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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendants' Motion for Summary Judgment ("Def. MSJ") makes no effort to deny the pervasive, longstanding deficiencies at Havasupai Elementary School (HES). Defendants do not even seriously contest that they are operating HES in violation of federal statutes and regulations that set minimum standards for Bureau of Indian Education (BIE) schools. Defendants nevertheless seek to skirt accountability for HES's extensive deficiencies based on a series of tenuous legal arguments and unsustainable factual claims. Defendants' arguments miss the mark in every respect.

First, Defendants seek summary judgment on Plaintiffs' Administrative Procedure Act (APA) claims on the ground that, by pointing out so many flaws at HES, Plaintiffs have mounted an impermissible "broad, programmatic" attack. This perverse argument grossly mischaracterizes Plaintiffs' APA claims and confuses an attack on *many* specific instances of agency failure with an attack on an entire program. But the two species of claim are distinct, and even the cases Defendants cite acknowledge the commonsense point that "[g]overnment deficiencies do not become non-reviewable simply because they are pervasive." *City of New York v. U.S. Dept. of Defense*, 913 F.3d 423, 433 (4th Cir. 2019).

Second, Defendants insist that Plaintiffs cannot prevail on their claim that BIE has failed to provide reasonable accommodations to HES students with disabilities resulting from exposure to trauma in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) because Plaintiffs have not identified a reasonable accommodation that would enable such students to meaningfully access education at HES. Defendants are wrong. But at a minimum, the question whether a reasonable accommodation exists for students impacted by trauma is a disputed factual one that cannot be resolved in Defendants' favor at summary judgment.

Third, Defendants make the remarkable claim that they are under no obligation to implement basic regulatory requirements regarding the identification of and procedural protections for students with disabilities under Section 504 because such requirements apply *only* to BIE-funded schools operated by tribes and not to schools operated directly by BIE.

Defendants' argument is contrary to the text of the Department of Interior's (DOI's) regulations, but even if it were not, BIE and HES agreed to follow these regulatory requirements when they accepted funds from the Department of Education (DOE).

Finally, Defendants seek summary judgment against Student Plaintiffs Durell P. and Stephen C. on standing and mootness grounds. Defendants are wrong on both counts.

ARGUMENT

I. DEFENDANTS' ATTACK ON PLAINTIFFS' APA CLAIMS IS MISPLACED AND UNSUPPORTED

A. Plaintiffs Challenge Discrete Agency Actions and Failures to Act

Defendants attack Count I of the Third Amended Complaint (TAC), which alleges that Defendants have failed to act in violation of 5 U.S.C. § 706(1), as an impermissible "broad, programmatic" challenge that seeks to "refashion the entire administration of HES." Def. MSJ, ECF No. 182, at 5-6, 8.[1] This fundamentally mischaracterizes Plaintiffs' claims. Defendants are, by their own admission, legally bound to follow numerous regulations concerning the administration of HES. *See* Pls.' Separate Statement of Material Facts (Pl. SOF), ECF No. 185, ¶¶ 1-4. As Plaintiffs' motion for partial summary judgment illustrates, these regulations are mandatory and discrete, requiring, for example, that BIE-operated schools provide instruction in science, art, and physical education, employ certified counselors, and maintain a functioning library. *See* Pls.' Mot. for Summary Judgment (Pl. MSJ), ECF No. 184, at 4-9; 25 C.F.R. §§ 36.22-.23 & 36.42. As further illustrated by Plaintiffs' MSJ, Defendants have indisputably failed to act to implement numerous of these

[1] Defendants also cursorily move for summary judgment on Count II of the TAC on the ground that "the gravamen of Plaintiffs' claim . . . is the alleged pervasive failure to act, rather than 'specific, affirmative agency action' that must be set aside." Def. MSJ at 4. Not so. Although many of the deficiencies and failures at HES do constitute failures to act rather than affirmative BIE actions, this is not universally the case. Discovery has revealed numerous instances in which Defendants *have* acted at HES, but have done so in ways that are arbitrary and capricious. *See* Pls.' Response to Defs.' Statement and Supplemental Separate Statement of Material Facts (Pl. SSOF) ¶¶ 120-27. These actions must be set aside under Section 706(2), and Defendants' Motion under Count II should be denied.

discrete regulatory mandates. Pl. MSJ at 4-9. Plaintiffs will prove at trial numerous other ways in which Defendants have failed to act to implement mandatory, discrete regulations at HES. *See, e.g.*, Pl. SSOF ¶¶ 123, 128-29.

