

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02733-STV

BIONCA CHARMAINE ROGERS,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity,
RYAN LONG, in his official capacity, and
MIKE ROMERO, in his official capacity,

Defendants.

LEONID RABINKOV,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,

Defendant.

**PLAINTIFF MARC TREVITHICK'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Marc Trevithick, a deaf inmate, moves for summary judgment against Defendant Colorado Department of Corrections (“CDOC”) on his claims under Title II of the Americans

with Disabilities Act (“Title II” or “ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794.

Because it is undisputed that CDOC does not provide videophone service to Mr. Trevithick and that the service it does offer him -- a teletypewriter (“TTY”) -- is ineffective and obsolete, Mr. Trevithick is entitled to summary judgment. “Plaintiffs’ desire for equally effective means of communication is not just an aspiration -- it is the law.” *McBride v. Michigan Dep’t of Corr.*, 294 F. Supp. 3d 695, 706 (E.D. Mich. 2018). Like Mr. Trevithick here, the deaf inmate plaintiffs in *McBride* sought access to videophones to communicate with individuals outside of prison. Mr. Trevithick respectfully requests that this Court do as the *McBride* court did: grant summary judgment in his favor and order CDOC to make videophones available to him. *See id.* at 700.

STATEMENT OF UNDISPUTED MATERIAL FACTS (“SUMF”)¹

1. Mr. Trevithick is an inmate in the custody of the Colorado Department of Corrections (“CDOC”) housed at the Colorado Territorial Correctional Facility (“CTCF”). Answer, ECF 69, ¶ 6; Trevithick Decl. ¶ 2.²

2. Mr. Trevithick is substantially impaired in the major life activity of hearing. Defs.’ Resps. to Pls.’ First Reqs. for Admis., Resp. 5 (Robertson Decl. Ex. 3). He is thus an individual with a disability as that term is used in the ADA and Section 504. 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(9)(B).

¹ Pursuant to Paragraph V of this Court’s Practice Standards, Plaintiff’s Statement of Undisputed Material Facts is also set forth in tabular format in a Separate Statement of Facts attached hereto.

² All declarations are referred to by the declarant’s last name and the abbreviation “Decl.” All depositions are referred to by the deponent’s last name and the abbreviation “Dep.”

3. Mr. Trevithick has been deaf since early childhood. American Sign Language (“ASL”) is his primary language and preferred mode of communication. He is not able to use a conventional telephone. Trevithick Decl. ¶¶ 3-4.

4. Videophones are telephones with a high-definition video display, capable of simultaneous two-way interactive video and audio for communication between people in real time using separate internal high-speed bandwidth Internet telecommunication services. Expert Report of Richard Lorenzo Ray (“Ray Report”) at 12 (Robertson Decl. Ex. 1).

5. Videophones let an inmate for whom ASL is their native language speak in their native language with people who have videophones or who are hearing. Jacobson³ Dep. 18:1-11 (Robertson Decl. Ex. 5).

6. Mr. Trevithick has repeatedly requested to be able to use a videophone to call friends and family outside the facility; CDOC has denied these requests. Trevithick Decl. ¶ 5.

7. Video relay service (“VRS”) is a method for deaf people to use videophones to communicate with hearing people. The deaf person signs to an intermediary sign language interpreter via video monitor. The interpreter, in turn, relays the deaf person’s message to the hearing individual in spoken English and vice versa. In a VRS conversation, the hearing party speaks into a standard telephone as he or she normally would. Ray Report at 13-14, *see also* Bradley⁴ Dep. 80:1-10 (Robertson Decl. Ex. 6).

³ Adrienne Jacobson is CDOC’s Rule 30(b)(6) designee on the use of videophones in CDOC facilities. The Rule 30(b)(6) deposition notice is Exhibit 1 to the deposition of Amy Bradley (Robertson Decl. Ex. 6). Each deposition excerpt includes the statement by counsel for CDOC and the deponent confirming the topics as to which each testified on behalf of CDOC.

⁴ Amy Bradley is one of CDOC’s Rule 30(b)(6) designees.

8. The average literacy level of the American Deaf Community is at the fourth-grade reading level. Expert Report of Jean Andrews (“Andrews Report”) at 5 and Ex. A⁵ at 4, 40 (Robertson Decl. Ex. 2); *see also* Smith⁶ Dep. 35:6-10 (“it’s fairly common for people who are born deaf to be less than fluent in written English”) (Robertson Decl. Ex. 7).

9. ASL is neither a manual form nor a derivative form of English, and thus there is not a one-to-one correspondence between ASL signs and English words. The grammatical and syntactic structure of ASL is fundamentally different from the grammatical and syntactic structure of English. Andrews Report at 4 and Ex. A at 10.

10. English is not Mr. Trevithick’s native language; communicating in written English is awkward, time-consuming, and incomplete for him. He is not able to fully express himself in written English or converse about the range of subjects he can in ASL. Trevithick Decl. ¶ 7; *see also* Andrews Report at 7 (using a TTY results in briefer messages and curtails ability to express thoughts and feelings in the same manner as hearing inmates using a telephone).

11. Inmates in CDOC custody are permitted to use telephones to communicate with family members, resources in the community, and legal counsel (the “inmate phone program”). CDOC Administrative Regulation (“AR”) 850-12, Bradley Dep. Ex. 2, at 1.

12. All hearing inmates in the CDOC have access to one or more wall phones. CDOC has approximately 1100 wall phones around the state. Bradley Dep. 15:19-20; 36:23-25.

