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STATE OF MONTANA
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Eddy, Amy
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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

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.l, K.W.2, K.D., K.P.l, 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.l, 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	Cause No. DDV-21-398 ORDER RE: DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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*.	

The Plaintiffs filed their *First Amended Class Action Complaint for Declaratory and Injunctive Relief* on December 8, 2021 (Doc. 29). Pending before the Court is the Defendants' *Motion to Dismiss Plaintiffs' First Amended Complaint*, filed January 14, 2022 (Doc. 33). The Plaintiffs filed their *Brief in Opposition* on February 25, 2022 (Doc. 38), to which the Defendants filed a *Joint Reply* on March 25, 2022 (Doc. 39).

Pursuant to the parties' request Judge John Parker originally set the matter for oral argument on August 25, 2022 (Doc. 42). On July 11, 2022, Plaintiffs filed an *Unopposed Motion to Reschedule Oral Argument* (Doc. 43), and on September 19, 2022, Judge Parker rescheduled the oral argument for December 15, 2022 (Doc. 44). However, on December 8, 2022, Judge Parker recused himself due to a conflict (Doc. 53), and the undersigned accepted jurisdiction on January 3, 2023 (Doc. 64).

The matter finally came before the Court for oral argument on April 4, 2023. Plaintiffs were represented at the oral argument by Alex Rate and Stephen Pevar, and the Defendants were represented by Thane Johnson and Katherine Orr. Having reviewed the file and being fully apprised, the Court rules as follows:

ORDER

The Defendants' *Motion to Dismiss Plaintiffs' First Amended Complaint* is DENIED.

RATIONALE

The Montana Constitution's "Indian Education Clause," 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). Montana is the only state that protects Indian education in its Constitution. (Doc. 29, p.3, ¶2).

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 Montana Supreme Court affirmed the district court's determination that the funding method for public education was unconstitutional. *Helena Elementary* expressly found that the Indian Education Clause "establishes a special burden in Montana .. . which must be addressed as a part of the school funding issues." 236 Mont. at 58, 769 P.2d at 693.

In 1995, the Montana Senate passed Joint Resolution No. 11, which asked the Montana Committee on Indian Affairs to evaluate the public schools' compliance with the Education Clause and make recommendations. Pursuant to this Resolution, the Committee surveyed surveyed 153 school districts and held public hearings. *See* Comm. on Indian Affairs, *To Promote a Better Understanding: The 1995-96 Activities of the Committee on Indian Affairs*, S. Rep., 55th Leg., 13 (Mont. 1996).

The Committee found that the intent of the Indian Education Clause was "for all public schools to develop appropriate policies and programs to recognize and preserve the value of the American Indian culture and traditions." The Committee noted that several public schools were doing a poor job of implementing the Clause, and some were not implementing the Clause at all. *To Promote a Better Understanding*, S. Rep., 55th Leg., *supra*,r 98, at 53.

The Committee's work led to the introduction in 1999 of House Bill (H.B.) 528 by Montana Representative Carol Juneau. H.B. 528 was specifically intended "to make the [Indian Education Clause's] application to the education system clear." Carol Juneau & Denise Juneau, *Indian Education for All: Montana's Constitution at Work in Our Schools*, 72 Mont. L. Rev. 111, 116-117 (2011) (citing§ 20-1-501, MCA, introduced in Mont. H.R. 528, 56th Leg. Sess. (Apr. 29, 1999)). 101.

Doc. 29, ¶¶98-100.

H.B. 525 was codified as the Montana Indian Education for All Act ("IEFA"), which was clearly intended to augment the Indian Education Clause, and provides as follows:

(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.

Mont. Code Ann. §20-1-501 (Recognition of American Indian Cultural Heritage -- Legislative Intent).

In *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, the constitutionality of the State's funding of public education was challenged, including violations of the Indian Education Clause. *Columbia Falls* found the funding system was unconstitutional, and further held:

> 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). It relied on our opinion in *Helena Elementary*, when we held that the "provision establishes a special burden in Montana for the education of American Indian children which must be addressed as part of the school funding issues." *Helena Elementary*, 236 Mont. at 58, 769 P.2d at 693. The State does not contest these conclusions . . . Therefore, we merely recognize that the findings and conclusions of the District Court regarding Article X, Section 1(2), of the Montana Constitution stand unchallenged.

Columbia Falls, ¶35 (emphasis added).

Helena Elementary and *Columbia Falls* resulted in the Montana Legislature making annual appropriations according to a legislatively calculated formula to fund the State's implementation of Indian education. Mont. Code Ann. §20-9-309. Neither of those decisions, however, specifically addressed how the State must implement Indian education.

