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 TO DISMISS AS MOOT

The assertion of Defendants Colorado Department of Corrections and officials (collectively "CDOC") that they intend to continue their current videophone program for deaf prisoners cannot satisfy their heavy burden to demonstrate that they will not, in the future, cancel this program. Among other things, this assertion was made in the middle of contested litigation, in an affidavit containing a significant misrepresentation on which CDOC also relies in its mootness argument. This unreliable assertion cannot outweigh the undisputed evidence of an earlier, canceled, videophone program, of CDOC's history of providing prisoners with technology and then taking it back, of CDOC's continued legal arguments that videophones are not required, and of the ease with which CDOC could withdraw the videophones in light of the fact that it has not entered a contract for the service.

Plaintiffs respectfully request that this Court reject CDOC's arguments for mootness, deny its motions to dismiss and for summary judgment on this and other grounds, and grant summary judgment in Plaintiffs' favor on their claims under Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794. *See* ECF 117, 140.

Procedural Posture

Earlier this year, CDOC moved for summary judgment based in part on its argument that Plaintiffs' claims requesting videophones at the Denver Women's Correctional Facility ("DWCF") were moot. Mot. for Summ. J. ("MSJ"), ECF 133, at 18-19. That motion is fully briefed. *See* ECF 140, 141. Six weeks later, CDOC moved to dismiss as moot claims relating to DWCF and the Colorado Territorial Correctional Facility ("CTCF"). Mot. to Dismiss as Moot ("MTD"), ECF 143. This brief opposes the MTD. Plaintiffs incorporate by reference Section V

of their Response to Defendants' Motion for Summary Judgment, ECF 140 at 16-20, and the facts on which that argument was based, Pls.' Separate Statement of Facts in Opp'n to Defs.' Mot. for Summ. J. ("Plaintiffs' Facts"), ECF 140-1 at 27-33, ¶¶ 73-113, and write further to address new information and arguments in the MTD.

Plaintiffs' Claims Are Not Moot

In response to CDOC's MSJ, Plaintiffs demonstrated that this latest chapter in CDOC's six-year on-again-off-again history of videophone projects was a classic example of the voluntary cessation exception to mootness:[1] based on this history and other examples of CDOC providing prisoners with technological solutions and then later taking them away, Plaintiffs need the protection of an injunction to ensure provision of videophone service to deaf prisoners on an equal basis with the phone service provided hearing prisoners.

In their reply in support of the MSJ, CDOC admitted most of the facts supporting Plaintiffs' voluntary cessation argument. Crucially, in their response to Plaintiffs' Facts, CDOC admitted all of the facts cited in the following bullet points:

- CDOC has a history of starting and stopping its videophone program, including cancelling the previous program the day it was supposed to go live, ECF 141-1, ¶¶ 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, *id.* ¶ 84;
- CDOC paid nothing to install the current videophone and has no contract with the provider, *id.* ¶¶ 102-104;

[1] *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) ("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.") (internal citations omitted).

- There is no policy ensuring access to videophones for Plaintiffs, *id.* ¶ 100;
- CDOC has previously rolled out other technology programs to prisoners and later cancelled them, *id.* ¶¶ 109-112; and
- CDOC continues to maintain that Title II and Section 504 do not require it to provide videophones to Plaintiffs, *id.* ¶¶ 107-108.

The strongest evidence that the voluntary cessation exception applies here -- and that the case is not moot -- is that CDOC previously spent two and a half years studying, preparing for, and installing videophones only to call off the program at the last minute. Plaintiffs' Facts ¶¶ 74-82. CDOC admits each of these facts, ECF 141-1, ¶¶ 74-82, but attempts to explain away the 2013-2016 pilot program by asserting that "Executive CDOC staff were unaware of" it. MTD at 3, 9 (citing Aff. of Adrienne Jacobson, ECF 143-1, ¶ 5).

