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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

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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.

their view that Plaintiffs' APA claims constitute a "programmatic challenge[]" and are "not actionable" as a result. ECF No. 191 (Def. Opp.) at 2. Defendants are wrong for the reasons previously stated in Plaintiffs' opening memorandum, *see* ECF No. 184 (Pl. MSJ) at 3-9, and Plaintiffs' opposition to Defendants' Motion, *see* ECF No. 190 (Pl. Opp.) at 2-7.

Second, Defendants accuse Plaintiffs of "[d]isregard[ing]" the legal standards governing a Section 706(1) claim because Plaintiffs have not addressed the factors courts often apply to determine whether an agency action has been "unreasonably delayed." Def. Opp. at 3-6. According to Defendants, Plaintiffs' 706(1) claim *must* be a challenge to unreasonably delayed action because 25 C.F.R. contains "no deadline[] for compliance." *Id.* at 3. This is specious. As Defendants concede, BIE "is responsible for ensuring that HES implements 25 C.F.R. part 36." *Id.* at 6. The requirements of 25 C.F.R. are mandatory,[2] and have not been substantively altered in decades. *See, e.g.*, 25 C.F.R. § 36.42 (last amended at 59 Fed. Reg. 61766 (Dec. 1, 1994)). These regulations contain no deadline for compliance not because they are aspirational or command BIE to take future action according to a timeline left to agency discretion, but because they set forth minimum educational standards with which BIE is under an *ongoing* duty to comply.

The cases Defendants cite to support their preferred characterization of Plaintiffs' claims provide no support at all. Contrary to Defendants' assertion, the court in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), did not discuss the distinction between actions "unlawfully withheld" and those "unreasonably delayed" at all. Moreover, *Cobell* acknowledged that "where an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review," which is precisely the scenario here. *Id.* at 1095 (internal quotation marks omitted). Similarly, *Sierra Club v. Thomas* specifically distinguished the plaintiff's unreasonable delay claim, which sought to compel the defendant agency to conclude a rulemaking by a

[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.

In attempting to evade review, Defendants seek license to extend their regulatory noncompliance indefinitely based on their own self-interested evaluation of what is feasible. In the meantime, generations of HES students, including the Student Plaintiffs, suffer the effects. As even BIE concedes, "almost no students at HES are proficient in reading, writing, or math." Def. SSOF ¶ 34. As in *Cobell*, delaying judicial review here would be "tantamount to denying review altogether." 240 F.3d at 1095. The Court should reject Defendants' attempt to distort the requirements of Section 706(1) to grant BIE unbridled discretion to disregard the clear mandates of 25 C.F.R.[4]

Third, Defendants argue that there are genuine disputes of material fact that preclude a finding that BIE is failing to implement the regulatory requirements on which Plaintiffs moved for summary judgment. Def. Opp. at 6-7. This fails as well. For one thing, and as Defendants fail to mention in their brief, Defendants actually concede several of the violations identified in Plaintiffs' Motion. *See, e.g.*, Def. SSOF ¶¶ 9, 11, 17-18, 21 (acknowledging that HES does not incorporate consumer economics into it middle school instructional program, employ a 1/5 time librarian, or maintain up-to-date reference materials in its library, and that its native language and culture programs have not received tribal approval). Defendants attempt to manufacture other supposed "disputes" through wordplay and meritless objections. For instance, while Defendants concede, as they must, that "HES does not currently have a textbook review committee," Def. SSOF ¶ 25, Defendants nonetheless describe this fact as "dispute[d]" in their brief, Def. Opp. at 7,

[4] Although Plaintiffs do not agree that the *TRAC* factors, *see* Def. Opp. at 4, have any bearing on their APA claims, those factors plainly tip toward judicial intervention. Defendants have failed to meet the minimum standards of 25 C.F.R. *for years*, during which time dozens if not hundreds of students have passed through HES without receiving anything close to an adequate basic education. BIE's failures implicate those children's welfare and deprive 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.

apparently on the theory that a "leadership team" reviewed textbooks in a prior school year. Def. SSOF ¶ 25. To take another example, although Jim Hastings—the BIE official concededly "responsible for ensuring that the schools he oversees are *complying* with federal regulations, including 25 C.F.R part 36," *id.* ¶ 3 (emphasis added)—testified in no uncertain terms that HES does not comply with 25 C.F.R. § 36.42 when it relies on the school counselor to teach general education, Defendants dismiss this testimony as a "legal conclusion." *Id.* ¶ 30.

