IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Fort Yates Public School District #4, Plaintiff, vs. Jamie Murphy for C.M.B. (a minor) and Standing Rock Sioux Tribal Court, Defendants.	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** Case No. _____

Plaintiff Fort Yates Public School District #4 ("District") submits this memorandum in support of its Motion for Temporary Restraining Order and Preliminary Injunction.

STATEMENT OF FACTS

Defendant Jamie Murphy, on behalf of her daughter C.M.B. (collectively "C.M.B."), brought an action against the District before the Standing Rock Sioux Tribal Court ("Tribal Court"). C.M.B. brought a separate action against Dawn Kelly, the parent of another student, in Tribal Court. The two actions have since been consolidated in Tribal Court. The (Proposed Consolidated) Amended Complaint claims that "[o]n or about the 30th day of November 2009, at approximately 3:21 p.m., [A.K.], a minor child and student at Ft. Yates, assaulted and battered [C.M.B.] in the south hallway of the school . . ." *See* Exhibit 1, ¶ 5. The (Proposed Consolidated) Amended Complaint includes three counts against the District: (1) Breach of Duty to Provide Safe Learning Environment; (2) Negligent Hiring/Training; and (3) Failure to Respect a Tribal Court Order and Failure to Restrain a Known Violent Student.

Upon being served with the initial Statement of Claim filed in Tribal Court, the District filed a Motion to Dismiss based on several reasons including the Tribal Court's lack of

jurisdiction over a public school district. *See* Exhibit 2.[1] The Tribal Court denied the District's motion to dismiss, finding it had jurisdiction. *See* Exhibit 3.

On August 21, 2012, counsel for C.M.B. and the District entered into a "Stipulation for Continuance of Trial and Request for Approval of Same" which was filed in the Tribal Court. *See* Exhibit 4. On September 27, 2012, counsel was faxed a copy of an unfinished order, granting the stipulation. *See* Exhibit 5. The order is signed by Honorable William P. Zuger, the Tribal Court judge assigned to the case, but dispositive motion deadlines and a trial date were left blank in the order. Judge Zuger has recently retired as Tribal Court judge and no other judge has been assigned to the case. As such, it is unclear when a new Tribal Court judge will be assigned and when trial will be held.

ARGUMENT

A federal court must have jurisdiction over the matter before it grants preliminary relief. *Sprint Commc'ns Co., L.P. v. Native Am. Telecom, LLC*, CIV. 10-4110-KES, 2010 U.S. Dist. LEXIS 127013, at *5 (D.S.D. Dec. 1, 2010) (citing *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1422 (8th Cir. 1996)). "Whether a tribal court has adjudicative authority over a non-tribal member presents a federal question" and "[f]ederal law governs the outcome." *Id.* (citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985)). As such, this Court has jurisdiction to grant preliminary relief under 28 U.S.C. § 1331 because the question falls under this Court's "arising under federal law" jurisdiction. *Id.*

"In determining whether preliminary injunctive relief should be granted, the Court is required to consider the factors set forth in *Dataphase Sys., Inc., v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)." *Nokota Horse Conservancy, Inc. v. Bernhardt*, 666 F. Supp. 2d 1073, 1077

[1] For a more complete background of the facts, please see the District's Motion to Dismiss, Exhibit 2, pp. 2-3.

(D.N.D. 2009). Whether a temporary restraining order or preliminary injunction should be granted under Rule 65 involves consideration of "(1) the movant's probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction's issuance would inflict on other interested parties, and (4) the public interest." *Id.* (quoting *Wachovia Sec., L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1032 (N.D. Iowa 2008) (citing *Dataphase*, 640 F.2d at 114)).

The burden of establishing the necessity of a temporary restraining order or preliminary injunction is on the movant. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (citing *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc)). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Id.* (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Dataphase*, 640 F.2d at 114)).

