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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' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Plaintiffs' briefing on summary judgment serves to highlight that there are numerous factual disputes relating to the services rendered at Havasupai Elementary School ("HES"). The situation at HES changes constantly, sometimes on a daily basis, as the Bureau of Indian Education ("BIE") works hard to address the challenges that inevitably arise from operating a school in the bottom of the Grand Canyon. For purposes of Defendants' motion, however, the Court should set aside those disputes and resolve the legal questions presented.

Defendants are entitled to summary judgment on Counts I and II because they give rise to an impermissible programmatic challenge under the Administrative Procedure Act ("APA"). With respect to Count IV, Defendants did not violate Section 504 of the Rehabilitation Act by failing to transform HES into a trauma-informed school to address the trauma-related disabilities of four student plaintiffs. With respect to Counts V and VI, Defendants could not violate the Department of Education's ("DOE") regulations implementing Section 504 because they do not apply to HES, a federally-operated program subject to Department of the Interior's ("DOI") regulations. And finally, the Court lacks subject-matter jurisdiction over the now-moot claims of Durell P. and Stephen C., which are not capable of repetition yet evading review.

## ARGUMENT

### I. COUNTS I AND II ARE NOT ACTIONABLE UNDER THE APA.

Most parties do not go as far as openly asserting that they are challenging the administration of a program and seeking systemic relief; Plaintiffs have expressly admitted as much. *See, e.g.*, Third Am. Compl. ("TAC") ¶ 251, ECF No. 128; Exhibit A to Pls.' Resp. to Defs.' First Set of Interrog. (attached as Ex. 24). Programmatic challenges are often disguised through the aggregation of multiple claims that purport to exemplify an agency's systemic failure to comply with its legal obligations. By seeking review of an agency's conduct over an extended period of time and across different areas, the aggrieved party asks the Court to oversee a program's day-to-day operations and superintend its wholesale correction. This is the tack pursued in Counts I and II: whether the Bureau of Indian Education ("BIE") has complied with 13 different regulations implementing the Indian Education Act—each containing numerous legal obligations—in administering HES over the last approximately ten years.

1. Although Plaintiffs repeatedly assert that Defendants mischaracterize their APA claims, the Court need not defer to Defendants' characterization. In cases involving programmatic challenges, such as this one, "the requested remedy tells the real story." *City of N.Y. v. U.S. Dep't of Def.*, 913 F.3d 423, 434 (4th Cir. 2019). And here, Plaintiffs' sweeping prayer for relief speaks volumes. *See* Defs.' MSJ, at 7-9 & n.2, ECF 182.[1] Plaintiffs argue that their requested relief "is phrased in general terms" "[f]or the sake of brevity," but "refers back to specific regulations governing such matters as staffing, curricula, and services." Pls.' Opp'n at 7 n.4, ECF No. 190. But whether or not the prayer for relief refers back to regulations, the nature of the claims remains the same: the aggregation of numerous flaws that could only be remedied through extensive reform. *See* TAC ¶¶ 239-40, 251-52; *id.* at Relief ¶¶ 1-4. While such reform may be desirable as a policy matter, "wholesale improvement" of the school *must* take place in the "offices of the Department" of the Interior "or the halls of Congress," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990), not in a courtroom, where corrections under the APA are made *only* on a "case-by-case" basis through review of *discrete* actions, *id.* at 894.

When given a further opportunity to "[i]dentify the *specific* relief" requested and "*specific* actions or measures that . . . Defendants should take," Plaintiffs replied that the relief "*at minimum* would include," *inter alia*, a "fully staffed [school] with sufficient qualified teachers and related service providers to meet its duties and obligations *under the Indian Education Act*" and "an oversight and accountability *system*" to "ensure[ ] compliance with the requirements *of the Indian Education Act*." Ex. 24, Exhibit A to Pls.' Resp. at 1 (emphasis added).[2] Plaintiffs further responded that, although it is up to Defendants to identify the specific actions that they must take to fully comply with their regulations, Plaintiffs' expert reports provide "examples of

[1] Plaintiffs argue that any discussion of remedy is "premature when the Court has not yet made any findings regarding liability." Pls.' Opp'n at 7. But that argument is especially meritless in the APA context, where the requested remedy often informs the question of whether the APA claim even challenges cognizable "agency action" for purposes of 5 U.S.C. § 702. This exact argument was made by the plaintiffs in *City of N.Y. v. Dep't of Def.*, *see* Dec. 11, 2018 Oral Argument at 20:51-24:18, https://www.courtlistener.com/audio/60509/city-of-new-york-v-dod (last visited July 15, 2019), and was rejected by the Court of Appeals, 913 F.3d at 434.

