

PRE-PUBLICATION

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# Disability in Prison

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## I. Introduction

The 2016 symposium, “Beating Mental Illness: A Dialogue on Race, Gender and Disability Stereotypes in Use of Force Cases,” examined complex issues of race, gender, sexual orientation, and disability (i.e., “intersectionality”) in the context of the Black Lives Matter Movement and engagement with the criminal justice system.<sup>1</sup> The “use of force” in policing often serves “as the entry point to the justice system for people with disabilities.”<sup>2</sup> Among other topics, the Symposium examined the 2015 decision in *City and County of San Francisco v. Sheehan*, in which the Supreme Court considered the application of the Americans with Disabilities Act (“ADA”) to circumstances involving the use of force (a shooting) in the arrest of a woman with schizophrenia who lived in a group home for persons with mental illnesses.<sup>3</sup>

According to a 2016 report by the Center for American Progress – *Disabled Behind Bars*, approximately ten percent of police interactions involve individuals with either mental health conditions or cognitive (e.g., intellectual, developmental, and learning impairments), hearing and vision, and mobility disabilities.<sup>4</sup>

Rebecca Vallas, the author of *Disabled Behind Bars*, writes:

The interplay of disability with race, poverty, sexual orientation, and gender identity further complicates the link between disability and the criminal justice system. There is a disproportionate incidence of intellectual and developmental disabilities among low-income racial and ethnic minority

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<sup>1</sup> For Symposium information, see <http://weblaw.usc.edu/who/faculty/conferences/beating-mental-illness/> (University of Southern California Symposium was Co-Sponsored by the Saks Institute for Mental Health Law, Policy, and Ethics, USC Gould Law School, USC School of Social Work, USC Dornsife Gender Studies, Jesse M. Unruh Institute of Politics, and PRISM (USC Initiative for the Study of Race, Gender, Sexuality and the Law)).

<sup>2</sup> Rebecca Vallas, *Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America’s Jails and Prisons*, CENTER FOR AM. PROGRESS, July 2016, <https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf>. In this article, I refer to prisons, which may be state or federal facilities, but local or county jails have many similar characteristics although inmates in jails typically serve shorter sentences for less severe crimes.

<sup>3</sup> *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015) (certiorari dismissed in part; reversed in part and remanded (“We granted certiorari to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent. After reviewing the parties’ submissions, we dismiss the first question as improvidently granted.”)).

<sup>4</sup> Vallas, *supra* note 2.

populations, which have higher rates of police involvement in their neighborhoods than higher-income neighborhoods.<sup>5</sup>

This article, which is based on my remarks at the Symposium, considers the incarceration of individuals with disabilities, the less publically visible side of interactions between law enforcement officials and individuals with mental and physical disabilities. Between 2015 and 2016, I was retained by the Southern Poverty Law Center (“SPLC”) and the Alabama Disabilities Advocacy Program (“ADAP”) to evaluate the plaintiffs’ (prisoners) allegations of disability discrimination throughout Alabama’s state prisons in violation of the ADA and the Rehabilitation Act of 1973.<sup>6</sup> In *Dunn v. Dunn*,<sup>7</sup> the putative class of plaintiffs alleged that they had experienced and continued to experience system-wide and programmatic barriers to addressing their needs as prisoners with disabilities<sup>8</sup> in the programs and activities administered by the Alabama Department of Corrections (“ADOC”).<sup>9</sup>

In *Dunn*, I was asked to examine whether and, if so to what extent, ADOC’s alleged programmatic barriers affecting plaintiffs, as individuals with disabilities housed in the state’s fifteen major correctional facilities, resulted in inappropriate and unequal services that unfairly denied access to and equal participation in ADOC’s programs. The plaintiffs alleged that ADOC’s program failures made them, and continued to make them, uniquely vulnerable to the effects of incarceration on the basis of their disabilities, particularly as relative to the general prison population.<sup>10</sup> The plaintiffs,

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<sup>5</sup> *Id.* See also Michael Morris, Christopher Rodriguez, & Peter Blanck, *ABLE Accounts: A Down Payment on Freedom*, 4 INCLUSION 21 (2016).

<sup>6</sup> See generally *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1287, n.14 (M.D. Ala. 2012) (ADA and Section 504 of Rehabilitation Act “clearly apply to Alabama’s state prisons.”). In prior work as an expert on the ADA and related laws, I inspected state juvenile and adult prison facilities. See, e.g., Peter Blanck, “*The Right to Live in the World*”: *Disability Yesterday, Today, and Tomorrow*, TEX. J. C.L. & C.R. 13, 367-401 (2008); Peter Blanck, *ADA at 25 and People with Cognitive Disabilities: From Voice to Action*, 3 INCLUSION 46 (2015).

<sup>7</sup> See *Dunn v. Dunn*, 163 F. Supp. 3d 1196 (2016). See also *Joshua Dunn, et al. v. Jefferson Dunn, et al.*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/seeking-justice/case-docket/joshua-dunn-et-al-v-kim-thomas-et-al>. See also *Cruel Confinement: Abuse, Discrimination and Death within Alabama’s Prisons*, SOUTHERN POVERTY LAW CENTER, June 4, 2014, <https://www.splcenter.org/20140604/cruel-confinement-abuse-discrimination-and-death-within-alabama%E2%80%99s-prisons> (report released prior to the filing of the lawsuit on conditions within Alabama prisons). The *Dunn* case is litigated in several phases; Phase I involved the ADA claims, and Phase II includes other claims relating to inmate mental health and medical status, which remain to be resolved at the time of this writing.

<sup>8</sup> I use the term “disability” to refer to an inmate who meets the definition of disability as set forth in the ADA, 42 U.S.C. § 12102, as amended (ADA Amendments Act of 2008, Pub.L. 110–325, §§ 4(a), 8, 122 Stat. 3555 (2008)).

