

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

KIM R. JIM,

Plaintiff,

v.

No. 1:17-cv-01114-RB-KBM

**SHIPROCK ASSOCIATED
SCHOOLS, INC.,**

Defendant.

**DEFENDANT’S MEMORANDUM IN SUPPORT OF SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT**

A.

Plaintiff has sued the Shiprock Associated School, Inc. (“SASI”) seeking relief under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act. Compl., ¶1. Plaintiff also claims that jurisdiction is appropriate in this Court pursuant to, *inter alia*, 42 U.S.C. § 2000e-5. (Compl., ¶1)

SASI seeks dismissal of Plaintiff’s claims on the grounds that it is not an “employer” for Title VII or Americans With Disabilities Act (“ADA”) purposes because it is excluded from the definition of “employer” in those statutes by the Indian Tribe exemption set out at 42 U.S.C. § 2000e(b)(1) and at 42 U.S.C. § 12111(5)(b)(1) (hereinafter the “Indian Tribe exemption”). *See*, Docs. 5, 6 and 15.

B.

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

Fed.R.Civ.P. 56(a); *accord Felkins v. City of Lakewood*, 774 F.3d 647, 650 (10th Cir. 2014). In ruling on a motion for summary judgment, the court should “examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party.” *Merrifield v. Bd. Of Cnty. Comm’rs*, 654 F.3d 1073, 1077 (10th Cir. 2011). But, this standard only applies to issues of fact, not to issues of law. All questions of law are determined by the Court. *Id.*

C.

The following undisputed material facts show that SASI is a tribal organization performing essential governmental functions for and under the control of the Navajo Nation; hence, as a matter of law, falls under the Indian Tribe exemption and is not an “employer” for purposes of the statutes under which Plaintiff seeks relief:

1. Defendant corporation, then named Shiprock Alternative Schools, Inc., was established in 1979. (Exhibit 1 to Affidavit of Richard Edwards (“Edwards Aff’d.”)). The Navajo Nation did not enact a corporation code until 1986. (Exhibit 2 to Edwards Aff’d.). In 2012, SASI was renamed Shiprock Associated Schools, Inc. (“SASI”). (Exhibit 3 to Edwards Aff’d.). Edwards Aff’d., ¶ 5.

2. SASI was at the time of the allegations stated in the Complaint, and continues to be, a New Mexico non-profit corporation. SASI is registered to conduct business on the Navajo Nation. (Exhibit 4 to Edwards Aff’d.). In 2012 SASI began the process of converting to a Navajo Nation form of corporate charter. SASI’s school board approved such a charter. (Exhibit 5 to Edwards Aff’d.). However, that process was not

completed. Hence, SASI continues to administer its schools under its state non-profit corporate charter. Edwards Aff'd., ¶ 6.

3. The Navajo Nation Court for the District of Shiprock in *Bernadette Todacheene v. Shiprock Associated Schools, Inc., et al.*, No-SR-CV-28-2012 (Oct. 11, 2018) recently ruled that SASI is authorized by the Navajo Nation to operate a school on the Navajo Nation and that SASI is a tribally controlled school. (Exhibit 6, pp. 2-3 to Edwards Aff'd.). Edwards Aff'd., ¶ 7.

4. At the time of the allegations in the Complaint, SASI was authorized by the Navajo Nation Board of Education to operate education, education-related and residential programs for Indian students per 10 NNC § 201 funded per the Tribally Controlled Schools Act, Pub. L. 100-297, 25 U.S.C. § 2501 ("TCSA"), *et seq.* (Exhibit 7 to Edwards Aff'd.). SASI is currently authorized by, and has for decades been authorized by, the Navajo Nation to operate its Navajo community schools on the Navajo Reservation. (Exhibit 8 to Edwards Aff'd.). Edwards Aff'd., ¶ 8.

5. SASI was in 2014 and is now the grantee of U.S. Department of Interior, Bureau of Indian Education ("BIE") funds received for operation of educational programs on the Navajo Nation for the benefit of Indian students in Shiprock, New Mexico and surrounding communities per the TCSA, and received those funds for all the years in between. (Exhibits 9 and 10 to Edwards Aff'd.). Edwards Aff'd., ¶ 9.

