UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

JOHN DOE A, JOHN DOE B, JOHN DOE C, JANE DOE A, JANE DOE B, JANE DOE C, JANE DOE D, and JANE DOE E Plaintiffs, vs. CAROL SPAHN, in her official capacity as Administrator of the Peace Corps, Defendant.	**Civil Action No. 1:23-cv-02859 (SJN)**

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REQUEST FOR ORAL HEARING

TABLE OF CONTENTS

INDEX OF EXHIBITS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

Plaintiffs oppose Defendant's Motion to Dismiss and respectfully request an oral hearing.

I. INTRODUCTION

The Peace Corps routinely denies life-changing volunteer opportunities to qualified people, claiming that their past or present mental health conditions prevent them from being able to serve, contrary to the objective evidence and recommendations of the medical professionals who personally evaluated them. In its Motion to Dismiss, the Peace Corps does not deny this, or claim that its policies, practices, and medical clearance determinations for the Plaintiffs were non-discriminatory. Rather, the government asserts numerous procedural challenges to Plaintiffs' First Amended Complaint, erroneously asserting that the agency's excessive administrative delays, as well as the biased and outdated "criteria" it has promulgated in secret that mandate denial of qualified volunteers with mental health disabilities, are "unreviewable." ECF No. 22, Mot. To Dismiss ("MTD"), at 40. The Peace Corps' arguments are wrong on the law and the facts. The Peace Corps is not above the law and its overtly discriminatory actions are ripe for review by this Court.

Plaintiffs applied to and were rejected from the Peace Corps because of the agency's outdated and unwarranted assumptions about the ability of people with mental health conditions to live and work abroad, as codified in its medical clearance criteria. *See, e.g.*, ECF No. 18-1, First Am. Compl. ("Compl.") ¶¶ 216-221 (former Peace Corps volunteer and healthcare worker rejected because she went to therapy after her mother died); *id.* ¶¶ 258-261 (college student rejected because she participated in therapy during COVID-19 to address mild anxiety). Each Plaintiff was highly qualified for the position and was offered a volunteer position, conditioned on medical clearance, after a rigorous application process. *See, e.g.*, *id.* ¶ 102 (John Doe C has a law degree, an MBA, and works in healthcare); ¶ 127 (Jane Doe A teaches in a low-income public school working with children with behavioral needs); ¶ 172 (Jane Doe C taught in Kenya for seven years,

two as a Peace Corps volunteer). Each submitted extensive documentation to the Peace Corps showing fitness to serve, including an evaluation by a mental health professional who determined they were each ready and able to serve in their assigned country and volunteer position. Yet the Peace Corps denied all of them an opportunity to serve based on their actual or perceived mental health disabilities.

These denials were all in line with and based on written "clearance criteria" that Peace Corps reviewers must use in making medical clearance decisions. Under these criteria – which are not public, and which Plaintiffs obtained only in connection with the Peace Corps' denials – the Peace Corps expressly excludes from volunteer service individuals who now or in the past have experienced certain very common mental health conditions or taken certain medications (including sleep aids), without regard to their current mental health or functioning or the opinions of their own doctors. *See* MTD Ex. 5. As set forth in the Complaint, the Peace Corps follows these criteria consistently, without conducting the individualized assessment that they concede is required by law, and without exercising discretion. As such, they are *de facto* rules that violate the Administrative Procedure Act (APA), because they were issued without the required notice and comment and are arbitrary and capricious.

Rather than argue that these rules and agency actions are not discriminatory, the Peace Corps instead says that this Court has no right to review its actions. In doing so, the government attempts to subvert the administrative and judicial process, and to avoid any accountability, so that it can continue to discriminate with impunity. The Peace Corps' arguments are meritless.

First, the Peace Corps claims that, even though it has fully and finally rejected Plaintiffs from Peace Corps service, Plaintiffs cannot challenge the Peace Corps' discriminatory decisions in court until the agency provides each Plaintiff with a *pro forma* document it labels a "final agency

decision" (FAD). At the same time, the Peace Corps says it has sole discretion[1] to delay issuing these FADs indefinitely without justification – even though its own regulations require decisions to be issued within 120 days unless infeasible, even though it has ignored related regulatory requirements that it must issue FADs *at the same time* as the investigation reports it has already provided to each Plaintiff, and even though the APA expressly prohibits unreasonable administrative delay. All Plaintiffs filed their administrative complaints well over a year ago, and received their final investigative reports months ago, yet Defendant has only issued a FAD to one of the eight Plaintiffs (and even tries to argue her case is moot simply because the Peace Corps made minor changes to the program to which she applied in the intervening years of delay). The Peace Corps' three-pronged attempt to avoid judicial review – claiming that Plaintiffs have not exhausted their administrate remedies because FADs have not issued, but that this Court cannot review its lengthy delay in issuing FADs, while raising a thin "mootness" claim against the one Plaintiff who has a FAD – should be denied.

Second, the Peace Corps asserts that it should be exempt from the requirements of Section 504 of the Rehabilitation Act ("Section 504"), and that Plaintiffs should be limited to bringing claims under the APA. That argument is contrary to the express language of the statute and clear congressional intent, as well as well-reasoned authority from this Court.

Third, the Peace Corps claims its secretly promulgated "clearance criteria" are insulated from challenge in court because they are nominally labeled as "guidance," not "rules," and baselessly argues that courts may not look behind the curtain as to how they actually operate. On

[1] Notably, this argument is based on a very recent (2021) change in the Peace Corps' regulations, which previously allowed plaintiffs to go to court after 180 days whether or not a FAD had issued, to now allowing the Peace Corps to exercise discretion over the timing. Even as amended, however, the regulations do not permit the unfettered discretion the Peace Corps now claims, nor does the APA.

the contrary, Justice Gorsuch has explained that "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019) (citing *General Motors Corp. v. Ruckelshaus*, 742 F. 2d 1561, 1565 (D.C. Cir. 1984) (*en banc*)) (emphasis in original). The Complaint clearly alleges, with specificity, how these criteria operate as binding norms and rules, and thus are subject to this Court's review.

In short, the Peace Corps' arguments can essentially be boiled down to this: the government can do what it wants and no court can tell it otherwise. Indeed, by the logic of Defendant's arguments, all federal Executive agencies could render themselves immune from judicial review under the APA, the Rehabilitation Act, and a host of other federal laws simply by issuing regulations granting themselves total discretion over the length of agency investigations and deliberations and then arbitrarily withholding final agency decisions. The Court should reject these excuses and give Plaintiffs their day in court to challenge the Peace Corps' disability discrimination.

II. STATEMENT OF FACTS

The Peace Corps, an independent agency within the U.S. government's executive branch, operates a volunteer program that sends Americans abroad to support international development efforts and, according to the Peace Corps, "transform[s] lives for generations." Compl. ¶¶ 17, 22. This program provides volunteers with numerous benefits, including financial, student loan, travel, medical and dental, career, graduate school, and networking benefits. *Id.* ¶ 23. The Peace Corps' volunteer program claims to "reflect the diversity of America" and to recruit "Americans with a wide range of experience, ages, and perspectives so we can share our nation's greatest resource—its people—with the communities we serve." *Id.* ¶ 26.

Plaintiffs John Does A, B, and C, and Jane Does A, B, C, D, and E represent this "wide range of experience, ages, and perspectives." The youngest is twenty-two; the oldest is sixty-six. *Id.* ¶¶ 147, 169. They live all over the country, from New Hampshire to Arkansas, from Missouri to Washington. *Id.* ¶¶ 100, 125, 148, 170. Some applied to the Peace Corps right out of college, eager to make use of the skills they learned through studying international relations, economics, and languages, while others hoped to bring their decades-long experience as teachers and healthcare workers to benefit communities in other countries. *Id.* ¶¶ 57, 80, 102, 127, 150, 172, 195, 217. Two Plaintiffs (Jane Does C and E) even served as Peace Corps volunteers earlier in their lives, the first as a special education teacher in Kenya and the latter as a healthcare volunteer in the Philippines. *Id.* ¶¶ 172, 217. Both continued to work in these respective fields when they came back to the U.S. *Id.*

While Plaintiffs' backgrounds may be different, they all share a deep commitment to public service which motivated their applications to the Peace Corps. *Id.* ¶ 13. All of them had already lived, studied, or worked abroad. *Id.* All of them were extended conditional offers to serve as Peace Corps volunteers on a specific project in a specific country following a rigorous and competitive application process. *Id.* This brief refers to such individuals as Invitees.[2]

A. Peace Corps' Medical Clearance Process Discriminates Based on Disability.

The Peace Corps' offers to each of the Plaintiffs were contingent on its "medical clearance" process, conducted by the agency's Office of Medical Services. *Id.* ¶¶ 13, 28. The Peace Corps' medical clearance process requires Invitees who disclose any kind of past or present mental health

[2] Throughout, the term "Invitee" refers to an individual who (a) was extended a conditional offer to become a Peace Corps Volunteer, including Response Volunteers, (b) accepted the Peace Corps' invitation to serve, and (c) must be medically cleared before being placed.

condition or treatment, as all Plaintiffs did, to submit specialist examinations, mental health forms, letters from providers, and personal statements. *Id.* ¶¶ 29, 60, 83, 105, 130, 153, 175, 198, 220.

Despite requiring Plaintiffs to submit extensive individualized documentation in support of their service, the Peace Corps has implemented mental health "clearance criteria" that must be adhered to by its medical personnel and that expressly exclude most people with a history of a mental health diagnosis or treatment. *Id.* ¶¶ 31-32. The Plaintiffs were all denied medical clearance based on these discriminatory agency rules, although the documentation they submitted supporting their fitness to serve and the recommendations of the medical professionals who personally evaluated them showed they were fit to serve. *Id*. ¶ 14.

B. Peace Corps' Clearance Criteria Exclude Most Mental Health Conditions.

The Peace Corps has clearance criteria for a wide range of mental health conditions and treatment, including Counseling, Career-Counseling, or Life Coaching; Attention-Deficit/Hyperactivity Disorder ("ADHD"); Generalized Anxiety Disorder; Major Depressive Disorder; Adjustment Disorder; and Acute Stress Disorder and Post Traumatic Stress Disorder ("PTSD"). *Id.* ¶ 31; *see also* MTD Ex. 5. When an Invitee discloses a mental health condition, Peace Corps personnel must use the clearance criteria to determine whether an Invitee can be medically cleared. *Id.* ¶ 32. The clearance criteria have a long list of disqualifying criteria based on mental health diagnoses, symptoms, and/or treatment, without regard to their severity, present status, or impact. *Id.* ¶ 33. If an Invitee's condition or history runs afoul of any of these criteria, their medical clearance is denied. *Id.* Some examples of the *per se* disqualifying criteria include:

- Taking "as-needed anti-anxiety medication" or "sleep medication" any time in the past year, MTD Ex. 5 at 10; *or*
- A diagnosis of ADHD plus any history (no matter how long ago) of any eating disorder, a seizure disorder, substance use disorder, or psychiatric hospitalization, among others, Compl. ¶ 34; *or*

- A diagnosis of Bipolar Disorder (no matter how long ago, how well treated, and whether no longer present);[3] *or*

- Any history of psychiatric hospitalization, partial hospitalization, or intensive outpatient psychiatric treatment (no matter how long ago, the circumstances surrounding the hospitalization, or the Invitee's health since), *id.* ¶ 35; *or*

- Any history of a co-existing mental health diagnoses (such as co-occurring depression and ADHD, even if mild or no longer present), *id.* ¶ 36-37; *or*

- Prescribed more than two psychiatric medications of any kind, *id.* ¶ 36-37.

None of these mental health clearance criteria policies underwent notice and comment or were otherwise subjected to any formal rule-making procedure.

All of the Plaintiffs and many others described in detail in Plaintiffs' Complaint were rejected by the Peace Corps based on these agency rules. *Id.* ¶¶ 311-313. All of the Plaintiffs, pursuant to Peace Corps policies, underwent a psychological evaluation by a mental health professional specifically for the purpose of determining their mental fitness to serve in their assigned position and country; and all were deemed fit to serve and had letters of support from their treating professionals. *Id.* ¶ 14. Yet all were denied medical clearance by the Peace Corps based on the agency's inflexible and discriminatory clearance criteria.

C. Plaintiffs Exhausted the Peace Corps' Administrative EEO Process.

Prior to filing the Amended Complaint, all Plaintiffs faithfully and timely followed the Peace Corps' administrative procedures for appealing these denials. All of their appeals were denied based on their mental health conditions and/or treatment pursuant to the Peace Corps' clearance criteria, and all of their offers to serve in the Peace Corps' volunteer program were revoked on this basis, representing final agency actions. *Id.* ¶ 46.

[3] Compl. ¶ 84. Plaintiffs possess this Peace Corps screening policy and will include it in subsequent discovery, dispositive motion briefing, and/or in a re-amended complaint.

