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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

M.W., by and through her guardian ad litem, HOPE W., and the AMERICAN DIABETES ASSOCIATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY; ROBERT SPEER, Acting Secretary of the Army, in his official capacity; UNITED STATES ARMY FAMILY AND MORALE, WELFARE AND RECREATION PROGRAMS; and UNITED STATES ARMY CHILD, YOUTH AND SCHOOL SERVICES.

Defendants.

Case No. 5:16-cv-04051-LHK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: December 7, 2017
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Hon. Lucy H. Koh

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STATEMENT OF ISSUES

1. Where Defendants have revised, but have failed to correct, the U.S. Army's discriminatory and exclusionary policy governing children with diabetes in its Child, Youth and School Services programs, do Plaintiffs have standing to sue based on harm predating the revised policy?
2. Does Plaintiff M.W. have standing to challenge Defendants' ongoing discrimination against children with diabetes where Defendants have voluntarily ceased their discrimination against her, but they may resume at any time, and where she is currently subject to Defendants' revised policy?
3. Does Plaintiff the American Diabetes Association have standing to challenge Defendants' ongoing discrimination against members and constituents with diabetes based on harm to itself and to its members, where it has diverted resources due to both the original and revised policies?
4. Do Plaintiffs' allegations of ongoing discrimination against children with diabetes plausibly state a claim for relief under Section 504 of the Rehabilitation Act?

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I. INTRODUCTION

This civil rights action, brought by M.W., an eight-year-old child with diabetes, and the American Diabetes Association ("the Association"), challenges Defendants' ongoing discrimination against children with diabetes in the U.S. Army's Child, Youth and School Services ("CYSS") programs. In response to this litigation, which began in July 2016 following over a decade of advocacy by the Association, Defendants revised their discriminatory policies, but their half-hearted gesture toward compliance with disability rights laws has failed to correct the violations that Plaintiffs challenge. Defendants' revised policy interposes a burdensome, multi-tier review process between families and the diabetes-related accommodations they need – in particular, insulin. Even assuming all prescribed timelines are followed, it leads to unreasonable and unnecessary delays of up to four months without childcare, deters families from enrolling children in CYSS programs altogether, and may even force families to accept unreasonable and potentially unsafe insulin practices for their children.

The First Amended Complaint ("FAC") should not be dismissed for lack of subject matter jurisdiction because both M.W. and the Association retain standing to sue – M.W. as a child injured by Defendants' discriminatory policies and the Association both on its own behalf and on behalf of affected members. Defendants' mid-litigation revision of their policies does not moot Plaintiffs' challenge to Defendants' discrimination because Defendants cannot demonstrate that there is no reasonable expectation that the wrong challenged will recur. Indeed, it has *already* recurred, because Defendants' revised policy continues the pattern of discrimination. Moreover, Plaintiffs' claims based on the revised policy are ripe because M.W. and the Association's member and constituent families are now subject to this new policy. In addition, Plaintiffs adequately state a claim for relief under Section 504 of the Rehabilitation Act because they plausibly allege that Defendants' policies discriminate against children with diabetes.

For these reasons, Defendants' motion to dismiss should be denied in its entirety.

II. STATUTORY AND REGULATORY BACKGROUND

Plaintiffs bring this action under Section 504 of the Rehabilitation Act, which provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the

> participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794(a). The implementing Department of Defense ("DOD") regulations bar Defendants, in providing any aid, benefit, or service, such as childcare, from "[d]eny[ing] a qualified handicapped person the opportunity to participate in or benefit from [it]," "[a]fford[ing] [her] an opportunity to participate in or benefit from [it] that is not equal to that afforded others," "[p]rovid[ing] [her] with an aid, benefit, or service that is not as effective as that afforded to others," or "[o]therwise limit[ing] [her] in the enjoyment of any right, privilege, advantage or opportunity granted to others . . . ." 32 C.F.R. § 56.8(a)(2)(ii)-(v). The DOD regulations further prohibit Defendants from "us[ing], directly or through contractual or other arrangements, criteria or methods of administration that: (i) Subject qualified handicapped persons to discrimination on the basis of handicap; [or] (ii) Defeat or substantially impair accomplishment of the objectives of the . . . program or activity with respect to handicapped persons." 32 C.F.R. § 56.8(a)(6)(i)-(ii).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

1. U.S. Army Child, Youth and School Services Provides Quality Childcare Services to Eligible Families

Defendant CYSS is a division of the Army that operates quality programs and activities for eligible children and youth on military bases. FAC, ECF No. 66, ¶¶ 32, 38-39. These programs include daycare services, in-home childcare programs, before- and after-school care, summer camps, and youth sports, and are designed to account for the unique needs of military families. *Id.* Particularly for families on military bases in remote areas, CYSS offers unique programs and activities that are close to home and work and start far earlier in the day than non-CYSS programs. FAC ¶ 39. In some cases, CYSS is the only available childcare option. *Id.*

2. Pursuant to Defendants' Longstanding Policies, CYSS Has Failed to Address the Needs of Children with Diabetes in Its Programs.

At the time this litigation began, Defendants' policy governing diabetes-related care in CYSS programs and activities was codified in Army Regulation 608-10 and a 2008

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memorandum interpreting it (together, the "Original Policy"), which prohibited CYSS personnel from providing a range of essential diabetes-related accommodations to children with diabetes, including counting carbohydrates, administering insulin, and administering a potentially lifesaving glucagon injection. *Id.* By expressly prohibiting these accommodations, which are both routine and necessary to manage type 1 diabetes, Defendants effectively excluded children with diabetes from CYSS programs. FAC ¶¶ 8, 36. Families of children with type 1 diabetes who are eligible for CYSS programs report that the Original Policy's blanket prohibition on diabetes-related accommodations meant that CYSS simply was not an option for them, that their children were barred from CYSS programs due to their diabetes-related needs, and even that they saw no point in attempting to enroll. *See* FAC ¶¶ 40-41, 56-61; Exhibit A, Declaration of Sarah Fech-Baughman ("Fech-Baughman Decl."), ¶¶ 4-5; Exhibit B, Declaration of Hope W. ("Hope W. Decl."), ¶¶ 2, 5-8, 10-11; Exhibit C, Declaration of Elizabeth Bendlin ("Bendlin Decl."), ¶¶ 2-9, 14-20; Exhibit D, Declaration of Nataliya Brantly ("Brantly Decl."), ¶¶ 2-5, 10, 12-13, 19-20, 27-32; Exhibit E, Declaration of Jessica Erwin ("Erwin Decl."), ¶¶ 2-4, 6-11, 20-26; Exhibit F, Declaration of Shantel Shackleford ("Shackleford Decl."), ¶¶ 2, 3, 5-6, 8-10, 12-13. This exclusion of children with diabetes from CYSS programs under the Original Policy caused families emotional distress and left them without viable childcare options, forcing parents to reduce work hours or leave their jobs entirely in order to care for their children. FAC ¶¶ 40, 44, 59-62, 82; Hope W. Decl. ¶¶ 10-11, 13-14; Bendlin Decl. ¶¶ 9, 12-16; Brantly Decl. ¶¶ 6, 13, 16-17, 21, 25, 28-29, 31-32, 34; Erwin Decl. ¶¶ 7-10, 12-13, 19; Shackleford Decl. ¶¶ 8, 10.