By challenging Defendants' discrete failures to act, Plaintiffs' Section 706(1) claims fall squarely within the well-recognized circumstances under which courts will compel agency action. *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2016), illustrates these circumstances well. The plaintiffs in *Vietnam Veterans* sued under Section 706(1) to compel the Army to notify former human test subjects of information that could impact their health, and to provide medical care for injury or disease caused by the testing. *Id.* at 1075. The regulation plaintiffs sought to enforce provided both that "'[c]ommanders have an obligation . . . to provide [research volunteers] with any newly acquired information that may affect their well-being when that information becomes available,'" and that "'[v]olunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research.'" *Id.* at 1076, 1080 (quoting regulation). The Ninth Circuit held that both regulatory provisions contained a "specific, unequivocal command" to the Army to take "discrete agency action," and thus that plaintiffs were entitled to relief under Section 706(1). *Id.* at 1078, 1081; *see also S. Carolina v. United States*, 907 F.3d 742, 747, 755 (4th Cir. 2018) (relief under Section 706(1) warranted where statute, 50 U.S.C. § 2566(c), provided that "the Secretary shall . . . remove from the State of South Carolina, for storage or disposal elsewhere," certain quantities of plutonium). *Vietnam Veterans* and *South Carolina* show that APA claims under Section 706(1) must challenge discrete failures to act to implement mandatory duties imposed by statute or regulation. This is exactly what Plaintiffs do here.

Defendants' argument to the contrary conflates a challenge to *many* failures to take mandatory, discrete action with a broad, programmatic attack on an entire regulatory scheme. Defendants apparently perceive an upper limit on the number of failures to take discrete action that a plaintiff may challenge. This makes no sense. Defendants' position would allow an agency to immunize itself from APA challenges simply by failing to

implement many discrete regulatory mandates at once—an illogical and perverse outcome. Fortunately, Defendants' position is not the law.

The cases Defendants cite to bolster their position either actively undermine it or are meaningfully distinguishable from the claims in this case. In *City of N.Y.*, for instance, the plaintiffs challenged the Department of Defense's (DOD's) failure to fully and accurately contribute to the National Instant Criminal Background Check System (NICS). 913 F.3d at 427-29. The plaintiffs—municipalities that, significantly, had no formal right to use the NICS database, but were afforded permissive access for limited purposes, *id.* at 428—did not seek to compel a discrete, mandated agency action or actions, as Plaintiffs do here, but rather sought to use the APA to compel DOD to comply fully with its overall reporting obligations under various federal statutes, *id.* at 429. In rejecting the municipal plaintiffs' attempt to achieve "full compliance" with a broad statutory scheme through an APA challenge, the Fourth Circuit did *not* hold that APA review is unavailable when an agency fails to take numerous discrete, mandatory actions. To the contrary, the Fourth Circuit expressly acknowledged that "ongoing failures to carry out discrete obligations can be subject to review," and that "*[g]overnment deficiencies do not become non-reviewable simply because they are pervasive*." *Id.* at 433. (emphasis added). Plaintiffs' claims in this case precisely embody this latter scenario, where APA review is available.

Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012) (en banc), is even further afield. The core question in that case was whether the Veterans' Judicial Review Act (VJRA) precluded judicial review of plaintiffs' claims that certain veterans' benefit determinations were being systematically and unreasonably delayed. *See id.* at 1016, 1019. The Ninth Circuit held that the VJRA—which generally bars judicial review of any Veterans' Administration (VA) decision related to an individual request for benefits—did indeed bar jurisdiction over plaintiffs' claims, because there was no way "for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests

properly." *Id.* at 1028.[2] Needless to say, the current case does not involve veterans' benefits and does not implicate the distinct jurisdictional bar imposed by the VJRA.

Finally, *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (en banc), and *Nevada Ass'n of Counties v. Department of Interior*, No. 3:13-cv-0712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015), are similar to one another, but distinct from Plaintiffs' claims here. Both cases involved attacks on an entire agency program, rather than a challenge to instances of discrete agency action or inaction. *See Sierra Club*, 228 F.3d at 567 ("Rather than limit their challenge to individual [timber] sales, [plaintiffs] merely used these sales as evidence to support their sweeping argument that the Forest Service's 'on-the-ground' management of the Texas forests over the last twenty years violates the NFMA."); *Nevada Ass'n of Ctys.*, 2015 WL 1130982, at *4 ("Plaintiffs do not allege a single AML or inventory that Federal Defendants failed to set. Nor do they identify a particular instance where Federal Defendants determined that AMLs had been exceeded, but failed to remove excess animals following that determination."). Here, by contrast and as explained above, Plaintiffs challenge specific instances of Defendants failing to act, or acting arbitrarily and capriciously, at a single BIE school and seek relief related directly to those failures. Pl. MSJ at 4-9; Pl. SSOF ¶¶ 120-29.

