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CHRISTOPHER D. RICH, Clerk
By KATHY JOHNSON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RUSSELL JOKI, and KATHLEEN I. JOKI, individually and as Guardians ad litem of PEYTON LEE GIFFORD-JOKI, *et al.*,

Plaintiffs,

vs.

THE STATE OF IDAHO; The HONORABLE TOM LUNA, Superintendent of Public Instruction; the IDAHO STATE DEPARTMENT OF EDUCATION; and the IDAHO STATE LEGISLATURE; and Aberdeen District #58; *et al.*,

Defendants.

Case No. CV-OC-2012-17745

MEMORANDUM DECISION RE: PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND THE SCHOOL DISTRICTS' MOTION TO DISMISS AND MOTION FOR CHANGE OF VENUE

I. PARTIES, NATURE OF THE CASE, AND PRIOR PROCEEDINGS

Russell Joki and 16 other individuals filed suit against the State of Idaho, the Superintendent of Public Instruction, the Department of Education, the Idaho State Legislature, all 114 Idaho public school districts, and one charter school. Plaintiffs describe themselves as grandparents, parents, and guardians of schoolchildren and

patrons of the Kooskia, Kellogg, Coeur d'Alene, Meridian, and Boise School Districts. Each claims an interest in school funding as citizens of the state of Idaho and patrons of the School Districts in which they reside. The complaint has two counts. The first count seeks a declaratory judgment that certain fees imposed upon schoolchildren, their parents, and guardians by school districts are unconstitutional. Count one also seeks to require reimbursement of all unconstitutional fees paid during the 2012-2013 school year. Count two seeks a declaration that the current system of funding education in Idaho is unconstitutional. The plaintiffs also seek to proceed by class action as representatives of a class consisting of all students currently enrolled in the defendant school districts together with their parents or guardians.

This Court earlier dismissed the State of Idaho, the Superintendent of Public Instruction, the Department Of Education, and the Idaho State Legislature as defendants. Fifty-three public school districts were voluntarily dismissed by plaintiffs before being served. Following dismissal of the various parties, 14 of the plaintiffs moved for "Leave to Withdraw as Plaintiffs." Defendants did not object and the motion was granted, leaving Russell Joki, Kathleen Joki and Sarah Holt as plaintiffs.

The 66 remaining defendants are represented by four different lawyers. Defendant Boise School District #1 is represented by Daniel Skinner of Cantrill, Skinner, Lewis, Casey, & Sorenson, LLP. Snake River District #52 and Madison District #321 are represented by James Reid of Ringert Law Chartered. Jefferson County Joint District #251, Mountain Home District #193, and Twin Falls District #411 are represented by Mark Prusynski of the firm Moffatt, Thomas, Barrett, Rock, and Fields, Chartered. The

rest of the defendants[1] are represented by Brian Julian of the firm Anderson, Julian, and Hull, LLP. For convenience, the defendants represented by Mr. Reid will be referred to as "the Reid Defendants," the defendants represented by Mr. Prusynski will be referred to as "the Prusynski Defendants," and the defendants represented by Mr. Julian will be referred to as "the Julian Defendants."

II. PENDING MOTIONS

Before the court for decision are the following motions:

1) Plaintiff's Motion for Class Certification pursuant to I.R.C.P. 23(a) and 23(b)(3)