The Plaintiffs have now brought this action seeking declaratory and injunctive relief for the Defendants' alleged "failure to implement, monitor, and enforce the guarantees of Montana's Constitution and statutes that provide that every Montana public school student, whether Indian or non-Indian, will learn about the distinct and unique cultural heritage of American Indians in a culturally responsive manner." (Doc. 29, p. 3, ¶1). The Plaintiffs have brought a claim for violation of the Indian Education Provision (Count I), and a claim for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Count II). (Doc. 29, ¶¶160-168). The Plaintiffs request the Court provide the following relief:

(1) A Declaratory Judgment that Defendants have constitutional and statutory duties to establish adequate minimum standards that ensure compliance with the Indian Education Provisions and then to implement, monitor, and enforce those standards.

(2) A Declaratory Judgment that Defendants are in violation of their constitutional and statutory duties by failing to require every Montana educational agency and all educational personnel to work cooperatively with Montana tribes to implement the Indian Education Provisions.

(3) A Declaratory Judgment that Defendants' violations of the Indian Education Provisions also violate the right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

(4) A Declaratory Judgment that Defendants must comply with the Indian Education Provisions now and in the future.

(5) 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.

Doc. 29, p. 48, ¶¶4-8.

The Court must also note the 68th Regular Session of the Legislature is still in session. HB 338 proposes to amend the IEFA in ways that would potentially impact this litigation. On April 14, 2023, HB 338 was returned to the House with amendments. The ultimate fate of the bill is unknown as of the date of this *Order*.

I. Factual Background

Parties

The named individual Plaintiffs include the parents of, and is brought on behalf of, 18 Indian and non-Indian students who attend Montana public schools in the Missoula, Billings, Helena and Great Falls school districts. (Doc. 29, pp. 3-12, ¶¶8-40). The Indian students are members of the Blackfeet Tribe, Confederated Salish and Kootenai Tribes, Northern Cheyenne Tribe, and Assiniboine and Sioux Tribe. (Doc. 29, pp. 3-12, ¶¶8-40). These individual Plaintiffs assert the Defendants' alleged failures have caused and/or will cause them to be subject to bullying, stereotyping and racism; being ostracized, unwelcome, misunderstood and excluded; and not being able to develop a feeling of pride in their cultural heritage. (Doc. 29, pp. 3-12, ¶¶10, 14, 18). These Plaintiffs also assert the Defendants' alleged failures have resulted not only in their cultures and traditions not being preserved, but have also perpetuated the spread of misinformation and made it impossible to predict when and where Indian education will be offered. (Doc. 29, pp. 7, 9, ¶¶18, 27). These Plaintiffs allege the "actual harm manifests itself in the form of lack of culturally relevant instruction for Plaintiffs and their classmates, resulting in racial and cultural discrimination and a dangerous school environment." (Doc. 29, p. 7, ¶19).

The named Plaintiffs also include the following Tribal Plaintiffs on behalf of themselves and their citizens as *parens patriae*:

(1) The Fort Belknap Indian Community of the Fort Belknap Reservation, which has over 8,400 citizens. The Fort Belknap Reservation is primarily served by one

public school district, and is in close proximity[1] to 19 other public school districts. (Doc. 29, p. 12, ¶41).

(2) The Confederated Salish and Kootenai Tribes of the Flathead Reservation, which has over 8,020 citizens. The Flathead Reservation is primarily served by eight public school districts, and is in close proximity to 55 other public school districts. (Doc. 29, p. 13, ¶45).

(3) The Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation, which has over 13,000 citizens. The Fort Peck Indian Reservation is primarily served by nine public school districts, and is in close proximity to 25 other public school districts. (Doc. 29, p. 15, ¶49).

(4) The Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, which has approximately 11,275 citizens. The Northern Cheyenne Indian Reservation is primarily served by three public school districts, and is in close proximity to 12 other public school districts. (Doc. 29, p. 16, ¶53).

(5) The Little Shell Tribe of the Chippewa Indians of Montana is headquartered in Great Falls, Montana, and has approximately 5,400 citizens. The Little Shell Tribe is in close proximity to 33 public school districts. (Doc. 29, p. 18, ¶57).

(6) The Crow Tribe of Montana of the Crow Reservation which has approximately 11,000 citizens. The Crow Reservation is primarily served by ten public school districts, and is in close proximity to 21 other public school districts. (Doc. 29, p. 19, ¶61).

These Plaintiffs assert the Defendants' alleged failures have caused the Tribal Plaintiffs to suffer and continue to suffer harm as their expertise, views and input is not being included in education generally, and Indian education specifically in Montana, resulting in a loss of or threat to cultural heritage. Doc. 29, p. 20, ¶64).

