IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CT-3118-D

THOMAS HEYER, Plaintiff, v. UNITED STATES BUREAU OF PRISONS, et al., Defendants.	)	**ORDER**

Thomas Heyer ("Heyer" or "plaintiff") is a sexually dangerous person in the custody of the Bureau of Prisons ("BOP") pursuant to 18 U.S.C. § 4248. See United States v. Heyer, 740 F.3d 284, 291–94 (4th Cir. 2014). Heyer is deaf and filed this action alleging ten causes of action concerning his conditions of confinement at the Federal Correctional Institution in Butner, North Carolina ("FCI-Butner"). See [D.E. 1, 24]. On March 11, 2013, the court dismissed two claims. See [D.E. 46]. The parties engaged in discovery concerning the remaining claims. On March 31, 2015, the court granted defendants' motion for summary judgment concerning Heyer's remaining claims. See [D.E. 142]. Heyer appealed. On February 23, 2017, the United States Court of Appeals for the Fourth Circuit affirmed in part, vacated in part, and remanded for further proceedings. See Heyer v. U.S. Bureau of Prisons, 849 F.3d 202 (4th Cir. 2017).

On November 2, 2017, the parties entered into a partial settlement agreement resolving Heyer's remaining claims, except Heyer's claim that defendants are violating his First Amendment rights by failing to provide him with videophone equipment that he claims he needs to communicate via American Sign Language ("ASL") with people outside of FCI-Butner. See [D.E. 181, 185]. On

November 6 and 7, 2017, the court held a bench trial concerning Heyer's remaining claim. See [D.E. 190, 193].

The court has considered the witnesses' testimony, the exhibits, the arguments, and the entire record. The court makes the following findings of fact and conclusions of law. In doing so, the court has weighed all the evidence, considered all the arguments, and assessed the credibility of all the witnesses. In judging witness credibility, the court has considered: (1) the demeanor of the witness; (2) any interests, bias, or prejudice the witness may have; (3) the opportunity of the witness to see, hear, know, and remember the events about which the witness testified; (4) whether the testimony of the witness is believable; and (5) whether the testimony comports with all other believable evidence in the case. As explained below, Heyer has failed to prove that the BOP's failure to provide him the requested videophone equipment violates the First Amendment. Thus, the court enters judgment for defendants.

I.

Heyer is civilly committed to the custody of the Attorney General as a sexually dangerous person pursuant to the Adam Walsh Child Protection and Safety Act of 2006, codified at 18 U.S.C. §§ 4247–48, and is confined at FCI-Butner. See Heyer, 740 F.3d at 287–95. Heyer was born deaf and his primary language is ASL. See [D.E. 195] 114–15 (Heyer testimony). Heyer can read, write, and effectively communicate in English, a language distinct from ASL. See, e.g., [D.E. 195] 25, 39, 41–42, 58 (Cokely testimony); [D.E. 195] 119, 124–25 (Heyer testimony). Essentially, Heyer can read and write English at the third-grade level. See, e.g., [D.E. 195] 25, 42, 58 (Cokely testimony); [D.E. 196] 70–75, 82–83 (Taylor testimony); Pl. Tr. Ex. 43; Pl. Tr. Ex. 167; Def. Tr. Ex. 23, at Def. 8377, Def. 7154, Def. 995; Def. Tr. Ex. 24; Def. Tr. Ex. 25, at Def. 7922; Def. Tr. Ex. 28 at Def. 6240–6244; Def. Tr. Ex. 26; Def. Tr. Ex. 27; Def. Tr. Ex. 32, at Def. 7106, Def. 7224.