<sup>9</sup> ADOC is the administrative department of the state of Alabama responsible for overseeing and exercising control over corrections institutions in the state of Alabama. ADOC is an instrumentality of the state of Alabama and receives federal funding. See, e.g., *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1287 (M.D. Ala. 2012).

<sup>10</sup> Compare Jennifer Bronson, Laura M. Maruschak, & Marcus Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011–12*, U.S. DOJ, Dec. 2015, <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf> (prevalence estimates and characteristics of disabilities among prison inmates reporting six disability types: hearing, vision, cognitive, ambulatory, self-care, and independent living; finding thirty-two percent of prisoners reported having at least one disability; prisoners nearly three times more likely than general population to report at least one disability; two in ten prisoners reported cognitive disability, which was most common reported disability; female prisoners more likely than males to report cognitive disability, but equally likely to report having other five

adult men and women incarcerated in ADOC prisons, brought the case to remedy ADOC's alleged failure to provide nondiscriminatory programs on the basis of disability, in accordance with the requirements of the ADA and enforce ADOC's "affirmative obligation to make benefits, services, and programs accessible to disabled people."<sup>11</sup>

As Alabama State prisoners, the plaintiffs satisfied the ADA eligibility requirements for the receipt of programs provided by the state.<sup>12</sup> Plaintiffs alleged that throughout the prison system they received inadequate and inferior services that, among other consequences, subjected them to exclusion from participation in and the denial of (or relegation to inferior) programs.<sup>13</sup> The plaintiffs claimed that this resulted in a substantial risk of serious harm, loss of function, injury, and even death. The plaintiffs further alleged that overcrowding, insufficient staffing levels, and deficiencies in staff training in prison facilities exacerbated these failures.

In this article, I first overview issues characteristically facing prisoners with disabilities, many of whom were incarcerated as a result of "policing on the basis of disability." Thereafter, I offer recommendations based on my work in *Dunn* and other related prison cases, which are based in part on materials I have examined as well as on prisoner interviews and prison site inspections that I have conducted.<sup>14</sup> I conclude with a call for future actions.

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disabilities; fifty-four percent of prisoners with a disability reported a co-occurring chronic condition; compared to those without a disability, prisoners with a disability were four times more likely to report past thirty-day serious psychological distress; thirty-three percent of prisoners with a cognitive disability reported past thirty-day serious psychological distress, compared to eleven percent of prisoners with disability other than cognitive). *See also* Laura M. Maruschak, *Medical problems of inmates*, LEARNING 21, 20.8: 21-5, Apr. 1, 2008, <http://www.bjs.gov/content/pub/pdf/mpp.pdf>; *Bureau of Justice Statistics Special Report*, U.S. DOJ, Aug. 2002, <http://www.bjs.gov/content/pub/pdf/bjsg02.pdf> (survey of inmates randomly selected from nationally representative sample of facilities finding: estimated 229,000 inmates reported having current medical problem: arthritis (thirteen percent), hypertension (eleven percent), asthma (ten percent), heart problems (six percent); cancer, paralysis, stroke, diabetes, kidney problems, liver problems, hepatitis, sexually transmitted diseases, tuberculosis (TB), human immunodeficiency virus (HIV) (less than five percent); learning impairment such as dyslexia, attention (twenty-two percent); mobility impairment requiring cane, walker, wheelchair, aids for daily activities (two percent); mental health condition (eight percent); hearing (six percent) and vision (eleven percent) impairments; two or more impairments (fifteen percent); medical problems highest among female and older inmates; inmates with impairments had higher rates of injuries, especially inmates with mental impairments).

<sup>11</sup> *But see* *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) ("Significantly for present purposes, because Congress was concerned that [d]iscrimination against the handicapped was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,] . . . the express prohibitions against disability-based discrimination in Section 504 and Title II include an affirmative obligation to make benefits, services, and programs accessible to disabled people. That is, an entity that provides services to the public cannot stand idly by while people with disabilities attempt to utilize programs and services designed for the able-bodied; instead, to satisfy Section 504 and Title II, such entities may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities.") (internal citations omitted).

<sup>12</sup> *See, e.g.*, Peter Blanck et al., *DISABILITY CIVIL RIGHTS LAW & POLICY* at 364-65 & *passim* (West 2014).

<sup>13</sup> *See, e.g.*, *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1310 (M.D. Ala. 2012). ("In addition to the integration mandate, the ADA prohibits the unnecessary exclusion of disabled individuals . . . legitimate safety requirements" may be imposed, but only when they are "necessary for safe operation" and "based on actual risks and not mere speculation, stereotypes, or generalizations about individuals with disabilities.").

<sup>14</sup> In *Dunn*, my review, site inspections, and interviews were subject to a Protective Order, and its confidentiality provisions, which were filed by the parties on November 24, 2014. I offer herein no

## II. Perils of Disability in Prison

According to the 2014 National Academy of Sciences Report, *The Growth of INCARCERATION in the United States*, physically and mentally disabling conditions “constitute a growing percentage of correctional health care needs as the result of a confluence of trends, especially the increase in chronic disease among younger Americans and the aging of the correctional population.”<sup>15</sup> The National Academy finds that:

Prisoners with disabilities also tend to be overlooked. Disabilities that are relatively minor in society at large can constitute serious impediments to well-being in prison. Living in correctional facilities entails activities of daily living (ADLs) that pose particular challenges to people with physical or developmental disabilities. For instance, regular ADLs include bathing and dressing, but ADLs in prison also can involve getting on and off an upper bunk, dropping to the floor for alarms, and hearing and promptly following orders against extensive background noise.<sup>16</sup>

Similar to many state prison systems, ADOC’s mission is to “confine, manage, and provide rehabilitative programs for convicted felons in a safe, secure, and humane environment, utilizing professionals who are committed to public safety and to the positive re-entry of offenders into society.”<sup>17</sup> All inmates, including prisoners with disabilities, are subjected to practices based on this mission statement. As “qualified” beneficiaries of the state system, prisoners with disabilities may not be subjected to inadequate and inferior services on the basis of their disabilities, behaviors resulting from their disabilities, nor to unnecessary exclusion from equal participation in confinement and rehabilitation programs as offered to the general prison population. For example, as I discuss below, prisoners with disabilities are entitled to appropriate reasonable accommodations (e.g., physically

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personal or identifying information as to the *Dunn* plaintiffs or defendants, and the views herein are my own and do not necessarily represent the views of any other entity and individuals.

