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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., a minor, by Frank C., guardian ad litem, et al,

Plaintiffs,

v.

Bureau of Indian Education, et al,

Defendants.

No. 3:17-cv-08004-SPL

DEFENDANTS' SECOND PARTIAL MOTION TO DISMISS

INTRODUCTION

Plaintiffs bring six claims seeking declaratory and injunctive relief against U.S. Department of the Interior ("DOI"), Bureau of Indian Education ("BIE"), Secretary of the Interior Ryan Zinke, Acting Assistant Secretary–Indian Affairs Michael Black, Director of BIE Tony Dearman, and Principal Jeff Williamson of Havasupai Elementary School (collectively, "Defendants"). Defendants move to dismiss certain claims pursuant to Federal Rules of Civil Procedure 12(b)(1), specifically, for lack of standing with respect to those claims by students who no longer attend Havasupai Elementary and for lack of subject-matter jurisdiction with respect to the fifth and sixth causes of action, as well as pursuant to Rule 12(b)(6) for failure to state a claim under the fourth cause of action. If those claims are not dismissed, defendants move to dismiss all but Secretary Zinke as improper defendants with respect to the third, fourth, fifth, and sixth causes of action. This motion is supported by the accompanying memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

The Havasupai Tribe is a federally recognized Native American tribe located on a reservation in the bottom of the Grand Canyon, along the western corner of the canyon's South Rim. See Second Am. Compl., ECF No. 64, (hereinafter, "SAC") ¶ 27. The only school on the reservation is the Havasupai Elementary School, which is operated and funded by BIE, and serves approximately 70 students in kindergarten through eighth grade. Id. ¶¶ 2, 27. Plaintiffs are a group of nine Havasupai students and an organization that advocates for the legal rights of Native Americans with disabilities. Id. ¶¶ 8-20. Only four out of the nine student plaintiffs still attend Havasupai Elementary School. Id. at 3-6. The remaining five students are enrolled in schools outside of the reservation. Moreover, as three of those five students are at least fourteen-year olds and have commenced their secondary education, they are not entitled to educational services at the school. Id. ¶¶ 12-14.

Plaintiffs allege that defendants have failed to: (1) provide a general curriculum (*i.e.*, instruction in areas other than math, reading, and writing) that also includes aspects of the Havasupai culture; (2) provide school resources (*i.e.*, textbooks, library, extracurricular activities); (3) ensure adequate staffing; (4) provide adequate special education; (5) adopt disciplinary measures beyond exclusion and law enforcement; (6) provide necessary wellness and mental health support; and (7) include the community in school decision-making. Id. ¶ 2. Plaintiffs claim that "[t]hese deprivations violate Defendants' substantive obligations under the Indian Education Act as amended, Section 504 of the Rehabilitation Act of 1973, and their implementing regulations." Id. ¶ 6.

Plaintiffs' Second Amended Complaint asserts claims for: (1) Failure to Take Action Required to Provide Basic Education, 5 U.S.C. § 706(1) (Count I); (2) Failure to Provide Basic Education, 5 U.S.C. § 706(2) (Count II); (3) Failure to Provide a System Enabling Students with Disabilities to Access Public Education in violation of the Rehabilitation Act, 29 U.S.C. § 794 (Count III); (4) Failure to Provide a System Enabling Students who Have Suffered Adversity and Complex Trauma to Access Public Education in violation of the

Rehabilitation Act, 29 U.S.C. § 794 (Count IV); (5) Violation of Department of Education Regulations Regarding "Location and Notification," 34 C.F.R. § 104.32 (Count V); (6) Violation of Department of Education Regulations Regarding "Procedural Safeguards," 34 C.F.R. § 104.36 (Count VI). See SAC at 50-62. Plaintiffs seek a declaration setting forth defendants' obligations "with respect to the delivery of education to students at Havasupai Elementary School" and stating that defendants' actions and omissions constitute violations of federal laws and regulations. Id. at 62. Plaintiffs also seek an order requiring defendants to comply with their obligations and provide certain educational services. See id. at 62-64.

Although some of the factual allegations giving rise to plaintiffs' claims are either inaccurate or no longer applicable, defendants assume all well-pleaded facts to be true at this procedural juncture. Defendants move to dismiss all claims by plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. pursuant to Federal Rule of Civil Procedure 12(b)(1) because they no longer attend Havasupai Elementary School and, thus, are not entitled to the relief requested. Defendants also move to dismiss Count IV pursuant to Rule 12(b)(6) because merely alleging exposure to adversity and trauma is insufficient as a matter of law to show that plaintiffs are disabled individuals under the Rehabilitation Act who were denied benefits solely by reason of a disability. If Count IV is not dismissed for failure to state a claim, then it is duplicative of Count III and should not remain as a separate count. Additionally, Counts V and VI should be dismissed pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction because there is no private right of action to sue under the Department of Education regulations. Finally, all but Secretary Zinke must be dismissed as improper defendants as to Count III, and to the extent Counts IV-VI are allowed to proceed, also as to those counts.

