

ADA Legal Updates

2022: Year in Review

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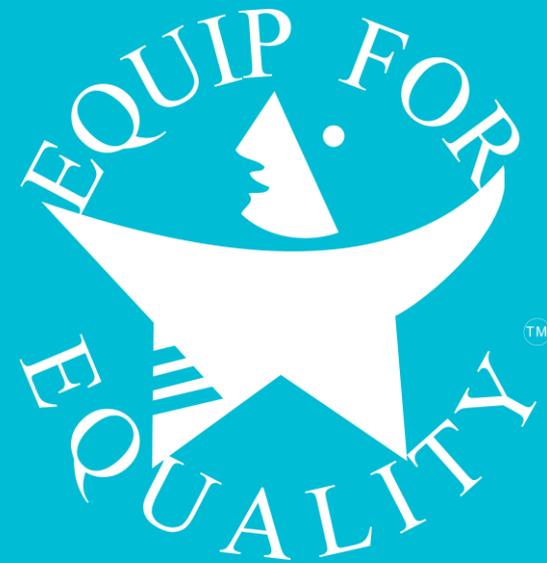




Agenda

- ▶ Definition of Disability
- ▶ Title I (Employment)
- ▶ Title II (Public Entities)
- ▶ Questions

Definition of Disability



Gender Dysphoria

Williams v. Kincaid

45 F.4th 759 (4th Cir. 2022)

- ▶ Transgender woman with gender dysphoria (GD) placed in men's facility sued under the ADA and Section 504
- ▶ **Dist. court:** ADA exemption for “gender identity disorders (GID) not resulting from physical impairments”
- ▶ Plaintiff argues on appeal: (1) GD categorically is not a GID; (2) even if it is, GD results from a physical basis
- ▶ **4th Cir:** Gender dysphoria is NOT a gender identity disorder
 - ▶ GID is an obsolete diagnosis removed from the DSM (said being transgender was a mental illness)
 - ▶ Pled physical bases of gender dysphoria
 - ▶ First appellate court to decide this question

COVID-19 – Actual/Record of Disability



Brown v. Roanoke Rehab. & Healthcare Ctr.

586 F. Supp. 3d 1171 (M.D. Ala. 2022)

- ▶ Employee alleged that COVID-19 caused severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes
- ▶ **Employee’s case can move forward (denied MTD)**
 - ▶ Employee named specific symptoms; substantially limit breathing, concentrating, thinking, communicating, performing manual tasks, working
 - ▶ Called [HHS/DOJ](#) and [EEOC guidance](#) “helpful”

McKnight v. Renasant Bank, 2022 WL 1342649 (N.D. Miss. May 3, 2022)

(finding no “record of” disability though plaintiff’s COVID-19 caused her to spend 5 days in the ICU, have severe lung problems and pneumonia)



COVID-19 – Regarded As

Courts have split on whether COVID-19 falls within the transitory and minor exception to “regarded as”

- ▶ *Alvarado v. ValCap Grp., LLC*, 2022 WL 953331 (N.D. Tex. Mar. 30, 2022) (“Given the nature of the fact-specific inquiry that would be required to determine whether COVID-19 is a physical impairment that is (or is not) transitory and minor, and the divisions that exist among both district and circuit courts, the court declines to dismiss Alvarado's ADA-based discrimination claim at the pleadings stage.”)
- ▶ *Freeman v. Moore Eye Care*, 2022 WL 2440765 (E.D. Pa. July 5, 2022) (transitory and minor when unwell for only a few days and took only Mucinex)

Title I (Employment)





Initiating Interactive Process

King v. Steward Trumbull Memorial Hospital

30 F.4th 551 (6th Cir. 2022)

- ▶ Nurse with asthma asked supervisor for leave
- ▶ **Court:** “We have generally given plaintiffs some flexibility in how they request an accommodation...A plaintiff's own requests, whether written or oral, can satisfy this element.”
- ▶ Also, no “magic words” needed to give notice employee is seeking reasonable accommodation

Owens v. Georgia, 52 F.4th 1327 (11th Cir. 2022)

(employee must both identify disability and explain how proposed accommodation will address disability)

Engaging in the Interactive Process



McGuire v. Little Caesars

2022 WL 1186731 (E.D. Ark. Apr. 21, 2022)

- ▶ New employee with low vision requested accommodations. Supervisor scheduled “walk through” of the restaurant to identify tasks employee could perform and any reasonable accommodations
- ▶ Employee refused to participate
- ▶ **Court:** Dismissed claim
 - ▶ Employee failed to engage in the interactive process

