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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' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## MEMORANDUM OF POINTS AND AUTHORITIES

Defendants, the Department of the Interior ("DOI") and the Bureau of Indian Education (collectively referred to as "BIE"), respectfully oppose Plaintiffs' Motion for Partial Summary Judgment ("Pls.' SJ Mem."), ECF No. 184 (redacted) & ECF No. 187 (sealed). BIE requests that the Court deny Plaintiffs' motion for summary judgment as to Counts I, III, IV, V, and VI of the Third Amended Complaint ("TAC"), ECF No. 128, and, for the reasons set forth in BIE's Motion for Partial Summary Judgment ("Defs.' SJ Mem."), enter judgment in favor of BIE on Counts I, II, IV, V, and VI. ECF No. 182.

With respect to Plaintiffs' APA Section 706(1) claim in Count I, in addition to the reasons set forth in BIE's opening memorandum, Plaintiffs are not entitled to summary judgment because they have failed to identify a proper basis for entering judgment in their favor. Specifically, they have neither stated which type of agency action they seek to compel—action that is "unlawfully withheld" or action that is "unreasonably delayed"—nor applied the appropriate governing law. With respect to Count III, the Court should decline to grant summary judgment because Defendants are in the process of providing Plaintiffs with all the relief they seek. With respect to Count IV, Plaintiffs are not entitled to summary judgment because establishment of schoolwide trauma-informed practices is not a reasonable accommodation required by Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Finally, as to Counts V and VI of the TAC, summary judgment for Plaintiffs is improper because the Department of Education regulations that implement Section 504 do not apply to DOI and, thus, those Counts fail as a matter of law.

## FACTUAL BACKGROUND

Defendants incorporate by reference the factual background set forth in Defendants' Motion for Partial Summary Judgment, ECF No. 182 at 2-3.

## LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where claims call for judicial review under the APA, "summary judgment is an

appropriate mechanism for deciding the legal question" presented. *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985).

## ARGUMENT

### I. ASSUMING COUNT ONE IS ACTIONABLE UNDER THE APA, PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT ONE.

Plaintiffs' arguments for summary judgment on Count One[1] in fact demonstrate—as noted in Defendants' opening brief—that Plaintiffs' APA claims are not actionable, and summary judgment should be granted in favor of BIE. *See* Defs.' SJ Mem. at 3-7. In Count One, Plaintiffs allege generally that BIE has violated Section 706(1) of the APA by "fail[ing] to take action required to provide basic education[.]" TAC at 56; *see also* 5 U.S.C. § 706(1). Section 706(1) allows courts to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). Judicial review under Section 706(1) is limited to "discrete agency actions"; it does not provide a cause of action to challenge an agency's operation of an entire program in an effort to effectuate wholesale, programmatic change. *See Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 62-63 (2004). But that is precisely what Plaintiffs seek in Count One. Although they recite the "discrete agency action" requirement, Plaintiffs do not explain how their aggregated allegations of regulatory violations—the sum of which clearly constitutes a systemic challenge to BIE's administration of HES across almost all operational programs—are exempt from the Supreme Court's prohibition against APA review of programmatic challenges. *See generally* Defs.' SJ Mem. at 3-7; *see also SUWA*, 542 U.S. at 62-63; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

Because Plaintiffs have failed to identify a discrete agency action, the Section 706(1) claim is not actionable under the APA, and the Court should enter summary judgment in favor of BIE on Count One without addressing the merits of Plaintiffs' summary judgment motion as to that Count. If the Court determines that Count One is somehow actionable, however, then the Court should deny Plaintiffs' summary judgment motion for the reasons discussed herein.

[1] Plaintiffs have narrowed Count One to the following regulations: 25 C.F.R. §§ 36.20, 36.22, 36.23, 36.40, 36.41, 36.42, 36.43. Pls.' SJ Mem. at 4-9.

**A. Plaintiffs Disregard the Legal Standards Governing Count One.**

As the parties seeking summary judgment on the merits of Count One, Plaintiffs must establish that they are "entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (discussing summary judgment burdens). At a minimum, this requires Plaintiffs to explain why the relevant legal standards governing Count One entitle them to a favorable judgment. *See, e.g.*, *Celotex Corp.*, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion[.]"). Plaintiffs have not satisfied this basic requirement.

