UNITED STATES DEPARTMENT OF JUSTICE

Bureau of Prisons

In the Matter of **Thomas Heyer**	**Docket No. 18-1**

ORDER DENYING THE GOVERNMENT'S MOTION TO STAY PROCEEDINGS, DENYING THE GOVERNMENT'S MOTION TO DISMISS, GRANTING, IN PART, COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION, AND ORDER FOR PREHEARING STATEMENTS

PROCEDURAL HISTORY

This case has a long history, including a two-day bench trial in the Eastern District of North Carolina and two appeals to the Fourth Circuit. *See Heyer v. United States Bureau of Prisons (Heyer I)*, 849 F.3d 201 (4th Cir. 2017); *Heyer v. United States Bureau of Prisons (Heyer II)*, 984 F.3d 347 (4th Cir. 2021); *Heyer v. United States Bureau of Prisons*, No. 5:11-CT-3118-D (E.D.N.C. February 12, 2019). As those cases all discuss, Complainant Thomas Heyer has been civilly detained pursuant to the Adam Walsh Child Protection and Safety Act of 2006 since December 31, 2008. *See Heyer I*, 849 F.3d at 205-06. He was housed in the Maryland Unit until July 9, 2012, at which time he was civilly committed and moved to the Butner, North Carolina Federal Correctional Institution, where he remains. *Id.* at 206; *see also* ALJ Ex. 4 at 3.

Relevant to this claim, Heyer first submitted an informal request for a videophone on March 21, 2016, stating, in part: "Since joining the CTP Program the things I have requested and require have not been provided to me for one reason or another." ALJ Ex. 10 at 3. The informal request specifically sought the use of a videophone and video relay service (VRS), among other accommodations. *Id.* BOP responded to Heyer's informal request on March 29, 2016, stating that videophones and VRS "pose a variety of concerns with preserving the security and orderly management of the institution, and protection of the public." ALJ Ex. 11 at 10. In its response, BOP acknowledged that it had begun to consider the use of VRS at another institution and said

that if it determined VRS could be provided without compromising security, it would "consider expanding VRS to other institutions," including FCI Butner. *Id.* Instead of a videophone, BOP advised Heyer to use the teletypewriter (TTY) device available at FCI Butner. *Id.*

As the regulations require, Heyer then proceeded to file a request for an administrative remedy, also known as a BP-9, that sought the use of a videophone or VRS on May 2, 2016. ALJ Ex. 12. BOP answered this request for administrative remedy on May 19, 2016, again echoing the security concerns and advising Heyer to use the TTY and other forms of communication in lieu of a videophone. *Id.* at 19. Heyer then exhausted his option to appeal, as set out in 28 C.F.R. § 542.15—to no avail. ALJ Ex. 13.

Pursuant to 28 C.F.R. § 39.170(i), Heyer then filed an administrative complaint on March 3, 2017 with Richard Toscano, Director of EEO at the Department of Justice. ALJ Ex. 4. As required by the regulations, BOP conducted an investigation of the complaint, and on July 24, 2017, submitted its position to the BOP Equal Opportunity Officer Mina Raskin, who is the "Responsible Official" within the meaning of § 39.170. ALJ Ex. 16. *See* 28 C.F.R. § 39.103. Ms. Raskin received statements from both parties and issued a Letter of Findings on September 5, 2017. ALJ Ex. 17. Heyer then appealed the Letter of Findings and requested a hearing on October 4, 2017. ALJ Ex. 18. Pursuant to § 39.170(k)(1), on December 19, 2017, Administrative Law Judge Mark Dowd was appointed to preside over these administrative proceedings. Judge Dowd issued an Order for Prehearing Statements on January 2, 2018. ALJ Ex. 19.

Concomitantly, Heyer pursued relief in the U.S. District Court for the Eastern District of North Carolina, claiming, *inter alia*, that BOP violated his First Amendment rights by denying him access to point-to-point videophone calls. *See generally Heyer v. United States Bureau of Prisons*, No. 5:11-CT-3118-D, 2015 U.S. Dist. LEXIS 42905 (E.D.N.C. March 31, 2015). The district court granted summary judgment in favor of BOP on that claim on March 31, 2015. *Id.* at *43. Heyer appealed this decision to the Fourth Circuit, which reversed the district court's grant of summary judgment on Heyer's First Amendment claim. *Heyer I*, 849 F.3d at 220-21. The parties then returned to the district court, which ruled after a two-day bench trial that Heyer failed to show that a denial of access to a videophone constituted a violation of his First Amendment rights. *Heyer II*, 984 F.3d at 355. Once again, Heyer appealed to the Fourth Circuit, which reversed the district court on January 13, 2021, and held that "the BOP's ban on point-to-point technology violates Heyer's First Amendment rights." *Id.* at 357.

While all this litigation in federal court took place, these administrative proceedings were stayed. In total, due to the request of parties and pending litigation in federal court, this case has been stayed for at least 39 months. Specifically, on January 9, 2018, the parties submitted a joint motion to stay administrative proceedings pending resolution of the litigation in the Eastern District of North Carolina. ALJ Ex. 20. Because of the ongoing federal litigation, Judge Dowd granted this stay on January 10, 2018. ALJ Ex. 21. Judge Dowd proceeded to grant six more stays while the federal litigation bounced back and forth between the district court and the Fourth Circuit. ALJ Exs. 24, 26, 28, 32, 36, 38.

On December 29, 2020, this tribunal issued an order reassigning the case to the undersigned. ALJ Ex. 39. Thereafter, on January 4, 2021, the tribunal issued an Order Vacating the Status Order and Scheduling a Status Conference. ALJ Ex. 40. On January 13, 2021, Heyer submitted a Notice of Decision, which included the Fourth Circuit's ruling on Heyer's appeal of the district court decision. ALJ Ex. 43. Since then, the parties have twice submitted position statements (ALJ Exs. 45-46, 49-50), and the tribunal has granted two thirty-day continuances for the purpose of settlement negotiations (ALJ Exs. 44, 48). The first continuance culminated in a status conference on February 22, 2021. ALJ Ex. 44. To allow the parties more time to settle, another status conference was then conducted on March 24, 2021. ALJ Ex. 48.

In its March 17, 2021, statement of position, BOP indicated that it interpreted the Fourth Circuit ruling in *Heyer II* differently than Heyer did. ALJ Ex. 49. Moreover, BOP maintained that the issue remaining before this tribunal after *Heyer II* was whether BOP's current policies and procedures unlawfully discriminate against Heyer solely on the basis of his disability, not whether Heyer is entitled to communicate using a point-to-point videophone with all individuals outside FCI Butner. *Id.* By these terms, according to BOP, this tribunal need not—and should not—find that, under the Rehabilitation Act, Heyer is entitled to the use of a videophone to make point-to-point calls. *Id.* On the other hand, Heyer contends that *Heyer II* requires the district court to enter judgment in his favor and order BOP to provide him with access to a point-to-point videophone. ALJ Ex. 50. During the March 24, 2021 hearing, the parties confirmed that there would likely be additional litigation in federal district court to resolve their differing interpretations of *Heyer II*.

This tribunal instructed the parties to file any dispositive motions or motions seeking a stay of these proceedings by April 9, 2021. ALJ Ex. 52. In response, on that date, Heyer filed a "Motion for Partial Summary Judgment," which this tribunal will treat as a motion for summary

disposition. ALJ Ex. 56. The Government filed a "Motion to Dismiss, or in the Alternative, to Stay Proceedings." ALJ Ex. 54. On April 28, 2021, each party filed a response (ALJ Exs. 60, 61) and, with the permission of this tribunal (ALJ Ex. 62), each party filed replies on May 12, 2021 (ALJ Exs. 64, 65).

FINDINGS OF FACTS

This tribunal is not writing on a clean slate. As the extensive procedural history makes clear, the facts underlying the first claim before this tribunal—whether failure to provide Heyer with point-to-point communication is a violation of the Rehabilitation Act—have been litigated extensively in the parallel civil proceedings. Specifically, the relevant evidence was adduced in a two-day bench trial and considered in detail by the Fourth Circuit in *Heyer II*. As to these facts, Heyer makes a compelling argument that, given the nature of the parallel proceedings, this tribunal is bound to accept the Fourth Circuit's factual findings under the doctrine of issue preclusion. *See* ALJ Ex. 56 at 11-12. Under that well-established doctrine, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B & B Hardware, Inc. v. Hargis Indus., Inc*., 575 U.S. 138, 148 (2015) (quoting Restatement (Second) of Judgments § 27 at 250 (1980)); *see also Montana v. United States*, 440 U.S. 147, 153 (1979). "[I]ssue preclusion is not limited to those situations in which the same issue is before two *courts*. Rather, where a single issue is before a court and an administrative agency, preclusion also often applies." *B&B Hardware, Inc.*, 575 U.S. at 148 (emphasis in original); *see also* Restatement Second of Judgments § 13 (1982) ("'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.").

In *Heyer II*, the Fourth Circuit made specific factual findings that were directly relevant to the four-part test under *Turner v. Safely*, 482 U.S. 78, 89-90 (1987) and were thus essential to *Heyer II*. *See, e.g.*, *Heyer II*, 984 F.3d at 350-57, 359, 362-66. Phrased differently, because each fact is discussed and analyzed under a specific *Turner* factor, those facts were actually litigated, by the same parties here, and were essential to the decision in *Heyer II*. Those factual findings are final because the Fourth Circuit discussed the facts at length, rejected the district court's findings of fact, remanded for the district court to enter judgment based on those factual findings, and issued the mandate for the appellate decision. While it is true, as BOP argues (ALJ Ex. 61 at 12), that the

Fourth Circuit remanded the case for entry of judgment "as well as any necessary proceedings to determine an appropriate remedy," *Heyer II*, 984 F.3d at 366, that language does not allow the parties to relitigate the facts found by the Fourth Circuit.[1]

Regardless of whether issue preclusion applies in this case, this tribunal will not disrupt the extensive factual findings of the Fourth Circuit in *Heyer II*. In this case, the same two parties—Heyer and BOP—have been litigating Heyer's access to a point-to-point videophone for years. The evidence adduced at the two-day bench trial, and discussed at length in *Heyer II*, is comprehensive and encompasses the facts necessary to adjudicate Heyer's Rehabilitation Act claim. *See Heyer II*, 984 F.3d at 350-57, 359, 362-66. Re-litigating those facts before this tribunal will not only be a waste of resources, but it risks the creation of inconsistent factual findings.[2]

Accordingly, this tribunal will apply the following facts as conclusively established. "Currently, Heyer is civilly committed as a sexually dangerous person in Federal Correctional Institution (FCI) Butner pursuant to the Adam Walsh Child Protection and Safety Act of 2006 (the 'Adam Walsh Act')." *Heyer II*, 984 F.3d at 352. "Since 2008, Heyer has been housed in the Maryland Unit, which only houses Adam Walsh Act detainees." *Id.* "Prior to his civil commitment, Heyer was incarcerated for violating the conditions of his supervised release on an

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[1] BOP also argues against giving any facts preclusive effect because it is "incredibly difficult to determine, especially at this stage, whether any facts were determined by a valid and final judgment, and especially whether such determination was essential to the judgment." ALJ Ex. 61 at 13. The Fourth Circuit's factual analysis in *Heyer II*, however, is not difficult to parse. Moreover, given the difference between the Rehabilitation Act and the *Turner* factors, BOP continues, "litigation may also be necessary in this forum to determine precisely which facts from the Fourth Circuit's Opinion and/or the District Court's original order . . . would have preclusive effect in this forum." *Id*. at 13-14. But that is a legal determination that does not require additional fact-finding, and the opportunity for additional litigation on that issue is in these dueling motions. BOP fails to identify what specific facts are lacking in *Heyer II* that preclude this tribunal from adjudicating Heyer's Rehabilitation Act claim. Similarly, BOP argues that "BOP should be afforded the opportunity to fully and fairly litigate any impact this newly recognized [First Amendment] right has on any of Heyer's rights under the Rehabilitation Act." ALJ Ex. 61 at 14. Even if the scope of Heyer's First Amendment right is relevant, that is likewise a legal argument capable of litigation in these dispositive motions.