<sup>15</sup> Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States*, NATIONAL ACADEMY OF SCIENCES, at 210 (2014) (overcrowding in prisons particularly harmful to person with psycho-social conditions, with increased risk for suicide; “prevalence of almost all chronic conditions is higher among both prison and jail inmates than in the general population”). See also David Cloud, *On Life Support: Public Health in the Age of Mass Incarceration*, VERA INSTITUTE OF JUSTICE 12 (Nov. 18, 2014) (“Cognitive impairments and physical disabilities make older prisoners extremely vulnerable in correctional environments, putting them at an increased risk of injury, victimization, and cognitive and emotional decompensation.”). *Id.* at 11 (“disproportionately high rates of chronic physical conditions among correctional populations; nationally representative survey found higher rates of hypertension, asthma, arthritis, cancer, and cervical cancer among correctional populations . . . compared to the general population, even after controlling for a range of socioeconomic factors”) (citing Ingrid A Binswanger, Patrick M. Krueger & John F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the United States Compared with the General Population*, J. OF EPIDEMIOLOGY AND COMMUNITY HEALTH (2009)).

<sup>16</sup> Travis, Western & Redburn, *supra* note 15, at 210-12 (“Older inmates also may have high rates of additional geriatric syndromes, such as cognitive impairment or dementia, and disabilities or impaired ability to perform ADLs. Like inmates with disabilities, older inmates may not be able to drop to the floor as instructed in response to an alarm or, worse, be unable to get back up again after the alarm is over, or have difficulty climbing on or off their assigned bunk.”).

<sup>17</sup> *Annual Report Fiscal Year 2014*, DEPARTMENT OF CORRECTIONS, 2014, <http://www.doc.state.al.us/docs/AnnualRpts/2014AnnualReport.pdf> (ADOC stated values include “the dignity of every human being”).

accessible housing facilities for inmates who use wheelchairs) as well as effective communication of informational materials (e.g., Braille materials for blind inmates, sign language interpreters or captioning for deaf inmates, and educational, vocational, and reentry activities).<sup>18</sup>

The National Academy of Sciences, in *The Growth of INCARCERATION in the United States*, sets forth core principles with regard to the use of incarceration in the United States, which have particular relevance to issues facing prisoners with disabilities.<sup>19</sup> Among these principles are the values of “proportionality” and “parsimony;” that is, conditions and consequences of imprisonment “that [are] more severe than is required to achieve valid and applicable purposes is to that extent morally unjustifiable [and] excessive.”<sup>20</sup> The National Academy finds that “the conditions and consequences of a prison sentence should not be so severe as to substantially weaken one’s status as a member of society.”<sup>21</sup> Thus:

The principle of citizenship suggests a rigorous review of the conditions of confinement and of the legal disabilities and restrictions imposed on those who have been incarcerated. In particular, policies and practices that result in long periods of administrative segregation from the general population, deprivation of meaningful human contact, overcrowding, and unnecessarily high levels of custody all require rigorous review. . . . Conditions of confinement should be reviewed with the objective of increasing prisoners’ chances of reentering society with social relationships intact and better prepared to make a positive, productive transition. Review of these conditions and the policies that regulate them is compelling because, with rare exceptions, all those incarcerated in the nation’s prisons and jails will be released to return to their communities.<sup>22</sup>

The National Academy’s principle of “social justice” provides that “prisons should be instruments of justice” and promote, not undermine, the “fair distribution of rights, resources, and opportunities.”<sup>23</sup> Justice requires meaningful *opportunities* for equivalent program participation by the incarcerated, and not disparate, inferior, and segregated treatment on the

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<sup>18</sup> Compare *Holmes v. Godinez*, 311 F.R.D. 177, 222 (N.D. Ill. 2015) (“The vast majority of services and programs that [Plaintiffs with disabilities] complain about do not appear to require any special qualification. For example, all inmates are permitted to participate in the grievance process, all inmates would have the right to be notified of emergency situations, and all inmates would have the right to receive proper medical treatment.”).

<sup>19</sup> Travis, Western & Redburn, *supra* note 15, at 8 (“Even under the best conditions, incarceration can do great harm—not only to those who are imprisoned, but also more broadly to families, communities, and society as a whole. Moreover, the forcible deprivation of liberty through incarceration is vulnerable to misuse, threatening the basic principles that underpin the legitimacy of prisons. The jurisprudence of punishment and theories of social policy have sought to limit public harm by appealing to long-standing principles of fairness and shared social membership.”).

<sup>20</sup> *Id.* at 8, 326 (noting principle of “Parsimony: The period of confinement should be sufficient but not greater than necessary to achieve the goals of sentencing policy.”).

<sup>21</sup> *Id.* at 341.

<sup>22</sup> *Id.* at 350.

