IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02733-STV

BIONCA CHARMAINE ROGERS,
CATHY BEGANO,
KANDYCE VESSEY,
JENNIFER SAUGAUSE,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity as Executive Director of the Colorado Department of Corrections,
RYAN LONG, in his official capacity as Warden of the Denver Women's Correctional Facility, and
JOHN/JANE DOE(S) responsible for the decision(s) not to provide videophones at the Denver Women's Correctional Facility, in their official capacities,

Defendants.

ORDER

Magistrate Judge Scott T. Varholak

This matter comes before the Court on Defendants' Motion to Dismiss [#37] and Motion to Stay [#44]. The motions are before the Court on the Parties' consent to have a United States magistrate judge conduct all proceedings in this action and to order the entry of a final judgment. [#30, 31, 51] This Court has carefully considered the motions and related briefing, the case file and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the motions. For the following reasons, I **DENY** both motions.

I. FACTUAL BACKGROUND[1]

Plaintiffs are all inmates incarcerated in the Colorado Department of Corrections ("CDOC"), at the Denver Women's Correctional Facility ("DWCF"). [#34 at ¶¶ 1, 5] Plaintiffs Begano, Vessey and Saugause are all deaf and use American Sign Language ("ASL") as their primary language. [*Id.* at ¶¶ 10-12] Plaintiff Rogers, on the other hand, is able to hear, but both her parents are deaf and communicate using ASL. [*Id.* at ¶ 9]

Plaintiffs claim that Defendants are denying Plaintiffs the ability to communicate with friends and relatives outside of DWCF. Plaintiff Rogers has requested permission to use a videophone inside DWCF to communicate with her parents. [*Id.* at ¶ 2] Plaintiffs Begano, Vessey and Saugause have likewise requested permission to use a videophone inside DWCF to communicate with their friends and family. [*Id.* at ¶ 5] Because ASL is a visual language in which communication occurs through the movement of hands combined with facial expressions and postures of the body [*id.* at ¶ 17], Plaintiffs contend that a videophone will allow them to effectively communicate with others using ASL [*id.* at ¶ 27]. Defendants have refused to provide Plaintiffs with a videophone to communicate with their friends and family members. [*Id.* at ¶¶ 3, 5]

CDOC permits prisoners to make telephone calls to individuals on their phone list. [*Id.* at ¶ 32] Calls are limited to twenty minutes, and the number of calls permitted is governed by the individual facility. [*Id.*] The telephones at DWCF are available at any time from 6:00 a.m. to 12:00 midnight. [*Id.* at ¶ 33] During these hours, hearing

[1] The facts are drawn from the allegations in Plaintiff's Third Amended Complaint [#34], which must be taken as true when considering a motion to dismiss. *See Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)).

prisoners who wish to contact family members can simply walk up to the phones and make a call. [*Id.* at ¶ 34]

DWCF has a teletypewriter ("TTY") for deaf inmates.[2] [*Id.* at ¶ 3] In a TTY communication, each participant types out his or her side of the conversation, then waits while the other person types back. [*Id.* at ¶ 22] For a TTY communication to occur, both participants must own TTY equipment. [*Id.* at ¶ 21] Plaintiff Rogers alleges that her parents do not own TTY equipment [*id.* at ¶ 41], and Plaintiffs Begano, Vessey and Saugause allege that many of the people with whom they seek to communicate likewise do not own TTY equipment [*id.* at ¶ 66].[3] Plaintiffs allege that, on multiple occasions, the DWCF TTY has been broken. [*Id.* at ¶¶ 42, 68] Plaintiffs further allege that the DWCF TTY "often skips words and when there is background noise or interference, the words are garbled." [*Id.* at ¶ 68]

Beginning in April 2017, Plaintiff Rogers has been able to call her deaf mother with a conventional telephone, using video relay service ("VRS"). [*Id.* at ¶ 60] Using VRS, a hearing caller uses a conventional telephone to call the deaf person's videophone number. [*Id.* at ¶ 59] The call is answered by a sign language interpreter, who then connects to the deaf person's videophone and interprets for the deaf recipient.

