EMPLOYMENT
Legal Briefings
Great Lakes ADA Center

Criminal Justice & the ADA

By Equip for Equality[1]

I. Introduction

In the United States, people with disabilities are significantly overrepresented in prisons and jails. The percentage of people with disabilities in prisons is nearly three times higher than outside of prison and, in jails, the percentage is even higher.[2] Given the mass incarceration of people with disabilities in our country's criminal justice system, it is critical to understand how the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act (Rehab Act) apply. This legal brief explores the application of the ADA and Rehab Act across the criminal justice system, including law enforcement, criminal court proceedings, correctional facilities, and re-entry planning by reviewing the relevant ADA provisions and regulations, as well as court decisions and case settlements.

II. Relevant Laws Related to Criminal Justice and the Rights of People with Disabilities

The ADA and the Rehab Act are federal civil rights laws that prohibit discrimination against people with disabilities in various aspects of life.[3] Though generally similar, the ADA and Rehab Act do have a few differences relevant to criminal justice issues. While Title II of the ADA applies to all programs, services, and activities of state and local governments regardless of whether they receive federal funding,[4] the Rehab Act applies only to entities that receive federal financial

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[2] Rebecca Valls, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons,* Center for American Progress (July 18, 2016) https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/

[3] 42 U.S.C. §§ 12131–12134 (Title II of the ADA); 29 U.S.C. § 794 (Section 504 of the Rehabilitation Act).

[4] Title II of the ADA states: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

assistance.[5] Thus, even if state and local entities do not receive federal financial assistance, they still have non-discrimination obligations under Title II of the ADA. As a practical matter, however, virtually all entities involved in the criminal justice system are state or local entities that receive federal funding and thus, the ADA, Rehab Act, and their respective regulations usually apply. Such entities include state and local law enforcement agencies, correctional facilities, and court judicial systems. The Rehab Act has exclusive jurisdiction for facilities and programs in the criminal justice system that are managed by the federal government, such as federal prisons.

The ADA and the Rehab Act have both general and specific non-discrimination requirements. Generally, state and local law enforcement agencies, correctional facilities, and court judicial systems must provide equal access to programs, services, and activities to people with disabilities.[6] Specifically, like other government entities covered by the ADA, law enforcement agencies, court judicial systems, and correctional facilities must provide auxiliary aids necessary to ensure effective communication,[7] must make reasonable modifications of policy,[8] must provide legally required architectural and programmatic access,[9] and must provide programs and services in the most integrated setting available.[10] Exactly what this means to each of these entities is examined in greater detail within this legal brief.

III. ADA & Law Enforcement

A. Application to Arrests

[5] Section 504 of the Rehabilitation Act states: "No otherwise qualified individual with a disability in the United States …shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." 29 U.S.C. § 794(a).

[6] 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

[7] 28 C.F.R. § 35.160(b) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.").

[8] 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

[9] 28 C.F.R. § 35.149.

[10] 28 C.F.R. § 35.130(d) (A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

It has been the longstanding position of the U.S. Department of Justice, the federal agency that promulgates regulations and enforces Title II of the ADA, that the ADA applies to law enforcement personnel in every facet of their work, including interrogating witnesses, booking and holding suspects, enforcing laws, operating 911 centers, and notably, arrests.[11] The DOJ reiterated this position in its Statement of Interest filed as recently as January 2017 in ***Sage v. City of Winooski, Vermont***.[12] There, the DOJ stated that Title II of the ADA applies to the stop and arrest of individuals with disabilities and there is no categorical ADA exception for police actions during exigent circumstances. ***See also Robinson v. Farley*, 15-cv-00803 (D.D.C. filed June 20, 2016)** (DOJ filed a statement of interest stating that Title II applies to all aspects of a police encounter, citing the broad scope of Title II and the ADA's legislative history).[13]

In addition to the DOJ, the vast majority of courts have held that Title II applies to all facets of law enforcement, including arrests. ***See, e.g., Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014)** ("We agree with the majority of circuits to have addressed the question that Title II applies to arrests**."), *rev'd on other grounds*, —— U.S. ——, 135 S. Ct. 1765, 191 L.Ed.2d 856 (2015)**; ***Seremeth v. Bd. of Cty. Comm'rs Frederick County*, 673 F.3d 333, 339 (4th Cir. 2012)**("[N]othing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate."); ***Gray v. Cummings*, 917 F.3d 1, 16–17 (1st Cir. 2019)** (noting that "[o]ther circuits ... have charted a different course, holding that Title II [of the ADA] applies without exception to ad hoc police encounters"); ***Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007)** (holding that "the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.").

However, a small subset of courts have found that certain conduct by law enforcement, involving risk of harm prior to securing the scene, is exempt from Title II of the ADA. The landmark case on this issue is ***Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000)**.[14] In *Hainze*, the Fifth Circuit held that the ADA "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing the scene and ensuring

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[11] *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, DEPT. OF JUST., www.ada.gov/q&a_law.htm (last visited Sept. 1, 2020).

[12] Statement of Interest of the United States of America, *Sage v. City of Winooski*, 16-cv-00116 (D. Vt. Jan. 18, 2017), available at https://www.ada.gov/briefs/winooski_soi.pdf (last visited Sept. 3, 2020).

[13] Statement of Interest of the United States, *Robinson v. Farley*, 15-cv-00803 (D.D.C. filed June 20, 2016) www.ada.gov/briefs/robinson_soi.pdf (last visited Sept. 1, 2020).

[14] *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000).

that there is no threat to human life."[15] In *Hainze*, a woman called 911 asking for assistance transporting her nephew, Hainze, who was suicidal, to a hospital for mental health treatment. The woman advised that Hainze had a history of depression, was currently under the influence of alcohol and anti-depressants, was carrying a knife, and was threatening either to commit suicide or "suicide by cop."[16] When the police arrived on the scene, they saw Hainze talking to individuals in a pickup truck and holding a knife. The police officer drew his weapon and ordered Hainze to walk away from the truck. Hainze responded with profanities, began to walk toward the officer, and was ordered again to stop. Hainze did not stop, and when he was within four to six feet of the officer, the officer shot Hainze twice in rapid succession in his chest. Hainze survived.

The Fifth Circuit concluded that because law enforcement personnel face the "onerous task" of having to "instantaneously identify, assess, and react to potentially life-threatening situations," it would pose an "unnecessary risk to innocents" to require officers to comply with the ADA "in the presence of exigent circumstances" prior to "securing the safety of themselves, other officers, and nearby civilians."[17] It concluded that Congress could not have intended the protections of the ADA to be attained at the expense of public safety, especially because there were other remedies available under the law, such as a Section 1983 or state law claim. Thus, it held that these specific situations fall outside the scope of the ADA. ***See also* Lynn v. City of Indianapolis, 2014 WL 3535554 (S.D. Ind. July 16, 2014)** (applying the *Hainze* and concluding that the ADA did not apply to an incident where officers tasered an individual with epilepsy who was having a seizure because they believed that he was high on cocaine, despite information from the dispatcher that it was believed that the man was having a seizure).

However, even for courts bound by the *Hainze* decision, this exception is not properly extended to situations where there is no threat of deadly harm to police officers or others. The case ***Wilson v. City of Southlake*, 936 F.3d 326 (5th Cir. 2019)** involved an eight-year-old child with autism, oppositional defiant disorder, and separation anxiety disorder, disabilities which were arguably known to the school.[18] After the child became upset during an in-school suspension, he, among other conduct, used a jump rope in a threatening way to try to hit school staff. The school resource officer was called, who proceeded to handcuff the child, scream at him, call him names, mock and laugh at him. After the child's parents arrived, the officer continued to escalate the situation making comments like "great parenting." The officer was ultimately fired as a result of

[15] *Id.* at 801.

[16] *Id.* at 797.

[17] *Id.* at 801.

[18] *Wilson v. City of Southlake*, 936 F.3d 326 (5th Cir. 2019).

this conduct. The child's parents brought a lawsuit asserting claims under the ADA, the Rehab Act, and the Constitution. The city filed a motion for summary judgment asserting that the ADA did not apply in light of the *Hainze* exception, and the district court agreed.

The Fifth Circuit, however, vacated that decision. The Fifth Circuit held that even though *Hainze* remains binding law, this incident did not involve a potentially life-threatening situation or a threat to human life. It said that *Hainze* provides no authority for expanding the exemption to situations where there is no potentially life threatening situation or even a real danger of physical harm. Notably, one of the judges even questioned whether *Hainze* was properly decided, stating, in a concurring decision, that the court in *Hainze* created "a categorical 'exigent circumstances' defense that appears nowhere in the text of either the Americans with Disabilities Act or the Rehabilitation Act" and noting that "it is not surprising that every circuit to opine on this issue has to our knowledge rejected our approach."[19]

B. General Framework of ADA Cases Involving Arrests

If Title II of the ADA does apply to arrests, what does that mean? In the context of arrests, courts generally recognize two types of ADA claims: (1) wrongful arrest, where police arrest a suspect based on conduct that stems from a disability, not criminal activity; and (2) reasonable accommodation, where police properly arrest suspects, but fail to reasonably accommodate their disability during the investigation or arrest, causing them to suffer greater injury or indignity than other arrestees. ***See*, *e.g.*, *Sacchetti v. Gallaudet Univ.*, 344 F. Supp. 3d 233, 269 (D.D.C. 2018).** Both of these claims are discussed below.

