Case No. 18-15242

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN DIABETES ASSOCIATION,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY, et al.,
Defendants-Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
Case No. 5:16-cv-04051-LHK
Hon. Lucy H. Koh

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant the American Diabetes Association (the "Association") states that it is a private nonprofit organization, it is not a publicly held corporation or other publicly held entity, and it has no parent corporation. No publicly held corporation or other publicly held entity owns ten percent or more of the Association.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over the Association's claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, pursuant to 28 U.S.C. §§ 1331 and 1343. In this appeal, the Association properly seeks review of a final order of dismissal from the district court, as discussed herein. This Court has jurisdiction over the Association's appeal pursuant to 28 U.S.C. § 1291.

On December 15, 2017, the district court entered an order granting Appellees' motion to dismiss without prejudice. Excerpts of Record ("ER") 2-23. After the Association filed a notice of intent not to amend the complaint,[1] the district court entered a final judgment of dismissal on January 16, 2018. ER 26-27, ER 1. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1135-37 (9th Cir. 1997) (directing that plaintiffs who elect to stand on their pleadings must obtain a final order of dismissal from the district court before appealing). The Association filed a timely notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure on February 13, 2018. ER 24-25.

[1] The Association and co-plaintiff M.W. jointly filed the notice of intent not to amend the complaint and the subsequent notice of appeal. ER 26-27, ER 24-25. The Association and M.W. subsequently moved to voluntarily dismiss M.W. from the suit following the termination of the Memorandum of Agreement that had permitted M.W. to participate in Appellees' childcare programs. Appellants' Mot. 1, ECF No. 15.

ISSUES PRESENTED

1. Whether the American Diabetes Association's (the "Association's") expenditure of resources to combat discrimination against children with diabetes in the U.S. Army's Child, Youth, and School Services ("CYSS") programs confers Article III standing.

2. Whether the Association has Article III standing to challenge discrimination against children with diabetes in CYSS programs on behalf of its injured members.

3. Whether the Army's mid-litigation introduction of revised, but still discriminatory, policy memoranda could moot the Association's challenge to ongoing discrimination against children with diabetes in CYSS programs.

PERTINENT REGULATIONS

Pertinent regulations are reproduced in the addendum.

STATEMENT OF THE CASE

I. Introduction

The American Diabetes Association (the "Association") exists to improve the lives of people affected by diabetes. In line with this mission, for more than a decade, it has responded to calls for help from families on military bases across the country, each reporting discrimination against children with type one diabetes in the U.S. Army's Child, Youth, and School Services ("CYSS") programs. By refusing to provide the routine accommodations that children with diabetes need to participate safely, the Army excludes families from its childcare services. Without viable childcare options, parents face difficult choices, such as working reduced hours, leaving their jobs, or relocating their families – all because of a child's diabetes diagnosis.

Having poured resources into providing individualized assistance to affected families nationwide and into unsuccessfully attempting to educate the Army about its legal obligations to accommodate children with diabetes, the Association stepped forward and filed suit. The suit challenges the Army's systemic discrimination against the Association's affected members and constituents and seeks declaratory and injunctive relief to redress injury to both the Association and its members.

In the midst of this litigation, however, the Army sought to moot the Association's claims by (1) modifying the relevant regulation in a way that did not address diabetes-related care and (2) issuing new policy memoranda governing requests for diabetes-related accommodations in CYSS programs that, although different from the existing memorandum, failed to correct the discrimination that the Association seeks to end. The district court nonetheless concluded that, in so doing, the Army had mooted any claims based on harm that predated the new memoranda. Looking only at injury incurred during the few weeks between when the Army issued these memoranda and when the Association filed its amended complaint, the district court further concluded that the Association lacked standing to challenge this discrimination moving forward.

The district court's decision was in error. Focusing only on the fact that new documents appeared, and not whether they corrected the challenged discrimination or constituted a meaningful commitment to inclusion moving forward, the district court ignored the evidence in the record that the Army continued to discriminate against children with diabetes. And instead of considering the Association's long history of advocacy on behalf of affected families, the district court artificially zeroed in on just a few weeks of activity, ultimately concluding that the entity best positioned to speak for children with diabetes on military bases nationwide lacked a sufficient stake in the case to move forward as a plaintiff.

Such an approach invites government entities to evade liability for ongoing civil rights violations without meaningfully correcting those violations. Permitting a government defendant sued by an organizational plaintiff that has invested years of resources combatting a discriminatory policy to shake off the suit by making incomplete and ineffective changes to the policy – thereby erasing the organizational plaintiff's standing – both guts the voluntary cessation doctrine and permits an end-run around direct organizational and representative standing.

The Association respectfully requests that this Court reverse the district court's judgment. The Court should hold that the Association has standing to pursue its claims, both on its own behalf and as a representative of its injured members, and that the Army's revised policy memoranda did not moot the Association's claims based on injury that predated them. The district court therefore has subject matter jurisdiction over the Association's claims.

II. Factual and Procedural Background

A. The American Diabetes Association is the Leading Nongovernmental Organization Addressing Diabetes Treatment and the Impact of Diabetes on People's Daily Lives.

The Association's mission is "to prevent and cure diabetes and to improve the lives of those affected by diabetes." ER 29 ¶ 2. It is "the largest, most prominent nongovernmental organization" working in this area, and serves as "a reliable resource and trusted advocate" for people with diabetes and their families.

ER 29 ¶ 3. In furtherance of its mission, the Association offers programs for children with diabetes in the community; advocates for laws, regulations, and policies that keep children with diabetes safe at school; advises companies and organizations about best practices for diabetes-related care; creates resources; and provides legal information and assistance to individuals and families experiencing diabetes-related discrimination. ER 29 ¶ 3. In pursuing this work, the Association advocates both for children currently affected by diabetes and for those who will be diagnosed in the future. ER 31 ¶ 8. Policies that exclude children with diabetes, like those at issue here, undermine the Association's mission, and the Association is devoted to dismantling them. ER 29-31 ¶¶ 2-8.

B. Since 2005, the Association Has Dedicated Substantial Resources to Combatting Discrimination Against Children with Diabetes in CYSS Programs.

The exclusion of children with diabetes from CYSS programs is at the heart of this case. Since 2005, or even earlier, at least twenty-six families from across the country have contacted the Association for assistance because of this exclusion. ER 29 ¶ 4, ER 32 ¶ 12, ER 39 ¶ 9, ER 45 ¶¶ 10-13, ER 49 ¶ 8, ER 60-61 ¶¶ 12-15, ER 66 ¶ 11, ER 72 ¶¶ 11-13.

CYSS is a division of the Army that operates programs for children and youth on military bases, including daycare services, before and after-school care, sports programs, and summer camps. ER 3, ER 113 ¶¶ 28-32, ER 115 ¶ 38. For

families working and living on military bases in remote areas, CYSS can be the only viable childcare option given soldiers' geographical, financial, and scheduling constraints. ER 3, ER 30 ¶ 6, ER 115 ¶ 39.

Constituents have reported to the Association that CYSS has refused to provide necessary diabetes-related accommodations to children in its care, including counting carbohydrates, administering insulin, and administering glucagon. ER 29-30 ¶¶ 4-5. CYSS's refusal to provide these accommodations has barred children from CYSS programs due to their diabetes-related needs, and some parents have seen no point in even attempting to enroll their children in CYSS programs. ER 38-39 ¶¶ 8, 10-11, ER 44-45 ¶¶ 7-8, 14, ER 49-50 ¶¶ 5, 12-13, ER 59-62 ¶¶ 6, 11, 24, ER 66 ¶ 10. Because CYSS left families without viable childcare options, parents had to work reduced hours, leave their jobs, or relocate their families to care for their children. ER 39 ¶ 10, ER 45-46 ¶¶ 12, 15-16, ER 51-53 ¶¶ 17, 28, ER 60 ¶ 10.

Association staff have spent countless hours providing direct assistance to these families. ER 32 ¶ 12. Assisting each of the twenty-six constituents who reached out to the Association for help typically involved an initial call with call center staff; an Association attorney's review of relevant information about the family's situation and completion of any relevant factual and/or legal research; a call with an Association attorney, who provided information about the family's

legal rights; counseling through various options for self-advocacy; and potentially referral to a local attorney for legal representation. ER 32 ¶ 12. In one case, a staff member accompanied a family to a hearing. ER 32-33 ¶ 12. Assisting a single family can take ten or more hours of staff time. ER 32 ¶ 12.