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[2] According to the Third Amended Complaint, Plaintiff Rogers was initially allowed to use the TTY to communicate with her parents [*id.* at ¶ 40], but CDOC later revoked her access to the TTY stating that Plaintiff Rogers was not deaf or otherwise protected by the ADA and that her parents were required to certify in writing that they were deaf and had access to a TTY [*id.* at ¶ 56]. Plaintiff Rogers asserts that she had previously submitted proof that her parents were deaf. [*Id.* at ¶ 57]

[3] In an attempt to communicate with hearing acquaintances, Plaintiffs Begano, Vessey and Saugause have used a TTY relay, a system in which they type their half of the conversation into the TTY, while an operator reads the text to the hearing person at the other end. [*Id.*] When the hearing person responds, the operator types the response back to the DWCF TTY. [*Id.*]

[*Id.*] The deaf person then signs a response, and the interpreter interprets into spoken English to the hearing caller. [*Id.*] Because participants in a VRS call do not speak with each other directly, they cannot perceive emotion, tone and other "non-spoken" features of a telephone conversation. [*Id.* at ¶ 61]

Plaintiffs' Third Amended Complaint brings three claims. The first claim for relief is brought pursuant to 42 U.S.C. § 1983 and alleges that all Defendants have violated Plaintiffs' First Amendment rights. [*Id.* at ¶¶ 72-78] The second claim alleges that Defendant CDOC violated Title II of the Americans with Disabilities Act ("ADA"). [*Id.* at ¶¶ 79-90] The third claim alleges that Defendant CDOC violated Section 504 of the Rehabilitation Act. [*Id.* at ¶¶ 91-102] Plaintiffs primarily seek injunctive relief and compensatory damages under Title II of the ADA and Section 504 of the Rehabilitation Act. [*Id.* at 19] Defendants have moved to dismiss all three claims [#37] and to stay the proceedings pending determination of the Motion to Dismiss [#44].

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of subject-matter jurisdiction." Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (alteration in original) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Id.* (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

III. ANALYSIS

Defendants make two primary arguments in support of their Motion to Dismiss. First, Defendants argue that Plaintiff Rogers lacks standing to assert her claims under the ADA and the Rehabilitation Act. [#37 at 4-5] Second, Defendants argue that all claims must be dismissed for failure to state a claim upon which relief can be granted. [*Id.* at 5-9] The Court disagrees with both arguments.

A. Plaintiff Rogers has standing to assert her ADA and Rehabilitation Act claims

Although Defendants concede that "[t]he enforcement provisions of Title II of the ADA do not limit relief to 'qualified individuals with disabilities,'" [#37 at 4 (citing *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 335 (6th Cir. 2002))], they argue that Plaintiff Rogers lacks standing to assert her ADA and Rehabilitation Act claims [*id.* at 4-5]. Specifically, Defendants assert that Plaintiff "does not allege that she has been discriminated against as a result of her known association with her parents, both of whom are alleged to be deaf." [*Id.* at 5]

The Tenth Circuit has held that "the totality of Title II's plain language, the plain language of its enforcement provision, and the statutory scheme's anti-discriminatory purpose" demonstrate that "Congress intended Title II to confer standing to the full limits of Article III [of the United States Constitution]." *Tandy v. City of Wichita*, 380 F.3d 1277, 1287 (10th Cir. 2004). Similarly, "[t]he language of the Rehabilitation Act also evinces Congress' intent to confer standing to the outer limits of Article III." *Id.* For Article III standing to exist, a party must be able to demonstrate that she "has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly

traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).

Plaintiff Rogers has demonstrated each of these requirements. Plaintiff Rogers has alleged actual injury in that she is being deprived of the ability to effectively communicate with her parents. This injury is fairly traceable to Defendants in that Defendants' refusal to allow videophones has allegedly caused the injury. Finally, because the Third Amended Complaint seeks injunctive relief, a favorable ruling would rectify this injury. Thus, to the extent Plaintiff Rogers need only show Article III standing, she has done so. *See Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009) (Wesley, J., concurring) (finding that the standing provision of the Rehabilitation Act extends to the limits of Article III standing and, as a result, a non-disabled person need only establish Article III standing to bring a Rehabilitation Act claim); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 47-49 (3d Cir. 2000) (extending Rehabilitation Act's anti-retaliation provision to non-disabled individuals); *Barber v. Colo. Dep't of Revenue*, No. CIVA05CV00807REBCBS, 2006 WL 469021, at *2 (D. Colo. Jan. 4, 2006) ("[A] party, although not herself disabled, may assert claims under Title II of the ADA and under the Rehabilitation Act for discrimination against a disabled person that directly injures that party.") (footnote omitted).