3. Defendants' Recently Revised Policies Continue to Fail to Address the Needs of Children with Diabetes in CYSS Programs.

As a result of this case, Defendants issued revised policy documents in May and June 2017. FAC ¶¶ 9, 43. These documents (together, "Revised Policy") include an updated version of Army Regulation 608-10 (Defendants' Exhibit A, ECF No. 71-3); a June 2, 2017 memorandum entitled "Diabetes-Related Accommodations in Child, Youth, and School Services Programs," (Defendants' Exhibit B, ECF No. 71-4); and a June 12, 2017 memorandum entitled "Accommodation of Children and Youth with Diabetes in Army Child, Youth, and School

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Services Programs," (Defendants' Exhibit C, ECF No. 71-5, hereafter "Policy Memo").[1] FAC ¶ 43. The regulation provides general guidance on administering medication and performing caregiving health practices in CYSS programs, whereas the policies and procedures specific to diabetes-related care appear only in the two policy memoranda.

The Revised Policy lays out a lengthy multi-tiered review process to access diabetes-related accommodations for children in CYSS programs and activities. FAC ¶ 4. A parent or guardian seeking any diabetes-related accommodation, no matter how straightforward, confronts the following steps: (1) completion of documentation by a medical provider; (2) review by a multi-disciplinary team ("MIAT") after up to thirty days; (3) review by a local CYSS Coordinator after up to four working days; and, assuming the accommodations are approved, (4) admission after another period of up to thirty days. FAC ¶ 46; Policy Memo § 4.d-4.f. Even a teenager who only needs staff to be trained to administer glucagon, a rescue medication, in an emergency might wait up to ten weeks to access a CYSS program. *See id.*

Each family that needs accommodations involving calculating insulin dosage or administering insulin –essential tasks in managing type 1 diabetes –also faces additional hurdles: (5) a compulsory legal review to be completed after up to five working days; (6) review by the Garrison Commander to be completed after up to five working days; (7) processing by Installation Management Command ("IMCOM") after up to five working days; and (8) review by the Assistant Chief of Staff for Installation Management ("ACSIM"), including consultation with the Office of the Surgeon General, after up to fifteen working days. FAC ¶¶ 33-35, 47; Policy Memo §§ 3-5, 8. The total waiting period, assuming that the accommodations are approved, is up to four months. *Id.* To be clear, for each individual child who needs assistance with insulin, whether that entails administering injections or supervising the use of an insulin pump, at least eight individuals, teams, or offices must weigh in over a period of months, and only the last of them has any authority to approve the requested accommodation. *Id.*

The Revised Policy's timeframes require families to forgo CYSS programs for up to four

[1] Plaintiffs do not dispute that these three policy documents are incorporated by reference into the First Amended Complaint. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

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months while they wait for insulin-related accommodations or, if they are unwilling to go through the process, seek alternative childcare. FAC ¶¶ 46-47, 80-81, 97-98; Bendlin Decl. ¶¶ 19-21; Shackleford Decl. ¶ 23; Erwin Decl. ¶¶ 28-29; Exhibit G, Declaration of De'Lori Gomes ("Gomes Decl."), ¶¶ 16-17. This exclusion, whether temporary or permanent, means that the very purpose of CYSS programs is not realized for families of children with diabetes. *See* FAC ¶ 38 (describing CYSS's purpose to "reduc[e] the conflict between mission readiness and parental responsibility"); Shackleford Decl. ¶ 23. Although the Revised Policy pays lip service to the burden that an extended period without childcare imposes on families by allowing for interim accommodation plans, these plans omit insulin-related accommodations. Policy Memo § 4.f.2; FAC ¶¶ 44-47, 80-82; Bendlin Decl. ¶¶ 21-22; Brantly Decl. ¶ 39; Gomes Decl. ¶¶ 16-17; Erwin Decl. ¶ 29; Hope W. Decl. ¶ 24. As a result, parents must leave work and travel to CYSS facilities to administer insulin themselves. FAC ¶ 14, 40, 44, 80, 82; Fech-Baughman Decl. ¶¶ 6-7; Bendlin Decl. ¶ 21; Erwin Decl. ¶¶ 28-29; Gomes Decl. ¶¶ 15-17; Shackleford ¶ 19-23; Hope W. Decl. ¶ 24. Not only is this practice considered unreasonable under Army regulations, but it is also potentially unsafe for children with diabetes. *See* FAC ¶ 44 (Army Regulation 608-10 states that "[i]t is not reasonable to expect parents to leave their work site" to administer medication); FAC ¶ 14; Fech-Baughman Decl. ¶ 6; Brantly Decl. ¶¶ 32-33; Gomes Decl. ¶ 17.

Even if the Revised Policy worked as intended, the timeframes could result in delays beyond four months. For instance, gaps in the review process invite further delay (i.e., although an installation attorney must weigh in within five days of receipt of relevant documentation, the policy does not indicate who must send the documentation or when and how it must be delivered; therefore the process could stall indefinitely at this stage without ever violating the timelines). *See* Policy Memo § 4.g. Furthermore, there is neither an internal mechanism nor an appeals process to ensure compliance with deadlines, and the Army has routinely failed to meet deadlines it has set for itself. *See generally* Policy Memo; *see also* FAC ¶ 48; Fech-Baughman Decl. ¶ 6; Brantly Decl. ¶¶ 23-27, 29; Shackleford Decl. ¶¶ 15-22.

Just this month, one family seeking to enroll a child with diabetes in after-school care got stuck at step one. *See generally* Shackleford Decl. Although the Policy Memo states that when

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a parent or guardian requests diabetes-related accommodations, CYSS "will immediately provide the parent(s)/legal guardian(s) with written materials explaining the process . . . and copies of the [forms] to be completed by the child/youth's health care providers," Policy Memo § 4.c, it took two weeks, three in-person visits, and multiple phone calls just for a staff member to locate the correct forms to begin the process. Shackleford Decl. ¶¶ 14-21. Similarly, staff interacting with a second parent currently seeking care are completely unaware of the existence of the Revised Policy, let alone the timelines the Army has committed to follow. Gomes Decl. ¶¶ 5-15.

4. Plaintiff M.W. Has Been and Remains Subject to Defendants' Policies that Fail to Address the Needs of Children with Diabetes in CYSS Programs

Plaintiff M.W. is an eight-year-old girl who is eligible for CYSS programs and first entered CYSS care before she was diagnosed with type 1 diabetes on June 14, 2015. FAC ¶¶ 22-23, 51 53, 56; Hope W. Decl. ¶¶ 4-5. After M.W.'s diagnosis, her mother, Hope W., unsuccessfully sought diabetes-related accommodations so that M.W. could access after-school care beginning in the fall of 2015, but, due to the Original Policy, CYSS refused to provide critical accommodations. FAC ¶¶ 23-24, 52, 57-58; Hope W. Decl. ¶¶ 6-8. Without them, M.W.'s parents could not send her to CYSS. FAC ¶ 59; Hope W. Decl. ¶ 10. Because they could not find an appropriate alternative, M.W.'s father had to work reduced hours to could care for M.W. FAC ¶ 60; Hope W. Decl. ¶ 10. M.W. lost the opportunity to participate in CYSS programs with her friends, and was devastated because she was afraid that the adults at CYSS didn't care about her anymore. FAC ¶¶ 61-62; Hope W. Decl. ¶ 11.

