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.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, four deaf prisoners and a hearing prisoner whose mother is deaf, bring suit against the Colorado Department of Corrections and several officials (collectively "CDOC"), alleging that CDOC's failure to provide videophones violates their rights under Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq*, Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and the First Amendment to the United States Constitution. CDOC's failure to provide videophones to Plaintiffs prevents them from directly communicating with family members and friends in their native language, American Sign Language ("ASL"). In contrast, hearing inmates regularly engage in such direct communications through phone calls.

Rather than granting Plaintiffs' requests for videophones, CDOC provides only teletypewriters ("TTYs") -- an outdated technology largely abandoned by the deaf community because it requires them to communicate in written English (their second language) instead of ASL. Providing only TTYs to these Plaintiffs is analogous to providing hearing prisoners with only fax machines instead of telephones: "the communication is asynchronous, you send your communication, wait for a response, hope it is not garbled and hope you have not been misunderstood." Plaintiffs' Statement of Additional Material Facts ("PF") ¶ 19.

CDOC's Motion for Summary Judgment ("DMSJ"), ECF 133, should be denied because it cannot satisfy its burden to demonstrate that the TTY is equally effective to the videophone. CDOC does not contest that Plaintiffs Rogers and Rabinkov exhausted their administrative remedies, and cannot satisfy its burden to show that Plaintiffs Atkins, Begano, and Trevithick failed to exhaust. Finally, CDOC cannot satisfy its heavy burden to demonstrate that the claims of Plaintiffs Rogers and Begano are moot. Among other things, CDOC has repeatedly rolled out

new technology -- including videophones -- that it has later withdrawn, and use of the single videophone at the Denver Women's Correctional Facility ("DWCF") remains unequal to the telecommunications provided hearing prisoners. Without an injunction, Plaintiffs cannot be assured the effective communication to which they are entitled.

For the reasons set forth below and in Plaintiff Trevithick's Motion for Partial Summary Judgment, ECF 117,[1] Plaintiffs respectfully request that this Court deny CDOC's motion and grant Mr. Trevithick's motion. Cognizant of D.C.COLO.LCivR 7.1(d), prohibiting a motion from being included in a response, Plaintiffs urge the Court to consider whether CDOC has had sufficient notice and the undisputed facts are such that it would be appropriate to grant summary judgment in favor of all Plaintiffs under Title II and Section 504. *See* Fed. R. Civ. P. 56(f).

OVERVIEW OF FACTS

In these two consolidated cases over three years, CDOC has propounded no discovery, taken no depositions, and disclosed no experts. Plaintiffs' sworn declarations and Plaintiffs' experts' opinions are therefore unrebutted. In sum:

- Plaintiffs Rabinkov, Begano, Atkins, and Trevithick (the "Deaf Plaintiffs") and Plaintiff Rogers's mother are deaf, are native speakers of ASL, are not fluent in written English, and find written English to be awkward, time-consuming, and incomplete;
- In contrast, in ASL, the Deaf Plaintiffs can express and understand a full range of meaning and emotion, and engage in fluent, complete, and meaningful communication;
- Plaintiffs' experts have established that videophones are effective communication for Plaintiffs and TTYs are not;
- All of the Plaintiffs have requested that CDOC provide them videophones to communicate with friends and family outside the facility, thereby shifting the burden to CDOC to demonstrate that any alternative accommodation is equally effective; and

[1] Plaintiffs incorporate by reference ECF 117 and 117-1 through 117-14.

- The only evidence that CDOC has put forth to support the effectiveness of the TTY -- three TTY transcripts -- starkly demonstrates the inadequacy of the TTY and the need for videophones.

There are no material facts, disputed or otherwise, supporting Defendants' Motion.

ARGUMENT

I. CDOC Is Not Entitled to Summary Judgment under Title II and Section 504.

CDOC is not entitled to summary judgment on Plaintiffs' Title II and Section 504[2] claims; to the contrary, Plaintiffs are entitled to summary judgment because there is no genuine dispute that videophones are necessary to provide them meaningful access to the inmate phone program and communication as effective as that provided hearing inmates; that Plaintiffs have requested videophone service and CDOC has refused those requests; and that CDOC cannot satisfy its burden to show that its proposed alternative, the TTY, is equally effective.

