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IN THE UNITED STATES DISTRICT COURT

FOR THE 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, *et al.* Defendants.	Case No.: 5:16-cv-04051-LHK **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** Hearing Notice for November 30, 2017, at 9:15 a.m.

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STATEMENT OF ISSUES

1. Whether Plaintiff M.W. has standing to pursue the claims in the Amended Complaint challenging Defendants' current diabetes accommodation policy inasmuch as Defendants have granted her request for an accommodation relating to her diabetes and the accommodation was granted pursuant to a policy that is no longer in place.

2. Whether Plaintiff American Diabetes Association has standing to pursue the claims in the Amended Complaint challenging Defendants' current diabetes accommodation policy when it has alleged neither the existence of any member injured by that policy nor plausibly alleged that it has diverted appreciable resources to challenging the current policy.

3. Whether Plaintiffs' facial challenge to the maximum permitted time for processing diabetes-related accommodation requests under Defendants' current policy states a claim, given that there are circumstances under which (A) any diabetes-related accommodation can be approved in less than the time identified by Plaintiffs as the "[b]est practice" and (B) children with diabetes will have meaningful access to programs even when the accommodations process takes the maximum permitted time.

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants United States Department of the Army, United States Army Child, Youth and School Services ("CYSS"), Under Secretary of the Army Ryan D. McCarthy, and United States Army Family and Morale, Welfare and Recreation Programs (collectively, "Defendants") move to dismiss the First Amended Complaint for Injunctive and Declaratory Relief for Violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Amended Complaint") (ECF No. 66) filed by Plaintiffs American Diabetes Association (the "Association") and M.W. (collectively, "Plaintiffs") for lack of standing and failure to state a claim upon which relief can be granted.

INTRODUCTION

Since Plaintiffs filed their original complaint in this case, Defendants have amended their policy and procedures regarding accommodation of children with diabetes in CYSS programs and provided M.W. with her requested accommodation. As a result, the claims for relief Plaintiffs requested in that pleading have been redressed. *See* Compl. for Injunctive and Declaratory Relief for Violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("First Complaint") (ECF No. 1). Nonetheless, Plaintiffs have now amended their pleadings to challenge the amended policy and procedures. Those challenges fail, however, both because Plaintiffs lack standing to assert them and because Defendants' actions and current policies comply with § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act").

Plaintiffs lack standing because they have not suffered any injury from Defendants' current policy on providing diabetes-related accommodations to children in CYSS programs. Plaintiffs' First Complaint challenged Defendants' then-existing policies on diabetes-related accommodations in CYSS programs and the application of those policies to M.W. *See generally* First Compl. ¶¶ 65-84. In relevant part, Plaintiffs sought to have Defendants implement a new policy that permitted CYSS to provide certain diabetes-related care that was not ordinarily provided at the time,

including care requested by M.W. [2] *Id.* at 17-18. Since Plaintiffs filed the First Complaint, Defendants have approved M.W.'s requested accommodation. In addition, in June 2017, Defendants implemented a new policy that permits CYSS to provide, after consideration on a case-by-case basis, accommodations that may include a wide range of diabetes-related care and improved the process for seeking approval and implementation of those accommodations. Although neither plaintiff has been affected by the new policy, Plaintiffs nonetheless have amended their pleadings to make a facial challenge to the revised policy. However, without a cognizable injury, Plaintiffs lack standing to assert these claims. The Court should therefore dismiss the Amended Complaint for lack of subject matter jurisdiction.

Even if Plaintiffs were found to have standing to challenge Defendants' new policy, Plaintiffs have not made out a plausible claim for relief in the Amended Complaint. The gravamen of their claims is that Defendants' new policy on its face violates the Rehabilitation Act because the maximum time period allowed for reviewing and implementing accommodation requests is too long. This position, however, finds no support in the law because Plaintiffs cannot show, based on the allegations in the Amended Complaint, that the policy would violate the Rehabilitation Act under all circumstances. Under the revised policy, nothing precludes the Army from granting a request for a diabetes-related accommodation and implementing it in less time than allowed or even within the time limits Plaintiffs identify as the "[b]est practice." Am. Compl. ¶ 47. Because it is at least possible that an accommodation request for a child with diabetes may be granted in accordance with Plaintiffs' preferred time-frame, this Court may not find that children are being excluded from participating in CYSS programs in violation of the Rehabilitation Act. Moreover, case law demonstrates that even the maximum time for approving and implementing an

[2] Plaintiffs also sought declaratory and injunctive relief concerning the old diabetes-related accommodation policy, which are moot because the policy has been rescinded, as well as costs and fees. First Compl. at 17-18.

accommodation request under the policy complies with the Rehabilitation Act. Thus, Plaintiffs' Amended Complaint should also be dismissed for failure to state a claim.

REGULATORY BACKGROUND

Through CYSS, the Army provides a wide variety of programs and activities for the children of soldiers and, in some cases, children of certain other eligible individuals. *See* Am. Compl. ¶¶ 28-32, 38-39. These programs and activities are offered at and near military installations across the globe and in a wide variety of environments, including day care centers and contractors' homes. *See id.* ¶¶ 38-39. To ensure that children with special needs can safely participate in CYSS programs, the Army has promulgated regulations and policies to govern the provision of medical care and other forms of accommodations that CYSS provides. *See id.* ¶¶ 7, 9.

Before Plaintiffs initiated this case, the Army's policy contained certain limitations on the types of diabetes-related medical care CYSS would routinely provide. *See id.* ¶ 7 (discussing Child Development Services, Army Reg. 608-10, ¶ 4-32 (July 19, 1997) and U.S. Dep't of the Army, Care of Diabetic Children and Youth within Army Child, Youth & School (CYS) Services (Oct. 20, 2008) (collectively, the "Old Diabetes Policy")). Under the Old Diabetes Policy, CYSS personnel could not count carbohydrates, administer insulin by injection or pump, or inject glucagon, a rescue medication used to treat acute hypoglycemia. *Id.* Although the Army issued exceptions to the Old Diabetes Policy upon request, there were no explicit processes or criteria for obtaining an exception. *Id.*

Since Plaintiffs filed their First Complaint, Defendants have revoked the Old Diabetes Policy in full and implemented a new policy for accommodating children with diabetes in CYSS programs. *See* Exhibit A (Child Development Services, Army Reg. 608-10, ¶ 4-32 (May 11, 2017); Exhibit B (U.S. Dep't of the Army, Diabetes-Related Accommodations in Child, Youth, and School Services Programs (June 2, 2017)); Exhibit C (U.S. Dep't of the Army, Accommodation of

Children and Youth with Diabetes in Army Child, Youth, and School Services Programs (June 12, 2017) (collectively, the "New Diabetes Policy").[3] To enact the New Diabetes Policy, Defendants entirely replaced the language concerning CYSS providing medical care in paragraph 4-32 of Army Regulation 608-10, Ex. A, and issued two memoranda with orders on how the new policy would be implemented, Exs. A, B. Under the New Diabetes Policy, CYSS personnel may provide all forms of diabetes-related care—including counting carbohydrates, administering insulin, and injecting glucagon—under an approved accommodation plan. *See* Ex. C at § 3.b.