6. All instructional and administrative funds for SASI's schools are awarded by the BIE per 25 U.S.C. § 2001 *et seq.* (the Indian School funding statute) and the TCSA. SASI's Navajo community schools (Shiprock Northwest High School and Atsá

Biyáázh Community School, an elementary school) also receive a small amount of U.S. Department of Agriculture school lunch funding channeled to the school through the State of New Mexico and some federal e-rate (internet infrastructure) funding awarded by the Federal Communications Commission. The SASI schools do not receive any state educational or instructional funding. The SASI schools are not part of the state public school system. Edwards Aff'd., ¶ 10.

7. The Navajo Nation Election Code states as follows at 10 N.N.C. § 201 (2005) (Exhibit 11 to Edwards Aff'd.). Edwards Aff'd., ¶ 11:

The Chapters of the Navajo Nation are authorized to establish such local Navajo Community School Boards as are suitable for their respective areas. Such local community school board shall govern the schools funded by the Bureau of Indian Affairs for the education of Navajo students. The elections of such local community school board members shall be conducted in accordance with the Navajo Nation Election Code, Title 11 of the Navajo Nation Code.

8. (a) The Navajo Nation Sovereignty in Education Act at 10 N.N.C. § 202 states as follows regarding tribal membership status and qualifications of prospective school board members: (Exhibit 11 to Edwards Aff'd.).

A. Any enrolled member of the Navajo Nation may serve as a member of a Local Community School Board, provided that he/she meets the qualifications established under the Navajo Nation Election Code.

B. School board members are subject to removal pursuant to the rules and procedures regarding removal of elected officials, established in the Navajo Nation Election Code.

(b) All SASI Board Members are elected per the Navajo Nation Election Code and are enrolled members of the Navajo Nation, whose elections are administered

and certified by the Navajo Election Administration. (Exhibit 12 to Edwards Aff'd.).
Edwards Aff'd., ¶ 12.

9. The Navajo Nation Board of Education classifies such entities such as SASI as “tribal organizations.” (Exhibit 7, p. 2, and Exhibit 8, p. 2 to Edwards Aff'd.).
Edwards Aff'd., ¶ 13.

10. The Navajo Nation Supreme Court ruled in *Rough Rock Community School, et al. v. Navajo Nation*, No. SC-CV-06-94 (Nav.Sup.Ct. 1995) (“*Rough Rock I*”) and *Rough Rock Community School, et al. v. Navajo Nation*, No. SC-CV-06-94 (Nav.Sup.Ct. 1996) (“*Rough Rock II*”). (Exhibits 13, pp. 5-6, and 14, p. 3 to Edwards Aff'd.) that the Navajo Nation Election Code applies to the election of boards of directors of non-profit corporations authorized by the Navajo Nation to contract with the Bureau of Indian Affairs (now Bureau of Indian Education) to operate Navajo community schools per Pub. L. 93-638, the Indian Self-Determination Act, now codified at 25 U.S.C. § 5301 *et seq.*, (formerly codified at 25 U.S.C. § 450 *et seq.*) or the TCSA (SASI operates its schools under the TCSA (Pub. L. 100-297, 25 U.S.C. § 2501, *et seq.*). Edwards Aff'd, ¶ 14.

11. The Navajo Nation Education Code states as follows at 10 N.N.C. § 200(B) (Exhibit 15 to Edwards Aff'd.) Edwards Aff'd., ¶ 15:

All local community school board (*sic*) operating developmental and educational schools within the Navajo Nation are subject to its educational laws to the full extent of the jurisdiction of the Navajo Nation and with applicable federal regulations. Such local school boards are to be held accountable to the Navajo Nation to for ensuring that their students make adequate yearly progress in meeting applicable, measureable academic

achievement standards, including any such standard established by the Navajo Nation.

12. SASI receives authority from the Navajo Nation Board of Education (NNBOE) to operate its BIE funded Indian education programs on the Navajo Nation. (Exhibits 7A, 7B, 7C and 8 to Edwards Aff'd.). Edwards Aff'd., ¶ 16.

