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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

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

16 Plaintiffs,

17 v.

18 Bureau of Indian Education, *et al.*,

19 Defendants.
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No. 3:17-cv-08004-SPL

**DEFENDANTS' TRIAL BRIEF ON
RELATIONSHIP BETWEEN THE
INDIVIDUALS WITH
DISABILITIES EDUCATION ACT
AND SECTION 504 OF THE
REHABILITATION ACT**

1 Before the Court is the question of what remedy, if any, is appropriate to address
2 Defendants' violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"),
3 in educating children with disabilities at Havasupai Elementary School ("HES"). The education
4 of children with disabilities is subject to requirements imposed by, among other laws, the
5 Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), Title II of the
6 Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA"), and Section 504. This trial
7 brief is submitted to explain the relationship between these schemes and why the development
8 and implementation of the remaining student-Plaintiffs' individualized education programs
9 ("IEPs") under IDEA satisfies the Bureau of Indian Education's ("BIE's") obligations under
10 Section 504 with respect to these students.

11 I. THE IDEA

12 The IDEA provides federal funds for special education to ensure that all eligible children
13 have available to them a "free appropriate public education" ("FAPE") that is tailored to their
14 unique needs. 20 U.S.C. § 1400(d)(1)(A). As defined in the IDEA, a FAPE comprises "special
15 education and related services"—both "instruction" tailored to meet a child's "unique needs"
16 and sufficient "supportive services" to permit the child to benefit from that instruction. *Id.*
17 §§ 1401(9), (26), (29). Entities receiving federal funds under the IDEA (including states and the
18 Secretary of the Interior, *id.* § 1411(h)) must show that they have implemented "policies and
19 procedures" to provide disabled children with a FAPE, including procedures to develop an
20 individualized education program for each eligible child. *Id.* § 1412(a), (a)(1), (a)(4); *see K.M. ex*
21 *rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1095 (9th Cir. 2013). The IEP must be
22 "reasonably calculated to enable the child to make progress appropriate in light of his
23 circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999
24 (2017). "Crafted by a child's 'IEP Team'—a group of school officials, teachers, and parents—
25 the IEP spells out a personalized plan to meet *all* of the child's 'educational needs.'" *Fry v.*
26 *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017) (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(II)(bb),
27 (d)(1)(B)) (emphasis added).

1 The Department of Education (“Education”) has promulgated regulations implementing
2 the IDEA, *see* 34 C.F.R. pt. 300, which, unlike Education’s 504 regulations (*see infra*), generally
3 apply to BIE-operated schools. *See* 34 C.F.R. § 300.716.

4 **II. SECTION 504**

5 Section 504 provides that “[n]o otherwise qualified individual with a disability . . . shall,
6 solely by reason of her or his disability, be excluded from the participation in, be denied the
7 benefits of, or be subjected to discrimination under any program or activity receiving Federal
8 financial assistance or under any program or activity conducted by any Executive agency or by
9 the United States Postal Service.” 29 U.S.C. § 794. As this Court has correctly held, BIE, as a
10 federal agency, is “not subject to the [Department of Education’s] regulations implementing
11 Section 504 but [is] subject to the D[e]partment [of] I[n]terior’s own regulations under Section
12 504.” ECF No. 221, at 5. The Department of the Interior has promulgated regulations applying
13 Section 504 to “programs or activities conducted by the Department of the Interior,” *see* 43
14 C.F.R. § 17.530(a), which includes schools operated by BIE. Further, BIE will be issuing by
15 July 20, 2020, a National Policy Memorandum (NPM-EDUC-33) setting forth interim guidance
16 on how to apply these regulations to its educational programs.

17 Courts have interpreted Section 504 “as demanding certain ‘reasonable’ modifications to
18 existing practices in order to ‘accommodate’ persons with disabilities.” *Fry*, 137 S. Ct. at 749
19 (citations omitted). As applied to educational programs like BIE’s schools, Section 504 requires
20 educational institutions to provide students with disabilities the accommodations they “need[]
21 to enjoy meaningful access to the benefits of a public education and that [are] available as
22 reasonable accommodations.”¹ *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195,
23 1204 (9th Cir. 2016); *see generally Alexander v. Choate*, 469 U.S. 287, 301 (1985) (same). What

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26 ¹ For context, the Department of Education’s Section 504 regulations (not applicable to
27 the BIE) specifically require that “[a] recipient [of federal funds] that operates a public
28 elementary or secondary education program or activity shall provide a free appropriate public
education” (“FAPE”) to children with disabilities. 34 C.F.R. § 104.33(a). The FAPE required
by the Department of Education’s Section 504 regulations differs from the FAPE required by
IDEA. *Mark H. v. Lemahieu*, 513 F.3d 922, 935 n.11 (9th Cir. 2008).

