

July 19, 2017

Via Email to reentry@usccr.gov

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Patricia Timmons-Goodson, Vice Chair
Debo P. Adegbile, Commissioner
Karen K. Narasaki, Commissioner
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U.S. Commission on Civil Rights
1331 Pennsylvania Ave NW, Suite 1150
Washington, DC 20425

RE: Collateral Consequences: The Crossroads of Punishment, Redemption and the Effects on Communities, Public Briefing of May 19, 2017 – Public Comments

Dear Chair Lhamon, Vice-Chair Timmons-Goodson, and Commissioners:

The undersigned organizations advocate for incarcerated and formerly incarcerated individuals, including individuals with disabilities. The barriers faced by formerly incarcerated individuals seeking to live meaningful lives in the community are inextricably intertwined with race, class, and other demographics, but also with disability. By huge margins, incarcerated and formerly incarcerated individuals are disproportionately persons with disabilities. Further, at each stage of the criminal process – arrest, booking, arraignment, trial, sentencing, probation, incarceration, parole, and reentry – individuals with disabilities face disability-related barriers. As a result, individuals with disabilities are more likely to be incarcerated,¹ more likely to serve longer sentences,² and more likely to return to jail or prison after release.³

¹ See *infra* notes 5-20 and accompanying text.

² Paula M. Ditton, *Special Report: Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics, 8 (1999), <http://www.bjs.gov/content/pub/pdf/mhtip.pdf> (reporting that inmates with disabilities were sentenced to an average of fifteen more months in prison as compared to other inmates with similar criminal convictions); Stanford Justice Advocacy Project, *Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise* (2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf> (indicating that, on average, prisoners with mental illness in California receive sentences that are 12% longer than prisoners convicted of the same crimes but without mental health diagnoses).

³ Council of State Governments, *Criminal Justice/Mental Health Consensus Project*, 6, 121, 162 (June 2002), <https://csgjusticecenter.org/mental-health-projects/report-of-the-consensus-project/> (“Without adequate planning to transition inmates with mental illness back into the community, many will quickly return to jail or prison; recidivism rates for inmates with mental illness can reach over 70 percent in some jurisdictions. ... Offenders with mental illness recidivate at a higher rate than those without mental illnesses, and they often do so

Dismantling the collateral consequences experienced by individuals leaving jails and prisons requires close and sustained attention to the disability-related barriers that characterize all procedures and programs within the criminal legal system. These barriers intersect with race, sex, and other statuses, and infuse the experience called reentry.

Providing individuals with disabilities with the tools they require to successfully and safely live in the community is a fundamental right. The unnecessary incarceration and reincarceration of individuals with disabilities violates the Americans with Disabilities Act,⁴ our public policies, and the principles of a humane and civil society.

I. Introduction: Incarceration and Disability

The statistics regarding incarcerated individuals with disabilities are overwhelming and must be reiterated:

- More than half of all prison and jail inmates suffer from a mental health problem.⁵
- About two-thirds of female jail and prison inmates report a history of mental health problems – a rate significantly higher than the rates for incarcerated men, which are also significantly higher than the general public.⁶

within the first months of release. ... [I]ndividuals with mental illness leaving prison without sufficient supplies of medication, connections to mental health and other support services, and housing are almost certain to decompensate, which in turn will likely result in behavior that constitutes a technical violation of release conditions or a new crime.”); see also *Paulone v. City of Frederick*, 718 F. Supp.2d 626, 636 (D. Md. 2010) (denying defendants’ motion to dismiss ADA and Rehabilitation Act claims based on state’s failure to provide sign language interpreter to deaf probationer ordered to attend DUI education class; plaintiff was charged with a probation violation (which was ultimately dismissed by the court).

⁴ Henry A. Dlugacz, M.S.W. and Luna Droubi, J.D., *The Reach and Limitation of the ADA and its Integration Mandate: Implications for the Successful Reentry of Individuals with Mental Disabilities in a Correctional Population*, 35 Behav. Sci. Law 135, 146-50 (2017) (arguing that ADA’s integration mandate should provide protections to individuals reentering society who are at risk of re-institutionalization in some capacity).

⁵ Doris J. James & Lauren E. Glaze, *Special Report: Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics, 1 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> (showing that estimates from mid-year 2005 found a mental health problem for 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates).

⁶ Jennifer Bronson, Ph.D. & Marcus Berzofsky, Dr. P.H., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, Bureau of Justice Statistics, 1 (June 2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf> (finding that 65.8% of female prisoners and 67.9% of female jail inmates report a history of mental health problems, compared to 34.8% of male prisoners and 40.8% of male jail inmates).

- Among jail inmates, 17.1 percent of males and 34.3 percent of females have a “serious mental illness” – a significant psychiatric disability.⁷
- Similarly, 37 percent of prisoners and 44 percent of jail inmates have been told in the past by a mental health professional that they have a mental disorder.⁸
- In California, where the overall prison population has declined under court orders, the percentages and absolute numbers of individuals with psychiatric disabilities have increased. Over 30 percent of California prisoners currently receive treatment for a “serious mental disorder,” an increase of 150 percent since 2000.⁹
- About half of federal and state inmates meet the medical criteria for substance use disorder.¹⁰ And about 70 percent of state inmates have a history of drug use.¹¹
- About 4 to 10 percent of inmates have an intellectual disability, compared to 2 to 3 percent of the general population.¹²
- About 20 to 30 percent of inmates have some form of cognitive disability (such as traumatic brain injury, attention deficit hyperactivity disorder or specific learning disabilities such as dyslexia), compared to less than 5 percent in the general population.¹³

⁷ Henry J. Steadman, Ph.D. et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60:6 *Psychiatric Services* 761, 764 (June 2009), <https://csgjusticecenter.org/wp-content/uploads/2014/12/Prevalence-of-Serious-Mental-Illness-among-Jail-Inmates.pdf>; see also Bronson & Berzofsky, *supra* note 6, at 1 (finding that 14% of state and federal prisoners, and 26% of jail inmates, reported experiences that met the threshold for serious psychological distress).

⁸ Bronson & Berzofsky, *supra* note 6, at 1.

⁹ Stanford Justice Advocacy Project, *supra* note 2, at 1, 3 (reporting that over the past decade, California’s overall prison population has decreased by approximately 40,000 inmates, or 25 percent, and that over the same period of time, the raw number of prisoners with mental illness increased by 25 percent).

¹⁰ Christopher J. Mumola & Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, Bureau of Justice Statistics, 1 (2006), <https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf> (indicating that 53% of state prisoners and 45% of federal prisoners meet the criteria for substance use disorder).

¹¹ *Id.* at 2.

¹² Leigh Ann Davis, M.S.S.W., M.P.A., *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects* (Aug. 2009), <http://www.thearc.org/page.aspx?pid=2458>.

¹³ Jennifer Bronson, Ph.D., *Disabilities Among Prison and Jail Inmates, 2011–12*, Bureau of Justice Statistics, 3, Table 1 (2015), <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf> (showing that 19.5% of prison inmates, and 30.9 percent of jail inmates, have a cognitive disability).

- The rate of diagnosed HIV infection among inmates in state and federal prisons is more than five times greater than the rate among people who are not incarcerated.¹⁴
- Almost 10 percent of incarcerated individuals have a mobility disability – around twice the rate of the general population.¹⁵
- Incarcerated individuals are three to four times as likely as the general population to be blind or to have another vision disability.¹⁶
- Incarcerated individuals are two to three times as likely to be deaf or hard of hearing.¹⁷
- Up to 80 percent of incarcerated youth are believed to have a special education disability, but about 33 percent are identified as having a disability. The reported rate is far higher than the rate found in public school programs.¹⁸
- Nearly all returning prisoners have chronic health conditions requiring treatment or management.¹⁹
- The experience of incarceration, which includes isolation, inadequate mental and physical health care, and additional physical and mental traumas, causes and exacerbates disabilities.²⁰

¹⁴ Centers for Disease Control and Prevention, *HIV Among Incarcerated Populations* (Mar. 14, 2017), <https://www.cdc.gov/hiv/group/correctional.html>.