[2] BOP also makes the conclusory claim that "new determinations are warranted in this forum . . . to avoid inequitable administration of the law," (ALJ Ex. 61 at 1, 14), but it fails to elaborate on why that is so given the extensive findings of fact in *Heyer II*. Similarly undeveloped is BOP's claim that "an exception to issue preclusion applies, as stated above." *Id.* at 18 n.13. Other than listing the recognized exceptions, BOP does not identify which exception applies or why. This tribunal finds both arguments unpersuasive in light of *Heyer II*.

earlier child pornography conviction." *Id.* Heyer's crimes were undeniably very serious. "He has previously been convicted of terrorist threats and kidnapping in an incident that involved the sexual assault of a ten-year-old boy. Heyer has also admitted to molesting more than forty children." *Id.* at 352 n.5.

Heyer was born deaf and "considers himself a 'big part' of the Deaf community." *Id.* at 351-52 (quoting Heyer's trial testimony). "Deafness is defined as the inability to 'hear *and* understand speech,' and it is a uniquely social condition." *Id.* at 350 (quoting expert testimony of Dr. Cokely) (emphasis in original). "Deaf individuals 'are fundamentally a visual people, with their own visual language, social organizations, history, and mores.'" *Id.* (quoting expert testimony of Dr. Cokely). "ASL users communicate in three dimensions and make use of hand shapes, movements, locations, and palm orientations, paired with 'non-manual behavior[s]'—for instance, wrinkling one's nose—to 'indicate grammatical features.'" *Id.* (quoting expert testimony of Dr. Cokely).

Heyer has limited English proficiency. *Id.* at 353. "Heyer's English skills are rated as 'novice low' on the American Counsel on Teaching of Foreign Languages Scale." *Id.* at 353. In practical terms, Heyer's "reading and writing skills mimic those of a seven-year old." *Id.* As Heyer testified, he struggles to write in English, is unable "to express his full thoughts," and has limited English vocabulary. *Id.* Heyer communicates with his brother, who is not deaf, using ASL. ALJ Ex. 56 at 10, 23; *see also Heyer II*, 984 F.3d at 352 n.6.

In terms of technology at Butner, Heyer has access to a "TRULINCS system, which allows detainees to send emails." *Id.* at 352. Heyer also has access to a teletypewriter (TTY) "under the direct supervision of a BOP staff member who dials the call from a list of pre-approved numbers, sits next to him as he makes that call, logs the call information, prints a call transcript, and locks the transcript in a safe." *Id.* at 352-53. TTY is "essentially a keyboard connected to an analog phone line that permits users to type messages back and forth." *Id.* at 350. "TTY requires users to have some fluency in written English." *Id.* at 350-51.

"Because deaf persons cannot make telephone calls, they require a substitute." *Id*. at 350. "For deaf individuals, point-to-point calls are the closest analogue to a telephone call." *Id*. at 351. "'[W]here telephones can convey important linguistic information such as emotion, tone, or inflection, which can affect meaning and message significantly, videophones [but not TTY] can also do so. . . ." *Id.* (quoting Br. Of Amicus Curiae NAD at 10). According to Dr. Thomas Cokely,

a sociolinguist and Heyer's expert witness, "'the cognitive demands of the interpretation process' make those interactions different from and more stilted than 'conversational interactions.'" *Id.* "For Dr. Cokely, speaking to a translator "is not the same thing as having a conversation or discussion in [ASL]." *Id.* Indeed, "a lack 'of meaningful social interaction' is a 'hallmark experience of most deaf and hearing-impaired prisoners, particularly those who are denied access to videophones.'" *Id.* (quoting Brief of *Amici Curiae* Professors at 6). "The experience mimics the effects of traditional solitary confinement, which include long-lasting psychiatric and physical difficulties. These professors contend that access to videophone technology, which permits 'social interaction and environmental stimulation' through conversations with other ASL-speakers can be essential in mitigating these harms." *Id.*

"Videophone users can make two types of calls: one between a deaf and non-deaf individual and a second between two deaf individuals. The first, Video Relay Service (VRS), permits a deaf individual to communicate with non-ASL speakers. The deaf participant calls an interpreter who in turn calls the hearing participant and then translates back and forth. The deaf and hearing participants are not directly connected." *Id.* "VRS calls are not supported between two deaf participants. Therefore, deaf individuals make point-to-point video calls to communicate with each other. These calls—which essentially resemble a Skype call—allow the two participants to sign directly to each other." *Id.* "Pursuant to a partial settlement in this case, BOP agreed to provide Heyer with access to VRS calls by installing a videophone in his unit and contracting with a provider of SecureVRS Services" for a system that limited calls to pre-approved numbers and allows recording of those calls. *Id.* at 353. Heyer currently communicates with his brother through SecureVRS. *Id.* at 359. "[T]he SecureVRS system can instantly sever the connection in the event of misconduct." *Id.* at 365. According to Heyer's communication technology expert, "this same system could be used for point-to-point calls," but that capability is currently disabled. *Id.* at 353.

Because Heyer cannot communicate effectively in written English, TTY, emails, and letters do not provide him with alternative means of communication. *See id.* at 359-62 & n.14. BOP currently has a total ban on Heyer's use of point-to-point calls, which restricts his access to the outside word. *Id.* at 353. As a result, "[t]he evidence at trial established that Heyer lacks any ability to communicate with the Deaf community." *Id.* at 366; *see also id.* at 359-62 (discussing lack of alternative means of communicating).

BOP witnesses testified as to the risks of allowing Heyer point-to-point videophone access, including concerns regarding "coded language" and that "Heyer's access to point-to-point calls might give him leverage to exploit other detainees for favors or give other detainees a reason to exploit Heyer for access." *Id.* at 354. According to BOP, Heyer's "unique designation as a sexually dangerous person presents public safety concerns, namely that he could use point-to-point calls to engage in acts of child exploitation or view child pornography. For instance, Heyer could expose himself to a child and that "visual depiction is immediate and [when] it's done, . . . whatever the information is, it's been permanently transmitted." *Id.* Butner's Warden testified "that he was opposed to any 'additional access,' because he considered sex offenders to be a particularly manipulative population." *Id.* Specifically, the Warden "feared that BOP would be unable to control the conduct of the other call participant, which could lead to acts of child exploitation." *Id*.

The Warden also testified that "providing point-to-point calls would burden BOP resources because they would need to be monitored like Heyer's TTY calls and because BOP currently lacks a contract to translate Heyer's point-to-point communications." *Id. "*By contrast, BOP generally makes telephone calls available to non-deaf inmates—including Adam Walsh Act detainees—although Warden Mansukhani testified that he made individualized assessments about which detainees in the Maryland Unit are given phone privileges. That access can also be taken away based on misconduct." *Id.* The evidence established that "BOP permits thousands of prisoners to make phone calls in sixty foreign languages, including prisoners who have committed acts of terrorism. Those calls are not contemporaneously translated." *Id.*

"A review of the full record establishes that these additional safeguards will impose only a de minimis burden on BOP's resources," in part because "BOP already supervises Heyer's TTY calls." *Id*. at 365-66. Moreover, "BOP already utilizes resource-efficient means of mitigating the risks associated with these calls. Point-to-point calls therefore would not produce [a] significant 'ripple effect.'" *Id*. at 364-65 (internal quotation marks omitted).

Following the Fourth Circuit's decision, on February 24, 2021, BOP issued a "Request for Information" (RFI) seeking information on the feasibility of a service described as Point-to-Point Copy Signing (P2P CS), "which is a video service in which a 3rd party ASL 'copy signer' is inserted in the video communication path between an ASL calling party (an inmate) and an ASL called party (outside of the prison) with no video interface between the parties." ALJ Ex. 59 at 5;

see also ALJ Ex. 49 at 7-8 (BOP explanation of "Point-to-Point Copy Signing (P2P CS)"). The RFI requested that "Vendors should propose a solution that addresses the functional, technical, and security requirements identified in the RFI." ALJ Ex. 49 at 5.

ANALYSIS

I. BOP's Request for a Stay

On April 14, 2021, the Government filed a Motion to Dismiss, or in the Alternative, Motion to Stay Proceedings. ALJ Ex. 54. "A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations and citations omitted);[3] *see also Fitzhugh v. DEA*, 813 F.2d 1248, 1252 (D.C. Cir. 1987); *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d 547, 588 (D.C. Cir. 1982). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34. In the current posture of this case, BOP effectively requests a stay that is comparable to an extended continuance, which also falls within the discretion of this tribunal. "In deciding whether to grant a continuance, the ALJ may consider: (1) the length of the delay requested, (2) the potential adverse effects of the delay, (3) the possible prejudice to the moving party if denied a delay, and (4) the importance of the testimony that may be adduced if the delay is granted." *Fitzhugh*, 813 F.2d at 1252 (citing *PATCO*, 685 F.2d at 588).

