UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JIMMY (BILLY) McCLENDON, et al.,

Plaintiffs,

vs.

CIV 95-24 JAP/KBM

CITY OF ALBUQUERQUE, et al.,

Defendants,

vs.

E.M., R.L., W.A., D.J., P.S., and N.W. on behalf of themselves and all others similarly situated,

Plaintiff-Intervenors.

PLAINTIFF INTERVENORS'
MOTION FOR AN ORDER TO SHOW CAUSE AND
FOR FURTHER REMEDIAL RELIEF REGARDING CITY DEFENDANTS

COMES NOW the Plaintiff Intervenor sub class, pursuant to this Court's inherent powers to enforce its orders, and pursuant to the Fourth and Fourteenth Amendments of the United States Constitution, the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disabilities Act ("ADA"), and hereby respectfully moves this Court to:

1. Issue to the City Defendants an order to show cause why they should not be held in contempt for failing to implement the terms of the stipulated orders that have been entered into by the parties and approved as orders of this Court;

2. Enter appropriate compensatory and coercive remedial orders against City Defendants for their non-compliance with this Court's extant orders; and

3. Order appropriate additional remedial relief to remedy the City Defendants' on-going violations of the federal rights of members of the Plaintiff Intervenor sub class under the Constitution, the ADA and Section 504 of the Rehabilitation Act of 1973.

County Defendants take no position on this Motion. City Defendants oppose it.

When this case was filed, the City of Albuquerque ("the City") both managed the local jail system and operated the law enforcement agency that booked the most people into jail. The City no longer manages the jail, but the City of Albuquerque and the Mayor of Albuquerque ("the City Defendants") remain defendants in this action and are, of course, obligated to comply with the Court's orders that apply to the City's activities. Additionally, this Court is the only forum in which sub class members can obtain injunctive relief to remedy violations of their rights under the U.S. Constitution, the ADA and the Rehabilitation Act, with respect to the claims that were brought against the City within this class action lawsuit. *Johnson v. City of Tulsa*, 489 F.3d 1089, 1110 (10th Cir. Okla. 2007); *McNeil v. Guthrie*, 945 F.2d 1163 (10th Cir. Okla. 1991); *See also Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. Tex. 1988); *Cotton v. Hutto*, 577 F.2d 453 (8th Cir.1978); *Wren v. Smith*, 410 F.2d 390 (5th Cir.1969).

For over a year, counsel for Plaintiff Intervenors attempted to resolve the issues raised herein without filing the instant motion. On April 4, 2014, counsel for Plaintiff Intervenors wrote to counsel for the City Defendants and raised the issues of the City's violations of this Court's orders and of the City's ongoing violations of the federal rights of sub class members that were raised in the complaint in intervention. See Exhibit 1, April 4, 2014 letter to City Attorneys. The City's subsequent responses to Plaintiff Intervenors' requests to inspect public records revealed that the City has never complied with the 2001 *Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility* ("Supplemental Order"), Doc. 319, or with the January 31, 2002 *Stipulated Agreement,* Doc. 361. Moreover, the City is still committing the following violations of federal law alleged in Plaintiff Intervenors' complaint in intervention: 1) unnecessarily subjects Plaintiff Intervenors to arrest and incarceration; 2) fails to reasonably accommodate sub class members with respect to the decisions made by law

enforcement officials whether to issue citations to them or to arrest them and incarcerate them; 3) books sub class members into jail even when it is apparent they need hospitalization; 4) fails to provide sufficient training to City personnel regarding the use of force, including failing to adequately instruct them to not use unnecessary force; and 5) still has not made reasonable modifications to City policies and procedures to avoid discrimination against Plaintiff Intervenors.

Since receiving the April 4, 2014 letter, the City Defendants have refused to take necessary actions to reduce the chronic and on-going irreparable harm to the thousands of sub class members detained by City police officers each year. Albuquerque police continue: a) targeting people with mental disabilities to be stopped, searched, seized, and subjected to unlawful uses of force in the absence of any reasonable suspicion that those people with disabilities are engaged in criminal activity; b) failing to reasonably accommodate the disabilities of sub class members in the course of what may be a lawful stop, search or seizure, thereby inflicting unnecessary and unreasonable force upon them; and c) discriminatory and unnecessary arrests and incarceration, causing sub class members to be institutionalized and segregated from the community due to their mental disabilities.

City Defendants are denying sub class members the benefits of this Court's orders to which the City Defendants stipulated, and also continue to subject members of the sub class to the same constitutional violations and violations of federal anti-discrimination statutes that were raised by Plaintiff Intervenors at the inception of this case. As a result, sub class members are experiencing recurrent and irreparable harm. Accordingly, it is necessary to bring the City Defendants' ongoing violations of the federal rights of sub class members before this Court.

BACKGROUND

In 1995, the Plaintiff Intervenors asserted in their complaint in intervention that both the City of Albuquerque and the County of Bernalillo, and various officials thereof, were violating the federal rights of the people arrested by their law enforcement officers and taken to jail. *See* Doc. 150. In addition to the claims brought regarding the local jail system, the complaint in intervention also alleged that City Defendants, including their police officers, were violating the Constitution, the ADA and the Rehabilitation Act by discriminating against sub class members, subjecting them to arrest, use of excessive force, incarceration and segregation.

The City's law enforcement practices were at the heart of Plaintiff Intervenors' complaint. The second sentence of the complaint in intervention states, "Frequently, people with disabilities are taken into police custody because of behaviors related to their disabilities [and] taken to jail instead of to the University of New Mexico Mental Health Center." Doc. 150, p. 1. The sub class alleged, *inter alia,* that the City Defendants violate federal law by: 1) unnecessarily subjecting them to arrest and incarceration (*Id.*, pp. 1-3, 30); 2) failing to reasonably accommodate them with respect to the decisions made by law enforcement officials whether to issue citations to them or to arrest them and incarcerate them (*Id.*, pp. 1, 17, 30); 3) booking them into jail even when it is apparent they need hospitalization (*Id.*, pp. 17, 30); 4) failing or refusing to provide sufficient training to City personnel regarding the use of force, including failing to adequately instruct them to not use unnecessary force. (*Id.*, pp. 17, 19-20); and 5) not making reasonable modifications to City policies and procedures to avoid discrimination. (*Id.*, p. 23).

I. The City Defendants Are Violating Orders To Which They Stipulated.

To avoid a trial, the City entered into two consent decrees on November 5, 1996: 1) the Order Regarding the PLRA (Doc. 255), which applies both to members of the sub class and to

members of the class, and 2) the Order (Doc. 256) which settled the claims brought by Plaintiff Intervenors in their complaint in intervention. The Defendants stipulated that "violations of one or more federal rights of BCDC residents have occurred," [Doc. 255, p. 1] and that "some residents are not afforded reasonable accommodations for their disabilities" [Doc. 256, p. 7].