Title II requires CDOC to ensure that communications with people with disabilities "are as effective as communications with others," 28 C.F.R. § 35.160(a)(1),[3] and to provide auxiliary aids and services as 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). "In 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), which means it must "honor the choice [of the disabled person] unless it can demonstrate that another effective means of communication exists," "Guidance to Revisions to ADA Regulation on

[2] The parties agree that the standards for the two statutes are the same. *See* DMSJ at 12 and n.1.
[3] The 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) (internal citations omitted).

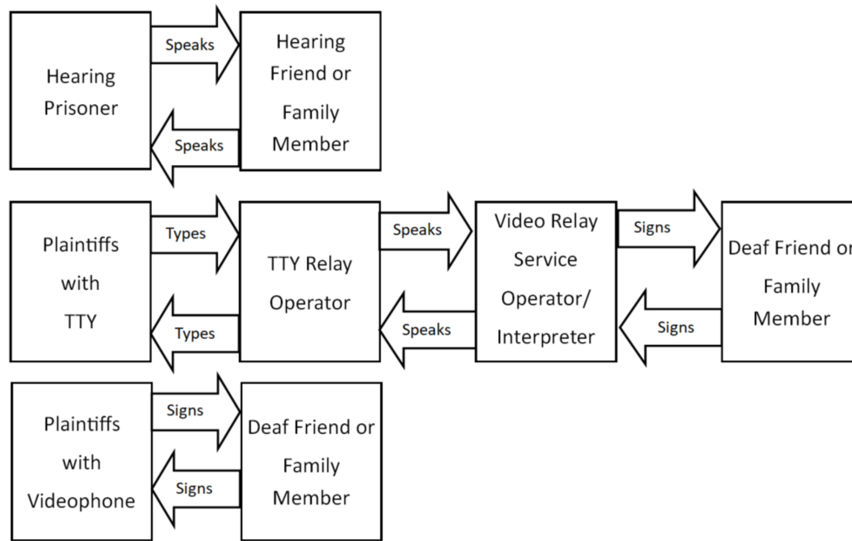
Nondiscrimination on the Basis of Disability in State and Local Government Services," ("Guidance") 28 C.F.R. pt 35, app. A at 665 (2018); *see also* U.S. Dep't of Justice, "The Americans with Disabilities Act Title II Technical Assistance Manual," § II-7.1100 ("TAM-II") (same). CDOC may reject Plaintiffs' request if it would result in a fundamental alteration or undue burden. *Id*. CDOC did not raise either defense. *See generally* DMSJ; PF ¶ 47.

Plaintiffs have demonstrated through unrebutted expert and lay testimony that videophones are necessary for them to communicate as effectively as hearing prisoners and that they have requested that CDOC provide videophones. PF ¶¶ 7-43. This shifts the burden to CDOC to demonstrate that their proffered alternative, the TTY, is equally effective. Guidance at 665; TAM-II § II-7.1100; *see also Taylor v. City of Mason*, 970 F. Supp. 2d 776, 783 (S.D. Ohio 2013) (same); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 396–97 (D. Md. 2011) (same); *Pierce v. City of Salem*, No. CIV. 06-1715-ST, 2008 WL 4415407, at *19 (D. Or. Sept. 19, 2008) (same); *Hayden v. Redwoods Cmty. Coll. Dist*., No. C-05-01785 NJV, 2007 WL 61886, at *9 (N.D. Cal. Jan. 8, 2007) (same). CDOC's then top lawyer conclusively nullified this defense when he stated, in 2013, 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." PF ¶ 20. CDOC cannot now argue that TTYs are an "equally effective means of communication."

The only evidence CDOC cites in support of its motion as to Title II and Section 504 rebuts rather than supports CDOC's reliance on the TTY. CDOC cites the transcripts of three TTY calls placed by Plaintiff Rogers, who is hearing, to her mother, who is deaf. DSMJ at 15

(citing Ex. A-5, ECF 133-5). The third transcript is a conversation concerning a very sensitive family matter relating to Ms. Rogers's past trauma and her efforts to ensure that her children do not experience the same trauma; it illustrates much of what is wrong with the TTY and how it falls far short of videophone communication. This call went through two relay operators so Ms. Rogers was unable to perceive her mother's tone and emotion during this excruciating call, and as the exhibit shows, it contains strings of nonsense characters that obscure parts of the conversation. PF ¶¶ 39-43. A hearing prisoner having a similarly sensitive conversation with her mother -- the proper comparator in light of the requirement for communication "as effective as" that provided others and an "equal opportunity to participate in, and enjoy the benefits of" CDOC's programs -- would have been able to speak with her directly, without intermediaries or garbled text, hearing and being able to respond to the difficult emotions this call invoked.

