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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 REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

Defendants' Brief in Support of their Motion to Dismiss ("MTD Br.") discussed the numerous fatal flaws in Plaintiffs' First Amended Complaint. Plaintiffs' Response asks this Court to disregard the text of the Montana Constitution and create new rights and duties out of thin air. But this Court shouldn't ignore the plain text or overwhelming weight of caselaw and common sense on Defendants' side.

The Indian Education Clause ("IEC") in Article X, §1(2) of the Montana Constitution, contains no mandatory language and doesn't create any enforceable rights or duties. The Indian Education for All ("IEFA") statute, MCA § 20-1-501, *et. seq.*, similarly, contains no relevant duties or obligations for Defendants. The Legislature chose to effectuate the IEC through IEFA and that alone is the sole mechanism by which the IEC can be enforced.

Plaintiffs blame Defendants for third-party school districts' improper use of IEFA funds and failure to work with Indian tribes. But Plaintiffs still cannot identify a legitimate injury-in-fact that's fairly traceable to Defendants and redressable. Defendants have no duty to remedy even the vague and conclusory injuries asserted. Plus, any relief that could possibly redress Plaintiffs' injuries is beyond this Court's power.

Plaintiffs' Response is also internally confused. They claim Defendants' violations are clear from the "plain text" of Montana law, Pls. Resp. at 11, 13, yet resort to implied duties and legislative history to find them, *id.* at 15. They claim they don't desire broad programmatic relief or agency supervision, *id.* at 6, but also ask this Court to enjoin Defendants to undertake punitive enforcement actions and monitor their compliance, First Amend. Compl. at 49. This exposes flawed theories in search of a lifeline.

Finally, even if the IEC and IEFA (collectively, "Indian Education Provisions") create some enforceable duties, those duties don't apply to Defendants. Plaintiffs fundamentally

misunderstand education when they claim Defendants are "the very agencies charged under Montana law with providing public education in Montana." Pls. Resp. at 8. The Montana Constitution and IEFA both recognize the primacy of local control of education. *See* MONT. CONST. art X, §8; MCA § 20-1-503(1).

ARGUMENT

I. Plaintiffs claims aren't justiciable.

A. Plaintiffs haven't carried their burden on standing.

1. Plaintiffs still can't identify injury-in-fact.[1]

Despite multiple bites at the apple, Plaintiffs fail to allege specific, concrete, and particularized harm. First, Plaintiffs have failed to allege that Article X, §1(2) creates any duties or specific rights. The IEC refers passively to a "recognition" and "commitment" to educational goals of the State without a designation of any entity responsible for the assertion. There's no mandatory language. *See* Antonin Scalia & Brian Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012) (mandatory words impose a duty, permissive words grant discretion). There's also no designated specific recipient of the right to whom a duty is owed. So, there's no possibility of a general injury-in-fact from the loss of a constitutional right.

Second, there's no duty under IEFA or the IEC for Defendants to protect Plaintiffs from ostracism, racism, stereotyping, bullying, feelings of danger, lack of cultural awareness, and discrimination. Under the public duty doctrine, Defendants owe no duty to Plaintiffs to protect them from the harms they allege. *See Nelson v. State*, 2008 MT 336, ¶ 35, 346 Mont. 206, 216,

[1] Plaintiffs are confused about Defendants' standing arguments and somehow believe Defendants do not contest the standing of the Tribal Plaintiffs. That's incorrect. The Tribal Plaintiffs fail to satisfy constitutional standing for the same reasons as the individual Plaintiffs. *See* MTD Br. at 4–19.

195 P.3d 293, 300. Plaintiffs' harms are also not particularized to a specific plaintiff or to an act or omission of the Defendants.

Plaintiffs accuse Defendants of not citing adequate caselaw when the burden on *them* to establish harm. Plaintiffs cite two abortion cases in support of allowing their vague claims to proceed. *See* Pls. Resp. at 3; *Weems v. State*, 2019 MT 98, ¶ 14, 395 Mont. 350, 440 P.3d 4; *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). Setting aside the obvious differences, the reason the medical providers in *Weems* were "plainly impacted" by the statute was because it prevented them from seeking licensure. *Weems*, ¶ 14. Meanwhile, Defendants cited the more applicable *Waln v. Dysart Sch. Dist.*, 522 F. Supp. 3d 560 (D. Ariz. 2021) and *Kan. Penn Gaming, L.L.C. v. Collins*, 656 F.3d 1210, 1221 (10th Cir. 2011).

