

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 16-cv-02733-STV

BIONCA CHARMAINE ROGERS,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity,
RYAN LONG, in his official capacity, and
MIKE ROMERO, in his official capacity,

Defendants.

LEONID RABINKOV,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,

Defendant.

**PLAINTIFF MARC TREVITHICK'S REPLY IN SUPPORT OF HIS
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Based on the evidence presented in Plaintiff Marc Trevithick's Motion for Partial Summary Judgment ("MPSJ"), ECF 117, and Defendant's Response to Plaintiff Trevithick's

Partial Motion for Summary Judgment (“Opposition” or “Opp.”), ECF 120, there is no genuine dispute as to any material fact and Mr. Trevithick is entitled to judgment as a matter of law on his claims that Title II of the Americans with Disabilities Act (“Title II” or “ADA”), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794, require Defendant Colorado Department of Corrections (“CDOC”) to provide him with videophone service to communicate with individuals outside the prison.

FACTS

CDOC responded to Mr. Trevithick’s Separate Statement of Facts in Support of Motion for Partial Summary Judgment but did not set forth, in the format required by the Court, *see* Civil Practice Standards, Magistrate Scott T. Varholak, at 5, any additional material facts in opposition to the MPSJ. Instead, CDOC made various factual assertions throughout its Opposition. Plaintiff has recited and responded to those assertions in the attached Separate Statement of Facts In Support of Motion for Partial Summary Judgment (“SoF”).

ARGUMENT

Defendant’s Opposition makes two arguments: that Mr. Trevithick did not exhaust his administrative remedies, Opp. at 3-6; and that the teletypewriter (“TTY”) CDOC provides is sufficient to satisfy its obligations under Title II and Section 504, *id.* 6-13. Neither argument has merit.

I. Plaintiff Exhausted His Administrative Remedies Before Filing His Complaint in *Rabinkov v. Colorado Department of Corrections.*

The Prison Litigation Reform Act (“PLRA”) requires Plaintiff to exhaust “such administrative remedies as are available.” 42 U.S.C. § 1997e(a). CDOC has the burden of proof to demonstrate that Plaintiff failed to exhaust administrative remedies. *Roberts v. Barreras*, 484

F.3d 1236, 1241 (10th Cir. 2007); *see also Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that “failure to exhaust is an affirmative defense under the PLRA.”).

CDOC admits that Mr. Trevithick has exhausted his administrative remedies, and that he did so as of May 21, 2018. Opp. at 5. His claims in the present case, *Rabinkov v. Colorado Department of Corrections*, were filed on November 14, 2018. *Rabinkov*, Complaint, ECF 1. As such, he has satisfied the exhaustion requirements of the PLRA.

Defendant argues that Mr. Trevithick has not properly exhausted his administrative remedies because he exhausted after being added as a plaintiff in the case of *Rogers v. Colorado Department of Corrections*, 16-cv-02733-STV, Fourth Amended Complaint, ECF 66, and because the *Rogers* and *Rabinkov* matters were later consolidated, Order, ECF 103. Opp. at 5. This is incorrect. As the Supreme Court recently held, “consolidation [does] not ... completely merg[e] the constituent cases into one, but instead ... enable[es] more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them.” *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). The *Rabinkov* case retains its distinct identity; Mr. Trevithick exhausted before filing his claims in that case.

Defendant further argues that, by filing claims in the *Rabinkov* case, Mr. Trevithick is trying to “get around” the fact that he exhausted after joining the *Rogers* case. Opp. at 5. In fact, Mr. Trevithick addressed the exhaustion situation precisely as instructed by the Tenth Circuit. “[A] dismissal based on a failure to exhaust administrative remedies should be *without* prejudice,” *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009) (emphasis in original), and because of this, a plaintiff can refile after exhausting his administrative remedies, *Mitchell v. Figueroa*, 489 F. App’x 258, 260 (10th Cir. 2012). The single case on which CDOC relies for the

proposition that the *Rabinkov* “‘action’ should not constitute a ‘new action’ under § 1997e(a),” does not in fact stand for that proposition, nor does it involve a separate or consolidated action; it merely addresses the question -- not at issue here -- of exhaustion prior to the filing of an amended complaint. *See Malouf v. Turner*, 814 F. Supp. 2d 454, 463-64, (D.N.J. 2011), *cited in* Opp. at 5. The *Rabinkov* complaint was a new matter, not an amendment of the *Rogers* complaint, and retained its independent character even when consolidated. Defendant cites no cases to the contrary.

II. Defendant Does Not Rebut Plaintiff’s Evidence or Arguments That Videophones Are Necessary to Enable Him to Communicate Effectively with Persons Outside of Prison.

Defendant admits the material facts supporting Plaintiff’s claim that videophones are necessary for him to communicate with others outside of prison; its legal arguments do not address the governing regulations requiring both effective communication and deference to the communications preferences of people with disabilities.

A. CDOC Admits or Does Not Effectively Rebut the Material Facts Supporting Plaintiff’s Motion.

Defendant admits that Mr. Trevithick is deaf, and as such, is a person with a disability as defined in Title II. SoF ¶¶ 2-3. It further admits that American Sign Language (“ASL”) is his primary language and preferred mode of communication, and that videophones permit inmates for whom ASL is their native language to communicate in their native language. *Id.* ¶¶ 3, 5. While CDOC denies that Mr. Trevithick has repeatedly requested to be able to use a videophone, the evidence on which it relies essentially admits this allegation: it shows three requests for videophones and three denials -- at each step of Mr. Trevithick’s grievance. *Id.* ¶ 6 (citing DeCesaro Aff., ¶ 16, citing Attachment 6, ECF 120-2 at 3-4).

