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

ERNEST KEVIN TRIVETTE, *et al.*, Plaintiffs, v. TENNESSEE DEPARTMENT OF CORRECTION, Defendant.	Civil No. 3:20-cv-00276 **Judge Aleta A. Trauger**

Plaintiffs' Reply in Support of Motion for Preliminary Injunction

Plaintiffs Alex Gordon Stinnett, Jason Andrew Collins, and Disability Rights Tennessee ("DRT"), by and through counsel, respectfully submit this reply brief in support of their Motion for Preliminary Injunction ("PI Motion"), ECF No. 22.

Plaintiffs Stinnett and Collins, deaf prisoners in the custody of Defendant Tennessee Department of Correction ("TDOC"), are entitled to the injunction they seek because TDOC has explicitly denied their requests for videophones ("VP") at all times prior to the filing of the instant motion; because the VP access TDOC now promises (but has not yet delivered) is unequal to that of the phone service provided hearing prisoners; and because, even if it were equal, access could be revoked, TDOC's single VP could fall out of repair, or Plaintiffs could be moved at any time.

FACTS

1. As of November 30, 2020, neither Mr. Stinnett nor Mr. Collins has access to a videophone that would permit him to communicate in American Sign Language ("ASL") directly with friends and family who also communicate in ASL.

2. Defendant TDOC does not contest that, prior to the filing of the PI Motion, it had

never provided VP service to Mr. Collins or Mr. Stinnett. TDOC concedes that it only has a VP at one facility, the Northeast Correctional Complex ("NECX"). Response in Opposition to Motion for Preliminary Injunction, ECF No. 32 ("Opp." or "Opposition") at 4.

3. Following the filing of the PI Motion, TDOC moved Mr. Collins from Bledsoe County Correctional Complex ("BCCX") to NECX where he has been in quarantine at least through November 30, 2020, without access to VP. *Id.*; Collins Supp. Decl. ¶ 2. Hearing inmates in quarantine have had access to phones. *Id.* ¶ 4. The move from BCCX to NECX deprived Mr. Collins of access to a drug rehabilitation program he was participating in. *Id*. ¶¶ 15-16. After TDOC told Mr. Collins he would be moved to NECX because there is a VP there, he again requested (through counsel) that TDOC provide VP to him at BCCX or, in the alternative, allow him to meet by Zoom with his deaf family members including his young children. He made clear to TDOC that he wanted to remain at BCCX in order to continue participating in his drug rehabilitation program. Lafferty Supp. Decl. ¶ 4.

4. Although Mr. Stinnett is already at NECX, there is no VP in the area of the prison in which he is housed. Opp. at 3; Stinnett Supp. Decl. ¶ 3. Rather, TDOC claims to be "working with" its contractor to install a VP in this unit. Opp. at 3. TDOC gave Mr. Stinnett the option to move to the area that allegedly has a VP, *id.* at 3-4, but it was his understanding that this would require him to move to a higher security level and prevent him from working at his current job, so he declined, Stinnett Supp. Decl. ¶ 6.

5. TDOC asserts that, for a deaf prisoner to communicate directly by VP – so-called "point-to-point" VP – the called party must have "1 to 2 gigs of bandwidth;" in the alternative "the parties can employ the relay service." Opp. at 1-2. This overstates the required bandwidth for VP by several orders of magnitude; in any event, the bandwidth required for a deaf person to

receive a point-to-point call is the same as for that person to receive a relay call. Ray Decl. ¶ 21. Moreover, a deaf prisoner communicating with a deaf friend or family member cannot use "relay service." Ray Decl. ¶¶ 14-20.

6. TDOC concedes that hearing prisoners have greater access to conventional telephones than it is willing to provide deaf prisoners access to VP. Opp. at 2. Hearing prisoners have access to conventional telephones between the hours of 6:00 a.m. and 10:00 p.m. TDOC Administrative Policy and Procedure, Index #503.08, "Telephone Privileges," ¶ VI(A)(3). Given this, providing equal access for deaf prisoners to VP would not require access "at all hours of the day and night," a straw man raised in the Opposition. *See* Opp. at 11.

7. TDOC concedes that its policy is to limit deaf inmates' use of the VP to three times per week for 30 minutes at a time. Opp. at 2. It asserts that this is because the VP must be stored in an office to which prisoners may not have unlimited access for security reasons. *Id.*

8. TDOC asserts that Hunter Hancock, an advocate with DRT, approved TDOC's limitation on the number and duration of VP calls. Gentry Decl., ECF No. 32-1 ¶ 6. That is not the case. Hancock Decl. ¶ 11.