In 1987, Heyer was charged with aggravated sexual assault, sexual assault, endangering the welfare of a child, and making a terroristic threat. See Def. Tr. Ex. 1, at Def. 7530; [D.E. 180] ¶ 17; Pre-Certification Evaluation Report, United States v. Heyer, No. 5:08-HC-2183-BO, [D.E. 36-1] 6 (E.D.N.C. Mar. 31, 2011). In 1989, Heyer pleaded guilty to making a terroristic threat and was sentenced to an indeterminate term in a state hospital. See Heyer, 740 F.3d at 287. In 1993, Heyer was indicted on charges of kidnapping, criminal restraint, unlawful possession of a weapon, and endangering the welfare of a child. See [D.E. 180] ¶ 18. Heyer pleaded guilty to kidnapping and was sentenced to 10 years' imprisonment. See Heyer, 730 F.3d at 287. Heyer kidnapped a 10-year-old boy, sexually assaulted him, tied him up, and buried him under some rubble near a local high school football field. See [D.E. 180] ¶ 18; Def. Tr. Ex. 1, at Def. 7530–31; Pre-Certification Evaluation Report, United States v. Heyer, No. 5:08-HC-2183-BO, [D.E. 36-1] 8–9 (E.D.N.C. Mar. 31, 2011); [D.E. 195] 129–30 (Heyer testimony); Heyer, 740 F.3d at 287. In total, Heyer admits to molesting at least 46 children, 44 of whom were male. Def. Tr. Ex. 1, at Def. 7524.

In 2002, Heyer possessed approximately 180 images of child pornography. Id., at Def. 7532; Heyer, 740 F.3d at 287; [D.E. 195] 145 (Heyer testimony). On October 31, 2002, Heyer pleaded guilty to possession of child pornography in the United States District Court for the Eastern District of Tennessee. See United States v. Heyer, No. 3:02-CR-50, [D.E. 18] (E.D. Tenn. Oct. 31, 2002). Heyer also had sex with the 15-year old son of a former girlfriend. See [D.E. 195] 130 (Heyer testimony). Heyer was sentenced to 60 months' imprisonment and 3 years of supervised release for possessing child pornography. See United States v. Heyer, No. 3:02-CR-50, [D.E. 23] (E.D. Tenn. Mar. 24, 2003); [D.E. 180] ¶ 19. In September 2007, after his release from incarceration, Heyer violated the terms of his supervised release and was sentenced to 18 months' imprisonment. See [D.E. 180] ¶ 21.

On December 18, 2008, while Heyer was serving his sentence, the government initiated civil commitment proceedings against Heyer pursuant to 18 U.S.C. §§ 4247–48. See Certification of a Sexually Dangerous Person, United States v. Heyer, No. 5:08-HC-2183-BO, [D.E. 1] (E.D.N.C. Dec. 18, 2008). On May 30 and 31, 2012, the court held an evidentiary hearing concerning the government's civil commitment petition. See United States v. Heyer, 879 F. Supp. 2d 487, 488 (E.D.N.C. 2012). On July 9, 2012, the court found that Heyer is a sexually dangerous person and committed him pursuant to 18 U.S.C. § 4248. See id. at 488–89; Judgment, United States v. Heyer, No. 5:08-HC-2183-BO, [D.E. 82] (E.D.N.C. July 9, 2012). Heyer appealed, and the Fourth Circuit affirmed. See Heyer, 740 F.3d at 287–95.

As mentioned, Heyer was born deaf and his primary language is ASL. See [D.E. 195] 114–15 (Heyer testimony). Heyer reads and writes English at the third-grade level, and he can effectively communicate in written English. See, e.g., [D.E. 195] 25, 39, 41–42, 58 (Cokely testimony); [D.E. 196] 70–75, 82–83 (Taylor testimony); Pl. Tr. Ex. 43; Pl. Tr. Ex. 167; Def. Tr. Ex. 23, at Def. 8377, Def. 7154, Def. 995; Def. Tr. Ex. 24; Def. Tr. Ex. 25, at Def. 7922; Def. Tr. Ex. 28 at Def. 6240–6244; Def. Tr. Ex. 26; Def. Tr. Ex. 27; Def. Tr. Ex. 32, at Def. 7106, Def. 7224. Heyer also has a limited ability to read lips. See [D.E. 196] 73–74 (Taylor testimony). Heyer wants the BOP to allow him to use a videophone to call people outside of prison, including the deaf and non-deaf. Heyer contends that using a videophone will allow him to communicate via ASL. Heyer argues that the BOP's refusal to install and allow him to use a videophone violates his First Amendment rights because the BOP's decision prevents him from communicating in ASL with people outside of prison.