CDOC denies that “English is not Mr. Trevithick’s native language; communicating in written English is awkward, time-consuming, and incomplete for him. He is not able to fully express himself in written English or converse about the range of subjects he can in ASL;” however the evidence it refers to -- written grievances -- does not meet the substance of the allegation. SoF ¶ 10. Defendant had the opportunity to retain an expert to test Mr. Trevithick’s (and other Plaintiffs’) English fluency but declined to do so.¹ And it has not pointed to any evidence contradicting Mr. Trevithick’s testimony -- concerning his own language and abilities -- that English is awkward and incomplete for him, and that he cannot converse in the range of subjects he can in ASL.

On the technical side, CDOC’s Rule 30(b)(6) witness agrees with the statement that “current TTY equipment is becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down.” SoF ¶¶ 18-19. CDOC also admits that deaf people in general have switched from TTYs to videophones, among other reasons, “because TTY conversations are typed, those conversations take significantly longer.” *Id.* ¶ 22. As a result, CDOC admits, when a deaf inmate contacts a deaf person outside of the prison, a three-step, two-intermediary process is involved. *Id.* ¶ 20.

In contrast to the admitted awkwardness and obsolescence of the TTY, CDOC admits that “[v]ideophones ... enable deaf people to communicate using American Sign Language, a

¹ Defendants represented to the Court that they had “been ... attempting to retain rebuttal experts” and on those grounds requested a six-week extension on the rebuttal expert disclosure deadline, ECF 75 at 2, which extension was granted, ECF 82. Even with the extension, Defendants did not disclose any experts. Similarly, CDOC did not disclose any experts at the expert disclosure deadline in *Rabinkov*, *see* ECF 113 at 10.

language in which they are much more comfortable and fluent,” and “permit deaf people to convey emotion, mood, tone, and affect, which cannot be conveyed or perceived using the TTY,” because “[f]acial expressions, head tilts and nods, and eyebrow raises are important elements that encode the grammar of ASL. These linguistic elements are not found in English nor can they be conveyed in written notes or in a TTY text conversation.” *Id.* ¶¶ 22, 26-27.

While CDOC denies Plaintiff’s expert’s evidence that “videophones [are] necessary to provide equivalent and effective telephonic services to deaf inmates who are able to communicate in ASL, regardless of level of intelligible speech or level of literacy,” *id.* ¶ 28, it provides no evidence -- expert or otherwise -- that contradicts this statement. Instead, it points to Mr. Trevithick’s grievances as evidence that he can write a bit of English text. This does not rebut -- and CDOC has no evidence to rebut -- Plaintiff’s expert’s testimony that videophones are necessary for ASL-using inmates “*regardless of level of intelligible speech or level of literacy.*” *Id.* (emphasis added).

B. CDOC Does Not Rebut The Legal Conclusion that Title II and Section 504 Require That It Provide Videophone Service to Mr. Trevithick.

The DOJ regulations implementing Title II -- which “have the force of law,” *Marcus v. Kansas Dep’t of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) -- explicitly require CDOC to ensure that communications with people with disabilities “are as effective as communications with others,” and to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity,” 28 C.F.R. §§ 35.160(a)(1), (b)(1). Crucially, “[i]n determining what types of auxiliary aids and services are necessary,” CDOC is required to “give primary consideration to the requests of individuals with disabilities.” *Id.* § 35.160(b)(2). The Tenth

Circuit, quoting this language from section 35.160, held that “[t]he only limitation on these duties” are the fundamental alteration and undue burden defenses, *Robertson v. Las Animas Cty. Sheriff’s Dep’t*, 500 F.3d 1185, 1196 (10th Cir. 2007) (citing 28 C.F.R. §§ 35.160, 35.164), neither of which has been pleaded or argued by CDOC, SoF ¶ 36, Answer, ECF 69, at 7-9.

Thus under regulations that have the force of law and governing Tenth Circuit precedent, CDOC is required to give primary consideration to Mr. Trevithick’s requests for a videophone. “‘Primary consideration’ means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available.” U.S. Dep’t of Justice, “The Americans with Disabilities Act Title II Technical Assistance Manual,” § II-7.1100. Since CDOC did not defer to Mr. Trevithick’s request for videophones, it bears the burden “to demonstrate that another effective means of communication exists or that the requested auxiliary aid would otherwise not be required.” *Updike v. Multnomah Cty.*, 870 F.3d 939, 958 (9th Cir. 2017), *cert. denied sub nom. Multnomah Cty., Or. v. Updike*, 139 S. Ct. 55 (2018); *see also Hayden v. Redwoods Cmty. Coll. Dist.*, No. C-05-01785NJV, 2007 WL 61886, at *9 (N.D. Cal. Jan. 8, 2007) (holding that if an entity proposes an alternative form of communication, it has the “burden under the statute to demonstrate the proffered aid’s effectiveness.”).

CDOC’s Opposition does not cite much less discuss any of these applicable regulations. Instead, it argues that the alternative it offers -- the TTY -- is sufficient. Opp. at 6-13. CDOC has not, however, satisfied its burden to show that the TTY is equally effective to the required videophone. Indeed, it admits that its “TTY equipment is becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates

unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down,” and that ASL is a visual language in which grammar and tone cannot be conveyed by the TTY. SoF ¶¶ 18, 26-27.