[1] Basin District #72, Blackfoot District #55, Blaine county District #61, Bonneville Joint District #93, Boundary County District #101, Bruneau-Grand View Joint Distrct #365, Buhl Joint District #412 Buhl Joint District #412, Cascade District #422, Cassia Distriict #151, Coeur d'Alene District#271, Emmett District #221, Firth District #59, Fremont County Joint District #215, Fruitland District #373, Garden Valley School District #71, Genesse District #282, Glenns Ferry District #192, Hagerman School District #233, Heritage Community Charter School District #481, Homedale Joint District #370, Horeshoe Bend School District #73, Idaho Falls District #91, Jerome Joint District #261, Kellogg Joint District #391, Kimberly District #414, Lake Pend Oreille District #84, Lakeland District #272, Lapwai District #341, Lewiston District #340, Marsing District #363, McCall Donnelly District #421, Melba Joint District #136, Meridian Joint District #2, Middleton District #134, Minidoka County Joint District #331, Moscow District #281, Mountain Home District #193, Mountain View District #244, Mullan District #392, Nampa School District #131, New Plymouth School District #372, Notus School District #135, Orofino Joint School District #171, Parma School District #137, Payette School District #371, Pocatello/Chubbuck School District #25, Post Falls School District #273, Potlatch School District #285, Ririe School District #252, St. Maries Joint District #41, Shelley Joint District #60, Sugar Salem School District #322, Troy School District #287, Vallivue School District #139, Wallace School District #393, Weiser School District #431, Wendell District School District #232, Whitepine School District #288.

2) The Julian Defendants' Motion to Dismiss, pursuant to I.R.C.P. 12(b)(1), 12(b)(6) and 9(b).

3) The Julian Defendants' Motion to Change Venue pursuant to I.R.C.P. 12(b)(3)

4) The Prusynski Defendants' Motion to Dismiss pursuant to I.R.C.P. 12(b)(6)

5) Boise School District's Motion to Dismiss pursuant to I.R.C.P. 12(b)(6)

6) The Reed Defendants' Motion to Dismiss pursuant to I.R.C.P. 12(b)(1), 12(b)(6) and 9(b).

The motions were argued and are now ripe for decision.

1. Plaintiff's Motion for Class Certification

Plaintiffs seek class certification pursuant to I.R.C.P. 23 (a) and 23 (b)(3).

Plaintiffs propose the class be defined as:

> All children enrolled in public and charter schools in Idaho in grades K through 12 during the school year 2012 – 13 (and succeeding years during the pendency of this litigation) together with their parents, guardians and other persons responsible for their payment of fees to participate in Idaho's system of free common schools.

Rule 23 (a) sets out the four prerequisites to a class-action. They are (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. These four requirements are frequently referred to as numerosity, commonality, typicality, and adequate representation. Plaintiffs may obtain class certification only if all four prerequisites are present. The burden is on the party seeking class certification to bring the issue before the trial court and the demonstrate that class certification is proper. A mere assertion in

the pleadings that the action is brought on behalf of others is not sufficient. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 297 P.3d 1134 (2013).

Rule 23 (b)(3) sets out the types of actions that may be maintained if the prerequisites of Rule23 (a) are met. Rule 23 (b) is written in the disjunctive so a plaintiff need only show that the proposed class action falls within one of the three recognized types allowable. In this case plaintiffs seek certification based on Rule 23 (b)(3):

> Rule 23(b). Class actions maintainable.
> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The determination of whether or not to grant class action status is a matter of discretion for the trial court. *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004). When interpreting I.R.C.P. 23, the trial court may look to federal law for guidance. *O'Boskey v. First Fed. Sav.& Loan Ass'n of Boise*, 112 Idaho 1002, 1005, 739 P.2d 301, 304 (1987). The burden is on the plaintiff to establish the existence of the prerequisites to the class-action as well as showing the case meets at least one of the requirements of Rule23 (b)(3). *Kerner v. Johnson* 99 Idaho 433, 583 P.2d 360 (1978).

C.f. Middlekauff v. Lake Cascade, Inc., 110 Idaho 909, 719 P.2d 1169 (1986). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, – US –, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). This holding was reiterated by the Supreme Court in *Comcast Corp. v. Behrend*, – US –, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).[2] On the other hand, the failure to plead the necessary facts showing the case is appropriate to proceed as a class action is fatal to a later effort to proceed as a class action. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978.)

Turning to the case at hand, plaintiffs argue that they meet all four requirements of Rule 23(a). Defendants strenuously argue to the contrary. The arguments of the defendants overlap to a great degree and will not be discussed separately except where a defendant makes an argument unique to that defendant. All defendants except the Meridian School District[3] challenge class certification on the basis of standing. Except as implicated in the typicality requirement, the standing arguments are actually directed toward plaintiffs standing to bring this suit, and not the issue of class certification under

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[2] Plaintiffs argue that the substantive allegations of plaintiffs' complaint should generally be accepted as true in determining class certification. The cases upon which plaintiffs rely no longer appear to be good law in that respect given the recent US Supreme Court cases. On the other hand, defendants do not challenge many of the underlying facts. For example, defendants do not dispute that at least some school districts charge fees to students or that there are in excess of 200,000 schoolchildren in Idaho.

[3] For convenience the # number designation of the defendants is omitted from their name in this opinion.

Rule 23. Discussion of standing will be deferred to the portion of this decision discussing the various motions to dismiss. The Court will first examine the elements of plaintiffs' motion for class certification, and then discuss the motions to dismiss although the issues are somewhat intertwined.

i. ***Numerosity***

As to numerosity, only defendant Boise School District argues this test is not met. Boise School District's argument is premised on the lack of an allegation in the pleadings, or any other evidence, of the number of students in the Boise school district. It argues that plaintiff must show numerosity as to each defendant. Boise school district posits that there must be sufficient students, parents, and guardians who paid fees on behalf of the students in each school district to form a class of litigants. Plaintiffs have not proposed separate classes of litigants for each defendant. Plaintiffs have proposed a single class and the determination of numerosity must be based upon membership of the proposed class, and not some hypothetical alternative class. It is obvious beyond the need of further discussion that it would be impracticable to join all of Idaho's school children and their parents and guardians in one action.

ii. ***Commonality,***

As to commonality, plaintiffs maintain in their *Memorandum in Support of Motion for Class Certification* that the constitutional standard of "free common schools" applies to all putative class members. Further, that they have a common interest in determination of which fees charged by the defendants are constitutionally permitted and which are not constitutionally permitted. They argue that this question is precisely the

same for all students K through 12 in the state of Idaho. It can be gleaned from the plaintiffs' other filings that they maintain all putative class members would have an interest in the determination of the constitutionality of I.C. § 33–603.

Defendants claim the record shows a lack of commonality predominates. The primary evidence of the types of fees charged and being challenged by plaintiffs is contained in the *Affidavit of Russell Joki, Ed.D.*, dated March 22, 2013, filed March 25, 2013. Attached to the affidavit are samples from the websites of various school districts setting forth student fees charged for various courses and activities. The examples range from a "General Supply Fee" of $20 charged by the Basin County School District to an Advanced Agricultural Welding fee of $15 charged by Boundary School District, to a $25 Interior Design class fee charged by Meridian School District. The record does not state explicitly, but the court infers that different students pay different fees even when they attend the same school depending upon the classes in which they are enrolled. While some districts' fees appear to be similar it is obvious that not all districts charge student fees for the same classes or activities or in the same amounts. Nor is it obvious which courses in each district are equivalent to courses in other districts for the purposes of determining whether the course is necessarily included in the constitutional mandate that the state provide "... a general, uniform and thorough system of public, free common schools."

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. ...Their claims must depend upon a common contention—for example, the assertion of

> discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature 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, --U. S.--, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011) (Internal citation omitted).

In this case, there is not sufficient commonality between the practices of the districts to allow determination of, for example, whether an activity fee determined to be illegal in one district is improper in other districts. All of the districts appear to have different fee schedules. Some charge for items for which others don't charge. Based on the examples provided by plaintiffs, where it appears that charges are made for seemingly similar classes or activities, the charges are in different amounts. It does not matter that all the claims fall under Article IX, Section 1 of the Idaho Constitution. What matters is if their injuries are in common, and in this case, they are not.

The plaintiffs have not put forth any specific arguments as to what common facts they allege exist beyond the generality that the plaintiffs are the students forced to pay unconstitutional fees or the parents and guardians paying the fees. While there may be some commonality in some of the legal questions presented, there is no showing that these questions are common to all the members of the proposed class. For example, assuming the legal issue is presented as to whether it is constitutional for a school district to charge a fee for taking a chemistry course. That would appear to be a legal question. But, based upon the information provided by Dr. Joki, not all members of the proposed class that take course in chemistry are charged a fee. As to those putative claimants, there is no legal question presented.

