

Case No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona
Case No. 3:17-CV-08004-SPL
The Honorable Steven P. Logan, United States District Judge*

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs are individuals and the Native American Disability Law Center, a private nonprofit organization. There is no parent company, and no public company has any ownership interest.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
JURISDICTION.....	3
ISSUES PRESENTED.....	4
RELEVANT STATUTES	4
STATEMENT OF THE CASE.....	5
I. Regulatory Background.....	5
II. Background on the Bureau of Indian Education and Havasupai Elementary School.....	7
III. Plaintiffs.....	8
IV. Procedural History	9
SUMMARY OF ARGUMENT	13
I. Plaintiffs’ APA Claims Are Reviewable	13
II. The Dismissed Student Plaintiffs Have Standing.....	15
STANDARD OF REVIEW	16
ARGUMENT	17
I. Plaintiffs Challenge Discrete Agency Actions and Failures to Act that Are Reviewable Under the APA	17
A. Plaintiffs Are Adversely Affected or Aggrieved By Defendants Admitted Failures to Fulfill Their Legal Duties	18
B. The Regulations With Which Defendants Have Failed to Comply Impose Legal Duties to Take Discrete Actions.....	19
C. Plaintiffs’ APA Claims Are Not Impermissible Solely Because Defendants’ Violations of Multiple Regulations Are Pervasive.....	30
II. Student Plaintiffs Who No Longer Attend HES Have Standing to Seek the Equitable Remedy of Compensatory Education and Their Claims Are Not Moot.....	42
A. The APA Permits Plaintiffs to Seek Any “Relief Other Than Money Damages”	45

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
B. Compensatory Education is an Equitable Remedy	47
C. Eligibility for Compensatory Education Does Not Require Current Enrollment at HES	52
CONCLUSION	57

TABLE OF AUTHORITIES

	<u>Page</u>
FEDERAL CASES	
<i>Adams v. United States</i> , 620 F.2d 1277 (8th Cir. 1980)	51, 52
<i>Alexopoulos ex rel. Alexopoulos v. Riles</i> , 784 F.2d 1408 (9th Cir. 1986)	49
<i>Alexopoulos ex rel. Alexopoulos v. S.F. Unified Sch. Dist.</i> , 817 F.2d 551 (1987).....	49
<i>Bd. of Educ. of Fayette Cty., Ky. v. L.M.</i> , 478 F.3d 307 (6th Cir. 2007)	48
<i>Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200</i> <i>v. Illinois State Bd. of Educ.</i> , 79 F.3d 654 (7th Cir. 1996)	48, 53
<i>Birmingham v. Omaha Sch. Dist.</i> , 220 F.3d 850 (8th Cir. 2000), <i>superseded by statute on other</i> <i>grounds as recognized in Richardson v. Omaha Sch. Dist.</i> , 957 F.3d 869 (8th Cir. 2020)	48
<i>Bowen v. Massachusetts</i> , 487 U.S. 879 (1988).....	16, 45, 46
<i>Brown v. Bd. of Ed. of Topeka</i> , 347 U.S. 483 (1954).....	56
<i>Burr v. Sobel</i> , 863 F.2d 1071 (2d Cir. 1988), <i>reaffirmed</i> , 888 F.2d 258 (2d Cir. 1989)	50
<i>City of N.Y. v. U.S. Dept. of Def.</i> , 913 F.3d 423 (4th Cir. 2019)	passim
<i>D.F. v. Collingswood Borough Bd. of Educ.</i> , 694 F.3d 488 (3d Cir. 2012)	47, 48, 54

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Doe v. E. Lyme Bd. of Educ.</i> , 790 F.3d 440 (2d Cir. 2015)	48
<i>Draper v. Atlanta Indep. Sch. Sys.</i> , 518 F.3d 1275 (11th Cir. 2008)	47, 48
<i>Ferren C. v. Sch. Dist. of Phila.</i> , 612 F.3d 712 (3d Cir. 2010)	48, 53
<i>Firebaugh Canal Co. v. United States</i> , 203 F.3d 568 (9th Cir. 2000)	29
<i>G ex rel. RG v. Fort Bragg Dependent Sch.</i> , 343 F.3d 295 (4th Cir. 2003)	47, 48, 51
<i>G.R. v. Dall. Sch. Dist. No. 2</i> , 823 F. Supp. 2d 1120 (D. Or. 2011)	54
<i>Gill v. U.S. Dep’t of Just.</i> , 913 F.3d 1179 (9th Cir. 2019)	16
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944)	50
<i>High Sierra Hikers Ass’n v. Blackwell</i> , 390 F.3d 630 (9th Cir. 2004)	32
<i>Idaho Conservation League v. Mumma</i> , 956 F.2d 1508 (9th Cir. 1992)	33
<i>Indep. Sch. Dist. No. 284 v. A.C. ex rel. C.C.</i> , 258 F.3d 769 (8th Cir. 2001)	54
<i>Int’l Longshoremen’s Ass’n, Local 1291 v. Phil. Marine Trade Ass’n</i> , 389 U.S. 64 (1967)	28
<i>Jefferson Cty. Bd. of Educ. v. Breen</i> , 853 F.2d 853 (11th Cir. 1988)	55

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1</i> , 778 F.2d 404 (8th Cir. 1985)	51
<i>Lujan v. Nat’l Wildlife Fed’n</i> , 497 U.S. 871 (1990).....	passim
<i>Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.</i> , 565 F.3d 1232 (10th Cir. 2009)	48, 49
<i>Morongo Band of Mission Indians v. Cal. State Bd. of Equalization</i> , 858 F.2d 1376 (9th Cir. 1988)	44
<i>Nevada Ass’n of Counties v. Department of Interior</i> , No. 3:13-cv-0712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015)	41
<i>Norton v. S. Utah Wilderness All.</i> , 542 U.S. 55 (2004).....	passim
<i>Parents of Student W. v. Puyallup Sch. Dist., No. 3</i> , 31 F.3d 1489 (9th Cir. 1994)	passim
<i>Park, ex rel. Park v. Anaheim Union High Sch. Dist.</i> , 464 F.3d 1025 (9th Cir. 2006)	48
<i>Pihl v. Mass. Dep’t of Educ.</i> , 9 F.3d 184 (1st Cir. 1993).....	passim
<i>Plaquemines Parish Sch. Bd. v. United States</i> , 415 F.2d 817 (5th Cir. 1969)	52
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	56
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946).....	45

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.</i> , 631 F.3d 1117 (9th Cir. 2011)	passim
<i>Reid ex rel. Reid v. District of Columbia</i> , 401 F.3d 516 (D.C. Cir. 2005)	48, 50
<i>Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.</i> , 172 F.3d 238 (3d Cir. 1999), <i>superseded on other grounds as</i> <i>recognized by P.P. v. West Chester Area Sch. Dist.</i> , 585 F.3d 727 (3d Cir. 2009)	53
<i>Sacks v. Office of Foreign Assets Control</i> , 466 F.3d 764 (9th Cir. 2006)	5, 6, 19, 22
<i>San Dieguito Union High Sch. Dist. v. Guray-Jacobs</i> , No. 04cv1330 DMS (POR), 2005 U.S. Dist. LEXIS 52124 (S.D. Cal. Oct. 27, 2005)	54
<i>Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.</i> , 471 U.S. 359 (1985)	16, 46, 49, 51
<i>Sierra Club v. Peterson</i> , 228 F.3d 559 (5th Cir. 2000)	15, 34, 41
<i>South Carolina v. United States</i> , 907 F.3d 742 (4th Cir. 2018)	13, 29, 30
<i>Southcentral Found. v. Alaska Native Tribal Health Consortium</i> , 983 F.3d 411 (9th Cir. 2020)	16
<i>Spring Branch Indep. Sch. Dist. v. O.W. ex rel. Hannah W.</i> , 961 F.3d 781 (5th Cir. 2020)	47, 48, 50
<i>Vietnam Veterans of America v. CIA (VVA)</i> , 811 F.3d 1068 (9th Cir. 2016)	passim
<i>Wild Wilderness v. Allen</i> , 871 F.3d 719 (9th Cir. 2017)	44

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Withrow v. Concannon</i> , 942 F.2d 1385 (9th Cir. 1991)	30
 FEDERAL STATUTES	
5 U.S.C. § 701	13
5 U.S.C. § 702	passim
5 U.S.C. § 706(1)	passim
5 U.S.C. § 706(2)	4
16 U.S.C. §§ 1333(a), 410bbb–2(a)(1), 460nnn–12(b)	25
20 U.S.C. § 1415(i)(2)(C)(iii)	51
25 U.S.C. § 2000	5
25 U.S.C. § 2001(a)(1)	5, 55
28 U.S.C. § 1291	4, 12
28 U.S.C. § 1331	3
Administrative Procedure Act	passim
Education of the Handicapped Act	46
Indian Education Act	passim
Individuals with Disabilities Education Act	passim
Native American Disability Law	1
Native American Education Improvement Act of 2001	5
Rehabilitation Act § 504	10, 11

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
 FEDERAL RULES	
Ninth Circuit Rule 28-2.7	4
Fed. R. App. P. 4(a)(1)(B)	4, 12
Fed. R. App. P. 28-2.6.....	58
Fed. R. App. P. 32(a)(7)(C)	59
Fed. R. Civ. P. 12(b)(1).....	16
 FEDERAL REGULATIONS	
25 C.F.R. § 32.3	7, 5, 56
25 C.F.R. § 36	5, 13, 18, 19
25 C.F.R. § 36.4(a).....	18
25 C.F.R. § 36.11	6, 22, 26
25 C.F.R. § 36.20	6, 22
25 C.F.R. § 36.21	6, 22, 26
25 C.F.R. § 36.22	6, 7, 14, 18, 26
25 C.F.R. § 36.23	6, 7, 14, 18, 26
25 C.F.R. § 36.30	22, 26

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
25 C.F.R. § 36.31	22
25 C.F.R. § 36.40	22
25 C.F.R. § 36.41	22
25 C.F.R. § 36.42	22
25 C.F.R. § 36.43	7, 18, 22
25 C.F.R. § 36.50	22
25 C.F.R. § 36.51	22

INTRODUCTION

This action is about the undisputed failure of Defendants Bureau of Indian Education (“BIE”) and Department of Interior (“DOI”) to implement several discrete and mandatory regulations that govern the provision of education at Havasupai Elementary School (“HES” or “Havasupai”).

HES is one of 184 schools funded or operated by the BIE, and it is the only school that serves the children of the Havasupai Tribe on their reservation in the Grand Canyon. Plaintiffs are current and former students at HES (“Student Plaintiffs”) and the Native American Disability Law Center, an organization that has spent years requesting that Defendants provide HES students with the education guaranteed to them under the Indian Education Act and its implementing regulations.

Plaintiffs seek review of: 1) the District Court’s grant of summary judgment to Defendants on Plaintiffs’ claims under the Administrative Procedures Act (“APA”), and 2) the District Court’s dismissal on standing and mootness grounds of several Student Plaintiffs.

With respect to Plaintiffs’ APA claims, the District Court incorrectly held that Plaintiffs had failed to identify a discrete, final agency action that the BIE had failed to take and that Plaintiffs’ challenges to numerous violations of specific

regulations, *when aggregated* in a single complaint, amounted to an impermissible programmatic attack on agency action.

The District Court's decision is inconsistent with this Court's decision in *Vietnam Veterans of America v. CIA (VVA)*, 811 F.3d 1068 (9th Cir. 2016). Defendants' actions and failures to act, in violation of very specific regulations, are at least as discrete and mandatory as those held reviewable in *VVA*. The District Court's rulings also misconstrue and are inconsistent with the Supreme Court's decisions in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892-94 (1990) and *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 64 (2004). Those decisions demonstrate that when a defendant has failed to comply with specific, discrete legal obligations, the fact that its failures are pervasive or that relief in the case could result in significant programmatic change do *not* render the claims unreviewable.

The District Court also improperly dismissed the claims of five Student Plaintiffs for lack of standing and later dismissed two additional Student Plaintiffs because they graduated from HES, which serves grades K-8. The court dismissed the Student Plaintiffs' claims based on the erroneous conclusion that they could not seek the equitable remedy of compensatory education as a remedy for their claims. Contrary to the District Court's holding, the remedy of compensatory education is not limited to claims under the Individuals with Disabilities in Education Act

(IDEA)—it is a generally available “equitable remedy that seeks to make up for ‘educational services the child should have received in the first place.’” *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Since compensatory education is an available remedy, the dismissed Student Plaintiffs have standing to pursue their claims against Defendants.

Proper consideration of controlling and persuasive authorities compels the conclusion that Plaintiffs have appropriately challenged discrete and mandatory agency action or inaction. The District Court’s granting of Defendants’ summary judgment motion on Plaintiffs’ APA claims should be reversed, and these claims should proceed to trial. And because an appropriate award of compensatory education would partially remedy the educational injuries caused by Defendants’ longstanding failure to provide the educational services required by the Indian Education Act, this Court should reverse the District Court’s orders dismissing the claims of the Student Plaintiffs who no longer attend HES.

JURISDICTION

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. Judge Steven P. Logan, of the United States District Court for the District of Arizona, issued a final judgment, granting summary judgment to Defendants on Counts I, II, V & VI of Plaintiffs’ Third Amended Complaint, and entering judgment for Defendants on all Counts as to Plaintiffs Levi R., Leo R.,

Jenny A., Jeremy A., Jordan A., Stephen C., and Durell P., on November 20, 2020.¹ 1-ER-3.² Plaintiffs filed a timely notice of appeal—within 60 days of the District Court’s final order—on January 14, 2021. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the District Court’s final decision under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether Plaintiffs’ claims that the Bureau of Indian Education has failed to implement specific regulations mandated by the Indian Education Act challenge discrete, mandatory agency action and inaction, as is permitted under the APA, 5 U.S.C §§ 706(1) and 706(2).

2. Whether standing and mootness bar four Student Plaintiffs who no longer attend HES from pursuing compensatory education as an equitable remedy under the Indian Education Act.

RELEVANT STATUTES

An addendum setting forth verbatim the constitutional and statutory provisions pertinent to this case is attached to this brief, pursuant to Ninth Circuit Rule 28-2.7.

¹ The parties reached a settlement agreement with respect to Counts III and IV of Plaintiffs’ Third Amended Complaint and submitted a stipulated request for dismissal of those counts. 2-ER-46. In its final judgment, the district court also dismissed Counts III and IV with prejudice.

² “ER” citations reference the concurrently filed Excerpts of Record.

STATEMENT OF THE CASE

I. Regulatory Background

Title XI of the Education Amendments of 1978, as amended by the Native American Education Improvement Act of 2001 (“Title XI”) states that in order to fulfill the federal government’s “unique and continuing trust . . . responsibility . . . for the education of Indian children,” the “Federal Government has the sole responsibility for the operation and financial support of the [BIE] funded school system” 25 U.S.C. § 2000; *see also* 25 C.F.R. § 32.3 (“[I]t is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians and Alaska Natives.”). The BIE school system must provide Native American children “with educational opportunities that equal or exceed those for all other students in the United States.” 25 U.S.C. § 2001(a)(1).

In order to provide such an education, the BIE is required to follow a series of discrete, mandatory regulations that provide detailed practical requirements for BIE schools. *See* 25 C.F.R. § 36, *et seq.*

In their Third Amended Complaint (“TAC”), Plaintiffs identify thirteen specific, mandatory agency actions that have been “unlawfully withheld or unreasonably delayed” at HES. 4-ER-526-27 (quoting 5 U.S.C. § 706(1)). These regulations consistently and repeatedly use mandatory language—stating what the curriculum “*shall* include,” or what content “*shall* be integrated.” *See Sacks v.*

Office of Foreign Assets Control, 466 F.3d 764, 778 (9th Cir. 2006) (“use of the word ‘shall’ indicates a mandatory duty that is not subject to discretion”).

For example, 25 C.F.R. § 36.11 provides requirements for staffing BIE schools, mandating that “[e]ach school shall, at a minimum,” meet requirements including, among other things, specific teacher to student ratios, substitute teacher requirements, and enrollment and attendance policies.

25 C.F.R. § 36.20 provides standards for “Minimum academic programs” in BIE schools, stating that a school’s “educational program shall include multi-culture and multi-ethnic dimensions,” and, among other things, specifically mandating that “[t]he school’s language arts program shall assess the English and native language abilities of its students and provide instruction” in both languages, § 36.20(b)(1); that “[t]he school program shall include aspects of the native culture in all curriculum areas,” § 36.20(b)(2); and that “[t]he school program shall assess the learning styles of its students and provide instruction based upon that assessment,” § 36.20(b)(3). “[L]ocal tribal approval” is required for language and culture educational programs, and Subsection (b)(3) requires that the “method for assessing learning styles shall be determined at the local level.”

25 C.F.R. §§ 36.21-.23 provide specific, mandatory requirements for kindergarten, elementary, and junior high/middle school curriculum. For example, the elementary curriculum “shall include” instruction in “Fine arts,” § 36.22(a)(5),

and “Physical education,” § 36.22(a)(6), and “shall integrate” content on “Career awareness,” § 36.22(b)(1), and “Health education,” § 36.22(b)(3). Similarly, the middle school curriculum at a BIE school “shall include” “fine arts and practical arts,” § 36.23(b)(5), and “Physical education,” § 36.23(b)(7), and “shall . . . integrate[]” content on “Consumer economics,” § 36.23(c)(4), and “Health education,” § 36.23(c)(5).

25 C.F.R. § 36.43 provides that “All schools shall provide and maintain a well-balanced student activities program,” including “special interest clubs, physical activities, student government, and cultural affairs,” and all student activities must receive School Board approval, § 36.43(a).

Despite its familiarity with these requirements and clear admissions that they are mandatory, BIE has failed to implement each of these regulations at HES.³

II. Background on the Bureau of Indian Education and Havasupai Elementary School

As stated in Title 25 C.F.R. Part 32.3, the BIE’s “mission . . . is to provide quality education opportunities from early childhood through life in accordance with the Tribes’ needs for cultural and economic well-being[,] in keeping with the wide diversity of Indian tribes and Alaska Native villages as distinct cultural and governmental entities.”

³ A comprehensive list of the thirteen regulations at issue is set forth in Addendum A.

Havasupai is just one of nearly 200 Bureau-funded schools, serving approximately 70 of the over 40,000 Indian students within the BIE system. 4-ER-480 ¶ 30; 4-ER-524 ¶ 224, n.13, 2015 GAO Report at 1 (incorporated by reference). The school is located on the Havasupai Tribe’s reservation at the bottom of the Grand Canyon, 4-ER-480 ¶ 30, and serves students from kindergarten through eighth grade. 4-ER-472 ¶ 2. There is no other school on the Havasupai reservation, so in order to attend high school or pursue alternative educational opportunities, students must leave the Canyon, the reservation, and often their families. 4-ER-523 ¶¶ 220-21.

In addition to being the only option for children living on the Havasupai reservation, HES is also one of the lowest-performing schools in the country. Despite the fact that English and Math are the only subjects even somewhat consistently taught at HES, almost no students have been proficient in math, reading, or writing on any recent standardized test. 4-ER-430 ¶ 34.

III. Plaintiffs

Student Plaintiffs Stephen C., Anna D., Olaf D., Moana L., Durell P., Taylor P., Freddy P., Leo R., and Levi R. are members of the Havasupai Tribe.

Organizational Plaintiff Native American Disability Law Center (“NADLC”) advocates for individuals with disabilities in a variety of settings, including schools. Olaf D., Moana L., Taylor P., and Freddy P. are current HES students.

Anna D. attended HES from kindergarten through third grade. Because HES could not meet her educational needs, Anna D. left HES to attend an Arizona public school but remained eligible to attend HES. 4-ER-474-75 ¶ 9. Durell P. and Stephen C. were attending HES when the TAC was filed, but graduated from the school before the District Court issued its summary judgment order in December 2019. Leo R. and Levi R. attended HES for nine and eight years, respectively, but were no longer attending the school when the TAC was filed.⁴ 4-ER-475-76 ¶¶ 12-13. Leo R. had completed eighth grade at HES and had received inadequate education from kindergarten through the eighth grade. 4-ER-476, 504 ¶¶ 13, 129. Levi R. attended a public school in Arizona. 4-ER-500 ¶ 114.

IV. Procedural History

On January 23, 2017, Plaintiffs filed suit against the BIE, U.S. Department of the Interior, and several individual defendants in their official capacities, alleging that Defendants had failed to provide legally-required educational services at HES. All Student Plaintiffs, “including [] those who previously attended but no longer attend” HES, sought compensatory education to remedy Defendants’

⁴ The Complaint also included three additional Student Plaintiffs who have not appealed the District Court’s ruling. Student Plaintiffs Jenny A., Jeremy A., and Jordan A. also attended HES for four to eight years but were no longer attending the school when the TAC was filed. 4-ER-476-77 ¶¶ 14-16. They each attended an out-of-state boarding school operated by Defendant BIE after their parents made the difficult decision to transfer them due to Defendants’ failure to provide adequate educational services at HES. 4-ER-507-08, 510 ¶¶ 146, 152, 161.

failures and to allow Student Plaintiffs to access all required general education subjects.⁵ 4-ER-540 Request for Relief, ¶ 3.k. On June 2, 2017, Plaintiffs filed a First Amended Complaint, asserting the same substantive claims. On June 23, 2017, Defendants filed a Partial Motion to Dismiss, and on July 14, 2017, Plaintiffs filed a Second Amended Complaint. On August 9, 2017, Defendants filed a Second Partial Motion to Dismiss, arguing, as relevant here, that the Student Plaintiffs who no longer attended HES lacked standing to bring their claims. 3-ER-311.

In its March 29, 2018 ruling on Defendants' motion, the District Court dismissed the claims of five Student Plaintiffs for lack of standing because they were no longer attending HES. The District Court held that these five students lacked standing because compensatory education was not "an appropriate equitable remedy outside the context of the Individuals with Disabilities Education Act (IDEA)." 1-ER-34.

On August 10, 2018, Plaintiffs filed their operative Third Amended Complaint. 4-ER-471. After extensive discovery, the parties filed cross-motions for summary judgment, which were fully briefed on July 16, 2019. 2-ER-163; 2-

⁵ The Complaint also brought claims under Section 504 of the Rehabilitation Act and certain Department of Education regulations, alleging that Defendants had failed to provide an adequate education and adequate procedural safeguards for Student Plaintiffs with disabilities. Those claims are not at issue here.

ER-142. Plaintiffs moved for summary judgment on Counts I, III, IV, V, and VI of the TAC, and Defendants moved for summary judgment on Counts I, II, IV, V, and VI. 1-ER-19. Defendants also moved to dismiss all claims by two Student Plaintiffs—Durell P. and Stephen C.—who had completed the eighth grade and were no longer attending HES. 1-ER-26.

The District Court heard oral argument on November 20, 2019, and issued its summary judgment order on December 17, 2019. The District Court granted Defendants’ Motion for Partial Summary Judgment in its entirety, and denied Plaintiffs’ Motion for Partial Summary Judgment. 1-ER-17. With respect to Plaintiffs’ APA Claims (Counts I and II), the District Court held that Defendants were entitled to summary judgment because “Plaintiffs’ challenges, when aggregated, rise to the level of an impermissible, systemic challenge under the APA that should not be resolved by the courts.”⁶ 1-ER-21.

⁶ On January 6, 2020, Defendants filed a Motion for Partial Relief from the December 17, 2019 Order, 2-ER-59, informing the Court that, while it had ruled in Defendants’ favor on Count IV and denied Plaintiffs’ motion for summary judgment on Count III based on a holding that Defendants were not subject to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Defendants in fact “are subject to the statutory requirements of Section 504,” 2-ER-60. Plaintiffs submitted a response on January 15, 2020. 2-ER-49.

On May 8, 2020, the district court concluded “that it was in error on the application of Section 504.” 1-ER-13. The Court granted in part Defendants’ motion and held that “Defendants . . . violated Section 504,” there was “no dispute

The District Court also dismissed Durell P. and Stephen C.’s claims as moot “because [they] are no longer enrolled at HES” and therefore “any benefit that [they] would receive . . . is speculative.” 1-ER-27.

On November 20, 2020, the District Court entered judgment in favor of Defendants on Counts I, II, V, and VI of Plaintiff’s Third Amended Complaint and in favor of Defendants on all Counts as to Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., Jordan A., Stephen C., and Durell P.⁷ Counts III and IV were dismissed with prejudice. 1-ER-3.

On January 14, 2021, Plaintiffs filed a timely notice of appeal to this Court. 3-ER-335; Fed. R. App. P. 4(a)(1)(B).

This appeal under 28 U.S.C. § 1291 thus arises from the District Court’s dismissal of four Student Plaintiffs on standing and mootness grounds, and its grant of summary judgment to the government on Counts I and II on the grounds

of material facts” on that issue, and that the remedy on Count III and Plaintiffs’ claim under Count IV should proceed to trial.

The parties subsequently reached a settlement agreement with respect to Counts III and IV of Plaintiffs’ Third Amended Complaint and submitted a stipulated request for dismissal of those counts. 2-ER-46. On September 28, 2020, the district court granted the Parties’ Stipulation for Dismissal of the remaining claims. 1-ER-7.

⁷ Plaintiffs Jenny A., Jeremy A. and Jordan A. are not appealing the District Court’s ruling. *See supra* n.4.

that “Plaintiffs’ challenges, when aggregated, rise to the level of an impermissible, systematic challenge under the APA,” 1-ER-21-22.

SUMMARY OF ARGUMENT

I. Plaintiffs’ APA Claims Are Reviewable

Plaintiffs’ APA claims are reviewable under 5 U.S.C. §§ 701 and 702 because they challenge mandatory and discrete agency actions or failures to act. 5 U.S.C. § 706(1) provides that a “reviewing court shall” compel agency action unlawfully withheld or unreasonably delayed, or set aside agency action that is arbitrary and capricious. A court must compel agency action “unlawfully withheld or unreasonably delayed” where there is “‘a specific, unequivocal command’ placed on the agency to take a ‘discrete agency action’” that the agency has failed to take. *VVA*, 811 F.3d at 1075 (9th Cir. 2016) (quoting *SUWA*, 542 U.S. at 63-64); *see also South Carolina v. United States*, 907 F.3d 742, 756 (4th Cir. 2018) (“[I]f a party has successfully demonstrated an unlawfully withheld agency action under § 706(1), the court must enter an appropriate order and secure the agency’s compliance with the law . . . regardless of equitable or policy considerations.”); 5 U.S.C. § 706(1).

It is undisputed that the BIE has failed to take numerous discrete actions that the agency is specifically and unequivocally required to take. 25 C.F.R. Part 36 provides clear and detailed direction to BIE for operating the school and providing

a basic education—such as which subjects must be offered, see, e.g., 25 C.F.R. §§ 36.22-.23—that Defendants have not followed. They do not dispute that. 4-ER-426-28. Defendants’ counsel directly told the District Court that “the agency doesn’t dispute that its efforts have been unsatisfactory and they have fallen short.” 2-ER-74. The District Court thus recognized “that there is no genuine dispute as to the material facts of this case,” as “Defendants admitted that they have failed to provide basic education as required by the law.” 1-ER-19.

The District Court erred, however, in holding that Plaintiffs had failed to identify discrete final agency actions or failures to act. 1-ER-20 (citing *SUWA*, 542 U.S. at 64). Under controlling Supreme Court and Ninth Circuit authority, Defendants’ alleged failures to comply with 13 specific regulations constitute discrete final agency actions that are reviewable under the APA. The actions and failures to act here are at least as discrete and mandatory as those held reviewable by this Court in *VVA*, 811 F.3d 1068 (9th Cir. 2016).

The fact that Plaintiffs challenged multiple violations of discrete provisions by Defendants in the “aggregate[]” does not somehow transform individually reviewable agency actions or omissions into an impermissible “broad, programmatic attack.” 1-ER-20-21. The District Court erred by holding that it did. Contrary to the District Court’s erroneous interpretation of *Lujan* and *SUWA*, discrete actions or failures to act do not become unreviewable simply because there

are so many of them that a judgment under the APA might result in programmatic changes. 1-ER-20. Indeed, the Supreme Court in *Lujan* specifically recognized that an APA challenge is proper even if it “*may* ultimately have the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency in order to avoid the unlawful result that the court discerns.” *Lujan*, 497 U.S. at 894; *see also Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (en banc). The District Court concluded otherwise by reading this quote and another in *Lujan* to mean the opposite of what they say.

Where plaintiffs are ““adversely affected or aggrieved by agency action within the meaning of a relevant statute,”” 5 U.S.C. § 702, as here, “[g]overnment deficiencies do not become non-reviewable simply because they are pervasive.” *City of N.Y. v. U.S. Dept. of Def.*, 913 F.3d 423, 433 (4th Cir. 2019). Holding otherwise would create a nonsensical and perverse incentive for government agencies to immunize themselves from APA challenges simply by failing to implement many discrete regulatory mandates at once. The District Court should be reversed.

II. The Dismissed Student Plaintiffs Have Standing

The four dismissed Student Plaintiffs who no longer attend HES have standing to seek the equitable remedy of compensatory education, and their claims are not moot. Having alleged that Defendants denied them educational services

required by the Indian Education Act, which can be redressed by a favorable decision awarding compensatory education, each of these students has an active controversy against Defendants with an available remedy. The APA permits all suits “seeking relief other than money damages,” 5 U.S.C. § 702, and the United States Supreme Court has held that “[r]elief that orders a town to reimburse parents for education costs that Congress intended the town to pay is not ‘damages.’” *See Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988) (citing *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985) (*Burlington*)). Courts routinely award compensatory education in a variety of contexts, and the remedy remains available to students who have graduated from high school or moved away from a district. The District Court’s dismissal of the four Student Plaintiffs based on standing and mootness should therefore be reversed, and those Plaintiffs should be permitted to pursue their claims.

STANDARD OF REVIEW

This Court reviews *de novo* an order granting a motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1). *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 416-17 (9th Cir. 2020). A district court’s grant of summary judgment is also reviewed *de novo*. *Gill v. U.S. Dep’t of Just.*, 913 F.3d 1179, 1184 (9th Cir. 2019).

ARGUMENT

I. Plaintiffs Challenge Discrete Agency Actions and Failures to Act that Are Reviewable Under the APA

Plaintiffs have a cause of action under the APA where they are “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. 5 U.S.C. § 706(1) provides that a “reviewing court *shall*” compel agency action unlawfully withheld or unreasonably delayed, or set aside agency action that is arbitrary and capricious. A court must compel agency action “unlawfully withheld or unreasonably delayed” where there is “a specific, unequivocal command’ placed on the agency to take a ‘discrete agency action’” that the agency has failed to take. *VVA*, 811 F.3d at 1075 (quoting *SUWA*, 542 U.S. at 63-64).

The BIE’s failure to take actions required by certain regulations under the Indian Education Act meet this standard. Plaintiffs are indisputably adversely affected or aggrieved, and the government has admitted that (1) the regulations at issue are mandatory; (2) they have failed to implement them at HES; and (3) individually, each regulation prescribes discrete action that Defendants are required to take.

The District Court held that Plaintiffs’ APA claims failed because “Plaintiffs have failed to identify a final, discrete agency action that is reviewable by the Court” and because “Plaintiffs’ challenges, when aggregated, rise to the level of an

impermissible systematic challenge under the APA that should not be resolved by the courts.” 1-ER-21. Both holdings are wrong.

A. Plaintiffs Are Adversely Affected or Aggrieved By Defendants Admitted Failures to Fulfill Their Legal Duties

It is undisputed that Plaintiffs have been “adversely affected or aggrieved” by Defendants’ numerous failures to comply with the regulations at HES. For example, the HES Student Plaintiffs are directly harmed by the lack of access to: “fine arts,” physical education,” “career awareness,” and other content areas, 25 C.F.R. §§ 36.22-.23; a librarian or reference books, 25 C.F.R. § 36.4(a); and student activities and programs such as “special interest clubs, physical activities, student government, and cultural affairs,” 25 C.F.R. § 36.43—all of which Defendants are required by law to provide. On a daily basis, Student Plaintiffs have been directly harmed by the BIE’s failure to implement each of the 13 regulations that Plaintiffs challenge at HES. They face the difficult choice between attending a school that leaves them nearly illiterate, unable to perform basic math, and frequently ineligible for high school or higher education, 4-ER-430 ¶ 34, or moving far from their homes and families to attain a more adequate education elsewhere.

It is also undisputed that Defendants have not complied with their obligations under the law. Defendants have admitted that they have failed to implement at HES the specific regulations in 25 C.F.R. Part 36 that Plaintiffs

challenge. 4-ER-449 (citing SOF ¶¶ 3-34, 74-119); 2-ER-74; 1-ER-19. Numerous witnesses for Defendants testified at deposition that HES lacks the subjects, staffing, and services required by those regulations. 4-ER-426-30, 4-ER-435-40. And at the hearing on the parties' cross-motions for summary judgment, counsel for the government stated that "the agency doesn't dispute that its efforts have been unsatisfactory and they have fallen short," 2-ER-74, and that it is the government's "position that [it has] not consistently complied with those legal obligations," 2-ER-85. The District Court held in its order "that there is no genuine dispute as to the facts of this case," as "Defendants admitted that they have failed to provide basic education as required by the law." 1-ER-19.

B. The Regulations With Which Defendants Have Failed to Comply Impose Legal Duties to Take Discrete Actions

The parties agree that the thirteen regulations Plaintiffs challenge are each individually mandatory. The regulations include mandatory language, such as "shall" and "required." See 25 C.F.R. §§ 36 *et seq.*; *see also Sacks*, 466 F.3d at 778 ("use of the word 'shall' indicates a mandatory duty that is not subject to discretion."). Moreover, the BIE administrator "responsible for ensuring" HES's compliance with these regulations, Jim Hastings, acknowledged that these regulations are mandatory at BIE-operated schools, including HES. 4-ER-426 ¶¶ 3-4. At summary judgment, the government referred to the regulations as "legal obligations" and did not dispute that they are mandatory in nature. 2-ER-85.

Moreover, while the government may have some discretion over how best to implement the required educational services at HES, the end result—that HES teach the required subjects, have the required staffing, and offer the required services—is not discretionary. Defendants’ argument that APA review would “require the Court to determine what social studies books to choose, how long the instruction should be provided, what sort of science should be taught, what sort of career exploration activities would be appropriate” misses the mark. 2-ER-79. What is at issue here is far more basic. Plaintiffs do not challenge the minutiae of whether a particular social studies book, individual science lesson, or specific career exploration activity is necessary to provide basic educational instruction. Rather, Plaintiffs challenge, for example, Defendants’ *total failure* to employ a one-fifth time librarian, to provide native language and cultural instruction that has received tribal approval, to provide any instruction at all in various content areas, and to maintain a textbook review committee—all of which are specifically required by the regulations. 4-ER-450-56; 4-ER-426-30, 4-ER-435-40; 2-ER-82.

It is true that “[t]he precise efforts the [BIE] must take” to fulfill its obligations under the 13 specific regulations Plaintiffs have identified “necessarily entail some discretionary judgment.” *See VVA*, 811 F.3d at 1079. “But discretion in the manner in which the duty may be carried out does not mean that the [BIE] does not have a duty to perform a ‘discrete action’ within the meaning of § 706(a)

and *SUWA*.” *Id.*; see also *SUWA*, 542 U.S. at 65 (“[W]hen an agency is compelled by law to act ... but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.”). The regulations at issue in this case are sufficiently discrete that a court may, indeed *must*, compel their implementation.

This Court’s decision in *VVA* compels this conclusion. The plaintiffs there sued under Section 706(1) to enforce two provisions of an Army regulation that the Army had failed to implement. 811 F.3d at 1075. The plaintiffs sought 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.* The regulation at issue provided 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 Court held that each of the two regulatory provisions contained a “specific, unequivocal command” to the Army to take “discrete agency action” and that the plaintiffs were therefore entitled to relief under Section 706(1). *Id.* at 1078, 1081. The regulations at issue here provide commands to take discrete agency action that are at least as specific and unequivocal.

VVA provides useful guidance on how a court should determine whether agency action is mandatory and discrete for purposes of Section 706, explaining that a court should look to “the text of the regulation” at issue to see if there “is a ‘specific, unequivocal command’ to take ‘discrete agency action.’” *Id.* at 1078 (quoting *SUWA*, 542 U.S. at 63-64). It is clear that each of the regulations at issue here includes such a “specific, unequivocal command.” *See* 25 C.F.R. §§ 36.11, 36.20-.23, 36.30-.31, 36.40-.43, 36.50-.51 (repeatedly instructing the government on what it “shall” do and “shall” or “must” provide); *see also VVA*, 811 F.3d at 1081 (“[t]he term “shall” is usually regarded as making a provision mandatory” (citation omitted)); *Sacks*, 466 F.3d at 778 (“use of the word ‘shall’ indicates a mandatory duty that is not subject to discretion”). Yet the District Court failed to “look to the text” of any of the regulations that Plaintiffs challenge; indeed, the court does not quote from even a single one of the regulations in its order. Moreover, the basis for the court’s holding that “Plaintiffs have failed to identify a final discrete agency action” is ambiguous. While the court quotes from the Supreme Court’s decision in *SUWA* to the effect that “judicial interference is not appropriate” where the law provides an agency “a great deal of discretion” 1-ER-20 (quoting *SUWA*, 542 U.S. at 66-67), it never analyzes the language of the

relevant regulations or compares that language with the laws at issue in *SUWA* to decide whether they grant such broad discretion.⁸

That analysis, however, demonstrates that the regulations at issue here, unlike the laws at issue in *SUWA*, do not grant such broad discretion to the agency as to render them unenforceable under the APA. This Court’s decision in *VVA* makes that clear. In *VVA*, one regulation provided, in relevant part, 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 required agencies to “establish a system which will permit the identification of [such] volunteers . . . and take actions to notify volunteers of newly acquired information.” *VVA*, 811 F.3d at 1076 (quoting regulations). The second regulation provided 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 1080 (quoting regulation). Neither regulation provided further instructions on how the agencies were to fulfill their obligations. This Court held that both regulations were enforceable under Section 706 of the APA and that the

⁸ Alternatively, the district court may be saying that, even if each of the relevant regulations does mandate final discrete agency actions, because Plaintiffs have “aggregated” Defendants’ failure to comply with all thirteen in a single lawsuit, the case becomes an “impermissible, systematic challenge under the APA.” For the reasons explained below, *infra* Section I.C, that is wrong.

plaintiffs were entitled to injunctions requiring the defendants to comply with both. *Id.* at 1076-1083.

The Court expressly distinguished these regulations from those at issue in *SUWA*, where the plaintiff broadly alleged that the Bureau of Land Management had failed to manage wilderness study areas “in a manner so as not to impair the suitability of such areas for preservation as wilderness” and to manage the public lands “in accordance with land use plans.” *VVA*, 811 F.3d at 1078 (quoting *SUWA*, 542 U.S. at 65, 67). The Court reasoned that “the failures to meet these statutory obligations were ‘[g]eneral deficiencies in compliance’ rather than failures to comply with commands to perform discrete actions.” *Id.* at 1079 (quoting *SUWA*, 542 U.S. at 66). “[T]hese obligations ‘lack[ed] the specificity requisite for agency action.’” *Id.* This Court held that, “[u]nlike the plaintiffs in *SUWA*, Plaintiffs [in *VVA*] have alleged both a legal duty to perform a discrete agency action and a failure to perform that action.” *Id.*

The land use plans at issue in *SUWA* did not, in the Supreme Court’s view, even prescribe any particular actions. Rather, they were general statements of priorities that “guid[ed] and restrain[ed]” and thus were not “legally binding” or “enforceable under § 706(1).” 542 U.S. at 56. While the statute was “mandatory as to the object to be achieved,”—nonimpairment of lands that could become wilderness areas—it left the BLM with so much “discretion in deciding how to

achieve it” that it did not mandate, with the clarity necessary to support judicial action under § 706(1), the specific action demanded by the plaintiffs—“total exclusion of [off-road-vehicle] use.” *Id.* at 59, 66. The *SUWA* Court compared the language at issue there to similarly worded statutes devoid of clarity and straightforward instruction, using examples of requirements that an agency will: “manage wild free-roaming horses and burros *in a manner that is designed to achieve and maintain* a thriving natural ecological balance”; “manage the [New Orleans Jazz National] [H]istorical [P]ark *in such a manner as will preserve and perpetuate knowledge and understanding* of the history of jazz”; or “*manage the . . . Protection Area for the benefit of present and future generations.*” *Id.* at 67 (quoting 16 U.S.C. §§ 1333(a), 410bbb–2(a)(1), 460nnn–12(b)) (emphasis added). The Court worried that challenges to failures to “manage” in “a [certain] manner,” would lead to “pervasive oversight by federal courts over the manner and pace of agency compliance with” broad congressional directives. *Id.* Because *SUWA* sought to compel government actions that lacked clarity and were not legally binding, the *SUWA* Court declined to even consider whether the BLM land use plans were “discrete” enough for APA review. *Id.* at 72 (“[T]he plan’s statements . . . are not a legally binding commitment enforceable under § 706(1). That being so, we find it unnecessary to consider whether the action envisioned by the statements is sufficiently discrete to be amenable to compulsion under the APA.”).

The regulations at issue here are far more like those in *VVA*, which this Court held were enforceable under the APA, than like the statute in *SUWA*. The regulations do not, for example, merely require that Defendants “manage the school in a manner so as to provide students with a basic education.” If they did, Defendants might have an argument under *SUWA*. But, instead, these regulations are even more specific and straightforward than those at issue in *VVA*.

For example, 25 C.F.R. § 36.11 mandates specific teacher-to-student ratios, substitute-teacher requirements, and enrollment and attendance policies. 25 C.F.R. § 36.21 mandates the specifics of what a “curriculum for kindergarten shall provide,” and 25 C.F.R. § 36.22 does the same for an “[e]lementary instructional program,” which must include “fine arts” and “physical education.” 25 C.F.R. § 36.23 expressly requires that a “junior high/middle school instructional program” include “consumer economics” and “health education.” 25 C.F.R. § 36.30 contains very specific requirements for grading and issuance of report cards to parents, including that such report cards be issued “not less than four (4) times yearly.” These are just a few examples of the uniformly specific and mandatory language of the regulations at issue here. *See also* Addendum at A-8–A-31.

Thus, Plaintiffs do not seek “judicial interference with [Defendants’] lawful discretion,” or “judicial entanglement in abstract policy disagreements.” *Cf. SUWA*, 542 U.S. at 66. They seek compliance with thirteen very specific

regulations that set forth discrete elements of the bare minimum education that the BIE is required to provide to students at HES.

Moreover, compelling Defendants to perform their mandatory duties under these regulations does not require the Court to deprive them of discretion over “the manner in which the dut[ies] may be carried out.” *VVA*, 811 F.3d at 1079. In *VVA*, this Court acknowledged that “[t]he precise efforts the Army [needed to] take to identify human subjects in past experiments, and the precise content of the notice to those subjects who [were] identified, necessarily entail[ed] some discretionary judgment.” *Id.* Yet the Court held that “discretion in the manner in which the duty may be carried out does not mean that the Army does not have a duty to perform a ‘discrete action’ within the meaning of § 706(a) and *SUWA*.” *Id.* (citing *SUWA*, 542 U.S. at 65 (“[W]hen an agency is compelled by law to act . . . but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.”))).

In *VVA*, “[t]he injunction simply direct[ed] the Army to fulfill its duty under [the regulation].” 811 F.3d at 1080. This Court held that such an injunction, “reiterate[ing] the plain language of [the regulation’s] duty,” was “appropriately tailored to direct the Army to carry out its duty . . . and that the district court acted within its discretion.” *Id.* at 1079-80. The injunction “expressly preserve[d] the Army’s ability to act ‘in its discretion’ to develop the appropriate policies in order

to carry out [its required] duty. It [did] not prescribe particular policies that the Army should follow,” or “even specify the means by which the Army” needed to give the notice that the regulation required. *Id.* at 1080. The injunction therefore “[did] not amount to programmatic oversight or ‘judicial entanglement in abstract policy disagreements which courts lack both expertise and information to solve.’” *Id.* (quoting *SUWA*, 542 U.S. at 66). Here, Plaintiffs seek a similar injunction that directs Defendants to fulfill their duties under the regulations.

In the district court, Defendants relied on language from the Fourth Circuit’s opinion in *City of New York v. United States Department of Defense*, 913 F.3d 423, 431 (4th Cir. 2019), to the effect that “‘obey the law’ injunction[s]” are “disfavored.” *Id.* at 431 (citing *Int’l Longshoremen’s Ass’n, Local 1291 v. Phil. Marine Trade Ass’n*, 389 U.S. 64, 76 (1967)). But the Supreme Court’s decision in *Int’l Longshoremen’s Ass’n* does not say that “obey the law” injunctions are “disfavored” (or even use that phrase or word); rather, the Court held, in the context of a contempt motion, that the particular injunction entered there—which merely required a union “to comply” with an arbitration award—“can only be described as unintelligible.” 389 U.S. at 69, 76. And, in *City of New York*, the Fourth Circuit was addressing what it described as a request that it “adjudicate generalized grievances asking [the court] to improve an agency’s performance of

operations,” rather than a request for an injunction to enforce “specific and discrete” governmental duties. 913 F.3d at 431.

In any event, to the extent that *City of New York* suggests that injunctions requiring defendants to comply with the law are inappropriate, it is squarely inconsistent with this Court’s holding in *VVA* and other decisions that confirm a court may mandate compliance with a law *without* specifying how the agency must comply. *See VVA*, 811 F.3d at 1079; *see also Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000) (“Although the district court can compel the Department of Interior to provide drainage service as mandated by the San Luis Act, the district court cannot eliminate agency discretion as to how it satisfies the drainage requirement.”).

In addition, and contrary to Defendants’ suggestions in the district court, Defendants’ obligations under the regulations at issue here do not become unenforceable under Section 706(1) simply because compliance may be difficult to achieve. In *South Carolina v. United States*, 907 F.3d 742, 747 (4th Cir. 2018), a statute required that the Department of energy take a discrete action: if DOE failed to meet [a] production objective, it was obligated to remove not less than one metric ton of defense plutonium from South Carolina by January 1, 2016. The “undisputed facts” showed that the plutonium removal requirement was triggered, and “DOE’s failure to remove not less than a metric ton of defense plutonium from

South Carolina by the statutory deadline thus constituted an unlawfully withheld agency action within the meaning of § 706(1).” *Id.* at 755. That “discrete” action was so difficult to achieve that the government argued it was effectively impossible. *Id.* The court held that the government was liable under § 706(1) regardless. *Id.* at 761-62, 765 (“[N]o federal court that has granted injunctive relief to redress unlawfully withheld agency action appears to have engaged in equitable balancing. . . . a district court retains discretion to order agency compliance, including by fixing firm deadlines if appropriate . . . even when full compliance may be unlikely.”); *see also Withrow v. Concanon*, 942 F.2d 1385, 1388 (9th Cir. 1991) (“Impossibility of perfect compliance . . . may be a defense to contempt, but it does not preclude an injunction requiring compliance . . . when a pattern of non-compliance has been shown . . .”).

So too here: Defendants argued at summary judgment that no injunction could be entered because appropriately staffing HES and providing the required educational services is simply too complicated and difficult. As in *South Carolina*, that argument must be rejected.

C. Plaintiffs’ APA Claims Are Not Impermissible Solely Because Defendants’ Violations of Multiple Regulations Are Pervasive.

The District Court held that “Plaintiffs’ challenges, when aggregated, rise to the level of an impermissible, systematic challenge under the APA that should not be resolved by the courts.” 1-ER-21. In doing so, the court relied on two Supreme

Court decisions, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), and *SUWA*. 1-ER-20-21. Neither supports the District Court's holding. *Lujan*, as explained below, is a standing case, and here Defendants do not even dispute that Plaintiffs have standing to assert their APA claims. *SUWA*, as discussed above, involved a request that the court "enter [a] general order[] compelling compliance with broad statutory mandates," not the sort of specific, discrete regulatory requirements at issue here. *See supra* § II.B.

The District Court fundamentally misconstrued *Lujan*, taking a few quotations out of context to reach a result not remotely supported by the Supreme Court's opinion. *Lujan* addresses the circumstances under which a particular plaintiff has standing to sue under the APA. The Supreme Court began its opinion by stating that it "must decide whether respondent, the National Wildlife Federation . . . , is a proper party to challenge actions of the Federal Government relating to certain public lands." *Id.* at 875. The question was whether the plaintiff had failed to show it was "adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* at 884.

The National Wildlife Federation alleged that the Bureau of Land Management's overall "land withdrawal review program"—which was "not derived from any authoritative text [and] d[id] not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and

regulations,”—was a final agency action by which it was “adversely affected or aggrieved.” *Id.* at 890. In support, however, the plaintiff filed member affidavits that “contain[ed] only a bare allegation of injury” and which “fail[ed] to show specific facts supporting” the allegations. *Id.* at 886-87. The Supreme Court held that the respondent could not challenge an “entire ‘program,’” consisting of thousands of individual actions, “simply because *one* of them that is ripe for review adversely affects *one* of respondent’s members.” *Id.* at 893 (emphases added); *see also id.* at 889 (factual averments were insufficient where they “state only that one of respondent’s members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action”).

The Court explained that, to be reviewable under the APA, agency action (or lack thereof) needs to apply “to the claimant’s situation in a fashion that harms or threatens to harm him,” and that the courts will intervene only “when, and to the extent that, a specific ‘final agency action’ has an actual or immediately threatened effect.” *Id.* at 891, 894; *see also High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (explaining that, in *Lujan*, the plaintiffs “failed to challenge any particular agency action that caused harm” because the “land withdrawal review program” was “a general label sweeping into its purview policies and practices as broad and multi-faceted as those of a ‘drug interdiction

program’ of the Drug Enforcement Administration”); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518-19 (9th Cir. 1992) (“Because the regulation at issue [in *Lujan*] was a general program of land review, too vast in the Court’s eyes to be considered an ‘agency action,’ it was found not to be ripe for challenge.”).

This case could not be more different. As explained in detail above, the Student Plaintiffs at HES have been and are indisputably “adversely affected or aggrieved” on a daily basis by Defendants’ failure to comply with each and every one of the 13 specific regulations. There is no question that Plaintiffs are proper parties to challenge Defendants’ failures, and Defendants have never claimed otherwise. *Lujan* is simply inapplicable.

The District Court took two quotations from *Lujan* dramatically out of context to purportedly support its ruling. First, the court wrote that “[the *Lujan* Court] stated that flaws in an agency program ‘consisting principally of the many individual actions ... cannot be laid before the courts for wholesale correction under the APA.’” 1-ER-20 (quoting *Lujan*, 497 U.S. at 893). But the District Court omitted the crucial and dispositive language that follows that clause; the entire sentence reads:

[I]t is entirely certain that the flaws in the entire “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, *simply because one of them that is ripe for review adversely affects one of [plaintiff’s] members.*

Lujan, 497 U.S. at 893 (emphasis added). In other words, a plaintiff may “lay before the courts” only those “flaws” in the agency’s program that adversely affect that plaintiff. In *Lujan*, that included only one action that affected one member. Here, that includes *all* of Defendants’ failures to comply with the regulations; again, Defendants do not contend otherwise.

Second, the District Court wrote that Plaintiffs’ challenges were impermissible because “any intervention by this court ‘may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole “program” to be revised by the agency,’ and ‘more sweeping actions,’ as in this case, ‘are for other branches.’” 1-ER-21 (quoting *Lujan*, 497 U.S. at 894). But, again, the District Court has wrenched this language from *Lujan* out of context in a way that dramatically distorts its meaning. The relevant passage from *Lujan* reads:

[W]e intervene in the administration of the laws only when, and to the extent that, a specific “final agency action” has an actual or immediately threatened effect. Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole “program” to be revised by the agency in order to avoid the unlawful result that the court discerns.

Lujan, 497 U.S. at 894 (emphasis added) (citation omitted). In other words, *where, as here, but unlike in Lujan, the plaintiff has shown actual injury from all the challenged violations, the courts will intervene, even if “such intervention” may ultimately have a broad programmatic effect. See Sierra Club*, 228 F.3d at 567 (“The environmental groups *can* challenge ‘a specific “final agency action” [which] has an

actual or immediately threatened effect,’ *even when such a challenge has ‘the effect of requiring a regulation, a series of regulations, or even a whole “program” to be revised by the agency.’*” (quoting *Lujan*, 497 U.S. at 894) (emphases added)).

Indeed, the Supreme Court reiterated this point specifically with reference to the land withdrawal review program:

If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in text, it can of course be challenged under the APA by a person adversely affected—and the entire “land withdrawal review program,” insofar as the content of that particular action is concerned, would thereby be affected.

Lujan, 497 U.S. at 890 n.2. And the dissenting Justices agreed:

In some cases the “agency action” will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain “programmatic” relief that affects the rights of parties not before the court.

Id. at 913 (Blackmun, J., dissenting)

The District Court’s quotations from *Lujan* are the lynchpins of its holding that Plaintiffs’ APA claims are impermissible. Read in proper context, however, the quoted passages and others in the Court’s opinions in fact demonstrate that Plaintiffs’ claims are reviewable and that the District Court’s order was erroneous.

Defendants have claimed that the injunction that Plaintiffs seek here would adversely affect the BIE by requiring a “broad restructuring” of the agency and its programs. 2-ER-86 (“[W]e have sweeping allegations about BIE’s management of every aspect of the operation of the Havasupai school. It would require the refashioning of that school by the Court. And such a broad-brush challenge is not permissible, again, because of the separation-of-powers issue. It interjects the Court into the day-to-day management of agency affairs.”). That argument is meritless.

The defendants in *VVA* made the same argument that Defendants raise here—that compelling agency action would amount to “broad restructuring” of a government program. *See VVA*, 811 F.3d at 1081-82 (noting the Army’s argument that an injunction would be “inconsistent with § 706(1) because such an injunction would require a ‘broad restructuring of Army programs and operations.’”). The court “recognize[d] that . . . [c]ourts are not permitted under § 706(1) to enter ‘general orders compelling compliance with broad statutory mandates,’” *id.* (quoting *SUWA*, 542 U.S. at 66), but rejected the Army’s argument, holding that the government was “substantially exaggerat[ing] the impact of an injunction requiring the Army to provide medical care to human test subjects who were harmed by DOD experiments.” *Id.* The court reasoned that only 6,700 people had been exposed to the experiments over the course of 20 years, and the number still

living was likely to be fairly small. *Id.* Indeed, the court held that identifying the affected individuals and “[r]equiring the provision of medical care to this limited population would hardly require a ‘broad restructuring of Army programs and operations.’” *Id.* “Instead, the Army would be required to provide medical care to a relatively small group of living veterans who were injured as a proximate result of the government’s conduct. This is a discrete action specifically mandated by subsection (k) of AR 70-25, for which judicial enforcement pursuant to § 706(1) is required.” *Id.*

So too here: Plaintiffs do not seek an injunction that would require a broad restructuring of BIE programs and operations. What Plaintiffs seek is for the court to compel the BIE to provide the services and resources required by 13 specific, mandatory regulations to approximately 70 students, at one school—HES—within its 183-school, over 40,000-student system. Of course, even if such an order would ultimately “have the effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be revised by the agency in order to avoid the unlawful result that the court discerns,” that result is precisely what the Supreme Court anticipated might properly occur. *See Lujan*, 497 U.S. at 894.

The District Court did not rely on any authority beyond *Lujan* and *SUWA* to support its summary judgment holding on Plaintiffs’ APA claims. To the extent

Defendants rely upon additional cases stemming from *Lujan* and *SUWA*, they similarly miss the mark.

In *City of New York*, on which Defendants have relied heavily, 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. Notably, the plaintiffs—municipalities that had no statutory right to use the NICS database but were afforded permissive access for limited purposes by the Attorney General, *id.* at 428—were not attempting to enforce any rights or obligations that ran from the DOD *to them*.

Indeed, “[t]heir challenge [was] not about access to the NICS” at all. *Id.* at 430. Rather, “it [was] about the quality of the information in that system.” *Id.* As the Fourth Circuit explained:

This is thus not a case where [plaintiffs] have asked for access provided for in the regulations and have been denied. Instead, the municipalities see their existing access to the NICS as an invitation to compel any *federal inter-agency legal requirement* that may affect the quality of the information they receive. On their view, the APA authorizes a recipient of government information to initiate a private action to compel governmental conduct that might improve that information’s accuracy or comprehensiveness.”

Id. (emphasis added).

The Fourth Circuit held that the plaintiffs “[did] not challenge a discrete agency action” but instead sought “to reach into the federal government and compel any legal obligations associated with developing the information in the

system.” *Id.* at 432-33. The court expressly distinguished the case before it from this Court’s decision in *VVA*, stating that its holding “raises no conflict” with *VVA* because what plaintiffs sought there “was particular to them and their own rights under federal law,” whereas the municipalities in *City of New York* sought “wholesale compliance with an entire administrative scheme, *based solely on the fact that the government has granted them access to an information system.*” *Id.* at 434-35 (emphasis added); *see also id.* at 434 (“[T]he municipal [plaintiffs] have failed to demonstrate that the DOD’s reporting requirements in any way determine their rights and obligations. . . . The action challenged in this case is DOD’s obligation to provide information only to another agency of the federal government.”) Here, Plaintiffs seek relief with respect to their own rights to the elements of a basic education that are specifically prescribed by Defendants’ own regulations.

Moreover, the plaintiffs in *City of New York* sought to compel nation- and agency-wide compliance with a broad statutory mandate to address “widespread and systemic” reporting failures of the DOD. *Id.* at 433. Plaintiffs here do not challenge the BIE’s implementation of the Indian Education Act’s, or its implementing regulations’, requirements at *all* BIE schools in the BIE system. Plaintiffs challenge numerous failures at *one* school out of nearly 200—a school

that serves a tiny minority of the total population of native children in attendance at BIE schools.

Defendants may argue that *City of New York* somehow supports the District Court’s “aggregation” of Plaintiffs’ claims to characterize them as “an impermissible, systematic challenge under the APA.” 1-ER-21. The Fourth Circuit did note that the plaintiffs there “tr[ie]d to nonetheless force [the court] onto the field by characterizing their broad claim as simply an aggregation of many small claims, each one seeking to compel the individual reports required by the NIAA.” 913 F.3d at 433. The court emphasized that “[a]ll governmental programs are the aggregation of individual decisions, many of which are required by law,” and that “[t]he APA ensures that it is the individual decisions that are assessed as agency action, rather than the whole administrative apparatus.” *Id.*

But the Fourth Circuit did not hold or even imply that APA review is unavailable when, as here, an agency fails to take numerous discrete, mandatory actions. To the contrary, the Fourth Circuit expressly acknowledged that it was “surely correct” 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). But in that case, unlike here, “a discrete action”—whether one or hundreds—was “wholly lacking.” *Id.* Here, Plaintiffs allege that Defendants’ failures to take

specific, discrete, and legally required actions are pervasive, but that does not render any of those failures immune from challenge under the APA. Defendants have cited no case that disallowed the type of “broad” challenge that Plaintiffs bring here—to an agency’s failure to comply with a large number of specific, discrete legal requirements that directly affect their rights.

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), upon which Defendants have relied, 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.”); *id.* at 569 (“[T]he environmental groups did not attack the implementation of specific timber sales but rather attacked general Forest Service practice in the Texas forests.”); *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 discrete instances of Defendants’ failing to act, or acting arbitrarily and capriciously, in violation of very specific regulations, at a single BIE school, and they seek only relief related directly to those specific violations. 4-ER-451-56; 2-ER-187-89.

Defendants attempted at summary judgment 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 3-ER-232. The scale and scope of 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 that have deprived Student Plaintiffs and other children of a basic education. But the fact remains that Plaintiffs’ APA claims are based on Defendants’ discrete actions and failures to act in violation of specific regulations. These “*deficiencies do not become non-reviewable simply because they are pervasive.*” *City of N.Y.*, 913 F.3d at 433 (emphasis added).

II. Student Plaintiffs Who No Longer Attend HES Have Standing to Seek the Equitable Remedy of Compensatory Education and Their Claims Are Not Moot

The four dismissed Student Plaintiffs have an active controversy against Defendants because they have sought the equitable remedy of compensatory

education as a remedy for their APA claims. The District Court dismissed for lack of standing the claims of five Student Plaintiffs who were no longer enrolled at HES when the Complaint was filed (including appellants Levi R. and Leo R.), 1-ER-34, and dismissed as moot at summary judgment the claims of two student Plaintiffs who completed eighth grade during the pendency of the litigation and therefore no longer attended HES (Durell P. and Stephen C.), 1-ER-27. These dismissals followed from the District Court's erroneous conclusion that there was no available relief the court could provide to redress the injuries of a student who no longer attends HES. 1-ER-34; 1-ER-27. But this is simply not the case: all Student Plaintiffs have sought and are entitled to the equitable remedy of compensatory education.

Contrary to the District Court's holding, 1-ER-34, the remedy of compensatory education is not limited to the Individuals with Disabilities in Education (IDEA) context—it is a generally available “equitable remedy that seeks to make up for ‘educational services the child should have received in the first place.’” *Prescott Unified Sch. Dist.*, 631 F.3d at 1125. Because an appropriate award of compensatory education would partially remedy the educational injuries caused by Defendants' longstanding failure to provide the educational services required by the Indian Education Act and its implementing regulations, this Court

should reverse the District Court's order dismissing the claims of the four Student Plaintiffs who no longer attend HES.

To satisfy the requirements of Article III standing, plaintiffs must allege a redressable injury at the time of the filing of the original complaint. *See 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."). 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 where any effective relief maybe granted." *Id.*

The Student Plaintiffs who no longer attend Havasupai Elementary School each have an active controversy against Defendants with an available remedy: They have alleged that Defendants have denied them educational services required by the IEA and its implementing regulations, which can be redressed by an award of compensatory education. All Student Plaintiffs have been harmed by the Defendants' failure to provide the educational services required by the IEA during each Plaintiff's time at HES and/or when students were eligible to attend HES but were compelled to obtain education away from home due to Defendants' failure to provide legally required educational services. Compensatory education can

remedy these injuries regardless of whether a particular Plaintiff currently attends HES or is still eligible to do so. All Student Plaintiffs therefore sought compensatory education as an equitable remedy. 4-ER-540, Request for Relief ¶ 3.k.

A. The APA Permits Plaintiffs to Seek Any “Relief Other Than Money Damages”

The Supreme Court has made clear that a federal court’s powers of equitable relief are broad, and that “those equitable powers assume an even broader and more flexible character” when “the public interest is involved.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Therefore, “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.” *Id.*

Nothing in the APA restricts this Court’s jurisdiction in equity. The APA permits all suits “seeking relief other than money damages,” 5 U.S.C. § 702. In *Bowen v. Massachusetts*, the Supreme Court interpreted the scope of relief available under § 702 of the APA and held that the legislative history of § 702 “demonstrate[s] conclusively that the exception for an action seeking ‘money damages’ should not be broadened beyond the meaning of its plain language,” 487 U.S. 879, 900 (1988). It therefore determined that a request for reimbursement for an underpayment did not constitute “money damages” within the meaning of § 702, despite the relief being monetary in form. *Id.* at 893 (“The fact that a

judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’”). This is because while “[d]amages are given to the plaintiff to *substitute* for a suffered loss,” “specific remedies . . . “attempt to give the plaintiff the very thing to which he was entitled” and are intended to “enforce the statutory mandate itself.” *Id.* at 895, 900 (citation omitted).

In reaching this conclusion, the Court relied on its holding in *School Committee of Burlington v. Department of Education of Massachusetts* that a bar on money damages did not preclude requests for tuition reimbursement under what is now the IDEA (and was then termed the Education of the Handicapped Act), because “[r]elief that orders a town to reimburse parents for education costs that Congress intended the town to pay is not ‘damages.’” *See id.* at 893-94 (citing *Burlington*, 471 U.S. at 370-71); *see also Burlington*, 471 U.S. at 370-71 (reimbursement of private school tuition and related expenses is not damages because it “merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it” complied with the statute).

The specific remedy of compensatory education, sought to here provide Student Plaintiffs with the education to which they are legally entitled and which Congress intended Defendants to provide, is not a money substitute. As discussed

further below, compensatory education requires Defendants to act to perform the duties they had long neglected to perform and, consequently, to dedicate resources they were already obligated to use in order to comply with their duties.

B. Compensatory Education is an Equitable Remedy

Compensatory education is a form of forward-looking, equitable relief appropriate to remedy Defendants’ failure to provide educational services mandated by law. “Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency’s failure over a given period of time” *G ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 308-09 (4th Cir. 2003). It provides “services prospectively to compensate for a past deficient program.” *Spring Branch Indep. Sch. Dist. v. O.W. ex rel. Hannah W.*, 961 F.3d 781, 800 (5th Cir. 2020) (quoting *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008)). While compensatory education is a flexible remedy and courts are encouraged to be creative in fashioning appropriate relief, awards of compensatory education often include additional assistance such as “tutoring, counseling, or other support services,” “the establishment of a fund to be spent on the child’s education,” *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 498-99 (3d Cir. 2012) (*Collingswood*), or summer school, *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 188 (1st Cir. 1993).

This Court has made clear that compensatory education is “an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” *Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994); *see, e.g., Prescott Unified Sch. Dist.*, 631 F.3d at 1125 (“[c]ompensatory education is an equitable remedy that seeks to make up for ‘educational services the child should have received in the first place’”); *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (“Compensatory education services can be awarded as appropriate equitable relief.”). Every other Circuit to consider this issue has agreed, characterizing compensatory education as an equitable remedy.⁹

⁹ *Spring Branch*, 961 F.3d at 789, *cert. denied*, 141 S. Ct. 1389 (2021); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 456 (2d Cir. 2015); *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 718 (3d Cir. 2010); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1285-86 (11th Cir. 2008); *Bd. of Educ. of Fayette Cty., Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (quoting *Park*, 464 F.3d at 1034); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005) (quoting *Parents of Student W.*, 31 F.3d at 1496); *Fort Bragg Dependent Sch.*, 343 F.3d at 308-09 (citing *Parents of Student W.*, 31 F.3d at 1496); *Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.*, 79 F.3d 654, 655 (7th Cir. 1996), as amended (Apr. 23, 1996) (same); *Pihl*, 9 F.3d at 188-89 (same); *see also Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 856 (8th Cir. 2000) (affirming that appropriate relief under the IDEA includes compensatory education but excludes damages), *superseded by statute on other grounds as recognized in Richardson v. Omaha Sch. Dist.*, 957 F.3d 869, 873 (8th Cir. 2020). The Tenth Circuit has not yet reached this issue. *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1249 n.11 (10th Cir. 2009) (“A number of circuits have held that the authority to grant equitable relief . . . includes the power to order the services themselves as ‘compensatory education.’”)

No authority requires departing from this well-established principle. In 1986, a panel of this Court suggested in dicta that compensatory education is no different than monetary damages, and is therefore barred under federal sovereign immunity. *Alexopoulos ex rel. Alexopoulos v. Riles*, 784 F.2d 1408, 1412 (9th Cir. 1986). The proposition was raised as an additional barrier to a claim for compensatory education that would nonetheless have failed on two additional and independent grounds. *Id.* at 1412. *Alexopoulos* is not good law. Decided in 1986, its reasoning relied exclusively on cases that were decided prior to the Supreme Court’s 1985 ruling in *Burlington*, 471 U.S. 359 (1985), which held that tuition reimbursement was an available equitable remedy and has formed the basis for nearly every Circuit’s embrace of compensatory education as an equitable remedy. *See, e.g., Pihl*, 9 F.3d at 188 (appellate courts “have extended the Supreme Court’s rationale in *Burlington* to support the award of compensatory education as ‘appropriate relief’”). *Alexopoulos* has not been discussed or relied upon since, except in glancing fashion the following year in a similar case brought by the same plaintiffs. *Alexopoulos ex rel. Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 553 (1987). In the past three decades these cases have been superseded by the more robust line of binding cases in *Parents of Student W.*, *Prescott Unified Sch. Dist.*, and *Park*, which all hold that an award of compensatory education is equitable in nature.

This Court and others have identified additional attributes of the remedy of compensatory education that characterize its nature as essentially equitable, and distinct from a request for money damages. *First*, the remedy of compensatory education is *flexible*. “The essence of equity jurisdiction” is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Accordingly, compensatory education is “designed to ensure that the student is appropriately educated,” not to provide a simple “day-to-day compensation for time missed.” *Parents of Student W.*, 31 F.3d at 1497; *see also Reid*, 401 F.3d at 523-24 (quoting with approval *Parents of Student W.*, 31 F.3d at 1497). Courts, therefore, have been “creative in fashioning the amount and type of compensatory education services to award.” *Prescott Unified Sch. Dist.*, 631 F.3d at 1126.

Second, compensatory education is *prospective*, intended to deliver education now and in the future that the educational agency was already required by law—but failed—to provide. *See, e.g., Burr v. Sobel*, 863 F.2d 1071, 1073, 1078-79 (2d Cir. 1988) (holding that mandatory injunction requiring compensatory education for the plaintiff was “purely prospective in nature” and not a damages claim for purposes of Eleventh Amendment immunity), *reaffirmed*, 888 F.2d 258, 259 (2d Cir. 1989); *see also Fort Bragg Dependent Sch.*, 343 F.3d at 309; *Spring Branch*, 961 F.3d at 800.

While compensatory education doctrine has arisen in the context of the IDEA, there is no justification to limit this equitable remedy as unique to the IDEA. The IDEA statute does not expressly authorize an award of compensatory education or refer to compensatory education in any way. Rather, it simply authorizes the “grant [of] such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). As the Supreme Court recognized in *Burlington*, “[t]he ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be ‘appropriate.’” 471 U.S. at 369-70. The APA likewise permits any form of “relief other than money damages,” 5 U.S.C. § 702, conferring similarly broad discretion to order any form of equitable remedy. There is no limitation on this Court’s broad equitable authority to remedy violations of the APA. Moreover, courts have ordered compensatory education as an equitable remedy to redress past educational deficiencies in cases not involving the IDEA, most notably to address general education inadequacies in the desegregation context. *See, e.g., Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 778 F.2d 404, 408 (8th Cir. 1985) (approving of the district court’s remedies, which included “providing compensatory and remedial programs for black children”); *Adams v. United States*, 620 F.2d 1277, 1295-96 (8th Cir. 1980) (desegregation relief requires “[d]eveloping and implementing compensatory and remedial education

programs.”); *Plaquemines Parish Sch. Bd. v. United States*, 415 F.2d 817, 831 (5th Cir. 1969) (approving remedial programs that were “an integral part of a program for compensatory education” to redress school segregation). The Court may therefore exercise its full array of equitable powers—including the remedy of compensatory education—when fashioning appropriate relief for Plaintiffs’ claims.

C. Eligibility for Compensatory Education Does Not Require Current Enrollment at HES

Compensatory education remains an available remedy to redress the legally-required education that was denied to Student Plaintiffs during the years they attended HES, even if they are no longer enrolled at the school. As a practical matter, compensatory education services such as tutoring, remedial, enrichment, or other support services, or a fund to cover future educational opportunities like tuition for private or specialized schooling or summer programming, does not require enrollment at HES. And this Court and others have confirmed that a student who no longer attends a school—whether because the student moved out of the school district or state or because the student graduated or “aged out” of eligibility for the school—remains entitled to compensatory education to remedy deficient education provided by the original school.

Courts routinely award compensatory education services to young people who have completed the twelfth grade and/or are over the age of 21. In *Parents of Student W.*, this Court recognized that a district court’s “fact-specific analysis”

could lead to an award of compensatory education to a student who had graduated from high school. 31 F.3d at 1497.¹⁰ *Id.* Other Circuits have reached the same conclusion. *See, e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999), *superseded on other grounds as recognized by P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009); *Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ.*, 79 F.3d 654, 656 (7th Cir. 1996) (court may order the “full range of equitable remedies” including “adult compensatory education”); *Pihl*, 9 F.3d at 188 n.8 (“[A]n award [of compensatory education services] may include . . . an extended period of assistance beyond the statutory age of entitlement.”). This Court has favorably cited *Ferren C. v. School District of Philadelphia*, 612 F.3d 712, 718-19 (3d Cir. 2010), a Third Circuit case holding that compensatory education remains available after the age of 21.

Prescott Unified Sch. Dist., 631 F.3d at 1126 (describing *Ferren C.* as standing for the proposition that a “court can order school to provide annual IEPs to student who had aged out of a statutory right to a FAPE”). Likewise, district courts in this Circuit have also routinely found that compensatory education is available after a student has graduated from high school and after age 21. *See, e.g., San Dieguito*

¹⁰ Although the fact-specific analysis in that case caused the Court to deny the award of compensatory education there, the Court acknowledged that “[i]t may be a rare case when compensatory education is not appropriate.” *Id.*

Union High Sch. Dist. v. Guray-Jacobs, No. 04cv1330 DMS (POR), 2005 U.S. Dist. LEXIS 52124, at *5-6 (S.D. Cal. Oct. 27, 2005); *G.R. v. Dall. Sch. Dist. No. 2*, 823 F. Supp. 2d 1120, 1143 (D. Or. 2011).

The remedy of compensatory education also remains available to a child who moves out of the state or school district and thus is no longer eligible to attend the original school. The Third Circuit has specifically addressed this issue and held that “[c]ontinuity of residence cannot be prerequisite to the grant of compensatory education.” *Collingswood*, 694 F.3d at 497-99 (holding that a claim for compensatory education is not rendered moot by an out-of-district move, even if that move takes the child out of state); *see also Indep. Sch. Dist. No. 284 v. A.C. ex rel. C.C.*, 258 F.3d 769, 774-75 (8th Cir. 2001) (same).

As several courts have recognized, denying students a remedy for past violations after they have left a school or district would incentivize educational agencies to evade their legal responsibilities by compelling families to leave to seek adequate education elsewhere or simply waiting out the clock during a lengthy legal process. *See Collingswood*, 694 F.3d at 497 (such a rule would “allow ‘a school district [to] simply stop providing required services to a student with the underlying motive of inducing this student to move from the district, thus removing any future obligation . . . which the district may owe to the student’” (citation omitted)); *Pihl*, 9 F.3d at 189-90 (“[C]ompensatory education must be

available beyond a student’s twenty-first birthday. Otherwise, school districts simply could stop providing required services to older teenagers, relying on the Act’s time-consuming review process to protect them from further obligations.”); *see also Jefferson Cty. Bd. of Educ. v. Breen*, 853 F.2d 853, 858 (11th Cir. 1988) (“Providing a compensatory education should serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability.”). The facts here vividly illustrate this rationale. Several of the dismissed Student Plaintiffs had no choice but to leave their home and community because of their inability to obtain legally-sufficient education at HES. Levi R.’s mother uprooted the entire family and moved outside of the canyon so he could attend a public school.¹¹ 4-ER-503-04 ¶ 128.

Permitting compensatory education is essential to fulfill the Indian Education Act’s statutory purpose to ensure that Native students “are provided with educational opportunities that equal or exceed those for all other students in the United States.” 25 U.S.C. § 2001(a)(1). Students who remain in K-12 schools require compensatory education to remediate past deficiencies and access age-

¹¹ Anna D.’s family likewise made the difficult choice to transfer her to an Arizona public school outside of her community because HES could not meet her educational needs. 4-ER-474-75 ¶ 9. And the parents of Plaintiffs Jenny A., Jordan A., and Jeremy A. made the agonizing decision to send their young children to attend an out-of-state boarding school, despite the long history of abuses at such schools. 4-ER-476-77, 507-08, 510 ¶¶ 14-16, 146, 152, 161.

appropriate general education curriculum. And after graduation, students require the education they were legally entitled to receive in the first place to fulfill the foundational promise of public education in this country: to ensure that every young person attains the basic skills necessary to succeed as adults economically and professionally and to participate fully in our democracy and civic life. *See, e.g., Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (Education “is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (“By denying . . . children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”).

The unique nature of the federal government’s obligation to provide education to Native students makes the rationale for ensuring the availability of the compensatory education remedy even stronger than in other cases where students moved out of the district, out of state, or graduated. Here, the responsible educational agency is not a traditional school district, but Defendant BIE, which is required to make an education available to any Native student. 25 C.F.R. § 32.3.

At the time the Complaint was filed, no student Plaintiff had completed the twelfth grade and all Student Plaintiffs remained eligible for a K-12 education provided by Defendant BIE. 4-ER-475-77. Currently, three of the four dismissed Student Plaintiffs remain eligible for a K-12 education provided by Defendant BIE.¹²

CONCLUSION

The District Court's grant of summary judgment on Plaintiffs' APA claim should be reversed. This Court should also reverse the District Court's orders dismissing the claims of Student Plaintiffs who no longer attend HES.

DATED: June 25, 2021

MUNGER, TOLLES & OLSON LLP

By: /s/ Emily Curran-Huberty
Emily Curran-Huberty
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¹² Twenty-year old Leo R., who has completed the twelfth grade, remains eligible for compensatory education under *Parents of Student W*. Plaintiffs are prepared to introduce evidence on remand as to the nature and value of compensatory educational services to him if it would be of assistance to the District Court.

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases pursuant to Federal Rule of Appellate Procedure 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and, according to the word count feature of the word processing system used to prepare the brief (Microsoft Word 2010), contains 13,680 words.

DATED: June 25, 2021

By: /s/ Emily Curran-Huberty
Emily Curran-Huberty

ADDENDUM A TO APPELLANTS' OPENING BRIEF

ADDENDUM TABLE OF CONTENTS

Document	Page
5 U.S.C. § 701	A-1
5 U.S.C. § 702	A-3
5 U.S.C. § 706	A-4
25 U.S.C. § 2000	A-6
25 C.F.R. § 32.3	A-7
25 C.F.R. § 36.11	A-8
25 C.F.R. § 36.20	A-10
25 C.F.R. § 36.21	A-12
25 C.F.R. § 36.22	A-13
25 C.F.R. § 36.23	A-15
25 C.F.R. § 36.30	A-17
25 C.F.R. § 36.31	A-19
25 C.F.R. § 36.40	A-20
25 C.F.R. § 36.41	A-22
25 C.F.R. § 36.42	A-23
25 C.F.R. § 36.43	A-26
25 C.F.R. § 36.50	A-28
25 C.F.R. § 36.51	A-30

5 U.S.C. § 701

§ 701. Application; definitions, 5 USCA § 701



KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 701

§ 701. Application; definitions

Effective: January 4, 2011

[Currentness](#)

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

§ 701. Application; definitions, 5 USCA § 701

(H) functions conferred by [sections 1738, 1739, 1743, and 1744 of title 12](#); subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;¹ and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by [section 551](#) of this title.

CREDIT(S)

([Pub.L. 89-554](#), Sept. 6, 1966, 80 Stat. 392; [Pub.L. 103-272](#), § 5(a), July 5, 1994, 108 Stat. 1373; [Pub.L. 111-350](#), § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

Footnotes

¹ See References in Text note set out under this section.

5 U.S.C.A. § 701, 5 USCA § 701

Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

End of Document

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5 U.S.C. § 702

§ 702. Right of review, 5 USCA § 702

United States Code Annotated

Title 5. Government Organization and Employees (Refs & Annos)

Part I. The Agencies Generally

Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

([Pub.L. 89-554](#), Sept. 6, 1966, 80 Stat. 392; [Pub.L. 94-574](#), § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 702, 5 USCA § 702

Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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5 U.S.C. § 706

§ 706. Scope of review, 5 USCA § 706



KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limitation Recognized by [Krafsur v. Davenport](#), 6th Cir.(Tenn.), Dec. 04, 2013

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated

Title 5. Government Organization and Employees (Refs & Annos)

Part I. The Agencies Generally

Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to [sections 556](#) and [557](#) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

§ 706. Scope of review, 5 USCA § 706

([Pub.L. 89-554](#), Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C.A. § 706, 5 USCA § 706

Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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25 U.S.C. § 2000

§ 2000. Declaration of policy, 25 USCA § 2000

United States Code Annotated

Title 25. Indians (Refs & Annos)

Chapter 22. Bureau of Indian Affairs Programs (Refs & Annos)

25 U.S.C.A. § 2000

§ 2000. Declaration of policy

Effective: January 8, 2002

[Currentness](#)

Congress declares that the Federal Government has the sole responsibility for the operation and financial support of the Bureau of Indian Affairs funded school system that it has established on or near Indian reservations and Indian trust lands throughout the Nation for Indian children. It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children and for the operation and financial support of the Bureau of Indian Affairs-funded school system to work in full cooperation with tribes toward the goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.

CREDIT(S)

([Pub.L. 95-561, Title XI, § 1120](#), as added [Pub.L. 107-110, Title X, § 1042](#), Jan. 8, 2002, 115 Stat. 2007.)

25 U.S.C.A. § 2000, 25 USCA § 2000

Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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25 C.F.R. § 32.3

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 32. Indian Education Policies (Refs & Annos)

25 C.F.R. § 32.3

§ 32.3 Mission statement.