Defendants attempt to wedge Plaintiffs' APA claims into the framework of *Sierra Club* and *Nevada Ass'n of Counties* by citing select snippets of the TAC and Plaintiffs' discovery responses. *See* Def. MSJ at 6. This fails. While the scale and scope of

[2] While *Veterans for Common Sense* is irrelevant for the reasons stated above, Defendants also misstate its holding. Defendants suggest that the Ninth Circuit held that individual claims related to veterans' benefits *were* reviewable, whereas aggregated claims were not. *See* Def. MSJ at 5. The Ninth Circuit in fact held exactly the opposite, finding that claims based on average delays to benefits determinations were unreviewable precisely *because* the individual claims that made up those averages *were themselves unreviewable. See* 678 F.3d at 1030 ("Because the district court lacks jurisdiction to review the circumstances or decisions that created the delay in any one veteran's case, it cannot determine whether there has been a systemic denial of due process due to unreasonable delay."). More troublingly, Defendants suggest that the Ninth Circuit found "systemic" claims unreviewable *because* judicial review would require ongoing monitoring of the VA's operations. Def. MSJ at 5. In reality, *Veterans for Common Sense* rests squarely on the VJRA's jurisdictional bar.

Defendants' failures to comply with the regulations governing the provision of education for Native American children at HES means that the TAC's allegations undoubtedly *do* reveal a pattern of longstanding, comprehensive deficiencies, the fact remains that Plaintiffs challenge discrete actions and inaction. These "deficiencies do not become non-reviewable simply because they are pervasive." *City of N.Y.*, 913 F.3d at 433.[3]

B. The Court Is Empowered to Remedy Defendants' APA Violations

Defendants' further argue that Plaintiffs' APA claims must be dismissed because "[t]he APA Does Not Authorize Plaintiffs' Requested Relief." Def. MSJ at 7. Again, Defendants' argument rests on a mischaracterization of Plaintiffs' APA claims and requested remedy. Plaintiffs seek, and the Court is empowered to award, declaratory and injunctive relief finding that Defendants have failed to act (or acted arbitrarily and capriciously) to implement specific, discrete regulations set forth in 25 C.F.R., and ordering Defendants to take action to implement these specific regulations. Such relief is authorized by law.

5 U.S.C. § 706 provides that a "reviewing court *shall*" compel agency action unlawfully withheld or set aside agency action that is arbitrary and capricious. The term "shall" connotes a mandatory duty, *see, e.g.*, *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 778 (9th Cir. 2006), and the Ninth Circuit has held that this holds true for relief under Section 706, *see Vietnam Veterans*, 811 F.3d at 1081-82; *see also South Carolina*, 907 F.3d at 758 ("In § 706(1), as in most circumstances, 'shall' means 'shall.' . . . Consequently, a district court is not entitled to interpose its equitable judgment in granting relief pursuant to § 706(1)." (citation omitted)); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("Through § 706 Congress has stated unequivocally that courts *must* compel

[3] Defendants' citations to select sentences of Plaintiffs' Responses and Objections to Defendants' Interrogatories, *see* Def. MSJ at 6, fare no better. Defendants cite Plaintiffs' General Objections, which note that the specific incidents alleged in the TAC are not "an exhaustive list," Def. Ex. 16 at 3, and to Plaintiffs' description of potential relief, which uses the term "systemic relief," *id.* Ex. A at 1. Defendants fail to note that both of these citations refer to the TAC as a whole, which includes claims under additional statutes and regulations, including Section 504, where Plaintiffs do allege systemic failures and seek systemic relief.

agency action unlawfully withheld or unreasonably delayed." (emphasis added)). Accordingly, in a case where discrete agency action has been unlawfully withheld or is arbitrary and capricious, a reviewing court *must* act to compel action or set it aside.

