

1 JOSEPH H. HUNT  
2 Assistant Attorney General  
3 CARLOTTA P. WELLS  
4 Assistant Branch Director  
5 LISA A. OLSON, D.C. Bar No. 384266  
6 Senior Trial Counsel  
7 CAROL FEDERIGHI, TX Bar No. 06872950  
8 Senior Trial Counsel  
9 CRISTEN C. HANDLEY, MO Bar No. 69114  
10 BRADLEY CRAIGMYLE, IL Bar No. 6326760  
11 Trial Attorneys  
12 U.S. Department of Justice  
13 Civil Division, Federal Programs Branch  
14 1100 L Street, N.W.  
15 Washington, D.C. 20005  
16 Tel: (202) 616-8101  
17 Fax: (202) 616-8460  
18 Email: Bradley.T.Craigmyle@usdoj.gov  
19 *Counsel for Defendants*

20 **UNITED STATES DISTRICT COURT**  
21 **DISTRICT OF ARIZONA**

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

24 Plaintiffs,

25 v.

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

27 Defendants.  
28

No. 3:17-cv-08004-SPL

**PRETRIAL BRIEF SETTING OUT  
DEFENDANTS' OBJECTIONS TO  
THE TESTIMONY OF  
INDEPENDENT EXPERTS WHO  
WERE HIRED FOR MEDIATION  
PURPOSES ONLY**

1 Consistent with the Court’s Order Setting Final Pretrial Conference, ECF No. 222-1  
2 at 2 n.1, Defendants respectfully submit the following trial brief.

3 To facilitate settlement, the parties mutually agreed to participate in mediation. To that  
4 end, the parties mutually agreed on a mediator and have engaged in mediation on and off over  
5 the past two years. To aid in this “[a]lternative [d]ispute [r]esolution,” the parties agreed to  
6 hire a team of independent experts, Bryan Brayboy and Kathleen Thorius, through an entity  
7 called Just Perspective LLC. *See* DOJ Contract at 1, 4 (awarded Mar. 4, 2019) (attached as  
8 Exhibit 1). Thus, as part of the parties’ mediation, the experts entered into a contract with the  
9 Department of Justice (“DOJ contract”). *See generally id.* Under the DOJ contract, Defendants  
10 arranged for the independent experts to travel to the Grand Canyon to visit the Havasupai  
11 Elementary School (“HES”) in the spring of 2019. During this visit, the experts had access to  
12 non-public information: they observed the school, visited classrooms, and interviewed  
13 teachers and families. Defendants also arranged for the independent experts to meet with  
14 community and Tribal members.

15 In the summer of 2019—based on their observations of HES’s conditions and  
16 operations—the independent experts submitted a draft report that recommended various  
17 remedial measures. The report is “for settlement purposes only.” *Id.* at 13 (Scope of Work).  
18 The parties commented on the draft report so that the independent experts could address the  
19 parties’ concerns in the final report. The experts have not yet issued the final report.

20 In the proposed joint pretrial order, Plaintiffs designated the independent experts as  
21 witnesses they may call to testify at trial. Plaintiffs state that the independent experts are  
22 expected to testify as “fact witness[es] regarding recent conditions at HES.” The Court should  
23 exclude the independent experts’ testimony for four reasons.

24 *First*, the Court should exclude the independent experts’ testimony because their  
25 testimony would violate the DOJ contract. *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*,  
26 982 F.2d 363, 368 (9th Cir. 1992) (explaining that, as part of their inherent authority, courts  
27 have “broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and  
28

1 orderly trial,” which includes the power to exclude witness testimony (quoting *Campbell Indus.*  
2 *v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980))). By testifying about HES, the independent  
3 experts would be breaching their contract with the Government. Under the DOJ contract,  
4 the independent experts “shall treat *all* information obtained during this case as privileged and  
5 confidential, and shall not disclose any case-related information without the written consent  
6 of the Department of Justice attorney except as otherwise required by the law.” *See* DOJ  
7 contract at 4 (emphasis added) (Schedule of Supplies/Services).<sup>1</sup> The information the  
8 independent experts obtained through their observations of HES’s “conditions” during their  
9 visit were “obtained during this case” and thus are “privileged and confidential.” *Id.* Their  
10 disclosure of that information violates the express terms of their contract.

11 *Second*, the Court should exclude the independent experts’ testimony because their  
12 testimony would violate the mediation agreement that the parties signed that states as follows:  
13 “In order to promote communication, we agree that all statements made during the course of  
14 the mediation are confidential. All statements made during the course of the mediation are  
15 also privileged settlement discussions and are not admissible in any future proceedings.” *See*  
16 Confidentiality and Mediation Agreement (attached as Exhibit 2). Any statements from the  
17 independent experts about observations that were permitted for the purposes of drafting their  
18 report to facilitate settlement are effectively “statements made during the course of  
19 mediation,” *id.*, and are therefore confidential.

