Diversion, Not Discrimination: Jails, the ADA, and People with Mental Illness

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Presenter Biography

Mark Murphy is the Managing Attorney of the Bazelon Center for Mental Health Law. Mark has represented people with disabilities and advocacy organization in a wide range of legal matters for more than 30 years, including cases involving the right to integrated, community-based services and the enforcement of rights under the Americans with Disabilities Act and other disability rights laws. Prior to joining the Bazelon Center, Mark held senior positions with both the New York and Pennsylvania protection and advocacy systems, including serving as the Legal Director and Chief Executive Officer of the Disability Rights Network of Pennsylvania.
Since 1972, the Judge David L. Bazelon Center for Mental Health Law has advocated for the civil rights, full inclusion and equality of adults and children with mental disabilities. We were pivotal in expanding the civil rights movement to include fighting discrimination against, and segregation of, people with mental disabilities. Today, the Bazelon Center accomplishes its goals through a unique combination of litigation, public policy advocacy, coalition building and leadership, public education, media outreach and technical assistance—a comprehensive approach that ensures we achieve the greatest impact.

Discussion Outline

I. The Problem Today
II. Application of ADA to Jails
III. Addressing the Problem of People with Mental Illness in Jails
IV. Applying Olmstead to Reduce the Number of People with Mental Illness in Jails
V. Challenges
VI. Key ADA and Olmstead Compliance Questions
VII. Practical Considerations for Service Delivery Systems
The Problem Today

• People with mental illness are:
  • Over-represented in the justice system.
    • 2009 study: 17% of males/34% of females in jail have a serious mental illness.
    • Often see 20% cited as applicable figure
  • Frequently arrested for behavior associated with their disability, including administrative offenses and non-violent “quality of life” offenses.

The Problem Today

• Once in jail, people with mental illness fare poorly.
  • Difficult conditions and inadequate access to treatment can exacerbate existing issues and lead to further problems.
  • Discipline is imposed, including solitary confinement, rather than providing reasonable accommodations for disability.
The Problem Today

• People with mental illnesses are:
  • Incarcerated for longer than if they did not have a mental illness
  • More costly to keep in jail, in part because of need for special attention and programs.
    • Los Angeles County: average cost of jailing person with SMI exceeds $48,500 per year. Cost of providing ACT and supportive housing — one of the most successful intervention models — amounts to less than $20,500 annually.

The Problem Today

• The large number of people with mental illness in jails and criminal justice system generally highlights two significant problems:
  • How to treat people with mental illnesses (and others with disabilities) in jail in a non-discriminatory manner?
  • Since we know jails are harmful places for people with mental illness, how do we divert as many as possible to more effective and less costly community-based programs?
Application of ADA to Jails

• Significant number of people with disabilities in jails
  • 40 percent of local jail inmates reported having at least one disability
  • 4 times more likely than the general population
    • (Bureau of Justice Statistics Report – December 2015)

Application of ADA to Jails

• Well known that many people with mental illness are in jails
• Less well known that a significant number of people with other disabilities are also in jails
  • Mobility impairments
  • Hearing loss or deafness
  • Vision-related impairments
  • Learning-related impairments
  • Medical issues, e.g. diabetes, infectious disease
Application of ADA to Jails

• What laws apply?
• What criminal justice entities are covered by these laws?
• Who gets the protections of these laws?
• What are the general non-discrimination principles that apply?

Two major federal laws
- Title II of the Americans with Disabilities Act
- Section 504 of the Rehabilitation Act

State & local anti-discrimination laws may also apply in some jurisdictions
Application of ADA to Jails

• Who is covered?
  • Title II of ADA – applies to “public entities”
    • jails, police departments, courts, district attorneys, public defenders
  • Section 504 of the Rehabilitation Act – applies to any recipient of federal funds

Application of ADA to Jails

• Who is protected by these laws?
  • Any person with a “disability”
    • a physical or mental impairment that substantially limits a major life activity
    • mobility impairments; hearing loss or deafness; vision-related impairments; leaning disabilities; medical issues such as diabetes and infectious diseases; intellectual disabilities; drug/alcohol addiction; mental illness
Application of ADA to Jails