⁵ Exhibit A to the Andrews Report is the Expert Report of Dennis Cokely, PhD. Dr. Cokely passed away in August, 2018, after preparing his report in this case. *See* ECF 83, 84. Dr. Andrews incorporated his report by reference into hers. Andrews Report at 1.

⁶ Janet Smith is one of CDOC’s Rule 30(b)(6) designees.

13. Violation of rules relating to the inmate phone program can result in suspension of privileges or Code of Penal Discipline charges. AR 850-12 at 10-11.

14. CDOC does not provide deaf inmates in CTCF with access to videophones. Defs.' Suppl. Resps. to Pls.' First Set of Interrogs. to Defs. ("Defs.' Resps. to Interrogs."), Resp. to Interrog. Nos. 2, 8 (Robertson Decl. Ex. 4); Bradley Dep. 82:12-14.

15. The only telecommunications service that CDOC provides deaf inmates in CTCF is the TTY. *See* Defs.' Resp. to Interrog. No. 1.

16. TTY is a 60-year-old technology that enables remote communications between deaf people and between deaf and hearing people. In a conversation between two deaf people, both parties type and read responses using a teletypewriter device, and their typed conversation is transmitted back and forth across the standard telephone network. Ray Report at 7; *see also* Andrews Report at 6 and Ex. A at 34 (TTY technology is obsolete).

17. In a TTY conversation between a deaf person and a hearing person, the deaf party types into the TTY and the hearing party uses a standard telephone. An operator dictates the deaf person's typed messages to the hearing party and types the hearing person's spoken messages to the deaf party. Ray Report at 7, *see also* Bradley Dep. 42:22 - 43:21.

18. Keith Nordell, at that time CDOC's highest ranking lawyer,⁷ stated in a December 9, 2013 Project Request Form that "current TTY equipment is becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down." Bradley Dep. Ex. 9 at CDOC/Rogers 002132.

⁷ Jacobson Dep. 10:10-20.

19. Ms. Bradley testified that she agreed with the content of the Project Request Form. Bradley Dep. 100:18 - 101:14.

20. Because very few deaf people use TTYs, when Mr. Trevithick is forced to use a TTY to contact another deaf person outside a CDOC facility, a three-step process is required: he types a message into the TTY; the TTY operator speaks it to a VRS operator; and the VRS operator signs it to the recipient's videophone. When the deaf called party responds, this process is reversed: they sign their response to the VRS operator, who speaks it to the TTY relay operator, who types it to Mr. Trevithick. Trevithick Decl. ¶ 9.

21. When asked how a deaf inmate who only has access to a TTY would communicate with a deaf person who only has access to a videophone, Amy Bradley, CDOC's Rule 30(b)(6) designee on the TTY system, stated, "I don't know how that would work," and that she was not aware of any inmates for whom that is an issue. Bradley Dep. 44:2 - 45:13.

22. During the past 10 to 15 years, deaf people have replaced TTYs with videophones for two very understandable reasons. First, TTYs require communication in typed English (the second language for most deaf people and a language in which they rarely attain any significant level of fluency). Second, because TTY conversations are typed, those conversations take significantly longer. Videophones, by contrast, enable deaf people to communicate using American Sign Language, a language in which they are much more comfortable and fluent. Thus, their videophone conversations are not encumbered by written English nor slowed by having to type. Signed videophone conversations are analogous to spoken telephone conversations. Andrews Report Ex. A at 33-34; *see also* Ray Report at 7-8.

23. CTCF's TTYs often freeze in the middle of calls or produce garbled text or strings of X's and other nonsense characters. Trevithick Decl. ¶ 12.

24. For example, the image below is a complete transcript of a call placed by Mr. Trevithick, redacted to delete the called party's phone number; similar nonsense text appears throughout the transcripts provided by CDOC in discovery. Robertson Decl. ¶ 14 and Ex. 10.

11-15-17 12:02 Le min.
~~01-01-04 03:09 AM~~

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^XY CO CA 7878F NUMBER
CAL PLS GA AUTOMATED
MSG. THIS CALL IS FROM
AN INMATE IN COLORADO
CORRECTIONAL FACILITY.
THIS CALL WILL BE
RECORDED. INMATE NAME:
MARC TREVITHICK PLEASE:
FOR SECURITY, ONLY PROC-
ESS CALL TO [REDACTED]
GA GA GA [REDACTED]
RINGING 1 ... 2 ...
^X^X^XMM . (F) HELLO
^X^X^X MARC HELLO MOMI
I WANT TO SA UY HAPPY
EERRMERRY HTTP://CHRIST-
MAS TO U AND ALL ILU
MUCH I HOPE U HAVE
GOOD DAY TODAY. S GAUH
THANK YOU MARC MERRY
CHRISTMAS TO YOU I H
OPE YOU HAVE A GOOD DAY
ALSO THANK YOU FOR CALL-
ING I LOVE YOU GA
WELCOME AND ILU MUCH ALL
OFU U. HGSUGS AND
MISS U , I PARAYRAY FOR
U AND RICH. HE W FIND
OTHER JOB AS SOON. GA^^-
X^^X^^XN^^X^XPXXX^XXX-
^XX^NR YOU ALSO GA .
COM LET U GO ANDDDDDDDD-
DDDDDD^^X^^X^^XNU FOR
CALLING MARC I LOVE YOU
BYE HANGING UP (PERSON
HUNG UP) RELAY CO 7878F
GA OR SK (RELAY WILL
DISCONNECT IN 30 SECON-
DS IF NO RESPONSE
THANK YOU HAVE A NICE

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CDOC Ex. 10-445

25. Provision of limited TTY access to deaf inmates fails to provide them with the means to effectively communicate with deaf and hearing individuals outside the correctional

center. CDOC needs to replace or supplement these TTY devices with video-based services to provide deaf inmates with remote communications technology comparable to that used by their hearing peers. Ray Report at 10-11.

