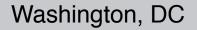# Using ADA and Olmstead Principles to Divert People with Mental Illness from the Criminal Justice System

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Disclaimer Slide

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Bazelon Center for Mental Health Law

- Founded in 1972

- Engage in legal & policy advocacy on behalf of people with mental illness & other disabilities

- Have provided technical assistance to public officials & advocates, including TA funded by the federal government & the National Association of State Mental Health Program Directors

- Recognized for our expertise in system reform, Medicaid & other funding streams, & community mental health care

The Problem Today

- **People with mental illnesses are over-represented in the justice system.**

  - Steadman, et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 Psychiatric Services (June 2009), available at https://csgjusticecenter.org/wp-content/uploads/2014/12/Prevalence-of-Serious-Mental-Illness-among-Jail-Inmates.pdf (17% of males/34% of females incarcerated in jails have a serious mental illness)

- **Frequently arrested for behavior associated with their disability, including administrative offenses and non-violent "quality of life" offenses.**

  - Liebowitz, et al, "A Way Forward: Diverting People With Mental Illness Away From Inhumane and Expensive Jails Into Community-Based Treatment That Works" (Los Angeles: American Civil Liberties Union of Southern California & Bazelon Center for Mental Health Law 2014), available at http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf

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The Problem Today

- **Once in jail, people with mental illnesses fare poorly.**
- **Difficult conditions and inadequate access to treatment can exacerbate existing issues and lead to further problems**
  - Gostin, Vanchieri, & Pope (Eds.), Ethical Considerations for Research Involving Prisoners (Washington: National Academies Press, 2007), available at https://www.ncbi.nlm.nih.gov/books/NBK19877/
- **Discipline is imposed, including solitary confinement, rather than providing reasonable accommodations for disability**
  - Aufderheide, "Mental Illness in America's Jails and Prisons," in Health Affairs, Apr. 1, 2014, available at https://www.healthaffairs.org/do/10.1377/hblog20140401.038180/full/

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The Problem Today

- **Incarcerated for longer than if they did not have a mental illness.**

  - Ditton, Special Report: Mental Health and Treatment of Inmates and Probationers, Bureau of Justice Statistics, 8 (1999), available at http://www.bjs.gov/content/pub/pdf/mhtip.pdf (on average 15 months more than those without disabilities with similar convictions)

  - Stanford Justice Advocacy Project, Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise (2017), available at https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf (on average, CA prisoners with mental illness receive sentences 12% longer than those without diagnosis for same crimes)

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The Problem Today

- **People with mental illnesses are more costly to keep in jail, in part because of need for special attention and programs.**

    - In Los Angeles County, average cost of jailing an individual with serious mental illness exceeds $48,500 per year. Cost of providing Assertive Community Treatment and supportive housing — one of the most successful intervention models — amounts to less than $20,500 annually, just two-fifths the cost of jail.

    - Liebowitz, et al, "A Way Forward: Diverting People With Mental Illness Away From Inhumane and Expensive Jails Into Community-Based Treatment That Works" (Los Angeles: American Civil Liberties Union of Southern California & Bazelon Center for Mental Health Law 2014), available at http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf

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The Problem Today

- **Is deinstitutionalization to blame for more people with mental illness being incarcerated?**

    - **The incomplete story:** Urban jails, such as Riker's, Cook County Jail, and LA County Jail, are frequently described as the nation's largest psychiatric institutions.

    - **Reality:** Failure to link deinstitutionalization to comprehensive community services & provide necessary resources.

    - **Reality:** Rising homelessness as result of reductions in federal spending on rental subsidies and affordable housing.

    - **Reality:** Increase in "law and order" policies and war on drugs.

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Addressing the Problem

- **Increase reliance of psychiatric hospitals instead of jails?**
  - Would mark a return to the era where people with mental illness were segregated from society.
  - Forces a choice between two types of institutionalization.
  - Fails to recognize that most people with mental illness do not need hospital care, but rather need housing and community mental health services.
- **Better tools:**
  - ADA and Olmstead principles & their implementation
  - Understanding & use of funding mechanisms, especially Medicaid

Addressing the Problem

The Americans with Disabilities Act

- Prohibits discrimination against people with disabilities (including psychiatric disabilities) by public entities in services, programs, and activities.

- The ADA's "Integration Mandate" requires public entities to administer services, programs, and activities for people with disabilities in the most integrated setting appropriate.

- Mandates end to discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3).

- "[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." Id. § 12101(a)(7).