ARGUMENT

"A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When the assertion of subject matter jurisdiction is facially challenged, the Court

takes the allegations in the complaint as true. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). "A Rule 12(b)(6) motion tests the legal sufficiency of a claim." Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (quotation omitted). "When analyzing a complaint for failure to state a claim" under Rule 12(b)(6), "the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party." JDA Software Inc. v. Berumen, 2015 WL 8003210, at *1 (D. Ariz. Dec. 7, 2015). "Legal conclusions couched as factual allegations are not entitled to the assumption of truth, and therefore are insufficient to defeat a motion to dismiss for failure to state a claim." Id. (citation omitted).

I. STUDENT PLAINTIFFS LEVI R., LEO R., JENNY A., JEREMY A., AND JORDAN A. LACK STANDING TO BRING THEIR CLAIMS.

Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. lack standing to bring their claims because they are no longer students at Havasupai Elementary School and cannot show an impending injury that can properly be remedied here. Article III's case or controversy requirement requires that plaintiffs establish standing to sue "separately for each form of relief sought." Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., Inc., 528 U.S. 167, 185 (2000) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). To satisfy "the irreducible constitutional minimum of standing," a plaintiff must show: (1) a concrete and particularized injury that is either actual or imminent, as opposed to conjectural or hypothetical; (2) a causal connection between the injury and the challenged action; (3) that it is likely that the injury will be redressed by a favorable decision. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

To have standing to seek declaratory and injunctive relief, "a plaintiff must demonstrate 'that he is realistically threatened by a repetition of [the violation].'" Melendres v. Arpaio, 695 F.3d 990, 997 (9th Cir. 2012) (quoting Lyons, 461 U.S. at 109) (bracketed text in original). Past injuries alone are insufficient to establish standing; rather the plaintiff must establish a reasonable fear that the injury will recur. The "threatened injury must be *certainly impending* to constitute injury in fact, and . . . allegations of possible future injury are not sufficient." Clapper v. Amnesty Int'l. USA, 133 S. Ct. 1138, 1147 (2013) (emphasis

in original & citation omitted). "When evaluating whether [the standing] elements are present, we must look at the facts as they exist at the time the complaint was filed." Am. Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1015 (9th Cir. 2006) (emphasis and internal quotation marks omitted).

The Second Amended Complaint establishes that plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. no longer attend Havasupai Elementary School. See SAC at 3-6. Levi R. (ninth grade), Leo R. (eleventh grade), and Jenny A. (tenth grade) are pursuing their secondary education and are no longer eligible to receive educational services at Havasupai Elementary School. See id. ¶¶ 12-14. Moreover, Jeremy A. and Jordan A. are enrolled at a BIE boarding school in Oklahoma and there is no allegation that they plan to enroll in Havasupai Elementary School any time soon. See id. ¶¶ 15-16. Further, as Jeremy A. will be starting eighth grade shortly, he will be ineligible to attend the school after the 2017-2018 academic year. The Second Amended Complaint thus fails to establish that the past injuries ascribed to these five plaintiffs are likely to recur in the imminent future. The alleged deficiencies in the school cannot constitute a threat of impending injury to students who are no longer enrolled in it. Also, these five plaintiffs lack standing "to seek injunctive or declaratory relief because they 'would not stand to benefit from' such relief." Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1047-48 (9th Cir. 2014) (holding that plaintiffs who were no longer FedEx drivers at the time the complaint was filed lacked standing to seek injunctive or declaratory relief) (quoting Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006)) (citation omitted). Specifically, they would not benefit from any changes made to the school (*i.e.*, curriculum, staffing, textbooks, cultural programs, mental health support and school counseling).

For the same reason, a declaration that defendants violated certain legal obligations at Havasupai Elementary School will not redress a threat of impending injury. It is well established that "a plaintiff whose injury lies wholly in the past without a reasonable likelihood of recurring in the future, therefore, lacks standing to seek a declaratory judgment because the remedy sought would only serve to give the aggrieved plaintiff the 'psychic

satisfaction' of having a court declare the defendant's past actions illegal." Tarhuni v. Holder, 8 F. Supp. 3d 1253, 1268 (D. Or. 2014) (quoting Leu v. Int'l Boundary Comm'n, 605 F.3d 693, 694 (9th Cir. 2010)). A declaration in this instance could only provide these five plaintiffs the satisfaction that their rights were violated during their enrollment at the school and, since mere "psychic satisfaction is not an acceptable Article III remedy," Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998), these student plaintiffs lack standing to seek the relief requested.

