IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

ERNEST KEVIN TRIVETTE, *et al.*, Plaintiffs, v. TENNESSEE DEPARTMENT OF CORRECTION, Defendant.	Civil No. 3:20-cv-00276 **Judge Aleta Trauger** **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Defendant Tennessee Department of Correction ("TDOC") has a long, well-documented history of discriminating against deaf and hard of hearing ("DHOH") prisoners in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. ("Title II"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). TDOC attempts to avoid an order to remedy these ongoing violations by making unsupported challenges to Plaintiff Disability Rights Tennessee's ("DRT's") well-established associational standing and attempts to avoid damages for these violations by arguing failure to exhaust its largely inaccessible grievance process, making an unsupported argument that certain claims are time-barred, ignoring evidence of individual Plaintiffs' damages, and misapplying precedent on Eleventh Amendment immunity. Defendant's Motion for Summary Judgment, Nov. 15, 2023, ECF No. 170, should be denied because it fails to meet its burden to show that there is no genuine dispute concerning the material facts relating to these arguments.

II. Defendant's Burden at Summary Judgment

Summary judgment is only appropriate when the moving party has shown that pleadings, the discovery and disclosure materials on file, and any affidavits show "that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party when deciding whether a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587-88 (1986).

III. DRT's Has Standing to Challenge TDOC's Title II and Section 504 Violations on Behalf of Its Constituents.

TDOC's attack on DRT's standing for injunctive relief ignores binding precedent and abundant evidence demonstrating, at a minimum, a genuine issue of material fact. As TDOC notes, this Court already held at the pleadings stage that DRT had associational standing. *See* Mem. and Order at 10-12, Nov. 12, 2020, ECF No. 29 ("MTD Order"). The subsequent record bolsters that finding, and TDOC presents nothing to call it into question.

An entity has associational standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members of the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). TDOC's motion addresses only the first prong.

A. DRT Has Sufficient Indicia of Membership.

Plaintiff DRT "is a nonprofit corporation that advocates on behalf of Tennesseans with disabilities as part of the federal government's Protection and Advocacy ('P&A') system." Mem. at 1, May 5, 2021, ECF No. 59 ("PI Order"). Associational standing under the *Hunt* test is not limited to organizations with members as commonly understood but includes those with "indicia of membership." *Hunt*, 432 U.S. at 344. Indeed, the organization at the heart of the *Hunt* case, the Washington State Apple Advertising Commission, was a state agency created to promote

Washington apples and financed by assessments on that industry. *Id.* at 336-37. The facts the growers and dealers it represented were not members "in the traditional . . . sense" and that membership was essentially required by mandatory assessments did not preclude the Commission from "asserting the claims of the Washington apple growers and dealers who form its constituency." *Id.* at 344-45.

At the pleading stage of the present case, this Court held that DRT had the "indicia of membership" necessary to establish standing under *Hunt*. MTD Order at 11. "[B]oth DRT's allegations and the statutory P&A structure support the conclusion that DRT is an organization that represents and is accountable to the state's disabled population in a manner akin to membership." *Id.* The Court relied on *Doe v. Stincer* which held that a P&A organization can assert associational standing on the same terms as membership-based organizations because its relationship with its constituents is "[m]uch like" the relationship of "members of a traditional association." 175 F.3d 879, 886 (11th Cir. 1999).

Facts in the record continue to support that holding. For example, DRT's board is representative of its constituents – it is made up of persons with disabilities, including at least one deaf Board member. Plaintiffs' Additional Material Facts ("PAF")[1] 1. DRT receives input on its advocacy activities from constituents, including those incarcerated in TDOC facilities. *Id*. 2. Such factors are exactly those that courts have identified as indicia of membership for P&A organizations. *See, e.g.*, *Doe*, 175 F.3d at 886 (finding the constituents of a P&A system possessed sufficient indicia of membership because the boards of P&As must have members

[1] Plaintiffs' Additional Material Facts are contained in Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment and Statement of Additional Material Facts in Opposition to Defendant's Motion for Summary Judgment, filed simultaneously with this brief.

who represent or are knowledgeable of the needs of clients; and P&As must provide the opportunity for the public to give feedback.).

While TDOC is correct that individual constituents do not fund DRT's activities, this is because DRT, like all P&A organizations, receives a large portion of its funding from the federal government. PAF 4. If such a factor were dispositive, no P&A organization would ever have standing to represent its constituents, a proposition contrary to the caselaw.[2] TDOC's claim that disabled people in Tennessee cannot opt out of being a constituent is misleading, since DRT does not force anyone to accept its services. *Id.* 3. Regardless, *Hunt* makes clear that "compelled" membership does not prevent a finding of sufficient indicia of membership. *See Hunt*, 432 U.S. at 344-45 (holding that the Commission had standing even though membership was compelled in the form of mandatory assessments).

B. DRT Has Sufficiently Identified Constituents Facing Ongoing Harms That Will Be Addressed by Its Claims for Injunctive Relief.

Binding Circuit precedent and a robust record support DRT's standing on behalf of constituents it has identified by name, those it has identified anonymously, and those who remain unidentified but whose interests DRT represents.

When an organization brings broad-level policy claims involving ongoing harms on behalf of its constituents, it need only identify one impacted constituent to have standing to pursue those claims on behalf of such constituents. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 441 (6th Cir. 2020) ("*Waskul II*"). This is consistent with this Court's earlier conclusion that DRT meets standards for associational standing in part "because DRT is

[2] *Cf. Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1171 (M.D. Ala. 2016) (quoting *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1113 (9th Cir. 2003) (recognizing that the Eleventh Circuit in *Doe v. Stincer* and numerous other courts had concluded that Congress had, by passing the P&A statutes, "explicitly authorized [P&As] to bring suit on behalf of their constituents.")).

challenging broad, policy-level failures by TDOC regarding its lack of language supports, [so] DRT can pursue these claims without the direct participation of each individual affected." MTD Order at 11-12.

