



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

August 6, 2024

Eric Miller
Deputy General Counsel
Texas Department of Criminal Justice
PO Box 4004
Huntsville, Texas 77342

Re: [REDACTED] v. *Tex. Dep't of Crim. J.* (18-OCR-0400)
Notice of Findings

Dear Mr. Miller:

Thank you for the Texas Department of Criminal Justice's (TDCJ) full cooperation with this investigation conducted by the Office for Civil Rights (OCR), Office of Justice Programs (OJP), at the U.S. Department of Justice (DOJ) in connection to the above-named administrative Complaint. The Complainant alleged TDCJ discriminated against him on the basis of his hearing disability. OCR has completed our review of the information provided by TDCJ and the Complainant. OCR is administratively closing the Complaint at this time, finding that the issues raised by the Complaint have been resolved. OCR's analysis and conclusion are set forth below.

I. Summary of Complaint

The Complainant is an incarcerated individual in TDCJ's custody. He stated that he has a hearing aid for his left ear but that the single hearing aid was not strong enough. He alleged that he requested a second hearing aid for his right ear, but TDCJ denied his request. The Complainant provided a [REDACTED], University of Texas Medical Branch Audiology Report showing bilateral hearing impairment and that he would have difficulty understanding conversational speech, especially in more problematic listening environments such as at a distance or with background noise. The report stated he may require raised speaking voices and increased visual cues. That report also noted he would benefit from amplification.

II. Response from TDCJ

In July 2022, TDCJ responded to OCR's request for records regarding the Complainant's hearing impairment. TDCJ conducted an extensive review of the Complainant's medical records from [REDACTED] and found no indication of a request for a second hearing aid. The records throughout this time did show routine visits to check and repair his single hearing aid. In these medical records, Correctional Managed Care ADS Clinic Notes dated [REDACTED], [REDACTED], all indicated the following: "Problem: Bilateral hearing loss with hearing aid."

In its July 2022 response, TDCJ also provided policies and procedures related to hearing aids for incarcerated individuals. These policies included the University of Texas Medical Branch (UTMB) at Hospital Galveston - TDCJ Hospital Administrative Policy and Procedure - Policy 02.15 Audiology Department, Audiology Services, dated August 2020 (Policy 02.15). The 2020 version of Policy 02.15, quoted below, stated it only covered the cost of one hearing aid:

The hearing aid program for TDCJ patients is a monaural, behind-the-ear, analog hearing aid program. Eligibility is determined based on the following audiometric criteria: Air conduction pure-tone average in the better ear of > 45 dB. UTMB-CMC shall cover the cost of the hearing aid, ear mold, and repairs for any UTMB-CMC issued hearing aid, while the offender is housed on TDC units.

The 2020 version of Policy 02.15 stated if an incarcerated individual with bilateral hearing loss wanted a second hearing aid or to repair it, that individual was financially responsible for the cost of the hearing aid and any repairs: “Upon patient request, TDCJ patients may purchase a second behind-the-ear, CMC approved, non-programmable hearing aid at free world prices. Repairs to this hearing aid shall be at the TDCJ patient's expense.” Further, the 2020 version of Policy 02.15 imposed a “twelve month waiting period” from ordering a new hearing aid if an incarcerated individual failed to claim his new hearing aid within 90 days of the order.

III. Legal Analysis

Under Title II of the Americans with Disabilities Act of 1990 (Title II), “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.” 42 U.S.C. § 12132 (1990). Section 504 of the Rehabilitation Act of 1973 (Section 504) provides that, “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” 29 U.S.C. § 794 (2016). TDCJ is a public entity and is covered by Title II. TDCJ is also a direct recipient of federal financial assistance from two DOJ program offices, the Bureau of Justice Assistance (BJA)¹ and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART),² and thus must also comply with Section 504.

DOJ Title II regulations define a disability as a physical or mental impairment that substantially limits one or more of the major life activities of such individual. 28 C.F.R. § 35.108(a)(1)(i). Title II specifies that major life activities include “seeing, hearing, eating, sleeping, walking, . . . learning, reading, concentrating, thinking, communicating, and working,” among others. *See Epley v. Gonzalez*, 860 F. App'x 310, 313 (5th Cir. 2021), *quoting* 42 U.S.C § 12102(2)(A). The determination of whether an impairment substantially limits a major life activity requires an *individualized assessment*. 28 C.F.R. § 35.108(d)(1)(vi) (emphasis added).

¹ TDCJ currently receives seven grants from BJA, including award number 15PBJA-22-GG-03570-NTCP.

² The SMART award number is 15PSMA-22-GG-00952-AWAX.

A. Effective Communication and Auxiliary Aids and Services

All state and local governments are public entities and must take steps to ensure that their communications with people with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a)(1). A public entity shall 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 of a public entity. 28 C.F.R. § 35.160(b)(1). To be effective, auxiliary aids and services must be provided in a timely manner. 28 C.F.R. § 35.160(b)(2). A public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. 28 C.F.R. Part 35, App. B, Subpart E.

In determining what types of auxiliary aids and services are necessary, the public entity must give primary consideration to the requesting individual with disability. 28 C.F.R. § 35.160(b)(2). Otherwise, the public entity may identify another equally effective means of communication or show that the requested auxiliary aid or service would result in an undue financial or administrative burden. Asserting an undue burden requires undertaking the process articulated in 28 C.F.R. § 35.164, which includes an assertion be made by an individual with budgetary authority that is accompanied by a written statement of the reasons for reaching that conclusion.

DOJ Title II regulations expressly state that effective communication requirements apply to deaf and hard of hearing incarcerated individuals in correctional facilities. 28 C.F.R. Part 35, App. A, Subpart D. DOJ regulations further state that correctional facilities are obligated to provide personal devices and services to incarcerated individuals with disabilities. *Id.*

Examples of activities, services, programs, or circumstances where auxiliary aids and services may be needed to ensure effective communication with incarcerated individuals who have hearing disabilities include, but are not limited to, the following:

- a. Critical interactions, complex information, lengthy exchanges, or communications involving legal matters or issues;
- b. Intake, including transfers between facilities;
- c. Orientation;
- d. Classification;
- e. Medical care and health programs and services, including physicals, medical screenings and treatment, dental, visual, and/or mental health examinations or treatment, and drug and alcohol recovery services, including telemedicine;
- f. Counseling or psychological services;
- g. Educational and vocational programming, including any programming required for parole or early-release;
- h. Due process hearings, including disciplinary hearings, and hearings in which the inmate is a witness;
- i. Classification review interviews;
- j. Grievance interviews or processes;
- k. Religious services;
- l. Investigations conducted by TDCJ; and
- m. Pre-release instructions.

DOJ Settlement Agreement Between U.S. and Vt. Dep't of Corr. Under ADA #204-78-44, ¶ 33 (Oct. 28, 2021), <https://perma.cc/DD8V-NG6N>; Settlement Agreement Between U.S. and S.C. Dep't of Corr. Under ADA # 204-67-174, ¶ 21 (Mar. 29, 2018), <https://perma.cc/Z64Y-PFVR>; *also see ADA Enforcement – Title II*, DOJ CIVIL RIGHTS DIVISION, https://archive.ada.gov/enforce_current.htm.

DOJ recognized in the preamble to the 1991 Title II regulation that the list of auxiliary aids was “not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.” 28 C.F.R. Part 35, App. A; *see also* 28 C.F.R. § 35.104. Consequently, hearing aids can be considered auxiliary aids for the purposes of providing effective communication to incarcerated individuals with hearing disabilities.

In addition, a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required. 28 C.F.R. § 35.130(f). Furthermore, a public entity is not relieved of its requirements under Title II due to an arrangement made with another party. 28 C.F.R. § 35.130(b)(1).

B. TDCJ Hospital Administrative Policy and Procedure - Policy 02.15

OCR reviewed UTMB at Hospital Galveston - TDCJ Hospital Administrative Policy and Procedure - Policy 02.15 Audiology Department, Audiology Services, dated August 2020 (Policy 02.15). The 2020 version of Policy 02.15 dictated the review and provision of hearing aids for individuals incarcerated with TDCJ. On its face, the 2020 version of Policy 02.15 only allowed for the review and provision for a single free hearing aid to incarcerated individuals.