¹⁵ Bronson, *supra* note 13, at 3, Table 1 (reporting that 10.1% of prison inmates and 9.5 percent of jail inmates have an ambulatory disability, compared to 5.1% and 3.7% in the respective control groups).

¹⁶ *Id.* at 3, Table 1 (reporting that 7.1% of prison inmates and 7.3 percent of jail inmates have a vision disability compared to 2.1% and 1.7% in the respective control groups).

¹⁷ *Id.* at 3, Table 1 (reporting that 6.2 percent of prison inmates and 6.5 percent of jail inmates are deaf or hard of hearing, compared to 2.6% and 1.9% in the control groups).

¹⁸ Mary Magee Quinn et al., *Youth With Disabilities in Juvenile Corrections: A National Survey*, 71 *Exceptional Children* 339, 342 (Spring 2005), http://helpingganguyouth.homestead.com/disability-best_corrections_survey.pdf; Southern Poverty Law Center, *SPLC Launches 'School To Prison Reform Project' To Help At-Risk Children Get Special Education Services, Avoid Incarceration* (Sept. 10, 2007), <https://www.splcenter.org/news/2007/09/11/splc-launches-school-prison-reform-project-help-risk-children-get-special-education>.

¹⁹ Kamala Mallik-Kane & Christy A. Visher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration* (Urban Institute, 2008), <http://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.PDF>.

²⁰ See, e.g., Jamelia Morgan, *Caged In: Solitary Confinement's Devastating Harm On Prisoners With Physical Disabilities*, American Civil Liberties Union (2017), <https://www.aclu.org/files/caged-in/010916-ACLU-SolitaryDisabilityReport-Accessible.pdf>; Anna Guy, *Locked Up and Locked Down: Segregation of Inmates with Mental Illness*, AVID Prison Project (Sept. 8, 2016), <http://avidprisonproject.org/assets/locked-up-and-locked-down---avid-prison-project.pdf>; Christie Thomas and Joseph Shapiro, *Inside Lewisburg Prison: A Choice Between A Violent Cellmate Or Shackles* (NPR, Oct. 26, 2016), <http://www.npr.org/2016/10/26/498582706/inside-lewisburg->

In short, people with disabilities are massively over-represented within the criminal legal system. This is not, we would posit, due to any inherent criminality of people with various identities and statuses, including the status of being a person with a disability, but to the pervasive bias and discrimination both within the criminal legal system and without.

Intersectional Barriers.

Multi-variable data analyses are seldom available to examine or demonstrate the intersections between disability and other statuses – such as race, ethnicity, religion, sex, sexual orientation, gender identity, and income – in the context of incarceration.²¹ The barriers and discrimination associated with disability intersect with the other forms of discrimination disproportionately experienced by incarcerated and formerly incarcerated individuals, such as discrimination based on race, ethnicity, religion, sex, sexual orientation, gender identity, and class. Many incarcerated and formerly incarcerated individuals experience overlapping or intersecting social identities – and related systems of oppression and discrimination.

The data that exists is consistent with intersecting forms of discrimination. The Vera Institute recently summarized the disproportionate levels of mental health disabilities and other chronic conditions reported by female inmates:

More than half of women in jails report having a current medical problem – compared to 35 percent of men. Approximately two-thirds of jailed women report having a chronic condition—compared to half of men in jails and 27 percent of people in the general population. ... The extent to which women in jail report having experienced trauma is startling: 86 percent report having experienced sexual violence in their lifetime, 77 percent report partner violence, and 60 percent report caregiver violence.²²

[prison-a-choice-between-a-violent-cellmate-or-shackles](#) (detailing “double cell solitary” and painful punitive restraint practices employed at federal prison in Lewisburg, Penn.); Joseph Shapiro, *Lawsuit Says Lewisburg Prison Counsels Prisoners With Crossword Puzzles* (NPR, June 15, 2017) (describing lack of counseling and medication for federal inmates with serious mental illness); see also Margo Schlanger, *How the ADA Regulates and Restricts Solitary Confinement for People with Mental Disabilities* (American Constitution Society, May 2016), https://www.acslaw.org/sites/default/files/How_the_ADA_Regulates_and_Restricts_Solitary_Confinement.pdf.

²¹ See, e.g., Equal Rights Center, *Unlocking Discrimination: A DC Area Testing Investigation About Racial Discrimination and Criminal Records Screening Policies in Housing 7-10*, 33-34 (2016) (“Unlocking Discrimination”), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf> (recommending that researchers, policymakers, advocates, and service providers should use an explicitly intersectional approach in the collection and analysis of data, development and implementation of law and policy, and delivery of services, noting that data on racial disparities within the criminal legal system are not disaggregated by sex, and describing common experiences of women inmates that may differ from their male counterparts such as domestic violence).

²² Elizabeth Swavola, et al., *Overlooked: Women and Jails in an Era of Reform*, 9-11 (Vera Institute, 2016) (“Overlooked”), https://storage.googleapis.com/vera-web-assets/downloads/Publications/overlooked-women-and-jails-report/legacy_downloads/overlooked-women-and-jails-report-updated.pdf; see also *supra* notes 6-7 and accompanying text.

Underlying these data are the distinct experiences of women involved in the criminal legal system. The Equal Rights Center explains:

[I]n order to understand the complex nature of women’s involvement in the criminal legal system, it is necessary to take into account that many ... factors are interrelated when it comes to how they play out in any one woman’s life. Further, their impacts are often compounding. For example, domestic violence is a leading cause of homelessness for women, and many incarcerated women have experienced both domestic violence and homelessness. Domestic violence and other types of abuse lead to mental health issues, another experience that is extremely common for women involved in the criminal legal system. In turn, “incarcerated women with a history of trauma and accompanying mental health concerns are more likely to have difficulties with prison adjustment and misconduct.” The interplay and accumulation of all of the above factors, in addition to discrimination, make re-entry for many women an insurmountable challenge.²³

However, disparities in disability rates may also reflect bias and inequalities in community resources. For example, studies indicate that white prisoners are more likely than black prisoners to have been told that they had a mental disorder.²⁴ A 2015 study on New York City’s jail mental health services showed that older white men were directed toward mental health services, while younger black and Hispanic men were subjected to a punishment response and sent to solitary confinement.²⁵ I don't think that fact reflects different rates of mental illness,” stated Dr. Robert Cohen, a member of the New York City Board of Correction, and a former director of medical and mental health services at the Rikers Island jail. “I think it demonstrates racial bias.”²⁶

Intersectional data collection and analysis must be employed and expanded to understand the intersecting barriers and collateral consequences faced by many formerly incarcerated individuals with disabilities.

²³ Unlocking Discrimination, *supra* note 21, at 10-11 (citing National Resource Center on Justice Involved Women, Ten Truths That Matter When Working With Justice Involved Women: Executive Summary (Apr. 2012), http://cjinvolvedwomen.org/wp-content/uploads/2015/09/Ten_Truths_Brief.pdf).