13. Resolution No. HEHSCMY-012012 of the Health, Education and Human Services Committee of the Navajo Nation Council, cited in Exhibit 7A, pp. 1-2 to Edwards Aff'd. at ¶s 3 and 4, Edwards Aff'd., ¶ 17 states as follows regarding reauthorizations for Pub. L 100-297 (TCSA) schools:

The Navajo Nation Board of Education also conditions its sanction, approval and authorization upon the standard conditions (Attached hereto as "Exhibit B") which the Navajo Nation places upon Navajo Nation tribal organizations which are authorized to operate BIE-funded education and education-related programs ... *Id.* at SASI-001556. (Emphasis added).

14. Exhibit B to SASI's reauthorization to operate BIE funded Indian education programs on the Navajo Nation from July 1, 2013 through June 30, 2014 is entitled "Conditions on Sanctions of Tribal Organizations to Operate BIA-Funded Education and Educated-Related Programs," which includes the following (Exhibit 7B to Edwards Aff'd.). Edwards Aff'd., ¶ 18:

1. meeting academic standards set by the Navajo North Central Association or the NNBOE; performance of an annual audit and responding to any audit findings with 90 days;
2. seeking prior approval of NNBOE for any grant amendments that add new programs or eliminate any programs approved in SASI's reauthorization;
3. compliance with the education laws of the Navajo Nation at Title 10 of the Navajo Nation Code;

4. compliance with the election laws of the Navajo Nation at Title 11 of the Navajo Nation Code;
5. permitting monitoring visits and access to records by representative of NNBOE, the Navajo Nation Ethics and Rules Office and the Navajo Nation Office of the Auditor General;
6. preparation of an annual report to the Navajo Nation Superintendent of Schools;
7. a prohibition on the use of school grant funds for litigation against the Navajo Nation;
8. a prohibition on the use of school grant funds to purchase insurance for school board members; and,
9. a requirement to report student data and information to the Navajo Nation's Department of Diné Education; to permit the monitoring and enforcement of Navajo Nation laws by the NNBOE and the Department of Diné Education and to oversee SASI's performance under the Pub. L. 100-297 grant approved by the reauthorization and "to make appropriate changes to the operation and management of the Shiprock Associated Schools, Inc." (Emphasis added).

15. SASI's 2013-2014 tribal reauthorization imposes additional conditions at Exhibit C to that document, which include requirements such as development of a corrective action plan to address adverse audit findings; compliance with criminal background check requirements for school personnel and school board members; audits of school board travel and stipends; financial reporting; and, enhancement of SASI's Navajo culture and language program. (Exhibit 7C to Edwards Aff'd.). Edwards Aff'd., ¶ 19.

16. The Navajo Nation has established and enforces a uniform stipend and travel policy that governs how much school funding can be spend on local community

school board members' travel and stipends. (Exhibit 16, pp. 1-6 to Edwards Aff'd.). Edwards Aff'd., ¶ 20.

17. SASI's school board members are elected to their positions in Navajo tribal elections. The Navajo Nation Ethics in Government Law 2 N.N.C. § 3741, *et seq.*, and the Regulations and Standards of Conduct for Elected Officials of the Navajo Nation, ERC-08-001 (2008) apply to SASI school board members as elected officials of the Navajo Nation. (Exhibits 17 and 18 to Edwards Aff'd.). Edwards Aff'd., ¶ 21.

18. Navajo Nation school board members, including the members of SASI's governing board, take an oath of office in which they swear to "preserve, protect and defend the laws and government of the Navajo Nation and advance the interests of the Navajo people, having due regard for the ethical duties and responsibilities of the office." Resolution No. BOESS-027-07 (Navajo Board of Election Supervisors, September 13, 2007)." *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12 (Nav.Sup. Ct. 2013). (Exhibit 19, p. 3 to Edwards Aff'd.). Edwards Aff'd., ¶ 22.

19. Members of SASI's school board must be qualified to hold office per the Navajo Nation Election Code, 11 N.N.C. § 8 (D)(4). (Exhibit 20 to Edwards Aff'd.). Unqualified persons can be removed from office under 11 N.N.C. § 8 (F) (disqualification) (Exhibit 20); 11 N.N.C. § 142 (forfeiture of office) (Exhibit 21 to Edwards Aff'd.); and 11 N.N.C. § 241 (recall by voters) (Exhibit 22 to Edwards Aff'd.). Edwards Aff'd., ¶ 23.