Ms. Rogers's experience is typical. When Plaintiffs contact deaf friends or family using the TTY, they type out their message, which is read aloud by a TTY relay operator to a video relay operator, who signs it to the called party. When the deaf called party signs their response, this process is reversed: the video relay operator interprets it into spoken English to the TTY relay operator, who types it to the prisoner. PF ¶¶ 23-24. This process is especially difficult for Plaintiff Rabinkov to use with his friends who communicate in Russian Sign Language; as a result, he cannot contact these individuals by phone. PF ¶ 25. The diagram below illustrates the contrast between the way hearing prisoners can communicate directly with hearing friends and family, and the way Plaintiffs are forced to communicate with deaf friends and family. The bottom example shows how Plaintiffs would be able to communicate using videophones -- the only method that is equivalent to the telephone service provided to hearing prisoners.



CDOC provides no other evidence besides Ms. Rogers's twice-interpreted TTY transcripts, did not retain experts, and does not cite to either the applicable regulations requiring effective communication and equal opportunity, 28 C.F.R. § 35.160(a)(1) and (b), or the DOJ guidance placing the burden on CDOC to justify the TTY, Guidance at 665; TAM-II § II-7.1100.

Instead, CDOC argues that Plaintiffs are not entitled to their preferred accommodation. DMSJ at 13-14. This is incorrect: CDOC is required to give "primary consideration" to Plaintiffs' request, and to "honor [that] choice" unless it can show the TTY is "equally effective." 28 C.F.R. § 35.160(b)(2); TAM-II § II-7.1100; *see also supra* at 4 (string cite). The defendants in *McBride v. Michigan Department of Corrections* made the same argument: that while videophones offer better communications, TTYs still provide meaningful access. 294 F. Supp. 3d 695, 709-10 (E.D. Mich. 2018). Relying on the same experts Plaintiffs designated in this case, the *McBride* court held that "[b]oth aspects of this argument are flawed." *Id.* at 710.

First, the *McBride* court held, the experts were not simply saying that videophones were "better;" rather, they had opined -- as they did here, *see, e.g.,* PF ¶ 34 -- that videophones were

"*necessary* to enable deaf and hard of hearing prisoners to communicate *effectively* with persons outside of prison." *McBride*, 294 F. Supp. 3d at 710 (emphasis in original). Second, the court held, these experts "clearly refute that TTYs provide 'meaningful access'; indeed, the very gist of their lengthy, detailed expert reports is that TTYs "fail[ ] to provide [deaf and hard of hearing prisoners] with the means to effectively communicate with ... individuals outside the correctional center.'" *Id.* (quoting report of Richard Ray). Mr. Ray offered the same opinion in this case. PF ¶ 31. Ultimately, as here, the *McBride* defendants' attempt to show that TTYs functioned and were available did not show that "mere functionality ... equate[d] with 'meaningful access.'" *McBride*, 294 F. Supp. 3d at 710.

CDOC's cases are not to the contrary. Four of them address communications for deaf prisoners. In two, the plaintiff did not request a videophone. *Douglas v. Gusman*, 567 F. Supp. 2d 877 (E.D. La. 2008); *Spurlock v. Simmons*, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000). In *Arce v. Louisiana*, 226 F. Supp. 3d 643, 651 (E.D. La. 2016), as this Court noted in its Order Denying Defendants' Motion to Dismiss, ECF 130, "the complaint did not allege that the TTY machine failed to function or that the plaintiff could not effectively communicate using the TTY machine." *Id*. at 7. This is in stark contrast to the undisputed evidence in this case. PF ¶¶ 14, 17-35, 113. In *Rosenthal v. Missouri Department of Corrections*, neither plaintiff complained of deficiencies in the TTY. No. 2:13-cv-04150, 2016 WL 705219, at *2-6, *10 (W.D. Mo. Feb. 19, 2016). None of these cases addresses the applicable regulation, 28 C.F.R. § 35.160.

