

Criminal Justice, the Americans with Disabilities Act, and People with Mental Illnesses

The Judge David L. Bazelon Center for Mental Health Law

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SAMHSA
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Disclaimer Slide

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Presenter Biographies

- **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.

Presenter Biographies

- **Elizabeth Jones has over 30 years of experience in the field of mental disability:** A substantial part of Elizabeth's work has been developing and managing community services for people with challenging psychiatric disabilities. She has been an expert consultant or a court monitor in several Olmstead cases, including in U.S. v. New York, U.S. v. North Carolina, and U.S. v. Georgia. She is an expert in the development and management of ACT teams, supported housing, crisis services, supported employment, and peer services. Elizabeth has also served as the director of psychiatric hospitals in D.C. and Augusta, Maine.

Webinar Outline

- I. Problem Today
- II. Deinstitutionalization
- III. Addressing the Problem (ADA, *Olmstead*)
- IV. Translating *Olmstead* to Reduce the Number of People with Mental Illnesses in Jails
- V. Challenges
- VI. Key ADA and *Olmstead* Compliance Questions
- VII. Practical Considerations for Service Delivery Systems

I. 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

I. 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/doi/10.1377/hblog20140401.038180/full/>

I. 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)

I. 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

II. Deinstitutionalization

- **Historical exclusion of people with mental illnesses from society.**
- **Disability rights movement of the 1960s and 1970s:**
 - Landmark court decisions from the U.S. Supreme Court and other federal courts:
 - Dangerousness requirement for involuntary commitment; right to legal representation and due process; right to adequate treatment and least restrictive conditions.
 - Development of antipsychotic medications.
- **Movement peaks in the 1980s; end result sees more people discharged to community settings.**

II. Deinstitutionalization

- **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.

III. 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:**
 - Americans with Disabilities Act (“ADA”) and *Olmstead*.

III. Addressing the Problem

The Americans with Disabilities Act

- 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).

III. 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).

III. 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.

III. 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.

III. 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.

III. 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.”

III. Addressing the Problem

Post-Olmstead Reforms

- State Olmstead plans.
- U.S. v. Georgia & U.S. v. Delaware settlement agreements:
 - 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.

III. Addressing the Problem

Post-Olmstead Reforms

- In Delaware, for example, by the end of the settlement agreement:
 - number of civil beds at state psychiatric facility reduced 42%
 - greatly expanded Medicaid coverage of community services previously funded only with state dollars
 - utilization of outpatient mental health services almost doubled
 - 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

III. Addressing the Problem

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

IV. Translating Olmstead to Reduce People with Mental Illnesses in Jails

- **Problem:** People with mental illnesses 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 illnesses from arrest and incarceration.

IV. Translating Olmstead to Reduce People with Mental Illnesses in Jails

- **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.

V. 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.”

VI. 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?

VI. 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?

VII. Practical Considerations for Service Delivery Systems

Three Levels of Effort:

A. Individual

B. Programmatic

C. Systemic

VII. Practical Considerations for Service Delivery Systems

Individual Effort:

- Each person with serious mental illness (SMI) requiring supports and services has a wide range of needs, abilities, interests, etc.
- Two factors seen in many people with SMI who due to lack of supports & services are at risk of being homeless or entering the criminal justice system
 - extraordinary levels of trauma in their lives
 - great difficulty establishing and maintaining trusting relationships

VII. Practical Considerations for Service Delivery Systems

Individual Effort:

- Trauma
 - child abuse; damaged/severed family relationships; poverty
 - trauma often noted in case files but doesn't get level of focus and attention necessary
- **Trusting relationships necessary at all levels – individual, programmatic, and systemic**

VII. 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 teams; crisis apartments; respite)

VII. 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

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **ACT Teams include:**
 - psychiatrist
 - nurse
 - employment specialist
 - case worker
 - peer specialist
- **24/7 service**
- **Proven effective when fidelity standards met**
 - reduction in hospitalization & incarceration

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **Supported Housing**
 - critical element in stabilization & reduction in criminal justice contact
 - Tsemberis, Sam, Leyla Gulcher & Maria Nakae. "Housing First, Consumer Choice, and Harm Reduction for Homeless Individuals with Dual Diagnosis." American Journal of Public Health 94:4 (2004) at 655; National Council on Disability. Inclusive Livable Communities for People with Psychiatric Disabilities, 17 Mar. 2008 at 17-26, available at <http://www.ncd.gov/newsroom/publications/index.htm>; Culhane, Dennis P., Stephen Metraux & Trevor Hadley. "The Impact of Supportive Housing for Homeless People with Severe Mental Illness on the Utilization of the Public Health, Corrections, and Emergency Shelter Systems: The New York-New York Initiative," Housing Policy Debate 13.1 (2002) at 137-38, available at: <http://works.bepress.com/metraux/16>.

