Confronting Sentences that Silence: The Americans with Disabilities Act’s Effective Communication Mandate for Prisoners and Probationers Who Are Deaf

By MaryBeth Musumeci

MaryBeth Musumeci
Staff Attorney
Disabilities Law Program
Community Legal Aid Society
100 W. 10th St., Suite 801
Wilmington, DE 19801
302.575.0660 ext. 228
mmusumeci@declasi.org

The denial of many individual rights and freedoms is inherent in being incarcerated. Still, a fundamental tenet of the American criminal justice system is that prisoners retain certain human and legal rights. For example, the Eighth Amendment to the U.S. Constitution prohibits “cruel and unusual punishment,” which has been interpreted by the U.S. Supreme Court to protect prisoners from deliberate indifference in the provision of medical treatment, from long-standing prison conditions such as overcrowding and the deprivation of food and sanitary surroundings, and from the malicious and sadistic use of force to cause harm.1 By contrast, the deprivation of the right to communicate effectively—to comprehend information being conveyed by prison personnel and have one’s own language and meaning understood in turn—may not be construed as a protected legal right of prisoners in the traditional sense.2 For inmates who are deaf and who communicate in American Sign Language (ASL), this is a right required by the Americans with Disabilities Act (ADA) but often repudiated by state prisons.3 The failure to ensure communication with prisoners who are deaf implicates other important rights, including access to medical and substance abuse treatment, inclusion in inmate programming that can lead to credits for early release, and meaningful participation in classification and disciplinary proceedings.


2The inaccessibility of communications with prison personnel for groups of prisoners, such as those with cognitive impairments or those with limited English proficiency, is not discussed.

3While some states have separate prison and jail systems, Delaware operates a unified system consisting solely of state prisons. I use the term “prison” to refer to all state correctional facilities.
In this article I discuss the plight of prisoners and probationers who are deaf and who are being denied interpreter services and other accommodations by state departments of correction. I illustrate the problem, including the need for reasonable accommodations to ensure communication for people who are deaf (I), detail the ADA provisions requiring state and local governmental entities, including prisons, to make such accommodations available (II), and outline various advocacy alternatives and describe experiences with each (III).

I. Reasonable Accommodations in State Correctional Systems for People Who Are Deaf

When I first met Carson, he was serving a six-month sentence at a drug treatment program in a locked violation-of-probation facility. Carson was 23 years old and had been profoundly deaf since he had a virus with a very high fever as a young toddler. Both of his parents and one sibling also are deaf. He was educated at a school for the deaf, and his first language is ASL.

Carson dropped out of high school after becoming involved with drugs. He was very bright, and the interpreter with whom I worked remarked that he expressed himself very eloquently. He articulated a sincere desire to complete drug treatment and turn his life around. But he found himself sitting in drug treatment group meetings all day with no way of meaningfully participating in and benefiting from treatment. Instead of having an interpreter to enable him to communicate with the group, he was given a small white board on which to write questions. Sometimes another inmate was assigned to transcribe the group’s discussion for him, but this proved to be unworkable. The other inmate often would lose interest or could not keep up with the pace of the group’s discussion.

If Carson did venture a written contribution to the group’s discussion, he was never sure if his thoughts were being accurately conveyed to the group. He sometimes was given written handouts as a substitute for the group therapy sessions, but his ability to understand written English was not as advanced as his ability to communicate in ASL. Carson also was unable to benefit from his weekly one-on-one meetings with his counselor because they communicated by writing notes back and forth instead of using an interpreter. Carson’s facility orientation sessions also amounted to sitting in a large group of inmates, watching but not hearing presentations, and receiving a written handbook. On several occasions during his incarceration, he was disciplined for minor idiosyncratic rule infractions—for example, he was made to stand with his nose against the wall for several hours after moving a certain colored chair from in front of the phone bank to the other side of the room, and for sleeping as a result of being unable to hear the loudspeaker announcement to wake up—as a result of not having been able to understand or become aware of the facility rules.

Ultimately the Department of Correction agreed to allow Carson to serve the balance of his sentence on probation with outpatient drug treatment at a local nonprofit provider in the community. That provider also initially balked at the notion of paying for a sign language interpreter for Carson’s counseling sessions and instead offered the services of a social worker with no formal training in ASL but with an estranged brother who was deaf. The agency ulti-

---

4 All client names have been changed to protect privacy.

5 The severity of hearing loss ranges from mild, moderate, and severe to profound. The term “deaf” is sometimes used to describe someone who has an approximately 90 dB (decibels) or greater hearing loss or who cannot use hearing to process speech and language information, even with the use of hearing aids. Individuals’ ability to learn to speak and to understand spoken language often is impaired particularly if they are born with hearing loss or lose their hearing before they are 2 years old. National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services, Hearing Loss, www.cdc.gov/ncbddd/dd/ddhi.htm.

