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FACT SHEET

USING THE ADA TO DIVERT INDIVIDUALS FROM, AND PREVENT DISCRIMINATION IN, THE CRIMINAL JUSTICE SYSTEM

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I. Introduction

People with disabilities -- particularly those with psychiatric disabilities who do not have access to critical mental health services in their communities -- face discrimination in almost every aspect of the criminal justice system. This discrimination includes the failure of public mental health and criminal justice systems to provide services that enable people with psychiatric disabilities to live in the community and avoid being swept into the criminal justice system for mental health crises or unnecessarily segregated in psychiatric facilities such as public or private psychiatric hospitals, board and care homes, or emergency rooms.[2] Public entities also discriminate against people with disabilities by having policies and practices that result in their needless institutionalization and incarceration and/or fail to accommodate the needs of people with disabilities in all stages of the criminal justice process, particularly parole, probation and release.[3] The consequences of this discrimination can be catastrophic – arrest of

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[1] Editorial assistance provided by Steven Schwartz and Robert Fleischner of Center for Public Representation and Alison Barkoff, Jennifer Mathis and Ira Burnim of the Bazelon Center for Mental Health Law.

[2] *See* Lorna Collier, *Incarceration Nation*, 45 American Psychological Association Monitor, 56 (October 2014), http://www.apa.org/monitor/2014/10/incarceration.aspx (last visited June 1, 2016) (summarizing a National Resource Council report that was presented to the White House in July, 2014 that noted "the lack of community resources to treat" people with mental illness that contributed to "some people going to prisons and jails" and "[o]ne study found this trend accounts for about 7 percent of prison population growth from 1980 to 2000 — representing 40,000 to 72,000 people in prisons who would likely have been in mental hospitals in the past.").

[3] "[T]he substance abuse and mental health systems used to operate in silos—but now frequently come together to provide integrated co-occurring treatment options— . . . a similar challenge is now before the corrections and behavioral health systems." Fred Osher, *et. al.*, *Adults with Behavioral Health Needs Under Correctional Supervision: A Framework for Reducing Recidivism and Promoting Recovery*, Council of State Governments Justice Center Criminal Justice/Mental Health Consensus Project 2012 https://csgjusticecenter.org/wp-

individuals in mental health crises, prolonged incarceration, unfair denial of release, inappropriate institutionalization, and cycles of incarceration and institutionalization after release.

The Americans with Disabilities Act (ADA) is an important tool for addressing this discrimination. The Supreme Court has made clear that not only are public entities' disability service systems (like mental health systems) covered by Title II of the ADA, but public agencies and programs that are part of the criminal justice system are also covered under the Title II.[4] As discussed in detail below, using the ADA's integration mandate, as interpreted by the Supreme Court's decision in *Olmstead,*[5] can be an effective strategy for requiring public entities to expand the services that help support people with psychiatric disabilities in the community, such as mobile crisis services, Assertive Community Treatment (ACT), supported housing, supported employment, and peer supports, and avoid their unnecessary entry into the criminal justice system or psychiatric facilities. Similarly, the ADA's requirement to make reasonable accommodations and its prohibition against policies, practices, and methods of administration that discriminate against people with disabilities may be effective tools for changing policies and practices that lead to people with disabilities in the criminal justice system being discriminated against in parole, prison discipline, and probation, often leading to their prolonged incarceration.[6]

II. The Harm to Be Prevented: Unnecessary Arrest, Institutionalization, and Incarceration

A. Arrest and police interactions

Individuals with disabilities, and particularly individuals with psychiatric disabilities, who interact with the criminal justice system are frequently arrested or admitted to mental health facilities because of a lack of community-based services and supports that would allow them to remain in the community -- before, instead of and after incarceration.[7] In

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content/uploads/2013/05/9-24-12_Behavioral-Health-Framework-final.pdf (last visited June 1, 2016) (hereafter "*Framework*") at viii.

[4] *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209–12 (1998).

[5] *Olmstead v. L.C.*, 527 U.S. 581, 600–01 (1999).

[6] *See* Part IV, and cases cited, *infra*. Mental health treatment programs and criminal justice supervision programs have been perceived to "work at cross- purposes." *Framework*, *supra* note 3, at viii. "[W]hat has been lacking is a truly integrated framework that can help officials at the systems level direct limited resources to where they can be most effective in achieving both public safety and healthcare goals." *Id.*

[7] *See, e.g., Brief of American Psychiatric Assoc., et al.*, *as Amici Curiae in Support of Respondent* in *San Francisco v. Sheehan*, *135 S. Ct. 1765 (2015)* (hereafter "*Sheehan")*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/13-1412_amicus_resp_apa.authcheckdam.pdf (last visited June 1, 2016) at 6, n. 6 (citing Melissa Reuland *et al*., Council of State Gov'ts Justice Center, *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice (2009*) http://csgjusticecenter.org/wp-content/uploads/2012/12/le-research.pdf (last visited June 1,

systems with inadequate mental health crisis systems, police officers often are the first and only responders to psychiatric crises. Police often are called to address behaviors that are manifestations of psychiatric disabilities when there are not appropriate community-based supports and services[8].

