

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



will begin at 12:30 pm ET

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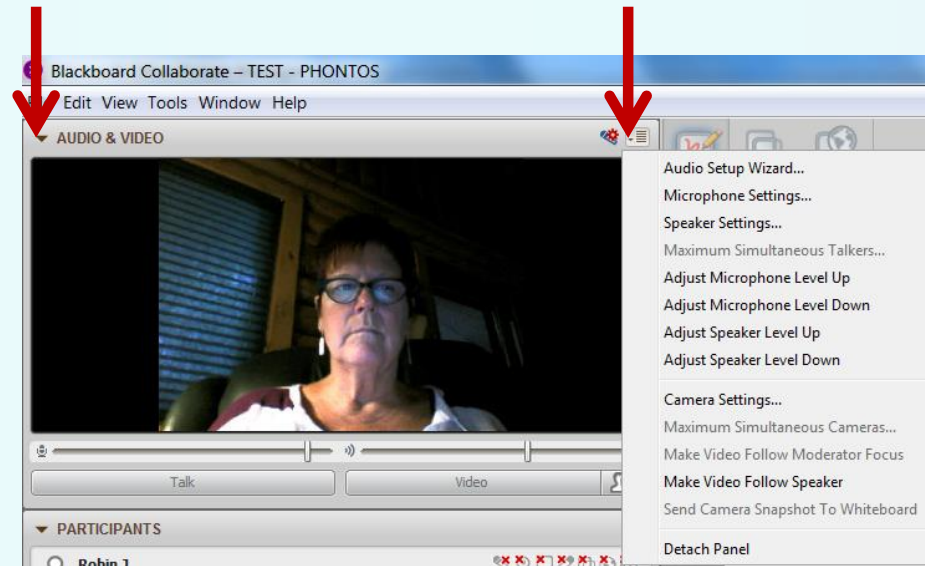
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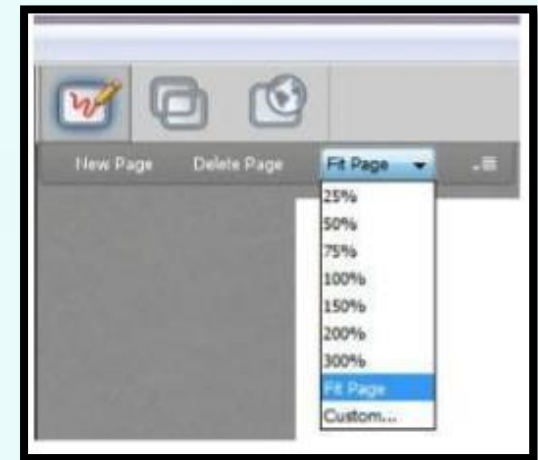
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- Certificates of participation or continuing education credits
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- TransCen, Inc.
 - Mission Statement: Improving lives of people with disabilities through meaningful work and community inclusion
- 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

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

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

11th 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 (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 (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

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

- 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

- 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 (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 (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



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



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- Training section at ADAinfo.org
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Thank You!