Heyer named as defendants Eric H. Holder, Jr., in his official capacity as Attorney General of the United States; the United States Bureau of Prisons; Hugh J. Hurwitz, in his official capacity

as Acting Director of the United States Bureau of Prisons; Ike Eichenlaub, in his official capacity as Regional Director of the United States Bureau of Prisons Mid-Atlantic Region; Sara M. Revell, Warden, FCC Butner; and Tracy W. Johns, Warden, FCI Butner Medium (collectively "defendants"). See [D.E. 24]. Pursuant to Federal Rule of Civil Procedure 25(d), Hugh J. Hurwitz is substituted for Charles E. Samuels, Jr., as Acting Director of the United States Bureau of Prisons, Angela P. Dunbar is substituted for Ike Eichenlaub as the Regional Director of the United States Bureau of Prisons Mid-Atlantic Region, J.C. Holland is substituted for Sara M. Revell as the Warden of FCC Butner, Andrew Mansukhani is substituted for Tracy W. Johns as Warden of FCI Butner Medium ("FCI-Butner"), and Matthew Whitaker is substituted for Eric H. Holder, Jr., as United States Attorney General. See Fed. R. Civ. P. 25(d); [D.E. 191].

The videophone technology that Heyer seeks allows two individuals to engage in real-time, visual communication, facilitating point-to-point video communication using ASL. See [D.E. 195] 45–47 (Cokely testimony); [D.E. 195] 125–26 (Heyer testimony). The technology is similar to Skype or FaceTime. Todd Craig is the BOP's Chief of the Office of Security Technology. See [D.E. 195] 150 (Craig testimony). Craig is a former BOP warden and also understands the Department of Justice's and the BOP's information technology security technology requirements. Id.

Craig persuasively explained the BOP's security concerns with providing Heyer access to direct point-to-pont videophone. See [D.E. 195] 159–69 (Craig testimony); [D.E. 196] 25–26, 28 (Craig testimony). Craig noted that no BOP facility is using such videophone technology as a method of communication for male inmates, deaf inmates, or sex offenders. See [D.E. 195] 159–69 (Craig testimony); [D.E. 180] ¶ 40. Craig explained that permitting Heyer to use such technology presents many security risks. See [D.E. 195] 164–69 (Craig testimony). For example, such technology would permit one of the call participants to depict methods of disruption or escape and

to introduce contraband (such as sexually explicit material). Moreover, the BOP's concerns are heightened due to Heyer's status as a sexually dangerous person and his record of improper behavior in the BOP. An outside call recipient could show Heyer child pornography and thereby exploit the child and undermine Heyer's sex-offender treatment. Furthermore, the presence of such videophone technology in the housing unit at FCI-Butner where Heyer lives could lead other sexually dangerous persons detained with Heyer to pressure Heyer to use the videophone technology to commit criminal activity within or outside FCI-Butner. See id.

FCI-Butner Warden Andrew Mansukhani also testified. See [D.E. 196] 30. Warden Mansukhani explained that installing and permitting Heyer to use the videophone technology in the housing unit where Heyer lives presents additional security concerns. See id. at 31–41. Heyer's housing unit exclusively contains detainees who have either been civilly committed as sexually dangerous persons or who are being detained pending a hearing and decision on whether the person meets criteria for commitment as a sexually dangerous person. This civil detainee population has a history of manipulative behavior and actual or attempted sexual violence or child molestation. See id.

Although the BOP has not agreed to install a videophone to allow Heyer to make video calls directly to other individuals, FCI-Butner is procuring a contract to provide Video Relay Service ("VRS"). See Def. Tr. Ex. 19; [D.E. 196] 41–42 (Mansukhani testimony). VRS allows deaf individuals to place phone calls to non-deaf individuals. See Def. Tr. Ex. 19; [D.E. 195] 45–46 (Cokely testimony); [D.E. 195] 91 (Ray testimony). With VRS, a deaf person uses a videophone to contact an ASL interpreter. See [D.E. 195] 46 (Cokely testimony); [D.E. 195] 91 (Ray testimony); Pl. Tr. Ex. 99. The deaf person communicates visually with the interpreter using ASL, and the interpreter then relays the conversation orally to the non-deaf person on the call by telephone. See

[D.E. 195] 46 (Cokely testimony); [D.E. 195] 91–92 (Ray testimony); [D.E. 195] 164 (Craig testimony).