Two other cases cited by CDOC arose in the correctional context; neither is relevant here. In *Wells v. Thaler*, a blind prisoner sought accessible legal resources and screen reading software to read his correspondence. The requested resources were not available and the requested

software could not read handwriting. 460 F. App'x 303, 306, 312-15 (5th Cir. 2012). In *Stafford v. King*, a prisoner with muscular dystrophy requested a typewriter to prepare court documents; however, he admitted he was never prevented from filing court documents, and continued to file handwritten documents after he was provided a typewriter. No. 2:11cv242–KS–MTP, 2013 WL 4833863, at *1, *6 n.2 (S.D. Miss. Sept. 11, 2013). *Gevarzes v. City of Port Orange, Florida*, No. 6:12-cv-1126-Orl-37DAB, 2013 WL 6231269, at *2 (M.D. Fla. Dec. 2, 2013) and *Valanzuolo v. City of New Haven*, 972 F. Supp. 2d 263, 274 (D. Conn. 2013), addressed effective communication in the context of arrests, that is, a single, short interaction where police may face exigent circumstances. Finally, *Dean v. University at Buffalo School of Medicine and Biomedical Sciences*, 804 F.3d 178, 187 (2d Cir. 2015), addressed accommodations for a student with mental illness, so the "primary consideration" provision, 28 C.F.R. § 35.160, was not at issue.

None of these cases addresses the obligation of a prison to provide deaf prisoners communication that is "as effective as" that provided others. 28 C.F.R. § 35.160(a)(1). That issue is addressed -- and resolved in the plaintiffs' favor -- in *McBride*, a case squarely on point with the present one. As the *McBride* court concluded, "Plaintiffs' desire for equally effective means of communication is not just an aspiration -- it is the law." 294 F. Supp. 3d at 706. Plaintiffs respectfully request this Court follow the persuasive reasoning of the *McBride* court, deny the DMSJ, and grant summary judgment in Plaintiffs' favor on their ADA and Section 504 claims.

II. Summary Judgment Is Not Appropriate on Plaintiffs' First Amendment Claims.

CDOC's First Amendment argument relies on a district court case that was reversed on appeal as to the proposition for which CDOC cites it and restates arguments rejected by this Court in its order denying CDOC's motion to dismiss in *Rogers*. CDOC does not point to any

evidence that denying access to videophones is related to any legitimate penological interest.

Deaf prisoners have a First Amendment right to communicate by videophone even when the prison makes a TTY available; the TTY is not a reasonable alternative. *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 214 (4th Cir. 2017). CDOC's argument on Plaintiffs' First Amendment claims relies on the district court decision that was reversed by the Fourth Circuit in *Heyer*. DSMJ at 11 (citing *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-3118-D, 2015 WL 1470877, at *13 (E.D.N.C. Mar. 31, 2015)); *compare Heyer*, 849 F.3d at 213-14, 221 (vacating and remanding the district court's decision as to, among others, the plaintiff's "videophone- and TTY-related First Amendment claims"). The only other case on which CDOC relies is *Arsberry v. Illinois* in which the Seventh Circuit's refusal to recognize a prisoner's First Amendment right to the telephone arose in a challenge to the rates charged for prison phone calls, not a complete denial of effective communication. 244 F.3d 558, 564 (7th Cir. 2001).

CDOC also argues that Plaintiffs have not asserted facts showing the "choice between TTY, [video relay], or the use of TTY Relay over videophones is not related to legitimate penological interests." DSMJ at 12. This Court has previously rejected this argument based on the allegations that "Plaintiffs Rogers [and] Begano ... have all previously been detained at other Colorado jails where they were able to use videophones. This allegation suggests that videophones can be used in prisons without impacting security concerns." Order, ECF 52, at 12 (citing Third Amended Complaint ¶¶ 30, 65 and *Heyer*, 849 F.3d at 212-18). These allegations are now undisputed facts. PF ¶ 44; *see also id.* ¶¶ 45-46.

This Court concluded that the proposition that videophones can be used without impacting security "is especially true here, where Defendants have not identified the security

concerns underlying the videophone ban." Order, ECF 52, at 13. Over eighteen months later, CDOC still has not identified any such security concerns. *See generally* DMSJ. CDOC is not entitled to summary judgment on Plaintiffs' First Amendment claims.