The Defendant Montana Office of Public Instruction is an executive agency. Defendant Elsie Arntzen is the Superintendent of Public Instruction ("Superintendent"), an officer of the Executive Branch, and "has the general supervision of the public schools and districts of the state." Article VI, §1(1); Mont. Code Ann. §20-3-106. The Superintendent has the duty to "faithfully work in all practical and possible ways for the welfare of the public schools of the state." Mont. Code Ann. §20-3-105(10). The Superintendent also has the following specific statutory responsibilities:

(1) Accrediting Montana public schools. Mont. Code Ann. §20-7-102(1);

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[1] For purposes of this case, Plaintiffs have used 50 miles as the measure of "close proximity." (Doc. 29, p. 12, ¶41, fn 2).

(2) Reviewing the operating conditions for each school district and school to determine compliance with accreditation standards. Mont. Code Ann. §20-2-102(1);

(3) Distributing Montana public school equity funding known as "BASE aid," including IEFA funding. Mont. Code Ann. §20-9-344(1)(c); §20-9-306(2)(e); and

(4) Upon order of the Montana Board of Public Education, withholding distribution of BASE aid from a school district when the district fails to submit required reports or budgets or fails to maintain accredited status. Mont. Code Ann. §20-9-344(2).

The Defendant Montana Board of Public Education ("MBPE") is a constitutionally created entity and "is responsible for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems." Article X, §9(1), Mont. Const. The Montana Board of Public Education is also responsible for "exercis[ing] general supervision over the public school system and such other public educational institutions as may be assigned by law." Article X, §9(1), Mont. Const. Defendant Darlene Schottle is the Chairperson of the Montana Board of Public Education. The MBPE has the following specific statutory responsibilities:

(1) Adopting accreditation standards and establish the accreditation status of every school. Mont. Code Ann. §20-2-121(6);

(2) Defining and specifying the basic instructional program for pupils in public schools, and this program must be set forth in the standards of accreditation. Mont. Code Ann. §20-7-111(1);

(3) Establishing content standards for school districts to use in developing curriculum. Admin. R. Mont. 10.53.101;

(4) Incorporating into the curriculum and content standards instruction the distinct and unique cultural heritage of American Indians pursuant to Article X, section 1(2) of the Constitution of the state of Montana and Mont. Code Ann. §20-1-501, §20-9-309(2)(c). Admin. R. Mont. 10.53.102.

(5) Administering and ordering the distribution of school equity funding known as "BASE aid," including IEFA funding. Mont. Code Ann. §20-2-121(3), §20-9-344(1), §20-9-306(1), §20-9-306(2), and §20-9-306(2)(e).

(6) Adopting policies for regulating the distribution of BASE aid (§ 20-9- 344(1)(a), MCA) and may require reports from county superintendents, county treasurers, and trustees that it considers necessary. Mont. Code Ann. §20-9-344(1)(a).

(7) Withholding distribution of BASE aid from a school district when the district fails to submit required reports or budgets or fails to maintain accredited status. Mont. Code Ann. §20-9-344(2).

General Allegations

In support of their allegations that the Defendants have failed to implement, monitor, and enforce the guarantees of Montana's Constitution and statutes that provide that every Montana public school student, whether Indian or non-Indian, will learn about the distinct and unique cultural heritage of American Indians in a culturally responsive manner, the Plaintiffs point to

specific instances where the Defendants have allegedly failed to fulfill their constitutional and statutory duties, including the following:

(1) A 2015 independent evaluation commissioned by OPI concluded that while some school districts were properly implementing IEFA, implementation in other districts was "very minimal" and these variations in compliance would very likely continue due to the absence of accountability. (Doc. 29, p. 30, ¶111).

(2) Failure to establish minimum accreditation and content standards incorporating Indian education. (Doc. 29, p. 31, ¶112).

(3) Failure to establish minimum reporting requirements to ensure funding for IEFA is being properly utilized. (Doc. 29, p. 33, ¶119). For fiscal years 2019 and 2020, only 10% of school districts reported on their Annual Trustees Financial Summaries IEFA expenditures that matched funding amounts, resulting in almost 50% of the $6.7 million appropriated for IEFA being unaccounted for those fiscal years. (Doc. 29, pp. 34-35, ¶¶123, 124). For those school districts that did report their expenditures, there is no information on how the money was spent in support of IEFA. (Doc. 29, p. 35, ¶125; pp. 36-37, ¶¶129-130).

(4) There is also evidence the IEFA funds are not being spent appropriately. For example:

    (a) In 2017-2018, the Bozeman school district used its $150,000 in IEFA funds to pay for librarians' salaries and benefits.

    (b) In 2017-2018, the Deer Creek Elementary District used its IEFA funds to purchase the book "*Squanto and the Miracle of Thanksgiving*" which "approaches the holiday from an evangelical point of view." (Doc. 29, p. 39, ¶136).

