

STANDARD 4.7

DISABILITY IDENTIFICATION, ASSESSMENT, AND ACCOMMODATION

I. POLICY

Facilities are required by federal law, including Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504), to ensure that detainees with a disability have an equal opportunity to participate in, access, and enjoy the benefits of the facility's programs, services, and activities. Such participation will be accomplished in the least restrictive and most integrated setting possible, through the provision of reasonable accommodations, modifications, and/or auxiliary aids and services, as necessary, and in a facility that is physically accessible.

II. STANDARDS AND PROCEDURES

A. Definitions

1. Disability

For purposes of these detention standards, the term “disability” means either of the below:

- a. A physical or mental impairment that substantially limits one or more of an individual's major life activities; or
- b. A record of such a physical or mental impairment.

“Major life activities” are basic activities that a detainee without a disability in the general population can perform with little or no difficulty, including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity can also include the operation of major bodily functions, like the immune, endocrine, and neurological systems; normal cell growth; digestion, respiration, and circulation; and the operations of the bowel, bladder, and brain.

2. Communication Impairments

Detainees with “communication impairments” include detainees with physical, hearing, vision, and speech impairments (e.g., detainees who have hearing loss or are deaf or blind, who have visual impairments, or who are nonverbal).

3. Mobility Impairments

Detainees with “mobility impairments” include detainees with physical impairments who require a wheelchair, crutches, prosthesis, cane, or other mobility device, or other assistance.

4. Programs, Services, or Activities

For purposes of these standards, the “programs,” “services,” “benefits,” and/or “activities” of a detention facility include all aspects of the facility’s operations that involve detainees. These include, but are not limited to, housing placements, medical care, safety and security protocols, food services, correspondence, visitation, grievance systems, transfers, and detainee programming and scheduled activities such as law and leisure libraries, religious services, educational or vocational classes, work programs, and recreation.

5. Auxiliary Aids or Services

“Auxiliary aids or services” are services or devices that allow for effective communication by affording individuals with impaired vision, hearing, speaking, sensory, and manual skills an equal opportunity to participate in, and enjoy the benefits of, programs and activities. Such aids or services include sign language interpreters, written materials, note-takers, video remote interpreting and/or video relay services, videophones, or other effective methods of making aurally delivered materials available to detainees with hearing impairments; readers, taped texts, materials or displays in Braille, secondary auditory programs, or other effective methods of making visually delivered materials available to detainees with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

6. Reasonable Accommodations

For purposes of these standards, “reasonable accommodation” means any change or adjustment in detention facility operations, any modification to detention facility policy, practice, or procedure, or any provision of an aid or service that permits a detainee with a disability to participate in the facility’s programs, services, activities, or requirements, or to enjoy the benefits and privileges of detention programs equal to those enjoyed by detainees without disabilities. Examples of “reasonable accommodations” include, but are not limited to, proper medication and medical treatment; accessible housing, toilet, and shower facilities; devices like bed transfer, accessible beds or shower chairs, hearing aids, or canes; and assistance with toileting and hygiene.

When considering requests for reasonable accommodations or modifications, the facility shall engage in an interactive and individualized process as outlined in section F below.

For the purposes of this standard, and particularly section F below, reasonable accommodations, disability-related modifications, and auxiliary aids and services are collectively referred to as “accommodations” or “reasonable accommodations.”

B. Reasonable Accommodation Process and Compliance Coordinator

1. Reasonable Accommodation Process

The facility shall develop a process, which includes reasonable timelines, for reviewing detainees’ requests for accommodations related to a disability and for providing accommodations (including interim accommodations), modifications, and reassessments.

2. Disability Compliance Coordinator

The facility or public entity shall designate a Disability Compliance Coordinator to assist facility personnel in ensuring compliance with this standard and all applicable federal, state, and local laws related to accommodation of detainees with disabilities. The Disability Compliance Coordinator may be a member of the medical staff, or anyone with relevant knowledge, education, and/or experience; this role may be filled by the county, locality, or agency’s existing ADA coordinator.

C. Identification

A detainee may identify him- or herself as having a disability and/or request a reasonable accommodation at any point during detention. Detainees may submit a formal or informal (i.e., verbal or written) request for accommodations or assistance. Requests should be reviewed in context, and do not need to include the words “disability” or “accommodation” to be considered a request for accommodations. The facility shall also consider information submitted by a third party, such as an attorney, family member, or other detainee identifying a detainee with a disability or a detainee’s need for an accommodation.

Further, it is incumbent upon facility staff to identify detainees with impairments that are open, obvious, and apparent. Identification of detainees with potential disabilities (i.e., impairments that are open, obvious, and apparent) may occur through medical or intake screenings, or through direct observation. Staff should be particularly vigilant for impairments that affect a detainee’s mobility or ability to communicate. Upon identifying a detainee with a potential disability, the facility shall review the need for any necessary accommodations pursuant to Section F below.

