UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

HANNAH SABATA, et al., **Plaintiffs,** **v.** **NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, et al.,** **Defendants.**	**Case No. 4:17-cv-03107-RFR-MDN** **CLASS ACTION** **EXPERT DECLARATION OF MARGO SCHLANGER IN SUPPORT OF PLAINTIFF' MOTION FOR CLASS CERTIFICATION**

I, Margo Schlanger, declare as follows:

1. I am the Wade H. and Dores M. McCree Collegiate Professor of Law at the University of Michigan. I have substantial expertise in the law, policy, and procedures affecting the incarceration of persons with disabilities. I have been retained by Plaintiffs' counsel in this case, *Sabata v. Nebraska Dep't of Correctional Services*, No. 4:17-cv-3107 (D. Neb.), as an expert on these topics. I have been asked to render my opinion with respect to disability-related policies, practices, and procedures in the Nebraska state prison system. A true and correct copy of my *curriculum vitae* is attached as **Exhibit 1**.

I. PROFESSIONAL QUALIFICATIONS

A. Appointments and Experience

2. I have been a tenured law professor at the University of Michigan since 2009, except for a two-year period in 2010 and 2011 when I was on leave to serve as the Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security. Among other classes, I teach Torts; Constitutional Law, including advanced classes about the Equal Protection Clause; and Prisons and the Law. I also founded and serve as the Director of the Civil Rights Litigation Clearinghouse, http://clearinghouse.net. I am a faculty affiliate of the University of

Michigan Center for Forensic Psychiatry Fellowship in Forensic Psychiatry and in that capacity teach and advise forensic psychiatrists-in-training.

3. I have also held faculty appointments at Harvard Law School (associate professor), Washington University Law School (professor), and UCLA Law School (visiting professor).

4. Outside of my academic appointment, I have served since June 2015 as the court-appointed Settlement Monitor in *Adams & Knights v. Kentucky Department of Corrections*, No. 3:14-cv-00001 (E.D. Ky.), a state-wide case about deaf and hard-of-hearing prisoners' access to programs, services, and activities offered by the Kentucky Department of Corrections and the constitutionality of their conditions of confinement.

5. I have had many corrections- and disability-related appointments in the past. Among them:

a. After appointment by U.S. Department of Homeland Security (DHS) Secretary Jeh Johnson, I served from November 2015 through October 2016 as a member of an Advisory Committee on Family Residential Centers, which recommended improved policies and practices relating to family immigration detention of noncitizens.

b. In 2012-2013, as part-time Counsel to the Secretary, I advised DHS Secretary Janet Napolitano on civil rights matters, including reducing the use of restrictive housing and minimizing sexual assault and abuse in immigration detention.

c. As the presidentially-appointed Officer for Civil Rights and Civil Liberties at DHS in 2010 and 2011, I was the head of civil rights for DHS, with responsibility for, among other things, civil rights complaints and policy relating to detention conditions. In that role, I was also the senior DHS official with responsibility for assessing and improving compliance with Section 504 of the Rehabilitation Act of 1973, the statute banning disability discrimination by federal agencies.

d. From 2007 to early 2010, I served as the Reporter for the American Bar Association task force on Standards relating to the Treatment of Prisoners. In that capacity, I was the principal drafter of both the standards themselves and the associated commentary.

e. From 2006 to 2008, I served as a member of the Commission on Safety and Abuse in America's Prisons, a blue-ribbon panel sponsored by the Vera Institute of Justice and chaired by former Attorney General Nicholas de B. Katzenbach and former Judge John Gibbons, which made recommendations for civil rights improvements in prisons and jails.

f. From 1995 to 1998, I served as a Trial Attorney and then a Senior Trial Attorney in the U.S. Dept. of Justice, Civil Rights Division, Special Litigation Section; among other activities, I conducted investigations of jails and prisons and their compliance with the Constitution and the Americans with Disabilities Act, and related litigation.

B. Relevant Publications

6. I have written widely on the topic of civil rights and prisons. My *curriculum vitae* includes a list of both academic and non-academic publications. I am currently working as the lead author of the next edition of a leading casebook on corrections law and policy. Among my published writing is:

a. *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018)

b. *Prisoners with Disabilities: Individualization and Integration*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., October 2017)

c. *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. MIAMI RACE & SOCIAL JUSTICE L. REV. 1 (2016)

d. *How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities*, ACS Issue Brief (May 19, 2016)

e. *The Just-Barely-Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 62 (2016)

f. *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015)

g. *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519 (2015)

h. *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. CIV. RGHTS-CIV. LIB. L. REV. 165 (2013)

i. *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421 (2010)

j. *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L., issue 1, article 1 (2008)

k. *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006)

l. *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79 (2004) (with Anne Morrison Piehl)

m. *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003)

n. *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999)

7. I also have substantial expertise in social science methods. I am the former Chair of the Association of American Law School's Section on Law and the Social Sciences. I have taught a law school class titled "Empirical Inquiries in Civil Litigation." I also have published both quantitative and qualitative empirical papers in both law reviews and peer-reviewed journals such as the Journal of Empirical Legal Studies and the Annals of the American Academy of Political and Social Science.

II. FACTUAL BASES AND SUMMARY OF OPINIONS

8. I have been asked to render my opinion with respect to disability-related policies, practices, and procedures in the Nebraska state prison system. My opinions, as outlined herein, are based on: my substantial experience in this area regarding implementation of the legal framework outlined in Section III; leading correctional standards in this area including the American Correctional Association's *Performance-Based Standards for Adult Correctional Institutions* (5th ed., 2018), the National Commission on Correctional Health Care's *Standards for Health Services in Prisons* (2018), and the American Bar Association's *Treatment of Prisoners Standards* (2011), which I played a lead role in drafting; relevant disability-related policies from other correctional systems throughout the country; review of numerous Nebraska Department of Correctional Services (NDCS) policies including policies previously obtained by

the University of Michigan Prison Information Project in response to a Freedom of Information Act Request; public reports regarding the NDCS system; transcripts of relevant depositions taken in this matter; and relevant documents produced by NDCS to counsel for Plaintiffs, including files relating to the named Plaintiffs. A list of materials I have reviewed and relied upon in making this declaration is attached as **Exhibit 2**; I have also referenced a number of other documents I have reviewed and relied upon in the footnotes of this declaration.

9. My work on this matter is ongoing and my opinions are partial and preliminary, based on the available information I have reviewed to date. It is my understanding that additional documents and information will be forthcoming during the course of this litigation, and that a number of relevant documents requested by Plaintiffs' counsel have yet to be produced. Based on the information I have reviewed, I am confident in the preliminary opinions contained in this declaration. I anticipate, however, that these opinions will be further developed and supplemented as more information becomes available.

10. Based on my review of the materials available to me, it is my opinion that NDCS systematically fails to provide prisoners with disabilities with equal access to NDCS services, programs, and activities, and fails to communicate effectively with prisoners with communications-related disabilities. NDCS's policies pertaining to disability are limited and appear to be governed by two core policies, Administrative Regulation 4.01, NDCS's general ADA policy, which covers application of the ADA for both NDCS employees and prisoners, and Administrative Regulation 200.3, which covers the provision of sign language interpreters. These two policies fail to adequately address identification of prisoners with disabilities, reasonable modifications and provision of assistive devices and auxiliary aids, and effective communication.

11. NDCS has no written policies or procedures to guide functional identification of prisoners with disabilities as they are processed through intake. NDCS has no written policies

governing the provision of assistive devices beyond a cursory reference that they will be provided subject to "medical necessity, safety, and security"; no guidance is offered staff to assist their application of those broad concepts in the context of disability-related devices. It appears that NDCS does not affirmatively inform prisoners about their rights under the ADA, or about how to access necessary services. To the extent prisoners with disabilities are identified, they seem not to be provided information on the services available to them. NDCS has no tracking system to ensure housing unit or other staff know what modifications are needed and provide them, and indeed has policies in place that obstruct provision of appropriate information.

12. As a result, NDCS fails to provide equal access to prisoners with disabilities by failing to: (a) have appropriate policies or formal practices in place to ensure people with disabilities are identified and their disability-related needs assessed; (b) have appropriate policies or formal practices in place to ensure prisoners who develop disabilities while incarcerated, or have their disabilities worsen during their incarceration, are identified and have their disability-related needs assessed; (c) ensure consultation between the ADA coordinator, medical and mental health staff, and correctional staff regarding disability-related needs and required reasonable modifications; (d) integrate ADA coordinators into disability-related processes including identification of prisoners with disabilities and decision-making regarding needed reasonable modifications; (e) have an appropriate system to track prisoners with disabilities and their disability-related needs to ensure needed reasonable modifications are provided to prisoners, including as they transfer between housing units and/or NDCS facilities; (f) develop adequate policies and practices that ensure appropriate assessment and provision of reasonable modifications; (g) develop substantial additional policies necessary for an adequate system ensuring effective communication.

13. With respect to parole, there are similar but even more glaring policy omissions, with an absence of written policies or established practices relating to parole applicant requests for reasonable modifications (including assistive devices) and auxiliary aids/effective communication. In addition, there are no systems in place to ensure equal access for prisoners with disabilities to either parole prerequisites or parole placements. And the formal rules explicitly declare disability to be factor weighing against grants of parole.

III. MINIMUM ELEMENTS OF A CORRECTIONAL SYSTEM FOR ADDRESSING THE NEEDS OF PRISONERS WITH DISABILITIES

14. The welfare of prisoners with disabilities is protected by both the Constitution (the Cruel and Unusual Punishments Clause, the Due Process Clause, and the Equal Protection Clause) and the two principal federal disability anti-discrimination statutes, the Rehabilitation Act (sometimes referred to as Section 504) and the Americans with Disabilities Act (ADA). Taken together, the requirements are robust. Prison 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 programs, service, and activities; and provide reasonable treatment for serious medical and mental-health conditions.

A. Constitutional Protections

15. Under the Eighth Amendment's Cruel and Unusual Punishments Clause, government officials must "respond[] reasonably to … risk[s]" to prisoners, where those risks threaten the "minimal civilized measure of life's necessities." *Farmer v. Brennan*, 511 U.S. 825, 844, 834 (1994). This obligation includes, for example, risks in the areas of nutrition, sanitation, large-muscle exercise, health care, mental health care, housing, and protection from harm by staff and other prisoners. So if an overarching prison policy or practice, applicable to prisoners with and without disabilities alike, poses an obstacle 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 his or her cell or housing unit, or avoid assaults by other prisoners—modification of that policy to accommodate the disability and solve the problem is required by the Constitution. Similarly, prisoners retain certain due process rights under the Fourteenth Amendment with regard to credit-earning, discipline, and parole matters. 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.