A. Probability of Success on the Merits

In evaluating this factor, this Court has recently stated:

> When evaluating a movant's "likelihood of success on the merits" the court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503 (quoting *Dataphase*, 640 F.2d at 113). At this preliminary stage, the Court does not decide whether the party seeking the preliminary injunction will ultimately prevail. *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a preliminary injunction cannot be issued if the movant has no chance on the merits, "the Eighth Circuit has rejected a requirement as to a 'party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.'" *Id.* (quoting *Dataphase*, 640 F.2d at 113). The Eighth Circuit has said that of the four factors to be considered by the district court in considering preliminary injunctive relief,

> the likelihood of success on the merits is "most significant." *S&M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992).

Dish Network Serv. LLC v. Laducer, Case No. 4:12-cv-058, 2012 U.S. Dist. LEXIS 94183, at *9-10 (D.N.D. July 9, 2012). This factor weighs in favor of granting the temporary restraining order and preliminary injunction because the tribal court lacks jurisdiction and exhaustion of tribal remedies is not required.

1) Tribal Court Lacks Jurisdiction

As a political subdivision of the State of North Dakota, the District is subject to and guided by the laws of the State of North Dakota, and is not a member of the Tribe nor subject to the jurisdiction of the Tribal Court.

The Defendants have the burden of establishing the existence of tribal jurisdiction. *Red Mesa Unified Sch. Dist. v. Yellowhair*, No. CV-09-8071-PCT-PGR, 2010 U.S. Dist. LEXIS 104276, at *7 (D. Ariz. Sept. 28, 2010) (citing *Plains Commerce Bank*, 554 U.S. 316). Tribal courts are courts of limited jurisdiction and as Supreme Court jurisprudence has consistently held, "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). No federal statute or treaty empowers the Tribal Court with regulatory or jurisdictional authority over the District. Furthermore, "Congress has passed no law which permits the [Tribe] to exercise regulatory authority over nonmember entities or individuals who employ members of the tribe within the confines of the reservation; nor has it passed a broader statute which arguably encompasses nonmember employers." *MacArthur v. San Juan Cnty., Utah*, 497 F.3d 1057, 1068 (10th Cir. 2007).

The Tribe does not have authority to regulate the activities of the District. If the Tribe cannot regulate the District's actions, it cannot adjudicate disputes arising out of the District's

actions and dismissal of the claims against the District is appropriate. *See Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001) (holding the adjudicative jurisdiction of the tribe cannot exceed its regulatory jurisdiction); *see also Glacier Cnty. Sch. Dist. No. 50 v. Galbreath*, 47 F. Supp. 2d. 1167, 1171-72 (D. Mont. 1997) (pre-dating *Hicks* but using a similar rationale, holding that once enrolled in a public school, tribal members must comply with the procedures established by state law to resolve issues relating to the operation and administration of the school).

Absent an express jurisdictional authority from Congress, the Court must determine if jurisdictional authority stems from the tribe's retained inherent sovereignty. The degree of a tribe's retained inherent sovereignty over nonmembers is governed by the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981). *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (applying *Montana*'s framework, which was originally applied as a measure of a tribe's civil regulatory jurisdiction, to a tribe's civil adjudicatory jurisdiction). *Montana*'s general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. This presumption applies even when the activities of nonmembers occurred on land owned by the tribe. *Hicks*, 533 U.S. at 360.

"[T]he *Montana* presumption is subject to only two narrow exceptions: the first exception relates to nonmembers who enter into consensual relationships with the tribe or its members, and the second exception concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Red Mesa Unified Sch. Dist.*, 2010 U.S. Dist. LEXIS 104276, at *10 (citing *Montana*, 450 U.S. at 565-66). The *Montana* exceptions "are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330. Neither of the two exceptions contained in

Montana are applicable when the nonmember is a State political subdivision, like the Fort Yates Public School District, and the underlying cause of action does not impact the Tribe's ability to self-govern.

The type of relationship existing between a public school district and a tribe was not what the Supreme Court had in mind when it created the first exception in *Montana*. *See Hicks*, 533 U.S. at 372. The first *Montana* exception allows tribes to regulate conduct of a private actor who enters a consensual relationship with the tribe or its members "through taxation, licensing, or other means." *Montana*, 450 U.S. at 565. This exception does not apply to the circumstances here because public school districts are not private actors nor can they freely or voluntarily enter into a relationship with the tribe. Public school districts are mandated to educate all children living in the state regardless of whether the children are also tribal members.