TDOC's brief cites (though misinterprets) an earlier opinion in the *Waskul* litigation but fails to cite the Sixth Circuit's later decision in *Waskul II.* TDOC relies instead on a 1998 district court opinion holding that a P&A organization did not have associational standing. *See* Mem. of Law in Support of Def.'s Mot. for Summ. J. ("TDOC MSJ") at 14-16, ECF No. 171 (citing *Tennessee Protection & Advocacy, Inc. v. Bd. of Educ. of Putnam Cty*., 24 F. Supp. 2d 808 (M.D. Tenn. 1998)). However, as this Court noted earlier, the reasoning of that case turned on the plaintiff's failure to identify "named individuals with specific injuries," MTD Order at 11 n.5, which is not an obstacle here. !

Indeed, DRT has identified multiple constituents facing ongoing harms addressed by the broad-level policy claims at issue here, including TDOC's failure to provide effective communication, auxiliary aids and services, and reasonable modifications to DHOH prisoners. All such claims are systemic and applicable to all TDOC facilities – a proposing supported by TDOC's attempt to address system-wide effective communication and reasonable accommodation issues by publishing a single, written policy and by its reliance on a system-wide RFP (which remains in bid dispute) to address Plaintiffs' claims involving accessible technology.[3]

Currently-incarcerated DRT constituents impacted by its systemic claims include:

- Lakeevious Owens, who is Deaf and currently incarcerated at TDOC's Northeast Correctional Complex; Mr. Owens had previously been incarcerated in the Bledsoe County Correctional Complex ("BCCX"), the intake facility where all male inmates are

[3] Plaintiffs' Rule 56.01(b) Statement of Undisputed Facts in Support of Their Motion for Partial Summary Judgment ("PSF") 30, 31, 159-160, ECF No. 164.

initially assigned, and later at the Morgan County Correctional Complex ("MCCX"). PSF 5, 10, 210-211.

- John Giles, who is hard of hearing and currently incarcerated at TDOC's DeBerry Special Needs Facility ("DSNF"). Statement of Undisputed Facts in Support of Def.'s Mot. for Summ. J. ("DSF") 24, Nov. 15, 2023, ECF No. 173; *see also* PAF 6.
- Pamela Bingham, who is hard of hearing and incarcerated at TDOC's West Tennessee State Penitentiary. DSF 28; PAF 7.
- Leonard Taylor, who is Deaf and incarcerated at DSNF. Mr. Taylor was previously incarcerated at BCCX. PSF 20-22, 217.
- Timothy Beck, who is Deaf and incarcerated at MCCX. Mr. Beck was previously incarcerated at BCCX. PSF 17-18, 220-21.
- More than fifty prisoners at fourteen TDOC facilities who responded to letters sent by DRT through its counsel. All such persons identified themselves as deaf or hard of hearing and nearly all of them requested to speak with DRT's counsel in connection with this case. PAF 5.

DRT has more than met the requirement in *Hunt* and *Waksul II* that it identify at least one constituent impacted by the ongoing harms its systemic claims seek to address. Further, while TDOC discounts the standing of certain constituents by arguing that they have not exhausted administrative remedies, as discussed *infra* in Section IV, exhaustion is an affirmative defense and not a jurisdictional issue impacting standing.[4] Thus, TDOC's attempt to bar DRT's injunctive relief claims on standing grounds fails.

IV. Plaintiffs' Claims Are Not Barred by the Prison Litigation Reform Act

Failure to exhaust administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) ("PLRA"), "is an affirmative defense (not a jurisdictional requirement) that the defendants have the burden to plead and prove by a preponderance of the evidence." *Lamb v. Kendrick*, 52 F.4th 286, 292 (6th Cir. 2022). Where, as here, the plaintiffs allege that

[4] See *Lamb v. Kendrick*, 52 F.4th 286, 292 (6th Cir. 2022) (holding that exhaustion is not jurisdictional); *see also Dunn,* 219 F. Supp. 3d at 1169 n.9 ("A failure to exhaust does not impact standing because standing is jurisdictional, while the PLRA's exhaustion requirement, the Supreme Court . . . [has] explained, is not." (citing *Woodford v. Ngo*, 548 U.S. 81, 101 (2006))).

administrative remedies were unavailable to them, the burden remains on the prison defendant, which is required to "present evidence showing that the plaintiff's ability to exhaust was not hindered." *Id.* at 295 (internal quotations omitted). Based on the disputed facts in TDOC's MSJ and Plaintiffs' Additional Facts, TDOC cannot satisfy its burden to show both that its remedies were available to Plaintiffs and that they did not exhaust.

A. DRT is not Required to Exhaust and TDOC Concedes Plaintiffs Trivette, Collins, and Stinnett Have Exhausted.

Before explaining why Plaintiffs' claims are not barred by the PLRA, Plaintiffs note several things that TDOC does *not* argue.

