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Inadequate Diabetes Care in Correctional Facilities & the Need for Relief Under the ADA and Section 504

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INADEQUATE DIABETES CARE IN CORRECTIONAL FACILITIES & THE NEED FOR RELIEF UNDER THE ADA AND SECTION 504[*]

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Recent reporting has highlighted the numerous, horrific deaths of diabetics across the country due to the receipt of inadequate medical care while incarcerated. Yet, incarcerated diabetics who bring suit claiming inadequate diabetes care are not often provided relief under the Eighth Amendment as courts are reluctant to find that prison officials acted recklessly so long as some medical care was given. Unlike the Eighth Amendment, the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504") providing promising, yet relatively unexplored, avenues for relief. Allowing inadequate diabetes care in correctional facilities to persist directly opposes the stated goals of the ADA and subjects diabetic persons to discrimination at the hands of a public entity.

On separate occasions, a few federal district courts recently held that an incarcerated diabetic person was discriminated against by a correctional institution in violation of the ADA and Section 504 when they were denied adequate diabetes care. Those decisions display the emergence of courts' willingness to find an ADA/Section 504 violation under the "otherwise discriminated against" provision of the statutes, rather than piecemeal tying the injury to an exclusion from an institution's "service, program, or activity." Cabining inadequate diabetes care as discrimination on its face—as those courts likely did—results in more consistent and fair outcomes. All in all, not providing adequate medical care to diabetics is a clear violation of the ADA and Section 504, and courts must recognize that.

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INTRODUCTION

Just over a decade ago, it was estimated that roughly 9% of the 2.1 million individuals in U.S. correctional institutions have diagnosed diabetes (most commonly Type 1 or Type 2 diabetes).[1] These individuals are often "at the mercy of prison staff to provide them with access to health care tools, medications, and reasonable accommodations

1. LAURA M. MARUSCHAK, MARCUS BERZOFSKY, & JENNIFER UNANGST, U.S. DEP'T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, at 3, 22 (2016), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf.

necessary to manage their diabetes."[2] Because they must depend on third parties for treatment, diabetics living in prisons are often provided with inadequate medical care resulting in life-altering or -ending consequences. While claims for relief for inadequate medical care under the Eighth Amendment are generally unsuccessful, the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504") provide promising, yet relatively unexplored, avenues for relief. On separate occasions, a few federal district courts recently held that an incarcerated diabetic person was discriminated against by a correctional institution in violation of the ADA and Section 504 when they were denied adequate diabetes care.[3] In so doing, the courts furthered the stated goals of the ADA, as inadequate diabetes care subjects diabetic persons to discrimination at the hands of a public entity.[4] And categorizing inadequate diabetes care as disability discrimination on its face, rather than piecemeal tying the injury to a diabetic's exclusion from a "service, program, or activity" results in more consistent and fair outcomes.[5] Regardless of courts' characterization of the issue, they have a clear avenue for applying the ADA and Section 504 as written to better provide relief for incarcerated diabetic persons' claims of inadequate medical care moving forward.[6]

Type 1 diabetes requires daily administration of insulin,[7] while Type 2 diabetes requires a healthy diet and exercise, and may require insulin and/or oral medications.[8] Insulin-dependent diabetics must

2. Mike Hoskins*, For People with Diabetes, Arrest and Incarceration Could be Lethal,* HEALTHLINE (Aug. 20, 2020), https://www.healthline.com/healthy/diabetes-endangered-arrest-and-incarceration?utm_source=ReadNext#Blaming-prisoners-for-poor-care.

3. *See, e.g.*, Rodesky v. Pfister, 2023 WL 2585858 (C.D. Ill. Feb. 21, 2023); Montez v. Owens, 2007 U.S. Dist. LEXIS 36218 (D. Colo. May 16, 2007).

4. *See* discussion *infra* Section III.A.

5. *See* discussion *infra* Section III.B.

6. For the scope of this piece, medical care is referring not only to sufficient access to diabetes medication and monitoring supplies, but also accommodations from a typically regimented prison schedule to allow for breaks from activities to test glucose levels, eat a snack, and check assistive devices as well as accommodations related to cell location and work assignments.

7. *Diabetes*, WORLD HEALTH ORG. (Sept. 16, 2022), https://www.who.int/news-room/fact-sheets/detail/diabetes.

8. *Insulin, Medicines, & Other Diabetes Treatments*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, https://www.niddk.nih.gov/health-information/diabetes/overview/insulin-medicines-treatments#:~:text=These%20lifestyle%20changes%20include%20consuming,you%20inject%2C%20such%20as%20insulin (Mar. 2022).

receive insulin through injections or an insulin pump.[9] The improper treatment of an individual's diabetes, such as not taking enough insulin or other medication to lower blood sugar, can result in high blood sugar levels, also known as hyperglycemia.[10] In the immediate, hyperglycemia can lead to blurred vision, feeling weak, and diabetic ketoacidosis (DKA).[11] If left untreated, DKA is a "life-threatening and often deadly consequence of a shortage of insulin."[12]

In the long-term, continuous high blood sugar levels can lead to diabetes-related complications, including nerve and kidney damage, cardiovascular disease, blindness, foot or leg amputation, bone and joint problems, and teeth and gum infections.[13] Insulin-dependent diabetics and diabetics on some oral medications are also subject to low blood sugar levels, known as hypoglycemia.[14] Symptoms of hypoglycemia include shaking, irritability or confusion, nervousness or anxiety, dizziness, fainting, and seizures.[15] While all insulin-dependent diabetics and those on some oral medications may experience hypoglycemia regularly, the greater concern is that individuals will face *severe* hypoglycemia and loss of consciousness.[16]

To manage their conditions, incarcerated diabetic persons require "regular blood checks to avoid hyperglycemia or hypoglycemia, manag[ement of] carbohydrate intake to avoid swings in blood glucose levels, and care for secondary complications such as vision problems, nerve pain, kidney failure or heart problems."[17] Both the American

9. BENJAMIN EISENBERG & VICTORIA THOMAS, AM. DIABETES ASS'N, LEGAL RIGHTS OF PRISONERS AND DETAINEES WITH DIABETES: AN INTRODUCTION GUIDE FOR ATTORNEYS AND ADVOCATES 4 (n.d.), http://main.diabetes.org/dorg/living-with-diabetes/correctmats-lawyers/legal-rights-of-prisoners-detainees-with-diabetes-intro-guide.pdf.

10. *Hyperglycemia in Diabetes*, MAYO CLINIC (Aug. 20, 2022), https://www.mayoclinic.org/diseases-conditions/hyperglycemia/symptoms-causes/syc-20373631.

11. *Id.*

12. EISENBERG & THOMAS, *supra* note 9, at 8.

13. *Hyperglycemia in Diabetes*, *supra* note 10.