A. City Police Continue to Inappropriately Arrest Plaintiff Intervenors for "Citable" Offenses.

To settle a motion regarding jail overcrowding, the Defendants stipulated to a September 25, 2000 order (Doc. 315) requiring them to take the necessary actions for the appointment of a *Pro Tem* Judge in the local state district court to facilitate better jail population management. In June of 2001, the *Pro Tem* judge sent the Court a memorandum listing 30 population management activities that were being undertaken to reduce the number of people held in jail. Doc. 319-1. City police officials were performing several of those activities. After negotiations facilitated by retired state district Judge Woody Smith, the parties settled the contempt motion based upon those 30 measures. The Court entered another stipulated order (Doc. 319) that found, "244 persons were brought into the jail by arresting officers in the month of March, 2001 and booked on petty misdemeanors, including, *inter alia*, shoplifting under $100, excessive sun screen material on vehicle windows, and unreasonable noise. Issuing citations for such non-violent petty offenses and using the jail's 'walk through procedure' for persons charged with such offenses would likely reduce unnecessary incarceration at BCDC." *Id.*, ¶ 5.

The City Defendants also stipulated in that Supplemental Order that they would, "Provide direction to law enforcement officials under the control of the City and/or the County to issue citations where appropriate and to use the 'walk through procedures,' rather than incarcerating individuals, where appropriate." *Id*. Shockingly, the City acknowledged in June of 2014 that it could not produce a single document indicating that the City had ever notified City law

enforcement officials of the existence of that federal court order, nor that the City ever provided the required direction to City police officials. Over a year later, the City Defendants *still* have not rectified their violation of the Court's 2001 order, despite several negotiating sessions with counsel for Plaintiff Intervenors and three mediation sessions before retired United States Magistrate Judge Alan C. Torgerson, the Court's Special Master. The most recent settlement conference was on July 21, 2015.

Meanwhile, APD officers continue to make warrantless arrests of sub class members, in violation of New Mexico constitutional and statutory law, and, consequently, also in violation of the Court's 2001 stipulated order requiring that arrests must be "appropriate."

New Mexico law dictates when arrests are appropriate. Notably, New Mexico's courts afford persons greater protections from warrantless arrest than are provided under the U.S. Constitution. In *State v. Gutierrez,* 1993-NMSC-062, ¶ 46, 116 N.M. 431, 863 P.2d 1052, the New Mexico Supreme Court stated, "[W]e observe that Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions." *See also Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155, 870 P.2d 117 ("We strongly favor the warrant requirement.").

For decades New Mexico law has allowed a warrantless felony arrest only if (1) based upon probable cause and (2) in conjunction with sufficient exigent circumstances. *Campos,* 1994-NMSC-012, ¶ 1, 117 N.M. at 156. Over a year ago, in *State v. Paananen*, 2014-NMCA-041, ¶ 27, 321 P.3d 945, *cert. granted*, 324 P.3d 376 (Mar. 28, 2014), the New Mexico Court of Appeals similarly held that, barring certain statutory exceptions, an officer also may only make a misdemeanor arrest if exigent circumstances exist which made it unreasonable to obtain a warrant. *Id.* at ¶¶ 34-35, 321 P.3d at 953-54. *See State v. Copeland*, 1986-NMCA-083, ¶ 14, 105

N.M. 27, 31 ("Exigent circumstances means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence."). City Defendants' police officers commonly arrest sub class members without warrants, in the absence of exigent circumstances, rather than issuing citations. Those arrests violate New Mexico law, and *ipso facto,* also violate the Court's order requiring the issuance of a citation, rather than making an arrest, "when appropriate."

B. The Defendants Have Not Created A Plan To Implement An Effective Jail Diversion Program For Persons With Psychiatric Or Developmental Disabilities.

In the 2001 Supplemental Order, the Court also included these stipulated Findings:

> Treatment programs and modalities which have proven effective in other communities for the safe, cost-effective and beneficial treatment of individuals with mental disabilities are not available in Bernalillo County in sufficient quantities to serve sub class members who could end or avoid incarceration by participating in such treatment programs. Effective jail diversion services for mentally disabled sub class members are needed in Bernalillo County to reduce jail overcrowding. Increased intensive mental health case management, crisis housing, and detox services, as well as a drop-in center for psycho-social rehabilitation, would reduce overcrowding at the jail.

Doc. 319, pp. 3-4.

When settling the 2001 contempt motion, the Defendants stipulated to an order requiring them, *inter alia,* to convene a meeting "to plan how to implement an effective jail diversion program for persons with psychiatric or developmental disabilities." *Id.,* p. 7. No jail diversion plan was created. The Court's mental health expert, Dr. Jeffrey L. Metzner MD, stated in his July 17, 2015 report to this Court, "There currently *does not exist an adequate plan to implement an effective jail diversion program for persons with psychiatric or developmental disabilities*." July 17, 2015 Metzner letter report to The Honorable James A. Parker, page 14 of 40 (emphasis added). In fact, no written plan has ever been created by Defendants.

C. The City Defendants Have Not Continued To Employ The "Population Management Tools" In Effect In 2002.

On January 31, 2002, the City Defendants entered into another stipulated order, titled *Stipulated Agreement* that requires, *inter alia,* "Defendants will continue to employ all existing population management tools. . ." Doc. 361, p. 2. Those "population management tools," set forth in Doc 319-1, include, *inter alia,* (1) "Pre-trial services walk-through for misdemeanor warrants. . .." Doc. 319-1, p. 2; (2) "APD officers have been instructed to obtain every possible phone number from people they stop and arrest or cite and release, and to write the phone number(s) on the face of the arresting/citing document." *Id.*, p. 10; and (3) "An APD sergeant assigned to BCDC has just started his duties . . . He will assist in familiarizing officers with the walk-through program and will make decisions, when necessary, on which cases are appropriate for walk-through as opposed to booking." *Id.* Despite this Court's stipulated order, these measures were subsequently abandoned by City Defendants, without notice to counsel for the sub class. None of those population management tools are currently being employed, and the City Defendants have not employed any of them for years.

II. The City Defendants Are Also Violating The Constitutional Rights Of Plaintiff Intervenors.

Albuquerque police are still violating Plaintiff Intervenors' constitutional rights in the same ways that Plaintiff Intervenors alleged in their complaint in intervention.

A. Albuquerque Police Department Officers Engage In A Pattern Of Use Of Excessive Force Against Sub Class Members Violating The Fourth Amendment.

On April 10, 2014 the United States Department of Justice (DOJ) issued a 46 page Letter of Findings (Findings Letter) setting forth the results of a multi-year investigation of use of excessive force by APD officers. The Findings letter contains recent credible evidence that the City Defendants are continuing to violate sub class members' federal rights, just as alleged

in their complaint in intervention. The DOJ stated that, "we have reasonable cause to believe that APD engages in a pattern or practice of use of excessive force, including deadly force, in violation of the Fourth Amendment and Section 14141. . . We have determined that structural and systemic deficiencies—including insufficient oversight, inadequate training, and ineffective policies—contribute to the use of unreasonable force." *See* Findings Letter, *United States v. City of Albuquerque* Civil No. 1:14-cv-1025 RB/KK Doc. 1-1, p. 1. The Findings Letter also states *inter alia*:

a. APD officers unconstitutionally utilize deadly force and of the twenty APD officer involved shootings the DOJ reviewed, a majority of those shootings were unconstitutional, Civil No. 1:14-cv-1025 RB/KK Doc. 1-1, p. 2-3;
b. APD officers also unconstitutionally utilize less than lethal force, *Id.*; and
c. This misuse of force is a pattern and practice resulting from inadequate oversight, training, and policy. *Id*., p. 3.
d. "A significant amount of the force we reviewed was used against persons with mental illness and in crisis" and that such behavior was "not isolated or sporadic." *Id.*, p. 9.