Once the VRS system is operational, Heyer will have access to the VRS system in a manner substantially similar to the access hearing inmates have to the BOP's inmate telephone system. See [D.E. 195] 163–64 (Craig testimony). The VRS system will be mounted to a wall in a hallway directly outside of Heyer's unit team office. See id. Heyer will be able to make calls using the VRS system with a reasonable amount of privacy while also providing BOP staff with the ability to observe Heyer. See id. As with traditional inmate telephone privileges, Heyer's unit team will have to approve all phone numbers that Heyer wishes to contact through the VRS system. See id. Heyer typically will have access to the VRS system seven days per week from 6:00 A.M. to 10:00 P.M. See id.; Def. Tr. Ex. 20; Pl. Tr. Ex. 130; Def. Tr. Ex. 19, at Def. 9611; cf. Pl. Tr. Ex. 91. Heyer generally will be able to use the VRS for a total of 300 minutes per month. In November and December, Heyer will be able to use the VRS for 400 minutes per month. See Def. Tr. Ex. 19. Heyer will be able to use VRS to communicate with individuals, including his brother, who are not fluent in ASL. See [D.E. 195] 94–96 (Ray testimony).

The VRS system has numerous safety features that the videophone technology lacks. First, VRS calls involve an ASL interpreter, the deaf caller, and the non-deaf call recipient. The three participants are never connected visually. Rather, the deaf caller sees the ASL interpreter, and the ASL interpreter talks on the phone with the non-deaf call recipient. See [D.E. 195] 46 (Cokely testimony); [D.E. 195] 91–92 (Ray testimony); [D.E. 195] 164 (Craig testimony). Second, the BOP will be able to monitor VRS calls in real-time or review the recordings at a later time. See [D.E. 195] 164 (Craig testimony); Pl. Tr. Ex. 150. Third, the BOP will be able to review and monitor these calls without using an ASL interpreter because the real-time monitoring and recording will include

the audio portion of the conversation that takes place between the ASL interpreter and the non-deaf recipient of the call. See [D.E. 195] 164 (Craig testimony).

VRS is not the only communication option available to Heyer. Heyer also can communicate with other individuals by in-person visitation, e-mail, letters, and the teletypewriter ("TTY") system. FCI-Butner provides TTY devices to deaf inmates for their use in making telephone calls, and FCI-Butner currently has two TTY devices. See [D.E. 196] 76–79 (Taylor testimony). A TTY allows individuals to type written messages to each other using a telephone line. See [D.E. 195] 43 (Cokely testimony); [D.E. 195] 84 (Ray testimony); Pl. Tr. Ex. 99. Upon request, Heyer typically can use a TTY device Mondays through Fridays, between the hours of 7:30 A.M. and 4:00 P.M. See [D.E. 195] 131–35 (Heyer testimony); [D.E. 196] 76–79 (Taylor testimony). A TTY device also is available on two evenings each week until approximately 9:00 P.M. The BOP has implemented practices to ensure deaf inmates have meaningful access to a TTY device and has trained additional staff on operating the TTY. See [D.E. 196] 76–79 (Taylor testimony). Although Heyer has access to a TTY device, a decreasing number of people outside of prisons use TTY devices to communicate because people are choosing to use videophone technology. See [D.E.195] 43–49 (Cokely testimony). Heyer has used TTY, e-mail, and letters to communicate with others outside of FCI-Butner. See Def. Tr. Exs. 21, 24–25; [D.E. 196] 76–77 (Taylor testimony); [D.E. 195] 121–24, 130–38 (Heyer testimony).