First, TDOC does not argue that Plaintiff DRT failed to exhaust, and indeed recognizes that the PLRA's exhaustion requirement applies only to "any confined prisoner." TDOC MSJ at 6; *see also* 42 U.S.C. § 1997e(a) (PLRA's exhaustion requirement applies to "prisoner[s] confined in any jail, prison, or other correctional facility"). As such, the PLRA and its exhaustion requirement do not apply to DRT. *See also Dunn*, 219 F. Supp. 3d at 1176 ("The PLRA's exhaustion requirement . . . does not apply to P&As."); *Trueblood v. Washington State Dep't of Soc. & Health Servs*., No. C14-1178 MJP, 2015 WL 12030114, at *1 (W.D. Wash. June 22, 2015) (holding that Washington's P&A was not governed by the PLRA because it "is not a prisoner, is not confined to a correctional facility, and has not been detained as a result of being accused of a crime.").

In addition, TDOC concedes that Plaintiffs Collins and Stinnett have properly exhausted. TDOC MSJ at 14.[5] TDOC also concedes that Mr. Trivette fully exhausted the grievance that they refer to as grievance number 2902029, but incorrectly states that this grievance only requested

[5] This Court reached the same conclusion in granting Plaintiffs' Motion for Preliminary Injunction. *See* PI Order at 3-4, 17-18.

access to a TTY. *Id.* at 7. In fact, this grievance requested access to the videophone on evenings and weekends at a time when such access was restricted. *See* PSF 185; PAF 59-62. TDOC's record citations demonstrate that Mr. Trivette has exhausted at least with respect to videophones. Additionally, as described below, exhaustion was not required because the grievance process was inaccessible to them.

B. TDOC's Grievance Process Was Not Available to Plaintiffs.

The PLRA only requires prisoners to exhaust "such administrative remedies *as are available*." 42 U.S.C. § 1997e(a) (emphasis added). An administrative scheme is unavailable where it is "so opaque that it becomes, practically speaking, incapable of use." *Ross v. Blake*, 578 U.S. 632, 643–44 (2016). "[W]hen a remedy is . . . essentially unknowable – so that no ordinary prisoner can make sense of what it demands – then it is . . . unavailable." *Id.* (internal quotations omitted). An administrative procedure can also be unavailable where "it operates as a simple dead end." *Id.* at 643.

TDOC's exhaustion argument relies on its three-step grievance process, TDOC MSJ at 7, which was unavailable to Plaintiffs because it was, per policy, "inappropriate" for a number of matters at issue in this lawsuit or, at the very least confusing to the point there it was "essentially unknowable."[6] The process was also unavailable to Plaintiffs White and Owens because both information about the process and the process itself are conducted entirely in written and spoken English; TDOC's Rule 30(b)(6) witness as to the grievance process confirmed that no part of the process has been interpreted into American Sign Language ("ASL"). PAF 27, 28, 31, 35-37. Additionally, the process was unavailable to Plaintiff Bingham because it "operate[d] as a simple dead end" when officers failed to respond to a series of her grievances. *Id.* 81.

[6] *See, e.g.*, Policy 501.01 at 8, PAF 48, which Plaintiffs submit is incoherent on its face.

1. TDOC's Grievance Process is Unavailable to the Extent it Explicitly Excludes a Number of the Claims at Issue.

TDOC's grievance process is set forth in its Policy 501.01. PAF 21. Paragraph IV.H of that Policy lists nine categories of "Matters Inappropriate to the Grievance Process." If a matter is determined to be non-grievable, "the grievant may appeal that decision as outlined in the handbook *TDOC Inmate Grievance Procedures*." *Id.* That document recites the same nine categories of matters inappropriate for grievance.

The Matters Inappropriate to the Grievance Process include "[d]iagnoses by medical professionals." *Id.* ¶ IV.H.8. Benjamin Bean, TDOC's Rule 30(b)(6) designee concerning its grievance process, testified that requests for sign language interpretation would not be appropriate for the grievance process, and that such grievances would fall instead under this medical category. PAF 40-41.[7] TDOC has admitted that it failed to provide sign language interpreters to the Deaf Plaintiffs on 269 occasions, at least 130 of which were medical appointments. PSF 59, 76-80. Based on the language of Policy 501.01, as interpreted by TDOC's own designee on the topic, these violations were not able to be grieved.

Under Policy 501.01, disciplinary issues are also inappropriate for grievance, but may be appealed pursuant to a separate policy. PAF 42. These cross-references are confusing at best. In practice, on 14 occasions on which Mr. Owens was disciplined, he waived his right to appeal without benefit of a sign language interpreter to explain that right or the applicable policy. PSF 84-85 and documents cited therein; *see also infra* Section IV.B.2. Issues relating to requests for hearing aids, such as the multi-year delay experienced by Mr. Giles, are also Matters Inappropriate to the Grievance Process. PAF 43. When asked whether grievances relating to

[7] After making this statement twice early in his deposition, Mr. Bean later appears to contradict or attempt to explain it, PAF 41 n.2, underscoring the opaqueness of the scheme, *cf. Ross*, 578 U.S. at 643.

videophones would be appropriate for grievance, Mr. Bean stated that it would depend on how the grievance was worded. *Id.* 44. This lack of clarity is further illustrated by TDOC's response to the videophone grievances of Plaintiffs Collins and Stinnett: they continued to deny equal access to videophones while discouraging them from appealing. *See* PI Order at 3-4, 17-18.

"[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). Here, those requirements excluded a number of relevant matters from the grievance process and contained inconsistent instructions. Where a policy states that certain types of claims are not grievable, the process is not available. *See Young v. Mulvaine*, No. 22-3733, 2023 WL 5665755, at *4 (6th Cir. June 23, 2023) (holding that prison defendants did not satisfy their burden of proof where policy stated that the grievance procedure could not be used for the claim at issue); *Figel v. Bouchard*, 89 F. App'x 970, 971 (6th Cir. 2004) (a "plaintiff . . . cannot be required to exhaust administrative remedies regarding non-grievable issues").

