



U.S. Department of Justice
Complaint Adjudication Office

Docket No. 18-1

950 Pennsylvania Ave NW, Room 3651
Washington, DC 20530

February 25, 2022

DEPARTMENT OF JUSTICE FINAL AGENCY DECISION

in the matter of

Thomas Heyer v. Federal Bureau of Prisons

On March 3, 2017, complainant Thomas Heyer, a civil detainee housed in the Federal Correctional Institution in Butner, North Carolina (FCI Butner), filed a discrimination complaint against the Federal Bureau of Prisons (BOP), pursuant to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (hereinafter, "Section 504"), and 28 C.F.R. §§ 39.130, 39.160, 39.170, and 542.10. Complainant alleged that the BOP violated Section 504 by failing to provide him with access to point-to-point videophone calls.¹

Section 504, Legal Standards, and the Complaint Process

Section 504 provides that no otherwise qualified person with a disability shall, solely by reason of the person's disability, be excluded from participating in, denied the benefits of, or subjected to discrimination under any program or activity conducted by a federal executive agency. 29 U.S.C. § 794(a). Regulations implementing Section 504 provide that agencies shall furnish "appropriate auxiliary aids where necessary" to give a person with a disability "an equal opportunity to participate in, and enjoy the benefits of," an agency program or activity. 28 C.F.R. § 39.160(a)(1). In determining what type of aid is necessary, the agency "shall give primary consideration to the requests" of the person requesting the aid. § 39.160(a)(1)(i). Auxiliary aids include "services or devices that enable persons with impaired sensory [...] skills to have an equal opportunity" to participate in, and

¹ Complainant's complaint contained other allegations that were either settled or withdrawn prior to the issuance of the Recommended Decision in this case. Complaint of Thomas Heyer (Mar. 3, 2017) at 10-11; Order Regarding Scope of Case and Briefing Schedule (Mar. 25, 2021) at 1-2; Complainant's Notice of Voluntary Dismissal of Certain Claims Without Prejudice and Request for Entry of Recommended Decision (July 8, 2021) at 1. This Decision will not address the settled and withdrawn claims.

enjoy the benefits of, agency programs and activities. The regulations list "telecommunication devices for deaf persons" as an example of such an aid. § 39.103.

To establish a prima facie case under Section 504 based on access to an agency program, the complainant must show that: (1) the complainant has a disability within the meaning of the Rehabilitation Act; (2) the complainant was otherwise qualified to participate in the program at issue; (3) the complainant was excluded from, denied the benefit of, or subjected to discrimination under a program solely on the basis of the complainant's disability; and (4) the program was carried out by a federal executive agency. Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1266 (D.C. Cir. 2008).

The Rehabilitation Act defines a disability as, among other things, a physical or mental impairment that substantially limits one or more major life activities. 28 C.F.R. § 39.103. Under Section 504, one is "qualified" if one meets the "essential eligibility requirements for participation" in an agency program. Id. With regard to being excluded from, denied the benefit of, or subjected to discrimination under a program solely on the basis of disability, this element is met when the evidence shows that a person with a disability was not provided accommodations that would give that person the same opportunity as others to participate in the program at issue. Paulson, 525 F.3d at 1267; Pierce v. District of Columbia, 128 F.Supp.3d 250, 267-69 (D.D.C. 2015). Finally, Section 504 does not define what a "program" is, but agencies and courts have defined it broadly as "anything a Federal agency does." Paulson, 525 F.3d at 1267 n.13.

If the above elements are met but no legally sufficient accommodation has been provided, the agency can avoid liability only if it shows that providing the requested accommodation would result in a fundamental alteration to an agency program and/or result in undue financial and/or administrative burdens. 28 C.F.R. § 39.160(d); Pierce, 128 F.Supp.3d at 277. An accommodation likely constitutes a fundamental alteration to a program when it would "expand the substantive scope of a program." Paulson, 525 F.3d at 1267-68. Section 504 and 28 C.F.R. § 39 do not define "undue burden," but regulations implementing Section 504 for the United States Postal Service define it as a "significant difficulty or expense." 39 C.F.R. § 255.2(1). Regulations implementing the analogous Title II of the Americans with Disabilities Act of 1990 (hereinafter, "Title

II")² also define "undue burden" in this manner. 28 C.F.R. § 36.104.

An inmate housed in a BOP facility seeking to vindicate rights under Section 504 must begin by exhausting the BOP's Administrative Remedy Procedure (ARP). 28 C.F.R. § 39.170 (d)(1)(ii); see 28 C.F.R. § 542.10 (implementing the ARP). The inmate may then file an administrative complaint. § 39.170 (d)(1)(i). If the designated BOP official finds that the complaint is complete, that official will accept the complaint, investigate its allegations, and issue findings of fact and conclusions of law. §§ 39.170(f)-(h). The complainant may then appeal that decision to the Department of Justice's (DOJ) Complaint Adjudication Officer (CAO), who issues a final DOJ decision on the complaint. Alternatively, if the complainant so requests, the DOJ shall appoint an Administrative Law Judge (ALJ) to conduct a hearing and issue recommended findings of fact and conclusions of law to the CAO, who then issues a final DOJ decision. The CAO must "consider" the ALJ's recommendation, but the ultimate decision remains with the CAO, who decides the case based on the "entire record." §§ 39.170(i)-(l).

Background Information

Complainant was born deaf and identifies as a member of the Deaf community.³ Complainant's parents did not realize that he was deaf until he was three or four years old, and he lacked language until he learned American Sign Language (ASL) when he was five. ASL is not a form of English, and is instead a lexicographically and syntactically distinct visual language. Complainant described learning ASL as a significant moment in his life, as it suddenly allowed him to communicate his thoughts and, in turn, connect with others as part of a group. Due to his ability to connect through ASL, complainant preferred to

² Although they apply to different entities, Section 504 and Title II are substantially similar, such that the standards applied to one are applicable to the other. See Pierce, 128 F.Supp.3d at 266 n.10 (cases interpreting Section 504 and Title II are mutually "applicable and interchangeable"); Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act at 1 ("[G]iven Congress' intent for parity between Section 504 and Title II . . . , the [Department of Justice] must . . . ensure that any interpretations of Section 504 are consistent with Title II (and vice versa).") (available at <https://www.justice.gov/crt/file/1466601/download>).

³ The National Center on Disability and Journalism recommends using "deaf" to describe the condition of hearing loss, and using "Deaf" to describe those who identify as members of the Deaf community. See <https://ncdj.org/style-guide/#Deaf>.

socialize with other Deaf people. When ASL users have no one with whom to converse, it can lead to profound social isolation and the atrophying of their ASL skills. Complainant cannot read lips or otherwise understand speech. Complainant's English-language skills are poor, significantly limiting his ability to read or write. While complainant can communicate effectively by writing in highly routine situations in which context helps to "overcome grammatical irregularities," it can take him hours to write a single page and he does not feel able to fully convey his thoughts in writing. Complaint of Thomas Heyer (Mar. 3, 2017) (hereinafter, "Complaint") at 3; Heyer v. United States Bureau of Prisons, 984 F.3d 347, 348, 350-53 (4th Cir. 2021).

Although the dates are unclear, it appears that, at some point, complainant was "convicted of terrorist threats and kidnapping in an incident that involved the sexual assault of a ten-year-old boy," and he "admitted to molesting more than forty children." Complainant was subsequently convicted of a charge involving child pornography and was later "incarcerated for violating the conditions of his supervised release" in relation to that conviction. At some point after that, complainant was civilly committed⁴ as a "sexually dangerous person" pursuant to the Adam Walsh Child Protection and Safety Act of 2006 (hereinafter, "Walsh Act"). Since 2008, complainant has been housed at FCI Butner in a unit for Walsh Act civil detainees. Heyer, 984 F.3d at 352.

The BOP has a program that provides phone privileges to inmates as "a supplemental means of maintaining community and family ties." Under that program, an inmate may ask to call a "person of his or her choice outside the institution on a telephone provided for that purpose." The program allows for limitations and conditions to be imposed on phone privileges consistent with other aspects of the BOP's correctional management responsibilities. A Warden may impose limitations on this program to ensure security and good order, including revoking phone privileges as a disciplinary measure. Generally, an inmate is allowed to make at least one phone call each month. 28 C.F.R. § 540.100 (implementing phone program); BOP Program Statement 5264.08 (Feb. 11, 2008) (BOP phone program policy).

This case involves four telecommunication technologies. The first, point-to-point audiophone, is the common device that allows parties to communicate directly via audio. The second,

⁴ Complainant is a detainee and not an inmate. Complaint at 5. Although the relevant statute and regulations refer only to inmates, there is no dispute in this case that they equally apply to detainees housed in federal prisons.

teletypewriter (TTY), is an old technology that allows those with TTY keyboards to communicate in writing over the phone. As TTY allows only written communication, using it requires some degree of skill in a written language. The third, Video Relay Service (VRS), allows an ASL user and a person using a spoken language to communicate indirectly over the phone through a remote interpreter. The fourth, point-to-point videophone, is just like a point-to-point audiophone, but with video. As such, point-to-point videophone calls allow two ASL users to directly converse over the phone. Complaint at 6-7; Heyer, 984 F.3d at 350-51.

Procedural History and Parallel Litigation

In 2011, complainant filed a lawsuit in federal court against the BOP and related federal entities alleging multiple constitutional and statutory violations, including claims that the BOP's failure to provide him access to videophone calls violated his rights under the First Amendment and Section 504. Heyer, 984 F.3d at 355-56; Complaint at ex. A. In 2013, the United States District Court for the Eastern District of North Carolina dismissed complainant's Section 504 claim on the basis that he had failed to exhaust the ARP. Complainant then filed an administrative complaint against the BOP that consisted of his first amended complaint in his federal court case. Complaint at ex. A. In 2015, the DOJ dismissed the 2013 complaint on the basis that complainant had failed to exhaust the ARP. Complaint at 2. In 2016, complainant exhausted the ARP. Believing that the alleged Section 504 violations had not been resolved, complainant filed the present complaint on March 3, 2017. Id. at 1-3, 8-9. In relevant part, the complaint alleged that the BOP violated Section 504 by not providing complainant with access to videophone and VRS calls. Id. at 11.