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **Supported Housing**
 - scattered-site, integrated location
 - tenancy rights
 - choice as to location, whether and who to have as a house-mate
 - supports as needed to maintain housing & navigate available community resources
 - neighbors & others as “natural supports

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **Supported Employment**
 - research shows benefits of employment in recovery process
 - Robert E. Drake, et al., “Social Security and Mental Illness: Reducing Disability with Supported Employment,” 28 *Health Affairs* 761 (May/June 2009); William D. Frey, et al., Westat, *Mental Health Treatment Study*, Final Report (2011); Bazelon Center, *Getting to Work: Promoting Employment of People with Disabilities* (2014), available at <http://www.bazelon.org/wp-content/uploads/2017/01/Getting-to-Work.pdf>

VII. 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

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **Peer Support Services**
 - includes variety of evidence-based services
 - SAMHSA, *Consumer Operated Services Evidence-Based Practices (EBP) KIT, The Evidence* (2011), available at <https://store.samhsa.gov/shin/content//SMA11-4633CD-DVD/TheEvidence-COSP.pdf>
 - has often been difficult for professionals to accept peers as equals in recovery process
 - peer specialists can help identify and set attainable goals and expectations
 - reliance on lived experience of others farther along in recovery process

VII. 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 criminal justice system, and incarceration
 - Roger L. Scott, *Evaluation of a Mobile Crisis Program: Effectiveness, Efficiency, and Consumer Satisfaction*, Psychiatric Services, Volume 51, Issue 9 (Sept. 2000) at 1153-1156; SAMHSA, *Crisis Services: Effectiveness, Cost-Effectiveness, and Funding Strategies* (2014), available at <http://store.samhsa.gov/shin/content//SMA14-4848/SMA14-4848.pdf>

VII. Practical Considerations for Service Delivery Systems

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

VII. Practical Considerations for Service Delivery Systems

Programmatic Effort:

- **Crisis Services**
 - Delaware recently created a comprehensive crisis management system as part of a court settlement
 - 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

VII. Practical Considerations for Service Delivery Systems

Systemic Effort:

- **Government Programs**
 - mental health & disability services
 - criminal justice system
 - police
 - courts
 - district attorneys
 - public defenders
 - jail/corrections

VII. Practical Considerations for Service Delivery Systems

Systemic Effort:

- Systemic level also includes advocacy organizations and other stakeholders
- Crucial for there to be coordination & partnerships at systemic level
 - especially between mental health and criminal justice systems
 - courts & police need to know about available community services & how to access them

VII. Practical Considerations for Service Delivery Systems

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

VII. Practical Considerations for Service Delivery Systems

Systemic Effort:

- Key elements/actions continued:
 - identifying the target population
 - involvement of consumers & community providers in identifying needed reforms
 - develop and apply 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

VII. Practical Considerations for Service Delivery Systems

Systemic Effort:

- Key elements/actions continued:
 - mapping the system
 - what programs & agencies need to be involved
 - who are decision-makers for what issues
 - who is responsible for each element of reform
 - what sources of funding or other resources are available or need to be developed
 - identify incentives/disincentives to reaching goals
 - data centralization
 - ensuring information available to all who need it

VII. Practical Considerations for Service Delivery Systems

Systemic Effort:

- Key elements/actions continued:
 - coordination with law enforcement
 - review and change practices that may be unintentionally harmful
 - e.g. transporting people in crisis using trained MH professionals rather than police whenever possible
 - funding
 - expand array of services funded via Medicaid/waivers
 - align fiscal incentives with policy goals

VII. 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 or other specialty courts

VII. Practical Considerations for Service Delivery Systems

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

Question and Answer Session

Please type your questions into the question box!