In addition to this individualized advocacy, as Association attorneys learned about CYSS's diabetes care policies, they performed hours of research on the Army's legal obligations to accommodate children with diabetes. ER 33 ¶ 12. In 2010, two staff members devoted time and energy to efforts to explain to the Army that its policies and practices were medically unjustified and unnecessarily excluded children with diabetes. ER 33 ¶ 13. These efforts included preparing for, attending, and following up after an ultimately unsuccessful meeting with Army staff. ER 33 ¶ 13. When the Army responded to the Association's education efforts with disinterest, Association staff spent time meeting internally to explore other strategies to address the Army's discrimination. ER 33 ¶ 13.

Because the Association is a nonprofit organization with an ambitious, multifaceted mission and limited resources, devoting these resources to combat the Army's discrimination in CYSS programs compromised the Association's ability to address diabetes-related discrimination in other settings. ER 31-33 ¶¶ 10-11, 13. The two attorneys in the Association's Legal Advocate Program are the only Association staff members whose roles entail providing individualized pro bono

assistance to constituents facing diabetes-related discrimination, and they cover substantive areas as diverse as employment, education, public accommodations, jails and prisons, and law enforcement. ER 31-32 ¶ 10. Demand for these staff members' services far exceeds their capacity; for every person the Legal Advocate Program serves, another goes without needed assistance. ER 32 ¶ 11.

As this litigation has progressed, the Association has continued to support families affected by the Army's exclusion of children with diabetes from CYSS programs, and anticipates it will need to undertake additional efforts moving forward. ER 33 ¶ 14. The Association is dedicated to protecting and advocating for families currently affected, as well as the families of yet-to-be-diagnosed children who will be affected in the future. ER 31 ¶ 8.

C. Association Members Have Been Injured by CYSS's Longstanding Discrimination Against Children with Diabetes.

The families injured by the Army's policies and practices governing children with diabetes seeking to participate in CYSS programs include at least eight members of the Association. ER 35 ¶ 19.

For example, Association member Nataliya Brantly joined the Association in 2016, the day after doctors diagnosed her son, O.B., with type one diabetes. ER 49 ¶¶ 2, 7. When O.B. received his diagnosis, he had been participating in CYSS programs at West Point, New York for two years. ER 49 ¶ 4. CYSS staff

informed Ms. Brantly that they would not count carbohydrates or administer glucagon or insulin for O.B., and that he could not continue to attend unless a parent returned to the daycare at least three times every day to administer insulin. ER 50 ¶¶ 12-13. Ms. Brantly requested an exception to this policy to permit staff to administer insulin for O.B., but her request was pending for months and never ultimately answered. ER 51-56 ¶¶ 13-39. While the family waited for the Army to respond to this request, at various times O.B.'s grandparents traveled from out of state and abroad to provide diabetes-related care; O.B.'s father took leave from work; Ms. Brantly requested permission to telework; O.B. attended a different, more expensive, and less convenient program; and, for a few weeks, Ms. Brantly left work at least three times every day, a thirty-minute round trip each time, to go to CYSS and administer insulin for O.B. herself. ER 51-54 ¶¶ 16-18, 30-31.

Ultimately, in part due to how difficult it was to find safe childcare for O.B. at West Point and the Army's failure to provide a clear timeline for responding to their long pending request for accommodations, O.B.'s family decided to move to Virginia, where feasible childcare options were available. ER 53 ¶ 28. O.B. is still eligible to participate in CYSS programs, and Ms. Brantly would still consider enrolling him in a CYSS summer program in the future. ER 56 ¶ 38.

A second member, Elizabeth Bendlin, joined the Association in 2011. ER 45 ¶ 11. In 2012, CYSS staff at her family's Army base in Washington refused

to provide diabetes-related accommodations, including glucagon administration, assistance with an insulin pump, blood glucose monitoring, and carbohydrate counting, to Ms. Bendlin's son, J.B. ER 44 ¶¶ 7-8. CYSS staff further stated that they would not permit J.B. to perform these diabetes management tasks himself while he was participating in a CYSS program. ER 44 ¶ 8. Because a child with type one diabetes needs insulin to survive, this policy excluded J.B. from CYSS programs altogether. ER 44-45 ¶ 8. Like O.B.'s family, J.B.'s family also struggled to find workable childcare options for him. ER 45 ¶ 12. Ms. Bendlin exhausted vacation days, took unpaid leave, and, at one point, stopped working for two years so that she could care for J.B. ER 46 ¶¶ 15-16.

Ms. Bendlin's family is currently stationed in North Carolina. ER 46 ¶ 17. In the summer of 2016, CYSS staff again informed her that they could not accommodate J.B. because he has diabetes. ER 46 ¶ 18. J.B. is still eligible to participate in CYSS programs, but Ms. Bendlin has been deterred from applying again due to CYSS's exclusionary policies and out of fear for J.B.'s safety. ER 46 ¶¶ 17, 20.

D. In Response to this Litigation, the Army Issued Memoranda Purporting to Address, but Failing to Correct, the Ongoing Discrimination.

The Association filed suit against the Army on July 19, 2016, alongside M.W., an individual child excluded from her CYSS daycare program because of

her diabetes diagnosis. ER 137-155, ER 38-39 ¶¶ 4-11. The suit challenges the longstanding discrimination in CYSS programs under Section 504 of the Rehabilitation Act. ER 137-155. After the Plaintiffs filed suit, the parties engaged in mediation for a period of several months. ER 135-36.

In the midst of the parties' extended mediation efforts, the Army unilaterally: (1) modified paragraph 4-32 of Army Regulation 608-10 in a way that does not address diabetes-related care or accommodations and (2) issued two policy memoranda specific to diabetes-related care in CYSS programs. ER 82-98.

The Army revised Army Regulation 608-10 on May 11, 2017, without notice-and-comment rulemaking. ER 83-84. The modified regulatory paragraph nowhere mentions diabetes and does not specify that crucial accommodations such as administration of insulin, administration of glucagon, and counting carbohydrates will be approved. Army Reg. 608-10 ¶ 4-32 (2017). Instead, paragraph 4-32, entitled "Administering medication and Performing Caregiving Health Practices," provides general guidance for CYSS personnel performing any health-related practice as a reasonable accommodation for a child with any disability. *Id*. Although, in revising the text, the Army did remove the preexisting explicit prohibition against providing insulin injections and add general language about the Army's responsibilities under the Rehabilitation Act, the regulatory text does not provide any affirmative directives or guidance specific to diabetes-related

care. *Compare* Army Reg. 608-10 ¶ 4-32 (2017), *with* Army Reg. 608-10 ¶ 4-32 (1997).

All policy language specific to diabetes-related accommodations appears in the two policy memoranda signed by the Assistant Chief of Staff for Installation Management, Lieutenant General Gwen Bingham, on June 2 and June 12, 2017. ER 4, ER 87-88, ER 89-98, ER 116 ¶ 43. These memoranda can be changed at any time and, of most concern, fail to adequately ensure that diabetes-related needs will be accommodated in CYSS programs; they also fail to ensure that CYSS will make decisions regarding approval of such accommodations in a timely manner. ER 106-10 ¶¶ 2-16, ER 30-31 ¶¶ 6-7, ER 42 ¶ 24, ER 47 ¶¶ 21-22, ER 56 ¶ 39, ER 62-63 ¶¶ 28-29, ER 68-69 ¶ 23. The memoranda lay out a lengthy, multi-tiered review process for requesting diabetes-related accommodations. ER 90-97, ER 107-108, 117-18 ¶¶ 4-6, 45-50. It might take up to ten weeks for *any* accommodation request to make it through the bureaucratic process – even straightforward accommodations such as approval for storage of insulin at a daycare site or permission for a teenager to wear her insulin pump. ER 4, ER 90-97, ER 117 ¶¶ 45-46. For accommodations involving CYSS staff calculating insulin dosages or administering insulin – essential tasks in managing type one diabetes – the bureaucratic steps can total up to four months of waiting. ER 4, ER 90-97, ER 117-18 ¶¶ 45-47. The additional steps required include, for each

individual child, a compulsory legal review as well as consideration of the accommodations request by the Assistant Chief of Staff for Installation Management in Washington, D.C. in consultation with the Office of the Surgeon General. ER 4, ER 89-92, ER 117-18 ¶¶ 45-47. While they are waiting to find out whether their children will be allowed to participate, families of children with diabetes must either forego childcare, seek alternative interim arrangements, or leave work every day, multiple times per day, to travel to their child's CYSS program and administer insulin themselves. ER 124-26 ¶¶ 80-82, ER 30-31 ¶ 6, ER 54 ¶¶ 30-32, ER 63 ¶ 29.