Police involvement in mental health crises – instead of community-based mental health services and supports -- creates a risk of unnecessary escalation of crises and often leads to people with psychiatric disabilities being inappropriately swept into the criminal justice system or unnecessarily segregated[9] in mental health facilities.[10] Moreover, relying upon law enforcement to respond to mental health crises is ineffective, often

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2016) at 7 ("The Los Angeles (Calif.) County Police Department identified 67 people with mental illnesses who had a minimum of five contacts with law enforcement during the first eight months of 2004. This resulted in a total of 536 calls for service during this time period."); Thomas M. Green, *Police as Frontline Mental Health Workers: The Decision to Arrest or Refer to Mental Health Agencies*, 20 Int'l J.L. & Psychiatry 469, 476 (1997).

[8] *Id.*

[9] Another consequence, in addition to unjustified segregation, is unnecessary injury and deaths. *See Brief Amicus Curiae of the American Civil Liberties Union, et al*., in *Sheehan*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/13-1412_amicus_resp_aclu.authcheckdam.pdf (last visited June 1, 2016) at 17-18, n. 29 (citing, among other sources, Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED News (Sept. 30, 2014), http://ww2.kqed.org/news/2014/09/30/half -of-those-killed-by-san-francisco-police-are-mentally-ill ("A KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident.")); Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald (Dec. 9,2012)("A review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems."); Tux Turkel, *When Police Pull the Trigger in Crisis, the Mentally Ill Often are the Ones Being Shot*, Portland Press Herald (Dec. 8, 2012) (finding that 42 percent of 57 police shootings in Maine since 2000 involved persons with mental health problems, and that 19 of 33 fatalities (58 percent) were persons with mental health problems); Police Exec. Research Forum, *Review of Use of Force in the Albuquerque Police Department* 13 (2011) (finding that 54 percent of people "whose actions led APD officers to use deadly force" had a confirmed history of mental illness); State of New Mexico, Pub. Defender Dep't, *2012 Annual Report* 6 (2012) (reporting that that 75 percent of police shootings in the last two years had a "mental health context")).

[10] *E. g., Framework, supra* n. 3, at 1 *("*State corrections and behavioral health administrators know that large numbers of adults with mental health and substance use disorders are churning through the nation's criminal justice, behavioral health, and social support systems, often with poor—even tragic—individual, public health, and community safety results.[reference omitted] People with mental illnesses, substance use disorders, or both, often take varied pathways into the criminal justice system. Once involved, however, they tend to get caught up in a whirlpool fueled by relapse and an inability to comply with the requirements of their incarceration, supervision, and release. Their conditions tend to deteriorate, and they often get ensnared in the system again and again because they lack effective integrated treatment and supervision. The costs to states, counties, and communities in excessive expenditures of scarce resources that have a limited effect on public safety, recidivism, and recovery are unacceptable*.").*

making situations worse and not better, and inefficient, leading to unnecessarily repetitive police involvement.[11]

B. Unnecessary institutionalization in mental health facilities

A significant portion of individuals who are admitted to mental health facilities have experienced repeated interactions with the criminal justice system.[12] Many of these arrests or detentions could have been avoided if community mental health services, and particularly mobile crisis intervention, ACT, supported housing, supported employment, and peer supports were available and promptly accessible. *See* Part VII, *infra.* In the absence of these services to support individuals with psychiatric disabilities in the community, and to divert them from institutionalization in mental health facilities, persons with psychiatric disabilities are forced into the criminal justice system by police officers, probation officers, and judges, often allegedly for their own protection or for questionable public safety concerns.[13]

C. Incarceration in prisons and jails

Over time, the lack of effective community-based mental health services has contributed to the number of individuals with mental illness in jails and prisons.[14] Once people are

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[11] Herbert Bengelsdorf et al., *The Cost Effectiveness of Crisis Intervention*, 181 J. Nervous & Mental Disease 757 (1993), http://www.researchgate.net/publication/14945620_The_cost_effectiveness_of_crisis_intervention._Admission_diversion_savings_can_offset_the_high_cost_of_service (last visited June 1, 2016); Kelli E. Canada et al., *Intervening at the Entry Point: Differences in How CIT Trained and Non-CIT Trained Officers Describe Responding to Mental Health-Related Calls,* 48 Community Mental Health J. 746 (2012), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3670143/ (last visited June 1, 2016).