Currentness

Recognizing the special rights of Indian Tribes and Alaska Native entities and the unique government-to-government relationship of Indian Tribes and Alaska Native villages with the Federal Government as affirmed by the United States Constitution, U.S. Supreme Court decisions, treaties, Federal statutes, and Executive Orders, and as set out in the Congressional declaration in sections 2 and 3 of the Indian Self-Determination and Education Assistance Act ([Pub.L. 93-638](#); 88 Stat. 2203; [25 U.S.C. 450](#) and [450a](#)), it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians and Alaska Natives. As acknowledged in section 5 of the Indian Child Welfare Act of 1978 ([Pub.L. 95-608](#); 92 Stat. 3069; [25 U.S.C. 1901](#)), in the Federal Government's protection and preservation of Indian Tribes and Alaska Native villages and their resources, there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska Native children, including their education. The mission of the Bureau of Indian Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities. The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal or Alaska Native village contexts.

SOURCE: [44 FR 58098](#), Oct. 9, 1979, unless otherwise noted. Redesignated at [47 FR 13327](#), Mar. 30, 1982., unless otherwise noted.

AUTHORITY: Secs. 1130 and 1133 of Title XI of the Education Amendments of 1978 (92 Stat. 2143, 2321 and 2325, [Pub.L. 95-561](#); [25 U.S.C. 2010](#) and [2013](#)).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.11

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart B. Educational Management

25 C.F.R. § 36.11

§ 36.11 Standard II—Administrative requirements.

Effective: May 31, 2005

Currentness

(a) Staffing. Each school shall, at a minimum, meet the following requirements:

(1) The overall school ratio of regular program students to regular program teachers in self-contained classrooms shall not exceed the following except under the conditions set forth in paragraphs (a)(4)(i) and (ii) of this section. Average daily membership (ADM) shall be used in meeting the following ratios.

Level	Ratio
Kindergarten.....	20:1
1st grade—3rd grade.....	22:1
4th grade—high school.....	25:1

(2) Multi-grade classrooms that cross grade-level boundaries (e.g., K–1, 3–4, etc.) shall use the maximum of the lower grade. In grades K–8, grades shall be consolidated to meet the teacher ratios listed above.

(3) The daily teaching load per teacher in departmentalized classes shall not exceed 150 students (ADM) except in activity type classes such as music and physical education.

(4) Schools exceeding these specific staffing ratios for over 30 consecutive days during one school year shall submit a justification for a request for a waiver to the Director, through the Agency Superintendent for Education or Area Education Programs Administrator, as appropriate, which may be approved for a period not to exceed one school year and for the following reasons:

(i) Additional classroom space is not available for establishing another class; or

§ 36.11 Standard II—Administrative requirements., 25 C.F.R. § 36.11

(ii) The school, Agency, Area and Office of Indian Education Programs Applicant Supply File has been exhausted and the required teacher position cannot be filled. However, efforts to fill the vacancy shall be continued.

(5) Each school shall provide, in the absence of a regular teacher, a certified substitute teacher who meets the State substitute teacher qualifications. In the event that such a substitute is not available, coverage will be provided by a school employee designated by the school supervisor. A class cannot have as a teacher an employee without teaching credentials for more than 20 school days during any one school year.

(b) Written school enrollment and attendance policies. Each school shall have written school enrollment and attendance policies in compliance with and/or consistent with 25 CFR 31, Federal Schools for Indians, the statutes of the State, and tribal education ordinances.

(c) Immunization. School children shall be immunized in accordance with the regulations and requirements of the state in which they attend school or standards of the Indian Health Service.

Credits

[[59 FR 61765](#), Dec. 1, 1994; [70 FR 21951](#), April 28, 2005]

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.20

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart C. Minimum Program of Instruction

25 C.F.R. § 36.20

§ 36.20 Standard V—Minimum academic programs/school calendar.

Effective: May 31, 2005

[Currentness](#)

(a) If an emergency arises from an uncontrollable circumstance during the school day which results in the dismissal of students by the school administration, the day may be counted as a school day provided that three-fourths of the instructional hours are met.

(b) The educational program shall include multi-culture and multi-ethnic dimensions designed to enable students to function effectively in a pluralistic society.

(1) The school's language arts program shall assess the English and native language abilities of its students and provide instruction that teaches and/or maintains both the English and the primary native language of the school population. Programs shall meet local tribal approval.

(2) The school program shall include aspects of the native culture in all curriculum areas. Content shall meet local tribal approval.

(3) The school program shall assess the learning styles of its students and provide instruction based upon that assessment. The method for assessing learning styles shall be determined at the local level.

(4) The school program shall provide for at least one field trip per child per year to broaden social and academic experiences.

(c) All intraschool programs (e.g., library, instructional labs, physical education, music, etc.) which are directly related to or affect student instruction shall provide services from the beginning of the school term through the final class period at the close of the school term.

Credits

[[59 FR 61765](#), Dec. 1, 1994; [70 FR 21951](#), April 28, 2005]

§ 36.20 Standard V—Minimum academic programs/school calendar., 25 C.F.R. § 36.20

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

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25 C.F.R. § 36.21

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart C. Minimum Program of Instruction

25 C.F.R. § 36.21

§ 36.21 Standard VI—Kindergarten instructional program.

Currentness

(a) The curriculum for kindergarten shall provide children with experiences which emphasize language development, native language where necessary as determined by [25 CFR 39.11\(g\)](#), and performance of the requirements in paragraph (b) of this section. Such programs shall assist children in developing positive feelings toward themselves and others.

(b) A kindergarten instructional program shall include but not be limited to:

- (1) Language (observing, listening, speaking).
- (2) Exploration of the environment (number, space and time relationships, natural science).
- (3) Psychomotor and socialization development.
- (4) Development of imaginative and creative tendencies.
- (5) Health education inclusive of the requirements contained in the Act of May 20, 1886, 24 Stat. 69.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.22

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart C. Minimum Program of Instruction

25 C.F.R. § 36.22

§ 36.22 Standard VII—Elementary instructional program.

Currentness

(a) The elementary instruction programs, grades one through six, shall include but need not be limited to:

- (1) Language arts.
- (2) Mathematics.
- (3) Social studies.
- (4) Sciences.
- (5) Fine arts.
- (6) Physical education.

(b) Each school shall integrate the following content areas into its curriculum:

- (1) Career awareness,
- (2) Environmental and safety education,
- (3) Health education (includes requirements contained in 24 Stat. 69),
- (4) Metric education, and

§ 36.22 Standard VII—Elementary instructional program., 25 C.F.R. § 36.22

(5) Computer literacy.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

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25 C.F.R. § 36.23

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart C. Minimum Program of Instruction

25 C.F.R. § 36.23

§ 36.23 Standard VIII—Junior high/middle school instructional program.

Currentness

(a) The instructional program shall reflect the school's philosophy and the needs of the students and the community. It shall be part of a progressive development that begins in the elementary program which precedes it and continues to the secondary program which follows.

(b) The curriculum shall include the following required instructional content areas at each grade level but need not be limited to:

(1) Language arts. One unit shall be required of each student every year.

(2) Social studies. One unit shall be required of each student every year.

(3) Mathematics. One unit shall be required of each student every year.

(4) Science. One unit shall be required of each student every year.

(5) Fine arts and practical arts. One unit each shall be required of each student in the junior high/middle school instructional program.

(6) Computer literacy. One unit shall be required of each student in the junior high/middle school instructional program.

(7) Physical education. One unit shall be required of each student in the junior high/middle school instructional program.

(c) The following content areas shall be integrated into the curriculum.

(1) Career exploration and orientation.

§ 36.23 Standard VIII—Junior high/middle school instructional program., 25 C.F.R. § 36.23

- (2) Environmental and safety education.
 - (3) Metric education.
 - (4) Consumer economics (including personal finances).
 - (5) Health education (includes meeting the requirements contained in 24 Stat. 69).
- (d) Languages other than English are encouraged to be offered as a content area beginning at junior high/middle school level.
- (e) Student enrollment in any laboratory or vocational exploration class shall be consistent with applicable health and safety standards.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.30

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart D. Student Instructional Evaluation

25 C.F.R. § 36.30

§ 36.30 Standard X—Grading requirements.

Currentness

(a) Each school shall implement a uniform grading system which assesses a student's mastery of the prescribed objectives of the courses of study undertaken. The mastery of prescribed course objectives shall be the primary measure of academic attainment for reporting student grades on report cards.

(b) The information derived from student instructional evaluations shall be shared with the student and with the parents and shall be used to give teachers and students direction for subsequent learning activities.

(c) Parent/teacher and parent/teacher/student conferences focused on the student's instructional progress and development shall be held, where feasible and practical, to provide an additional means of communication between home and school. Residential schools may meet this standard by documenting the communication of student grades on report cards to parents.

(d) Each school shall issue a report card to parents of students who are under the age of eighteen (18) and to students eighteen (18) years of age and older on a regular basis, but not less than four (4) times yearly. The report card shall include, but not be limited to, the following sections:

(1) Recommendations and probable promotion status;

(2) Appropriate signatures and request for return of report cards; and

(3) Student attendance record.

(e) A summary of each year's final card shall become part of the student's permanent school record.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

§ 36.30 Standard X—Grading requirements., 25 C.F.R. § 36.30

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

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25 C.F.R. § 36.31

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart D. Student Instructional Evaluation

25 C.F.R. § 36.31

§ 36.31 Standard XI—Student promotion requirements.

Currentness

Each school shall establish and implement a promotion policy which shall be submitted to and approved by the local school board and Agency Superintendent for Education or Area Education Programs Administrator, as appropriate. The requirements shall include, but not be limited to, the following:

(a) Each grade level or equivalent shall have a minimum criteria for student promotion based primarily on measurable mastery of the instructional objectives.

(b) Criterion-referenced tests that evaluate student skills shall be utilized for measuring the mastery of instructional objectives. The evaluation results shall form the basis for the promotion of each student.

(c) A student who has not participated, either directly or through approved alternative instructional methods or programs, in a minimum of 160 instructional days per academic term or 80 instructional days per semester without a written excused absence shall not be promoted. A school board or a school committee may review a promotion decision and, if warranted due to compelling and/or extenuating circumstances, rescind in writing such action on a case-by-case basis. Alternative instructional methods shall be submitted in writing for approval by the Agency Superintendent for Education or Area Education Programs Administrator, as appropriate.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.40

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart E. Instructional Support

25 C.F.R. § 36.40

§ 36.40 Standard XIII—Library/media program.

Currentness

(a) Each school shall provide a library/media program which shall, as a minimum, meet the applicable state and/or regional standards, but shall not be limited to these, and shall include the following:

(1) A written set of instructional and service objectives shall be established that is integrated and consistent with the school's educational goals and philosophy. The librarian or educational media specialist, with students and staff, shall set objectives based on assessed academic and residential needs. The program and services will be evaluated yearly by the principal and the librarian or educational media specialist to determine the degree to which all objectives have been met.

(2) A written policy for the selection of materials and equipment shall be developed by a library committee in collaboration with the librarian and be approved by the school board. The collection of materials shall include as a minimum the following:

(i) A collection of books suitable for the range of student abilities and interests being served in the following ADM ratios.

(A) Elementary K–6, 15 books per student

(B) Middle 7–8, 12 books per student

(C) Secondary 9–12, 10 books per student

It is required that materials pertaining to Indian Tribes and/or Alaskan Natives be integrated within this basic collection.

(ii) Eight (8) to 12 percent of the basic collection must be composed of reference books, currently relevant and in a state of good physical condition, for practical use. Single copies of the principal textbooks used to complement instruction shall be in the collection, but textbooks cannot be counted toward this standard.

§ 36.40 Standard XIII—Library/media program., 25 C.F.R. § 36.40

(iii) A periodical collection, suitable for the range of student abilities and interests being served, consisting of one (1) periodical for every ten (10) students, shall be maintained. Schools of over 200 will have a base collection of 20 periodicals.

(iv) A professional collection for the school staff shall be developed and maintained by the librarian in cooperation with a faculty committee.

(v) A variety of audio-visual materials, suitable for the range of instruction being provided, of at least 750 items or five (5) items for each student, whichever is larger, and inclusive of materials located in the classrooms shall be maintained. This category includes some of each of the following: Tactile objects, globes, models, maps, films, film-strips, microforms, slides, audio and video tapes, recordings, transparencies and graphics, and the equipment to use all of these. Multiple items within a specific set of materials will be counted as separate items.

(3) There shall be a library media center serviced by a librarian. Schools with fewer than 200 students are encouraged, wherever feasible, to cooperate in sharing librarian resources. Schools within an Agency and/or Area may cooperatively share the costs and services of a librarian who shall facilitate sharing of the combined available resources among the cooperating schools in accordance with the following ratios:

School Enrollment (ADM)

Up to 100— $\frac{1}{5}$ time librarian

101–200— $\frac{1}{5}$ time librarian and $\frac{1}{2}$ time library aide or 20 hours of library activity

201–400—1 full-time librarian or $\frac{2}{5}$ time librarian provided the school has a full-time library aide

401+—1 full-time librarian and a full-time library aide

(4) All libraries must conduct an annual inventory of available books, materials, and equipment in accordance with the acquisitions and selection policies.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101–477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.41

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart E. Instructional Support

25 C.F.R. § 36.41

§ 36.41 Standard XIV—Textbooks.

Currentness

(a) Each school shall establish a textbook review committee composed of teachers, parents, and students, and school board members. Appointment to the textbook review committee shall be subject to school board approval.

(b) The textbook review committee shall establish a procedure and criteria for the annual review of textbooks and other materials used to complement instruction. The criteria shall include, but not be limited to, the following:

(1) The textbook content shall meet the course objectives which are within the adopted school curriculum.

(2) The textbooks shall, as much as possible, reflect cultures accurately.

(3) The textbooks shall be current, in good physical condition, and varied in reading levels.

(c) Each school shall equitably distribute instructional materials to all classrooms. Each school shall inventory all property and equipment annually prior to requisitioning additional materials. Copies of the inventory shall be kept on file by the school staff.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.42

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart E. Instructional Support

25 C.F.R. § 36.42

§ 36.42 Standard XV—Counseling services.

Currentness

Each school shall offer student counseling services concerned with physical, social, emotional, intellectual, and vocational growth for each individual. Counseling services shall be included in a school-wide assessment program.

(a) Each Agency and Area, as appropriate, shall institute and supervise an assessment program for its schools in order to provide for the objective assessment of student academic performance. Required formal tests shall be administered annually to all regular program students in grades 4, 8, and 12. (The testing of special education and gifted/talented students shall be in accordance with respective regulations.) If required by state certification standards, schools may use the state mandated academic achievement tests and accompanying requirements. These formal tests and their subtest contents, as well as the test-related procedures, shall include, but not be limited to, the following:

- (1) Each Spring, schools shall conduct testing for grades 4, 8, and 12 using a current version of a standardized academic achievement test based upon the national assessment standards designed to assess higher order thinking skills. All schools shall keep a current record, with the Office of Indian Education Programs, of the test the school administers each Spring and the testing dates.
- (2) Schools shall use some form of performance-based or authentic assessment in addition to standardized achievement testing.
- (3) Each school shall report the summative results of its assessment program to its respective Agency or Area, as appropriate, and its school board.
- (4) Parents/guardians shall be informed of their children's assessment results and provided with an explanation and interpretation to ensure adequate understanding of the results.
- (5) Each school's instructional program shall establish an ongoing student academic assessment program to ensure that defined assessment procedures are in place. The program shall include regular training in basic assessment procedures and routines for all teachers and other staff involved in student assessment.

§ 36.42 Standard XV—Counseling services., 25 C.F.R. § 36.42

(6) Each Agency and Area, as appropriate, shall report the results of each school's formal Spring tests to the Office of Indian Education Programs by August 1 of each year. Summative information from performance-based and authentic assessments shall be reported at the same time.

(b) Each counseling program shall provide the following:

(1) Each school having a minimum school ADM of 200 students shall make provisions for the full-time professional services of a counselor, and each school enrolling fewer than 200 students shall make provisions for a part-time professional counselor.

(2) The counselors shall be familiar with the unique tribal, social, and economic characteristics of students.

(3) The counseling program shall contain the following:

(i) A written referral procedure;

(ii) Counseling techniques and documentation procedures to provide for the career, academic, social, and personal needs of the students which are based on the cultural beliefs and values of the students being served;

(iii) Preventative and crisis counseling on both individual and group bases;

(iv) Confidentiality and security of counseling records for each student; and

(v) Design and implementation of orientation programs to facilitate the pupil's transition from elementary to junior high/middle school and from junior high/middle school to high school.

(vi) Each junior or middle school and high school student shall receive academic counseling a minimum of twice yearly during which time the counselor shall assist the student in developing a written academic and career plan based on ability, aptitude, and interests. Additionally, counselors will assist high school students in selecting courses which satisfy the school's and the state's graduation requirements and the student's academic and career plan. Further, seniors will be given aid in completing registration and/or financial assistance applications for either vocational or academic post-secondary institutions.

(vii) Each high school counseling program shall be required to have on file for each student a planned academic program of studies which is available from the regular course offerings of the school to meet the student's career objectives and which will show that the student has received counseling.

Credits

[59 FR 61766, Dec. 1, 1994]

§ 36.42 Standard XV—Counseling services., 25 C.F.R. § 36.42

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

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25 C.F.R. § 36.43

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart E. Instructional Support

25 C.F.R. § 36.43

§ 36.43 Standard XVI—Student activities.

Currentness

All schools shall provide and maintain a well-balanced student activities program based on assessment of both student and program needs. Each activity program shall help develop leadership abilities and provide opportunities for student participation but not be limited to activities that include special interest clubs, physical activities, student government, and cultural affairs. The activity program shall be an integral part of the overall educational program.

(a) All student activities shall be required to have qualified sponsors and be approved by the school supervisor, and the school board shall approve the overall activity plan. A qualified sponsor is a professional staff member of the school that is given responsibility to provide guidance or supervision for student activities.

(b) A plan of student activity operations shall be submitted, by each activity at the beginning of each school year, to the school supervisor. The plan will include the purpose, structure, coordination, and planned types of fund-raising activities.

(c) School may participate in interscholastic sports and activities on an informal or formal basis. On an informal basis, the Bureau-operated schools will coordinate with other schools in setting up a schedule of sports and games. Schools that participate in state-recognized leagues will abide by those state rules regulating inter-school competition.

(d) Until comparable competitive opportunities are provided to all students, regardless of sex, no student shall be barred from participation in interscholastic competition in noncontact sports except on the basis of individual merit.

(e) Residential schools shall plan and provide an intramural program for all students. The program shall include a variety of scholastic and sport activities.

(f) Students shall be involved only in activities which are sanctioned by the school.

(g) All student activities involved only in fund raising are required to establish a school/student activity bank account following school/student banking procedures outlined under [25 CFR 31.7](#). All student activity accounts shall be audited annually.

§ 36.43 Standard XVI—Student activities., 25 C.F.R. § 36.43

(h) The school shall provide for the safety and welfare of students participating in school-sponsored activities.

(i) Each sponsor of a student activity will be given orientation and training covering the responsibilities of a sponsor by the school supervisor.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

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25 C.F.R. § 36.50

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart F. Evaluation of Educational Standards

25 C.F.R. § 36.50

§ 36.50 Standard XVII—School program evaluation and needs assessment.

Currentness

Each school shall complete a formal, formative evaluation at least once every seven (7) years beginning no later than the second complete school year following the effective date of this part. Schools shall follow state and/or regional accreditation, or accreditation requirements equal to the state in which a school is located. Each school shall follow the prescribed evaluation cycle. The primary purpose of this evaluation will be to determine the effects and quality of school programs and to improve the operations and services of the school programs.

(a) Each school's evaluation design or model will provide objective and quantitative analysis of each area to be evaluated. The analysis shall include product and process evaluation methods. The areas to be reviewed will include, but not be limited to, the following:

- (1) School philosophy and objectives.
- (2) Administrative and organizational requirements.
- (3) Program planning and implementation.
- (4) Curriculum development and instruction.
- (5) Primary education.
- (6) Program of studies for elementary, junior high/middle, and high schools.
- (7) Grading requirements.
- (8) Promotion requirements.

(9) High school graduation requirements.

(10) Library/media.

(11) Textbooks and other instructional materials.

(12) Counseling services.

(13) Medical and health services.

(14) Student activities.

(15) Transportation services.

(16) Staff certification and performance.

(17) Facilities (school plant).

(18) Parent and community concerns.

(19) School procedures and policies.

(20) School board operations.

(b) The Director, within six (6) months from the effective date of this part, shall distribute to each school, Agency or Area, as appropriate, a standardized needs assessment and evaluation instrument with guidelines for developing and applying a locally appropriate evaluation model for carrying out the requirements of this standard.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

25 C.F.R. § 36.51

Code of Federal Regulations

Title 25. Indians

Chapter I. Bureau of Indian Affairs, Department of the Interior

Subchapter E. Education

Part 36. Minimum Academic Standards for the Basic Education of Indian Children and National Criteria for Dormitory Situations (Refs & Annos)

Subpart F. Evaluation of Educational Standards

25 C.F.R. § 36.51

§ 36.51 Standard XVIII—Office of Indian Education Programs
and Agency monitoring and evaluation responsibilities.

Currentness

(a) The Office of Indian Education Programs shall monitor and evaluate the conformance of each Agency or Area, as appropriate, and its schools with the requirements of this part. In addition, it shall annually conduct onsite monitoring at one-third of the Agencies and Areas, thereby monitoring onsite each Agency and/or Area at least once every three (3) years. Within 45 days of the onsite visit, the Director shall issue to each Agency Superintendent for Education or Area Education Programs Administrator, as appropriate, a written report summarizing the monitoring findings and ordering, as necessary, required actions to correct noted deficiencies.

(b) Each Agency or Area, as appropriate, in conjunction with its school board shall monitor and evaluate the conformance of its school with the requirements of this part through an annual onsite evaluation involving one-third of the schools annually, thereby monitoring onsite each school at least once every three (3) years. Within 30 days of the onsite visit, the Agency Superintendent for Education or Area Education Programs Administrator, as appropriate, shall issue to the local school supervisor and local school board a written report summarizing the findings and ordering, as necessary, required actions to correct noted deficiencies.

(c) Schools, Agencies, and Areas shall keep such records and submit to the responsible official or designee accurate reports at such times, in such form, and containing such information as determined by that official to be necessary to ascertain conformance with the requirements of this part.

(d) Schools, Agencies, and Areas shall permit access for examination purposes by the responsible official, or any duly authorized designee, to any school records and other sources of information which are related or pertinent to the requirements of this part.

(e) The Office of Indian Education Programs, Agency Superintendent for Education, or Area Education Programs Administrator, as appropriate, shall annually conduct a summative evaluation to assess the degree to which each Bureau educational policy and administrative procedure assists or hinders schools in complying with the requirements of this part. This will include, but not be limited to, the following actions:

- (1) Evaluate current policies and practices not related to this part and the effects thereof on the amount of time and resources required which otherwise would be available for these standards;

§ 36.51 Standard XVIII—Office of Indian Education Programs and..., 25 C.F.R. § 36.51

- (2) Modify any policies and practices which interfere with or compromise a school's capability to achieve and maintain these standards;
- (3) Invite non-Federal agencies to evaluate the effects current policies and procedures have had on complying with the requirements of this part; and
- (4) Submit annually to the Director a copy of the summative evaluation.

SOURCE: [50 FR 36816](#), Sept. 9, 1985; [59 FR 61765](#), Dec. 1, 1994, unless otherwise noted.

AUTHORITY: Section 502, [25 U.S.C. 2001](#); section 5101, [25 U.S.C. 2001](#); Section 1101, [25 U.S.C. 2002](#); [5 U.S.C. 301](#); [25 U.S.C. 2](#) and [9](#); [25 U.S.C. 2901](#), Title I of [P.L. 101-477](#).

Current through June 17, 2021; 86 FR 32240.

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CERTIFICATE OF SERVICE

I certify that on June 25, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: June 25, 2021

By: /s/ Emily Curran-Huberty
Emily Curran-Huberty

Case No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona
Case No. 3:17-CV-08004-SPL
The Honorable Steven P. Logan, United States District Judge*

APPELLANTS' INDEX VOLUME

VOLUMES 1-4

Attorneys for Plaintiffs-Appellants

EXCERPTS OF RECORD
Index Volume
TABLE OF CONTENTS

Vol.	Tab No.	Document	ECF No.	ER Page
1	1	Judgment in a Civil Case, filed November 20, 2020	270	1-ER-2
1	2	Order Granting Joint Request for Entry of Judgment, filed November 20, 2020	269	1-ER-4
1	3	Order Granting Joint Stipulation of Dismissal of Third and Fourth Causes of Action, filed September 28, 2020	267	1-ER-6
1	4	Order Granting in Part Defendants' Motion for Partial Relief from the December 17, 2019 Order, filed May 8, 2020	221	1-ER-8
1	5	Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, filed December 17, 2019	214	1-ER-16
1	6	Order Granting in Part and Denying in Part Defendants' Second Partial Motion to Dismiss, filed March 29, 2018	100	1-ER-29
2	7	Joint Stipulation of Dismissal of Third and Fourth Causes of Action, filed September 25, 2020	266	2-ER-44
2	8	Plaintiffs' Response to Defendants' Motion for Partial Relief from the December 17, 2019 Order, filed January 15, 2020	219	2-ER-48
2	9	Defendants' Motion for Partial Relief from the December 17, 2019 Order, filed January 6, 2020	216	2-ER-58
2	10	Reporter's Transcript of Proceedings Regarding Plaintiffs' and Defendants' Motions for Summary Judgment, hearing date November 20, 2019	215	2-ER-67
2	11	Defendants' Reply in Support of their Motion for Partial Summary Judgment, filed July 16, 2019	203	2-ER-141
2	12	Plaintiffs' Reply in Support of Motion for Partial Summary Judgment, filed July 16, 2019	202	2-ER-162
2	13	Plaintiffs' Response to Defendants' Separate Statement and Supplemental Statement of Material Facts, filed July 1, 2019	192	2-ER-180
3	14	Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment, filed July 1, 2019	190	3-ER-194
3	15	Defendants' Motion and Memorandum in Support of Motion for Partial Summary Judgment, filed May 31, 2019	182	3-ER-219
3	16	Reporter's Transcript of Proceedings Regarding Defendants' Second Partial Motion to Dismiss, hearing date October 24, 2017	99	3-ER-244
3	17	Reply in Support of Defendants' Second Partial Motion to Dismiss, filed September 15, 2017	92	3-ER-295

Vol.	Tab No.	Document	ECF No.	ER Page
3	18	Defendants' Second Partial Motion to Dismiss, filed August 9, 2017	69	3-ER-310
3	19	Plaintiffs' Notice of Appeal, filed January 14, 2021	271	3-ER-334
3	20	U.S. District Court, District of Arizona, Official Docket Sheet, <i>Stephen C. et al. v. Bureau of Indian Education et al.</i> , Case No. 3:17-cv-08004-SPL, last visited on June 23, 2021	--	3-ER-344
4	21	Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed July 3, 2019 (UNDER SEAL)	200	4-ER-406
4	22	Plaintiffs' Separate Statement of Material Facts in Support of Motion for Summary Judgment, filed June 3, 2019 (UNDER SEAL)	187-1	4-ER-424
4	23	Plaintiffs' Motion for Summary Judgment and Memorandum in Support, filed June 3, 2019 (UNDER SEAL)	187	4-ER-441
4	24	Plaintiffs' Third Amended Complaint, filed August 10, 2018 (UNDER SEAL)	129	4-ER-470
4	25	Plaintiffs' Opposition to Defendants' Second Partial Motion to Dismiss, filed August 28, 2017 (UNDER SEAL)	75	4-ER-543

Case No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona*

Case No. 3:17-CV-08004-SPL

The Honorable Steven P. Logan, United States District Judge

APPELLANTS' EXCERPTS OF RECORD

VOLUME 1 OF 4

Attorneys for Plaintiffs-Appellants

TAB 1

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5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Stephen C., et al.,

10 Plaintiffs,

11 v.

12 Bureau of Indian Education, et al.,

13 Defendants.
14

NO. CV-17-08004-PCT-SPL

JUDGMENT IN A CIVIL CASE

15 **Decision by Court.** This action came for consideration before the Court. The
16 issues have been considered and a decision has been rendered.

17 IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed
18 November 20, 2020, judgment is entered in favor of Defendants on Counts I, II, V and VI
19 of Plaintiff's Third Amended Complaint (Doc. 128) and in favor of Defendants on all
20 Counts as to Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., Jordan A., Stephen C., and
21 Durell P. Counts III and IV are dismissed with prejudice.
22

23 Debra D. Lucas
24 District Court Executive/Clerk of Court

25 November 20, 2020

26 By s/ S. Strong
27 Deputy Clerk
28

TAB 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., et al.,

Plaintiffs,

vs.

Bureau of Indian Education, et al.,

Defendants.

No. CV-17-08004-PCT-SPL

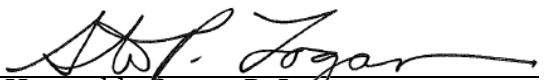
ORDER

On March 29, 2018, this Court granted in part Defendants' Second Partial Motion to Dismiss. (Doc. 100). On December 16, 2019, the Court granted in part Defendants' Motion for Partial Summary Judgment. (See Doc. 214 (granting Defendant's MSJ); Doc. 221 (vacating Doc. 214 in part)). On September 28, 2020, the Court granted the Parties' Stipulation for Dismissal of the remaining claims. (Doc. 267). Before the court is the parties' Joint Request for Entry of Judgment Pursuant to Fed. R. Civ. P. 58(d). (Doc. 268). Finding good cause appearing,

IT IS ORDERED that the Request for Entry of Judgment (Doc. 268) is **granted**.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment for Defendants on Counts I, II, V & VI of Plaintiffs' Third Amended Complaint (Doc. 128); for Defendants on all Counts as to Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., Jordan A., Stephen C., and Durell P.; and dismissing Counts III and IV with prejudice.

Dated this 20th day of November, 2020.


Honorable Steven P. Logan
United States District Judge

TAB 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., et al.,

Plaintiffs,

vs.

Bureau of Indian Education, et al.,

Defendants.

No. CV-17-08004-PCT-SPL

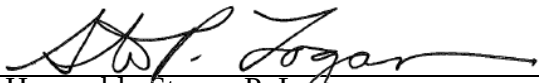
ORDER

Having considered the parties' stipulation,

IT IS ORDERED:

1. That the Stipulation for Dismissal (Doc. 266) is **granted**;
2. That the Third and Fourth Causes of Action are **dismissed with prejudice**;
3. That each party shall bear its own costs and attorneys' fees, except as expressly provided in the Settlement Agreement; and
4. That, the Third and Fourth Causes of Action being the only remaining claims in this case, the Clerk of Court shall **terminate** this action.

Dated this 28th day of September, 2020.


Honorable Steven P. Logan
United States District Judge

TAB 4

1 **WO**

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5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Stephen C., et al.,

9 Plaintiffs,

10 vs.

11 Bureau of Indian Education, et al.,

12 Defendants.
13
14

No. CV-17-08004-PCT-SPL

ORDER

15 This dispute arises out of a conflict between several students (together, the
16 “Plaintiffs”) who attend or have previously attended Havasupai Elementary School
17 (“HES”) and the defending parties responsible for the operation and administration of HES,
18 including the Bureau of Indian Education and the United States Department of the Interior
19 (together, the “Defendants”). Before the Court is the Defendants’ Motion for Partial Relief
20 from the December 17, 2019 Order under rule 60(b) (Doc. 216) (the “Motion”). The
21 Motion was fully briefed on January 15, 2020. (Doc. 219) Defendants also filed a notice
22 of school closing to inform the Court that HES was closed down due to the COVID-19
23 pandemic. (Doc. 220) The Court’s ruling is as follows.

24 **I. Legal Standard**

25 **A. Motion for Relief from Judgment**

26 Reconsideration is disfavored and “appropriate only in rare circumstances.”
27 *WildEarth Guardians v. United States Dep’t of Justice*, 283 F.Supp.3d 783, 795 n.11 (D.
28

Ariz. June 21, 2017); *see also Bergdale v. Countrywide Bank FSB*, No. CV-12-8057-PCT-SMM, 2014 WL 12643162, at *2 (D. Ariz. May 23, 2014) (“[Reconsideration] motions should not be used for the purpose of asking a court to rethink what the court had already thought through-rightly or wrongly.”). Under Rule 60(b), a motion for reconsideration will only be granted if a court may relieve a party from a final judgment for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

B. Summary Judgment

A court shall grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party “show 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those facts “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record, together with

1 affidavits, which it believes demonstrate the absence of a genuine issue of material fact.
2 *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the non-
3 movant who, “must do more than simply show that there is some metaphysical doubt as to
4 the material facts,” and instead must “come forward with ‘specific facts showing that there
5 is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
6 574, 586–87 (1986). A judge’s function’ at summary judgment is not to weigh the evidence
7 and determine the truth of the matter but to determine whether there is a genuine issue for
8 trial. *Cable v. City of Phoenix*, 647 F. App’x 780, 781 (9th Cir. 2016).

9 **II. Background**

10 The Plaintiffs are students who attend or have previously attended HES. The
11 defending parties, including the Bureau of Indian Education (“BIE”) and the United States
12 Department of the Interior (“DOI”), are responsible for the operation and administration of
13 HES. The Plaintiffs filed their third amended complaint (the “TAC”) on August 10, 2018,
14 alleging six causes of action against the Defendants. (Doc. 129) Each claim is rooted in the
15 Defendants’ failure to provide the Plaintiffs with adequate education under the standards
16 set forth by the Department of Education’s (“DOE”) regulations and other federal statutes.
17 On December 17, 2019, the Court ruled on the parties’ various motions for summary
18 judgment. The Court granted summary judgment in favor of Defendants on counts 1, 2, 4,
19 and 6 and denied Plaintiffs’ motion for summary judgment on count 3. Defendants had not
20 moved for summary judgment on count 3. The Motion requests relief from judgment as to
21 counts 3 and 4 of the TAC.

22 **III. Analysis**

23 At the outset, the Court notes that Defendants’ Motion was untimely under the
24 District of Arizona’s Civil Local Rule 7.2(g)(2), which states that “[a]bsent good cause
25 shown, any motion for reconsideration shall be filed no later than fourteen (14) days after
26 the date of the filing of the Order that is the subject of the motion.” LRCIV 7.2(g)(2).
27 Defendants have not provided any reason for filing their Motion three weeks after the
28 December 17, 2019 order. However, the Court recognizes that there is a manifest error in

1 its previous order and will entertain the Motion. Count 3 of the TAC alleges that
2 Defendants violated 29 U.S.C. § 794 for failure to provide a system enabling students with
3 disabilities to access public education and count 4 alleges that Defendants violated 29
4 U.S.C. § 794 for failure to provide a system enabling students impacted by childhood
5 adversity access to public education. (Doc. 129) The Motion seeks relief from the judgment
6 on the ground that the Court erred in holding that Defendants are not subject to Section 504
7 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”). (Doc. 216 at 1–2) Additionally,
8 Defendants argue that the Court should allow them to present evidence of their attempts to
9 comply with Section 504 so that the relief the Court would order under Section 504 on
10 count 3 will take into account such attempts. (Doc. 216 at 3–4) Finally, Defendants argue
11 that once the Court finds that they are subject to Section 504, the Court should grant
12 summary judgment in their favor on count 4 of the TAC. (Doc. 216 at 4–7) Plaintiffs agree
13 with Defendants’ position that Section 504 applies but disagree on the other two issues.
14 Plaintiffs argue that the Court should enter summary judgment in their favor on the liability
15 portion of count 3 and set a hearing or trial to determine the course of action on remedy.
16 (Doc. 219 at 3–4) Plaintiffs also argue that Defendants cannot succeed on summary
17 judgment on count 4 because the Court already found that the “reasonableness of the
18 Plaintiff’s recommended accommodations is a factual issue that cannot be resolved on
19 summary judgment.” (Doc. 219 at 4–6)

20 **A. Count III – Violation of 29 U.S.C. § 794 – Failure to Provide a System Enabling**
21 **Students with Disabilities to Access Public Education**

22 In Count 3 of the TAC, the Plaintiffs allege a claim under Section 504 of the
23 Rehabilitation Act of 1973 (29 U.S.C. 794), stating that the Defendants failed to provide
24 the requisite system and resources necessary to educate children with disabilities. (Doc.
25 129 at 60–62) The Court found that Plaintiff’s motion for summary judgment had to be
26 denied on count 3 because “the Defendants, as members of the executive branch, are not
27 subject to Section 504.” (Doc. 214 at 6)

28 The Court reviewed the briefing associated with that issue and its reasoning and

1 concludes that it was in error on the application of Section 504. There appears to have been
2 some confusion as to the arguments of the parties. Indeed, it appears that Defendants did
3 not argue that they were not subject to Section 504 but instead, narrowly argued that they
4 were not subject to the Department of Education's ("DOE") regulations implementing
5 Section 504 but instead only the Department of the Interior's ("DOI") own regulations
6 implementing Section 504. At the hearing on the motions for summary judgment, the
7 Defendants argued that Subpart E of Section 17.220 applies to the Defendants. Subpart E
8 of Section 17.220 specifically applies to programs or activities conducted by the DOI. 43
9 C.F.R. § 17.501–17.999. However, unlike in Subpart B, there is no portion of Subpart E
10 that requires programs operated by the DOI to "comply with the Section 504 requirements
11 promulgated by the Department of Education at 34 C.F.R. Part 104, Subpart D." 43 C.F.R.
12 § 17.220. Without any such obligation, the Court finds that the Defendants are not subject
13 to the DOE's regulations implementing Section 504 but are subject to the DOI's own
14 regulations under Section 504. The plain language of Section 504 mandates this
15 conclusion. It states that Section 504 applies to "any program or activity receiving Federal
16 financial assistance *or under any program or activity conducted by any Executive agency.*"
17 29 U.S.C. § 794(a) (emphasis added). Courts have uniformly applied the statute to
18 executive agencies. *See, e.g., Lane v. Pena*, 518 U.S. 187, 199 (1996) ("Section 504 . . .
19 extends its coverage to program[s] or activit[ies] conducted by any Executive agency.");
20 *J.L. v. Social Sec Admin.*, 971 F.2d 260, 270 (9th Cir. 1992) ("Therefore, we conclude that
21 a plaintiff states a claim under the Rehabilitation Act by alleging that the government's
22 action . . . discriminates on the basis of handicap."); *see also Rhode Island Handicapped*
23 *Action Comm. V. Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 497 n.9 (1st Cir. 1983)
24 (noting that "federal agencies . . . are subject . . . to section 504 of the Rehabilitation Act.").
25 Accordingly, the Court will grant the Motion on the issue of whether Defendants are
26 subject to Section 504.

27 The Court denied Plaintiffs' motion for summary judgment on count 3 of the TAC
28 because it had found that Section 504 did not apply to the Defendants. (Doc. 214 at 7)

1 Defendants urge the Court to consider the appropriate remedy on count 3 and allow them
2 an opportunity to demonstrate the current status of their compliance with Section 504.
3 (Doc. 216 at 3–4) Interestingly, and consistent with the pleadings Defendants submitted at
4 the summary judgment stage, they do not argue that they have complied with Section 504
5 but instead that they have taken steps to come into compliance and are implementing
6 measures toward full compliance. (Doc. 216 at 3) Defendants’ arguments on count 3 are
7 focused on presenting evidence to the Court to help it in shaping equitable relief it might
8 order on the issue. (Doc. 216 at 3–4) Plaintiffs argue that the Court should grant summary
9 judgment in their favor on the liability portion of count 3 and then proceed to resolve the
10 remedy portion with an evidentiary hearing or trial. (Doc. 219 at 4)

11 The Court agrees with Plaintiffs on count 3. Having revised its conclusion that
12 Section 504 did not apply to Defendants, it is indeed a logical conclusion that summary
13 judgment must be granted in favor of Plaintiffs on the issue of liability. Defendants have
14 not challenged that they are not complying with Section 504 but have argued that their
15 efforts toward compliance should be taken into account when the Court fashions an
16 equitable remedy for the violations. Defendants specifically argue that such efforts show
17 that an injunction is not necessary to ensure compliance with Section 504. (Doc. 216 at 4)
18 The Court finds that Defendants have violated Section 504 and that there is no dispute of
19 material facts on this issue. The Court finds that it is appropriate to set the case for trial on
20 the remaining issues given that discovery took place and the stage at which the case is at.

21 **B. Count IV – Violation of 29 U.S.C. § 794 – Failure to Provide a System Enabling**
22 **Student Plaintiffs Impacted by Childhood Adversity to Access Public**
23 **Education**

24 In Count 4 of the TAC, the Plaintiffs allege a claim under Section 504 stating that
25 the Defendants failed to provide the requisite system and resources necessary to educate
26 children impacted by childhood adversity or complex trauma. (Doc. 129 at 62–65) The
27 Court had granted summary judgment in favor of Defendants on this count based on its
28 finding that Section 504 did not apply to Defendants. (Doc. 214 at 8) Defendants ask the

1 Court to look at the merits of the parties' arguments on this issue and grant summary
2 judgment in their favor. (Doc. 216 at 4–7) Defendants argue that Section 504 only requires
3 schools to make “reasonable” modifications to policies and procedures when “necessary”
4 to avoid discrimination against disabled students. (Doc. 182 at 18) They argue that
5 Plaintiffs’ long list of demands, which includes training HES in trauma-informed,
6 culturally-sensitive strategies and adopting practices to enhance student wellness, far
7 surpasses “reasonable” by requiring HES to implement an entirely new system of practices.
8 (Doc. 182 at 17) The Court already concluded in its order ruling on the motions for
9 summary judgment that “the reasonableness of the Plaintiffs’ recommended
10 accommodations is a factual issue that cannot be resolved on summary judgment.” (Doc.
11 214 at 8) The Court will not take up Defendants’ invitation to reconsider this part of its
12 previous opinion now and accordingly, the Court stands by its previous finding that there
13 is a dispute of material facts on count 4 which prevents the entry of summary judgment.

14 Accordingly,

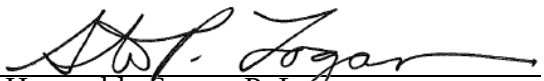
15 **IT IS ORDERED** that Defendants’ Motion for Partial Relief from the December
16 17, 2019 Order (Doc. 216) is granted in part;

17 **IT IS FURTHER ORDERED** that the Court’s December 17, 2019 order is vacated
18 in part (Doc. 214);

19 **IT IS FURTHER ORDERED** that only the part of the Court’s December 17, 2019
20 order dismissing Counts 3 and 4 of the TAC is vacated; and

21 **IT IS FURTHER ORDERED** that the Court will set a date and time for the final
22 pre-trial conference in separate order.

23 Dated this 8th day of May, 2020.

24 
25 Honorable Steven P. Logan
26 United States District Judge
27
28

TAB 5

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., et al.,

Plaintiffs,

vs.

Bureau of Indian Education, et al.,

Defendants.

No. CV-17-08004-PCT-SPL

ORDER

This dispute arises out of a conflict between several students (together, the “Plaintiffs”) who attend or have previously attended Havasupai Elementary School (“HES”) and the defending parties responsible for the operation and administration of HES, including the Bureau of Indian Education and the United States Department of the Interior (together, the “Defendants”). Before the Court is the Defendants’ Motion for Partial Summary Judgment (Doc. 182) (the “Defendants’ Motion”) and the Plaintiffs’ Motion for Summary Judgment (Docs. 184, 187) (the “Plaintiffs’ Motion”). The Defendants’ Motion and the Plaintiffs’ Motion were fully briefed on July 17, 2019. (Docs. 190, 191, 200, 202, 203) The Plaintiffs requested oral argument on both motions, and the Court held a hearing (the “Motion Hearing”) on both motions on November 20, 2019. The Court’s ruling is as follows.

I. Legal Standard

A court shall grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party “show 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those facts “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record, together with affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant is able to do such, the burden then shifts to the non-movant who, “must do more than simply show that there is some metaphysical doubt as to the material facts,” and instead must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). A judge’s function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Cable v. City of Phoenix*, 647 F. App’x 780, 781 (9th Cir. 2016).

II. Background

The Plaintiffs are students who attend or have previously attended HES. The defending parties, including the Bureau of Indian Education (“BIE”) and the United States Department of the Interior (“DOI”), are responsible for the operation and administration of HES. The Plaintiffs filed their third amended complaint (the “TAC”) on August 10, 2018, alleging six causes of action against the Defendants. (Doc. 129) Each claim is rooted in the Defendants’ failure to provide the Plaintiffs with adequate education under the standards set forth by the Department of Education’s (“DOE”) regulations and other federal statutes.

1 **III. Analysis**

2 The Complaint lists six causes of action for (i) violation of 5 U.S.C. § 706(1) for
 3 failure to provide basic education, (ii) violation of 5 U.S.C. § 706(2) for failure to provide
 4 basic education, (iii) violation of 29 U.S.C. § 794 for failure to provide a system enabling
 5 students with disabilities to access public education, (iv) violation of 29 U.S.C. § 794 for
 6 failure to provide a system enabling students impacted by childhood adversity access to
 7 public education, (v) violation of 34 C.F.R. § 104.32 for failing to abide by DOE
 8 regulations regarding “location and notification”, and (vi) violation of 34 C.F.R. § 104.36
 9 for failing to abide by DOE regulations regarding “procedural safeguards.” (Doc. 129) The
 10 Defendants’ Motion seeks partial summary judgment on counts 1, 2, 4, 5, and 6. The
 11 Plaintiffs’ Motion seeks partial summary judgment on counts 1, 3, 4, 5, and 6. At the
 12 Motion Hearing, the Defendants admitted that they have failed to provide basic education
 13 as required by the law; thus, the Court finds that there is no genuine dispute as to the
 14 material facts of this case. Accordingly, the Court addresses summary judgment on each
 15 claim in turn.

16 **A. Count I – Violation of 5 U.S.C. § 706(1) – Failure to Provide Basic Education**

17 The Defendants seek summary judgment on the Plaintiffs’ claim pursuant to
 18 5 U.S.C. § 706(1), arguing that this claim is not actionable under the Administrative
 19 Procedure Act (“APA”). (Doc. 182 at 10–11) The Defendants argue that the APA only
 20 allows judicial review of a final “agency action,” and there is no final agency action for the
 21 Court to review in this case. (Doc. 182 at 11) In response to the Defendants’ Motion, the
 22 Plaintiffs argue that they should survive summary judgment because the Complaint alleges
 23 “discrete failures to act” by the Defendants, and the Court may compel agency action under
 24 such circumstances. (Doc. 190 at 9)

25 In the Plaintiffs’ Motion, the Plaintiffs seek summary judgment on Count 1, arguing
 26 that there is no dispute as to the fact that the Defendants have failed to comply with
 27 regulations set forth in Title 25 of the Code of Federal Regulations (the “Title 25
 28 Regulations”). (Doc. 184 at 10) In addition to arguing that the Plaintiffs have failed to

1 identify a discrete agency action as required for a claim pursuant to 5 U.S.C. § 706(1), the
 2 Defendants respond to the Plaintiffs’ Motion by arguing that the Plaintiffs fail to meet their
 3 burden of demonstrating that summary judgment is warranted because (i) the Plaintiffs fail
 4 to identify and discuss the legal standards underlying their claim, and (ii) there are genuine
 5 disputes of material fact regarding whether BIE has implemented the Title 25 Regulations
 6 identified by the Plaintiffs. (Doc. 191 at 8–13)

7 It is plainly stated that 5 U.S.C. § 706(1) allows the Court to “compel agency action
 8 unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706. A claim under § 706(1)
 9 can proceed only where a plaintiff asserts that an agency failed to take a discrete agency
 10 action that it is required to take. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).
 11 However, it is well settled that a plaintiff cannot seek “wholesale” improvement of an
 12 agency program under the APA through the courts. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.
 13 871, 892–94 (1990). The Supreme Court of the United States addressed this issue in *Lujan*
 14 *v. National Wildlife Federation*, in which it stated that flaws in an agency program
 15 “consisting principally of the many individual actions . . . cannot be laid before the courts
 16 for wholesale correction under the APA.” *Lujan*, 497 U.S. at 893.

17 *Lujan’s* holding is supported by the Supreme Court’s analysis in *Norton v. Southern*
 18 *Utah Wilderness Alliance*, in which the Supreme Court stated that broad programmatic
 19 attacks are not permissible under 5 U.S.C. § 706(1). *SUWA*, 542 U.S. at 64, (2004). The
 20 *SUWA* opinion moved on to state that judicial interference is not appropriate where a statute
 21 mandates an agency action and provides the agency “a great deal of discretion in deciding
 22 how to achieve it.” *Norton*, 542 U.S. at 66–67. Specifically, the Supreme Court stated:

23 “[t]he principal purpose of the APA limitations we have
 24 discussed—and of the traditional limitations upon mandamus
 25 from which they were derived—is to protect agencies from
 26 undue judicial interference with their lawful discretion, and to
 27 avoid judicial entanglement in abstract policy disagreements
 28 which courts lack both expertise and information to resolve. If
 courts were empowered to enter general orders compelling
 compliance with broad statutory mandates, they would
 necessarily be empowered, as well, to determine whether
 compliance was achieved—which would mean that it would
 ultimately become the task of the supervising court, rather than

1 the agency, to work out compliance with the broad statutory
2 mandate, injecting the judge into day-to-day agency
management.”

3 *Id.* at 67–68.

4 The Court finds that the Defendants are entitled summary judgment on Count 1
5 because the Plaintiffs have failed to identify a final, discrete agency action that is
6 reviewable by the Court. The Court finds that the Plaintiffs’ challenges, when aggregated,
7 rise to the level of an impermissible, systematic challenge under the APA that should not
8 be resolved by the courts. As stated in *Lujan*, any intervention by this court “may
9 ultimately have the effect of requiring a regulation, a series of regulations, or even a whole
10 ‘program’ to be revised by the agency,” and “more sweeping actions,” as in this case, “are
11 for other branches.” *Lujan*, 497 U.S. at 894. Accordingly, the Defendants are entitled to
12 summary judgment on Count 1.

13 **B. Count II - Violation of 5 U.S.C. § 706(2) – Failure to Provide Basic Education**

14 The Defendants arguments for summary judgement on Count 2 mirror their
15 arguments for summary judgment on Count 1. The Defendants seek summary judgment
16 on the Plaintiffs’ claim pursuant to 5 U.S.C. § 706(2), arguing that this claim is not
17 actionable under the APA. (Doc. 182 at 10–11) The Defendants argue that the APA only
18 allows judicial review of a final “agency action,” and there is no final agency action that
19 the Court may address in this case. (Doc. 182 at 11) In response to the Defendants’ Motion,
20 the Plaintiffs argue that they should survive summary judgment because discovery has
21 produced evidence demonstrating that the Defendants have acted in an arbitrary and
22 capricious manner in their dealings with HES. (Doc. 190 at 9)

23 The Court’s analysis of the claims set forth in Count 2 mirrors its analysis of the
24 Plaintiffs’ claims in Count 1. The Court finds that the Defendants are entitled summary
25 judgment on Count 2 because the Plaintiffs’ challenges, when aggregated, rise to the level
26 of an impermissible, systematic challenge under the APA that should not be resolved by
27 the courts. As stated in *Lujan*, any intervention by this court “may ultimately have the
28 effect of requiring a regulation, a series of regulations, or even a whole ‘program’ to be

1 revised by the agency,” and “more sweeping actions,” as in this case, “are for other
2 branches.” *Lujan*, 497 U.S. at 894. Accordingly, the Defendants are entitled to summary
3 judgment on Count 2.

4 **C. Count III – Violation of 29 U.S.C. § 794 – Failure to Provide a System Enabling**
5 **Students with Disabilities to Access Public Education**

6 In Count 3 of the TAC, the Plaintiffs allege a claim under Section 504 of the
7 Rehabilitation Act of 1973 (29 U.S.C. 794) (“Section 504”), stating that the Defendants
8 failed to provide the requisite system and resources necessary to educate children with
9 disabilities. (Doc. 129 at 60–62) The Plaintiffs argue that HES often fails to employ special
10 education teachers and counselors, and special needs students often receive limited or no
11 instruction because HES is understaffed and ill-prepared to handle the needs of students
12 with disabilities. (Doc. 184 at 19–22) In response, the Defendants argue that this claim is
13 misguided, as the Defendants are not subject to DOE regulations because they do not
14 receive federal financial assistance as required for Section 504 to apply. (Doc. 191 at 13)
15 Additionally, the Defendants argue that summary judgment should not be granted on Count
16 3 because the Defendants are actively working to provide the relief requested by the
17 Plaintiffs; therefore, no present relief is available. (Doc. 191 at 14) In reply, the Plaintiffs
18 argue that their motion should not be denied based on the Defendants’ hollow promises.
19 (Doc. 202 at 10)

20 The Court finds that the Plaintiffs’ Motion must be denied as to Count 3 because the
21 Defendants, as members of the executive branch, are not subject to Section 504. Section
22 504 applies to “any program or activity receiving Federal financial assistance or under any
23 program or activity conducted by any Executive agency.” 29 U.S.C. § 794. At the Motion
24 Hearing, the Plaintiffs argued that the DOI adopted Section 504 in Subpart B of 43 C.F.R.
25 § 17.220 (“Section 17.220”), which applies Section 504 to “education programs or
26 activities that receive Federal financial assistance, and to recipients that operate, or that
27 receive Federal financial assistance for the operation of such programs or activities.” 43
28 C.F.R. § 17.220. Therefore, Subpart B of Section 17.220 explicitly incorporates Section

1 504 into the requirements of educational programs that receive federal funds.

2 At the Motion Hearing, the Defendants argued that the DOI and BIE are not
 3 programs that receive federal financial assistance to operate HES. Instead, the Defendants
 4 argue, and the Court agrees, that federal agencies do not receive federal funds for the
 5 purpose of being subject to Section 504. *U.S. Dep't of Transp. v. Paralyzed Veterans of*
 6 *Am.*, 477 U.S. 597, 612 (1986) (stating that a federally owned and operated system is not
 7 a recipient of federal financial assistance.) At the Motion Hearing, the Defendants argued
 8 that Subpart E of Section 17.220 applies to the Defendants. Subpart E of Section 17.220
 9 specifically applies to programs or activities conducted by the DOI. 43 C.F.R. § 17.501–
 10 17.999. However, unlike in Subpart B, there is no portion of Subpart E that requires
 11 programs operated by the DOI to “comply with the Section 504 requirements promulgated
 12 by the Department of Education at 34 C.F.R. Part 104, Subpart D.” 43 C.F.R. § 17.220.
 13 Without any such obligation, the Court finds that the Plaintiffs’ Motion must be denied on
 14 Count 3.

15 **D. Count IV – Violation of 29 U.S.C. § 794 – Failure to Provide a System Enabling**
 16 **Student Plaintiffs Impacted by Childhood Adversity to Access Public**
 17 **Education**

18 In Count 4 of the TAC, the Plaintiffs allege a claim under Section 504 of the
 19 Rehabilitation Act of 1973 (29 U.S.C. 794), stating that the Defendants failed to provide
 20 the requisite system and resources necessary to educate children impacted by childhood
 21 adversity or complex trauma. (Doc. 129 at 62–65) In the Plaintiffs’ Motion, the Plaintiffs
 22 argue that HES often fails to provide reasonable accommodations to students impacted by
 23 complex trauma. (Doc. 184 at 22–23) In response, the Defendants reiterate their arguments
 24 used to address Count 3, stating (i) the Defendants are not subject to DOE regulations
 25 because they are executive agencies, and (ii) summary judgment should not be granted
 26 because the Defendants are actively working to provide the relief requested by the
 27 Plaintiffs. (Doc. 191 at 13–14) In reply, the Plaintiffs argue that their motion should not
 28 be denied based on the Defendants’ hollow promises. (Doc. 202 at 10)

1 In the Defendants' Motion, the Defendants argue that they should be awarded
 2 summary judgment on Count 4 because Section 504 only requires schools to make
 3 "reasonable" modifications to policies and procedures when "necessary" to avoid
 4 discrimination against disabled students. (Doc. 182 at 18) The Defendants argue that the
 5 Plaintiffs' long list of demands, which includes training HES staff in trauma-informed,
 6 culturally-sensitive strategies and adopting practices to enhance student wellness, far
 7 surpasses "reasonable" by requiring HES to implement an entirely new system of practices.
 8 (Doc. 182 at 17) The Defendants argue that such substantial modifications are
 9 inappropriate under Section 504, as they would cause substantial financial and
 10 administrative burdens on HES. (Doc. 182 at 18–20) In response, the Plaintiffs argue that
 11 they have met their burden of proving that the "trauma-informed" practices outlined in the
 12 TAC are reasonable; however, the reasonableness of the Plaintiff's recommended
 13 accommodations is a factual issue that cannot be resolved on summary judgment. (Doc.
 14 190 at 15, 18)

15 Based on the Court's aforementioned analysis for Count 3, the Court finds that the
 16 Defendants are not bound to comply with the DOE's Section 504 regulations. Therefore,
 17 the Defendants are entitled to summary judgment on Count 4.

18 **E. Count V – Violation of 34 C.F.R. § 104.32 – Violation of Department of**
 19 **Education Regulations Regarding "Location and Notification"**

20 In Count 5 of the TAC, the Plaintiffs allege a claim pursuant to DOE regulation 34
 21 C.F.R. § 104.32, stating that the Defendants failed to implement a system to identify and
 22 notify students who are not receiving adequate public education due to their disabilities or
 23 experiences with complex trauma. (Doc. 129 at 65–66) 34 C.F.R. § 104.32 states:

24 "[a] recipient that operates a public elementary or secondary
 25 education program or activity shall annually: (a) Undertake to
 26 identify and locate every qualified handicapped person
 27 residing in the recipient's jurisdiction who is not receiving a
 public education; and (b) Take appropriate steps to notify
 handicapped persons and their parents or guardians of the
 recipient's duty under this subpart."

28 34 C.F.R. § 104.32.

1 In the Defendants' Motion, the Defendants argue that they are entitled to summary
 2 judgment on Count 5 because this claim is brought pursuant to a DOE regulation, which
 3 the Defendants argue does not apply to schools operated by federal agencies. (Doc. 182 at
 4 20) Specifically, the Defendants argue that 34 C.F.R. § 104.32 is a regulation that is
 5 intended to apply to schools that are recipients of federal funds, but the regulation does not
 6 bind other federal agencies. (Doc. 182 at 21) In response, the Plaintiffs argue that Subpart
 7 B of 43 C.F.R. § 17.220 requires compliance with DOE regulations. (Doc. 190 at 18)
 8 Additionally, the Plaintiffs argue that the Defendants are bound by DOE regulations
 9 because they accept DOE funds to operate HES. (Doc. 190 at 19) In the Plaintiffs' Motion,
 10 the Plaintiffs argue that there is no genuine dispute of material fact as to HES's failure to
 11 establish a system to identify students with disabilities in its student body, as required under
 12 34 C.F.R. § 104.32. (Doc. 184 at 24) In response, the Defendants argue that they are not
 13 subject to DOE regulations. (Doc. 191 at 16)

14 Based on the Court's aforementioned analysis for Count 3, the Court finds that the
 15 Defendants are not bound to comply with DOE regulation 34 C.F.R. § 104.32.
 16 Accordingly, the Defendants are entitled to summary judgment on Count 5.

17 **F. Count VI – Violation of 34 C.F.R. § 104.36 – Violation of Department of**
 18 **Education Regulations Regarding “Procedural Safeguards”**

19 In Count 6 of the TAC, the Plaintiffs allege a claim pursuant to Department of
 20 Education regulation 34 C.F.R. § 104.36, arguing that the Defendants failed to implement
 21 a system to allow parents of students with disabilities to examine records and participate
 22 in hearings and review procedures. (Doc. 129 at 67–68) 34 C.F.R. § 104.36 states:

23 “A recipient that operates a public elementary or secondary
 24 education program or activity shall establish and implement,
 25 with respect to actions regarding the identification, evaluation,
 26 or educational placement of persons who, because of handicap,
 27 need or are believed to need special instruction or related
 28 services, a system of procedural safeguards that includes
 notice, an opportunity for the parents or guardian of the person
 to examine relevant records, an impartial hearing with
 opportunity for participation by the person's parents or
 guardian and representation by counsel, and a review
 procedure. Compliance with the procedural safeguards of

section 615 of the Education of the Handicapped Act is one means of meeting this requirement.”

34 C.F.R. § 104.36.

The Defendants’ Motion reiterates its arguments from Count 5 to argue that the Defendants should be awarded summary judgment on Count 6. (Doc. 182 at 20) Specifically, the Defendants argue that 34 C.F.R. § 104.36 is a regulation that is intended to apply to schools that are recipients of federal funds, but the regulation does not bind other federal agencies. (Doc. 182 at 21) In response, the Plaintiffs again argue that Subpart B of 43 C.F.R. § 17.220 requires compliance with DOE regulations, and the Defendants are bound by DOE regulations because they accept DOE funds to operate HES. (Doc. 190 at 19)

Based on the Court’s aforementioned analysis for Count 3, the Court finds that the Defendants are not bound to comply with DOE regulation 34 C.F.R. 104.36. Accordingly, the Defendants are entitled to summary judgment on Count 6.

G. Plaintiffs Steven C. and Durell P.

The Defendants argue that the Court lacks subject matter jurisdiction over two of the students identified in the TAC, Stephen C. and Durell P., because the students no longer attend HES. (Doc. 182 at 22–23) In response, the Plaintiff argues that Stephen C. and Durell P.’s claims are not moot because the Court can still provide a ruling that would benefit these parties. (Doc. 190 at 22) Specifically, the Plaintiffs argue that an order from the Court would benefit Stephen C. and Durell P. by (i) allowing them to gain access to their school records as they transition to high school and (ii) clarifying, as a matter of law, whether BIE schools are subject to DOE regulations. (Doc. 190 at 2) The Plaintiffs argue that, even if Stephen C. and Durell P.’s claims are moot, the Court should not dismiss the claims because the harm asserted is capable of repetition, which is an exception to dismissal for mootness. (Doc. 190 at 23)

The rule in federal cases is that an actual controversy “must be extant at all stages of review, not merely at the time the complaint is filed.” *Timbisha Shoshone Tribe v. U.S.*

1 *Dep't of Interior*, 824 F.3d 807, 812 (9th Cir. 2016) (citing *Steffel v. Thompson*, 415 U.S.
2 452, 459 n. 10 (1974)). Where an actual controversy does not persist throughout litigation,
3 “[a] case becomes moot.” *Id.* The mootness doctrine does not turn on whether the plaintiff
4 continues to believe that some unlawful conduct occurred; rather, “the case is moot if the
5 dispute ‘is no longer embedded in any actual controversy about the plaintiffs’ particular
6 legal rights.’” *Id.* (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

7 The basic question in determining mootness is whether there is a present
8 controversy as to which effective relief can be granted. *Nw. Envtl. Def. Ctr. v. Gordon*, 849
9 F.2d 1241, 1244–45 (9th Cir. 1988) (citing *United States v. Geophysical Corp.*, 732 F.2d
10 693, 698 (9th Cir.1984)). “[C]ourts of equity have broad discretion in shaping remedies.”
11 *Id.* (citing *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986)). Thus, in deciding a
12 mootness issue, “the question is not whether the precise relief sought at the time the
13 application for an injunction was filed is still available. The question is whether there can
14 be any effective relief.” *Id.* The Ninth Circuit Court of Appeals has held that “[i]f there is
15 no longer a possibility that an appellant can obtain relief for his claim, that claim is moot
16 and must be dismissed for lack of jurisdiction.” *Timbisha*, 824 F.3d at 812.

17 In light of the Court’s rulings on both motions, Count 3 is the only remaining viable
18 claim. In Count 3, the Plaintiffs seek declaratory relief requiring the Defendants to provide
19 the Plaintiffs with adequate special education instruction, among other accommodations.
20 (Doc. 129 at 61) As of the filing of the TAC, Plaintiff Durell P. completed the eighth grade
21 and was not attending HES. (Doc. 182 at 23) Plaintiff Stephen C. was enrolled at HES at
22 the time the TAC was filed, but he has since completed the eighth grade and is no longer
23 attending the school. (Doc. 182 at 23) It is clear to the Court that there remains no active
24 controversy as to Stephen C. and Durell P. under Count 3 because these students are no
25 longer enrolled in HES. At this stage of the litigation, any benefit that Stephen C. or Durell
26 P. would receive pursuant to Count 3 is speculative. Accordingly, the Court finds that there
27 is no effective relief that is available to Stephen C. or Durell P., and any claims on their
28 behalf shall be dismissed as moot.

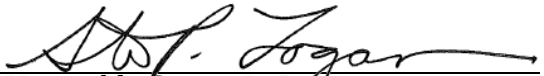
Accordingly,

IT IS ORDERED that:

1. Defendants' Motion for Summary Judgment (Doc. 182) is **granted**;
2. Plaintiffs' Motion for Summary Judgment (Docs. 184, 187) is **denied**; and
3. Plaintiff Stephen C. and Plaintiff Durell P.'s claims are **moot**. Therefore, the

Clerk of Court shall terminate Plaintiffs Stephen C. and Durell P. from this case.

Dated this 16th day of December, 2019.


Honorable Steven P. Logan
United States District Judge

TAB 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

Bureau of Indian Education, et al.,

Defendants.

No. CV-17-08004-PCT-SPL

ORDER

Before the Court is Defendants' Second Partial Motion to Dismiss. (Doc. 69.) For the reasons set forth below, the motion is granted in part and denied in part.

I. Background¹

The present action is brought by Nine Havasupai students and the Native American Disability Law Center ("NADLC") to address alleged longstanding educational deprivations at Havasupai Elementary School ("HES")—a school operated by the Bureau of Indian Education on the Havasupai Indian Reservation.² Plaintiffs allege that Defendants have "knowingly failed to provide basic general education, a system of special education, and necessary wellness and mental health support to Havasupai students, resulting in indefensible deficits in academic achievement and educational attainment." (Doc. 60 at 1-2.) In connection with these alleged deprivations, Plaintiffs

¹ The Court assumes the parties' familiarity with the facts and proceedings.

² HES is the only option available to Havasupai children who wish to obtain an elementary education in their community. (Doc. 60 at 2.)

1 have filed suit against the following federal government agencies and officials: the
2 Bureau of Indian Education (“BIE”); United States Department of the Interior (“DOI”);
3 Ryan Zinke in his official capacity as Secretary of the DOI; Michael Black, in his official
4 capacity as Acting Assistant Secretary—Indian Affairs; Tony Dearman, in his official
5 capacity as the Director of the BIE; and Jeff Williamson, in his official capacity as
6 Principal of HES (collectively, “Defendants”). (Doc. 60.) Plaintiffs seek declaratory and
7 injunctive relief. (Doc. 60 at 62-64.)

8 **II. Standard of Review**

9 To survive a motion to dismiss, a complaint must contain “a short and plain
10 statement of the claim showing that the pleader is entitled to relief” such that the
11 defendant is given “fair notice of what the . . . claim is and the grounds upon which it
12 rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (quoting Fed. R. Civ. P.
13 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The Court may dismiss a complaint
14 for failure to state a claim under Federal Rule 12(b)(6) for two reasons: (1) lack of a
15 cognizable legal theory, and (2) insufficient facts alleged under a cognizable legal theory.
16 *Balistreri v. Pacificia Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

17 A complaint must “state a claim to relief that is plausible on its face.” *Ashcroft v.*
18 *Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). Facial plausibility requires the
19 plaintiff to plead “factual content that allows the court to draw the reasonable inference
20 that the defendant is liable for the misconduct alleged.” *Id.* “Where a complaint pleads
21 facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line
22 between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550
23 U.S. at 557). Although a complaint “does not need detailed factual allegations,” a
24 plaintiff must “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at
25 555. This requires “more than labels and conclusions, and a formulaic recitation of the
26 elements of a cause of action.” *Id.*

27 In deciding a motion to dismiss the Court must “accept as true all well-pleaded
28 allegations of material fact, and construe them in the light most favorable to the non-

moving party.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). In comparison, “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences” are not entitled to the assumption of truth, *id.*, and “are insufficient to defeat a motion to dismiss for failure to state a claim.” *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (internal citation omitted). A plaintiff need not prove the case on the pleadings to survive a motion to dismiss. *OSU Student All. v. Ray*, 699 F.3d 1053, 1078 (9th Cir. 2012).

III. Discussion

Plaintiffs’ Second Amended Complaint contains six causes of action: (1) Count I is brought by all Plaintiffs against all Defendants under 5 U.S.C. § 706(1) for failure to provide basic education; (2) Count II is brought by all Plaintiffs against all Defendants under 5 U.S.C. § 706(2) for failure to provide basic education; (3) Count III is brought by Plaintiffs Stephen C., Durell P., Levi R., Jenny A., Jordan A., and NADLC against Defendants Zinke, Black, Dearman, and Williamson under 29 U.S.C. § 794 for failure to provide a system enabling students with disabilities to access public education; (4) Count IV is brought by Plaintiffs Stephen C., Durell P., Taylor P., Leo R., Levi R., Jenny A., and Jordan A. against Defendants Zinke, Black, Dearman, and Williamson under 29 U.S.C. § 794 for failure to provide a system enabling students impacted by childhood adversity to access public education; (5) Count V is brought by Plaintiffs Stephen C., Durell P., Levi R., Jenny A., Jordan A., and NADLC against Defendants Zinke, Black, Dearman, and Williamson under 34 C.F.R. § 104.32 for violations of Department of Education “location and notification” regulations; and (6) Count VI is brought by Plaintiffs Stephen C., Durell P., Levi R., Jenny A., Jordan A., and NADLC against Defendants Zinke, Black, Dearman, and Williamson under 34 C.F.R. § 104.36 for violations of Department of Education “procedural safeguards” regulations. (Doc. 60 at 50-62.)

Defendants have moved to dismiss the following parties and claims: (1) dismissal of certain student Plaintiffs; (2) dismissal of Count IV or in the alternative, consolidation

1 of Counts III and IV; (3) dismissal of Counts V and VI; and (4) dismissal of each
 2 Defendant with the exception of Defendant Zinke for Counts III, IV, V, and VI. (Doc. 69
 3 at 4-20.) The Court will address each in turn.

4 **A. Standing for Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A.**
 5 Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. previously attended
 6 HES, but are no longer enrolled as students there for reasons related to the gravamen of
 7 this suit—that is, the alleged “inadequacy of the education provided at the School.” (Doc.
 8 60 at 4-6.) Sibling Plaintiffs Levi R. and Leo R. both attended HES from kindergarten
 9 through eighth grade until their family relocated from Supai so that they could attend
 10 public schools in Coconino County. (Doc. 60 at 4-5.) Similarly, sibling Plaintiffs Jenny
 11 A., Jeremy A., and Jordan A. each attended HES from kindergarten through the sixth,
 12 fifth, and third grades, respectively, until their mother decided to enroll them in a BIE
 13 boarding school in Oklahoma because of the school’s inability to meet her children’s
 14 educational needs. (Doc. 60 at 5-6.) Defendants contend that because the aforementioned
 15 student Plaintiffs are no longer enrolled at HES, they do not have standing to bring their
 16 claims and should be dismissed under Federal Rule of Civil Procedure 12(b)(1). (Doc. 69
 17 at 4-7.)

18 “Article III of the United States Constitution limits the jurisdiction of the federal
 19 courts to ‘Cases’ and ‘Controversies.’” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d
 20 853, 861 (9th Cir. 2017) (citing U.S. Const. art. III, § 2, cl. 1). The restriction that federal
 21 courts are limited to hearing cases and controversies “requires a party invoking a federal
 22 court’s jurisdiction to demonstrate standing.” *Wittman v. Personhuballah*, 136 S. Ct.
 23 1732, 1736 (2016) (internal citation omitted). A party invoking federal jurisdiction bears
 24 the burden of establishing the irreducible constitutional minimums of standing—that is,
 25 an injury in fact, a causal connection between the injury and the conduct complained of,
 26 and the ability of a favorable decision to provide redress. *Lujan v. Defs. of Wildlife*, 504
 27 U.S. 555, 560-61 (1992) (internal citations omitted). If Plaintiff is unable to meet this
 28 burden, the federal court lacks subject matter jurisdiction and the suit should be dismissed

1 under Federal Rule of Civil Procedure 12(b)(1). *Cetacean Cmty. v. Bush*, 386 F.3d 1169,
2 1174 (9th Cir. 2004) (internal citations omitted).

3 **1. Compensatory Education**

4 Because student Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. are
5 no longer enrolled at HES, standing is predicated on the availability of compensatory
6 education as an equitable remedy. (Doc. 76 at 3-7.) “Compensatory education is an
7 equitable remedy that seeks to make up for ‘educational services [a] child should have
8 received in the first place,’ and ‘aim[s] to place disabled children in the same position
9 they would have occupied but for the school district’s violation of *IDEA*.’” *R.P. ex rel.*
10 *C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (internal citations
11 omitted) (emphasis added). Plaintiffs have not directed the Court to any case law that
12 stands for the proposition that compensatory education is an appropriate equitable
13 remedy outside the context of the Individuals with Disabilities Education Act (IDEA),
14 nor has the Court’s own research yielded any such case.³ Without such redress, these
15 student Plaintiffs have failed to meet their burden of establishing that they have standing
16 to bring their claims against Defendants. Defendants’ motion to dismiss Plaintiffs Levi
17 R., Leo R., Jenny A., Jeremy A., and Jordan A. for lack of standing is granted.

18 **B. Count IV**

19 Student Plaintiffs Stephen C., Durell P. Taylor P., Leo R., Levi R., Jenny A., and
20 Jordan A. allege that Defendant Zinke, Black, Dearman, and Williamson violated Section
21 504 of the Rehabilitation Act by failing to establish systems that address their exposure to
22 adversity⁴ and complex trauma⁵ so as to facilitate meaningful access to the benefits of
23

24 ³ As Defendants point out, “Plaintiffs do not cite any cases discussing an award of
25 compensatory education as a form of equitable relief under the Rehabilitation Act (or the
Indian Education Act) against the Federal Government.” (Doc. 92 at 2.)

26 ⁴ Adverse Childhood Experiences (“ACEs”) are “inherently disruptive experiences
27 in childhood that produce significant potentially damaging level[s] of stress and
28 associated physical changes.” (Doc. 60 at 40, n.5.) “Although a child can be profoundly
affected by one traumatic experience, Student Plaintiffs impacted by Childhood
Adversity have all experienced complex trauma.” (*Id.*)

1 public education. (Doc. 60 at 56-58.) Count IV is thus predicated on an initial, underlying
 2 finding that these student Plaintiffs are disabled under Section 504 by virtue of their
 3 exposure to complex trauma and adversity, including, but not limited to: “experiences of
 4 physical and sexual violence, involvement in the child welfare and juvenile justice
 5 systems, alcohol and substance abuse in the family and community, extreme poverty,
 6 denial of access to education, and historical trauma.” (Doc. 76 at 7.) Defendants
 7 challenge Plaintiffs’ characterization of exposure to complex trauma and adversity as a
 8 disability within the meaning of Section 504 and their claims that they were denied
 9 benefits solely because of their disabilities. (Doc. 69 at 8-12.) Defendants alternatively
 10 argue that Count IV—if allowed to proceed—is duplicative of Count III and should be
 11 consolidated. (Doc. 69 at 14-16.)

12 Section 504 of the Rehabilitation Act, reads in part:

13 No otherwise qualified individual with a disability . . . shall,
 14 solely by reason of her or his disability, be excluded from the
 15 participation in, be denied the benefits of, or be subjected to
 16 discrimination under any program or activity receiving
 Federal financial assistance or under any program or activity
 conducted by an Executive agency.

17 29 U.S.C. § 794(a).

18 By cross-reference to the Americans with Disabilities Act (“ADA”), Section 504 defines
 19 a disability as “a physical or mental impairment that substantially limits one or more
 20 major life activities.” 42 U.S.C. § 12102(1)(A). Major life activities pertinent to this case
 21 include: learning, reading, concentrating, thinking, and communicating. 42 U.S.C. §
 22 12102(2)(A). To state a claim under Section 504, Plaintiffs must establish that: (1) they
 23 are individuals with a disability; (2) they are otherwise qualified to receive the benefit;
 24 (3) they were denied the benefits of the program solely by reason of their disability; and
 25

26
 27 ⁵ “Complex trauma stems from an individual child’s exposure to multiple persistent
 28 sources of violence, loss, and other adverse childhood experiences (‘ACEs’) and
 describes children’s exposure to these events and the impact of [such] exposure.” (Doc.
 60 at 40-41.)

(4) the program receives federal financial assistance.⁶ *Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017) (internal citation omitted).

First, Defendants' characterization of Plaintiffs' allegations as rote recitations of the legal definition of disability and sweeping generalizations of historical trauma within the Havasupai community ignore the actual allegations contained in Plaintiffs' Second Amended Complaint. (Doc. 69 at 8-12.) Plaintiffs make substantial reference to the historical, environmental, and socioeconomic factors contributing to the prevalence of trauma within the students' community, including, but not limited to:

involvement in the juvenile justice and child welfare systems; family disruption, including separation from caregivers due to boarding school placements; historical trauma, including parent experience with boarding schools; physical and sexual violence, including exposure to restraints in the school setting; alcohol and substance abuse in the community; denial of access to education; and poverty.

(Doc. 60 at 39.)

For purposes of the present motion, it is important to note that Plaintiffs' allegations do not stop there; rather, Plaintiffs explain the ways in which "[e]xposure to trauma can lead to palpable, physiological harm to a young person's developing brain," and how these physiological impacts manifest in the classroom. (Doc. 60 at 40.) Moreover, the Second Amended Complaint is replete with allegations relating each student Plaintiffs' unique exposure to complex trauma and adverse childhood experiences to their ability to read, think, and concentrate—i.e. how their brains' physical response to trauma substantially limits their ability to learn. (Doc. 60 at 13-36.) Thus, the Court finds that Plaintiffs have adequately alleged that complex trauma and adversity can result in physiological effects constituting a physical impairment that substantially limits major life activities within the meaning of Section 504 of the Rehabilitation Act.

⁶ "[A]ll BIE-operated schools must comply with Section 504 of the Rehabilitation Act pursuant to the Education Amendments of 1978, as amended by the No Child Left Behind Act of 2001." (Doc. 69 at 8, n.4.)

1 Second, Defendants’ argument that Plaintiffs are unable to satisfy the causation
2 requirement of their Section 504 claims conflates the standards for discrimination claims
3 in the employment and educational contexts. Defendants maintain that Plaintiffs have not
4 established “that the duty to accommodate was triggered here because there are no
5 allegations showing that defendants knew, had notice of, or had reason to believe that any
6 of the plaintiffs had a disability as a result of trauma and adversity.” (Doc. 69 at 13.)

7 Section 504 of the Rehabilitation Act is intended “to protect disabled persons from
8 discrimination arising out of both discriminatory animus and ‘thoughtlessness,’
9 ‘indifference,’ or ‘benign neglect.’” *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir.
10 1996) (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)). In determining whether
11 disabled individuals are being discriminated against in violation of Section 504, courts
12 may look to “whether disabled persons were denied meaningful access to state-provided
13 services.” *Id.* (internal punctuation and citations omitted).

14 Defendants contend that Plaintiffs have not—and cannot—establish that they were
15 denied the benefits of public education solely by virtue of their disabilities because
16 Defendants did not have the requisite knowledge of the Plaintiffs’ disabilities resulting
17 from exposure to complex trauma and adverse childhood experiences. (Doc. 69 at 12-14.)
18 Specifically, Defendants point to Plaintiffs’ failure to (1) provide notice to Defendants of
19 their disabilities and (2) engage in interactive processes to discuss possible
20 accommodations prior to bringing this suit. (*Id.*) To agree with this argument, however,
21 would be to import the pre-litigation notice and accommodation request requirements for
22 ADA claims in the workplace to the classroom. See *P.P. v. Compton Unified Sch. Dist.*,
23 135 F.Supp.3d 1098, 1114-15 (C.D. Cal. 2015). Even if this were the standard—which it
24 is not—Plaintiffs have sufficiently alleged in their Second Amended Complaint facts
25 which make it plausible that Defendants were in fact on notice of student Plaintiffs’
26 disabilities by virtue of their exposure to trauma and adversity. Defendants have
27 previously acknowledged the impact that trauma and adversity within the Havasupai
28 community has on HES students:

[HES] is a U.S. Bureau of Indian Education operated K-8 school and is considered to be the most isolated and remote school in the lower 48 states. High levels of poverty, unemployment, low levels of literacy and substance abuse and family violence plague this community. . . . During the current school year, 2010-2011, HES has a total population of 68 , [sic] 100% are Havasupai tribal members, 100% qualify for Free or Reduced Lunch, 90% are identified limited English proficient and 90% are identified as needing Special Education Services.