Plaintiffs chastise Defendants as being "unable to understand the depth and gravity of these immense injuries," Pls. Resp. at 3, but Defendants shouldn't have to consult a cryptex to find injury-in-fact. One would think Plaintiffs would be able to provide one single example of widespread racism, ostracism, stereotyping, bullying, lack of cultural awareness, or discrimination that the Defendants are directed by the Legislature to protect. But they haven't. Concrete and particularized injuries are required because they must be fairly traceable to conduct by Defendants and redressable by the Court.

2. Any injuries are not fairly traceable.

Plaintiffs also cannot show any purported injuries are fairly traceable to Defendants. Defendants don't instruct or develop curricula and they don't appropriate or expend IEFA funds. *See* MTD at 17—0. Nor are they obligated to protect Plaintiffs from emotional harm, mental illness, or criminal acts. *Nelson*, ¶ 35. At best, Plaintiffs have alleged indirect harm. *See Warth v. Seldin*, 422 U.S. 490, 505 (1975) ("indirectness of the injury ... may make it substantially more difficult to meet the minimum requirement of Art. III...."). Plaintiffs cannot escape that their

"causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries" and is thus too weak to support standing. *Native Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (cleaned up).

In a tacit admission that their claims can't succeed under traditional traceability analysis, Plaintiffs rely almost exclusively on environmental caselaw while largely ignoring the civil rights caselaw cited by Defendants. *See* MTD Br. at 5–6. For example, Plaintiffs cite *WildEarth Guardians v. U.S.D.A.*, 795 F.3d 1148 (9th Cir. 2015), a procedural challenge under the National Environmental Policy Act (NEPA). Hardly dispositive, Plaintiffs forget to tell the Court that under NEPA "[o]nce plaintiffs seeking to enforce a procedural requirement establish a concrete injury, 'the causation and redressability requirements are relaxed." *Id.* at 1154 (quotations omitted). They also cite *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), where the plaintiffs (who had sufficiently alleged a specific injury in fact, *id.* at 1168) proved at summary judgment that their injuries were caused in part by federal subsidies and leases for fossil fuels. *Id.* at 1169; *see also Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1141–46 (9th Cir. 2013) (causal chain between failure to regulate oil refineries and climate-change related injuries was too tenuous to support standing). *Nw. Env't. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 959 (D. Or. 2006), is inapplicable as well because the "traceable" element was pollution that the defendant, as well as other sources, were all capable of emitting. But here, there's no harmful consequence emanating directly from the Defendants' actions. Plaintiffs' theory is based solely on Defendants purported inaction pursuant to a non-existent statutory directive in the area of compliance, corrective, or enforcement actions. *See* First Amend Compl. at ¶ 148.

Nor can the "substantial factor" test save Plaintiffs. "[W]hen a plaintiff alleges that government action caused injury by influencing the conduct of third parties ... more particular

facts are needed to show standing." *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (quotations omitted). Plaintiffs have not alleged sufficient facts demonstrating that Defendant's actions or omissions are a substantial factor in causing Plaintiff's injuries. *See Id.*

Further, Plaintiffs don't—and can't—allege that there's a connection between their harms and any act or omission of the Defendants or of any deprivation of a constitutional or statutory right. Plaintiffs admit that state statutes containing no mandatory language and conferring substantial discretion on agency officials do not create a protected interest. Pls. Resp. at 19. Defendants don't have the ability to dictate the curriculum of individual districts, local school districts do. *See* ARM 10.55.501(1). Accreditation content standards are merely adopted by the BPE after recommendations from the SPI. MCA § 20-7-101.

3. Any injuries are not redressable.

There are numerous redressability problems with Plaintiffs' legal claims. *See* MTD Br. at 6-8. Plaintiffs' purported injuries are not redressable because they're caused by third parties, not Defendants. There's no proper relief under the statutes Defendants execute that could redress Plaintiffs' alleged injuries. Defendants' Motion to Dismiss sets forth the numerous redressability problems with Plaintiffs' legal claims. *See* MTD Br. at 6–8. As a result, Plaintiffs cannot show a significant likelihood they would obtain relief that directly redresses the injury suffered.