<sup>23</sup> *Id.* at 8.

basis of disability.<sup>24</sup> The ADA and the Rehabilitation Act incorporate these principles into their statutory schemes.<sup>25</sup>

Research shows that prisoners with disabilities are at an increased risk for inadequate rehabilitation and safety while incarcerated.<sup>26</sup> Inmates with disabilities have higher rates of injuries from violence and unintentional causes as compared to the general population of inmates without disabilities.<sup>27</sup> Inmates with comorbid mental health conditions, and psychosocial and cognitive impairments (who are overrepresented in prisons<sup>28</sup>) are at a higher risk of being victims of violence and displaying more violent behaviors relative to inmates without such disabilities.<sup>29</sup> Incarceration is also generally associated with greater and deteriorating health conditions.<sup>30</sup>

The absence of timely and effective reasonable accommodations, as well as the lack of effective communications and physical accessibility, significantly increases the likelihood of present and future injury and illness facing prisoners with disabilities. Absent reasonable accommodations, for instance, inmates with disabilities are less able to engage meaningfully in prison activities as offered to the general population, and they are more vulnerable to misunderstanding and exploitation by other prisoners and correctional staff. Additionally, the absence of reasonable accommodations for prisoners with disabilities (e.g., in educational, vocational, work-release, and reentry programs<sup>31</sup>), is reasonably expected to be associated with increased levels of recidivism. Research supports this conclusion, showing the association between effective accommodations and subsequent academic success of individuals with disabilities.<sup>32</sup> These findings are in accord with others that have been documented in the correctional setting:

[G]iven that Section 504 and Title II require *all* entities that provide public services to act affirmatively to ensure that disabled individuals have meaningful access, prisons seemingly have even more responsibility in this

<sup>24</sup> *Id.* at 330.

<sup>25</sup> See generally Blanck, *supra* note 12; Peter Blanck, *The First “A” in the ADA: And 25 More “A”s Toward Equality for Americans with Disabilities*, 4 INCLUSION 46 (2016); *Routledge Handbook of Disability Law and Human Rights* (Peter Blanck & Eilíonóir Flynn eds., 2017).

<sup>26</sup> For instance, inmates who evidence a range of health impairments and general health problems in addition to their primary disabilities (e.g., comorbidity of physical, sensory, and mental health).

<sup>27</sup> See, e.g., Xiuquan Shi et al., *Increased Risk of Unintentional Injuries in Adults with Disabilities: A Systematic Review and Meta-Analysis*, DISABILITY & HEALTH J. (2014).

<sup>28</sup> Vallas, *supra* note 2.

<sup>29</sup> See generally Shi et al., *supra* note 27; Kimberly Houser & Steven Belenko, *Disciplinary Responses to Misconduct Among Female Prison Inmates with Mental Illness, Substance Use Disorders, and Co-Occurring Disorders*, 38 PSYCHIATRIC REHABILITATION J. 1, 25 (2015) (interactive and additive nature of co-morbidity may intensify behavioral problems more than singular disorders, and inmates with co-morbid conditions are more limited in their capacity to operate independently in the correctional setting, and difficult to treat with severe and persistent mental health disorders and often display symptoms of delusions and hallucinations that create disruptive and erratic behaviors).

<sup>30</sup> See, e.g., Emma G. Thomas, Matthew J. Spittal, Faye S. Taxman, & Stuart A. Kinner, *Health-Related Factors Predict Return to Custody in a Large Cohort of Ex-Prisoners: New Approaches to Predicting Re-Incarceration*, HEALTH & JUSTICE, 3(1), 1-13, at 1 (2015) (citing studies in support); Lauren Brinkley-Rubinstein, *Incarceration as a Catalyst for Worsening Health*, HEALTH & JUST., 1(1), 3 (2013) (incarceration environment negatively affects inmate health).

<sup>31</sup> Vallas, *supra* note 2.

<sup>32</sup> Won Ho Kim & Juyoung Lee, *The Effect of Accommodation on Academic Performance of College Students with Disabilities*, 60(1) REHABILITATION COUNSELING BULL. 40 (2016) (relationship between accommodations and academic outcomes).

regard, because inmates necessarily rely totally upon corrections departments for all of their needs while in custody and do not have the freedom to obtain such services (or the accommodations that permit them to access those services) elsewhere.<sup>33</sup>

The provision of ADA accommodations by state prison systems typically derives from a verbal or written request for an accommodation by an inmate with an ADA-related disability or by that inmate's actions. Knowledge of an individual's need for an accommodation may be reasonably evident, such that prison staff are on notice of that prisoner's eligibility to participate in prison activities. Sometimes, the need for an accommodation may be evident even though the inmate with the disability does not expressly request an accommodation and does not consider him or herself to be a person with an ADA-protected impairment.<sup>34</sup>

Moreover, many disabilities are non-obvious, such as a cognitive disability, an intellectual or mental health disability, a traumatic brain injury, and learning impairments from which inmates cannot effectively read, write, and understand informational documents. These impairments require information to be presented in simpler and alternative formats as an accommodation. In these instances, in the absence of assessment techniques and training, prison staff are not able to effectively determine the need for reasonable accommodations for prisoners with disabilities.<sup>35</sup> Nonetheless, best practice would not necessarily require that an inmate request a specific type of accommodation when the need is explicit or apparent. That is why the ADA requires an "interactive process" or meaningful discussion among staff and the inmate to identify a reasonable accommodation.<sup>36</sup> The approach

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<sup>33</sup> *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 269-70 (D.D.C. 2015) ("The District does not explain how inmates with known communications-related difficulties ... are supposed to communicate a need for accommodations, or, for that matter, why the protections of Section 504 and Title II should be construed to be unavailable to such disabled persons unless they somehow manage to overcome their communications-related disability sufficiently enough to convey their need for accommodations effectively. ... it would appear that only a specific request for a wheelchair would trigger any duty to accommodate an inmate who cannot walk, and a blind inmate would need to make a specific request for a cane or a guide if he desired to move about the prison grounds; meanwhile, prison officials could sit idly by, taking no affirmative steps to accommodate such disabled prisoners and expecting to be able to wield the inmate's failure to request accommodation like some sort of talisman that wards off Section 504 and Title II liability in any future legal action. This imagined state of affairs is unquestionably inconsistent with the text and purpose of the Rehabilitation Act and the ADA.")

<sup>34</sup> *See, e.g., Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1194 (10th Cir. 2007). *Id.* at 1197, n.10 ("Whether the public entity's knowledge derives from an individual's request for an accommodation or an individual's obvious need for an accommodation, the critical component of the entity's knowledge is that it is aware not just that the individual is disabled, but that the individual's disability affects his ability to receive the benefits of the entity's services.")