CDOC's statement that its executive staff were unaware of the videophone pilot program is false. Keith Nordell, the Director of Legal Services at CDOC from October 2009 to June 2015, proposed the pilot program in December, 2013. Decl. of Keith Nordell ¶¶ 2-3 & Ex. 1. He had regular meetings with the Executive Director of the CDOC and other executive staff members to brief them on ADA issues; during some of those meetings, he briefed them on the videophone pilot program. *Id.* ¶¶ 5-6 & Exs. 2-3.[2]

CDOC also relies on Ms. Jacobson's assertion that CDOC intends to maintain videophone units for use by deaf prisoners. *See* MTD at 11 (citing Jacobson Aff. ¶ 13). This

[2] Exhibits 2 and 3 to Mr. Nordell's declaration are CDOC meeting agendas showing discussion of videophones among Mr. Nordell, Rick Raemisch, then CDOC Executive Director, and Kellie Wasko, then and now CDOC Deputy Executive Director. These documents are responsive to discovery served by Plaintiffs on CDOC on November 1, 2017, but were never produced by CDOC. Rather, the undersigned received them from Mr. Nordell on June 25, 2019. Robertson Decl. in Opp'n to Mot. to Dismiss ¶¶ 5-6.

single assertion -- made in the context of litigation -- cannot satisfy CDOC's "heavy burden" to show that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A "'mid-litigation change of course' in accommodating deaf and hard of hearing prisoners does not moot ADA and Rehabilitation Act claims because '[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 v. Michigan Dep't of Corr.*, 294 F. Supp. 3d 695, 720 (E.D. Mich. 2018) (quoting *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017)) (emphasis added). Ms. Jacobson's bald assertion[3] -- in support of dispositive motions -- that CDOC will continue to provide videophones this time around cannot outweigh the undisputed evidence, *see supra* at 2-3, including most importantly that CDOC has repeatedly canceled technology programs for prisoners, including a previous videophone program.

It is also undisputed that the current videophone program at CDOC was motivated at least in part by the present litigation. Ms. Jacobson asserts that she decided to "re-visit the option of videophone service" in early 2018. CDOC admits that its Rule 30(b)(6) witness concerning past, present, or future plans for use of videophones at CDOC sent an email in January, 2018, stating, "I would like to get started as soon as possible on the video phone project as CTCF's deaf population is being contacted by Attorney Amy Robertson. (The same attorney representing the deaf women in the pending lawsuit regarding lack of videophones.)" ECF 141-1 at 30, ¶ 84.

[3] Plaintiffs respectfully submit that this Court should view this assertion with appropriate skepticism in light of Ms. Jacobson's assertion -- in the same affidavit -- that CDOC executive staff were unaware of the videophone pilot program, which is demonstrably untrue based on documents in CDOC's possession, called for by pending discovery, but withheld from Plaintiffs.

Finally, the current videophone program still does not provide phone access equal to that provided hearing prisoners. CDOC admits that deaf prisoners are required to sign up in advance to use the videophone, while hearing prisoners are not required to do this to use the conventional phone, and that deaf prisoners must rely on staff members to dial the phone for them. ECF 141-1 at 31, ¶¶ 90-92. As a result of the latter, the ability of deaf prisoners to use the VP "often depends on the mood or whim of the guards;" for example, one guard "told deaf prisoners that [they] cannot use the VP even when no one was using it," something that occurred repeatedly over a three-day period earlier this month. Atkins Decl. in Opp'n to Mot. to Dismiss, ¶ 6. The videophones were installed in a public area, so other prisoners are able to see the people deaf prisoners are calling. Rabinkov Decl. in Opp'n to Mot. to Dismiss ¶ 5; Trevithick Decl. in Opp'n to Mot. to Dismiss ¶ 6. Naturally, other prisoners are not able to listen in on hearing prisoners' conventional phone calls, much less see the friends and family members they are speaking with.

CDOC appears to believe that Plaintiffs have the burden to show that the current videophone program is "gamesmanship" or "a ploy to deprive the court of jurisdiction." MTD at 7, 8. While there is, in fact, evidence that this is the case, *see* ECF 141-1 at 30, ¶ 84, this is not the standard. Rather, it is CDOC that has the burden -- the "heavy burden" -- to show that the challenged conduct will not recur. In light of the undisputed facts that CDOC has offered and withdrawn videophones, tablets, and video visitation, that it still asserts that videophones are not required, and that it would be easy for CDOC to withdraw this round of videophones, CDOC has not satisfied and cannot satisfy its burden. Because it is very far from "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 189, Plaintiffs' claims are not moot.

CONCLUSION

For the reasons set forth above and in Section V of Plaintiffs' Response to Defendants' Motion for Summary Judgment, Plaintiffs respectfully request that this Court hold that Plaintiffs' claims are not moot.

Respectfully submitted,

/s/ Amy F. Robertson

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Dated: June 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019 I electronically filed the foregoing document, and the Declarations of Amy Robertson, Leonid Rabinkov, Marc Trevithick, Andrew Atkins, and Keith Nordell with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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/s/Amy F. Robertson
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