20. In 2016, two members of SASI's school governing board were disqualified by the Navajo Election Administration from running in the primary election that year for

SASI's school board and for another school board. (Exhibit 23 to Edwards Aff'd.). Edwards Aff'd., ¶ 24.

21. The Navajo Election Code includes language regarding determinations of qualifications of candidates for local Navajo school boards per 11 N.N.C. § 8 (D)(4). (Exhibit 20 to Edwards Aff'd.). Former Executive Director Leo Johnson, Jr. was disqualified from serving on SASI's governing board in *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12 (Nav.Sup. Ct. 2013). (Exhibit 19, pp. 10-11 to Edwards Aff'd.). Edwards Aff'd., ¶ 25.

22. The Navajo Election Code at 11 N.N.C. § 161 establishes the process regarding appointments to fill vacancies on local Navajo school boards. (Exhibit 24 to Edwards Aff'd.). A current member of SASI's governing board, Nikki E. Begay, was appointed by the Navajo Nation to fill a vacancy created by the resignation of another board member. (Exhibit 25 to Edwards Aff'd.). Edwards Aff'd., ¶ 26.

23. The Navajo Education Code states at 10 N.N.C. § 106(G) (a)(iii) that: "The Navajo Nation Board of Education" shall have the general power to monitor the activities of all Bureau of Indian Affairs funded schools and local community school boards serving the Navajo Nation, including the authority:

(a) To assume control of local community controlled schools from the local community school board in situations wherein ...

(iii) The Navajo Nation Board of Education has provided the local community school board with a written notice of its opportunity for a due process hearing held pursuant to regulations adopted by the Health, Education and Human Services Committee of the Navajo Nation Council, at which the local community school board may appear and show cause why the programs, or portions of programs, which the local community

school is managing and operating under authorization from the Navajo Nation pursuant to Public Law 93-638, as amended, or Public Law 100-297, as amended, should not be assumed by the Department of Diné Education.

(Exhibit 26, p. 3 to Edwards Aff'd.). Edwards Aff'd., ¶ 27.

24. In 2012, the Navajo Nation's Department of Diné Education assumed control of a local Navajo community school when its governing board lost its quorum. *See Wauneka v. Yazzie*, No. SC-CV-64-12 (Nav.Sup.Ct. 2013). (Exhibit 27, p.2. to Edwards Aff'd.). Edwards Aff'd., ¶ 28.

25. In 2016, the Navajo Nation Council passed one bill and considered another in which local Navajo community schools funded under the TSCA were to be retroceded to the U.S. Department of the Interior, Bureau of Indian Education, taking authority to operate those schools from the local community boards, which had previously been authorized to operate them and returning those schools to a regime of direct BIE operation. (Exhibits 28A, pp. 1-2, and B. p.2 to Edwards Aff'd.). Edwards Aff'd., ¶ 29.

26. According to SASI records, 80 percent of SASI's current employees who carry out SASI's school operations are enrolled in federally recognized Indian Tribes. (Exhibit 29 to Edwards Aff'd.). Edwards Aff'd., ¶ 30. The percentage of SASI's school employees from 2014 to the present was comparable.

27. In the years 2014-2018, over 98% of SASI's school pupils were enrolled in federally recognized Indian Tribes as follows:

2014-15 99.27 percent of SASI's students were enrolled in federally recognized Indian Tribes.

2015-16 98.2 percent of SASI's students were enrolled in federally recognized Indian Tribes.

2016-17 99.25 percent of SASI's student body were enrolled in federally recognized Indian Tribes.

2017-18 99.27 percent of SASI's student body were enrolled in federally recognized Indian Tribes.

Exhibit 30 to Edwards Aff'd. Edwards Aff'd., ¶ 31

28. SASI has not received any tuition reimbursements for the small number of non-Indian students it serves. Those students are typically the children of non-Indian SASI teachers or of Indian Health Service Clinic staff. Edwards Aff'd., ¶ 32.