14. EISENBERG & THOMAS, *supra* note 9, at 5.

15. *Id.*; *Low Blood Sugar (Hypoglycemia)*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/diabetes/basics/low-blood-sugar.html (Dec. 30, 2022).

16. EISENBERG & THOMAS, *supra* note 9, at 6.

17. *Id.* at 8.

Diabetes Association and the Federal Bureau of Prisons have published guidance for the management of diabetes in correctional settings.[18]

Recent reporting has highlighted the numerous deaths of diabetics across the country due to inadequate medical care while incarcerated. In Georgia jails and prisons, at least a dozen people have died from DKA in the past decade.[19] One diabetic was denied insulin for forty-eight hours before his death, another had a blood sugar level nearly thirteen times the normal range at the time he died, and others died after exhibiting DKA symptoms for days or weeks without proper medical attention.[20]

Another diabetic individual died recently in a Washington state prison after suffering from severely low blood sugar.[21] After missing his usual evening insulin shot and dinner, he was found collapsed in a common area.[22] The staff responding to his unconscious state lacked the proper training to help him.[23] Although he had previous access to and relied on glucose tabs and an insulin pump, he was eventually denied these life-saving medical supplies because he ran out of funds.[24] Horrific stories and traumatic deaths will only become more common as the rate of incarcerated diabetic persons has been on the rise.[25]

Some families of individuals who have died due to diabetic complications while incarcerated have succeeded in their suits for

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18. FED. BUREAU OF PRISONS, MANAGEMENT OF DIABETES 1 (2017), https://www.bop.gov/resources/pdfs/diabetes_guidance_march_2017.pdf; *Diabetes Management in Detention Facilities*, AM. DIABETES ASS'N (Oct. 2021), https://diabetes.org/sites/default/files/2021-11/ADA-position-statement-diabetes-management-detention-settings-2021.pdf.

19. Danny Robbins, *For Some in Ga. Prisons and Jails, Diabetes Has Meant a Death Sentence*, ATLANTA J.-CONST. (Apr. 12, 2019), https://www.ajc.com/news/state--regional-govt--politics/for-some-prisons-and-jails-diabetes-has-meant-death-sentence/wVz7xy1g4ujG3ClhH1visJ/.

20. *Id.*

21. Felix Sitthivong & Sam Levin, *'I Don't Have the Funds': A Diabetic Prisoner Pleaded for Insulin Supplies Before His Death*, GUARDIAN (Nov. 15, 2022), https://www.theguardian.com/us-news/2022/nov/15/prison-healthcare-washington-diabetes-death-clifford-farrar.

22. *Id.*

23. *Id.*

24. *Id.*

25. The rate of incarcerated persons with diabetes nearly doubled from 2004 to 2012. Robbins, *supra* note 19.

wrongful death.[26] Additionally, prison staff have been found guilty of negligent homicide and manslaughter following the death of an incarcerated diabetic person.[27] But incarcerated diabetics should have means of relief when receiving inadequate medical care before death or irreversible complications occur.

Incarcerated diabetic persons can make various claims in the event that they are receiving inadequate medical care.[28] First, a person detained following their criminal conviction can claim a violation of the Eighth Amendment, which prohibits cruel and unusual punishment, including inadequate medical care.[29] A person detained, but not yet convicted, can make a similar argument under the Fourteenth Amendment.[30] The remainder of this piece will analyze the Eighth Amendment claims, with the understanding that the standards and outcomes under the Fourteenth Amendment are largely equivalent. Second, incarcerated persons in state and local institutions can file a claim under Title II of the ADA.[31] Third, incarcerated persons in institutions that receive federal funding can bring a claim under Section 504.[32] Claims under the ADA and Section 504 are often treated as "substantively the same" by courts, who regularly rely on Section 504 case law to interpret ADA claims.[33] Interestingly, few inadequate diabetes care claims have been brought by lawyers; instead, most cases have been litigated by pro se plaintiffs in correctional institutions.[34]

Few Eighth Amendment claims have succeeded, as it has proven to be a "monumental task" for an incarcerated person to show their right

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26. Linda Satter, *$344,000 Paid in Central Arkansas Jail-Death Suit*, ARK. DEMOCRAT GAZETTE (June 17, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/jun/17/344-000-paid-in-jail-death-suit-2018061-1/; *Mississippi County to Pay $2.75M in Diabetic Inmate's Death*, AP NEWS (June 23, 2022, 12:24 PM), https://apnews.com/article/lawsuits-mississippi-c0e28614f6aa3f76269b92ee3115a3be.

27. *See e.g.*, Brannan v. Mississippi, 319 So.3d 1119 (Miss. Ct. App. 2020); Robbins, *supra* note 19*; Mississippi County to Pay $2.75M in Diabetic Inmate's Death*, *supra* note 26.

28. VICTORIA THOMAS, AM. DIABETES ASS'N, CLAIMS RELATED TO MEDICAL CARE FOR PRISONERS WITH DIABETES 1 (2009), https://www.prisonlegalnews.org/media/publications/american_diabetes_association_claims_related_to_medical_care_for_prisoners_with_diabetes_2009.pdf..

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 6.

34. EISENBERG & THOMAS, *supra* note 9, at 2.

to adequate medical care has been violated.[35] Oftentimes, if "some medical attention" has been given to the individual, the court will find no violation of the Eighth Amendment.[36] Similarly, courts have rarely held in favor of incarcerated diabetic persons on their ADA and Section 504 claims.[37] To succeed under the ADA/Section 504, many courts require diabetic persons to show that they were denied access to a specific prison program or service because of their disability; alleged inadequate treatment on its own will not suffice.[38] Taken together, it appears that, at present, incarcerated diabetics have little to no relief for inadequate medical care under federal law. State law may allow incarcerated diabetic persons relief for "medical wrongful death, intentional infliction of emotional distress, battery, and negligent hiring, training, or supervision"[39] and/or relief under state-level disability discrimination laws (some of which mirror the federal ADA),[40] but the scope of this piece will focus only on available claims under federal law.

This piece argues that courts should apply the ADA and Section 504 as written to provide relief for incarcerated diabetic persons who receive inadequate medical care. Allowing inadequate medical care to persist directly opposes the goals of the ADA and such treatment subjects diabetic persons to discrimination at the hands of a public entity. As inadequate diabetes care itself constitutes a discriminatory action by a correctional institution, requiring plaintiffs to show they were denied access to a specific prison service, program, or activity runs counter to the mandate of the ADA and Section 504.[41] Section I analyzes the difficulty of meeting the standards required to prevail on an Eighth Amendment claim. Section II provides an overview of the historic success of ADA and Section 504 claims for inadequate medical care in

35. Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH L. 1, 6 (2008).

36. Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 638 (2010).