The processes described in this standard apply to any detainee who has requested an accommodation or auxiliary aid or service, or who has otherwise been identified as potentially needing an accommodation.

D. Physical Accessibility and Most Integrated Setting Possible

1. Physical Accessibility

The facility shall comply with all applicable federal, state, and local laws and regulations related to the accessibility of safe and appropriate housing for detainees with disabilities.

The facility will ensure that detainees with disabilities are able to physically access its programs, services, and activities. This includes, for example, ensuring detainees with disabilities can access telephones, as well as toileting and bathing facilities.

2. Most Integrated Setting

Every detainee with a disability will be housed in a space that affords him or her safe, appropriate living conditions. Detainees with disabilities should be provided access to the facility's programs and services in the least restrictive setting possible and the most integrated setting appropriate to the needs of the detainee with a disability.

Detainees with disabilities shall generally be permitted to keep assistive devices (including such aids as canes and crutches) with them at all times, including in general population. Placement apart from the general population due to security concerns related to the use of any such item must be based on individualized review, and the justification for the placement must be documented, whether the detainee is placed in an SMU, medical clinic, or elsewhere. The justification shall set forth the individualized assessment of the safety or security concern created by the assistive device that could not be eliminated or mitigated by modification of policies or procedures.

A detainee's disability or need for accommodations may not provide the sole basis for a decision to place the detainee in an SMU. An individualized assessment must be made in each case, and the justification for the placement documented.

E. Effective Communication

Throughout the facility's programs and activities, including at all stages of the reasonable accommodation process, the facility must take appropriate steps to allow for effective communication with detainees with disabilities to afford them an equal opportunity to participate in, and enjoy the benefits of, the facility's programs and activities. Steps to ensure effective communication may include the provision and use of auxiliary aids or services for detainees with vision, hearing, sensory, speech, and manual impairments, as needed. The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual detainee, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what types of auxiliary aids or services

are necessary, the facility shall give primary consideration to the request of the detainee with a disability.

Use of other detainees to interpret or facilitate communication with a detainee with a disability may only occur in emergencies.

F. Reasonable Accommodations Process

The facility's process to appropriately accommodate a detainee with a disability will differ depending on the nature of the impairment or disability being addressed.

1. Immediate Accommodations

The facility shall provide detainees with disabilities with necessary accommodations in an expeditious manner. In many situations, the facility will be able to immediately grant a detainee's request for an accommodation.

2. Medical and Mental Health Treatment

Many detainees with disabilities will receive medical and/or mental health treatment from the facility's clinical medical authority. Where a detainee with a disability is fully able to access the facility's programs and activities through the provision of appropriate medical or mental health treatment, further interactive process may not be necessary. However, where the provision of accommodations depends on medical expenditures requiring ICE/ERO authorization, the facility shall consider whether there are any interim accommodations that would afford the detainee access to its programs and activities pending ICE/ERO authorization (for example, providing a wheelchair as an interim accommodation to allow for mobility while a prosthesis is repaired), and shall provide to the detainee any such interim accommodations it identifies.

3. Interactive Process

Requests or referrals that require an interactive process include (1) detainees with mobility impairments; (2) detainees with communication impairments; (3) detainees whose initial requests for accommodations or assistance have been denied; (4) detainees who have filed grievances about the accommodation of their disabilities or impairments; (5) detainees whose requests are complex or best addressed by staff from more than one discipline (e.g., security, programming, medical, or mental health, etc.); and (6) detainees whose cases are otherwise determined by facility staff to be appropriate for review.

The interactive process will likely include participation from a healthcare professional and any additional facility staff with requisite knowledge of and/or responsibility for compliance with the facility's obligation to accommodate detainees with disabilities. When appropriate, the facility shall consult with ICE/ERO to obtain guidance, information, and/or resources for providing accommodations.

a. Interaction with the Detainee

Given the importance of considering information from the detainee, the interactive process shall include a good faith attempt to interview the detainee and determine the nature of the detainee's disability, any difficulties the detainee experiences in accessing the facility or its programs or services, and the detainee's specific requests or needs for accommodation, if any. The facility will respect any detainee's decision to decline to participate in the accommodation process. If a detainee declines such an invitation, the facility will document this declination.

b. Determinations

The facility will determine whether the detainee has a disability, whether the detainee requires an accommodation to meaningfully access the facility's programs and activities, and whether to grant or recommend denying the requested accommodation (if any) or propose an alternate, equally effective accommodation. The facility will issue a written decision within a reasonable time of the request or referral.

If there is a delay in determining whether to approve an accommodation request or in providing the detainee with an approved accommodation, the facility shall consider whether there are any interim accommodations that would afford the detainee access to its programs and activities pending the final disposition of the request or the provision of approved accommodations. The facility shall provide to the detainee any such interim accommodations it identifies.