Defendants' authorities are not to the contrary. While it is true that a court may not "enter 'general orders compelling compliance with broad statutory mandates.'" *Vietnam Veterans*, 811 F.3d at 1081 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004)), that is not what Plaintiffs seek.[4] Defendants' hand-waving references to "follow-the-law injunctions" and "extensive [court] supervision," Def. MSJ at 9 (internal quotation marks omitted), are beside the point where, as here, a plaintiff seeks to compel or set aside specific, discrete agency action. Defendants' assertion of no remedy is based solely on a mistaken, misleading characterization of what Plaintiffs claim and what they seek.

In any event, Defendants' complaints regarding remedy are premature when the Court has not yet made any findings regarding liability. The Court can and should determine liability first and consider questions regarding what precise remedy to order in light of that determination. *See United States v. Philip Morris USA, Inc.*, 319 F. Supp. 2d 9, 12 (D.D.C. 2004). Summary judgment as to Count I and II should be denied.

II. PLAINTIFFS HAVE IDENTIFIED REASONABLE ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES RESULTING FROM TRAUMA

As Plaintiffs argued in their MSJ, the four Student Plaintiffs with disabilities resulting from childhood trauma are entitled to accommodations under Section 504. *See* Pl. MSJ at 11-12, 16-17. Defendants do not dispute that these Student Plaintiffs have disabilities resulting from trauma, and that these disabilities impair their ability to meaningfully access

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[4] In arguing that Plaintiffs seeks an impermissible remedy, Defendants again distort both the TAC and Plaintiffs' Interrogatory Responses. *See* Def. MSJ at 8 & n.2. For the sake of brevity, the TAC's Request for Relief is phrased in general terms, but the requested relief clearly refers back to the specific regulations governing such matters as staffing, curricula, and services, that are referenced throughout the TAC. *See, e.g.*, TAC Request for Relief ¶ 3(a)-(d). Similarly, Plaintiffs' Interrogatory Responses respond to Interrogatories directed to the TAC as a whole, which, as noted previously, *see supra* note 3, contain claims under additional statutes and regulations and seek additional remedies.

education at HES. Def. MSJ at 10. Nor can they dispute that the BIE has failed to identify these students, much less offer *any* accommodations to address their disabilities. Pl. MSJ at 16-19. Instead, Defendants seek summary judgment on Count IV on the ground that Plaintiffs' requested accommodations for trauma-related disabilities under Section 504 are not reasonable. Their arguments are unavailing—especially at summary judgment.[5]

A. Plaintiffs Have Provided Evidence of a Reasonable Accommodation for Student Plaintiffs' Disabilities Resulting from Trauma

A plaintiff bringing a Section 504 claim bears the initial burden of producing evidence of a reasonable accommodation. *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816 (9th Cir. 1999). Once it is met, the burden then shifts to the defendant to prove that the accommodation is not reasonable. *Id.* at 817. Plaintiffs have met their initial burden of producing evidence that a trauma-informed school is a reasonable accommodation. *See* Pl. MSJ at 16-17. The expert reports of Dr. George Davis, Dr. Tami DeCoteau, and Dr. Noshene Ranjbar described the need for a trauma-informed environment for students with disabilities resulting from childhood adversity, and for Durell P., Stephen C., Taylor P., and Moana L. in particular. *Id.*; Pl. SOF ¶¶ 94-101. The need for trauma-informed practices is well-documented in academic papers dating back decades. Pl. SSOF ¶ 130. Plaintiffs' trauma experts testified that they were aware of or had worked on trauma-informed programs in a variety of schools, including schools that serve Native American students, and in other settings. *Id.* ¶ 131. Even Defendants' witness on trauma testified that "trauma-informed programming is beneficial to all students." *Id.* ¶ 135. BIE set a goal of setting up trauma-informed schools as part of its written strategic plan, and is already implementing trauma-informed practices at some of its schools. *Id.* ¶¶ 133-34. This evidence far exceeds

[5] Plaintiffs affirmatively moved for summary judgment on the ground that Defendants are violating Section 504 by failing to provide *any* accommodation for Student Plaintiffs with disabilities resulting from childhood trauma, despite the existence of reasonable accommodations, including trauma-informed schools. Pl. MSJ at 16-17. Plaintiffs did not seek summary judgment on the availability of any particular accommodation, which Plaintiffs submit is an issue for trial.

Plaintiffs' burden of production and shifts the burden to Defendants to prove that the accommodation is not reasonable.