BOP EEO Officer Mina Raskin accepted the complaint, investigated its allegations, and subsequently issued a decision on September 5, 2017. Findings of Fact and Conclusions of Law (hereinafter, "FFCL") at 1. The FFCL found that complainant would have access to VRS by November 2017, and that, in the meantime, he had access to TTY. The FFCL, which misconstrued complainant's allegation as being that he was entitled to videophone or VRS access, did not specifically address videophones. Id. On October 4, 2017, complainant appealed the FFCL and requested a hearing before an ALJ. Letter from Complainant to CAO at 1. The appeal noted that the FFCL failed to address complainant's request for videophone access and that it also failed to address whether VRS would provide him with the

same access to the phone program as that enjoyed by hearing persons housed in his unit. Complainant argued that videophone access would allow him to communicate directly with other ASL users, and thus that it was uniquely able to provide him with access comparable to that enjoyed by hearing inmates/detainees. Complainant argued that neither VRS nor TTY could provide him such access, as VRS does not allow an ASL user to communicate with another ASL user, and as TTY use requires proficiency in a written language. Id. at 3.

On December 19, 2017, ALJ Mark Dowd was assigned to conduct complainant's hearing. Letter from Chief ALJ Mulrooney to EEO Officer Raskin; Letter from EEO Officer Raskin to ALJ Dowd; Memorandum from Chief ALJ Mulrooney to ALJ Dowd. From January 2018 to August 2020, ALJ Dowd granted several joint motions for stays in order to allow the parallel federal court case to reach a judgment.⁵ On December 29, 2020, in light of ALJ Dowd's retirement, the case was reassigned to ALJ Teresa Wallbaum (hereinafter, "the ALJ"). Order Reassigning Case at 1. On January 4, 2021, the ALJ vacated the most recent of ALJ Dowd's stays and ordered the parties to a status conference. Order Vacating Status Order and Scheduling Status Conference at 1.

The Fourth Circuit's Decision in *Heyer*

On January 13, 2021, prior to the status conference, the United States Court of Appeals for the Fourth Circuit issued a decision on complainant's First Amendment claim. Heyer, 984 F.3d at 347. Pertinent portions of Heyer must be described here, as the Heyer decision played a major role in this matter. The case first came to the Fourth Circuit on complainant's appeal of the District Court's grant of summary judgment in the BOP's favor. Id. at 354. The Fourth Circuit reversed and remanded the case to the District Court for trial. Id. at 354-55. After a two-day bench trial in 2017, the District Court found that complainant had failed to establish that the BOP had violated his First Amendment rights by not providing him with videophone access. Complainant appealed the District Court's ruling, and Heyer is the Fourth Circuit's decision on that appeal. Id.

⁵ Order Granting the Joint Motion to Stay (Jan. 10, 2018); Order Granting the Joint Motion to Stay Extension (Feb. 9, 2018); Order Granting the Joint Motion to Stay (May 18, 2018); Order Granting the Joint Motion to Stay (Mar. 15, 2019); Order Carrying Parties' Request to Stay and Setting Status Update Deadline (July 8, 2019); Order Granting the Joint Motion to Stay (July 15, 2019); Order Granting the Joint Motion to Stay (Feb. 21, 2020); Order Granting the Joint Motion to Stay (Aug. 18, 2020).

In Heyer, the Fourth Circuit applied the test propounded in Turner v. Safley, 482 U.S. 78 (1987), which weighs a prison's security needs and costs against the First Amendment rights of inmates/detainees. Heyer, 984 F.3d at 355-56. The Turner test determines the reasonability of an impingement on a detainee's First Amendment rights by weighing the following four factors: (1) whether a valid, rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether alternative means of exercising the right exist that remain open to prison inmates; (3) what impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether there was an absence of ready alternatives to the regulation in question. The detainee bears the burden of establishing that the government's impingement was unreasonable. Substantial deference must be given to the judgments of BOP staff, but this deference "is not limitless," and courts "will not sustain policies that lack a reasonable connection between ends and means." Id. at 356, 365.

After analyzing the facts from the trial under the Turner test, the Fourth Circuit found that complainant has a First Amendment right to communicate with members of the Deaf community, that point-to-point videophone calls would allow such communication, and that, although factor one weighed in the BOP's favor, the remaining factors weighed against the BOP. Ultimately, the Fourth Circuit reversed the District Court and found in complainant's favor, "hold[ing] that the BOP's ban on point-to-point technology violates [complainant]'s First Amendment rights."⁶ Heyer, 984 F.3d at 351, 357, 366. While complainant had a right to communicate with the Deaf community, the Fourth Circuit did "not define [his] right as a right to videophone access, although such a definition may be appropriate in a future case." The Fourth Circuit also declined to "construe the right so broadly that it extends" to complainant's hearing brother, whom complainant can call through VRS. Id. at 359. The Fourth Circuit remanded the case for entry of judgment in complainant's favor, "as well as [for] any necessary proceedings to determine an appropriate remedy." Id. at 366.

⁶ While portions of Heyer, including its holding, refer to "point-to-point calls," it is exceedingly clear in context that these were references to point-to-point videophone calls. Indeed, the case's synopsis states: "The Court of Appeals . . . held that failure to provide plaintiff access to point-to-point videophone calls violated [the] First Amendment." Heyer, 984 F.3d at 347.

In weighing the Turner factors, the Fourth Circuit made several findings. These included findings on the background facts presented above, such as those about ASL and complainant's language abilities. In addition to what has already been described, the Fourth Circuit found that, for ASL users, "point-to-point [videophone] calls are the closest analogue" to an audiophone call, as videophone calls allow the conveyance of "important linguistic information such as emotion, tone, [and] inflection." These conclusions were based on testimony presented at trial and on amicus briefs. Heyer, 984 F.3d at 349-53.

The Fourth Circuit also made findings about protocols and technology already in place at FCI Butner. The Fourth Circuit found that complainant's use of TTY was directly supervised by FCI staff who dialed the call from a list of pre-approved numbers, sat next to him during the call, logged the call information, printed a transcript, and locked the transcript in a safe. The Fourth Circuit found that, pursuant to a settlement agreement, the BOP had provided complainant with VRS access by installing videophone hardware in his unit, and that the BOP had created a system that would limit VRS calls to pre-approved numbers and allow for calls to be recorded and, if need be, instantly terminated. The Fourth Circuit also found that the already-installed VRS system was capable of making point-to-point videophone calls, but that the BOP had disabled that function. The Fourth Circuit further found that the BOP allows hearing persons, including Walsh Act detainees and those "who have committed acts of terrorism," to make point-to-point audiophone calls in sixty languages other than English, and that those calls are recorded and subsequently translated. Heyer, 984 F.3d at 353-54.

In addition, the Fourth Circuit detailed the BOP's security and logistical concerns over providing complainant with point-to-point videophone access. With regard to security, the BOP argued that complainant could use such technology to convey "coded language" to the recipient. The BOP also argued that complainant's access to direct videophone calls could create incentives for him and other detainees to exploit each other. The BOP further argued that complainant's "designation as a sexually dangerous person presented public safety concerns, namely that he could use point-to-point calls to engage in acts of child exploitation or view child pornography." FCI Butner's Warden testified that he was opposed to any "additional access" because he considered sex offenders to be a "particularly manipulative population," and he worried that the BOP would not

be able to control the conduct of the person at the other end of a call, "which could lead to acts of child exploitation." With regard to logistical concerns, the Warden testified that providing complainant access to point-to-point videophone calls would burden BOP resources because such calls "would need to be monitored like [complainant]'s TTY calls and because BOP currently lacks a contract to translate . . . point-to-point [ASL] communications." The BOP also argued that it would have to go through the "hurdle" of securing a DOJ waiver permitting it to bypass the normal DOJ IT protocols. The Fourth Circuit found that the BOP had already received such waivers for the hardware required to provide point-to-point calls, as well as for TTY and VRS. Heyer, 984 F.3d at 353-54, 362-63.

Applying the Turner test, the Fourth Circuit found that implementing safeguards for complainant's point-to-point videophone calls would impose only a de minimis cost to the BOP, as there was no indication that such safeguards would be more onerous than those already in place for TTY calls. And, although obtaining a waiver might be a hurdle, there was no evidence that the waiver process would create more than a de minimis burden on the BOP. With regard to security concerns, the Fourth Circuit found that the District Court "clearly erred by crediting BOP testimony about the risks of point-to-point calls without considering the wealth of testimony about safety features that have managed those risks for every other form of communication it makes available," including "substantial evidence that BOP already utilizes resource-efficient means of mitigating the risk associated with" point-to-point videophone calls. Heyer, 984 F.3d at 362-66.

Disagreement Over the Significance of Heyer

In light of Heyer, at the January 2021 status conference, the ALJ ordered the parties to submit statements of position (SOP) detailing the issues before her. Order for Statements of Position and Scheduling Status Conference. In February 2021, complainant and the BOP submitted their SOPs. Complainant's Statement of Remaining Issues (hereinafter, "Complainant's First SOP"); BOP's Position Statement of Remaining Issues (hereinafter, "BOP's First SOP"). Complainant and the BOP agreed that videophone access for point-to-point calls was one of the claims before the ALJ, but they disagreed on Heyer's significance with regard to that claim. This disagreement persisted through subsequent settlement negotiations and another round of SOPs. Order for Statements of Position and Scheduling Status Conference (Feb. 23, 2021); Complainant's Statement of

Position on Remaining Issues; Bureau of Prison's Statement of Position (hereinafter, "BOP's Second SOP"). On March 25, 2021, the ALJ issued an order describing the issues before her. Order Regarding Scope of Case and Briefing Schedule at 8. The ALJ described the videophone issue as being "[w]hether, and to what extent, [complainant] is entitled to point-to-point video technology to communicate outside the prison walls." The ALJ also described the parties' disagreement over Heyer. The ALJ wrote that complainant framed the issue before her as "his right to videophone access for point-to-point calls." The BOP disagreed, noting that Heyer did not explicitly find that the First Amendment requires complainant to have videophone access, and that Heyer explicitly stated that his First Amendment rights did not provide a justification for allowing videophone calls to his hearing brother. The BOP described the issue as:

whether BOP's current policies and procedures unlawfully discriminate against [complainant] solely because of his disability, and whether the BOP must provide an accommodation to Heyer that would allow him to communicate with individuals outside of FCI Butner akin to a hearing inmate's utilization of a telephone.

Id. at 1-3; Complainant's First SOP at 2; BOP's First SOP at 2.

Also of note, the BOP asserted in its first SOP that, in light of its interpretation of Heyer, it was "considering several options" to allow complainant to communicate with the Deaf community, including access to point-to-point videophone calls. BOP's First SOP at 2. And, in its second SOP, the BOP provided information on a claimed alternative to point-to-point videophone called "CopySign." The BOP described CopySign as a videophone service that would allow two ASL users to communicate indirectly through an ASL intermediary. "In theory," the BOP claimed, CopySign could operate on the already-installed VRS equipment and the ASL intermediary could narrate the conversation in spoken English, obviating the need for subsequent translation. BOP's Second SOP at 7-8.

