

***Doreen N. McPaul, Attorney General  
The Navajo Nation***

***Jason Searle, Attorney  
Louis Mallette, Attorney  
NAVAJO NATION DEPARTMENT OF JUSTICE  
Post Office Box 2010  
Window Rock, Navajo Nation (AZ) 86515  
Phone: (928) 871-6210  
Fax: (928) 871-6177***

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

Brenda G. Chicharello,

Plaintiffs,

v.

U.S. Department of the Interior; Secretary of Indian  
Affairs, Sally Jewel; Director of Bureau of Indian  
Affairs, Bryan Rice; Director of Indian Education,  
Tony Dearman; Navajo Nation Department of Diné  
Education, Superintendent of Schools, Dr. Lewis Jr.  
Tommy; Assistant Superintendent, Dr. Tim Benally;  
Gallup McKinley County School, Superintendent,  
Mike Hyatt,

Defendants.

Case No. 20-cv-1070-JHR

**MOTION TO DISMISS**

**COME NOW** Defendants Department of Diné Education (“DODE”) and Patricia Gonnies, Superintendent of Schools (“Navajo Nation Defendants”),<sup>1</sup> to file this Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiff asserts jurisdiction over her claim pursuant to “28 U.S.C. § 1343(3), 420 U.S.C. § 1983.” Navajo Nation Defendants, in good faith, presume that Plaintiff means to invoke 28 U.S.C.

---

<sup>1</sup> Navajo Nation Defendant names have been updated to reflect that Patricia Gonnies is the new Superintendent, in place of Dr. Lewis, and Dr. Benally is no longer Assistant Superintendent. This is also reflected in Navajo Nation Defendants’ pending notice of substitution and motion to drop a party. Dkt. 13, Motion to Dismiss Party; Dkt. 14, Motion to Substitute Party.

§ 1343(a)(3) (“1343(a)(3)”) and 42 U.S.C. § 1983 (“1983”), as those are the correct citations for the kind of civil rights claim Plaintiff alleges in the complaint.

Plaintiff fails to establish jurisdiction over Navajo Nation Defendants under these provisions. Section 1343(a)(3) establishes subject-matter jurisdiction of United States district courts for deprivations of civil rights under color of State law. Section 1983 establishes a civil rights cause of action against persons acting under color of State or Territorial law, or under color of law of the District of Columbia. As detailed below, with respect to Navajo Nation Defendants, Plaintiff fails to meet the minimum pleading requirements under Rule 8(a) of the Federal Rules of Civil Procedure to both establish subject-matter jurisdiction under Section 1343(a)(3) and to state a Section 1983 claim. Thus, Plaintiff’s lawsuit as to Navajo Nation Defendants should be dismissed per Rule 12(b)(1) for failure to establish this court’s subject-matter jurisdiction, and per Rule 12(b)(6) for failure to state a claim.

### **FACTS**

Plaintiff in this action is Brenda G. Chicharello, a New Mexico resident, appearing *pro se*. See Complaint at 1, 6. Plaintiff named Dr. Tim Benally, who was the former Navajo Nation DODE Assistant Superintendent, and Dr. Tommy Lewis, the former Navajo Nation DODE Superintendent, as Defendants in this action, along with a host of other federal and local officials and entities. See *id.*, 1. Dr. Benally and Dr. Lewis no longer work for DODE. Because neither Dr. Benally nor Dr. Lewis hold the respective DODE positions—and Plaintiff intended to sue them in their official, and not individual, capacities—Navajo Nation Defendants have filed a notice of substitution of DODE’s acting Superintendent, Patricia Gonnie, for Dr. Lewis, and have moved to drop Dr. Benally as a Defendant. Dkt. 13, Motion to Dismiss Party; Dkt. 14, Motion to Substitute Party.

For purposes of a facial challenge under Rule 12(b)(1), the court assumes the allegations in the complaint to be true. Baker v. USD 229 Blue Valley, 979 F.3d 866, 872 (10<sup>th</sup> Cir. 2020). And, pursuant to Rule 12(b)(6), non-conclusory facts as pled in the complaint are assumed to be true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In her complaint, Plaintiff alleges that Defendants violated her civil rights under the United States Constitution, establishing her claim under Section 1983. Complaint at 1-2. Plaintiff avers that this Court has subject-matter jurisdiction pursuant to Section 1343(a)(3), based on alleged Section 1983 violations. *See id.* Plaintiff specifically identifies her removal from the Indian Education Committee (“IEC”) for the Tobe Turpen Elementary School in Gallup, New Mexico, as violating her civil rights. *Id.* at 4. However, Plaintiff does not allege any direct involvement of Navajo Nation Defendants in her removal from the IEC.