Lastly, the Second Amended Complaint also asks for compensatory education for the "student Plaintiffs—including those who previously attended but no longer attend Havasupai Elementary School . . . ." Request for Relief at SAC ¶ 3(k). It is unclear which statute or regulation is relied upon to seek such remedy. However, the Ninth Circuit has stated that "a request for compensatory education is virtually identical to a request for monetary damages measured by the cost of the educational services provided." See Alexopulos By & Through Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 553 (9th Cir. 1987); Alexopulos v. Riles, 784 F.2d 1408, 1412 (9th Cir. 1986) (noting that compensatory education "is virtually indistinguishable from a request for tuition reimbursement based on a past breach of legal duty") (citing Miener v. Missouri, 673 F.2d 969, 982 (8th Cir. 1982)). Because there is no "explicit language in the Rehabilitation Act . . . waiving the government's sovereign immunity" as to monetary claims, Dorsey v. U.S. Dep't of Labor, 41 F.3d 1551, 1555 (D.C. Cir. 1994); see also Cleveland v. Hunton, 2017 WL 531897, at *3 (E.D. Cal. Feb. 9, 2017), there is no right of action for compensatory education against the federal government under Section 504. The same reasoning applies to the Indian Education Act and the regulations cited in the Amended Complaint, neither of which provides this specific remedy or expressly waives sovereign immunity.[1]

[1] Even if compensatory education were considered injunctive relief, the alleged violations occurred when these students were enrolled in the school. Because a past breach of legal duty is insufficient to establish standing for prospective relief, it follows that these five plaintiffs are not entitled to such relief. See Lyons, 461 U.S. at 109.

In conclusion, student plaintiffs Levi R., Leo R., Jenny A., Jeremy A. and Jordan A. lack standing to bring their claims, which must be dismissed under Rule 12(b)(1).[2]

II. COUNT IV SHOULD BE DISMISSED BECAUSE EXPOSURE TO ADVERSITY AND TRAUMA IS INSUFFICIENT TO ESTABLISH THAT PLAINTIFFS ARE DISABLED INDIVIDUALS WHO WERE DENIED BENEFITS SOLELY BY REASON OF ANY ALLEGED DISABILITY.

Section 504 of the Rehabilitation Act of 1973 provides, in relevant part: "No otherwise qualified *individual with a disability* . . . shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (emphasis added). To state a violation of Section 504, plaintiffs must establish that they: (1) are individuals with a disability; (2) are otherwise qualified to receive the benefits of a program; and (3) were excluded from, denied the benefits of, or subject to discrimination under the program solely by reason of their disability. Duvall v. Cnty. Of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001), as amended on denial of reh'g (Oct. 11, 2001) (citation omitted). Because Count IV fails to establish that plaintiffs are individuals with "disabilities" within the meaning of the statute, and fails to show any causal connection between any alleged "disabilities" and the denial of benefits, it should be dismissed. To the extent Count IV establishes that certain students are disabled and that they were denied access to a public education solely by reason of their disabilities, then both Counts III and IV are duplicative and should not remain as separate counts.

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[2] Given that the Second Amended Complaint was filed using pseudonyms and plaintiffs have not provided defendants with the names of the students, defendants reserve the right to argue that all or some of the students' Rehabilitation Act claims are also time barred under the applicable two-year statute of limitations. See Oskowis v. Sedona Oak-Creek Unified Sch. Dist. #9, No. CV-16-08063-PCT-JJT, 2017 WL 1135558, at *3 (D. Ariz. Mar. 27, 2017).

A. Count IV Fails To Establish The Existence Of A Qualifying Disability.

Counts III and IV of the Second Amended Complaint allege violations of the Rehabilitation Act: (1) failure "to establish a system to ensure that students [Stephen C., Durell P., Levi R., Jenny A., and Jordan A.] who have disabilities" receive the benefits of a public education (Count III), SAC ¶ 226; and (2) failure "to establish a system to ensure that Student Plaintiffs Impacted by Childhood Adversity [the five students "who have disabilities" plus Taylor P. and Leo R.] who have suffered adversity and complex trauma" receive the benefits of a public education (Count IV), id. ¶ 243. Accordingly, five of the seven students are identified as having specific "disabilities" (Count III), and all seven students are alleged to have been "impacted by childhood adversity" (Count IV). Compare SAC ¶¶ 8, 10, 12, 14, 16 with id. ¶¶ 11, 13.[3] However, the Rehabilitation Act applies only to individuals with a disability. As discussed below, the claim that certain students have suffered adversity and trauma does not establish in and of itself that they are individuals with "disabilities" under the Rehabilitation Act. Accordingly, Count IV fails to show that plaintiffs can satisfy the first and third elements of a Rehabilitation Act claim and, thus, must be dismissed under Rule 12(b)(6). [4]

In relevant part, Section 504 defines "disability" and "individual with a disability" as

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[3] The Complaint alleges that certain disabled students, who are the subject of Count III, are eligible to receive special education services: (1) Stephen C. (Attention Deficit Hyperactive Disorder ("ADHD")); (2) Durell P. (Oppositional Defiant Disorder, ADHD, and significant mental health needs); (3) Levi R. (ADHD and a specific learning disability); Jenny A. (significant mental health needs and an emotional disturbance); and Jordan A. (specific learning disability). The Complaint does not identify Taylor P. and Leo R. (who are included in Count IV), as well as Anna D. and Jeremy A., as students having a recognized impairment.