2. TDOC's Grievance Process is Unavailable to Deaf Prisoners Whose Primary Language is American Sign Language.

Plaintiffs Owens and White are both Deaf and ASL is their primary language. PSF 5, 7. Mr. Owens reads English at the third to fourth grade level; Mr. White is functionally illiterate in written English. PSF 15-16. TDOC's grievance process is unavailable to them because it is conducted entirely in English with no attempt to make it available in ASL. PAF 23-37; 48-53.

The grievance process is initially explained to incoming prisoners during intake, at which point they also receive a copy of the Inmate Grievance Handbook. *Id.* 49. TDOC did not provide a sign language interpreter for any of the Deaf Plaintiffs during their intake, PSF 68, so the process was not explained to them in their native language of ASL. Although they may have physically received a copy of the Inmate Grievance Handbook, that document is, according to

the Flesch-Kincaid grade level analysis,[8] written at above grade level 13 – that is, the equivalent of high school and one year of college. PAF 51. Accordingly, Mr. White testified that he did not understand the grievance appeal process, *id.* 55, and Mr. Owens testified that he did not understand the grievance form or the process as a whole, *id*. 56.

TDOC's Mr. Bean testified that grievance forms are only available in written English and must be completed in writing; grievance responses are also provided in written English; and the grievance process assumes the grievant can read and write English. *Id.* 23-27. The grievance form has not been interpreted into ASL, and Mr. Bean was not aware of any instances in which a deaf person was provided an interpreter – or any other accommodation – to obtain or complete a grievance form or at any other stage of the grievance process. *Id.* 28-36.

Based on the above, TDOC's grievance procedures were unavailable to Mr. White and Mr. Owens and the procedures themselves violate the Title II requirement that TDOC ensure that communication with deaf prisoners is as effective as that with hearing prisoners, 28 C.F.R. § 35.160(a)(1).

Several courts have held that administrative remedies may be inaccessible to deaf prisoners who cannot communicate in writing. *See, e.g.*, *Williams v. Hayman*, 657 F. Supp. 2d 488, 495-97 (D.N.J. 2008) (holding that evidence of deaf plaintiff's inability to communicate in writing raised a factual issue concerning availability to him of the grievance remedy); *Kuhajda v. Ill. Dep't of Corr*., 2006 WL 1662941, *1 (C.D. Ill., June 8, 2006) (holding that deaf prisoner who had limited ability to read and write, and who did not have the assistance of a sign language interpreter, raised a factual issue concerning availability of administrative remedies). As the

[8] The Flesch-Kincaid grade level readability formula analyzes and rates text based on a U.S. grade school educational level. *See* PAF 53 for more a detailed explanation.

Seventh Circuit explained in *Smallwood v. Williams*, "a remedy that is available to the majority of inmates may not be available to those who are illiterate, blind, or whose individual circumstances otherwise render the procedures unavailable to them;" for example, "a grievance system manual that is written in English and then explained in English to a Spanish-speaking prisoner with little, if any, English comprehension, is not a process that is available to that prisoner." 59 F.4th 306, 314 (7th Cir. 2023); *see also Braswell v. Corr. Corp. of Am*., 419 F. App'x 622, 625 (6th Cir. 2011) (holding that grievance system was unavailable to prisoner with mental illness, as it was doubtful he understood the system or was capable of filling out a grievance form). TDOC's administrative remedies were unavailable to the Deaf Plaintiffs – and especially to Plaintiffs Owens and White – as they were explained and conducted entirely in a language they could not understand, without required interpretation.

3. TDOC's Grievance Process was Unavailable to Plaintiff Pamela Bingham as TDOC Repeatedly Failed to Respond to her Grievances.

Plaintiff Pamela Bingham submitted grievances concerning missed verbal call-outs that were inaccessible to her in November 2020 and in September 2021, as well as a grievance requesting captioned telephones in March 2022. PAF 79-80. TDOC did not respond in writing to any of these grievances; in response to the captioned telephone grievance, she was told informally that TDOC would get her a captioned telephone. *Id.* 81-82. At the time Ms. Bingham filed these three grievances, the procedure for filing was to hand the grievance to a corrections officer, which she did, later following up with an inquiry to her unit manager. *Id*. 83. Because she did not receive a written response to any of these three grievances, she has no written record of them. *Id.* 81. TDOC admits that it did not provide Ms. Bingham with a captioned telephone. *Id.* 14. Having received no response, Ms. Bingham was not required to appeal.

Ms. Bingham's situation is similar to the plaintiff in *Parks v. Cochran*, in which a prisoner in TDOC custody submitted a written grievance and received no response but took no further action beyond inquiring as to its status. No. 2:16-CV-2862-STA-EGB, 2018 WL 6186807, at *3 (W.D. Tenn. Nov. 27, 2018). The court held that "a reasonable juror could find that Parks did all that TDOC policy required to file a timely grievance." *Id.* at *5. This was true despite the fact that TDOC's grievance policy – the same policy TDOC relies on here – provides the option to proceed to the next level in the grievance process when no response is forthcoming. The *Parks* court held that this provision was permissive, not mandatory, and that "[s]ubmitting the grievance was all TDOC policy 'specifically required' Parks to do." *Id.* at *6. Ultimately, the court held that "'administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance.'" *Id.* at *5 (quoting *Boyd v. Corr. Corp. Am.*, 380 F.3d 989 (6th Cir. 2004)); *see also Troche v. Crabtree*, 814 F.3d 795, 800-01 (6th Cir. 2016) (holding that a prisoner's declaration – without supporting documents – was sufficient to create a genuine issue of material fact as to the filing of the grievances and that the lack of response excused the plaintiff from appealing). Based on the rationale of *Parks*, *Troche*, and *Boyd*, Ms. Bingham has raised a disputed issue of fact as to whether she has exhausted TDOC's grievance process.