The Peace Corps provides an administrative equal employment opportunity (EEO) process for volunteers following the final agency action denying medical clearance and revoking their invitations to serve. *Id.* ¶ 47. The process has two parts, an informal complaint stage and a formal complaint stage, the latter of which is supposed to end with the Peace Corps issuing a Report of Investigation ("ROI") and a proposed Final Agency Decision ("FAD") within 120 days (unless determined to be infeasible and extended by the Peace Corps' Director). *Id.* ¶¶ 49-50; 22 C.F.R. § 306.9(i) and (j). The proposed FAD becomes final if not timely appealed within 10 days. 22 C.F.R. § 306.9(m). Contrary to its own regulatory requirements, the Peace Corps did not issue proposed FADs with the ROIs issued to Plaintiffs.[4]

Until a few years ago, this process, as described in agency regulations, imposed a 180-day deadline on the agency to ensure that aggrieved parties had the opportunity to challenge its decisions in court within a reasonable time period. The Peace Corps revised its regulations in 2021 to make the deadline 120 days after filing the formal complaint, unless determined to be infeasible and extended by the Peace Corps director. Compl. ¶ 50; 22 C.F.R. § 306.9(i). In practice, the Peace Corps has used this undefined "feasibility" exception to ensure that applicants remain in a lengthy administrative limbo with no judicial recourse. Compl. ¶ 51. The Peace Corps does not operate this process on a "first in, first out" basis, but rather considers complaints and issues investigative reports and decisions out of order. *Id.* ¶ 48. Plaintiffs who filed their EEO complaints later than others received ROIs sooner, and all ROIs came without the mandatory accompanying proposed FADs. *Id.* ¶ 52.

[4] Compl. ¶ 52.

As detailed in this Table, the Peace Corps has ignored its 120-day deadline for all Plaintiffs, in some cases already taking almost five times as long without issuing a FAD:[5]

	Appeal Denied	Informal EEO Complaint Filed	Formal EEO Complaint Filed	ROI Issued	FAD Issued	Days Elapsed Since Informal Complaint	Days Elapsed Since Formal Complaint, as of 9/6/24
John Doe A	12/21/22	12/7/22	2/16/23	5/8/24	No.	640 Days	569 Days
John Doe B	2/8/23	12/4/22	2/16/23	5/8/24	No.	642 Days	569 Days
John Doe C	7/21/23	8/24/23	10/9/23	6/26/24	No.	380 Days	334 Days
Jane Doe A	2/1/23	3/11/23	4/25/23	2/1/24	No.	546 Days	501 Days
Jane Doe B	3/15/23	4/4/23	6/2/23	2/5/24	No.	522 Days	463 Days
Jane Doe C	3/29/23	4/5/23	7/19/23	5/8/24	No.	521 Days	416 Days
Jane Doe D	12/14/22	12/7/22	2/16/23	5/8/24	No.	640 Days	569 Days

Under the old regulation, Jane Doe E received her FAD 491 days from filing her informal EEO complaint – it is a six-page document that simply reiterates the prior medical clearance denial,

[5] Compl. ¶¶ 75, 97, 122, 145, 167, 190, 212. Much of the Table is derived from Compl. ¶¶ 69, 72-74; 87, 94-96; 112, 119-121; 135, 142-144; 157, 164-166; 180, 187-189; 202, 209-211. Many ROIs were issued since the filing of the Amended Complaint; Plaintiffs can further amend to add these facts if needed.

with largely boilerplate language.[6] *See* Exhibit 3. Since the ROIs received are considerably longer and more detailed, there is no justification for the Peace Corps' delay in generating FADs for Plaintiffs, and the Peace Corps has offered none. Moreover, the Peace Corps' regulations require the proposed FADs to be issued with the ROIs, which it has failed to do for all other Plaintiffs. If issued when required with their ROIs, all the FADs would now be final. 22 C.F.R. § 306.9(m).

In multiple communications, undersigned counsel sought to obtain the FADs from the Peace Corps' EEO office, with citations to the regulations' 120-day timeline.[7] The Peace Corps – without offering any justification for the lengthy delay – issued two letters stating only that it had the discretion to extend the time to issue FADs.[8] Ultimately, the Peace Corps' Motion to Dismiss makes plain that it believes its "discretion" to extend the time limit is not limited by any bounds of reasonableness or feasibility. The Peace Corps calls the time limit in the regulation a "non-binding suggested deadline that the … Director has free discretion to extend." MTD at 41. Defendant admits Plaintiffs' allegation regarding unreasonable delay, by arguing that the Director may "extend the Peace Corps' response time indefinitely and without notice to the complainant or

[6] Another prior FAD received by Plaintiffs' counsel was likewise a six-page document reiterating the medical clearance denial. Compl. ¶ 233.

[7] Because this is a motion to dismiss, and not for summary judgment, Plaintiffs do not supply "evidence," but would in litigation, upon a further motion, or in re-amending the complaint.

[8] If the Court were inclined to grant the government's Motion to Dismiss, it should be without prejudice, and Plaintiffs should be allowed the opportunity to amend to add additional facts to the complaint concerning the letters showing the agency's unreasonable delay. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) ("dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency"); *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (applying *Firestone*, holding: "[t]he standard for dismissing a complaint with prejudice is high").

reasonable basis." *Id*. at 41-42. Nowhere in its Motion does the Peace Corps articulate any excuse for its delay or an explanation why it was not "feasible" to meet the deadline in the regulations.

III. LEGAL STANDARD

A complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted). In evaluating a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6), this Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Perrigo Research & Dev. Co. v. United States FDA*, 290 F. Supp. 3d 51, 59 (D.D.C. 2017) (internal quotations omitted); *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). A motion to dismiss under 12(b)(1) should not prevail "unless plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Randolph v. Ing Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 4-5 (D.C. Cir. 2007). This Court "may consider material other than allegations in the complaint in determining whether it has subject matter jurisdiction to hear the case, as long as it still accepts the factual allegations in the complaint as true." *Mykonos v. United States*, 59 F. Supp. 3d 100, 104 (D.D.C. 2014). When ruling on a Rule 12(b)(6) motion, a complaint need only state "a plausible claim for relief" to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (1937).

IV. ARGUMENT

A. Plaintiff Jane Doe E's Case Is Not Moot Because Peace Corps Can Grant Her Effective Relief.

Because Jane Doe E received a FAD, and Defendant thus cannot claim there is a procedural barrier barring her claim, Defendant instead raises a meritless argument that her claim is either moot or not yet ripe because the specific Peace Corps program to which she applied no longer

exists. *See* Jane Doe E FAD, Ex. 3. The same program need not exist, however, for Jane Doe E's claims to survive.[9] The Peace Corps' argument omits dispositive information: that, even though it has discontinued the Global Health Services Partnership (GHSP) to which Jane Doe E originally applied, the Peace Corps has another current program, the Advancing Health Professionals (AHP) program, which is essentially the same program under another name.

Defendant misunderstands the heavy burden it must meet to prove Jane Doe E's claim is moot. Under governing U.S. Supreme Court authority, a case is moot only when it is *impossible* to grant *any* relief that would be effective in securing the plaintiff's goal. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (emphasis added); *see also Maldonado v. District of Columbia*, 61 F.4th 1004, 1006 (D.C. Cir. 2023). The general rule for applicants challenging a barrier to participation in a program is that they establish they are "able and ready" to participate once the barrier is removed. *Carney v. Adams*, 592 U.S. 53, 60 (2020). Courts have "broad discretion" to shape an equitable remedy which provides effective relief. *Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 5-6 (D.D.C. 2012). Effective relief is "expansively defined" and is any remedy which has a practical impact on the parties, even if the remedy is partial or does not return the parties to the *status quo ante*. *Id.* ("[I]n deciding a mootness issue, 'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief."). If the relief the court provides could be "effective at securing" Plaintiff's goal then her "suit remains live." *Almaqrami v. Pompeo*, 933 F.3d 774, 784 (D.C. Cir. 2019).

[9] Since Peace Corps can grant Jane Doe E relief through the Advancing Health Professionals program, Plaintiffs do not reach the ripeness inquiry Defendants raise. MTD at 14-15.

Jane Doe E applied to Peace Corps' GHSP, a program described by the Peace Corps as providing "high-impact, short-term" volunteer opportunities for U.S. citizens with medical backgrounds to "assist in strengthening teaching and training capacity" in medical or nursing schools overseas, and to "build capacity in the health systems of developing countries." *See* Ex. 1; MTD Ex. 1 at 1. GHSP was an "expansion of the Peace Corps Response program," and GHSP volunteers were considered Peace Corps Response volunteers. *Id.* GHSP operated in Eswatini, Liberia, Tanzania, Malawi, and Uganda. *See* MTD Ex. 1 at 1. GHSP closed its doors in 2018 and the very next year, the Peace Corps launched the AHP, which played the same role as the GHSP: an extension of the Peace Corps Response program that sends U.S. citizens with medical backgrounds to medical institutions overseas to build their capacity. The Peace Corps uses the same words to describe the AHP (describing it as a "high-impact, short-term" volunteer opportunity for U.S. citizens with medical backgrounds to build capacity in other countries) as it did to describe GHSP.[10] *See* Ex. 2. AHP, like GHSP, is part of the Peace Corps Response program, and sends U.S. medical professionals on six- to twelve-month assignments to universities, colleges, clinics, NGOs, and government departments to provide instruction to local health care professionals in classrooms or skills lab settings. *See id.*; MTD Ex. 1. AHP even operates in the *same five countries* as GHSP did. *See* Ex. 2. It is effectively a change in name only.

Jane Doe E's claim is not moot because the Peace Corps can grant her relief to secure her goal of holding a Peace Corps Response Volunteer position in a healthcare field. The Court can provide her this effective relief through the AHP program. She has alleged, in allegations that must be taken as true for purposes of Defendant's Motion, that she is able and ready for such a position,

[10] The Peace Corps describes the AHP as "part of the Peace Corps Response program" that "offers Volunteers high-impact, short-term opportunities abroad to improve health care education and strengthen health systems in resource-limited areas abroad." Ex. 2.

and indeed has worked in the years since her rejection from the Peace Corps in public health humanitarian efforts in South Asia and in lower-income communities in the U.S. Compl. ¶ 234. Thus, the Court should reject Defendant's claim that Plaintiff Jane Doe E's case is moot.

B. The Complaint Sufficiently Alleges Unreasonable Delay in Violation of the APA.

The Peace Corps has delayed up to nearly 600 days in issuing documents marked "Final Agency Decision" or FADs, despite the agency's own regulation that provides that FADs should be issued within 120 days. Yet, the Peace Corps argues that Plaintiffs' unreasonable delay APA claim fails and that its unexplained decision to delay indefinitely is "unreviewable" under 5 U.S.C. § 706(1) (MTD at 40), even arguing the Court "lacks jurisdiction" to decide the question. MTD at 41. The Peace Corps, indeed, contends that it has no required timeline at all to act on Plaintiffs' appeals, and that it may delay responding to them "indefinitely without notice to the complainant or reasonable basis." *Id*. at 42. Defendant's position – coupled with its claims that FADs are *required* before a plaintiff can bring suit – would, if permitted, effectively eliminate judicial review, insulating the Peace Corps from the consequences of its discrimination.[11] The Peace Corps' argument also ignores the language of the regulation: (i) permitting delay only if timely action is not "feasible"; (ii) requiring the issuance of a proposed FAD along with a ROI; (iii) stating that a proposed FAD becomes final if not appealed within 10 days of the ROI and proposed FAD being jointly issued; (iv) the APA's requirement that all agencies act within a "reasonable" period of time, 5 U.S.C. §§ 555(b), 706(1); and (v) controlling authority from this District finding that agencies cannot ignore their self-imposed deadlines, *Sai v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99 (D.D.C. 2015).

[11] Such a result would render the Rehabilitation Act meaningless and violate Due Process.

The Peace Corps' regulation permits it to extend the 120-day deadline only when it is not "feasible" for it to meet that deadline. *See* 22 C.F.R. § 306.9(i) ("to the extent feasible," FADs will be completed within 120 days of filing the complaint). Something is feasible when it is "capable of being done, executed or effected." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508 (1981).[12] Under this language, the Director can delay acting on Plaintiffs' EEO complaints only if the Peace Corps is *not capable* of completing it. The Peace Corps has never, in the instant motion nor in correspondence with Plaintiffs, given any reason why it is not capable of issuing its brief, boilerplate FADs within 120 days after it has already reviewed and definitively denied each Plaintiff's application to serve in the Peace Corps twice, and after it has published a ROI regarding the Plaintiffs' disability discrimination allegations. *See supra* at I.C. Moreover, there is no such feasibility limitation or discretionary language in the regulatory provision requiring the Peace Corps to issue a proposed FAD with each ROI (22 C.F.R. § 306.9(j)), which the Peace Corps has not done.

The Peace Corps also ignores binding language from the APA *requiring* agencies to act within a "reasonable" period, 5 U.S.C. § 555(b), and allowing plaintiffs to sue when action has been "unreasonably" delayed, *id.* § 706(1). It is binding law that the APA "give[s] courts authority to review ongoing agency proceedings to ensure that they resolve the questions in issue within a reasonable time." *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food and Drug Admin.,* 740 F.2d 21, 32 (D.C. Cir. 1984). If, as the Peace Corps claims, it can exercise absolute discretion to withhold FADs for as long as it wishes and this Court has no jurisdiction to interfere, Congress' direction in the APA that agencies must act within a reasonable period of time would be meaningless. Yet all

[12] Merriam-Webster, *Accord*, https://www.merriam-webster.com/dictionary/feasible (last visited Sept. 5, 2024) (defining "feasible" as "capable of being done or carried out").

words of a statute must be given meaning. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (describing the "cardinal principle" that courts "must give effect, if possible, to every clause and word of a statute").