(Doc. 60, Ex. A at 3.)⁷

For these reasons, Defendants’ motion to dismiss Count IV is denied. With respect to Defendants’ alternative argument that Counts III and IV should be consolidated (Doc. 69 at 14-17), these claims are brought by different Plaintiffs, are predicated on different conduct and factual circumstances, and seek different remedies. Because of these fundamental distinctions between Counts III and IV, Defendants’ motion to consolidate is denied. *See* Fed. R. Civ. P. 10(b) (“If doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count or defense.”); *see also* *Bautista v. L.A. Cty.*, 216 F.3d 837, 840 (9th Cir. 2000) (“Separate counts will be required if necessary to enable the defendant to frame a responsive pleading or to enable the court and the other parties to understand the claims.”) (quoting JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE, § 10.3[2][a] (3d ed. 1997)).

C. Claims under Department of Education Regulations

Counts V and VI of Plaintiffs’ Second Amended Complaint allege that Defendants have violated DOE regulations implementing Section 504 of the Rehabilitation Act, specifically those regarding “Location and Notification” and “Procedural Safeguards.” (Doc. 60 at 59-62.) Defendants move to dismiss these claims on the theory that these DOE regulations contain no private right of action and cannot be enforced through an implied private right of action. (Doc. 69 at 17-19.)

⁷ As recently as 2014, Plaintiffs allege HES self-reported that approximately half of its students had been identified as students with disabilities. (Doc. 64 at 43.)

1 “Section 504 establishes an implied private right of action allowing victims of
 2 prohibited discrimination, exclusion, or denial of benefits to seek the full panoply of
 3 remedies, including equitable relief and compensatory damages.” *Mark H. v. Lemahieu*,
 4 513 F.3d 922, 930 (9th Cir. 2008) (internal citations and punctuation omitted). In order
 5 for Plaintiffs to successfully bring their claim against Defendants under these provisions
 6 by virtue of a private right of action, it must first be determined whether each regulation
 7 at issue is “tightly enough linked to § 504 that they ‘authoritatively construe’ that
 8 statutory section, rather than impose new obligations.” *Lemahieu*, 513 F.3d at 939 (citing
 9 *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)). “[T]he Ninth Circuit has previously
 10 found § 504 ‘reasonable accommodation’ and ‘meaningful access requirements’ relevant
 11 when evaluating whether regulations ‘come within § 504’s substantive scope.’” *P.P.*, 135
 12 F.Supp.3d at 1118 (citing *Lemahieu*, 513 F.3d at 938.)

13 The “Location and Notification” provision of Section 504’s implementing
 14 regulations requires that:

15 A recipient that operates a public elementary . . . education
 16 program or activity shall annually:

- 17 (a) Undertake to identify and locate every qualified
- 18 handicapped person residing in the recipient’s
- 19 jurisdiction who is not receiving a public education;
- 20 and
- 21 (b) Take appropriate steps to notify handicapped
- 22 persons and their parents or guardians of the
- 23 recipient’s duty under this subpart.

24 34 C.F.R. § 104.32.

25 Following the reasoning adopted by the *P.P.* Court, this Court finds that the
 26 “Location and Notification” regulation is necessary to ensure meaningful access to an
 27 appropriate education in this case. *Lemahieu*, 513 F.3d at 938, n.14 (“Depending on the
 28 particular circumstances, testing and evaluation of a disabled child might be necessary to
 ensure ‘meaningful access’ to an appropriate education, *as might notice to a child’s*
parents of the educational plan for that child.”) (emphasis added); *see also P.P.*, 135
 F.Supp.3d at 1119.

1 Having determined that the “Location and Notification” regulation contains an
2 implied private right of action, the Court now turns to the sufficiency of the allegations in
3 Plaintiffs’ Second Amended Complaint. Plaintiffs allege that Defendants have failed to
4 establish a system for identifying and assessing the needs of students with disabilities as
5 follows:

6 Havasupai Elementary School does not employ, and has not
7 employed at any time in recent years, sufficient numbers of
8 the following personnel necessary to adequately provide
9 special education services to students with disabilities: highly
10 qualified special education teachers, mental health providers,
11 occupational therapists, physical therapists, and speech
12 therapists. At no time in recent years has the School
employed sufficient numbers of paraprofessionals or support
staff to meet the needs of students with disabilities. The
staffing of Havasupai Elementary School is so inadequate that
the School cannot even hold IEP meetings on a timely basis.

13 (Doc. 64 at 44.)

14 Based on these allegations, as well as those regarding the inability of HES to effectively
15 communicate with student Plaintiffs’ parents and guardians about the services that are
16 required to be available to students with disabilities, it is facially plausible that
17 Defendants have violated 34 C.F.R. § 104.32 and Defendants’ motion to dismiss Count
18 IV is denied.

19 The “Procedural Safeguards” provision of 34 C.F.R. § 104.36 requires, in part:

20 A recipient that operates a public elementary . . . program or
21 activity shall establish and implement, with respect to actions
22 regarding the identification, evaluation, or educational
23 placement of persons who, because of handicap, need or are
24 believed to need special instruction or related services, a
25 system of procedural safeguards that includes notice, an
26 opportunity for the parents or guardian of the person to
examine relevant records, an impartial hearing with
opportunity for participation by the person’s parents or
guardian and representation by counsel, and a review
procedure.

27 34 C.F.R. § 104.36.
28

1 Again looking towards the sound reasoning demonstrated by sister courts within
 2 this Circuit, the Court finds that this regulation is necessary to ensure meaningful access
 3 to an appropriate education with respect to the present facts. *Lemahieu*, 513 F.3d at 938,
 4 n.14; *see also P.P.*, 135 F.Supp.3d at 1119; *J.M v. Liberty Union High Sch. Dist.*, No.
 5 16-CV-05225-LB, 2017 WL 2118344, at *4 (N.D. Cal. May 16, 2017). The Court agrees
 6 with Plaintiffs that Defendants' reliance on *Power ex rel. Power v. Sch. Bd. of City of Va.*
 7 *Beach*, 276 F.Supp.2d 515, 519-520 (E.D. Va. 2003) is misplaced because of the
 8 underlying claims of discrimination present in this case. (Doc. 76 at 18-19.)

9 Further, the Court finds that Plaintiffs have sufficiently pleaded factual allegations
 10 that make it facially plausible that Defendants have violated 34 C.F.R. § 104.36. With
 11 respect to the procedural safeguards required DOE regulations, Plaintiffs allege as
 12 follows:

13 177. Havasupai Elementary School does not have the
 14 capacity to meet its obligation to identify and provide
 15 comprehensive assessments of students with disabilities. The
 16 School makes matters even more challenging for parents by
 17 failing to provide information required by federal statutes and
 18 regulations, including notice of procedural safeguards and
 information necessary to understand disabilities, participate in
 planning, and access educational records. The School also
 does not have an adequate recordkeeping system in place.

19 (Doc. 64 at 45.)

20 Based on these allegations, as well as those regarding the lack of adequate staffing, it is
 21 facially plausible that Defendants have violated 34 C.F.R. § 104.36 and Defendants'
 22 motion to dismiss Count VI is denied.

23 **D. Proper Defendants for Counts III-VI**

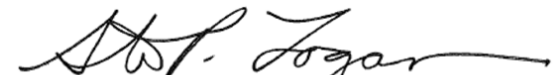
24 Defendants argue that Defendant Zinke, in his official capacity as Secretary of the
 25 Interior, is the only proper defendant for Counts III, IV, V, and VI, and have moved to
 26 dismiss Defendants Black, Dearman, and Williamson. (Doc. 69 at 19-20.) Plaintiffs
 27 maintain that these claims may be asserted against all named defendants. (Doc. 76 at 19-
 28 20.)

1 Plaintiffs and Defendants agree that Section 504 of the Rehabilitation Act
 2 incorporates “the remedies, procedures, and rights set forth in title VI of the Civil Rights
 3 Act of 1964 (42 U.S.C 2000d et seq.).” 29 U.S.C. § 794a(a)(1). (Doc. 76 at 19; Doc. 92 at
 4 11.) In spite of this agreement, Plaintiffs and Defendants reach opposite conclusions
 5 regarding its application to this case. The Court is persuaded, however, by Defendants’
 6 argument that Secretary of the Interior Ryan Zinke is the only proper defendant for these
 7 claims. *See Johnston v. Horne*, 875 F.2d 1415, 1420 (9th Cir. 1989), *overruled on other*
 8 *grounds by Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990). Moreover, this
 9 conclusion is supported by the fact that any violations would ultimately be attributable to
 10 the Department of the Interior. As Defendants also point out, Plaintiffs have failed to
 11 attribute separate predicate acts to each defendant. (Doc. 92 at 11-12.) For these reasons,
 12 the Court concludes that Defendant Ryan Zinke in his official capacity as Secretary of the
 13 Interior is the only proper Defendant for Counts III, IV, V, and VI. Accordingly,

14 **IT IS ORDERED** that Defendants’ Second Partial Motion to Dismiss (Doc. 69) is
 15 **granted in part and denied in part** as follows:

- 16 1. That Defendants’ motion to dismiss Plaintiffs Levi R., Leo R., Jenny A.,
 17 Jeremy A., and Jordan A. for lack of standing is **granted**;
- 18 2. That Defendants’ motion to dismiss Count IV is **denied**;
- 19 3. That Defendants’ motion to dismiss Counts V and VI is **denied**; and
- 20 4. That Defendants’ motion to dismiss Defendants Michael Blackman, Tony
 21 Dearman, and Jeff Williamson with respect to Counts III, IV, V, and VI is **granted**.

22 Dated this 29th day of March, 2018.

23 
 24 Honorable Steven P. Logan
 25 United States District Judge
 26
 27
 28

Case No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona*

Case No. 3:17-CV-08004-SPL

The Honorable Steven P. Logan, United States District Judge

APPELLANTS' EXCERPTS OF RECORD

VOLUME 2 OF 4

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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

**JOINT STIPULATION OF
DISMISSAL OF THIRD AND
FOURTH CAUSES OF ACTION**

The Third and Fourth Causes of Action of the Third Amended Complaint for Declaratory and Injunctive Relief ("Complaint") are hereby dismissed with prejudice. The dismissal of these Causes of Action shall constitute a dismissal with prejudice of all claims arising out of the Third and Fourth Causes of Action of the Complaint, as provided in the settlement agreement attached hereto as Exhibit A.

RESPECTFULLY SUBMITTED this 25th day of September, 2020.

BY PLAINTIFFS:

BY DEFENDANTS:

By: /s/ Emily Curran-Huberty
Emilv Curran-Hubertv

By: /s/ Lisa A. Olson
Lisa A. Olson

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, 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
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**IN THE UNITED STATES DISTRICT COURT
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Stephen C., a minor, by Frank C., guardian ad
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v.

Bureau of Indian Education, et al.,

Defendants.

No. 3:17-cv-08004-SPL

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR
PARTIAL RELIEF FROM THE
DECEMBER 17, 2019 ORDER**

1 Pursuant to the Court's order (Dkt. No. 218) calling for Plaintiffs to respond to
2 Defendants' Motion for Partial Relief from the December 17, 2019 Order (Dkt. No. 216)
3 ("Defendants' Motion" or "Mot."), Plaintiffs Stephen C., Anna D., Olaf D., Moana L.,
4 Durell P., Taylor P., Freddy P., and Native American Disability Law Center ("NADLC")
5 (collectively, "Plaintiffs") submit the following response to Defendants' Motion.

6 Plaintiffs agree with Defendants that executive agencies, such as the Bureau of
7 Indian Education ("BIE"), are subject to Section 504 of the Rehabilitation Act of 1973.
8 Plaintiffs therefore do not oppose Defendants' Motion to the extent it seeks to clarify that
9 Section 504 applies to Defendants and their operation of Havasupai Elementary School
10 ("HES").

11 Plaintiffs disagree, however, as to the implications such a clarification should have
12 for the case. Rather than denying Plaintiffs relief as to Counts 3 and 4 of Plaintiffs' Third
13 Amended Complaint ("TAC"), as Defendants urge, if the Court revises its analysis to hold
14 that Section 504 applies to Defendants, the Court should *grant* Plaintiffs summary
15 judgment as to liability on Count 3 and *deny* the parties' cross-motions for summary
16 judgment on Count 4. The Court should then schedule a case management conference to
17 discuss how to proceed to an evidentiary hearing or trial on Counts 3 and 4.

18 If, on the other hand, the Court is inclined to adhere to its original conclusion that
19 Section 504 does not apply to Defendants, then the practical effect of that reasoning may
20 be that Count 3 also cannot proceed. Thus, if the Court denies Defendants' motion for
21 partial relief on this ground, Plaintiffs recognize that the Court has the authority to grant
22 Defendants summary judgment on Count 3 pursuant to Federal Rule of Civil Procedure
23 56(f) and enter final judgment in the case.

24 **ARGUMENT**

25 **I. Plaintiffs Agree that Defendants Are Subject to Section 504**

26 Defendants' Motion seeks relief from the portion of the Court's December 17, 2019
27 Order that held that "Defendants, as members of the executive branch, are not subject to
28 Section 504." Dkt. No. 214 at 6 ("Summary Judgment Order" or "SJ Order"). As

Defendants point out, Section 504 expressly applies to “any program or activity conducted by any Executive agency,” 29 U.S.C. § 794(a), and courts have “uniformly and consistently” applied Section 504 to executive agencies.” Mot. at 2 (citing cases). Thus, Defendants ask the Court to reconsider that portion of its Summary Judgment Order holding that Section 504 does not apply to Defendants. *Id.*¹

Plaintiffs agree that Defendants are subject to the statutory requirements of Section 504. Courts, including the Supreme Court, have uniformly applied Section 504 to the executive branch, which is consistent with the plain language of the statute. As such, Plaintiffs do not oppose Defendants’ request for reconsideration of the portion of the Summary Judgment Order that finds Section 504 inapplicable to Defendants.

II. Given that Section 504 Applies to Defendants, Plaintiffs Are Entitled to Summary Judgment as to Defendants’ Liability on Count 3

Defendants acknowledge that they are subject to Section 504, and they do not dispute that they are currently failing to comply with Section 504’s statutory requirements at HES. Instead, Defendants claim, as they did in their summary judgment papers,² that they “have taken steps to *come into* compliance with Section 504 and are implementing measures *toward full compliance* with Section 504 at HES.” Mot. at 3 (emphasis added). Defendants attempt to sidestep Plaintiffs’ motion for summary judgment on Count 3, which should be granted for the reasons explained below, and instead ask to present additional “facts” regarding their purported efforts to comply with Section 504 in order to

¹ Plaintiffs note that the District of Arizona’s Civil Local Rules require motions for reconsideration to be brought “no later than fourteen (14) days after the date of the filing of the Order that is the subject of the motion,” “[a]bsent good cause shown.” LRCiv 7.2(g)(2). Defendants brought their Rule 60(b) motion on January 6, 2020, nearly three weeks after the Court issued its summary judgment order on December 17, 2019.

² Plaintiffs hereby incorporate by reference all arguments and authority raised in support of Plaintiffs’ Motion for Summary Judgment and in opposition to Defendants’ Motion for Summary Judgment. Plaintiffs do not repeat all such arguments here for the sake of space, but they do not intend to waive any argument previously made by failing to reiterate it in this response.

1 “show that there is no need for an injunction to ensure that Section 504 will be effectively
2 enforced.” *Id.* at 3-4.

3 Defendants’ efforts to avoid summary judgment on Count 3 fall short. As explained
4 in Plaintiffs’ briefing on summary judgment, *see* Dkt. No. 202 at 6-8, Defendants fail to
5 explain why Plaintiffs are not entitled to judgment on liability where Defendants do not
6 even contest their noncompliance with Section 504’s demands. Defendants express
7 concerns about possible remedies, but Plaintiffs did *not* move for summary judgment as to
8 the proper remedy for Count 3 and acknowledge that the issue of remedy should proceed
9 to an evidentiary hearing or trial.

10 Given Defendants’ acknowledgement that Section 504 applies and given their
11 failure to contest that—at least as of the close of discovery—they were *not* complying with
12 Section 504 at HES, the proper course is for the Court to grant Plaintiffs’ Motion for
13 Summary Judgment as to liability and to schedule a case management conference to
14 discuss further proceedings as to remedy.

15 **III. Defendants Fail to Show that They Are Entitled to Summary Judgment on** 16 **Count 4**

17 Defendants’ argument for relief as to Count 4 attempts to persuade the Court that
18 there are no disputed facts regarding the existence of reasonable accommodations to ensure
19 that Student Plaintiffs suffering the effects of complex trauma can meaningfully access a
20 public education at HES. Mot. at 4. Defendants’ argument is contrary to the Court’s
21 analysis in its Summary Judgment Order, where the Court expressly concluded that “the
22 reasonableness of the Plaintiff’s recommended accommodations is a factual issue that
23 cannot be resolved on summary judgment.” SJ Order at 8. The Court should not take
24 Defendants up on their specious invitation to reconsider this conclusion, which utterly fails
25 to show that the Court’s original conclusion was “manifest error,” or inconsistent with
26 “new facts or legal authority that could not have been brought to its attention earlier with
27 reasonable diligence,” as is required on a motion for reconsideration. LRCiv 7.2(g)(1); *see*
28 *also* Fed. R. Civ. P. 60(b).

1 In an effort to reargue the facts they presented at summary judgment, Defendants
 2 mischaracterize both the testimony of Plaintiffs' expert witnesses and the law on
 3 reasonable accommodations. See Mot. at 5-6. Defendants are flatly incorrect that there is
 4 no dispute as to whether "trauma informed practices would require major reforms and
 5 resources." Mot. at 5. Plaintiffs' summary judgment briefing and statements of fact
 6 pointed to numerous trauma-informed programs that have been implemented across the
 7 country in settings that face the same kinds of constraints as HES. See, e.g., Dkt. No. 185
 8 ¶¶ 94-101; Dkt. No. 190 at 8-9; Dkt. No. 192 ¶¶ 130-35. And the fact that Plaintiffs'
 9 trauma experts "never visited HES" continues to be irrelevant. See Dkt. No. 202 at 11 n.8.
 10 Section 504 "requires a fact-specific, individualized analysis of *the disabled individual's*
 11 circumstances and the accommodations that might allow him to enjoy meaningful access
 12 to the program." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010) (emphasis
 13 added) (alterations and internal quotation marks omitted). It does not matter whether the
 14 proposed accommodations are convenient for the school. And Defendants' speculation
 15 that *all* of Plaintiffs' proposed accommodations are wholly infeasible is legally
 16 insufficient, not to mention factually unsupported. *Id.* ("Mere speculation that a suggested
 17 accommodation is not feasible falls short of the reasonable accommodation requirement."
 18 (internal quotation marks omitted)).³

19 Perhaps in a last ditch effort to persuade the Court to reassess its conclusion that
 20 disputes of fact bar Defendants' motion for summary judgment on Count 4, Defendants for
 21 _____

22 ³ Assuming the Court adheres to its conclusion that there are disputed facts regarding the
 23 existence of a reasonable accommodation under Count 4, the appropriate course is to deny
 24 the parties' cross-motions for summary judgment on Count 4 and set the case for an
 25 evidentiary hearing or trial. If, however, the Court is inclined to revisit its conclusion that
 26 there are disputed facts regarding reasonable accommodations, Plaintiffs submit that,
 27 contrary to Defendants, it is in fact undisputed that reasonable accommodations *do* exist
 28 for the reasons explained in Plaintiffs' Motion for Summary Judgment. See Dkt. No. 184
 at 9-10, 16-17; Dkt. No. 202 at 11. Accordingly, if the Court is inclined to reconsider its
 ruling as to the existence of disputed facts on Count 4, Plaintiffs submit that the
 appropriate course is to *grant* Plaintiffs summary judgment as to liability on Count 4 and
 set the case for a hearing or trial on remedy.

1 the first time fault Plaintiffs’ experts for not “rebutting” the declaration and testimony of
 2 Defendants’ putative expert Teresia Paul. Mot. at 6-7 n.5. In so arguing, Defendants
 3 misrepresent the timeline of expert discovery in this case. Plaintiffs’ ten expert reports
 4 were served on March 1, 2019, the deadline for expert disclosures. See Dkt. No. 143 at 2.
 5 Defendants disclosed no experts on March 1, 2019, but summarily named several
 6 ostensible rebuttal experts—including Ms. Paul—on March 29, 2019. Dkt. No. 190 at 9-
 7 10. Ms. Paul’s declaration, which was submitted with Defendants’ partial summary
 8 judgment motion on May 31, 2019, consisted entirely of opinions that had *never* been
 9 disclosed, so that Plaintiffs had *no* opportunity to respond, with expert testimony or
 10 otherwise. *Id.* In attempting to undermine Plaintiffs’ experts, Defendants have their
 11 Federal Rules backwards—it is Ms. Paul’s untimely disclosed opinions that should be
 12 excluded. See Fed. R. Civ. P. 37(c)(1); Dkt. No. 190 at 10. Plaintiffs’ experts cannot be
 13 faulted for failing to respond to opinions disclosed for the first time more than a month
 14 after the close of discovery.

15 **IV. If the Court Adheres to Its Reasoning that Section 504 Does Not Apply to**
 16 **Defendants, then the Court Has the Authority to Grant Defendants Summary**
Judgment on Count 3 and Enter Final Judgment

17 Although Plaintiffs agree with Defendants that Defendants are subject to Section
 18 504, if the Court is inclined to deny Defendants’ request for reconsideration, Plaintiffs
 19 recognize that the Court has the authority to grant summary judgment in Defendants’ favor
 20 on Count 3 based on the same rationale applied to Count 4, and to enter final judgment in
 21 Defendants’ favor on all counts. Although the Court did not explicitly grant summary
 22 judgment for Defendants on Count 3 in its Summary Judgment Order, the Order’s
 23 reasoning that Section 504 does not apply to Defendants can be interpreted as having the
 24 practical effect of granting summary judgment for Defendants on Count 3 as well as
 25 Counts 4, 5, and 6.

26 In denying Plaintiffs’ Motion for Summary Judgment on Count 3, the Court
 27 concluded that “the Defendants, as members of the executive branch, are not subject to
 28 Section 504.” SJ Order at 6. In granting Defendants’ motion for summary judgment on

Count 4, the Court further concluded that, based on the “aforementioned analysis” related to Count 3, Defendants are “not bound to comply with the DOE’s Section 504 regulations” and are “[t]herefore . . . entitled to summary judgment” on Count 4. *Id.* at 8. Despite applying the same legal analysis to Count 3 and Count 4, the Court did not enter summary judgment on Count 3, presumably because Defendants had not moved for summary judgment on that claim. *See id.* at 3.

The practical effect of concluding that Section 504 does not apply to Defendants may be that Plaintiffs cannot proceed under Count 3. Although Plaintiffs firmly believe that Defendants *are* subject to Section 504, the conclusion that Section 504 does not apply potentially precludes Plaintiffs from pursuing Count 3 as well, which also arises under Section 504’s statutory prohibition against discrimination on the basis of disability.

Thus, if the Court is inclined to deny Defendants’ Motion for reconsideration as to the conclusion that Section 504 does not apply to Defendants, then the Court has the authority to *sua sponte* grant summary judgment in favor of Defendants on Count 3 pursuant to Rule 56(f), which provides that a Court may grant summary judgment for a nonmovant.⁴ In that event, there would be no live claims remaining in the case, and the Court could then proceed to enter final judgment for Defendants in a separate document pursuant to Federal Rule of Civil Procedure 58(a) and (d). *See Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994).

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court grant Defendants’ Motion to clarify that Section 504 applies to Defendants, but deny Defendants’ Motion insofar as Defendants resist summary judgment as to liability on Count 3 and request summary judgment on Count 4. Plaintiffs further request that the Court immediately schedule a case management conference to discuss further proceedings on Counts 3 and 4.

⁴ In such a case, Plaintiffs would waive their right to notice under Rule 56(f).

1 In the alternative, if the Court adheres to its reasoning that Section 504 does not
2 apply to Defendants and also concludes that this logic precludes Plaintiffs from proceeding
3 on Count 3, Plaintiffs ask that the Court grant Defendants summary judgment on Count 3
4 and, in a separate document, enter final judgment for Defendants on all counts in the TAC
5 pursuant to Rule 58(a) and (d).

6
7 DATED: January 15, 2020

MUNGER, TOLLES & OLSON LLP

8 By: /s/ Emily C. Curran-Huberty
9 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2020, 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

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

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No. 3:17-cv-08004-SPL

**DEFENDANTS' MOTION FOR
PARTIAL RELIEF FROM THE
DECEMBER 17, 2019 ORDER,
AND ACCOMPANYING
MEMORANDUM**

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, defendants hereby respectfully move the Court for partial relief from the Court's December 17, 2019 Order ("Order") [ECF No. 214]. Defendants moved for summary judgment on all but Count 3 of the Third Amended Complaint ("Complaint"), and the Court denied plaintiffs' motion for summary judgment on Count 3 on grounds that "[d]efendants, as members of the executive branch, are not subject to Section 504" of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Order at 6. On these same grounds, the Court granted defendants' motion for summary judgment on Count 4. The relief requested in this motion implicates the Court's Order with respect to Claims 3 and 4 of the Complaint.

In particular, to ensure consistency with existing authority, defendants seek relief from the ruling that "[d]efendants, as members of the executive branch, are not subject to

1 Section 504.” The language of Section 504 indicates that it applies to “any program or
 2 activity conducted by any Executive agency,” 29 U.S.C. § 794(a), and the statute has
 3 uniformly and consistently been construed to apply to executive agencies. *See, e.g., Lane*
 4 *v. Pena*, 518 U.S. 187, 199 (1996) (“Section 504 . . . extends its coverage to ‘program[s] or
 5 activit[ies] conducted by any Executive agency.”); *J.L. v. Social Sec. Admin.*, 971 F.2d
 6 260, 270 (9th Cir. 1992) (“Therefore, we conclude that a plaintiff states a claim under the
 7 Rehabilitation Act by alleging that the government’s action . . . discriminates on the basis
 8 of handicap.”); *see also Taylor v. City of Shreveport*, 798 F.3d 276, 284 (5th Cir. 2015)
 9 (acknowledging that a plaintiff could pursue a Rehabilitation Act claim “against a federal
 10 agency”) (emphasis in original); *Rhode Island Handicapped Action Comm. v. Rhode Island*
 11 *Pub. Transit Auth.*, 718 F.2d 490, 497 n.9 (1st Cir. 1983) (noting that “federal agencies . . .
 12 are subject . . . to section 504 of the Rehabilitation Act”). On the basis of this authority,
 13 defendants are subject to the statutory requirements of Section 504, because the statute
 14 prohibits discrimination against individuals with disabilities “under any program or activity
 15 conducted by any Executive agency,” 29 U.S.C. § 794(a), such as the Bureau of Indian
 16 Education’s operation of Havasupai Elementary School (“HES”). Defendants therefore
 17 seek relief from the Court’s ruling that defendants are not subject to Section 504’s statutory
 18 requirements. *See Order at 6.*¹

19
 20 ¹ The Court has entered summary judgment for defendants on Counts 1, 2, 4, 5, and 6 of
 21 the Complaint. Counts 1 and 2 allege that defendants failed to provide a basic education to
 22 students at HES in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §
 23 706(1) and (2). The Court granted defendants’ motion for summary judgment as to Counts
 24 1 and 2 because plaintiffs raised “an impermissible, systematic challenge” that improperly
 25 sought “‘wholesale’ improvement of an agency program under the APA through the court.”
 Order at 4, 5 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *Lujan v. Nat’l*
Wildlife Fed’n, 497 U.S. 871 (1990)).

26 Counts 5 and 6 of the Complaint allege that defendants violated certain
 27 requirements under U.S. Department of Education (“DOE”) regulations implementing
 28 Section 504. The Court granted summary judgment for defendants as to Counts 5 and 6
 because the United States Department of the Interior (“DOI”) is not subject to those DOE
 regulations. Order at 9-10. Congress recognized, and the courts have consistently held,

1. The Court Should Consider The Appropriate Remedy With Respect To Count 3 Taking Into Account The Current Status of Defendants' Efforts To Comply With Section 504

Of the six counts in the Complaint, Count 3 is the only remaining claim in this case. Count 3 alleges that defendants violated Section 504 by failing to provide a system enabling students with disabilities to gain access to a public education. Order at 6. The Court denied plaintiffs' motion for summary judgment as to Count 3 on grounds that defendants are not subject to Section 504. *Id.* at 7. Defendants did not move for summary judgment on Count 3.

Because defendants are subject to Section 504, defendants respectfully submit that the Court should consider the appropriate remedy for Count 3 and allow defendants an opportunity to demonstrate the current status of its compliance with Section 504. Since the filing of the Complaint and continuing to the present, defendants have taken steps to come into compliance with Section 504 and are implementing measures toward full compliance with Section 504 at HES despite the constraints of geography, a housing shortage, and budgetary limitations. *See* Defendants' Responses to Plaintiffs' Separate Statement of Material Facts and Additional Facts Precluding Judgment in Favor of Plaintiffs [ECF No. 195] at ¶¶ 120-156. Defendants request the opportunity to present these facts to the Court so that any relief the Court may order will take the current section 504 compliance efforts into consideration.

that federal executive agencies are not "recipients of federal financial assistance" so as to fall within the category of entities subject to the DOE regulations in question; DOI's own regulations implementing Section 504 expressly indicate that DOI is not subject to the DOE regulations in question; and DOE has no authority unilaterally to compel other federal agencies to comply with DOE regulations. *See generally* Defendants' Motion and Memorandum in Support of Motion for Partial Summary Judgment ("Def. SJ Memo.") [ECF No. 182] at 13-15; Defendants' Reply in Support of Their Motion for Partial Summary Judgment ("Def. SJ Reply") [ECF No. 203] at 8-12; Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment [ECF No. 191] at 11.

Count 4 will be addressed below.

1 The Court has discretionary power in shaping equity decrees, *U.S. v. Oakland*
2 *Cannabis Buyers' Co-Op*, 532 U.S. 483, 496 (2001), which should be “mould[ed] [sic] to
3 the necessities of the particular case,” *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973).
4 “Equitable remedies are a special blend of what is necessary, what is fair, and what is
5 workable.” *Id.* In using its equitable power, the Court need not employ “the extraordinary
6 remedy of an injunction” if there are other means of ensuring compliance with a statute.
7 *Oakland Cannabis*, 532 U.S. at 496-98. Given that defendants are diligently taking the
8 actions necessary to come into compliance with Section 504, and are fully committed to
9 continuing those efforts in the future, defendants should be afforded the opportunity to
10 show that there is no need for an injunction to ensure that Section 504 will be effectively
11 enforced, and that all appropriate mechanisms are in place to achieve compliance with
12 Section 504 within the constraints governing HES.

13 **2. There Are No Material Facts In Dispute With Respect To Count 4, Which Is**
14 **Ripe For Decision As A Matter Of Law**

15 Count 4 of the Complaint alleges that defendants violated Section 504 by failing to
16 transform HES into a trauma informed school in order to provide student plaintiffs
17 impacted by childhood adversity with access to a public education. Order at 7. Plaintiffs
18 claim that the transformation of HES into a trauma informed school would be a
19 “reasonable accommodation” required by Section 504. *Id.* The Court granted defendants’
20 motion for summary judgment with respect to Count 4 on grounds that Section 504 does
21 not apply to defendants. *Id.* at 8.

22 Because defendants are subject to Section 504, defendants respectfully submit that
23 the Court should address the merits of the parties’ arguments regarding Count 4 and grant
24 summary judgment in favor of defendants. Plaintiffs conducted full discovery as to Count
25 4 and submitted declarations of putative experts regarding the trauma informed practices
26 that defendants allegedly should adopt; the parties have fully briefed the merits of Count 4;
27 and there are no disputes as to any material fact. Count 4 is therefore ripe for decision as a
28 matter of law.

Defendants will not repeat their position here except to emphasize that *plaintiffs'* own witnesses have attested to the *undisputed* facts showing that, as a matter of law, the implementation of trauma informed practices at HES would not constitute a "reasonable accommodation." See Def. SJ Memo [ECF No. 182] at 10-13; Def. SJ Reply [ECF No. 203] at 5-8. First, it is not in dispute that instituting trauma informed practices would require major reforms and resources that HES does not have in its current structure.² Hence, the measures would involve "fundamental and substantial modifications" of HES and, as a matter of law, are therefore not a "reasonable accommodation." *Zulke v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1046 (9th Cir. 1999) (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)).

Second, plaintiffs' putative experts have never visited HES, observed the students or teachers there, or considered specifically whether such practices in fact are appropriate for HES.³ Thus, plaintiffs' experts have failed to make the "fact-specific, individualized

² Plaintiffs seek wide-ranging changes to HES. See Complaint Relief ¶ 3i. And according to plaintiffs' putative experts, instituting trauma-informed practices would require special training and mentoring, Deposition of George Davis ("Davis Dep.") 20:16-20, Deposition of Noshene Ranjbar ("Ranjbar Dep.") 62:2-7, Deposition of Tami DeCoteau ("DeCoteau Dep.") 24:2-7; "experts in . . . education, social work, psychology, . . . occupational therapists," Davis Dep. 22:21-25; additional financial and human resources, Davis Dep. 24:20-22, DeCoteau Dep. 21:10-14, Ranjbar Dep. 49:1-6; access to additional services, Ranjbar Dep. 62:24-63:6; and a consultant to help develop a "shift in adult perspective," Deposition of Lisa Persinger ("Persinger Dep.") 47:4-13.

³ Plaintiffs rely on putative experts who have never visited HES or worked with the students as a whole, and who have no first-hand knowledge about HES or the Tribe. See Ranjbar Dep. 28:3-5, 63:13-66:9; Davis Dep. 44:14-16, 34:22-24, 35:20-36:2, 36:13-21, 38:8-10, 43:9-21, 46:3-6, 46:12-16; DeCoteau Dep. 29:11-18, 45:15-19, 48:4-15. None of plaintiffs' putative experts has gone so far as to say HES should be converted into a trauma-informed school for the benefit of the two student plaintiffs identified as having trauma-related disorders, Taylor P. and Moana L. And in fact, Taylor P. and Moana L. are already receiving special education services through their Individualized Education Programs ("IEPs"), which have been approved by their parents/guardians and legal counsel, and which do not include a need for instituting trauma-informed practices. Should they have any concerns regarding the appropriateness of their IEPs, their parents/guardians

analysis” which is required in order to determine if trauma informed practices, as a matter of law, are a “reasonable accommodation.” *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (“[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry.”).

Third, plaintiffs’ putative experts admitted that trauma informed practices are still an evolving field.⁴ What plaintiffs have proposed are, according to plaintiffs’ own putative expert, simply “best practices,” DeCoteau Dep. 29:6-10, and an “example ... of how trauma-informed practices ought to look,” DeCoteau Dep. 37:17-20, in an ideal world. It is not “reasonable” to expect BIE to adopt trauma informed practices on a wholesale basis when there is no consensus -- even among plaintiffs’ own putative experts -- as to exactly what those practices should be.

Finally, the testimony of the Bureau of Indian Education’s Student Health Program Specialist, Teresia Paul, shows that to transform HES into a trauma informed school would be an undue burden on defendants.⁵ None of plaintiffs’ evidence refutes the fact that

may exercise their administrative remedies under the Individuals with Disabilities Education Act at any time.

⁴ Plaintiffs’ putative expert admits that trauma-informed practices are an “emerging” area, Persinger Dep. 43:21-22, 46:17, 49:12-13, and that there is no evidence-based model in existence for a trauma-informed school, Persinger Dep. 46:7-17, and therefore no agreed upon set of standards that have been successfully implemented based on empirical evidence that such practices are the best practices, Persinger Dep. 44:23-45:17. None of plaintiffs’ experts could name an evidence-based trauma-informed school. *See* Davis Dep. 20:12-13; Ranjbar Dep. 51:21-23; Persinger Dep. 46:7-17; DeCoteau Dep. 17:13-18:16.

⁵ Plaintiffs deposed Ms. Paul about the trauma-informed school model that plaintiffs’ putative experts were proposing. Paul Dep. 102:3-135:17. Ms. Paul testified that such a model would be unduly burdensome -- because as an academic institution, HES is not equipped to act as a “treatment facility,” *id.* 130:3-8, with its “multi-faceted” requirements, *id.* 103:19-23. *See also* Declaration of Teresia Paul [ECF No. 183-23] ¶ 2. Plaintiffs should have anticipated that defendants would be showing an undue burden because plaintiffs themselves introduced the claim that trauma-informed practices are a “reasonable

1 instituting a trauma-informed system at HES would entail undue financial and logistical
2 burdens.

3 The only question for the Court to resolve here is whether it is “reasonable” for
4 BIE to adopt trauma informed practices given the facts described above. Because there are
5 no material facts in dispute, the question may be answered as a matter of law and, thus, the
6 Court should find that the adoption of trauma-informed practices would not be a
7 “reasonable accommodation.” See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.,*
8 *Westchester Cty. v. Rowley*, 458 U.S. 176, 208 (1982) (“[C]ourts lack the specialized
9 knowledge and experience necessary to resolve persistent and difficult questions of
10 educational policy.”); *Zulke*, 166 F.3d at 1048 (“[D]eference is appropriately accorded an
11 educational institution’s determination that a reasonable accommodation is not available.”);
12 see also *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999) (noting
13 that court would “abstain from an in-depth, *de novo* analysis of suggested accommodations
14 that the school rejected if the institution demonstrates that it conducted such an inquiry
15 itself and concluded that the accommodations were not feasible or would not be
16 effective”). Count 4 has been fully briefed and is ready for a decision. Thus, in addition to
17 clarifying that defendants are subject to Section 504 of the Rehabilitation Act, the Court
18 should also grant summary judgment in defendants’ favor on Count 4 on grounds that, as a
19 matter of law, requiring defendants to transform HES into a trauma informed school would
20 not constitute a “reasonable accommodation” under Section 504.

21 CONCLUSION

22 For the foregoing reasons, the Court should grant this motion, rule that defendants
23 are subject to Section 504, set a briefing schedule on the appropriate remedy for Count 3 of
24 the Complaint, and grant summary judgment as a matter of law for defendants on Count 4
25 of the Complaint.

26
27 accommodation.” Complaint ¶ 278. The fact that plaintiffs neglected to refute Ms. Paul’s
28 testimony in any of the ten declarations they submitted from their putative experts in this
case is not a basis for disregarding Ms. Paul’s declaration.

Case 3:17-cv-08004-SPL Document 216 Filed 01/06/20 Page 8 of 8

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Dated: January 6, 2020

Respectfully submitted,

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TAB 10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., et al.,	)	
	)	
Plaintiff,	)	CV-17-08004-PCT-SPL
	)	
vs.	)	Phoenix, Arizona
	)	November 20, 2019
Bureau of Indian Education,	)	9:04 a.m.
et al.,	)	
	)	
Defendants.	)	

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:
Elva Cruz-Lauer, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 33
Phoenix, Arizona 85003-2151
(602) 322-7261

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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P R O C E E D I N G S

THE CLERK: Civil case 17-8004, Steven C. and others
versus Bureau of Indian Education and others.

This is the time set for hearing on pending motions.

Please announce your presence for the record.

MS. CURRAN-HUBERTY: Your Honor, this is Emily
Curran-Huberty at the law firm Munger Tolles & Olson on behalf
of the plaintiffs.

THE COURT: I am going to ask all of you to get closer
to the microphone. The room is so large that if you're not
closer to it, we can't hear you.

What's your name again?

MS. CURRAN-HUBERTY: This is Emily Curran-Huberty of
Munger Tolles & Olson on behalf of the plaintiffs, Your Honor.

THE COURT: Good morning to you.

MS. HECKENLIVELY: Good morning, Your Honor. Bryan
Heckenlively also with Munger Tolles & Olson and also for the
plaintiffs.

THE COURT: Good morning.

MS. FRILEY: Good morning, Your Honor. Jesselyn Frile
with public counsel, also for the plaintiffs.

THE COURT: Jesselyn Friley, good morning to you also.

MS. EIDMANN: Good morning, Your Honor. Kathryn
Eidmann also of public counsel, and also for the plaintiffs.

THE COURT: Good morning to you as well.

1 MS. OLSON: Good morning, Your Honor. Lisa Olson with
2 the Department of Justice representing the United States.

3 THE COURT: Good morning.

4 MS. HANDLEY: Good morning, Your Honor. Cristen
5 Handley also with the Department of Justice, also on behalf of
6 the defendants and the United States.

7 MS. SINHA: Chaitna Sinha with the Southwest Region
8 Solicitor's Office with the Department of Interior.

9 THE COURT: Good morning to all of you as well.

10 I have several questions for both sides. First of
11 all, I appreciate everyone making it to court on time. I know
12 it's raining pretty hard outside, but I really appreciate it.

13 (Discussion held between Judge and Courtroom Deputy.)

14 THE COURT: During the course of the hearing, everyone
15 just please remain in your seats since we have seven lawyers
16 here. But what I need you to do, to make sure that we have a
17 clear record, when you talk, tell me your full name and who you
18 represent, so we can keep track of who is saying what.

19 The first question I have is for plaintiffs in the
20 case. What is your position on how the Ninth Circuit qualifies
21 discrete agency action?

22 MS. CURRAN-HUBERTY: Your Honor, our position is that
23 discrete --

24 THE COURT: What's your name, ma'am?

25 MS. CURRAN-HUBERTY: I apologize, Your Honor. This is

1 Emily Curran-Huberty on behalf of the plaintiffs.

2 Your Honor, our position is that the agency -- I
3 apologize -- the Ninth Circuit defines discrete agency action
4 as individual actions laid out in a regulation that defendants
5 are required, by law, to take.

6 THE COURT: What's the defendants' position on that
7 question?

8 MS. OLSON: The Ninth Circuit --

9 THE COURT: I'm sorry, ma'am, what's your name?

10 MS. OLSON: I'm sorry. Lisa Olson with the Department
11 of Justice.

12 The Ninth Circuit has made it very clear that when
13 individual discrete actions are aggregated, as they have been
14 here, a court is not at liberty to entangle itself in the
15 management of the day-to-day affairs of agencies by addressing
16 what is essentially a programmatic attack.

17 THE COURT: What if I find that it's unconstitutional
18 the way that the aid is being administered? You're saying that
19 I don't have any ability to address that issue?

20 MS. OLSON: I am saying that the Supreme Court in
21 Lujan and in SUWA, the Southern Utah Wilderness Alliance, made
22 it very clear that when claims are presented, as they have been
23 here, which is a collection of individual actions that present
24 such a widespread and systemic attack on an agency program,
25 that a court cannot appropriately become involved in what would

1 be superintending the agency program.

2 THE COURT: Does that answer my question I just asked,
3 ma'am?

4 MS. OLSON: I was about to say, this derives from
5 Article III of the constitution in which -- which says that
6 there's a separation of powers, and that courts cannot
7 intervene in executive branch affairs.

8 Here, in particular, the program in question is -- it
9 is an executive program. The plaintiffs have attacked every
10 aspect of that program. There isn't any way for the court to
11 become involved unless it dictates how the agency is going to
12 operate this school.

13 THE COURT: Ma'am, I don't understand part of your
14 argument. I can't recall what you said.

15 (Pause.)

16 THE COURT: You said I can't entangle myself in the
17 management of day-to-day affairs of the executive branch. It's
18 almost as if you've told me since we have a separation of
19 powers, that I basically have no ability to do anything in an
20 executive branch case.

21 Regularly I have criminal matters in this courtroom
22 that I will reject a plea agreement and the case basically
23 stops. So there's a number of things I can do to the executive
24 branch when I don't agree with what they bring into this
25 courtroom.

1 Do you distinguish that in a civil matter versus a
2 criminal matter?

3 MS. OLSON: The distinction isn't between a civil and
4 criminal matter. The difference is that here, the agency is
5 alleged to have violated multiple provisions of a statute. And
6 in order to -- we are not saying there's no accountability
7 here, we are just saying that it's for Congress and the
8 executive to resolve these problems.

9 THE COURT: Is it important for minors to receive
10 proper education?

11 MS. OLSON: Absolutely, and the agency doesn't dispute
12 that its efforts have been unsatisfactory and they have fallen
13 short. It is -- and I'm happy to provide the Court with the
14 current situation at the school.

15 But as I think we have made clear in our briefs, BIE
16 is facing obstacles that are outside of its control, and to
17 date, neither the plaintiffs or anyone has offered us any
18 solutions to that problem, including independent experts.

19 Those obstacles are the difficulty of retaining and
20 recruiting staff due to the geographic location of this school.
21 This means that -- I think you are probably aware --

22 THE COURT: I am very aware. I have had this case a
23 long time. I have read everything in the case.

24 MS. OLSON: Well, you would understand then that it is
25 impossible for us to change the fact that people become

1 uprooted from their homes and families in order to go down
2 there and teach. And this is of no fault of the tribes or of
3 the Havasupai, it is simply a hard reality that we face.

4 And short of having a private helicopter to ship these
5 people in and out of the canyon, which we don't have the
6 funding to do, they are separated from their homes and their
7 lives and living in isolation, and that simply limits the pool
8 of applicants from which we can draw to staff this school. It
9 is a perpetual chronic problem.

10 We have background investigations that we have -- that
11 people have to undergo. Sometimes they refuse to undergo them.
12 Sometimes they fail them. Sometimes they take other offers
13 while we are waiting for the background investigation to be
14 completed, and they are more stringent for Native American
15 schools. There's nothing we can do to change that.

16 THE COURT: So what you are basically saying, counsel,
17 is it is the problem of the parents, and they need to make
18 better decisions about where they have children so they can be
19 properly educated?

20 MS. OLSON: The problem is that the tribe was left in
21 this canyon of no fault of its own.

22 THE COURT: You are deflecting. I asked you a
23 specific question, and you are deflecting. Answer the
24 question.

25 MS. OLSON: Yes, we need -- it is not the parents'

1 fault, but we need the cooperation of the parents and the
2 community.

3 It is -- the situation is very complex, and no single
4 school, not Havasupai school, or any other school, could solve
5 these problems on its own. It is an educational institution.
6 And I'm saying that BIE is doing its best and tries to enlist
7 the support of parents and the tribe.

8 THE COURT: Well, how is your agency doing its best
9 when you just told me that it is a resource issue and you
10 obviously can't fly the children out of the bottom of the Grand
11 Canyon? How exactly are you doing your best?

12 MS. OLSON: Because it deals with these situations on
13 a day-to-day basis as best it can. We just hired -- we just
14 gave an offer to a general education teacher who turned it down
15 last week.

16 Right now, the school is -- the professional positions
17 at Havasupai are filled, with the exception of that position.
18 We have advertised for a cultural and native language
19 instructor, and we hope for assistance from the tribal council
20 in filling that position, but so far we haven't succeeded.

21 We have recently implemented a schedule that includes
22 all of the required subjects, including social studies, art,
23 science, and physical education.

24 We have established -- BIE has established a
25 curriculum committee with BIE staff and hopefully parent

1 volunteers to evaluate curriculum needs.

2 We have initiated focus groups and are working with
3 the tribe to develop a culturally relevant curriculum. We are
4 soliciting bids for a behavior support specialist to help
5 assess children with behavior issues and develop a School-wide
6 positive behavior support plan.

7 We're partnering with the Indian Health Service to
8 provide telehealth behavioral health services, which will make
9 counseling services for students much more accessible.

10 We have been providing significant professional
11 development opportunities during the 2019 to '20 school year,
12 including professional development on behavioral health and
13 bullying prevention.

14 BIE is in the process of hiring a --

15 THE COURT: Counsel, everything you have already
16 provided to the Court, like I indicated before, I have read. I
17 appreciate the information you are providing right now.

18 Is there any plaintiff in the courtroom right now,
19 plaintiffs' counsel, that agrees with anything that the defense
20 counsel has just placed on the record?

21 MS. CURRAN-HUBERTY: Regarding --

22 THE COURT: Who are you?

23 MS. CURRAN-HUBERTY: Emily Curran-Huberty, thank you
24 Your Honor, for plaintiffs.

25 So regarding the facts that Ms. -- the ostensible

1 facts that Ms. Olson just listed with regards to what is
2 currently going on in the canyon, I would say, first of all,
3 that's argument of counsel. That's not in the record. She is
4 just saying that.

5 And based on our understanding of the situation on the
6 ground, no, Your Honor, we don't agree with what she has just
7 said.

8 MS. OLSON: Your Honor, I am not offering these as a
9 basis for a summary judgment motion. I am offering them
10 because you had asked what BIE is doing, and they illustrate
11 the constant ongoing efforts that it undertakes to provide an
12 education to these students.

13 Solving problems at this school is very different than
14 solving problems elsewhere. If we have a teacher who leaves in
15 the middle of the school year or is sick, we can't just snap
16 our fingers, make a phone call, and bring in a substitute. It
17 takes days to do that.

18 First to find someone, but then given the helicopter's
19 schedule, it takes several days to get someone down there,
20 leave their lives behind, and fill in that slot. These are not
21 normal affairs or problems for the school to solve.

22 Sympathy and compassion and will are not what are
23 lacking here. But sometimes where there's a will, there isn't
24 a way. And if anyone has any solutions to the intractable
25 problems that BIE faces, we are open to suggestions. So far,

1 we haven't been offered any feasible legally permissible
2 solutions here.

3 THE COURT: Counsel for the defense, why isn't the
4 relief requested in paragraph 239 of the third amended
5 complaint, which is document number 129 at page 57, discrete
6 agency action? That's document number 129, page number 57,
7 paragraph 239.

8 MS. OLSON: The reason that this --

9 THE COURT: Ma'am, who are you again for the record?

10 MS. OLSON: Lisa Olson, sorry, with the Department of
11 Justice, I apologize.

12 If you -- this -- granting relief with respect to each
13 of these claims would require the Court to determine what
14 social studies books to choose, how long the instruction should
15 be provided, what sort of science should be taught, what sort
16 of career exploration activities would be appropriate, what
17 should be done to make the library function, what kinds of
18 behavioral health services should be provided.

19 And this is by definition what the Supreme Court in
20 Lujan and in SUWA warned against, because it would require a
21 general judicial management of the agency's day-to-day
22 operations where the courts are simply not equipped with the
23 knowledge or expertise or information to correct such problems.

24 The plaintiffs themselves in their complaint and in
25 their discovery and in the relief that they have requested in

1 their requests for relief, they have characterized their claims
2 as a programmatic attack, to quote from their discovery
3 responses.

4 They actually corrected us when we have asked for
5 specifics and said, that mischaracterizes their claims as
6 limited to addressing particular incidents, actions, or
7 omissions by the defendants.

8 Every time we have asked them to identify specific
9 actions or measures that they say we should take, they failed
10 to do so. They said in their discovery responses, it would be
11 too burdensome an investigation for them to undertake. They
12 are expecting us to tell them what the flaws are in our program
13 and how to correct them.

14 And they are expecting the Court to do the same thing,
15 and that's the quagmire that the Fourth Circuit declined to
16 enter in City of New York, because it would lead to day-to-day
17 oversight of the executive's administrative practices.

18 In their request for relief, they ask for three kinds
19 of relief. They want a broad declaration from this Court that
20 the defendants have violated various laws, and they want an
21 injunction, basically about how BIE should run the school.

22 It wouldn't correct the discrete action, but it would
23 cover all of the things they have alleged in the complaint, the
24 subjects, the content, the curriculum. What are sufficient
25 numbers of qualified teachers? What's a culturally relevant

1 education? What procedures should protect parent and student
2 rights?

3 And in Cobell, the D.C. Circuit said that would put
4 the Court in the position of micromanaging court ordered reform
5 efforts.

6 They want an obey the law injunction, but injunctions
7 are supposed to set forth specific duties tied to specific
8 legal obligations.

9 And as the Fourth Circuit said in the City of New
10 York, such obey the law injunctions are disfavored. And here,
11 an obey the law injunction would just subject defendants
12 potentially to contempt charges for every legal failing, rather
13 that simply the civil remedies provided by the APA.

14 So this would be an ongoing saga of attempts by the
15 agency to comply with the law, which it does regularly, and
16 potentially contempt proceedings if the Court were to issue
17 such a broad injunction.

18 THE COURT: I have a question for plaintiffs as it
19 relates to counts 1 and 2. Why did the failures outlined in
20 the third amended complaint qualify as final agency action
21 under the APA?

22 MS. CURRAN-HUBERTY: Your Honor, this is Emily
23 Curran-Huberty, on behalf of the plaintiff.

24 THE COURT: I'm sorry. If you could move the
25 microphone closer, please, so it will pick you up?

1 MS. CURRAN-HUBERTY: Yes. Emily Curran-Huberty on
2 behalf of the plaintiffs. So the failures identified in the
3 complaint are final agency action because they are
4 fundamentally -- at least as to the ones where we have
5 affirmatively moved for summary judgment, they are clear
6 instances of failure to act.

7 These duties are ongoing. There is not a time
8 specified for compliance, because the BIE is under the duty to
9 comply today. It was under the duty to comply 10 years ago,
10 and they are simply failing to implement these things.

11 They are failing to hire a one-fifth time librarian.
12 They are failing to provide native language and cultural
13 instruction that has received tribal approval.

14 They are failing to provide instruction in various
15 content areas, some of which they've actually admitted, such as
16 consumer economics.

17 They are failing to maintain a textbook review
18 committee or perform any of the duties that a textbook review
19 committee would perform. And all of these failures are laid
20 out in specifics in our opening motion.

21 And Your Honor, if I may respond to several points
22 that Ms. Olson has made in response to your questions?

23 THE COURT: Go ahead.

24 MS. CURRAN-HUBERTY: Thank you. Your Honor, Ms. Olson
25 began the proceedings by saying that Lujan and several other

1 cases stand for the principle that you can't take individual
2 mandatory discrete final agency actions and aggregate them in a
3 single challenge.

4 Now, Lujan doesn't say that, Your Honor. Lujan says
5 that you cannot, through an APA challenge, attack the operation
6 of an entire agency such as was the case in Lujan, the
7 entire -- the Bureau of Land Management's entire approach to
8 the management of public lands throughout the United States.

9 But Lujan doesn't say that you can't bring multiple
10 challenges to multiple failures for the agency to take
11 mandatory discrete action. That's nowhere in Lujan.

12 And indeed, Your Honor, defendants appear to concede
13 that plaintiffs could, for instance, bring an action based on
14 the failure to hire a one-fifth time librarian, which is a
15 discrete mandatory action they are required to take.

16 And then we could presumably as well bring a suit for
17 the failure to teach consumer education as part of the, I
18 believe, middle school instructional program. And then again
19 we could bring another suit for failure to have a textbook
20 review committee.

21 But defendants' position is that we can't bring those
22 claims in a single suit. And frankly, Your Honor, Lujan, and
23 no other case that they've cited, actually says that you can't
24 do that, and their position makes no sense. It would lead to a
25 series of challenges to these individual failures to act that

1 would just go on indefinitely.

2 And I would point out, it's particularly perverse in
3 this context, Your Honor, because this is an instance in which
4 real live children at the school are failing to receive an
5 education today.

6 And to say that we --

7 THE COURT: Counsel, my apologies for interrupting you
8 mid sentence. I will allow you to finish. But tell me about
9 Defense Counsel Olson's position that they are doing everything
10 they possibly can do. They've asked you for assistance outside
11 of the box to help them help the children.

12 MS. CURRAN-HUBERTY: Well, Your Honor, I frankly --
13 plaintiffs disagree that we've provided -- that we've failed to
14 provide suggestions. We've served 10 expert reports in this
15 case that provide hundreds of pages of suggestions of things
16 that the Bureau of Indian Education could do to improve the
17 education of the students at HES.

18 There have also been extensive communications back and
19 forth between the parties that I don't want to go into
20 substantively because they are settlement communications. But
21 it simply is inaccurate to state that we have done nothing to
22 suggest ways, constructive ways in which we could all improve
23 the situation at Havasupai Elementary.

24 I would also say, Your Honor, that as regards all of
25 our counts, their claims of impossibility are simply -- they

1 have no hook for why that's legally relevant. As to the APA,
2 the government is under the mandatory obligation to take the
3 actions laid forth in the regulations.

4 As to Section 504, the government is absolutely
5 obliged to provide meaningful access to education to students
6 who are facing disabling conditions under Section 504 of the
7 Rehabilitation Act.

8 Impossibility isn't a factor there. And we contest
9 that factually, their position that it's impossible, but we
10 also contest it legally.

11 And, Your Honor, if you want to see a case that
12 addresses the specifics of government claims of impossibility,
13 I would direct you to South Carolina versus United States,
14 which is the case about plutonium removal within the state of
15 South Carolina. Impossibility was raised in that case, and it
16 was rejected by the court in that case as well.

17 THE COURT: I have another question for the defense as
18 it relates to counts 1 and 2. Is it your position that you
19 have not failed to provide the basic educational requirements
20 outlined in Title 25 of the Code of Federal Regulations?

21 MS. OLSON: It is our position that we have not
22 consistently complied with those legal obligations, yes.

23 THE COURT: So why aren't the plaintiffs entitled to
24 summary judgment?

25 MS. OLSON: Because -- for the reasons explained in

1 Lujan, and I will say, it is applicable and governs this case,
2 as does SUWA. And there, a wildlife group did exactly what the
3 plaintiffs have done here. They -- it alleged the violation of
4 multiple statutory provisions by the Department of Interior in
5 administering public lands.

6 The plaintiff in Lujan alleged rampant violations of
7 the law within a program, and that's where the court said the
8 plaintiff can't seek wholesale improvement of this program by
9 court decree, because programmatic improvements have to be made
10 in the offices of the department or the halls of Congress.
11 That is exactly the situation here.

12 We have a sweeping -- we have sweeping allegations
13 about BIE's management of every aspect of the operation of the
14 Havasupai school. It would require the refashioning of that
15 school by the Court. And such a broad-brush challenge is not
16 permissible, again, because of the separation-of-powers issue.
17 It interjects the Court into the day-to-day management of
18 agency affairs.

19 The Court in City of New York addressed exactly the
20 same aggregation claim that the plaintiffs have made here. And
21 the municipal -- Court said that the municipal -- and there,
22 the issue in City of New York was a failure to comply with the
23 statutory requirement to report criminal records to a federal
24 database.

25 And the Court said, the municipal appellants

1 characterize their broad claim as simply an aggregation of many
2 small claims, each one seeking to compel the individual reports
3 required by the statute. On this view, what the cities seek is
4 not programmatic, because each specific act that DOD has failed
5 to perform --

6 THE COURT: Counsel, if you could stop for a moment.
7 Everything every lawyer says in this courtroom is incredibly
8 important to me.

9 And as you all know, when you read from something, you
10 tend to read faster. So that I can take this all in, I am
11 going to ask that you slow down when you read, if you could,
12 please.

13 MS. OLSON: Yes, I apologize.

14 THE COURT: That's okay.

15 MS. OLSON: On this view, what the cities -- this is
16 the court that I am, I hope, quoting. On this view, what the
17 cities seek is not programmatic, because each specific act that
18 DOD has failed to perform is discrete when considered on its
19 own.

20 And that's exactly what the plaintiffs are alleging.

21 But, the Court said, any limit on programmatic
22 assessment would be rendered meaningless if such an argument
23 prevailed. All government programs are the aggregation of
24 individual decisions, many of which are required by law.

25 The APA ensures that it is the individual decisions

1 that are assessed as agency actions rather than the whole
2 administrative apparatus.

3 And Your Honor, the cases that we've cited in our
4 brief, Lujan, SUWA, City of New York, Sierra Club versus
5 Peterson, Nevada -- Sheldon versus Vilsack, Nevada Association
6 of Counties, Friends of the Earth, Cobell versus Norton, all
7 who are confronted with a failure -- an alleged failure by an
8 agency to take multiple actions in conformance with a statute
9 or regulations, and in all of those cases, the Court said, you
10 can't seek wholesale improvement of a program by court decree
11 when these are legislative or judicial functions.

12 And again, the -- sovereign immunity in the
13 constitution is what is at the basis of this issue.

14 And none of the experts that -- whose reports the
15 plaintiffs provided in discovery, none of those experts have
16 ever visited the canyon. None of them have worked with the
17 students as a whole. So it is unclear what relevance their
18 reports have at all, except as general proclamations of what
19 would be best practices in an ideal world.

20 THE COURT: Counsel for the plaintiffs, I am going to
21 give you five minutes to address the last point that defense
22 counsel just placed on the record.

23 MS. CURRAN-HUBERTY: Regarding expert reports, Your
24 Honor?

25 THE COURT: Correct.

1 MS. CURRAN-HUBERTY: Thank you, Your Honor.

2 So I would say, first of all, Your Honor, that it is
3 actually not true that none of our experts have visited the
4 canyon. Several of our experts have.

5 It is true that given the time constraints for serving
6 expert reports in this case, and the complexities of accessing
7 the canyon on short notice, that a variety -- a number of our
8 experts were unable to access the canyon in the time it
9 required to serve their expert reports.

10 But I firmly disagree, Your Honor, that that means
11 that our experts were not offering relevant information. First
12 of all, I believe four of our experts are experts that
13 individually evaluated our student plaintiffs. So they are
14 familiar with these children and their specific needs and their
15 families and their educational situations.

16 I would also add that several of our other experts
17 have quite extensive experience providing services to schools
18 that are similarly situated to Havasupai Elementary.

19 Defendants take great pains --

20 THE COURT: Which schools are similarly situated to
21 Havasupai?

22 MS. CURRAN-HUBERTY: So Dr. Tami DeCoteau, as well as
23 Dr. George Davis and Dr. Noshene Ranjbar have provided services
24 in a number of reservation schools that are similarly remotely
25 located, as well as in other remote rural communities where

1 access is difficult. I don't, off the top of my head, have a
2 list of the schools.

3 THE COURT: Are you talking about a Navajo community
4 based on distance, or are you talking about the Grand Canyon
5 here, the bottom of the Grand Canyon?

6 MS. CURRAN-HUBERTY: That's correct, Your Honor, but
7 some of the reservations, and I have a list of them here, these
8 include -- our experts have worked in schools including Pine
9 Ridge Reservation Schools, with the San Carlos Apache Tribe,
10 the Standing Rock Indian Reservation, Turtle Mountain, Fort
11 Berthold, Tohono O'odham. Several others have served schools
12 in Alaska.

13 And so the bottom of the Grand Canyon is remote, but
14 the challenges of providing education in rural, remote settings
15 are not unique to --

16 THE COURT: Well, wouldn't the difference be, the
17 schools that you just named, they have nonreservation schools
18 in close proximity? You don't have that option at the bottom
19 of the Grand Canyon, do you?

20 MS. CURRAN-HUBERTY: Yes, but these schools are -- but
21 this is an instance in which these services are being provided
22 to students in either tribally-run or BIE-run schools.

23 THE COURT: But you would agree they have some other
24 options to go to a more public school if the parents choose to
25 have them in city schools instead of a reservation school; is

1 that correct?

2 MS. CURRAN-HUBERTY: This is a long list, Your Honor.
3 I am not actually sure that that would be true for all of these
4 schools. Some of these reservations are -- occupy very large
5 swaths of territory in sparsely populated states.

6 THE COURT: Well, counsel, I have another question for
7 you, plaintiffs' counsel. In light of the extensive list of
8 defendants' failures set forth in counts 1 and 2, why don't
9 your allegations against the defendants rise to the level of
10 general systemic challenge to the operation of HES?

11 MS. CURRAN-HUBERTY: Your Honor, I think that the case
12 law makes clear that there's a distinction between attacking
13 the entire operation of what is often called a program, and
14 attacking specific individual failures, even if they are
15 numerous.

16 Now, City of New York, the case Ms. Olson was just
17 describing, makes this very point. The Court in City of New
18 York says that government deficiencies do not become
19 nonreviewable simply because they are pervasive. And, Your
20 Honor, that is our case.

21 There are -- we have identified multiple mandatory
22 discrete actions that BIE is required to take at Havasupai
23 Elementary, and that they are failing to take. And the fact
24 that we have identified more than one, that we have identified
25 many, does not transform this into a programmatic attack.

1 I think that City of New York itself makes that clear.
2 And there are other cases cited in the parties' papers in which
3 a party is permitted to challenge multiple instances of an
4 agency's failure to act.

5 I would submit that Vietnam Veterans of America versus
6 CIA, which is a Ninth Circuit opinion, I would submit that that
7 is one such case.

8 I would submit that the case cited by plaintiffs in
9 their opposition -- defendants in their opposition to our
10 motion for summary judgment, Western Rangeland Conservation
11 Association versus Zinke is also such a case. There were
12 multiple challenges there. And the plaintiffs in that case
13 were ultimately unsuccessful on their challenge, but it wasn't
14 because the Court did not have -- but it wasn't because their
15 challenge was not nonjusticiable. They lost ultimately on the
16 substantive merits of their claims.

17 THE COURT: Well, counsel, aside from the follow the
18 law order from this Court, what other specific and realistic
19 relief are you seeking from this Court on counts 1 and 2?

20 MS. CURRAN-HUBERTY: Your Honor, I would point out,
21 first of all, that we have not moved as to remedy. As to
22 whether they are or are not implementing their own regulations
23 at the school, we moved as to that issue, and they are plainly
24 not doing that, as to the specific regulation -- regulatory
25 provisions for which we moved.

1 And we acknowledge that remedy is a separate question
2 that will have to be addressed at a later stage. But I do
3 think that there is relief that goes beyond simply ordering
4 them to comply with their own regulations.

5 And if you look again to the kinds of injunctions that
6 were issued in cases like Vietnam Veterans of America, South
7 Carolina versus United States, Cobell v. Norton actually, a
8 case that defendants rely on, that you see that the courts are
9 able to go beyond simply ordering the defendants to follow the
10 law and to craft specific relief that properly maintains agency
11 discretion, but that nonetheless affords the plaintiffs
12 meaningful relief.

13 THE COURT: So what do you envision in an order from
14 me that will compel the defendants to do something in counts 1
15 and 2? In a perfect world, what would that look like?

16 MS. CURRAN-HUBERTY: Your Honor, again, with the
17 caveat that I am a little hesitant to describe in exact terms
18 what the remedy would be, I believe that as to counts 1 and
19 count 2, you would take something like the requirement to, for
20 instance, have a textbook review committee consisting of
21 teachers, parents, administrators, and they would be ordered to
22 take steps to assemble such a committee, possibly with a
23 reporting obligation to the Court in the interim so that there
24 was a check to ensure that they were actually meeting their
25 obligations.

1 THE COURT: Defense counsel, what problem would that
2 cause your agency?

3 MS. OLSON: I think this is sort of a quintessential
4 follow the law injunction that they want, Your Honor. It's not
5 just textbooks. And, you know, it would be assessing student
6 achievement, what subjects should be taught.

7 The relief that they request clearly shows this,
8 because the injunction that they want would cover all of the
9 allegations in the complaint. And we have asked them over and
10 over in discovery to provide specific actions that they want us
11 to take to address the alleged failures in the complaint, and
12 they have repeatedly failed to identify them.

13 I don't think that briefing on a remedy is going to
14 change anything here. And they've said, as I said before, it
15 would be too burdensome, those are their words, an
16 investigation in response to interrogatory number 1. They said
17 that the information regarding relief is, quote, equally or
18 more available to defendants. They say this over and over
19 again. So they are expecting us to identify the specific
20 relief that they want, and that's a reversal of the usual roles
21 in litigation as the D.C. Circuit said.

22 I also would like to address the fact that South
23 Carolina and Vietnam Vets are completely different from any of
24 the cases we have cited. They -- in South Carolina, there was
25 a single duty to remove plutonium that the government had

1 failed to fulfill.

2 In Vietnam Vets it was a single duty to notify
3 veterans of medical care and provide that medical care. So
4 these are very different from the cases that stem from Lujan
5 and SUWA.

6 And I will say, in City of New York, the portion that
7 they quoted, where the Court says, government deficiencies do
8 not become nonreviewable simply because they are pervasive.
9 The Court went on to say, this, however, does nothing to
10 obviate the fact that the discrete action is wholly lacking
11 here. And the Court at length explained why it should not
12 become enmeshed in agency affairs.

13 And in Cobell, the plaintiff mischaracterized the D.C.
14 Circuit, in Cobell versus Norton, the 392 F.3d 461 case that we
15 cited from 2004.

16 The Court of Appeals vacated the District Court
17 injunction that required the government to produce a plan to
18 fix the trust management system, appointed a monitor to oversee
19 compliance and routine jurisdiction for four years.

20 The Court of Appeals held that APA review was not
21 available, even in the face of rampant violations of law for
22 claims seeking wholesale improvement of a program by court
23 decree, when those are legislative or judicial functions.

24 And I would like to go back, briefly, if I may, Your
25 Honor, to correct the record that the plaintiffs had presented

1 on their experts.

2 THE COURT: I will allow it.

3 MS. OLSON: If I may? Thank you. Their expert
4 Ranjbar said she never worked with the Havasupai Tribe. That
5 was in her deposition at page 48, lines 3 to 5. That she has
6 no firsthand knowledge regarding Havasupai school, its
7 students, teachers, staff, or the services provided or
8 available there. That was on page 63 to 66 of her deposition.

9 Their expert Davis offered no opinions specific to
10 Havasupai, that was page 44, and has no firsthand familiarity
11 with Havasupai itself. That's on Pages 34 and 35 of his
12 deposition. The trauma upon the students at Havasupai, on
13 pages 35 and 36, the resource limitations at Havasupai on page
14 36. How many students at Havasupai have experienced trauma.
15 That's on page 38, et cetera.

16 DeCoteau, same thing. No firsthand knowledge of the
17 tribe or the situation at the reservation. That's on page 29
18 of her deposition. And she offered no opinion about the
19 circumstances at Havasupai school. That's on pages 45 and 48
20 of her deposition.

21 So the experts they rely on, and I think we are
22 talking mainly about these trauma-informed practices, have
23 testified that those practices are good in an ideal world, but
24 it doesn't necessarily mean that they're good for the Havasupai
25 school, or that they are a reasonable accommodation.

1 And as the Court is aware, because we have said it in
2 our brief, in order for the plaintiffs to meet their burden
3 that there is a reasonable accommodation, they have to -- one
4 of the three things they have to show is that there was an
5 individualized assessment that took into account the individual
6 circumstances of each case.

7 THE COURT: Okay. What I would like to do now is
8 shift gears. I will allow counsel for both sides ten minutes
9 of argument on counts 1 and 2 from the lectern. Plaintiffs
10 first, only counts 1 and 2, please.

11 MS. CURRAN-HUBERTY: Thank you, Your Honor. Again,
12 this is Emily Curran-Huberty on behalf of plaintiffs.

13 Your Honor, I do want to just make two quick points in
14 relation to what Ms. Olson just said. Now, Your Honor is
15 perfectly capable of reading the cases that the parties have
16 cited. And I -- fundamentally, I would direct the Court to
17 look at the Cobell decision, and to look at City of New York,
18 and to see, I think, the distinctions between those cases and
19 our case. And those are laid out in our briefing as well.

20 I will say that as to Cobell, the injunction was
21 vacated in part. The injunction issued by the Court was not
22 vacated in full.

23 And the -- at bottom, the challenge to the
24 administration of Indian trust accounts in that case, that was
25 considered reviewable under the APA in both the Cobell

1 decisions.

2 I want to make another point about Lujan as well, Your
3 Honor. Defendants have quoted Lujan on page 3 of their reply
4 brief for the proposition that, and I'm quoting, a program
5 consisting principally of the many individual actions
6 referenced in the complaint and presumably actions yet to be
7 taken as well, cannot be laid before the courts for wholesale
8 correction under the APA.

9 But defendants cut off the last part of that sentence,
10 and I do want to point that out, because that last part of that
11 sentence provides some really important context that shows that
12 Lujan was fundamentally addressing a different issue than what
13 we are addressing here.

14 Because the full quote is that a program, consisting
15 principally of the many individual actions referenced in the
16 complaint, and presumably actions yet to be taken as well,
17 cannot be laid before the courts for wholesale correction under
18 the APA, simply because one of them is ripe for review
19 adversely affects one of respondent's members.

20 And so what's apparent from that whole quote is that
21 Lujan is fundamentally a standing decision. It is a decision
22 about whether a party has been sufficiently harmed individually
23 by an agency's action in order to have standing to bring suit.

24 And all the court is saying in this quote is that by
25 having an injury regarding one final agency action, that that

1 is not enough to then by proxy give you as an individual
2 plaintiff standing to challenge everything that the agency has
3 ever done. That's all that Lujan is saying there.

4 And I want to make a couple of points about the cases
5 that we've principally relied on, which are South Carolina
6 versus United States, and Vietnam Veterans of America versus
7 CIA.

8 And I'd submit, Your Honor, that the defendants
9 describe the actions that the agencies were ordered to take in
10 those cases as quote, circumscribed. But if you look at what
11 they're actually being ordered to do, I think that it's
12 abundantly clear that nothing that was going on in those cases
13 was realistically circumscribed or uncomplicated or simple.

14 The agency in South Carolina was ordered to remove
15 plutonium from nuclear sites within the state. The factual
16 history of that case makes it very clear that the Department of
17 Energy had been trying to deal with its obligations to remove
18 plutonium and had a number of challenges in doing so, at the
19 time that South Carolina, the state, brought the challenge.

20 And so it's obviously a complex task, and the agency
21 obviously was trying, but that did not prevent the court from
22 ordering plaintiff relief under the APA and issuing an
23 injunction.

24 And similarly, the Army in Vietnam Veterans, it was
25 sort of -- it had taken steps to notify former service members

1 who had been exposed to various medical experiments during
2 their service, had been trying occasionally to warn those
3 former service members of those risks.

4 And it's obviously a complex task identifying former
5 service members who had participated in experiments going back
6 many, many decades, trying to keep on track of what health
7 risks those individuals might be facing as a result of those
8 experiments, and then finding all those people and notifying
9 them on an ongoing basis, and then also providing them medical
10 care. That's not an easy or circumscribed task by any means.
11 But that, again, did not prevent the court in Vietnam Veterans
12 from ordering them to take that step.

13 Your Honor asked about the relief in this case. And I
14 just want to point out, Your Honor, that the regulations that
15 are at issue here, that defendants are wholesale failing to
16 implement, these relationships -- apologies, these regulations,
17 these are not vague mandates. They have a lot of detail and
18 specificity to them.

19 And I would just direct you to pages 3 to 9 of our
20 opening motion where we lay out what their regulations actually
21 are and what they require. Because I think that it shows the
22 level of specificity.

23 I also want to address defendants' characterization of
24 our interrogatory responses. So defendants have mentioned that
25 they served this interrogatory on us that asked us to identify

1 the specific relief, and I am quoting now, that we are
2 requesting for each individual student plaintiff, identifying
3 the specific actions or measures that you, meaning we, the
4 plaintiffs, contend defendants should take to provide that
5 relief to the particular student plaintiff.

6 So that was the interrogatory they propounded on us.
7 Spoke to individual relief to each of the individual student
8 plaintiffs, and it addressed all counts of our complaint.

9 And we did object to this interrogatory on a number of
10 grounds, including that it recalled upon us to ask for
11 information that was fundamentally a legal determination for
12 the court, and also asked us to provide information that was
13 better in the possession of defendants, insofar as they have
14 better sense of what services are available and what mechanisms
15 are available to them under the various administrative
16 structures in which they operate.

17 But we did answer the interrogatory, and we answered
18 it in a document that is many pages long, single spaced, in
19 which we attempted to answer the question and provide them with
20 specific answers to what relief we were seeking for our
21 individual plaintiffs, again, on all of their claims.

22 And our plaintiffs have claims under all of the counts
23 of the complaint, the APA claims, but also the Section 504
24 claims. And we answered those questions as to relief as a
25 group.

1 And I frankly submit, Your Honor, that what defendants
2 have done, both in their briefing and here at this hearing, is
3 they have cherry picked out of context statements in order to
4 simultaneously complain that we are being insufficiently
5 specific as to the relief we are seeking, but also to play a
6 form of "gotcha," in terms of trying to trap us into pleading
7 our way out of court by citing out-of-context snippets from our
8 discovery responses.

9 THE COURT: Counsel, you have a minute left.

10 MS. CURRAN-HUBERTY: Thank you, Your Honor.

11 And in that last minute, Your Honor, I will just take
12 it back to how perverse plaintiffs believe that defendants'
13 position on the APA is from a policy perspective.

14 Because again, they concede that we could have brought
15 each of these specific challenges as an individual action, and
16 I really would question what purpose there is then to a rule
17 that says that we can't challenge more than one of these
18 actions in a single case.

19 What purpose is there from a court efficiency
20 perspective, from their own perspective, in terms of having to
21 face serial challenges to the operation of Havasupai
22 Elementary. And then fundamentally what purpose there is to
23 such a rule for our clients, who again, children, children who
24 are being deprived of an education now.

25 And I'd submit, Your Honor, that there is no purpose

1 to such a rule, and that the rule defendants are proposing is
2 not the law, and that their motion should be denied as to count
3 1 and count 2, and that our motion should be granted.

4 THE COURT: Thank you very much, counsel.

5 Ms. Olson.

6 MS. OLSON: Thank you, Your Honor. Before I make some
7 more general statements, I would like to address the fact that
8 Lujan wasn't a standing case, it was an APA case brought under
9 5 U.S.C. Section 706.

10 I'd also like to point out that South Carolina and
11 Vietnam Vets did involve singular discrete actions that the
12 government had failed to take, although the court did not tell
13 the government how those duties should be carried out, and I
14 think that's a critical distinction.

15 And on Lujan, I'd also briefly reiterate that it was
16 brought under the APA, but whether or not plaintiffs believe it
17 was doesn't matter, because there are scores of other cases
18 that we've cited, perhaps not scores, but a large number of
19 other cases we've cited about programmatic challenges.

20 On the issue of sovereign immunity, we are not making
21 this up. That's simply an Article III fact. And then as far
22 as the interrogatories, we didn't just ask them to identify the
23 specific actions that we wanted them to take to provide -- that
24 the plaintiffs wanted defendants to take to provide relief to
25 particular students. That was interrogatory number 3.

1 But in interrogatory number 4, we asked them what
2 specific actions they wanted defendants to take to remedy
3 staffing --

4 THE COURT: Counsel, you are starting to read really
5 fast again.

6 MS. OLSON: Sorry, I apologize.

7 THE COURT: If you would slow down. I want to make
8 sure I am taking all of this in.

9 MS. OLSON: In interrogatory 4, we asked them to
10 identify the specific actions they wanted defendants to take to
11 remedy the staffing and retention problems.

12 In interrogatory number 5 we asked them to identify
13 the specific actions that they wanted defendants to take to
14 remedy the housing shortage.

15 In interrogatory 6 we asked them to identify the
16 specific remedy they wanted defendants to take to recruit
17 cultural instructors.

18 In interrogatory 7, we asked them to identify the
19 specific actions they wanted defendants to take to provide --
20 excuse me, to obtain additional funding.

21 In interrogatory 8, we asked them to identify the
22 specific actions they wanted defendants to take to improve the
23 library.

24 In interrogatory 9, to improve the counseling.

25 In interrogatory 10, to include the community in

1 decision-making.

2 In interrogatories 12 and 13, to identify the dates on
3 which education instruction was not provided.

4 In interrogatory 18, to identify the specific
5 curriculum that defendants should use.

6 In interrogatory 24, to -- measures that they wanted
7 defendants to take to communicate with family members or
8 caregivers of students. And in each of these instances, they
9 failed to provide specifics.

10 As I've said before, they said it would be too -- it
11 would require too burdensome an investigation on their part,
12 and they also said that this information about what relief
13 should be provided is equally or more available to defendants.

14 To address the counts 1 and 2 claims generally, Your
15 Honor, I would simply refer the Court to the many cases we have
16 cited, which hold that programmatic challenges are simply to be
17 made in the offices of the department or the halls of Congress.

18 And the Supreme Court in Lujan recognized that this,
19 quote, case by case approach, that the identification of a
20 discrete agency action requires, would be, quote,
21 understandably frustrating to an organization which has as its
22 objective across-the-board protection.

23 It said -- the Supreme Court said that courts can only
24 rule on specific final agency action.

25 And the Fourth Circuit said something which is

1 particularly apt in this case. It said in New York City of New
2 York that widespread and systemic shortcomings are, quote, the
3 sort of public policy problem that often requires reallocating
4 resources, developing new administrative systems, and working
5 closely with partners across government. Solving it will
6 require expertise, unquote.

7 That is exactly the situation here, where the
8 Department of Interior faces complex problems that are going to
9 require additional resources, a reworking of parts of its
10 system on an ongoing basis, and cooperation from other parts of
11 the government, Congress, and even nongovernmental entities.