D.

Based on the authorities addressed *infra*, the question whether SASI falls under the Indian Tribe exemption turns on the answers to the following questions:

- Is SASI a tribal organization carrying out an essential governmental function of the Navajo Nation as authorized by the Nation in accordance with applicable tribal and federal law? Yes, Edwards Aff'd at ¶s 1-11, 13-16 and exhibits there referenced. *See*, 25 U.S.C. § 2501 recognizing that tribal control of schools educating their tribal member students is an essential manifestation of tribal self-determination.¹
- Is Navajo Nation approval a prerequisite to SASI's operation of the Shiprock Alternative Schools? Yes, Edwards Aff'd at ¶s 4, 7-10, 12, 15-16 and exhibits there referenced. *See*, 25 U.S.C. §§ 2502(a) and 2504(a) recognizing that only tribally controlled schools operated by tribes or tribal organizations ("which are approved by their tribal governing bodies") are eligible to receive grants under the TCSA); *accord*, 25 C.R.R. Part 44.105.

¹ As shown in the Edwards Aff'd at ¶ 31 and Exhibit 30 thereto, over 98% of SASI's students have at all times material been Indians. This fact is supportive of SASI's status as the operator of Navajo community schools established to provide educational programs for the Navajo Nation per Navajo law and the TCSA. Further, the fact that approximately 20% of SASI's school employees are non-Indian (Edwards Aff'd., ¶ 30 and Exhibit 29 thereto) does not in any undermine SASI's status as a Navajo tribal organization entitled to be covered by the Indian Tribe exemption. *See*, Doc. 15, pp. 16-19. Furthermore, SASI has the statutory authority under Navajo law at 10 N.N.C. § 124(c) to waive Navajo preference in employment and hire non-Navajos as needed to carry out their school operations.

- Does the Navajo Nation retain ultimate control over whether SASI is entitled to operate its schools as Navajo community schools under Title 10 of the Navajo Nation Code and under the Tribally Controlled Schools Act? Yes, Edwards Aff'd at ¶s 3-6, 15-19, 28 and exhibits there referenced. *See*, 25 U.S.C. § 2502(f)(1) (“Wherever a tribal governing body requests retrocession [of a school grant] such retrocession shall become effective ... not later than 120 days after the date on which the tribal governing body requests the retrocession).
- Are the board members at SASI elected officials of the Navajo Nation who can be removed from office at the initiation of the Nation for conduct contrary to Navajo law or for failing to meet the prerequisites for serving on the SASI board established by Navajo law? Yes, Edwards Aff'd at ¶s 17-27 and exhibits there referenced.
- Does the Navajo Nation possess and exercise control over how SASI carries out its school operations? Yes, Edwards Aff'd at ¶s 17-19 and exhibits there referenced.
- Are the SASI schools funded under the TCSA? Yes. All the school's administrative and instructional funds are awarded by the Bureau of Indian Education under the TCSA and SASI schools are not part of New Mexico's public school system. Some USDA school lunch funding is channeled to the school through the State² and the school receives some internet infrastructure funding through the Federal Communications Commission. Edwards Aff'd. at ¶ 10. SASI does not receive any tuition reimbursements for the small number of non-Indian students who attend the SASI schools. Edwards Aff'd. at ¶ 32.

As shown in the undisputed material facts set out in Part C and referenced above, all of these questions are answered in the affirmative as to SASI; hence, SASI satisfies the test used in the cases ruling that such tribal organizations are covered by the Title VII and ADA Indian Tribe exemptions.

² *See, Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (federal law enforcement funds channeled to the Ramah Navajo Chapter through the State to supplement the Chapter's Pub. L. 93-638 contract for law enforcement should have been treated as federal funds for calculating the indirect costs due from the Bureau of Indian Affairs to support operation of the Chapter's Pub. L. 93-638 contract operations, notwithstanding that they were awarded to the Chapter from the State).