[12] *See, e.g., Addressing the Critical Mental Health Needs of NH's Citizens, A Strategy for Restoration, Report of the Listening Sessions* at 1 and 17, April 2009 http://www.dhhs.nh.gov/dcbcs/bbh/documents/listeningsessions.pdf (last visited June 1, 2016).

[13] *See*, e.g., id.; Ram Subramanian et al., Vera Inst. Of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 22-24 (Feb. 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf (last visited June 1, 2016).

[14] *See Framework, supra,* n. 3, at 1-3 (explaining the increase in the number of incarcerated people with psychiatric disabilities: "Their conditions tend to deteriorate, and they often get ensnared in the system again and again because they lack effective integrated treatment and supervision."); Lorna Collier, *Incarceration Nation*, 45 American Psychological Association Monitor, 56 (October 2014), http://www.apa.org/monitor/2014/10/incarceration.aspx (last visited June 1, 2016) ("While at least half of prisoners have some mental health concerns, about 10 percent to 25 percent of U.S. prisoners suffer from serious mental illnesses, such as major affective disorders or schizophrenia, the report finds. That compares with an average rate of about 5 percent for serious mental illness in the U.S. population in general. Dependence on drugs, alcohol or both is also common among prisoners."); *see also* Timothy Williams, *Jails have Become Warehouses for the Poor, Ill and Addicted, a Report Says,* N.Y. Times, Feb 11,

segregated in penal facilities, they are subject to discrimination on the basis of their disabilities with respect to opportunities for probation, parole and release, and their unjustifiable segregation is perpetuated.

III. Unjustified Segregation Is Prohibited Discrimination Under the ADA

Congress enacted the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[15] Title II of the ADA prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[16]

Unjustified isolation of people with disabilities constitutes discrimination because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[17]

The ADA's integration mandate requires public entitles to provide services to persons with disabilities in the "most integrated setting appropriate to the[ir] needs."[18] The "most integrated setting" is "'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'"[19] This mandate advances one of the principal purposes of Title II of the ADA—"ending the isolation and segregation" of people with disabilities.[20]

The integration mandate dictates that states "shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[21] Failure to provide disability services, specifically mental health services in integrated settings that are needed to avoid unjustified segregation, violates the ADA.

The Department of Justice (DOJ) has described *Olmstead* this way:

> The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into

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2015, at A19; Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America, supra* n.*12* at 11-13 .

[15] 42 U.S.C. § 12101(b)(1).

[16] 42 U.S.C. § 12132.

[17] *Olmstead,* 527 U.S. at 600–01.

[18] 28 C.F.R. § 35.130(d).

[19] *Olmstead*, 527 U.S. at 592 (quoting 28 C.F.R. pt. 35 app. A, p. 450 (1998)).

[20] *Arc of Wash. State Inc. v. Braddock,* 427 F.3d 615, 618 (9th Cir. 2005).

[21] 28 C.F.R. §35.130(d) (1998).

account the resources available to the entity and the needs of others who are receiving disability services from the entity.[22]

Since the *Olmstead* decision, courts[23] and the DOJ have recognized that the determination whether an individual is "qualified" for an integrated setting can be proven through a variety of methods and need not be a determination by the entity's own professionals.[24] Determinations about the supports and services necessary to safely and adequately support individuals with psychiatric disabilities in the community are best made by mental health professionals, not necessarily police, probation, parole and correctional officers. It is arguable that a public entity's reliance on police officers as first responders, without providing the benefit of needed supports and services in the community to individuals with psychiatric disabilities, can constitute a violation of the integration mandate of the ADA because the result of this reliance often is unjustified segregation in psychiatric facilities.

IV. Policies and Practices that Place People At Risk of Unnecessary Institutionalization Is Prohibited by the ADA

Numerous courts have recognized that people "at risk" of institutionalization may state claims under the ADA's integration mandate. "First, 'there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized.'"[25] "Based on the purpose and text of the ADA, the text of the integration

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[22] Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, at http://www.ada.gov/olmstead/q&a_olmstead.htm (hereafter DOJ Guidance).

[23] *E.g. Lane v. Kitzhaber,* 283 F.R.D. 587, 602 (D. Oregon 2012)("As in *Olmstead,* whether a class member is qualified for the services he or she seeks is determined by the reasonable judgments of professionals. But those judgments must actually be reasonable and based on professional assessments, rather than simply the exigencies of available services or providers.")

[24] DOJ Guidance, at Answer 4.