B. Statutory Disparate Treatment

16. Section 504 of the 1973 Rehabilitation Act, 29 U.S.C. §§ *794 et seq.*,[1] and Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*,[2] prohibit discrimination on the basis of disability in federally conducted or supported services, and state and local government services, respectively.

17. Both statutes protect from exclusion or discrimination prisoners with disabilities who are "qualified" to participate in the relevant program. 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

[1] The 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." *Id.* § 794(a).

[2] Title II provides, in relevant part, "[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." *Id.* § 12132.

impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1).

18. The ADA regulations on the definition of disability, 28 C.F.R. § 35.108, are capacious, covering many conditions by name and description, 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." In the ADA Amendments Act of 2008, Congress had clarified and broadened the operative definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3556.

19. The Rehabilitation Act does not define "qualified individual with a disability," but the ADA does. That definition, 42 U.S.C. § 12131(2), is:

> an 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.

20. A key source for understanding what constitutes disability discrimination is the ADA's Title II regulation. Most simply, discriminating against prisoners "because of" their physical disability, serious mental illness, or intellectual disability, violates the statutory ban against disparate treatment. The ADA regulation explains that public entities must afford qualified people with disabilities the same opportunity as non-disabled people to benefit from the entity's services. This means a prison may not, because of an prisoner's disability, deny the prisoner the "opportunity to participate" in a service offered to other inmates, may not provide an alternative service "that is not equal to that afforded others," and must provide aids, benefits, or

services that would enable the prisoner to "gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. § 35.130(b)(1).

21. A prison violates this regulation, for example, if simply because of their disability, it excludes prisoners with disabilities from a program or assigns prisoners with disabilities to segregation cells where prisoners are denied most prison privileges, programs, activities, and services.

C. Reasonable Modification

22. The Rehabilitation Act and the ADA also require the provision of "reasonable modifications"—the ADA Title II's (and Title III's) equivalent of the more familiar "reasonable accommodation" requirement in Title I of the ADA, which addresses employment discrimination. There is generally speaking no operative difference between these two phrases. 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 making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 36.302. A failure to implement a reasonable modification needed by a person with a disability is a type of discrimination; under the ADA, a prison must "take certain pro-active measures to avoid the discrimination proscribed by Title II." *Chisolm v. McManimon*, 275 F.3d 315, 324–25 (3d Cir. 2001).

23. The reasonable modification requirement can require both small and large changes in ordinary practices and procedures. And it includes both training and provision of devices that allow access to services, programs, and activities. Thus a prison would violate the ADA if it declines to provide devices or other necessary assistance that enable equal participation. Some such aids make it possible for a prisoner to overcome physical obstacles. For

example, a prisoner with one arm might use various types of "grip aids" to facilitate tasks that others use two hands for. Or a prisoner who cannot stand for a long period of time can use a stool for job tasks that others stand up while doing. Other times, required assistance addresses cognitive difficulties: a prisoner who is illiterate because of an intellectual disability can, for example, be assigned a reader (whether a person or somehow computer assisted), or excused from a program's journaling requirement.

D. Effective Communication

24. In addition, both the Rehabilitation Act's and the ADA's regulations require prisons and jails to "take appropriate steps to ensure that communications with … participants … are as effective as communications with others." 28 C.F.R. § 35.160(a)(1); 28 C.F.R. § 39.160(a); 28 C.F.R. § 42.503(e). The effective-communication mandate protects prisoners with a variety of communication-impairing disabilities—among them, blindness or low vision, deafness or low hearing, and speech impediments. Often, it translates to a requirement for provision of "auxiliary aids and services," 28 C.F.R. § 35.160—interpreters, computer-aided transcription services, assistive listening systems, open and closed captioning, various telephonic communications devices for the deaf, videophones, visual and other non-auditory alert systems, and more.

25. As the regulations explain, 28 C.F.R. § 35.160(b)(2):

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

E. The Integration Mandate

26. The ADA regulations include a provision, usually termed the "integration mandate," that directs that "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The regulation that deals specially with program access in prisons and jails adds some detail to this general mandate. It 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.

28 C.F.R. § 35.152.

27. Prisons often house prisoners with disabilities in various kinds of special housing that are, if not quite solitary confinement, at least close to it; they impose far more locked-down time than ordinary housing, restrict access to property, limit various privileges, etc. This kind of dedicated housing for people with disabilities (as well as infirmary assignments for prisoners not actually in need of in-patient medical care) violate the plain dictates of the ADA's regulations if the housing area is not "the most integrated setting appropriate" to the prisoners' needs. 28 C.F.R. § 35.130(d).

F. The Anti-Surcharge Regulation

28. Although compliance with the above ADA requirements may cost the regulated public entity money, it is not allowed to charge benefitted individuals. Under 28 C.F.R. §35.130(f), "A public entity may not place a surcharge on a particular individual with a disability

or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part."

IV. POLICY NEEDS AND DEFICIENCIES IN NDCS POLICIES AND PROCEDURES

29. Using data from the 2013-2017 American Community Survey 5-Year Estimate, conducted by the United States Census Bureau, the total civilian noninstitutionalized population of Nebraskans over the age of 16 is estimated to be 1,446,266. Of this total, an estimated 198,830—nearly 14%—have a disability of at least one of six types (hearing difficulty, vision difficulty, cognitive difficulty, ambulatory difficulty, self-care difficulty, and independent living difficulty). The disability rate is significantly higher in jails and prisons. Although different prisons and their populations vary, it is likely that a majority of American prisoners have some kind of disability. Table 1 sets out some of the national prison and jail estimates, with sources:

Table 1: Estimates of Disability in Jails and Prisons

	Prisons			Jails		
	All	Men	Women	All	Men	Women
Vision[3]	7.1%	7.1%	6.4%	7.3%	7.6%	5.1%
Hearing[4]	6.2%	6.2%	5.3%	6.5%	6.6%	6.0%
Ambulatory[5]	10.1%	9.9%	12.1%	9.5%	8.9%	13.5%
Chronic condition[6]	41%			40%		
Age 65+[7]	2.3%	2.3%	1.2%	NA		
Intellectual or developmental disability[8]	4-10%			NA		
Mental illness symptoms: All[9]	49%	48%	62%	60%	59%	70%
Mania	43%			54%		
Major depression	23%			30%		
Psychotic disorder	15%			24%		

30. As Table 1 shows, the types of prevalent disabilities are varied. While the resulting needs vary, as well, there are certain categories of systemic policies and practices that correctional systems need to have in place in order to ensure they are providing prisoners with all

[3] JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-2012 (2015), at 4-5, tbls. 4 & 5, http://www.bjs.gov/content/pub/pdf/dpji1112.pdf. The data in this survey are self-reported in response to the following questions: "Hearing—Are you deaf or do you have serious difficulty hearing? Vision—Are you blind or do you have serious difficulty seeing even when wearing glasses? Ambulatory—Do you have serious difficulty walking or climbing stairs?"

[4] *Id.*

[5] *Id.*

[6] *Id.* at 4–6 tbls.4-6 ("Chronic conditions include cancer, high blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and cirrhosis of the liver."). I used the material in all three source tables to calculate the data in text.

[7] E. ANN CARSON, BUREAU OF STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, app. tbl.3 (2015), https://www.bjs.gov/content/pub/pdf/p14.pdf.

[8] JOAN PETERSILIA, DOING JUSTICE: DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES, http://files.eric.ed.gov/fulltext/ED465905.pdf.

[9] DORRIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 4 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf. The data are for state prisons and local jails; this study finds a lower rate among federal prisoners.

types of disabilities with an opportunity to have equal access to prison services, programs, and activities. Considering all the many types of disabilities and their interaction with a prison environment, appropriate treatment and accommodation of prisoners with disabilities requires effective implementation of the following systemic policies, practices, and processes, which are taken up in more detail in ¶¶32-103. (Note: this is not an exhaustive list.)

a. Identification of prisoners with disabilities and assessment of their disability-related needs. This includes both intake processes, when prisoners arrive to the system or to a new prison, and other identification processes for disabilities that may arise or worsen during an individual's incarceration.

b. Consultation among an ADA Coordinator, medical and mental health staff, and correctional staff regarding disability-related needs and required reasonable modifications.

c. Integration of ADA Coordinators into disability-related processes including with regards to identification of prisoners with disabilities and decision-making regarding needed reasonable modifications.

d. Tracking of prisoners with disabilities and their needs, including routinized notice to staff of both.

e. Development of a system to provide disability-related reasonable modifications to policies and practices, including assistive devices.

f. Development of policies and practices, and provision of auxiliary aids, to ensure effective communication to prisoners who are deaf or hard-of-hearing, blind or low-vision, or have other communications disabilities.

g. Disability request and grievance processes.

31. In the prison environment, some of the issues that, in my experience, need particular attention are:

a. Use of Restrictive Housing for people with disabilities.

b. Improper segregation of prisoners with disabilities in special housing units, such as in medical facilities or mental health units, that restrict their access to programs and services.

c. Parole policies and processes, including: access to parole prerequisites and in-prison parole planning; reasonable modifications and effective communication to allow equal access to parole hearings; criteria used in

parole decision-making; and equal access/reasonable modifications to parole plans.

These are discussed in more detail in ¶¶ 104-122.

A. Identification of Prisoners with Disabilities and Their Disability-Related Needs: Intake

32. Prison systems typically have intake processes for new prisoners. In many systems, including Nebraska, prisoners who are new to the system are admitted first into a reception facility. (My understanding is that Nebraska's intake for men occurs at the Diagnostic and Evaluation Center, in Lincoln; intake for women occurs at the Nebraska Correctional Center for Women, in York.) At initial intake, prisoners receive some type of medical and mental health assessment, custody classification, and perhaps other evaluations. When they are given a more permanent housing assignment to another institution, and each time they are subsequently transferred, there is another, typically less comprehensive, intake process, with varying components.

33. Just as prisons risk causing prisoners grave harm if prison staff fail to ask prisoners, proactively, about their medical and mental health situation and needs, it is important for prison staff to ask about and assess disability needs.

34. Disabilities are founded on physical or mental health impairments, so timely, complete, and competent medical and mental health histories and evaluations are crucial to identification and appropriate response to disabilities.

35. However, it is not enough for a prison to simply do medical/mental health histories and exams, for two reasons. First, physical or mental health impairments identified by medical or mental health staff are usually noted only in medical/mental health records—which means prison officials do not know about them for purposes of complying with the ADA's mandates relating to non-discrimination, reasonable modification, and effective communication.