<sup>35</sup> *See, e.g., Robertson*, 500 F.3d at 1196 ("A public entity cannot know that a modification to its services under the ADA is necessary if it does not first understand that an individual requires such modification because he is disabled."); *Pierce*, 128 F. Supp. 3d 250, 270 (D.D.C. 2015) (public entities like ADOC must take "affirmative steps to ascertain what accommodations might be needed ... [and not have] reliance on guesswork and happenstance with respect to the provision of accommodations, when the law clearly requires otherwise.")

<sup>36</sup> *See generally* Peter Blanck, *eQuality: The Struggle for Web Accessibility by Persons with Cognitive Disabilities*, BEHAV. SCI. & L. (Jan. 2014).

is to ensure that prisoners with disabilities receive program benefits as afforded to inmates without disabilities.<sup>37</sup>

In the absence of system-wide policies for the ADA accommodation process, prisoners with disabilities are often forced to rely on individual “coping mechanisms” and self-directed alternative “accommodations.” For instance, inmates with disabilities frequently resort to paying other inmates to receive basic accommodations (e.g., paying an inmate to push an inmate’s wheelchair or for attempting to sign for a deaf inmate). These ad hoc accommodations commonly lead to ancillary health and safety risks (e.g., denial of equal access on the basis of their disabilities to work-release programs, emergency evacuation, and physical and programmatic activities). Moreover, however effective such “self-help” strategies may be to aid disabled prisoners to participate in prison programs, these non-systematic approaches to accommodation do not negate the state’s continuing responsibilities under the ADA to offer accessible programs and services and to provide reasonable accommodations and effective communications.<sup>38</sup> The negative effects of inadequate accommodations are exacerbated in aging, overcrowded, and physically inaccessible facilities.

### III. Implications of Disability in Prison

My examination in *Dunn* involved review of case documents, correctional accreditation standards, as well as of reports and social science literature on inmates with disabilities. I conducted inspections of the majority of Alabama’s high and medium security prison facilities, with on-site interviews and observations of male and female inmates with mobility and sensory impairments, psychosocial, mental health (e.g., schizophrenia and bipolar disorder), cognitive disabilities (e.g., developmental, intellectual, and learning impairments), as well as diseases and illnesses (e.g., diabetes, hepatitis, high blood pressure, and cancer).<sup>39</sup> There is high comorbidity and

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<sup>37</sup> Robertson, 500 F.3d at 1199 (“Moreover, even if an action, such as obtaining a TTY or TDD, would result in an undue administrative burden, the public entity must “take any *other* action that would not result in ... such burdens but would nevertheless ensure that, *to the maximum extent possible*, individuals with disabilities receive the benefits or services provided by the public entity . . . Here, the facility took no action.” (emphasis and citations omitted)). It is also not necessarily the case that the provision of certain reasonable accommodations (e.g., assistive devices and tapping canes for the blind) to inmates with disabilities create safety threats because they may be used as weapons. The provision of such accommodations and assistive devices remain subject to proper use, and appropriate behavior and standards. See, e.g., Brie A. Williams, James S. Goodwin, Jacques Baillargeon, Cyrus Ahalt, & Louise C. Walter, *Addressing the Aging Crisis in US Criminal Justice Health Care*, J. OF THE AM. GERIATRICS SOC’Y, 60(6), 1150, 1153 (2012) (need for evidence-based practices and not reliance on outdated stigma about disability accommodations).

<sup>38</sup> Compare *Mason v. Correctional Medical Services, Inc.*, 559 F.3d 880, at 886 (2009) (“public entity is required to make reasonable accommodations where necessary to give “*meaningful access*” to programs or benefits”) (emphasis added). *Id.* at 887 (prison “has a continuing obligation under the ADA to make reasonable accommodations for [inmate], and the substitution of an assistant who is illiterate or not reasonably available, or the failure to procure requested audio materials, would raise different issues [that could violate the ADA and Rehabilitation Act]).

<sup>39</sup> See, e.g., John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement—A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385 (2006) (high rates of disease and illness among prisoners, and inadequate services and programs for health care, endanger prisoners and staff); *Id.* at 59 (psycho-social conditions such as schizophrenia and depression

co-occurrence among these conditions and disabilities, which has been shown to raise additional health care and programmatic considerations.<sup>40</sup>

One area of my review focused on the ways in which state prison systems developed and implemented policies and procedures to address the needs of inmates with disabilities. For example, whether the prison developed and implemented an “ADA/Section 504 Transition and Self-Evaluation Plan,” as required by law and whether the prison had policies to identify, assess, and monitor programs to ensure access and nondiscriminatory participation by prisoners with disabilities. With such policies and procedures in place, a prison system is more likely to effectively plan and track its service outcomes for inmates with disabilities. However, in the absence of responsible ADA program administrators (often called “ADA Coordinators”) to ensure facility accessibility, it is difficult to monitor the accommodation needs of inmates with disabilities.<sup>41</sup>

Inappropriate disability classifications and the associated lack of accommodations for vulnerable individuals such as those with disabilities, further exacerbate secondary mental and physical disabilities, which also are associated with anti-social behavior, decreases in health and functioning, victimization, negative outcomes for inmate and institutional safety, and increased risk of recidivism.<sup>42</sup> As mentioned above, at prisons where no ADA accommodation process exists, inmates with disabilities often must “self-accommodate” or pay for accommodations that would otherwise be required to be provided by the state. Sometimes, where no formal accommodation processes exist, an inmate with disability’s only option is to “self-accommodate.”

A second area of my review involved assessment of ADA-related training offered to prison staff. For example, staff training often is needed for identifying, interacting with, and accommodating inmates with disabilities. There also is a need for staff training on communicating with an inmate with a visual or a hearing impairment (e.g., provision of a qualified sign language interpreter for an inmate who is deaf and subject to a

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“can make it impossible for a person to cope with the conditions of segregation,” particularly for those with suicidal tendencies).

