

# Effective Communication in the Criminal Justice System: Lessons from Case Law



will begin at 12:30 pm ET

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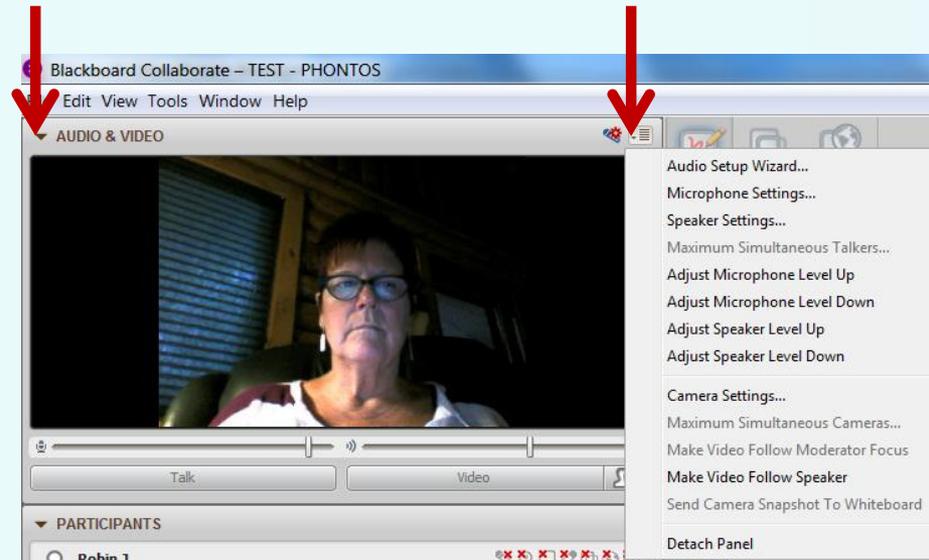
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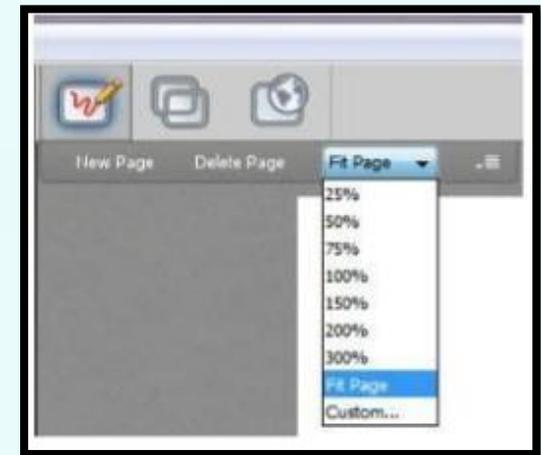
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# Customize Your View continued

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- TransCen, Inc.
  - Mission Statement: Improving lives of people with disabilities through meaningful work and community inclusion
- Mid-Atlantic ADA Center, a project of TransCen, Inc.
  - Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services



# Effective Communication in the Criminal Justice System: Lessons from Case Law



Rachel Weisberg  
Equip for Equality



# CLE Credit for Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for **Illinois** attorneys.
- We can provide certifications to attorneys in other states; some other states will accept CLE certification.
- **Attorneys** interested in obtaining continuing legal education credit should contact Rachel Weisberg at: [rachelw@equipforequality.org](mailto:rachelw@equipforequality.org)

# Today's Webinar

- Refresher on the ADA's Effective Communication Requirements
- Focus on Law Enforcement
  - Exigent Circumstances
- Focus on Correctional Facilities
  - Focus on Communication for Inmates who are Blind/Low Vision
  - Sign Language Interpreters
  - Telephone Access
  - Accessible Notification System
  - Affirmative Assessment of Needs
- Recap of Lessons Learned

# Refresher: Effective Communication Requirements

- Covered entities must provide ***auxiliary aids and services*** when needed to communicate effectively with people who have communication disabilities
  - **Examples:** Braille, electronic material, qualified sign language interpreter, written materials, using communication board
- **Key:** Consider the nature, length, complexity and content of the communication and the person's normal method of communication
- Title II entities: Must give ***primary consideration*** to the choice of aid or service requested by the person with a disability
  - Choice must be honored *unless* entity can demonstrate that another equally effective means of communication is available OR would result in an undue burden or fundamental alteration

[www.ada.gov/effective-comm.htm](http://www.ada.gov/effective-comm.htm)

