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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. Amy Eddy

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR JOINDER OF SCHOOL DISTRICTS

INTRODUCTION

Defendants, Montana Office of Public Instruction (OPI), Elsie Arntzen in her official capacity as Superintendent of Public Instruction, the Montana Board of Public Education (BPE) and Madalyn Quinlan, in her official capacity as Chair of the Board of Public Education (collectively "Defendants") move the Court for joinder of school districts referenced in the Complaint pursuant to Mont. R. Civ. P. 19(a)(1)(A), Mont. R. Civ. P. 20(a)(2)(A) and (B), and Mont. Code Ann. § 27-8-301. Defendants contend that, pursuant to Mont. R. Civ. P. 19(a)(1)(A) and to accord complete relief given the claims directly made against them and the relief requested concerning the school districts named and unnamed, that they should be joined as necessary parties. Defendants also contend the school districts must be joined pursuant to Mont. Code Ann. § 27-8-301 because they would be directly affected by any award of declaratory relief. In the alternative, Defendants move for permissive joinder of the school districts as Defendants pursuant to Mont. R. Civ. P. 20(a)(2)(A) and (B) because there are "rights arising out of the same transaction, occurrence or series of transactions or occurrences." Also, there are questions of law or fact common as to the school districts and the named Defendants such as what constitutes the compliant curricula and instruction, compliant reporting and expenditure of funds allocated under the Indian Education for All Act, (IEFA), Mont. Code Ann. §§ 20-1-501 through -503 and appropriate cooperation with Montana Tribes that must be provided in compliance with IEFA and the Mont. Const. Art. X., § 1(2) both as a matter of oversight by the current Defendants and as a matter of implementation by the school districts.

BACKGROUND

Plaintiffs have brought this action seeking declaratory and injunctive relief against the Defendants. The requested declaratory relief concerns an adjudication of the duties of the

Defendants in complying with their constitutional, Article X, § 1(2), and statutory duties under IEFA and Mont. Code Ann. §§ 20-9-306, -309(2)(c), -344 ("Indian Education provisions). The First Amended Complaint also alleges that Defendants' violations of the IEFA provisions constitute a violation of due process. Plaintiffs ask the Court for entry of a preliminary and final injunction enjoining Defendants from failing to establish adequate minimum standards that ensure compliance with the Indian Education provisions, failing to implement, monitor and enforce those standards, and failing to ensure 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. The named individual Plaintiffs include Tribal Plaintiffs consisting of six Montana Tribes who are alleging harm because their expertise, views and input are not being included in education generally and Indian education specifically in Montana, resulting in a loss of or threat to cultural heritage. Individual Plaintiffs include parents bringing this action on behalf of 18 Indian and non-Indian students, also named Plaintiffs in this action, who attend Montana public schools in Missoula, Billings, Helena and Great Falls School districts. The Plaintiffs allege the failures of the Defendants have caused them harm in the form of bullying, stereotyping, their cultures and traditions not being preserved but also perpetuation and spread of misinformation such that it is unpredictable when and where Indian education will be offered. (*See*, e.g., Doc. 29, ¶¶ 14, 18, 26, 27.) Plaintiffs allege that the harm that they suffer arises 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. (*See*, e.g., Doc. 29, ¶¶ 11, 15, 18, 19, 22, 23.)

Among the various types of relief sought by Plaintiffs is that Defendants ensure compliance by school districts with minimum Indian education standards and enforcement of IEFA. While Defendants can to some extent, through the rulemaking process (albeit not by court order), develop

standards and monitor compliance with those standards, they cannot, as a matter of law, dictate coordination with Tribes in close proximity, the development of specific curricula, institution of compliant instruction and spending decisions by local school boards that properly apply and expend IEFA monies. Only by joining individual school districts can the relief sought by Plaintiffs be accomplished. School districts are primarily responsible to provide public educational services, content standards to develop local curriculum and assessment in all the content areas, Mont. Code Ann. §§ 20-6-101(1) and (2), 20-3-324 (30), Mont. Admin. R. 10.53.101; curriculum and instruction of the content standards developed by school districts shall incorporate the distinct and unique cultural heritage of Montana American Indians pursuant to Mont. Const. Art. X, § 1(2), Mont. Admin. R. 10.53.102.

APPLICABLE AUTHORITY AND ARGUMENT

I. Mandatory Joinder

Defendants are bringing their motion for joinder under Mont. R. Civ. P. 19(a)(1)(A). Under this rule and Mont. R. Civ. P. 21, Defendants request that the Court enter an order that the school districts must be joined as party Defendants. In the alternative, as set forth below, Defendants move that the Court join the school districts pursuant to Mont. R. Civ. P. 20(a)(2) (A) and (B).

Mont. R. Civ. P. 19(a)(1)(A) states the following:

> (a) Persons Required to be Joined if Feasible.
> (1) Required Party. A person who is subject to service of process must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties.
> . . . .
> (2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party.
> . . . .

In this case, Defendants are seeking to join as co-defendants the school districts expressly named in the First Amended Complaint of Missoula, Billings, Helena, and Great Falls and the unnamed school districts where there are others similarly situated to the individual Plaintiffs who attend schools who have similar claims of poor compliance by school districts as may be revealed as the case progresses. School districts are subject to service of process, *see* Mont. R. Civ. P. 4(k)(1)(D) and Mont. Code Ann. § 20-6-101(3).

School districts are solely responsible for various harms alleged in the First Amended Complaint, including the "spread [of] misinformation" that makes it "impossible to predict when and where Indian education will be incorporated into public school curricula," as well as for the alleged harm of failing to provide "culturally relevant instruction" for Plaintiffs and their classmates. (*See*, e.g., Doc 29, ¶¶ 11, 15, 18, 19, 23, 26.) Complete relief cannot be accorded without the participation of the school districts because the Plaintiffs are seeking relief that only the school districts can provide; namely, developing and providing educational instruction that complies with the Indian Education provisions, and cooperating with the Tribes in close proximity to the school districts in providing educational instruction, implementing educational goals and following relevant Indian educational content standards and accreditation requirements. The Defendants lack the authority or responsibility to provide the actual instruction that is compliant with the Indian education provisions or to require school districts to cooperate with Montana Tribes. These actions are exclusively within the control and authority of school districts and relief cannot be ordered without their joinder as Defendants. Proof of and removal of the alleged harms may only be accomplished through joinder of the school districts, which are directly responsible for removing these harms.

Rule 19(a)(1)(A) establishes that persons shall be joined as parties if complete relief cannot be accorded without their participation. Relevant here in interpreting Mont. R. Civ. P. 19(a)(1)(A), the Montana Supreme Court has held that, "whenever feasible, persons materially interested in the subject of an action be joined so that they may be heard and a complete disposition of the case be made." *Vill. Bank v. Cloutier*, 249 Mont. 25, 29, 813 P.2d 971, 974 (1991). Unquestionably, school districts are materially interested in the subject matter of this action because the development of curricula, provision of instruction in compliance with the Indian Education provisions, and methods for monitoring and enforcement of implementation of the Indian Education provisions Plaintiffs seek be applied to school districts all directly affect or are the sole responsibility of school districts. Moreover, school districts are solely responsible for working cooperatively with Tribes "when providing instruction" and "implementing educational goals" (Doc. 29, ¶ 42). *See* Mont. Code Ann. §§ 20-1-501(1)(2)(b), -503; Mont. Admin. R. 10.55.701(1), 10.53.101. These statutes and rules establish that successful and complete implementation of the Indian Education provision can only be accomplished if the school districts are joined to this action.

Mont. Admin. R. 10.53.102 establishes that curriculum development and instruction of the content standards [by school districts] shall incorporate the distinct and unique cultural heritage of Montana American Indians pursuant to Article X, § 1(2) of the Constitution of Montana and Mont. Code Ann. §§ 20-1-501 and 20-9-309(2)(c). Any order of the Court as between the named Defendants and the Plaintiffs attempting to set forth duties and responsibilities of all educational personnel under the Indian Education provisions and to ensure through injunctive relief the implementation of adequate minimum standards (such as curriculum and instruction incorporating the content standards) that does not also apply to school districts will not result in the complete

relief Plaintiffs are seeking. In short, without the joinder of the school districts this litigation cannot be completed.

In this case, because the school districts are absent as parties, no meaningful relief can be granted without their joinder. This case does not fall into a situation where the Montana Supreme Court has found joinder of an absent party is not appropriate. For example, this is not a situation in which the absent party holds no legal interest related to the issues and is not a party to any of the underlying interests at issue. Similarly, this is not a situation in which, although certain forms of relief are unavailable due to a party's absence, meaningful relief can still be provided. *See Mohl v. Johnson*, 275 Mont. 167, ___, 911 P.2d 217, 220 (1996) (citing JAMES W. MOORE ET. AL., MOORE'S FEDERAL PRACTICE 3A P 19.07-1[1] (2d ed. 1994)).

In this case, meaningful relief cannot be provided without joining the school districts because their legal interests must be incorporated to ensure complete relief and compliance with that relief. The court in *Mohl* (citing *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991)), elaborated that there is no precise formula for determining whether a particular non-party is necessary to an action. Consequently, the determination is heavily influenced by the facts and circumstances of each case.

In the circumstances of this case, school districts are necessary parties to this an action because judgment solely against the currently-named Defendants would in no way assure compliant instruction by school districts and would render most relief meaningless. Additionally, school districts have a legal interest in the litigation because the outcome affects their responsibilities to provide compliant instruction and it would impose funding consequences to school districts for not providing the required instruction. School districts have a vested interest in

showing how they would cooperate with Tribes in developing compliant instruction under the Indian provisions.

The statutory provisions of Mont. Code Ann. § 27-8-301 must be followed here. It establishes that, where declaratory relief is sought, all parties shall be made parties who have or claim any interest which would be affected by the declaration. In other words, a court ***must*** join any person who has an interest that a declaratory judgment would affect. Clearly, as described above, the school districts have an interest in the outcome of this case insofar as a ruling of what constitutes compliance with the Indian Education provisions particularly as to the development of curricula and instruction and what consequences will be applied to them if they fail to comply with the Indian provisions such as the inappropriate expenditure or application of IEFA funding.

Based on the foregoing, it is mandatory that the school districts be joined as necessary parties under Mont. R. Civ. P. 19(a)(1)(A), as complete relief cannot be afforded in their absence. Furthermore, this Court must join the school districts pursuant to Mont. Code Ann. § 27-8-301 because they would be directly affected by any declaratory relief ultimately awarded by this court.

II. Permissive Joinder

As an alternative to joinder under Mont. R. Civ. P. 19(a)(1)(A), Defendants move the Court for entry of an order joining the school districts as Defendants under Mont. R. Civ. P. 20(a)(2)(A) and (B) and pursuant to its authority under Mont. R. Civ. P. 21 to add or drop parties. Mont. R. Civ. P. 20 states in pertinent part:

> (a) Persons Who May Join or Be Joined.
> . . . .
> (2) Defendants. Persons may be joined in one action as defendants if:
> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all defendants will arise in the action.

In this case, the examples where rights arise out of the same transactions or occurrences and questions of law or fact are common to the named Defendants and school districts are numerous and qualify the school districts for permissive joinder under Rule 20(a)(2)(A) and (B). The questions of law common to the Defendants and the school districts are what constitutes compliance with the Indian Education provisions in the development, implementation, monitoring, and enforcement of these provisions which parties are responsible for what and by what mechanisms authorized by law in the determination of appropriate injunctive and declaratory relief. Existing law and rules demonstrate how intertwined the Defendants' and school districts' responsibilities are when it comes to assuring compliance with the Indian Education provisions. There are also areas where the current Defendants do not have responsibility for oversight, direction, or control of school districts, such as oversight of school districts in their cooperation with adjacent Tribes in providing educational instruction, implementing educational goals, and adopting educational rules. (The Defendants lack authority to ensure that schools and school districts in close proximity to Montana Tribes cooperate with those Tribes.) Rulings concerning compliance standards, areas and methods of enforcement, proper coordination with Tribes by Defendants, and what even constitutes proper injunctive and declaratory relief are all questions of law common to school districts and the named Defendants. Clearly, school districts have a direct interest in the relief that may be awarded concerning the monitoring, reporting, expenditure of funding and withdrawal of funding.