[25] *Steimel v. Wernert*, Docket Nos. 15–2377, 15–2389, (7th Cir. May 10, 2016), 2016 WL 2731505 at *6, *quoting Pashby v*. Delia, 709 F.3d 307, 322 (4th Cir. 2013); *see also, e.g.*, *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011) ("An ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization."); *Radaszewski ex. rel. Radaszewski v. Maram*, 383 F.3d 599, 614-17 (7th Cir. 2004); *M.A.C. v. Betit,* 284 F. Supp. 2d 1298, 1309 (D. Utah 2003); *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1177-78, 1182 (10th Cir. 2003) ("Olmstead does not imply that disabled persons who, by reason of a challenge to that state policy, stand imperiled with segregation, may not bring a challenge to that state policy under the ADA's integration regulation without first submitting to institutionalization."); *Makin ex.rel. Russel v. Hawaii,* 114 F. Supp.2d 1017, 1033 (D. Haw. 1999); DOJ Guidance, Answer 6 ("[T]he ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent . . . a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such

mandate, the Supreme Court's rationale in *Olmstead*, and the DOJ Guidance," the Seventh Circuit recently held that "the integration mandate is implicated where the state's policies have . . . put [people with disabilities] at serious risk of institutionalization."[26]

In order to prove that an individual is "at risk" of institutionalization or segregation, a plaintiff must show that the risk is "serious." According to the DOJ, "a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution."[27] For individual claims, a plaintiff could should that manifestations of her psychiatric disability had led to interactions with law enforcement and unjustified segregation in the past. For class claims, the risk must be definite enough to establish that the class is ascertainable for purposes of class certification.[28]

The DOJ in its *Olmstead* findings letters and settlement agreements has recognized that certain target populations face a "very high risk of unnecessary institutionalization" because of the lack of services available to them. For example, in *U.S. v. Delaware*, the DOJ defined the target population as "the subset of the individuals who have serious and persistent mental illness (SPMI) who are at the highest risk of unnecessary institutionalization."[29] From this target population, the settlement agreement identifies groups that have a "very high" risk of unnecessary institutionalization to include "[p]eople with SPMI who have been arrested, incarcerated, or had other encounters with the criminal justice system in the last year due to conduct related to their serious mental illness."[30] DOJ settlement agreements regarding the mental health systems in Georgia and New Hampshire similarly include people with criminal justice

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services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.").

[26] *Steimel v. Wernert*, 2016 WL 2731505 at *9; *See also* DOJ Guidance, Answer 6.

[27] DOJ Guidance, Answer 6.

[28] Fed. R. Civ. P. 23 (a)(3); see also *Steward v. Abbott*, Civ. No. 5:10–cv–1025- OLG, Order, Docket No. 287 (W. D. Tex. May 20, 2016)(extensively quoting from *Kenneth R. ex rel. Tri-Cly. CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 267 (D.N.H. 2013) ("Rather, this is a case in which: 'Substantial evidence suggests that the State's policies and practices have created a systemic deficiency in the availability of community-based mental health services, and that that deficiency is the source of the harm alleged by all class members. The State's own reports, for example, demonstrate that there is a dearth of available community-based services . . . . They further show that this systemic condition "is a result of the way the State manages the system and is something that the State . . . can control." *MD. [v. Perry]*, 294 F.R.D. at 48 [(S.D. Tex. 2013)] (finding that the States' policies and practices brought about the challenged systemic conditions). In addition, the evidence suggests a causal connection between that systemic condition and the harm experienced by all class members: a serious risk of unnecessary institutionalization, which includes a serious risk of continued unnecessary institutionalization.'")

[29] *U.S. v. Delaware*, Civ. No. 11-591 (D. Del. Settlement Agreement approved July 6, 2016), available at http://www.ada.gov/delaware.htm.

[30] *Id.*

interactions in their "at risk" target groups.[31] These same settlement agreements identify people who have used emergency or crisis services or have been in a homeless shelter as a result of a mental illness during the past three years as at risk.[32]

V. Framing an ADA Olmstead Criminal Justice Diversion Case

A. The Plaintiffs

In both mental health settings and in criminal justice settings, there are certain indicators associated with an increased risk of segregation for people with psychiatric disabilities.[33] Given the obvious difficulties with challenging jail or prison placement under *Olmstead*, an ADA Olmstead criminal justice diversion case will optimally have both plaintiffs with a serious mental illness in a particular local jurisdiction who are unnecessarily institutionalized in a segregated mental health setting or facility, and those who are at serious risk of unnecessary institutionalization in a segregated mental health setting or facility. Specifically, a segregated mental health setting or facility could include state or private mental health hospitals, as well as other congregate care settings (i.e adult homes). Those who are at serious risk of institutionalization in a segregated mental health setting or facility could include individuals who: (1) were recently institutionalized in a segregated mental health setting or facility; *or* (2) were recently involved with the criminal justice system as a result of mental illness; *or* (3) who recently have used emergency or crisis services or have been in a homeless shelter as a result of a mental illness.