26. Facial expressions, head tilts and nods, and eyebrow raises are important elements that encode the grammar of ASL. These linguistic elements are not found in English nor can they be conveyed in written notes or in a TTY text conversation. Andrews Report at 5.

27. Videophones permit deaf people to convey emotion, mood, tone, and affect, which cannot be conveyed or perceived using the TTY. Trevithick Decl. ¶ 4.

28. Provision of videophones is necessary to provide equivalent and effective telephonic services to deaf inmates who are able to communicate in ASL, regardless of level of intelligible speech or level of literacy. Andrews Report at 6-8; *see also id.* Ex. A at 37-38.

29. The only way for Mr. Trevithick to have an equal opportunity to participate in and enjoy the benefits of CDOC's telecommunications services and programs is to use a videophone. Using a TTY is not as effective as the conventional telephone is for hearing prisoners. Trevithick Decl. ¶ 13.

30. CDOC's Rule 30(b)(6) witness concerning the considerations relating to making videophones available in CDOC facilities believes it is "feasible" to provide videophone service to CDOC inmates and that "it's where the world is going." Bradley Dep. 88:23 - 89:2.

31. Between late 2013 and mid-2016, CDOC considered undertaking a "pilot program" to provide videophone service to deaf inmates at CTCF; Ms. Jacobson ultimately decided not to move forward with it. Jacobson Dep. 21:8 - 22:3

32. Global Tel*Link (“GTL”) provides conventional telephone service for inmates in the CDOC. Bradley Dep. 17:22-24.

33. The GTL videophone kiosks that were installed in anticipation of the pilot program were still present at CTCF as of May 4, 2018. *See* Bradley Dep. 96:20 - 97:10; *see also* Robertson Decl. Ex. 9 (photographs of videophones at CTCF taken on May 4, 2018).

34. All of the videophone units observed at CTCF on May 4, 2018 were locked down, either with a metal cover and padlock, or in a locked room. Robertson Decl. ¶ 13.

35. The videophone units in place at CTCF are GTL “Flex Link” units. Given this fact, GTL could provide VRS service to the CDOC. Deuster Dep. 21:14 - 22:11; 27:7-10 (Robertson Decl. Ex. 8).

36. CDOC did not plead either the defense that videophones would result in a fundamental alteration of a service, program or activity, or that they would constitute an undue financial or administrative burden. Answer, ECF 69, at 7-9.

37. CDOC has provided three reasons for its refusal to provide videophone service: (1) that deaf inmates would be able to dial any number, rather than being limited to an approved list of numbers; (2) that there was no mechanism to limit the duration of the call; and (3) that there was no way to charge inmates for phone calls. Defs.’ Resps. to Interrogs 3, 9, and 10; *see also* Jacobson Dep. 30:4 - 31:9.

38. Ms. Jacobson also mentioned the risk of being vandalized, but conceded that this risk existed with conventional phones as well. *Id.* 31:11 - 32:11.

39. As for the duration of the call, although hearing inmates are limited to 20 minutes per call, they are permitted to call back multiple times if no one is in line to use the phone.

Bradley Dep. 33:16-34:6.

40. CDOC's interest in charging for videophone calls is based on its interest in maintaining records of the calls so they could be interpreted. Jacobson Dep. 42:3-17.

41. CDOC does not monitor all calls in real time, and has not monitored any TTY calls since at least 2010. Bradley Dep. 25:25 - 26:2; 52:7 - 53:12.

42. There are various methods for monitoring and recording video-based communications between a deaf inmate and the calling party. Ray Report at 17-18; Deuster Dep. 23:7-10.

43. The videophone pilot program at CTCF had been set up with a system to record and monitor videophone calls. Ray Report 17-18 & Ex. E; *see also* Deuster Dep. 27:7-10.

44. GTL makes available a videophone/VRS service for Flex-Link units that has the same call control and security enforcement measures as available on GTL's inmate calling system, including limitation to pre-approved users and called phone numbers and limits on the length of calls. Deuster Dep. 19:21 - 21:4.

45. While (as of June of 2018) this service was not available for the GTL platform in use by CDOC, it is available for departments of corrections at this time, and GTL anticipated having it available for the platform in use at CDOC in the near future. Deuster Dep. 29:4-19.

46. No one at CDOC has been in touch with GTL recently about providing videophone service. Jacobson Dep. 36:22-25.

47. CDOC is not aware of the cost of implementing videophone service; no one at CDOC has received a cost estimate or discussed costs with any providers. Jacobson Dep. 33:15 - 34:2.

48. Plaintiffs Rogers and Begano both used videophones when they were detained in the El Paso County Jail, and Ms. Begano, when she was detained in the Denver Jail. Rogers Decl. ¶ 13; Begano Decl. ¶ 10.

49. GTL provides videophone service to approximately 30 departments of corrections, each of which may in turn have many facilities. Deuster Dep. 17:23 - 18:9.

50. In settlements from around the country, state departments of corrections and county sheriffs have agreed to provide videophones in their facilities. Robertson Decl. ¶¶ 15-16.

51. CDOC receives federal financial assistance as that term is used in Section 504 of the Rehabilitation Act. Fourth Amd. Compl., ECF 66, ¶ 99; Answer, ECF 69, ¶ 99.