III. CDOC's Refusal to Provide Videophones Is Intentional.

Under Section 504, compensatory damages are available for intentional discrimination, which "can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." *Havens v. Colorado Dep't of Corr*., 897 F.3d 1250, 1264 (10th Cir. 2018) (internal citations omitted). There is a two-pronged test for this standard: knowledge that a harm to a federally protected right is substantially likely; and a failure to act upon that likelihood. *Id*. CDOC's conduct meets both prongs.

CDOC has long had sufficient knowledge. It has been aware since at least December 2013 that TTYs are antiquated and that videophones are necessary to, among other things, "lessen [prisoner] complaints and criticism from outside stake holders." PF ¶¶ 20-21. In addition, each of the Plaintiffs has repeatedly requested videophones. *See, e.g., id.* ¶¶ 9-10. Ms. Rogers, for example, explained in detail in her 2015 grievances that sign language is a visual language and that it is necessary to see facial expressions and hand gestures to express meaning. *Id*. ¶ 11. "When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001); *see also Havens*, 897 F.3d at 1266 ("[A] factfinder may conclude that a prison official knew of a

substantial risk from the very fact that the risk was obvious." (internal citations omitted)).

It is also undisputed that CDOC "failed to act" in response to that risk: it refused, for years, to provide videophones. And CDOC cannot avoid liability for intentional conduct by pointing to the TTYs. "Under the second element, 'a public entity does not "act" by proffering just any accommodation." *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 12297 (10th Cir. 2009) (internal citations omitted). CDOC's argument that it is not liable for intentional discrimination because it provides TTYs fails.

IV. Plaintiffs Exhausted Their Administrative Remedies.

The Prison Litigation Reform Act ("PLRA") requires Plaintiffs to exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). CDOC has the burden of proof to demonstrate that Plaintiffs failed to exhaust administrative remedies. *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007).

CDOC does not contest that Plaintiffs Rabinkov, Rogers, and Trevithick exhausted their administrative remedies. Based on the dates in CDOC's submissions and the uncontested date of filing in *Rabinkov v. Colorado Department of Corrections*, 18-cv-02926 (filed Nov. 14, 2018), it is undisputed that all Plaintiffs received their Step 3 grievance letters before that case was filed. Despite the fact that it has the burden of proof, CDOC cannot establish that Ms. Begano's Step 2 grievance was untimely or that Mr. Atkins's 2018 grievance was duplicative of a 2015 grievance.

A. Cathy Begano Exhausted Her Administrative Remedies.

1. CDOC Has Not Satisfied Its Burden to Show that Ms. Begano's Step 2 Grievance was Untimely.

CDOC admits that Ms. Begano submitted her Step 1, 2, and 3 grievances, and that her

Step 3 grievance was timely following receipt of the Step 2 response. Defs.' Separate Statement of Material Facts in Supp. of Mot. for Summ. J. ("DF"), ECF 137-1, ¶¶ 13-18. She received her Step 3 response before filing her claims in *Rabinkov*. PF ¶ 61.

CDOC argues that Ms. Begano's Step 2 grievance was untimely based on its assertion that she received the response to her Step 1 grievance on July 13, 2017 and filed her Step 2 grievance on July 21, 2017, that is, three days past the five-day deadline in AR 850-04. DF ¶¶ 15-16. However, CDOC presents no evidence that Ms. Begano received the response to her Step 1 grievance on July 13, 2017 or at any other time that would have rendered her Step 2 untimely. PF ¶¶ 51-60. The only document CDOC offers to support this assertion -- the Step 1 response -- does not contain a date in the field provided for the date the response was received. PF ¶ 54. Tony DeCesaro's affidavit, ECF 133-1, does not satisfy CDOC's burden as, based on his Rule 30(b)(6) testimony concerning the CDOC grievance procedure, he could not have had personal knowledge of the date on which the Step 1 grievance response was served on Ms. Begano. PF ¶¶ 55-58. CDOC has not satisfied its burden of proof to show that Ms. Begano failed to exhaust her administrative remedies.