37. THOMAS, *supra* note 28, at 8.

38. *Id.* at 9.

39. EISENBERG & THOMAS, *supra* note 9, at 1.

40. *Disability Discrimination Laws by State*, BLOOMBERG L. (Dec. 20, 2021), https://pro.bloomberglaw.com/brief/disability-discrimination-laws-by-state/.

41. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*." 42 U.S.C. § 12132 (emphasis added).

correctional institutions. Section III discusses how courts should use the ADA and Section 504 to remedy inadequate medical care for diabetics in correctional institutions. Section IV concludes with policy considerations that could reduce the need for litigation for inadequate diabetes care altogether.

I. EIGHTH AMENDMENT CLAIMS

A. Overview

The Eighth Amendment prohibits cruel and unusual punishment, which requires that prison officials ensure adequate medical care is given to incarcerated persons.[42] If a diabetic individual is deprived of any right, privilege, or immunity secured by the Constitution, they can bring a claim under 42 U.S.C. § 1983 if they are in a local or state prison, or a Bivens action[43] if they are in a federal prison.[44] But the claim can be brought only after the individual exhausts all available administrative remedies in compliance with prison grievance procedures.[45] To succeed on an Eighth Amendment claim, the plaintiff must prove that prison officials had deliberate indifference to the individual's serious medical need.[46] As previously noted, the Eighth Amendment applies only to individuals convicted of a crime, while the Fourteenth Amendment applies to incarcerated persons prior to trial. The deliberate indifference standard and outcomes under the Fourteenth Amendment are equivalent to that under the Eighth Amendment discussed below.[47]

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42. U.S. CONST. amend. VIII; Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citing Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

43. "Bivens actions are simply the federal counterpart to § 1983 claims brought against state officials." Egervary v. Young, 366 F.3d 238, 246 (3d Cir. 2004) (citing Brown v. Philip Morris, Inc., 250 F.3d 789, 800 (3d Cir. 2001)). Notably, in 2012, the U.S. Supreme Court held that a Bivens claim for the deprivation of adequate medical care could not be brought against privately employed personnel working in a privately operated federal prison if the conduct "is of a kind that typically falls within the scope of traditional state tort law . . . ." Minneci v. Pollard, 565 U.S. 118, 131 (2012).

44. 42 U.S.C. § 1983. *See generally* Bivens v. Six Unknown Named Agents Fed. Bureau Narcotics, 403 U.S. 388 (1971) (finding a direct cause of action under certain parts of the federal constitution for civil rights violations undertaken at the hands of federal agents or officials).

45. Jones v. Bock, 549 U.S. 199, 218 (2007); 42 U.S.C. § 1997e(a).

46. Estelle v. Gamble, 429 U.S. 97, 106 (1976).

47. EISENBERG & THOMAS, *supra* note 9, at 13–14.

Deliberate indifference can be exhibited by both "prison doctors in their response to the [incarcerated person's] needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."[48] Moreover, the deliberate indifference standard has two distinct components: an objective component and a subjective component. The objective component requires that the medical need be "sufficiently serious" and "one that has been diagnosed by a physician as mandating treatment or one that is so obvious even a lay person would easily recognize the necessity for a doctor's attention."[49] The subjective component requires the plaintiff to "establish that defendant(s) knew he faced a substantial risk of harm and disregarded that risk, 'by failing to take reasonable measures to abate it.'"[50] These two components are addressed in turn below.

B. Objective Component: Sufficiently Serious Medical Need

Across federal district and circuit courts, diabetes is typically considered a sufficiently serious medical need under the Eighth Amendment deliberate indifference standard.[51] According to a report by the American Diabetes Association, "this is treated almost as a per se rule by many courts."[52] This sentiment has been expressed by many federal appellate courts. For example, in 2003, the Ninth Circuit opined that it was joining its sister circuits—the Second, Third, Fifth, Seventh, Eighth, and Tenth circuits—in finding that diabetes constitutes a serious medical need.[53]

Some courts have tried to distinguish the seriousness of the needs of some diabetics from the needs of other diabetics. For example, the Third Circuit asserted in one case that "not all insulin-dependent diabetics require the same level of medical care" by distinguishing "unstable" plaintiffs from those who have already achieved the primary goal of diabetes management.[54] The circuit court remanded the case to the district

48. *Estelle*, 429 U.S. at 104–05.

49. Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999) (quoting Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980)).

50. *Id.*

51. EISENBERG & THOMAS, *supra* note 9, at 10.

52. *Id.*

53. Lolli v. Cnty. of Orange, 351 F.3d 410, 420 (9th Cir. 2003).

54. Rouse v. Plantier, 182 F.3d 192, 198–99 (3d Cir. 1999).

court to determine whether prison officials acted with deliberate indifference on a case-by-case basis in regard to each plaintiff.[55] But, in a later case, the Third Circuit indicated that there was no dispute as to whether plaintiff's insulin-dependent diabetes was a serious medical need.[56]

Ultimately, diabetic plaintiffs would likely meet the objective prong of the deliberate indifference standard so long as they provide evidence of the consequences that result from inadequate diabetes care.[57]

C. Subjective Component: Prison Officials' Knowledge and Disregard

While incarcerated diabetic persons would likely meet the objective component of the deliberate indifference standard under the Eighth Amendment, it is much more difficult for them to meet the subjective component in theory and in practice. The U.S. Supreme Court has acknowledged its failure to explain the term deliberate indifference, but has pointed to case law as "instructive" of its meaning.[58] The Court first formulated the deliberate indifference standard in *Estelle v. Gamble*,[59] stating that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."[60] In other words, mere negligence does not constitute deliberate indifference.[61] Instead, courts equate the subjective indifference component with recklessness.[62] The U.S. Supreme Court has defined recklessness in this context as a situation where "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference."[63]

Various scholars have written on the difficulty of meeting this subjective standard under an Eighth Amendment claim for inadequate

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55. *Id.* at 201.
56. Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003).
57. *See* EISENBERG & THOMAS, *supra* note 9, at 12.
58. Farmer v. Brennan, 511 U.S. 825, 835 (1994).
58. Estelle v. Gamble, 429 U.S. 97 (1976).
60. *Id.* at 106.
61. *Farmer*, 511 U.S. at 835.
62. *Id.* at 836.
63. *Id.* at 837.

medical care. One scholar notes courts' refusal to litigate the adequacy of medical treatment; if some treatment was provided, that typically satisfies an entity's Eighth Amendment obligation.[64] Furthermore, courts have not held that an Eighth Amendment claim is valid when an incarcerated person disagrees with the treatment they were provided.[65] This is particularly concerning in the case of incarcerated diabetic persons claiming inadequate medical care. In the diabetic community, treating diabetes is described as "both an art and a science."[66] Diabetics are one of few, if not the only, individuals who must make day-to-day treatment decisions without the explicit direction of their doctor. It has been estimated that Type 1 diabetics in particular make about 180 decisions per day to address how their body is feeling and reacting to insulin, exercise, heat, etc.[67] Even though diabetic individuals have a unique knowledge of the course of action needed to treat their diabetes, they cannot enjoy the constitutional protection afforded by the Eighth Amendment if prison officials do not listen to their requests.

