IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, MARY HILL, and JOSEPH NETTLES, Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION and MICHAEL NAIL, in his official capacity as Commissioner of the Georgia Department of Community Supervision, Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

ORDER

Before the Court are Defendants Georgia Department of Community Supervision and Commissioner Michael Nail's Motion for Summary Judgment [Doc. 200], as well as Plaintiffs Brandon Cobb, Mary Hill, and Joseph Nettles's Motion for Class Certification. [Doc. 197]. Both motions are opposed. [Docs. 214, 217].[1] The Court held a hearing on the motions on August 26, 2022. [Doc. 255].

[1] Both parties also filed replies in support of their respective motions. [Docs. 228, 230]. Additionally, the parties have filed numerous supplemental materials relating to these motions. Plaintiffs filed a Motion for Leave to Supplement Plaintiffs' Statement of Additional Material Facts in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. [Doc. 237], which was granted. [Doc. 240]. Defendants then responded. [Doc. 246]. Plaintiffs filed a Second Motion for Leave to Supplement Plaintiffs' Statement of Additional Material Facts [Doc. 249], which was granted. [Doc. 260]. Defendants responded to this as well. [Doc 251]. Plaintiffs

After careful consideration of the parties' arguments, the applicable law, and the relevant parts of the record, and for the reasons discussed herein, the Court denies Defendants' Motion for Summary Judgment and grants Plaintiffs' Motion for Class Certification.

I. Background[2]

Plaintiffs are deaf individuals on parole or probation in the State of Georgia. [Doc. 2-6 ¶¶ 3, 5; Doc. 197-24 ¶¶ 3, 6; Doc. 214-16 at 7–8, 52].[3] Because Plaintiffs are on parole or probation in Georgia, they are under the supervision of the Georgia Department of Community Supervision ("DCS"), which also supervises other deaf and hard of hearing individuals. [Doc. 214-1 ¶¶ 2, 12].

Deaf individuals communicate in different ways. For example, Plaintiffs'

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then filed a Motion for Leave to File Notice of Supplemental Authority in Opposition to Defendants' Motion for Summary Judgment [Doc. 252], which was granted [Doc. 253] and to which Defendants responded [Doc. 254]. Defendants followed with a Motion for Leave to Supplement the Record Re Pending Motions [Doc. 256], which the Court granted. [Doc. 259]. Plaintiffs responded [Doc. 257], and then Defendants replied [Doc. 258]. Thus, such extensive and aggressive briefing helps to explain why the Court struggled to rule on these motions within the normal six-month time frame.

[2] Plaintiffs filed their original complaint in July 2019. [Doc. 1]. Plaintiffs originally moved for class certification in this case in October 2019. [Doc. 53]. After briefing was completed, the Court held a hearing on the motion on March 9, 2020 [Doc.103]. The Court then issued an order delaying the issue of class certification and ordering the parties to engage in discovery related to the potential class and engage in mediation. [Doc. 104]. After various delays relating to the COVID-19 pandemic, the Court issued an order on July 27, 2020, terminating the motion for class certification and inviting plaintiffs to resubmit that motion after the close of discovery. After the Sixth Joint Motion for Extension of Time to Complete Discovery [Doc. 159], the discovery period concluded on June 29, 2021, except for limited discovery concerning Plaintiff Mary Hill, which closed on August 16, 2021. [Docs. 160, 179].

[3] Documents are referred to by ECF pagination instead of internal pagination.

primary language is American Sign Language ("ASL"), and they have difficulty communicating in written English. [Doc. 229 ¶ 64]. Like Plaintiffs, some deaf individuals may use "ASL as [their] primary and preferred language." [Doc. 197-19 at 12]. However, not all deaf individuals communicate in the same way as Plaintiffs. Some deaf individuals can "navigate both ASL and written English with much more ease than other Deaf people," while others "who are profoundly deaf . . . do not use ASL" and communicate another way, such as with written English. [*Id.* at 12–13, 24]. Deaf individuals who do not use ASL but understand written English can sometimes communicate by using Communication Access Realtime Translation ("CART"), which transcribes what someone says contemporaneously. [Doc. 69-1 at 64, 112–14].

As part of their supervision, Plaintiffs and other supervisees have "multiple . . . interactions" with DCS, including initial intake, home visits, employment visits, random drugs screens "from time to time," and counseling. [Doc. 214-4 at 19–20]. During the initial intake, DCS's community supervision officers ("CSOs") discuss the terms and conditions of supervision to the supervisee and the process of violations and sanctions if conditions are not met. [*Id.* at 24-26; Doc. 214-28 at IV.B.1; Doc. 214-9 at 83]. Further, CSOs are supposed to see supervisees "every so often." [Doc. 214-4 at 30–31]. During these interactions with supervisees, the CSOs discuss services to address housing, employment, and other needs. [Doc. 229 ¶ 36].

In addition, DCS helps supervisees obtain information about substance abuse treatment and mental health services, which leads to better integration into the community and better outcomes on supervision. [*Id.* ¶ 35]. Plaintiffs also contend that the CSOs have the authority to change or modify the conditions of supervision, such as by mandating an anger management course or by choosing the curfew for a supervisee. [Doc. 214-2 ¶ 34].

To have these interactions with its deaf supervisees that use ASL, such as Plaintiffs, DCS can provide live interpreters or use video remote interpreting ("VRI"). [Doc. 214-1 ¶¶ 22–23]. VRI is a video service that provides an ASL interpreter at a remote location to facilitate communication between individuals who do not speak a common language. [*Id.*]. According to Plaintiffs, VRI "can be useful" depending on the technology, context, internet connection, screen size, and capability of the interpreters, but it "does not provide an equivalent experience to that provided by a live interpreter." [Doc. 214-2 ¶¶ 38–39, 47]. VRI can be a "good or bad" method of communication depending on whether the internet connection is "decent" and whether the interpreter is "capable." [Doc. 229 ¶ 79].

Plaintiffs have experienced poor communication with VRI during their interactions with DCS: Mr. Cobb's CSO has used VRI in their meetings, but he has "really struggle[d]" to communicate with her in that way and has "had difficulty understanding what was being communicated" [Doc. 214-14 at 49–50; Doc. 249-1

at 36]; "every time" the CSOs used VRI to communicate with Ms. Hill, she "couldn't understand any of those interactions" [Doc. 214-16 at 18–19]; and Mr. Nettles "can count one or two times where communication went really well with VRI," but "[a]ll the other times, communication has been difficult or impossible" [Doc. 197-25 ¶ 7]. In sum, Plaintiffs' communications both *to* and *from* DCS have been ineffective at times.

In addition to not receiving helpful services and information during their interactions with their CSOs, Plaintiffs fear that they will suffer other consequences, such as revocation of their supervision and reincarceration, because of such poor communication. [Doc. 2-6 ¶¶ 20–21; Doc. 214-14 at 24–25, 29–30]. This fear came true for both Mr. Cobb and Ms. Hill when they were reincarcerated upon parole and probation revocation, respectively. [Doc. 249-1 at 36-38; Doc. 257 at 1-3; Doc. 214-18 at 102–03].