Defendants cannot meet their burden because the accommodation is reasonable or, at a minimum, there is a factual dispute about reasonableness that precludes summary judgment. Defendants characterize Plaintiffs' requested accommodations as "emerging practices." Def. MSJ at 10. But, at the absolute best for Defendants, that is a disputed fact. In fact, Defendants have it backwards: there can be no genuine factual dispute that trauma-informed practices are well-established and tested. The evidence supporting trauma-informed systems dates back decades, and such systems have been implemented by numerous school districts, public programs, and other initiatives. Pl. SSOF ¶¶ 130-31. BIE evidently sees value in such accommodations, as it has implemented trauma-informed practices in some of its schools. *Id.* ¶ 133. This is significant because evidence that a defendant offers a particular accommodation to individuals other than the plaintiff supports the conclusion that the accommodation is reasonable. *See, e.g.*, *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098-99 (9th Cir. 2010); *Wong*, 192 F.3d at 820.[6]

The primary evidence Defendants attempt to offer to meet their burden is the declaration of Teresia Paul. That declaration is not admissible. In her declaration, Ms. Paul purports to rebut opinions contained in the expert report of Dr. Noshene Ranjbar. These rebuttal opinions were not timely disclosed and must be excluded. Ms. Paul was disclosed as a rebuttal expert on March 29, 2019 and deposed on May 3, 2019. At her deposition, Ms. Paul testified that she had reviewed the expert reports of *only* two of Plaintiffs' experts, Drs. Davis and DeCoteau. Pl. SSOF ¶ 136. Ms. Paul did not mention Dr. Ranjbar at all and indeed confirmed that she did not expect to testify at trial about anything beyond what was

[6] There is no requirement that a reasonable accommodation be supported by an "established consensus," "a longitudinal population-based study," or a "randomized controlled trial." *Cf.* Def. SOF ¶¶ 1, 3; Def. MSJ at 12. Defendants cite no authority for such a requirement. And trauma-informed practices have been subject to rigorous evaluation, including randomized controlled trials. *See* Pl.'s Resp. to Defs.' SOF # 3.

discussed at her deposition. *Id.* ¶ 137. Ms. Paul's opinions regarding Dr. Ranjbar's report remained undisclosed until Defendants moved for summary judgment on May 31, 2019.

Federal Rule of Civil Procedure 37(c)(1) requires exclusion of evidence, such as expert testimony, that a party did not timely disclose pursuant to Rule 26(a) or (e). The exclusionary sanction is automatic unless the late-disclosing party proves that the untimely disclosure was substantially justified or harmless. *See Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *Leland v. Cty. of Yavapai*, No. CV-17-8159-PCT-SPL (DMF), 2019 WL 1547016, at *3 (D. Ariz. Mar. 18, 2019), *report and recommendation adopted by* 2019 WL 1531875 (Apr. 9, 2019). The late disclosure of Ms. Paul's opinions was neither. Plaintiffs served Dr. Ranjbar's expert report on March 1, 2019, over two months before Ms. Paul's deposition—ample time for Ms. Paul to have developed any rebuttal opinions regarding Dr. Ranjbar's report. Worse, Defendants base a substantial portion of their MSJ on Plaintiffs' Section 504 claims on expert opinions they withheld during discovery—the epitome of prejudice. Plaintiffs respectfully request that the Court exclude Ms. Paul's declaration under Rule 37(c)(1).

Absent Ms. Paul's declaration, Defendants can only speculate that making HES trauma-sensitive would require a "substantial modification" of the school. Def. MSJ at 11. "Mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement." *Mark H.*, 620 F.3d at 1098 (internal quotation marks omitted).

Even with Ms. Paul's declaration, the most Defendants could do is create a disputed issue of fact as to whether "financial or administrative burdens" justified denying the accommodation. Def. MSJ at 13. That would not be sufficient to meet their burden, and certainly would not entitle Defendants to summary judgment.

Nor is it sufficient to argue policy and suggest that a ruling denying summary judgment would have consequences for BIE and other school systems. *See* Def. MSJ at 12. On that score, Defendants cite *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999), and *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126 (C.D. Cal. 2015), for

the proposition that "[n]o court has found that Section 504 requires a school to provide an accommodation such as Plaintiffs seek here." Def. MSJ at 12. Neither case supports that proposition. *Zukle* is not even on topic. The case is about a medical student who failed a number of requirements and asked for schedule changes and extra time to complete her rotations. 166 F.3d at 1050. The accommodations have nothing to do with trauma or any relief requested here. And the court in *P.P.* did not order trauma-sensitive accommodations because it was evaluating a motion for a preliminary injunction. 135 F. Supp. 3d at 1144-45. In that posture and because of "the standards . . . for issuance of mandatory injunctions" at that preliminary stage, the court determined that it did not need to evaluate the propriety of the accommodations. *Id.* at 1148-49. It left the question open. *Id.* at 1143, 1144, 1150.

B. Systemic Relief Is Available and Required

Contrary to Defendants' cursory assertions, Plaintiffs need accommodations that are not available in the context of individualized education programs. *See* Def. MSJ at 12-13 & n.6. Systemic relief is available under Section 504, and there is at least a genuine factual dispute as to whether it is necessary here. In general, the scope of injunctive relief should match the scope of the violation it remedies. *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976). This principle holds for class actions and individual or multi-plaintiff actions alike: Relief is "not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). If an injury results from "violations of a statute . . . that are attributable to policies or practices pervading the whole system," then "[s]ystem-wide relief is required" even for cases that are not class actions. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1072-73 (9th Cir. 2010). Accordingly, courts have permitted, and granted, claims for systemic relief under Section 504, whether or not plaintiffs are part of a class. *See, e.g.*, *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259-61 (D.C. Cir. 2008); *Christopher S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 1207 (9th Cir. 2004); *Gray v. Golden Gate Nat'l Rec. Area*, 279 F.R.D. 501, 503 (N.D. Cal. 2011); *Huezo v. L.A. Cmty. Coll. Dist.*, 672 F. Supp. 2d 1045, 1051, 1059-68 (C.D. Cal. 2008).

Systemic relief is necessary because the violations at issue here are system-wide. As BIE deponents admitted, HES has no policies regarding the identification of trauma-related disabilities, and it makes no effort to accommodate students with trauma. Pl. SOF ¶ 102. These school-wide failures require school-wide relief. *See Armstrong*, 622 F.3d at 1072-73. Again, at a minimum, there are genuine issues of material fact.

III. THE REGULATORY SCHEME GOVERNING BIE SCHOOLS MANDATES COMPLIANCE WITH 34 C.F.R. § 104.32 AND 34 C.F.R. § 104.36

A. 43 C.F.R. Part 17, Subpart B Applies to Schools and Requires Compliance with 34 C.F.R. §§ 104.32 and 104.36

Contrary to Defendants' argument, DOI regulations address nondiscrimination in BIE-operated elementary and secondary education schools. Defendants admit that a DOI regulation, 43 C.F.R. part 17, subpart B requires compliance with the two DOE regulations alleged in the TAC, 34 C.F.R. §§ 104.32 and 104.36. Def. MSJ at 15. They argue, however, that subpart B does not apply to BIE-*operated* schools. That argument does not withstand scrutiny. Subpart B applies to "each recipient of Federal financial assistance from the Department of the Interior and to each program or activity that receives such assistance." 43 C.F.R. § 17.201. The DOI regulations define "program or activity" to specifically include a local education agency (LEA) as defined in 20 U.SC. § 7801. 43 C.F.R. § 17.202(q)(2)(ii). Congress has declared that BIE-funded schools are LEAs, 20 U.S.C. § 7801(30)(C), and BIE's regulations treat BIE-*operated* schools like HES as BIE-*funded* schools, 25 C.F.R. § 39.2. Under those regulations, "bureau-funded school means: (1) *Bureau school*; (2) A contract or grant school; or (3) A school for which assistance is provided under the Tribally Controlled Schools Act of 1988." *Id.* (emphasis added). HES is a bureau school, so it is an LEA. BIE has also specifically described HES as an LEA. Pl. SSOF ¶ 138.

This commonsense interpretation of the DOI regulations is consistent with the preamble to 43 C.F.R., part 17, jointly signed by DOI and other agencies. *See* 68 Fed. Reg. 51334-01, 2003 WL 22020275 (Aug. 26, 2003). The preamble highlights the importance of coordinating DOI's Section 504 regulations with DOE's regulations on the same subject: "Because we believe that it is particularly important to maintain consistency among Federal

agencies with respect to these subparts, we have, with a few minor exceptions, followed [DOE's] lead when amending these sections for the other eight agencies" with similar regulations, including DOI. *Id.* Indeed, to conclude otherwise would mean that students with disabilities attending BIE-operated schools had fewer rights than students with disabilities attending tribally controlled schools. That would be inconsistent with a longstanding executive order mandating that "The Federal Government must hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to educational programs and activities of State and local governments, and to private institutions receiving federal financial assistance." Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000).