This focus on a group with characteristics that put them at risk of segregation is like the focus in any other mental health system reform case based on *Olmstead.* The difference here is that the intentional focus, particularly with respect to remedies, is on the intersection of the mental health system with the criminal justice system.

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[31] *Amanda D. v. Hassan,* No. 1:12-CV-53 (SM), (D. N.H., Proposed Settlement Agreement approved February 12, 2014), link available at http://www.ada.gov/olmstead/olmstead_docs_list.htm#Settlements (last visited June 1, 2016) ("At risk of institutionalization means persons who, within a two year period: (1) had multiple hospitalizations; (2) used crisis or emergency room services for psychiatric reasons; (3) had criminal justice involvement as a result of their mental illness; or (4) were unable to access needed community services"); *U.S. v. Georgia*, 1:10-CV-249-CAP (N.D. GA., Settlement Agreement) link available at http://www.ada.gov/olmstead/olmstead_docs_list.htm#Settlements (last visited June 1, 2016) ("The target population for the community services described in this Section (III.A) shall be individuals with a primary diagnosis of a developmental disability who are currently hospitalized in the State Hospitals and those who are at risk of hospitalization in the State Hospitals").

[32] *E.g., id.* ("The target population for the community services described in this Section (III.B) shall be approximately 9,000 individuals by July 1, 2015, with SPMI who are currently being served in the State Hospitals, who are frequently readmitted to the State Hospitals, who are frequently seen in Emergency Rooms, who are chronically homeless, and/or who are being released from jails or prisons.")

[33] *E.g., id*.

Alternatively, the case could focus only on individuals with a serious mental illness who are or who have been involved in the criminal justice system. That more narrow case could include individuals with a serious mental illness and prior involvement with the criminal justice system who are unnecessarily institutionalized in a segregated mental health setting or facility, as well as those who are at serious risk of institutionalization in a segregated mental health setting or facility. The at risk group would only include individuals who: (1) are or were recently institutionalized in a segregated mental health setting *and* (2) are or were recently involved with the criminal justice system as a result of their mental illness.

B. The Defendants

Title II and *Olmstead* prohibit the planning, administration, operation, and funding of criminal justice and mental health systems by state or local entities that result in a risk of unjustified segregation of persons with psychiatric disabilities in mental health institutions. Criminal justice systems and mental health systems often are funded by the same or related state and local entities. In some states and counties, the same entity provides both criminal justice and mental health programs. This is most likely to be true where counties or other local governmental entities administer, operate, and at least partially fund mental health services in that jurisdiction. In other states, state agencies may control, direct, fund, or oversee both criminal justice programs and mental health service systems, such that the state entity (either the Department of Correction, the Department of Mental Health, or both) have inter-related duties and authorities. Finally, in most states, there often is a single point of accountability, such as the Governor or a Secretary who is ultimately responsible for both the criminal justice and mental health service systems.

The defendants should include the public entity that administers and funds the jail or prison, as well as the public entity that administers and funds the mental health system in that locality. Consideration should also be given to including the public entity that administers and funds vocational services and law enforcement activities. At the county level, the defendants should include both the county governmental entity that administers the jail and the state governmental entity that administers the mental health, corrections, and vocational rehabilitation systems.

The remedy for these *Olmstead* claims will be to compel these related public entities to jointly eliminate or reduce the risk of unjustified segregation by providing the community-based supports and services necessary to support individuals in the community and prevent their unnecessary involvement in the criminal justice system for unmet mental health needs and unnecessary segregation in mental health facilities. These services include mobile crisis teams, ACT, supported housing, peer supports, and supported employment.

C. Strategies to Address the Fundamental Alteration Defense

A fundamental alteration defense[34] to an *Olmstead* claim requires a public entity to show that providing the requested service or benefit would fundamentally alter the entity's program, either because the entity does not provide the service or benefit in any location or context, or because the cost of doing so would be excessive in light of its resources and the needs of other beneficiaries. According to the DOJ, and courts in the majority of circuits, a defendant may not raise a fundamental alteration defense unless it can show it has developed and is implementing a comprehensive, effectively-working *Olmstead* plan that includes the population at issue.[35]

The fundamental alternation defense is not likely to defeat an *Olmstead* claim if it can be shown that provision of community-based services and supports for people with psychiatric disabilities to divert them from confinement in a psychiatric facility and repeated but preventable interactions with the criminal justice system is cost-effective. Plaintiffs should have evidence that replacing ineffective and expensive law enforcement and criminal justice interventions with more effective mental health supports and services in the community will not cost more, and may even save money.[36]

If costs related to confining individuals in psychiatric facilities are combined with the criminal justice, medical (hospital and emergency room), shelter, public benefit, and

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[34] As set out in *Olmstead*, 527 U.S. at 603, this defense "allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs. 28 CFR § 35.130(b)(7) (1998)."

