



The Americans with Disabilities Act in Prison

ENSURING PROGRAMMATIC
ACCESSIBILITY

Samantha Reed - Equip for Equality - Samantha@equipforequality.org

Ashley N. Austin - Alabama Disabilities Advocacy Program - gaustin@adap.ua.edu

William Van Der Pol, Jr. - Alabama Disabilities Advocacy Program - wvanderpoljr@adap.ua.edu

*How to
participate
today*





Roadmap

Welcome & Introductions

What the ADA/Rehab Act require in prison

Why prisons get it wrong

Understanding ADA vs. medical care

Once you've identified a violation, what are your options?

How technology is expanding available accommodations

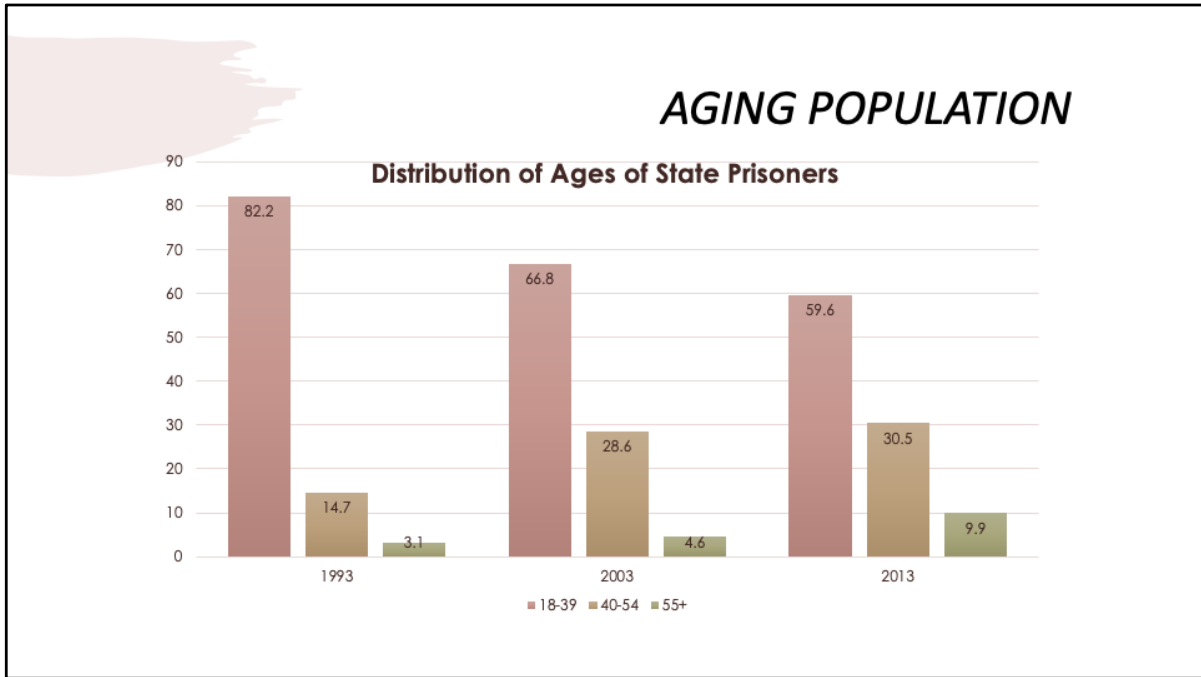
*Why are we
talking about
prisons?*

1 in 3

Prisoners report
having a disability



REUTERS/Lucy Nicholson/File Photo



In 1993, the median age was 30 years old.

In 2013, the median age was 36 years old.

Projections suggest the number of individuals over 50 could be 1 in every 3 by 2030.

Why are we talking about aging populations?



As people age, many chronic illnesses as well as mobility, hearing, and vision impairments develop.

People that develop disabilities as an anticipated part of aging may not see themselves as having a disability.

The ADA does not define a disability by how it develops, simply whether it impacts day-to-day life.

As prison populations age, so does the number of individuals in prison populations that qualify under P&A grants.

Prisons may seek to cluster individuals with disabilities that develop due to age to limit resource spending or program access

*We're assuming
a few things...*



General understanding
of the Prison Litigation
Reform Act.




Knowledge of the ADA
definition of a disability

18 U.S.C. Sec. 3626(g)(3)

Keep in mind, although the Prison Litigation Reform Act mentions prisons, it applies to: “any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”

Don't forget that a disability:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).



*Which laws apply
where?*

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the title text.

*Section 504 of
the Rehab Act*

What facilities does it
apply to?



*Section 504 of
the Rehab Act*

What facilities does it
apply to?

- Federal prisons, jails,
and detention centers

A note about federal facilities: cannot get damages under Rehab Act – you'll want to look into an FTCA (Fed Torts Claim Act) action for that. These have special grievance procedure outside typical BOP prisoner grievance process, and will need to submit Standard Form 95: <https://www.justice.gov/civil/documents-and-forms-0>

This is a very tricky, time-sensitive process. Cannot file FTCA action before you've grieved the FTCA issue, and then only have 6 months from completion of grievance to file lawsuit.



*Section 504 of
the Rehab Act*

What facilities does it
apply to?

- Federal prisons, jails,
and detention centers
- State prisons that
receive federal funds



*Section 504 of
the Rehab Act*

What facilities does it
apply to?

- Federal prisons, jails,
and detention centers
- State prisons that
receive federal funds
- Private prisons &
detention centers that
receive federal funds



*Section 504 of
the Rehab Act*

What facilities does it
apply to?

- Federal prisons, jails,
and detention centers
 - State prisons that
receive federal funds
 - Private prisons &
detention centers that
receive federal funds
- Local jails

Basically, everywhere!

What facilities does it
apply to?




*Title II of the
ADA*

- State prisons = “public entities”
 - *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)



What types of facilities
does it apply to?

- State prisons = “public entities”
 - *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)
- Local jails




What types of facilities does it apply to?

- State prisons = “public entities”
 - *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998)
- Local jails
- *But NOT federal prisons/jails*

ALSO private contractors – this is in the regulations now, but beware of caselaw saying ADA does not apply to private entities.

§ 35.152 Jails, detention and correctional facilities, and community correctional facilities.

(a) General. This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.



Recap: Which laws apply?

Section 504 of the Rehab Act

- Any federal prisons/jails, and any state/local prisons and jails that receive federal funds

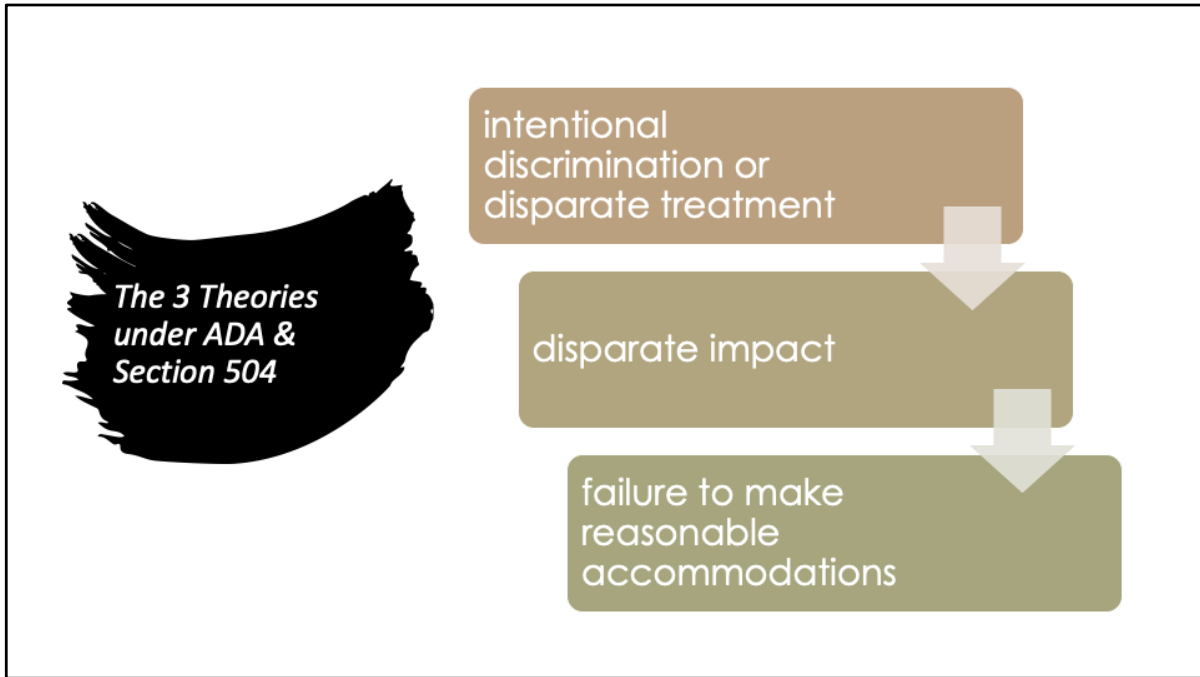
Title II of the ADA

- State prisons, local jails and detention centers are "public entities"
- Includes private prisons and contractors (explicit in regulations)
- *But not federal prisons or jails!*

Implementing Regulations

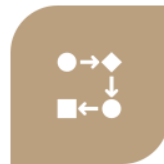
Relief available under both statutes is coextensive, you can use precedent under either one to understand the other, and courts often cite to both. So why does it matter?

It matters if you want DAMAGES. Under the ADA, there can be some complications related to sovereign immunity that can make getting damages harder. Since the Rehab Act requires the entity to receive federal funds, that constitutes a waiver of sovereign immunity and makes it easier to get damages. Also, if you're suing a federal entity, you can bring the Rehab Act claim for injunctive relief but NOT for damages. In that case, you should think about an FTCA claim if you're seeking damages.