It has been widely accepted through Supreme Court jurisprudence post-*Montana* that *Montana*'s first exception only applies to private entities that freely enter into agreements with the tribe. In *Strate* the Supreme Court recognized that:

> *Montana*'s list of cases fitting within the first exception, *see* 450 U.S. at 565-566, indicates the type of activities the Court had in mind: *Williams v. Lee*, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384, 48 L.Ed. 1030, 24 S. Ct. 712 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); [*Washington v. Confederated Tribes of Colville Indian Reservation*], 447 U.S. 134, 152-54 (1980)] (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

Strate, 520 U.S. at 457. These cases demonstrate that the Court intended the exception to apply to commercial activities freely entered into by private parties. *Id.*

The Supreme Court also discussed *Montana*'s first exception in *Hicks* and stated that it was not intended to be applied to a state governmental entity or the entity's employees acting in their official capacity:

> The Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into.

Hicks, 533 U.S. at 372.

In a recent decision involving an employment dispute against a public school district operating on tribal lands, one court recognized public school districts:

> are not private actors for purposes of *Montana* – they are instead political subdivision of the state . . . [T]here is a fundamental difference for tribal jurisdictional purposes between governmental actors constitutionally mandated to enter tribal lands to fulfill a governmental obligation and private actors operating commercial enterprises on tribal lands and that the former is not the kind of consensual relationship that subjects a nonmember to tribal jurisdiction over decisions unrelated to the tribal land. Even if the consensual relationship exception were to extend under some circumstances to state actors based on the existence of a state-tribe contract, an issue not resolved in *Hicks*, the [court is] not persuaded . . . that the first *Montana* exception can properly be extended to reach the actions here of [the school district], regardless of their status as tribal lessees, since [it] made the employment decisions at issue while operating in [its] governmental capacities pursuant to [its] state constitutionally-imposed mandate to operate a public school system within the reservation boundaries.

Red Mesa Unified Sch. Dist., 2010 U.S. Dist. LEXIS 104276, at *15-16. The court held that based on the school district's status as a governmental entity, *Montana*'s first exception did not apply and the tribal court did not have jurisdiction. Similarly, other courts have found that the first Montana exception does not apply to public actors. *See MacArthur*, 497 F.3d at 1073-74 (finding the tribal court did not have jurisdiction over the plaintiff's employment claim against

health service district that was a political subdivision of the state of Utah); *Cnty. of Lewis, Idaho v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (concluding tribal court did not have jurisdiction over state law enforcement officer).

Montana's first exception does not apply to political subdivisions because they are public not private actors. Unlike a private individual or company that can freely enter into agreements with the tribe or a tribal member, the public school district must provide an education to students living within the reservation boundaries pursuant to its State constitutional mandate. N.D. Const. art. VIII, § 1. Since the State has an affirmative duty to provide an education to the students, it cannot be said to have freely entered into an agreement with the tribe and *Montana*'s first exception does not apply to it.

Montana's second exception concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. When interpreting *Montana*'s second exception, the United States Supreme Court stated, in *Strate*, that:

> [T]he *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.

Strate 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The Court said that the cases relied upon by the *Montana* Court when formulating the second exception illustrate that the Court intended the exception to apply only when the "State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Id.* at 458. In other words, *Montana's* second exception is only triggered by nonmember conduct that threatens the Tribe's ability to self-govern. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657, n.12 (2001). "[U]nless the drain of

the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority . . ." *Id.* If a tribe were to have jurisdiction over every matter related to the health and welfare of the tribe, the exception would swallow the rule. *Strate*, 520 U.S. at 458.

The State has a strong interest in ensuring that its schools are operated in compliance with its laws. The allegations contained in the (Proposed Consolidated) Amended Complaint directly implicate the State's interests in how its schools are being operated. As such, *Montana*'s second exception will only apply if the exercise of State authority over the matter would "trench unduly on tribal self-government." In this case, allowing the State to exercise its authority would not "trench unduly on tribal self-government." The claims against the District in this case would not "imperil the political integrity of the tribe" to justify application of *Montana*'s second exception. Tribal self-government is not at issue in this case, nor is this case likely to affect any rights of the Tribe as it pertains to their right to educate tribal children. Furthermore, C.M.B. is not without remedy absent Tribal Court jurisdiction – C.M.B. could pursue her claims against the District in State Court.