[35] *See, e.g., Frederick L. v. Dep't of Pub. Welfare of Pa. (Frederick L. II), 422 F.3d 151, 157 (3d Cir. 2005); Sanchez v. Johnson, 416 F.3d 1051, 1067-68 (9th Cir. 2005); Pa. Prot. & Advocacy, Inc., 402 F.3d 374, at 381-82 (3d Cir. 2005); see also* DOJ Guidance, Answer 13 ("The Department of Justice has interpreted the ADA and its implementing regulations to generally require an *Olmstead* plan as a prerequisite to raising a fundamental alteration defense, particularly in cases involving individuals currently in institutions or on waitlists for services in the community. In order to raise a fundamental alteration defense, a public entity must first show that it has developed a comprehensive, effectively working *Olmstead* plan that meets the standards described above. The public entity must also prove that it is implementing the plan in order to avail itself of the fundamental alteration defense. A public entity that cannot show it has and is implementing a working plan will not be able to prove that it is already making sufficient progress in complying with the integration mandate and that the requested relief would so disrupt the implementation of the plan as to cause a fundamental alteration.")

[36] *See, e.g.,* Peggy L. El-Mallakh et al., *Costs and Savings Associated with Implementation of a Police Crisis Intervention Team*, 107 S.Med.J. 391 (2014); Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47, at 51-52 (2008), http://www.jaapl.org/content/36/1/47.full.pdf+html (last visited June 1, 2016) (citing Alexander J. Cowell et al., *The Cost-Effectiveness of Criminal Justice Diversion Programs for People With Serious Mental Illness Co-Occurring With Substance Abuse*, 20 J. Contemp. Crim. Justice 292 (2004)).

other related public expenditures for these individuals,[37] there is little likelihood that the public entity can demonstrate that confinement is cost effective.[38] And since community mental health services are commonly provided by all state mental health authorities, it is not likely that the entity – when properly and broadly described – can claim a new service or benefit is required.

VI. Other ADA Discrimination Claims Regarding the Criminal Justice System

In addition to an *Olmstead* claim, an ADA discrimination case also could challenge discriminatory practices and policies of a state or local public entity's criminal justice programs, services or activities that result in individuals with psychiatric disabilities remaining in a jail, prison, or other segregated penal setting due to their disabilities.[39] Discriminatory prison, parole, probation, and release practices that fail to provide reasonable accommodation can result in needless incarceration and seclusion[40] and violate the ADA. "Although the power to fashion and enforce criminal laws is reserved primarily to the States, many functions traditionally reserved to the states are subject to the ADA, including . . . significantly, prison administration."[41] Several federal appellate

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[37] These costs broadly include expenditures incurred by the mental health system, police, probation and parole agencies as well as corrections. In addition it may be possible to project costs based on use of public benefits such as medical benefits and lost revenue from the negative outcomes of incarceration and conviction, including from unemployment and also the costs associated with known consequences such as recidivism and homelessness, for example. *See generally* David Cloud and Chelsea Davis, *Treatment Alternatives to Incarceration for People with Mental Health Needs in the Criminal Justice System: The Cost-Savings Implications,* Research Summary, February 2013, http://www.vera.org/sites/default/files/resources/downloads/treatment-alternatives-to-incarceration.pdf (last visited June 1, 2016).

[38] *See* DOJ Guidance, Answer 11 ("The relevant resources for purposes of evaluating a fundamental alteration defense consist of all money the public entity allots, spends, receives, or could receive if it applied for available federal funding to provide services to persons with disabilities. Similarly, all relevant costs, not simply those funded by the single agency that operates or funds the segregated or integrated setting, must be considered in a fundamental alteration analysis.")

[39] The relevant regulatory provisions could include: 28 C.F.R. §§ 35.130(b)(3), (7), (8) (administrative methods, reasonable modifications, eligibility criteria), 35.130(d) (failure to provide services in the most integrated setting appropriate), 35.150(a)(program access).

[40] K. Kim, et al., *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*, March 2015 Research Report, http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf (last visited June 1, 2016).