Cooke v. Carpenter Tech. Corp., 2022 WL 17730393

(11th Cir. Dec. 16, 2022) (company refused to consider altered shifts causing breakdown of interactive process)

Interactive Process: Delay

DiFranco v. City of Chicago

2022 WL 672746 (N.D. Ill. Mar. 7, 2022)

- ▶ **3-19-2020:** Chicago Police Department told employees to contact medical department if they have a medical condition that places them at greater risk for COVID
- ▶ **Less than 2 hours later,** DiFranco's doctor sent letter to CPD saying DiFranco had cystic fibrosis and cystic fibrosis related diabetes; asked for remote work or social distancing - no meaningful response from City
- ▶ Per policy, DiFranco continued to work
- ▶ **3-29-2020:** Developed COVID
- ▶ **4-2-2020:** Died from COVID-related complications



Interactive Process: Delay (2)

- ▶ DiFranco's estate brought ADA lawsuit on his behalf
- ▶ **Court:** Denied motion to dismiss
 - ▶ Rejected City's argument that it cannot be liable for failure to accommodate because of short time frame (10 days) between his request and hospitalization
 - ▶ Determining whether a delay is "reasonable" depends on the "totality of the circumstances" including the employer's good faith, the length and reasons for the delay, and the complexity of the requested accommodation – cited *McCray v. Wilkie*, 966 F.3d 616 (7th Cir. 2020)



When Accommodations are Required

Edwards v. Wellstar Medical Group

2022 WL 3012297 (11th Cir. July 29, 2022)

- ▶ Office manager with depression asked for 18 accommodations to “maximize” her productivity
- ▶ **Court:** An accommodation is reasonable if it enables employee to perform the essential functions of the job.
 - ▶ Employee worked for two years after diagnosis
 - ▶ She did not **need** accommodation to do EJM, not required to engage in the interactive process.

But see Bell v. O’Reilly Auto Enterprises 972 F.3d 21 (1st Cir. 2020) (holding employee eligible to request and receive accommodations even if they “can, with some difficulty” perform the essential functions of the job).

Job Restructuring



Brown v. Advanced Concept Innovations, LLC

2022 WL 15176870 (11th Cir. Oct. 27, 2022)

- ▶ Customer service rep had pregnancy-related complications; requested to use a “spit cup”
- ▶ Her job was 20% production area; 80% clerical
- ▶ Employer: Cannot use cup in production; no discussion about job restructuring
- ▶ **Jury:** Found for employee (FL state law similar to ADA)
- ▶ **11th Cir.:** Reasonable jury could find working in production is not an essential function
 - ▶ Being in the production area is not listed as essential in her job description
 - ▶ 20% of time; team had a buddy system

Remote work may be reasonable

Wright v. Blackman

2022 WL 602381 (S.D. Fla. Feb. 7, 2022)

- ▶ Due to effects of colon cancer treatment, evidence technician asked to work from home for most of her job tasks, as she had during the pandemic
- ▶ **Court:** ADA accommodation claim can move forward
 - ▶ Defendant's policy during the pandemic allowed Plaintiff and other evidence technicians to work from home on a part-time basis

Coleman v. NYC Dep't of Health & Mental Hygiene,
2022 WL 704304 (S.D.N.Y. Mar. 9, 2022) (denying MTD
citing successful remote work during pandemic)

See [EEOC settlement with ISS Facility](#) (Dec. 2022)



Remote work is not reasonable

Turner v. Bd. of Supervisors of Univ. of Louisiana Sys.
2022 WL 4482642 (E.D. La. Sept. 27, 2022)

- ▶ Professor with IBS asked to teach remotely
- ▶ Would require swapping three of her in-person sections with three online sections already assigned
- ▶ **Court:** Request is not reasonable
 - ▶ “recogniz[ing] that remote work is a regular part of many different fields, a reality that has grown even more prevalent since the Covid-19 Pandemic,”
 - ▶ “just because some employers allow remote work does not mean that all fields or workplaces are equally suited to this type of arrangement”
- ▶ **Status:** Case on appeal to 5th Circuit



Job Coach

EEOC v. Wal-Mart Stores

38 F.4th 651 (7th Cir. 2022)

- ▶ Employee with disabilities worked for 16 years as a cart attendant with full-time permanent job coaches paid for by Medicaid
- ▶ Dispute about job coach; removed from schedule
- ▶ Several court decisions (MSJ, JML, equitable relief)
- ▶ **Jury verdict:** \$200,000 in compensatory damages; \$5 million in punitive (reduced per statutory cap)
- ▶ **Wal-Mart argued full-time job coach is never a RA**
- ▶ **7th Cir:** Refused to adopt this rule
 - ▶ Whether a full-time, permanent job coach is reasonable is a case-by-case question – who is performing essential tasks



Direct Threat

Zimmerman v. SkyWest Airlines Inc.