²⁴ Bronson & Berzofsky, *supra* note 6, at 4 (finding that white prisoners (50%) were more likely than black prisoners (30%) to have ever been told they had a mental disorder); Fatos Kaba, M.A., *et al.*, *Disparities in Mental Health Referral and Diagnosis in the New York City Jail Mental Health Service*, 105:9 Am J Public Health 1911 (Sept. 2015) (citing studies), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4539829/>.

²⁵ Kaba, *supra* note 24.

²⁶ Manuel Villa, *The Mental Health Crisis Facing Women in Prison* (The Marshall Project, June 22, 2017), <https://www.themarshallproject.org/2017/06/22/the-mental-health-crisis-facing-women-in-prison#.fDu7Obssa>.

II. Disability Barriers to Successful Reentry – Prior to Release.

A. Failure of Jails and Prisons to Provide Disability Access to Prison Programming, Including Reentry Programming and Parole.

Much prison programming – including educational, vocational, and therapeutic programming, reentry programming, and programs that allow inmates to earn credits toward an earlier release date – is inaccessible to inmates with disabilities. Inmates with mobility disabilities are excluded from participating in many programs because they are provided in facilities with architectural barriers.²⁷ Deaf and blind inmates typically have no access to effective communication including sign language interpreting and accessible materials – even for parole hearings and pre-release programs.²⁸ Some prisons and jails, including the federal Bureau of Prisons, fail to provide special education services to incarcerated youth with disabilities.²⁹

Inmates with a range of disabilities including psychiatric disabilities are often *explicitly* excluded on the basis of disability from certain programs, including employment, reentry programs, early release programs, fire camp, and programs that reduce sentences.³⁰ Related, inmates who are

²⁷ See, e.g., AVID Prison Project, *Making Hard Time Harder: Programmatic Accommodations for Inmates with Disabilities Under the Americans with Disabilities Act*, Disability Rights Washington, 19-21, 29, 32 (June 2016) (“Making Hard Time Harder”), <http://avidprisonproject.org/Making-Hard-Time-Harder/assets/making-hard-time-harder---pdf-version.pdf> (describing architectural barriers preventing access to programs in Alabama, Florida, Iowa, New Hampshire, New York, South Carolina, Washington, including credit-earning opportunities); *Cruel Confinement: Abuse, Discrimination and Death Within Alabama’s Prisons, A Special Report from the Southern Poverty Law Center and the Alabama Disabilities Advocacy Program*, 19 (June 2014) (“Cruel Confinement”), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/cruel_confinement.pdf, (with one exception, “every facility contains architectural barriers for [Alabama] prisoners with mobility impairments.”); *Pierce v. County of Orange*, 526 F.3d 1190, 1217-23 (9th Cir. 2008) (reversing district court and finding that county violated Title II of the ADA by failing to provide equal access to vocational and other activities and programs to inmates with disabilities).

²⁸ *Making Hard Time Harder*, *supra* note 27, at 22-27 (describing failures to provide communication access to deaf and hard of hearing inmates in Alabama, Connecticut, Delaware, Florida, Idaho, Illinois, New York, Pennsylvania, and Vermont, including to access medical appointments, counseling, peer support groups, telecommunications, pre-release programs, and parole hearings); *Cruel Confinement*, *supra* note 27, at 18-19; *Disability Rights Florida v. Jones*, No. 4:16-cv-00047, Complaint for Declaratory and Injunctive Relief, at 5-7 & 12 (N.D. Fla., Jan. 26, 2016), <http://www.floridajusticeinstitute.org/wp-content/uploads/2016/01/dfc-complaint.pdf> (describing failure to provide sign language interpreters and other auxiliary aids and services to deaf and hard of hearing inmates, including for programs required for release).

²⁹ Ryan J. Reilly and Julia Craven, *Federal Bureau Of Prisons Fires Head Of An Obama-Era Education Effort, Putting Reform Under Trump In Doubt*, Huffington Post (May 19, 2017), http://www.huffingtonpost.com/entry/bureau-of-prisons-education-reform_us_591f2289e4b094cdba53c398 (noting that prior to cancelled reforms, special education classes were not available in every facility or, if they were, they were not up to standards).

³⁰ *Making Hard Time Harder*, *supra* note 27, at 31 (describing exclusion of New York inmates with psychiatric disabilities from rehabilitative program); *Cruel Confinement*, *supra* note 27, at 18 (describing exclusion of Alabama inmates with disabilities, including deaf and blind inmates, from work release program); Declaration of Michael W. Bien in Support of Motion for Preliminary Approval of Class Action Settlement, at 9, *Hecker v. California Dep’t of*

assigned to a particular housing unit or work status based on disability are often categorically excluded from programs that are available to other inmates.³¹ Inmates who are housed “out of level” – at a higher security level than otherwise warranted – based on disability-related need are also excluded from programming as a result.³² This can be exacerbated by bias in risk assessment.³³

Inmates with disabilities – including inmates who are blind or who have cognitive or intellectual disabilities – are often excluded from important programs due to the prison’s use of discriminatory eligibility criteria and the failure to provide reasonable modifications or assistive technology.³⁴

Parole hearings are themselves infused with disability barriers – inmates with disabilities are typically not accommodated during hearings,³⁵ and parole decisions are often intertwined with negative inferences drawn from the inmate’s disability status.³⁶ The Massachusetts Supreme

Corrections and Rehabilitation (E.D. Cal., Aug. 5, 2014) (No. 2:05-CV-02441) (“Hecker Settlement”), <http://rbgg.com/wp-content/uploads/Declaration-of-Michael-Bien-in-Support-of-Joint-Motion.pdf> (noting ongoing disputes regarding exclusion of inmates with psychiatric disabilities from reentry hubs, minimum security facilities and community-based programs, and lack of agreement on exclusion of prisoners with psychiatric disabilities from CDCR’s fire/conservation camps); *Disability Rights Florida*, *supra* note 28, at 9, 24 (describing exclusion of deaf inmates from prison industry and work release jobs).

³¹ *Hecker Settlement*, *supra* note 30, at 7-8 (requiring prison system to provide program access to California inmates with significant psychiatric disabilities housed at the Enhanced Outpatient Program (EOP) level of care, including the opportunity to earn milestone credits which reduce time to be served); *Making Hard Time Harder*, *supra* note 27, at 28, 32 (describing exclusion of New York inmate using a placed on “medically unassigned” program status from participating in programs that allow earning of merit time toward early release date), 33 (describing exclusion of Washington inmates housed in the mental health unit from sex offender programming).

³² *Making Hard Time Harder*, *supra* note 27, at 5-6 (discussing problem of inmates with psychiatric disabilities being housed at higher security levels on the basis of disability).

³³ *Overlooked*, *supra* note 22, at 15 (noting that assessment tools classify women as higher risk than actual threat, and that such over-classification bars women from many jail-based educational, vocational, and rehabilitative programs, work assignments, and other privileges, and may make them ineligible for pretrial release programs).

³⁴ *Making Hard Time Harder*, *supra* note 27, at 7, 21, 25, 28-31, 33 (describing, *inter alia*, failure to accommodate Vermont inmate with learning disabilities in educational program required for release, and exclusion of Connecticut inmate from job based on the purported safety and security concern posed by his wheelchair); Peter Blanck, *Disability in Prison*, 26 S. Cal. Interdisc. L. J. 309, 311-15 (Spring 2017) (discussing exclusion of, and failure to accommodate, inmates with disabilities).

³⁵ *Making Hard Time Harder*, *supra* note 27, at 23 (describing lack of communication access during parole hearing for inmate with hearing loss).