The New Diabetes Policy includes an initial assessment by the Multidisciplinary Inclusion Action Team ("MIAT") and three levels of review at which a request for a diabetes-related accommodation may be approved, although not all requests must be considered at each level. The levels are: (1) the CYSS Coordinator for the installation where the CYSS program is offered; (2) the Garrison Commander of that installation, and (3) the Army's Assistant Chief of Staff for Installation Management ("ACSIM"), the officer responsible for Army-wide installation services. *See generally id.* The required level of review depends on the nature of the accommodation requested and the resources available at each level to provide the accommodation. *See generally id.*

Although the New Diabetes Policy sets out a maximum permissible amount of time for each step in the accommodations process, all tasks at every step must occur "as soon as possible." *See*

[3] Although a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is typically decided solely on the allegations in the complaint (including any documents attached to the complaint), "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The exhibits to this motion fall in that category because they collectively set forth the policy that Plaintiffs challenge, *see* Am. Compl. ¶ 9, and they are extensively referred to in the Amended Complaint. *See, e.g., id.* ¶¶ 9, 43, 44, 82. Moreover, these are subject to judicial notice because they are government documents with legal effect, the accuracy of which cannot reasonably be questioned. *See* Fed. R. Civ. P. 201(b)(2); *see also Mangiaracina v. Penzone*, 849 F.3d 1191, 1193 n.1 (9th Cir. 2017) (taking judicial notice of a county's rules and regulations for inmates in its jails); *United States v. Thornton*, 511 F.3d 1221, 1229 n.5 (9th Cir. 2008) (taking judicial notice of a Federal Bureau of Prisons policy statement). If the Court does not consider Exhibits A through C to be incorporated by reference into Plaintiffs' Amended Complaint, Defendants hereby ask that the Court take judicial notice of them pursuant to Federal Rule of Civil Procedure 201(c)(2).

id. §§ 4.e-h, 5.b, 5.g-h, 8.a. Also, if a request needs to go beyond the CYSS Coordinator, CYSS offers an interim accommodation plan that includes all the accommodations that can be approved at that time. *Id.* § 4.f.2.

I. The MIAT Process

As soon as a parent or guardian requests a diabetes-related accommodation for a child eligible to participate in a CYSS program, the program provides the parent or guardian with written materials explaining the process and models of a Diabetes Daily Medical Action Plan and a Diabetes Emergency Medical Action Plan (collectively, a "MAP") for the child's medical provider to complete. *Id.* § 4.c. Once the parent or guardian provides a completed MAP and any additional relevant medical information, "[a] MIAT must be convened as soon as possible, but not later than 30 calendar days" later. *Id.* § 4.e.

"All members of the MIAT must participate in the assessment of the request for accommodation and the preparation of a recommended Accommodation Plan." *Id.* § 4.e.2. The MIAT is comprised of (1) the child's parent(s) and/or legal guardian(s), (2) an Army Public Health Nurse, (3) the relevant CYSS Program Managers, (4) any CYSS personnel who will work with, or have worked with, the child, (5) the CYSS Coordinator, and (6) an Exceptional Family Member Program Manager (*i.e.*, a disability inclusion specialist). *Id.* § 4.e.1. When there is a concern about the reasonableness of a requested accommodation, the MIAT may also include an Army attorney to provide legal guidance. *Id.* The "[p]arent(s)/legal guardian(s) may [also] bring the child's health care provider(s) or other representatives." *Id.*

Once the MIAT has met, the policy requires it to generate a recommended accommodation plan and forward the recommendation for approval to the installation's CYSS Coordinator within two working days. *Id.* § 4.e.2. Proposed plans are required to meet numerous requirements to ensure they allow children to participate safely in CYSS programs. *See id.* § 6.b (detailing the

requirements for a MIAT's proposed plan); *see also id.* § 7 (detailing the implementation of a diabetes-related accommodation plan).

II. CYSS Coordinator Approval

An installation's CYSS Coordinator has four working days to act on a MIAT's recommendation. *Id.* § 4.f. A Coordinator can approve any MIAT-recommended accommodation plan that does not require CYSS "personnel to determine the correct insulin dosage or to administer insulin." *Id.* § 8.b. Notably, this limitation does not apply to accommodation plans under which CYSS personnel assist children who can manage their own insulin. *See id.* For example, a CYSS Coordinator can approve an accommodation plan under which CYSS personnel supervise a child the MIAT has determined is able to adjust his or her insulin pump or to self-inject.

For accommodation plans that do not include CYSS personnel directly calculating or administering dosages of insulin, the CYSS Coordinator must approve a plan unless the Coordinator determines that it imposes "an undue hardship, fundamentally alters the program in which the accommodations would be made, or poses a direct threat to the health and safety of the participants in that program." *Id.* § 3.a. If the Coordinator makes that determination, he or she nonetheless cannot deny the request. *Id.* § 8.a. Rather, any accommodation that the Coordinator does not approve is automatically sent up the chain of command for consideration. *See id.* § 4.f.

When a CYSS Coordinator reaches a decision, he or she "inform[s] the parent(s)/legal guardian(s) in writing of either the approval of all requested accommodations or of the need for further review . . . of the accommodations that s/he does not have the authority to approve." *Id.* § 4.3.f. "At the same time, parent(s)/legal guardian(s) will be advised of their option to submit additional information" within three working days. *Id.*

III. Garrison Commander Review

At the same time the CYSS Coordinator informs the parent(s)/guardian(s) of his or her determination, the Coordinator sends any unapproved requests to the Garrison Commander, the officer in command of the installation where the program is located, for further review. *Id.* § 4.f. Army attorneys at the installation review the unapproved request to ensure that it contains all the necessary documentation and, if not, to obtain any missing documentation and to provide a legal analysis of the CYSS Coordinator's determination. *Id.* § 4.g. Any additional materials that the parents or guardians submit during this period will also be added to the packet. *See id.* § 4.3.f. The legal review can take no more than five working days. *Id.* § 4.g.