On May 23, 2017, almost two years after Hope W. first sought accommodations and ten months after Plaintiffs filed this case, Defendants issued a memorandum approving M.W.'s accommodations. FAC ¶ 67; Hope W. Decl. ¶ 13. M.W. began after-school care at CYSS on August 2, 2017, her first day of third grade.[2] Hope W. Decl. ¶¶ 14-15. Per the May 23, 2017 memorandum, M.W.'s family must go through a MIAT review and reassessment of her

[2] Contrary to Defendants' allegation that M.W.'s parents delayed her enrollment, M.W. did not enroll until August 2, 2017, because: (1) her parents sought clarification about the accommodations offered, the contract nurse(s) who would be assigned, and the anticipated training, which occurred on July 31; and (2) M.W. did not need care until school started after summer vacation on August 2, 2017. Hope W. Decl. ¶¶ 15-17.

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accommodations semiannually and, if her needs change, they must submit documentation for CYSS review before her accommodations can be updated. FAC ¶ 69; Hope W. Decl. ¶¶ 19, 24.

M.W.'s need for insulin-related accommodations may change for two reasons. First, as a young child, M.W. is vulnerable to and indeed already showing signs of diabetes "burnout," a psychological response to type 1 diabetes that often leads doctors to transition patients from an insulin pump to injections for a period of time to offer a break from being continuously attached to medical devices. Hope W. Decl. ¶¶ 20-22; Exhibit H, Declaration of Jill Weissberg-Benchell ("Weissberg-Benchell Decl."), ¶¶ 4-7, 9. Second, because M.W. has relatively low body fat she may need to temporarily transition to injections to protect her skin and preserve infusion sites for ongoing use. Hope W. Decl. ¶¶ 23; Weissberg-Benchell Decl. ¶¶ 8-9. In either situation, M.W. would need new accommodations and would find herself at the beginning of the Revised Policy's accommodations process. FAC ¶ 68; Hope W. Decl. ¶ 24. In any event, because CYSS personnel have represented to Hope W. that the contract nurses who currently support M.W. may not be available in the future due to funding constraints, M.W.'s accommodations are in jeopardy going forward even if her needs remain the same. Hope W. Decl. ¶ 18.

5. The American Diabetes Association and its Members Have Been and Continue to Be Injured by Defendants' Policies that Fail to Address the Needs of Children with Diabetes in CYSS Programs

Plaintiff the American Diabetes Association is a nationwide nonprofit membership organization that addresses diabetes treatment and the impact of diabetes on people's daily lives. FAC ¶ 26; Fech-Baughman Decl. ¶¶ 2-3. In pursuit of its mission to improve the lives of all people affected by diabetes, the Association offers community programs; advocates for laws, regulations, and policies that keep children with diabetes safe at school; advises companies and organizations concerning best practices for caring for children with diabetes; creates diabetes-related resources; and provides legal information and assistance to individuals and families experiencing diabetes-related discrimination. FAC ¶ 26; Fech-Baughman Decl. ¶ 3.

In line with its mission, over the last twelve years the Association has assisted numerous families who reached out after experiencing discrimination due to Defendants' Original and Revised Policies. FAC ¶ 72-75, Fech-Baughman Decl. ¶¶ 4-6, 12, 14. The Association's Legal

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Advocacy Department has devoted substantial time and resources to investigating Defendants' pattern of discrimination and assisting affected individuals, including two who contacted the Association since Defendants' issued their Revised Policy on June 12, 2017 – one on June 26, 2017, and the other on August 10, 2017. FAC ¶¶ 72-75; Fech-Baughman Decl. ¶¶ 4-6, 9-14. In addition, staff members have spent time meeting internally to explore strategies to respond to Defendants' policies and to preparing for, attending, and following up after a meeting with Army staff in an ultimately unsuccessful effort to advocate for affected families. FAC ¶¶ 74-75; Fech-Baughman Decl. ¶¶ 12-13. Because the Association has an ambitious, multifaceted mission and limited resources, including just two attorneys available to assist constituents on an individual basis, devoting these resources to addressing the Army's ongoing discrimination compromises the Association's ability to assist constituents facing diabetes-related discrimination in other settings, such as employment, education, public accommodations, prisons, and encounters with law enforcement. FAC ¶¶ 72; Fech-Baughman Decl. ¶¶ 3, 4-6, 9-14.

Among the numerous constituents of the Association who are affected by Defendants' policies are at least eight Association members, including Hope W., whose eligible children have been excluded from CYSS programs and activities or who were deterred from enrolling their eligible children because of Defendants' policies. FAC ¶¶ 78-83; Fech-Baughman Decl. ¶¶ 17-20; Hope W. Decl. ¶¶ 3, 7-24; Bendlin Decl. ¶¶ 7-22; Brantly Decl. ¶¶ 7, 12-13, 19-20, 28, 35-40. Of these families, at least three have children who are still eligible for and/or participating in CYSS programs, and who are therefore subject to Defendants' Revised Policy. Fech-Baughman Decl. ¶ 20; Hope W. Decl. ¶ 18; Bendlin Decl. ¶ 17; Brantly Decl. ¶ 38. At least one member is currently deterred from seeking to enroll her child in CYSS programs because, having reviewed the Revised Policy and, in particular, the process and timelines involved, she believes that it would be futile to attempt to secure accommodations for her son. Bendlin Decl. ¶¶ 17-22.

B. Procedural Background

Plaintiffs M.W. and the Association filed the instant action on July 19, 2016, alleging violations of Section 504 of the Rehabilitation Act under the Original Policy. ECF No. 1. Defendants answered on September 23, 2016. ECF No. 20. The Court granted Defendants'

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unopposed motion for a stay of this litigation on January 5, 2017, and the parties engaged in mediation for a period of several months. ECF Nos. 39-41. After Defendants' issued their Revised Policy in June 2017, the parties stipulated to the filing of Plaintiffs' First Amended Complaint, which incorporates allegations concerning the Revised Policy. ECF Nos. 64, 66. Defendants now move to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. ECF No. 71.

I. LEGAL STANDARDS

A motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In this situation, "the court assumes the allegations are true and draws all reasonable inferences in the plaintiff's favor." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). In a factual attack, however, "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction," and "the district court may review evidence beyond the complaint." *Safe Air for Everyone*, 373 F.3d at 1039. "Once the moving party has converted the motion to dismiss into a factual motion . . . , the party opposing the motion must furnish . . . evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.*

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a complaint need only contain sufficient factual allegations that, when they are accepted as true, it states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard is not a "probability requirement;" it simply "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* In determining whether a plaintiff has met the plausibility standard, the court must accept all well-pleaded factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *OSU Student All. v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012).

