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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

SHAUN YELLOW KIDNEY, et al., Plaintiffs, vs. MONTANA OFFICE OF PUBLIC INSTRUCTION, et al., Defendants.	Case No. DDV-21-0398 Hon. John W. Parker **DEFENDANTS' JOINT BRIEF IN SUPPORT OF MOTION TO DISMISS**

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INTRODUCTION

Pursuant to Montana Rule of Civil Procedure 12(b)(6), the Montana Office of Public Instruction (OPI), Elsie Arntzen, in her official capacity as Superintendent of Public Instruction (SPI), Montana Board of Public Education (BPE) and Tammy Lacey, in her official capacity as Chair of the Board of Public Education (collectively "Defendants") move to dismiss the Complaint. Plaintiffs allege that Defendants have failed to implement, monitor, and enforce the Indian Education Clause of the Montana Constitution ("the IEC"), MONT. CONST. art. X, § 1(2), and its implementing statute, the Montana Indian Education for All Act ("IEFA"), MCA § 20-1-501 (collectively "Indian Education Provisions"). The Court should dismiss Plaintiffs' claims because (1) Plaintiffs lack standing and have asked this Court to decide a non-justiciable political question; (2) Plaintiffs fail to identify a legal duty or responsibility Defendants have violated; and (3) the relief requested by Plaintiffs is improper.

LEGAL STANDARD

Montana Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." The plaintiff carries the burden to adequately plead a cause of action. *See Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. The complaint must "state[] a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. Additionally, a court has no obligation to take as true legal conclusions that have no factual basis. *See Cowan v.*

Cowan, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. "[T]he court is limited to an examination of the contents of the complaint in making its determination [under a motion to dismiss]." *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552.

ARGUMENT

I. Plaintiffs' claims are not justiciable.

Montana courts may decide "only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 47, 435 P.3d 1187, 1193; *see also Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 144, 355 Mont. 142, 226 P.3d 567 (Article VII, Section 4(1) embodies the same limitations imposed by Article III).

A. Plaintiffs lack case-or-controversy standing.

Standing is a threshold jurisdictional question, "especially … where a … constitutional violation is claimed." *Olson v. Dep't of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986). It "limits Montana courts to deciding only … actual, redressable controvers[ies]." *Bullock*, ¶ 28. "'Standing … must be satisfied prior to class certification.'" *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 25, 366 Mont. 450, 288 P.3d 193 (quoting *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997)). To establish standing, a plaintiff must demonstrate a "past, present, or threatened injury to a property or civil right … that … would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430 "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*, ¶ 31 (citations omitted).

1. Plaintiffs fail to allege injury-in-fact.

Plaintiffs fail to allege they have suffered an actual injury. *Olson*, 223 Mont. at 470, 726 P.2d at 1166 ("[T]he constitutional aspect of standing requires a plaintiff to show that he has personally been injured … by the alleged constitutional or statutory violation."). Plaintiffs merely allege that (1) they are parents and students at Montana schools or citizens of Indian tribes, Compl. at ¶¶ 8–23, 24–29, and (2) Defendants have violated alleged duties under state and federal law. *See, e.g., id.* at ¶¶ 5–6, 69, 72, 94, 99, 109–111, 115. Plaintiffs must allege they have "sustained, or [are] in immediate danger of sustaining some direct injury … and not merely that [they] suffer[] in some indefinite way in common with people generally." *Schoof v. Nesbit*, 2014 MT 6, ¶ 20, 373 Mont. 226, 232, 316 P.3d 831, 836 (quotations omitted).

It is insufficient to only allege Defendants have violated the Indian Education Provisions. *See Larson*, ¶ 46 ("a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing"); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[The Supreme] Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Thus, Plaintiffs cannot skirt the standing requirements by alleging a "generalized grievance." *See Schoof*, ¶ 20.

Plaintiffs don't allege the challenged conduct has affected them in any way at all, much less in the concrete, specific manner required by Article VII, § 4 and Article III. In *Olson*, the plaintiffs challenged the constitutionality of statutes requiring county residency to obtain a hunting license or run for county office. 223 Mont. at 469–71, 726 P.2d at 1165–67. But the plaintiffs failed to establish standing because they did not allege that they requested and were denied a license or they sought to run for a county office and were prohibited from doing so. *Id.; see also, e.g., Wee Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, ¶ 19, 337 Mont. 229, 160 P.3d 482 (standing to assert constitutional injury for public records claim because plaintiff asserted "personal interest in the records at issue" due to "the records [being] necessary for [plaintiff's] work"); *State ex rel. Mitchell v. First Judicial Dist. Ct.*, 128 Mont. 325, 339, 275 P.2d 642, 649 (1954) (no standing to challenge legality of nomination of candidate process absent allegation of resulting injury to plaintiff personally).