# ADA & Law Enforcement

# Law Enforcement: Exigent Circumstances

- **DOJ and most courts:** ADA applies to all aspects of law enforcement, including arrests - but exigency is a factor in determining what auxiliary aids and services to provide
- **Some courts (minority view):** ADA does not apply to an officer's on-the-street responses to reported disturbances prior to securing the scene and ensuring that there is no threat to human life
- **Lesson:** Create policies and practices about how to communicate in both emergency and non-emergency situations

***Bircoll v. Miami-Dade County***  
**480 F.3d 1072 (11th Cir. 2007)**

- Plaintiff is deaf. Asserts that he requested an oral interpreter during a traffic stop, but was not given one
- Given field sobriety tests and taken to station for Intoxilyzer test

# Law Enforcement: Exigent Circumstances

County argued that arrest was “exempt” from the ADA

**11<sup>th</sup> Circuit:** Rejected complete exemption from ADA

- “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.”
- But found no interpreter required due to exigent circumstances
  - DUI stop on the side of the highway, on-the-spot judgment, serious public safety concerns
  - Waiting for interpreter would alter results of blood alcohol level
- Circumstances of a DUI arrest on the roadside are different from those of an office at a school or police station
- Noted Plaintiff’s primary form of communication is lip reading and that he can speak with a speech impediment

# Law Enforcement: Exigent Circumstances

**Lesson:** Don't overextend the argument that exigent circumstances require immediate action without effective communication

***Taylor v. Mason***  
970 F.Supp.2d 776 (S.D. Ohio 2013)

- Deaf man called the police after physical altercation with a partially deaf woman at his home
- Each alleged the other engaged in an assault
- Police arrived and used the woman as an interpreter while waiting for the qualified interpreter to arrive
- **Court:** Found for plaintiff (denied motion to dismiss)
  - No exigent circumstances existed to require a rushed investigation – no imminent safety risk
  - Police should have waited for a qualified interpreter

# Law Enforcement Exigent Circumstances

- Other reasons interactions were problematic under regulations -- 28 C.F.R. § 35.160
  - Woman was not an appropriate person to use as an interpreter, given the circumstances
  - Man did not consent to using the woman as an interpreter
- Communication at police station
  - City provided an interpreter who was not ASL certified
  - Man complained but city refused to replace the interpreter
  - When a law enforcement agency does not defer to the deaf individual's requests, the burden is on law enforcement to ensure that communications with a deaf individual are **as effective** as communications with hearing individuals

# DOJ Agreement: Focus on Exigent Circumstances

**Tip:** Learn from comprehensive DOJ agreements

**DOJ Settlement with City of Philadelphia Police Department**  
[www.ada.gov/ppd\\_sa.html](http://www.ada.gov/ppd_sa.html) (Aug. 2, 2018)

- **2016:** DOJ issued letter of findings
- **Settlement Agreement:** Addresses exigent circumstances
  - **If** an emergency involving an **imminent threat** to the safety or welfare of an individual (including law enforcement personnel or members of the public)
  - **And** there is **insufficient time** to make available appropriate auxiliary aids and services
  - **Then** law enforcement personnel will use **whatever** auxiliary aids and services are **most effective** under the circumstances to communicate with persons who are deaf or hard of hearing, **consistent** with an appropriate law enforcement response to the imminent threat

# DOJ Agreement: Focus on Exigent Circumstances

## In other words:

- When exigent circumstances exist, officers don't necessarily need to stop to secure *specific* auxiliary aids and services
- But even in those circumstances, officers should provide the *most effective* auxiliary aids and services they can *under the circumstances*
  - Example: Use pen/paper if can't wait for ASL interpreter
- And, as soon as there is no longer an imminent threat, officers will follow its procedures to assess and provide appropriate auxiliary aids and services to ensure effective communication

**Same requirements in DOJ Agreement with Columbia Police Department, South Carolina:**

[www.ada.gov/columbia\\_pd/columbia\\_pd\\_sa.html](http://www.ada.gov/columbia_pd/columbia_pd_sa.html) (May 3, 2016)

# DOJ Agreement: Assessing Communication Needs

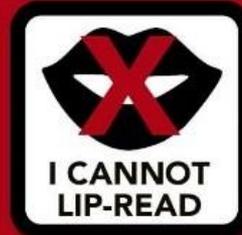
## Additional Highlights of the City of Philadelphia Settlement Agreement

- **Develop a communication assessment process**
  - Personnel will use a Communication Card during routine interactions (where no imminent threat exists)
  - Uses pictograms to communicate basic information and ask about preferred method of communication
- **Use Communication Assessment Form**
  - Asks individual what auxiliary aids and services are desired, and includes a list of possibilities
  - Clarifies that they will be provided free of charge

# VIOLATIONS



The best way to communicate with me is:



## Letter of Findings:

[www.ada.gov/briefs/philadelphia\\_pd\\_lof.pdf](http://www.ada.gov/briefs/philadelphia_pd_lof.pdf)

# DOJ Agreement: Providing Effective Communication

- Gives “primary consideration” to expressed preference
- Police Department will ensure appropriate auxiliary aids and services are made available, including qualified interpreters
- Interpreter provided ASAP (within one hour of identified need)
  - Requires maintaining contract with qualified interpreter agencies with oral and sign language interpreter agencies to ensure services will be available on a priority basis
- Update electronic detainee tracing system to notify enforcement personnel of a detainee’s disability and preferred auxiliary aids
- Develop a training program for personnel
- Monetary payment of \$97,500

# ADA & Correctional Facilities

# Effective Communication in Prison

**Lesson:** Consider both systemic and individual needs when ensuring effective communication (requests + acquisition of technology)

## *Disability Rights Florida v. Jones*

16-cv-47 (N.D. Fla. 2017)

[www.clearinghouse.net/chDocs/public/PC-FL-0027-0003.pdf](http://www.clearinghouse.net/chDocs/public/PC-FL-0027-0003.pdf)

- Lawsuit about diverse group of inmates with disabilities
- **Highlights:** Focus on inmates who are blind / have low vision
  - Materials distributed must be in an accessible format (paper forms, signs, handbooks, orientation materials)
  - Talking watches to remind inmates about necessary events or appointments, in certain circumstances
  - Plastic magnifying sheets in dorms as an accommodation
  - Library/law library will have magnifiers, a CCTV video magnifier, large print books and other resources

# Effective Communication in Prison

- If library has a computer, the computer will have font enlargement feature and screen magnifier
- At least one computer in law library will have JAWS software and training on this software will be available
- Upon request and demonstrated need, a recorder (in or near law library) to dictate correspondence
- Access to inmate assistants, law clerks or library clerks to, among other things, help prepare grievances, grievance appeals, requests for modifications/accommodations, responses to disciplinary actions

**See also *Wells v. Thaler*, 460 Fed. Appx. 303 (5th Cir. 2012)** (concluding that prison did not violate the ADA by failing to provide inmate with Braille/audio versions of legal resources because inmate had effective communication to law library due to a qualified reader and facility found that alternative resources were not available).

**Tip:** Even though in prison, enable independence as much as possible

# Correctional Facilities

## Common themes in the case law:

- Cases with a broad range of issues
- When ASL interpreters are required
- Accessible telecommunications—focus on video phones
- Accessible notification systems
- Throughout all – balance with security needs

**Lesson:** Use “high stakes interactions” concept as a shortcut about when to provide ASL interpreters

## *McBride v. Michigan Dep’t of Corrections* 294 F.Supp.3d 695 (E.D. Mich. 2018)

- Class action of deaf and hard of hearing inmates – asserted systemic failure to provide auxiliary aids/services
- **Court:** Found for class (granted motion for summary judgment)
- MDOC violated ADA by failing to provide ASL interpreters

# Interpreters for High Stakes Interactions

- **Ordered:** Provide necessary auxiliary aids to participate equally in programs, including ASL interpreters for all “high-stakes” interactions, including religious services (even if voluntary)

## ***Holmes v. Baldwin (“Holmes Settlement”)***

11-cv-2961 (N.D. Illinois class settlement approved July 26, 2018)

[www.equipforequality.org/wp-content/uploads/2018/09/Holmes-Settlement-Agreement-all-attachments.pdf](http://www.equipforequality.org/wp-content/uploads/2018/09/Holmes-Settlement-Agreement-all-attachments.pdf)

- Class action lawsuit against the Illinois Department of Corrections on behalf of deaf and hard of hearing inmates
- **Settlement highlights:**
  - Individuals whose primary language is ASL will receive ASL interpreters for all “high stakes interactions”

# Interpreters for High Stakes Interactions

- **High stakes interactions include:**
  - Medical care and appointments, including dental, vision, audiological, mental health care and appointments, and include both individual therapy and group counseling sessions
    - Narrow exception for routine appointments without substantial conversation, such as allergy shots
  - 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
  - Transfer and classification meetings
  - Meetings with the ADA Coordinator to Communication Plan

***See also DOJ Settlement with South Carolina DOC***  
[www.ada.gov/south\\_carolina\\_doc\\_sa.html](http://www.ada.gov/south_carolina_doc_sa.html) (2018) (listing important communications for auxiliary aids and services and interpreters)

