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OPINION OF THE NINTH CIRCUIT
(AUGUST 31, 2017)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID UPDIKE,

Plaintiff-Appellant,

v.

MULTNOMAH COUNTY, a Municipal Corporation and STATE OF OREGON,

Defendants-Appellees,

and

CITY OF GRESHAM,

Defendant.

No. 15-35254
D.C. No. 3:13-cv-01619-SI

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Before: A. Wallace TASHIMA, Ronald M. GOULD, and Johnnie B. RAWLINSON, Circuit Judges.

GOULD, Circuit Judge:

David Updike, who has been deaf since birth, uses American Sign Language ("ASL") as his primary language. He brings this action against Defendants the State of Oregon ("State") and Multnomah County ("County"), alleging that the State and the County did not provide him with an ASL interpreter at his arraignment on criminal charges, and that the County did not provide him with an ASL interpreter and other auxiliary aids in order for Updike to effectively communicate while he was in pretrial detainment and under pretrial supervision. Updike brings claims for violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and § 504 of the Rehabilitation Act, 42 U.S.C. §§ 701-796I, negligence, and false arrest. Updike appeals the district court's grant of summary judgment to Defendants on all claims. We affirm in part, reverse in part, and remand this case for further proceedings.

I

A

David Updike has been deaf since birth and communicates primarily through ASL, which is his native language and preferred method of communication. Updike does not consider himself to be bilingual in English and does not read or speak English well. Updike is not proficient at reading lips because he has never heard English words—in these circumstances, it is difficult to know the shape that lips make to produce certain words. All of Updike's friends are deaf and Updike's ex-wife is deaf. Updike explains that he "live[s] in the deaf world."

In the early afternoon of January 14, 2013, officers from the Gresham Police Department arrived at Updike's home to respond to a 911 call reporting a disturbance. The 911 caller told the operator that the disturbance[1] involved deaf individuals, but the officers did not bring an ASL interpreter with them. The officers arrested Updike and took him to Multnomah County Detention Center ("MCDC") for booking.

MCDC has a telecommunications device for the deaf ("TDD") available. MCDC staff, including corrections deputies and medical providers, can request an ASL interpreter as needed. The County has a contract with Columbia Language Services, Inc. to provide interpreting services, including "Interpretation for the Deaf," "Interpretation for the Deaf/After Hours," "Remote/Electronic Interpretation," "Interpreter [Services]/ Normal Hours/ASL," and "Interpreter Services/After Hours/ASL."

At MCDC, Updike signed for an ASL interpreter and a teletypewriter ("TTY")[2] and tried to speak the word "interpreter," but was denied these requests. Instead, Officer Ozeroff showed Updike statements written by the other person involved in the disturbance and a witness, and wrote Updike a note asking Updike to write down what happened. Updike had trouble writing down what happened because written English is not his preferred form of communication. No ASL interpreter was provided.

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[1] Updike explains that a deaf guest in his home assaulted him after he refused to give the guest money.

[2] TDD and TTY are used interchangeably by Updike and throughout this opinion.

At booking, a female corrections office removed Updike's handcuffs and spoke to Updike. Updike tried to read her lips and could not understand her statements. Deputy Kessinger, a booking deputy, completed Updike's intake. Updike was also photographed and fingerprinted. Updike requested an ASL interpreter during the booking process but was not given one.

After booking, Updike was placed in a holding room. Updike saw other inmates making telephone phone calls, and he wanted to call an attorney and his mother. He asked a corrections officer for a TTY, by saying "TTY," and motioned his hand to his ear to mime a telephone. The officer instructed Updike to sit down and gestured for Updike to sit down. Updike stated and signed "I need an interpreter," but the officer did not respond to this request. Updike then spoke the word "paper" and made a writing gesture. The officer denied the request for paper and a writing instrument, and told Updike to sit down.

After the booking process, Updike again asked to use a TTY by gesturing typing and by making a verbal request to a different corrections officer. The officer denied the requests and instructed Updike to sit down and wait.

Still at MCDC, Updike met with Nurse Nielsen and asked for an ASL interpreter. Updike wanted to communicate that officers hurt his neck and back during the course of his arrest, but the nurse did not request or provide an interpreter despite his request. The nurse pointed to questions on a health intake form, but Updike could not read the form very well and used body language to answer the questions the best he could. The nurse did not examine his neck and

back, and Updike could not communicate that those areas hurt.

Updike met with Recognizance Officer Iwamoto from Multnomah County Pretrial Services Program. Updike had trouble reading the officer's lips and requested an ASL interpreter. The officer did not provide one. Updike also requested a TTY, but was not given one. Updike then learned that he would be held overnight and would appear in court the next day. Officer Iwamoto assured Updike that Iwamoto would notify the court that Updike would require an interpreter at his arraignment.

Officer Iwamoto's practice is to communicate with deaf people in custody by writing notes. Officer Iwamoto testified that if Updike was again arrested, he would likely not be given an ASL interpreter for his recognizance interview, and that he believed this practice needed to change. Iwamoto stated that he felt that written communication was sufficient to complete Updike's recognizance interview in order to make a release determination. Iwamoto's summary of his interview with Updike noted that the interview was conducted by writing, but that Updike would "need a sign language interpreter for court." This information became part of the court's records, and went to the judge, the district attorney's office, and the defense attorney. The information was also made available to pretrial release services. Iwamoto stated that he made this determination because arraignment occurred by video conference, and not because he himself had difficulties communicating with Updike by writing during the recognizance interview.

While at MCDC, Updike also met with Deputy Waggoner, a classification deputy. Waggoner's notes

said that Updike was deaf; this notation was made so corrections staff could give Updike accommodations, including getting the TTD machine for Updike to make phone calls. However, Deputy Waggoner did not call for an ASL interpreter during his triage interview with Updike because Waggoner did not think that Updike needed one and felt that Updike communicated fine using written English. Waggoner has never been trained on the necessary steps to obtain an interpreter for a deaf person during booking, and does not know how to get an ASL interpreter if he had trouble with a deaf inmate during a triage interview. Waggoner indicated in the Classification Summary Report that he believed Updike read fine, but also noted that Updike answered "yes" to the question asking whether Updike had a disability that would impact his ability to understand instructions while detained.

During Updike's time at MCDC, he was not given access to an ASL interpreter, a computer, a TTY, video relay services, or pen and paper. He could not call a lawyer or his family members without a TTY device. He was not able to watch television because there was no video relay service and no closed captioning.

On the evening of January 14, 2013, Updike was transferred to Multnomah County Inverness Jail ("MCIJ"). At MCIJ, an officer gave Updike a toothbrush, toothpaste, a comb, some blank paper and a pen, and a copy of MCIJ's Inmate Manual. Updike wrote to the officer that his neck and back hurt, and he requested pain medication, but no medical provider examined Updike.

Updike remained at MCIJ from January 14 through January 16, 2013. He made many requests for a TTY so he could make phone calls, as he saw that other

inmates were freely able to use telephones during their free time. He was denied these requests. Updike also wrote a note requesting that an officer turn on closed captioning, but that request was not honored. MCIJ uses a loudspeaker system to address inmates, but Updike did not hear any of the announcements made while at MCIJ.

On January 15, 2013, Updike appeared at his arraignment by video. MCIJ arranges arraignment by video, and inmates are not transported to court. During the arraignment, Updike could see but not read Judge Kathleen Dailey's lips and noticed that an interpreter was not in the courtroom. Upon learning that Updike was deaf, Judge Dailey postponed Updike's arraignment to the following day when an ASL interpreter would be available. Updike was thus held for another night at MCIJ.

The County's Pretrial Release Office conducts pretrial release interviews, including an assessment of the language needs of an individual, such as whether an individual needs an ASL interpreter, or whether the individual requires some other accommodation for hearing loss. This information is transmitted to the staff of the Oregon Judicial Department ("OJD") prior to arraignment. Updike's pretrial release documents received by OJD employees noted that Updike required an ASL interpreter. If staff do not determine whether an interpreter is required, the issue is not addressed until the court appearance. Typically, OJD staff prepare for arraignments by looking only at the booking register and not by reviewing the pretrial release report. But if a booking register notes a need for an accommodation, OJD staff would take appropriate action. At some time after Updike's arraignment, the County modified the

format of the booking register so that the booking register notifies the court of a need for an accommodation. As a result of this change, OJD staff are now alerted that a person needs an ASL interpreter or a foreign language interpreter through the booking register.

On January 16, 2013, Updike again appeared in court by videoconference. An ASL interpreter was provided for Updike, and Updike was released that day. Updike again requested a corrections officer to supply him with a TTY so he could call for his daughter to pick him. He received a TTY for the first time, and left jail late that evening.