Another scholar explains that it is a "monumental task" for incarcerated persons to meet the requisite subjective deliberate indifference standard to succeed on an Eighth Amendment claim for lack of adequate healthcare.[68] Predictably, the difficulty arises because "it is impossible to look into someone else's mind and discern his or her thoughts."[69] But she goes on to say that this difficulty is exacerbated in correctional institutions because prison officials can just hide behind the excuse that their actions were due "to the unique safety concerns associated with prisons, rather than a disregard for [incarcerated person's] needs."[70]

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64. Thompson, *supra* note 36, at 638.

65. *Id.* at 650–51; *see also* Coleman v. Beard, 131 F. App'x 10, 11 (3d Cir. 2005) ("[Plaintiff]'s disagreement with the medical care provided by [the medical professional] does not state an Eighth Amendment claim.").

66. Delia Corrigan, *The Art and Science of Staying Active: Living with Type 1 Diabetes*, COLUM. METRO. (Sept. 2013), https://columbiametro.com/article/the-art-and-science-of-staying-active/.

67. *See* Erin Digitale, *New Research Shows How to Keep Diabetics Safer During Sleep*, SCOPE (May 8, 2014), https://scopeblog.stanford.edu/2014/05/08/new-research-keeps-diabetics-safer-during-sleep/.

68. Westhoff, *supra* note 35, at 6.

69. *Id.*

70. *Id.*

D. Qualified Immunity

The qualified immunity defense to § 1983 claims provides another barrier for successful litigation of alleged inadequate diabetes care. Even if a court finds that a prison official violated the Eighth Amendment, the official will escape liability if they can show that the constitutional right was not "clearly established" at the time of the incident.[71] A diabetic plaintiff has a high burden in showing the right was "clearly established"—they must identify a case where a prison official acting under similar circumstances as the defendant was held to have violated the Eighth Amendment.[72] As there are few successful suits for inadequate diabetes care, as described in Section I.E., diabetic plaintiffs face difficulty in pointing to such a case necessary for survival of a qualified immunity defense.[73] A qualified immunity defense bars plaintiffs from receiving monetary damages, even if a constitutional violation occurred.[74]

E. Wins and Losses

Courts have been likely to recognize the viability of Eighth Amendment claims when prison officials failed to provide any insulin at all. For example, in *Bustetter v. Amor Correctional Health Services*,[75] an incarcerated person overcame a motion to dismiss his Eighth Amendment claim when he was given medication for Type 2 diabetes, although he was in fact a Type 1 diabetic who required insulin.[76] However, such claims are not always successful. In *Hixson v. Moran*,[77] a diabetic who was prescribed oral medication and insulin prior to incarceration did not succeed on his Eighth Amendment claim when he was denied those treatments by the prison's doctor.[78] Claims are more likely to fail when

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71. *Qualified Immunity*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/civil-and-criminal-justice/qualified-immunity#:~:text=In%201967%2C%20the%20Supreme%20Court,'t%20%E2%80%9Cclearly%20established.%E2%80%9D.

72. *See* White v. Pauly, 580 U.S. 73, 79 (2017).

73. *See infra* Section I.E.

74. *Qualified Immunity*, *supra* note 71.

74. Bustetter v. Armor Corr. Health Servs., Inc., 919 F. Supp. 2d 1282 (M.D. Fla. 2013).

76. *Id.* at 1284, 1286–87.

76. Hixson v. Moran, 1 F.4th 297 (4th Cir. 2021).

78. *Id.* at 300, 304.

incarcerated diabetic persons request changes to their diet because it is often considered by the courts as a "simple disagreement" about the course of medical treatment.[79] But in fact, there is not one meal plan that is best for managing Type 2 diabetes; rather individuals can benefit from creating an *individualized* plan in coordination with a registered dietitian.[80]

Other suits claiming inadequate medical care by prison officials—such as denial or delay in providing medication, as well as injuries resulting from diabetes complications—have had mixed results.[81] For example, in *Chapman v. Santini*,[82] three medical professionals in a federal prison were found to have violated an incarcerated person's Eighth Amendment right when he suffered life-threating instances of hypoglycemia and hyperglycemia multiple days per week.[83] On multiple occasions, the last of which resulted in Chapman's death, the medical professionals waited more than two hours to administer insulin when he had severe hyperglycemia.[84] Similarly, in *Smith v. Missouri Department of Corrections*,[85] an incarcerated diabetic person succeeded on his claim after his foot was amputated due to the denial of treatment of his diabetes-related foot problem by medical professionals.[86]

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Ultimately, it is very difficult for incarcerated diabetic persons to succeed on an Eighth Amendment claim citing inadequate medical care. Though courts are in general agreement that diabetes is a "sufficiently serious medical need," it is well established that courts are reluctant to find that prison officials acted recklessly unless there is a clear and abhorrent disregard for a medical need resulting in amputation or death.

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79. EISENBERG & THOMAS, *supra* note 9, at 21; *see also* Anderson v. Burge, 539 F. Supp. 2d 684, 687 (W.D.N.Y. 2008) ("At most, plaintiff's allegations indicate that he disagreed with the treatment and diet provided to him."); Jackson v. Lucine, 119 F. App'x. 70, 71 (9th Cir. 2004) ("[D]ifference of opinion about a medical treatment does not amount to deliberate indifference to serious medical needs . . . .").

80. *See Managing Diabetes: A Look at Nutrition*, YALE MED. (Sept. 8, 2022), https://www.yalemedicine.org/news/managing-diabetes-nutrition.

81. EISENBERG & THOMAS, *supra* note 9, at 21–22.

81. Chapman v. Santini, 805 F. App'x 548 (10th Cir. 2020).

83. *Id.* at 555–57.

84. *Id.*

84. Smith v. Missouri Dep't of Corrs., 207 F. App'x 736 (8th Cir. 2006).

86. *Id.* at 737.

II. CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT

A. Overview

The ADA was passed with the four goals of participation in society, equal opportunity, independent living, and economic self-sufficiency for those with disabilities.[87] Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[88] The Act defines a disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual," with "major life activities" encompassing the operation of a major bodily function, including the function of the endocrine system.[89] Since diabetes "substantially limits the function of the endocrine system" it is protected as a disability under the ADA.[90]

In 1998, the U.S. Supreme Court unequivocally held that Title II of the ADA extends to local jails, detention centers, and state prisons.[91] This provision is applicable to private prisons and contractors as well if the facilities accept federal funding.[92] In *United States v. Georgia*,[93] the Court stated that prison officials' refusal to adhere to an incarcerated person's disability-related needs in "such fundamentals as" medical care constitutes "'exclu[sion] from participation in or . . . deni[al of] the benefits of' the prison's 'services, programs, or activities.'"[94] The Court reiterated that the phrase "services, programs, or activities" includes

87. Proclamation No. 10426, 87 Fed. Reg. 45233 (July 25, 2022).

88. 42 U.S.C. § 12132.

89. 42 U.S.C. §§ 12102(1)(A), (2)(B).

90. *Is Diabetes a Disability?*, AM. DIABETES ASS'N, https://diabetes.org/tools-support/know-your-rights/discrimination/is-diabetes-a-disability#:~:text=Specifically%2C%20federal%20laws%2C%20such%20as,function%20of%20the%20endocrine%20system (last visited Mar. 26, 2024).

91. *See generally* Pennsylvania Dep't of Corrs. v. Yeskey, 524 U.S. 206, 209 (1998).

92. Samantha Reed, Ashley N. Austin, & William Van Der Pol, Jr., *The Americans with Disabilities Act in Prison: Ensuring Programmatic Accessibility*, http://materials.ndrn.org/virtual20/session12/ADA%20and%20Prisons/ADA-in-Prison-PowerPoint-Notes-version-for-Attendees.pdf (last visited Mar. 26, 2024).

92. United States v. Georgia, 546 U.S. 151 (2006).

94. *Id.* at 157 (alteration in original) (quoting 42 U.S.C. § 12132).

medical programs.[95] Regulations were later issued under 28 C.F.R. § 35.152 regarding the applicability of the ADA to correctional facilities.[96]

The ADA's sister law is Section 504 of the Rehabilitation Act. Like the ADA, Section 504 protects individuals with disabilities from discrimination based on their disability.[97] Individuals with disabilities in federal prisons, jails, and detention centers—as well as in state prisons, private prisons, local jails, and detention centers that receive federal funds—can bring a claim under Section 504.[98] Individuals often bring claims under both Section 504 and the ADA, and courts regularly use each statute's precedents interchangeably to understand and apply the other statute.[99] Because the two statutes are often interchangeable, the remainder of this piece will discuss them as one.

To comply with the ADA and Section 504, correctional facilities must make "reasonable accommodations" to modify their policies, practices, and procedures to ensure all incarcerated persons with disabilities have access to their services, programs, and activities.[100] The modifications must ensure that people with disabilities are provided with "meaningful access" to the service, program, or activity.[101] However, public institutions may avoid accommodations for incarcerated persons with disabilities if an "undue burden"—e.g., a substantial financial or administrative hardship—can be shown.[102] Whether an accommodation constitutes an "undue burden" on a correctional institution is determined by looking at the overall size of the institution, the type of the operations, and the nature and cost of the accommodation needed.[103] Similarly,

95. *Id.*

96. 28 C.F.R. § 35.152.

97. 29 U.S.C. § 794(a); *Your Rights Under Section 504 of the Rehabilitation Act*, U.S. DEP'T OF HEALTH & HUM. SERVS. (June 2006), https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf.

98. 29 U.S.C. § 794(a).

99. Reed, Austin, & Van Der Pol, Jr., *supra* note 92.

100. *ADA Title II (State and Local Government)*, DISABILITY RTS. N.C. (Apr. 9, 2021), https://disabilityrightsnc.org/resources/ada-title-ii-state-and-local-government/ [hereinafter *ADA Title II*].

101. Cheryl Anderson, *Making "Meaningful Access" Even Less Meaningful: Judicial Gatekeeping Under Title II of the American with Disabilities Act*, 49 UNIV. MEMPHIS L. REV. 635, 655 (2019) ("[T]he meaningful benefit standard has played a significant role in judicial gatekeeping of Title II claims, along with the definition of 'program, service, or activity.'"); Alexander v. Choate, 469 U.S. 287, 301 (1985).

102. *ADA Title II, supra* note 100.

103. 42 U.S.C. § 12111(10); 10 C.F.R. § 4.123(c).

modifications can be circumvented if it would cause a direct health and/or safety concern.[104]

Incarcerated persons can bring an ADA and Section 504 claim in two ways. First, they can file an administrative complaint with the appropriate federal agency within 180 days of the alleged discrimination.[105] Second, they can file a lawsuit directly in federal court.[106] Courts have commonly identified three elements that a plaintiff must establish in a claim of disability discrimination under the ADA and Section 504:

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.[107]

If a plaintiff is successful on an ADA and/or Section 504 claim, they can receive injunctive relief.[108] Individuals can also receive compensatory damages, but only if the discrimination was intentional.[109] However, compensatory damages cannot include damages for emotional distress.[110] Moreover, sovereign immunity for state governments creates a barrier for individuals to receive damages under the ADA in comparison to Section 504.[111]

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104. *See* 42 U.S.C. § 12111(10); 10 C.F.R. § 4.123(c); *Know Your Rights: Legal Rights of Disabled Prisoners*, ACLU 1, 3 (Nov. 2012), https://www.aclu.org/sites/default/files/field_document/know_your_rights_--_disability_november_2012.pdf [hereinafter *Know Your Rights*].

105. DBTAC SW. ADA CTR. AT ILRU, REMEDIES UNDER THE ADA 3–4 (2010), http://www.southwestada.org/html/publications/ebulletins/legal/2010/june2010.pdf [hereinafter REMEDIES UNDER THE ADA].

106. *Id.*

107. Anderson, *supra* note 101, at 658 n.12.

108. REMEDIES UNDER THE ADA, *supra* note 105, at 4.

109. *See, e.g.,* Koon v. North Carolina, 50 F.4th 398, 404 (4th Cir. 2022).

110. *See* Cummings v. Premier Rehab. Keller, P.L.L.C., 596 U.S. 212, 230 (2022) (holding emotional damages are not recoverable under the Spending Clause antidiscrimination statutes, which provide compensatory relief).