The Joint Powers Agreement ("JPA") does not submit the District to Tribal Court jurisdiction. Rather, the JPA specifically states that neither the tribe nor the District "waivers [sic] any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. This Agreement neither diminishes nor expands rights or protections afforded other persons or entities under tribal, state or federal law." *See* Exhibit 2 (Exh. A, § X). A political subdivision only has the powers granted to it by the state. North Dakota law provides that a school district cannot "[a]uthorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments

located in North Dakota." N.D.C.C. § 54-40.2-08. Hence, the District cannot, through an agreement, submit itself to the jurisdiction of the Tribal Court.

Furthermore, the United States Supreme Court has never held that recognizing tribal authority somehow waives any right to assert lack of personal jurisdiction in a future matter. *See Plains Commerce Bank*, 554 U.S. at 342 (finding that the fact that a nonmember sought a tribal court's aid does not constitute consent to future litigation in tribal court, especially when the nonmember contends that the tribal court lacks jurisdiction over it). In *Hicks*, the State game wardens appeared in tribal court to get the tribal court to approve their warrant before they carried out the warrant. *Hicks*, 533 U.S. at 356. After they carried out the warrant, the State game wardens were sued in tribal court. *Id.* The game wardens challenged the tribal court's jurisdiction and the United States Supreme Court held that the tribal court did not have jurisdiction over them. *Id.* The fact that they had previously appeared in the same tribal court in which they were later sued did not play a role in the Court's ultimate analysis. *Id.* "A nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Town Pump, Inc. v. LaPlante*, 394 F. App'x 425, 427 (9th Cir. 2010) (quoting *Atkinson Trading Co.*, 532 U.S. at 656).

2) Exhaustion of Tribal Remedies is Not Required

The Tribal Court lacks jurisdiction and exhaustion of tribal remedies is not required in this case. Exhaustion of tribal court remedies is generally required before a federal district court should consider relief in a civil case. However, the United States Supreme Court has recognized several exceptions to the exhaustion requirement, as noted in *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-57 (1985). The Supreme Court added a broader exception in later cases if the exhaustion requirement "would serve no purpose other than delay." *Strate*, 520

U.S. at 453. The Court in *Nevada v. Hicks* applied this exception to cases where it is clear that the tribal court lacks jurisdiction over state officials for causes of action relating to their performance of official duties, since adherence to the tribal exhaustion requirement would serve no purpose other than delay, and is therefore unnecessary. *Hicks*, 533 U.S. at 369.

The federal district court in *Glacier Cnty. Sch. Dist. No. 50 v. Galbreath*, 47 F. Supp. 2d 1167 (D. Mont. 1997), held that a school district did not need to exhaust tribal court remedies before bringing an action in federal court seeking declaratory and injunctive relief. The district court quoted *Strate*:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. [citation omitted]. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, . . . must give way, for it would serve no purpose other than delay.

Glacier Cnty. Sch. Dist., 47 F. Supp. 2d at 1172 (quoting *Strate*, 520 U.S. at 459, n.14).

In *Glacier Cnty. Sch. Dist.*, the court granted the school district's request for declaratory relief. The Glacier County School District is a political subdivision of the State of Montana and operates a school within the boundaries of the Blackfeet Indian Reservation. *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1169. The parents of a student brought an action in the Blackfeet Tribal Court, seeking an order compelling the school district to readmit their daughter after the school district expelled her. The tribal court rejected the school district's assertion that it lacked jurisdiction over the school district. *Id.* The school district then sought declaratory and injunctive relief in the federal district court, regarding the authority of the tribe to interfere with the administration and operation of the school district. The defendants (which included the tribal

court) brought a motion to dismiss, claiming in part that the school district failed to exhaust tribal court remedies. The court denied the defendants' motion to dismiss and granted the school district's request for declaratory relief, noting that the State of Montana "is the authority responsible for safeguarding the inalienable right of children to a public education." *Id.* at 1171.