C. Wrongful Arrest Claims for Conduct Related to a Disability

To prevail on a theory of wrongful arrest under the ADA, a plaintiff must prove that arrestee was disabled, the officer knew or should have known the arrestee was disabled; and the officer arrested the person because of legal conduct related the arrestee's disability. For example, in ***Leibel v. City of Buckeye*, 364 F. Supp. 3d 1027 (D. Ariz. 2019)**, the arresting officer approached a young, autistic teenager at a park and questioned him about his activities.[20] The teen responded that he was "stimming" with string, i.e., moving the string in repetitive manner to calm himself. The officer believed that the boy was using drugs, and allegedly used excessive force to detain and arrest him. The court denied a motion to dismiss the ADA claim, explaining that the minor plausibly stated a claim under the ADA against the city on the theory that he was wrongfully arrested for legal conduct related to his disability.

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[19] *Id*. at 333.

[20] *Leibel v. City of Buckeye*, 364 F. Supp. 3d 1027 (D. Ariz. 2019).

D. Reasonable Modifications During Arrests

The second theory is a failure to provide an accommodation during an otherwise lawful arrest. Title II of the ADA requires public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(7).

Like other cases under the ADA, much of the analysis turns on whether a modification during the arrest was reasonable, especially in light of exigent circumstances and safety concerns. In ***Vos v. City of Newport Beach*, 892 F.3d 1024, 1037 (9th Cir. 2018)**, officers approached a scene where an individual with schizophrenia was acting erratically and brandishing a metal object believed to be scissors.[21] The individual charged at the officers with a metal object and the officers shot and killed him. The district court granted summary judgement for the officers on an ADA claim brought by the individual's estate. The Ninth Circuit reversed, holding that summary judgment was inappropriate because the officers "had the time and the opportunity to assess the situation and potentially employ the accommodations identified by the Parents, including de-escalation, communication, or specialized help." The facts showed that further accommodation was possible and thus summary judgment was inappropriate on the ADA claim. Critical to the court's analysis was the fact that once the police arrived, everyone else had exited the store, there were eight officers and one canine unit, and the police set up communication, but did not communicate with the man in the 20 minutes they were on the scene. The man then ran out the door at the police with his hand raised and police did not believe that the man had a gun. The Ninth Circuit declined to rule on one argument raised by the defendants because it had not been ruled on by the district court. The defendants asserted that because the plaintiff had been under the influence of illegal drugs, he was not protected by the ADA. On remand to the district court, in ***Vos v. City of Newport Beach*, 2020 WL 4333656 (C.D. Cal. June 8, 2020)**, the court found that it was "undisputed" that the plaintiff was currently engaging in the illegal use of drugs at the time of the altercation.[22] However, it denied summary judgment for the defendants after finding a genuine issue of fact as to whether the defendants acted on the basis of the plaintiff's drug usage, as opposed to acting on the basis of his schizophrenia.

Similar to ***Vos***, other courts have also found that police need to modify their approach when interacting with people with disabilities, including mental illness. ***See, e.g., Sheehan v. City & Cty.***

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[21] *Vos v. City of Newport Beach*, 892 F.3d 1024, 1037 (9th Cir. 2018), *cert. denied sub nom. City of Newport Beach, Cal. v. Vos*, 139 S. Ct. 2613, 204 L. Ed. 2d 263 (2019).
[22] *Vos v. City of Newport Beach*, 2020 WL 4333656 (C.D. Cal. June 8, 2020).

***of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014)** (finding a reasonable jury could have found that the officers, who forced their way into the locked room of an individual with schizoaffective order, could have used alternative, non-threatening tactics to defuse the situation rather than precipitating a deadly confrontation); ***Montgomery v. D.C.*, 2019 WL 3557369 (D.D.C. Aug. 5, 2019)** (denying motion to dismiss because the plaintiff sufficient pled that despite being aware that he had a disability and even asking the plaintiff if he had a mental illness, the officers did not assess whether he needed an accommodation during his interrogation to ensure that he could communicate and understand the information given to him).

There have been instances where plaintiffs pursue an ADA case both under the theory of a wrongful arrest and a failure to accommodate. This was the situation in a recent case, ***Ravenna v. Village of Skokie*, 388 F. Supp. 3d 999 (N.D. Ill. 2019)**.[23] In *Ravenna*, the plaintiff interacted with the police over 40 times in a short time span. In their reports, the police noted that her erratic behavior—including claiming to talk with her dog and that her neighbor repeatedly broke in her house and assaulted her dog—was likely due to a mental illness. She was arrested following an incident where she beat on a neighbor's door. The court denied the police department's motion for summary judgment on the ADA claim, explaining that a reasonable jury could find an ADA violation under either or both of these theories. The court found that there was evidence that the police understood her actions to be the product of mental illness, not criminal activity. The court also found that the police had the opportunity to advise the responding officers to take Ravenna's mental illness into consideration in addressing the situation.

E. Effective Communication with Law Enforcement

Title II of the ADA requires public entities to provide auxiliary aids and services necessary to ensure effective communication to individuals with communication disabilities.[24] Most cases involving effective communication in the criminal justice arena revolve around police interactions with members of the deaf community and analyze the reasonableness of the request in light of any exigent circumstances, and the effectiveness of any auxiliary aid and service provided.

One recent case, ***Lange v. City of Oconto*, 2020 WL 1032240 (E.D. Wis. Mar. 3, 2020),** provides helpful guidance to police departments about the importance of providing ASL interpreters during police encounters.[25] In *Lange*, a deaf woman brought claims under the ADA and Rehab Act against two municipal police departments for a number of instances where she was not

[23] *Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999 (N.D. Ill. 2019).

[24] 28 C.F.R. § 35.160(b).

[25] *Lange v. City of Oconto*, 2020 WL 1032240 (E.D. Wis. Mar. 3, 2020).

provided with an ASL interpreter during police interactions. According to the record, between August 2014 and August 2016, the police had 50 interactions with the plaintiff where she had requested an ASL interpreter and one was not provided. On numerous occasions the police relied on the plaintiff's minor children as interpreters despite the plaintiff's insistence that this was unreliable communication.

The city filed a motion for summary judgment, in which it raised a number of arguments about why its failure to provide an interpreter did not violate the ADA and Rehab Act, all of which were rejected by the court. For one encounter, the city asserted that the plaintiff's request for an interpreter was unreasonable because she needed to be removed immediately for the safety of her children. The court said that a reasonable jury could conclude that while the plaintiff was agitated and angry, there was no exigent threat to the officers or third parties as the plaintiff was not threatening anyone's safety. The city also argued that its officers reasonably relied on their pattern and practice of relying on the plaintiff's children or written notes to communicate. In rejecting this argument, the court first noted that the ADA regulations state that public entities cannot rely on a minor child to interpret and more so here, where the plaintiff's dispute was with her children so they were not impartial. The plaintiff also presented an issue of fact as to whether written notes provided effective communication in a custodial police setting. Finally, the city asserted that for other dates, including an incident where police arrested the plaintiff's boyfriend and relied on the plaintiff's minor child to show plaintiff a search warrant, the plaintiff was not entitled to an interpreter because she was not arrested. Again, the court rejected this argument noting that Title II is not limited to providing accommodations for arrestees only. The chief also claimed that using an interpreter would have enabled the plaintiff to destroy evidence, an assertion the court found unsupported by the record. ***See also Williams v. City of New York*, 121 F.Supp.3d 354 (S.D.N.Y. 2015)** (rejecting city's argument that it was unreasonable to provide any accommodations for deaf individuals prior to arrest as there appeared to be no imminent danger).

Another recent case about effective communication, ***Sacchetti v. Gallaudet University*, 344 F. Supp. 3d 233 (D.D.C. 2018)**, serves as an important reminder of the obligation on public entities to provide effective communication, even in the absence of a specific request.[26] In *Saccheti*, a deaf student with mental illness died by suicide following a police encounter, and his estate brought a lawsuit against the University and the District of Columbia alleging various claims including under the ADA and Rehab Act. The plaintiff asserted that the District failed to accommodate the student's deafness by not allowing him to use his hands to communicate or obtaining an independent ASL interpreter. The District argued that the plaintiff's case should be dismissed because he did not request an ASL interpreter or any other assistance in

[26] *Sacchetti v. Gallaudet Univ.*, 344 F. Supp. 3d 233 (D.D.C. 2018).

communication. The court rejected the District's argument and held that where an individual's disability is obvious and indisputably known to the provider of a service, then a request is not required. Applying that principle to the case, the court explained that the officers were aware of the student's inability to communicate verbally due to his deafness, thereby negating the student's need to request a specific accommodation. The District also argued that the accommodations it did provide—communicating in ASL with one officer in the field and using handwritten notes at the station —was sufficient, was also rejected by the court. The court explained that a public entity needs to gather sufficient information to determine what accommodations are obvious. Here, there was no evidence that the officers did that or even asked the student and instead, just presumed what was effective. As a result, the court permitted this case to proceed past summary judgment, and the parties reached a confidential settlement in March of 2020.