On January 17, 2013, Updike reported to pretrial supervision as ordered by Judge Dailey. Updike met with Michale Sacomano, a case manager for the Multnomah County Department of Community Justice's Pretrial Services Program. Sacomano conducted intake by written communication, despite the fact that Updike did not agree to conduct intake by writing and had requested—by both signing and speaking—an ASL interpreter and signed requesting an ASL interpreter. Sacomano denied the request, and explained that Updike should write all of his requests.[3] Updike had a series of miscommunications with Sacomano, and felt that Sacomano believed Updike used his

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[3] Sacomano disputes whether Updike requested an ASL interpreter at this meeting. Because this is an appeal from the grant of summary judgment to Defendants, we construe the facts in the light most favorable to Updike as the non-moving party. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

hearing impairment as an excuse to violate conditions of his pretrial release.[4]

The trial on Updike's criminal charge was postponed until April 22, 2013. After the jury was impaneled, the district attorney moved for dismissal.

B

On September 13, 2013, Updike filed his complaint, alleging claims against the City of Gresham, Multnomah County, and the State of Oregon. In early 2014, the City of Gresham settled. On June 1, 2014, Updike filed his first amended complaint. Updike brought several claims: ADA discrimination claims against the State and the County, violations of § 504 of the Rehabilitation Act against the State and the County, common law negligence against the State and the County, and false arrest against the County. He sought compensatory damages, injunctive relief, and attorneys' fees and costs.

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[4] Sacomano's log entries noted that Updike's case was dismissed, that Updike had poor reporting during his time with pretrial services, that Updike used his hearing impairment as the reason for not complying with the conditions of supervision, and that their interactions were challenging because Updike "argued" everything. The "hearing impaired, learning impaired, and developmentally disabled individuals engage in a range of coping mechanisms that can give the false impression of uncooperative behavior or lack of remorse." *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005). As a result, it is likely that such individuals may have difficulty interacting with personnel who supervise them. *Id.* This is one basis that may explain why the interactions between Sacomano and Updike were challenging.

The State filed its motion for summary judgment on April 23, 2014, which the district court granted on October 15, 2014. The County filed its motion for summary judgment on November 26, 2014, which the district court granted on March 24, 2015. The district entered final judgment on March 24, 2015.

Updike timely appealed. He does not challenge the grant of summary judgment on his negligence and false arrest claims.

II

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's grant of summary judgment. *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 648 (9th Cir. 2016). On review, we determine—viewing the evidence in the light most favorable to Updike, the non-moving party—whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004); *see* Fed. R. Civ. P. 56. "Summary judgment is improper if 'there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Simo v. Union of Needletrades, Indus. & Textile Emps.*, 322 F.3d 602, 610 (9th Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). We review de novo the district court's decision regarding standing. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002).

III

Article III of the Constitution limits federal courts to hearing only cases and controversies. To establish

standing to sue, a plaintiff must show: (1) an injury that is concrete and particularized and actual or imminent; (2) a causal connection between the injury and defendant's challenged action; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Apart from this, standing for injunctive relief requires that a plaintiff show a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 107-08 (1983).

The parties do not dispute that Updike satisfies the general standing requirements of Article III,[5] but instead dispute whether Updike has shown a real and immediate threat that the injury will be repeated—which is necessary for standing to seek injunctive relief.

A

Updike offers no evidence of a "real or immediate threat" that he would be "wronged again" by way of the State's failure to provide an ASL interpreter at future court appearances. *Lyons*, 461 U.S. at 111. Evidence in the record further indicates that this wrongful conduct will likely not occur again, given that information about necessary accommodations are now

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[5] Nor could the County or State really dispute this: The State and County's alleged failure to provide Updike with an ASL interpreter or the use of auxiliary services constitute concrete and particularized injuries sufficient to satisfy Article III. Further, Updike's inability to effectively communicate with corrections staff or even communicate at all with his lawyer or family was caused by the Defendants' failure to provide him with accommodation and meaningful access. Finally, a decision favorable to Updike would redress his injuries. *See Lujan*, 605 U.S. at 560-61.

noted in the booking registers—the documents relied upon by OJD to set hearing dates—rather than the pretrial release reports.

Updike has not met his burden of showing that the State's allegedly wrongful behavior will likely recur. Moreover, Updike's evidence is insufficient to establish that any such wrongful behavior is likely to recur against him, *i.e.*, that he is likely again to be a pretrial detainee. Updike lacks standing to pursue his claims for injunctive relief against the State because it is no more than speculation and conjecture that the State will not provide an ASL interpreter and auxiliary aids if Updike makes an appearance as a pretrial detainee again. *See id.* at 103, 107-08.

B

Although certain facts slightly alter our calculus in considering the threat of future harm from the County, we also hold that the possibility of recurring injury remains speculative such that Updike also lacks standing to pursue injunctive relief against the County.

Updike has been booked at MCDC on five previous occasions, and avers that he had been held overnight in a Multnomah County detention facility before and was then denied an ASL interpreter and a TTY although he requested auxiliary aids and services. Record evidence also shows that a County officer had communicated with other deaf people in custody by writing notes, and that another County officer admitted to now knowing how to get an ASL interpreter if he had difficulties communicating with a deaf inmate.

Although "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," *O'Shea*, 414 U.S. at 496, "past wrongs do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy," *Lyons*, 461 U.S. at 103. Updike's past injury is insufficient to establish that the risk of recurring injury is more than speculative. He has not identified specific County policies and practices that would subject Updike to a realistic possibility that the County would subject him to the injurious acts again in the future. *Compare id.* at 108-110 (holding that the plaintiff did not have standing because it was no more than conjecture that he would be subject to another unconstitutional chokehold in the future), *with Armstrong v. Davis*, 275 F.3d 849, 864 (9th Cir. 2001) (explaining that the California Board of Prison Term's consistent practice of denying appropriate accommodations warranted holding that the plaintiff class established standing), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005). Further counseling against standing for injunctive relief is the assumption that Updike will likely conform his activities within the law such that he would not be arrested and detained in the future. *See O'Shea*, 414 U.S. at 497 ("We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners."). Updike has not shown "there is 'sufficient immediacy and reality' to [his] allegations of future injury to warrant invocation" of jurisdiction. *Id.*

In sum, Updike does not have standing to pursue his claims for injunctive relief against the State and

County. We turn next to the merits of his claims for compensatory damages.

IV

A

Updike challenges the district court's grant of summary judgment in favor of the State and the County on his ADA and § 504 claims.

The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)&(2). Title II of the ADA provides:

> [N]o 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.

Id. § 12132. To prove that a public program or service violated Title II of the ADA, Updike must show that: "(1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh'g en banc* (Oct. 11, 2001). This provision extends to discrimina-

tion against inmates detained in a county jail. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (concluding that "[s]tate prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" (quoting 42 U.S.C. § 12131(1)(B))).

"Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act." *Duvall*, 260 F.3d at 1135. Section 504 of the Rehabilitation Act provides:

> No 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. To bring a § 504 claim, Updike must show that "(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." *Duvall*, 260 F.3d at 1135.

Title II and § 504 include an affirmative obligation for public entities to make benefits, services, and programs accessible to people with disabilities. *See id.* at 1136; *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266-67 (D.D.C. 2015) (citing 42 U.S.C. § 12131 (2) and 28 C.F.R. § 35.130(b)(1)(ii)), *reconsideration denied*, 146 F. Supp. 3d 197 (D.D.C. 2015).

As to persons with a hearing disability, implementing regulations for Title II provide that a public entity must "take appropriate steps to ensure that

communications" with disabled persons "are as effective as communications with others." 28 C.F.R. § 35.160 (a). These regulations, squarely on point here, provide:

> (b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
>
> (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

Id. § 35.160(b). For deaf and hearing-impaired persons, auxiliary aids and services include:

> Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of writ-

> ten notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing[.]

Id. § 35.104(1).

The Appendix to the ADA regulations also makes clear that the public entity has a duty to ensure effective communications and establishes a required deference that must normally be given to a disabled person's personal choice of aid and service:

> The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.

Id. pt. 35, App. A (alteration in original) (quoting 28 C.F.R. pt. 35, App. A (2009)). The Appendix goes on to

explain that "the type of auxiliary aid or service necessary to ensure effective communication will vary with the situation." *Id.* These regulations "require effective communication in courts, jails, prisons, and with law enforcement officers." *Id.*

One limitation on this duty, however, provides that a public entity is not required "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.164; *see also id.* pt. 35, App. A. Yet the mere payment for an ASL interpreter and the payment for a TTY or similar device cannot be considered an undue burden.