In still other cases, Defendants attempt to dispute a fact with a laundry list of citations that add up to nothing of significance. Defendants "dispute" the fact that "BIE has frequently failed to employ a professional counselor at HES" by noting that HES had a counselor on staff for about a year between December 2016 and 2017 and employed a detailed counselor for roughly one month in 2014 and 2018. *Id.* ¶ 28. That HES was able to employ a counselor *at some point* between 2014 and the present hardly undermines the fact that there frequently has *not* been a counselor at HES; indeed, it emphasizes it. Defendants also "dispute" the fact that HES does not offer any student activity other than student council by citing a list of one-off events—like a Halloween parade—that HES has sponsored in the past. *Id.* ¶ 32. Not only are these not "activities" akin to the "special interest clubs, physical activities, student government, and cultural affairs" activities described in 25 C.F.R. § 36.43, Defendants could identify only three examples.

Defendants also profess mystification both at the meaning of terms such as "consistently" and "often" as well as the significance of such terms for Plaintiffs' claims. *See* Def. Opp. at 7-8; Def. SSOF ¶¶ 22, 29. In fact, the relevance is straightforward: As Plaintiffs explained in their opening memorandum, the failure to consistently teach required subjects or offer required services is itself a violation, because 25 C.F.R. § 36.20(c) mandates that "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." (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

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[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.

ensuring HES's compliance with Section 504 as recently as April 8, 2019, when Defendants responded to Plaintiffs' Interrogatories, ECF No. 195-3 at 9-10—has been directed to provide voluntary training over the summer to persons yet to be identified about Section 504 policies and procedures that have yet to be developed. ECF No. 195-23 ¶¶ 5-7. For his part, Director Dearman maintains that he has "directed" Ms. Oliver to develop policies regarding Section 504 and has ordered "training . . . on Section 504 principles" to begin in the unspecified future. ECF No. 195-22 ¶¶ 3, 5. Based on these statements alone, Defendants ask this Court to assume that BIE schools, including HES, will be prepared to properly identify students protected by Section 504 and develop suitable Section 504 plans for such students come the start of the school year. Given DOI's longstanding failure to comply with Section 504, *see* Pl. MSJ at 13-16, the Court should decline to make this assumption and should reject Defendants' baseless invitation to deny summary judgment based on their vague assurances of future compliance.

Defendants' lengthy, unfocused response to Plaintiffs' Separate Statement of Material Facts alludes to various other reasons why the Court might decline to grant summary judgment as to liability on Count III (or Count IV). These assertions, which barely rise to the level of argument and largely do not appear in Defendants' brief, are meritless.

Student Plaintiffs Indisputably Are Individuals with Disabilities. Although they purport to be working to ensure the Student Plaintiffs have meaningful access to education at HES, Def. Opp. at 9, Defendants also appear to contest whether the Student Plaintiffs are actually individuals with disabilities for purposes of Section 504. This is not in genuine dispute. As Defendants concede, qualified experts evaluated Stephen C., Durell P., Taylor P., and Moana L. and diagnosed each of them with physical and/or mental impairments that substantially limit multiple life activities. *See* Def. SSOF ¶¶ 37, 46, 52, 57. Defendants also concede that Plaintiffs' experts similarly evaluated Olaf D. and Freddy P. and provisionally diagnosed each child with an impairment that substantially limits life activities. *Id.* ¶¶ 71, 73. Offering no expert opinion to the contrary, Defendants nonetheless argue that Plaintiffs' expert reports and the statements cited therein are "opinion testimony," and "not sufficient

to support a conclusion" regarding Plaintiffs' diagnoses and the effects of their diagnoses on major life activities. *Id.* ¶¶ 37, 46, 52, 57. But Defendants provide no evidence that contradicts Plaintiffs' experts, did not move to strike or exclude their opinions, and do not dispute the actual diagnoses the experts provided.[6]

Defendants also object to Plaintiffs' expert evaluations as relying on "inadmissible hearsay" regarding Stephen C.'s and Durell P.'s traumatic experiences. *Id.* ¶¶ 40, 46. Even assuming the statements in question are inadmissible hearsay (which is far from certain), Defendants' objection is off the mark, because Federal Rule of Evidence 703 *expressly permits* experts to rely on inadmissible evidence, including hearsay. Fed. R. Evid. 703 ("If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."). The purpose of Defendants' hearsay objections is also entirely unclear given that Defendants do *not* dispute that Stephen C., Durell P., Taylor P., and Moana L. have all experienced childhood adversity for the reasons Plaintiffs have alleged "and/or for other reasons not cited." Def. SSOF ¶¶ 40, 47, 53, 58.