The DOJ has reached a number of settlement agreements with law enforcement agencies across the country regarding effective communication, including an agreement reached on August 2, 2018, with the police department of **Philadelphia, Pennsylvania**, following DOJ's investigation into whether a complainant was provided with effective communication during arrest and detainment.[27] During the investigation, a range of people were interviewed from detainees to crime victims, and they alleged the police denied them effective communication. Given the comprehensive nature of this agreement, law enforcement departments are encouraged to review it for guidance on how to implement training, change signage, modify handcuffing policies, and a variety of other topics that could prove helpful as law enforcement agencies evaluate their own best practices.

In addition to revised policies and training requirements, some of the highlights of the settlement include Philadelphia Police Department's agreement to designate at least one employee as the ADA coordinator responsible for ADA compliance; provide appropriate auxiliary aids and services, including qualified sign language interpreters; create "communication cards" to aid in communication with persons who are deaf or hard of hearing during routine interactions in the field; use pictograms to determine if someone requires an interpreter in all non-exigent circumstances; and use a communication assessment form into custody for processing.

This agreement also addresses the different requirements for communication during imminent threats and exigent circumstances. When there is such an exigent circumstance and insufficient time exists to make appropriate auxiliary aids and services available, police are permitted to use

[27] *Settlement Agreement between the Dep't of Just. And the City of Philadelphia And the Philadelphia Police Department under the Americans with Disabilities Act*, ADA.GOV (August 2, 2018), https://www.ada.gov/ppd_sa.html.

what is available, consistent with an appropriate law enforcement response—such as exchanging written notes or using the services of a person who knows sign language but who is not a qualified interpreter, for an interim period during the period of ongoing imminent threat, even if the person who is deaf or hard of hearing would prefer a qualified sign language interpreter or another appropriate auxiliary aid or service. However, when there is no longer an imminent threat, the police department agreed to follow its procedures to provide appropriate auxiliary aids and services.

To ensure that these requirements are met, the police department has also agreed to form and maintain working relationships with one or more qualified oral/sign language interpreter agencies to ensure interpreter availability on a priority basis 24/7. The department also agreed to modify its handcuffing policy by handcuffing an individual in front of his body to enable sign language or writing. It also agreed to ensure a sufficient number of working TTYs and videophones at each station, but no fewer than one of each, and provide signage to inform the community about their availability.

IV. ADA and Criminal Proceedings

Following an arrest, the next stage in the criminal justice process involves court proceedings. Similar to other aspects of the criminal justice system, disagreements and misunderstandings about when and toward whom Title II applies have existed, preventing individuals with disabilities from fully participating in judicial proceedings and accessing judicial services. Problems range from a lack of appropriate communication during judicial proceedings to a lack of physical access to courtrooms. These problems impact not only criminal defendants, but also their families, witnesses, members of the public, and court employees. Recent case law analyzing these issues reveal common barriers to accessibility, including misunderstandings about sovereign immunity (whether a governmental entity can be sued), confusion about what circumstances require courts to provide accommodations, and, in some instances, indifference or even intentional discrimination toward individuals with disabilities during criminal justice proceedings.

In 2004, the U.S. Supreme Court addressed the issue of sovereign immunity in *Tennessee v. Lane*.[28] In that case, two plaintiffs, both of whom had paraplegia and used wheelchairs, brought an action against the state of Tennessee for failing to provide physically accessible courtrooms and facilities. The first plaintiff was compelled to appear on the second floor of a courthouse to answer to criminal charges against him. Because there were no elevators or ramps at the courthouse, he was forced to crawl up the stairs to reach the courtroom. On his second visit, he

[28] *Tennessee v. Lane*, 541 U.S. 509 (2004).

refused to crawl up the stairs and was then arrested and jailed for failure to appear. The second plaintiff was a court reporter who had been unable to enter several county courtrooms because they were not accessible by wheelchair. As a result, she was denied several opportunities to work and participate in the judicial process.

The state argued that its Eleventh Amendment immunity, also referred to as sovereign immunity, prevented the plaintiffs from taking any action against it for monetary damages. When considering this claim, the Supreme Court first pointed out that Congress had clearly intended to abrogate (or waive) states' Eleventh Amendment immunity when it enacted Title II of the ADA and thus, the real issue was whether Congress had the authority to abrogate immunity. The Supreme Court held that Congress had unquestionably acted within its scope of powers when it enacted Title II, as Section 5 of the Fourteenth Amendment gives Congress the power to take appropriate steps to protect the public's constitutional rights. This includes the First Amendment right to access criminal proceedings and the Sixth Amendment right for a criminal defendant to be present at all stages of his or her trial. The Supreme Court underscored the validity of Title II as a response to a long history of discrimination against people with disabilities in the criminal justice system, emphasizing that its holding applied only to the "class of cases implicating the accessibility of judicial services."[29]

Since *Lane*, the right of individuals in both criminal and civil cases to bring an action against states or government entities for ADA violations has been widely acknowledged. However, because the *Lane* holding was limited to class of the cases involving the accessibility of judicial services, it sparked a new debate among individuals and government entities over which proceedings fall into that category. In ***Prakel v. Indiana*, 100 F. Supp. 3d 661 (S.D. Ind. 2015)**, a criminal defendant's son brought an action against the state of Indiana for denying him access to his mother's criminal proceedings.[30] The plaintiff was deaf and used ASL as his primary language. In order to participate in and understand his mother's pretrial hearings, he made multiple requests for interpreters in advance of the hearings. All of his requests were denied, and as a result he was forced to choose between being absent from the proceedings or personally paying for an interpreter. The proceedings included a fact-finding hearing, a sentencing hearing, and a hearing to address his request for a sign language interpreter. The defendants argued that the hearings Prakel wanted to attend did not fall into the category of "judicial services" because they were not part of formal trial proceedings. The court disagreed, noting that the Rehab Act's definition of "services, programs, and activities" as "all of the operations of…a local government" has also

[29] *Id.* at 524.

[30] *Prakel v. Indiana*, 100 F. Supp. 3d 661 (S.D. Ind. 2015).

been applied to the ADA.[31] Accordingly, the *Prakel* court held that any public judicial proceeding or trial falls under the category of a judicial service and must be accessible to people with disabilities.

Moreover, because the plaintiff in *Prakel* was a spectator rather than a criminal defendant, the case also raises the question of exactly whose rights are protected by the ADA. Title II states that *"*[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, *members* of the public, and companions with disabilities are as effective as communications with others."[32] Still, the *Prakel* defendants denied Prakel's request for a sign language interpreter partially on the basis that it was their court's practice to provide interpreters exclusively for witnesses and defendants during criminal proceedings. When determining whether the plaintiff was a qualified individual under the ADA, the court relied again on the U.S. Supreme Court's holding in *Lane,* recognizing that all members of the public have the right to participate in criminal proceedings. It also pointed out that the plain language of Title II extends the right to fully participate in public services, programs, and activities to members of the public, including spectators at criminal proceedings. While members of the public continue to face problems accessing judicial proceedings, cases like *Lane* and *Prakel* have helped to firmly establish the right of *all* people to participate in *every* stage of criminal proceedings.

Recently, in ***Lacy v. Cook County, Illinois*, 897 F.3d 847 (7th Cir. 2018)**, five detainees using wheelchairs brought a class action suit for inaccessible ramps and bathrooms at six county courthouses.[33] The dispute centered on whether the defendants provided reasonable modifications to overcome the physical barriers that existed. Despite the wheelchair ramps being steep the plaintiffs had to maneuver the ramps alone. Further, the plaintiffs were not consistently assisted to ADA-compliant restrooms and the plaintiffs either could not use or struggled greatly with using commode chairs supplied in the holdings rooms where they waited for hearings. This case brought a matter of first impression to the Seventh Circuit on what was the proper standard for determining intentional discrimination under the ADA and Rehab Act for the individual plaintiffs' damages claims. On appeal, the court held that a showing of deliberate indifference was the proper standard for showing intentional discrimination and obtaining compensatory damages under the ADA and Rehab Act. This approach aligns with that of most other circuits.[34] With respect to the class claims for injunctive relief, the district court granted plaintiffs' requested injunction that the ramp-assistance policy be modified to ensure effective

[31] *Id.* at 682.

[32] 28 C.F.R. § 35.160 (2016).

[33] *Lacy v. Cook Cty., Illinois*, 897 F.3d 847, 851 (7th Cir. 2018).

[34] *Id.* at 862

implementation, and this injunction was not appealed. The district court also granted a supplemental injunction ensuring that the holding cells had sufficient clear floor space, which was affirmed. The Seventh Circuit also affirmed the court's decision granting class certification.