This is review for anyone who knows the ADA, but just as a reminder. Presentation today focuses on reasonable accommodations/how to cure discrimination

**ADA
Coordinators
&
28 CFR 35.107**



PROCEDURE



RESPONSIBLE
EMPLOYEE

28 CFR 35.107

- (a) Designation of responsible employee. A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.
- (b) Complaint procedure. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

A note on implementing regulations: many courts have held that there's no private right of action to enforce regulations that go beyond what is in the statute. Instead, failure to follow the regs can be evidence of other violations of the ADA, like failure to accommodate, discrimination.

*Prisoner-
specific
Regulations*

28 CFR § 35.152(b)(1)

Public entities must ensure that "qualified inmates or detainees with disabilities" are not excluded from **services, programs, or activities** because the facility is inaccessible/unusable or subject to discrimination

This regulation takes the language of the ADA that we're all familiar with and applies it explicitly to inmates and detainees, making it very clear that prisons and jails cannot exclude PWDs from services programs and activities.

*What is a “program,
service, or activity”
of a prison?*

BASICALLY EVERYTHING!

Note that courts (at least in 7th Circuit) have held that “incarceration” itself is not a program, service, or activity, but need a hook that is. That can be almost anything that a prisoner does in the prison.

Appendix A provides guidance on revisions to 28 C.F.R. part 35, and explains the reality of prison life for people with disabilities. Prisons control all aspects of daily life, and are responsible for providing basic needs like meals, facilities for bathing and sleeping, as well as rehabilitative services.

It is perhaps easier to understand that programs like education classes, vocational training, and other rehabilitative programming are covered – that includes GED, job skills, religious instruction, substance abuse groups, work assignment, work release, halfway houses, etc.

BUT ALSO, prison controls and must provide for basic needs related to disability, which includes access to proper med tx, accessible toilet & shower facilities, devices such as bed transfer or shower chair, assistance with hygiene methods. Also access to the mail, recreation, etc.

While this presentation is focused on programmatic access, in reality the lines between program access and architectural accessibility are a little blurred in prison, as architectural accommodations may be necessary to enable program access. For example, prisons who have their law library or school classes on an upper floor of a building without an elevator.

The Alabama case defines a "program" as follows: educational, vocational, rehabilitative, work release, treatment, and religious training or instruction and include all educational, rehabilitative, substance abuse treatment, vocational, work release, religious, disciplinary, classification, medical or mental health treatment or similar programs, procedures, or processes provided to Inmates in ADOC custody regardless of whether such programs are administered by ADOC, or by a contractor of ADOC.

Rehabilitative programming

- GED classes
- Religious services
- Substance abuse groups
- Vocational training
- Re-entry programming



Needs to be provided on the same basis. See e.g., *Cook v. Illinois Dept. of Corrections*, 2018 WL 294515 (N.D. Ill. Jan. 4, 2018)

Plaintiff, a wheelchair user, was ordered to participate in **substance abuse program**. Plaintiff was approved 2x for transfers to facilities with substance abuse programs that ultimately did not occur because facilities weren't ADA compliant. Only two facilities in IDOC system that offered the program had accessible cells—one had 4-5 wheelchair-accessible cells and the other had just one. With less than 6 months remaining on sentence, he finally was transferred to program at facility with ADA accessible cell (*after* lawsuit was filed). Received only 4 months of what is typically a 9-month program.

Court denied Defendants' motion for summary judgment, rejected DOC's argument that it *had* accommodated plaintiff because he participated in and graduated from program.

Prison services must be provided on "same basis." Here, program was substantially shorter and less comprehensive when compared to non-disabled inmates.

But also!

- Prison mail
- Access to the courts
- The grievance process
- Family visits
- Legal calls



Prisons often get confused about things that are considered privileges – PWD does not need to have independent legal right to the activity/service in order to have a right to *accommodation*.

*And “needs
related to a
disability”*



Again, incarceration isn't a program/service/activity, but some courts have held that "safe custody" is. Along with that, access to hygiene, medical treatment, functions of the cell, showers, toilets, etc. all would count. We're not talking here about strict compliance with ADA Standards for physical accessibility necessarily, but just making whatever modifications to the cell/cellhouse that may be needed to allow access to the bed, the shower, or the toilet. those are considered services of the prison.

*Reasonable
Accommodations*



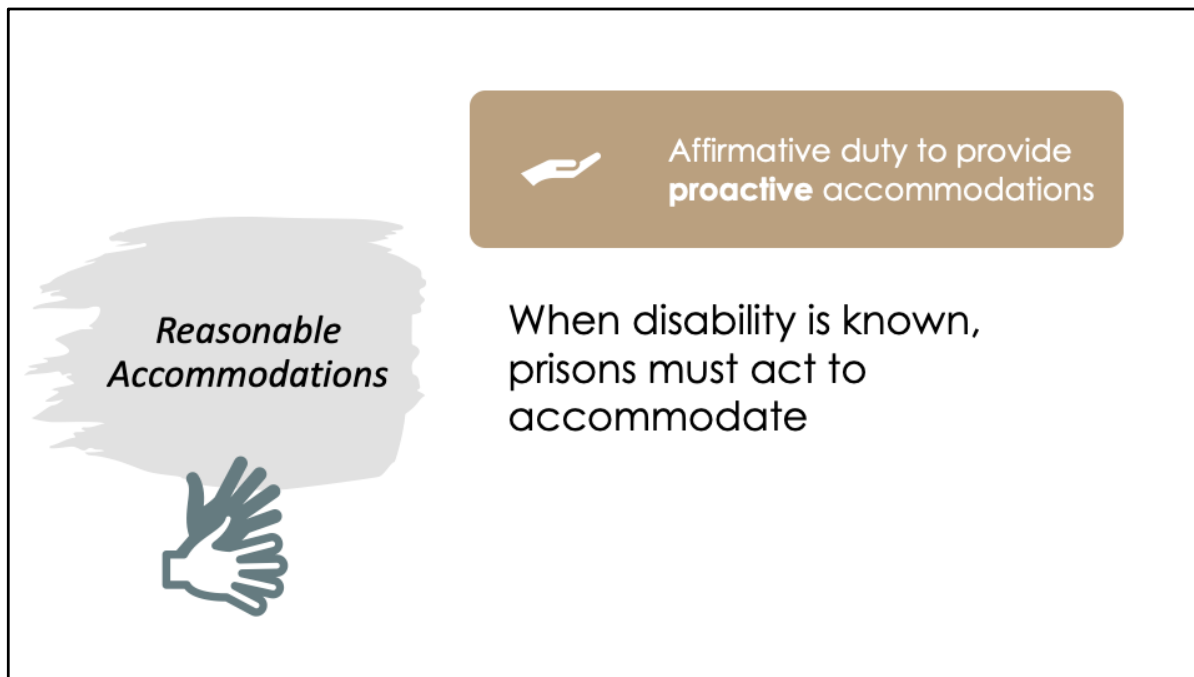
Affirmative duty to provide
proactive accommodations



That provide **meaningful**
access



May require modifications to
prison **policies**



The infographic features two hand icons. One is a simple line drawing of an open hand, and the other is a stylized hand with fingers spread, set against a grey brushstroke background. The text is arranged in two columns. The right column has a brown box at the top with a white hand icon and text, followed by a larger text block. The left column has a grey brushstroke background with text and a hand icon below it.

Reasonable Accommodations

Affirmative duty to provide **proactive** accommodations

When disability is known, prisons must act to accommodate

Many courts have held there's no duty to accommodate a disability that isn't known if prisoner doesn't affirmatively request an accommodation. BUT many also recognize that there is an affirmative duty to provide proactive accommodations whenever they know about a prisoner's disability or the disability is obvious.

For example:

See Pierce v. DC, 128 F. Supp. 3d 250 (D.D.C. 2015) – a joy to read.

Was obvious to prison that inmate was deaf, but DOC's argument was that the prisoner did not specifically request any accommodations in order to effectively communicate:

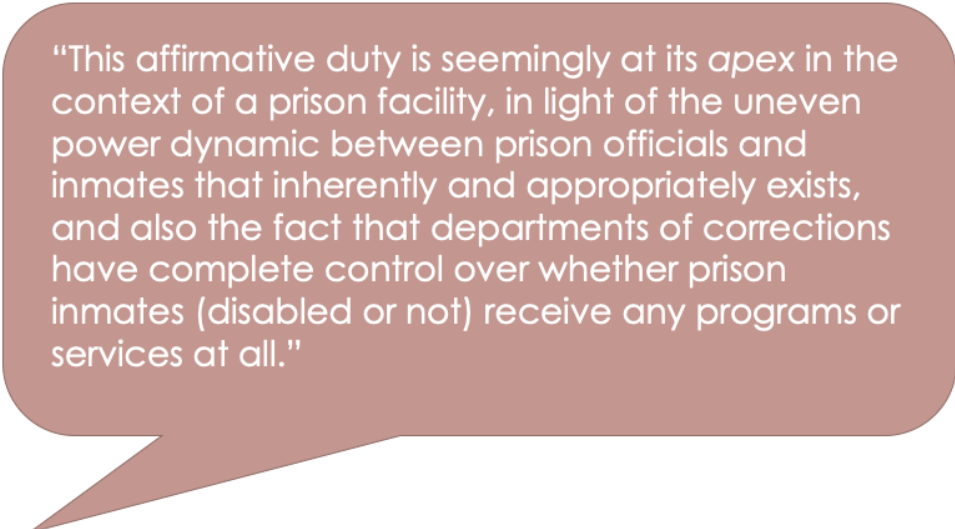
Court REJECTED that argument, found that “prison officials have an affirmative duty to assess the potential accommodation needs of inmates with known disabilities who are taken into custody and to provide the accommodations that are necessary . . . without regard to whether or not the disabled individual has made a specific request for accommodation.”