OCR found the 2020 version of Policy 02.15 did not provide an opportunity for incarcerated individuals with bilateral hearing loss to receive an individualized assessment for the need of binaural hearing aids, in violation of 28 C.F.R. § 35.108(d)(1)(vi). This 2020 version of Policy 02.15 also denied incarcerated individuals with bilateral hearing loss the opportunity to request binaural hearing aids as the auxiliary aid of their choice to ensure effective communication, as required under 28 C.F.R. § 35.160 and App. B, Subpart E.

Further, under the 2020 version of Policy 02.15, the only avenue for incarcerated individuals with bilateral hearing loss to obtain a second hearing aid was to purchase a hearing aid out of pocket. Repairs were also the incarcerated individual's own financial responsibility under the policy. These provisions effectively imposed a surcharge on incarcerated individuals with bilateral hearing loss to access an auxiliary aid, which is prohibited under Title II. 28 C.F.R. § 35.130(f).

Lastly, the 2020 version of Policy 02.15 imposed a “twelve month waiting period” from ordering another hearing aid if an incarcerated individual failed to claim his hearing aid within 90 days of the date of the order. This blanket one-year ban could deny incarcerated individuals with hearing

disabilities access to necessary auxiliary aids for an entire year, running afoul of TDCJ's responsibility to provide auxiliary aids in a timely manner. 28 C.F.R. § 35.160(b)(2).

IV. Actions Taken by TDCJ

OCR shared concerns regarding the 2020 version of Policy 02.15 with TDCJ. TDCJ fully cooperated with OCR throughout this investigation. OCR provided TDCJ with technical assistance regarding TDCJ's obligations to ensure effective communication for incarcerated individuals with hearing disabilities. After working collaboratively with OCR, TDCJ committed to revising its hearing aid policies and procedures, including the 2020 version of Policy 02.15.

First, TDCJ updated UTMB/TDCJ Correctional Managed Health Care ADS Casework Policy Manual No. 7.1 which now provides that "Offenders who are hearing disabled will receive an individualized assessment to determine appropriate accommodations."

Second, TDCJ made significant updates to Policy 02.15, which now states "the hearing aid program for TDCJ patients is a monaural and binaural behind-the-ear digital hearing aid program." The revised version of Policy 02.15 allows for incarcerated individuals with either unilateral or bilateral hearing loss to receive a hearing assessment by an audiologist and "be prescribed the appropriate number of hearing aids to ensure effective communication." Moreover, the revised version of Policy 02.15 removed all surcharges for hearing aids, ear molds, and repairs issued to incarcerated individuals. This revised policy also no longer imposes a one-year ban for unclaimed hearing aids when hearing aids are necessary to ensure effective communication.

V. Conclusion

For the reasons above, OCR is administratively closing this Complaint and thanks TDCJ for its responsiveness and cooperation. OCR appreciates TDCJ's ongoing commitment to ensure communications with incarcerated individuals with hearing disabilities are as effective as communications with others. OCR also commends TDCJ's efforts to reform its hearing aid policies and procedures. Because TDCJ has taken corrective actions to address each of the issues raised in this letter, OCR finds that the issues discovered in this investigation have been resolved. While OCR is closing this Complaint, OCR remains available to provide TDCJ with training and technical assistance in any of the areas referenced above.

Please be advised that the closure of this Complaint is limited to the specific facts of the matter and does not preclude DOJ from taking additional actions to evaluate TDCJ's compliance with any of the laws enforced by DOJ. These actions can include a future investigation into the same policies and procedures discussed in this letter if new concerns arise with how hearing aids are provided by TDCJ to incarcerated individuals with hearing disabilities.

Closing this Complaint does not affect TDCJ's requirement to comply with all applicable federal laws and regulations, provided that TDCJ remains subject to such laws and regulations. Federal law also protects persons who participate in OCR's investigation from retaliation for having

Eric Miller, Deputy General Counsel

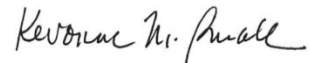
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provided information. OCR will initiate an investigation if it should receive credible evidence of retaliation.

OCR will share this letter with the Complainant and notify him of his right to file future complaints with OCR if he believes TDCJ discriminated against him based on his disability or another protected class. This letter is a public document, and it will be posted on OCR's website.

Sincerely,

A handwritten signature in cursive script that reads "Kevonne M. Small".

Kevonne M. Small

Director

Office for Civil Rights

Office of Justice Programs

U.S. Department of Justice