ARGUMENT

Plaintiff Trevithick is entitled to summary judgment on his ADA and Section 504 claims because there is no genuine dispute that:

- Mr. Trevithick is deaf and his primary language is ASL;
- Videophones are necessary to provide him meaningful access to the inmate phone program and to provide communication as effective as that provided hearing inmates;
- He has requested videophone service and CDOC has refused those requests;
- CDOC cannot show that its proposed alternative, the TTY, is equally effective; and
- CDOC neither pleaded nor proved any applicable affirmative defense.

I. Legal Standard

A. Summary Judgment

Summary judgment is appropriate only if “the movant shows 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir. 1994). If the moving party bears the burden of proof at trial, “the moving party must establish, as a matter of law, all essential elements of the [claim on which summary judgment is sought] before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant’s case.” *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir. 2008).⁸

B. Title II and Section 504.

Title II of the ADA prohibits discrimination on the basis of disability by public entities such as CDOC. 42 U.S.C. § 12131 *et seq.* Section 504 prohibits such discrimination by recipients of federal financial assistance. 29 U.S.C. § 794. “To state a claim under Title II,⁹ the plaintiff must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability.” *Robertson*

⁸ Quoted from *Mackey v. Watson*, No. 17-CV-01341-CMA-STV, 2018 WL 4376440, at *4 (D. Colo. Aug. 2, 2018), *report and recommendation adopted*, 2018 WL 4360624 (D. Colo. Sept. 13, 2018).

⁹ The parties agree that “[t]he Rehabilitation Act is materially identical to and the model for the ADA...” and that, as such, “the discussion of the elements required under the ADA is equally applicable to consideration of the Rehabilitation Act.” *See* Defs.’ Mot. to Dismiss, ECF 37, at 5 (internal citations omitted).

v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1193 (10th Cir. 2007). The ADA “requires public entities to provide ‘meaningful access’ to their programs and services.” *Id.* at 1195.

CDOC admits that Mr. Trevithick is an individual with a disability. SUMF ¶ 2. He is qualified to participate in CDOC’s inmate phone program, which permits inmates to communicate telephonically with individuals outside of their facilities. *See, e.g., Penn. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (holding disabled prisoners are “qualified” to receive the benefits and services of state prisons if they meet eligibility requirements, despite the fact that prisoners may not always participate voluntarily in services or programs).

C. Effective Communication

Title II regulations explicitly require CDOC to ensure that communications with people with disabilities “are as effective as communications with others,” 28 C.F.R. § 35.160(a)(1),¹⁰ and to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity,” *id.* § 35.160(b)(1). Crucially, “[i]n determining what types of auxiliary aids and services are necessary,” CDOC is required to “give primary consideration to the requests of individuals with disabilities.” *Id.* § 35.160(b)(2).

“Primary consideration” means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

¹⁰ The Department of Justice (“DOJ”) Title II regulations have the force of law. *Marcus v. Kansas Dep’t of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999).

U.S. Dep't of Justice, "The Americans with Disabilities Act Title II Technical Assistance Manual," § II-7.1100 ("TAM-II") (emphasis added).¹¹ If an entity proposes an alternative form of communication, it has the "burden under the statute to demonstrate the proffered aid's effectiveness." *Hayden v. Redwoods Cmty. Coll. Dist.*, No. C-05-01785NJV, 2007 WL 61886, at *9 (N.D. Cal. Jan. 8, 2007).

II. Is Undisputed That CDOC Does Not Provide Mr. Trevithick Meaningful Access to Its Inmate Phone Program.

CDOC's inmate phone program permits inmates to speak with individuals outside the facility by telephone, SUMF ¶¶ 11-12, a technology that allows hearing inmates to communicate directly with hearing friends and family, to understand all of their words and grammar, to express themselves fully in their native language, and to hear tone of voice, affect, and emotion without barriers.

In contrast, Mr. Trevithick is forced to use the TTY, obsolete technology that requires the him to communicate in a language in which he is not fluent, that denies him access to the visual grammar and emotional tone of a direct videophone conversation, and that forces his conversations with deaf people outside the facility to be mediated by two different interpreters, and placing further barriers between him and his friends and family. SUMF ¶¶ 3, 8-10, 14-27.

This is not meaningful access; it is discrimination and exclusion on the basis of disability.

The court in *McBride v. Michigan Department of Corrections* granted summary judgment to a class of deaf plaintiffs and ordered the defendant to provide videophone service based on facts materially identical to those here. 294 F. Supp. 3d at 706-13. The Michigan Department of

¹¹ <https://www.ada.gov/taman2.html> (last visited Jan. 17, 2019).

Corrections (“MDOC”), like CDOC here, denied deaf inmates access to videophones, provided only TTYs instead, and argued that TTYs offered meaningful access. *Id.* at 709-10. The *McBride* plaintiffs moved for summary judgment and relied on the opinions of two experts: Richard Ray, Plaintiff’s expert here; and Dennis Cokely, who prepared a report in this matter before he passed away in August, 2018, which report was incorporated in its entirety into the report of Plaintiffs’ expert Jean Andrews. *See id.* at 706-09. Like here, MDOC did not offer any expert evidence to rebut the plaintiffs’ experts. *Id.* at 709. The *McBride* court granted the plaintiffs’ motion in large part based on Mr. Ray’s and Dr. Cokely’s opinions, specifically on the opinions set forth above in SUMF ¶¶ 4, 7, 16, 17, 22, 25.