Mr. Cobb was arrested on July 26, 2022, for allegedly violating the conditions of his parole. [Doc. 249-1 at 36]. Though Mr. Cobb requested in-person interpreters for his meeting with his CSO on that date, the CSO used VRI to conduct the meeting. [*Id.*] On August 4, 2022, his CSO met with Mr. Cobb in jail and again communicated through the ASL interpreter over VRI on a cell phone screen. [*Id.*] Mr. Cobb told his CSO through the VRI interpreter that he could not understand the information, but the CSO continued anyway, and Mr. Cobb signed a document that—

unbeknownst to him—waived his right to a preliminary hearing before the parole board. [*Id.* at 36-37]. This document listed five alleged parole violations, including an alleged failure to notify his CSO of his arrest on July 1, 2022, to receive a substance abuse assessment by a counselor, and to pay a "Victim's Compensation Fee in the amount of $140."[4] [Doc. 249-4 at 10; Doc. 251-1, Ex. J]. Mr. Cobb did not understand these reasons or the contents of the document he signed until his lawyers explained it to him on August 8, 2022, and he would not have signed it had his CSO explained it to him. [*Id.* at 36-37]. Mr. Cobb was also unaware of the terms of his parole that he had allegedly violated because his CSO had not previously communicated the terms to him in a way Mr. Cobb could understand. [*Id.* at 38]. Mr. Cobb's parole was revoked on September 6, 2022, and he is currently in the custody of Georgia Department of Corrections ("GDC"). [Doc. 256 at 2, 13; Doc. 257 at 2].

Ms. Hill was reincarcerated on a probation revocation when she allegedly violated her probation conditions by failing to complete community service and by failing a drug screen. [Doc. 214-18 at 102–03]. When meeting with Ms. Hill at the jail on November 3, 2020, her CSO used a laptop computer to read a proposed consent order through an ASL interpreter over VRI. [*Id.*] The order admitted the

[4] Mr. Cobb admitted to failing a drug test on May 24, 2022, and on June 23, 2022. [Doc. 249-4 ¶¶ 5,6,7]. Mr. Cobb was arrested on July 1, 2022, for domestic violence involving a fight with his girlfriend. [*Id.* at ¶ 12; Doc. 152 at 6].

alleged drug and community service violations. [*Id.*] Although the CSO failed to read two critical paragraphs of the order [Doc. 200-5 ¶ 11], which required 60 days incarceration, the CSO asked Ms. Hill to sign the order, without explaining that by signing it she was waiving her right to a hearing before a judge. [Doc. 214-18 at 103].

As for Mr. Nettles, he completed his probation September 5, 2021. [Doc. 256 at 3]. No revocation proceedings were initiated against him during his supervision. [Doc. 214-1 ¶ 52].

In the operative complaint from July 2021, Plaintiffs claim that Defendants have discriminated against them on the basis of disability in violation of Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment. [Doc. 181 at 31–39.] Plaintiffs seek an order enjoining Defendants from engaging in such unlawful discrimination and for other injunctive relief, including:

> directing Defendants to immediately provide qualified ASL interpreters, auxiliary aids and services, and reasonable modifications, as determined by each individual's preferred method of communication, to Plaintiffs and to all other deaf and hard of hearing individuals subject to GDCS supervision, including: (i) at every meeting and encounter with a GDCS officer and (ii) to facilitate effective communication of the contents of any written documents related to the terms of these individuals' supervision.

[*Id.* at 40.]

In terms of the injunctive relief Plaintiffs seek, Commissioner Nail states that Plaintiffs' requested relief could cost DCS over $3 million to hire interpreters for all meetings between the CSOs and the supervisees and to hire additional CSOs to provide security for the interpreters during home visits. [Doc. 200-4 ¶¶ 8, 14]. He further states that DCS's budget does not support such "additional manpower and resources," such that implementing those services "would alter the funding of agency operations in a detrimental manner" and "negatively impact the agency's ability to provide supervision at the level currently provided." [*Id.* ¶ 15].

Through this action, Plaintiffs also "seek to represent a class of all present and future deaf or hard of hearing people supervised by GDCS."[5] [Doc. 181 at 28]. Plaintiffs use the term "deaf and hard of hearing" to refer to "individuals with hearing levels or hearing loss that qualify as disabilities under the ADA and the Rehabilitation Act." [Doc. 181 ¶ 2 n.1; Doc. 197-1 at 8]. Plaintiffs further explain that their use of "Deaf" refers to "individuals with hearing loss who self-identify as culturally deaf," and thus "[t]he phrase 'deaf and hard of hearing' used [in their motion for class certification] includes deaf, hard of hearing, d/Deaf-Disabled, d/DeafBlind, and Deaf individuals." [Doc. 197-1 at 8]. Plaintiffs reiterate their

[5] In addition to injunctive and declaratory relief, Plaintiffs also seek "reasonable service awards for the named Plaintiffs" in the event that a class is certified. [Doc. 181 at 40]. The Court need not decide this request at this juncture, but the Court notes that such "service awards" are barred by recent Eleventh Circuit precedent. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1256-1261 (11th Cir. 2020) (holding that Supreme Court precedent prohibits incentive awards for class representatives).

claims in their motion for class certification, alleging that "DCS is denying Plaintiffs and other deaf and hard of hearing individuals subject to its supervision the auxiliary aids and services and reasonable modifications they need to communicate effectively and to fully participate in DCS programs, services, and activities." [Doc. 197-1 at 8].

In terms of the proposed class, DCS has identified approximately 88 individuals under its supervision as deaf or seriously hearing-impaired out of the roughly 200,000 individuals that it supervises, though counsel for DCS admitted during the August 26, 2022, hearing that this number could be greater. [Doc. 200-3 ¶ 9; 214-1 ¶¶ 10, 12; Doc. 255]. During the initial intake, CSOs are directed to ask supervisees whether they require ADA accommodations, [Doc. 214-30 at 3 (under seal)], and "DCS makes entries in its Portal computer system, of disability status (including deafness) when it comes to the attention of DCS personnel." [Doc. 217 at 23]. DCS also has access to large portions of GDC records, which may reference a supervisee's hearing loss. [Doc. 214-4 at 41-44]. While DCS "does not maintain custody" over its supervisees and does not "maintain offenders' medical records, results of hearing tests, information about hearing capabilities, or information regarding hearing impairment," DCS does maintain information about a supervisee's hearing impairment once it learns about the impairment through self-identification, a doctor's statement provided by a supervisee, or apparent difficulty in effective

communication with the supervisee. [Doc. 200-3 ¶ 23]. However, because it does not have custody over the supervisees, DCS does not have the "authority to conduct medical evaluations" regarding hearing ability. [*Id.*].

After Plaintiffs brought this action, Defendants enacted an ADA policy (the "ADA Policy") in November 2019 in an attempt to remedy Plaintiffs' concerns. [Doc. 76 at 20; Doc. 214-9 at 102]. Defendants have revised the ADA Policy at least twice since it was adopted in 2019. [Doc. 200-3 ¶ 6; Doc. 214-9 at 102]. Relevant here, the operative version of the ADA Policy states that, during the initial interview with supervisees, the CSOs "will use auxiliary aids and services (AAS) as necessary in order to have effective communication." [Doc. 197-13 § IV.C.1]. In addition, the ADA Policy states "DCS will generally, upon request, provide appropriate aids and services leading to effective communication." [*Id.* § IV.E].