Dispositive Motions

On April 14, 2021, the BOP filed a motion to dismiss complainant's claims, or alternatively, to stay proceedings. Also on that date, complainant filed a motion for summary judgment on, among other things, the videophone claim. Memorandum of Law in Support of Respondent's Motion to Dismiss, or in the Alternative, Motion to Stay Proceedings (hereinafter,

"MTD") at 1, 24; Complainant's Motion for Partial Summary Judgment (hereinafter, "MSJ") at 1. On April 28, 2021, complainant responded to the MTD, and the BOP responded to the MSJ. Complainant Thomas Heyer's Opposition to Respondent Bureau of Prisons' Motion to Dismiss, or in the Alternative, Motion to Stay Proceedings (hereinafter, "MTD Response") at 17; Respondent's Response in Opposition to Complainant's Motion for Partial Summary Judgment (hereinafter, "MSJ Response") at 24. On May 12, 2021, the BOP replied to complainant's response to the MTD, and complainant replied to the BOP's response to the MSJ. Respondent's Reply in Support of Its Motion to Dismiss, or in the Alternative, Motion to Stay Proceedings (hereinafter, "MTD Reply") at 10; Complainant's Reply in Support of His Motion for Partial Summary Judgment (hereinafter, "MSJ Reply") at 12.

I. The MTD

A. The BOP's Motion

As noted, the MTD consisted of a motion to dismiss and, in the alternative, a request for a stay. With regard to the motion to dismiss, the BOP asserted that complainant's complaint failed to state a claim under Section 504. MTD at 1. The only element of the prima facie case that the BOP disputed was that complainant had been excluded from, denied the benefit of, or subjected to discrimination under a program solely on the basis of his disability. Id. at 7-8. The BOP essentially argued that complainant's videophone claim should be dismissed because he already enjoyed legally sufficient access to the phone program. In making this argument, the BOP asserted that, with regard to calls to hearing persons, VRS already provided complainant access to the phone program that was comparable to that enjoyed by hearing inmates/detainees. With regard to calls to deaf people, the BOP asserted that it was "in the midst of securing and implementing" CopySign. The BOP argued that Section 504 does not require it to provide complainant's "preferred accommodation," so long as it provides an accommodation that gives him "meaningful access" to the phone program, and that, taken together, VRS and CopySign did/would provide such access. Thus, the BOP asserted, if the claim was not dismissed, it should be limited "to an evaluation of whether the BOP's proposed accommodation, rather than [complainant]'s, satisfies" Section 504. Id. at 10-14.

The BOP acknowledged that, in Yeh v. Federal Bureau of Prisons, Register No. 50807-037 (Feb. 5, 2018), the DOJ found that a deaf inmate was entitled to videophone access under

Section 504. However, the BOP noted, in recognition of its security concerns, Yeh encouraged the parties to consider substituting a videophone with any device that would permit telecommunication in ASL.⁷ The BOP claimed that CopySign would be such a device, once implemented. MTD at 13-14.

With regard to the request for a stay, the BOP explained that it needed time to "implement a reasonable accommodation for Complainant to access the specific services and programs in question in the claim." The BOP argued that, while the issues in Heyer and the issues before the ALJ were "different," there could be "no question" that the two matters "involve the same parties and same request for relief, and therefore should be deemed parallel proceedings." Given this, the BOP argued, the District Court's implementation of Heyer could make this complaint moot. The BOP warned of the risk of "duplicate proceedings and potentially differing outcomes," and of the inefficient use of judicial resources. In addition, the BOP argued that a stay would allow the parties more time to settle the complaint. MTD at 17-24.

B. Complainant's Response

Complainant noted that, while the BOP denied that it had violated Section 504, it did not argue that his complaint had failed to allege such a violation. Thus, complainant concluded, the MTD was "a preview of [the BOP's] factual defense," rather than an argument that he had failed to state a claim. Complainant maintained that he had stated a claim. In making this argument, complainant noted that the only element of the prima facie case that the BOP disputed was whether it had excluded him from, denied him the benefit of, or subjected him to discrimination under a BOP program or activity. Complainant argued that his complaint did allege this, as it claimed that he needed access to videophone calls in order to communicate over the phone in ASL. Complainant described the BOP's argument that CopySign would provide him meaningful access to the phone program as "a *non sequitur* in the context of a motion to dismiss." MTD Response at 1, 4-7 (emphasis in original).

With regard to Yeh, complainant noted that, although the DOJ's decision encouraged the parties to explore alternative

⁷ See Yeh, Register No. 50807-037 at 20 ("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 a device.").

accommodations in light of security concerns, this did not affect the finding, which was that videophone access was not a fundamental alteration of the phone program or an undue burden.⁸ Moreover, complainant asserted, the BOP ultimately did provide the complainant in Yeh with videophone access, strongly suggesting that providing such access was feasible. MTD Response at 6 (citing to a "Joint Status Report" in Yeh v. United States Bureau of Prisons, No. 3:18-cv-00943 (M.D. Pa. Mar. 25, 2019)). Thus, complainant argued, Yeh did not support dismissing his claim, and instead supported a finding in his favor on summary judgment. Complainant also cited to two recent federal cases in which summary judgment was granted in favor of deaf state prison inmates in claims involving videophone access under Section 504 and Title II. Id. at 5-6 (citing Rogers v. Colo. Dep't of Corr., No. 16-CV-02733-STV, 2019 WL 4464036 (D. Colo. Sept. 18, 2019); McBride v. Mich. Dep't of Corr., 294 F.Supp.3d 695 (E.D. Mich. 2018)).

With regard to the BOP's request for a stay, complainant argued that further delay was unwarranted and unnecessary in light of the age of the case and the findings in Heyer, and that a stay would risk further delaying implementation of an accommodation, which would be detrimental to him. Complainant also argued that, as Heyer and the present case involve different causes of action, there was no risk of inconsistent rulings. Complainant asserted that the BOP had already had enough time to explore accommodations and that it was clear that it would not provide videophone access unless required to by a court order. In addition, complainant noted that settlement negotiations could occur regardless of whether there was a stay. MTD Response at 14-16.

C. The BOP's Reply

The BOP did not address complainant's argument that it had failed to provide any basis upon which to dismiss his claim. The BOP asserted that it was "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." MTD Reply at 4-5 (emphasis in original) (citing to 49 FR 35724-01 at 35731-32 (discussing 28 C.F.R. § 39.160)). The BOP also argued that complainant's reliance on Yeh and the two recent federal cases was unavailing, as all three involved a comparison

⁸ See Yeh, Register No. 50807-037 at 20 (finding that providing videophone access would not constitute a fundamental alteration of the phone program or create undue burdens).

of TTY to videophone calls, without any analysis of VRS as an option. Id. at 1-4. To the extent that Yeh and the other cases suggest some right to videophone access for deaf inmates/detainees, the BOP argued, they did not establish "an automatic, unqualified and unfettered right" to such access. Id. at 4. The BOP also suggested that the present case could be distinguished from these cases because complainant is a "sexually dangerous person." Id. at 2 n.2.

II. Complainant's Motion for Summary Judgment

A. Complainant's Motion

Complainant argued that Heyer held that the BOP's denial of access to point-to-point videophone calls violated his First Amendment rights, and that this holding "necessitate[d]" a finding here that the BOP also violated Section 504. To support this, complainant argued that the Turner test applied in Heyer and the Section 504 analysis relevant here both examine whether providing a denied benefit would impose undue burdens on prison administration. He noted that he prevailed under Turner, which applied a "more stringent" standard than Section 504. Complainant also cited to two cases in which Turner was used to guide Section 504 analyses.⁹ At a minimum, complainant argued, the factual and legal issues resolved in Heyer should have a "binding, issue preclusive effect on BOP in this proceeding," as Heyer made findings on several issues of fact and law that were directly relevant to this matter. Complainant identified these issues, which included the conclusions from Heyer that are described above. MSJ at 10-13.

Complainant noted that the only dispute with regard to the prima facie case was whether he was excluded from, denied the benefit of, or subjected to discrimination under a program or activity. Complainant argued that, by not providing him with point-to-point videophone access, the BOP was not affording him an equal opportunity to enjoy the benefits of the phone program, as hearing inmates did not have their audiophone calls mediated through a third party. Complainant also noted that, because videophone access was his preferred accommodation, regulations require the BOP to afford it primary consideration. Complainant argued that providing point-to-point videophone access would not fundamentally alter the phone program or create undue burdens, as the already-installed VRS can support point-to-point

⁹ See Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (using Turner to apply Section 504 to a prison setting); Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1269 n.11 (10th Cir. 2018) (same).

videophone calls, and as the approaches the BOP took to managing risk in point-to-point audiophone and TTY calls (i.e., monitoring calls in person, recording calls, having calls translated, instant termination of calls, and revoking phone privileges for misconduct) could be applied to point-to-point videophone calls. MSJ at 13-18.

Addressing CopySign specifically, complainant argued that this newly-proposed accommodation failed to satisfy Section 504 because it was merely "hypothetical," it would not allow the point-to-point phone access enjoyed by hearing inmates/detainees, and it would impose greater costs on the BOP than point-to-point videophone calls (due to the costs of obtaining and scheduling CopySign intermediaries). Finally, complainant argued that Section 504 required the BOP to allow him to make point-to-point videophone calls to his hearing brother (who has some ASL skills)¹⁰, as ASL was complainant's preferred method of communication. Complainant noted that, in Yeh, the complainant's videophone access was not limited to calls with deaf people or those within the Deaf community. MSJ at 18-24.

B. The BOP's Response

The BOP reiterated that Heyer did not "explicitly hold" that the First Amendment required complainant to have access to point-to-point videophone calls, and that the Fourth Circuit declined to define complainant's First Amendment right as a right to videophone access or as a right that would allow him to make videophone calls to his brother. MSJ Response at 7-8. The BOP then argued that the facts and conclusions of law in Heyer should not be given preclusive effect here. The BOP noted that Heyer did not address the Rehabilitation Act in any way, and that, while the Turner test and the Section 504 analysis "are similar, they are not identical." Id. at 9-11. The BOP also argued that there had been no "final judgment" in Heyer, as the District Court had not yet entered judgment in complainant's favor or determined the appropriate remedy. Until then, the BOP asserted, preclusion could not apply, and complainant's arguments about the meaning of Heyer "remain speculative at best." Id. at 11-12.