Section 706(1) of the APA allows courts to compel agency action that is "unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). Plaintiffs limit their arguments on Count One to the vague assertion that BIE has "[f]ailed to [a]ct to [i]mplement" various regulations in purported violation of Section 706(1). *See* Pls.' SJ Mem. at 4-9. However, Plaintiffs do not specify which of the two distinct categories of agency action they seek to compel under Section 706(1)—"unlawfully withheld" or "unreasonably delayed"—and thus disregard the different legal standards that govern the two categories. 5 U.S.C. § 706(1); *see also South Carolina v. United States*, 907 F.3d 742, 759 (4th Cir. 2018) ("[A] claim challenging an 'unreasonably delayed' agency action is sufficiently distinct from a claim contesting 'unlawfully withheld' agency action to differentiate those provisions.") (quoting 5 U.S.C. § 706(1)). Plaintiffs' failure to identify the legal basis for their Section 706(1) claim forecloses a finding that Plaintiffs are entitled to summary judgment on Count One. *See Celotex Corp.*, 477 U.S. at 323.

In any event, Plaintiffs' Section 706(1) claim could only be treated as a possible challenge to "unreasonably delayed" agency action because the applicable regulations contain no deadlines for compliance, and BIE's implementation of those regulations is an ongoing "work in progress[,]" as opposed to a final refusal to act or a determination that BIE is not required to act. *See Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (citation omitted) (differentiating unlawfully withheld and unreasonably delayed claims on the basis of final actions versus "on-going program[s]"); *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) (distinguishing unreasonable delay claims from claims alleging "that agency inaction violates a clear duty to take

a particular action by a date certain"); *Org. for Comp. Markets v. USDA*, 912 F.3d 455, 463 (8th Cir. 2018) (considering whether agency delay is unreasonable and stating that "[t]his is not a case where an agency has failed to take action in the face of multiple unambiguous commands"). To the contrary, BIE acknowledges its duties under the relevant regulations and has taken actions to comply with those regulations. *See generally* Defs.' Resp. Pls.' SOF. Thus, any alleged failure by BIE to implement the regulations is not due to "agency recalcitrance[,]" *see Thomas*, 828 F.2d at 794, but instead reflects BIE's ongoing efforts to fulfil its responsibilities in a timely manner.

Section 706(1) claims alleging unreasonable delay are evaluated using a six-factor balancing test, originally devised by the D.C. Circuit in *Telecommunications Research and Action Center v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984). *See also In re A Community Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (stating that the Ninth Circuit applies the *TRAC* factors for APA claims of agency delay). The so-called *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason,"
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason,
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[,]
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority,
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay, . . . and
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

750 F.2d at 80 (citations omitted). These factors are the touchstone for determining the merits of an APA claim for agency delay, yet they are not once referenced in Plaintiffs' summary judgment motion. Instead, Plaintiffs rely on the substantive content of the DOI regulations they claim BIE has failed to implement as the relevant legal principles governing the merits of their agency delay claim. *See* Pls.' SJ Mem. at 3-9. But the APA—not the underlying

regulations—governs judicial review of agency action. And the APA does not provide any bright-line rule for evaluating agency delay claims under Section 706(1). *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) ("[T]here is no *per se* rule as to how long is too long[.]"). To the contrary, even if the Court concludes that BIE's efforts are legally insufficient under the relevant regulations, the Court must still apply the *TRAC* factors in order to determine whether injunctive relief is appropriate under Section 706(1). *See TRAC*, 750 F.2d at 79-80; *see also In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) ("[A] finding that delay is unreasonable does not, alone, justify judicial intervention."); *W. Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1294 (D. Utah 2017) (applying *TRAC* and finding that the agency's efforts, "though legally insufficient, . . . weigh against a finding of unreasonable delay").

To that end, there are entire categories of material facts omitted from Plaintiffs' Statement of Material Facts ("Plaintiffs' SOF"), ECF Nos. 185 (redacted) & 187 (sealed), which the Court must consider and which weigh heavily against a finding of unreasonable delay under Section 706(1). These include, namely, facts regarding BIE's administrative limitations, including its limited resources, a shortage of housing for Havasupai Elementary School ("HES") staff, safety concerns including assaults and death threats directed at HES teachers, difficulties recruiting and retaining qualified staff, as well as the unique challenges associated with operating an elementary school in the bottom of the Grand Canyon. *See* Defs.' Resp. Pls.' SOF ¶¶ 120-56.[2] Indeed, an agency's practical and administrative realities, and the complexity of the agency's duties, frequently tip the *TRAC*-balancing scale away from a finding of unreasonable delay. *See In re Pesticide Action Network N. Am.*, 532 F. App'x 649, 651 (9th Cir. 2013) (considering "the complexity of the issue" when deciding whether agency delay is unreasonable); *Quest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1239 (10th Cir. 2005) (one factor courts consider in evaluating agency delay is "administrative difficulties bearing on the agency's ability to resolve an issue" and "complexity of the task envisioned"); *In re Int'l Chemical Workers Union*, 958 F.2d at 1150 (considering agency delay and stating that "the court should give due consideration in the