Plaintiffs' generalized grievances may be remedied at the ballot box, but not in the courts. Their failure to allege concrete, particularized injuries is fatal.

2. The alleged harms are not fairly traceable to Defendants.

Even, however, if Plaintiffs generalized grievances could be transformed into actual injuries, Plaintiffs would still lack standing because any alleged injuries have not been caused by Defendants. "[T]here must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly … trace[able] to the challenged action of the defendant, and not … the result [of] the independent action

of some third party not before the court." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992) (quotations omitted). "The line of causation between the defendant's action and the plaintiff's harm must be more than attenuated." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (cleaned up).

The alleged violations of the Indian Education Provisions are the result of actions by individual school districts—not Defendants. *See Kivalina,* 696 F.3d at 867 ("[W]here the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries … the causal chain is too weak to support standing.") (citations, quotes, and bracket omitted). Plaintiffs allege school districts may have improperly spent IEFA funds. Compl. at ¶¶ 85–87. And Plaintiffs concede the IEFA payment statute contains a prohibition constraining *school districts*' use of funds—not Defendants'. *See* MCA § 20-9-329(4); Compl. at ¶ 84. Plaintiffs also allege school districts fail to work cooperatively with Montana tribes. Compl. at ¶¶ 94–95. The IEFA statute 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." MCA § 20-1-501(2)(b).

This falls well short of the standard set in *Allen v. Wright* where parents of black public-school children brought a class action alleging the IRS had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. 468 U.S. at 739–40. Despite plaintiffs alleging the tax-exemptions diminished their children's ability to receive an

education at a racially-integrated school, the Court found those injuries were not fairly traceable because the complaint: (1) "[did] not challenge particular identified unlawful IRS actions"; and (2) "allege[d] no connection between the asserted desegregation injury and the challenged IRS conduct direct enough to overcome the substantial separation of powers barriers to a suit seeking an injunction to reform administrative procedures." *Id.* at 766; *id.* at 757 (causation was "attenuated at best"). Plaintiffs here claim Defendants have not established sufficient compliance standards, yet cannot identify any unlawful action. *See* Compl. at ¶¶ 104, 110, 115. Without any legal duty—much less authority—to take the actions supported by Plaintiffs, it's impossible to satisfy the causation requirement. The same separation of powers concerns from *Allen*, moreover, apply to the request to enjoin Defendants' IEFA procedures. *See* Compl. at 34 (Prayer for Relief ¶ (8)).

3. Any alleged injuries are not redressable

The injury asserted by Plaintiffs "must be one that would be alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 221, 255 P.3d 80, 91; *Lujan*, 504 U.S. at 561 (must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision"). Plaintiffs must "show a substantial likelihood that the relief sought would redress the injury." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quotations omitted). Finally, "[r]edressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017).

Plaintiffs ask this Court to enjoin Defendants to take administrative actions they have no authority to institute. Additionally, even the Court grants relief, it's unlikely any injuries would be redressed. In *Railway Labor Execs. Association v. Dole*, 760 F.2d 1021 (9th Cir. 1985), a railroad union and employee requested a declaratory judgment and injunction requiring federal agencies to better enforce railway safety statutes. *Id*. at 1022. The injuries were not redressable "because even with an injunction sending more inspectors to monitor enforcement of the railroad safety statutes, injuries [would] occur in rail yards" and the "number of inspectors necessary to prevent a given number of accidents [was] unknown." *Id*. at 1023–24. The relief was improper because requested remedy would've involved "the court in fashioning an enforcement manual for an executive branch agency" and that it was "virtually impossible" for a court "to write the qualitative standards" and "supervise the enforcement efforts" of the agency. *Id*.

As in *Dole*, it is impossible to know what level of compliance standards Defendants would need to promulgate to remedy Plaintiffs' alleged injuries. Plaintiffs, moreover, request that this Court essentially "fashion[] an enforcement manual" for Defendants to supervise IEFA compliance. *Dole*, 760 F.2d at 1023; Compl. at 34 (Prayer for Relief at (4), (8)). Not only do Defendants lack authority to wield the power envisioned by Plaintiffs, this Court lacks the power to grant such relief. *Brown*, 902 F.3d at 1083 ("even where a plaintiff requests relief that would redress her claimed injury, there is no redressability if a federal court lacks the power to issue such relief."); *see* Part II, *infra*. And from a practical perspective, it would be

functionally impossible for the Court to supervise the IEFA compliance efforts of Defendants. *See Dole*, 760 F.2d at 1023–24.

