment, lack of funding to implement it was addressed in *Columbia Falls*, in which this Court held that the Legislature must provide sufficient funds to implement the Indian Education Provisions, and, on appeal, the Montana Supreme Court affirmed, noting that the State did not challenge that conclusion. *Id*., at ¶ 35. In direct response, the Legislature appropriated

funds to implement the Indian Education Provisions and *assigned to the SPI the duty* to disperse those funds to school districts. *See* Sp. Sess. Laws Dec. 2005 (2005 Mont. Laws 1st Sp. Sess.) Ch. 4, § 3 (S.B. 1), *as amended by* 2007 Mont. Laws 1st Sp. Sess. Ch. 1 § 17, (S.B. 2). In addition, the Legislature enacted § 20-9-329, MCA in 2007, which prohibits school districts that receive IEFA funding from "diverting it for any [other] purpose" and provides, moreover, that each district "shall file an annual report with the office of public instruction, in a form prescribed by the superintendent of public instruction, that specifies how the Indian education for all funds were expended."

Defendants cite *Holms v. Bretz*, 2021 MT 200, ¶ 8, 405 Mont. 186, 189, 492 P.3d 1210, for the principle that the role of a court "'is to implement the objectives the legislature sought to achieve.'" Defs.' Br. at 14. Plaintiffs could not agree more. The objectives of the Indian Education Provisions are to guarantee recognition and preservation of the unique history and culture of Montana's tribes in public school education. That is precisely what these provisions declare. Importantly, as discussed next, other Montana constitutional provisions, education statutes, and Defendants' own IEFA regulations support and acknowledge these guarantees.

Defendants are the executive branch agencies and officers created by and charged under the Montana Constitution and statutes with overseeing and administering the state's public educational system. *See, e.g.*, § 20-2-121, MCA (setting forth the duties of the Board of Education, including the duty to "adopt standards of accreditation" and perform all duties prescribed by any "act of the legislature"), and § 20-3-105, MCA (setting forth the duties of the SPI, including the duty to "faithfully work in all practical and possible ways for the welfare of the public schools of the state."). *See also*, Pls. Am. Compl. ¶¶ 66-86. The primary means by which these agencies accomplish their intended purpose is by creating the standards that school districts must meet to attain accreditation and by then enforcing those standards. *See generally* § 20-1-101, MCA.

Defendants have promulgated a substantial network of regulations that inform school districts what they must accomplish to attain and maintain accreditation. ARM 10.55.601 provides that to be accredited, a school must submit a plan that will be "reviewed on a yearly basis" that "shall include" a process for "implementing all content and program area standards" and "a description of strategies for . . . meeting all content standards." ARM 10.53.101 states that "[t]he content standards *shall* be used by school districts to develop" their curricula. (Emphasis added). Next, ARM 10.53.102 ("Indian Education") states that school curriculum *shall* incorporate "the distinct and unique cultural heritage of [Montana] American Indians" pursuant to the Indian Education Clause, the IEFA, and MCA § 20-9-309(2)(c). (Emphasis added.) What is more, ARM 10.53.909 ("The Economics Content Standards for Ninth Through Twelfth Grade") states "that each student *will* [learn]*"* as part of the state's social studies curriculum about American Indians, including "how pressures and incentives" impacted the treatment of them, "relationships and interactions" with non-Indians, and "governmental policies impacting American Indians," and that students will "analyze perspectives of American Indians in US history." *Id*., § 10.53.909 (2)(a), (3)(d), and (4)(e) and (i) respectively.

Particularly significant is ARM 10.55.603 ("Curriculum and Assessment"). This regulation mandates that "[l]ocal school districts *shall ensure* their curriculum is aligned to all content standards," including "curricula and instructional materials and resources to ensure the inclusion of the distinct and unique cultural heritage and contemporary portrayal of American Indians;" it also mandates that "[t]he Superintendent of Public Instruction *shall* develop criteria and procedures . . . to be used to assess student progress in achieving content and appropriate content-specific grade-level learning progressions in all program areas" and "*shall* provide technical assistance to districts to meet [those] criteria and procedures." *Id*. ARM 10.55.603(1), (4)(d), (5)(c)

and (d), respectively (emphasis added). Notably, then, Defendants' own regulations require instruction about American Indians and their history and relationships to be a *mandatory* part of each school's curriculum.