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IV. ARGUMENT

A. The Court has Subject Matter Jurisdiction to Decide the Claims Raised in the First Amended Complaint

Plaintiffs have standing to sue, and therefore the Court has subject matter jurisdiction, based on ongoing injury under both the Original and Revised Policies. First, Plaintiffs' claims based on injury under the Original Policy are not moot because Defendants cannot show that there is no reasonable expectation that the discrimination will recur. In fact, it has already recurred because Defendants' Revised Policy still discriminates against children with diabetes. Second, Plaintiffs' claims based on injury under the Revised Policy, which is currently in effect, are ripe. Third, M.W. and the Association have each alleged and established, under both the Original and Revised Policies, an injury in fact sufficient to withstand Defendants' facial and factual attacks on their standing – M.W. as a child injured by Defendants' discriminatory policies and the Association both on its own behalf and on behalf of its injured members.

1. Plaintiffs Have Standing to Challenge Defendants' Ongoing Discrimination Pursuant to Both the Original and Revised Policies

Plaintiffs' operative complaint properly challenges Defendants' ongoing and uninterrupted discrimination against children with diabetes under both the Original and Revised Policies. Defendants' attempt to evade review of their policies by artificially bifurcating Plaintiffs' complaint into "old" allegations that are resolved and therefore off the table and "new" allegations that are too speculative to move forward is unavailing. Plaintiffs have standing to challenge Defendants' continued failure to accommodate children with diabetes both based on harm that predates June 2017 and based on the current impact of the Revised Policy.

a. Defendants' Mid-Litigation Revision of their Policies Does Not Moot Plaintiffs' Discrimination Claims Based on Experiences Before June 2017.

Defendants' decision to rescind the Original Policy following the filing of this lawsuit does not erode Plaintiffs' standing. The voluntary cessation doctrine applies in precisely this circumstance, blocking a defendant's decision to reverse an unlawful policy when litigation is underway from mooting the plaintiff's claims unless defendants can meet the "formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably

be expected to recur." *Friends of the Earth v. Laidlaw Env'tl Servs.*, 528 U.S. 167, 190 (2000).

Courts assessing whether a defendant's voluntary cessation of challenged conduct has mooted the plaintiff's claims "consider whether the change in conduct is accompanied by circumstances indicating the change is a 'genuine' act of 'self-correction,'" rather than a "practical or strategic" attempt to "avoid[] litigation." *Moyle v. Cty. of Contra Costa*, No. 05-cv-02324-JCS, 2007 WL 4287315, at *13 (N.D. Cal. Dec. 5, 2007) (citing *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 565 (7th Cir.1991); *United States v. Government of Virgin Islands*, 363 F.3d 276, 285 (3d Cir.2004)). Where, as here, a government entity has not bound itself through a statutory or regulatory change, courts look to factors including whether a "policy change is evidenced by language that is 'broad in scope and unequivocal in tone,'" whether the change fully addresses the plaintiffs' claims; whether the suit was the "catalyst" for the new policy; how long the new policy has been in place; whether officials have engaged in conduct similar to that challenged by the plaintiffs since the implementation of the new policy; and whether the new policy "could be easily abandoned or altered in the future." *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014) (quoting *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Cir. 2000); *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)).[3] In addition, "[w]here a defendant has not conceded that its past conduct is illegal, courts are less likely to find a cessation of challenged conduct makes the case moot." *Moyle*, 2007 WL 4287315, at *13 (citing *Armster v. United States Dist. Court for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1359 (9th Cir.1986); *Sasnett v. Litscher*, 197 F.3d 290, 291-292 (7th Cir.1999)).

Here, Defendants cannot meet their heavy burden to demonstrate that it is "absolutely clear" that discrimination will not recur and that the change is a genuine act of self-correction. *See Friends of the Earth*, 528 U.S. at 190; *Moyle*, 2007 WL 4287315, at *13. The Revised

[3] Defendants erroneously assert that the *Rosebrock* analysis does not apply here because the Army has amended its regulations. Defs.' Br. 14 n.7. But while Defendants have amended Army Regulation 608-10 to delete language that foreclosed a policy change, the meat of the Revised Policy is contained in policy memoranda, not in regulatory text. Because Defendants have not bound themselves to their Revised Policy "in statutory changes or even in changes in ordinances or regulations," but rather only in policy memoranda, the *Rosebrock* factors apply. 745 F.3d at 971-72.

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Policy is neither "broad in scope" nor "unequivocal in tone," in that it continues to erect disproportionate and unreasonable barriers between children with diabetes and access to CYSS programs. Moreover, the Revised Policy has been in place for only two months, Defendants have not conceded that their past conduct was unlawful, and the speed with which Defendants issued the Revised Policy in an apparent strategic attempt to moot Plaintiffs' claims shows that it could be revisited again at any time. Defendants have made no enforceable commitment either to continue to accommodate M.W. or to keep the Revised Policy in place moving forward.

Weighing most heavily against a finding of mootness is the fact that the Revised Policy comes nowhere near to fully addressing Plaintiffs' claims and, since Defendants issued their Revised Policy, they have continued to engage in conduct similar to that originally challenged. Defendants still systematically discriminate against children with diabetes based on their need for accommodations including, most critically, insulin-related accommodations, by interposing a burdensome, multi-tier process and unreasonable and unnecessary delays between children with diabetes and the services for which they are eligible. *See* FAC ¶¶ 43-50; Gomes Decl. ¶¶ 2-8, 13-17; Shackleford Decl. ¶ 14-23; Brantley Decl. ¶ 35-40; Bendlin Decl. ¶¶ 21-22; Erwin Decl. ¶ 27-29; Hope W. Decl. ¶ 24. In one case, CYSS staff even informed a family that they cannot perform glucose checks, administer insulin, or count carbohydrates – clear evidence that CYSS personnel are still following the Original Policy on some bases.[4] Gomes Decl. ¶¶ 7-8, 13-14.

Where, as here, a defendant has not ended the challenged discrimination but rather has replaced its discriminatory policy with one that, even if less egregious, continues the ongoing pattern of discrimination, the voluntary cessation doctrine applies with even more force. Defendants cannot moot Plaintiffs' claims by cobbling together a cosmetic, ineffective fix in response to litigation because Defendants' Revised Policy itself demonstrates that they will continue to discriminate against children with diabetes. *See Ne. Fla. Chapter of Assoc. Gen.*

[4] The only factor that might weigh in Defendants' favor under *Rosebrock*—that this lawsuit was the catalyst for the policy change—has been viewed as a factor weighing *against* mootness by the Supreme Court. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (noting that a "presumption" of future injury exists when a "defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity").

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Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662 (1993) ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so [in passing its new ordinance]."); *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-CV-155, 2012 WL 2160969, at *2 n.1 (S.D. Ohio June 12, 2012) ("[A] new policy that disadvantages Plaintiffs in the same fundamental way as the old one, albeit to a possible lesser degree, does not moot the case. . . . [T]he Court need not speculate whether the Defendants will return to the allegedly wrongful conduct because they already have in the form of the new policy."). As the Supreme Court has explained in a case challenging a local ordinance, the voluntary cessation doctrine "does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect." *Ne. Fla.*, 508 U.S. at 662. Even if the Revised Policy "disadvantage[s] [plaintiffs] to a lesser degree than the old one," as long as "it disadvantages them in the same way," the case is not moot. *Id.* at 662-63.