[2] These references to the Indian Education Act relate directly to the APA claims in Counts I and II and do *not* implicate the Section 504 claims, thereby contradicting any assertion that Plaintiffs only seek systemic relief with respect to Counts III-VI. *Cf.* Pls.' Opp'n at 6 n.3.

policies, practices, and programs that could address the issues identified in the complaint." *Id.*, Pls.' Resp. at 16-17. Plaintiffs' position turns the APA on its head in at least two significant ways. *First*, the "aggrieved" party seeking judicial review and not the agency, 5 U.S.C. § 702, must identify the discrete acts that must be "compel[led]" or "set aside" to ensure compliance with a particular legal obligation, *id.* § 706(1)-(2). And, *second*, the systems, policies, practices, and programs advocated by Plaintiffs do not meet § 551(13)'s definition of "agency action" that could be compelled under § 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004).

In short, Plaintiffs are improperly using the APA as a vehicle to challenge BIE's administration of HES over time and to enforce the Indian Education Act's regulatory scheme.[3]

2. Plaintiffs attempt to distinguish cases involving programmatic challenges on the basis that they "challenge specific instances of Defendants failing to act, or acting arbitrarily and capriciously." Pls.' Opp'n at 5. That effort falls flat, as it is based on nothing more than say-so.

As an initial matter, Plaintiffs fail to address *Lujan*, the seminal case on programmatic challenges relied upon by Defendants. There, the Supreme Court held that, notwithstanding how "rampant" is the "violation of the law," an agency "'program'—consisting principally of the *many individual actions* referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA." 497 U.S. at 891, 893 (emphasis added). The specific failures in administering the land withdrawal review program—*e.g.*, failures to revise land use plans, submit recommendations to Congress, consider multiple use, provide required notice, and provide environmental impact statements—were not reviewable when aggregated for correction. *See id.* at 891. Similarly here, Plaintiffs "cannot seek wholesale improvement" of the school by aggregating failures in administering HES. *Id.*

Also, Plaintiffs' arguments are nearly identical to those rejected in *City of N.Y.* There, three cities complained about the Department of Defense's ("DOD") conceded failure to comply with *specific* reporting obligations in 34 U.S.C. § 40901(e)(1)(C)-(D). *City of N.Y.*, 913

[3] Plaintiffs have developed a record consisting of more than 30,000 pages that touches upon almost every single aspect of the school's operation over the past ten years—*e.g.*, teacher training, funding, textbook selection, efforts to recruit, hire, and retain personnel, student handbooks, student discipline, achievement data, and even day-to-day decisions relating to classroom instruction. It is hard to imagine a challenge more programmatic than this one.

F.3d at 428-29. The cities argued that what they sought—"to compel [DOD's] more thorough compliance" with its reporting obligations, *id.* at 427—was "not programmatic because each specific act that [the agency] has failed to perform is discrete when considered on its own," *id.* at 433. But the court did not fall for this "aggregation" argument because "any limit on programmatic assessment would be rendered meaningless if such an argument prevailed." *Id.* The same conclusion applies here. The operation of a school necessarily consists of the "aggregation of individual decisions, many of which are required by law," *id.*, and thus an aggrieved party cannot aggregate them to compel more thorough compliance with a regulatory scheme and refashion a program's administration.[4]

Defendants certainly do not seek to place an "upper limit" on the number of discrete actions that could be reviewed. Pls.' Opp'n at 3-4. Plaintiffs are correct that a pervasive failure to take a discrete act is reviewable, but such acknowledgment "does nothing to obviate the fact that a discrete action is wholly lacking here." *City of N.Y.*, 913 F.3d at 433. As *Lujan* and *City of N.Y.* make clear, an aggrieved party cannot aggregate numerous decisions and actions over time to enforce legal compliance that could only be achieved through extensive programmatic reform. Here, "[t]here is simply no way to achieve" the result that Plaintiffs desire "without wholesale improvements" to HES and BIE, "which take time and require . . . expertise" across different areas. *City of N.Y.*, 913 F.3d at 434.

