

Effective Communication with Deaf, Hard of Hearing, Blind, and Low Vision Incarcerated People

Tessa Bialek & Margo Schlanger

Abstract:

Tens of thousands of people incarcerated in jails and prisons throughout the United States have one or more communication disabilities, a term that describes persons who are deaf, hard of hearing, blind, low vision, deafblind, speech disabled, or otherwise disabled in ways that affect communication. Incarceration is not easy for anyone, but the isolation and inflexibility of incarceration can be especially challenging, dangerous, and further disabling for persons with disabilities. Correctional entities must confront these challenges; the number of incarcerated persons with communication disabilities—already overrepresented in jails and prisons—continues to grow as a proportion. Federal antidiscrimination law obligates jails and prisons to avoid discrimination, promote integration, and ensure effective communication. This requires adequate resources and preparation, joined by a shift in policy, practice, and values: to meet their antidiscrimination obligations, jails and prisons must offer choice and individuation well beyond what is typical in carceral environments. This Article offers a starting point for such efforts, summarizing the law and offering detailed policy recommendations for meeting its requirements and improving practices. The recommendations derive from litigation documents—including court opinions and settlement agreements—as well as workshops and interviews with advocates and experts. They are intended to fill the gap between the overarching requirements of federal antidiscrimination law and the granular policies and protocols—currently absent from most jails and prisons—needed to meaningfully implement these requirements.

Effective Communication with Deaf, Hard of Hearing, Blind, and Low Vision Incarcerated People

Tessa Bialek & Margo Schlanger***

INTRODUCTION 138
I. FEDERAL ANTIDISCRIMINATION LAW 144

Copyright © 2022 Tessa Bialek & Margo Schlanger. This Article may be copied and distributed for free or at cost, with the authors' names and publication citation remaining, by nonprofit institutions for educational purposes including distribution to students, or for distribution to incarcerated people or their advocates. In addition any advocate, government official, or policy maker dealing with jails or prisons may freely copy or use Part III of the work (in whole or in part, as is or with edits), free of copyright or source notice.

We are grateful for invaluable research assistance from University of Michigan Law School students Sarah Bender, Hannah Juge, and Hannah Shilling, and for the careful editorial work by journal staff. The policy recommendations in this Article derive from a review of the case information and litigation documents in the Civil Rights Litigation Clearinghouse and from informative interviews of advocates and experts in the field (see *infra* note 89), as well as conversations with the Advisory Committee of the Civil Rights Litigation Clearinghouse and two feedback workshops via Zoom in April 2022, at which participants provided enormously helpful guidance on the policy recommendations in Part III. Without implying that these individuals or their organizations have endorsed this publication, we are grateful for their expertise. They are: Eileen Baker, M.E.D. (Master's in Education of the Deaf), Consultant to Industry, Education and Government; Michael Bien, Co-Founding Partner, Rosen, Bien, Galvan & Grunfeld LLP; David Boyer, Legal Director, Disability Rights Rhode Island; Marc Charmatz, Senior Attorney, National Association of the Deaf, Law and Advocacy Center, (Mar. 9, 2022); Mark Cody, Legal Director, Disability Rights Michigan; Philip Fornaci, Attorney, National Disability Rights Network; Deborah Golden, Attorney, Law Office of Deborah M. Golden; Eve Hill, Partner, Brown, Goldstein, Levy; Jacob Hutt, Staff Attorney, Prison Law Office; Caroline Jackson, Associate, Rosen, Bien, Galvan & Grunfeld LLP; Jo, Advocate, HEARD; Corene Kendrick, Deputy Director, ACLU National Prison Project; Kaj Kraus, Advocate, HEARD; Scott LaBarre, General Counsel, National Federation of the Blind; Sophia Lau, Staff Attorney, Equip for Equality; Marsha Levick, Chief Legal Officer, Juvenile Law Center; Talila Lewis, Advocate, HEARD; Rita Lomio, Staff Attorney, Prison Law Office; Barry Marano, ADA Coordinator, Virginia Department of Corrections; Alan Mills, Executive Director, Uptown People's Law Center; Jamelia Morgan, Assistant Professor of Law, University of California, Irvine School of Law; David Muhammad, Executive Director, National Institute for Criminal Justice Reform; Michael Nunez, Senior Counsel, Rosen, Bien, Galvan & Grunfeld LLP; Richard Lorenzo Ray, ADA Technology Access Consultant, ADA Technology Access Coordinator, City of Los Angeles (Retired); Amy Robertson, Partner, Fox & Robertson PC; Howard Rosenblum, Chief Executive Officer, National Association of the Deaf; Ronald D. Simpson-Bey, Executive Vice President, JustLeadership USA; Brittany Shrader, Senior Attorney, National Association of the Deaf; William Snowden, Director, Vera Institute of Justice, New Orleans; Homer Venters, physician and epidemiologist; Roxanne Zech, Advocate, HEARD. All errors are our own.

* Managing Attorney, Civil Rights Litigation Clearinghouse

** Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School; Director, Civil Rights Litigation Clearinghouse, on leave. The views expressed are solely the author's.

<i>A. Constitutional Protections</i>	145
<i>B. Statutory Protections</i>	146
1. No Disparate Treatment	148
2. The Reasonable Modification Requirement.....	149
3. The Effective Communication Requirement.....	151
4. The Integration Mandate.....	152
5. The Anti-Surcharge Regulation.....	153
II. OTHER SOURCES OF STANDARDS, POLICIES, AND PRACTICES FOR CORRECTIONS	153
<i>A. National Standards and Local/ Departmental Policies</i>	153
<i>B. Litigation</i>	156
III. MODEL POLICIES AND COMMENTARY.....	160
1. <i>Antidiscrimination Principals</i>	164
1.1 Overall Commitment to Equality.....	164
1.2 No Punishment of Disability or Its Expression	165
1.3 No Disparate Treatment.....	165
1.4 Reasonable Modifications and Accommodations	165
1.5 Effective Communication	166
1.6 Adverse Determinations	166
1.7 Integration Mandate	167
1.8 No Surcharges	167
1.9 Primary Consideration to Prisoner Requests	167
2. <i>Initial Identification; Initial and Ongoing Assessment; and Requests for Auxiliary Aids and Services, and Reasonable Modifications and Accommodation</i>	168
2.1 Initial Identification.....	168
2.2 Medical Assessment.....	170
2.3 Functional Assessment	171
2.4 Communication and Accommodation Plan.....	173
2.5 Periodic Reassessment and Subsequent Requests	174

136	<i>The Journal of Gender, Race & Justice</i>	[26:2023]
	2.6 Appeal of Denial of Requests	175
	Commentary.....	176
3.	<i>Notice of Rights and Resources</i>	178
	3.1 Notice of Rights	178
	3.2 Intake and Orientation Materials.....	180
	Commentary.....	181
4.	<i>Identification</i>	181
	4.1 Identification.....	181
5.	<i>Classification and Housing</i>	182
	5.1 Classification and Housing.....	182
	Commentary.....	184
6.	<i>Participation in Services, Programs, and Activities</i>	186
	6.1 Access to Services, Programs, and Activities	186
	6.2 Access to Visiting.....	187
7.	<i>Medical Devices</i>	187
	7.1 Hearing Aids and Cochlear Processors	187
	7.2 Corrective Lenses, Glasses, and Sunglasses.....	189
	7.3 White Canes	190
	Commentary.....	190
8.	<i>Auxiliary Aids and Services, and Reasonable Modifications and Accommodations</i>	191
	8.1 Qualified Interpretation for Deaf and Hard of Hearing Prisoners.....	191
	Commentary.....	195
	8.2 Other Auxiliary Aids and Services for Deaf and Hard of Hearing Prisoners	198
	Commentary.....	198
	8.3 Effective Telecommunications	199
	Commentary.....	201
	8.4 Access to Television and Other Screen Devices	203
	8.5 Recreation	204

8.6 Additional Auxiliary Aids and Services and Reasonable Modifications and Accommodations for Blind and Low Vision Prisoners	204
8.7 Non-Auditory Alarms, Alerts, and Emergency Evacuation Notification.....	207
Commentary.....	208
9. <i>Prisoner Assistants</i>	209
9.1 Prisoner Assistants for Blind and Low Vision Prisoners	209
Commentary.....	210
10. <i>Hand Restraints</i>	211
10.1 Hand Restraints and Sign Language Communication	211
10.2 Hand Restraints and Blind or Low Vision Mobility	212
Commentary.....	213
11. <i>Staff and Training</i>	213
11.1 ADA Coordinators.....	213
11.2 Other Staff Training.....	215
Commentary.....	217
12. <i>Tracking and Auditing</i>	217
12.1 Tracking and Annual Audit.....	217
Commentary.....	218
13. <i>Definitions</i>	218
13.1 Auxiliary Aids and Services	218
13.2 Communication Disability	219
13.3 Disability	219
13.4 Effective Communication	220
13.5 [Entity].....	220
13.6 Qualified Interpreter	220
13.7 Reasonable Modifications and Accommodations	221
13.8 Service, Program, or Activity	221
13.9 Staff.....	221

INTRODUCTION

Tens of thousands of people incarcerated in jails and prisons throughout the United States have one or more communication disabilities, a term that describes persons who are deaf, hard of hearing, blind, low vision, deafblind, speech disabled, or otherwise disabled in ways that affect communication. Incarceration is not easy for anyone, but the isolation and inflexibility of incarceration can be especially challenging, dangerous, and further disabling for persons with disabilities.¹ Correctional entities must confront these challenges; the number of incarcerated persons with communication disabilities, already overrepresented in jails and prisons, continues to grow as a proportion.² Federal antidiscrimination law obligates jails and prisons to avoid discrimination, promote integration, and ensure effective communication. This requires adequate resources and preparation, joined by a shift in policy, practice, and values: to meet their antidiscrimination obligations, jails and prisons must offer choice and individuation well beyond what is typical in carceral environments. This Article offers a starting point for such efforts.

¹ See Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 978 (2019). See generally Jamelia N. Morgan, *The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons*, 27 GEO. J. POVERTY L. & POL'Y 305 (2020) (discussing the implications of seeking greater access and inclusion for people with disabilities in carceral spaces); Talila A. Lewis, *Disability Justice in the Age of Mass Incarceration*, in DEAF PEOPLE IN THE CRIMINAL JUSTICE SYSTEM: SELECTED TOPICS ON ADVOCACY, INCARCERATION, AND SOCIAL JUSTICE 229 (Debra Guthmann et al. eds., 2021) (cautioning against entrenching systemic inequity through advocacy); Margo Schlanger et al., *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability under the Americans with Disabilities Act and the Rehabilitation Act*, HARV. L. & POL'Y REV. (forthcoming 2022) (arguing that federal antidiscrimination law sometimes requires release of pretrial detainees with disabilities, where their incarceration undermines their equal access to court proceedings and is not necessary for public safety).

² In 2011–12, prisoners in state or federal prisons were about twice as likely to report a hearing disability and about three times as likely to report a vision disability as the general population, and persons in jail custody were three times as likely as the general population to report a hearing or vision disability, after standardizing data for sex, age, race, and Hispanic origin. See JENNIFER BRONSON ET AL., U.S. DEP'T OF JUST., DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-2012, at 3, 3 tbls.1 & 2 (Lynne McConnell & Jill Thomas eds., 2015), <https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/NM6Z-WRG7>]. Among state and federal prisoners, 6.2% reported a hearing disability, and 7.1% reported a vision disability, *id.* at 3 tbl.1, and among jail detainees 6.5% reported a hearing disability and 7.3% reported a vision disability, *id.* at 3 tbl.2. Survey data are self-reported (and unverified) in response to the questions: “Hearing—Are you deaf or do you have serious difficulty hearing?” and “Vision—Are you blind or do you have serious difficulty seeing even when wearing glasses?” *Id.* at 2.

A NOTE ON SCOPE:

Although many of the best practices identified in this Article may be applied more broadly to people with disabilities in jails and prisons, this Article focuses principally on people who are deaf, hard of hearing, blind, and/or low vision, and their medical devices, auxiliary aids and services, and reasonable modifications and accommodations, with particular emphasis on the “effective communication” requirement of federal antidiscrimination law.³

Similarly, although many of the best practices and model policies recommended here offer useful guidance for the custody and treatment of any person with a communication disability, there is not a one-size-fits-all policy that serves the needs of all such persons. This Article uses the term “communication disabilities” throughout as shorthand for “deaf, hard of hearing, blind, and/or low vision”—the recommended policies derive from litigation and settlement agreement focusing primarily on these groups. But such a focus is underinclusive, and policies and practices must be flexible and individualized enough to accommodate the broad range of communication disabilities, including deafblind-ness, speech disabilities, and certain intellectual, cognitive, or mental health disabilities. Moreover, people who are deaf, hard of hearing, blind, and/or low vision may be differently or multiply disabled—they may also have mobility, intellectual, and other disabilities—in ways that must be accounted for. The policies and practices recommended in Part III serve as a starting point but must be adapted to meet the specific needs of each prisoner with a communication disability. For example, a person who is deafblind may require Protactile (touch-based) interpreters to communicate effectively, or a person who is deaf or blind and also mobility impaired may require an assistant to make a telephone call, and so on. For all people who are multiply disabled, the general requirements of effective communication, equal access, and reasonable modifications and accommodations apply in full force. Meeting these requirements will require an ongoing, individualized, and collaborative process.

Jails and prisons need not undertake policy and practice reform alone. A variety of governmental agencies, community-based service providers, training centers, centers for independent living, and correctional associations are well positioned to support jails and prisons in improving conditions for persons with communication disabilities. These entities can provide direct support or help develop resources for programming, training, reentry

³ See 28 C.F.R. § 35.160(a)(1) (2022); *id.* § 39.160(a); *id.* § 42.503(e).

planning, and care.⁴ And every state has a state Protection and Advocacy (P&A) system—an entity with federal authority to advocate on behalf of persons with disabilities and to monitor settings in which persons with disabilities live, work, and receive services.⁵

But the ultimate responsibility to avoid discrimination, by providing effective communication and equal access to services, programs, and activities, belongs to each custodial authority. They need to prevent illegal discrimination against prisoners with communication disabilities. (To standardize our recommendations and simplify adoption/adaption into jail and prison policy, this Article principally uses the shorthand “prisoner” to refer to people detained in jails or incarcerated in prisons.) Jails and prisons must not: bar persons with communication disabilities from participating in certain programs; house persons with communication disabilities in segregated environments as a matter of policy;⁶ or punish prisoners for manifestations of disability, such as failing to obey an order that they did not

⁴ See, e.g., C.R. DIV., U.S. DEP’T OF JUST., EXAMPLES AND RESOURCES TO SUPPORT CRIMINAL JUSTICE ENTITIES IN COMPLIANCE WITH TITLE II OF THE AMERICANS WITH DISABILITIES ACT (2017), <https://www.ada.gov/cjta.html> [<https://perma.cc/P98R-CCY6>] [hereinafter DOJ EXAMPLES AND RESOURCES] (describing collaborations between correctional facilities and disability services providers); Interview with David Boyer & Philip Fornaci, *infra* note 89; Interview with Eve Hill, *infra* note 89; Interview with Barry Marano, *infra* note 89.

⁵ See, e.g., RACHAEL SEEVERS, AVID PRISON PROJECT, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT, 8, 21–23, 39 (2016), https://www.disabilityrightswa.org/wp-content/uploads/2017/12/MakingHardTimeHarder_June2016.pdf [<https://perma.cc/5RZR-MARQ>] (describing P&A systems and their work and gains in treatment of prisoners with communication disabilities in prisons across the country as the result of P&A advocacy efforts, and noting that “on balance it appears that those systems faring the best are those that are collaborators . . . with the state P&A.”). To identify the P&A for your state or territory, visit: <https://www.ndrn.org/about/ndrn-member-agencies> [<https://perma.cc/6QYR-RVD5>].

⁶ See, e.g., KAYLEY BEBBER & KIMBERLY MOSOLF, AVID PRISON PROJECT, WASTED TIME: LACK OF ACCESS TO PROGRAMMING FOR INMATES WITH DISABILITIES IN WASHINGTON’S COUNTY JAILS 12 (2017), https://www.disabilityrightswa.org/wp-content/uploads/2017/11/WastedTime_February2017.pdf [<https://perma.cc/8G35-UFN2>] (explaining that “[s]ome jails actually have an explicit policy or practice that an inmate is not allowed to participate in certain programming if they are not physically or mentally able to meet the requirements of the program.”); First Amended Complaint for Injunctive Relief and Compensatory and Punitive Damages ¶ 50, *Brown v. Md. Dep’t of Pub. Safety & Corr. Servs.*, No. 1:16-cv-00945-RDB (D. Md. Sept. 7, 2016) [hereinafter *Brown Complaint*], <https://clearinghouse.net/doc/110626> [<https://perma.cc/P7SM-K5V6>] (alleging that blind prisoners are formally excluded from a particular work program providing higher wages than other jobs). See generally Margo Schlanger, *Prisoners with Disabilities: Law and Policy*, in PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 43, 45 (Robert B. Greifinger ed., 2d ed. 2022) (ebook), <https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Publications/Public%20Health%20Behind%20Bars.pdf> [<https://perma.cc/4W4X-9LCY>] (describing how isolated prison conditions exacerbate preexisting mental illness).

see or hear.⁷ However, discrimination can also be more subtle. For example, inadequate preparation may mean that a qualified interpreter is not available when needed or failure to provide a range of up-to-date telecommunications devices may limit deaf prisoners' communication with family, friends, and attorneys outside of jail or prison. Indeed, challenges facing prisoners with communication disabilities affect all aspects of incarceration. For example:

- Housing and custody. Prisoners with communication disabilities may be inappropriately housed in solitary confinement, a harmful and extremely isolating practice, because of their disability. For example, some facilities have policies requiring users of certain assistive devices to be housed apart from others. Other facilities segregate for perceived safety reasons—or because of disability-related challenges to understanding and obeying rules or participating in disciplinary proceedings.⁸
- Communication isolation. In some states, prison authorities insist on separating individuals who use sign language to communicate, out of a misguided and

⁷ See, e.g., Jamelia N. Morgan, *Caged In: The Devastating Harms of Solitary Confinement on Prisoners with Physical Disabilities*, 24 BUFF. HUM. RTS. L. REV. 81, 147–49 (2018) (describing instances of prisoners with sensory disabilities disciplined for failing to obey orders that they couldn't see or hear, or for failing to understand rules in inaccessible handbooks or documents).

⁸ See, e.g., DAVID CARLSON, AVID PRISON PROJECT, ACCESS DENIED: CONDITIONS FOR PEOPLE WITH PHYSICAL AND SENSORY DISABILITIES IN WASHINGTON'S COUNTY JAILS 2, 19 n.5 (2017), <https://www.disabilityrightswa.org/wp-content/uploads/2017/11/Access-Denied-January2017.pdf> [<https://perma.cc/JAX6-XZXC>]; Class Action Complaint for Declaratory and Injunctive Relief ¶ 6, *McBride v. Mich. Dep't of Corr.*, No. 2:15-cv-11222-SFC-DRG (E.D. Mich. Mar. 31, 2015) [hereinafter *McBride Complaint*] <https://clearinghouse.net/doc/76914> [<https://perma.cc/HZ6A-5Y7V>] (alleging that discipline has resulted from deaf prisoners in custody of Michigan Department of Corrections unable to hear, and therefore follow, orders, as well as challenges “defend[ing] themselves in hearings or proceedings stemming from disciplinary charges brought against them, because they could not effectively communicate with hearing officers and investigators.”). For a thorough examination of causes and devastating effects of solitary confinement on persons with physical disabilities, as well as recommendations for limiting the practice, see JAMELIA MORGAN, ACLU, CAGED IN: SOLITARY CONFINEMENT'S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 11–12 (2017), https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf [<https://perma.cc/3HMQ-34ER>] (explaining that “some people with physical disabilities are placed in solitary confinement for reasons that have *nothing to do with the safety and security of the corrections institution*. Prisoners and detainees with disabilities may be placed in solitary confinement because there are no accessible housing units in which to hold them . . . [s]ome have even been punished with solitary confinement for rule violations that were *caused by their disabilities*,” and describing the heightened barriers to meeting health needs and ensuring equal access to services, programs, and activities for persons with physical disabilities in solitary confinement).

discriminatory fear that they will somehow use sign language nefariously. The result is that some prisoners have nobody they can actually communicate with directly, perhaps for years on end.

- Communications obstacles. Overreliance on out-of-date telecommunications devices, like teletypewriters (TTYs, also called telecommunications devices for the deaf, or TDDs) has precluded contact between prisoners and their loved ones outside of prison both because written English is often not effective for native sign language users and because friends and family often do not have access to such near-obsolete technologies required for communication.⁹ In the absence of a qualified interpreter or other auxiliary aid or service to facilitate effective communication at medical appointments, deaf and hard of hearing prisoners have received inaccurate diagnoses or treatment, or not been made aware of their own medical diagnoses or treatment.¹⁰ American Sign Language (ASL) is not merely English in gestures (nor do other signed languages have one-to-one correspondence with other spoken languages). Therefore, a prisoner whose primary or native language is ASL, or another signed language, may not be literate in English or able to communicate effectively in written English, or another spoken language.¹¹ Reliance on written English (or

⁹ See, e.g., Verified First Amended Complaint ¶¶ 9, 57–58, *Heyer v. U.S. Bureau of Prisons*, No. 5:11-ct-03118-D (E.D.N.C. Nov. 2, 2017) <https://clearinghouse.net/doc/75929> [<https://perma.cc/HW46-NQ3Z>]; Third Amended Complaint ¶¶ 21, 25, 35, 40–41, *Rogers v. Colo. Dep't of Corr.*, No. 16-cv-02733-STV (D. Colo. June 17, 2017) <https://clearinghouse.net/doc/103449> [<https://perma.cc/YG84-WHRA>]; Class Action Complaint ¶¶ 35–43, *Briggs v. Mass. Dep't of Corr.*, No. 1:15-cv-40162-GAO (D. Mass. Nov. 24, 2015) [hereinafter *Briggs Complaint*], <https://clearinghouse.net/doc/100394> [<https://perma.cc/E24A-QJEY>]; Comments of Helping Educate to Advance the Rights of Deaf Communities (HEARD) at 9–12, *In re Rates for Interstate Calling Services*, Case No. 12-375 (F.C.C. Nov. 23, 2020) [hereinafter *HEARD F.C.C. Comments*], <https://clearinghouse.net/doc/130979> [<https://perma.cc/8HC4-8Y2H>].

¹⁰ Plaintiff-Intervenor United States' Complaint in Intervention ¶ 10, *Disability Rts. Fla. v. Jones*, No. 4:16-cv-00047-RH-CAS (N.D. Fla. Jan. 9, 2017), <https://clearinghouse.net/doc/130805> [<https://perma.cc/W7X2-A66H>]; Complaint for Declaratory Relief, Injunctive Relief, and Damages ¶¶ 19, 24, *Avitia v. United States Immigr. & Customs Enft.*, No. 2:16-CV-04818 (C.D. Cal. June 30, 2016), <https://clearinghouse.net/doc/88585> [<https://perma.cc/5TB4-EJUC>].