The legal arguments in Section II of CDOC’s Opposition fail for the same reason they failed in its motions to dismiss, and Plaintiff incorporates by reference the oppositions to these motions, ECF 38 at 7-18 and ECF 123, as well as this Court’s Order denying CDOC’s June 30, 2017 Motion to Dismiss, ECF 52 (“2017 Order”) at 8-11.

Only four of the cases it cites address telecommunications for deaf prisoners. In two of them, the plaintiff did not request a videophone. *See generally Douglas v. Gusman*, 567 F. Supp. 2d 877 (E.D. La. 2008); *Spurlock v. Simmons*, 88 F. Supp. 2d 1189, 1196 (D. Kan. 2000). In *Arce v. Louisiana*, 226 F. Supp. 3d 643, 651 (E.D. La. 2016), as this Court noted in the 2017 Order, “the complaint did not allege that the TTY machine failed to function or that the plaintiff could not effectively communicate using the TTY machine.” 2017 Order at 11. In *Rosenthal v. Missouri Department of Corrections*, neither plaintiff complained of deficiencies in the TTY. No. 2:13-cv-04150, 2016 WL 705219, at *2, *5, *6, *10 (W.D. Mo. Feb. 19, 2016). Importantly, none of these cases addresses the applicable regulation, 28 C.F.R. § 35.160.

Two other cases cited by CDOC arose in the correctional context; neither is relevant here. In *Wells v. Thaler*, 460 F. App’x 303, 306, 312-15 (5th Cir. 2012), a blind prisoner sought access to accessible legal resources and screen reading software to read his correspondence. However, the requested legal resources were not available and the requested software could not read handwriting. In *Stafford v. King*, No. 2:11cv242–KS–MTP, 2013 WL 4833863 (S.D. Miss. Sept. 11, 2013), a prisoner with muscular dystrophy requested access to a typewriter to prepare court

documents; however, he admitted he was never prevented from filing court documents, *id.* at *1, and continued to file handwritten documents even after he was provided a typewriter, *id.* at *6 n.2. *Gevarzes v. City of Port Orange, Florida*, No. 6:12-cv-1126-Orl-37DAB, 2013 WL 6231269, at *2 (M.D. Fla. Dec. 2, 2013) and *Valanzuolo v. City of New Haven*, 972 F. Supp. 2d 263, 274 (D. Conn. 2013), addressed effective communication in the context of arrests, that is, a single, short interaction where police may face exigent circumstances.

Ultimately, CDOC is in the same position as the Michigan Department of Corrections was in opposing the deaf prisoners’ motion for summary judgment in *McBride v. Michigan Department of Corrections*, 294 F. Supp. 3d 695 (E.D. Mich. 2018). Plaintiff here proffered the same expert testimony on which the *McBride* plaintiffs relied,² SoF ¶¶ 4, 7-10, 16, 17, 22, 25, 26, 28, while CDOC -- like the MDOC -- offered no expert testimony in rebuttal and ultimately no support for the proposition that TTYs provide effective communication. *McBride*, 294 F. Supp. 3d at 709. Instead, CDOC -- like the MDOC -- argues that Plaintiff’s experts showed only that “videophones offer *better* communication than TTY telephones, [but] do not refute that TTY telephones provide *meaningful access*.” *Id.* at 710. The *McBride* court rejected this, holding that:

Both aspects of this argument are flawed. First, one cannot reasonably interpret Dr. Cokely and Ray to be asserting that videophones are merely a “better” alternative to TTYs. Rather, Plaintiffs’ experts clearly opine that video technology is *necessary* to enable deaf and hard of hearing prisoners to communicate *effectively* with persons outside of prison. Moreover, this aspect of Defendants’ argument ignores that under the ADA, “[i]n determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.” 28 C.F.R. § 25.160(b)(2). Second, Plaintiffs’ experts clearly refute that TTYs provide “meaningful access”; indeed, the very gist of their lengthy, detailed expert reports is that TTYs “**fail | to**

² Plaintiffs retained both Richard Ray and Dennis Cokely, the experts on which the court relied in *McBride*. Dr. Cokely passed away in August, 2018, after preparing his report in this case. *See* ECF 83, 84. Jean Andrews incorporated his report by reference into hers. Andrews Report at 1.

provide [deaf and hard of hearing prisoners] with the means to effectively communicate with ... individuals outside the correctional center.” (PX P at 13) (emphasis added). Defendants’ evidence that TTYs “function” and are available to MDOC prisoners (DX 24 at 18; DRX 2 at 4), fails to address any of the evidence which shows that the machines’ mere functionality does not equate with “meaningful access.”

Id. (emphasis in original). The expert testimony cited in this passage comes from the report of Richard Ray in that case, and is before this Court in his report in the present case. *See* SoF ¶ 25.

As the *McBride* court concluded, “Plaintiffs’ desire for equally effective means of communication is not just an aspiration -- it is the law.” 294 F. Supp. 3d at 706. Mr. Trevithick respectfully urges this Court to do as the *McBride* court did: grant summary judgment in his favor and order CDOC to make videophone service available to him. *See id.* at 721.