Plaintiffs' APA claims also bear a close resemblance to those in *Sierra Club v. Peterson*, 228 F.3d 559, 565-70 (5th Cir. 2000) (en banc), *Nevada Association of Counties v. Department of Interior*, No. 3:13-cv-712-MMD, 2015 WL 1130982, at *2-*4 (D. Nev. Mar. 12, 2015), *aff'd*, 686 Fed. App'x 407 (9th Cir. 2017); *Defenders of Wildlife v. Flowers*, No. 02-CV-195, 2003 WL 22143270, at *1-*2 (D. Ariz. Aug. 18, 2003), *aff'd*, 414 F.3d 1066 (9th Cir. 2005). The organizations in those cases also sought to challenge administrative practices and used specific instances of failures to

[4] Plaintiffs note that the cities in *City of N.Y.*, "significantly, had no formal right" to use the admittedly deficient background check database. Pls.' Opp'n at 4. But that point is "significant" only for purposes of a *different* APA requirement *not* addressed here: whether the alleged "agency action" at issue determined any "rights and obligations." *City of N.Y.*, 913 F.3d at 434-35.

act as evidence of systemic legal noncompliance. Those courts correctly refused to engage in such programmatic undertakings foreclosed by the APA.[5]

3. The only two cases that Plaintiffs cite in support of their position are completely distinguishable and, if anything, illustrate why Counts I and II are not actionable under the APA. Those cases involved an agency's failure to perform a circumscribed, discrete act required by law. *See S. Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018) (removal of precise quantities of plutonium required by statute); *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068 (9th Cir. 2016) (hereinafter, "*VVA*") (specific duty to warn and provide medical care under certain circumstances required by field regulation). Those plaintiffs did not seek to enforce a wide array of legal obligations and did not ask the Court to evaluate day-to-day operations over an extended period of time in an effort to improve a program. More fundamentally, those cases did not involve the aggregation strategy pursued by Plaintiffs here and rejected in cases like *City of N.Y.*[6]

Ultimately, if Counts I and II were to proceed, federal judges could quickly find themselves being asked to oversee the administration of hundreds of federally-operated schools in the BIE or DOD. The APA forecloses that outcome.[7]

## II. COUNT IV DOES NOT IDENTIFY A REASONABLE ACCOMMODATION.

Plaintiffs have failed to establish that Count IV presents a *prima facie* case of

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[5] Defendants withdraw their reliance on *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012), as they agree with Plaintiffs that the decision is inapposite. However, Defendants note that the district court and panel decisions did find that the veterans did not challenge cognizable agency action under the APA, but the court en banc did not address that conclusion because it held that there was no jurisdiction under another statute. *See id.* at 1026 n.15.

[6] Plaintiffs' reliance on *VVA* is misplaced for another reason. *VVA* mainly addressed a different question: whether a regulation contained a nondiscretionary duty giving rise to a legal obligation, that is, whether the duties to warn and provide medical care were legally required. 811 F.3d at 1076-81; *id.* at 1083-85 (Wallace, J., concurring and dissenting in part).

[7] Count II fails for another reason. Plaintiffs acknowledge that a claim under 5 U.S.C. § 706(2) could only be invoked to challenge affirmative acts, and not failures to act. Pls.' Opp'n at 2 n.1. The problem is that Count II of the TAC expressly challenges "the *failures* listed in paragraph 240." TAC ¶ 252 (emphasis added). At no point does Count II identify affirmative actions that should be set aside. And although Plaintiffs now assert that "[d]iscovery has revealed numerous instances in which Defendants have acted at HES," Pls.' Opp'n at 2 n.1, Plaintiffs cannot ask the Court to set aside actions that have yet to be identified. In any event, the assertion confirms Plaintiffs' desire for the Court to review the school's day-to-day operations and "set aside" "numerous" unidentified acts, including those revealed through discovery, by the agency. *Id.*

discrimination under Section 504 of the Rehabilitation Act, as they have not satisfied their "initial burden of producing evidence" that a reasonable accommodation exists and has been denied. *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816 (9th Cir. 1999) (citation omitted); *accord Quinones v. Potter*, 661 F. Supp. 2d 1105, 1125 (D. Ariz. 2009).