9. TDOC asserts that it would be an undue burden to provide access to VP for deaf prisoners in their housing units, a measure that would permit use on terms closer to that permitted hearing inmates using the telephone. The sole basis for this argument is cost. TDOC asserts – relying only on a non-expert, hearsay "informal[ ] estimate[ ]" – that providing VP service in housing units would require fiber cabling at a cost of 1.2 million dollars. Opp. at 2.

10. Defendant's informal estimate is incorrect. As Plaintiffs' expert explains, given that TDOC admits its unit team offices are wired for fiber cable, Gentry Decl. ¶ 5, VP service could be provided to housing units through the use of ethernet cable, likely at a far lower cost

than 1.2 million dollars. Ray Decl. ¶ 23. TDOC has many other options for providing VP service that do not require fiber cable. *Id.* ¶¶ 24-26.

11. Citing the declaration of Jerry Gentry, TDOC asserts that a VP came online at NECX in early 2018 and that "the system works well." Opp. at 1; Gentry Decl. ¶¶ 3-4. However, in a July 26, 2018 email to a DRT advocate, Mr. Gentry stated that the system had just been installed, and – several days later – that "the quality was not good," and – even after trying several different pieces of equipment – that it was "dropping between [NECX] and the called party." Craig Decl. Ex. A.

12. In addition, the VP at NECX was not in good working order and did not provide Plaintiff Trivette with effective communication from the time of the VP's installation through his release on parole on approximately April 2, 2019. The VP often froze, pixelated, or moved in slow motion. Sometimes the screen went black. Other times the screen of the person he was calling went black. Trivette Decl. ¶¶ 6-7; *see also* Hancock Decl. ¶ 8-9.

13. On June 7, 2019, Plaintiff DRT requested that TDOC "install videophones (VPs) in each facility." Mancino-Rosete Decl. Ex. A. On August 13, 2019, Bryce Coatney, Deputy General Counsel for TDOC, responded that TDOC was developing a new request for proposals that would require the provision of VP service, and that "[i]f an inmate requires videophone service before the new contract is awarded, TDOC will make sure that the services are provided on an as-needed basis." *Id.* However when Mr. Stinnett and Mr. Collins requested access to VPs in March 2020, they were both denied and told that there was no policy permitting VPs. Lafferty Decl., ECF 23-3, Exs. 3-4.

ARGUMENT

TDOC misstates the standard for a mandatory injunction. *See* Opp. at 5. As Plaintiffs previously noted, the Sixth Circuit applies the same standard to both mandatory and prohibitory preliminary injunctive relief. *United Food & Com. Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth*., 163 F.3d 341, 348 (6th Cir. 1998), *cited in* Mem. in Support of Pl. Disability Rights Tennessee's Mot. for Preliminary Injunction, ECF No. 23, at 9.

Plaintiffs bring suit under Title II of the ADA, 42 U.S.C. § 12131 *et seq*., and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The parties agree that the standards under these statutes are the same. *See* Opp. at 7.

Under Title II's implementing regulations, TDOC is required to provide deaf prisoners communication as effective as that provided others and to give primary consideration to the requests of deaf prisoners unless it can demonstrate that an alternative form of communication is equally effective. 28 C.F.R. § 35.160(a)(1), (b)(2). TDOC does not appear to contest that VPs are required for effective communication or to argue that the teletypewriters (TTYs) that it has provided Mr. Stinnett and Mr. Collins in the past constitute effective communication. Rather, TDOC argues that a preliminary injunction is unnecessary because it will soon be providing these Plaintiffs with access to VP service.

This is not so. Plaintiffs remain likely to prevail on the merits both because TDOC's plan to provide VP service will not result in telecommunications "as effective as" the conventional telephone service for hearing prisoners and because TDOC does not provide evidence sufficient to support defenses on which it has the burden of proof. Even if its VP plans could satisfy the requirements of the ADA, an injunction remains necessary as TDOC could move either prisoner at will or could limit, revoke, or fail to maintain VP service.

1. TDOC is not providing videophone service that is as effective as phone service.

TDOC has not previously provided VP access to either Mr. Stinnett or Mr. Collins; in its Opposition, the best it can offer is a promise to provide Mr. Collins VP service following his quarantine, and service to Mr. Stinnett at some uncertain future date. Given TDOC's prior promises to Plaintiffs Trivette and DRT regarding installation of VPs and that the VP installed at NECX is not in good working order, Plaintiffs are understandably reluctant to rely on TDOC's latest promises. *See* FACTS ¶¶ 11-13

Even if TDOC eventually provides Plaintiffs access to VPs in good working order, it concedes such access will be limited to three times per week for 30 minutes, whereas hearing prisoners may access conventional telephones any time between 6 a.m. and 10 p.m. This does not constitute communication for deaf prisoners that is "as effective as" that for others, as required by the implementing regulations of Title II of the ADA. 28 C.F.R. § 35.160(a)(1).

TDOC cites several cases for the proposition that the ADA does not require prisons to provide equal access to telecommunications services for deaf prisoners. Opp. at 7-10. None of these cases address or even cite to 28 C.F.R. § 35.160 and its "as effective as" and "primary consideration" language. Two are *pro se* cases. *Spurlock v. Simmons*, 88 F. Supp. 2d 1189 (D. Kan. 2000); *Douglas v. Gusman*, 567 F. Supp. 2d 877 (E.D. La. 2008). The other two cases rely on one or the other or both of these *pro se* cases without further analysis. *Rosenthal v. Missouri Dep't of Corr*., No. 2:13-CV-04150, 2016 WL 705219, at *10 (W.D. Mo. Feb. 19, 2016); *Arce v. Louisiana*, 226 F. Supp. 3d 643, 651 (E.D. La. 2016). Indeed, the quote on which TDOC relies in *Arce* – "The ADA provides for reasonable accommodation, not preferred accommodation," *id*. at 651, *quoted in* Opp. at 9 – directly contradicts the language of the applicable regulations: "In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2).

"'Primary consideration' means that the public entity must honor the choice," unless it can establish an applicable defense. U.S. Dep't of Justice. The Americans with Disabilities Act Title II Technical Assistance Manual § II-7.1100 (Nov. 1993).

Mr. Stinnett and Mr. Collins have requested access to VP on an equal basis that is as effective as that of hearing prisoners' access to telephones. TDOC must provide such service unless it can establish an applicable defense.

2. TDOC does not satisfy its burden of proof as to the defense of undue burden.

TDOC is not required to take measures called for by section 35.160 if it can demonstrate that the measures would result in a fundamental alteration or undue burden. 28 C.F.R. § 35.164. TDOC asserts that providing equivalent access would be an undue burden because it would require fiber cable in housing units at a cost of 1.2 million dollars. Opp. at 2, 11.[1]

TDOC has the burden to establish this defense and to show that the decision that compliance would result in an undue burden was made by the Commissioner or his designee, "after considering all resources available for use in the funding and operation of the service, program, or activity" and that this decision was "accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 36.164.

TDOC cannot meet its burden to show that providing equal access to VPs would be an undue burden by relying on hearsay evidence from an unnamed person of an informal estimate of the cost of steps it believes are required to provide VPs in prison housing units. *See* Gentry Decl. ¶ 5. This is not reliable evidence of the cost of fiber cable. In any event, Plaintiffs' expert explains in detail why neither the technology nor the cost presupposed by TDOC would be

[1] TDOC asserts the fundamental alteration defense, but only as to the proposition that deaf prisoners be given unfettered access to VPs located in prison offices, requiring security staff assistance. Opp. at 2-3. Plaintiffs do not request unfettered access to prison offices, but rather provision of VP in housing units.

necessary to provide equal access to VPs. Ray Decl. ¶¶ 22-26. TDOC also has not provided the required written decision of the Commissioner or his designee, much less any evidence that the Commissioner considered all available resources, as required by 28 C.F.R. § 35.164.

Because Mr. Stinnett and Mr. Collins requested access to VPs and TDOC has not satisfied the burden for any defense to this request, Plaintiffs are likely to prevail on the merits.