The Garrison Commander then considers the request in light of the legal review and all available information. *See id*. §§ 4.h, 5. Within five working days, the Garrison commander must issue either a decision or, if necessary, a recommendation to the ACSIM. *Id*. §§ 4.h, 8.a. If the request must go to the ACSIM, the Garrison Commander provides "a detailed analysis of any installation resource, training, personnel, [or] funding gaps" that might cause the accommodation to impose an undue burden, fundamentally alter the program, or pose a direct threat. *Id.* § 5.a.2.

This installation-level review serves three purposes. First, the legal review ensures that the CYSS Coordinator has not wrongly concluded that he or she lacks authority to grant an accommodation. *Id.* Second, in light of the legal review, the Garrison Commander can reconsider a Coordinator's determination that an accommodation imposes an undue burden, constitutes a fundamental alteration, or poses a direct threat and approve a requested accommodation that does not require CYSS personnel to calculate or administer dosages of insulin. Third, if the request must go to the ACSIM, the Garrison Commander's analysis of the installation's existing resources and capabilities allows the ACSIM to make an informed decision and, if necessary, determine the additional resources the installation needs.

IV. ACSIM Review

If, under the policy, the ACSIM is required to approve an accommodation request, the ACSIM has twenty working days from receipt of the Garrison Commander's recommendation to reach a final decision on the request and issue a plan for implementing the approved accommodation.[4] *Id.* § 5.b. For accommodations that include CYSS personnel directly calculating or administering insulin, the ACSIM formulates the approved plan in consultation with the Army's Office of the Surgeon General. *Id.* § 3. As the authority overseeing all Army installations, the ACSIM can allocate resources not already available at the installation where the CYSS program is offered to provide the accommodation safely without creating an undue burden on the installation or fundamentally altering the CYSS program. *Id.* § 5.a.2.

FACTUAL AND PROCEDURAL BACKGROUND

I. M.W.

Before the summer of 2015, M.W., then five years old, participated in the Porter Youth Center after-school program provided by the Presidio of Monterey, an Army installation. Am. Compl. ¶¶ 54-56. In June of that year, M.W. was diagnosed with type 1 diabetes. *Id.* ¶ 56. Hope W., M.W.'s mother, then sought an accommodation for M.W. to participate in the after-school program the following year. *Id.* ¶ 57. Although CYSS engaged in extensive discussions with Hope to reach a workable accommodation, she sought accommodations that could not be provided under the Old Diabetes Policy without an exception to policy. *Id.* ¶¶ 57-58. During these discussions, CYSS informed Hope that the policy was in the process of being revised. *Id.* ¶¶ 62-63. Unwilling

[4] The Garrison Commander's request is routed through command channels to the Army headquarters. The Installation Directorate and Commander of Installation Management Command are intermediate headquarters between the installation and the Office of the ACSIM. Ex. C § 5. The Installation Management Command makes a recommendation to the Office of the ACSIM but does not have authority to approve a request. *See generally id.* §§ 5.b, 8.a. Defendants therefore refer to it as part of the Office of the ACSIM for purposes of this motion.

to send M.W. to the after-school program without the accommodations she requested, Hope did not enroll M.W. for the 2015-2016 academic year. *Id.* ¶ 59.

On July 19, 2016, Hope W., joined by the Association, filed the First Complaint in the instant law suit on M.W.'s behalf. First Compl. 1. After answering, Defendants moved for a ninety-day stay of litigation to enable them to revise the Old Diabetes Policy. ECF No. 32. Defendants did not, however, seek to stay mediation of the dispute. ECF No. 32-1 at 2. Plaintiffs initially opposed the stay motion but then withdrew their opposition. ECF No. 38. The parties proceeded to engage in multiple rounds of mediation. ECF Nos. 39, 41. After the second mediation session, the parties jointly moved to continue the initial case management conference, which was then scheduled for June 15, 2017. ECF No. 43.

The Army provided M.W. with its approval of the accommodations Hope W. had requested on May 23, 2017. *See* Am. Compl. ¶ 25; Exhibit D (Redacted M.W. Accommodation).[5] Plaintiffs allege that "M.W. requires the following diabetes-related accommodations: glucagon administration, supervision of blood glucose testing and appropriate response to high or low blood glucose levels, assistance with the administration of insulin using an insulin pump, carbohydrate counting, and monitoring her food intake." Am. Compl. ¶ 52. The approved accommodation includes all these forms of care and more. *See* Ex. D. at 1-2. The Army has also approved a MAP that provides the specifics of how each type of care is to be provided. Garfield Decl. ¶¶ 8, 18. Plaintiffs do not challenge the sufficiency of M.W.'s accommodation or the approved MAP. *See* Am. Compl. ¶ 25; *see generally id.* ¶¶ 86-109.

[5] The Court may consider this document on a motion to dismiss for two reasons. First, it is "incorporated by reference into a complaint" because "the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Second, the court may look outside the pleadings to resolve questions of jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121-1122 (9th Cir. 2014); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Here, the Army's approval of M.W.'s accommodation goes to her lack of injury upon which to base standing and, thus, to the Court's jurisdiction. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000).

Although M.W.'s parents delayed formally enrolling M.W. for some time after the accommodation and MAP were approved, M.W. is currently enrolled and receiving care in accordance with her MAP at CYSS's Porter Youth Center after-school program. Garfield Decl. ¶¶ 18-21.