A number of the findings made by the DOJ are quite similar to the allegations made by the sub class in their complaint in intervention. For example, the Findings Letter states:

> There is a pattern of APD [Albuquerque Police Department] officers using force that is unnecessary and unreasonable against individuals who pose little, if any, threat, or who offer minimal resistance. . . . *We reviewed incidents where officers applied force against individuals who were unable to understand or yield to commands but posed a minimal threat to the officers. Many subjects of excessive force had indications of mental illness, physical disabilities, intoxication, and other incapacity.* In most instances, these individuals were engaging in lawful activities or committing minor infractions.

Id., p. 15 (emphasis added).

The Findings Letter contains three pages of findings (pages 20-22) regarding APD's pattern of using excessive force against people with mental disabilities, including:

> *Officers also used excessive force against individuals who suffered from mental illness . . . We reviewed many incidents in which we concluded that officers failed to consider an individual's physical, mental, or emotional state in making force determinations. Consequently, we found instances where individuals did not pose*

> *an immediate threat to the safety of the officer or the public, and officers deployed a level of force that was unreasonable under the circumstances.*

Id., p. 20 (emphasis added).

The Findings Letter also stated that the City has a practice of sending uniformed police to intercede when a person is in behavioral crisis, but not presenting any danger to anyone other than him/herself, and that the City fails to use properly trained personnel in those situations.

> *Under-Use of the Crisis Intervention Team Contributes to the Pattern or Practice of Unconstitutional Force.*
> In far too many of those [use-of-force] reports, officers encountered a person who was clearly in mental health crisis, but they made no attempt to contact the [Crisis Intervention] Team or patrol officers in their area who had been trained and certified by the Team. Partially as a result of the officers' failure to use the resources available to them, far too many of these encounters had a violent outcome.

Id., p. 34-35.

The complaint in *United States v. City of Albuquerque, supra,* also parallels a number of the Plaintiff Intervenors' claims in the instant case, alleging, *inter alia*:

> The Defendant has *failed to ensure that the Albuquerque Police Department provides adequate policies, training, and accountability systems to de-escalate situations* and minimize the need to use force when encountering individuals in crisis. . . . The Defendant, its agents, and persons acting on its behalf, including Albuquerque police officers, use excessive force against individuals who pose little or no threat of harm to the officers or others, and that is otherwise unreasonable under the totality of the circumstances.

No. 1:14-cv-1025 RB/KK, Doc. 1, p. 5 and pp. 6-7. (emphasis added)[1]

B. City Defendants Still Do Not Provide Sufficient Training To City Personnel Regarding The Use Of Force, Including Failing To Adequately Instruct Them To Not Inappropriately Arrest People With Mental Or Developmental Disabilities And To Not Use Unnecessary Force Against Them, Violating Plaintiff Intervenors' Fourth Amendment Rights.

[1] On June 2, 2015, the Honorable Robert C. Brack denied a motion by Disability Rights New Mexico, the ACLU of New Mexico and others to intervene in *United States v. City of Albuquerque* Civil No. 1:14-cv-1025 RB/KK. The proposed intervenors asked the Court to address APD's targeting of people with mental disabilities and APD's discrimination against them. The court denied the motion, stating, "The Court cannot ask the parties to include a non-biased policing provision, because the [DOJ] Complaint does not allege that there were biased policing practices."

The Fourth Amendment requires the City to adequately train its police officers with respect to individuals with mental disabilities. The Supreme Court has held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of person with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). The deliberate indifference standard is met "when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1999). Deliberate indifference can also be found where there is a patently obvious need for training in a particular area, such as not training employees in "specific skills needed to handle recurring situations." *Id*., p. 1307-08. The Tenth Circuit has held, regarding the Denver police department, that, "usual and recurring situations for police include . . . encounters with armed mentally ill people." *Brown v. Gray,* 227 F.3d 1278, 1288 (10th Cir. 2000). The *Brown* court held that police departments can be deliberately indifferent if they do not adequately train their officers regarding situations that are, "common, or at least not uncommon," "foreseeable" or "predictable." *Id.*

In *Brown*, witness testimony supported the existence of a usual and recurring police situation. In Albuquerque, it is indisputable that, problematic, even lethal, encounters between APD and people with mental disabilities is a "usual and recurring situation." Media accounts in early 2015 reported that, since 2010, APD officers had shot 37 people, at least 23 resulting in fatalities. Of those 37 individuals, most of them reportedly had mental disorders. Further, the percentage of people booked into MDC who require mental health treatment ranges from over 50% to 39%. Those facts make it clear that APD officers must regularly deal with individuals

with mental illness. City Defendants have long been aware of the risk of harm to the sub class if their police officers are not properly trained. In 2009, a Bernalillo County state district court judge found that the "training provided to City of Albuquerque police officers, on the use of deadly force, was not reasonable and was designed to result in the unreasonable use of deadly force." *See, Findings of Fact and Conclusions of Law*, NO. CV 2009-0915 (N.M. 2d Judicial Dist., filed Aug. 19, 2009), ¶¶66, 67.

III. The City Defendants Continue to Discriminate Against Sub Class Members By Reason Of Their Disabilities, Violating The Rehabilitation Act And The ADA.

Plaintiff Intervenors' *Amended Complaint in Intervention*, [Doc. 150], alleged that the City Defendants violate Plaintiff Intervenors' rights under the ADA and the Rehabilitation Act, *inter alia*, in these ways:

> Defendants, in the administration of the Albuquerque Police Department ... have violated Plaintiff Intervenors' rights under the ADA by: ... failing to establish an adequate system for identifying mental, behavioral and developmental problems of people arrested ...
> failing to develop for and provide to Plaintiff Intervenors necessary therapeutic placements and services; ...
> failing to provide Plaintiff Intervenors with services that are as effective as those provided to non-handicapped people . . .
> denying Plaintiff Intervenors programs, activities and services in the most integrated setting appropriate to their needs . . .
> failing to make reasonable modifications in programs, policies and procedures when necessary to avoid discrimination against Plaintiff Intervenors on the basis of disability . . .
> using methods of administration that have the effect of defeating or substantially impairing accomplishment of the disability integration objectives of the ADA.

Doc. 150, pp. 22-23. Plaintiff Intervenors are still being subjected to those violations of the ADA and the Rehabilitation Act by City Defendants, who continue to subject sub class members to: (1) discrimination against people who have a mental or developmental disability in the operation of the City's police department; and (2) unlawful segregation in jail due to their disabilities.

A. APD Unlawfully Targets Plaintiff Intervenors For Stops, Searches, Seizures, Arrests And Uses Of Force Based Upon Their Disabilities; Violating This Court's Orders, The Rehabilitation Act And The ADA.

The *Amended Complaint in Intervention*, [Doc. 150], alleged that City Defendants and their agents did not reasonably accommodate sub class members with respect to decisions made by law enforcement officials whether to issue citations to them or to arrest and incarcerate them. That remains true today. *See* Section I, *supra* at pp. 4-8.