111. "[A] disabled prisoner who is incarcerated in a state prison may sue the state for monetary damages under the ADA based on conduct that independently violates the Eighth

B. Precedential ADA and Section 504 Claims for Inadequate Medical Care

Despite the U.S. Supreme Court's indication in *United States v. Georgia* that refusing to provide disability-related medical care can constitute a violation of the ADA and Section 504, courts have been reluctant to find that negligent medical care or disagreements about medical treatment qualify as disability discrimination.[112] For example, in *Nottingham v. Richardson*,[113] the Fifth Circuit explicitly stated that "the ADA is not violated by 'a [prison] simply failing to attend to medical needs of'" incarcerated persons with disabilities.[114] Although prior to *Georgia*, the Seventh Circuit similarly held that "the ADA does not create a remedy for medical malpractice,"[115] while the Tenth Circuit held that "the ADA does not provide a private right of action for substandard medical treatment."[116]

The U.S. Supreme Court has "not set out any standards for determining whether something is a service, program, or activity."[117] But the Seventh Circuit has held that incarceration itself is not a "service, program, or activity" under the ADA.[118] From that baseline, courts have begun to differentiate between what type of occurrences in prison constitute a service, program, or activity. For example, showers have been found to constitute a service, program, or activity under the ADA.[119] As described by the Third Circuit, complaints about not having the ability to use an accessible shower "are requests for reasonable accommodations so that [incarcerated persons] with disabilities can take a shower" rather than complaints of "medical malpractice or disagreements about medical treatment."[120]

Additionally, refusal to allow incarcerated persons to use support aids such as wheelchairs has been held to be a violation of the ADA and

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Amendment's prohibition against cruel and unusual punishment. What remains an unsettled question is whether disabled prisoners can seek damages for conduct that violates the ADA, but does not violate the Constitution." *Know Your Rights, supra* note 104, at 4.

112. EISENBERG & THOMAS, *supra* note 9, at 45.

112. Nottingham v. Richardson, 499 F. App'x 368 (7th Cir. 1996).

114. *Id.* at 377 (quoting Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996)).

115. *Bryant*, 84 F.3d at 249.

116. Fitzgerald v. Corrs. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005).

117. Anderson, *supra* note 101, at 644–45.

118. *Bryant*, 84 F.3d at 249; Reed, Austin, & Van Der Pol, Jr., *supra* note 92, at 21.

119. Furgess v. Pennsylvania Dep't of Corrs., 933 F.3d 285, 291 (3d Cir. 2019).

120. *Id.*

Section 504. In *Wright v. New York State Department of Corrections and Community Supervision*,[121] an incarcerated person was denied his request for a motorized wheelchair after he was using a manual wheelchair that caused him pain and required him to rely on mobility assistants for access to prison services and programs.[122] The court stated that "by requiring [incarcerated persons] to make a formal request in advance for an aid, [the prison officials have] created a system which fails to provide [incarcerated persons] with mobility assistants in situations where their need to move cannot be contemplated in advance."[123] The court ruled that the denial of Wright's request for the motorized wheelchair violated the ADA and Section 504.[124]

However, courts have rarely found in favor of diabetics claiming inadequate medical care under the ADA and Section 504.[125] At present, to succeed on an ADA or Section 504 claim, it is likely that an individual would have to point to the specific services, programs, or activities they were denied equal access to because of their diabetes.[126] But, in *Montez v. Owens*,[127] a court found a violation of the ADA and Section 504 when the correctional institution did not keep a diabetic medication in stock, and the plaintiff once had to wait three weeks for it.[128] Most notably, the court in *Montez* stated that "a diabetic in prison has no option to seek appropriate medication on his own or through non-prison sources. To deny a diabetic needed medication is to treat that individual differently, as the non-diabetic does not need [diabetes medication] or insulin to keep on living."[129]

Interestingly, in 2021, a jury found a violation of the ADA and Section 504—and not the Eighth Amendment—when an incarcerated person had a below-the-knee leg amputation resulting from diabetes

120. Wright v. New York State Dep't of Corrs. & Cmty. Supervision, 242 F. Supp. 3d 126 (N.D.N.Y. 2017).

122. *Id.* at 137.

123. *Id.* at 139 (quoting Wright v. New York State Dep't of Corrs. & Cmty. Supervision, 831 F.3d 64, 74 (2d Cir. 2016)).

124. *Id.* at 141.

125. THOMAS, *supra* note 28, at 8.

126. EISENBERG & THOMAS, *supra* note 9, at 48.

126. Montez v. Owens, 2007 U.S. Dist. LEXIS 36218 (D. Colo. May 16, 2007).

128. *Id.* at *12.

129. *Id.*

complications.[130] That individual, Rodesky, had an open foot ulcer from a previous denial of diabetic shoes, and his housing situation required him to walk long distances to receive his twice-daily insulin injections.[131] As diabetics can face severe complications stemming from an open foot ulcer, it was particularly risky for him to walk such a distance.[132] While the jury's deliberations are not public, Rodesky likely won because even though he continued to receive his twice-daily insulin injections—and thus was not denied a service—the correctional institution's failure to place him closer to the medical center was discriminatory, as it caused further aggravation of his foot ulcer that other incarcerated individuals did not have to endure.[133]

III. COURTS SHOULD APPLY EXISTING ADA AND SECTION 504 PRECEDENT TO PROVIDE RELIEF FOR INADEQUATE DIABETES CARE IN CORRECTIONAL FACILITIES

As illustrated thus far, incarcerated diabetics are not often provided relief under the Eighth Amendment, ADA, or Section 504 if they argue their medical care is inadequate. Because improper diabetes treatment can lead to life-threatening symptoms, long-term complications, amputation, and death, there must be means of relief for incarcerated diabetic persons not receiving proper care. The Eighth Amendment precedent appears settled in that relief will not be given if some medical care was provided and/or there is a disagreement about the proper course of treatment. Unlike the Eighth Amendment, the ADA and Section 504 are well positioned to provide relief for claims of inadequate medical care. *Montez* and *Rodesky* display the emergence of courts' willingness to find an ADA/Section 504 violation for disability

130. Rodesky v. Pfister, 2023 WL 2585858, at *1 (C.D. Ill. Feb. 21, 2023); Hannah Meisel, *Jury Sides With Ill. Inmate Whose Under-Treated Diabetes Ended in Leg Amputation*, NPR ILL. (Dec. 8, 2021), https://www.nprillinois.org/statehouse/2021-12-08/jury-sides-with-ill-inmate-whose-under-treated-diabetes-ended-in-leg-amputation.

131. Rodesky v. Wexford Health Source, Inc., 582 F. Supp. 3d 594, 602 (C.D. Ill. 2020).

132. *Id.*

133. *Id.*; *Rodesky,* 2023 WL 2585858 at *1.

discrimination on its face, rather than tying the injury to exclusion from a service, program, or activity.[134]

While other courts have held that the ADA and Section 504 are not intended to settle disputes about the scope and quality of medical care, two clear arguments indicate that these statutes should be used in such a way moving forward. First, allowing diabetics to receive inadequate medical care undermines the stated goals of Congress when it passed the ADA. Second, improper treatment constitutes discrimination by the institution in violation of the ADA.[135]

A. Purposes of the ADA

In 1990, when Congress passed the ADA, it had four primary goals for the historic legislation: to ensure people with disabilities enjoy full participation in society, equal opportunity, independent living, and economic self-sufficiency.[136] These goals cannot be met in the short- or long-term if diabetics are not receiving appropriate medical care while incarcerated.