The leading case on this issue is *Giedosh v. Little Wound School Bd., Inc.*, 995 F.Supp. 1052, 1055 (D.S.D. 1997). There the Court held that the Little Wound School Board, Inc. was not subject to Title VII claims since it was exempted from the definition of “employer” by the Indian Tribe exemption. The Court based its ruling on the following core facts:

This Court finds that the non-moving parties have failed to meet their burden in providing evidence which creates a genuine issue of material fact as to the issues surrounding the Board's relationship with the Tribe. Accordingly, this Court finds that there are no genuine issues of material fact as to the following facts which relate to the Board's relationship with the Tribe. This Court finds that the school was formed with the consent and authorization of the Tribe. The Board is a democratically-elected Board, and the Board's membership is comprised solely of members of the Oglala Sioux Tribe. The school is a tribally chartered entity. The Little Wound School must adhere to the Oglala Sioux Tribal Council's resolutions and ordinances. The school is directly responsible to the Tribe and the Tribe's education committee. To further the Tribe's policy of community participation, the Tribe has allowed the Little Wound School to be operated by a democratically-elected board. Given that the school is tribally chartered, the Tribe may step in at any time, for good reason, and assume the control and operation of the school. (Internal citations to exhibits omitted). *Id* at 1055.

The Court in *Giedosh* relied in part upon the Tenth Circuit's ruling in *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986) where the Court held that the Council was exempt from Title VII claims under the Indian Tribe exemption even though the Council itself was not an Indian Tribe. The Court ruled that the Council was an instrument of the Tribe which organized it to carry out tribal government activities.

Relying on *Dille*, the Court found (*Giedosh, supra* at 1057):

Like in *Dille*, the members of the organization, in this case the Board, are made up of members of the Tribe. For good reason, the Oglala Sioux Tribe may even step in and assume the operation of the Little Wound School. Like in *Dille*, the purpose of establishing the organization is to further the development, in this case the educational development, of the children living in Indian country, and to involve the Indian community in the education of the Indian children. In reaching its conclusion that the Board fits within the definition of an “Indian Tribe” under Title VII, this court also takes into account the following factors. First, the Board has contracted with the BIA under the ISDEAA. The Indian Self-Determination and Education Assistance Act emphasizes the importance of parental and community control in the educational process. *See* 25 U.S.C. § 450(b)(3). The school is tribally chartered. The Board was formed with the consent and authorization of the Tribe and is required to comply with tribal regulations and ordinances. The Board is made up of members of the Tribe, and those members are democratically elected. The school, which is operated by the Board, services tribally controlled members in the Kyle community and the surrounding area of the Pine Ridge Indian Reservation.

SASI’s status is in all material respects identical to that of the Little Wound School Board, Inc.—except the degree of tribal control over Navajo community schools exercised by the Navajo Nation is even more extensive than the control exercised by the Oglala Sioux Tribe over the tribal community schools located on the Pine Ridge Indian Reservation, such as Little Wound.

Otherwise, both entities are tribal organizations authorized to operate local community schools under tribal law using BIE Indian school funding and do so by leave of their tribes; both fall under the ultimate control of their tribes, whose governments have the power to determine whether they can start (or can be forced to stop) those school operations; both are instruments of their tribes established to provide schools for their communities which must be operated in accordance with tribal law, the provision of local education services being an essential governmental function of their tribes. In both cases,

the school boards are elected pursuant to tribal law and are (and are required to be members) of their tribes. Both schools are ultimately subject to takeover or closure by their respective tribes.

E.

Other courts have likewise held, following *Little Wound*, that other kinds of “tribal organizations” which were authorized by their tribal governments to enter into Pub. L. 93-638 contracts to operate federal Indian programs are also covered by the Indian Tribe exception. *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1124 (10th Cir. 1999) (tribal housing authority operating under state non-profit corporate charter was covered by the Title VII Indian Tribe exemption.); *Dillon v. Yankton Sioux Tribal Housing Authority*, 144 F.3d 581, 583 (8th Cir. 1998) (holding that a tribal housing authority established by a tribal council pursuant to its powers of self-governance was a “tribal agency operating with tribal authorization under the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. § 4101 *et seq.*” hence, was not subject to suit under Title VII); *Pink v. Modoc Indian Health Project, Inc.* 157 F.3d 1185, 1188 (9th Cir. 1998) (Indian tribal organization operating a tribal health clinic funded per the Indian Self-Determination Act (“ISDA”) and governed by a tribally-appointed governing board was arm of the tribe which authorized the ISDA contract and was covered by the Title VII Indian Tribe exemption notwithstanding that the organization was a state non-profit corporation). *EEOC v. Navajo Health Foundation-Sage Memorial Hospital*, 2007 WL 2683825 (D.Az. 2007) (unpublished) (hereinafter “Sage”).