For example, effective communication with a hard-of-hearing prisoner may require that staff speak to that prisoner one-on-one in a quiet location, making sure that the lighting is good and that the prisoner can see the staff-member's face.[10] None of that will happen if the prisoner's hearing impairment is merely noted in a medical file. Second, appropriate treatment of prisoners with disabilities depends on the interaction of their disability with their environment. Appropriate disability assessments look not just at physical or mental impairments, but how those impairments affects a prisoner's needs and equal access to programs, services, and activities in light of his or her housing, job, education/rehabilitation, and other assignments. This assessment is not part of an ordinary medical/mental health history and exam.

36. Many states require disability identification/assessment as part of the prison intake process. For example, the Arizona Department of Corrections ADA policy sets out a process by which a health care provider performs a disability assessment and relays the gathered information to non-medical staff.[11] The components are both medical and functional. For example, the assessment includes "endurance (able to walk less than 200 feet)," and whether assistance is needed for "ambulation," "transfers," "hygiene," "bathing," "feeding," "toilet requirements."[12]

37. There are existing models, as well, of policies that cover disability not just by conducting simple medical screening but more fully. For example, Colorado's medical intake policy explains that intake must include medical history, "use of or need for health care

[10] For U.S. Department of Justice suggestions on law enforcement communication with deaf and hard-of-hearing individuals, *see* https://www.ada.gov/lawenfcomm.htm.

[11] Ariz. Dep't Corr. Chapter 100, Department Order 108: Americans With Disabilities Act Compliance (May 9, 2014) https://corrections.az.gov/sites/default/files/policies/100/0108_101518.pdf.

[12] *Id.* at 1.2.2; 1.3.3, Attachment C.

appliances," and "housing restrictions, accessible placement and Americans with Disabilities Act (ADA) accommodations to ensure equal access pursuant."[13] And its ADA policy explains that the medical screening "includes screening for limitations"; that "all new arrivals will be provided an opportunity to complete [an] Offender Request for Accommodation"; and that the ADA coordinator must be notified by health services about any prisoner who is assessed as needing a "housing or medical restriction[]," "provided, ordered or permitted to maintain a health care appliance," or has "an obvious physical disability." In turn, upon receiving notice "regardless if an offender self-identifies or makes a request, ADA coordinator(s) will review the offender's limitations, investigate potential barriers and reasonable accommodations."[14] Many other states also have policies that require not just medical but functional assessments.[15]

38. I cite the policies referenced in the above three paragraphs to make a limited but important point: Compliance with the ADA's obligations requires speedy and routine intake identification of prisoners with disabilities, which is not just a medical but a functional conclusion. It requires identification of prisoners' functional needs and then prompt consideration of modifications, auxiliary aids, and communication adjustments needed for equal access to programs, services, and activities and for effective communication. The key is to identify disability during intake, and then conduct functional assessments that can be used to

[13] Colo. Dep't. of Corr. Admin. Reg. 700-07: Officer Health Examinations (October 15, 2017), https://drive.google.com/file/d/0B8bgSyXgeic3ME9Ybk5ZSDFoQnc/view (accessed via https://www.colorado.gov/pacific/cdoc/policies-1), p. 2.

[14] Colo. Dep't. of Corr. Admin. Reg. 750-04, American with Disabilities Act-Offender Request for Accommodation, at 5, https://drive.google.com/file/d/1jDw_AtZVCG23xszUMisGiysktty6nJsV/view.

[15] *See, e.g.*, Vt. Agency of Human Services Dep't of Corr., 371.01, Americans with Disabilities Act (ADA) – Facility and Field, at 11, http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/371-375-programs-classification-and-case-planning/371-01-ada.pdf; In. Dep't. of Corr. 00-02-202, Offenders with Physical Disabilities, at 4, https://www.in.gov/idoc/files/00-02-202%20Offenders%20with%20%20Disabilities%201-1-2013.pdf.

ensure ADA compliance. If prison policies or practices do not cover this need, it is highly likely that the result will be unequal access to programs, services, and activities for prisoners with disabilities, and failures of effective communication.

39. As far as I can tell from Nebraska's relevant policies and discovery disclosures, NDCS policies relating to intake do not require disability-related intake apart from a simple health history. The intake medical screening includes an "observations" section that references, for example, "deformities," and "prosthetic/brace," and a health history that covers some disability-relevant issues (e.g., "hearing disorder").[16] But there is very little that guides a functional assessment—just a spot to mark for a "lower bunk pass" or a "medical equipment pass."[17] This is a major problem; I would expect it to under-identify prisoners with disabilities.

B. Non-Intake Identification Processes

40. It is important that intake not be the only time when prison officials can learn of a prisoner's disability. Intake can miss issues, of course. In addition, prisoners can become disabled or more significantly disabled over time during their incarceration, either because their medical/mental health situation worsens or because of some changing interaction of a physical or mental impairment and their environment. For example, a hard-of-hearing prisoner newly assigned to a noisier unit may find his hearing impairment a more significant obstacle to effective communication.

41. Thus an appropriate prison disability identification process cannot be limited to intake. Instead, it requires many entry points: a prisoner's self-report, or referral by NDCS staff, including custody, unit, medical, and mental health staff. A verification process, which may include a medical or mental health exam, would then follow where appropriate.

[16] Initial Medical Screening for Jail Release Offenders (NDCS031709).

[17] Intra-System Medical Screening (NDCS031696)

42. For any of these non-intake identification processes to work, the relevant reporter—prisoner or staff—must know both that there is a reason to report disability (that is, that reports will somehow be useful to the prisoner and his or her access to services), and how to invoke disability identification processes.

1. Prerequisites for Prisoner Self-Identification

43. Effective prisoner self-reporting depends on effective notice to prisoners that disability-related services are available and how to obtain them. Prisoners identified as having disabilities should receive detailed notice of what services are available and how to request those services. By contrast, the notice needed for *all* prisoners is not extensive. Including disability anti-discrimination policy and services in orientation materials/sessions may suffice, or perhaps a further notice could be posted in housing units.

44. To be effective, the universal notice should be in simple language and should cover the range of the prison's obligations/services, and how to obtain them. It might read something like[18]:

> **Americans with Disabilities Act and Inmates with Disabilities**
>
> - It is the policy of [this Institution] to treat inmates with disabilities fairly. That means:
> - [Institution] will not discriminate against any inmate on account of disability.
> - [Institution] will provide inmates with verified disabilities an equal chance to participate in services, privileges, and programs at this institution, and will offer reasonable modifications to institution policies and practices, including by providing assistive devices, if necessary to allow equal participation.
> - [Institution] will communicate effectively with inmates who are deaf or hard-of-hearing or blind or have low vision, including by using auxiliary aids such as interpretation, braille, large print, and non-auditory alerts.
> - If you have a disability-related need or complaint, [what they should do].

[18] For an example of a disability rights statement that includes somewhat similar language, see Mont. Dep't. of Corr., Montana State Prison Martz Diagnostic & Intake Unit (2010) at 4, https://www.law.umich.edu/special/policyclearinghouse/Documents/Montana%20State%20Prison%20Handbook.pdf; Wa. Dep't. of Corr., Statewide Inmate Orientation Handbook (2017) at 7-8, https://www.doc.wa.gov/docs/publications/400-HA002.pdf.

45. And of course, it is important that the policy not be merely written but actually communicated to prisoners, at orientation—and in a manner sufficient to reach prisoners with communication and cognitive disabilities.

46. My information is currently incomplete due to the stage of litigation and documents not yet produced by NDCS, but from what I have reviewed, Nebraska does not adequately provide notice to prisoners of their disability-related rights and how to exercise those rights. It is true that NDCS ADA Coordinator Lisa Mathews has stated that "Inmates receive ADA policy information in several ways, including but not limited to, inmate orientation, visits with health services, medical, mental health, and social workers, Housing/Re-Entry staff referrals and library staff referrals." Affidavit of Lisa Mathews, ¶ 6 (Dkt No. 127-46). But Ms. Mathews also testified that she does not know the details: "I have not been to orientation so I don't know how it is presented, but I do know that those orientations are held." Mathews August 23, 2018 Dep. at 127:5-8. The written orientation materials available to me from each NDCS facility—both from 2014 and more recent discovery—suggest that there is no systematic effort to include disability issues in orientation:

47. In NDCS materials I have reviewed, apart from orientation relating to mental health programs and services, there is remarkably little that informs prisoners about their rights under the ADA, the services available, or how to access those services. Some of the recent disclosures list dozens of topics required to be covered in particular prisons' orientations, each with a spot to check off that it has been covered. Disability is not on any such list I have seen.[19]

[19] From OCC, the list is: Notification of Family of Change in Institutional Housing; Unit Positions, Names, Classification Process/Unauthorized Areas; Emergency Procedures - Fire/Severe Weather; Unit Daily Schedule; Counts; Searches/Shakedowns/UA Tests; Sanitation; Work Assignments; Housing Unit Rules; Inmate Rooms; Day Areas; Meals; Showers; Mail; Medical/Dental/Medication/Eye Clinic; Mental Health; Religious Services; Haircuts; Library; Canteen; Grievances; Visiting; Laundry - Unit Specific Schedule; Telephone; Policy

48. A few of the orientation-related "operational memoranda" (OMs)—prison-specific policy implementation documents—include what seems to be intended as an antidiscrimination statement. The Diagnostic and Evaluation Center OM, for example, states "All commitments received at the DEC will participate In an initial screening/orientation/ classification process and ongoing assessment resulting in finalization of the classification document and assignment to the appropriate institution/program, Program access, work assignments, and administrative decisions will be made without regard to the inmate's race, religion, national origin, sex, disability or political views." DEC Operational Memorandum 201.2.3.1 (NDCS 178322-178328, at 2). And many of the OMs explain to prison staff their obligation to ensure that orientation is itself accessible to prisoners with disabilities—if, for example, interpretation is needed. For example, the Nebraska State Penitentiary OM on intake states, "The inmate will be briefed on the Rules and Regulations by his Case Manager in detail, and if necessary, provided with a pre-recorded cassette tape (talking book) which is a verbatim account of all rules and regulations as written in the Inmate Rule Book …. For hearing impaired inmates and those with disabilities not specifically listed in this OM, additional assistance may be sought to provide orientation information." NSP Operational Memorandum 201.002.102 (NDCS 178308-178321, at 4). But I did not see any orientation documents that describe oral presentations to prisoners about their disability-related rights or any relevant processes, or that put any such information in print.

Changes/Inmate Bulletin Board; Protective Custody procedures and requests. (NDCS178237.) For NSP, the list is: Names of unit staff and their duties; Count; Doors; Unauthorized areas; Searches; Grievances; Telephone; Wake-up; Medicine/Medical services; Clothing Issue; Sanitation; Classification matters; Visitation; Mail; Law Library; Religious Services; Conduct and Discipline; Notification to family of transfer; Showers; Personal Property; Fire Evacuation; Policy Change; Passes; Dress Code; Personal Bunk Area; Lights Out; Hobby Activities; Sexual Assault/Abuse. (NCDS178212)

49. NDCS's ADA Policy, AR 004.01, cannot fill this gap, even if it is available to prisoners in prison law libraries. Most crucially, prisoners who do not know about their rights are unlikely to think to look in the law library for a policy they do not realize exists. (Presumably, this is the reason that NDCS affirmatively tells prisoners that they have the right not to face sexual abuse in prison, rather than just placing an anti-abuse policy in the law library.) In addition, the ADA Policy is long, quite complex, and far from easy to read or understand—in part because it outlines both the Title I accommodation processes for NDCS employees and Title II prisoner processes. The ADA Policy is also incomplete: it does not ever mention the obligation of effective communication, or the ADA's integration mandate. Finally, the ADA Policy seems to rely on prisoners to somehow figure out the inscrutable issue of whether authorities will classify their disability-related complaint/issue as medical (and therefore appropriately brought to the attention of medical staff) or non-medical (and therefore appropriately brought to the attention of other staff).

50. In summary, I have seen no evidence that, in Nebraska, the state's obligations—the ADA's antidiscrimination, reasonable modification, effective communication/auxiliary aids, and integration requirements—are presented to prisoners, much less explained. Likewise, there seems to be nothing in orientation describing the process for obtaining disability-related services. In general, then, a prisoner with a disability that is *not* identified during intake—or whose disability was identified during intake but who has not received the services he or she needs—is apparently left to figure out next steps without notice by NDCS.

2. Prerequisites to Staff Referrals

51. Similarly, if staff are going to be able to do disability identification/referral, they need training that explains that this is an important role for them and how to fulfill it. They should be trained on the signs of disability (for example, signs of hearing, vision, cognitive

impairments), and informed about the steps to follow if they detect such an impairment. This would enable appropriate response by, for example, a teacher whose class includes a prisoner having trouble hearing or seeing, or a correctional officer who observes a prisoner having difficulty reaching an upper bunk, or a unit administrator who encounters a prisoner with cognitive limitations that render him unable to understand unit rules. All those staff members should know the signs of the disabilities in question and how to make a referral so the potential disability can be evaluated and appropriate accommodations offered. Based on the materials I have reviewed, I am not aware of any such training at NDCS.

C. Consultation

52. Once a disability is detected/verified by medical/mental health staff, it needs to be taken account of in prison life. That is, it may require a reasonable modification to prison policy or practices, or provision of an auxiliary aid or other steps to ensure effective communication. This frequently requires consultation with the prisoner to understand his or her needs, and also with quite a few different officials within the prison.

53. For some prisoners, their disability is basically a medical issue; they need treatment, but rarely much else. Other prisoners need some kind of assistive device, which can be prescribed by medical staff—a brace, perhaps, or glasses—but little more. For many prisoners, however, once their disability is identified and verified, equal access to services, programs, and activities, and effective communication, requires the cooperation and participation of non-medical staff. It is for this reason that the American Correctional Association (ACA) standards require

> consultation between the facility and program administrator (or a designee) and the responsible health care practitioner (or designee) prior to taking action regarding chronically ill, physically disabled, geriatric, seriously mentally ill, or

> developmentally disabled offenders in the following areas: housing assignments, program assignments, disciplinary measures, transfers to other facilities.[20]

54. The ACA standard does not mention waiting for a prisoner's request—instead, the coordination referenced is required "prior to taking action [relating to] housing assignments, program assignments, disciplinary measures, transfers to other facilities" without any such limit. Yet—with the exception of "Functional Assessments for Aging Inmates" dated over five years ago (see Curtright ADA File, Filing No. 127-49, at NDCS 001133-001135), I am not aware of this type of coordination by NDCS staff. Given that the staff who make housing assignments, program assignment, disciplinary decisions, and transfer decisions have no way to know, reliably, about prisoners' disabilities, it is inevitable that such decisions will deprive some prisoners of the ADA's promised equal access to services, programs, and activities.

55. Several hypothetical examples demonstrating the usefulness of consultation follow:

a. The access of prisoners with mobility impairments to all the services, programs, and activities of a prison can be greatly assisted by minimizing the distances they are required to walk. Yet based on the materials I have reviewed, it seems that the only housing accommodation that seems to occur in NDCS facilities is a lower bunk assignment.

b. When prisoners who are hard-of-hearing are assigned to a program, it is useful for the staff member running the program to know about their hearing impairment, to ensure that the program is conducted in a location that minimizes sound interference. For example, at some prisons some programs are run in housing areas, where hearing can be very difficult because of fans, laundry or ice machines, and the like. If a hard-of-hearing prisoner is assigned to such a program, and officials know about his hearing, the program can be moved to an environment that facilitates effective communication.

c. If a deaf or hard-of-hearing prisoner is charged with an infraction such as failing to obey an order, a hearing officer who knows about the hearing impairment can make sure to ascertain whether or not he heard the order, and dismiss the disciplinary charge in appropriate circumstances.

[20] ACA ACI 5-6C-4399 (2018).

d. A prisoner with low vision who has a television can be given some method to place the television near enough to see, in his cell.

e. A prisoner with intellectual disability can receive one-on-one orientation to a new housing assignment, to explain to her any new rules or practices in a way she is more likely to understand.

56. All these types of steps depend on routine reliable communication to the relevant staff that a particular prisoner has a disability and then consultation between medical/mental health staff, someone with ADA expertise, and the appropriate operational staff to make decisions about accommodations.

D. ADA Coordinator

57. Providing appropriate services for prisoners with disabilities requires knowledge of what the law requires—the content of ¶¶ 15-28. Equally important, it requires knowledge of multiple technologies and techniques. Take a relatively easy question: What can be done to provide access to telephone communication to a prisoner who is too hard of hearing to use a regular phone, but who doesn't sign? To answer requires awareness of the range of devices available—for example, amplifiers (including their interaction with hearing aids), or devices such as captioned telephones.[21] In correctional facilities, there are added complications. What kinds of amplifiers are sturdy enough for congregate facilities and capable of use with (usually low-tech and analog signal) prison pay phones? How can a captioned telephone be linked to the prison phone-billing system? And so on. Someone needs to develop the requisite regulatory and practical expertise.[22]

---

[21] *See Internet Protocol (IP) Captioned Telephone Service*, FCC, https://www.fcc.gov/consumers/guides/internet-protocol-ip-captioned-telephone-service ("CTS [captioned telephone service] allows a person with hearing loss but who can use his or her own voice and has some residual hearing, to speak directly to the called party and then listen, to the extent possible, to the other party and simultaneously read captions of what the other party is saying.").

[22] On what an effective ADA coordinator needs to know and be empowered to do, see U.S. DEP'T OF JUSTICE, ADA BEST PRACTICES TOOL KIT FOR STATE AND LOCAL GOVERNMENTS (2006) https://www.ada.gov/pcatoolkit/chap2toolkit.pdf.

58. The Title II regulations, 28 C.F.R. § 35.107(a), state:

> Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part.

59. Accordingly, many prison systems assign ADA coordinators to develop the expertise and manage the consultations just described. It would be difficult to do this with just one coordinator for a large and spread out prison system. So it is common to have an ADA coordinator for the system as a whole and for each prison in it.[23]

60. By contrast, NDCS has just one ADA coordinator, located not in a prison but at central headquarters—far away from many of the state's prisons. In a system as large and dispersed as NDCS (more than 5000 prisoners, 10 prisons) it is in my view unlikely that this setup can succeed. Instead, as in so many other states, each prison also needs its own ADA coordinator. The task would probably not require a full-time assignment, but having an ADA coordinator at each (or nearly each) prison would put that coordinator in close contact with the relevant custody and non-custody staff, and make him or her responsible for a manageable number of prisoners.

61. Just as the consultation described above, ¶¶ 52-56, cannot be effective if it waits for a prisoner's request, notification to the ADA coordinator that a prisoner has a disability and might need some kind of intervention should be automatic. That way the ADA coordinator can

[23] See, e.g., Conn. Dep't. of Corr., 10.19, Americans with Disabilities Act, at 2-3, https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad1019pdf.pdf?la=en; Md. Dep't. of Pub. Safety and Correctional Services, OPS.200.0004, Policy Statement—Inmates with a Hearing Disability, at 6-8, http://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=1437; Ma. Dep't of Corr., 2003 DOC 408, Reasonable Accommodations for Inmates, at 6-8, https://www.mass.gov/files/documents/2018/11/14/408.pdf; N.C. Dep't. of Public Safety Prisons, E.2600, Reasonable Accommodations for Inmates with Disabilities, at 4, https://www.doc.state.nc.us/dop/policy_procedure_manual/e2600.pdf.

assess what steps are useful and, when appropriate, consult with other prison staff and/or the prisoner.

62. Depending on the disability and its severity, it may be appropriate for there to be a disability assessment—a meeting during which someone knowledgeable discusses with the prisoner whether there is any need for reasonable modifications or auxiliary aids in housing, programming, education, work, or the like, and then makes appropriate arrangements, in consultation with prison staff in the relevant areas.

63. But at NDCS, if medical staff identify someone as having a disability, that does not routinely lead to notification to the ADA coordinator, or indeed any non-medical staff.[24] (A diagnosis code for the underlying physical/mental impairment is placed in the Nebraska Inmate Case Management System (NICaMS), but this is apparently not available to most correctional staff.)

64. The policy gap is confirmed by the deposition of Lisa Mathews, NDCS's ADA coordinator. That deposition demonstrates that Ms. Mathews is informed only very occasionally that a prisoner with a disability has arrived at the prison:

> Q. And if medical does identify somebody as having a disability, say for instance somebody is injured while they are incarcerated and all of a sudden can't walk, does medical ever consult with you at that time in regards to what accommodations might be needed? A. Rarely.

Mathews August 23, 2018 Dep. at 102:11-17.

[24] NCDS Medical Director Deol testified that a nurse conducting an intake assessment will address disability: "will ask the questions and the initial clinical assessment will be done what the requirement might be and then we refer to the physician and they will make the further determination. And if ADA requirements are made, they will call the ADA coordinators." Deol November 30, 2018 Dep. at 83. But this is not written down in policy, and ADA Coordinator Lisa Matthews testified to the contrary, likewise in a Rule 30(b)(6) deposition. She also noted she had never received such a referral from intake since the time she started at NDCS in her role as ADA Coordinator. Mathews December 5, 2018 Dep. at 41:24-42:2.

65. Typically, Ms. Mathews testified, she gets involved only if a prisoner approaches her:

> Q. What do you mean by you don't accommodate on a referral? A. Well, I'll go back to the example of a person is only disabled – we acknowledge that a person gets to decide if they are disabled. So if we had an inmate who was just at intake because they have an obvious disability, they might make that referral, but I'm not going to run out and start accommodating them until that person says, hey, I'm going to need some accommodation because of my disabilities. Q. Okay. So you would wait for a person to file a request or send you a letter? A. Yeah. Yes, that is correct.

Id. at 95:11-25.

> Q. And for those examples that you gave, you would only get involved if the prisoner made a request? A. Exactly.

Id. at 103:25-104:3.

66. Ms. Mathews suggested during her deposition that the systematic failure to notify her or other non-medical staff when medical screening reveals a disability is *pro*-disability. She stated,

> [W]e acknowledge that a person gets to decide if they are disabled. So if we had an inmate who was just at intake who someone thought, well, they looked disabled because they have an obvious disability, they might make that referral, but I'm not going to run out and start accommodating them until that person says, hey, I'm going to need some accommodation because of my disabilities.

Id. at 95:13-22. Similarly, she testified:

> [U]nder the ADA just because someone has a condition that could qualify as a disability doesn't mean that person is disabled. So disability truly is in the eyes of the beholder. So just because someone has a certain diagnosis, it doesn't mean that we would say that person is disabled.

Id. at 299:18-25.

67. This represents a very problematic approach. It is appropriate for prisoners with disabilities to be given the choice whether or not an accommodation is useful to them, and to have substantial input into what kind of accommodation/modification would be best. Indeed (as described above), for auxiliary aids, the regulations require that "[i]n determining what types of

auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." But it does not make sense for a prison to take no steps to inform prisoners with disabilities about what kinds of accommodations/auxiliary aids are available and what the process is for them. As described above, ¶¶ 43-45, *all* prisoners should be told something about disability-related prison policies and the disability-related resources available to them, just as they are told about food services, religious services, resources relating to avoiding sexual misconduct, and the like. When a prisoner is discovered to have a disability—through medical intake or otherwise—the next step should be to specifically inform that prisoner about the relevant policies/processes. The obvious person to provide that information is an ADA coordinator, who understands the policies and processes. (It could be done by someone else, but whoever does it would have to have appropriate training and processes.)

68. In addition, even if a prisoner *does* make a request, at NDCS, it seems that the ADA coordinator coordinates for only a small sliver of the ways disability affects prisoners. ADA coordinator Lisa Mathews explained that there are at least four realms in which she plays no role—even though each involves disabled prisoners and their needs.

a. *Medical:* The ADA Coordinator plays no role in the identification of medical needs and assignment of key reasonable modifications including provision of: inmate "porters" (assistants) (Mathews August 23, 2018 Dep. at 103:4-104:22, 155:8-156:2); health care appliances (*Id*. at 99:1-100:9, 159:5-160:17); lower bunk or tier (*Id*. at 67:3-18); medical housing (*Id*. at 75:12-76:1).

b. *Mental Health:* The ADA Coordinator plays no role in identification of mental health diagnoses and treatment plans and is not consulted in regards to potential reasonable modifications for prisoners with mental illness or prior to use of force on prisoners with serious mental illnesses.

c. *Interpretation:* The ADA Coordinator plays no role in managing the process of obtaining American Sign Language (ASL) interpreters when needed. (Mathews Dep. p. 260; AR 200.03 ("Upon request, NDCS interpretation and translation services staff shall arrange for a qualified and licensed interpreter to assist an inmate who is deaf or hard of hearing"). (Note, however, that

apparently in 2004, this was a process managed more by the ADA coordinator. See NDCS-001142)

d. *Housing/Classification:* The ADA Coordinator plays no role relating to the provision of accessible cells or housing of prisoners with disabilities. This seems to be because NDCS categorizes decisions about where to house prisoners with disabilities (and with whom[25]) as "housing" rather than "disability" decisions. This is a conceptual error. The categories of classification or housing on the one hand, and disability on the other, are not mutually exclusive. If they are treated as such, that means that a large and important category of disability-related decision-making—where and how to house a prisoner—is siloed and appropriate disability expertise is excluded.[26]

e. *Parole:* The role of the ADA coordinator with respect to effective communication/reasonable modifications related to prisoner parole hearings or planning is unclear.

69. The point is not that an ADA coordinator needs to be the decisionmaker for each of the above areas. Rather, the issue is that NDCS has chosen a diffuse and uncoordinated set of processes. For many of them, the exclusion of the ADA coordinator likely also means that decisions are made without appropriate expertise in disability rights and available accommodations, assistive devices, auxiliary aids, etc.

E. Tracking and Notice to Staff

70. Apart from the consultation and coordination described above, ¶¶52-69, for a prison to provide prisoners with disabilities equal access to services, programs, and activities,

---

[25] *See* Mathews August 23, 2018 Dep. at 240:1-8 ("Facilities have procedures for how inmates request specific roommates or cellmates, and I don't know that process. But I know that it exists at certain times or certain facilities or that it has existed. But that is a facility process, and something like that being medical, I wouldn't deal with a roommate request.")

[26] *See Id*. at 220:22-221:12:

> Q. … [T]o the extent an individual prisoner requests a single-man cell due to concerns of abuse or exploitation by other inmates, due to their blindness or vision disability, would you consider that an ADA-related issue?
>
> A. Well, housing assignments are not made through ADA. They are made -- it is my understanding, it is a group process. Classification goes into that. You know, there is GP; there is PC; there is different groups for different types of either protection or control or disciplinary measures. So those classifications issues, I'm not involved with, and I'm not involved with housing.

and to effectively communicate with them, the prison must keep track of which prisoners have which disabilities, and must make that information routinely available to appropriate staff. For many disabilities—those affecting communication, cognitive functioning, and mobility—that means all staff who might encounter the prisoner. For example, any staff member who might have dealings with a prisoner who is deaf or hard-of-hearing could need to know that in order to communicate effectively. For this reason, prison policy should address notice in several different ways:

a. *ID cards:* For situations when a prisoner encounters some difficulty related to his or her disability, an ID card provides appropriate notice to staff of the disability. For example, if a prisoner is walking slower than a correctional officer thinks appropriate, an ID card that says "mobility impairment" can verify that prisoner's explanation that he didn't hear the request to hurry up. Likewise an ID card that says "Deaf/Hard-of-hearing" can be helpful for a prisoner having difficulty understanding a conversation or requesting a seat close to the speaker during a program. These ID cards can be made part of the prisoner's ordinary ID (as an extension or marking) or can be separate and worn with the ordinary ID.[27]

b. *Bed/Cell Cards:* For a disability that affects access to services, programs, or activities in housing units, a bed or cell card can be very useful. For example, a blind or mobility-impaired prisoner might have trouble getting out of a unit in an emergency. So a bed/cell card reminding staff that she needs assistance is useful. Similarly, a deaf prisoner will be unable to hear announcements or a fire alarm. So a bed/cell card reminding staff to provide effective communication of those alerts is useful.[28]

---

[27] *See, e.g.*, Md. Dep't. of Pub. Safety and Correctional Services, OPS.200.0004, Policy Statement—Inmates with a Hearing Disability, at 11, http://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=1437 ("The Commissioner of Correction … shall facilitate employee awareness of inmates with a hearing disability by developing and offering to an inmate qualified as an individual with a disability based on a hearing disability identification indicating the inmate is deaf."); Pa. Dep't. of Corr., DC-ADM 006, Reasonable Accommodations for Inmates with Disabilities, at 1-1, https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/006%20Reasonable%20Accommodations%20for%20Inmates%20with%20Disabilities.pdf ("Upon the request of the inmate. A notation shall be placed on the inmate's I.D. card that he/she has a qualified disability to alert staff that accommodations may be needed to properly communicate.")

[28] *See, e.g.*, Md. Dep't. of Corr., 500.060, Medical Alert Tags, http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=500.060.htm ("Staff must assist offenders who

c. *Electronic alert in prisoner file:* Often, the staff member who needs to know that a prisoner has a disability is dealing with the prisoner's file, not addressing the prisoner in person. A classification decision about a prisoners' cell or bed assignment must be informed about the prisoner's disability. Perhaps a mobility impairment requires housing the prisoner close to the unit entrance or close to the chow hall, or a hearing impairment requires a bed assignment near enough to staff to facilitate in-person alerts. Prisoners' disabilities should therefore be noted in their electronic files, someplace hard to miss.[29]

71. At NDCS, however, it seems that prison officials do not have a way to know if a particular prisoner has a disability. NDCS does not provide personal disability IDs, bed/cell cards, or any similar notifications. It does not notate disabilities in prisoner files (with the limited exception that medical diagnosis codes may be in NICaMS, but not available to most correctional staff). And ADA files and information on disability-related needs are kept confidential with the ADA Coordinator.

72. In addition, the fact that medical files at NDCS are paper, not electronic,[30] poses an obstacle to equal access to medical care and to effective communication with patients who have communication-affecting disabilities.

73. Even when a particular set of staff members who have routine encounters with a prisoner with disabilities find out about those disabilities, failure to consolidate information about the identity of prisoners with disabilities and the resulting modification/etc. decisions is problematic for another reason. If disability and resulting modifications/auxiliary aids are not

---

request medical alert tags. Staff must: 1. Inform offenders of the medical alert tag process in the receiving and orientation (R&O) program. … 5. Place the appropriate medical alert tag on the back of the offender's ID card and/or cell door as requested.").

[29] Alaska Dep't. of Corr., 808.16, Prisoner ADA Compliance Program, at 3, http://www.correct.state.ak.us/pnp/pdf/808.16.pdf ("If a prisoner[']s request for a reasonable accommodation under the ADA is granted, the DOC offender management system shall be updated (on the ADA screen) to indicate that an accommodation for that particular prisoner is in place.").