Here, as in *McBride*, it is undisputed that videophones are the only means of telecommunications that provide Mr. Trevithick equal or even meaningful access to CDOC’s inmate phone program and communications as effective as those provided hearing inmates. SUMF ¶¶ 4-7, 28-29. It is also undisputed that Mr. Trevithick requested to use a videophone to call friends and family outside the facility. SUMF ¶ 6. Under applicable regulations, CDOC must honor that request unless it can show that TTYs are equally effective. *See TAM-II § II-7.1100; Hayden*, 2007 WL 61886, at *9. It has not sustained and cannot sustain this burden.

Plaintiff and his experts provide substantial evidence that the TTY is not effective at all, much less equally effective to a videophone: it requires communication in a second, often difficult language; it is slower and more cumbersome under the best of circumstances; it often breaks down and transmits garbled or nonsense words and letters; and since it is essentially obsolete, communication with deaf people outside the facility requires a three-step interpretation process. SUMF ¶¶ 3, 8-10, 15-27. Indeed, CDOC agrees that “current TTY equipment is

becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down.” SUMF ¶ 18; *see also id.* ¶ 30.

The *McBride* court analyzed substantially similar evidence and concluded that “merely providing deaf and hard of hearing inmates with TTYs does not satisfy the MDOC’s obligations under the ADA . . .” 294 F. Supp. 3d at 712–13. Similarly, the Fourth Circuit has held, in a case brought by a deaf prisoner, that “TTY does not permit real-time conversations, and each conversation over a TTY device takes significantly longer than signed or spoken conversations” and that

TTY is old technology that is fast becoming obsolete. Over the last decade, many deaf people have migrated from TTY devices to videophones. Because a TTY device is required on both ends of the call, the abandonment of TTY technology means there are fewer and fewer people with whom [the plaintiff] can communicate.

Heyer v. United States Bureau of Prisons, 849 F.3d 202, 207 (4th Cir. 2017). Based on the undisputed facts -- including the expert reports that formed the basis for summary judgment in the plaintiffs’ favor in *McBride* and CDOC’s admission -- CDOC cannot satisfy its burden to show that TTY’s are as effective as videophones.

Based on the facts and law above, it is undisputed that CDOC does not provide Mr. Trevithick with meaningful access or equal opportunity to enjoy its inmate phone program.

III. CDOC Did Not Plead and Cannot Sustain Its Burden to Prove Either of the Two Available Defenses to an Effective Communication Claim.

Applicable Title II regulations provide two defenses to a claim for effective communication pursuant to section 35.160: a public entity is not required “to take any action that it can demonstrate would result [1] in a fundamental alteration in the nature of a service,

program, or activity or [2] in undue financial and administrative burdens.” 28 C.F.R. § 35.164. That provision makes clear that “a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens.” *Id.*; *see also Hindel v. Husted*, 875 F.3d 344, 347 (6th Cir. 2017) (Holding that fundamental alteration is an affirmative defense); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1266 (D.C. Cir. 2008) (Holding that undue burden is an affirmative defense).

As an initial matter, CDOC has waived these affirmative defenses because it did not plead them in its Answer. ECF 69; Fed. R. Civ. P. 8(c) (“In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense....”). “[I]t is well established that failure to assert an affirmative defense results in waiver of that defense.” *Racher v. Westlake Nursing Home Ltd. P’ship*, 871 F.3d 1152, 1167 (10th Cir. 2017).

More importantly, however, CDOC cannot support either defense. The fact that correctional institutions around the country have installed and use videophones and that Plaintiffs Begano and Rogers have been detained at other Colorado jails where they were able to use videophones, SUMF ¶¶ 48-50, establishes that this technology can be used without fundamentally altering prison telecommunications or other prison programs, or unduly burdening prison systems. *See, e.g.*, Order, ECF 52, at 12 (Plaintiffs’ previously experience with videophones in jail “suggests that videophones can be used in prisons without impacting security concerns.”). CDOC has produced no evidence that provision of videophone service to deaf inmates would constitute a fundamental alteration or undue burden.

CDOC has produced no evidence concerning the cost of implementing videophone service; in fact, CDOC’s 30(b)(6) designee on the relevant subjects testified that she was not

aware of the cost of implementation, and did not believe anyone with CDOC had received an estimate. SUMF ¶ 47. There is thus no evidence that videophones would constitute an undue financial burden.

Nor do any of the three reasons CDOC has offered for refusing to provide videophones -- that it was unable to find a way to limit call duration, to limit numbers called, or to charge deaf inmates for videophone calls, SUMF ¶ 37 -- rise to the level of an undue administrative burden or fundamental alteration. CDOC's current inmate phone provider, GTL, now provides a service that solves all three problems, but no one from CDOC has been in touch with GTL. SUMF ¶¶ 44-46. Given that hearing inmates can make an unlimited number of 20-minute calls, one after the other, SUMF ¶ 39, the fact that CDOC has not found a way to limit the duration of videophone calls would not be a fundamental alteration or undue burden.

CDOC's interest in charging inmates for videophone calls relates only to its need to maintain records of those calls for monitoring purposes. SUMF ¶ 40. However it is undisputed that there are various methods to monitor videophone calls, that monitoring and recording technology was in place in CDOC's abandoned pilot program system, that CDOC does not monitor all conventional calls in real time, and that no TTY call has been monitored in the past eight years. SUMF ¶¶ 41-43. It is thus undisputed that the inability to charge for videophone calls would not fundamentally alter or burden the interest involved: CDOC's ability to monitor those calls.

Finally, CDOC has not established that it is unable to effectively limit the phone numbers that deaf inmates would dial using a videophone. Each of the videophones currently in place at CTCF is locked down, either with a metal cover or inside a locked office. SUMF ¶¶ 33-34.

