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# The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections

US Department of Justice

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# National Institute of Justice

Research in Action

Jeremy Travis, Director

September 1995

## Highlights

The National Institute of Justice launched an initiative to examine the implications of the Americans With Disabilities Act (ADA) for criminal justice agencies at the State and local levels. This Research in Action report, the sixth in a series on the ADA, examines how correctional facilities must deliver programs, services, and activities to inmates, job applicants, and employees with mental disabilities.

Under the ADA, corrections facilities must do more than just identify mentally disabled inmates and employees. Now they must also provide mental health screening, evaluation, and treatment. Key points include the following:

- The ADA raises significant issues for correctional facilities because of the prevalence of mental disabilities among inmates. Jails across the United States are handling 640,000 to 800,000 detainees with such disabilities each year.
- According to the ADA, a mental disability is any developmental or psychological disorder, such as retardation, organic brain syndrome, emotional illness, or specific learning disability.
- Title II of the ADA governs how correctional facilities are to make their programs accessible. Program access is not required when it poses a direct threat to the health or safety of others.

## The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections

by Paula N. Rubin and Susan W. McCampbell

The enactment of the Americans With Disabilities Act (ADA) was part of a new effort in the civil rights movement to integrate into all segments of society individuals with disabilities. The ADA affects not only mainstream society but also prisons and jails. The manner in which a correctional facility works with inmates, job applicants, and employees with disabilities is now regulated by the ADA.

The ADA affects how correctional facilities deliver their programs and services to inmates with disabilities as well as others who have a legitimate right to be in the facility or are employed to work there.

Significant issues arise because of the prevalence of mental disabilities among inmates. Approximately 10 million individuals are detained in jails in the United States each year. An estimated 6.4 percent of these detainees have a severe mental disability.<sup>1</sup> Some experts believe this percentage is even higher,

around 8 percent, and that the percentage of female detainees with a severe mental disability may be as high as 13 percent. This means that jails across the United States are dealing with 640,000 to 800,000 detainees with mental disabilities each year.

This Research in Action report, the sixth in a series on the ADA published by the National Institute of Justice, examines how correctional facilities must deliver programs, services, and activities to inmates, job applicants, and employees with mental disabilities.

### Defining mental disability

According to the ADA, a mental disability is any "mental or psychological disorder, such as retardation, organic brain syndrome, emotional or mental illness, or specific learning disability."<sup>2</sup> The ADA distinguishes between mental illness and developmental disability (retardation). Mental illness is defined as "...a group of disorders causing severe disturbances in

Americans With Disabilities Act

continued



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## Highlights

*continued . . .*

- Inappropriate policies and procedures that eliminate inmates from programs and services on the basis of a disability can be avoided by clearly defining the eligibility for program participation, by tying eligibility criteria to actual program needs, and by ensuring that the screening process is objectively applied.
- Under Title I of the ADA, it is illegal to deny equal employment opportunities to qualified individuals with disabilities on the basis of the disability. If job applicants are screened out because they are unable to perform an essential job function, the agency must be prepared to show that the standard is job-related and cannot be met even with reasonable accommodation.
- The liability of not referring for evaluation employees who are suspected of being mentally disabled is tremendous. Agencies that suspect an employee is thus unfit to perform duties and whose actions, or inactions, cause harm to an arrestee or inmate, may be liable.
- Many approaches to accommodating the needs of inmates with mental disabilities are valid. These include specialized housing units to hold inmates who pose a direct threat to the health and safety of others, treatment for inmates housed in regular housing units, and diversion of inmates to other institutions and services. Each approach, however, must not exclude eligible inmates with mental disabilities from programs and services available to the rest of the inmate population.