Now before the Court are Defendants' Motion for Summary Judgment [Doc. 200] and Plaintiffs' Motion for Class Certification. [Doc. 197]. The Court held a hearing on the motions on August 26, 2022. [Doc. 255].

II. Discussion

The Court begins by addressing Defendants' Motion for Summary Judgment and then considers Plaintiffs' Motion for Class Certification.

A. Defendants' Motion for Summary Judgment

Under the Federal Rules of Civil Procedure, the Court "shall grant 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). "A genuine dispute of material fact exists when 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020). The Court construes the evidence in the light most favorable to the non-moving party. *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1263 (11th Cir. 2020).

As noted, Plaintiffs brought claims under Title II of the ADA and Section 504 of the Rehabilitation Act.[6] Both of these claims "forbid discrimination on the basis of disability in the provision of public services." *J.S., III ex rel. J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017). Claims under the ADA and the Rehabilitation Act "are governed by the same standards, and the two claims are generally discussed together." *Id.* To prevail on these claims, a plaintiff must show that she (1) is a qualified individual with a disability, (2) was excluded from participating in or denied the benefits of a public entity's services, programs, or

[6] Plaintiffs also brought a claim under the Fourteenth Amendment, but the parties do not address the merits of that claim in any detail. The Court therefore does not address the merits of that claim either.

activities, or otherwise discriminated against, and (3) the exclusion, denial of benefit, or other discrimination was by reason of the disability. *Id.*

In their motion, Defendants do not argue that they are entitled to summary judgment as a matter of law based on the foregoing substantive legal principles. Rather, they assert: (1) Plaintiffs lack standing to seek injunctive relief, (2) Plaintiffs' claims are moot in light of DCS's ADA Policy, and (3) Plaintiffs are not entitled to injunctive relief. [*See generally* Doc. 200; Doc. 256]. The Court addresses those three issues in turn.

i. Standing

Defendants first argue that Plaintiffs lack standing to seek injunctive relief. For the Court to have Article III jurisdiction over this case, a plaintiff must have standing to bring his lawsuit. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1261 (11th Cir. 2021). Proposed class representatives like Plaintiffs must likewise have standing to pursue claims on behalf of a class. *See Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1287 (11th Cir. 2001). The plaintiff has standing if three requirements are met: (1) he suffered an "injury in fact," which is an injury that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly traceable" to the challenged conduct of the defendant and "not the result of some action by a third party"; and (3) it is likely that the injury will be redressed by a favorable court decision. *Equifax*, 999 F.3d at 1261.

For the first requirement of standing, to obtain injunctive relief in relation to future conduct, the plaintiff "must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 832 (11th Cir. 2017). The threat of future injury to the plaintiff must be "real and immediate." *Id.* In the context of this case, that means there must be a "real and immediate likelihood" that Plaintiffs will interact with DCS and that they "will likely experience a denial of benefits or discrimination" during those interactions. *Id.* The Eleventh Circuit has also stated that this likelihood of future injury must be a "substantial likelihood." *AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, 938 F.3d 1170, 1179 (11th Cir. 2019).

Here, Defendants argue that Plaintiffs lack standing to bring their claims individually and on behalf of the proposed class because the three standing requirements are not met. [Doc. 200 at 21–35; Doc. 256 at 1-4]. As for the injury-in-fact requirement, Defendants contend that the "primary future harm" alleged by Plaintiffs is that "they do not know the conditions of supervision and as a result are subject to the 'constant risk' or 'constant threat of incarceration' in the form of revocation." [Doc. 200 at 27.] Defendants "concede that in the November 3, 2020 event, [in which Ms. Hill's probation was revoked] communication between [the CSO] and Hill did not satisfy the DCS ADA Title II policy, which requires auxiliary aids and services sufficient to establish 'effective communication.'" [*Id.* at 28].

Nevertheless, Defendants argue, "this single failure is not evidence that Hill or any other offenders under DCS supervision face an immediate and substantial threat of future harm from violations by DCS of the ADA or other laws." [*Id.* at 27-28]. Defendants further argue that because Mr. Cobb and Mr. Nettles are no longer under the supervision of DCS, any standing that they had "has now evaporated and their claims are moot." [Doc. 256 at 1-3].

Regarding the other two requirements, Defendants argue that Plaintiffs cannot show that the risk of revocation is traceable to their conduct or that the Court can redress that potential injury because "other Georgia agencies which are not Defendants have independent legal responsibilities to communicate to probationers and parolees conditions of supervision." [*Id.* at 29–35].

According to Plaintiffs, Defendants' Motion for Summary Judgment is "an attempt to mischaracterize [their] claims." [Doc. 214 at 10]. Plaintiffs assert that the primary harm they suffer is not the risk of revocation, but the "Defendants' failure to provide effective communication *in the first place*" during their many interactions with DCS. [*Id.* at 21–25]. With the correct harm in mind, Plaintiffs argue that "there is no meaningful dispute that their harms are traceable to, and are redressable by, Defendants," as DCS's failure to comply with its legal obligations when interacting with Plaintiffs is "caused by, and can *only* be redressed by, Defendants." [*Id.* at 25–26].

The Court determines that there is sufficient evidence to find that Plaintiffs Ms. Hill and Mr. Cobb have Article III standing.[7] Starting with the injury-in-fact requirement, there is evidence that Ms. Hill and Mr. Cobb face a substantial likelihood that they will be affected by Defendants' allegedly unlawful conduct in the future. As an initial matter, there is a real and immediate likelihood that Ms. Hill and Mr. Cobb, who are or will be under the supervision of DCS by nature of being on parole or probation, will interact with DCS in the future. The Rule 30(b)(6) designee for DCS testified that supervisees have "multiple . . . interactions" with DCS, including initial intake, home visits, employment visits, random drugs screens "from time to time," and counseling. [Doc. 214-4 at 15–17]. Further, the CSOs are supposed to see supervisees "every so often." [*Id.* at 30–31].

[7] While Mr. Cobb's parole was recently revoked and he is presently in DCS custody, his term of imprisonment will be completed and his renewed term of probation will begin no later than May 2023. [Doc. 257 at 3]. Mr. Cobb was sentenced on May 15, 2014, to a term of 20 years, including nine years imprisonment followed by a term of probation for the remainder of the sentence. [*Id.*; Doc. 34-1 at 9]. Because Mr. Cobb will have served his prison sentence—nine years—by May 2023 through a combination of imprisonment and parole, his remaining eleven-year term of probation will begin at that time. [*Id.*]. Thus, Mr. Cobb faces a "substantial likelihood" of future injury by DCS. *Suncoast*, 938 F.3d at 1179. Moreover, Mr. Cobb asserts that ineffective communication during the course of Mr. Cobb's supervision contributed to his recent revocation. [Doc. 257 at 2]. For example, one of the reasons for revocation listed was that Mr. Cobb failed to pay the required "Victim's Compensation Fee." [*Id.*]. But, Mr. Cobb alleges that he did not understand what fees he was required to pay and believed that he had met all of his financial obligations. [*Id.*]. However, Mr. Nettles' situation is different because he successfully completed his probation in September 2021. [Doc. 256 at 3]. No evidence indicates a "substantial likelihood" of his return to probation in the future. Thus, the Court finds that Mr. Nettles does not have standing to pursue injunctive relief.