Craig testified concerning the TTY system. Craig persuasively explained why the TTY system presents a much lower risk than direct point-to-point videophone contact. See [D.E. 196] 4–10, 19–21, 23 (Craig testimony).

II.

Heyer argues that the BOP's refusal to provide him access to a videophone to call other

individuals outside of FCI-Butner and communicate in ASL violates his First Amendment rights. "[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Such rights generally include the right to "communicate with others beyond the prison walls." Heyer, 849 F.3d at 213 (collecting cases). When a prison regulation or policy "impinges on an inmate's ability to communicate with others, it is valid if it is reasonably related to legitimate penological objectives." Yang v. Mo. Dep't of Corr., 833 F.3d 890, 894 (8th Cir. 2016) (quotation omitted); see Turner v. Safley, 482 U.S. 78, 89 (1987); Heyer, 849 F.3d at 213.

Civil detainees' First Amendment rights "are at least as broad as those retained by convicted prisoners." Heyer, 849 F.3d at 213. In the context of civil detention, "a prison regulation impinging on a civil detainee's constitutional rights is valid if reasonably related to legitimate nonpunitive governmental interests." Matherly v. Andrews, 859 F.3d 264, 282 (4th Cir. 2017) (emphasis added); see Heyer, 849 F.3d at 214 n.9.

The court analyzes Heyer's claim under Turner v. Safley, 482 U.S. 78, 89 (1987), as modified in Matherly. See Matherly, 859 F.3d at 282; Heyer, 849 F.3d at 213; see also Lane v. Williams, 689 F.3d 879, 883–84 (7th Cir. 2012); Rivera v. Rogers, 224 F. App'x 148, 150–51 (3d Cir. 2007) (per curiam) (unpublished). Under Turner, the court must balance four factors to determine the reasonableness of a prison regulation that allegedly abridges a civil detainee's First Amendment rights:

> (1) whether there is a valid, rational connection between the policy and the [legitimate, nonpunitive governmental] interest; (2) whether an alternative means of exercising the right remains open to [civil detainees]; (3) the impact accommodation of the asserted right will have on guards, other [civil detainees], and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

Morrison v. Garraghty, 239 F.3d 648, 655 (4th Cir. 2001); Matherly, 859 F.3d at 282 (modifying Turner factors in the context of civil detainees); see Beard v. Banks, 548 U.S. 521, 529 (2006); Turner, 482 U.S. at 89–91; Heyer, 849 F.3d at 214. In analyzing the Turner factors, the court accords "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." Overton v. Bazzetta, 539 U.S. 126, 132 (2003); see Turner, 482 U.S. at 90; Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982); Bell v. Wolfish, 441 U.S. 520, 547–48 (1979); Pell, 417 U.S. at 826–27; Rivera, 224 F. App'x at 150. The burden is "not on the [BOP] to prove the validity of prison regulations but on [Heyer] to disprove it." Overton, 539 U.S. at 132; Beard, 548 U.S. at 529; Yang, 833 F.3d at 894; LaSure v. Gore, No. 9:08-CV-320-RBH-BM, 2009 WL 1748718, at *7 n.5 (D.S.C. June 19, 2009) (unpublished).

As for the first Turner factor, a BOP "regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." Turner, 482 U.S. at 89; Heyer, 849 F.3d at 215. There is a valid, rational connection between preventing Heyer from using a videophone to directly call others outside of FCI-Butner and the legitimate, nonpunitive governmental interests to promote safety at FCI-Butner, to protect the public (including children), and to rehabilitate Heyer. See Overton, 539 U.S. at 133; Matherly, 859 F.3d at 282; Heyer, 849 F.3d at 215. Direct video contact between Heyer and an outside call participant would allow a call participant to transmit dangerous, inappropriate, and prohibited information through ASL or other visual means, such as writings, drawings, or photographs. See [D.E. 195] 150–52, 166–69 (Craig testimony). A call participant could display this information by holding the information up to the camera, or less conspicuously in the background of the video. See [D.E. 196] 28 (Craig testimony). Moreover, the BOP might not readily detect such information,

even with monitoring of Heyer's calls, thereby endangering individuals within FCI-Butner and the public generally and inhibiting Heyer's rehabilitation. See [D.E. 195] 150–52, 166–69 (Craig testimony); [D.E. 196] 28 (Craig testimony).