II. The Association

The Association is a non-profit organization that engages in a wide variety of activities to further "its mission of preventing and curing diabetes and improving the lives of all people affected by diabetes." Am. Compl. ¶¶ 26, 72. The Association "has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers" as well as more than $150 million in assets. Exhibit E (Excerpt of Association *Amicus* Brief) at 1; Exhibit F (Association 2016 Financial Statement Excerpt) at 3.[6]

The Association identifies two ways in which it has allegedly been "directly harm[ed]" by Defendants' policies. *Id.* ¶ 71. First, the Association took time to "to prepare for and conduct a meeting with the Army" regarding the Old Diabetes Policy seven years ago and spent some time corresponding with the Army afterward. *Id.* ¶ 75. Second, the Association has "conduct[ed] intakes with . . . impacted families since 2005." *Id.* ¶¶ 74. Of those intakes, "the majority . . . [were] with families who were [allegedly] harmed or at risk of being harmed by Defendants' [allegedly] discriminatory policy before the filing of this lawsuit in July 2016." *Id.* ¶ 74. Plaintiffs do not disclose who the "minority" of the individuals were for whom the Association conducted intakes. *See generally id.* In total, Association staff "spent numerous hours assisting" these families. *Id.*

[6] The Association premises its standing in part on the allegation that the resources expended in connection with Defendants' diabetes-accommodation policies "have perceptibly impaired the Association's ability to carry out its mission." Am. Compl. ¶ 72. Thus, the Court may consider documents outside the pleadings concerning the Association's resources to assess whether Plaintiffs can meet their burden to show that the resources spent have actually affected its ability to pursue its other activities. *See Leite*, 749 F.3d at 1121-1122; *McCarthy*, 850 F.2d at 560.

Since the implementation of the New Diabetes Policy in June 2017, Plaintiffs allege only a single intake concerning Defendants' diabetes accommodation policies. *Id.* ¶ 75. Plaintiffs do not allege that the intake concerned a challenged aspect of the New Diabetes Policy, that the person who contacted the Association was eligible to enroll a child in CYSS programs, or that he or she made any effort to enroll a child. *Id.* Rather, Plaintiffs only allege that the intake "occurr[ed] on July 3, 2017." *Id.*

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) requires dismissal when the plaintiff fails to meet his or her burden of establishing subject-matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989), including when a plaintiff fails to establish the elements of standing, *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009). "[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

Federal Rule of Civil Procedure 12(b)(6) requires dismissal when the plaintiff fails to make allegations sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A "claim has facial plausibility" when the remaining "well-pleaded factual allegations" allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "[C]onclusory statements" and "bare assertions" of fact "are not entitled to the presumption of truth" and must be "discount[ed]" prior to "determining whether a claim is plausible." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

ARGUMENT

I. Plaintiffs Lack Standing to Assert the Claims in the Amended Complaint.

A federal court has subject matter jurisdiction to consider cases only when a plaintiff has standing. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042 (9th Cir. 2017). "To establish standing, a plaintiff must show that '(1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision.'" *WildEarth Guardians v. USDA*, 795 F.3d 1148, 1154 (9th Cir. 2015) (quoting *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008)). Whether a party has standing is determined as of the date upon which the operative complaint is filed or, when there is an amended complaint in a case, the date the amended complaint is filed. *See Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043-48 (9th Cir. 2015), *as amended on reh'g en banc* (Apr. 28, 2015). If an injury exists at the filing of a complaint but ceases to exist while a case is pending, the case is moot and should be dismissed for lack of jurisdiction. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

There are two types of jurisdictional challenges under Federal Rule of Civil Procedure 12(b)(1)—facial and factual. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). A facial challenge looks only at the allegations in the complaint and evaluates them under the standard applied for stating a claim under Rule 12(b)(6). *See id.* However, when jurisdiction depends on "the truth of the plaintiff's factual allegations[,] . . . plaintiff must support her jurisdictional allegations with 'competent proof' under the same evidentiary standard that governs in the summary judgment context." *Id.*; *see also Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013) (laying out the summary judgment standard). Here, Plaintiffs cannot demonstrate their standing to bring the claims in the Amended Complaint under either standard.

A. Injuries Under the Old Diabetes Policy are No Longer Relevant to Standing.

Throughout their Amended Complaint, Plaintiffs rely on events that occurred under Defendants' Old Diabetes Policy to attempt to establish standing. *See, e.g.*, Am. Compl. ¶ 71 ("The Association has standing to bring this lawsuit because Defendants have directly harmed the Association, dating back to 2005 . . . ."). However, the relevant provision of Army Regulation 608-10 and the memoranda that implemented that regulation, which together constituted the Old Diabetes Policy, have been "rescinded in their entirety." Ex. B at 1; *see* Ex. A ¶ 4-32; Ex. C § 2. In an attempt to rely on alleged injuries under the Old Diabetes Policy to establish standing, Plaintiffs contend that Defendants could reasonably be expected to reinstate that Policy. *See* Am. Compl. ¶ 71. Such conclusory assertions, however, are not sufficient to show that Defendants are not committed to the New Diabetes Policy. Therefore, in order for Plaintiffs to establish standing, they must demonstrate actionable injuries under the New Diabetes Policy.

Federal courts "presume that a government entity is acting in good faith when it changes its policy," although the government must nonetheless show that "the challenged conduct cannot reasonably be expected to start up again." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). "[W]hen a challenged regulation is repealed and the government does not openly express intent to reenact it," the government is presumed to be committed to the new policy, absent "'clear showings of reluctant submission [by government actors] and a desire to return to the old ways.'" *Citizen Ctr. v. Gessler*, 770 F.3d 900, 908 (10th Cir. 2014) (citation omitted) (alteration in original). This is why, when a challenged policy embodied in a regulation has been superseded during litigation, "the issue of the validity of the old regulation is moot." *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982). Here, the Army has replaced and superseded the regulatory provision underlying the Old Diabetes Policy, and Plaintiffs have not proffered specific allegations (nor could they) to indicate that the Army intends to retreat from the New Diabetes Policy, particularly in light of the

significant undertaking to replace the old policy. *See* Exs. A-C; Garfield Decl. ¶ 12. This is sufficient to defeat Plaintiffs' invocation of the voluntary cessation doctrine.