³⁶ For example, California regulations governing suitability for parole explicitly identify the fact that “[t]he prisoner has a lengthy history of severe mental problems related to the offense” as a “circumstance[] tending to indicate unsuitability” for parole. 15 CCR § 2281. In Massachusetts, the Parole Board has told the public defenders who represent inmates at parole hearings that if they want to present mental health evidence at the hearing, they will have to arrange for and pay for it. There is no mechanism for them to do so. *See also Crowell v. Massachusetts*

Court recently discussed the application of the ADA to parole:

First, the board clearly may not categorically exclude any prisoner by reason of his or her disability. Second, both the ADA and the parole statute require the board to take some measures to accommodate prisoners with disabilities. Where the board is aware that a mental disability may affect a prisoner's ability to prepare an appropriate release plan in advance of a parole hearing, the board should make reasonable modifications to its policy, for example, by providing an expert or other assistance to help the prisoner identify appropriate postrelease programming. In accommodating prisoners with mental disabilities, the board should also consider whether there are risk reduction programs designed to reduce recidivism in those who are mentally disabled.

These provisions do not require the board to make modifications that would “fundamentally alter” the nature of parole. ... The interaction of these requirements means that once the board became aware that the plaintiff's disability could potentially affect his ability to qualify for parole, it had the responsibility to determine whether reasonable modifications could enable the plaintiff to qualify, without changing the fundamental nature of parole.³⁷

Without equal access to programming, including pre-release programs and procedures, inmates with disabilities serve more time and are less prepared than other inmates for their return to the community.

B. *Failure of Jails and Prisons to Provide Reentry Programming Tailored to the Needs of Individuals with Disabilities.*

For many inmates with disabilities, a critical component of pre-release programming is assistance with disability-related benefits such as SSI, SSDI, veterans' disability benefits, and health coverage like Medicaid. These programs provide a minimal safety net to enable formerly incarcerated individuals with disabilities to live in the community. Such programs also function as an entry point to other community-based programs, such as supported housing. Importantly, these benefits do not preclude educational, vocational, or employment activities, but can provide a basic foundation for survival.

Individuals who are incarcerated may enroll in Medicaid and Medicare during incarceration (although they cannot access benefits until release).³⁸ Individuals who are incarcerated may

Parole Bd., 74 N.E.3d 618, 625 (2017) (discussing board's consideration of disability as negative factor in making parole determination).

³⁷ *Crowell*, 74 N.E.3d at 624 (2017) (citations omitted).

³⁸ HealthCare.Gov, *Incarcerated people*, <https://www.healthcare.gov/incarcerated-people/>; Elizabeth Priaulx, *Promoting Medicaid Coverage Upon Re-Entry*, National Disability Rights Network (2016), http://www.ndrn.org/images/webcasts/2016/Prisoner_Re-Entry3-16-16.pdf.

apply for SSI or SSDI shortly before release. In some cases, individuals already covered by Medicaid or a disability benefit prior to incarceration can have their benefits suspended during incarceration, and reinstated upon release.³⁹

Many inmates with disabilities easily meet the requirements for these benefits, but need assistance to successfully navigate the cumbersome government bureaucracy.⁴⁰ Obtaining SSI or SSDI, for example, depends upon the submission of a detailed written application accompanied by medical and psycho-social records and reports, as well as compliance with the bureaucratic process. Those applicants who are initially denied require legal assistance with the appeals process.

While such assistance requires the investment of resources, linking inmates to Medicaid before release achieves cost savings to communities by reducing uncompensated care upon release. And studies demonstrate a three-to-one economic return for monies spent on benefits advocacy work.⁴¹ Free technical assistance for programs providing pre- and post-release benefits advocacy is available from the federally funded SOAR (SSI/SSDI Outreach, Access and Recovery) initiative.⁴²

The best practice is to complete and submit disability benefits applications prior to release, with the goal being to provide persons with immediate access to benefits upon their release from custody.⁴³ In the year ending June 2016, California's pre-release benefits program

³⁹ Prialux, *supra* note 38; U.S. Government Accountability Office, *Medicaid: Information on Inmate Eligibility and Federal Costs for Allowable Services*, <http://www.gao.gov/assets/670/665552.pdf>; Brian Bowden and Austin Igleheart, NACo releases new Medicaid and County Jails presentation focused on the Medicaid Inmate Exclusion (Mar. 15, 2017), <http://www.naco.org/blog/naco-releases-new-medicaid-and-county-jails-presentation-focused-medicaid-inmate-exclusion>; National Association of Counties, *Health Coverage & County Jails: Suspension vs. Termination* (2016), <http://www.naco.org/sites/default/files/documents/2016-suspension-termination-Final-Citations.pdf>; Margo Schlanger, *Prisoners with Disabilities: Individualization and Integration*, Michigan Law, Public Law and Legal Theory Research Paper Series, Paper No. 544, 26-28 (March 14, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932940.

⁴⁰ Making Time Harder, *supra* note 27, at 28 (describing need of Colorado inmate for assistance in reinstating his SSDI benefit).

⁴¹ Katherine E. Meiss & Abbi Coursolle, *Investing in People to Save Counties Money: Best Practices for Moving People with Disabilities from General Assistance to SSI*, Health Consumer Alliance (Sept. 2010), <http://wclp.org/wp-content/uploads/2015/06/SSIAdvocacyBestPracticesRpt.pdf>; Economic Roundtable, *Dividends of a Hand Up: Public Benefits of Moving Indigent Adults with Disabilities onto SSI*, Health Consumer Alliance (2011), https://economicrt.org/wp-content/uploads/2011/03/Dividends_of_a_Hand_Up_2011.pdf.

⁴² Deborah Dennis & Daniel J. Abreu, *SOAR: Access to Benefits Enables Successful Reentry*, 72 *Corrections Today* 82 (Apr. 2010); see also Bazelon Center for Mental Health Law, *Lifelines: Linking to Federal Benefits for People Exiting Corrections – Blueprint for Action* (Oct. 2009), <http://www.bazelon.org/wp-content/uploads/2017/01/Lifelines-All.pdf>.

⁴³ Social Security Administration, *Program Operations Manual System (POMS), SI 00520.910 Prerelease Agreements with Institutions*, <https://secure.ssa.gov/poms.nsf/lnx/0500520910>. (indicating that while a formal

submitted almost 2,000 SSI/SSDI applications and more than 6,600 MediCal applications for inmates with psychiatric disabilities, but capacity remains a problem: during the same period, the state prison system released more than 7,900 inmates with psychiatric disabilities.⁴⁴

C. *Failure of Jails and Prisons to Link Inmates to Accessible Reentry Programs in the Community.*

As inmates with disabilities approach their release date, they are often denied effective referrals to community reentry programs because, on a systemic basis, jails and prison fail to contract and make arrangements with such programs.⁴⁵ For example, referral lists of available homeless shelters,⁴⁶ supportive housing,⁴⁷ and substance treatment programs⁴⁸ may not include appropriate wheelchair accessible options. Available substance abuse programs may exclude individuals with certain disabilities, such as individuals with certain psychiatric disabilities. Employment programs often refuse to serve or accommodate individuals with disabilities.⁴⁹ And community reentry programs of all kinds fail to provide sign language interpreting or accessible materials.⁵⁰

agreement is the best practice, the SSA is required to follow the pre-release procedure even in the absence of an agreement).

⁴⁴ California Rehabilitation Oversight Board, *September 15, 2016 C-ROB Report*, 49-54 (Sept. 15, 2016), [https://www.oig.ca.gov/media/crob/reports/C-ROB Annual Report September 15 2016.pdf](https://www.oig.ca.gov/media/crob/reports/C-ROB%20Annual%20Report%20September%2015%202016.pdf).