Even if Heyer was a "final judgment" for the purposes of preclusion, the BOP argued, preclusion should not apply to the following assertions from the MSJ, derived from Heyer: (1) the BOP's ban on point-to-point videophone access impinges upon

¹⁰ See MSJ at ex. A (complainant's trial testimony that he communicates in ASL with his hearing brother).

complainant's ability to communicate with deaf persons outside of the FCI; (2) point-to-point videophone access alone can allow him to communicate with deaf persons outside of the FCI; (3) he cannot communicate effectively in writing, and therefore, TTY and other forms of written communication do not allow him to communicate with deaf persons outside of the FCI; (4) allowing him access to point-to-point videophone calls would not produce a significant "ripple effect" on fellow inmates or on prison staff; (5) the BOP already uses resource-efficient means of mitigating the risks associated with point-to-point videophone calls; (6) none of the BOP's security concerns justify a ban on point-to-point videophone calls; (7) there are available safeguards that will mitigate the risks associated with videophone use; and (8) providing videophone access would impose only a de minimis burden on the BOP's resources. The BOP did not argue that these assertions were inaccurate or misleading. Instead, it argued that, because the Turner test "involves an intricate balancing of several factors," it was impossible to determine which of these assertions were "conclusive" for the purposes of preclusion. MSJ Response at 12-13.

The BOP noted that several of the above assertions from Heyer were issues of law, and asserted that Heyer's recognition of complainant's constitutional right to communicate with the Deaf community had changed the "legal context." The BOP argued that, because of this, it should be given an opportunity to "determine and implement" CopySign in order to satisfy complainant's First Amendment and Section 504 rights. The BOP also noted that the decision in Heyer was based on facts produced during the 2017 trial, and that Heyer was thus decided without considering the newly-proposed CopySign. As the facts and circumstances had changed, the BOP argued, it should be given the opportunity to argue before the District Court that CopySign would satisfy complainant's First Amendment right, as well as the opportunity to "litigate any impact this newly recognized right has on any of [his] rights under" Section 504. To do otherwise, the BOP asserted, would result in the inequitable administration of the law. MSJ Response at 14 (citing to Restatement (Second) of Judgments §§ 27-28).

Having argued that Heyer should not be used to reach findings in this case, the BOP noted that, omitting information from Heyer, the record was essentially empty. Given this and the requirement that the facts be construed in the light most favorable to the non-moving party (i.e., the BOP), the BOP argued that the MSJ must be denied. MSJ Response at 17. The BOP also addressed the merits of the claim, reiterating its

arguments from the MTD that VRS and CopySign did/would satisfy Section 504. Id. at 17-23.

C. Complainant's Reply

Complainant argued that Heyer is "final" for the purposes of issue preclusion because the District Court was bound by Heyer to enter judgment in complainant's favor. MSJ Reply at 4-5. Complainant speculated that the BOP mistook issue preclusion for claim preclusion, as the fact that Heyer and the present case were based on different causes of action ruled out the latter but had no significance for the former. Id. at 5-6. With regard to issue preclusion, complainant asserted, as he did in response to the MTD, that the particular facts at issue here make the Turner and Section 504 analyses essentially identical. Complainant also noted that Heyer specifically found that there was no basis for considering point-to-point videophone calls to be riskier or costlier than the point-to-point audiophone calls to which hearing inmates/detainees had access. Id. at 6-7. Complainant further argued that issue preclusion would apply even if the Turner and Section 504 analyses were merely similar, as "[o]nly issues decided under 'significantly different' legal standards" lack preclusive effect. Id. at 7 (quoting SAS Inst., Inc. v. World Programming Ltd., 874 F.3d 370 (4th Cir. 2017)).

Complainant noted that the BOP did not address the following assertions from the MSJ: that CopySign is hypothetical and thus unavailable, that it would allow only mediated communication, and that it would be costlier than implementing point-to-point videophone access. By not addressing these points, complainant asserted, the BOP had conceded them. Complainant also noted that the BOP did not address the requirement that it give primary consideration to his preferred accommodation. MSJ Reply at 8-9. Complainant cited to DOJ guidance on Title II, which provides that a covered entity must honor the accommodation requester'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." Id. at 9 (citing DOJ ADA Requirements: Effective Communication at 6 (Jan. 2014)). Complainant argued that, for the reasons stated in the MSJ, CopySign was neither an available, nor an equally effective means of communication. Id. at 9-10.

The ALJ's Order Granting the MSJ

On May 20, 2021, the ALJ issued an order denying the BOP's MTD and granting complainant's MSJ on the videophone claim. 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 (hereinafter, "Order Granting MSJ") at 34, 37. In making findings of fact, the ALJ noted the parties' arguments regarding the relevance of Heyer to this case. The ALJ found that complainant made "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." However, the ALJ also wrote shortly thereafter that, "[r]egardless of whether issue preclusion applies," she would "not disrupt the extensive factual findings" in Heyer. In any event, the ALJ found that Heyer included "the facts necessary to adjudicate" the present claim, and that re-litigating the facts would be a waste of resources that would also risk creating inconsistent factual findings. Id. at 4-5. The ALJ identified the facts that she found to have been "conclusively established" in this case, which are the same facts from Heyer that are described above in discussion of that case. Id. at 5-8.

I. The Request for a Stay

The ALJ noted that a stay is not a matter of right, and is instead an exercise of judicial discretion. Order Granting MSJ at 9. The ALJ found that the BOP's request for a stay was "comparable to an extended continuance," and that the following considerations should be weighed when deciding whether to grant a continuance: (1) the length of the requested delay; (2) the potential adverse effects of the delay; (3) the possible prejudice to the moving party if the delay is denied; and (4) the importance of the testimony that may be adduced if the delay is granted. Id. at 9 (citing to Fitzhugh v. Drug Enforcement Admin., 813 F.2d 1248 (D.C. Cir. 1987)). With regard to the length of the delay, the ALJ noted that the BOP did not provide any concrete time frame. The ALJ found that any delay would likely be significant, noting that logistical considerations would likely prevent the District Court from addressing Heyer any time soon. The ALJ also noted that the BOP was "still soliciting information" about whether CopySign was "even technically possible," and that, if it ended up being impossible, the BOP would "presumably return to the drawing board, resulting in further delay." Id. at 9-10. With regard

to potential adverse effects of a delay, the ALJ found that a delay would place a significant burden on complainant, who currently has limited options for communicating with friends and family, and is thus isolated. The ALJ noted that this social isolation, which Heyer suggested was comparable to solitary confinement, had existed since at least 2013, and that this fact weighed heavily against granting a stay. Id. at 10-11.

With regard to prejudice to the moving party if the delay is denied, the ALJ found that not granting a continuance would burden both parties, as they could end up simultaneously litigating in two fora. However, the ALJ found that this burden was "inherent in many of the cases before this tribunal," and thus deserved relatively limited weight. The ALJ found that the risk that she and the District Court would come to different conclusions was limited because the facts have already been established at trial and because she and the District Court would be applying different standards. The ALJ found that these factors reduced potential prejudice on the BOP. With regard to the importance of the testimony that may be adduced if a continuance is granted, the ALJ found that this factor was not directly relevant here, but she noted that a delay could save judicial resources if the District Court's ruling made further proceedings before her unnecessary. However, the ALJ found that having to use judicial resources did not outweigh the likely length of the delay and the negative impact such a delay could have on complainant. Order Granting MSJ at 11.

The ALJ noted that the BOP seemed most concerned about the risk of piecemeal litigation, but she found that avoiding such circumstances "should not come at the expense of timely and just adjudication," especially when, as here, the matter has been pending for years. Also, the ALJ noted that "cases like this one - where the complainant's rights under the Rehabilitation Act are at stake - are not a waste of judicial resources." In light of the above, the ALJ denied the BOP's request for a stay. Order Granting MSJ at 11-13.

II. The Motion to Dismiss

The ALJ found that the motion to dismiss did not address the legal sufficiency of complainant's allegation, and that it instead improperly addressed the merits of the claim. The ALJ found that complainant had stated a claim under Section 504 because he had alleged: (1) that he lacked English-language skills; (2) that TTY restricted his ability to communicate in a way that hearing inmates/detainees were not restricted; (3) that

TTY is so different from an audiophone call that being required to use it instead of a videophone amounted to exclusion from the phone program; and (4) that access to point-to-point videophone calls presented no greater security risk than TTY or audiophone calls. As such, the ALJ denied the motion to dismiss. Order Granting MSJ at 13-15, 17.

III. Complainant's MSJ

A. Propriety of Summary Judgment

The ALJ found that there were no material facts in dispute that might preclude a decision on summary judgment, as the relevant facts had been "extensively litigated" in Heyer. The ALJ found that these facts were sufficient to satisfy complainant's burden to show that no material facts were in dispute, and thus sufficient to resolve complainant's Section 504 claim on summary judgment. The ALJ noted that the BOP argued that material facts were in dispute because the record had not been developed, but she rejected this argument for two reasons. Order Granting MSJ at 17-21.

First, the ALJ found that there had been extensive fact-finding in Heyer on a parallel issue involving the same parties and the same accommodation, and the BOP had provided no compelling reason to conduct duplicative fact-finding. Although Heyer and the present case were based on different causes of action, the ALJ found, it was "beyond cavil that the facts adduced by the parties and evaluated by the Fourth Circuit are the same facts relevant" to the present case. The ALJ also found that the facts contained in Heyer were final, as the Fourth Circuit ordered the District Court to enter judgment in complainant's favor. Order Granting MSJ at 17-19. Second, the ALJ found that the BOP's argument that material facts were in dispute was general and conclusory, and that it conflated issues of facts with issues of law. The ALJ acknowledged that Heyer did not address facts "relevant to each and every Rehabilitation Act factor (e.g., whether access to a telephone is a program)," but found that this did not raise genuine issues of material fact because the BOP did not dispute those matters. In response to the BOP's assertion that CopySign satisfied Section 504, the ALJ found that, even if this was a fact and not a legal conclusion, claiming that a non-existent technology would satisfy Section 504 does not create a genuine issue of material fact. Order Granting MSJ at 19-21.

B. Prima Facie Case

The ALJ found that complainant had established all four elements of the prima facie case under Section 504. The ALJ noted that only one element was in dispute. Nonetheless, the ALJ found that the record established the three undisputed elements, explaining that the record established that complainant's deafness constituted a disability under the Rehabilitation Act and that the BOP's phone program constituted an agency program under Section 504. The ALJ, however, did not explain her finding that the record established the third undisputed element (that he was "qualified" to use the phone program). Order Granting MSJ at 21-24.