Under both Title II of the ADA and § 504 of the Rehabilitation Act, Updike must show that he was excluded from participating in or denied the benefits of a program's services or otherwise discriminated against. "[C]ompensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent." *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998), *as amended* (Oct. 8, 1998); *see Duvall*, 260 F.3d at 1138. To show intentional discrimination, this circuit requires that the plaintiff show that a defendant acted with "deliberate indifference," which requires "both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood." *Duvall*, 260 F.3d at 1139. "When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the

deliberate indifference test." *Id.* To meet the second prong, the entity's failure to act "must be a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.*

A public entity may be liable for damages under Title II of the ADA or § 504 of the Rehabilitation Act "if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons." *Mark H. v. Lemahieu*, 513 F.3d 922, 937-38 (9th Cir. 2008). The "failure to provide reasonable accommodation can constitute discrimination." *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002). A public entity may not disregard the plight and distress of a disabled individual.

The parties do not dispute that Updike is a qualified individual with a disability and that, as a detainee at the detention facility, he was otherwise qualified to receive the services and benefits of the public entity. Instead, the parties dispute whether Updike was intentionally discriminated against when his requested accommodations were denied or when accommodation was not provided. Because Updike's ADA and § 504 claims do not differ in any respect relevant to resolving this appeal, and no party asserts that any distinctions are material, we address the ADA and § 504 claims together. *See Duvall*, 260 F.3d at 1135-36.

B

The thrust of Updike's allegations against the State is that the State failed to arrange for an ASL interpreter at Updike's first criminal court appearance. As a result, Updike had to stay at MCIJ for an additional evening, and he complains that he could have

been released earlier if an ASL interpreter had been provided on January 15, 2013, the date of his first arraignment hearing. The district court concluded that Updike did not show that the State acted with deliberate indifference. The State gave evidence that in setting Updike's arraignment, it reviewed the booking register, which did not note his need for an interpreter, but not the pretrial release report, which did note Updike's need for an interpreter.

Updike relies on *Robertson v. Las Animas County Sheriff's Department*, 500 F.3d 1185, 1199 (10th Cir. 2007) and *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001) to argue that he was denied the ability to participate at the January 15, 2013 arraignment. Both cases involved deaf or hearing impaired individuals who made court appearances without ASL interpreters. But neither out-of-circuit case discussed our circuit's heightened requirement for a plaintiff to establish that the discrimination was committed with deliberate indifference in order to recover monetary damages under the ADA or § 504. *See Duvall*, 260 F.3d at 1138-39. We have explained deliberate indifference as follows:

> Because in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction, we have stated that deliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course. Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a

> result of conduct that is more than negligent, and involves an element of deliberateness.

Id. at 1139.

We conclude that the district court correctly granted summary judgment for the State on this issue. This case reflects an absence of effective communication and coordination between the County's pretrial services and employees at OJD about the need for an interpreter at Updike's arraignment. While it is regrettable that it appears that Updike spent an extra night in jail that he likely would not have had to spend had he been provided an ASL interpreter the first time he appeared before Judge Dailey, there is no evidence that the State deliberately failed to order an interpreter at the January 15, 2013 arraignment. Instead, the evidence shows "bureaucratic slippage that constitutes negligence rather than deliberate action or inaction." *Id.* Since Updike's first arraignment, the County and State have reviewed their procedures and taken the appropriate corrective action, such that this "bureaucratic slippage" is likely to be avoided in the future. Similarly, pretrial services has modified their procedures such that the booking register now provides the necessary notice for accommodations.

There is no evidence that the State's failure to provide an ASL interpreter was the result of deliberate indifference. We accordingly affirm the district court's holding that summary judgment in favor of the State is appropriate on Updike's claims under the ADA and § 504.

C

Along with alleging that the County failed to arrange for an ASL interpreter at Updike's arraignment, Updike alleges that the County did not provide him with an ASL interpreter and other auxiliary aids in order to effectively communicate while he was in pretrial detainment and under pretrial supervision. The district court held that Updike could have, but did not, provide the County notice of this conduct that allegedly violated the ADA and § 504 and that summary judgment was warranted on this ground. The district court, however, went on to review Updike's allegations and found that there was no evidence in the record creating a genuine issue as to whether the County intentionally violated the ADA or the Rehabilitation Act. As to Updike's ADA and § 504 claims for damages against the County, we reverse.

1

"Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, (2002)). "[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006).

The district court found that Updike raised several specific factual allegations in his declaration opposing the County's motion for summary judgment, submitted after the close of discovery, that were not previously raised in his complaint, including:

> Plaintiff's requests: (1) for an auxiliary aid to make telephone calls; (2) for an ASL interpreter to speak with Nurse Julie Nielson; (3) for closed captioning to be turned on for the [j]ail televisions; and (4) for an ASL interpreter for his meetings with pre-trial services.

The district court concluded that Updike's failure to provide the County with adequate notice of additional allegations warranted summary judgment on Updike's ADA and § 504 claims on these allegations.

We disagree. Although the primary focus of Updike's complaint was on the ASL interpreter that was not provided at his arraignment on January 15, 2013, Updike's complaint gave sufficient factual allegations describing the County's failure to provide auxiliary aids and services while Updike was detained and under pretrial supervision to put the County on notice that those inactions would be at issue. For example, Updike's complaint stated that while Updike was at MCDC he requested an ASL interpreter and a TTY but neither was provided. He further alleged that he was directed to write a statement without the accommodations of a TTY or an ASL interpreter. The complaint went on to allege that the County did not provide Updike with an ASL interpreter while he was held at MCIJ.

His complaint also alleged that while he awaited trial, he was under the supervision of employees of the County. He had requested an ASL interpreter to aid his communication, but the County did not accommodate this request. Updike repeated these allegations throughout his complaint:

> Defendant County denied Plaintiff the benefits of Defendant's services and programs through failure to provide an ASL interpreter and failure to promptly provide a TTD while Plaintiff was in custody. Defendant County also failed to provide an ASL interpreter during Plaintiff's pretrial release while he was under the supervision of Defendant County's employees.

The complaint specifically alleged that the County denied Updike "effective communication by refusing to provide him with a qualified interpreter in circumstances involving the following types of communication which would be normal in criminal investigations and the arrest of a suspect." These circumstances included:

> explaining to the police the details of the incident and the alleged crime; discussing injuries; discussing damage to and loss of personal property; conveying and understanding one's rights as a crime victim; conveying and understanding one's rights as an arrestee and pretrial detainee; asserting the right to effective communication during booking and being held by a jail or correctional facility; asserting the right to an ASL interpreter for appearances in court; and asserting the right to effective communication with supervising County employees during pretrial release.

Updike complied with the notice pleading requirement of Federal Rule of Civil Procedure 8. Updike alleged sufficient facts that the County did not accommodate his requests for an auxiliary aid to make tele-

phone calls or for an ASL interpreter while in custody, such that the County should have been "on notice of the evidence it need[ed] to adduce in order to defend against [Updike's] allegations." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). Coupled with Updike's deposition testimony, the County was put on notice of the evidence it would need to defend against Updike's ADA and Rehabilitation Act claims. *See id.*

2

The district court also granted summary judgment on the alternative ground that there was insufficient evidence of intentional discrimination by the County against Updike.

The County argues that not providing Updike with his preferred form of communication is not, by itself, a violation of the ADA or the Rehabilitation Act. The County emphasizes that each of the County employees believed Updike could effectively communicate without the use of an ASL interpreter or TTD/TTY device. Whether Updike could effectively communicate in English is disputed as Updike avers that ASL is his primary language, he does not consider himself to be bilingual in English, he does not read or speak English well, and he is not proficient at reading lips. He contends that he was not able to communicate effectively with correctional staff because they did not provide appropriate accommodations. Other disputes central to this case include whether the County undertook "a fact-specific investigation to determine what constitutes a reasonable accommodation," *Duvall*, 260 F.3d at 1139, and gave "primary consideration" to Updike's requests, 28 C.F.R. § 35.160(b)(2).

It is well-settled that Title II and § 504 "create a duty to gather sufficient information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary." *Duvall*, 260 F.3d at 1139 (alteration in original) (quoting *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999)). Thus, a public entity "must consider the particular individual's need when conducting its investigation into what accommodations are reasonable." *Id.* As explained above, to meet the deliberate indifference test for compensatory damages, the public entity must be on notice that an accommodation is required, and that the entity's failure to act involved an element of deliberateness. *Id.* A denial of a request without investigation is sufficient to survive summary judgment on the question of deliberate indifference. *See id.* at 1140 ("[Plaintiff] provided sufficient evidence to create a triable issue as to whether [defendants] . . . had notice of his need for the accommodation involved and that they failed despite repeated requests to take the necessary action."). Here, there is no dispute that County employees were aware of Updike's disability. There is also no record evidence that the County properly investigated Updike's need for accommodation. We reverse the district court's grant of summary judgment on the ground that the County's failure to provide accommodations proceeded without conducting an adequate investigation of Updike's disability and the efficacy of other ways to communicate.