[30] Deol November 30, 2018 Dep. at 33:23-34:18.

prominently noted in a centrally available record, and are not consulted routinely as a decisionmaking aid, there is the potential for a hand-off difficulty every time a prisoner enters a new environment—a new job, program, housing unit, prison. Accommodations he had gained, formally or informally, in the prior environment are often lost: the newly relevant staff lack knowledge of the prisoner's disability and needs, technical solutions and workarounds.[31] In my experience, hand-off problems are a very significant obstacle to the equality of prisoners with disabilities.[32]

74. In fact, NDCS augments hand-off difficulty not just by the decision not to notify the ADA coordinator when a prisoner with a disability is identified, and not just with the diffusion of responsibility, but more directly. Even when the ADA coordinator *is* involved, under Nebraska's ADA Policy, "Only personnel involved in making the reasonable accommodation and/or assisting in the implementation of the accommodation will have knowledge of the request. Information will be provided only on a need-to-know basis." AR 004.01 ADA Policy (2018), at 4 (NDCS 177761-177768). It seems that pursuant to this policy, accommodations are excluded from prisoner institutional files. See Mathews Memo dated December 9, 2015 re: ADA Accommodation for Michael Gunther (NDCS 006605). ("In order to maintain confidentiality, this information will not be included in the inmate's institutional file. To ensure this

[31] ADA Coordinator Lisa Mathews testified to these difficulties, see Mathews August 23, 2018 Dep. at 186:10-25, but there seems to be no process in place to address them.

[32] For a policy that addresses this issue head-on, see, e.g., Ma. Dep't. of Corr., 103 DOC 408, Reasonable Accommodations for Inmates, at 16, https://www.mass.gov/files/documents/2018/11/14/408.pdf ("The Superintendent of each facility shall ensure that the written and automated records of all admissions to the facility are reviewed for approved accommodations as part of the admissions process. Additionally, the institution's admission procedures shall include a mechanism by which the Institution ADA Coordinator, or Shift Commander during nonbusiness hours, is either notified upon the arrival of transferred inmates with approved accommodations or proactively ensures the review of the applicable screen(s) in IMS to note such arrival.")

accommodation remains in effect during future cell or facility changes, please communicate this accommodation only to the current Unit Manager, and any subsequent Unit Manager if a move is to be made. Questions about confidentiality can be directed to the ADA Coordinator.")[33] Mathews August 23, 2018 Dep. at 86:3-88:4 (ADA file access limited to confidential HR staff). With this policy/practice in place, it is only to be expected that every cell or job change, or similar event, will pose significant difficulties for a prisoner with a hard-won modification.

75. The point is not that non-medical staff should have free access to medical files or information. It is that prisoners need there to be an easy path for alerting prison staff to their functional needs, and to already-evaluated reasonable modifications, assistive devices, and auxiliary aids. These should not be considered private, even though the underlying medical issues may be. For example, if a prisoner has a limitation relating to endurance, custody staff do not need to know its source, but they *do* need to know that the limitation exists and what modifications are approved as a result.

F. Provision of Reasonable Modifications and Auxiliary Aids

76. Once prisoners with disabilities are identified and tracked, the next step is to assess what, if anything, is needed to comply with the ADA's requirements of equal access to services, programs, and activities—including by providing making reasonable modifications in prison rules and practices (which may include provision of assistive devices)—and effective communication.

77. If a functional assessment of a prisoner's disability suggests that he or she has areas of need, then there should be a process to meet those needs. The decisionmaking process for the grant or denial of modifications/assistive devices/auxiliary aids should involve someone

[33] Mathews August 23, 2018 Dep. at 107:25-108:3 ("[A]n inmate's interaction with me is, I keep that confidential in the sense that the facility wouldn't necessarily be aware of that.").

with expertise in disability rights and appropriate operational staff, working together. And in order to understand the prisoners' needs and abilities, it must involve the prisoner himself or herself.

78. While individual needs may vary, there are certain common requirements that must be met for all persons with disabilities in a prison environment. Some key considerations for three categories of accommodations—reasonable modifications relating to policy/practice; prisoner assistants, and devices—follow. For each, there are indications in the materials I have read that NDCS's policies and practices are inadequate to appropriately assess and provide reasonable modifications.

1. Reasonable modifications

79. In my experience, prisons sometimes misunderstand the ADA's reasonable modification requirement, which is much broader than the requirement to provide devices that help prisoners surmount disability-related obstacles. Prison officials may reject a request to modify a rule for a prisoner with a disability with the simple answer "that's the policy." For example, at NDCS, when plaintiff Angelic Norris requested special shoes to ameliorate her pain from diabetes, the response was "We do not provide special shoes for that." See Inmate Interview Requests (Dkt No. 127-69) at 26. This is, of course, insufficient in the face of a law that instructs government entities to make "reasonable modifications to rules, policies, or practices."

2. Devices

80. Prisons are required to provide assistive devices under the requirement of reasonable modification or as auxiliary aids. There are dozens, perhaps hundreds, of such devices/features.

81. For example, for deaf/hard-of-hearing prisoners, where I have the most experience, devices could include, among others:

a. *Telecommunications*: TTY/TDD, captioned telephones, built-in and portable volume adjustment (with or without t-coil connection), videophone with or without interpreter relay service.

b. *Television*: captioning, earphones, blue tooth connection to t-coil hearing aids.

c. *Site-specific amplification*: portable microphone/earphone connections via Bluetooth, radio, or other transmission method; built in induction loop systems; ordinary amplification.

d. *Non-auditory substitutes for announcements*: Pagers; non-auditory personal or room alarms including talking watches, bed-shakers, etc.

e. *Interpretation*: Video remote interpretation (VRI); computer aided real-time transcription (CART).

82. Using devices like these in a prison environment is complicated; each one poses its own security and usability issues that need to be worked through. For example, pagers may have insufficient range and need a signal boost that is difficult to enable through thick prison walls. Captioned telephones may mesh poorly with a prison's prisoner phone system. And so on.

83. This technical difficulty is yet another reason that there should be someone at each prison and at the system overall to serve as a coordinator who can solicit, develop, and share the relevant expertise.

84. Instead, at NDCS, it seems that there is a combination of split authority/responsibility and a problematic disinclination to recognize that certain issues are in fact ADA issues. Consider, for example, the following passage from ADA Coordinator Mathews' deposition:

> Q. Do you have any -- to the extent an individual prisoner requests a single-man cell due to concerns of abuse or exploitation by other inmates, due to their blindness or vision disability, would you consider that an ADA-related issue?
>
> A. Well, housing assignments are not made through ADA. They are made -- it is my understanding, it is a group process. Classification goes into that. You know,

> there is GP [general population]; there is PC [protective custody]; there is different groups for different types of either protection or control or disciplinary measures. So those classifications issues, I'm not involved with, and I'm not involved with housing."

Mathews August 23, 2018 Dep. at 220:22-12

85. In my view, whether a device relates to housing, ambulation, education, or some other aspect of prison life, if it serves a disability-related need, prisons must develop appropriate practices and policies, and must be alert to, inter alia:

a. Development of expertise with respect to repeat needs.

b. The appropriateness of standards governing prisoner access to each such device.

c. Process for assessment/decisionmaking.

d. Timeliness of decisionmaking.

e. Waiver of fees, costs, or co-payments for disability-related devices, modifications, aids, or services.

f. Availability of replacements in the event of damage, theft, loss.

g. Appropriate training to non-medical staff about avoiding damage and loss, for example, when prisoners are transferred to disciplinary housing or a new prison.

h. Appropriately easy process for cleaning, getting batteries, replacement parts, etc.

86. Some devices that assist prisoners with disabilities can fairly be considered medical: for example, hearing aids, glasses, canes, prosthetics, and the like. At NDCS, decisions about whether or not to provide these devices are allocated to medical staff, and appropriately so. See AR 115.04 MP 3. (See Attachment A, Bates NDCS078342, defining covered devices as including: "Braces, splints, wraps, prosthesis, hearing aid(s), shoes, glasses, clothing, wheel chairs, dental prosthesis, bite guards, etc.") But the ADA applies to them just as for non-medical devices, and the considerations just listed apply in full force. There seem not to be any policies

that offer guidance on provision of these devices beyond a cursory reference that they will be provided subject to "medical necessity, safety, and security."

3. Prisoner assistants

87. One common strategy prisons use to provide equal access/effective communications to prisoners with disabilities is to assign them prisoner assistants. This approach can be helpful—but it needs to be implemented carefully:

a. When prisoners with disabilities must depend on other prisoners, there is an ever-present opportunity for abuse, both monetary and physical. Abuse of people with disabilities by personal assistants is a major problem outside of prison, as well—but in prison, where autonomy is so limited, the danger is even greater. Prisoner assistants might refuse to provide needed services unless the prisoner with a disability supplements their authorized wage with monetary or equivalent payment. Or a prisoner assistant who helps by reading correspondence might, for example, take advantage of personal information. A wheelchair "pusher" might purposefully dump a mobility-impaired prisoner out of the chair. Prison officials must deter, monitor, and respond to abuse promptly and with real attention.

b. If a prisoner with a disability prefers an accommodation that affords him or her privacy and independence, and it can be reasonably provided, a prisoner assistant is not appropriate. See 28 C.F.R. 35.160(b)(2) ("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.").

c. Prisoner assistants must be adequately trained and monitored.

d. If a prison chooses to use them, prisoner assistants should be available to prisoners with a variety of different disabilities. A prisoner assistant can help deaf prisoners with announcements, blind prisoners with written materials and navigation, mobility-impaired prisoners with transportation, cognitively impaired prisoners with many daily living tasks, and so on.

e. Prisoner assistants must be authorized to provide appropriate assistance, with clarity in the assignments. Prisoner assistants should be assigned whenever necessary for equal access and for whatever tasks are necessary, without limits based on medical severity or the like.

f. Certain assignments—for example, interpretation of sensitive conversations—are simply inappropriate for prisoner assistants.[34]

g. If for some reason a prisoner assistant assignment does not work out—perhaps because the prisoner assistant and the prisoner with a disability do not get along, or one of them is abusive towards the other—alternative arrangements may be necessary.

88. The materials I have reviewed do not suggest that NDCS has taken account of any of the above issues.

89. At NDCS, prisoner assistants are labeled "porters." The porters are assigned, trained, and supervised by medical staff. Deol November 30, 2018 Dep. at 139:20-142:7; Mathews August 23, 2018 Dep. at 156:3-18. Their training, however, is not geared towards disability-related personal-aid-type tasks, but towards nursing-type tasks. The porters are Certified Nursing Assistants, and are apparently trained to do quite a few nursing/personal care tasks. Deol November 30, 2018 Dep. at 139:20-142:7; Mathews August 23, 2018 Dep. at 156:3-18. For some prisoners with disabilities, this is no doubt very helpful. But for many, the tasks with which an aide is useful are not medical at all. A deaf prisoner may need someone to tell him when an auditory alert is sounded; a blind prisoner may need someone to read to her; a prisoner with limited ability to move his arms may need assistance in writing; a prisoner with an intellectual disability may need someone to explain things or read.