Plaintiffs lack standing and the Court should dismiss on those grounds alone.

B. Montana's Indian Education Clause presents a non-justiciable political question.

This Court also lacks jurisdiction to adjudicate Plaintiffs' claim under the Montana Constitution because it concerns a non-justiciable political question—i.e., the Plaintiffs lack prudential standing. "Prudential standing is a form of judicial self-governance that discretionarily limits the exercise of judicial authority consistent with the separation of powers." *Bullock*, ¶ 43 (quotations omitted). It "embodies the notion that courts generally should not adjudicate matters more appropriately in the domain of the legislative or executive branches or the reserved political power of the people." *Id*. (citation and internal quotation marks omitted).

Montana's IEC provides: "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). The IEC is non-self-executing and is therefore entrusted to the Legislature—not the courts. *See State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 73, 132 P.2d 689, 700 (1942).

Non-self-executing clauses of constitutions are non-justiciable political questions. *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 281, 488 P.3d 548, 555. "To determine whether a provision is self-executing, [courts] ask whether the Constitution addresses the language to the courts or to the Legislature." *Id.*

(quotations omitted). "If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing." *Columbia Falls*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257; *see also Republic of the Marsh. Islands*, 865 F.3d at 1193 (claims seeking to enforce non-self-executing provisions are non-justiciable because their resolution would exceed the court's judicial power).

The U.S. Supreme Court's seminal decision on the political question doctrine, *Baker v. Carr*, provided six factors ("*Baker* factors") to examine. 369 U.S. 186, 217 (1962); *see also Vieth v. Jubelirer*, 541 U.S. 267 (2004) (describing Baker factors as "six independent tests."). A finding of any one of the *Baker* factors means there's a political question. *INS v. Chadha*, 462 U.S. 919, 941 (1983). The first two factors are the most important and often overlap. *See Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 822 (9th Cir. 2017). They are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department and (2) a lack of judicially discoverable and manageable standards for resolving it. *Baker*, 369 U.S. at 217. Both are present here.

1. The Montana Constitution commits the Indian Education Clause to the Legislature

Article X of the Montana Constitution is textually committed to the legislative branch. *See Mattis*, 868 F.3d at 828 ("chief concern under the first *Baker* factor is to avoid answering a question committed to a coordinate political department"); *Bullock*, ¶ 44. Although Article X, § 1(3) of Article X has been found justiciable, the same cannot be said for Article X, § 1(2). To be sure, the Montana Supreme Court has described § 1(2) as a placing a "burden" on the State, but that burden is

fundamentally different from its justiciable companion in § 1(3). First, § 1(3) mandates "[t]he legislature *shall* provide a basic system of free quality public elementary and secondary schools." (emphasis added). In deciding § 1(3) constitutes a justiciable question, the *Columbia Falls* court found significant that it contained a "directive to the Legislature." *Columbia Falls*, ¶ 17. Second, that command combined with § 1(1)'s *guarantee* of "[e]quality of educational opportunity" to trigger a justiciable question of whether the legislature had adequately funded public education. *Id.* ¶ 19. Not so for the IEC in § 1(2). The lack of a mandatory command is significant for analysis under *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989) and *Columbia Falls* as well as other state school finance cases. *See, e.g.,* G*annon v. State,* 319 P.3d 1196, 1220 (Kan. 2014); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

Additionally, in *Helena Elementary* the State argued § 1(1) was purely aspirational because it reads: "It is the *goal* of the people to establish a system of education which will develop the full educational potential of each person." 236 Mont. at 52–53, 769 P.2d at 689 (emphasis added). The court rejected that reading because in "the next sentence, the framers did not use the term 'goal.' Instead they stated equality of educational opportunity 'is guaranteed' to each person of the state.'" *Id.* 236 Mont. at 53, 769 P.2d at 689. Because the IEC in § 1(2) contains no corresponding guarantee, *Helena Elementary* controls: it is an aspirational goal committed solely to the Legislature.

2. The Indian Education Clause lacks judicially discoverable and manageable standards.

A political question also exists when a claim suffers from "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. "One of the most obvious limitations imposed by [Article III, § 1, of the Constitution] is that judicial action must be governed by standard, by rule." *Vieth*, 541 U.S. at 278 (plurality opinion). Plaintiffs ask this Court to impose and manage a massive compliance regime dependent on several branches of government. It is also highly speculative whether the requested relief will redress any alleged injuries. *See Alperin v. Vatican Bank*, 410 F.3d 532, 553 (9th Cir. 2005) (courts must be "capable of granting relief in a reasoned fashion" and not merely "providing 'hope' without a substantive legal basis for a ruling.").