We also reverse the district court's grant of summary judgment on the ground that there are disputed issues of material fact as to whether, at each of Updike's requests for accommodation, the County's failure to provide an accommodation was done with

deliberate indifference, rather than merely negligence.[6]

These are the individual bases for Updike's ADA and § 504 claims:

Failure to provide an ASL interpreter or TTY during the booking process: During the booking process, Updike requested an ASL interpreter and also requested a TTY device so he could make phone calls to his attorney and his mother. The district court dismissed this aspect of Updike's claim, explaining that Updike did not explain how the booking process would have been different in any material respect had he been provided with his preferred accommodation. This analysis, however, disregards the County's affirmative obligations to provide reasonable accommodations. Employees for the County were aware that Updike was deaf, and that Updike had requested an ASL interpreter and other auxiliary services. Furthermore, the County has a contract with Columbia Language Services for interpreting services. Taken together, a reasonable trier of

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[6] Updike also contends that an inmate with a communication-related disability "often lacks the ability to communicate his need for accommodation." *See, e.g.*, *Pierce*, 128 F. Supp. 3d at 269 ("[Defendant] does not explain how inmates with known communications-related difficulties (such as [Plaintiff]) 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."). Our case law is clear on this point: there may be situations where a public entity's duty to look into and provide a reasonable accommodation may be triggered when "the need for accommodation is obvious," and the public entity is on notice about a need for accommodation. *Duvall*, 260 F.3d at 1139.

fact could conclude that the County acted with deliberate indifference in denying a reasonable accommodation. *See id.* at 1136; *Wong*, 192 F.3d at 819 (explaining that the denial of a request for accommodation "without consulting [plaintiff] or any person at the University whose job it was to formulate appropriate accommodations" was "a conspicuous failure to carry out the obligation 'conscientiously' to explore possible accommodations"). A reasonable jury could conclude that an accommodation, such as an ASL interpreter or use of a TTY, was necessary for effective communication during the booking process.

Failure to provide a TTD to make phone calls: Updike made many requests for corrections staff to provide him with a TTD or TTY device so he could call his mother or an attorney but avers that no such aid was ever provided. As the district court noted, the parties do not dispute that a TTY machine was available for inmates to use for telephone calls, and that Updike was never provided with a TTY machine until after the January 16, 2013 arraignment when he was released from custody. The district court reasoned that Updike failed to present any evidence that the County actually refused to provide him with a TTY machine. We disagree with the district court's conclusion that the County did not act with deliberate indifference in denying the request for a TTD or TTY. That Updike repeatedly requested a TTD, which was physically available at the jail, but was never provided such a device to assist making phone calls is evidence that the County denied him use of a TTD, creating a genuine issue of material fact on this issue. A trier of fact could conclude that the County acted with deliberate indifference in denying direct requests for

this accommodation, which would permit Updike to use telephones, a service routinely made available to non-deaf inmates.

Failure to turn on closed captioning on jail televisions: Updike asked MCDC officials to turn on closed captioning several times while in the custody of the County, but avers this request was not accommodated. Although the district court attributed this to an "unintentional oversight," Updike has introduced evidence that County jail employees were aware of Updike's disability, yet ignored his repeated requests to turn on closed captioning. Again, there is a genuine factual dispute on deliberate indifference.

Failure to provide an ASL interpreter during his medical evaluation: Under Updike's evidence, which should be credited on summary judgment, Updike requested an ASL interpreter while meeting with Nurse Nielsen, and could not convey that he had neck and back pain because of an inability to communicate. He also explained that he could not read well the form the nurse used and that he could not respond or give input. Although the County asserts that Updike was very literate, and that an accommodation through writing was sufficient to comply with the ADA, the County has not put forth evidence showing that it looked into whether his request for accommodation could be granted without undue burden. Further, Updike disputes that the method of communication through writing was effective.

The district court dismissed this claim because there was no evidence in the record that Updike was denied any specific benefit or service that is regularly offered to other inmates. The lack of an ASL translator, however, may have denied Updike the opportunity to

communicate effectively during the medical evaluation provided by the County. Medical evaluations often will be the type of complex and lengthy situation in which an ASL interpreter should be provided. *See Duffy v. Riveland*, 98 F.3d 447, 456 (9th Cir. 1996) ("[A] qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time." (quoting 28 C.F.R. pt. 35, App.); 28 C.F.R. § 35.160(b)(2) ("The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place."). A trier of fact can weigh these factors in deciding whether written communication, rather than an ASL translator, was an appropriate accommodation.

Failure to provide an ASL interpreter during the recognizance interview: During Updike's recognizance interview, he requested an ASL interpreter and a TTY device, was not given either, and Updike said that he had difficulty reading the officer's lips. Officer Iwamoto disputed this, believing that he was able to communicate effectively with Updike through written English and that Updike communicated clearly through written notes. But again, the County introduced no evidence that it ascertained what accommodations might be needed, and instead relies on self-serving observations that its employees believed they were effectively communicating with Updike. Whether the County's accommodation was sufficient requires sifting through a number of facts. *See* 28 C.F.R. § 35.160(b)(2). And here too, a reasonable jury could conclude that

written communication was not adequate to ensure that Updike could communicate as effectively as non-hearing-impaired individuals or that the County provided the appropriate accommodation.

Failure to provide an ASL interpreter and other auxiliary aids during interactions with pretrial services: Updike and Sacomano dispute whether Updike requested an interpreter. Although the record shows that Sacomano was aware that Updike is deaf, the County did not put forward evidence that she looked into providing Updike with an ASL interpreter during their meetings. The district court focused on whether Updike was actually denied services or whether his interactions "actually caused him harm" in dismissing this aspect of Updike's claim. The district court should have instead focused on whether Updike could effectively communicate with Sacomano while under supervision of the County and whether the County gave Updike reasonable accommodations. Considering the evidence in the light most favorable to Updike, a reasonable jury could conclude that Sacomano did not adequately address Updike's need for accommodation.

Failure to timely arrange for an ASL interpreter at arraignment: Updike inquired with County staff whether an ASL interpreter would be available at arraignment, yet no interpreter appeared at his January 15, 2013 arraignment. The County, however, timely communicated Updike's need for an ASL interpreter before his January 15 arraignment by noting it in his pretrial release report. That OJD staff looked at the booking register but not the pretrial release report in setting calendar, does not show that the County was deliberately indifferent to Updike's need for an ASL interpreter. As discussed earlier, this sequence of events

shows "bureaucratic slippage that constitutes negligence rather than deliberate action or inaction." *Duvall*, 260 F.3d at 1139. Summary judgment was appropriate on this facet of Updike's claim.

* * *

The County's employees knew that Updike was deaf but did not provide Updike with an ASL interpreter, TTY device, or closed captioning for television, despite his repeated requests for these accommodations. Updike put forth evidence that he made repeated requests for an ASL translator and other auxiliary services with respect to various aspects of his time in custody and under pretrial supervision. The County was also on notice that Updike believed that his disability would impact his ability to understand instructions while detained. Updike contends that the County's failure to provide auxiliary aids and services limited his ability to communicate effectively, speak with his attorney and family members, and enjoy other programs and services on par with non-hearing impaired inmates.

Updike disputes the County's assertion that he was able to communicate fine using pen and paper, and instead contends that communication between him and corrections staff during the course of his detention and supervision were ineffective. Even if a jury ultimately determines that the County is correct—a matter that must be left to the jury where, as here, there are disputes of material fact—summary judgment was improper because the County never meaningfully assessed Updike's limitations and comprehension abilities. At no time was Updike assessed to determine to what extent he would need accommodation to ensure that he could communicate effectively with others

during his time in custody and under pretrial supervision. Yet "[w]hen an entity is on notice of the need for accommodation, it 'is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation.'" *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1207 (9th Cir. 2016) (quoting *Duvall*, 260 F.3d at 1139). Nor did the County present evidence that it engaged in any inquiry as to why an ASL interpreter or TTY would be unreasonable or could not be accommodated.[7] The record sets forth that it was not until his January 16, 2013 arraignment that Updike was provided with an ASL interpreter, and that it was not until Updike was released from custody that he was provided with a TTD. For these reasons, the district court erred in granting summary judgment in favor of the County on Updike's ADA and § 504 claims.

The district court, in granting summary judgment in favor of the County, concluded that Updike was not actually excluded from services that similarly-situated non-deaf individuals also accessed. We emphasize, however, that a public entity can be liable for damages under Title II and § 504 if it intentionally or with deliberate indifferences does not provide a reasonable accommodation to a deaf or hearing-impaired person. *See Duvall*, 260 F.3d 1138-39; *Mark H.*, 513 F.3d at 938.

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[7] The County makes no argument that providing Updike with an interpreter or providing other auxiliary services, such as a TTD, would have been unduly burdensome. Nor would this argument have much weight, given their existing contract with Columbia Language Services to provide those in custody with ASL interpreter services.