The Peace Corps' argument also ignores precedents of this Court expressly holding that an unreasonable delay APA claim lies where an agency fails to articulate any basis (other than its own "discretion") for a lengthy delay that exceeds the agency's own articulated, anticipated timeline for agency action. MTD at 40-41. In *Sai v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99 (D.D.C. 2015), repeatedly cited by Defendant (MTD at 19, 22, 23), this Court held:

> It is difficult to envision the "rule of reason" that would permit an agency routinely to delay the processing of administrative complaints by a factor of five times the timetable set out in the agency's governing regulations—and Defendants have offered no justification or explanation here.

Id. at 120-121.

Sai, like the instant case, was a disability discrimination case that brought claims under both Section 504 of the Rehabilitation Act and the APA against a federal agency. The plaintiff argued that the agency's delay "verging on three years" was "*prima facie* unreasonable" in light of a "180-day deadline" set forth in agency regulations. *Id.* at 120. In *Sai*, as here, there was "no evidence in the record regarding the reasons behind the [agency defendants'] failure to respond to Plaintiff's … complaint." *Id.* Instead, the defendant essentially argued that it had the discretion to delay, without further explanation. *See* MTD at 40. This Court in *Sai* held that a 2.75-year delay (roughly five times the regulatory deadline) in responding to a complaint was unreasonable in light of regulatory authority that set a 180-day timeframe. *Sai,* 149 F.Supp.3d at 120. Here, the Peace Corps has a 120-day deadline from filing the formal EEO complaint, unless determined to be infeasible and extended by the Peace Corps director. Compl. ¶ 50; 22 C.F.R. § 306.9(i). The Peace Corps has delayed issuing FADs for three to five times that 120-day timeframe and has done so

without justification beyond asserting its right to exercise discretion. Nowhere in the record or in its Motion has Defendant even attempted to argue that issuing the FADs is infeasible. Such an unreasonable delay runs afoul of the APA. *See also Thompson v. U.S. Dep't of Labor,* 813 F.2d 48, 52 (3d Cir. 1987) (reversing summary judgment and finding plaintiff had asserted APA claim, despite lack of final action, based on government's failure to conclude EEO administrative proceedings on his complaint within a reasonable time) (citing *Pub. Citizen Health Rsch. Grp.,* 740 F.2d at 32).

Further, applying the factors for determining unreasonable delay claims under Section 706(1) of the APA, outlined in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"),[13] the Court in *Sai* found that "many of the factors that ordinarily militate against Section 706(1) relief are not present." *Sai,* 149 F. Supp. 3d at 121. The same is true here. First, the Court found that "the relief Plaintiff seeks does not—as many cases do—seem to present the kind of 'complex scientific, technological, and policy questions' that may arise when the relief sought is the promulgation of a regulation or a policy." *Id.* (quoting *Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 993 (D.C. Cir. 1996). Second, *TRAC* instructs reviewing courts to "consider the effect of expediting delayed action on agency activities of a higher or competing priority." 750 F.2d at 80. But in *Sai* the Court found "no basis to conclude that [the agency's] delay in responding to Plaintiff's administrative complaint is the product of 'higher or competing priorit[ies].'" 149 F. Supp. 3d at 121. The same is true here. As the Court concluded: "This is thus not a case in which a plaintiff is seeking to upend a 'first-in, first-out' procedure by

[13] Defendant argues that the Court must apply the factors for determining a writ of mandamus (MTD at 41), but the *TRAC* factors discussed in *Sai* are the correct factors for adjudicating an unreasonable delay claim under section 706(1) of the APA.

attempting to 'automatically go to the head of the line at the agency.'" *Id.* (quoting *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-15 (D.C. Cir. 1976)).

Here, as in *Sai*, "the agency [has] not show[n] due diligence in processing plaintiff's individual request." *Sai,* 149 F. Supp. 3d at 121 (quoting *Open Am.*, 547 F.2d at 615). The Peace Corps has yet to issue a FAD for seven of the eight Plaintiffs,[14] some now 569 days old (as of the date of this filing), though the Peace Corps' own regulations say that FADs should be issued within a timeframe of 120 days unless not feasible. 22 C.F.R. § 306.9(i). There is no basis for the Peace Corps' delay, as the agency has already denied all of Plaintiffs' applications and their appeals. Nor does the agency follow a "first in, first out" procedure, as some Plaintiffs received ROIs before others who had filed their complaints earlier. *See* Table, *supra* Statement of Facts, Section C. Though Plaintiffs have sought answers from the Peace Corps, it has provided no evidence to Plaintiffs or this Court justifying its delay or demonstrating the infeasibility of issuing timely FADs, other than to assert that it is not obligated to act timely or, indeed, at any time, because its delay is "unreviewable." MTD at 40. As in *Sai*, without "micromanaging" the Peace Corps' processing of administrative complaints, the Court should nonetheless find that the agency's delay without justification is unreasonable and violates the APA. *Sai*, 149 F. Supp. 3d at 121.

Moreover, the Peace Corps' argument premised on lack of a "clear duty to act" ignores its own regulation, 22 C.F.R. § 306.9(j), which *requires* the agency to issue a proposed FAD along with the ROI and starts the clock ticking for an appeal and a final FAD, in 22 C.F.R. § 306.9(k), (l), and (m). If Plaintiffs had received proposed FADs with the ROIs *as required*, the proposed FADs would have become final FADs *long ago.*

[14] Compl. ¶¶ 236, 291.

As a result of the Peace Corps' delay, Plaintiffs have been left in limbo for years awaiting their FADs, despite the clear decisions already communicated by the Peace Corps that they were disqualified on basis of their mental health conditions and treatment. Compl. ¶¶ 51-52, 294-296. As discussed *infra*, in Argument Section C, upon the initial denial and the denial of their appeals, the Peace Corps' discrimination was final: the Plaintiffs all had to seek other career opportunities. Compl. ¶ 297. They had to explain their dismissal to friends, family, colleagues, and employers, requiring many to have to disclose private mental health information. *Id.* While all Plaintiffs remain ready and able to serve in the Peace Corps, and wish to have the opportunity to do so, they cannot put their lives and careers on hold forever. Under the *TRAC* factors, and as in *Sai*, Plaintiffs' interest in the timely processing of their complaints is "not insubstantial" – "To the extent that Plaintiff[s] have a right to be free of discrimination…and have asked the agency to remedy such discrimination, the agency's delay in responding to [their] complaints has the effect of perpetuating the alleged wrong." *Sai*, 149 F. Supp. 3d at 121 (citing *TRAC*, 750 F.2d at 80).

Defendant's authorities to the contrary are readily distinguishable and do not support Defendant's position that the Court lacks jurisdiction to adjudicate the Peace Corps' unreasonable delay in processing EEO complaints because the agency maintains discretion. MTD at 42 (citing *Beshir v. Holder*, 10 F. Supp. 3d 165, 172 (D.D.C. 2014); *Long Term Care Pharmacy All. v. Leavitt*, 530 F. Supp. 2d 173, 187 (D.D.C. 2008) ("*Long Term Care"*)). In *Beshir*, for example, unlike here, the issue was whether the Immigration and Naturalization Act (INA) precluded jurisdiction over an unreasonable delay claim, and "national security considerations [were] implicated by the adjudication…." *Beshir*, 10 F. Supp. 3d at 173. The court noted a host of authorities where subject-matter jurisdiction *was* found to exist. *Id.* at 172-173 (noting courts are divided on the question of jurisdiction over unreasonable delay claims under the INA). And *Long Term Care* involved a

provision of the Federal Land Policy and Management Act that simply said that the Department of Interior had to manage certain areas "in a manner so as not to impair the suitability of such areas for preservation as a wilderness." *Long Term Care,* 530 F.Supp.2d at 187. It did not embrace any particular timeline for action (like the 120 days in the regulation here), and therefore did not have "the clarity necessary to support judicial action under §706(1)" regarding unreasonable delay. *Id.*

Notably, *Sai*, which is much more analogous to our case, was decided *after* the *Beshir* and *Long Term Care* decisions and found unreasonable delay in violation of the APA. The Court should therefore deny Defendant's Motion to Dismiss the unreasonable delay claim.

C. Plaintiffs John Does A-C and Jane Does A-D Have Exhausted Their Claims.

As described above, the Peace Corps has ignored its own regulatory timeframes and requirements by failing to issue FADs to seven of the eight Plaintiffs,[15] claiming that it has unreviewable discretion to delay as long as it wants. Compounding its effort to avoid the accountability that comes with judicial review, the Peace Corps next argues that the FADs it is refusing to issue are *required* before Plaintiffs can sue. The Peace Corps, not Plaintiffs, control when the FADs are issued, and it has unilaterally decided not to issue these *pro forma* documents for many months (even years) after it was required to do so, even though Plaintiffs timely followed every step of the Peace Corps' administrative process and responded to every one of the Peace Corps' requirements and requests.

There is no question as to the agency's final decision in each Plaintiff's case. Each Plaintiff was provided a written decision denying their medical clearance. They each appealed that decision and were again denied for the same reasons set forth in the first letter. Their offers to serve were fully and finally revoked. They each then filed an informal complaint, which was unsuccessful,

[15] *See supra* at Argument, Section A, regarding Jane Doe E.

and each filed a formal complaint. Through this process, the Peace Corps has denied each Plaintiff's appeal based on its medical clearance criteria, under which Plaintiffs are deemed unqualified to serve based on mental health disabilities. The FAD is simply a formality that the Peace Corps is using as a litigation strategy to avoid judicial review of its discriminatory rules and actions. The Peace Corps nonetheless claims that Plaintiffs somehow "failed to exhaust" without the FADs that the Peace Corps itself has unreasonably delayed issuing. MTD at 15.

The Peace Corps' exhaustion argument is meritless. The Peace Corps issued effective and final agency decisions determining Plaintiffs' rights and status when it denied Plaintiffs' medical clearances, denied their appeals, and rescinded their invitations to become volunteers representing the U.S. abroad. Alternatively, its inaction itself constitutes final action given the status of the claims and the lengthy delay. Even if Peace Corps' prior actions were not effectively final, requiring issuance of FADs to "complete" the administrative process would be futile given the *de facto* rules that require denying medical clearance to Plaintiffs. Moreover, the Section 504 discrimination claims contain no administrative exhaustion requirement.

1. Plaintiffs Have Received Final Determinations from the Peace Corps, or in the Alternative, Peace Corps Has Constructively Denied Their Complaints.

Under the APA, an agency's challenged decision is subject to judicial review if it constitutes final agency action. 5 U.S.C. § 704. But a final agency action is not limited to one labeled as such. An agency action (or its inaction) is final if it is "definitive" and has "a direct and immediate effect on the day-to-day business of the party challenging it." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980); *see also Nat'l Ass'n of Home Builders v. U.S. EPA*, 956 F. Supp. 2d 198, 209 (D.D.C. 2013). Moreover, agency inaction may itself constitute agency action, operating as a constructive denial. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987).

Plaintiffs have received final agency determinations under these standards. As the current Complaint alleges, the Peace Corps has repeatedly and definitively communicated its determination that the Plaintiffs may not serve as volunteers because of their mental disabilities. That decision has indeed had a "direct and immediate effect" on Plaintiffs, by precluding them from serving as Peace Corps volunteers. Each Plaintiff engaged extensively with Peace Corps officials to exhaust administrative remedies, providing details of their claims, responding to all requests for information from agency officials, and meeting all agency-dictated deadlines. Compl. ¶¶ 54-234. Each Plaintiff timely completed each required step in the Peace Corps' administrative process, including initiating and pursuing required appeals. *Id.* For each Plaintiff, the Peace Corps issued an initial denial informing them that the Peace Corps is "unable to clear [them] for Peace Corps service," thanking them for their interest, and "wish[ing them] well in all [their] future endeavors." MTD Ex. 2-A through -G. Each Plaintiff timely appealed (Compl. ¶¶ 63, 85, 110, 133, 155, 178, 200), and the Peace Corps denied each appeal, affirming that Plaintiff was denied the opportunity to serve as a volunteer for the same disability-based reasons as the original denial. Compl. ¶¶ 65, 87, 112, 135, 157, 180, 202. For all Plaintiffs, the Peace Corps has now issued a ROI, once more stating the Peace Corps' position that it denied Plaintiffs the opportunities abroad for the same disability-based reasons. Compl. ¶¶ 144, 166; *see also supra* Statement of Facts, Section C (explaining that some ROIs were issued after the filing of the First Amended Complaint). No Plaintiff other than Jane Doe E has received a document labeled a FAD, even though the regulations require a proposed FAD to be issued with the ROI, which becomes the final FAD if not appealed within ten days. *Id.*; 22 C.F.R. § 306.9(j), (m).

For each Plaintiff, the appeal denial operated as the final determination that they could not serve as a Peace Corps volunteer. Compl. ¶¶ 71, 93, 118, 141, 163, 186, 208. The appeal denial is

"definitive" and "has a direct and immediate effect on the day-to-day" lives and careers of the Plaintiffs. *Standard Oil Co.*, 449 U.S. at 239. Once the appeal was denied, the Plaintiffs had definitively lost their bids to be Peace Corps volunteers and all had to seek other career opportunities. Even if the Court were to find that the appeal denials were not the final agency action, Plaintiffs have exhausted every possible administrative process available to them, to no avail. For the Peace Corps to claim now that exhaustion is lacking because it is refusing to issue a document labeled "FAD" ignores the facts pled – construed in the light most favorable to the non-moving party – and renders exhaustion an insurmountable obstacle.

