

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 U.S. District Court for the District of Arizona

Case No. 3:17-CV-08004-SPL

The Honorable Steven P. Logan, United States District Judge

BRIEF OF *AMICI CURIAE*
OF THE NATIONAL INDIAN EDUCATION ASSOCIATION,
THE TRIBAL EDUCATION DEPARTMENTS NATIONAL ASSEMBLY,
THE AMERICAN INDIAN HIGHER EDUCATION CONSORTIUM,
AND THE NATIONAL CONGRESS OF AMERICAN INDIANS,
IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND IN SUPPORT OF REVERSAL

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, the National Indian Education Association (NIEA), the Tribal Education Departments National Assembly (TEDNA), the American Indian Higher Education Consortium (AIHEC), and the National Congress of American Indians (NCAI) make the following disclosures:

The NIEA, TEDNA, AIHEC, and NCAI have no parent corporations and no publicly traded corporation currently owns 10% or more of their stock.

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INTEREST OF AMICI CURIAE¹

The National Indian Education Association (NIEA), www.niea.org, is the national membership organization for Native educators and others seeking to improve education for American Indians, Alaska Natives, and Native Hawaiians. The Tribal Education Departments National Assembly (TEDNA), www.tedna.org, is the national membership organization for Tribal Education Departments and Agencies. The American Indian Higher Education Consortium (AIHEC), www.aihec.org, is the national membership organization for Tribal Colleges and Universities. The National Congress of American Indians (NCAI), www.ncai.org, is the national membership organization for American Indian and Alaska Native Tribal governments. Because of their longstanding familiarity with federal Indian education law and policy and advocacy on behalf of tribal sovereignty and tribal students, all Amici have an interest in this case, which raises issues of first impression regarding the legal obligations of the United States to educate K-12 tribal students.

¹ Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel to a party authored this brief in whole or in part; no party or counsel to a party contributed money intended to fund preparing or submitting this brief; and, no person other than Amici and Amici's counsel contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs/Appellants (Plaintiffs) appeal from the District Court’s grant of summary judgment to Defendants/Appellees on Counts I and II of their Third Amendment Complaint (TAC). The District Court concluded that in these Counts, Plaintiffs are making a “systemic challenge,” which is not permitted by the Administrative Procedures Act (APA), 5 U.S.C. § 702, to the Bureau of Indian Education’s (BIE) failure to provide basic education at Havasupai Elementary School (HES), which is a K-8 school operated by the BIE.² *See* Appellants’ Excerpts of Record (ER) Dkt. 23-3 at 1-ER-21 (“the Plaintiffs’ challenges, when aggregated, rise to the level of an impermissible, systematic challenge under the APA that should not be resolved by the courts”). The District Court’s conclusion is erroneous.

For decades, Amici have been tracking the federal law and policy governing the BIE, as well as the BIE’s administration of schools and education programs. They are keenly aware of the BIE’s numerous systemic shortcomings. Plaintiffs’ APA claims do not mention, much less seek to resolve, any of the BIE’s persistent and widespread systemic deficiencies. On the contrary, Plaintiffs challenge the

² For simplicity’s sake, this brief uses only the term BIE, but acknowledges that before August 29, 2006, the BIE was known as the Office of Indian Education Programs, and was located within the Bureau of Indian Affairs (BIA). *See About Us*, <https://www.bie.edu/topic-page/bureau-indian-education>, (last visited July 2, 2021).

BIE's provision of basic education at *one* of the 53 schools that BIE operates: HES.³ ER Dkt. 23-6 at 4-ER-470, *et seq.* Plaintiffs' APA claims make no reference to the 52 other schools operated by BIE or to any practices occurring at those other schools, and they seek to remedy nothing other than unlawful basic education conditions at HES. *Id.*

Contrary to the District Court's unsupported conclusion that Plaintiffs' claims constitute a systemic challenge, Plaintiffs' TAC enumerates nineteen "unlawful failures" regarding the BIE's "obligations to provide an adequate education to *Havasupai children*." ER Dkt. 23-6 at 4-ER-470 (emphasis added). This list includes alleged failures to provide HES students with educational instruction in "social studies," "science," "computer literacy," and "fine arts," as well as the BIE's failure to provide Student Plaintiffs with "adequate textbooks." *Id.* Thus, Plaintiffs' TAC contains run-of-the-mill claims under the APA, which allows a party "suffering legal wrong because of agency action or adversely affected or aggrieved by agency action" to seek judicial review. 5 U.S.C. § 702. By alleging precise deficiencies in the education services at HES, Plaintiffs' TAC raises discrete and finite claims over

³ According to its website, the BIE directly operates 53 elementary and secondary schools. The BIE funds another 130 elementary and secondary schools that are operated by tribes pursuant to contracts and grants. *See About Us*, <https://www.bie.edu/topic-page/bureau-indian-education>, (last visited July 2, 2021).

which the District Court had jurisdiction under the APA. The District Court's decision to the contrary should be reversed.