1. In Count IV, Plaintiffs identify "a trauma-informed school" as an accommodation to address the alleged trauma-related disabilities of certain student plaintiffs. Pls.' Opp'n at 8; TAC Relief ¶ 3i. For an accommodation to be appropriate, it must address the effects of the disabilities, *see Wong*, 192 F.3d at 818, which here are these student plaintiffs' difficulties "learning, reading, concentrating, thinking, and/or communicating," TAC ¶ 276. To attempt to make this showing, Plaintiffs rely on the opinions of Dr. George Davis, Dr. Tami DeCoteau, and Dr. Noshene Ranjbar. *See* Pls.' Opp'n at 8. But neither Dr. Davis nor Dr. DeCoteau has examined any of the students within the past few years, and they do not have opinions on what would be of current benefit to those students specifically. *See* Ex. 25, Davis Dep. at 14:8-25, 30:2-12; Ex. 26, DeCoteau Dep. 33:10-16; 34:15-18. And, although Dr. Ranjbar examined some of the students exposed to trauma, she does not explain how a trauma-informed school would enable these students to overcome any limits they may have with respect to learning, reading, concentrating, thinking, and/or communicating. *See* Ex. 27, Ranjbar Dep. at 25-27. She makes a leap from her finding that the students' disabilities are a result, in part, of trauma, to the conclusion that trauma-informed approaches will help and does not explain how any of those approaches will help each of the Count IV students, each of whom has different disabilities and life experiences.

Accordingly, Plaintiffs have failed to produce evidence demonstrating that the *systemic* accommodation of a "trauma-informed school" would in fact allow each of these *individual* students to obtain meaningful access to education at HES. *See Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999). Being able to obtain *equal* access to a basic education ultimately requires an individualized assessment of the students' needs, *see* Defs.' MSJ at 11-12, which is why educational needs are often addressed through individualized plans and not

through an entire transformation of the school.[8] Plaintiffs still cannot cite a case in which denial of systemic relief in the context of educational programming has resulted in a Section 504 violation. *Cf.* Pls.' Opp'n at 11.

2. Even if Plaintiffs have identified an appropriate accommodation, Defendants have demonstrated beyond dispute that the accommodation would require a fundamental and substantial modification of HES's program and would be unduly burdensome to implement. *See* Defs.' MSJ, Ex. 22, Teresia M. Paul Decl. ¶¶ 5-8 (describing the burden of Plaintiffs' proposed accommodation on HES); *see also* Ex. 28, Paul Dep. at 72:20-22, 103:14-104:4 (same).

Plaintiffs argue that the Court should disregard the declaration of Teresia Paul, BIE's Student Health Program Specialist, because her testimony consists of "rebuttal opinions [that] were not timely disclosed." Pls.' Opp'n at 9. Plaintiffs misstate events, however. Defendants did disclose Ms. Paul pursuant to Federal Rule of Civil Procedure 26(a)(2)(C) as an expert rebuttal witness expected "to rebut the testimony of plaintiffs' putative experts and offer her opinion that while trauma-informed programming is beneficial to all students, the program proposed by plaintiffs' experts would not be feasible to implement at HES due to the school's unique needs/challenges; and there is not one exclusive way to incorporate trauma-informed practices specifically for HES." Ex. 29, Defs.' Disclosures Pursuant to Rule 26(a)(2)(C) Concerning Paul Decl. ¶ 3. Following this disclosure, Plaintiffs deposed Ms. Paul and questioned her extensively on whether it was feasible to implement the type of trauma-informed approach at HES envisioned by Drs. Davis and DeCoteau. *See* Ex. 28, Paul Dep. 102:10-118:9.[9] Accordingly, Plaintiffs received sufficient notice of the substance of Ms. Paul's testimony as it pertained to these experts' recommendations. In any event, given the nature of the disclosure made and the opportunity to depose Ms. Paul, Plaintiffs were not prejudiced by any supposed

[8] Plaintiffs apparently confuse the (laudable) policy goal of better educational outcomes with Section 504's purpose. Section 504 guarantees disabled individuals *equal access* to federal programs—not "equal results." *Alexander v. Choate*, 469 U.S. 287, 304 (1985).