The Tribal Court does not have jurisdiction and the exhaustion of tribal remedies is not required. The probability-of-success-on-the-merits factor weighs in favor of granting the temporary restraining order and preliminary injunction.

B. Irreparable Harm

The District "must next establish there is a threat of irreparable harm if injunctive relief is not granted and that such harm is not compensable by money damages." *Nokota Horse Conservancy, Inc.*, 666 F. Supp. 2d at 1080 (citing *Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007)). "Possible or speculative harm is not enough." *Id.* A significant risk of harm must be shown by the District to exist. *Id.*

The District will suffer irreparable harm if forced to litigate in Tribal Court because it will be required to expend substantial effort and resources. The District will not be able to recover the money it must spend on the Tribal Court litigation. A court "can presume irreparable harm if the movant has a likelihood of success on the merits." *Calvin Klein Cosmetics Corp.*, 815 F.2d at 505 (citing *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 (8th Cir. 1980)). "Other courts have concluded a movant would suffer irreparable harm if forced to litigate in a Tribal Court that likely does not have jurisdiction." *Dish Network Serv. LLC v. Laducer*, Case No. 4:12-cv-058, 2012 U.S. Dist. LEXIS 94183, at *8-9 (D.N.D. July 9, 2012) (citing *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157-58 (10th Cir. 2011)).

In a recent case, this Court found this factor weighed in favor of granting a preliminary injunction, because the plaintiff would suffer irreparable harm if forced to expend time, effort, and money in a forum that lacks jurisdiction. *See Dish Network Serv. LLC*, 2012 U.S. Dist. LEXIS 94183, at *9. Similarly, the District would suffer irreparable harm if forced to expend any more time, effort, and money in Tribal Court. This factor weighs in favor of granting the temporary restraining order and preliminary injunction.

C. Balance of Harm

In *Dish Network Serv. LLC*, this Court found this factor weighed in favor of granting a preliminary injunction because the plaintiff would be required to expend time and resources litigating in tribal court if the preliminary injunction was denied, while the defendants would not suffer any harm because the tribal court proceedings would only be delayed if a preliminary injunction was ordered. *Dish Network Serv. LLC*, 2012 U.S. Dist. LEXIS 94183, at *9. The same balance of harm exists in this case. If the Court grants the temporary restraining order and preliminary injunction, C.M.B. and the Tribal Court would not be harmed because the Tribal Court proceedings would only be delayed (and C.M.B. has agreed to a continuance of the Tribal Court proceedings by stipulation). However, if the Court denies the temporary restraining order and preliminary injunction, the School District will be required to expend more time and resources litigating in tribal court. This factor weighs in favor of granting the temporary restraining order and preliminary injunction.

D. Public Interest

In *Glacier Cnty. Sch. Dist.*, the court noted that the State of Montana "is the authority responsible for safeguarding the inalienable right of children to a public education." *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1171. Likewise, the State of North Dakota is responsible for

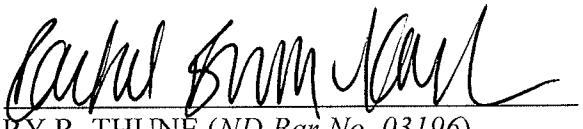
safeguarding the inalienable right of children to a public education in this state. The District must provide an education to students living within the reservation boundaries pursuant to article VIII, section 1 of the North Dakota State Constitution. "Accordingly, the public interest lies in ensuring the responsible state agencies are free to apply their expertise in resolving the various issues associated with providing an education to the children of this State." *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1171. This factor weighs in favor of granting the temporary restraining order and preliminary injunction.

CONCLUSION

The factors set forth in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) weigh in favor of granting the temporary restraining order and preliminary injunction. The District has met its burden of establishing the necessity of a temporary restraining order and preliminary injunction, and respectfully requests the Court grant its motion.

DATED this 5th day of October, 2012.

PEARCE & DURICK

By: 

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