3. Even if TDOC had started providing adequate access to VP, a preliminary injunction would remain necessary.

TDOC argues that Plaintiffs will not succeed on the merits because they already have access to VPs. Opp. at 6. While they do not use the word, this is essentially an argument that Plaintiffs' claims for VP are moot. However, "[v]oluntary cessation of the alleged illegal conduct does not, as a general rule, moot a case … 'The burden of demonstrating mootness is a heavy one.'" *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (internal citations omitted). In *Speech First*, the plaintiffs challenged, among other things, what they viewed as overbroad definitions in a university anti-bullying rule, and requested a preliminary injunction enjoining the rule. The district court denied the injunction on the grounds that the university had changed the definitions after the suit was filed. *Id.* The Sixth Circuit reversed, holding that there was no evidence of the university's future intentions with respect to the definitions, and that the timing of the change was suspicious. *Id.* at 769.

The Supreme Court, in considering a challenge to New York's COVID restrictions, addressed the question whether a preliminary injunction remained necessary when the applicants were no longer subject to the restrictions they challenged. The Court held that "injunctive relief is still called for because the applicants remain under a constant threat" that they will be subject to these restrictions in the future. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020). Similarly, Plaintiffs here remain under threat that

VP will not ultimately be provided, that it will not be in working order, that it will be removed once provided, or that they will be moved to a facility that does not have a VP.

Several cases have held that prison systems that provide VP to deaf prisoners only after being sued do not moot the prisoners' ADA claims. *See, e.g., Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017) (observing that "mid-litigation change of course" in accommodating deaf and hard of hearing prisoners does not moot ADA claims); *Rogers v. Colorado Dep't of Corr.*, No. 16-CV-02733-STV, 2019 WL 4464036, at *7 (D. Colo. Sept. 18, 2019) (holding deaf prisoners' claims for VP were not moot even after prison installed VP because there was no policy requiring VP or any other "practical barrier to Defendants removing videophones from" its facilities, and because VP was installed at least in part in response to the litigation); *McBride v. Michigan Dep't of Corr.*, 294 F. Supp. 3d 695, 720 (E.D. Mich. 2018) ("in the context of prison litigation, courts are particularly suspicious of non-binding policy changes by correctional institutions party to the litigation.").

In contrast, the single case on which TDOC relies for the proposition that an injunction is not necessary was filed *after* the plaintiff "receiv[ed] administrative relief in the form of an order to install videophone technology" at his facility. *Yeh v. U.S. Bureau of Prisons*, No. 3:18-CV-943, 2020 WL 1505661, at *1 (M.D. Pa. Mar. 30, 2020). Furthermore, the motion for preliminary injunction was denied after the plaintiff had obtained full relief, and was denied without prejudice in case "videophone access . . . was improperly terminated or curtailed." *Id.* at *2. Here, Plaintiffs' access to VP had been consistently denied prior to filing the lawsuit, TDOC has repeatedly promised but not provided VP, and no compliant VP has yet been provided. A preliminary injunction remains necessary.

4. Plaintiffs Stinnett and Collins have exhausted their administrative remedies.

Both Mr. Stinnett and Mr. Collins filed grievances requesting access to VPs; both were denied, and in both, TDOC's response struck through the option of an appeal. Lafferty Decl. Exs. 3-4; *see also* attachment to Holland Decl., ECF No. 32-5. TDOC staff also told them not to appeal the grievance and not to file another one. Collins Supp. Decl. ¶¶ 11-12; Stinnett Supp. Decl. ¶¶ 12-13. This constitutes required exhaustion under the Prison Litigation Reform Act ("PLRA"). *See, e.g. Marella v. Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (dismissal for failure to exhaust improper where appeals process was unavailable).

In addition, Plaintiff DRT is not required to exhaust administrative remedies pursuant to the PLRA to bring claims on behalf of disabled prisoners. *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1176 (M.D. Ala. 2016). While it is required to bring the problems to the attention of TDOC before filing suit, *see id.* at 1174, it is clear that DRT has done this, *see* Lafferty Supp. Decl. Ex. A; *see also* Mancino-Rosete Decl. Ex. A.

CONCLUSION

For the reasons set forth above and in Plaintiffs' memorandum in support of their motion for preliminary injunction, ECF 23, Plaintiffs respectfully request that this Court issue a preliminary injunction requiring Defendant TDOC to provide VP service to Mr. Stinnett and Mr. Collins and to take all steps necessary to ensure that Mr. Stinnett and Mr. Collins have access to VP on an equal basis with that of hearing inmates' access to telephones.

Respectfully submitted,

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Dated: December 2, 2020

CERTIFICATE OF SERVICE

I certify that, on December 2, 2020, I served the foregoing document upon all parties herein by e-filing with the CM/ECF system maintained by the court which will provide notice to the following:

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