V. ADA and Correctional Facilities

In 1998, the U.S. Supreme Court confirmed in ***Yeskey v. Pennsylvania Department of Corrections*, 524 U.S. 206, 213 (1998)**, that Title II of the ADA applies "to any department, agency . . . or other instrumentality of a State," including state prisons.[35] Accordingly, for over two decades, it has been clear that correctional facilities are barred from discriminating against inmates on the basis of their disabilities. Put another way, people with disabilities do not lose their rights under the ADA simply because they are incarcerated.[36] In spite of *Yeskey*, prisoners with disabilities still face significant challenges, and instances of discrimination remain common.

A. Physical Accessibility

Despite *Yeskey*, a common argument made by correctional institutions in defending ADA claims – especially claims involving physical accessibility – is that the alleged issue is not a program, service or activity of a public entity. For example, in ***Furgess v. Pennsylvania Department of Corrections*, 933 F.3d 285 (3d Cir. 2019)**, the court considered whether the provision of showers in a correctional facility constituted a program, service, or activity within the meaning of Title II of the ADA.[37] The plaintiff was diagnosed with myasthenia gravis, a neuromuscular disease that inhibited his ability to see, walk, speak, and lift. The plaintiff alleged that the prison staff violated his rights under the ADA by not providing him with an accessible shower facility. While the district court dismissed the case, the Third Circuit vacated the dismissal and remanded back to the district court, holding that the plaintiff stated a plausible claim for disability discrimination because the prison staff acted with deliberate indifference. In so doing, the Third Circuit explained that because Title II is "extremely broad in scope and includes anything a public entity does," the prison's "provision of showers to inmates fits within this expansive definition."[38] It also cited to the DOJ guidance on the Title II regulations explaining that correctional systems are unique and thus, must address the needs of inmates with disabilities by providing "accessible

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[35] *Yeskey v. Pennsylvania Department of Corrections*, 524 U.S. 206, 213 (1998).

[36] However, it is worth noting that inmates' opportunities to recovery are limited by the Prison Litigation Reform Act, which requires prisoners to exhaust administrative remedies before filing in federal court. See 42 U.S.C. § 1997e.

[37] *Furgess v. Pennsylvania Department of Corrections*, 933 F.3d 285 (3d Cir. 2019).

[38] *Id*. at 290.

toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities."[39] ***See also Jaros v. Illinois Dept. of Corrections*, 684 F.3d 667, 672 (7th Cir. 2012)** (finding meals and showers made available to inmates are programs or activities).

It is important to remember that having some accessible correctional institutions is not enough; the jail or prison must have sufficient accessible institutions to serve its population as well as appropriate policies and practices in place to ensure that people with disabilities who need to be placed in the accessible facilities are actually given access. In ***Roberts v. Dart*, 2018 WL 1184735 (N.D. Ill. March 7, 2018),** a plaintiff with a leg amputation required grab bars to safely use the toilet.[40] The plaintiff was incarcerated in Cook County Jail's Residential Treatment Unit, where some cells complied with the ADA and some did not. The plaintiff was housed in an ADA-compliant room for 364 days, and a non-compliant room for 243 days. While he was in the non-compliant room, he was forced to depend on correctional officers to take him to a common area restroom that had grab bars. On numerous occasions he was not permitted to go, and he fell twice in his cell. The court granted summary judgment in favor of the plaintiff, reasoning that letting him use the dayroom bathroom was not sufficient because he was not always permitted to go and he was dependent on others to use the bathroom. The court ruled that this constituted deliberate indifference, permitting the recovery of monetary damages, because the correctional staff acted despite knowledge of risk of harm. The case was ultimately settled.

Disabled prisoners are often excluded from participating in programs and services offered in the correctional setting as a result of inaccessible facilities. In ***Cook v. Illinois Dept. of Corrections*, 2018 WL 294515 (N.D. Ill. Jan. 4, 2018)**, the plaintiff was ordered to participate in a substance abuse treatment program while incarcerated.[41] The plaintiff used a wheelchair and only a limited number of accessible facilities offered this program, none of which had space for him. The plaintiff was eventually transferred to an accessible facility where he participated in the substance abuse treatment for a limited period of time. However, he did not receive substance abuse treatment prior his transfer and, even after he transferred, he had to wait several months before he could be moved into the only accessible cell at the facility. This meant that he was only able to participate in four months of substance abuse treatment prior to his release, and the program typically lasts longer than that. The court denied the IDOC's motion for summary judgment, rejecting IDOC's argument that IDOC accommodated the plaintiff because he participated in the program, because the program in which he participated was substantially

[39] *Id*.

[40] *Roberts v. Dart*, 2018 WL 1184735 (N.D. Ill. March 7, 2018).

[41] *Cook v. Illinois Dept. of Corrections*, 2018 WL 294515 (N.D. Ill. Jan. 4, 2018).

shorter and less comprehensive when compared to the programs in which non-disabled inmates were able to participate. The case was ultimately settled.

Prisons have occasionally tried to avoid providing accessible facilities by offering inmates assistance with navigating physical barriers. For instance, in ***Clemons v. Dart*, 168 F.Supp.3d 1060 (N.D. Ill. 2016)**, rather than assigning an inmate who used a wheelchair to an accessible room, the Cook County Sherriff provided him with an inaccessible room but promised that nurses were always on call to help him access the sink, shower, and toilet in his room.[42] When the inmate sued, the Sheriff argued that he had not discriminated because the nursing staff would allow him to access all the same facilities and available to individuals without disabilities. The court rejected that argument, reasoning that on-demand nursing support was not equivalent to providing an accessible cell because it reduced the inmate's ability to engage in independent living to the fullest extent possible—a right protected by the ADA. Another important point raised by the *Clemons* case is that Title II "requires affirmative, proactive accommodations necessary to ensure meaningful access to public services and programs, not accommodation upon request."[43] The court held that the Sheriff "gets things backward" by arguing that the plaintiff was not discriminated against because he could obtain assistance when he asked for it. Reasoned the court: "[Sheriff] was required to provide non-discriminatory access; [Plaintiff] was not required to request it."[44]

Another interesting issue is whether a correctional system's failure to provide a mobility aid—like a wheelchair—is considered a violation of the ADA. In ***Cadena v. El Paso County*, 946 F.3d 717 (5th Cir. 2020),** a detainee was using a wheelchair at the time of her arrest because she had recently undergone knee surgery.[45] The county took away her wheelchair and instead required her to use crutches. The plaintiff fell while using crutches, resulting in further injuries. The lower court dismissed the plaintiff's ADA lawsuit, but the Fifth Circuit reversed this decision. The Fifth Circuit held that the plaintiff had requested various types of accommodations, her disability was open and obvious, and a reasonable jury could find that her requests for a wheelchair, modified food delivery procedure (she was unable to hold a food tray while using crutches), and various forms of medical care were reasonable. The County argued that failing to provide a wheelchair is not an ADA claim because the court must defer to the doctor's medical judgment that the plaintiff did not need a wheelchair. While acknowledging that the ADA does not typically provide a

[42] *Clemons v. Dart*, 168 F.Supp.3d 1060 (N.D. Ill. 2016).

[43] *Id.* at *6.

[44] *Id.*

[45] *Cadena v. El Paso County*, 946 F.3d 717 (5th Cir. 2020).

remedy for negligent medical treatment, the court said that mobility aids have been characterized as disability accommodations.

The DOJ has entered into agreements that focus on architectural barriers within a correctional setting. In 2018, the **South Dakota Department of Corrections (SDDC)** entered into a settlement agreement after the DOJ investigated complaints that the South Dakota State Penitentiary (SDSP) was not accessible to inmates with mobility disabilities.[46] The investigation was expanded to include another SDDC facility. The DOJ concluded that the SDDC facilities contained architectural and programmatic barriers to access for people with disabilities in violation of Title II of the ADA. The SDDA agreed to retain an Independent Licensed Architect to review architectural provisions of the agreement and all other architectural alterations made by the SDDC. The SDSP was required to move inmates with disabilities to accessible housing or another prison while housing them in the most integrated possible setting. Further, the SDDC had to provide inmates with disabilities access to benefits, aids, or services provided to other inmates.