Plaintiffs' Response surprisingly avers that they do not seek "broad programmatic relief or agency judicial supervision" and that they apparently desire only declaratory relief. Pls. Resp. at 6. But their First Amended Complaint asks this Court to

> (8) Grant a preliminary and Final Injunction enjoining Defendants from failing to establish adequate minimum standards that ensure compliance with the Indian Education Provisions and failing to implement, monitor, and enforce those standards, and failing to ensure that schools and school districts in close proximity

> to Montana tribes cooperate with those tribes in providing educational instruction, implementing educational goals, and adopting educational rules;
>
> (9) Retain continuing jurisdiction over this matter until such time as the Court has determined that Defendants have, in fact, fully and properly fulfilled its Orders.

First Amend. Compl. at 49; *see also* Pls. Resp. at 27–28. Plaintiffs' filings clearly request broad programmatic relief, but if Plaintiffs no longer desire injunctive relief or judicial supervision, and since they have not responded to Defendants' arguments, *see* MTD Br. at 6-9, this Court should dismiss those requested remedies and associated claims.

Declaratory relief alone can't save Plaintiffs. Plaintiffs don't seek a simple declaratory judgment on the constitutionality of a statute, but rather an abstract opinion about an agency's compliance with vague constitutional goals. The Montana Supreme Court rejected this type of declaratory relief in *Donaldson v. State*, 2012 MT 288, 367 Mont. 228, 292 P.3d 364, where the plaintiffs didn't "seek a declaration that any particular statute is unconstitutional or that its implementation should be enjoined" but only "a general declaration of their rights" and "orders enjoining the State to provide them a 'legal status and statutory structure that protects their rights.'" *Id.* ¶8. The Court declined to provide the relief because it "exceed[ed] the bounds of a justiciable controversy." *Id.* ¶9. Plaintiffs likewise can't identify a specific statutory provision violated by Defendants.

The cases cited by Plaintiffs involve either clearly identifiable, particularized rights under a statute or the constitutionality of a statute. Neither is present here. Plaintiffs cite *Gazelka v. St. Peter's Hosp.*, where a patient alleged discrimination based on lack of health insurance. 2015 MT 127, ¶¶ 1, 6, 379 Mont. 142, 347 P.3d 1287. But the plaintiff sought both declaratory and injunctive relief regarding the constitutionality of the statute. *Id.* ¶17. *Mont. Auto. Ass'n v. Greely* also involved the constitutionality of a statute. 193 Mont. 378, 382, 632 P.2d 300, 303 (1981).

The same cannot be said here. And, in *Doty v. Mont. Comm'r of Political Practices*, 2007 MT 341, ¶ 21, 340 Mont. 276, 283, 173 P.3d 700, 705, the Court held the declaratory judgment statute didn't provide Doty with standing to challenge the Commissioner's discretionary decision not to prosecute. *Id.* ¶ 21.

Finally, even meritorious and traceable constitutional claims may not be redressable. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). For example, in *Juliana* the traceable injuries-in-fact weren't redressable because "it is beyond the power of an Article III court to order, design, supervise, or implement" a remedial plan. 947 F.3d at 1171. Granting relief "would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking." *Id.* at 1172. This is particularly true when it comes to non-self-executing provisions. *See Republic of the Marsh. Is. v. United States*, 865 F.3d 1187, 1199 (9th Cir. 2017). Plaintiffs ask for similarly unworkable relief.

B. The IEC is non-justiciable political question.

1. The IEC is not self-executing.

Plaintiffs' Response takes the extreme position that any constitutional provision that does not contain an express directive to the legislature is necessarily self-executing. *See* Pls. Br. at 7. Not so. The lack of language directive actually militates toward interpreting the IEC as non-self-executing. That's why the Legislature has effectuated the IEC through IEFA.

"A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative...." *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975). There must be "a manifest intention that [it] should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 74, 132 P.2d 689, 700 (1942).

The IEC isn't self-executing because it neither imposes a duty nor confers a right. It merely lays out principles for the Legislature to implement. *See Davis v. Burke*, 179 U.S. 399, 403 (1900) ("A constitutional provision ... is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.") (quotations omitted). Plaintiffs' own source confirms this. *See* Carol Juneau & Denise Juneau, *Indian Education for All: Montana's Constitution at Work in Our Schools*, 72 Mont. L. Rev. 111 (2011) ("Although the Montana Constitution is the foundation of Indian Education for All, further action was necessary to define the intent of the provision and to provide the necessary resources to make it effective."); Alex Sakariassen, *Montana's long road to make good on Indian Education for All*, MONT. FREE PRESS (Mar. 23, 2022) ("Without funding from the state, [Denise] Juneau said, the promise to recognize Indian heritage in K-12 instruction was 'just sort of this lofty language' in the state Constitution."), https://montanafreepress.org/2022/03/23/montana-constitution-indian-education/. Even the trial court in *Columbia Falls* recognized that the IEFA statute "incorporates mandates [in the funding arena] that are intended to give effect to the constitutional *principles* of [the IEC]." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2004 Mont. Dist. LEXIS 3727, *72 (Apr. 15, 2004) (emphasis added).