Now, City Defendants are not merely failing to reasonably accommodate sub class members, but they are also intentionally discriminating again Plaintiff Intervenors due to their disabilities. The root cause of many inappropriate detentions and arrests of sub class members, and the attendant unconstitutional uses of force against them, is the City Defendants' *de facto* policy of "sweeping the streets" of people who appear to have a mental disability by: 1) unlawfully initiating interactions with people who have, or who appear to have, a mental disability without reasonable suspicion of a crime, and 2) arresting people with a mental disability and taking them to jail for petty offenses, instead of issuing a citation; which is what they do with people who do not have a disability. APD officers routinely stop and question people who appear to be what law enforcement officials commonly refer to as "homeless mentally ill," and order them to move when they are standing or sitting in public places, particularly downtown Albuquerque and near certain business establishments. Upon information and belief, the Mayor of Albuquerque has told business owners that he will reduce the numbers of "homeless mentally ill" people in the downtown area. Media accounts reported that, in 2015, the City assigned undercover police to investigate a "tent city" in downtown Albuquerque, then evicted all the occupants. *See* Gabrielle Burkhart, *ABQ officials to clear out homeless from 'Tent City,'* KRQE, January 23, 2015. http://krqe.com/2015/01/23/abq-officials-to-clear-out-homeless-

from-tent-city/.

The City's *de facto* policy of "profiling" homeless people with mental disabilities directly causes many inappropriate bookings into the jail and the institutionalization of them.

Use of excessive force incidents like those cited in DOJ's Findings Letter often begin when an APD officer stops a person who appears to be "homeless mentally ill" for no lawful reason, then demands identification from him/her and searches their person and his/her backpack. Those unlawful stops, searches and seizures of members of the sub class, without reasonable suspicion of a crime, frequently lead to unlawful uses of force, inappropriate arrests and discriminatory segregation from the community.

The City Defendants direct APD employees to approach persons who have, or appear to have, disabilities merely because they are exhibiting non-threatening symptoms of their mental illness or because they had an encounter with law enforcement in the past. APD officers then commonly check whether that sub class member has a warrant, often charge him or her with a crime and, in the absence of an exigent circumstance, arrest them instead of issuing a citation. For example, in 2014 on an APD officer ordered sub class member B. A. to throw away his cigarette for "littering," then arrested B. A. after he obeyed the order. Alex Goldsmith, *APD puts litterbug behind bars*, KRQE, April 25, 2014. http://krqe.com/2014/04/25/apd-puts-litterbug-behind-bars/. B.A. had already been booked into MDC on minor charges sixteen times. *Id.* A later media account stated, "At least 7 people have been arrested and booked into MDC solely on littering charges since 2012. The majority of those arrested for that lone littering violation, including [B. A.], have a history of substance abuse or mental health problems." Alex Goldsmith, *Litterbug's jail stay nearly a week,* KRQE, May 2, 2014. http://krqe.com/2014/05/01/litterbugs-jail-stay-nearly-a-week/.

APD's own training materials promote fear and stigma regarding sub class members; referring to people with developmental disabilities as "mentally retarded," an archaic and pejorative term. A lesson plan provided to Plaintiff Intervenors' counsel in 2014 by APD suggests that people with a developmental disability are prone to violence:

> Methods for Dealing with Mentally Retarded Persons . . .
> 3. Criminal profile . . .
> b. Feelings of inferiority mentioned earlier may *cause aggression toward others*.
> c. Study of persons with mental retardation in state prison revealed their single most frequent crime was homicide; *greater than 50% of the crimes committed by persons with retardation were crimes of violence against a person*.

Exhibit 2, pp.3-4 (emphasis added)

APD officers also commonly use force against, arrest and/or subject sub class members to segregation and institutionalization in jail, because the sub class member, or someone they know, is trying to get mental health treatment for them. The DOJ Findings Letter states:

> *One area where we believe the department can immediately begin leveraging the skills and training of the [Crisis Intervention] Team is in what officers call "welfare checks"—where someone has called 911 to ask officers to check on a person who may be at risk of harming himself or who seems to be in crisis. In the use-of-force reports we reviewed, far too many encounters that began as welfare checks ended in violence, and far too often the officers' use of force was unreasonable.* The inclusion of the Team or patrol officers trained and certified by the Team on welfare checks could make a substantial impact on the department's use of force and could lead to better overall outcomes for residents in mental health crisis.

Findings Letter, p. 34-35 (emphasis added).

> [O]fficers escalate situations in which force could have been avoided had they instead used de-escalation measures. A significant amount of the force we reviewed was used against persons with mental illness and in crisis. *APD's policies, training, and supervision are insufficient to ensure that officers encountering people with mental illness will do so in a manner that respects their rights* and is safe for all involved.

Id., p. 3 (emphasis added).

APD's Standard Operating Procedure No. 3-12 is construed by police officers as

mandating arrest when a person experiencing a mental health crisis clashes with a household member. For example, sub class member W. D.'s mother called APD and requested a Crisis Intervention Team ("CIT") officer to help take her son to the hospital, on the advice of mental health professionals. Rather than provide the requested assistance, APD sent a non-CIT officer who instead arrested the sub class member on a charge of "domestic violence." The same scenario happens with regularity, including on May 26, 2015, when another sub class member was arrested when her grandmother phoned APD for the same reasons. Upon information and belief, APD officers are actually trained to take people who appear to need mental health treatment to jail, because mental health care is likely to be provided to them while in jail, and because an arrest consumes less of a police officer's time than taking the person to the UNM mental health center, which might not admit them. The City Defendants subject sub class members to disparate treatment and their failure to reasonably accommodate sub class members in the City's policies, training and supervision violates the ADA and the Rehabilitation Act.

Due to stigma and fear, law enforcement officers working for City Defendants subject Plaintiff Intervenors to disparate treatment. In 2003, a sub class member who had been jailed 50 times for minor offenses, D.P., shot and severely injured APD Sergeant Carol Oleksak. The mayor convened a Summit to "address the issues of mental illness and homelessness." *See* Exhibit 3, excerpts from PowerPoint presentation, "Coast to Coast" pp.3-4.[2] Then, in 2005, two police officers were shot and killed when they went to the door of J.H., a man diagnosed with schizophrenia, in order to take him for a mental health evaluation. The shootings led many APD officers to have a very negative attitude toward people with mental disabilities. Since that time, City Defendants paid police officers to attend training provided by a private foundation reportedly financed by the family of another deceased police officer who was also shot. Officers

[2] "COAST" is an acronym for APD's "Crisis Outreach and Support Team."

recount that, during the events, they are cautioned about how "dangerous" people with mental disabilities can be to police officers. During a meeting in 2014 between counsel for the *McClendon* sub class and for the City, a lawyer for the City who frequently provides advice to APD officers stated, as a fact, a belief commonly held by City police, that the most dangerous moment in a police officer's life is when they encounter a person with a mental disability.