The experiences of the Association's constituents, whom the Association has continued to support, ER 33 ¶ 14, demonstrate the ineffectiveness of the memoranda in eliminating CYSS's discriminatory failures to accommodate the needs of children with diabetes. Indeed, CYSS continues to fail to accommodate the needs of children with diabetes, and the delays and uncertainty resulting from the process for approving diabetes-related accommodations deter otherwise qualified families from enrolling in CYSS programs. ER 30-31 ¶ 6, ER 47 ¶¶ 21-22, ER 55-56 ¶¶ 36-37, ER 62-63 ¶¶ 28-29, ER 71-73 ¶¶ 7-8, 16-17.

For example, well after CYSS issued its June 2017 memoranda, CYSS refused to accommodate the diabetes-related needs of De'Lori Gomes' four-year-old daughter, S.G., who was diagnosed with type one diabetes on August 1, 2017.

ER 71 ¶¶ 2, 4, 7. CYSS staff in Hawaii informed Ms. Gomes that S.G. could not come to CYSS at all unless Ms. Gomes agreed to stay with her the entire day, which would require Ms. Gomes to quit her job and defeat the purpose of sending S.G. to daycare. ER 71 ¶ 7.

In addition, families have reported that local CYSS staff they have encountered on bases as far apart as Colorado, Hawaii, and New York were unaware of any updated guidance and were continuing to operate exactly as before. ER 67-68 ¶¶ 14-19, ER 72-73 ¶¶ 13-14, ER 55-56 ¶¶ 35-37.

The memoranda have also deterred families from enrolling their children in CYSS programs because they provide no assurance that CYSS will accommodate children's needs in a timely manner. ER 30-31 ¶ 6. In North Carolina, Association member Elizabeth Bendlin, whose son, J.B., has been excluded from CYSS due to his diabetes diagnosis since 2012, reviewed the June 2017 memoranda but determined that attempting once again to enroll her child in a CYSS program would be futile; there is no guarantee that the Army will grant J.B. the accommodations he needs and the family cannot afford to wait several months to find out whether CYSS will accommodate him. ER 47 ¶¶ 21-22. Similarly, parent Jessica Erwin in Missouri reviewed the June 2017 policy memoranda and concluded that there is no point in reapplying yet again, as she anticipates the same delays and resistance to providing diabetes-related accommodations that she has

encountered in the past. ER 62-63 ¶¶ 26-29. In Virginia, parent Nataliya Brantly also reviewed the June 2017 memoranda and, given her experience seeking accommodations from CYSS, was skeptical that CYSS would grant the accommodations her son needs or adhere to their own prescribed timelines. ER 56 ¶ 39.

On July 21, 2017, having reviewed the June 2017 memoranda, the Association and M.W. filed their First Amended Complaint, challenging the Army's ongoing discrimination against children seeking to participate in CYSS programs. ER 105-34.

E. The Association Timely Appealed the District Court's Order Dismissing the First Amended Complaint.

On December 15, 2017, the district court issued an order granting the Army's motion to dismiss the First Amended Complaint without prejudice. ER 2-23. The district court first concluded that all injury incurred before the Army issued the June 2017 policy memoranda was moot. ER 10. As a result, it did not consider any evidence[2] concerning resources the Association expended or injury to any Association members or constituents before June 2017. ER 19, 21. Looking only at evidence the Association put forward concerning the period between June

[2] Because the Army's motion to dismiss raised a factual dispute with respect to subject matter jurisdiction, both sides presented evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. ER 8. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2017, when the Army released its memoranda, and July 21, 2017, the date that M.W. and the Association filed their First Amended Complaint, the district court concluded that neither the Association nor M.W. had standing to sue. ER 14-23. It therefore dismissed the case for lack of subject matter jurisdiction. ER 23.

On January 12, 2018, the Association and M.W. filed a notice of their intent not to file a second amended complaint, but instead to stand on their existing pleading. ER 26-27. The district court entered a final Judgment of Dismissal on January 16, 2018. ER 1. *See WMX Techs. v. Miller*, 104 F.3d 1133, 1135-37 (9th Cir. 1997). The Association and M.W. timely appealed. ER 24-25.

After the termination of the Memorandum of Agreement that had allowed M.W. to participate in her CYSS program, M.W. voluntarily withdrew from this appeal. Appellants' Mot. 1, ECF No. 15.

SUMMARY OF THE ARGUMENT

The district court erred in three critical respects.

First, in concluding that the American Diabetes Association lacks standing to challenge CYSS's ongoing discrimination against children with diabetes on its own behalf, the district court applied a flawed, heightened standard for direct organizational standing. The district court's ruling lost sight of the purpose of the standing analysis, which is a threshold question, independent of the merits, and designed to ensure that a plaintiff clears the minimal Article III bar and has a true

stake in the outcome of the action. In so doing, the district court stripped the Association – a national organization with decades of experience fighting for children with diabetes, whose mission is to improve the lives of all people affected by diabetes, and whose staff have been advocating for families affected by CYSS's exclusionary policies for more than ten years – of its right to stand up and challenge discrimination against children with diabetes on military bases across the country.

Second, in ruling that the Association lacks standing to sue on behalf of its injured members because no individual member would have standing to sue in his or her own right, the district court erroneously disregarded the evidence presented of harm to individual members both before and after the Army issued its June 2017 memoranda. In particular, the district court erred in concluding that families with knowledge of CYSS's discriminatory policies and practices who are therefore deterred from applying for care lack standing to challenge that discrimination unless they can show they have formally applied for accommodations. Like plaintiffs in any other disability discrimination suit, these families were harmed as soon as they became subject to, aware of, and were deterred or otherwise affected by the Army's discriminatory policies. A person with diabetes who encounters a discriminatory system has no more of an obligation to engage in a futile effort to

use that system than a person with a mobility disability has to try to use a noncompliant and dangerous ramp.

Third, the district court erred in concluding that, by altering the text of Army Regulation 608-10 and issuing two new policy memoranda, the Army had mooted any claims based on injuries before June 2017. Contrary to the district court's analysis, a defendant cannot moot a plaintiff's claims by modifying, but failing to correct, a discriminatory policy. Such a rule invites government defendants, when met with a challenge to a discriminatory policy, to update the language without fixing the problem, thereby sending plaintiffs back to square one. Because the Army did not meet its burden to demonstrate that harm to children with diabetes in CYSS programs will not recur – indeed, evidence in the record demonstrated that such harm continued – the district court should not have discounted the long history of injury to the Association and its members.

Therefore, this Court should reverse the judgment of the district court and hold that the American Diabetes Association has standing to prosecute this action both on its own behalf and on behalf of its members;[3] that the Army's revised policy memoranda did not moot the Association's claims based on injury that

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

predated them; and that the district court has subject matter jurisdiction over the Association's claims.

STANDARD OF REVIEW

A district court's determinations of whether a party has standing and whether a claim is moot, both legal questions, are reviewed de novo. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004); *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504, 507 (9th Cir. 2003); *S. Cal. Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1034 & n.6 (9th Cir. 2009).

ARGUMENT

I. The Association has Direct Organizational Standing to Challenge Discrimination Against Children with Diabetes in CYSS Programs.

A. The Article III Standing Requirement is a Low Bar.

To establish Article III standing, a plaintiff must demonstrate an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted).

The threshold for injury is low. *See, e.g.*, *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) ("The injury may be minimal."); *Council of Ins. Agents &*

Brokers v. Molasky-Arman, 522 F.3d 925, 932 (9th Cir. 2008) (rejecting defendant's argument that any impact on the plaintiff was "only minor" as irrelevant to the standing analysis). As the Supreme Court explained in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*:

> [I]mportant interests [may] be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax. . . . The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle provides the motivation.

412 U.S. 669, 689 n.14 (1973). Furthermore, the Supreme Court has directed that courts should "take a broad view of constitutional standing in civil rights cases, especially where . . . private enforcement suits are the primary method of obtaining compliance." *Chapman v. Pier 1 Imports*, 631 F.3d 939, 946 (9th Cir. 2011) (quoting *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (in turn quoting *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209 (1972))) (internal quotation marks omitted).