C. Plaintiffs Are Not Required to Appeal from a Grant or Partial Grant of a Grievance.

With respect to several grievances, TDOC did not deny the requested relief but suggested that it was working on a solution. Under those circumstances, a prisoner is not expected to appeal and is considered to have exhausted his administrative remedies. In *Rogers v. Colorado Department of Corrections*, for example, a Deaf prisoner had grieved the lack of videophones; in response, the prison told him it was preparing to launch a videophone pilot program. Because the prison did not deny the grievance, the plaintiff did not appeal. The court held that he was not

required to do so: a prisoner "'has no obligation to appeal from a grant of relief, or a partial grant that satisfies him, in order to exhaust his administrative remedies." *Id*. No. 16-CV-02733-STV, 2019 WL 4464036, at *13 (D. Colo. Sept. 18, 2019) (quoting *Harvey v. Jordan*, 605 F.3d 681, 685 (9th Cir. 2010)). The fact that the prison did not ultimately start the pilot program did not change this result, and that plaintiff's claims were allowed to move forward. *Rogers*, 2019 WL 4464036, at *13.

On June 25, 2018, Mr. Trivette requested interpreters for religious services. In response, TDOC stated, "Asking some of the volunteers if they can help us on this issue!" PAF 63. Mr. Trivette filed another grievance in December 2018 that addressed the inequality in services he was being provided in contrast to hearing prisoners, including failure to provide interpreters for classes and being required to allow a unqualified inmate to interpret for him. *Id.* 64. TDOC responded to Mr. Trivette's grievance by saying "if you are recommended to take another program, we will consider what will need to be done to assist you." *Id.* 65. TDOC did not deny either grievance, and so Mr. Trivette was not required to appeal even though TDOC did not ultimately provide the relief Mr. Trivette requested. Similarly, Ms. Bingham was not required to appeal her captioned telephone grievance when she was told one would be provided. *Id.* 82. *See also id.* 67-70 (in response to two of Mr. Collins's grievances, TDOC stated that they were working on resolving the problem).

V. Plaintiffs' Claims for Monetary Damages Are Not Barred by the Statute of Limitations.

"'[T]he statute of limitations is an affirmative defense,' and it is the defendant's burden to show that the statute of limitations has run." *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 698 (6th Cir. 2022), *cert. denied* 143 S. Ct. 2659 (2023). TDOC does not carry that burden.[9]

The Parties agree that the statute of limitations applicable to claims under Title II and Section 504 is one year. TDOC MSJ at 4-5 (citing MTD Order at 6-7). All of the Plaintiffs have been harmed by TDOC's violations within the statute of limitations, so these claims are not time-barred. Furthermore, the record shows that these are continuing violations, that is, they "involve[e] a longstanding and demonstrable policy of discrimination," so all actions taken pursuant to that policy, including those that would otherwise be time barred, remain at issue. *See Sharpe v. Cureton*, 319 F.3d 259, 268 (6th Cir. 2003).

A. All Plaintiffs Have Been Harmed by TDOC's Violations within One Year of Joining the Lawsuit.

TDOC's brief does not attempt an analysis of what violations fall within or outside the limitations period for each Plaintiff. It simply lists, in a chart, the Plaintiffs, the dates each joined the lawsuit, and the dates one year prior to joining the lawsuit. TDOC MSJ at 5. While this may establish, mathematically, the limitations periods for each plaintiff, it does nothing to address which events occurred within or outside these periods. The chart below replicates TDOC's chart in the first three columns, and adds a fourth column showing that each Plaintiff has alleged harm within his or her applicable limitations period.

[9] TDOC argues only that this defense bars Plaintiffs' claims for monetary damages; it does not argue that claims for injunctive relief are barred. TDOC MSJ at 4-5.

Name	Date Claims Asserted	Limitation Date	Examples of Violations Within One Year of Filing
Trivette	3/31/2020	3/31/2019	TDOC provided only an unqualified inmate signer to interpret for Mr. Trivette's meeting with his case manager on April 2, 2019. PAF 10. TDOC did not provide an interpreter at all when Mr. Trivette signed his parole certificate on April 3, 2019. *Id.* 11.
Collins	11/12/2020	11/12/2019	All: entered custody within limitations period. PSF 9.
Stinnett	11/12/2020	11/12/2019	All: entered custody within limitations period. PSF 11.
White	8/9/2021	8/9/2020	TDOC failed to provide an interpreter for Mr. White on at least 30 occasions after August 9, 2020. PAF 8. TDOC has never provided Mr. White a vibrating watch or alarm clock, and does not have visible strobe alarms in any cell. *Id.* 12-13.
Owens	4/4/2022	4/4/2021	TDOC failed to provide an interpreter for Mr. Owens on at least 28 occasions after April 4, 2021. *Id.* 9. TDOC has never provided Mr. Owens a vibrating watch or alarm clock, and does not have visible strobe alarms in any cell. *Id.* 12-13.
Giles	4/4/2022	4/4/2021	TDOC has never provided Mr. Giles with a vibrating watch or alarm clock or assistive listening system, and does not have visible strobe alarms in any cell. *Id.* 12-13, 16. As of January 18, 2023, TDOC had not provided Mr. Giles with a hearing aid. *Id.* 17.
Bingham	4/4/2022	4/4/2021	TDOC has never provided Ms. Bingham with a captioned telephone, vibrating watch or alarm clock, or assistive listening system, and does not have visible strobe alarms in any cell. *Id.* 12-16.