⁴⁵ See, Debra A. Harley et al., *Vulnerability and Marginalization of Adult Ex-Offenders with Disabilities in Community and Employment Reintegration*, 45 *Journal of Applied Rehabilitation Counseling* 6 (Winter 2014), <https://www.questia.com/library/journal/1P3-3556747921/vulnerability-and-marginalization-of-adult-ex-offenders>, citing Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry*, in *Studies in Crime and Public Policy* (2003).

⁴⁶ See, e.g., Pei-Shu Ho et al., *Health and Housing among Low-Income Adults with Physical Disabilities*, 18 *Journal of Health Care for the Poor and Underserved* 902, 908-909 (Nov. 2007), <https://muse.jhu.edu/article/222763/pdf> (reporting that homeless wheelchair users in some D.C. shelters had given up on maintaining their personal hygiene due to the inaccessibility of the shelter bathrooms).

⁴⁷ See, e.g., Jon Pynoos et al., *Aging in Place, Housing and the Law*, 16 *The Elder Law Journal* 77 (2008), <http://publish.illinois.edu/elderlawjournal/files/2015/02/Pynoos.pdf> (describing the lack of available physically accessible supportive housing, thus driving individuals to institutional settings).

⁴⁸ See, e.g., S.L. West et al., *Physical inaccessibility negatively impacts the treatment participation of persons with disabilities*, 32:7 *Addiction Behavior* 1497 (July 2007), <https://www.aahd.us/abstract/physical-inaccessibility-negatively-impacts-the-treatment-participation-of-persons-with-disabilities/> (over half of addiction treatment providers approached by persons with SCI and nearly half of those approached by persons with TBI were unable to provide services due to physical barriers).

⁴⁹ *Making Time Harder*, *supra* note 27, at 30 (describing need of Washington inmate with visual impairment for referral to specialized work release program).

⁵⁰ See *Levy v. Louisiana Department of Public Safety And Corrections*, No. 3:16-cv-00542-JWD-EWD, Class Action Complaint (M.D. La., Aug. 16, 2016), http://www.washlaw.org/pdf/pdf/ldpsc_complaint_2016_08_16.PDF (describing lack of sign language interpreters when the terms and conditions of their probation and/or parole are initially discussed with formerly incarcerated deaf plaintiffs, during plaintiffs' required meetings with their

The failure to ensure that prisoners with disabilities are connected to accessible programs including housing at the time of their release can have devastating consequences, including homelessness. It can also trigger a delay in an inmate's release date, a form of disability discrimination. In *Prisoner A v. State of Vermont*, Disability Rights Vermont brought an action on behalf of a state prisoner alleging that he had served his minimum sentence, but continued to be held at Southern State Correctional Facility because the defendants failed to implement disability-related support in the community.⁵¹ The case settled with services, and the inmate was released.

In Massachusetts, an inmate with psychiatric disabilities was initially granted parole following a 2010 hearing, conditioned on his being admitted to a Department of Mental Health (DMH) "secured facility." However, the DMH concluded that the inmate did not qualify for the services. The inmate remains incarcerated.⁵² Similarly, in the U.S. Virgin Islands, an individual found "not guilty by reason of insanity" remains incarcerated – with no legal charges pending – for more than three years due to a lack of an alternative placement.⁵³

III. Disability Barriers to Successful Reentry – At and After Release

A. Access Barriers in Reentry Activities and Programs

Beginning on the very day of release, inmates with disabilities face overwhelming access barriers. Frequently, individuals are sent back into the community with a few dollars in their pocket, a bus ticket, and two or three days' worth of needed medication. Wheelchair accessible transportation is not ensured. Adequate amounts of medication are not provided. Medical appointments are not arranged. Disability benefits and health coverage may not yet be in place. And typically, community reentry programs are not accessible to inmates who are deaf, blind, who use wheelchairs, and who have psychiatric disabilities.

In *Brad H. v. City of New York*, jail inmates receiving mental health services at Rikers Island brought litigation alleging an unlawful failure to provide discharge planning. Upon release from jail, inmates were not provided any mental health services, government benefits assistance, housing referrals, or any other services or planning, but were instead taken by bus to a subway

probation and/or parole officers, during required post-release counseling or other educational classes, and at other times).

⁵¹ *Prisoner A v. State of Vermont*, No. 2:15-cv-000221, Verified Complaint (D. Vt., Oct. 15, 2015), <https://www.clearinghouse.net/chDocs/public/PC-VT-0006-0002.pdf>. Similarly, Disability Rights Oregon reports that one of their clients, an inmate with autism and psychiatric disabilities, experienced a one-year delay in parole because of the state's failure to identify a residential placement.

⁵² *In the Matter of Wilfred Dacier*, No. W62511 (Massachusetts Parole Board, Nov. 4, 2015), <http://www.mass.gov/eopss/docs/pb/lifer-decisions/2015/dacierrod2015.pdf>.

⁵³ *Carty v. Mapp*, No. 94-78, Docket No. 936 (Plaintiffs' Quarterly Report) at 14 (D. V.I., Nov. 18, 2016).

station between 2:00 and 6:00 AM and given \$1.50 plus two subway tokens.⁵⁴ The plaintiffs' experts presented evidence that, without adequate discharge planning, the plaintiffs "face the immediate threat of psychological relapse, with a greater likelihood of the concomitant return to lives of drug and/or alcohol abuse, homelessness, lawlessness, and danger to themselves and/or others."⁵⁵ The court granted the plaintiffs a preliminary injunction requiring that the defendants provide discharge planning.⁵⁶

In 2003, the parties settled the case with an agreement that the City would provide the 15,000 people who receive psychiatric treatment in City jails each year with discharge planning services, including continued mental health care, case management, and assistance in accessing public benefits and housing.⁵⁷ Despite this positive advance, the agreement's implementation has faltered and is still the subject of court monitoring.⁵⁸

Without discharge planning and accessible reentry programming, released inmates with significant disabilities face far greater risks of homelessness, medical and physical crisis, and a return to incarceration.⁵⁹ Successful reentry is aided by programs that bridge the walls that separate prison from the outside world, and that integrate jail and prison health and mental health care with community health and mental health care.⁶⁰

In an analogous context, the Second Circuit upheld a district court's order finding that New York City was in violation of the ADA and Rehabilitation Act for failing to ensure that indigent individuals with HIV have effective access to the social welfare benefits and services available to eligible New York City residents. The district court explained:

[A]s the Second Circuit has observed, "[i]t is not enough to open the door for the handicapped ...; a ramp must be built so the door can be reached." Plaintiffs in this case

⁵⁴ *Brad H. v. City of N.Y.*, 185 Misc. 2d 420, 423 (Sup. Ct. N.Y.), *aff'd*, 716 N.Y.S.2d 852 (Sup. Ct. N.Y. App. 2000); see also *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999) (finding violation of Eighth Amendment based on failure to provide supply of medications to inmates upon discharge).

⁵⁵ *Brad H.*, 185 Misc. 2d at 425.

⁵⁶ *Brad H.*, 185 Misc. 2d at 431.

⁵⁷ *Brad H.*, No. No. 117882/99, Stipulation of Settlement (Sup. Ct. N.Y., Jan. 8, 2003), <https://www.clearinghouse.net/chDocs/public/JC-NY-0017-0001.pdf>.

⁵⁸ See, e.g., *Brad H.*, No. No. 117882/99, Thirty-Sixth Regular Report of the Compliance Monitors, 8 (Oct. 6, 2016), https://mhp.urbanjustice.org/sites/default/files/Brad%20H%20Report%2036%20FINAL%202016%20_10_06_signed_combined.pdf ("Defendants demonstrated on-going lack of compliance with the foundational requirement that they provide a supply of psychotropic medications to eligible class members as they leave jail.").