12 So declaratory and injunctive relief isn't warranted
13 on counts 1 and 2 because the obstacles that face BIE are
14 largely insurmountable and out of its control. There's a
15 limited budget, geographical and background check requirements,
16 which prevent effective recruitment and retention efforts,
17 inadequate housing which can't be increased without tribal
18 consent.

19 BIE has made constant diligent efforts to address
20 problems at Havasupai school, despite these constraints, but
21 the practical difficulties are enormous.

22 And there -- no specific practical solutions or
23 remedies have been offered by plaintiffs or anyone else. So
24 these factors all underscore the fact that plaintiffs have --
25 APA claims are not actionable under the APA -- plaintiffs'

1 claims in counts 1 and 2 that defendants have failed to take
2 action to provide a basis education are therefore not
3 actionable under the APA.

4 THE COURT: Counsel, thank you very much.

5 Before we move on to counts 3 and 4, I'm a little
6 unclear about one issue, plaintiffs. I was looking at my
7 notes. So you want me to -- you want me to address the remedy
8 after the injunction is issued? Is that what you are asking
9 for?

10 MS. CURRAN-HUBERTY: Emily Curran, again, on behalf of
11 the plaintiffs, Your Honor.

12 No, Your Honor. We are asking for an order
13 adjudicating that we are entitled to summary judgment as to
14 liability. The actual framing of the injunction would have to
15 come in a later phase of the case.

16 THE COURT: Okay. Thank you. Defendants, I have a
17 question for you as it relates to counts 3 and 4. Is it your
18 position that you have not failed to provide meaningful access
19 to education to students with disabilities?

20 And if not, why aren't the plaintiffs entitled to
21 summary judgment on that issue?

22 MS. OLSON: We have not been complying with Section
23 504. However, we have been providing reasonable accommodations
24 to the individual students who are at issue here. The 504
25 violations concern the implementation of the statute on a wider

1 scale. And we are -- and the Court has broad discretion in
2 fashioning equitable relief.

3 And the reason it should exercise that discretion to
4 deny summary judgment to the plaintiffs is that the defendants
5 are presently acting to provide all disabled students with
6 meaningful access to an education as required by 504.

7 It has a 504 coordinator in place who's charged with
8 developing and implementing a plan to bring BIE into compliance
9 with 504. It has 504 coordinators in place for the Havasupai
10 and almost all bureau-operated schools. It has provided 504
11 training to staff at Havasupai twice so far since the beginning
12 of this school year.

13 BIE has provided training on 504 to all
14 bureau-operated schools and all off reservation boarding
15 schools in October. BIE is in the process of finalizing its
16 Section 504 policies and procedures document, which is about 75
17 percent done.

18 BIE has developed a comprehensive list of tasks
19 necessary to bring it into compliance with 504, and is
20 committed to providing the resources necessary to implement
21 this plan.

22 In shaping equity decrees, the Court has broad
23 discretionary power. The Supreme Court said this in U.S.
24 versus Oakland Cannabis Buyers' Co-op, 532 U.S. 483.

25 THE COURT: Counsel, my apologies for rudely

1 interrupting you, but I have a question for the plaintiff.

2 Plaintiffs, can you confirm that the defendants have
3 been working with you to ensure that the students with
4 disabilities identified in the third amended complaint are
5 receiving the desired equal access to education?

6 MS. CURRAN-HUBERTY: Your Honor, as the summary
7 judgment record reflects, there is an ongoing process in place
8 involving both school level officials and our clients being
9 represented individually by Native American Disability Law
10 Center to obtain needed services.

11 We do not agree that those efforts have been adequate
12 to date or that the students are in fact, either as of the time
13 the record closed or as of today, actually being provided
14 reasonable accommodations.

15 THE COURT: So why don't you believe that they are
16 receiving the desired equal access to education?

17 MS. CURRAN-HUBERTY: Your Honor, our student
18 plaintiffs are, for instance, continuing to be subject to
19 exclusionary discipline, which is a 504 violation we identify
20 in the complaint.

21 I don't currently -- I don't know the current exact
22 status of the effort to evaluate our student plaintiff Moana L.
23 for services, but that was significantly delayed without basis,
24 in violation of Section 504.

25 There are ongoing issues regarding our student

1 plaintiff Taylor P. and the bullying she has been subjected to
2 at the school. So these are ongoing issues.

3 And then on top of all of that, at core, Your Honor,
4 our Section 504 claim is not limited to the specific
5 deprivations that the individual student plaintiffs have been
6 subjected to.

7 Our Section 504 claim fundamentally targets the fact
8 that the school does not have systems in place to provide these
9 students meaningful access, and that's true as to the general
10 special education needs under Section 504, as well as to the
11 Section 504 needs as they relate to complex trauma.

12 THE COURT: Counsel, I want to cite to defendants'
13 argument, which is document number 191 at page number 13, line
14 22. I will let you get to that and look at it and a few
15 sentences before that part of defendants' argument.

16 MS. CURRAN-HUBERTY: Sorry, Your Honor, could you
17 repeat the page number?

18 THE COURT: Of course, document number 191, page
19 number 13, line 22.

20 MS. CURRAN-HUBERTY: Yes, Your Honor.

21 THE COURT: My question is, why are the defendants
22 bound by the Department of Education's agency regulations
23 implementing Section 504?

24 MS. CURRAN-HUBERTY: I see, Your Honor. So our
25 position, Your Honor, has been that the Department of Interior

1 adopted those regulations into its own code at 43 C.F.R., I
2 have a section cite, if I may?

3 THE COURT: Just take your time.

4 MS. CURRAN-HUBERTY: Thank you. That DOI adopted
5 these regulations into its own regulations at 43 C.F.R. 17.220,
6 or what the parties generally refer to as subpart B.

7 The disagreement with defendants is defendants contend
8 that that subpart, subpart B, applies exclusively in instances
9 in which the school is being -- is what's known as a grant
10 school. So the BIE funds the school, but the school is
11 operated by a tribe or by another entity.

12 It contends that subpart B does not apply when the
13 Bureau of Indian Education is itself operating the school. It
14 contends instead, that in that circumstance, where the Bureau
15 is operating the school, that subpart E applies.

16 THE COURT: Well, counsel, are you specifically asking
17 me again to just simply follow the law, or do you have -- do
18 you envision something from me that would actively compel the
19 defendants to do so as it relates to counts 3 and 4? What are
20 you asking me to do?

21 MS. CURRAN-HUBERTY: Well, as it relates to the
22 Department of Education, the specific regulations, what we call
23 the Child Find, and then the procedural safeguards regulations,
24 Your Honor, we are asking for clarification that they are
25 required to have regulations regarding Child Find and

1 procedural safeguards in place at bureau-operated schools like
2 Havasupai Elementary.

3 Under their own -- under their preferred reading of
4 the regulations right now, they have no such regulations in
5 place, and therefore, administrators, staff, teachers, are
6 not -- they don't have a framework from which to work to know
7 how to identify children with Section 504 disabilities and how
8 to evaluate those children and provide them services under a
9 framework that provides those students procedural safeguards.

10 And so our position is that they're required to have
11 those regulations. They currently don't have those
12 regulations, if you accept their reading of the statute -- of
13 the regulatory structure.

14 They currently have no specific regulations in place
15 addressing either Child Find or procedural safeguards. Now,
16 under our reading of the regulation, that these regulations
17 from the Department of Education apply by adoption, and
18 therefore, govern the school. And they are, by their own
19 admission, simply not complying.

20 By their own reading, they have no regulations, and if
21 that's the case, Your Honor, then they are actually violating
22 Section 504 itself, and so our position is that in that case,
23 the remedy would be to order them to have regulations governing
24 these procedural safeguards and identification and notification
25 provisions at the school.

1 THE COURT: Counsel for the defendants. I will give
2 you five minutes to address the issues that plaintiff just
3 placed on the record as it relates to my questions for her.

4 MS. OLSON: Thank you, Your Honor.

5 THE COURT: You're welcome.

6 MS. OLSON: Regarding the -- I just wanted to finish
7 my point, if I may, regarding why the Court shouldn't grant an
8 injunction regarding 504. Equity decrees need to be molded to
9 the necessities of the particular case. The Supreme Court said
10 that in Lemon versus Kurtzman, 411 U.S. 192.

11 So in using its equitable power, the Court need not
12 issue an injunction if there are other means of ensuring
13 compliance with a statute.

14 The qualities of mercy and practicality have made
15 equity the instrument for nice adjustment and reconciliation
16 between the public interest and private needs. That's what the
17 Court said in Lemon versus Kurtzman.

18 Here, we are doing -- defendants are doing exactly
19 what the plaintiffs want them to do with respect to the
20 individual plaintiffs. There is little, if anything, the Court
21 could order the defendants to do with respect to Section 504,
22 that defendants are not already doing. And that applies both
23 to the individual plaintiffs and to our more program-wide
24 Section 504 measures.

25 All of these individual plaintiffs have Individual

1 Education Plans in place under the Individuals with
2 Disabilities Education Act, which is not at issue here,
3 however, the Court in Scanlon said -- which was affirmed by the
4 Ninth Circuit at 69 F.3d 544, said that compliance with the
5 Rehab Act education requirements can be achieved through
6 implementation of an IEP.

7 All of these students have IEPs in place. They are
8 current and up to date. There is a reference to Moana P. and
9 without getting into details that would reveal her identity, we
10 are waiting for this person's attorney to forward the necessary
11 report so that we can reconvene an IEP meeting.

12 So everything is up to date. As I said, Havasupai
13 school always presents a fluid situation. It's a moving
14 target, and the defendants need flexibility to adapt to
15 changing circumstances, and it is doing that diligently. And
16 an injunction would not be necessary or appropriate to ensure
17 that the statute will be effectively enforced.

18 As far as the DOE regulations and their applicability
19 to the Havasupai school, the plaintiffs are drawing from I
20 don't know where, to say that there are actions that the
21 defendants should take that aren't -- I don't know what they
22 are citing to, but what they have cited to in their complaint
23 are the Department of Education regulations.

24 And Congress has drawn a distinct dichotomy as far as
25 whether those regulations apply. There's a distinct dichotomy

1 between an entity that is a recipient of federal financial
2 assistance, and a program that is conducted by an agency.

3 The Department of Education regulations only apply to
4 recipients of federal financial assistance, and I don't want to
5 repeat what we've said in our briefs, but when 504 was first
6 enacted, it only applied to programs or activities receiving
7 federal financial assistance.

8 Five years later, Congress amended it, because it
9 recognized that 504 hadn't been applying to programs or
10 activities conducted by any executive agency.

11 So when the DOE regs say they apply to programs or
12 activities that receive federal financial assistance, those
13 regs do not apply to programs or activities like Havasupai
14 school that are conducted by other federal agencies.

15 The Supreme Court reinforced this in Paralyzed
16 Veterans and made clear that programs or activities carried out
17 by the United States with federal funds, like the Havasupai
18 school, quote, cannot fairly be described as receiving federal
19 assistance for purposes of 504.

20 The Ninth Circuit agreed in Jacobson, and the Tenth
21 Circuit agreed in Coleman versus Darden. The Department of
22 Interior regs maintain this distinction between programs
23 receiving federal financial assistance and programs conducted
24 by federal agencies.

25 And Congress authorized each agency to promulgate its

1 own regulations. So Interior's regulations at subpart E govern
2 nondiscrimination in programs conducted by the Department of
3 Interior. Subpart E doesn't refer to the Department of
4 Education regs.

5 So that means that programs conducted by Interior are
6 subject only to Interior's Section 504 regs, but subpart B of
7 Interior's regs do govern nondiscrimination and programs that
8 receive federal financial assistance, and do refer to the
9 Department of Energy -- of Education's regulations, and require
10 compliance with Section 504 requirements in DOE's regs.

11 So programs that receive federal financial assistance,
12 like tribally-operated schools, would under Interior's regs, be
13 subject to DOE's 504 requirements, but programs conducted by
14 the Department of Interior, like the Havasupai school, would
15 not.

16 And DOE can't simply unilaterally decide that its
17 regulations bind other agencies. The Court said this in Lujan
18 versus Defenders of Wildlife, nor could DOE sue Interior to
19 enforce its regs, because the U.S. can't sue itself.

20 So here the plaintiffs are essentially claiming the
21 authority to enforce the Department of Interior's regs --
22 Department of Education regs against Interior, when the
23 Department of Education itself can't enforce its regs against
24 Interior.

25 The plaintiffs' argument is based on an inapplicable

1 definition. It's so -- it's, frankly, too convoluted for me to
2 attempt to explain its argument that the Havasupai school
3 should be deemed a recipient of federal financial assistance.

4 But it boils down to reliance on an inapplicable
5 definition in 25 C.F.R. Section 39.2, which applies only to the
6 Indian School Equalization Program.

7 The plaintiffs contend that because bureau-funded
8 schools are equated with BIE-operated schools in that
9 regulation, that the BIE-operated school should be treated as
10 recipients of federal financial assistance.

11 But 25 C.F.R., which is entitled, what definitions
12 apply to the terms in this part, only applies to, quote, this
13 part. And "this part" is part 29. Part 29 of 25 C.F.R. deals
14 with the Indian School Equalization Program, which involves the
15 allocation of Indian School Equalization Program funds for both
16 bureau-funded and bureau-operated schools.

17 So the definition of bureau-funded schools only
18 applies to that program, that definition in 25 C.F.R. 39.2, and
19 defendants don't deny that for purposes of the Indian School
20 Equalization Program funding, all Bureau schools, whether
21 bureau-funded or bureau-operated, are treated the same, or
22 should be treated the same.

23 THE COURT: Well, counsel, at this point, I'm ready to
24 hear arguments as it relates to counts 3 and 4 from plaintiffs'
25 counsel. I will give you five minutes, and then I will give

1 you, defense counsel, five minutes to complete your thoughts.
2 And I need you to do it from the lectern, if you would, please.

3 MS. CURRAN-HUBERTY: Your Honor, may I briefly ask for
4 clarification?

5 THE COURT: Sure.

6 MS. CURRAN-HUBERTY: So thus far we haven't been
7 discussing what we have often colloquially referred to as the
8 "trauma complaint." So with your permission, I would like to,
9 again, leave the trauma issues off to one side and just address
10 the issues we've been addressing, which is Section 504
11 generally, and the specific regulatory provisions.

12 THE COURT: And the questions that I've asked, they're
13 the questions that I need answers to. Some of the other issues
14 are relatively clear to me.

15 MS. CURRAN-HUBERTY: Thank you, Your Honor.

16 So, Your Honor, counsel for the United States made two
17 points that I do wish to respond to. Sticking with the
18 regulations governing what I call Child Find and procedural
19 safeguards, the one thing I think counsel for defendants and
20 counsel for plaintiffs can agree on is that the particular way
21 the regulations all fit together is certainly convoluted. I
22 think we can agree on that.

23 And I think that is fully laid out in the parties'
24 respective briefs on this issue. But I do want to highlight,
25 Your Honor, that -- what the import of defendants' reading of

1 the regulations is.

2 Because under defendants' reading of the regulations,
3 wherein only subpart E applies to nondiscrimination on the
4 basis of disability in bureau-operated schools, schools like
5 Havasupai Elementary, that are directly run by the Bureau of
6 Indian Education, that because there's only this general
7 nondiscrimination subpart applies, the result of defendants'
8 position is that the students at Havasupai Elementary and other
9 bureau-operated schools throughout the country, and there are
10 dozens, that those students, unlike students attending
11 tribally-run schools, and unlike students attending public
12 school in essentially every other state and school district
13 within this entire country, are entitled to fewer protections
14 under Section 504 than any other student in the United States.
15 That these students alone, are entitled to -- are not entitled
16 to the protections of a Child Find regulation or procedural
17 safeguard. That is the import of defendants' reading of the
18 regulations. And we think that that's wrong. We think that
19 our reading as set forth in our briefing is the preferred one,
20 because it avoids this absurd result.

21 But, Your Honor, if defendants are correct, then it is
22 our position that they are simply violating Section 504
23 directly by failing to have regulations governing Child Find
24 and procedural safeguards in place.

25 And I want to briefly address something else Ms. Olson

1 said, which is that the Court should decline to issue an
2 injunction here because the defendants purport to be doing all
3 they can to comply with their general obligations under Section
4 504.

5 And notably, defendants either just -- they cite
6 general statements regarding the flexibility of equity, but
7 they cite no actual case that would have Your Honor decline to
8 issue injunctive relief in the face of an acknowledged
9 violation of the law, simply because they claim to be working
10 on the problem.

11 It's essentially a mootness argument, but they are not
12 calling it that because they know they can't meet the standards
13 for mootness, and they know that our claims are not moot.

14 You heard Ms. Olson say that we acknowledge, we being
15 the defendants, acknowledge that they are not currently
16 complying with their obligations under Section 504. Frankly, I
17 don't know if Your Honor needs anything more than that to find
18 in our favor as to liability and to issue an injunction.

19 And, again, we are not, at this point, telling you
20 exactly what we think the scope of that injunction should be,
21 but we certainly think we are entitled to some relief based on
22 that admission.

23 They are bending over backwards to avoid receiving an
24 order from this Court, and frankly, bending over backwards to
25 avoid acknowledging their obligations to educate these kids.

1 So I think, Your Honor, with that, I will cede the
2 podium. I believe that clearly, we are entitled to a finding
3 of liability as to Section 504.

4 THE COURT: Thank you very much.

5 Ms. Olson, you have five minutes, count 3 and 4.

6 MS. OLSON: Thank you, Your Honor.

7 We are not only doing what we can with respect to 504,
8 we are doing what we must. And the case that I have cited,
9 which supports the fact that this Court need not issue an
10 injunction, is *Opened Cannabis*, which says that a Court may not
11 issue an injunction if there are other means of ensuring
12 compliance with a statute.

13 The defendants are doing what 504 requires, or they
14 are headed in the right direction. The road ahead is an
15 arduous one, as we have acknowledged. But there is really
16 nothing more that the Court could order, or certainly that the
17 plaintiffs have imagined that we could do with respect to 504
18 that we are not already doing.

19 And separate briefing on a remedy would make no
20 difference now and would just continue to draw out this case.
21 Because if the plaintiffs can't identify specific relief now
22 they will never be able to.

23 I would suggest that as an alternative to an
24 injunction, there are, as I said, continuing efforts on the
25 part of the Bureau of Indian Education, a continuing commitment

1 and a commitment of resources, attempting to solve the ongoing
2 problems at this school.

3 And an alternative to an injunction would be that
4 every two months for six months, we file a status report to
5 assure the Court that we are coming into compliance with 504.
6 And at the end of that time, have a status conference in which
7 we either are in compliance or we are not.

8 But for the Court to begin to involve itself in the
9 minutiae of agency compliance would not necessarily be the most
10 efficient course, particularly because the situation there is
11 so constantly evolving. And that's really all I have to say,
12 Your Honor, thank you.

13 THE COURT: Thank you very much, counsel.

14 Next, I would like to shift gears to counts 5 and 6.
15 Defendants, what is your position on the argument that HES is
16 bound by the Department of Education's regulations because HES
17 accepts federal financial assistance from the Department of
18 Education?

19 MS. OLSON: Your Honor, I think I covered a little bit
20 of that earlier, maybe I was off on a tangent that I wasn't
21 supposed to be on. I thought I was responding to a question or
22 some points that the plaintiffs had made.

23 But what I had said before that is -- that the
24 Department of Education regulations implementing 504, which
25 have these notification and procedural safeguard requirements,

1 don't apply to programs that are conducted by -- wholly
2 conducted by a federal agency.

3 Congress recognized this distinction when it amended
4 504 to include programs or activities conducted by an executive
5 agency. The Supreme Court in *Paralyzed Veterans* made it clear
6 that programs carried out by the United States with federal
7 funds can't be described as receiving federal financial
8 assistance, which is what the Department of Education regs --

9 THE COURT: Well, counsel, is HES a local education
10 agency that receives federal financial assistance?

11 MS. OLSON: It is not a recipient of federal financial
12 assistance.

13 THE COURT: What's your position on that, plaintiffs'
14 counsel, that last question?

15 MS. CURRAN-HUBERTY: Our position, Your Honor, is that
16 they are a recipient of federal financial assistance, and that
17 they have designated Havasupai Elementary as a local education
18 agency.

19 THE COURT: Defendants, I need you to elaborate on
20 your position that the Department of Interior regulations make
21 a distinction between BIE-operated schools and BIE-funded
22 schools.

23 MS. OLSON: Subpart E of 43 C.F.R. Sections 17.501 to
24 .570 of Interior's regs govern nondiscrimination in programs or
25 activities conducted by the Department of the Interior.

1 That regulation doesn't refer to the Department of
2 Education regs or require compliance with Department of
3 Education regs.

4 So that means that programs conducted by Interior, are
5 subject only to Interior's Section 504 regs in subpart E. But
6 subpart B of Interior's regs makes it clear that those
7 regulations, which govern nondiscrimination in programs or
8 activities that receive federal financial assistance, do
9 require compliance with the Section 504 requirements in the
10 Department of Education's regulations.

11 So the regulations themselves make clear that
12 Department of Interior's regs as they apply to programs
13 receiving federal financial assistance, require compliance with
14 the Department of Education regulations, but the Department of
15 Interior regs that govern programs and activities conducted by
16 Department of Interior do not require compliance with
17 Department of Education regs.

18 And this is consistent with what the Supreme Court
19 said in *Paralyzed Veterans*, what the Ninth Circuit said in
20 *Jacobson*, what the Tenth Circuit said in *Coleman versus Darden*.

21 The plaintiffs say that *Paralyzed Veterans* isn't
22 applicable because it holds that a service provided by a
23 federal agency, in that case air traffic control, is not
24 federal financial assistance to a party. That is not an
25 accurate characterization of the case.

1 What was relevant in Paralyzed Veterans was the
2 Court's determination that because the air traffic control
3 system is owned and operated by the United States, the air
4 traffic control system is not federal financial assistance at
5 all. And I am quoting from there, 477 U.S. at 612.

6 In other words, under Paralyzed Veterans, a program
7 like the Havasupai school, that is, quote, wholly carried out
8 by the United States with federal funds, cannot fairly be
9 described as receiving federal financial assistance. So that
10 case clearly supports the fact that Havasupai is not a
11 recipient of federal financial assistance and therefore, is not
12 subject to the Department of Education Section 504 regs.

13 The plaintiffs contend that Coleman versus Darden is
14 inapplicable, because it is about another agency's regulations
15 and has nothing to do with education. But the fact that the
16 case concerned another agency's regs and didn't involve
17 education is irrelevant.

18 The case did involve Section 504. And it reinforces
19 the distinction between programs that receive federal financial
20 assistance and programs like the Havasupai school that are
21 entirely operated by the federal government.

22 THE COURT: Counsel, thank you for that.

23 Plaintiffs, I want to direct your attention to
24 defendants' argument in document number 203, page number 14,
25 line 20. Again, document 203, page 14, line 20.

1 My question is, what is your position on the argument
2 that 25 C.F.R. part 39 does not apply to Section 504
3 regulations, and what precedent do you have to support your
4 position, if any?

5 I will repeat my question: What is your position on
6 the argument that 25 C.F.R. part 39 does not apply to Section
7 504 regulations, and what precedent do you have to support your
8 position?

9 MS. CURRAN-HUBERTY: Your Honor, I don't believe we
10 have a specific precedent that would say that 25 C.F.R. Section
11 39 applies to the Section 504 regulations. I don't believe we
12 have a specific case cite for that either way.

13 I would say, however, Your Honor, that our general
14 mode of argument as to why we believe that the regulations in
15 subpart B apply or fairly read should apply to BIE-operated
16 schools, as well as BIE-funded schools, hinges on the fact
17 that, first, BIE-operated schools are defined as a local
18 education agency, which the subpart B regulations explain that
19 they cover.

20 And also, that it is our position that Havasupai
21 Elementary or the BIE-operated schools are a program that
22 receives financial assistance. And the question is not whether
23 Havasupai Elementary School itself is a form of federal
24 financial assistance. It's whether the school and the Bureau
25 receive other federal funds for the operation of that school,

1 and we make clear in our briefing that they do. They receive
2 multiple forms of funding from DOE and from elsewhere for the
3 purpose of providing education at Havasupai Elementary.

4 THE COURT: Plaintiffs' counsel, isn't there relief
5 available to Steven C. and Durell P. only speculative, since
6 they are no longer students at HES?

7 MS. CURRAN-HUBERTY: Your Honor, I would --

8 THE COURT: In other words, is there a lack of subject
9 matter jurisdiction?

10 MS. CURRAN-HUBERTY: Your Honor, I think the question
11 as to jurisdiction comes down to mootness. I think, as we
12 explain in our papers, both Durell P. and Steven C. had
13 standing at the time the complaint was filed, and so I think we
14 can take the sort of prior standing issue off the table and
15 focus exclusively on mootness.

16 And what I would emphasize for you there, Your Honor,
17 is that when we are talking about mootness, the standard for
18 mootness is not whether the relief that we asked for initially
19 for them is available, but if whether, as of now, there's any
20 effective relief that the Court could grant. And we lay out
21 some examples of effective relief we think the Court could
22 grant in our briefs.

23 I would point out that one of the ones that stands out
24 the most, standing here today, is that both of these students
25 continue to be clients of our organizational plaintiff, Native

1 American Disability Law Center.

2 The Native American Disability Law Center, as
3 explained in our opposition to defendants' summary judgment
4 motion on this point, is a small resource constrained
5 protection and advocacy organization that has been diverting
6 its resources attempting to address the challenges at Havasupai
7 Elementary, at the expense of other clients they could be
8 serving.

9 Now, Durell P. and Steven C. continue to be NADLC's
10 clients, and they continue to require services. And so we
11 submit that one form of effective relief that these individual
12 students could obtain in this case is that if it were the case
13 that we receive relief that actually addresses the challenges
14 that Havasupai Elementary faces, that NADLC will have more
15 resources available to it to meet the needs of these individual
16 clients as they progress in their educational journey.

17 THE COURT: Ms. Olson, I will give you one minute to
18 address your position on the lack of subject matter
19 jurisdiction matter as it relates to Steven C. and Durell P.

20 MS. OLSON: Thank you, Your Honor.

21 There are two issues, there's the mootness issue,
22 which pertains to both Durell P. and Stephen C., and then
23 there's a standing issue, both of which -- and that one only
24 pertains to Durell P.

25 In both of these cases, the students have graduated

1 from Havasupai school. And while Stephen C. might have been
2 eligible for educational services when the third amended
3 complaint was filed, he is no longer.

4 There has to be a live case or controversy as required
5 by Article III of the constitution. And once they graduated,
6 they no longer had a live case or controversy.

7 As we have shown in our brief, all of the relief that
8 the plaintiffs want, or that this Court -- or that they say
9 would benefit them, does not render their claims not moot.

10 They say they want some help with the transition to
11 high school, but that doesn't fit within the categories of
12 relief under the APA and an order requiring help transitioning
13 into high school wouldn't remedy the alleged failure to comply
14 with 504 in count 3, or to implement trauma-informed practices
15 in count 4 of the complaint.

16 They say that they benefit from a remedy that
17 clarifies the Department of Education's 504 regulations
18 applicability to BIE, but again, such a remedy wouldn't have
19 any foreseeable impact on the plaintiffs. They don't even
20 request declaratory relief that the Department of Education's
21 Section 504 regulations apply to BIE.

22 They just allege defendants have violated the
23 Department of Education's regulations. And those alleged
24 violations of the Department of Education's regulations in 5
25 and 6 of the complaint, counts 5 and 6, dealing with

1 notification and procedural safeguards, only apply to parents
2 of students. So relief couldn't provide any meaningful relief
3 to students who no longer attend Havasupai, like Durrel P. and
4 Stephen C.

5 THE COURT: Counsel, thank you.

6 Plaintiffs, I will give you five minutes to argue on
7 counts 5 and 6, the subject matter jurisdiction issue. And
8 anything else we have talked about this morning. You have five
9 minutes. This is your final argument on everything.

10 Please approach the lectern or any other lawyers that
11 would like to argue.

12 MS. CURRAN-HUBERTY: Thank you, Your Honor. I hope to
13 make just a few quick points, and then I do want to just pass
14 my time to Ms. Friley, because she did have a couple of points
15 in response to some of the things that Ms. Olson said very
16 early on at the start of this hearing to which she would like
17 to respond.

18 THE COURT: I will allow it.

19 MS. CURRAN-HUBERTY: Thank you.

20 I just want to reiterate on counts 5 and 6, the
21 procedural safeguard and Child Find regulations, that again,
22 the regulatory structure is complicated and the parties have
23 offered you two competing ways to read the Department of
24 Interior's regulations in 43 C.F.R.

25 But I just, again, want to emphasize that the import

1 of accepting defendants' reading of the regulatory structure is
2 simply that the students attending these BIE-operated schools
3 are deprived of procedural protections that are available to
4 every other child attending a public school in the United
5 States.

6 I also want to make one very brief point as to --
7 going back to the APA claims. Defendants have repeatedly
8 argued that what we are asking for is a, quote, follow the law
9 injunction, at the same time that they have repeatedly
10 criticized plaintiffs for being insufficiently prescriptive in
11 the kinds of suggestions that we have offered for how to
12 address the challenges at Havasupai Elementary.

13 I would direct you to the regulations. Again, I think
14 think provide a lot of specifics as to what could be ordered
15 here. But I do want to point out that it's very unclear under
16 defendants' position exactly what, if anything, the Court would
17 be empowered to do in this scenario.

18 And I think that the law fairly read makes it clear
19 that the Court does have the power to intervene in this
20 scenario, and defendants' position would have the Court
21 completely hamstrung in the face of what everybody acknowledges
22 to be, frankly, distressing conditions occurring and
23 distressing failures to educate children at the school.

24 So with that, Your Honor, I will pass my time to
25 Ms. Friley.

1 THE COURT: Ms. Friley, come on up.

2 MS. FRILEY: Thank you, Your Honor. And once again, I
3 am Jesselyn Friley with public counsel for the plaintiffs.

4 I'd like to make a few rebuttal points about issues
5 that have been raised about plaintiffs' expert reports.

6 First, Ms. Olson repeatedly said that in our Section
7 504 claim and our other claims, we had not identified specific
8 remedies.

9 We have ten expert reports, and for the 504 claim, in
10 particular, I point you to the Persinger report, the Batsche --
11 Persinger report, the Batsche report, the DeCoteau report, the
12 Davis report, and the Ranjbar report, for specific remedies.

13 Second, Ms. Olson said several times in reference to
14 the expert reports that the experts had not visited the school.
15 I have a couple of points on that. First, the remedy has to --
16 sorry, the accommodations have to be tailored to the individual
17 students under the standard announced in Mark H. versus
18 Hamamoto.

19 What we are looking at is whether the accommodations
20 are necessary to give them meaningful access to an education.
21 No part of the standard says that the school has to be
22 evaluated and visited by the qualified experts who are opining
23 on the reasonable accommodations.

24 And in any event, Dr. Ranjbar did, in fact, meet with
25 five of the students and evaluate them, contrary to Ms. Olson's

1 implication. And Dr. DeCoteau testified in her deposition, and
2 this is cited in defendants' opposition, that she, if she had
3 visited the school, her opinions about the necessary
4 accommodations would not have changed.

5 Because the accommodations that would work at this
6 school have worked in every other school she has worked in,
7 including those in Montana that are so rural that the roads are
8 impassible in the winter, and other locations in the Dakotas
9 that are very remote.

10 In the face of plaintiffs' three trauma experts,
11 plaintiffs have -- sorry, defendants have not put forth expert
12 testimony that contradicts plaintiffs' arguments that these
13 accommodations are necessary.

14 All they have done is provide a declaration from their
15 putative expert Teresa Paul, one of their employees, who takes
16 issue with only the Ranjbar report, and our briefing has a lot
17 of argument about why that declaration is not admissible.

18 But I would just like to point out that the Ranjbar
19 report is assessing all of the things that students need, and
20 not prescribing who should provide all of those things to the
21 students.

22 So, for instance, she says, specifically, that medical
23 care would not necessarily need to be provided by the school.
24 And that's something that Ms. Paul takes issue with.

25 So we just don't think that there's a factual dispute

1 between what plaintiffs' experts have put forth and what
2 Ms. Paul says in her declaration, and that's really all they
3 have on the issue of reasonable accommodations.

4 To close, I'd just like to focus on what defendants
5 have really been saying with respect to all of their claims,
6 but especially the 504 claim.

7 They know that these students have been impacted by
8 trauma, and they haven't been educated for a very long time,
9 and in fact, they know that across all of their schools, their
10 students are facing similar issues. But they are saying that
11 in this school, nothing can be done. And that's not reasonable
12 as a matter of law or on the record in front of us.

13 We have put forth accommodations and remedies that are
14 reasonable and that our experts say are necessary in this
15 situation, and defendants are asking you to find that nothing
16 is reasonable, and that's why plaintiffs are entitled to
17 summary judgment on their claims.

18 THE COURT: Thank you very much, counsel.

19 Ms. Olson, you have six minutes.

20 MS. OLSON: Thank you, Your Honor.

21 I would like to reiterate the point that what is at
22 issue here is Article III Separation of Powers, as far as the
23 plaintiffs' APA claims and the repeated admonitions of the
24 cases we've cited that having an indefinitely extended
25 all-purpose supervision of the defendants' compliance with

1 unlimited duties is not something that the Court should engage
2 in. The court said that in Cobell with the D.C. Circuit.

3 The remedies that they are talking about here are
4 trauma-informed practices. And the reason that these are not
5 reasonable is -- or not a reasonable accommodation, is because
6 they don't meet the standards required for -- under 504 for a
7 reasonable accommodation. They would fundamentally and
8 substantially transform the school.

9 Our witness, Teresa Paul, explained why, because it
10 would require a paradigm shift in the approach that the school
11 took. And we're talking about an accommodation for two
12 students here. The only two students who allegedly have been
13 diagnosed with a disability due to exposure to trauma.

14 It would require a substantial and fundamental
15 transformation of the school. And the Supreme Court said that
16 an agency doesn't have to make -- an accommodation is not
17 reasonable if it would require such a transformation.

18 The reason it's relevant that their experts never
19 visited the school, except I think one of them testified she'd
20 been there on a vacation years ago, is because the decision
21 about whether an accommodation is reasonable, requires an
22 individualized case-by-case assessment.

23 And the experts, none of them, have gone so far as to
24 say that trauma-informed practices should be incorporated into
25 the Havasupai school. They've said they would be beneficial

1 but they have not testified that they believe the school should
2 adopt them.

3 And their own expert, Lisa Persinger said this is an
4 emerging field. So what they are asking the Bureau of Indian
5 Education to do is take a leap of faith and adopt emerging,
6 evolving practices as to which none of their experts could cite
7 to a school where there was an evidenced based trauma-informed
8 model that was in effect and had been proven to be effective
9 other than, you know, to graduate students and researchers.

10 There is no evidenced based trauma-informed school in
11 effect, but they want to transform the Bureau of Indian
12 Education into such a school.

13 And the Havasupai -- BIE has a pilot program
14 concerning trauma-informed schools. It's examining this issue
15 like a lot of other schools. It's also not adverse to
16 incorporating some trauma-informed practices into the Havasupai
17 school, where that's appropriate. But there is no proof yet
18 that that is indeed the best practice for the Havasupai school.

19 We have shown that it is -- that implementing such a
20 school would be an undue burden at this point, because Teresa
21 Paul testified that it would create financial, logistical, and
22 administrative burdens that the school isn't equipped to
23 handle.

24 It is an academic institution, and having it converted
25 to a trauma-informed school, in effect, it would require

1 additional personnel costs, the hiring of new staff, a new
2 nurse, clinician, nutritionist, psychiatrist. It would turn
3 the -- there would be continuous training costs due to the high
4 staff turnover at the Havasupai school.

5 There would be housing problems, because as Ms. Paul
6 testified, we have to get rid of all the current teachers in
7 order to house all the staff that this would require.

8 So we have shown that it is -- in an ideal world, yes,
9 this would be great. This school could have it all. But this
10 is the real world, with real budget constraints that make such
11 an endeavor not feasible.

12 And the recommendations that their experts have
13 offered are not feasible for one reason or another, either
14 because logistically or legally, we can't do them, or we have
15 implemented some of them, the ones that we can implement.

16 But there is -- there is an entire transformation of
17 the school that would have to take place in order for it to
18 become a trauma-informed school.

19 I would just invite the Court to step back from the
20 specifics and an obey the law injunction would simply invite
21 another round of briefing and arguments in yet another attempt
22 for the plaintiffs to figure out what they want us to do.

23 The problems at the Havasupai school are difficult and
24 they are complex. There isn't a silver bullet. There's no
25 simple command that's going to solve all of the problems. And

1 if solutions are offered, we will eagerly accept them to the
2 extent they're legally permissible and feasible.

3 In the meantime, Your Honor, BIE continues to do
4 whatever is within its authority to educate the students and
5 the school -- at the school pursuant to its statutory and
6 regulatory duties within the constraints that it faces.

7 Thank you, Your Honor.

8 THE COURT: I want to thank all of you for your hard
9 work in this matter, and obviously it is under advisement. And
10 safe travels back to your firms.

11 Court is adjourned.

12 (Proceedings conclude at 10:54 a.m.)
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C E R T I F I C A T E

I, ELVA CRUZ-LAUER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 10th day of December, 2019.

s/Elva Cruz-Lauer
Elva Cruz-Lauer, RMR, CRR

C E R T I F I C A T E

I, ELVA CRUZ-LAUER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

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DATED at Phoenix, Arizona, this 10th day of December, 2019.

s/Elva Cruz-Lauer
Elva Cruz-Lauer, RMR, CRR

TAB 11

Case 3:17-cv-08004-SPL Document 203 Filed 07/16/19 Page 1 of 20

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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**

TABLE OF CONTENTS

ARGUMENT	1
I. COUNTS I AND II ARE NOT ACTIONABLE UNDER THE APA.....	1
II. COUNT IV DOES NOT IDENTIFY A REASONABLE ACCOMMODATION....	5
III. DOE REGULATIONS IN COUNTS V AND VI DO NOT APPLY TO HES.	8
IV. THE CLAIMS OF DURELL P. AND STEPHEN C. ARE MOOT.....	12
CONCLUSION	14

TABLE OF CONTENTS

Cases

<i>Alexander v. Choate</i> , 469 U.S. 287 (1985).....	7
<i>C.F. ex. rel. Farnan v. Capistrano Unified Sch. Dist.</i> , 654 F.3d 975 (9th Cir. 2011)	12, 14
<i>City of N.Y. v. U.S. Dep't of Def.</i> , 913 F.3d 423 (4th Cir. 2019)	2, 3, 4
<i>Coleman v. Darden</i> , 595 F.2d 533 (10th Cir. 1979).....	10
<i>Defenders of Wildlife v. Flowers</i> , No. 02-CV-195, 2003 WL 22143270 (D. Ariz. Aug. 18, 2003), <i>aff'd</i> , 414 F.3d 1066 (9th Cir. 2005).....	4
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974).....	12, 14
<i>Doe v. Madison Sch. Dist. No. 321</i> , 177 F.3d 789 (9th Cir. 1999)	12, 13, 14
<i>Greenpeace Action v. Franklin</i> , 14 F.3d 1324 (9th Cir. 1992)	14
<i>Husky Int'l Elecs., Inc. v. Ritz</i> , 136 S. Ct. 1581 (2016)	10
<i>Lujan v. Nat'l Wildlife Fed'n</i> , 497 U.S. 871 (1990).....	2, 3
<i>Nevada Association of Counties v. Department of Interior</i> , No. 3:13-cv-712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015), <i>aff'd</i> , 686 Fed. App'x 407 (9th Cir. 2017)	4
<i>Norton v. S. Utah Wilderness All.</i> , 542 U.S. 55 (2004).....	3
<i>Quinones v. Potter</i> , 661 F. Supp. 2d 1105 (D. Ariz. 2009).....	6
<i>S. Carolina v. United States</i> , 907 F.3d 742 (4th Cir. 2018)	5

Case 3:17-cv-08004-SPL Document 203 Filed 07/16/19 Page 4 of 20

1	<i>Sepe v. Gordon Trucking, Inc.</i> ,	
2	755 F. App'x 668 (9th Cir. 2019).....	8
3	<i>Sierra Club v. Peterson</i> ,	
4	228 F.3d 559 (5th Cir. 2000)	4
5	<i>Steel Co. v. Citizens for a Better Env't</i> ,	
6	523 U.S. 83 (1998).....	13
7	<i>U.S. Dep't of Transp. v. Paralyzed Veterans of Am.</i> ,	
8	477 U.S. 597 (1986).....	10
9	<i>Veterans for Common Sense v. Shinseki</i> ,	
10	678 F.3d 1013 (9th Cir. 2012)	5
11	<i>Vietnam Veterans of Am. v. CIA</i> ,	
12	811 F.3d 1068 (9th Cir. 2016)	5
13	<i>Wong v. Regents of Univ. of Cal.</i> ,	
14	192 F.3d 807 (9th Cir. 1999)	6
15	<i>Zukle v. Regents of Univ. of Cal.</i> ,	
16	166 F.3d 1041 (9th Cir. 1999).....	6
17	<u>Statutes</u>	
18	5 U.S.C. § 702.....	2, 3
19	5 U.S.C. § 706.....	3, 5
20	20 U.S.C. § 1411(h)(2).....	11
21	20 U.S.C. § 7824(a)(2)	11
22	29 U.S.C. § 794(a)	10
23	<u>Regulations</u>	
24	2 C.F.R. § 200.40(a)	10
25	25 C.F.R. part 39.....	9
26	25 C.F.R. § 39.2.....	9
27	43 C.F.R. part 17.....	8, 9
28	43 C.F.R. § 17.220	11

1	43 C.F.R. § 17.502	9
2	43 C.F.R. § 17.503	11
3	43 C.F.R. §§ 17.200-17.280	9
4	43 C.F.R. §§ 17.501-17.570	9
5	110 Cong. Rec. 13380 (1964)	10
6	Exec. Order No. 13,160, Guidance Document: Ensuring Equal Opportunity in Federally	
7	Conducted Education and Training Programs,	
8	66 Fed. Reg. 5398 (Jan. 18, 2001)	11, 12
9	<u>Other Authorities</u>	
10	<i>City of N.Y. v. Dep't of Def.</i> , Dec. 11, 2018 Oral Argument,	
11	https://www.courtlistener.com/audio/60509/city-of-new-york-v-dod	2
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1 Plaintiffs' briefing on summary judgment serves to highlight that there are numerous
2 factual disputes relating to the services rendered at Havasupai Elementary School ("HES"). The
3 situation at HES changes constantly, sometimes on a daily basis, as the Bureau of Indian
4 Education ("BIE") works hard to address the challenges that inevitably arise from operating a
5 school in the bottom of the Grand Canyon. For purposes of Defendants' motion, however, the
6 Court should set aside those disputes and resolve the legal questions presented.

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

16 ARGUMENT

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

18 Most parties do not go as far as openly asserting that they are challenging the
19 administration of a program and seeking systemic relief; Plaintiffs have expressly admitted as
20 much. *See, e.g.*, Third Am. Compl. ("TAC") ¶ 251, ECF No. 128; Exhibit A to Pls.' Resp. to
21 Defs.' First Set of Interrog. (attached as Ex. 24). Programmatic challenges are often disguised
22 through the aggregation of multiple claims that purport to exemplify an agency's systemic failure
23 to comply with its legal obligations. By seeking review of an agency's conduct over an extended
24 period of time and across different areas, the aggrieved party asks the Court to oversee a
25 program's day-to-day operations and superintend its wholesale correction. This is the tack
26 pursued in Counts I and II: whether the Bureau of Indian Education ("BIE") has complied with
27 13 different regulations implementing the Indian Education Act—each containing numerous
28 legal obligations—in administering HES over the last approximately ten years.

1 1. Although Plaintiffs repeatedly assert that Defendants mischaracterize their APA
 2 claims, the Court need not defer to Defendants' characterization. In cases involving
 3 programmatic challenges, such as this one, "the requested remedy tells the real story." *City of*
 4 *N.Y. v. U.S. Dep't of Def.*, 913 F.3d 423, 434 (4th Cir. 2019). And here, Plaintiffs' sweeping prayer
 5 for relief speaks volumes. *See* Defs.' MSJ, at 7-9 & n.2, ECF 182.¹ Plaintiffs argue that their
 6 requested relief "is phrased in general terms" "[f]or the sake of brevity," but "refers back to
 7 specific regulations governing such matters as staffing, curricula, and services." Pls.' Opp'n at
 8 7 n.4, ECF No. 190. But whether or not the prayer for relief refers back to regulations, the
 9 nature of the claims remains the same: the aggregation of numerous flaws that could only be
 10 remedied through extensive reform. *See* TAC ¶¶ 239-40, 251-52; *id.* at Relief ¶¶ 1-4. While such
 11 reform may be desirable as a policy matter, "wholesale improvement" of the school *must* take
 12 place in the "offices of the Department" of the Interior "or the halls of Congress," *Lujan v. Nat'l*
 13 *Wildlife Fed'n*, 497 U.S. 871, 891 (1990), not in a courtroom, where corrections under the APA
 14 are made *only* on a "case-by-case" basis through review of *discrete* actions, *id.* at 894.

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

23 ¹ Plaintiffs argue that any discussion of remedy is "premature when the Court has not yet made
 24 any findings regarding liability." Pls.' Opp'n at 7. But that argument is especially meritless in
 25 the APA context, where the requested remedy often informs the question of whether the APA
 26 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-](https://www.courtlistener.com/audio/60509/city-of-new-york-v-dod)
 dod (last visited July 15, 2019), and was rejected by the Court of Appeals, 913 F.3d at 434.

27 ² These references to the Indian Education Act relate directly to the APA claims in Counts I
 28 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.

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

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

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

13 As an initial matter, Plaintiffs fail to address *Lujan*, the seminal case on programmatic
 14 challenges relied upon by Defendants. There, the Supreme Court held that, notwithstanding
 15 how “rampant” is the “violation of the law,” an agency “‘program’—consisting principally of
 16 the *many individual actions* referenced in the complaint, and presumably actions yet to be taken as
 17 well—cannot be laid before the courts for wholesale correction under the APA.” 497 U.S. at
 18 891, 893 (emphasis added). The specific failures in administering the land withdrawal review
 19 program—*e.g.*, failures to revise land use plans, submit recommendations to Congress, consider
 20 multiple use, provide required notice, and provide environmental impact statements—were not
 21 reviewable when aggregated for correction. *See id.* at 891. Similarly here, Plaintiffs “cannot seek
 22 wholesale improvement” of the school by aggregating failures in administering HES. *Id.*

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

26 ³ Plaintiffs have developed a record consisting of more than 30,000 pages that touches upon
 27 almost every single aspect of the school’s operation over the past ten years—*e.g.*, teacher training,
 28 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.

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

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

19 Plaintiffs’ APA claims also bear a close resemblance to those in *Sierra Club v. Peterson*, 228
 20 F.3d 559, 565-70 (5th Cir. 2000) (en banc), *Nevada Association of Counties v. Department of Interior*,
 21 No. 3:13-cv-712-MMD, 2015 WL 1130982, at *2-*4 (D. Nev. Mar. 12, 2015), *aff’d*, 686 Fed.
 22 App’x 407 (9th Cir. 2017); *Defenders of Wildlife v. Flowers*, No. 02-CV-195, 2003 WL 22143270, at
 23 *1-*2 (D. Ariz. Aug. 18, 2003), *aff’d*, 414 F.3d 1066 (9th Cir. 2005). The organizations in those
 24 cases also sought to challenge administrative practices and used specific instances of failures to

25
 26 ⁴ Plaintiffs note that the cities in *City of N.Y.*, “significantly, had no formal right” to use the
 27 admittedly deficient background check database. Pls.’ Opp’n at 4. But that point is “significant”
 28 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.

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

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

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

16 **II. COUNT IV DOES NOT IDENTIFY A REASONABLE ACCOMMODATION.**

17 Plaintiffs have failed to establish that Count IV presents a *prima facie* case of
18

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

24 ⁶ Plaintiffs' reliance on *VVA* is misplaced for another reason. *VVA* mainly addressed a
25 different question: whether a regulation contained a nondiscretionary duty giving rise to a legal
26 obligation, that is, whether the duties to warn and provide medical care were legally required.
27 811 F.3d at 1076-81; *id.* at 1083-85 (Wallace, J., concurring and dissenting in part).

28 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.*

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

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

22 Accordingly, Plaintiffs have failed to produce evidence demonstrating that the *systemic*
23 accommodation of a “trauma-informed school” would in fact allow each of these *individual*
24 students to obtain meaningful access to education at HES. *See Zukle v. Regents of Univ. of Cal.*,
25 166 F.3d 1041, 1047 (9th Cir. 1999). Being able to obtain *equal* access to a basic education
26 ultimately requires an individualized assessment of the students’ needs, *see* Defs.’ MSJ at 11-12,
27 which is why educational needs are often addressed through individualized plans and not
28

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

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

9 Plaintiffs argue that the Court should disregard the declaration of Teresia Paul, BIE's
 10 Student Health Program Specialist, because her testimony consists of "rebuttal opinions [that]
 11 were not timely disclosed." Pls.' Opp'n at 9. Plaintiffs misstate events, however. Defendants
 12 did disclose Ms. Paul pursuant to Federal Rule of Civil Procedure 26(a)(2)(C) as an expert
 13 rebuttal witness expected "to rebut the testimony of plaintiffs' putative experts and offer her
 14 opinion that while trauma-informed programming is beneficial to all students, the program
 15 proposed by plaintiffs' experts would not be feasible to implement at HES due to the school's
 16 unique needs/challenges; and there is not one exclusive way to incorporate trauma-informed
 17 practices specifically for HES." Ex. 29, Defs.' Disclosures Pursuant to Rule 26(a)(2)(C)
 18 Concerning Paul Decl. ¶ 3. Following this disclosure, Plaintiffs deposed Ms. Paul and
 19 questioned her extensively on whether it was feasible to implement the type of trauma-informed
 20 approach at HES envisioned by Drs. Davis and DeCoteau. *See* Ex. 28, Paul Dep. 102:10-118:9.⁹
 21 Accordingly, Plaintiffs received sufficient notice of the substance of Ms. Paul's testimony as it
 22 pertained to these experts' recommendations. In any event, given the nature of the disclosure
 23 made and the opportunity to depose Ms. Paul, Plaintiffs were not prejudiced by any supposed

24 _____
 25 ⁸ Plaintiffs apparently confuse the (laudable) policy goal of better educational outcomes with
 26 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).

27 ⁹ Admittedly, at her deposition, Ms. Paul did not state that she had read Dr. Ranjbar's report or
 28 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.

1 failure to more fully describe Ms. Paul's anticipated testimony. *See Sepe v. Gordon Trucking, Inc.*,
 2 755 F. App'x 668, 670 (9th Cir. 2019) (failure to disclose physicians as experts and provide
 3 reports was harmless because party was aware of both witnesses).

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

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

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

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

24 1. The first argument is a convoluted syllogism created from whole cloth: (1) Subpart B
 25 applies to a "program or activity" receiving "Federal financial assistance from [DOI];" (2) A
 26 "program or activity" in Subpart B includes a "local education agency" ("LEA"); (3) Congress
 27 has defined LEAs to include BIE-funded schools; (4) a DOI regulation defines BIE-funded
 28

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

3 *First*, a "program or activity" under Subpart B (43 C.F.R. §§ 17.200-17.280) is an entity
4 that is "extended Federal financial assistance" by DOI, *id.* §§ 17.201, 17.202(q)(2)(ii). That
5 stands in stark contrast to a "program or activity" under Subpart E (43 C.F.R. §§ 17.501-17.570),
6 which is "conducted and/or administered and/or maintained by" DOI, 43 C.F.R. § 17.502.
7 HES is not subject to Subpart B for the basic reason that it is a school conducted, administered,
8 and maintained by DOI and, thus, it is subject to Subpart E. *See* Defs.' MSJ at 14-15.¹⁰

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

16 The regulation cited by Plaintiffs, 25 C.F.R. § 39.2, defines the term "Bureau-funded
17 school" to include both BIE-operated and tribally-operated schools. But that regulation has
18 nothing to do with Section 504 or DOI's regulations interpreting *that* statute. DOI's Section
19 504 regulations are in 43 C.F.R. part 17, not 25 C.F.R. part 39 ("The Indian School Equalization
20 Program"). Ironically, 25 C.F.R. § 39.2 is entitled "What definitions apply to the terms *in this*
21 *part?*," referring of course to part 39 of Title 25. Therefore, when § 39.2 defines the term
22 "Bureau-funded school" it is in the context of the No Child Left Behind Act, not Section 504.

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

27
28 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.

1 programs conducted by an executive agency. *See* 29 U.S.C. § 794(a). Just as new language in a
 2 statute must be given a “real and substantial effect,” *Husky Int’l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581,
 3 1586 (2016), so too DOI’s Section 504 regulations must be interpreted as written.

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

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

9 *First*, Plaintiffs do not cite any authority for the proposition that a federally-operated
 10 program could also be a recipient of Federal financial assistance under Section 504. Nor could
 11 they. That conclusion would eviscerate the textual distinction between programs operated by
 12 federal agencies and programs receiving financial assistance from those agencies. *See* 29 U.S.C.
 13 § 794(a). It would also contradict the legislative history, which makes it unmistakably clear that
 14 “[a]ctivities wholly carried out by the United States with Federal funds,” such as a federally-
 15 owned and operated school, “are not included in the list of federally assisted programs. Such
 16 activities, being wholly owned by, and operated by or for, the United States, *cannot fairly be*
 17 *described as receiving Federal ‘assistance.’”* 110 Cong. Rec. 13380 (1964) (emphasis added), *cited in*
 18 *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 612 (1986); *see also* 2 C.F.R. §
 19 200.40(a) (Office of Management and Budget guidance defining “Federal financial assistance”
 20 as “assistance that *non-Federal* entities receive or administer” (emphasis added)).¹¹

21 *Second*, every single BIE-operated school receives funds transferred from DOE to BIE.
 22 If it were true that a federally-operated program could also be federally assisted, as Plaintiff
 23 mistakenly contends, then all BIE-operated schools would have to comply with DOE’s Section
 24 504 regulations. But that conclusion again would render meaningless the distinction between
 25 DOI’s Subpart B, which enforces DOE’s regulations *ex proprio vigore*, and Subpart E, which does

26 ¹¹ *Paralyzed Veterans* was cited for its discussion of Section 504’s legislative history, which makes
 27 clear that a federally-operated program cannot be federally assisted. Plaintiffs’ discussion of the
 28 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

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.

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

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

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

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

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

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

14 Plaintiffs' invocation of the exception fails because there is no reasonable expectation
 15 that the plaintiffs will be subjected to the challenged action again. In other words, because these
 16 "student-plaintiff[s] here will not graduate from [HES] again," the alleged deficiencies at the
 17 school—the challenged action in each count of the TAC—are not capable of repetition against
 18 Durell P. and Stephen C. *Doe*, 177 F.3d at 798-99; *accord C.F. ex. rel. Farnan*, 654 F.3d at 983.¹⁵

19 CONCLUSION

20 For the foregoing reasons, this Court should grant Defendants' motion.
 21
 22
 23

24 ¹⁴ Plaintiffs' theory is not only legally unsupported, but also makes little sense as a practical
 25 matter. Under their theory, an individual could file an action challenging systemic deficiencies
 26 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.

27 ¹⁵ Plaintiffs cannot invoke "similar deficiencies in other [unspecified] schools within the BIE
 28 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.

1 Dated: July 16, 2019

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TAB 12

Case 3:17-cv-08004-SPL Document 202 Filed 07/16/19 Page 1 of 17

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

ORAL ARGUMENT REQUESTED

Case No. 3:17-cv-08004-SPL

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT.....	1
I. DEFENDANTS ARE INDISPUTABLY VIOLATING 5 U.S.C. § 706(1) BY FAILING TO PROVIDE HES STUDENTS WITH AN EDUCATION THAT MEETS THE MINIMUM STANDARDS SET FORTH IN 25 C.F.R.	1
II. DOI CANNOT AVOID A FINDING THAT IT IS DISCRIMINATING AGAINST STUDENTS WITH DISABILITIES IN VIOLATION OF SECTION 504 THROUGH VAGUE PROMISES TO CEASE ITS VIOLATIONS IN THE FUTURE	6
III. DOI INDISPUTABLY FAILS TO OFFER REASONABLE ACCOMMODATIONS FOR CHILDREN IMPACTED BY COMPLEX TRAUMA	11
IV. DOI CANNOT DISCLAIM ITS OBLIGATION UNDER SECTION 504 TO IDENTIFY AND NOTIFY STUDENTS WITH DISABILITIES OR PROVIDE PROCEDURAL SAFEGUARDS	11
CONCLUSION.....	12

TABLE OF AUTHORITIES**Page(s)****FEDERAL CASES**

<i>In re Barr Labs., Inc.</i> , 930 F.2d 72 (D.C. Cir. 1991)	3
<i>Cobell v. Norton</i> , 240 F.3d 1081 (D.C. Cir. 2001)	2, 4
<i>Cutler v. Hayes</i> , 818 F.2d 879 (D.C. Cir. 1987)	3
<i>Fikre v. F.B.I.</i> , 904 F.3d 1033 (9th Cir. 2018).....	7
<i>High Sierra Hikers Ass’n v. Blackwell</i> , 390 F.3d 630 (9th Cir. 2004).....	6
<i>In re Int’l Chem. Workers Union</i> , 958 F.2d 1144 (D.C. Cir. 1992)	3
<i>Mark H. v. Lemahieu</i> , 513 F.3d. 922 (9th Cir. 2008).....	12
<i>McCormack v. Herzog</i> , 788 F.3d 1017 (9th Cir. 2015).....	7
<i>Org. for Competitive Markets v. USDA</i> , 912 F.3d 455 (8th Cir. 2018).....	3
<i>In re Pesticide Action Network N.A.</i> , 532 F. App’x 649 (9th Cir. 2013)	3
<i>Qwest Commc’ns Int’l, Inc. v. FCC</i> , 398 F.3d 1222 (10th Cir. 2005).....	3
<i>Sierra Club v. Thomas</i> , 828 F.2d 783 (D.C. Cir. 1987)	2, 3
<i>W. Rangeland Conservation Ass’n v. Zinke</i> , 265 F. Supp. 3d 1267 (D. Utah 2017).....	3
<i>Wong v. Regents of Univ. of Cal.</i> , 192 F.3d 807 (9th Cir. 1999).....	11

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEDERAL STATUTES

5 U.S.C. § 706(1)..... 1, 2, 3, 4

42 U.S.C. § 12102..... 9

Rehabilitation Act of 1973, § 504 1, passim

FEDERAL RULES

Fed. R. of Evid. 703..... 9

D. Ariz. LRCiv. 56.1(b)..... 3

FEDERAL REGULATIONS

25 C.F.R. pt. 36..... 2, 5, 6

25 C.F.R. § 32.3..... 4

25 C.F.R. § 36.20..... 1, 5

25 C.F.R. § 36.22..... 1

25 C.F.R. § 36.23..... 1

25 C.F.R. § 36.40..... 1

25 C.F.R. § 36.41..... 1

25 C.F.R. § 36.42..... 1, 2, 5

25 C.F.R. § 36.43..... 1, 5

43 C.F.R. pt. 17, subpt. B 12

FEDERAL ADMINISTRATIVE MATERIALS

59 Fed. Reg. 61766 (Dec. 1, 1994)..... 2

INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment is an exercise in distraction. Defendants acknowledge that they are obligated to provide students at Havasupai Elementary School (HES) with a general education that meets the minimum standards of the Indian Education Act and its implementing regulations, and that they must provide students with disabilities with meaningful access to education under Section 504 of the Rehabilitation Act of 1973. Defendants also acknowledge that they are failing to meet these obligations in many respects.

Despite this, Defendants urge the Court to deny Plaintiffs' Motion in its entirety. According to Defendants, compliance with their legal obligations is challenging, which, in their view, entitles Defendants to an apparently limitless grace period in which they can avoid judicial scrutiny of their failures and inaction as long as they profess to be "working to" address the problem. This is simply not a defense. Defendants do not and cannot show that the supposed challenges of delivering general or special education services at HES excuse them from the duty to provide these services, nor do they show that their purported efforts to meet their obligations raise a genuine issue of material fact as to whether they are complying with their obligations today or stand any chance of doing so in the future. The Court should grant Plaintiffs' Motion for Partial Summary Judgment.

ARGUMENT**I. DEFENDANTS ARE INDISPUTABLY VIOLATING 5 U.S.C. § 706(1) BY FAILING TO PROVIDE HES STUDENTS WITH AN EDUCATION THAT MEETS THE MINIMUM STANDARDS SET FORTH IN 25 C.F.R.**

Defendants resist partial summary judgment on Count I of Plaintiffs' Third Amended Complaint (TAC) on three grounds, none of which has merit.¹ *First*, Defendants reiterate

¹ Contrary to footnote 1 of Defendants' Opposition, Plaintiffs have not "narrowed" Count I to the regulations addressed in their Motion. Plaintiffs affirmatively moved for summary judgment as to 25 C.F.R. §§ 36.20, 36.22-23, and 36.40.-43 because there is no genuine factual dispute that BIE is violating provisions of those regulations, and Plaintiffs are entitled to judgment as to those violations. Plaintiffs have not abandoned their claims as to other provisions of 25 C.F.R., and will prove additional violations at trial.

1 their view that Plaintiffs' APA claims constitute a "programmatic challenge[]" and are "not
 2 actionable" as a result. ECF No. 191 (Def. Opp.) at 2. Defendants are wrong for the reasons
 3 previously stated in Plaintiffs' opening memorandum, *see* ECF No. 184 (Pl. MSJ) at 3-9,
 4 and Plaintiffs' opposition to Defendants' Motion, *see* ECF No. 190 (Pl. Opp.) at 2-7.

5 *Second*, Defendants accuse Plaintiffs of "[d]isregard[ing]" the legal standards
 6 governing a Section 706(1) claim because Plaintiffs have not addressed the factors courts
 7 often apply to determine whether an agency action has been "unreasonably delayed." Def.
 8 Opp. at 3-6. According to Defendants, Plaintiffs' 706(1) claim *must* be a challenge to
 9 unreasonably delayed action because 25 C.F.R. contains "no deadline[] for compliance." *Id.*
 10 at 3. This is specious. As Defendants concede, BIE "is responsible for ensuring that HES
 11 implements 25 C.F.R. part 36." *Id.* at 6. The requirements of 25 C.F.R. are mandatory,²
 12 and have not been substantively altered in decades. *See, e.g.*, 25 C.F.R. § 36.42 (last
 13 amended at 59 Fed. Reg. 61766 (Dec. 1, 1994)). These regulations contain no deadline for
 14 compliance not because they are aspirational or command BIE to take future action
 15 according to a timeline left to agency discretion, but because they set forth minimum
 16 educational standards with which BIE is under an *ongoing* duty to comply.

17 The cases Defendants cite to support their preferred characterization of Plaintiffs'
 18 claims provide no support at all. Contrary to Defendants' assertion, the court in *Cobell v.*
 19 *Norton*, 240 F.3d 1081 (D.C. Cir. 2001), did not discuss the distinction between actions
 20 "unlawfully withheld" and those "unreasonably delayed" at all. Moreover, *Cobell*
 21 acknowledged that "where an agency is under an unequivocal statutory duty to act, failure
 22 so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review,"
 23 which is precisely the scenario here. *Id.* at 1095 (internal quotation marks omitted).
 24 Similarly, *Sierra Club v. Thomas* specifically distinguished the plaintiff's unreasonable
 25 delay claim, which sought to compel the defendant agency to conclude a rulemaking by a
 26

27 _____
 28 ² Defendants purport to "acknowledge[] [their] duties under the relevant regulations," Def.
 Opp. at 4, and do not appear to contest that the requirements of 25 C.F.R. are mandatory.

certain date, from a claim that an agency “has failed to perform a nondiscretionary duty,” 828 F.2d 783, 794 (D.C. Cir. 1987), which, again, is what Plaintiffs claim here. And *Organization for Competitive Markets v. USDA* provides little guidance on distinguishing between actions that are withheld versus delayed, but instead holds that the agency’s failure to finalize the proposed rule at issue actually complied with the congressional directive in question. 912 F.3d 455, 462-63 (8th Cir. 2018). Defendants’ remaining cases all involve claims brought expressly for the purpose of forcing an agency to speed up an ongoing process. See *In re Pesticide Action Network N.A.*, 532 F. App’x 649, 650 (9th Cir. 2013); *Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1238 (10th Cir. 2005); *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1148 (D.C. Cir. 1992); *In re Barr Labs., Inc.*, 930 F.2d 72, 73 (D.C. Cir. 1991); *Cutler v. Hayes*, 818 F.2d 879, 885-86 (D.C. Cir. 1987); *W. Rangeland Conservation Ass’n v. Zinke*, 265 F. Supp. 3d 1267, 1282 (D. Utah 2017).

There is no analogous process here. Tellingly, Defendants do *not* argue that they will bring HES into compliance with 25 C.F.R. if given enough time to do so. To the contrary, Defendants devote their entire Supplemental Statement of Facts to explaining why they believe compliance is effectively impossible. See ECF No. 195 (Def. SSOF) ¶¶ 120-56. This is untenable and irrelevant,³ as the regulations do not contain any exception that excuses compliance because BIE finds it “challenging” to comply. But Defendants’ position is nonetheless revealing. Their complaint about the “challenges” of providing a basic education to HES students is, for all intents and purposes, a repudiation of their legal obligations and should be viewed as such. Defendants have a nondiscretionary duty to provide an education to HES students that meets the minimum standards of 25 C.F.R. They are not doing so, and thus judicial review is appropriate under Section 706(1). See *Sierra Club*, 828 F.2d at 794.

³ Plaintiffs object to the entirety of Defendants’ Supplemental Statement of Facts as immaterial. In accordance with Civil Local Rule 56.1(b), Plaintiffs do not submit a reply statement of facts.

1 In attempting to evade review, Defendants seek license to extend their regulatory
 2 noncompliance indefinitely based on their own self-interested evaluation of what is feasible.
 3 In the meantime, generations of HES students, including the Student Plaintiffs, suffer the
 4 effects. As even BIE concedes, “almost no students at HES are proficient in reading, writing,
 5 or math.” Def. SSOF ¶ 34. As in *Cobell*, delaying judicial review here would be
 6 “tantamount to denying review altogether.” 240 F.3d at 1095. The Court should reject
 7 Defendants’ attempt to distort the requirements of Section 706(1) to grant BIE unbridled
 8 discretion to disregard the clear mandates of 25 C.F.R.⁴

9 *Third*, Defendants argue that there are genuine disputes of material fact that preclude
 10 a finding that BIE is failing to implement the regulatory requirements on which Plaintiffs
 11 moved for summary judgment. Def. Opp. at 6-7. This fails as well. For one thing, and as
 12 Defendants fail to mention in their brief, Defendants actually concede several of the
 13 violations identified in Plaintiffs’ Motion. *See, e.g.*, Def. SSOF ¶¶ 9, 11, 17-18, 21
 14 (acknowledging that HES does not incorporate consumer economics into its middle school
 15 instructional program, employ a 1/5 time librarian, or maintain up-to-date reference
 16 materials in its library, and that its native language and culture programs have not received
 17 tribal approval). Defendants attempt to manufacture other supposed “disputes” through
 18 wordplay and meritless objections. For instance, while Defendants concede, as they must,
 19 that “HES does not currently have a textbook review committee,” Def. SSOF ¶ 25,
 20 Defendants nonetheless describe this fact as “dispute[d]” in their brief, Def. Opp. at 7,
 21

22
 23 ⁴ Although Plaintiffs do not agree that the *TRAC* factors, *see* Def. Opp. at 4, have any bearing
 24 on their APA claims, those factors plainly tip toward judicial intervention. Defendants have
 25 failed to meet the minimum standards of 25 C.F.R. *for years*, during which time dozens if
 26 not hundreds of students have passed through HES without receiving anything close to an
 27 adequate basic education. BIE’s failures implicate those children’s welfare and deprive
 28 them of an interest of utmost importance (*TRAC* factors 3 & 5). And it is unclear that an
 agency that exists *for the purpose of* providing for the education of Native American
 children, 25 C.F.R. § 32.3, could or should have any higher priority than educating those
 children (*TRAC* factor 4). The remaining *TRAC* factors do not counsel in favor of either
 intervention or non-intervention.

1 apparently on the theory that a “leadership team” reviewed textbooks in a prior school year.
 2 Def. SSOF ¶ 25. To take another example, although Jim Hastings—the BIE official
 3 concededly “responsible for ensuring that the schools he oversees are *complying* with federal
 4 regulations, including 25 C.F.R part 36,” *id.* ¶ 3 (emphasis added)—testified in no uncertain
 5 terms that HES does not comply with 25 C.F.R. § 36.42 when it relies on the school
 6 counselor to teach general education, Defendants dismiss this testimony as a “legal
 7 conclusion.” *Id.* ¶ 30.

8 In still other cases, Defendants attempt to dispute a fact with a laundry list of citations
 9 that add up to nothing of significance. Defendants “dispute” the fact that “BIE has frequently
 10 failed to employ a professional counselor at HES” by noting that HES had a counselor on
 11 staff for about a year between December 2016 and 2017 and employed a detailed counselor
 12 for roughly one month in 2014 and 2018. *Id.* ¶ 28. That HES was able to employ a counselor
 13 *at some point* between 2014 and the present hardly undermines the fact that there frequently
 14 has *not* been a counselor at HES; indeed, it emphasizes it. Defendants also “dispute” the
 15 fact that HES does not offer any student activity other than student council by citing a list of
 16 one-off events—like a Halloween parade—that HES has sponsored in the past. *Id.* ¶ 32.
 17 Not only are these not “activities” akin to the “special interest clubs, physical activities,
 18 student government, and cultural affairs” activities described in 25 C.F.R. § 36.43,
 19 Defendants could identify only three examples.

20 Defendants also profess mystification both at the meaning of terms such as
 21 “consistently” and “often” as well as the significance of such terms for Plaintiffs’ claims.
 22 See Def. Opp. at 7-8; Def. SSOF ¶¶ 22, 29. In fact, the relevance is straightforward: As
 23 Plaintiffs explained in their opening memorandum, the failure to consistently teach required
 24 subjects or offer required services is itself a violation, because 25 C.F.R. § 36.20(c)
 25 mandates that “All intraschool programs (*e.g., library, instructional labs, physical*
 26 *education, music, etc.*) which are directly related to or affect student instruction shall provide
 27 services from the beginning of the school term through the final class period at the close of
 28 the school term.” (emphasis added); see Pl. MSJ at 7. Thus, it is no defense to claim, as

Defendants do, that HES provides instruction in health, physical education, or native culture by providing one-off workshops regarding “hydration,” “taking students outside for physical activities” (which, in fact, describes recess, not physical education), or employing a native culture instructor for sporadic portions of a school year. Def. SSOF ¶¶ 6, 14, 16.

Defendants’ attempts to create issues of fact as to their compliance with the regulatory provisions identified in Plaintiffs’ Motion ultimately do little more than underscore the degree to which Defendants are failing to provide HES students with an education that meets even the basic requirements set forth by law. Defendants are indisputably failing to act to implement the regulatory commands of 25 C.F.R. part 36, and Plaintiffs are entitled to partial summary judgment establishing Defendants’ violation.

II. DOI CANNOT AVOID A FINDING THAT IT IS DISCRIMINATING AGAINST STUDENTS WITH DISABILITIES IN VIOLATION OF SECTION 504 THROUGH VAGUE PROMISES TO CEASE ITS VIOLATIONS IN THE FUTURE

DOI does not deny that it is discriminating against Student Plaintiffs with disabilities in violation of Section 504. Instead, with respect to Count III, the agency asks the Court to trust that it will correct these violations itself. Def. Opp. at 9. This hollow promise provides no basis for denying Plaintiffs’ Motion.

Plaintiffs moved for partial summary judgment as to liability on Count III of the TAC on the ground that DOI, through BIE, is indisputably violating Section 504. Pl. MSJ at 3, 9. Plaintiffs did not move for summary judgment as to remedies. Ignoring this, Defendants’ sole argument for why the Court should deny Plaintiffs’ Motion is that Defendants are purportedly “diligently working” to provide the Student Plaintiffs with disabilities with meaningful access in the future, and thus that there is “no further relief the Court could grant at this point.” Def. Opp. at 9. Defendants cite no legal authority to support their position. Indeed, the sole legal citation in this entire section of their brief merely affirms that courts have “broad latitude in fashioning equitable relief” in the face of “established wrong[s].” *Id.* (quoting *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004)).

Defendants' claim that there are no available remedies would be relevant only if Plaintiffs' claims were moot. But Defendants do not claim that Plaintiffs' claims under Count III are moot.⁵ Nor could they. Mootness is a demanding doctrine that, even under ordinary circumstances, requires a defendant to prove that there is *no* effective relief available. *See McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015). The burden is higher still where the defendant argues that its own "voluntary cessation of allegedly illegal conduct" renders a plaintiff's claims moot. *Fikre v. F.B.I.*, 904 F.3d 1033, 1037 (9th Cir. 2018). Voluntary cessation can establish mootness *only* where "it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur and interim relief or events have *completely and irrevocably eradicated the effects of the alleged violation.*" *Id.* (emphasis added) (alteration in original) (internal quotation marks omitted).

Defendants do not even attempt to meet this standard, and it is clear from the weak assortment of evidence they cite to support their claim to be "working" on remedying their Section 504 violations that they would fail if they tried. Defendants do not claim to have actually ceased any existing violation or provided any remedy, let alone taken steps to "completely and irrevocably eradicate[] the effects" of their violations. *Id.* Defendants can assert only that they "are in the process of providing Plaintiffs" relief and are "working to ensure" that Student Plaintiffs with disabilities receive meaningful access to education in the 2019-2020 school year. Def. Opp. at 1, 9. In other words, Defendants' violations are ongoing *as of today*, with only the possibility of ceasing in the future.

What is more, Defendants' promise that they will "fix" violations that have been ongoing at HES *for years* within the next few weeks is woefully unsupported. Defendants offer the statements of Marcy Oliver, a newly designated "*Acting* Section 504 Coordinator for the BIE," ECF No.195-23 ¶ 1 (emphasis added), and BIE Director Tony Dearman. Per her declaration, Ms. Oliver—who had not been identified as a person with responsibility for

⁵ Defendants repeat their argument that Stephen C.'s and Durell P.'s claims are moot because they have aged out of HES. ECF No. 182 (Def. MSJ) at 9. Defendants are incorrect for the reasons explained in Plaintiffs' Opposition to Defendants' Motion. Pl. Opp. at 16-17.

1 ensuring HES's compliance with Section 504 as recently as April 8, 2019, when Defendants
 2 responded to Plaintiffs' Interrogatories, ECF No. 195-3 at 9-10—has been directed to
 3 provide voluntary training over the summer to persons yet to be identified about Section 504
 4 policies and procedures that have yet to be developed. ECF No. 195-23 ¶¶ 5-7. For his part,
 5 Director Dearman maintains that he has “directed” Ms. Oliver to develop policies regarding
 6 Section 504 and has ordered “training . . . on Section 504 principles” to begin in the
 7 unspecified future. ECF No. 195-22 ¶¶ 3, 5. Based on these statements alone, Defendants
 8 ask this Court to assume that BIE schools, including HES, will be prepared to properly
 9 identify students protected by Section 504 and develop suitable Section 504 plans for such
 10 students come the start of the school year. Given DOI's longstanding failure to comply with
 11 Section 504, *see* Pl. MSJ at 13-16, the Court should decline to make this assumption and
 12 should reject Defendants' baseless invitation to deny summary judgment based on their
 13 vague assurances of future compliance.

14 Defendants' lengthy, unfocused response to Plaintiffs' Separate Statement of
 15 Material Facts alludes to various other reasons why the Court might decline to grant
 16 summary judgment as to liability on Count III (or Count IV). These assertions, which barely
 17 rise to the level of argument and largely do not appear in Defendants' brief, are meritless.

18 ***Student Plaintiffs Indisputably Are Individuals with Disabilities.*** Although they
 19 purport to be working to ensure the Student Plaintiffs have meaningful access to education
 20 at HES, Def. Opp. at 9, Defendants also appear to contest whether the Student Plaintiffs are
 21 actually individuals with disabilities for purposes of Section 504. This is not in genuine
 22 dispute. As Defendants concede, qualified experts evaluated Stephen C., Durell P., Taylor
 23 P., and Moana L. and diagnosed each of them with physical and/or mental impairments that
 24 substantially limit multiple life activities. *See* Def. SSO ¶¶ 37, 46, 52, 57. Defendants also
 25 concede that Plaintiffs' experts similarly evaluated Olaf D. and Freddy P. and provisionally
 26 diagnosed each child with an impairment that substantially limits life activities. *Id.* ¶¶ 71,
 27 73. Offering no expert opinion to the contrary, Defendants nonetheless argue that Plaintiffs'
 28 expert reports and the statements cited therein are “opinion testimony,” and “not sufficient

1 to support a conclusion” regarding Plaintiffs’ diagnoses and the effects of their diagnoses on
 2 major life activities. *Id.* ¶¶ 37, 46, 52, 57. But Defendants provide no evidence that
 3 contradicts Plaintiffs’ experts, did not move to strike or exclude their opinions, and do not
 4 dispute the actual diagnoses the experts provided.⁶

5 Defendants also object to Plaintiffs’ expert evaluations as relying on “inadmissible
 6 hearsay” regarding Stephen C.’s and Durell P.’s traumatic experiences. *Id.* ¶¶ 40, 46. Even
 7 assuming the statements in question are inadmissible hearsay (which is far from certain),
 8 Defendants’ objection is off the mark, because Federal Rule of Evidence 703 *expressly*
 9 *permits* experts to rely on inadmissible evidence, including hearsay. Fed. R. Evid. 703 (“If
 10 experts in the particular field would reasonably rely on those kinds of facts or data in forming
 11 an opinion on the subject, they need not be admissible for the opinion to be admitted.”). The
 12 purpose of Defendants’ hearsay objections is also entirely unclear given that Defendants do
 13 *not* dispute that Stephen C., Durell P., Taylor P., and Moana L. have all experienced
 14 childhood adversity for the reasons Plaintiffs have alleged “and/or for other reasons not
 15 cited.” Def. SSOF ¶¶ 40, 47, 53, 58.

16 Finally, Defendants state that Student Plaintiffs cannot be deemed students with
 17 disabilities for purposes of Section 504 unless a school team so declares. *E.g.*, Def. Opp. at
 18 9; Def. SSOF ¶ 56. Defendants are wrong. A “disability” for purposes of Section 504 is
 19 defined by statute as an impairment that substantially limits one or more major life activities.
 20 42 U.S.C. § 12102(1)(A), (2)(A). Whether an individual has an impairment is a question for
 21 professionals licensed to evaluate and diagnose the impairment, such as Plaintiffs’ experts.
 22 Whether that impairment constitutes a disability under Section 504, if contested, is a legal
 23 question for a court. Defendants offer no support for their position that a school team is the
 24 sole arbiter of whether a student is disabled under Section 504, and there is none. Undisputed
 25 facts and uncontradicted expert opinions demonstrate that Student Plaintiffs are individuals
 26 _____

27 ⁶ The validity of Plaintiffs’ experts’ evaluations is further reinforced by the fact that
 28 Defendants have recently chosen to rely on Plaintiffs’ expert evaluations in upcoming
 individual meetings about these students’ disabilities and educational needs.

1 with disabilities protected by Section 504. Defendants’ muddled, meritless contentions to
 2 the contrary serve only to emphasize the force of this conclusion and strongly suggest that
 3 Defendants realize they are grasping at straws.⁷

4 ***Defendants cannot absolve themselves of liability by blaming the Havasupai Tribe***
 5 ***and community.*** Defendants’ Supplemental Statement of Facts attempts to distract from
 6 their own failure to provide meaningful access to education to students with disabilities by
 7 pointing fingers at the community that BIE is supposed to be serving. Defendants do not
 8 and cannot explain why the community’s supposed deficiencies are legally relevant, and
 9 even Defendants’ self-serving account of the supposed “obstacles” to their compliance with
 10 their legal obligations reveals that these obstacles lie with BIE itself.