<sup>40</sup> See, e.g., Gloria L. Krahn, Deborah Klein Walker, & Rosaly Correa-De-Araujo, *Persons with Disabilities as an Unrecognized Health Disparity Population*, AM. J. OF PUB. HEALTH S198, S201 (Supp. 2, Feb. 17, 2015) (people with cognitive disabilities significantly more likely to have diabetes than general population); Houser & Belenko, *supra* note 29 (for mental illness and co-occurring conditions, the important distinction is between singular and dual disorders, simultaneous occurrence and implied interaction affect course and prognosis of individual disorders and often intensifying the symptom severity of each, which may help explain the increasing presence of the mentally ill in the criminal justice system).

<sup>41</sup> See *infra* (ADA Coordinator responsible for compiling and maintaining information regarding the identification and monitoring of inmate accommodations to help ensure they are not denied access to programs and services because of their disabilities. Compare *Holmes v. Godinez*, 311 F.R.D. 177, 193 (N.D. Ill. 2015) (inmates keep a copy of their ADA accommodation plan “to show it to prison staff to demonstrate that they are entitled to accommodations” to ensure nondiscrimination in access to programs, services, and activities).

<sup>42</sup> See, e.g., Allison Hastings, Angela Browne, Kaitlin Kall & Margaret DiZerega, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails*, NATIONAL PREA RESOURCE CENTER, Apr. 2016, <https://www.prearesourcecenter.org/sites/default/files/library/keepingvulnerablepopulationsSAFEunderPREAapril2015.pdf>.

disciplinary hearing). In the absence of ADA training, prison staff are often forced to make on-the-spot decisions about daily life, safety, and health issues facing prisoners with disabilities. Staff and prisoners already are at risk in the prison environment and are placed in further jeopardy by the lack of identification, provision, and monitoring of ADA accommodations.

Training is also important because staff often misunderstand the communication barriers facing individuals with sensory (e.g., hearing and visual) and cognitive (e.g., intellectual and psychosocial) impairments. For instance, individuals with no hearing impairments tend to overestimate the ability of deaf individuals to interact in the English language.<sup>43</sup> In the correctional environment, prison staff “often believe that deaf offenders can rely on speech, speech-reading, reading and writing for communication and for obtaining information. However, they report that most deaf inmates cannot use these English avenues.”<sup>44</sup>

In addition, prison staff “often think that the only problem with deaf inmates is that they cannot hear,” and they typically ignore the “constellation of unique differences related to cognition, background knowledge and experiences, cultural differences, and communication and language challenges.”<sup>45</sup> Likewise, correctional staff frequently incorrectly believe that deaf inmates and inmates with cognitive and mental health impairments, can appropriately read and understand documents presented to them, for example, to review and acknowledge by signature.<sup>46</sup> Thus, in the absence of training, staff may believe that if they “raise the volume of their voices, a deaf person will hear them,” and “that all deaf inmates can read lips (speech-read) and read documents given to them during the booking and intake process, including the inmate handbook.”<sup>47</sup>

There are many other accommodation issues in prison service areas that, if not addressed, act to deny equal participation to prisoners on the basis of their disabilities.<sup>48</sup> These areas include: (1) housing (e.g., adequate housing

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43 Compare Tom Holcomb & Joy Kreeft Peyton, *ESL Literacy for a Linguistic Minority: The Deaf Experience*, July 1992, <http://www.ericdigests.org/1993/deaf.htm> (“In spite of concerted efforts by educators to facilitate the development of literacy skills in deaf individuals, most deaf high school graduates read English at roughly a third or fourth grade level as determined by standardized reading assessments. In their writing, they often make vocabulary and structural errors that include omitting or confusing articles, prepositions, and verb tense markers, and they have difficulty with complex structures such as complements and relative clauses.”).

44 Jean F. Andrews, *Deaf Inmates: Cultural and Linguistic Challenges and Comprehending the Inmate Handbook*, 36 CORRECTIONS COMPENDIUM 1, 2 (2011). *Id.* (citing research finding an overrepresentation of inmates with hearing impairments in state prisons, with approximately 35-40 percent of inmates having some hearing impairment).

45 *Id.* Compare Holmes, 311 F.R.D. 177 at 195 (Illinois prison staff inadequately trained to accommodate and communicate with deaf offenders; inmate “recalls an incident when he first entered [prison] in which he told correction officers that he was deaf but they nonetheless expected him to answer when they called his name out loud in a group. ... [prison] employees often assume that he can hear because he does not know American Sign Language (“ASL”) well, and thus they do not take the time to effectively communicate with him.”).

46 Compare *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 260 (D.D.C. 2015) (given communication deficiencies and lack of accommodations, deaf inmate believed he had no choice but to sign documents presented to him by correctional staff).

47 Jean F. Andrews, *Cultural and Linguistic Challenges and Comprehending the Inmate Handbook*, 36 *Corrections Compendium* 1, 2 (Spring 2011) (citations omitted).

48 Compare *Armstrong*, *supra* at 960 (“prison violations are systemwide and extensive. They involve the widespread denial of mobility-assistance devices to persons unable to physically function

assignments of inmates with disabilities and accessible specialized cells such as segregation and suicide cells); (2) education and trade programs (e.g., accessible learning materials); and (3) work-release programs (e.g., accessible vocational training programs).