At minimum, the Peace Corps' inaction, in the form of a willful refusal to issue the FADs, is a constructive denial and itself constitutes final agency action. "[W]hen administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." *Sierra Club*, 828 F.2d at 793; *see also* 5 U.S.C. § 551(13) (defining agency "action" to include a "failure to act"). In *Friedman v. Federal Aviation Administration*, 841 F.3d 537 (D.C. Cir. 2016), for instance, the D.C. Circuit found the agency had constructively denied the plaintiff's application for a pilot's license based on his diabetes when it had "clearly communicated it will not reach a determination on a petitioner's submission" but "simultaneously refuses to deny the petitioner's submission." *Id.* at 542-43. When "the Agency has placed [plaintiff] in a holding pattern—preventing him from obtaining any explicitly final determination on his application and thwarting the Court's interest in reviewing those agency actions that, in practical effect if not formal acknowledgement, constitute 'the consummation of the agency's decisionmaking process' and determine 'rights or obligations,'" it "has engaged in final agency action subject to this Court's review." *Id.* at 542 (internal quotations omitted); *see*

also Sai, 149 F. Supp. 3d at 118-119 (rejecting motion to dismiss on "final action" grounds in light of agency's substantial delay in responding to plaintiff's complaint).

That is exactly the situation here. The Peace Corps has decisively denied Plaintiffs the opportunity to become volunteers, and has plainly and repeatedly communicated that Plaintiffs cannot serve, but has failed for an unreasonable time to issue the document it says is necessary for the action to be subject to judicial review. That failure to act has had "precisely the same impact on the rights of the parties" as issuing a FAD. Put differently, the agency's delay has resulted in a constructive denial and thus constitutes final agency action reviewable by this Court.

2. Further Exhaustion of the Peace Corps' Process Is Futile.

Alternatively, the Peace Corps contends that further exhaustion of the administrative process is not futile because Plaintiffs' "allegations are not enough to determine that administrative remedies for all Plaintiffs are certain to fail, as required by precedent." MTD at 17, citing *Tesoro Refin. & Mktg. Co. v. Fed. Energy Regul. Comm'n*, 552 F.3d 868, 874 (D.C. Cir. 2009). This argument ignores the fact that the Peace Corps itself could remove whatever doubt it says exists about the outcome of Plaintiffs' appeals by simply issuing the long-overdue FADs. It also ignores Plaintiffs' allegations, which are specific and conclusive and must be taken as true on a motion to dismiss, establishing that further exhaustion would be futile.

Plaintiffs have alleged that each of them and many others have been denied the opportunity to serve as volunteers based on outmoded notions of mental health conditions and their effect. Compl. ¶ 286-88, 291. The futility of further administrative process is apparent first from the common experiences of the Plaintiffs who all attempted to exhaust administrative remedies only to receive cookie cutter denials at every step, and who were then left in limbo for years awaiting their FADs, despite the clear decisions already communicated by the Peace Corps time and again that they were disqualified on basis of their mental health conditions and treatment. *Id.* ¶ 234. All

were denied repeatedly during the medical clearance process, appeals, and EEO process. *Id.* ¶¶ 65, 87, 112, 135, 157, 180, 202.

If that were not enough, futility of further administrative process is clear from the terms of the *de facto* rules that the Peace Corps applied in reaching those denials. For each of the Plaintiffs and Invitees in the Complaint, the Peace Corps criteria were applied to deny them the opportunity to serve, notwithstanding the opinions of their treating professionals. *Id.* ¶¶ 65, 87, 112, 135, 157, 180, 202. As alleged in the Complaint, these criteria are "routinely and rigidly followed" to exclude people with current, past, and perceived mental health disabilities from Peace Corps service (as is apparent from the denial letters received by Plaintiffs and other Invitees). *Id.* ¶¶ 32, 32, 65, 87, 112, 135, 157, 180, 202. These *de facto* rules "contain so many exclusionary criteria that it is extremely difficult for an Invitee with a current mental health condition or a record of a past mental health diagnosis to obtain medical clearance," no matter how many evaluations from medical professionals they submit. *Id.* ¶ 289.

In fact, the criteria exclude most people with mental health disabilities, containing a long list of disqualifying criteria based on mental health diagnoses, symptoms, and/or treatment, without regard to their present status or impact. *Id*. ¶ 33. If an Invitees' condition or history meets one of these criteria, their medical clearance is denied. *Id.* For example, clearance must be denied to any Invitee with ADHD who has also had (no matter how long ago) a history of an eating disorder, seizure disorder, substance use disorder, or psychiatric hospitalization. *Id.* ¶ 34. The Peace Corps' criteria also exclude Invitees with generalized anxiety disorder accompanied by any history of depression or ADHD no matter how mild or long ago. *Id.* ¶¶ 35-37. Other such examples abound. So long as the Peace Corps continues to use these sweeping and outmoded criteria in the

medical clearance process, Invitees with actual or perceived mental health conditions like Plaintiffs will continue to be denied medical clearances. *Id.* ¶ 290.

These allegations amply demonstrate that requiring Plaintiffs to wait for their long-overdue FADs would be futile. This Court has recognized that exhaustion may be futile when as here, plaintiffs "took a variety of steps to exhaust his administrative remedies," including making repeated requests to an agency, *Jasperson v. Fed. Bureau of Prisons*, 460 F. Supp. 2d 76, 88 (D.D.C. 2006), and "an agency has articulated a very clear position on the issue which it has demonstrated it would be unwilling to reconsider[,]" *Johnson v. D.C.*, 368 F. Supp. 2d 30, 38-39 (D.D.C. 2005), *aff'd*, 552 F.3d 806 (D.C. Cir. 2008). Plaintiffs' allegations also show that the Peace Corps is "biased or has otherwise predetermined the issue before it," rendering the administrative remedy "inadequate." *McCarthy v. Madigan,* 503 U.S. 140, 146, 148 (1992). In response, the Peace Corps cites nothing beyond the speculative possibility that, having twice or (counting the ROIs) thrice denied Plaintiffs medical clearances, and having delayed their FADs for years without any excuse, the Peace Corps might suddenly change its mind. That remote and speculative possibility is not enough to support a motion to dismiss, and Plaintiffs should be allowed their day in court.

3. Exhaustion is Not Required for Plaintiffs' Rehabilitation Act Claim.

The Peace Corps concedes that the Rehabilitation Act does not require exhaustion of administrative remedies,[16] but nonetheless asks this court to exercise its "discretion" to require

[16] Many courts have held that there is no administrative exhaustion requirement under Section 504 of the Rehabilitation Act. *See Ott v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 909 F.3d 655, 661 (4th Cir. 2018) ("[T]he Rehabilitation Act does not require exhaustion of administrative remedies prior to filing suit."); *Greater Los Angeles Council on Deafness, Inc. v. Baldridge*, 827 F.2d 1353, 1361, n.6 (9th Cir. 1987) (Rehabilitation Act does not have an administrative remedies exhaustion requirement); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1382 (10th Cir. 1981) (applicant to a university's psychiatric residency program was "not required to exhaust remedies as a prerequisite to filing" suit under Section 504); *Mendez v. Gearan*, 947 F. Supp. 1364,

exhaustion to "serve[] the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *See* MTD at 15-16, quoting *McCarthy*, 503 U.S. at 144-45; *Malladi Drugs & Pharms., Ltd. v. Tandy*, 552 F.3d 885, 891 (D.C. Cir. 2009). Neither consideration applies here, given the Peace Corps' position that its rules allow it to exercise unfettered and unreviewable discretion to delay final agency action indefinitely.

The Peace Corps' discussion of the caselaw is notable for what it ignores, namely the courts' insistence that a timely, effective remedy allowing prompt recourse to judicial review must be available before courts will use their discretion to require exhaustion. *McCarthy*, for example, explains the standard in language notably missing from the Peace Corps' discussion of the case:

> In determining whether exhaustion is required, federal courts must *balance the interest of the individual in retaining prompt access to a federal judicial forum* against countervailing institutional interests favoring exhaustion. "[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." Application of this balancing principle is "intensely practical," because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.

503 U.S. at 146 (citations omitted; emphasis added).

Applying this standard, the *McCarthy* court explained that exhaustion is not required when it would prejudice plaintiffs by requiring "an unreasonable or indefinite timeframe for administrative action" before they can seek judicial review. *Id.* at 147. *See also*

1366 (N.D. Cal. 1996) ("a plaintiff alleging discrimination on the basis of disability by a federal agency would have immediate recourse to federal court under § 504"). Both the Department of Justice and the U.S. Department of Labor have also stated no exhaustion is required. *See* U.S. Dep't of Justice, *Guide to Disability Rights Laws*, https://www.ada.gov/resources/disability-rights-guide/ (last visited Sept. 5, 2024)("It is not necessary to file a complaint with a Federal agency or to receive a "right-to-sue" letter before going to court."); Dept. of Labor, *Employment Rights: Who Has Them and Who Enforces Them*, https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-rights-who-has-them-and-who-enforces-them (last visited Sept. 5, 2024) ("Individuals do not have to exhaust administrative procedures under Section 504 of the Rehabilitation Act.").

Gibson v. Berryhill, 411 U.S. 564, 575, n.14 (1973) (administrative remedy deemed inadequate "[m]ost often ... because of delay by the agency"); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Administrative remedies that are inadequate need not be exhausted.…"); *Smith v. Illinois Bell Telephone Co.,* 270 U.S. 587, 591-592 (1926) (claimant not required indefinitely to await administrative decision before seeking equitable relief in federal court).

The sole case that the Peace Corps cites that required exhaustion for a Section 504 claim is out of district and similarly makes clear that discretion should be exercised *only* if the administrative process provides a prompt and efficient remedy and would not unreasonably delay judicial review. The district court in *Cooke v. U.S. Bureau of Prisons*, 926 F. Supp. 2d 720, 731-34 (W.D.N.C. 2013) (cited in MTD at 16, 17), explained that "in analyzing the exercise of judicial discretion concerning the exhaustion of administrative remedies ... a court should examine whether resort to the administrative process will result in indefinite or unreasonable delay versus a prompt administrative decision." *Id.* at 733 (citing *Coit*, 489 U.S. at 587; *Gibson*, 411 U.S. at 575 n.14; *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966)). In the *Cooke* case, the rules at issue did require prompt action, so under that narrow circumstance the court exercised its discretion to require exhaustion. *Id.* at 734 ("[T]he process described in 28 C.F.R. § 39.170 includes prompt deadlines that the Department of Justice must meet in resolving an inmate's claim under section 504(a) of the Rehabilitation Act.").[17]

The Peace Corps' administrative process is much different than the prompt-deadline-driven process considered in *Cooke*, and those differences require a different result on exhaustion. Here,

[17] *Malladi Drugs & Pharms., Ltd. v. Tandy*, 552 F.3d 885, 891 (D.C. Cir. 2009), also cited by Defendant, is inapposite. It involved a party seeking reversal of a forfeiture claim that did not attempt to pursue administrative remedies in the first place, in contrast to Plaintiffs' complete and timely performance of every step in the administrative process under their control. *Pereira v. U.S. D.O.J.*, 2016 WL 2745850, at *19 n.17 (S.D.N.Y. 2016), merely cites *Cooke.*

the Peace Corps in 2021 amended its administrative process to *remove* the long-effectuated provision providing prompt access to court by allowing plaintiffs to sue if they had not received an agency determination within 180 days. Compl. ¶ 53. Instead, it promulgated regulations requiring the agency to act within 120 days "if feasible" and allowing the Peace Corps to extend that time. Its actions and statements in this matter – *i.e.*, delaying FADs for almost five times the 120 days permitted by the regulation and repeatedly contending that it has no duty to act and that its delay is "unreviewable" (MTD at 40) – demonstrate that the administrative procedure here permits precisely the kind of "indefinite or unreasonable delay versus a prompt administrative decision" that the courts have held does not require exhaustion. In these circumstances no judicial efficiency is served by requiring Plaintiffs to wait indefinitely until the Peace Corps issues the FADs that were required along with the ROIs, when the Peace Corps has already twice denied their appeals on discriminatory bases.

For all these reasons, this Court should not impose a Rehabilitation Act exhaustion requirement.

D. Plaintiffs Have Sufficiently Alleged a Claim Under the Rehabilitation Act.

1. <u>Plaintiffs Have a Private Right of Action Under Section 504.</u>

The Peace Corps concedes that Plaintiffs can sue for discrimination under the APA (as they have done in Count II), but contends that Count I must be dismissed because there is no separate private right of action under Section 504 of the Rehabilitation Act. MTD at 18. However, Section 504's text and history support a private right of action, because the text contains the same "rights creating" language that the Supreme Court found critical in holding that Congress intended for statutes like the Civil Rights Act to give victims of discrimination the right to sue. *See Nat'l Ass'n of the Deaf v. Trump*, 486 F. Supp. 3d 45, 55-56 (D.D.C. 2020) *("NAD")*,.

In determining whether a statute provides a private right of action, "[t]he guiding principle ... is legislative intent." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 889 (D.C. Cir. 2014). The Court's analysis should "begin[] with the text and structure of the statute," and also may consider supportive legislative history. *Lee v. U.S. Agency for Int'l Dev.*, 859 F.3d 74, 77-78 (D.C. Cir. 2017). Here, the text and the structure of the statute, as well as legislative history, demonstrate that Congress in fact intended a private right of action under the Rehabilitation Act.