    (c) In 2007, the Helena school district used its IEFA funds to purchase a book about marmots. (Doc. 29, p. 39, ¶136).

(5) In 2017-2018, 214 schools (over 25%) reported an overall "low" knowledge of IEFA. (Doc. 29, p. 37, ¶131). This included the Hardin Intermediate School which is located adjacent to the Crow Indian Reservation and has a student population that is 78% American Indian. From 2015-2018 the Hardin Intermediate School reported a low level of IEFA knowledge.

(6) Failure to work cooperatively with Tribes in close proximity when developing and providing IEFA. (Doc. 29, p. 42, ¶142).

II. Standard of Review

"Under Rule 12(b)(6) a court must take all well-pled, "non-conclusory" factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim." *Hamlin Constr. & Dev. Co. v. Mont. DOT*, 2022 MT 190, P29, 410 Mont. 187, 521 P.3d 9 (citing *Meyer v. Jacobsen*, 2022 MT 93, ¶4, 408 Mont. 369, 510 P.3d 52). "A claim may be dismissed pursuant to M. R. Civ. P. 12(b)(6) if it fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Hamlin Constr*., P29 (citing *Babcock v. Casey's Mgmt., LLC*, 2021 MT 215, ¶25, 405 Mont. 237, 494 P.3d 322. "The liberal notice pleading requirements of M. R. Civ. P. 8(a) and 12(b)(6) do 'not go so far to excuse omission of that which is material and necessary in order to entitle relief,' and the 'complaint must state something more than facts which, at most, would breed only a suspicion' that the claimant may be entitled to relief." *Hamlin Constr*., P29 (quoting *Anderson*, ¶8; *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶42, 337 Mont. 1, 155 P.3d 1247).

III. Legal Analysis

A. Justiciability

The judicial power of Montana's courts is limited to justiciable controversies:

> A justiciable controversy is one upon which a court's judgement will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion. Courts have an independent obligation to determine whether jurisdiction exists and, thus, whether constitutional justiciability requirements . . . have been met.
>
> Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing). Standing thus embodies two complimentary but somewhat different limitations. Case-or-controversy standing limits the courts to deciding actual, redressable controversy, while prudential standing confines the courts to a role consistent with the separation of powers.

Bullock v. Fox, 2019 MT 50, ¶¶27-28, 395 Mont. 35, 435 P.3d 1187 (internal citations omitted); *Brown v. Gianforte*, 2021 MT 149, ¶9, 404 Mont. 269, 488 P.3d 548.

The Defendants have moved to dismiss this matter arguing there exists no justiciable controversy. Defendants challenge to this Court's jurisdiction presents both case-or-controversy and prudential standing arguments. For the reasons explained below, the Defendants' arguments fail as a matter of law.

(1) Case or Controversy Standing

"When case-or-controversy standing is at issue, the question is whether the complaining party is the proper party before the court, not whether the issue itself is justiciable." *Bullock*, ¶31 (quoting *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997)). To have case-or-controversy standing, "the complaining party must clearly allege past, present, or threatened injury to a property or civil right." *Bullock*, ¶31 (quoting *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. "A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right." *Mitchell v. Glacier County*, 2017 MT 258, ¶11, 389 Mont. 122, 406 P.3d 427. "If the alleged injury 'is premised on the violation of constitutional and statutory rights, standing depends on whether the constitutional or statutory provision . . . 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.

(a) Concrete Injury

In the present case, as described above, the individual Plaintiffs have sufficiently alleged a past, present and threated injury to their fundamental constitutional right to learn about the distinct and unique heritage of American Indians in a culturally responsive manner. The Tribal Plaintiffs have sufficiently alleged a past, present and future injury to their ability to work cooperatively with educational agencies and personnel in developing and providing Indian education. The Plaintiffs have alleged these injuries have or will result in racism, bullying, stereotyping, prejudice, a dangerous school environment, mental and emotional harm, and loss of cultural heritage. These injuries are not abstract, conjectural or hypothetical. While the Court recognizes the Defendants want more specific information about these injuries, the Plaintiffs' *First Amended Complaint* is sufficiently well-pled to meet the notice pleading requirements in Montana. Rule 8(a), M.R.Civ.P.

(b) Causation

As articulated in *Heffernan*:

> In federal jurisprudence, "the irreducible constitutional minimum of standing" has three elements: injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), *causation (a fairly traceable connection between the injury and the conduct complained of),* and redressability (a likelihood that the requested relief will redress the alleged injury). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992);

Heffernan, ¶32 (emphasis added).

In contrast to federal jurisprudence, Montana law does not separately analyze causation as a separate element of justiciability. *See Heffernan*, ¶¶32-33. However, because both parties have presented the issue, the Court will address it pursuant to federal jurisprudence.