#### IV. Recommendations for Disability in Prison

There is no one solution to address the needs of prisoners with disabilities and discrimination that the ADA was intended to prevent; that is, state prison systems that result in unnecessary exclusion, segregation, and isolation on the basis of disability. The result of such disability discrimination is harmful and stigmatizing. However, ADA accommodations and accessible services enhance equal program participation for prisoners with disabilities as well as for the general prison population and those who may become disabled in prison. The beneficial “ripple effects” associated with ADA accommodations, when well-planned and properly implemented, are likely to result in programmatic, safety, and economic benefits to prison operations.<sup>49</sup>

There are other recognized approaches to fostering equal services for inmates with disabilities, who are among the system’s most vulnerable prisoners. These practices include development and implementation of:

1. *ADA self-evaluation plans*: develop and adopt a system-wide ADA self-evaluation plan.<sup>50</sup>
2. *Disability identification and monitoring*: identify and track inmates with disabilities, their accommodations and ADA grievances, and evaluate accommodation requests with consideration of the inmate’s preferred accommodation.
3. *Accommodation implementation*: implement an “Inmate Helper and/or Aid” certification training program to assist in the provision of accommodations for inmates with disabilities.<sup>51</sup>
4. *ADA training*: provide staff training on ADA disabilities.<sup>52</sup>

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without them, the denial of hearing devices to deaf class members, and the denial of accessibility devices, such as tapping canes, to blind class members. These denials forced disabled class members into the vulnerable position of being dependent on other inmates to enable them to obtain basic services, such as meals, mail, showers, and toilets.”).

<sup>49</sup> See, e.g., Lisa Schur, Lisa Nishii, Meera Adya, Douglas Kruse, Susan M. Bruyere, & Peter Blanck, *Accommodating Employees With and Without Disabilities*, 53 HUMAN RESOURCE MANAGEMENT, 593, 621 (2014).

<sup>50</sup> See also Vallas, *supra* note 2 (suggesting annual training for law enforcement officials on disability issues).

<sup>51</sup> Compare *Holmes v. Godinez*, --- F.R.D. --- (ND ED IL, 2015) (2015 WL 5920750), at 43 (prisoners contend “hearing impaired inmates, who cannot hear the auditory announcements, are often forced to rely on the goodwill of fellow inmates, and in some cases miss meals, visitors, church services, medical appointments”).

<sup>52</sup> Compare *Reasonable Accommodation for Inmates with Disabilities*, STATE OF N.C. DEP’T OF PUB. SAFETY PRISONS, Sept. 5, 2013, [http://www.doc.state.nc.us/dop/policy\\_procedure\\_manual/e2600.pdf](http://www.doc.state.nc.us/dop/policy_procedure_manual/e2600.pdf) (“(j) Training. (1) ADA Training will be provided to all current Department of Public Safety Prisons staff on the policy and procedure regarding the ADA Process for inmates. New employees will be provided ADA Training as part of new employees Orientation. (2) All Department of Public Safety Prisons staff are mandated to annually attend ADA for Inmates Training. (3) All Department of Public Safety Prisons staff will be trained through use of audio and visual methods and will be provided printed educational information on the ADA Policy and

5. *ADA coordinators*: designate facility ADA coordinators with accountability for monitoring and sustaining ADA-related outcomes.<sup>53</sup>
6. *ADA notice*: disseminate information in accessible formats to inmates about their ADA rights and responsibilities.
7. *ADA accountability*: state prison leaders foster staff accountability with respect to the rights of inmates with disabilities under the ADA.<sup>54</sup>

These practices, among others, are important given the cumulative and escalating effects of disability and chronic health conditions in the context of long-term incarceration, and to reduce the risk of injury and violence while incarcerated.<sup>55</sup> People with disabilities are more likely to be victims of nonfatal violent crimes than people without disabilities, and they are more likely to report rape or sexual assault compared to people without disabilities—women are victimized more often than men, and people with cognitive disabilities have high rates of violent victimization. Mental illnesses, such as depression and anxiety, are common concerns for people with disabilities who are less likely to report receiving adequate social and emotional supports.<sup>56</sup> In addition, the inability to attain and retain employment post-release is associated with an increased risk of re-arrest.<sup>57</sup> Inmates with disabilities who are denied equal opportunities and appropriate accommodations to engage in prison work-release programs because of their disabilities are at a greater risk of recidivism.

In addition, prison staff often misperceive the behaviors associated with an inmate's disability (e.g., deaf or hard of hearing, blind, epileptic, intellectual challenges, psycho-social effects, and irrational speech or

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Procedures regarding the ADA and inmates.”). *Compare also* Commonwealth of Pennsylvania Department of Corrections, Reasonable Accommodations for Inmates with Disabilities, *supra* at 1-2 (“Housing Unit Staff who have primary supervisory responsibility for an affected inmate may obtain out-service training to learn methods of communicating with the inmate and/or managing his/her specific disability”).

<sup>53</sup> See also Vallas, *supra* note 2 (suggesting need for designated ADA coordinators at prison and jail facilities).

<sup>54</sup> *Compare Callous and Cruel: Use of Force against Inmates with Mental Disabilities in U.S. Jails and Prisons*, HUM. RIGHTS WATCH, May 12, 2015, <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and> (“Effective leadership is required to ensure policies are reflected in practice. Leadership is essential in any institution, but is particularly important in jails and prisons because they are operated as hierarchical organizations subject to a quasi-militaristic chain of command and there is little external pressure for the humane treatment of prisoners.”). See also Allison Hastings, Angela Browne, Kaitlin Kall & Margaret DiZerega, *supra* note 42 (zero-tolerance culture that takes verbal and physical harassment seriously towards vulnerable inmates).

<sup>55</sup> See, e.g., Gloria L. Krahn, Deborah Klein Walker, & Rosaly Correa-De-Araujo, *supra* note 40, at S201 (adults with disabilities four times more likely to report their health to be fair or poor than people with no disabilities; using the National Health Interview Survey, United States, 2010, finding cumulative impact of experiences over the life course associated with disability as a proportion of population that increases with age, and majority of people with disabilities are younger than sixty-five years with one third at ages 44-65 years).