The Department of Justice's investigation recognized that sub class members are frequently the victims of APD's excessive use of force.

a. Officers frequently utilized excessive force against people with mental disabilities who were engaging in lawful activities or committing minor infractions, and training regarding interaction with persons with mental illness is deficient, Findings Letter, Civil No. 1:14-cv-1025 RB/KK Doc. 1-1, p. 2-3 and 15;

b. There is a pattern of APD officers using force that is unnecessary and unreasonable against individuals who were unable to understand or yield to commands including when there are indications of mental illness, physical disabilities, intoxication, and other incapacity, *Id.*, p. 15; and

c. Many encounters in which APD officers approached a person for the stated purpose of checking on their welfare ended in violence, and "far too often the officers' use of force was unreasonable", *Id.*, p. 34-35.

This evidence not only shows that the City violates the Fourth Amendment, it also shows that the City Defendants violate Title II of the ADA and Section 504 of the Rehabilitation Act.

B. City Defendants Discriminate Against Plaintiff Intervenors By Segregating Them From the Community, In Violation Of The ADA And The Rehabilitation Act.

The ADA requires state and local governments and their agents to "administer services, progress, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. ' 35.130(d). The "most integrated setting," is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), 28 C.F.R. pt. 35 app. A. State and local governments and their agents are forbidden from "directly or through contractual or other arrangements

utiliz[ing] ... methods of administration" that have the "effect" of subjecting individuals with disabilities to unnecessarily segregated services. 28 C.F.R. '35.130(b)(3).

In *L.C. by Zimring v. Olmstead*, 138 F.3d 893 (11th Cir. Ga. 1998), the Eleventh Circuit held that, "where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA's integration mandate." 138 F.3d at 897. The following year, the Supreme Court upheld that decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), stating that "[u]njustified isolation . . . is properly regarded as discrimination based on disability," observing that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable of or unworthy of participating in community life." 527 U.S. at 597, 600. Many courts, including this one, have similarly held that it violates the Rehabilitation Act and/or the ADA when a public entity requires a person with a disability to receive services in an institutional, rather than an integrated, setting. *See, e.g.*, *Jackson v. Ft. Stanton Hosp. & Training School*, 757 F. Supp. 1243 (D.N.M. 1990) (training schools); *Rolland v. Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (nursing homes); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (nursing home); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009) (residential adult care facilities); *Benjamin v. Dep't of Pub. Welfare*, 768 F. Supp. 2d 747 (M.D. Pa. 2011) (ICF/MR); *Day v. District of Columbia*, 894 F. Supp. 2d 1 (D.D.C. 2012)(nursing home).

Sub class members are being arrested by City police officers and segregated from the community for the very behaviors that lead those same officers to issue citations to people who do not have disabilities. That unnecessary segregation results from the City Defendants' political

choices, including the choice not to provide community-based treatment to Plaintiff Intervenors.

C. City Policies And Practices Do Not Reasonably Accommodate Plaintiff Intervenors' Disabilities And Have a Disparate Impact On Them.

The ADA prohibits the City Defendants from treating Plaintiff Intervenors worse than City Defendants treat people without disabilities.

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7)

The City's customs and practices have a disparate impact upon sub class members, violating the Rehabilitation Act and the ADA. First, the City Defendants send police officers, rather than mental health professionals, to provide "crisis response" when someone calls "911" for help with a mental health crisis, even when no criminal activity is alleged. When "911" is called to report a medical crisis like a heart attack, medical professionals respond. Second, the City Defendants assign APD personnel, not civilian mental health professionals, to seek out and initiate interactions with members of the Plaintiff Intervenor sub class, merely because the person has a mental disability and previously had an encounter with law enforcement.

In light of APD's custom and practice of arresting people in mental health crisis, and APD's pattern of using excessive force, including deadly force, against them, it is difficult to imagine a **less** reasonable accommodation of the needs of Plaintiff Intervenors than for the City to use APD employees to be the City's sole system for responding to mental health crises. A behavioral health or health care organization, the City's Family and Community Services Department or the Albuquerque Fire Department could perform the "crisis response" or mental health "outreach" functions being performed by APD employees. But the City sends police to

respond to mental health crises and to conduct "outreach" to connect to treatment programs people with mental disabilities who are not suspected of criminal activity.

Rather than paying for mental health professionals to respond to crises, or case managers to perform outreach, the City Defendants chose to use the City's financial resources to establish within the APD a "Crisis Outreach and Support Team," commonly called COAST. It is a unit of the City police department, not of a behavioral health services or social service agency. COAST's members are mental health professionals including a psychiatrist, who dress like and work side by side with police officers wearing firearms. See Exhibit 3, p 6. The mental health professionals are under the command of an APD lieutenant, and directed by APD, not a behavioral health or social service agency. COAST's activities are not law enforcement activities, but are essentially "case management" activities not usually performed by police. The crisis response, case management, and outreach functions performed by City police department employees are not police functions and the City's methods of administration discriminate against Plaintiff Intervenors. The City's choice to spend its funds to pay for police to respond to mental health crises, instead of paying for mental health services for City residents with mental disabilities, causes Plaintiff Intervenors to be subjected to unnecessary incarceration, excessive force and segregation from the community. The City's concomitant failure to finance essential mental health services is a major cause of many mental health crises that result in inappropriate arrests and, often, excessive force by APD against members of the sub class.

A media report stated that, in 2014, then-Defendant Ramon Rustin, the former jail administrator, agreed with his staff that the jail is the largest mental health provider in the state and that, if there were more community treatment programs, the jail population would decrease. http://kunm.org/post/ county-jail-largest-mental-health-provider-nm#stream/0. Therefore, as in

Olmstead, supra, the City should be ordered to modify its practices and develop a jail diversion plan like the one they agreed to develop in 2001 and to redeploy some of its resources away from law enforcement and incarceration and into the provision of basic mental health services, such as a mobile crisis team that is not comprised of police department personnel and a crisis response facility that can receive sub class members in crisis, in lieu of the jail. Mental health professionals, not just APD, should be dispatched when people phone 911 due to a mental health crisis. The City Defendants do not reasonably accommodate Plaintiff Intervenors' disabilities.

D. City Defendants Do Not Reasonably Accommodate Sub Class Members In the Course Of Police Investigations And Arrests.

City police discriminate against Plaintiff Intervenors when deciding whether, and how, to arrest them. In the context of police encounters, federal courts have analyzed Title II claims under two different theories. *Gohier v. Enright,* 186 F.3d 1216 (10th Cir. 1999). The first theory, known as the "wrongful arrest theory" is where "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity." *Gohier v. Enright*, p. 1220. The second theory is known as the "Reasonable Accommodation During Arrest Theory." *Id*., p. 1222. Under the second theory, "while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.*, p. 1220-1221.

Under both approaches, the City Defendants are violating the ADA. Their policies, procedures and practices lead City employees to: 1) charge sub class members with crimes merely for manifesting symptoms of their mental disabilities, 2) arrest them under circumstances when people without disabilities would receive a citation; 3) respond to their symptoms with excessive force in the course of arresting them; and 4) take them to jail, rather than to a hospital

or mental health facility, when they obviously need treatment. Accordingly the Court should order the City Defendants to make modifications to APD's policies, procedures and training methods regarding investigations and arrests involving people with mental disabilities in order to avoid unlawful discrimination against Plaintiff Intervenors on the basis of disability.