[2] In accordance with Local Rule 56.1(b), BIE has identified these additional facts that otherwise preclude judgment in separately numbered paragraphs at the end of its responses to Plaintiffs' SOF. *See* Defs.' Resp. Pls.' SOF ¶¶ 120-56.

balance to . . . practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources") (citation omitted); *In re Barr Labs*, 930 F.2d at 76 (courts "have no basis for reordering agency priorities. The agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way"); *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) ("If the court finds an absence of bad faith, it should then consider the agency's explanation, such as administrative necessity, insufficient resources, or the complexity of the task confronting the agency."); *W. Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d at 1292 (discussing the "practical realities restrict[ing]" the agency's ability to timely comply with its statutory duties, which "weigh strongly against a finding of unreasonable delay"). By ignoring these critical facts, Plaintiffs' SOF cannot be relied upon as a basis for determining the merits of the Section 706(1) claim.

Because Plaintiffs have neither specified the nature of their Section 706(1) claim nor identified the governing law, they have failed to inform the court of the basis for their motion for summary judgment. *See Celotex Corp.*, 477 U.S. at 323. Accordingly, summary judgment in favor of Plaintiffs as to Count One should be denied.

**B. There are Genuine Disputes of Material Fact as to the Merits of Count One.**

Assuming the Court concludes that the Section 706(1) claim is cognizable, and despite Plaintiffs' disregard for the law governing that claim, Plaintiffs are still not entitled to summary judgment because there are genuine disputes of material facts underlying Count One. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

Plaintiffs' SOF presents a one-sided view that BIE has consistently—and for an unspecified period of time—failed to comply with each regulation listed in Plaintiffs' brief. *See* Pls.' SJ Mem. at 4-9. That view is not only factually untrue, but it gives a fundamentally incomplete account of the past and present circumstances at HES. BIE acknowledges that it is responsible for ensuring that HES implements 25 C.F.R. part 36. Defs.' Resp. Pls.' SOF ¶¶ 1-3. BIE further acknowledges that there are contradictions within and between many of its

witnesses' testimonies, and that some record evidence supports Plaintiffs' arguments as to some of the relevant regulations for some periods of time. But that is precisely why summary judgment on the merits of Count One is improper: there are genuine disputes of material fact as to BIE's implementation of nearly every regulation that Plaintiffs cite. *See* Defs.' Resp. Pls.' SOF ¶¶ 5-7, 10, 12-16, 21, 23. The legal issues presented by each regulation, accompanied by citations to their underlying factual disputes, are shown in the following table.

| | |
|---|---|
| 25 C.F.R. §§ 36.20(b)(1)-(b)(3) | • Whether BIE teaches and/or maintains the primary native language of students. *See* Defs.' Resp. Pls.' SOF ¶¶ 6-7.<br>• Whether the curriculum includes aspects of the native culture in all curriculum areas. *See* Defs.' Resp. Pls.' SOF ¶ 10.<br>• Whether the school assesses the learning styles of its students. *See* Defs.' Resp. Pls.' SOF ¶ 12. |
| 25 C.F.R. §§ 36.22(a)(5), (a)(6), (b)(1), (b)4), 25 C.F.R. §§ 36.23(b)(5), (b)(7), (c)(5) | • Whether BIE provides physical education instruction in the elementary and junior high/middle school instruction programs. *See* Defs.' Resp. Pls.' SOF ¶ 14.<br>• Whether BIE provides fine arts instruction in the elementary and junior high/middle school instruction programs. *See* Defs.' Resp. Pls.' SOF ¶ 12.<br>• Whether BIE integrates career awareness in its elementary curriculum. *See* Defs.' Resp. Pls.' SOF ¶ 15.<br>• Whether BIE integrates health education into its curriculum for elementary and junior high/middle school instruction programs. *See* Defs.' Resp. Pls.' SOF ¶ 16. |
| 25 C.F.R. §§ 36.40(a)(2)(ii)-(iv) | • Whether HES has appropriate library facilities. *See* Defs.' Resp. Pls.' SOF ¶¶ 21-23. |
| 25 C.F.R. § 36.41(a) | • Whether HES has had a textbook review committee. *See* Defs.' Resp. Pls.' SOF ¶ 25. |
| 25 C.F.R. § 36.42(b)(1) | • Whether BIE has made provisions for a part-time professional counselor. *See* Defs.' Resp. Pls.' SOF ¶¶ 28-29. |
| 25 C.F.R. § 36.43 | • Whether BIE offers a well-balanced student activities program. *See* Defs.' Resp. Pls.' SOF ¶¶ 31-32. |