All of the factual allegations in the complaint against Navajo Nation Defendants are for conduct as an entity within, and as employees of, the Navajo Nation—a sovereign tribal government. *See, e.g., id.* at 5 (alleging that the Navajo Nation Johnson O’Malley Program (“NNJOM”) and DODE did not respond to Plaintiff’s requests for assistance with her allegedly illegal removal from the IEC). Nowhere does Plaintiff allege facts to suggest Navajo Nation Defendants acted under color of state law, or allege that Defendants have any state authority or otherwise represent a state. *See generally id.*

### **ARGUMENT**

In order to establish a United States district court’s jurisdiction, a plaintiff must meet the minimum pleading requirements of Rule 8(a). Rule 8(a) requires “short and plain statement[s]” of the grounds for jurisdiction and of the claim showing the plaintiff is entitled to relief.

Plaintiff identifies Sections 1343(a)(3) and 1983 as the bases for the district court's jurisdiction over this matter. Complaint at 2. Section 1343(a)(3) provides that United States district courts have original jurisdiction over any civil action "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In turn, Section 1983 creates a cause of action for violation of "rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."

Plaintiff has not met the pleading requirements of Rule 8(a) to allege facts that establish that Navajo Nation Defendants deprived her of civil rights or acted under color of state or territorial law. Therefore, her lawsuit must be dismissed as to Navajo Nation Defendants, pursuant to both Rule 12(b)(1) for failure to establish subject-matter jurisdiction and Rule 12(b)(6) for failure to state a claim.

**I. PLAINTIFF FAILS TO ESTABLISH SUBJECT-MATTER JURISDICTION UNDER SECTION 1343(a)(3) AGAINST NAVAJO NATION DEFENDANTS, AS SHE MAKES NO ALLEGATIONS THAT NAVAJO NATION DEFENDANTS DEPRIVED HER OF A FEDERAL RIGHT OR ACTED UNDER COLOR OF STATE LAW**

Plaintiff fails to establish subject-matter jurisdiction under Section 1343(a)(3) as to Navajo Nation Defendants. Per Rule 12(b)(1), a court must dismiss a case over which it lacks subject-matter jurisdiction. Federal courts are courts of limited jurisdiction. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); Morris v. City of Hobart, 39 F.3d 1105, 1111 (10<sup>th</sup> Cir. 1994). In a 12(b)(1) motion, plaintiffs bear the burden to establish that their claim falls within the court's subject matter jurisdiction, as defined by the United States Constitution and federal laws.

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Havens v. Colorado Department of Corrections, 897 F.3d 1250, 1260-61 (10<sup>th</sup> Cir. 2018). In this case, Plaintiff's short and plain statement must establish that this court has jurisdiction under Section 1343(a)(3). Plaintiff fails to plead factual allegations sufficient to meet her burden to establish subject-matter jurisdiction, as she alleges neither that Navajo Nation Defendants deprived her of a federal right nor that they acted under color of state law, each necessary to establish subject-matter jurisdiction under Section 1343(a)(3).

Indeed, Plaintiff's factual allegations against Navajo Nation Defendants are sparse, to the point that they may be recited here:

I have informed the Navajo Nation Johnson-O' Malley Program (NNJOM) of the wrongful actions against me and I need their help to correct the wrongful action against me. My civil Rights for due process was violated. I did not hear back from the NNJOM and the Navajo Nation Department of Dine Education regarding my request for assistance to remedy the situation...I sent the Contractor Navajo Nation Johnson-O' Malley numerous emails pleading my case of wrongful charge and illegally removed from the IEC.

Complaint at 5.

These factual allegations fail to meet Rule 8(a)'s minimal pleading requirements to establish jurisdiction under Section 1343(a)(3). Nowhere does Plaintiff indicate how Navajo Nation Defendants violated a federal right. It appears that Plaintiff believes her removal from the IEC deprived her of a federal right to due process. Complaint at 4-5. But, even assuming removal from the IEC could constitute deprivation of a federal right, Plaintiff does not allege that Navajo Nation Defendants were in any way involved in her removal from the IEC. Instead, Plaintiff appears aggrieved that the NNJOM and DODE allegedly did not respond to her pleas for assistance after she was removed. Plaintiff does not suggest this conduct is a federal-right deprivation. Therefore, Plaintiff fails to allege deprivation of a federal right, a necessary component for subject-matter jurisdiction under Section 1343(a)(3).

Furthermore, even if Plaintiff had identified a federal right Navajo Nation Defendants violated, she fails to establish that Navajo Nation Defendants acted under color of State or Territorial law, and actually pleads to the contrary. The acts or omissions of the Navajo Nation and its officers are not undertaken pursuant to the United States Constitution or federal law, but rather pursuant to tribal law. *See Burrell v. Armijo*, 456 F.3d 1159, 1174 (10<sup>th</sup> Cir. 2006); *See also E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1305-06 (10th Cir. 2001). Therefore, like Section 1983 claims, Section 1343(a)(3) does not apply to acts taken under color of tribal law. *See id.*

Although the specific allegations concerning Navajo Nation Defendants are minimal, it is clear from the entire complaint that Plaintiff understands Navajo Nation Defendants to be constituent parts of the Navajo Nation government, and her allegations about their failure to assist her are omissions of a tribal government. Plaintiff establishes no “real nexus” between the alleged acts or omissions of Navajo Nation Defendants or any “badge of state authority” in order to demonstrate their conduct was under color of state law. *E.F.W.* at 264 F.3d at 1305 (*internal quotation marks and citation omitted*). Instead, Plaintiff is aggrieved by how Navajo Nation Defendants performed their roles as part of a tribal sovereign. Therefore, Plaintiff’s allegations fail to state that Navajo Nation Defendants acted under color of state law, the second necessary component for subject-matter jurisdiction under Section 1343(a)(3).

As Plaintiff’s complaint fails to meet the minimum pleading requirements of Rule 8(a) to establish jurisdiction over Navajo Nation Defendants per Section 1343(a)(3), and she provides no other basis for subject-matter jurisdiction, her lawsuit should be dismissed as to Navajo Nation Defendants pursuant to Rule 12(b)(1).

**II. PLAINTIFF FAILS TO STATE A CLAIM UNDER SECTION 1983, AS SHE MAKES NO ALLEGATIONS THAT NAVAJO NATION DEFENDANTS DEPRIVED HER OF A FEDERAL RIGHT OR ACTED UNDER COLOR OF STATE LAW**

Plaintiff fails to state a claim under Section 1983, her only cause of action. Per Rule 12(b)(6), a court must dismiss a lawsuit where a plaintiff fails to state a claim upon which relief may be granted. A defendant may move to dismiss a legally insufficient claim prior to filing a responsive pleading. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations omitted).

The elements of a claim under Section 1983 mirror the requirements of Section 1343(a)(3) discussed above: 1) the defendant has deprived plaintiff of a federal right, and 2) the defendant acted under color of state or territorial law in the act depriving them of that right. West v. Atkins, 487 U.S. 42, 48 (1988); Gomez v. Toledo, 446 U.S. 635, 640 (1980). Both elements must be present. Id. Therefore, in order to state a claim under Section 1983 against Navajo Nation Defendants, Plaintiff must have alleged facts demonstrating both prongs.

While Plaintiff states that Navajo Nation Defendants have committed Section 1983 violations, such a bare assertion on its own is too conclusory to satisfy pleading requirements under Rule 8(a). Rather, legal conclusions must be supported by plausible factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). And, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” Twombly, 550 U.S. at 555 (2007). (citations omitted). As described in the previous section, Plaintiff fails to allege facts sufficient to establish both that Navajo Nation Defendants deprived her of a federal right and acted under color of state law. These two prongs being essential to making a Section 1983 claim, and

Plaintiff lacking any other cause of action, Plaintiff fails to state a claim against Navajo Nation Defendants, and her lawsuit as to them should be dismissed.<sup>2</sup>

**CONCLUSION**

For the reasons stated above, the court should dismiss Plaintiff's lawsuit against Navajo Nation Defendants, pursuant to Rules 12(b)(1) and 12(b)(6).

Respectfully submitted this 10<sup>th</sup> day of February, 2021.

By: 

\_\_\_\_\_  
Jason Searle, Attorney  
Louis Mallette, Attorney  
Counsel for the Navajo Nation

---

<sup>2</sup> Plaintiff's failure to state a claim under Section 1983 is also another ground for dismissal per Rule 12(b)(1), as she lacks a cause of action to which Section 1343(a)(3) subject-matter jurisdiction could attach. Plaintiff identifies no other basis for subject-matter jurisdiction, and the court should dismiss her lawsuit as to Navajo Nation Defendants pursuant to Rule 12(b)(1).



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **MOTION TO DISMISS** was electronically transmitted to the Clerk's Office for filing and service using the CM/ECF System on this 10<sup>th</sup> day of February, 2021:

Brenda G. Chicharello (*Pro Se Plaintiff*)  
Post Office Box 2774  
Gallup, New Mexico 87305

Sally Jewel  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
MS-4660-MIB

Bryan Rice  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
MS-4660-MIB

Tony Dearman  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
MS-4660-MIB

Mike Hyatt  
Gallup McKinley County Schools  
640 Boardman  
Gallup, New Mexico 87301

By:   
Dana Martin, Senior Legal Secretary  
Navajo Nation Department of Justice