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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' MOTION AND
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Alexander v. Choate,
469 U.S. 287 (1985) 14

Am. Civil Liberties Union of Nev. v. Lomax,
471 F.3d 1010 (9th Cir. 2006) 15

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley,
458 U.S. 176 (1982) 7

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 8

City of New York v. U.S. Dep’t of Def.,
913 F.3d 423 (4th Cir. 2019) *passim*

Cnty. Coll. v. Davis,
442 U.S. 397 (1979) 15

Cobell v. Norton,
392 F. 3d 461 (D.C. Cir. 2004) 10

Coleman v. Darden,
595 F.2d 533 (10th Cir. 1979) 14

Crowder v. Kitagawa,
81 F.3d 1480 (9th Cir. 1996) 11, 12, 13

Ctr. for Biological Diversity v. U.S. Dep’t of Hous. & Urban Dev.,
241 F.R.D. 495 (D. Ariz. 2006) 9

Defs. of Wildlife v. Flowers,
No. 02-CV-195, 2003 WL 22143270 (D. Ariz. Aug. 18, 2003), *aff’d*, 414 F.3d 1066 (9th
Cir. 2005) 6

Def. Supplies Corp. v. U.S. Lines Co.,
148 F.2d 311 (2d Cir. 1945)..... 15

Del Monte Fresh Prod. N.A., Inc. v. United States,
706 F. Supp. 2d 116 (D.D.C. 2010) 7

Doe v. Attorney Gen. of the U.S.,
941 F.2d 780 (9th Cir. 1991), *overruled on other grounds by Lane v. Pena*, 518 U.S. 187 (1996)... 12

1 *Forest Guardians v. Babbitt*,
 2 174 F.3d 1178 (10th Cir. 1999)..... 7, 8
 3 *Friends of the Earth v. U.S. Dep’t of Interior*,
 4 478 F. Supp. 2d 11 (D.D.C. 2007)..... 6
 5 *Friends of the Earth, Inc. v. Laidlaw Emt’l. Servs., Inc.*,
 6 528 U.S. 167 (2000) 15
 7 *Garcia v. Capistrano Unified Sch. Dist.*,
 8 No. SA CV 16-2111-DOC (JCGx), 2018 WL 6017009 (C.D. Cal. Mar. 30, 2018)..... 15
 9 *Hells Canyon Pres. Council v. U.S. Forest Serv.*,
 10 593 F.3d 923 (9th Cir. 2010) 8
 11 *Hinck v. United States*,
 12 550 U.S. 501 (2007) 7
 13 *Jacobson v. Delta Airlines, Inc.*,
 14 742 F.2d 1202 (9th Cir. 1984) 14
 15 *John v. United States*,
 16 720 F.3d 1214 (9th Cir. 2013) 4
 17 *Lujan v. Defenders of Wildlife*,
 18 504 U.S. 555 (1992) 15
 19 *Lujan v. Nat’l Wildlife Fed’n*,
 20 497 U.S. 871 (1990) 5, 6, 7
 21 *Mark H. v. Hamamoto*,
 22 620 F.3d 1090 (9th Cir. 2010) 11, 12
 23 *Mark H. v. Lemahien*,
 24 513 F.3d 922 (9th Cir. 2008) 11, 14, 15
 25 *Myers v. United States*,
 26 272 U.S. 52 (1926) 15
 27 *Nev. Ass’n of Ctys. v. Dep’t of Interior*,
 28 No. 3:13-cv-712-MMD, 2015 WL 1130982 (D. Nev. Mar. 12, 2015), *aff’d*, 686 Fed.
 App’x 407 (9th Cir. 2017)..... 5, 6, 9
Norton v. S. Utah Wilderness All.,
 542 U.S. 55 (2004) *passim*