Mandatory agency rules such as these create entitlements protected against arbitrary loss by the Due Process Clause. *See Boreen*, 884 P.2d at 767; *see also see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (recognizing that "rules and understandings," as well as statutes, can create a protected interest). Oddly, Defendants claim that "BPE is not empowered to establish 'minimum standards' for IEFA compliance by school districts and schools." Defs.' Br. at 19. That statement flies in the face of the ARMs. As these regulations show, BPE not only has the power to establish such standards, but BPE has *already* established them.

OPI, too, obviously is aware that the Indian Education Provisions impose duties on OPI and is already seeking to satisfy some of them. OPI has undertaken at least four activities to help school districts properly implement these Provisions. First, OPI has issued a Manual to assist local educators implement the IEFA, entitled Tammy Elser, *The Framework: A Practical Guide for Montana Teachers and Administrators Implementing Indian Education for All*, Mont. Off. of Pub. Instruction (2010), https://opi.mt.gov/Portals/182/Page%20Files/Indian%20Education/Indian%20Education%20101/Framework.pdf ("Manual"). The Manual notes at the outset that the IEFA imposes mandatory duties on state educators. *See id.* at 2 ("the Montana legislature determined that integration of content providing information about Montana American Indians was vital to a quality education. *Indian Education for All* is the law"). Because of the IEFA, the Manual states, "teachers in Montana can and will develop meaningful lessons designed to implement *Indian Education for All*." *Id*. The Manual details measures that must be undertaken to implement the IEFA. *See, e.g.*,

at 20: "When teaching current events, be sure to include articles and stories about tribes and contemporary issues (*e.g.*, court decisions regarding treaties, commentary and debate regarding Native American mascots, tribal hunting and fishing rights, etc.)." The Manual states that, as a result of the IEFA, school districts should offer "multiple perspectives" on such subjects as Columbus, Thanksgiving, Manifest Destiny, Boarding Schools, and Reservations. *Id*. at 34. The Manual also includes a section that describes other resources available through OPI to assist schools implement the IEFA. *See id.* at 27-28.

Second, OPI has created a website entitled "Indian Education in Montana." *See* Mont. Off. Of Pub. Instruction Homepage, http://opi.mt.gov/Educators/Teaching-Learning/Indian-Education. OPI acknowledges that "Montana's constitutional requirement and duly enacted policy *require* recognition of the distinct and unique cultural heritage of American Indians and a commitment in our educational goals to preserve their cultural heritage." (Emphasis added). The website contains video presentations and written instructional materials designed to facilitate IEFA implementation. Third, OPI has created a set of courses that educators can take online to help them understand their duties under the IEFA. These courses are referenced in the Manual. *See* Manual at 27 ("The OPI offers online IEFA courses through the Teacher Learning Hub."). Fourth, OPI has created an "Indian Education for All Unit" to assist tribes with IEFA implementation. According to OPI's website, the IEFA Unit "works with districts, tribes, and other entities to ensure all schools have the knowledge, tools and resources necessary to honor the IEFA requirement and integrate it into their teaching materials and methods." *See* Mont. Off. Of Pub. Instruction Homepage, http://opi.mt.gov/Educators/Teaching-Learning/Indian-Education. Among other things, the IEFA Unit disperses grants to help school implement the IEFA. *See* Manual at 82 ("The OPI IEFA Unit

awards a limited number of grants to schools for specific projects and initiatives . . . [to help] support sustained quality IEFA implementation").

While the aforementioned activities that the SPI and MBPE undertake demonstrate that Defendants understand the Provisions create a mandatory entitlement, they are entirely insufficient to satisfy the protected interests created by those Provisions. As set forth exhaustively in Plaintiffs' Amended Complaint, Defendants' have utterly failed to satisfy their primary and over-arching responsibility – to ensure that Indian Education is robustly implemented across all school districts in Montana. Amended Complaint, ¶¶ 112-159. Creating manuals, courses and websites cannot be a substitute for ensuring implementation of Indian Education.