"Causation can 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 citations omitted). Taking the Plaintiffs' allegations as true on this *Motion to Dismiss*, even if local school district may bear some liability for Plaintiffs' claims, that does not mean the Defendants have not caused the Plaintiffs injury. *See also WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148 ("So 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."); *Wandering Medicine v. McCulloch*, 2014 WL 12588302, *4 (D. Mont. 2014) (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.").

The Court finds there is a fairly traceable connection between the Defendants' alleged failures and the injury complained of, sufficient to satisfy this element.

(c) Redressable Injury

In order to satisfy redressability, the alleged harm must be "of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶46, 394 Mont. 167, P.3d 241, 262. Under federal law, redressability is assumed and "need not be guaranteed, but it must be more than 'merely speculative.'" *Juliana*, 947 F.3d at 1170.

In *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶17, 379 Mont. 142, 347 P.3d 1287 (internal citations omitted), the plaintiff sought:

> a declaratory judgment that the MPPAA is unconstitutional, a declaratory judgment that the Hospital's practices are unlawful, and an injunction prohibiting further unequal treatment. These orders, if awarded, would likely "significantly affect," the injury of unequal treatment and unequal opportunity that Gazelka alleges. The controversy before the Court is a controversy in which "the judgment of [a] court may effectively operate" and have the "effect of a final judgment in law or decree in equity upon the right, status or legal relationships of one or more of the real parties in interest."

Similarly, in the present matter, the Plaintiffs only seeks declaratory and injunctive relief, which is within this Court's power to grant. The Plaintiffs' *First Amended Complaint* does not seek broad programmatic relief, which would likely be functionally impossible for the Court. The Court finds the Plaintiffs' alleged injuries are redressable with the requested relief. For example, the Court could issue a Declaratory Judgment that Defendants are in violation of their constitutional and statutory duties by failing to require every Montana educational agency and all educational personnel to work cooperatively with Montana tribes to implement the Indian Education Provisions. The corresponding injunctive relief would directly impact the real parties in interest and address the alleged harm of the Tribal Plaintiffs' expertise, views and input not being included in Indian education, as well as address the loss or threat of loss to cultural heritage.

(d) Injury Distinguishable from the Public Generally

The Defendants do not challenge the conclusion that any redressable, concrete injury suffered by the Plaintiffs is distinguishable from any injury to the public generally.

(2) Prudential Standing

The Montana Constitution states, "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, §1. "Prudential standing 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." *Bullock*, ¶43 (internal citations omitted). "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.

"'[W]here there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[,] or a lack of judicially discoverable and manageable standards for resolving' the issue, the issue is not properly before the judiciary." *Bullock*, ¶44 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)). Of course, "not every matter touching on politics is a political question." *Bullock*, ¶44 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y.*, 478 U.S. 221, 229 (1986)). "Only those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government" are generally excluded. *Larson v. State*, 2019 MT 28, ¶39, 394 Mont. 167, 434 P.3d 241 (internal citations omitted).

> While prudential standing in Montana is not defined by "hard and fast rules," this Court has recognized prudential policy limitations, including that a party may generally assert only his or her own constitutional rights and immunities and that the alleged injury must be distinguishable from the injury to the public in general. Weighing against these prudential policy limitations is "the importance of the question to the public." Furthermore, this Court has recognized prudential standing where "the statute at issue would effectively be immunized from review if the plaintiff were denied standing."

Bullock, ¶45 (internal citations omitted).

The Defendants have asserted the Plaintiffs' claims exceed prudential standing limitations. Specifically, the Defendants assert the Indian Education Clause is not self-executing, and therefore is a non-justiciable political question committed to the legislative branch. As evidence of this conclusion, the Defendants assert there is a lack of judicially discoverable and manageable standards.

(a) This Case does not present a Non-Justiciable Political Question

"Both the United States Supreme Court and [the Montana Supreme] Court recognize that non-self-executing clauses of constitutions are non-justiciable political questions." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶15, 326 Mont. 304, 109 P.3d 257 (citing *Baker v. Carr*, 369 U.S. 186 (1962)). To determine whether a provision is self-executing, courts in Montana "ask whether the Constitution addresses the language to the courts or to the Legislature." *Columbia Falls Elem. Sch. Dist.*, ¶16. "A constitutional provision that is "addressed to the Legislature" is "non-self-executing." *Mitchell*, ¶23 (citing *Columbia Falls*, ¶23). Regardless, "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 Elem. Sch. Dist.*, ¶17 (internal citations omitted).

> Provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own. That is, although the 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 . . . ."

Brown v. Gianforte, 2021 MT 149, ¶23, 404 Mont. 269, 488 P.3d 548 (quoting *Columbia Falls Elem. Sch. Dist.*, ¶18).

Article X, §1 of the Montana Constitution provides as follows:

> (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.
> (2) 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.
> (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.

