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18 *Attorneys for Plaintiffs*

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

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

24 *Plaintiffs,*

25 v.

26 Bureau of Indian Education, et al.,

27 *Defendants.*

No. 3:17-cv-08004-SPL

**PLAINTIFFS' TRIAL BRIEF ON
ROLE OF SECTION 504**

1 One disputed issue for trial is what remedy, if any, is appropriate to address
2 Defendants' admitted violation of Section 504 of the Rehabilitation Act. Defendants lean
3 heavily on the "if any" part of that statement, and they have taken the position that no remedy
4 under Section 504 is available because there are individualized education programs ("IEPs")
5 in place for the four remaining student plaintiffs under a different law—the Individuals with
6 Disabilities Education Act ("IDEA"). This is wrong on several levels.

7 **1. IDEA and Section 504 Are Materially Different, and the BIE Treats Them**
8 **that Way.** IDEA is focused on obtaining specific services for individual students, whereas
9 Section 504 addresses both individual services *and* the broader need for an educational
10 system that is capable of providing services to students with disabilities. Defendants'
11 argument and their reliance on *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017),
12 ignores this second, broader aspect of Section 504. What Plaintiffs seek here under Section
13 504 is not a private placement or more hours of a particular type of instruction, but a system
14 that works and enables the school to identify, evaluate, and accommodate students with
15 disabilities. As set out in detail in the Findings of Fact and Conclusions of Law, Plaintiffs'
16 experts have introduced uncontroverted testimony that the appropriate program to
17 accommodate students with disabilities would include full staffing, school-wide curriculum
18 and supports, and school-wide policies and procedures. The needs of specific students are
19 relevant to demonstrate what the school must have the capacity to do, but they are not the
20 ultimate end to be met. And the Ninth Circuit has recognized that, where these type of
21 systemic failures are at stake, the individualized framework of IDEA does not govern. *Doe*
22 *By & Through Brockhuis v. Arizona Dep't of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997); *Hoelt*
23 *v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1304 (9th Cir. 1992).

24 Defendants' trial exhibits include training materials on Section 504 presented by
25 BIE's Acting 504 Coordinator, which acknowledge the differences between the two statutes.
26 See Trial Exhibit 1006. These slides include a long list of differences between Section 504
27 and IDEA, including that the two laws contain different definitions of disability, different
28 eligibility criteria, funding streams, and types of accommodations. The slides state the BIE's

1 view that Section 504 is different from special education and that Section 504
 2 accommodations must be provided “in the general education program.” *Id.*, Slide 8. It is
 3 disingenuous for the BIE now to claim that it may avoid legal sanction under Section 504
 4 because it is complying with the IDEA.

5 **2. The BIE Is Not Actually Implementing the IEPs.** And the BIE is not
 6 complying with the IDEA. As Defendants admit, the four student Plaintiffs are not actually
 7 receiving the services to which they are entitled under their IEPs. The BIE’s assurances that
 8 it will begin to comply fully with the IEPs next year are not worthy of credence in light of
 9 the BIE’s history of failed promises to satisfy its legal obligations to HES students with
 10 disabilities. And these promises are legally insufficient as well for the reasons laid out in
 11 Plaintiffs’ trial brief on the need for an equitable remedy.

12 **3. There Are Other Students At Issue.** Defendants’ argument also ignores that
 13 this case is not only about the four remaining student Plaintiffs. Organizational plaintiff
 14 Native American Disability Law Center faces an ongoing diversion of resources because of
 15 its advocacy on behalf of current and former HES students, including Stephen C. and Durell
 16 P. who do not currently have IEPs at the school. This diversion of resources cannot be
 17 corrected by offering limited services to only some of the students with disabilities at HES.
 18 Among other problems, having IEPs for these four students does not address the persistent
 19 problems at HES with identifying students with disabilities. Indeed, Olaf D., Moana L., and
 20 Freddy P. were identified and evaluated as students with disabilities only during the course
 21 of this litigation. *See* Plaintiffs’ Proposed Findings of Fact ¶ 104.

22 **4. School-Wide Accommodations Are Required for Disabilities Related to**
 23 **Trauma.** School-wide accommodations are particularly important for students with
 24 disabilities related to trauma. *See* Plaintiffs’ Proposed Findings of Fact ¶¶ 62-75. Without
 25 the school-wide behavioral and instructional supports identified as essential by undisputed
 26 expert testimony, the BIE will not be providing meaningful access to students with
 27 disabilities related to trauma.

28 * * *

1 For all these reasons, and based on the evidence that will be presented at trial,
2 Plaintiffs respectfully submit that the existence of IEPs for the student Plaintiffs does not
3 obviate the need for injunctive relief under Section 504. To the contrary, such relief is
4 critical to meeting the needs of students with disabilities at HES.

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