In summary, the plaintiffs have failed to make a sufficient showing that there are questions of law or fact common to the entire class.

iii. ***Typicality***

As to typicality, plaintiffs maintain that they share the exact same injury — being unconstitutionally charged fees for the privilege of attending school — caused by the same injurious conduct by defendants. That being the case, plaintiffs maintain their claims are inescapably typical of the claims of the proposed class.

The difficulty with plaintiffs' position is that typicality requires more than similarity. Except for the Meridian School District, the individual plaintiffs have not alleged any claim by a named plaintiff against each of the defendants. "In brief, typicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." *La Mar v. H & B Novelty & Loan Co.* 489 F.2d 461, 465 (9th Cir. 1973).

La Mar decided two consolidated cases. In the first case the plaintiff initiated an action against all the pawn brokers licensed to conduct business in Oregon on behalf of all customers of such pawn brokers to recover for alleged violations by the defendant pawn brokers of the Truth-in-Lending Act. La Mar did business with only one pawn broker. The district court determined that La Mar's action was a proper class action under Rule 23(b)(3) on behalf of all those who borrowed from that broker as well as on behalf of those who borrowed from all other defendants. La Mar settled with his pawn broker on behalf of himself and all those who did business with that broker. The settlement was

approved by the district court. The other defendants appealed the class certification. In the consolidated case the plaintiff, Kinsling, purchased round trip airline tickets from Trans World Airlines and Piedmont Aviation Corp. The plaintiff alleged that he was overcharged under the regulatory scheme in effect at that time that set airfares. Suit was brought against Trans World Airlines and Piedmont Aviation Corp. and six other air carriers on behalf of Kinsling and all others who had suffered a similar overcharge in dealings with these carriers. The district court dismissed the complaint as to the six carriers on the ground that the plaintiff had no dealings with, nor suffered any injury at the hands of, these carriers. The Ninth Circuit held that the claims of the plaintiffs in each case against the defendants with whom the plaintiff had no dealing were not typical and could not be maintained. C.f. *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970) (Plaintiff mutual fund investor could not maintain class action on behalf of shareholders of mutual fund against the funds in which plaintiff held no shares).

Here, the plaintiffs are in the same position the proponents of the class actions in *La Mar*. They have adequately shown claims against one defendant, but have not demonstrated the existence of any claim against the others.

The plaintiffs and their counsel exhibit a great deal of knowledge and interest in the issue of public education and the adequate funding of the same, but, to paraphrase the Ninth Circuit, the claims of the representative parties must be typical of the class. There is nothing in the rule to suggest that the zeal or talent of the representative plaintiff's and their attorney can supply this omission. *La Mar v. H & B Novelty & Loan Co.* 489 F.2d 461, 465 (9th Cir. 1973).

iv. ***Adequate Representation***

The question of whether a named plaintiff will adequately represent class members is similar to the question of typicality. While adequacy of representation sometimes turns on the quality of plaintiffs' legal representation, that is not the issue here. The issue is whether a party with no claim against a defendant, although it has an identical claim against a different defendant, can fulfill the requirement of adequacy of representation. In that regard this issue overlaps with typicality. The question is whether a plaintiff without an individual claim against a defendant can adequately represent the interests of the class members who actually hold such claims. If the only requirements were a zealous interest in the matter by plaintiff (as opposed to legal interest) and the experience of counsel, the answer might be different.[4] However, except for the Meridian School District, these proposed representative plaintiffs have no connection with the defendants. The plaintiffs cannot, as a matter of law, adequately represent the entire proposed class.