6 The legal obligation of places of public accommodation to provide qualified sign language interpreters where necessary to ensure effective communication with people who are deaf is contained in Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181 (2004): Additional causes of action may be found in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2004), and corresponding state antidiscrimination laws, such as the Delaware Equal Accommodations Law, 6 Del. Laws § 4500 (1996).
mately relented but discharged Carson after only a few sessions with a qualified interpreter. Six months later, Carson is reportedly using drugs again.

Justin was detained in prison pending his trial for theft because he was unable to post bail. His disabilities include deafness, a visual impairment, mental retardation, and mental illness. He was educated at a residential school for the deaf and is considered to have minimal language skills. He tends to use “home signs”—the meanings of which are particular to him and those who are familiar with him—rather than traditional ASL signs. As a result, even professional sign language interpreters have had difficulty communicating with him if they are unfamiliar with him. Even the correctional facility counselor readily acknowledged that communicating via written notes was a failure. However, rather than hiring a qualified interpreter to facilitate communication, the facility provided no services for him, and thus he was denied, among other entitlements, the pretrial mental health screening routinely afforded to all detainees.

Anthony, 26, has been profoundly deaf since he had the measles as a toddler. He was educated at a residential school for the deaf, where he was a star athlete. His primary language is ASL, and his English skills are rudimentary. Over the past eighteen months, he has been held for violation of probation stemming from drug charges. When I first met Anthony, he was at a locked violation-of-probation center without access to interpreter services or a TTY (TeleTYpewriter), or TDD (Telecommunications Device for the Deaf). After filing inmate grievances concerning these problems, he was transferred to a work release center and then incarcerated. At each new facility, the Department of Correction promised that appropriate accommodations would be available for him, but staff members at each facility did not have access to a TTY and either did not see the need for or did not know how to access interpreter services. The most disturbing part of Anthony’s mistreatment came toward the end of his sentence when he was classified as appropriate for the prison unit which housed inmates with serious mental illness and placed on an antidepressant, all without ever having met with a mental health counselor or physician with interpreter services. Even after Anthony began complaining of side effects from the medication, including dizziness and feeling disoriented, another six weeks elapsed before he could see a doctor with an interpreter in order to communicate his symptoms and understand his treatment.

These stories illustrate some of the mistreatment and discrimination that prisoners who are deaf routinely face from correctional facilities unaware of their legal obligation to ensure communication, lacking sufficient resources to do so, or ignorant about the need to provide such accommodations. Appropriate accommodations to ensure communication for prisoners and probationers who are deaf fall into several main categories.

**Interpreter Services.** Among the most needed and often most misunderstood accommodations are interpreter services. A frequent misconception is that interpreter services are not necessary because a person who is deaf is able to communicate by writing notes back and forth in English. ASL, however, does not directly correlate with written English. ASL has its own syntax, vocabulary, and grammatical structure and is akin to a foreign language when compared to English. In fact, the “assumption that signs should refer to words rather than concepts is based on a serious misconception regarding the nature of ASL. ASL is not a code for English. It is an independent language in which the signs directly represent the concepts [that words convey] in spoken language.”

---

7The term “minimal language skills” refers to “[p]ersons who have inadequate education, lack of exposure to any language or for other reasons are not competent in any language. They use neither ASL [American Sign Language] nor English fluently. They may use ‘home signs.’ [When interpreting for such a person, it is common to use props, gestures, pictures and a Deaf interpreter. The Deaf interpreter will interpret to the hearing interpreter what the minimal language deaf person is communicating. The hearing interpreter then interprets what the deaf interpreter is communicating.” Rochester Institute of Technology Libraries, Interpretation and Deaf Resources, http://wally.rit.edu/pubs/guides/interpret.html.

nation of hand shapes, hand movements, locations on or near the body, palm orientation, and nonmanual signals and often do not have direct counterparts in English. There are other important differences. For example, concepts in ASL are communicated visually, not literally.9 The verb “to be,” a significant part of the English language, does not exist in ASL. Articles (such as “a,” “an,” “the”) are not used. The use of plurals, adverbs, and adjectives is fundamentally different from how those concepts are conveyed in traditional spoken and written English.10

ASL is actually based on French Sign Language, and thus shares more similarities with written French than with written English.11 ASL also is distinct from other sign languages, such as British Sign Language, Japanese Sign Language, and Danish Sign Language: “[O]ther sign languages differ from each other as much as spoken languages differ. Just like different spoken languages, different sign languages are mutually unintelligible. For instance, a deaf person from Britain, who knows only his own sign language, cannot understand two deaf Americans signing to each other in ASL.”12