Additionally, several of Plaintiffs' factual assertions are irrelevant to their Section 706(1) claim and are therefore immaterial. *See Liberty Lobby*, 477 U.S. at 248 ("Factual disputes that are

irrelevant or unnecessary will not be counted."). Consider, for instance, paragraphs six and seven of Plaintiffs' SOF. Those paragraphs allege, respectively, "HES has not consistently employed a native language and culture instructor" and, "[w]hile HES currently employs a native language and culture instructor, that individual does not consistently provide native language and cultural instruction[.]" Defs.' Resp. Pls.' SOF ¶¶ 6-7. Although it is unclear what Plaintiffs mean by "consistently," the facts asserted in these paragraphs are immaterial because there is no legal requirement that HES "consistently employ[] a native language and culture instructor" or "consistently provide native language and cultural instruction[.]" *Id.*; *see also* 25 C.F.R. § 36.20. Likewise, paragraph eight of Plaintiffs' SOF—"[t]he current native language and culture instructor is not a credentialed teacher[]"—is immaterial, as there is no law requiring a credentialed teacher in that position. *See* Defs.' Resp. Pls.' SOF ¶¶ 8; 25 C.F.R. § 36.20(b).

For these reasons, should the Court find that Plaintiffs' APA claims are actionable, it should not enter summary judgment in favor of Plaintiffs on Count One.

## II. SUMMARY JUDGMENT ON PLAINTIFFS' SECTION 504 CLAIMS IS UNWARRANTED.

Plaintiffs are not entitled to summary judgment on Counts III and IV of the TAC. Counts III and IV allege generally that BIE has violated Section 504 by failing to provide a system enabling students with disabilities, including student Plaintiffs impacted by childhood adversity, to access public education. TAC ¶¶ 257-85; *see also* 29 U.S.C. § 794. Section 504 prohibits discrimination on the basis of disability under "any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794. For the reasons already explained, *see* Defs.' SJ Mem. at 13-15, Plaintiffs erroneously apply to the Defendants the Department of Education regulations implementing Section 504 *for recipients of Federal financial assistance* (*see* Pls.' SJ Mem. at 10, 13, 15), when, in fact, Defendants are Executive agencies conducting their own programs and activities. For the reasons stated therein, this distinction is paramount to the determination of what requirements apply to the Defendants and the specific relief available to Plaintiffs. Plaintiffs' claims in this section that the Defendants have violated Section 504 by failing to

comply with these regulations should therefore be rejected.

In any event, the Court should decline to grant summary judgment on Plaintiffs' Section 504 claims because Defendants are presently acting to provide HES students with the "meaningful access" required by Section 504. First, Defendants are addressing the claims of individual students. Plaintiffs have identified six of the named student plaintiffs as having disabilities and as having been denied meaningful access to an education at HES, in violation of Section 504. Pls.' SJ Mem. 9-12. As set forth in the Declaration of BIE's Acting Section 504 Coordinator, Marcy Oliver, regardless of whether Defendants failed to provide these students with meaningful access in the past (*see id.* 13-15), Defendants are diligently working to ensure that such access is provided in the future, beginning with the start of the 2019-2020 school year. *See* Defs.' Opp'n Exh. 22, Declaration of Marcy Oliver ("Oliver Decl.") ¶ 9. Specifically, as to four of the named student plaintiffs with alleged disabilities (Taylor P., Freddy P., Moana L., and Olaf D.), BIE has instituted the process for ensuring that these students are evaluated for Section 504 eligibility and has scheduled multidisciplinary team meetings for [redacted] (or, with regard to Moana L., will shortly schedule such a meeting) to review those evaluations and determine Section 504 eligibility. *Id.* ¶ 9(c)-(f). (Until a team has made such a determination, the student is not considered to have a disability for Section 504 purposes.) The remaining two named student plaintiffs with disabilities, Stephen C. and Durell P., will no longer be enrolled in HES for the next school year and therefore, as Defendants argued in their motion for partial summary judgment, these students' claims against HES are moot. *See* Defs.' SJ Mem. at 15.

As the evaluation process regarding the four named student plaintiffs who plan to attend HES next school year is ongoing, there would be no further relief this Court could grant at this point, as Defendants are doing exactly what Plaintiffs seek to have them do. Given the fluid situation and developing nature of Defendants' efforts, therefore, summary judgment is not necessary or appropriate at this point as to the Section 504 claims relating to the individual students. *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) (a district court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong").