¹¹ See, e.g., Expert Report of Dennis Cokely, Ph.D. at 12–18, *Disability Rts. Fla. v. Jones*, No. 4:16-cv-47-RH-CAS (N.D. Fla. Jan. 30, 2017) [hereinafter *Cokely Expert Report*],

another spoken language) for communication with medical staff has led to prisoners whose primary language is ASL (or another signed language) not understanding or having access to vital personal medical information.¹²

- Jobs and rehabilitative opportunities. Prisoners with communication disabilities have been relegated to jobs that pay less and offer fewer opportunities for vocational training or for diminution in sentence credits, based on unfounded safety concerns, misunderstanding of capabilities, and failure to make reasonable modifications.¹³
- Safety. Prisoners with communication disabilities are sometimes targeted for abuse because of their inability to perceive danger and their reliance on other prisoners, and may be at risk because of communication failures during emergencies.¹⁴
- Access to remediation. Prisoners who are blind and rely on sighted prisoners to initiate grievance processes have

<https://clearinghouse.net/doc/130857> [<https://perma.cc/JW44-5VGZ>] (explaining that American Sign Language is not a signed form of English, describing lower English literacy rates among Deaf persons in the United States and among incarcerated persons in the United States, and noting that “one would expect that a greater proportion of Deaf inmates would be considered functionally illiterate than would be the case for the inmate population as a whole.”); Jean F. Andrews et al., *The Bill of Rights, Due Process and the Deaf Suspect/Defendant*, J. INTERPRETATION 9, 33 (2007), <https://njdc.info/wp-content/uploads/2014/10/Bill-of-Rights-Due-Process-and-the-Deaf-Suspect-Defendants-JOI-2007.pdf> [<https://perma.cc/DSF7-2R6E>] (explaining that approximately 30% of deaf people are functionally illiterate, reading at a grade 2.9 level or below).

¹² See Cokely Expert Report, *supra* note 11, at 35–36; HEARD, HEARD DEAF PRISON CORRESPONDENCE: MAY 2018 SUMMARY (2018), <https://create.piktochart.com/output/35244179-heard-deaf-prison-correspondence-may-2018-summary> [<https://perma.cc/9S58-T3F6>] (“I met with a doctor. I tried to lipread. I think he asked about my medical insurance and I said yes. The nurse interrupted and she signed to clarify. Turns out the doctor asked if I have mental health issues. They put down a need for ASL interpreters in my medical files. When I transferred to another prison, interpreters were not provided and there is no [videophone].”).

¹³ Brown Complaint, *supra* note 6, ¶¶ 49, 51; see also Cokely Expert Report, *supra* note 11, at 44 (explaining that, “[w]ithout valid language and communication assessments, d/Deaf and hard of hearing inmates are significantly disadvantaged” and not able to be successful in services, programs, and activities).

¹⁴ See, e.g., Brown Complaint, *supra* note 6, ¶ 81 (“If a blind inmate is housed with a sighted inmate on whom he is dependent, such as for reading, writing, and/or movement around the prison, the risk of abuse and exploitation increases dramatically.”).

had grievances dismissed due to mistakes by the sighted prisoners. They have also been subject to extortion and have been unable to initiate or complete grievance processes when sighted prisoners refuse to help, or because they haven't wanted to disclose personal information.¹⁵

Over the past several years, persons with communication disabilities incarcerated in jails and prisons across the United States have sued for violations of their rights under federal antidiscrimination law. The resulting court opinions and settlement agreements offer a starting point for developing better policies. Incarceration necessarily poses significant challenges for persons with communication disabilities and for those responsible for their custody, but improved practices and attention to evolving technologies and standards can address and, perhaps, alleviate some of those challenges. This Article builds on the lessons from recent lawsuits, supplemented by conversations with advocates and experts, to answer the question: *What must jails and prisons do to avoid discrimination and promote equal access to their services, programs, and activities—in particular to avoid disparate treatment, provide reasonable modifications, and effectively communicate with persons with communication disabilities in their custody?*

This Article is intended as a resource for correctional administrators, legislators, and advocates who are working to change jail and prison policy to serve the needs of prisoners with communication disabilities. Parts I and II of this Article detail the requirements of federal antidiscrimination law as well as national standards that offer broad-strokes guidance for compliance. Part III fills in the gaps, offering detailed policy recommendations for nondiscrimination, reasonable modifications, and effective communication in this context.

I. FEDERAL ANTIDISCRIMINATION LAW

The welfare of prisoners with disabilities is governed principally by the U.S. Constitution and two federal disability antidiscrimination statutes, the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA).¹⁶ Taken together, the requirements are robust. Prison and jail officials must: ensure that disability does not lead to unnecessary infliction of pain or deprivation of serious needs; avoid discrimination; individually accommodate disability; maximize integration of prisoners with disabilities with respect to

¹⁵ *Id.* ¶¶ 40–42, 47.

¹⁶ This section draws extensively from Schlanger, *supra* note 6; Margo Schlanger, *Prisoners with Disabilities*, in 4 REFORMING CRIMINAL JUSTICE 295 (Erik Luna ed., 2017), <https://perma.cc/W52C-TUL2>; Expert Declaration of Margo Schlanger in Support of Plaintiff Motion for Class Certification, *Sabata v. Neb. Dep't of Corr.*, No. 4:17-cv-03107-RFR-MDN (D. Neb. Feb. 19, 2019), ECF No. 249–50 [hereinafter Schlanger Expert Declaration], <https://clearinghouse.net/doc/100862> [<https://perma.cc/Y9S6-DT6Z>].

services, programs, and activities; and provide reasonable treatment of serious medical conditions. State constitutional and antidiscrimination provisions may also apply in this context to provide analogous or additional protection, but such state law, which varies by jurisdiction, is outside the scope of this report.¹⁷

A. Constitutional Protections

The United States Supreme Court has interpreted the Eighth Amendment's ban on "cruel and unusual punishments" to require government officials to "respond[] reasonably to . . . risk[s]" to convicted prisoners, where those risks threaten the "minimal civilized measure of life's necessities."¹⁸ This obligation includes, for example, risks in the areas of nutrition, sanitation, health care, housing, and protection from harm by staff and other prisoners. If an overarching prison policy or practice, applicable to prisoners with and without disabilities alike, poses a serious risk to a prisoner with a disability—for example, making it harder for that prisoner to get enough food, live in sanitary conditions, receive healthcare, move safely in or out of a cell or housing unit, or avoid assaults by other prisoners—the Constitution requires modification of that policy to accommodate the disability and solve the problem. The Fourteenth and Fifth Amendments' Due Process Clauses provide pretrial detainees with similar rights, perhaps a little more robust though the precise contours of the constitutional standard are currently contested.¹⁹

¹⁷ For examples of lawsuits alleging violations of state constitutional or statutory law, in addition to claims alleging violation of federal law, in treatment of prisoners with communication disabilities, see Class Action First Amended Complaint at 55–59, 64–66, *Minnis v. Johnson*, No. 1:10-cv-96-TSE-TRJ (E.D. Va. Apr. 13, 2010), ECF No. 34, <https://clearinghouse.net/doc/69494> [<https://perma.cc/M83Y-EDHP>] (alleging violations of Virginia constitutional and statutory law); Amended Complaint at 38–40, *Adams v. Kentucky*, No. 3:14-cv-00001-GFVT-EBA (E.D. Ky. Oct. 1, 2014), ECF No. 42, <https://clearinghouse.net/doc/78049> [<https://perma.cc/4M9E-L682>] (alleging violations of the Kentucky Civil Rights Act).

¹⁸ *Farmer v. Brennan*, 511 U.S. 825, 832, 834, 844 (1994).

¹⁹ See, e.g., *Kingsley v. Hendrickson*, 576 U.S. 389, 392 (2015) (holding that to prove an excessive force claim, a pretrial detainee must show that the officers' use of force was *objectively* unreasonable, citing, inter alia, the differences between pretrial detainees and convicted prisoners to reject a *subjective* standard). For an example of a current circuit split on the scope of the right in the pretrial context, compare *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("[T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an

Convicted prisoners also retain due process rights, under the Fifth and Fourteenth Amendments, with regard to credit-earning, discipline, and parole matters. Therefore, if an overarching prison policy or practice, applicable to prisoners with and without disabilities alike, poses procedural obstacles to a prisoner with a disability—for example, making it harder for that prisoner to receive notice that implicates due process concerns, or to prepare or participate in hearings—modification of that policy to accommodate the disability is required by the Constitution.

Finally, both convicted and pretrial prisoners retain “those First Amendment rights that are not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system.”²⁰ In this context, an unreasonable failure to provide the accommodations required to enable communication with others may violate the First Amendment rights of a prisoner with a communication disability.²¹

Note that people with disabilities do not receive special antidiscrimination protection under the Equal Protection Clause of the Fourteenth Amendment.²² Therefore, absent other constitutional harm of the kind described above, the Constitution does not prevent officials from discriminating against people with disabilities “so long as their actions toward such individuals are rational.”²³

B. Statutory Protections

Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, provide broader protection, prohibiting exclusion or discrimination on the basis of disability in federally

excessive risk to health or safety.” *with Strain v. Regalado*, 977 F.3d 984, 990 (10th Cir. 2020) (requiring, instead, plaintiff to establish that the official “knows of and disregards an excessive risk to inmate health or safety,” a subjective test under which the official must be aware of the facts from which the inference could be drawn and that a substantive risk of serious harm exists, *and* must draw the inference).

²⁰ *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Bell v. Wolfish*, 441 U.S. 520, 551–52 (1979) (applying standard to pretrial detainees).

²¹ *See, e.g., Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 357 (4th Cir. 2021), <https://clearinghouse.net/doc/111493> [<https://perma.cc/92UN-96A3>] (holding that the U.S. Bureau of Prisons violated a Deaf prisoner’s First Amendment rights by denying him access to point-to-point videophone calls with other Deaf individuals); *Rogers v. Colo. Dep’t of Corr.*, No. 1:16-cv-02733-STV, 2019 WL 4464036, at *18–19 (D. Colo. Sept. 18, 2019) (denying Colorado Department of Corrections’ motion for summary judgment on plaintiffs’ First Amendment claim, which alleged that policy providing for teletypewriters only precluded effective communication with persons outside prison, reasoning that “a rational jury could find that the CDOC policy impinges on Plaintiffs’ First Amendment rights to communicate with individuals outside CDOC facilities”). Lawsuits have also alleged violations of the Free Exercise Clause, based on failure to make religious services accessible. *See, e.g., Briggs Complaint*, *supra* note 9, at 43–44; *McBride Complaint*, *supra* note 8, at 45–47.

²² *See City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 440–41 (1985).

²³ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 357 (2001).

conducted or supported services, and state and local government services, respectively.

Title II of the 1990 ADA similarly provides that:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.²⁴

And Section 504 of the 1973 Rehabilitation Act provides, in relevant part:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.²⁵

Between the two statutes, every prison and jail in the United States is covered. The ADA's Title II covers all nonfederal jails and prisons—its definition of “public entity” includes state and local government agencies, without respect to federal support.²⁶ The Rehabilitation Act also covers all federal facilities and also covers most state and local jails and prisons because they receive federal financial assistance.²⁷ Moreover, the Supreme Court has held specifically that Title II of the ADA's reference to “services, programs, or activities” encompasses the operation of jails and prisons.²⁸ Both the ADA and the Rehabilitation Act regulations extend to private prisons operated under contract with federal, state, or local entities “directly or through contractual, licensing, or other arrangements.”²⁹

²⁴ 42 U.S.C. § 12132.

²⁵ 29 U.S.C. § 794(a).

²⁶ 42 U.S.C. § 12131(1).

²⁷ 29 U.S.C. § 794(b)(1)(A) (defining “program or activity” as “a department, agency, special purpose district, or other instrumentality of a State or of a local government”).

²⁸ Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209 (1998).

²⁹ 28 C.F.R. § 35.130(b)(1) (2022); *see also id.* § 39.130(b)(1) (prohibiting discrimination on the basis of disability, either directly or through contractual or other arrangements, in the provision of any aid, benefit or service); Marks v. Colo. Dep't of Corr., 976 F.3d 1087, 1097 (10th Cir. 2020) (holding that the Rehabilitation Act applied to private prisons that receive federal funding).

Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment.³⁰

Both statutes protect “qualified” prisoners with disabilities from discrimination or exclusion. The ADA defines “qualified individual with a disability” as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.³¹

Prior to the enactment of the ADA, the Supreme Court explained that the Rehabilitation Act, which does not otherwise define “disabled”, guarantees qualified individuals with a disability “meaningful access” to each federally conducted or supported service, program, or activity.³²

The ADA and the Rehabilitation Act create specific statutory obligations on jails and prisons to avoid discrimination against and exclusion of persons with communication disabilities in their custody. These obligations include:

1. No Disparate Treatment

Discriminating against prisoners “by reason of” their disability violates the statutory bans, quoted above, against disparate treatment.³³ The ADA regulations explain that public entities must afford qualified people with disabilities the same opportunity as nondisabled people to benefit from the entity’s services. This means that a prison or jail may not, because of an prisoner’s disability, deny them “the opportunity to participate” in a service offered to other prisoners, may not provide an alternative service “that is not equal to that afforded others[.]” and must provide aids, benefits, or services that enable the prisoner to “gain the same benefit, or to reach the same level

³⁰ See 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1). ADA regulations on the definition of disability, 28 C.F.R. § 35.108, are capacious, covering many conditions by name—including visual, speech, and hearing impairments—and emphasizing, generally, that “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. ‘Substantially limits’ is not meant to be a demanding standard.” *Id.* § 35.108.

³¹ 42 U.S.C. § 12131(2).

³² *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

³³ 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

of achievement as that provided to others.”³⁴ A prison violates this regulation if, for example, for reasons related to a prisoner’s disability, it excludes the prisoner from a program, or assigns the prisoner to a segregation cell (where prisoners are denied most prison privileges, services, programs, and activities).

Prison and jail officials *can*, however, exclude a prisoner with a disability from a service, program, or activity if the exclusion is “necessary for the safe operation of its services, programs, or activities.”³⁵ Safety requirements must be “based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities[.]”³⁶ a determination that requires substantial individuation. Similarly, prison and jail officials may exclude prisoners with disabilities from programs “when that individual poses a direct threat to the health or safety of others,”³⁷ which the Supreme Court has emphasized “must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.”³⁸ Thus, disparate treatment is lawful only where participation in a particular program by a particular prisoner with disabilities raises particular—that is, individualized, and proven, rather than assumed—safety risks to others, and only where those risks cannot be mitigated by some kind of tailored modification of the programs policies, practices, or procedures.

2. The Reasonable Modification Requirement

The Rehabilitation Act and the ADA also require the provision of “reasonable modifications.”³⁹ The Title II ADA regulation states:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that

³⁴ 28 C.F.R. § 35.130(b)(1) (2022).

³⁵ *Id.* § 35.130(h).

³⁶ *Id.*

³⁷ *Id.* § 35.139(b).

³⁸ *Chevron v. Echazabal*, 536 U.S. 73, 86 (2002) *quoting with approval* 28 C.F.R. § 35.139(b) (2022) (requiring “an individualized assessment, based on reasonable judgment that relies on current medical knowledge or the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk”).

³⁹ 28 C.F.R. § 36.302 (2022)

making the modifications would fundamentally alter the nature of the service, program, or activity.⁴⁰

The requirement of reasonable modifications can require both small and large changes to ordinary practices and procedures. (Borrowing from the ADA's employment provisions, reasonable modifications are often referred to using the more familiar phrase "reasonable accommodations"; this Article principally uses the phrase "reasonable modifications and accommodations"). The reasonable modification requirement includes providing technologies and innovations that allow access to services, programs, and activities,⁴¹ and may require training of staff and/or prisoners. A jail or prison violates the ADA if it declines to provide necessary assistance to enable equal participation or fails to modify policies and practices to permit participation.

Here, too, jails and prisons may decline to provide a reasonable modification citing safety concerns, or if the entity can demonstrate that the required modification "would result in a fundamental alteration in the nature of [the] service, program, or activity or in undue financial and administrative burdens."⁴² An asserted undue financial burden is not measured in the abstract or as to a single line item in a budget, but rather as to "all resources available for use in the funding and operation of the service, program, or activity."⁴³ That means, for example, that in considering the financial burden of providing a qualified sign language interpreter for a class in a prison, the cost of the interpreter must be measured not against the budget for the class, but rather must be considered in light of the operating budget for the whole educational program, if not for the entire prison system. Moreover, where there *is* an undue financial burden, the jail or prison "shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided"⁴⁴

⁴⁰ *Id.* § 35.130(b)(7)(i).

⁴¹ *See, e.g., Schlanger, supra* note 6, at 305–08.

⁴² 28 C.F.R. § 35.150(a)(3) (2022); *see, e.g., Pascuiti v. N.Y. Yankees*, 87 F. Supp. 2d 221, 225 (S.D.N.Y. 1999) (holding, in lawsuit alleging inadequate access to stadium, that the relevant budget for assessing financial burden was that of city's Parks Department); *Ewbank v. Gallatin Cnty.*, No. Civ.A. 03-156-DLB, 2006 WL 197076, at *7 (E.D. Ky. 2006) (assessing County budget in its entirety to evaluate undue burden defense in lawsuit challenging accessibility of county courthouse); *Am. Council of the Blind v. City of N.Y.*, 495 F. Supp. 3d 211, 241 (S.D.N.Y. 2020) (in lawsuit challenging New York City's failure to provide non-visual crossing information at most signalized intersections, explaining: "the City, in reciting its bottom-line cost figure, does not situate it in the context of the DOT's, the City's, or any other relevant budget, or address potential means by which the City could recoup such outlays. Such makes it difficult, if not impossible, to assess the burden it might impose on the City's other activities.").

⁴³ 28 C.F.R. § 35.150(a)(3) (2022).

⁴⁴ *Id.*

3. The Effective Communication Requirement

The ADA's regulations further require jails and prisons to "take appropriate steps to ensure that communications with . . . participants . . . with disabilities are as effective as communications with others[.]"⁴⁵ and the Rehabilitation Act's regulations similarly obligate funding recipients to "insure that communications with their applicants, employees and beneficiaries are effectively conveyed to those having impaired vision and hearing."⁴⁶ The effective communication requirement by its own terms covers all "communications with . . . participants" and is not limited to formal communication or communication about particularly important topics.⁴⁷ Instead, the regulations detail precise, muscular obligations for jails and prisons with regard to prisoners with communication disabilities.

Often, effective communication requires "auxiliary aids and services,"⁴⁸ which may include qualified interpreters, notetakers, real-time computer-aided transcription services, written materials, various telephonic communications devices for the deaf, videophones, open and closed captioning, qualified readers, taped texts, audio recorders, magnifiers, Brailled materials and displays, screen reader software, and other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing, and visually delivered materials available to individuals who are blind or low vision.⁴⁹

As the regulations explain:

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in

⁴⁵ *Id.* § 35.160(a)(1).

⁴⁶ *Id.* § 42.503(e).

⁴⁷ *Id.* § 35.160(a)(1).

⁴⁸ *Id.* § 35.160(b)(1).

⁴⁹ *See* 28 C.F.R. § 35.104 (2022) (defining auxiliary aids and services and providing examples).

such a way as to protect the privacy and independence of the individual with a disability.⁵⁰

It is essential to give primary consideration to the requests of persons with communication disabilities to ensure that the auxiliary aids and services provided enable the requisite effective communication.

4. The Integration Mandate

The ADA regulations also include a provision, often termed the “integration mandate,” that directs: “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”⁵¹ In particular, in the context of program access in jails and prisons, the relevant regulation provides, in pertinent part:

(b)(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment; [and]

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed.⁵²

The integration mandate prohibits housing prisoners in special housing—including solitary confinement or similarly isolated and restrictive settings—because of disability, unless the housing area is “the most integrated setting appropriate” to the prisoners’ needs.⁵³ Such segregation—from all other prisoners, or disabled from non-disabled prisoners—may be presumed harmful under the mandate. That is, the regulation bans an unjustified decision to isolate people with disabilities, even absent any additional showing of harm.

⁵⁰ *Id.* § 35.160(b)(2).

⁵¹ *Id.* § 35.130(d).

⁵² *Id.* § 35.152(b)(2).

⁵³ *Id.* § 35.130(d).

5. The Anti-Surcharge Regulation

Finally, although compliance with the above requirements may cost jails and prisons money, the ADA's regulations forbid them to charge the persons with disabilities in their custody for "the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required . . . [for] the nondiscriminatory treatment required."⁵⁴

II. OTHER SOURCES OF STANDARDS, POLICIES, AND PRACTICES FOR CORRECTIONS

Various national standards guide compliance with federal antidiscrimination law in jails and prisons, offering overarching recommendations to serve the needs of prisoners with communication disabilities. These standards may direct state and local entities to develop policies for implementation. Indeed, many correctional systems have policies that address disability nondiscrimination in general terms.⁵⁵ Litigation outcomes—judicial decisions and settlement agreements—have been instrumental in filling gaps left by broad-strokes guidance and policy, often outlining requirements in significantly more detail. These litigation documents, therefore, are the starting point for our recommendations.

A. National Standards and Local/ Departmental Policies

The American Correctional Association's Commission on Accreditation for Corrections, the accreditation arm of the professional association, publishes *Performance-Based Standards and Expected Practices for Adult Correctional Institutions*, which provides "performance standards, expected practices, and outcome measures" for institutions seeking accreditation, designed to "enable administrators and practitioners to not only monitor activities but also to *measure* over time the outcomes of their efforts."⁵⁶ The performance-based standards and expected practices related to persons with disabilities

⁵⁴ *Id.* § 35.130(f).

⁵⁵ A handful of state departments of correction have developed policy guidance related to deaf and/or hard of hearing prisoners, sometimes, as in Michigan, resulting from related litigation. *See, e.g.*, MICH. DEP'T OF CORR., POLICY DIRECTIVE 04.06.156: DEAF AND/OR HARD OF HEARING PRISONERS (2021) [hereinafter MDOC POLICY DIRECTIVE 04.06.156]; MD. DEP'T OF SAFETY & CORR. SERVS., POLICY STATEMENT—INMATES WITH A HEARING DISABILITY, NO. OPS.200.0004 (2016); VT. AGENCY OF HUM. SERVS. DEP'T OF CORR., EFFECTIVE COMMUNICATION FOR DEAF AND HEARING IMPAIRED, NO. 316 (2021) [hereinafter VT. AHS DOC NO. 316]. These and other policies referenced in this document are available in .pdf form in a Google drive folder at this link: <https://clearinghouse.net/resource/3567> [https://perma.cc/G4KW-KMS5].

⁵⁶ AM. CORR. ASS'N, PERFORMANCE-BASED STANDARDS AND EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS xxvii (5th ed. 2021).

include: “[w]ritten policy, procedure, and practice [that] provide a mechanism to process requests for reasonable accommodation;”⁵⁷ housing prisoners with disabilities in a manner that provides for their safety and security, provides for integration with other prisoners, and makes accessible programs and services⁵⁸; “written policy, procedure, and practice prohibit[ing] discrimination based on . . . disability,”⁵⁹ including “in the provision of services, programs, and activities;”⁶⁰ “written policy, procedure, and practice provid[ing] for the assignment of appropriately trained individuals to assist disabled offenders who cannot otherwise perform basic life functions;”⁶¹ and consultation between medical and correctional staff in decision-making related to persons with special needs.⁶² These standards describe in general terms the responsibility of correctional institutions to take steps to avoid discrimination and provide reasonable modifications and accommodations, but anticipate that jails and prisons will develop specific policies and procedures for implementation.