In *Sage* the Court held that a state non-profit corporation certified under Navajo law and the ISDA as a tribal organization authorized to provide health care with Indian Health Service funding on the Navajo Reservation and operating a hospital on the reservation under a governing board appointed by eight political subdivisions of the Navajo Nation was covered by the Title VII Indian Tribe exemption. *Id.* at 2-3. The Court expressly ruled that:

Sage Hospital’s status as a “tribal organization” under the ISDEAA supports the conclusion that the hospital serves as an arm of the Navajo Nation and therefore falls within the scope of the Title VII “tribe” exemption. *See id.* at 1187-88. “Congress sought to achieve essentially the same goal when it enacted the ISDEAA as when it excluded ‘tribes’ from the operation of Title VII. Both the ISDEAA and the Title VII ‘tribe’ exemption attempt to aid tribal entities in their efforts to conduct their own affairs and economic activities with as much autonomy as possible.” *Pink*, 157 F.3d at 1188-89 (citing *Dille*, 801 F.2d at 374).

The core basis for *Little Wound* and these other rulings applying the Indian Tribe exemption to tribal organizations performing essential tribal government functions is the recognition that Indian tribal governments have the right to determine the way they choose to allocate and exercise their governmental authority on their reservations. *See, Williams v. Lee*, 358 U.S. 217 (1959) (“... Indian Tribes have the right to make their own laws and be ruled by them”). This gives them the right and power to determine what governmental functions they want to have carried out via central tribal government departments and which they want to have carried out through tribal governmental institutions operated at the local level. This is also why Pub. L. 93-638 and the TCSA both recognize that Indian Tribes may elect to contract to directly operate BIA and IHS programs and tribally controlled schools or may authorize local “tribal organizations” to

operate those contracts and schools for the Tribe subject to tribal law and under ultimate tribal government control.

All of these choices—and the subordinate tribal government entities they give rise to—reflect the exercise of tribal government authority; hence, warrant recognition that authorized “tribal organizations” such as SASI are instruments of the tribes which authorized them to assume responsibility to carry out essential tribal government functions e.g., schools and health clinics; and, as such, are entitled to the protections afforded to Indian Tribes under the Indian Tribe exemption.

The fact that the local Navajo Chapters served by SASI chose (with Navajo Nation approval) to operate SASI’s schools using a state non-profit corporate structure rather than as an unincorporated association or by use of a Navajo corporate charter³ does not alter SASI’s status as a Navajo tribal organization under tribal and federal law and required to comply with the Navajo Nation’s Election Code for school board elections. *Rough Rock Community School, et al. v. Navajo Nation*, No. SC-CV-06-94 (Nav.Sup.Ct. 1995) (“*Rough Rock I*) and *Rough Rock Community School, et al. v. Navajo Nation*, No. SC-CV-06-94 (Nav.Sup.Ct. 1996) (“*Rough Rock II*”). (Exhibits 13 and 14) Edwards Aff’d., ¶ 14.; *Ramah Navajo School Board, Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832

³ When SASI and its predecessor, the Shiprock Alternative School, Inc. was first organized, the school board opted to operate the school using a state non-profit corporate charter. At that time there did not exist any form of Navajo corporate code. The Tribe later adopted such a code and SASI then began the process of converting to a Navajo form of corporate charter. The board approved such a charter. However, that process was not completed. Hence, SASI continues to administer its schools under its state non-profit corporate charter. *See*, Fact Nos. 1 and 2, *supra*. (Edwards Aff’d., ¶s 1 and 2). In any event, the Navajo Supreme Court has unequivocally held that Navajo community schools operating via state non-profit corporate charters are Navajo tribal organizations subject to the laws and requirements of the Nation. *Rough Rock, supra*.