Implementation of the IEC "revolve[s] around 'political, social and economic' judgments" for the political branches to decide. *See Virginia v. Ferriero*, No.: 2-242(RC), 2021 U.S. Dist. LEXIS 41330, at *30–31 (D.D.C. Mar. 5, 2021). Granting relief would improperly require this Court to make policy determinations, which implicate other important questions like funding and local control of education. *See id.* at *34 (no political question because "[a]ddressing the effect of the ERA's deadline would not entail making a policy determination"). There are simply no manageable judiciable standards for the Court to apply for reporting, monitoring, oversight, and compliance for hundreds of school districts across the state. *See Coleman v. Miller*, 307 U.S. 433, 453–54 (1939) (finding political question based on the absence of any acceptable criteria for making a judicial determination).

C. Any justiciable controversy under the Indian Education Clause is limited to the school funding context.

Even if the IEC was justiciable, it would be limited to the adequacy of funding. *Columbia Falls* and *Helena Elementary* were decided specifically in the context of the adequacy of funding under Article X, §1. *See Columbia Falls*, ¶ 20–31; *Helena Elementary*, 236 Mont. at 55, 784 P.2d at 690–91. Those decisions did not implicate Defendant—nor do they here. *Helena Elementary* dispositively says the IEC's "burden … must be addressed as a part of the school funding issues." 236 Mont. at 58, 784 P.2d at 693; *see also Columbia Falls*, ¶ 35. Since Plaintiffs do not challenge funding and Defendants have no legal role in appropriations, their claim should be dismissed.

II. Plaintiffs Fail to state a claim upon which relief can be granted.

A. Plaintiffs fail to allege a violation of the Montana Constitution.

The plain text of the IEC demonstrates that it does not confer any duty or responsibility on Defendants. *Bryan v. Yellowstone Cty. Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 23, 312 Mont. 257, 60 P.3d 381 ("intent of the framers … must first be determined from the plain language of the words used."). Plaintiffs rely on *Helena Elementary* and *Columbia Falls* for their IEC claim. But Defendants have no constitutional duties under Article X, § 1(2). Any cognizable "burden" would reside with the Legislature and would be limited to funding. The language from *Helena Elementary* came in the context of the district court's finding regarding whether the State could factor certain federal payments into its equalization formula. 236 Mont.

at 57–58. The Court "invite[d]" the political branches to make changes to the law that would permit it. *Id.* at 58. The *Columbia Falls* Court did not further address the IEC. *Columbia Falls*, ¶35. And Plaintiffs do not challenge the adequacy of IEFA funding.[1] Plaintiffs have no constitutional claim.

B. Defendants fail to state a claim under IEFA.

1. The Complaint fails to allege a statutory violation by Defendants.

Plaintiffs' statutory claims also fail. Most importantly, Plaintiffs do not identify a single statutory command that Defendants have allegedly violated. Nor can they. Plaintiffs' allegations that Defendants have statutory duties to "implement, monitor, and enforce" the Indian Education Provisions are legal conclusions entirely without textual support. Compl. at ¶ 109; *Cowan*, ¶ 14. The Legislature enacted the IEFA statute and has set forth the responsibilities for each level of government. *Holms v. Bretz*, 2021 MT 200, ¶ 8, 405 Mont. 186, 492 P.3d 1210 (the role of a court "is to implement the objectives the legislature sought to achieve."). Courts "'interpret a statute first by looking to its plain language' and will not interpret it further 'if the language is clear and unambiguous.'" *Holmes*, ¶ 9. The statutory text is clear that Defendants have no such responsibilities.

The IEFA statute, MCA § 20-1-501, contains no mandatory language and does not mention Defendants. *See* Appendix A (MCA § 20-1-501(1)); *see also id.* § 20-1-501(2) (defining "American Indian studies" and "instruction"). Defendants read into

[1] If Plaintiffs challenged adequacy of funding, Plaintiffs would still not have standing because their injuries would not be traceable to Defendants.

the statute requirements that do not exist. *See Bates v. Neva*, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265 ("[I]n interpreting a statute, we are simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted … It is not our prerogative to read into a statute what is not there.") (quotations and citations omitted). Nowhere in Montana law are Defendants required—or authorized—to establish minimum outcomes for IEFA compliance, impose additional reporting requirements, or withhold funding. *See* Compl. at ¶¶ 69, 72, 84.