B. The Association's Longstanding Diversion of Resources to Combat Discrimination in CYSS Programs Easily Confers Article III Standing.

To establish direct organizational standing based on an injury to itself, an organization must show "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, 379 (1982) (articulating the standard for direct organizational standing). The Army has not disputed that discrimination against children with diabetes in its childcare and youth programs frustrates the Association's mission; therefore the relevant focus is diversion of resources. ER 18.

The Association alleged and presented concrete evidence sufficient to clear the low Article III bar by showing diversion of resources that "perceptibly impaired" the Association's ability to carry out its mission. *See Havens*, 455 U.S. at 379; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19 (9th Cir. 2013) (collecting cases). Specifically, the Association has (1) provided individualized assistance to more than two dozen affected constituents; (2) prepared for, attended, and followed up after a meeting with CYSS personnel in an effort to advocate for affected families; and (3) engaged in internal strategy discussions about the best way to address the Army's discrimination. ER 32-33 ¶¶ 12-13. These extensive activities impaired the Association's ability to assist constituents facing diabetes-related discrimination in other settings, especially in light of the Association's limited resources and, more specifically, because of the limited capacity of the two attorneys in the Association's Legal Advocate Program. ER 31-33 ¶¶ 10-13. Therefore, the Army has "perceptibly impaired" the Association's ability to fulfill its mission.

C. Even Resources Expended After June 2017 Alone Would Suffice to Meet the Article III Bar.

As discussed in Part III, *infra*, the district court erred in considering only harm incurred between the June 2017 issuance of the Army's policy memoranda and the filing of the First Amended Complaint. However, even accepting the district court's analysis with respect to mootness, the court erred in concluding that the resources diverted during this narrow window of just a few weeks did not "perceptibly impair" the Association's ability to carry out its mission during that time. ER 20.

The Association demonstrated that it assisted a constituent who reached out for help on June 26, 2017, squarely in between the time when CYSS issued the June 2017 memoranda and July 21, 2017, the date that the Association filed its First Amended Complaint. ER 33 ¶ 14. In response to this telephone call, an Association attorney explained the Army's relevant policies and practices, the June 2017 memoranda, the family's rights under federal law, and next steps in advocating for the caller's child. ER 33 ¶ 14. Helping this aggrieved family meant that another individual who contacted the Association for assistance in confronting diabetes-related discrimination did not receive this support. ER 33 ¶ 14.

The resources expended supporting this caller amount to more than the "identifiable trifle" necessary to clear the "minimal" Article III bar and qualify the Association "to fight out a question of principle." *SCRAP*, 412 U.S. at 689 n.14;

Preminger, 552 F.3d at 763; *see also Nnebe v. Daus*, 644 F.3d 147, 156-58 (2d Cir. 2011) (recognizing an organization's standing based on "scant" evidence that it counseled affected members, because "[e]ven if only a few suspended drivers are counseled . . . in a year, there is some perceptible opportunity cost"); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) ("The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury.").

In concluding that, to the contrary, "[t]he June 26, 2017 intake call did not perceptibly impair the Association," the district court erroneously focused on the amount or size of the harm. ER 20. *See SCRAP*, 412 U.S. at 689 n.14 (rejecting the government's request "to limit standing to those who have been 'significantly' affected by agency action"); *Council of Ins. Agents & Brokers*, 522 F.3d at 932 (rejecting argument that "only minor" impact on a plaintiff is insufficient for standing); *see also Am. Humanist Ass'n, Inc. v. Douglas Cnty. Sch. Dist. RE-1*, 859 F.3d 1243, 1248 (10th Cir. 2017) ("We find no support in our jurisprudence for the proposition that an injury must meet some threshold of pervasiveness to satisfy Article III.").

The district court further erred in suggesting that, to count toward direct organizational standing, resources expended must be outside an organization's general scope of work. ER 20. *See Nat'l Council of La Raza v. Cegavske*, 800

F.3d 1032, 1040-41 (9th Cir. 2015) (considering resources put toward registering voters that the organizational plaintiffs would otherwise "have spent on some *other* aspect of their organizational purpose – such as registering [other] voters . . . , increasing their voter education efforts, or any other activity that advances their goals" (emphasis added)); *Roommate.com*, 666 F.3d at 1219 (finding that Fair Housing Councils' investigation of alleged violations and responsive education and outreach campaigns sufficed for direct organizational standing).

The district court also problematically held the Association's resources, broad membership, and ambitious, multi-faceted mission against it in the organizational standing analysis, requiring a heightened showing from the Association as compared to a smaller organization. ER 20. Such an approach nonsensically deprives organizations arguably best positioned to advocate for their constituents of standing to take on issues at the heart of their missions and runs counter to the Supreme Court's guidance that standing need not be based on an organization's economic interest. *See Havens*, 455 U.S. at 379 n.20 ("That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered, and accordingly does not deprive the organization of standing." (citation omitted)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (holding that injury to nonprofit corporation's noneconomic interest in making low-cost

housing available met constitutional standing requirements); *see also Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) ("[T]he district court should have asked, first, whether Post's alleged discriminatory conduct injured the [plaintiff's] interest in promoting fair housing and, second, whether the [plaintiff] used its resources to counteract that harm.").

Finally, the district court's approach also belies the facts in the record demonstrating the impact of this harm on the Association. The Association's Legal Advocate Program has limited staff – just two attorneys – whose ability to provide legal assistance to others is affected every time they take on an advocacy call. ER 31-33 ¶¶ 10-11, 14.

D. The Association has Standing Because Threatened Injury is Imminent.

Having erroneously determined that (1) claims based on injury incurred before the Army issued its June 2017 memoranda were moot and (2) the resources diverted to assisting the June 26, 2017, caller did not injure the Association, the district court erred in concluding that the Association lacked direct organizational standing to sue. ER 18-20. The district court's reasoning disregarded the fact that the Association would expend further resources combatting the Army's policies in the future, ER 31-34 ¶¶ 8, 14, and the principle that a plaintiff "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) (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974)); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm . . . ."). "If the injury is certainly impending, that is enough" for the case to be ripe for adjudication. *Blanchette*, 419 U.S. at 143.

When the Association filed the First Amended Complaint on July 21, 2017, it had (1) assisted two dozen families over a period of more than ten years, (2) supported another in the narrow window after the Army issued its memoranda in June 2017, and (3) correctly anticipated that additional families, including the families of newly diagnosed children with diabetes encountering the Army's discriminatory policies and practices for the first time, would reach out for help and receive assistance from the Association. ER 29-34 ¶¶ 4-14. Indeed, the mother of S.G., a child diagnosed with type one diabetes on August 1, 2017, reached out to the Association just a few weeks later on August 10, 2017. ER 33 ¶ 14, ER 71-72 ¶¶ 4, 11.

In concluding that, nevertheless, the Association lacked standing, the district court implied that, by issuing its policy memoranda in June 2017, the Army had reset the diversion of resources clock to zero, and that the Association was then required to sit and wait for more and more families to be harmed when, in its view and the view of its members and constituents, the memoranda would not correct

the exclusion of children with diabetes from CYSS programs that the Association had been fighting for more than two decades. ER 30-31 ¶¶ 6-7, ER 42 ¶ 24, ER 47 ¶¶ 21-22, ER 56 ¶ 39, ER 62-63 ¶¶ 28-29, ER 68-69 ¶ 23. However, under Supreme Court and Ninth Circuit precedent, the Association need not have waited for "the consummation of [this] threatened injury" to pursue its claims. *See Blanchette*, 419 U.S. at 143; *Ariz. Right to Life*, 320 F.3d at 1006.

At the time the Association filed the First Amended Complaint, it therefore had a sufficient "'stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Looking to its significant investment of resources over time, its immediate response following the June 2017 memoranda, its impending future expenditure of resources, or all three, the Association easily cleared the minimal Article III bar.

II. The Association has Representative Standing to Sue on Behalf of its Affected Members.

A. The Association has Representative Standing Because Ongoing Discrimination in CYSS Programs Harmed Association Members.