The Court recognizes that some courts have limited standing for non-disabled individuals under both the Rehabilitation Act and the ADA, finding that these individuals only have standing "if they allege that they were personally excluded, personally denied benefits, or personally discriminated against because of their association with a

disabled person." [4] *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1143 (11th Cir. 2014); *see also R.S. v. Butler County*, No. 16–3194, 2017 WL 2787615, at *3 n.19 (3d Cir. June 27, 2017). But even under this more narrow interpretation, Plaintiff Rogers has sufficiently alleged standing. Plaintiff Rogers has alleged that she has been personally denied the same ability to communicate with her parents that other inmates possess solely because her parents are deaf. *See S.K. v. North Allegheny Sch. Dist.*, 146 F. Supp. 3d 700, 717-20 (W.D. Pa. 2015) (finding that non-disabled mother of disabled child had standing to bring an associational discrimination claim where school district refused to make reasonable modification to its transportation service to accommodate her child); *Prakel v. Indiana*, 100 F. Supp. 3d 661, 672-73 (S.D. Ind. 2015) (finding that non-disabled mother had standing to assert associational claim for defendants' failure to provide deaf son with interpreter services to attend her criminal proceedings because she alleged distinct injuries, including having to pay for an interpreter and being denied her son's emotional support when an interpreter was not provided).

B. Plaintiffs have pled plausible claims for relief

1. Plaintiffs' ADA and Rehabilitation Act claims

"Analysis of a claim under Title II of the ADA is identical to an analysis under the Rehabilitation Act." *Kimble v. Douglas Cty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176, 1182 (D. Colo. 2013) (citing *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 n.7 (10th Cir. 1998); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1102 (10th Cir. 1998)); *see also*

[4] The Tenth Circuit does not appear to have yet addressed this issue. The *Tandy* Court did not expressly consider whether the ADA or the Rehabilitation Act limit standing for non-disabled individuals, because the plaintiffs in that case were disabled. 380 F.3d at 1281-82.

Anderson v. Colo. Dep't of Corr., 848 F. Supp. 2d 1291, 1300 n.2 (D. Colo. 2012) ("The Rehabilitation Act is materially identical to and the model for the ADA[—]the elements are the same except the Rehabilitation Act requires that defendant receive federal funds." (quotations omitted)). Accordingly, and as requested by the parties, the Court will apply the same analysis to Plaintiffs' ADA and Rehabilitation Act claims.

Title II of the ADA states, in pertinent part, that "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, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. This provision applies to prisoners. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). "To state a claim under Title II, the plaintiff must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability."[5] *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

With respect to Defendants' argument that the Third Amended Complaint fails to state an ADA or Rehabilitation Act claim, Defendants' Motion to Dismiss only challenges the reasonableness of the accommodations already in place at DWCF. [#37 at 5-7] As

[5] When a non-disabled plaintiff, like Plaintiff Rogers, is asserting an ADA claim on the basis of her relationship to a disabled individual, the plaintiff must allege: "(1) a logical and significant association with an individual with disabilities; (2) that a public entity knew of that association; (3) that the public entity discriminated against them because of that association; and (4) they suffered a direct injury as a result of the discrimination." *Schneider v. County of Will*, 190 F. Supp. 2d 1082, 1091 (N.D. Ill. 2002) (citing 28 C.F.R. § 35.130(g) ("A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.")).

the Tenth Circuit has instructed, the ADA "requires more than physical access to public entities: it requires public entities to provide *meaningful* access to their programs and services." *Robertson*, 550 F.3d at 1193 (emphasis in original) (quotations omitted). To effectuate Title II's mandate, Department of Justice "regulations require public entities to 'make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.'" *Id.* (quoting 28 C.F.R. § 35.130(b)(7)). Defendants argue that they are only required to make reasonable accommodations for Plaintiffs, not the best possible accommodations, and that they have satisfied this obligation by providing TTY equipment. [#37 at 5-7; #40 at 2 (citing *Arce v. Louisiana*, 226 F. Supp.3d 643, 651 (E.D. La. 2016) (finding that ADA did not require prison to provide deaf inmate with videophone as a reasonable accommodation))]

