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

Melody McCoy*
Native American Rights Fund
250 Arapahoe Ave.
Boulder, CO 80302-6296
(720) 647-9691

Mark Carter*
Samantha Kelty*
Native American Rights Fund
950 F Street, NW, Suite 1050
Washington, DC 20004
(202) 785-4166

Rachel Meeropol*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(929) 585-0061

Attorneys for Plaintiffs
**pro hac vice*

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, FORT BELKNAP INDIAN COMMUNITYOF 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 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.	Cause No. DDV – 21 – 0398 Hon. Amy Eddy **PLAINTIFFS' REPLY IN SUPPORT OF MOTION UNDER M. R. CIV. P. 23 FOR ORDER CERTIFYING CLASS, APPOINTING CLASS REPRESENTATIVES, AND APPOINTING CLASS COUNSEL**

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs have moved for class certification with: (1) a Rule 23(b)(2) class consisting of all Montana K-12 public school system enrolled students, now and in the future; (2) appointment of the 29 Individual Plaintiffs named in the First Amended Complaint (FAC) (Dkt. 29) as Named Representatives of the Class; and (3) appointment of the American Civil Liberties Union-Montana (ACLU-MT), the American Civil Liberties Union Foundation (ACLU), and the Native American Rights Fund (NARF), as Class Counsel. Dkt. 95. Defendants oppose the Motion. Dkt. 102. Plaintiffs file this Reply in support of their Motion.

Defendants concede Class Counsel's adequacy, Defs.' Resp. 5, but make several arguments against class certification. Defendants assert that Rule 23(a)'s commonality and adequacy requirements are not met. Defendants further assert that Plaintiffs' Rule 23(b)(2) proposed class definition is too broad and that Rule 23(b)(2)'s relief indivisibility requirement is not met. None of the arguments are well-supported factually or legally and otherwise are unpersuasive.

ARGUMENT

I. RULE 23(a)'s COMMONALITY AND ADEQUACY REQUIREMENTS ARE MET

A. Commonality

Rule 23(a)(2) requires a common question of law or fact. *See Jacobsen v. Allstate Ins. Co*., 2013 MT 244, ¶ 31, 371 Mont. 393, 310 P.3d 453, 460, *cert. denied*, 572 U.S. 1110 (2014). Plaintiffs here allege that Defendants are denying the putative class members' rights under constitutional and statutory Indian Education Provisions (Provisions). This raises several questions of law and fact common to the putative class. The common questions of law are whether Defendants have failed 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 Indian Education for All (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 ¶ 156.

The common facts include that Individual Plaintiffs are students enrolled in the Montana public schools, or are their parents or guardians, and they have been harmed and continue to be harmed by Defendants' violations of and failures under the Provisions. *See Id*. ¶¶ 8-40. "[A]ll Plaintiffs have suffered, and will continue to suffer, cultural, mental, and emotional harm and educational deficiency and deficits as a result of Defendants' failures." *Id*. ¶ 40.

Challenging Plaintiffs' position, Defendants argue "Plaintiffs cannot establish a common contention between the class claims and the representative Plaintiffs." Defs.' Resp. 3. Defendants state purported differences in the Montana public schools that the Named Representative Plaintiffs attend, the relationship of certain schools in Montana to Tribes in Montana, and the students and teachers at certain schools in Montana. *Id*. Defendants then conclude that "[t]he group [Plaintiffs] seek to represent is simply too diverse and too dependent upon their particular teacher [sic] and the school board governing the school." *Id*. Defendants are wrong.

Notably, Defendants rely exclusively on a nonbinding case, *Neenan v. Carnival Corp*., 199 F.R.D. 372, 375 (S.D. Fla. 2001), where it was determined that the alleged various injuries suffered by cruise ship passengers who experienced the same fire and failed sanitary system essentially created different causes of action that precluded Rule 23(a) commonality. There, passengers

suffered distinct injuries, including "malfunctioning toilets, a lack of drinking water, damage to their luggage, and inconvenience from missing two days of work." *Id.*