There is also a real and immediate likelihood that Ms. Hill and Mr. Cobb will experience a denial of benefits or discrimination during their interactions with DCS. During the meetings with supervisees, the CSOs discuss services to address housing, employment, and other needs. [Doc. 229 ¶ 36]. In addition, DCS helps supervisees obtain information about substance abuse treatment and mental health services, which leads to better integration into the community and better outcomes on supervision. [*Id.* ¶ 35].

However, both Ms. Hill and Mr. Cobb have stated that they have experienced ineffective communication during their interactions with DCS: Mr. Cobb's CSO has used VRI in their meetings, but Mr. Cobb has "really struggle[d]" to communicate with her in that way [Doc. 214-14 at 49–50], and "every time" the CSOs used VRI to communicate with Ms. Hill, Ms. Hill "couldn't understand any of those interactions" [Doc. 214-16 at 17–19]. Accordingly, due to this ineffective communication, Ms. Hill and Mr. Cobb are unable to effectively learn about helpful services and information from DCS that they would otherwise be able to learn and have accordingly suffered injury. *See Luke v. Texas*, 46 F.4th 301, 306 (5th Cir. 2022) ("Lack of meaningful access is *itself* the harm under Title II, regardless of whether any additional injury follows.")

Therefore, there is sufficient evidence to find that Ms. Hill and Mr. Cobb have an injury in fact because they face a substantial likelihood that they will be affected

by Defendants' allegedly unlawful conduct in the future. Indeed, the Eleventh Circuit recently held that plaintiffs had standing to pursue injunctive relief in a case involving similar facts to this case. *See Silva*, 856 F.3d at 831–33. In *Silva*, two deaf individuals sued under the ADA and the Rehabilitation Act because they claimed they could not effectively communicate with the staff at the defendants' hospitals. *Id.* at 829.

The Eleventh Circuit reversed the District Court's decision that the plaintiffs lacked standing, as the plaintiffs offered evidence sufficient to support a finding that they would return to the defendants' facilities and they "routinely experienced problems with the VRI devices not working at all or failing to transmit a clear screen image," so there was "good reason to believe that will continue to happen" at the defendants' hospitals when the plaintiffs returned in the future. *Id.* at 831–33. Like *Silva*, Ms. Hill and Mr. Cobb have an injury in fact because there is sufficient evidence that they will interact with DCS in the future and that their communication is ineffective due to problems with VRI.

As for the traceability and redressability requirements of standing, the Court determines that they are both met in this case. Plaintiffs' injury in fact—their inability to effectively communicate with DCS about helpful services and information—is fairly traceable to Defendants' purported conduct that does not allow for effective communication. Likewise, the Court can likely redress the injury

by issuing an injunction that requires Defendants to use a more effective method of communication.

In short, Plaintiffs have an injury in fact because they are unable to effectively communicate with DCS about helpful services and information, that injury is fairly traceable to Defendants' conduct, and the Court can likely redress that injury.[8]

ii. Mootness

Defendants next assert that Plaintiffs' claims are moot. A case is moot when events subsequent to the filing of the case deprive the Court of the ability to provide meaningful relief to the plaintiff, such that the Court lacks jurisdiction. *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1267 (11th Cir. 2020). A superseding policy can moot a case, but "only to the extent that it removes challenged features of the prior [policy]." *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992).

Under the voluntary-cessation exception to the mootness doctrine, a defendant's "voluntary cessation of allegedly illegal conduct does not moot" the case. *Keohane*, 952 F.3d at 1267. This exception reflects the "commonsense

[8] Because the Court finds that Plaintiffs' inability to effectively communicate with DCS about helpful services and information is a sufficient injury in fact, the Court need not decide whether, as raised by Defendants [*see* Doc. 200 at 21–35], the risk of Plaintiffs facing revocation of their supervision and reincarceration due to the ineffective communication is sufficient for Article III standing.

concern" that the defendant may change its conduct to moot the lawsuit but later "return to [its] old ways." *Id.*

When the government voluntarily ceases the challenged conduct, "there is a presumption that the government will not later resume the action." *Walker v. City of Calhoun*, 901 F.3d 1245, 1270 (11th Cir. 2018). In such a case, to show that the voluntary-cessation exception applies and that the case is not moot, the plaintiff must show there is a reasonable expectation that the government will "reverse course." *Id.* To decide whether such a reasonable expectation exists, the Court considers "three broad factors." *Id.*

First, the Court asks whether the government's change in conduct "resulted from substantial deliberation" or was "merely an attempt to manipulate [the Court's] jurisdiction." *Id.* Under this first factor, the Court looks to the timing of the change in conduct, the procedures used, and any explanations that may have motivated the change in conduct beyond the litigation. *Id.* Second, the Court asks whether the change in conduct was "unambiguous"—*i.e.*, whether the change in conduct "reflect[s] a rejection of the challenged conduct that is both permanent and complete." *Id.* Third, the Court asks whether the government has "consistently maintained its commitment to the new policy." *Id.*

Defendants argue that this case is moot because DCS now has the "comprehensive written" ADA Policy, which requires full compliance with the

ADA, and now allows the CSOs to engage VRI, CART, and other accommodations without administrative approval in order to communicate with deaf supervisees. [Doc. 200 at 18–20]. In response, Plaintiffs contend that the ADA Policy does not "actually address[] the concerns raised by Plaintiffs," so the case is not moot. [Doc. 214 at 30–33]. In any event, Plaintiffs assert that the three factors for the voluntary-cessation exception "weigh[] against a finding of mootness." [*Id.* at 28; *see id.* at 28–30, 33–37].

As an initial matter, the Court determines that the ADA Policy does not moot Plaintiffs' claims. Plaintiffs ask this Court for an injunction "directing Defendants to immediately provide qualified ASL interpreters, auxiliary aids and services, and reasonable modifications, *as determined by each individual's preferred method of communication*." [Doc. 181 at 40 (emphasis added)]. Yet, the ADA Policy states that, during the initial interview with supervisees, the CSOs "will use auxiliary aids and services (AAS) *as necessary* in order to have effective communication"—not the supervisees' preferred method of communication. [Doc. 197-13 § IV.C.1 (emphasis added)]. Indeed, the ADA Policy states "DCS will *generally*, upon request, provide appropriate aids and services leading to effective communication for qualified persons with disabilities." [*Id.* § IV.E (emphasis added)].

These provisions in the ADA Policy appear to leave a good deal of discretion to DCS and the CSOs and do not necessarily provide supervisees with their preferred

method of communication, as sought by Plaintiffs in this case. As such, there is still a live controversy between the parties. *See also Naturist Soc'y*, 958 F.2d at 1520 ("[A] superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case is not moot.").