The ALJ noted that the dispute in this case was over the remaining element: whether complainant established that he was excluded from, denied the benefit of, or subjected to discrimination under a program solely on the basis of his disability. Citing to caselaw, the ALJ noted that a person is excluded solely on the basis of disability if that person is not provided with accommodations that would allow "meaningful access" to the program at issue, and that there is likely an absence of meaningful access where the person identifies "an obstacle that impedes their access" to that program. Order Granting MSJ at 24-25.

The ALJ found that the evidence showed that complainant did not currently have meaningful access to the phone program, as the means of telecommunication already available to him did not allow him to communicate effectively. The ALJ found that complainant could not communicate effectively by audiophone because he could not communicate aurally. The ALJ found that complainant could not communicate effectively by TTY because the nearly-obsolete technology required proficiency in a written language, which he lacked. The ALJ found that VRS did not allow complainant to communicate effectively with his brother or other ASL users because it did not allow for direct, point-to-point communication.¹¹ With regard to CopySign, the ALJ found that, if it existed, it would fail for the same reasons that VRS does: it would not allow for point-to-point communication, and instead

¹¹ The ALJ noted that the BOP's arguments over the significance of Heyer suggested that it might take the position that communication through an intermediary is "point-to-point" even if it is not "direct." The ALJ found that, under both a technical and commonsense definition, "point-to-point" communication must involve direct, rather than mediated, communication. Order Granting MSJ at 27-29 (citing to information from the Federal Communication Commission).

would insert an intermediary between the parties, depriving complainant of the ability to communicate directly in ASL with another ASL user. Order Granting MSJ at 25-26.

In making the above findings, the ALJ (citing to Heyer and Yeh) stressed that, due to the inherently visual nature of the language, point-to-point communication is "essential to people communicating through ASL," rather than a mere "personal preference." The ALJ noted that mediation negatively affects the quality and quantity of conversation. With regard to quality, the ALJ noted that VRS and the proposed CopySign does/would not allow any form of overlap in communication. The ALJ found that, because unmediated communication and the ability to make overlapping statements are normal aspects of conversation that hearing inmates/detainees enjoy in point-to-point audiophone calls, complainant was also entitled to enjoy those aspects of conversation in his own language. With regard to quantity, the ALJ found that an intermediary necessarily slows conversation, meaning that fewer things can be relayed in a mediated call than in a direct call of the same length. Finding that non-English audiophone calls were the closest analogy to ASL videophone calls, the ALJ noted that hearing inmates/detainees were allowed to make unmediated audiophone calls in many spoken languages, and that complainant's inability to do so in his own language highlighted the fatal limitations of VRS and CopySign under Section 504. Order Granting MSJ at 26-28.

The ALJ also found that the BOP had not given any consideration, let alone primary consideration, to complainant's preferred accommodation. The ALJ noted that the BOP did not address this matter until its reply to the MSJ, in which it argued that it was not obligated to consider accommodations that would fundamentally alter the phone program. However, as she ultimately concluded that point-to-point videophone calls would not fundamentally alter that program, the ALJ rejected this argument. The ALJ also addressed the BOP's assertion that Section 504 requires that a disabled person "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." The ALJ questioned whether this "convoluted statement is accurate," but found that, even if it was, it had no significance here, where the options currently available to complainant and the proposed CopySign do/would not allow for effective communication or equal access to the phone program. Order Granting MSJ at 28-29.

C. Affirmative Defense

Having found that the record supported each element of the prima facie case, the ALJ addressed whether the BOP avoided liability by establishing that providing complainant with point-to-point videophone access would constitute a fundamental alteration to the phone program and/or create undue burdens. The ALJ acknowledged that the BOP's security concerns over videophone access were legitimate, given complainant's particular criminal history, and that the BOP was entitled to deference in this regard. However, the ALJ noted, this deference had limits, as the BOP bore the burden of establishing its affirmative defense. The ALJ found that Heyer made findings directly relevant to the questions of fundamental alteration and undue burden, and she noted that the BOP argued against preclusion but did not address the substance of Heyer's findings. Order Granting MSJ at 30-31.

With regard to fundamentally altering the phone program, the ALJ found that the program is already open to Walsh Act detainees, that point-to-point videophone calls can be enabled on the already-installed VRS technology, and that the BOP had already provided videophone access to at least two inmates in other BOP facilities. Given these facts, the ALJ found that providing point-to-point videophone access to complainant would not constitute a fundamental alteration of the phone program. Order Granting MSJ at 31.

The ALJ divided discussion of undue burdens into discussion of (1) security concerns based on complainant's status as a sex offender, (2) general security concerns, (3) concerns about the burden on the BOP's resources, and (4) general concerns. Order Granting MSJ at 31-34. With regard to concerns based on complainant's status as a sex offender, the ALJ acknowledged the risk that he could use point-to-point calls to engage in child exploitation, the Warden's assessment that sex offenders tend to be particularly manipulative, and the Warden's concern that the BOP would not be able to control the behavior of the recipient of a point-to-point call. However, the ALJ found that Heyer established that protocols already in place to manage these risks (e.g., restricting calls to preapproved numbers, instant termination of calls, and the monitoring, recording, and documenting of calls) were sufficient, and thus could be effectively applied to point-to-point videophone calls without undue burden. Id. at 31-32.

With regard to general security concerns, the ALJ acknowledged the risk that complainant could use coded language in point-to-point videophone calls, and that access to such calls might create an incentive for him and other inmates/detainees to exploit each other over such access. The ALJ found that there was no basis for concluding that preventing coded language was more onerous for point-to-point videophone calls than for point-to-point audiophone calls, and she noted that any coded language used by hearing inmates/detainees in their unmediated audiophone calls would not be discovered until later when the calls were reviewed. Given this, the ALJ found, the concern over coded language was "facially insufficient" to establish an undue burden. Order Granting MSJ at 32.

With regard to concerns about resources, the ALJ noted that the Warden testified in Heyer that point-to-point videophone calls would need to be monitored and that the BOP did not have a contract to translate ASL. The ALJ also noted that the BOP allowed Walsh Act detainees to make point-to-point audiophone calls in many spoken languages, with translation occurring after-the-fact. Given this, the ALJ agreed with Heyer that, if additional effort was needed to implement safeguards for point-to-point videophone calls, such efforts would impose only a de minimis burden on resources. Order Granting MSJ at 33.

With regard to "general concerns," the ALJ agreed with Heyer's take on the following: (1) that having to obtain a DOJ IT waiver would not impose more than de minimis costs; (2) that risks specific to videophones could be mitigated by the security features on the already-installed VRS; (3) that safeguards already in place would mitigate the risk of the videophone becoming a source of leverage between complainant and others; (4) that the BOP would not need to translate complainant's videophone calls in real time; and (5) that any costs incurred in providing videophone access would be de minimis. Order Granting MSJ at 33.

Ultimately, "given the findings in [Heyer] and BOP's failure to offer specific arguments on this issue," the ALJ found that the BOP had failed to establish an affirmative defense. As such, the ALJ found that the BOP violated Section 504 when it did not provide complainant with point-to-point videophone access or its "functional equivalent." The ALJ defined a functional equivalent as any device that allows the parties to see each other. Order Granting MSJ at 34-35.

Recommended Decision

On July 20, 2021, the ALJ issued her Recommended Decision in this case, in which she adopted her order finding for complainant on summary judgment. Superseding Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (hereinafter, "Recommended Decision") at 1-3.¹² The ALJ recommended the following remedy: "Respondent BOP is herein ORDERED, within thirty (30) days of the date of final Agency action in this matter, to ensure that a fully operational videophone (or its functional equivalent as defined in this tribunal's May 20, 2021 Order) is available for use by Complainant Thomas Heyer at [FCI] Butner." Id. at 3. The ALJ added the caveat that "[n]othing in this order shall be interpreted to limit or abridge the authority of BOP to implement reasonable security measure[s] or to limit access to the videophone in the same manner that access of all inmates may be limited under the inmate telephone program." Id. at 3 n.5.

The BOP's Exceptions to the Recommended Decision and Complainant's Reply

I. The BOP's Exceptions

On August 4, 2021, the BOP submitted exceptions to the Recommended Decision to this Office, arguing that the DOJ should ignore the facts drawn from Heyer and either order the record to be supplemented or remand the case to the ALJ for further development of the record. The BOP took exception to the Recommended Decision's procedural history, findings of fact, conclusions of law, and remedy. Respondent's Exceptions to the July 20, 2021, Superseding Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (hereinafter, "BOP's Exceptions") at 1-28.

With regard to the ALJ's description of the procedural history, the BOP objected to the ALJ's statement that this "case has a long history, including a two-day bench trial . . . and two appeals." The BOP asserted that this sentence conflated the federal court case with this administrative complaint, and thus "imply[ed] that his civil action is inevitably dispositive of the administrative action." BOP's Exceptions at 3.

¹² The ALJ's order on the MSJ resolved the videophone claim, but not two outstanding claims, which were ultimately resolved when complainant withdrew them on July 8, 2021. Recommended Decision at 23.

With regard to the ALJ's findings of fact, the BOP made several arguments that facts listed by the ALJ were without support. The BOP asserted that the record was unclear about how skilled complainant's brother was in ASL. The BOP also noted that the ALJ relied on statements from Heyer that were themselves based on amicus briefs, and argued that these were "opinions" rather than facts adduced at trial and subject to cross-examination, making them ineligible for issue preclusion. The BOP cited to no authority to support this proposition. In addition, the BOP asserted that the record did not support the ALJ's finding that complainant "has deaf friends or family with which he wishes to communicate." Further, the BOP asserted that references to complainant being isolated in a manner comparable to solitary confinement had "not been adduced in this record whatsoever." Also, the BOP argued that the ALJ improperly relied on conclusions of law from Heyer "couched as factual findings." The BOP did not explain why this was improper. In addition, the BOP asserted that there were "no factual findings whatsoever regarding the nature and extent" of the phone program or the cost of implementing point-to-point videophone access. Further, the BOP asserted that the ALJ failed to make factual findings regarding "any financial costs associated with implementing videophone access for Complainant." Finally, the BOP argued that the ALJ "cherry-pick[ed] the minimum facts" from Heyer that would "support her finding," noting that she did not review "the entirety of the trial court transcript, [the] subsequent order granting summary judgment in BOP's favor, [or the] Fourth Circuit opinion to determine each and every fact that should be given preclusive effect." The BOP did not identify any of the allegedly "cherry-picked" facts or any fact ignored by the ALJ. BOP's Exceptions at 5-9, 11

With regard to the ALJ's conclusions of law, the BOP made several arguments. The BOP argued that the ALJ improperly denied its request for a stay, reiterating its argument that stays can avoid duplicative litigation. The BOP supported this assertion with citation to cases in which denied stays were found to be abuses of discretion. Also, the BOP asserted that the ALJ had implied that delays in this matter were solely due to the BOP, when the prior stays had actually been granted on joint motions. In addition, the BOP objected to the ALJ's findings regarding the potential adverse effects of a stay on complainant, arguing that the record lacked such information and that the ALJ framed the matter in a way that "assume[d] the sole possible outcome of these proceedings is a ruling in Complainant's favor." BOP's Exceptions at 10-13.