In addition to its direct organizational standing, the Association independently has standing to sue on behalf of its members because (1) at least one member would have standing to sue in his or her own right; (2) the interests that the organization seeks to protect are germane to its purposes; 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) (*citing Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (articulating criteria for representative standing); *Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members."). The Army has not contested that the interests the Association seeks to protect in this litigation are germane to its mission to advance the interests of all people affected by diabetes, or that this suit, which seeks only declaratory and injunctive relief, does not require individual members' participation. ER 79. The question at issue is whether at least one individual member would have standing to sue in his or her own right.

The Association alleged and presented evidence of substantial harm to several Association members, both before and after the Army issued its June 2017 memoranda. The declarations submitted established that at least eight Association members have been injured by CYSS's policies and practices concerning children with diabetes in its programs. ER 35 ¶ 19. At least two members, Nataliya Brantly and Elizabeth Bendlin, have children who are still eligible to participate in CYSS programs. ER 56 ¶ 38, ER 46 ¶ 17. And at least one, Ms. Bendlin, is deterred from enrolling her child because, having reviewed the June 2017 memoranda, she

believes that it would be futile to seek diabetes-related accommodations for her son, J.B. ER 46-47 ¶¶ 20-22. If Ms. Bendlin tried to re-enroll J.B. in CYSS care, she would have to wait for up to four months and expend time and energy navigating a complicated, burdensome system in pursuit of a final determination that may or may not ultimately result in J.B. receiving the diabetes-related accommodations he needs. ER 90-97, ER 47 ¶ 21.

The Association thus has the right to sue on behalf of these injured members. Indeed, "the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others," "draw[ing] upon a pre-existing reservoir of expertise and capital . . . [that] can assist both courts and plaintiffs." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289-90 (1986).

B. The Association has Representative Standing to Sue on Behalf of an Identified Member Injured After June 2017.

In rejecting the Association's evidence of its members' standing, the district court erroneously disregarded harm incurred before June 2017, *see infra* Part III, and dismissed deterrence as a valid theory of standing for families who determined that it would be futile to seek diabetes-related accommodations from CYSS, *see infra* Part II.C. But, even accepting the district court's erroneous reasoning on these points, the Association still presented evidence in the Declaration of Nataliya

Brantly that an individual member had standing to sue on the date that the Association filed its First Amended Complaint.[4] ER 48-57.

From June 12, 2017, to June 30, 2017, after the Army issued its June 2017 policy memoranda, Ms. Brantly's son, O.B., was enrolled and participating in a CYSS program at West Point where staff refused to administer insulin for him as an accommodation for his type one diabetes. ER 54-56 ¶¶ 29-37. At the time, Ms. Brantly's request for an exception to Army policy to permit CYSS staff to administer insulin for O.B. had been pending for more than six months. ER 55 ¶ 36. In the meantime, still waiting for an answer from CYSS, and during a time in June 2017 when the revised memoranda should have been in effect, Ms. Brantly left work at least three times a day, about a thirty-minute round trip each time, to administer insulin for her son. ER 54-56 ¶¶ 30-31, 36-37. This arrangement ended only because the family relocated to Virginia – a decision driven in part by how

[4] The Association also alleged that its members had standing in the First Amended Complaint, although it did not name Ms. Brantly at that time. ER 123-126 ¶¶ 77-82. As this Court explained in *National Council of La Raza v. Cegavske*, "[w]here it is relatively clear, rather than merely speculative, 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" in its complaint. 800 F.3d 1032, 1041 (9th Cir. 2015).

difficult it was to find safe childcare for O.B. and the Army's failure to respond to Ms. Brantly's request for accommodations. ER 53-54 ¶¶ 28-30.

The Army's failure to accommodate O.B. disrupted Ms. Brantly's workday and put O.B. at risk because there was no one onsite that CYSS would permit to administer insulin in the event that Ms. Brantly was delayed in getting to CYSS or O.B.'s insulin pump malfunctioned. ER 54 ¶¶ 31-32. At one point, a CYSS employee did offer to operate O.B.'s insulin pump for him, but as soon as his supervisors learned about it, they forbade this willing employee from continuing to assist a child in his care. ER 54-55 ¶ 33.

Although O.B. was enrolled in a CYSS program in the summer of 2017, and had a request for accommodations pending, no one informed Ms. Brantly that the policy documents governing diabetes-related accommodations had changed until the Association shared the June 2017 memoranda with her in August 2017. ER 55 ¶¶ 35-36. Moreover, no one granted or denied Ms. Brantly's outstanding request for reasonable accommodations, despite the issuance of the June 2017 memoranda. ER 55-56 ¶¶ 36-37. Rather, the Army's exclusion of O.B. continued. The Brantlys were Association members eligible to participate in CYSS programs when the Association filed the First Amended Complaint and they remain eligible, and therefore subject to the Army's ongoing discrimination against children with diabetes in CYSS programs. ER 49, 56 ¶¶ 7, 38.

Based on these facts, Association member Nataliya Brantly would have standing to sue in her own right *after* CYSS issued the June 2017 memoranda if she chose to pursue her claims. Therefore, regardless of whether the June 2017 memoranda mooted claims based on harm incurred before June 2017, and regardless of whether Association members deterred from seeking to enroll in CYSS programs by the Army's policies have standing to sue, the district court should have found that the Association has standing to challenge diabetes-related discrimination in CYSS programs as a representative of its injured members.

C. Members Deterred from Requesting Diabetes-Related Accommodations Have Standing to Sue.

The district court's conclusion that members who were aware of CYSS's discriminatory practices after June 2017, and would have enrolled their children in CYSS programs but for those practices, lack standing to challenge them is unsupported. In reaching this conclusion, the district court erroneously reasoned that plaintiffs with disabilities must first attempt access and encounter a barrier, before asserting standing based on deterrence. ER 22-23. Because the Association's members had not sought accommodations pursuant to the procedures outlined in the June 2017 memoranda, the district court concluded that they "lack[ed] the prerequisite necessary – an unsuccessful attempt to use the New Policy – to claim standing based on deterrence." ER 23. This approach lacks merit and support in case law.

In analyzing standing in this case brought under Section 504 of the Rehabilitation Act, it is appropriate to look to relevant decisions in actions brought under Title II and Title III of the Americans with Disabilities Act ("ADA"). *See Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. . . . Thus, courts have applied the same analysis to claims brought under both statutes . . . ."); *Kirola v. City and Cnty. of S.F.*, 860 F.3d 1164, 1174 n.3 (9th Cir. 2017) (explaining that, despite the different applications of Title II and Title III of the ADA, and the "different standards for relief on the merits, the answer to the *constitutional question* of what amounts to injury under Article III is the same).

As in any other disability discrimination suit, the deterred Association members were harmed as soon as they became subject to, aware of, and were deterred or otherwise affected by the Army's discriminatory policies. *See Civil Rights Educ. & Enforcement Ctr. v. Hospitality Props. Trust*, 867 F.3d 1093, 1099-1100 (9th Cir. 2017) (holding that any requirement that a plaintiff "personally encounter" a challenged access barrier in order to have standing to sue "lacks foundation in Article III"; whether the plaintiff has "actual knowledge of a barrier, rather than the source of that knowledge, . . . is determinative" (internal quotation marks omitted)); *Chapman v. Pier 1 Imports, Inc.*, 631 F.3d 939, 944 (9th Cir.

2011) (holding that "an ADA plaintiff can establish standing to sue for injunctive relief either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with intent to return to a noncompliant facility"); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1042 n.5, 1043 (9th Cir. 2008) (holding that "[o]nce a disabled individual has encountered or become aware of alleged 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," and explaining that uncertainty concerning the extent of ADA violations "is itself an actual, concrete and particularized injury under the deterrence framework of standing"); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002) ("[W]hen a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the 'futile gesture' of attempting to gain access in order to show actual injury.").

The district court also erred in discounting the relevance of cases involving physical access barriers, drawing a distinction that has no legal basis. ER 22. Indeed, courts in this circuit have found deterrence-based standing in discrimination cases involving other types of barriers. *See Nat'l Fed'n of the Blind v. Uber Techs, Inc.*, 103 F. Supp. 3d 1073, 1080-81 (N.D. Cal. 2015) (applying

Pickern and *Doran* where a blind passenger was deterred from using a shared ride service because of its drivers' practice of refusing service animals); *Greater L.A. Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. 13-cv-7172-PSG, 2014 WL 12561074, at *3 (C.D. Cal. May 6, 2014) (applying *Chapman* and *Doran* in a case where a plaintiff had been deterred from visiting a movie theater because it did not offer captioned movies); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1194 (N.D. Cal. 2007) (applying *Pickern* in a case where blind customers were deterred from shopping at Target because of the inaccessibility of Target's website); *see also Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 867 (9th Cir. 2014) (discussing deterrence-based standing in a case involving a hospital's refusal to provide a sign-language interpreter). Like any other deterred plaintiff in a disability discrimination suit, these Association members encountered obstacles that compromised equal access. The relevant analog to encountering a physical access barrier to a public accommodation is encountering discriminatory policies and practices, like the CYSS policies and practices at issue in this case, and deciding not to embark on an excessively onerous and most likely futile process. Contrary to the district court's analysis, a person with a disability has no more of an obligation to try to "use" such a policy, ER 23, than a person with a mobility disability has to try to use a noncompliant and dangerous ramp.