The National Commission on Correctional Health Care’s *Standards for Health Services in Prisons* and *Standards for Health Services in Jails* similarly provide a general outline of the requirements for health services in correctional settings, including for persons with disabilities. The standards include implementation of “written policy and defined procedures” to identify and develop a plan of care for persons with disabilities and to ensure timely provision of devices, such as eyeglasses, hearing aids, and canes, “to reduce effects of impairment,”⁶³ procedures to make sure that persons who have difficulty communicating understand how to access health services,⁶⁴ and policies to ensure that correctional and health staff communicate about significant health needs, including disability, relevant to classification,

⁵⁷ *Id.* § 5-ACI-1C-07.

⁵⁸ *Id.* § 5-ACI-2C-11.

⁵⁹ *Id.* § 5-ACI-3D-04.

⁶⁰ *Id.* § 5-ACI-5E-02.

⁶¹ *Id.* § 5-ACI-2C-12.

⁶² AM. CORR. ASS’N, *supra* note 56, § 5-ACI-6C-06 (requiring “consultation between the facility and program administrator (or a designee) and the responsible health care practitioner (or designee) prior to taking action regarding . . . physically disabled . . . offenders in the following areas: housing assignments, program assignments, disciplinary measures, transfer to other facilities”).

⁶³ NAT’L COMM’N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS, § P-F-01 (2018) [hereinafter NCCHC STANDARDS FOR HEALTH SERVICES IN PRISONS]; *see also* NAT’L COMM’N ON CORR. HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN JAILS, § J-G-01 (2003) [hereinafter NCCHC STANDARDS FOR HEALTH SERVICES IN JAILS].

⁶⁴ NCCHC STANDARDS FOR HEALTH SERVICES IN PRISONS, *supra* note 63, § P-E-01; NCCHC STANDARDS FOR HEALTH SERVICES IN JAILS, *supra* note 63, § J-E-01.

housing, work and program assignments, disciplinary measures, and other such decisions.⁶⁵

The American Bar Association's *Standards for Criminal Justice: Treatment of Prisoners* provide an overview of the obligations of jails and prisons to serve the needs of persons with disabilities in their custody, intended to guide jail and prison policy.⁶⁶ These standards, and the associated commentary, address, among other topics, safe and integrated housing,⁶⁷ provision of impairment-related aids,⁶⁸ provision of reasonable accommodations,⁶⁹ and the effective communication requirement.⁷⁰

Finally, the federal Prison Rape Elimination Act (PREA) implementing regulations offer more specific guidance about effective communication with prisoners with communication disabilities. Elaborating the requirements of the ADA and the Rehabilitation Act, the PREA Standards for Adult Prisons and Jails require that, when necessary to ensure effective communication with prisoners who are deaf or hard of hearing, jails and prisons must "provid[e] access to interpreters who can interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary."⁷¹ Similarly, jails and prisons must "ensure that written materials are provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates . . . who are blind or have low vision."⁷² In addition, in seeming recognition of relevant privacy and safety concerns, jails and prisons are directed not to "rely on inmate interpreters, inmate readers, or other types of inmate assistants except in limited circumstances."⁷³

⁶⁵ NCCHC STANDARDS FOR HEALTH SERVICES IN PRISONS, *supra* note 63, § P-B-07; NCCHC STANDARDS FOR HEALTH SERVICES IN JAILS, *supra* note 63, § J-A-08.

⁶⁶ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 1 (3d ed. 2011) [hereinafter ABA TREATMENT OF PRISONERS], https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/treatment_of_prisoners.pdf [<https://perma.cc/267G-CUVJ>].

⁶⁷ *Id.* at 23-3.2.

⁶⁸ *Id.* at 23-6.10.

⁶⁹ *Id.* at 23-7.2.

⁷⁰ *Id.*

⁷¹ 28 C.F.R. § 115.16(a) (2022); *see also id.* § 35.104 (defining auxiliary aids and services).

⁷² *Id.* § 115.16(a).

⁷³ *Id.* § 115.16(c).

Most state departments of correction and a few local jails⁷⁴ have formal ADA compliance policies, implementing regulations and directives, and/or administrative rules.⁷⁵ However, these policies vary in scope and in depth of focus. Many, for example, don't mention communication disabilities, at all, although some provide fairly detailed instructions for communication with people who are deaf, hard of hearing, blind, or low vision. Some states have policies about deaf and hard of hearing prisoners,⁷⁶ but no corresponding policy for blind or low vision prisoners. Some policies derive from litigation, whereas others have been developed independently or in collaboration with local advocates. Some states and probably most municipalities appear to have no formal ADA compliance policies at all. Examples from existing state policies inform the recommendations in Part III, which are intended to supplement, update, or provide a model for new policies and practices in this area.

B. Litigation

When policies governing the treatment of prisoners with disabilities are out of date, incomplete, nonexistent, or not followed, jails and prisons jeopardize the wellbeing of prisoners with communication disabilities—and violate the law. Over the last two decades, in dozens of class action and putative class action lawsuits, prisoners with communication disabilities across the United States have challenged violations of federal antidiscrimination law and sometimes achieved changes in jail and prison policies and practices. These lawsuits have been instrumental in, for example, expanding access to videophone technology for deaf and hard of hearing persons⁷⁷ and to technologies, aids, and services that permit independent

⁷⁴ It is less straightforward to take stock of local policies promoting ADA compliance and antidiscrimination in jails, but sources addressing the issue on a state-level suggest that many jails lack such policies. *See, e.g., WASTED TIME*, *supra* note 6, at 11 (“Only about one quarter of our county jails [in Washington state] have a policy that generally prohibits the jail from discriminating on the basis of disability or requires compliance with the ADA.”).

⁷⁵ Although state and local entities may memorialize relevant procedures in various kinds of documents, the shorthand “policies” as used in this Article refers to any written document that governs correctional practice.

⁷⁶ *See* sources cited *supra* note 55.

⁷⁷ *See, e.g., Philip Fornaci, Fact Sheet: Accommodations in Telecommunications for Incarcerated People Who Are Deaf or Hard of Hearing*, TRAINING & ADVOC. SUPPORT CTR. (Dec. 2020), <https://www.tascnow.com/wp-content/uploads/2021/01/Fact-Sheet-Accom.-in-Telecom.-for-Incarcerated-People-Who-Are-Deaf-or-Hard-of-Hearing-FINAL.docx.pdf> [<https://perma.cc/4D8V-NY7P>] (describing litigation efforts to expand access to videophones and related technology and the legal framework for those efforts). Several interviewees cited access to videophone technology as among the most concrete and widespread gains from litigation in this area. Interview with David Boyer & Philip Fornaci, *infra* note 89; Interview with Deborah Golden, *infra* note 89; Interview with Amy Robertson, *infra* note 89.

access to library materials for blind persons.⁷⁸ More broadly, lawsuits have catalyzed development of formal policies and led to system overhaul.⁷⁹

Some litigation gains have come from judicial opinions ordering relief. Courts have ruled, for example, that a prison has an affirmative duty to evaluate a newly incarcerated deaf prisoner's accommodation requirements pursuant to the ADA and the Rehabilitation Act;⁸⁰ that deaf prisoners have the right, under the First Amendment and the Rehabilitation Act, to point-to-point communication with persons outside of prison;⁸¹ and that the ADA and the Rehabilitation Act require facilities to provide deaf prisoners with interpretive services for reception and classification, adequate communication devices for telephone and television, and non-auditory alarms and alerts.⁸² And courts have, in some cases, ordered large-scale changes in practice and policy, including requiring videophones, consistent access to ASL interpreters for all "high-stakes" interactions and programs, and mandatory training for correctional officers and staff on how to identify and appropriately interact with deaf and hard of hearing prisoners.⁸³

⁷⁸ See, e.g., Exhibit 1 to Release and Settlement Agreement: Non-Monetary Term Sheet ¶¶ 2–4, *Brown v. Dep't of Pub. Safety & Corr. Servs.*, No. 17-cv-945-RDB (D. Md. June 15, 2019) [hereinafter *Brown Non-Monetary Term Sheet*], <https://clearinghouse.net/doc/109315> [<https://perma.cc/AC9G-NP93>].

⁷⁹ See, e.g., Opinion and Order Adopting 2/8/18 Report and Recommendation at 7, *McBride v. Mich. Dep't of Corr.*, No. 2:15-11222-SFC (E.D. Mich. Mar. 9, 2018), <https://clearinghouse.net/doc/98904> [<https://perma.cc/QL3E-H57D>] (requiring the Michigan Department of Corrections to adopt "effective and comprehensive policies and procedures"); MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55.

⁸⁰ See *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 254 (D.D.C. 2015) (granting summary judgment on plaintiff's disability claims, finding that prison's failure to evaluate his need for accommodation despite their knowledge that he was disabled denied him meaningful access to prison services and constituted intentional discrimination).

⁸¹ See *Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 349 (4th Cir. 2021) (concluding that the U.S. Bureau of Prisons violated a deaf prisoner's First Amendment rights by denying him access to point-to-point videophone calls, without which he lacked any ability to communicate with the deaf community); *Heyer v. Federal Bureau of Prisons*, No. 18-01, at 42 (U.S. Dep't of Just. Feb. 25, 2022), <https://clearinghouse.net/doc/130651> [<https://perma.cc/9GDK-QG9A>] (finding that the BOP violated the Rehabilitation Act by failing to provide point-to-point videophone access or its functional equivalent, and ordering provision of a fully operational videophone within thirty days).

⁸² See *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1052 (S.D.N.Y. 1995), <https://clearinghouse.net/doc/54899> [<https://perma.cc/56YY-6EJ9>].

⁸³ See *McBride v. Mich. Dep't of Corr.*, 294 F. Supp. 3d 695, 700 (E.D. Mich. 2018); Consent Judgment and Order, *Clarkson v. Coughlin*, No. 91-cv-1792-RWS (S.D.N.Y. June 6, 1996), <https://clearinghouse.net/doc/4248> [<https://perma.cc/J83D-HL33>] (issuing consent judgment and order, following grant of summary judgment in plaintiffs' favor, requiring

But in this area of law as in nearly all others, settlements are more common than litigated judgments. Thus, most changes to policy and practice in these cases result from settlement agreements, usually negotiated after lengthy litigation. For this reason, the model policies proposed in Part III derive in large part from the settlement agreements in private ADA/Rehabilitation Act lawsuits, and from settlements to Department of Justice investigations,⁸⁴ both of which have outlined in extensive detail policies for compliance with federal antidiscrimination law.

Litigation can draw the attention and resources necessary to make important change,⁸⁵ and post-settlement monitoring and court enforcement can guide and safeguard implementation.⁸⁶ Even when litigation results in meaningful change, however, there may be significant downsides. Litigation is costly,⁸⁷ slow, and make adversaries of parties who might be better served by cooperating. Once a lawsuit has been resolved, problems may linger, or new problems may arise, with no clear path to resolution. Litigation may lead to retaliation against the prisoners leading the litigation efforts. It may also inadvertently further marginalize people who are most or multiply disabled; the needs of those most easily able to communicate with counsel are more likely to be understood and prioritized. Finally, procedural barriers to litigation may frustrate reform efforts in this area. For example, the requirement under the Prison Litigation Reform Act that prisoner-plaintiffs

provision of qualified sign language interpreters, assessment of needs and notice of right to and method for requesting auxiliary aids, services, and devices, and education and training of staff).

⁸⁴ The U.S. Department of Justice is empowered to receive and investigate complaints of noncompliance with Title II of the ADA, and, after investigating and issuing findings, to negotiate and secure voluntary compliance agreements or to bring civil enforcement actions. See 28 C.F.R. §§ 35.171–174 (2022); see also Settlement Agreement Between the United States of America and Elizabeth F. Arthur, in Her Official Capacity as the Arlington County Sheriff ¶ 4 (2016) [hereinafter Settlement Agreement, Arlington County Sheriff] https://www.ada.gov/arlington_co_sheriff_sa.html [https://perma.cc/3QM2-MHLD].

⁸⁵ Interview with Mark Cody, *infra* note 89; Interview with Marc Charmatz, *infra* note 89.

⁸⁶ Interview with Marc Charmatz, *infra* note 89.

⁸⁷ Attorney's fees, costs, and damages may total in the millions of dollars, on top of the costs of implementing negotiated changes. For example, Maryland recently settled a lawsuit filed by blind prisoners for \$1.4 million in damages and attorney's fees, in addition to an agreement to modify relevant procedures and provide requisite devices, aids, and services. See *Maryland Settles Discrimination Case by Blind Inmates for \$1.4 Million*, BROWN, GOLDSTEIN & LEVY (June 5, 2019), <https://browngold.com/news/discrimination-case-for-blind-inmates> [https://perma.cc/J8XK-E685]. Attorney's fees and costs, alone, may be burdensome for defendants. See, e.g., Stipulation of Settlement ¶ 97, *Holmes v. Godinez*, No. 1:11-cv-02961-MEA (E.D. Ill. July 12, 2018) [hereinafter *Holmes Stipulation of Settlement*], <https://clearinghouse.net/doc/102686> [https://perma.cc/L7DK-Z544] (enshrining agreement that Illinois Department of Correction would pay \$1.5 million in attorney's fees and costs); Settlement Agreement ¶ 77, *Disability Rights Florida v. Jones*, No. 4:16-cv-47-RH-CAS (N.D. Fla. July 7, 2017) [hereinafter *Disability Rights Florida Settlement Agreement*], <https://clearinghouse.net/doc/90381> [https://perma.cc/EU3B-Q4JR] (providing that Florida Department of Corrections would pay \$2 million in attorney's fees and costs).

first exhaust available administrative remedies⁸⁸ may be especially difficult to navigate for persons with communication disabilities.

Policy change outside of, but informed by, litigation outcomes, as recommended in Part III, can be proactive and collaborative, avoiding the pitfalls of litigation while achieving similar change.

Accordingly, this Article leans on litigation documents as its major sources. Settlement agreements in particular are valuable because they codify collaboratively developed solutions to problems. But more generally, different litigation documents can shed light on different aspects of correction conditions or solutions:

<u>Topic</u>	<u>Type of document</u>
Conditions, problems, needs	Complaints, expert reports, monitoring reports
What the law requires	Opinions, briefs
Training	Post-settlement reports, exhibits
Reforms/policies	Settlements, post-judgment reports
Results of reforms	Post-judgment reports, enforcement

Of course, litigation documents have drawbacks, too. They are static and may therefore be outdated with respect to technologies or best practices. They may prioritize the views of lawyers and leave out the views of non-parties. And they may offer an incomplete or unfinished picture of what worked in practice, or after litigation concluded. For this reason, we have supplemented our reliance on litigation documents with interviews and policy workshops with experts and advocates,⁸⁹ intended to help us fill in gaps and account for more recent developments.

⁸⁸ See 42 U.S.C. § 1997e(a). The Prison Litigation Reform Act has undermined prisoners' ability to bring, settle, and win lawsuits, requiring meticulous exhaustion, increasing filing fees, decreasing attorneys' fees, and limiting damages. See Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153–54 (2015).

⁸⁹ Tessa Bialek conducted the following interviews and follow up conversations, all via Zoom or telephone, on the dates listed:

Eileen Baker, Consultant to Indus., Educ. & Gov't (May 5 & May 18, 2022).

David Boyer & Philip Fornaci, Attorneys, Nat'l Disability Rts. Network (Feb. 22, 2022).

Marc Charmatz, Senior Attorney, National Association of the Deaf, Law and Advocacy Center (Mar. 9, 2022).

III. MODEL POLICIES AND COMMENTARY

The following model policies address treatment of prisoners with communication disabilities in jails and prisons. The model policies provide a detailed guide to implementing the requirements of federal antidiscrimination law and national standards, and are based on best practices in settlement provisions, court decisions, and related litigation documents, as well as input from advocates and experts working on these issues.

We introduce the policies in this Part with some guidance on *preparing* to implement them. Antidiscrimination efforts cannot succeed unless jails and prisons prepare for prisoners with a diverse array of communication disabilities even before any such prisoner is in their custody. Preparation is particularly crucial in the jail setting, where relatively short stays of detainees may preclude longer term adjustments. As one disability rights attorney reflected in an interview: “Once we hear about the problem, they are already gone.”⁹⁰ Proactive preparation should include the following:

- Adopt policies. Jails and prisons should adopt formal, detailed policies for the treatment of prisoners with communication disabilities to supplement or replace existing policies that may be nonexistent, so general as to be unhelpful in this context, and/or out-of-date. Note that some of the policies will require significant changes in practice—for example, medical intake protocols may need substantial adjustment, requiring in-advance consideration of and preparation for varied medical and related functional needs. See Policy 2.2.

Mark Cody, Legal Director, Disability Rts. Mich. (Mar. 8, 2022).

Deborah Golden, Attorney, Law Office of Deborah M. Golden (Feb. 18, 2022).

Eve Hill, Partner, Brown, Goldstein, & Levy (Mar. 2, 2022).

Kaj Kraus, Talila Lewis, & Roxanne Zech, Advocates, HEARD (Mar. 24, 2022)

Talila Lewis & Roxanne Zech, Advocates, HEARD (Apr. 25, 2022).

Barry Marano; ADA Coordinator, Va. Dep’t of Corr. (Mar. 7, 2022 & Apr. 12, 2022).

Richard Lorenzo Ray, ADA Tech. Access Consultant (Mar. 25, 2022).

Amy Robertson, Partner, Fox & Robertson (Feb. 24, 2022).

In addition, we conducted two workshops via Zoom, receiving feedback on the proposed policies, in draft, from numerous experts and advocates, and solicited written comments from practitioners on various versions of the draft. *See Acknowledgements, supra.*

⁹⁰ Interview with Mark Cody, *supra* note 89.

- Prepare for wide variation. There is not a one-size-fits-all solution for prisoners with communication disabilities. Instead, policies and practices should acknowledge that prisoners with communication disabilities may be differently and/or multiply disabled in ways that affect their abilities and needs. The requisite medical devices, auxiliary aids and services, and reasonable modifications and accommodations required for effective communication require a robust array of options and individualized solutions. For example, videophones may work well for some people who are deaf, but not for those who do not use sign language or who also have vision loss. Similarly, a white cane may enable independent navigation for some people who are blind, but it may not be a solution for persons with certain mobility disabilities. Policies should account for these differences by maximizing options—by making available as many different medical devices, auxiliary aids and services, and modifications and accommodations as possible—and by individualizing the choice among these options, informed to the maximum extent by the preferences and unique needs of the prisoner.
- Appoint a trained, experienced ADA coordinator for each facility and for each entity. Providing appropriate services for and treatment of persons with communication disabilities in jails and prisons requires understanding legal requirements, available technologies and services, and techniques for adapting those technologies and services to the correctional setting. As detailed in Policy 11.1, ADA coordinators with appropriate experience should be designated to lead these efforts and should be given sufficient time and resources to do so.
- Interface with community organizations and resources. Jails and prisons should identify and collaborate with community organizations, including P&As, state and local governmental agencies, community-based service providers, training centers, and centers for independent living. These organizations can participate in training staff and prisoners, including on available technologies;

can offer experience and insight that helps identify needed devices and equipment; and can identify local vendors and services. Jails and prisons can also contract with a qualified expert to perform an access survey to assess facilities and make recommendations.

- Enter into contracts with qualified interpreter services. As outlined in Policy 8.1, jails and prisons should proactively, in advance of any prisoner with communication disabilities being present, enter into contracts for remote and in-person interpretation, with qualified interpreters, as defined in Policy 13.6, to ensure that interpretation is available promptly when needed.
- Enter into contracts for specialized medical services. As described in Policies 2.2 and 7, jails and prisons should ensure that contracts are in place and in effect with accredited providers for necessary specialized medical services, such as audiology and ophthalmology services, to perform comprehensive hearing and/or vision assessments, including evaluating the need for medical devices at intake and on an ongoing basis.
- Ensure that existing contracts include the requisite accessibility components. Jails and prisons should ensure that existing contracts with outside providers include provisions for accessible technology and materials. For example, contracts for educational materials and resources and for telecommunications services should require accessible materials and equipment and adaptive technologies.
- Train staff. As specified in Policy 11.2, jails and prisons should provide training to all staff who have or may have contact with prisoners with communication disabilities. Trainings should cover the rights, needs, and capabilities of persons with such disabilities, as well as indicia of communication disabilities, relevant policies and practices, and medical devices, auxiliary aids and services, and reasonable modifications and accommodations. Staff should be trained at regular intervals, at least once annually, as well as during orientation to new employment or job responsibilities. When possible, jails and prisons should seek to hire

staff with relevant experience and to hire staff who are themselves disabled.

- Create accessible versions of all intake, orientation, and training materials. As outlined in Policy 3, jails and prisons should evaluate and overhaul their entire intake and orientation processes to ensure that all necessary presentations and materials—live, in writing, video, or other formats—are accessible to persons with communication disabilities. This may include preparing sign language and captioned versions of videos and written materials, Brailled or electronic versions of written materials with available assistive technologies, and other modifications.
- Purchase and install equipment. Policies 6-8 and 13.1, below, describe the types of medical devices and auxiliary aids and services that may be necessary for effective communication with prisoners with communication disabilities. Jails and prisons should purchase and install this equipment in advance, including videophones, captioned telephones, non-auditory alarms, large-screen televisions with captioning capabilities, text-to-speech and screen reading technologies and devices, and many more. As Policy 11.2 states, jails and prisons should also proactively train staff on how to use the equipment, and identify vendors and services for replacements and repairs.
- Anticipate needed modifications and accommodations. Jails and prisons should begin the process of identifying modifications and accommodations that prisoners with communication disabilities may require, including, for example: extra time for phone calls or with library resources, lead time to move between activities, and access to lower bunks or non-dormitory housing. Jails and prisons will need to modify existing policies and practices to allow for such reasonable modifications accommodations. See Policies 2, 6, 8, and 13.7.
- Prepare housing spaces with appropriate technologies. As described in Policy 5, jails and prisons should ensure that non-segregated housing spaces are available that are safe and equipped for persons with communication

disabilities. This means making the necessary medical devices, auxiliary aids and services, and reasonable modifications and accommodations available in non-isolation environments.

- Modify emergency protocols. Policy 8.7 details the required non-auditory alert and alarm systems, and emergency protocols must be modified accordingly. Jails and prisons must ensure that non-auditory alarm systems—providing visual and tactile notification of emergencies—are installed and available. Staff should be trained on protocols, procedures, and non-auditory alert technologies, and the necessary processes should be tested regularly in practice drills.

The model policies promote equal access to jail and prison services, programs, and activities, covering nondiscrimination, reasonable modification, and effective communication for incarcerated persons with communication disabilities. We have written these policies so that they can be copied and pasted, and then refined for a particular facility or system. In the model policies, we refer to the facility/system as “[entity],” and generally do not specify which particular staff are responsible for which particular duties; a system importing these model policies would probably wish to so specify. As Policy 13.9 states, when we refer to “staff” we are not distinguishing between employees and contractors. Finally, note that simply adopting these policies as written may not be enough; implementation will differ based on system characteristics, and detailed written guidance tailored to the particular system likely will be necessary to establish these processes and ensure their success.

The model policies are available at <https://clearinghouse.net/resource/3567/> in an unfootnoted word processing text format to facilitate copying and refining for use in particular jail and prison systems.