The Montana Supreme Court recognized the textual limitations of § 20-1-501 in *Dupuis v. Bd. of Trustees* when it rejected a claim that IEFA created a private right of action for students. 2006 MT 3, ¶ 14, 330 Mont. 232, 128 P.3d 1010. The Court noted that "[n]othing in this statute provides … for a right to a hearing before the County Superintendent if an aggrieved party believes that a school district has violated this provision of Montana law." *Id.* ¶ 15. Similarly, Defendants here have not been tasked by the Legislature with implementing IEFA nor do they possess the authority to implement, monitor, and enforce it.

To implement Article X, § 1(2), rather, the Legislature has chosen that the State will "provide an Indian education for all payment to public school districts." MCA § 20-9-329(1). This payment is a component of Montana's BASE aid school funding formula. *Id.* § 20-9-329(2). It mandates school districts receiving IEFA payments "may not divert the funds to any purpose" and requires school districts to

"file an annual report with [OPI], in a form prescribed by the [SPI], that specifies how the Indian education for all funds were expended." *Id.* § 20-9-329(4). That is all.

Plaintiffs wrongly claim that § 20-9-329(4) "reflects a clear legislative intent that OPI must monitor through written reports the expenditure of IEFA funds to ensure that not one penny of those funds is spent for a non-IEFA purpose." Compl. at ¶ 84. That belies the plain meaning. The Legislature did not prescribe authority for IEFA compliance to OPI. *Dupuis*, ¶ 15; *Bates*, ¶ 13. OPI's sole responsibility under § 20-9-329(4) consists of providing a form for school districts to file their annual report. Plaintiffs do not allege OPI has failed to prescribe a form for specifying how IEFA funds were expended. Plaintiffs' allegations, in fact, concede OPI has satisfied this requirement via the Annual Trustees Financial Summaries (ATFS) and TEAMS data collection. *See* Compl. at ¶¶ 73–74, 79–82. It is telling that the only identified alleged misuses of IEFA by districts were reported to OPI via TEAMS in accordance with the statute. *See* Compl. at ¶¶ 86–87.

Plaintiffs also claim "neither the ATFS nor the TEAMS data collection require school districts to report their statutorily required cooperation with Montana tribes." Compl. at ¶ 83. Once again, Plaintiffs read a requirement into the statute that does not exist.

2. Defendants lack authority to oversee IEFA compliance.

The IEFA statute reflects the Legislature's reverence for local control of schools. *See* Mont. Const. art. X, § 8 ("The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.").

It is the responsibility of local school boards to review how funds are expended. *See* MCA § 20-9-213. For example, another IEFA provision says: "The board of trustees for an elementary or secondary public school district may require that all of its certified personnel satisfy the requirements for instruction in American Indian studies." MCA § 20-1-503(1). The statute further provides: "[p]ursuant to Article X, section 8, of the Montana constitution, this requirement may be a local school district requirement with *enforcement and administration solely the responsibility of the local board of trustees*." *Id.* (emphasis added). Thus, reflecting the Legislature's desire to implement IEFA without disturbing local control.

Defendants also don't possess independent authority to enforce IEFA.[2] The Legislature has given the SPI limited enumerated powers and duties for the supervision of schools. *See generally* MCA § 20-3-106 (powers and duties). She does not possess general compliance authority over all education matters and lacks the power to withhold or impact IEFA funding. Compl. at ¶¶ 97–98.

The SPI's duty is to "distribute BASE aid and special education allowable cost payments in support of the BASE funding program" in accordance with statute. MCA § 20-3-106(12). Nowhere in her duties is she allowed or required to enforce IEFA—which is a component of BASE aid. Plaintiffs do not identify any statutory authority

[2] Defendant BPE joins the Motion to Dismiss and this Joint Brief. As argued, Plaintiffs fail to state a claim upon which relief can be granted, and they have failed to adequately plead the necessary elements to give rise to standing, justiciable claims or the relief requested as articulated by OPI. Necessarily, BPE cannot address arguments concerning the scope of or interpretation of OPI's responsibilities or duties as referenced in the Complaint.

for Defendants to impose "consequences" on school districts for lack of compliance with IEFA. *See* Compl. at ¶¶ 96–97.

The Legislature has given the SPI specific oversight duties elsewhere. For example, she must "supervise" school budgeting procedures, the school financial administration provisions of § 20-9-201(2), and special education. MCA §§ 20-3-106(6), (9), (23). She is also tasked with administering traffic education and food service. *Id*. § 20-3-106(24), (25). As part of her BASE aid duties under § 20-3-106(12), she is tasked with a number of specific reporting and recording requirements for equalization aid. *See id*. § 20-9-346. The Legislature, however, chose not to impose similar requirements on her for IEFA.