• Identification/Screening
  • Critical to have systems in place that effectively identify inmates with disabilities and screen for any needed services
  • Can’t avoid non-discrimination obligation by failing to identify/screen
  • Obligations arise if jail personnel know or reasonably should know that someone may have a disability

Application of ADA to Jails

• Discrimination includes:
  • Failure to provide physical/architectural access
  • Failure to provide effective communication
  • Failure to reasonably modify policies and practices
  • Failure to integrate people with disabilities to maximum extent possible
Application of ADA to Jails

• Failure to provide effective communication
  • Persons who are Deaf/Hard of Hearing
  • Persons who are Blind of have visual impairments
  • Comparative standard: communication provided to PWD must be as effective as communication provided to those w/o disabilities

Application of ADA to Jails

• Failure to provide effective communication
  • Must provide “auxiliary aids and services”
  • Person Deaf/Hard of Hearing: qualified sign language interpreter; real-time transcription services; telephone amplifiers; videophones; captioned phones
  • Person Blind/Low Vision: print materials in alternative formats, such as Braille or large print; audio recordings; guide to help navigate hallways, etc.
Application of ADA to Jails

• Failure to provide effective communication
  • Public entity must give “primary consideration” to mode of communication requested by PWD
  • Requests should be evaluated and decided on a case-by-case basis
  • Obligation to provide effective communication extends to family members or others visiting inmate in jail
    • e.g., inmate not a person with a disability but relative is and needs auxiliary aid or service to communicate with inmate or jail staff

Application of ADA to Jails

• Reasonable modifications/accommodations
  • Must reasonably modify rules/policies/practices if such modification is necessary to assure meaningful access and participation for PWD
  • Example: special diet; eating meals at non-designated times; modifying intake procedures so understood by person with intellectual or learning disability
Application of ADA to Jails

• Reasonable modifications/accommodations
  • Modification must by reasonable AND necessary
  • Modification not required if it would be a “fundamental alteration” due to unreasonable cost or administrative burden
  • Safety/security issues may factor into reasonable modification analysis in jail context
  • Individual assessments based on objective evidence (NOT: “That’s not how we do things here.

Application of ADA to Jails

• Reasonable modifications/accommodations
  • Public entities – such as jails – are required to provide information about the ADA and its application to its programs and services, e.g., publications, handouts, posters
  • Must make known process by which people with disabilities can seek reasonable modifications to policies and practices or otherwise request assistance
Addressing the Problem of People with Mental Illness in Jails

• Second issue:
  • Since we know jails are harmful places for people with mental illness, how do we divert as many as possible to more effective and less costly community-based programs?

Addressing the Problem of People with Mental Illness in Jails

• Deinstitutionalization
  • Historical exclusion of people with mental illness from mainstream society
  • Disability rights movement of 1960s and 1970s, and other changes (e.g., development of medications), lead to legal and policy reforms and fewer people in hospitals long-term
  • Movement peaks in 1980s; end result is more people discharged to community settings.
Addressing the Problem of People with Mental Illness in Jails

• 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.

• 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.

Addressing the Problem of People with Mental Illness in Jails

• 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:
  • Americans with Disabilities Act and Olmstead.
Addressing the Problem of People with Mental Illness in Jails

• The ADA’s Integration Mandate
  • Public entities must “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”
  • 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.

Addressing the Problem of People with Mental Illness in Jails

• The ADA’s Integration Mandate
  • Most integrated setting: 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 illness (or other disabilities) is illegal discrimination.
Addressing the Problem of People with Mental Illness in Jails

• 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.”
  • 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.

Applying Olmstead to Reduce Number of People with Mental Illness in Jail

• Problem: People with mental illness who are jailed lack access to the right kind of community mental health services.
• Answer: Use Olmstead services and implementation of the ADA to divert people with mental illness from arrest and incarceration.
Applying Olmstead to Reduce Number of People with Mental Illness in Jail

• **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 illness are jailed more frequently and for longer than people without mental illness.
  - People with mental illness in jail usually are not public safety risks.
  - Diverting people with mental illnesses from criminal justice to mental health system is feasible and cost-effective.