With an understanding of the differences between ASL and English as a foundation, the need for interpreter services in a variety of contexts for prisoners and probationers who are deaf becomes more evident.13 Some contexts are intake, classification, orientation, and disciplinary proceedings; meetings with facility counselors, social workers, and probation officers; medical appointments; mental health and substance abuse evaluations and treatment; and educational classes and other inmate programming—instances where communication is lengthy or complex or both.14

TTY Access. Another accommodation for prisoners who are deaf is TTY access.15 TTYs are “terminals used for two-way text conversation over a telephone line.”16 The device includes a keyboard with a space to

---

9E.g., I recently watched a talk given in English which was simultaneously being interpreted into ASL for the deaf members of the audience. The speaker referred to “the attack on the World Trade Center.” Rather than forming the signs which would most closely correspond to those English words, the interpreter instead set up a visual picture of two tall buildings and then signed an airplane flying into the buildings to convey that concept.

10By contrast, other sign languages, such as Signed Exact English, are intended to be direct correlations with the English language. These languages, however, are distinct from ASL.

11Approximately two-thirds of ASL’s signs have French origins. ASL evolved from the meeting of Laurent Clerc, a Frenchman deafened during early childhood, and Thomas Hopkins Gallaudet, an American minister and educator. Clerc exposed Gallaudet to French Sign Language and methods for teaching children who were deaf. He and Gallaudet jointly founded the first residential school for the deaf in America. See National Deaf Education Center, Gallaudet University, Laurent Clerc: Apostle to the Deaf People of the New World (2003), available at http://clerccenter.gallaudet.edu/Literacy/MSSD/LC/clerc/index.html.

12Gallaudet College, supra note 8. For a sense of the breadth and diversity of the different sign languages in use around the world, see Gallaudet University Library’s list of Sign Languages of the World by Country, http://library.gallaudet.edu/dr/faq-world-si-country.html. ASL cannot be understood in isolation from an understanding of the corresponding deaf culture. While a full examination of the role of deaf culture is beyond the scope of this article, attorneys and other advocates who work with people who are deaf should be aware that many consider themselves culturally “deaf” as a result of their shared language (ASL), educational and life experiences, including a history of being marginalized and discriminated against by members of the hearing world. See, e.g., Deborah L. Maxwell-McCaw et al., Gallaudet University, Social Identity in Deaf Culture: A Comparison of Ideologies, 4 (2000), http://gradschool.gallaudet.edu/jlc/2002/Readings/SocialIdentityinDeafCulture.PDF.

13The elements to be weighed under the ADA when determining whether interpreter services are required in a particular context are detailed infra (II).

14In this article I focus on instances in which prisons may be required to provide interpreter services, as opposed to other instances in which people who are deaf routinely require interpreter services in the criminal justice process, such as during court hearings and proceedings. In Delaware the duty of the courts to provide interpreter services for people who are deaf and who are parties or witnesses in a proceeding is codified at 10 Del. Laws § 8907 (2005). Note, however, that Section 8907 conflicts with the ADA’s mandate that the costs of accommodations not be passed on to the person who is deaf. See 28 C.F.R. § 35.130(f) (2004).

15The TTY (TeleTYpewriter) was invented in 1963 by a deaf man, Robert Weitbrecht, who developed the acoustic coupler that connected a telephone to a TTY. See Rochester Institute of Technology Libraries, FAQs and General Etiquette Tips for New TTY Users (2003), http://wally.rit.edu/depts/ref/research/deaf/ttyuse.html. The emergence of the TTY was revolutionary since for the first time communication over the telephone rather than in-person became possible for people who are deaf.

accommodate a telephone handset, a modem, and sometimes a printer. TTY users can exchange typewritten messages directly with other TTY users. TTYs also enable people who are deaf to communicate with hearing people on voice telephones facilitated by communication assistants in the telephone relay system. Ranging in price from $200 to $1,000 per unit and operating on regular telephone lines, TTYs should be relatively minor capital investments and easy accommodations to provide. Nevertheless, the experiences of my clients demonstrate that TTYs routinely are not available in correctional facilities. For example, throughout the majority of Carson’s sentence, he was not in a facility with a TTY, the result being that he was deprived of the opportunity to make independent telephone calls, unlike the inmates who could hear. Even after he was moved to the one facility with a TTY, the device was located in a locked room that required staff permission for access, unlike the telephones which were located in the inmates’ residential pod and available at all times. Consequently Carson’s ability to place phone calls at times depended on the whim of the staff person on duty and was not equal to the opportunity afforded to the inmates who could hear.

Visual Alarms. Another area of accommodation for prisoners who are deaf involves the accessibility of audible alarms and announcements. For example, fire alarms can be augmented with flashing lights. Delaware’s facilities also utilize loudspeaker announcements to indicate “count times” and different color “codes” to delineate the areas which prisoners can enter according to the level of security. This information must be made accessible to prisoners who are deaf.

Despite the existence of many accommodations to ensure effective communication for prisoners who are deaf, state departments of correction often fail to provide such accommodations when they are legally required to do so.

II. The Legal Basis for Accommodations Under the ADA for Prisoners and Probationers Who Are Deaf

Title II of the ADA prohibits discrimination against people with disabilities by state and local government. The regulations implementing Title II also contain specific affirmative requirements for making communications with public entities effective and accessible to people with disabilities. The U.S. Supreme Court held that the ADA specifically applied to state prisons.

Nondiscrimination Provisions. The ADA’s general nondiscrimination mandates encompass the provision of accommodations to ensure communication for prisoners who are deaf. Title II provides that 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 subject to discrimination by any [public] entity. The regulations implementing this section give further meaning to this prohibition. Public entities are prohibited specifically from

---

17 The telecommunications relay system is mandated by 47 U.S.C. § 225 (2004). The relay system traditionally comprises operators who alternately speak the TTY user’s typewritten message and type the words spoken by the hearing person on the other end of the phone. Recent technological advances include the advent of video relay services in which the intermediary is a sign language interpreter who has a video link to the deaf person and who is able to translate the spoken conversation directly into ASL.


21 42 U.S.C. § 12132 (2004); see also 28 C.F.R. § 35.130 (a) (2005). A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in the programs or activities provided by a public entity.” 42 U.S.C. § 12131(2). The ADAs definition of “disability” is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” 28 C.F.R. § 35.104. The definition of disability includes “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting … special sense organs … [or] speech organs…” Id.
denying qualified individuals with disabilities the opportunity to participate in or benefit from their aids, benefits, or services;\textsuperscript{22}

affording a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;\textsuperscript{23}

providing a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;\textsuperscript{24}

providing different or separate aids, benefits, or services to individuals with disabilities from those provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;\textsuperscript{25}

aiding or perpetuating discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity’s program;\textsuperscript{26} and

otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or services of a public entity.\textsuperscript{27}

Public entities also are required by regulation 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 such modifications would fundamentally alter the nature of the service, program, or activity.\textsuperscript{28}

As detailed in the cases described below, the ADA’s nondiscrimination provisions have been used to challenge circumstances such as those experienced by Carson, Justin, and Anthony—a prison’s failure to provide interpreter services for medical appointments, substance abuse treatment, and inmate programming, as well as lack of TTY access, visual alarms, and television closed captioning.

Effective Communication Provisions. The ADA also contains specific regulatory directives about effective communication with people who are deaf. Public entities, such as state prisons, must take appropriate steps to ensure that communications with [people] with disabilities are as effective as communication with others.\textsuperscript{29} The ADA also requires that public entities shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.\textsuperscript{30} Public entities may not impose surcharges on individuals with disabilities in order to cover the cost of accommodations.\textsuperscript{31}

Auxiliary aids and services under the ADA include qualified interpreters, note takers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with

\textsuperscript{22} 22 C.F.R. § 35.130(b)(1)(i).
\textsuperscript{23} Id. § 35.130(b)(1)(ii).
\textsuperscript{24} Id. § 35.130(b)(1)(iii).
\textsuperscript{25} Id. § 35.130(b)(1)(iv).
\textsuperscript{26} Id. § 35.130(b)(1)(v).
\textsuperscript{27} Id. § 35.130(b)(1)(vii).
\textsuperscript{28} Id. § 35.130(b)(7).
\textsuperscript{29} Id. § 35.160(a).
\textsuperscript{30} Id. § 35.160(b)(1).
\textsuperscript{31} Id. § 35.130(f).
hearing aids, closed caption decoders, open and closed captioning, TDDs, videotext displays, or other methods of making aurally delivered materials available to individuals with hearing impairments. In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

When an auxiliary aid or service is required, the public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. "Primary consideration" means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens.

The Justice Department, in its comments on the ADA Title III regulations, asserts that "it is not difficult to imagine a wide range of communications involving areas such as health, legal matters, and finances that would be sufficiently lengthy or complex to require an interpreter for effective communication."

Defenses. A public entity has two defenses available under the ADA. First, a public entity does not have to take any action that would result in a fundamental alteration of the nature of a service, program, or activity. Second, a public entity does not have to take any action that would result in undue financial and administrative burdens. The burden of establishing a fundamental alteration or undue burden rests on the public entity.

Another defense that prisons are likely to raise is the alleged threat that accommodations such as interpreter services and TTY devices pose to institutional safety and security concerns. For example, officials may contend that TTYs are unsafe because they could be used as a weapon. Or allowing outside interpreters into prison facilities may be seen as a potential safety breach.

Remedies. In a recent case involving a prisoner with disabilities, the U.S. Supreme Court held that states could be liable for

---

32 Id. § 35.104. “Qualified interpreter” is defined as “an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.” Id.

33 Id. § 35.160(b)(2). This is an important difference from the ADA’s Title III, which envisions that places of public accommodation will “consult” with the person with a disability prior to determining what accommodation will be provided. See 56 Fed. Reg. 35544, 35567 (July 26, 1991).

34 ADA Title II Technical Assistance Manual § II-7.1100.


37 28 C.F.R. § 35.164.

38 Id.

39 Id.

40 This defense can be compelling to a court which may be inclined to defer to the state prison system’s concern and expertise about ensuring the security of its facilities.
money damages under the ADA for unconstitutional conduct.\textsuperscript{41} The Third Circuit had held that claims against states for money damages under Title II of the ADA were barred by sovereign immunity.\textsuperscript{42} By contrast, the eight circuit courts of appeal that have considered the availability of injunctive relief under Title II of the ADA conclude that sovereign immunity does not bar such relief.\textsuperscript{43}

\textbf{Case Law.} The Third, Eighth, and Ninth Circuits, as well as several district courts, have issued decisions on the provision of interpreter services, TTY access, and other accommodations for inmates who are deaf under the ADA. These cases demonstrate their highly fact-specific nature, especially regarding the need for interpreter services. The decisions focus on several key areas where interpreters may be required to ensure communication for inmates who are deaf; such key areas include intake, facility orientation, medical and mental health appointments, substance abuse treatment, educational and vocational programming, and classification, grievance, and disciplinary hearings. By contrast, inmates are not likely to succeed in having interpreters assigned to them twenty-four hours a day in all interactions with prison officials.

In \textit{Chisolm v. McManimon} the Third Circuit reversed the trial court’s granting of summary judgment to the county detention center and held that genuine issues of material fact existed as to whether the county’s use of written notes rather than an ASL interpreter constituted an effective auxiliary aid under the ADA.\textsuperscript{44} Mr. Chisolm, who was deaf and communicated in ASL, contended that the county failed to provide him with interpreter services during his intake and medical evaluation, and as a result he was not informed of the reason for his detention or the facility’s rules and he was inappropriately classified.\textsuperscript{45} He also challenged the county’s failure to provide him with TDD access and television closed captioning. The Third Circuit noted that the aid from the county conflicted with the ADA’s “regulatory mandate that a public entity honor a disabled person’s choice of auxiliary aid or service.”\textsuperscript{46} That the communication resulted in Mr. Chisholm’s erroneous classification evidenced its ineffectiveness, the Third Circuit also observed.\textsuperscript{47} The Third Circuit was not swayed by the county’s reliance on institutional “safety and security concerns” and noted that factual issues existed as to whether TDD access and an ASL interpreter could have been provided “at critical points, including intake, medical evaluations, and classification” while accounting for security concerns.\textsuperscript{48}

The Eighth Circuit, holding that genuine issues of material fact existed as to whether the provision of an ASL interpreter was a reasonable accommodation required by the ADA, reversed a grant of summary judgment for a deaf inmate. In \textit{Randolph v. Rodgers} a deaf inmate whose primary means of communication was ASL was denied

\begin{small}
\begin{enumerate}
\item Cochran v. Pinchak, 401 F.3d 184 (3d Cir. 2005), opinion vacated pending U.S. Supreme Court’s decision in Goodman v. Georgia, 412 F.3d 500 (3d Cir. 2005).
\item See Miller v. King, 384 F.3d 1248, 1264–65 (11th Cir. 2004) (citing decisions from the Fifth, Tenth, Second, Seventh, Ninth, Sixth, and Eighth Circuits).
\item Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001); see also Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (reversing grant of summary judgment for the state defendants and finding that factual issues existed as to whether the failure to provide a deaf inmate with interpreter services during counseling sessions, disciplinary proceedings, and medical appointments violated Section 504).
\item Id. at 326.
\item Id. at 327.
\item Id. at 328.
\item Id. at 329. The county argued that security was implicated if an interpreter was permitted “on the living unit” and asserted that a TDD (telecommunication devices for the deaf) could be used as a weapon. Id. see also Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) (reversing trial court’s grant of summary judgment in favor of state officials and finding that genuine issues of material fact existed as to whether interpreter provided by state was qualified and could communicate adequately and effectively with deaf inmate where interpreter was a correctional mental health counselor without any formal interpreting training).
\end{enumerate}
\end{small}
interpreter services during a disciplinary proceeding.49 The Eighth Circuit observed that Mr. Randolph was not given the “meaningful access” to prison disciplinary proceedings required by the ADA in the absence of an interpreter; his physical presence was not enough.50 However, the Eighth Circuit found issues of fact regarding whether the request for an interpreter raised safety and security issues as well as whether a financial burden warranted a remand.51

Conversely, in Clarkson v. Coughlin, the court found no issues of material fact and entered summary judgment in favor of a class of deaf inmates.52 The court found that the state prison system violated the ADA by inter alia failing to notify deaf inmates about accommodations available under the ADA, failing to give deaf inmates the opportunity to request accommodations, failing to provide adequate TDDs and visual alarms, and failing to provide interpreter services for educational and vocational classes, alcohol and drug counseling, medical and mental health treatment, and disciplinary, grievance, and parole hearings.53 Similarly, in Bailey v. Minnesota Department of Corrections, the court held that a deaf inmate sentenced to a sex offender treatment program was entitled to “consistent interpreter services” under the ADA.54 Working alone on a computer without the means of participating in peer group sessions and depending on an “inadequate” interpreter for his assessment were not appropriate alternatives.55 While factual issues underlie the substance of these claims, the opportunity certainly exists under current law to obtain accommodations to ensure effective communication with prisoners who are deaf.

III. Advocacy Alternatives

Advocates seeking interpreter services, TTY access, and other accommodations for prisoners and probationers who are deaf have multiple avenues.

Requests for Information. Advocates can begin by gathering information about the extent of the need for accommodations for deaf inmates and a prison system’s existing ADA compliance. The ADA’s regulations mandate that public entities “make available to applicants, participants, beneficiaries, and other interested persons information regarding [Title II’s] provisions … and its applicability to the services, programs, or activities of the public entity.”56 Public entities with fifty or more employees must designate an ADA coordinator to implement its Title II obligations and investigate complaints.57 State freedom of information laws may be a source of access to departmental policies and factual information, such as the number of inmates with hearing impairments in various facilities and the frequency and cost of interpreter services provided.58 Also, collaboration with other advocates, such as centers for independent living and public defenders, has proven to be a rich source of information about the extent of a problem and has served to bring the plight of individual clients to light.

Administrative Complaints. As the federal agency charged with enforcing Title II of the ADA and investigating violations, the Justice Department offers an administra-

49Randolph v. Rodgers, 170 F.3d 850 (8th Cir. 1999).
50Id. at 859.
51Id.
53Id. at 1038, 1044–50.
55Id. at *8, ¶ 68.
5628 C.F.R. § 35.106.
57Id. § 25.107 (a).
58Delaware state law prohibits the disclosure of any inmate records or departmental policies; however, this barrier has been overcome through the use of the federal records access authority granted to the protection and advocacy agency on behalf of persons with developmental disabilities. See 11 Del. Laws § 4322(2005); 42 U.S.C. § 15043; 42 C.F.R. § 1386.22.
Confronting Sentences that Silence

New York prisoners on ADA grievance procedures “includes no mention of the [Justice Department] procedures”). The burden of proving that the [Justice Department] remedy is available to prisoners and noting that the information given to Department process “lacks the authority to actually provide relief”), and

lawsuit” including administrative remedies under the ADA through the Justice Department, whether or not the Justice Department process that prisoners must first exhaust “federal administrative remedies extraneous to the prison system, prior to commencing a lawsuit.” The biggest barrier at the outset is the Prison Litigation Reform Act’s requirement that facility inmate grievance procedures be exhausted prior to filing suit. An overview of the Prison Litigation Reform Act follows, although advocates are encouraged to consult more exhaustive analyses of this issue.

The Prison Litigation Reform Act in pertinent part provides that “[i]no actions shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility unless such administrative remedies as are available are exhausted.” The U.S.

parenthetical and are enforced by state human relations commissions. Significant components of settlement agreements are a timely assessment by facilities of whether individuals are deaf or hearing impaired; the opportunity to request accommodations; the provision of auxiliary aids and services with deference afforded to the deaf individual’s preferred means of communication; the use of interpreter services for orientation, medical evaluations and treatment, and other rehabilitative and educational programming: TTY access on the same terms as hearing inmates with telephone access; the use of visual alarms and closed captioning decoders; the availability of a nondiscrimination policy and the ADA grievance process; the designation of an ADA coordinator; and staff training. Administrative remedies also may be available under state laws that parallel the ADA and are enforced by state human relations commissions.

Federal Court. Prisoners and probationers who are deaf and denied accommodations may sue to enforce the ADA in federal court. This option, however, is not without its pitfalls. In addition to the time and expense of filing suit and the idiosyncrasies of Section 1983 and Eleventh Amendment immunity issues (which are beyond the scope of this article), litigation involving prisoners brings additional issues to consider. The biggest barrier at the outset is


5928 C.F.R. § 35.170. A complaint form can be accessed at www.ada.gov/2cmpfrm.htm. Instructions for filing a Title II complaint are available at www.ada.gov/3cmpfrm.htm. Complaints must be filed within 180 days of the alleged violation. Id. § 35.170 (b).

60My office filed a U.S. Department of Justice complaint on behalf of a deaf probationer who had not been provided with interpreter services or TTY access while in a violation-of-probation center. That complaint has languished for two and a half years.

61See, e.g., Settlement Agreement Between the U.S.A. and Anne Arundel County, DOJ Matter No. 204-35-247 (Nov. 28, 2005), www.ada.gov/anqnaaurwl.himl; Settlement Agreement Between the U.S.A. and the New York City Department of Corrections (Aug. 5, 2004), www.usdoj.gov/crt/adapacydocrcies.htm; Settlement Agreement Between the U.S.A. and the Wood County Sheriff’s Department, Bowling Green, Ohio, DOJ Complaint No. 204-57-100 (June 5, 1997), www.usdoj.gov/crt/fi/a/6.txt.

62But see Delaware Attorney General Opinion Letter from Sherry V. Hoffman, Deputy Attorney General, to Shirley Horowitz, Acting Chairwoman, State Human Relations Commission (May 30, 2000) (finding that Delaware Equal Accommodations Law does not apply to the state or state agencies) (on file with MaryBeth Musumeci).


64Id. § 1997e(a). Because the Prison Litigation Reform Act’s exhaustion requirement applies only to inmates confined in correctional facilities, a deaf individual on probation or parole should be able to go directly to federal court without first exhausting an internal grievance procedure. However, the issue as to whether the Prison Litigation Reform Act requires the exhaustion of administrative remedies under the ADA’s Title II in addition to the exhaustion of internal prison grievance procedures is unsettled. Compare Parkinson v. Goord, 116 F. Supp.2d 390 (W.D.N.Y. 2000) (requiring exhaustion only of internal prison grievance procedures and not exhaustion of administrative remedies under the ADA prior to filing a Title II ADA suit by a prisoner), and Velazquez v. New York, 339 F. Supp. 2d 505 (S.D.N.Y. 2004) concluding that prisoner is required to exhaust only internal prison administrative remedies and not administrative remedies under the ADA’s Title II through the Justice Department), with Rosario v. N.Y. State Department of Correctional Services, No. 03-CV-859, 2003 WL 22529271, at *4 (S.D.N.Y. Sept. 23, 2003) (holding that prisoners must first exhaust “federal administrative remedies extraneous to the prison system; prior to commencing a lawsuit” including administrative remedies under the ADA through the Justice Department, whether or not the Justice Department process “lacks the authority to actually provide relief”), and Burgess v. Garvin, No. 01 CIV 10994, 2004 WL 527053, at *4, 5 (S.D.N.Y. March 16, 2004) (finding that “[b]ecause exhaustion of remedies is an affirmative defense, [the state] bear[s] the burden of proving that the [Justice Department] remedy is available to prisoners” and noting that the information given to New York prisoners on ADA grievance procedures “includes no mention of the [Justice Department] procedures”).
Supreme Court found that Congress intended the Prison Litigation Reform Act to further several purposes, including:

afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case ... [possibly] obviating the need for litigation ... ‘filter[ing] out some frivolous claims’ ... [and facilitating] adjudication ... by an administrative record that clarifies the contours of the controversy.65

Thus Section 1997e(a) requires that a “prisoner must properly (i.e., on pain of procedural default) exhaust administrative remedies as a prerequisite to a suit in federal court.”66 The “determination [as to] whether a prisoner has ‘properly’ exhausted a claim (for procedural default purposes) is made by evaluating the prisoner’s compliance with the prison’s administrative regulations governing inmate grievances, and the waiver, if any, of such regulations by prison officials.”67

The Prison Litigation Reform Act’s exhaustion requirement is particularly burdensome because facility grievance procedures typically involve multiple levels of appeal with tight deadlines, which inmates are expected to follow flawlessly. This challenge is compounded for inmates whose first language is ASL, not English. Moreover, as Carson and Anthony experienced, facilities often do not follow the strictures of their own policies, leaving open the question as to whether a process is available to exhaust.