1 NRDC v. EPA,
 2 966 F.2d 1292 (9th Cir. 1992) 9

3 Occidental Eng'g Co. v. INS,
 4 753 F.2d 766 (9th Cir. 1985) 3

5 P.P. v. Compton Unified Sch. Dist.,
 6 135 F. Supp. 3d 1126 (C.D. Cal. 2015)..... 12, 15

7 Prewitt v. U.S. Postal Serv.,
 8 662 F.2d 292 (5th Cir. 1981) 13

9 Pub. Lands for the People, Inc. v. USDA,
 733 F. Supp. 2d 1172 (E.D. Cal. 2010)..... 9

10 RCM Technologies, Inc. v. DHS,
 11 614 F. Supp. 2d 39 (D.D.C. 2009)..... 9

12 San Antonio Indep. Sch. Dist. v. Rodriguez,
 13 411 U.S. 1 (1973) 7

14 Sheldon v. Vilsack,
 15 538 F. App'x 644 (6th Cir. 2013)..... 4

16 Sierra Club v. Peterson,
 17 228 F.3d 559 (5th Cir. 2000) 5, 6

18 Sierra Nev. Forest Prot. Campaign v. Rey,
 19 573 F. Supp. 2d 1316 (E.D. Cal. 2008), *aff'd in part, rev'd sub nom. Sierra Forest Legacy v.*
 20 *Sherman*, 646 F.3d 1161 (9th Cir. 2011)..... 7

21 Slayman v. FedEx Ground Package Sys., Inc.,
 22 765 F.3d 1033 (9th Cir. 2014) 16

23 Stephen C. v. BIE,
 24 2018 WL 1871457 (Mar. 29, 2018)..... 16

25 U.S. Dep't of Transp. v. Paralyzed Veterans of Am.,
 26 477 U.S. 597 (1986) 14

27 United States v. Strong,
 28 489 F.3d 1055 (9th Cir. 2007) 16

Veterans for Common Sense v. Shinseki,
 678 F.3d 1013 (9th Cir. 2012) 5, 6

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		
15	Act to Replace the Vocational Rehabilitation Act,	
16	Pub. L. No. 93-112, 87 Stat. 355 (1973)	13
17	Act to Amend the Rehabilitation Act of 1973,	
18	Pub. L. No. 95-602, 92 Stat. 2955 (1978)	13
19	<u>Constitutional Law</u>	
20	U.S. Const. art. II, § 1, cl. 1 & 3	15
21	<u>Rule</u>	
22	Fed. R. Civ. P. 56(a)	1, 3
23	<u>Regulations</u>	
24	25 C.F.R. Part 63	3
25	28 C.F.R. § 35.130(b)(7)(i)	11
26	34 C.F.R. Part 104	14
27	34 C.F.R. § 104.2	14
28		

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
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
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MOTION FOR PARTIAL SUMMARY JUDGMENT

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.

MEMORANDUM OF POINTS AND AUTHORITIES

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.

Plaintiffs, a group of seven current and former students and an advocacy organization, bring this lawsuit under the Administrative Procedure Act (“APA”) and Section 504 of the Rehabilitation Act (“Section 504”) to challenge what they describe as longstanding and systemic failures in BIE’s administration of HES. Regarding the counts addressed in this motion, Plaintiffs’ claims fail as a matter of law. With respect to the APA claims in Counts I and II, the nature of those claims and their expansive corresponding discovery demonstrate that Plaintiffs seek wholesale programmatic improvement of HES by court decree rather than judicial review of discrete agency action. The APA forecloses such claims. With respect to Count IV, Plaintiffs’ requested accommodation to address the trauma-related disorders of certain students is neither appropriate nor legally required under Section 504. As to Counts V and VI, Plaintiffs cannot enforce regulations of the Department of Education (“DOE”) that do not apply to BIE. Finally, the Court lacks jurisdiction over the claims of Stephen C. and Durell P. because they completed the eighth grade at HES and thus cannot benefit from the relief requested. Defendants’ motion should be granted.