ARGUMENT

THE BUREAU OF INDIAN EDUCATION'S SYSTEMIC FAILURES ARE WELL-DOCUMENTED, BUT THEY ARE NOT AT ISSUE IN THIS CASE

Located within the U.S. Department of the Interior (Interior), the BIE is a troubled agency permeated with systemic failures. Amici will describe some of these systemic failures, as they are important background and context for this litigation. In so doing, Amici demonstrate that this lawsuit does not raise, or seek to remedy, these systemic failures. In fact, the systemic failures are conspicuously absent from Plaintiffs' allegations.

A. The BIE's General Systemic Failures, Acknowledged By Congress In The Education Amendments Of 1978, And As Yet Unrectified, Are Not Raised In This Case

The BIE is governed primarily by a statutory framework that dates back to 1978. When Congress amended the Elementary and Secondary Education Act (ESEA) of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965), with the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143 (1978), it added to ESEA a new Title XI, entitled Indian Education. Even then, "[r]ecognizing the Bureau's poor performance," the new Title was intended "to provide a framework for correcting the severe educational and management deficiencies which have thwarted

the delivery of quality education to Indians.” Report by the Comptroller General, U.S. General Accounting Office, to the Chairman, Committee on Governmental Affairs, U.S. Senate, *Should the Bureau of Indian Affairs Continue to Provide Educational Services to Indian Children?*, CED-80-72 (Apr. 23, 1980). “Title XI provides for substantive, structural and procedural changes needed in BIA education.” *Id.* at 4.

A half century later, and to the detriment of generations of students at BIE schools, few if any of the needed changes have materialized. As the U.S. Senate has recognized, “[e]fforts to reform the BIE have been unsuccessful.” S. Rep. No. 114-380, 114th Cong., 1st Sess., 2016 WL 6901962, at *5 (2016). In the last decade alone, the BIE’s multiple, continuing and large-scale deficiencies are detailed in over 45 congressional hearings and major government reports -- including the BIE’s own reports.⁴

In 2013, for instance, the Government Accountability Office (GAO) released a comprehensive report that made multiple recommendations to improve the BIE. U.S. Gov’t Accountability Off., GAO-13-774, *Indian Affairs: Better Management and Accountability Needed to Improve Indian Education* (2013), <https://www.gao.gov/products/gao-13-774>. The recommendations were based on

⁴ Some but not all of the hearings and reports are cited in this brief; accordingly, a fuller list of pertinent selected hearings and reports is attached hereto as an Appendix.

systemic administrative and management deficiencies that included a fragmented administrative structure; frequent leadership and employee turnover; poor communication; and contracting delays. *Id.* at 17-26. All recommendations met with Interior’s concurrence. *Id.* at 27. But BIE officials were unable to provide the GAO with a “specific plan articulating the strategies they will use to achieve BIE’s mission of improving education for Indian students....Without such performance measures, BIE ... cannot be held accountable for meeting agency goals.” *Id.* at 22-23.

One year later, a Cabinet-level-directed BIE Study Group echoed the GAO’s findings of historic and widespread “systemic issues within the BIE.” *Findings and Recommendations Prepared by the Bureau of Indian Education Study Group Submitted to the Secretaries of the Departments of the Interior and Education*, at 2, (June 27, 2014, as revised July 9, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Study-Group-Blueprint-DOI-FINAL.pdf>. Subsequently, in its own report, the BIE admitted that it should undergo major systemic changes. *Blueprint for Reform Implementation*, <https://www.bie.edu/topic-page/blueprint-reform-implementation>, (last visited July 2, 2021). “[C]rumbling infrastructure, failure to include tribal nations in the decision-making process, [and] lack of access to broadband...contribute to the urgency of the situation.” *Id.*

Significantly for purposes of this case, none of these deficiencies – a fragmented administrative structure, frequent leadership and employee turnover, poor communication, contracting delays, crumbling infrastructure, failure to include tribal nations in the decision-making process, and lack of access to broadband -- or anything like them, are mentioned in Plaintiffs’ TAC. *See* ER Dkt. 23-6 at 4-ER-470.