However, even assuming the ADA Policy mooted Plaintiffs' claims, there is sufficient evidence to nonetheless find that the voluntary-cessation exception to the mootness doctrine applies in this case. Starting with the first factor, there is evidence that the ADA Policy did not result from substantial deliberation and instead was an attempt to moot the case and dismiss the pending litigation. DCS adopted the first version of its ADA Policy in November 2019, just a few months after Plaintiffs initiated this lawsuit. [Doc. 214-8 at 38]. DCS conducted only a few months of deliberation over the ADA Policy, as DCS "first started working on the policy" in either September or October 2019. [*Id.* at 72]. As for DCS's motivation in adopting the ADA Policy, Defendants previously represented to this Court that "DCS has changed its written policy so that it no longer invites the criticisms lodged by Plaintiffs." [Doc. 76 at 20]. Likewise, DCS revised the ADA Policy about a year

later because "[s]ome updates needed to be added from [its] previous meeting that [it] had with" Plaintiffs' counsel. [Doc. 214-9 at 102].

Next, as for the second factor, there is evidence that the ADA Policy does not reflect a permanent and complete rejection of the challenged conduct. For instance, the policy does not mandate access to auxiliary aids and services or effective communication. Instead, it states that DCS "will *generally*, *upon request*, provide appropriate auxiliary aids and services leading to effective communication for qualified persons with disabilities." [*Id.* § IV.E (emphasis added)]. Nor does the policy provide any guidance to CSOs to determine whether effective VRI is possible, *i.e.* adequate internet speeds, screen size, and quality. [*see* Doc. 214 at 33]. Further, Plaintiffs claim that they should be entitled to their preferred method of communication [Doc. 181 at 40], but the ADA Policy appears to provide DCS and the CSOs with discretion to choose the method of communication [*see* Doc. 197-13 §§ IV.C.1, IV.E]. While the ADA Policy certainly represents a step in the right direction, there is at least some evidence that the ADA Policy did not completely reject the challenged conduct. Indeed, the ADA Coordinator for DCS stated that DCS is "looking into" additional processes for assessing supervisees' needs during their intake, but those processes are not in the current ADA policy. [*see* Doc. 200-3 at 3]. Thus, the Court cannot find that the ADA policy constitutes an "unambiguous" termination of the challenged conduct.

Under the last factor, the Court considers whether DCS has consistently maintained its commitment to the ADA Policy. Defendants have revised the ADA Policy at least twice since it was adopted in 2019 [Doc. 200-3 ¶ 6; Doc. 214-9 at 102], and Plaintiffs do not contend that Defendants have somehow watered down the ADA Policy or reversed course through those revisions [Doc. 214 at 36–37]. However, Plaintiffs do contend that the policy is neither finalized nor enforced. [Doc. 214 at 33-37]. While DCS's policy aims to achieve effective communication, DCS does not provide any formal training to CSOs on how to provide such communication to deaf and hard of hearing supervisees. [Doc. 214-8 at 29-30; Doc. 214-9 at 93-95]. Moreover, the record shows that DCS has not followed the policy in at least one circumstance. [*see* Doc. 200 at 27 ("Defendants concede that in the November 3, 2020 event, communication between [the CSO] and Hill did not satisfy the DCS ADA Title II policy."] As such, the Court finds that this factor leans in favor of the voluntary-cessation exception.

On balance, under the three factors, there is sufficient evidence to find that there is a reasonable expectation that DCS will reverse course in its decision to adopt the ADA Policy and thus that the voluntary-cessation exception to the mootness doctrine applies here.[9]

[9] The Court notes that it might reach a different conclusion on this point at trial when all of the evidence has been presented so that the Court can fairly evaluate whether Defendants have adhered to and enforced this new policy.

iii. Injunctive Relief

Finally, in moving for summary judgment, Defendants argue that Plaintiffs are not entitled to permanent injunctive relief for two main reasons. First, Defendants assert that Plaintiffs' requested relief is not within the proper scope of injunctive relief and, relatedly, that principles of federalism would be infringed by the injunction sought by Plaintiffs. [Doc. 200 at 10–11, 35–38]. However, the Court agrees with Plaintiffs [Doc. 214 at 45–46] that it should defer ruling on the proper scope of injunctive relief until Defendants are found liable (if at all). The Eleventh Circuit has observed that "[i]njunctive relief should be narrowly tailored to fit the specific legal violations adjudged," *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003), so the Court finds it appropriate to wait until there are specific legal violations before fashioning any injunctive relief. *See also United States v. Colonial Pipeline Co.*, 242 F. Supp. 2d 1365, 1372 (N.D. Ga. 2002) ("The scope of appropriate injunctive relief cannot be determined until and if liability is established and a hearing on the appropriate relief has been conducted.").

Second, Defendants assert that the Plaintiffs cannot as a matter of law satisfy the requirements for permanent injunctive relief. [Doc. 200 at 34–35.] Plaintiffs, of course, contend that they have presented evidence showing that they are entitled to injunctive relief. [Doc. 214 at 38–45.] For the Court to grant a permanent injunction, Plaintiffs must demonstrate: (1) they have suffered an irreparable injury,

(2) remedies at law—*e.g.*, monetary damages—are inadequate to compensate that injury,[10] (3) a remedy in equity is warranted based on the balance of hardships between Plaintiffs and Defendants, and (4) the public interest would not be disserved by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010). "When the state is a party, the third and fourth considerations are largely the same." *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010).

Here, the Court finds there is evidence to support Plaintiffs' claims for injunctive relief, at least at this stage.[11] Starting with the first requirement, as discussed, Plaintiffs have each testified that they have had ineffective communication with the CSOs [Doc. 197-25 ¶ 7; Doc. 214-14 at 49–50; Doc. 214-16 at 18–19], who are supposed to communicate with the supervisees about helpful services and information [Doc. 229 ¶¶ 35–36], which shows a possible irreparable injury. In addition, Plaintiffs fear that they will face other consequences, such as revocation of their supervision and reincarceration, because of the ineffective communication. [Doc. 2-6 ¶¶ 20–21; Doc. 214-14 at 24–25, 29–30.] This fear came true for both Mr. Cobb—when the CSO failed to communicate the terms of his parole which contributed to his revocation and subsequent reincarceration—and Ms.

[10] Defendants do not argue that the second requirement is not met here [*see generally* Doc. 200 at 34–35], so the Court does not address it.

[11] Of course, the Court might reach a different conclusion after the trial and presentation of all the evidence.

Hill—when the CSO failed to tell her that she was waiving her right to a hearing before a judge by signing a consent order to 60 days incarceration. [Doc. 249-4 at 36-38; Doc. 214-18 at 102–03.] This, too, shows possible irreparable injury.