[41] *Thompson v. Davis*, 295 F. 3d 890 (9th Cir. 2002) (citing *Yeskey* among others in denying motion to dismiss ADA claim based on categorical denial of inmates consideration for parole because of disability and concluding that "parole hearings are public programs or activities covered by the ADA; allegation was that state parole authority follows an unwritten policy of automatically denying parole to prisoners with substance abuse histories); *See also Minich v. Spencer*, Suffolk County, Mass. Superior Court, Civil Action No. 2015 – 00278, Memorandum of Decision and Order on Defendants' Motion to Dismiss ("Here, the plaintiffs allege that the defendants subjected them to seclusion and restraint for punitive and disciplinary purposes

courts have held that the ADA applies to law enforcement officers in the course of arrests.[42] DOJ guidance clarifies and expands the ADA's scope through regulation.[43]

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rather than under emergency circumstances; the renewals of their seclusion and restraints would occur even when the plaintiffs were calm, compliant, or sleeping; and as a matter of general practice, the defendants would seclude and/or restrain the plaintiffs without first trying to de-escalate situations or trying to treat the plaintiffs to avoid having to seclude and restrain them. These facts plausibly suggest that the defendants secluded and restrained the plaintiffs because of their disabilities, rather than based on 'an individualized inquiry into [each plaintiff's] condition' . . . . The plaintiffs have therefore stated a claim 'based upon defendants' failure to provide them reasonable accommodations,' i.e., access to mental health treatment and services from which they could benefit.[citation omitted] 'A comparison with the manner in which benefits are administered to the non-disabled is thus not required, for the question of equality of administration is irrelevant to a claim for reasonable accommodations."); *See generally* Framework, *supra* note 3.

[42] The Supreme Court in *Sheehan* left intact the Ninth Circuit's decision in *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1231–33 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 702 (2014) that the ADA applies to arrests. *See also Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody."); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 338 (4th Cir. 2012) ("[I]n light of *Yeskey*'s expansive interpretation, the ADA applies to police interrogations . . . ."); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (noting that the final clause of Section 12132 "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") (citation omitted); *Anthony v. City of New York*, 339 F.3d 129, 140–41 (2d Cir. 2003); *Delano-Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 574–76 (5th Cir. 2002) (applying ADA to sobriety test of deaf driver suspected of intoxication); *Thompson v. Williamson Cnty.*, *Tenn.*, 219 F.3d 555, 558 (6th Cir. 2000) (applying ADA to police response to 911 call); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law."); *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1214–15 (D.C. Cir. 1997); *Chisolm v. McManimon*, 275 F.3d 315, 324–29 (3d Cir. 2001 (applying ADA to jail intake procedure). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) ("[W]e hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.");*Tucker v. Tennessee*, 539 F.3d 526, 53 1–36 (6th Cir. 2008) (questioning application of ADA to arrest but ruling that "even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against [plaintiffs] because of the their disabilities in violation of the ADA.")

[43] 28 C.F.R. pt. 35, App. B (2014) ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."); *id.* ("[T]itle II applies to anything a public entity does."); DOJ, Civil Rights Div., The ADA and City Governments: Common Problems (2008) ("When dealing with persons with disabilities, law enforcement agencies often fail to modify policies, practices, or procedures in a variety of law enforcement settings—including citizen interaction, detention, and arrest procedures. . . . When interacting with police and other law enforcement officers, people with disabilities are often placed in unsafe situations or are unable to communicate with officers because standard police practices and policies are not appropriately modified."); DOJ, Civil Rights Div., Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement (2006) ("The ADA affects virtually

While a fundamental alteration defense would need to be addressed with an analysis of the cost-effectiveness of non-discrimination, this should be substantially easier in a discrimination and failure to accommodate case than in an *Olmstead* case.

A reported decision from the Massachusetts Parole Board demonstrates how a discrete agency within the criminal justice system may run afoul of the ADA for its failure to accommodate people with psychiatric disabilities.[44] Mr. Dacier, a state prison inmate since approximately 1997 who had been treated for schizoaffective disorder, "was initially granted parole to a 'DMH secured facility' following his 2010 hearing; however the DMH [Department of Mental Health] evaluation revealed that he did not qualify for DMH services." As a result, Mr. Dacier remained in prison for another five years, when, in its 2015 decision, the parole board indicated that the parole board requested "a re-evaluation by DMH to see if he is eligible for services." Because the Parole Board lacks the capacity to conduct timely assessments and placement, and instead, must work cooperatively with DMH, the parole granted to Mr. Dacier in 2010 has been indefinitely postponed.

VII. Remedies for *Olmstead* Diversion and Related Discrimination Cases

Remedies for an *Olmstead* diversion case should include the same community mental health services that are sought in other *Olmstead* cases: ACT, supported housing, supported employment, mobile crisis and stabilization, and peer support services, plus substance abuse services. Evaluation for, and access to, these services should be directly connected to the criminal justice system, with specific attention on locating, administering and operating these services in a manner that engages all key players in that system, including judges, probation officers, public defenders, prosecutors, and sheriffs and other law enforcement agencies. Training, outreach, and assistance to these key players should be included as part of the implementation requirements for system reform. Ultimately, the outcome should be the substantial reduction or elimination of the risk that people with psychiatric disabilities and repeated interactions with the criminal justice system are unnecessarily institutionalized in mental health facilities or incarcerated.