Deterrence-based standing in this context finds further support beyond disability discrimination suits including, for example, in employment discrimination suits brought under Title VII of the Civil Rights Act of 1964. The Supreme Court has made clear that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977). In the Ninth Circuit, courts permit a "subjective evaluation of . . . futility." *Bouman v. Block*, 940 F.2d 1211, 1221-22 (9th Cir. 1991) (holding that a plaintiff had standing to challenge a discriminatory promotion examination that she did not take because she believed doing so would be futile); *see also Breiner v. Nev. Dep't of Corr.*, 610 F.3d 1202, 1206-07 (9th Cir. 2010) (holding that a male plaintiff deterred from applying for a position at the Nevada Department of Corrections, which had a policy of hiring only female correctional lieutenants at a women's prison, had standing to bring a Title VII sex discrimination claim). Similarly, Association members who believed it would be futile to apply for diabetes-related accommodations and were therefore deterred from seeking to enroll their children in CYSS programs were not required to submit a new application after June 2017 in order to retain standing to challenge the Army's policy.

The Association put forward sufficient evidence to demonstrate that members of the Association have been deterred by the Army's discriminatory policies and practices, including those laid out in the June 2017 memoranda. ER 47 ¶¶ 21-22, ER 62-63 ¶¶ 26-29, ER 56 ¶¶ 38-39. These procedures effectively exclude children with diabetes because of the excessive timelines and burdensome, multi-level review process, which singles out insulin administration – an essential diabetes-related accommodation – for elevated review. ER 90-97, ER 30-31 ¶ 6. The process extends up to four months. ER 4, ER 90-97, ER 117-18 ¶¶ 45-47. In the meantime, families on military bases frequently lack the option to temporarily switch to a different daycare because CYSS is often the only viable choice geographically, financially, or that accommodates a soldier's unique schedule. ER 30-31 ¶ 6. Families like the Bendlins, who have taken complicated steps to rearrange their families' schedules and work-lives in order to meet their children's childcare needs, ER 44-46 ¶¶ 8-18, would risk further disruption of these childcare arrangements if they were forced to engage in the onerous and futile task of navigating CYSS's confusing, multi-level system to access the accommodations they need.

Moreover, there is no basis for the district court's requirement that individuals who had experienced discrimination while seeking diabetes-related accommodations before June 2017 needed to reapply for accommodations after the

Army issued new memoranda in order to retain standing. ER 23. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1170-71, 1175 (9th Cir. 2010) (allowing plaintiff's challenge to Chipotle's new written "Customers With Disabilities Policy," adopted because of his lawsuit, although plaintiff had not visited the restaurants at issue since Chipotle issued the policy, because he still wished to return); *Doran*, 524 F.3d at 1041 (holding that a plaintiff who "has visited a public accommodation on a prior occasion and is currently deterred from visiting that accommodation by accessibility barriers" suffers an actual and imminent injury, even if he intends to return only when the barriers have been removed); *see also Chapman*, 631 F.3d at 944 (holding that standing to sue for injunctive relief can derive either from deterrence or from injury-in-fact coupled with an intent to return to a noncompliant facility, and that "an ADA plaintiff who establishes standing as to encountered barriers may also sue for injunctive relief as to unencountered barriers related to his disability").

The Association therefore sufficiently established that Association members like Elizabeth Bendlin who, after reviewing the relevant policy documents, were deterred from applying for accommodations, would have standing to sue. ER 47 ¶¶ 21-22.

III. The District Court Erred in Finding that the Army's Revised, but Still Discriminatory, Policy Memoranda Could Moot the Association's Challenge to the Army's Discrimination Against Children with Diabetes.

A. Government Entities Cannot Evade Liability by Modifying, But Failing to Correct, Their Discriminatory Policies.

The district court's analysis of the Association's standing is fundamentally flawed because the court erroneously only considered injury after the Army issued its June 2017 memoranda. ER 10-14. In artificially bifurcating its consideration of harm incurred before and after the Army issued the June 2017 policy memoranda, the district court ignored the Supreme Court's admonition in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, a case cited nowhere in the district court's order, that a government entity cannot moot a plaintiff's claims by modifying, but failing to correct, an unlawful policy. 508 U.S. 656, 662 (1993).

In *Northeastern Florida*, the Supreme Court explained that this scenario is an extension of the voluntary cessation doctrine. 508 U.S. at 661-63. Under this doctrine, a defendant's decision to reverse an unlawful policy when litigation is underway does not moot a plaintiff's claims unless defendants meet "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Knox v.*

Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 307 (2012) ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("It is no small matter to deprive a litigant of the rewards of its efforts . . . . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."); *L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979) (holding that a case is moot only if "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the challenged violation" (citations and internal quotation marks omitted)).

As the Supreme Court explained in *Northeastern Florida*, this 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." 508 U.S. at 662. Even if the new policy "disadvantage[s] [plaintiffs] to a lesser degree than the old one," as long as "it disadvantages them in the same fundamental way," the case is not moot. *Id*. at 662-63; *see also id*. at 662 ("There is no mere risk that Jacksonville will

repeat its allegedly wrongful conduct; it has already done so [in passing its new ordinance]."); *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (applying *Northeastern Florida* where Caltrans' new affirmative action program was substantially similar to the prior program and plaintiff alleged that it disadvantaged its members in the same fundamental way). Indeed, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox*, 567 U.S. at 307 (internal quotation marks omitted); *see also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 862 (9th Cir. 2017) ("The question is not whether the precise relief sought at the time the case was filed is still available, but whether there can be any effective relief." (internal quotation marks omitted)).

This case mirrors the circumstances in *Northeastern Florida*. Confronted with the instant lawsuit, the Army cobbled together a cosmetic, ineffective fix that continues the discrimination that families of children with diabetes face each time they seek access to CYSS programs. Instead of affirmatively guaranteeing accommodations for children with diabetes enrolled in CYSS programs, the Army instead interposed a complicated, burdensome, multi-tier review process between families and the diabetes-related accommodations they need, leading to exclusion of children with diabetes from CYSS programs. As the Supreme Court has cautioned, the district court's approach invites the government to evade liability by

responding to a legal challenge to a discriminatory policy by slightly shifting its policy language and asserting that plaintiffs' claims under the original language are now moot, and any claims under the modified language are not yet ripe for review. Under the district court's rule, the government could repeatedly move the goalposts in this way, indefinitely blocking plaintiffs from asserting meritorious claims.

B. The Army Did Not Meet Its Burden to Demonstrate that Harm to Children with Diabetes Will Not Recur.

In evaluating whether the Association retained live claims, the district court should have applied the framework laid out in *Rosebrock v. Mathis*, governing situations in which the government introduces "a policy change not reflected in statutory changes or even in changes in ordinances or regulations." 745 F.3d 963, 971-72 (9th Cir. 2014); *see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 963 n.1 (9th Cir. 1999) (adopting the reasoning of *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998), in which the court concluded that a changed policy did not moot a controversy because the policy, adopted after the litigation began, was "not implemented by statute or regulation and could be changed again").

The district court reasoned that the factors laid out in *Rosebrock* do not apply because the Army amended the language of Army Regulation 608-10 and therefore automatically met its "formidable burden," *Friends of the Earth*, 528

U.S. at 190, to demonstrate that the challenged conduct would not recur. ER 12-13. But while the amendment to Army Regulation 608-10 may have opened up the possibility of a policy change in that it deleted the prohibition on insulin administration and, indeed, any reference to diabetes or diabetes-specific accommodations, the updated regulation contains no substantive guidance on the issue at hand – diabetes-related care as an accommodation. *Compare* Army Reg. 608-10 ¶ 4-32 (2017), *with* Army Reg. 608-10 ¶ 4-32 (1997). Furthermore, the regulation neither includes a history of the revisions made that might alert the reader to the relevant deletions, nor references the two memoranda in which language concerning diabetes-related accommodations does appear. Army Reg. 608-10 ¶ 4-32 (2017); ER 85-86, ER 87-88, ER 89-98.