Defendants' argument that Plaintiffs can rely only on injury experienced between June 2017 and the filing of the FAC in July 2017 to support their standing fails. Rather, in a situation where Defendants amend an unlawful policy in response to litigation, filing an amended complaint is an appropriate way to avoid dismissal due to mootness. *See Pashby v. Wos*, No. 5:11-CV-273-BO, 2013 WL 4500575, at *1–2 (E.D.N.C. Aug. 21, 2013) ("plaintiffs' amendment 'to demonstrate that the repealed [policy] retains some continuing force or to attack the newly enacted [policy]' is a wholly appropriate way to avoid dismissal due to mootness." ((citing *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir.1988); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972))). Moreover, weighing in favor of a permissive interpretation of standing in this case is the Supreme Court's instruction that courts should take "a broad view" of standing in civil rights cases, "especially where . . . private enforcement suits 'are the primary method of obtaining compliance.'" *Chapman v. Pier 1 Imports Inc.* 631 F.3d 939, 946 (9th Cir. 2011) (quoting *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008); *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

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b. Plaintiffs' Claims Based on the Revised Policy Are Ripe

In addition and independently, as described below, Plaintiffs establish injury in fact sufficient to confer standing to challenge Defendants' current application of the Revised Policy. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants' suggestion that Plaintiffs' injuries are too hypothetical and speculative to give Plaintiffs an adequate stake in challenging the Revised Policy, which amounts to a ripeness challenge, is unavailing.

Although courts cannot decide hypothetical questions, "one does not have to await the consummation of threatened injury to obtain preventive relief." *Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir.2003) (citations omitted); *see also Chapman,* 631 F.3d at 949 (citing *Farmer v. Brennan,* 511 U.S. 825, 845 (1994)). "If the injury is certainly impending, that is enough." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania v. W. Virginia*, 262 U.S. 553, 593 (1923)). If a plaintiff can make "a sufficient showing of likely injury in the future related to the plaintiff's disability to ensure that injunctive relief will vindicate the rights of the particular plaintiff rather than the rights of third parties," her claims survive a ripeness challenge. *Chapman*, 631 F.3d at 949.

Furthermore, where, as here, Plaintiffs' standing is based on engagement in a discriminatory system, their claims are ripe as soon as they become aware of and are deterred or otherwise affected by such discrimination. *See Chapman*, 631 F.3d at 947 ("Once a disabled individual has encountered or become aware of alleged [Americans with Disabilities Act ("ADA")] violations that deter his patronage of or otherwise interfere with his access to a place of public accommodation, he has already suffered an injury in fact traceable to the defendant's conduct and capable of being redressed by the courts, and so he possesses standing under Article III . . . ."); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) ("a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered "actual injury." Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers "imminent injury."); *Doran,* 524 F.3d at 1042-43 (uncertainty concerning the scope and extent of an ADA violation is "itself an actual, concrete and

particularized injury under the deterrence framework of standing"). Because children with diabetes who are enrolled in or eligible for enrollment in CYSS programs, including M.W., are currently subject to and navigating the procedures laid out in Defendants' active Revised Policy, their claims are ripe. FAC ¶¶ 68-69, 78-82; Fech-Baughman Decl. ¶ 20; Hope W. Decl. ¶¶ 18, 24; Shackleford Decl. ¶¶ 14-23; Gomes Decl. ¶¶ 5-15.

2. Plaintiffs M.W. and the Association Have Standing to Challenge Defendants' Ongoing Discrimination Against Children with Diabetes

a. M.W. Has Standing to Challenge Defendants' Ongoing Discrimination

Plaintiff M.W. meets her burden to establish an injury in fact sufficient to withstand either a facial or factual challenge to her standing because she has alleged and demonstrated, under both the Original and Revised Policies, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560-61. Notably, Defendants do not challenge the sufficiency of Plaintiffs' allegations of injury under Defendants' Original Policy, focusing only on whether those claims are moot. Consequently, Plaintiffs focus on injury under the Revised Policy.

Although Defendants are currently providing M.W. the accommodations she needs to participate in CYSS programs, Hope W. Decl. ¶ 18, they cannot demonstrate that it is absolutely clear that their discrimination against her cannot reasonably be expected to recur, *see Friends of the Earth*, 528 U.S. at 190, because they have made no enforceable commitment to continue to provide these accommodations in the future. Indeed, M.W.'s accommodations might be revoked at any time, and are subject to review and reassessment every six months. FAC ¶¶ 68-69; Hope W. Decl. ¶¶ 19, 24. CYSS staff have already indicated to Hope W. that the funding source for the contract nurses currently supporting M.W. is not secure, and that the nurses may not be available in the future, putting her accommodations at risk. Hope W. Decl. ¶ 18.

In addition, M.W. is subject to the Revised Policy if her diabetes care regimen changes, a possibility that is neither speculative nor hypothetical. FAC ¶ 68; Hope W. Decl. ¶¶ 19, 24. As described above, M.W. is vulnerable to, and already showing signs of, diabetes "burnout," and may need to take a break from her insulin pump. Hope W. Decl. ¶¶ 20-23; Weissberg-Benchell

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Decl. ¶¶ 4-7, 9. Moreover, because of her low body fat percentage, she may need to temporarily discontinue use of her pump to guard against the formation of scar tissue and preserve infusion sites for continuing use. Hope W. Decl. ¶ 23; Weissberg-Benchell Decl. ¶¶ 8-9. In either situation, M.W. would need to request new accommodations allowing for CYSS to administer insulin by injection pursuant to the Revised Policy. FAC ¶ 69; Hope W. Decl. ¶¶ 19, 24.

a. The Association Has Standing to Challenge Defendants' Ongoing Discrimination

Plaintiff the Association has standing to challenge Defendants' ongoing discrimination based on injury to itself and, independently, based on injury to its members. Either basis is sufficient to support the Association's standing.[5] *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

(1) The Association Has Direct Standing to Challenge Defendants' Ongoing Discrimination

An organization establishes direct organizational standing based on injury to itself by showing "a drain on its resources from both a diversion of its resources and frustration of its mission." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The Association withstands either a facial or factual challenge to its direct standing because it has alleged and demonstrated both a diversion of its resources and frustration of its mission in responding to Defendants' discrimination under the Original and Revised Policies. Defendants do not contest that discriminating against children with diabetes frustrates the Association's mission, i.e., improving the lives of families affected by diabetes. FAC ¶¶ 72-73, 102; Fech-Baughman Decl. ¶¶ 2, 7-8. Instead, they focus on diversion of resources. Defs.' Br. 19-21.

Because, as described above, Defendants have not met their burden to demonstrate that it is absolutely clear that their discrimination under the Original Policy cannot reasonably be expected to recur, *see Friends of the Earth*, 528 U.S. at 190, the Court should look to resources expended investigating, opposing, and assisting constituents with both the Original and Revised

[5] As noted above, Defendants do not challenge the sufficiency of Plaintiffs' allegations of injury under Defendants' Original Policy, focusing only on whether those claims are moot. As a result, Plaintiffs focus on injury under the Revised Policy.