(1982) (Ramah Navajo School Board, Inc. did not lose its status as a “tribal organization” operating its school per Pub. L. 93-638 and Title 10 of the Navajo Nation Code because it chose to administer its school via a state chartered non-profit corporation); *see, Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (fact that Mescalero Apache Tribe chose to operate through a particular corporate structure did not alter its status as an Indian Tribe: “In any event, the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business.”) (state chartered non-profit corporations authorized by the tribe to operate Navajo community schools per Pub. L. 93-638 and Title 10 of the Navajo Nation code are tribal organization whose school board members must be chosen as required by the Navajo Nation Election Code); *Todacheene v. Shiprock Associated Schools, Inc.*, Case No. SR-cv-028-2012 (dismissing tribal court suit pleading tort claims against SASI because of its status as a tribally-controlled school under 25 U.S.C. § 2501 and the extension of FTCA coverage to such schools per Pub. L. 101-512) (copy attached to the Motion as Exhibit 6 to Edwards Aff’d.). *See*, authorities cited at pp. 12-13 and 16 (Doc. 15). Deferring to tribal government choices on how to exercise tribal power is essential if the congressional purposes underlying the TCSA and Pub. L. 93-638 are to be achieved. *See*, Congressional Findings and Declarations of Policy at 25 U.S.C. §§ 5301, 5302 and 25 U.S.C. § 2500.

Thus, none of the grounds Plaintiff has previously identified (Doc. 11) for distinguishing SASI’s status and circumstances from those found to require invocation of the Indian Tribe exemption to the “tribal organizations” there involved withstand scrutiny.

As shown in SASI's original Reply Br. (Doc. 15, pp. 4-20), the contrary approach then pressed by Plaintiff seeks to have this Court use a completely different test to address the tribal exemption issue as established in *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113 (9th Cir. 1985) and applied in *N.L.R.B v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1000 (9th Cir. 2003), the inapposite cornerstone of Plaintiff's whole argument. As previously shown (Doc. 15, p.6), *Chapa De* did not address the express Indian Tribe exemption here at issue, as no such exemption exists in the National Labor Relations Act. That test is applicable only where the question before the Court is whether an entity organized or established by a tribe is subject to federal laws of general application which do not contain any exemption for Indian Tribes.

Applying the correct test makes clear that SASI is a tribal organization authorized by the Navajo Nation to carry out tribal public school programs under Title 10, Navajo Nation Code and the Tribally Controlled Schools Act, 25 U.S.C. § 2501 *et seq.*, on the Navajo Indian Reservation; and, as such, is covered by the Indian Tribe exemption.

F.

ANY DOUBTS ABOUT HOW THE INDIAN TRIBE EXEMPTION SHOULD BE INTERPRETED MUST BE RESOLVED IN FAVOR OF SASI

Any doubts about how the Indian Tribe exemption in Title VII and the ADA should be interpreted must be resolved in favor of SASI and against the Plaintiff based on the Indian canon of statutory interpretation applicable to all federal statutes enacted for the benefit of Indian Tribes. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (Indian canon of construction must be applied in interpreting statutory provisions

enacted for the benefit of Indian Tribes such as Pub. L. 93-638 and “[t]he result is that if the [Act] can reasonably be construed as the Tribe would have it construed, it must be construed that way,” rejecting government’s restrictive interpretation of tribal ‘638 contract rights). The same Indian canon of construction must be applied in interpreting the reach of the Indian Tribe exemption. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (federal statutes enacted for the benefit of the Indian Tribes must be liberally construed in their favor). *See*, authorities cited at Doc. 15, p. 4 applying the Indian canon in ruling on whether particular “tribal organizations” were covered by the Indian Tribe exemption.

CONCLUSION

Applying the applicable summary judgment standards, it is clear from the undisputed evidence before the Court that SASI is entitled to judgment as a matter of law that it is covered by the Indian Tribe exemption in the statutes under which Plaintiff seeks relief. Hence, that Defendants are entitled to entry of summary judgment rejecting the claims and relief sought by Plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically pursuant to CM/ECF procedures, which caused the parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

s/ C. Bryant Rogers_____