For inmates with mobility disabilities, the SDDC also needed to provide shower chairs, wheelchairs and other adaptive equipment that was maintained and routinely cleaned. The SDDC also needed to hire ADA coordinators for both facilities and provide training to employees on these policies. ***See also Settlement Agreement Between the United States of America and the Ohio Department of Rehabilitation and Correction*** (agreeing to remove architectural and programmatic barriers for people with disabilities to ensure participation in benefits, programs and services of the state correctional system).[47]

B. Reasonable Modifications

Like in the law enforcement context, Title II's reasonable modification requirements are essential to ensuring equal access to programs, services and activities within correctional institutions. Given the nature of correctional institutions, failure to provide reasonable modifications can have devastating effects for people with disabilities. One example is the recent case ***Richard v. Pfister*, 2020 WL 5210829 (N.D. Ill. Sept. 1, 2020)**, which involved a prisoner with multiple medical conditions, including COPD, emphysema, asthma that required 24/7 oxygen and a CPAP machine at night.[48] While most prisoners are transferred to "parent facilities" in just 1-2 weeks, the plaintiff was kept at the IDOC Receiving Center for 11 and a half months due to the Department's

[46] *Settlement Agreement Between the United States of America and the South Dakota Department of Corrections*, (October 23, 2018), https://www.ada.gov/sd_sa.html

[47] *Settlement Agreement Between the United States of America and the Ohio Department of Rehabilitation and Corrections*, (January 3, 2017), https://www.ada.gov/ohio_doc_sa.html

[48] *Richard v. Pfister*, 2020 WL 5210829 (N.D. Ill. Sept. 1, 2020).

failure to arrange accessible transportation that would accommodate his oxygen tank. Notably, the plaintiff did not need accessible transportation due to his own impairments, but because IDOC policy prohibited him from bringing his oxygen tank on the regular transfer bus with other inmates, because it could be used as a weapon. Because the Receiving Center was designed for temporary placement, the cells did not have outlets (so he could not plug in his CPAP machine or a fan, watch television or listen to the radio), and the facility lacked most programming and out-of-cell opportunities available at parent facilities (no educational or vocational programming, all meals and library materials were delivered to the cell, and yard was provided just once a week, which Plaintiff was not permitted to attend with his oxygen tank).

The plaintiff brought a lawsuit claiming, among other things, violations of the ADA and Rehab Act. He argued that the Department's failure to transfer him was because of his disability and, as a result of their failure to accommodate his disability in the transfer, he was denied access to the programs and services that would have been available to him at a parent facility. At summary judgment, the court rejected Defendants' arguments that plaintiff had no legal right to transfer facilities, and that the failure to transfer him was a result of multiple administrative failures rather than deliberate indifference. The court found that a reasonable jury could conclude that plaintiff was denied access to the programs and services that would have been available to him at a parent facility due to Defendants' failure to make accommodations in the transfer process. The court also noted that the transportation itself could be a "service" under the ADA which was denied to Plaintiff due to Defendants' failure to accommodate him. ***See also Wright v. New York State Department of Corrections*, 2016 WL 4056036 (2nd Cir. July 29, 2016)** (concluding that New York's absolute ban on motorized chairs in prison due to safety concerns effectively prevented the plaintiff from enjoying a wide range of prison services, and therefore, the prison was required to allow for exceptions to this policy when appropriate); ***Reaves v. Department of Corrections*, 2016 WL 4124301 (D. Mass July 15, 2016)** (concluding the Massachusetts Department of Corrections failed to modify various policies and procedures and, as a result, the plaintiff was prevented him from showering, going outdoors, or socializing with peers for over sixteen years).

These important reasonable modification principles apply for all correctional policies, practices and procedures, including ones about mental health services. ***See, e.g., Wright v. Texas Department of Criminal Justice*, 2013 WL 6578994 (N.D. Texas 2013)** (permitting case brought by the a mother of an inmate with bipolar disorder and schizophrenia to move forward because the facility, despite knowledge of the inmate's mental illness, failed to provide him with a roommate or a cell without "tie off" points, both of which could be considered accommodations and could have reduced his likelihood of dying by suicide).

C. Integration

The ADA also requires people with disabilities to be allowed to live in the most integrated setting possible and prohibits segregating prisoners on the basis of disability. Here again, prisons have not always lived up to the ADA's requirements, with the most flagrant recent example likely being the segregation of prisoners with HIV. In 2018, the **Union Parish Detention Center (UDPC)** entered a settlement with the DOJ, following an investigation revealing the UPDC held a detainee with HIV in isolated, segregated housing for six months because he has HIV.[49] Per the settlement agreement, UDPC agreed to stop segregating detainees based on HIV status, adopt nondiscrimination policies, designate an ADA coordinator, and pay $27,500 to the complainant. UDPC also agreed to establish an ADA complaint procedure, advise staff about the agreement, and provide annual training to staff about HIV and nondiscrimination. ***See also Henderson v. Thomas*, 289 F.R.D. 506, 509 (M.D. Ala. 2012)** (finding Alabama's "segregation policy" which categorically restricted inmates with HIV to certain housing units, limited their ability to participate in prison programs, and required them to wear a white armband that effectively publicized their status as HIV-positive was not supported by any scientific or medical evidence and that it violated the ADA).

Prisons also continue to impose more subtle forms of segregation. For example, the DOJ recently issued a letter of findings, concluding that the **Nevada Department of Corrections** discriminates against inmates with HIV in at least two ways: first, by requiring them to either share rooms with other inmates with HIV or to live alone, and second by excluding them from transitional housing settings and certain vocational opportunities.[50]

D. Effective Communication

One of the most heavily litigated areas in ADA prison litigation involves the ADA's requirement to ensure effective communication. Most of these cases have focused on inmates who are deaf and hard of hearing.

One important issue, referenced above as well, is the obligation of Title II entities to affirmatively evaluate the accommodation needs of individuals with known disabilities. Perhaps the most-cited case on this issue is ***Pierce v. DC*, 128 F. Supp. 3d 250 (D.D.C. 2015)**.[51] In *Pierce*, although it

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[49] *Settlement Agreement between the United States of American and Union Parish Detention Center*, (March 22, 2018), www.ada.gov/union_parish_sa.html.

[50] *Justice Department Finds that Nevada Discriminates Against Inmates with HIV and Inmates with Other Disabilities*, June 20, 2016, U.S. DEP'T OF JUSTICE, www.justice.gov/opa/pr/justice-department-finds-nevada-discriminates-against-inmates-hiv-and-inmates-other; Letter of findings: https://www.ada.gov/briefs/ndoc_lof.docx

[51] *Pierce v. DC*, 128 F. Supp. 3d 250 (D.D.C. 2015).

was obvious to the prison that an inmate was deaf, the prison did not evaluate how it could enable him to communicate effectively while in prison, nor did it provide him with any accommodations. In its defense, the prison argued that it was not required to accommodate the plaintiff because he had not specifically requested any accommodations. The court rejected that argument, and found that "prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the accommodations that are necessary . . . without regard to whether or not the disabled individual has made a specific request for accommodation."[52]

As a result of recent settlement agreements, prisons have created enhanced screening and evaluation processes to ensure that they are providing affirmative evaluations of the needs of inmates with disabilities. For example, in the settlement agreement from ***Holmes v. Baldwin*, 11-cv-2961, N.D. Ill. (July 26, 2018) (*Illinois Settlement*),** the Illinois Department of Corrections agreed to create an enhanced screening process to assess whether someone is deaf or hard of hearing at intake, during period exams, and upon request.[53] IDOC also agreed to use third-party communication assessors to determine the communication needs of individuals and help develop an ADA communication plan, which sets forth what accommodations are needed in prison. Similarly, in the settlement agreement from ***Disability Rights Florida v. Jones*, 16-cv-47-RS-CAS (N.D. Fla. 2017) (*Florida Settlement*)**, the Florida Department of Corrections, at reception, will perform an evaluation to identify whether an individual has a hearing, vision or mobility disability, and whether they require accommodations.[54]

There is a trend in cases and settlements that correctional institutions should ensure that individuals whose primary language is ASL must be provided ASL interpreters for all "high stakes interactions." In ***McBride v. Michigan Department of Corrections*, 294 F. Supp. 3d 695 (E.D. Mich. 2018)**, the court granted the plaintiffs' motion for summary judgment in a class action filed by deaf and hard of hearing inmates held in custody of Michigan Department of Corrections (MDOC) alleging agency administrators and prison wardens denied them auxiliary aids and services in violation of the ADA. The court ordered the MDOC to provide ASL interpreters for all high stakes interactions, including religious services. This concept was applied in the ***Illinois***

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[52] *Id.* at 272.

[53] *Holmes et al v. Baldwin,* 11-cv-2961, N.D. Illinois, Stipulation of Settlement, approved July 26, 2018, Retrieved from www.equipforequality.org/wp-content/uploads/2018/07/Holmes-Stipulation-of-Settlement.pdf.

[54] *Disability Rights Florida, Inc. v. Jones*, No. 4:16-cv-47-RS-CAS (N.D. Fla. 2017). Retrieved from www.floridajusticeinstitute.org/wp-content/uploads/2017/08/Settlement-Agreement-no-exhibits-searchable-07148878xB3B17.pdf.

Settlement as well.[55] In this settlement agreement, high stakes interactions were defined as "those in which the risks of miscommunication or misunderstanding are high and the consequences of miscommunications may have serious repercussions for inmates." Such interactions include most medical care and appointments, including dental, vision, audiological, mental health care and appointments, disciplinary investigations and disciplinary hearings; educational programs, specific training sessions and general educational opportunities that include a verbal component; vocational programs that include a verbal component; and transfer and classification meetings. The agreement also requires the provision of interpreters for religious services.