As for the last two requirements for injunctive relief, the Court finds there is a mix of evidence as to the balance of hardships between Plaintiffs and Defendants and the public interest. As discussed above, there is certainly evidence that Plaintiffs would face some hardship if they do not receive their requested injunctive relief. But, on the other side of the scales, there is a great deal of evidence that Defendants would face hardship and that the public interest could be disserved by the requested injunctive relief. Specifically, issuing the requested injunctive relief would likely impose a significant burden on DCS and taxpayers by forcing DCS to revamp its entire policy. Commissioner Nail states that the requested relief could cost DCS over $3 million to hire interpreters for all meetings between the CSOs and the supervisees and to hire additional CSOs to provide security for the interpreters during home visits. [Doc. 200-4 ¶¶ 8, 14.][12] He further states that DCS's budget does not support such "additional manpower and resources," such that implementing those services "would alter the funding of agency operations in a detrimental

[12] Plaintiffs contend that the Court cannot consider this declaration because it was not disclosed during discovery. [Doc. 214 at 17.] However, as argued by Defendants [Doc. 228 at 25], there is no indication in the record that Defendants had an obligation to produce the declaration as part of discovery.

manner" and "negatively impact the agency's ability to provide supervision at the level currently provided." [*Id.* ¶ 15.]

In light of the foregoing, the Court is unwilling to find that Plaintiffs are unable to obtain injunctive relief as a matter of law at this stage of the case. Even so, the Court wishes to make clear that it has reservations that the wide-reaching injunctive relief sought by Plaintiffs is proper in this case, particularly when there will be a great hardship on Defendants to follow such an injunction. Perhaps there are other alternatives or a middle ground. The Court envisions any injunctive relief requiring DCS (1) to employ an across-the-board policy which outlines how to determine the aids and services an individual needs to receive effective communication and (2) to implement and enforce that policy. However, the Court will wait to make a decision on that issue until, and if, there is a finding of liability.

B. Plaintiffs' Motion for Class Certification

The Court next addresses Plaintiffs' Motion for Class Certification.[13] The Court has broad discretion in determining whether to certify a class action. *See Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992) (citing *Coon v. Ga. Pac. Co.*, 829 F.2d 1563, 1566 (11th Cir. 1987)). But, "[b]efore a district court may grant a motion for class certification," the Court must

[13] "Plaintiffs" refers to Ms. Hill and Mr. Cobb during the Court's discussion regarding class certification.

find that the proposed class is "adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012). Although not in the text of Federal Rule of Civil Procedure 23, which governs class actions, the ascertainability requirement is "an implied prerequisite to the requirements of Rule 23(a)." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021).

In addition, once the party seeking class certification has established that the proposed class is adequately defined and clearly ascertainable, Rule 23 itself "sets forth a number of requirements that a class action must meet in order for a district court to certify the class." *Equifax*, 999 F.3d at 1274. Specifically, a "class action may be maintained" if the four requirements of Rule 23(a) are satisfied and one of the three parts of Rule 23(b) is satisfied. *See* Fed. R. Civ. P. 23(a), (b).

Under Rule 23(a), (1) the class must be "so numerous that joinder of all members is impracticable"; (2) there must be "questions of law or fact common to the class"; (3) the class representatives' claims or defenses must be "typical" of the class's claims or defenses; and (4) the class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These four requirements are respectively known as the "numerosity, commonality, typicality, and adequacy requirements." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1275 (11th Cir.), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022).

In addition, as noted, one of the three parts of Rule 23(b) must be satisfied. Here, Plaintiffs only seek to certify the class under Rule 23(b)(2). [*See* Doc. 197-1 at 30–32.] That provision states that a class action may be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The Court must conduct a "rigorous analysis" to determine if these requirements for class certification are satisfied. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). This analysis may require a court to "probe behind the pleadings" and analyze the facts regarding the class action. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Falcon*, 457 U.S. at 1600. The party seeking class certification has the burden of proving that the requirements have been met. *See Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 981 (11th Cir. 2016). "The Supreme Court has made clear that district courts must grant class certification in 'each and every case' where the conditions of Rule 23(a) and (b) are met." *Cherry*, 986 F.3d at 1303 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–400 (2010) (internal quotation marks omitted).

Here, Plaintiffs contend that all of the requirements for class certification are satisfied. [*See generally* Doc. 197-1.] In response, Defendants do not dispute that the numerosity requirement is met, but they assert that the ascertainability,

commonality, typicality, and adequacy requirements of Rule 23(a), and the Rule 23(b)(2)'s requirements, are all not met in this case. [Doc. 217 at 19–37.] The Court the concludes that Plaintiffs have satisfied the prerequisites for certification of a class and addresses the disputed requirements in turn.[14]

i. The Ascertainability Requirement

As noted, every class must be "adequately defined and clearly ascertainable." *AA Suncoast Chiropractic Clinic*, 938 F.3d at 1174. Without this requirement, the Court "would be unable to evaluate whether a proposed class satisfies Rule 23(a)." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021). A class is ascertainable if it is "adequately defined such that its membership is capable of determination." *Id.* at 1304. Importantly, "membership can be capable of determination without being capable of *convenient* determination." *Rensel v. Centra Tech, Inc.*, 2 F.4th 1359, 1369 (11th Cir. 2021) (quoting *Cherry*, 986 F.3d at 1303).

Plaintiffs seek to represent a class of "all present and future deaf or hard of hearing people supervised by GDCS." [Doc. 181 at 28.] Plaintiffs define those who are deaf or hard of hearing as "individuals with hearing levels or hearing loss that

[14] The Court does not address the numerosity requirement because Defendants agree it is met in this case. [Doc. 217 at 8.] The Court also does not address Defendants' arguments in opposing class certification that Plaintiffs lack standing and that this case is moot [*see id.* at 9–19] because it has already addressed those arguments in ruling on the motion for summary judgment. [*See supra* at 12-22]. The Court determined that Plaintiffs have standing to pursue their ripe claims. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("[I]t is well-settled that prior to the certification of a class . . . the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.").

qualify as disabilities under the Americans with Disabilities Act and the Rehabilitation Act." [*Id.* at 2 n.1.] As noted previously, Plaintiffs expand on this definition to add that "Deaf" refers to "individuals with hearing loss who self-identify as culturally deaf" and thus "[t]he phrase 'deaf and hard of hearing' used [in their motion for class certification] includes deaf, hard of hearing, d/Deaf-Disabled, d/DeafBlind, and Deaf individuals." [Doc. 197-1 at 8].

In response, Defendants assert that they do not have the means to identify members of the proposed class besides "self-identification, voluntary disclosure of medical records, or obvious difficulties in communication." [Doc. 217 at 22–23]. DCS "does not maintain custody" over its supervisees and does not "maintain offenders' medical records, results of hearing tests, information about hearing capabilities, or information regarding hearing impairment." [Doc. 200-3 ¶ 23.][15] While DCS will maintain information about a supervisee's hearing impairment once it learns about the impairment, DCS generally only learns about the impairment through self-identification, a doctor's statement provided by a supervisee, or apparent difficulty in effective communication with the supervisee. [*Id.*] In addition, because it does not have custody over the supervisees and "is not

[15] Plaintiffs contend that the Court cannot consider this declaration because it was not disclosed during discovery. [Doc. 214 at 17.] However, as argued by Defendants [Doc. 228 at 25], there is no indication in the record that Defendants had an obligation to produce the declaration as part of discovery.

responsible for their medical care," DCS emphasizes that it "cannot require offenders to be screened for hearing, sight, or other disabilities." [*Id.*] Defendants also take issue with Plaintiffs' proposed class definition, which Defendants frame as "all individuals with hearing levels or hearing loss that qualify as disabilities." [Doc. 217 at 22-23]. Defendants propose that a "[a] workable definition of hearing impairment for ADA purposes would specify those persons who are unable to communicate effectively due to hearing impairment." [*Id.* at 24]. Defendants claim that Plaintiffs' definition would require "mini-trials" to identify prospective class members because "Plaintiffs' proposed definition does not provide any mechanism for separating persons with common hearing loss from those with hearing loss serious enough to interfere significantly in their ability to communicate." [*Id.* at 21, 25]. Defendants thus argue that "DCS does not have records allowing it administratively to identify" the proposed class, and the class is therefore not ascertainable. [*Id.* at 23].