See Clemons v. Dart, 2016 WL 890697 (N.D. Ill. Mar. 9, 2016).

In that case, wheelchair user was assigned to inaccessible room at Cook County jail,

promising that nurses would always be on call to help him access the sink, shower, and toilet in his room. On-demand nursing support not the same as accessible cell because limited detainee's ability to live independently. Court also noted that Title II "requires affirmative, proactive accommodations necessary to ensure meaningful access to public services and programs, **not accommodation upon request.**"

Good idea as an advocate to find out what the prison system/facility process is for requesting an accommodation or grieving failure to accommodate. Get handbooks, administrative directives, look at applicable statutes so that you can inform your clients (and know what you might need to do to exhaust before filing suit).

A speech bubble with a dark red background and white text. The bubble has a tail pointing towards the bottom left.

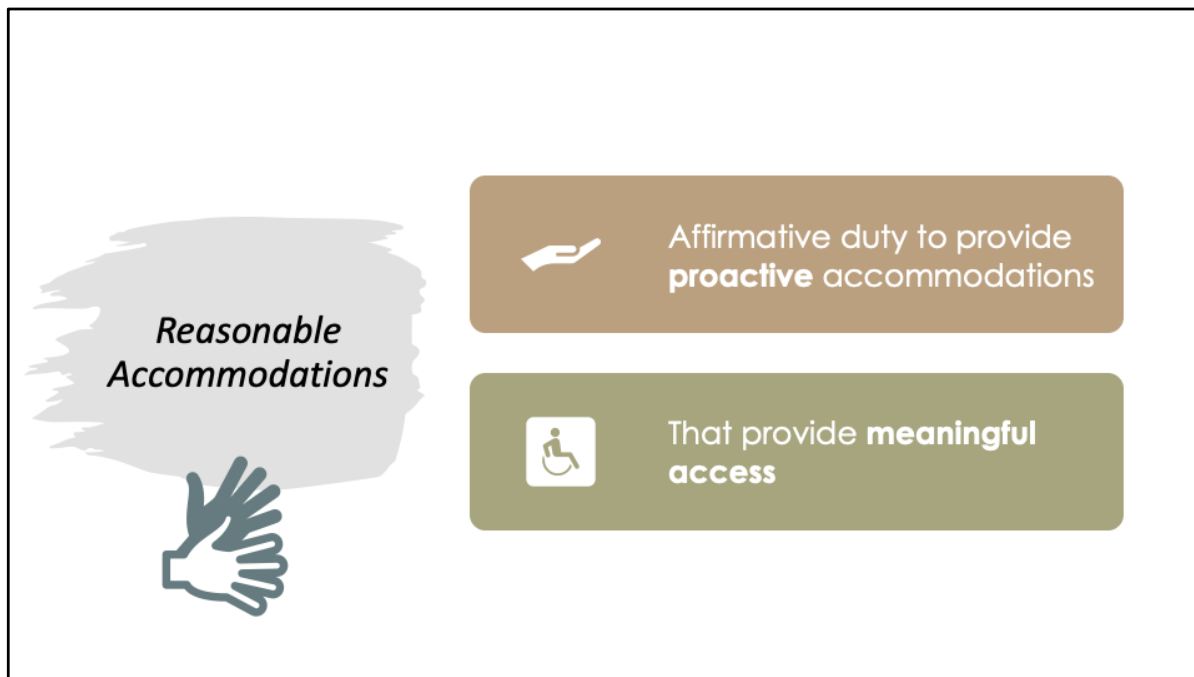
"This affirmative duty is seemingly at its apex in the context of a prison facility, in light of the uneven power dynamic between prison officials and inmates that inherently and appropriately exists, and also the fact that departments of corrections have complete control over whether prison inmates (disabled or not) receive any programs or services at all."

Pierce v. D.C., 128 F. Supp. 3d 250, 269 (D.D.C. 2015)

Despite this observation by the DC district court, making affirmative accommodations is not within the DNA of the prison system. These are rigid, rules-based environments, and customization to fit a particular individual's needs is NOT their MO. For example, one issue we run up against that is a lack of awareness/culture issue in the prison is the use of the term "ADA." Prisons will often characterize anyone with a disability as "ADA." That doesn't necessarily trigger the appropriate accommodation for their disability, and causes a lot of confusion about what the person actually needs.

In short, we should never take for granted that the DOC is going to affirmatively provide accommodations for someone, but this is helpful to keep in mind especially if you're litigating a case where defendants are arguing that they didn't receive any request for an accommodation

We still always advise prisoners we speak with to put in a request for a reasonable accommodation in writing. In our system, that may mean using the grievance process to get the need communicated through the proper channel, but different facilities have different methods for handling these issues.



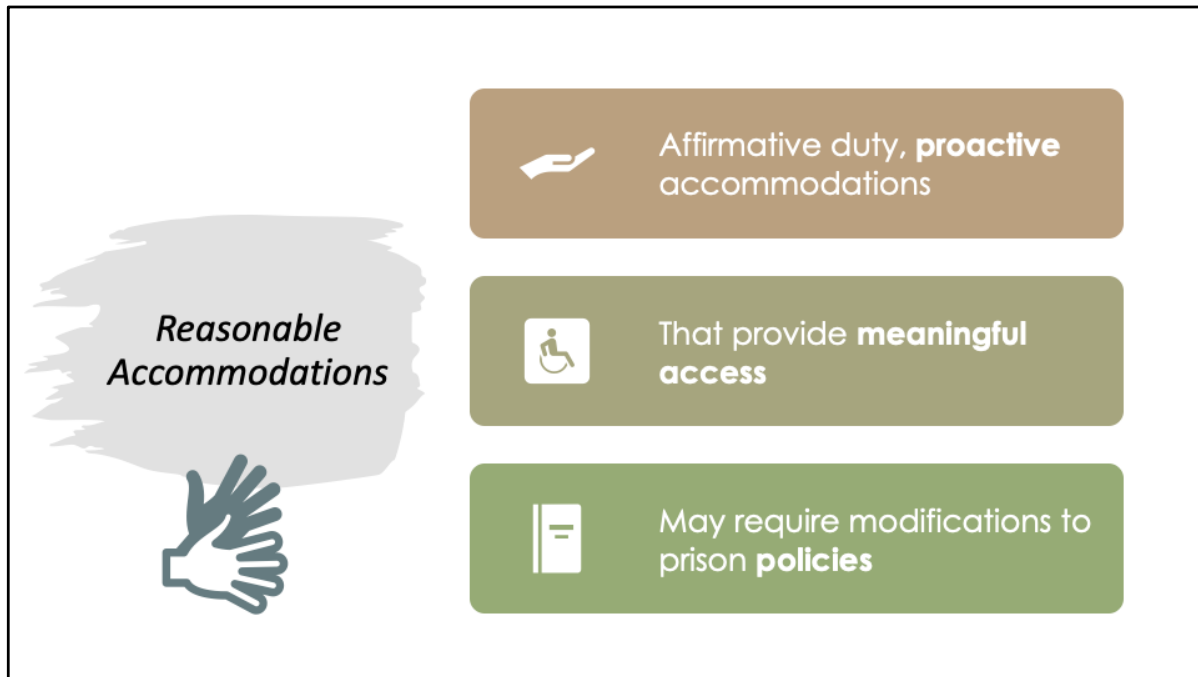
Accommodations provided need to create MEANINGFUL access. Prisons often rely on third parties to provide accommodations, like assistance with writing or movement, but these can be problematic with regards to meaningful access because they take away independence.

Prisons may also argue that prisoner CHOSE not to access a program, they weren't affirmatively excluded, for example, in a situation where the path is inaccessible or dangerous to a wheelchair user so the person chose not to go. *Flynn v. Doyle*, ED Wisconsin for example. 672 F.Supp.2d 858.

In *Clemons v. Dart*, 2016 WL 890697 (N.D. Ill. Mar. 9, 2016), court held that on-demand nursing support not the same as accessible cell features that would enable independent living.

Another example out of the 2nd circuit is *Wright v. New York State Department of Corrections*, 831 F.3d 64 (2nd Cir. 2016), where the court held that Department's reliance on ADA attendants not the same as providing independent access. Plaintiff had to rely on "inmate mobility aides" for movement around the facility was fundamentally "in tension" with the ADA's "emphasis on **independent living and self-**

sufficiency” which ensures that “a public benefit is not contingent upon the cooperation of third persons.”



Reaves v. Department of Corrections,

Man with quadriplegia, was unable to sit upright in a wheelchair, brought case about access to a number of programs including the yard -- had not been permitted to go to yard in over 16 years. Prison's argument was that it wasn't safe -- couldn't leave him on yard by himself and couldn't put an officer with him bc officer would be outnumbered. Court rejected this argument, prison could modify yard schedule to allow him to go outside, even if that required change to policy/procedure, add'l staff time, etc.

Quote from the court: Department had an obligation to modify its policies and provide the inmate with accommodations that would allow him to be able to enjoy the "experience[s] that [are] fundamental to what it means to be human" alongside other prisoners.