B. The Systemic Poor And Unsafe BIE School Conditions Are Not At Issue In This Case

Following 2014 oversight hearings on the BIE, the Senate and House held further oversight hearings that focused on BIE school facilities. As Senator Barrasso, then-Chairman of the Senate Committee on Indian Affairs, stated, “Indian children are some of the most at-risk children in the Nation. The school conditions many of them face on a daily basis are deplorable.” Hearing before the U.S. Senate Committee on Indian Affairs, *Bureau of Indian Education: Examining Organizational Challenges in Transforming Educational Opportunities for Indian Children*, S. Hrg. 114-170, 114th Cong., 1st Sess., at 1 (May 13, 2015) <https://www.govinfo.gov/app/details/CHRG-114shrg98435/CHRG-114shrg98435> (Statement of Sen. Barrasso). House members also heard about the “deplorable, deplorable conditions” of BIE schools. “The details we have learned are shocking: falling ceilings, broken water heaters, electrical hazards, rotten floors, and rodent-infested classrooms. At a school I visited earlier this year, blankets hang over the

doors in a desperate attempt to keep out the cold air.” Hearing before the U.S. House of Representatives Committee on Education and the Workforce, *Examining the Federal Government’s Mismanagement of Native American Schools*, Serial No. 114-14, 114th Cong. 2nd Sess., at 2 (May 14, 2015) (Statement of Rep. Kline).

Yet little had changed one year later when Interior’s Office of the Inspector General reported again that BIE schools “are well recognized—by Congress, bureau personnel, school officials, and the media—as broadly in poor condition ...” including “major facility deficiencies and health and safety concerns,” such as “asbestos, radon, and mold,” “electrical issues,” and “problems with fire safety issues.” U.S. Department of the Interior, Office of the Inspector General, *Condition of Indian School Facilities*, Report No. C-EV-BIE-0023-2014, at 1 (Sept. 30, 2016), https://www.doioig.gov/sites/doioig.gov/files/FinalEval_BIESchoolFacilitiesB_093016.pdf. BIE’s management of these facilities “has several systemic programmatic weaknesses.” *Id.*

In July 2019, the U.S. House Interior, Environment, and Related Agencies Appropriations Subcommittee held an Oversight Hearing on Indian Education Construction, at which Subcommittee Chair Representative Betty McCollum, stated, “In 2016 and 2017, this Committee directed BIE to provide a report on a comprehensive, long-term planning approach for every campus and component education facility. We still have not received this report.” *Chair McCollum*

Statement at Oversight Hearing on Indian Education Construction, <https://appropriations.house.gov/news/statements/chair-mccollum-statement-at-oversight-hearing-on-indian-education-construction> (last visited July 2, 2021). As recently as March 2021, the BIE remained on the GAO list of “High-Risk” agencies due to its “limited capacity to support and oversee schools and ensure accountability for school construction projects.” U.S. Gov’t Accountability Off., GAO 21-119SP, *High Risk Series: Dedicated Leadership Needed to Address Limited Progress in Most High-Risk Areas*, at 108 (2021), <https://www.gao.gov/assets/gao-21-119sp.pdf>.

The systemic problems plaguing BIE’s administration of school conditions — crumbling schools, electrical and fire safety issues, asbestos, radon, rot, mold, rodents, *etc.* — could be grounds for broad remedial relief by litigants. But not one of them is mentioned in Plaintiffs’ TAC. *See* ER Dkt. 23-6 at 4-ER-470.