In reversing the grant of summary judgment in favor of the County on Updike's claims for damages, we do not hold that Updike necessarily was entitled to have an ASL interpreter as a matter of course to achieve effective communication with County employees or that the County should be subject to liability for failing to provide one. However, whether the County provided appropriate auxiliary aids where necessary is a fact-intensive exercise. Upon notice of the need for an accommodation, a public entity must investigate what constitutes a reasonable accommodation. *See Duvall*, 260 F.3d at 1139. Regulations require that public entities give primary consideration to the requests of the deaf individual with respect to auxiliary aid requests and give deference to such requests. 28 C.F.R. § 35.160(b)(2). And the type of auxiliary aid or service that will be appropriate should take into account the context in which the communication is taking place. *Id.* If the public entity does not defer to the deaf individual's request, then the burden is on the entity to demonstrate that another effective means of communication exists or that the requested auxiliary aid would otherwise not be required. *See* 28 C.F.R. pt. 35, App. A. A public entity must "take appropriate steps to ensure that communications" with a person with a disability is "as effective as communications with others." *Id.* § 35.160(a)(1). To deny a deaf person an ASL interpreter, when ASL is their primary language, is akin to denying a Spanish interpreter to a person who speaks Spanish as their primary language. An ASL interpreter will often be necessary to ensure communication with a deaf person who has become enmeshed in the criminal justice system. At a minimum, officials must conduct an adequate investigation into what accommodations may be necessary to

permit effective communication of the deaf while incarcerated.

In this case, a reasonable jury could find that the County was deliberately indifferent and violated Title II and § 504 when it did not conduct an informed assessment of Updike's accommodation needs, when it did not give primary deference to Updike's requests or context-specific consideration to his requests, when County employees failed to provide Updike with an ASL interpreter in a multitude of interactions with County employees, when County employees did not offer use of a TTD, and when County employees did not turn on closed captioning. Thus, we reverse the district court's holding that no evidence in the record created a genuine issue of material fact on whether the County violated the ADA or the Rehabilitation Act by inaction and conduct undertaken with deliberate indifference to Updike's legitimate needs as a deaf individual. Stated another way, the County may not turn a blind eye to a deaf ear. Whether it has done so here cannot be resolved at this stage of the proceedings before the consideration of relevant testimony and other evidence that may be offered at trial, and before a jury or the district court has made findings of fact based on trial proceedings. We reverse the grant of summary judgment in favor of the County on Updike's compensatory claims under Title II of the ADA and § 504 of the Rehabilitation Act. On the genuine factual disputes that we have identified, the case should proceed to trial.

V

We affirm in part and reverse in part the district court's summary judgment orders. We affirm the dis-

trict court's grant of summary judgment in favor of the State. We also affirm the district court's conclusion that Updike lacks standing to pursue his claims for injunctive relief. We reverse the district court's grant of summary judgment in favor of the County on Updike's ADA and § 504 claims for compensatory damages. We remand the case for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; and REMANDED. Each party shall bear its own costs on appeal of the summary judgment order entered in favor of the State. We award costs to Updike on appeal of the summary judgment order entered in favor of the County.

OPINION AND ORDER OF THE DISTRICT COURT OF OREGON (MARCH 24, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID UPDIKE,

Plaintiff,

v.

CITY OF GRESHAM, MULTNOMAH COUNTY, and STATE OF OREGON,

Defendants.

Case No. 3:13-cv-01619-SI

Before: Michael H. SIMON, United States District Judge

Michael H. Simon, District Judge.

Plaintiff, David Updike ("Updike" or "Plaintiff"), maintains this action against Defendant Multnomah County (the "County"), final judgments having been entered as to Plaintiff's claims against the City of Gresham and State of Oregon. Updike alleges violations of the Vocational Rehabilitation Act of 1973 ("Rehabilitation Act")[1] and Title II of the Americans with Dis-

[1] 29 U.S.C. § 794.

abilities Act ("ADA").[2] Additionally, Updike brings state law claims for negligence and false arrest. Before the Court is the County's Motion for Summary Judgment. For the reasons discussed below, the County's motion is granted.

Standards

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). Although "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment," the "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotations and citation omitted).

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[2] 42 U.S.C. § 12132.

Background

On January 14, 2013, Plaintiff was arrested at his home by officers of the Gresham, Oregon police department. Plaintiff was booked at the Multnomah County Detention Center in the Justice Center and later transferred to the Multnomah County Inverness Jail (the "Jail"), where Plaintiff was held for arraignment the next day. On January 15, 2013, Plaintiff appeared for arraignment by video conference before Multnomah County Circuit Judge Kathleen Dailey. No American Sign Language ("ASL") interpreter was present. When Judge Dailey learned that Plaintiff was deaf, she postponed Plaintiff's arraignment to the following day when an ASL interpreter would be available. As a result of this delay, Plaintiff was held overnight at the Jail. On January 16, 2013, Plaintiff again appeared for arraignment, and an ASL interpreter was provided for him. Plaintiff was arraigned and released that day.[3]

Discussion

A. Plaintiff's Claims Under the ADA and Rehabilitation Act

Plaintiff brings claims under the ADA and the Rehabilitation Act, seeking both monetary damages and equitable relief. Plaintiff alleges that the County failed to provide him with an ASL interpreter or other auxiliary aids both during his confinement in the Jail and during his interactions with the County's pretrial release services staff. The County responds that Plaintiff fails to show any genuine disputes of material fact

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[3] The criminal charges against Plaintiff were ultimately dismissed.

that the County intentionally violated either the ADA or the Rehabilitation Act. The County further argues that even if Plaintiff were able to present an issue of disputed fact, Plaintiff's claims are barred on the basis of judicial immunity, because any harm suffered by Plaintiff was solely the result of Judge Dailey's actions.

1. Standing to Seek Equitable Relief Under the ADA and Rehabilitation Act

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Accordingly, both the Supreme Court and the Ninth Circuit have held that whether or not either party raises the issue, "federal courts are *required* sua sponte to examine jurisdictional issues such as standing." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir.2001)) (emphasis added); *see also United States v. Hays*, 515 U.S. 737, 742 (1995). Therefore, although neither Updike nor the County addressed in their briefs the issue of Plaintiff's standing to seek equitable relief, the Court has "both the power and duty to raise the adequacy of [plaintiff's] standing sua sponte." *Bernhardt*, 279 F.3d at 868.

To invoke the jurisdiction of the federal courts, a disabled person claiming discrimination under the ADA or the Rehabilitation Act "must satisfy the case or controversy requirements of Article III by demonstrating his standing to sue at each stage of the litigation." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). Standing is the "personal

interest that must exist at the commencement of the litigation." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189 (2000). Moreover, the requisite personal interest that must exist at the commencement of a case must continue throughout its existence. *Id.* The personal interest that constitutes standing consists of three elements: (1) an injury in fact, *i.e.*, an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) a causal connection between the injury-in-fact and the defendant's challenged behavior; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling. *Id.* at 181-82.

When a plaintiff seeks equitable relief, he cannot establish an injury in fact simply by showing that he has suffered some harm in the past. Rather, he must demonstrate a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974) (holding that plaintiffs who sought to enjoin judges from racial discrimination lacked standing because the possibility that any plaintiff would again be charged with a crime and brought before the particular judges was speculative, especially given that plaintiffs could avoid the injury by conducting their activities within the law). The possibility of future injury must rise beyond the level of speculative or hypothetical injury. *See Lyons*, 461 U.S. at 103 (1983) (finding a lack of standing because it was "no more than speculation" to assert that the plaintiff would someday in the future again be arrested and subjected to an unconstitutional chokehold).

In its previous ruling on Defendant State of Oregon's Motion for Summary Judgment (Dkt. 77), which was fully briefed by the State and by Plaintiff,

the Court found that Plaintiff lacked standing to seek equitable relief for alleged violations of the ADA and the Rehabilitation Act by the State of Oregon. As the Court explained in that ruling:

> Plaintiff lacks Article III standing because he has not demonstrated an injury in fact that will be redressed by a favorable ruling. Specifically, Plaintiff provides the Court with no reason why he would be unable to conduct his activities within the law. Moreover, Plaintiff provides no explanation for his assertion that he will likely be booked into a county detention center and need to make a first appearance as a pretrial detainee again. The mere fact that Plaintiff has been arrested in the past does not create the real and immediate threat of repeated injury required to seek equitable relief. Accordingly, Plaintiff lacks standing to seek equitable relief.

Dkt. 77. This finding applies to Plaintiff's claims against the County as well as Plaintiff's claims against the State. Accordingly, Plaintiff lacks standing to seek equitable relief against the County, and the Court addresses Plaintiff's claims for violations of the ADA and the Rehabilitation Act only as to Plaintiff's claims for compensatory damages.