In analyzing the first factor, the court notes that Heyer has a disturbing history of sex offenses against children, including molesting at least 46 children and possessing child pornography, and is a sexually dangerous person. Moreover, since being certified as a sexually dangerous person, Heyer has continued to engage in improper behavior. See, e.g., Def. Tr. Ex. 32, at Def. 7112, Def. 7126, Def. 7131–32, Def. 7136, Def. 7158–59, Def. 7164, Def. 7190, Def. 7203, Def. 7205, Def. 7208–09, Def. 7213, Def. 7224, Def. 7226, Def. 7232–34, Def. 7277, Def. 7280, Def. 7283, Def. 7285, Def. 7289. For example, Heyer received an incident report at FCI-Butner in July 2009 for having a 109-page handwritten manuscript of a child pornography manuscript in his cell. See [D.E. 196] 50–56 (Grover testimony). The manuscript described adult child sexual contact, incest, and bondage. Correctional officers also found two sexually explicit books and a sexual magazine with cutouts depicting pre-pubescent boys in bathing suits and kissing. See id. at 56–57. In addition, in August 2010 and January 2011, Heyer had mail rejected due to texts describing victimization, abuse of children or dogs, and sexually violent conduct. See id. Furthermore, Heyer has dropped out of the treatment program for sexually dangerous people, and Heyer is housed in a unit within FCI-Butner with numerous other men who are "sexually dangerous" under the Adam Walsh Act. See id. at 57–58; Def. Tr. Ex. 32, at Def. 7117.

The BOP can consider Heyer's record of improper behavior in the BOP and current location in choosing its policy to not make videophone technology available to Heyer. See Sebolt v. Samuels, No. 17-2845, 2018 WL 4232075, at *2–3 (7th Cir. Sept. 6, 2018) (per curiam) (unpublished) (upholding dismissal of First Amendment claim denying inmate's ability to send and receive e-mail

due to the warden's determination that the inmate's offense conduct and other personal history indicates a propensity to offend through the use of e-mail or whose access to e-mail could jeopardize the safety, security, and orderly operation of the correctional facility, or the protection of the public or staff). Direct videophone calls with outside call recipients pose a significant risk that Heyer could receive images of children during a videocall. Although the BOP can monitor videophone calls in real-time, the BOP cannot control an act by an outside call participant to exploit a child (whether in person or in a photograph) during a videocall with Heyer. Such potential incidents pose a significant risk of harm to a child. See [D.E. 195] 167–69 (Craig testimony); [D.E. 180] ¶¶ 35–44. The person on the other end of the videophone call also could record the call and post its content on the Internet, thereby further exploiting the child and using BOP technology to facilitate such exploitation. Furthermore, there will be a delay in translating any direct conversation that Heyer has in ASL into English. See [D.E. 196] 13–14 (Craig testimony). The court finds that the BOP's concerns are markedly different than those posed by using a TTY device, e-mails, or letters, or non-deaf detainees' use of telephones. Cf. Overton, 539 U.S. at 133 ("Protecting children from harm" is "a legitimate goal."); Sebolt, 2018 WL 4232075, at *2 ("But monitoring emails to detect abuse imposes costs on the prison. And those costs increase when the users are likely to abuse the system because the prison must then scrutinize their emails more carefully. Prisons have a legitimate interest in limiting the costs of detecting unlawful communications between inmates and outsiders."); Heyer, 849 F.3d at 215 ("There is no doubt that BOP has a legitimate interest in maintaining the security of its facilities and in protecting the public from further criminal acts by inmates and detainees."); Yang, 833 F.3d at 895 ("If prison officials could not monitor an inmate's communications with people outside the facility in an unfamiliar language, then they would be vulnerable to escape, smuggling of contraband, and other planning of criminal activity."). Accordingly, the court finds

that there is a valid, rational connection in this case between the BOP's regulation and legitimate, nonpunitive governmental interests.[1]

As for the second Turner factor, "courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation." Turner, 482 U.S. at 90 (quotation and alteration omitted). Moreover, "[a]lternatives to the type or amount of speech at issue need not be ideal[;] they need only be available." Holloway v. Magness, 666 F.3d 1076, 1080 (8th Cir. 2012); see Overton, 539 U.S. at 135 ("Alternatives . . . need not be ideal."); Yang, 833 F.3d at 895 (same).