<sup>56</sup> See, e.g., *Id.*

<sup>57</sup> See, e.g., Thomas et al., *supra* note 30, at 2 (citing studies in support). *Id.* at 9-10 (finding positive association among substance abuse, mental health conditions, and recidivism, and between intellectual disability and recidivism).

aberrant behaviors)<sup>58</sup> as violating disciplinary codes and prison rules.<sup>59</sup> Punitive consequences and sanctions, therefore, may be used improperly to address the behaviors of prisoners with mental illness, for instance. Such behavior is often the *result* of mental illness and is exacerbated due to inappropriate and unmodified mental health care and medication treatment programs as well as from a lack of reasonable accommodations.<sup>60</sup> Research also shows that people with mental disabilities are generally susceptible to stereotyping and bias. Misinformed reliance on biases<sup>61</sup> and stereotypes about people with disabilities, and the behaviors associated with their disabilities (e.g., as to the relationship between mental illness and violent behavior, as referenced above in *City and County of San Francisco v. Sheehan*),<sup>62</sup> often leads to inappropriate actions that may further exclude and punish these individuals.<sup>63</sup>

In 2016, subsequent to the presentation of my report in *Dunn*, the parties settled the ADA claims against ADOC.<sup>64</sup> In accord with the recommendations described above, ADOC agreed to prepare and implement an ADA Transition and Self-Evaluation Plan, screen inmates for physical and mental disabilities at intake, house inmates with disabilities in accessible and ADA compliant settings, and designate ADA Coordinators at prison facilities. ADOC also agreed to create ADA accommodation request and grievance procedures, with forms and materials available in alternative accessible formats. Staff must receive training on the ADA, and the Alabama

58 See, e.g., Peter Blanck & Mollie W. Marti, *Attitudes, Behavior, and the ADA*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH, 356-84 (Peter Blanck ed., 2000) (“Persons with physical and mental disabilities are among those minority groups most stigmatized by society”); Peter Blanck & Mollie W. Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 345-408 (1997) (same).

59 See, e.g., Jennifer Skeem & Lynne Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, 59 PSYCHIATRIC SERVICES 201, 203, Feb. 2008, <http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2008.59.2.201> (officers trained in crisis intervention tended to use “force conservatively, even with subjects who posed an extreme risk of violence”).

60 See, e.g., Maureen L. O’Keefe & Marissa J. Schnell, *Offenders with Mental Illness in the Correctional System*, J. OFFENDER REHAB. 45(1-2), 81-104, at 86 (2007) (detrimental effects of medication noncompliance worsened by prison environment, such as lack of accessibility, overcrowding, excessive noise and uncomfortable temperatures).

61 See generally Linda Krieger, *The Contents of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, STAN. L. REV., 47, 1161-248 (1995).

62 See, e.g., Amy C. Watson, Patrick W. Corrigan, & Victor Ottati, *Police Officers’ Attitudes Toward and Decisions About Persons With Mental Illness*, 55 PSYCHIATRIC SERVICES 49, 52 (2004) (schizophrenia label associated with increased perceptions of dangerousness, although may be reflection of experience with a person with mental illness who became violent). *Id.* at 53 (persons with mental illness, particularly who are experiencing psychotic symptoms and those abusing drugs and alcohol, have increased rates of violent behavior, but most are not violent). *Id.* (“Skills training in the recognition of mental illness coupled with effective communication and deescalation strategies will assist officers in successfully resolving contacts with persons with mental illness who are in crisis.”).

63 Research, my own and by others, shows bias towards people with disabilities may be mitigated when decision makers are held accountable for their decisions through clear policies and procedures. See, e.g., Leonard Sandler & Peter Blanck, *Accessibility as a Corporate Article of Faith at Microsoft: Case Study of Corporate Culture and Human Resource Dimensions*, 23 BEHAV. SCI. & THE LAW 39 (2005). See also Peter Blanck & Jonathan Martinis, “*The Right to Make Choices*”: National Resource Center for Supported Decision-Making, 3 INCLUSION 24 (2015).

64 *Settlement Agreement, Dunn v. Dunn*, S. POVERTY LAW CENTER, No. 2:14-cv-00601-MHT-TFM (M.D. Ala. Mar. 15, 2016), [https://www.splcenter.org/sites/default/files/documents/dunn-splc\\_settlement-agreement.pdf](https://www.splcenter.org/sites/default/files/documents/dunn-splc_settlement-agreement.pdf).

Disabilities Advocacy Program (“ADAP”) will monitor compliance with the agreement over multiple years.

## V. Conclusion

“Incarceration inherently involves the relinquishment of many privileges; however, prisoners still retain certain civil rights, including protections against disability discrimination.”<sup>65</sup> There is no justification in policy, practice, or research for continued discrimination, segregation, and suffering by prisoners solely on the basis of their disabilities.<sup>66</sup> Rather, with safety and rehabilitation as primary objectives, prison systems may appropriately provide prisoners with disabilities equitable and reasonable access to the programs offered to the general prison population. Discrimination in prison services towards inmates with disabilities is neither inevitable nor is inaction unavoidable.<sup>67</sup> The recent symposium illuminated the challenges and opportunities to be faced in the years to come.

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<sup>65</sup> *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 253 (D.D.C. 2015).

<sup>66</sup> The U.S. Department of Justice has noted: “Historically, individuals with disabilities have been excluded from [prison] programs [that] are not located in accessible locations, [and] inmates with disabilities have been segregated in units without equivalent programs. In light of the Supreme Court’s decision in *Yeskey* and the requirements of [ADA] title II, however, it is critical that public entities provide these opportunities to inmates with disabilities. In proposed § 35.152, the Department sought to clarify that title II required equal access for inmates with disabilities to participate in programs offered to inmates without disabilities.” 28 C.F.R. pt. 35 app. A., as revised § 35.152 in 75 Fed. Reg. 56164 (Sept. 15, 2010).

<sup>67</sup> *Compare* *Holmes v. Godinez*, 311 F.R.D. 177, 219 (N.D. Ill. 2015) (Plaintiffs’ expert concluded that Illinois prison “has instilled a culture of accepting non-compliance with the ADA’s requirement to provide deaf and hard of hearing inmates with effective communication.”).