B. BIE Is Bound by DOE Regulations Because It Accepts DOE Funds

Defendants admit that LEAs receiving funds from DOE must comply with DOE's Office of Civil Rights regulations, *see* Def. MSJ at 14, and their position that HES is not an LEA is incorrect for reasons explained above. Even apart from any concession, it is clear that DOE regulations apply to HES because it accepted DOE funds. Under 34 C.F.R. § 104.31, certain DOE regulations (including Section 104.32 and .36) apply to any elementary or secondary "education programs or activities that receive Federal financial assistance" or "recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities." The definitions in the regulations make clear this covers HES and BIE. A "program or activity" includes "all the operations of … a *local education agency* . . . system of vocational education, *or other school system*." 34 C.F.R. § 104.3(k) (emphasis added). Even if HES were not an LEA (it is), then this would apply because BIE operates a "school system." A "recipient" includes "*any public or private agency*, institution, organization, or other entity . . . to which Federal financial assistance is extended directly or through another recipient." *Id.* § 104.3(f) (emphasis added). And "Federal financial assistance" (quite logically) includes "[f]unds." *Id.* § 104.3(h).

Contrary to Defendants' argument, Plaintiffs do not argue that one agency can acquire the power to direct other agencies by simply claiming that power in its own regulations.

Instead, the point is that BIE has accepted funds from DOE for the purposes of operating a public elementary and secondary school program, and DOE can condition those funds on compliance with certain requirements. BIE schools are eligible to receive numerous sources of DOE funds. Pl. SSOF ¶ 139-43. To receive those funds, BIE must make assurances to DOE that it will comply with the various requirements of the funding sources. *Id.* ¶ 144. In 2016, HES received at least four funding streams from the DOE and was eligible to receive more. *Id.* ¶ 140. HES has since applied for at least one new funding source from DOE to provide after school and summer programs. *Id.* ¶ 142. In its 2018-2019 BIE Schoolwide Program Plan, HES indicated it received at least five sources of DOE monies. *Id.* ¶ 143. The DOE monitors the BIE as a recipient of its funds, and has even put BIE under a Corrective Action Plan for failing to comply with its requirements for recipients of DOE money. *Id.* ¶ 144.

That leaves Defendants with the argument that a federal agency cannot be a recipient of "Federal financial assistance." Def. MSJ at 14. That argument fails too. As noted above, the DOE regulations containing the term "Federal financial assistance" contemplate that a recipient of such assistance could include "*any* public or private agency." 34 C.F.R. § 104.3(f) (emphasis added). Defendants may wish that the definition said "except federal agencies," but it does not. Defendants' reliance on *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 612 (1986), is badly misplaced. That case holds that a *service* provided *by* a federal agency—in that case, air traffic control—is not "Federal financial assistance" to a party—such as an airline—that benefits from the service. *Id.* at 612. The analogous claim here would be that BIE is providing federal financial assistance to the Havasupai tribe by operating HES—but that is not the claim in this case. The reasoning of *Paralyzed Veterans* is inapposite; there can be no question that *funds* provided by DOE are a form of financial assistance. *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979), a lightly reasoned forty-year-old case about a different agency's regulations, does not warrant a different conclusion. That case had nothing to do with education, an area in which Congress has long recognized the special importance of nondiscrimination by LEAs

and schools. *See, e.g.*, 42 U.S.C.A. § 2000d-6.[7] As Defendants admit, Section 504 provides specific protections for educational programs, including those operated by the federal government. Def. MSJ at 13.

IV. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER BOTH DURELL P.'S AND STEPHEN C.'S CLAIMS

A. Durell P. Has Standing

Defendants' argument that Durrell P. lacks standing confuses standing with mootness. Defendants acknowledge that standing must be based on the facts "as they exist at the time the complaint was filed." *Id.* at 15 (quoting *Am. Civil Liberties Union of Nev. v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006)). They then make the baseless assumption that standing must be based on the facts that exist at the time the *operative* complaint was filed. But the case they cite makes clear that standing depends on whether the claim was "redressable when the [plaintiff] filed suit" in the first instance. *ACLU*, 471 F.3d at 1015; *see also Morongo Band of Mission Indians v. Cal. State Bd. Of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) ("In determining federal court jurisdiction, we look to the original, rather than to the amended, complaint.").