Plaintiffs also cannot bootstrap accreditation into a cognizable IEFA duty. Defendants don't have the ability to dictate the curriculum of individual districts. Accreditation content standards are merely adopted by the BPE after recommendations from the SPI. *Id*. § 20-7-101. The SPI's recommendations come following a negotiated rulemaking—an intense process that involves stakeholders across all spectrums. The conditions for accreditation of schools are reviewed by OPI and then a report is made to BPE, who then makes a final determination. *Id*. § 20-7-102; ARM 10.55.

The content standards are not curriculum but rather the base minimum for curriculum development. It is the responsibility of each school district to ensure their curriculum is aligned to all content standards. *See* ARM 10.55.603; *see also* ARM 10.55.601 (content standards are part of each district's school improvement plan).

Each school district's board of trustees approves curriculum, not Defendants. MCA § 20-3-324(18); *see also* § 20-9-213.

BPE defines and specifies the basic content standards. *Id*. § 20-7-111. Those content standards are used by local districts to develop curriculum. *See* ARM 10.53.101. IEFA is not a standalone subject area. Rather, IEFA should be incorporated into each subject area as appropriate. ARM 10.53.102. For example, in outlining social studies for grades 9-12, the content standards include IEFA-related topics such as tribal institutions, sovereignty of federally recognized tribes, and decision-making a tribal level. *See* ARM 10.53.909.

Reviewing the scope of BPE's constitutional and statutory duties, it's clear that Plaintiffs have not sufficiently alleged any duties, breach of duties or authority of BOE that would give rise to a cause of action and warrant relief. BPE is not empowered to establish "minimum standards" for IEFA compliance by school districts and schools and in relation to these standards to implement reporting, monitoring and enforcement mechanisms regarding the standards or funding compliance with standards either by itself or as to OPI or school districts. Compl. at ¶¶ 69, 72, 84, 88, 108-110, 115. Nor does BPE have authority over, or duties with respect to OPI or school districts to require them to work cooperatively with Montana tribes. Compl. at ¶¶ 93-95, 99, 111-112. As to itself, BPE has implemented Mont. Const. art. X, § 1(2), including MCA §§ 20-1-501, 20-7-101, and 20-9-309 in its administrative rules in Chapter 10, Subchapters 55 and 53, Mont. Admin. R. In short, no enabling authority Plaintiffs cite as to BPE confer actionable duties for which there has been a breach or remedies

prescribed. BPE does acknowledge the constitutional and statutory underpinnings referenced by Plaintiffs and going forward will continue working to achieve them as required or as brought to BPE's attention.

For these reasons, the Court should dismiss Count I.

C. Plaintiffs fail to allege a Fourteenth Amendment Due Process claim.

The Court should dismiss Count II because Plaintiffs have no due process claim. The Due Process Clause of the Fourteenth Amendment requires procedural due process only where a person is deprived of a protected interest in liberty or property. *See Board of Regents v. Roth*, 408 U.S. 564, 569–70 (1972). "[T]he complainant must allege facts showing not only that the State has deprived him of a … property interest but also that the State has done so without due process of law." *Brewster v. Bd. of Educ.*, 149 F.3d 971, 983 (9th Cir. 1998) (quotations omitted); *Paul v. Davis*, 424 U.S. 693, 710 (1976) ("[Liberty and property] interests attain … constitutional status by virtue of the fact that they have been initially recognized and protected by state law."). But, "not every statute authorizing a benefit creates a property interest." *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010).

Plaintiffs rely on one line from *Helena Elementary* and *Columbia Falls* to support the creation of an individual right to Indian Education. Compl. at ¶ 114. Montana law creates no such right—at least not one that is actionable by the courts. In *Mishler*, for example, both state and federal law recognized professional licenses as a protected property interest. *Mishler v. Nev. State Bd. of Med. Exam'rs*, 896 F.2d 408, 409–10 (9th Cir. 1990); *see also Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir.

1979) (holding that a state statute, coupled with its implementing regulations, created a property interest in general relief benefits because the regulations "set forth specific objective eligibility criteria for receipt of aid"). Plaintiffs' claims regarding Defendants' lack of implementation regulations actually cut against the existence of a protected right. *See Crawford v. Antonio B. Won Pat Int'l Airport Auth.*, 917 F.3d 1081, 1091 (9th Cir. 2019) (lack of implementing regulations supported the conclusion that Plaintiff's property right was not a constitutionally protected interest).