11 For instance, Defendants cite a shortage of teacher housing as an obstacle to
 12 recruiting and retaining HES staff, Def. SSOF ¶ 129, but neglect to mention that BIE has
 13 promised to present the Havasupai Tribal Council with a proposal to expand teacher housing
 14 and has, since 2014, failed to do so. ECF No. 195-13 at 146:2-12. Although Defendants are
 15 fully aware that using detail teachers drains HES’s budget and compromises students’ access
 16 to basic and special education, *see* ECF No. 192 (Pl. SSOF) ¶¶ 125-26; Def. SSOF ¶ 82, BIE
 17 has only recently engaged teachers at HES in a discussion about what could help to retain
 18 permanent teachers. ECF No. 195-11 at 194:14-95:12. And while Defendants cite “safety
 19 considerations” as an impediment to staff retention and vaguely insinuate that the Tribe and
 20 community are hostile to BIE, *e.g.*, Def. SSOF ¶ 152, Defendants fail to consider how their
 21 own actions—including, but not limited to, their undisputed practice of using the police to
 22 discipline children, *id.* ¶¶ 43, 50, 91—could foster a sense of mistrust. Defendants’ efforts
 23
 24

25 ⁷ In keeping with this pattern, Defendants also suggest that there was no basis for identifying
 26 Taylor P. as a child with a disability because, as compared to other students, one of her
 27 teachers did not have any concerns. ECF No. 195-6 at 152:14-23. That Defendants would
 28 suggest that comparison to other children is a valid tool for identifying students with
 disabilities at a school where, by BIE’s own admission, almost *no* students are proficient in
 reading, writing or math, Def. SSOF ¶ 34, is incredible and hints at desperation.

to blame someone, anyone, other than themselves to avoid responsibility for their own failures are misplaced, culturally insensitive, and legally irrelevant.

III. DOI INDISPUTABLY FAILS TO OFFER REASONABLE ACCOMMODATIONS FOR CHILDREN IMPACTED BY COMPLEX TRAUMA

Defendants do not dispute that, according to Plaintiffs' experts, BIE officials, and HES principals, "trauma can impact a student's ability to learn, read, think, concentrate, communicate, and work in the classroom." Def. SSOF ¶ 92. Nor do they offer any evidence to contradict Plaintiffs' experts' opinions about reasonable accommodations for such trauma, including trauma-informed practices. *See, e.g., id.* ¶¶ 94-101. Citing a single case that has nothing to do with trauma-related accommodations and no facts, Defendants instead rest on the argument from their own summary judgment motion that trauma-informed practices are "not a reasonable accommodation with[in] the meaning of Section 504." Def. Opp. at 11. As Plaintiffs explained in their opposition to Defendants' Motion, a trauma-informed school is a reasonable accommodation supported by peer-reviewed evidence dating back decades and by the expert reports submitted in this case.⁸ Pl. Opp. at 8-9.

In any event, Plaintiffs sought summary judgment with respect to Defendants' liability, not with respect to the exact remedy the Court should impose. At this stage, it is enough for Plaintiffs to prove (as they have, *see* Pl. SOF ¶¶ 94-101) that a remedy in the form of *some* reasonable accommodation is available. *See Wong*, 192 F.3d at 816-17.

IV. DOI CANNOT DISCLAIM ITS OBLIGATION UNDER SECTION 504 TO IDENTIFY AND NOTIFY STUDENTS WITH DISABILITIES OR PROVIDE PROCEDURAL SAFEGUARDS

Defendants' argument that they are not bound to follow the regulations implementing Section 504 fails for the same reasons it did when they made the same argument in their own

⁸ Whether or not Plaintiffs' experts have visited HES has no bearing on whether the accommodations they propose are reasonable. *See* Defs' SSOF ¶¶ 92-101. Under the applicable burden-shifting framework, it is up to Defendants to show that the proposed accommodations are *not* reasonable. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 816 (9th Cir. 1999). As explained in Plaintiffs' Opposition, Defendants have put forth no evidence suggesting this. Pl. Opp. at 8-11.

1 motion for summary judgment. As explained more fully in Plaintiffs' Opposition, the DOI
2 regulations in 43 C.F.R. part 17, subpart B apply to BIE-operated schools like HES and
3 incorporate the two DOE regulations identified in the TAC. Pl. Opp. at 12-13. HES is
4 bound by those DOE regulations for another reason: it accepts DOE funding. Def. SSOF
5 ¶ 35. Defendants' convoluted argument that BIE can receive federal funds without being a
6 recipient of federal funds is as wrong as it sounds, for reasons Plaintiffs have already
7 explained. Pl. Opp. at 13-15. As public entities that accept federal financial assistance from
8 DOE, BIE and HES are obligated to comply with the regulatory requirements that guarantee
9 nondiscrimination in schools. *Id.*

10 In any event, the implication of Defendants' argument that the regulations do not
11 apply to them is that either they are in direct violation of Section 504 or their own regulations
12 are invalid. The Ninth Circuit allows enforcement of Section 504 regulations precisely
13 because such regulations "must be tightly enough linked to § 504 that they 'authoritatively
14 construe' that statutory section, *rather than impose new obligations.*" *Mark H. v. Lemahieu*,
15 513 F.3d. 922, 939 (9th Cir. 2008) (emphasis added). In other words, if there is an
16 enforceable obligation in the regulations, it *must* be an obligation imposed by the statute
17 itself. *Id.* This Court already determined that the two regulations at issue are enforceable
18 obligations necessary to ensure meaningful access to an appropriate education. ECF No.
19 100 at 9-12. So even if Defendants' evasive argument that subpart B does not apply to BIE-
20 operated schools were correct, that would not exempt BIE-operated schools from complying
21 with the obligations contained in subpart B because those are obligations imposed by the
22 statute. All routes lead to the conclusion that BIE-operated schools must follow these critical
23 DOE regulations to ensure that they meet their obligations to provide meaningful access to
24 education for students with disabilities.

25 **CONCLUSION**

26 For the reasons stated herein, Plaintiffs respectfully request that this Court grant
27 Plaintiffs' Motion for Partial Summary Judgment.

1 DATED: July 16, 2019

MUNGER, TOLLES & OLSON LLP

2 By: /s/ Emily C. Curran-Huberty

3 Attorneys for Plaintiffs

4
5 CERTIFICATE OF SERVICE

6 I hereby certify that on July 16, 2019, I electronically transmitted the foregoing document
7 to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of
8 Electronic Filing to the CM/ECF registrants for this matter.

9
10 /s/ Aileen Beltran

TAB 13

Case 3:17-cv-08004-SPL Document 192 Filed 07/01/19 Page 1 of 12

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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' RESPONSE TO
DEFENDANTS' SEPARATE
STATEMENT AND
SUPPLEMENTAL STATEMENT
OF MATERIAL FACTS**

ORAL ARGUMENT REQUESTED

Case No. 3:17-cv-08004-SPL

PLS.' RESP. TO DEFS.' SEPARATE STATEMENT AND SUPP'L STATEMENT OF MATERIAL FACTS

Pursuant to Civil Local Rule 56.1, Plaintiffs Stephen C., Anna D., Olaf D., Moana L., Durell P., Taylor P., and Freddy P., and Native American Disability Law Center (NADLC) (collectively, Plaintiffs) submit this Response to Defendants' Separate Statement and Supplemental Statement of Material Facts in Opposition to Defendants' Motion for Partial Summary Judgment.

PLAINTIFFS' RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF FACTS

1. "[T]he first national and state child-level data on adverse childhood experiences" were not available until 2013. Exh. 17, Christina D. Bethell *et al.*, *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33:12 Health Affairs 2106, 2107 (2014) (cited in Third Am. Cmpt. ("TAC") ¶ 200). Indeed, "the United States does not have a longitudinal population-based study that includes information on adverse childhood experiences. Such data are needed to document the . . . mitigating effects of protective factors[.]" *Id.* at 2108-09.

Disputed/Undisputed: Disputed. Plaintiffs do not dispute that the referenced article contains the quotations in paragraph 1. However, the quotation is vague with respect to the terms "national and state child-level data." Peer-reviewed studies on adverse childhood experiences date back decades. *E.g.*, Felitti *et al.*, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 American Journal of Preventive Medicine 245-58 (1998), attached hereto as Exhibit 1, (cited in Declaration of Dr. Tami DeCoteau, attached hereto as Exhibit 2, Ex. A & C; Declaration of Dr. Noshene Ranjbar, attached hereto as Exhibit 3, Ex. 1); Bruce D. Perry & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation—A Neurodevelopmental View of Childhood Trauma*, 7 Child Adolesc. Psychiatr. Clin. N. Am. 1 (1998), attached hereto as Exhibit 4, (cited in Declaration of Dr. George Davis, attached hereto as Exhibit 5, Ex. A & C); M.Y.H. Brave Heart, "The return of the sacred path: Healing the historical trauma and historical unresolved grief response

1 among the Lakota through psychoeducational group intervention,” 68 Smith College
2 Studies in Social Work, 287-305 (1998), attached hereto as Exhibit 6, (cited in Ex. 2,
3 at Ex. A & C).

4 2. “[R]esearch and definitions about” the standards that should guide a school
5 towards becoming a trauma-informed educational setting are still “emerging[.]” Exh. 18,
6 Dep. of Lisa Persinger (“Persinger Dep.”) 43:18-22; *see also id.* at 46:25-47:13.

7 **Disputed/Undisputed:** Disputed. Plaintiffs do not dispute that the deposition
8 transcript referenced contains the quotations in paragraph 2, but Plaintiffs dispute that
9 ongoing research into trauma-informed practices means that they are “emerging.”
10 Trauma-informed schools are “not a new thing”—“models for trauma-informed
11 schools [] have been implemented and [] monitored by researchers.” Deposition of
12 Dr. Lisa Persinger, attached hereto as Exhibit 7, at 46:7-13, 46:18-19; *see also*
13 Deposition of Dr. Noshene Ranjbar, attached hereto as Exhibit 8, at 132:1-3;
14 Deposition of Dr. Tami DeCoteau, attached hereto as Exhibit 9, at 19:24-20:9. .

15 3. Because the models for trauma-informed schools are “research-based and
16 emerging[.]” there is not yet a “randomized controlled trial,” or any evidence-based trauma
17 informed school in existence. Exh. 18, Persinger Dep. 46:7-17, 49:12-18; *see also* Exh. 19,
18 Dep. of George Davis (“Davis Dep.”) 20:7-24, 28:14-23 (“I don’t think any school
19 completely fits th[e] model [of] . . . a trauma-informed school[.]”); Exh. 20, Dep. of Tami
20 DeCoteau (“DeCoteau Dep.”) 17:13-20:13, 23:17-24 (describing the implementation of
21 trauma-informed practices at schools as a work-in-progress and stating that “the majority of
22 states are at least at a phase where they are at the beginning of considering trauma-informed
23 models”); Exh. 21, Dep. of Noshene Ranjbar (“Ranjbar Dep.”) 51:10-17 (Plaintiffs’ expert
24 testifying that she does not have data on the results achieved by trauma-informed approaches
25 under a recent grant to the Pine Ridge Reservation).

26 **Disputed/Undisputed:** Disputed, except that Plaintiffs do not dispute that the
27 referenced depositions and reports contain the quotations in paragraph 3.
28 Defendants’ selective citations to isolated quotes from Plaintiffs’ experts do not

support Fact #3, and misleadingly insinuate that trauma-informed practices are untested or unvalidated. Dr. Persinger testified that trauma-informed practices such as Positive Behavior Interventions and Supports, a “school-wide system that is often put in place with trauma-informed care” have been subject to randomized controlled trials. Ex. 7 at 49:23-50:5; *see also* Bradley D. Stein et al., *A Mental Health Intervention for Schoolchildren Exposed to Violence: A Randomized Controlled Trial*, 290 J. Am. Med. Ass’n 603, 603-11 (2003), attached hereto as Exhibit 10 (cited in Ex. 5, at Ex. A. p. 17 n.40); Catherine DeCarlo Santiago & Gillian Pears et al., *Engaging Parents in Evidence-Based Treatments in Schools: Community Perspectives from Implementing CBITS* [Cognitive Behavioral Intervention for Trauma in Schools], 5 Sch. Mental Health 209-20 (2013), attached hereto as Exhibit 11 (cited in Ex. 2, at Ex. A ¶ 35 n.18). “[T]rauma-informed schools [] have been implemented,” Ex. 7 at 46:11-12, and psychiatrists and/or researchers have “evaluated the outcomes of trauma-informed practices in schools,” Ex. 8 at 132:1-3; *see also* Deposition of Dr. George Davis, attached hereto as Exhibit 12, at 23:3-23.

4. “[I]n order to implement change to better serve traumatized students, both financial and human resources are required[.]” Exh. 20, DeCoteau Dep. 21:5-14. Indeed, “the problem and the issue is complex and multi-faceted[.] [W]hoever ends up hopefully putting together a system of care to address the issues at hand would need to have a multidisciplinary and multi-faceted plan, and so that would need to have components that address educational needs, medical care needs, psychiatric needs, nutritional needs, psychological needs, [and] cultural needs. . . . [F]rom that integrative perspective, all of those things are a part of a whole. So it would be pretty challenging to just pick one.” Exh. 21, Ranjbar Dep. 61:5-18.

Disputed/Undisputed: Disputed, except that Plaintiffs do not dispute that the referenced depositions contain the quotations in paragraph 4. In context, Dr. Ranjbar’s report and deposition make clear that not all of the “components” listed would be part of a trauma-informed school. Ex. 3, at Ex. 1 at 26-27; Ex. 8 at 61:19-

63:12. Plaintiffs’ experts also testified that schools do not necessarily need financial resources to become trauma-informed. Dr. DeCoteau testified that she had “seen schools use donations and community resources to implement the model” and that she had done trauma-informed training at “rural, remote tribal schools that have very limited funding.” Ex. 9 at 20:25-21:2, 21:20-22:3. Dr. Davis testified that the need for trauma-informed schools “is not one of those problems that you can solve by lots and lots of funding” and that trauma-informed interventions “can be relatively cost neutral.” Ex. 12 at 22:9-18, 23:24-25:6. *See also* Pl. SSOF ¶ 132.

5. Some examples of transformations that a school would need to make in order to address childhood trauma include “school accommodations . . . as outlined in the psychoeducational evaluation of a child, . . . [c]ultural sensitivity training for everyone in the school [which] would have to be a collaboration between the community and the school, . . . [t]he escalation behavioral management training would need to happen at the school and hopefully at other settings in the community[,] [and a] [t]rauma-informed approach would need to happen in the school.” Exh. 21, Ranjbar Dep. 61:19-63:9.

Disputed/Undisputed: Plaintiffs do not dispute that the referenced deposition contains the quotations in paragraph 5, but Plaintiffs note that other experts provided additional views on actions schools can take to address childhood trauma. *E.g.*, Ex. 5, at Ex. A ¶¶ 29-43; Ex. 2, at Ex. A ¶¶ 35-38.

6. “[T]he best way to have an actual trauma-informed system that is totally effective [is] . . . a holistic approach that the entire school staff . . . needs to undertake and be committed to together[.]” Exh. 19, Davis Dep. 26:9-17; *see also* Exh. 21, Ranjbar Dep. 48:24-49:6 (applying a trauma-informed model to a school involves “[t]raining the teachers and the counselors that work with the kids about—and the parents really—about how trauma affects the children and teaching them skills to incorporate into the classroom, into homes, et cetera, because it really needs to be across settings and not just in the school”). And a shortage of resources can affect a school’s ability to implement a trauma-informed system,

1 particularly a shortage of “resources prevent[ing] regular staffing with permanent kinds of
2 teachers.” Exh. 19, Davis Dep. 24:9-25:12; *see also* Exh. 20, DeCoteau Dep. 20:16-21:4.

3 **Disputed/Undisputed:** Undisputed, but Plaintiffs note that whether a shortage of
4 resources can affect a school’s ability to implement a trauma-informed system “really
5 varies based on the context of the school,” and that “rural, remote tribal schools that
6 have very limited funding” have done so despite their resource limitations. Ex. 9 at
7 20:16-21:4, 21:20-22:3.

8 7. Havasupai Elementary School (“HES”) is formula funded. Exh. 13, Dep. of
9 Jimmy Hastings (“Hastings Dep.”) 142:22-144:24. Accordingly, the total amount of money
10 that HES receives is based on a set formula that is a function of the number of students
11 enrolled in the school, and the uses to which that money can be put have specific restrictions
12 based on the source of the funds. *Id.* at 144:18-24.

13 **Disputed/Undisputed:** Disputed. Undisputed that HES is formula funded, but
14 Plaintiffs dispute Defendants’ characterization of formula funding as “the total
15 amount of money that HES receives.” In fact, HES receives funding from additional
16 sources outside of the formula referenced. *See, e.g.*, Pl. SSOF ¶¶ 139-43.

17 8. In order to hire behavioral health specialists at HES under its current budget,
18 HES “would actually have to take away something in order to pay for that unless Congress
19 would give [BIE] another line item or additional funding for the positions.” Exh. 1, Dep. of
20 Tony L. Dearman (“Dearman Dep.”) 170:25-171:4-10.

21 **Disputed/Undisputed:** Disputed, except that the referenced deposition exhibit
22 contains the quotations in paragraph 8. BIE and HES have other means of funding
23 new positions, trainings, and other aspects of trauma-informed schools, including
24 funds from DOE, federal grants, partnerships with universities, and other sources.
25 *See, e.g.*, Pl. SSOF ¶¶ 139-43; BIE00006538, attached hereto as Exhibit 13;
26 BIE00007174, attached hereto as Exhibit 14; BIE00007192, attached hereto as
27 Exhibit 15; BIE00007202, attached hereto as Exhibit 16; 30(b)(6) Deposition of
28 Tony Dearman, attached hereto as Exhibit 17, at 31:18-32:9, 35:23-39:22, 42:25-

45:23, 75:23-76:24, 80:18-84:14; Exhibit 7 to Dearman 30(b)(6) Deposition, attached hereto as Exhibit 18, at 2-3. Moreover, BIE Director Tony Dearman testified that funding is not currently an issue at HES. Ex. 17 at 58:12-22.

9. Transforming HES into a trauma-informed educational system would impose financial, logistical, and administrative burdens on HES. Exh. 22, Decl. of Teresia Paul (“Paul Decl.”) ¶ 5. Such burdens include, among other things, strained housing accommodations for teachers and staff, costs associated with hiring new personnel and providing continuous training to offset high turnover, and fundamentally altering the nature of the programming currently offered at HES. *Id.* ¶¶ 5-8.

Disputed/Undisputed: Disputed. Defendants’ Fact #9 is supported only by the inadmissible declaration of Teresia Paul, a BIE employee. See Pl. Opp. at 9-10. There is no evidence that a trauma-informed system would impose such burdens. Plaintiffs’ experts testified that schools, including tribal schools, have successfully accessed financial, logistical, and administrative resources to implement trauma-informed systems, even when facing housing shortages. Ex. 9 at 20:16-21:4, 21:20-22:3, 41:14-42:25, 49:1-10; Ex. 12 at 23:3-23; Ex. 8 at 38:14-39:16; 42:7-43:5.

10. Durell P. “completed the eighth grade” in 2018 and is no longer eligible to receive educational services at HES. See TAC ¶¶ 10, 75; Exh. 16, Pls.’ Resp. to Defs.’ Interr. No. 1 at 6 (“Response”). As of April 2019, he is “enrolled in an off-reservation BIE boarding school[.]” Exh. 16, Response at Exh. A p. 4.

Disputed/Undisputed: Undisputed.

11. Stephen C. completed the eighth grade on May 23, 2019 and is not eligible to enroll in HES for the 2019-2020 school year. Exh. 23, Decl. of Lolita Paddock (“Paddock Decl.”) ¶ 3.

Disputed/Undisputed: Undisputed.

PLAINTIFFS’ SUPPLEMENTAL SEPARATE STATEMENT OF FACTS

120. HES routinely relies on the Special Education teacher, the school counselor, and the principal to cover general education classes in the absence of regular, general

1 education teachers. Deposition of Lolita Paddock, attached hereto as Exhibit 19, at 20:24-
2 21:9, 47:2-18, 49:6-11, 53:7-17; Deposition of Susan Boyd, attached hereto as Exhibit 20,
3 at 36:14-42:5; Pls.' Separate Statement of Material Facts (Pl. SOF), ECF No. 185, Exs. 6-8.

4 121. When these administrators and specialists teach general education, they do not
5 fulfill their primary responsibilities. Ex. 19 at 47:2-18, 208:12-22; Pl. SOF Ex. 6;
6 BIE00005086, attached hereto as Exhibit 21; Ex. 20 at 77:6-20.

7 122. HES also regularly relies on non-credentialed school employees to cover
8 general education classes in the absence of regular, credentialed, general education teachers.
9 April 18, 2019 Deposition of Tony Dearman, attached hereto as Exhibit 22, at 307:23-
10 309:11, 311:5-312:9; Deposition of Jim Hastings, attached hereto as Exhibit 23, at 58:2-15;
11 84:21-85:19; Deposition of Catherine Muhammad, attached hereto as Exhibit 24, at 229:8-
12 231:9; Exhibit 3 to the Deposition of Coleen Maldonado, attached hereto as Exhibit 25; Pl.
13 SOF Exs. 6-8.

14 123. There is evidence that HES may be using non-credentialed employees to teach
15 general education in excess of twenty (20) days per school year, in violation of 25 C.F.R.
16 § 36.11(a)(5). Documents from January 2019 show that the school's culture instructor—
17 who is not a credentialed teacher—was “covering” classes for three weeks that month. Ex.
18 23 at 58:14-15; 85:3-6; Pl. SOF Exs. 6-8.

19 124. HES relies heavily on a rotating cast of temporary “detail” teachers to teach
20 general education for brief periods—often for only a few weeks—at a time. April 17, 2019
21 Deposition of Tony Dearman, attached hereto as Exhibit 26, at 122:8-124:10; Ex. 19 at
22 44:19-45:6, 47:2-13; Ex. 25; Deposition of Dr. Jeff Williamson, attached hereto as Exhibit
23 27, at 38:4-39:5; Pl. SOF Exs. 6-8; Ex. 21.

24 125. Detail teachers act as a drain on HES's budget. Ex. 23 at 165:1-167:24.

25 126. High teacher turnover is detrimental to students at HES. Ex. 20 at 160:14-
26 162:19; Ex. 24 at 226:6-25; Deposition of Coleen Maldonado, attached hereto as Exhibit 28,
27 at 231:12-232:7, 244:8-20.

28

1 127. Although HES has a Student Handbook that supposedly lays out the
 2 disciplinary policies and procedures the school follows, HES's current principal
 3 acknowledged that the school does not always follow the procedures described in the Student
 4 Handbook. Ex. 19 at 163:23-164:4, 164:21-167:3; BIE00003992, attached hereto as Exhibit
 5 29, at -3997 to -4003.

6 128. There is evidence that HES fails to act to provide students and their parents or
 7 guardians notice of their individual student rights and responsibilities by failing to provide
 8 them with copies of the HES Student Handbook, as required by 25 C.F.R. § 42.10. Pl. SOF
 9 Ex. 18 ¶ 18; Ex. 19 ¶ 17; Ex. 20 ¶ 17; Ex. 21 ¶ 14.

10 129. There is evidence that HES fails to act to provide "at least one field trip per
 11 child per year," as required by 25 C.F.R. § 36.20(b)(4). Ex. 24 at 118:18-119:3, 121:16-19;
 12 Ex. 28 at 72:15-18; Ex. 23 at 73:3-16.

13 130. Research supporting trauma-informed practices in schools dates back decades.
 14 *E.g.*, Ex. 8 at 45:22-46:7; Ex. 7 at 46:7-13; Ex. 3, at Ex. 1 pp. 27-29; Diane D. Allensworth
 15 & Lloyd J. Kolbe, *The Comprehensive School Health Program: Exploring an Expanded*
 16 *Concept*, 57 J. of School Health, 409, 409 (1987), attached hereto as Exhibit 30, (cited in
 17 Ex. 2, at Ex. C); Ex. 2, at Ex. A ¶¶ 17-19 & Ex. C, Ex. 5, at Ex. A ¶¶ 10, 23 & Ex. C.
 18 Accordingly, trauma researchers have such as Dr. Peter Levine and Dr. Bessel van der Kolk
 19 have "train[ed] people in dealing with trauma and disorders for decades." Ex. 8 at 19:4-23.

20 131. Plaintiffs' experts testified that they personally had worked on or knew about
 21 the implementation of trauma-informed practices in schools and other settings across the
 22 country, including in Boston public schools, Pine Ridge Reservation schools, Bismarck
 23 Public Schools, the Justice Resource Institute in Massachusetts, The Perry Project (Bruce
 24 Perry's Child Trauma Academy), the ADOBE project in New Mexico, with the San Carlos
 25 Apache Tribe (San Carlos Unified School District), the Menominee Tribe, the McLaughlin
 26 Public School on the Standing Rock Indian Reservation, the community of Turtle Mountain
 27 and the Fort Berthold Reservation, the Tohono O'odham schools, the Viejas Tribe, Sisseton
 28 Reservation, Spirit Lake Reservation, the Yakama Nation, and the states of Tennessee,

1 Kentucky, Vermont, Washington, and Oregon, among others. Ex. 8 at 15:10-17; 38:14-
2 39:16; 42:7-43:5; 47:14-48:20; Ex. 3, at Ex. 1 p. 10; Ex. 12 at 23:3-23; Ex. 5, at Ex. A
3 ¶¶ 29, 40; Ex. 9 at 16:6-19:23, 22:8-23:2; 25:4:16; Ex. 2, at Ex. A ¶¶ 41-45.

4 132. “[J]ust the basic staff needed for a school” can provide trauma-informed
5 services with adequate training. Ex. 8 at 48:24-49:19.

6 133. The BIE runs a Trauma Resilient School Systems Initiative program, which
7 includes training, onsite visits, ongoing consultation and other interventions, in at least 10
8 of its schools. BIE has planned to operate a trauma-informed program at HES.
9 BIE00008025, attached hereto as Exhibit 31; BIE00010669, attached hereto as Exhibit 32;
10 Exs. 13-16; BIE00021781, attached hereto as Exhibit 33; Ex. 17 at 80:18-84:14;
11 BIE00009712, attached hereto as Exhibit 34, at -9712 to -9716.

12 134. The BIE included goals, strategies, and milestones related to “Wellness,
13 Behavioral Health, and Safety” in its Strategic Direction for 2018-2023. BIE00003366,
14 attached hereto as Exhibit 35, at -3406 to -3409; Ex. 26 at 130:3-25; 189:7-24. These goals
15 include identifying partners to provide behavioral health support, training and services to
16 students; “[p]rovid[ing] trauma-informed curriculum for all grade levels,” and “[p]roviding
17 trauma-informed teaching practices for all grade levels.” Ex. 35 at -3408.

18 135. Defendants’ witness on trauma, Teresia Paul, testified that “trauma-informed
19 programming is beneficial to all students.” Deposition of Teresia Paul, attached hereto as
20 Exhibit 36, at 99:20-100:6.

21 136. At her deposition, Teresia Paul testified that she had reviewed only the expert
22 reports of two of Plaintiffs’ experts, Dr. George Davis and Dr. Tami DeCoteau. Ex. 36 at
23 17:5-17.

24 137. Ms. Paul further testified that she did not intend to offer testimony about
25 anything beyond what was discussed at her deposition. Ex. 36 at 182:14-20.

26 138. BIE has designated HES as a local education agency (LEA). BIE00001730,
27 attached hereto as Exhibit 37; ESI000462, attached hereto as Exhibit 38.

28

1 139. BIE schools are eligible to receive the following DOE funds: Title I, Part A;
2 Title I, Part D; Title II, Part A; Title III, Part A; Title IV, Part A; Title IV, Part B; Title V,
3 Part B; and Title VII, Subpart B. [https://www.bie.edu/cs/groups/xbie/documents/text/idc2-](https://www.bie.edu/cs/groups/xbie/documents/text/idc2-068896.pdf)
4 068896.pdf, attached hereto as Exhibit 39, at p. 6.

5 140. In 2016, HES received the following DOE funds: Title I, Part A, Sec. 1114-
6 1119; Title I, Part A, Sec. 1003(g) (School Improvement Grant); Title II, Part A; IDEA, Part
7 B. BIE00001132, attached hereto as Exhibit 40, at -1137 to -1139.

8 141. HES is eligible to receive Title X (McKinney-Vento) funds, but did not apply
9 for the McKinney-Vento funds for the 2018-2021 school years. BIE00020145, attached
10 hereto as Exhibit 41.

11 142. HES has applied for at least one new funding source from the DOE to provide
12 students with after-school and summer programs. Ex. 19 at 83:6-16; BIE00020143, attached
13 hereto as Exhibit 42.

14 143. In its 2018-2019 BIE Schoolwide Program Plan, HES indicated it received at
15 least five sources of DOE funds. BIE00003910, attached hereto as Exhibit 43.

16 144. To receive DOE funds, BIE must make assurances to DOE that it will comply
17 with the requirements of DOE funding sources. The DOE monitors the BIE as a recipient
18 of its funds and has put BIE under a Corrective Action Plan for failing to comply with its
19 requirements for recipients of DOE money. BIE00010241, attached hereto as Exhibit 44;
20 BIE00024856, attached hereto as Exhibit 45, at -24856 to -24864; BIE00010439, attached
21 hereto as Exhibit 46.

22 145. Durell P. and Stephen C. remain clients of NADLC. Pl. SOF Ex. 19 ¶ 26, Ex.
23 21 ¶ 25.

1 DATED: July 1, 2019

MUNGER, TOLLES & OLSON LLP

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3
4 By: /s/ Emily C. Curran-Huberty
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5
6 CERTIFICATE OF SERVICE

7 I hereby certify that on July 1, 2019, I electronically transmitted the foregoing document to
8 the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of
9 Electronic Filing to the CM/ECF registrants for this matter.

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11 /s/ Aileen Beltran
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Case No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona*

Case No. 3:17-CV-08004-SPL

The Honorable Steven P. Logan, United States District Judge

APPELLANTS' EXCERPTS OF RECORD

VOLUME 3 OF 4

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TAB 14

Case 3:17-cv-08004-SPL Document 190 Filed 07/01/19 Page 1 of 24

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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

Case No. 3:17-cv-08004-SPL

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT.....	2
I. DEFENDANTS’ ATTACK ON PLAINTIFFS’ APA CLAIMS IS MISPLACED AND UNSUPPORTED	2
A. Plaintiffs Challenge Discrete Agency Actions and Failures to Act	2
B. The Court Is Empowered to Remedy Defendants’ APA Violations.....	6
II. PLAINTIFFS HAVE IDENTIFIED REASONABLE ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES RESULTING FROM TRAUMA	7
A. Plaintiffs Have Provided Evidence of a Reasonable Accommodation for Student Plaintiffs’ Disabilities Resulting from Trauma	8
B. Systemic Relief Is Available and Required.....	11
III. THE REGULATORY SCHEME GOVERNING BIE SCHOOLS MANDATES COMPLIANCE WITH 34 C.F.R. § 104.32 AND 34 C.F.R. § 104.36	12
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	12
B. BIE Is Bound by DOE Regulations Because It Accepts DOE Funds	13
IV. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER BOTH DURELL P.’S AND STEPHEN C.’S CLAIMS	15
A. Durell P. Has Standing	15
B. Neither Durell P.’s nor Stephen C.’s Claims Are Moot.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES**Page(s)****FEDERAL CASES**

<i>Alaska Ctr. for the Env't v. U.S. Forest Serv.</i> , 189 F.3d 851 (9th Cir. 1999).....	17
<i>Am. Civil Liberties Union of Nev. v. Lomax</i> , 471 F.3d 1010 (9th Cir. 2006).....	15
<i>Am. Council of the Blind v. Paulson</i> , 525 F.3d 1256 (D.C. Cir. 2008)	11
<i>Armstrong v. Schwarzenegger</i> , 622 F.3d 1058 (9th Cir. 2010).....	11, 12
<i>Bresgal v. Brock</i> , 843 F.2d 1163 (9th Cir. 1987).....	11
<i>Christopher S. v. Stanislaus Cty. Office of Educ.</i> , 384 F.3d 1205 (9th Cir. 2004).....	11
<i>City of New York v. U.S. Dept. of Defense</i> , 913 F.3d 423 (4th Cir. 2019).....	1, 4, 6
<i>Coleman v. Darden</i> , 595 F.2d 533 (10th Cir. 1979).....	14
<i>Forest Guardians v. Babbitt</i> , 174 F.3d 1178 (10th Cir. 1999).....	6, 7
<i>Gray v. Golden Gate Nat'l Rec. Area</i> , 279 F.R.D. 501 (N.D. Cal. 2011).....	11
<i>Hills v. Gautreaux</i> , 425 U.S. 284 (1976).....	11
<i>Honig v. Doe</i> , 484 U.S. 305 (1988).....	17
<i>Huezo v. L.A. Cmty. Coll. Dist.</i> , 672 F. Supp. 2d 1045 (C.D. Cal. 2008)	11
<i>Jacobson v. Delta Airlines, Inc.</i> , 742 F.2d 1202 (9th Cir. 1984).....	15

TABLE OF AUTHORITIES
(Continued)

	<u>Page(s)</u>
<i>Karuk Tribe of Cal. v. U.S. Forest Serv.</i> , 681 F.3d 1006 (9th Cir. 2012).....	17
<i>Leland v. Cty. of Yavapai</i> , No. CV-17-8159-PCT-SPL (DMF), 2019 WL 1547016 (D. Ariz. Mar. 18, 2019)	10
<i>Mark H. v. Hamamoto</i> , 620 F.3d 1090 (9th Cir. 2010).....	9, 10
<i>Morongo Band of Mission Indians v. Cal. State Bd. Of Equalization</i> , 858 F.2d 1376 (9th Cir. 1988).....	15
<i>Nevada Ass’n of Ctys. v. Dep’t of Interior</i> , No. 3:13-cv-0712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015).....	5
<i>Norton v. S. Utah Wilderness All.</i> , 542 U.S. 55 (2004).....	7
<i>P.P. v. Compton Unified Sch. Dist.</i> , 135 F. Supp. 3d 1126 (C.D. Cal. 2015)	10, 11
<i>S. Carolina v. United States</i> , 907 F.3d 742 (4th Cir. 2018).....	3, 6
<i>Sacks v. Office of Foreign Assets Control</i> , 466 F.3d 764 (9th Cir. 2006).....	6
<i>Sierra Club v. Peterson</i> , 228 F.3d 559 (5th Cir. 2000) (en banc).....	5
<i>U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.</i> , 477 U.S. 597 (1986).....	14
<i>United States v. Philip Morris USA, Inc.</i> , 319 F. Supp. 2d 9 (D.D.C. 2004)	7
<i>Veterans for Common Sense v. Shinseki</i> , 678 F.3d 1013 (9th Cir. 2012) (en banc).....	4, 5
<i>Vietnam Veterans of Am. v. CIA</i> , 811 F.3d 1068 (9th Cir. 2016).....	3, 6, 7

TABLE OF AUTHORITIES
(Continued)

Page(s)

<i>West v. Secretary of Dept. of Transp.</i> , 206 F.3d 920 (9th Cir. 2000).....	16
<i>Wild Wilderness v. Allen</i> , 871 F.3d 719 (9th Cir. 2017).....	15, 16
<i>Wong v. Regents of Univ. of Cal.</i> , 192 F.3d 807 (9th Cir. 1999).....	8, 9
<i>Yeti by Molly Ltd. v. Deckers Outdoor Corp.</i> , 259 F.3d 1101 (9th Cir. 2001).....	10
<i>Zukle v. Regents of the Univ. of Cal.</i> , 166 F.3d 1041 (9th Cir. 1999).....	10, 11
FEDERAL STATUTES	
42 U.S.C. § 2000d-6	15
5 U.S.C. § 706.....	2, 3, 6
20 U.S.C. § 7801.....	12
50 U.S.C. § 2566.....	3
Rehabilitation Act of 1973, § 504	1, passim
FEDERAL RULES	
Fed. R. Civ. P. 26.....	10
Fed. R. Civ. P. 37.....	10
FEDERAL REGULATIONS	
25 C.F.R § 36.22.....	2
25 C.F.R § 36.23.....	2
25 C.F.R. § 36.42.....	2
25 C.F.R. § 39.2.....	12
34 C.F.R. § 104.3.....	13, 14

TABLE OF AUTHORITIES
(Continued)

	<u>Page(s)</u>
34 C.F.R. § 104.31.....	13
34 C.F.R. § 104.32.....	12, 13
34 C.F.R. § 104.32.....	12
34 C.F.R. § 104.36.....	12
43 C.F.R., § 17.201.....	12
43 C.F.R. § 17.202.....	12
FEDERAL ADMINISTRATIVE MATERIALS	
68 Fed. Reg. 51334-01, 2003 WL 22020275 (Aug. 26, 2003).....	12
Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000)	13

1 **INTRODUCTION**

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

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

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

25 *Third*, Defendants make the remarkable claim that they are under no obligation to
26 implement basic regulatory requirements regarding the identification of and procedural
27 protections for students with disabilities under Section 504 because such requirements apply
28 *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.

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

4 By challenging Defendants' discrete failures to act, Plaintiffs' Section 706(1) claims
 5 fall squarely within the well-recognized circumstances under which courts will compel
 6 agency action. *Vietnam Veterans of America v. CIA*, 811 F.3d 1068 (9th Cir. 2016),
 7 illustrates these circumstances well. The plaintiffs in *Vietnam Veterans* sued under Section
 8 706(1) to compel the Army to notify former human test subjects of information that could
 9 impact their health, and to provide medical care for injury or disease caused by the testing.
 10 *Id.* at 1075. The regulation plaintiffs sought to enforce provided both that “[c]ommanders
 11 have an obligation . . . to provide [research volunteers] with any newly acquired information
 12 that may affect their well-being when that information becomes available,” and that
 13 “[v]olunteers are authorized all necessary medical care for injury or disease that is a
 14 proximate result of their participation in research.” *Id.* at 1076, 1080 (quoting regulation).
 15 The Ninth Circuit held that both regulatory provisions contained a “specific, unequivocal
 16 command” to the Army to take “discrete agency action,” and thus that plaintiffs were entitled
 17 to relief under Section 706(1). *Id.* at 1078, 1081; *see also S. Carolina v. United States*, 907
 18 F.3d 742, 747, 755 (4th Cir. 2018) (relief under Section 706(1) warranted where statute, 50
 19 U.S.C. § 2566(c), provided that “the Secretary shall . . . remove from the State of South
 20 Carolina, for storage or disposal elsewhere,” certain quantities of plutonium). *Vietnam*
 21 *Veterans* and *South Carolina* show that APA claims under Section 706(1) must challenge
 22 discrete failures to act to implement mandatory duties imposed by statute or regulation. This
 23 is exactly what Plaintiffs do here.

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

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

3 The cases Defendants cite to bolster their position either actively undermine it or are
4 meaningfully distinguishable from the claims in this case. In *City of N.Y.*, for instance, the
5 plaintiffs challenged the Department of Defense’s (DOD’s) failure to fully and accurately
6 contribute to the National Instant Criminal Background Check System (NICS). 913 F.3d at
7 427-29. The plaintiffs—municipalities that, significantly, had no formal right to use the
8 NICS database, but were afforded permissive access for limited purposes, *id.* at 428—did
9 not seek to compel a discrete, mandated agency action or actions, as Plaintiffs do here, but
10 rather sought to use the APA to compel DOD to comply fully with its overall reporting
11 obligations under various federal statutes, *id.* at 429. In rejecting the municipal plaintiffs’
12 attempt to achieve “full compliance” with a broad statutory scheme through an APA
13 challenge, the Fourth Circuit did *not* hold that APA review is unavailable when an agency
14 fails to take numerous discrete, mandatory actions. To the contrary, the Fourth Circuit
15 expressly acknowledged that “ongoing failures to carry out discrete obligations can be
16 subject to review,” and that “[g]overnment deficiencies do not become non-reviewable
17 simply because they are pervasive.” *Id.* at 433. (emphasis added). Plaintiffs’ claims in this
18 case precisely embody this latter scenario, where APA review is available.

19 *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc), is
20 even further afield. The core question in that case was whether the Veterans’ Judicial
21 Review Act (VJRA) precluded judicial review of plaintiffs’ claims that certain veterans’
22 benefit determinations were being systematically and unreasonably delayed. *See id.* at 1016,
23 1019. The Ninth Circuit held that the VJRA—which generally bars judicial review of any
24 Veterans’ Administration (VA) decision related to an individual request for benefits—did
25 indeed bar jurisdiction over plaintiffs’ claims, because there was no way “for the district
26 court to resolve whether the VA acted in a timely and effective manner in regard to the
27 provision of mental health care without evaluating the circumstances of individual veterans
28 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.

1 Defendants' failures to comply with the regulations governing the provision of education for
 2 Native American children at HES means that the TAC's allegations undoubtedly *do* reveal
 3 a pattern of longstanding, comprehensive deficiencies, the fact remains that Plaintiffs
 4 challenge discrete actions and inaction. These "deficiencies do not become non-reviewable
 5 simply because they are pervasive." *City of N.Y.*, 913 F.3d at 433.³

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

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

14 5 U.S.C. § 706 provides that a "reviewing court *shall*" compel agency action
 15 unlawfully withheld or set aside agency action that is arbitrary and capricious. The term
 16 "shall" connotes a mandatory duty, *see, e.g., Sacks v. Office of Foreign Assets Control*, 466
 17 F.3d 764, 778 (9th Cir. 2006), and the Ninth Circuit has held that this holds true for relief
 18 under Section 706, *see Vietnam Veterans*, 811 F.3d at 1081-82; *see also South Carolina*, 907
 19 F.3d at 758 ("In § 706(1), as in most circumstances, 'shall' means 'shall.' . . . Consequently,
 20 a district court is not entitled to interpose its equitable judgment in granting relief pursuant
 21 to § 706(1)." (citation omitted)); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th
 22 Cir. 1999) ("Through § 706 Congress has stated unequivocally that courts *must* compel
 23

24
 25 ³ Defendants' citations to select sentences of Plaintiffs' Responses and Objections to
 26 Defendants' Interrogatories, *see* Def. MSJ at 6, fare no better. Defendants cite Plaintiffs'
 27 General Objections, which note that the specific incidents alleged in the TAC are not "an
 28 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

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.

1 education at HES. Def. MSJ at 10. Nor can they dispute that the BIE has failed to identify
 2 these students, much less offer *any* accommodations to address their disabilities. Pl. MSJ at
 3 16-19. Instead, Defendants seek summary judgment on Count IV on the ground that
 4 Plaintiffs' requested accommodations for trauma-related disabilities under Section 504 are
 5 not reasonable. Their arguments are unavailing—especially at summary judgment.⁵

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

8 A plaintiff bringing a Section 504 claim bears the initial burden of producing
 9 evidence of a reasonable accommodation. *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807,
 10 816 (9th Cir. 1999). Once it is met, the burden then shifts to the defendant to prove that the
 11 accommodation is not reasonable. *Id.* at 817. Plaintiffs have met their initial burden of
 12 producing evidence that a trauma-informed school is a reasonable accommodation. *See* Pl.
 13 MSJ at 16-17. The expert reports of Dr. George Davis, Dr. Tami DeCoteau, and Dr. Noshene
 14 Ranjbar described the need for a trauma-informed environment for students with disabilities
 15 resulting from childhood adversity, and for Durell P., Stephen C., Taylor P., and Moana L.
 16 in particular. *Id.*; Pl. SOF ¶¶ 94-101. The need for trauma-informed practices is well-
 17 documented in academic papers dating back decades. Pl. SSOF ¶ 130. Plaintiffs' trauma
 18 experts testified that they were aware of or had worked on trauma-informed programs in a
 19 variety of schools, including schools that serve Native American students, and in other
 20 settings. *Id.* ¶ 131. Even Defendants' witness on trauma testified that "trauma-informed
 21 programming is beneficial to all students." *Id.* ¶ 135. BIE set a goal of setting up trauma-
 22 informed schools as part of its written strategic plan, and is already implementing trauma-
 23 informed practices at some of its schools. *Id.* ¶¶ 133-34. This evidence far exceeds
 24

25 ⁵ Plaintiffs affirmatively moved for summary judgment on the ground that Defendants are
 26 violating Section 504 by failing to provide *any* accommodation for Student Plaintiffs with
 27 disabilities resulting from childhood trauma, despite the existence of reasonable
 28 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.

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

3 Defendants cannot meet their burden because the accommodation is reasonable or, at
4 a minimum, there is a factual dispute about reasonableness that precludes summary
5 judgment. Defendants characterize Plaintiffs' requested accommodations as "emerging
6 practices." Def. MSJ at 10. But, at the absolute best for Defendants, that is a disputed fact.
7 In fact, Defendants have it backwards: there can be no genuine factual dispute that trauma-
8 informed practices are well-established and tested. The evidence supporting trauma-
9 informed systems dates back decades, and such systems have been implemented by
10 numerous school districts, public programs, and other initiatives. Pl. SSOF ¶¶ 130-31. BIE
11 evidently sees value in such accommodations, as it has implemented trauma-informed
12 practices in some of its schools. *Id.* ¶ 133. This is significant because evidence that a
13 defendant offers a particular accommodation to individuals other than the plaintiff supports
14 the conclusion that the accommodation is reasonable. *See, e.g., Mark H. v. Hamamoto*, 620
15 F.3d 1090, 1098-99 (9th Cir. 2010); *Wong*, 192 F.3d at 820.⁶

16 The primary evidence Defendants attempt to offer to meet their burden is the
17 declaration of Teresia Paul. That declaration is not admissible. In her declaration, Ms. Paul
18 purports to rebut opinions contained in the expert report of Dr. Noshene Ranjbar. These
19 rebuttal opinions were not timely disclosed and must be excluded. Ms. Paul was disclosed
20 as a rebuttal expert on March 29, 2019 and deposed on May 3, 2019. At her deposition, Ms.
21 Paul testified that she had reviewed the expert reports of *only* two of Plaintiffs' experts, Drs.
22 Davis and DeCoteau. Pl. SSOF ¶ 136. Ms. Paul did not mention Dr. Ranjbar at all and
23 indeed confirmed that she did not expect to testify at trial about anything beyond what was
24

25 _____
26 ⁶ There is no requirement that a reasonable accommodation be supported by an "established
27 consensus," "a longitudinal population-based study," or a "randomized controlled trial." *Cf.*
28 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.

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

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

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

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

25 Nor is it sufficient to argue policy and suggest that a ruling denying summary
26 judgment would have consequences for BIE and other school systems. *See* Def. MSJ at 12.
27 On that score, Defendants cite *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir.
28 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).

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

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

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

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

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

1 agencies with respect to these subparts, we have, with a few minor exceptions, followed
 2 [DOE's] lead when amending these sections for the other eight agencies" with similar
 3 regulations, including DOI. *Id.* Indeed, to conclude otherwise would mean that students
 4 with disabilities attending BIE-operated schools had fewer rights than students with
 5 disabilities attending tribally controlled schools. That would be inconsistent with a
 6 longstanding executive order mandating that "The Federal Government must hold itself to
 7 at least the same principles of nondiscrimination in educational opportunities as it applies to
 8 educational programs and activities of State and local governments, and to private
 9 institutions receiving federal financial assistance." Exec. Order No. 13,160, 65 Fed. Reg.
 10 39,775 (June 23, 2000).

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

12 Defendants admit that LEAs receiving funds from DOE must comply with DOE's
 13 Office of Civil Rights regulations, *see* Def. MSJ at 14, and their position that HES is not an
 14 LEA is incorrect for reasons explained above. Even apart from any concession, it is clear
 15 that DOE regulations apply to HES because it accepted DOE funds. Under 34 C.F.R.
 16 § 104.31, certain DOE regulations (including Section 104.32 and .36) apply to any
 17 elementary or secondary "education programs or activities that receive Federal financial
 18 assistance" or "recipients that operate, or that receive Federal financial assistance for the
 19 operation of, such programs or activities." The definitions in the regulations make clear this
 20 covers HES and BIE. A "program or activity" includes "all the operations of ... a *local*
 21 *education agency* . . . system of vocational education, or *other school system*." 34 C.F.R. §
 22 104.3(k) (emphasis added). Even if HES were not an LEA (it is), then this would apply
 23 because BIE operates a "school system." A "recipient" includes "*any public or private*
 24 *agency*, institution, organization, or other entity . . . to which Federal financial assistance is
 25 extended directly or through another recipient." *Id.* § 104.3(f) (emphasis added). And
 26 "Federal financial assistance" (quite logically) includes "[f]unds." *Id.* § 104.3(h).

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

1 Instead, the point is that BIE has accepted funds from DOE for the purposes of operating a
 2 public elementary and secondary school program, and DOE can condition those funds on
 3 compliance with certain requirements. BIE schools are eligible to receive numerous sources
 4 of DOE funds. Pl. SSOF ¶ 139-43. To receive those funds, BIE must make assurances to
 5 DOE that it will comply with the various requirements of the funding sources. *Id.* ¶ 144. In
 6 2016, HES received at least four funding streams from the DOE and was eligible to receive
 7 more. *Id.* ¶ 140. HES has since applied for at least one new funding source from DOE to
 8 provide after school and summer programs. *Id.* ¶ 142. In its 2018-2019 BIE Schoolwide
 9 Program Plan, HES indicated it received at least five sources of DOE monies. *Id.* ¶ 143.
 10 The DOE monitors the BIE as a recipient of its funds, and has even put BIE under a
 11 Corrective Action Plan for failing to comply with its requirements for recipients of DOE
 12 money. *Id.* ¶ 144.

13 That leaves Defendants with the argument that a federal agency cannot be a recipient
 14 of “Federal financial assistance.” Def. MSJ at 14. That argument fails too. As noted above,
 15 the DOE regulations containing the term “Federal financial assistance” contemplate that a
 16 recipient of such assistance could include “any public or private agency.” 34 C.F.R.
 17 § 104.3(f) (emphasis added). Defendants may wish that the definition said “except federal
 18 agencies,” but it does not. Defendants’ reliance on *U.S. Department of Transportation v.*
 19 *Paralyzed Veterans of America*, 477 U.S. 597, 612 (1986), is badly misplaced. That case
 20 holds that a service provided by a federal agency—in that case, air traffic control—is not
 21 “Federal financial assistance” to a party—such as an airline—that benefits from the service.
 22 *Id.* at 612. The analogous claim here would be that BIE is providing federal financial
 23 assistance to the Havasupai tribe by operating HES—but that is not the claim in this case.
 24 The reasoning of *Paralyzed Veterans* is inapposite; there can be no question that funds
 25 provided by DOE are a form of financial assistance. *Coleman v. Darden*, 595 F.2d 533 (10th
 26 Cir. 1979), a lightly reasoned forty-year-old case about a different agency’s regulations, does
 27 not warrant a different conclusion. That case had nothing to do with education, an area in
 28 which Congress has long recognized the special importance of nondiscrimination by LEAs

1 and schools. *See, e.g.*, 42 U.S.C.A. § 2000d-6.⁷ As Defendants admit, Section 504 provides
 2 specific protections for educational programs, including those operated by the federal
 3 government. Def. MSJ at 13.

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

6 **A. Durell P. Has Standing**

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

17 Durell P. was enrolled in seventh grade at HES and thus had standing at the time this
 18 suit was filed on January 23, 2017. ECF No. 17 ¶ 19. Any subsequent change in his
 19 circumstances does not bear on his standing.⁸ Rather, the Court's ongoing jurisdiction is a
 20 question of mootness, on which Defendants bear the burden of demonstrating "that there is
 21 no effective relief remaining that the court could provide." *See Wild Wilderness v. Allen*,
 22 871 F.3d 719, 724 (9th Cir. 2017). "That burden is always 'heavy,' as a case is not moot

23
 24 ⁷ The other case Defendants cite is also about whether airlines receive federal financial
 25 assistance. *See Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1213 (9th Cir. 1984). Like
 26 *Paralyzed Veterans*, and contrary to Defendants' suggestion, it does not address whether a
 federal agency can be a recipient of federal financial assistance.

27 ⁸ The Court's ruling dismissing five students for lack of standing does not suggest otherwise.
 28 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.

1 where any effective relief may be granted.” *Id.*

2 **B. Neither Durell P.’s nor Stephen C.’s Claims Are Moot**

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

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

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

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

7 *First*, to hold otherwise would leave students in upper grades like Durell P. and
 8 Stephen C. with two years or less to pursue their claims. This period is insufficient to allow
 9 for complete judicial review. *See Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d
 10 851, 855 (9th Cir. 1999) (finding two years insufficient to resolve a claim). Adopting
 11 Defendants' position would make it functionally impossible for these students to bring an
 12 effective challenge even though they were eligible to attend HES when the case was filed
 13 and have been subject to the most longstanding deprivations given their tenure at HES.

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

22 **CONCLUSION**

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

25 DATED: July 1, 2019

MUNGER, TOLLES & OLSON LLP

26 By: /s/ Emily C. Curran-Huberty

27 Attorneys for Plaintiffs

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

TAB 15

Case 3:17-cv-08004-SPL Document 182 Filed 05/31/19 Page 1 of 24

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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' MOTION AND
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

TABLE OF CONTENTS

MOTION FOR PARTIAL SUMMARY JUDGMENT	1
MEMORANDUM OF POINTS AND AUTHORITIES.....	1
FACTUAL BACKGROUND	2
LEGAL STANDARD	3
ARGUMENT.....	3
I. COUNTS I AND II ARE NOT ACTIONABLE UNDER THE APA.....	3
A. Plaintiffs Do Not Challenge a Cognizable “Agency Action.”	4
B. The APA Does Not Authorize Plaintiffs’ Requested Relief.....	7
II. COUNT IV FAILS BECAUSE PLAINTIFFS HAVE NOT IDENTIFIED A REASONABLE ACCOMMODATION BIE HAS FAILED TO PROVIDE.....	10
III. PLAINTIFFS CANNOT PREVAIL ON COUNTS V AND VI BECAUSE 34 C.F.R. §§ 104.32 AND 104.36 DO NOT APPLY TO INTERIOR.....	13
IV. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE CLAIMS OF DURELL P. AND STEPHEN C.	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Alexander v. Choate</i> , 469 U.S. 287 (1985)	14
<i>Am. Civil Liberties Union of Nev. v. Lomax</i> , 471 F.3d 1010 (9th Cir. 2006)	15
<i>Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley</i> , 458 U.S. 176 (1982)	7
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	8
<i>City of New York v. U.S. Dep't of Def.</i> , 913 F.3d 423 (4th Cir. 2019)	<i>passim</i>
<i>Cnty. Coll. v. Davis</i> , 442 U.S. 397 (1979)	15
<i>Cobell v. Norton</i> , 392 F. 3d 461 (D.C. Cir. 2004)	10
<i>Coleman v. Darden</i> , 595 F.2d 533 (10th Cir. 1979)	14
<i>Crowder v. Kitagawa</i> , 81 F.3d 1480 (9th Cir. 1996)	11, 12, 13
<i>Ctr. for Biological Diversity v. U.S. Dep't of Hous. & Urban Dev.</i> , 241 F.R.D. 495 (D. Ariz. 2006)	9
<i>Defs. of Wildlife v. Flowers</i> , No. 02-CV-195, 2003 WL 22143270 (D. Ariz. Aug. 18, 2003), <i>aff'd</i> , 414 F.3d 1066 (9th Cir. 2005)	6
<i>Def. Supplies Corp. v. U.S. Lines Co.</i> , 148 F.2d 311 (2d Cir. 1945)	15
<i>Del Monte Fresh Prod. N.A., Inc. v. United States</i> , 706 F. Supp. 2d 116 (D.D.C. 2010)	7
<i>Doe v. Attorney Gen. of the U.S.</i> , 941 F.2d 780 (9th Cir. 1991), <i>overruled on other grounds by Lane v. Pena</i> , 518 U.S. 187 (1996)...	12

Case 3:17-cv-08004-SPL Document 182 Filed 05/31/19 Page 4 of 24

1	<i>Forest Guardians v. Babbitt</i> ,	
2	174 F.3d 1178 (10th Cir. 1999).....	7, 8
3	<i>Friends of the Earth v. U.S. Dep’t of Interior</i> ,	
4	478 F. Supp. 2d 11 (D.D.C. 2007).....	6
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6	528 U.S. 167 (2000)	15
7	<i>Garcia v. Capistrano Unified Sch. Dist.</i> ,	
8	No. SA CV 16-2111-DOC (JCGx), 2018 WL 6017009 (C.D. Cal. Mar. 30, 2018).....	15
9	<i>Hells Canyon Pres. Council v. U.S. Forest Serv.</i> ,	
10	593 F.3d 923 (9th Cir. 2010).....	8
11	<i>Hinck v. United States</i> ,	
12	550 U.S. 501 (2007)	7
13	<i>Jacobson v. Delta Airlines, Inc.</i> ,	
14	742 F.2d 1202 (9th Cir. 1984).....	14
15	<i>John v. United States</i> ,	
16	720 F.3d 1214 (9th Cir. 2013).....	4
17	<i>Lujan v. Defenders of Wildlife</i> ,	
18	504 U.S. 555 (1992)	15
19	<i>Lujan v. Nat’l Wildlife Fed’n</i> ,	
20	497 U.S. 871 (1990)	5, 6, 7
21	<i>Mark H. v. Hamamoto</i> ,	
22	620 F.3d 1090 (9th Cir. 2010).....	11, 12
23	<i>Mark H. v. Lemahieu</i> ,	
24	513 F.3d 922 (9th Cir. 2008)	11, 14, 15
25	<i>Myers v. United States</i> ,	
26	272 U.S. 52 (1926)	15
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28	No. 3:13-cv-712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015), <i>aff’d</i> , 686 Fed. App’x 407 (9th Cir. 2017).....	5, 6, 9
	<i>Norton v. S. Utah Wilderness All.</i> ,	
	542 U.S. 55 (2004)	<i>passim</i>

1	<i>NRDC v. EPA</i> ,	
2	966 F.2d 1292 (9th Cir. 1992).....	9
3	<i>Occidental Eng'g Co. v. INS</i> ,	
4	753 F.2d 766 (9th Cir. 1985).....	3
5	<i>P.P. v. Compton Unified Sch. Dist.</i> ,	
6	135 F. Supp. 3d 1126 (C.D. Cal. 2015).....	12, 15
7	<i>Prewitt v. U.S. Postal Serv.</i> ,	
8	662 F.2d 292 (5th Cir. 1981).....	13
9	<i>Pub. Lands for the People, Inc. v. USDA</i> ,	
10	733 F. Supp. 2d 1172 (E.D. Cal. 2010).....	9
11	<i>RCM Technologies, Inc. v. DHS</i> ,	
12	614 F. Supp. 2d 39 (D.D.C. 2009).....	9
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14	411 U.S. 1 (1973).....	7
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16	538 F. App'x 644 (6th Cir. 2013).....	4
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18	228 F.3d 559 (5th Cir. 2000).....	5, 6
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21	<i>Sherman</i> , 646 F.3d 1161 (9th Cir. 2011).....	7
22	<i>Slayman v. FedEx Ground Package Sys., Inc.</i> ,	
23	765 F.3d 1033 (9th Cir. 2014).....	16
24	<i>Stephen C. v. BIE</i> ,	
25	2018 WL 1871457 (Mar. 29, 2018).....	16
26	<i>U.S. Dep't of Transp. v. Paralyzed Veterans of Am.</i> ,	
27	477 U.S. 597 (1986).....	14
28	<i>United States v. Strong</i> ,	
	489 F.3d 1055 (9th Cir. 2007).....	16
	<i>Veterans for Common Sense v. Shinseki</i> ,	
	678 F.3d 1013 (9th Cir. 2012).....	5, 6

Case 3:17-cv-08004-SPL Document 182 Filed 05/31/19 Page 6 of 24

1	<i>Walsh v. Nev. Dep't of Human Res.</i> ,	
2	471 F.3d 1033 (9th Cir. 2006)	16
3	<i>Zukle v. Regents of Univ. of California</i> ,	
4	166 F.3d 1041 (9th Cir. 1999)	11, 12
5	<u>Statutes</u>	
6	5 U.S.C. § 551(13)	4
7	5 U.S.C. § 706	<i>passim</i>
8	20 U.S.C. § 1681	14
9	25 U.S.C. § 3207	3
10	29 U.S.C. § 794(a)	13
11	34 U.S.C. § 20351	3
12	42 U.S.C. § 2000d	14
13	110 Cong. Rec. 13380 (1964)	14
14	Act to Replace the Vocational Rehabilitation Act,	
15	Pub. L. No. 93-112, 87 Stat. 355 (1973)	13
16	Act to Amend the Rehabilitation Act of 1973,	
17	Pub. L. No. 95-602, 92 Stat. 2955 (1978)	13
18	<u>Constitutional Law</u>	
19	U.S. Const. art. II, § 1, cl. 1 & 3	15
20	<u>Rule</u>	
21	Fed. R. Civ. P. 56(a)	1, 3
22	<u>Regulations</u>	
23	25 C.F.R. Part 63	3
24	28 C.F.R. § 35.130(b)(7)(i)	11
25	34 C.F.R. Part 104	14
26	34 C.F.R. § 104.2	14
27		
28		

Case 3:17-cv-08004-SPL Document 182 Filed 05/31/19 Page 7 of 24

1	34 C.F.R. § 104.32.....	13
2	34 C.F.R. § 104.36.....	13
3	43 C.F.R. § 17.201.....	15
4	43 C.F.R. § 17.220.....	15
5	43 C.F.R. §§ 17.501-17.570.....	14
6	43 C.F.R. §§ 17.502.....	15
7		
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11		
12		
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Pursuant to Fed. R. Civ. P. 56, Defendants move for summary judgment as to Counts I, II, IV, V, and VI of the Third Amended Complaint (“TAC”), ECF No. 128. This motion is supported by a Memorandum of Law, Statement of Undisputed Material Facts, and exhibits, all filed herewith.

Defendants, the Department of the Interior (“DOI”) and the Bureau of Indian Education (collectively referred to as “BIE”), operate Havasupai Elementary School (“HES”), a school of approximately 70 K-8 students located in the bottom of the Grand Canyon. Operating HES is extraordinarily challenging. BIE has taken numerous measures to ensure that Havasupai students are provided with an educationally sound and safe environment. BIE is committed to developing solutions to the issues HES confronts and working with the Havasupai Tribe to provide students with an adequate education.

3-ER-227

FACTUAL BACKGROUND

The Indian Education Act, 25 U.S.C. §§ 2000, *et seq.* (incorporating regulations at 25 C.F.R. Part 32) governs BIE's operation of programs like HES and sets forth formulas used to allocate appropriated funds for schools. HES is located at the bottom of the Grand Canyon, accessible only via an eight-mile hike or mule ride, or helicopter. Ex. 1, Dearman Dep. 216:18-28.¹ The extremely remote location poses a number of obstacles to BIE's attempts to recruit, hire, and retain staff necessary for providing adequate educational services. Ex. 2, Shamblin Dep. 93:17-94:16. Teachers must use costly helicopter transportation to visit family or purchase supplies. Ex. 3, Roanhorse-Dineyahze Expert Dep. 103:6-10; Ex. 4, Ticeahkie Dep. 90:4-7. In addition, many teachers have experienced threats of, or actual, physical violence in the community. Ex. 5, Paddock Dep. 221:18-222:9; Ex. 6, Williamson Dep. 332:2-3. These circumstances often result in applicants declining a position or employees leaving after a year. Ex. 7, Roanhorse-Dineyahze Dep. 131:3-10; Ex. 2, Shamblin Dep. 55:18-56:4, 65:8-17.

There also is a shortage of housing for HES staff. Although HES's organizational chart has 17 positions, only 12 beds are available to house staff, double occupancy apartments must be shared, and there is no space for staff members to house their families. Ex. 2, Shamblin Dep. 95:23-96:2; Ex. 1, Dearman Dep. 62:16-21. Additional housing cannot be constructed without permission from the Tribe and authorization from the Bureau of Indian Affairs. Ex. 7, Roanhorse-Dineyahze Dep. 122:11-16.

BIE offers a variety of monetary and nonmonetary incentives to recruit and retain staff at HES, including higher salaries than state schools in the area, a 25% differential pay increase for teachers, recruitment bonuses, additional pay for certification training and maintenance, loan forgiveness, transportation of personal belongings, rent reductions, and training and mentoring. Ex. 8, Boyd Dep. 110:16-117:3; Ex. 1, Dearman Dep. 138:24-139:3; Ex. 9, Maldonado Dep. 250:3-15; Ex. 10, Shamblin 30(b)(6) Dep. 46:1-48:9, 56:10-19; Ex. 11, Defs. Interrog. Response #9(d). Yet, vacancies are hard to fill because the federally mandated hiring process for BIE

¹ Exhibits to this Motion and Memorandum are listed and described in the attached Index of Exhibits.

1 teachers, *see* 34 U.S.C. § 20351, especially for teachers of Native American children, *see* 25 U.S.C.
 2 § 3207; 25 C.F.R. Part 63, is lengthy. Ex. 10, Shamblin 30(b)(6) Dep. 96:17-97:2, 110:7-20,
 3 110:23-111:3; Ex. 2, Shamblin Dep. 110:18-111:11, Ex. 1, Dearman Dep. 60:4-6. And positions
 4 remain unfilled because selectees are unable to pass the requisite background check or are not
 5 certified. Ex. 2, Shamblin Dep. 106:12-22, 154:21-155:14.

6 Despite these challenges, BIE generally provides adequate instructional resources, Ex. 8,
 7 Boyd Dep. 129:21-130:1; Ex. 12, Hastings Dep. 98:16-20; Ex. 13, Muhammad Dep. 122:18-21,
 8 127:9-11; Ex. 11, Defs. Interrog. Response #1 & Att. #1; a curriculum that aligns with state
 9 standards, Ex. 5, Paddock Dep. 102:3-9, 112:22-113:8; Ex. 11, Defs. Interrog. Response #2;
 10 cultural instruction, Ex. 7, Roanhorse-Dineyahze Dep. 206:6-207:24; Ex. 14, Vigil Dep. 13:9-22;
 11 Ex. 11, Defs. Interrog. Response #5-6; some extra-curricular activities, Ex. 8, Boyd Dep. 148:13-
 12 16; Ex. 11, Defs. Interrog. Response #3 & Att. #3; field trips, Ex. 11, Defs. Interrog. Response
 13 #3 & Att. #3; Ex. 12, Hastings Dep. 80:21-81:5; Ex. 5, Paddock Dep. 127:9-128:11; behavioral
 14 health services, Ex. 8, Boyd Dep. 251:17-252:23; Ex. 4, Ticeahkie Dep. 173:17-174:1; and a
 15 handbook of student rights and responsibilities, Ex. 15, Dearman 30(b)(6) Dep. 99:7-100:5,
 16 113:13-114:18; Ex. 13, Muhammad Dep. 104:3-106:25, 139:8-140:9, 183:24-185:1. And BIE is
 17 taking steps relating to its compliance with Section 504 and addressing the needs of the student
 18 plaintiffs. Ex. 1, Dearman Dep. 98:12-99:3, 168:25-169:5.

19 LEGAL STANDARD

20 “The court shall grant summary judgment if the movant shows that there is no genuine
 21 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
 22 R. Civ. P. 56(a). Where claims call for judicial review under the APA, “summary judgment is an
 23 appropriate mechanism for deciding the legal question” presented. *Occidental Eng’g Co. v. INS*,
 24 753 F.2d 766, 770 (9th Cir. 1985).

25 ARGUMENT

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

27 The APA enables a “reviewing court” either to “compel agency action unlawfully
 28 withheld or unreasonably delayed[.]” 5 U.S.C. § 706(1) (Count I), or to “hold unlawful and set

1 aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in
2 accordance with law[.]” 5 U.S.C. § 706(2) (Count II). The APA confines judicial review to a
3 cognizable final “agency action” that causes actual harm and circumscribes the type of relief that
4 the reviewing court can enter: it can “compel” or “set aside” discrete acts—nothing more.
5 Plaintiffs disregard each limitation.

6 **A. Plaintiffs Do Not Challenge a Cognizable “Agency Action.”**

7 Plaintiffs broadly attack years of alleged failures to properly administer HES, what they
8 loosely describe as BIE’s “failure to take action required to provide basic education” (Count I)
9 and “failure to provide basic education” (Count II). Counts I and II thus challenge purported
10 systemic failures in the school’s administration. *See* TAC ¶¶ 47-192, 207-256. The TAC does
11 not seek judicial review of BIE’s failure to issue a particular “rule, order, license, sanction, relief,
12 or the equivalent” type of discrete governmental act. 5 U.S.C. § 551(13). Nor can the TAC
13 fairly be read to challenge the lawfulness of affirmative, discrete acts. Plaintiffs recite a list of
14 grievances and refer to BIE regulations, but in fact challenge countless logistical decisions (or
15 omissions) across a broad swath of categories that have taken place over an unspecified period
16 of time concerning the “administration of [HES].” TAC ¶ 251.

17 Preliminarily, Count II does not properly state a claim. Under § 706(2), Plaintiffs must
18 identify some “discrete agency action[.]” that the agency has in fact taken and that they seek to
19 set aside by showing that the action was arbitrary or capricious or otherwise unlawful. *Norton v.*
20 *S. Utah Wilderness All.* (“SUWA”), 542 U.S. 55, 61-62 (2004). Because the gravamen of Plaintiffs’
21 claim, *see* TAC ¶ 252 (incorporating ¶ 239 by reference), is the alleged pervasive failure to act,
22 rather than “specific, affirmative agency action” that must be set aside, the claim *only* could arise
23 under § 706(1). *Sheldon v. Vilsack*, 538 F. App’x 644, 649 n.3 (6th Cir. 2013); *cf. John v. United*
24 *States*, 720 F.3d 1214, 1228 n.86 (9th Cir. 2013).

25 In any event, because Plaintiffs seek wholesale improvement of the school under the
26 APA, both Counts I and II fail because they do not challenge a cognizable agency action. The
27 APA defines “agency action” as “the whole or a part of an agency rule, order, license, sanction,
28 relief, or the equivalent or denial thereof, or failure to act[.]” 5 U.S.C. § 551(13); *see also id.* § 706.

1 Because these statutorily enumerated categories share the “same characteristic of discreteness[.]”
2 the Supreme Court has made clear that APA review is limited to “circumscribed, discrete agency
3 actions[.]” *SUWA*, 542 U.S. at 62-63. Put another way, a plaintiff cannot use the APA either
4 to bring a generalized challenge to an agency’s operations or to seek broad, programmatic relief.
5 *See id.* at 64-65; *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890-91 (1990).

6 A plaintiff cannot bring APA claims that “challenge an entire program”—in this case, a
7 school’s entire operation—“by simply identifying specific allegedly-improper final agency
8 actions within that program[.]” *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (en banc).
9 The Supreme Court made this point in *Lujan*. There, a group attempted to challenge a number
10 of failures by the agency in administering a government program—including the failure to revise
11 land use plans, submit recommendations to Congress, and provide adequate environmental
12 impact statements. *See Lujan*, 497 U.S. at 891. The Court held the claim was unreviewable under
13 the APA, no matter how often the agency had repeated the alleged failures. *Id.* The Court in
14 *SUWA* reiterated its rejection of programmatic challenges, holding that challenges to across-
15 the-board deficiencies in legal compliance lack the requisite specificity. 542 U.S. at 64-66.

16 In light of *Lujan* and *SUWA*, lower courts have consistently rejected APA suits
17 predicated on aggregated claims that merely highlight an agency’s general deficiencies to comply
18 with statutory or regulatory obligations. *See, e.g., City of New York v. U.S. Dep’t of Def.*, 913 F.3d
19 423, 433 (4th Cir. 2019) (rejecting APA suit consisting of “an aggregation of many small claims”
20 relating to agency’s conceded failure to comply with reporting obligations); *Veterans for Common*
21 *Sense v. Shinseki*, 678 F.3d 1013, 1027-30 (9th Cir. 2012) (en banc) (rejecting APA suit
22 complaining of agency delay in the processing of claims for benefits and noting that, while
23 review of a delay claim in an individual case might be available, such review could not be
24 extended to systemic delay because such an “approach would have the federal courts as virtually
25 continuing monitors of the wisdom and soundness of Executive action” (citation omitted)); *Nev.*
26 *Ass’n of Cty. v. Dep’t of Interior*, No. 3:13-cv-712-MMD, 2015 WL 1130982, at *2-*4 (D. Nev.
27 Mar. 12, 2015) (rejecting challenge to failure to properly manage wild horses and burros under
28 the Wild Horses Act because the “many individual actions” identified in the complaint merely

1 exemplified the alleged flaws in the program that plaintiffs wanted to correct), *aff'd*, 686 Fed.
 2 App'x 407 (9th Cir. 2017).

3 Under this well-established precedent, Plaintiffs' litany of the alleged "flaws" concerning
 4 the administration of HES—"consisting principally of the many individual actions referenced
 5 in the complaint, and . . . actions yet to be taken as well—cannot be laid before th[is] court[]
 6 for wholesale correction under the APA[.]" *Sierra Club*, 228 F.3d at 567-68 (citing *Lujan*, 497
 7 U.S. at 892-93); *accord Defs. of Wildlife v. Flowers*, No. 02-CV-195, 2003 WL 22143270, at *1-*2
 8 (D. Ariz. Aug. 18, 2003), *aff'd*, 414 F.3d 1066 (9th Cir. 2005). Based on the TAC, there can be
 9 no doubt that Plaintiffs challenge how BIE administers the school across almost all operational
 10 programs. Their request for the Court to enter broad relief measured in qualitative terms such
 11 as "sufficient" or "appropriate," *infra* n. 1, underscores the true nature of their claims as Plaintiffs
 12 seek not to compel or set aside discrete agency actions but rather wholesale correction of the
 13 school, *see City of New York*, 913 F.3d at 434. Plaintiffs' Response to Defendants' First Set of
 14 Interrogatories further reiterates the programmatic nature of their APA claims. *See* Ex. 16.
 15 Plaintiffs state that "[t]he Complaint challenges *longstanding* and *systemic* failures to provide basic
 16 general education" and the "incidents, actions, or omissions [alleged in the TAC] are provided
 17 as *examples only*." Ex. 16 at 2-3 (emphases added); *see also id.*, Ex. A at 1 ("All student Plaintiffs
 18 and NADLC seek systemic relief as set forth more fully in the Complaint.").

19 A challenge to the longstanding and systemic failure to provide education in compliance
 20 with regulations is neither "circumscribed" nor "discrete." *SUW4*, 542 U.S. at 62-63; *Veterans*
 21 *for Common Sense*, 678 F.3d at 1027-30. Claims such as those presented in Counts I and II are
 22 not cognizable under the APA because, although "[c]ourts are well-suited to reviewing specific
 23 agency decisions, such as rulemakings, orders, or denials[.]" they are "woefully ill-suited . . . to
 24 adjudicate generalized grievances asking [courts] to improve an agency's performance or
 25 operations." *City of New York*, 913 F.3d at 431; *see also Friends of the Earth v. U.S. Dep't of Interior*,
 26 478 F. Supp. 2d 11, 25 (D.D.C. 2007) (noting that in the absence of any discrete action to review,
 27 courts risk "embarking on the kind of wholesale, programmatic review of general agency
 28 conduct for which courts are ill-suited, and for which they lack authority").

1 In such cases, “courts would be forced either to enter a disfavored ‘obey the law’
 2 injunction, or to engage in day-to-day oversight of the executive’s administrative practices”—
 3 “alternatives” which Plaintiffs pursue in this case and which “are foreclosed by the APA, and
 4 rightly so.” *City of New York*, 913 F.3d at 431 (internal citation omitted); *accord Del Monte Fresh*
 5 *Prod. N.A., Inc. v. United States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010). Day-to-day oversight
 6 is especially foreclosed in the educational context where the Supreme Court has “cautioned that
 7 courts lack the ‘specialized knowledge and experience’ necessary to resolve ‘persistent and
 8 difficult questions of educational policy.’” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.,*
 9 *Westchester Cty. v. Rowley*, 458 U.S. 176, 208 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*,
 10 411 U.S. 1, 42 (1973)).

11 Across-the-board grievances concerning a government program, such as the
 12 administration of schools, do not belong in a courtroom; rather, they should be directed towards
 13 “the offices of the [relevant agencies] or the halls of Congress, where programmatic
 14 improvements are normally made.” *Lujan*, 497 U.S. at 891. “By leaving programmatic decisions
 15 and relief to the two political branches of government . . . the appropriate deference to the
 16 separation of powers vital to our system of government is properly respected.” *Sierra Nev. Forest*
 17 *Prot. Campaign v. Rey*, 573 F. Supp. 2d 1316, 1328 (E.D. Cal. 2008) (emphasis added), *aff’d in part,*
 18 *rev’d sub nom. Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011).

19 If Plaintiffs’ APA claims were allowed to proceed, the Court necessarily would be
 20 involved in the day-to-day operation of HES and called upon to evaluate hiring and retention
 21 efforts, as well as the adequacy of handbooks, textbooks, field trips, curricula, disciplinary
 22 procedures, and instructional materials. Congress has foreclosed such involvement and, thus,
 23 BIE’s motion on Counts I and II should be granted.

24 **B. The APA Does Not Authorize Plaintiffs’ Requested Relief.**

25 In enacting the APA, Congress replaced the courts’ traditional equitable powers with two
 26 statutory remedies. *See SUWZA*, 542 U.S. at 63; *see also Hinck v. United States*, 550 U.S. 501, 506
 27 (2007) (explaining that equitable relief may not be awarded when Congress has provided for a
 28 different remedy in a “precisely drawn, detailed statute” (citation omitted)); *Forest Guardians v.*

1 *Babbitt*, 174 F.3d 1178, 1188 n.14 (10th Cir. 1999) (“5 U.S.C. § 706 . . . strips courts of their
 2 traditional tools of equity”). The APA authorizes a Court to “compel” action—*i.e.*, issue an
 3 order requiring an agency to take a legally required discrete action, 5 U.S.C. § 706(1)—or to “set
 4 aside” action—*i.e.*, issue an order vacating an unlawful discrete act or remanding to the agency
 5 for further consideration, *id.* § 706(2).

6 In seeking to refashion the entire administration of HES, *see* TAC Request for Relief
 7 (“Relief”) ¶¶ 3, 4,² Plaintiffs’ requested relief does not conform to a discrete duty as necessary
 8 to support a § 706(1) claim. Specifically, the requested relief does not seek to compel a “precise,
 9 definite act” that contains an “unequivocal command” about which the agency has “no
 10 discretion what[so]ever,” *SUWZA*, 542 U.S. at 63 (citations omitted), and that “could traditionally
 11 have been enforced through a writ of mandamus.” *Hells Canyon Pres. Council v. U.S. Forest Serv.*,
 12 593 F.3d 923, 932 (9th Cir. 2010).³ Plaintiffs not only fail to seek to compel or set aside *specific*
 13 actions, but also concede that “the nature of the relief requested” is *not* “limited to addressing
 14 particular incidents, action, or omissions by Defendants[.]” Ex. 16, Pls. Interrog. Response at 5.
 15 The relief instead is designed to redress alleged “systemic failures [by Defendants] . . . to fulfill
 16 their statutory and regulatory obligations.” *Id.* at 3.

17 Even if BIE has failed to operate the school in compliance with its regulations, acceding
 18 to Plaintiffs’ request that the Court “compel compliance with [its regulations] and refashion

19 ² Plaintiffs seek a declaration “setting forth the duties and obligations of [BIE] with respect to
 20 *the delivery of education* to students at [HES],” and an injunction requiring the agency (and even
 21 “successors in office and assigns/assignees”) to provide, among other things, “access to”: (1)
 22 “an *adequate* public education”; (2) “education provided by *sufficient* numbers of *qualified* teachers
 23 and related services providers”; (3) “education that is *culturally relevant* based on the unique culture
 24 and tradition of the Havasupai tribe”; (4) “instruction *appropriate* to students’ native language”;
 25 (5) “education that is *properly governed* by a school board appointed by the Tribal Council”; and
 (6) “*appropriate* assessment of student achievement[.]” TAC Relief ¶¶ 2-3 (emphasis added).
 Plaintiffs also want a declaration that BIE has violated its own regulations, the “appointment of
 an independent third party to receive and respond to complaints from parents or tribal
 officials[.]” a “permanent injunction” prohibiting future unlawful conduct—including “policies
 and practices.” *Id.* ¶¶ 1-2, 3, 4.

26 ³ In addition, Congress has not set forth any meaningful standards in the Indian Education Act,
 27 25 U.S.C. §§ 2000, *et seq.*, to determine what is “adequate,” “sufficient,” or “appropriate.”
 28 Therefore, under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) and its progeny,
 Plaintiffs’ claims arguably are not reviewable under the APA. *See id.* at 410 (APA bars judicial
 review of agency decision where, among other circumstances, “statutes are drawn in such broad
 terms that in a given case there is no law to apply” (citation omitted)).

1 Federal Defendants’ management” of HES would be contrary to the APA. *Nev. Ass’n*, 2015
 2 WL 1130982, at *2-*4; *cf. Ctr. for Biological Diversity v. U.S. Dep’t of Hous. & Urban Dev.*, 241 F.R.D.
 3 495, 500, 501 (D. Ariz. 2006) (denying request for declaration that defendants were violating
 4 federal law and for injunction compelling defendants to change their practices). The APA
 5 forecloses such follow-the-law injunctions. *See City of New York*, 913 F.3d at 431; *Forest*
 6 *Guardians*, 174 F.3d at 1188 n.14.