These issues and their implications are detailed in this Research in Action.

thinking, feeling, and relating. They result in substantially diminished capacity for coping with ordinary demands of life....A mental illness can have varying levels of seriousness. Identical illnesses can cause different reactions in different people, or different reactions at different times in the same person."<sup>3</sup> Personality traits such as poor judgment or a hot temper are not considered disabling under the ADA. Stress and depression may be considered disabling when they are diagnosed as an identifiable stress disorder and an impairment that substantially limits a major life activity.<sup>4</sup>

It should be noted that mental illness is not a crime. Prosecution and incarceration are inappropriate responses to symptoms of mental illness. Law enforcement agencies have a responsibility to distinguish criminal behavior from conduct that is the product of mental illness but has no criminal intent. Thus, failure to work with mental health authorities to ensure the appropriate response to "nuisance" offenders by determining whether the "offense" is simply a manifestation of a disability may violate the ADA, in addition to burdening correctional institutions with individuals who have needs that the institution is not equipped to meet.

A developmental disability means that "normal development fails to occur....A developmental disability is diagnosed by significant subaverage general intellectual functioning (as measured by IQ tests) resulting in, or associated with, defects or impairments in adaptive behavior, such as personal independence and social responsibility, with onset by age 18."<sup>5</sup> "[R]etardation is estimated as...the Nation's fourth ranking disabling condition."<sup>6</sup>

## Delivering programs, services, and activities

Title II of the ADA governs how correctional facilities are to make their programs, services, and activities accessible to inmates with mental disabilities. This law requires the facility to evaluate each program, service, and activity in such a way so that, when viewed in its entirety, the program, service, or activity is readily accessible to and usable by *eligible* inmates with disabilities.

**Eligibility requirements.** Under the ADA, not all inmates with disabilities may be "qualified." A "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services of the participation in programs provided by a public entity.<sup>7</sup>

Local jail officials deal with numerous severely mentally disabled arrestees each day, many of whom must handle the additional trauma of being arrested. Program access is not required when it poses a direct threat to the health or safety of others.

An inmate whose participation in a particular activity poses a "direct threat" to the health or safety of others will not be "qualified," but the determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and se-



erity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. Thus, across the board classification of an individual as a “direct threat” because of a mental disability would be inappropriate without consideration of the requirements of the particular program or activity in question.

Determination of whether an inmate with a mental illness or developmental disability is “qualified” for a particular program, service, or activity provided by a correctional institution requires analysis of the particular activity to identify the “essential eligibility requirements” and analysis of the particular inmate to determine the effect of the disability on his or her abil-

ity to meet those requirements and, if necessary, the feasibility of accommodation (see box).

Eligibility may also be based upon individual behavior. For those inmates with mental illness who can be safely housed in a general population setting, eligibility should not be an issue. Inmates whose disability requires maintenance on psychotropic medications, but who are stable enough for general population settings, may be eligible to participate in the facility’s programs, services, or activities based on individual behavior. For example, an eligibility requirement that excludes all inmates on psychotropic medication from inmate worker status may violate the ADA. However, requiring the inmate’s behavior to be stable while on such medication may be an acceptable eligibility requirement.

Corrections agencies, especially prisons, are faced with the long-term incarceration of inmates whose mental illness is acute and perhaps will never improve. In the long-term custodial setting of prison, inmates who are mentally ill may arrive in that condition, or they may develop illnesses over the term of their confinement. In circumstances in which the inmate’s behavior is a direct threat to staff or other inmates, there is no requirement that they be permitted to participate in programs, services, or activities offered to other inmates. Those inmates who, because of a mental disability, cannot meet the essential eligibility requirements will not be “qualified” persons with a disability and therefore may not be entitled to participate in the program, service, or activity.

### Essential Eligibility Requirements

**I**f an inmate is “qualified” for participation in a program or activity, excluding the inmate or limiting his or her participation would violate one or more of the general prohibitions of discrimination in 28 C.F.R. § 35.130...

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability:

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that

is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(b)(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(b)(7) A public entity shall make reasonable modifications in policies, practices, or proce-

dures 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.

(b)(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.



To ensure compliance with ADA mandates, corrections administrators should look at three distinct areas when evaluating the accessibility of their facility's programs, services, and activities: (1) policies and procedures, (2) architectural barriers, and (3) communications.