All of the individual Plaintiffs have suffered harm from TDOC's violations within their respective limitations periods.

B. TDOC's Violation of Title II and Section 504 Constitutes a Continuing Violation

The undisputed facts show that TDOC has had a policy and practice of denying effective communication to and discriminating against DHOH prisoners, and that this discrimination was and continues to be TDOC's "standing operating procedure." *See Sharpe*, 319 F.3d at 269 (internal quotation omitted). It may thus be considered "a single course of conduct." *Hamer*, 924 F.3d at 1098.

Plaintiffs have provided undisputed evidence of TDOC's policy and practice of discriminating against DHOH prisoners. For example, TDOC has never conducted adequate assessments of or properly tracked the disabilities and communications needs of DHOH prisoners; has consistently failed to provide interpreters for substantive communications, including 269 admitted occasions between 2015 and the present, 124 of which occurred after the filing of the original complaint in this matter; and has continued, long after this Court's PI Order, to deny deaf prisoners access to videophones. *See generally* Mem. in Support of Pls.' Mot. for Partial Summ. J. at 7-20, Nov. 15, 2023, ECF No. 163 and references cited therein. In addition, TDOC admits that it has never provided vibrating watches or alarm clocks as accommodations for DHOH inmates, does not provide strobe alarms in individual cells, and does not provide captioned telephones or assistive listening systems at any facility. PAF 12-13, 15-16.

Prior to August 26, 2022 – two and a half years into this litigation – TDOC had no policy addressing accommodations for DHOH prisoners. PSF 30. On August 26, 2022, TDOC published its new Policy 113.95, "Accommodations for Deaf and Hard of Hearing Inmates," but that policy does not require videophones, captioned telephones, other captioning services, visual or tactile alarms or messaging systems, or assistive listening systems, nor does it address assessing and tracking DHOH prisoners. PSF 31. In any event, TDOC's proffered expert stated that, as of his report this August, TDOC was not in full compliance with its own policy 113.95. *Id.* 32.

The Sixth Circuit recognizes that, "[w]hen a continuing violation is found, 'a plaintiff is entitled to have the court consider all relevant actions allegedly taken pursuant to the . . . discriminatory policy or practice, including those that would otherwise be time barred.'" *Sharpe*, 319 F.3d at 267 (internal quotations omitted). This can be established two ways: by showing a

series of acts inside and outside the limitations period that are "sufficiently related to" each other; and by showing "a longstanding and demonstrable policy of discrimination." *Id.* at 268; *see also Straser v. City of Athens*, 951 F.3d 424, 427 (6th Cir. 2020), *cited in* MTD Order at 7.

The evidence in Plaintiffs' Statement of Undisputed Facts and their Additional Material Facts shows a series of closely related acts from 2014 to the present which also constitute and evidence a longstanding policy of discrimination. *See, e.g.*, *Vanvalkenburg v. Oregon Dep't of Corr.*, No. 3:14-CV-00916-BR, 2014 WL 5494895, at *6 (D. Or. Oct. 30, 2014) (holding that the defendant's failure to provide interpreters to a deaf prisoner constituted a continuing violation); *cf. Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001) (holding that prisoner's Eighth Amendment claim "continued for as long as the defendants had the power to do something about his condition"). Thus, the continuing violation doctrine applies and Plaintiffs may recover for any harm they suffered as a result of TDOC's ongoing discrimination against DHOH prisoners.

TDOC devotes one paragraph to the continuing violations doctrine and cites no cases in support of its position. TDOC MSJ at 5. The only facts referenced in this paragraph – again, without citation – address the experiences of deaf prisoners (not hard of hearing) and seem to suggest that the continuing violation doctrine does not apply where the defendant occasionally complies with the law. This makes no more sense than excluding from that doctrine sexual harassment cases in which the harasser manages to keep his hands to himself for a day or two. *Cf. Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002) ("[T]he entire hostile work environment encompasses a single unlawful employment practice.").

VI. Plaintiffs Have Provided Sufficient Evidence of Compensatory and Nominal Damages to Establish Genuine Issues of Material Fact.

A. Plaintiffs are Entitled to Compensatory Damages.

The Supreme Court recently reaffirmed that compensatory damages are available under Section 504, though it explained that one subset – emotional distress – was unavailable. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 221 (2022). A number of post-*Cummings* cases have held that damages similar to those incurred by Plaintiffs here remain recoverable under Section 504.

For example, courts have acknowledged that damages are available under Section 504 for loss of an expected opportunity. *Luke v. Lee Cnty.*, No. 1:20-CV-388-RP, 2023 WL 6141594, at *1–2 (W.D. Tex. Sept. 20, 2023); *Chaitram v. Penn Medicine-Princeton Med. Ctr.*, No. 21-17583, 2022 WL 16821692 at *2 (holding that "expectation interest in the ability to fully participate in her own medical care through effective communication," was the basis for loss of opportunity compensatory damages permitted under *Cummings*); *Montgomery v. District of Columbia*, No. 18-1928, 2022 WL 1618741 at *25 (D.D.C. May 23, 2022) (holding damages available for the lost opportunity to "meaningfully access and participate in police interrogations");[10] *see also* Restatement (Second) of Contracts ("Restatement") § 347 cmt. a (Am. L. Inst. 1981) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money

[10] Section 504 remedies are interpreted in harmony with that of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). In the wake of *Cummings*, several courts have held that compensatory damages are available under Title IX for injuries analogous to those suffered by Plaintiffs. *See, e.g.*, *A.T. v. Oley Valley Sch. Dist.*, No. CV 17-4983, 2023 WL 1453143, at *4 (E.D. Pa. Feb. 1, 2023) (holding Title IX allows damages for inability to engage in usual and customary school activities); *Doe v. Fairfax Cnty. Sch. Bd.*, No. 118CV00614MSNIDD, 2023 WL 424265, at *5 (E.D. Va. Jan. 25, 2023) (holding loss of educational opportunities can be the basis for compensatory damages).

that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.")