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Policies. Especially as "the case law is abundantly clear that minimal showing of detriment is all that is required to establish an injury in fact," *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1045 (N.D. Cal. 2015), Plaintiffs have more than sufficiently alleged and demonstrated diversion of resources due to Defendants' Policies through tasks such as: (1) providing individual assistance to more than two dozen constituents;[6] (2) preparing for, attending, and following up after a meeting with the Army to advocate for affected families; and (3) internal meetings and deliberations. FAC ¶¶ 27, 72-75; Fech-Baughman Decl. ¶¶ 3, 9-15. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) ("[A] diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is 'broadly alleged,'" including by alleging that "Plaintiffs expended additional resources that they would not otherwise have expended, and in ways that they would not have expended them") (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) ("The allegation [defendant's] policy frustrates [the organizations'] goals and requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing.").[7]

Because the Association has a complex mission and limited resources, including just two attorneys who provide individual assistance, devoting these resources to addressing the Army's ongoing discrimination "perceptibly impairs," *Havens Realty*, 455 U.S. at 379 (1982), the

[6] Defendants suggest that the Association's standing depends on whether these people submitted requests for accommodation that were denied. Defs.' Br. 20-21. Whether these individuals would themselves have standing is irrelevant to whether the Association diverted resources. In addition, as Plaintiffs have alleged and demonstrated, the harm families experience due to Defendants' Policies is not limited to denial of accommodations – it includes deterrence from even applying for CYSS care and the adoption of unreasonable and potentially unsafe insulin administration practices. FAC ¶¶ 12-14, 26, 59 106; Hope W. Decl. ¶ 10; Fech-Baughman Decl. ¶¶ 6-7; Bendlin Decl. ¶¶ 14, 19-22; Brantly Decl. ¶ 31, 37, 39; Erwin Decl. ¶ 24. Such injury would not necessarily be reflected in CYSS's records on accommodations sought and granted.

[7] Contrary to Defendants' suggestion, Defs' Br. 19, the Association has not voluntarily diverted resources or manufactured harm for the purpose of this litigation. Rather, the Association has expended its limited resources assisting constituents who themselves reach out for help. Fech-Baughman Decl. ¶¶ 4, 9, 15. In any event, frustration of an organization's mission is itself sufficient to show that its diversion of resources was not a choice. *Animal Legal Def. Fund v. United States Dep't of Agric.*, 223 F. Supp. 3d 1008, 1016–18 (C.D. Cal. 2016).

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Association's ability to assist constituents facing diabetes-related discrimination in other settings. FAC ¶¶ 27, 72, 74; Fech-Baughman Decl. ¶¶ 10-11. Indeed, for every person served, another goes without the assistance they need. FAC ¶ 73; Fech-Baughman Decl. ¶¶ 10-11. That the Association, a non-profit organization, has many employees and volunteers does not mean that they can all provide legal advocacy.

Even assuming Defendants are correct that only resources expended after they issued the Revised Policy are relevant to the Association's standing, the Association still clears the low Article III bar because it has continued to assist callers encountering diabetes-related discrimination under the Revised Policy since June 2017, including one who contacted the Association on June 26, 2017 and one who reached out on August 10, 2017. Fech-Baughman Decl. ¶ 14; Gomes Decl. ¶ 11. Moreover, Defendants' assertion that no one has yet been harmed by the policy is nonsensical and inaccurate. Because the policy is in effect now, Association members and constituents, whose interests it is the Association's mission to protect, are being harmed now, and the Association must therefore divert resources to investigating these violations. Fech-Baughman Decl. ¶ 20; Gomes Decl. ¶¶ 14-17; Shackleford Decl. ¶¶ 22-23.

(2) The Association Has Representational Standing to Challenge Defendants' Ongoing Discrimination on Behalf of its Members.

To establish associational standing on behalf of its members, the Association must show that: (1) at least one member would have standing; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires members' individual participation as plaintiffs. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147, 1150-51 & n.10 (9th Cir. 2000); *see also Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977). The Association withstands Defendants' facial and factual challenges to its associational standing because it has alleged and established these elements with respect to both the Original and Revised Policies.

Defendants do not contest that the interests at issue are germane to the Association's purpose to improve the lives of people affected by diabetes, and that the claims asserted and relief requested do not require members' individual participation as plaintiffs because the suit

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seeks only injunctive relief. Defs.' Br. 17-19; FAC ¶¶ 26, 77, 84-85; Fech-Baughman Decl. ¶¶ 2-3. Defendants dispute only that at least one member would have standing to sue.[8]

Plaintiffs clearly allege that "at least one Association member family would have standing to sue . . . because (1) Defendants' previous policy discriminated against Association member families and could be reinstated at any time and (2) Defendants' revised policy continues to discriminate against and currently harms Association member families." FAC ¶ 78. The FAC goes on to assert that "[t]he discrimination experienced by member families under Defendants' previous policy has not been corrected" and to describe in detail the various ways that Defendants' Revised Policy "blocks access by imposing burdensome procedures and unnecessary delays that harm families currently seeking to enroll their children in CYSS programs and activities." FAC ¶¶ 79-82. It further identifies Hope W. as a member of the Association. FAC ¶ 26. These allegations more than meet the requirements for pleading membership standing. *See Warth*, 422 U.S. at 511 ("The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit"); *Nat'l Council of La Raza*, 800 F.3d at 1041 (9th Cir. 2015) ("Where it is relatively clear . . . that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, [there is] no purpose to be served by requiring an organization to identify by name the member or members injured.").

Moreover, in response to Defendants' factual attack on the Association's standing to assert claims on behalf of its members, Plaintiffs have introduced sufficient factual evidence that eligible members have in the past and now continue to experience discrimination in seeking access to CYSS programs. At least eight Association members, including Hope W.,[9] have eligible children excluded from CYSS programs or have been deterred from enrolling their

[8] Defendants do not dispute that member parents have standing to challenge discrimination against their children. Rather, they allege that Plaintiffs have not and cannot allege the existence of a family harmed by the Revised Policy who would have standing to sue. Defs' Br. 17 n.8.

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eligible children. FAC ¶¶ 78-83; Fech-Baughman Decl. ¶¶ 17-20; Hope W. Decl. ¶¶ 3, 7-24; Bendlin Decl. ¶¶ 7-22; Brantly Decl. ¶¶ 7, 12-13, 19-20, 28, 35-40. At least three have children who are still eligible and/or enrolled, and therefore subject to Defendants' Revised Policy. Fech-Baughman Decl. ¶ 20; Hope W. Decl. ¶ 18; Bendlin Decl. ¶ 17; Brantly Decl. ¶ 38. At least one is currently deterred from seeking to enroll because she believes it would be futile to seek accommodations under the Revised Policy. Bendlin Decl. ¶¶ 17-22.

B. Plaintiffs' First Amended Complaint States a Claim for Which Relief Can Be Granted and Withstands Defendants' Rule 12(b)(6) Challenge.