Even if the Army had not embodied its new policy in an amended Army Regulation 608-10, Defendants would more than meet their burden to demonstrate that they are committed to the New Diabetes Policy. The Ninth Circuit has repeatedly held that a policy memorandum from a high-ranking agency official, even in the absence of a statutory or regulatory change, is sufficient evidence of enduring policy change to moot prospective relief based on the earlier policy. *See, e.g.*, *Rosebrock*, 745 F.3d at 966, 973 (considering an email from an agency head on the proper enforcement of a regulation); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (considering a policy memorandum from a high-ranking agency official).[7]

The New Diabetes Policy reflects the Army's commitment to provide accommodations for children with diabetes across the wide variety of programs and activities that CYSS offers at installations around the world. *See* Garfield Decl. ¶ 12. The New Diabetes Policy is both embodied in Army regulations, Ex. A, and laid out in exhaustive detail in memoranda issued by the Lieutenant General serving as the Assistant Chief of Staff for Installation Management for the Army, Exs. B, C. Either the regulatory amendment or the implementation memoranda standing alone would be sufficient to meet Defendants' burden of demonstrating its commitment to the New Diabetes Policy, and the combination of the policy documents overwhelmingly demonstrates that the Army will not abandon the current policy. *See Citizen Ctr.*, 770 F.3d at 908; *White*, 227 F.3d at

[7] In reaching these holdings, the Ninth Circuit set out a non-exhaustive list of four factors to be considered for "policy change not reflected . . . in changes in ordinances or regulations." *Rosebrock*, 745 F.3d at 972. Although that analysis is not applicable here because the Army did change its regulations, Defendants' implementation of the New Diabetes Policy would nonetheless meet Defendants' burden on voluntary cessation under that analysis. The New Diabetes Policy uses language that is both broad in scope and unequivocal in tone, fully addresses the aspects of the Old Diabetes Policy that Plaintiffs challenged in the First Complaint, was in part a result of this litigation, and has been followed since its enactment. *See id.*; Garfield Decl. ¶ 13. Indeed, the only one of the five *Rosebrock* factors that does not favor Defendants is that the New Diabetes Policy has not been in place long. *See id.* However, that is the inevitable result of Plaintiffs committing to challenging the Policy before Defendants even implemented it.

1243. Plaintiffs' attempt to use the voluntary cessation doctrine to bootstrap their alleged injuries under the Old Diabetes Policy to challenge the New Diabetes Policy therefore must be rejected.

B. M.W. Lacks Standing to Assert the Claims in the Amended Complaint.

M.W. has not suffered an injury sufficient to give her standing to challenge the New Diabetes Policy. The Army has approved the accommodation her mother requested on her behalf in December 2016, and she is currently enrolled in a CYSS program. Garfield Decl. ¶¶ 16-21. Plaintiffs do not allege in the Amended Complaint that either the accommodation or the MAP that implements it fail to comply with the Rehabilitation Act. *See generally id.* ¶¶ 86-109. Moreover, M.W.'s accommodation was not approved under the New Diabetes Policy, but rather was granted as an exception under the Old Diabetes Policy on May 23, 2017. *See* Am. Compl. ¶ 25; Ex. D. The New Diabetes Policy procedures that Plaintiffs challenge in the Amended Complaint were not implemented until June 12, 2017. Ex. C. Thus, M.W. cannot claim she has suffered an injury due to the New Diabetes Policy. Without an injury in fact arising from the New Diabetes Policy, M.W. lacks standing to challenge it.

Plaintiffs make two assertions in the Amended Complaint to support M.W.'s continued standing, but neither has merit. First, Plaintiffs allege that M.W. "has still not been enrolled in CYSS programs and activities." Am. Compl. ¶ 25. M.W. was not formally enrolled when Plaintiffs filed the Amended Complaint because her mother had not yet accepted the accommodation and MAP that the Army had issued weeks before. *See* Ex. D. Thus, her purported injury at that time was the result of M.W.'s delay and is not fairly traceable to Defendants. *See McConnell v. FEC*, 540 U.S. 93, 228 (2003) (holding that an injury resulting from a plaintiff's own decisions does not confer standing); *see also La Asociacion de Trabajadores de Lake v. City of Lake Forest*, 624 F.3d 1083, 1088 n.4 (9th Cir. 2010). Moreover, M.W.'s mother has since accepted the accommodation, and M.W. is now enrolled in CYSS's Porter Youth Center after-school program. Garfield Decl.

¶ 21. Therefore, to the extent M.W.'s purported non-enrollment could have conferred standing, that potential basis for asserting injury is now moot. *See Friends of the Earth, Inc.*, 528 U.S. at 189.

Second, Plaintiffs allege that M.W. will "still be subject to Defendants' [New Diabetes P]olicy when she must renew her accommodations or if she has any changes in her needs for diabetes-related accommodations." Am. Compl. ¶ 25. Both of these putative harms are speculative and premature, so neither can confer standing at this juncture. Next year, M.W.'s parents may or may not choose to enroll M.W. in a CYSS program, which may or may not be at the Porter Youth Center. Likewise, M.W. may or may not need a change in her diabetes-related accommodations at some unknown point in the future. The change she seeks may or may not be encompassed by her current accommodation (rather than her MAP's implementation of the accommodation, which can be changed without going through the process in the New Diabetes Policy). Garfield Decl. ¶ 8. Now that the accommodation M.W.'s mother sought for her has been approved, she lacks standing to seek injunctive relief with respect to the New Diabetes Policy simply because she may or may not be subject to it in the future. *See Forziano v. Indep. Grp. Home Living Program, Inc.*, 613 F. App'x 15 (2d Cir. 2015) (holding that the possibility that defendants would in the future deprive plaintiffs of an accommodation provided to them during the pendency of a disability discrimination lawsuit was insufficient to create standing); *see also Alaska Wilderness League v. Jewell*, 637 F. App'x 976, 979-980 (9th Cir. 2015) (holding that a possible violation or expiration of a regulation that foreclosed a threatened injury was too speculative to confer standing).

Having received an accommodation that permits M.W. to participate in the CYSS program of her choice, M.W. no longer has an injury in fact traceable to Defendants. The mere possibility that she may need a different accommodation in the future is not enough to give her standing now. Her claim should therefore be dismissed.

C. The Association Lacks Standing to Assert the Claims in the Amended Complaint.

Although the Association contends it has both representative and direct standing to challenge the New Diabetes Policy, it cannot maintain this action because neither the Association's members nor the Association itself has been injured by the Policy. *See* Am. Compl. ¶ 70.

1. *The ADA Lacks Representational Standing to Challenge Defendants' New Diabetes Policy Because No ADA Members Have Been Subject to It.*

For an association to have standing to sue on behalf of its members, it must demonstrate that its members would otherwise have standing to sue in their own right, among other requirements. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). To satisfy this requirement, "at least one of its members [must have] standing to bring th[e] petition on its own." *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F3.d 939, 969 n.4 (9th Cir. 2013). Here, the Association cannot meet its burden on this issue.

For an Association member to have standing, he or she would have to demonstrate an injury resulting from the New Diabetes Policy.[8] *See WildEarth Guardians*, 795 F.3d at 1154. Plaintiffs' Amended Complaint fails to meet this requirement. Under the standard applicable to facial jurisdictional challenges, "[m]ere conclusory allegations are not enough to establish the 'concrete and particularized' injury required for standing under Article III." *Escobar v. Brewer*, 461 F. App'x 535, 535-36 (9th Cir. 2011) (quoting *Carrico v. City & Cty. of S.F.*, 656 F.3d 1002, 1006 (9th Cir. 2011)). Plaintiffs provide only wholly conclusory allegations that any Association member has been injured by the New Diabetes Policy. For example, Plaintiffs contend that "[a]t least one Association member family would have standing to sue in their [sic] own right because . .

[8] Plaintiffs assert that parents and guardians of children with diabetes eligible to participate in CYSS programs have direct standing as well as third-party standing to assert claims on behalf of their children. Am. Compl. ¶ 83. Defendants do not dispute that, if a child has standing, his or her parents or guardians generally have standing to assert the claim on the child's behalf. However, this proposition is unavailing here because, as explained in this section, Plaintiffs have not alleged that any Association members have children who would have standing to challenge the New Diabetes Policy.

. Defendant's revised policy continues to discriminate against and currently harms Association member families."). Am. Compl. ¶ 78. Further, Plaintiffs provide only one specific factual allegation concerning an event occurring since the New Diabetes Policy became effective. Plaintiffs merely allege that the Association conducted an intake on July 3, 2017, implicitly suggesting, but not expressly averring, that the intake concerned a diabetes-related accommodation in a CYSS program.[9] *Id.* ¶ 75. However, Plaintiffs allege neither that the person who contacted the Association was a member nor that he or she had suffered an injury resulting from the New Diabetes Policy. *See id.*

Moreover, applying the standard for factual challenges to jurisdiction, Plaintiffs cannot raise a genuine issue of material fact as to the existence of an Association member injured by the New Diabetes Policy. Only a single request for a diabetes-related accommodation has been forwarded to the Office of the ACSIM since the New Diabetes Policy was put in place. Garfield Decl. ¶ 14. Defendants do not know if the parents or guardians of that child are Association members. However, even if they were members, they would not confer standing on the Association because the Amended Complaint is devoid of any allegations that this particular family suffered an injury under the New Diabetes Policy. In fact, the Army granted an interim accommodation on July 18, 2017, the day after an accommodation was formally requested, and the child is now participating in CYSS programs. *Id.*

[9] At one point, Plaintiffs make a vague allegation that the Association is a "non-profit membership organization whose members include families affected by Defendants' previous policy and their revised policy, including M.W.'s mother," Hope W. Am. Compl. ¶ 26. It is unclear whether that statement alleges that M.W.'s mother is an Association member or merely someone whose family was allegedly affected, especially given that both the First Complaint and the Amended Complaint are devoid of any explicit allegation that Hope W. is an Association member, including in the paragraphs specifically concerning her and those devoted to representational standing. *See id.* ¶¶ 77-84; First Compl. ¶¶ 63-64. Regardless, as explained in the preceding section, Hope W. does not have standing to challenge the New Diabetes Policy because M.W. has not been subject to it. *See* § II.A, *supra*. Thus, Hope W. could not confer representational standing on the Association even if she were a member. *See Ass'n of Pub. Agency Customers*, 733 F3.d at 969 n.4.

Plaintiffs have not sufficiently alleged that an Association member has standing to challenge the New Diabetes Policy or put forward evidence of a member's injury sufficient to create a genuine issue of material fact. Therefore, the Court must conclude that the Association lacks representational standing.

2. *The ADA Lacks Direct Standing to Challenge Defendants' New Diabetes Policy Because it Lacks a Sufficient Personal Stake in the Outcome of its Challenge.*

The Association has not alleged, and cannot demonstrate, that it has direct standing to challenge the New Diabetes Policy because it lacks an independent cognizable injury in fact. "[A]n organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular . . . [alleged] discrimination in question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (citations omitted). To confer standing, organizations' diversion of resources must be significant enough to "'perceptibly impair[]' their ability to carry out their missions." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19 (9th Cir. 2013) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *cf. Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839 (9th Cir. 2007) (holding that a *de minimis* injury did not confer standing to assert a disability discrimination claim). An organization "cannot manufacture the injury [needed for standing] by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake*, 624 F.3d at 1088. Rather, it "may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at n.4; *see also Smith*, 358 F.3d at 1105.

Plaintiffs have not adequately alleged a diversion of the Association's resources to challenge the New Diabetes Policy. Plaintiffs' only allegation concerning events since the New Diabetes Policy has been in place is that the Association conducted a single intake. *See* Am. Compl. ¶ 75.

The absence of additional detail in the allegation is fatal to its facial sufficiency as demonstrating a diversion of resources. Even charitably reading the allegation to specify that the intake concerned a diabetes-related accommodation in a CYSS program, Plaintiffs do not allege that the intake concerned a challenged aspect of the New Diabetes Policy. *See id.* Thus, any resources devoted to the intake were not spent "to combat the particular . . . [alleged] discrimination in question" in this case. *Smith*, 358 F.3d at 1105 (citations omitted). Plaintiffs also do not allege any resources expended on the call that would plausibly "'perceptibly impair[]' [the Association's] ability to carry out [its] mission[]." *Valle del Sol Inc.*, 732 F.3d at 1018-19 (quoting *Havens Realty Corp.*, 455 U.S. at 379). Indeed, the Amended Complaint does not identify any resources spent on this particular intake (and only references "numerous hours" spent on all intakes in the past year, including those while the Old Diabetes Policy was still in place). *See* Am. Compl. ¶ 74; *see also id.* ¶¶ 72-75. Plaintiffs must plausibly allege that the Association spent significant resources on combatting the New Diabetes Policy in order to establish that the Association has direct standing. Their failure to do so undermines the Association's direct standing here.