7 Further, by miring the Court in the myriad of decisions stemming from the day-to-day
 8 operation of HES, Plaintiffs’ requested relief would subvert the framework Congress created in
 9 the APA to review *discrete* acts. *See Cobell v. Norton*, 392 F. 3d 461, 475 (D.C. Cir. 2004). The
 10 Court therefore should decline Plaintiffs’ improper invitation “to take on potentially extensive
 11 supervision of [HES].” *NRDC v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992).

12 In sum, in seeking wholesale relief to enforce compliance with BIE regulations at HES—
 13 the crux of Counts I and II— Plaintiffs seek to contravene Congress’s clear intent that the APA
 14 should not employed as a vehicle for effectuating broad programmatic relief. *Pub. Lands for the*
 15 *People, Inc. v. USDA*, 733 F. Supp. 2d 1172, 1183 (E.D. Cal. 2010) (“[T]he APA does not permit
 16 courts to oversee agencies wholesale.”). Although a “case-by-case approach” where a plaintiff
 17 must challenge single actions may be “frustrating” when “‘across-the-board protection’ is sought
 18 by a plaintiff . . . this is the traditional, and remains the normal, mode of operation of the courts.”
 19 *RCM Technologies, Inc. v. DHS*, 614 F. Supp. 2d 39, 45 (D.D.C. 2009) (citation omitted).

20 Counts I and II identify “the sort of public policy problem that often requires
 21 reallocating resources, developing new administrative systems, and working closely with partners
 22 across[, and outside of the] government. Solving it will likely require expertise” across different
 23 areas and the development of new partnerships. *City of New York*, 913 F.3d at 433. BIE shares
 24 Plaintiffs’ goal of better opportunities and services for *all* Havasupai children and is committed
 25 to undertaking the time-consuming process necessary to solve the deep-rooted problems at HES
 26 with the active involvement of the Tribe, which is not a party to this litigation. Nevertheless,
 27 the TAC fails to set forth a cognizable claim as “the sort of ‘broad programmatic’ undertaking”
 28

1 Plaintiffs seek is that “for which the APA has foreclosed judicial review.” *Id.* (quoting *SUWA*,
2 542 U.S. at 64).

3 **II. COUNT IV FAILS BECAUSE PLAINTIFFS HAVE NOT IDENTIFIED A**
4 **REASONABLE ACCOMMODATION BIE HAS FAILED TO PROVIDE.**

5 Count IV alleges that “Student Plaintiffs Impacted by Childhood Adversity” are
6 “individual[s] with a disability” under Section 504 and that, “solely by reason of their
7 unaddressed exposure” to complex trauma and adversity, they “have been denied meaningful
8 access to public education.” TAC ¶¶ 271-77.⁴ Plaintiffs contend that the four allegedly disabled
9 students who have been exposed to complex trauma and adversity—only two of whom are
10 eligible for enrollment at HES during the next academic year (*i.e.*, Taylor P. and Moana L.), *see*
11 Defs.’ Stmt. of Material Facts (“Defs.’ SOF”) ¶¶ 10, 11—“require a *system* that is responsive to
12 and capable of addressing the impact of complex trauma.” TAC ¶ 278. The “system” that
13 Plaintiffs contend is required “includ[es], but [is] not limited to: (1) comprehensive and ongoing
14 training, coaching, and consultation for all adult staff regarding trauma-informed and culturally
15 sensitive strategies” for education; “(2) implementation of restorative practices to prevent,
16 address, and heal after conflict”; and (3) “adoption of [culturally sensitive] practices and
17 interventions to enhance student wellness[.]” TAC Relief ¶ 3i.

18 For purposes of this motion, BIE does not dispute that the four student plaintiffs have
19 been diagnosed with trauma-related disorders that substantially limit one or more major life
20 activities. The question is whether Section 504 “require[s]” HES to establish a school-wide
21 “system” comprised of transformative and emerging practices in the field of education to
22 address trauma-related disorders of specific students and, relatedly, whether BIE’s failure to
23 establish such a “system” violates Section 504. TAC ¶ 278. Because the requested
24 accommodation is a developing “system” that would require a fundamental and substantial

25 ⁴ The TAC refers to a group identified as “Student Plaintiffs Impacted by Childhood Adversity.”
26 Although not entirely clear, presumably the members of that group are the student plaintiffs in
27 Count IV. To that effect, the remaining Count IV Plaintiffs are Stephen C., Durell P., Taylor
28 P., Moana L., and the Native American Disability Law Center. As discussed below, the Court
lacks subject-matter jurisdiction over *all* claims raised by Stephen C. and Durell P. because they
have completed their eighth grade and are not eligible to receive educational services at HES in
the next academic year. *See infra* at 16.

1 modification of HES and impose an undue burden on BIE, Plaintiffs have failed to meet their
2 burden under Section 504.

3 “‘[T]he focus of the prohibition in § 504 [of the Rehabilitation Act] is ‘whether disabled
4 persons were denied meaningful access to state-provided services.’” *Mark H. v. Lemahieu*, 513
5 F.3d 922, 937 (9th Cir. 2008) (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).
6 To ensure such access, schools must “make *reasonable* modifications in policies, practices, or
7 procedures when the modifications are *necessary* to avoid discrimination on the basis of disability,
8 *unless* the [school] can demonstrate that making the modifications would fundamentally alter the
9 nature of the service[s], program, or activity.” 28 C.F.R. § 35.130(b)(7)(i) (emphases added)
10 (implementing Title II of the Americans with Disabilities Act (“ADA”)); *accord Zukele v. Regents of*
11 *Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999).⁵ “[Section] 504 does not require
12 ‘substantial adjustments in existing programs beyond those necessary to eliminate discrimination
13 against otherwise qualified individuals[.]’” *Mark H.*, 513 F.3d at 937 (citation omitted). It
14 “require[s] *reasonable* modifications *necessary* to correct for instances in which qualified disabled
15 people are prevented from enjoying ‘meaningful access to a benefit because of their disability.’”
16 *Id.* (emphases added) (citation omitted). The denial of such “reasonable accommodation”
17 violates Section 504. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010).

18 Plaintiffs must show “the existence of a reasonable accommodation that would enable
19 [the disabled students with trauma-related disorders] to meet the educational institution’s
20 essential eligibility requirements.” *Zukele*, 166 F.3d at 1047. A requested accommodation that
21 would require a fundamental or substantial modification of the school’s services fails to satisfy
22 Plaintiffs’ burden to show that BIE denied a *reasonable* accommodation otherwise required by
23 Section 504. *See id.* Such is the case here as the requested accommodation would substantially
24 modify the school’s services. *See* Defs.’ SOF ¶¶ 4-9.

25 Requiring HES to implement “trauma-informed and culturally sensitive strategies” or
26 “restorative practices to prevent, address, and heal after conflict[.]” TAC Relief ¶ 3i, does not
27

28 ⁵ The “same analysis” is applied “to claims brought under both” the ADA and Section 504.
Zukele, 166 F.3d at 1045 n. 11.

1 represent a “reasonable accommodation” in the present circumstances. Plaintiffs’ ideas stem
 2 from aspirational, developing practices, as there is yet no established consensus as to the nature
 3 and scope of such practices or the extent to which they are necessary or can feasibly be adopted
 4 into existing school programs. Defs.’ SOF ¶¶ 1-3. The models for trauma-informed schools,
 5 which are being implemented in a handful of schools across the country, currently are “research-
 6 based and emerging.” *Id.* ¶ 2, 3. In other words, no uniformly agreed-upon standards govern
 7 how a school should provide a trauma-informed educational setting. *Id.* ¶ 1-3. Plaintiffs’ experts
 8 concede that an evidence-based trauma informed school does not yet exist. *Id.* ¶ 3.

9 If Count IV were allowed to proceed, the Court in effect would find that Section 504
 10 requires schools to adopt trauma-informed and culturally sensitive strategies to address the
 11 unfortunate reality that thousands, if not millions, of children across the country are invariably
 12 exposed to complex trauma and adversity. No court has found that Section 504 requires a
 13 school to provide an accommodation such as Plaintiffs seek here. *See, e.g., Zukele*, 166 F.3d at
 14 1048. To the contrary, a court presented with the same issue explicitly refused to hold as much.
 15 *See P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126, 1143 (C.D. Cal. 2015) (“Without
 16 opining as to whether Plaintiffs’ proposed program” of establishing “districtwide and school-
 17 wide policies and practices that address trauma and its effects” “might be beneficial or desirable
 18 as a policy matter, the Court concludes that it is not appropriate to order the relief sought at this
 19 time.” (citation omitted)).⁶

20 Plaintiffs have identified only two students with specific trauma-related disorders who
 21 are eligible to receive educational services at HES in the next academic year and who need an
 22 accommodation to address those disorders: Taylor P. and Moana L. Plaintiffs were required to
 23 conduct a “fact-specific, individualized analysis of the disabled individual[s]’ circumstances[.]”
 24 *Hamamoto*, 620 F.3d at 1098, and identify “‘reasonable modifications’ which should be
 25 implemented” to address the needs arising from the specific trauma-related disorders of the

26 ⁶ Unlike here, where Plaintiffs seek system-wide relief on behalf of only a few students, in *P.P.*,
 27 a putative class sought virtually identical system-wide relief to assert Section 504 claims on behalf
 28 of *all* students in a school district allegedly exposed to trauma and adversity. 135 F. Supp. at
 1129-30. Unsurprisingly, system-wide relief is often sought in the context of class actions. *See*
id.; *see also Crowder*, 81 F.3d at 1485. No such class exists here.

disabled students, *Crowder*, 81 F.3d at 1485. Yet, rather than seeking specific accommodations designed to meet these particular students' educational needs in the context of individualized education programs, Count IV seeks to have this Court hold that BIE violated federal law by failing to implement a cutting-edge and yet untested system of emerging practices that would require substantial and unduly burdensome adjustments to the school. *See* Defs.' SOF ¶¶ 4-9. And to the extent Plaintiffs rely on the Report of Dr. Noshene Ranjbar, "Mental Health Needs Assessments for Four Students and Recommendations," to identify specific modifications that BIE must provide for Taylor P. and Moana L., such modifications are not "reasonable" under Section 504, as they would impose "undue financial and administrative burdens" on HES and BIE. *See Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979); *see* Defs.' SOF ¶¶ 7-9. Because Plaintiffs' requested accommodation is not reasonable, BIE's motion should be granted as to Count IV.

III. PLAINTIFFS CANNOT PREVAIL ON COUNTS V AND VI BECAUSE 34 C.F.R. §§ 104.32 AND 104.36 DO NOT APPLY TO INTERIOR.

Counts V and VI allege that Defendants have violated two Department of Education ("DOE") regulations implementing Section 504: 34 C.F.R. § 104.32 on "[l]ocation and notification," and 34 C.F.R. § 104.36 on "procedural safeguards." These regulations do not apply to federal agencies like BIE.

As originally enacted in 1973, Section 504 provided in relevant part that no "qualified handicapped individual . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." Act to Replace the Vocational Rehabilitation Act, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394. Recognizing that the statute did not apply to federal agencies, Congress amended the law in 1978 to prohibit such discrimination under any program or activity receiving Federal financial assistance "*or under any program or activity conducted by any Executive agency.*" Act to Amend the Rehabilitation Act of 1973, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982, *codified in* 29 U.S.C. § 794(a) (emphasis added). Accordingly, the "1978 amendment . . . subject[ed] federal agencies to section 504's nondiscrimination requirement." *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 785 (9th Cir. 1991), *overruled on other grounds by Lane v. Pena*, 518 U.S. 187 (1996); *accord Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 302 (5th Cir. 1981).

1 The DOE regulations relied upon in Counts V and VI are contained in 34 C.F.R. Part
 2 104, which by its own terms applies only “to each recipient of Federal financial assistance from
 3 the Department of Education and to the program or activity that receives such assistance.” 34
 4 C.F.R. § 104.2. The regulations thus govern, for example, Section 504 implementation by local
 5 educational agencies receiving financial assistance from DOE, but do not apply to programs
 6 operated or conducted by other federal agencies. *See U.S. Dep’t of Transp. v. Paralyzed Veterans of*
 7 *Am.*, 477 U.S. 597, 612 (1986)(“program[s]” or “[a]ctivities wholly carried out by the United
 8 States with Federal funds . . . cannot fairly be described as receiving Federal ‘assistance’” for
 9 purposes of Section 504 and other statutes like Title VI (42 U.S.C. § 2000d) and Title IX (20
 10 U.S.C. § 1681)) (quoting 110 Cong. Rec. 13380 (1964)); *accord Jacobson v. Delta Airlines, Inc.*, 742
 11 F.2d 1202, 1213 (9th Cir. 1984); *Coleman v. Darden*, 595 F.2d 533, 538-39 (10th Cir. 1979) (same).

12 Further, Congress did not authorize DOE to unilaterally promulgate regulations that
 13 bind other executive agencies. In fact, Congress authorized each agency to “promulgate
 14 regulations that implement the requirements concerning treatment of disabled individuals
 15 contained in § 504,” *Mark H.*, 513 F.3d at 929, thereby granting each agency “substantial leeway
 16 to explore areas in which discrimination against the handicapped pose[s] particularly significant
 17 problems and to devise regulations to prohibit such discrimination[.]” *Alexander v. Choate*, 469
 18 U.S. 287, 304 n. 24 (1985).

19 DOI’s regulations implementing Section 504 are located in 43 C.F.R. Part 17. In those
 20 regulations, the agency maintains the dichotomy between regulations governing
 21 “Nondiscrimination on the Basis of Handicap in Programs or Activities *Conducted by the*
 22 *Department of the Interior*,” *see* 43 C.F.R. §§ 17.501-17.570 (“Subpart E”), and those governing
 23 “Nondiscrimination on the Basis of Handicap” in *other* programs or activities that are not
 24 conducted by DOI but receive Federal financial assistance, *see id.* §§ 17.200-17.280 (“Subpart
 25 B”). While Subpart E applies to BIE-operated schools, Subpart B applies to non-BIE-operated
 26 schools that receive federal funds. HES is an example of a program or activity “conducted
 27 and/or administered and/or maintained by” BIE, *id.* § 17.502, under Subpart E. A tribal-
 28 operated school is an example of a program or activity receiving federal funds under Subpart B.

Although Subpart E does not refer to DOE regulations, Subpart B does in fact require compliance “with the Section 504 requirements promulgated by the Department of Education at 34 CFR part 104, subpart D.” 43 C.F.R. § 17.220; *see id.* § 17.201 (applying Subpart B to a “recipient of Federal financial assistance from the Department of the Interior and to each program or activity that receives such assistance[.]” such as tribally operated schools). Thus, whereas a tribally operated school is subject to DOE’s regulations pursuant to Subpart B, a BIE-operated school like HES is not. *Compare* 43 C.F.R. § 17.201 *with id.* § 17.502.

Plaintiffs’ APA claims in Counts V and VI at best amount to a “facially impracticable suggestion . . . that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations[.]” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). Because these regulations could only be enforced through Section 504’s implied right of action, *Mark H.*, 513 F.3d at 939, for Plaintiffs to prevail this Court would need to construe the statute as authorizing them to do what DOE cannot: unilaterally bind and sue BIE to enforce its own regulations. *Def. Supplies Corp. v. U.S. Lines Co.*, 148 F.2d 311, 312-13 (2d Cir. 1945) (noting the United States cannot sue itself).⁷ Tellingly, there is no precedent for Plaintiffs’ claim. BIE is not aware of any case in which someone has sued, let alone successfully, a federal agency to enforce the DOE regulations.⁸ BIE is thus entitled to summary judgment.

IV. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE CLAIMS OF DURELL P. AND STEPHEN C.

Each plaintiff must establish that he or she has standing to sue “separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Envt’l. Servs., Inc.*, 528 U.S. 167, 185 (2000). And “[w]hen evaluating whether [the standing] elements are present, we must look at the facts ‘as they exist at the time the complaint was filed.’” *Am. Civil Liberties Union of Nev. v. Lomax*, 471

⁷ Private enforcement of an agency rule against another agency under these circumstances could undermine the President’s authority under the Vesting and Take Care Clauses of Article II. *See* U.S. Const. art. II, § 1, cl. 1; *id.* cl. 3; *see also Myers v. United States*, 272 U.S. 52, 135 (1926).

⁸ Cases involving these regulations concern suits against local educational agencies. *See, e.g., Mark H.*, 513 F.3d at 938-39; *Garcia v. Capistrano Unified Sch. Dist.*, No. SA CV 16-2111-DOC (JCGx), 2018 WL 6017009, at *8 (C.D. Cal. Mar. 30, 2018); *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. at 1116-17.

1 F.3d 1010, 1015 (9th Cir. 2006). Similarly, Article III of the Constitution requires “a live case
 2 or controversy . . . at all stages of review. Otherwise, the case is moot and must be dismissed.”
 3 *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007) (citations omitted). The Court lacks
 4 subject-matter jurisdiction over the claims of Durell P. and Stephen C. because they do not
 5 present a case or controversy for purposes of Article III. Specifically, Durell P. lacks standing
 6 to bring his claims and Stephen C.’s claims are moot.

7 The operative complaint in this case was filed on August 10, 2018. The TAC makes clear
 8 that, as of that date, Durell P. had already completed the eighth grade and thus was no longer
 9 eligible to receive educational services at HES. Defs.’ SOF ¶ 10. Indeed, Durell P. is now
 10 pursuing options outside of the Havasupai reservation. *Id.* In light of the Court’s earlier
 11 dismissal of former students for lack of standing, *see Stephen C. v. BIE*, 2018 WL 1871457, at *2-
 12 *3 (Mar. 29, 2018), the Court should find that Durell P. also lacks standing “to seek injunctive
 13 or declaratory relief because [he] ‘would not stand to benefit from’ such relief.” *Slayman v. FedEx*
 14 *Ground Package Sys., Inc.*, 765 F.3d 1033, 1047-48 (9th Cir. 2014) (citation omitted). Alternatively,
 15 because he is no longer at HES and no longer eligible to enroll at HES, “his claims for
 16 prospective relief became moot because he could no longer benefit from such relief.” *Id.* (citing
 17 *Walsh v. Nev. Dep’t of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006)).

18 That is also the case for Stephen C. Although Stephen C. was enrolled at HES at the
 19 time of the TAC’s filing, *see* TAC ¶ 8, he recently completed eighth grade as of May 23, 2019.
 20 Defs.’ SOF ¶ 11. Accordingly, Stephen C.’s claims are also moot. *See Slayman*, 765 F.3d at 1048.
 21 In both instances, there is no Article III case or controversy and the Court would be issuing an
 22 impermissible advisory opinion. Therefore, BIE is entitled to summary judgment on the claims
 23 of both Stephen C. and Durell P.

24 CONCLUSION

25 For the foregoing reasons, this Court should grant BIE’s motion.

26 Dated: May 31, 2019

Respectfully submitted,

27 JOSEPH H. HUNT
 28 Assistant Attorney General

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/s/ Cesar A. Lopez-Morales

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TAB 16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Stephen C., et al.,	)	
	)	
Plaintiffs,	)	No. CV-17-8004-PCT-SPL
	)	
vs.	)	Phoenix, Arizona
	)	October 24, 2017
Bureau of Indian Education,	)	9:33 a.m.
et al.,	)	
	)	
Defendants.	)	
	)	

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

Official Court Reporter:
Candy L. Potter, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc 36
Phoenix, Arizona 85003-2151
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

CV-17-8004-PCT-SPL - October 24, 2017

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CV-17-8004-PCT-SPL - October 24, 2017

1 (Proceedings begin at 9:33 a.m.)

2 THE CLERK: This is case number CV-17-8004,
3 Stephen C., et al, versus the Bureau of Indian Education,
4 et al., on for oral argument.

5 Counsel please announce for the record. 09:33:16

6 MR. LOPEZ-MORALES: Good morning, Your Honor, Cesar
7 Lopez-Morales, from the Civil Division of the U.S. Department
8 of Justice. With me at counsel table are Lisa Olson, also from
9 the Department of Justice, and Jennifer Wiginton from the
10 Office of the Solicitor at the Department of the Interior. 09:33:31

11 THE COURT: Good morning to all of you.

12 MS. EIDMANN: Good morning, Your Honor, Kathryn
13 Eidmann with Public Counsel on behalf of all plaintiffs.

14 And with the Court's permission I'd like to ask my
15 co-counsel to introduce themselves. 09:33:42

16 MR. PHILLIPS: Good morning, Your Honor, Brad Phillips
17 of Munger Tolles & Olson, also on behalf of the plaintiffs.

18 MS. FORD: Good morning, Your Honor, my name is
19 Tara Ford, I'm with the Youth & Education Law Project at Mills
20 Legal Clinic at Stanford Law School, and I'm also here on
21 behalf of the plaintiffs. 09:33:55

22 THE COURT: Good morning.

23 This is the time set for oral argument. The
24 plaintiffs have requested oral argument in document number 87.

25 And I notice that the defense's position is they think 09:34:08

CV-17-8004-PCT-SPL - October 24, 2017

1 it's sufficiently pled.

2 But plaintiff, you requested argument, and I would
3 like to hear from you. So whoever is going to present the
4 argument, please approach the lectern.

5 MS. EIDMANN: As it's defendants' motion, plaintiffs
6 had expected the defendants --

09:34:25

7 THE COURT: I'm sorry, I didn't hear anything that you
8 just said.

9 MS. EIDMANN: I'm sorry. As it's defendants' motion,
10 I think we had anticipated the defendants would present first,
11 if that's appropriate for Your Honor.

09:34:34

12 MR. LOPEZ-MORALES: That's fine with us, Your Honor.

13 THE COURT: Go ahead.

14 (Discussion off the record between the Court and courtroom
15 deputy.)

09:34:47

16 THE COURT: Go ahead, sir.

17 MR. LOPEZ-MORALES: Good morning, Your Honor.

18 As you know, this case involves stated claims by nine
19 Havasupai children and a nonprofit organization to redress the
20 alleged deprivation of certain educational rights at Havasupai
21 Elementary School.

09:35:05

22 There is no question, Your Honor, that the Second
23 Amended Complaint paints a bleak picture of the situation at
24 the school, as well as the socioeconomic difficulties of the
25 Havasupai Reservation, a reservation that is located at the

09:35:19

CV-17-8004-PCT-SPL - October 24, 2017

1 bottom of the Grand Canyon and that is only accessible by
2 helicopter, mule, or an eight-mile hike from the nearest road.

3 And while I want to make clear that defendants take
4 issue with the accuracy and completeness of some of the
5 allegations in the Complaint, at this procedural juncture we
6 take the allegations as true, and our only argument is that
7 certain claims should be dismissed as a matter of law.

09:35:35

8 By filing the partial motion to dismiss, Your Honor,
9 defendants do not seek to trivialize the allegations in the
10 Complaint or deny obligations vis-a-vis the school. Rather,
11 our only goal is to streamline the Complaint by pointing to
12 certain jurisdictional issues as well as pleading
13 deficiencies.

09:35:53

14 During this argument I would like to focus on three
15 issues that were briefed in our papers.

09:36:07

16 First, the lack of standing of --

17 THE COURT: I'm going to ask you to slow down. I
18 notice that my court reporter is not keeping up with you.
19 Sometimes when lawyers get excited, which I'm sure all the
20 lawyers are, they tend to speak really fast. So if you can
21 just slow down a little bit, that would be very helpful because
22 I want to make sure I take in all of your argument.

09:36:21

23 MR. LOPEZ-MORALES: Will do, Your Honor. I apologize.

24 THE COURT: It's okay.

25 MR. LOPEZ-MORALES: I will focus on three issues that

09:36:31

CV-17-8004-PCT-SPL - October 24, 2017

1 were briefed in our papers.

2 The first is the lack of standing of five students who
3 are either no longer eligible to receive educational services
4 at Havasupai Elementary or who are already enrolled in school
5 elsewhere.

09:36:47

6 The second argument is Count 4's failure to state a
7 claim. Specifically, the failure to plead that those students
8 who were impacted by adversity and trauma are disabled within
9 the meaning of Section 504 of the Rehabilitation Act, and that
10 they were discriminated against by defendants solely because of
11 a disability.

09:37:05

12 And finally, Your Honor, the third issue is the
13 absence of a private right of action to enforce the Department
14 of Education's regulations that are identified in Counts 5 and
15 6 of the Second Amended Complaint.

09:37:22

16 Unless Your Honor has a preference, I would like to
17 start with our standing argument.

18 THE COURT: That's fine.

19 MR. LOPEZ-MORALES: There are two important precepts
20 of standing jurisprudence, Your Honor, that are particularly
21 relevant in this case.

09:37:31

22 The first -- the first one is that when evaluating
23 whether the constitutional elements of Article III standing are
24 present, courts must look at the facts as they exist at the
25 time that the Complaint is filed.

09:37:47

CV-17-8004-PCT-SPL - October 24, 2017

1 And the second one, Your Honor, is that a plaintiff
2 must establish standing separately for each remedy sought in
3 the Complaint.

4 And in this case, whether we look at the injury in
5 fact or the redressability requirements, we believe that those
6 students who are no longer enrolled at Havasupai Elementary
7 lack standing for two independent reasons.

09:37:59

8 The first one is that the deficiencies in the
9 educational services that are alleged in the Complaint while
10 they were enrolled in the school cannot possibly constitute a
11 threat of ongoing or immediate future injury since they're no
12 longer there.

09:38:18

13 And the second reason is that -- and perhaps more
14 importantly, that because they're no longer there, they would
15 not stand to benefit from --

09:38:33

16 THE COURT: Counsel, my apologies for interrupting
17 you, but I have a question.

18 Should the Court take into consideration potential
19 future injury to others? If you still have the school, isn't
20 that important? You have other children that are in line for
21 education under those circumstances. So wouldn't that be
22 important?

09:38:45

23 MR. LOPEZ-MORALES: Well, Your Honor, that is
24 important. And I believe your question raises an issue of
25 mootness, which is not necessarily the argument that we're

09:38:57

CV-17-8004-PCT-SPL - October 24, 2017

1 making.

2 And it is important to highlight that four of the
3 other students have standing to seek specifically the kind of
4 systemic-wide remedies that they want to change the school and
5 improve the services that are alleged.

09:39:13

6 So if it's a matter of providing a remedy that they're
7 seeking to improve the educational services at the school, that
8 is available, Your Honor, because four of the students have
9 standing.

10 And I believe your question also raises the point of
11 mootness. And there is an exception, as you well know,
12 Your Honor, to mootness doctrine of whether it's capable of
13 repetition yet evading review. And that doctrine, that
14 exception is only available if the claims of that specific
15 plaintiff become moot during the litigation, which is why I
16 raised that first point, that we must look at the facts as they
17 exist at the time that the Complaint is filed.

09:39:26

09:39:45

18 And for that proposition, Your Honor, we rely on two
19 important Ninth Circuit cases, *Slayman v. FedEx* and *Walsh v.*
20 *Nevada Department of Human Resources*. And they discuss those
21 two points, including the exception to mootness doctrine.

09:40:04

22 And, Your Honor, we believe that those five students
23 lack standing for those two reasons that I mentioned earlier.

24 And it is important to acknowledge that the plaintiffs
25 do not dispute any of this. Their only argument, Your Honor,

09:40:23

CV-17-8004-PCT-SPL - October 24, 2017

1 is that those five students have standing to sue for
2 compensatory education.

3 And defendants acknowledge that the law on
4 compensatory education is often messy, and the interplay of
5 federal laws related -- in the special education context is
6 confusing at best. 09:40:39

7 However, we believe that our argument is
8 straightforward. Relying on the Supreme Court's decision in
9 *Edelman V. Jordan*, the Ninth Circuit held in *Alexopoulos v.*
10 *San Francisco Unified School District* and *Alexopoulos v. Riles* 09:40:55
11 that compensatory education is virtually identical to a
12 judicial award of monetary relief, and that absent a waiver of
13 sovereign immunity such claim is barred.

14 And we believe that the law in the Ninth Circuit is
15 clear. It might be different in other circuits, but in the 09:41:14
16 Ninth Circuit it's clear. None of the statutes or regulations
17 relied upon and cited by plaintiffs in their brief or in the
18 Second Amended Complaint provide a right of action for a
19 judicial award of compensatory education against the Federal
20 Government. 09:41:32

21 THE COURT: So, Counsel, let's take a step back.

22 If it's established that you have a situation where
23 there's a clearly deficient education, should the Court step
24 in?

25 MR. LOPEZ-MORALES: So, Your Honor, I think it is 09:41:46

CV-17-8004-PCT-SPL - October 24, 2017

1 important to distinguish the different claims that plaintiffs
2 raise here, and why precisely we are -- we filed a partial
3 motion to dismiss and not a motion to dismiss.

4 And we believe that those allegations of serious
5 deficiencies in the educational --

09:42:02

6 THE COURT: No, I just want -- obviously all the
7 parties are incredibly well read on the issue. So I just want
8 to know from your perspective, since you've obviously done a
9 lot of research on the issue -- and you're doing a really nice
10 job, and all the pleadings from both sides have been very, very
11 impressive.

09:42:16

12 But I'm just curious, as it relates to your opinion,
13 if we have a situation where it's clearly established that the
14 education -- the elementary education is deficient, should the
15 Court step in?

09:42:32

16 MR. LOPEZ-MORALES: We believe so, Your Honor,
17 especially with respect to the first two claims which are under
18 the Administrative Procedures Act.

19 The plaintiffs allege that there are serious
20 deficiencies with the educational services. We acknowledge
21 that they have stated a claim, at least at this juncture, and
22 we believe that's something that the Court has jurisdiction
23 over and should step in.

09:42:44

24 Similarly with respect to Count 3, which is another
25 claim under the Rehabilitation Act, we believe that the

09:42:59

CV-17-8004-PCT-SPL - October 24, 2017

1 plaintiffs have alleged sufficient facts to point to certain
2 students who have been identified as having disabilities, and
3 that they have also stated a claim with respect to possible
4 allegations of discrimination or failure to provide reasonable
5 accommodation. That's all -- those are all claims that this
6 Court should step in and has jurisdiction over.

09:43:17

7 And, you know, at a later date, Your Honor, we'll be
8 able to explore more carefully the evidence and the record.
9 And obviously we're very willing to collaborate with the
10 plaintiffs, with the Tribe, in order to improve those services
11 and do a better job to provide education to these children.

09:43:34

12 Which is why our arguments are very narrow,
13 Your Honor, and they're based strictly on what is the available
14 case law and what is available to the plaintiffs as a matter of
15 law.

09:43:51

16 And, Your Honor, those are our arguments with respect
17 to standing.

18 Our next argument is that Count 4 fails to state a
19 claim for two reasons.

20 The first one, the failure to plead the existence of
21 impairments that may give rise to a qualifying trauma-induced
22 or trauma-related disability.

09:44:02

23 And the second reason, the failure to satisfy the
24 causation requirement in Section 504.

25 With respect to the first reason, Your Honor, I would

09:44:17

CV-17-8004-PCT-SPL - October 24, 2017

1 like to direct the Court's attention to the language that the
2 plaintiffs use themselves in their brief in the Second Amended
3 Complaint in drawing a distinction between Count 3, which we do
4 not move to dismiss, and Count 4.

5 Both counts, Your Honor, allege that defendants
6 violated Section 504 by failing to establish a system to ensure
7 access to certain students so that they can receive the
8 benefits of a public education. However Count 3, Your Honor,
9 focuses on the denial of benefits to students with
10 disabilities, and Count 4 focuses on the denial of benefits to
11 students impacted by adversity.

12 The language of Section 504 makes very clear that the
13 statute only applies to individuals with disabilities, which is
14 why we do not move to dismiss Count 3.

15 Accordingly, Your Honor, by its own terms we would
16 submit that Count 4 fails to state a claim under Section 504.

17 And, Your Honor, a disability requires a recognized
18 impairment that substantially limits one or more major life
19 activities. It is our position that plaintiffs appear to
20 conflate the two requirements, the impairment and the
21 substantial limitation requirements, in their opposition brief.

22 But to be clear, an impairment is a term of art that
23 requires, in part, either a physiological disorder or condition
24 or a mental and psychological disorder.

25 And we do not dispute that the plaintiffs have alleged

CV-17-8004-PCT-SPL - October 24, 2017

1 sufficient facts to satisfy the substantial limitation
2 requirement, and they have alleged facts of specific instances
3 of adversity.

4 The same cannot be said, Your Honor, with respect to
5 the existence of a physiological or psychological disorder. 09:46:02
6 There's nothing in Count 4 that suggests the existence of a
7 recognized impairment, and that can easily be seen from the
8 language that the plaintiffs use.

9 In fact, in page 12 in footnote 10 of their opposition
10 brief the plaintiffs acknowledge that they have not requested 09:46:20
11 these students to be evaluated, that they don't think it's
12 necessary, and that it is also unnecessary to identify these
13 students as disabled.

14 That is clearly, Your Honor, incompatible with the
15 text and purpose of Section 504, which is to prevent 09:46:35
16 discrimination and ensure that students with disabilities or
17 individuals with disabilities receive accommodation.

18 We also argue, Your Honor, that Count 4 fails to state
19 a claim because it does not show or establish or plead the fact
20 that defendants discriminated against them solely because of a 09:46:55
21 disability.

22 Plaintiffs propose a notion that it is possible for a
23 defendant to violate the antidiscrimination mandate of the
24 Rehabilitation Act regardless of whether that defendant knew or
25 should have known of the plaintiff's alleged disability. 09:47:13

CV-17-8004-PCT-SPL - October 24, 2017

1 We don't believe that makes a lot of sense,
2 Your Honor, and that there is valid authority for that
3 proposition. In fact, we have cited a number of cases in our
4 papers that indicate that prior knowledge and notice of a
5 plaintiff's disability is a requirement and a precondition to
6 any claim under Section 504, including a case from this very
7 court in District of Arizona, *Patton V. Phoenix School of Law*,
8 which relied on the Ninth Circuit decisions and callings to
9 establish that to make a -- to make out a discrimination claim
10 there has to be awareness of the disability.

09:47:30

09:47:52

11 And the same, Your Honor, in case *Dutson v. Farmer's*
12 *Insurance*, a District of Oregon case affirmed by the
13 Ninth Circuit; *Stearns v. Board of Education*, Northern District
14 of Illinois, which relied on Seventh Circuit precedent in
15 *Hedberg*.

09:48:10

16 And all of those cases, Your Honor, establish that the
17 awareness has to be of the disability itself and not of its
18 effects.

19 And as a final matter -- final argument in
20 this -- with respect to that issue, Your Honor, of Count 4's
21 failure to state a claim, we believe that plaintiffs' theory of
22 relief is incompatible with Section 504 with respect to that
23 count. Not Count 3, Your Honor, Count 4.

09:48:22

24 And the reason why it is incompatible, it is because
25 essentially it requires the Federal Government to make

09:48:40

CV-17-8004-PCT-SPL - October 24, 2017

1 inappropriate if not impermissible assumptions regarding the
2 educational capacity, the needs, and the mental health of
3 children based on their race or ethnicity.

4 And, Your Honor, that is something that the Congress
5 and the Department of Education warned against by requiring 09:49:01
6 local educational agencies, the Federal Government, states,
7 et cetera, to have procedures available, including the
8 evaluation of children, which is something that the plaintiffs
9 reject, specifically to avoid the disproportionate
10 representation and overidentification of disabled children in 09:49:22
11 underdeveloped communities, Native American communities across
12 the United States.

13 And for that proposition, Your Honor, you may look at
14 the appendix to those Section 504 regulations, as well as the
15 reauthorization of the Individuals With Disabilities Education 09:49:39
16 Act in 2004, which is codified in 20 U.S.C. 1412.

17 And finally, Your Honor, our last argument is that
18 those claims pursuant to the implementing regulations in
19 Counts 5 and 6 that relate to location and identification as
20 well as procedural safeguards, those claims should be dismissed 09:50:02
21 for lack of subject matter jurisdiction.

22 Those regulations -- and I believe plaintiffs would
23 agree with me -- do not provide for a right of action to be
24 enforced. Rather, the only question with respect to this issue
25 is whether those regulations could be enforced through the 09:50:20

CV-17-8004-PCT-SPL - October 24, 2017

1 implied right of action of the statute of Section 504.

2 And in order to determine whether those regulations
3 are enforceable under that implied private right of action, the
4 question is and the standard is whether those regulations
5 authoritatively construe the prohibition encompassed in the
6 statute. 09:50:40

7 And that is a standard that comes from a Supreme Court
8 decision, *Alexander v. Sandoval*. And that Supreme Court
9 decision emphasizes that we first look at the text of the
10 statute and then we look at the nature of the regulations. 09:50:54
11 And when you compare both, you determine whether those
12 regulations really encompass and authoritatively construe the
13 prohibition in Section 504, which is really an
14 anti-discrimination mandate.

15 And while we acknowledge -- and the plaintiffs have 09:51:10
16 cited some cases, we have cited some cases -- that there is a
17 split in authority among the district courts, there is no case
18 at a court of appeal level on whether those regulations are
19 enforceable.

20 We would submit, Your Honor, that the most persuasive 09:51:24
21 line of cases are the ones that -- is the one that we cited in
22 our brief, because they analyze the text of Section 504, and
23 they also consider and examine the nature of these regulations.

24 These regulations are procedural in nature, and they
25 impose more specific duties and obligations than Section 504 09:51:41

CV-17-8004-PCT-SPL - October 24, 2017

1 itself. Section 504 contains no procedural rights nor
2 guarantees them, which is exactly what these regulations
3 provide.

4 THE COURT: Well, sir, in your pleadings, unless I
5 missed something, it appears that you've cited a lot of
6 employment cases. Have you only found employment cases that
7 deal with that?

09:51:55

8 MR. LOPEZ-MORALES: So, Your Honor, we cited -- I
9 believe your question related to Count 4's ability to state a
10 claim. And we cited not only employment cases, but also
11 education cases. Some of our education cases involve *Patton v.*
12 *School of -- Phoenix School of Law; Stearns*, which I mentioned
13 earlier. *Stearns*, in fact, is a case involving athletic
14 eligibility in a high school. We also cited *St. Forbes* (sic),
15 which is a Southern District of Florida case.

09:52:13

09:52:37

16 And let me -- I think it is -- I'm glad you brought
17 that point, Your Honor, because I think it is important to
18 analyze both the employment and the education context.

19 Section 504 doesn't really differentiate between the
20 two. To the extent there is a difference -- and the only
21 important meaningful distinction that the plaintiffs have cited
22 in their briefs, and we agree with that, is the fact that there
23 is an implementing regulation by the Department of Education
24 that imposes the burden on schools and educational institutions
25 to identify handicapped children, disabled students who are not

09:52:55

09:53:11

CV-17-8004-PCT-SPL - October 24, 2017

1 receiving an education and evaluate them in order to determine
2 what sort of reasonable accommodation is necessary to ensure
3 that they receive the benefits of a public education.

4 So in that sense there is a burden on the school that
5 does not exist in the employment context. 09:53:30

6 However, we're not arguing, Your Honor, that the
7 children have to come to us in order to request an
8 accommodation and that their failure to request an
9 accommodation is detrimental to their claim. That sort of
10 argument would be more appropriate in the employment context. 09:53:47

11 But that's not why we cited the employment cases. We
12 did not cite them for that proposition. Our argument,
13 Your Honor, is that notice or knowledge of a disability is
14 required. And whether that is because the student or the
15 individual approached a school to request an accommodation and 09:54:05
16 put the school on notice of that disability, or whether it is
17 because the school had constructive notice of a student's
18 disability. Then at that point, only at that point, the school
19 would be liable or potentially liable for violating Section
20 504. 09:54:25

21 So I think it is important that just because there are
22 cases in the employment context -- and you will take a look at
23 our briefs and we cite both education and employment cases --
24 you should not disregard those, because we only cite them for
25 the clear proposition and universal proposition that knowledge 09:54:38

CV-17-8004-PCT-SPL - October 24, 2017

1 of a disability is required in order to allege that defendant
2 is violating solely because of that disability.

3 And finally, Your Honor, our last point with respect
4 to the regulations, I would direct the Court to take a look
5 carefully at a Ninth Circuit case, *K.M. v. Tustin Unified*
6 *School District*, which examines the relationship between the
7 Individual with Disabilities Education Act, the Rehabilitation
8 Act, and the American's with Disabilities Act.

09:54:58

9 The Ninth Circuit and pretty much federal courts
10 across the United States have examined -- the analysis with
11 respect to ADA and Rehab Act claims is virtually identical.

09:55:16

12 And in that case the Ninth Circuit noted that the
13 IDEA is a process-oriented statute. Meanwhile, the ADA and
14 the Rehab Act focus more on substance. Which is precisely
15 why we argue that these procedural regulations are not
16 really enforceable through the Section 504's implied right
17 of action.

09:55:38

18 And finally, Your Honor, I would like to note that
19 among the important regulations that implement and interpret
20 Section 504, the plaintiffs only rely on those two, procedural
21 regulations -- the procedural safeguards and the location
22 identification. They did not rely on the regulations which are
23 really at the crux of what Section 504 means in the context of
24 education, which is in 34 CFR 104.33, which is the regulation
25 that provides and ensures that all students receive a free

09:55:57

09:56:21

CV-17-8004-PCT-SPL - October 24, 2017

1 appropriate public education.

2 And you can -- and I think the reason, Your Honor, and
3 this is really speculation, it's because the plaintiffs are
4 more interested -- even though it's a specific lawsuit by nine
5 students, they're more interested in the sort of broad changes 09:56:38
6 to the school as opposed to the individualized remedies to
7 these students and ensuring that they receive the necessary
8 public appropriate education.

9 Whether -- if they're actually more interested in
10 receiving compensatory education and sort of individualized 09:56:52
11 remedy to help these students, they would have sued under the
12 IDEA, and they --

13 THE COURT: Counsel, what's wrong with the plaintiffs
14 seeking some type of global remedy to address all of the
15 education issues? 09:57:09

16 MR. LOPEZ-MORALES: Your Honor, we don't have any
17 objections with that, and I want to make that clear. It's not
18 that the Federal Government is resisting any sort of changes or
19 remedies. We're 100 percent willing in good faith to help all
20 of the students in this school, not only the student 09:57:24
21 plaintiffs.

22 However, Your Honor, because they have relied on some
23 claims, to the extent they are seeking the broad systemic
24 remedy -- for example, they want a certain type of
25 culturally-sensitive curriculum. That is something that is 09:57:44

CV-17-8004-PCT-SPL - October 24, 2017

1 available under the first two claims in the APA, and we're not
2 moving to dismiss those claims.

3 However, when you rely, Your Honor, on a statute that
4 Congress intended to protect disabled individuals, that is a
5 very specific individual-based statute. And we are only
6 interested in this case. And why we're moving to dismiss
7 Count 4, not Count 3, is that we want to ensure -- the Federal
8 Government wants to ensure that the statutes are implemented
9 and enforced just like Congress intended to.

09:58:01

10 And that is our only argument, Your Honor. It's not
11 to resist any sort of change to the school or to help certain
12 students and not others.

09:58:20

13 And that is our -- the only point I wanted to
14 emphasize.

15 And if Your Honor doesn't have any questions, I would
16 just like to conclude with summarizing what our arguments are.

09:58:34

17 We would -- our first argument is that those five
18 students lack standing and those claims should be dismissed for
19 lack of subject matter jurisdiction.

20 That Count 4 fails to state a claim and should be
21 dismissed pursuant to 12(b)(6).

09:58:49

22 And that Counts 5 and 6 lack -- are not enforceable
23 through the implied private right of action of Section 504 and,
24 therefore, should be dismissed for lack of subject matter
25 jurisdiction.

09:59:03

CV-17-8004-PCT-SPL - October 24, 2017

1 THE COURT: Thank you very much.

2 MR. LOPEZ-MORALES: Thank you, Your Honor.

3 THE COURT: Christine.

4 (Discussion off the record between the Court and courtroom
5 deputy.)

09:59:10

6 THE COURT: Counsel.

7 MS. EIDMANN: Good morning, Your Honor.

8 THE COURT: Good morning again.

9 MS. EIDMANN: As Your Honor is aware, this lawsuit
10 challenges defendants' longstanding failure to comply with
11 their duties under federal statutes and the Federal
12 Government's special trust responsibility to Native students
13 and their tribes.

09:59:34

14 The Indian Education Act requires defendants to
15 provide to Native students educational opportunities that equal
16 or exceed those for all other students in the United States.

09:59:52

17 Havasupai Elementary School fails to deliver even the
18 most basic minimal education, much less the education required
19 by Congress.

20 I'll plan to address the three issues raised in
21 defendants' partial motion to dismiss in the order that my
22 opposing counsel raised them.

10:00:10

23 With respect to compensatory education, defendants are
24 asking this Court to rule that no matter how severe an
25 educational deprivation is, once a student leaves a school for

10:00:26

CV-17-8004-PCT-SPL - October 24, 2017

1 any reason that student has no recourse to vindicate her
2 rights.

3 There is no real question that all student plaintiffs'
4 injuries can be redressed by an award of the equitable remedy
5 of compensatory education. And forward looking compensatory
6 education is particularly appropriate in this case involving
7 Native education.

10:00:43

8 Unlike in a traditional public school context, the
9 history of our Federal Government's actions towards Native
10 American tribes and the ensuing special trust responsibility
11 means that the Federal Government has undertaken the
12 responsibility of providing comprehensive educational services
13 to all Native children through high school.

10:01:02

14 All student plaintiffs remain eligible to attend BIE
15 schools. And that means that defendants, absent the principal
16 of Havasupai Elementary School, Defendant Williamson, have
17 continuing obligations to these students.

10:01:21

18 I'd like to make three brief points in response to the
19 defense argument.

20 First, the students in this school are entitled to
21 basic education under the Indian Education Act, which we're
22 seeking to enforce here through the Administrative Procedures
23 Act.

10:01:35

24 Defendants have put forth no argument to suggest that
25 compensatory education is not an appropriate remedy available

10:01:50

CV-17-8004-PCT-SPL - October 24, 2017

1 under the APA, and nor could they.

2 Under *Bowen versus Massachusetts*, which we cite and
3 discuss on page 5 of our opposition, the U.S. Supreme Court
4 made clear that the APA permits all remedies except for money
5 damages, and that this exception should not be broadened beyond 10:02:10
6 the plain meaning of the text.

7 We're not asking for money damages here. And it's not
8 possible to make up for what has been lost with money.

9 What is needed are educational services. Compensatory
10 education means -- asks, what educational services are required 10:02:28
11 now to put the student in the position she would have been in
12 if her educational rights were not violated.

13 Second, with respect to Section 504, defendants' sole
14 argument is based on a 30-year-old piece of dicta that has
15 never been cited outside of its facts. 10:02:50

16 *Alexopoulos* is not controlling law on this point. Even
17 the judge who originally decided *Alexopoulos*, Judge Poole,
18 decided eight years later in *Parents of Student W.* that
19 compensatory education constitutes appropriate equitable
20 relief. 10:03:12

21 And by our very conservative count, at least 50 courts
22 in the Ninth Circuit that have had occasion to consider this
23 issue similarly held consistent with *Parents of Student W.*,
24 that compensatory education is a form of equitable relief.

25 In contrast, other than in a follow-on case brought 10:03:28

CV-17-8004-PCT-SPL - October 24, 2017

1 the next year by the same plaintiff, *Alexopulos* has never been
2 cited by any court in the Ninth Circuit for this proposition.

3 Now -- defendants are now trying to distinguish
4 between the IDEA and Section 504, arguing that *Alexopulos*
5 applies to 504 but not IDEA. 10:03:51

6 First of all, I want to be clear that their argument
7 under *Alexopulos* has no bearing on the redressability of
8 plaintiffs' claims under the Indian Education Act, which
9 *Alexopulos* did not reach. But defendants have cited no case
10 law to suggest that there's any distinction in the character of 10:04:08
11 compensatory education with respect to the IDEA versus Section
12 504. *Alexopulos* itself did not make this distinction. That
13 case was decided under both Section 504 and the predecessor to
14 the IDEA, the Education For All Children With -- All
15 Handicapped Children Act, and did not distinguish between these 10:04:30
16 two statutes on this point.

17 It makes no sense to distinguish between them here
18 because the purpose of the remedy is the same in both cases for
19 the Indian Education Act as well. It is to put the student in
20 the position she would have been in but for the violation of 10:04:47
21 her educational rights.

22 I would add that *Alexopulos* is very distinguishable on
23 its facts from this context. That case involved an adult
24 student who was not eligible for a public education in any
25 context. Here we have students who are currently in school and 10:05:05

CV-17-8004-PCT-SPL - October 24, 2017

1 remain eligible for comprehensive educational services from the
2 defendants who are named in this suit.

3 Third, I want to add that the Court's ability to
4 access broad equitable relief as a remedy in this case,
5 including comprehensive -- excuse me, including compensatory 10:05:28
6 educational services, is particularly necessary given the
7 unique and important public interest at stake here, providing
8 basic education to Native American students.

9 As the Complaint documents in paragraphs 180 to 185,
10 the consequences of these educational deprivations have been 10:05:46
11 severe, both for the plaintiffs and for the community.
12 Havasupai Elementary School, according to the most recent
13 achievement data, performs at the first and third percentile in
14 reading and math respectively, double digits behind the next
15 closest school. And this is in a universe of schools that are 10:06:09
16 significantly underperforming, nearby public schools.

17 By the time students reach eighth grade they are so
18 far behind that students have trouble gaining admission to high
19 school, because to -- including BIE high schools because they
20 cannot meet the appropriate proficiency and prerequisite 10:06:26
21 requirements.

22 In concrete terms, this means that 12-year-old
23 plaintiff Stephen C. can barely read and write. And as the
24 amicus briefs filed by the Havasupai Tribe and the Society of
25 Indian Psychologists demonstrate, the costs of these 10:06:41

CV-17-8004-PCT-SPL - October 24, 2017

1 deprivations are exponential. Student plaintiffs are denied
2 the opportunity to learn, and the Tribe is deprived of its
3 future leaders and the engine of its economic productivity.

4 We have a generation of Native children who are
5 leaving this school without the minimal skills required to 10:07:01
6 participate in the economy and in democracy, and the Government
7 is saying it's too late. But it's not too late for these
8 children. They can still learn. But they need the
9 comprehensive compensatory educational services that are
10 necessary in order to allow them to access the public education 10:07:18
11 that they're entitled to now and in the future.

12 Turning to Plaintiffs' Section 504 claim alleging
13 complex trauma under -- excuse me, turning to plaintiffs' claim
14 under Count 4, plaintiffs' fourth cause of action alleges that
15 the defendants have failed to provide meaningful access to a 10:07:44
16 basic, safe education for plaintiff students as a result --
17 who, as a result of the complex trauma that they have
18 experienced, have difficulty with the tasks that are required
19 to learn and participate in school.

20 A district court in this circuit has already held that 10:07:58
21 complex trauma can constitute a disability within Section 504
22 in *Peter P. versus Compton Unified School District*.

23 Defendants here are merely re-raising the two
24 arguments that were already rejected by that court. They cited
25 no controlling law in support of their arguments, and these 10:08:18

CV-17-8004-PCT-SPL - October 24, 2017

1 positions are incompatible with the fundamental meaning and
2 purpose of Section 504.

3 First, regarding the definition of disability,
4 defendants have conceded on page 5 of their reply brief that
5 the effects of trauma can constitute a disability within the
6 meaning of Section 504. And -- as they must. 10:08:35

7 As the *Peter P.* court interpreting Ninth Circuit law
8 also acknowledged, Section 504 of the Rehabilitation Act
9 defines disability not with respect to any particular medical
10 diagnosis, but with respect to a functional standard that looks 10:08:56
11 at the effect of the impairment on the life activities of the
12 individual.

13 As Your Honor is aware, the definition of disability
14 under Section 504 is a physical or mental impairment that
15 substantially limits one or more major life activities. 10:09:16

16 The statute goes on to delineate these activities that
17 qualify, in a nonexclusive list, including learning, reading,
18 thinking, concentrating and communicating. All of the very
19 core activities that are required to be a student.

20 As the Complaint documents in paragraphs 161 to 164 10:09:32
21 and the Society of Indian Psychologists amicus brief likewise
22 documents, decades of brain science have established that
23 exposure to complex trauma creates palpable physiological
24 effects on the brain and the endocrine system, and particularly
25 the developing brain of a young person. 10:09:56

CV-17-8004-PCT-SPL - October 24, 2017

1 These neurological and biological changes affect
2 cognition, memory, emotional self-regulation. All of the core
3 activities that are required to be a student and to participate
4 in school.

5 Now defendant stated a few times that there's no
6 recognized impairment here. First of all, it is not the law in
7 the Ninth Circuit that the standard is a recognized impairment.
8 Rather, the statute itself defines disability with respect to
9 this functional standard, a physical or mental impairment that
10 substantially limits one or more major life activities.

11 In fact, in 2008 Congress passed the Americans with
12 Disabilities Amendments Act further broadening the definition
13 of disability under Section 504. Congress was overriding
14 several court decisions that they thought had been unduly
15 restrictive within the meaning of disability. And at that time
16 Congress chose again not to set forth a particular list of
17 conditions or diagnoses that would qualify but, in fact,
18 broadened the already flexible functional standard.

19 Congress cautioned that the role of courts in
20 adjudicating Section 504 cases is to look at the effect of the
21 impairment on the life of the individual and whether meaningful
22 access to publically-funded activities is denied, and not
23 whether an individual is disabled within the meaning of the
24 statute.

25 Defendants' only remaining argument then is that the

CV-17-8004-PCT-SPL - October 24, 2017

1 Complaint does not allege with sufficient specificity that the
2 particular student plaintiffs here are impaired within the
3 meaning of Section 504. But that ignores the painstakingly
4 detailed allegations specific to each student found in
5 Section 3 of the Unredacted Second Amended Complaint.

10:11:48

6 This omission is particularly striking here given the
7 procedural history of the amendments to the Complaint.

8 Defendants raised this argument in their first Motion to
9 Dismiss. And while we believed the allegations in the First
10 Amended Complaint were sufficient, in order to avoid

10:12:05

11 unnecessary motions practice we added in 25 paragraphs specific
12 to the student plaintiffs in Section 3, detailing for each
13 student bringing this claim their trauma histories, the
14 concrete effects that the exposure to trauma has had on their
15 behaviors and their ability to learn, and the resultant denial
16 of access to public education.

10:12:23

17 These allegations are under seal because of their
18 extreme specificity, so I won't go into deep detail here. But
19 to take just one plaintiff, Durell P. as an example, in
20 paragraphs 68 to 70 we detail his lengthy exposure to sustained
21 pervasive and repeated trauma as a very young child.

10:12:42

22 In paragraphs 71 to 73 we document the way in which it
23 affects his ability to learn, read, think, concentrate and
24 communicate. A few examples are challenges with emotional
25 self-regulation, panic and anxiety, reactive behavior, and

10:13:03

CV-17-8004-PCT-SPL - October 24, 2017

1 withdrawal and self-isolating behavior.

2 All of these are entirely consistent with the
3 documented effects of trauma in the medical literature. They
4 are expected and even predictable consequences of a young
5 person who has tragically had to endure such tremendous
6 adversity as a very young person.

10:13:20

7 I'd like to address just two more issues raised by
8 defendants.

9 I'd like to clarify that plaintiffs are certainly not
10 alleging that every Native American or every Native American
11 young person is disabled within the meaning of Section 504
12 because of the trauma that he or she has experienced. The
13 Complaint identifies seven students who are impacted in their
14 ability to learn and participate in school because of the
15 trauma that they have experienced. And it is unquestionable
16 that they have stated a claim within Section 504.

10:13:34

10:13:51

17 We have included allegations about the widespread
18 nature of exposure to adversity in this community in the
19 Complaint in part to establish the other item challenged by
20 defendants, which is that the Federal Government is on notice
21 of the need to address the effects of trauma and wellness in
22 schools serving Native American youth.

10:14:12

23 As we allege in the Complaint at paragraphs 186 to
24 194, defendants, quote, have repeatedly recognized the harmful
25 impacts of complex trauma on Native youth and the critical need

10:14:31

CV-17-8004-PCT-SPL - October 24, 2017

1 to provide wellness and mental health services to address
2 trauma in BIE schools.

3 Defendants are aware that Native American youth are
4 exposed to adversity at rates higher than returning war
5 veterans. And defendants see the consequences of the exposure
6 to trauma in the classroom every day.

10:14:45

7 To take Durell P. as an example again, the school is
8 aware that he's endured repeated sustained trauma, and they see
9 panic attacks in the classroom, they see reactive behavior and
10 highly dysregulated emotions. Defendants can't just close
11 their eyes and say, we had no idea.

10:15:06

12 Even if there was a requirement of constructive
13 notice, as the defendants are now conceding, that's been more
14 than alleged throughout the Complaint, and particularly in
15 paragraphs 186 to 194.

10:15:22

16 But I do want to be clear that no court in the
17 Ninth Circuit has ever held that an intent requirement of
18 actual knowledge is required as a predicate to bringing a 504
19 claim for injunctive relief.

20 The leading Ninth Circuit case on this issue is
21 *Mark H. versus Lemahieu*. And there the Ninth Circuit held that
22 when damages are sought, there is a heightened mens rea
23 requirement of deliberate indifference, not actual knowledge.
24 There's no such requirement in an injunctive relief context.

10:15:37

25 Defendants' argument to the contrary is based entirely

10:15:55

CV-17-8004-PCT-SPL - October 24, 2017

1 on out-of-context and out-of-jurisdiction cases, mostly
2 district court cases that are importing a standard from the ADA
3 employment law context derived from EEOC regulations that have
4 no applicability here.

5 No court in this Circuit has ever applied that 10:16:14
6 standard urged by defendants to a case involving K through 12
7 education or brought under Section 504. And with good reason,
8 because there are significant differences between employers and
9 schools, as defendant acknowledged.

10 Schools play a unique role in our society because they 10:16:36
11 are the engines of social mobility and equity and opportunity
12 for young people. And our Government has recognized that by
13 implementing regulations interpreting Section 504 in the
14 context of schools. One of those regulations is that schools
15 have an affirmative obligation to identify students with 10:16:56
16 disabilities if they have reason to suspect a disability.

17 A requirement that a school would need to have actual
18 knowledge of a disability is completely incompatible with the
19 regulation standard that it's the school's initial obligation
20 to identify a student with a disability because they are in the 10:17:14
21 best position to do so.

22 Just to address a few of the cases that defendant
23 cited, *Patton versus -- Patton*, the Arizona case, is an
24 unpublished case. It does not involve K through 12 education,
25 it was in a university context, and it was brought only under 10:17:32

CV-17-8004-PCT-SPL - October 24, 2017

1 the ADA.

2 The remainder of those cases are also private
3 employment discrimination cases brought under the ADA, with the
4 exception of *Stearns*, which is a Northern District of Illinois
5 case and involved a very particular doctrine there regarding 10:17:47
6 whether a student may participate on an athletic team if they
7 have a history of alcohol abuse.

8 Finally, with respect to the policy argument made
9 regarding identification of children and relief, what we're
10 seeking here, what we've alleged in the Complaint, what experts 10:18:06
11 will establish when we reach the evidentiary stage of this
12 proceeding, is that what is necessary to accommodate the
13 effects of complex trauma in an education context is not
14 individualized relief, but systemic whole school practices
15 designed to understand the effects of trauma and effectively 10:18:28
16 accommodate students.

17 If systemic trauma informed practices are effectively
18 implemented, there's no need for individualized education plans
19 in the vast majority of cases. That means that every student
20 does not need to be individually evaluated. And if the 10:18:46
21 trauma-sensitive practices are implemented appropriately, it
22 also means that fewer students will need individualized relief
23 and fewer students will be identified as individuals with
24 disabilities under the statute.

25 In fact, the fact that we currently have an over 10:19:03

CV-17-8004-PCT-SPL - October 24, 2017

1 identification of students of color with disabilities in our
2 system demonstrates the failure of approaching disability and
3 the impact of trauma from only an individualized approach and
4 the need for these broader more systemic practices to
5 accommodate trauma more appropriately.

10:19:21

6 Finally, with respect to whether the regulations pled
7 in Counts 5 and 6 can be enforced through a private right of
8 action. The Ninth Circuit also addressed this issue in *Mark H.*
9 *versus Lemahieu*. In that case the Ninth Circuit reversed a
10 district court that held that the regulations were not
11 enforceable by a private right of action. It made clear that
12 the regulations could be enforced to the extent that they
13 authoritatively construe Section 504. That is the extent to
14 which they impose meaningful access in reasonable accommodation
15 requirements.

10:19:40

10:19:58

16 It then issued guidance to lower courts that these
17 regulations arguably are imposing meaningful access and
18 reasonable accommodation requirements.

19 It's not true that there is a split of authority in
20 the Ninth Circuit, as defendant suggested. Every district
21 court to have considered this issue has followed the guidance
22 of *Mark H. versus Lemahieu* and held that the regulations are
23 enforceable by a private right of action.

10:20:09

24 The two out-of-jurisdiction district court cases cited
25 by defendants are not applicable here.

10:20:25

CV-17-8004-PCT-SPL - October 24, 2017

1 One was dicta, where the plaintiff acknowledged that
2 she was not even attempting to allege a private right of
3 action.

4 And the second was a case where there was no
5 allegation that an underlying right of meaningful access to
6 education was violated. The only claim there was for a
7 procedural violation in that Eastern District of Virginia case,
8 *Power versus School Board of Virginia Beach*.

9 Unless the Court has any further questions, that
10 concludes --

11 THE COURT: I don't have any questions. Thank you
12 very much.

13 MS. EIDMANN: Thank you.

14 MR. LOPEZ-MORALES: Your Honor, there are several
15 arguments that I would like to address in rebuttal, unless you
16 have specific questions.

17 THE COURT: Go ahead.

18 MR. LOPEZ-MORALES: Let me start with the standing
19 analysis.

20 As you just heard, plaintiffs' only argument with
21 respect to the lack of standing is related to the availability
22 of compensatory education.

23 As an initial matter, there were no cases that were
24 cited for the proposition that compensatory education is
25 available against a federal government. And let me highlight

CV-17-8004-PCT-SPL - October 24, 2017

1 the importance of that.

2 After the Ninth Circuit's decision in *Douglas* and in
3 *Clark*, the Ninth Circuit has held that the acceptance of funds
4 by state institutions and state local authorities waives their
5 ability to invoke Eleventh Amendment immunity. 10:21:55

6 So the availability of compensatory education against
7 those institutions is kind of a moot point, because regardless
8 of whether compensatory education is injunctive relief or
9 damages, monetary relief, it doesn't matter because the states
10 have waived their immunity. 10:22:14

11 So no case has -- after *Alexopoulos* has addressed the
12 nature of the award -- the judicial award of compensatory
13 education.

14 Second point -- and again, none of those cases
15 involved a federal government, where after *Lane v. Pena* in 1996 10:22:30
16 Justice O'Connor held that there is no waiver of federal
17 sovereign immunity with respect to the Federal Government in
18 the Rehabilitation Act.

19 Second point, Your Honor. The defendants -- sorry,
20 the plaintiffs rely on the Administrative Procedures Act as a 10:22:46
21 potential alternative vehicle for the award of compensatory
22 education. There is no proposition -- again, no case cited for
23 that.

24 The APA is a procedural vehicle, and the substance
25 underlying the APA claims in this case is the Indian Education 10:23:02

CV-17-8004-PCT-SPL - October 24, 2017

1 Act, which does not provide for an award of compensatory
2 education. The compensatory education, all of the cases cited
3 by plaintiffs, *Parents of Student W.*, et cetera, they analyze
4 the availability of compensatory education in the context of
5 the IDEA. 10:23:20

6 Plaintiffs could have raised that claim here if they
7 were really genuinely interested in an award of compensatory
8 education for those students. They have not. And I have not
9 heard the plaintiffs articulate why they didn't bring such a
10 claim in this case. 10:23:36

11 Final point, they rely for the proposition that the
12 APA should be construed narrowly when -- in terms of the
13 definition of injunctive relief available under the statute.
14 And I think -- I'm glad they raised that point.

15 *Bowen* was a decision in 1988, and Justice Stevens in 10:23:56
16 that opinion relied on the reasoning of *Burlington v.*
17 *Massachusetts Department of Education*, a 1985 case, where Chief
18 Justice Rehnquist relied on the legislative history of the
19 Education For Handicapped Children Act, the predecessor, as
20 plaintiffs pointed out, of the IDEA. 10:24:19

21 And in the legislative history Congress had already
22 made clear that compensatory education was a remedy available
23 under the statute, and it relied on that basis to recognize
24 that tuition reimbursement could be available in certain
25 circumstances. 10:24:36

CV-17-8004-PCT-SPL - October 24, 2017

1 Why are the dates important? Because *Bowen* relied on
2 this 1985 decision, *Burlington*, and several circuits, including
3 the Ninth Circuit, changed their minds about what kind of
4 nature -- nature of the relief of compensatory education. For
5 example, the Eighth Circuit in 1982 had said that compensatory
6 education was virtually identical to monetary relief relied on
7 *Burlington* in 1988 to reverse itself.

10:24:52

8 1985 *Burlington*, 1986 and 1987 are the two *Alexopoulos*
9 cases. And the Ninth Circuit was not bothered by the
10 reasoning, and we believe justifiably so, the reasoning of the
11 *Burlington* case, and still held that compensatory education is
12 virtually identical to monetary relief, and because it
13 addresses a past breach of a legal duty.

10:25:13

14 That is exactly what we have here, Your Honor, with
15 respect to those students who are no longer at this school.

10:25:31

16 And as a last point, the reliance on the APA is not
17 only inaccurate, it's also a red herring. And let me explain
18 why.

19 The APA provides for injunctive relief against the
20 Federal Government. So -- and it only -- it is only an
21 available procedural vehicle in those cases where there is no
22 adequate remedy under the law, under other specific statutes.

10:25:47

23 So if it's true that compensatory education is
24 injunctive relief, then it would be available under Section
25 504, the APA doesn't come into play. But if it's true, as the

10:26:06

CV-17-8004-PCT-SPL - October 24, 2017

1 Ninth Circuit has held, that it is virtually identical to
2 monetary relief, and that absent a claim of sovereign immunity,
3 a waiver of sovereign immunity, the claim is barred, then the
4 APA is also irrelevant because the APA only provides for
5 injunctive relief.

10:26:23

6 As a last point, plaintiffs' counsel pointed out that
7 the purpose -- it has to be that compensatory education is
8 available against a federal government under Section 504
9 because the purpose of the IDEA and Section 504 are virtually
10 identical, so Congress had to intend the same thing.

10:26:41

11 And that is a non sequitur, Your Honor. And there is
12 Ninth Circuit contradicting this specific point in *Mark H.*,
13 which plaintiffs relied on for the regulations part of our
14 argument. They -- the Ninth Circuit carefully analyzes point
15 by point the differences in the requirement of free appropriate
16 public education under the IDEA and how Section 504 doesn't
17 contain the statute itself, a requirement of a FAPE, it is
18 rather the regulations that contain a requirement. And how the
19 regulations -- the requirement of a free appropriate public
20 education under those regulations is substantively different
21 than the one in the IDEA because it only guarantees that they
22 receive access to a public education to the same extent that
23 nonhandicapped children have access to those benefits. So it
24 is a comparative requirement.

10:26:59

10:27:18

25 So it is not unfeasible or impossible to see why

10:27:37

CV-17-8004-PCT-SPL - October 24, 2017

1 Congress probably had a different view with respect to these
2 two statutes, and why in the *Alexander v. Choate* decision the
3 Supreme Court held that it is very important for courts to be
4 aware, to keep the meaning and purpose of Section 504 within
5 manageable bounds. 10:27:59

6 With respect to the second argument, Count 4's failure
7 to state a claim, plaintiffs cited the *Peter P. v. Compton* case
8 for the proposition that complex trauma, and I quote,
9 constitutes a disability. And that is -- Your Honor, we have
10 some issues for reasons explained in our brief why the *Compton* 10:28:18
11 case, which is a district court case, is not persuasive
12 authority.

13 But even then, the district court in the first page of
14 the opinion explicitly rejected that characterization of the
15 argument -- of plaintiffs' argument in that case and said that 10:28:33
16 complex trauma by itself is not a disability. And for the
17 reasons that we articulated in our opening argument, that you
18 need an impairment, and that impairment is a disorder or a
19 condition.

20 And, Your Honor, throughout the argument plaintiffs' 10:28:48
21 counsel kept conflating the substantial limitation requirements
22 and the impairment requirement, which is what I pointed out in
23 my opening argument. They said that an impairment -- an effect
24 or the impact of the impairment on a major life activity, that
25 is a disability. 10:29:09

CV-17-8004-PCT-SPL - October 24, 2017

1 But, Your Honor, those are two separate requirements.
2 It can't be that because they experienced complex trauma and
3 they have some difficulties sleeping or learning, then by
4 definition they have a disability. And that is a problem with
5 overidentification and disproportionate representation. 10:29:26

6 If we go to all of these communities, underdeveloped
7 communities, Native American communities, where there is,
8 Your Honor, terrible instances of trauma, then the school would
9 have to evaluate every single child and presumptively treat
10 that children as a disabled student. 10:29:43

11 Your Honor -- and to the extent that the plaintiffs
12 have an issue with that and they would prefer what they call
13 universal intervention as opposed to individualized
14 evaluations, their beef and their disagreement, Your Honor, is
15 with the political branches. This is not the right forum for 10:29:59
16 that, because the regulations in the statute specifically
17 provide for the individualized evaluation of those students.

18 And, in fact, the Department of Education, which
19 issues these regulations, if you look at their guidance on how
20 they interpret those regulations, they require the evaluation 10:30:17
21 of those students specifically to avoid all of these Native
22 American children and children in underdeveloped communities to
23 be treated per se as disabled.

24 And, Your Honor, plaintiffs' counsel made a reference
25 to the amendments in 2008 by Congress to the definition of 10:30:34

CV-17-8004-PCT-SPL - October 24, 2017

1 disability. That is all true, Your Honor, except for the fact
2 that Congress didn't amend the definition of disability because
3 it had an issue with the way that impairment, the separate
4 requirement, was defined. The definition of disability was
5 brought in because Congress was concerned that district courts 10:30:50
6 were reading the substantial limitation requirement too
7 narrowly.

8 And the reason for that was that they were -- they
9 took the word "substantial" and they said, well, it's not
10 enough that this person has a PTSD, for example, and difficulty 10:31:04
11 learning, that limitation has to be substantial. And Congress
12 made clear that that definition of substantial limitation was
13 not too strict. That's why it amended the definition of
14 disability to kind of reject those -- that reading.

15 It didn't really touch or address the independent 10:31:23
16 requirement that there has to be a physiological or a
17 psychological disorder.

18 And, Your Honor, we do not deny that trauma could be a
19 disability -- trauma, the experiences of trauma could result in
20 a disability. And they cite -- PTSD, for example, Your Honor. 10:31:39
21 And they cite a number of cases, *Mustafa v. Clark*,
22 Ninth Circuit decision; *Desmond v. Mukasey*, D.C. Circuit
23 decision; *Whelan v. Potter*, Eastern District of California;
24 *Linder v. Potter* in Washington. All of those cases,
25 Your Honor, if you read them carefully, they identify specific 10:31:57

CV-17-8004-PCT-SPL - October 24, 2017

1 impairments and how those impairments substantially limited
2 major life activities.

3 And you can look at -- PTSD is the common factor in
4 all of those cases --

5 THE COURT: Well, counsel, my apologies for
6 interrupting you again. Let's take a step back.

10:32:10

7 Are you conceding that there are significant trauma
8 issues from the school?

9 MR. LOPEZ-MORALES: From the school? Well,
10 Your Honor, we --

10:32:25

11 THE COURT: Some of the students that attend the
12 school.

13 MR. LOPEZ-MORALES: Well, Your Honor, we have to take
14 the allegations as true at this procedural juncture. So we
15 obviously would not dispute that there are specific instances
16 of trauma.

10:32:33

17 For example, some of the allegations -- and just like
18 plaintiffs' counsel, I want to be really careful here because
19 of some of the privacy issues and the allegations that are
20 under seal. These are serious allegations, family separation,
21 witnessing alcohol and substance abuse around the Reservation,
22 really serious allegations of trauma.

10:32:47

23 But our only argument, Your Honor, it is because of
24 Congress' warning and the Department of Education's warning and
25 the terrible consequences that it would have to assume that

10:33:06

CV-17-8004-PCT-SPL - October 24, 2017

1 everyone that witnesses this around the community has to be
2 disabled.

3 So we don't dispute the fact that trauma could lead to
4 a disability. And we certainly don't dispute that. But they
5 have to allege at a minimum the existence of a physiological or 10:33:19
6 a psychological disorder. And I think it's -- the error is
7 compounded when they refuse -- the Federal Government -- or at
8 least they argue that those students do not have to be
9 evaluated because that's incompatible with Section 504.

10 So I think there is an internal contradiction in the 10:33:38
11 argument that the plaintiffs are making. Which is why,
12 Your Honor, to the extent we acknowledge that with respect to
13 Count 3 they have identified some students with disabilities,
14 and those students are -- have to be evaluated, and they're
15 entitled to a reasonable accommodation under the meaning of 10:33:56
16 Section 504, the same cannot be said with respect to a broad
17 complex trauma claim that is untethered to an existence of a
18 physiological or psychological disorder.

19 And finally, Your Honor, with respect to the
20 regulations, I think in my opening argument I kind of addressed 10:34:16
21 some of the substantive points that plaintiffs' counsel was
22 making. I just want to clarify that we did not say that there
23 was a split of authority within the Ninth Circuit, there was a
24 split of authority among district courts around the country.

25 The case that the plaintiffs rely, *Mark H. v.* 10:34:36

CV-17-8004-PCT-SPL - October 24, 2017

1 Lemahieu, that case reversed the District Court for holding
2 that there is no private right of action under the regulations,
3 not because there -- it doesn't follow that from that reversal
4 there is a private right of action. The reversible -- the
5 reason for the reversal was rather that the District Court
6 relied on an incorrect reading of the statute. 10:34:57

7 So it basically explained what the purpose of Section
8 504 is, and then remanded the case in light of that
9 interpretation of the statute to then figure out if there, in
10 fact, are implementing regulations -- if the implementing
11 regulations are enforceable. 10:35:12

12 I would also like to highlight that the main
13 allegation in *Mark H.* was a denial of a free appropriate public
14 education, which as I mentioned in my opening argument, it's in
15 104.33. That is not one of the regulations, Your Honor, in
16 Count 5 and Count 6. 10:35:31

17 If they wanted -- as I mentioned before, if they
18 wanted compensatory education, they could have sued under the
19 IDEA. 104.33 is a Section 504 version of a denial of a free
20 appropriate public education. They do not rely on that
21 regulation. 10:35:48

22 And they rather, as I pointed out, rely on procedural
23 regulations. And that is our only point. Our argument is not
24 that none of the regulations cannot be enforced under the
25 statute. Our point is the two regulations that they rely upon 10:36:03

CV-17-8004-PCT-SPL - October 24, 2017

1 are procedural in nature. Because Section 504 does not
2 guarantee any procedures, it follows that those regulations do
3 not authoritatively construe the statute.

4 Unless Your Honor has any other questions, that would
5 be our argument, Your Honor.

10:36:23

6 THE COURT: Thank you very much.

7 MR. LOPEZ-MORALES: Thank you.

8 THE COURT: Counsel?

9 MS. EIDMANN: Thank you. I just want to make three
10 very brief points.

10:36:34

11 First, with respect to the availability of
12 compensatory education under -- against the Federal Government,
13 Congress has specifically authorized spending for the Indian
14 Education Act in keeping with the Federal Government's special
15 trust obligations to Native youth and their tribes.

10:36:49

16 It requires comprehensive -- while it doesn't
17 delineate the specific types of remedies, again under Section
18 706, which we are using as a procedural vehicle to bring the
19 Indian Education Act claim, all remedies other than money
20 damages are available. And compensatory education is certainly
21 captured within that broad authorization for equitable relief.

10:37:08

22 Second, with respect to Section 504 and the IDEA,
23 while there are certainly differences between the scope and the
24 purpose of those two statutes, those -- the differences in the
25 purpose does not affect the issue that we're talking about

10:37:30

CV-17-8004-PCT-SPL - October 24, 2017

1 here, which is the character of the remedy of compensatory
2 education.

3 The purpose of compensatory education in both cases is
4 to look at the student now and determine what educational
5 services are required to put the student in the position she
6 would have been in were her educational rights not violated. 10:37:47

7 Third, with respect to the trauma claim, I just want
8 to be clear that *Peter P.* was decided at the pleading stage, as
9 we are here. And what the Court held in that case, and as
10 defendants have conceded here, is that the effects of complex 10:38:10
11 trauma can constitute a disability within the meaning of
12 Section 504.

13 And that's all we need to decide at this point. That
14 is what we've alleged in the Complaint, and we are prepared to
15 present evidence at the appropriate time that all of the 10:38:27
16 student plaintiffs who have brought that claim, in fact, are
17 impaired by the effects of complex trauma.

18 With respect to the allegation about evaluations,
19 there is some conflation between what the ultimate remedy would
20 be in the case and what would be necessary here to prove 10:38:46
21 student plaintiffs' particular claims.

22 We're not resisting the idea of individual evaluations
23 as evidence in this case to prove liability, but just making
24 the point that a global systemic remedy does not necessarily
25 require evaluations for every child at Havasupai Elementary 10:39:05

CV-17-8004-PCT-SPL - October 24, 2017

1 School.

2 Thank you, Your Honor.

3 THE COURT: Thank you very much.

4 I certainly appreciate you all for coming and being
5 incredibly prepared for your arguments.

10:39:18

6 And court's adjourned.

7 (Proceedings concluded at 10:39 a.m.)

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9 -oOo-

CV-17-8004-PCT-SPL - October 24, 2017

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C E R T I F I C A T E

I, CANDY L. POTTER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 1st day of November, 2017.

s/Candy L. Potter
Candy L. Potter, RMR, CRR

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9 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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

11 Plaintiffs,

12 v.

13
14 Bureau of Indian Education, et al,
15 Defendants.

No. 3:17-cv-08004-SPL

**REPLY IN SUPPORT OF
DEFENDANTS' SECOND
PARTIAL MOTION TO
DISMISS**

16 **INTRODUCTION**

17 Plaintiffs' opposition fails to provide sufficient bases to rebut Defendants' arguments
18 that this suit should be streamlined by dismissing: (1) all claims by students who no longer
19 attend Havasupai Elementary for lack of standing; (2) Count IV for failure to state a claim
20 upon which relief can be granted; (3) Counts V and VI for lack of subject matter jurisdiction;
21 and (4) all but the Secretary of the Interior as superfluous defendants with respect to Counts
22 III-VI.

23 **ARGUMENT**

24 **I. STUDENT PLAINTIFFS LEVI R., LEO R., JENNY A., JEREMY A., AND**
25 **JORDAN A. LACK STANDING TO BRING THEIR CLAIMS.**

26 Students Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. no longer attend
27 Havasupai Elementary School. See Partial MTD, ECF No. 67, at 4-5. Plaintiffs' opposition
28 does not explain how these plaintiffs have standing, given that they are no longer eligible to

1 receive educational services at the School, or are enrolled in school elsewhere. As
2 Defendants have shown, these Plaintiffs do not face a threat of impending injury and would
3 not benefit from any changes made to the school or a declaration that past actions were
4 illegal. *See id.* at 5-6. In their Opposition, Plaintiffs only respond to Defendants' argument
5 that compensatory education does not constitute prospective injunctive relief. Plaintiffs'
6 contention that compensatory education is an appropriate remedy in this instance is
7 misguided.

8 Plaintiffs do not cite any cases discussing an award of compensatory education as a
9 form of equitable relief under the Rehabilitation Act (or the Indian Education Act) against
10 the Federal Government. Rather, the cases cited in the Opposition are in the context of the
11 Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, a statute
12 that does not contain an anti-discrimination mandate and provides for compensatory
13 education in cases where a school deviates from an individualized education program. *See*
14 *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1120 (9th Cir. 2011) (noting
15 that "IDEA offers compensatory education as a remedy for the harm a student suffers while
16 denied a [free appropriate public education ('FAPE')]," *see Parents of Student W. v.*
17 *Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1496-97 (9th Cir. 1994), and that it "is an equitable
18 remedy that 'aim[s] to place disabled children in the same position they would have
19 occupied but for the school district's violations of IDEA'" (quoting *Reid ex rel. Reid v.*
20 *Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)) (citing 20 U.S.C. §
21 1415(i)(2)(C)(iii)).