1 constitutes a reasonable accommodation “depends on the individual circumstances of each case,
2 and requires a fact-specific, individualized analysis of the disabled individual’s circumstances and
3 the accommodations that might allow him to [enjoy meaningful access to the program.]” *Mark*
4 *H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010) (internal citation and quotation marks
5 omitted, brackets in original). Section 504 does not, however, “require an organization to make
6 fundamental or substantial alterations to its program.” *Id.*; see 43 C.F.R. § 17.550(a)(3)
7 (Department of the Interior regulation stating that Section 504 does not “[r]equire the agency
8 to take any action that it can demonstrate would result in a fundamental alteration in the nature
9 of a program or activity or in undue financial and administrative burdens.”).

10 Where appropriate, individualized plans may be developed to provide accommodations
11 or services to a child with a disability who is qualified for accommodations under Section 504.
12 Such plans are called “504 Plans,” and they address accommodations or services required so the
13 child may participate in the general education classroom to the maximum extent possible. *See*,
14 *e.g.*, *Simmons v. Pittsburg Unified Sch. Dist.*, No. 4:13-cv-04446-KAW, 2014 WL 2738214, at *1 n.3
15 (N.D. Cal. June 11, 2014).

16 **III. THE INTERACTION BETWEEN THE IDEA AND 504 AND** 17 **APPLICATION TO THE REMAINING STUDENT-PLAINTIFFS**

18 One of the IDEA’s provisions, 20 U.S.C. § 1415(*l*), makes clear that nothing in the IDEA
19 “restrict[s] or limit[s] the rights [or] remedies” that other federal laws, including anti-
20 discrimination statutes like Section 504, confer on children with disabilities.” *Id.*; see *Fry*, 137 S.
21 Ct. at 748. Thus, both the IDEA and Section 504 apply to students at BIE schools.

22 In general, Section 504 covers a much broader group of individuals than the IDEA, but
23 IDEA affords those it covers with more well-defined and extensive supports and services for
24 students, as well as more explicit procedural protections, than are available under Section 504.
25 *See, e.g.*, *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 159 (2d Cir. 2016); *Fry*, 137 S. Ct. 743, 755-
26 56 (2017) (“[T]he IDEA guarantees individually tailored educational services, while ... [Section]
27 504 promise[s] non-discriminatory access to public institutions.”). Notwithstanding the
28 different scope of the two schemes, many children with disabilities qualify under both schemes,

1 and schools can meet their 504 requirements through an IEP developed in accordance with the
2 IDEA.² For these children, a separate 504 plan is unnecessary—their IEP “spells out a
3 personalized plan to meet *all* of [their] ‘educational needs.’” *Fry*, 137 S. Ct. at 750; *see note 2 supra*
4 (discussing the Department of Education’s regulations).

5 Defendants do not dispute that the four remaining student-Plaintiffs in this case—Olaf
6 D., Freddy P., Moana L., and Taylor P.—qualify as individuals with disabilities under Section
7 504. In fact, these four student-Plaintiffs all have valid IDEA IEPs developed in consultation
8 with their parents, their attorneys, and the Havasupai Elementary School and BIE. Plaintiffs’
9 IEPs provide them with all the IDEA services and Section 504 accommodations to which they
10 are deemed entitled.

11 Ostensibly, Plaintiffs do not challenge or seek relief pursuant to the IDEA but rather
12 pursuant to Section 504. However, the relief Plaintiffs seek is not for discrimination under
13 Section 504, but rather for an alleged denial of FAPE under IDEA, possibly based on an alleged
14 failure to develop or implement suitable IEPs. *See Fry*, 137 S. Ct. at 756 (discussing how to
15 determine whether the gravamen of a complaint against a school concerns the denial of a FAPE,
16 or instead addresses disability-based discrimination). In fact, the evidence at trial will show that,
17 subject to the ever-present obstacles that HES faces, BIE is positioning itself to address the
18 remaining student-Plaintiffs’ disabilities through full implementation of IEPs that satisfy Section
19 504. Moreover, the student-Plaintiffs have never contended that their IEPs are insufficient if
20 fully implemented. (Should they have any concerns regarding the appropriateness of their IEPs,
21 their parents/guardian may exercise their administrative remedies under the Individuals with
22 Disabilities Education IDEA at any time.) No more is required of BIE, nor could the Court
23 order any relief in addition to the services the student-Plaintiffs already are receiving that would
24 be tailored to their individual circumstances. *See* Defs.’ Proposed Conclusions of Law ¶¶ 15-17,

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27 ² For context, the Department of Education’s Section 504 regulations (not applicable to
28 the BIE) provide that “[i]mplementation of an Individualized Education Program developed in
accordance with the Education of the Handicapped Act is one means of meeting the standard
established in paragraph (b)(1)(i) of this section.” 34 C.F.R. § 104.33(b)(2).

1 36-41, 46-47. The Court should therefore decline to intervene in the student-Plaintiffs'
2 educational programs.

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Respectfully submitted,

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