**Policies and procedures.** The courts now consider a facility's deliberate indifference to an inmate's mental disability as the same as that facility's indifference to an inmate's medical condition. A correctional facility should avoid policies and procedures that screen out or eliminate eligible inmates from programs and services on the basis of a mental (as well as physical) disability. If such policies and procedures exist, it may be necessary to reasonably modify the policy or procedure to allow eligible inmates to participate in a meaningful way. Reasonable modification is not necessary if it fundamentally alters the nature of the program, service, or activity. Inappropriate policies and procedures can be avoided by clearly defining the eligibility for program participation, by tying these criteria to actual program needs, and by ensuring that the screening process is objectively applied.

Correctional facilities, including local jails, should screen all inmates to identify those with developmental disabilities. Those with mental disabilities should be evaluated by qualified mental health professionals, and they should have access to crisis intervention, treatment, and discharge planning services.<sup>8</sup> This approach requires a collaborative effort among corrections, mental health, and medical staff. One obvious way to address detainees with developmental disabilities is to

divert these individuals before they get to the local jail. Community diversion works well in many jurisdictions and requires a collaborative effort among criminal justice, social service, and public health agencies to work with individuals who are often nuisance offenders—trespassers, petty thieves, public inebriants, the chronic homeless, and those who are dually diagnosed, i.e., those who have mental illness and are also substance abusers.

To avoid having police officers handle this special needs population, teams of specially trained community mental health workers can be on call for the local police. Mental health workers can come to arrest sites, provide alternative sites to which individuals who are candidates for diversion can be brought, or be present at local jails to initiate diversion activities. This collaborative approach requires training police officers to recognize signs and symptoms of mental disability so that they can respond appropriately. Inmates with mental disabilities, particularly those in local jails, are the responsibility of the community. The integration of jail services and community mental health services is critical to the success of an inmate's treatment and reintegration into the community.<sup>9</sup>

Policies for housing those with severe mental illness must be based on ADA criteria. Acceptable approaches may include maintaining specialized housing units to hold those who pose a direct threat to the health and safety of others or placing them in other institutions where more care is available to meet their needs. Not included, however, are individuals who are court-ordered to undergo evaluation and/or treatment or individuals for whom insanity and/or competency to stand trial

is an issue. These legal activities are usually outside the scope of a correction facility's responsibilities.

**Architectural barriers.** Although the ADA does not automatically require correctional institutions to be architecturally retrofitted, it does mandate that the facility provide physical access for its inmates, visitors, staff, and volunteers with disabilities. This requirement can be accomplished without construction. It may be achieved by relocating services and activities to a different part of the facility, redesigning equipment, providing auxiliary aids, or, as a last resort, altering an existing structure. An agency need not experience an undue burden, however, in providing program access. An undue burden is defined as a significant expense or a fundamental alteration of the nature of the operations of the agency.

Architectural barriers may not be as significant an issue for mentally disabled inmates as other inmates with disabilities. If the local jail or prison has separate housing for individuals with mental disabilities, the inmates confined to that housing must have access to jail or prison programs for which they are eligible and for which their participation does not pose a direct threat. It is not enough to provide separate services to those with mental disabilities since mainstreaming is a hallmark of the ADA.

To ensure that those with disabilities are not summarily excluded, a review of all eligibility requirements for inmate and family programs should be made. The goal of this review should be to tie eligibility requirements to the program's actual requirements and provide a means to ensure that individuals with mental disabilities are not



excluded from mainstream activities. For example, if family group therapy is part of the inmate's treatment plan, but a disabled family member is not able to participate either because of architectural barriers or the absence of a sign language interpreter, the inmate should not be excluded.

**Communications.** Inmates, inmate families, and inmate visitors are also entitled to an effective means of communicating under the ADA. Meeting this condition may require auxiliary aids. Although this portion of the ADA applies only to hearing, speech, and vision impairments, to the extent an inmate with a mental disability has one of these disabilities, the ADA requirements would also apply.