[4] Although Havasupai Elementary School is not a "program" that "receives federal financial assistance," see Exec. Order No. 13160, 65 F.R. 39775 (June 23, 2000), all BIE-operated schools must comply with Section 504 of the Rehabilitation Act pursuant to the Education Amendments of 1978, as amended by the No Child Left Behind Act of 2001. See 25 U.S.C. § 2005(b)(1).

"the meaning given to it" in Title II of the American with Disabilities Act ("ADA"), 42 U.S.C. § 12102. 29 U.S.C. § 705(9)(B), (20)(B); 29 U.S.C. § 794(a). The ADA, in turn, defines "disability . . . with respect to an individual" as a "physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).[5] An "impairment" is defined as: "(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . ; or (2) [a]ny mental or psychological disorder . . . ." 29 C.F.R. § 1630.2(h); see also 34 C.F.R. § 104.3(j)(1), (j)(2)(i). Pursuant to this definition, even if, as alleged, these Havasupai students have experienced adversity and trauma within their community, such experience must result in an impairment as defined in 29 C.F.R. § 1630.2(h) to constitute a disability.

Indeed, the applicable regulations expressly state that "[e]nvironmental, cultural, or economic disadvantages such as poverty," homelessness, violence, and family disruption "are not impairments" for purposes of the Rehabilitation Act. 29 C.F.R. app. § 1630.2(h); see also 34 C.F.R. app. A to Part 104. Hence, the alleged "forced relocations, loss of homes, families and culture," and poverty within the Havasupai community, SAC ¶¶ 158-60, do not state a colorable Section 504 claim because they do not constitute a physical or mental impairment. And, while the Second Amended Complaint provides specific examples of serious socio-economic adversity and trauma that certain students have experienced in their community and families (*i.e.*, family instability and disruption, bullying, violence, substance abuse throughout the community, high unemployment, referrals to the juvenile justice system, economic stress, and financial hardship), see id. at 12-35, these experiences are not impairments for purposes of the Rehabilitation Act. Count IV should be dismissed on this basis alone.

In addition, the Second Amended Complaint does not allege that the adversity and

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[5] "[M]ajor life activities, include, but are not limited to . . . learning, reading, concentrating, thinking, communicating, and . . . the operation of a major bodily function . . . ." 42 U.S.C. § 12102(2)(B).

trauma has resulted in each plaintiff having a "recognized 'impairment'" that substantially limits one or more major life activities. Mamola v. Grp. Mfg. Servs., Inc., No. CV-08-1687-PHX-GMS, 2010 WL 1433491, at *9 (D. Ariz. Apr. 9, 2010) (quoting Bragdon v. Abbott, 524 U.S. 624, 631 (1998)). Rather than showing that specific physical or mental disorders were induced by, or related to, trauma and adversity, the Second Amended Complaint concludes that experiencing adversity and trauma "cause impairment that limits a student's ability to learn, read, concentrate, think, and/or communicate, and to generally receive an education and have the opportunity to succeed in school." Second Am. Compl. ¶ 239. This threadbare and conclusory assertion that basically amounts to a recitation of the legal definition of "disability," is not entitled to deference at the pleading stage, and is insufficient to state a claim. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.") (citation omitted).

Count IV relies for the most part on generalized notions about the historical trauma of Native Americans, particularly the Havasupai, and provides some examples of how the student plaintiffs' experience reflects such trauma. However, this is not a case about the trauma that Native American children may suffer generally or about the adversity and trauma that these students have experienced. Count IV involves seven student plaintiffs who allege that they have been deprived of meaningful access to public education in violation of the Rehabilitation Act, which in turn requires the existence of an impairment that affects a major life activity, that is, a "disability." Discussing the impact of childhood adversity and trauma on child development and the ability to learn, without alleging any specific impairments that the seven students might have developed as a result of such experiences, is insufficient to state a claim under Section 504. Since the question of whether the student plaintiffs have a qualifying disability within the meaning of the Rehabilitation Act presents a question of law for this Court to decide, the Second Amended Complaint's shortcomings necessarily mean there is no cognizable Section 504 claim. See Holt v. Grand Lake Mental Health Ctr., Inc.,

443 F.3d 762, 765 n.1 (10th Cir. 2006).

Furthermore, plaintiffs' emphasis on historical trauma based on the students' identity as Native Americans arguably is inconsistent with the purpose of the Rehabilitation Act: to prevent disability-based discrimination with respect to federally funded activities and programs. See Alexander v. Choate, 469 U.S. 287, 292-99 (1985). Inherent in Count IV is the notion that all Native Americans suffer from adversity and historical trauma which affects their ability to learn, read, concentrate, think, or communicate. This claim should be rejected not only for its legal insufficiency, but also because it would require the United States to make inappropriate, if not impermissible, assumptions about the educational capacity and needs of children based on their race or ethnicity. Taken to its logical conclusion, adopting plaintiffs' expansive definition of "disability" to include adversity and trauma untethered to any showing of an actual impairment would not only adversely impact Native American students by predetermining their educational capacity, but it would also impose a significant responsibility on elementary and secondary educational agencies in underdeveloped communities across the United States to locate and evaluate all children who are exposed to such generalized adversity.[6]