[9] Admittedly, at her deposition, Ms. Paul did not state that she had read Dr. Ranjbar's report or that she planned to offer any rebuttal opinions specifically with regard to that report. However, Dr. Ranjbar's report and recommendations are essentially no different than those of Drs. Davis and DeCoteau, and Plaintiffs do not identify any specific way in which Ms. Paul's testimony is "new" or unanticipated.

failure to more fully describe Ms. Paul's anticipated testimony. *See Sepe v. Gordon Trucking, Inc.*, 755 F. App'x 668, 670 (9th Cir. 2019) (failure to disclose physicians as experts and provide reports was harmless because party was aware of both witnesses).

Finally, instituting a trauma-informed school is no easy task. It must be done with proper and prior study and evaluation, as BIE has realized and is currently doing. *See* Ex. 28, Paul Dep. 88:18-93:17, 107:4-108:15. BIE is currently conducting a pilot study involving a handful of its schools to determine whether to adopt such an approach and, if so, how best to design and implement it. *See id.* at 147:16-23. And, on a different but related track, Defendants are currently working to develop formal Section 504 policies and procedures for BIE-operated schools and train BIE administrators, teachers, and staff on Section 504's requirements. *See* Defs.' Opp'n, Ex. 21, Dearman Decl. ¶¶ 3-6, ECF No. 195-22; *id.*, Ex. 22, Oliver Decl. ¶¶ 3-8, ECF No. 195-23. These steps will ensure that BIE and HES have a system in place to assure that all students are provided meaningful access to education, while awaiting further assessment of a more systemic trauma-informed approach.

This Court should not hold that an already-struggling school in the bottom of the Grand Canyon violated Section 504 for failing to establish a system that a few institutions have only commenced to adopt in recent years as part of an ongoing development in the field of education.

## III. DOE REGULATIONS IN COUNTS V AND VI DO NOT APPLY TO HES.

Plaintiffs make two arguments as to why HES must comply with DOE's regulations in Counts V and VI. They argue that HES is subject to DOI's regulations in 43 C.F.R. part 17, subpart B ("Subpart B"), which in turn require compliance with DOE's regulations. *See* Pls.' Opp'n at 12-13. Or, in the alternative, that DOE's regulations apply to HES directly because it is a recipient of "Federal financial assistance." *See id.* at 13-14. Both arguments lack merit.

1. The first argument is a convoluted syllogism created from whole cloth: (1) Subpart B applies to a "program or activity" receiving "Federal financial assistance from [DOI];" (2) A "program or activity" in Subpart B includes a "local education agency" ("LEA"); (3) Congress has defined LEAs to include BIE-funded schools; (4) a DOI regulation defines BIE-funded

schools to include BIE-operated schools; *ergo*, (5) a BIE-operated school must comply with DOE's Section 504 regulations. Pls.' Opp'n at 12. This contrived effort falls apart at the seams.

*First,* a "program or activity" under Subpart B (43 C.F.R. §§ 17.200-17.280) is an entity that is "extended Federal financial assistance" by DOI, *id.* §§ 17.201, 17.202(q)(2)(ii). That stands in stark contrast to a "program or activity" under Subpart E (43 C.F.R. §§ 17.501-17.570), which is "conducted and/or administered and/or maintained by" DOI, 43 C.F.R. § 17.502. HES is not subject to Subpart B for the basic reason that it is a school conducted, administered, and maintained by DOI and, thus, it is subject to Subpart E. *See* Defs.' MSJ at 14-15.[10]

*Second*, notwithstanding the distinction between Subparts B and E, Plaintiffs argue that BIE's regulations treat BIE-operated schools in the same manner as schools that receive Federal financial assistance (like tribally-operated schools). *See* Pls.' Opp'n at 12. And since federally-assisted schools are subject to DOI's Subpart B regulations, it must follow, Plaintiffs contend, that BIE-operated schools like HES are also subject to Subpart B. But Plaintiffs' argument rests on the mistaken premise that "BIE's regulations treat BIE-operated schools like HES as BIE-funded schools" *for purposes of Section 504*. *Id.* (citing 25 C.F.R. § 39.2) (emphasis omitted).

The regulation cited by Plaintiffs, 25 C.F.R. § 39.2, defines the term "Bureau-funded school" to include both BIE-operated and tribally-operated schools. But that regulation has nothing to do with Section 504 or DOI's regulations interpreting *that* statute. DOI's Section 504 regulations are in 43 C.F.R. part 17, not 25 C.F.R. part 39 ("The Indian School Equalization Program"). Ironically, 25 C.F.R. § 39.2 is entitled "What definitions apply to the terms *in this part*?," referring of course to part 39 of Title 25. Therefore, when § 39.2 defines the term "Bureau-funded school" it is in the context of the No Child Left Behind Act, not Section 504.

*Third*, Plaintiffs' argument that Subpart B applies to *all* schools ignores the clear dichotomy between Subparts B and E. Plaintiffs do not explain the purpose of Subpart E under their theory, which cannot be treated as meaningless as it was promulgated to maintain a distinction that exists in Section 504: programs receiving Federal financial assistance and

[10] Also, as discussed further below, a "program or activity" that is operated by the Federal Government cannot also be a recipient of "Federal financial assistance" for purposes of Section 504 or its implementing regulations. *See infra* at 10-12.

programs conducted by an executive agency. *See* 29 U.S.C. § 794(a). Just as new language in a statute must be given a "real and substantial effect," *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016), so too DOI's Section 504 regulations must be interpreted as written.

In conclusion, HES is not subject to Subpart B's requirements, but rather to Subpart E's.

2. Plaintiffs' alternative argument, while perhaps simpler, is equally flawed. They argue that DOE's regulations bind HES *directly* because it is a "program or activity" receiving "Federal financial assistance," notwithstanding that it is operated by the Federal Government. Plaintiffs do not cite any authority for this *ipse dixit* assertion, which fails for at least three reasons.

*First,* Plaintiffs do not cite any authority for the proposition that a federally-operated program could also be a recipient of Federal financial assistance under Section 504. Nor could they. That conclusion would eviscerate the textual distinction between programs operated by federal agencies and programs receiving financial assistance from those agencies. *See* 29 U.S.C. § 794(a). It would also contradict the legislative history, which makes it unmistakably clear that "[a]ctivities wholly carried out by the United States with Federal funds," such as a federally-owned and operated school, "are not included in the list of federally assisted programs. Such activities, being wholly owned by, and operated by or for, the United States, *cannot fairly be described as receiving Federal 'assistance.*'" 110 Cong. Rec. 13380 (1964) (emphasis added), *cited in U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 612 (1986); *see also* 2 C.F.R. § 200.40(a) (Office of Management and Budget guidance defining "Federal financial assistance" as "assistance that *non-Federal* entities receive or administer" (emphasis added)).[11]

*Second*, every single BIE-operated school receives funds transferred from DOE to BIE. If it were true that a federally-operated program could also be federally assisted, as Plaintiff mistakenly contends, then all BIE-operated schools would have to comply with DOE's Section 504 regulations. But that conclusion again would render meaningless the distinction between DOI's Subpart B, which enforces DOE's regulations *ex proprio vigore*, and Subpart E, which does

[11] *Paralyzed Veterans* was cited for its discussion of Section 504's legislative history, which makes clear that a federally-operated program cannot be federally assisted. Plaintiffs' discussion of the holding is a red herring. They do not cite an example of a program that is both federally operated and assisted. And Plaintiffs' only response to *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979), is to say that the case was "lightly reasoned" and did not involve education, both less-than-principled grounds for distinction. Pls.' Opp'n at 14.

not. Relatedly, the term "Section 504," as used in Subpart E, applies to "programs or activities conducted by Executive agencies and *not to federally assisted programs*." 43 C.F.R. § 17.503 (emphasis added). That definition alone shows that a "program" cannot be both federally operated and assisted for purposes of DOI's regulations *and* Section 504. *Id.*

*Third*, Plaintiffs do not cite any authority demonstrating that DOE can direct DOI's compliance with its Section 504 regulations. Plaintiffs point to the fact that 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." Pls.' Opp'n at 14. That argument is at best misleading. The oversight referred to by Plaintiffs, *see id.*, pertains to DOI's compliance with the Individuals with Disabilities in Education Act ("IDEA") and the Elementary and Secondary Education Act ("ESEA"), *not* Section 504. Under IDEA and ESEA, Congress expressly authorized DOE to oversee DOI's compliance with certain statutory requirements. *See* 20 U.S.C. §§ 1411(h)(2), 7824(a)(2). Congress did not do that in Section 504.