Plaintiffs essentially concede the IEC contains no literal directive. Instead, they look to passive language in the IEC about the state being "committed in its educational goals" to impose an affirmative duty on the entire state. Pls. Br. at 7. In support, they rely on out-of-context dicta from *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989). First, *Helena Elementary* makes clear that any enforceable burden under IEC should be "addressed as a part of the school funding issues." *Id.* at 58, 693. Second, *Helena Elementary* only mentioned the "executive branch" because in order to factor in certain federal revenues into the school finance

equalization system, the state had to secure approval from U.S. Department of Education. *Id.* The Legislature couldn't do that on its own.

Columbia Falls offers no support because (1) it was also a school finance case, ¶ 10; (2) the State didn't challenge the district court's legal conclusions regarding interpretation of the IEC, ¶ 35; and (3) the State eventually met its IEC obligations by providing adequate funding, *see Columbia Falls Elem. Sch. Dist. v. State*, 2008 Mont. Dist. LEXIS 483, at *4 (Dec. 15, 2008).

Finally, Plaintiffs wrongly suggest that even if the IEC isn't self-executing it becomes justiciable once the Legislature has acted. *See* Pls. Resp. at 8 n.5. Non-self-executing provisions may become justiciable against the *Legislature* once it acts, but not against every state entity. The *Columbia Falls* court clearly said courts in that situation may determine whether the "enactment fulfills *the Legislature's* constitutional responsibility." *Columbia Falls*, ¶ 17. Only the Legislature can create an enforceable duty for Defendants.

2. The IEC has no manageable standards.

Plaintiffs would have this Court believe it's deciding a "run-of-the-mill" constitutional challenge. Pls. Resp. at 9. But categorizing Plaintiffs' claims as mere requests for constitutional and statutory construction would be like categorizing a triathlon as a "morning run." In reality, Plaintiffs ask this Court to evaluate and supervise Defendants' compliance with a purposefully malleable constitutional standard that has no basis in law. As such, this court lacks "the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions." *Alperin v. Vatican Bank*, 410 F.3d 532, 552 (9th Cir. 2005) (quotations omitted).

The two Montana cases cited by Plaintiffs involve courts adjudicating the constitutionality of *statutes*. *See Mont. Auto. Ass'n v. Greeley*, 193 Mont. 378, 632 P.2d 300 (Mont. 1981); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445. Likewise,

although the Supreme Court in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), recognized that the political status of Jerusalem raised serious lack of judicially discoverable and manageable standards concerns, it found those problems ameliorated by the fact that it was only being asked to adjudicate the constitutionality of a statute. *See id.* at 197. And *Alperin*, 410 F.3d 532, only concerned whether adjudicating tort claims against foreign defendants with some relationship to a foreign government triggered foreign relations concerns. Plaintiffs go far beyond wanting a statute declared unconstitutional. They want the Court to make decisions political in nature about programmatic implementation and administrative oversight of local school districts under IEFA.

3. Justiciability is limited to school funding

Plaintiffs Response essentially concedes that nothing in *Helena Elementary* or *Columbia Falls* supports adjudication of the IEC outside the school funding context. *See* Pls. Br. at 10; *see also Columbia Falls*, ¶¶10, 35; *Helena Elementary*, 236 Mont. at 58, 769 P.2d at 693; *Columbia Falls*, 2008 Mont. Dist. LEXIS at*4. Rather, as explained below, plaintiffs want this Court to create new constitutional duties to match their policy preferences. This Court should decline to do so.

II. Plaintiffs fail to state a claim.

A. The IEC imposes no duty on Defendants.

The IEC is an aspirational goal for the Legislature to fulfill. Any justiciable controversy is limited to the school funding context and does not implicate Defendants. The IEC contains no mandatory language such as "shall," "shall have," "right," or "right to, "not be denied," "guaranteed," or "shall not be infringed upon." *See* MONT. CONST. art. X, §1(2); Scalia & Garner, *supra*, at 112. It's notable that §1(1) and §1(2) of Article X both contain "goal." Mont. Const. art. X, §§ 1, 2. As *Helena Elementary* made clear, although the first sentence of §1(1) uses the aspirational term goal, the second sentence imposes a duty because it uniquely uses the word

guarantee. Helena Elementary, 236 Mont. at 52–53. Section 1(2), however, does not use the same language as §1(1) and therefore contains no corresponding guarantee. *See Helena Elementary*, 236 Mont. at 53 ("As we review our Constitution, we do not find any other instance in which the Constitution 'guarantees' a particular right."); *see also* BLACK'S LAW DICTIONARY 772 (9th ed. 2009) (defining "guarantee" as "[t]he assurance that a contract or legal act will be duly carried out."). If the Framers wanted to guarantee Indian Education, they could have done so.