First, inadequate medical care can lead to long-term complications for diabetics that could hinder their economic self-sufficiency and ability to fully participate in society. As noted previously, even if diabetics do not face such complications while incarcerated, complications can arise in the years following insufficient medical care.[137] As 95% of incarcerated persons will be released from correctional institutions at some point, it is important to consider what reentry will

134. *See generally id.* (denying defendant's motion for summary judgment when the plaintiff faced unequal access to medical care); *Rodesky,* 2023 WL 2585858 (jury finding in favor of plaintiff when he faced unequal access to medical care); Montez v. Owens, 2007 U.S. Dist. LEXIS 36218 (D. Colo. May 16, 2007) (ruling that denying a diabetic their medication is unequal treatment).

135. Correctional institutions and prison officials may argue that providing the often-requested accommodations for incarcerated diabetic persons would cause the institution undue burden under 42 U.S.C. § 12111(10) and 10 C.F.R. § 4.123(c). But many of the requested accommodations such as altering meal plans, receiving the most effective medication at the appropriate time, changing cell locations, and keeping snacks in one's cell to treat an unanticipated low blood sugar are neither high cost nor administratively strenuous requests.

136. Proclamation No. 10426*, supra* note 87.

137. Christie Thompson, *When Your Insulin Pump is Contraband*, MARSHALL PROJECT (Apr. 22, 2015), https://www.themarshallproject.org/2015/04/22/when-your-insulin-pump-is-contraband.

look like for them.[138] Irreversible diabetic complications, such as nerve damage, amputation, and bone and joint problems,[139] can lead to the inability of individuals to work[140] and an increased reliance on the social safety net once released.[141] And individuals who are able to work, but also face diabetes-related complications, often have decreased productivity due to more severe symptoms and consistent medical appointments.[142] Therefore, correctional institutions' failure to provide adequate medical care to incarcerated diabetics hinders both their ability to fully participate in society and their economic self-sufficiency upon release.

Second, incarcerated diabetic persons' dependence on prison officials to provide medical care and their inability to have input on treatment-related decisions does not allow them to engage in independent living to the extent that their incarcerated peers without disabilities can. In the context of incarcerated persons requiring mobility aids, such as wheelchairs, courts have held that requiring an individual to rely on prison officials' assistance rather than providing them with the measures needed to address their own basic needs violates the ADA.[143] Similarly, diabetics are not able to address their own basic needs when they must rely on prison officials to receive their medication as well as treat hypo- and hyperglycemia. Medication distribution times can often be problematic for adequate diabetic care,[144] and diabetics cannot predict when they will need treatment for hypo- or hyperglycemia. Like the court

138. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 1 (Apr. 4, 2004), https://bjs.ojp.gov/content/pub/pdf/reentry.pdf.

139. *Hyperglycemia in Diabetes*, *supra* note 10.

140. *See generally* Marie-Claude Breton, Line Guénette, Mohamed Amine Amiche, Jeanne-Françoise Kayibanda, Jean-Pierre Grégoire, & Jocelyne Moisan, *Burden of Diabetes on the Ability to Work*, 36 DIABETES CARE 740 (2013) (Type 2 diabetes appears to reduce an individual's ability to work).

141. *Hyperglycemia in Diabetes*, *supra* note 10.

142. Breton, Amiche, Kayibanda, Grégoire, & Moisan, *supra* note 140, at 742–46.

143. JULIE BALLINGER & VINH NGUYEN, AMERICANS WITH DISABILITIES ACT: DISABILITY RELATED ACCESS FOR INMATES AND VISITORS PRACTICAL GUIDE, SW. ADA CTR. AT ILRU 27 (2023), http://www.southwestada.org/html/publications/Title2/ADA-access-inmates-visitors.pdf (citing Clemons v. Dart, 168 F. Supp. 3d 1060 (N.D. Ill. 2016)).

144. *See* Laura L. Edwards, *Managing Diabetes in Correctional Facilities*, 18 DIABETES SPECTRUM 148 (2005) (discussing that, in most facilities, times for medication lines are not flexible and inmates are expected to be present regardless of their health circumstances).

stated in *Wright*, the present system fails to provide incarcerated persons with assistance when their need "cannot be contemplated in advance."[145]

As previously discussed, diabetics outside of correctional institutions make near constant day-to-day treatment decisions without the explicit direction of their doctor.[146] Once incarcerated, diabetics are forced to give up that agency and instead rely on prison officials to treat their illness. But prison officials are often constrained by lack of knowledge as well as time, money, and safety pressures. Diabetics have a unique knowledge of the needs and course of action necessary to treat their diabetes,[147] and they should be able to maintain this relative independence in treating their illness while incarcerated, which benefits both the individual and the state.

Third, all incarcerated persons should have equal access to safe custody and the ability to fully participate in the programming of the institution. For example, individuals requiring mobility aids have been provided with supports to ensure their safety while in their cell, using the showers and restroom, and moving about the institution.[148] A diabetic must similarly be provided with adequate medical care because, without it, they face unsafe conditions. Inappropriately treated diabetes can lead to hypo- and hyperglycemia which can cause blurred vision, weakness, shaking, irritability or confusion, dizziness, fainting, and seizures.[149] Those symptoms can lead to instability while walking and moving, resulting in dangerous falls. For example, one incarcerated diabetic person fell off the top bunk during a hypoglycemic episode, resulting in injuries to his shoulder and head.[150] Additionally, irritability and confusion may lead to confrontations, putting multiple people at risk. Depriving diabetic individuals of adequate medical care runs counter to the ADA's goal of providing equal opportunity to access and full participation in services, programs, and activities that individuals without disabilities may access.

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145. Wright v. New York State Dep't of Corrs. & Cmty. Supervision, 242 F. Supp. 3d 126, 139 (N.D.N.Y. 2017).

146. See discussion *supra* Section I.C.

147. See discussion *supra* Section I.C.

148. Reed, Austin, & Van Der Pol, Jr., *supra* note 92, at 24.

149. *Low Blood Sugar (Hypoglycemia)*, *supra* note 15; EISENBERG & THOMAS, *supra* note 9, at 5–6.