Without characterizing these important meetings as "high stakes interactions," other settlement agreements have included similar requirements. In the ***Florida Settlement***, the settlement provides the FDC will provide ASL interpreters for a list of programs.[56] Similarly, in 2018, the United States entered into a settlement agreement with the **South Carolina Department of Corrections (SCDC)** to ensure that inmates who are deaf and hard of hearing receive appropriate auxiliary aids and services.[57] The agreement lists the programs where auxiliary aids and services, especially ASL interpreters, must be provided, including: critical communication, complex information, lengthy exchanges, or anything involving legal due process; intake; orientation; classification; medical care and health programs and services, including physicals, medical screenings and treatment, dental, visual, and/or mental health examinations or treatment, and drug and alcohol recovery services; counseling or psychological services; educational and vocational programming, including any programming required for parole or early-release; due process hearings, including disciplinary hearings, and hearings in which the inmate is a witness; classification review interviews; grievance interviews or processes; religious services; non-criminal investigations; and pre-release instructions.

Another important issue in the discussion of ASL interpreters is the increasing reliance on Video Remote Interpreting (VRI) as a method of providing sign language interpreters. Many people in

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[55] *Holmes et al v. Baldwin,* 11-cv-2961, N.D. Illinois, Stipulation of Settlement, approved July 26, 2018, retrieved from www.equipforequality.org/wp-content/uploads/2018/07/Holmes-Stipulation-of-Settlement.pdf (last accessed Sept. 14, 2018).

[56] *Disability Rights Florida, Inc. v. Jones*, No. 4:16-cv-47-RS-CAS (N.D. Fla. 2017). Retrieved from www.floridajusticeinstitute.org/wp-content/uploads/2017/08/Settlement-Agreement-no-exhibits-searchable-07148878xB3B17.pdf.

[57] The DOJ reached a settlement agreement with the South Carolina Department of Corrections (SCDC) to, similarly, ensure that inmates with hearing disabilities are provided auxiliary aids and services. *See Settlement Agreement between the United States of America and South Carolina Department of Corrections Under the Americans with Disabilities Act*, ADA.GOV, (Mar. 29, 2018), Retrieved from www.ada.gov/south_carolina_doc_sa.html.

the deaf and hard of hearing community are concerned about the overreliance on VRI.[58] VRI can be an inferior means of communication as compared to an on-site interpreter because VRI has less mobility and less access to visual and auditory cues in the environment. There are also concerns about technological problems when interpretation services are needed and lack of adequate staff training. Because of these limitations, the general consensus in the deaf community is that VRI should be implemented as a last resort method of communication.[59]

Within the criminal justice context, the DOJ has entered into settlement agreements on behalf of the United States outlining the specific parameters required when a public entity opts to use VRI. A good example of this is the settlement agreement with the **Arlington County Sheriff** in 2016.[60] That settlement agreement involved a person who is deaf and was incarcerated for 40 days. During that time, he repeatedly requested an ASL interpreter for his housing, medical, and classification assessments, as well as for his meeting with the ADA coordinator. Instead of providing a qualified ASL interpreter, however, the Arlington County Sheriff used unqualified staff members to facilitate conversation. As part of the settlement agreement, the Sheriff agreed that when it used VRI, it would adhere to the four DOJ regulatory requirements.[61] In addition to these regulatory requirements, the agreement expressly restricts the Sheriff from using VRI if the technology would be ineffective for other reasons—including a person's limited ability to move his head, hands or arms; vision or cognitive issues; significant emotional distress or pain; and/or space limitations in the room. Finally, and importantly, the agreement also outlines a protocol whereby the Sheriff must call an on-site interpreter if the VRI is not functioning properly and staff cannot get it to work within 30 minutes of the malfunction.

Another important and heavily litigated issue is the accessibility of telephones and, specifically, the consistent availability of video phones for deaf inmates. This issue was also addressed in ***McBride v. Michigan Department of Corrections*, 294 F. Supp. 3d 695 (E.D. Mich. 2018)**, where MDOC defended itself by asserting that videophones caused "possible safety concerns."[62] The court rejected this argument, explaining that MDOC "failed to explain why the safety policies

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[58] Minimum Standards for Video Remote Interpreting Services in Medical Settings (2018, February 13). National Association of the Deaf. Retrieved from http://nad.org/issues/technology/vri/position-statement-hospitals.

[59] *Id.*

[60] *Settlement Agreement between the United States of America and Elizabeth F. Arthur*, ADA.Gov, (Nov. 17, 2016), Retrieved from www.ada.gov/arlington_co_sheriff_sa.html. In addition, per the terms of the settlement agreement, the complainant was awarded $250,000, and the Sheriff agreed to implement substantial changes, including having an ADA coordinator, revising its policies to provide auxiliary aids and services promptly, ensure telephone access via videophones, and provide hearing aid and cochlear implant batteries.

[61] 28 C.F.R. § 35.160(d).

[62] *McBride v. Michigan Dep't of Corr.*, 294 F. Supp. 3d 695 (E.D. Mich. 2018).

applied to telephone conversations 'would not be as effective at addressing risks associated with video transmissions.'"[63] The court held that MDOC must provide deaf and hard of hearing inmates with means of communication that are "as effective as those of hearing prisoners," noting that the inmates' "desire for equally effective means of communication is not just an aspiration—it is the law."[64] Videophones are necessary for effective communication and TTYs alone are insufficient, as TTYs are increasingly becoming obsolete since they require communication in typed English, a second language for many deaf people, and TTY conversations take significantly longer than video calls.[65] MDOC's own witness compared TTYs to "sending someone a fax to their homes versus an email to communicate."[66] The court ordered MDOC to make videophones available to all deaf and hard of hearing prisoners.

The plaintiffs obtained a similar result in ***Rogers et al v. Colorado Dep't of Corrections,* 2019 WL 4464036 (D. Colo. Sept. 19, 2019)**, where the court ordered the CDOC to make videophones available to all deaf and hard of hearing inmates and all inmates communicating with deaf and hard of hearing friends, family members and others, as well as adopt effective and comprehensive policies and procedures about the use and implementation of videophones, including for appropriate compliance monitoring, maintenance and repair). ***See also Yeh v. United States Bureau of Prisons,* 2019 WL 1330446 (M.D. Pa. March 25, 2019)** (court "instituted a rigorous program of reporting and case management, designed to ensure that the preliminary injunctive relief sought by Yeh, installation of a videophone, would be accomplished in a timely fashion").

Another issue central to deaf and hard of hearing prisoners is the accessibility of a notification system, as it is common for communications to be done aurally through a loudspeaker. This type of alert system is not accessible to individuals who are deaf and hard of hearing, so this has also been the subject of litigation. In ***Bearden v. Clark County*, 2016 WL 1158693 (W.D. Wash. Mar. 24, 2016)**, the court found that the plaintiff established, as a matter of law, that the jail's communication system was not accessible.[67] The plaintiff testified that "they would call my name to give me the dose [of medication] in the middle of the night when I was asleep, and I couldn't hear them calling my name."[68] The court concluded that the County failed to provide an accessible notification system so that the plaintiff had access to medication.

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[63] *Id.* at 699.

[64] *Id.* at 706.

[65] *Id.* at 707-08.

[66] *Id.* at 708 n. 5.

[67] *Bearden v. Clark County*, 2016 WL 1158693 (W.D. Wash. Mar. 24, 2016).

[68] *Id*. at *3.

The issue of accessible notifications has also been part of recent settlement agreements. For example, in the ***Illinois Settlement***, IDOC will provide deaf and hard of hearing inmates with a tactile notification system so that they can receive notification of alerts, such as meal times, showers, yard, and visitors.[69] Similarly, in the ***South Carolina Settlement***, the State will "provide an effective visual or other notification system so that inmates who have a hearing disability do not miss announcements, alarms, or other auditory information, including times for meals, recreation, education, work assignments, and other events."[70]

While the majority of cases and settlements focus on people who are deaf and hard of hearing, it is important to remember that the ADA's effective communication obligations apply to people with other communication-related disabilities as well. In ***Brown v. Department of Public Safety and Correctional Services*, 17-cv-945 (D. Md.)**, blind plaintiffs brought a lawsuit alleging lack of access to prison services and privileges, asserting that they were forced to rely on other prisoners for help with reading documents, using the commissary and library, filing grievances, requesting medical attention, educational/vocational information, and more. The parties reached a settlement whereby the prison agreed to provide equally effective access to all print materials. Specifically, it will provide information in an accessible format, including large print, electronic, Braille or audio. The prison will also provide the assistive technology necessary to access materials, including computers with text-to-speech software, CD player, printer, JAWS, Talking Typer, Book Wizard Reader, etc. and that such technology will be available in the library, classrooms, job locations or cells, as appropriate. Further, for plaintiffs who prefer a reader and scribe, they can choose a fellow inmate who has been trained and meets disciplinary and security requirements.