The Court is not persuaded by Defendants' arguments and finds that the ascertainability requirement is met in this case. Defendants' position—that because DCS is not required to conduct medical evaluations and does not maintain records of hearing status of offenders, it is thus unable to identify individuals who would be class members—is untenable. During the class certification hearing on August 26, 2022, Defendants were unable to provide an answer as to why DCS could not access

DOC records regarding supervisees' hearing status, nor could they answer if anything prevented DCS from allowing supervisees who want accommodations to present themselves for a medical evaluation. Indeed, DCS officers have access to significant portions of Georgia Department of Correction ("GDC") records, which may reference a supervisee's hearing loss. [Doc. 214-4, Ex. A]. And, Defendants concede that they have tools at their own disposal to identify class-members, including their own records and through context, simple inquiry, or self-identification. [Docs. 217 at 21-23; 214; 217-3 ¶ 10]. Moreover, DCS's current ADA policy states that CSOs "will go through a module to determine the supervisee's disability if there is one" during the intake interview and "will document the preferred mode of communication and requested accommodations in the Departmental case management system." [Doc. 197-13 at 6].

Thus, the Court finds that Defendants already have systems in place to identify supervisees that qualify as class members, and regardless, "neither foreknowledge of a method of identification nor confirmation of its manageability says anything about the qualifications of the putative class representatives." *Cherry*, 986 F.3d at 1302-03. Plaintiffs need only show that the class is "not defined through vague or subjective criteria[]" so that it is "capable of being determined." *Id.* at 1302-03. Other than logistical or financial issues, the Court finds that DCS is perfectly capable of identifying class members, which constitute supervisees who meet the definition

of a hearing disability used in the ADA: hearing loss that "substantially limits" major life activities, such as hearing, speaking, and communicating.[16] 42 U.S.C. §12102.

However, the Court will refine Plaintiffs' proposed class definition to include only those individuals with "objective hearing loss." *Harris v. Ga. Dep't of Corr.*, 18-cv-00365, 2021 WL 6197108, at *11 (M.D. Ga. Dec. 29, 2021). Plaintiffs include those people who "identify as culturally Deaf" in a footnote to their class definition, but the Court finds that including such phrasing would broaden the class such that "vague and subjective criteria" would make it incapable of being determined. *Cherry*, 986 F. 3d at 1303. The Court concludes that the following proposed class turns on objective criterion and can be sufficiently determined:

> All present and future deaf or hard of hearing individuals supervised by GDCS, whose hearing qualifies as a disability under the ADA and Rehabilitation Act and who require hearing-related accommodations and services to communicate effectively and/or to access or participate equally in programs, services, or activities available to individuals supervised by GDCS.

Based on the foregoing, the Court holds that Plaintiffs' class definition as refined by the Court is sufficiently ascertainable and describes an identifiable class.

[16] The Court notes that DCS has already identified approximately 88 individuals under its supervision as deaf or seriously hearing-impaired. [Doc. 200-3 ¶ 9; 214-1 ¶¶ 10, 12; Doc. 255].

ii. Rule 23(a) Requirements

a. Commonality

Plaintiffs must also meet the "commonality" prerequisite, which requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "does not require that all the questions of law and fact raised by the dispute be common or that common questions of law or fact predominate over individual issues." *Vega v. T–Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009) (internal quotations and citation omitted). The commonality requirement is satisfied when there is at least one common question, the resolution of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[F]or purposes of Rule 23(a)(2) even a single common question will do[,]" *id.* at 359 (citation omitted), which is a "low hurdle to overcome." *Harris*, 2021 WL 6197108 at *11 (quoting *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009)).

Here, Plaintiffs proffer several questions to satisfy the commonality requirement: (1) [w]hether DCS policies fail to provide class members equally effective communication; (2) [w]hether DCS fails to employ effective communication methods when trying to communicate with class members; (3) [w]hether DCS's policies and practices deny class members adequate and equal access to programs, activities, and services; and (4) [w]hether DCS is denying class

members due process by failing to provide adequate notice of supervision rules and conditions. [Doc. 197-1 at 12–13; *see id.* at 13–27.] Plaintiffs also include the following questions regarding whether Defendants maintain policies and practices that, *inter alia*:

- Do not meet Defendants' affirmative obligations to ensure that class members have access to effective communication;
- Fail to identify or give "primary consideration" to the supervisees' preferred method of communication;
- Rely on VRI in most interactions with supervisees who need interpreters, even if it is not appropriate, or not functioning;
- Rely on written notes and family members to communicate with supervisees, even if it is not appropriate; and
- Fail to provide in-person interpreters during any field visits and fail to provide Deaf Interpreters in any encounters.

[Doc. 230 at 23]. In response, Defendants argue that Plaintiffs' "quarrels with DCS are highly individualized" and that these questions do not show commonality because the class members "have a wide variety of communications wishes and needs." [Doc. 217 at 25–26.]

The Court finds that Plaintiffs have shown at least one common question that is amenable to a common answer that will drive the litigation. Plaintiffs are challenging the system-wide policies and practices of DCS and how such issues affect all class members. While Defendants are correct that "every deaf person is different" and that the necessary accommodations they need for effective

communication will inevitability vary, such differences do not negate the commonality of this action. [Doc. 217-1 at 27]. The "focus of this litigation is on the alleged systemic discrimination in policy and practice by DCS in its supervision of deaf and hard of hearing individuals."[17] [Doc. 197-1 at 13]. The policy and practice "raise[] issues common to all class members and [are] susceptible to generalized proof." *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001)*; see also Harris*, 2021 WL 6197108, at *12 (holding that individual class members' circumstances do not defeat class certification where plaintiffs claim that they "have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation" and "challenge [] system-wide practices, policies, and procedures that affect all members of the proposed class," specifically the "alleged systemic discrimination in policy and practice across the GDC's prison facilities").

Determining liability in this case requires resolution of numerous common questions of law and fact regarding whether DCS's policy is adequate and whether that policy is enforced in practice. The Court therefore determines that the commonality requirement is met in this case.

[17] During the August 26, 2022 hearing, Plaintiffs' counsel confirmed this focus, stating that their ideal remedy would involve an order requiring a process for effective communication throughout the entire supervision. Plaintiffs' counsel emphasized that Plaintiffs are not seeking relief that would spell out what every single plaintiff might need as an accommodation.

b. Typicality

Under the typicality requirement, the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). This requirement asks whether a "sufficient nexus exists between the claims of the named representatives and those of the class at large." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008). The nexus requirement can be met when the "claims or defenses of the class and the class representatives arise from the same event or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984).