The cases that the district court relied on to reach its conclusion involve government defendants that cement new, compliant policies in statutes and regulations that respond to plaintiffs' allegations, substantively address the issues at hand, and meaningfully bind the government moving forward. *See, e.g., Twitter, Inc. v. Lynch*, 139 F. Supp. 3d 1075, 1081-83 (N.D. Cal. 2015) (finding case moot due to statutory amendments "directly addressed to correcting the defects identified by Twitter"); *Ozinga v. Price*, 855 F.3d 730, 734-35 (7th Cir. 2017) (holding that plaintiff's case was moot because the government had revised the challenged regulation through notice-and-comment rulemaking, thereby removing

the only complained-of defect); *Sannon v. United States*, 631 F.2d 1247, 1250-51 (5th Cir. 1980) (holding that case became moot when amended regulations granted the same relief that plaintiffs had sought and the district court had ordered). These cases do not stand for the proposition that any policy change, if it is accompanied by some change to a regulation, however minimal, automatically bypasses the voluntary cessation doctrine. Here, the Army did not enshrine a new policy in its amendment to the regulation; all substantive provisions appeared in two policy memoranda that could be changed at any time. ER 87-88, ER 89-98. For this reason, the "policy change [is] not reflected in statutory changes or even in changes in ordinances or regulations," and therefore the district court should have applied the *Rosebrock* factors. 745 F.3d at 971-72.

Under *Rosebrock*, the Army did not meet its burden to show that the challenged discrimination cannot reasonably be expected to recur. *See* 745 F.3d at 972 (discussing the relevant factors and the object of the inquiry).

First, the language in the June 2017 memoranda is neither "broad in scope [nor] unequivocal in tone." *Id.* (quoting *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000)); *see also Hazle v. Crofoot*, 727 F.3d 983, 998 (9th Cir. 2013) (requiring a permanent policy change that is broad in scope, unequivocal in tone, and fully supportive of the rights at issue). Rather than affirmatively guaranteeing the access for children with diabetes to CYSS programs that the Association seeks in this

action, the June 2017 memoranda continue the pattern of past discrimination by erecting disproportionate and unreasonable barriers – namely, a burdensome, multi-tiered process for requesting diabetes-related accommodations, which may or may not be granted – between children with diabetes and access to childcare. ER 90-97.

Second, the memoranda come nowhere near to "fully address[ing] all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case," *Rosebrock*, 745 F.3d at 972 (internal quotation marks omitted), because they continue to exclude children with diabetes from participation in CYSS programs. ER 30-31 ¶ 6. For example, CYSS continued to fail to accommodate Ms. Brantly's son, O.B., even after it issued the memoranda. ER 55-56 ¶¶ 36-37. *See also Courthouse News Serv. v. Planet*, No. 11-cv-08083-SJO, 2016 WL 4157210, at *14-15 (C.D. Cal. May 26, 2016) (finding that the *Rosebrock* factors were not met where the question of whether the defendant's practices violated the First Amendment was still "squarely at issue," and plaintiffs maintained that "certain access problems persist even under this new policy").

Third, the policy had not "been in place for a long time when [the court] consider[ed] mootness," *Rosebrock*, 745 F.3d at 972, as the memoranda were introduced just two months before the Army filed its motion to dismiss. ER 4, ER 75-77, ER 116 ¶ 43.

Fourth, after issuing the memoranda, the Army continued to "engage[] in conduct similar to that challenged by the plaintiff[]," *Rosebrock*, 745 F.3d at 972, by continuing to discriminate against children and youth with diabetes and failing to accommodate their needs. ER 30-31 ¶ 6, ER 47 ¶¶ 21-22, ER 55-56 ¶¶ 36-37, ER 62-63 ¶¶ 27-29, ER 71-73 ¶¶ 7-8, 16-17. Indeed, in some cases, CYSS staff were unware that any new guidance had been issued at all, and continued exactly as before. ER 55-56 ¶¶ 36-37, ER 67-68 ¶¶ 14-19, ER 72-73 ¶¶ 13-14. *See also Hazle*, 727 F.3d at 998-99 (holding that a California Department of Corrections and Rehabilitation directive stating that parolees could not be compelled to attend a religion-based treatment program did not moot plaintiff's First Amendment claims because it was not "implemented in any meaningful fashion"; among other implementation problems, the private contractor had not received a copy of the directive and had not changed its practices as a result); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (finding that a new policy governing access to the law library at an Arizona prison did not moot plaintiffs' claims in part based on inmate affidavits asserting that deficiencies continued and the Department of Corrections had not implemented the new policy).

Fifth, the speed with which the memoranda were developed and issued by Lieutenant General Bingham demonstrates that they "could be easily abandoned or altered in the future." *Rosebrock*, 745 F.3d at 972. *See also Bell v. City of Boise*,

709 F.3d 890, 900 (9th Cir. 2013) ("Even assuming Defendants have no intention to alter or abandon the Special Order, the ease with which [they] could do so counsels against a finding of mootness, as a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision" (internal quotation marks omitted)); *Armster v. United States Dist. Court for the Cent. Dist. of Cal.*, 806 F. 2d 1347, 1359 (9th Cir. 1986) ("The bare assertion by the Justice Department in its mootness motion that this situation will not recur . . . [is not] sufficient to deprive this Court of its constitutional power to adjudicate this case."); *Tiwari v. Mattis*, No. 17-cv-242-TSZ, 2017 WL 6492682, at *4-5 (W.D. Wash. Dec. 19, 2017) (in concluding that Department of Defense ("DoD") policy memoranda issued after the lawsuit was filed did not moot the case under *Rosebrock*, noting that, "[i]f anything, the recent revisions to this policy show just how quickly DoD can revise its internal procedures").[5]

Because the Army did not meet its heavy burden to demonstrate that the challenged discrimination would not recur, and indeed because the Association demonstrated that discrimination was already recurring, the June 2017 policy memoranda did not moot the Association's claims. The district court therefore

[5] One *Rosebrock* factor, whether this case "was the catalyst for the agency's adoption of the new policy," 745 F.3d at 972, does weigh in the opposite direction. But the Supreme Court has viewed this as a factor weighing against mootness. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998).

erred in discounting harm before the Army's introduction of the June 2017 memoranda in its analysis of the Association's standing.

C. The District Court's Mootness Analysis Erroneously Strayed into Disputed Issues of Material Fact that Should Have Been Reserved for Summary Judgment.

In erroneously concluding that the regulatory amendment and June 2017 memoranda mooted any injury predating June 2017, the district court effectively determined that these developments changed the policy that the Association had originally challenged and ended that harm. ER 10-14. This significant factual finding, implicating the central issues in this case, was both premature and unsupported by the limited record available to the district court.

Although the Army's motion to dismiss presented a factual attack on the Association's standing, and the Association therefore needed to supply the district court with the "evidence necessary to satisfy its burden of establishing subject matter jurisdiction," this did not convert the motion to dismiss into a motion for summary judgment. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (discussing facial and factual attacks on a court's subject matter jurisdiction). The proper inquiry at this juncture was limited to whether the Association has standing – a threshold determination designed to ensure that the plaintiff asserting a claim has an adequate stake, even if small, in the outcome. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citing *Baker v. Carr*, 369 U.S. 186,

204) (1962)); *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973). The standing analysis is distinct from merits questions, such as whether discrimination has occurred. *Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal."); *see also Chaudhry v. City of L.A.*, 751 F.3d 1096, 1109 (9th Cir. 2014) (distinguishing analysis of standing from analysis of the merits of a plaintiff's claims).