2022 WL 3682213 (D.N.D. Aug. 25, 2022)

- ▶ Deaf employee hired as a ramp agent; he asked for closed captioning for computer training
- ▶ Placed on admin leave to talk about accommodations
- ▶ Audiologist recommended he use his hearing aids and a head lamp while working in the dark – SkyWest said no and required an onsite eval; audiologist asked questions, SkyWest did not answer; fired
- ▶ **Court:** Denied motion to dismiss on direct threat claim
 - ▶ Employee worked in role for 2 months w/o incident

Retaliation

Laguna v. Chester Housing Authority

2022 WL 2953687 (E.D. Pa. July 25, 2022)

- ▶ Employee had mental health complications from seven-month bout with COVID
- ▶ Employee was on leave and asked for an additional week to attend to his mental health; he was fired the same day he made his request
- ▶ **Court:** Employee stated retaliation claim (in addition to termination/failure to accommodate)
 - ▶ He engaged in a protected activity = requested extension of medical leave
 - ▶ Fired the same day = inference of retaliation

See [EEOC settlement with Pneuline](#) (Jan. 2023)



Constructive Discharge



Bentson, et al. v. West Suburban Bancorp Inc.

2022 WL 4482767 (N.D. Ill. Sept. 27, 2022)

- ▶ Husband, wife both worked for employer; wife has MS and had significant costs paid for by health insurance
- ▶ Employer fired wife; reduced husband's hours causing him to lose health insurance
- ▶ Husband brought claim for constructive discharge
- ▶ **Court:** Constructive discharge claim can move forward due to reduced hours/salary - and loss of benefits
 - ▶ Employer knew that employee would have to quit to find insurance
 - ▶ High bar, but met it here

Federal agency roundup - EEOC



- ▶ [Preschool settles case](#) for not hiring candidate with CP; \$100k; adopt policies; training (Jan. 2023)
- ▶ [Red Roof Inn settles case](#) for refusing blind employee accommodations for seminar to learn about promotional opportunities; \$43k; training (Dec. 2022)
- ▶ [Staffing company settles case](#) for rescinding job offer because applicant does not have a left hand; \$77,500; revise policies; trainings (Oct. 2022)
- ▶ [Healthcare provider settles case](#) for failing to hire deaf applicant as a greeter and refusing accommodations; \$180k; revise policies; require contracts with staffing firms to agree to engage in the ADA interactive process and provide accommodations required by law; provide reports of failure to hire (Jan. 2023)

Federal agency roundup - DOJ



- ▶ [Town settles case](#) after revoking a job offer to a police officer with HIV; \$150k; revised policies for medical exams; training (Sept. 2022)
- ▶ [County resolves case](#) where DOJ alleged that the Sheriff's Department discriminated against a correctional officer on the basis of his disability – opioid use disorder – by failing to make accommodations to allow him to take prescribed medication for OUD; \$160k; policies and procedures; training (Jan. 2023)
 - ▶ First OUD employment discrimination settlement
- ▶ [Ohio agency resolves case](#) where it denied a correctional officer's request to work the day shift to accommodate his diabetes; \$50k; accommodate employee with day shift; revise policies; training (Dec. 2022)

Title II (Public Entities – State and Local Governments)



Court Access



Luke v. Texas

46 F.4th 301 (5th Cir. 2022)

- ▶ No ASL interpreter provided for deaf man at court hearing
- ▶ Instead, his mom, with limited ASL skills, served as his interpreter in court and meetings with parole officer.
- ▶ ADA Claim – lack of meaningful access to govt services

Trial Court: no ADA claim – successfully completed probation

5th Circuit: reversed – plaintiff had viable ADA claim

- ▶ “No harm, no foul” theory inconsistent with ADA
- ▶ Lack of meaningful access is *itself* a harm under Title II, regardless of whether any additional injury follows.