2. CDOC Waived Any Timeliness Objections to Ms. Begano's Grievances.

CDOC accepted Ms. Begano's Step 2 grievance and responded to it on the merits. PF ¶ 52. That made "the filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court." *Savage v. Troutt*, No. CIV-15-0670-HE, 2018 WL 1404401, at *2 (W.D. Okla. Mar. 20, 2018). In *Savage*, the Oklahoma Department of Corrections accepted an intermediate-level grievance and responded on the merits, while, at the final stage, asserting that the intermediate grievance had been untimely. The court held that this was improper and

that, ultimately, exhaustion was excused. *Id.* at *2-3. For the same reason, CDOC has waived its timeliness objection to Ms. Begano's Step 2 grievance by responding to it on the merits.

B. Andrew Atkins Exhausted His Administrative Remedies.

CDOC admits that Mr. Atkins submitted his Step 1, 2, and 3 grievances concerning the issues in this case and that all three steps were timely. DF ¶¶ 21-22. CDOC responded on the merits to his Step 1 and 2 grievances. PF ¶ 64. CDOC's response to Mr. Atkins's Step 3 grievance was that it duplicated a grievance he filed in 2015; CDOC relies on this to argue that Mr. Atkins did not exhaust. DMSJ at 9.

As an initial matter, CDOC waived their procedural objections to Mr. Atkins's 2018 grievance by responding to Steps 1 and 2 on the merits. *See Savage*, 2018 WL 1404401, at *2.

In addition, the 2015 grievance response shows that the 2018 grievance is not duplicative. Mr. Atkins's 2015 grievance complained that the TTY was often broken and requested that CDOC install videophones instead. PF ¶ 66. CDOC's response to that grievance stated, "We are getting ready to launch a PILOT program for video relay phones at CTCF." *Id.* ¶ 69. Mr. Atkins did not file a Step 2 grievance for the simple reason that his Step 1 was not denied; rather, CDOC committed to launch a videophone pilot program at CTCF. *Id.* ¶ 66-70.

CDOC considered the pilot program for three years before abandoning it in 2016. PF ¶¶ 74-82. There is no evidence, however, that CDOC ever informed Mr. Atkins that it had abandoned this program. "An inmate has no obligation to appeal from a grant of relief, or a partial grant that satisfies him, in order to exhaust his administrative remedies. Nor is it the prisoner's responsibility to ensure that prison officials actually provide the relief that they have promised." *Harvey v. Jordan*, 605 F.3d 681, 685 (9th Cir. 2010).

C. Plaintiffs Begano, Atkins, and Trevithick Timely Exhausted.

CDOC concedes that Plaintiff Trevithick exhausted his administrative remedies, DF ¶ 27, and that Plaintiffs Begano and Atkins completed all three steps of the grievance process, *id.* ¶¶ 14-17, 21-22. These Plaintiffs all completed the grievance process before filing their claims in *Rabinkov*. PF ¶¶ 50, 61, 63. CDOC argues that these Plaintiffs did not exhaust before joining the *Rogers* case. DSMJ at 10. However, even if they exhausted after filing in *Rogers*, it would mean, at most, that their claims should be dismissed without prejudice. *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009). The filing of Plaintiffs' claims in *Rabinkov* after full exhaustion has cured this issue. *Mitchell v. Figueroa*, 489 F. App'x 258, 260 (10th Cir. 2012) (holding that prisoner could refile following dismissal without prejudice for failure to exhaust).

D. Plaintiffs Were Not Required to Exhaust Administrative Remedies Because the Requested Remedy Was a Dead End.

The PLRA requires prisoners to exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a); *see also Tuckel v. Grover*, 660 F.3d 1249, 1252 (10th Cir. 2011) ("[I]f an administrative remedy is not available, then an inmate cannot be required to exhaust it."). "[T]he ordinary meaning of the word 'available' is '"capable of use for the accomplishment of a purpose," and that which '"is accessible or may be obtained."'" *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (internal citations omitted). Videophones were not an available remedy -- they were not something that could be obtained -- when Plaintiffs filed their grievances. CDOC has not satisfied its burden to prove that "administrative remedies were, in fact, available." *See Purkey v. CCA Det. Ctr.*, 263 F. App'x 723, 726 (10th Cir. 2008).

In *Ross*, the Supreme Court delineated three ways in which a remedy might be unavailable; the first of these was where

> (despite what regulations or guidance materials may promise) it operates as a simple dead end -- with officers unable or consistently unwilling to provide any relief to aggrieved inmates. ... So too if administrative officials have apparent authority, but decline ever to exercise it. Once again: "[T]he modifier 'available' requires the possibility of some relief." When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy.