The Montana Supreme Court has previously found:

> The guarantee provision of subsection (1) is not limited to any one branch of government. Clearly the guarantee of equal educational opportunity is binding upon all three branches of government, the legislative as well as the executive and judicial branches. We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level.

Helena Elementary Sch. Dist. No. 1 v. State, 236 Mont. 44, 53, 769 P.2d 684, 689-690 (1989).

While decided in the context of school funding directed to the Legislature, *Helena Elementary* and *Columbia Falls* are clear. Article X, §1(3) is of course directed towards the Legislature, arguably making it non-self-executing, and therefore giving rise to non-justiciable political questions. Nonetheless, the Montana Supreme Court still exercised jurisdiction specifically because individual rights were implicated. In contrast, Article X, §1(2), is not directed towards the Legislature, making it self-executing, and therefore not giving rise to a political question. Additionally, the Legislature's enactment of IEFA is similarly subject to judicial review in light of the Indian Education Clause:

Helena Elementary found the plain language of Article X, §1(3) was not "intended to be a limitation on the guarantee of equal educational opportunity contained in subsection (1)." *Helena Elementary*, 236 Mont. at 53, 769 P.2d at 689. Instead, the guarantee of subsection (1) informed the Legislature's obligations in subsection (3). Based on this ruling, there is no reason to believe the Indian Education Clause is not also viewed in the context of the guarantee of equal educational opportunity contained in subsection (1).

Helena Elementary also found that subsection (2) "establishes a special burden in Montana for the education of American Indian children . . ." *Helena Elementary*, 236 Mont. at 58, 769 P.2d at 693. Finally, 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.

Based on the above analysis, the Court finds that interpretation and application of the Indian Education Clause is not a non-justiciable political question. The plain language of subsection (2) is not directed to the Legislature, and it implicates individual rights guaranteed by the Montana Constitution for which the courts are responsible to guard and protect.

(b) Judicially Discoverable and Manageable Standards

Similar to the redressability argument analyzed above, this case presents a conflict in interpretation of the Indian Education Clause and IEFA, that is manageable for the judiciary, if not routine. *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"); *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *Helena Elementary* and *Columbia Falls* are further evidence that disputes of this nature are subject to judicially discoverable and manageable standards.

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B. Failure to State a Claim Upon Which Relief Can be Granted

(1) Violation of the Montana Constitution

The Defendant's first argue the Indian Education Clause does not confer any duty or responsibility on the Defendants and is simply aspirational. Of course, this aspirational argument was rejected by the Montana Supreme Court when it held that "the guarantee of equality of educational opportunity applies to each person of the State of Montana, *and is binding upon all branches of government whether at the state, local, or school district level*." *Helena Elementary*, 236 Mont. at 53, 769 P.2d at 689-690. *Helena Elementary* further found the Indian Education Clause "establishes a special burden in Montana . . ." 236 Mont. at 58, 769 P.2d at 693. *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 (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).

The Plaintiffs have specifically asserted the Defendants' alleged failures have given rise to an inequality of educational opportunity in the context of Indian education and have sufficiently pled a constitutional violation.

(2) Violation of the IEFA

The Defendants similarly argue they have no responsibilities under the IEFA as there is no mandatory language nor mention of the Defendants. The Defendants additionally rely on *Dupuis v. Bd. of Trustees*, 2006 MT 3, ¶14, 330 Mont. 232, 128 P.3d 1010 for the proposition that the IEFA does not create a private right of action. However, the Defendants misconstrue the holding in *Dupuis*, which was limited to the following:

> Section 20-1-501, MCA, provides, in part, that "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." Dupuis asserts that § 20-1-501, MCA, creates a privately enforceable right, and that the Board's decision to continue using mascots that are degrading and offensive to the dignity of Native students and the Confederated Salish and Kootenai Tribes violates this right.
>
> Nothing in this statute provides, however, 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. A county superintendent does not have jurisdiction to hear a matter absent a constitutional or statutory right to a hearing. *Roos*, P10. We therefore agree with the State Superintendent and the District Court that nothing in § 20-1-501, MCA, confers jurisdiction on the County Superintendent.

Dupuis, ¶¶14-15.

Dupuis is plainly limited to the jurisdiction of a County Superintendent, and arguably acknowledges there is a private right of action—just not before the County Superintendent. The IEFA requires the State to teach "every Montanan" about the "distinct and unique heritage of American Indians in a culturally responsive manner" and to work "cooperatively with Montana tribes… when providing instruction." Mont. Code Ann. § 20-1-501. The Plaintiffs have sufficiently alleged a violation of the IEFA. Additionally, the constitutional mandate that the State provide a "basic system of free quality public elementary and secondary schools" means in relevant part:

> educational programs to implement the provisions of Article X, section 1(2), of the Montana constitution and Title 20, chapter 1, part 5, through development of curricula designed to integrate the distinct and unique cultural heritage of American Indians into the curricula, with particular emphasis on Montana Indians . . .