Ultimately, for purposes of deciding the instant Motion to Dismiss, the Court need not decide whether Defendants must provide Plaintiffs with a videophone in order to provide a reasonable accommodation, because Plaintiffs have plausibly alleged that they have often been denied *any* meaningful access to forms of communication with friends and family. As indicated above, Plaintiffs allege that, on multiple occasions, the DWCF TTY has been broken. [#34 at ¶¶ 42, 68] Plaintiffs further allege that the DWCF TTY "often skips words and when there is background noise or interference, the words are garbled." [*Id.* at ¶ 68] Such allegations are sufficient to state both an ADA and a Rehabilitation Act claim. *See Tanney v. Boles*, 400 F. Supp. 2d 1027, 1041-42 (E.D. Mich. 2005) (denying summary judgment for institution where inmate offered evidence that he was denied reasonable access to TTY machine); *Zemedagegehu v.*

Arthur, No. 1:15cv57 (JCC/MSN), 2015 WL 1930539, at *13 (E.D. Va. April 28, 2015) (denying motion to dismiss filed by institution where plaintiff was provided access to TTY services but plaintiff's inability to read or write English made such access meaningless); *cf. Arce*, 226 F. Supp.3d at 651 (granting motion to dismiss where the complaint did not allege that the TTY machine failed to function or that the plaintiff could not effectively communicate using the TTY machine). Accordingly, Defendants' Motion is DENIED to the extent it seeks dismissal of Plaintiffs' ADA and Rehabilitation Act claims.

2. Plaintiffs' First Amendment claims

In the First Amendment context, the Supreme Court has acknowledged that "federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citation omitted). The Supreme Court has also recognized, however, that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). As a result, prison officials may restrict prisoners' First Amendment rights in ways that "would raise grave First Amendment concerns outside the prison context." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). Accordingly, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

Defendants argue that "Plaintiffs have not asserted any facts tending to show that the choice between TTY, VRS, or the use of TTY Relay over videophones [is] not

related to legitimate penological interests." [#37 at 8-9] The Tenth Circuit has held that, in light of *Turner*, a prisoner asserting a First Amendment violation "must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests." *Gee v. Pacheco*, 627 F.3d 1178, 1188 (10th Cir. 2010). But the prisoner need not "identify every potential legitimate interest and plead against it." *Id.* Rather, "[i]t is sufficient that he plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Id.*

Plaintiffs' Third Amended Complaint alleges that "Defendants' refusal to provide Plaintiffs with access to a videophone serves no legitimate or compelling need and is not rationally related or narrowly tailored to any identified penological or rehabilitative need." [#34 at ¶ 74] Although a CDOC representative informed Plaintiff Rogers that a videophone pilot program was unsuccessful at a different facility because "the technology available did not work from a security standpoint" [*id.* at ¶ 63], Plaintiffs Rogers, Begano and Vessey have all previously been detained at other Colorado jails where they were able to use videophones [*id.* at ¶¶ 30, 65]. This allegation suggests that videophones can be used in prisons without impacting security concerns. Plaintiffs also allege that "[p]rovision of appropriate telecommunication equipment to Plaintiffs would have negligible effects, if any, on other prisoners and prison employees at DWCF." [*Id.* at ¶ 75] These allegations support a plausible inference that the videophone restrictions are not reasonably related to legitimate penological interests. *See Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 212-18 (4th Cir. 2017) (applying a *Turner* analysis and reversing grant of summary judgment to defendant Bureau of

Prisons in case challenging Bureau of Prisons' refusal to allow deaf inmates to use videophones). This is especially true here, where Defendants have not identified the security concerns underling the videophone ban in either their Motion or their Reply. *Cf. Al-Owhali v. Holder*, 687 F.3d 1236, 1241 (10th Cir. 2012) (finding deficiencies in complaint that alleged First Amendment restrictions without explaining why they were not justified for security reasons, "especially clear *given the government's proffered justifications* for imposing" the restrictions (emphasis added)). Accordingly, Defendants' Motion is DENIED to the extent it seeks dismissal of Plaintiffs' First Amendment claim.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant's Motion to Dismiss [#37]. The Court also **DENIES** the Motion to Stay [#44] as moot.

DATED: September 29, 2017

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge