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MONTANA EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CASCADE

SHAUNA YELLOW KIDNEY, as next friend of C.Y.K. and S.Y.K.; CAMMIE DUPUIS-PABLO and ROGER PABLO, as next friends of K.W.1, K.W.2, K.D., K.P.1, and K.P.2; HALEIGH THRALL and DURAN CAFERRO, as next friends of A.E., D.C., and C.C.; AMBER LAMB, as next friend of K.L.; RACHEL KANTOR, as next friend of M.K.1, and M.K.2; CRYSTAL AMUNDSON and TYLER AMUNDSON, as next friends of C.A. and Q.A.; JESSICA PETERSON, as next friend of A.C.; and DAWN SKERRITT, as next friend of S.S. and M.S; on behalf of themselves and all others similarly situated,

Cause No. DDV – 21 – 0398

Hon. Amy Eddy

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’ BRIEF IN SUPPORT OF OPPOSED MOTION UNDER M. R. CIV. P. 23 FOR ORDER CERTIFYING CLASS, APPOINTING CLASS REPRESENTATIVES, AND APPOINTING CLASS COUNSEL

Plaintiffs,

vs.

MONTANA OFFICE OF PUBLIC INSTRUCTION; ELSIE ARNTZEN, in her official capacity as the Superintendent of Public Instruction; MONTANA BOARD OF PUBLIC EDUCATION; and DARLENE SCHOTTLE, in her official capacity as Chairperson of the Montana Board of Public Education,

Defendants.

INTRODUCTION

Class actions are intended to save resources by permitting the litigation of multiple, related claims to be accomplished more efficiently and economically than individual lawsuits. William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 10:252 (Rutter Group 2021).¹ A class action can provide a group remedy without the cost and delay of multiple lawsuits and the attendant risk of inconsistent judgments. *Id.*

Plaintiffs Shauna Yellow Kidney, C.Y.K., S.Y.K., Cammie L. DuPuis-Pablo, Roger A. Pablo Jr., K.W.1, K.W.2, K.D., K.P.1, K.P.2, Haleigh Thrall, Duran Caferro, C.C., D.C., A.E., Amber Cruz Lamb, K.L., Rachel Kantor, M.K. 1, M.K. 2, Tyler Amundson, Crystal Amundson, C.A., Q.A., Jessica Peterson, A.C., Dawn Skerritt, M.S., and S.S. (hereinafter collectively referred to as “Individual Plaintiffs”), are enrolled students, in grades ranging from Kindergarten to 12th grade, of various elementary, middle, and high schools in the Montana public school system and their parents. First Amended Complaint (“FAC”) (Doc. 29) at ¶¶ 8-38.

Pursuant to M. Rs. Civ. P. 7(b) and 23, Plaintiffs have moved this Court for an Order: 1) certifying this action as a class action under M. R. Civ. P. 23(b)(2), with a Class consisting of all Montana K-12 public school system enrolled students, now and in the future; 2) appointing Individual Plaintiffs as representatives of the Class; and 3) appointing the American Civil Liberties Union-Montana (ACLU-MT), the American Civil Liberties Union (ACLU) Foundation, and the

¹ In Montana courts, “[t]he propriety of a class action is governed by Rule 23 of the Montana Rules of Civil Procedure.” *Chipman v. Nw., Healthcare Corp.*, 2012 MT 242, ¶ 43, 366 Mont. 450, 464, 288 P.3d 193, 205. Montana courts have a “long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23.” *Id.* ¶ 52; *accord MacDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993); *see also Sangwin v. State*, 2013 MT 373, ¶ 13, 373 Mont. 131, 315 P.3d 279, 283 (“Because the Montana version of Rule 23 is identical to the corresponding federal rule, federal authority on the issue of class certification is instructive”).

Native American Rights Fund (NARF), as Class Counsel. Pursuant to Rule 2, U.Dist.Ct.R. and M.R. Civ. P. 7(b), the grounds in support of the Motion are stated with particularity as follows.

SUMMARY STATEMENT OF THE CASE

Eighteen of the Individual Plaintiffs in this case are enrolled students in the Montana public school system, and eleven are the parents of these students. FAC at ¶¶ 8-38. Six federally recognized Indian tribes located in Montana also are Plaintiffs: the Fort Belknap Indian Community, the Confederated Salish Kootenai Tribes, the Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation, the Northern Cheyenne Tribe, the Little Shell Tribe of Chippewa Indians of Montana and the Crow Tribe of Montana (“Tribal Plaintiffs”). *Id.* at ¶¶ 41-65. Defendants are the Montana Office of Public Instruction, the Montana Superintendent of Public Instruction, the Montana Board of Public Education, and the Chairperson of the Montana Board of Public Instruction. *Id.* at ¶¶ 66-86. The Superintendent and Chairperson are sued in their official capacities. *Id.* at ¶ 1.

Plaintiffs seek declaratory and injunctive relief for Defendants’ alleged failure to implement, monitor, and enforce the guarantees of the Montana’s Constitution’s Indian Education Clause, Article X, section 1(2), and Montana’s Indian Education for All Act, §§ 20-1-501, et seq., MCA, (hereinafter collectively “the Indian Education Provisions”) which 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, and that every Montana educational agency and all Montana educational personnel will work cooperatively with Montana tribes or those tribes that are in close proximity when providing this instruction. *See generally id.* at ¶¶ 2-3 and 5-7.

On April 4, 2023, the Court heard oral argument on Defendants’ fully briefed Motion to Dismiss the FAC (Docs. 33, 38, and 39). The Court denied the Motion from the bench and on April 19, 2023, issued a written Order denying the Motion (Doc. 77) (Order). In denying dismissal the Court rejected all of Defendants’ arguments under Rule 12(b)(6) with respect to justiciability, including case or controversy standing (concrete injury, causation, redressable injury, and injury distinguishable from the public generally); prudential standing (including political question and judicially discoverable and manageable standards); failure to state a claim upon which relief can be granted (violation of the Indian Education provisions and due process); and authority to grant the requested relief. *Id.* at 9-19. The Court did not reach Defendants’ necessary party argument on the grounds that the Court determined that this issue was not relevant to its determination of the Rule 12(b)(6) Motion. *Id.* at 19-20.

Since the oral argument, the Court has issued several scheduling Orders, including an Order Setting Trial beginning July 29, 2024 (Doc. 78); an Order extending the time for Defendants to Answer to the FAC (Doc. 81); and, a Second Amended Rule 16 Scheduling Order (Doc. 85). While none of these Orders address the timing of the filing of the Motion for Class Certification, the filing of the Motion was raised and discussed at the oral argument. Oral Argument Transcript at 78, 82, and 83. On May 9, 2023, Defendants filed their Answer. (Doc. 82). On June 12, 2023, Defendants filed a Motion for Joinder of School Districts (Doc. 88), which is pending before the Court.

ARGUMENT

I. STANDARD OF REVIEW

“The party requesting certification bears the burden of proving by a preponderance of the evidence that all requirements for class certification are met.” *Sides v. Glob. Travel All., Inc.*, No.

CV 20-53-BLG-SPW-TJC 2021, WL 5926136, at *3 (D. Mont. Aug. 16, 2021) (citation omitted). “Whether to grant class certification is within the discretion of the trial court.” *Id.*; accord *Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶ 8, 409 Mont. 267, 272, 513 P.3d 1256, 1261 (citation omitted) (“We review a district court’s ruling on a motion for class certification for abuse of discretion”). “The Court has broad discretion in determining whether certification is appropriate but must engage in a rigorous analysis.” *Dow v. Safeco Ins. Co. of Am.*, No. CV 20-31-BLG-SPW, 2021 WL 2187288, at *1 (D. Mont. May 28, 2021) (citation omitted). “An evaluation of whether the class is likely to succeed on the merits is inappropriate[;] the Court must analyze the facts only to the extent necessary to answer the [Rule 23] factors.” *Id.* (citation omitted).

II. THE COURT SHOULD CERTIFY THE PROPOSED CLASS, APPOINT THE CLASS REPRESENTATIVES, AND APPOINT CLASS COUNSEL

A. The Proposed Class Definition

While M. R. Civ. P. 23 generally governs class certification, in addition to and “prior to addressing the Rule 23 analysis, the moving party must [define] the proposed class[] with ... specificity” and ascertainability. *Jodie v. Mountain W. Farm Bureau Mut. Ins. Co.*, No. CV 20-30-BLG-SPW, 2022 WL 3975033, at *2 (D. Mont. Sept. 1, 2022). The class must be defined in such a manner “as to render it ‘administratively feasible to determine if a given individual is a member of the class.’” *Id.* (citation omitted). Courts use “several criteria for determining ascertainability, including whether class members can be determined based on objective criteria.” *Id.* (citation omitted).

“[A] class certification order ‘must define the class and the class claims, issues, or defenses,’” *Diaz v. State*, 371 MT 219, ¶ 18, 371 Mont. 214, 220, 308 P.3d 38, 43, citing M. R. Civ. P. 23(c)(1)(B). “The District Court’s choice of class definition thus forms a mandatory component of the appealable class certification order.” *Id.* However, “under M. R. Civ. P.

23(c)(1)(C)” a district court “maintains discretion to modify the class definition at any time until final judgment.” *Rolan v. New W. Health Servs.*, 2013 MT 220, ¶ 15, 371 Mont. 228, 233, 307 P.3d 291, 295; *accord Rogers*, 2022 MT 144 ¶ 11.

Individual Plaintiffs’ proposed class definition is “all current and future students in the Montana public school system.” FAC at ¶ 153 (citation omitted). This definition is typical of student classes that meet the specificity and ascertainability requirements, *see, e.g., Ridgeway v. Montana High Sch. Ass’n*, 633 F. Supp. 1564, 1567 (D. Mont. 1986), *aff’d*, 858 F.2d 579 (9th Cir. 1988) (certified class defined as “[a]ll female students enrolled in [certain Montana high schools] as of the date of filing of the complaint in this action and all such female students who may enroll in said schools in the future”), “even though ascertaining who will be a future student ... is of course impossible.” *Floyd v. City of New York*, 283 F.R.D. 153 n.115 (S.D.N.Y. 2012) (citation omitted);² *see also Knudsen v. Univ. of Montana*, 2019 MT 175, ¶ 14, 396 Mont. 443, 449, 445 P.3d 834, 840 (class includes “past and present students”); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 230, 338 Mont. 259, 328, 165 P.3d 1079, 1123 (citation omitted) (“the litigation at issue ... benefitted a ‘large class’ defined as ‘all Montana citizens interested in Montana’s public schools’”). Hence, specificity and ascertainability are met here.