The Association's allegations in its First Amended Complaint, along with the evidence of ongoing discrimination the Association presented in support of its opposition to the motion to dismiss, were sufficient to avoid a jurisdictional dismissal at this early stage, before the parties had had a meaningful opportunity to engage in fact discovery. ER 105-34, ER 30-33 ¶¶ 5-7, 14, ER 67-68 ¶¶ 14-22, ER 71-73 ¶¶ 6-10, 13-17. For example, weeks after CYSS issued the June 2017 memoranda, CYSS staff informed De'Lori Gomes that her four-year-old daughter could not come to her CYSS program at all unless Ms. Gomes quit her job and stayed with her the entire day to provide diabetes-related care. ER 71 ¶¶ 2, 7. The paperwork Ms. Gomes received stated that "CYSS service providers cannot administer insulin, glucagon injections, adjust [an] insulin pump, or count carbohydrates." ER 71 ¶ 8. CYSS staff were neither aware of nor implementing the June 2017 memoranda in responding to Ms. Gomes' requests for diabetes-related accommodations for her daughter. ER 72-73 ¶¶ 13-14. Ms. Gomes'

experience demonstrates that, at the very least, there was a factual dispute as to whether CYSS's discrimination persisted.

The district court should have deferred any final determination of whether discrimination was ongoing and whether the memoranda had corrected the problems identified by the Association in its pleadings – questions entangled in the ultimate merits issues at the heart of this case. *Cf. Safe Air for Everyone*, 373 F.3d at 1040 (explaining that a case should not be dismissed under Federal Rule of Civil Procedure 12(b)(1) where "the jurisdictional issue and substantive issues . . . are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits"). This Court should remand to allow the Association to test the evidence and present it at the appropriate time – in a motion for summary judgment or at trial.

CONCLUSION

For the foregoing reasons, the American Diabetes Association respectfully requests that this Court reverse the district court's judgment; hold that the Association has standing to pursue its claims, that the June 2017 memoranda did not moot claims based on harm that predated them, and that the district court therefore has subject matter jurisdiction; and remand this action for further proceedings.

Respectfully submitted,

Dated: June 25, 2018 DISABILITY RIGHTS ADVOCATES

By: s/ Freya Pitts

Stuart Seaborn
Rebecca Williford
Freya Pitts
Attorneys for Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant the American Diabetes Association states that it is unaware of any related cases pending before this Court.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15242

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Signature of Attorney or Unrepresented Litigant: s/ Freya Pitts

Date: Jun 25, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

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Army Reg. 608–10 ¶ 4–32 (1997)

4–32. Administering medication and Performing Caregiving Health Practices

On occasion, CDS personnel may be required to perform health related practices as a reasonable accommodation for children with disabilities (special needs), pursuant to the Rehabilitation Act of 1973, as amended. These specific caregiving health practices are usually outlined in the child's Individual Development Plan (IDP) or the Individual Family Service Plan (IFSP). Such practices may include, but are not limited to, administering oral medications in addition to those discussed in paragraph 4–32c below, hand held or powered nebulizers, clean intermittent catherization of the bladder, gastrostomy tube feedings, or assistance with self–care for medical conditions including glucose monitoring for diabetes. However, CDS staff and Family Child Care providers will not perform functions that require extensive medical knowledge (e.g., determining the dosage or frequency of a prescribed medication); are considered medical intervention therapy (e.g., those not typically taught to parents by physical, occupational, speech therapists or special educators as part of a home program); or if improperly performed, have a high medical risk (e.g., injection of insulin). CDS personnel will adhere to the following guidance in developing SOPs for performing health related practices, including the administering of medication to children.

a. Medications and caregiving health practices will be administered only within full day, part day care, and school–age programs enrolling regularly scheduled children and in sick child care settings. Medications and caregiving health practices required by special needs children attending hourly programs and part day preschool will be administered on a case–by–case basis.

b. Medication and special therapeutic procedures will be administered only when prescribed by a physician and only when there is no other reasonable alternative to the medical requirement for the child. It is not reasonable to expect parents to leave their work site for this purpose.

c. Antibiotics, antihistamines, and decongestants are the only categories of medication which can be routinely administered by authorized CDS personnel. Other physician prescribed medications may be administered after specific consultation with the health consultant and the provision of special training to CDS personnel e.g., side effects, dosage techniques. No oral PRN (as needed) medication may be administered, except those designated as basic care items. The installation health consultant will determine and approve (with concurrence of the medical treatment facility physician point of contact) specific basic care items which may be used. Only those approved items will be used. Basic care items are limited to topical items used for the prevention of sunburn, diaper rash (ointments and lotions), and teething irritation. Parents of children showing any indication of

disease (infected sunburn, diaper rash, or gums) will be notified and referred to a health care provider for diagnosis and treatment. Use of basic care items will be discontinued until health care provider determines further use will not be harmful.

d. Written permission from a parent or guardian must be obtained before administering medication.

e. The physician or parents will administer the first dosage of any medication.

f. Children will be on oral medication at least 24 hours before dosage is administered by CDS personnel.

g. Medication will be—

(1) In the original container with a child–proof cap.

(2) Dated with physician's name and instructions for use.

(3) Labeled with the child's name, name of medication, and dosage strength.

(4) Stored according to instructions.

h. No "over–the–counter" medications will be administered unless ordered by prescription or are on the list of approved basic care items and all the specifications in paragraph 4–32g are met.

i. Designated center–based personnel and all FCC providers are authorized to administer medication within CDS programs according to the physician's instructions.

j. Individuals administering medication will have received prior specialized training.

k. All medication administered will be recorded on the DA Form 5225–R (para 2–13).

(1) Each medication requires a separate form that may be used for a one month period. The form will be maintained and filed into each child's folder monthly or upon completion of the medication period.

(2) Forms may be reissued as needed for long term medication and should follow the calendar month for recordkeeping purposes.

(3) The time of each dosage and the initials of the person administering medication will be entered at the time the dosage is administered.

l. All medication will be kept in one centrally located and monitored locked cabinet, out of the reach of children.

m. Medication requiring refrigeration will be isolated within the refrigerator in a separate secured container.

n. Medication will be returned to parents when no longer needed or upon termination of child's attendance in the CDS program.

o. Staff and providers will receive specialized training as identified by the SNRT prior to placement of a special needs child in a child care setting. Training will be conducted according to paragraph 2–3c (6).

Army Reg. 608–10 ¶ 4–32 (2017)

4–32. Administering medication and Performing Caregiving Health Practices

On occasion, Child, Youth, and School (CYS) Services personnel may be required to perform health related practices as a reasonable accommodation for children with disabilities (special needs), pursuant to the Rehabilitation Act of 1973, as amended. These specific caregiving health practices are usually outlined in the child's Medical Action Plan. Such practices may include, but are not limited to, administering medications in addition to those discussed in paragraph 4–32c below; using hand held or powered nebulizers; performing clean intermittent catheterization of the bladder and gastrostomy tube feedings; or providing assistance with self–care for medical conditions. In all cases, requests for accommodation must be reviewed and assessed individually. CYS Services programs must provide special needs accommodations unless the requested accommodation imposes an undue hardship on the Army, fundamentally alters the CYS Service program in which the accommodation is being made, or poses a direct threat to staff or other participants in the program. Requests for accommodation that require CYS Services staff and Family Child Care providers to perform functions that necessitate extensive medical knowledge; are considered medical intervention therapy; or if improperly performed, have a high medical risk must be approved by the ACSIM, in consultation with The Army Surgeon General,

prior to implementation. CYS Services personnel will adhere to the following guidance in developing operating procedures for performing health related practices, including the administering of medication to children.

a. Medications and caregiving health practices will be administered only within full day, part day care, and school–age programs enrolling regularly scheduled children and in sick child care settings. Medications and caregiving health practices required by special needs children attending hourly programs and part day preschool will be administered on a case–by–case basis.

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c. Antibiotics, antihistamines, and decongestants are the only categories of medication which can be routinely administered by authorized CDS personnel. Other physician prescribed medications may be administered after specific consultation with the health consultant and the provision of special training to CDS personnel e.g., side effects, dosage techniques. No oral PRN (as needed) medication may be administered, except those designated as basic care items. The installation health consultant will determine and approve (with concurrence of the

medical treatment facility physician point of contact) specific basic care items which may be used. Only those approved items will be used. Basic care items are limited to topical items used for the prevention of sunburn, diaper rash (ointments and lotions), and teething irritation. Parents of children showing any indication of disease (infected sunburn, diaper rash, or gums) will be notified and referred to a health care provider for diagnosis and treatment. Use of basic care items will be discontinued until health care provider determines further use will not be harmful.

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o. Staff and providers will receive specialized training as identified by the SNRT prior to placement of a special needs child in a child care setting. Training will be conducted according to paragraph 2–3*c* (6).

9th Circuit Case Number(s) 18-15242

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