FACTUAL BACKGROUND

1
2 The Indian Education Act, 25 U.S.C. §§ 2000, *et seq.* (incorporating regulations at 25
3 C.F.R. Part 32) governs BIE's operation of programs like HES and sets forth formulas used to
4 allocate appropriated funds for schools. HES is located at the bottom of the Grand Canyon,
5 accessible only via an eight-mile hike or mule ride, or helicopter. Ex. 1, Dearman Dep. 216:18-
6 28.¹ The extremely remote location poses a number of obstacles to BIE's attempts to recruit,
7 hire, and retain staff necessary for providing adequate educational services. Ex. 2, Shamblin
8 Dep. 93:17-94:16. Teachers must use costly helicopter transportation to visit family or purchase
9 supplies. Ex. 3, Roanhorse-Dineyahze Expert Dep. 103:6-10; Ex. 4, Ticeahkie Dep. 90:4-7. In
10 addition, many teachers have experienced threats of, or actual, physical violence in the
11 community. Ex. 5, Paddock Dep. 221:18-222:9; Ex. 6, Williamson Dep. 332:2-3. These
12 circumstances often result in applicants declining a position or employees leaving after a year.
13 Ex. 7, Roanhorse-Dineyahze Dep. 131:3-10; Ex. 2, Shamblin Dep. 55:18-56:4, 65:8-17.

14 There also is a shortage of housing for HES staff. Although HES's organizational chart
15 has 17 positions, only 12 beds are available to house staff, double occupancy apartments must
16 be shared, and there is no space for staff members to house their families. Ex. 2, Shamblin Dep.
17 95:23-96:2; Ex. 1, Dearman Dep. 62:16-21. Additional housing cannot be constructed without
18 permission from the Tribe and authorization from the Bureau of Indian Affairs. Ex. 7,
19 Roanhorse-Dineyahze Dep. 122:11-16.

20 BIE offers a variety of monetary and nonmonetary incentives to recruit and retain staff
21 at HES, including higher salaries than state schools in the area, a 25% differential pay increase
22 for teachers, recruitment bonuses, additional pay for certification training and maintenance, loan
23 forgiveness, transportation of personal belongings, rent reductions, and training and mentoring.
24 Ex. 8, Boyd Dep. 110:16-117:3; Ex. 1, Dearman Dep. 138:24-139:3; Ex. 9, Maldonado Dep.
25 250:3-15; Ex. 10, Shamblin 30(b)(6) Dep. 46:1-48:9, 56:10-19; Ex. 11, Defs. Interrog. Response
26 #9(d). Yet, vacancies are hard to fill because the federally mandated hiring process for BIE

27
28 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." *SUWA*, 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 SUWA*, 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 _____
26 ⁴The TAC refers to a group identified as “Student Plaintiffs Impacted by Childhood Adversity.”
27 Although not entirely clear, presumably the members of that group are the student plaintiffs in
28 Count IV. To that effect, the remaining Count IV Plaintiffs are Stephen C., Durell P., Taylor
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 Zuke 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.” *Zuke*, 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.
Zuke, 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.

1 disabled students, *Crowder*, 81 F.3d at 1485. Yet, rather than seeking specific accommodations
 2 designed to meet these particular students' educational needs in the context of individualized
 3 education programs, Count IV seeks to have this Court hold that BIE violated federal law by
 4 failing to implement a cutting-edge and yet untested system of emerging practices that would
 5 require substantial and unduly burdensome adjustments to the school. *See* Defs.' SOF ¶¶ 4-9.
 6 And to the extent Plaintiffs rely on the Report of Dr. Noshene Ranjbar, "Mental Health Needs
 7 Assessments for Four Students and Recommendations," to identify specific modifications that
 8 BIE must provide for Taylor P. and Moana L., such modifications are not "reasonable" under
 9 Section 504, as they would impose "undue financial and administrative burdens" on HES and
 10 BIE. *See Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979); *see* Defs.' SOF ¶¶ 7-9. Because Plaintiffs'
 11 requested accommodation is not reasonable, BIE's motion should be granted as to Count IV.