Respectfully Submitted,

CIVIL RIGHTS EDUCATION AND
ENFORCEMENT CENTER

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Counsel for Plaintiffs

Dated: February 21, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019 I electronically filed the foregoing document and its attachment with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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Counsel for Defendant

/s/ Jean Peterson _____
Jean Peterson, Paralegal
Civil Rights Education and Enforcement Center

**PLAINTIFF MARC TREVITHICK’S UPDATED SEPARATE STATEMENT OF FACTS
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
1. Mr. Trevithick is an inmate in the custody of the Colorado Department of Corrections (“CDOC”) housed at the Colorado Territorial Correctional Facility (“CTCF”). Answer, ECF 69, ¶ 6; Trevithick Decl. ¶ 2. ¹	Admit.	
2. Mr. Trevithick is substantially impaired in the major life activity of hearing. Defs.’ Resps. to Pls.’ First Reqs. for Admis., Resp. 5 (Robertson Decl. Ex. 3). He is thus an individual with a disability as that term is used in the ADA and Section 504. 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(9)(B).	Admit.	
3. Mr. Trevithick has been deaf since early childhood. American Sign Language (“ASL”) is his primary language and preferred mode of communication. He is not able to use a conventional telephone. Trevithick Decl. ¶¶ 3-4.	Admit.	

¹ All declarations are referred to by the declarant’s last name and the abbreviation “Decl.” All depositions are referred to by the deponent’s last name and the abbreviation “Dep.”

Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
4. Videophones are telephones with a high-definition video display, capable of simultaneous two-way interactive video and audio for communication between people in real time using separate internal high-speed bandwidth Internet telecommunication services. Expert Report of Richard Lorenzo Ray (“Ray Report”) at 12 (Robertson Decl. Ex. 1).	Admit.	
5. Videophones let an inmate for whom ASL is their native language speak in their native language with people who have videophones or who are hearing. Jacobson ² Dep. 18:1-11 (Robertson Decl. Ex. 5).	Admit.	
6. Mr. Trevithick has repeatedly requested to be able to use a videophone to call friends and family outside the facility; CDOC has denied these requests. Trevithick Decl. ¶ 5.	Deny. <i>See</i> Exhibit A-1, para 16, Affidavit of Tony DeCesaro	Paragraph 16 of Mr. DeCesaro’s Affidavit references Mr. Trevithick’s grievances, Attachment 6, which include three requests to use a videophone (Steps 1, 2 and 3), and three denials.

² Adrienne Jacobson is CDOC’s Rule 30(b)(6) designee on the use of videophones in CDOC facilities. The Rule 30(b)(6) deposition notice is Exhibit 1 to the deposition of Amy Bradley (Robertson Decl. Ex. 6). Each deposition excerpt includes the statement by counsel for CDOC and the deponent confirming the topics as to which each testified on behalf of CDOC.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>7. Video relay service (“VRS”) is a method for deaf people to use videophones to communicate with hearing people. The deaf person signs to an intermediary sign language interpreter via video monitor. The interpreter, in turn, relays the deaf person’s message to the hearing individual in spoken English and vice versa. In a VRS conversation, the hearing party speaks into a standard telephone as he or she normally would. Ray Report at 13-14, <i>see also</i> Bradley³ Dep. 80:1-10 (Robertson Decl. Ex. 6).</p>	<p>Admit.</p>	
<p>8. The average literacy level of the American Deaf Community is at the fourth-grade reading level. Expert Report of Jean Andrews (“Andrews Report”) at 5 and Ex. A⁴ at 4, 40 (Robertson Decl. Ex. 2); <i>see also</i> Smith⁵ Dep. 35:6-10 (“it’s fairly common for people who are born deaf to be less than fluent in written English”) (Robertson Decl. Ex. 7).</p>	<p>Admit.</p>	

³ Amy Bradley is one of CDOC’s Rule 30(b)(6) designees.

⁴ Exhibit A to the Andrews Report is the Expert Report of Dennis Cokely, PhD. Dr. Cokely passed away in August, after preparing his report in this case. *See* ECF 83, 84. Dr. Andrews incorporated his report by reference into hers. Andrews Report at 1.

⁵ Janet Smith is one of CDOC’s Rule 30(b)(6) designees.