B. Plaintiffs fail to identify a statutory violation.

Plaintiffs' Response fails to identify a single statutory provision giving Defendants a duty or the authority to establish minimum outcomes for IEFA compliance, impose additional reporting requirements, withhold funding, or carry out any of the actions referenced in paragraphs 148–49, 151 of the amended complaint. Plaintiffs, instead, resort to a variety of statutory gimmicks. But they can't escape the plain language and structure of the statute. *See Clark Fork Coal. v. Mont. Dep't of Nat'l Res. & Conserv.* 2021 MT 44, ¶ 36, 403 Mont. 225, 257, 481 P.3d 198, 213 ("Our role in statutory construction is to simply ascertain and declare what is in terms or in substance contained therein, not insert what has been omitted or omit what has been inserted") (quotations omitted).

1. The IEFA statute imposes no duty on Defendants.

Plaintiffs allege that because § 20-1-501(2)(b) says that it's intent of the Legislature that "every educational agency and all educational personnel will work cooperatively with all Indian tribes" it means there's an enforceable duty against Defendants. That theory erroneously looks to the legislative intent portion of IEFA to invent legal duties for Defendants. It, moreover, asks this Court to put words into the statute—impermissibly changing the legislative scheme. *Id.*

If the Legislature intended to create an enforceable duty, it would have included operative language such as "may" or "shall"—as it did elsewhere in the statute. *See* MCA § 20-1-503(1);

Scalia & Garner, *supra*, at 112. There's a reason why it's not there. Section 20-1-501 is just the legislative declaration. It's then followed by a definition section. *See* MCA § 20-1-502. IEFA concludes with the operative section regarding qualification in Indian studies, which addresses the statute to local school districts, not Defendants. *See* MCA § 20-1-503.

Plaintiffs' novel interpretation is also belied by the Preamble to the bill that became IEFA. IEFA was enacted with the express understanding that education in Montana is subject to local control. *See* H.B. 528, 56th Leg. Ch. 527 (Mont. 1999) ("WHEREAS, the Legislature also recognizes that Article X, section 9(3), of the Montana Constitution provides the Board of Public Education with general supervision over the public school system and that Article X, section 8, of the Montana Constitution vests the supervision and control of the schools in each school district to the local board of trustees"). The operative section then 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. Pursuant 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.*" MCA § 20-1-503(1) (emphasis added).

Including Defendants as "education agencies" would lead to an absurd result. The previous section, MCA § 20-1-501(2)(a), similarly says it's the intent of the Legislature that "*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." (Emphasis added). Under Plaintiffs interpretation, "every Montanan" would literally include every adult in Montana, and schools would violate IEFA by not offering Indian Education to elderly Montanans. *See S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 369, 15 P.3d 948. Likewise,

"every education agency" does not include Defendants, the Wyoming Department of Education, or the U.S. Department of Education. Context matters.

Even if Plaintiffs interpretation of education agency includes Defendants, the statute is an expression of a future objective to work cooperatively and encouraging shared learning about American Indian Culture. In any case, Plaintiffs do not allege any specifics. For example, in ¶138 of the complaint, where Plaintiffs fail to establish content standards or to meet the requirements listed in ¶138 of the amended complaint.

Nor have Defendants implicitly recognized they have a duty. Plaintiffs' citation to language in OPI's Indian Education Manual ("Manual") isn't helpful. Pls. Resp. at 24. The Manual is a technical assistance document, not a substantive regulation carrying the force of law. And the language cited by Plaintiffs only supports the idea that IEFA imposes a duty on *school districts*, not Defendants. *See* Pls. Resp. at 24–25.