As a matter of law, it is abundantly clear that the legislative history of, and the mandatory language contained in, the Indian Education Clause, the IEFA, and agency regulations create protected interests. Defendants' arguments to the contrary must be rejected. At the motion to dismiss stage, this Court need not—and cannot—determine *precisely* what process is due, as that finding depends on further pre-trial proceedings and possibly trial. We only know at present that every Montana public school student and every Montana tribe has entitlements guaranteed under state law and, therefore, these students and tribes have a right to adequate notice and a meaningful hearing to determine whether Defendants are violating those entitlements. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding that the Due Process Clause guarantees an opportunity to be heard "at a meaningful time and in a meaningful manner."); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted) (recognizing that a meaningful hearing is "'the root requirement'" of due process).

III. This Court Has the Power to Grant Plaintiffs' Requested Declaratory and Injunctive Relief.

It is well-established that District Courts in Montana generally have broad discretion to grant or deny declaratory and injunctive relief. *Weems*, 2019 MT 98, ¶ 7. Declaratory and injunctive relief is a typical and proper remedy to cure past and ongoing unconstitutional government conduct. *See, e.g.*, *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999). Montana courts routinely award injunctive relief in cases against state and local agencies based on constitutional and statutory claims. *See, e.g.*, *Citizens for Balanced Use v. Montana Fish, Wildlife & Parks Comm'n*, 2014 MT 214, ¶ 1, 376 Mont. 202, 203, 331 P.3d 844, 845 (affirming a preliminary injunction prohibiting agency from further enforcing its decision and from making any additional changes to wildlife seasons without first complying with Montana law); *Williams v. Bd. of Cty. Comm'rs of Missoula Cty.*, 2013 MT 243, 371 Mont. 356, 308 P.3d 88 (enjoining county commissioners from taking any actions based on an unconstitutional statutory protest provision).

Defendants argue generally that this Court lacks the power to grant Plaintiffs' requested declaratory and injunctive relief because the requested relief is "speculative" and "overly broad." Defs.' Br. at 22-25. Plaintiffs seek to have this Court confirm Defendants' specific constitutional and statutory obligations, confirm that Defendants are not fulfilling those obligations, and confirm that in the future Defendants must fulfill those obligations. This is not speculative or overbroad. *See Donaldson v. State*, 2012 MT 288, ¶ 8, 337 Mont. 67, 155 P.3d 1278 (requested relief is speculative and overbroad only where plaintiffs do not challenge a specific statute on specific grounds).

Nor does the requested relief convert Plaintiffs' claims into a "mandamus action." Defs.' Br. at 23. Plaintiffs seek to declare and enjoin Defendants' improper acts and omissions regarding

Defendants' non-discretionary constitutional and statutory obligations. To accomplish this relief, this Court need not, as Defendants suggest, Defs.' Br at 24, "create" any duties, it need only affirm the constitutionally and statutorily created duties that already exist, and then require that Defendants fulfill those duties. Plaintiffs do not seek mandamus relief in this action, nor need they do so because the requested declaratory and injunctive relief will sufficiently address their alleged injuries. *See Whitehouse v. Illinois Cent. R. Co.*, 349 U.S. 366, 373 (1955); *Montana Auto. Ass'n v. Greeley*, 193 Mont. at 399-400.