Second, Defendants are also addressing Plaintiffs' complaints regarding development of a system to ensure that all disabled students at HES are provided with meaningful access to an education as appropriate. *See* TAC ¶ 26. Defendants are diligently working to develop such a system, including written policies and procedures. *See* Defs.' Opp'n Exh. 21, Declaration of Tony L. Dearman, ("Dearman Decl.") ¶¶ 3-6; Defs.' Opp'n Exh. 22, Oliver Decl. ¶¶ 3-8. Specifically, the Director of BIE has directed BIE's Acting Section 504 Coordinator, Marcy Oliver, to work with the DOI, Office of Civil Rights, to develop formal Section 504 policies and procedures for BIE-operated schools based on the DOI regulations 43 C.F.R. Part 17, Subpart E—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of the Interior ("DOI's regulations"). Defs.' Opp'n Exh. 21, Dearman Decl. ¶ 3; Defs.' Opp'n Exh. 22, Oliver Decl. ¶ 3. Although BIE is just beginning this process, Director Dearman has also directed that the training of BIE administrators, teachers, and staff on Section 504 principles begin as soon as possible. Defs.' Opp'n Exh. 21, Dearman Decl. ¶ 5; Defs.' Opp'n Exh. 22, Oliver Decl. ¶ 5. These trainings will discuss requirements mandated by statute and by DOI's regulations, and best practices being used by schools across the country. Defs.' Opp'n Exh. 21, Dearman Decl. ¶ 5; Defs.' Opp'n Exh. 22, Oliver Decl. ¶ 5.

Ms. Oliver has accordingly begun the process of developing the necessary compliance documents and guidance, and has scheduled trainings open to all BIE administrators, teachers, and staff throughout the summer. Defs.' Opp'n Exh. 22, Oliver Decl. ¶¶ 3-5, 7. In addition, she will direct all BIE-operated Schools to designate a Section 504 Coordinator and will schedule a webinar for all Section 504 Coordinators in August. *Id.* ¶ 6. As a result of the foregoing, Ms. Oliver anticipates that, all BIE-operated schools, including HES, will be prepared to properly identify students in need of accommodations mandated by Section 504 and to develop suitable 504 Plans for such students. *Id.* ¶ 8.

As to Plaintiffs' Count IV, seeking systemic change in the form of schoolwide implementation of trauma-informed practices, Pls.' SJ Mem. at 16, Defendants showed in their summary judgment memorandum that this requested accommodation, stemming from

aspirational, developing practices, would require a fundamental and substantial modification of HES and impose an undue burden on BIE. Defs.' SJ Mem. at 10-13. Therefore, it is not a reasonable accommodation with the meaning of Section 504. *See Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999). Plaintiffs' motion for summary judgment on this Count should therefore be denied, and summary judgment granted instead for Defendants.

## III. THE DEPARTMENT OF EDUCATION REGULATIONS THAT IMPLEMENT SECTION 504 DO NOT APPLY TO DOI.

Plaintiffs argue that DOI regulations implementing Section 504, *see* 43 C.F.R. Part 17, mandate HES's compliance with Department of Education ("DOE") regulations implementing Section 504, *see* 34 C.F.R. §§ 104.32 and 104.36, which govern "each recipient of Federal financial assistance from the Department of Education[,]" 34 C.F.R. § 104.2; Pls.' SJ Mem. at 17. However, for the reasons already explained, *see* Defs.' SJ Mem. at 13-15, neither HES nor DOI is a "recipient of Federal financial assistance," 43 C.F.R. § 17.201, because HES is instead "conducted and/or administered and/or maintained" by DOI, *see* 43 C.F.R. § 17.502. DOI regulations mandate compliance with the DOE regulations implementing Section 504, 43 C.F.R. §§ 17.200-17.280 ("Subpart B"), only by programs or activities "rec[eiving] Federal financial assistance," 43 C.F.R. § 17.201. In contrast, programs or activities "*[c]onducted* by the Department of the Interior," like HES, are governed by DOI's regulations implementing Section 504, 43 C.F.R. §§ 17.501-17.570 ("Subpart E") (emphasis added). Hence, the DOE regulations at issue do not apply. Indeed, DOI's regulations implementing Section 504 do not include the "[l]ocation and notification" and "[p]rocedural safeguard[]" requirements contained in the corresponding DOE regulations, 34 C.F.R. §§ 104.32, 104.36. Plaintiffs therefore cannot prevail on Counts V and VI of the TAC alleging a violation of DOE regulations.

## CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for partial summary judgment.

Dated: July 1, 2019

Respectfully submitted,

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