Here, by contrast, Plaintiffs do not allege different causes of actions or that Defendants have caused different injuries to individuals or groups within the proposed class. Rather, Plaintiffs allege uniform, systemic failures and flaws on the part of Defendants that are capable of class-wide resolution in the form of declaratory and injunctive relief. Such contentions routinely satisfy commonality. *See, e.g.*, *Jacobsen*, 2013 MT 244, ¶ 38 and ¶ 44 (violation of state Unfair Trade Practices Act); *Houser v. City of Billings*, 2020 MT 51, ¶ 8, 399 Mont. 140, 458 P.3d 1031 (impermissible city franchise fees on municipal services); *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 28, 379 Mont. 265, 275, 350 P.3d 39, 46 (violations of state Residential Landlord and Tenant Act and Security Deport Act); *Sangwin v. State*, 2013 MT 373, ¶ 19, 373 Mont. 131, 138, 315 P.3d 279, 284 (uniform course of conduct by State and insurer in denying health insurance claims). There is commonality when a proposed class "seek[s] to enjoin state defendants from violating their rights through statewide policies and practices of uniform application." *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014). The Court need not "determine the effect of those policies and practices upon any individual class member … or [] undertake any other kind of individualized determination." *Id*.

Further, nothing in the record in this case supports Defendants' asserted purported "differences" within the putative class. To the extent the assertions are relevant to the commonality inquiry, this Court is not required to probe beyond the pleadings. *See Jacobsen*, 2013 MT 244, ¶ 37 (citation omitted). Moreover, some potential or actual factual differences among class members are permissible. *See Jacobsen*, 2013 MT 244, ¶ 39; *Worledge,* 2015 MT 142, ¶¶ 27-29 and 31-32. "Dissimilarities within the proposed class [may] exist, but [when] common facts connect all class

members in relation to the ultimate resolution of th[e] dispute[,]" commonality is not defeated. *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 52, 366 Mont. 450, 468 288 P.3d 193, 208.

B. Adequacy

Where Rule 23(a)'s commonality and typicality requirements are satisfied, antagonism within the class is unlikely to be present. *See Jacobsen*, 2013 MT 244, ¶ 58. Nevertheless, the adequacy requirement "prevents certification of a class if the representative parties' interests are 'antagonistic to the class interests.'" *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 38, 385 Mont. 396, 408, 384 P.3d 455, 465 (citation omitted). The adequacy inquiry focuses on conflicts of interest among class members and the ability of named representatives to vigorously prosecute the class claims. *See Evenson-Childs v. Ravalli Cnty*, No. CV 21-89, 2023 WL 2705902, at *30 (D. Mont. Jan. 13, 2023), *report and recommendation adopted*, No. CV 21-89-M-DLC-KLD, 2023 WL 2583261 (D. Mont. Mar. 21, 2023). "[P]erfect symmetry of interest is not required" and discrepancies are allowed. *Jacobsen,* 2013 MT 244, ¶ 59 (quoting *Matamoros v. Starbucks Corp*., 699 F.3d 129, 138 (1st Cir.2012)). "[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).

Defendants argue that the Named Representative here "fail to have the same interests as members of the class and fail to suffer the same injury." Defs.' Resp. 5. Astoundingly, Defendants then assert that:

> 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.

Id. Defendants make other unfounded and offensive assertions, *e.g*., for certain students, "[l]earning the Crow language, or any Native American language, does them no good," and "[t]he class action does nothing for them." *Id*.

Even if there was any veracity to these unsupported assertions, none of the relief sought by Plaintiffs turns on them. *See Worledge*, 2015 MT 142, ¶ 39 (finding adequacy where remedy sought does not depend on actual factual differences or future factual determinations). Moreover, Defendants' argument is contrary to basic legal authority. "As a general rule, disapproval of the action by some class members will not preclude a class action on the ground of inadequate representation." 1 Newberg and Rubenstein on Class Actions § 3:65 (6th ed.) (footnote omitted). Defendants have not met their burden on this point, which is to show that the portion of the class that disagrees with the suit is "very large." *Id*. (footnote omitted).