E. ADA and Solitary Confinement

Disability advocates contend that correctional facilities far-too-frequently refer people with mental illnesses to solitary confinement, where their impairments are often exacerbated, rather than providing these inmates with the proper care and medical treatment.[71] Under pressure

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[69] *Holmes et al v. Baldwin,* 11-cv-2961, N.D. Illinois, Stipulation of Settlement, approved July 26, 2018, Retrieved from www.equipforequality.org/wp-content/uploads/2018/07/Holmes-Stipulation-of-Settlement.pdf (last accessed Sept. 14, 2018).

[70] *Settlement Agreement between the United States of America and South Carolina Department of Corrections Under the Americans with Disabilities Act*, ADA.GOV, (Mar. 29, 2018), Retrieved from www.ada.gov/south_carolina_doc_sa.html.

[71] *See e.g.*, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, ACLU (2014), www.aclu.org/stop-solitary-briefing-paper.

created by class action litigation, several states have agreed to reduce solitary confinement for inmates with mental illness; for example, the Illinois Department of Corrections agreed to reduce the amount of hours inmates with mental illness spend in isolation, and committed to increasing health care resources for these inmates.[72] Adding momentum to this movement, the DOJ articulated its view that under the ADA, prisons cannot confine an inmate to solitary confinement because of that person's mental illness.[73]

This issue was also examined in ***Andrews v. Rauner*, 2018 WL 3748401 (C.D. Ill. Aug. 6, 2018)**.[74] In this case, an incarcerated woman with a number of mental health conditions regularly engaged in acts of self-harm. Medical professionals noted the importance of "out of cell time" for the inmate to engage in activities like socializing and writing. However, after a 2015 suicide attempt, she was placed in solitary confinement. The inmate was stripped naked in a crisis cell instead of being transferred to an inpatient hospital for mental health care. While in segregation, she was asked questions about her mental health through the cell door and only received a psychiatrist visit for 30 minutes each week. The inmate brought a case under the ADA, the Rehab Act, and Constitution for discrimination and failure to accommodate. The Department of Corrections argued that a plaintiff could not bring an ADA or Rehab Act claim for inadequate mental health treatment because "access to human interaction" was not a program, service or activity under Title II and there was just disagreement with care provided. The court found for plaintiff, denying a motion to dismiss, and stated the plaintiff's claim was about deprivation of access to services, programs and activities. The plaintiff was denied access to hospitalization outside of the prison while prisoners with physical disabilities or illnesses were sent to an outside hospital for treatment. Lastly, the plaintiff was denied access to education, programming, recreation, exercise, and mental health treatment due to her disability and segregation-status so there was no need to decide if human interaction was a program, service, or activity under Title II.

F. Emerging Issues: Gender Dysphoria

One emerging ADA legal issue is whether individuals with Gender Dysphoria (GD) are people with disabilities under the ADA, a question with implications for the criminal justice system. In ***Doe v. Massachusetts Dept. of Corrections*, 2018 WL 2994403 (D. Mass. June 14, 2018)**, a transgender

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[72] Lisa Klein, *Giant Settlement Approved for Illinois Prison Care," Courthouse News Service*, COURTHOUSE NEWS (May 18, 2016), www.courthousenews.com/2016/05/18/giant-settlement-approved-for-illinois-prison-care.htm.

[73] Statement of the Interest of the United States of America, *G.F. v. Contra Costa County*, No. 13-cv-03667-MEJ, 2015 U.S. Dist. LEXIS 100512, at *3 (N.D. Cal. July 30, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/14/contracosta_soi_2-13-14.pdf.

[74] *Andrews v. Rauner*, 2018 WL 3748401 (C.D. Ill. Aug. 6, 2018).

woman was housed in a men's prison.[75] The plaintiff filed a complaint stating she was subjected to a litany of humiliations and trauma caused by this placement. This included strip searches by male guards who groped her, being forced to shower with male prisoners, and verbal harassment. The plaintiff requested a transfer to a women's prison; an injunction against strip searches by male officers, showering in the presence of men, treating her differently than other women, using male pronouns, and referring to her former male name; and training for staff.

The Department of Corrections filed motion to dismiss on the grounds that GD is not a disability under the ADA. However, the court denied the motion to dismiss. The court found that GD is not categorically exempt because the ADA has language excluding "gender identity disorders not resulting from physical impairments;" there is a debate in the scientific community that GD may result from physical causes—namely, hormonal and genetic drivers; and the DSM definition requires attendant disabling physical symptoms. The court held that the plaintiff adequately plead other elements of an ADA claim. She was denied access to facilities and/or programs that would correspond with her gender identification. The DOC's biological sex-based assignment policy had a disparate impact on inmates with GD. She was denied the reasonable accommodation of a transfer to a woman's prison and being addressed consistent with her gender identity.

This court in this case ordered various aspects of injunctive relief, including ordering defendants: (1) to use female correctional officers whenever feasible when conducting strip searches, consistent with staffing concerns and union agreements; (2) absent exigent circumstances, house the plaintiff in an individual cell with separate shower times; and (3) to the extent possible, ensure that male inmates do not enter the shower.[76] The court never ruled on the plaintiff's request to be transferred to a women's facility or require training, but suggested that the plaintiff could prevail on her ADA and constitutional claims and directed the parties to meet and confer to reach a resolution absent court intervention.[77] As a result of those discussion, plaintiff's requested injunctive relief was provided.[78] ***But see Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744 (S.D. Ohio 2018)** (finding, outside of the criminal justice setting, that GD is not an ADA-disability as the plaintiff did not plead that her GD was caused by a physical impairment or that GD is always caused by a physical impairment). This is an issue where additional litigation is expected.

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[75] *Doe v. Massachusetts Dept. of Corrections*, 2018 WL 2994403 (D. Mass. June 14, 2018).

[76] *Doe v. Massachusetts Dep't of Correction*, 2018 WL 1156227, at *2 (D. Mass. Mar. 5, 2018)

[77] *Id*. ("As may be apparent from this decision, the court is of the view that Doe may very well prevail on her ADA and Equal Protection claims.").

[78] *Doe v. Massachusetts Dep't of Correction*, 2019 WL 2913969 (D. Mass. July 8, 2019).

G. Emerging Legal Issue: Treatment for Opioid Use Disorder

Another emerging legal issue is whether the ADA requires correctional institutions to modify their policies to provide treatment for opioid use disorder, such as medication assisted treatment (MAT). A number of courts have found that it does.

In ***Smith v. Aroostook Cty.*, 376 F. Supp. 3d 146 (D. Me. 2019), *aff'd,* 922 F.3d 41 (1st Cir. 2019)**, the plaintiff with a history of opioid use disorder (OUD) was prescribed buprenorphine. She was due to be incarcerated for 40 days. The jail had a policy generally prohibiting MAT and instead requiring anyone with opiates in their system to experience withdrawal and then be treated accordingly. The plaintiff had previously been incarcerated without such medication for a short period of time and testified that she experienced the worst pain she had ever experienced and considered suicide for the first time in her life. In light of this, and various other aspects of the plaintiff's medical history, the plaintiff's doctor opined that forced and immediate withdrawal would cause painful symptoms and increased risk of relapse, overdose, and death. The plaintiff filed a motion for preliminary injunction, asking the court to require the jail to provide her medication upon incarceration. The plaintiff provided testimony that many correctional facilities oppose providing MAT because they equate it to giving addicted individuals drugs as opposed to treatment, as well as purported security concerns about the presence of opiates in the jail setting. In a strongly worded opinion, the district court granted the plaintiff's motion for immediate relief, and the First Circuit affirmed the decision. The court held that the plaintiff would likely be able to prove discrimination based on a disparate treatment theory, in light of the jail's apparent stigma against MAT, concluding that it made treatment decisions on stereotypes. The court also, alternatively, concluded that the plaintiff would be able to succeed on a theory that she was denied a reasonable accommodation. She specifically requested that she be exempted from the jail's practice of prohibiting MAT and instead undergoing withdrawal. This will deprive the plaintiff with meaningful access to the jail's services. ***See also Pesce v. Coppinger*, 355 F. Supp. 3d 35 (D. Mass. 2018)** (granting preliminary injunction for individual seeking access to methadone treatment during his impending incarceration).

VI. ADA and Re-Entry

For the 95% of incarcerated people who will eventually leave their correctional facilities, the quality of discharge planning and services may significantly impact the success of their transitions into the community.[79] For inmates with disabilities, an absence of appropriate discharge services

[79] Hughes, T. & D.J. Wilson, *Reentry Trends in the United States*. BUREAU OF JUST. STATISTICS, (2004), bjs.ojp.usdoj.gov/content/pub/pdf/reentry.pdf (last visited Aug. 29, 2016).

often results in a lack of access to appropriate public services, a decline in mental and physical well-being, and even recidivism or institutionalization. Whether these consequences caused by correctional facilities violate the ADA and the Rehab Act, including the ADA's integration mandate, is an emerging legal issue.