22 Moreover, "[c]ompensatory services, like the award of a money judgment, would be
23 measurable against past educational deprivation" and "[t]he expenditure of state monies to
24 provide compensatory services would not, in other words, ensure compliance in the future
25 with a substantive federal question determination." *Miener v. State of Mo.*, 673 F.2d 969,
26 982 (8th Cir. 1982) (citation omitted). Rather than ensure future compliance with a legal
27 obligation, the claims in question seek retroactive compensation from the government for a
28 past breach of a legal duty, *see Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), and

1 Plaintiffs have not demonstrated that this form of relief is available against the Federal
2 Government in the context of the Rehabilitation Act.

3 Finally, Plaintiffs claim that the cases cited in the Partial Motion to Dismiss—namely,
4 Alexopoulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 553 (9th Cir. 1987) and
5 Alexopoulos v. Riles, 784 F.2d 1408, 1412 (9th Cir. 1986)—contain mere dicta and are no
6 longer good law. Plaintiffs are mistaken. First, the Ninth Circuit’s conclusion that
7 compensatory education constitutes retrospective relief indistinguishable from money
8 damages is not dicta—the fact that it was discussed “as an additional [and independent]
9 barrier to [the plaintiff’s] claim for compensatory education,” Opp’n, ECF No. 76, at 5 ,
10 shows that it is part of the holding’s underlying reasoning and therefore law of the Circuit.
11 See The Cetacean Community v. George W. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004)
12 (noting that “where a panel confronts an issue germane to the eventual resolution of the
13 case, and resolves it after reasoned consideration in a published opinion, that ruling becomes
14 the law of circuit, regardless of whether doing so is necessary in some strict logical sense”)
15 (citation omitted).

16 Second, the reasoning and holding of both Alexopoulos cases continue to be the law of
17 this Circuit. Plaintiffs’ contention that “these cases have been superseded by the more
18 robust line of binding cases” cited in the Opposition, Opp’n at 5, lacks merit. “Of course,
19 the decision of one three-judge panel cannot overrule another three-judge panel unless
20 intervening higher authority”—namely, a Ninth Circuit en banc decision or the Supreme
21 Court—“is *clearly irreconcilable* with our prior circuit authority” Rendon v. Holder,
22 782 F.3d 466, 472 (9th Cir. 2015) (citation omitted) (emphasis added). None of the cases
23 relied upon in Plaintiffs’ Opposition are Supreme Court or Ninth Circuit *en banc* decisions
24 and therefore cannot supersede the clear conclusion of the Alexopoulos cases. The law of
25 this Circuit on this issue is clear: Since the Federal Government is immune from suits in
26 federal court for monetary relief under section 504 of the Rehabilitation Act—a premise
27 that is well established and undisputed by Plaintiffs—and “[b]ecause a request for
28 compensatory education is virtually identical to a request for monetary damages measured

by the cost of the educational services provided,” Alexopoulos v. San Francisco Unified Sch. Dist., 817 F.2d at 553 (citing Alexopoulos v. Riles, 784 F.2d at 1412), then it follows that the Federal Government “is shielded by [federal sovereign immunity] from liability for compensatory education.” Id. at 553-554; see also Miener, 673 F.2d at 982 (8th Cir. 1982).¹

The claims of student plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. should therefore be dismissed.

II. ALLEGATIONS OF EXPOSURE TO ADVERSITY AND TRAUMA ARE INSUFFICIENT TO STATE A CLAIM UNDER SECTION 504.

Count IV must be dismissed because it fails to establish that the students have a qualifying disability, specifically related to trauma, or that they were denied access to educational opportunities solely by reason of such disability. Rather than shoring up the validity of their position, Plaintiffs’ Opposition in fact highlights the core deficiencies of the Second Amended Complaint.

A. Count IV Fails To Plead That The Students Have Recognized Impairments That May Give Rise To Trauma-Related Disabilities.

Plaintiffs claim that “it is the neurobiological effects” of the trauma “on the child’s developing brain—and not the adverse experiences themselves—that impair the ability to learn.” Opp’n at 8. Under the Rehabilitation Act, however, an individual is not disabled simply because he or she has experienced violence, poverty, the juvenile criminal system,

¹ It is well established that “plaintiffs must establish standing *independently for each remedy sought . . .*” Vegan Outreach, Inc. v. Chapa, 454 F. App’x 598, 600 (9th Cir. 2011)(citing Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc., 528 U.S. 167, 185 (2000)) (emphasis added). Compensatory education is only one of fifteen different remedies sought in the Second Amended Complaint. See Second Am. Compl. (hereinafter “SAC”), Request for Relief at 62-64. Because Plaintiffs generally seek broad, systemic relief for the Havasupai Elementary School, Plaintiffs have not established how students who no longer attend the school and, thus, “would not stand to benefit from such [systemic and institutional] relief, Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1047-48 (9th Cir. 2014) (citation omitted), have standing.

1 or alcohol abuse in the family; a plaintiff must have a recognized impairment in order to be
2 entitled to relief. Because the Second Amended Complaint alleges merely that the Count
3 IV Plaintiffs' exposure to adversity and trauma has substantially limited their ability to think
4 and learn, but does not identify specific physical or mental impairments, Plaintiffs have
5 failed to state a plausible claim that each of the Count IV Plaintiffs has a qualifying
6 disability.

7 To be clear, Defendants do not dispute the validity of Plaintiffs' general assertions
8 that "exposure [to adversity and trauma] *can* lead to palpable, physiological harm to a young
9 person's developing brain," Opp'n at 9-10 (emphasis added), and that "[t]rauma is
10 *associated* with mental health conditions" that constitute recognized impairments (*i.e.*,
11 schizophrenia, post-traumatic stress disorder, and somatic symptom disorders, such as
12 hypochondria and body dysmorphia), SAC ¶ 162 (emphasis added). The deficiencies in the
13 Second Amended Complaint stem, however, from the absence of any ties between each of
14 the Count IV Plaintiffs and any allegations of the specific physical or mental harm each
15 student has suffered due to exposure to adversity and complex trauma.

16 Without pleading how the students' experience of trauma manifests in a particular
17 impairment that substantially affects each of the Count IV students' ability to think and
18 learn (or otherwise perform major life activities), the Second Amended Complaint fails to
19 state a claim upon which relief can be granted. Plaintiffs' Opposition does not address this
20 issue head on, and instead presents an internally inconsistent argument that underscores
21 their failure to state a plausible claim. On the one hand, Plaintiffs claim that the Count IV
22 students need not be evaluated for trauma-related disabilities, contending that such
23 evaluations are unnecessary and that "the systemic, universal interventions sought as
24 remedies by Plaintiffs [in Count IV] *do not require identifying any individual student as*
25 *disabled.*" Opp'n at 12, n.10 (emphasis added). On the other hand, Plaintiffs assert that as
26 part of the broad, systemic relief they seek for the school, one feature would be the
27 "employment of appropriately trained counselors who can assist with identification of
28

1 students who have mental-health difficulties.”² Opp’n at 12 (quoting SAC ¶ 242). At
 2 bottom, Plaintiffs appear to concede that, in order to make out a claim under Section 504 of
 3 discrimination against a “qualified individual with a disability . . . , solely by reason of her
 4 or his disability,” see 29 U.S.C. § 794(a), an individualized assessment of each plaintiff’s
 5 disability is necessary. Because the Second Amended Complaint fails to plead the existence
 6 of recognized impairments for each student resulting from the alleged trauma and adversity,
 7 Count IV must be dismissed.³

8 **B. Count IV Does Not Satisfy The Causation Requirement Of Section 504.**

9 In their Opposition, Plaintiffs argue that Defendants have violated the Rehabilitation
 10 Act regardless of whether they knew or should have known of the alleged disabilities of the
 11 Count IV students. This contention lacks merit. As a matter of both logic and law, and
 12 regardless of whether the relief sought is for damages or for an injunction, no defendant
 13 could or should be found liable for failing to provide an accommodation, the need for which
 14 it was not aware. See, e.g., Patton v. Phoenix Sch. Of Law LLC, No. CV 11-0748-PHX-

15
 16
 17 ² Plaintiffs assert that they “have not requested this remedy” of individual evaluations. Opp’n
 18 at 12. But, an evaluation for physiological and mental disorders is not a “remedy”; rather, it
 19 is an indispensable tool to demonstrate the existence of a recognized impairment that rises
 20 to the level of a disability, which in turn triggers the process for reasonable accommodation
 under Section 504. Individualized evaluations are required to identify the students as
 disabled within the meaning of the statute. See 34 C.F.R. § 104.35 and the development of
 a free appropriate public education under § 104.33 is contingent upon adherence to § 104.35.

21 ³ The cases on which Plaintiffs rely for the proposition that generalized claims of trauma
 22 are sufficient, see Opp’n at 8 n.5, are inapposite. None of the cases found that allegations
 23 of trauma standing alone were adequate to establish a qualified disability. For example, in
 24 Mustafa v. Clark County School District, the plaintiff’s claim of employment
 25 discrimination under the Rehabilitation Act based on her “severe depression, panic
 26 disorder, and post-traumatic stress disorder,” 157 F.3d 1169, 1172-73 (9th Cir. 1998),
 27 raised a factual issue of whether plaintiff suffered from a qualifying disability or, instead,
 28 from a “temporary, nonchronic impairment.” Id. at 1174. Similarly, in Desmond v.
Mukasey, the determination of whether plaintiff was a qualified individual with a disability
 turned on whether his condition of post-traumatic stress disorder substantially limited his
 ability to sleep. 530 F.3d 944, 946-48, 953 (D.C. Cir. 2008). In Whelan v. Potter, No. CIV
 09-3606 KJM, 2012 WL 3535869, at *12 (E.D. Cal. Aug. 15, 2012) and Linder v. Potter,
 No. 05-0062-FVS, 2009 WL 2595552, at *3 (E.D. Wash. Aug. 18, 2009), the district courts
 considered disability discrimination claims premised on “post-traumatic stress disorder” as
 the relevant recognized impairment and did not rely solely on allegations of exposure to
 trauma and adversity to plead the existence of a qualifying disability.

1 GMS, 2011 WL 1936920, at *4 (D. Ariz. May 20, 2011) (involving claim of reinstatement);
 2 Stearns v. Bd. Of Educ. for Warren Twp. High Sch. Dist. #121, No. 99 C 5818, 1999 WL
 3 1044832, at *3 (N.D. Ill. Nov. 16, 1999) (involving claim that athletic eligibility in high
 4 school be restored).⁴

5 Indeed, one of the primary cases on which Plaintiffs rely stands for this proposition.
 6 Plaintiffs claim, quoting D.R. ex. rel. Courtney R. v. Antelope Valley Union High Sch.
 7 Dist., 746 F. Supp. 2d 1132, 1144 (C.D. Cal. 2010), that Defendants have “a duty to identify
 8 and evaluate children who are suspected of having a qualifying disability[. . .]” and, thus,
 9 that knowledge of an actual disability is not required. Opp’n at 13. The court in Courtney
 10 R., however, clarified that a school district has “a duty to identify and evaluate children who
 11 are *suspected of* having a qualifying disability **within a reasonable time after school**
 12 **officials are placed on notice.**” Id. (emphasis added); see also 34 C.F.R. § 104.32(a).
 13 Thus, once a school has been placed on notice that a student may have a qualifying
 14 disability, the school then has the duty to evaluate the student to determine if he or she has
 15 an actual disability (again, once on notice, the regulations require the very process that
 16 Plaintiffs have described as “unnecessary and potentially counterproductive,” Opp’n at 12).

17 Plaintiffs further assert that Defendants’ awareness of the “poverty, unemployment,
 18 low levels of literacy and substance abuse and family violence [that] plague th[e]
 19 community,” as well as “the harmful impacts of complex trauma on Native Youth and the
 20 critical need to provide wellness and mental health services to address trauma in BIE
 21

22
 23 ⁴ Plaintiffs contend that “Defendants attempt to import into the Section 504 education context
 24 a standard that is specific to the private employment discrimination context under the
 25 American with Disabilities Act,” namely the pre-litigation interactive process of requesting
 26 and evaluating requests for reasonable accommodation. Opp’n at 13. While there is
 27 substantial support for the applicability of that standard in the education context, see Partial
 28 MTD at 13 n.7, Plaintiffs mischaracterize Defendants’ argument. Defendants are not
 claiming that their duty to accommodate the Count IV students was not triggered because
 the students never requested reasonable accommodation. Rather, Defendants argue that they
 did not have actual or constructive notice of any alleged disabilities and without such notice,
 it is impossible for Defendants to have discriminated against the students solely because of
 their disability.

1 schools,” Opp’n at 15 (citation omitted), is sufficient to put Defendants on notice that each
2 student Plaintiff is disabled. Plaintiffs, however, again fail to allege that Defendants are
3 aware or should have been aware that the seven students in Count IV suffer from a specific
4 impairment resulting from their exposure to adversity and trauma. Any general awareness
5 of the students’ difficulties concentrating, thinking, or communicating (all of which are life
6 activities and not physiological or mental disorders), and of their exposure to trauma is not
7 sufficient to put Defendants on notice of their particular disabilities as defined for purposes
8 of section 504.

9 Under section 504, “[t]he knowledge required must be of the disability itself, not just
10 its causes, consequences, or effects.” Partial MTD at 14 (collecting cases). If it were
11 otherwise, Defendants would be obliged to presume that all students in the Havasupai Tribe,
12 Native youth, and children in underdeveloped communities across the United States, are
13 disabled and hence subject to physical and mental health evaluations. Not only would this
14 create a “wholly unwieldy administrative and adjudicative burden” for elementary and
15 secondary educational agencies, Alexander v. Choate, 469 U.S. 287, 298 (1985), but also,
16 it would inevitably lead to the “inappropriate over-identification or disproportionate
17 representation by race and ethnicity of children as children with disabilities,” 20 U.S.C. §
18 1412(a)(24), thereby perpetuating a stigma that mere exposure to adversity and trauma in
19 certain communities leads to disabled individuals.⁵ Because Plaintiffs have failed to address
20 this argument or otherwise come forth with sufficiently valid reasons, Count IV should be
21 dismissed.

22 **III. COUNTS V AND VI MUST BE DISMISSED FOR LACK OF SUBJECT**
23 **MATTER JURISDICTION.**

24 Plaintiffs do not, nor could they, dispute that the implementing regulations identified
25

26
27 ⁵ To the extent Count IV states a claim, for the sake of succinctness and to avoid repetition,
28 Defendants rely on the arguments made in the Partial Motion to Dismiss as to why it is
duplicative of Count III. See Partial MTD at 14-16.

1 in Counts V and VI, 34 C.F.R. §§ 104.32 & 104.36, lack a private right of action. Rather,
2 Plaintiffs agree with Defendants that, under Ninth Circuit case law, these implementing
3 regulations could only be enforced through Section 504's right of action to the extent they
4 "authoritatively construe" the statute, Alexander v. Sandoval, 532 U.S. 275, 284 (2001),
5 which in turn "will turn on whether [the regulations' requirements] fall within the scope of
6 the prohibition [against disability discrimination] contained in § 504 itself," Mark H. v.
7 Lemahieu, 513 F.3d 922, 935 (9th Cir. 2008).

8 The Ninth Circuit has not held that these implementing regulations are enforceable
9 through Section 504's right of action and Defendants are not aware of any other circuit that
10 has construed these regulations to be enforceable, and for a good reason. These regulations
11 include affirmative obligations that go beyond the Rehabilitation Act's nondiscrimination
12 mandate and create duties that are separate and apart from the language of the statute. See
13 Partial MTD at 18-19. To support the notion that these implementing regulations are
14 enforceable in federal court, Plaintiffs rely mainly on the dicta in Mark H., in which the
15 Ninth Circuit stated in a short footnote that some of Section 504's Free Appropriate Public
16 Education ("FAPE") regulations "are arguably intended to ensure 'meaningful access' to
17 public education." Mark H., 513 F.3d at 938 n.14. Relying on this dicta concerning an
18 issue that was never briefed by the parties is problematic because it lacks a limiting principle
19 and would expand the scope of the Rehabilitation Act beyond its "manageable bounds" by
20 allowing, among other things, mere procedural claims.⁶ Choate, 469 U.S. 287 at 299.

21 Because Section 504 does not contain or guarantee any procedural rights, regulations
22 that set forth procedural, as distinct from substantive, rights concerning access to special
23 education—such as the regulations in § 104.32 and § 104.36—are not linked directly to
24

25
26 ⁶ The other cases cited in the Opposition similarly rely on the dicta in the footnote and
27 conclude without much independent analysis that these procedural regulations
28 authoritatively construe Section 504. See J.M. v. Liberty Union High Sch. Dist., No. 16-
CV-5225-LB, 2017 WL 2118344, at *4 (N.D. Cal. May 16, 2017); P.P. v. Compton Unified
Sch. Dist., 135 F. Supp. 3d 1098, 1115 (C.D. Cal. 2015).

1 Section 504's nondiscrimination mandate so as to create a right of action.⁷ See Power ex.
 2 rel. Power v. School Board of City of Virginia Beach, 276 F. Supp. 2d 515 (E.D. Va. 2003)
 3 ("There is no statutory due process right separate and apart from the right to be free from
 4 discrimination."). Thus, to the extent a school agency could violate the implementing
 5 regulations in § 104.33 and § 104.36 without violating Section 504 itself, that is only
 6 because the regulations go beyond what the statute requires to create additional affirmative
 7 obligations on educational institutions.⁸

8 Plaintiffs attempt to undermine the holding in Power by claiming that it "is inapposite
 9 because the Plaintiff did not plead an underlying violation of Section 504 claiming disability
 10 discrimination; the only claimed violation was procedural." Opp'n at 19. Although
 11 factually different, it is a meaningless distinction. Whether a regulation is enforceable
 12 through a statutory right of action does not turn on whether or not a plaintiff chooses to
 13 assert a claim pursuant to the underlying statute. Plaintiffs do not explain why this
 14 artificially-drawn distinction is important and, thus, fail to properly develop the argument.
 15 See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a
 16 perfunctory manner, unaccompanied by some effort at developed argumentation, are
 17 deemed waived. It is not enough merely to mention a possible argument in the most skeletal
 18 _____

19
 20
 21 ⁷ The implementing regulation in 34 C.F.R. § 104.33(a) provides that "[a] recipient that
 22 operates a public elementary or secondary education program or activity shall provide a
 [FAPE] to each qualified handicapped person who is in the recipient's jurisdiction,
 regardless of the nature or severity of the person's handicap."

23 ⁸ In addition to the regulations' unenforceability, Plaintiffs misrepresent the nature of
 24 Defendants' obligation under 34 C.F.R. § 104.32(a). Plaintiffs allege that Defendants are
 25 required under the regulations to "identify and locate Havasupai students who are not
 26 properly receiving an adequate public education on account of their disabilities." SAC ¶
 27 253. However, section 104.32 simply requires Defendants to "identify and locate every
 28 qualified handicapped person . . . *who is not receiving a public education.* . . ." and "notify"
 such persons and "their parents or guardians of the recipient's duty under this subpart." All
 student plaintiffs are, and at all relevant times within the applicable two-year statute of
 limitations have been, "receiving a public education" and therefore the Second Amended
 Complaint fails to allege properly a violation of 104.32(a). Of course, Defendants are still
 required to evaluate any students *suspected of* having a disability, § 104.33, to provide the
 student with a FAPE, § 104.35.

1 way, leaving the court to do counsel's work, create the ossature for the argument, and put
 2 flesh on its bones."). Plaintiffs cannot dispute that "[t]he weight of authority holds that there
 3 is no private right of action to enforce § 504's special education regulations" H v.
 4 Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1247, 1264 (M.D. Ala. 2011) (collecting
 5 cases). Accordingly, the implementing regulations in sections 104.32 and 104.36 are not
 6 enforceable through Section 504's right of action. Counts V and VI must be dismissed.

7 **IV. THE COURT SHOULD DISMISS ALL BUT THE SECRETARY OF THE**
 8 **INTERIOR AS SUPERFLUOUS DEFENDANTS IN COUNTS III-IV.**

9 Plaintiffs correctly point out that Section 504, 29 U.S.C. § 794, "incorporates the
 10 remedies, procedures and rights of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §
 11 2000d" Opp'n at 19-20. But nothing in Title VI suggests, as plaintiffs do, that Section
 12 504 claims may be brought against "multiple individual defendants . . . rather than just a
 13 single agency head," Opp'n at 20. It has been held that "[t]he proper defendant in a Title
 14 VI case is an entity rather than an individual." Farm Labor Organizing Committee v. Ohio
 15 St. Highway Patrol, 95 F. Supp. 2d 723, 741 (N.D. Ohio 2000); Everson v. Leis, 556 F.3d
 16 484, 501 & n. 7 (6th Cir. 2009) (noting that the proper defendant is the public entity
 17 responsible for the alleged discrimination).

18 Counts III-VI allege violations against four individual defendants in their official
 19 capacities. And, while there is support for the proposition that "no claim may be maintained
 20 against an individual under Title VI [or Section 504] even in his official capacity," TC and
 21 KC v. Valley Cent. Sch. District, 777 F. Supp. 2d 577, 594 (S.D.N.Y. 2011), generally, a
 22 suit against a person in an official capacity is considered to be a suit against the entity of
 23 which the officer is an agent, see Stewart v. Bright, No. C 13-1794 LB, 2013 WL 2355450,
 24 at *3 (N.D. Cal. May 29, 2013) (citing Kentucky v. Graham, 473 U.S. 159, 165 (1985)).
 25 The individual defendants in this instance are all agents of the same entity (*i.e.*, the
 26 Department of the Interior), and the Secretary of the Interior is the superior of the three other
 27 individuals. Because Plaintiffs fail to attribute separate predicate acts to each defendant, it
 28 follows that all officials except the Secretary of the Interior are mere surplusage to this

litigation and should be dismissed as redundant. See Indest v. Freeman Decorating, Inc., 164 F.3d 258, 262 (5th Cir. 1999); Fireman's Fund Ins. Co. v. City of Lodi, 41 F. Supp. 2d 1100, 1106-07 (E.D. Cal. 1999); see also Stewart v. Bright, No. C 13-1794 LB, 2013 WL 2355450, at *3 (N.D. Cal. May 29, 2013) (explaining that the proper defendant for the Section 504 claim would be the prison as an entity *or* the prison's chief medical officer in an official capacity).⁹

V. THE AMICUS BRIEFS DO NOT CURE ANY OF THE DEFECTS IN THE SECOND AMENDED COMPLAINT.

The amicus briefs of the Havasupai Tribe and the Society of Indian Psychologists do not cure any of the legal deficiencies in the Second Amended Complaint. In fact, the briefs do not focus much, if at all, on Defendants' legal arguments.¹⁰ By focusing on historical background and providing a mostly incomplete, and sometimes inaccurate, characterization of the Federal Government's efforts to provide education to the children of the Havasupai reservation, the Tribe seems to be under the false impression that this is a class action lawsuit and does not focus on the specific legal arguments raised in the Defendants' motion. And, while Defendants take serious issue with some of the factual representations made by the Tribe in its brief, such factual differences are immaterial to the resolution of the motion. Finally, the amicus brief of the Society of Indian Psychologists simply reiterates and provides further credence to the general assertion that trauma may be associated under certain

⁹ The three cases plaintiffs cite as having "explicitly approved" Section 504 claims against multiple defendants, Opp'n at 20, did not in fact "explicitly approve" such claims, because the question of who or what is a proper named federal defendant with respect to a Section 504 claim was not at issue in those cases.

¹⁰ The Tribe simply reiterates some of Plaintiffs' arguments in only two paragraphs of their sixteen-page brief. See Havasupai Tribe Amicus Br., ECF No. 78, at 14-15. The Tribe appears to argue in passing that Plaintiffs' claims are not moot because the violations are capable of repetition. See id. at 14. This argument is meritless. Defendants have not made a mootness argument, the alleged violations in the Havasupai school are not capable of repetition with respect to those students who no longer attend the school, and there are student plaintiffs in this lawsuit who do have standing to seek the relief requested. Finally, The Society of Indian Psychologists do not make any legal arguments in response to Defendants' motion. See generally Society of Indian Psych. Br., ECF No. 82.

1 circumstances with specific physiological and mental impairments. Once again, Defendants
 2 do not dispute that trauma could be an external factor that may lead in certain situations to a
 3 qualifying disability under Section 504. Nothing in the brief changes the fact that Plaintiffs
 4 have failed to state a claim in Count IV; if anything, reinforces Plaintiffs' pleading defect.

5 **CONCLUSION**

6 Defendants respectfully request that the Court dismiss (1) all claims by Levi R., Leo
 7 R., Jenny A., Jeremy A., and Jordan A. for lack of standing; (2) Count IV for failure to state
 8 a claim or, in the alternative, as duplicative of Count III; (3) Counts V and VI for lack of
 9 subject-matter jurisdiction; and (4) all defendants but the Secretary of the Interior as to Count
 10 III, and to the extent Counts IV-VI are allowed to proceed also as to those counts.

11 Dated: September 15, 2017

Respectfully submitted,

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16 /s/ Cesar A. Lopez-Morales

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27 **CERTIFICATE OF SERVICE**

1 I hereby certify that on September 15, 2017, I electronically transmitted the foregoing
2 Affidavit of Service by Certified Mail to the Clerk's Office using the CM/ECF System for
3 filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants for this
4 matter.

5
6 /s/ Cesar A. Lopez-Morales

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TAB 18

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8
9 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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

11 Plaintiffs,

12 v.

13
14 Bureau of Indian Education, et al,

15 Defendants.

No. 3:17-cv-08004-SPL

**DEFENDANTS' SECOND
PARTIAL MOTION TO
DISMISS**

16 **INTRODUCTION**

17 Plaintiffs bring six claims seeking declaratory and injunctive relief against U.S.
18 Department of the Interior ("DOI"), Bureau of Indian Education ("BIE"), Secretary of the
19 Interior Ryan Zinke, Acting Assistant Secretary–Indian Affairs Michael Black, Director of
20 BIE Tony Dearman, and Principal Jeff Williamson of Havasupai Elementary School
21 (collectively, "Defendants"). Defendants move to dismiss certain claims pursuant to Federal
22 Rules of Civil Procedure 12(b)(1), specifically, for lack of standing with respect to those
23 claims by students who no longer attend Havasupai Elementary and for lack of subject-
24 matter jurisdiction with respect to the fifth and sixth causes of action, as well as pursuant to
25 Rule 12(b)(6) for failure to state a claim under the fourth cause of action. If those claims are
26 not dismissed, defendants move to dismiss all but Secretary Zinke as improper defendants
27 with respect to the third, fourth, fifth, and sixth causes of action. This motion is supported
28 by the accompanying memorandum of points and authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **BACKGROUND**

3 The Havasupai Tribe is a federally recognized Native American tribe located on a
 4 reservation in the bottom of the Grand Canyon, along the western corner of the canyon's
 5 South Rim. See Second Am. Compl., ECF No. 64, (hereinafter, "SAC") ¶ 27. The only
 6 school on the reservation is the Havasupai Elementary School, which is operated and funded
 7 by BIE, and serves approximately 70 students in kindergarten through eighth grade. Id. ¶¶
 8 2, 27. Plaintiffs are a group of nine Havasupai students and an organization that advocates
 9 for the legal rights of Native Americans with disabilities. Id. ¶¶ 8-20. Only four out of the
 10 nine student plaintiffs still attend Havasupai Elementary School. Id. at 3-6. The remaining
 11 five students are enrolled in schools outside of the reservation. Moreover, as three of those
 12 five students are at least fourteen-year olds and have commenced their secondary education,
 13 they are not entitled to educational services at the school. Id. ¶¶ 12-14.

14 Plaintiffs allege that defendants have failed to: (1) provide a general curriculum (*i.e.*,
 15 instruction in areas other than math, reading, and writing) that also includes aspects of the
 16 Havasupai culture; (2) provide school resources (*i.e.*, textbooks, library, extracurricular
 17 activities); (3) ensure adequate staffing; (4) provide adequate special education; (5) adopt
 18 disciplinary measures beyond exclusion and law enforcement; (6) provide necessary
 19 wellness and mental health support; and (7) include the community in school decision-
 20 making. Id. ¶ 2. Plaintiffs claim that "[t]hese deprivations violate Defendants' substantive
 21 obligations under the Indian Education Act as amended, Section 504 of the Rehabilitation
 22 Act of 1973, and their implementing regulations." Id. ¶ 6.

23 Plaintiffs' Second Amended Complaint asserts claims for: (1) Failure to Take Action
 24 Required to Provide Basic Education, 5 U.S.C. § 706(1) (Count I); (2) Failure to Provide
 25 Basic Education, 5 U.S.C. § 706(2) (Count II); (3) Failure to Provide a System Enabling
 26 Students with Disabilities to Access Public Education in violation of the Rehabilitation Act,
 27 29 U.S.C. § 794 (Count III); (4) Failure to Provide a System Enabling Students who Have
 28 Suffered Adversity and Complex Trauma to Access Public Education in violation of the

1 Rehabilitation Act, 29 U.S.C. § 794 (Count IV); (5) Violation of Department of Education
2 Regulations Regarding “Location and Notification,” 34 C.F.R. § 104.32 (Count V); (6)
3 Violation of Department of Education Regulations Regarding “Procedural Safeguards,” 34
4 C.F.R. § 104.36 (Count VI). See SAC at 50-62. Plaintiffs seek a declaration setting forth
5 defendants’ obligations “with respect to the delivery of education to students at Havasupai
6 Elementary School” and stating that defendants’ actions and omissions constitute violations
7 of federal laws and regulations. Id. at 62. Plaintiffs also seek an order requiring defendants
8 to comply with their obligations and provide certain educational services. See id. at 62-64.

9 Although some of the factual allegations giving rise to plaintiffs’ claims are either
10 inaccurate or no longer applicable, defendants assume all well-pleaded facts to be true at this
11 procedural juncture. Defendants move to dismiss all claims by plaintiffs Levi R., Leo R.,
12 Jenny A., Jeremy A., and Jordan A. pursuant to Federal Rule of Civil Procedure 12(b)(1)
13 because they no longer attend Havasupai Elementary School and, thus, are not entitled to the
14 relief requested. Defendants also move to dismiss Count IV pursuant to Rule 12(b)(6)
15 because merely alleging exposure to adversity and trauma is insufficient as a matter of law
16 to show that plaintiffs are disabled individuals under the Rehabilitation Act who were denied
17 benefits solely by reason of a disability. If Count IV is not dismissed for failure to state a
18 claim, then it is duplicative of Count III and should not remain as a separate count.
19 Additionally, Counts V and VI should be dismissed pursuant to Rule 12(b)(1) for lack of
20 subject-matter jurisdiction because there is no private right of action to sue under the
21 Department of Education regulations. Finally, all but Secretary Zinke must be dismissed as
22 improper defendants as to Count III, and to the extent Counts IV-VI are allowed to proceed,
23 also as to those counts.

24 ARGUMENT

25 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the
26 challenger asserts that the allegations contained in a complaint are insufficient on their face
27 to invoke federal jurisdiction.” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th
28 Cir. 2004). When the assertion of subject matter jurisdiction is facially challenged, the Court

1 takes the allegations in the complaint as true. Wolfe v. Strankman, 392 F.3d 358, 362 (9th
 2 Cir. 2004). “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” Cook v. Brewer,
 3 637 F.3d 1002, 1004 (9th Cir. 2011) (quotation omitted). “When analyzing a complaint for
 4 failure to state a claim” under Rule 12(b)(6), “the well-pled factual allegations are taken as
 5 true and construed in the light most favorable to the nonmoving party.” JDA Software Inc.
 6 v. Berumen, 2015 WL 8003210, at *1 (D. Ariz. Dec. 7, 2015). “Legal conclusions couched
 7 as factual allegations are not entitled to the assumption of truth, and therefore are insufficient
 8 to defeat a motion to dismiss for failure to state a claim.” Id. (citation omitted).

9 **I. STUDENT PLAINTIFFS LEVI R., LEO R., JENNY A., JEREMY A., AND**
 10 **JORDAN A. LACK STANDING TO BRING THEIR CLAIMS.**

11 Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. lack standing to bring
 12 their claims because they are no longer students at Havasupai Elementary School and cannot
 13 show an impending injury that can properly be remedied here. Article III’s case or
 14 controversy requirement requires that plaintiffs establish standing to sue “separately for
 15 each form of relief sought.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc., 528
 16 U.S. 167, 185 (2000) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983)). To
 17 satisfy “the irreducible constitutional minimum of standing,” a plaintiff must show: (1) a
 18 concrete and particularized injury that is either actual or imminent, as opposed to conjectural
 19 or hypothetical; (2) a causal connection between the injury and the challenged action; (3)
 20 that it is likely that the injury will be redressed by a favorable decision. Lujan v. Defs. of
 21 Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

22 To have standing to seek declaratory and injunctive relief, “a plaintiff must
 23 demonstrate ‘that he is realistically threatened by a repetition of [the violation].’” Melendres
 24 v. Arpaio, 695 F.3d 990, 997 (9th Cir. 2012) (quoting Lyons, 461 U.S. at 109) (bracketed
 25 text in original). Past injuries alone are insufficient to establish standing; rather the plaintiff
 26 must establish a reasonable fear that the injury will recur. The “threatened injury must be
 27 *certainly impending* to constitute injury in fact, and . . . allegations of possible future injury
 28 are not sufficient.” Clapper v. Amnesty Int’l. USA, 133 S. Ct. 1138, 1147 (2013) (emphasis

1 in original & citation omitted). “When evaluating whether [the standing] elements are
2 present, we must look at the facts as they exist at the time the complaint was filed.” Am.
3 Civil Liberties Union of Nev. v. Lomax, 471 F.3d 1010, 1015 (9th Cir. 2006) (emphasis and
4 internal quotation marks omitted).

5 The Second Amended Complaint establishes that plaintiffs Levi R., Leo R., Jenny A.,
6 Jeremy A., and Jordan A. no longer attend Havasupai Elementary School. See SAC at 3-6.
7 Levi R. (ninth grade), Leo R. (eleventh grade), and Jenny A. (tenth grade) are pursuing their
8 secondary education and are no longer eligible to receive educational services at Havasupai
9 Elementary School. See id. ¶¶ 12-14. Moreover, Jeremy A. and Jordan A. are enrolled at a
10 BIE boarding school in Oklahoma and there is no allegation that they plan to enroll in
11 Havasupai Elementary School any time soon. See id. ¶¶ 15-16. Further, as Jeremy A. will
12 be starting eighth grade shortly, he will be ineligible to attend the school after the 2017-2018
13 academic year. The Second Amended Complaint thus fails to establish that the past injuries
14 ascribed to these five plaintiffs are likely to recur in the imminent future. The alleged
15 deficiencies in the school cannot constitute a threat of impending injury to students who are
16 no longer enrolled in it. Also, these five plaintiffs lack standing “to seek injunctive or
17 declaratory relief because they ‘would not stand to benefit from’ such relief.” Slayman v.
18 FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1047-48 (9th Cir. 2014) (holding that
19 plaintiffs who were no longer FedEx drivers at the time the complaint was filed lacked
20 standing to seek injunctive or declaratory relief) (quoting Walsh v. Nev. Dep’t of Human
21 Res., 471 F.3d 1033, 1037 (9th Cir. 2006)) (citation omitted). Specifically, they would not
22 benefit from any changes made to the school (*i.e.*, curriculum, staffing, textbooks, cultural
23 programs, mental health support and school counseling).

24 For the same reason, a declaration that defendants violated certain legal obligations
25 at Havasupai Elementary School will not redress a threat of impending injury. It is well
26 established that “a plaintiff whose injury lies wholly in the past without a reasonable
27 likelihood of recurring in the future, therefore, lacks standing to seek a declaratory judgment
28 because the remedy sought would only serve to give the aggrieved plaintiff the ‘psychic

1 satisfaction’ of having a court declare the defendant’s past actions illegal.” Tarhuni v.
 2 Holder, 8 F. Supp. 3d 1253, 1268 (D. Or. 2014) (quoting Leu v. Int’l Boundary Comm’n,
 3 605 F.3d 693, 694 (9th Cir. 2010)). A declaration in this instance could only provide these
 4 five plaintiffs the satisfaction that their rights were violated during their enrollment at the
 5 school and, since mere “psychic satisfaction is not an acceptable Article III remedy,” Steel
 6 Co. v. Citizens for a Better Env’t, 523 U.S. 83, 107 (1998), these student plaintiffs lack
 7 standing to seek the relief requested.

8 Lastly, the Second Amended Complaint also asks for compensatory education for the
 9 “student Plaintiffs—including those who previously attended but no longer attend Havasupai
 10 Elementary School” Request for Relief at SAC ¶ 3(k). It is unclear which statute or
 11 regulation is relied upon to seek such remedy. However, the Ninth Circuit has stated that “a
 12 request for compensatory education is virtually identical to a request for monetary damages
 13 measured by the cost of the educational services provided.” See Alexopulos By & Through
 14 Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 553 (9th Cir. 1987);
 15 Alexopulos v. Riles, 784 F.2d 1408, 1412 (9th Cir. 1986) (noting that compensatory
 16 education “is virtually indistinguishable from a request for tuition reimbursement based on
 17 a past breach of legal duty”) (citing Miener v. Missouri, 673 F.2d 969, 982 (8th Cir. 1982)).
 18 Because there is no “explicit language in the Rehabilitation Act . . . waiving the government’s
 19 sovereign immunity” as to monetary claims, Dorsey v. U.S. Dep’t of Labor, 41 F.3d 1551,
 20 1555 (D.C. Cir. 1994); see also Cleveland v. Hunton, 2017 WL 531897, at *3 (E.D. Cal. Feb.
 21 9, 2017), there is no right of action for compensatory education against the federal
 22 government under Section 504. The same reasoning applies to the Indian Education Act and
 23 the regulations cited in the Amended Complaint, neither of which provides this specific
 24 remedy or expressly waives sovereign immunity.¹

25
 26 ¹ Even if compensatory education were considered injunctive relief, the alleged violations
 27 occurred when these students were enrolled in the school. Because a past breach of legal
 28 duty is insufficient to establish standing for prospective relief, it follows that these five
 plaintiffs are not entitled to such relief. See Lyons, 461 U.S. at 109.

1 In conclusion, student plaintiffs Levi R., Leo R., Jenny A., Jeremy A. and Jordan A.
2 lack standing to bring their claims, which must be dismissed under Rule 12(b)(1).²

3 **II. COUNT IV SHOULD BE DISMISSED BECAUSE EXPOSURE TO**
4 **ADVERSITY AND TRAUMA IS INSUFFICIENT TO ESTABLISH THAT**
5 **PLAINTIFFS ARE DISABLED INDIVIDUALS WHO WERE DENIED**
6 **BENEFITS SOLELY BY REASON OF ANY ALLEGED DISABILITY.**

7 Section 504 of the Rehabilitation Act of 1973 provides, in relevant part: “No
8 otherwise qualified *individual with a disability* . . . shall, *solely by reason of her or his*
9 *disability*, be excluded from the participation in, be denied the benefits of, or be subjected to
10 discrimination under any program or activity receiving Federal financial assistance” 29
11 U.S.C. § 794(a) (emphasis added). To state a violation of Section 504, plaintiffs must
12 establish that they: (1) are individuals with a disability; (2) are otherwise qualified to receive
13 the benefits of a program; and (3) were excluded from, denied the benefits of, or subject to
14 discrimination under the program solely by reason of their disability. Duvall v. Cnty. Of
15 Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001), as amended on denial of reh’g (Oct. 11, 2001)
16 (citation omitted). Because Count IV fails to establish that plaintiffs are individuals with
17 “disabilities” within the meaning of the statute, and fails to show any causal connection
18 between any alleged “disabilities” and the denial of benefits, it should be dismissed. To the
19 extent Count IV establishes that certain students are disabled and that they were denied
20 access to a public education solely by reason of their disabilities, then both Counts III and
21 IV are duplicative and should not remain as separate counts.

22
23
24
25
26 ² Given that the Second Amended Complaint was filed using pseudonyms and plaintiffs have
27 not provided defendants with the names of the students, defendants reserve the right to argue
28 that all or some of the students’ Rehabilitation Act claims are also time barred under the
applicable two-year statute of limitations. See Oskowis v. Sedona Oak-Creek Unified Sch.
Dist. #9, No. CV-16-08063-PCT-JJT, 2017 WL 1135558, at *3 (D. Ariz. Mar. 27, 2017).

A. Count IV Fails To Establish The Existence Of A Qualifying Disability.

Counts III and IV of the Second Amended Complaint allege violations of the Rehabilitation Act: (1) failure “to establish a system to ensure that students [Stephen C., Durell P., Levi R., Jenny A., and Jordan A.] who have disabilities” receive the benefits of a public education (Count III), SAC ¶ 226; and (2) failure “to establish a system to ensure that Student Plaintiffs Impacted by Childhood Adversity [the five students “who have disabilities” plus Taylor P. and Leo R.] who have suffered adversity and complex trauma” receive the benefits of a public education (Count IV), *id.* ¶ 243. Accordingly, five of the seven students are identified as having specific “disabilities” (Count III), and all seven students are alleged to have been “impacted by childhood adversity” (Count IV). Compare SAC ¶¶ 8, 10, 12, 14, 16 *with id.* ¶¶ 11, 13.³ However, the Rehabilitation Act applies only to individuals with a disability. As discussed below, the claim that certain students have suffered adversity and trauma does not establish in and of itself that they are individuals with “disabilities” under the Rehabilitation Act. Accordingly, Count IV fails to show that plaintiffs can satisfy the first and third elements of a Rehabilitation Act claim and, thus, must be dismissed under Rule 12(b)(6).⁴

In relevant part, Section 504 defines “disability” and “individual with a disability” as

³ The Complaint alleges that certain disabled students, who are the subject of Count III, are eligible to receive special education services: (1) Stephen C. (Attention Deficit Hyperactive Disorder (“ADHD”)); (2) Durell P. (Oppositional Defiant Disorder, ADHD, and significant mental health needs); (3) Levi R. (ADHD and a specific learning disability); Jenny A. (significant mental health needs and an emotional disturbance); and Jordan A. (specific learning disability). The Complaint does not identify Taylor P. and Leo R. (who are included in Count IV), as well as Anna D. and Jeremy A., as students having a recognized impairment.

⁴ Although Havasupai Elementary School is not a “program” that “receives federal financial assistance,” *see* Exec. Order No. 13160, 65 F.R. 39775 (June 23, 2000), all BIE-operated schools must comply with Section 504 of the Rehabilitation Act pursuant to the Education Amendments of 1978, as amended by the No Child Left Behind Act of 2001. *See* 25 U.S.C. § 2005(b)(1).

1 “the meaning given to it” in Title II of the American with Disabilities Act (“ADA”), 42
 2 U.S.C. § 12102. 29 U.S.C. § 705(9)(B), (20)(B); 29 U.S.C. § 794(a). The ADA, in turn,
 3 defines “disability . . . with respect to an individual” as a “physical or mental impairment
 4 that substantially limits one or more major life activities of such individual.” 42 U.S.C. §
 5 12102(1)(A).⁵ An “impairment” is defined as: “(1) any physiological disorder or condition,
 6 cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . ; or (2)
 7 [a]ny mental or psychological disorder” 29 C.F.R. § 1630.2(h); see also 34 C.F.R. §
 8 104.3(j)(1), (j)(2)(i). Pursuant to this definition, even if, as alleged, these Havasupai students
 9 have experienced adversity and trauma within their community, such experience must result
 10 in an impairment as defined in 29 C.F.R. § 1630.2(h) to constitute a disability.

11 Indeed, the applicable regulations expressly state that “[e]nvironmental, cultural, or
 12 economic disadvantages such as poverty,” homelessness, violence, and family disruption
 13 “are not impairments” for purposes of the Rehabilitation Act. 29 C.F.R. app. § 1630.2(h);
 14 see also 34 C.F.R. app. A to Part 104. Hence, the alleged “forced relocations, loss of homes,
 15 families and culture,” and poverty within the Havasupai community, SAC ¶¶ 158-60, do not
 16 state a colorable Section 504 claim because they do not constitute a physical or mental
 17 impairment. And, while the Second Amended Complaint provides specific examples of
 18 serious socio-economic adversity and trauma that certain students have experienced in their
 19 community and families (*i.e.*, family instability and disruption, bullying, violence, substance
 20 abuse throughout the community, high unemployment, referrals to the juvenile justice
 21 system, economic stress, and financial hardship), see id. at 12-35, these experiences are not
 22 impairments for purposes of the Rehabilitation Act. Count IV should be dismissed on this
 23 basis alone.

24 In addition, the Second Amended Complaint does not allege that the adversity and
 25

26
 27 ⁵ “[M]ajor life activities, include, but are not limited to . . . learning, reading, concentrating,
 28 thinking, communicating, and . . . the operation of a major bodily function” 42 U.S.C.
 § 12102(2)(B).

1 trauma has resulted in each plaintiff having a “recognized ‘impairment’” that substantially
2 limits one or more major life activities. Mamola v. Grp. Mfg. Servs., Inc., No. CV-08-1687-
3 PHX-GMS, 2010 WL 1433491, at *9 (D. Ariz. Apr. 9, 2010) (quoting Bragdon v. Abbott,
4 524 U.S. 624, 631 (1998)). Rather than showing that specific physical or mental disorders
5 were induced by, or related to, trauma and adversity, the Second Amended Complaint
6 concludes that experiencing adversity and trauma “cause impairment that limits a student’s
7 ability to learn, read, concentrate, think, and/or communicate, and to generally receive an
8 education and have the opportunity to succeed in school.” Second Am. Compl. ¶ 239. This
9 threadbare and conclusory assertion that basically amounts to a recitation of the legal
10 definition of “disability,” is not entitled to deference at the pleading stage, and is insufficient
11 to state a claim. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (“A pleading that offers
12 labels and conclusions or a formulaic recitation of the elements of a cause of action will not
13 do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual
14 enhancement.”) (citation omitted).

15 Count IV relies for the most part on generalized notions about the historical trauma
16 of Native Americans, particularly the Havasupai, and provides some examples of how the
17 student plaintiffs’ experience reflects such trauma. However, this is not a case about the
18 trauma that Native American children may suffer generally or about the adversity and trauma
19 that these students have experienced. Count IV involves seven student plaintiffs who allege
20 that they have been deprived of meaningful access to public education in violation of the
21 Rehabilitation Act, which in turn requires the existence of an impairment that affects a major
22 life activity, that is, a “disability.” Discussing the impact of childhood adversity and trauma
23 on child development and the ability to learn, without alleging any specific impairments that
24 the seven students might have developed as a result of such experiences, is insufficient to
25 state a claim under Section 504. Since the question of whether the student plaintiffs have a
26 qualifying disability within the meaning of the Rehabilitation Act presents a question of law
27 for this Court to decide, the Second Amended Complaint’s shortcomings necessarily mean
28 there is no cognizable Section 504 claim. See Holt v. Grand Lake Mental Health Ctr., Inc.,

1 443 F.3d 762, 765 n.1 (10th Cir. 2006).

2 Furthermore, plaintiffs' emphasis on historical trauma based on the students' identity
3 as Native Americans arguably is inconsistent with the purpose of the Rehabilitation Act: to
4 prevent disability-based discrimination with respect to federally funded activities and
5 programs. See Alexander v. Choate, 469 U.S. 287, 292-99 (1985). Inherent in Count IV is
6 the notion that all Native Americans suffer from adversity and historical trauma which
7 affects their ability to learn, read, concentrate, think, or communicate. This claim should be
8 rejected not only for its legal insufficiency, but also because it would require the United
9 States to make inappropriate, if not impermissible, assumptions about the educational
10 capacity and needs of children based on their race or ethnicity. Taken to its logical
11 conclusion, adopting plaintiffs' expansive definition of "disability" to include adversity and
12 trauma untethered to any showing of an actual impairment would not only adversely impact
13 Native American students by predetermining their educational capacity, but it would also
14 impose a significant responsibility on elementary and secondary educational agencies in
15 underdeveloped communities across the United States to locate and evaluate all children who
16 are exposed to such generalized adversity.⁶

17 Indeed, "[t]he formalization and policing" of plaintiffs' proposed approach—
18 evaluating every person within a certain racial group or community that has been exposed to
19 adversity and complex historical trauma for signs of disability and the need for reasonable
20 accommodation—"could lead to a wholly unwieldy administrative and adjudicative burden."
21 Choate, 469 U.S. at 298. And, as the Supreme Court has warned, "[a]ny interpretation of §
22 _____

23
24 ⁶ Such expansion would be in contravention of Congress's intent and would have far reaching
25 and unintended implications with respect to federal disability laws. In fact, in 2004,
26 Congress specifically enacted safeguards against such an expansion when it re-authorized
27 the Individual with Disabilities Education Act and required states to have "in effect policies
28 and procedures designed to prevent the inappropriate over-identification or disproportionate
representation by race and ethnicity of children as children with disabilities, including
children with disabilities with a particular impairment described in Section 602(3)." 20
U.S.C. § 1412(a)(24).

504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.” *Id.* at 299. For the reasons stated above, Count IV must be dismissed.

B. Count IV Fails To Establish That The Student Plaintiffs Were Denied Benefits Solely By Reason Of Their Disability.

Even assuming that Count IV could establish that all seven students impacted by childhood adversity are disabled, there is no indication that they were denied benefits “solely by reason” of their alleged disability. 29 U.S.C. § 794(a). The purpose of the Rehabilitation Act is “to protect disabled persons from discrimination arising out of both discriminatory animus and ‘thoughtlessness,’ ‘indifference,’ or ‘benign neglect.’” *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (quoting *Choate*, 469 U.S. at 295 (1985)). When determining whether disabled persons are being discriminated against in violation of Section 504, courts may consider whether they are being “denied ‘meaningful access’ to state-provided services” solely by reason of their disability. *Id.* (quoting *Choate*, 469 U.S. at 302); see also *K.M. Ex. Rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

The phrase “solely by reason of a disability” makes clear that Section 504 requires, among other things, a causal nexus between the claimed disability and the alleged discriminatory act. 29 U.S.C. § 794(a); *Doe v. Eagle-Union Cmty. Sch. Corp.*, 101 F. Supp. 2d 707, 719 (S.D. Ind. 2000), *aff’d in part, vacated in part on other grounds*, 2 F. App’x 567 (7th Cir. 2001). This nexus, in turn, requires notice to the school of the disability. See *Granados v. J.R. Simplot Co.*, 266 Fed. App’x 547, 549 (9th Cir. 2008).

Knowledge of a claimed disability, not just of the consequences thereof, is essential to a Section 504 claim. If a defendant lacks knowledge of the claimed disability, there cannot be a denial of, or exclusion from, a benefit *solely by reason of a disability*. See *Tsuji v. Kamehameha Sch.*, 154 F. Supp. 3d 964, 978 (D. Haw. 2015), *aff’d*, No. 16-15105, 2017 WL 711143 (9th Cir. Feb. 23, 2017) (“[T]here is no obligation to explore possible accommodations unless an employer knows about an employee’s disability.”). To satisfy

1 this notice requirement, the Ninth Circuit and the vast majority of federal circuits have held
 2 that there *must* be a pre-litigation interactive process between the parties to determine
 3 whether it is possible under the specific circumstances for a reasonable accommodation of
 4 the disabled individual's needs. See Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1114-15 (9th
 5 Cir. 2000) (en banc), vacated on other grounds sub nom. U.S. Airways, Inc. v. Barnett, 535
 6 U.S. 391 (2002) (describing the "interactive process" as "a mandatory rather than a
 7 permissive obligation"). The notice and pre-litigation interactive process requirements have
 8 been extended to the educational context. See Patton v. Phoenix Sch. Of Law LLC, No. CV-
 9 11-0748-PHX-GMS, 2011 WL 1936920, at *4 (D. Ariz. May 20, 2011) ("Under the ADA,
 10 an educational institution's 'obligation to engage in an interactive process with the [student]
 11 to find a reasonable accommodation is triggered by the [student] giving notice of the []
 12 disability and the desire for accommodation.'") (alterations in original) (quoting Downey v.
 13 Crowley Marine Servs., 236 F.3d 1019, 1023 n. 6 (9th Cir. 2001)).⁷

14 The Second Amended Complaint does not establish that the duty to accommodate
 15 was triggered here because there are no allegations showing that defendants knew, had notice
 16 of, or had reason to believe that any of the plaintiffs had a disability as a result of trauma and
 17 adversity. General awareness of deficiencies in the school's services or the "harmful impacts
 18 of complex trauma on Native youth and the critical need to provide wellness and mental
 19

20
 21 ⁷ See also, e.g., Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906, 908 (8th
 22 Cir. 2000); Willis v. Norristown Area Sch. Dist., 2 F. Supp. 3d 597, 608-09 (E.D. Pa. 2014);
 23 Girard v. Lincoln Coll. Of New England, 27 F. Supp. 3d 289, 294 (D. Conn. 2014); Forbes
 24 v. St. Thomas Univ., Inc., 768 F. Supp. 2d 1222, 1231 (S.D. Fla. 2010); Rivera-Concepcion
 25 v. Puerto Rico, 786 F. Supp. 2d 442, 454-55 (D.P.R. 2010); Stearns v. Bd. Of Educ. for
 26 Warren Twp. High Sch. Dist. #121, No. 99 C 5818, 1999 WL 1044832, at *3 (N.D. Ill. Nov.
 27 16, 1999); but see P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1098, 1115 (C.D.
 28 Cal. 2015) (noting that even though "[i]t makes sense to the Court that Plaintiffs should have
 made a request for the relief sought *prior to* bringing suit so as to allow Defendants an
 opportunity to engage in an interactive process with them[,] it would not dismiss the
 complaint given that "the Ninth Circuit has yet to mandate this notice requirement in the
 context of ADA lawsuits against education institutions") (emphasis in original).

1 health services to address trauma in BIE schools,” SAC ¶ 187; see also id. at 47-49, is
 2 insufficient to establish the necessary knowledge of a qualifying disability in connection with
 3 each of the plaintiffs.

4 The knowledge required must be of the disability itself, not just its causes,
 5 consequences, or effects. See Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 (7th Cir.
 6 1995); Collings v. Longview Fibre Co., 63 F.3d 828, 834 (9th Cir. 1995); Tsuji, 154 F. Supp.
 7 3d at 978; Patton, 2011 WL 1936920, at *4; Stearns, 1999 WL 1044832, at *3. That
 8 “[t]rauma is associated with mental health conditions such as somatoform disorders, major
 9 depression, schizophrenia, and substance abuse and dependence” does not establish that any
 10 of the student plaintiffs impacted by childhood adversity in fact have such impairments, let
 11 alone that the school knew of any trauma-induced disabilities. SAC ¶ 162. Without showing
 12 knowledge of the claimed disabilities, plaintiffs cannot demonstrate that defendants have
 13 denied the student plaintiffs meaningful access to a proper education *solely by reason of their*
 14 *disability*. See Dutson v. Farmers Ins. Exch., 815 F. Supp. 349, 352 (D. Or. 1993) (noting
 15 that plaintiff could only be “within the protected class of handicapped persons” under federal
 16 anti-discrimination statutes if plaintiff established that defendants knew he was
 17 handicapped), aff’d, 35 F.3d 570 (9th Cir. 1994).

18 Allowing the claims to proceed notwithstanding the Second Amended Complaint’s
 19 failure to satisfy the required notice would eviscerate the causation requirement inherent in
 20 the statutory text and create “an enormous sphere of potential liability” for educational
 21 institutions. Hedberg, 47 F.3d at 934. Such a determination also would disregard the
 22 Supreme Court’s warning that, when interpreting Section 504, courts must keep the statute
 23 “within manageable bounds.” Choate, 469 U.S. 287 at 299. Count IV should be dismissed.

24 **C. Alternatively, If Count IV States A Cognizable Claim Under the**
 25 **Rehabilitation Act, Then It Is Duplicative Of Count III And Should**
 26 **Not Remain As A Separate Count.**

27 To the extent that plaintiffs’ allegations concerning the exposure to childhood
 28 adversity and historical trauma are sufficient to establish that defendants denied meaningful

1 access to a proper education solely by reason of a qualifying disability, then the
 2 Rehabilitation Act claims in Count III and Count IV are duplicative. A plaintiff “cannot
 3 assert two separate counts alleging the exact same claims.” Smith v. Bd. of Trustees
 4 Lakeland Cmty. Coll., 746 F. Supp. 2d 877, 899 (N.D. Ohio 2010). Moreover, the Ninth
 5 Circuit has reiterated that a district court can dismiss any “duplicative claims” from a
 6 complaint. See M.M. v. Lafayette Sch. Dist., 681 F.3d 1082, 1086 (9th Cir. 2012) (“It is
 7 well established that a district court has broad discretion to control its own docket, and that
 8 includes the power to dismiss duplicative claims.”) (citing Adams v. California v. Dep’t of
 9 Health Services, 487 F.3d 684 (9th Cir. 2007)). And, in fact, district courts generally dismiss
 10 such claims early in the litigation. See, e.g., Bey v. City of Oakland, No. CV 14-01626, 2016
 11 WL 1639372, at *15 (N.D. Cal. Apr. 26, 2016); Hussain v. Smith, No. CV 15-708, 2016 WL
 12 4435177, *at 4 (D.D.C. Aug. 19, 2016); Slimm v. Bank of Am. Corp., No. CV. 12-5846,
 13 2013 WL 1867035, at *22 (D.N.J. May 2, 2013); Dunlap v. Palmer, No. CV 3:07-00019,
 14 2011 WL 4344042, at *5, (D. Nev. Sept. 14, 2011).

15 If the premise and allegations of Count IV were sufficient to state a claim, then it is
 16 clear that both Counts III and IV allege the same claim: that defendants have failed to provide
 17 a system that enables student plaintiffs to access public education in violation of Section 504
 18 of the Rehabilitation Act. See SAC at 54, 56. Specifically, both claims allege that defendants
 19 have denied these students meaningful access to public education and that defendants “are
 20 required to provide specialized instruction, related services, and other resources . . . and they
 21 must put into place a system—including procedures, teachers, and appropriate providers—
 22 for delivery of specialized instruction and services in order to ensure that those students have
 23 access to the benefits of a public education.” Id. ¶¶ 225, 244. And, although the language
 24 may be slightly different—while Count III identifies certain qualifying disabilities, Count
 25 IV refers to adversity and trauma—both allege the same violation. Bey, 2016 WL 1639372,
 26 at *15 (stating that although two counts in the complaint “had slightly different language, at
 27 their core both allege the same constitutional violation”). Moreover, not only do the claims
 28 rely on the same operative facts, allege the same injury, and require proof of the same

1 elements, they also both seek declaratory relief and appropriate injunctive relief, which
2 presumably involves reasonable accommodation for each student to ensure meaningful
3 access to their public education.

4 Accordingly, assuming *arguendo* that Count IV states a claim upon which relief can
5 be granted, then this court should dismiss one of the two counts as duplicative. See Knapp
6 v. California Dep't of Corr. & Rehab., No. CV 1:08-780, 2009 WL 2524603, at*2 (E.D.
7 Cal. Aug. 17, 2009) (finding two counts in the same complaint to be “duplicative claims of
8 deliberate indifference *by the same Defendants for the same conduct*” and dismissing the
9 first count “as duplicative of the more expansive allegations” in the second count)
10 (emphasis added). Although the allegations are virtually identical as to both counts, one
11 point of distinction—which likely explains why Count IV focuses on adversity and trauma
12 in lieu of alleging a specific impairment giving rise to a disability—is that Count IV
13 includes two additional students (Taylor P. and Leo R.) that are not a part of Count III.
14 One way to address the duplicative nature of the claims would be to dismiss one of the
15 counts and consolidate them into one omnibus Rehabilitation Act claim. See Arndell v.
16 Robinson, Belaustegui, Sharp, & Low, No. CV 3:11-469, 2012 WL 12897879, at *2 (D.
17 Nev. May 11, 2012) (consolidating ten claims into one single claim of legal malpractice
18 due to duplicative nature); see also Van Vliet v. Cole Taylor Bank, No. CV. 10-3221, 2011
19 WL 148059, at *2-4 (N.D. Ill. Jan. 18, 2011) (dismissing discrimination claim under
20 Family Medical Leave Act as duplicative of plaintiff’s retaliation claim under the statute
21 and granting leave to consolidate counts and plead one claim of willful
22 discrimination/retaliation).

23 Dismissing one count and allowing the separate counts to be consolidated into one
24 Rehabilitation Act claim would help streamline a lengthy 65-page pleading and save the
25 parties, as well as the court, substantial resources and time.⁸ Therefore, to the extent Count
26

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28 ⁸ “While pleading in the alternative is generally allowed under Rule 8(d)(2) of the Federal
Rules of Civil Procedure, the Rule does not prohibit dismissal of duplicative claims.” Van

IV states a claim, it should not be allowed to remain as a separate count.

III. PLAINTIFFS' CLAIMS FOR RELIEF FOR VIOLATION OF THE IMPLEMENTING REGULATIONS OF THE REHABILITATION ACT MUST BE DISMISSED.

Counts V and VI allege violations of the Department of Education's implementing regulations of the Rehabilitation Act regarding "Location and Notification," 34 C.F.R. §104.32,⁹ and "Procedural Safeguards," 34 C.F.R. §104.36.¹⁰ Notably, these regulations do not provide a private right of action. And, while implementing regulations may be enforceable through a statute's private right of action when they "authoritatively construe"

Vliet, 2011 WL 148059, at *2 & n.1 (finding that "dismissal of a federal claim on the grounds that it is duplicative of another federal claim brought in the same lawsuit is proper under Rule 12(b)(6)). Alternatively, the court may also rely on Rule 12(f) to strike from the pleading "any redundant, immaterial, impertinent, or scandalous matter" in order "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial" Black & Veatch v. Modesto Irr. Dist., No CV 11-0695, 2011 WL 2636218, at *2 (E.D. Cal. July 5, 2011) (quoting Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)); see also Van Vliet, 2011 WL 148059, at *2 n. 1.

⁹ "Any recipient that operates a public elementary or secondary education program or activity shall annually: (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart." 34 C.F.R. §104.32.

¹⁰ "A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, *because of handicap*, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement." 34 C.F.R. §104.36 (emphasis added).

1 the underlying statute, Alexander v. Sandoval, 532 U.S. 275, 284 (2001), these regulations
 2 go beyond the Rehabilitation Act’s anti-discrimination mandate to create additional
 3 affirmative obligations on educational institutions.

4 Regulations that impose obligations beyond the statute do not fall within the statute’s
 5 private right of action. See id. “As applied here, Sandoval instructs that whether the § 504
 6 regulations are privately enforceable will turn on whether their requirements fall within the
 7 scope of their prohibition contained in § 504 itself.” Mark H. v. Lemahieu, 513 F.3d 922,
 8 935 (9th Cir. 2008).¹¹ These regulations do not fall within Section 504’s private right of
 9 action because they impose more specific duties and obligations than the statute. While
 10 Section 504 prohibits discrimination “solely by reason of” disability, K.M. Ex. Rel. Bright,
 11 725 F.3d at 1099 (quoting 29 U.S.C. § 794(a)), the Department of Education’s implementing
 12 regulations go beyond this “general anti-discrimination mandate,” id., by placing additional
 13 duties on educational institutions, such as locating and identifying disabled students,
 14 notifying parents of educational plans for their children, and providing the opportunity to
 15 examine relevant records and be heard in an impartial hearing, see 34 C.F.R. §§ 104.32, 36

16 These affirmative obligations are not linked tightly enough “to Section 504’s
 17 nondiscrimination mandate,” K.M. Ex. Rel. Bright, 725 F.3d at 1099, in a way that
 18 authoritatively construes the statute. See Power v. Sch. Bd. of City of Virginia Beach, 276
 19 F. Supp. 2d 515, 519-21 (E.D. Va. 2003) (holding that “no private cause of action exists to
 20 enforce [34 U.S.C. § 104.36’s] regulatory due process provision”); see also H. v.

21
 22 ¹¹ In Mark H., the Ninth Circuit noted in dicta that, “to the degree the § 504 [Free Appropriate
 23 Public Education (FAPE)] regulations that the H. family invokes can be interpreted as a
 24 variety of meaningful access regulation, they will fall within the § 504 implied cause of
 25 action.” 513 F.3d at 939. Notably, the Circuit did not actually “decide whether the H. family
 26 ha[d] alleged a privately enforceable cause of action”; instead, it remanded the case for
 27 further proceedings on this issue. Id. Based on this dicta, a distinction reasonably may be
 28 drawn between substantive access regulations and the procedures put in place to promote
 access. The regulations at issue in Counts V and VI fall in the second category and, unlike
 substantive access regulations, are not enforceable through the statute’s right of action.

1 Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1247, 1264 (M.D. Ala. 2011) (“[T]he weight
2 of authority holds that there is no private right of action to enforce § 504’s special education
3 regulations, to the extent these regulations create any duties separate and apart from the
4 statutory text”) (collecting cases); but see Compton Unified, 135 F. Supp. 3d at 1118-19
5 (recognizing a private right of action to enforce certain regulatory provisions).

6 While a violation of these regulations could be relevant to satisfy the requisite *mens*
7 *rea* for a damages claim under Section 504 (a requirement that does not apply to the federal
8 government), see Mark H., 513 F.3d at 938, the weight of authority suggests that such a
9 violation does not give rise to a stand-alone claim. “Section 504 itself contains no procedural
10 rights, nor guarantees them” and, by contrast, “the regulations promulgated under Section
11 504 require the establishment of procedural safeguards” and identification policies and
12 procedures “to protect the rights of students and parents to participate in the educational
13 process.” Power, 276 F. Supp. 2d at 519 (citation omitted). Because “the regulations do not
14 delineate any specific procedures [or policies] with regard to Section 504, and they do not
15 expand the substantive scope of the statute”—namely, “to ensure that handicapped
16 individuals receive evenhanded treatment in relation to the nonhandicapped,” P.C. v.
17 McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990); see also K.M. Ex. Rel. Bright, 725 F.3d
18 at 1097-98—plaintiffs cannot rely on Section 504’s anti-discrimination mandate to avail
19 themselves of some separate remedy under these regulations. Power, 276 F. Supp. 2d at 520.

20 Accordingly, the court should dismiss Counts V and VI for lack of subject-matter
21 jurisdiction pursuant to Rule 12(b)(1). “To hold otherwise would subvert the plain meaning
22 of discrimination in the statute and invite a flood of litigation in the special education
23 context” by inviting lawsuits seeking to remedy inadequate policies or procedures, even
24 where no one was discriminated against because of a disability. See id. at 521.

25 **IV. THE SECRETARY OF THE INTERIOR IN HIS OFFICIAL CAPACITY IS**
26 **THE ONLY PROPER DEFENDANT WITH RESPECT TO COUNTS III-VI.**

27 Counts III-VI assert claims under Section 504 and the Department of Education’s
28 implementing regulations against all individual defendants in their official capacities.

1 However, it is well established that, in a Rehabilitation Act case, the head of the relevant
 2 department or agency is the only proper defendant. Tanner v. Derwinski, 24 F.3d 249 n.1
 3 (9th Cir. 1994) (citing Johnston v. Horne, 875 F.2d 1415, 1420 (9th Cir. 1989)); see also
 4 Nurridin v. Bolden, 674 F. Supp. 2d 64, 81 (D.D.C. 2009). It is also clear that a “plaintiff
 5 may not sue more than one department or agency head in his or her official capacity” for
 6 purposes of the Rehabilitation Act. Lassiter v. Reno, 885 F. Supp. 869, 873 (E.D. Va. 1995),
 7 aff’d, 86 F.3d 1151 (4th Cir. 1996). In this case, the only proper defendant as to these claims
 8 is Secretary Zinke in his official capacity. See Woodward v. Salazar, 731 F. Supp. 2d 1178
 9 (D.N.M. 2010) (involving Title VII claim by employees of the Bureau of Indian Affairs
 10 against the Secretary of the Interior); see also Graves v. Clinton, No. 2:10-CV-03156 (MCE),
 11 2011 WL 5024500, at *11 (E.D. Cal. Oct. 20, 2011) (dismissing Rehabilitation Act claims
 12 against the Deputy Secretary of State). Accordingly, Count III must be dismissed as to all
 13 defendants but Secretary Zinke. To the extent that this Court does not dismiss Counts IV-
 14 VI, it should also dismiss all but Secretary Zinke as improper defendants.

15 CONCLUSION

16 For the reasons set forth above, this Court must dismiss the claims as follows: (1) all
 17 claims by Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. for lack of standing; (2) Count
 18 IV for failure to state a claim or, in the alternative, as duplicative of Count III; (3) Counts V
 19 and VI for lack of subject-matter jurisdiction. Finally, all defendants but Secretary Zinke
 20 must be dismissed as improper defendants as to Count III, and to the extent Counts IV-VI
 21 are allowed to proceed, also as to those counts.

22 Dated: August 4, 2017

Respectfully submitted,

23 CHAD A. READLER
 24 Acting Assistant Attorney General
 25 CARLOTTA P. WELLS
 26 Assistant Branch Director

27 /s/ Cesar A. Lopez-Morales

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2017, I electronically transmitted the foregoing Affidavit of Service by Certified Mail 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/ Cesar A. Lopez-Morales

Cesar A. Lopez-Morales

Case 3:17-cv-08004-SPL Document 69-1 Filed 08/09/17 Page 1 of 2

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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' CERTIFICATION

Defendants hereby certify that they have conferred with plaintiffs' counsel in an attempt to resolve this motion to dismiss certain claims in the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The parties discussed the issues and arguments set forth in defendants' motion. Plaintiffs indicated their disagreement with defendants' position on such issues and the various grounds for dismissal articulated in the motion. Finally, plaintiffs' counsel indicated that they intend to oppose defendants' motion.

Dated: August 4, 2017

Respectfully submitted,

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/s/ Cesar A. Lopez-Morales

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/s/ Cesar A. Lopez-Morales
Cesar A. Lopez-Morales

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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' NOTICE OF APPEAL

1 Notice is hereby given that Plaintiffs Stephen C., Taylor P., Freddy P., Durell P.,
2 Moana L., Anna D., Olaf D., Levi R., Leo R., and Native American Disability Law Center
3 appeal to the United States Court of Appeals for the Ninth Circuit from the United States
4 District Court's judgment dated November 20, 2020.

5
6
7
8 DATED: January 14, 2021

By: /s/ Bradley S. Phillips

9
10 MUNGER, TOLLES & OLSON LLP
11 *Attorneys for Plaintiffs*
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Form 1. Notice of Appeal from a Judgment or Order of a
United States District Court**

Name of U.S. District Court:

U.S. District Court case number:

Date case was first filed in U.S. District Court:

Date of judgment or order you are appealing:

Fee paid for appeal? (*appeal fees are paid at the U.S. District Court*)

☒ Yes ☐ No ☐ IFP was granted by U.S. District Court

List all Appellants (*List each party filing the appeal. Do not use "et al." or other abbreviations.*)

Is this a cross-appeal? ☐ Yes ☒ No

If Yes, what is the first appeal case number?

Was there a previous appeal in this case? ☐ Yes ☒ No

If Yes, what is the prior appeal case number?

Your mailing address:

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature Date

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 6. Representation Statement

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form06instructions.pdf>

Appellant(s) (List *each* party filing the appeal, do not use “et al.” or other abbreviations.)

Name(s) of party/parties:

Stephen C., a minor, by Frank C., guardian ad litem; [see Attachment A - Continued List of Appellants]

Name(s) of counsel (if any):

Bradley S. Phillips, Bryan H. Heckenlively, Emily Curran-Huberty, Allison Day, Alison Karol Sigurdsson, April Youpee-Roll
MUNGER, TOLLES & OLSON LLP

Address: 350 South Grand Avenue, 50th Floor

Telephone number(s): 213 683-9100

Email(s): brad.phillips@mto.com

Is counsel registered for Electronic Filing in the 9th Circuit? ☒ Yes ☐ No

Appellee(s) (List *only* the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)

Name(s) of party/parties:

Bureau of Indian Education; [see Attachment B - Continued List of Appellees]

Name(s) of counsel (if any):

Jeffrey Bossert Clark, Acting Ass't AG, Carlotta P. Wells, Ass't Branch Dir., Lisa A. Olson, Sr. Trial Counsel, Carol Federighi, Sr. Trial Counsel, Cristen C. Handley, Trial Atty, Bradley Craigmyle, Trial Atty, US Department of Justice

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To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

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

Name(s) of counsel (if any):

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[for additional counsel, see Exhibit C]

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Is counsel registered for Electronic Filing in the 9th Circuit? ☒ Yes ☐ No

Appellees

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Case 3:17-cv-08004-SPL Document 271 Filed 01/14/21 Page 6 of 9

Attachment - A
[Continued List of Appellants]

Anna D., a minor, by Elsa D., guardian ad litem; Olaf D., a minor, by Elsa D., guardian ad litem; Durell P., a minor, by Billie P., guardian ad litem; Taylor P., a minor, by Billie P., guardian ad litem; Freddy P., a minor, by Billie P., guardian ad litem; Moana L., a minor, by Mark L., guardian ad litem; Levi R., a minor, by Laila R., guardian ad litem; Leo R., a minor, by Laila R., guardian ad litem; and The Native American Disability Law Center

Case 3:17-cv-08004-SPL Document 271 Filed 01/14/21 Page 7 of 9

Attachment B
[Continued List of Appellees]

United States Department of The Interior; Sally Jewell, in her official capacity as Secretary of the Interior; Lawrence Roberts, in his official capacity as Principal Deputy Assistant Secretary – Indian Affairs; Tony Dearman, in his official capacity as Director of the Bureau of Indian Education; Jeff Williamson, in his official capacity as Principal of Havasupai Elementary School,

Case 3:17-cv-08004-SPL Document 271 Filed 01/14/21 Page 8 of 9

Attachment C
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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, 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/ Bradley S. Phillips

Bradley S. Phillips

TAB 20

6/23/2021

CM/ECF - azd

APPEAL,CLOSED,STD

**U.S. District Court
DISTRICT OF ARIZONA (Prescott Division)
CIVIL DOCKET FOR CASE #: 3:17-cv-08004-SPL**

Stephen C. et al., al v. Bureau of Indian Education et al.,
Assigned to: Judge Steven P Logan
Case in other court: Ninth Circuit, 21-15097
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 01/12/2017
Date Terminated: 09/28/2020
Jury Demand: Plaintiff
Nature of Suit: 448 Civil Rights: Education
Jurisdiction: U.S. Government Defendant

Plaintiff

Stephen C.
*a minor, by and through Frank C., guardian
ad litem*

represented by **Alexis Marie DeLaCruz**
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Jeremy A.
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TERMINATED: 03/29/2018

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Plaintiff

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Plaintiff

Anna D.
a minor, by and through Elsa D., guardian
ad litem

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Seth J Fortin
(See above for address)
TERMINATED: 10/31/2017
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

6/23/2021

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Tara Ford
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Emily Claire Curran-Huberty
(See above for address)
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Plaintiff

Native American Disability Law Center

represented by **Alexis Marie DeLaCruz**
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LEAD ATTORNEY
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Alison F Karol
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
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Allison Marie Day
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April Youpee-Roll
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Judith M Dworkin

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Fax: 213-683-4018
Email: seth.fortin@mto.com
TERMINATED: 10/31/2017
ATTORNEY TO BE NOTICED

Plaintiff

Taylor P.
a minor, by and through Billie P., guardian
ad litem

represented by **Alexis Marie DeLaCruz**
(See above for address)
LEAD ATTORNEY
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Alison F Karol
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ATTORNEY TO BE NOTICED

Anne Morgan Hudson-Price
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April Youpee-Roll
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Bradley S Phillips
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Bryan H Heckenlively
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David C Tierney
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Elisabeth Virginia Bechtold
(See above for address)
TERMINATED: 06/04/2018
LEAD ATTORNEY
PRO HAC VICE
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Elizabeth Song
(See above for address)
TERMINATED: 07/28/2017
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Jesselyn Friley
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CM/ECF - azd

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Mark Dale Rosenbaum
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Tara Ford
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William S Koski
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LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Emily Claire Curran-Huberty
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Leo R.
a minor, by and through Laila R., guardian
ad litem
TERMINATED: 03/29/2018

represented by **Alexis Marie DeLaCruz**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Anne Morgan Hudson-Price
(See above for address)
TERMINATED: 02/04/2019
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Elisabeth Virginia Bechtold
(See above for address)
TERMINATED: 06/04/2018
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth Song
(See above for address)
TERMINATED: 07/28/2017
LEAD ATTORNEY
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Judith M Dworkin
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Kathryn Ann Eidmann
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Mark Dale Rosenbaum
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Seth J Fortin

6/23/2021

CM/ECF - azd

(See above for address)
TERMINATED: 10/31/2017
LEAD ATTORNEY
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Tara Ford
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Emily Claire Curran-Huberty
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Jordan A.
a minor, by and through Jasmine A.,
guardian ad litem
TERMINATED: 03/29/2018

represented by **Alexis Marie DeLaCruz**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Anne Morgan Hudson-Price
(See above for address)
TERMINATED: 02/04/2019
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Bradley S Phillips
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Bryan H Heckenlively
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David C Tierney
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elisabeth Virginia Bechtold
(See above for address)
TERMINATED: 06/04/2018
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Elizabeth Song
(See above for address)

6/23/2021

CM/ECF - azd

TERMINATED: 07/28/2017
LEAD ATTORNEY
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Judith M Dworkin
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Kathryn Ann Eidmann
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LEAD ATTORNEY
PRO HAC VICE
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Maria Martinez Sanchez
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LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Mark Dale Rosenbaum
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Seth J Fortin
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TERMINATED: 10/31/2017
LEAD ATTORNEY
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Tara Ford
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Emily Claire Curran-Huberty
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Jenny A.
a minor, by and through Jasmine A.,
guardian ad litem
TERMINATED: 03/29/2018

represented by **Alexis Marie DeLaCruz**
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LEAD ATTORNEY
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Anne Morgan Hudson-Price
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TERMINATED: 02/04/2019
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David C Tierney

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Elisabeth Virginia Bechtold

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Elizabeth Song

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Plaintiff

Olaf D.

represented by **Alexis Marie DeLaCruz**
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Emily Claire Curran-Huberty
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Plaintiff

Freddy P.

represented by **Alexis Marie DeLaCruz**
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LEAD ATTORNEY
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Alison F Karol
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Emily Claire Curran-Huberty
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Plaintiff

Moana L.

represented by **Alexis Marie DeLaCruz**
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Emily Claire Curran-Huberty

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ATTORNEY TO BE NOTICED

V.

Defendant

Bureau of Indian Education

represented by **Bradley Thomas Craigmyle**
US Dept of Justice Civil Division Federal

6/23/2021

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Defendant

United States Department of the Interior

represented by **Bradley Thomas Craigmyle**
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LEAD ATTORNEY
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6/23/2021

CM/ECF - azd

Carol Federighi
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Cesar A. Lopez-Morales
(See above for address)
TERMINATED: 08/01/2019
LEAD ATTORNEY
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Cristen C Handley
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa Ann Olson
(See above for address)
LEAD ATTORNEY
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Defendant

Sally Jewell
in her official capacity as Secretary of the
Interior
TERMINATED: 06/02/2017

represented by **Bradley Thomas Craigmyle**
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LEAD ATTORNEY
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Cesar A. Lopez-Morales
(See above for address)
TERMINATED: 08/01/2019
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa Ann Olson
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Lawrence Roberts
in his official capacity as Principal Deputy
Assistant Secretary - Indian Affairs
TERMINATED: 06/02/2017

represented by **Bradley Thomas Craigmyle**
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LEAD ATTORNEY
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Cesar A. Lopez-Morales
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Lisa Ann Olson
(See above for address)

6/23/2021

CM/ECF - azd

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Tony Dearman

*in his official capacity as Director of the
Bureau of Indian Education*

represented by **Bradley Thomas Craigmyle**
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LEAD ATTORNEY
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Carol Federighi
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Cristen C Handley
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Lisa Ann Olson
(See above for address)
LEAD ATTORNEY
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Defendant

Jeff Williamson

*in his official capacity as Principal of
Havasupai Elementary School*

represented by **Bradley Thomas Craigmyle**
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Carol Federighi
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Cesar A. Lopez-Morales
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TERMINATED: 08/01/2019
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Cristen C Handley
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Lisa Ann Olson
(See above for address)

6/23/2021

CM/ECF - azd

LEAD ATTORNEY
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Defendant

Ryan Zinke

*in his official capacity as Secretary of the
Interior*

represented by **Bradley Thomas Craigmyle**
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Carol Federighi
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Cesar A. Lopez-Morales
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TERMINATED: 08/01/2019
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Cristen C Handley
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Lisa Ann Olson
(See above for address)
LEAD ATTORNEY
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Defendant

Michael Black

*in his official capacity as Acting Assistant
Secretary of Indian Affairs*

represented by **Bradley Thomas Craigmyle**
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Carol Federighi
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TERMINATED: 08/01/2019
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Cristen C Handley
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ATTORNEY TO BE NOTICED

Lisa Ann Olson
(See above for address)

6/23/2021

CM/ECF - azd

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Guardian Ad Litem

Billie P.