Mont. Code Ann. §20-9-309(2)(c).

The Defendants' argument that despite the plain statutory language, they specifically have no responsibility or authority to enforce the IEFA is completely unfounded. The duties prescribed by the IEFA apply to "every educational agency" and "all education personnel" and the Defendants present no cogent argument they should not be included in these terms. Mont. Code Ann. §20-1-501(2)(b).

For example, the Defendants assert 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. However, Mont. Code Ann. §20-3-106 provides the SPI "has the *general* supervision of the public schools and districts of the state and shall perform" certain duties. There are then 29 enumerated duties include distribution of BASE aid, adopting and evaluating compliance with accreditation standards, recommending accreditation status to the MBPE, and maintaining curriculum guides for instructional programs. Mont. Code Ann. §§20-3-106(1)-(29), 20-9-306(2)(e) (IEFA funding is included in BASE aid). The SPI is also 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." Mont. Code Ann. §20-3-106(30). Of course, the duties of Title 20, MCA, include those set forth by the IEFA.

Similarly, while the Defendants concede the MBPE "makes a final determination" with regard to the conditions for accreditation, the MBPE's responsibilities do not end there. Defs.' Br. p. 18. The MBPE must also "adopt standards of accreditation and establish the accreditation status" and "order the administration and distribution of BASE aid." Mont. Code Ann. §§20-1-121(3), (6). Finally, the MBPE must "perform any other duty prescribed from time to time by this title or any other act of the legislature." Mont. Code Ann. §20-1-121(12).

Relevant to the Plaintiffs' claims, the Defendants specific authority to oversee all public school funding includes IEFA funding:

> (1) The state shall provide an Indian education for all payment to public school districts, as defined in 20-6-101 and 20-6-701, to implement the provisions of Article X, section 1(2), of the Montana constitution and Title 20, chapter 1, part 5.
>
> (2) The Indian education for all payment is calculated as provided in 20-9-306 and is a component of the BASE budget of the district.
>
> (3) The district shall deposit the payment in the general fund of the district.
>
> (4) A public school district that receives an Indian education for all payment may not divert the funds to any purpose other than curriculum development, providing curriculum and materials to students, and providing training to teachers about the curriculum and materials. A public school 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.

Mont. Code Ann. §20-9-329.

Of course, the curriculum adopted by a district must generally meet curricula content standards, and the Defendants 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.

Nonetheless, Defendants maintain "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. As the Court emphasized at oral argument the position that OPI has no oversight to ensure the IEFA money is being spent appropriately is entirely without support. The Defendants conceded at oral argument that in other areas, including special education or school lunch programs, they would have a duty to ensure the allocated money was spent appropriately. There is no basis to hold the Defendants to a different standard for IEFA funding, particularly when districts are required to send IEFA compliance reports. The allegations in the Plaintiffs' *First Amended Complaint*, taken as true for purposes of the *Motion to Dismiss*, indicate the Defendants not only do not know how millions of dollars of taxpayer money allocated for IEFA is being spent, they do not seem to care. This position flies in the face of the Indian Education Clause and the IEFA.

Moreover, the Montana Supreme Court has concluded that a state agency has an implicit duty to carry out an implied function when necessary to implement its overall duties. *See Orr v. State*, 2004 MT 354, 324 Mont. 391; *Ravalli Cnty. Fish & Game Ass'n*, 273 Mont. 371, 903 P.3d 1362 (1995); *Jackson v. State*, 1998 MT 46, 287 Mont. 473, 956 P.2d 35. The rationale of these cases applied equally to this matter.

(3) Due Process Claims

The United States Supreme Court has held that a state creates a "protected interest" when it enacts a law or regulation that creates some "legitimate claim of entitlement." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005). The state-created right must be substantive, rather than merely procedural, and generally must be set forth in "mandatory" language. *Castle*

Rock, 545 U.S. at 760. These protected rights are then subject to federal constitutional Due Process Clause protection to prevent against arbitrary deprivation. State law creates the substantive liberty or property interest, but federal law determines what procedural safeguards attach to it. *Castle Rock,* 545 U.S. at 757.

The Montana Supreme Court has found a protected interest exists 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, 57 P.3d 836 (internal citations omitted).