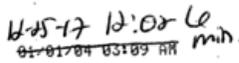
Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
9. ASL is neither a manual form nor a derivative form of English, and thus there is not a one-to-one correspondence between ASL signs and English words. The grammatical and syntactic structure of ASL is fundamentally different from the grammatical and syntactic structure of English. Andrews Report at 4 and Ex. A at 10.	Admit.	
10. English is not Mr. Trevithick’s native language; communicating in written English is awkward, time-consuming, and incomplete for him. He is not able to fully express himself in written English or converse about the range of subjects he can in ASL. Trevithick Decl. ¶ 7; <i>see also</i> Andrews Report at 7 (using a TTY results in briefer messages and curtails ability to express thoughts and feelings in the same manner as hearing inmates using a telephone).	Deny. <i>See</i> Exhibit A-4; Exhibit A-1, Attachment 6. Grievances written by Mr. Trevithick demonstrating ability to communicate in the written English language.	Defendant provides no evidence contradicting the fact that English is not Mr. Trevithick’s native language, or that communicating in written English is awkward, time-consuming, and incomplete for him. Defendant had the opportunity to retain an expert to test this assertion but did not. A handful of written documents do not contradict Mr. Trevithick’s description of his own communications abilities.
11. Inmates in CDOC custody are permitted to use telephones to communicate with family members, resources in the community, and legal counsel (the “inmate phone program”). CDOC Administrative Regulation (“AR”) 850-12, Bradley Dep. Ex. 2, at 1.	Admit.	
12. All hearing inmates in the CDOC have access to one or more wall phones. CDOC has approximately 1100 wall phones around the state. Bradley Dep. 15:19-20; 36:23-25.	Admit.	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
13. Violation of rules relating to the inmate phone program can result in suspension of privileges or Code of Penal Discipline charges. AR 850-12 at 10-11.	Admit.	
14. CDOC does not provide deaf inmates with access to videophones. Defs.' Suppl. Resps. to Pls.' First Set of Interrogs. to Defs. ("Defs.' Resps. to Interrogs."), Resp. to Interrog. Nos. 2, 8 (Robertson Decl. Ex. 4); Bradley Dep. 82:12-14.	Deny. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response. <i>See also</i> Exhibit 6.	The referenced documents show that a single videophone has been installed at the Denver Women's Correctional Facility ("DWCF"). CDOC states that it plans to expand this to Colorado Territorial Correctional Facility ("CTCF"), where Mr. Trevithick is housed, but "has no detailed drawn plan" to do so. As such, CDOC admits that it does not provide Mr. Trevithick with access to a videophone.
15. The only telecommunications service that CDOC provides deaf inmates is the TTY. Defs.' Resp. to Interrog. No. 1.	Deny. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response.	A single videophone has been installed at DWCF. CDOC states that it plans to expand this to CTCF, where Mr. Trevithick is housed, but "has no detailed drawn plan" to do so. As such, CDOC admits that the only telecommunications service that CDOC provides Mr. Trevithick is the TTY.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>16. TTY is a 60-year-old technology that enables remote communications between deaf people and between deaf and hearing people. In a conversation between two deaf people, both parties type and read responses using a teletypewriter device, and their typed conversation is transmitted back and forth across the standard telephone network. Ray Report at 7; <i>see also</i> Andrews Report at 6 and Ex. A at 34 (TTY technology is obsolete).</p>	<p>Admit.</p>	
<p>17. In a TTY conversation between a deaf person and a hearing person, the deaf party types into the TTY and the hearing party uses a standard telephone. An operator dictates the deaf person's typed messages to the hearing party and types the hearing person's spoken messages to the deaf party. Ray Report at 7, <i>see also</i> Bradley Dep. 42:22 - 43:21.</p>	<p>Admit, however, the same process is utilized with a video relay service.</p>	<p>Video relay also requires an intermediary; however, video relay permits the deaf prisoner to communicate in sign language, in this case, Mr. Trevithick's native language.</p>

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>18. Keith Nordell, at that time CDOC's highest ranking lawyer, Jacobson Dep. 10:10-20, stated in a December 9, 2013 Project Request Form that "current TTY equipment is becoming antiquated, requires frequent maintenance from sources that are not familiar or trained on the use/repair of a TTY and creates unfair delays for offenders due to the limited number of TTY machines department wide when equipment is down." Bradley Dep. Ex. 9 at CDOC/Rogers 002132.</p>	<p>Admit that Mr. Nordell indicated this, however, deny that Mr. Nordell speaks on behalf of the CDOC.</p>	
<p>19. Ms. Bradley testified that she agreed with the content of the Project Request Form. Bradley Dep. 100:18 - 101:14.</p>	<p>Admit.</p>	
<p>20. Because very few deaf people use TTYs, when Mr. Trevithick is forced to use a TTY to contact another deaf person outside a CDOC facility, a three-step process is required: he types a message into the TTY; the TTY operator speaks it to a VRS operator; and the VRS operator signs it to the recipient's videophone. When the deaf called party responds, this process is reversed: they sign their response to the VRS operator, who speaks it to the TTY relay operator, who types it to Mr. Trevithick. Trevithick Decl. ¶ 9.</p>	<p>Admit.</p>	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>21. When asked how a deaf inmate who only has access to a TTY would communicate with a deaf person who only has access to a videophone, Amy Bradley, CDOC's Rule 30(b)(6) designee on the TTY system, stated, "I don't know how that would work," and that she was not aware of any inmates for whom that is an issue. Bradley Dep. 44:2 - 45:13.</p>	<p>Admit.</p>	
<p>22. During the past 10 to 15 years, deaf people have replaced TTYs with videophones for two very understandable reasons. First, TTYs require communication in typed English (the second language for most deaf people and a language in which they rarely attain any significant level of fluency). Second, because TTY conversations are typed, those conversations take significantly longer. Videophones, by contrast, enable deaf people to communicate using American Sign Language, a language in which they are much more comfortable and fluent. Thus, their videophone conversations are not encumbered by written English nor slowed by having to type. Signed videophone conversations are analogous to spoken telephone conversations. Andrews Report Ex. A at 33-34; <i>see also</i> Ray Report at 7-8.</p>	<p>Admit in part.</p> <p>To the extent that the Plaintiff contends that videophone conversations are analogous to spoken telephone conversations, Defendants deny.</p>	<p>Defendant admits the text highlighted in green.</p>