Another consideration when filing suit on behalf of inmates is the potential mootness of their claims. Since any case brought in federal court must be investigated and worked up thoroughly, the length of the prisoner’s sentence must be considered. A former prisoner is not a live client. The doctrine of capable-of-repetition-yet-evading-review typically allows courts to decide controversies which are too short-lived to be fully litigated while live but which carry with them a reasonable expectation that the same party will be subject to the same action in the future.68 However, in the prison context, the Eighth Circuit endorses the principle that, “for purposes of assessing the likelihood that state authorities will rein inflict a given injury, [courts] generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”69

Plaintiffs who filed a complaint seeking accommodations under the ADA while incarcerated “are in control of the type of conduct that will put [them] in jail again and subject [them] to the same deprivations alleged in [their] complaint. ... Indeed, they are ‘required by law to prevent such a possibility from occurring.’”70 Thus court relief may be unavailable to many inmates, given the time that is required

67Id. A majority of cases under Section 1997e(a) conclude that prisoners are required to exhaust internal prison grievance procedures prior to initiating a lawsuit. But see In re Bayside Prison Litigation, 190 F. Supp. 2d 755, 757 (D.N.J. 2002) (holding that “while administrative remedies described in internal prison documents that are not promulgated pursuant to a state administrative procedure act may constitute an ‘administrative remedy’ under the [Prison Litigation Reform Act], the procedures at issue in the case at bar were not sufficiently clear, expeditious, or respected by prison officials to constitute such an administrative remedy”); Murphy v. Martin, No. 03-CV-72932-DT, 2003 WL 1658489 (E.D. Mich. July 28, 2004) (finding that exhaustion of prison grievance procedure was not required prior to initiating lawsuit alleging constitutional violations resulting from application of prison policy where the prison policy directive on its face precluded prisoner from grieving the substance of that policy).
69Hickman v. Missouri, 144 F.3d 1141, 1143 (8th Cir. 1998).
70Id.
to exhaust internal facility grievance procedures first and then wind their case through the federal trial court system.\textsuperscript{71}

**Legislative and Policy Advocacy.** Advocacy through the legislative process or through negotiations with the state agency that administers prisons is an alternative means of pursuing relief on both an individual case and systemic basis.\textsuperscript{72} For example, the recent public and media focus on the inadequacies of the prison health care system in Delaware has launched a legislative inquiry with the opportunity to present public testimony that highlights the need for interpreter services for deaf inmates, such as Anthony.

Existing law provides a variety of opportunities for advocacy on behalf of prisoners and probationers who are deaf and who seek appropriate accommodations to ensure effective communication with state prison personnel. The highly fact-specific nature of these controversies underscores the need for careful case preparation. Potential legal bars, such as the Prison Litigation Reform Act and mootness, pose procedural hurdles. Still, these cases present opportunities to vindicate basic inequalities on behalf of prisoners and probationers who are deaf as well as to address the very real risks of recidivism, improper medical care, and ineffective rehabilitation that result from ineffective communication. If my experience in Delaware is indicative of what is going on nationally, there is a sizable population of our clients suffering what amounts to extended solitary confinement without effective communication. What makes matters worse is that the failure to ensure effective communication fosters lengthier and more frequent incarcerations by increasing the risk of internal violations and recidivism. Without legal assistance to ensure their civil rights, prisoners who are deaf will continue to suffer in silence.

**Author's Acknowledgments**

I am grateful to Leba Tolpin, University of Pennsylvania law student, law clerk, and future colleague at Community Legal Aid Society, for her legal research on the mootness issue; Marybeth Tkach, certified interpreter and director of the American Sign Language Studies program at Delaware Technical and Community College’s Department of Language and Culture, for her feedback on the accommodations and ASL portions; and Dan Atkins, Esq., and Eliza Hirst, Esq., colleagues at Community Legal Aid Society, for their comments on drafts.

---

\textsuperscript{71}Suing in the name of the state’s protection and advocacy agency for people with disabilities, rather than in the name of individual inmates, is one means of addressing such barriers, though not without its own particular challenges. See, e.g., Oregon Advocacy Center v. Mink, 323 F.3d 1101 (9th Cir. 2003).

\textsuperscript{72}For examples of comprehensive policies which pertain to inmates with disabilities and which may be useful as a basis for negotiations with state agencies, see Washington State Department of Corrections Policy No. 490.050 (Sept. 1, 1998) (arising out of the stipulation entered in Duffy v. Riveland, No. CV-92-01596 (W.D. Wash. 1998)), and State of Connecticut Department of Corrections Directive No. 10.19 (April 9, 2004) (on file with MaryBeth Musumeci).