Indeed, "[t]he formalization and policing" of plaintiffs' proposed approach—evaluating every person within a certain racial group or community that has been exposed to adversity and complex historical trauma for signs of disability and the need for reasonable accommodation—"could lead to a wholly unwieldy administrative and adjudicative burden." Choate, 469 U.S. at 298. And, as the Supreme Court has warned, "[a]ny interpretation of §

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[6] Such expansion would be in contravention of Congress's intent and would have far reaching and unintended implications with respect to federal disability laws. In fact, in 2004, Congress specifically enacted safeguards against such an expansion when it re-authorized the Individual with Disabilities Education Act and required states to have "in effect policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in Section 602(3)." 20 U.S.C. § 1412(a)(24).

504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." Id. at 299. For the reasons stated above, Count IV must be dismissed.

B. Count IV Fails To Establish That The Student Plaintiffs Were Denied Benefits Solely By Reason Of Their Disability.

Even assuming that Count IV could establish that all seven students impacted by childhood adversity are disabled, there is no indication that they were denied benefits "solely by reason" of their alleged disability. 29 U.S.C. § 794(a). The purpose of the Rehabilitation Act is "to protect disabled persons from discrimination arising out of both discriminatory animus and 'thoughtlessness,' 'indifference,' or 'benign neglect.'" Crowder v. Kitagawa, 81 F.3d 1480, 1484 (9th Cir. 1996) (quoting Choate, 469 U.S. at 295 (1985)). When determining whether disabled persons are being discriminated against in violation of Section 504, courts may consider whether they are being "denied 'meaningful access' to state-provided services" solely by reason of their disability. Id. (quoting Choate, 469 U.S. at 302); see also K.M. Ex. Rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1102 (9th Cir. 2013).

The phrase "solely by reason of a disability" makes clear that Section 504 requires, among other things, a causal nexus between the claimed disability and the alleged discriminatory act. 29 U.S.C. § 794(a); Doe v. Eagle-Union Cmty. Sch. Corp., 101 F. Supp. 2d 707, 719 (S.D. Ind. 2000), aff'd in part, vacated in part on other grounds, 2 F. App'x 567 (7th Cir. 2001). This nexus, in turn, requires notice to the school of the disability. See Granados v. J.R. Simplot Co., 266 Fed. App'x 547, 549 (9th Cir. 2008).

Knowledge of a claimed disability, not just of the consequences thereof, is essential to a Section 504 claim. If a defendant lacks knowledge of the claimed disability, there cannot be a denial of, or exclusion from, a benefit *solely by reason of a disability*. See Tsuji v. Kamehameha Sch., 154 F. Supp. 3d 964, 978 (D. Haw. 2015), aff'd, No. 16-15105, 2017 WL 711143 (9th Cir. Feb. 23, 2017) ("[T]here is no obligation to explore possible accommodations unless an employer knows about an employee's disability."). To satisfy

this notice requirement, the Ninth Circuit and the vast majority of federal circuits have held that there *must* be a pre-litigation interactive process between the parties to determine whether it is possible under the specific circumstances for a reasonable accommodation of the disabled individual's needs. See Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114-15 (9th Cir. 2000) (en banc), vacated on other grounds sub nom. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (describing the "interactive process" as "a mandatory rather than a permissive obligation"). The notice and pre-litigation interactive process requirements have been extended to the educational context. See Patton v. Phoenix Sch. Of Law LLC, No. CV-11-0748-PHX-GMS, 2011 WL 1936920, at *4 (D. Ariz. May 20, 2011) ("Under the ADA, an educational institution's 'obligation to engage in an interactive process with the [student] to find a reasonable accommodation is triggered by the [student] giving notice of the [ ] disability and the desire for accommodation.'") (alterations in original) (quoting Downey v. Crowley Marine Servs., 236 F.3d 1019, 1023 n. 6 (9th Cir. 2001).[7]

The Second Amended Complaint does not establish that the duty to accommodate was triggered here because there are no allegations showing that defendants knew, had notice of, or had reason to believe that any of the plaintiffs had a disability as a result of trauma and adversity. General awareness of deficiencies in the school's services or the "harmful impacts of complex trauma on Native youth and the critical need to provide wellness and mental