The length of the delay requested. BOP requests a stay of the proceedings while the parties continue to litigate, before the district court, the scope of the Fourth Circuit's opinion in *Heyer II*. As to the length of the requested stay, BOP does not, and indeed realistically cannot, provide a concrete time frame. To this tribunal, however, it appears likely that any delay would be significant. To begin, BOP is still soliciting information as to whether its proposed

[3] *Nken* addressed a stay of an enforcement order on appeal and held that the applicable "legal principles have been distilled into consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." While BOP is seeking to stay the proceedings, not an enforcement action, I nonetheless find, as an alternative, that BOP also fails to satisfy these factors. BOP has little likelihood of success on the merits, *see infra*; BOP will not be injured by the absence of a stay because it may still pursue its arguments before the district court; Heyer will be substantially injured by a stay because he has no effective means of communication; and there are competing public interests that do not clearly mandate a stay.

accommodation is even technically possible. ALJ Ex. 59. If it is not, BOP would presumably return to the drawing board, resulting in further delay. Second, as of the date of this order, the district court docket reflects no action on the Fourth Circuit's remand. Given the incredible demands the COVID-19 pandemic has placed, and continues to place, on federal district courts, it seems unlikely that Heyer's claim will be prioritized over pending criminal and civil trials.[4] Third, after two months in which to engage in settlement negotiations, the parties appear committed to litigating their respective—and irreconcilable—interpretations of *Heyer II*. Proceedings before the district court will therefore involve briefing, arguments, and the issuance of a district court opinion. But, if past is prologue, the district court's decision will not be the end of the federal litigation in this matter. At best, there will be delay as BOP explores various options for implementing a remedy. At worst, the losing party will, for the third time, appeal to the Fourth Circuit.

Any stay must also be evaluated in the context of this case's lengthy procedural history. This will be the eighth stay in this case; when added to the two continuances for settlement negotiations, BOP has had, *at a minimum*, 39 months in which to resolve this issue either through settlement or federal litigation. It has done neither. And, as Heyer notes in a different context, the remedy BOP now seeks more time to explore was first raised by the district court in November 2017, yet BOP took no action until February 2021, only after losing its second appeal. *See* ALJ Ex. 56 at 20; *see also* ALJ Ex. 58. This factor weighs heavily against granting BOP's request.

Potential adverse effects of the stay. Given the nature of Heyer's claim, any delay would place a significant burden of isolation upon Heyer, who currently has limited options for communicating with friends and family. As the Fourth Circuit noted in *Heyer II*, communication with those outside the prison walls is an important individual right. *Heyer II*, 984 F.3d at 355 (quoting *Turner*, 482 U.S. at 84). Indeed, Heyer has had limited communication options since at least 2013, when he filed his first administrative complaint. ALJ Ex. 5. As the Fourth Circuit noted, "a lack 'of meaningful social interaction' is a 'hallmark experience of most deaf and hearing-impaired prisoners, particularly those who are denied access to videophones.'" (quoting *amicus* Brief of Professors at 6). "The experience mimics the effects of traditional solitary confinement, which include long-lasting psychiatric and physical difficulties." *Id.* at 351. Thus,

[4] Indeed, as Heyer notes, even without the strains of the pandemic, fifteen months elapsed between the district court's bench trial and the issuance of a decision. ALJ Ex. 60 at 15.

additional delay would place a heavy burden on Heyer, the functional equivalent of being in solitary confinement, and this fact weighs heavily against granting BOP's request.

The possible prejudice to the moving party if denied a delay. Not granting the stay places a burden on both parties in that they would be litigating the same case, albeit under different standards, in two fora—the administrative proceeding before this tribunal and the district court. That burden, however, is inherent in many of the cases before this tribunal, and thus I give this factor limited weight. There is, of course a risk of prejudice if a stay is denied and this case proceeds on parallel tracks, *i.e.*, the possibility that the district court and this tribunal could reach different determinations. That risk is limited here by two considerations: (1) the facts have already been established in a bench trial and will not be relitigated here; and (2) the district court is applying a different standard than this tribunal. Those factors reduce any possible prejudice to BOP.

The importance of the testimony that may be adduced if the delay is granted. This factor is not directly relevant, but I note that a stay could obviate the need for additional proceedings in this case, which would save judicial resources. While this tribunal will expend additional resources absent a stay, I conclude that the expenditure of those resources does not outweigh the significant delay and the significant adverse impact such delay has on Heyer's continued isolation.

BOP's Argument. According to the Government, the analysis of whether a stay is warranted is a two-step process. First, the tribunal must determine whether two proceedings are truly parallel. ALJ Ex. 55 at 19. Next, if the proceedings are parallel, the tribunal must balance the factors weighing in favor of, and against, a stay. *Id.* The Government argues that the proceedings in this tribunal and the proceedings in the district court "involve the same parties and same request for relief, and therefore should be deemed parallel proceedings." *Id.* at 20. For the purposes of these proceedings, the tribunal will assume, without deciding, that the proceedings in the district court are parallel. Even under this assumption, however, a proper balancing of factors—conducted, *supra*—necessitates a denial of the Government's motion to stay.

BOP's argument centers around avoiding piecemeal litigation, which "occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Nat'l Textiles v. Daugherty*, 250 F. Supp. 2d 575, 579 (M.D.N.C. 2003) (quoting

Gannett Co., Inc. v. Clark Const. Group, Inc., 286 F.3d 737, 744 (4th Cir. 2002)).[5] To be sure, this is a legitimate concern, but it does not justify a stay under the specific circumstances of this case. First, avoiding piecemeal litigation should not come at the expense of timely and just adjudication. That is especially the case here, where Heyer's case has been pending in this tribunal for over three years, and where the consequences of further delay could be dire. *See Heyer II*, 984 F.3d at 351 (noting that when hearing-impaired prisoners are denied access to videophones, their experience "mimics the effects of traditional solitary confinement.") (internal quotation marks omitted). Contrary to BOP's assertion, cases like this one—where the complainant's rights under the Rehabilitation Act are at stake—are not a waste of judicial resources.

Moreover, the risk of piecemeal litigation is not as great as BOP contends. After years of litigation in federal court, that case is nearly completed. The district court must enter judgment in favor of Heyer and may hold limited proceedings to implement a remedy, if necessary. That remedy will address Heyer's First Amendment right. In contrast, the case before this tribunal will address Heyer's rights under the Rehabilitation Act. Therefore, even though the two cases involve substantially the same facts, and some of the Fourth Circuit's factual findings are given preclusive effect here, an "exercise of judgment" that maintains an "even balance" counsels against granting a stay because the legal theory is different. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("Only in rare cases will a court stay proceedings in a cause on its docket while a litigant in another settles the rule of law that will define the rights of both.").

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[5] BOP relies upon cases that involve different types of parallel proceedings. Some of the cases deal primarily with parallel proceedings involving state and federal courts. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (ALJ Ex. 54 at 19); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F. 2d 1072, 1073-74 (ALJ Ex. 54 at 19); *Nat'l Textiles LLC v. Daugherty*, 250 F. Supp. 2d 575, 577 (M.D. N.C. 2003) (ALJ Ex. 54 at 19-20); *Gannet Co., Inc. v. Clark Const. Group, Inc.*, 286 F.3d 737, 744 (4th Cir. 2002) (ALJ Ex. 54 at 20). Those types of parallel proceedings involve the "abstention doctrine," which is a specific area of jurisprudence. *See Colorado River Water Conservation Dist.*, 424 U.S. at 813-17 (discussing different categories of abstention). The abstention doctrine does not apply here, but it also fails to assist BOP because it "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Other cases deal with parallel proceedings involving two federal district courts, which present different issues. *See Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 625 (D.C. Cir. 1975)) (ALJ Ex. 54 at 19). Thus, the cases cited by BOP have limited application to my analysis because this case involves, at best, parallel proceedings between a federal district court and an administrative tribunal applying different legal standards to the same facts.

Accordingly, in the unique context of this case, I conclude that an eighth stay of these administrative proceedings is not warranted and, thus, BOP's Motion to Stay Proceedings is **DENIED**.

II. The Government's Motion to Dismiss for Failure to State a Claim

After requesting numerous stays over the last 39 months and entering into settlement agreements on other claims, BOP now moves to dismiss all remaining claims in Heyer's 2017 Complaint "for failure to state a claim of discrimination under the Rehabilitation Act of 1973." ALJ Ex. 55 at 1. Though fashioned as such, the Government's motion in fact seeks to litigate the merits of the remaining issues in these proceedings. That is not a proper motion to dismiss.[6]

A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Generally, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). The key inquiry is whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim of relief that is plausible on its face.'" *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145 (4th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff need not allege any "specific facts beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570 (internal quotation marks omitted). Rather, a claim for relief must be facially plausible—a requirement that is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678-79. And the motion to dismiss should be denied if the complaint

[6] The Government, for example, argues that Heyer's Rehabilitation Act claim for a videophone should be dismissed because the Government seeks to implement a new system, called "Copysign," which will comply with the Rehabilitation Act. ALJ Ex. 55 at 11. This argument, however, amounts to a factual defense of Heyer's claim—it does not demonstrate that Heyer has failed to state a claim. Moreover, the Government argues that Heyer's claim for visual notifications of audible announcements should be dismissed because BOP has already implemented sufficient accommodations. ALJ Ex. 55 at 14-16. Again, this is a factual defense and not a reason to dismiss for failure to state a claim. Finally, the Government argues that Heyer's claim for a qualified ASL interpreter to allow him access to the GED program should be dismissed because his proposed accommodation would amount to fundamental alteration of a federal program or preferential treatment. ALJ Ex. 55 at 16-17. That a proposed remedy is a fundamental alteration or preferential treatment is not a ground for dismissal for failure to state a claim; rather, it is a substantive defense to a claim.

"provides sufficient detail about the claim to show that the plaintiff has a more-than-conceivable chance of success on the merits." *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 511 (4th Cir. 2015).

That said, a pleading is insufficient when it contains mere "labels and conclusions" or a formulaic recitation of the elements of a cause of action. *Twombly*, 550 U.S. at 555. A court is free to dismiss a complaint where the plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 697. A plausible claim does not mean "probable," but it requires more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. The burden is on the moving party to show that allegations, when taken as true, fail to state a claim upon which relief can be granted. *Cohen v. Bd. of Trustees of the Univ. of the D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016).

Heyer has stated claims upon which relief can be granted. The Rehabilitation Act provides a specific administrative procedure through which claimants may pursue requests for accommodation. 28 C.F.R. § 39.170. Heyer has followed the path set forth by the regulations, and at each stage, he has requested relief sought in this hearing. The Government argues that Heyer has failed to allege a plausible claim of discrimination with respect to any of the three issues remaining. The tribunal will address each claim *in seriatim*.

First, as described, *infra*, Heyer has requested the use of a videophone to make point-to-point calls to persons outside FCI Butner. ALJ Ex. 4 at 6-8. The Complaint noted that Heyer lacks proficiency in English and recounted the limits of teletypewriter (TTY) technology. *Id.* at 7. It noted that Heyer's ability to communicate through the TTY technology was restricted in ways that hearing inmates' access to the inmate telephone program was not. *Id.* at 7. Further, it noted that, even if such restrictions on TTY technology were not limited by BOP, using TTY technology itself is so different from using a telephone that requiring Heyer to use TTY rather than a videophone amounts to exclusion from the inmate telephone system. *Id.* Finally, the Complaint alleged that the use of a videophone or VRS technology "presents no greater security risks than Mr. Heyer's use of the TTY device or hearing inmates' use of telephones." *Id.* These facts—taken together and accepted as true—state a plausible claim for relief under the Rehabilitation Act.