Where the facility approves a request for an accommodation, but the recommended accommodation requires approval from ICE/ERO (i.e., expenditures on medical treatment, medication, and durable medical equipment that require IHSC authorization), the facility will inform the detainee of the decision and the status of the request with ICE/ERO and shall consider whether to provide an interim accommodation. The facility shall provide to the detainee any such interim accommodations it identifies.

Where the facility approves a request for accommodations, and can immediately provide the necessary accommodation, the facility will follow the notification procedures outlined below and implement the approved accommodations as quickly as possible.

c. Final Review of Any Denial by Facility Administrator or Assistant Facility Administrator

Any denial of a request for accommodation related to a disability must be approved by the facility administrator or assistant facility administrator. Such denials include all cases in which the facility determines that accommodations, including all

requested accommodations, should be denied; or that alternate, unrequested accommodation(s) should be provided.

d. Detainee Notification

The facility will provide the detainee with written notification of the facility's final decision on his or her request for accommodation, regardless of whether an accommodation was granted or denied, and regardless of whether the accommodation requires further approval by ICE/ERO. Notification of a denied accommodation, or provision of an alternate, unrequested accommodation will include a justification for the denial. Notification shall be provided in a language or manner the detainee can understand.

e. Staff Notification

Where an accommodation is granted, all relevant facility staff, including facility security staff, receive timely notification and, as needed, instructions for successful implementation of the accommodation. The provision of this information will also account for any applicable privacy and confidentiality considerations.

G. Denial of an Accommodation

Permissible reasons for the facility to deny an accommodation to a detainee who has been determined to have a disability include: (1) the detainee is not denied access to the facility's programs or activities because of a disability; (2) there is not a nexus between the disability and the requested accommodation; (3) the requested accommodation would fundamentally alter the nature of the program, service, or activity; (4) the requested accommodation would result in an undue financial and administrative burden; or (5) the detainee poses a direct threat to staff or other detainees.

Both "fundamental alteration" and "undue financial and administrative burden" are generally high standards that are difficult to meet. Further, if a particular accommodation would result in an undue financial and administrative burden or fundamental alteration, the facility must take any other action that would not result in such an undue burden or fundamental alteration but would nevertheless ensure that, to the maximum extent possible, detainees with a disability receive the benefits and services of the program or activity. Similarly, determinations that individuals pose a "direct threat" are generally very rare, and require a careful, individualized assessment as described below.

1. Fundamental Alteration

A "fundamental alteration" to a facility's programs, services, or activities is a change that is so significant that it alters the essential nature of the program, service, or activity offered. Whether a change constitutes a fundamental alteration is a determination that must be made on a case-by-case basis, and that must consider the unique characteristics of each facility and each detainee with a disability.

2. Undue Financial and Administrative Burden

An “undue financial and administrative burden” is a significant difficulty or expense related to a facility’s operations, programs, or activities. In evaluating whether a particular accommodation would result in an undue burden, the facility must consider all resources available for use in the funding and operation of the conducted program or activity *as a whole*.

3. Direct Threat

The facility may justify the denial of an accommodation to a detainee with a disability on the basis of the detainee posing a direct threat to staff or other detainees only if providing the accommodation would unavoidably exacerbate the threat. The determination that a detainee with a disability poses such a direct threat to staff or other detainees must be reached through an individualized assessment. The assessment must rely on reasonable judgment and current medical evidence, or the best available objective evidence, to determine the nature, duration, and severity of the risk, and whether any modifications of policies, practices, or procedures can mitigate or eliminate the risk. Detainees who are found to pose a direct threat are nevertheless entitled to auxiliary aids or services to allow for effective communication.

H. External Notifications

1. Notification of a Detainee with a Communication or Mobility Impairment

The facility shall notify ICE/ERO as soon as practicable, but no later than 72 hours, after the facility has completed its interactive process to assess the needs of any detainee with a communication or mobility impairment. This notification must include, at a minimum,

- a. The nature of the detainee’s disability or impairment;
- b. The accommodation requested by the detainee or required; and
- c. The facility’s plan to accommodate the detainee.

2. Notification of Facility Denials and Provision of Alternative Accommodations

The facility shall notify ICE/ERO in writing within 72 hours of any denial of any accommodation’s requests. This notification must include, at a minimum,

- a. The nature of the detainee’s disability;
- b. The accommodation requested by the detainee;
- c. The reason for denial; and

d. Any steps the facility has taken to address the detainee's needs.

ICE/ERO may review the facility's denial of a request for an accommodation. The facility shall provide additional information as needed to further ICE/ERO's review and shall cooperate with ICE/ERO on any additional steps that may be necessary.

I. Detainee Orientation

The facility orientation program shall notify and inform detainees about the facility's disability accommodations policy, including their right to request reasonable accommodations and how to make such a request, in a language and/or manner they can understand. The facility will post other documents for detainee awareness in detainee living areas and in the medical unit, as requested by ICE/ERO.