Finally, Defendants state that Student Plaintiffs cannot be deemed students with disabilities for purposes of Section 504 unless a school team so declares. *E.g.*, Def. Opp. at 9; Def. SSOF ¶ 56. Defendants are wrong. A "disability" for purposes of Section 504 is defined by statute as an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(1)(A), (2)(A). Whether an individual has an impairment is a question for professionals licensed to evaluate and diagnose the impairment, such as Plaintiffs' experts. Whether that impairment constitutes a disability under Section 504, if contested, is a legal question for a court. Defendants offer no support for their position that a school team is the sole arbiter of whether a student is disabled under Section 504, and there is none. Undisputed facts and uncontradicted expert opinions demonstrate that Student Plaintiffs are individuals

[6] The validity of Plaintiffs' experts' evaluations is further reinforced by the fact that Defendants have recently chosen to rely on Plaintiffs' expert evaluations in upcoming individual meetings about these students' disabilities and educational needs.

with disabilities protected by Section 504. Defendants' muddled, meritless contentions to the contrary serve only to emphasize the force of this conclusion and strongly suggest that Defendants realize they are grasping at straws.[7]

Defendants cannot absolve themselves of liability by blaming the Havasupai Tribe and community. Defendants' Supplemental Statement of Facts attempts to distract from their own failure to provide meaningful access to education to students with disabilities by pointing fingers at the community that BIE is supposed to be serving. Defendants do not and cannot explain why the community's supposed deficiencies are legally relevant, and even Defendants' self-serving account of the supposed "obstacles" to their compliance with their legal obligations reveals that these obstacles lie with BIE itself.

For instance, Defendants cite a shortage of teacher housing as an obstacle to recruiting and retaining HES staff, Def. SSOF ¶ 129, but neglect to mention that BIE has promised to present the Havasupai Tribal Council with a proposal to expand teacher housing and has, since 2014, failed to do so. ECF No. 195-13 at 146:2-12. Although Defendants are fully aware that using detail teachers drains HES's budget and compromises students' access to basic and special education, *see* ECF No. 192 (Pl. SSOF) ¶¶ 125-26; Def. SSOF ¶ 82, BIE has only recently engaged teachers at HES in a discussion about what could help to retain permanent teachers. ECF No. 195-11 at 194:14-95:12. And while Defendants cite "safety considerations" as an impediment to staff retention and vaguely insinuate that the Tribe and community are hostile to BIE, *e.g.*, Def. SSOF ¶ 152, Defendants fail to consider how their own actions—including, but not limited to, their undisputed practice of using the police to discipline children, *id.* ¶¶ 43, 50, 91—could foster a sense of mistrust. Defendants' efforts

[7] In keeping with this pattern, Defendants also suggest that there was no basis for identifying Taylor P. as a child with a disability because, as compared to other students, one of her teachers did not have any concerns. ECF No. 195-6 at 152:14-23. That Defendants would 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.

motion for summary judgment. As explained more fully in Plaintiffs' Opposition, the DOI regulations in 43 C.F.R. part 17, subpart B apply to BIE-operated schools like HES and incorporate the two DOE regulations identified in the TAC. Pl. Opp. at 12-13. HES is bound by those DOE regulations for another reason: it accepts DOE funding. Def. SSOF ¶ 35. Defendants' convoluted argument that BIE can receive federal funds without being a recipient of federal funds is as wrong as it sounds, for reasons Plaintiffs have already explained. Pl. Opp. at 13-15. As public entities that accept federal financial assistance from DOE, BIE and HES are obligated to comply with the regulatory requirements that guarantee nondiscrimination in schools. *Id.*

In any event, the implication of Defendants' argument that the regulations do not apply to them is that either they are in direct violation of Section 504 or their own regulations are invalid. The Ninth Circuit allows enforcement of Section 504 regulations precisely because such regulations "must be tightly enough linked to § 504 that they 'authoritatively construe' that statutory section, *rather than impose new obligations*." *Mark H. v. Lemahieu*, 513 F.3d. 922, 939 (9th Cir. 2008) (emphasis added). In other words, if there is an enforceable obligation in the regulations, it *must* be an obligation imposed by the statute itself. *Id.* This Court already determined that the two regulations at issue are enforceable obligations necessary to ensure meaningful access to an appropriate education. ECF No. 100 at 9-12. So even if Defendants' evasive argument that subpart B does not apply to BIE-operated schools were correct, that would not exempt BIE-operated schools from complying with the obligations contained in subpart B because those are obligations imposed by the statute. All routes lead to the conclusion that BIE-operated schools must follow these critical DOE regulations to ensure that they meet their obligations to provide meaningful access to education for students with disabilities.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Partial Summary Judgment.

DATED: July 16, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 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