The Government is free to litigate the merits of this claim. For example, it is entirely appropriate for the Government to argue that the use of a videophone is not, as a matter of law, required by the Rehabilitation Act. But a motion to dismiss is properly weighed by giving the

plaintiff (here, complainant) the benefit of every reasonable inference to be drawn from the allegations in the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). As such, the question on a motion to dismiss is whether the complaint is legally sufficient to continue litigation, not whether the complainant should prevail on the merits.

BOP's reliance on *Arce v. Lousiana*, 226 F. Supp. 3d 643, 651 (E.D. La. 2016), to claim that Heyer, as a matter of law, cannot "establish that the Rehabilitation Act requires the provision of videophone access in order to provide a deaf inmate with meaningful access to the use of prison telephones," (ALJ Ex. 55 at 12), is wholly unpersuasive. *Arce* does not stand for such a broad proposition. Indeed, as BOP itself notes in a parenthetical (*id.* at 12-13), *Arce* based its decision on the fact that the complaint did not allege that the TTY machine at the facility prevented the inmate from "communicat[ing] effectively using a TTY machine. Instead, the plaintiffs simply claim that [the inmate] would have preferred to communicate using a video phone." *Arce*, 226 F. Supp. 3d at 651. Heyer, however, devotes two paragraphs in his complaint to the very allegation absent in *Arce*—that TTY is insufficient for him especially given that TTY requires a proficiency in English that Heyer lacks. ALJ Ex. 4 at 6-7. Moreover, BOP gives short shrift to other, more recent cases, in which inmates established a violation of the Rehabilitation Act under similar facts. *See McBride v. Mich. Dep't of Corr.*, 294 F. Supp. 3d 695, 710 (E.D. Mich. 2018); *Rogers v. Colo. Dep't of Corr.*, 2019 U.S. Dist. LEXIS 159001 (D. Colo. Sept. 18, 2019); *Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995) (applying the first three prongs of this test); *John TC Yeh v. Federal Bureau of Prisons*, Register No. 50807-037 at 3 (U.S. Dep't of Justice Feb. 05, 2018) (ALJ Ex. 63).[7] Accordingly, because nothing in Heyer's Complaint is implausible, the motion to dismiss must be denied as to Heyer's claim for a videophone under the Rehabilitation Act.

[7] The Government disputes the relevance of *McBride* and *Rogers*. ALJ Ex. 64 at 2-3. In particular, the Government argues that those cases did not consider "alternative videophone technology or whether VRS permits deaf inmates to communicate effectively." *Id.* at 2. To begin, that is not the relevant inquiry. The Rehabilitation Act requires the BOP to grant Heyer meaningful access to the federal program at issue, which is the inmate telephone program. *See Alexander v. Choate*, 469 U.S. 287, 300-01 (1985). Moreover, the Fourth Circuit has already found facts regarding such "alternative videophone technology," such as VRS. *Heyer II*, 984 F.3d at 351. In its opinion, the Fourth Circuit credited testimony that interactions through an interpreter do not alleviate the harms Deaf people may suffer when they are denied the ability to communicate in their own language, ASL. *Id.* For this reason, the tribunal finds, as did the Fourth Circuit, that "[f]or deaf individuals point-to-point calls are the closest analogue to a telephone call." *Id.* BOP also argues that *Yeh* is not binding on this tribunal. While that may well be true, *Yeh* is undeniably persuasive authority

Second, Heyer has requested visual notifications of non-emergency events or announcements. ALJ Ex. 4 at 8. The Complaint specifically notes that Heyer has had to rely on inmates to alert him to announcements over the prison's public address system. *Id.* The Complaint further suggests the use of vibrating pagers or electronic message boards as reasonable accommodations. *Id.* Certainly, the Complaint has alleged enough specific facts to state a claim for relief. *See Iqbal*, 556 U.S. at 697. BOP argues that Heyer "does not allege that he is not provided information as it pertains to institutional announcements" and that "[h]e only alleges that he cannot hear any such announcements." ALJ Ex. 55 at 15. The Government would have one believe that Heyer must specifically plead that he "is not provided information as it pertains to announcements." This odd conclusion does not withstand scrutiny. As noted, Heyer is not required to plead facts beyond those necessary to show that he is entitled to relief. *Twombly*, 550 U.S. at 570. To state a plausible claim, Heyer need not specifically enumerate information of which he has not been made aware due to the alleged inadequate public address system. Further, in this case, Heyer *has* alleged facts that, if accepted as true, show that he has stated a plausible claim. For example, the Complaint states that Heyer is forced to rely on inmates to relay to him information from non-emergency announcements. ALJ Ex. 4 at 8. This fact alone shows that the prison's public address system is not reaching Heyer. It is not enough to warrant dismissal to say that Heyer is apprised of the information by an outside source. The question under the Rehabilitation Act is whether he has been excluded from a federal program. *See Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1266 (D.C. Cir. 2008). If, as Heyer alleges, the federal program is so ineffective at relaying information that he must rely on inmates to do the job of the program, he has stated a plausible claim for relief.[8]

Third, and finally, Heyer's Complaint alleges that BOP has failed to provide him with qualified ASL interpreters. Before the tribunal, specifically, is Heyer's request for ASL interpreters to enable his participation in the GED self-study program offered by BOP. The Government urges the tribunal to dismiss Heyer's claim requesting an interpreter because it amounts to a "conclusory allegation" and "is supported by no facts identifying" any limitation on

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as a recent determination by the adjudicating official dealing with Rehabilitation Act claims. I will treat it as such. I will cite to *Yeh* (ALJ Ex. 63) using the opinion's internal pagination.

[8] At the Status Conference held March 24, 2021, the parties expressed a possibility of settling the issue of non-emergency announcements but have not yet done so.

his ability to participate in the GED program. ALJ Ex. 55 at 16. True, the Complaint itself states only that Heyer "attends a GED preparation class, but participation is limited because no interpreter is provided." ALJ Ex. 4 at 6. But this is sufficient to state a claim, especially when read in context of the entire complaint. Without belaboring the point, this tribunal has already stressed that Heyer need only allege facts necessary to show a *plausible* claim for relief—and nothing more. *Twombly*, 550 U.S. at 570. Where, as here, a Deaf inmate alleges that he has not been provided an interpreter while participating in a GED program, the inmate has stated a plausible claim for relief under the Rehabilitation Act. It would serve no purpose to require Heyer to allege that the program involves spoken communication or listening to audio recordings. Nor does he need to show that the examination would be offered in ASL, rather than English, as the Government's motion suggests. ALJ Ex. 55 at 17. Heyer must only allege that he has been denied access to the program on the basis of his disability. He did that by stating that his participation was limited because he has not been provided an interpreter. The tribunal makes this finding with the knowledge that a plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 697.

For these reasons, BOP's Motion to Dismiss is **DENIED.**

III. Heyer's Motion for Summary Disposition

Although there are still three pending issues for resolution in this case, (*see* ALJ Ex. 52), Heyer moves for summary disposition on only two of them—his claim for a videophone and his claim for qualified ASL interpreters to enable him to participate in the GED self-study program. ALJ Ex. 56 at 24. He does not move for summary disposition on his claim for visual notifications of non-emergency announcements.

A. Propriety of Summary Disposition

''[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987). Indeed, "[c]ommon sense suggests the futility of hearings where there is no factual dispute of substance." *Id.*; *see also Weinberger v. Hynson Westcott and Dunning, Inc.*, 412 U.S. 609, 621 (1973) ("There can be no question that to prevail at a hearing an applicant must furnish evidence stemming from 'adequate and well-controlled investigations.' We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's 'pleadings' that the application cannot succeed."); *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d

600, 606 (1st Cir. 1994) ("Administrative summary judgment is not only widely accepted, but also intrinsically valid."); *NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 433*, 549 F.2d 634, 639 (9th Cir. 1977) ("Public policy clearly favors the granting of summary judgment here, where no relevant factual issues exist."); *Citizens for Allegan County, Inc. v. Federal Power Commission*, 414 F.2d 1125, 1128-29 (D.C. Cir. 1969) ("An analogy is sometimes drawn from the court rules which provide summary judgment procedure for the cases that involve only legal issues and no bona fide disputed questions of fact . . . .").

Heyer—as the moving party—bears the burden of proving there are no material issues of fact and judgment must be issued as a matter of law. *Celotex Corportion v. Catrett*, 477 U.S. 317, 323-25 (1986). Once the moving party meets its burden of proof, the burden shifts to the non-moving party to identify the genuine issues of material fact. *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). To meet its burden, the nonmoving party, to survive the motion for summary disposition, must demonstrate specific, material facts that give rise to a genuine issue of fact. *Celotex Corp.*, 477 U.S. at 323. Under this standard, "the mere existence of a scintilla of evidence" in favor of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion." *Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020).

1. Heyer's Videophone Claim

As to his claim for a videophone, Heyer has met his burden of proving there are no disputed issues of material fact. As noted previously, the relevant facts have been extensively litigated and conclusively found by the Fourth Circuit in *Heyer II*. These comprehensive, conclusively established facts provide a sufficient basis for this tribunal to resolve Heyer's Rehabilitation Act claim. *See Wai Man Tom*, 980 F.3d at 1037.

Accordingly, the burden shifts to the non-movant. *Celotex Corp.*, 477 U.S. at 323. BOP contends that because "there has been no development of a factual record whatsoever in the administrative forum, . . . there are vigorous disputes over material fact." ALJ Ex. 61 at 17. BOP's conclusory denials are insufficient to raise a genuine issue or material fact or to preclude a grant of summary disposition for two reasons.

First, the absence of a hearing is not a *per se* bar to granting summary disposition—that is the very nature of summary disposition. But, in any event, in this case there has been extensive factfinding in the parallel federal proceeding involving the same parties. BOP would have this tribunal ignore those findings but offers no compelling reason why this tribunal should engage in a duplicative fact-finding mission. While the Fourth Circuit was not deciding Heyer's Rehabilitation Act claim, it is beyond cavil that the facts adduced by the parties and evaluated by the Fourth Circuit are the same facts relevant to a Rehabilitation Act analysis. And, importantly, those facts are final; while BOP and Heyer may contest the proper reading of *Heyer II* before the district court, under the clear mandate in *Heyer II*, neither party will be permitted to relitigate the established facts in this case. Thus, to the extent BOP identifies any facts covered in *Heyer II* as disputed, its argument must fail. *See, e.g.* ALJ Ex. 61 at 2 n.1 (disputing paragraphs 3, 4, 8, 9, 10, 11, 12, 14, and 16 of Heyer's Motion for Partial Summary Judgment).[9]

[9] To the extent there are disputes, they are minor and easily resolvable either by using direct quotes from *Heyer II* or by narrowing the language of the fact. This is true of the following facts contested by BOP:

(1) "BOP's ban on point-to-point videophone impinges upon Mr. Heyer's ability to communicate with deaf persons outside of prison." ALJ Ex. 61 at 12. There is only a minor dispute here—the use of the word videophone—as the Fourth Circuit held that "BOP's total ban on point-to-point calls restricts Heyer's access to the outside world." *Heyer II*, 984 F.3d at 356.