See also, Mendoza v. Dart, 2022 WL 16635555 (N.D. Ill. Nov. 2, 2022) (lack of meaningful access for pre-detention detainee who experienced architectural barriers)

Remote Access

Cushing v. Packard

30 F.4th 27 (1st Cir. 2022)

- ▶ State legislators with disabilities sued after Speaker of the House denied their accommodation request to participate and vote remotely due to enhanced vulnerability to COVID.
- ▶ **Trial Court:** Preliminary injunction denied – Speaker had legislative immunity.
- ▶ **1st Cir:** Reversed and vacated trial court’s opinion – Congress validly abrogated legislative immunity when it passed ADA.
- ▶ **1st Cir Rehearing *En Banc*:** Agreed with trial court. Speaker of the House sued in his professional capacity was immune from suit under ADA and Rehab Act.



Sidewalk Accessibility



Liberty Resources v. City of Philadelphia

- ▶ Class action filed to address sidewalk inaccessibility
- ▶ Consent Decree reached to address systemic issues in which the City agreed to:
 - ▶ Install or remediate at least 10,000 curb ramps over the next 15 years;
 - ▶ Maintain existing curb ramps;
 - ▶ Issue annual progress reports;
- ▶ Federal court maintaining jurisdiction over the agreement.

Transportation – Meaningful Access

Segal v. Metropolitan Council

29 F.4th 399 (8th Cir. 2022)

- ▶ Deaf/blind bus rider documented 150 incidents where bus drivers failed to appropriately pick him up
- ▶ Filed suit under ADA, Rehab Act and local laws
- ▶ **Court:** Plaintiff adequately alleged denial of meaningful access and his case can proceed to trial

Gustafson v. Bi-State Dev. Agency of the Mo.-Ill. Metro. Dist.

29 F.4th 406 (8th Cir. 2022)

- ▶ Deaf bus rider documented 3 times when bus failed to pick him up and filed suit under ADA, Rehab Act and local laws
- ▶ **Court:** Being passed by bus 3 times over 8-month period did not rise to the level of denial of meaningful access.



Transportation – Bus Stops

Wright v. Capital Area Transit System

2022 WL 17574078 (M.D. La Dec. 9, 2022)



- ▶ Riders with disabilities challenged inaccessible bus stops
- ▶ **Defendant’s arguments:**
 - ▶ Plaintiffs can take paratransit if mainline inaccessible
 - ▶ Defendants’ 30-year plan to increase access city-wide rendered case moot
- ▶ **Court:** Summary judgment for plaintiffs because defendants
 - ▶ failed to provide program access
 - ▶ failed to comply with new construction requirements
 - ▶ failed to provide reasonable modifications
- ▶ 30-year plan insufficient to provide concrete relief plaintiffs are entitled to today
- ▶ Paratransit is not viable substitute for accessible mainline

Transportation - Paratransit

DOJ finds NYC paratransit violates ADA

DOJ conducted investigation and issued a [Letter of Findings](#) that NYC's paratransit violates ADA's Title II

Violations identified by DOJ include:

- ▶ significant untimely drop-offs
- ▶ excessive travel times

DOJ's Corrective Action Demands:

- ▶ establish performance standards for on-time drop-offs and trip length
- ▶ collect and maintain data on requested drop-off times
- ▶ conduct analysis of on-time drop-off and travel time performance

See also, [DOJ Paratransit Agreement](#) with City and County of Honolulu



Transportation – Subways



Settlement to Make NYC Subways Accessible

- ▶ 2 lawsuits filed to address inaccessible NYC subway stations – only 25% of stations accessible when suits filed
- ▶ **Settlement:** At least 95% of NYC’s 354 subways stations will be accessible by 2055
 - ▶ 81 stations made accessible between 2020-2024;
 - ▶ 85 more stations will be accessible by 2035;
 - ▶ 90 more stations accessible by 2045; and
 - ▶ final 90 stations accessible by 2055.
- ▶ MTA commits to dedicating 14.69% of each of its 5-year Capital Plan budgets to station accessibility

See also, [DOJ Settlement Agreement with Dowagiac, MI](#) to make its rail station accessible

Voting

La Union Del Pueblo Entero v. Abbott

2022 WL 3045657 (W.D. Tex. Aug. 2, 2022)

- ▶ In 2021, Texas passed the Election Protection and Integrity Act seeking to detect and punish voter fraud
- ▶ Law challenged under numerous theories including disability discrimination under ADA and Rehab Act

Court: ADA and RA claims can proceed as law's provisions disproportionately impact people with disabilities including

- ▶ signature matching and voter ID requirements;
- ▶ limits on providing in-person voting assistance; and
- ▶ limits on providing vote-by-mail assistance

Appeal: Defendants' appeal is pending before the 5th Circuit

Effective Communication



Bone v. UNC Health Care System

2022 WL 138644 (M.D.N.C. Jan. 14, 2022)

- ▶ UNC did not give written information in accessible formats, such as large print, Braille, and accessible electronic formats
- ▶ Bind plaintiffs unable to participate fully in care and pay medical bills
- ▶ **Court:** Magistrate judge recommended decision that UNC was liable for violating laws
- ▶ **Settlement (July 2022):** Admit to liability; pay \$125,000 in damages
- ▶ **Status:** Litigation continues about injunctive relief/policies

Education

M.F. v. NYC Dep't of Education

582 F.Supp.3d 49 (E.D.N.Y. 2022)

Class action against school district for failure to provide appropriate care for students with diabetes

Court: District violated ADA by failing to provide a variety of reasonable accommodations

Settlement Agreement Highlights: Defendants will modify their policies, practices, and procedures, including to:

- ▶ determine needs of students with diabetes and how defendants will meet those needs (Section 504 plans)
- ▶ provide care so students with diabetes are not excluded or segregated from their classmates;
- ▶ train for staff and contractors



Education – Mask Mandate Round-Up



L.E. v. Cobb County Sch. Dist., 55 F.4th 1296 (11th Cir. 2022) (11th Cir. reverses court dismissal of parents' suit seeking compliance with CDC COVID-19 guidelines)

The Arc of Iowa v. Reynolds, 2022 WL 16627483, (S.D. IA, Nov. 8, 2022) (Iowa court allows masking in schools as a possible reasonable accommodation)

E.T. v. Paxton, 2022 WL 2914732 (5th Cir. July 25, 2022) (5th Cir. vacates Texas ruling that prohibited enforcement of ban on mask mandates)

R.K. v. Lee, 2022 WL 17076105 (6th Cir. Nov. 18, 2022) (6th Cir. finds students with disabilities lack standing to challenge state law curtailing ability of schools to issue mask mandates to help stop COVID-19)

Education – Digital Accessibility



U.S. v. Regents of California

Case No. 22-7345

Complaint: DOJ filed ADA suit alleging much of UC Berkeley's free online content is inaccessible to people with hearing, vision, and manual disabilities.

Consent Decree Highlights - UC Berkeley has agreed to:

- ▶ make all future and vast majority of existing online content accessible to people with disabilities;
- ▶ revise its policies and procedures related to online content;
- ▶ train relevant personnel;
- ▶ designate a web accessibility coordinator;
- ▶ conduct accessibility testing of its online content; and
- ▶ hire an independent auditor to evaluate accessibility of content.

Education – Testing Accommodations



DOJ Investigation of Educational Testing Services (ETS)

DOJ received multiple complaints by people with disabilities that ETS violated the ADA with respect to its testing accommodations process and procedures.

Settlement Agreement Highlights – ETS has agreed to:

- ▶ be reasonable and limited in requesting documentation to evaluate accommodation requests;
- ▶ respond in timely manner to requests for accommodations;
- ▶ give considerable weight to recommendations of qualified professionals who personally observed applicant; and
- ▶ give considerable weight to those testing accommodations previously provided in response to an IEP or 504 Plan.

Olmstead & Kids

DOJ Investigation of State of Maine

- ▶ [DOJ Findings:](#)
 - ▶ unnecessarily segregating children with behavioral health needs in psychiatric hospitals, residential treatment facilities, and a juvenile detention center
 - ▶ DOJ found barriers to community services caused by long waitlists; failure to maintain an adequate community provider network; lack of crisis services; and poor support for treatment foster care parents.
- ▶ **Settlement:** State of Maine has agreed to:
 - ▶ modify Medicaid waiver cap on service hours; ensure sufficient provider capacity and increase crisis services.