# Video Phones

**Lesson:** Provide video phones to ensure equivalent access

## ***McBride:***

- **Court:** MDOC violated ADA by failing to provide VPs; ordered VPs must be available for all deaf/hard of hearing inmates
- MDOC asserted defense of “possible safety concerns” but failed to explain why traditional safety policies were insufficient
- Must have communications that “are as effective” as communications with others – Defendants’ own witness compared TTY system to “sending someone a fax to their homes versus an email to communicate”

## ***Holmes Settlement:***

- Increased number of TTYs (at least two per facility)
- Video phones at all facilities with class members

# Video Phones

## Other cases on video phones:

- ***Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017)**
  - Failure to provide access to video phone improperly restricted First Amendment rights
  - Rejected BOP arguments re: security, cost, TTY alternatives
  - Called TTY “old technology that is fast becoming obsolete”
  - “We believe that a factfinder could reasonably conclude that BOP’s refusal to provide a videophone is an exaggerated response to the perceived security concerns.”
- ***DOJ Agreement with Arlington County***
  - [www.ada.gov/arlington\\_co\\_sheriff\\_sa.html](http://www.ada.gov/arlington_co_sheriff_sa.html) (2016)
- ***Disability Rights Florida v. Jones*, 16-cv-47 (N.D. Fla. 2017)**
- ***Minnis v. Johnson*, 10-cv-0096 (E.D. Va. 2010)**

# Accessible Notification System

**Lesson:** Consider how inmates are receiving notifications and consider whether they are accessible

## *Bearden v. Clark County*

2016 WL 1158693 (W.D. Wash. March 24, 2016)

- Plaintiff brought lawsuit stating that the jail's alert system was inaccessible and that he commonly missed alerts
  - Example: Name called over loud speaker for medicine
- **Court:** Found for plaintiff (granted summary judgment) on issue

# Accessible Notification System

## Similar conclusions in settlement agreements:

- **Holmes:** Tactile alert system to provide a safe way to provide accessible notifications about fires, emergencies, evacuations, meals, showers, yard time, doctor or counselor appointments
- **DOJ Agreement with South Carolina:** 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”

# Affirmative Evaluation of Disability-Related Needs

- **Lesson:** Be proactive. Develop process to assess inmates' disability-related needs

## *Pierce v. D.C.*

128 F. Supp. 3d 250 (D.D.C. 2015)

- Deaf individual was incarcerated for 51 days
- Prison staff never assessed Plaintiff's communication needs
- Assumed lip-reading and written notes were sufficient
- Plaintiff asserted he asked for an interpreter for medical intake, health services and various classes
- **Court:** Violated ADA/504 as a matter of law by failing to evaluate Plaintiff's need for accommodation when taken into custody
  - **Prisons have an affirmative duty to assess the accommodation needs of inmates with known disabilities**

# Affirmative Evaluation of Disability-Related Needs

## ***Holmes Settlement***

- Enhanced screening process to assess whether someone is deaf/hard of hearing (at intake and during periodic exams)
- Third-party communication assessors will assess communication needs and help develop inmate's communication plan
- Set principles to follow when creating communication plan
  - Example: *If primary language is ASL, then needs an interpreter for all High Stakes interactions*

## ***Disability Rights Florida***

- At reception, evaluation to identify whether an inmate has a hearing, vision (or mobility) disability and whether they need accommodations
- Verbal/written communication/ASL skills will be evaluated by professional, including inmate's requested communication needs

# Recap of Lessons Learned

- Create policies and procedures about how to communicate as effectively as possible during exigent circumstances
- Don't overextend the argument that exigent circumstances require immediate action without effective communication
  - Training, training, training – hands on, when possible
- Learn from comprehensive DOJ agreements
- Consider both systemic and individual needs when ensuring effective communication (requests + acquisition of technology)
- Use “high stakes interactions” concept as a shortcut about when to provide ASL interpreters
- Install and use video phones instead of using TTY only
- Provide ASL interpreters for all “high stakes programs”
  - Contract with interpreting agencies to ensure priority
- Ensure oral information is communicated in alternative ways
- Develop process to assess inmates' disability-related needs.

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# Contact Us

## ADA questions

- **ADA National Network**
  - 1-800-949-4232 V/TTY
  - [www.adata.org](http://www.adata.org)



- **Mid-Atlantic ADA Center**
  - 1-800-949-4232 V/TTY (DC, DE, MD, PA, VA, WV)
  - 301-217-0124 local
  - [www.adainfo.org](http://www.adainfo.org)
  - [ADAtraining@transcen.org](mailto:ADAtraining@transcen.org)



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- Events section at [ADATA.org](http://ADATA.org)

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