B. The Rule 23 Requirements for Class Certification Are Met

² As discussed *infra*, Individual Plaintiffs seek to proceed under Rule 23(b)(2), FAC at Prayer for Relief (1), and seek only declaratory and injunctive relief. *Floyd* has been widely cited for its apt reasoning that “precise ascertainability of class members is unnecessary in a Rule 23(b)(2) class action...[and] ‘[i]t would be illogical to require precise ascertainability in a suit that seeks no class damages.’” *Stroucher v. Shah*, 286 F.R.D. 244, 248 (S.D.N.Y. 2012) (citing *Floyd*). “After all, the need to accurately determine class membership is significantly reduced when the class action seeks injunctive relief that would benefit the class whether they are joined in the action or not.” *Raymond v. New York State Dep’t of Corr. & Cmty. Supervision*, 579 F. Supp. 3d 327, 340 (N.D.N.Y. 2022). Similarly, it is unnecessary here to determine precisely who has been treated unlawfully or unfairly, because “final injunctive relief or corresponding declaratory relief [will be] appropriate respecting the class as a whole.” *Stroucher*, 286 F.R.D. at 248 (brackets in original; footnote omitted).

Rule 23, Class Actions, provides in relevant part as follows:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
- (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.
- (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
 - (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
 - (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (D) the likely difficulties in managing a class action.

M. R. Civ. P. 23.

All four Rule 23(a) requirements must be met along with at least one Rule 23(b) subsection. *Knudsen*, 2019 MT ¶ 7. “Rule 23 ‘does not set forth a mere pleading standard.’” *Evenson-Childs v. Ravalli Cnty.*, No. CV 21-89-M-DLC-KLD, 2023 WL 2705902, at * 26 (D. Mont. Jan. 13, 2023) (citation omitted). “Therefore, a court cannot accept the allegations in the pleadings as true.” *Id.* (citation omitted). “The party seeking class certification must prove ‘in fact’ the requirements of

23(a) and ‘satisfy through evidentiary proof’ any individual provision of 23(b).” *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶ 15, 401 Mont. 489, 496, 474 P.3d 310, 315 (citations omitted). Further, “it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question.” *Rogers*, 2022 MT 144 ¶ 16.

1. The Rule 23(a) Requirements

“The four requirements found in Rule 23(a) provide the threshold inquiry courts engage in when considering a putative class.” *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 28, 371 Mont. 393, 403, 310 P.3d 452, 459, *cert. denied*, 572 U.S. 1110 (2014). They “are respectively known as numerosity, commonality, typicality, and adequacy of representation.” *Rogers*, 2022 MT 144, ¶ 16 (citation omitted). They “ensure the ‘named plaintiffs are appropriate representatives of the class whose claim they wish to litigate and effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.’” *Kramer*, 2020 MT 258, ¶ 15 (citation omitted); *accord Rogers*, 2022 MT 144 ¶ 16.

a. Numerosity

“While Rule 23(a)(1) is often referred to as the ‘Numerosity’ requirement, at its heart is that joinder is impracticable.” *Roose v. Lincoln Cnty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 18, 381 Mont. 409, 414, 362 P.3d 40, 44 (citation omitted). “A proposed class must be ‘so numerous that joinder of all members is impracticable.’” *Byorth*, 2016 Mont. 302, ¶ 20 (citation omitted). Impracticability of joinder does not mean impossibility. *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 594 (E.D. Cal. 2008) (citing *Harris v. Palm Springs Alpine Est. Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir. 1993). An attempt to join all parties need only be difficult or inconvenient. *Harris*, 329 F.2d at 913-14. Impracticality exists where individual adjudications and joinder would be expensive and time

consuming for all parties. *In re Drexal Burnham Lambert Grp. Inc.*, 960 F.2d 285, 290 (2nd Cir. 1990), *cert. dismissed*, 506 U.S. 1088 (1993).

The numerosity “determination is largely discretionary for the district court.” *Dow*, 2021 WL 2187288, at * 2 (citation omitted). “There is no bright-line number of class members that will establish numerosity.” *Morrow v. Monfric., Inc.*, 2015 MT 194, ¶ 9, 380 Mont. 58, 61, 354 P.3d 558, 561. “Instead, the numerosity of the class and the impracticability of joinder must be determined on a case by case basis, with consideration given to all of the surrounding circumstances.” *Id.* (citation omitted). “Generally, fewer than 21 potential class members is regarded as inadequate, while more than 40 is likely to be sufficient.” *Id.* (citation omitted); *accord Evenson-Childs*, 2023 WL 2705902, at *28 (“Courts generally find Rule 23’s numerosity requirement is satisfied when a class contains at least 40 members”) (citations omitted).

“[T]he party seeking class action certification [must] ‘present some evidence of, or reasonably estimate, the number of class members.’” *Rogers*, 2022 MT 144 ¶ 19 (citations omitted). According to Defendants’ own website, which is the evidentiary basis for the estimated number of class members who are current students, the statewide Montana K-12 public school enrollment in 2021 was 149,181 students. FAC at ¶ 110, citing Office of Public Instruction, 2021 Facts About Montana Education (2021), <https://opi.mt.gov/Portals/182/Superintendent-Docs-Images/Facts%20About%20Montana%20Education.pdf?ver=2020-09-16-132427-883>; see also Ballotpedia, Public Education in Montana https://ballotpedia.org/Public_education_in_Montana#:~:text=In%202022%2C%20Montana%20had%20108%2C894,schools%20in%20302%20school%20districts (last visited June 23, 2023) (“In 2022, Montana had 108,894 students enrolled in a total of 684 schools in 302 school districts”).

Adding future students only increases the number of proposed class members, and further renders joinder inherently impractical. *See, e.g., Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (internal quotation marks and citation omitted) (“[W]here the class includes unnamed, unknown future members, joinder of such unknown individuals is impracticable and the numerosity requirement is therefore met, regardless of class size,” quoting *Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986)); *Kidd v. Mayorkas*, 343 F.R.D. 428, 437 (C.D. Cal. 2023) (“class actions challenging statutes or administrative procedures on constitutional grounds, have been recognized as natural class actions, and inclusion in the class of potentially aggrieved individuals has often been regarded as sufficient to meet the Rule 23(a)(1) impracticability requirement,” quoting *Walters*, 111 F.R.D. at 599, citing 1 H. Newburg, *Class Actions* § 3.07 (2d ed. 1985)); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) (in injunctive relief cases, “[j]oinder in the class of persons who may be injured in the future has been held impracticable without regard to the number of persons already injured”); *Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) (“The joinder of potential future class members who share a common characteristic, but whose identity cannot be determined yet is considered impracticable.”). Joinder of all affected individuals who fit within the proposed class definition here would be impracticable, and thus numerosity is satisfied.

b. Commonality

“Rule 23(a)(2) requires ... questions of law or fact” common to the class. *Byorth*, 2016 MT 302, ¶ 26. The requirements “are disjunctive,” so either a common question of law or fact is required, not “total commonality.” *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 31. “[R]egardless of differences among class members, this element is met if a single issue is common to all.”

Ferguson v. Safeco Ins. Co., 2008 MT 109 ¶ 16, 342 Mont. 380, 180 P.3d 1164 (citation omitted). “[I]t is not required that all questions of law or fact raised by the dispute be common.” *Dow*, 2021 WL 2187288, at *2 (citation omitted).

Commonality may be satisfied by alleging a “common injury ... shared across the class,” *Byorth*, at ¶ 28, caused, for example, by an allegedly unlawful systemic program, policy, or plan. *Id.* at ¶ 29; *accord Jacobson*, 2013 MT 244 at ¶ 38 and ¶ 44 (citations omitted) (commonality analysis focuses on allegations “that a defendant’s programmatic conduct violates the law”). Similarly, “an issue of law that can be decided by a court at one time for all class members” typically establishes commonality. *Worledge v. Riverstone Residential Grp.*, 2015 MT 142, ¶ 30, 379 Mont. 265, 276, 350 P.3d 39, 47. “[T]he common contention among class members must also require a potential common class-wide resolution.” *Dow*, 2021 WL 2187288, at *2 (citation omitted). “Where proof of liability can be made on a common basis, the commonality requirement is satisfied.” *Id.* (citation omitted); *accord Evensen-Childs*, 2023 WL 2705902, at *29 (“What matters to class certification ... is not the raising of common ‘questions’ – even in droves – but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation”) (emphasis in original) (citation omitted).

Plaintiffs’ allegations here fit squarely within these parameters. “[I]ndividual Plaintiffs have sufficiently alleged a past, present and threatened injury to their fundamental constitutional right to learn about the distinct and unique heritage of American Indians in a culturally responsive manner.” Order at 10. They also “have alleged that these injuries have or will result in racism, bullying, stereotyping, prejudice, a dangerous school environment, mental and emotional harm, and loss of cultural heritage.” *Id.* Thus, the common “questions include, but are not limited to, whether Defendants are denying the class members of rights guaranteed under the Indian

Education Provisions by failing to: (1) establish minimum standards by which Defendants can determine whether school districts and schools are complying with their responsibilities under the Provisions and then to adequately monitor, implement, and enforce those standards; (2) establish meaningful and objective reporting requirements to assess IEFA funding expenditures by school districts and schools; (3) ensure proper expenditures by school districts and schools of IEFA funds; (4) ensure compliance by school districts and schools with IEFA content standards for purposes of school accreditation; (5) ensure cooperation by school districts and schools with Montana tribes in educational instruction, the implementation of educational goals, and the adoption of educational rules; and, (6) enforce generally the Provisions.” FAC at ¶ 156.

As these common allegations show, “the validity of the prospective class members’ claims hinge[s] on a single issue:” whether Defendants are in violation of constitutional and statutory provisions. *Worledge*, 2015 MT 143, ¶ 26; *accord Chipman*, 2012 MT 242, ¶ 52 (commonality is met where a “court’s determination of . . . the legal obligations” to plaintiffs “will generate common answers applicable to all class members”). Any one of these common issues, standing alone, is enough to satisfy Rule 23(a)(2)’s permissive standard. *See Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) (“Courts have found that a single common issue of law or fact is sufficient.”) (citation omitted); *Sweet v. Pfizer*, 232 F.R.D. 360, 367 (C.D. Cal. 2005) (observing that “there must only be one single issue common to the proposed class”) (quotation and citation omitted).

Additionally, and alternatively, sufficient “common facts,” *i.e.*, Individual Plaintiffs’ status as Montana public school students, “connect[s] all class members in relation to the ultimate resolution” of the claims raised in this case. *Chipman*, 2012 MT 242, ¶ 52; *see also Ferguson*, 2008 MT109, ¶ 26 (“the existence of a well-established duty does not eliminate the common fact

issue of whether [a defendant] has programmatically breached that duty”). Individual Plaintiffs thus satisfy commonality in terms of both a common question of law and facts.

c. Typicality

Typicality ensures that “the named class members interests align with the interests of absent class members.” *Byorth*, 2016 MT 302, ¶ 33 (citation omitted). The rationale is that “a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class.” *Jacobsen*, 2013 MT 244, ¶ 51 (citation omitted). “Typicality is not a demanding standard.” *Worledge*, 2015 MT 142, ¶ 34 (citation omitted). “If the class claims are based on the ‘same event, practice, or course of conduct’ and ‘the same legal or remedial theory,’ typicality is satisfied.” *Byorth*, 2016 MT 302, ¶ 33 (citation omitted). “Moreover, the event, practice, or course of conduct need not be identical for all members of the class.” *Id.* (citation omitted).

Similar to commonality, typicality can be satisfied by “a patterned course of conduct” or practice “that the class representatives shared with the class.” *Sangwin v. State*, 2013 MT 373, ¶ 22, 373 Mont. 131, 139, 315 P.3d 279, 285. Typicality focuses on class representatives and putative class members having experienced the same dealings with or being subject to the same conduct or practice of the opposing party, even if there is some variation of facts between class representatives and class members. *Id.* at ¶ 24; *accord Jacobsen*, 2013 MT 244, ¶ 52 (typicality is met where putative class members were subjected to the same alleged systemic violations of the law generally). “Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), *cited in Sangwin*, 2013 MT 373, ¶ 26.

As in *Sangwin*, Individual Plaintiffs’ allegations and claims here are based on the same systematic and programmatic failures of Defendants and “on the same legal theory” as the allegations and claims of the putative class members. *Id.* Individual Plaintiffs, like all putative class members have been subjected to Defendants’ alleged failures to implement, monitor, and enforce the Indian Education Provisions in violation of the Provisions. “[T]he individual Plaintiffs have ... alleged a past, present, and threatened injury to their fundamental constitutional right to learn about the distinct and unique heritage of American Indians in a culturally responsive manner.” Order at 10. “The named individual Plaintiffs expressly assert they have received no Indian education or have received Indian education that is not culturally relevant.” *Id.* at 18. Typicality is thus met.

d. Adequacy of Representation

“Rule 23(a)(4) ensures ‘the representative parties will fairly and adequately protect the interests of the class.’” *Byorth*, 2016 MT 302, ¶ 38 (citation omitted). This requirement “looks to the attorney representing the class, who must be ‘qualified, experienced, and generally capable’ of conducting the class action.” *Id.* (citation omitted). “Adequacy also prevents certification of a class if the representative parties’ interests are ‘antagonistic to the class interests.’” *Id.* (citation omitted); accord *Evenson-Childs*, 2023 WL 2705902, at *30 (citations omitted) (The adequacy “inquiry presents two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?’”).

Individual Plaintiffs’ proposed Class Counsel are “qualified and competent” to conduct this litigation. *Sangwin*, 2013 Mont. 373, ¶ 28. The lead attorney of record in this case, Alex Rate, is the Legal Director for the ACLU-MT, which has extensive trial experience in Montana state and

federal courts, including successful representation of plaintiffs in class actions including *Langford v. Bullock*, No. CV-93-46-LBE (D. Mont. 1995) and *Chief Goes Out v. Missoula Cnty.*, No. CV-12-155-M-DWM (D. Mont. 2012). See Declaration of Alex Rate in Support of Plaintiffs' Motion, ¶¶ 1-4 and 7, submitted herewith as Exhibit 1.

NARF is a national, non-profit, private law firm with 53 years of experience in litigating precedent-setting legal issues on behalf of American Indian and Alaska Native tribes and individuals. *Id.* ¶ 9. For 35 years, NARF attorney and Plaintiffs' Counsel Melody McCoy has represented NARF's clients in Indian education matters at the federal, state and tribal levels. *Id.* ¶ 10. Ms. McCoy also currently is the lead Class Counsel in the federal court certified plaintiff class action, *Peltier v. Haaland*, No. 20-3775 (D.D.C. filed Dec. 21, 2020), and has been the lead attorney for 27 years in the companion 28 U.S.C. § 1505 Indian identifiable group claim case, *Chippewa Cree Tribe v. United States*, No. 92-675L (Fed. Cl. filed Sept. 30, 1992). *Id.*

The ACLU Foundation is the premier national, non-profit legal organization with over 100 years of experience in defending U.S. Constitutional rights and combatting government abuse. *Id.* ¶ 13. Many ACLU Foundation cases have involved American Indians, education, and / or discrimination, including *Antoine v. Winner Sch. Dist.*, No. CV-3:06-3007 (D.S.D.); *Kenny v. Wilson*, No. 2:16-cv-2794, 566 F. Supp. 3d 447 (D.S.C. 2021); and *Pernell v. Florida Bd. of Governors*, No. 4:22-cv-304, 2022 WL 16985720 (N.D. Fla. 2022). The ACLU Foundation also was involved in two Montana class action cases: *Ridgeway*, 633 F. Supp. 1564 (certified class of female high school students), and *Noren v. Straw*, 578 F. Supp. 1 (D. Mont. 1982) (certified class of prisoners). *Id.*

Rachel Meeropol joined the ACLU Foundation as a Staff Attorney in September 2022. *Id.* ¶ 12. Prior to that time, she conducted significant litigation on half of American Indian tribes and

individuals, including achieving two successful settlements for a tribe in a federal action to protect the tribe's rights to gather and pray on its privately-owned land in *Ramapough Mountain Indians, Inc. v. Ramapo Hunt & Polo Club Assoc. Inc.*, No. 2:18-cv-09228 (D.N.J. 2021) and dismissal of a RICO complaint against a tribe member arising out of her First Amendment protected activism at Standing Rock, *Energy Transfer Entity v. Greenpeace International*, No. 1:17-cv-00173-BRW-CRH (D.N.D. Feb. 14, 2019). *Id.* ¶ 14. Her 20 years of civil rights litigation experience in diverse areas in state and federal courts includes her long-standing representation of the plaintiff class in *Ashker v. Governor*, No. C 09-5796, 2014 WL 2465191 (C.D. Cal. June 2, 2014). *Id.* ¶ 15.

In sum, all “[c]ounsel will adequately represent the class.” *Sangwin*, 2013 MT 373, ¶ 28. And, as discussed *supra*, Individual Plaintiffs meet Rule 23(a)'s commonality and typicality requirements, and where these requirements are satisfied, antagonism is unlikely to be present. *Jacobsen*, 2013 MT ¶ 58. “[P]erfect symmetry of interest is not required” and discrepancies are allowed. *Id.* at ¶ 59. “[O]nly conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.” *Id.* (citations omitted). No fundamental conflicts exist here to deter Individual Plaintiffs’ “incentive to vigorously pursue the requested injunctive and declaratory relief” sought on behalf of all class members. *Id.* Their interests thus are not antagonistic with those of the putative class.

2. The Rule 23(b) Requirements

“Once the Rule 23(a) prerequisites are satisfied, the analysis shifts to Rule 23(b), which sets forth additional requirements depending on the type of class action being sought.” *Mattson v. Montana Power Co.*, 2012 MT 318, ¶ 18, 368 Mont. 1, 291 P.3d 1209 (citation omitted). “[T]here are three avenues under which a class action may proceed under Rule 23(b).” *Houser v. City of Billings*, 2020 MT 51, ¶ 8, 399 Mont. 140, 458 P.3d 1031. Individual Plaintiffs here seek to proceed

under Rule 23(b)(2), FAC at Prayer for Relief (1), which “provides that a class action may be maintained if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole.” *Id.* at ¶ 11.³ “The first requirement focuses on whether the defendant’s action affects everyone in the same proposed class in a similar fashion.” *Id.* (citations omitted). “The second requirement focuses on the ‘indivisible nature’ of the declaratory or injunctive relief – ‘the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’” *Id.* (citations omitted).

The first requirement – acting on grounds generally applicable to the class – is met by identification “of a common policy or action by the defendant that affect[s] the entire defined class.” *Houser*, 2020 MT 51, ¶ 11; *see also Byorth v. USAA Cas. Ins. Co.*, 333 F.R.D. 519, 526 (D. Mont. 2019) (citation omitted) (“Rule 23(b)(2) may be satisfied if ‘class members complain of a pattern or practice that is generally applicable to the class as a whole.’”) That is precisely what Individual Plaintiffs allege: Defendants have failed to implement, monitor and enforce the Indian Education Provisions applicable to all Montana public schools statewide. FAC at ¶¶ 6 and 112-151. This identified “common policy or action” affects the entire class. *Knudsen*, 2019 MT 175, ¶ 14.

The second requirement – indivisibility – is met where a court can provide declaratory and injunctive relief to all class members by singularly enjoining or declaring unlawful the ongoing conduct or action of a defendants. *Knudsen*, 2019 MT 175, ¶ 15. “[T]he relief sought must be able to affect the entire class at once.” *Jacobsen*, 2013 MT 244, ¶ 65; accord *Evenson-Childs*, 2023 WL

³ “A Rule 23(b)(2) class is considered a mandatory class.” *Roose*, 2015 MT 324, ¶ 17. “Unlike a damage class under Rule 23(b)(3), wherein the class members can opt out, 23(b)(2) class members generally cannot opt out. *Id.* (citation omitted).

2705902, at *30 (citation omitted) (“Rule 23(b)(2) applies then a single injunction or declaratory judgment would provide relief to each member of the class”). The relief that Individual Plaintiffs seek – to wit, (a) a declaration that Defendants are in violation of constitutional and statutory provisions, (b) a declaration that Defendants must abide by their constitutional and statutory duties in the future, and (c) corresponding injunctive relief – satisfies the indivisibility requirement. *Id.* at ¶¶ 67-68 (requested declaratory relief seeking to compel defendants to properly perform their statutory duties supports Rule 23(b)(2) class certification); *accord Ferguson*, 2008 MT 109, ¶¶ 34-36. No “individualized determinations” of class members’ alleged injuries is required. *Evensen-Childs*, 2023 WL 2705902, at *30.

C. Appointment of Class Representatives and Class Counsel

1. Class Representatives

In connection with seeking class certification, it is common to seek appointment of the designated representatives of the class. *See, e.g., Gendron v. Montana Univ. Sys.*, 2020 MT 82, ¶ 4, 399 Mont. 470, 461 P.3d 115; *accord Byorth v. USAA Cas. Ins. Co.*, 2015 WL 5022899, at * 1 (D. Mont. Aug. 21, 2015). Individual Plaintiffs propose appointment as Class Representatives the twenty-nine Individual Plaintiffs named in the FAC: Shauna Yellow Kidney, the parent of Plaintiffs C.Y.K. and S.Y.K who attend Paxson Elementary School which is part of the Missoula Elementary School District; Cammie L. DuPuis-Pablo and Roger A. Pablo Jr., the parents of Plaintiffs K.W.1, K.W.2 who attend Lewis and Clark Elementary School, K.D., who attends Washington Middle School, and K.P.1 and K.P.2 who attend Willard Alternative High School, schools that are part of the Missoula Elementary and High School Districts; Haleigh Thrall and Duran Caferro, the parents of C.C. and D.C. who attends Chief Charlo Elementary School, D.C., who attends Meadow Hill Middle School, and A.E., who attends Sentinel High School, schools

that are part of the Missoula Elementary and High School Districts; Amber Cruz Lamb, the parent of K.L. who attends Big Sky High School, which is part of the Missoula High School District; Rachel Kantor, the parent of M.K. 1 and M.K. 2 who attend Washington Middle School, which is part of the Missoula Elementary District; Tyler and Crystal Amundson, the parents of C.A. and Q.A. who attend Meadowlark Elementary School, which is part of the Billings Elementary District; Jessica Peterson, the parent of A.C. who attends the Montessori Classroom at Central Elementary School, which is part of the Helena Elementary District; and Dawn Skerritt, the parent of M.S. who attends Lewis & Clark Elementary School, and S.S. who attends, Great Falls High School, schools that are part of the Great Falls Elementary and High School Districts. FAC at ¶¶ 8-38.

2. Class Counsel

Plaintiffs seek the appointment as Class Counsel of the ACLU-MT, the ACLU Foundation, and NARF. FAC at Prayer for Relief (3). Rule 23(g) requires that “[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel.” Further, “[a] court appointing class counsel ... must ensure that counsel meets the factors of Rule 23(g).” 1 Newberg on Class Actions §3:81 (5th ed.).

Individual Plaintiffs have addressed, *supra*, their proposed Class Counsel’s adequacy under Rule 23(a), and that information also supports the Rule 23(g) factors, including i) the work counsel has done in identifying or investigating potential claims in the action; ii) counsel’s experiences in handling class actions, other complex litigation, and the types of claims asserted in the action; iii) counsel’s knowledge of the applicable law; and the resources that counsel will commit to representing the class. *See* 1 Newberg on Class Actions §3:81 (footnote omitted) (Rule 23(g)(1)(B) allows the court to “consider any other matter pertinent to counsel’s ability to fairly and adequately

represent the class” and this “catch-all provision effectively incorporates much if not all of the case law developed under traditional Rule 23(a)(4) adequacy of class counsel analysis”).

CONCLUSION

Plaintiffs meet all requirements for class certification. Accordingly, Plaintiffs’ motion for certification of a Plaintiff Class consisting of all current and future K-12 students in the Montana public school system, for appointment of the named Individual Plaintiffs as Class Representatives, and for appointment of the ACLU-MT, the ACLU Foundation, and NARF as Class Counsel, should be granted.

Respectfully submitted this 13th day of July, 2023.

/s/ Alex Rate
Alex Rate (MT Bar # 11226)
ACLU of Montana
P.O. Box 1968
Missoula, MT 59806
406-224-1447

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Krystel Pickens, hereby certify on this date I filed a true and accurate copy of the foregoing document with the electronic filing system for Montana courts and electronic service was sent to:

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Attorney for the Board of Public Education and Tammey Lacey

Electronically signed by Krystel Pickens on behalf of Alex Rate.

Dated July 13, 2023

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Attorneys for Plaintiffs
** Pro Hac Vice admitted*

MONTANA EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CASCADE

SHAUNA YELLOW KIDNEY, as next)
friend of C.Y.K. and S.Y.K.; CAMMIE)
DUPUIS-PABLO and ROGER PABLO, as)
next friends of K.W.1, K.W.2, K.D., K.P.1,)
and K.P.2; HALEIGH THRALL and)
DURAN CAFERRO, as next friends of A.E.,)
D.C., and C.C.; AMBER LAMB, as next)
friend of K.L.; RACHEL KANTOR, as next)
friend of M.K.1, and M.K.2; CRYSTAL)
AMUNDSON and TYLER AMUNDSON, as)
next friends of C.A. and Q.A.; JESSICA)
PETERSON, as next friend of A.C.; and)
DAWN SKERRITT, as next friend of S.S.)
and M.S; on behalf of themselves and all)
others similarly situated,)

Cause No. DDV-21-0398

Hon. Amy Eddy

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 RESERVA-)
TION, MONTANA; NORTHERN)
CHEYENNE TRIBE OF THE NORTHERN)
CHEYENNE INDIAN RESERVATION,)
MONTANA; LITTLE SHELL TRIBE OF)
CHIPPEWA INDIANS OF MONTANA; and)
CROW TRIBE OF MONTANA)

**DECLARATION OF ALEX RATE IN
SUPPORT OF PLAINTIFFS'
OPOSED MOTION FOR ORDER
CERTIFYING CLASS, APPOINTING
CLASS REPRESENTATIVES, AND
APPOINTING CLASS COUNSEL
PURSUANT TO MONT. R. CIV. P.
23(b)(2)**

Plaintiffs,

vs.

MONTANA OFFICE OF PUBLIC)
INSTRUCTION; ELSIE ARNTZEN, in her)
official capacity as the Superintendent of)
Public Instruction; MONTANA BOARD OF)
PUBLIC EDUCATION; and DARLENE)
SCHOTTLE, in her official capacity as)
Chairperson of the Montana Board of Public)
Education,)

Defendants.

I, Alex Rate, declare as follows:

1. I am the Legal Director for the ACLU of Montana (“ACLU – MT”), and among the co-counsel for Plaintiffs in this case. I am the lead attorney of record in the case. I submit this declaration in support of Plaintiffs’ Motion for Class Certification to address the qualification of Plaintiffs’ counsel to serve as Class Counsel in this proposed class action.

2. ACLU – MT was founded in 1972 and is a nonprofit and nonpartisan organization dedicated to fighting for the rights of marginalized communities.

3. ACLU – MT has effectively and successfully represented other plaintiffs in class actions, including *Noren v. Straw*, 578 F. Supp. 1 (D. Mont. 1982), *Ridgeway v. Montana High Sch. Ass’n*, 633 F. Supp. 1564 (D. Mont. 1986), *Langford v. Bullock*, No. CV-93-46-H-LBE (D. Mont. 1994) and *Chief Goes Out v. Missoula County*, No. CV-12-155-M-DWM (D. Mont. 2012).

4. I have been the Legal Director at the ACLU – MT since 2017.

5. I have practiced law for 14 years. I received a B.A. degree, with high honors, from the University of California-Berkeley in 1999 and a J.D. from the University of Montana School of Law in 2009. I worked as a solo practitioner in private practice with Rate Law Office, P.C. between 2009 and 2017.

6. I am admitted to practice law in the State of Montana. I am admitted to practice in the U.S. District Court for the District of Montana and in the U.S. Court of Appeals for the Ninth Circuit. I have never been suspended from or disciplined in the practice of law by any jurisdiction.

7. I have extensive trial experience in Montana state and federal courts, including extensive experience in injunctive litigation cases.

8. I am familiar with the legal and factual issues raised in this action. I helped draft the Complaint and the First Amended Complaint (FAC). I helped write the brief in opposition to

Defendants' Motion to Dismiss the FAC, and along with my co-counsel Stephen Pevar, I did the oral argument on the dismissal motion, which was denied. Order of April 19, 2023, Doc. 77.

9. Plaintiffs' Counsel Melody McCoy is a Staff Attorney at the Native American Rights Fund (NARF), a non-profit law firm with 53 years of experience in litigating precedent-setting legal issues on behalf of American Indian and Alaska Native tribes and individuals.

10. At NARF, Ms. McCoy has accrued over 35 years of experience litigating matters of federal Indian law in all levels of federal courts, including 33 years of experience in Indian education matters at the federal, state and tribal levels, and 27 years as the lead attorney for a breach of trust claim case determined to be an identifiable group claim case under 28 U.S.C. § 1505, *Chippewa Cree Tribe, v. United States*, No. 92-675L (Fed. Cl. filed Sept. 30 1992), and its companion federal court certified plaintiff class action including 4 tribes and approximately 39,000 individuals, *Peltier v. Haaland*, No. 20-3775 (D.D.C. filed Dec. 21, 2020).

11. Ms. McCoy is in good standing and eligible to practice in all the courts to which she is admitted. She is not currently suspended or disbarred in any court. She has never been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or been sanctioned.

12. Plaintiffs' Counsel Rachel Meeropol is a Staff Attorney with the ACLU Foundation's Racial Justice Project. She joined the ACLU Foundation's legal staff in September 2022.

13. The ACLU Foundation is the premier national, non-profit legal organization with over 100 years of experience in defending U.S. Constitutional rights and combatting government abuse. Many ACLU Foundation cases have involved American Indians, education, and / or discrimination, including, for example, *Antoine v. Winner Sch. Dist.*, No. CV-3:06-3007 (D. S.D.); *Kenny v. Wilson*, No. 2:16-cv-2794, 566 F. Supp. 3d 447 (D. S.C. 2021); *Pernell v. Florida Bd. of*

Governors, No. 4:22-cv-304, 2022 WL 16985720 (N.D. Fla. 2022). The ACLU Foundation also was involved in two Montana class action cases: *Ridgeway v. Montana High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988) (certified class of all female students at certain Montana High Schools) and *Noren v. Straw*, 578 F. Supp. 1 (D. Mont. 1982) (certified class of prisoners challenging conditions of confinement in the Yellowstone County Jail).

14. Ms. Meeropol has conducted significant litigation on half of American Indian tribes and individuals, including achieving two successful settlements for the Ramapough Lenape Nation in a federal action to protect their rights to gather and pray on their privately-owned land in *Ramapough Mountain Indians, Inc. v. Ramapo Hunt & Polo Club Assoc. Inc.*, No. 2:18-cv-09228 D. N.J. 2021) and dismissal of a RICO complaint against an Oglala Lakota and Northern Cheyenne activist arising out of her First Amendment protected activism at Standing Rock, *Energy Transfer Entity v. Greenpeace Int'l*, No. 1:17-cv-00173-BRW-CRH (D. N.D. Feb. 14, 2019).

15. In addition to her Indigenous Justice experience, Ms. Meeropol has 20 years of civil rights litigation experience in diverse areas and has appeared in every level of state and federal court, and her significant class action experience includes her long-standing representation of the certified plaintiff class in *Ashker v. Governor*, No. C 09-5796, 2014 WL 2465191 (C.D. Cal. 2014).

16. Ms. Meeropol is in good standing and eligible to practice in all the courts to which she is admitted. She is not currently suspended or disbarred in any court. She has never been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders or been sanctioned.

17. On behalf of Plaintiffs' Counsel, who are qualified to serve as Class Counsel, I therefore request that the Court certify the proposed Class, appoint Class Representatives, and appoint Class Counsel as set forth in Plaintiffs' Motion and Supporting Brief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, based on my personal knowledge.

DATED this 13th day of July, 2023.

/s/ Alex Rate

Alex Rate (MT Bar #11226)

ACLU of Montana

P.O. Box 1968

Missoula, MT 59806

406-224-1447

Attorney for Plaintiffs