Ross, 136 S. Ct. at 1859 (internal citations omitted). This is the situation that confronted Plaintiffs when they grieved CDOC's refusal to provide videophones. From 2013 to 2016, the Department had considered a pilot program to provide videophone service, but by 2017 -- when Ms. Begano filed her grievances -- it had definitively decided not to proceed. PF ¶¶ 74-83. This was still the case in 2018 when Mr. Trevithick and Mr. Atkins filed their grievances, a fact that was underscored by the identical response to their Step 2 grievances (and Mr. Rabinkov's as well): "Video phones are not currently approved for use in the DOC." PF ¶ 71. Ms. Begano and Ms. Saugause, another deaf inmate in DWCF, also received identical responses, denying access to videophones. *Id.* ¶ 72.

Since a Department-wide policy decision had been made not to provide videophone service to any inmate at any facility, any individual grievance requesting such service would be the definition of a "dead end." *See, e.g., Taylor v. Gilbert*, No. 2:15-cv-00348-JMS-MJD, 2017 WL 3839390 at *4 (S.D. Ind. Aug. 31, 2017) (holding that the case "exemplifie[d] the 'dead end' scenario" when there was an unwritten policy by grievance staff not to consider certain types of grievances); *cf. Jarboe v. Maryland Dep't of Pub. Safety & Corr. Servs*., No. 12-cv-572-ELH, 2013 WL 1010357, at *15 (D. Md. Mar. 13, 2013) (holding, in case by deaf prisoners challenging effective communication in prison, that the "grievance procedure simply is not equipped to address programmatic complaints such as those advanced here by plaintiffs.").

V. Ms. Rogers's and Ms. Begano's Claims Are Not Moot.

CDOC argues that its installation of a single videophone in a single unit at DWCF moots the claims of Plaintiffs Rogers and Begano. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. [I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citations and quotation marks omitted). A case is moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* CDOC has the "heavy burden of persua[ding]" this Court "that the challenged conduct cannot reasonably be expected to start up again." *Id.*

CDOC cannot satisfy its "heavy burden" to make it "absolutely clear" that their failure to provide a videophone at DWCF cannot be "reasonably expected to recur" because:

- CDOC has a history of starting and stopping its videophone program, including cancelling the previous program the day it was supposed to go live, PF ¶¶ 73-82;
- CDOC started this latest videophone project at least in part because the undersigned was contacting deaf prisoners relating to the pending *Rogers* litigation, PF ¶ 84;
- CDOC paid nothing to install the current videophone and has no contract with the provider, PF ¶¶ 102-104;
- CDOC cancelled the previous videophone program based on purported security concerns, many of which remain with respect to the current program, PF ¶ 105;
- There is no policy ensuring access to videophones for Plaintiffs, PF ¶ 100;
- CDOC has previously rolled out other technology programs to prisoners and later cancelled them, PF ¶¶ 109-112;
- Videophone service at DWCF remains unequal to phone service for hearing prisoners; PF ¶¶ 88-95; and

- CDOC continues to maintain that Title II and Section 504 do not require it to provide videophones to Plaintiffs, PF ¶¶ 107-108.

Were this Court to dismiss Plaintiffs' claims, CDOC would be "free to return to [its] old ways," *Friends of the Earth*, 528 U.S. at 189, something it has done repeatedly in the past.

The Eleventh Circuit considered three factors in addressing the question of voluntary cessation in the ADA context: "(1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007). Based on all three factors -- and others -- Ms. Begano's and Ms. Rogers's claims are not moot.

CDOC's practice of denying access to videophones is longstanding and official. *See, e.g.,* PF ¶¶ 48, 71-72. It is more reasonable to expect "recurrence when the challenged behavior constituted a 'continuing practice' or was otherwise deliberate." *Sheely*, 505 F.3d at 1184-85.

CDOC's provision of videophones at DWCF was timed to avoid the present litigation. PF ¶ 84. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *Sheely*, 505 F.3d at 1188-89 (holding claim not moot where the change in policy occurred in the middle of the litigation); *Heyer*, 849 F.3d at 220 (holding that provision of accommodations to deaf prisoner did not moot the case as a "mid-litigation change of course ... does not support [a] decision to dismiss [the] claims as moot"). The *McBride* court rejected a similar argument, holding "greater skepticism is warranted where such remedial action 'only

appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed.'" 294 F. Supp. 3d at 720 (internal citations omitted).