20 *Third*, the Court should exclude the independent experts’ testimony because Plaintiffs  
21 could have requested an on-site visit under Rule 34(a)(2) of the Federal Rules of Civil  
22 Procedure during the discovery period and failed to do so. They should not now be permitted  
23 to compensate for their failure to meet the Court’s discovery requirements by using the  
24 independent experts as a backdoor to testimony about the “conditions” at HES. The  
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26  
27 <sup>1</sup> The DOJ contract further requires that “information made available [to the  
28 independent experts] under this contract shall be used only for the purpose of performance  
of this contract and shall not be divulged or made known in any manner to any persons except  
as may be necessary in the performance of this contract.” *Id.* at 6 (Addendum section III(C)).

1 independent experts' visit to HES was roughly concurrent with the discovery period, and their  
2 alleged observations could offer no more current information about the conditions at HES  
3 than an on-site visit under Rule 34 would have yielded.

4 *Fourth*, excluding the independent experts' testimony would not prejudice Plaintiffs  
5 because they can call other witnesses who could testify about the conditions at HES. For  
6 example, HES staff members and HES students' parents could testify about these conditions,  
7 and none of these witnesses would be breaching a contract with the Government by offering  
8 this testimony. The Court should thus exclude the independent experts' testimony. *Cf.* Fed.  
9 R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially  
10 outweighed by a danger of . . . wasting time[] or needlessly presenting cumulative evidence.").

11 \* \* \*

12 Even if the Court does allow the independent experts to testify, the Court should, at a  
13 minimum, limit that testimony to Count III because the experts' testimony as to Count IV  
14 would violate Rule 408 of the Federal Rules of Evidence. Under Rule 408, "[e]vidence of . . .  
15 conduct or a statement made during compromise negotiations" is "not admissible" "to prove  
16 or disprove the validity . . . of a disputed claim." Here, any information the independent  
17 experts gathered about the conditions at HES is a direct result of—and therefore evidence  
18 of—"conduct" by BIE that the independent experts never would have had access to but for  
19 the settlement negotiations. *See, e.g., Bradley v. Kryvicky*, 577 F. Supp. 2d 466, 468 n.1 (D. Me.  
20 2008) (excluding representations that "indirectly transmit[ted]" the parties' conduct).<sup>2</sup> Such

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21  
22 <sup>2</sup> Although the court in *Bradley* noted that the witness "may testify as to anything he  
23 observed" during a site inspection conducted pursuant to confidential settlement negotiations,  
24 *see id.* at 468 n.2, that does not change the analysis here. In this case, the parties jointly selected  
25 the independent experts for the sole purpose of assisting with mediation. And they visited  
26 HES only because they were writing a report to *facilitate mediation*. By contrast, the witness at  
27 issue in *Bradley* was the defendant's expert. *See* Def.'s Memo. in Opp'n to Pls.' Mot. to Exclude  
28 Expert Test. at 2, *Bradley v. Kryvicky*, 577 F. Supp. 2d 466 (D. Me. 2008) (No. 1:07-cv-109-GZS,  
2008 WL 4159588 ("The parties then agreed to allow Defendant and his construction expert to  
inspect the allegedly defective windows at the [property at issue]."). So the witness in that  
case was not hired to assist with mediation, was not independent, and did not visit the property  
at issue solely to facilitate the parties' mediation. Therefore, the situation here is much  
different from the situation at issue in *Bradley*.

1 evidence was gathered for the sole and express purpose of making settlement  
2 recommendations. To allow the independent experts to divulge information they obtained  
3 with an understanding that it was for settlement purposes and that it would remain confidential  
4 would chill any future dialogue between the parties in this case. *See United States v. Contra Costa*  
5 *City. Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (noting that “the public policy favoring out-  
6 of-court settlement necessitates the inadmissibility of negotiations in order to foster frank  
7 discussion”).

8  
9 Dated: July 2, 2020

Respectfully submitted,

10 JOSEPH H. HUNT  
11 Assistant Attorney General

12 CARLOTTA P. WELLS  
13 Assistant Branch Director

14 /s/ Bradley Craigmyle  
15 LISA A. OLSON, D.C. Bar No. 384266  
Senior Trial Counsel  
16 CAROL FEDERIGHI, TX Bar No. 06872950  
Senior Trial Counsel  
17 CRISTEN C. HANDLEY, MO Bar No. 69114  
18 BRADLEY CRAIGMYLE, IL Bar No. 6326760  
Trial Attorneys  
19 U.S. Department of Justice  
20 Civil Division, Federal Programs Branch  
1100 L Street, N.W.  
21 Washington, D.C. 20005  
22 Telephone: (202) 514-5633  
23 Fax: (202) 616-8101  
24 Email: Bradley.T.Craigmyle@usdoj.gov  
*Counsel for Defendants*