As Plaintiffs concede, DOE cannot unilaterally bind DOI through DOE's regulations. *See* Pls.' Opp'n at 13. For the regulations to be enforceable against DOI, one of three things would need to happen. DOI could expressly accept the regulations as binding on BIE-operated schools. *Cf.* 43 C.F.R. § 17.220 (directing non-BIE-operated schools to comply with DOE's regulations). Or Congress could expressly condition the transfer of funds to DOI on its compliance with DOE's Section 504 regulations. *Cf.* 20 U.S.C. § 1411(h)(2) (conditions DOI's entitlement to funds under IDEA on compliance with DOE's implementing regulations). Or the President could direct DOI to comply with DOE's Section 504 regulations. *Cf.* Exec. Order No. 13,160 Guidance, 66 Fed. Reg. 5398, 5404 (Jan. 18, 2001) (BIE "should comply with [DOE's] guidance on the provision of language services" to limited English proficient students).

None has happened here. To the contrary, DOI's regulations do *not* direct BIE-operated schools to comply with DOE's Section 504 regulations. And far from authorizing DOE to condition funds on DOI's compliance, in Section 504, Congress authorized *each* agency to promulgate its own implementing regulations, which DOI has done. *See* Defs.' MSJ at 14.[12]

[12] In fact, DOE has *never* attempted to condition the transfer of funds upon DOI's compliance with DOE's Section 504 regulations. *See* Ex. 30, Dearman Fact Dep. 95:14-18.

Relatedly, "executive departments and agencies may comply with the Executive Order" 13,160 on Nondiscrimination in Federally Conducted Education Programs "by ensuring that all of their education . . . programs are operated in accordance with *their* Section 504 regulations governing federally conducted activities," not with DOE's Section 504 regulations. 66 Fed. Reg. at 5404 (identifying BIE-operated schools as examples of federally-operated programs).

Plaintiffs cannot do what the author of the regulations, DOE, could not otherwise do: enforce them against BIE-operated schools. Thus, Counts V and VI fail as a legal matter.

## IV. THE CLAIMS OF DURELL P. AND STEPHEN C. ARE MOOT.

Durell P. and Stephen C. have experienced a change in *factual* circumstances that moots all of their claims.[13] Specifically, they completed eighth grade and thus would not benefit from any *prospective* relief related to the deficiencies that they sought to vindicate in their claims—namely, the longstanding and systemic failures in BIE's administration of HES, which by Plaintiffs' own account, are the crux of each cause of action in the TAC.

1. "It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory or injunctive relief against a school's action or policy," *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 983 (9th Cir. 2011), because "a student's graduation moots claims for [such prospective] relief," *Doe v. Madison Sch. Dist.* No. 321, 177 F.3d 789, 798 (9th Cir. 1999); *see also DeFunis v. Odegaard,* 416 U.S. 312, 316-19 (1974) (per curiam). Plaintiffs attempt to avoid this settled proposition of law by hypothesizing about relief that is unrelated to the alleged deficiencies at HES. That strategy does not work because a graduate cannot conjure up relief that does not address the deficiencies at the school in order to argue that his legal challenge to those deficiencies is not moot. *Cf. Doe*, 177 F.3d at 798.

That is the case, for example, with Plaintiffs' argument that Durell P. and Stephen C. would benefit from assistance transitioning to high school, *see* Pls.' Opp'n at 16. Under Counts

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[13] Plaintiffs do not deny that, at the time the TAC was filed, Durell P. was not eligible to receive educational services at HES. *See* Pls.' Resp. to Defs.' Statement of Suppl. Material Facts ¶ 10, ECF No. 192. They nonetheless argue that Durell. P. has standing to bring his claims because he was enrolled when the original complaint was filed in January 2017. Pls.' Opp'n at 15. The Court need not resolve this issue because, regardless of standing, the claims of Durell P. and Stephen C. are moot.