Individualized Assessments

- Prison must conduct **individualized inquiry**
- Title II does not explicitly contain a "direct threat" defense, but the regulations do

prisons often will argue that the accommodation requested poses some kind of security concern. For example, many segregation units in IDOC will not provide crutches or canes, and IDOC will not allow prisoners who are on oxygen tanks to live in general population because the tank can be used as a weapon. But the ADA requires prisons to make an **INDIVIDUALIZED** inquiry – inquiry into the particular inmates’ propensity to commit violent acts, disciplinary history, past crimes, or physical needs. those considerations need to be weighed together. blanket bans on certain accommodations are inappropriate under the ADA.

An example Wright v. NY State DOC

A man with cerebral palsy and scoliosis sought to bring in his own motorized wheelchair as a reasonable accommodation but was denied due to the facility’s blanket ban on motorized wheelchairs. Instead, the facility provided a manual wheelchair (which the individual could not operate independently), a wheelchair-accessible cell, a quad cane, and access to mobility aides.

The court further concluded that Title III’s **“individualized inquiry”** requirement applied to failure to accommodate actions under Title II. The court found that the blanket ban on motorized wheelchairs, based on generalized security concerns,


violated this requirement, and the facility was required to engage in an individualized inquiry into the particular inmates' propensity to commit violent acts, disciplinary history, past crimes, or physical needs

"Direct threat" may not be discussed as such in the cases, but is a natural argument for prisons to make due to security concerns. Comes up most frequently in HIV cases.



ADA's integration mandate applies in the prison context as well. Prisons must provide programs and services in the most integrated setting appropriate to the needs of prisoners with disabilities.

Also want to note that in the prison context where resources are finite, there are some practical considerations that are in tension with the ADA's integration mandate. For example, logistically a system can provide better medical care for dialysis patients if housed in same facility. Or for example, prisoners who are deaf/hard of hearing could benefit greatly from being housed in same facility together where, if they use ASL, they can communicate w/ one another, or if they need interpreting of important news items the facility is more able to provide that as well. Otherwise, can result in language deprivation/isolation.



28 CFR §35.152

Prohibits placing inmates with disabilities in **inappropriate security classifications**

Andrews v. Rauner, 2018 WL 3748401 (C.D. Ill. Aug. 6, 2018)

Incarcerated woman had a number of mental health conditions and regularly engaged in acts of self-harm. Medical professionals noted importance of “out of cell time” to engage in activities like socializing and writing. Instead, placed in solitary, segregation conditions, after she tried to hurt herself.

In motion to dismiss, IDOC argued that you can’t bring an ADA/504 claim of inadequate mental health treatment—that’s an 8th Amendment claim.

Court rejected this argument, agreed with plaintiff that denying PWD access to hospitalization and instead placing her in solitary confinement removed her from access to services, programs, and activities

IDOC also argued that “access to human interaction” is not a program, service or activity under Title II. Fair enough, but by placing her in solitary due to self harm, she was functionally denied access to long list of activities, incl. education, recreation, exercise, mental health treatment and services. Court allowed this claim to go forward based on denial of access to those programs

28 CFR §35.152



Prohibits placing inmates with disabilities in **facilities that do not offer same programs as where they'd otherwise be housed**

Reaves case is a great example of this. *See, e.g., Reaves v. Dep't of Correction*, 195 F. Supp. 3d 383, 423 (D. Mass. 2016) (issuing injunctive relief to prisoner with quadriplegia who had been denied any socialization or outdoor recreation: “ADA coordinator []was tasked with fashioning an appropriate and safe alternative, so that Reaves would not have to spend the remainder of his life in isolation, solely on account of his disability.”).

EFE is also litigating a case called *Richard v. Pfister* that deals with a related concern. PWDs held longer in receiving facility under segregation-like conditions, no electrical outlets in cells, no programming bc not designed for long-term stays. Client in mid-60s, has COPD and emphysema, history of heart attacks, came in with CPAP machine and prescription for 24/7 oxygen tank. CPAP not given to him, couldn't use it anyway bc no outlet. Most prisoners stayed 2-6 weeks. He stayed for almost a year.

We brought a couple different theories, including failure to accommodate in the transfer process (Department's theory is that he needed special transport, even though he did not require a wheelchair accessible van. They believed he could not travel with his oxygen tank on normal transfer van because it could be used by others as a weapon.

Another theory, keeping him at receiving center constitutes discrimination, denied him access to programs he otherwise would have had access to at any other home facility (even maximum security, would've had TV, school, communal meals, etc)


28 CFR §35.152



Prohibits placing inmates with disabilities in **designated medical areas (unless actually receiving treatment)**

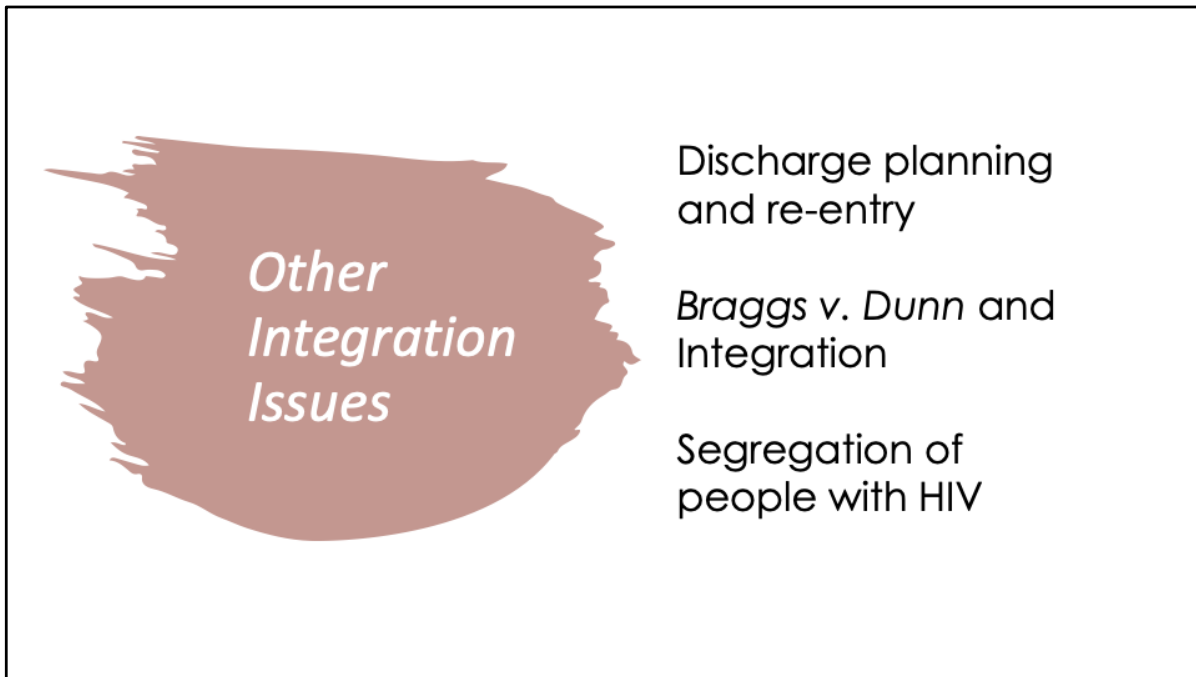
We see this a lot in Illinois--people with disabilities being held in healthcare units where they don't have access to same programming as is available in other parts of prison. A lot of times this is about security concerns – afraid of someone having a crutch or an oxygen tank in general population where it could be used as a weapon.

This was also an issue in the William Richard case, discussed on previous slide, and creates a backlog in the receiving centers as well because people are waiting for bedspace in medical settings that they might not even need to be in. In addition to our individual lit, we've worked on this in informal negotiations with IDOC in a more systemic way.



28 CFR §35.152
Prohibits placing inmates with disabilities in **more distant facilities than they would otherwise be housed in (thereby depriving PWDs of visitation w/ family)**

This is tricky—potentially an area where ADA is in tension with practical considerations. Take a state like CA or Illinois, very spread out. Almost all our prisons are downstate, many hours from Chicago. Prisoners from all over state, but obviously higher % come from Chicago/cook county. But buildings throughout the state are old, not proximate to medical facilities with expertise. This causes some of the problems with transfer, because there aren't enough accessible beds within traveling distance of Chicago.



Discharge planning and re-entry. *U.S. v. Los Angeles County*, 2016 WL 2885855 (C.D. Cal. May 17, 2016); *M.G. v. Cuomo*, 19-0639 (SDNY) (alleging prisoners with mental illness held past their release dates in violation of *Olmstead*).

Braggs v. Dunn – agreement in the consent decree not to congregate; have a handshake deal for no more than 10% of each dorm; however prisoners who use ASL may want to be congregated together; dialysis or other medical needs needed to be housed together; serious mental health needs housed together.

HIV cases – Alabama

Harris v. Thigpen (1987-2000) - 87-1109 (M.D. Ala.)


Ended with the 11th circuit determining that the rights of HIV positive prisoners had not been violated. Significant risk of transmission for any program with HIV positive prisoners; DC finding that integrated programs would risk violence was not erroneous and segregation was not exaggerated response

Leatherwood v. Campbell (2002 – 2006) – cv-02-BE-2819-W (N.D. Ala.)

Medical treatment and conditions of confinement – settlement included HIV

Specialist, HIV Coordinator at Limestone Correctional where all male prisoners with HIV were housed.

Henderson v. Thomas (2011 – 2016) – 2:11-cv-00224-MHT-WC (M.D. Ala.)
Violation of the ADA because seclusion from housing units, SAP programs, jobs, medical treatment, and work release. ADOC also required armbands for HIV positive prisoners. HIV status fell within definition of disability. No need to exhaust because no forms provided. Settlement reached in 2013, consent decree entered on the major facilities with private settlement agreement on work releases. Terminated in 2016.



*Why are we
talking about
the basics?*

- Alabama

Alabama did not have any of the basic requirements of the ADA

Most other state correctional systems probably have some of the requirements of the ADA in place but aren't following it

Knowing the bare minimum of what is required can help indicate what areas are not working as they should be

Illinois has similar story.

County jails throughout the country are much less likely to have the required systems in place, even though the requirements are the same.

*Why are we
talking about
the basics?*

- Alabama
- Illinois

Alabama did not have any of the basic requirements of the ADA

Most other state correctional systems probably have some of the requirements of the ADA in place but aren't following it

Knowing the bare minimum of what is required can help indicate what areas are not working as they should be

Illinois (Samantha) – culture problem, using the term “ADA” to cover all disabilities without knowing what it means.

County jails throughout the country are much less likely to have the required systems in place, even though the requirements are the same.

*Why are we
talking about
the basics?*

- Alabama
- Illinois
- County Jail

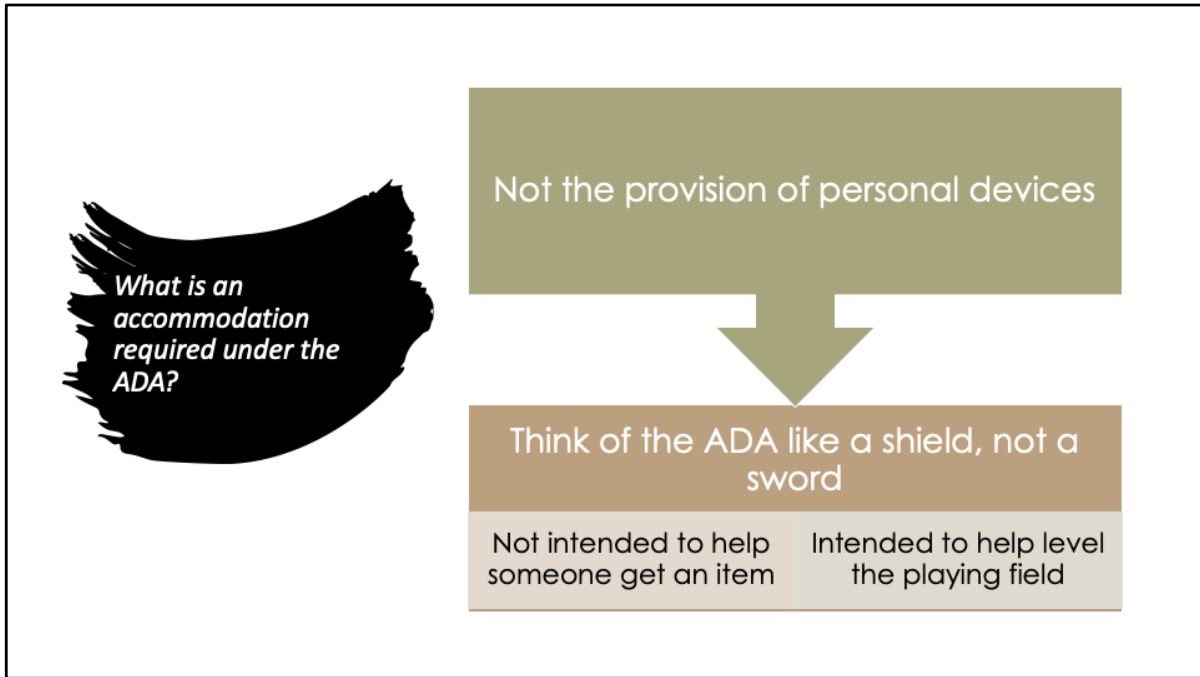
Alabama did not have any of the basic requirements of the ADA

Most other state correctional systems probably have some of the requirements of the ADA in place but aren't following it


Knowing the bare minimum of what is required can help indicate what areas are not working as they should be

Illinois

County jails throughout the country are much less likely to have the required systems in place, even though the requirements are the same.



This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.



*ADA vs.
Medical Care*

Failure to provide medical care may violate Title II

Deliberate refusal of officials to to accommodation “disability related needs in mobility, hygiene, medical care, and virtually all other programs” constituted exclusion from participation or benefits of services, programs, and activities. *United States v. Georgia*, 546 U.S. 151, 157 (2006).

“The ADA does not create a remedy for medical malpractice.” *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (finding that was not complaining about being excluded from programs, just that treatment was incompetent); see also *Nottingham v. Richardson*, 499 F. App'x 368, 377 (5th Cir. 2012) (“The ADA is not violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.” (internal quotation marks omitted)); *Iseley v. Beard*, 200 Fed. Appx. 137, 142 (3d. Cir. 2006); *McCroy v. Ill. Dep't of Corr.*, 2008 U.S. Dist. LEXIS 43266, *31-32 (C. D. Ill. 2008) (“However, the exclusion or denial must be by reason of the individual's disability, discrimination based on the individual's disability.”)

Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005).



*ADA vs.
Medical Care*

Failure to provide medical care *may* violate Title II

Must be related to the disability, not the failure of medical care generally

Deliberate refusal of officials to to accommodation “disability related needs in mobility, hygiene, medical care, and virtually all other programs” constituted exclusion from participation or benefits of services, programs, and activities. *United States v. Georgia*, 546 U.S. 151, 157 (2006).

“The ADA does not create a remedy for medical malpractice.” *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (finding that was not complaining about being excluded from programs, just that treatment was incompetent); see also *Nottingham v. Richardson*, 499 F. App'x 368, 377 (5th Cir. 2012) (“The ADA is not violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.” (internal quotation marks omitted)); *Iseley v. Beard*, 200 Fed. Appx. 137, 142 (3d. Cir. 2006); *McCroy v. Ill. Dep't of Corr.*, 2008 U.S. Dist. LEXIS 43266, *31-32 (C. D. Ill. 2008) (“However, the exclusion or denial must be by reason of the individual's disability, discrimination based on the individual's disability.”)

Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005).



*ADA vs.
Medical Care*

Failure to provide medical care *may* violate Title II

Must be related to the disability, not the failure of medical care generally

Denial must be solely related to disability

Deliberate refusal of officials to to accommodation “disability related needs in mobility, hygiene, medical care, and virtually all other programs” constituted exclusion from participation or benefits of services, programs, and activities. *United States v. Georgia*, 546 U.S. 151, 157 (2006).

“The ADA does not create a remedy for medical malpractice.” *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) (finding that was not complaining about being excluded from programs, just that treatment was incompetent); see also *Nottingham v. Richardson*, 499 F. App'x 368, 377 (5th Cir. 2012) (“The ADA is not violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.” (internal quotation marks omitted)); *Iseley v. Beard*, 200 Fed. Appx. 137, 142 (3d. Cir. 2006); *McCroy v. Ill. Dep't of Corr.*, 2008 U.S. Dist. LEXIS 43266, *31-32 (C. D. Ill. 2008) (“However, the exclusion or denial must be by reason of the individual's disability, discrimination based on the individual's disability.”)

Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005).

ADA vs. Medical Care



Can address inadequate healthcare using 42 U.S.C. Sec. 1983



8th amendment applies to prisons; 14th amendment applies to jails



Can simultaneously plead both in litigation

Great discussion of 8th amendment vs. ADA claims as it relates to diabetes provided in the resource guide that was produced by the American Diabetes Association



Hypotheticals

Prisoner Jones has a hearing impairment and believes that if he is supplied with a hearing-aid he will be able to hear.



A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 1

Prisoner Jones has been evaluated for a hearing aid, found to benefit from one, but the Department of Corrections will not supply him with one. Is the failure of the Department to provide him a hearing aid an ADA violation?

Question 1

- Prisoner Jones has been evaluated for a hearing aid, found to benefit from one, but the Department of Corrections will not supply him with one. Is the failure of the Department to provide him a hearing aid an ADA violation?

A - Yes, if the failure to provide the hearing aid keeps him from participating in any service, program, or activity on an equal basis as a prisoner without a disability.

B - No, the ADA does not require that a covered entity provide specific items, only that the covered entity provide a reasonable accommodation, which might or might not, include the provision of a specific item.

28 CFR § 35.135 “This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.”

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 2

Prisoner Jones has a hearing aid but needs batteries, so it is operable. Is the failure of the Department to provide batteries an ADA violation?

Question 2

- Prisoner Jones has a hearing aid but needs batteries, so it is operable. Is the failure of the Department to provide batteries an ADA violation?

A - Yes, if the failure to provide a battery is keeping him from participating in any service, program, or activity on an equal basis as a prisoner without a disability.

B - No, since the ADA does not require the department give a prisoner a hearing aid, it is not required to provide batteries for the hearing aid.

C - No, it is an 8th amendment failure to provide constitutionally adequate medical care issue.

D - Maybe. It is clearly either an ADA violation or an 8th Amendment constitutionally inadequate medical care claim.

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 3

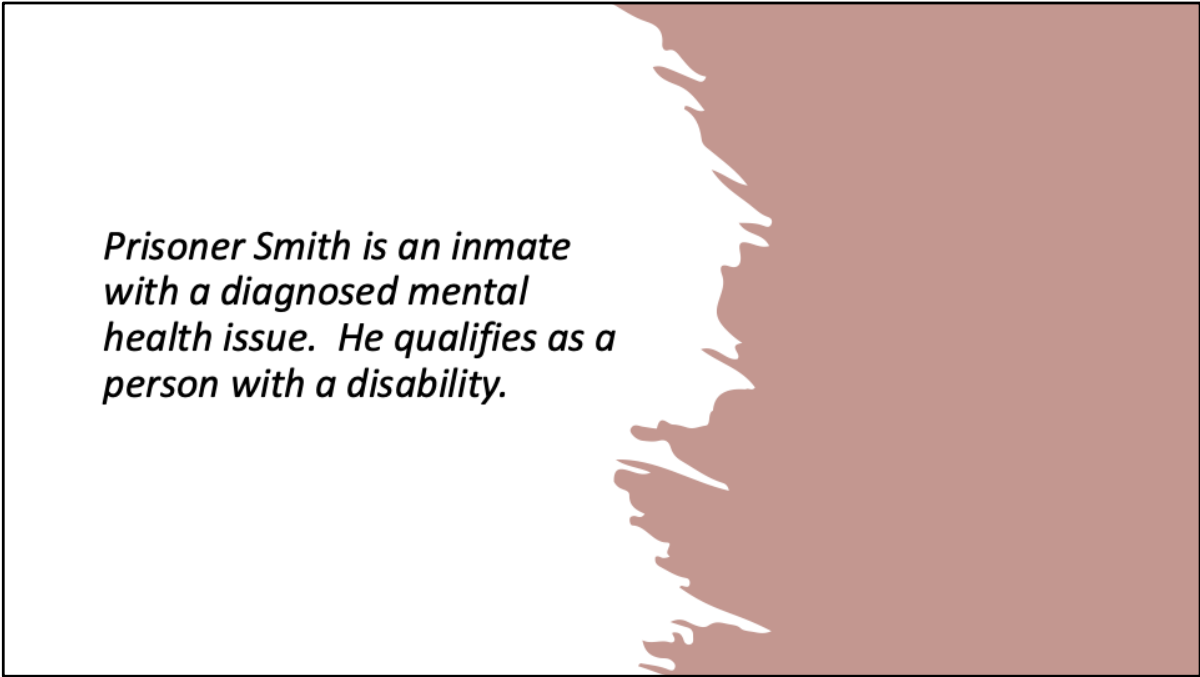
Prisoner Jones has a hearing disability and has requested that he be evaluated for need. Is the Department's refusal to evaluate him an ADA violation?

Question 3

- Prisoner Jones has a hearing disability and has requested that he be evaluated for need. Is the Department's refusal to evaluate him an ADA violation?

A - Yes. The facility has an affirmative duty to evaluate his disability-related needs and determine what accommodations are appropriate, even if some individuals with hearing loss are expected to not benefit from a hearing aid.

B - No, since ultimately the ADA does not require the department to give a prisoner a hearing aid, it is not required to assess whether the prisoner needs a hearing aid under the ADA.



Prisoner Smith is an inmate with a diagnosed mental health issue. He qualifies as a person with a disability.

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 4

All prisoners in general population without a mental health diagnosis have access to GED classes. All prisoners with a diagnosed mental health issue are precluded from the GED program. Prisoner Smith is in general population. Is Prisoner Smith's preclusion from the GED program a violation of the ADA?

Question 4

- All prisoners in general population without a mental health diagnosis have access to GED classes. All prisoners with a diagnosed mental health issue are precluded from the GED program. Prisoner Smith is in general population. Is Prisoner Smith's preclusion from the GED program a violation of the ADA?

A - Yes. Per se exclusion of a person with mental health disability from the GED program is a violation of the ADA.

B - No, prisoner with a mental health issue is not similarly situated to a prisoner without a mental health issue, and hence the department is not required under the ADA to provide him equal access to the GED program.

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 5

Prisoner Smith is assigned to a residential mental health unit for prisoners with enhanced mental health needs that cannot be adequately treated in general population. The Department refuses to provide GED programming in the residential mental health unit. Is this an ADA violation?

Question 5

- Prisoner Smith is assigned to a residential mental health unit for prisoners with enhanced mental health needs that cannot be adequately treated in general population. The Department refuses to provide GED programming in the residential mental health unit. Is this an ADA violation?

A - Yes. A per se exclusion of all prisoners in the unit violates the ADA.

B - No, since all prisoners in the unit are excluded from programming, no prisoner is discriminated against since all prisoners in the unit are treated the same.

C - Maybe. A per se exclusion for all prisoners violates the ADA. However, there is likely to be a subset of prisoners in the unit who are currently so acutely mentally ill that they cannot participate in the program without a significant material alteration to the program. Hence, the department must provide an individual assessment of each prisoner before they can be excluded from programming.

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 6

Prisoner Smith is assigned to segregation (also known as Restrictive Housing) for a disciplinary violation. All prisoners, regardless of mental health condition, are precluded from programming while in segregation. Is the exclusion from programming an ADA violation?

Question 6

- Prisoner Smith is assigned to segregation (also known as Restrictive Housing) for a disciplinary violation. All prisoners, regardless of mental health condition, are precluded from programming while in segregation. Is the exclusion from programming an ADA violation?

A - No, his behavior caused him to go to segregation, and hence is no longer similarly situated to prisoners with disabilities in general population.

B - Yes, he has a mental illness and he is entitled to the same access to programming as all prisoners with mental illness, otherwise he is discriminated against on the basis of his disability.



Question 7

Prisoner Smith is placed in a diversion unit designed for prisoners with a serious mental illness (SMI), who but for their diagnosis, would be placed in segregation for a disciplinary violation. The Department does not consider the diversion unit as a disciplinary unit.

None of the prisoners in segregation have access to programming. All prisoners in non-disciplinary units have access to program without regard to disability status. The Department provides no programming to anyone in the diversion unit. Is this a violation of the ADA?

Question 7

- None of the prisoners in segregation have access to programming. All prisoners in non-disciplinary units have access to program without regard to disability status. The Department provides no programming to anyone in the diversion unit. Is this a violation of the ADA?

A - No, he is not similarly situated to prisoners without a disability due to his disciplinary event

B - Yes, he has a mental illness and he is entitled to the same access to programming as all prisoners in general population with mental illness, otherwise he is discriminated against on the basis of his disability.

C - Yes, since the department does not consider this a disciplinary unit, even though his actions placed him in this unit, he is entitled to access to programming consistent with prisoners in general population.



Question 8A

Same scenario, but the diversionary unit contains the following groups of prisoners:

Group 1: Diagnosed SMI

Group 2: Has a mental health condition and counter-indicated to go to segregation

Group 3: No mental health condition but counter-indicated to go to segregation

Group 4: Inability to understand wrongfulness of actions

Which, if any, group is entitled to programming?

A large, horizontal, reddish-brown brushstroke graphic with a textured, irregular edge, serving as a background for the question title.

Question 8B

If any of the other groups is entitled to programming, is the failure of the Department to provide Prisoner Smith with programming a violation of the ADA?

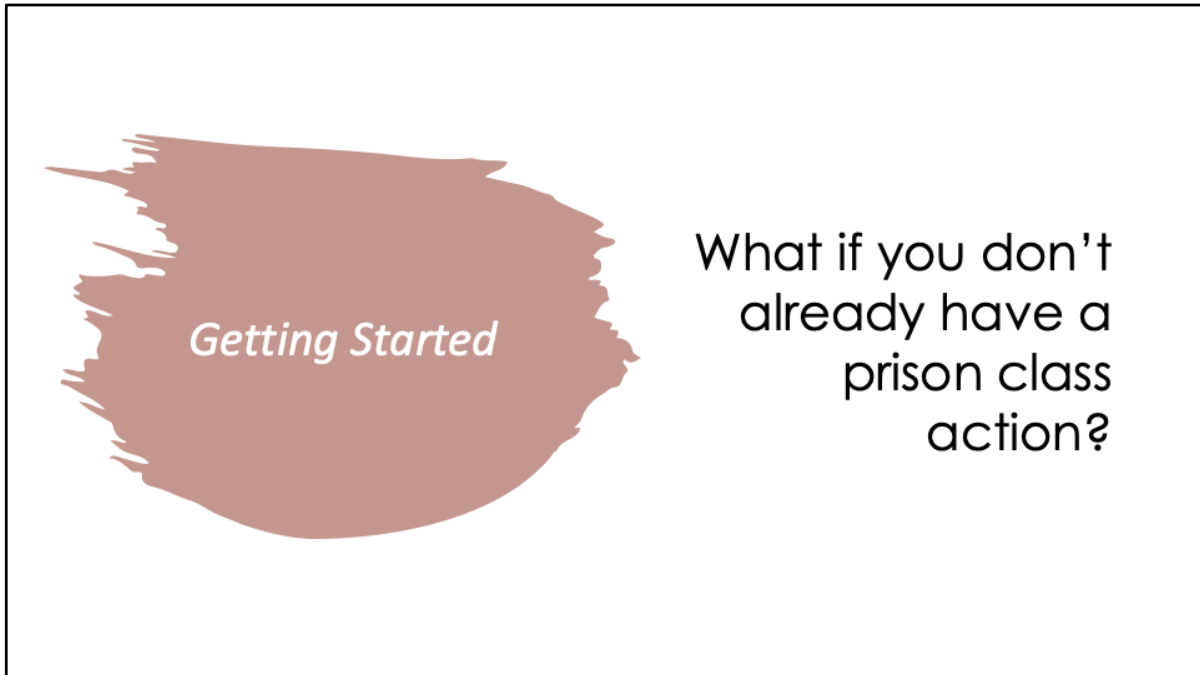
Question 8B

- If any of the other groups is entitled to programming, is the failure of the Department to provide Prisoner Smith with programming a violation of the ADA?

A - No, the presence of a group in individuals in the unit does not mean that other prisoners in the same unit needs to be given an equal access. The similarly situated individuals are prisoners in the same status, not in the same housing unit.