⁵⁹ See *supra* note 3.

⁶⁰ Margo Schlanger, Prisoners with Disabilities: Individualization and Integration, Michigan Law, Public Law and Legal Theory Research Paper Series, Paper No. 544, 23-26 (March 14, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932940.

contend that the [Division of AIDS Services and Income Support] was created to serve as a reasonable accommodation to their disability, a “ramp,” as it were, to assist them in accessing and maintaining the social welfare benefits and services to which they are entitled. Plaintiffs claim the “ramp” of DASIS is necessary under the ADA and the Rehab. Act to ensure them meaningful access to the benefits and services upon which they depend, and for which they are fully qualified. ...

The evidence presented demonstrated an alarming failure to provide plaintiffs with the intensive case management and assistance that DASIS was intended to provide. In the unsatisfactory performance of these services, DASIS cannot ensure plaintiffs meaningful access to their subsistence benefits. ...

The reasonable accommodation concept embodied in the federal disability statutes is meant to address the unique hurdles that people with disabilities face, and it recognizes that mere equality of treatment is not enough. ... Plaintiffs have alleged, and demonstrated, that defendants have failed to provide them with the reasonable accommodations required by the federal disability statutes, thus failing to ensure them meaningful access to the benefits to which they are entitled.⁶¹

Consistent with these principles, programs for linking individuals with disabilities to government-funded benefits and services before and after release should be expanded and replicated. One example is the DC Jail Advocacy Project, which assists D.C. residents with serious mental illness who are returning to the community from jail and prison by connecting them to government-funded benefits and services.⁶² Others include the After Incarceration Support Systems (AISS) of the Hampden, Massachusetts Sheriff’s Office⁶³ and Span, Inc., in Boston, Massachusetts.⁶⁴ Programs that provide these kinds of supports reduce recidivism.⁶⁵

⁶¹ *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 207-08, 210, 212-13 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

⁶² University Legal Services, *DC Jail and Prison Advocacy Project*, <http://www.uls-dc.org/JPAP.htm>.

⁶³ See Hampden County Sheriff’s Department Massachusetts, *AISS*, <http://hcsdma.org/aiss-3/>.

⁶⁴ See Span, Inc., *Our Services*, <https://spaninc.org/services>.

⁶⁵ Rani Hoff et al., *The Effects of a Jail Diversion Program on Incarceration: A Retrospective Cohort Study*, 27 *Journal of American Academy of Psychiatric Law* 377 (1999) (reporting that jail diversion participants spent an average of 132.33 fewer days in jail in the year following diversion than those who qualified but did not participate); Brian Case et al., *Who Succeeds in Jail Diversion Programs for Persons with Mental Illness? A Multi-Site Study*, *Behavioral Sciences and the Law* 661 (2009) (finding that half of jail diversion participants were not arrested in the twelve months following completion, and all diversion participants spent less time in jail in the year after diversion than the year before); Travis Parker et al., *Jail Diversion Programs: Finding Common Ground*, 23 *American Jails* 25 (2009) (reporting that participants in New York City’s jail diversion program have serious mental illness and multiple misdemeanor charges, and receive initial assessment, weekly substance abuse meetings, case management, service planning, and counseling; successful participants had an 18% decline in recidivism); John Buntin, *Miami’s Model for Decriminalizing Mental Illness in America*, *Governing* (August 2015), <http://www.governing.com/topics/public-justice-safety/gov-miami-mental-health-jail.html> (suggesting that jail

B. Access Barriers in the Conditions of Parole or Community Supervision.

Formerly incarcerated individuals with disabilities may need reasonable modifications to successfully comply with the conditions of their parole (or other form of community supervision). Individuals with psychiatric or cognitive disabilities may need appointment reminders or drop-in scheduling, or other modifications. Individuals with a range of disability may need assistance with getting to a parole appointment. Typically these modifications and supports are not available.

Individuals who are deaf and hard of hearing need effective communication such as a sign language interpreter in order to meet with their parole officer and to understand the rules and conditions of their release.⁶⁶ Instead, sign language is rarely available for meetings or required programs. In North Carolina, a deaf woman recently reported that she was found in violation of her parole when she left a drug treatment class because there was no interpreter; she is now in prison.⁶⁷

Moreover, parolees with disabilities are often required to meet *additional* parole conditions. For example, California's parole division operates parole outpatient clinics. Referral to the

diversion program in Miami-Dade County, where serious mental illness is extraordinarily prevalent, reduced recidivism rates to about 20% from nearly 72% in one year; also indicating that Miami-Dade County shut down one of its jails following successful implementation of comprehensive diversion program); Ann O'Reagan Keary, *Mental Health Diversion for Criminal Defendants: One Judge's Experience*, 54 *The Judge's Journal* 18 (2015) (reporting that participants in Washington D.C. mental health court were 51% less likely to be rearrested than comparison group); Henry J. Steadman & Michelle Naples, *Assessing the Effectiveness of Jail Diversion Programs for Persons with Serious Mental Illness and Co-Occurring Substances Use Disorder*, 23 *Behavioral Sciences and the Law* 163, 166-167 (2005), <http://www.addictioncounselor.com/articles/101367/assessing.pdf> (finding that jail diversion impact on recidivism rates observed in both individuals charged with violent and nonviolent offenses); Peter J. Sartorius & Vondie Woodbury, *Service Delivery Innovation Profile: Michigan Pathways Project Links ex-prisoners to Medical Services, Contributing to a Decline in Recidivism*, Agency for Healthcare Research & Quality (Aug. 2014) <https://innovations.ahrq.gov/profiles/michigan-pathways-project-links-ex-prisoners-medical-services-contributing-decline> (showing that returning citizens in Michigan who were given access to a wide range of services had recidivism reduction from 46% to 21.8% for two-year parolees, 17.7% for eighteen-month parolees, and 9.3% for one-year parolees); Dennis P. Culhane et al., *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13 *Public Housing Debates* 107, 130 (2002) (finding that people with psychiatric disabilities in supportive housing had 84.8% reduction in prison days); Evan Marie Lowder, *The Role of the SOAR Model in Successful Community Reintegration: Final Report*, 11-12 (2015), https://ddp.policyresearchinc.org/wp-content/uploads/2015/09/Lowder_Final-Report.pdf (detailing two studies, one funded by the Department of Justice, that found jail detainees with psychiatric disabilities had lower rates of recidivism and fewer arrests when connected to Medicaid).

⁶⁶ Making Hard Time Harder, *supra* note 27, at 27 (describing denial of sign language interpreter to deaf parolee in Delaware during meetings with his parole officer, and achievement of settlement agreement requiring the provision of sign language interpreters for all probation and parole meetings).

⁶⁷ Email with Disability Rights North Carolina (on file).

outpatient service is accompanied by a parole condition requiring attendance.⁶⁸ In other words, missing a clinic appointment can mean return to jail or prison. And by statute, violation of that condition requires return to incarceration without the benefit of work time credits.⁶⁹ Parole failures are very high for persons with psychiatric and intellectual disabilities.⁷⁰

In an interview, Tammy Seltzer, the director of the DC Jail and Prison Advocacy Project, reflected on this issue:

I think of one client in particular who had cycled in and out of jail and prison because he could not comply with the conditions of his release. It wasn't until after, when the Jail and Prison Advocacy Project had negotiated accommodations for him, under supervision, did he finally have a different life. He's now been in the community for over two years! He had his supervision terminated early because of how well he was doing. And that was really just a matter of looking at his mental illness and how it impacted his behavior and ability to comply with the terms, and say, "Well how do we make changes that can help him be successful?"⁷¹

This access-based approach is not made available to most formerly incarcerated individuals with disabilities.