As outlined above, the specific guarantee included in the Indian Education Clause and the specific mandatory language of the IEFA guarantee the right of every public school student in Montana to an education that includes instruction on American Indian history and culture. The Tribal Plaintiffs have the parallel companion guarantee. *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). The associated legislative history[2] and the implementing regulations, which contain mandatory language, confirm this protected right. See ARM 10.55.601, ARM 10.53.101, ARM 10.53.102, ARM 10.53.909, ARM 10.55.603. Mandatory regulations can create entitlements protected against arbitrary deprivation. *See Boreen v. Christensen*, 267 Mont. 405, ___, 884 P.2d 761, 767 (1994); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). None of the authority cited by the Defendants supports a contrary conclusion.

Despite the Defendants' protestations they have no authority to establish minimum standards for IEFA compliance, their conduct demonstrates otherwise. As demonstrated above, they have in fact created mandatory regulations implementing IEFA, in 2010 they published *The Framework: A Practical Guide for Montana Teachers and Administrators Implementing Indian Education for All* to assist educators in implementing IEFA, they created a website entitled "Indian Education in Montana" which contains materials for educators, training for educators as to their IEFA obligations, as well as an "Indian Education for All Unit" to assist tribes with IEFA implementation.

Nonetheless, the Defendants continue to maintain that despite the actions described above, they have no authority to actually enforce the Indian Education Clause, the IEFA or the promulgated regulations. As outlined above, this argument is unpersuasive. Equally unpersuasive is the Defendants argument that the Plaintiffs have not suffered any deprivation of the right. The named individual Plaintiffs expressly assert they have either received no Indian education or have received Indian education that is not culturally relevant. The named Tribal Plaintiffs have expressly asserted there has been no cooperation with the Tribes in developing and providing Indian education.

The Plaintiffs have sufficiently pled a violation of Due Process claim.

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[2] The Court does not include the legislative history in this *Order*, but it is fully described in the Plaintiffs' Brief, pp. 20-21.

C. Authority to Grant the Requested Relief

District Courts in Montana have broad discretion to grant or deny declaratory and injunctive relief, which may be awarded in cases based on constitutional and statutory claims. *See Weems*, at ¶ 7; *Citizens for Balanced Use v. Montana Fish, Wildlife & Parks Comm'n*, 2014 MT 214, ¶1, 376 Mont. 202, 331 P.3d 844 (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).

As described above, Plaintiffs simply seek a declaration (1) of Defendants' specific constitutional and statutory obligations, (2) that Defendants are not fulfilling those obligations, and (3) that Defendants must fulfill those obligations in the future. This is not "speculative" and "overly broad" as the Defendants argue. *See Donaldson v. State*, 2012 MT 288, ¶ 8, 337 Mont. 67, 155 P.3d 1278. The mere fact the constitutional, statutory and administrative framework for the provision of IEFA in Montana public schools is complicated, this does not place it beyond the jurisdiction of the Court to afford the requested relief. In fact, this is the exact type of work the district courts ably performed in both *Helena Elementary* and *Columbia Falls*.

The Defendants also argue that instead of injunctive relief, the Plaintiffs are in fact requesting mandamus relief to which they are not entitled under Montana law:

> A court may issue a writ of mandamus to compel performance of an official duty where there is no "plain, speedy, and adequate remedy in the ordinary course of law." Section 27-26-102, MCA. Mandamus is appropriate only when the public official involved is under a "clear legal duty" to act. *O'Brien v. Krantz*, 2018 MT 191, ¶ 8, 423 P.3d 572, 392 Mont. 265 (internal quotation omitted). In other words, the official act sought to be compelled cannot be a "discretionary function." *Jeppeson v. Dep't. of State Lands*, 205 Mont. 282, 288, 667 P.2d 428, 431 (1983) (citation omitted).

Richards v. Gernant, 2020 MT 239, ¶19, 401 Mont. 364, 472 P.3d 1189.

While the requested injunctive relief is awkward, the Plaintiffs are entitled to elect their remedies and they have specifically denied requesting mandamus relief. The Court finds at this juncture the Plaintiffs' requested relief is sufficient to survive the *Motion to Dismiss*.

D. Necessary Parties

The Defendants argue the Plaintiffs have failed to join indispensable defendants, the local school districts, citing Rule 19(a)(1), M.R.Civ.P. However, the Defendants have cited no authority that failure to join indispensable parties is grounds for Rule 12(b)(6) dismissal of these Defendants, and *Mohl v. Johnson*, 275 Mont. 167, 911 P.2d 217 (1996) is inapposite. Accordingly, whether local school districts need to be joined as indispensable parties to provide complete relief is an issue reserved for another day. Additionally, while the local control of

school districts is well-established, that control must still be exercised within the parameters of constitutional and statutory mandated.

CONCLUSION

The Defendants are directed to timely file an *Answer* to the Plaintiffs *First Amended Class Action Complaint for Declaratory and Injunctive Relief*.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

Electronically Signed By:
Hon. Judge Amy Poehling Eddy
Wed, Apr 19 2023 09:50:00 AM