CDOC does not acknowledge liability. PF ¶¶ 107-108. "[A] defendant's failure to acknowledge wrongdoing ... suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely*, 505 F.3d at 1187. In *Ybanez v. Raemisch*, the court rejected mootness in part because CDOC refused to "concede[] that the challenged versions of the policy violated the First Amendment." No. 14-CV-02704-PAB-MLC, 2018 WL 2994416, at *3 (D. Colo. June 14, 2018); *cf. United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 856 (9th Cir. 1995) (defendant's "intransigent insistence on its own blamelessness" and "repeated self-justification" showed "a likelihood of future violation").

It would be easy for CDOC to resume the challenged practice. A number of courts have considered the ease with which the defendants could undo its promised solution as mitigating against mootness. For example, in *Feldman v. Pro Football, Inc.*, deaf football fans challenged a stadium's refusal to provide open captioning. The defendant started providing captioning mid-litigation and urged mootness. The Fourth Circuit held, "[g]iven the ease with which defendants could stop providing captioning, 'we simply cannot say that they have made an affirmative showing that the continuation of their alleged ADA violations is nearly impossible.'" 419 F. App'x. 381, 387-88 (4th Cir. 2011) (internal citations omitted); *see also Ybanez*, 2018 WL 2994416, at *3 (CDOC "ha[s] not pointed to any legal or practical barrier to their reinstatement of the previous versions of the policy"); *Goldman v. Brooklyn Ctr. for Psychotherapy, Inc.*, No. 15-CV-2572-PKC-PK, 2018 WL 1747038, at *2 (E.D.N.Y. Apr. 11, 2018) (holding that defendant that contracted with an interpreting agency in response to the plaintiff's lawsuit could

"choose to end its relationship with [the agency] at any time, thereby resurrecting the set of circumstances that prompted this litigation"). It is also telling -- and suggestive of relapse -- that CDOC has not adopted any policies relating to videophones or in any way ensuring that Plaintiffs will have consistent access to that service, PF ¶ 100. *See Goldman*, 2018 WL 1747038, at *3 (relevant to rejection of mootness that the defendant had not "adopted proper policies to ensure that its intake procedures will no longer violate the ADA").

This Court can grant effective relief. "'[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal citations omitted). Here, based on CDOC's history of starting and stopping the videophone program; rolling out and then withdrawing technology; failing to maintain existing TTY technology; failing to issue a policy ensuring access to videophones for eligible prisoners; and failing to secure a contract to provide videophone service, there is no question that this Court can grant effective relief, not only for Plaintiffs housed at CTCF or receiving medical care at DRDC -- who do not yet have videophones -- but also for those at DWCF, who cannot be assured of consistent, equal access to the videophone at that facility. For these reasons, CDOC has not "eliminat[ed] the issues upon which this case is based." *Wyo. v. U.S. Dep't of Agr.*, 414 F.3d 1207, 1212 (10th Cir. 2005), *cited in* DMSJ at 18.

Ultimately, "'[b]ald assertions of a defendant … that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot.'" *McBride*, 294 F. Supp. 3d at 720 (quoting *Heyer*, 849 F.3d at 219). "It is no small matter to deprive a litigant of the rewards of its efforts ... . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that is sought." *Adarand*

Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000). Based on CDOC's history, Plaintiffs need the judicial protection of an injunction requiring CDOC to provide them videophone service on a basis equal to that on which hearing inmates received phone services, and to implement policies ensuring continued access to such service.

CONCLUSION

For the reasons set forth above and in ECF 117, Plaintiffs respectfully request that this Court deny Defendants' motion and grant summary judgment in favor of Plaintiffs under Title II and Section 504.

Respectfully submitted,

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Dated: May 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2019 I electronically filed the foregoing document, Plaintiffs' Separate Statement of Facts in Opposition to Defendants' Motion for Summary Judgment, and the Declarations of Amy Robertson, Bionca Charmaine Rogers, Cathy Begano, Leonid Rabinkov, Marc Trevithick, Andrew Atkins, Jennifer Saugause, and Teresa Jordan with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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