There is also no mandatory or prohibitive language in the Indian Education Provisions giving rise to a protected interest. *See, e.g.*, G*reenholtz v. Inmates of Neb. Penal & Corr. Complex, 442* U.S. 1, 11–12 (1979) (finding protected liberty interest in the expectation of parole due to a state statute containing mandatory language ("shall") that created a presumption of release); *Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983) (finding statutory scheme placed significant substantive restrictions on the agency's actions so as to confer due process rights).

Finally, Plaintiffs' failure to allege injury in fact is fatal because they don't allege they have been deprived of any protected interest. *See Teigen v. Renfrow*, 511 F.3d 1072, 1080 (10th Cir. 2007) (property interest in continued employment status could not form the basis for due process claims because plaintiffs had not alleged they were terminated or deprived of their existing employment status). In *Goss v. Lopez*, the Supreme Court directed that, where state law creates an entitlement to public education, it is a student's "total exclusion from the educational process" that constitutes a deprivation of protected property and liberty interests. 419 U.S. 565,

576 (1975). Plaintiffs' allegations do not come close. And, as discussed, even if Plaintiffs had been deprived of a protected property interest, they would not have standing because those purported injuries would not be traceable to Defendants or redressable. *See* Part I(A)(2), *infra*.

Because Defendants have no additional statutory or constitutional authority to control IEFA compliance, it is impossible for them to provide the notice and opportunity. Plaintiffs' remedies are through the political and legislative processes. This is not a case where Defendants have taken an action that deprived Plaintiffs of some concrete right, such as suspension and other disciplinary punishments. *See Goss*, 419 U.S. at 580. As a result, no process was due by Defendants. Plaintiffs' due process claim should be dismissed.

III. The Court lacks the power to grant the requested relief.

A. Declaratory relief is prohibitively speculative.

Plaintiffs ask this Court to grant a declaratory judgment regarding Defendants' alleged duties under Montana law. *See* Compl. at ¶¶ 33–34. But "[a] district court may refuse to enter a declaratory judgment if it would not terminate the uncertainty or controversy giving rise to the proceedings[.]" *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364 (citing MCA § 27-8-206).

First, the justiciability issues in Part I, *infra*, wholly negate this Court's ability to award declaratory relief. *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 7, 337 Mont. 67, 155 P.3d 1278 ("It is necessary for a justiciable controversy to exist before a court may exercise jurisdiction under the [Declaratory Judgment Act]."). Plaintiffs' failure to allege concrete harms renders any opinion abstract and

speculative. *Donaldson*, ¶ 9. Second, since the IEC is a non-justiciable political question, a declaratory judgment would be an unwarranted intrusion into the Legislature's authority. *See Miller*, ¶ 9. In *Donaldson* the Montana Supreme Court agreed declaratory relief "exceed[ed] the bounds of a justiciable controversy" when plaintiffs had essentially requested "a direction to the legislature to enact a statutory arrangement." ¶ 4; *see also Id.* ¶ 8 ("Plaintiffs seek a general declaration of their rights and seek orders enjoining the State to provide them a legal status and statutory structure that protects their rights.").

Finally, declaratory relief would not terminate the uncertainty or controversy due in large party to the redressability issues discussed in Part I(A)(3), *infra*. Plaintiffs allege numerous third-party schools are in violation of the Indian Education Provisions. Compl. at ¶¶ 86, 94. The Legislature also has the key role in funding IEFA and authorizing Defendants to take any action. Any relief this Court could fashion would necessarily be prohibitively speculative.

B. The requested injunctive relief is improper.

The requested injunctive relief is effectively a mandamus action. *See In re "A" Family*, 184 Mont. 145, 153, 602 P.2d 157, 162 (1979) ("Injunction is a remedy to restrain the doing of injurious acts or, in its mandatory form, to require the undoing of injurious acts and restoration of the status quo, while mandamus commands the performance of a particular duty which rests upon the defendant, or respondent, because of his official status or by operation of law …") (quoting 42 Am.Jur.2d 750 Injunctions § 19). For a writ of mandamus, Plaintiffs must show a Defendants have