2. Legal Standards

"Title II of the ADA and § 504 of the [Rehabilitation Act] both prohibit discrimination on the basis of disability." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002); *see also* 42 U.S.C. § 12132; 29 U.S.C. § 794. To establish a claim under the ADA, a plaintiff

must show that he or she: (1) "is an individual with a disability"; (2) "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities"; (3) "was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (4) "such exclusion, denial of benefits, or discrimination was by reason of [his or] her disability." *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (quoting *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam)) (quotation marks omitted). To establish a claim under the Rehabilitation Act, a plaintiff must show that he or she: (1) is "handicapped within the meaning of the [Rehabilitation Act]"; (2) is "otherwise qualified for the benefits or services sought"; (3) was "denied the benefit or services solely by reason of [his or] her handicap; and (4) that "the program providing the benefit or services receives federal financial assistance." *Lovell*, 303 F.3d at 1052. In claims for compensatory damages under either the ADA or the Rehabilitation Act, the law in the Ninth Circuit also requires that a plaintiff show that a defendant had discriminatory intent. *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998).

In determining under the ADA or the Rehabilitation Act whether a defendant acted with discriminatory intent toward a plaintiff because of his or her disability, the Ninth Circuit applies the "deliberate indifference" standard. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001); *see also Daniel v. Levin*, 172 F. App'x 147, 150 (9th Cir. 2006) (unpublished) (applying the "deliberate indifference" standard to the discriminatory intent requirement for ADA

and Rehabilitation Act claims). A defendant acts with deliberate indifference only if: (1) the defendant has knowledge from which an inference could be drawn that a harm to a federally protected right is substantially likely; and (2) the defendant actually draws that inference and fails to act upon the likelihood. *See Duvall*, 260 F.3d at 1138-39; *see also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

To satisfy the first prong of deliberate indifference, a plaintiff must identify a specific, reasonable, and necessary accommodation that the public entity has failed to provide, and that the plaintiff notified the public entity of the need for accommodation. *Duvall*, 260 F.3d at 1138. The second prong of deliberate indifference requires a showing that the entity deliberately failed to fulfill its duty to act in response to the request for accommodation. *Id.* at 1139-40. To raise a triable issue of material fact on this point, the plaintiff must present evidence that the entity failed to undertake a fact-specific investigation, gathering from the plaintiff and qualified experts sufficient information to determine what constituted a reasonable accommodation. *Id.* The Ninth Circuit has made clear that in order to satisfy this prong, the plaintiff must show that the entity's failure to act was deliberate:

> Because in some instances events may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction, we have stated that deliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course. Rather, in order to meet the second

> element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness.

Id. at 1139.

Generally, the effectiveness of auxiliary aids or services is a question of fact precluding summary judgment. *Chisolm v. McManimon*, 275 F.3d 315, 327-28 (3d Cir. 2001); *see also Randolph v. Rodgers*, 170 F.3d 850, 860 (8th Cir. 1999); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir. 1996). A denial of a request for accommodation without investigation is sufficient to survive summary judgment on the question of deliberate indifference. *Button v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nevada*, 289 F. App'x 964, 968 (9th Cir. 2008); *Duvall*, 260 F.3d at 1139-41.

3. Applicable Regulations

As to persons with hearing disabilities, the Title II implementing regulations provide that a public entity must take steps to ensure that communications with disabled persons are as "effective as communications with others." 28 C.F.R. § 35.160. The regulations further provide that:

> (b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

> (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

Id. (emphasis added). Auxiliary aids and services are defined as applicable to individuals who are "deaf or hard of hearing." 28 C.F.R. § 35.104. Regarding whether written notes are an effective accommodation, Appendix A to 28 C.F.R. § 35 explains that:

> Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

28 C.F.R. § 35, App. A. Furthermore, 28 C.F.R. § 35.164 sets forth limitations on the duty to provide auxiliary aids, stating:

> This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens.

28 C.F.R. § 35.164. The regulations further explain that: "The public entity shall honor the choice [of auxiliary aid] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under Sec. 35.164." 28 C.F.R. § 35.160. Thus, as articulated in the Appendix, the ADA and, by analogy, the Rehabilitation Act require that a public entity must give deference to a deaf person's choice of auxiliary aid, unless it can demonstrate that another effective means of communication exists, or that use of the means chosen would not be required under § 35.164.

4. Analysis

In this case, the parties do not dispute that Plaintiff qualifies as an individual with a disability who otherwise is qualified to participate in and receive services from the County, or that the County receives

federal financial assistance within the meaning of the Rehabilitation Act. Instead, Plaintiff contends, and the County denies, that the Jail was required to provide him with auxiliary aids and interpretive services necessary to enable him to participate in and enjoy the benefits of the Jail's services and that written notes used by County employees were not effective accommodations for this purpose.

Plaintiff identifies multiple separate instances in which the County allegedly failed to fulfill its obligation under the ADA and Rehabilitation Act. As to each of these allegations, Defendant argues that Plaintiff has failed show any evidence creating a disputed issue of fact that the County acted with the requisite deliberate indifference that must be shown for a plaintiff to recover monetary damages. Plaintiff responds that that he should not be required to show any actual evidence of discriminatory intent to survive summary judgment on his claim for monetary damages and that allegations of discriminatory intent are sufficient to survive summary judgment.

Plaintiff's argument relies on the Third Circuit's opinion in *Chisolm v. McManimon*, 275 F.3d 315 (3d Cir. 2001), which bears a striking resemblance to the present case. In *Chisolm*, the plaintiff, a deaf person, was arrested and taken to a detention center. *Id.* at 317. At the detention center, the plaintiff requested an ASL interpreter and a TTY.[4] *Id.* at 318. He was denied these auxiliary aids, and therefore attempted to communicate through notes and lip-reading. *Id.* The detention center also placed him in a cell with a tele-

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[4] TTY stands for Text Telephone. It is also sometimes called a TDD, or Telecommunication Device for the Deaf.

vision equipped with closed captioning, but did not activate the service for him. *Id.* Although the defendants eventually permitted the plaintiff to use a TTY, he did not receive it until several days into his detention. *Id.* The plaintiff therefore filed suit against the detention center, alleging that it discriminated against him by failing reasonably to accommodate his disability. In reversing the District Court's grant of summary judgment for the defendant, the Third Circuit explained:

> Chisolm presented evidence indicating that ASL was his primary language of communication and that he was not proficient in either lip-reading or written English. From this evidence, a reasonable trier of fact could infer that these alternative aids were ineffective.

Id. at 328.

Plaintiff's reliance on *Chisholm* is misplaced for multiple reasons, not the least of which is that this Court is obliged to follow controlling precedent in the Ninth Circuit, primarily *Duvall*, not those of its sister circuits. Further, the Third Circuit's opinion in *Chisholm* makes no mention of a heightened standard governing claims for monetary damages in suits brought under the ADA or Rehabilitation Act. The absence of this discussion is not surprising, as *Chisholm* was decided in 2001, the same year as *Duvall*. As the Ninth Circuit's opinion in *Duvall* explains, the applicable standard for the recovery of monetary damage under the ADA was unclear at that time, both in the Ninth Circuit and elsewhere. 260 F.3d at 1138-39. More recent opinions by circuit courts that have expressly decided the question have held that to recover compensatory damages under either the ADA or the Rehabil-

itation Act, a plaintiff must establish that the defendant's discrimination was intentional. *See Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 126 & n. 20 (1st Cir. 2003); *Garcia v. S.U.N.Y. Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 115 (2d Cir. 2001); *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009). Several other circuits, while not expressly deciding the question, have suggested or implied the same. *See Douris v. Office of Pa. Att'y Gen.*, 174 Fed. Appx. 691, 693 (3d Cir. 2006); *Moreno v. Consol. Rail Corp.*, 99 F.3d 782, 791 (6th Cir. 1996); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 561 (7th Cir. 1996). Accordingly, the Court follows *Duvall* and declines to follow *Chisholm*.

Therefore, controlling precedent in this Circuit confines the Court's inquiry to whether there is a genuine issue of whether Plaintiff was intentionally excluded from participation in, or denied the benefits of, the County's services, programs, or activities, or was otherwise discriminated against because he was deaf. The Court next applies this standard to each of Plaintiff's specific allegations.