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[7] See also, e.g., Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906, 908 (8th Cir. 2000); Willis v. Norristown Area Sch. Dist., 2 F. Supp. 3d 597, 608-09 (E.D. Pa. 2014); Girard v. Lincoln Coll. Of New England, 27 F. Supp. 3d 289, 294 (D. Conn. 2014); Forbes v. St. Thomas Univ., Inc., 768 F. Supp. 2d 1222, 1231 (S.D. Fla. 2010); Rivera-Concepcion v. Puerto Rico, 786 F. Supp. 2d 442, 454-55 (D.P.R. 2010); Stearns v. Bd. Of Educ. for Warren Twp. High Sch. Dist. #121, No. 99 C 5818, 1999 WL 1044832, at *3 (N.D. Ill. Nov. 16, 1999); but see P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1098, 1115 (C.D. Cal. 2015) (noting that even though "[i]t makes sense to the Court that Plaintiffs should have made a request for the relief sought *prior to* bringing suit so as to allow Defendants an opportunity to engage in an interactive process with them[,]" it would not dismiss the complaint given that "the Ninth Circuit has yet to mandate this notice requirement in the context of ADA lawsuits against education institutions") (emphasis in original).

health services to address trauma in BIE schools," SAC ¶ 187; see also id. at 47-49, is insufficient to establish the necessary knowledge of a qualifying disability in connection with each of the plaintiffs.

The knowledge required must be of the disability itself, not just its causes, consequences, or effects. See Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 (7th Cir. 1995); Collings v. Longview Fibre Co., 63 F.3d 828, 834 (9th Cir. 1995); Tsuji, 154 F. Supp. 3d at 978; Patton, 2011 WL 1936920, at *4; Stearns, 1999 WL 1044832, at *3. That "[t]rauma is associated with mental health conditions such as somatoform disorders, major depression, schizophrenia, and substance abuse and dependence" does not establish that any of the student plaintiffs impacted by childhood adversity in fact have such impairments, let alone that the school knew of any trauma-induced disabilities. SAC ¶ 162. Without showing knowledge of the claimed disabilities, plaintiffs cannot demonstrate that defendants have denied the student plaintiffs meaningful access to a proper education *solely by reason of their disability*. See Dutson v. Farmers Ins. Exch., 815 F. Supp. 349, 352 (D. Or. 1993) (noting that plaintiff could only be "within the protected class of handicapped persons" under federal anti-discrimination statutes if plaintiff established that defendants knew he was handicapped), aff'd, 35 F.3d 570 (9th Cir. 1994).

Allowing the claims to proceed notwithstanding the Second Amended Complaint's failure to satisfy the required notice would eviscerate the causation requirement inherent in the statutory text and create "an enormous sphere of potential liability" for educational institutions. Hedberg, 47 F.3d at 934. Such a determination also would disregard the Supreme Court's warning that, when interpreting Section 504, courts must keep the statute "within manageable bounds." Choate, 469 U.S. 287 at 299. Count IV should be dismissed.

C. Alternatively, If Count IV States A Cognizable Claim Under the Rehabilitation Act, Then It Is Duplicative Of Count III And Should Not Remain As A Separate Count.

To the extent that plaintiffs' allegations concerning the exposure to childhood adversity and historical trauma are sufficient to establish that defendants denied meaningful

access to a proper education solely by reason of a qualifying disability, then the Rehabilitation Act claims in Count III and Count IV are duplicative. A plaintiff "cannot assert two separate counts alleging the exact same claims." Smith v. Bd. of Trustees Lakeland Cmty. Coll., 746 F. Supp. 2d 877, 899 (N.D. Ohio 2010). Moreover, the Ninth Circuit has reiterated that a district court can dismiss any "duplicative claims" from a complaint. See M.M. v. Lafayette Sch. Dist., 681 F.3d 1082, 1086 (9th Cir. 2012) ("It is well established that a district court has broad discretion to control its own docket, and that includes the power to dismiss duplicative claims.") (citing Adams v. California v. Dep't of Health Services, 487 F.3d 684 (9th Cir. 2007)). And, in fact, district courts generally dismiss such claims early in the litigation. See, e.g., Bey v. City of Oakland, No. CV 14-01626, 2016 WL 1639372, at *15 (N.D. Cal. Apr. 26, 2016); Hussain v. Smith, No. CV 15-708, 2016 WL 4435177, *at 4 (D.D.C. Aug. 19, 2016); Slimm v. Bank of Am. Corp., No. CV. 12-5846, 2013 WL 1867035, at *22 (D.N.J. May 2, 2013); Dunlap v. Palmer, No. CV 3:07-00019, 2011 WL 4344042, at *5, (D. Nev. Sept. 14, 2011).

If the premise and allegations of Count IV were sufficient to state a claim, then it is clear that both Counts III and IV allege the same claim: that defendants have failed to provide a system that enables student plaintiffs to access public education in violation of Section 504 of the Rehabilitation Act. See SAC at 54, 56. Specifically, both claims allege that defendants have denied these students meaningful access to public education and that defendants "are required to provide specialized instruction, related services, and other resources . . . and they must put into place a system—including procedures, teachers, and appropriate providers—for delivery of specialized instruction and services in order to ensure that those students have access to the benefits of a public education." Id. ¶¶ 225, 244. And, although the language may be slightly different—while Count III identifies certain qualifying disabilities, Count IV refers to adversity and trauma—both allege the same violation. Bey, 2016 WL 1639372, at *15 (stating that although two counts in the complaint "had slightly different language, at their core both allege the same constitutional violation"). Moreover, not only do the claims rely on the same operative facts, allege the same injury, and require proof of the same

elements, they also both seek declaratory relief and appropriate injunctive relief, which presumably involves reasonable accommodation for each student to ensure meaningful access to their public education.