Addressing the Problem

Who is Covered by the ADA?

- Title II of the ADA – applies to "public entities."
- Legal obligations apply even if the public entity contracts with someone else for day-to-day operation of jail.
- Includes:
  - Jails, police departments, probation/parole agencies, court systems, district attorneys, public defenders.
  - Psychiatric hospitals & community mental health programs.
  - Medicaid program.

Addressing the Problem

The ADA's Integration Mandate

- Requirement that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2017).

- An integrated setting enables people with disabilities to interact with non-disabled persons to the maximum extent possible.

- Provides individuals opportunities to live, work, and receive services in the community, like individuals without disabilities.

- Offers access to community activities and opportunities at times, frequencies, and with persons of an individual's choosing; affords choices in daily life activities.

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Addressing the Problem

The ADA's Integration Mandate

- Most integrated setting is the one that allows a person with a disability to live as much as possible like someone without a disability.

- Example: living in one's own apartment or house with supportive services.

- Example: working in competitive employment (with a job coach, if necessary, rather than in a "sheltered workshop" or "vocational program."

- Needless institutionalization of people with mental illnesses (or other disabilities) is illegal discrimination.

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Addressing the Problem

The Olmstead Decision (1999)

- Plaintiffs claimed they were being repeatedly and needlessly institutionalized in violation of the ADA because the state was not providing community services.

- Supreme Court agreed, holding that the "unjustified institutional isolation of persons with disabilities is a form of discrimination." Olmstead v. L.C., 527 U.S. 581, 600 (1999).

- Reasoning: 1) needless institutionalization perpetuates unwarranted assumptions that people are "incapable or unworthy of participating in community life" and 2) severely curtails everyday life activities, including family, work, education, and social contacts.

- Two defenses recognized: changes sought too expensive or would represent a "fundamental alternation."

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Addressing the Problem

- **Critical facts:**
  - Under Olmstead, the avoidable incarceration in jail of people with mental illness is a form of "unjustified" institutionalization.
  - Jails are now a de facto part of the mental health system, and thus must also help serve people in the community.
  - People with mental illnesses are jailed more frequently and for longer than people without mental illnesses.
  - People with mental illnesses in jail usually are not public safety risks.
  - Federal money is available to fund community services.
  - Diverting people with mental illnesses from criminal justice to mental health system is feasible and cost-effective.

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Key ADA and Olmstead Compliance Questions

1. Are all elements of the criminal justice system – police, corrections, courts, prosecutors, and defenders – working collaboratively and with the mental health system to avoid needless incarceration in jail?
2. What is the typical profile of the people with mental illnesses whose incarceration could and should be avoided?
3. What mechanisms need to exist to accomplish their diversion?
4. Does your jurisdiction have, or is it developing, the full array of community mental health services, including mobile teams, Assertive Community Treatment, and supported housing, known to reduce criminal justice involvement by people with mental illnesses?

Key ADA and Olmstead Compliance Questions

5. What provider network will your jurisdiction need to create or strengthen to ensure appropriate community-based alternatives to incarceration?

6. Are community mental health or housing providers permitted to refuse services to individuals because they have been arrested or incarcerated?

7. Has your jurisdiction identified all possible sources of funding for housing and other community-based services, including maximizing Medicaid funding?

Challenges

- Ensuring collaboration between multiple players in mental health, criminal justice, and other relevant systems (e.g., housing authorities, Medicaid, vocational rehabilitation).

- Ensuring that these public systems recognize that they have the same obligations under the ADA and Olmstead as mental health.

- Overcoming barriers to diverting individual from the criminal justice system.

- Understanding what savings can be anticipated – i.e., the "business case for diversion."

Using ADA & Olmstead for System Reform

- **Problem:** People with mental illnesses are jailed unnecessarily because they lack access to the right kind of community mental health services.

- **Answer:** Implementing lessons learned from putting ADA & Olmstead principles into practice, along with maximization of Medicaid & other funding, will result in creation of effective & cost-efficient community services that divert people with mental illnesses from arrest and incarceration.

Post-Olmstead Reforms

- State Olmstead plans.

- U.S. v. Georgia & U.S. v. Delaware settlement agreements:
  - A new emphasis on WHY people are in institutions;
  - Focus on people with serious mental illnesses;
  - Identify community services that must be developed;
  - Identify community supports that must be developed.

- GA & DE made changes to their mental health programs, housing programs, vocational service agencies, Medicaid spending, law enforcement training.