In sum, Defendants simply have failed to identify a requisite fundamental conflict within the proposed class or a reason why the Named Representatives cannot and will not vigorously pursue the requested injunctive and declaratory relief sought by all class members. *See, e.g., Doyle v. Chrysler Grp., LLC*, 663 Fed. App'x. 576, 579-80 (9th Cir. 2016) (failure to show adequacy where theory or type of damages sought by named representative did not account for all class members' damages claims); *Jacobsen*, 2013 MT 244, ¶ 144 (Baker, J., dissenting) (failure to show adequacy where named representative is not pursuing the same claims as other class members and his claims would be subject to unique defenses). The Named Representatives' interests here are not antagonistic with those of the proposed class.

II. PLAINTIFFS' RULE 23(b)(2) PROPOSED CLASS DEFINITION IS APPROPRIATE FOR THE CLAIMS RAISED AND RELIEF SOUGHT

Plaintiffs' Rule 23(b)(2) proposed class definition is "all current and future students in the Montana public school system." FAC ¶ 153(citation omitted). Plaintiffs' requested relief, in relevant part, is: "1) Ent[ry of] 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) Ent[ry of]

a Declaratory Judgment that Defendants are in violation of their constitutional and statutory duties by failing to require every Montana educational agencies and all educational personnel to work cooperatively with Montana tribes to implement the Indian Education Provisions; 3) Ent[ry of] 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) Ent[ry of] a Declaratory Judgment that Defendants must comply with the Indian Education Provisions now and in the future; 5) [the] Granting [of] 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." *See id*. at Prayer for Relief.

Defendants argue that "Plaintiffs have failed to establish that they represent a class as defined by Montana Rules of Civil Procedure 23." Defs.' Resp. 5-7. Defendants make two sub-arguments: (1) Plaintiffs' proposed class definition is too broad, *see id*. at 5; and (2) Plaintiffs' relief sought is divisible, *see id*. at 7. Neither argument has merit.

Plaintiffs' proposed class definition is grounded in the constitutional and statutory Provisions on which their claims against Defendants are based. The Indian Education Clause provides in its entirety that "[t]he 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). The IEFA provides in relevant part that "every Montanan, whether Indian or non-Indian, be encouraged to learn about the distinct and unique heritage of American Indians in a culturally responsive manner." MCA § 20-1-501(2)(a). Nothing in the

Provisions limits their guarantees or mandates to anything but Montana's statewide K-12 school system or to anyone but the current and future students in that system. Accordingly, the proposed class definition is appropriate. *See Rogers v. Lewis & Clark Cnty.*, 2022 MT 144, ¶¶ 39-41, 409 Mont. 267, 513 P.3d 1256 (McGrath, C.J., concurring) (class definitions should not depart from applicable statutes).

The two cases Defendants cite involving "limited" definitions of student classes are readily distinguishable. First, the class definition in *Ridgeway v. Montana High School Ass'n*, 633 F. Supp. 1564, 1566 (D. Mont. 1986), *aff'd*, 858 F.2d 579 (9th Cir. 1988), was limited to female student athletes in three named defendant high schools because the claims were of alleged "sex discrimination in the secondary athletics program in the state of Montana." *Id*. "Although only three school districts had been named as defendants, the [Settlement] Agreement contemplated compliance by all school districts within Montana through the statewide efforts of the High School Association and OPI." *Id*. at 1567. Second, the class definition in *Knudsen v. University of Montana,* 2019 MT 175, ¶¶ 1 and 5, 396 Mont. 443, 445 P.3d 834, 837 was limited to current and former students at the named defendant university because the actions and conduct of that university system, but no other higher education systems were at issue. Indeed, these two cases support Plaintiffs in that the definitions in those cases, like the one here, were appropriately tied to the plaintiffs' claims and chosen defendants.