To state a claim under Section 504, a plaintiff must show (1) she is a qualified individual with a disability; (2) she is being subjected to discrimination, such as being excluded from or denied the benefits of a program or being denied a reasonable accommodation; and (3) the program in question receives federal financial assistance. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) quoting *Weinreich v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d 976 (9th Cir. 1997); *see also A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016) quoting *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010). Here, Defendants challenge only whether Plaintiffs have plausibly alleged the third element – discrimination.[10] Plaintiffs plausibly allege that the timelines and review process[11] laid out in Defendants' Revised Policy[12] violate Section 504 and its implementing regulations. Plaintiffs also support their discrimination claims with sufficient factual allegations. Furthermore, contrary to Defendants' argument, the "no set of circumstances" test under *United*

[10] Allegations of discrimination may comprise, inter alia, denial of benefits, providing a less effective service, and exclusion, not only denial of a reasonable accommodation needed to provide meaningful access, as Defendants suggest.

[11] Despite Defendants' assertion that Plaintiffs challenge the Revised Policy's "bureaucratic hoops" only once in the FAC, Plaintiffs consistently allege that the review process is discriminatory and pled sufficient facts to support this. Indeed, Plaintiffs repeatedly claim that the policy discriminates due to the "burdensome process" FAC ¶¶ 2, 15 24, 45, 47, 68, 82, 96, 97, 100, 105, 111; *see also* FAC ¶¶ 4, 6, 12, 15, 45, 96 (characterizing the review process as multi-tiered).

[12] Plaintiffs also plausibly allege discrimination under Defendants' Original Policy, e.g., FAC ¶¶ 7, 8, 10, 23-24, 26, 41-42, although Defendants do not challenge the sufficiency of these allegations because they contend that any claims based upon such discrimination are moot. Consequently, Plaintiffs do not address the sufficiency of these allegations here.

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States v. Salerno, 481 U.S. 739, 745 (1987), should not be applied in this case but, even if the Court were to apply it, Plaintiffs' allegations satisfy this test.

1. Plaintiffs' Claims of Discrimination Under Section 504 Are Plausibly Pled and Sufficiently Supported.

In the FAC, Plaintiffs allege that Defendants' Revised Policy violates Section 504's statutory and regulatory requirements and thus, is discriminatory. Specifically, Plaintiffs plead that Defendants' Revised Policy's timelines and review process discriminate against children with diabetes because they (1) deny them the opportunity to participate in and benefit from CYSS programs and activities; (2) afford them an unequal opportunity to participate in or benefit from CYSS programs and activities; (3) provide them a less effective aid, benefit or service than children without diabetes; and (4) otherwise limit them in the enjoyment of the opportunity to participate in CYSS programs and activities. FAC at ¶¶ 96. Plaintiffs also plead that Defendants' Revised Policy's timelines and review process are discriminatory because they are a method of administration that "(i) Subject[s] qualified handicapped persons to discrimination on the basis of handicap; [or] (ii) Defeat[s] or substantially impair[s] accomplishment of the objectives of the recipient's or DOD Component's program or activity with respect to handicapped persons. . ." FAC at ¶¶ 104, 106, 107. Plaintiffs support their discrimination claims with sufficient factual allegations about delay, exclusion, and unreasonable, and potentially unsafe insulin administration practices that, when accepted as true, state a plausible claim.

a. Plaintiffs' Claims of Discrimination Are Sufficiently Supported by their Allegations of Unreasonable and Unnecessary Delay.

First, Plaintiffs' claims that the Revised Policy's timelines and review process result in discrimination are supported by their allegations of unreasonable and unnecessary delay in reviewing requested diabetes-related accommodations, in particular insulin-related accommodations. FAC ¶¶ 12. 15, 24, 80. Defendants do not challenge Plaintiffs' assertion that Defendants have up to four months to address and implement basic insulin-related accommodations. *See* Motion, 25 Furthermore, Plaintiffs' allege sufficient factual support to

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demonstrate the under the Revised Policy unreasonable delay results.[13] (FAC ¶¶, 80, 97, 107) Court recognize that allegations regarding unreasonable delay support discrimination claims. *Anderson v. Ross Stores, Inc.*, No. C 99-4056 CRB, 2000 WL 1585269, at *9 (N.D. Cal. Oct. 10, 2000) (a court may find that a public accommodation denied access to its facilities or denied a request for an accommodation if it took an excessive amount of time to decide how to accommodate the disabled individual); *Frankeberger v. Starwood Hotels & Resorts Worldwide, Inc.*, No. C09–1827RSL, 2010 WL 2217871, at *4 (W.D. Wash. June 1, 2010) (if delay is not unreasonable it is not reflective of discrimination). Among the factors courts consider in assessing the reasonableness of delay, is often the presence of interim accommodations. *See, e.g., Hill v. Clayton Cty. Sch. Dist.*, 619 F. App'x 916, 922 (11th Cir. 2015) (collecting cases finding that delay was not discriminatory because interim accommodations were provided). Indeed, in the cases that Defendants cite involving comparable lengths of delay, interim accommodations were offered to the plaintiff. The half-hearted interim accommodations that Defendants provide – allowing children to attend CYSS programs without the insulin-related accommodations they need – do not lessen the impact of delay in any way because there is no access for children with type one diabetes without access to insulin

Contrary to Defendants' assertion, discriminatory animus is not necessary to state a claim of discrimination due to unreasonable delay. Courts have mentioned "bad faith" as ***a*** factor to consider, but not the only one. *See Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1262-63 (10th Cir. 2001) (courts evaluating unreasonableness of delay look to length of delay, reasons for delay, whether employer offered alternative accommodations during delay, and whether employer acted in good faith). Even if the cases Defendants used to support their assertion that discriminatory animus is a necessary element to finding discriminatory delay, other courts have found that delay itself to be an indicia of bad faith. *See, e.g., Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir. 1999) (noting that a party that delays the "interactive process" of

[13] On a motion to dismiss, Plaintiffs need only allege sufficient facts to demonstrate a delay is unreasonable. Here, Plaintiffs plausibly allege unreasonable delay not by drawing a bright line at a particular length of time, but rather by assessing the impact of delay, such as deterrence, financial hardship.

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finding a mutually acceptable accommodation is not acting in good faith and may violate the ADA); *Beck v. University of Wisconsin Bd. of Regents*, 675 F.3d 1130, 1135 (7th Cir. 1996).

b. Plaintiffs' Claims of Discrimination Are Sufficiently Supported by their Allegations of Deterrence

Plaintiffs' allegations that the timelines and review process are discriminatory are also supported by their allegations of deterrence. Specifically, Plaintiffs have supported their allegations that both the timelines and burdensome review process are discriminatory with sufficient facts that families will be deterred from accessing CYSS childcare. FAC ¶ 13, 81, 98, 106, 109. Courts have recognized that such allegations of deterrence are sufficient to plead discrimination. Specifically, courts require that a plaintiff's allegations of deterrence "give[] rise to a plausible inference that" the plaintiff "will be deterred from the purported violation from" going to the" public accommodation in the future. *Kohler v. CJP, Ltd.*, 818 F.Supp.2d 1169; *see also Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir.2002); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 135-37 (D. Mass. 1997) (imposition of costly testing requirements as a precondition of academic accommodations "imposed significant additional burdens" on students with disabilities, and both "actually screened out," or deterred and also "tended to screen out the learning disabled within the meaning of [the ADA]").

c. Plaintiffs' Claims of Discrimination Are Sufficiently Supported by their Allegations of Unreasonable and Potentially Unsafe Insulin Administration Practices.