5. Specific Conduct of the County

As discussed above, Plaintiff identifies multiple separate instances in which the County allegedly failed to fulfill its obligation under the ADA and Rehabilitation Act. The County denies these allegations, arguing that Plaintiff presents no evidence that the County acted with the requisite deliberate indifference. Additionally, the County alleges that much of the conduct alleged by Plaintiff to be in violation of the ADA

and Rehabilitation Act was disclosed for the first time after the close of discovery and in response to Plaintiff's motion for summary judgment and should, therefore, be dismissed regardless of any determination on the merits. The Court addresses the County's latter argument first and then addresses each instance of conduct alleged to be in violation of the ADA and Rehabilitation Act.

a. Federal Rule of Civil Procedure 8(a)(2)

The County argues that Plaintiff's allegations involving Plaintiff's request (1) for an auxiliary aid to make telephone calls; (2) for an ASL interpreter to speak with Nurse Julie Nielson; (3) for closed captioning to be turned on for the Jail televisions; and (4) for an ASL interpreter for his meetings with pre-trial services, were not disclosed until after the close of discovery and in response to the County's Motion for Summary Judgment. "Federal Rule of Civil Procedure 8(a)(2) requires that allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pickern v. Pier 1 Imports (U.S), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). Accordingly, "[a] complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (refusing to allow plaintiff to proceed at summary judgment on unpled theory of liability under ADEA because defendant had no notice of which actions to defend). "Unless a plaintiff includes allegations in her complaint or informs the defendant before the close of discovery of [his or] her intent to rely on previously undisclosed

allegations, [he or] she may not assert them for the first time in opposing summary judgment." *McKinney v. Am. Airlines, Inc.*, 641 F. Supp. 2d 962, 982 (C.D. Cal. 2009) (citing *Coleman*, 232 F.3d at 1291-94).

The Ninth Circuit's decision in *Pickern* in instructive on this point. In that case, the plaintiff generally alleged that the defendant's store violated the ADA because it "contains architectural barriers that make it inaccessible." 457 F.3d at 968. In response to the defendant's motion for summary judgment, the plaintiff attempted to raise additional ADA violations that went beyond what was alleged in her complaint. *Id.* The District Court found that the plaintiff failed to provide the defendant with adequate notice of the new allegations and granted summary judgment to the defendant on those claims. *Id.* The Ninth Circuit affirmed the District Court's ruling, holding that the plaintiff could have filed an amended complaint to include the additional claims, but failed timely to do so. *Id.*

In this case, Plaintiff could have, but did not, inform the County of additional conduct that allegedly violated the ADA and Rehabilitation Act. Accordingly, the Court finds that Plaintiff failed to provide the County with adequate notice of the additional allegations and that this failure warrants summary judgment on Plaintiff's ADA and Rehabilitation Act claims premised on those allegations.[5] Despite this finding,

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[5] Specifically, this finding applies to all of Plaintiff's allegations related to Plaintiff's requests: (1) for an auxiliary aid to make telephone calls; (2) for an ASL interpreter to speak with Nurse Julie Nielson; (3) for closed captioning to be turned on for the Jail televisions; and (4) for an ASL interpreter for his meetings with pre-trial services.

the Court also reviewed all of Plaintiff's allegations below and finds that there is no evidence in the record creating a genuine issue on whether the County intentionally violated the ADA or the Rehabilitation Act.

b. Arrangement for Interpreter at Court Appearance

Plaintiff alleges that no arrangements were made by the County for an ASL interpreter to be available at Plaintiff's arraignment. It is undisputed that no ASL interpreter actually appeared at Plaintiff's January 15, 2013 arraignment. Precisely who was at fault for the lack of an interpreter is disputed. Plaintiff asserts that the County failed to provide the Circuit Court with appropriate information. The County, in turn, argues that it did provide adequate information to the Court's staff to inform them that Plaintiff required an ASL interpreter.[6]

The undisputed evidence in the record shows that the County timely provided documents to the Circuit Court before Plaintiff's January 15 arraignment, including the Sherriff's Office "mark-up" list[7] and the Multnomah County Pre-Trial Release Office Interview Report. The parties agree that these documents identify that Plaintiff was deaf and required an ASL interpreter.

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[6] As the Court explained in its ruling on the State's Motion for Summary Judgment (Dkt. 77), the Circuit Court's actions are attributable to the State of Oregon.

[7] The record is unclear regarding whether the Sherriff's "mark-up" list includes Mr. Iwamoto's notes from his interactions with Plaintiff. Regardless, both parties agree the notes from Mr. Iwamoto, a County employee, indicate that Plaintiff required an ASL interpreter and that Mr. Iwamoto's notes were timely provided to the Circuit Court.

Therefore, the undisputed evidence in the record shows that the County was not deliberately indifferent to Plaintiff's need for an ASL interpreter at his arraignment. This aspect of Plaintiff's claim is dismissed.

c. The Booking Process

Plaintiff alleges that he requested an ASL interpreter or an auxiliary aid during the booking process but was not provided with either accommodation. Although Plaintiff generally alleges that this process was difficult and confusing without an interpreter or auxiliary aids, Plaintiff's Amended Complaint specifically states that corrections officers did attempt to locate an available text telephone to assist Plaintiff but were unable to find one. Pl.'s Amend. Compl., p. 6 ¶ 20, Dkt. 60. The County's failed attempt to find an available auxiliary aid does not rise to the level of "deliberate indifference" that Plaintiff must show to recover monetary damages. *Duvall v. County of Kitsap*, 260 F.3d at 1138 (explaining that "bureaucratic slippage" or negligence does not amount to deliberate indifference). Moreover, Plaintiff provides no explanation as to how he was denied any benefit or service during the booking process because his preferred accommodation was not available. Plaintiff admits that he has been booked at the Jail on five previous occasions. Although the booking process is undoubtedly difficult for all arrestees, Plaintiff does not explain how the booking process would have been different in any material respect if he had been provided with his preferred accommodation. Accordingly, there is no issue of disputed fact regarding this allegation. This aspect of Plaintiff's claim is dismissed.

d. Plaintiff's Request to Make Phone Calls

Plaintiff alleges that he made multiple requests for Jail staff to provide him with auxiliary aids so that he could make phone calls to his mother or an attorney but that no auxiliary aid was ever provided. The County's response to this allegation is that Plaintiff was given a copy of the Jail's inmate manual, which states on page 17 that inmates may obtain a TTY machine by filling out a request form and handing that form to corrections staff. Plaintiff concedes that he did not file a written request for an interpreter and the County contends that, because Plaintiff has been confined in the Jail on five separate occasions, he must have been aware that he needed to fill out a form if he wanted a TTY. Additionally, Captain Raimond Adgers, a County employee, testified that inmates may verbally request auxiliary aids from Jail staff and that Jail staff will assist inmates in filling out request forms. Dkt. 93, Ex. A.

The parties do not dispute that the Jail has TTY machines available for inmates to use for telephone calls. It is also undisputed that Plaintiff was never provided with a TTY machine. Plaintiff, however, fails to present any evidence that the County actually refused to provide him with a TTY machine. Because Plaintiff's assertion that he did not receive a TTY machine is insufficient to create a disputed issue of material fact that the County intentionally discriminated against Plaintiff, this aspect of Plaintiff's claim is dismissed.

e. Closed Captioning on Televisions

Plaintiff alleges that he wrote a note to a corrections officer requesting that the closed captioning on

the Jail televisions be turned on but that this was not done. Plaintiff does not, however, allege that this failure was intentional and provides no evidence that this failure was more than an unintentional oversight. This aspect of Plaintiff's claim is dismissed.

f. Plaintiff's Interactions with Nurse Nielson

Plaintiff alleges that he requested an interpreter during his interactions with Nurse Julie Nielson but that one was not provided. Plaintiff contends that Gresham police officers hurt his back and neck during his arrest but that he was unable to communicate this to Nurse Nielson to receive medical care. The County responds that Plaintiff's interactions with the nurse by written note were sufficient to comply with the ADA.

Here, Plaintiff's general complaint that no interpreter was provided upon his request is insufficient to demonstrate that the County intentionally discriminated against Plaintiff. Plaintiff's only alleged harm is that he did not receive the specific medical attention he wanted. The evidence in the record, however, shows that Plaintiff's interactions with Nurse Nielson involved little more than a standard evaluation conducted with all inmates promptly after booking. There is also no evidence in the record that Plaintiff was denied any specific benefit or service that is regularly provided to other inmates. Accordingly, this aspect of Plaintiff's claim is dismissed.

g. Plaintiff's Interactions with Recognizance Officer Iwamoto

Plaintiff alleges that he requested an ASL interpreter during his interactions with Recognizance

Officer Eric Iwamoto on January 14, 2013. Plaintiff's allegations, however, do not specifically identify any harm suffered by Plaintiff during his interaction with Mr. Iwamoto. Instead, Plaintiff seems to argue that Mr. Iwamoto's inability to call an ASL interpreter was, by itself, a violation of the ADA, or in the alternative, that Mr. Iwamoto's interview results would have been different and Plaintiff would have been released at his January 15 arraignment if an interpreter had been present with Mr. Iwamoto the day before. Plaintiff provides no explanation for the latter argument, and in fact concedes that Mr. Iwamoto wrote in his interview notes that Plaintiff needed an ASL interpreter for his arraignment. Accordingly, there is no disputed issue of material fact on this point and this aspect of Plaintiff's claim is dismissed.

h. Plaintiff's Interaction with Pretrial Services

Plaintiff alleges that he requested, but was not provided with, an ASL interpreter during his interactions with Michale Sacomano, a case manager for Pretrial Services. Plaintiff alleges that the failure to provide an interpreter led to difficult and confusing interactions with Ms. Sacomano. For example, Ms. Sacomano allegedly logged that Plaintiff missed a report when he had permission to be out of the state. Ms. Sacomano also allegedly accused Plaintiff of using his disability "as an excuse" for not following her instructions and threatened him with violation notices. Ms. Sacomano testified that Plaintiff never requested an interpreter, but did state that she had used interpreters with other deaf inmates.