IV. The School Districts Are Not Necessary Parties To This Action.

Finally, Defendants make an absent party/compulsory joinder argument, arguing that this action must be dismissed because Plaintiffs have failed to join Montana public school districts to the action. Defs.' Br. at 25. It is unclear whether Defendants argue that the school districts are necessary parties or indispensable parties, but "[u]nder Rule 19, M.R.Civ.P., a court must first determine under Rule 19(a) whether the absent party is necessary to the action, that is, whether complete relief can be accorded without the absent party's participation and, second, if the absent party is necessary but joinder is not possible, whether the absent party is indispensable under Rule 19(b), that is, whether in 'equity and good conscience the action should proceed ... or should be dismissed.'" *Blaze Constr. Inc. v. Glacier Elec. Coop.*, 280 Mont. 7, 11, 928 P.2d 224 (1996) (citation omitted); *accord Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

"There is no precise formula for determining whether a particular non-party is necessary to an action, consequently the determination is heavily influenced by the facts and circumstances of each case." *Mohl v. Johnson*, 275 Mont. 167, 171, 911 P.2d 217, 220 (1996) (citation omitted); *accord Bakia v. Los Angeles Cnty. of State of Cal.*, 687 F.2d 299, 301 (9th Cir. 1982). Courts

should be mindful of Rule 19's philosophy to "avoid dismissal whenever possible." *Mohl*, 275 Mont. at 171 (citations omitted).

The school districts may be necessary parties under Rule 19(a)(1) only if in their absence complete relief cannot be obtained among the existing parties. *First Nat'l Bank of Missoula v. Fed. Leasing, Inc*., 110 F.R.D. 675, 676 (D. Mont. 1986); *accord Mohl*, 275 Mont. at 171 (Rule 19 "complete relief" refers to relief as between the existing parties, not absent parties).

Defendants argue that the Indian Education Provisions impose obligations on school districts and that their absence precludes complete relief in this case. But that is manifestly incorrect. To be sure, Plaintiffs *could* have sued one or more of the school districts on the grounds, for example, that the district is diverting IEFA funds for an impermissible purpose, but there is no need to do so. Rather, Plaintiffs chose to sue the state defendants that have the authority and the duty to regulate *all* expenditures of IEFA funds. Plaintiffs seek declaratory and injunctive relief against Defendants as the governing agencies and officials responsible for implementing the Indian Education Provisions precisely because Defendants' superior (*vis-a-vis* school districts) governing status makes their obligations a threshold issue for judicial determination of the Indian Education Provisions. Complete relief between Plaintiffs and Defendants regarding Defendants' obligations under the Provisions is possible without addressing any obligations of school districts. *See Mohl*, 275 Mont. at 171 (joinder of an absent party is not necessary where, although certain forms of relief are unavailable due to a party's absence, meaningful relief can still be provided). Plaintiffs seek a remedy only against the state agencies and officials sued, and complete relief against them is possible without the presence of any school district as a party. Nor, since they do not claim an interest in this action, are the school districts necessary parties under M. R. Civ. P. 19(a)(2) or 19(a)(3). *Green v. Gremaux*, 285 Mont. 31, 38, 945 P.2d 903 (1997).

Since the school districts are not necessary parties under Rule 19(a), this Court need not proceed to determine whether their joinder is possible, or whether they are indispensable under Rule 19(b). *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999). If, however, the Court should determine that school districts are necessary parties, or that their indispensability is an issue in whether this case should be dismissed, the Court should allow supplemental briefing on whether the school districts' joinder is feasible. *See NVE Constructors, Inc. v. Hartford ACC. & Indem. Co.*, 924 F.2d 1063 (9th Cir. 1991) (noting that absent party determined to be necessary was provided an opportunity to join litigation before district court proceeded to consider indispensability).

Every plaintiff has a right to select the issues the plaintiff wants to litigate and cannot be compelled to add other issues. Here, Plaintiffs have elected to sue state defendants for violating Plaintiffs' rights. No outside party is necessary to adjudicate those claims. The Court, therefore, should proceed to determine whether Defendants are violating duties assigned to them under the Indian Education Provisions.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

DATED this 24th day of February 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7 of the Eighth Judicial District and this Court's Order on the Parties' Joint Motion for Leave to File Over-Length Briefs, I certify that this brief is 6,500 words plus ten additional pages or less. The word count was calculated using Microsoft Word and excludes the caption, certificates of service and compliance, signature lines and attachments.

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify on this date I emailed a true and accurate copy of the foregoing document to:

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