90. Porters trained to do nursing tasks may feel that these types of assistance are not really their job. If supervision is insufficient to correct that misimpression, then the prisoner with a disability has an assistant who does not assist—which is insufficient.

[34] In. Dep't. of Corr., 00-02-202, Offenders with Physical Disabilities, at 7, https:// www.in.gov/idoc/files/00-02-202%20Offenders%20with%20%20Disabilities%201-1-2013.pdf (""Helper/aids" shall not be used to interpret for a hearing impaired offender during educational programming, Classification hearings, Disciplinary hearings, or Medical appointments.").

G. Effective Communication

91. The obligation to provide effective communication applies to all types of communication—formal and informal; verbal, written, or by visual or auditory signal. It applies to any prisoner with a disability that affects any particular communication—deaf or hard-of-hearing, blind or low-vision, etc. And it requires communication in a format accessible to the particular prisoner—for example, a braille version of a written document is insufficient for a blind prisoner who does not know braille; and captioning is insufficient for a deaf prisoner who cannot read.

92. Effective communication requires advance and extensive planning and development of significant expertise. Visual materials must be made available in alternative non-visual formats, like braille or audio recordings. Auditory communications must be converted to non-auditory formats—captioned, written, interpreted. Equipment must be purchased and interpreter contracts signed in advanced, so that time-sensitive communications can occur.

93. Literacy rates are lower in prison than on the outside. And literacy rates for deaf and blind people are independently low.[35] So solutions must be cognizant of the prevalence of low literacy.

94. The issues are varied and would require detailed discussion to survey. But some issues that in my experience are particularly important follow in ¶¶95-98. Based on the materials I have reviewed, it seems that NDCS has only a very spare policy addressing these topics. In light of the significant needs and the complexity of appropriate responses to them, I would expect that substantial additional policy development would be necessary for an adequate system to exist.

[35] For individuals whose sign to communicate, English is, after all, not their primary language—American Sign Language (ASL) is grammatically entirely distinct from English. For individuals who are blind, braille literacy is very low.

95. *Intake and orientation*: Effective communication is particularly important during intake and orientation, so that prisoners understand the rules and resources available to them and are appropriately assessed and assigned. But communication during a prisoners' first few days in a new system or prison is also particularly challenging, because prison authorities may not know of the prisoner's communication needs. Thus there must be policy and practice to:

a. Speedily detect communications needs and share those needs with each official who communicates with the prisoner.

b. Anticipate needs for individuals who are (i) blind, (ii) low vision, (iii) deaf (and sign), (iv) deaf (and do not sign), and (v) hard-of-hearing. Prison officials should audit their entire intake and orientation process—each presentation, interview, written communication, video, etc.—and create, in advance, versions or strategies for prompt and effective communication for each category of communications disability, taking account of the low literacy rate.[36]

96. *Sign language interpretation*: For prisoners who sign to communicate, sign language interpretation is essential. Some issues that frequently arise:

a. Because sign language interpretation can be expensive, prisons may try to minimize it. But there are frequently no adequate alternatives.

b. Sign language interpretation must be provided by qualified interpreters—not people who know a little bit of ASL, and not by other prisoners, except in highly unusual circumstances. Involving another prisoner in sensitive communication with a deaf prisoner is problematic.

c. Interpretation should be regularized, so that it can be obtained quickly. It is important for interpreters in a prison setting to be comfortable with people whose sign language is not always formally correct.

d. While it is reasonable for a prison to make sure that interpretation is appropriate for a given prisoner, the prisoner should qualify once and then

[36] Dr. Deol testified that medical staff use a TDD for communication with deaf prisoners in health care. If this is the case, it is completely inappropriate. A TDD is a telephonic 1970s version of instant messaging. It requires literacy and is slow and cumbersome. There is no reason anyone would use it for in-person communication. In fact, TDD would, in that setting, work even worse than simply passing a pen and paper back and forth, which Dr. Deol himself testified "would be pretty slow process and would not be the best option." He was further asked "Would it be medically appropriate?" Dr. Deol responded "No." Deol November 30, 2018 Dep. at 91:1-4.

that qualification should be permanently noted, so that further, unnecessary vetting does not delay future communications.

e. Prison staff often overestimate the efficacy of lip-reading. Even the most expert lip readers miss much of what is said to them in the best circumstances—one-on-one, face-to-face communication. Lip reading is still more ineffective in group settings or at any distance.

f. Arrangements should be made for both in-person interpretation and video remote interpretation (VRI). In-person interpretation is necessary for complex communications, when there are multiple people involved (a class, for example), and in some physical environments in which video interpretation is difficult (for a person who is moving around, for example). But VRI can be necessary for time-sensitive or quick communications—for example, a conversation with correctional staff about something going wrong in a prisoner's cell.

g. VRI poses some very major technical difficulties in prison related to internet access, keeping equipment/software up to date, training, and amplification. These need to be monitored and any problems solved proactively. If solutions are impossible, then in-person interpretation needs to be broadened to reach the situations that might otherwise be covered by VRI.

97. *Telecommunications*: Prisons supply telecommunications devices for prisoner calls; to avoid discrimination, these must be accessible to prisoners with disabilities:

a. *Blind prisoners* may need braille handsets or other similar modifications; hard-of-hearing prisoners may need amplification or captioning; deaf prisoners need alternative devices: in particular, *both* a TTY and a videophone.

b. To understand the needs of *deaf prisoners* requires a bit of background. Beginning in the 1960s, the preferred accessibility device for phone access by deaf people was a TTY (**T**ele**TY**pewriter), sometimes referred to as a TDD (**T**elecommunications **D**evice for the **D**eaf). This is a machine that attaches to a phone line on each end of a phone call; it allows each party to type a message and read what the other person is typing. To communicate with someone who does not have a TTY, the person with a TTY types and a remote Communication Assistant (CA) reads what has been typed out loud to a person on a regular phone. The person using the regular phone then responds verbally, and the CA types that to be read by the TTY user.

c. TTY technology has not changed significantly in decades. As might be expected from such old technology, TTYs are extremely cumbersome. They are slow and in my experience prone to radio interference when used in prisons. And they require literacy in English, which is not the primary language of individuals who use ASL to communicate.

d. As computer and video alternatives to TTYs have been developed, deaf people in the United States have used TTYs less and less. TTYs are no longer very common in the deaf community.

e. For people who sign to communicate, the much-preferable alternative is a videophone, with video relay service (VRS) if necessary. Using a videophone, a person who signs to communicate can sign directly with another person—or can access an interpreter to relay signed language to the person on the other side of the conversation. My understanding based on the materials I have reviewed is that NDCS has refused to provide deaf prisoners who rely on ASL with a videophone.

f. Because people who sign to communicate prefer videophones to TTYs, they are far more prevalent outside of prison. So a relay is less likely to be necessary.

98. *Amplification and hard-of-hearing prisoners*: Prisons are often extremely noisy environments, not just in cell blocks but elsewhere. I have seen many prison programs that are offered in spaces with a high level of ambient noise—ice machines, washing machines, televisions, and many people, all making noise. For hard-of-hearing individuals the ambient noise can create very significant difficulties. But while many institutions—churches, movie theaters, schools—have implemented amplification systems, most prisons have not. To comply with the ADA, prisons must install amplification systems where necessary for effective communication.

H. ADA Request and Grievance Processes

99. To comply with the ADA, a prison system must have a way for prisoners to make their disability-related needs known to staff. As already described above, see ¶¶43-45, the first step is notice: prisoners need to know that they are entitled to seek reasonable modifications, effective communication, auxiliary aids, and how such requests should be made.

100. As far as I understand, neither NDCS nor the Nebraska Parole Board currently provides this kind of notice. Cotton Dep. at 65:4-14 (Parole Board doesn't provide notice of the availability of accommodations).

101. The request process itself must be accessible, both because it is itself a prison service and because it is the gatekeeper for modifications to other prison programs. For example, a requirement that requests be in writing may exclude prisoners who are blind and prisoners who are illiterate, including because of intellectual disabilities. Such a requirement must be modified when necessary for access—and a path to seek this kind of modification must exist.

102. To work effectively, the request process must allow the prisoner to explain his or her needs and issues, not just once at the outset but interactively. For auxiliary aids in particular, prisons are required to "give primary consideration to the requests of individuals with disabilities primary."

103. Most prisons systems, including NDCS, have a grievance process, which offers prisoners a method to seek a resolution to their complaints. This process, too, constitutes the kind of program that must be accessible. But it seems that at NDCS, there is no process to consider reasonable modifications to the grievance process—extensions of deadlines for prisoners with mental disabilities, assistance with filing out the forms, etc. See Sabatka-Rine August 24, 2018 Dep. at 75:15-19 ("Q: But is there any policy that actually directs individuals if you are requested to help with a policy, then this is your responsibility to do so? A. I am not aware of that.").

I. Restrictive Housing Issues

104. Prisoners with disabilities frequently end up in restrictive housing—locked down in single cells nearly all day, with no chance for congregate activity. Often, this violates the ADA: it may be disparate treatment (simple discrimination) or it may violate the reasonable modification requirement.

1. Disparate Treatment

105. Most simply, isolating prisoners "because of" their serious mental illness, intellectual disability, or physical disability violates the statutory ban against disparate treatment. That is, if a prison assigns people with disabilities to segregation cells—where prisoners are denied most prison privileges, programs, activities, and services—simply because of their disability, that is unlawful. This kind of assignment is far from unheard of. For example, in a U.S. Department of Justice's (DOJ) findings letter addressing conditions of confinement at the Pennsylvania State Correctional Institution at Cresson—a key document in the development of the law governing solitary confinement under the ADA—the DOJ concluded that the ADA required Cresson to "modify its policies and practices so prisoners with serious mental illness or intellectual disabilities are not automatically or categorically housed in segregation and instead receive the services they need."[37]

2. Reasonable Modification

106. The ADA's reasonable modification rule cover the *route into solitary*, the *conditions in solitary*, and the *route out of solitary*.

107. The ADA supports prisoners with disabilities who seek adjustments to the *route into solitary* by, for example, asking for modifications to policies and practices that:

a. Fail to take account of mental illness or intellectual disability in making housing decisions, which often assign disabled prisoners to double cells in which conflict and violence are likely.