Plaintiffs also attempt to fundamentally re-write the original public meaning of IEFA. *See* Scalia & Garner, *supra*, at 80–81 ("[N]ew rights cannot be suddenly 'discovered' years later in the document, unless everyone affected by the document had somehow overlooked an applicable provision that was there all along."). Nothing in the legislative history cited by plaintiffs supports their theory. Contemporary sources on IEFA further demonstrate that H.B. 528 was also only understood to "encourage" school districts, not impose mandates—and certainly not on Defendants. *See, e.g.*, Rebecca Tsosie, *The Challenge of the 'Differentiated Citizenship: Can State Constitutions Protect Tribal Rights?*, 64 MONT. L. REV. 199, 218 (2003) ("Carol Juneau ... introduced House Bill 528 to encourage public school districts, especially those on or near Indian reservations, to ensure that certified teaching personnel have an understanding of the history, culture, and contemporary contributions of Montana's Indian people."); Raymond Cross, *American Indian Education: The Terror of History and Nation's Debt to the Indian People*, 21

U. Ark. Little Rock L. Rev. 941, 969 (1999) (H.B. 528 was "a bill to encourage public school districts ... to ensure that certified teaching personnel have an understanding of the history, culture, and contemporary contributions of Montana's Indian people.").

2. OPI has no power to enforce IEFA.

Plaintiffs theorize that because the SPI has a general duty of supervision of public schools, she also possesses broad and limitless authority to regulate IEFA compliance. Pls. Br. at 13-14, 29. This interpretation is plainly at odds with separation of powers set forth in Article X. *See* MONT. CONST. art. X, §8; *see also* MCA § 20-1-503(1) (implementing IEFA in accordance with Article X, §8). This interpretation would put no limit on the SPI's power. And Plaintiffs fail to respond to Defendants' examples where the Legislature has given OPI actual oversight and administrative duties. *See* MTD Br. at 18.

Plaintiffs also claim—without explanation—that the SPI's statutory duties surrounding the distribution of IEFA funding as a part of BASE aid, accreditation, recommending accreditation status, and maintaining curriculum guidelines somehow compel her to mandate compliance activities and even withhold IEFA funding.[2] *See* Pls. Br. at 14. They point to the SPI's duties for distributing funding under MCA § 20-9-329, but cannot identify what language gives the SPI the right to *withhold* that funding. *See* Pls. Br. at 15.

In addition to withholding funding, Plaintiffs offer vague terms such as "remedial action" and "scrutinize" yet don't tell this Court what that would entail. The precise actions that Plaintiffs believe Defendants can take are highly relevant because Plaintiffs harms are still being caused by third parties. So, any purported remedial action by Defendants would still need to

[2] Even if this Court finds the SPI has authority to influence IEFA compliance, it should keep two matters in mind. First, without a legal duty under the IEC or IEFA, the SPI is not *obligated* to act. Second, even if obligated to act, the scope of that obligation (and the Court's power to order relief) is highly relevant to the redressability analysis.

satisfy constitutional redressability standards. The relief must actually be able to redress the injury and the Court must be able to grant it. *See* Part I(A)(3).

Plaintiffs, eventually, give away the game in their arguments about IEFA annual reports under MCA § 20-9-329(4). They admit the plain text of a "carefully crafted" statute contains no express authorization for remedial action by the SPI against districts. *See* Pls. Resp. at 15. Instead, they want this Court to insert that authority into the statute—citing caselaw about an agency's regulatory authority and implied functions. *See id.* at 15-16. Even if Plaintiffs were correct as a general matter, that "implied" authority would fundamentally alter the IEFA regime. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."). Giving OPI the ability to withhold or withdraw funding would essentially re-write the IEFA statute.

Elsewhere in their Response, Plaintiffs characterize the alleged right to Indian Education as "absolute" and aver that "no state agency or official has been conferred with any discretion to curtail or condition it." Pls. Resp. at 19; *accord id.* at 20. Yet Plaintiffs theorize that Defendants have broad authority to withhold funding from school districts that don't comply. It's quite paradoxical if Defendants somehow have the authority to withhold IEFA funding from districts refusing to implement IEFA properly, but also have "no discretion to curtail or condition" Indian Education. Taking Plaintiffs' proposed actions would—ironically—put Defendants in violation of the Indian Education Clause by depriving schools of IEFA dollars.

Plaintiffs concede OPI has taken steps to support IEFA compliance. *See* Pls. Resp. at 24–26. Strangely, however, Plaintiffs think that this is evidence that Defendants are "aware the Indian Education Provisions impose duties on OPI." Pls. Resp. at 24. By that logic, a school that encourages its students to eat healthy lunches is tacitly acknowledging that it has the legal duty

and authority to confiscate unhealthy lunches. OPI has merely offered assistance to help carry out IEFA.