Plaintiffs' claim that the Association has direct standing also lacks merit under the summary judgment standard applicable to factual challenges to jurisdiction. The Association has more than one hundred fifty million dollars in assets and can draw on its thousands of employees and more than a million volunteers. Ex. E at 1; Ex. F at 3. It is not at all plausible that the resources the Association devoted to a single intake "perceptibly impaired" its efforts to benefit other individuals with diabetes. *Valle del Sol Inc.*, 732 F.3d at 1018-19 (quoting *Havens Realty Corp.*, 455 U.S. at 379). Moreover, there is no reason to assume or imply that any of Plaintiffs' intakes concerned the New Diabetes Policy. As previously stated, CYSS is aware of only a single diabetes-related

accommodation request submitted since the implementation of the Policy.[10] Garfield Decl. ¶ 14. That request was deemed to be complete on July 17, 2017, and an interim accommodation was approved the next day. *Id.* The child is currently participating in the CYSS program under that interim accommodation. *Id.* Thus, no one has been injured by the aspects of the Policy that Plaintiffs challenge, so the Association could not have spent resources on assisting people injured by the Policy.

Plaintiffs' contention that the Association suffered harm sufficient to confer direct standing, rather than standing to represent its members, does not survive even casual scrutiny. They have not specifically alleged any efforts to combat the challenged provisions of the New Diabetes Policy or any significant resources spent in those efforts. *See generally* Am. Compl. ¶¶ 27, 72-75. Moreover, even if Plaintiffs had alleged that the Association expended significant resources to combat the New Diabetes Policy, the available facts demonstrate that Plaintiffs do not have sufficient evidence to create a genuine issue of material fact concerning those allegations. The Association's claim to direct standing therefore also fails.

II. Plaintiffs Fail to State Claims for Which Relief May be Granted Because the New Diabetes Policy Complies with the Rehabilitation Act.

To assert a facially valid claim under Section 504 of the Rehabilitation Act, a plaintiff "must show: (1) she is a qualified individual with a disability; (2) she was denied 'a reasonable accommodation that [she] needs in order to enjoy meaningful access to the benefits of public services;' and (3) the program providing the benefit receives federal financial assistance" or is offered by a federal agency. *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)); 29 U.S.C. § 794. Here, Defendants do not challenge that M.W.'s diabetes constitutes a disability, that

[10] The Office of the ACSIM is also aware of two possible requests for diabetes-related accommodations, but the formal requests have not yet been submitted for approval as yet. Garfield Decl. ¶ 15.

she is eligible to participate in the CYSS after school program at the Presidio of Monterey, or that the program is subject to the Rehabilitation Act. Rather, the sole issue is whether the New Diabetes Policy deprives M.W. or other eligible children with diabetes of meaningful access to CYSS programs.

The New Diabetes Policy provides children with diabetes the opportunity to be included in and enjoy the benefits of CYSS programs as mandated by the Rehabilitation Act. Plaintiffs' Amended Complaint asserts a facial challenge to the Policy, alleging that the maximum times permitted for the Army to process various diabetes-related accommodations deprive children with diabetes eligible to participate in CYSS programs of equal access to those programs.[11] *See* Am. Compl. ¶¶ 86-112 (setting forth Plaintiffs' three claims, all premised on the allegedly discriminatory possible delay in approving diabetes-related policies). For a delay in processing a request for an accommodation to exclude a person with a disability from meaningful access or participation, it must amount to a constructive denial of the request. *See Groome Res., Ltd., L.C.C. v. Par. of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (discussing constructive denial of accommodations under Fair Housing Act); *Updike v. City of Gresham*, 62 F. Supp. 3d 1205, 1211 (D. Or. 2014) (same under Americans with Disabilities Act ("ADA")); *Logan v. Matveevskii*, 57 F.

[11] Plaintiffs also make a single perfunctory reference to the harm from "bureaucratic hoops" through which parents and guardians must jump to obtain accommodations for their children. To the extent it is possible to construe this single reference as stating a claim, it is not plausible. The only obligations on parents and guardians are to submit a request for an accommodation completed by their medical provider (including fill-in-the-blank forms describing the desired implementation of the accommodation) and to participate in the MIAT meeting. *See* Ex. C §§ 4.c, 4.e. Parents and guardians then have the option to submit additional information if the request is subject to higher level review. *Id.* § 4.f. All other steps in the process by which diabetes-related accommodations are approved under the New Diabetes Policy are carried out by Army personnel. *See generally id.* §§ 3-5. Completion of a single set of forms is hardly a barrier so extreme that it would prevent a parent or guardian from seeking the accommodation necessary to allow a child with diabetes to be able to participate safely in a CYSS program, particularly in light of the urgent need for childcare described by Plaintiffs. *See, e.g.*, Am. Compl. ¶ 14. Moreover, it is well established that an entity providing accommodations may require information from a person seeking an accommodation, such as verification of a person's eligibility for an accommodation, a description of the accommodation sought, and justification for the particular accommodation sought in light of the nature of the disability. *See Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App'x 617, 621-22 (6th Cir. 2011) (concerning accommodations under the Fair Housing Act); *see also Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 6:11-cv-1637-Orl-31DAB, 2012 U.S. Dist. LEXIS 178183, at *18-19 (M.D. Fla. Dec. 17, 2012) (same).

Supp. 3d 234, 271 (S.D.N.Y. 2014) (same under, among other statutes, Section 504 of the Rehabilitation Act). Because Plaintiffs have asserted facial challenges to the New Diabetes Policy under the Rehabilitation Act, they must show that "no set of circumstances exists under which the [Policy] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Reno v. Flores*, 507 U.S. 292, 301 (1993) (stating that the *Salerno* standard applied "to both the constitutional challenges . . . and the statutory challenge" to a challenged regulation). Plaintiffs' claims fail because they cannot make this showing for two reasons.

First, Plaintiffs disregard the possibility that the Army could complete steps in the New Diabetes Policy's accommodation approval process in less than the maximum time permitted by the Policy. In alleging that the process for approving and implementing accommodations under the new Diabetes Policy takes too long, Plaintiffs exclusively assume that all accommodation requests will require the maximum permissible time the Policy allows. *See, e.g.*, Am. Compl. ¶¶ 6, 12, 13, 47, 50, 80, 97, 107. However, the New Diabetes Policy directs that each step in the approval process occur "as soon as possible," and does not on its face contemplate that the maximum time allotted will be necessary for each accommodation request at each stage of the process. *See* Ex. C §§ 4.e-h, 5.b, 5.g-h, 8.a. Although they never identify what they contend is the maximum reasonable time for approving and implementing an accommodation under the Rehabilitation Act, Plaintiffs allege in conclusory fashion that the "[b]est practice" is "approximately two weeks"[12] Am. Compl. ¶ 47. Under the New Diabetes Policy, it is possible that the Army could approve and implement an accommodation in less than two weeks. Given the possibility that the Army could approve an accommodation in a time consistent with what Plaintiffs allege is the best practice,

[12] Even accepting that two weeks could be deemed to be the "[b]est practice," Defendants are obligated only to implement a reasonable practice. *See Hoffman v. Contra Costa College*, 21 F. App'x 748, 749 (9th Cir. 2001); *Hartsfield v. Miami-Dade Cty.*, 90 F. Supp. 2d 1363, 1372 (S.D. Fla. 2000). Plaintiffs do not identify what a reasonable maximum timeline would be.