Heyer has numerous alternative means of effectively communicating with individuals (both deaf and non-deaf) outside of FCI-Butner. As for communicating with non-deaf individuals, Heyer can have visitors, send and receive letters and e-mails, use a TTY deceive, and soon will have access to the VRS system. See, e.g., Yang, 833 F.3d at 895; Valdez v. Rosenbaum, 302 F.3d 1039, 1049 (9th Cir. 2002). In making this finding, the court has reviewed the conflicting evidence and finds that Heyer can read, write, and effectively communicate in English at the third-grade level. See, e.g., [D.E. 195] 25, 39, 41–42, 58 (Cokely testimony); [D.E. 196] 70–75, 82–83 (Taylor testimony); Pl. Tr. Ex. 43; Pl. Tr. Ex. 167; Def. Tr. Ex. 23, at Def. 8377, Def. 7154, Def. 995; Def. Tr. Ex. 24; Def. Tr. Ex. 25, at Def. 7922; Def. Tr. Ex. 28, at Def. 6240–44; Def. Tr. Ex. 26; Def. Tr. Ex. 27; Def. Tr. Ex. 32, at Def. 7106, Def. 7224. In doing so, the court does not credit the evidence to the contrary from Dr. Denis Cokely. Cf. [D.E. 195] 22–43. The cross examination of Dr. Cokely revealed flaws

[1] In making this finding, the court recognizes that some state prison systems allow deaf inmates (including sex offenders and civilly committed offenders) to use videophones. See [D.E. 183] ¶ 21. The court also recognizes that the BOP has begun a pilot program in other institutions housing female inmates to provide some non-deaf inmates with access to what amounts to a videophone. See id. ¶ 22. These decisions do not lessen the valid, rational connection in this case between the BOP's regulation and legitimate, nonpunitive governmental interests.

in his methodology and opinions. See id. at 51–65. Similarly, the court does not credit Heyer's testimony that he cannot effectively read, write, and communicate in English. Compare [D.E. 195] 119–24 (Heyer testimony), with [D.E. 196] 70–75 (Taylor testimony). The court also does not credit the evidence from Dr. Cokely that Heyer cannot effectively communicate using a TTY device, e-mail, or in person. Cf. [D.E. 195] 44–45. Again, the cross examination of Dr. Cokely revealed flaws in his methodology and opinions. See id. at 55–57, 65–68, 70–74. Likewise, the cross-examination of Richard Ray revealed flaws in his opinions. See id. at 100–05. As for communicating with deaf individuals, Heyer can have visitors, send and receive letters and e-mail, and use a TTY device. Accordingly, the court finds that Heyer has effective alternative means of communication.

As for the third Turner factor, a court must assess "the impact accommodation of the asserted constitutional right will have on [correctional officers] and other [civil detainees], and on the allocation of prison resources generally." Turner, 482 U.S. at 90. "In the necessarily closed environment of the correctional institution few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." Id. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow [civil detainees] or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." Id.; Matherly, 859 F.3d at 282; Heyer, 849 F.3d at 216.

The court finds that the BOP cannot operate a videophone that allows for point-to-point communication between detainees and individuals outside of FCI-Butner without a waiver of BOP or DOJ IT security requirements. See [D.E. 195] 153–58 (Craig testimony); [D.E. 196] 15. The court also finds that installing and permitting Heyer to use videophone technology in the housing unit in FCI-Butner where Heyer resides presents a risk that Heyer will abuse the system and that other detainees could pressure Heyer into allowing them to use the videophone technology. See [D.E.