Knudsen, where certification for a subclass was denied due to relief sought that was determined to be divisible, is distinguishable on this point. The plaintiff students in *Knudsen* alleged that the defendant university had acted unlawfully with respect to a long-expired, third-party contract and that the university might repeat its actions; but the plaintiffs did not allege or provide any evidence of current objectionable contracts or contemplated future such contracts. *See*

2019 MT 175, ¶ 14. "There is no ongoing conduct to enjoin or to declare unlawful" with respect to the subclass at issue, and "[t]he nature of the injunctive or declaratory relief" sought for the subclass "is not 'indivisible.'" *Id*. ¶ 15. "The broad wording of the class certification [approved by the district court] includes any number of situations in which the University has contracted or could in the future contract with third-party vendors—including situations that are entirely unlike the [expired] contract." *Id*. "Each such contract would require separate analysis and injunction." *Id*. "Rather than a single injunction, the court would need to fashion separate injunctions based on different allegedly offending contract terms from different contracts with different companies—contracts that at this point have not been identified, might not yet exist, and thus are entirely speculative." *Id*.

In contrast, the relief sought here does not suffer from the same problems. Plaintiffs do not seek relief for expired agreements, and no new agreements, actions, or events need to be identified or occur for Plaintiffs' requested relief to be warranted or viable. The requested relief is based on Defendants' existing actions and conduct which are ongoing vis-à-vis the entire proposed class—not on unidentified or speculative future actions or conduct, and not on actions or conduct specific to any subclass or group within the proposed class. If Defendants are in violation of the Provisions as Plaintiffs allege, the requested relief to declare and enjoin such violations is singular and indivisible with respect to the proposed class. "The 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*, 2019 MT 175, ¶ 13 (citations omitted); *accord Houser*, 2020 MT 51, ¶ 11 (where defendant's actions affect the proposed class in a similar fashion, "the injunctive or

declaratory relief warranted, if any, has an indivisible nature and ultimately will be appropriate for all class members or for none of them") (citation omitted).

Other applicable authorities support Plaintiffs on this point. In *Parsons,* plaintiff inmates requested that state correctional officers be ordered to develop and implement, as soon as practical, a plan to eliminate the substantial risk of serious harm that prisoner plaintiffs and a member of the plaintiff class suffered due to defendants' inadequate medical, mental health, and dental care. 754 F.3d at 687; *see B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) (citation omitted). *Parsons* held that Rule 23(b)(2) by its text requires that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." 754 F.3d at 689 (citation omitted).

Here, as in *Parsons*, "every [student] in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in statewide [Indian education] policy and practice." *Id*. (citation omitted). Relief differentiation between class members is neither alleged nor required to obtain the declaratory and injunctive relief sought. *See id*. (noting as an example that if it is determined that defendants' policy and practice of failing to employ enough doctors for inmates was unlawful, an injunction to hire more doctors was the class-wide appropriate remedy, "with the exact number of necessary additional hires to be determined" after that relief is granted); *accord B.K*., 922 F.3d at 971 (where plaintiffs brought unified claims that a specified set of centralized state policies and practices of statewide application caused them harm, "a single, indivisible injunction ordering state officials to abate those policies and practices 'would provide relief to each member of the class,' thus satisfying Rule 23(b)(2)") (citation omitted); *see also Fowler v. Guerin*, 899 F.3d 1112, 1120 (9th Cir. 2018) (teachers seeking an injunction ordering state official to apply a single formula to state

agency's electronic records system to correct errors in the entire system was indivisible relief for purposes of Rule 23(b)(2)).

CONCLUSION

Plaintiffs have met their burden to show that all requirements for class certification are met. 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, and NARF as Class Counsel, should be granted.

Respectfully submitted this 29th day of August, 2023.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7 of the Eighth Judicial District, I certify that this brief is 2,963 words plus ten additional pages or less. The word count was calculated using Microsoft Word and excludes the caption, certificates of service and compliance, signature lines and attachments.

CERTIFICATE OF SERVICE

I, Krystel Pickens, hereby certify on this date that a true and accurate copy of the foregoing document was served via electronic filing on counsel for Defendants:

AUSTIN KNUDSEN
Montana Attorney General
THANE JOHNSON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
thane.johnson@mt.gov

Attorneys for the Office of Public Instruction and Superintendent Elsie Arntzen

KATHERINE ORR
CHAD R. VANISKO
Agency Legal Counsel
P.O. Box 201440
Helena, MT 59620-1440
korr@mt.gov
chad.vanisko@mt.gov

Attorney for the Board of Public Education and Tammey Lacey

Electronically signed by Krystel Pickens on behalf of Alex Rate.
Dated August 29, 2023