I and II, the Court could either compel a discrete act specified by law that was unlawfully withheld or unreasonably delayed at HES, or set aside an unlawful discrete act taken by the agency at HES. *See* Defs.' MSJ at 7-8. And under Counts III-IV, transition planning to high school has no bearing on the alleged disability-based discrimination at HES. As such, Plaintiffs' made-up relief is unrelated to the legal claims in the TAC.

Plaintiffs' proposed "remedy [of] clarifying that the DOE regulations implementing Section 504 apply to the BIE," Pls.' Opp'n at 16, also would have no foreseeable impact on Stephen C. and Durell P.'s actual injuries at HES. More fundamentally, there is *no* claim for declaratory relief that DOE's Section 504 regulations apply to BIE. Rather, the claim is for Defendants having violated those regulations at HES. *See* TAC ¶¶ 286-307. The relief sought in Counts V and VI applies to "parents of students at [HES]," TAC Relief ¶ 3j, and would not provide any meaningful relief to students who are no longer eligible to attend, other than perhaps "psychic satisfaction [which] is not an acceptable Article III remedy," *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998). In any event, Plaintiffs' argument does not explain how the APA and Section 504 claims by Durell P. and Stephen C. remain live.

Finally, Plaintiffs' argument that they have preserved their already-dismissed claims for compensatory education is irrelevant as preservation for appeal does not confer jurisdiction over the now-moot claims of Stephen C. and Durell P. And, the argument that Stephen C. and Durell P. would benefit from relief addressing the alleged diversion of NADLC's resources goes to NADLC's standing, not the mootness of the students' claims. Even then, Durell P. and Stephen C. are no longer a source of NADLC's current and imminent "diver[sion of] resources to address the ongoing failures at HES," Pls.' Opp'n at 16, as they are no longer HES students.

2. Plaintiffs are also wrong that an exception to mootness applies because the claims are capable of repetition, yet evading review. That exception only applies in "extraordinary cases in which (1) the duration of the *challenged action* is too short to be fully litigated before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the *same action* again." *Doe*, 177 F.3d at 798 (emphasis added). Durell P. and Stephen C. satisfy neither requirement.

Plaintiffs argue that an exception applies here because upper-class students would only

have two years or less to pursue their claims, which is not enough under the exception's first requirement. The argument lacks merit. *First*, in determining whether a claim could evade review, the relevant duration is that of the "challenged action," that is, the "complained of activity" by Defendants—here, the alleged failures to provide certain services at HES under the Indian Education and Section 504 (and DOE's regulations). *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992); *see also Doe*, 177 F.3d at 798-99 (collecting cases). Under Plaintiffs' view of the case, those failures have been going on for more than a decade. And, as demonstrated by the number of students in this action, the issues raised here are not of the kind that could evade review now or in the future. *See DeFunis*, 416 U.S. at 319. *Second*, Durell P. and Stephen C. attended HES since kindergarten until their graduation from eighth grade (*i.e.*, approximately nine years) and the TAC alleges that the challenged actions were consistent during their enrollment at HES. *See* TAC ¶¶ 8, 10. Nine years is an appropriate period to litigate a claim. And challenged conduct that has never ceased is not too short to evade review.[14]

Plaintiffs' invocation of the exception fails because there is no reasonable expectation that the plaintiffs will be subjected to the challenged action again. In other words, because these "student-plaintiff[s] here will not graduate from [HES] again," the alleged deficiencies at the school—the challenged action in each count of the TAC—are not capable of repetition against Durell P. and Stephen C. *Doe*, 177 F.3d at 798-99; *accord C.F. ex. rel. Farnan*, 654 F.3d at 983.[15]

## CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion.

[14] Plaintiffs' theory is not only legally unsupported, but also makes little sense as a practical matter. Under their theory, an individual could file an action challenging systemic deficiencies at HES on the day before graduating from the eighth grade on the grounds that one day is too short to allow full litigation, and still be able to seek relief transforming a school that she could no longer attend. That is not the law under Article III of the Constitution.

[15] Plaintiffs cannot invoke "similar deficiencies in other [unspecified] schools within the BIE system," Pls.' Opp'n at 17, to argue that the claims are capable of repetition against Stephen C. and Durell P. Those hypothetical deficiencies are *not* the subject of this suit. Even then, these students would not have had standing to challenge flaws in schools they do not attend.

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Respectfully submitted,

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