1. Antidiscrimination Principals

1.1 Overall Commitment to Equality

[Entity] shall not, because of a prisoner’s disability, exclude qualified prisoners with disabilities from participating in or deny them the benefits of [entity’s] services, programs, or activities, shall not provide an alternative service, program, or activity that is not equal to that afforded others, and shall provide medical devices, auxiliary aids and services, and reasonable modifications and accommodations that enable the prisoner to gain the same benefit, or to reach the same level of achievement, as non-disabled prisoners.

1.2 No Punishment of Disability or Its Expression

[Entity] shall not punish or penalize disability or its expression. For example, [entity] shall not discipline or otherwise disadvantage any prisoner who uses sign language to communicate, or any person who communicates with such a prisoner for communicating with sign language, including the expressive physical movement that is part of sign language. [Entity] shall not discipline or otherwise disadvantage any prisoner for failing to obey an order that the prisoner could not hear or a visual instruction that the prisoner could not see, or for failing to comply with any rule or expectation that was not effectively communicated to the prisoner.

1.3 No Disparate Treatment

[Entity] shall not, because of a prisoner's disability, exclude the prisoner from any service, program, or activity, including by making a housing or custody assignment that bars the prisoner from a service, program, or activity. Exclusion on the basis of disability is permissible only if it is necessary for the safe operation of the service, program, or activity, and the safety issue cannot be appropriately mitigated by an auxiliary aid or service and/or a reasonable modification or accommodation, or if the prisoner poses a direct threat to the health or safety of others, based on reasonable medical judgment relying on current medical knowledge and/or the best available objective evidence. Exclusions based on safety shall be founded on actual and individually evaluated risks, not on mere speculation, stereotypes, or generalizations about persons with disabilities.

1.4 Reasonable Modifications and Accommodations

[Entity] shall make reasonable modifications and accommodations to policies, practices, or procedures when the modifications and accommodations are necessary to avoid discrimination on the basis of disability, unless both the Facility and the Entity ADA Coordinator determine and demonstrate that making the modifications and accommodations would fundamentally alter the nature of the service, program, or activity, or would result in undue financial and administrative burdens, measured against all resources available for use in the funding and operation of the service, program, or activity. If the Facility and Entity ADA Coordinators determine and demonstrate that a modification or accommodation would cause a fundamental alteration or undue burden, [entity] shall take any other available action that would not result in such an alteration or such burdens, but would ensure that prisoners with disabilities receive, to the maximum extent possible, the benefits or services at issue.

1.5 Effective Communication

- A. [Entity] shall ensure that its communications with prisoners and members of the public who have communication disabilities are as effective as communications with others. This effective communication requirement extends to each and every communication by staff, contractors, and volunteers; it extends not just to formal or particularly important communication, but to all communication including routine and non-routine, formal or informal, oral, written, or video. [Entity] shall be prepared and equipped with a wide-range of medical devices, auxiliary aids and services, and reasonable modifications and accommodations to ensure effective communication in myriad settings and contexts.
- B. Effective communication shall afford prisoners with communication disabilities an opportunity to participate in and enjoy the benefits of [entity's] services, programs, and activities in a way that is substantially equal to the opportunity provided to similarly situated non-disabled prisoners.
- C. To ensure effective communication and equal access, [entity] shall frequently review and update its technologies and practices, so that as technology outside of confinement evolves, devices and practices available inside [entity] facilities keep pace.

1.6 Adverse Determinations

- A. Adverse determinations under this policy, including but not limited to determinations to exclude a prisoner with a communication disability from a service, program, or activity or to deny an auxiliary aid or service, or a modification or accommodation, because it results in a "fundamental alteration," "undue burden," or safety risk, shall be made in the first instance by the [Facility] ADA Coordinator, and shall be thoroughly documented. Such determinations shall not be final until reviewed and approved by [Entity] ADA Coordinator, with appropriate documentation.
- B. In evaluating any such potential adverse determination, the Facility and Entity ADA Coordinators shall give primary consideration to the request of the prisoner when required by Policy 1.9. Such determinations shall be made on an individualized basis and in accordance with Policy 1.3, and decisions related to financial and other resources shall be made in consideration of, and with documentation of, all resources available for use in the funding and operation of the department.

1.7 Integration Mandate

- A. [Entity] shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified prisoners with disabilities. [Entity] shall not:
- i. place prisoners with disabilities in inappropriate security classifications because no accessible cells or beds are available or based on administrative convenience in providing services;
 - ii. place prisoners with disabilities in designated medical areas unless they are actually receiving medical care or treatment; or
 - iii. place prisoners with disabilities in facilities that do not offer the same programs as the facilities where they would be housed but for the disability.

1.8 No Surcharges

[Entity] shall not charge prisoners with disabilities for the costs of measures, such as the provision of medical devices, auxiliary aids and services, or reasonable modifications and accommodations for program accessibility provided for under these policies. Under this rule against surcharges, items non-disabled people pay for shall be free for individuals with communication disabilities who need the items as an auxiliary aid. For example, if such an individual needs pen and paper as an auxiliary aid, to communicate, [entity] shall provide those items free of charge.

1.9 Primary Consideration to Prisoner Requests

- A. In identifying appropriate auxiliary aids and services, [entity] shall give primary consideration to the requests of prisoners with communication disabilities. This primary consideration must be informed by appropriate and affirmative notice, effectively communicated, of available auxiliary aids and services.
- B. [Entity] shall not insist upon or incentivize any medical intervention or provision of any medical device. [Entity] shall not require use of particular auxiliary aids and services, nor reasonable modifications and accommodations; shall allow prisoners to waive auxiliary aids and services and/or reasonable modifications and accommodations (including public identification as disabled but *not* including identification in private official records); and shall allow prisoners to easily and readily revoke any such waivers.

- C. [Entity] shall not restrict or limit a prisoner's access to any medical device, auxiliary aid or service, or reasonable modification or accommodation based solely on the fact the prisoner uses or has the opportunity to use another medical device, auxiliary aid or service, and/or reasonable modification or accommodation.
- D. [Entity] shall not rely on prisoners with communication disabilities to know their rights or what medical devices, auxiliary aids and services, and/or reasonable modifications and accommodations are available. [Entity] shall make all practicable efforts to inform prisoners of their rights under this policy, using effective, non-technical communication techniques that include affirmative explanation of potential medical devices, auxiliary aids and services, and reasonable modifications and accommodations, and the processes for seeking them. [Entity] shall provide necessary auxiliary aids and services and reasonable modifications and accommodations when the need for them is obvious.

2. *Initial Identification; Initial and Ongoing Assessment; and Requests for Auxiliary Aids and Services, and Reasonable Modifications and Accommodation*

2.1 Initial Identification⁹¹

- A. [Entity] shall ensure that the initial intake process is accessible to prisoners with communication disabilities by providing auxiliary aids and services, and reasonable modifications and accommodations necessary for effective communication. This may include, but is not limited to: ensuring immediate access to on-site or remote qualified sign language interpreters or qualified readers/writers; providing real-time captioning; and/or making all documents available in accessible format, which may include scanning and screen reading devices, so that blind or low vision prisoners can read and respond to them independently.

⁹¹ See, e.g., Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 125; Settlement Agreement at 9–10, *Briggs v. Mass. Dep't of Corr.*, No. 1:15-cv-40162-GAO (D. Mass. May 28, 2019) [hereinafter *Briggs Settlement Agreement*], <https://clearinghouse.net/doc/102593> [<https://perma.cc/X5M3-ZNQX>]; Amended & Restated Settlement Agreement Concerning Claims Arising Under the Americans with Disabilities Act & 504 of the Rehabilitation Act of 1973, & Resolving Phase I Trial of these Proceedings at 28, *Briggs v. Dunn*, No. 2:14-cv-00601-MHT-TFM (M.D. Ala. May 26, 2016) [hereinafter *Briggs Settlement Agreement Resolving Phase I*] <https://clearinghouse.net/doc/82631> [<https://perma.cc/K2EN-23FA>]; Voluntary Compliance Agreement Between the United States of America & the City of New York, the New York City Department of Correction, & the New York City Health & Hospitals Corporation Under the Americans with Disabilities Act, U.S. DEP'T OF JUST. 13 (Aug. 16, 2018) [hereinafter *Voluntary Compliance Agreement, City of New York*], <https://clearinghouse.net/doc/102123> [<https://perma.cc/T4VF-88R2>].

- B. Within 24 hours of admitting any prisoner, [entity] shall take reasonable efforts to identify whether a prisoner has a communication disability and whether the prisoner needs any medical devices, auxiliary aids and services, and/or reasonable modifications and accommodations. This initial identification process shall be tailored to the individual prisoner, and [entity] shall account for any additional disabilities that may affect the devices, aids, services, modifications, and/or accommodations required to ensure effective communication and equal access to services, programs, and activities.
- C. To attempt to identify and evaluate whether a prisoner is deaf, hard of hearing, blind, and/or low vision:
 - i. [Entity] shall ask each new admit if the new admit has hearing loss and shall perform a medical and functional exam to assess hearing.
 - ii. [Entity] shall ask each new admit if the new admit has vision loss and shall perform a medical and functional exam to assess vision.
- D. [Entity] shall ask any prisoner who self-identifies as deaf or hard of hearing whether that prisoner has ever used a sign language interpreter and if so whether their primary language is American Sign Language (ASL) or another signed language. If the prisoner identifies as a sign language user, a sign language interpreter will be provided to ensure effective communication for the remainder of the intake process.
- E. To begin the process of identifying necessary medical devices, auxiliary aids and services, and reasonable modifications and accommodations, [entity] shall ask any prisoner who self-identifies as deaf, hard of hearing, blind, and/or low vision to identify the medical devices, auxiliary aids and services, and reasonable modifications and accommodations the prisoner has used in the past and/or believes is needed. To facilitate this process, [entity] shall provide to each such prisoner information concerning the medical devices, auxiliary aids and services, and reasonable modifications and accommodations routinely available to prisoners with like disability.
- F. All responses and results from (B)–(E) shall be documented.

- G. [For jails only⁹²] As soon as [entity] staff learn that a person who is deaf, hard of hearing, blind, and/or low vision will arrive at [entity], they shall inquire through all available means—including, at a minimum, looking at records of any prior stay at the jail and asking the person’s lawyer—whether the person would like to use a qualified sign language interpreter, captioning, Brailled materials, audio recordings, or other auxiliary aids and services, considering the nature, length, context, complexity, and importance of the anticipated communication and the person’s usual method of communication.
- H. [For jails only] If a person with a communication disability prefers, requests, or is found to require, an auxiliary aid or service and/or a reasonable modification or accommodation for effective communication upon or before arrival, initial jail processing shall not proceed without the auxiliary aid or service and/or reasonable modification or accommodation, absent exceptional circumstances.

2.2 Medical Assessment⁹³

- A. If assessment by a medical professional during the initial intake process indicates that the prisoner may have a hearing disability significant enough to be appropriately treated with one (1) or two (2) hearing aids or other medical intervention, the prisoner shall be referred to a professionally accredited audiologist to perform a comprehensive hearing assessment, including evaluation of need for hearing aids.
- B. If assessment by a medical professional during the initial intake process indicates that the prisoner may have a vision disability significant enough to be appropriately treated with eyeglasses or other medical intervention, the prisoner shall be referred to a professionally accredited ophthalmologist to perform a comprehensive vision assessment, including evaluation of need for eyeglasses or other medical devices.
- C. [Entity] shall not confiscate medical devices related to hearing and vision—including, but not limited to, hearing aids, eyeglasses, and their associated equipment such as batteries, cleaning supplies, and

⁹² See, e.g., Settlement Agreement at 7–8, *Martos v. Miami-Dade County*, No. 1:16-cv-21501-JEM (S.D. Fla. 2016) [hereinafter *Martos Settlement Agreement*], <https://clearinghouse.net/doc/130803> [<https://perma.cc/BK45-P2V2>]; Settlement Agreement & Release of Claims ¶ 52, *Gordon v. Texas*, No. 98-cv-0394 (S.D. Tex. Aug. 9, 1999) [hereinafter *Gordon Settlement Agreement*], <https://clearinghouse.net/doc/130985> [<https://perma.cc/82C9-DYKD>].

⁹³ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § S; Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 32.

the like—of prisoners who enter with such devices. Prisoners shall be permitted to retain and use such devices and associated equipment and accessories. A professionally accredited audiologist or ophthalmologist, as appropriate, may perform a comprehensive assessment to evaluate whether a change or upgrade is indicated.

- D. The medical assessment shall determine what supplies are routinely needed, and [entity] shall make provision to ensure that these supplies are readily available, without a waiting period.

2.3 Functional Assessment

- A. Initial assessment for prisoners who self-identify as or are found to be deaf, hard of hearing, blind, and/or low vision shall include evaluation—with any necessary auxiliary aids and services, or reasonable modifications and accommodations—of verbal and written communication skills, reading level, and, where appropriate, proficiency in sign language by an appropriate professional.
- B. A basic form of such an evaluation shall be done immediately, if possible within 24 hours. Then a more complete evaluation can follow.
- C. The sign language evaluation shall be completed by a qualified evaluator who is able to assess proficiency in various signed languages, including but not limited to ASL. Such an evaluator shall be qualified to perform the communication evaluation and should communicate directly, via sign language if appropriate, with the prisoner who is deaf. The qualification to perform such an evaluation is not merely sign language proficiency, and a qualified sign language interpreter is not necessarily appropriately qualified. However, if a prisoner who is deaf appears not to speak or write English, and not to use ASL, a Certified Deaf Interpreter (CDI) may be required for effective communication during the evaluation.
- D. The assessment shall also include inquiry into and documentation of any needs, auxiliary aids and services, and/or reasonable modifications and accommodations desired by the prisoner. [Entity] shall conduct an individualized assessment of the need for auxiliary aids and services, and/or reasonable modifications and accommodations and the timing, duration, and frequency with which they shall be required. To make this determination, [entity] staff shall ask each new prisoner, and shall record the response, if the new prisoner:
 - i. requires a reasonable modification or accommodation for a disability;

- ii. has ever used a hearing aid or any other medical device to assist with hearing;
- iii. has ever relied on eyeglasses or any other medical device to assist with seeing;
- iv. believes a reasonable modification or accommodation would help with hearing or seeing;
- v. [if identified as deaf or hard of hearing] has ever used a sign language interpreter, captioning, amplifiers, teletypewriter and/or videophones, visual alarms, vibrating watches or other tactile alerts and notification systems, over-the-ear headphones, or other auxiliary aids or services, or reasonable modifications and accommodations;
- vi. [if identified as deaf or hard or hearing] whether the prisoner's primary language is ASL, English, or some other spoken or sign language;
- vii. [if identified as blind or low vision] whether the prisoner has ever used large print materials, Braille, audio recordings, screen readers, talking watches, white canes, or other or other auxiliary aids or services, or reasonable modifications and accommodations.

E. Subsequent assessment for prisoners who self-identify as or are found to be:

- i. deaf or hard of hearing such that, unaided by any medical device, they are unable to hear in one or both ears sufficiently to understand the spoken word, considering the level of noise in the prison environment; and/or
- ii. blind or low vision such that, unaided by any medical device, they are unable to see in one or both eyes sufficiently to understand written text and/or to navigate, considering the typical prison environment

shall include evaluation by a qualified assessor with experience evaluating individuals with that prisoner's communication disability. The qualified assessor shall make recommendations about medical devices, auxiliary aids and services, and/or reasonable modifications and accommodations that may be necessary to ensure effective communication and to permit the prisoner to adequately, equally, and fully participate in all services, programs, and activities, benefits, and other opportunities.

F. Results of initial and subsequent functional assessments shall be recorded in the prisoner's record and in any electronic information system, and provided in writing to all staff responsible for the

prisoner's medical care, programs, or custody and supervision. The record containing the results of this assessment should follow the prisoner on any transfer within or between facilities.

2.4 Communication and Accommodation Plan⁹⁴

- A. Immediately after initial identification of a communication disability—which should occur within the first 24 hours of incarceration—[entity] shall develop an initial communication and accommodation plan to promote effective communication and equal access to services, programs, activities.
- B. Within 30 days of initial identification of a communication disability, [entity], in collaboration with the prisoner, shall finalize a communication and accommodation plan and document the plan in all relevant prisoner records.
- C. The communication and accommodation plan shall identify the medical devices, auxiliary aids and services, and reasonable modifications and accommodations necessary for effective communication and access to [entity] services, programs and activities. The communication and accommodation plan shall be tailored to the individual prisoner, developed through an interactive and ongoing process, and shall account for any additional disabilities that may affect the devices, aids, services, modifications, and/or accommodations required to ensure effective communication and equal access to services, programs, and activities.
- D. As required by Policy 1.9, primary consideration shall be given to the expressed choice of the prisoner in determining the appropriate auxiliary aids and services to ensure effective communication and access; for all auxiliary aids and services, and reasonable modifications and accommodations, any deviation from the prisoner's expressed preferences shall be documented and the rationale explained.
- E. All auxiliary aids and services and reasonable modifications and accommodations identified in the plan shall be provided in a timely manner.
- F. Communication and accommodation plans shall be reviewed at least every six (6) months, in an in-person meeting between the [Facility] ADA Coordinator and the prisoner and necessary changes made.

⁹⁴ See, e.g., VT. AHS DOC No. 316, *supra* note 55, § C.

Assessment and results shall be documented in the communication and accommodation plan.

- G. A prisoner with a communication and accommodation plan may supplement or modify the information contained in the plan at any time by informing the [Facility] ADA Coordinator of the new information.
- H. All facility and medical staff having contact with a prisoner with a communication disability shall have access to the communication and accommodation plan. The plan shall not be treated as confidential medical information unless so requested by the prisoner.
- I. The Facility ADA Coordinator shall be responsible for ensuring that the medical devices, auxiliary aids and services, and reasonable modifications and accommodations required by a prisoner's communication and accommodation plan are provided to the prisoner as required and without delay. This includes tracking a prisoner's scheduled programs, appointments, and activities, such as classes, work assignments, hearings, and medical appointments, to ensure, in advance, that necessary aids, services, modifications, and accommodations are scheduled, working, and ready.

2.5 Periodic Reassessment and Subsequent Requests⁹⁵

- A. At least once every six (6) months, and at any time requested by a prisoner determined to have a communication disability, [entity] shall reassess to determine whether any changes in medical devices, auxiliary aids and services, or reasonable modifications and accommodations, are necessary. These reassessments shall include but not be limited to determining whether the prisoner is able to effectively communicate and to participate in and receive equal benefits from services, programs, and activities, and whether the prisoner desires any changes to the plan.
- B. A prisoner not initially found to require, or initially refusing, medical devices, auxiliary aids and services, or reasonable modifications and

⁹⁵ See, e.g., Disability Rights Florida Settlement Agreement, *supra* note 87, ¶¶ 13, 16; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶ 28 (setting 1-month reassessment period in jail setting); Settlement Agreement among the United States of America, the County of Arapahoe, Colorado, and Arapahoe County Sheriff J. Grayson Robinson, and Plaintiffs in Lawrence et al. v. City of Englewood, et. al. ¶ 32 (Mar. 22, 2013) (No. 204-13-310) [hereinafter Settlement Agreement, Arapahoe County], <https://www.ada.gov/englewood.htm> [<https://perma.cc/7U4H-3SBE>]; Settlement Agreement § III(F), Jarboe v. Md. Dep't of Pub. Safety & Corr. Servs., No. 1:12-cv-00572-ELH (D. Md. 2013) [hereinafter Jarboe Settlement Agreement], <https://clearinghouse.net/doc/102685> [<https://perma.cc/3AYJ-5ZPC>].

accommodations, or desiring a change in the same, may submit such a request for at any time. Requested auxiliary aids and services, and reasonable modifications and accommodations shall be made available to the prisoner for this process. Such requests shall be considered in good faith, and shall include an in-person meeting with the prisoner—with communications aids and services as required—and, if medical issues are relevant, a medical assessment by appropriate medical staff.

- C. Consideration of the request shall be, in the first instance, by the [Facility] ADA Coordinator. The denial of a request for a medical device, auxiliary aid or service, or modification or accommodation shall be made only in accordance with the guidelines in Policy 1.6 and shall be documented in writing in the prisoner's record and be appealable to [Entity] ADA Coordinator, pursuant to Policy 2.6.
- D. Any changes in the prisoner's medical devices, auxiliary aids and services, and/or reasonable modifications and accommodations, or other aspect of a communication and accommodation plan shall be made available to staff responsible for the prisoner's medical care, programs, custody, and supervision.

2.6 Appeal of Denial of Requests⁹⁶

- A. [Entity] shall permit a prisoner whose request for a medical device, auxiliary aid or service, and/or modification or accommodation was denied by the [Facility] ADA Coordinator to appeal the decision to [Entity] ADA Coordinator. Upon request, prisoners with communication disabilities shall be provided assistance in completing the appeal process and with any required documents. [Entity] shall provide requested auxiliary aids and services and reasonable modifications and accommodations to permit independent completion of the process.
- B. [Entity] ADA Coordinator shall review the appeal and may consult with [Facility] ADA Coordinator and medical and correctional staff as appropriate in order to render a decision. [Entity] ADA Coordinator shall render a decision on the appeal within 20 business days. The decision shall be provided to the prisoner in a format accessible to that prisoner and shall be documented in the prisoner's record.

⁹⁶ See, e.g., MASS. DEP'T OF CORR., POLICY 103 DOC 408.08: REASONABLE ACCOMMODATIONS FOR INMATES (Mar. 2021), <https://clearinghouse.net/resource/3567> [<https://perma.cc/T6FK-56FN>]; Briggs Settlement Agreement, *supra* note 91, at 21.

Commentary

Jails and prisons must ensure that all prisoners, at the time of intake, are promptly assessed for communication disabilities and related needs. Initial assessment must include complete and competent medical health histories and evaluations. But medical assessment alone will be insufficient to comprehensively identify and meet the needs of prisoners with communication disabilities. Instead, medical and correctional staff, and other qualified professionals, must collaborate to evaluate how a communication impairment affects a prisoner's ability to communicate and to access the full range of services, programs, and activities.⁹⁷ Consultation with the prisoner is a necessary piece of the process, but cannot be the only mechanism for identifying disabilities and needs—stigma, confusion, and fear may be barriers to self-identification as disabled. Confidential, comprehensive screening by appropriately trained and qualified professionals is therefore essential.

An initial assessment should be functional as well as medical, including evaluation of ability to communicate and to perform tasks necessary in the correctional setting.⁹⁸ Medical and correctional staff should work together, and rapidly, to consider which medical devices, auxiliary aids and services, and reasonable modifications and accommodations are needed to ensure effective communication and equal access to services, programs, and activities.⁹⁹ Relevant decisions must be individualized and made in consultation with, and with deference to, the prisoner, whose preferences for auxiliary aids and services must be given primary consideration,¹⁰⁰ and who should have substantial input into and the right to refuse any proposed reasonable modification or accommodation.

Ultimately, jails and prisons should create an individualized communication and accommodation plan, detailing what specific means of communication, auxiliary aids and services, and reasonable modifications and

⁹⁷ See, e.g., Schlanger Expert Declaration, *supra* note 16, at 16–17; NCCHC STANDARDS FOR HEALTH SERVICES IN PRISONS, *supra* note 63, § P-B-07 (requiring procedures for collaboration between medical and correctional staff to make both groups aware of special considerations and decisions related to special needs patients); NCCHC STANDARDS FOR HEALTH SERVICES IN JAILS, *supra* note 63, § J-A-08 (same, in jail setting).

⁹⁸ Schlanger Expert Declaration, *supra* note 16, at 16–19; Cokely Expert Report, *supra* note 11, at 44.

⁹⁹ Schlanger Expert Declaration, *supra* note 16, at 15–19; Cokely Expert Report, *supra* note 11, at 44; see also NCCHC STANDARDS FOR HEALTH SERVICES IN PRISONS, *supra* note 63, §§ P-B-07, P-F-01; NCCHC STANDARDS FOR HEALTH SERVICES IN JAILS, *supra* note 63, §§ J-A-08, J-G-01.

¹⁰⁰ 28 C.F.R. § 35.160(b)(2) (2022); see also Cokely Expert Report, *supra* note 11, at 33 (“[I]t is simply not possible to determine or infer effective means of communication solely on the basis of an audiological exam;” instead, the deaf and hard of hearing prisoners themselves must “be consulted on what means of communication are effective for them.”).

accommodations are required, and under what circumstances. The plan should become a permanent part of the prisoner's record, following the prisoner in the event of transfer within or between facilities, and must be reviewed by all staff in direct contact with the prisoner.¹⁰¹ Any required medical devices or auxiliary aids and services must be delivered promptly, and be maintained.

In addition, and prior to the individualized assessment at intake, each facility must be able to provide the basic auxiliary aids and services and reasonable modifications and accommodations necessary to ensure that the intake itself is accessible. These include immediate access to qualified sign language interpreters and captioning services—as appropriate to a prisoner's language needs and preferences—and independently accessible text-based interactions, for example, medical forms, for blind or low vision people.

It is essential that communication with a prisoner about prospective medical devices, auxiliary aids and services, and reasonable modifications and accommodations be effective and direct. Questions must be explicit and thorough. Some prisoners might assume that identifying themselves as deaf and/or blind constitutes an implicit request for a particular modification or accommodation,¹⁰² and many will not know enough about the correctional setting to anticipate every instance in which they might need a particular auxiliary aid or service, or a reasonable modification or accommodation.¹⁰³ A proactive, collaborative, and accessible needs assessment thus supports the independence, dignity, and wellbeing of prisoners with communication disabilities,¹⁰⁴ and places the burden on the institution to proactively identify and address communication barriers at the outset.¹⁰⁵ A prisoner's

¹⁰¹ See Cokely Expert Report, *supra* note 11, at 34.

¹⁰² Brief of Amicus Curiae Nat'l Assoc. of the Deaf in Support of Plaintiff William Pierce at 6, *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 254 (D.D.C. 2015) (No. 13-cv-0134-KB), <https://clearinghouse.net/doc/100302> [<https://perma.cc/KUG2-5JB5>] (“Of the thousands of intakes we have received over the years, not one involved an individual who took offense at being offered an auxiliary aid or service or being assessed for such a need. By contrast, although the majority of these intakes reflect a denial of a request for auxiliary aids and services, some come from individuals who believed that showing that they are deaf and use sign language suffices as an implicit interpreter request.”).

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 9–10; *Pierce*, 128 F. Supp. 3d at 272 (holding that “prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the accommodations that are necessary for those inmates to access the prison's programs and services, without regard to whether or not the disabled individual has made a specific request for accommodation and without relying solely on the assumptions of prison officials regarding that individual's needs”).

communication disability must not itself become a barrier to communicating need for reasonable modifications and accommodations.¹⁰⁶

Initial intake must not be the only opportunity to identify disabilities and needs; prisoners may become disabled or more significantly disabled over time during incarceration, either because their medical condition worsens or because of some changing interaction of their impairment and their environment.¹⁰⁷ In addition, technology-based aids and services evolve, often in ways that prisoners do not have the resources to learn about. Thus, there must be ongoing opportunities for evaluation, and reevaluation, of needs, with a process initiated by prisoner self-report or by referral from correctional or medical staff. Effective notice about disability resources and processes for self-reporting, as described throughout Policy 3, are essential to a well-functioning process for ongoing self-identification and evaluation.¹⁰⁸ And, of course, the request process must itself be accessible to prisoners with communication disabilities.¹⁰⁹

Finally, although a medical assessment may evaluate a prisoner for increased or additional need, medical devices that a prisoner already possesses at the time of intake—such as eyeglasses, hearing aids, and/or white canes—should not be removed or confiscated. Rather, such devices should be presumptively permissible, and prisoners should be allowed to maintain and use these devices while incarcerated, including during transport and in restricted housing or solitary confinement.

3. *Notice of Rights and Resources*

3.1 Notice of Rights¹¹⁰

- A. [Entity] shall provide all newly admitted prisoners with information about: their rights under the ADA and the Rehabilitation Act;

¹⁰⁶ *Pierre*, 128 F. Supp. 3d at 269–70; Interview with Mark Cody, *supra* note 89; Interview with Barry Marano, *supra* note 89.

¹⁰⁷ Schlanger Expert Declaration, *supra* note 16, at 19; Interview with Barry Marano, *supra* note 89.

¹⁰⁸ Schlanger Expert Declaration, *supra* note 16, at 19–20.

¹⁰⁹ *Id.* ¶ 45.

¹¹⁰ See, e.g., Order Certifying Settlement Class, Appointing Class Representatives and Class Counsel, Preliminarily Approving the Parties' Private Settlement Agreement, and Providing for Notice to Class Members at Exhibit 1, *Medina v. Fischer*, No. 1:11-cv-00176-JLC (S.D.N.Y. Mar. 4, 2014) [hereinafter *Medina Settlement Agreement*], <https://clearinghouse.net/doc/75779> [<https://perma.cc/M3GM-DQ9U>]; Briggs Settlement Agreement, *supra* note 91, at 10–11; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶¶ 21, 31, 40; Voluntary Compliance Agreement, City of New York, *supra* note 91, § VII(2); Braggs Settlement Agreement Resolving Phase I, *supra* note 91, § IX; Brown Non-Monetary Term

available medical devices, auxiliary aids and services, and reasonable modifications and accommodations; the process for requesting medical devices, auxiliary aids and services, and reasonable modifications and accommodations, and that they are available free of cost; and the names and contact information of both the Facility and Entity ADA Coordinator(s).

- B. The information in section (A) shall be communicated effectively, including with use of any necessary auxiliary aids and services, which may include but are not limited to the following:
 - i. For deaf or hard of hearing prisoners whose primary language is a signed language, the information shall be communicated through a qualified sign language interpreter, which may be accomplished through a video recording of a sign language rendition of the information.
 - ii. For deaf or hard of hearing prisoners whose primary language is English and who are sufficiently literate, any audible materials shall include captions.
 - iii. Any written materials shall be available in large print (at least size 18 font) and in a format accessible to persons who are blind or low vision (options include large print, electronic with available assistive technology, Braille, or orally, as aligns with the prisoner's preferred method for communication).
- C. Information about prisoner rights under the ADA and the Rehabilitation Act, available auxiliary aids and services and reasonable modifications and accommodations, and the process for requesting them, shall also be displayed in accessible formats throughout [facilities], in all places where notices to prisoners are ordinarily posted, including in each housing unit.
 - i. Posted signs shall be in large print (at least size 18 font).

Sheet, *supra* note 78, ¶ 2; Martos Settlement Agreement, *supra* note 92, at 11. PREA implementation guidance is instructive here, as, similarly, disability notice ought be “provided in formats or through methods that ensure effective communication with inmates with disabilities, including inmates who are . . . blind or have low vision.” 28 C.F.R. § 115.16(c) (2022).

- ii. Posted signs shall include the International Symbol for Hearing Loss, a symbol to indicate the availability of sign language interpreters, and a symbol for a TTY.



- iii. Information shall also be made available in a format accessible to persons who are blind or low vision, including electronic, with available assistive technology, Braille, or audio, as appropriate to the needs and skills of the blind person).

3.2 Intake and Orientation Materials¹¹¹

- A. Intake and orientation materials, including any prisoner handbook, shall be communicated effectively with prisoners with communication disabilities, including:
 - i. For deaf or hard of hearing prisoners whose primary language is a signed language, the materials shall be available in that signed language. [Entity] may show such persons a video of a qualified interpreter interpreting all intake and orientation materials using the signed language that the prisoner knows. The video shall be shown as soon as practicable after the intake process and shall be available upon request for review. At the request of a prisoner whose primary language is a signed language, [entity] shall provide that prisoner with the opportunity to meet with a staff member accompanied by a qualified interpreter to ask any questions regarding intake and orientation materials. Captioning and a written transcript of the same information shall also be made available for persons who are deaf or hard of hearing, who do not use sign language, but who can read English (or another language, in which captioning and a written transcript shall be made available).

¹¹¹ See, e.g., Gordon Settlement Agreement, *supra* note 92, ¶ 10; Settlement Agreement ¶ 4.5, *Siaki v. Darr*, No. 1:11-cv-03074-JLK-BNB (D. Colo. Sept. 26, 2012), <https://clearinghouse.net/doc/104564> [<https://perma.cc/TKY2-GL55>]; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶ 31; Braggs Settlement Agreement Resolving Phase I, *supra* note 91, at 42–43; Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 2.

- ii. For blind or low vision prisoners, intake and orientation materials shall be provided in large print (at least size 18 font); Braille; electronic with available assistive technology, and/or orally, as aligns with the prisoner's preferred method for communication.

Commentary

Jails and prisons must evaluate and overhaul their entire intake and orientation processes to ensure that all necessary presentations and materials are accessible to persons with communication disabilities. This must be done proactively, *before* a person needing modified materials enters custody, to ensure prompt and effective initial orientation. Relevant information about available resources and processes for requesting medical devices, auxiliary aids and services, and reasonable modifications and accommodations must also remain available and accessible after initial entry, for those whose conditions develop or worsen while incarcerated, or those who wish to review the material for any other reason.

4. Identification

4.1 Identification¹¹²

- A. When a prisoner is identified as having a communication-related disability, [entity] shall take appropriate steps to ensure that all staff having contact with that prisoner are made aware of the disability and the prisoner's communication and accommodation plan, including any necessary medical devices, auxiliary aids and services, and reasonable modifications and accommodations.
- B. [Entity] shall freely permit a prisoner with a communication disability who chooses to use identification cards, badges, bracelets, vests, signs, or other public forms of identification to do so. A prisoner may choose at any time to modify the decision about

¹¹² See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, §§ X, Z; VT. AHS DOC No. 316, *supra* note 55, § A(5); Settlement Agreement Between the United States of America and South Carolina Department of Corrections Under the Americans with Disabilities Act ¶ 37 (Mar. 29, 2018) [hereinafter Settlement Agreement, SC DOC], https://www.ada.gov/south_carolina_doc_sa.html [<https://perma.cc/CLM5-PV8T>]; Martos Settlement Agreement, *supra* note 92, at 14; Briggs Settlement Agreement, *supra* note 91, at 20; Jarboe Settlement Agreement, *supra* note 95, § III(C); Holmes Stipulation of Settlement, *supra* note 87, ¶¶ 43, 44; Medina Settlement Agreement, *supra* note 110, at exhibit 1 ¶ II(C)(2); Schlanger Expert Declaration, *supra* note 16, at 31–32, 34–35; Interview with Barry Marano, *supra* note 89.

whether to use a form of public identification; [entity] shall promptly implement that changed decision.

- C. For those prisoners with communication disabilities who choose to be visually identifiable, appropriate mechanisms for such identification may include:
- i. An identification card, bracelet, vest, or badge indicating the nature of the disability and preferred method of communication, which the prisoner can carry on their person and present to staff and/or other prisoners as necessary;
 - ii. An identification sign indicating the nature of the disability and preferred method of communication placed on the prisoner's cell door or above their bed.
- D. Facilities housing prisoners with communication disabilities shall post in a prominent location (e.g., a front desk) a notice clearly stating that the facility houses prisoners with communication disabilities and the method—card, bracelet, vest, badge, bed or door card, etc.—for identifying the prisoners who have chosen to use such identification.

5. *Classification and Housing*

5.1 Classification and Housing¹¹³

- A. Security classification determinations shall be made without regard to a prisoner's communication disability. Auxiliary aids and services

¹¹³ See, e.g., NEB. DEP'T OF CORR. SERVS., POLICY 004.01: ADA – INMATES AND THE PUBLIC, § IV(A)–(B) (2021) [hereinafter NDCS POLICY 004.01], <https://clearinghouse.net/resource/3567> [<https://perma.cc/8A4X-5NCM>]; VA. DEP'T OF CORR., OPERATING PROCEDURE 801.3: MANAGING OFFENDERS WITH DISABILITIES 5–6 (2016) [hereinafter VA DOC 801.3], <https://clearinghouse.net/resource/3567> [<https://perma.cc/XG5R-LXRH>]; Martos Settlement Agreement, *supra* note 92, at 11; Brown Non-Monetary Term Sheet, *supra* note 78, ¶¶ 8–9; Braggs Settlement Agreement Resolving Phase I, *supra* note 91, at 36; ABA TREATMENT OF PRISONERS, *supra* note 66, at 70, 77–78 (Standard 23-3.2 and commentary). The Title II regulations in 28 C.F.R. § 35.152(b) (2022) are also instructive:

(1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the

and reasonable modifications or accommodations shall be provided at any stage of the classification process at which they are required for effective communication with and participation by a prisoner with a communication disability.

- B. Prisoners with communication disabilities shall be housed in a manner that provides for their safety and socialization. Upon request by the prisoner, [entity] shall house prisoners who are blind or severely low vision in cells, including single cells, rather than dormitories.
- C. [Entity] shall house prisoners with communication disabilities in a setting appropriate given their classification—which may not be altered for reasons related to disability, and shall integrate such prisoners with non-disabled populations to the maximum extent possible. [Entity] shall not house prisoners with communication disabilities in a more restrictive setting due to their disability or to lack of available modifications and accommodations elsewhere.
- D. [Entity] shall take steps to avoid communication isolation for prisoners with communication disabilities, particularly those who use sign language to communicate. It shall not adopt or implement a rule against housing such prisoners in the same dorm, unit, or facility.

individuals. Unless it is appropriate to make an exception, a public entity—

(i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and

(iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(3) Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

Id. § 35.152(b).

- E. With their consent, prisoners with communication disabilities may be housed in dorms, units, or facilities that minimize their communication isolation. For example, prisoners who sign to communicate might be housed in a dorm with other such prisoners, to allow them to more easily communicate with each other. However:
- i. Prisoners with communication disabilities shall be placed in designated medical areas only when necessary to provide medical care or treatment.
 - ii. Special placements should not lack programs that would be available in other housing assignments.
- F. Prisoners who are blind or severely low vision shall receive, in coordination with relevant community entities and resources, prompt orientation and mobility instruction upon entering new living environments, including within the same facility, including a guided walkthrough. Such training shall be implemented by certified orientation and mobility specialists, shall be adapted to the particular needs and skills of the individual prisoner (including substantial general training for the newly blind or severely low vision), and shall include both specific orientation to surroundings and general training to assist the prisoner in adapting to new situations and environments.
- G. When prisoners who are blind or low vision are moved between units or facilities, effort shall be made to preserve features of their prior living situation—such as housing on a bottom bunk—relevant to orientation and mobility.

Commentary

The integration mandate of federal antidiscrimination law requires that persons with communication disabilities be housed in the most integrated appropriate setting—and not isolated in segregation or medical housing because of a facility's inability to otherwise implement the required practices and procedures.¹¹⁴ Classification decisions must be made without regard to communication disabilities, and facilities at every classification or security level must be equipped to house persons who are deaf, hard of hearing, blind, or low vision, with the requisite auxiliary aids and services and reasonable modifications and accommodations.¹¹⁵

Prisoners with communication disabilities may prefer to be housed in facilities with other persons who share their disabilities—for example, deaf

¹¹⁴ See *supra* Part I(B)(4).

¹¹⁵ Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 9.

prisoners who communicate with ASL may prefer to be housed with other deaf prisoners who also communicate with ASL. This kind of grouping may also permit correctional systems to focus resources for auxiliary aids and services and reasonable modifications and accommodations at particular facilities, which might align with resources available in the community—for example, it may be easier to arrange for in-person ASL interpreting services at facilities near urban centers.¹¹⁶ Importantly, however, custody levels must not be altered for purposes of grouping or moving persons with disabilities. Advocates are not of one mind about whether grouping, particularly as a means to lessen the isolation of prisoners with communication disabilities, is appropriate—in most cases, advocates defer to the preferences of their clients.¹¹⁷

For prisoners who are blind or very low vision, housing in cells, especially single cells, may be the safest and most appropriate choice. Blind and very low vision prisoners are especially vulnerable to abuse by cellmates, and may also require a housing situation that maximizes their ability to keep track of their belongings and navigate their surroundings.¹¹⁸ Housing policies should account for these concerns when possible, with medical staff input as appropriate.¹¹⁹

Blind and low vision prisoners may require different levels of orientation and mobility training depending on whether they are newly blind, whether they have had such training before, and other factors. Training must be implemented by orientation and mobility specialists with nationally recognized certification, which, at the time of publication, include certification as a Certified Orientation and Mobility Specialist or a National Orientation and Mobility Certification.

¹¹⁶ See Cokely Expert Report, *supra* note 11, at 56; Interview with Deborah Golden, *supra* note 89; Interview with Barry Marano, *supra* note 89; Settlement Agreement § IV(A), *Minnis v. Johnson*, No. 10-cv-00096-TSE-TRJ (E.D. Va. Oct. 18, 2010) [hereinafter *Minnis Settlement Agreement*], <https://clearinghouse.net/doc/69410> [<https://perma.cc/M7J7-GSSK>].

¹¹⁷ Interview with David Boyer & Philip Fornaci, *supra* note 89; Interview with Mark Cody, *supra* note 89; Interview with Deborah Golden, *supra* note 89.

¹¹⁸ Interview with Eve Hill, *supra* note 89.

¹¹⁹ Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 8.

6. *Participation in Services, Programs, and Activities*6.1 Access to Services, Programs, and Activities¹²⁰

- A. In accordance with Policy 1.1, [entity] shall not exclude otherwise qualified prisoners with disabilities from participating in or enjoying the benefits of services, programs, or activities, as defined in Policy 13.8, including, but not limited to, educational, vocational, recreational, rehabilitative, early release, support, treatment, and religious services, programs, and activities. [Entity] shall provide appropriate auxiliary aids and services and make reasonable modifications and accommodations to policies, practices, or procedures to ensure equal participation in or benefit from [entity] services, programs, and activities, and shall incorporate those aids, services, modifications, and accommodations in the prisoner's Communication and Accommodation Plan, described in Policy 2.4 and 2.5. [Entity] shall give primary consideration to prisoner preferences, pursuant to Policy 1.9, in determining which auxiliary aids and services are required.
- B. [Entity] shall ensure that the materials for learning about, applying for or requesting, and appealing denial of services, programs, or activities are accessible to prisoners with communication disabilities. This may include modifying requirements or processes—such as rules that requests or appeals must be made in writing and/or on particular forms—to account for different communication capacities, technologies, and needs.
- C. [Entity] shall ensure that the prisoner's primary method of communication is used during the prisoner's participation in the program, service, or activity.
- D. [Entity] shall provide opportunities for institutional work assignments for prisoners with disabilities that are consistent with opportunities for the same assignments given to similarly situated non-disabled prisoners. Such assignments shall be offered unless

¹²⁰ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, §§ JJ, OO; PA. DEP'T OF CORR., POLICY NO. DC-ADM 006: REASONABLE ACCOMMODATIONS FOR INMATES WITH DISABILITIES § 1(C)(1) (2009), <https://clearinghouse.net/resource/3567> [<https://perma.cc/62XV-KH3Y>] (“No inmate shall be discriminated against from participating in work programs due to a qualified disability. The Department is required to make reasonable accommodations to the known disability of qualified inmate applicants with disabilities.”); Settlement Agreement, SC DOC, *supra* note 112, ¶ 17; Voluntary Compliance Agreement, City of New York, *supra* note 91, § III(1)–(2); Braggs Settlement Agreement Resolving Phase I, *supra* note 91, at 24; Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 10; Minnis Settlement Agreement, *supra* note 116, § III(F)–(G); Expert Report of Richard Lorenzo Ray at 4–5, *McBride v. Mich. Dep’t of Corr.*, No. 2:15-cv-11222 (Oct. 28, 2016) [hereinafter Ray Expert Report], <https://clearinghouse.net/doc/130804> [<https://perma.cc/B2SL-4XNR>]; ABA TREATMENT OF PRISONERS, *supra* note 66, at 23-7.2(d).

[entity] determines, after individualized assessment that an assignment presents a direct threat of injury or death.

- E. If a prisoner is unable to participate in a service, program, or activity due to disability that cannot be accommodated, [entity] shall ensure that the prisoner does not suffer adverse consequences such as loss of sentencing credit for good conduct, discipline, or denial of parole and shall provide the opportunity to earn an equal amount of good conduct time credit for participating in alternative activities.

6.2 Access to Visiting

- A. In order to facilitate equal access to visits with their family and others for prisoners with communication disabilities, [Entity] shall allowing visitors to bring and use necessary or useful auxiliary aids and services for communicating with the prisoner. [Entity] shall allow visitors to use appropriate devices or to bring a qualified interpreter for a prisoner who needs interpretation.
- B. [Entity] shall provide effective communication to visitors who have communication disabilities, including by providing qualified interpretation.

7. *Medical Devices*

7.1 Hearing Aids and Cochlear Processors¹²¹

- A. Pursuant to Policy 2.2(A), [entity] shall ensure that a professionally accredited and licensed audiologist evaluates eligible prisoners who are deaf or hard of hearing to determine need for hearing aids, and eligibility for cochlear implants, and shall provide hearing aids or cochlear implants free of charge as necessary and desired by the prisoner to ensure effective communication and equal access to services, programs, and activities. The audiologist is to use appropriate modern medical equipment to identify the level of hearing loss and which assistive hearing technology offers an appropriate medical option for the prisoner who is deaf or hard of hearing. [Entity] shall offer prisoners with bilateral hearing loss hearing aids for both ears. Under no circumstances shall [entity]

¹²¹ See, e.g., CAL. DEP'T OF CORR. & REHAB. & CAL. CORR. HEALTH SERVS., HEALTH CARE DEPARTMENT OPERATIONS MANUAL: 3.6.1–DURABLE MEDICAL EQUIPMENT AND MEDICAL SUPPLY § 12(B) (2018), <https://clearinghouse.net/resource/3567> [<https://perma.cc/62XV-KH3Y>]; MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, §§ BB-EE; VT. AHS DOC NO. 316, *supra* note 55, § E(4); Settlement Agreement, SC DOC, *supra* note 112, ¶¶ 34–36; Braggs Settlement Agreement Resolving Phase I, *supra* note 91, at 39–40.

require or coerce a prisoner into wearing hearing aids or receiving a cochlear implant.

- B. [Entity] shall allow prisoners who already possess upon admission prescription hearing aids or other hearing-related devices, including cochlear processors, in working order to keep the devices and any necessary accessories, including batteries, chargers, and cleaning supplies.
- C. [Entity] shall allow prisoners who use hearing aids or cochlear implants to keep the devices and any necessary accessories, including batteries, chargers, and cleaning supplies, upon transfer to a different facility or a different housing unit, including restrictive housing, segregation, or solitary confinement.
- D. [Entity] shall facilitate the prompt repair, replacement, and/or adjustment of hearing aids and cochlear processors, including covering any associated costs unless the devices are intentionally misused or destroyed by the prisoner, in which case the prisoner may be financially responsible for repair or replacement, with consideration given to ability to pay. Repeated intentional damage or destruction may be treated as a refusal of the medical device. [Entity] shall not impose financial responsibility for necessary repair or replacement resulting from unintentional and/or nondestructive treatment of the hearing aids and cochlear processors by the prisoner. Efforts to repair, replace, or adjust hearing aids or cochlear processors shall be initiated within one business day of receiving a request and shall be documented. [Entity] shall take appropriate steps to ensure effective communication with the prisoner during any period in which the prisoner is without hearing aids, cochlear processors, or related devices, including by loaning the prisoner temporary aids and devices.
- E. [Entity] shall supply appropriate hearing aid and cochlear processor replacement batteries, free of charge, as needed to prisoners who utilize such devices, whether or not the devices were provided by the [entity]. The need for replacement batteries for hearing aids and cochlear processors should be anticipated, and gaps during which the devices do not work shall be minimized by providing sufficient batteries for one replacement round without any wait. [Entity] shall purchase and maintain sufficient replacement and extra batteries in stock and available to immediately provide batteries when needed, including weekends and holidays.
- F. [Entity] shall similarly supply appropriate hearing aid storage containers and cleaning kits to protect the devices and prevent mold, moisture, and other damage. [Entity] shall also supply appropriate other accessories to clean, maintain, store, or comfortably wear hearing aids or cochlear implant processors.

7.2 Corrective Lenses, Glasses, and Sunglasses¹²²

- A. Pursuant to Policy 2.2(B), [entity] shall ensure that a professionally accredited and licensed ophthalmologist evaluates eligible prisoners who are blind or low vision to determine need for corrective lenses, glasses, or sunglasses, and shall provide corrective lenses, glasses, or sunglasses free of charge, as necessary and desired by the prisoner to ensure effective communication and equal access to services, programs, and activities. Under no circumstances shall [entity] require or coerce a prisoner into wearing corrective lenses, glasses, or sunglasses.
- B. [Entity] shall allow prisoners who already possess prescription corrective lenses, glasses, and/or sunglasses to keep the devices and any necessary accessories.
- C. [Entity] shall allow prisoners who use prescription corrective lenses, glasses, and/or sunglasses to keep the devices and any necessary accessories upon transfer to a different facility or a different housing unit, including restrictive housing, segregation, or solitary confinement.
- D. [Entity] shall facilitate the prompt repair, replacement, and/or adjustment of corrective lenses, glasses, and sunglasses, including covering any associated costs, unless the devices are intentionally misused or destroyed by the prisoner, in which case the prisoner may be financially responsible for repair or replacement, with consideration given to ability to pay. Repeated intentional damage or destruction may be treated as a refusal of the medical device. [Entity] shall not impose financial responsibility for necessary repair or replacement resulting from unintentional or nondestructive treatment of the corrective lenses, glasses, or sunglasses by the prisoner. Efforts to repair or replace corrective lenses, glasses, or sunglasses shall be initiated within one business day of receiving a request and shall be documented. [Entity] shall take appropriate steps to ensure effective communication with the prisoner during any period in which the prisoner is without corrective lenses, glasses, or sunglasses, including by loaning the prisoner temporary aids and devices.

¹²² See, e.g., Medina Settlement Agreement, *supra* note 110, ¶¶ II(B)(1), II(C)(2)(d).

7.3 White Canes¹²³

- A. [Entity] shall make white canes available as appropriate to prisoners who are blind or low vision and who have difficulty safely and independently navigating the facility. [Entity] may also make white canes available to prisoners with degenerative vision disabilities who anticipate relying on a white cane in the future and who would benefit from advance training.
- B. The length of the white cane shall be based on a prisoner's height, and generally should stand at shoulder height, but the preference of the prisoner shall be considered.
- C. [Entity] shall honor the preference of the prisoner as to cane tip type (e.g., pencil, marshmallow, roller, or glide) and for collapsible white canes.
- D. [Entity] shall supply appropriate replacement white canes, free of cost, as needed to prisoners who utilize such devices, whether or not the devices were provided by the [entity]. The need for replacement white canes should be anticipated, and gaps during which the devices are broken or otherwise not able to be used shall be minimized by maintaining a stock of replacement white canes, so that [entity] can provide them to prisoners immediately when needed, including weekends and holidays.
- E. [Entity] shall ensure that, no later than one (1) week from the time a prisoner is issued a white cane, the prisoner is offered a training session on the use of a white cane with a certified orientation and mobility expert or other similar specialist, in accordance with the orientation and mobility training requirements in Policy 5.1(F).

Commentary

Persons with communication disabilities may require individually prescribed medical devices to facilitate effective communication and integration.¹²⁴ For persons who are deaf or hard of hearing, this frequently includes hearing aids. It may also include cochlear implants, which should be made available to medically qualifying prisoners, but never required or coerced. For persons who are blind or low vision, this may include

¹²³ See, e.g., Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 41. Training on use of white canes may be implemented by a community independent living or other training centers with necessary expertise. Interview with Eve Hill, *supra* note 89.

¹²⁴ The much shorter lengths of stay in some jails mean that provision of medical devices may not be practicable; some settlement agreements specify, for example, that jails are not required to provide hearing aids, but *are* required to provide replacement batteries as needed, and are required to facilitate but not cover costs of repair for such devices absence facility wrongdoing. See, e.g., Martos Settlement Agreement, *supra* note 92, at 13.

prescription lenses, eyeglasses, sunglasses, and white canes. Devices must be appropriate to an individual prisoner's needs; for example, sunglasses that block someone's peripheral vision shall not be provided to someone who depends primarily on peripheral vision.

Note that although public entities generally are not required to provide such devices under the ADA and the Rehabilitation Act,¹²⁵ the situation is different for jails and prisons, for several reasons. First, they have a constitutional obligation to provide adequate health care to prisoners in their custody, and to protect prisoners from harm.¹²⁶ Second, because jails and prisons provide health care and medical devices more generally, it would be discriminatory for them to fail to provide such devices when needed by prisoners with communications disabilities. Third, medical devices may well be the most efficient and effective way to accomplish their obligation to communicate effectively,¹²⁷ and to provide equal access to services, programs, and activities, and integration of prisoners with communication disabilities.

Decisions about medical devices may appropriately be made by medical staff, but medical staff must understand the functional needs of prisoners with communication disabilities within the jail or prison, as well as the entity's obligations under the ADA, the Rehabilitation Act, and other applicable law and regulations.¹²⁸

8. Auxiliary Aids and Services, and Reasonable Modifications and Accommodations

8.1 Qualified Interpretation for Deaf and Hard of Hearing Prisoners¹²⁹

- A. [Entity] shall make available a qualified interpreter, or a team of qualified interpreters, to any prisoner whose effective means of

¹²⁵ See 28 C.F.R. § 35.135 (2022) ("This part does not require a public entity to provide . . . individually prescribed devices, such as prescription eyeglasses or hearing aids . . .").

¹²⁶ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (holding that deliberate indifference to prisoner injury or illness may constitute cruel and unusual punishment); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (holding that failure to prevent inmate assaults may result in liability under the Eighth Amendment).

¹²⁷ Settlement Agreement, SC DOC, *supra* note 112, ¶ 34.

¹²⁸ Schlanger Expert Declaration, *supra* note 16, at 86; Interview with Barry Marano, *supra* note 89.

¹²⁹ See, e.g., 28 C.F.R. § 35.160(c)–(d) (2022); MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § G; Settlement Agreement Between Defendants the Commonwealth of Kentucky et al. and Plaintiffs Oscar Adams and Michael Knights § VI, *Adams v. Kentucky*, No. 3:14-cv-

communication is sign language in at least the following situations and their equivalents:

- i. Intake, classification, and orientation;
- ii. Medical, dental, and mental health appointments, including all therapeutic sessions of any type;
- iii. Meetings with case managers;
- iv. Scheduled meetings with classification officers;
- v. Educational and rehabilitative sessions, programs, and meetings;
- vi. All processes and procedures relating to discipline including interviews, hearings, and copies of documents;
- vii. Work and job training and programs;
- viii. Religious programs;
- ix. Grievance paperwork, interviews or processes;
- x. Processes relating to parole (including attorney calls/visits, hearing and paperwork);
- xi. Any trainings, including Prison Rape Elimination Act (PREA);
- xii. Any court or other official hearing held at the facility, including by video; and
- xiii. Any pre-release, re-entry, or contracted parole instructions, classes, and/or trainings.

This list of circumstances is not exhaustive; there may be other circumstances not identified here when it may be necessary to provide qualified interpreters for effective communication.

- B. [Entity] shall provide two or more qualified interpreters to facilitate team interpretation when appropriate to ensure accuracy, including in any of the instances listed in (A), above, or their equivalent, when interpretation is expected to be required for 30 minutes or more.

00001-GFVT (E.D. Ky. June 24, 2015) [hereinafter Adams Settlement Agreement], <https://clearinghouse.net/doc/82472> [<https://perma.cc/S2Q5-69UJ>]; Settlement Agreement, SC DOC, *supra* note 112, ¶¶ 23–26; Martos Settlement Agreement, *supra* note 92, at 8–11; Settlement Agreement, Arapahoe County, *supra* note 95, ¶¶ 28(a), 28(c), 31; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶ 33; Disability Rights Florida Settlement Agreement, *supra* note 87, ¶¶ 29–30; Braggs Settlement Agreement Resolving Phase I, *supra* note 91, at 40; Jarboe Settlement Agreement, *supra* note 95, § I(U); Interview with Bary Marano, *supra* note 89.

- C. On-site interpretation shall be prioritized for all circumstances that qualified interpretation is required. In certain circumstances when on-site interpretation is not available, qualified interpretation may be provided through a Video Remote Interpreting (VRI) service. VRI shall not be used when it is likely to be ineffective. For this reason, it shall not be used when:
- i. The event at issue is long or complex or involves multiple speakers, for example, a class or program, a disciplinary, parole, or court hearing;
 - ii. The speakers or participants in the event are not stationary, for example, job training or a medical exam;
 - iii. The location of the event is not conducive to successful VRI, for example, internet is unreliable or low quality, or there is too much noise for successful audio transmission;
 - iv. The prisoner has a secondary disability, such as low vision or physical mobility, that impedes ability to access VRI communications; or
 - v. The prisoner has other physical, cognitive, psychiatric, or linguistic difficulties that impede effective communication through VRI.
- D. If qualified interpreters are provided through VRI services, [entity] shall provide:
- i. Real-time, full-motion video and audio over a dedicated high-speed, wideband width video connection or wireless connection that, even when others are using the same internet connection for other tasks, reliably delivers high-quality video images that do not produce lags; choppy, blurry, or grainy images; or irregular pauses in communication;
 - ii. A sharply delineated image on a screen that is large enough (at least 19") to display the qualified interpreter's face, arms, hands, and fingers, and the participating prisoner's face, arms, hands, and fingers, regardless of body position;
 - iii. A clear, audible transmission of voices;
 - iv. Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI; and

- v. Use of the VRI equipment in a location that safeguards the prisoner's privacy, as much as any privacy is protected for a non-disabled prisoner.
- E. [Entity] shall maintain standing contracts with one or more qualified interpreter agencies, including both in-person services and a VRI provider, to ensure that qualified interpreting services remain available on a priority basis, 24 hours per day, 7 days per week. [Entity] may also contract directly with or hire qualified interpreters on a fee-for-service basis. [Entity] has an affirmative duty to arrange for qualified interpreters for planned events no later than 24 hours after the event is scheduled, or within 1 hour of a prisoner request. For example, if a prisoner is scheduled for a parole hearing, and qualified in-person interpreters are needed because the hearing will be long, complex, and involve multiple speakers, efforts to secure qualified in-person interpreters should begin well in advance of the visit, and not when the visit starts.
- F. In the event qualified interpreters are necessary to provide effective communication, [entity] shall provide qualified interpreters at the earliest reasonable time. Except in situations or circumstances involving an emergency, [entity] is permitted to delay the service, program, or activity, until qualified interpreters are available, and a prisoner who needs interpretation shall be permitted to delay participation until qualified interpreters are available. [Entity] shall use the most effective, readily available means of communicating with the prisoner until such time as qualified interpreters are present. [Entity] shall inform the prisoner of the current status of efforts being taken to secure qualified interpreters on the prisoner's behalf within 30 minutes of the prisoner making the request for interpretation, and shall provide additional updates as necessary. Notification of such efforts does not lessen the obligation to provide a qualified interpreter in a timely manner.
- G. [Entity] shall document all oral/written requests it receives for qualified interpreters and the action taken in response to such requests, including denials of services.
- H. [Entity] shall not use another prisoner or adult accompanying the prisoner to interpret except in rare and limited circumstances where (1) there is no qualified interpreter available (including via VRI) in an emergency involving an imminent threat to the safety or welfare of the prisoner or the public, or (2) the topic of the communication is extremely routine, and the prisoner specifically requests such assistance, the interpreter prisoner agrees, and reliance is appropriate under the circumstances. An example of a situation qualifying under (2) would be a request for a meeting with a counselor—but *not* the meeting itself. Staff shall be alert to the possibility of coercion and

power imbalance underlying a request under (2), in order to counteract that possibility by providing a qualified interpreter.

- I. Except for [entity] staff hired specifically to serve as qualified sign language interpreters, [entity] shall not use its staff to serve as sign language interpreters unless there is no qualified interpreter available, the staff's presence does not pose a conflict of interest or raise confidentiality or privacy concerns, and (1) there is an emergency involving an imminent threat to the safety or welfare of a prisoner or the public, or (2) the topic of the communication is extremely routine, the prisoner specifically requests such assistance, and reliance is appropriate under the circumstances.
- J. [Entity] shall ensure that confidential, sensitive, or private communications using a sign language interpreter are conducted in a location where the participants are not visible to those who should not have access to the communication.

Commentary

Often, a qualified sign language interpreter is the best, and only, mechanism for ensuring effective communication with a person who is deaf or hard of hearing.¹³⁰ American Sign Language (ASL) is the primary method of communication for Deaf¹³¹ persons in the United States. ASL is a visual language—the shape, placement, and movement of hands as well as facial expressions and body movements convey linguistic information.¹³² Members

¹³⁰ Courts have long recognized the need for qualified, non-prisoner interpreters to ensure effective communication and protect privacy. *See, e.g., Bonner v. Lewis*, 857 F.2d 559, 563–64 (9th Cir. 1988) (reversing grant of summary judgment to prison defendants as to Rehabilitation Act claims brought by deaf, mute, low vision prisoner, citing, *inter alia*, allegations that “inmate interpreter violated the confidentiality of [plaintiff’s] meetings with prison officials by leaking the nature of his crime to the general prison population” and that plaintiff was given medical treatment without the assistance of an interpreter which may have impeded communication with his doctor); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1032–33 (S.D.N.Y. 1995) (granting summary judgment in favor of plaintiff finding that failure to provide qualified interpreters for, *inter alia*, reception, evaluation, classification, programming, medical care, and mental health treatment violated the ADA and Rehabilitation Act).

¹³¹ Generally, “deaf” indicates the audiological condition of a hearing impairment, whereas “Deaf” refers to a group of people who share a culture and, often, a language—ASL. *See, e.g., Community and Culture – Frequently Asked Questions*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions> [https://perma.cc/CXZ3-J42C]. Mostly, this Article uses the lower-case version because it is addressing the physical rather than cultural aspects of deafness.

¹³² *What is American Sign Language?*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/resources/american-sign-language/what-is-american-sign-language> [https://perma.cc/3HJR-V64U].

of the Deaf community who were raised using ASL generally do not use speech for communication, do not lip read, and may have limited competence in English.¹³³ ASL is not a derivative form of spoken English. Rather, it is a separate language, as different from English as Spanish or Chinese. The lexicon of ASL refers not to a spoken language but directly to the concept or meaning that Deaf persons seek to convey, and there is not a one-to-one correspondence with English.¹³⁴ For this reason, ASL is the only effective and efficient means of linguistic communication for most members of the Deaf community in the United States, for whom ASL is their native language, and written communication in English and other English-based alternatives may not be an effective alternatives.¹³⁵

Importantly, ASL is not the only sign language used by Deaf and hard of hearing prisoners in the United States, and jails and prisons must seek out appropriate, qualified interpreters to ensure effective communication with Deaf and hard of hearing persons who use other sign languages, including Black American Sign Language, Mexican Sign Language, and others.¹³⁶ Indeed, sign language varies regionally, including between countries with the same spoken language, and with regional “accents” within the English-speaking United States, and, sometimes, for persons who learned informal sign language within their families.¹³⁷ If a prisoner who is deaf or hard of hearing appears not to speak or write English and is not fluent in ASL, a Certified Deaf Interpreter (CDI)—a certified interpreter who is deaf or hard of hearing and has a demonstrated knowledge and understanding of interpreting, deafness, and Deaf community and culture¹³⁸—may be required for effective communication. Interpretation may also require deaf-to-standard ASL interpreters, accounting for regional variation or non-standard ASL. A qualified interpreter must be trained and able to communicate effectively in the context of the jail or prison environment, which may require

¹³³ Cokely Expert Report, *supra* note 11, at 11.

¹³⁴ *Id.* at 12.

¹³⁵ See, e.g., Cokely Expert Report, *supra* note 11, at 17; *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 275 (D.D.C. 2015) (“ASL is not derived from English; ASL has its own syntax and grammar and utilizes signs made by hand motions, facial expressions, eye gazes, and body postures. . . . Therefore, the vast majority of deaf people—*Pierce* included—lack the ability to communicate effectively in English, whether by writing notes or reading lips.”).

¹³⁶ Interview with Deborah Golden, *supra* note 89; Interview with Barry Marano, *supra* note 89; *What is American Sign Language?*, *supra* note 132.

¹³⁷ Interview with Deborah Golden, *supra* note 89; Interview with Richard Lorenzo Ray, *supra* note 89.

¹³⁸ See *Certified Deaf Interpreter (CDI)*, REGISTRY OF INTERPRETERS FOR THE DEAF, INC., <https://rid.org/rid-certification-overview/available-certification/cdi-certification> [<https://perma.cc/ENT3-3J6M>] (providing the process for certification of a deaf interpreter).

specialized vocabulary and other unique needs.¹³⁹ Prisoners and prison staff—with the exception of staff hired for their qualifications in and for the purpose of communicating in sign language—should not be used as interpreters.¹⁴⁰

In-person interpretation is best whenever possible in light of the visual, dimensional, and interactive nature of ASL—in-person interpretation offers the opportunity to check comprehension and make any necessary adjustments. Moreover, and especially in light of the many variations in signed languages and signs used, jails and prisons should seek to maximize continuity of interpreter whenever possible.¹⁴¹

When qualified in-person interpreters are not available or accessible, Video Remote Interpreting (VRI), a service that uses video conferencing technology to access an off-site interpreter to provide real-time interpreting,¹⁴² may suffice. If VRI is used, a high-quality video image as well as clear, audible transmission of voices is required to ensure effectiveness.¹⁴³ A phone or tablet screen is not large enough; a 19” or larger display is, in practice, the smallest sufficient space to display face, arms, hands, and fingers of persons on both sides of the connection.

The efficacy of a VRI system must be tested at a time there is other widespread internet and WiFi use to ensure sufficient video and connection quality under those more realistic circumstances.

¹³⁹ See *Episode 34: Catch a Kite 4*, EAR HUSTLE, at 14:20 (Sept. 11, 2019), <https://www.earhustlesq.com/episodes/2019/9/11/catch-a-kite-4> [<https://perma.cc/TGM3-4LQG>] (quoting a sign language interpreter at a prison facility who explained that she “had to learn all the prison terminology when [she] started working there”) (transcript available at <https://static1.squarespace.com/static/5bd0d552e8ba44146721bb3c/t/5d8a87a844c78527f639b265/1569359812090/Catch+A+Kite+4+Transcript.pdf> [<https://perma.cc/22FG-TJRPJ>]).

¹⁴⁰ See, e.g., *Community Statement on Louisiana Department of Corrections' Use of Hearing Imprisoned People as "interpreters" for Deaf Imprisoned People*, HEARD & LA. REGISTRY OF INTERPRETERS FOR THE DEAF (Aug. 21, 2018), bit.ly/deafprisonla [<https://perma.cc/Z8UN-9XWQJ>] (noting that using prisoners as interpreters can lead to exploitation and retaliation for hearing and deaf prisoners, and conflicts of interest and confidentiality concerns, and inability to ensure the integrity of the message expressed).

¹⁴¹ Interview with Eileen Baker, *supra* note 89.

¹⁴² 28 C.F.R. § 35.104 (2022) (“Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).”).

¹⁴³ See *ADA Requirements – Effective Communication*, C.R. DIV., U.S. DEP’T OF JUST. (Jan. 31, 2014), [https://www.ada.gov/effective-comm.htm#:~:text=In%20addition%2C%20aids%20and%20services,%2C%20text%20telephones%20\(TTYs\)%20%2C](https://www.ada.gov/effective-comm.htm#:~:text=In%20addition%2C%20aids%20and%20services,%2C%20text%20telephones%20(TTYs)%20%2C) [<https://perma.cc/V3RL-QQ2F>].

Whether in-person or remote, a team of qualified interpreters may be required to ensure the sustained accuracy of communication—this is because sign language interpreter accuracy declines significantly after approximately 30 minutes of interpretation.¹⁴⁴ Team interpretation permits interpreters to switch off and take breaks, and also to assist each other in real time.¹⁴⁵

8.2 Other Auxiliary Aids and Services for Deaf and Hard of Hearing Prisoners

- A. If needed for effective communication, in the same circumstances as qualified interpretation is required for prisoners who use sign language, [entity] shall offer non-interpretation aids and services for communication to prisoners who use English (or another spoken language) as their primary language and are able to read English with sufficient fluency. This may include, but is not limited to: speech transliterators; Communication Access Real-Time Translation (CART) or other real-time captioning services; and/or similar devices.
- B. If needed for effective communication, in the same circumstances as qualified interpretation is required for prisoners who use sign language, [entity] shall offer amplification, including wireless transmitters, receivers, and devices compatible with hearing aids.
- C. Deaf and hard of hearing prisoners shall be informed about the available range of non-interpretation aids and services, including amplification, and about how to use the various technologies.
- D. Deaf and hard of hearing prisoners desiring to learn sign language shall be provided the appropriate materials to do so, including tutoring, or in-person or video classes.

Commentary

Certain deaf or hard of hearing prisoners, including many who are late-deafened or hard of hearing, may be most comfortable in written English, and may therefore require captions for audible materials, as well as remote captioning services for oral communication, instead of ASL or other sign language interpretation. For prisoners who are insufficiently literate in English to read captions and who do not sign, individuated communications methods will have to be developed. Some, for example, will be able to use

¹⁴⁴ See, e.g., Jo Anne Simon, *The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the A.D.A.*, 8 J.L. & HEALTH 155, 191 (1994) (“Research shows that interpreter competence begins to diminish after one-half hour of interpreting. For this reason, team interpreters switch off at appropriate breaks in the flow of communication every 20-30 minutes.”).