As amended in 1978 to extend its non-discrimination mandate to federal agency programs, Section 504 states that people with disabilities cannot "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity … conducted by any Executive agency" such as the Peace Corps. 29 U.S.C.A. § 794(a). That language mirrors language in other statutory programs for which the Supreme Court has found Congress intended a private right of action. Section 601 of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin, contains the same language[18] and indisputably creates a private right of action. *Alexander v. Sandoval,* 532 U.S. 275, 279 (2001) ("[P]rivate individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages."). In *Sandoval*, the Supreme Court found that the phrasing "[n]o [person] ... shall ... be subjected to discrimination," also contained in Section 504 of the Rehabilitation Act, is "'rights-creating' language" that is "critical" to implying private rights of action. *Id.* at 278-79; *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979) (same for section 901 of Title IX [of the Civil Rights Act], which provides that "[n]o person ... shall, on the basis of sex, ... be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20

[18] Section 601 provides: "No person in the United States shall, on the ground of race… be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

U.S.C. § 1681(a)). This Court recently confirmed "the language of section 504 indicates that Congress intended to create a private cause of action," because it is the same as the rights-creating language in sections 601 and 901 of the Civil Rights Act considered in *Sandoval* and *Cannon*. *NAD*, 486 F. Supp. 3d at 54.[19]

The structure and legislative history of the Rehabilitation Act, including the 1978 amendment extending the Act's coverage to all Executive agencies, further confirm that Congress understood that it was providing victims of discrimination by federal agencies with a private right of action. As this Court explained in *NAD*, Congress expressly modeled Section 504 of the Rehabilitation Act on the Civil Rights Act sections with full knowledge those sections "had been interpreted to provide private rights of action." *Id.* at 54. Indeed, the drafters used "the verbatim statutory text that courts had previously interpreted to create a private right of action" and "explicitly assumed it would be interpreted and applied" as previous statutes had been. *Id.* (quoting *Sandoval*, 532 U.S. at 288, 279-80, and *Cannon*, 441 U.S. at 694-95). Congress amended the Rehabilitation Act in 1978, 1988, 1990, and 1992, all without changing the operative rights-creating language.[20] Indeed, a colloquy in the Senate in connection with the 1978 amendments expressly recognized "the continuing intention of Congress that private actions be allowed under … [Section 504] of the Rehabilitation Act," *id.* (quoting 124 Cong. Rec. 30,349 (1978)), and that

[19] The *NAD* court also found Congress must have intended a private right of action separate from an action under the APA because some agencies, including the one in *NAD*, are not subject to the APA, so some plaintiffs would have no judicial recourse at all without a Section 504 claim. 486 F. Supp. 3d at 54-55.

[20] *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, § 119, 92 Stat. 2955, 2982; Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1807; Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28; and Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344.

cases finding otherwise "are in direct conflict with the congressional intent." 138 Cong. Rec. 31520 (1992).

In 1978, Congress also expanded and supported private enforcement by adding an attorneys' fees provision applicable to claims under Section 504, further demonstrating its intent to assure that plaintiffs injured by Executive agencies' discrimination could sue under Section 504. *See NAD*, 486 F. Supp. 3d at 52 (citation omitted). This course of action by Congress provides "convincing support for the conclusion that Congress accepted and ratified" these prior judicial and regulatory interpretations of Section 504. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) ("The [prior construction] canon teaches that if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has that same meaning.") (citing *Bragdon v. Abbott*, 524 U. S. 624, 645 (1998)); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 n.11 (2009) (Congress's amendment of statute without altering text previously construed by the Court "implicitly adopted [the Court's] construction of the statute.").

Numerous courts, from both this District and others, have also reached the conclusion that Congress intended to provide a judicial remedy for discrimination against people with disabilities in Section 504 of the Rehabilitation Act. *See NAD*, 486. F. Supp. 3d at 55 (collecting cases from

federal courts nationwide).[21] In *Lane v. Pena*, 867 F. Supp. 1050 (D.D.C. 1994),[22] for example, a Merchant Marine Academy cadet sued the Department of Transportation seeking reinstatement and compensatory damages for a violation of Section 504 after he was separated from the Academy on the ground that his recently diagnosed diabetes mellitus rendered him ineligible for a commission. *Id.* at 1052. The court recognized that "[i]t is well-established that injunctive and declaratory relief are available under the Rehabilitation Act." *Id.* Likewise, in *American Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006), *aff'd* 525 F.3d 1256 (D.C. Cir. 2008), this Court again held a private right of action was available to pursue declaratory and injunctive relief against Executive agencies for a violation of Section 504.

The Peace Corps' cited authorities are largely out of circuit and inapplicable because, as this Court explained in *NAD*, they involved challenges to *regulations* with the agency *acting as regulator*, which the courts held could be brought only under the APA,[23] rather than individual claims of discrimination under the Rehabilitation Act. *See NAD*, 486 F. Supp. 3d at 56 (distinguishing *Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989)

[21] *See, e.g.*, *Spence v. Straw*, 54 F.3d 196, 199 (3d Cir. 1995) (finding a private right of action against federal agencies under Section 504); *J.L. v. Soc. Sec. Admin.*, 971 F.2d 260, 264 (9th Cir. 1992) ("Congress unequivocally expressed its intent [in Section 504] to provide [disabled] victims of government discrimination a private right of action."), *overruled in part on other grounds Lane v. Peña*, 518 U.S. 187, 191, 200 (1996); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1380 (10th Cir. 1981) (affirming private right of action under Section 504); *Mendez v. Gearan*, 947 F. Supp. 1364, 1366 (N.D. Cal. 1996) (recognizing "private right of action established under § 504(a)" for equitable remedies against the Peace Corps). The U.S. Department of Justice has also stated: "Section 504 may also be enforced through private lawsuits." U.S. Dep't of Justice, *Guide to Disability Rights Laws*, https://www.ada.gov/resources/disability-rights-guide/ (last visited Sept. 5, 2024).

[22] *Vacated in part on other grounds Lane v. Peña*, 518 U.S. at 191, 200.

[23] Indeed, it is for this reason that Plaintiffs' challenge to the Peace Corps' de facto rules (Count III) is brought under the APA, not Section 504.

(cited MTD at 22-23); *Clark v. Skinner*, 937 F.2d 123, 125-27 (4th Cir. 1991) (cited MTD at 22-25)).[24] Though the *Sai* decision stated otherwise regarding a private right of action under Section 504, the well-reasoned and exhaustive *NAD* decision addressed *Sai*, explaining that even in *Sai*, the government conceded that Section 504 "implies a private right of action to sue for injunctive relief in federal court" for substantive Rehabilitation Act claims. *NAD*, 486 F. Supp. 3d at 55 (discussing *Sai*, 149 F. Supp. 3d at 113, and quoting Defendant's Reply in Support of Motion to Dismiss from *Sai*). [25]

The Peace Corps' instant motion also makes much of the fact that Section 505 of the Rehabilitation Act incorporated remedies from the Civil Rights Act for some Section 504 claims but not for claims against executive agencies discriminating in their own programs. MTD at 23. But the *NAD* court rejected this argument, finding it ignored the controlling rights-creating language of Section 504 that "the Supreme Court has consistently found creates a private right of action." *NAD*, 486 F. Supp. 3d at 55.

Plaintiffs have a private right of action under Section 504 of the Rehabilitation Act, and Defendant's Motion should be denied.

2. <u>The Peace Corps Act Does Not Preclude a Right of Action Under Section 504.</u>

The Peace Corps claims it is exempt from the Rehabilitation Act because the Peace Corps Act provides that the "terms and conditions" of volunteer services are prescribed "exclusively" by

[24] The Peace Corps also relies on *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 128 (2d Cir. 2020) (cited MTD at 22, 25), which is inapplicable for the same reason. *Id.* (finding no Section 504 private right of action *based on discriminatory regulations*).

[25] This Court's reasoning in *NAD* also explains why the Court should not follow the Peace Corps' suggestion to adopt the reasoning from a 1992 Massachusetts case, *Wisher v. Coverdell*, 782 F. Supp. 703 (D. Mass. 1992) (cited in MTD at 21, 25).

the Peace Corps statute and Peace Corps regulations promulgated under it. MTD at 26-30 (quoting 22 U.S.C. § 2504(a)). The Peace Corps' claim is not supported by the language of the Peace Corps Act or the Rehabilitation Act and ignores years of Peace Corps recognition that its conduct is governed by the Rehabilitation Act. This also appears to be the first time the Peace Corps has ever taken this legal position, and there appear to be no authorities supporting the argument, in the 63-year history of the statute.

To the contrary, in a factually analogous case, the D.C. Circuit rejected a similar argument from the State Department that a Foreign Service Act provision requiring officers to be "available to serve in assignments throughout the world" meant that officers must be able to serve in *all* potential assignments without need for accommodations. This Circuit rejected the government's interpretation and applied the Rehabilitation Act's standards to find the State Department liable for disability discrimination based upon its medical clearance process for foreign service officers. *Taylor v. Rice*, 4513.3d 898, 900 (D.C. Cir. 2006).

Rejecting a similarly bold (and ultimately unfounded) argument by the State Department in another case, the D.C. Circuit quoted the Supreme Court's repeated admonition that:

> Congress "does not, one might say, hide elephants in mouseholes." Exemptions from the statutory protections afforded to U.S. citizens against discrimination by their own government are surely elephants. And the provisions the State Department cites as purportedly authorizing such exemptions are surely mouseholes—and well-camouflaged ones at that.

Miller v. Clinton, 687 F.3d 1332, 1352 (D.C. Cir. 2012) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). In *Miller*, this Circuit rejected the State Department's claim that it was exempt from the Age Discrimination in Employment Act (and by extension the Civil Rights Act and Americans with Disabilities Act) under a Foreign Service Act statute that the agency said gave it discretion to hire and fire employees without regard to laws governing contracts or work

in the United States. *Id.* at 1351. The D.C. Circuit rejected this argument, stating that the language purportedly creating the exemption did not even mention the antidiscrimination laws and explaining that "it is hard for us to imagine that Congress would have hidden such a dramatic exemption from its landmark antidiscrimination laws in the anodyne language" on which the State Department relied. *Id.* at 1347; *see also id.* at 1338 (given the broad coverage and importance of antidiscrimination mandates, courts should "hesitate to read an ambiguous statutory provision as exempting a class of U.S. citizens" from their protection).

The *Miller* court's reasoning is equally applicable to the Peace Corps Act. The Peace Corps Act was enacted in 1961, well before any U.S. law prohibiting discrimination on the basis of disability. It forbade discrimination on the basis of "race, sex, creed, or color." 22 U.S.C. § 2504(a). Section 504 of the Rehabilitation Act, as amended in 1978, filled the gap and added disability to this list, establishing that no Executive agency may discriminate on the basis of disability in the provision of its own programs and services, and requiring agencies to promulgate regulations implementing its mandates. 29 U.S.C. § 794(a). By its plain language, Section 504 applies to "any" Executive Agency. *Id.* There is no dispute that the Peace Corps is an Executive agency. *See* 3 C.F.R. § 102.103 (defining Agency as "[…] any committee, board, commission, or similar group established in the Executive Office of the President"). In short, nothing in the Rehabilitation Act exempts the Peace Corps from its mandates or the broad purpose of the Rehabilitation Act to ensure that the "millions of Americans" with "physical or mental disabilities" are protected from discrimination. 29 U.S.C. § 701(a)(1), *et seq.*

Like the language in the Foreign Service Act at issue in *Miller* and *Taylor*, the Peace Corps Act's use of the word "exclusively" to describe the Peace Corps' ability to set terms and conditions of volunteer service does not exempt the Peace Corps from complying with federal civil rights

laws. *Compare Miller*, 687 F.3d at 1347. Nor is there any conflict between the requirements of the Rehabilitation Act and the Peace Corps Act, as the Peace Corps concedes. MTD at 27 ("Section 504 of the Rehabilitation Act does not expressly contradict the Peace Corps Act."). When there is no conflict between statutes, the court must give effect to both, "harmoniz[ing] the provisions and render[ing] each effective." *See Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also id.* (The "specific over general" argument [made by the Peace Corps] is irrelevant "unless the compared statutes are irreconcilably conflicting.") (cited with approval by *Sierra Club v. EPA*, 21 F.4th 815, 821 (D.C. Cir. 2021)).[26]

Moreover, the Peace Corps has repeatedly recognized that it is subject to the Rehabilitation Act, contrary to its position here that the Peace Corps Act and regulations under it provides the sole source of limitations on discrimination against volunteers. When it promulgated amended regulations in 2017, the Peace Corps explained that it was "in the process of developing *its section 504 implementing regulation* and plans to coordinate the regulation's development with the Department of Justice pursuant to the requirements of Executive Order 12250." Eligibility and Standards for Peace Corps Volunteer Service, 82 FR 1185-01 (2017) (emphasis added). Indeed, its current regulation governing medical qualification was promulgated in direct response to an Executive Order directing agencies to promulgate implementing regulations under the

[26] The "exclusively" language in the Peace Corps Act stands in sharp contrast to the language in the completely inapposite case Peace Corps cites in support of its argument. MTD at 26-27. The Aviation and Transportation Security Act unambiguously provides that "notwithstanding any other provision of law" airport security screeners must meet specific enumerated physical and other standards and that "notwithstanding any other provision of law" the TSA may terminate screeners as it deems fit. *See Field v. Napolitano*, 663 F.3d 505, 510-13 (1st Cir. 2011). When it enacted that statute, Congress expressly considered making TSA subject to Rehabilitation Act claims and decided not to do so. *Id.* at 511. Neither the "notwithstanding any other provision of law" language nor legislative history showing congressional intent to exempt are present here.

Rehabilitation Act (Exec. Order No. 12250; 45 FR 72995 (1980)), and expressly incorporates Rehabilitation Act standards. 82 FR 1185-01 at 2 (revised Section 305.4 discussing Medical Status "… implements, in relation to applications for Volunteer service, Section 504 of the Rehabilitation Act."). It "describes the medical qualifications that are applied, taking into account Section 504 of the Rehabilitation Act of 1973." *Id.* Further confirming the applicability of the Rehabilitation Act, the sole Final Agency Decision issued to any Plaintiff herein acknowledges that the Peace Corps was subject to the Rehabilitation Act. Ex. 3 at 2.

Finally, Defendant's reliance on the Domestic Volunteer Service Act ("DVSA") is misplaced. MTD at 28-30. The inclusion of, and deletion of, the Peace Corps from the DVSA has nothing to do with the Rehabilitation Act, but rather reflects an administrative reorganization. Originally the Peace Corps was governed together with a set of domestic volunteer agencies under the DVSA. DVSA Amendments of 1979, Pub. L. No. 96-143, § 12(b), 93 Stat. 1074, 1079. In 1985, it was removed from that administrative umbrella and thus from the DVSA. DVSA Amendments of 1984, Pub. L. No. 98-288, § 30(a), 98 Stat. 189, 197. Nothing in the statute or its legislative history indicates that this reorganization was meant to exempt Peace Corps volunteers from the broad protections against discrimination provided by the Rehabilitation Act.

For all these reasons, the Court should reject this attempt by the Peace Corps to claim special treatment and immunity from liability under well-established federal law.

E. Plaintiffs Sufficiently Allege that Peace Corps' Clearance Criteria Are Binding Norms or *De Facto* Rules Challengeable Under the APA.

As alleged in Plaintiffs' Complaint, the Peace Corps' clearance criteria are "guidelines" in name only. These criteria cabin the discretion of the Peace Corps' evaluating medical professionals to assure that any Invitee with certain past or present mental health conditions will be denied medical clearance.

The Peace Corps makes a three-part argument about why its clearance criteria policies are not subject to APA review, arguing: (1) that the clearance criteria are not agency action; (2) that even if they are agency action, they are not final agency action; and (3) that even if they are final agency action, they are not legislative rules subject to notice-and-comment rulemaking. MTD at 30-39. These arguments are all meritless and can be disposed of in one fell swoop, because all three depend on the fact that the Peace Corps inserted a fine print, parenthetical note in each document under the bold heading "CLEARANCE CRITERIA" saying that they are "guidelines" and "[e]ach applicant receives an individual review" that is decided by "the reviewer." MTD at 22-25. But the Peace Corps concedes in its Motion to Dismiss that this boilerplate disclaimer language is "not dispositive." MTD at 36 (quoting *Ctr. for Auto Safety v. v. NHTSA*, 452 F.3d 798, 806 (D.C. Cir. 2006)); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (Boilerplate language stating that "policies set forth in this paper are intended solely as guidance…" are not dispositive when the rest of the document "reads like a ukase [edict of the Tsar:] It commands, it requires, it orders, it dictates."). Plaintiffs' allegations in the Complaint, which must be taken as true for purposes of this Motion, show that the clearance criteria function as binding norms or *de facto* rules requiring volunteers with actual or perceived mental health disabilities to be rejected from service.

"Binding norms" and "*de facto* rules" are used interchangeably in the jurisprudence. *Ctr. for Auto Safety*, 452 F.3d at 806 (concluding that a court can only review agency action under the APA if it is final or "constitute[s] a de facto rule or binding norm that could not properly be promulgated absent" APA notice-and-comment rulemaking.). An agency's adoption of either a binding norm or a *de facto* rule clearly constitutes final agency action, reviewable by this Court. 5 U.S.C. § 704; *Center for Auto Safety*, 452 F.3d at 806 ("… the agency's adoption of a binding norm

obviously would reflect final agency action."). The Peace Corps, indeed, concedes that a *de facto* rule is necessarily final agency action. MTD at 38 n.28. The law is similarly clear that if agency action is determined to be a *de facto* rule/binding norm, it requires APA notice-and-comment rulemaking. *Center for Auto Safety*, 452 F.3d at 806. Demonstrating that these clearance criteria are either binding norms or *de facto* rules is thus sufficient to dispose of all three of the Peace Corps' arguments.

The Peace Corps, however, argues that Plaintiffs are precluded from challenging these standards as *de facto* rules under the APA and that the Court is limited to the "traditional" mode of "adjudicat[ing] the merits of Plaintiffs' individual determinations."[27] MTD at 31-34. The Peace Corps' argument is wrong. The clearance criteria's plain language (repeatedly using unequivocal terms like "must" and "no history of" with no qualifiers or room for discretion), as well as the rote way in which they were applied to Plaintiffs and the dozens of Invitees described in the Complaint without exception, demonstrate they are final and binding norms. As such, they should have undergone notice-and-comment rulemaking and are subject to an APA challenge.

1. Peace Corps' Medical Clearance Criteria Are Binding Norms/*De Facto* Rules.

The fact that the Peace Corps calls these documents "guidelines" is immaterial, because it is "the substance of what the agency has purported to do and has done which is decisive," and not the label. *See Env't Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) (cleaned up). While the Peace Corps alleges that its clearance criteria are unreviewable policy statements that are discretionary, a policy statement must not merely say that the agency has discretion, it actually "… must leave the administrator free to exercise his informed discretion." *American Bus Ass'n v.*

[27] Defendant saying that adjudication of individual claims is an available remedy rings hollow, given the Peace Corps' refusal to issue FADs to seven of the Plaintiffs, which it claims makes Plaintiffs' individual determinations "unreviewable."

United States, 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting *Guardian Federal Sav. & Loan Asso. v. Federal Sav. & Loan Ins. Corp*., 589 F.2d 658, 666-67 (D.C. Cir. 1978)). If that policy statement "… is in purpose or in likely effect one that narrowly limits administrative discretion, it will be taken for what it is, a binding rule of substantive law." *Id.* Such is the case here.

While the criteria state that Peace Corps staff have ultimate discretion to grant or deny medical clearances based on an individualized review, the contents of the documents – not just the agency's "self-serving label" – indicate that these criteria "circumscribe administrative choice" and are applied in a way that indicate they are binding rules, not policy statements. *Guardian Fed. Sav. & Loan Assn.*, 589 F.2d at 667; *Texas v. United States*, 50 F.4th 498, 522(5th Cir. 2022). In a case addressing similar agency "guidelines" that contained "an introductory statement that the guidelines are 'designed to assist applicants…' and are not intended to prejudge any individual application," the Fifth Circuit looked to the substance of the document and found "there are sinews of command beneath the velvet words of the subsequent sections of the guidelines." *Am. Trucking Associations, Inc. v. I. C. C.*, 659 F.2d 452, 463 (5th Cir. 1981). Those "sinews of command" are present here.

The "guidelines" language repeatedly quoted in Defendants' Motion is in fact a fine-print parenthetical under the large-print heading "CLEARANCE CRITERIA," and belies the mandatory non-discretionary language used in the directives themselves. In reality the criteria are commands clearly dictating to whom clearance will be denied, using such unequivocal language as "must be stable ON or OFF medication for at least the past **ONE** year," "[n]o history of psychiatric hospitalization," "[n]o history of *distinct* co-existing psychiatric disorders," "[n]ot currently taking … as-needed anti-anxiety medication [or] sleep medication," and "[n]ot currently prescribed more than **TWO** psychiatric medications." MTD Ex. 5 at 5, 10, 12 (emphasis in original). There are no

qualifiers or possible exceptions that follow these rules. Rather, there are clear "sinews of command beneath the velvet words" of the small-type "guidelines" language footnoting the "CLEARANCE CRITERIA." The plain language of the criteria show that they are binding rules for evaluating Invitees with certain mental health conditions, not discretionary guidelines from which reviewers may depart. Indeed, the dictionary definition of "criterion" is "*a rule* or principle for evaluating or testing something."[28] That is how the criteria operate here: as a binding rule.

In a factually analogous case, *Texas v. United States*, the Fifth Circuit held that an internal memorandum issued by the Secretary of Homeland Security to Department of Homeland Security (DHS) personnel violated procedural notice-and-comment requirements of the APA. *Texas*, 50 F.4th at 498. The memo provided a list of criteria that would qualify an undocumented person for relief from removal and instructed DHS staff to "exercise prosecutorial discretion, on an individual basis" in deferring enforcement action for people who met the list of criteria. *Id.* at 508-09. Though the memo repeatedly stated that applications will be reviewed on a "case by case basis" and called the program an "exercise of discretion," the memo narrowly cabined discretion by listing a "fixed set of criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion." *Id.* at 524. Reviewing the record on summary judgment, the court held that the memo constituted a rule because, while DHS staff had some discretion to reject applicants, "little else suggests that [the memo] would be a policy statement." *Id*. The same can be said here.

Beyond the dictatorial content of the criteria, the manner in which the criteria are applied further demonstrates that they operate as rules, not discretionary guidelines. A rule is binding if it "is applied by the agency in a way that indicates it is binding." *General Electric v. Environmental*

[28] Dictionary.com, "Criterion," https://www.dictionary.com/browse/criterion (last visited Aug. 31, 2024) (emphasis added).

Protection Agency, 290 F.3d 377, 383 (D.C. Cir. 2002). The clearance criteria are routinely and rigidly followed by Peace Corps reviewers and operate to unlawfully exclude large categories of people with mental health conditions from service. Compl. ¶ 32. Despite lip service to discretion, there is no individualized review in practice that may depart from these binding clearance criteria. Compl. ¶¶ 6, 8-9; *see also* MTD Ex. 5 at 5, 10, 12. None of the Plaintiffs or Invitees described in the Complaint escaped from these clearance criteria, no matter how much supportive documentation they submitted to the Peace Corps showing their mental fitness to serve as volunteers. All were denied based on the clearance criteria, as the Peace Corps has admitted in the ROIs. Compl. ¶¶ 226, 236-237, 290-291.

In sum, the Peace Corps' clearance criteria – both in substance and application – eliminate the reviewer's discretion in granting medical clearance to people with numerous common mental health conditions, resulting in all eight Plaintiffs and dozens of other Invitees being excluded from service based on disability. These criteria are therefore binding rules. Moreover, whether the "guidelines" are in fact "rules" permitting an APA challenge is a highly fact specific inquiry that requires fact discovery and cannot be determined at the motion to dismiss stage. *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbech*, 495 F.3d 695, 723 (D.C. Cir. 2007) (issue in question is "a factual question that is not properly resolved at the motion-to-dismiss stage when all reasonable inferences must be drawn to the plaintiff's benefit.").

2. <u>Accordingly, Peace Corps' Clearance Criteria Constitute Final Agency Action that Plaintiffs May Challenge, and that Were Invalidly Promulgated.</u>

The clearance criterias' status as binding norms/*de facto* rules addresses and disposes of the Peace Corps' arguments. As binding norms/*de facto* rules, the clearance criteria "obviously would reflect final agency action" and thus are subject to challenge under the APA. *Ctr. for Auto*

Safety, 452 F.3d at 806; 5 U.S.C. § 704.[29] The APA sets forth various grounds for challenging final agency action. Here, Plaintiffs challenge the criteria as arbitrary and capricious, because they apply discriminatory standards. Compl. ¶ 332. The criteria were also invalidly promulgated, because the Peace Corps failed to undertake required notice-and-comment rulemaking. *Id*. ¶ 330.

Defendant argues, however, that even if its clearance criteria are final agency action, they did not require notice-and-comment rulemaking because they are not legislative rules. But that distinction is irrelevant. Plaintiffs did not allege that these agency actions were formally promulgated legislative rules, and instead argued that these actions were *de facto* rules.[30] *Id*. ¶¶ 8, 11, 237, 293, 326-335. As the Peace Corps concedes, *all* substantive agency rules – including both legislatively promulgated rules and *de facto* rules – require notice-and-comment rulemaking. MTD at 28 (The "APA provides that agencies must use notice-and-comment rulemaking to implement 'substantive' rules...").

As the Supreme Court has explained, "courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019) (Gorsuch, J.) (citing *General Motors Corp. v. Ruckelshaus*, 742 F. 2d 1561, 1565 (D.C. Cir. 1984) (*en banc*)). *See also Texas*, 50 F.4th at 522 (same); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1056 (D.C. Cir. 1987) (noting that courts need not defer to an agency's characterization of a policy in determining if notice-and-comment rulemaking is required). Because the clearance criteria narrowly cabin reviewers' discretion and alter substantive rights of Invitees with mental health disabilities, they

[29] The Peace Corps admits that if something is a *de facto* rule, it is in fact a final agency action. MTD at 38 n.28.

[30] *De facto* rules are also referred to as *de facto* legislative rules in the D.C. Circuit. *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 41 n.6 (D.D.C. 2011); *SRM Chem. Ltd., Co. v. Fed. Mediation & Conciliation Serv.*, 355 F. Supp. 2d 373, 376 (D.D.C. 2005).

are in fact substantive rules that determine the agency's actions with respect to people with mental disabilities. *See American Bus Ass'n*, 627 F.2d at 529; *Guardian Fed. Sav. & Loan Assn.,* 589 F. 2d at 666–667 (if "a so-called policy statement is in purpose or likely effect ... a binding rule of substantive law," it "will be taken for what it is"). As such, notice-and-comment demands apply to the criteria, regardless of how they are labeled.

In short, if the agency action walks like a rule, and talks like a rule, then it is a rule and is reviewable by this Court.[31]

V. CONCLUSION

For the reasons stated, Defendant Peace Corps' Motion should be denied.

[31] In a single cursory paragraph, Defendant asks the Court to dismiss "any" APA challenge contained in Plaintiffs' Count II to the extent that challenge goes to Defendant's "pattern, practice, or policy" of denying medical clearances to people with mental health conditions, claiming that Plaintiffs do not "attempt to identify any *discrete* agency action at the center of their challenge, much less a final agency action." MTD at 40 (emphasis in original). That is wrong. All eight Plaintiffs have expressly, specifically, and credibly alleged violations of the APA's mandate that the Peace Corps may not discriminate against people with disabilities – they applied, were accepted, disclosed mental health conditions, and their invitations were rescinded as required by the binding clearance criteria. Compl. ¶¶ 2-7, 54-234. This is not a generalized challenge to agency conduct but a claim directed "against [a] particular agency action that causes [Plaintiffs] harm." *See, e.g.*, *Inst. for Wildlife Prot. v. Norton*, 337 F. Supp. 2d 1223, 1227 (W.D. Wash. 2004) (quoting *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 891 (1990)).

By: /s/ *Bryan Schwartz* DATED: September 6, 2024

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UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

JOHN DOE A, JOHN DOE B, JOHN DOE C, JANE DOE A, JANE DOE B, JANE DOE C, JANE DOE D, and JANE DOE E Plaintiffs, vs. CAROL SPAHN, in her official capacity as Administrator of the Peace Corps, Defendant.	**Civil Action No. 1:23-cv-02859 (SJN)**

[Proposed]

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

Upon consideration of Defendant Peace Corps' Motion to Dismiss, any opposition and reply, and the entire record, it is hereby:

ORDERED that Defendant's Motion is **DENIED.**

Dated:_____

_____

Hon. Carl J. Nichols
United States District Judge

EXHIBIT 1

GLOBAL HEALTH SERVICE CORPS

Building Capacity Through Health Service

PEACE CORPS

PEPFAR

U.S. President's Emergency Plan for AIDS Relief

The Global Health Service Partnership

The Peace Corps, the President's Emergency Plan for AIDS Relief (PEPFAR), and the Global Health Service Corps (GHSC) are launching the Global Health Service Partnership (GHSP), an innovative public-private partnership to place nurses, physicians and other health professionals as adjunct faculty in medical or nursing schools overseas. The new volunteers will help improve medical and nursing education and build capacity in the health care systems of developing countries.

Background: Demand for More Health Expertise

GHSP will help address the shortage of qualified health professionals by investing in capacity and creating sustainable practices for local health care workforces. GHSP responds to expressed host country demand, advances PEPFAR's commitment to training and retaining more health care workers in countries with high HIV disease burden, and provides an innovative volunteer opportunity for Americans.

In January 2012, Peace Corps announced the expansion of the Peace Corps Response program, allowing experienced professionals to serve in short-term, high impact Peace Corps assignments in dozens of countries around the world. GHSP volunteers will serve as members of Peace Corps Response.

An Innovative Public-Private Partnership

The Peace Corps has a rich, 50-year history of preparing and sending American volunteers for service overseas. Drawing on its networks within the United States, GHSC will raise awareness of the program among qualified professionals who may be interested in serving as GHSP volunteers, and provide technical support to the program, volunteers and the teaching institutions abroad. Consulting staff include senior global health leaders skilled and experienced in care delivery, medical education and patient care quality. The GHSC will also raise funds from the private sector to finance loan repayment for GHSP volunteers.

Overview

- In collaboration with PEPFAR country teams, the Peace Corps will work closely with the Ministries of Health, Ministries of Education and identified educational and health institutions to increase capacity and strengthen the quality and sustainability of medical, nursing, and midwifery education and clinical practices.

- GHSP is expected to launch in Tanzania, Malawi and Uganda, placing 10-12 health professionals in training institutions in each of the three partner countries. GHSP may consider expanding to additional countries and disciplines in future years.
- Participants in the program will serve one-year assignments through Peace Corps Response, a program that offers high-impact, short-term assignments for qualified Americans. Some volunteers may also have the option to serve for a second year.
- The application process will begin in September 2012. It is expected that volunteers will be on the ground in the summer of 2013.
- GHSP volunteers will receive the same benefits as Peace Corps Response volunteers, including: monthly living stipends, transportation to and from their country of service, comprehensive medical care, a readjustment allowance and vacation days. Volunteers will also receive additional technical training and support provided by GHSC.
- Qualified volunteers will also be eligible to participate in a privately funded program offering loan repayment for educational debt through the Global Health Service Corps.
- In coordination with host country faculty, GHSP volunteers will function primarily as academic medical or nursing educators. They will also participate in direct clinical care as appropriate to their roles as educators and mentors.
- Volunteers will include board eligible or board certified doctors in core specialties, and nurses who have completed a BSN/MPH, MSN, NP, DNP, or Ph.D. and have a minimum of three years of both clinical and teaching experience.

About the Peace Corps: *Since President John F. Kennedy established the Peace Corps by executive order on March 1, 1961, more than 200,000 Americans have served in 139 host countries. Today, 9,095 volunteers are working with local communities in 75 host countries. Peace Corps volunteers must be U.S. citizens and at least 18 years of age. Peace Corps service is a 27-month commitment and the agency's mission is to promote world peace and friendship and a better understanding between Americans and people of other countries. Visit www.peacecorps.gov for more information.*

About PEPFAR: *The U.S. President's Emergency Plan for AIDS Relief (PEPFAR) is the U.S. Government initiative to help save the lives of people affected by HIV/AIDS around the world. PEPFAR is the largest commitment by any nation to combat a single disease internationally and PEPFAR investments also provide a platform for efforts to address other public health needs. PEPFAR is driven by a shared responsibility among donor and partner nations and others to make smart investments to save lives. For more information, visit www.pepfar.gov.*

About the Global Health Service Corps (GHSC): *The GHSC is a national non-profit whose mission is to support health professionals to serve in medical, nursing, and public health education in resource-poor settings. Our greater goal is, in collaboration with our partners, to create sustainable solutions to strengthen health systems and address the vast shortages of health professionals in many parts of the world. GHSC believes educators provide a force multiplier effect. GHSC is committed to helping recruit the best-qualified candidates, including those who may have financial constraints to service, by raising and disbursing loan repayment and other appropriate stipends of support to individuals chosen for assignments abroad. Visit www.globalhealthservicecorps.org for more information.*

EXHIBIT 2

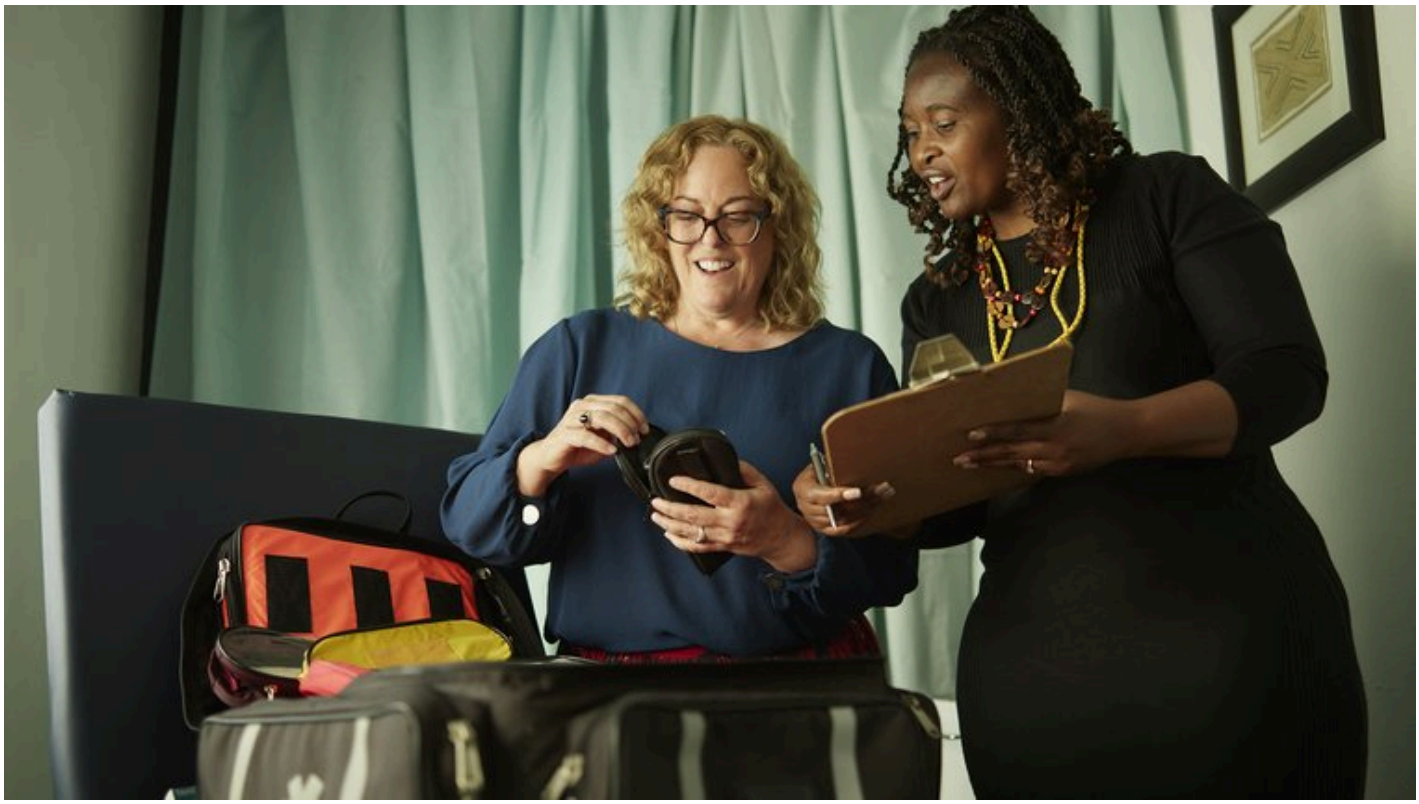
An official website of the United States government

Peace Corps

IN THIS SECTION

Advancing Health Professionals

Discover international service opportunities for health care professionals who want to share their knowledge and skills with health care and health service delivery professionals to help improve health care systems around the world.



Advancing Health Professionals Volunteers works in health systems

Non-clinical positions to advance health equity

As part of the Peace Corps Response program, Advancing Health Professionals (AHP) offers Volunteers high-impact, short-term opportunities to improve health care education and strengthen health systems in resource-limited areas abroad.

The basics

Partner with local professionals to improve health care education, efficiency, and access in the places that need it most.

- For U.S. citizens with professional experience in a medical field
- Non-clinical service assignments last 6-12 months
- Get a living allowance and other benefits while you serve
- Find Volunteer openings in 5 different countries
- Be experienced in low-resource settings and ready for cross-cultural collaboration

Questions about the AHP program? Contact a recruiter ›

Call to service

Why is this work important?

According to the UN, less than half the global population is covered by essential health services, and estimates predict that over 18 million additional workers will be needed by 2030.*

Peace Corps' Advancing Health Professionals is bridging the gap by connecting host organizations in high-need places with Volunteers to help train local health professionals to be practice-ready.

Outcomes can be replicated across the entire country, supporting widespread and equitable delivery of health services where they are needed most.

Eligibility

Who can serve as a Volunteer through Advancing Health Professionals?

Volunteer positions through AHP are for those with a background in medicine, nursing, pharmacy, mental health, pre-clinical education, health care administration, health care services delivery, or midwifery.

Learn more about eligibility ›

Benefits

What are the benefits for AHP Volunteers?

Volunteers serving in AHP receive the same benefits as Peace Corps Response Volunteers. Housing costs are covered and we provide a monthly living allowance that can pay for food and other expenses. You will also earn vacation time, and the Peace Corps covers necessary medical and dental care, provides student loan assistance, and more.

Learn more about benefits ›

What kind of training is available for AHP Volunteers?

Peace Corps Response Volunteers serving in AHP arrive in country with the necessary skills to hit the ground running. They will receive an orientation, but no specialized technical training is offered.

Due to the specialized nature of the work, AHP Volunteer positions may require targeted expertise and credentialing from local health care licensure authorities in country.

Application

How do I apply to serve as a Peace Corps Response Volunteer working in Advancing Health Professionals?

Volunteers complete the same online application process as for other Peace Corps Response Volunteer opportunities. Once invited, you must complete medical and legal clearance to serve.

Day-to-day life

Where will I serve?

AHP service opportunities are in five countries: Eswatini, Liberia, Tanzania, Malawi, and Uganda. In the future, we may expand the geographical scope of service.

Who will I work with?

Host institutions include universities, colleges, clinics, non-governmental organizations (NGOs), and government departments and ministries.

What will I do?

AHP assignments focus on either classroom education or on strengthening health systems.

Volunteers focused on education provide instruction to health care professionals in a classroom or skills lab setting only. They do not work directly with patients and are not involved in administering clinical research.

Volunteers focused on strengthening health systems serve in positions where they work to improve processes of health care delivery in resource-limited environments.

Sign up for AHP newsletter

Receive updates on featured openings and Volunteer stories.

Register now

Take the next step.

Connect
with a recruiter

Attend
an event

Learn

how to apply

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What We Do

Ways to Serve

How to Apply

Info For

More from the Peace Corps

Want to receive Peace Corps news and updates?

Sign up for emails.

Email address*

Phone

U.S. numbers/numeric characters only.

What are you interested in?

Submit

EXHIBIT 3

Peace Corps

FINAL AGENCY DECISION

In the discrimination complaint of

Jane Doe E, Agency Case No. PCV-17-07

I. Statement of the Claim

The Peace Corps accepted the following claim:

Whether Complainant, Jane Doe E, Peace Corps Volunteer applicant, was discriminated against based on disability, mental health, when she was medically not cleared (MNC) for Peace Corps service.

II. Procedural History

Peace Corps Volunteers (PCVs) are not employees of the Peace Corps. PCVs do not have access to the administrative process of the Equal Employment Opportunity Commission (EEOC). Rather, in cases involving allegations of discrimination based on disability, the Peace Corps offers Equal Employment Opportunity (EEO) counseling and investigation to a PCV who believes he or she has been the subject of discrimination. In discrimination cases, the Peace Corps models its procedural guidelines on EEOC regulations and Executive Orders.

Jane Doe E (Complainant) applied to become a PCV Nurse Educator with the 2017 Global Health Services Partnership in October 2016. On April 20th, 2017, the Agency ruled that she was medically not cleared (MNC) for Peace Corps service on the basis she had been receiving treatment for Adjustment Disorder (AD) with mixed anxiety and depressed mood until June 2017. Record of Investigation (ROI) at 9, 29. Following her denial of medical clearance, Complainant sought EEO counseling from the Peace Corps Office of Civil Rights and Diversity (OCRD) on April 25th, 2017. An EEO Counselor interviewed the Complainant on May 1st, 2017. EEO counseling was concluded without resolution on approximately June 20th, 2017. Complainant received her notice of right to file a formal discrimination complaint and filed a formal complaint of discrimination on June 19th, 2017. The Peace Corps accepted the Complaint for investigation on July 13th, 2017. After the investigation was complete, the Proposed Final

Agency Decision (Proposed FAD) upholding her MNC was sent to Complainant on December 7th, 2017.

After an issue regarding receipt was resolved by our Office of General Counsel, Complainant appealed the Proposed FAD on April 13th, 2018, through her attorney, [redacted], of the law firm [redacted].

III. Argument on Appeal

In her Statement of Appeal (App. Statement), Complainant argues that the Proposed FAD is erroneous for three reasons: 1) the Proposed FAD purported to rely on the original statements of the Complainant's mental healthcare professional, but these statements were misrepresented or misinterpreted by Agency officials; 2) the Proposed FAD reflected a process that did not involve an individualized assessment of her situation; and 3) the record included statements that the Complainant argues are factually incorrect. The Complainant argues that these three errors reflect an Agency-wide bias towards real or perceived mental health conditions.

IV. Analysis

In deciding this appeal, I reviewed the ROI, the FAD, and the Complainant's appeal to determine:

(1) Whether the Proposed FAD is correct and reasonable in that:

The Proposed FAD applied the correct legal standard, and

The Proposed FAD has a reasonable analysis of the facts against the legal standard; and

(2) Whether the Complainant has presented any new evidence or arguments on appeal that would lead to different conclusions than those in the FAD.

The Proposed FAD was correct in assessing the complainant's allegation falls within the purview of the Rehabilitation Act of 1973, as amended, 42 U.S.C Section 794a, and Complainant is a "qualified individual with a disability"[1] under Americans With Disabilities Act (ADA), 42 U.S.C. Section 12102(1) and 3(A). Accordingly, when determining whether an employer has discriminated against a qualified individual with a disability, the courts employ the McDonnell Douglas "burden-shifting analysis" in analyzing the claim. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that analysis, Complainant has the burden of establishing a *prima facie* case of discrimination based on a disability by presenting a body of evidence, such that, if not rebutted, the fact finder could conclude that unlawful discrimination had occurred. *See* McDonnell Douglas Corp., 411 U.S. at 801. A *prima facie* case for discrimination demonstrates that the Complainant is a member of a protected

[1] A "qualified individual with a disability" is an individual with a disability who satisfies the requisite skill, experience, education, and other job related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. § 1630.2(m).

group, that he or she is similarly situated to members outside of that protected group, and that he or she is treated differently from members outside of that protected group. *Id.* If a *prima facie* case is made, the burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for the Complainant's rejection. *Id.*

In this matter, the Agency found Complainant MNC. The burden then shifts back to the Complainant to demonstrate and prove that the Agency's proffered reason is pretextual. *Id.* To achieve this, the Complainant must generally provide either direct or circumstantial evidence that: (1) casts sufficient doubt upon each proffered reason so that a fact finder could reasonably conclude that each reason was a fabrication or (2) allows a fact finder to infer that discrimination was more likely than not a motivating or determinative cause of adverse action. *See* Fuentes v. Perskie, 32 F.3d 759, 774 (3d Cir. 1994).

The Proposed FAD thoroughly and reasonably analyzed the facts of the ROI and Complainant's rebuttals, and determined that there was insufficient evidence to (1) disbelieve the Peace Corps' management officials' reasons for finding Complainant MNC, or (2) believe discrimination against complainant on the basis of her perceived mental disability was a motivating factor in this adverse action.

In this Final Agency Decision (FAD), I have given consideration to the facts and statements raised by the Complainant's appeal. The appeal's factual assertions and arguments, even when viewed in the light most favorable to the Complainant, do not provide sufficient evidence to reverse the credible findings of the Proposed FAD.

A. Complainant failed to establish a *prima facie* claim for discrimination based on disability because she did not demonstrate that she is similarly situated to members outside of her protected group and that she is treated differently from members outside of that protected group.

As previously discussed, complainants asserting discrimination based on a disability are subject to the McDonnell-Douglas "burden shifting analysis" to determine if the employer-defendant did in fact discriminate against the employee-plaintiff based to his or her disability. *See* McDonnell Douglas Corp., 411 U.S. at 801. To do so, an employee-plaintiff must first prove a *prima facie* case for discrimination. A *prima facie* case for discrimination demonstrates that the Complainant is a member of a protected group, that he or she is similarly situated to members outside of that protected group, and that he or she is treated differently from members outside of that protected group. *Id.* Here, if the Complainant can establish a *prima facie* case, the burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for the Complainant's rejection. *Id.*

In the instant case, it is not contested that Complainant is a protected individual based on her disability and was subject to an adverse action when her application was denied, however the Complainant has failed to produce any evidence from which a reasonable fact-finder could infer even some discrimination against Complainant because of her disability.

In her Statement of Appeal, it appears as though Complainant's representation attempts to reveal Agency bias by pointing out the discrepancy in treatment received by Complainant and her husband, [redacted] who was accepted into precisely the same program and at the same time

that Complainant applied, despite the fact that he also received talk therapy treatment with active symptoms when he applied. *See* App. Statement at 6. However, when we examined this apparent inconsistency, it turned out that according to our records, [redacted] failed to disclose on his application that he was engaged in therapy with active symptoms. Had [redacted] listed his past medical treatment as his wife did, he may have been found MNC as well.

B. Even if Complainant did establish a *prima facie* claim, Complainant's individualized medical assessment showing symptoms of mental illness and her need for self-talk as construed by agency guidelines are legitimate, non-discriminatory reasons for finding her MNC and denying her application.

It is the Peace Corps responsibility to determine whether or not a Volunteer can likely complete a tour of service without undue interruption and also whether the Peace Corps can provide needed medical assistance. *See* 22 C.F.R. Subpart 305.4. The fact that Complainant was engaged in talk therapy at the time of her application is a legitimate concern in evaluating her medical clearance in light of the Peace Corps responsibility to provide necessary medical care to its Volunteers.

Agency Medical Clearance Guidelines for Adjustment Disorder (AD) require an applicant to have no history of active symptoms related to adjustment issues for the preceding 6 months to one year, and that the applicant not be actively engaged in counseling or treatment, with a one year lapse from the last counseling or treatment. *See* ROI at 36. Complainant has been in therapy on and off for the last six years and, at the time of her application, continued to be engaged in treatment. *See* ROI at 121-122. The Agency's concern is the need to establish a significant period of time without the need for talk therapy and without active symptoms. *See* ROI at 122. This was the basis for the Agency's rejection of her application. As a result, her finding of MNC was a legitimate, non-discriminatory basis to reject Complainant's application.

Complainant's loss of a substantial coping mechanism to help her address her AD with mixed anxiety and depressed mood, would likely pose a significant risk to both Complainant and other PCVs. An individual assessment of Complainant's potential risk was based on the medical and employment history provided by Complainant, and the reasonable medical judgment of Chief Clinical Officer, Dr. Brynn Huyssen, Director of Counseling and Outreach, Jill Carty, and Acting Manager of the Office of Health Services and Nurse Supervisor, Kathy Fallon, which relied on both the most current medical knowledge and on the best available objective evidence. The initial decision was reviewed and affirmed by the Pre-Service Review Board, comprised of the aforementioned three, as well as six or seven other medical staff members. *See* ROI at 40-42. In this FAD, the comments of Complainant's former social worker are also taken into consideration.

As set forth in the Agency Guidelines for Adjustment Disorder, AD can cause disturbances at work, school and in social relationship, and is materialized as distress disproportionate to the severity and intensity of the stressor and significant impairment in social, occupational, or other important areas of functioning. *See* Medical Screening Guidelines, Section 24 1.1. Complainant, the Medical Director of the Health Center where she worked, and her social worker's statements are all to the effect that Complainant operates well under pressure and is not normally subject to stress even in high pressure situations. *See* ROI at 26. However, it cannot be ruled out that her

ability to handle stressful situations in a self-possessed and graceful manner is actually attributable to the fact that she had been engaged in talk therapy sessions for the past six years, and not her own self-sufficiency. *See* ROI at 42-43.

As the Proposed FAD discussed, "it may not be possible to provide care for those conditions that can be managed in the U.S., in the places in which the PCVs serve." *See* Prop. FAD at 3. It is likely that this significant coping mechanism that Complainant has been engaged in for more than half a decade, will not be available wherever she is placed if she is accepted into service. Even the self-care regimen suggested by Complainant in her Appeal, including yoga, massage, and bike riding, may also not be available or appropriate where she is posted. *See* App. Statement at 7.

In her Statement of Appeal, Complainant and her former psychotherapist, [redacted] assert in an enclosed letter dated April 5, 2018 (April 5 Letter) that Complainant's talk therapy session were due to her "relatively mild symptoms [Complainant] temporarily exhibited following the death of her mother", and not due to any lasting mental health issues. *See* App. Statement at 1. [redacted] stressed that Complainant's choice to continue therapy even after her initial symptoms of AD improved demonstrated "good judgment" and that the frequency of the sessions was sporadic. *See* April 5 Letter. Regardless of whether complainant exhibited good judgment in continuing her treatment, she had received talk therapy within the six month to one year period prior to her application for the Peace Corps Nurse Ecuador program and was designated MNC and therefore unable to join PCV service at that time.

V. Conclusion

In sum, there is no showing of any pretext in the finding by the Peace Corps' medical staff (and confirmed on appeal) that Jane Doe E s MNC. I find that the decision that Complainant is MNC supported by the facts and the law, and that the Complainant has not presented any new evidence or arguments on appeal that would lead to a different conclusion.

It has been well over a year since Jane Doe E indicated in her documents that she finished her talk therapy. She is of course free to apply again for any Peace Corps position at any time. Once Jane Doe E demonstrates to the satisfaction of the Peace Corps medical office that she has cessation of active mental health symptoms, including a cessation of the need for regular therapy as provided under our guidelines, her medical clearance status may be reconsidered. This may result in a change from NMC to MC, however any such decision will be based on the facts at that time, and there is no guarantee that her medical clearance status will change.

VI. Final Agency Decision

I find that (1) the decision in the Proposed FAD that the Complainant failed to show that she was discriminated against is supported by the facts and law as correct and reasonable, and (2) the Complainant has not presented any new evidence or arguments that would lead to a different conclusion than that reached in the Proposed FAD. The appeal is denied.

This is the Final Agency Decision on this Complaint.

Appeal

The Complainant may have the right to file a civil action in an appropriate U.S. District Court based on disability discrimination under section 504 of the Rehabilitation Act:

1. Within thirty (30) calendar days of receipt of this Final Agency Decision on Complainant's Appeal.
2. After one hundred eighty (180) calendar days from the date of filing the complaint with the agency if there has been no final agency action.

Jody Olsen

Jody Olsen, Director

08/29/18

Date