Plaintiffs interestingly rely on scholarship from former SPI Denise Juneau—published while she was the SPI. *See* Pls. Resp. at 20, 21; Compl. at ¶¶ 100, 103. But nothing in it discusses an enforceable duty or right against Defendants. *See* Juneau & Juneau, *supra.* Plaintiffs further cite actions taken by Ms. Juneau when she was the SPI from 2009-2017. Pls. Resp. at 24–25; Compl. at ¶¶ 111, 113, 141, 145. Plaintiffs claim that a 2010 Manual issued by Ms. Juneau's OPI makes clear that IEFA imposes mandatory duties on Defendants. Pls. Resp. at 24–25. And, in February 2015 Ms. Juneau's OPI issued a report finding "insufficient standards, insufficient monitoring, and insufficient enforcement" of the Indian Education Provisions. Compl. at ¶ 111. But if—as Plaintiffs theorize—OPI possessed the clear legal duty and authority to act, it's highly suspect that Ms. Juneau's OPI didn't propose regulations or undertake compliance actions against school districts during her tenure—particularly when she knew districts were out of compliance in early 2015. It's also noteworthy that the documents referenced by Plaintiffs contain no language discussing OPI's alleged enforcement authority.

3. BPE has no power to enforce IEFA.

Plaintiffs claim BPE's accreditation responsibilities regulations give it the authority to enforce IEFA. Montana law confers substantial discretion on BPE for the accreditation process, BASE Aid decisions under 20-9-344 (2), and participation in the Montana Advisory Council on Indian Education. Issues such as the degree of noncompliance with performance standards resulting in withholding of BASE aid, withholding accreditation if school districts failed to write curricula meeting content standards and what should be reviewed in the standards review process, and bases to revise the content standards are all discretionary policy questions that a court can't address.

III. Plaintiffs fail to state a due process claim.

Plaintiffs' due process claim is part and parcel of their failed constitutional and statutory theories. The Indian Education Provisions don't create a legitimate claim of entitlement for anyone—much less against Defendants. *See* Part II, *infra*. They don't contain mandatory language, particularly the terms "shall" or "must." *See Bd. of Pardons v. Allen*, 482 U.S. 369, 381 (1987); *Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1993). Plaintiffs' arguments about alleged "mandatory" language are easily defeated by Defendants' statutory analysis. *See* Part II(A)–(B), *infra*. With no right to Indian Education, they have no due process claim.

There's also no protected interest because "the nature and extent of the alleged entitlement are vague." *Doyle v. City of Medford*, 606 F.3d 667, 675 (9th Cir. 2010). "[A] statute must contain particularized standards or criteria to create a property interest." *Id.* at 673 (quotations omitted); *see also Santa Clara v. Andrus*, 572 F.2d 660, 676 (9th Cir. 1978) ("[A] statute will create an entitlement to a governmental benefit either if the statute sets out conditions under which the benefit must be granted or if the statute sets out the only conditions under which the benefit may be denied."). Plaintiffs interest in a nebulous entitlement of "Indian Education" is fundamentally different than protected interests in employment or welfare benefits.

Plaintiffs' due process claims against Defendants for actions of third parties necessarily must fail because existence of a property interest "will depend largely upon the extent to which the statute contains mandatory language that *restricts the discretion of the decisionmaker.*" *Doyle*, 606 F.3d at 672 (emphasis added). Defendants are not the decisionmaker when it comes to the IEC or IEFA. The Legislature appropriates money and sets forth the statutory scheme. Local school districts decide how to use the funds. Moreover, school districts are the entities depriving Plaintiffs of their benefit, not Defendants. *See Goss v. Lopez*, 419 U.S. 565 (1975).

Plaintiffs cite various regulations from Defendants as proof of a protected interest. *See* Pls. Resp. at 22–24. But Plaintiffs offer no convincing caselaw supporting this theory. In *Boreen v. Christensen*, 267 Mont. 405, 414, 884 P.2d 761, 766 (1994), an agency's disciplinary regulations supported an employee's argument that she had a property interest in continued employment. And mere dicta from *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)—another employment case—is also no help. These protected interest cases all involve statutes and regulations that provided direct benefits to plaintiffs. Plaintiffs don't provide a single case where a defendant's regulations of another entity create a protected interest for a third party.