(2) "Mr. Heyer has no means of communicating with deaf persons outside of prison, other than via point-to-point videophone." ALJ Ex. 61 at 12. Again, the issue here is merely the inclusion of the word videophone. *Heyer* II found: "The evidence at trial established that Heyer lacks any ability to communicate with the Deaf community." *Heyer* II, 984 F.3d at 366.

(3) "Mr. Heyer cannot communicate effectively in written English, and therefore, TTY, emails, and letters do not allow him to communicate with deaf persons outside of prison;" ALJ Ex. 61 at 12. Again, the Fourth Circuit reached this issue. *Heyer II*, 984 F.3d at 353, 359-62, 362 n.14.

(4) "[a]llowing Mr. Heyer to use point-to-point videophone will not have a 'significant ripple effect on fellow inmates or on prison staff,' and BOP 'already utilizes resource efficient means of mitigating the risks associated with these [point-to-point videophone] calls.'" ALJ Ex. 61 at 12-13. Again, by substituting the word "calls" for videophone, there is no dispute here under *Heyer II*, 984 F.3d at 364-65 (Point-to-point calls therefore would not produce [a] "significant 'ripple effect.'").

(5) "[t]here are available safeguards—including live-monitoring, recording, and after-the-fact translation—that will mitigate the risks associated with videophone and 'will impose only a *de minimis* burden on BOP's resources." ALJ Ex. 61 at 13. The Fourth Circuit did make a relevant, corresponding factual finding: "A review of the full record establishes that these additional safeguards will impose only a de minimis burden on BOP's resources," in part

Second, BOP's assertions that factual disputes exist are general, conclusory, and conflate issues of fact with issues of law. *See, e.g. id.* ("Respondent dispute nearly all of Complainants purportedly 'indisputable facts.'"); *id.* at 17 ("BOP does dispute, however, whether its policies and procedures discriminate against Heyer because of his disability."); *id.* at 23 (arguing that providing respondent with an ASL interpreter is a fundamental alteration of a federal program). As such, BOP's assertions fail to state a genuine issue of fact. *Wai Man Tom,* 980 F.3d at 1037 ("conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion.").[10] Moreover, to the extent that *Heyer II* did not address facts relevant to each and every Rehabilitation Act factor (*e.g.*, whether access to a telephone is a program), that is irrelevant, as those factors are not disputed by the Government.

At best, BOP identifies a new "fact" that it wishes to litigate—whether its proposal of a new method of communication that it labels as "CopySign" or "Point-to-Point CopySign" is sufficient to satisfy the Rehabilitation Act. Even if this is truly a fact, rather than a legal conclusion, it does not create an issue of fact sufficient to defeat summary disposition. According to BOP, "the facts and circumstances have changed since the trial conducted in 2017. Point-to-Point CopySign, the BOP's proposed accommodation, was not available at the time." ALJ Ex. 61 at 14. To be precise, Point-to-Point CopySign does not exist *now* as BOP has only recently issued a Request for Information to determine whether it is even possible. ALJ Ex. 59. Moreover, it did not exist in 2017 because BOP declined to explore that option when the district court suggested it. ALJ Ex. 56 at 20; *see also* ALJ Ex. 57 at 9. Setting aside the propriety of allowing BOP to benefit from its own inaction nearly four years later, its identification of a potential future development is no different than a conclusory allegation.[11] Thus, even if construed as a fact, it is a hypothetical

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because "BOP already supervises Heyer's TTY calls." *Heyer II*, 984 F.3d at 365-66. That modification has been made in the facts adopted by this tribunal.

[10] To be clear, this tribunal does agree that some of Heyer's statements are legal conclusions, not facts. For example, Heyer's statement that none of BOP's security concerns "justify a ban on point-to-point videophone calls" (ALJ Ex. 61 at 13), is a legal conclusion.

[11] On this point, the tribunal also considers that BOP had made similar assurances in the parallel federal proceedings, and those assurances went unrealized. *See Heyer I*, 849 F.3d at 220 ("Because the record establishes that BOP has already failed to live up to its promises regarding the provision of ASL interpreters, the record does not require us to conclude that the challenged conduct cannot reasonably be expected to start up again.") (internal quotation marks omitted).

fact and is therefore insufficient to create a genuine issue of material fact for purposes of Heyer's motion for summary disposition.

Therefore, I find that, in regard to Heyer's claim regarding access to a videophone, there are no genuine issues of material fact. The only remaining issue is a legal one—whether BOP has violated the Rehabilitation Act by failing to provide Heyer with some form of point-to-point communication device. That claim is resolved below.

2. Heyer's Claim for ASL Interpreters

As to Heyer's second claim—failure to provide him with an ASL interpreter for assistance with GED courses violates the Rehabilitation Act—the record is not sufficiently developed for summary disposition. To be sure, there are two relevant facts that have been conclusively established and require no additional litigation. First, the Fourth Circuit did find that Heyer lacked the ability to communicate in English. *Heyer II*, 984 F.3d at 362 (finding it "clearly erroneous" to conclude that Heyer can exercise his first amendment right in written English); *id.* n.14 ("[W]e conclude that Heyer cannot effectively communicate in English. . . .").[12] Second, BOP has agreed to provide Heyer with ASL interpreters in other contexts. *See* Partial Settlement Agreement, *Heyer v. U.S. Bureau of Prisons, et al*., 5:11-CT-03118-D, D.E. 181-1 at 4-6 (E.D.N.C. Nov. 2, 2017). While these facts are certainly highly relevant, I find that the record requires additional development on this issue. Heyer's request for summary disposition on this claim is therefore **DENIED**.

B. Heyer's Rehabilitation Act Claim

1. Applicable Law

Given the absence of a material issue of fact, Heyer's claim that failure to provide him with videophone access is ripe for dismissal as a matter of law.[13] The law relevant to that determination is found in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, which provides:

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[12] Accordingly, consistent with this order, should this issue proceed to a merits hearing, this tribunal will consider those facts conclusively established.

[13] Heyer argues that the Fourth Circuit's decision in *Heyer II* "establishes that the Rehabilitation Act requires BOP to provide Mr. Heyer access to point-to-point videophone." ALJ Ex. 56 at 10-11. The Government strongly disagrees. ALJ Ex. 61 at 7. Heyer's argument would require this tribunal to interpret the scope of *Heyer II*, a task this tribunal is hesitant to perform given the pending parallel federal proceedings. Nonetheless, this tribunal may not grant a remedy that is inconsistent with the ruling in *Heyer II*, *i.e.*, this tribunal could not grant a remedy under the Rehabilitation Act if that remedy is unconstitutional under *Heyer II*. This tribunal need not

> No otherwise qualified individual with a disability in the United States . . . 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 Executive agency.

29 U.S.C. § 794(a). "One of the primary purposes of the Rehabilitation Act is 'to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through . . . (F) the guarantee of equal opportunity.'" *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1266 (D.C. Cir. 2008) (quoting 29 U.S.C. § 701(b)(1)).

Three key federal regulations supplement the statutory text. First, an agency "shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an *equal opportunity to participate in*, and enjoy the benefits of, a program or activity conducted by the [BOP]." 28 C.F.R. § 39.160(a)(1) (emphasis added). Second, auxiliary aids are defined as "services or devices that enable persons with impaired sensory, manual, or speaking skills to have an *equal opportunity to participate in*, and enjoy the benefits of, programs or activities conducted by the agency." 28 CFR § 39.103 (emphasis added). Third, "[i]n determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person." 28 C.F.R. § 39.160(a)(1)(i). This regulation pertains specifically to accommodations necessary to "ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public." 28 C.F.R. § 39.160(a).

In this case, Heyer alleges that the BOP has unlawfully discriminated against him on the basis of his disability, in violation of § 504. To make a *prima facie* claim under the Rehabilitation Act, a plaintiff must show:

> 1) Complainant is disabled within the meaning of the Rehabilitation Act; 2) he is otherwise qualified to participate in the program and activity at issue; 3) he was excluded from, denied the benefit of, or subject to discrimination under a program

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consider whether it is *required* to grant Heyer videophone access under *Heyer II*, if it reaches the same conclusion after an independent evaluation of his claim under the Rehabilitation Act, in which the analysis in *Heyer II* is instructive, but not binding. Moreover, a remedy cannot be unconstitutional under Heyer so long as that remedy constitutes point-to-point communication. *See Heyer II*, 984 F.3d at 357.

> or activity solely on the basis of his disability; and 4) the program or activity is carried out by a federal executive agency or with federal funds.[14]

Am. Council of the Blind, 525 F.3d 1at 1266; *see also Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995) (applying the first three prongs of this test); *John TC Yeh v. Federal Bureau of Prisons*, Register No. 50807-037 at 3 (U.S. Dep't of Justice Feb. 05, 2018) (ALJ Ex. 63). If the first four elements are established, BOP may avoid liability if it can establish that that the auxiliary aid sought, here, a videophone, "would result in a fundamental alteration in

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[14] Although Heyer brings his claims under the Rehabilitation Act, courts often conduct similar analyses under the ADA and the Rehabilitation Act. *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012). Courts have even held that the ADA and the Rehabilitation Act require a plaintiff to prove the same elements to establish liability. *Id.*; *see also Bowers v. NCAA*, 475 F.3d 524, 535 n. 12 (3d Cir. 2007). That said, the analysis of the Rehabilitation Act is altered by the Government's obligation to give "primary consideration" to the complainant's requested accommodation. 28 C.F.R. 39.160(a)(1)(i). Moreover, under the Rehabilitation Act, both the disabled person and the public entity are expected to attempt to resolve any disputes through an administrative remedy process. 28 C.F.R. § 39.170. Complainants who are federal prisoners must complete an additional step of exhausting the Bureau of Prisons Administrative Remedy Procedure, spelled out in 28 C.F.R. Part 542. *Id*. § 39.170(d)(1)(ii).