150. Felix-Torres v. Graham, 521 F. Supp. 2d 157, 162 (N.D.N.Y. 2007).

B. "Otherwise Discriminated Against"

To succeed on an ADA or Section 504 claim, an incarcerated diabetic person must show that they are a qualified individual within the meaning of the Act and that they were either "excluded from participation in or denied the benefits of a public entity's services, programs or activities, or [] otherwise discriminated against by the public entity" because of their disability.[151] As the courts in *Montez* and *Rodesky* did, courts should consider the receipt of inadequate diabetes care as meeting the "otherwise discriminated against by the public entity" portion of that standard. The court in *Montez* certainly focused on the fact that that the plaintiffs were "otherwise discriminated against" by the correctional institution when finding an ADA/Section 504 violation as it stated, "to deny a diabetic needed medication is to treat that individual differently, as the non-diabetic does not need [diabetes medication] or insulin to keep on living."[152] Similarly, the jury in *Rodesky* also likely focused on the "otherwise discriminated against" language because even though Rodesky still received his twice-daily insulin injections (a service) he was treated differently from others because access to his medication further exacerbated his diabetic foot ulcer.[153]

In other words, the courts held that a diabetic is discriminated against by a correctional institution when they are denied medication or other aids needed to simply survive. This application of the statute results in more consistent and fair outcomes than courts' piecemeal determination of what constitutes a correctional institutions' service, program, or activity. For example, the determination by multiple circuit courts as to whether showers constitute a service, program, or activity could have been avoided.[154] The courts could instead have held that plaintiffs were "otherwise discriminated against" when they were not able to take a shower as their peers were due to their disability.

151. Anderson, *supra* note 101, at 638 n. 12.

152. Montez v. Owens, 2007 U.S. Dist. LEXIS 36218, *12 (D. Colo. May 16, 2007).

153. Rodesky v. Pfister, 2023 WL 2585858, *1 (C.D. Ill. Feb. 21, 2023); Rodesky v. Wexford Health Source, Inc., 582 F. Supp. 3d 594, 602 (C.D. Ill. 2020).

154. Furgess v. Pennsylvania Dep't of Corr., 933 F.3d 285, 290–91 (3d Cir. 2019).

C. Access to Services, Programs, or Activities

If courts insist on determining piecemeal what constitutes a service, program, or activity, they should follow the U.S. Supreme Court's decision in *Georgia*, which explicitly held that the ADA's references to services, programs, and activities includes medical care.[155] Incarcerated diabetic persons are denied "meaningful access" to the benefits of a correctional institution's program and/or service when they are provided with inadequate medical care to treat their disability: diabetes. While the phrase "meaningful access" is not used explicitly in the ADA or Section 504, the U.S. Supreme Court in *Alexander v. Choate*[156] adopted the standard requiring that individuals with disabilities have meaningful access to a public entity's services, programs, or activities.[157] While not clearly defined, meaningful access certainly includes the right of individuals with disabilities to have more than "any minimal access."[158]

A straightforward example: the Federal Bureau of Prisons's ("BOP) diabetes management guidance indicates that upon entry to a facility, the medical staff should create an initial treatment plan for the patient".[159] Such a treatment plan typically includes the goal of achieving a hemoglobin A1C of <7%, which is a clear indicator of good diabetes management.[160] Treatment plans must be individualized, and continuous modifications may be needed to reach the appropriate A1C level.[161] When diabetics are not provided the tools needed to reach the goal A1C level outlined in their treatment plan, they are not meaningfully benefitting from the institution's medical services. Put differently, if incarcerated diabetic persons are not receiving adequate medical care, they are therefore only able to minimally access the goals stated outright in their treatment plan. Therefore, there would be a violation of the ADA and Section 504.

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155. United States v. Georgia, 546 U.S. 151, 155 (2006).
155. Alexander v. Choate, 469 U.S. 287 (1985).
157. Anderson, *supra* note 101, at 655, 657.
158. *Id.* at 685.
159. FED. BUREAU OF PRISONS, *supra* note 18, at 5.
160. *Diabetes Management in Detention Facilities*, *supra* note 18.
161. *Id.*

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One caveat is important to note: even if diabetics can receive relief for inadequate medical care while incarcerated under the ADA and Section 504, such individuals must exhaust all administrative remedies prior to bringing a claim.[162] First, this is problematic because of the significant time it takes to exhaust all administrative remedies and then file a complaint can result in detrimental consequences for a diabetic. And incarcerated diabetic persons are not likely to prevail on their administrative complaints because the complaints "are often reviewed by the very staff members who are the subjects of the complaint."[163] Second, incarcerated persons may not have access to another individual—such as a lawyer or social worker—who can help them take the required administrative steps. At present, most claims for inadequate medical care constituting disability discrimination have been brought by pro se plaintiffs.[164]

IV. ADDITIONAL POLICY CONSIDERATIONS

To avoid time-consuming and costly litigation from diabetic persons, prisons and jails can consider adjusting their policies in three ways. First, patients should be involved in creating and adjusting their treatment plan. The BOP guidance states that "involvement of the inmate in the development of the treatment plan is pivotal to success . . . ."[165] Including the patient in treatment decisions can spark a dialogue between the incarcerated person and medical staff to create a plan that both the doctor and diabetic are comfortable with. BOP guidance also suggests that "addressing patient concerns may improve adherence and outcomes."[166] Second, given the number of diabetics who are incarcerated and the severe consequences of mistreatment, all prison officials should undergo biannual training to further understand what diabetes is, signs of a diabetic emergency, and the appropriate response

162. 42 U.S.C. § 1997e(a).

163. Erika Eichelberger, *Prisons Basically Ignore the Americans with Disabilities Act, Leaving a Third of Inmates Facing Abuse and Neglect*, VICE (Dec. 28, 2016, 9:54 AM), https://www.vice.com/en/article/evayea/prisons-basically-ignore-the-americans-with-disabilities-act.

164. EISENBERG & THOMAS, *supra* note 9, at 2.

165. FED. BUREAU OF PRISONS, *supra* note 18, at 5.

166. *Id.* at 6.

to help a diabetic in distress.[167] Such training will ensure prison officials provide more appropriate and prompt responses to treat severe hypo- and hyperglycemia.[168] Third, when possible, incarcerated diabetic persons should be equipped with the necessary equipment to self-manage, including supplies to self-inject insulin in order to avoid severe hypo- and hyperglycemia.[169]

CONCLUSION

While a substantial number of incarcerated individuals have diabetes, they continue to receive inadequate medical care due to their reliance on third parties for treatment. Constant bouts of severe hypo- and hyperglycemia lead to irreversible short- and long-term consequences. Yet, incarcerated diabetics are not often provided relief under the Eighth Amendment, Americans with Disabilities Act, or Section 504 of the Rehabilitation Act if they believe their medical needs are not being met. Because Eighth Amendment jurisprudence appears to be settled on this issue, courts must be willing to categorize inadequate diabetes care as discriminatory treatment in violation of the ADA and Section 504, as a few federal district courts already have. At present, diabetics in correctional institutions are suffering, and attention is often only given to them once they have passed away from tragic diabetes complications. Not providing adequate medical care to diabetics is a clear violation of the ADA and Section 504, and courts must recognize that.

167. *Diabetes Management in Detention Facilities*, *supra* note 18.
168. *Id.*
169. *Id.*