[37] *See* Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Tom Corbett, Governor of Pa., *Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation*, 33-34 (May 31, 2013), http://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf [hereinafter Cresson Letter].

b. Provide inadequate mental health care more generally, including a variety of obstacles to obtaining treatment.[38] Without treatment, prisoners with mental illness are more likely to run into trouble of various kinds, leading them to solitary, either as a disciplinary or management response.

c. Use solitary confinement as a routine management technique to cope with the difficulties presented by prisoners with disabilities.[39]

d. Treat behavior that manifests serious mental illness or intellectual disability as a disciplinary rather than mental health or habilitation matter.[40]

108. The ADA similarly entitles prisoners with disabilities to modifications of the *conditions in solitary*. For those prisoners whose disabilities mean they simply cannot be safely managed in general population, prisons retain the "obligation to provide the prisoners with the opportunity to participate in and benefit from mental health services and activities, and other services, programs, and activities to which prisoners without disabilities have access."[41] Even if a prison has a safety interest in substantial physical isolation, that should not mean that prisoners with disabilities are denied phone calls, books, education, rehabilitative programming, exercise, and the like.

109. Prisons should also accommodate disabled prisoners' particular, disability-related vulnerability to the conditions of isolated confinement by softening those conditions. Prisoners with mental illness and intellectual disabilities are less resilient to the absence of social interaction and the enforced idleness of solitary confinement. Consequently, these features

---

[38] *See, e.g.*, Agreed Order, *Rasho v. Baldwin*, No. 1:07-CV-1298-MMM-JAG (C.D. Ill. May 8, 2013), at 3-4, *available at* http://www.clearinghouse.net/chDocs/public/PC-IL-0031-0008.pdf;

[39] Cresson Letter, *supra* note 37, at 1.

[40] *See, e.g.*, Private Settlement Agreement, *Disability Advocates, Inc. v. New York State Office of Mental Health*, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), at 12, *available at* http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf; Settlement Agreement and General Release, *Disability Rights Network of Pennsylvania v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), at 16, *available at* http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf.

[41] Cresson Letter, *supra* note 37, at 37 (citing 28 C.F.R. § 35.130(b)).

should be modified for them; they could, for example, receive controlled programming, increased recreation hours, expanded access to educational materials and similar accommodations.[42] This applies even to disabled prisoners whose path into solitary was unconnected to their disability.[43]

110. The eligibility criteria for various kinds of in-unit programming or services—visits, phone calls, various property privileges, group therapy, etc.—should also be adjusted so those criteria do not deprive prisoners with disabilities the opportunity to participate in and benefit from those programs. Otherwise, such criteria unlawfully "screen out" prisoners with disabilities from "fully and equally enjoying" such programs or make it difficult for them to "obtain the same result [or] gain the same benefit" from these programs. 28 C.F.R. § 35.130(b)(8) & (1)(iii).

111. Finally, the ADA requires modifications to the *route out of solitary*—that is, to eligibility and step-down type requirements for prisoners in solitary confinement or other high-security housing that are ill-suited or even impossible for prisoners with disabilities. For example, if a step-down process used to transition prisoners out of restrictive housing requires prisoners to read or write, a modification will be necessary to provide access to a blind or illiterate prisoner.

112. I am aware of incorporation of anti-discrimination remedies like these—narrowing the route in, modifying the conditions, and widening the route out of solitary—in a number of state systems including, for example, in Colorado, Pennsylvania, and California.

---

[42] *See, e.g.,* Settlement Agreement, *Peoples v. Fischer*, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2015), *available at* http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf.

[43] *See, e.g.,* Stipulation, *Parsons v. Ryan*, No. 2:12-cv-00601 (D. Ariz. Oct. 14, 2014), at 8, *available at* http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0028.pdf.

J. Special Housing and the Integration Mandate

113. Prisons often house prisoners with disabilities in various kinds of special housing that are, if not quite solitary confinement, at least close to it; they impose far more locked-down time than ordinary housing, restrict access to property, limit various privileges, etc. This kind of dedicated housing for people with disabilities (as well as infirmary assignments that do not actually provide medical care or treatment) violate the plain dictates of the ADA's regulations if the housing area is not "the most integrated setting appropriate" to the prisoners' needs.[44]

114. Similarly, a prison would violate the regulation if, for example, all the mental health housing is high security, so that prisoners who would otherwise have access to gentler conditions in minimum or medium security are forced into harsher environments in order to get treatment.

115. More commonly, though, confinement of prisoners with disabilities to restrictive housing is not because of a shortage of accessible cells elsewhere, but rather because prisons choose to manage difficult, disability-related behavior with solitary confinement rather than less harsh housing assignments and services. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court required states to deinstitutionalize people with disabilities who had been unjustifiably assigned to receive various state-provided services in segregated institutions rather than in the community.[45] In prison or jail, when solitary confinement is triggered by a prisoner's disability (and resulting conduct), that means that prison services are provided in a setting that lessens the prisoner's contact with other, non-disabled prisoners. This is "segregated" not only in the way

[44] 28 C.F.R. § 35.130(d).

[45] For more on *Olmstead* and its implementation, see Civil Rights Division, U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (June 22, 2011), available at http://www.ada.gov/olmstead/q&a_olmstead.pdf.

the term is used in prison, but also in the way the term is used in the *Olmstead* opinion to describe civil institutionalization, which the Court held can be a form of unlawful discrimination.

116. The ADA's integration mandate presumes that such segregation is harmful. That is, the regulation itself bans an under-justified decision to isolate people with disabilities from other, non-disabled people; plaintiffs need not demonstrate how that decision hurts them. In addition, a decade of litigation under *Olmstead* in other settings has established that the solution for violations of the integration mandate is the provision of services in integrated settings that avoid the need to segregate.[46] For example, in *United States v. Delaware*, an *Olmstead* settlement between the DOJ and the state of Delaware required statewide crisis services to "[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse."[47] The settlement detailed numerous items that would form a "continuum of support services intended to meet the varying needs of individuals with mental illness." This included Assertive Community Treatment teams—multidisciplinary groups including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a peer specialist—to "deliver comprehensive, individualized, and flexible support, services, and rehabilitation to individuals in their home and communities," and various kinds of case management.[48] And it provided for "an array of supportive services that vary according to people's changing needs and promote housing

[46] *See* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

[47] Settlement Agreement, *U.S. v. Delaware*, 1:11-cv-00591-LPS (D. Del. July 6, 2011,), at 3, *available at* http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf.

[48] *Id*. at 5-6.

stability" and "integrated opportunities for people to earn a living or to develop academic or functional skills".[49] Other *Olmstead* decrees contain similar provisions.[50]

117. The Delaware and other *Olmstead* cases provide a very helpful model for how prisons can comply with the integration mandate, managing the needs of prisoners with disabilities to keep them out of the segregated solitary confinement setting. The possibilities are broad: provision of mental health treatment and other supports, perhaps assignment to a one-person cell to minimize intra-cell conflict, and many more.

K. Parole hearings

118. The ADA's requirements of course reach parole hearings/processes, because those are government activities. With respect to parole, at least four separable issues exist: parole eligibility prerequisites, accommodations for the parole process itself, appropriate decisionmaking re. parole, and accommodations for the parole plan. These are discussed in the paragraphs that follow, ¶¶119-122.

1. Parole prerequisites

119. Equal access to parole requires equal access to anything the parole board either demands or values as a prerequisite to parole—for example, particular rehabilitative programming. For any programming that is advantageous for parole, that means, in turn, that equal access to parole requires appropriate access to that programming, including by provision of:

a. auxiliary aids (hearing aids, braille, interpreters, assistive listening, etc.)

b. program access (removal of physical barriers, wheelchair accessible housing, etc.)

---

[49] *Id*. at 7-8.

[50] *See Special Collection: Olmstead Cases*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/results.php?searchSpecialCollection=7 (last visited February 16, 2019) (listing cases).

c. reasonable modifications to policies that present unjustified obstacles to participation. For example, some rehabilitative program well regarded by the parole board may require prisoner literacy. If a prisoner's intellectual disability renders that impossible, the prison must develop a substitute—for example, assigning a reader or transcriber.

2. Accommodations for the parole process

120. The ADA's requirements mean that parole hearings must provide effective communication and reasonable modifications where necessary for equal access. But from what I have reviewed, it seems that NDCS and the Board of Parole follow no clear process with respect to disability-related requests relating to parole. There is apparently no written policy. There is apparently no history of providing communications-related assistance (interpretation, alternative formats for written materials, amplification, CART, etc.). Provision of counsel at any or all of the stages of the parole process might be an appropriate modification for prisoners with mental disabilities, but the process and standards are very unclear, and perhaps non-existent.

3. Appropriate Decisionmaking by the Parole Board

121. It would violate the ADA if parole-board decisionmaking were discriminatory. But it seems likely that it is, for two reasons:

a. First, the Board's rules themselves suggest that disability weighs against parole ("In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account … The offender's mental or physical makeup, including any disability or handicap which may affect his or her conformity to law"[51])

b. Second, it seems that the Board is not informed whether reported misconduct was a result of disability-related behaviors, which suggests that the Board is likely to over-assess prisoner culpability for prisoners with disabilities.[52]

---

[51] See Nebraska Board of Parole Rule 4-401(A), Parole Decisions, Factors Considered , https://parole.nebraska.gov/sites/parole.nebraska.gov/files/doc/10-3-2017%20Board%20of%20Parole%20Rules%20-%20website_0.pdf

[52]Cotton Dep at 142:15-23 ("Q. Are you ever informed whether misconduct reports were a result of disability-related behaviors? A. Not that I'm aware of. Q. Has the Board of Parole ever asked for that information? A. No, it's not something that we would--that's not something that would

4. Content of Parole Plans

122. Finally, it is important that parole plans themselves not be discriminatory. Failure to provide a disability-appropriate placement option for a parolee is inappropriate. For example, if a parole plan requires drug treatment, but no drug treatment placement available for an individual who uses a wheelchair, that constitutes inappropriate discrimination. Likewise, terminating parole for a person with mental illness because the facility to which she paroled is unable to manage people with mental illness—as it appears occurred to plaintiff Hannah Sabata[53]—constitutes discrimination.

V. CONCLUSION

123. All my opinions contained herein are based upon my review of the pertinent records currently available to me and my training, education, and experience, and are offered to a reasonable degree of probability.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration is executed on February 18, 2019 at Ann Arbor, Michigan.

Margo Schlanger

be assisting us with our decision-making process, because we would assist accordingly. If we could …").

[53] Filing No. 237-5, Page ID # 10342 ("Living Water Rescue Mission administration indicates that due to her increased needs and their inability to address those needs, they are terminating her residency and considering it an unsuccessful completion of their program.")