- Result: Dramatically reduced reliance on institutional facilities and better integration of people with mental illnesses into the community.

Using ADA & Olmstead for System Reform

Systemic Effort:

- Moving from theory to necessary systemic change
- Delaware recently conducted a revamping of MH system as part of settlement of lawsuit brought by U.S. Department of Justice
- Key elements/actions:
  - change in culture
  - presumption that people w/ SMI can and should live in community with appropriate supports and services
  - peer involvement in all aspects of the process

Using ADA & Olmstead for System Reform

Fundamental Changes-Lessons from Delaware:

- A change in culture whereby <u>services supporting integration</u> become the new "default"
- Recognizing that many police roles relating to people with SMI were inherited as a result of gaps in mental health and other public services
  - Recognizing that these police roles have been incorporated in practice by MH systems

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Using ADA & Olmstead for System Reform

More Fundamental Changes-Lessons from Delaware:

- Recognizing that even police encounters that are "without incident" have adverse consequences
  - Trauma to the individual
  - Reinforcement of negative stereotypes about people with MI
  - Systemic and financial costs to police departments
- Meaningfully incorporating peers in the change process

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Using ADA & Olmstead for System Reform

Diagnosing Segregation-Lessons from Delaware:

- Mapping the interactions of various public and publicly-supported systems leading to institutional segregation
  - Mental Health
  - Police
  - General Hospitals
  - Private Psychiatric Hospitals (IMDs)
  - Housing
  - Others…
- Mapping the lines of authority, funding sources, politics, and priorities of these systems

Using ADA & Olmstead for System Reform

More Diagnostics-Lessons from Delaware:

- Understanding how state mental health laws affect Olmstead compliance
- Understanding data challenges within and between public systems
- Understanding the skepticism of people with SMI who have histories of being served by public systems, and of their families
- Understanding skepticism of mental health and other providers

Using ADA & Olmstead for System Reform

Some immediate and ongoing tasks:

- identifying the target population and individuals' needs
- developing and applying clear criteria to measure progress & success
    - e.g., reduction in inpatient days; number of people diverted; level of engagement in community services; level of contact with police & criminal justice system
- Incorporating data into QA/PI systems

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Using ADA & Olmstead for System Reform

Programmatic Effort:

- Mental health system must have in place the array of evidence-based practices proven effective to provide comprehensive community-based support:
  - assertive community treatment (ACT) teams
  - scattered-site supported housing
  - supported employment
  - peer supports
  - intensive case management
  - crisis services (walk-in centers, mobile crisis teams; crisis apartments; respite)

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Using ADA & Olmstead for System Reform

Programmatic Effort:

- **Crisis Services**
  - system should have an array of crisis services to assist people at different levels of need
  - crisis hotline
  - mobile crisis teams
  - crisis centers
    - walk-in; brought by police
    - "living room" model & peer support services
  - crisis apartments
  - targeted case management teams

Using ADA & Olmstead for System Reform

Programmatic Effort:

- **Crisis Services**
    - per 2016 report from Court Monitor:
        - Mobile crisis teams typically divert 80-90% of people from hospitalization or contact with criminal justice system
        - Walk-in crisis center diverts 70% of people from hospitalization or contact with criminal justice system

Using ADA & Olmstead for System Reform

Post-Olmstead Reforms

- In Delaware, by the end of the settlement agreement:

  - number of civil beds at state psychiatric facility reduced 42%

  - State mental health laws were updated after decades

  - greatly expanded Medicaid coverage of community services previously funded only with state dollars

  - utilization of outpatient mental health services almost doubled

  - vibrant, engaged peer movement

  - Source: Tenth Report of Court Monitor on Progress Towards Compliance with the Agreement: U.S. v. Delaware (9/19/16), available at www.ada.gov/olmstead/documents/de_10th_report.pdf

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Post-Olmstead Reforms

- Also in Delaware by the end of the settlement agreement:
  - the number of supported housing units more than tripled
  - the number of people receiving supported employment services increased by about 500%
  - the number of people actively employed increased by about 400%
  - Source: Tenth Report of Court Monitor on Progress Towards Compliance with the Agreement: U.S. v. Delaware (9/19/16), available at www.ada.gov/olmstead/documents/de_10th_report.pdf

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Using ADA & Olmstead for System Reform

Systemic Effort:

- Effective, mental health programs are:
  - responsive
  - provide necessary resources
  - supported by the political will necessary to be successful
- Jails are not & should not be described as psychiatric hospitals
- We know what works to help people with mental illnesses live meaningful lives in the community

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