Durell P. was enrolled in seventh grade at HES and thus had standing at the time this suit was filed on January 23, 2017. ECF No. 17 ¶ 19. Any subsequent change in his circumstances does not bear on his standing.[8] Rather, the Court's ongoing jurisdiction is a question of mootness, on which Defendants bear the burden of demonstrating "that there is no effective relief remaining that the court could provide." *See Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017). "That burden is always 'heavy,' as a case is not moot

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[7] The other case Defendants cite is also about whether airlines receive federal financial assistance. *See Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1213 (9th Cir. 1984). Like *Paralyzed Veterans*, and contrary to Defendants' suggestion, it does not address whether a federal agency can be a recipient of federal financial assistance.

[8] The Court's ruling dismissing five students for lack of standing does not suggest otherwise. The factual basis for those students' dismissal—that they did not attend HES—was present when the original complaint was filed. *See* ECF No. 17 ¶¶ 24, 27, 29, 32, 34. The Court therefore need not revisit its prior ruling to reject Defendants' standing argument here.

where any effective relief may be granted." *Id.*

B. Neither Durell P.'s nor Stephen C.'s Claims Are Moot

In arguing that Durrell P.'s and Stephen C.'s claims are moot, Defendants ignore the many forms of relief Plaintiffs seek that would continue to benefit Durell P. and Stephen C. As Defendants recognize, Durell P.'s and Stephen C.'s claims for relief would become moot only if they "could no longer benefit from such relief." Def. MSJ at 16; *see also West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000) ("[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.").

Both Durell P. and Stephen C. would continue to benefit from the relief requested in various ways. For example, Durell P. and Stephen C. would continue to benefit from any remedy that addresses HES's failure to provide requested records and assistance with transition to high school. *See* Pl. SOF ¶ 115. In addition, both students continue to be eligible to attend BIE schools and will accordingly benefit from any remedy clarifying that the DOE regulations implementing Section 504 apply to the BIE, and from any remedy addressing the BIE's system-wide failure to comply with Section 504. Finally, all Student Plaintiffs continue to pursue their claims for compensatory education on the grounds articulated in their Opposition 7to Defendants' Motion to Dismiss, *see* ECF No. 76 at 4, and intend to preserve this argument for appeal.

What is more, Durell P. and Stephen C. would benefit from any remedy that relieves the diversion of NADLC's resources. As alleged in the TAC, NADLC is a Protection and Advocacy Organization whose mission is to advocate for the rights of Native Americans with disabilities. TAC ¶ 20. "NADLC has devoted significant organizational resources to identifying and counteracting Defendants' practices" and has had to "divert[] its scarce resources from other efforts." *Id.* ¶ 22. Durell P. and Stephen C. are clients of NADLC, Pl. SSOF ¶ 145, and as Native American students with disabilities who continue to be eligible for special education services will benefit if NADLC no longer must divert resources to address the ongoing failures at HES.

Finally, even if the Court finds that Durell P.'s and Stephen C.'s claims are moot, the Court should not dismiss them because the claims are "capable of repetition, yet evading review." That exception to mootness applies when "(1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012). Both are satisfied here.

First, to hold otherwise would leave students in upper grades like Durell P. and Stephen C. with two years or less to pursue their claims. This period is insufficient to allow for complete judicial review. *See Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855 (9th Cir. 1999) (finding two years insufficient to resolve a claim). Adopting Defendants' position would make it functionally impossible for these students to bring an effective challenge even though they were eligible to attend HES when the case was filed and have been subject to the most longstanding deprivations given their tenure at HES.

Second, although neither Durell P. nor Stephen C. will attend HES next year, they remain eligible to attend BIE-operated schools. As such, there is a reasonable expectation that, absent a remedy, they will face similar deficiencies in other schools within the BIE system, particularly with respect to the DOE regulations Defendants are claiming do not apply to BIE-run schools. *See Honig v. Doe*, 484 U.S. 305, 318-19 (1988) (20-year-old student's challenge to exclusionary disciplinary policies was not moot despite moving out of district whose policies were at issue, given defendants' "insistence that all local school districts retain residual authority" to implement such policies).

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court deny Defendants' Motion for Partial Summary Judgment.

DATED: July 1, 2019

MUNGER, TOLLES & OLSON LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On July 1, 2019, I served true copies of the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, RESPONSE TO DEFENDANTS' SEPARATE STATEMENT AND SUPPLEMENTAL STATEMENT OF MATERIAL FACTS AND EXHIBITS THERETO** on the interested parties in this action as follows:

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically transmitted the foregoing document 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/ Aileen Beltran