To effectively implement these services and divert individuals with psychiatric disabilities from admission to mental institutions and correctional facilities, the remedy should also include administrative and operational provisions designed to promote collaboration between the entity's criminal justice and mental health programs and services. Structural reforms may be necessary to ensure the prompt availability of comprehensive community services and supports for people with serious mental illness.

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everything that officers and deputies do, for example: . . . arresting . . . suspects[.]"); DOJ, Civil Rights Div., Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers (2006).

[44] *In the Matter of Wilfred Dacier*, No. W62511, November 4, 2015 decision of the Commonwealth of Massachusetts Parole Board, available at http://www.mass.gov/eopss/docs/pb/lifer-decisions/2015/dacierrod2015.pdf (last visited June 1, 2016).

It will require that barriers that currently separate law enforcement, corrections, probation and parole from each other and from mental health services be eliminated so that these public programs can efficiently allocate resources and eliminate unjustified segregation.

Creating the necessary supports and services to prevent mental health crises from becoming law enforcement matters and to divert people with psychiatric disabilities from mental health institutions is the better and more affordable alternative to expensive institutionalization or incarceration. The remedy for the unjustifiable segregation of people with psychiatric disabilities and criminal justice histories is the provision of community supports and services to divert them from entering the criminal justice system and to provide supports and services when they are released from incarceration to prevent re-entry.

There are successful examples of law enforcement agencies adopting model police practices that incorporate Crisis Intervention Training (CIT), as a result of DOJ litigation, in Seattle and Portland.[45] Massachusetts has taken the initiative to begin to eliminate the barriers between the mental health service system and law enforcement in order to provide appropriate supports and services that divert people with psychiatric disabilities from the criminal justice system.[46] In the DOJ settlement agreements in Georgia and Delaware, police are required to be trained and made aware of the mental health crisis system as an alternative for when police interact with people in mental health crises.[47]

Remedies for discriminatory policies and practices in the criminal justice system that violate the ADA will include changing those policies and practices to eliminate the discrimination. These remedies could overlap with the *Olmstead* remedies where the

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[45] Press Release, DOJ, *Court Approves Police Reform Agreement in Portland, Oregon* (Aug. 29, 2014), *available at* https://www.justice.gov/opa/pr/court-approves-police-reform-agreement-portland-oregon (last visited June 1, 2016); Settlement Agreement and Stipulated [Proposed] Order of Resolution at ¶¶ 130–37, *United States v. City of Seattle*, Civil Action No. 12-CV-1282 (W.D. Wash. July 27, 2012) http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf (last visited June 1, 2016) ("SPD will continue to provide Crisis Intervention training as needed to ensure that CI trained officers are available on all shifts to respond to incidents or calls involving individuals known or suspected to have a mental illness, substance abuse, or a behavioral crisis ('individuals in crisis'). . . . SPD's CI training will continue to address field evaluation, suicide intervention, community mental health resources, crisis de-escalation, and scenario exercises."); *see also* Susan Stefan, Center for Public Representation*, Q&A: What are the Essential Components of a Psychiatric Community Crisis System?* (TASC) August 2008. http://www.tascnow.com/tasc/images/Documents/Publications/Q_A/TASC_0808_What-are-the-Essential-Component.pdf (last visited June 1, 2016, user name and log in required).

[46] Commonwealth of Massachusetts DMH Forensic Services Report Pre-Arrest Law Enforcement-Based Jail Diversion Program Report, July 1, 2011 to Jan. 1,2014 (example of reporting under statewide model) http://tinyurl.com/lr7blnw (last visited June 1, 2016).

[47] Settlement Agreement, approved July 6, 2012 in *U.S. v. Delaware*, Civ. No. 11-591-, U.S.D.C. D. Del., available at http://www.ada.gov/delaware.htm; Settlement Agreement, approved October 29, 2010 in *U.S. v. Georgia*, *supra,* n. 30.

provision of community-based supports and services enables the parole, probation and other agents in the criminal justice system to release people with mental disabilities from penal institutions not only with confidence that appropriate community based services are available but also to facilitate access by people with mental disabilities to these community resources upon release.

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VIII. Conclusion

P&As can make a strong case that the risk of the unnecessary institutionalization and unjustified segregation of individuals with psychiatric disabilities with criminal justice histories that is created by the failure of public entities to provide appropriate community supports and services violates the ADA integration mandate. The remedy is comprehensive effort by the public entities which provide mental health and criminal justice programs to enhance community based services and supports so that mental health crises do not result in incarceration. Since case law in this area is in its infancy, P&As are encouraged to reach out to NDRN and our legal back up provider the Center for Public Representation for advice when drafting this claim.