C. Access Barriers Related to the Lack of Olmstead Compliance in the Community.

After release, individuals with significant disabilities need access to services and supports in the community, including mental health, medical health, and supported housing. These are the

⁶⁸ There is no evidence that court-ordered treatment is more effective than voluntary treatment. Burns et al., *Effect of increased compulsion on readmission to hospital or disengagement from community services for patients with psychosis: follow-up of a cohort from the OCTET trial*, *The Lancet Psychiatry* (Oct. 2015); Maughan et al., *A Systematic Review of the Effect of Community Treatment Orders on Service Use*, 49 *Social Psychiatry and Psychiatric Epidemiology* (2014); Burns et al., *Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial*, *Lancet* (May 2013); Kisely et al., *Compulsory community and involuntary outpatient treatment for people with severe mental disorders*, *CDSR* (Feb. 2011); Churchill et al., *International experiences of using community treatment orders*, *Institute of Psychiatry* (2007); Kisely et al., *Randomized and on-randomized evidence for the effect of compulsory community and involuntary out-patient treatment on health service use: systematic review and meta-analysis*, 37 *Psychological Medicine* (2007); Ridgely et al., *The Effectiveness of Involuntary Outpatient Treatment*, *RAND Health* (2001); Steadman et al., *Assessing the New York City involuntary outpatient commitment pilot program*, 52 *Psychiatric Services* (2001).

⁶⁹ CAL. PENAL CODE § 3057(d)(2)(B).

⁷⁰ See, e.g., J.M. LePage et al., *Effects of structured vocational services on job-search success in ex-offender veterans with mental illness: 3-month follow-up*, 48 *Journal of Rehabilitation Research & Development* 277 (2011) <http://www.rehab.research.va.gov/jour/11/483/pdf/doaj/lepage.pdf> (finding that over 66 percent of ex-offender veterans with mental illness or substance dependence were arrested for probation or parole violations).

⁷¹ Council for Court Excellence, *Interview with Tammy Seltzer* (May 2016), <http://www.courtexcellence.org/news-events/interview-with-tammy-seltzer>.

cost-effective disability services and supports that are required by the ADA's integration mandate, as affirmed by the U.S. Supreme Court's ruling in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Implementation of the *Olmstead* mandate is far from complete in any state.⁷² Hundreds of thousands of people with disabilities remain on waiting lists for home and community-based services.⁷³ Increased services are particularly needed for individuals with physical disabilities and mental illnesses.⁷⁴

In crafting *Olmstead* plans and settlements, public and private advocates should take care to explicitly include the needs of disabled individuals at risk of incarceration.⁷⁵ When these needs are included, and states provide such relevant elements as timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, incarceration may be prevented.⁷⁶

D. Barriers Related to Criminal Records.

As detailed by several witnesses who testified before the Commission, formerly incarcerated individuals with disabilities face an array of barriers created by criminal record screens, barriers that intersect with and exacerbate other disability-related barriers.

⁷² U.S. Senate, Health, Education, Labor, and Pensions Committee, *Separate and Unequal: States Fail to Fulfill the Community Living Promise of the Americans with Disabilities Act* (July 2013), <https://www.help.senate.gov/imo/media/doc/Olmstead%20Report%20July%2020131.pdf>.

⁷³ *Id.* at 2 & 18.

⁷⁴ *Id.* at 2 & 19.

⁷⁵ See, e.g., *United States of America v. Georgia*, No. 1:10-CV-249-CAP, Settlement Agreement (N.D. Ga. Oct. 19, 2010), https://www.ada.gov/olmstead/documents/georgia_settle.pdf (describing target population as individuals with severe and persistent mental illness, including those “who are chronically homeless, and/or who are being released from jails or prisons,” and noting that “[i]ndividuals with serious and persistent mental illness and forensic status shall be included in the target population, if the relevant court finds that community service is appropriate”); *Amanda D. v. Hassan and United States of America v. New Hampshire*, No. 1:12-cv-53-SM, Class Action Settlement Agreement (D.N.H. Feb. 12, 2014), <https://www.ada.gov/olmstead/documents/nh-final-settlement.pdf> (describing second priority area for target population as serving individuals with severe mental illness “who have had criminal justice involvement as a result of their mental illness in the last two years”); *United States of America v. Delaware*, No. 11-591-LPS, Settlement Agreement (D. Del. July 6, 2011), <https://www.ada.gov/delaware.htm> (describing priority area for target population as serving individuals with severe and persistent mental illness “who have been arrested, incarcerated, or had other encounters with the criminal justice system in the last year due to conduct related to their serious mental illness”).

⁷⁶ Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, Michigan Law, Public Law and Legal Theory Research Paper Series, Paper No. 515, 22-24 (May 24, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783963 (discussing elements of Delaware *Olmstead* settlement).

For example, many public housing authorities and private landlords deny housing to individuals based on criminal history.⁷⁷ These exclusions occur even though there is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy.⁷⁸ On the other hand, housing instability is significantly associated with recidivism. A Georgia study found that every time a parolee changed his address, his likelihood of being re-arrested increased by 25 percent.⁷⁹

Similarly, as detailed by experts at a 2011 hearing before the Equal Employment Opportunity Commission, criminal background checks in employment are often broadly employed, without consideration of relevant factors such as the nature of the offenses, the passage of time, and the type of job. At the same time, unemployment is closely associated with recidivism.⁸⁰

Unnecessary criminal record screens in housing and employment constitute race discrimination based upon their disparate racial impact.⁸¹ Moreover, a recent study found disparate treatment in the application of such screens in housing – criminal background screens were implemented more harshly for black female applicants than for white female applicants.⁸²

These screens also constitute disability discrimination based on their impact on individuals with disabilities. And for many formerly incarcerated individuals, these screens are part of an experience of multi-variable discrimination – discrimination based on multiple statuses such as race, ethnicity, sex, and disability.

IV. Youth With Disabilities and the Criminal Legal System.

While not a specific focus of the Commission’s public briefing on May 19, 2017, the unique

⁷⁷ Marie Claire Tran-Leun, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver National Center on Poverty Law (Feb. 2015), <http://www.povertylaw.org/files/docs/WDMD-final.pdf>; *Unlocking Discrimination*, *supra* note 19, at 11.

⁷⁸ Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, N.Y.U. J. Legis. & Public Pol’y Quorum 1, 20 (Mar. 3, 2015) (reviewing studies).

⁷⁹ *Id.*

⁸⁰ U.S. Equal Employment Opportunity Commission, Meeting of July 26, 2011, <https://www.eeoc.gov/eeoc/meetings/7-26-11/> (linking to testimony of witnesses, including Cornell William Brooks, <https://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm>, and Stephen Saltzburg, <https://www.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm>).

⁸¹ U.S. Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; First Amended Complaint, *Fortune Society v. Sandcastle Towers Housing Development Fund Corp.* (E.D.N.Y. May 1, 2015) (No. 1:14-cv-06410-VMS) <https://www.clearinghouse.net/chDocs/public/FH-NY-0023-0002.pdf>; *Unlocking Discrimination*, *supra* note 19, at 27-28.

⁸² *Unlocking Discrimination*, *supra* note 21, at 20-26.

needs of youth with disabilities in the juvenile and adult criminal legal systems are worthy of mention here.