Guardian Ad Litem for minor Freddy P.
on behalf of
F.P.

represented by **Alison F Karol**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Allison Marie Day
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

April Youpee-Roll
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Bryan H Heckenlively
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Mark Dale Rosenbaum
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LEAD ATTORNEY
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ATTORNEY TO BE NOTICED

Emily Claire Curran-Huberty
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Guardian Ad Litem

Monica L.

Guardian Ad Litem for Minor Moana L. /
Mark L. substituted in her place per order
256
TERMINATED: 08/27/2020
on behalf of
M.L.

represented by **Alison F Karol**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Allison Marie Day
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

April Youpee-Roll
(See above for address)
LEAD ATTORNEY

6/23/2021

CM/ECF - azd

PRO HAC VICE
ATTORNEY TO BE NOTICED

Bryan H Heckenlively
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LEAD ATTORNEY
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Mark Dale Rosenbaum
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LEAD ATTORNEY
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ATTORNEY TO BE NOTICED

Emily Claire Curran-Huberty
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Guardian Ad Litem

Elsa D.
Guardian Ad Litem for Minor Olaf D.
on behalf of
O.D.

represented by **Alison F Karol**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Allison Marie Day
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April Youpee-Roll
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Mark Dale Rosenbaum
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ATTORNEY TO BE NOTICED

Emily Claire Curran-Huberty
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PRO HAC VICE
ATTORNEY TO BE NOTICED

6/23/2021

CM/ECF - azd

Guardian Ad Litem

Mark L.

*Guardian Ad Litem for Minor Moana L /
substituted for Monica L. per order 256*

represented by **Alison F Karol**
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LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Allison Marie Day
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Emily Claire Curran-Huberty
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Guardian Ad Litem

Laila R.

represented by **Alison F Karol**
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LEAD ATTORNEY
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Allison Marie Day
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April Youpee-Roll
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6/23/2021

CM/ECF - azd

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6/23/2021

CM/ECF - azd

TERMINATED: 05/23/2019
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Date Filed	#	Docket Text
01/12/2017	1	*MOTION to Seal Initial Pleadings by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (submitted by Judith Dworkin) (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Text of Proposed Order) (ATD) *Modified on 1/23/2017 to Seal Attachments A and B Pursuant to Order 17 (MAP)*. (Entered: 01/12/2017)
01/12/2017	2	*FILED Unsealed at Doc. 17 *SEALED LODGED Proposed Complaint and Civil Cover Sheet re: 1 SEALED MOTION to Seal Initial Pleadings. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (submitted by Judith Dworkin) (Attachments: # 1 Civil Cover Sheet) (ATD) *Modified on 1/23/2017 (MAP)*. (Entered: 01/12/2017)
01/12/2017	3	*FILED Unsealed at Doc. 18 *SEALED LODGED Proposed Motion for Appointment of Guardian Ad Litem re: 1 SEALED MOTION to Seal Initial Pleadings. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (submitted by Judith Dworkin) (Attachments: # 1 Text of Proposed Order) (ATD) *Modified on 1/23/2017 (MAP)*. (Entered: 01/12/2017)
01/12/2017	4	*FILED at Doc. 19 *SEALED LODGED Proposed Motion to Proceed Under Pseudonyms re: 1 SEALED MOTION to Seal Initial Pleadings. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (submitted by Judith Dworkin) (Attachments: # 1 Text of Proposed Order) (ATD) *Modified on 1/23/2017 (MAP)*. (Entered: 01/12/2017)
01/12/2017	5	NOTICE: Filing fee paid, receipt number 0970-13801427. This case has been assigned to the Honorable John Z Boyle. All future pleadings or documents should bear the correct case number: CV-17-08004-PCT-JZB. Magistrate Election form attached. (cc: Plaintiff's Counsel) (Attachments: # 1 Consent) (ATD) (Entered: 01/12/2017)
01/17/2017	6	Party Elects Assignment of Case to District Judge Jurisdiction. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MAP) (Entered: 01/17/2017)
01/17/2017	7	MINUTE ORDER: Pursuant to Local Rule 3.7(b), a request has been received for a random reassignment of this case to a District Judge. FURTHER ORDERED Case reassigned by random draw to Judge Steven P. Logan. All further pleadings/papers should now list the following COMPLETE case number: CV-17-8004-PHX-SPL. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (cc: Plas' Cnsl) (MAP) (Entered: 01/17/2017)
01/17/2017	8	MOTION for Admission Pro Hac Vice as to attorney Bryan H Heckenlively by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/17/2017	9	MOTION for Admission Pro Hac Vice as to attorney Bradley S Phillips by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)

6/23/2021

CM/ECF - azd

01/17/2017	10	MOTION for Admission Pro Hac Vice as to attorney Elizabeth Song by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/17/2017	11	MOTION for Admission Pro Hac Vice as to attorney Seth J Fortin by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/17/2017	12	MOTION for Admission Pro Hac Vice as to attorney Anne Morgan Hudson-Price by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Entered: 01/17/2017)
01/17/2017	13	MOTION for Admission Pro Hac Vice as to attorney Kathryn Ann Eidmann by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/17/2017	14	MOTION for Admission Pro Hac Vice as to attorney Mark Dale Rosenbaum by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/17/2017	15	MOTION for Admission Pro Hac Vice as to attorney Tara Ford by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (REW) (Entered: 01/17/2017)
01/19/2017	16	MINUTE ORDER granting 8 , 9 , 10 , 11 , 12 , 13 , 14 and 15 Sealed Motions for Admission Pro Hac Vice. (cc: Counsel of Record/BAS)(MAP) (Entered: 01/19/2017)
01/23/2017	17	STRICKEN by 47 - COMPLAINT filed by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A. (Attachments: # 1 Civil Cover Sheet)(MAP) Modified on 5/8/2017 (CLB). (Entered: 01/23/2017)
01/23/2017	18	MOTION to Appoint Guardian Ad Litem by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (MAP) (Entered: 01/23/2017)
01/23/2017	19	MOTION to Proceed Under Pseudonyms by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (MAP) (Entered: 01/23/2017)
01/23/2017	20	ORDER granting 1 Motion to Seal. That the Clerk of Court shall file the Declarations of Proposed Guardians Ad Litem (Exh. A, filed at Doc. 1-1) and the Declaration of Alexis De La Cruz (Exh. B, filed at Doc. 1-2) under seal. FURTHER ORDERED That the Clerk of Court shall unseal and file the lodged Complaint (Doc. 2), the lodged Motion for Appointment of Guardians Ad Litem for Minor Plaintiffs (Doc. 3), and the lodged Motion to Proceed Under Pseudonyms (Doc. 4). FURTHER ORDERED granting 18 Motion to Appoint Guardian Ad Litem. FURTHER ORDERED granting 19 Motion to Proceed Under Pseudonyms. FURTHER ORDERED That upon amendment of the caption as set forth above, the Clerk of Court shall unseal this action. SEE ORDER FOR FULL DETAILS. Signed by Judge Steven P Logan on 1/23/17. (MAP) (Entered: 01/23/2017)
01/23/2017	21	PRELIMINARY ORDER that motions pursuant to Fed. R. Civ. P. 12(b) are discouraged if the defect can be cured by filing an amended pleading. The parties must meet and confer prior to the filing of such motions to determine whether it can be avoided. FURTHER ORDERED that Plaintiffs serve a copy of this Order upon Defendants and file a notice of service. See attached Order for complete details. Signed by Judge Steven P. Logan on 1/23/17. (CLB) (Entered: 01/23/2017)

6/23/2021

CM/ECF - azd

01/23/2017	22	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/23/2017	23	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/23/2017	24	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/23/2017	25	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/23/2017	26	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/23/2017	27	SUMMONS Submitted by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) (Entered: 01/23/2017)
01/24/2017	28	Summons Issued as to All Defendants. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons)(BAS). *** IMPORTANT: When printing the summons, select "Document and stamps" or "Document and comments" for the seal to appear on the document. (Entered: 01/24/2017)
01/26/2017	29	MOTION for Admission Pro Hac Vice as to attorney Elisabeth Bechtold on behalf of Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Durell P, Taylor P, Leo R, and Levi R. (BAS) (Entered: 01/26/2017)
01/26/2017		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX181292 as to Elisabeth Bechtold. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 01/26/2017)
01/26/2017	30	MOTION for Admission Pro Hac Vice as to attorney Maria Martinez Sanchez on behalf of Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Durell P, Taylor P, Leo R, and Levi R. (BAS) (Entered: 01/26/2017)
01/26/2017		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX181293 as to Maria Martinez Sanchez. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 01/26/2017)
01/26/2017	31	ORDER pursuant to General Order 09-08 granting 29 Motion for Admission Pro Hac Vice; granting 30 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (BAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 01/26/2017)
02/07/2017	32	SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Certificate of Service re: Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon Bureau of Indian Education on 01/27/2017. (Dworkin, Judith) (Entered: 02/07/2017)

6/23/2021

CM/ECF - azd

02/07/2017	33	SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Affidavit of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon Tony Dearman in his official capacity as Director of the Bureau of Indian Education on 01/30/2017. (Dworkin, Judith) (Entered: 02/07/2017)
02/07/2017	34	*SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Certificate of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon United States Department of the Interior on 01/27/2017. (Dworkin, Judith) *Modified to correct party served on 2/8/2017 (REK). (Entered: 02/07/2017)
02/07/2017	35	SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Certificate of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon Sally Jewell, in her official capacity as Principal Deputy Assistant Secretary of the Interior on 01/27/2017. (Dworkin, Judith) (Entered: 02/07/2017)
02/07/2017	36	SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Certificate of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon U.S. Department of the Interior on 01/27/2017. (Dworkin, Judith) (Entered: 02/07/2017)
02/07/2017	37	*AMENDED SERVICE EXECUTED re: 34 filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Certificate of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) upon Lawrence Roberts, in his official capacity as Principal Deputy Assistant Secretary-Indian Affairs on 01/27/2017. (Dworkin, Judith) *Modified to reflect amended document on 2/9/2017 (REK). (Entered: 02/07/2017)
02/13/2017	38	NOTICE re: Service of Preliminary Order by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R re: 21 Order re Rule 12(b) Motions . (Dworkin, Judith) (Entered: 02/13/2017)
02/13/2017	39	SERVICE EXECUTED filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R : Affidavit of Service re: Summons, Complaint (Dkt 17), Civil Cover Sheet (Dkt 17 -1), Motion for Appointment of Guardian Ad Litem (Dkt 18); Motion to Proceed Under Pseudonyms (Dkt 19); Order Granting Motions (Dkt 20); and Preliminary Order (Dkt 21) by <i>Certified Mail</i> upon Jeff Williamson, in his official capacity as Principal of Havasupai Elementary School on 01/31/2017. (Attachments: # 1 Exhibit A - Certified Mail Receipt) (Dworkin, Judith) (Entered: 02/13/2017)
03/03/2017	40	MOTION for Admission Pro Hac Vice as to attorney Emily C. Curran-Huberty on behalf of Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (KAS) (Entered: 03/03/2017)

6/23/2021

CM/ECF - azd

03/03/2017		PRO HAC VICE FEE PAID. \$ 35, receipt number PHX182790 as to Emily C Curran-Huberty. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (KAS) (Entered: 03/03/2017)
03/03/2017	41	ORDER pursuant to General Order 09-08 granting 40 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov . Counsel is advised that they are limited to two (2) additional e-mail addresses in their District of Arizona User Account. (KAS) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 03/03/2017)
03/22/2017	42	First MOTION to Strike 17 Complaint by Lawrence Roberts, United States Department of the Interior, Jeff Williamson. (Attachments: # 1 Memorandum in Support of Motion to Strike, # 2 Text of Proposed Order, # 3 Certification)(Olson, Lisa) (Entered: 03/22/2017)
03/22/2017	43	STIPULATION FOR EXTENSION OF TIME TO ANSWER COMPLAINT re: 17 Complaint by Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson. (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) (Entered: 03/22/2017)
03/28/2017	44	ORDER granting in part the parties' 43 Stipulation. Defendants shall have until April 21, 2017 to file a Response to the Motion to Strike 42 . (See Order for details) Signed by Judge Steven P. Logan on 3/28/17. (CLB) (Entered: 03/28/2017)
04/21/2017	45	RESPONSE in Opposition re: 42 First MOTION to Strike 17 Complaint filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Tierney, David) (Entered: 04/21/2017)
04/27/2017	46	REPLY to Response to Motion re: 42 First MOTION to Strike 17 Complaint filed by Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson. (Olson, Lisa) (Entered: 04/27/2017)
05/08/2017	47	ORDER: 1. That Defendants' Motion to Strike the Complaint 42 is granted; 2. That the Complaint 17 is stricken; 3. That Plaintiffs are granted leave to file an amended complaint in accordance with this Order no later than June 5, 2017; and 4. That if Plaintiffs elect not to file an amended complaint by June 5, 2017, the Clerk of Court shall enter judgment dismissing this action without further order of this Court. Signed by Judge Steven P. Logan on 5/8/17. (CLB) (Entered: 05/08/2017)
06/02/2017	48	NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R <i>First Amended Complaint for Declaratory and Injunctive Relief</i> . (Attachments: # 1 Exhibit 1)(Dworkin, Judith) (Entered: 06/02/2017)
06/02/2017	49	AMENDED COMPLAINT <i>for Declaratory and Injunctive Relief</i> against All Defendants filed by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A. (Attachments: # 1 Exhibit A)(Dworkin, Judith) (Entered: 06/02/2017)
06/08/2017	50	MOTION for Protective Order <i>Partially Unopposed</i> by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Exhibit Proposed Protective Order, # 2 Exhibit Acknowledgment of Privacy Act Protective Order)(Olson, Lisa) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 06/08/2017)
06/09/2017	51	ORDER denying Defendants' 50 Motion for Protective Order. Signed by Judge Steven P.

6/23/2021

CM/ECF - azd

		Logan on 6/9/17.(CLB) (Entered: 06/09/2017)
06/23/2017	52	MOTION to Dismiss for Lack of Jurisdiction, MOTION to Dismiss for Failure to State a Claim by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Certification) (Lopez-Morales, Cesar) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 06/23/2017)
06/26/2017	53	MOTION for Extension of Time To Oppose Defendants' Partial Motion to Dismiss by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order Proposed Order)(Tierney, David) (Entered: 06/26/2017)
06/27/2017	54	ORDER that the Motion to Extend Time 53 is granted. Plaintiffs shall have until July 14, 2017, to file a Response to the Partial Motion to Dismiss. Signed by Judge Steven P. Logan on 6/27/17.(CLB) (Entered: 06/27/2017)
07/14/2017	55	STIPULATION to File Second Amended Complaint and Motion Regarding Extension of Time by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Heckenlively, Bryan) (Entered: 07/14/2017)
07/14/2017	56	NOTICE OF ATTORNEY'S CHANGE OF ADDRESS/FIRM NAME by Judith M Dworkin. (Dworkin, Judith) (Entered: 07/14/2017)
07/14/2017	57	NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Exhibit 1)(Heckenlively, Bryan) (Entered: 07/14/2017)
07/14/2017	58	MOTION to Seal Document 57 Notice of Filing - Amended Pleading (LRCiv 15.1(b)) by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Heckenlively, Bryan) (Entered: 07/14/2017)
07/14/2017	59	*FILED at Doc. 64 *SEALED LODGED Proposed Second Amended Complaint re: 58 MOTION to Seal Document 57 Notice of Filing - Amended Pleading (LRCiv 15.1(b)) . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Supplement Un-redacted Redline SAC)(Dworkin, Judith) *Modified on 7/17/2017 (MAP)*. (Entered: 07/14/2017)
07/14/2017	60	AMENDED COMPLAINT (Second) against All Defendants filed by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A.(Dworkin, Judith) (Entered: 07/14/2017)
07/15/2017	61	*FILED at Doc. 64 *LODGED Proposed Additional Attachments to Main Document re: 59 Sealed Lodged Proposed Document, 60 Amended Complaint <i>Exhibit A to SAC</i> by Plaintiffs Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Dworkin, Judith) *Modified on 7/17/2017 to change from filed to lodged and place under seal pursuant Modified on 7/17/2017 (MAP). *Modified on 7/17/2017 (MAP)*. (Entered: 07/15/2017)
07/17/2017	62	ORDER granting 55 Stipulation. Plaintiffs' 60 Second Amended Complaint is deemed filed. Defendants' 52 Motion to Dismiss is denied without prejudice. Defendants shall have until August 4, 2017 to file an answer to the Second Amended Complaint or otherwise respond. Signed by Judge Steven P Logan on 7/17/2017.(MMO) (Entered: 07/17/2017)
07/17/2017	63	ORDER granting 58 Motion to Seal. The Clerk of Court is directed to file Plaintiff's

6/23/2021

CM/ECF - azd

		lodged Second Amended Complaint and its Attachments (Docs. 59 , 61) under seal. Signed by Judge Steven P Logan on 7/17/17.(MAP) (Entered: 07/17/2017)
07/17/2017	64	SEALED (UNREDACTED) Second Amended Complaint against All Defendants by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Exhibit A)(MAP) (Entered: 07/17/2017)
07/28/2017	65	NOTICE of Attorney Withdrawal <i>re: Elizabeth Song</i> filed by Judith M Dworkin. (Dworkin, Judith) (Entered: 07/28/2017)
08/04/2017	66	MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 08/04/2017)
08/04/2017	67	***FILED at (Doc. 69)--LODGED Proposed Partial MOTION to Dismiss for Lack of Jurisdiction and Failure to State a Claim re: 66 MOTION for Leave to File Excess Pages for Motion to Exceed Page Limit . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Certification)(Lopez-Morales, Cesar) Modified on 8/10/2017 (ATD). (Entered: 08/04/2017)
08/09/2017	68	ORDER: IT IS ORDERED that the Motion to Exceed (Doc. 66) is granted. The Clerk of Court shall file the lodged proposed Second Partial Motion to Dismiss (lodged at Doc. 67). Signed by Judge Steven P Logan on 8/9/17.(MAW) (Entered: 08/09/2017)
08/09/2017	69	Second PARTIAL MOTION to Dismiss for Lack of Jurisdiction by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Certification) (ATD) (Entered: 08/10/2017)
08/25/2017	70	MOTION to Seal Document <i>Opposition to Defendants' Second Partial Motion to Dismiss</i> by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order) (Eidmann, Kathryn) (Entered: 08/25/2017)
08/25/2017	71	***FILED at (Doc. 75)--SEALED LODGED Proposed Response to Motion re: 70 MOTION to Seal Document <i>Opposition to Defendants' Second Partial Motion to Dismiss</i> . Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Eidmann, Kathryn) *Modified on 8/28/2017 to change to a Lodged Proposed Document (ATD). Modified on 8/28/2017 (ATD). (Entered: 08/25/2017)
08/25/2017	72	MOTION for Leave to File Excess Pages for Opposition to Defendants' Second Partial Motion to Dismiss by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Eidmann, Kathryn) (Entered: 08/25/2017)
08/25/2017	73	***FILED at (Doc. 76)--LODGED Proposed Redacted Response to Motion re: 72 MOTION for Leave to File Excess Pages for Opposition to Defendants' Second Partial Motion to Dismiss . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Eidmann, Kathryn) *Modified restriction to unseal per chambers on 8/28/2017 (SCH). *Modified

6/23/2021

CM/ECF - azd

		on 8/28/2017 to change event to a Lodged Proposed Document (ATD). Modified on 8/28/2017 (ATD). (Entered: 08/25/2017)
08/28/2017	74	ORDER - The 70 Motion to File Under Seal is granted. The Clerk of Court is directed to file Plaintiffs' proposed Opposition to Defendants' Second Partial Motion to Dismiss (lodged at Doc. 71) under seal. FURTHER ORDERED that the 72 Motion to Exceed Page Limit is granted. The Clerk of Court shall file the proposed Redacted Opposition to Defendants' Second Partial Motion to Dismiss (lodged at Doc. 73). Signed by Judge Steven P Logan on 8/28/2017. (ATD) (Entered: 08/28/2017)
08/28/2017	75	SEALED RESPONSE to Motion re: 69 MOTION to Dismiss for Lack of Jurisdiction by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (ATD) (Entered: 08/28/2017)
08/28/2017	76	<i>Redacted</i> RESPONSE to Motion re: 69 MOTION to Dismiss for Lack of Jurisdiction filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (ATD) (Entered: 08/28/2017)
08/30/2017		Remark: Pro hac vice motion granted for attorney Lauren Gallo White on behalf of Amicus Party Society of Indian Psychologists. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/30/2017)
08/30/2017		Remark: Pro hac vice motion granted for Steven Guggenheim on behalf of Amicus Party Society of Indian Psychologists. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/30/2017)
08/30/2017		Remark: Pro hac vice motion granted for Rachel Landy on behalf of Amicus Party Society of Indian Psychologists. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/30/2017)
08/30/2017		Remark: Pro hac vice motion granted for Ziwei Xiao on behalf of Amicus Party Society of Indian Psychologists. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/30/2017)
08/30/2017	77	Consent MOTION for Leave to File Brief of Amicus Curiae The Havasupai Tribe by Havasupai Tribe. (Attachments: # 1 Exhibit 1, # 2 [Proposed] Order)(Fox, Brandon) (Entered: 08/30/2017)
08/30/2017	78	* (Filed at Doc. 84) LODGED Proposed Brief of Amicus Curiae The Havasupai Tribe; Declaration of Chairman Don Watahomigie re: 77 Consent MOTION for Leave to File Brief of Amicus Curiae The Havasupai Tribe . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Havasupai Tribe. (Fox, Brandon) Modified on 9/5/2017 (LAD). (Entered: 08/30/2017)
08/31/2017		Remark: Pro hac vice motions granted for Brandon D Fox and Benjamin J Brysacz on behalf of Amicus party Havasupai Tribe. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 08/31/2017)
09/01/2017	79	NOTICE of Appearance by Spencer Garrett Scharff on behalf of Society of Indian Psychologists. (Scharff, Spencer) (Entered: 09/01/2017)
09/01/2017	80	Corporate Disclosure Statement by Society of Indian Psychologists. (Guggenheim, Steven) (Entered: 09/01/2017)
09/01/2017	81	Consent MOTION for Leave to File Brief as Amicus Curiae in Support of Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss by Society of Indian Psychologists. (Attachments: # 1 Text of Proposed Order)(Guggenheim, Steven) (Entered: 09/01/2017)
09/01/2017	82	* (Filed at 86) LODGED Proposed Brief of Society of Indian Psychologists as Amicus

6/23/2021

CM/ECF - azd

		Curiae in Support of Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss re: 81 Consent MOTION for Leave to File Brief as Amicus Curiae in Support of Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Society of Indian Psychologists. (Guggenheim, Steven) Modified on 9/5/2017 (LAD). (Entered: 09/01/2017)
09/05/2017	83	ORDER - IT IS ORDERED that the Motion for Leave to File Brief of Amicus Curiae (Doc. 77) is granted. IT IS FURTHER ORDERED that the Clerk of Court shall filed the lodged proposed brief (Doc. 78). Signed by Judge Steven P Logan on 9/5/17. (LAD) (Entered: 09/05/2017)
09/05/2017	84	BRIEF of Amicus Curiae; Declaration of Chairman Don Watahomigie by Amicus Havasupai Tribe. (LAD) (Entered: 09/05/2017)
09/05/2017	85	ORDER - IT IS ORDERED that the Motion for Leave to File Brief of Amicus Curiae (Doc. 81) is granted. IT IS FURTHER ORDERED that the Clerk of Court shall filed the lodged proposed brief (Doc. 82). Signed by Judge Steven P Logan on 9/5/17. (LAD) (Entered: 09/05/2017)
09/05/2017	86	BRIEF as Amicus Curiae in Support of Opposition to 69 PARTIAL MOTION to Dismiss for Lack of Jurisdiction by Amicus Society of Indian Psychologists. (LAD) (Entered: 09/05/2017)
09/07/2017	87	* MOTION for Oral Argument on 69 Second Partial Motion to Dismiss by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Fortin, Seth) * Modified to correct event; attorney noticed on 9/8/2017 (LAD). (Entered: 09/07/2017)
09/14/2017	88	ORDER the Request for Oral Argument 87 is granted. Oral Argument on Defendants' Second Partial Motion to Dismiss 69 shall be heard on October 24, 2017 at 9:30 a.m. before the Honorable Judge Steven P. Logan, United States District Judge, in Courtroom 501, Sandra Day O'Connor United States Courthouse, 401 West Washington Street, Phoenix, Arizona 85003. Signed by Judge Steven P. Logan on 9/14/17. (CLB) (Entered: 09/14/2017)
09/15/2017	89	MOTION for Leave to File Excess Pages by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 09/15/2017)
09/15/2017	90	* (Filed at Doc. 92) LODGED Proposed Reply Brief in Support of Defendants' Partial Motion to Dismiss re: 89 MOTION for Leave to File Excess Pages . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Lopez-Morales, Cesar) Modified on 9/15/2017 (LAD). (Entered: 09/15/2017)
09/15/2017	91	ORDER granting 89 Motion for Leave to File Excess Pages. The Clerk of Court shall file the proposed Reply in Support of Defendants' Second Partial Motion to Dismiss (lodged at Doc. 90). Signed by Judge Steven P Logan on 9/15/17. (LAD) (Entered: 09/15/2017)
09/15/2017	92	REPLY to Response to Second Partial 69 MOTION to Dismiss for Lack of Jurisdiction filed by United States Department of the Interior, Jeff Williamson, Ryan Zinke. (LAD) (Entered: 09/15/2017)
10/24/2017	93	MINUTE ENTRY for proceedings held before Judge Steven P Logan: Oral Argument held on 10/24/2017. IT IS ORDERED taking under advisement Defendants' 69 Second

6/23/2021

CM/ECF - azd

		Partial Motion to Dismiss. APPEARANCES: Kathryn Eidmann, Bradley Phillips, and Tara Ford for Plaintiffs. Cesar Lopez-Morales and Lisa Olson for Defendants. (Court Reporter Candy Potter.) Hearing held 9:32 AM to 10:39 AM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (CLB) (Entered: 10/24/2017)
10/27/2017	94	TRANSCRIPT REQUEST by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R for proceedings held on 10/24/2017, Judge Steven P Logan hearing judge(s). (Tierney, David) (Entered: 10/27/2017)
10/30/2017	95	TRANSCRIPT REQUEST <i>for October 24, 2017 hearing</i> by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke for proceedings held on October 24, 2017, Judge Steven P Logan hearing judge(s). (Olson, Lisa) *Modified to remove filer on 7/30/2018 (DXD). (Entered: 10/30/2017)
10/30/2017	96	NOTICE TO FILER OF DEFICIENCY re: AO435 95 Transcript Request filed by Ryan Zinke, Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson. Item 19 - Signature is not in proper electronic format. FOLLOW-UP ACTION REQUIRED: Please refile with Item 19 in proper electronic signature format - <i>s/typewritten name of e-filer</i> . Deficiency must be corrected within one business day of this notice. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (RAP) *Modified text/filers on 7/30/2018 (DXD). (Entered: 10/30/2017)
10/30/2017	97	AMENDED TRANSCRIPT REQUEST pursuant to 96 Notice of Deficiency by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke for proceedings held on October 24, 2017, Judge Steven P Logan hearing judge(s). (Olson, Lisa) *Modified remove filers on 7/30/2018 (DXD). (Entered: 10/30/2017)
10/31/2017	98	NOTICE of Attorney Withdrawal - <i>Notice of Withdrawal for Seth Fortin</i> filed by Seth J Fortin. (Fortin, Seth) (Entered: 10/31/2017)
11/01/2017	99	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of <i>ORAL ARGUMENT</i> Proceedings held on 10/24/2017, before Judge Steven P. Logan. (Court Reporter: Candy L. Potter). The ordering party will have electronic access to the transcript immediately. All others may view the transcript at the court public terminal or it may be purchased through the Court Reporter/Transcriber by filing a Transcript Order Form on the docket before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/22/2017. Redacted Transcript Deadline set for 12/4/2017. Release of Transcript Restriction set for 1/30/2018. (RAP) (Entered: 11/08/2017)
03/29/2018	100	ORDER - IT IS ORDERED that Defendants' Second Partial Motion to Dismiss (Doc. 69) is granted in part and denied in part as follows: 1. That Defendants' motion to dismiss Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., and Jordan A. for lack of standing is granted; 2. That Defendants' motion to dismiss Count IV is denied; 3. That Defendants' motion to dismiss Counts V and VI is denied; and 4. That Defendants' motion to dismiss Defendants Michael Blackman, Tony Dearman, and Jeff Williamson with respect to Counts III, IV, V, and VI is granted. (See document for further details). Signed by Judge Steven P Logan on 3/29/18. (LAD) (Entered: 03/29/2018)
03/30/2018	101	ORDER: Defendants shall have fourteen (14) days from the filing of this Order to file an answer to the Second Amended Complaint 60 . Signed by Judge Steven P Logan on

6/23/2021

CM/ECF - azd

		3/30/2018. (REK) (Entered: 03/30/2018)
04/11/2018	102	MOTION for Extension of Time to File Answer re: 60 Amended Complaint by Bureau of Indian Education, United States Department of the Interior, Ryan Zinke. (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) (Entered: 04/11/2018)
04/12/2018	103	ORDER granting 102 Motion for Extension of Time to Answer. Defendants shall have until April 23, 2018, to file an answer to the Second Amended Complaint. Signed by Judge Steven P Logan on 4/11/18. (CLB) (Entered: 04/12/2018)
04/23/2018	104	ANSWER to 60 Amended Complaint by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 04/23/2018)
04/23/2018	105	ORDER SETTING RULE 16 CASE MANAGEMENT ORDER: A Rule 16 Case Management Conference is set for 6/13/2018 at 09:30 AM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P Logan. Signed by Judge Steven P Logan on 4/23/18. (Attachments: # 1 Proposed Case Management Order)(CLB) (Entered: 04/23/2018)
05/14/2018	106	REPORT of Certification by Plaintiffs' Attorneys Re: Discovery Obligations Under MIDP by Plaintiffs Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Dworkin, Judith) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 05/14/2018)
05/16/2018	107	Joint MOTION for Protective Order by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Text of Proposed Order, # 2 Attachment to Proposed Order - Acknowledgment by Defendants, # 3 Attachment to Proposed Order - Acknowledgment by Plaintiffs)(Olson, Lisa) *Modified remove filers on 7/30/2018 (DXD). (Entered: 05/16/2018)
05/29/2018	108	ORDER denying 107 Joint Motion for Entry of Protective Order. Signed by Judge Steven P Logan on 5/29/2018. (MMO) (Entered: 05/29/2018)
05/29/2018	109	NOTICE of Attorney Withdrawal <i>Elisabeth Bechtold</i> filed by Elisabeth Virginia Bechtold. (Bechtold, Elisabeth) (Entered: 05/29/2018)
06/01/2018	110	REPORT of Rule 26(f) Planning Meeting by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Proposed Case Management Order)(Heckenlively, Bryan) (Entered: 06/01/2018)
06/04/2018	111	ORDER that attorney Elisabeth Bechtold is hereby withdrawn as counsel of record for Plaintiffs. Signed by Judge Steven P Logan on 6/4/18. (CLB) (Entered: 06/04/2018)
06/05/2018	112	MOTION to Withdraw as Attorney by Society of Indian Psychologists. (Attachments: # 1 Text of Proposed Order)(Scharff, Spencer) (Entered: 06/05/2018)
06/05/2018	113	ORDER granting 112 Motion to Withdraw as Attorneys. Attorneys Terry Goddard and Spencer G. Scharff, of Goddard Law Office PLC, are hereby withdrawn as counsel for Amicus Curiae Society of Indian Psychologists. Ordered by Judge Steven P Logan on 6/5/18. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (CLB) Modified on 6/5/2018 (CLB). (Entered: 06/05/2018)
06/07/2018	114	ORDER the Rule 16 Case Management Conference, presently set for June 13, 2018 at 9:30 a.m. before Honorable Steven P. Logan is vacated. Signed by Judge Steven P Logan on 6/7/18. (CLB) (Entered: 06/07/2018)
06/07/2018	115	RULE 16 CASE MANAGEMENT ORDER: All Discovery due by 10/12/2018.

6/23/2021

CM/ECF - azd

		Dispositive motions due by 1/14/2019. Signed by Judge Steven P Logan on 6/7/18. (CLB) (Entered: 06/07/2018)
07/27/2018	116	*NOTICE of Service of Discovery filed by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Dworkin, Judith) *Modified to remove filers on 7/30/2018 (DXD). (Entered: 07/27/2018)
07/31/2018	117	*STIPULATION to File Third Amended Complaint and Motion Regarding Extension of Time by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order Proposed Order)(Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
07/31/2018	118	NOTICE OF ATTORNEY'S CHANGE OF ADDRESS/FIRM NAME by Judith M Dworkin. (Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
07/31/2018	119	*NOTICE of Filing Amended Pleading pursuant to LRCiv 15.1(b) by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Exhibit 1 Comparison TAC to SAC, # 2 Exhibit 2 Redacted Proposed TAC)(Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
07/31/2018	120	MOTION to Seal Document (<i>Unopposed</i>) Declarations and TAC by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order)(Dworkin, Judith) *Modified remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
07/31/2018	121	*FILED at Docs. 129 , 130 , 131 *SEALED LODGED Proposed TAC and Supporting Papers re: 120 MOTION to Seal Document (<i>Unopposed</i>) Declarations and TAC. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Exhibit A - Un-redacted Proposed TAC, # 2 Exhibit B - Un-redacted Comparison TAC to SAC, # 3 Exhibit C - Decl. of Proposed GALs, # 4 Exhibit D - Decl. of A. DeLaCruz)(Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). *Modified on 8/13/2018 (MAP). (Entered: 07/31/2018)
07/31/2018	122	*MOTION to Appoint Guardians ad Litem by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order) (Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
07/31/2018	123	*MOTION to Proceed Under Pseudonyms by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order) (Dworkin, Judith) *Modified to remove filers on 8/1/2018 (DXD). (Entered: 07/31/2018)
08/01/2018	124	NOTICE of Attorney Withdrawal <i>Benjamin J. Brysacz</i> filed by Benjamin J Brysacz. (Brysacz, Benjamin) (Entered: 08/01/2018)
08/10/2018	125	ORDER granting 117 Stipulation. Plaintiffs will file a Third Amended Complaint and Defendants shall answer or otherwise respond no later than August 31, 2018. Signed by Judge Steven P Logan on 8/10/18. (CLB) (Entered: 08/10/2018)
08/10/2018	126	ORDER granting 120 Motion to Seal Third Amended Complaint. Signed by Judge Steven P Logan on 8/10/18. (MAP) (Entered: 08/10/2018)
08/10/2018	127	Joint MOTION for Extension of Time to Complete Discovery and Extend Discovery Deadlines by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Proposed Order)(Heckenlively, Bryan) (Entered: 08/10/2018)
08/10/2018	128	*Third AMENDED COMPLAINT (Redacted) against All Defendants filed by Taylor P,

6/23/2021

CM/ECF - azd

		Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A.(Dworkin, Judith) *Modified on 8/13/2018 to correct docket text (GMP). (Entered: 08/10/2018)
08/10/2018	129	*SEALED (UNREDACTED) Third Amended Complaint against All Defendants filed by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A by Taylor P. (MAP) *Modified to replace Main Document 129 with correct document on 8/14/2018 (SCH). (Entered: 08/13/2018)
08/10/2018	130	SEALED Declarations of Proposed Guardians Ad Litem Re 122 Application for Guardian Ad Litem for Plaintiffs by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A. (MAP) (Entered: 08/13/2018)
08/10/2018	131	SEALED Declaration of Alexis De La Cruz In Support of 123 Plaintiffs Motions to Proceed Under Pseudonyms by Taylor P, Stephen C, Jordan A, Jenny A, Anna D, Native American Disability Law Center, Leo R, Durell P, Levi R, Jeremy A. (MAP) (Entered: 08/13/2018)
08/13/2018	132	ORDER: The Motion for Appointment of Guardians Ad Litem 122 is granted. The guardians ad litem are appointed for minor Plaintiffs as follows: Billie P. as guardian ad litem for Freddy P.; Monica L. as guardian ad litem for Moana L.; and Elsa D. as guardian ad litem for Olaf D. IT IS FURTHER ORDERED that the Motion to Proceed Under Pseudonyms 123 is granted. The minor Plaintiffs and their guardians may proceed by pseudonyms, shall be allowed to endorse documents related to this litigation using their pseudonyms, and shall be referred to by their pseudonyms in all proceedings held before this Court and in all pleadings, depositions, and other documents related to this litigation. Signed by Judge Steven P Logan on 8/10/2018. (REK) (Entered: 08/13/2018)
08/13/2018	133	NOTICE TO FILER OF DEFICIENCY re: 127 Joint MOTION for Extension of Time to Complete Discovery <i>and Extend Discovery Deadlines</i> filed by Leo R, Jenny A, Taylor P, Anna D, Stephen C, Durell P, Levi R, Jeremy A, Jordan A, Native American Disability Law Center. Document not in compliance with LRCiv 7.1(a)(1) - The name, address, email address, State Bar Attorney number, proceeding and whether the attorney appears for the plaintiff, defendant, or other party - in propria persona - must be typewritten or printed in the space to the left of the center of the page and beginning at line one (1) on the first page. The space to the right of the center must be reserved for the filing remarks of the Clerk. No further action is required. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (GMP) (Entered: 08/13/2018)
08/15/2018	134	ORDER: The Joint Motion to Extend 127 is granted. Fact Discovery shall be completed by November 30, 2018. Expert Disclosures shall be due by September 28, 2018. Rebuttal Expert Disclosure shall be due by October 29, 2018. Expert depositions must be completed by November 30, 2018. Signed by Judge Steven P Logan on 8/15/2018. (REK) (Entered: 08/15/2018)
08/24/2018	135	Joint MOTION to Stay <i>Litigation</i> by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 08/24/2018)
09/27/2018	136	STATUS REPORT by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Heckenlively, Bryan) (Entered: 09/27/2018)
09/28/2018	137	NOTICE TO FILER OF DEFICIENCY re: 136 Report - Status filed by Leo R, Jenny A, Taylor P, Anna D, Stephen C, Durell P, Levi R, Jeremy A, Jordan A, Native American Disability Law Center. Document not in compliance with LRCiv 7.1(a)(1) - Title Page.

6/23/2021

CM/ECF - azd

		The following information must be stated upon the first page of every document and may be presented for filing single-spaced: The name, address, email address, State Bar Attorney number, telephone number, and optionally the fax number, of the attorney appearing for the party in the action or proceeding and whether the attorney appears for the plaintiff, defendant, or other party - in propria persona - must be typewritten or printed in the space to the left of the center of the page and beginning at line one (1) on the first page. The space to the right of the center must be reserved for the filing marks of the Clerk. <i>No further action is required.</i> This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (REK) (Entered: 09/28/2018)
11/20/2018	138	NOTICE OF PARTY'S CHANGE OF ADDRESS by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, United States Department of the Interior, Jeff Williamson, Ryan Zinke: U.S. Department of Justice, 1100 L Street, N.W., Washington, D.C. 20005. (Olson, Lisa) (Entered: 11/20/2018)
11/20/2018	139	ORDER: The Joint Motion to Stay Litigation 135 is denied. Status Report due by 1/11/2019. No later than 1/11/2019 the parties shall file a joint memorandum explaining why the Court should not dismiss this case without prejudice in light of the progress made by the parties through mediation. See order for additional details. Signed by Judge Steven P Logan on 11/20/2018. (LMR) (Entered: 11/20/2018)
12/07/2018	140	STATUS REPORT <i>and Memorandum</i> by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P, Leo R, Levi R. (Attachments: # 1 Text of Proposed Order)(Dworkin, Judith) (Entered: 12/07/2018)
12/10/2018	141	NOTICE of Errata re: 140 Report - Status <i>and Memorandum</i> by Plaintiffs Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R, Guardian Ad Litem Elsa D.. (Curran-Huberty, Emily) (Entered: 12/10/2018)
01/11/2019	142	STATUS REPORT by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Heckenlively, Bryan) (Entered: 01/11/2019)
01/24/2019	143	ORDER: Plaintiffs' request to stay this case (see Doc. 142) is denied. This case will be dismissed without prejudice by the Clerk of Court without further notice on February 1, 2019 unless a party files a request for reinstatement on the Court's trial calendar. If a request for reinstatement is filed, the parties shall deem it to be granted, and the schedule listed in this order shall be set. See document for complete details. Signed by Judge Steven P Logan on 1/23/19. (EJA) (Entered: 01/24/2019)
01/24/2019	144	NOTICE by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R re: 143 Order, Set Deadlines, Terminate Motions <i>Request for Reinstatement</i> . (Curran-Huberty, Emily) (Entered: 01/24/2019)
01/28/2019	145	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 01/28/2019)
01/30/2019	146	NOTICE of Attorney Withdrawal <i>Anne Hudson-Price</i> filed by Mark Dale Rosenbaum. (Rosenbaum, Mark) (Entered: 01/30/2019)
02/01/2019		Remark: Pro hac vice motion granted for Jesselyn Friley on behalf of plaintiffs. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 02/01/2019)

6/23/2021

CM/ECF - azd

02/04/2019	147	ORDER - The 46 Notice of Withdraw of Counsel Anne Hudson-Price is granted. Signed by Judge Steven P Logan on 2/4/19. (MSA) (Entered: 02/04/2019)
02/15/2019	148	* ANSWER to 128 Amended Complaint by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) * Modified to add additional filers on 2/28/2019 (LAD). (Entered: 02/15/2019)
02/22/2019		Remark: Pro hac vice motion granted for Allison Day on behalf of plaintiffs. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 02/22/2019)
03/08/2019	149	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 03/08/2019)
03/12/2019	150	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 03/12/2019)
03/15/2019	151	*NOTICE of Service of Discovery filed by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P (Curran-Huberty, Emily) *Modified to remove terminated filers on 3/15/2019 (SLQ). (Entered: 03/15/2019)
03/25/2019	152	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 03/25/2019)
03/26/2019	153	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 03/26/2019)
03/27/2019	154	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 03/27/2019)
03/27/2019	155	*NOTICE of Appearance by Carol Federighi on behalf of Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Federighi, Carol) *Modified to remove previously terminated parties as filers on 3/28/2019 (REK). (Entered: 03/27/2019)
03/28/2019	156	NOTICE of Appearance by Cristen C Handley on behalf of Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Handley, Cristen) (Entered: 03/28/2019)
03/29/2019	157	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 03/29/2019)
04/03/2019	158	NOTICE of Deposition of George M. Batsche, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	159	NOTICE of Deposition of Corina Chavez, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	160	NOTICE of Deposition of George Davis, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson,

6/23/2021

CM/ECF - azd

		Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	161	NOTICE of Deposition of Tami DeCoteau, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	162	NOTICE of Deposition of Nancy Eldredge, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	163	NOTICE of Deposition of Susan C. Faircloth, filed by Michael Black, Bureau of Indian Education, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	164	NOTICE of Deposition of Joseph A. Gentry, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	165	NOTICE of Deposition of Susanna Loeb, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	166	NOTICE of Deposition of Lisa Persinger, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/03/2019	167	NOTICE of Deposition of Noshene Ranjbar, filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Subpoena)(Olson, Lisa) (Entered: 04/03/2019)
04/04/2019		Remark: Pro hac vice motion granted for William Sheldon Koski on behalf of plaintiffs. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/04/2019)
04/09/2019	168	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 04/09/2019)
04/12/2019	169	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 04/12/2019)
04/14/2019	170	*NOTICE of Service of Supplemental Mandatory Initial Discovery Responses filed by Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) *Modified on 4/15/2019 to correct event type to MIDP for management and statistical purposes (MSA). (Entered: 04/14/2019)
04/15/2019	171	NOTICE re: of Stipulation re Scheduling of Expert Depositions by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 04/15/2019)
04/16/2019	172	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 04/16/2019)
04/17/2019	173	NOTICE of Service of Discovery filed by Jenny A, Jeremy A, Jordan A, Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Leo R, Levi R. (Curran-Huberty, Emily) (Entered: 04/17/2019)
04/19/2019		Remark: Pro hac vice motion granted for Alison Karol on behalf of plaintiffs and

6/23/2021

CM/ECF - azd

		guardian ad litem for same. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 04/19/2019)
04/26/2019	174	*NOTICE re: Status of Pending Document Review and Production by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke . (Lopez-Morales, Cesar) *Modified to correct filers on 5/6/2019 (GMP). (Entered: 04/26/2019)
04/29/2019	175	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Olson, Lisa) (Entered: 04/29/2019)
05/03/2019	176	*NOTICE re: Updated Status of Pending Document Review and Production by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke . (Handley, Cristen) *Modified to correct filers on 5/6/2019 (GMP). (Entered: 05/03/2019)
05/06/2019	177	*RESPONSE re: 176 Notice (Other) Defendants' Further Notice of Pending Document Review and Production by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Curran-Huberty, Emily) *Modified to correct event and filers on 5/7/2019 (GMP). (Entered: 05/06/2019)
05/07/2019	178	*NOTICE of Service of Discovery filed by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P .(Curran-Huberty, Emily) *Modified on 5/8/2019 to remove terminated parties as filers (MSA). (Entered: 05/07/2019)
05/23/2019	179	NOTICE of Attorney Withdrawal of <i>Counsel Brandon D. Fox</i> filed by Brandon D Fox. (Fox, Brandon) (Entered: 05/23/2019)
05/24/2019	180	*Joint MOTION for Leave to File Excess Pages for Cross-Motions for Summary Judgment and accompanying Separate Statements of Fact by Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) *Modified to remove terminated parties as filers; attorney noticed on 5/28/2019 (SST). (Entered: 05/24/2019)
05/29/2019	181	*NOTICE re: Status of Document Review and Production by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke . (Handley, Cristen) *Modified to remove terminated parties as filers; attorney noticed on 5/30/2019 (SST). (Entered: 05/29/2019)
05/31/2019	182	MOTION for Partial Summary Judgment by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Certificate of Conferral)(Lopez-Morales, Cesar) (Entered: 05/31/2019)
05/31/2019	183	STATEMENT OF FACTS re: 182 MOTION for Partial Summary Judgment by Defendants Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Exhibit Index, # 2 Exhibit Dearman Dep., # 3 Exhibit Shamblin Dep., # 4 Exhibit Expert Roanhorse-Dineyahze Dep., # 5 Exhibit Ticeahkie Dep., # 6 Exhibit Paddock Dep., # 7 Exhibit Williamson Dep., # 8 Exhibit Roanhorse-Dineyahze Dep., # 9 Exhibit Boyd Dep., # 10 Exhibit Maldonado Dep., # 11 Exhibit Shamblin 30(b)(6) Dep., # 12 Exhibit Defs Interrog. Response, # 13 Exhibit Hastings Dep., # 14 Exhibit Muhammad Dep., # 15 Exhibit Vigil Dep., # 16 Exhibit Dearman 30(b)(6) Dep., # 17 Exhibit Pls. Interrog. Response, # 18 Exhibit Bethell Article, # 19 Exhibit Persinger Dep., # 20 Exhibit Davis Dep., # 21 Exhibit DeCoteau Dep., # 22 Exhibit Ranjbar Dep., # 23 Exhibit Paul Decl., # 24 Exhibit Paddock Decl.)(Lopez-Morales, Cesar) (Entered: 05/31/2019)
05/31/2019	184	MOTION for Partial Summary Judgment by Stephen C, Anna D, Elsa D, Monica L,

6/23/2021

CM/ECF - azd

		Native American Disability Law Center, Billie P, Durell P, Taylor P. (Attachments: # 1 Certificate of Conferral)(Curran-Huberty, Emily) (Entered: 05/31/2019)
05/31/2019	185	STATEMENT OF FACTS re: 184 MOTION for Partial Summary Judgment by Plaintiffs Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Elsa D, Monica L, Billie P. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37, # 38 Exhibit 38, # 39 Exhibit 39, # 40 Exhibit 40, # 41 Exhibit 41, # 42 Exhibit 42, # 43 Exhibit 43, # 44 Exhibit 44, # 45 Exhibit 45, # 46 Exhibit 46, # 47 Exhibit 47, # 48 Exhibit 48, # 49 Exhibit 49, # 50 Exhibit 50, # 51 Exhibit 51, # 52 Exhibit 52, # 53 Exhibit 53, # 54 Exhibit 54)(Curran-Huberty, Emily) (Entered: 05/31/2019)
05/31/2019	186	MOTION to Seal Document by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (Attachments: # 1 Proposed Order) (Curran-Huberty, Emily) (Entered: 05/31/2019)
06/03/2019	187	*SEALED Motion for Partial Summary Judgment, Memorandum and Statement of Facts filed by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (Attachments: # 1 Plaintiffs' Statement of Facts, # 2 Exhibit 1, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 10, # 6 Exhibit 13, # 7 Exhibit 17, # 8 Exhibit 18, # 9 Exhibit 19, # 10 Exhibit 20, # 11 Exhibit 21, # 12 Exhibit 22, # 13 Exhibit 23, # 14 Exhibit 24, # 15 Exhibit 25, # 16 Exhibit 26, # 17 Exhibit 27, # 18 Exhibit 28, # 19 Exhibit 29, # 20 Exhibit 30, # 21 Exhibit 31, # 22 Exhibit 32, # 23 Exhibit 33, # 24 Exhibit 34, # 25 Exhibit 35, # 26 Exhibit 36, # 27 Exhibit 37, # 28 Exhibit 38, # 29 Exhibit 39, # 30 Exhibit 40, # 31 Exhibit 41, # 32 Exhibit 42, # 33 Exhibit 43, # 34 Exhibit 44)(Curran-Huberty, Emily) * Modified to file per 188 Order; NEF regenerated on 6/3/2019 (LAD)(CEI). (LAD). (Entered: 05/31/2019)
06/03/2019	188	ORDER granting 186 Motion for Leave to File Motion for Summary Judgment, Separate Statement of Facts, and Exhibits in Support of Summary Judgment Under Seal (Doc. 186) is granted. IT IS FURTHER ORDERED that the Clerk of Court is directed to file Plaintiffs' Proposed Motion for Summary Judgment and Memorandum in Support (lodged at Doc. 187) under seal. IT IS FURTHER ORDERED that Plaintiff shall file a redacted version of its Motion for Summary Judgment and Memorandum in Support on the public docket. Signed by Judge Steven P Logan on 6/3/19. (LAD) (Entered: 06/03/2019)
06/21/2019	189	ORDER granting 180 the Joint Motion to Exceed Page Limits. The parties' Motions for Summary Judgment (Docs. 182 , 184 , 187) are deemed properly filed. Signed by Judge Steven P. Logan on 6/21/2019. (RMW) (Entered: 06/21/2019)
07/01/2019	190	RESPONSE to Motion re: 182 MOTION for Partial Summary Judgment filed by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (Curran-Huberty, Emily) (Entered: 07/01/2019)
07/01/2019	191	RESPONSE to Motion re: 187 SEALED MOTION for Partial Summary Judgment, 184 MOTION for Partial Summary Judgment filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Handley, Cristen) (Entered: 07/01/2019)
07/01/2019	192	* RESPONSE TO DEFENDANTS' SEPARATE STATEMENT OF FACTS AND

6/23/2021

CM/ECF - azd

		SUPPLEMENTAL STATEMENT OF MATERIAL FACTS re: 182 and 183 by Plaintiffs Stephen C, Anna D, Native American Disability Law Center, Durell P, Taylor P, Elsa D, Monica L, Billie P. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3 [REDACTED], # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37, # 38 Exhibit 38, # 39 Exhibit 39, # 40 Exhibit 40, # 41 Exhibit 41, # 42 Exhibit 42, # 43 Exhibit 43, # 44 Exhibit 44, # 45 Exhibit 45, # 46 Exhibit 46)(Curran-Huberty, Emily) * Modified to correct event and document linkage on 7/3/2019 (LAD). (Entered: 07/01/2019)
07/01/2019	193	MOTION to Seal Document [<i>Exhibit 3 to Opposing Statement of Facts #192</i>] by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 07/01/2019)
07/01/2019	194	* (Filed at Doc. 199) SEALED LODGED Proposed Exhibit 3 SEALED to Opposing Statement of Facts re: 193 MOTION to Seal Document [<i>Exhibit 3 to Opposing Statement of Facts #192</i>]. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (Curran-Huberty, Emily) Modified on 7/3/2019 (LAD). (Entered: 07/01/2019)
07/01/2019	195	* RESPONSES TO SEPARATE STATEMENT OF FACTS AND ADDITIONAL FACTS PRECLUDING JUDGMENT IN FAVOR OF PLAINTIFFS re 185 and 187 by Defendants Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Exhibit Exhibit Index, # 2 Exhibit STUREC01572, # 3 Exhibit Defs.' Resp. Pls.' Interrog., # 4 Exhibit Williamson Depo., # 5 Exhibit Roanhorse-Dineyahze Exp. Depo., # 6 Exhibit Muhammad Depo., # 7 Exhibit Roanhorse-Dineyahze Fact Depo., # 8 Exhibit Paddock Depo., # 9 Exhibit Hastings Depo., # 10 Exhibit Maldonado Depo., # 11 Exhibit Ticeahkie Depo., # 12 Exhibit Boyd Depo., # 13 Exhibit Dearman 30(b)(6) Depo., # 14 Exhibit Dearman Fact Depo., # 15 Exhibit Vigil Depo., # 16 Exhibit Shamblin Exp. Depo., # 17 Exhibit Shamblin 30(b)(6) Depo., # 18 Exhibit Davis Depo., # 19 Exhibit DeCoteau Depo., # 20 Exhibit Ranjbar Depo., # 21 Exhibit Paul Depo., # 22 Exhibit Dearman Declaration, # 23 Exhibit Oliver Declaration, # 24 Exhibit Loeb Declaration, # 25 Exhibit Batsche Report, # 26 Exhibit E-mail Correspondence)(Handley, Cristen) Modified on 7/3/2019 (LAD). (Entered: 07/01/2019)
07/01/2019	196	MOTION to Seal Document by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson. (Attachments: # 1 Text of Proposed Order)(Handley, Cristen) (Entered: 07/01/2019)
07/01/2019	197	* (Filed at Doc. 200) SEALED LODGED Proposed Opposition Brief, Responsive Statement of Facts, Unredacted Exhibits re: 196 MOTION to Seal Document . Document to be filed by Clerk if Motion or Stipulation for Leave to File or Amend is granted. Filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit)(Handley, Cristen) *Modified to add sealed document restriction on 7/2/2019 (SCH). Modified on 7/3/2019 (LAD). (Entered: 07/01/2019)

6/23/2021

CM/ECF - azd

07/03/2019	198	ORDER - IT IS ORDERED that Plaintiffs' Motion to Seal (Doc. 193) is granted. The Clerk of Court is directed to file Plaintiffs lodged Exhibit 3 (Doc. 194) under seal. IT IS FURTHER ORDERED that Defendants' Motion to Seal (Doc. 196) is granted. The Clerk of Court is directed to file Defendants' lodged Opposition Brief, Responsive Statement of Facts, and Unredacted Exhibits (Doc. 197) under seal. IT IS FURTHER ORDERED that Defendants shall file a redacted version of their Opposition to Plaintiff's Motion for Partial Summary Judgment and any supporting documentation on the public docket no later than July 10, 2019. Signed by Judge Steven P Logan on 7/2/19. (LAD) (Entered: 07/03/2019)
07/03/2019	199	Sealed Exhibit 3 to 192 by Stephen C, Anna D, Elsa D, Monica L, Native American Disability Law Center, Billie P, Durell P, Taylor P. (LAD) (Entered: 07/03/2019)
07/03/2019	200	SEALED RESPONSE (OPPOSITION) to 184 MOTION for Partial Summary Judgment, 187 SEALED MOTION for Partial Summary Judgment by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Responses to Separate Statement of Material Facts 185 and 187 and Additional Facts Precluding Judgment in Favor of Plaintiffs, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 22)(LAD) (Entered: 07/03/2019)
07/15/2019	201	Joint MOTION for Leave to File Excess Pages by Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Ryan Zinke. (Attachments: # 1 Text of Proposed Order Proposed Order)(Handley, Cristen) (Entered: 07/15/2019)
07/16/2019	202	REPLY to Response to Motion re: 184 MOTION for Partial Summary Judgment filed by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Curran-Huberty, Emily) (Entered: 07/16/2019)
07/16/2019	203	REPLY to Response to Motion re: 182 MOTION for Partial Summary Judgment filed by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Exhibit Index, # 2 Exhibit 24, # 3 Exhibit 25, # 4 Exhibit 26, # 5 Exhibit 27, # 6 Exhibit 28, # 7 Exhibit 29, # 8 Exhibit 30)(Lopez-Morales, Cesar) (Entered: 07/16/2019)
07/22/2019	204	ORDER granting 201 Motion for Leave to File Excess Pages. Signed by Judge Steven P Logan on 7/22/19. (MAP) (Entered: 07/22/2019)
08/01/2019	205	NOTICE of Attorney Withdrawal of <i>Cesar A. Lopez-Morales as Counsel for Defendants</i> filed by Cesar A. Lopez-Morales. (Lopez-Morales, Cesar) (Entered: 08/01/2019)
10/09/2019	206	ORDER: Hearing on Defendants' Motion for Partial Summary Judgment 182 and Plaintiffs' Motion for Summary Judgment 184 is set for 10/23/2019 at 01:30 PM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P Logan. Signed by Judge Steven P Logan on 10/8/2019. (LMR) (Entered: 10/09/2019)
10/09/2019	207	SEALED ORDER setting Motion Hearing on Plaintiffs' Motion for Summary Judgment (doc. 187). Signed by Judge Steven P Logan on 10/8/19. (cc: all counsel). (SLQ) (Entered: 10/09/2019)
10/09/2019	208	Joint MOTION to Continue Hearing on Motions for Summary Judgment by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Heckenlively, Bryan) (Entered: 10/09/2019)
10/10/2019	209	ORDER: The Joint Motion to Continue Hearing 208 is granted. The Motion Hearing presently set for October 23, 2019 (Docs. 206 , 207) is vacated and reset for November 20, 2019, at 9:00 a.m. Signed by Judge Steven P Logan on 10/10/2019. (LMR) (Entered: 10/10/2019)

6/23/2021

CM/ECF - azd

11/20/2019	211	MINUTE ENTRY for proceedings held before Judge Steven P Logan: Hearing is held on 11/20/2019 on 182 Motion for Partial Summary Judgment and 184 Motion for Partial Summary Judgment. Argument is presented. The motions are taken under advisement. APPEARANCES: Emily Curran-Huberty, Kathryn Eidmann, Jesselyn Friley, Bryan Heckenlively and David Tierney for Plaintiffs. Lisa Olson, Cristen Handley and Chaitna Sinha for Defendants. (Court Reporter Elva Cruz-Lauer.) Hearing held 9:04 AM to 10:54 AM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (LMR) (Entered: 11/20/2019)
11/26/2019	212	TRANSCRIPT REQUEST [Ct Rptr Elva Cruz-Lauer] re Hearing on Motions for Partial Summary Judgment by Jenny A., Jeremy A., Jordan A., Stephen C., Anna D., Native American Disability Law Center, Durell P., Taylor P., Leo R., Levi R. for proceedings held on 11-20-2019, Judge Steven P Logan hearing judge(s). (Curran-Huberty, Emily) (Entered: 11/26/2019)
12/02/2019	213	TRANSCRIPT REQUEST by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, United States Department of the Interior, Jeff Williamson, Ryan Zinke for proceedings held on November 20, 2019, Judge Steven P Logan hearing judge(s). (Olson, Lisa) (Entered: 12/02/2019)
12/10/2019	215	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of <i>MOTION HEARING</i> proceedings held on 11/20/2019, before Judge STEVEN P. LOGAN. [Court Reporter: Elva Cruz-Lauer, RMR, CRR, Telephone number (602) 322-7261]. The ordering party will have electronic access to the transcript immediately. All others may view the transcript at the court public terminal or it may be purchased through the Court Reporter/Transcriber by filing a Transcript Order Form on the docket before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/31/2019. Redacted Transcript Deadline set for 1/10/2020. Release of Transcript Restriction set for 3/9/2020. (RAP) (Entered: 12/17/2019)
12/17/2019	214	*VACATED IN PART BY DOC. 221 * ORDER - 1. Defendants' Motion for Summary Judgment (Doc. 182) is granted; 2. Plaintiffs' Motion for Summary Judgment (Docs. 184 , 187) is denied; and 3. Plaintiff Stephen C. and Plaintiff Durell P.'s claims are moot. Therefore, the Clerk of Court shall terminate Plaintiffs Stephen C. and Durell P. from this case. (See document for further details). Signed by Judge Steven P Logan on 12/16/19. (LAD) Modified on 5/8/2020 (LMR). (Entered: 12/17/2019)
01/06/2020	216	MOTION ruling as to Count 3 re: 214 Order on Motion for Partial Summary Judgment <i>for Partial Relief from Dec. 17, 2019 Order</i> by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) (Entered: 01/06/2020)
01/14/2020	217	NOTICE re: Proposed Response by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P. re: 216 MOTION ruling as to Count 3 re: 214 Order on Motion for Partial Summary Judgment <i>for Partial Relief from Dec. 17, 2019 Order</i> . (Attachments: # 1 Proposed Response)(Curran-Huberty, Emily) (Entered: 01/14/2020)
01/14/2020	218	ORDER: Plaintiffs shall have until January 31, 2020 to file a response to the Motion for Reconsideration 216 . No reply shall be permitted unless otherwise ordered by the Court. See order for additional details. Signed by Judge Steven P Logan on 1/13/2020. (LMR) (Entered: 01/14/2020)
01/15/2020	219	RESPONSE to Motion re: 216 MOTION ruling as to Count 3 re: 214 Order on Motion for Partial Summary Judgment <i>for Partial Relief from Dec. 17, 2019 Order</i> filed by

6/23/2021

CM/ECF - azd

		Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Curran-Huberty, Emily) (Entered: 01/15/2020)
03/30/2020	220	NOTICE re: of School Closing Due to COVID-19 by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Ryan Zinke . (Olson, Lisa) (Entered: 03/30/2020)
05/08/2020	221	ORDER: Defendants' Motion for Partial Relief from the December 17, 2019 Order 216 is granted in part. The Court's December 17, 2019 order is vacated in part 214 . Only the part of the Court's December 17, 2019 order dismissing Counts 3 and 4 of the TAC is vacated. The Court will set a date and time for the final pre-trial conference in separate order. Signed by Judge Steven P Logan on 5/8/2020. (LMR) (Entered: 05/08/2020)
05/14/2020	222	ORDER SETTING FINAL PRETRIAL CONFERENCE: Final Pretrial Conference is set for 7/23/2020 at 09:00 AM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P Logan. See order for additional deadlines and details. Signed by Judge Steven P Logan on 5/13/2020. (Attachments: # 1 Attachments)(LMR) (Entered: 05/14/2020)
06/08/2020	223	Joint MOTION To Hold Final Pretrial Conference Remotely re: 222 Order, Set/Reset Hearings by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 06/08/2020)
06/11/2020	224	ORDER granting the parties' Joint Motion to Hold Final Pretrial Conference Remotely 223 . See order for details. Signed by Judge Steven P Logan on 6/10/2020. (LMR) (Entered: 06/11/2020)
06/15/2020	225	NOTICE of Service of Discovery filed by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Curran-Huberty, Emily) (Entered: 06/15/2020)
06/15/2020	226	NOTICE of Service of Discovery filed by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Curran-Huberty, Emily) (Entered: 06/15/2020)
06/15/2020	227	Consent MOTION for Extension of Time To Exchange Trial Exhibit by Michael Black, Bureau of Indian Education, Tony Dearman, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Text of Proposed Order Proposed Order) (Handley, Cristen) (Entered: 06/15/2020)
06/15/2020	228	NOTICE TO FILER OF DEFICIENCY re: 226 Notice of Service of Discovery filed by Taylor P., Anna D., Billie P., Stephen C., Monica L., Elsa D., Durell P., Native American Disability Law Center. Document not in compliance with LRCiv 7.1(a)(3) - Party names must be capitalized using proper upper and lower case type, not all caps. <i>No further action is required.</i> This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (WLP) (Entered: 06/16/2020)
06/18/2020	229	NOTICE OF ATTORNEY APPEARANCE: Bradley Craigmyle appearing for Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. . (Craigmyle, Bradley) (Entered: 06/18/2020)
06/19/2020	230	ORDER: Defendants' Unopposed Motion to Extend Deadline to Exchange One Trial Exhibit 227 is granted. Signed by Judge Steven P Logan on 6/19/2020. (LMR) (Entered: 06/19/2020)
06/26/2020		Remark: Pro hac vice motion(s) granted for April Youpee-Roll on behalf of Plaintiffs Stephen C., Anna D., Native American Disability Law Center, Taylor P., Elsa D., Monica

6/23/2021

CM/ECF - azd

		L., Billie P.. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 06/26/2020)
07/02/2020	231	TRIAL BRIEF by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Federighi, Carol) (Entered: 07/02/2020)
07/02/2020	232	Proposed Findings of Fact by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Handley, Cristen) (Entered: 07/02/2020)
07/02/2020	233	TRIAL BRIEF <i>Setting out Defendants' Objections to the Testimony of Independent Experts Who Were Hired for Mediation Purposes Only</i> by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Attachments: # 1 Exhibit DOJ Contract, # 2 Exhibit Confidentiality and Mediation Agreement)(Craigmyle, Bradley) (Entered: 07/02/2020)
07/02/2020	234	*TRIAL BRIEF <i>Plaintiffs' Trial Brief Regarding Reasonable Accommodations</i> by Stephen C., Anna D., Native American Disability Law Center, Taylor P., (Curran-Huberty, Emily) *Modified to correct filers on 7/6/2020 (WLP). (Entered: 07/02/2020)
07/02/2020	235	*TRIAL BRIEF on Appropriateness of Injunctive Relief by Stephen C., Anna D., Elsa D., Monica L., Billie P., Taylor P. (Curran-Huberty, Emily) Modified to correct filers on 7/6/2020 (WLP). (Entered: 07/02/2020)
07/02/2020	236	*TRIAL BRIEF on Role of Section 504 by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Heckenlively, Bryan) *Modified to correct filers on 7/6/2020 (WLP). (Entered: 07/02/2020)
07/02/2020	237	*NOTICE of Filing - Joint Proposed Pretrial Order filed by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P. (Curran-Huberty, Emily) *Modified to correct filers on 7/6/2020 (WLP). (Entered: 07/02/2020)
07/02/2020	238	*Proposed Findings of Fact by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P. (Curran-Huberty, Emily) *Modified to correct filers on 7/6/2020 (WLP). (Entered: 07/02/2020)
07/07/2020	239	*NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, (Handley, Cristen) Modified to remove terminated parties on 7/8/2020 (WLP). (Entered: 07/07/2020)
07/17/2020	240	Joint MOTION To Hold Trial Via Videoconference by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 07/17/2020)
07/20/2020	241	*AMENDED by 248 -- Joint MOTION for Discovery <i>to Reopen</i> by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (WLP). *Modified on 7/30/2020 (WLP). (Entered: 07/20/2020)
07/20/2020	242	*MOTION for Discovery <i>to Reopen to Allow a Site Inspection--Oral Argument Requested--</i> by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) *Modified to correct filers, attorney noticed on 7/21/2020 (WLP). (Entered: 07/20/2020)

6/23/2021

CM/ECF - azd

07/22/2020	243	ORDER: The Court has received an inquiry regarding members of the public or media who wish to listen to the July 23, 2020, telephonic Final Pretrial Conference. Although the standard is that federal district courts may not broadcast their proceedings, the Executive Committee of the Judicial Conference recently issued a guidance document that "approve[s] a temporary exception to the policy to allow a judge to authorize the use of teleconference technology to provide the public and the media audio access to court proceedings while public access to federal courthouses generally, or with respect to a particular district, is restricted due to health and safety concerns during the Coronavirus Disease (COVID-19) pandemic." Given this development, public access to the July 23, 2020 telephonic Final Pretrial Conference will be permitted. Members of the public and the media seeking access are directed to email AZD-PIO@azd.uscourts.gov to obtain dial-in instructions. Pursuant to Local Rule 43.1, participants are reminded that audiotaping court proceedings is prohibited. Signed by Judge Steven P. Logan on 7/21/2020. (LMR) (Entered: 07/22/2020)
07/23/2020	244	TRANSCRIPT REQUEST by Stephen C., Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Durell P., Taylor P. for proceedings held on 7/23/2020, Judge Steven P Logan hearing judge(s). (Curran-Huberty, Emily) (Entered: 07/23/2020)
07/23/2020	245	TRANSCRIPT REQUEST by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke for proceedings held on 07/23/2020, Judge Steven P Logan hearing judge(s). (Craigmyle, Bradley) (Entered: 07/23/2020)
07/23/2020	246	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of <i>FINAL PRETRIAL CONFERENCE</i> proceedings held on 07/23/2020, before Judge STEVEN P. LOGAN. [Court Reporter: Elva Cruz-Lauer, RMR, CRR, Telephone number (602) 322-7261]. The ordering party will have electronic access to the transcript immediately. All others may view the transcript at the court public terminal or it may be purchased through the Court Reporter/Transcriber by filing a Transcript Order Form on the docket before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/13/2020. Redacted Transcript Deadline set for 8/24/2020. Release of Transcript Restriction set for 10/21/2020. (RAP) (Entered: 07/24/2020)
07/23/2020	247	*AMENDED by Doc. 254 MINUTE ENTRY for proceedings held before Judge Steven P Logan: Final Pretrial Conference held on 7/23/2020. Bench Trial set for 11/10/2020 at 09:00 AM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P. Logan. Plaintiffs' Motion to Reopen Discovery to Allow a Site Inspection 242 is denied. The parties' Joint Motion to Hold Trial Remotely Via Videoconference 240 is denied without prejudice. The parties are directed to confer and file an amended joint motion for reopening of discovery not later than close of business on July 29, 2020. See attachment for additional details. (Court Reporter Elva Cruz-Lauer.) Hearing held 9:09 AM to 11:07 AM.(LMR) Modified on 8/13/2020 (LMR). *Modified on 8/19/2020 (SCH). (Entered: 07/24/2020)
07/23/2020	254	*AMENDED BY DOC. 255 * AMENDED MINUTE ENTRY - Amending Doc. 247 - for proceedings held before Judge Steven P Logan: Final Pretrial Conference held on 7/23/2020. Bench Trial set for 11/10/2020 at 09:00 AM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P. Logan. Plaintiffs' Motion to Reopen Discovery to Allow a Site Inspection 242 is denied. The parties' Joint Motion to Hold Trial Remotely Via Videoconference 240 is denied without prejudice. The parties are directed to confer and file an amended joint motion for reopening of discovery not later than close of business on July 29, 2020. See attachment for additional details. (Court Reporter Elva Cruz-Lauer.) Hearing held 9:09 AM to 11:07 AM.(LMR)

6/23/2021

CM/ECF - azd

		Reason for Amendment: to correct header. Modified on 8/21/2020 (LMR). (Entered: 08/18/2020)
07/23/2020	255	SECOND AMENDED MINUTE ENTRY - Amending Doc. 254 AMENDED MINUTE ENTRY - Amending Doc. 247 - for proceedings held before Judge Steven P Logan: Final Pretrial Conference held on 7/23/2020. Bench Trial set for 11/10/2020 at 09:00 AM in Courtroom 501, 401 West Washington Street, Phoenix, AZ 85003 before Judge Steven P. Logan. Plaintiffs' Motion to Reopen Discovery to Allow a Site Inspection 242 is denied. The parties' Joint Motion to Hold Trial Remotely Via Videoconference 240 is denied without prejudice. The parties are directed to confer and file an amended joint motion for reopening of discovery not later than close of business on July 29, 2020. See attachment for additional details. (Court Reporter Elva Cruz-Lauer.) Hearing held 9:09 AM to 11:07 AM.(LMR) Reason for Amendment: to correct header. Reason for Second Amendment: to correct header. (Entered: 08/21/2020)
07/29/2020	248	Joint MOTION for Discovery <i>to Reopen (AMENDED)</i> by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 07/29/2020)
08/04/2020	249	ORDER - IT IS ORDERED that the Amended Joint Motion to Reopen Discovery (Doc. 248) is granted in part. IT IS FURTHER ORDERED discovery is reopened solely for the purposes, categories of documents, and depositions set forth below. IT IS FURTHER ORDERED that the Amended Joint Motion to Reopen Discovery (Doc. 248) is granted in full as to categories 1 through 4 of Plaintiffs' requests and categories 1 and 2 of Defendants' requests. IT IS FURTHER ORDERED that the Amended Joint Motion to Reopen Discovery (Doc. 248) is granted in part as to category 7 of Plaintiffs' request, limiting discovery to curricula, plans, and training materials regarding the BIE's trauma pilot program from April 26, 2019 to present. IT IS FURTHER ORDERED that the Amended Joint Motion to Reopen Discovery (Doc. 248) is denied as to categories 5 and 6 of Plaintiffs' requests and category 3 of Defendants' requests. IT IS FURTHER ORDERED that the Amended Joint Motion to Reopen Discovery (Doc. 248) is granted as to both parties' requests for depositions. IT IS FURTHER ORDERED that the parties shall comply with the deadlines they have proposed in the Motion and informing the parties that the Court will not entertain any further extension or request to alter the reopened discovery schedule or scope. See document for complete details. Signed by Judge Steven P Logan on 8/4/2020. (WLP) (Entered: 08/04/2020)
08/06/2020	250	MOTION to Seal Document [<i>Exhs A - D to Proposed Order</i>] by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 08/06/2020)
08/06/2020	251	*FILED at 257 and 258 * SEALED LODGED Proposed Exhibits A - D of Proposed Order re: 250 Motion to Seal. Document to be filed by Clerk if Motion or Stipulation to Seal is granted. Filed by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Curran-Huberty, Emily) *Modified to add link to Motion to Seal on 8/7/2020 (CEI). Modified on 8/27/2020 (SLQ). (Entered: 08/06/2020)
08/06/2020	252	MOTION to Appoint Guardian ad Litem by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Exhibit Declaration of Alexis DeLaCruz, # 2 Exhibit Declaration of Proposed Guardian ad Litem, # 3 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 08/06/2020)
08/06/2020	253	MOTION to Proceed Under Pseudonym by Anna D., Elsa D., Monica L., Native

6/23/2021

CM/ECF - azd

		American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Exhibit Declaration of Alexis DeLaCruz, # 2 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 08/06/2020)
08/27/2020	256	ORDER - IT IS ORDERED that the Motion to Seal Documents (Doc. 250) is granted. The Clerk of Court is directed to file Plaintiffs' Proposed Exhibits A - D (lodged at Doc. 251) under seal. IT IS FURTHER ORDERED that the Motion to Appoint Guardian Ad Litem (Doc. 252) is granted. Mark L. is substituted for Monica L. as guardian ad litem for Moana L. IT IS FURTHER ORDERED that the Motion to Proceed Under Pseudonym (Doc. 253) is granted. Plaintiff Moana L.'s substituted guardian ad litem may proceed by the pseudonym "Mark L.," shall be allowed to endorse documents related to this litigation using his pseudonym, and shall be referred to by his pseudonym in all proceedings held before this Court and in all pleadings, depositions, and other documents related to this litigation. Signed by Judge Steven P Logan on 8/27/20. (SLQ) (Entered: 08/27/2020)
08/27/2020	257	SEALED MOTION for Substitution of Guardian Ad Litem by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Declaration, # 2 Declaration)(SLQ) (Entered: 08/27/2020)
08/27/2020	258	SEALED Declaration re: 253 MOTION to Proceed Under Pseudonym by Anna D., Elsa D., Monica L., Native American Disability Law Center, Billie P., Taylor P.. (SLQ) (Entered: 08/27/2020)
08/28/2020	259	NOTICE of Service of Discovery filed by Anna D., Elsa D., Mark L., Native American Disability Law Center, Billie P., Taylor P.. (Curran-Huberty, Emily) (Entered: 08/28/2020)
08/31/2020	260	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Federighi, Carol) (Entered: 08/31/2020)
09/04/2020	261	NOTICE of Service of Discovery filed by Anna D., Elsa D., Mark L., Native American Disability Law Center, Billie P., Taylor P.. (Curran-Huberty, Emily) (Entered: 09/04/2020)
09/08/2020	262	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Handley, Cristen) (Entered: 09/08/2020)
09/08/2020	263	NOTICE of Service of Discovery filed by Michael Black, Bureau of Indian Education, Tony Dearman, Sally Jewell, Lawrence Roberts, United States Department of the Interior, Jeff Williamson, Ryan Zinke. (Federighi, Carol) (Entered: 09/08/2020)
09/13/2020	264	*Joint MOTION for Extension of Time to Complete Discovery by Michael Black, Bureau of Indian Education, Tony Dearman, Jeff Williamson, Ryan Zinke, United States Department of the Interior (Attachments: # 1 Text of Proposed Order)(Olson, Lisa) *Modified to remove unnecessary motion and add filer on 9/14/2020 (SLQ). (Entered: 09/13/2020)
09/15/2020	265	ORDER granting the parties' Joint Motion to Extend 264 : The discovery deadline shall be extended to October 2, 2020. Signed by Judge Steven P. Logan on 9/14/2020. (LMR) (Entered: 09/15/2020)
09/25/2020	266	STIPULATION of Dismissal <i>[JOINT]</i> of Third and Fourth Causes of Action by Anna D., Elsa D., Mark L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Exhibit A-Executed Settlement Agreement, # 2 Text of Proposed Order)(Curran-Huberty, Emily) (Entered: 09/25/2020)
09/28/2020	267	ORDER: The Stipulation for Dismissal 266 is granted. The Third and Fourth Causes of

6/23/2021

CM/ECF - azd

		Action are dismissed with prejudice. Each party shall bear its own costs and attorneys' fees, except as expressly provided in the Settlement Agreement. The Third and Fourth Causes of Action being the only remaining claims in this case, the Clerk of Court shall terminate this action. Signed by Judge Steven P. Logan on 9/28/2020. (LMR) (Entered: 09/28/2020)
11/17/2020	268	Joint MOTION for Judgment <i>Entry - Pursuant to Fed. R. Civ. P. 58(d)</i> by Anna D., Elsa D., Mark L., Native American Disability Law Center, Billie P., Taylor P.. (Attachments: # 1 Proposed Judgment)(Curran-Huberty, Emily) (Entered: 11/17/2020)
11/20/2020	269	ORDER: IT IS ORDERED that the Request for Entry of Judgment (Doc. 268) is granted. IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment for Defendants on Counts I, II, V & VI of Plaintiffs' Third Amended Complaint (Doc. 128); for Defendants on all Counts as to Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., Jordan A., Stephen C., and Durell P.; and dismissing Counts III and IV with prejudice. Signed by Judge Steven P Logan on 11/20/20. (SST) (Entered: 11/20/2020)
11/20/2020	270	CLERK'S JUDGMENT - IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed November 20, 2020, judgment is entered in favor of Defendants on Counts I, II, V and VI of Plaintiff's Third Amended Complaint (Doc. 128) and in favor of Defendants on all Counts as to Plaintiffs Levi R., Leo R., Jenny A., Jeremy A., Jordan A., Stephen C., and Durell P. Counts III and IV are dismissed with prejudice. (SST) (Entered: 11/20/2020)
01/14/2021	271	* NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 269 Order, 270 Clerks Judgment by Stephen C., Anna D., Elsa D., Mark L., Native American Disability Law Center, Billie P., Durell P., Taylor P., Leo R., Levi R., Olaf D, Taylor P, Freddy P, Moana L, Laila R. Filing fee received: \$ 505.00, receipt number 0970-19060777. (Phillips, Bradley) * Modified to add document linkage on 1/14/2021 (LAD). (Entered: 01/14/2021)
01/19/2021	272	USCA Case Number re: 271 Notice of Appeal. Case number 21-15097, Ninth Circuit. (LAD) (Entered: 01/19/2021)

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Description:	Docket Report	Search Criteria:	3:17-cv-08004-SPL
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Case No. 21-15097

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

Plaintiffs-Appellants.

v.

Bureau of Indian Education, et al.,

Defendants-Appellees,

*On Appeal from The United States District Court
for the District of Arizona
Case No. 3:17-CV-08004-SPL
The Honorable Steven P. Logan, United States District Judge*

APPELLANTS' EXCERPTS OF RECORD

VOLUME 4 OF 4

**FILED PROVISIONALLY UNDER SEAL – PUBLIC REDACTED
VERSION**

Attorneys for Plaintiffs-Appellants