Examples of auxiliary aids include assisted listening devices, telecommunication devices for the deaf, taped texts, and qualified readers. These aids should take into account, where practical, the mental disability of the inmate. Effectively communicating with visitors for an inmate who is developmentally disabled or retarded may mean alternatives to traditional visiting procedures.

### A word about personal devices and services

Section 35.135 of the Department of Justice's Regulations provides that:  
 ...this part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

The regulation does, however, require that whatever services the entity provides must be provided without discrimination against qualified individuals with disabilities. Because of the custodial relationship between the institution and its inmates, the obligation of the institution is likely to include provision of personal devices or services that would not be required of public entities. For example, a correctional institution is responsible for providing medical care for inmates, including appropriate treatment for inmates with mental illnesses. Where an inmate's mental illness would require residential treatment in a mental hospital, housing that individual in a specialized facility, rather than among the general population, would be appropriate.

### Applicants and employees with mental disabilities

Title I of the ADA deals with employment issues. Under this part of the law, it is illegal to deny equal employment opportunities to qualified individuals with disabilities on the basis of the disability. Equal employment opportunity includes the application and hiring process as well as how employees are treated with respect to transfers, promotions, and benefits.

**Applicants with mental disabilities.** To be covered by Title I of the ADA, the applicant must be qualified for the job. That means the applicant meets the requirements for the position, such as education and experience, and can perform the essential functions of the job with or without an accommodation.

Essential functions are those that are fundamental to the job. If the applicant cannot perform the essential functions of the job because of a dis-

ability, the correctional agency must determine whether there is a reasonable accommodation that will enable the individual to perform the essential functions of the job. Reasonable accommodations can include modifying existing facilities to make them accessible, job restructuring, part-time or modified work schedules, acquiring or modifying equipment, and changing policies or procedures. Providing a reasonable accommodation will not be necessary if doing so causes an undue hardship, that is, a significant expense or difficulty.

An additional condition for coverage by Title I of the ADA is that the applicant must not pose a direct threat to the safety of self or others that cannot be eliminated or reduced by reasonable accommodation. Under Title I, direct threat means "significant risk of substantial harm." This is interpreted to mean a high probability of substantial harm.

Ensuring that persons have equal access to employment opportunities means that applicants are allowed to participate in the application process in a meaningful way. For example, someone with a learning or reading disability might be accommodated by providing extra time to take a written exam.

Agencies need to develop and validate job-related entry level fitness standards—both physical and psychological. Candidates for positions who are significantly limited by mental disabilities need to be assessed to determine if they are eligible for the position and are able to perform the essential job functions. If a candidate is screened out by a particular job standard, the agency must be prepared to show that the standard, as applied,



is job-related and consistent with business necessity and cannot be met even with reasonable accommodation.

Blanket exclusions based on mental illnesses, controlled or not by psychotropic medications, may violate the ADA. Agencies should address this issue on a case-by-case basis. Persons experiencing a short-term mental illness, such as situational stress or mild depression, may not be covered by the ADA.

**Employees with mental disabilities.** In stressful corrections work environments, the effective evaluation of conditions such as post-traumatic stress disorder become as important as the ability to evaluate a back injury. In the event an employee acquires a mental disability, an evaluation as to whether a reasonable accommodation can be provided will need to be made. Accommodations may include time off to participate in therapy or temporary reassignment. It is essential to remember that mental illness may be temporary in nature, just as are some physical ailments. A disorder that is truly temporary would not be covered by the ADA.

Whether the condition is related to the job or not is often a matter that the worker's compensation statutes of the State will decide. The State's decision may ultimately affect the manner in which the individual receives help.

The liability of not referring employees who are suspected of being mentally disabled for evaluation is tremendous. Agencies who suspect an employee is physically or mentally unfit to perform duties and whose actions, or inactions, cause harm to an arrestee or inmate, may be liable.

The same evaluation and validation process for determining what mental health conditions exclude candidates for initial hiring might also provide a guideline for dealing with individuals who develop a mental disability during their employment. Moreover, a system that places as much emphasis on mental health as physical health for continued employment might provide an objective measure to ensure that a reasonable accommodation for the employee's needs is provided. For example, when developing light duty policies, the same issues will exist for both physical and mental health conditions: What is the probable time until return to full duty is possible? What will be the measure? What is the next step if return to full duty is not possible?