WHEREFORE, Plaintiff Intervenors respectfully request that this Court:

1. Find that City Defendants are in noncompliance with this Court's extant orders.

2. Adopt a discovery schedule for this motion and set this motion for a three day evidentiary hearing.

3. Find that City Defendants are violating the U.S Constitution, the Rehabilitation Act and the ADA.

4. Order the City Defendants to work collaboratively with counsel for the Plaintiff Intervenors to establish adequate policies and procedures and training methods that comply with the requirements of the U.S. Constitution, the Rehabilitation Act, the ADA and the Court's extant orders, and to then implement policies, operating procedures and training methods that: a) prohibit the practice of stopping, demanding ID from or searching people who appear to have a mental disability, and/or to be homeless, unless an officer articulates *bona fide* probable cause to suspect a crime is being committed; b) prohibit confiscating or destroying people's personal belongings and identification papers; c) prohibit arrests of people merely because they have no permanent address; d) require training to not arrest people for petty offenses due to them having no home and e) require all officers to file a written report whenever they stop and either frisk or search any person, whether or not a crime is charged.

4. Order the Defendants to provide Crisis Intervention Training consistent with the model curriculum issued by Crisis Intervention International to all APD Field Services officers.

5. Order the Defendants to work collaboratively with counsel for the Plaintiff Intervenors to develop policies and procedures and training methods to remedy the City Defendants' violations of the ADA and the Rehabilitation Act, including:

a. Restructuring the training for APD cadets and officers regarding encounters with people who have or appear to have a mental disability or a developmental disability, with respect to reasonable accommodations of their disabilities and the constitutional standards to which law enforcement officers are held and also regarding best-practices within the law enforcement field.

b. Prohibiting warrantless stops, demands for identification, frisks, and searches of people without reasonable suspicion that the person has committed, is committing or is about to commit a crime, and also prohibiting warrantless arrests of anyone in the absence of exigent circumstances justifying an arrest solely because the person appears to need treatment for a mental disability or to be homeless; requiring the City to train its personnel on those prohibitions and to collect data regarding the characteristics of anyone subjected to a warrantless stop.

c. Prohibiting City law enforcement officers from seeking out people who have a mental disability for the purposes of encouraging them to obtain treatment or for the purpose of assessing their mental health status.

6. Order the Defendants to reasonably accommodate people with mental disabilities or developmental disabilities by arranging for mental health professionals who are not employees of the police department to provide to sub class members the mental health follow up and case management services that has been provided by APD personnel.

7. Order the Defendants to use mobile crisis teams comprised of mental health professionals, instead of police officers, to conduct "welfare checks" regarding people alleged to have a mental disability and to respond to mental health crises, including alleged threats of

suicide or self-harm, and requiring the City to redistribute its funds to pay for a crisis response facility to reduce the unnecessary incarceration and segregation of sub class members.

8. Issue those further Orders this Court deems just and proper in order to compensate the sub class for past violations of this Court's orders.

9. Award the Plaintiff Intervenors their reasonable attorneys fees, expenses and costs for this motion.

Respectfully submitted,

/signed electronically
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Attorneys for Plaintiff Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015 I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Signed electronically
Peter Cubra

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April 4, 2014

VIA EMAIL ONLY

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Re: *McClendon, et al. v. City of Albuquerque, et al.* Civ. No. 95-24 JAP-KBM

Dear Kathy and David:

I am writing, on behalf of counsel for the Plaintiff-Intervenor sub class in the *McClendon* federal class action, to ask you to schedule a meeting with us as soon as possible so we can discuss ongoing violations of the Constitution, the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disability Act ("ADA") by the City of Albuquerque and its agents. The City Defendants in *McClendon* are the City of Albuquerque and the Mayor. Although the City no longer manages the local jail system, there are ongoing claims in the *McClendon* case against the Mayor and the City with respect to Albuquerque law enforcement practices that violate the Constitution, the Rehabilitation Act and the ADA.

Our November 22, 1995 *Amended Complaint in Intervention* (Doc. 150) stated, *inter alia,* that the Mayor "is responsible for the supervision, direction, and control of the conduct of the executive and administrative departments of the City, including the Albuquerque Police Department" and that "[h]e supervises . . . the Chief of Police." (*Id*. pp. 4-5). The *McClendon* complaint explicitly alleged that the City Defendants, including the Albuquerque Police Department, discriminate against members of the subclass (defined on November 5, 1996 as "all persons with mental and/or developmental disabilities who are now, or in the future may be, detained in the BCDC") in violation of the Constitution, ADA and Rehabilitation Act by:

1. unnecessarily subjecting them to arrest and incarceration;
2. failing to reasonably accommodate them with respect to the decisions made by law enforcement officials whether to issue citations to them or to arrest them and incarcerate them in the jail; and

3. violating the federal rights of subclass members by:
    a. booking them into jail even when it is apparent they need hospitalization; and
    b. establishing a custom and practice of failing or refusing to provide sufficient training to staff regarding the use of force, including failing to adequately instruct them to not use unnecessary force.

Although the central focus of *McClendon* is, of course, what happens once a class member is booked inside the jail, the law enforcement practices that lead to incarceration have always been within the scope of the case. For example, on June 27, 2001, the federal court made these findings of fact: "Despite the efforts to date of the parties and the Court, 244 persons were brought into the jail by arresting officers in the month of March, 2001 and booked on petty misdemeanors, including, *inter alia,* shoplifting under $100, excessive sun screen material on vehicle windows, and unreasonable noise. Issuing citations for such non-violent petty offenses and using the jail's "walk through procedure" for persons charged with such offenses would likely reduce unnecessary incarceration." (Doc. 319, pp. 2-3)

Based upon that finding, the federal court ordered the Defendants to "Provide direction to law enforcement officials under the control of the City and/or the County to issue citations where appropriate and to use the "walk through procedures," rather than incarcerating individuals, where appropriate. (Doc. 319, p. 5) That order has never been vacated, and it indisputably applies to APD.

In the past two years we made informal, and unsuccessful, efforts to address APD's failure to reasonably accommodate people with mental or developmental disabilities. In March of 2012, at the direction of Judge Torgerson, who was then the U.S. Magistrate Judge on the case, I wrote the attached letter regarding APD's practices with respect to improper arrests of people with mental disabilities. We asked a number of specific questions, and asked generally, "what steps has the City taken [since the Mayor's November 2011 Summit] to reduce the number of individuals in need of treatment for mental illness who get booked into MDC?" Kathy brought then-Deputy Chief Allen Banks to the federal court in August of 2012 for a discussion of those issues. Unfortunately, as the attached clerk's minutes from that conference show, the Deputy Chief had limited information. He did, however, acknowledge that "Officers have discretion when to arrest an individual who does not have an address. A homeless shelter is an insufficient address." Chief Rustin stated that "90 to 100 inmates are in jail because they do not have an address." The Deputy Chief also stated, "APD keeps track of the number of people who go to mental health facilities versus jail. He will provide these statistics." We have not received those statistics.

Deputy Chief Banks also told the Court, "The number of officers having crisis intervention training will be 100% by the end of August [2012]. However, the April 3, 2014 edition of the *Albuquerque Journal* cited the Mayor as saying that only 27% of APD field services officers are currently CIT certified, fewer than were certified in 2011. The *Journal* also cited the head of the local Forensic Intervention Consortium (FIC), Barri Roberts, as stating that there are only four full time CIT detectives within the APD, down from seven two years ago.