One of the first cases addressing the issue of re-entry for people with disabilities was brought not under the ADA, but under New York State Law. In ***Brad H. v. City of New York*, 185 Misc.2d 420 (Sup. Ct. 2000)**, inmates in New York City jails brought an action challenging the City's failure to provide inmates with mental illness with discharge planning services.[80] This case demonstrates that inadequate discharge planning deprives individuals with disabilities appropriate benefits and services. Plaintiffs alleged that upon discharge, the city released inmates without giving any referrals and provided only a few dollars for train fare. As a result, inmates with mental illness were denied access to the psychiatric medication and services they needed as they transitioned into the community. The case settled in 2003, with Defendants agreeing to provide all inmates who spend 24 hours or more in New York City jails and receive psychiatric treatment during their incarceration with comprehensive discharge planning services.[81] The services agreed upon include mental health assessment; case management; access to medication and prescriptions; and assistance accessing public benefits, housing, and transportation.

However, this settlement applied to city jails only—not state facilities. In 2014, a man with schizophrenia was released from a five-year prison sentence with no psychiatric medication or referrals to mental healthcare providers. Nine days later, he went on a violent stabbing spree, killing a young boy and wounding several others. Recognizing the vital importance of meaningful re-entry programming, in January of 2015, the State of New York enacted legislation requiring the implementation of mental health discharge plans for all inmates who have received psychiatric care within three years of their release dates.[82]

More recently, in ***U.S. v. Los Angeles County*, 2016 WL 2885855 (C.D. Cal. May 17, 2016)**, the United States filed a Complaint against the County for violations of the Civil Rights of Institutionalized Persons Act and the Violent Crime Control and Law Enforcement Act.[83] At the same time, the government and county filed a stipulated Settlement Agreement that provides for comprehensive policies related to a wide range of issues, including discharge planning.

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[80] *Brad H. v. City of New York*, 185 Misc.2d 420 (Sup. Ct. 2000).

[81] *Brad H. v. City of New York*, Settlement Agreement, https://mhp.urbanjustice.org/sites/default/files/The_settlement.pdf

[82] N.Y. Correct. Law § 404 (2016).

[83] *U.S. v. Los Angeles County*, 2016 WL 2885855 (C.D. Cal. May 17, 2016).

Various individuals sought to intervene, challenging the discharge planning requirements as a violation of the ADA. The County had a practice of releasing inmates without engaging in discharge planning. A group of Intervenors with disabilities argued that they had been denied access to various public services as a result of Los Angeles County's failure to provide meaningful discharge planning—namely, access to transportation, shelter, medical care, psychiatric care, and other services. While the County argued that its practices could not be discriminatory because all inmates were treated equally with respect to discharge planning and services, the court disagreed, pointing out that the ADA applies not only to intentional discrimination, but also to "facially neutral practices that disproportionately impact disabled people."[84] It concluded that the practice of releasing inmates without engaging in discharge planning disproportionately affected inmates with disabilities, and denied the County's motion for judgment on the pleadings on the basis that inmates with disabilities were not offered the same degree of access to public services as their non-disabled peers.

The decision in ***U.S. v. Los Angeles County*** also demonstrates that in some instances, discharge planning can conflict with the ADA's integration mandate. The stipulated settlement agreement created a system whereby inmates with an "intense need for assistance" be directly referred to an Institution for Mental Disease (IMD), a segregated institution, despite the ADA's requirement requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate."[85] The court agreed that this provision conflicted with the Supreme Court's decision in *Olmstead v. L.C. by Zimring*.[86]

In addition to discharge planning itself, there has been recent litigation involving programs that facilitate the re-entry of inmates with disabilities. In ***Beckhorn v. New York State Department of Corrections,* 2019 WL 234774 (W.D.N.Y. Jan. 16, 2019)**, the court evaluated the NY Department of Corrections' program for prisoners with histories of substance abuse which includes transfer to a work-release program.[87] The plaintiff requested light-duty work, such as secretarial work, due to a shoulder injury for which he was also seeking workers compensation benefits. A counselor told him he should leave the work-release program and do community service program instead. He did as he was advised, but then lost out on opportunity to earn good-time credit to reduce his sentence. At a hearing to evaluate eligibility for good-time credit, he was denied credit due to his "request to remain unemployed and statement of not being able to work." The chairperson of the hearing stated they couldn't take a risk with him because even if he got a job

[84] *Id.* at *5.

[85] *Id.* at *7.

[86] 527 U.S. 581 (1999)

[87] *Beckhorn v. New York State Department of Corrections,* 2019 WL 234774 (W.D.N.Y. Jan. 16, 2019).

doing secretarial work, he could fall out of his chair, showing discriminatory intent. The plaintiff brought suit under the ADA and Rehab act. The court granted his request for a preliminary injunction ordering immediate reinstatement of the revoked merit time and a parole hearing.

Similarly, the DOJ reached a settlement agreement in 2019 with the **Hawaii Department of Public Safety** (HDPS) following an investigation into reports that the Hale Nani Correctional Facility (HNCF) excluded inmates with mobility disabilities from its furlough program which then delayed their parole and extended their imprisonment.[88] The DOJ then extended this investigation to four other HDPS facilities. The DOJ concluded that HDPS had excluded qualified individuals with mobility disabilities from its furlough program because of their disability in violation of Title II of the ADA. HDPS agreed to modify its policies and practices no longer discriminate on the basis of disability, including mobility disabilities; remove eligibility criteria designed to screen out those with mobility disabilities; and make its facilities accessible to inmates with disabilities. HDPS further agreed to provide inmates with disabilities reasonable accommodations to participate in furlough programs, designate an ADA coordinator in for HDPS and in each HDPS facility, train staff on the new policies, and pay $45,000 in damages to the complainants.

Often correctional institutions maintain programs to help prisoners transition into the community. If that community center discriminates against an individual with a disability, causing them to return to prison instead of remaining in the community, can the state be held responsible? That question was answered in the recent case ***Marks v. Colorado Dep't of Corr.*, 958 F.3d 1001 (10th Cir. 2020)**.[89] In *Marks*, a state prisoner participated in a program of the state department of corrections. After she aggravated her spinal stenosis and had some work-related limitations, she was deemed ineligible for the program and returned to prison. The question on appeal was whether the ADA and Rehab Act applied where the decision-maker was not the public entity or a direct recipient of federal funding. The Tenth Circuit held that both ADA and Rehab Act applied. Regarding the ADA, the Tenth Circuit found that a factfinder could reasonably regard the program as the state's, as a state regulation assigned administration of residential community corrects programs to the CDOC and, the CDOC provided funding, made referrals, created standards, maintained custody over all inmates, continued to monitor the status, and audited community corrections programs. Regarding the Rehab Act, the court held that the Colorado Department of Corrections and Colorado Department of Criminal Justice both received federal funds so had liability under the law. This case is being remanded for further proceedings.

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[88] *Settlement Agreement Between The United States of America and the Hawaii Department of Public Safety*, (March 13, 2019), https://www.ada.gov/hawaii_dps_sa.html.

[89] *Marks v. Colorado Dep't of Corr.*, 958 F.3d 1001 (10th Cir. 2020).

Parole is often the first step in reentering into the community. Given the breadth of Title II, it is not surprising that parole is considered a program, service or activity of the state. But exactly how Title II applies to parole decisions is another emerging issue. One recent case decided by the Massachusetts Supreme Court provides guidance about this question. In ***Crowell v. Massachusetts Parole Board*, 74 N.E.3d 618 (Mass. 2017),** the plaintiff brought a lawsuit after he was denied parole.[90] During his parole hearing, one of the board members discussed his disability—a traumatic brain injury (TBI)—and the impact of such disability. The board member said that the plaintiff's TBI resulted in cognitive and emotional functioning, uncooperative behavior, and that this was a chronic life-long condition that might be worse so he would need a particular kind of setting. The board ultimately denied his request for parole, stating that he was unable to offer any concrete, viable release plan that could assure that he could be compliant on parole. The plaintiff brought a lawsuit under the ADA and state law, asserting that as a result of his disability, he was denied a fair hearing and parole review decision process. The Massachusetts Supreme Court vacated the dismissal of the plaintiff's case on procedural grounds so it did not need to reach any decision on the merits of this issue. Despite that, the court said that it was clear from the limited record that the board's decision was not adequately considered in light of the ADA. The court held while parole decisions are granted deference, this deference is not without limits. It continued that the board "clearly may not categorically exclude any prisoner by reason of his or her disability."[91] The court also held that if an individual's mental disability affects a prisoner's ability to make an appropriate release plan, the board should make reasonable modifications by, for example, providing an expert or other assistance to help the prisoner identify appropriate programming. The court concluded that once the board became aware the plaintiff's disability could potentially affect his ability to qualify for parole, it had a responsibility to determine whether reasonable modifications could enable the plaintiff to qualify, without changing the fundamental nature of the program.

VII. Conclusion

As noted earlier, people with disabilities are overrepresented in the criminal justice system. Accordingly, it is essential that all stakeholders understand that people with disabilities do not lose their rights under the ADA and Rehab Act when they come in contact with the criminal justice system, including their encounters with law enforcement, criminal courts, correctional facilities and re-entry programs.

[90] *Crowell v. Massachusetts Parole Bd.*, 74 N.E.3d 618, 620–21 (2017).

[91] *Id*. at 624.