The Government contends that this administrative remedy procedure requires the parties to "engage in an interactive process to develop the specific accommodation necessary, and feasible, for the particular situation." ALJ Ex. 55 at 9. This mischaracterizes the administrative process under the Rehabilitation Act. The Rehabilitation Act regulations require federal agencies to follow a specific investigation process, which includes an attempt at an informal resolution of the complaint. 28 C.F.R. § 39.170(g). The regulations do not, however, call for the parties to cooperatively craft a remedy that meets the needs of the situation. On the contrary, the Government must give "primary consideration" to the requested accommodation, meaning that the BOP "must honor the [disabled] person's choice, unless it can demonstrate that another *equally effective means of communication* is available" or that the requested accommodation would constitute an undue burden on BOP. *See* DOJ ADA Requirements: Effective Communication 6 (2014) www.ada.gov/effective-comm.pdf (emphasis added).

Moreover, BOP's contention that the parties must engage in an interactive process to develop the specific accommodation required under the circumstances is rooted in an erroneous application of inapposite regulations to this case. The "interactive process" of which the BOP speaks is a requirement in employment disputes under the ADA. *Clemons v. Dart*, 168 F. Supp. 3d 1060, 1071 (N.D. Ill. 2016) (noting the distinction between Title I and Title II of the ADA). The Rehabilitation Act does not make a reference to such an "interactive process," but even if it did, the requirement in this case would have been satisfied. *See* ALJ Ex. 12, 13. This tribunal granted the parties 60 days in which to reach a settlement. Rather than craft a mutually-agreeable settlement, BOP *unilaterally* decided to explore the "Point-to-Point CopySign" system. ALJ Ex. 44, 48. Therefore, even if such a requirement applies, I find that it does not justify dismissal of Heyer's Complaint.

the nature of a program or activity or in undue financial and administrative burdens." 28 C.F.R. § 39.160(d). *See Southeastern Community College v. Davis*, 442 U.S. 397 (1985); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 683 n.17 (S.D. Ind. 2015) (noting that the holding in *Davis* that § 504 only requires reasonable accommodations is "already built into the Title II framework.").

There is no dispute that Heyer has satisfied Factors One, Two, and Four. *See* ALJ Ex. 55 at 7.[15] As to Factor One, Heyer, who was born deaf, is disabled within the meaning of the Rehabilitation Act. *See Heyer II*, 984 F.3d at 351-52. It is beyond dispute that access to phone communications and GED programs qualify as "programs" under the Rehabilitation Act. *See Yeh*, ALJ Ex. 63 at 3. Finally, it is clear that these programs are carried out by a federal executive agency, *i.e.*, Federal Correctional Institution (FCI) Butner. *See id.; see also Yeskey v. Pa. Dept. of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997) ("The DOJ regulations applicable to federally conducted programs also make it clear that institutions administered by the Federal Bureau of Prisons are subject to Section 504.").

Thus, the first question before this tribunal involves Factor Three, *i.e.*, whether Heyer has made a *prima facie* case that he was "excluded from, denied the benefit of, or subject to discrimination under a program or activity solely on the basis of his disability." *Am. Council of the Blind*, 525 F.3d at 1266.

Courts have held that § 504 requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1985). "[T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* There is likely an absence of "meaningful access" "[w]here the plaintiffs identify an obstacle that impedes their access to a government program or benefit." *American Council of the Blind*, 525 F. 3d at 1267. Courts hold that one is excluded solely on the basis of disability if he is not provided assistance or accommodations that would allow him to participate in the program. *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1203 (9th Cir. 2016); *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268 (2d Cir.

[15] Specifically, BOP concedes: "that Heyer, as a deaf individual, alleges and suffers from a disability contemplated by the Rehabilitation Act. For the purposes of this motion, Respondent does not dispute that Heyer is otherwise qualified to utilize the inmate telephone system; be notified of non-emergency events or activities, such as meal announcements, count calls, or meetings; and to participate in a self-study GED program." ALJ Ex. 55 at 7.

2009); *Jarvis v. Potter*, 500 F.3d 1113, 1120-21 (10th Cir. 2007); *Am. Council of the Blind*, 525 F. 3d at 1266; *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1998).

2. Heyer's Claim for a Point-to-Point Videophone

Heyer claims that he is entitled to use a videophone to make point-to-point calls from FCI Butner to both Deaf individuals and his brother, who is hearing but can communicate in ASL. ALJ Ex. 56 at 10, 23. At present, Heyer does not have meaningful access to the inmate telephone system. As a Deaf person, Heyer lacks the ability to use a telephone, and as a person with limited English skills, Heyer lacks the ability to communicate effectively through TTY, emails, or letters. *See Heyer II*, 984 F.3d at 350, 363, 366. Rather, he has monitored access to the TTY and monitored access to the SecureVRS to contact his brother. *Id.* at 351, 359. The VRS system does not allow Heyer to see his brother, even though he communicates with him through ASL. *Id.* at 351-53.

"For deaf individuals, point-to-point calls are the closest analogue to a telephone call." *Id*. at 351. Other courts to address the issue of videophones for deaf inmates have agreed. *See Rogers*, 2019 U.S. Dist. LEXIS 159001, at *44 ("videophone conversations are analogous to spoken telephone conversations") (citation omitted)); *McBride*, 294 F. Supp. 3d at 710 (granting summary judgment on plaintiff's claim for a videophone under the Rehabilitation Act because TTY did not provide meaningful access); *id*. ("[V]ideo technology is necessary to enable deaf and hard of hearing prisoners to communicate effectively with persons outside of prison."); *Yeh*, ALJ Ex. 63 at 11 ("[T]he point here is that it cannot be reasonably claimed that TTY use establishes communication access that is comparable to ordinary telephone use."). This is so, as the Fourth Circuit persuasively explained, because ASL is a "visual language," not merely a visual representation of English, and "ASL users communicate in three dimensions and make use of hand shapes, movements, locations, and palm orientations, paired with 'non-manual behavior[s]'—for instance, wrinkling one's nose—to 'indicate grammatical features.'" *Heyer II*, 984 F.3d at 350.

Access to TTY. Indeed, in the year 2021, TTY is a nearly obsolete technology. *See Heyer II*, 984 F.3d at 351 n.3 (citing a communication technology expert who testified that "few people still use these devices, and he expects TTY to become obsolete in the next three-to-four years."). TTY provides "markedly slower communication than voice conversation [and] it is cumbersome communication . . . a slow, stilted pace, something very different from the fluidity and spontaneity of spoken language through the telephone." *Yeh*, ALJ Ex. 63 at 11-12. "[A] marked difference in opportunity to access and use [of] an agency program provides a firm basis for finding a § 504

violation." *Id*. at 13; *see also Heyer II*, 984 F.3d at 351 n.3 (referring to TTY as obsolete). This is especially true, here, because TTY—effectively a typewriter—requires proficiency in written English, and Heyer has the English competency of a seven-year old. *See Heyer II*, 984 F.3d at 350-51, 353. Accordingly, I find that TTY does not provide "meaningful access" and "equal opportunity" to Heyer.

Access to SecureVRS or CopySign. For many of the reasons articulated in *Heyer II* and *Yeh*, I find that the SecureVRS system fails to provide meaningful communication between Heyer and his brother, both of whom communicate through ASL, because it does not allow for point-to-point communication, as that term is commonly understood. *See Heyer II*, 984 F.3d at 352 n.6 (brothers communicate through ASL); ALJ Ex. 57 at 8; *Yeh*, ALJ Ex. 63 at 15-16 n.9-10 (discussing VRS and videophones).[16] Similarly, even if this tribunal were to consider BOP's proposed Point-to-Point Copy Sign as a possible remedy, it would fail for the same reason.[17]

And that reason is this: The SecureVRS system does not allow Heyer to see his brother, nor would the proposed "Point-to-Point CopySign" system allow Heyer to see a Deaf individual with whom he was conversing. Rather, both systems insert an interpreter as a relay between the conversation participants. This feature deprives two Deaf individuals, or a Deaf individual communicating with an ASL user, of meaningful and effective communication for the following reasons.

First, as the Fourth Circuit persuasively noted, point-to-point communication is essential to people communicating through ASL, a complex, three-dimensional, visual language. *Heyer II*, 984 F.3d at 350. It is not, as BOP so blithely suggests, merely "personal preference." *See* ALJ Ex. 61 at 20 n.15. Rather, visual cues are a vital component of ASL. They are the functional equivalent of "pauses, sighs, and other non-aural cues." *See Yeh*, ALJ Ex. 63 at 11; *see also Heyer II*, 984 F.3d at 351 (telephone conversation "can convey important linguistic information such as

[16] BOP cites *Heyer II* for the proposition that "Heyer has 'access to the VRS system in a manner substantially similar to the access hearing inmates have to the BOP's inmate telephone system." ALJ Ex. 61 at 18. But, on that point, *Heyer II* states only "[n]or will we construe the right so broadly that it extends to his brother, a non-deaf individual with whom Heyer can already communicate through SecureVRS." Thus, nothing in *Heyer II* conflicts with this tribunal's conclusion.

[17] Heyer argues that BOP is precluded from even offering that remedy under the doctrine of defense preclusion. ALJ Ex. 56. at 19-20. This tribunal does not need to reach this issue given the tribunal's decision.

emotion, tone, or inflection, which can affect meaning and message significantly."). Moreover, the participants in a telephone conversation can interrupt each other and speak simultaneously, things that are impossible for Deaf individuals on devices other than a videophone. Therefore, for a Deaf individual communicating with another ASL user, all of those important nuances are lost if two ASL users cannot see each other. For this reason, "point-to-point" communications is "the closest analogue to a telephone call" for Deaf individuals. *Heyer II*, 984 F.3d at 351.

Importantly, "point-to-point communication" has both a technical and common sense meaning. The FCC has defined point-to-point communication as follows:

> [Point-to-point video communication services] are more rapid in that *they involve direct, rather than interpreted, communication*; they are more efficient in that they do not trigger the costs involved with interpretation or unnecessary routing; and they increase the utility of the Nation's telephone system *in that they provide direct communication—including all visual cues that are so important to persons with hearing and speech disabilities*.

FCC Fact Sheet at 4 (April 18, 2019), https://docs.fcc.gov/public/attachments/DOC-357093A1.pdf (emphasis added) (citing Second TRS Numbering Order, 24 FCC Rcd at 821, para. 67 (quoted in VTCSecure Waiver Order, 32 FCC Rcd at 779, para. 9)). The FCC's definition of point-to-point communication is consistent with *Heyer II*, at 351: ("VRS calls are not supported between two deaf participants. Therefore, deaf individuals make *point-to-point video calls* to communicate with each other. These calls—which essentially resemble a Skype call—*allow the two participants to sign directly to each other*. For deaf individuals, point-to-point calls are the closest analogue to a telephone call.") (emphasis added). Thus, point-to-point means direct, *i.e.*, that the two ASL users can see each other; *id*. at 363 ("The only difference between these SecureVRS calls and point-to-point calls is that the latter directly connect the call participants, while the former are mediated by a translator.").