Accordingly, assuming *arguendo* that Count IV states a claim upon which relief can be granted, then this court should dismiss one of the two counts as duplicative. See Knapp v. California Dep't of Corr. & Rehab., No. CV 1:08-780, 2009 WL 2524603, at*2 (E.D. Cal. Aug. 17, 2009) (finding two counts in the same complaint to be "duplicative claims of deliberate indifference *by the same Defendants for the same conduct*" and dismissing the first count "as duplicative of the more expansive allegations" in the second count) (emphasis added). Although the allegations are virtually identical as to both counts, one point of distinction—which likely explains why Count IV focuses on adversity and trauma in lieu of alleging a specific impairment giving rise to a disability— is that Count IV includes two additional students (Taylor P. and Leo R.) that are not a part of Count III. One way to address the duplicative nature of the claims would be to dismiss one of the counts and consolidate them into one omnibus Rehabilitation Act claim. See Arndell v. Robinson, Belaustegui, Sharp, & Low, No. CV 3:11-469, 2012 WL 12897879, at *2 (D. Nev. May 11, 2012) (consolidating ten claims into one single claim of legal malpractice due to duplicative nature); see also Van Vliet v. Cole Taylor Bank, No. CV. 10-3221, 2011 WL 148059, at *2-4 (N.D. Ill. Jan. 18, 2011) (dismissing discrimination claim under Family Medical Leave Act as duplicative of plaintiff's retaliation claim under the statute and granting leave to consolidate counts and plead one claim of willful discrimination/retaliation).

Dismissing one count and allowing the separate counts to be consolidated into one Rehabilitation Act claim would help streamline a lengthy 65-page pleading and save the parties, as well as the court, substantial resources and time.[8] Therefore, to the extent Count

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[8] "While pleading in the alternative is generally allowed under Rule 8(d)(2) of the Federal Rules of Civil Procedure, the Rule does not prohibit dismissal of duplicative claims." Van

IV states a claim, it should not be allowed to remain as a separate count.

III. PLAINTIFFS' CLAIMS FOR RELIEF FOR VIOLATION OF THE IMPLEMENTING REGULATIONS OF THE REHABILITATION ACT MUST BE DISMISSED.

Counts V and VI allege violations of the Department of Education's implementing regulations of the Rehabilitation Act regarding "Location and Notification," 34 C.F.R. §104.32,[9] and "Procedural Safeguards," 34 C.F.R. §104.36.[10] Notably, these regulations do not provide a private right of action. And, while implementing regulations may be enforceable through a statute's private right of action when they "authoritatively construe"

Vliet, 2011 WL 148059, at *2 & n.1 (finding that "dismissal of a federal claim on the grounds that it is duplicative of another federal claim brought in the same lawsuit is proper under Rule 12(b)(6)). Alternatively, the court may also rely on Rule 12(f) to strike from the pleading "any redundant, immaterial, impertinent, or scandalous matter" in order "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." Black & Veatch v. Modesto Irr. Dist., No CV 11-0695, 2011 WL 2636218, at *2 (E.D. Cal. July 5, 2011) (quoting Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)); see also Van Vliet, 2011 WL 148059, at *2 n. 1.

[9] "Any recipient that operates a public elementary or secondary education program or activity shall annually: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart." 34 C.F.R. §104.32.

[10] "A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, *because of handicap*, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement." 34 C.F.R. §104.36 (emphasis added).

the underlying statute, Alexander v. Sandoval, 532 U.S. 275, 284 (2001), these regulations go beyond the Rehabilitation Act's anti-discrimination mandate to create additional affirmative obligations on educational institutions.

Regulations that impose obligations beyond the statute do not fall within the statute's private right of action. See id. "As applied here, Sandoval instructs that whether the § 504 regulations are privately enforceable will turn on whether their requirements fall within the scope of their prohibition contained in § 504 itself." Mark H. v. Lemahieu, 513 F.3d 922, 935 (9th Cir. 2008).[11] These regulations do not fall within Section 504's private right of action because they impose more specific duties and obligations than the statute. While Section 504 prohibits discrimination "solely by reason of" disability, K.M. Ex. Rel. Bright, 725 F.3d at 1099 (quoting 29 U.S.C. § 794(a)), the Department of Education's implementing regulations go beyond this "general anti-discrimination mandate," id., by placing additional duties on educational institutions, such as locating and identifying disabled students, notifying parents of educational plans for their children, and providing the opportunity to examine relevant records and be heard in an impartial hearing, see 34 C.F.R. §§ 104.32, 36

These affirmative obligations are not linked tightly enough "to Section 504's nondiscrimination mandate," K.M. Ex. Rel. Bright, 725 F.3d at 1099, in a way that authoritatively construes the statute. See Power v. Sch. Bd. of City of Virginia Beach, 276 F. Supp. 2d 515, 519-21 (E.D. Va. 2003) (holding that "no private cause of action exists to enforce [34 U.S.C. § 104.36's] regulatory due process provision"); see also H. v.