### Developing and implementing mental health services for inmates

Because of the large number of severely mentally ill in local jails and the likelihood that developmentally disabled arrestees will be returned within a short period of time to their community, a better and more effective approach to addressing the needs of mentally disabled inmates needs to be found.

The first step is problem solving at the local level between corrections and mental health agencies. Other local agencies need to be involved as well, including police, prosecutors, public defenders, the defense bar, and judges. All agencies who deal with mentally disabled people share the burden in addressing this issue. Memorandums of agreement, contracts, and other shared objectives may form the basis for a working relation-

ship that will, in the end, ensure that the best interests of the community, the mentally disabled person, and the jail staff are taken into consideration.

How correctional facilities accommodate the needs of inmates with mental disabilities will differ depending upon the setting—jail or prison. Various approaches include specialized housing units to hold inmates who pose a direct threat to the health and safety of others, treatment for inmates housed in regular housing units, and diversion of inmates to other institutions or services that are better able to meet their needs. Each approach is valid as long as it does not exclude eligible mentally disabled inmates from participating in programs and services available to the rest of the inmate population.



**Notes**

<sup>1</sup>Teplin, Linda, "The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees," *American Journal of Mental Health*, 80 (1990), p. 663-669.

<sup>2</sup>See Equal Employment Opportunity Commission's (EEOC) Technical Assistance Manual (TAM), Section 2.2(a)(i).

<sup>3</sup>Murphy, Gerard R., *Managing Persons with Disabilities: A Curriculum Guide for Police Trainers*, Police Executive Research Forum, Washington, D.C., 1989, p. 2-5.

<sup>4</sup>TAM, Section 2.2(a)(i).

<sup>5</sup>Murphy, Gerard R., *Managing Persons with Disabilities: A Curriculum*

*Guide for Police Trainers*, Police Executive Research Forum, Washington, D.C., 1989, p. 2-5.

<sup>6</sup>Ibid, p. 2-13.

<sup>7</sup>See *Department of Justice Technical Assistance Manual*, Section II-2.800.

<sup>8</sup>American Psychiatric Association, "Psychiatric Services in Jails and Prisons," Washington, D. C., March 1989.

<sup>9</sup>Steadman, Henry J., McCarty, Dennis W., and Morrissey, Joseph P., *The Mentally Ill in Jail: Planning for Essential Services*, New York, The Guilford Press, 1989.

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**Related NIJ Publications**

Listed below are selected NIJ publications related to issues of mental illness and the ADA. These publications can be obtained free from the National Criminal Justice Reference Service (NCJRS): telephone 800-851-3420, e-mail askncjrs@ncjrs.aspensys.com, or write to NCJRS, Box 6000, Rockville, MD 20849-6000.

Please note that when free publications are out of stock, they are available in photocopies for a minimal fee or through interlibrary loan. They are also usually available on the NCJRS Bulletin Board System or on the Department of Justice Internet

gopher site for downloading. Call NCJRS for more information.

McDonald, Douglas, C., Ph.D and Michele Teitelbaum, Ph.D., *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, NIJ Program Focus, March 1994, NCJ 145330.

Rubin, Paula N., *Civil Rights and Criminal Justice: Employment Discrimination Overview*, Research in Action, June 1995, NCJ 154278.

Rubin, Paula N. and Toni Dunne, *The Americans With Disabilities Act: Emergency Response Systems and Telecommunications Devices for the Deaf*,

Research in Action, February 1995, NCJ 151177.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: Hiring New Employees*, Research in Action, August 1994, NCJ 147479.

Rubin, Paula N., *The Americans With Disabilities Act and Criminal Justice: An Overview*, NIJ Research in Action, September 1993, NCJ 142960.

Rubin, Paula N. and Susan W. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Providing Inmate Services*, Research in Action, July 1994, NCJ 148139.





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