Thus, point-to-point means that Person A (point one) has direct contact with Person B (point two). For SecureVRS, Person A has contact with an ASL interpreter and the ASL interpreter has contact with Person B (recipient of inmate's call). *Heyer II*, 984 F.3d at 353. Similarly, in BOP's proposed, inchoate "Point-to-Point CopySign" system, *at best,* Person A (inmate) has contact with ASL interpreter 1 and ASL interpreter 1 has contact with Person B (recipient of inmate's call). Again, Person A and Person B do not see each other. ALJ Ex. 55 at 11 n.9 ("Essentially, P2P CopySign is a video service in which a third-party ASL interpreter is inserted

in the video communication path between an ASL calling party (Heyer) and Deaf individual who communicates using ASL, with no video interface between the parties."). The ASL interpreter is a relay; and once a relay is introduced into the communication, by definition, it ceases to be point-to-point, regardless of what name BOP assigns to the system. Accordingly, I conclude that "Point-to-Point CopySign" does not satisfy this legal or common-sense definition of point-to-point, regardless of what label BOP attaches to it.

Second, inserting an interpreter as an intermediary between two people using the same language serves no linguistic purpose and, in fact, undermines the quality of the communication. No matter how qualified the ASL interpreter, the use of an interpreter as a relay—much like the childhood game of telephone—introduces the possibility of miscommunication. That potential error erodes meaningful communication. Moreover, the insertion of an intermediary introduces some of the same problems as TTY—it is cumbersome, slows down a conversation, and prevents participants from interrupting each other, thereby rendering the communication between the two participants far less fluid. As a practical matter, it also means that Heyer has less time to communicate with his brother or another Deaf person than two hearing persons would have to speak with each other on the telephone. *See Yeh*, ALJ Ex. 63 at 11.

When both participants communicate in ASL, the closest comparison to determine equal opportunity and meaningful access is foreign language speakers in BOP custody, although even that comparison is far from ideal because it does not take into account the visual component of ASL. BOP houses a significant number of foreign language speaker who make phone calls in sixty different languages. *Heyer II*, 984 F.3d at 353. Notably, if Person A and Person B both speak the same foreign language, BOP does not insert an interpreter as an intermediary. *Id.* at 364 ("These calls are not live-translated, despite some of those calls being made by international terrorists."). And when put in those terms, the limitations of SecureVRS and "Point-to-Point CopySign" become clear. Accordingly, I find that failure to provide Heyer with a videophone or a functionally-equivalent point-to-point communication device—defined herein as a device that *allows ASL users to see each other*—violates § 504 of the Rehabilitation Act.

Also relevant here is the regulatory mandate that BOP must give "primary consideration" to Heyer's requested remedy, which is a videophone. *See* 28 C.F.R. § 39.160(a)(1)(i). The Department of Justice has published guidance on this issue, and has instructed that to give primary consideration, an agency "must honor the [disabled] person's choice, unless it can demonstrate

that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration or in an undue burden." DOJ ADA Requirements: Effective Communication 6 (2014) www.ada.gov/effective-comm.pdf. Based on the procedural history of this case, including two status conferences and two statements of position, it does not appear that BOP has given primary consideration to Heyer's request. Rather, it appears that BOP is determined to litigate, in federal district court, the meaning of the phrase "point-to-point" as used in *Heyer II*. While BOP may certainly do so in the parallel federal proceedings, such an endeavor is unnecessary here given the established facts, the Rehabilitation Act standard, and the primary consideration regulation.

The Government addresses its failure to give primary consideration to a videophone for the first time in its Reply Brief. ALJ Ex. 64. Even assuming the Government has not waived this argument for failure to raise it in its initial pleading, its argument is unpersuasive. On this issue, the Government simply contends that it is not required to give Heyer's request primary consideration because a videophone would constitute a fundamental alteration of the BOP's telephone program. *Id.* at. 5. Because the tribunal concludes, *infra*, that the provision of a videophone is not a fundamental alteration of the program, I reject this argument. Seeing no other justification[18] for its failure to give *any* consideration, let alone primary consideration, to Heyer's requested accommodation, the tribunal concludes that the Government has failed to do so.

[18] BOP's reply brief contains the following language: "The supplementary information makes clear that a disabled individual must be provided *equal opportunity* to participate in a program, and communication must be *effective*; however, nothing requires that the accommodation necessarily need be equally effective." ALJ Ex. 64 (emphasis in original). Even if that convoluted statement is accurate—which this tribunal questions—it does not alter the analysis or outcome here. As discussed, *supra*, Heyer has no effective mechanism for communicating with ASL users. BOP's inchoate, hypothetical CopySign system does not exist; even if it did exist, it would not provide Heyer equal access to the telephone program. The proposed system would preclude two ASL users from seeing each other, even though ASL is a visual language. Moreover, inserting an unnecessary interpreter into an ASL conversation will render the conversation prone to errors; it will also make any conversation between two ASL users disjointed, cumbersome, and slow. I find that this is not effective communication for Heyer, especially as his limited English language skills prevent him from effectively using other means of communication, such as emails.

3. Fundamental Alteration to Any BOP Program or Creation of Undue Burdens

But the analysis does not end there. BOP can avoid making a videophone, or the functional equivalent (*in which two ASL users see each other*) available to Heyer if it can show that the proposed accommodation "would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens." 28 C.F.R. § 39.160(d). The agency bears the burden of proving that the accommodations at issue would result in a fundamental alteration or financial or administrative burden. *Id.*

In considering this issue, this tribunal is keenly aware of two points: (1) Heyer is a sex offender who has committed very serious crimes; thus, BOP has legitimate security concerns about installing a videophone device; and (2) BOP is entitled to deference from this tribunal about how best to meet those security concerns. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). And, as BOP notes, the Adjudicating Official in *Yeh* stated that if "complainant or BOP can identify another device that permits complainant to communicate with a hearing-impaired individual using ASL but also provides more of the security safeguards that BOP insists upon, the parties are strongly encouraged to explore the implementation of such device." ALJ Ex. 61 at 22 (quoting *Yeh*, ALJ Ex. 63 at 10). This tribunal gives great deference to BOP and its legitimate security concerns in reaching its decision. This deference, however cannot be so strong as to deprive Heyer of meaningful access to communications. *See Yeh*, ALJ Ex. 63 at 13 ("But a reasonable understanding of 'equal opportunity to participate' cannot be that it is met by a showing of any opportunity to participate, even if it means minimal participation.").

While BOP is afforded deference on security issues, it still bears the burden to demonstrate that a proposed accommodation constitutes a fundamental alteration or undue burden. 28 C.F.R. § 39.160(d). In this case, BOP officials *have had years* to identify an alternative means of communicating that would satisfy their security concerns while giving Heyer meaningful communication with ASL users.[19] They have not done so, even after two adverse appellate decisions and an adverse decision in *Yeh*.

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[19] In arguing that a videophone is *not* required to provide Heyer meaningful access, the Government, in its Reply Brief, frames its argument as follows: "Federal Regulations Similarly Do Not Require Correctional Facilities to Provide Sexually Dangerous Civil Detainees with Unqualified and Unfettered Access to Video Communication Technology." ALJ Ex. 64 at 4. This is nothing more than a strawman argument. Nowhere in his Complaint does Heyer request "unfettered access," nor does this tribunal's decision demand such a broad remedy. BOP is free

Rather, at this late stage in this litigation, BOP argues that there are genuine issues of fact on this issue but fails to address the directly relevant facts found by the Fourth Circuit in *Heyer II*. ALJ Ex. 61 at 23; s*ee Heyer II*, 984 F.3d at 362 (rejecting district court's factual findings on: "(1) the need for BOP to secure a waiver to the DOJ's IT policies, (2) the risk that Heyer would abuse point-to-point calls, (3) the risk that Heyer would be pressured by another inmate for access to point-to-point calls, (4) the difficulty involved with real-time monitoring of conversations conducted entirely in ASL, and (5) the financial cost of additional safeguards."). Those facts, which have been conclusively litigated by the parties here, provide sufficient basis from which this tribunal can find that providing Heyer with a videophone or the functional equivalent as defined herein would not create a fundamental change to a program or impose undue financial or administrative burdens.

Fundamental alteration to a program. BOP has an established program called the Telephone Communications Program (TCP), which provides a regular opportunity for inmates to communicate with people outside the prison. The regulations establishing the TCP—28 C.F.R. § 540.100(a)—note that "[t]elephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development." Adam Walsh detainees who are not hearing impaired have access to this program, subject to security-based limitations. *Heyer II*, 984 F.3d at 354. Moreover, BOP, and specifically Butner, include VRS services for Deaf and hearing-impaired individuals. *Id.* at 353. While these do not provide point-to-point communication for ASL users, they are video-based technology and contain the features necessary for a point-to-point call, if those features were enabled. *Id.* Finally, BOP has provided videophones to inmates in at least two facilities—Tucson and Schuylkill. *Yeh*, ALJ Ex. 63 at 15-16. Based on these undisputed facts, this tribunal finds that providing Heyer with a videophone or its functional equivalent, as defined above, would not constitute a fundamental alteration of a BOP program.

Security concerns based on Heyer's status as a child sex offender. According to BOP, Heyer's "unique designation as a sexually dangerous person presents public safety concerns,

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to impose limitations on point-to-point videophone calls in order to address their security concerns—the same way BOP places such limitations on phone calls for hearing inmates. *Heyer II*, 984 F.3d at 364-65 (discussing feasible security measures). But those limitations cannot constitute a ban on point-to-point communications, *i.e.*, direct, visual communication.

namely that he could use point-to-point calls to engage in acts of child exploitation or view child pornography." *Heyer II*, 984 F.3d at 354. For instance, Heyer could expose himself to a child and that "visual depiction is immediate and [when] it's done, . . . whatever the information is, it's been permanently transmitted." *Id.* Butner's Warden testified "that he was opposed to any 'additional access,' because he considered sex offenders to be a particularly manipulative population." *Id.* Specifically, the Warden "feared that BOP would be unable to control the conduct of the other call participant, which could lead to acts of child exploitation." *Id*.

I agree with the Fourth Circuit's conclusion that, given the facts established in this case, BOP has adequate mechanisms to manage these security risks and thus those risks do not justify denying Heyer access to a videophone or its functional equivalent, as defined herein. Specifically, as the Fourth Circuit found, "[p]ursuant to a partial settlement in this case, BOP agreed to provide Heyer with access to VRS calls by installing a videophone in his unit and contracting with a provider of SecureVRS services." *Id.* at 353. Moreover, "[t]he SecureVRS system restricts calls to preapproved numbers and allows BOP staff to maintain call records; track, record, and monitor SecureVRS calls in real-time; and play them back." *Id.* (internal quotations omitted). The VRS system allows BOP to interrupt calls "to prevent prohibited conduct." *Id.* Thus, "[i]f Heyer engages in any criminal activity using the SecureVRS system, those calls can be referred for prosecution." *Id*. "[T]his same system could be used for point-to-point calls," but that capability is currently disabled. *Id*.