¹⁴⁵ *Id.* (“Team members are able to assist each other by feeding each other unclear phrases or words.”).

personal amplification devices; in some settings, non-text visual tools developed for people with limited English proficiency may be helpful. The key is thoughtful preparation and individuated solutions.

8.3 Effective Telecommunications¹⁴⁶

- A. [Entity] shall provide prisoners with communication disabilities, or prisoners communicating with persons with communication disabilities, telecommunications devices to enable communication with persons outside of the facility that is substantially on the same basis as access to telecommunication for persons who do not have communication disabilities.
- B. Accessible telecommunications devices shall be made available in the same accessible areas and during the same hours as typical telephone services are available.
- C. [Entity] shall permit prisoners relying on accessible telecommunications devices at least three times as many minutes to complete a teletypewriter, captioned telephone, or videophone call as afforded prisoners making calls using traditional telecommunication devices such as telephones. [Entity] shall ensure that prisoners using such devices are made aware of the additional time permitted for such calls.
- D. Telephone and videophone calls using such devices shall be monitored only to the same extent as any other call under applicable monitoring policies; monitoring shall not be increased because the call involves a deaf or hard of hearing person or an accessible telecommunications device.
- E. [Entity] shall ensure that accessible telecommunications devices are available for legal and other confidential calls in locations permitting privacy, and shall not place such devices in locations that result in

¹⁴⁶ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, §§ SS, TT; Jarboe Settlement Agreement, *supra* note 95, § IX(A)–(D); Martos Settlement Agreement, *supra* note 92, at 12–13; Holmes Stipulation of Settlement, *supra* note 87, ¶¶ 70–71; Adams Settlement Agreement, *supra* note 129, § IX(C)–(D); Voluntary Compliance Agreement, City of New York *supra* note 91, § IV(2); Briggs Settlement Agreement, *supra* note 91, at 35–41; Disability Rights Florida Settlement Agreement, *supra* note 87, ¶¶ 33–36; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶¶ 41–42; Minnis Settlement Agreement, *supra* note 116, § X(E); Settlement Agreement, Arapahoe County, *supra* note 95, ¶ 37(C); see also *Rights of Deaf and Hard of Hearing Inmates*, NAT'L ASS'N OF THE DEAF, <https://www.nad.org/resources/justice/jails-and-prisons/rights-of-deaf-and-hard-of-hearing-inmates> [https://perma.cc/3W7L-L9Q4] (summarizing the rights of inmates with disabilities).

frequent or repeated interruptions that disrupt effective communication.

- F. Accessible telecommunications devices shall be available at no cost to prisoners who have been approved to use such services and devices. Fees associated with these telecommunications devices and services shall not exceed those incurred by prisoners using the traditional telephone system. No fee shall be assessed for using a Telecommunications Relay Service (TRS).
- G. [Entity] shall train staff on how to operate accessible telecommunication devices, and [entity] shall maintain the technology in working order, fixing, or replacing broken devices as soon as practicable and maintaining alternative devices to use as necessary. Devices shall undergo regular systems testing.
- H. [Entity] shall make available the following communication technologies, or their functional equivalents. This list is not exhaustive. [Entity] shall stay abreast of evolving technology and shall add additional equipment to reflect technological advances as appropriate. [Entity] shall give notice of available telecommunication devices to all prisoners upon intake and shall display a list of available devices in areas where prisoners use telecommunication devices.
 - i. Braille or other Accessible Handsets. [Entity] shall provide big button telephones with Braille or other appropriate tactile markings for prisoners who are blind or low vision.
 - ii. Built-In Volume Adjustment. [Entity] shall ensure that all traditional telephones provided for prisoner use include a built-in, user-controlled volume button that permits users to amplify call volume.
 - iii. Hearing Aid Compatible Telephones. [Entity] shall ensure that all traditional telephones provided for prisoner use include handsets that are hearing aid compatible in accordance with Federal Communications Commission guidelines.
 - iv. Captioned Telephones or Devices with Captioning Technology. [Entity] shall provide captioned telephones and/or devices with captioning technology for prisoners who can speak but cannot hear on the telephone.
 - v. TTYs. [Entity] shall provide teletypewriters (TTYs) or successor technology for text communication over a telephone line, for prisoners who choose to use a TTY instead of other devices. Any TTY or successor technology must have both “voice carryover” and “hearing carryover” functions.

- vi. Videophones and Video Relay Services. For prisoners who use sign language to communicate and prisoners who wish to speak by phone with family members or others who use sign language to communicate, [entity] shall provide videophones, devices with a camera and a screen that permit visual, real-time, point-to-point communication, as well as access to a Video Relay Service, a video telecommunication service that permits no-fee access to a qualified real-time sign language interpreter.
- vii. Permission to Dial Relay Access Numbers. To ensure access to necessary relay services, [entity] shall permit prisoners using accessible telecommunications devices to dial toll-free “800” or “711” access numbers. Prisoners with communication disabilities shall not be charged for use of relay services.

Commentary

The effective communication requirement encompasses enabling communication with persons outside of confinement, including communication between hearing prisoners and deaf and hard of hearing family members. That is, jails and prisons must ensure that telecommunication devices are accessible to prisoners with communication disabilities, to enable calls with family, friends, and attorneys, and to enable any prisoner to communicate with people with communication disabilities outside of confinement. The devices must enable outside communication that is substantially equivalent in terms of amount and quality of information conveyed and expense incurred¹⁴⁷ to that of prisoners using traditional telecommunications devices.¹⁴⁸

Litigation has been instrumental in catalyzing the availability of videophones in jails and prisons—an essential technology for prisoners who use (or seek to communicate with¹⁴⁹) sign language to communicate. Previously, most jails and prisons relied on point-to-point keyboard devices that transmit typed messages over telephone lines (called TTYs, for Teletypewriters or TDDs, for Telecommunication Devices for the Deaf).

¹⁴⁷ See 47 C.F.R. § 64.6040 (2022) (providing that “[n]o Provider shall levy or collect any charge in excess of 25 percent of the applicable per-minute rate for TTY-to-TTY calls when such calls are associated with Inmate Calling Services” and that “[n]o Provider shall levy or collect any charge or fee for TRS-to-voice or voice-to-TTY calls”).

¹⁴⁸ MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § TT.

¹⁴⁹ See Jake Parker et al., *Case Summary: Rogers v. Colorado Department of Corrections*, C.R. LITIG. CLEARINGHOUSE, <https://clearinghouse.net/case/16222> [<https://perma.cc/6LK9-NK3T>].

TTY or TDD technology often fails to achieve effective communication because it requires proficiency in written English, is slow, is not commonly used in the Deaf community, and is nearing technological obsolescence.¹⁵⁰ For those reasons, facilities must ensure access to videophones,¹⁵¹ which use a camera and a screen for visual, real-time communication, including by sign language, and which may be supplemented by a video relay service (VRS), a free, subscriber-based service through which a qualified sign language interpreter serves as an intermediary between a person who has a videophone and a person with a standard voice telephone.¹⁵² For deaf and hard of hearing individuals who do not use sign language, facilities must ensure access to captioned telephones, which have all-but supplanted TTY and TDD technology among the non-signing deaf and hard of hearing community. It is necessary, however, to have typing-based technology available for those who do not use sign language and also do not speak.

Achieving equity in per-call fees may require substantially reducing the per-minute fees associated with calls, because communication must proceed at a much slower pace through certain types of technology. For example, federal regulations prohibit entities from charging “in excess of 25 percent of the applicable per-minute rate for TTY-to-TTY calls.”¹⁵³ Federal regulations

¹⁵⁰ A TTY is a machine that attaches to the phone line on each end of a phone call. It enables each party to type a message and to read what the other person is typing. To communicate with someone who does not have a TTY, the person with a TTY types a message, and a remote communication assistant reads the message out loud to a person on a regular phone. The person using the regular phone can respond verbally, and the communication assistant will type that message to be read by the TTY user. TTY use requires literacy in English, which may not be the primary language of all deaf persons in jail or prison custody or of persons who use American Sign Language to communicate. Moreover, the TTY is inefficient and permits communication of short phrases only—and, like all writing, without emotion, tone, or inflection. TTY technology often functions poorly in jails and prisons because of radio interference and other obstacles. In addition, because TTYs are no longer widely used outside of jails and prisons, TTY devices may be available secondhand only. They typically require analogue telephone lines. The Federal Communications Commission has stated that TTY communications in their current form are likely to be eliminated by 2025. *See, e.g.*, Report and Recommendation to Grant in Part and Deny in Part Plaintiffs’ Motion for Summary Judgment and to Deny Defendants’ Motion for Summary Judgment at 10–20, *McBride v. Mich. Dep’t of Corr.* (E.D. Mich. Feb. 8, 2018) (2:15-cv-11222), <https://clearinghouse.net/doc/98902> [<https://perma.cc/V2AE-N3A5>] (citing expert testimony of Richard Ray); *Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347 (4th Cir. 2021); Cokely Expert Report, *supra* note 11, at 47–48; Schlanger Expert Declaration, *supra* note 16, at 43–44; Fornaci, *supra* note 77. For persons who rely extensively on text for communication, modern text-based technologies continue to facilitate communication. *See, e.g.*, HEARD F.C.C. Comments, *supra* note 9, at 11.

¹⁵¹ Settlement agreements may provide for TTY availability for persons “who choose to use TTY in lieu of Videophones, or other devices and have the capability of using them.” *See, e.g.*, Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 33.

¹⁵² *See* ADA Requirements, *supra* note 143 (explaining the rights of inmates with communication disabilities under the ADA).

¹⁵³ 47 C.F.R. § 64.6040(a) (2022).

further prohibit charging for TTY calls placed via the telecommunications relay service.¹⁵⁴

8.4 Access to Television and Other Screen Devices¹⁵⁵

- A. [Entity] shall provide and maintain large-screen televisions that allow for closed captioning for use in common areas. Deaf, hard of hearing, blind, and low vision prisoners shall have priority seating.
- B. [Entity] shall place large screen audio-visual media sets that allow closed captioning in housing facilities. All audio-visual media, and all devices used for viewing such media, purchased by [entity] for prisoner use shall include open and closed captioning capabilities.
- C. When available, captioning shall be turned on, and remain on at all times, in housing units where deaf or hard of hearing prisoners are housed. Deaf and hard of hearing prisoners shall have priority seating in front of televisions in common areas.
- D. If audio description is available on television or similar equipment in any housing unit in which a blind prisoner is housed, [entity] shall ensure the common television is operated with audio description enabled at all times.
- E. Televisions in common areas shall have FM or other wireless transmitters, and the transmitters shall be turned on at all times when the televisions are on. Broken transmitters shall be repaired within ten business days. When a deaf or hard of hearing prisoner is determined to require a transmitter as an auxiliary aid, receivers, and any other devices necessary to receive the signal shall be provided.
- F. [Entity] shall ensure that closed captioning is available and turned on for all audio-visual media used for educational or vocational programming. In addition, [entity] shall provide sign-language interpretation for any deaf or hard of hearing participants who need it for effective communication, either with a “picture-in-picture”

¹⁵⁴ See *id.* § 64.6040(b).

¹⁵⁵ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § XX; Partial Settlement Agreement ¶ 9, *Heyer v. U.S. Bureau of Prisons*, No. 5:11-ct-03118-D (E.D.N.C. Nov. 2, 2017) [hereinafter *Heyer Partial Settlement Agreement*], <https://clearinghouse.net/doc/111492> [<https://perma.cc/A872-C5VQ>]; Disability Rights Florida Settlement Agreement, *supra* note 87, ¶¶ 39–40, 56; Minnis Settlement Agreement, *supra* note 116, § XI; Jarboe Settlement Agreement, *supra* note 95, § X; Adams Settlement Agreement, *supra* note 129, § X; Medina Settlement Agreement, *supra* note 110, ¶ II(H)(3)(a)–(b); Cokely Expert Report, *supra* note 11, at 51–52.

technology or, whenever possible, with an on-site qualified interpreter.

- G. [Entity] shall make all practicable efforts to offer blind-accessible (audio-description) versions of audio-visual media used for any purpose.
- H. [Entity] shall make available to blind or low vision prisoners television magnifiers to use with in-cell televisions.
- I. If [entity] offers prisoners access to other screen devices—such as kiosks, tablets, etc. and the like—it shall offer prisoners with communication disabilities accessible versions of those devices.

8.5 Recreation¹⁵⁶

- A. [Entity] shall provide or maintain multiple copies of a minimum of six different types of games designed for use by people with visual impairments, including talking chess sets and playing cards, as a standard accommodation in common areas and, on loan, for in-cell use, free of charge.
- B. [Entity] shall provide a broad array of audio books, and any devices necessary to play the audio books, as a standard accommodation in common areas and, on loan, for in-cell use, free of charge.
- C. When possible, [entity] shall offer movies that make available picture-in-picture or other sign language interpretation.

8.6 Additional Auxiliary Aids and Services and Reasonable Modifications and Accommodations for Blind and Low Vision Prisoners¹⁵⁷

- A. Talking, Vibrating, and Braille Watches. [Entity] shall make available talking, vibrating, and Braille watches for individual use by blind and low vision prisoners.
- B. Accessible Means of Reading and Writing Independently.

¹⁵⁶ See, e.g., Medina Settlement Agreement, *supra* note 110, ¶¶ II(H)(1), II(H)(2)(a). Some jurisdictions facilitate participation of blind or low vision prisoners in talking book programs, establishing processes for eligibility determinations, certification, and necessary equipment and materials. See, e.g., Memorandum from Mich. Dep't of Corr. to Wardens re. Talking Books, Mich. Dep't of Corr. (May 20, 2020), <https://clearinghouse.net/resource/3567/> [<https://perma.cc/BJJ8-T9K5>]; see also Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 50 (requiring assistance to prisoners in registering for the programing and obtaining necessary resources); Medina Settlement Agreement, *supra* note 110, ¶ II(H)(2)(b) (same).

¹⁵⁷ See, e.g., ARIZ. DEP'T OF CORR. REHAB. AND REENTRY, DEPARTMENT ORDER 108 – AMERICANS WITH DISABILITIES ACT (ADA) COMPLIANCE 4 (2020), <https://clearinghouse.net/resource/3567> [<https://perma.cc/RQ7T-RWHA>]; Disability Rights Florida Settlement Agreement, *supra* note 87, at ¶¶ 43, 45–49, 51; Medina Settlement Agreement, *supra* note 110, ¶¶ I(G), I(K), II(D), II(E)(2), II(F), II(G); Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 5.

- i. [Entity] shall make written materials—including but not limited to notifications of rights, orientation and handbook materials, memoranda to prisoners, facility directives, reasonable modification and accommodation request forms, disbursement or refund requests, commissary requests, requests for medical care, requests for library and other resources, grievance forms and responses, notices, educational and vocational materials, and dispositions of disciplinary actions—available to blind and low vision prisoners in accessible formats, as aligned with the prisoner’s preferred method. Accessible formats for written materials may include: large print (at least size 18 font); Braille; electronic versions with accompanying screen magnification tools and/or text-to-speech or screen-reading programs, and audio.
 - ii. [Entity] shall ensure that all available types of tablets, laptops, or other assistive technology devices are equipped with an e-book reader program, typing tutorial program, and screen reader software, and shall also make available printing and scanning devices compatible with assistive technology and compatible headphones to enable independent access, scanning, printing, and communication.
 - iii. [Entity] shall provide blind and low vision prisoners bold-lined paper and 20/20 pens, in common areas and for in-cell use, upon request, and recorders for dictating correspondence, which should be made available in a location permitting privacy.
 - iv. These accessible materials and/or assistive technology shall be available in the library, classrooms, job locations, or in dormitories or cells, as appropriate to the function of the print material, and mindful of confidentially concerns that may require certain audio dictation or player devices to be available in locations permitting privacy.
 - v. [Entity] shall provide blind or low vision prisoners who prefer to have all or some documents read and/or written for them the opportunity to select a fellow prisoner to promptly provide such services upon request, pursuant to the requirements and procedures in Policy 9.1.
- C. Magnifiers. [Entity] shall make available magnifiers with variable magnification and color, brightness, and contrast-adjusting features,

for use in cell or in supervised areas of their housing units, as well as in the library. Magnifying devices of various magnifications shall be available in all libraries for use by blind and low vision prisoners. Libraries shall contain a closed-circuit television video magnifier for use by blind or low vision prisoners. Blind and low vision prisoners shall also be permitted to have plastic magnifying sheets for individual use in dorms and cells.

- D. Library, Law Library, Mail, and Computer Services. To the extent possible, [entity] libraries shall offer large print books and other written resources. [Entity] computers shall have font enlargement features and screen magnifiers, as well as glare screens available upon request. At least one (1) computer in every location containing computers for common use shall be equipped with text-to-speech software and headphones, and library staff and prisoners requiring such an accommodation shall be trained on the use of the software. Prisoner assistants or library clerks shall be available to read out loud for blind or low vision prisoners who request this service, including to read handwritten or other incoming mail that is incompatible with screen reading devices, in a location that permits confidentiality when required for legal or other sensitive communications. Blind and low vision prisoners shall be permitted to check out legal materials that have been recorded onto audio devices compatible with audio players in the prisoner's possession.
- E. Additional Time to Work with Library Clerks, Law Clerks, and Prisoner Assistants. Blind or low vision prisoners shall be provided no less than fifty percent (50%) additional time to work with library clerks, law clerks, readers, and/or scribes in the law library, beyond the amount of time normally afforded non-vision disabled prisoners.
- F. Training. [Entity] shall make available screen reader and other assistive technology trainings, orientation and mobility trainings, and blindness skills courses, all in accessible formats, to blind or low-vision prisoners.

Commentary

Not all blind and low vision prisoners will have the same needs, circumstances, and skills— therefore, a wide range of auxiliary aids and services and reasonable modifications and accommodations must be available, so that prisoners are able to access those that best align with their needs and preferences. In all circumstances that a sighted prisoner has access to technology, auxiliary aids, and services permitting equivalent access, these must also be made available to blind and low vision prisoners needing them. Providing appropriate devices ensures equivalent access to technology and permits independence in reading and writing.

8.7 Non-Auditory Alarms, Alerts, and Emergency Evacuation Notification¹⁵⁸

- A. [Entity]’s obligation of effective communication extends to announcements, alarms, or any other auditory information from [entity] staff to the general population, which must be delivered in an effective, non-auditory way to deaf and hard of hearing prisoners. Several of these devices, when used in combination, are likely to be necessary to reach prisoners in various places, at various times, during various activities, for various reasons.
- i. Emergency notifications. [Entity] shall provide an effective non-auditory notification system to alert all deaf and hard of hearing prisoners of emergencies, including emergency evacuations. Appropriate non-auditory systems shall communicate with prisoners who are sleeping on their beds, who are elsewhere in cells/dorms, and who are in spaces such as bathrooms, recreation areas, and outdoors. Non-auditory alert systems may include personal vibrating pagers, visual alarms, and bed-shaking devices.
 - ii. General routine notifications. [Entity] shall implement an effective, non-auditory notification system to notify all deaf and hard of hearing prisoners of general prison activities, including but not limited to: wake-up calls, counts, meals, and recreation.
 - iii. Individual routine notifications. [Entity] shall provide an effective non-auditory notification system to provide all deaf and hard of hearing prisoners with individual, non-emergency notifications, such as the arrival of visitors, or medical appointments. Appropriate non-auditory systems to deliver individualized messages may include personal vibrating pagers and/or electronic message boards.
 - iv. Personal alert devices. Personal non-auditory alert devices, such as vibrating watches, vibrating alarm clocks, and

¹⁵⁸ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § RR; Jarboe Settlement Agreement, *supra* note 95, § VIII; Minnis Settlement Agreement, *supra* note 116, § IX; Settlement Agreement, Arlington County Sheriff, *supra* note 84, ¶ 44(d). For examples of more specific policies implementing particular alert systems, see MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § QQ (describing Page Alert Broadcast System); Jarboe Settlement Agreement, *supra* note 95, § VIII(D) (personal pagers); Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 38 (vibrating watches); Heyer Partial Settlement Agreement, *supra* note 155, ¶¶ 6–8 (emergency flashing lights, bed shaking device, vibrating watch); Holmes Stipulation of Settlement, *supra* note 87, ¶ 78; Cokely Expert Report, *supra* note 11, at 37–39; Ray Expert Report, *supra* note 120, at 18–20.

similar devices, shall be provided to supplement, but not to replace, routine notification systems.

- B. [Entity] shall facilitate the prompt repair or replacement of personal non-auditory alert devices, including pagers, vibrating watches, vibrating alarm clocks, and similar devices, and shall maintain spare devices as required to avoid gaps in access.
- C. Any non-auditory alert system positioned in a common space shall be visible from any dormitory or cell housing a deaf or hard of hearing prisoner.
- D. Information delivered via non-auditory notification system shall be delivered promptly and with sufficient advance notice, at least equivalent to that provided by an auditory notification system. Staff shall document messages sent.
- E. Person-to-person systems of non-auditory notification may be used to supplement other non-auditory alert systems for announcements, alarms, or any other information audibly conveyed from staff to hearing prisoners, but may not replace technology-based notification systems.
- F. Staff shall be trained on emergency and non-emergency alarm and alert protocols and on proper use and maintenance of the relevant technologies. Non-auditory emergency notification systems shall be regularly tested, and staff and prisoners shall participate in practice drills at regular intervals.

Commentary

To ensure effective communication and meaningful access to services, programs, and activities, jails and prisons must have non-auditory systems for notifying deaf and hard of hearing persons of emergency and non-emergency communications that are otherwise delivered to prisoners via a public address or other auditory system. Systems for delivering individual messages should include personal devices, such as a personal pager, whenever possible. Non-personal notification systems, including those used for emergency alerts and non-emergency notifications, must be visible in all places that prisoners with communication disabilities might be, including outdoors and from all places inside a dormitory or cell.¹⁵⁹ Procedures that rely on correctional officers or others to identify deaf and hard of hearing

¹⁵⁹ Cokely Expert Report, *supra* note 11, at 38–39.

persons and provide face-to-face notification are inadequate substitutes because they are inefficient and subject to human error.¹⁶⁰

9. Prisoner Assistants

9.1 Prisoner Assistants for Blind and Low Vision Prisoners¹⁶¹

- A. Prisoners who are blind or low vision and prefer a prisoner assistant as an auxiliary aid or service to assist with reading and writing or with navigation shall have access to and the opportunity to select a sighted prisoner assistant who:
 - i. Has been appropriately trained, including in confidentiality requirements and (for prisoner navigation assistants) in the appropriate techniques for guiding blind or low vision prisoners, including sighted guide techniques;
 - ii. Can communicate effectively, including sufficient and documented literacy skills to read aloud, write clearly, and follow oral requests;
 - iii. Is not affiliated with a security threat group, has been screened for sexually predatory behavior, has not been convicted of a crime involving abuse of a vulnerable person, and has been free of any abuse-related infraction for one (1) year; and
 - iv. Consents to provide and is appropriately paid for providing the assistance.
- B. Prisoner communication assistants shall provide prompt help with tasks that may include reading or writing documents such as sick call slips, commissary forms, grievances, personal mail, and legal documents.
- C. Prisoner assistants shall maintain confidentiality and shall not offer services in exchange for goods or favors from the prisoner needing assistance.

