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' OPENING BRIEF

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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.

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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.

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[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.

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[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

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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. Concannon*, 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[ied] 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. *Alexopulos ex rel. Alexopulos 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. *Alexopulos* 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'"). *Alexopulos* has not been discussed or relied upon since, except in glancing fashion the following year in a similar case brought by the same plaintiffs. *Alexopulos ex rel. Alexopulos 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

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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.