See also, [DOJ/Rhode Island settlement](#) on similar issues



Olmstead & More Integrated Setting

Murphy v. Harpstead

Case No. 16-2623

- ▶ Class action lawsuit alleged Minnesota over-relies on 4-person group homes to serve people with disabilities who prefer to live in their own homes.
- ▶ **Court:** [ADA and Rehab Act claims can proceed](#)
 - ▶ *Olmstead* and integration mandate apply beyond traditional institutionalization
 - ▶ Fact issue whether facilities enabled residents to interact with non-residents to fullest extent possible
- ▶ [Proposed Settlement](#) (Fairness Hearing 5/12/23):
 - ▶ State agrees to provide access to housing stabilization services, so class members have opportunity to live in their own home or apartment

Access to Community Housing



Valencia and U.S. v. City of Springfield

- ▶ City zoning ordinance limited homes with residents who were unrelated people with disabilities
- ▶ Lawsuit filed under ADA, Fair Housing Act and Rehab Act
- ▶ **7th Cir (2018): [Found for plaintiff](#)**
 - ▶ Intentional discrimination + failure to accommodate
 - ▶ Suitable group homes are in short supply, so exceptions are necessary for equal opportunity
 - ▶ “In the context of a zoning waiver, equal opportunity means the opportunity to choose to live in a residential neighborhood.”
- ▶ **Jury Trial (2022):** Case went to trial and jury found City violated federal law and rendered a [verdict of \\$293,000](#)

Service Animals: Response by Police



Oliva v. City of Winston Salem

1:21-cv-00717-LCB-LPA

- ▶ Blind man with guide dog was shopping and told by police he had to leave the store or be arrested
- ▶ ADA and Rehab Act suit filed against the City.
- ▶ **Settlement:**
 - ▶ The City agreed to settle the case and adopt a [Policy](#) ensuring that Winston-Salem police officers are specifically trained on the laws that protect the rights of people who use service animals.

Law Enforcement

Sandoval v. City of National City

2023 WL 1453157 (S.D. Cal. Feb. 1, 2023)

- ▶ Man with history of mental illness pacing near his home at 4:00 am in empty street with a knife
- ▶ Police arrived and instead of de-escalating situation, they sicced police dog on him, and when man tried to defend himself, police shot and killed him
- ▶ Estate sued under various theories, including ADA

Court: Denied City's motion to dismiss

- ▶ Proper ADA claim made by asserting that officers failed to make reasonable accommodations by not taking mental illness into account and employing tactics that could have resolved situation without injury to anyone



Law Enforcement (2)



Sligh v. City of Conroe

2022 WL 3140502 (S.D. Tex. Aug. 5, 2022)

- ▶ Police called after woman with mental illness attempted suicide at home and ran into the woods
- ▶ Officer tried to hold her and she broke free
- ▶ Officer released dog which bit her several times
- ▶ Woman sued under various theories including failure to accommodate under ADA and Rehab Act

Court: Granted City’s motion to dismiss ADA and RA claim

- ▶ “To require officers to ascertain whether their actions in the presence of exigent circumstances might comply with the ADA prior to securing the safety of themselves and others would pose an unnecessary risk to innocents”

Corrections

Tellis v. LeBlanc

2022 WL 67572 (W.D. La. Jan. 6, 2022)



- ▶ Class action sub-class comprised of prisoners with mental illness – lack of mental health treatment, solitary confinement and abuse/neglect.
- ▶ **Court:** Allows ADA and RA claims to proceed to trial
- ▶ **Trial:** Court rules in favor of sub-class after 4-week trial
 - ▶ **Failure to accommodate needs of inmates with SMI**
 - ▶ No changes to solitary confinement after identify as SMI
 - ▶ No changes to discipline measures after identify as SMI
 - ▶ Disregard staff recommendations on treatment of SMI
 - ▶ **Methods of administration are discriminatory**
 - ▶ Failure to individually identify inmates with disabilities
 - ▶ inadequate system for processing requests for accommodations and fails to track such requests

Corrections (2)

Mackes v. Colorado Dep't. of Corrections

Case No. 1:21-cv-01100

Complaint: ADA claim that CDOC's failure to accommodate compromises safety and privacy of blind inmates and excludes them from most programming.

Settlement Highlights:

- ▶ Enhanced identification of blind inmates;
- ▶ Expert consultant to be hired to evaluate prisoners and acquire appropriate assistive technology;
- ▶ Provide auxiliary aids and services – giving prime consideration to preferences of blind inmate;
- ▶ Accessible materials/communication commitments; and
- ▶ Equal access to work assignments



Questions?