It's noteworthy that Plaintiffs turn to legislative history to support their due process argument. *See* Pls. Resp. at 21–23. That's another blanket admission that Defendants' alleged duties under the Indian Education Provisions are not based on "plain text" readings. *See* Pls. Resp. at 11, 13. Courts only turn to legislative history when the meaning is ambiguous. *Skinner Enters. v. Lewis & Clark Cnty. Bd. of Health*, 286 Mont. 256, 274, 950 P.2d 733, 744 (1997).

Finally, the framework surrounding what process would be due for a protected interest exposes the folly of Plaintiffs' theory. There's no hearing or process by which agency decisions on curricula or enforcement can be adjudicated. Plaintiffs would have this Court improperly interject itself into the decisions of the political branches with no manageable standards. This is untenable, and Plaintiffs' Complaint should therefore be dismissed.

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

Plaintiffs' response suffers an identity crisis when they re-assert their desire for injunctive relief. Pls. Resp. at 27. *But see* Pls. Resp. at 6; First Amend. Compl. at 49. Plaintiffs still do nothing to counter Defendants' arguments regarding why this Court cannot grant the requested

relief.[3] The main case cited by Plaintiffs, *Donaldson*, clearly says that relief is speculative and overbroad when plaintiffs do not challenge a specific statute on specific grounds. *Id.* ¶8. Here, as in *Donaldson*, the "requested relief exceeds the bounds of a justiciable controversy" and "would not terminate the uncertainty or controversy giving rise to this proceeding." *Donaldson*, ¶ 9. Plaintiffs do not contend a specific statute is unconstitutional or that Defendants have failed to take specific action that is required by IEFA or the IEC.

Plaintiffs claim they don't need a mandamus action because "the requested declaratory and injunctive relief will sufficiently address their alleged injuries." Defendants have shown this to be incorrect. *See* Part I(A)(3); MTD Br. at 6–9. The caselaw cited in response is entirely irrelevant. In *Whitehouse v. Ill. C.R. Co.*, 349 U.S. 366 (1955), the injuries were too speculative to support either mandamus or an injunction. *Id.* at 373. In *Greeley*, the Court decided which portions of a legislative initiative conflicted with the constitution. 193 Mont. at 399, 632 P.2d at 311. Plaintiffs aren't asking this court to enjoin an unconstitutional statute. They also don't identify a specific act or omission that is fairly traceable to the harms they've suffered. *See* Part I(A)(1)-(2). Yet they ask this Court to order Defendants to take actions—such as withholding funding—that they have no legal duty or authorization to take. *See* Part II(A)-(B).

V. The School Districts are necessary parties.

Rule of Civil Procedure 19(a)(1) establishes that persons "shall" be joined as parties if complete relief cannot be accorded without their participation. Plaintiffs allege that school districts are the entities not complying with IEFA and the IEC. *See* First Amend. Compl. at ¶¶ 42, 46, 50, 54, 62, 132. They are, therefore, both necessary and indispensable parties. *See also* MCA § 27-8-301 ("When declaratory relief is sought, all persons shall be made parties who have

[3] Plaintiffs hereby incorporate their redressability arguments contained in Part I(A)(3), *infra.*

or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

The school districts are absolutely necessary to this action because a judgment against Defendants would not be binding on them and therefore Plaintiffs would not be afforded complete relief. *See Confederated Tribes of Chehalis Indian Rsrv. v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Defendants don't have the ability to develop curricula or spend IEFA funds—school districts do. *See Eldredge v. Carpenters 46 N. Cal. Counties. Joint Apprenticeship & Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981) (employers participating in apprenticeship program were not necessary parties to sex-discrimination claim because parties agreed that Defendant had the power to structure apprentice program any way it wanted).

If Defendants are in violation of the Indian Education Provisions, this Court must first determine that the school districts are in violation. Any ruling, moreover, that hypothetically imposes enforcement, funding withholding authority, or accreditation withdrawal by Defendants on the basis of curricula deficiencies under §1(2) and MCA § 20-1-501 without the school districts and boards would prejudice the rights of the school districts and boards, would constitute an adjudication without participation of the parties whose rights are affected, and would not end the controversy.

CONCLUSION

Plaintiffs have failed to establish both constitutional and prudential standing. They also fail to state a claim for relief because they can't identify any duty violated by an act or omission of Defendants. They've sued the wrong Defendants, asked for improper relief, and utilized the wrong causes of action. For these reasons, the Court should dismiss the First Amended Complaint with prejudice.

DATED this 25th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7 of the Eighth Judicial District and this Court's order, I certify that this brief is 3,151 words plus an additional ten pages. 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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