C. The Systemic Failure To Consult With Tribes Is Not Raised In This Case

Another major BIE systemic shortcoming, documented for decades but conspicuously absent from this litigation, is the routine violation of a stringent tribal consultation provision imposed by Congress on BIE precisely because the BIE is incapable of proper self-direction in this area. *See Hearing on S. 1645, to Reauthorize Certain Indian Educational Programs*, before the Select Committee on Indian Affairs, 100th Cong., 1st Sess., at 45 (Aug. 17, 1987) (BIE often acts “without

regard to the trust responsibility, without regard to laws that require consultation with Indian tribal leaders and Indian educators on major program changes[,] without regard to factual basis for assertions made about the quality of education in BIA-operated schools and without regard to the real educational needs of the Indian people”) (Statement of Sen. Daschle). Senator Daschle continued, “[s]imply put, [we will] ... make[] some very serious requirements on [BIE’s] consultation.” *Id.*

Accordingly, as part of the 1988 reauthorization of the ESEA, Congress added the following mandate to the Indian Education provisions: “All actions under [these provisions] shall be done with active consultation with tribes.” Pub. L. No. 100-297, § 5111(b)(1), 102 Stat. 130 (emphasis added), *codified at* 25 U.S.C. § 2011(b). By any standard, this is one of the strictest tribal consultation mandates ever enacted by Congress, *see generally* C. Routel and J. Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J.L. Reform 417 (Winter 2013), and one which to this day the BIE continues to ignore. *See, e.g., Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052, 1060 (D.S.D. 2016) (finding that the BIE “once again” failed to consult meaningfully with a tribe regarding a proposed restructuring of the BIE); *see also Eight N. Indian Pueblos Council, Inc. v. Kempthorne*, No. CV 06-745 WJ/ACT, 2006 WL 8443876 (D.N.M. Sept. 15, 2006) (BIE failed to consult on earlier proposed restructuring plan); *accord Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D. 2006).

Most recently, the BIE's consultation failings have continued with respect to the COVID-19 pandemic. *See, e.g.*, Oversight Hearing before the U.S. House of Representatives, Committee on Natural Resources, Subcommittee for Indigenous Peoples of the United States, *Examining the Bureau of Indian Education's School Reopening Guidance During the COVID-19 Pandemic*, Serial No. 116-40, 116th Cong., 2nd Sess., at 31 (Sept. 10, 2020) <https://www.congress.gov/event/116th-congress/house-event/LC65588/text?s=1&r=13> (last visited July 2, 2021) (in response to a question from Committee Member Rep. Rueben Gallego about whether the BIE had properly consulted with tribal governments, school administrators, and parents regarding its decision to fully re-open BIE-operated schools for the 2020-2021-school year, Witness Joe Garcia, Co-Chair, Tribal Interior Budget Council, Education Subcommittee, National Congress of American Indians, stated "I don't believe so, sir."). Plaintiffs' TAC does not raise the BIE's chronic and systemic failure to adhere to tribal consultation obligations. *See* ER Dkt. 23-6 at 4-ER-470.

CONCLUSION

The briefs filed by Plaintiffs and other amici address the merits of the APA claims in this case. As those briefs explain, the APA is an appropriate vehicle created by Congress by which Student Plaintiffs can bring their federal claims to the attention of the judiciary. The courthouse door should not be slammed shut on them.

They bring precise allegations about specific deficiencies at HES, and seek precise relief. The finite and discrete allegations contained in Counts I and II of the TAC—which challenge *only* basic educational practices and conditions at HES—are nothing like the systemic challenges, many of which are discussed in this brief, that *could have been made* against the BIE. The District Court’s conclusion to the contrary should be reversed.

DATED this 2nd day of July 2021.

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APPENDIX: LIST OF SELECTED MAJOR CONGRESSIONAL HEARINGS AND OTHER REPORTS ON THE SYSTEMIC FAILURES OF THE BUREAU OF INDIAN EDUCATION, 2013 TO PRESENT

2013

1. U.S. Government Accountability Office, Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Management Challenges Continue to Hinder Efforts to Improve Indian Education*, GAO-13-342T (February 27, 2013) <https://www.gao.gov/products/gao-13-342t>
2. U.S. Government Accountability Office, Report to the Chairman, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Better Management and Accountability Needed to Improve Indian Education*, GAO-13-774 (September 2013) <https://www.gao.gov/products/gao-13-774>

2014

3. U.S. Senate, Oversight Hearing Before the Committee on Indian Affairs, *Indian Education Series: Ensuring the Bureau of Indian Education Has The Tools Necessary To Improve*, S. Hrg. 113-523, 113th Cong., 2nd Sess. (May 21, 2014) <https://www.govinfo.gov/app/details/CHRG-113shrg92271/CHRG-113shrg92271>
4. *Findings and Recommendations Prepared by the Bureau of Indian Education Study Group Submitted to the Secretaries of the Departments of the Interior and Education* (June 27, 2014, as revised July 9, 2014) <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Study-Group-Blueprint-DOI-FINAL.pdf>
5. U.S. Government Accountability Office, Report to the Chairman, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Bureau of Indian Education Needs to Improve Oversight of School Spending*, GAO-15-121 (November 2014) <https://www.gao.gov/products/gao-15-121>