B - Yes, by the department mixing prisoners who have a right to programming with prisoners who do not have a right to programming, the refusal to provide equal access is now based on a disability, and hence they are discriminating.

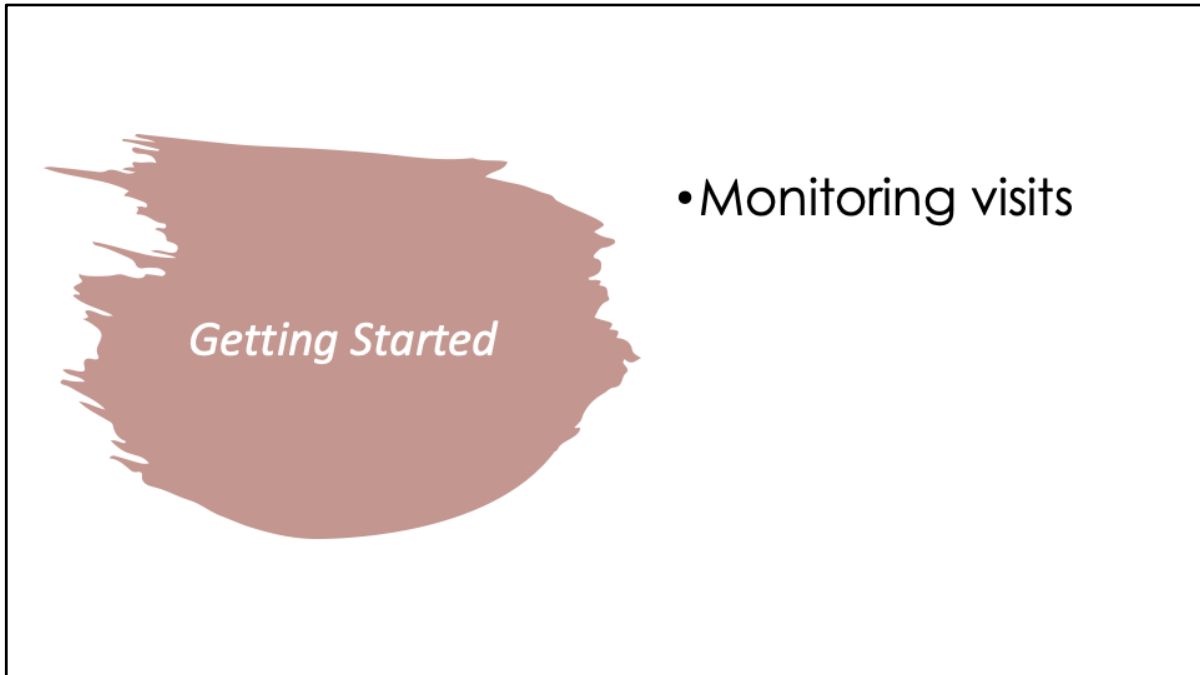
Samantha -- I think this comes down to why individualized assessments are important to determine whether these individuals are qualified for the programs. Fair enough if prison says people who commit certain types of disciplinary infractions are not entitled to certain educational programs, but if the REASON they're in disciplinary housing is BECAUSE OF their disability, that could pose an ADA issue. If SMI is the cause of their behavior that violates a prison rule, then they could be being denied programs due to disability like in Andrews v. Rauner case.



Prisons present unique challenges to getting started in this work. For the most part, potential clients can't just call your intake line—it requires a lot of work to get started. Many, but not all, of your P&As already have at least one systemic class action going on targeted issue like use of segregation for SMI prisoners or deaf/hard of hearing prisoners. Having those kind of systemic cases gives you contacts within the prison already. Once your name or the name of your organization gets spread around, you will start getting mail from prisoners about a variety of other issues.

At EFE, we were able to expand the work we were already doing from our class action litigation to other disability-related matters because we had already made connections in the prison and gotten our name out there. We are able to track letters and see trends over time (like a wing at one of our maximums that was built to be ADA-accessible but isn't – over the last 2 years, just about everyone who has lived on that wing has written to us, and we've been able to follow up on those issues.

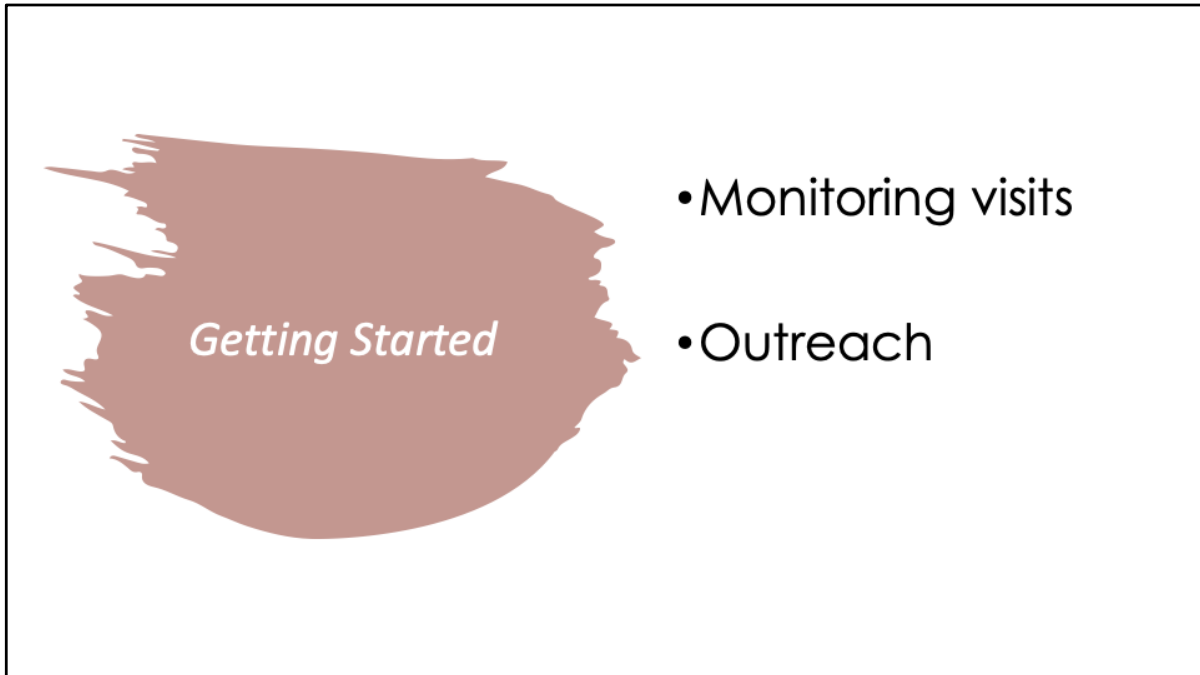
If you're at an organization that has not already done that work and are trying to figure out how to start, there are a couple of ways we've thought of that you might get engaged with the prison population. If anyone in the audience has additional ideas, please feel free to type them up in the chat box



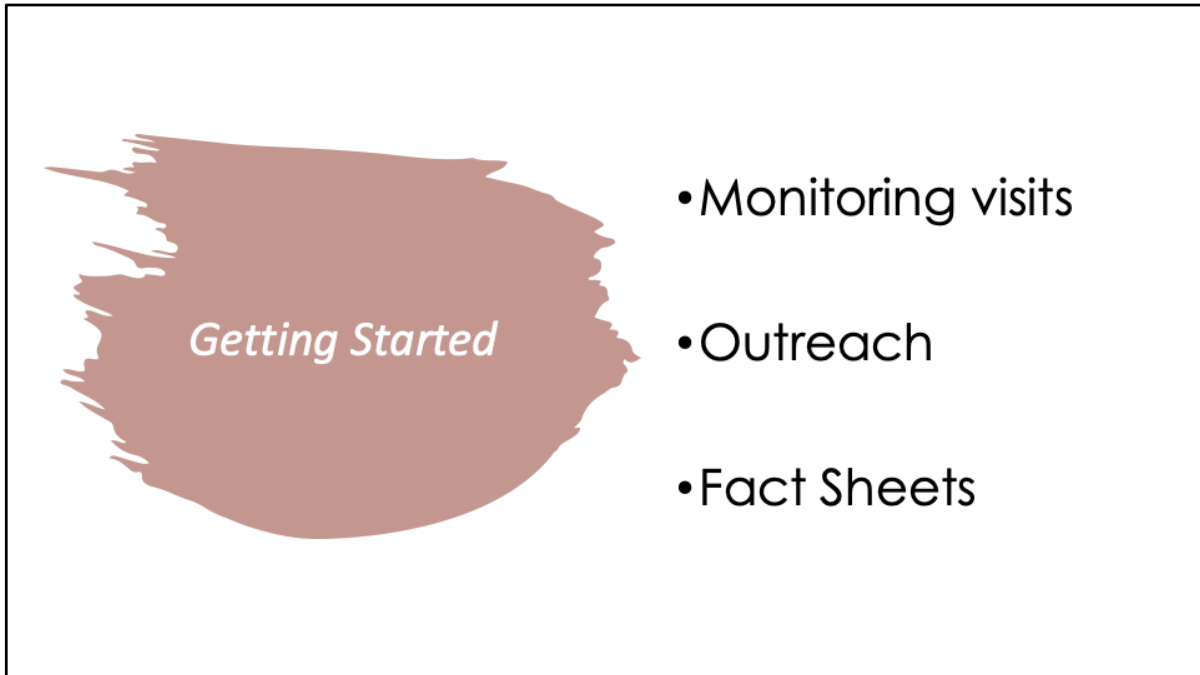
Send an access letter in advance that explains your authority as P&A— generally want some element of surprise, but that’s not really possible in a prison environment. Prison officials are going to be skeptical of you if they are not already familiar with the P&A, you should be prepared for lower level officers to be extra skeptical. Be strategic about what you bring in—typically not allowed to bring in anything but paper and pen, but if doing accessibility monitoring will need measuring tape and might want a level or camera (We’ve done it without a level, definitely NOT a camera). You want to put all that in the letter up front.