a clear legal duty. *See RAE Subdivision Cty. Water & Sewer Dist. No. 313 v. Gallatin Cty.*, 233 Mont. 456, 457, 760 P.2d 755, 755 (1988): *State ex rel. Chisolm v. District Court*, 224 Mont. 441, 442, 731 P.2d 324, 324-25 (1986) (A writ of mandamus "is an extraordinary remedy" to be granted only in "rare cases."); *State v. Bd. of Cty. Comm'rs.*, 181 Mont. 177, 179, 592 P.2d 945, 946 (1979) (A party who seeks a writ of mandamus accordingly possesses a "heavy burden."). "A clear legal duty exists … only when the law defines the duty with 'such precision and certainty as to leave nothing to the exercise of discretion and judgment.'" *City of Deer Lodge ex rel. City of Deer Lodge Ordinances 130 & 136 v. Chilcott, 20*12 MT 165, ¶ 16, 365 Mont. 497, 500, 285 P.3d 418, 421. Plaintiffs cannot ask the Court to command the performance of a duty they're also asking the Court to create. The theory of Plaintiffs' case necessarily shows that—irrespective of their deficient pleading—they cannot satisfy mandamus's "heavy burden." *Bd. of Cty. Comm'rs.*, 181 Mont. at 179, 592 P.2d at 946.

Affirmative relief is improper under the injunctive lens as well. Such mandatory injunctive relief is subject to greater scrutiny and disfavored. *See Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986) (when the effect of a mandatory injunction is equivalent to the issuance of mandamus it is governed by similar considerations); *Transwestern Pipeline Co., Ltd. Liab. Co. v. 17.19 Acres*, 550 F.3d 770, 776 (9th Cir. 2008) (mandatory injunctions are "particularly disfavored in law").

Finally, Plaintiffs' failure to satisfy standing affects this Court's ability to grant relief because any injunction must also be limited to the scope of the harm. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also Missouri v. Jenkins*, 515 U.S. 70,

88, 89 (1995) ("[T]he nature of the … remedy is to be determined by the nature and scope of the constitutional violation") (cleaned up). "[A]n injunction should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs before the court." *City & Cty. of S.F. v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020) (quotations omitted).

IV. Plaintiffs failed to join all necessary Defendants.

The Court should dismiss the Complaint because Plaintiffs have failed to join indispensable defendants. Rule 19(a)(1) establishes that parties must be joined if complete relief cannot be accorded without their participation. *Mohl v. Johnson*, 275 Mont. 167, 911 P.2d 217, 219 (1996). As discussed in Part II(B)(1), Plaintiffs allege that numerous school districts are in direct violation of statutory IEFA provisions. This Court, thus, cannot provide complete relief without those parties and should dismiss the complaint.

CONCLUSION

Plaintiffs lack standing, fail to state a claim for relief, and have asked this Court for relief that it lacks the power to grant. Therefore, this Court should dismiss their Complaint pursuant to Mont. R. Civ. P. 12(b)(6).

DATED this 21st day of October, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7 of the Eighth Judicial District, I certify that this brief is 6,399 words. The word count was calculated using Microsoft Word for Windows and excludes the caption, certificates of service and compliance, signature lines and attachments.

CERTIFICATE OF SERVICE

Pursuant to the parties' Stipulation to Electronic Service, I certify a true and correct copy of the foregoing was sent by email to the following:

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ROCHELL STANDISH

Appendix A

20-1-501, MCA

20-1-501, MCA

Current with legislation effective through May 4, 2021.

LexisNexis® Montana Code Annotated > Title 20 Education (Chs. 1 — 32) > Chapter 1 General Provisions (Pts. 1 — 6) > Part 5 Indian Education for All (§§ 20-1-501 — 20-1-503)

20-1-501 Recognition of American Indian cultural heritage — legislative intent.

(1) It is the constitutionally declared policy of this state to recognize the distinct and unique cultural heritage of American Indians and to be committed in its educational goals to the preservation of their cultural heritage.

(2) It is the intent of the legislature that in accordance with *Article X, section 1(2), of the Montana constitution*:

(a)every Montanan, whether Indian or non-Indian, be encouraged to learn about the distinct and unique heritage of American Indians in a culturally responsive manner; and

(b)every educational agency and all educational personnel will work cooperatively with Montana tribes or those tribes that are in close proximity, when providing instruction or when implementing an educational goal or adopting a rule related to the education of each Montana citizen, to include information specific to the cultural heritage and contemporary contributions of American Indians, with particular emphasis on Montana Indian tribal groups and governments.

(3) It is also the intent of this part, predicated on the belief that all school personnel should have an understanding and awareness of Indian tribes to help them relate effectively with Indian students and parents, that educational personnel provide means by which school personnel will gain an understanding of and appreciation for the American Indian people.

History

En. Sec. 1, *Ch. 527, L. 1999*.

Annotations

LexisNexis® Notes

Case Notes

Civil Rights Law: Practice & Procedure: Civil Rights Commissions: Complaints

Education Law: Discrimination: Racial Discrimination: Racial Harassment

Governments: Native Americans: Civil Rights