Plaintiffs assert that the typicality requirement is satisfied because they, like the proposed class members, "experience some form of hearing loss that affects their ability to communicate without the use of hearing-related accommodations" and "seek injunctive and declaratory relief for DCS's failure to provide such accommodations." [Doc. 197-1 at 27–28.] In opposing class certification, Defendants contend that Plaintiffs' claims are not typical because their "injuries depend on an individual assessment of their impairment and an individual assessment of the accommodation required for effective communication." [Doc. 217 at 26.]

The Court finds that typicality is satisfied here because Plaintiffs showed a "strong similarity of legal theories" amongst individual class members. *Murray*, 244

F.3d at 811. Though the extent of each members' hearing loss and their necessary accommodations will vary, Plaintiffs raise the same claims based on the same legal theories as class members: whether DCS fails to provide effective communication to deaf and hard of hearing individuals in violation of the ADA, the Rehabilitation Act, and the Fourteenth Amendment. Plaintiffs each suffer "some form of a hearing impairment that affects their ability to communicate without the use of hearing-related accommodations," and they pursue the theory that DCS is not providing adequate accommodations. Thus, the Court concludes that Plaintiffs' claims are typical of those of the other class members and that typicality is satisfied.

c. Adequacy

Plaintiffs must also show that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy-of-representation requirement encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby*, 513 F.3d at 1323 (quoting *Valley Drug Co. v. Geneva Pharms. Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)). "[A] party's claim to representative status is defeated only if the conflict between the representative and the class is a fundamental one,

going to the specific issues in controversy." *Carriuolo*, 832 F. 3d at 989 (internal citations and quotation marks omitted).

Defendants contend that because "Plaintiffs [sic] claims are not typical of claims of other offenders and there are no common questions of law or fact, Plaintiffs also cannot show that they 'will fairly and adequately protect the interests of the class.'" [Doc. 217 at 34]. As explained above, the Court disagrees and finds that Plaintiffs' claims satisfy both the commonality and typicality requirements. Likewise, the Court also finds that Plaintiffs, as class representatives, satisfy the adequacy requirement.

As to the first inquiry, no evidence indicates that a substantial conflict exists between any class representative and the proposed class. Plaintiffs and class members allege that they are similarly harmed by DCS's conduct and seek injunctive relief to remedy such harm. Their sought relief would provide substantially equal benefits and relief to all class members. *See Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd.*, 197 F.R.D. 522, 528 (S.D. Fla. 2000). (holding that the adequacy requirement is satisfied when the class shares same injuries as plaintiffs and relief sought will provide relief to all members).[18] As to the second inquiry, Defendants "do not dispute that Plaintiffs' counsel are well qualified to act as class counsel."

[18] Plaintiffs are not seeking monetary damages; thus, "the interests of the representative Plaintiffs do not actually or potentially conflict with those of the class." *Id.*

[Doc. 217 at 9]. Plaintiffs' counsel have shown themselves to be competent and dedicated advocates throughout this litigation. The Court thus concludes that the adequacy requirement of Rule 23(a) is satisfied.

iii. Rule 23(b)(2) Requirements

Plaintiffs only seek certification under Rule 23(b)(2), which provides for class certification where the "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) certification "applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. It does not apply "when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Id.* The Supreme Court has recognized that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of what (b)(2) is meant to capture." *Id.* at 361 (quoting *Amchem Prod., Inc. v. Georgia Windsor*, 521 U.S. 591, 614 (1997)).

Here, Plaintiffs' claims "center on DCS's continuous and systemic failure" to implement and adhere to policies and practices that would "provide effective communication and equal participation to deaf and hard of hearing supervisees." [Doc. 230 at 9; Doc. 181 ¶¶ 5, 35-51]. Specifically, Plaintiffs allege that DCS is

denying class members their rights under the ADA and Section 504 and is violating their procedural due process rights. Therefore, Plaintiffs' claims allege that "the party opposing the class"—DCS—has discriminated "on grounds that apply generally to the whole class." Such claims can be resolved with a declaratory judgment that DCS's actions and/or inactions are unlawful and injunctive relief that enjoins the unlawful policies and practices.[19] Accordingly, the requirements of Rule 23(b)(2) have been satisfied.

III. Appointment of Class Counsel

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. Rule 23(g)(1)(A)(i)(iv). This determination takes into account counsel's work "in identifying or investigating potential claims in the action," "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "the resources that counsel will commit to representing the class." *Id.*

Plaintiffs request that the Court appoint "Plaintiffs' counsel as class counsel." [Doc. 197-1 at 32]. Plaintiffs are jointly represented by a variety of organizations and firms, including the American Civil Liberties Union Disability Rights Program ("ACLU"), American Civil Liberties Union Foundation of Georgia ("ACLU of

[19] As discussed previously, the Court need not determine the proper scope of an injunction, if any, at this stage.

Georgia"), Arnold & Porter Kaye Scholer LLP, the Disability Rights Education and Defense Fund "DREDF", and the National Association of the Deaf "NAD". [Doc. 197-1 at 33-34]. All organizations identify specific attorneys and the credentials of each attorney who will be operating in the role as Class Counsel. [*See* Doc. 197-3, Mizner Decl. ¶¶ 3-6; Doc. 197-4, Dimmick Decl. ¶¶ 3-5; Doc. 197-5, Center Decl. ¶¶ 3-6; Doc. 197-7, Young Decl. ¶ 1-4; Doc. 197-8, Hoffman Decl. ¶¶ 6-12; Doc. 197-6, Shrader Decl. ¶¶ 4-7]. Defendants do not oppose appointment as requested by Plaintiffs. [*See* Doc. 217].

The Court finds that the attorneys identified by Plaintiffs are well qualified to prosecute claims asserted against the Defendants on behalf of Plaintiffs and other members of the class. ACLU, ACLU of Georgia, Arnold & Porter Kay Scholer LLP, DREDF, and NAD have experience handling complex class actions and have extensive knowledge of the applicable law of disability rights. [*See* Doc. 197-3, Mizner Decl. ¶¶ 4-6; Doc. 197-4, Dimmick Decl. ¶¶ 4-5; Doc. 197-5, Center Decl. ¶¶ 4-6; Doc. 197-7, Young Decl. ¶ 4; Doc. 197-8, Hoffman Decl. ¶¶ 7-12; Doc. 197-6, Shrader Decl. ¶¶ 5-13]. They have devoted considerable time and resources investigating and prosecuting the claims and legal issues herein, and they attest that they have the necessary resources to "zealously represent the interest of the class" and. [*See, e.g.*, Doc. 197-3, Mizner Decl. ¶ 7]. Accordingly, ACLU, ACLU of

Georgia, Arnold & Porter Kay Scholer LLP, DREDF, and NAD fulfill the requirements of Rule 23(g) and are adequate Class Counsel.

IV. Conclusion

Accordingly, Defendants' motion for summary judgment [Doc. 200] is **DENIED**, and Plaintiffs' motion for class certification [Doc. 197] is **GRANTED**.

IT IS SO ORDERED, this 13th day of October, 2022.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE