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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

SHAUNA YELLOW KIDNEY, et al., Plaintiffs, vs. MONTANA OFFICE OF PUBLIC INSTRUCTION, et al., Defendants.	Case No. DDV-21-0398 Hon. Amy Eddy **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 23 MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Plaintiffs have failed to meet their burden under Montana Rules of Civil Procedure 23. All students of Montana, present and future, fail to be common of the class. In addition, the class representatives must be able to fairly and adequately protect all members of the class. The Court must deny the motion.

Montana's American Indian population equals 78,000, comprising 6.3% of the total population of the State. Native American students comprise 10.8% of the public school population. The Montana public school system has 150,000 students in 402 school districts and 825 public schools. The group of public school students in Montana includes Hutterite children,

Native American children attending school within the seven reservations, and special needs children.

None of the individual Plaintiffs reside within the exterior boundaries of an Indian Reservation, nor do they attend a public school from one of the seven reservations. None of the individual Plaintiffs are special needs children, nor are any of them representative of a special group like the Hutterite children. In fact, all of the individual Plaintiffs reside and attend urban schools.

ARGUMENT

In order for certification of a class to be appropriate under Rule 23, Plaintiffs must meet the four elements in Rule 23(a) and one of the elements in Rule 23(b). *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 61, 371 Mont. 393, 310 P.3d 452. One or more members of a particular class may file suit on behalf of all of the members if:

(1) The class is so numerous that joinder of all of members is impracticable;

(2) There are questions of law and 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 fairly and adequately protect the interests of the class.

M.R.Civ.P. Rule 23(a). Plaintiffs must provide proof rather than mere presumptions in order to succeed on a Rule 23 class certification motion. *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains indispensable."). Here, Plaintiffs fail to meet the requirements under Rule 23(a) and Rule 23(b). This Court, therefore, must deny their motion to certify the class.

I. Plaintiffs Cannot Meet the Commonality Requirement.

In order to meet the commonality requirement under Rule 23(a)(2), Plaintiffs' must establish that questions of law and facts exist that are common to the class. *Worledge v. Riverstone Residential Group. LLC*, 2015 MT, 142, 379 Mont. 265, 350 P.2d 39. Montana has followed federal courts in making this determination. *Id.* In 2011, the United States Supreme Court tightened the standard requiring a common contention between class claims and their representatives to such a degree "that it is capable of classwide resolution" – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

Plaintiffs cannot establish a common contention between the class claims and the representative Plaintiffs. The common characteristics of the named Plaintiffs is that they all attend urban schools and not reservations schools. The most obvious lack of a common contention is between reservation public school students versus the representative Plaintiffs. Reservation schools have a close relationship with their Tribes. In addition, many of the teachers are Tribal Members or descendants of the very Tribe in which the school is situated. To say that a student from a Missoula school faces the same lack of Indian education as an elementary student at the Vina Chatin Elementary School in Browning, Montana is like comparing an elephant to a buffalo. It is like comparing the education curriculum of a country school in the 1800s to a school today. A student at the Box Elder High School simply does not have the same contention whatsoever as a student from Billings West. Plaintiffs bear the burden of establishing that the Box Elder and Vina Chatin students have that common contention. They cannot.

In addition, Plaintiffs seek to represent all the Hutterite students and the special needs students. These classes of students do not have any contention similar to the named Plaintiffs. The group they seek to represent is simply too diverse and too dependent upon their particular teacher and the school board governing the school. All of these students are going to have different complaints concerning

their respective teachers and school boards as to how the use and implementation of Indian Education Funds and resources are being applied to each student.

In *Neenan v. Carnival Corp.*, 199 F.R.D. 372, (S.Dist.Fla. 2001), ninety-six passengers from a cruise ship suffered injuries as a result of an inoperable sanitation system. Because each passenger had different complaints and suffered different damages, the court denied the class certification for lack of commonality. Like *Neenan*, the students in rural schools, especially attending reservation schools, have different contentions with regard to the funding and implementation of Indian Education Funding and resources. A student from Box Elder High School who has Native American teachers is going to have an entirely difference perspective on his or her access to Indian Education. Each student is dependent upon their particular situation. As a result, class representatives fail to adequately represent the members of the class.

II. Plaintiffs Cannot Adequately Represent the Members of the Class.

Under Rule 23(a), the representative parties must fairly and sufficiently represent the interests of the class members. M.R.Civ.P. Rule 23(a)(3). This class requirement is "designed to ensure that the named representatives' interests are aligned with the class's interests, the rationale being that a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interest of the class." *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, 35, 363 Mont. 151, 267 P.3d 756. The "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 2250-2251 (1997). To meet the adequacy of representation requirement, the Plaintiffs must establish: 1) that they have common interests with and not antagonistic to the class interests; and 2) that the Plaintiffs can prosecute the action vigorously through qualified counsel. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Plaintiffs fail to have the same interests as members of the class and fail to suffer the same injury. Defendants concede that Plaintiffs' counsel are qualified and competent, but instead, Plaintiffs fail to have the same interest of their class. Montana is a large state with most of its school districts being rural. Similarly to the lack of commonality, reservation students being taught by Native American teachers are not suffering any injury at all. They do not want to be a part of the class. Plaintiffs' action can only hurt their situation. It will not help them. In addition, each district has demands of their Indian Education that differs from other districts. As a result, the students' quest for a remedy differs. For example, students attending the public school in Lame Deer may seek to be taught the Native Crow language. This instruction differs greatly from the Hutterite students in Glacier County. Learning the Crow language, or any Native American language, does them no good. They will never use that instruction. Instead, the Hutterite students probably want the historical perspective of all of the Tribes including Tribes outside of Montana. In addition, the Hutterite students may also want instruction regarding Tribal jurisdiction. This instruction may become useful in their future endeavors.

The named Plaintiffs cannot adequately represent the interests in the special needs students. For these students, the Indian Education will be dependent upon the extent of their disability. The class action does nothing for them. The bottom line is this class represents too many divergent interests from too many different locations and backgrounds. The class fails.

III. Plaintiffs Fail to Satisfy Rule 23(b)(2).

Plaintiffs have failed to establish that they represent a class as defined by Montana Rules of Civil Procedure 23. Plaintiffs' proposed class definition is "all current and future students in the Montana public school system." Brief in Support of Opposed Class Certification, 5. In support of this definition, Plaintiffs cite *Knudsen v. Univ. of Montana*, 2019 MT 175, ¶ 14, 396 Mont. 443, 449, 445 P.3d 834, 840, *Ridgeway v. Montana High Sch. Ass'n*, 633 F. Supp. 1564, 1567 (D. Mont.

1986), and *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 230, 338 Mont. 259, 328, 165 P.3d 1079, 1123. Unlike the class definition proposed by Plaintiffs, in each of these cases the class definitions were limited to one public university, or a relatively small geographic area or a division inside of school districts.

In *Ridgeway*, the class was limited to female student athletes at three Montana high schools. The class was specifically defined as:

> All female students enrolled at Hellgate High School in Missoula, Montana, Whitehall High School in Whitehall, Montana, and Columbia Falls High School in Columbia Falls, Montana, 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.

Ridgeway v. Mont. High Sch. Ass'n, 633 F. Supp. 1564, 1567. The class neither extended to any male students attending the named high schools, nor did the class extend to *all* students at *any* Montana high school. Despite the widespread nature of the individual high schools, the class was narrowly tailored to female students. The class did not purport to address issues faced by all girls enrolled in public education from 5 to 18, but those enrolled in three high schools. Also, the class was further limited to those girls who participated in school athletics, not all girls at the three high schools. Here, Plaintiffs purport to speak for every child enrolled in public education, from 5 to 18, both male and female, and without regard for any difference in academic standing, extracurricular participation, or other identifying mark that would denote any definable characteristic beyond "current or future student in the Montana public school system."

In *Knudsen*, the class was limited to students who attended the University of Montana and future students who will attend the University of Montana. Notably, the class did not extend to *all* university students at *any* public higher education institution in Montana. This case involved three separate classes of students suing the university. While the Supreme Court found that all three classes were tailored enough to meet Rule 23(a), the third class of students was rejected by the Montana Supreme Court because, despite the fact that the class met the requirements of Rule 23(a),

the class could not be awarded indivisible injunctive or declaratory relief. The court discussed this issue, saying:

> Under the second requirement, "[t]he key to the [Rule 23](b)(2) class is[] the indivisible nature of the injunctive or declaratory remedy warranted—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.

Knudsen v. Univ. of Mont., 2019 MT 175, 13, citing *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 61, 371 Mont. 393, 310 P.3d 452 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011)). The court held that "Rather than a single injunction, the court would need to fashion separate injunctions" for every defined member of the class. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶15. Here, not only is the class overbroad, but the declaratory relief that Plaintiffs seek is divisible. The steps that a school in Missoula would have to take to satisfy an order granting declaratory relief would be far different than the steps that a school in Browning would have to take. Even if Defendants take the same action in all of the school districts, the results of their actions would be felt differently in every school district. This difference in result would mean that while the declaratory relief is identical to all Plaintiffs, the "corresponding injunctive relief" would have to be tailored differently for every school district.

CONCLUSION

Plaintiffs' motion for class certification should be denied. They fail to meet the requirements under Rule 23.

DATED this 3rd day of August, 2023.

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CERTIFICATE OF SERVICE

I, Thane P. Johnson, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Response Brief to the following on 08-03-2023:

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