As to common questions of fact, there are multiple allegations of fact throughout the First Amended Complaint regarding specific failures of school districts which should serve as a predicate for their joinder. For instance, the First Amended Complaint refers to "instructors continuing to spread misinformation by using tools and materials not consistent with IEFA." (Doc.

29, ¶ 18.) The named Defendants have no instructors and do not instruct. The First Amended Complaint also states that a Plaintiff "reports that [in the Missoula High School District] there are currently no classes available to her that incorporate or teach Indian education and as a result Plaintiff's peers have very little understanding of American Indian culture and contributions. (Doc. 29 ¶ 22.) On page 9 of the First Amended Complaint, two individual plaintiffs "report that Indian education instruction is highly variable across classes and grades and depending on the teacher. As a result, there is no uniformity in Indian education instruction being offered and it is impossible to predict when and where Indian education will be incorporated into public school curricula." (Doc 29, ¶ 26.) The First Amended Complaint contains similar allegations about a complete lack or a partial lack of an offering of education of American culture. (*See*, e.g., Doc 29, ¶¶ 14, 18, 22, 27, 30, 34, 38.) All these allegations constitute issues of fact in common with the Defendants. The First Amended Complaint alleges Defendants' failures have caused or will cause individual Plaintiffs 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, ¶¶ 10, 14, 18.) Plaintiffs allege that Defendants' failures have resulted in their cultures and traditions not being preserved and the failures have also perpetuated the spread of misinformation making it impossible to predict when and where Indian education will be offered. (Doc. 29, ¶¶ 18, 27.) The individual 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, ¶ 19.)

All the foregoing alleged harms are within the direct control of school districts since school districts develop curricula, determine what instruction is offered, how frequent and the content of the instruction and are responsible for addressing the existence of racist or other harmful behavior

in the school environment that might be detrimental to students. The questions of fact concerning the proof of and causation between the complained of harms and alleged delinquent actions of Defendants are unquestionably common to both school districts and the Defendants and arise out of the same occurrences. Similarly, the allegation that the Tribal Plaintiffs suffer harm as their expertise, views and input is not being included in education generally (*see* Doc 29, ¶ 24) involve questions of fact that are in common with school districts and arise out of the same facts because they are also directed to coordinate with Tribes when providing instruction or when implementing educational goals. *See* Mont. Code Ann. § 20-1-501(2)(b).

To the extent the Complaint references improper use of IEFA funding by school districts, (e.g., Doc 29, ¶ 33), these allegations also arise out of the same facts and occurrences and constitute questions of fact in common with the Defendants who monitor application of IEFA funding in terms of amount and purpose by school districts. As educational personnel, school districts have questions of fact in common with the Defendants concerning what actions they have taken that are compliant or and what actions may not have been undertaken in compliance with the statutory, rule, and constitutional requirements concerning Indian education.

There are more than enough examples of rights arising out of the same transactions and occurrences and common questions of law and fact to join the school districts making it clear the school districts should be joined under Mont. R. Civ. P. 20(a)(2)(A) and (B) even if this Court does not conclude their joinder is mandatory.

CONCLUSION

In summary, there are multiple reasons to join school districts as defendants in this case under both Rule 19 and Rule 20 as well as pursuant to Mont. Code Ann. § 27-8-301. Without joinder of the school districts, their rights and the Defendants' related rights concerning the

determination of respective responsibilities and measures for compliance under IEFA and Mont. Const. Art. X, § 1(2) cannot be fully adjudicated.

DATED this 12th day of June, 2023.

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CERTIFICATE OF SERVICE

I, Katherine Orr, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 06-12-2023:

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