CDOC personnel who unlock and provide access to the videophones can supervise the numbers dialed. In addition, since all videophone calls can be monitored and recorded, abuse of the privilege -- by calling an unauthorized number -- can be punished by withholding phone privileges or other punishment, as is currently the case with the TTY and conventional telephone. SUMF ¶ 13. Finally, CDOC could adopt the GTL platform and technology that permit limitation of the outgoing numbers dialed. SUMF ¶¶ 32-35; 44-46.

CONCLUSION

For the reasons set forth above, Mr. Trevithick respectfully requests that this Court grant this motion for partial summary judgment, enter judgment in his favor against CDOC on his injunctive claims under Title II of the ADA and Section 504 of the Rehabilitation Act, and order CDOC to provide him with videophone service.

Respectfully submitted,

/s/ Amy F. Robertson

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Dated: January 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2019 I electronically filed the foregoing document, along with the Declarations of Amy F. Robertson (with exhibits), Marc Trevithick, Bionca Charmaine Rogers, and Cathy Begano, with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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**PLAINTIFF MARC TREVITHICK’S SEPARATE STATEMENT OF FACTS
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
<p>1. Mr. Trevithick is an inmate in the custody of the Colorado Department of Corrections (“CDOC”) housed at the Colorado Territorial Correctional Facility (“CTCF”). Answer, ECF 69, ¶ 6; Trevithick Decl. ¶ 2.¹</p>		
<p>2. Mr. Trevithick is substantially impaired in the major life activity of hearing. Defs.’ Resps. to Pls.’ First Reqs. for Admis., Resp. 5 (Robertson Decl. Ex. 3). He is thus an individual with a disability as that term is used in the ADA and Section 504. 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(9)(B).</p>		
<p>3. Mr. Trevithick has been deaf since early childhood. American Sign Language (“ASL”) is his primary language and preferred mode of communication. He is not able to use a conventional telephone. Trevithick Decl. ¶¶ 3-4.</p>		

¹ All declarations are referred to by the declarant’s last name and the abbreviation “Decl.” All depositions are referred to by the deponent’s last name and the abbreviation “Dep.”

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4. Videophones are telephones with a high-definition video display, capable of simultaneous two-way interactive video and audio for communication between people in real time using separate internal high-speed bandwidth Internet telecommunication services. Expert Report of Richard Lorenzo Ray (“Ray Report”) at 12 (Robertson Decl. Ex. 1).		
5. Videophones let an inmate for whom ASL is their native language speak in their native language with people who have videophones or who are hearing. Jacobson ² Dep. 18:1-11 (Robertson Decl. Ex. 5).		
6. Mr. Trevithick has repeatedly requested to be able to use a videophone to call friends and family outside the facility; CDOC has denied these requests. Trevithick Decl. ¶ 5.		

² Adrienne Jacobson is CDOC’s Rule 30(b)(6) designee on the use of videophones in CDOC facilities. The Rule 30(b)(6) deposition notice is Exhibit 1 to the deposition of Amy Bradley (Robertson Decl. Ex. 6). Each deposition excerpt includes the statement by counsel for CDOC and the deponent confirming the topics as to which each testified on behalf of CDOC.

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<p>7. Video relay service (“VRS”) is a method for deaf people to use videophones to communicate with hearing people. The deaf person signs to an intermediary sign language interpreter via video monitor. The interpreter, in turn, relays the deaf person’s message to the hearing individual in spoken English and vice versa. In a VRS conversation, the hearing party speaks into a standard telephone as he or she normally would. Ray Report at 13-14, <i>see also</i> Bradley³ Dep. 80:1-10 (Robertson Decl. Ex. 6).</p>		
<p>8. The average literacy level of the American Deaf Community is at the fourth-grade reading level. Expert Report of Jean Andrews (“Andrews Report”) at 5 and Ex. A⁴ at 4, 40 (Robertson Decl. Ex. 2); <i>see also</i> Smith⁵ Dep. 35:6-10 (“it’s fairly common for people who are born deaf to be less than fluent in written English”) (Robertson Decl. Ex. 7).</p>		

³ Amy Bradley is one of CDOC’s Rule 30(b)(6) designees.

⁴ Exhibit A to the Andrews Report is the Expert Report of Dennis Cokely, PhD. Dr. Cokely passed away in August, after preparing his report in this case. *See* ECF 83, 84. Dr. Andrews incorporated his report by reference into hers. Andrews Report at 1.

⁵ Janet Smith is one of CDOC’s Rule 30(b)(6) designees.

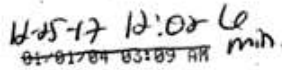
Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
9. ASL is neither a manual form nor a derivative form of English, and thus there is not a one-to-one correspondence between ASL signs and English words. The grammatical and syntactic structure of ASL is fundamentally different from the grammatical and syntactic structure of English. Andrews Report at 4 and Ex. A at 10.		
10. English is not Mr. Trevithick’s native language; communicating in written English is awkward, time-consuming, and incomplete for him. He is not able to fully express himself in written English or converse about the range of subjects he can in ASL. Trevithick Decl. ¶ 7; see also Andrews Report at 7 (using a TTY results in briefer messages and curtails ability to express thoughts and feelings in the same manner as hearing inmates using a telephone).		
11. Inmates in CDOC custody are permitted to use telephones to communicate with family members, resources in the community, and legal counsel (the “inmate phone program”). CDOC Administrative Regulation (“AR”) 850-12, Bradley Dep. Ex. 2, at 1.		
12. All hearing inmates in the CDOC have access to one or more wall phones. CDOC has approximately 1100 wall phones around the state. Bradley Dep. 15:19-20; 36:23-25.		