Post-*Cummings* courts have also recognized the availability of consequential damages under Section 504. *Montgomery*, 2022 WL 1618741 at *27; *see also* Restatement § 347 ("the injured party has a right to damages based on [party's] expectation interest as measured by ... [*inter alia*,] any other loss, including incidental or consequential loss, caused by the breach."). Consequential damages can include damages for physical pain and suffering that is distinct from emotional pain and suffering. Order at 6-7, *Wade v. Univ. Med. Ctr. of S. Nev.*, No. 2:18-cv-01927-RFB-EJY (D. Nev. Feb. 21, 2023), ECF No. 56; *see also* Restatement § 347 cmt. c ("Consequential losses include such items as injury to person or property resulting from defective performance. ... [T]he general principle is that all losses, however described, are recoverable."). Whether consequential losses flow from a defendant's failure to accommodate a plaintiff's disability is a fact-specific question and "ordinarily is one for the jury." *Montgomery*, 2022 WL 1618741 at *28 (citations omitted).

The record is replete with evidence of compensatory damages for each of the named Plaintiffs. For example, Plaintiff Trivette lost the opportunity to obtain his GED, participate in religious services, participate in cognitive behavioral therapy, attend career advancement courses, and actively participate in his own medical care, in addition to enduring years of deprivation of telecommunications access and being punished as a result of being unable to hear count, among other compensable harms and lost opportunities. PSF 79, 83, 90, 98-101, 105, 119, 124-31, 133-35, 183-87; PAF 88-90. Similarly, Plaintiff Stinnett lost the opportunity to participate in the GED program, cognitive behavioral therapy, medical appointments, and prison electrical classes, among other prison programs, hindering his career prospects. PSF 78, 81, 119,

124-31, 138; PAF 91-92. He was not able to understand critical information relating to his incarceration at orientation or participate in his parole hearing due to TDOC's failure to provide interpreters, in addition to enduring significant deprivation of contact with family, impeding his efforts to reintegrate with them following release, due to TDOC's failure to provide him with telecommunications access. PSF 102, 106, 198-203; PAF 93-96.

Plaintiff Collins was also unable to participate in critical medical care, including an emergency room visit and an eye surgery, career enhancement through prison electrical classes, and TDOC's TCOM program due to TDOC's failure to provide interpreters. PSF 76, 91-92; PAF 97-99. His pre-parole home program was delayed because TDOC failed to effectively communicate the requirements of the program, and he was denied contact with his children, impeding reintegration with them after release, among other harms, due to TDOC failing to provide telecommunications access. PSF 188-97; PAF 100. Plaintiff White had his release delayed due to TDOC's failure to provide interpreters in connection with his pre-parole program, was unable to participate in classes and religious services, and endured long periods without access to TDOC's telecommunications program, among other compensable harms. PSF 69, 71, 80-81, 88, 90, 103-04, 116, 119, 137, 204-08; PAF 101-06. Plaintiff Owens has been denied access to classes and educational opportunities, prison jobs, religious programming, and the ability to adequately participate in medical appointments and disciplinary hearings due to TDOC's failure to provide him with effective communication. PSF 70, 77, 84-87, 90, 93-96, 114, 123, 141-43; PAF 107-11. He also endured long periods without access to TDOC's telecommunications program. PSF 210-16.

Plaintiff Giles has suffered compensable harm due to TDOC's failure to provide him with hearing aids or assistive devices that would permit him to hear staff instructions. PAF 112-14.

Plaintiff Bingham was not provided captioning for the cognitive behavioral therapy and other mental health treatment programs. *Id.* 115-16. She has also failed to receive critical medication and has missed meals and library time because she cannot hear call-outs by the prison staff. *Id.* 117. Missing meals caused her to lose 30 pounds in six months. *Id.* 118. She suffered smoke inhalation after being left behind during a fire because she could not hear the alarm. *Id.* 119.

B. Plaintiffs Are Entitled to Nominal Damages

All Plaintiffs have raised at least disputed facts establishing violation of their rights under Title II and Section 504, and are entitled to recover nominal damages for the deprivation of those rights even if they cannot establish quantifiable compensatory damages. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("Because 'every violation [of a right] imports damage,' nominal damages can redress [an] injury even if [the plaintiff] cannot or chooses not to quantify that harm in economic terms.") (internal citations omitted); *see also* Restatement § 346(2) ("If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages"). Courts routinely award nominal damages under the ADA and Section 504. *See, e.g.*, *Lockwood v. Our Lady of the Lake Hosp., Inc*., 467 F. Supp. 3d 435, 438 (M.D. La. 2020) (holding nominal damages available for claims under Section 504); *Guy v. LeBlanc*, 400 F. Supp. 3d 536, 545 (M.D. La. 2019) (nominal damages available for claims under the ADA and Section 504); *Cassidy v. Indiana Dep't of Correction*, 59 F. Supp. 2d 787, 793 (S.D. Ind. 1999), *aff'd*, 199 F.3d 374 (7th Cir. 2000) (holding nominal damages available for violations of the ADA or Section 504 even if no other damages are available).

Similarly, in cases involving prison conditions, the Sixth Circuit has recognized that a plaintiff is still entitled to pursue non-compensatory relief such as nominal damages even if they have not alleged compensable physical injuries. *Small v. Brock,* 963 F.3d 539, 543-44 (6th Cir.