Moreover, during the August 2012 conference, Judge Torgerson suggested that APD arrests due to Failures to Appear in court could be reduced if APD officers automatically obtain phone numbers and email addresses from people they cite. The clerk's minutes state "Judge Torgerson asks Ms. Levy to inquire about the possibility of APD starting to ask for telephone numbers and email addresses." We have not been told whether telephone numbers and email addresses are now being routinely recorded by APD officers.

Next, on February 7, 2013, I wrote to Kathy and the other defense counsel in *McClendon*, to ask the City to address APD's ongoing discriminatory treatment of sub class members, citing an example of APD's unnecessary arrest and failure to reasonably accommodate a sub class member with a mental disability. Our attached letter stated, "Upon the advice of mental health professionals, [a mother of a sub class member] called the Albuquerque Police Department ("APD") and asked for a Crisis Intervention Team ("CIT") officer to assist in de-escalating the situation and to help get [our client] to the hospital. [The mother] reported that, in response, an officer was sent out by APD who was not a CIT officer. . . . [The mother] reported that the officer refused to take [our client] to UNMH and instead arrested him. . . . on domestic violence and other charges related to this incident and he has remained at MDC . . . for more than 90 days . . . not because she was alleging a crime, but as a result of her attempting to secure mental health care and treatment for [our client] via assistance from APD." We requested, "Please . . . advise what actions the City and County Defendants will take to address this failure to appropriately respond to the request for CIT assistance from the APD." The City never responded.

Two recent developments make clear that the APD's failure to reasonably accommodate the needs of people with mental disabilities with whom APD has encounters requires urgent attention. First, video of the recent tragic death of James Boyd appears to show that APD personnel were attempting to arrest Mr. Boyd, rather than issuing him a citation, even though his alleged petty offense was merely camping in an unauthorized area. The head of the FIC was cited in the newspaper as saying that none of the full time CIT detectives were involved in the five hour stand off that led to Mr. Boyd's death, and that SWAT officers were also not summoned during those five hours. Second, ongoing law enforcement arrest practices have caused the MDC to reach an all time high with respect to the number of people with mental disabilities held in the jail. There are about twice as many people on the mental health caseload inside the MDC today compared to 2005, although the overall number of people in County custody is roughly the same. Fully *half* of the people in the MDC in 2014 require mental health care, while the national norm, by most accounts, is much lower. Our community is jailing far too many people with mental disabilities.

This letter is our final attempt to get the City to address, without litigation, how the City Defendants are treating people with mental disabilities; particularly how APD trains and supervises its officers with respect to encounters with them, and especially whether APD officers should resolve an encounter informally, transport the person to an evaluation facility, issue a citation to the person, or arrest them.

The law is clearly established that the ADA applies to law enforcement officials who encounter people with disabilities. The Tenth Circuit has held that an ADA claims lies when a person shows "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by

reason of a disability." *Robertson v. Las Animas County Sheriff's Dept.,* 500 F.3d 1185, 1193(10th Cir. 2007). Additionally, ADA regulations explicitly require APD to make reasonable modifications to its policies and practices "unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7).

In the context of police encounters, federal courts have approached Title II claims under two different theories. *Gohier v. Enright,* 186 F.3d 1216 (10th Cir. 1999); *see also* Rachel E. Brodin, *Remedying A Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. Pa. L. Rev. 157, 161-62 (2005). The first, known as the "wrongful arrest theory," analyzes whether "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity." *Gohier*186 F 3d at 1220. The second analysis is known as the "Reasonable Accommodation During Arrest Theory." *Id.* at 1222. Under this theory, "while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.* at 1220-1221. Under either analysis, APD fails to pass muster.

In *Monarque v. City of Rio Rancho*, 2012 U.S. Dist. LEXIS 177622 (D.N.M. Jan. 23, 2012), the court held, as have other courts, that a police officer can be held liable for failing to reasonably accommodate the plaintiff in the process of arresting him.

> The Tenth Circuit has thus far only observed that *other* Circuits have recognized claims for disability discrimination where a plaintiff alleges that a police officer "failed to reasonably accommodate [his] disability" in the process of arresting him. *Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999) (citing *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998)). Other courts of this Circuit have read the court's survey of out-of-circuit case law in Gohier to predict that the Tenth Circuit would likewise "recognize a failure-to-reasonably-accommodate theory during an arrest." *Ulibarri v. City & County of Denver*, 742 F. Supp. 2d 1192, 1213 (D. Colo. 2010); *see alsoTwitchell v. Hutton*, 2011 U.S. Dist. LEXIS 8474, at * 28-*30 (D. Colo., Jan. 28, 2011). For purposes of considering the instant motion for summary judgment, this Court will do the same.

2012 U.S. Dist. LEXIS 177622, fn 4, pp. 34-35.

Additionally, the Fourth Amendment requires the City to adequately train police officers with respect to individuals with mental illness. The Supreme Court has held "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the

rights of person with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). The deliberate indifference standard is met "when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1999). Deliberate indifference can also be ascertained absent a pattern of unconstitutional behavior where there is a patently obvious need for training in a particular area, such as failing to train employees in "specific skills needed to handle recurring situations." *Id*. at 1307-08. The Tenth Circuit established, with respect to the Denver police department, that, "usual and recurring situations for police include individuals requiring medical care while in custody, arresting of fleeing felons, and encounters with armed mentally ill people." *Brown v. Gray,* 227 F.3d 1278, 1288 (10th Cir. 2000)(internal citations omitted). The *Brown* court stated that police departments can be proven to be deliberately indifferent if they do not adequately train their officers regarding situations that are, "common, or at least not uncommon," "foreseeable" or "predictable." *Id*.

In Albuquerque, as in *Brown*, where the Denver police officers' testimony supported the existence of a usual and recurring police situation, it is indisputable that, problematic, even lethal, encounters between APD and people with mental illness is a "usual and recurring situation." Media accounts show that, since 2010, APD officers have shot 37 people, at least 23 resulting in fatalities. Of those 37 individuals, most of them reportedly had diagnosed mental disorders. Those facts make it irrefutably clear that APD officers must regularly deal with individuals with mental illness. Therefore, if we must litigate these issues, the City is certainly vulnerable to a finding of liability for failing to properly train and supervise its officers.

We would prefer to resolve these issues without filing a motion against the City Defendants. However, if you do not promptly agree to meet with us soon for the purpose of protecting the federal rights of *McClendon* sub class members, we will have no choice but to raise these issues with the federal court.

We hope you will promptly schedule a meeting with us regarding these very important issues.

Very truly yours,

Peter Cubra

Peter Cubra

cc: Nancy L. Simmons, co-counsel for Plaintiff Intervenors
Kelly Waterfall, co-counsel for Plaintiff Intervenors

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION

LESSON PLAN

INTRODUCTION

A. Course Title: Handling the Mentally Ill and Other Special Considerations

Instructional Goals:

1. To present to the student an overview of mental disorders, physical disabilities, communication disorders, and unusual behaviors which a law enforcement officer may encounter and to present methods and procedures to identify, to communicate with, and to assist disabled or disordered persons with maximum safety and efficiency.