The BOP continued, arguing that the ALJ did not make clear whether she had found that issue preclusion applied, and that, "because she refused to explicitly consider and affirmatively hold" as much, "any conclusions couched as factual findings should be disregarded." The BOP argued that the ALJ incorrectly determined that Heyer was final for the purposes of issue preclusion because she did not support her assertion that "a remand with further instructions can nevertheless" be a final judgment. The BOP did not cite to any authority supporting its view of when a judgment is final, but did note that it was "theoretically possible" that complainant's First Amendment claim could be dismissed as moot if he is released from detainment before the District Court formally entered judgment. The BOP also reiterated its argument that it was "nearly impossible" to determine if any particular fact was essential to the judgment for the purposes of preclusion because Turner is a balancing test. In addition, the BOP noted that many of the facts relied upon by the ALJ come from Heyer's factual summary, and asserted that those facts "cannot be given preclusive effect." The BOP cited to no authority to support this assertion. BOP's Exceptions at 13-15.

The BOP further argued that the ALJ failed to use the proper standard of review in her summary judgment analysis, on the asserted basis that the ALJ did not view the evidence in the light most favorable to the BOP. The BOP provided three examples to illustrate this. First the BOP asserted that "an argument could be made" that complainant's written "communication skills are elementary, but nonetheless effective." The BOP then asserted, without elaboration: "The ALJ's interpretation of, and inferences drawn from, the facts concerning [complainant]'s ability to communicate in English, as found by the District Court and adopted by the Fourth Circuit, need not be the exact same, as the two cases are distinct." The second example was that the ALJ's finding that VRS did not satisfy Section 504 "failed to mention a single fact or inference from [the BOP]'s opposition." Perhaps identifying such a fact, the BOP noted that the Fourth Circuit's finding that complainant "can already communicate" with his brother through VRS could be read as a finding that VRS provided "meaningful" communication. The BOP's third example was that the ALJ "summarily dismissed" the BOP's undue burden arguments "based solely upon the reasoning" from Heyer, and that the ALJ's acknowledgement that some of those concerns were "legitimate" demonstrated that she did not view the evidence in the light most favorable to the BOP. BOP's Exceptions at 19-22.

Further addressing the ALJ's conclusions of law, the BOP argued that she improperly determined that the BOP violated Section 504. In this regard, the BOP took exception to the ALJ's finding that the BOP had not given any consideration to complainant's preferred accommodation, but it did not explain how this affected the outcome. The BOP also argued that it was inappropriate for the ALJ to cite to DOJ guidance on Title II, but, again, it did not explain how this affected the outcome. The BOP further argued that the fact that the BOP provided videophone access to others was irrelevant absent "a description of the specific circumstances" in which those accommodations were made. Finally, the BOP argued that the ALJ's conclusion that point-to-point videophone access would not impose undue burdens was made without any "properly found facts or evidence . . . regarding the specific financial and specific administrative burdens" posed by implementing that accommodation. The BOP did not identify any financial or administrative burden that the ALJ failed to address. BOP's Exceptions at 22-26.

With regard to the ALJ's recommended remedy, the BOP asked the DOJ to allow it to substitute another accommodation along the lines of what Yeh had encouraged. In so arguing, the BOP asserted that complainant can use the phone program as all other inmates/detainees can, "that is, [he] may place a call to, and communicate with, a hearing individual." The BOP argued that, as no inmate/detainee "can use the telephone to call a hearing-impaired individual, BOP should be permitted an opportunity to implement a device and program . . . that would permit Complainant to utilize ASL to communicate with other hearing-impaired individuals" while also satisfying the BOP's security concerns by prohibiting point-to-point communication in ASL. Finally, the BOP asserted that thirty days was not enough time to implement point-to-point videophone access, but it did not provide any specific information substantiating that assertion and it gave no indication of what it believed would be a feasible timetable. BOP's Exceptions at 26-27.

II. Complainant's Reply

On August 24, 2021, complainant submitted to this Office a reply to the BOP's Exceptions, arguing that the DOJ should adopt the ALJ's analysis, findings, and remedy. Complainant Thomas Heyer's Reply Exceptions in Response to Respondent Bureau of Prisons' Exceptions to the Administrative Law Judge's July 20, 2021 Superseding Recommended Rulings, Findings of Fact, Conclusions of Law, And Decision (hereinafter, "Complainant's Exceptions Reply") at 1, 22.

Complainant argued that the ALJ did not abuse her discretion by denying the BOP's request for a stay, as she reasonably weighed the appropriate factors. Complainant noted that the ALJ correctly rejected the cases cited by the BOP on the basis that they involve inapplicable forms of parallel proceedings. Also, complainant asserted that the BOP made it seem as if a stay was necessary to focus on the federal case, but he noted that the BOP was simultaneously asking the District Court for a stay. Complainant opined that the BOP was attempting to "run out the clock in both actions to avoid its constitutional and statutory obligation" to provide complainant with access to point-to-point videophone calls. In addition, complainant disagreed that the ALJ had implied that the BOP was to blame for delays in this case, and instead asserted that she was merely saying that further delays were inappropriate in light of prior delays. Complainant asserted that the consequences of further social isolation for him were properly assessed by the ALJ, but he did not address the BOP's claim that, in so recognizing, the ALJ presumed that complainant would prevail. Complainant described the BOP's claim that the record lacked evidence that he had deaf friends to call as "brazen," asserting that the BOP had created such a situation by denying him videophone access. Regardless, complainant noted, Heyer found that complainant had twenty Deaf friends to whom he would reach out if he could communicate with them over the phone. Finally, complainant noted that the only prejudice the BOP claimed it would experience from denial of the requested stay was that the District Court's remedy might obviate further proceedings before the ALJ. Complainant asserted that the ALJ was reasonable in finding that this concern did not outweigh the other factors. Complainant's Exceptions Reply at 18-21 (emphasis in original).

With regard to issue preclusion, complainant argued that the ALJ did hold that it applied, and that she did so correctly. Complainant noted that the ALJ addressed the factors relevant to an issue preclusion analysis and stated that she found his issue preclusion arguments to be persuasive. Complainant asserted that the ALJ's subsequent assertion that she would not disrupt the factual findings in Heyer "[r]egardless of whether issue preclusion applies" merely meant that, "even aside from the legal intricacies of the issue preclusion doctrine," common sense dictated that "it does not make sense to re-litigate the exact same facts a second time between the exact same parties." Complainant's Exceptions Reply at 2-8.

Complainant reiterated that issue preclusion applies when an issue of fact or law is litigated and determined by a final judgment, provided that the issue was essential to the judgment. Complainant argued that the issues from Heyer upon which the ALJ drew were fully litigated and essential to the Turner analysis, and that they were final because Heyer does not provide any room for further litigation on the question of liability. Complainant argued that the fact that Turner is a balancing test does not make it difficult to determine which facts were essential to the judgment, as everything in a decision that is not dicta is essential to the judgment. Complainant cited to caselaw and to the Restatement (Second) of Judgments to support these assertions. Complainant argued that it was not necessary for the ALJ to have reviewed the entire record that was before the Fourth Circuit in order for issue preclusion to apply, as it was Heyer's conclusions about that record that were preclusive, and that the ALJ's actions thus did not constitute "cherry-picking." Complainant added that the BOP cited to no authority to support its assertion that facts not mentioned in the analysis cannot be subject to preclusion, asserting that a "court is not required to repeat each fact in two separate places for those facts to gain preclusive effect." Also, complainant argued that the amicus briefs had, in fact, been litigated, as the Fourth Circuit "relied on portions of those *undisputed* amicus briefs in issuing its opinion." Finally, complainant reiterated that it did not matter that the ALJ adopted conclusions of law from Heyer, as issue preclusion applies to conclusions of law and fact. Complainant's Exceptions Reply at 2-8 (emphasis added).

Complainant argued that the ALJ correctly concluded that there were no material facts in dispute, and thus that a decision on summary judgment was appropriate. Complainant noted that Heyer had found that he could not "effectively communicate in English" and that the District Court erred in finding that he could communicate effectively in writing. Complainant also noted that the BOP failed to identify anything that it would have presented in a hearing that might raise a genuine dispute of material fact. In addition, complainant argued that, simply because Heyer did not find that complainant had a First Amendment right to communicate with his brother via point-to-point videophone, it did not follow that he also lacked a right under Section 504 to do so. Complainant argued that the ambiguity about the degree of his brother's ASL skills was immaterial, as the record established that he communicated with his brother in ASL. Complainant clarified that he did find VRS useful as it allowed him to communicate with hearing persons who

do not know ASL, but that, when he can directly communicate because the other person knows ASL, he wanted to be able to do so. Complainant's Exceptions Reply at 9-11.

Complainant argued that the ALJ correctly held that the BOP had violated Section 504, and that the BOP's "hodgepodge" of arguments to the contrary were meritless. Complainant noted that the DOJ's Title II guidance was applicable, although he did not clearly explain why. With regard to the BOP's argument that the record lacked fact-finding on the nature of the phone program, complainant noted that the BOP failed to explain how the ALJ's description of the phone program was inadequate. Also, complainant argued that the ALJ's conclusions about fundamental alteration and undue burden were grounded in established fact, that she analyzed each point raised by the BOP, and that she ultimately concluded that the BOP had failed to establish its affirmative defense under Section 504. In addition, complainant argued that, contrary to the BOP's assertion, Heyer did make findings regarding financial costs which the ALJ appropriately considered in her analysis, and he noted that the BOP failed to provide any information on costs above what was included in Heyer. Complainant argued that, in light of the BOP's conclusory assertions that unidentified facts were not in the record, the ALJ correctly determined that the BOP had failed to raise a genuine issue of material fact. Finally, complainant noted that Yeh found that the BOP's security concerns (which were very similar to those at issue here) did not establish an affirmative defense under Section 504. Complainant's Exceptions Reply at 11-15.