You should always do monitoring with a partner, can be emotionally draining work, can see some disturbing things, want to be prepared for that.

Another option instead of or in addition to: requesting a list of prisoners who have a disability or who get accommodations, and then set up legal visits with them either in the same trip or in a follow up trip. We toured a facility once for accessibility monitoring and thought we had seen everything, but I went back to do legal interviews and learned there was a whole other yard area that we weren’t shown that was totally inaccessible, yet PWDs were sent to that yard once a week.



Another way to raise awareness of your organization and work within the prison walls is to do outreach with other nonprofits that work within the prison. Sometimes this happens sort of naturally, like we co-counsel with organizations that work on different types of issues in the prison and so they're aware of us as the "disability experts." But if you don't already have relationships with those organizations, it's a great idea to reach out to them and let them know that you're getting started in this work. Perhaps have a meeting to discuss how you can collaborate and learn what they know. You can even do a training on disability and ADA issues for them! Those organizations can then refer disability-related issues to you and direct prisoners to your organization.



Many organizations who work with prisoners receive LOTS of mail. One resource you can provide for those organizations, and ultimately your prisoners with disabilities, is a fact sheet on their rights under the ADA while in prison, which can double as a flyer with your org's contact information on it.

EFE has an example that's in your packets.

Remember to keep language basic and readable, and to try to read them with a culturally sensitive eye. That means thinking about how disability is perceived in different communities and where your clients or potential clients are coming from.



Getting Started

- Monitoring visits
- Outreach
- Fact Sheets
- Other ideas?

If you have other ideas, please put them up in the chat box!

How to address ADA issues with DOC officials?

- Individual advocacy
- Monitoring & Reports
- Informal systemic advocacy
- Structured Negotiations
- Systemic Litigation
- OCR/CRIPA complaints



Next we're going to talk a bit about different ways to address these issues once you've identified them. Class actions are a popular choice for addressing these systemic issues in a big and broad way, but that's not the only way to use the ADA/Rehab Act to make meaningful change for PWDs in prison.



Informing PWDs of their rights under the ADA and Rehab Act can be extremely powerful. We get letters all the time from prisoners asking for help with getting an accommodation, and it turns out that they didn't even know that the prison had an ADA Coordinator and that there's a process available to them to make this request through the prison. Often it is meaningful and helpful to simply explain that they DO have a right to request this thing (like a typewriter) and advise them on how to explain why their disability requires accommodation. Sometimes we are advising them that the accommodation they're seeking is not reasonable, but can help suggest alternatives and encourage them to talk with their counselor or ADA Coordinator. The key, as it always is with SAA, is giving them tools so they can advocate for themselves. Can be helpful to educate yourself first about what the process is for requesting ADA accommodations in your system – get prison handbooks, look at administrative directives, etc.

Sometimes, a PWD will contact you after they've been denied an accommodation, often for some reason related to safety/security or \$\$ resources. Another tool that can be extremely powerful is writing demand letters to the facility explaining why they may be violating the law. This is where some of those case examples can be really helpful—you want to show prisons that they aren't exempt from the

ADA/Rehab Act and that courts have found prisons liable in similar situations. You can also provide them with resources for finding accommodations, as prisons are not exactly known for being creative problem solvers, especially higher security facilities. Think about whether you want follow up from the facility – maybe if it's a persistent problem, you want to work with them to problem solve.

Then, as for litigation – you want to obviously consider your client's goals and your org's resources. This is also where your PLRA considerations are going to come into play. Has your client exhausted? Is your client still facing this problem, or is it something that happened in the past and is still happening to others, such that litigation could lead to both damages for your client and policy changes in the prison facility/system?



Using P&A authority carefully, can help to start with select facilities
Be sure to look at all areas where programs take place – not always obvious.
Bring two people so you can take notes, talk to people during the tour

Consider whether your report will be for your team, for sharing with department, for public? (This could be an entire training in itself and was last year – see AVID for great examples)

Can be springboard for individual contacts, formal or informal systemic advocacy.

Informal Systemic Advocacy



If DOC seems eager to make changes & you are low on resources, consider informal systemic advocacy, perhaps with some regular sharing of information and discussion about progress. For example, prolonged incarceration of prisoners with disabilities at NRC.

Consider: when do you need to ratchet up the pressure? How will you memorialize progress? What will happen if you or the person on the other end leaves their position?



A more formalized approach to pre-litigation. See the book by Lainey Feingold, and her website's FAQ page: <https://www.lflegal.com/faqs/#Structured-Negotiation-Questions>

Strategy to resolve issues without lawsuit, hopefully more collaborative, avoids negative press, high cost of litigation, etc. Basically negotiating a settlement agreement. Start with an agreement about how the negotiations will proceed – agree on issues to be addressed in the negotiation (accommodations for people with vision impairments? Making all school classes/good time programs accessible?) will there be legal fees? Will you hire independent experts, one joint expert? What are benchmarks for progress/schedule for meetings?

Talk about physical access structured negotiations?



Lots of resources, can take a long time, but can have huge impact. Will definitely want to think about collaboration with pro bono counsel, other organizations.

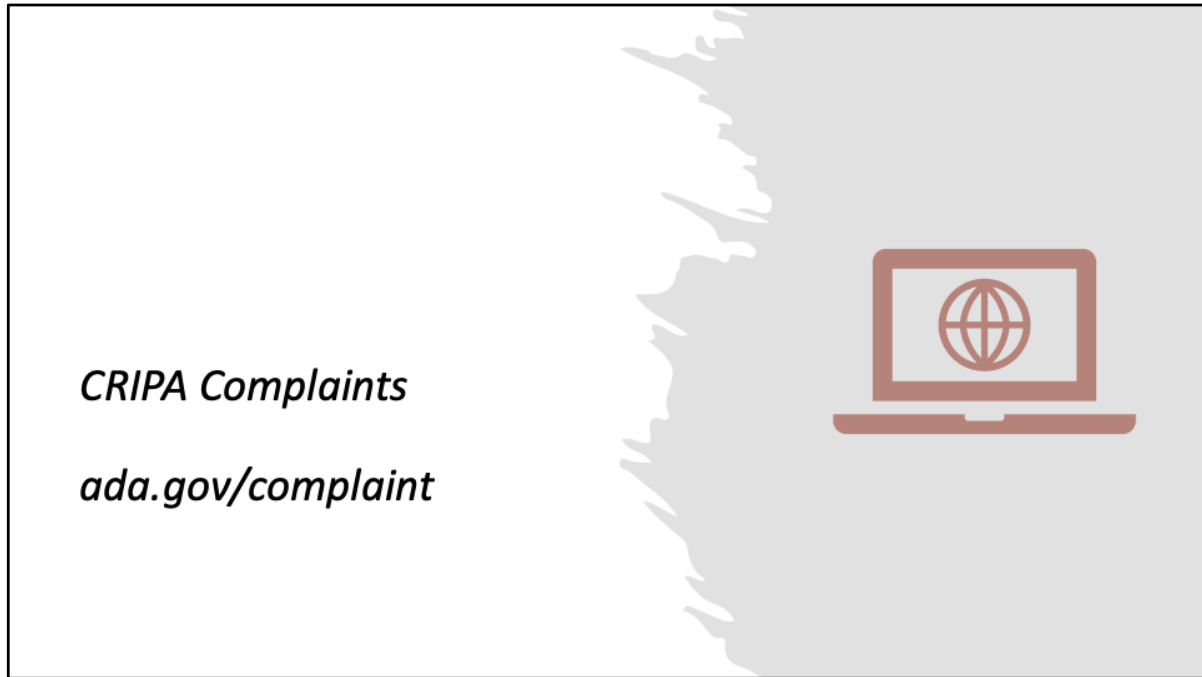
Alabama examples:

ADA violations one of five original claims – four claims; settled the ADA portion, a due process portion, still working on claim 3, haven't started claim 4.

SPLC partner plus private attorneys

Two attorneys in ADAPs office almost full time

Resources are the biggest consideration when contemplating systemic litigation



ada.gov/complaints

The more detail the better!

Can refer prisoners to submit their own complaints by mail to **US Department of Justice**

950 Pennsylvania Avenue, NW

Civil Rights Division

Disability Rights Section – 1425 NYA

Washington, D.C. 20530

Fax: (202) 307-1197

You may also file a complaint by E-mail at ADA.complaint@usdoj.gov.

If you have questions about filing an ADA complaint, please call:

ADA Information Line: 800-514-0301 (voice) or 800-514-0383 (TTY).

Cutting Edge: The Growth of Technology



VIDEO RELAY



SMART
WATCHES



MESSAGE
BOARDS



ACCESSIBLE
TABLETS

Video relay replacing TTY/TTD machines and improving access to interpreters in emergencies

Smart watches or strobe lights can help indicate to individuals with a hearing impairment that an important announcement is occurring

Message boards

Accessible tablets can make programming accessible to individuals with hearing/vision impairments

DRF v. Jones

- CapTel (captioned telephone devices)
- Video relay devices (including in a location for confidential/legal calls)
- Light boards and visual alert systems
- Vibrating watches
- FM transmitters
- Talking watches
- Law library computer with text-to-speech capabilities

4:16-cv-00047

(N.D. Florida)

Doc 71 is settlement agreement



Questions?