195] 168 (Craig testimony). The BOP also will have difficulty in real-time monitoring of Heyer's conversations exclusively in ASL without hiring ASL interpreters at additional cost. See [D.E. 196] 31–41 (Mansukhani testimony). The court finds that using a videophone for direct video calls will result in "significantly less liberty and safety for everyone else, [correctional officers] and other [civil detainees] alike." Thornburgh v. Abbott, 490 U.S. 401, 418 (1989); see Sebolt, 2018 WL 4232075, at *2–3. The court also finds that, in order to safeguard the public, the BOP would need to expend substantial resources to monitor ASL conversations in real-time. See [D.E. 196] 11–14 (Craig testimony); [D.E. 196] 31–41 (Mansukhani testimony). The court defers to the BOP's informed discretion in setting its policy against permitting Heyer to engage in point-to-point video calls at FCI-Butner. Cf. [D.E. 196] 39–40 (Mansukhani testimony). Accordingly, the third factor weighs against Heyer.

Finally, as for the fourth Turner factor, the court considers whether a civil detainee "can point to an alternative that fully accommodates the [detainee]'s rights at de minimis cost to valid penological interests . . . ." Turner, 482 U.S. at 90–91; see Sebolt, 2018 WL 4232075, at *3; Matherly, 859 F.3d at 283; Heyer, 849 F.3d at 217; Yang, 833 F.3d at 895. "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." Turner, 482 U.S. at 90–91; Overton, 539 U.S. at 136.

Heyer argues that alternatives to a complete ban on point-to-point video calls exist. See, e.g., [D.E. 184] 25–27; [D.E. 195] 83–85, 96–97 (Ray testimony). In support, Heyer notes that the BOP could treat videophone calls like telephone calls and permit him reasonable access to such calls absent Heyer's abuse or misuse of the device, or that the BOP could monitor Heyer's calls in a manner similar to how it will monitor Heyer's use of the VRS system. See [D.E. 184] 25–27; [D.E.

195] 96–97 (Ray testimony).

Heyer's proposed alternatives do not impose merely de minimis costs. See [D.E. 195] 69–70 (Cokely testimony); [D.E. 195] 167 (Craig testimony); [D.E. 195] 97–98, 105–10 (Ray testimony); [D.E. 196] 12–14 (Craig testimony); [D.E. 196] 31–41 (Mansukhani testimony); [D.E. 196] 59–63 (Grover testimony); Def. Tr. Ex. 19. In Matherly, the Fourth Circuit held that the BOP could censor civil detainees' mail, reasoning that the proposed alternative of "making a BOP official available to supervise each civil detainee when he opens his mail would be burdensome." Matherly, 859 F.3d at 283. Real-time monitoring of conversations in ASL would impose substantially more costs than observing detainees open their mail. See [D.E. 196] 12–14 (Craig testimony); [D.E. 196] 37–39 (Mansukhani testimony). Moreover, the court has discussed the real security and other concerns that will arise if the BOP permits Heyer to make point-to-point videophone calls. Furthermore, Heyer has not shown that the BOP's policy is an "exaggerated response" to the BOP's legitimate concerns. See Thornburgh, 490 U.S. at 418; Turner, 482 U.S. at 90; Sebolt, 2018 WL 4232075, at *2–3. Heyer has not shown any alternative that imposes a de minimis cost on the BOP's legitimate, nonpunitive interests. See Matherly, 859 F.3d at 283 (noting that "common sense says that making a BOP official available to supervise each civil detainee while he opens his mail would be burdensome"); Sebolt, 2018 WL 4232075, at *2; Yang, 833 F.3d at 895; Minton v. Childers, 113 F. Supp. 3d 796, 803 (D. Md. 2015). Thus, the fourth factor weighs against Heyer.

III.

After weighing the Turner factors as modified in Matherly, the court FINDS that Heyer failed to prove that the BOP's failure to install and provide Heyer the requested videophone equipment violates the First Amendment. Thus, the court enters judgment in favor of defendants and against Heyer. The clerk shall close the case.

SO ORDERED. This 12 day of February 2019.

JAMES C. DEVER III
United States District Judge