<p>Plaintiffs’ Undisputed Material Facts and Supporting Evidence</p>	<p>Defendants’ Response/Additional Facts and Supporting Evidence</p>	<p>Plaintiffs’ Reply and Supporting Evidence</p>
<p>23. CTCF’s TTYs often freeze in the middle of calls or produce garbled text or strings of X’s and other nonsense characters. Trevithick Decl. ¶ 12.</p>	<p>Deny. Mr. Trevithick has not grieved this issue often during his time within the CDOC. See Exhibit A-1, para 16, Affidavit of Tony DeCesaro</p>	<p>Defendant’s response does not meet the substance of Plaintiff’s statement, and does not provide evidence contradicting the fact that CTCF’s TTYs often freeze in the middle of calls or produce garbled text or strings of X’s and other nonsense characters.</p>
<p>24. For example, the image below is a complete transcript of a call placed by Mr. Trevithick, redacted to delete the called party’s phone number; similar nonsense text appears throughout the transcripts provided by CDOC in discovery. Robertson Decl. ¶ 14 and Ex. 10.</p>  <pre> ~*XV CO CA 7878F NUMBER CAL PLS GA AUTOMATED MSG. THIS CALL IS FROM AN INMATE IN COLORADO CORRECTIONAL FACILITY. THIS CALL WILL BE RECORDED. INMATE NAME: MARC TREVITHICK PLEASE: FOR SECURITY, ONLY PROC- ESS CALL TO [REDACTED] GA GA GA [REDACTED] RINGING 1 ... 2 ... ~*X***XMM . (F) HELLO ~*X*** MARC HELLO MOMI I WANT TO SA UV HAPPY EERRMERRY HTTP://CHRIST- MAS TO U AND ALL ILU MUCH I HOPE U HAVE GOOD DAY TODAY. S GAUH THANK YOU MARC MERRY CHRISTMAS TO YOU I H OPE YOU HAVE A GOOD DAY ALSO THANK YOU FOR CALL- ING I LOVE YOU GA WELCOME AND ILU MUCH ALL OFU U. HGSUGS AND MISS U . I PARAYRAY FOR U AND RICH. HE W FIND OTHER JOB AS SOON. GA~- X**X**XH**X*XPXXX*XXX- *XX*NR YOU ALSO GA COM LET U GO ANDDDDDDDD- DDDDDD**X**X0***XNU FOR CALLING MARC I LOVE YOU BYE HANGING UP (PERSON HUNG UP) RELAY CO 7878F GA OR SK (RELAY WILL DISCONNECT IN 30 SECON- CDOC DOES NOT RESPOND THANK YOU HAVE A NICE </pre>	<p>Deny. Defendants dispute that this call represents a nonsense text. Clear thoughts have been conveyed though this conversation.</p>	<p>The transcripts speak for themselves.</p>