Complainant argued that the ALJ's recommended remedy was proper. In doing so, complainant argued that it was feasible for the BOP to provide point-to-point videophone access within thirty days because the already-installed VRS hardware could already support point-to-point videophone calls, the BOP has prior experience providing videophones, and the BOP has been on notice since January 2021 that it likely would have to provide a videophone pursuant to Heyer. Complainant argued that the BOP should not be allowed to substitute point-to-point videophone access with some other form of telecommunication, as encouraged in Yeh, because the BOP had had years since Yeh to identify such an alternative, and because the BOP ultimately provided the complainant in Yeh with videophone access. Complainant's Exceptions Reply at 15-18.

Analysis

A review of the record in this case establishes that complainant exhausted the ARP and that the matter was properly before the ALJ. The record also shows that the ALJ made reasonable and fair decisions with regard to the management of this case. The record further shows that, following Heyer, the record was sufficiently developed that a decision on summary judgment was appropriate. As such, the record shows that this matter is ripe for a DOJ Final Decision. Based on that record, the evidence establishes that complainant met all of the elements of the prima facie case under Section 504 and that the BOP failed to demonstrate that providing him with his requested accommodation would fundamentally alter any program or create undue burden. Ultimately, the DOJ finds, as the ALJ did, that the BOP violated Section 504 by not providing complainant with point-to-point videophone access or a functional equivalent.

The major contention here was whether it was appropriate to use Heyer to reach conclusions in this case. The BOP's arguments that issue preclusion did not apply were unpersuasive, for the reasons outlined by the ALJ and complainant. Heyer was a case in which complainant argued that he was entitled to point-to-point phone calls that would allow him to communicate directly in ASL with other ASL users. The Fourth Circuit made findings regarding his need for this accommodation and the feasibility of providing it in light of the BOP's concerns over security and resources. Given the allegations in the present case and the substantial similarity between the Turner and Section 504 analyses, the findings in Heyer are clearly relevant to this case for the purposes of issue preclusion. And, as Heyer foreclosed the possibility that those findings would be disturbed, they were final for the purposes of issue preclusion.¹³

The BOP is correct that Heyer did not require a finding in complainant's favor under Section 504, but the ALJ did not simply find in complainant's favor on the basis of his success in Heyer. Rather, the ALJ applied relevant findings from Heyer to the Section 504 analysis and reasonably determined that those

¹³ The District Court must still determine a remedy, but the nature of that remedy is irrelevant here for the purposes of issue preclusion. Rather, it is Heyer's conclusions about complainant's language abilities, communication technologies, BOP phone program protocols, and the BOP's concerns related to security and resources that are relevant, and thus subject to preclusion. Indeed, other than the fact that these conclusions were essential to Heyer's holding, the precise meaning of its holding is not relevant here.

conclusions supported a finding in complainant's favor under Section 504. The DOJ agrees with the ALJ that the BOP presented no convincing reason to conduct discovery or a hearing on matters that had already been fairly and conclusively established in Heyer, especially in light of the BOP's failure to identify any material inadequacies in Heyer's findings.

The only information provided by the BOP in this matter that was not raised in Heyer was that the BOP was working towards being able to provide a new means of ASL-ready telecommunication called CopySign. The BOP argued that the announcement of this hypothetical accommodation constituted a change in circumstances that made Heyer inapplicable to this matter, such that a stay was warranted. The DOJ agrees with the ALJ that this hypothetical technology, raised only after years of litigation, was insufficient to break the preclusive connection between Heyer and this matter. The DOJ also agrees with the ALJ that the BOP's proffer of CopySign did not justify a stay. Further, for reasons explained below, the DOJ agrees with the ALJ that CopySign would be inadequate under Section 504 even if it currently existed.

Given the above, the DOJ finds that the ALJ's use of Heyer under the doctrine of issue preclusion was appropriate, reasonable, and fair in light of the record as a whole, and that additional fact-finding and/or a stay was not necessary to reach a just outcome. The DOJ agrees with the BOP that the ALJ was somewhat unclear about whether she found that issue preclusion applied. But, as the Recommended Decision addresses the elements required to establish issue preclusion, and as its analysis of the merits draws on information derivable through issue preclusion, this ambiguity does not justify further factfinding or a finding in the BOP's favor. To resolve any ambiguity, the DOJ finds that, for the reasons stated by complainant, issue preclusion applies to the conclusions from Heyer identified by the ALJ.

Although the BOP was free to argue against preclusion, it is significant that it did not also argue that the key findings in Heyer were incorrect, misleading, incomplete, superseded, or otherwise substantively not worthy of consideration or weight in this matter. For instance, the BOP noted that, omitting Heyer, the record contained no information on the BOP's concerns about security and resources. However, the BOP did not provide any information *in this case* about such concerns. It did not argue that managing such concerns in implementing videophone access constituted undue burdens *under Section 504*, and, beyond

mentioning CopySign, it did not identify any evidence that it would have submitted *in this case* that it did not submit in Heyer. The BOP appears to want it both ways, arguing, for instance, that Heyer and the current matter were too different to warrant issue preclusion but too similar to deny a stay.¹⁴ The BOP's repeated failure to identify facts not in the record that would preclude summary judgment and/or distinguish Heyer suggests that there were no such facts to provide, and thus that there was no merit to its claim that the record was not sufficiently developed. The BOP asks the DOJ to remand this matter to the ALJ for development of the record, but such a request rings hollow in the face of the BOP's failure to raise genuine issues precluding summary judgment when it clearly had ample opportunity to do so - including in its exceptions.

Further, the BOP's arguments for a stay fall far short of demonstrating that the ALJ abused her discretion. It is true that the ALJ's assertion that a stay would risk delay of an accommodation carried with it some suggestion that she had concluded that complainant would prevail on summary judgment. But this does not appear to be an indication of bias as much as it appears to be a byproduct of the fact that the ALJ came to that very conclusion later in the same document. The fact of the matter is that a stay would have delayed resolution of complainant's Section 504 claim for an indefinite period, during which he certainly would have lacked the ability to communicate with others in ASL over the phone. By contrast, deciding the case on summary judgment allowed for a quicker resolution to this case without significant prejudice to the BOP.

With regard to other arguments in the BOP's exceptions related to the ALJ's alleged abuse of discretion, the record shows that the ALJ may have occasionally been less than precise, such as in her description of the procedural history. But the BOP has presented nothing to establish that she abused her discretion or otherwise demonstrated biased against the BOP. Furthermore, some of the BOP's other exceptions pertained to matters that played no role in the ALJ's ultimate conclusion. For instance, the ALJ's assertion that the BOP did not give primary consideration to complainant's preferred accommodation had no bearing on the ultimate conclusion. On a related note,

¹⁴ Given the BOP's reliance on the importance of judicial efficiency and related concepts, it is noted that issue preclusion is a principle partially based in judicial efficiency. See In re Moffitt, 252 B.R. 916, 920 (B.A.P. 6th Cir. 2000) ("The doctrine [of issue preclusion] is based on the efficient use of judicial resources and on a policy of discouraging parties from ignoring actions brought against them.").

the BOP argued that the ALJ erroneously cited to DOJ Title II guidance in reaching her finding that the BOP did not give primary consideration to videophone access. However, the substantial similarity between Title II and Section 504 suggests that the Title II guidance is at least persuasive authority in this case. Regardless, the ALJ's ultimate conclusion did not rest on that guidance.

Moving to the merits, the parties and the ALJ correctly agreed that the record established three of the four elements of the prima facie case. Complainant's inability to hear clearly constitutes a disability under the Rehabilitation Act, and the BOP's phone program clearly constitutes a "program" under Section 504. As noted above, with regard to the third undisputed element, the ALJ did not explain her finding that complainant was "qualified" to use the BOP's phone program. And also noted above, one is "qualified" under Section 504 when one "meets the essential eligibility requirements for participation in, or receipt of benefits from, [an agency] program." 28 C.F.R. § 39.103. The record establishes that complainant was in the class of detainees who were granted access to the phone program. As such, the record clearly establishes that he was "qualified" within the meaning of Section 504.

The disputed element was whether complainant was excluded from, denied the benefit of, or subjected to discrimination under the phone program solely on the basis of his disability. The record shows that hearing inmates/detainees are allowed to make unmediated point-to-point audiophone calls in numerous spoken languages and that the BOP would not allow complainant to make unmediated phone calls in ASL - the language he uses because he is deaf. Thus, complainant's disability is the sole reason that he is not allowed to make the unmediated calls that are enjoyed by hearing inmates/detainees. The regulations implementing Section 504 make clear that, absent a showing of a fundamental alteration and/or an undue burden, inmates/detainees with disabilities are to be provided with equitable access to programs such as the phone program. Given the above, the record establishes that the BOP denied complainant equitable access to the phone program solely on the basis of his disability.

As noted, the BOP may deny complainant such access without violating Section 504 when it can show that granting it would constitute a fundamental alteration in the nature of its program and/or that it would constitute an undue financial and/or administrative burden. With regard to fundamentally altering the phone program, the record lacks any basis for concluding

that point-to-point videophone calls are so different from the various telecommunication technologies already made available by the BOP that allowing such calls would "expand the substantive scope" of the phone program. The program is intended to allow inmates/detainees to make phone calls, and videophone calls are phone calls. Further, the protocols already employed for the phone program are easily applicable to point-to-point videophone calls, and the technology installed at the FCI as part of the phone program already supports such calls. Indeed, the BOP has already provided videophone access to at least two other inmates/detainees housed in its facilities. This fact suggests that videophone access is, in some way, already a part of the phone program.

The BOP suggested that, without knowing the circumstances surrounding the provision of videophones in these two instances, no conclusion can be reached about those matters. But one of those inmates was the complainant from Yeh, who was undisputedly provided with videophone access following the DOJ's finding that such access did not constitute a fundamental alteration to the phone program. And in any event, the BOP has not presented any explanation of those circumstances in its many filings, even though it is the BOP that implemented the use of videophones in those cases. The BOP cannot derive the benefit of a lack of information when the BOP itself could have provided the relevant information but did not.

The BOP provided no information showing or even suggesting that point-to-point videophone access would fundamentally alter the phone program, and instead argued that CopySign would satisfy Section 504. However, it is difficult to understand how the potential future availability of CopySign establishes that point-to-point videophone access is a fundamental alteration of the phone program. And, in any event, the DOJ agrees with the ALJ that CopySign, as described, would not provide equitable access because it would require an intermediary, whereas hearing inmates/detainees are allowed to communicate directly in point-to-point audiophone calls. Ultimately, the record does not establish that complainant's requested accommodation would fundamentally alter the phone program.