Incarcerated and formerly incarcerated youth have extremely high rates of disability.⁸³ Most youth leave the criminal legal system and return to their communities. However, this transition is often rocky. According to the National Juvenile Information Exchange, two-thirds of youth leaving a facility do not return to school after their discharge. Many are released without being enrolled in Medicaid or other health insurance programs, and as many as 75 percent are arrested within three years of their discharge.⁸⁴

And despite an earlier understanding that juvenile criminal proceedings and outcomes be maintained in confidence, many juvenile criminal records are easily accessible to individuals both inside and outside the system, creating barriers to education, employment, housing, and licensing.⁸⁵

In addition to the barriers discussed throughout these comments, youth with disabilities face unique needs due to their minority. These include access to education, including special education, and their need for legal supervision by adults, whether those adults are their parents, family members or state provided caregivers. These youth, like all youth their age, also have developmentally related educational needs such as driver training, budgeting, and other independent living skills that need to be met before and after they are incarcerated. Such programs must be adapted to address disability related needs.

Many youth with disabilities qualify for the transition services required by the IDEA⁸⁶ and for employment services provided by vocational rehabilitation services, but do not receive them while incarcerated or after release.

In short, to promote successful reentry for youth, pre-release and post-release planning for youth with disabilities must address these areas, and must include effective and affirmative supports to access relevant benefits and programming.

⁸³ See note 18, *supra* (“Up to 80 percent of incarcerated youth are believed to have a special education disability, but only about 33 percent are identified as having a disability. The reported rate is far higher than the rate found in public school programs.”).

⁸⁴ Benjamin Chambers, *What is Re-entry and Aftercare for Youth*, Juvenile Justice Information Exchange (2015), <http://jjie.org/2015/03/23/what-is-re-entry-and-aftercare-for-youth/>.

⁸⁵ *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records*, Juvenile Law Center, http://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web.pdf.

⁸⁶ The IDEA requires that older students receive a plan for a coordinated set of services designed to move them successfully from school to post-school settings. See 34 C.F.R. §§ 300.1 & 300.43.

V. Recommendations for Reducing and Eliminating Collateral Consequences for Formerly Incarcerated Individuals with Disabilities.

Systemic reform of reentry programming and reentry conditions is needed to include individuals with disabilities and to remove the disability barriers that result in disproportionate numbers of formerly incarcerated individuals with disabilities becoming homeless and/or being reincarcerated.

Reducing and eliminating collateral consequences for formerly incarcerated individuals with disabilities requires the dismantling of systemic disability-related barriers that characterize the experience called reentry. Necessary reforms include:

- The full implementation and enforcement of the ADA to provide inmates with disabilities with an equal and equally effective opportunity to access important programs prior to and following release, including –

Within the prison or jail system:

- Well-trained, properly financed ADA Coordinators with sufficient budget and status to ensure the accommodation and access needs of incarcerated individuals.
- Policies that require **all** programs offered within the prison or jail to include and accommodate prisoners with disabilities.
- Requirements that all prisons provide robust special education and related services to youth with disabilities.
- Affirmative steps to equalize treatment of inmates who have been excluded from programming on the basis of disability, including by waiving prerequisites and granting equivalent time credits or early release.
- Effective notice to inmates of their rights to reasonable modifications of policies practices, and procedures, and to auxiliary aids and services when needed to have equal access to programs and services within the system, including medical services, religious services, educational and vocational programs, disciplinary hearings, parole hearings, recreational services, and programs providing for early release, reduced sentences, or reduced security.
- Training for guards and disciplinary officers on how to recognize and accommodate prisoners with disabilities (along with the training to understand that prisoners with disabilities will be the rule rather than the exception).

- Request for Proposals for all services and contracts within the prison or jail must specify not only compliance with disability rights laws, but also a preference for providers and contractors who have successful experience in incorporating prisoners with a wide range of disabilities.
- Standard communication access provisions must be in place – including standing contracts for sign language interpreters and real-time captioners for prisoners with hearing disabilities and accessible print materials for prisoners who are blind.

Upon release and within parole (or other form of community supervision):

- Direct connections to housing including supported housing, health care, community mental health services, drug treatment programs.
- Disability access to parole itself including meetings with parole officers and to any programs required as a condition of parole.
- Policies that explicitly recognize that parole officers work with large percentages of people with disabilities, and that outline their legal obligations to provide reasonable modifications to policies, practices and procedures in order to accommodate disabilities.
- Training for parole officers on: how to recognize and accommodate clients with disabilities (along with the training to understand that clients with disabilities will be the rule rather than the exception); and how to affirmatively engage with clients about the types of accommodations that might provide them an equal opportunity to succeed in their program
- Waiving of the conditions and requirements of supervision wherever disability access, modifications, auxiliary aids, or accommodations are not available.
- Notice to clients of their rights to reasonable modifications of policies, practices and procedures, and their right to access auxiliary aids and services when needed to have equal access to programs to meeting the requirements and opportunities of parole.
- Request for Proposals for all services and contracts providing re-entry services or community supports that specify not only compliance with disability rights laws, but also a preference for providers and contractors who have successful experience working with formerly incarcerated people with disabilities.

- Substantially increased capacity for assisting individuals with disabilities to apply for disability and health benefits prior to and following release.
- The implementation of the *Olmstead* integration mandate for individuals with significant developmental, intellectual, and psychiatric disabilities who are at risk of incarceration, in order to strengthen community mental health systems, intensive case management, and other community supports.
- The rebalancing of public expenditures from incarceration to community-based housing and supports, consistent with the principles of *Olmstead*.
- The elimination of criminal records barriers to housing and employment.

The AVID (Amplifying Voices of Inmates with Disabilities), a project of Disability Rights Washington, recently produced a short documentary about the experience of reentry for formerly incarcerated individuals with disabilities entitled *On The Outs: Reentry for Inmates with Disabilities*. *On The Outs* follows three inmates with various disabilities, including vision impairment, brain injury, and mental illness, through all stages of the reentry process. The documentary depicts each person's experience in prison prior to release, on their release date, and life on the "outs" after release. The signatories urge the Commission to view this documentary at their next meeting, as it provides powerful insights into the barriers faced by individual with disabilities upon release from jail or prison.⁸⁷

CONCLUSION

Formerly incarcerated inmates with disabilities face tremendous barriers to thriving and surviving in the community upon release. Dismantling these barriers to reentry requires sustained and close attention to eliminating disability discrimination at each step of the criminal legal system, and to implementing the disability supports required to realize the ADA's integration mandate as recognized in *Olmstead*.

At this critical time, we urge the Commission to take a leadership role in advancing this work. The undersigned commit to working together with you going forward.

And please do not hesitate to contact Claudia Center at ccenter@aclu.org, 415-343-0762, or Diane Smith-Howard at diane.smithhoward@ndrn.org, 207-522-2871, to follow up or to request additional information.

⁸⁷ This video may be accessed at <http://www.rootedinrights.org/videos/criminal-justice/on-the-outs-reentry-for-inmates-with-disabilities-avid-prison-project/>.

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Respectfully submitted,

American Civil Liberties Union

Amplifying Voices of Inmates with Disabilities (AVID) Prison Project of Disability Rights

Washington

Center for Public Representation

DC Jail & Prison Advocacy Project, University Legal Services

Disability Rights Education & Defense Fund, Inc. (DREDF)

Equal Rights Center

Helping Educate to Advance the Rights of Deaf communities (HEARD)

Judge David L. Bazelon Center for Mental Health Law

National Alliance on Mental Illness

National Association of the Deaf

National Disability Rights Network

National Federation of the Blind

Prison Law Office

Rooted in Rights

Rosen Bien Galvan & Grunfeld LLP

The Arc

Who Speaks for Me?