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>25. Provision of limited TTY access to deaf inmates fails to provide them with the means to effectively communicate with deaf and hearing individuals outside the correctional center. CDOC needs to replace or supplement these TTY devices with video-based services to provide deaf inmates with remote communications technology comparable to that used by their hearing peers. Ray Report at 10-11.</p>	<p>Deny. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response. <i>See also</i> Exhibit A-4; Exhibit A-1, Attachment 6. Grievances written by Mr. Trevithick demonstrating ability to communicate in the written English language.</p>	<p>Defendant provides no evidence contradicting Plaintiff's expert's evidence that TTYs do not provide deaf prisoners with an effective means to communicate. Defendant had the opportunity to retain an expert to test this assertion but did not. A handful of written documents do not contradict Mr. Ray's expert testimony.</p>
<p>26. Facial expressions, head tilts and nods, and eyebrow raises are important elements that encode the grammar of ASL. These linguistic elements are not found in English nor can they be conveyed in written notes or in a TTY text conversation. Andrews Report at 5.</p>	<p>Admit.</p>	
<p>27. Videophones permit deaf people to convey emotion, mood, tone, and affect, which cannot be conveyed or perceived using the TTY. Trevithick Decl. ¶ 4.</p>	<p>Admit.</p>	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
<p>28. Provision of videophones is necessary to provide equivalent and effective telephonic services to deaf inmates who are able to communicate in ASL, regardless of level of intelligible speech or level of literacy. Andrews Report at 6-8; <i>see also id.</i> Ex. A at 37-38.</p>	<p>Deny. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response. <i>See also</i> Exhibit A-4; Exhibit A-1, Attachment 6. Grievances written by Mr. Trevithick demonstrating ability to communicate in the written English language.</p>	<p>Defendant provides no evidence contradicting Plaintiff's expert's evidence that provision of videophones is necessary to provide equivalent and effective telephonic services to deaf inmates who are able to communicate in ASL, regardless of level of intelligible speech or level of literacy. Defendant had the opportunity to retain an expert to test this assertion but did not. A handful of written documents do not contradict Dr. Andrews's expert testimony.</p>
<p>29. The only way for Mr. Trevithick to have an equal opportunity to participate in and enjoy the benefits of CDOC's telecommunications services and programs is to use a videophone. Using a TTY is not as effective as the conventional telephone is for hearing prisoners. Trevithick Decl. ¶ 13.</p>	<p>Deny. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response. <i>See also</i> Exhibit A-4; Exhibit A-1, Attachment 6. Grievances written by Mr. Trevithick demonstrating ability to communicate in the written English language.</p>	<p><i>See</i> Pl.'s Reply Facts, ¶¶ 10, 25, and 28 <i>supra</i>.</p>
<p>30. CDOC's Rule 30(b)(6) witness concerning the considerations relating to making videophones available in CDOC facilities believes it is "feasible" to provide videophone service to CDOC inmates and that "it's where the world is going." Bradley Dep. 88:23 - 89:2.</p>	<p>Admit. <i>See</i> Exhibit 5, Supplemental Response to Plaintiffs' interrogatory response.</p>	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
31. Between late 2013 and mid-2016, CDOC considered undertaking a "pilot program" to provide videophone service to deaf inmates at CTCF; Ms. Jacobson ultimately decided not to move forward with it. Jacobson Dep. 21:8 - 22:3.	Admit. However, there were certain security concerns which prevented the pilot program going forward. <i>See</i> Doc. 117-5, Interrogatory Response No. 2.	
32. Global Tel*Link ("GTL") provides conventional telephone service for inmates in the CDOC. Bradley Dep. 17:22-24.	Admit.	
33. The GTL videophone kiosks that were installed in anticipation of the pilot program were still present at CTCF as of May 4, 2018. <i>See</i> Bradley Dep. 96:20 - 97:10; <i>see also</i> Robertson Decl. Ex. 9 (photographs of videophones at CTCF taken on May 4, 2018).	Admit.	
34. All of the videophone units observed at CTCF on May 4, 2018 were locked down, either with a metal cover and padlock, or in a locked room. Robertson Decl. ¶ 13.	Admit.	
35. The videophone units in place at CTCF are GTL "Flex Link" units. Given this fact, GTL could provide VRS service to the CDOC. Deuster Dep. 21:14 - 22:11; 27:7-10 (Robertson Decl. Ex. 8).	Admit.	
36. CDOC did not plead either the defense that videophones would result in a fundamental alteration of a service, program or activity, or that they would constitute an undue financial or administrative burden. Answer, ECF 69, at 7-9.	Admit.	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
37. CDOC has provided three reasons for its refusal to provide videophone service: (1) that deaf inmates would be able to dial any number, rather than being limited to an approved list of numbers; (2) that there was no mechanism to limit the duration of the call; and (3) that there was no way to charge inmates for phone calls. Defs.' Resps. to Interrogs 3, 9, and 10; <i>see also</i> Jacobson Dep. 30:4 - 31:9.	Admit. This is of a particular concern as Plaintiff Trevithick has been convicted at least twice under the Code of Penal Discipline for wrongfully trying to have contact with his victims. <i>See</i> Exhibit A-7.	Defendant admits that there are various methods for monitoring and recording video-based communications between a deaf inmate and the calling party. <i>See</i> Def.'s Response Facts, ¶ 42 <i>infra</i> .
38. Ms. Jacobson also mentioned the risk of being vandalized, but conceded that this risk existed with conventional phones as well. <i>Id.</i> 31:11 - 32:11.	Admit.	
39. As for the duration of the call, although hearing inmates are limited to 20 minutes per call, they are permitted to call back multiple times if no one is in line to use the phone. Bradley Dep. 33:16-34:6.	Admit.	
40. CDOC's interest in charging for videophone calls is based on its interest in maintaining records of the calls so they could be interpreted. Jacobson Dep. 42:3-17.	Admit. This is of a particular concern as Plaintiff Trevithick has been convicted at least twice under the Code of Penal Discipline for wrongfully trying to have contact with his victims. <i>See</i> Exhibit A-7.	Defendant admits that there are various methods for monitoring and recording video-based communications between a deaf inmate and the calling party. <i>See</i> Def.'s Response Facts, ¶ 42 <i>infra</i> .
41. CDOC does not monitor all calls in real time, and has not monitored any TTY calls since at least 2010. Bradley Dep. 25:25 - 26:2; 52:7 - 53:12.	Admit.	

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
42. There are various methods for monitoring and recording video-based communications between a deaf inmate and the calling party. Ray Report at 17-18; Deuster Dep. 23:7-10.	Admit.	
43. The videophone pilot program at CTCF had been set up with a system to record and monitor videophone calls. Ray Report 17-18 & Ex. E; <i>see also</i> Deuster Dep. 27:7-10.	Deny. <i>See</i> Doc. 117-5, Response to Interrogatory No. 2.	The cited Response to Interrogatory No. 2 does not address this subject.
44. GTL makes available a videophone/VRS service for Flex-Link units that has the same call control and security enforcement measures as available on GTL's inmate calling system, including limitation to pre-approved users and called phone numbers and limits on the length of calls. Deuster Dep. 19:21 - 21:4.	Admit.	
45. While (as of June of 2018) this service was not available for the GTL platform in use by CDOC, it is available for departments of corrections at this time, and GTL anticipated having it available for the platform in use at CDOC in the near future. Deuster Dep. 29:4-19.	Admit.	
46. No one at CDOC has been in touch with GTL recently about providing videophone service. Jacobson Dep. 36:22-25.	Admit. However, CDOC has been/and is working with Sorenson to provide video phone services to offenders within the CDOC. <i>See</i> Exhibit A-5.	A single videophone was installed at DWCF. CDOC states that it plans to expand this to CTCF, where Mr. Trevithick is housed, but "has no detailed drawn plan" to do so. As such, CDOC admits that Mr. Trevithick does not have access to a videophone.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
47. CDOC is not aware of the cost of implementing videophone service; no one at CDOC has received a cost estimate or discussed costs with any providers. Jacobson Dep. 33:15 - 34:2.	Deny. <i>See</i> Exhibit A-5.	Exhibit A-5 does not discuss the cost of implementing videophone service.
48. Plaintiffs Rogers and Begano both used videophones when they were detained in the El Paso County Jail, and Ms. Begano, when she was detained in the Denver Jail. Rogers Decl. ¶ 13; Begano Decl. ¶ 10.	Admit, however, this point is irrelevant as to Plaintiff Trevithick.	
49. GTL provides videophone service to approximately 30 departments of corrections, each of which may in turn have many facilities. Deuster Dep. 17:23 - 18:9.	Admit.	
50. In settlements from around the country, state departments of corrections and county sheriffs have agreed to provide videophones in their facilities. Robertson Decl. ¶¶ 15-16.	Deny.	Defendant provides no basis to deny the existence of the referenced and linked settlements.
51. CDOC receives federal financial assistance as that term is used in Section 504 of the Rehabilitation Act. Fourth Amd. Compl., ECF 66, ¶ 99; Answer, ECF 69, ¶ 99.	Admit.	