Challenges

• Ensuring collaboration between multiple players in mental health and criminal justice systems.
• Overcoming barriers to diverting individual from the criminal justice system.
• Understanding what savings can be anticipated – i.e., the “business case for diversion.”
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?
Practical Considerations for Service Delivery Systems

• 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 (mobile crisis; crisis apartments; respite)

Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • ACT Teams:
    • frequently studied evidence-based practice
    • fidelity measures exist to determine how well systems are using ACT services
    • can use data to identify successes as well as problems that need to be fixed
Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • ACT Teams include:
    • Psychiatrist, nurse, employment specialist, case manager; peer specialist
    • Provided 24/7 as needed
    • Proven effective when fidelity standards met – reduction in hospitalization and incarceration

Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • Supported Housing
    • Critical element in stabilization & reduction in criminal justice contacts
    • Elements: scattered-site, integrated location; tenancy rights; choice of location; choice of whether and who to have as roommate; supports as needed to maintain housing and navigate community resources
Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • Supported Employment
    • Fidelity measures used to measure effectiveness
    • Employment often happens last in supports sequence – tendency is to deal with other issues first
      • Just as important as other services
      • We work near where we live & live near where we work

Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • Supported Employment
    • Research shows benefits of employment in recovery process
Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • Peer Support Services
    • Peers can be involved in variety of evidence-based services
      • peer specialists can help identify and set attainable goals and expectations
      • reliance on lived experience of others farther along in recovery process

Practical Considerations for Service Delivery Systems

• Programmatic Effort:
  • Crisis Services
    • Also an often-studied evidence-based practice
      • shown to be successful in diverting people with SMI away from hospitalization, contact with the criminal justice system, and incarceration
      • System should have an array of crisis services to assist people at different levels of need
Practical Considerations for Service Delivery Systems

- Programmatic Effort:
  - Crisis Services
    - crisis hotline
    - mobile crisis teams
    - crisis centers
      - walk-in; brought by trained mental health workers or police
      - “living room” model & peer support services
    - crisis apartments
    - targeted case management teams

- Crisis Services
  - Delaware recently created a comprehensive crisis management system as part of a court settlement
    - 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
Practical Considerations for Service Delivery Systems

• Systemic Effort:
  • Different elements of government programs must work together rather than separately
    • mental health & disability services
    • criminal justice system
      • police
      • courts
      • district attorneys
      • public defenders
      • jail/corrections

Practical Considerations for Service Delivery Systems

• Systemic Effort:
  • Talk to action – moving to necessary systemic change
    • Key elements/actions:
      • change in culture
      • presumption that people with SMI can and should live in community with appropriate supports and services
      • peer involvement in all aspects of the process
Practical Considerations for Service Delivery Systems

• Systemic Effort:
  • Talk to action – moving to necessary systemic change
  • Key elements/actions:
    • identifying the target population
    • involvement of consumers and community providers
    • develop and apply clear criteria to measure progress & success, e.g., reduction in inpatient days; number of people diverted

• Systemic Effort:
  • Talk to action – moving to necessary systemic change
  • Key elements/actions:
    • coordination between MH system and law enforcement
    • review and changes practices that may be unintentionally harmful, e.g. transporting people in crisis by police rather than trained MH professionals when possible
    • funding
      • expand array of services funded via Medicaid
      • align fiscal incentives with policy goals
## Practical Considerations for Service Delivery Systems

**Systemic Effort:**
- Coordination & partnerships necessary to assure all systems working toward common goal of reduced hospitalization & incarceration
  - crisis intervention & other appropriate training for police
  - training for judges, prosecutors, court personnel
  - best practices for mental health courts and other specialty courts

**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 illness live meaningful lives in the community
CONCLUSION

• QUESTIONS AND DISCUSSION

What We’re Expecting In the Future

• Proposals to expand Medicaid, Medicare, or other things
• Changes to Medicaid
  • Medicaid Managed Care Regulation
  • Bureaucratic Burdens (1115s)
• Other legislative proposals
  • MFP, EVV, DIA
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