

STATE OF NEW MEXICO
COUNTY OF MCKINLEY
ELEVENTH JUDICIAL DISTRICT

ZUNI PUBLIC SCHOOL DISTRICT et al.,
Plaintiffs,

-vs-

No. D-1113-CV-98-14-II

THE STATE OF NEW MEXICO et al.,
Defendants.

ORDER PARTIALLY DISMISSING COMPLAINT

THIS MATTER is before the Court on Motion to Dismiss against all Plaintiffs for lack of standing. The motion was filed by the Defendants on January 23, 2017. The Court has reviewed the motion and all pleadings generated by it. Although the motion is brought pursuant to rule 12 (B) (1) and (6) NMRA, the Court will consider the evidence presented by the Plaintiff over the course of four days trial held in November 2016, and thus treat the motion as one for Summary Judgment pursuant to rule 1-012(C) NMRA. This treatment, however, only impacts the Gallup Individual Plaintiffs. The trial evidence is immaterial to the decision by the Court to dismiss the complaints against the other Plaintiffs.

After considering the pleadings, the evidence, and otherwise being sufficiently advised, the Court finds the Zuni Amended Complaint should be dismissed with respect to the Zuni Individual Plaintiffs because the Zuni Individual Plaintiff's claims have been abandoned. The Zuni Amended Complaint should be dismissed with respect to the Zuni School District because the District does not have the statutory power to sue. The Gallup-McKinley County School District Amended complaint should be dismissed with respect to the Gallup-McKinley School District for the same reason as the Zuni School District.

The Gallup-McKinley County School District individual Plaintiffs have sufficiently alleged and have presented evidence sufficient to create a question of fact regarding the elements of standing.

Their claims for relief based on Art. XII. Sec. 1 of the New Mexico Constitution should be allowed to go forward independently from an equal protection challenge as the Court is not persuaded by the Defendant's argument that an equal protection challenge is mandatory when seeking relief under Art. XII Sec. 1.

FINDINGS AND CONCLUSIONS.

1. The complaint brought by the individual Zuni Plaintiffs should be dismissed. The Zuni Amended Complaint alone, filed December 12, 2015, is to be looked to as determining the cause of action in this case. Primus v. Clark, 1954-NMSC-079, ¶16. The Court cannot consider the original complaint. The only Plaintiff in the Zuni Amended Complaint is the Zuni Public School District. See Zuni Amended Complaint at ¶ 1. The Amended Complaint fails to allege standing or anything else by any Individual Zuni Plaintiffs (who are only listed in the caption of the Amended Complaint). The Amended Complaint brings no cause of action by the Zuni Individual Plaintiffs. For these reasons the Amended Complaint should be dismissed as to the Zuni Individual Plaintiffs under NMRA rule 1-012 (B)(6).

2. The complaint by the Zuni Public School District and the Gallup Public School District should be dismissed. Both districts, being political subdivisions of the state of New Mexico, only have the powers that are granted to them by the legislature. State ex rel. Robinson v King, 1974-NMSC-028. The legislature has not provided school districts with the power to sue and be sued, but rather has conferred this power on local school boards. § 22-5-4 NMSA; *c. f.* NMSA 1978 Chapter 7. The school boards are not parties to this action.

Further, the Zuni and Gallup School Districts have sued for a declaratory judgment under the Declaratory Judgment Act, §§ 44-6-1 to 15 NMSA 1978. The act empowers a "person" to sue. "Person" is defined under the act. See § 44-6-3. No definition of person under the act fits the School Districts. A "School district" is an "area of land". See § 22-1-2 (R) NMSA 1978. Because the School Districts are without power to sue under NMSA 1978 Chapter 7 or under the Declaratory Judgment Act, they lack

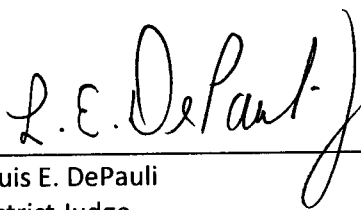
standing and the Amended Complaint brought by the districts should be dismissed pursuant to NMRA rule 1-012 (B)(1)and(6).

3. The complaint brought by the Gallup individual Plaintiff's should not be dismissed. The Defendant argues that the failure by the Plaintiffs to allege an equal protection violation under the Federal Constitution or the New Mexico Constitution is fatal to their claims. The Defendant cites Asplund v. Hannet, 1926-NMSC-004, for authority. Asplund held that the Plaintiff in that case had no right to complain solely of a violation of the New Mexico Constitution. Asplund at ¶ 14 (emphasis added). One must be "injuriously affected" by a violation of the Constitution before he or she has a right to complain. Id. Since Asplund did not specifically hold that a plaintiff must base a constitutional claim on the equal protection clause of the Federal or State constitution in order to be cognizable, this Court cannot conclude that Asplund so requires. Nor does Petrella v Brownback, 697 F.3d 1285, cited by the Defendants, stand for the proposition that an equal protection claim must be made in order for a constitutional claim to be cognizable.

In this case the Individual Gallup Plaintiffs have shown through the four days of trial testimony there is a question of fact as to whether they have been "injuriously affected" as well as whether their claims can be redressed.

Because the authority cited by the Defendants does not persuade the Court that an equal protection challenge by the Plaintiffs is mandatory for their cause of action and the Plaintiffs have shown a question of fact exists as their standing, the Court concludes the Gallup individual Plaintiffs should be allowed to go forward with their claim under Art. XII Sec. 1 of the New Mexico Constitution.

IT IS SO ORDERED.



Louis E. DePauli
District Judge