ADDITIONAL FACTUAL ASSERTIONS IN DEFENDANT’S RESPONSE BRIEF, ECF 120 AT 3-5, 10-13, AND PLAINTIFF’S RESPONSE.

Plaintiffs’ Undisputed Material Facts and Supporting Evidence	Defendants’ Response/Additional Facts and Supporting Evidence	Plaintiffs’ Reply and Supporting Evidence
	<p>The CDOC provides offenders with administrative remedies pursuant to a four-part process. <i>See</i> Exhibit A-1, ¶ 3. There is an initial informal opportunity to engage in constructive dialog. <i>Id.</i> at ¶ 4.</p> <p>Subsequently, there is a formalized three-step grievance process set forth by AR 850-04, which includes certain time limits and timeframes. <i>Id.</i> at ¶¶ 5-11.</p>	Undisputed.
	<p>As to Mr. Trevithick, he filed a Step I grievance regarding hearing issues in grievance no. M-CT11/12-00016380-1. <i>Id.</i> at ¶ 16. Specifically, in this grievance, Mr. Trevithick is grieving that the relay system in the chapel has been out of service for three weeks. <i>Id.</i></p>	Undisputed.
	<p>Mr. Trevithick did not proceed beyond a Step I grievance step regarding these complaints. <i>Id.</i></p>	Undisputed.
	<p>On February 11, 2018, Mr. Trevithick filed a Step I grievance relating to the TTY machines and requesting the use of videophones. <i>See</i> Attachment 6, p. 1.</p>	Undisputed.
	<p>Mr. Trevithick filed his Step II and Step III grievances on March 2, 2018 and April 2, 2018, respectively. <i>Id.</i> at pp. 2-3.</p>	Undisputed.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
	On May 21, 2018, the Step III grievance response was issued. <i>Id.</i> at p. 4.	Undisputed.
	Mr. Trevithick was added as a plaintiff in this original action on January 22, 2018.	Undisputed that Mr. Trevithick was added as a plaintiff in the matter of <i>Rogers v. Colorado Department of Corrections</i> , 16-cv-02733-STV on January 22, 2018.
	While he properly went through the grievance process, he did so after he was added to the original case.	Undisputed that Mr. Trevithick properly went through the grievance process after he was added to the case of <i>Rogers v. Colorado Department of Corrections</i> , 16-cv-02733-STV.
	Mr. Trevithick filed his Step I grievance on February 11, 2018 and ultimately his Step III grievance on March 2, 2018.	Undisputed. (It actually appears that the Step II grievance was filed on March 2, 2018 and the Step III, on April 2, 2018, but this is not a material difference.)
	Offenders within the CDOC with hearing and/or speech disabilities, and offenders who wish to communicate with parties who have such disabilities, are afforded access to a Telecommunications Device for the Deaf (TDD/TTY), or comparable equipment. <i>See</i> Exhibit A-8 AR 850-12(IV)(A)(4).	Undisputed.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
	Text telephone, teletype (TTY) terminal, or teletypewriter is an assistive device that allows individuals who are deaf, hearing and/or speech impaired to use telephone communication through use of typed text messages. Exhibit A-8, AR 850-12(III)(E).	Undisputed.
	A TTY device is required at both ends of the conversation or a telecommunications relay service may provide text to speech interpretation. <i>Id.</i>	Undisputed.
	Within CDOC, hearing offenders are able to use the offender phone system up to a maximum of 20 minutes for each call. Exhibit A-8, AR 850-12(IV)(B)(3).	Undisputed.
	For offenders making calls through TTY, the maximum length of time per call is extended to 45 minutes. Exhibit A-8, AR 850-12(IV)(M)(1).	Undisputed.
	If the offender does not have hearing or speech disability but desires to call an outside party who requires the use of a TTY: a. The outside party shall forward a physician's statement of TTY verification to the offender's case manager; b. Upon case manager approval, the offender may sign up for telephone calls pursuant to the facility policy. Exhibit A-2, 850-12(IV)(M)(3).	Undisputed.

Plaintiffs' Undisputed Material Facts and Supporting Evidence	Defendants' Response/Additional Facts and Supporting Evidence	Plaintiffs' Reply and Supporting Evidence
	Any offender with approval to use the TTY kiosks or portable devices shall not be denied use of the regular CIPS phone. Both prison facilities, the Denver Women's Correctional Facility and the Colorado Territorial Facility have TTY kiosks available for offender use. <i>See Exhibit A-9 and A-10.</i>	Undisputed.
	[A] review of Mr. Trevithick's call log demonstrates that he has taken advantage of the TTY machine to contact individuals outside of the prison. <i>See Exhibit A-2.</i>	Undisputed that Mr. Trevithick has used the TTY to contact individuals outside of the prison.
	In fact, at least in 2008, Mr. Trevithick reported to CDOC staff that his family didn't know ASL. <i>See Exhibit A-3.</i>	Undisputed for purposes of this Motion.