Since these, and similar, mechanisms are available to BOP, it may adequately manage the specific security risks.

General security concerns. BOP witnesses also testified as to the risks of allowing Heyer point-to-point videophone access, including concerns regarding "coded language" and "Heyer's access to point-to-point calls might give him leverage to exploit other detainees for favors or give other detainees a reason to exploit Heyer for access." *Id.* at 354. It is beyond cavil that any inmate can use "coded language" on a telephone call and, since those calls do not have intermediaries, that coded language would—at best—be discovered later. As a result, that claim is facially insufficient to justify denying point-to-point, *i.e.*, direct and visual communication. Similarly insufficient is BOP's claim that provision of a videophone could give Heyer or other inmates leverage over each other—when given the opportunity to explain that claim, it failed to do so. *Id.* at 363.

Burden on BOP Resources. In the two-day bench trial, the Warden also testified that "providing point-to-point calls would burden BOP resources because they would need to be monitored like Heyer's TTY calls and because BOP currently lacks a contract to translate Heyer's point-to-point communications." *Id.* "By contrast, BOP generally makes telephone calls available to non-deaf inmates—including Adam Walsh Act detainees—although Warden Mansukhani testified that he made individualized assessments about which detainees in the Maryland Unit are given phone privileges. That access can also be taken away based on misconduct." *Id.* The evidence established that "BOP permits thousands of prisoners to make phone calls in sixty foreign languages, including prisoners who have committed acts of terrorism. Those calls are not contemporaneously translated." *Id.*

Based on these facts, I agree with the Fourth Circuit's conclusion that "additional safeguards will impose only a de minimis burden on BOP's resources," in part because "BOP already supervises Heyer's TTY calls." *Id*. at 365-66. Moreover, "BOP already utilizes resource-efficient means of mitigating the risks associated with these calls. Point-to-point calls therefore would not produce [a] "significant 'ripple effect.'" *Id*. at 364-65.

General Concerns. This tribunal further agrees with the Fourth Circuit's conclusions regarding BOP's general concerns. *See id.* at 362-63 (finding that the need to secure a waiver from DOJ for a videophone would create no more than a *de minimis* effect on BOP); *id.* at 363 (holding that internal security concerns regarding videophones can be mitigated by the same security features available on the VRS system); *id.* (observing that available safeguards mitigate the risk of point-to-point calls on a videophone becoming a source of "leverage" between Heyer and other inmates); *id.* at 364 (rejecting the argument that BOP would have to translate point-to-point calls on a videophone in real time, which was an administrative and financial burden); *id.* at 364-65 (concluding that any costs incurred by BOP's provision of a videophone would be *de minimis*).

This tribunal thus finds that, although some of these security concerns are certainly legitimate, they are not "so unusual or so beyond the scrutiny and monitoring capabilities of institutional so as to meet the high regulation hurdle." *Yeh*, ALJ Ex. 63 at 16-17. Accordingly, given the findings in *Heyer II*, and BOP's failure to offer specific arguments on this issue, I find that BOP has not satisfied its burden laid out in § 39.160(d).[20]

[20] Although *Yeh* involved a different facility and an inmate convicted of fraud, its analysis supports this tribunal's conclusion. In *Yeh,* the CAO found that BOP "has the capability and capacity to

Accordingly, this tribunal finds—based on the established facts, the persuasive analysis in *Heyer II* and *Yeh*, and the absence of undue burden or fundamental change to an existing program—that the Rehabilitation Act requires BOP to provide Heyer with videophone access or the functional equivalent. To be clear, functional equivalent in this context means another device that allows two ASL users to communicate *directly* with each other visually, *i.e.*, a device that allows the two participants *to see each other*. I find that BOP's hypothetical "Point-to-Point CopySign" is not, in fact, a point-to-point communication device and is thus not the functional equivalent to a videophone for purposes of the Rehabilitation Act.

For these reasons, Heyer's Motion for Summary Disposition on the issue of access to a videophone (or its functional equivalent as defined herein) is **GRANTED**.

In conclusion, the Government's Motion to Stay Proceedings is **DENIED**. The Government's Motion to Dismiss is **DENIED**. Heyer's Partial Motion for Summary Disposition is **DENIED** with respect to his claim regarding access to an ASL interpreter for GED classes; it is **GRANTED** with respect to his claim regarding access to a point-to-point videophone or its functional equivalent, as defined herein.

ORDER FOR PREHEARING STATEMENTS

Given the tribunal's grant of summary disposition on Heyer's claim for a videophone, there remain two issues in this case: Heyer's claim for ASL interpreters to enable participation in the GED self-study program and his claim for visual notifications for non-emergency announcements. Although the parties have previously indicated that settlement appeared likely on those issues, this tribunal has seen no significant progress towards that goal. Accordingly, the tribunal concludes that the time has come to schedule the submission of Prehearing Statements and, subsequently, to hold a Prehearing Conference. At the Prehearing Conference, this tribunal will schedule a hearing on the merits. Accordingly, prior to the Prehearing Conference, the parties

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monitor VRS communication." ALJ Ex. 63 at 17. Here, as in *Yeh*, no evidence suggests "that extending this capability and capacity to videophones would result in undue burdens." *Id. Yeh* also rejected BOP's argument that the inmate's fraud conviction raised security concerns given the manipulative nature of fraudsters. *Id.* at 18. Indeed, the CAO described that argument as "not very persuasive." *Id.* The CAO in *Yeh* also concluded that risk of coercion by other inmates was "well within the corrections wheelhouse," and that BOP had not "provided statements detailing how videophone coercion is meaningfully different as to make for an undue administrative burden." *Id.* at 19. Finally, the CAO in *Yeh* held that BOP's need to obtain DOJ authorization was not an administrative burden that justified rejecting a videophone as a remedy. *Id*.

are directed to: (1) determine its witness availability for a merits hearing; and (2) create a logistical plan that will allow Heyer to participate in the hearing by video and communicate privately with his counsel during the hearing. The parties should also be prepared to address any other logistical issues at that time.

Therefore, it is hereby **ORDERED** that Complainant, Thomas Heyer, no later than **2:00 p.m. Eastern Time** on **June 3, 2021**, and Respondent, BOP, no later than **2:00 p.m. Eastern Time** on **June 17, 2021**, electronically file and serve on each other, a written statement containing the following sections:

1. **Issue(s).** Statement of the perceived issues.
2. **Requested Relief.** Statement of the relief requested.
3. **Stipulations.** Proposed stipulations and admissions of fact. Each party is directed to examine available evidence and determine which facts may be the subject of stipulation to narrow the issues to those that will be and should be the subject of contested litigation.
4. **Witnesses.** Names and *current* addresses of all witnesses whose testimony is to be presented; Complainant Heyer should note that, if he intends to testify, he must be listed as a witness, and a summary of his testimony as described below must be provided.
5. **Summary of testimony.** Brief summary of the testimony of each witness. **The summaries are to state what the testimony will be, rather than merely list the areas to be covered.** The parties are reminded that testimony not disclosed in the prehearing statements or pursuant to subsequent rulings is likely to be excluded at the hearing.
6. **Documents.** A list of all documentary evidence, including affidavits and other exhibits to be offered in evidence, specifying the number of pages in each. Each exhibit is to be numbered or lettered ("For Identification") with the designation to be used at the hearing.
7. **Position regarding hearing situs.** Either or both parties may raise issues relative to logistics that militate in favor of a particular place of hearing.[21]
8. **Other matters.** Any other matters that the parties consider relevant.
9. **Best estimate as to time required for presentation of own case.**

It is further **ORDERED** that a prehearing conference in this matter will be conducted by video teleconference (VTC) on **June 21, 2021, at 2:00 p.m. Eastern Time**; and it is further **ORDERED** that all proceedings will be governed by the provisions of 28 C.F.R. § 39.170(k).

[21] The current COVID-19 pandemic may profoundly impact the setting of venue in this case, and may result in the hearing being conducted in whole or in part through the use of videoconference (VTC) technology.

Electronic Filing: The preferred method of filing correspondence in these proceedings is as a PDF attachment via email to the DEA Judicial Mailbox (**ECF-DEA@usdoj.gov**). The forwarding email on all electronically-filed correspondence must indicate that it was simultaneously served on the opposing party via email. The Complainant must ensure that all documents filed with the DEA Judicial Mailbox are simultaneously served on Counsel for the Government. Any request(s) to modify email addresses of a party or counsel must be made on notice to this tribunal and the opposing party. The email receipt date reflected by the DEA Judicial Mailbox server shall conclusively control all issues related to the date of service of all filed correspondence, provided however, that correspondence received after 5:00 p.m., local Washington, D.C. time, will be deemed to have been received on the following business day. Note: While email is utilized as the method to forward documents for filing—as attachments—no substantive matter communicated through the body of a forwarding email will be considered. The parties are directed to refrain from including social security numbers or personally identifiable information in electronically-filed documents. Proposed exhibits will not be accepted via electronic filing.

Hard Copy and Facsimile Filing: Alternatively, correspondence may be filed in hard-copy form. Hard-copy filings must be served in triplicate and addressed to my attention at: **The DEA Office of Administrative Law Judges, 8701 Morrissette Drive, Springfield, VA 22152**. Because the DEA Hearing Facility is not physically collocated with the DEA mailing address, hard copy filings must be posted sufficiently in advance of the due date to assure timely receipt by this office. Documents may also be served via facsimile,[22] so long as they are followed up by hard copies consistent with the directions above that are simultaneously placed for delivery. Facsimile filings will be deemed timely if received at this office by the date and time due, and are limited in size to twenty (20) pages, absent prior permission granted by me upon advance request.

Failure to timely file a prehearing statement that complies with the directions provided above may result in a sanction, including (but not limited to) a waiver of hearing and an implied withdrawal of a request for hearing. Prehearing statements should not include motions, which should be filed separately.[23]

[22] The facsimile number for this office is (202) 307-8198.
[23] A prehearing ruling setting deadlines will be issued after the prehearing conference.

It is further **ORDERED** that any requests for extension of time to file must be made by written motion sufficiently in advance of scheduled deadlines to be considered and ruled upon.

Dated: May 20, 2021

Teresa A. Wallbaum
TERESA A. WALLBAUM
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on **May 20, 2021**, caused a copy of the foregoing to be delivered to the following recipients: (1) Ian Hoffman, Esq., Counsel for Complainant, at Ian.Hoffman@arnoldporter.com; and (2) Christina A. Kelley, Esq., Counsel for Respondent, at c4thompson@bop.gov, Holly P. Pratesi, Esq., Counsel for Respondent, at hpratesi@bop.gov, and Mallory Brooks Storus, Esq., Counsel for Respondent, at mstorus@bop.gov.

Melissa E. Barnes

Melissa E. Barnes, Secretary
Office of Administrative Law Judges