2015

6. U.S. Government Accountability Office, Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Preliminary Results Show Continued Challenges to the Oversight and Support of Education Facilities*, GAO-15-389T (February 27, 2015) <https://www.gao.gov/products/gao-15-389t>
7. U.S. House of Representatives, Committee on Education and the Workforce, Subcommittee on Early Childhood, Elementary, and Secondary Education, *Examining the Challenges Facing Native American Schools*, Serial No. 114-10, 114th Cong., 1st Sess. (April 22, 2015) <https://www.govinfo.gov/app/details/CHRG-114hhrg94209/CHRG-114hhrg94209>
8. U.S. Government Accountability Office, Testimony Before the Subcommittee on Early Childhood, Elementary, and Secondary Education, Committee on Education and the Workforce, House of Representatives, *Indian Affairs: Further Actions on GAO Recommendations Needed to Address Systemic Management Challenges with Indian Education*, GAO-15-539T (April 22, 2015) <https://www.gao.gov/products/gao-15-539t>
9. U.S. Government Accountability Office, Testimony Before the Committee on Indian Affairs, U.S. Senate, *Indian Affairs: Further Actions on GAO Recommendations Needed to Address Systemic Management Challenges with Indian Education*, GAO-15-597T (May 13, 2015) <https://www.gao.gov/products/gao-15-597t>
10. U.S. Senate, Hearing Before the Committee on Indian Affairs, *Bureau of Indian Education: Examining Organizational Challenges in Transforming Educational Opportunities for Indian Children*, S. Hrg. 114-170, 114th Cong., 1st Sess. (May 13, 2015) <https://www.govinfo.gov/app/details/CHRG-114shrg98435/CHRG-114shrg98435>
11. U.S. House of Representatives, Hearing Before the Committee on Education and the Workforce, *Examining the Federal Government's Mismanagement of*

Native American Schools, Serial No. 114-14, 114th Cong. 1st Sess. at 2 (May 14, 2015) <https://www.govinfo.gov/app/details/CHRG-114hhr94508/CHRG-114hhr94508>

12. U.S. Senate, Hearing Before the Committee on Indian Affairs, *S. 410, S. 1163, and S. 1928*, S. Hrg. 114-192, 114th Cong., 1st Sess. (November 18, 2015) <https://www.govinfo.gov/app/details/CHRG-114shrg98984/CHRG-114shrg98984>

2016

13. U.S. Government Accountability Office, Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Key Actions Needed to Ensure Safety and Health at Indian School Facilities*, GAO-16-313 (March 2016) <https://www.gao.gov/products/gao-16-313>
14. U.S. Government Accountability Office, Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives, *Indian Affairs: Key Actions Needed to Ensure Safety and Health at Indian School Facilities*, GAO-16-391T (March 16, 2016) <https://www.gao.gov/products/gao-16-391t>
15. U.S. Senate, Hearing Before the Committee on Indian Affairs, *S. 2304, S. 2468, S. 2580, and S. 2711*, S. Hrg. 114-287, 114th Cong., 2nd Sess. (April 6, 2016) <https://www.govinfo.gov/app/details/CHRG-114shrg20548/CHRG-114shrg20548>
16. *Blueprint for Reform Implementation*, <https://www.bie.edu/topic-page/blueprint-reform-implementation>
17. U.S. Department of the Interior, Office of the Inspector General, *Condition of Indian School Facilities*, Report No.: C-EV-BIE-0023-2014 (September 2016) https://www.doioig.gov/sites/doioig.gov/files/FinalEval_BIESchoolFacilitiesB_093016.pdf

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,624 words, excluding the items exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in Microsoft Word using Times New Roman font, a proportionately spaced typeface, and 14-point font.

Dated this 2nd day of July, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically filed the foregoing brief *amici curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case were registered CM/ECF users at the time of this filing, and service will be accomplished by the appellate CM/ECF system.

Dated this 2nd day of July, 2021.

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