2020); *Lucas v. Chalk,* 785 F. App'x 288, 292 (6th Cir. 2019) (identifying "injunctive relief, nominal damages, [and] compensatory or punitive damages for constitutional violations" as "other relief not prohibited by the PLRA").

VII. Congress Validly Abrogated the State's Immunity with Respect to the Title II Claims

The claims at issue in this case, which involve a range of fundamental rights to public services limited by TDOC's failure to provide incarcerated persons effective communication, are clear examples of valid congressional abrogation of Eleventh Amendment immunity. The Supreme Court clarified in *Tennessee v. Lane* that claims under Title II of the ADA involving fundamental rights, including those addressing access to public services, represent an appropriate use of Congressional power to abrogate state immunity. 541 U.S. 509, 529 (2004) ("[T]he extensive record of disability discrimination that underlies [the ADA's Congressional findings], makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation."). The *Lane* Court noted the extensive legislative history documenting unequal access to public services as evidence of Congress's expressed intent. *See id*. at 510.

Similar to *Lane*, Plaintiffs' claims involve denials of effective communication in a range of government and public services impacting fundamental rights, including the ability to participate in disciplinary and parole proceedings, each of which implicate the deprivation of liberty, and access to critical medical care, among others.

Before addressing TDOC's Eleventh Amendment argument, it is important to note that it only implicates the individual Plaintiffs' entitlement to damages under Title II. TDOC does not challenge Plaintiffs' right to injunctive relief on Eleventh Amendment grounds. And because TDOC has waived its Eleventh Amendment immunity under Section 504 by accepting federal

funds, *see Waskul II*, 979 F.3d at 443, Plaintiffs are entitled to compensatory damages under that statute regardless of the availability of sovereign immunity under Title II, *see Cummings*, 596 U.S. at 221; *see also supra* Section VI.

TDOC's attempt to argue that an independent Fourteenth Amendment violation is required for abrogation is misplaced. Though *U.S. v Georgia* emphasized that allegations of conduct actually violating the Fourteenth Amendment demonstrate valid abrogation of Eleventh Amendment immunity, the case does nothing to limit *Lane*'s holding that Congress has validly abrogated state immunity for cases alleging denial of access to public services and public facilities. *Compare U.S. v. Georgia*, 546 U.S. 151, 159 (2006) *with Lane*, 541 U.S. at 518, 527-31. Indeed, multiple cases have held that the showing of a Fourteenth Amendment violation or even a violation of a fundamental right is not prerequisite to valid abrogation in the context of Title II claims. *See Lane* at 518; *Nat'l Ass'n of the Deaf v. Fla*., 980 F.3d 763, 771-74 (11th Cir. 2020) (Congress validly abrogated Florida's sovereign immunity for plaintiffs' claims under Title II even though the misconduct did not definitively violate a fundamental right) (citing *Ass'n for Disabled Americans, Inc. v. Florida Intern. Univ.*, 405 F.3d 954 (11th Cir. 2005)); *see also Arce v. Louisiana*, No. 16-14003, 2017 WL 5619376, at *17, *23 (E.D. La.) (whether defendant, in failing to provide interpreter during probation proceedings, actually violated the Constitution did not matter where allegations *implicated* due process) (emphasis added).[11]

[11] Defendant's reliance on a district court case from Missouri is not dispositive. That case addressed the narrow issue of learning-disability accommodations in a sex-offender program and, though the court there did not find valid abrogation in that context, it actually cited *Lane* to reinforce the validity of abrogation where access to public services is at stake. *See Perry v. Missouri Dept. of Corrections*, No. 4:05-cv-1384, 2007 WL 892460, at *1-4 (citing *Lane*, 541 U.S. at 529).

Additionally, even if this Court were to require facts implicating a Fourteenth Amendment violation, TDOC has failed to meet its burden of showing no genuine issue of fact. Indeed, TDOC's brief acknowledges that allegations in the operative complaint implicate both equal protection and due process. TDOC MSJ at 10-11.[12] Yet, rather than provide evidence demonstrating no genuine issue of fact in support of a rational basis for the discrimination at issue, TDOC cites to only one quote from Associate Warden Gentry, vaguely noting undefined differences in "requirements" for videophones and conventional phones. *Id*. at 11. Such a statement, alone, cannot establish rational basis on a motion for summary judgment; in fact, it pales in comparison to the vast array of record evidence documenting denials of equal access to TDOC programs and services resulting from TDOC's failure to provide effective communication. *See generally* PSF; PAF. Similarly, with respect to claims implicating Plaintiffs' due process rights, TDOC rehashes its exhaustion and statute of limitations arguments, addressed in Sections IV and V *supra*, where it has failed to meet its evidentiary burden.

VIII. Conclusion

For the reasons set forth above, Plaintiffs respectfully request the Court deny TDOC's Motion for Summary Judgment.

[12] Such allegations are sufficient to implicate the Fourteenth Amendment. *See Arce* at *17; s*ee also Mingus v.* Butler, 591 F.3d 474, 483 (6th Cir. 2010) (holding valid abrogation of Eleventh Amendment immunity where the gravamen of prisoner's complaint was that he was treated differently than similarly situated prisoners or prisoners with fewer, or less serious, disabilities with no rational basis underlying the disparate treatment).

Respectfully submitted,

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December 13, 2023

CERTIFICATE OF SERVICE

I certify that, on December 13, 2023, I served the foregoing document upon all parties herein by e-filing with the CM/ECF system maintained by the court which will provide notice to the following:

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