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[4] Given the nature of the undertaking to move forward with this case if it is certified as a class action, it might be questionable if the plaintiffs are in a position to adequately represent the class members notwithstanding their zeal. Pursuing this case as a class action would undoubtedly require the taking of numerous depositions and other out-of-pocket expenditures to properly prosecute plaintiffs' claims. Plaintiffs dismissed nearly one half of the original defendants for lack of funds to effectuate service of process. If the plaintiffs cannot afford to serve all of the defendants, one might question whether they have the financial wherewithal to pay the costs necessary to pursue all the defendants. The issue was not raised by the parties, so it does not form a basis for the Court's decision here.

v. ***Rule 23 (b)(3)***

Even though the Court has determined that the plaintiffs have not met the requirements of Rule 23 (a), the requirements of Rule 23 (b)(3) will be discussed to provide a complete record in the event of appeal. This Rule requires that the court determine:

> that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

That standard cannot be met on the facts presented here. To the extent there are common questions of law and fact, they do not predominate. As set out above, while the issues arise under the same constitutional provision, the factual and legal determinations are not, for the most part, applicable to all plaintiffs and all defendants.

Plaintiffs face an additional hurdle in the case of the claim for a refund. Class action certifications have been permitted even though proof of damages may be a matter of individual proof. These cases generally involve situations where establishing individual damages at least follows an easily ascertained standard pattern. Where the issues of injury and damages do not lend themselves to mechanical patterns, but require mini-trials of numerous individual claims class certification is not appropriate. *Pope v.*

Intermountain Gas Co., 103 Idaho 217, 239, 646 P.2d 988, 1010 (1982). In *Pope* the Idaho Supreme Court held that where proof of injury and damages for each plaintiff would be highly individualized and would require separate proceedings for fair adjudication, individual issues predominated over common questions and class action certification was error. In this case, there is no set standard to determine whether each district engaged in constitutional or unconstitutional behavior. Determination of damages for each class member will require, in many instances, inquiry into the courses taken by that class member, the fees charged, and whether the particular fee is constitutional.

Taking the subparts of the rule one by one, the totality of the factors weigh against class action status. The first factor, the interest of members of the class individually controlling the prosecution of their case, is neutral or weighs in favor of certification. There is nothing about the nature of this case which gives any particular class member a unique interest other than the amount of any damages awardable. To the extent the matter were to proceed as a class action, the class members would be in control of their own proof and claim for a refund if the plaintiffs are successful.

The second factor, the extent and nature of litigation concerning this controversy already commenced weighs in favor of certification. So far as the court is aware, there is no other pending litigation concerning this issue commenced by or against members of the proposed class. There is no evidence that any other pending or proposed litigation would be affected by class certification.

The third factor, the desirability or undesirability of concentrating the litigation of the claims in a particular forum, weighs heavily against certification. Idaho is a

geographically large state. The class action as proposed requires the participation of persons, and ultimately the gathering and production of evidence, from all corners of the state. The result would be the defendants' representatives (school board members, superintendents, etc.) having to travel to court from as far as Fremont County in eastern Idaho and Boundary County at the Canadian border in north Idaho and points in between. The alternative is to have the parties pay their respective counsel to travel throughout the state — a not inexpensive proposition. It would also seem that likely witnesses would be just as scattered.

The fourth factor, difficulty in the management of the class action, also weighs heavily against certification. Whatever inefficiency maybe gain by a determination that the charges found improper in one district are sufficiently similar to charges in another district that a separate hearing is not required as to the second district, are outweighed by the need to make individual inquiry of charges that may be similar but are not necessarily so. It is beyond inefficient to require all defendants be present for this lengthy process as the charges imposed by each defendant are examined. While in some instances a school district, perhaps all of them, would have an interest in determining whether charges, for example, for a chemistry course are unconstitutional, there will be many more instances where most or all of the districts would have no interest in the outcome of the challenge to a particular fee. For example most districts might not be interested in the fee charged for outdoor recreation classes when only one school district offers such a class or activity. Similarly, where the school districts may offer the class or activity under scrutiny but

does not charge a fee, it is hardly in anyone's best interest to have their time and money spent in the wrangling over issues that do not affect them.

In the judgment of this Court, the nature of this case is such that a statewide a class action is far from superior to other available methods for the fair and efficient adjudication of the controversy. In order to have truly representative plaintiffs to adjudicate the claims made in this case a representative plaintiff from each school district would need to be joined in order to have class plaintiffs with the claim against each defendant. This would make the case even less manageable from a practical standpoint. There are alternatives. The plaintiffs argue that the amounts are so small that no individual will challenge them. They overlook the forum of small claims court. A school patron is free to sue in small claims for a modest fee. The nature of the claim is not beyond the ken of the local magistrate judges. Nor is it implausible that a class action by a patron might be appropriate against an individual district.

The motion for class certification is DENIED.

2. The Motions to Dismiss

All defendants have filed motions to dismiss. With the exception of the Meridian School District, they rely on more or less common ground. The circumstances regarding the Meridian School District are factually different from all other defendants because the remaining plaintiffs reside in the Meridian School District. In addition, these plaintiffs assert individual claims against the Meridian School District. For that reason the motion to dismiss on behalf of the Meridian School District will be discussed separately from that of the other defendants.

vi. Motion to Dismiss by Defendants Other Than Meridian School District

Defendants moved to dismiss pursuant I.R.C.P. 12 (b)(6). The Julian defendants and the Reid defendants also cite to I.R.C.P. 9(b), and I.R.C.P. 12 (b)(1). A motion under Rule 12 (b)(1) requests dismissal based on lack of subject matter jurisdiction. A motion under Rule12 (b)(6) is based on failure of the complaint to state a claim upon which relief can be granted. The substantive ground of the motions to dismiss is lack of standing. For procedural purposes, the distinction between the two rules is that the court may consider matters outside the pleadings when deciding a motion under 12 (b)(1), while determination of the motion under 12 (b)(6) is decided on the content of the complaint alone.[5]

As to the motion under I.R.C.P. 12 (b)(1), this court has subject matter jurisdiction over this controversy. The subject matter of the loss is a claim that the defendants, all of whom are within the boundaries of the state of Idaho, are engaging in unconstitutional activity to the injury of plaintiffs. Regardless of the merits of that claim, this court has jurisdiction to examine the issue, at least in the sense of having the power to issue a ruling that is binding on the parties.

Plaintiffs are making a Constitutionally Based Educational Claim as defined by I.C. § 6–2202. Although plaintiffs attempt to distinguish their claims as something not

[5] "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." I.R.C.P. 12 (b). As announced at the hearing on the motion, the Court declines to convert these 12 (b)(6) motions to Rule 56 motions even though the file contains affidavits.

covered by the Constitutionally Based Educational Claims Act (CBECA), the claims pled in count one fall squarely within CBECA 's definition such claims. First, plaintiffs assert that CEBECA has no application to a declaratory judgment because it does not mention declaratory judgments. Where the declaratory judgment sought is a declaration that the defendants are failing to fulfill the duty to provide a free education in contravention of the Constitution, CEBECA applies.

Second, according to plaintiffs, CEBECA provides "a mechanism for adjudicating the performance of that duty when there are allegations that the public schools **do not provide educational services** that they are required to provide as part of a general, uniform and thorough system of public, free common schools." *Plaintiff's' Brief in Opposition to Motions to Dismiss*, page 4. Plaintiffs go on to state that they "make absolutely no claim that any services are not being provided.... The First Cause of Action... makes only one claim, that is, that the School Districts are violating the Constitution in the levying of fees not within their statutory taxing power." *Id.*

This argument is not just disingenuous, it is specious. Plaintiffs' amended complaint nowhere mentions the statutory taxing power of school districts. But the complaint does allege in its opening paragraph that "plaintiffs bring this case as a Class Action on behalf of all schoolchildren... of the State of Idaho and on behalf of their parents and guardians, to enforce the provision of Article IX, Section 1 of the Constitution of the State of Idaho..." The factual allegations include, among other things, "In contravention of the constitutional requirement to provide free common schools, the great majority of Idaho's school districts... have been engaging in the

practice of levying fees upon the students and their families for various supplies and coursework, elected and otherwise, in violation of the Idaho Constitution." *Amended Complaint*, page 3, ¶ I- 2. "Plaintiffs reluctantly bring this action to require that the school district refund unconstitutional fee charges against students and their families..." *Amended Complaint*, page 3, ¶ I- 4, f.n. 1. "Defendants have created a state-sponsored and state-directed 'essential consumable supply curriculum' that contravenes the constitutional protection of a free public education..." *Amended Complaint*, page 6-7, ¶ I-9. These are but samples of the language of the amended complaint. The prayer for relief includes a request that certain fees being charged be declared illegal and unconstitutional. Plaintiffs' claims in Count I are covered by CEBECA.

Defendants have raised standing under CEBECA as well as traditional standing as that doctrine is applied by the Idaho courts. CEBECA provides:

I.C. § 6 – 2205

> (1) Patron suits against local school districts. Any person who is a schoolchild, the parent or guardian of a schoolchild, or the parent or guardian of a child who will enter public school in the next two (2) years has standing to sue and may bring suit against the local school district in which the schoolchild or potential schoolchild resides on the ground that the local school district is not providing constitutionally required educational services. These complaints may be known as patron complaints, and the persons who are plaintiffs may be known as patrons. The patron complaint must list with specificity the manner in which the patrons contend that the local school district is not providing constitutionally required educational services. No other person, except the state as parens patriae, has standing to bring suit against a school district on the ground that the school district is not providing constitutionally required educational services.

No one other than a patron, as defined in the statute, may sue a local school district on a constitutionally based claim. A patron, by definition, is either a schoolchild or the parent or guardian of the schoolchild that lives in the district being sued. In other words, the residence of the schoolchild determines what district a patron may sue. The patron, other than a schoolchild, need not necessarily reside in the district. All of the remaining plaintiffs, the Jokis and Ms. Holt, allege that they are the guardian, grandmother, or parent of a schoolchild residing in the Meridian School District. There is no allegation, other than an apparent interest in education statewide, connecting the plaintiffs any of the other defendants. As to all defendants other than the Meridian school district, plaintiffs lack standing under CEBECA.

Plaintiffs argue that CEBECA is unconstitutional as being in contravention of the inherent power of the judicial branch to govern proceedings in court. That argument, however, is made in the context of a class-action. Since this Court has decided a class-action will not be certified, this argument need not be addressed.

Alternatively, the plaintiffs' claims against all school districts other than Meridian are barred by the traditional doctrine of standing. The leading case in Idaho on standing is *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d at 761 (1989). Adopting the language and reasoning of the United States Supreme Court in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978), our Supreme Court held:

> The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the

> controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

116 Idaho at 641, 778 P.2d at 763.

There is no allegation that any of these plaintiffs have suffered a "distinct palpable injury" fairly traceable to any activity of the defendants other than Meridian School District. "[Standing] focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.* at 116 Idaho 641, 778 P.2d at 763. Any injury to these plaintiffs by the defendants other than Meridian School District is no different than the injuries suffered by any citizen of the state of Idaho. That is insufficient to confer standing. *Young v. City of Ketchum*, 137 Idaho 102, 104-05, 44 P.3d 1157, 1159-60 (2002). (An interest as a concerned citizen in seeing that the government abides by the law does not confer standing).

Because the plaintiffs lack standing as to all school districts other than the Meridian School District, the motions to dismiss pursuant to I.R.C.P. 12 (b)(6) are GRANTED as to those defendants. Given this ruling, the court has no need to discuss I.R.C.P. 9 insofar as it applies to these defendants.

vii. Motion to Dismiss by the Meridian School District

The Meridian School District cites I.R.C.P. 9(b), I.R.C.P. 12 (b)(1) and12 (b)(6) as the basis for its motion. For the reasons set forth with respect to the other defendants, the motion under Rule 12 (b)(1) will be denied.

Dealing with the motion to dismiss by defendant Meridian School District is somewhat problematical because this defendant has chosen to intertwine its motion to dismiss with that of the other defendants when it is clearly in a different factual circumstance from the other defendants. Defendants argue that plaintiffs lack standing under CEBECA and traditional standing. However, defendant Meridian School District almost concedes the obvious the by stating "arguably only Russ Joki and Sarah Holt fulfill the definition of 'patron,' as they are the only alleged parents or alleged guardians of school children enrolled in a local school district enrolled in a local school district, namely the Meridian School District." The Julian Defendants' *Memorandum in Support of Motions to Dismiss*, page 10-11. Dr. Joki and Ms. Holt are in fact patrons under CEBECA based on the allegations in the complaint which are taken as true for purposes of an I.R.C.P. 12 (b)(6) motion to dismiss. By the very terms of CEBECA they have standing to bring claims under CEBECA.

They also have alleged facts sufficient to give them standing under the traditional doctrine. They have alleged a distinct, palpable injury in the form of allegedly unconstitutional fees assessed by Meridian School District.

The circumstance with respect to Kathleen Joki is different. She neither alleges that she is the parent or guardian of a schoolchild nor a schoolchild herself. She does not

allege payment of any fees on behalf of a schoolchild. Although the caption of the complaint appears to designate her as a guardian of a schoolchild, there is no such allegation in the body of the complaint. She lacks standing under both CEBECA and the traditional standing doctrine. Since it is possible that failing to name her as a guardian of a schoolchild is a mere oversight, she will be dismissed with leave to amend within 14 days of entry of the order of dismissal.

Defendants also move to dismiss under I.R.C.P. 9 for failure to plead constitutional violations with specificity and its equivalent requirement in CEBECA. This motion is not well taken as to the Meridian School District. The amended complaint specifies the fees paid by Joki for the high school student as well as the amount paid on behalf of kindergartners. Sarah Holt is alleged to be the parent of children currently enrolled in the elementary school in the Meridian School District. The nature and amount of the charges she claims to be unconstitutional are set forth in the complaint. A list of expenditures detailing all of the charges made by Meridian school district was attached to the original complaint. In what appears to be an oversight, the list is referenced in, but missing as an attachment to, the amended complaint. Defendants, in fact, referred to the attachment in their briefing. The allegations in the complaint are sufficiently particular to allow Meridian School District to know exactly what unconstitutional conduct is being alleged as required by CEBECA. The motion to dismiss based on I.R.C.P. 9 is DENIED.

3. Motion for Change of Venue

The Julian defendants moved to change venue. That motion is moot given the Court's rulings on the emotions to dismiss. It will not be discussed further.

III. SUMMARY

The motion for class certification is DENIED.

The motions to dismiss on the basis of I.R.C.P. 12 (b)(6) is GRANTED as to all defendants except the Meridian School District.

The motion to dismiss on the basis of I.R.C.P. 12 (b)(6) by defendant Meridian School District is DENIED as to plaintiffs Russell Joki and Sarah C. Holt.

The motion to dismiss on the basis of I.R.C.P. 12 (b)(6) by defendant Meridian School District is GRANTED as to plaintiff Kathleen Joki with leave to amend within 14 days.

The motion to dismiss on the basis of I.R.C.P. 9 by defendant Meridian School District is DENIED as to plaintiffs Russell Joki and Sarah C. Holt.

The motion for change of venue by the Julian Defendants is DENIED as moot.

IT IS SO ORDERED.

Dated this 24 day of May 2013.

Richard D. Greenwood
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of May 2013, I mailed a true and correct copy of the within instrument to:

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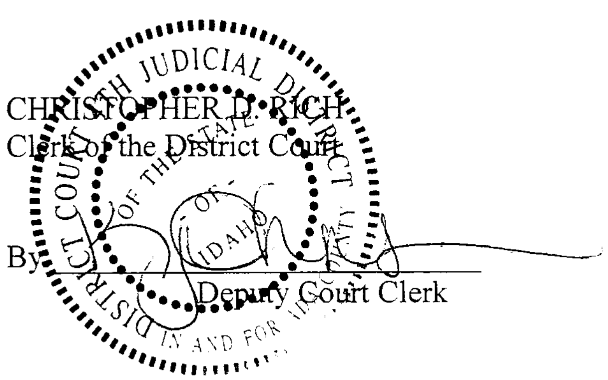

CHRISTOPHER D. RICH
Clerk of the District Court

By ______________________
Deputy Court Clerk