Plaintiffs' allegations that the timelines and review process are discriminatory are supported by their allegations that families of children with diabetes are being forced to adopt unreasonable and potentially unsafe insulin administration practices. FAC ¶¶ 26, 99, 107. Specifically, Plaintiffs detail how parents have to leave work to administer insulin and how this practice of insulin administration is not optimal. FAC ¶¶ 14, 44, 82. Courts have recognized similar allegations regarding accommodations that do not effectively address the discrimination are sufficient for pleading discrimination. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (holding that an "ineffective 'modification' . . . will not accommodate a disabled individual's" needs) (emphasis in original)); *see also See Lentini v. California Ctr. for the Arts*,

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Escondido, 370 F.3d 837, 846 (9th Cir. 2004) (upholding further reasonable modification to policy required because policy continued to discriminate against people with disabilities). [14]

2. The Salerno Test Does Not Apply and, In Any Event, Plaintiffs' Challenge to Defendants' Revised Policy Withstands It.

Attempting to muddy the waters, Defendants argue that Plaintiffs have not plausibly alleged that there is "no set of circumstances" under which the Revised Policy could be valid, pursuant to *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("*Salerno* test" hereafter). The Salerno test does not apply to Plaintiffs' allegations in the FAC. However, even if this Court did choose to apply this standard, Plaintiffs allegations in the FAC would satisfy it, and, moreover, the Court must at least separately consider Plaintiffs' as applied challenge.

a. The Salerno Test Does Not Apply to Plaintiffs' Allegations.

Even if the Court does find Plaintiffs made a facial challenge, which Plaintiffs contest, there are at least two reasons why the *Salerno* test does not apply to Plaintiffs' allegations regarding Defendants' disability discrimination.

First, courts are not required to apply the *Salerno* test to any facial challenge. Indeed, the Supreme Court and the Ninth Circuit have explicitly questioned the use of the *Salerno* test for both statutes and regulations, especially outside the context of constitutional challenges. In *Sierra Club v. Bosworth*, the Ninth Circuit refused to apply the *Salerno* test to a facial challenge to a Forest Service regulation, noting that the Supreme Court has questioned whether the *Salerno* test was merely dicta. 510 F.3d 1016, 1023–24, fn 4 (9th Cir.2007) (collecting Supreme Court plurality, concurring, and dissenting opinions questioning the use of the *Salerno* test) (omitting other supportive citations). For this reason, courts in the Ninth Circuit routinely refuse to apply the *Salerno* test to facial challenges. *Rocky Mountain Farmers Union v. Goldstene*, 843 F.Supp. 2d 1042, 1066-68 (E.D. Cal. 2011) (refusing to apply *Salerno* test because the Ninth Circuit only applies it to "facial challenges of simple federal statutes based on the First or Fourth Amendment"). In sum, there is no clear mandate that courts should ever apply the *Salerno* test, let alone that it applies in this instance.

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Second, assuming that the *Salerno* test should ever be applied, there is no compelling reason to apply it here. When Congress legislates, there are democratic and separation of powers principles at stake if litigants launch premature or overbroad challenges to statutes. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (collecting cases, and discussing rationale for disfavoring facial challenges to statutes, including risk of "short circuiting" democratic process and frustrating intent of elected representatives). Arguably, since *Salerno* test can (though need not) apply to regulations as well (*see Reno v. Flores*, 507 U.S. 292,), similar rationales apply to agencies with expertise in the regulated area. *But see Sierra Club*, 510 F.3d at 1023–24 (refusing to apply the *Salerno* test to challenge to agency's regulation). Here, Plaintiffs have neither challenged the constitutionality of a statute nor whether an agency has issued regulations in compliance with the statute that it administers. Instead, Plaintiffs challenge a series of policy memos on a subject – appropriate care for children with diabetes – outside Defendants' area of expertise.

The appropriate standard for facial challenges to a policy is whether the agency has complied with its obligations under the relevant federal regulations. *See, e.g., Doe v. Rowe*, 156 F.Supp.2d 35, 59 D. Maine (2001) ("there is no such thing as a facial challenge to the State's compliance with a federal statute. A ripe claim for violation of a federal statute is based on either previous conduct or ongoing violations. Thus, in considering Plaintiffs' ADA and Rehabilitation Act claims, the Court may only consider the evidence regarding Maine's past application of its voting restriction along with any evidence relating to how the voting restriction continues to be applied today); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999) (granting facial challenge to zoning policy prohibiting operation methadone clinics in residential areas on basis of facial ADA violations alone, with no mention of *Salerno*). Thus, the relevant standards for Plaintiffs' challenges are the regulations that Plaintiffs cited in the FAC ¶¶ 95, 104 (quoting language from the relevant Department of Defense Section 504 regulations, 32 C.F.R. §§ 56.8(a)(2)(ii)-(v) and 56.8(a)(6)(i)-(ii)); *cf. Bay Area Addiction Research & Treatment, Inc.*, 179 F.3d at 734-35 (finding that "facially discriminatory laws present per se violations of [the ADA]"),

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b. Plaintiffs' Allegations Regarding Defendants' Revised Policy Satisfies the Salerno Test.

Even if this Court were to decide that Plaintiffs made a facial challenge and the *Salerno* test should apply, Plaintiffs have adequately alleged that Defendants' Revised Policy plausibly violates Section 504 in every circumstance.

Every family seeking diabetes-related accommodations faces the challenged provisions. Regardless of when or whether accommodations are granted, they all immediately encounter Defendants' lengthy and burdensome process comprising myriad levels of review and timelines that allow for months of delay, without knowing if their accommodations will be granted. Defendants' assertion that they intend to process accommodations "as soon as possible" does nothing to negate the fact that the review process immediately creates uncertainty for every family seeking diabetes-related accommodations while their requests are passed from official-to-official in a process that is disproportionate to the accommodations requested. FAC ¶¶ 37, 47.

Most importantly, however, this uncertainty as to when and/or whether these families will have childcare when they want and need it is not experienced by similarly situated families unaffected by diabetes. See 29 U.S.C. § 794(a). Since families who have children with diabetes cannot enroll their children in CYSS childcare without confronting the timelines and review process in Defendants' Revised Policy, they are "afford[ed] an opportunity to participate that is not equal" and "provide[d] a benefit that is not as effective." 32 C.F.R. § 56.8(a)(2)(iii), (iv). This is true in every circumstance.

Even if this Court applies the *Salerno* test to Plaintiffs' challenge to Defendants' Revised Policy, it must separately consider Plaintiffs' as applied challenges. *See Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008) (applying the *Salerno* to a facial challenge to the constitutionality of a municipal policy and analyzing plaintiff's challenge as applied to herself separately). Because defendants fail to address Plaintiffs' "as applied" challenges to both the Original and Revised Policy and focus solely on the supposed facial challenge to the Revised Policy, this Court must accept Plaintiffs' as applied challenges as sufficient to survive a Rule 12(b)(6) challenge.

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Respectfully submitted,

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