Instructional Objectives:

Upon completion of this course, the participants will be able to:

LO1 1. List the eight general characteristics of psychosis (out of touch with reality).

LO2 2. List six behaviors an officer should display when interacting with a person with mental illness to maximize safety.

LO3 3. Describe in writing the four major steps for obtaining an involuntary commitment order by a law enforcement officer.

LO4 4. Describe in writing appropriate methods for intervention with mentally retarded persons.

LO5 5. List ten types of information which aid in identification and evaluation of a potential suicide.

LO6 6. Given visual hypothetical situations, determine the following information:
   a. Is the subject dangerous to self or others?
   b. What legal authority law enforcement has.
   c. What action should the officer(s) take.

LO7 7. Identify local mental health resources to obtain help for individuals with mental illness or mental retardation.

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION

Instructional Methods: Lecture/ Conference

Equipment/
Materials Required:
Lesson Outline
Pen/ Pencil / Paper
Powerpoint projector (optional)
Overhead projector
Television and VCR

Handouts:

Estimated Time: 16 hours

Bibliography and Resources:

Instructor:_ Law Enforcement Academy Staff

Revised for New Mexico by DPS Staff Date: Jan 2014
Approved by:_ Date:_

Revised:_

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION

LO4

I. Methods for Dealing With Mentally Retarded Persons

People are often uncomfortable in the presence of abnormal behavior from a rapidly narrowing range of norms. Society looks away, hurries away, or calls law enforcement to put away. We like people who look and act as we do. The mentally retarded person often, even if he/she looks like us, does not act as we expect.
For example, the person who robs the bank and signs the note that he gives the teller, and the person who rushes to a getaway car after a grocery store hold-up and discovers the car keys are lost, make amusing squad room conversation--yet a closer look at these individuals might reveal retardation rather than clumsiness.

1. Definition

In general, a mentally retarded person is one whose learning capacity is limited. The degree of retardation varies widely, from those who must be institutionalized to those who can maintain a routine job.

Many of the persons who are retarded have comparatively minor difficulties with learning and social functioning, and are in the mild or moderate range. Remember, persons with mental retardation are not mentally ill.

2. Psychological profile elements: mental retardation

a. May be unable to formulate thoughts and answer questions readily.

b. May have speech defects.

c. May appear interested in children as they can better understand what children are doing.

d. May have slow responses similar to alcohol or drug abuse.

e. Often they have poor judgment.

f. Often unable to foresee the consequences of an act.

g. Easily influenced by an authority figure.

h. Often inadequate in their personal relationships.

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION

i. Socially immature.

j. Resent unkind nicknames/teasing and may do something foolish because of it.

k. Some individuals with mental retardation are quite sensitive and very aware that they are different.

l. Some individuals with mental retardation, to compensate, may become aggressive in order to feel "important."

m. Awareness of being different may be responsible for feelings of inferiority, frustration, and resentments; as a result, less tolerant to stress.

n. Fear may be the major characteristic in a confrontation with an officer.

o. Potential for violence or aggression exists since the appropriate outlet channels may never have been learned by the mentally retarded person.

3. Criminal profile

a. Criminal offenses of retarded persons usually result from an interaction of many factors.

b. Feelings of inferiority mentioned earlier may cause aggression toward others.

c. Study of persons with mental retardation in state prison revealed their single most frequent crime was homicide; greater than 50% of the crimes committed by persons with retardation were crimes of violence against a person.

d. Burglary, improper sexual behavior, theft, and vandalism are other common criminal acts committed by persons with mental retardation - usually at the instigation of others.

e. A mentally retarded person is easily influenced to be led into criminal behavior.

f. This individual is frequently the victim of criminal behavior.

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION

g. Mentally retarded offender

(1) Although estimates of the number of mentally retarded adult offenders vary, there are proportionately more persons who are mentally retarded in prisons and jails than in the general population. For example, a 1976 H.V. Wood study identified only 3% of Missouri's general population as retarded, while approximately 10% of the correctional institutions' population and 7% of the probationers and parolees were identified as retarded.

(2) It has been found that many delinquent acts are due to their level of social and behavioral insight. Moreover, the suspect may not always understand his or her civil rights. In the H.V. Wood Study, 95% of the inmates who are mentally retarded either confessed or pleaded guilty to offenses. Low intellect often leads to internalizing false confession; individuals with mental retardation believe they committed a crime that in reality they did not.

4. Methods to deal with a mentally retarded person

a. May come in as a missing person complaint - may have gotten lost and is wandering aimlessly.

b. GO SLOWLY – rapid questions during an interview or confrontation may confuse or frighten the person.

c. Patience is needed to overcome a communication barrier and alleviate any exaggerated fears.

d. Rephrase questions into simpler language if it appears person does not comprehend.

e. Minimize unnecessary sensory input - noises, crowds, as they may confuse the person.

f. Identification and information concerning parents/guardians important to establish immediately. Many persons who are mentally retarded carry cards with information of important

Performance Objectives And Instructional Cues	OUTLINE AND PRESENTATION
	contacts written on them.
	g. If any doubts, ask if they go to a special school.
	h. Misinterpretation of acts
	(1) Individual may quickly go to their pocket to get contact card on which is written parent, doctor, or employee name and number.
	(2) Fear of officer may take the form of flight.
LO7	i. If you should need assistance, contact one of the following:
	(1) Association for Retarded Citizens
	(2) Mental Health, Mental Retardation, and Substance Abuse Service
	(3) Special Education Department of the School Systems
	(4) Vocational Rehabilitation Office
	j. Another group of persons with disabilities which is being served more frequently in the community is persons with autism. Autism is a severe disorder of communication and behavior. It is a lifelong developmental disability which seriously impairs the way the brain processes information sent from the senses. Characteristics include:
	(1) Withdrawal from contact with others
	(2) Very inadequate social relationships
	(3) Language disturbances
	(4) Monotonous repetitive body movement
	(5) Behavior problems in terms of resistance to change and emotional responses
	J. Suicide
	1. Myths and facts

"COAST to COAST"
Bridging the gap between law enforcement and the community

Presented by:

Albuquerque Police Department's CRISIS OUTREACH & SUPPORT TEAM (COAST)

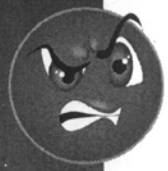
COAST- its conception

- July, 2003 APD Sgt. Carol Oleksak was shot by Duc Pham, a man with history of
  - Homelessness
  - Untreated mental illness
  - Over 50 Misdemeanor arrests
    - (released because no proof he was dangerous)
  - Incompetent to stand trial-every case!
  - No supportive services

MAYOR'S SUMMIT

Summit addressed:

- How the City of Albuquerque can better address the issues of mental illness and homelessness.
- Identify the gaps in services for mental health consumers
- Negative perceptions and relationships between service providers and police officers.
- Resolution for "blame" (persons rights vs safety for self and others)



Outcomes of Summit

- City of Alb. Implemented pilot project = COAST
- Civilian project
- City and police department begin looking at new ways to address old problems.
  - City deploys its first ACT Team (Assertive Community Treatment Team)
  - City funds Housing First Program

Albuquerque Police Department CIT/COAST 2011