Plaintiffs' Amended Complaint cannot plausibly demonstrate that implementation of the New Diabetes Policy always violate the Rehabilitation Act. Thus, Plaintiffs have not stated a claim upon which relief could be granted. *See Flores*, 507 U.S. at 301.

Second, even if the Army were to take the maximum time permissible under the New Diabetes Policy to approve and implement an accommodation, plaintiffs have not plausibly alleged that such a lapse of time would amount to a constructive denial in all circumstances. Notably, Plaintiffs do not allege that the approval process outlined in the New Diabetes Policy is motivated by discriminatory animus. *See* Am. Compl. ¶ 15 (alleging that layers of review under the New Diabetes Policy are designed to "appease the military bureaucracy," not to discriminate against children with diabetes).[13] This alone is fatal to their claims because "where an entity acts in good faith to determine the best way to accommodate a person's disability, and the disabled person suffers some delay as a result of that process, that entity has not denied altogether the disabled person's request for a reasonable accommodation." *Anderson v. Ross Stores, Inc.*, No. C 99-4056 CRB, 2000 U.S. Dist. LEXIS 15487, at *26 (N.D. Cal. Oct. 6, 2000); *see also Wilson v. Dalton*, 24 F. App'x 777, 778 (9th Cir. 2001); *Taylor v. Contra Costa Cty. Emp't & Human Servs. Dep't*, 16-cv-03738-MEJ, 2017 U.S. Dist. LEXIS 56190, at *11-12 (N.D. Cal. Apr. 12, 2017); *Logan*, 57 F. Supp. 3d at 258.

Moreover, the maximum time permitted to approve an accommodation is not unreasonable under all circumstances. The accommodation process requires a "fact-specific, individualized analysis of the disabled individual's circumstances," *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999), *as amended* (Nov. 19, 1999), and the reasonable length will depend on those specific and unique circumstances. The key consideration is whether the length of the process

[13] Defendants also note the obvious tension between Plaintiffs' seeming disapproval of the purported lack of an appeal process in the New Diabetes Policy, Am. Compl. ¶¶ 6, 49, 105, 106, and their allegations that multi-level review of accommodations—which serves as an automatic appeal process—violates the Rehabilitation Act.

is so long that it deprives the child of "meaningful access." *A.G.*, 815 F.3d at 1204. The maximum possible time for approval of a diabetes-related accommodation that must go to the ACSIM for approval (*e.g.*, an accommodation that requires CYSS personnel to inject insulin) is just under twelve weeks from the date of the request to the date of approval, with a maximum of thirty days thereafter for the accommodation to be fully implemented.[14] Plaintiffs cannot show that this would be unreasonable in every factual circumstance, given the innumerable permutations of a child's medical needs, the nature of the CYSS program offered, and the wide variety of environments and resources available at Army installations across the world. For example, a parent, like Hope W., seeking to re-enroll a child with diabetes in an afterschool program under the New Diabetes Policy need only submit a request for an accommodation at the end of one academic year to ensure that it would be processed and implemented before the beginning of the next. Under this circumstance, the New Diabetes Policy could hardly be said to have excluded the child from access to CYSS programs.

Indeed, even without the range of circumstances that could apply in the unique context of CYSS programs, courts generally hold that "[a] relatively short delay of a few weeks (or even a few months) in approving a request does not support" a constructive denial claim. *Marks v. Wash. Wholesale Liquor Co. LLC*, No. 15-1714 (JEB), 2017 U.S. Dist. LEXIS 80929, at *30-31 (D.D.C. May 26, 2017) (collecting cases under the ADA); *see also Sherrer v. Miami-Dade Cty.*, No. 14-24903-Civ-Scola, 2015 U.S. Dist. LEXIS 93314, at *4 (S.D. Fla. July 17, 2015) ("A four to six month turn-around time for a decision on a [zoning] variance request [to accommodate a disability] does not equate to a constructive denial of the request."). Even a delay of "several months" in

[14] Because it uses working days to calculate deadlines from the MIAT meeting through final ACSIM approval, the maximum time for approval of an accommodation under the New Diabetes Policy varies slightly on the day of the week the request is made and whether there are any intervening federal holidays. Assuming the MIAT meeting occurs on a Monday and there are no intervening federal holidays, the process could potentially take up to eighty calendar days for final ACSIM approval. A MIAT meeting on a Friday, however, would add two days for the intervening weekend.

providing a workplace accommodation has been held not to violate the ADA. *Hartsfield v. Miami-Dade Cty.*, 90 F. Supp. 2d 1363, 1373 (S.D. Fla. 2000), *aff'd sub nom. Hartsfield v. Miami Dade Cty.*, 248 F.3d 1179 (11th Cir. 2001). So long as the Army implements the New Diabetes Policy in good faith, even taking the maximum time permitted would not violate the Rehabilitation Act in a given case. *See Pasatiempo v. England*, 125 F. App'x 794, 795-96 (9th Cir. 2005). Under this legal standard, Plaintiffs have not adequately alleged that the timelines in the New Diabetes Policy would violate the Rehabilitation Act in every case, which is what they are required to do.

Without any acknowledgment of the circumstances that can affect CYSS' ability to provide diabetes-related medical care in programs offered in different environments across the globe, Plaintiffs attempt to hold Defendants to a standard not required by the Rehabilitation Act. However, Plaintiffs' facial challenges to the New Diabetes Policy fail precisely because Plaintiffs have not plausibly alleged that the Policy violates the Rehabilitation Act in all circumstances. Plaintiffs have adequately alleged neither that the Army will always take the permissible maximum time to approve and implement diabetes-related accommodations nor that those maximums will always deprive children with diabetes meaningful access to CYSS programs. Therefore, Plaintiffs' Amended Complaint fails to state a claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Amended Complaint with prejudice.

DATED: August 4, 2017

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