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13. Violation of rules relating to the inmate phone program can result in suspension of privileges or Code of Penal Discipline charges. AR 850-12 at 10-11.		
14. CDOC does not provide deaf inmates with access to videophones. Defs.' Suppl. Resps. to Pls.' First Set of Interrogs. to Defs. ("Defs.' Resps. to Interrogs."), Resp. to Interrog. Nos. 2, 8 (Robertson Decl. Ex. 4); Bradley Dep. 82:12-14.		
15. The only telecommunications service that CDOC provides deaf inmates is the TTY. Defs.' Resp. to Interrog. No. 1.		
16. TTY is a 60-year-old technology that enables remote communications between deaf people and between deaf and hearing people. In a conversation between two deaf people, both parties type and read responses using a teletypewriter device, and their typed conversation is transmitted back and forth across the standard telephone network. Ray Report at 7; <i>see also</i> Andrews Report at 6 and Ex. A at 34 (TTY technology is obsolete).		

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<p>17. In a TTY conversation between a deaf person and a hearing person, the deaf party types into the TTY and the hearing party uses a standard telephone. An operator dictates the deaf person's typed messages to the hearing party and types the hearing person's spoken messages to the deaf party. Ray Report at 7, <i>see also</i> Bradley Dep. 42:22 - 43:21.</p>		
<p>18. Keith Nordell, at that time CDOC's highest ranking lawyer, Jacobson Dep. 10:10-20, stated in a December 9, 2013 Project Request Form that "current TTY equipment is becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down." Bradley Dep. Ex. 9 at CDOC/Rogers 002132.</p>		
<p>19. Ms. Bradley testified that she agreed with the content of the Project Request Form. Bradley Dep. 100:18 - 101:14.</p>		

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<p>20. Because very few deaf people use TTYs, when Mr. Trevithick is forced to use a TTY to contact another deaf person outside a CDOC facility, a three-step process is required: he types a message into the TTY; the TTY operator speaks it to a VRS operator; and the VRS operator signs it to the recipient's videophone. When the deaf called party responds, this process is reversed: they sign their response to the VRS operator, who speaks it to the TTY relay operator, who types it to Mr. Trevithick. Trevithick Decl. ¶ 9.</p>		
<p>21. When asked how a deaf inmate who only has access to a TTY would communicate with a deaf person who only has access to a videophone, Amy Bradley, CDOC's Rule 30(b)(6) designee on the TTY system, stated, "I don't know how that would work," and that she was not aware of any inmates for whom that is an issue. Bradley Dep. 44:2 - 45:13.</p>		

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<p>22. During the past 10 to 15 years, deaf people have replaced TTYs with videophones for two very understandable reasons. First, TTYs require communication in typed English (the second language for most deaf people and a language in which they rarely attain any significant level of fluency). Second, because TTY conversations are typed, those conversations take significantly longer. Videophones, by contrast, enable deaf people to communicate using American Sign Language, a language in which they are much more comfortable and fluent. Thus, their videophone conversations are not encumbered by written English nor slowed by having to type. Signed videophone conversations are analogous to spoken telephone conversations. Andrews Report Ex. A at 33-34; <i>see also</i> Ray Report at 7-8.</p>		
<p>23. CTCF's TTYs often freeze in the middle of calls or produce garbled text or strings of X's and other nonsense characters. Trevithick Decl. ¶ 12.</p>		

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<p>24. For example, the image below is a complete transcript of a call placed by Mr. Trevithick, redacted to delete the called party's phone number; similar nonsense text appears throughout the transcripts provided by CDOC in discovery. Robertson Decl. ¶ 14 and Ex. 10.</p>  <pre> ~*XY CO CA 7878F NUMBER CAL PLS GA AUTOMATED MSG. THIS CALL IS FROM AN INMATE IN COLORADO CORRECTIONAL FACILITY. THIS CALL WILL BE RECORDED. INMATE NAME: MARC TREVITHICK PLEASE: FOR SECURITY, ONLY PROC- ESS CALL TO [REDACTED] GA GA GA [REDACTED] RINGING 1 ... 2 ... ~*X***XMM . (F) HELLO ~*X*** MARC HELLO MOMI I WANT TO SA UY HAPPY EERRMERRY HTTP://CHRIST- MAS TO U AND ALL ILU MUCH I HOPE U HAVE GOOD DAY TODAY. S GAUH THANK YOU MARC MERRY CHRISTMAS TO YOU I H OPE YOU HAVE A GOOD DAY ALSO THANK YOU FOR CALL- ING I LOVE YOU GA WELCOME AND ILU MUCH ALL OFU U. HGSUGS AND MISS U , I PARAYRAY FOR U AND RICH. HE U FIND OTHER JOB AS SOON. GA~- X~*X**XN**X*XPXXX'XXX- 'XX*HR YOU ALSO GA COM LET U GO ANDDDDDDDD- DDDDDD~*X**X*~*XNU FOR CALLING MARC I LOVE YOU BYE HANGING UP (PERSON HUNG UP) RELAY CO 7878F GA OR SK (RELAY WILL DISCONNECT IN 30 SECON- DS IF NO RESPONSE THANK YOU HAVE A NICE </pre>		