With regard to undue burdens, the DOJ shares the ALJ's understanding that the BOP, as a subject matter expert in correctional matters, is entitled to deference with regard to its security and operational concerns. However, as the ALJ noted, this deference does not relieve the BOP of its burden to explain its reasons for claiming that managing these concerns

would create an undue burden. Here, while the BOP raises legitimate concerns, it failed to establish that point-to-point videophone calls present sufficiently more risks or costs than point-to-point audiophone calls (or any other form of already-approved telecommunication), such that allowing access to them would constitute a "significant burden or expense."

The BOP argued that the ALJ's acknowledgement that its concerns were legitimate demonstrated that she did not view the facts in the light most favorable to the BOP. But the fact that those concerns are legitimate does not mean that they amount to undue burdens. And in general, the BOP's arguments about viewing the facts in the light most favorable to it ignore the fact that, although Heyer was decided in complainant's favor, this did not mean that adoption of its relevant conclusions constituted viewing the facts in the light most favorable to complainant. Rather, issue preclusion effectively obviated the need to view the evidence in the light most favorable to any party, as the facts had already been resolved and the only thing the ALJ had to do was apply them to the Section 504 analysis. Further, as detailed by complainant, the BOP's assertions that the ALJ made unsupported factual assertions lack merit.

With regard to the BOP's security concerns, the record fails to explain how point-to-point videophone calls would create meaningfully greater security risks than those already raised by point-to-point audiophone calls or other forms of approved telecommunication. The only difference between point-to-point videophone and audiophone calls is that the former includes video. The concern of the BOP's most related to this fact was that complainant could use videophone access to exploit children and view child pornography. However, this risk appears quite limited if complainant was allowed to call only pre-approved numbers, and the record provides no indication that such a protocol could not be put in place for videophone calls. Limiting complainant to calling pre-approved numbers would also limit the likelihood that the recipient of a videophone call would use the call to commit a crime such as exploiting a child. And, were complainant to commit a crime during a call, the BOP could refer the matter for criminal prosecution and revoke complainant's phone privileges as a disciplinary measure, consistent with 28 C.F.R. §§ 39.160 and 542.10.

The record also lacks any clear explanation as to how point-to-point videophone calls would make it easier to transmit coded language relative to point-to-point audiophone calls. It seems that the BOP believed that videophone calls provide more

opportunities to send coded messages than audio calls. But this assumption appears to be based on no more than the likelihood that BOP officials would not understand ASL, such that complainant could use ASL to communicate illicit information without detection. However, the record shows that, even if all point-to-point audiophone calls were contemporaneously monitored by a BOP employee (which they are not), those calls could involve conversations in various languages that the employee might not understand, just as the employee might not understand ASL. As the ALJ correctly found, this fact undermines the assertion that point-to-point communication in ASL is more of a security risk than point-to-point communication in a spoken language. Also, if complainant is limited to calling pre-approved numbers, it is unclear how he could use videophone access to exploit inmates/detainees or how they could exploit him over such access. In any event, the BOP must regularly manage the risk of such exploitation, and the record lacks a clear basis for concluding that doing so in relation to videophone access would require any change in procedure or any increased effort. Again, if Heyer was insufficiently detailed with regard to the BOP's security concerns, the BOP should have explained as much.

The same logic applies to the BOP's concerns about resources. It is true that the BOP would have to obtain services to translate complainant's ASL conversations. But the record contains no information suggesting that doing so would be costlier or otherwise more burdensome than obtaining translation services for point-to-point audiophone calls. As the already-installed VRS can be enabled to provide point-to-point videophone calls, the costs of providing complainant with access to such calls would not create a significant financial or administrative burden. The record contains nothing suggesting that securing the requisite waiver would impose more than de minimis costs. Direct or indirect monitoring of complainant's videophone calls would require some logistical effort by the BOP. But, as stated above, the record lacks any reason to believe that such effort would be more logistically onerous than direct or indirect monitoring of any of the forms of telecommunication already available to inmates/detainees.

Ultimately, the record fails to establish any clear basis for concluding that point-to-point videophone calls are so different from the other forms of telecommunication available under the phone program that the BOP's methods of managing risks and costs in relation to those other forms of telecommunication could not simply be applied to videophone calls without any

meaningful increase in risk or cost. It is significant that the Fourth Circuit applied the broadly deferential "rational basis" standard when finding in Heyer that the BOP's concerns did not justify its refusal to provide complainant with point-to-point videophone access. The BOP's inability to justify its arguments under such a generous standard underscores the implausibility of those arguments. And again, the BOP provided no additional information on security or costs that might interfere with the applicability of the conclusions from Heyer. In light of the above, the record does not support the contention that providing complainant with point-to-point videophone calls would impose undue burdens on the BOP.

Finding, Clarification, and Caveats

As complainant established a prima facie case under Section 504, and as the BOP did not establish an affirmative defense, judgment must be rendered in complainant's favor. The ALJ's recommended remedy, and her caveat regarding the implications of that recommendation, are reasonable.¹⁵ However, some adjustments and clarifications must be made.

The DOJ agrees with the ALJ that the BOP must provide complainant with point-to-point videophone access, but that the BOP could also provide a functionally equivalent accommodation. The DOJ finds that if the BOP provides complainant with a telecommunication device that allows direct, point-to-point video calls in which complainant and another ASL user enjoy unmediated communication in ASL, such a device would provide complainant with phone access that is functionally equivalent to point-to-point videophone calls. Any form of mediated telecommunication that prevents complainant and another ASL user from communicating directly in ASL would not be a functional equivalent. As the record does not support the conclusion that such videophone access would fundamentally alter the phone program or create undue burdens, there is no basis for allowing the BOP to substitute mediated videophone calls for unmediated ones. With regard to the timeframe for compliance, complainant has provided fact-based reasons supporting a thirty-day window, whereas the BOP provided only vague assertions that implementing such access would take more time. As such, there is no basis in the record for providing the BOP with more than thirty days to implement this remedy.

¹⁵ Complainant did not request any form of relief in this case beyond point-to-point videophone access.

Further, it was unclear what the ALJ determined as to whether complainant should be allowed to make videophone calls to his brother in ASL. As complainant's brother is not deaf, he and complainant can engage in mediated communication through VRS. However, the mere fact that complainant and his brother can use VRS does not, by itself, justify excluding his brother from videophone calls. Hearing inmates/detainees can make unmediated audiophone calls in a number of spoken languages without any apparent requirement that such calls must be conducted in the recipient's native language. As complainant's brother can communicate with him in ASL, his degree of skill in ASL is irrelevant, as is the fact that he is not deaf or a member of the Deaf community.

Heyer reached a different conclusion, but did so on a basis specific to its First Amendment analysis. That analysis is inapplicable here. Heyer defined complainant's First Amendment right as a right to communicate with members of the Deaf community, and, in that context, it was reasonable to limit this right to members of the Deaf community (which would not include his hearing brother, regardless of his ability to use ASL). In contrast, the issue here is whether complainant has legally sufficient access to the phone program, pursuant to Section 504. And in this context, the record provides no basis for requiring him to communicate with his brother through a less-effective method simply because his brother is not deaf. Such a parochial, categorical approach would not uphold Section 504's directive to provide effective communication aids that afford equitable access to BOP programs. Further, it would not support the phone program's specific mission to allow inmates/detainees to maintain family ties through phone calls. Indeed, beyond its reasons for opposing any point-to-point videophone calls, it is unclear what interest the BOP has in preventing complainant from making such calls to his brother.

That said, nothing in this Decision interferes with the BOP's ability to exercise its sound correctional judgment in determining whether to allow complainant to call any particular individual, including his brother. But such determinations should be made under the same bases that the BOP uses to decide whether to allow hearing inmates/detainees to call any particular person on any device. And, in general, nothing in this Decision limits or abridges the BOP's authority to implement reasonable security measures and/or to limit access to the phone, provided that it does so on the same bases it would for hearing inmates/detainees.

On February 17, 2022, the BOP informed this Office that, on January 26, 2022, the District Court entered judgment in complainant's favor in his First Amendment case. Memorandum of Law in Support of Respondent's Motion to Dismiss at 5-6. According to the BOP, among other remedies, the District Court ordered the BOP to provide complainant with "access to a videophone in a manner that allows him to communicate visually and directly (point-to-point) with deaf persons outside of FCI Butner." Id. at 5. The BOP asserted that complainant was provided with such videophone access on February 9, 2022. Id. at 6. The BOP asked this Office to dismiss the present administrative complaint as moot, on the basis that the District Court had provided complainant with the remedy he sought in the present matter. Id. at 10-12.

On February 22, 2022, complainant provided this Office with a response to the BOP's motion to dismiss. Complainant Thomas Heyer's Opposition to Respondent Bureau of Prisons' Motion to Dismiss at 1, 5. Complainant argued, among other things, that this administrative complaint is not moot because the District Court's remedy directs the BOP to allow him to make point-to-point videophone calls to deaf persons, whereas, in the current complaint, he also sought the ability to make such calls to his hearing brother. Complainant noted that, given the BOP's previous arguments in this case, there was no reason to believe that it would allow him to make point-to-point videophone calls to his brother. Id. at 2-3.

In considering the parties' advocacy, it is noted that this Office has received no dispositive evidence that the BOP has provided complainant with point-to-point videophone access. Based on the parties' description, the District Court's remedy would limit complainant's point-to-point videophone access to calls with deaf persons. But, as explained above, Section 504 requires that complainant be allowed to make such calls to any ASL user, subject to the BOP's standard security protocols. As such, the DOJ agrees with complainant that this complaint is not moot. There are no assurances that the BOP will allow complainant to make point-to-point videophone calls with his brother or other hearing ASL users, either now or in the future. Furthermore, the DOJ wants to make it clear that, going forward, when faced with materially identical factual circumstances, the BOP will be required to provide point-to-point videophone access as described in this Decision. In light of the above, the DOJ finds it prudent to issue this decision out of an abundance of caution and in order to memorialize the BOP's obligations. As such, the BOP's February 17, 2022, motion is denied.

Decision and Remedy

The record in this case supports a finding that the BOP violated the Rehabilitation Act when it failed to provide complainant with point-to-point videophone access, or its functional equivalent as defined herein. Therefore, the following relief is ordered:

1. Within thirty days of this Final Decision, the BOP must provide complainant with fully operational videophone access that allows him to make direct, point-to-point videophone calls to other ASL users from the BOP facility at which he is housed; and
2. The BOP shall provide the Complaint Adjudication Office with a report on the status of this remedy within 60 days of its receipt of this Final Decision.



C. Douglas Kern
Complaint Adjudication Officer

/s/ Alexander D. Silver
Alexander D. Silver
Senior Attorney
Complaint Adjudication Office