[11] In Mark H., the Ninth Circuit noted in dicta that, "to the degree the § 504 [Free Appropriate Public Education (FAPE)] regulations that the H. family invokes can be interpreted as a variety of meaningful access regulation, they will fall within the § 504 implied cause of action." 513 F.3d at 939. Notably, the Circuit did not actually "decide whether the H. family ha[d] alleged a privately enforceable cause of action"; instead, it remanded the case for further proceedings on this issue. Id. Based on this dicta, a distinction reasonably may be drawn between substantive access regulations and the procedures put in place to promote access. The regulations at issue in Counts V and VI fall in the second category and, unlike substantive access regulations, are not enforceable through the statute's right of action.

Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1247, 1264 (M.D. Ala. 2011) ("[T]he weight of authority holds that there is no private right of action to enforce § 504's special education regulations, to the extent these regulations create any duties separate and apart from the statutory text") (collecting cases); but see Compton Unified, 135 F. Supp. 3d at 1118-19 (recognizing a private right of action to enforce certain regulatory provisions).

While a violation of these regulations could be relevant to satisfy the requisite *mens rea* for a damages claim under Section 504 (a requirement that does not apply to the federal government), see Mark H., 513 F.3d at 938, the weight of authority suggests that such a violation does not give rise to a stand-alone claim. "Section 504 itself contains no procedural rights, nor guarantees them" and, by contrast, "the regulations promulgated under Section 504 require the establishment of procedural safeguards" and identification policies and procedures "to protect the rights of students and parents to participate in the educational process." Power, 276 F. Supp. 2d at 519 (citation omitted). Because "the regulations do not delineate any specific procedures [or policies] with regard to Section 504, and they do not expand the substantive scope of the statute"—namely, "to ensure that handicapped individuals receive evenhanded treatment in relation to the nonhandicapped," P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990); see also K.M. Ex. Rel. Bright, 725 F.3d at 1097-98—plaintiffs cannot rely on Section 504's anti-discrimination mandate to avail themselves of some separate remedy under these regulations. Power, 276 F. Supp. 2d at 520.

Accordingly, the court should dismiss Counts V and VI for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1). "To hold otherwise would subvert the plain meaning of discrimination in the statute and invite a flood of litigation in the special education context" by inviting lawsuits seeking to remedy inadequate policies or procedures, even where no one was discriminated against because of a disability. See id. at 521.

IV. THE SECRETARY OF THE INTERIOR IN HIS OFFICIAL CAPACITY IS THE ONLY PROPER DEFENDANT WITH RESPECT TO COUNTS III-VI.

Counts III-VI assert claims under Section 504 and the Department of Education's implementing regulations against all individual defendants in their official capacities.

However, it is well established that, in a Rehabilitation Act case, the head of the relevant department or agency is the only proper defendant. Tanner v. Derwinski, 24 F.3d 249 n.1 (9th Cir. 1994) (citing Johnston v. Horne, 875 F.2d 1415, 1420 (9th Cir. 1989)); see also Nurriddin v. Bolden, 674 F. Supp. 2d 64, 81 (D.D.C. 2009). It is also clear that a "plaintiff may not sue more than one department or agency head in his or her official capacity" for purposes of the Rehabilitation Act. Lassiter v. Reno, 885 F. Supp. 869, 873 (E.D. Va. 1995), aff'd, 86 F.3d 1151 (4th Cir. 1996). In this case, the only proper defendant as to these claims is Secretary Zinke in his official capacity. See Woodward v. Salazar, 731 F. Supp. 2d 1178 (D.N.M. 2010) (involving Title VII claim by employees of the Bureau of Indian Affairs against the Secretary of the Interior); see also Graves v. Clinton, No. 2:10-CV-03156 (MCE), 2011 WL 5024500, at *11 (E.D. Cal. Oct. 20, 2011) (dismissing Rehabilitation Act claims against the Deputy Secretary of State). Accordingly, Count III must be dismissed as to all defendants but Secretary Zinke. To the extent that this Court does not dismiss Counts IV-VI, it should also dismiss all but Secretary Zinke as improper defendants.

CONCLUSION

For the reasons set forth above, this Court must dismiss the claims as follows: (1) all claims by Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. for lack of standing; (2) Count IV for failure to state a claim or, in the alternative, as duplicative of Count III; (3) Counts V and VI for lack of subject-matter jurisdiction. Finally, all defendants but Secretary Zinke must be dismissed as improper defendants as to Count III, and to the extent Counts IV-VI are allowed to proceed, also as to those counts.

Dated: August 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I electronically transmitted the foregoing Affidavit of Service by Certified Mail to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants for this matter.

/s/ Cesar A. Lopez-Morales
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