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<p>25. Provision of limited TTY access to deaf inmates fails to provide them with the means to effectively communicate with deaf and hearing individuals outside the correctional center. CDOC needs to replace or supplement these TTY devices with video-based services to provide deaf inmates with remote communications technology comparable to that used by their hearing peers. Ray Report at 10-11.</p>		
<p>26. Facial expressions, head tilts and nods, and eyebrow raises are important elements that encode the grammar of ASL. These linguistic elements are not found in English nor can they be conveyed in written notes or in a TTY text conversation. Andrews Report at 5.</p>		
<p>27. Videophones permit deaf people to convey emotion, mood, tone, and affect, which cannot be conveyed or perceived using the TTY. Trevithick Decl. ¶ 4.</p>		
<p>28. Provision of videophones is necessary to provide equivalent and effective telephonic services to deaf inmates who are able to communicate in ASL, regardless of level of intelligible speech or level of literacy. Andrews Report at 6-8; <i>see also id.</i> Ex. A at 37-38.</p>		

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29. The only way for Mr. Trevithick to have an equal opportunity to participate in and enjoy the benefits of CDOC's telecommunications services and programs is to use a videophone. Using a TTY is not as effective as the conventional telephone is for hearing prisoners. Trevithick Decl. ¶ 13.		
30. CDOC's Rule 30(b)(6) witness concerning the considerations relating to making videophones available in CDOC facilities believes it is "feasible" to provide videophone service to CDOC inmates and that "it's where the world is going." Bradley Dep. 88:23 - 89:2.		
31. Between late 2013 and mid-2016, CDOC considered undertaking a "pilot program" to provide videophone service to deaf inmates at CTCF; Ms. Jacobson ultimately decided not to move forward with it. Jacobson Dep. 21:8 - 22:3.		
32. Global Tel*Link ("GTL") provides conventional telephone service for inmates in the CDOC. Bradley Dep. 17:22-24.		
33. The GTL videophone kiosks that were installed in anticipation of the pilot program were still present at CTCF as of May 4, 2018. <i>See</i> Bradley Dep. 96:20 - 97:10; <i>see also</i> Robertson Decl. Ex. 9 (photographs of videophones at CTCF taken on May 4, 2018).		

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34. All of the videophone units observed at CTCF on May 4, 2018 were locked down, either with a metal cover and padlock, or in a locked room. Robertson Decl. ¶ 13.		
35. The videophone units in place at CTCF are GTL “Flex Link” units. Given this fact, GTL could provide VRS service to the CDOC. Deuster Dep. 21:14 - 22:11; 27:7-10 (Robertson Decl. Ex. 8).		
36. CDOC did not plead either the defense that videophones would result in a fundamental alteration of a service, program or activity, or that they would constitute an undue financial or administrative burden. Answer, ECF 69, at 7-9.		
37. CDOC has provided three reasons for its refusal to provide videophone service: (1) that deaf inmates would be able to dial any number, rather than being limited to an approved list of numbers; (2) that there was no mechanism to limit the duration of the call; and (3) that there was no way to charge inmates for phone calls. Defs.’ Resps. to Interrogs 3, 9, and 10; <i>see also</i> Jacobson Dep. 30:4 - 31:9.		
38. Ms. Jacobson also mentioned the risk of being vandalized, but conceded that this risk existed with conventional phones as well. <i>Id.</i> 31:11 - 32:11.		

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39. As for the duration of the call, although hearing inmates are limited to 20 minutes per call, they are permitted to call back multiple times if no one is in line to use the phone. Bradley Dep. 33:16-34:6.		
40. CDOC's interest in charging for videophone calls is based on its interest in maintaining records of the calls so they could be interpreted. Jacobson Dep. 42:3-17.		
41. CDOC does not monitor all calls in real time, and has not monitored any TTY calls since at least 2010. Bradley Dep. 25:25 - 26:2; 52:7 - 53:12.		
42. There are various methods for monitoring and recording video-based communications between a deaf inmate and the calling party. Ray Report at 17-18; Deuster Dep. 23:7-10.		
43. The videophone pilot program at CTCF had been set up with a system to record and monitor videophone calls. Ray Report 17-18 & Ex. E; <i>see also</i> Deuster Dep. 27:7-10.		
44. GTL makes available a videophone/VRS service for Flex-Link units that has the same call control and security enforcement measures as available on GTL's inmate calling system, including limitation to pre-approved users and called phone numbers and limits on the length of calls. Deuster Dep. 19:21 - 21:4.		

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45. While (as of June of 2018) this service was not available for the GTL platform in use by CDOC, it is available for departments of corrections at this time, and GTL anticipated having it available for the platform in use at CDOC in the near future. Deuster Dep. 29:4-19.		
46. No one at CDOC has been in touch with GTL recently about providing videophone service. Jacobson Dep. 36:22-25.		
47. CDOC is not aware of the cost of implementing videophone service; no one at CDOC has received a cost estimate or discussed costs with any providers. Jacobson Dep. 33:15 - 34:2.		
48. Plaintiffs Rogers and Begano both used videophones when they were detained in the El Paso County Jail, and Ms. Begano, when she was detained in the Denver Jail. Rogers Decl. ¶ 13; Begano Decl. ¶ 10.		
49. GTL provides videophone service to approximately 30 departments of corrections, each of which may in turn have many facilities. Deuster Dep. 17:23 - 18:9.		
50. In settlements from around the country, state departments of corrections and county sheriffs have agreed to provide videophones in their facilities. Robertson Decl. ¶¶ 15-16.		

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51. CDOC receives federal financial assistance as that term is used in Section 504 of the Rehabilitation Act. Fourth Amd. Compl., ECF 66, ¶ 99; Answer, ECF 69, ¶ 99.		