12 **III. PLAINTIFFS CANNOT PREVAIL ON COUNTS V AND VI BECAUSE 34**
 13 **C.F.R. §§ 104.32 AND 104.36 DO NOT APPLY TO INTERIOR.**

14 Counts V and VI allege that Defendants have violated two Department of Education
 15 ("DOE") regulations implementing Section 504: 34 C.F.R. § 104.32 on "[l]ocation and
 16 notification," and 34 C.F.R. § 104.36 on "procedural safeguards." These regulations do not
 17 apply to federal agencies like BIE.

18 As originally enacted in 1973, Section 504 provided in relevant part that no "qualified
 19 handicapped individual . . . shall . . . be subjected to discrimination under any program or activity
 20 receiving Federal financial assistance." Act to Replace the Vocational Rehabilitation Act, Pub.
 21 L. No. 93-112, § 504, 87 Stat. 355, 394. Recognizing that the statute did not apply to federal
 22 agencies, Congress amended the law in 1978 to prohibit such discrimination under any program
 23 or activity receiving Federal financial assistance "*or under any program or activity conducted by any*
 24 *Executive agency.*" Act to Amend the Rehabilitation Act of 1973, Pub. L. No. 95-602, § 119, 92
 25 Stat. 2955, 2982, *codified in* 29 U.S.C. § 794(a) (emphasis added). Accordingly, the "1978
 26 amendment . . . subject[ed] federal agencies to section 504's nondiscrimination requirement."
 27 *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 785 (9th Cir. 1991), *overruled on other grounds by Lane*
 28 *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.

1 Although Subpart E does not refer to DOE regulations, Subpart B does in fact require
 2 compliance “with the Section 504 requirements promulgated by the Department of Education
 3 at 34 CFR part 104, subpart D.” 43 C.F.R. § 17.220; *see id.* § 17.201 (applying Subpart B to a
 4 “recipient of Federal financial assistance from the Department of the Interior and to each
 5 program or activity that receives such assistance[.]” such as tribally operated schools). Thus,
 6 whereas a tribally operated school is subject to DOE’s regulations pursuant to Subpart B, a BIE-
 7 operated school like HES is not. *Compare* 43 C.F.R. § 17.201 *with id.* § 17.502.

8 Plaintiffs’ APA claims in Counts V and VI at best amount to a “facially impracticable
 9 suggestion . . . that one agency of the Government can acquire the power to direct other agencies
 10 by simply claiming that power in its own regulations[.]” *Lujan v. Defenders of Wildlife*, 504 U.S.
 11 555, 569 n.4 (1992). Because these regulations could only be enforced through Section 504’s
 12 implied right of action, *Mark H.*, 513 F.3d at 939, for Plaintiffs to prevail this Court would need
 13 to construe the statute as authorizing them to do what DOE cannot: unilaterally bind and sue
 14 BIE to enforce its own regulations. *Def. Supplies Corp. v. U.S. Lines Co.*, 148 F.2d 311, 312-13 (2d
 15 Cir. 1945) (noting the United States cannot sue itself).⁷ Tellingly, there is no precedent for
 16 Plaintiffs’ claim. BIE is not aware of any case in which someone has sued, let alone successfully,
 17 a federal agency to enforce the DOE regulations.⁸ BIE is thus entitled to summary judgment.

18 **IV. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE** 19 **CLAIMS OF DURELL P. AND STEPHEN C.**

20 Each plaintiff must establish that he or she has standing to sue “separately for each form
 21 of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Emt’l. Servs., Inc.*, 528 U.S. 167, 185 (2000).
 22 And “[w]hen evaluating whether [the standing] elements are present, we must look at the facts
 23 ‘as they exist at the time the complaint was filed.’” *Am. Civil Liberties Union of Nev. v. Lomax*, 471

24
 25 ⁷ Private enforcement of an agency rule against another agency under these circumstances could
 26 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).

27 ⁸ Cases involving these regulations concern suits against local educational agencies. *See, e.g.,*
 28 *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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