Here, Plaintiff fails to create a genuine issue of whether Ms. Sacomano's failure to use an ASL interpreter in her interactions with Plaintiff actually caused him harm. Plaintiff's allegations, at best, show that Ms. Sacomano was discourteous. Plaintiff, however, did not actually suffer any cognizable harm. Plaintiff's only concrete allegation, that Ms. Sacomano incorrectly logged that Plaintiff missed a required report, amounts no more than "bureaucratic slippage" that does not rise to the level of intentional discrimination against Plaintiff. This aspect of Plaintiff's claim is dismissed.

B. Plaintiff's Claim for Negligence

In addition to his claims under the ADA and the Rehabilitation Act, Plaintiff brings a claim for negligence based on County employees' failure to provide him with an interpreter or auxiliary aids while he was at the Jail. Plaintiff alleges that the County's failure to provide auxiliary aids was negligent because it harmed Plaintiff's liberty and property. Under Oregon law, a common law negligence claim requires the plaintiff to demonstrate that: (1) defendant's conduct caused a foreseeable risk of harm; (2) the risk is to an interest of a kind that the law protects against negligent invasion; (3) defendant's conduct was unreasonable in light of the risk; (4) the conduct was a cause of plaintiff's harm; and (5) plaintiff was within the class of persons and plaintiff's injury was within the general type of potential incidents and injuries that made defendant's conduct negligent. *Solberg v. Johnson*, 306 Or. 484, 490-91 (1988) (citing *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1 (1987) and *Stewart v. Jefferson Plywood Co.*, 255 Or. 603, 606 (1970)). Under *Fazzolari,* the Oregon Supreme Court has abandoned the tradi-

tional notion of "proximate cause," as well as the concept of common-law duty, for cases involving personal injury or property damage in the absence of a special relationship. *Fazzolari*, 303 Or. at 17. In the alternative, Plaintiff also alleges that the County had a special duty to protect Plaintiff's liberty and property, and that this special duty required the County to provide Plaintiff with auxiliary aids.

To support his claim for negligence, Plaintiff does no more than reassert the same allegations against the County that Plaintiff raised under the ADA and Rehabilitation Act. Reviewing Plaintiff's alleged harms, the Court finds no evidence in the record showing a genuine issue that Plaintiff suffered a cognizable harm that was caused by the County's allegedly negligent conduct. For example, Plaintiff alleges that Mr. Iwamoto's conduct was negligent and that he was somehow the cause of Plaintiff's delayed release from the Jail. Plaintiff concedes, however, that the County did provide documents to the Circuit Court indicating that Plaintiff was deaf and required an ASL interpreter. The evidence in the record, even when viewed in the light most favorable to Plaintiff, demonstrates that only the Circuit Court, a State actor,[8] may have been negligent.

Similarly, Plaintiff's claim that the County negligently failed to provide a TTY so that Plaintiff could call an attorney or his mother is without merit.[9] Plain-

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[8] *See* n. 6, *supra*.

[9] As explained in more detail above, Plaintiff's allegation that he requested a TTY from the County to make phone calls was raised for the first time in Plaintiff's response to the County's Motion for Summary Judgment. Therefore, the Court also grants sum-

tiff's claim that he could have contacted an attorney and that his attorney would have arranged for his immediate release from the Jail is speculative. In addition, Plaintiff's claim that a phone call to his mother would have prevented his van from being stolen by a third-party is similarly speculative, and in any event, is not a harm that the County can be found liable for under Oregon law. *See Buchler v. State By & Through Oregon Corr. Div.*, 316 Or. 499, 511-12 (1993) (holding that "mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm-producing force, does not cause the harm so as to support liability for it"). For these reasons, the Court grants summary judgment against Plaintiff's claim for negligence.

C. False Imprisonment

Plaintiff contends that his confinement by the County was unlawful because he was held longer than 36 hours without arraignment in violation of Or. Rev. Stat. ("ORS") § 135.010. To state a claim for false imprisonment under Oregon law, a plaintiff must allege that: (1) the defendant confined the plaintiff; (2) the defendant intended its actions to cause confinement; (3) the plaintiff was aware of the confinement; and (4) the confinement was unlawful. *Oviatt v. Pearce*, 954 F.2d 1470, 1479 (9th Cir. 1992). ORS § 135.010 states in relevant part:

> Except for good cause shown or at the request of the defendant, if the defendant is

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mary judgment to the County on that portion of Plaintiff's negligence claim premised on a negligent failure to provide a TTY to make phone calls.

> in custody, the arraignment shall be held during the first 36 hours of custody, excluding holidays, Saturdays and Sundays. In all other cases, except as provided for in ORS 133.060, the arraignment shall be held within 96 hours after the arrest.

Id.

Plaintiff's specific contention regarding his claim of false imprisonment is that the 12 additional hours Plaintiff spent in jail after Judge Dailey postponed Plaintiff's arraignment[10] amounts to "unlawful" confinement because, but for the County's alleged negligent failure to inform the Court that Plaintiff was deaf, Plaintiff likely would have been released from jail one day earlier. This argument, framed as a claim for false imprisonment, is without merit. Plaintiff does not contend that Judge Daley's order to postpone his arraignment was unlawful or that the County's compliance with that order was unlawful. Instead, Plaintiff complains only of the County's negligence in allegedly failing to inform the Court that he required an interpreter and of the Circuit Court's negligence in not acting upon that information. Because it is the alleged negligence of the County that Plaintiff actually objects to, Plaintiff's claim appropriately sounds in negligence rather than the intentional tort of false-imprisonment.

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[10] As explained above, on January 15, 2013, Plaintiff appeared for arraignment by video conference before Multnomah County Circuit Judge Kathleen Dailey. No ASL interpreter was present at that time. When Judge Dailey learned that Plaintiff was deaf, she postponed Plaintiff's arraignment to the following day, when an ASL interpreter would be available.

Plaintiff's real complaint appears to be that Judge Dailey did not order that he be released immediately and instead rescheduled his arraignment to the following day. As the Court's previous ruling on the State of Oregon's motion for summary judgment (Dkt. 77) found that Judge Dailey's actions were covered by absolute judicial immunity, and Plaintiff's allegations are appropriately directed at the conduct of Judge Dailey, Plaintiff's claim for false imprisonment must be dismissed.

Furthermore, the statutory text of ORS § 135.010 does not indicate that Plaintiff must be released from the Jail within 36 hours as Plaintiff suggests. Instead, ORS § 135.010 only requires that an arraignment be held within 36 hours unless there is "good cause shown" for the delay. The County, however, did in fact bring Plaintiff for arraignment on January 15, in compliance with the requirements of ORS § 135.010. It was Judge Dailey, not the County, who ordered that Plaintiff's arraignment be continued until the following day. Accordingly, to the extent that Plaintiff's claim for false imprisonment is solely premised on a violation of ORS § 135.010, the Court finds that the County did not violate the statute. Moreover, even if the County's alleged negligence did contribute to the Judge's decision to continue Plaintiff's arraignment to the following day, and that negligence resulted in a violation of ORS § 135.010 attributable to the County, the Court finds that the County's compliance with the Judge's scheduling order amounts to "good cause shown" within the meaning of ORS § 135.010.

CONCLUSION

Defendant Multnomah County's Motion for Summary Judgment (Dkt. 85) is GRANTED. This case is DISMISSED.

IT IS SO ORDERED.

DATED this 24th day of March, 2015.

/s/ Michael H. Simon
United States District Judge

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (NOVEMBER 27, 2017)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID UPDIKE,

Plaintiff-Appellant,

v.

MULTNOMAH COUNTY, a Municipal Corporation and STATE OF OREGON,

Defendants-Appellees,

and

CITY OF GRESHAM,

Defendant.

No. 15-35254
D.C. No. 3:13-cv-01619-SI
District of Oregon, Portland

Before: TASHIMA, GOULD, and RAWLINSON, Circuit Judges

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc.

Fed. R. App. P. 35. Appellee's Petition for Rehearing En Banc is DENIED.