¹⁶⁰ See, e.g., Plaintiffs' Opposition to Massachusetts Department of Correction Defendant's Motion for Summary Judgment at 7–10, *Briggs v. Mass. Dep't of Corr.*, No. 1:15-cv-40162-GAO (D. Mass. Jan. 28, 2020), <https://clearinghouse.net/doc/130986> [<https://perma.cc/8AFK-3P8T>] (describing inadequacies of the so-called “red dot” procedure, which requires correctional officers to identify and notify all deaf and/or hard of hearing persons during emergencies, noting repeated “delayed or non-existent notifications” and reports from several plaintiffs “that a CO has never come to their cell to notify them of an emergency during all their years in custody”); Cokely Expert Report, *supra* note 11, at 37.

¹⁶¹ See, e.g., Brown Non-Monetary Term Sheet, *supra* note 78, ¶ 7; Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 55.

- D. Prisoner assistants shall be periodically evaluated for fulfillment of established job duties and performance criteria, and any information provided by the prisoner being assisted shall be considered.
- E. Prisoner communication assistants shall not be used if the prisoner needing assistance instead requests staff assistance. Requests for staff assistance with communication shall be met in any situation in which a prisoner assistant would otherwise be appropriate. Staff performing the role of assistant shall maintain confidentiality.
- F. Assistants shall not be used if the prisoner needing assistance instead requests to use an available auxiliary aid or service that permits independent reading and writing and navigation.
- G. Under no circumstances shall a prisoner be assigned to be an assistant as a form of punishment.

Commentary

Many jails and prisons rely on prisoner assistants to support access for prisoners with disabilities to services, programs, and activities as well as assistance in daily life. But such programs must be limited, and voluntary for all involved. Prisoner assistants may, for example, help blind or low vision prisoners draft documents, navigate the facility, or perform legal research in the law library. But, if not carefully administered and monitored, the prisoner/assistant relationship can result in exploitation and abuse. Prisoner assistants sometimes, for example, refuse to provide a necessary service unless the prisoner with the disability supplements their official wage with monetary or equivalent payment, or even sexual favors—or might use personal information gleaned through assistant tasks to bribe or blackmail.¹⁶² Even in the best of circumstances, certain tasks, including reporting abuses or requesting particular medical care, are too private or sensitive to be comfortably shared with another prisoner.¹⁶³ Prisoner assistants should be carefully selected, screened, and monitored, and should be fairly compensated for their work. Prisoners needing assistance should have input into selecting their assistant whenever possible and the opportunity to decline a prisoner assistant for any reason.¹⁶⁴ Confidentiality is essential, and a strict duty of confidentiality must be imposed. Indeed, confidentiality and other

¹⁶² See, e.g., Schlanger Expert Declaration, *supra* note 16, at 39; Brown Complaint, *supra* note 6, ¶ 93 (alleging physical and sexual abuse, extortion, disruption of relationships with loved ones, and severe anxiety and emotional distress resulting from blind prisoners' dependence on sighted prisoners to provide necessary services); Interview with Eve Hill, *supra* note 89.

¹⁶³ The guidelines for implementing PREA recognize this dynamic, noting that, in the context of reports made in that context, prisons and jails ought not "rely on inmate interpreters, inmate readers, or other types of inmate assistants except in limited circumstances." 28 C.F.R. §115.16(a) (2022).

¹⁶⁴ Interview with Eve Hill, *supra* note 89.

concerns may weigh in favor of providing a staff person—bound by a confidentiality agreement and subject to discipline for breach—to serve as an assistant in certain sensitive situations. Ultimately, auxiliary aids and services enabling independence in reading and writing should be prioritized and available—if a prisoner with a communication disability prefers to use an aid or service that affords privacy and independence, a prisoner assistant is not appropriate.¹⁶⁵

10. Hand Restraints

10.1 Hand Restraints and Sign Language Communication¹⁶⁶

- A. [Entity] shall not restrain the hands of deaf or hard of hearing persons who use sign language to communicate when there is a need

¹⁶⁵ 28 C.F.R. § 35.160(b)(2) (2022) (“In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.”); Schlanger Expert Declaration, *supra* note 16, at 39.

¹⁶⁶ See, e.g., MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § R; Consolidated Recommendations for Settlement Compliance at 21, *Adams v. Kentucky*, No. 3:14-cv-00001-GFVT (E.D. Ky. May 31, 2017), <https://clearinghouse.net/doc/88981> [<https://perma.cc/QLG3-7B3X>]; *Adams Settlement Agreement*, *supra* note 129, § XI(A) (providing that “the KDOC will use hand restraints on Deaf Inmates only in the following circumstances: when transporting a Deaf Inmate to or from a KDOC Adult Institution; when transferring a Deaf Inmate into or out of the special management unit; and as needed in response to security threats” and requiring correctional staff to be trained on “the agreement that hand restraints will be removed from a Deaf Inmate when a Deaf Inmate is in a secure environment, when security is no longer a threat, or there are other security devices in place to allow the Deaf Inmate to Effectively Communicate.”); VT. AHS DOC NO. 316, *supra* note 55, § F(3) (“Unless a legitimate security or safety concern is present (which must be documented in an incident report), staff will ensure incarcerated individuals with a hearing disability are handcuffed or restrained in a manner that permits effective communication, for instance: a. Handcuffing in the front to allow the person to sign, and; b. Allowing one hand to be free to allow for writing.”); *Gordon Settlement Agreement*, *supra* note 92, ¶ 6 (“The County recognizes that persons who are deaf and who communicate using sign language cannot communicate when they are handcuffed. If the removal of the handcuffs does not result in a direct threat to the health or safety of any person in the jail, or cause an undue burden or fundamental alteration of the custodial activity, the County will remove the handcuffs of a booked and classified detainee who is deaf to allow communication. The individual’s custody level will be considered in making this determination. This does not prohibit a County officer from removing the handcuffs of a detainee who is deaf prior to booking and classification.”); *Settlement Agreement, Arlington County Sheriff*, *supra* note 84, ¶ 39 (“When personnel deem it necessary to handcuff a person who is deaf or hard of hearing, personnel will, safety permitting, reasonably modify standard operating procedure and handcuff people who are deaf or hard of hearing so their hands remain in front of them to

or potential need for communication (including with telecommunications devices), absent a reasonable, individualized finding of a present security threat by the particular prisoner in question if his or her hands are unrestrained, which finding shall be documented.

- B. In situations requiring restraints of a prisoner who uses sign language to communicate, [entity] shall, if possible, use less restrictive alternatives to hand restraints or restraint techniques that keep the prisoners' hands in the front of the prisoner's body and provide sufficient flexibility for the prisoner to raise at least one hand as high as the forehead and to freely move the hands and fingers.
- C. Safety and security decisions related to use/non-use of hand restraints should be made by a supervisor on an individualized basis.
- D. Correctional staff shall be trained on appropriate alternatives to hand restraints and that hand restraints are to be removed from persons who use sign language to communicate in a secure environment, when the person does not pose a safety threat, or when other security devices are in place to permit safe removal of the restraint.

10.2 Hand Restraints and Blind or Low Vision Mobility

- A. [Entity] shall not restrain the hands of blind or low vision persons who use white canes or rely on their hands to navigate when there is a need or potential need to self-navigate or ambulate, absent a reasonable and individualized finding of a present security threat by the particular prisoner in question if his or her hands are unrestrained, which finding shall be documented.
- B. In situations requiring restraints, less restrictive alternatives to hand restraints, or restraint techniques that permit sufficient forward arm extension and mobility to sweep a white cane in front of the body, shall be used when possible.
- C. Safety and security decisions related to use/non-use of hand restraints should be made by a supervisor on an individualized basis.
- D. Correctional staff shall be trained on appropriate alternatives to hand restraints and that hand restraints are to be removed from persons who use white canes or rely on their hands to navigate their surroundings in a secure environment, when the person does not pose a safety threat, or when other security devices are in place to permit effective communication.

facilitate communication using sign language or writing.”); Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 31 (requiring handcuffing in the front except during transfer or when there is a compelling reason not to do so); Martos Settlement Agreement, *supra* note 92, at 11; Minnis Settlement Agreement, *supra* note 116, § XII.

Commentary

Deaf and hard of hearing persons who use sign language to communicate cannot communicate effectively when in hand restraints. And blind and low vision persons who rely on white canes or otherwise use their hands to guide themselves through their environments cannot safely move while in hand restraints. Therefore, jails and prisons must develop or modify policies to permit removal of hand restraints—absent an individualized finding of a present security threat—and/or use of alternative restraint mechanisms¹⁶⁷—to enable sign language and, when appropriate, written communication, including for telecommunications access,¹⁶⁸ and to ensure the safety of those who rely on their hands for mobility. A determination that hand restraints cannot safely be removed must be documented and individualized, and based on a security threat that is not inherent in the item itself (e.g., someone with a cane could use it to harm someone else) or a manifestation of disability (e.g. using sign language while expressing emotion).

11. Staff and Training

11.1 ADA Coordinators

- A. [Entity] shall designate at least one employee as Entity ADA Coordinator, to coordinate system-wide efforts to comply with and carry out its responsibilities under the ADA, the Rehabilitation Act, and/or other governing antidiscrimination law, as well as these policies. Responsibilities shall include, but are not limited to: developing and implementing procedures, processes, and trainings; rendering individual and systemwide decisions about medical devices, auxiliary aids and services, and reasonable modifications and accommodations; addressing appeals of such decisions by Facility ADA Coordinators; and maintaining relevant records related to evaluations, requests, and decisions; supervising Facility ADA Coordinators and the needs assessments and communication and

¹⁶⁷ Less restrictive alternatives may include, for example, or a belt and chain shackle connected to a wall, leaving hands free. *See, e.g.*, Second Semi-Annual Report by the Settlement Monitor at 29, *Adams v. Kentucky*, No. 3:14-cv-00001-GFVT (E.D. Ky. Dec. 5, 2016), <https://clearinghouse.net/doc/85977> [<https://perma.cc/95CS-R3PG>] (describing this “side saddles” technique, which permitted effective sign language communication).

¹⁶⁸ *See, e.g.*, Holmes Stipulation of Settlement, *supra* note 87, ¶¶ 80–81 (requiring within 60 days implementation of policy to permit removal of hand restraints to enable deaf or hard of hearing persons to communicate with sign language, including for use of TTY machines or videophones); MDOC POLICY DIRECTIVE 04.06.156, *supra* note 55, § R (“Unless there is a documented safety and security concern, deaf and/or hard of hearing prisoners shall be permitted to use their hands for effective communication (e.g., signing, writing, etc.).”).

accommodation plans they develop; and meeting regularly with prisoners with disabilities and staff to remain informed about needs and challenges.

- B. [Entity] shall designate at least one employee at each facility as a Facility ADA Coordinator, to coordinate facility-wide compliance with the ADA, the Rehabilitation Act, and/or other governing antidiscrimination law, as well as these policies. Responsibilities shall include, but are not limited to: identifying prisoners with disabilities; developing, reviewing, and revising prisoner communication and accommodation plans; assisting staff in implementing disability-related policies and practices; rendering individual and facility-wide decisions about medical devices, auxiliary aids and services, and reasonable modifications and accommodations; maintaining data about requests and decisions and addressing related appeals and grievances; and meeting regularly with prisoners with disabilities to assess needs. Facility ADA Coordinators shall also be responsible for ensuring that the medical devices, auxiliary aids and services, and reasonable modifications and accommodations required by a prisoner's communication and accommodation plan are provided to the prisoner as required and without delay, meeting daily and ongoing needs. This may require tracking each affected prisoner's scheduled programs, appointments, and activities to ensure, in advance, that necessary aids, services, modifications, and accommodations are available.
- C. [Entity] shall ensure that persons hired as Entity and Facility ADA Coordinators possess a background in disability and/or other relevant expertise, an understanding of the requirements of disability and antidiscrimination law, and knowledge of how to stay abreast of the relevant technologies and developments.
- D. [Entity] shall coordinate with community and/or government resources to provide Entity and Facility ADA Coordinators with supplemental training at regular intervals about: the ADA and its requirements; available medical devices, auxiliary aids and services, and reasonable modifications and accommodations for prisoners with communication disabilities and related best practices; evolving technologies and new devices; how to identify common communication access barriers and need areas, and best practices for removing such barriers; and other relevant topics.

11.2 Other Staff Training¹⁶⁹

- A. [Entity] shall provide training appropriate to the responsibilities of all [entity] medical care, programs, custody, and supervision staff, including, as defined in Policy 13.9, contractors and volunteers, who interact or may interact with prisoners with communication disabilities on the following subjects:
- i. Disability nondiscrimination laws and rights of prisoners with disabilities;
 - ii. Functional implications of being a prisoner with a communication disability, including unique needs and problems encountered and potential impact on interactions with correctional staff, including education about avoiding punishment for manifestations of disability, including but not limited to: using gestures or signs to communicate; failing to obey an order that wasn't seen, heard, or understood; failing to comply with a count that was not effectively communicated; or other disability-related behaviors;
 - iii. The prevalence of dual- or multiple-disability diagnoses, the wide-ranging needs and capabilities of prisoners with communication disabilities, and the importance of individualized assessment of needs and capacities;
 - iv. Common misunderstandings about a prisoner with a communication disability's remaining sight, hearing, and mobility, including the limitations of hearing aids, cochlear implants, glasses, and other medical devices;
 - v. Signs of communication disabilities and [entity's] process of evaluating impairments, disability, and necessary medical devices, auxiliary aids and services, and reasonable modifications and accommodations;
 - vi. General information about how to effectively support and communicate with prisoners with communication disabilities, including literacy issues that may impact communication;

¹⁶⁹ See, e.g., Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 26; Briggs Settlement Agreement, *supra* note 91, at 46–47; Holmes Stipulation of Settlement, *supra* note 87, ¶ 66; DOJ EXAMPLES AND RESOURCES, *supra* note 4.

- vii. Explanations of signed languages, the use of sign language by some deaf and hard of hearing prisoners, and the proper use and role of qualified sign language interpreters, in person and via video remote interpreting;
 - viii. The limitations of lip-reading and note writing as modes of communication with deaf and hard of hearing prisoners;
 - ix. Available medical devices, auxiliary aids and services, reasonable modifications and accommodations, and relevant policies and procedures;
 - x. The process for requesting medical devices, auxiliary aids and services, and reasonable modifications and accommodations;
 - xi. How to operate and maintain auxiliary aids and services for prisoners with communication disabilities, how to maintain devices in working order, and the processes for fixing or replacing broken devices as soon as practicable and maintaining alternative devices to use as necessary;
 - xii. Appropriate ways to guide prisoners who are blind or low vision, including sighted guide techniques;
 - xiii. How to assist blind or low vision prisoners with preparing and submitting grievances, appeals, modification and accommodation requests, disciplinary appeals and paperwork, and other similar documents, as well as the available auxiliary aids and services to permit independence in these processes;
 - xiv. Alternatives to hand restraints for prisoners who rely on their hands to communicate or navigate, in accordance with Policies 10.1(D) and 10.2(D);
 - xv. Protocols for non-auditory alarms and alerts, including in emergency and non-emergency situations, and the requisite technologies, per Policy 8.7;
- B. Training shall be prepared and presented by qualified staff and should be developed in consultation with community and/or government organizations with expertise in communication disabilities. Materials shall be updated on a regular basis, apace with relevant developments in technologies and best practices.
- C. [Entity] shall ensure that new staff receive training as part of their initial orientation, and that all staff receive repeat and/or updated training on at least an annual basis.

Commentary

All jail and prison staff who have or may have contact with prisoners with communication disabilities must be trained about the rights, needs, and capabilities of persons with such disabilities, as well as about available resources, medical devices, auxiliary aids and services, reasonable modifications and accommodations, and relevant policies and practices.¹⁷⁰ Correctional staff must also be trained on the signs of communication disability, including how to recognize when a prisoner shows signs of hearing or vision impairment, and what steps to follow if they detect such an impairment.¹⁷¹ Trainings should present the information from a social and communicative perspective, and not simply a medical one.¹⁷² Jail and prison staff should be trained at regular intervals, at least once annually, as well as part of orientation to new employment or job responsibilities. Such training is essential to preparedness, even if nobody with a communication disability is presently housed at the facility.¹⁷³

*12. Tracking and Auditing*12.1 Tracking and Annual Audit¹⁷⁴

- A. [Entity] shall track, in a reliable and accurate electronic manner—including both in individual electronic prisoner records and in a form accessible for systematic evaluation—prisoners identified as having a communication disability, including any required medical devices, auxiliary aids and services, reasonable modifications and accommodations, and communication and accommodation plans and preferences.
- B. [Entity] shall make publicly available information about the total numbers of prisoners identified as having a communication disability, and the kinds of communication disabilities the prisoners have (e.g., deaf, blind, deafblind, hard of hearing, low vision).
- C. [Entity] shall track in a reliable and accurate electronic manner, information concerning each request for modification or accommodation and each disability-related complaint submitted,

¹⁷⁰ Cokely Expert Report, *supra* note 11, at 53–54.

¹⁷¹ Schlanger Expert Declaration, *supra* note 16, at 23–24.

¹⁷² Cokely Expert Report, *supra* note 11, at 53–54.

¹⁷³ Interview with Eve Hill, *supra* note 89.

¹⁷⁴ *See, e.g.*, Voluntary Compliance Agreement, City of New York, *supra* note 91, § VII(5); Cokely Expert Report, *supra* note 11, at 57.

including information about the source, nature, outcome, and basis for the decision.

- D. [Entity] shall implement annual audits to evaluate compliance with policies related to prisoners with communication disabilities.

Commentary

Jails and prisons must establish concrete, quantifiable metrics by which to evaluate their compliance with federal antidiscrimination law and relevant standards and policies governing treatment of prisoners with communication disabilities.¹⁷⁵ Relevant metrics should be documented regularly and accurately. Documented information should include the numbers, locations, and needs of prisoners with communication disabilities, as well as medical devices, auxiliary aids and services, and reasonable modifications and accommodations requested, provided, and/or denied, including decisions about safety and security concerns. Individualized, electronic records must ensure adequate and reliable tracking of prisoners with communication disabilities as they move throughout the system, including between units or facilities.¹⁷⁶ Annual audits should evaluate compliance,¹⁷⁷ and systems can evaluate whether and how best to implement external compliance mechanisms.¹⁷⁸

13. Definitions

13.1 Auxiliary Aids and Services¹⁷⁹

- A. Auxiliary aids and services are devices or services that enable effective communication for individuals with communication disabilities. Auxiliary aids and services include, but are not limited to:
- i. Qualified interpreters on-site or through video remote interpreting services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening

¹⁷⁵ Interview with David Boyer & Philip Fornaci, *supra* note 89.

¹⁷⁶ Cokely Expert Report, *supra* note 11, at 57; Schlanger Expert Declaration, *supra* note 16, at 33–34.

¹⁷⁷ Cokely Expert Report, *supra* note 11, at 57.

¹⁷⁸ For more on external oversight, see the work of the Prison and Jail Innovation Lab at the Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, *Prison and Jail Innovation Lab*, UNIV. OF TEX. AT AUSTIN, <https://pjil.lbj.utexas.edu> [<https://perma.cc/E3KF-UML7>]; see also Michele Y. Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207, 241–73 (2020) (describing the Lab's work to find, interview, and catalog all external prison and jail oversight bodies in the United States, and assessing the status of correctional oversight).

¹⁷⁹ 28 C.F.R. §§ 35.104, 35.160(b) (2022).

- devices and systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to prisoners who are deaf or hard of hearing;
- ii. Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; accessible format documents; or other effective methods of making visually delivered materials available to prisoners who are blind or have low vision;
 - iii. Acquisition or modification of equipment or devices; and
 - iv. Other similar services and actions.

13.2 Communication Disability¹⁸⁰

Communication disability as used in these policies refers to any disability, as defined in Policy 13.3 and including a speech, hearing, or visual impairment, that affects a person's ability to receive, send, process, and/or comprehend communications, whether using verbal, nonverbal, or graphic symbol systems.

13.3 Disability¹⁸¹

A. Disability as used in these policies refers to:

- i. A physical or mental impairment that substantially limits one or more of the major life activities (including major bodily functions) of the prisoner;

¹⁸⁰ See, e.g., Ad Hoc Comm. on Serv. Delivery, *Definitions of Communication Disorders and Variations*, ASHA (1993), <https://www.asha.org/policy/rp1993-00208/#:~:text=A%20communication%20disorder%20is%20an,severity%20from%20mild%20to%20profound> [https://perma.cc/BPD7-ECVW].

¹⁸¹ 42 U.S.C. § 12102(a); 28 C.F.R. § 108(a) (2022).

- ii. A record of such an impairment; or
 - iii. Being regarded as having such an impairment.
- B. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major Bodily Functions include, but are not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
- C. The definition of “disability” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law, and in line with the provisions of 42 U.S.C. § 12102 and 28 C.F.R. § 35.108.

13.4 Effective Communication¹⁸²

Effective communication means communication with prisoners with communication disabilities that is substantially as effective as communication with the general prisoner population.

13.5 [Entity]

As used throughout this policy, [entity] refers to the prison or jail system. The term is used generally to mean the entity or any staff member(s), as defined in Policy 13.9.

13.6 Qualified Interpreter¹⁸³

- A. A qualified interpreter is a person who, via a video remote interpreting service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, with an individual deaf or hard of hearing prisoner using any necessary specialized vocabulary.
- B. A valid certification from the National Registry of Interpreters for the Deaf or the National Association of the Deaf shall be considered a sufficient, but not a necessary, qualification for a Qualified Interpreter for sign language; preference shall be given to interpreters so certified, and a reasonable effort shall be made to utilize such interpreters.

¹⁸² 28 C.F.R. § 35.160(a) (2022); Jarboe Settlement Agreement, *supra* note 95, § K; Adams Settlement Agreement, *supra* note 129, § 5.

¹⁸³ 28 C.F.R. § 35.104 (2022); Disability Rights Florida Settlement Agreement, *supra* note 87, ¶ 29.

- C. Depending on the needs of the prisoner, the appropriate qualified interpreter might be an ASL interpreter, an interpreter of another sign language such as Mexican Sign Language or Black American Sign Language, a deaf-to-standard or certified deaf interpreter, a sign language interpreter using more English based signs, an oral interpreter, a cued speech transliterator, a Deaf-Hearing team, or a tactile interpreter for a prisoner who is deaf and blind.

13.7 Reasonable Modifications and Accommodations¹⁸⁴

Reasonable modifications and accommodations are changes to [entity] policies, practices, or procedures, made in accordance with Policy 1.4, that are necessary to avoid discrimination on the basis of disability and to ensure equal access to [entity] services, programs, and activities.

13.8 Service, Program, or Activity

- A. A service, program, or activity means any function conducted by [entity] or staff, directly or by other entities through contractual, licensing or other arrangements, including but not limited to volunteer-provided programming and including but not limited to on-site and off-site medical care.
- B. Services, programs, and activities include, but are not limited to: daily environments such as recreation, meals, library, work assignments, and basic communications; educational and vocational programming; religious services; medical and mental health care; grievance interviews and processes; disciplinary matters, including investigations and proceedings; classification interviews; pre-release meetings and programs; meetings to discuss auxiliary aids and services and reasonable modifications and accommodations; and any other relevant interactions and programming.

13.9 Staff

As used throughout this policy, “staff” means any person performing duties for [entity], including as an employee, contractor, or volunteer, including carrying out [entity] services, programs, or activities.

¹⁸⁴ 28 C.F.R. § 35.130(b)(7)(i) (2022); *id.* § 35.150(a)(3).