UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JIMMY (BILLY) McCLENDON, et al.,

Plaintiffs,

vs.

CIV 95-24 JAP/KBM

CITY OF ALBUQUERQUE, et al.,

Defendants,

vs.

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

Plaintiff-Intervenors.

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

COMES NOW the Plaintiff Intervenor sub class, pursuant to this Court's inherent powers to enforce its orders, and to the Fourth and Fourteenth Amendments, the Rehabilitation Act of 1973 ("Rehabilitation Act") and the Americans with Disabilities Act ("ADA"), and submits this motion amending the original motion, Doc. 1191, respectfully requesting that the Court:

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

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

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

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

After this case was filed, six people with mental disabilities and developmental disabilities intervened on behalf of all similarly situated people to address the violations of their federal rights by the City of Albuquerque ("the City") and Bernalillo County ("the County"). The gravamen of their complaint in intervention was that City law enforcement officials were inappropriately arresting people with disabilities and booking them into the local jail, where the conditions were cruel and unusual. The second sentence of the complaint in intervention states, "Frequently, people with disabilities are taken into police custody because of behaviors related to their disabilities [and] taken to jail instead of to the University of New Mexico Mental Health Center." Doc. 150, p. 1. The sub class alleged, *inter alia*, that the City Defendants violate federal law by: 1) unnecessarily subjecting them to arrest and incarceration (*Id.*, pp. 1-3, 30); 2) failing to reasonably accommodate them with respect to the decisions made by law enforcement officials whether to issue citations to them or to arrest them and incarcerate them (*Id.*, pp. 1, 17, 30); 3) booking them into jail even when it is apparent they need hospitalization (*Id.*, pp. 17, 30); and 4) not making reasonable modifications to City policies and procedures to avoid discrimination. *Id.*, p. 23. The City's law enforcement practices were at the heart of Plaintiff Intervenors' complaint.

When the case was filed, the City both managed the local jail system and operated the law enforcement agency that booked the most people into jail. Although the City no longer manages the jail, the City of Albuquerque and the Mayor of Albuquerque ("the City Defendants") remain defendants in this action and are, of course, obligated to comply with all Court's orders that apply to the City's activities. City Defendants still book most sub class members into the jail and are currently denying sub class members the benefits of the orders to which the parties stipulated, in order to remedy Plaintiff Intervenors' claims. Their actions

continue subjecting the sub class to the same violations of federal anti-discrimination statutes that were raised 1995 by Plaintiff Intervenors, causing recurrent and irreparable harm.

Because the City Defendants are currently (1) violating court orders designed to cure their violations of the ADA and Rehabilitation Act, and (2) continuing the violations of those Acts alleged in Plaintiff Intervenors' complaint in intervention, this Court is the only court with jurisdiction to grant further remedial relief to the sub class, to halt both types of ongoing violations of Plaintiff Intervenors' federal rights.

BACKGROUND

In 1997, when the City Defendants submitted a proposed judgment to the Court for its approval, they stipulated that "the above captioned lawsuit should henceforth be maintained as a class action with respect to *any claims for injunctive relief under 42 U.S.C. § 1983, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12101 . . .*" (Doc. 289 at 2, emphasis added). Accordingly, as is discussed further in Section II, *infra*, this Court has exclusive jurisdiction to consider any request for injunctive relief to halt ongoing violations of their rights under the Constitution, the ADA and the Rehabilitation Act, to the extent those violations fall within the scope of the claims raised in the sub class' complaint.

I. Since Its Inception, This Class Action Has Always Addressed The City's Inappropriate Practices With Respect To Incarcerating Sub Class Members

Contrary to the City's arguments, this case has always addressed the City's practices that lead to people being inappropriately jailed; not just the conditions of confinement within the jail. In addition to the claims brought regarding jail conditions, the complaint in intervention also alleged that actions taken by City Defendants *outside the jail*, including by their police officers, were violating the Constitution, the ADA and the Rehabilitation Act. Numerous court orders to which the City Defendants stipulated obligated them to remedy those violations of federal law.

Because those orders have been violated and because the underlying violations of Plaintiff Intervenors' federal rights have not ceased, this Court must remedy the violations.

A. To Remedy The Violations Of Federal Law Alleged By Plaintiff Intervenors, The Defendants Have Stipulated To Several Orders Regarding Actions Outside The Jail Designed To Reduce The Incarceration Of Sub Class Members

Beginning in 1996, the City and County Defendants stipulated to a number of court orders that require them to take actions that, if implemented, would reduce the number of people with mental disabilities or developmental disabilities placed in jail by City personnel.

On November 5, 1996, the Defendants entered into the first two consent decrees: 1) the Order Regarding the PLRA (Doc. 255), which applies both to members of the sub class and to members of the class, and 2) the Order that only applies to the sub class (Doc. 256) which settled the claims unique to Plaintiff Intervenors in their complaint in intervention. The Defendants stipulated in 1996 that they would, *inter alia*:

> Develop solutions to the continuing resident population pressures to include possible development of additional drug treatment and/or mental health treatment facilities.

Doc. 255 at 4, ¶ 4.

> Contract with a licensed psychologist to provide written competency evaluations to jail residents charged with misdemeanors who are ordered by the Courts to undergo such evaluations.

Doc. 255 at 4, ¶ 7.

> [D]evelop and implement, or cause to be developed and implemented, adequate formal procedures for seeking psychiatric hospitalization or other appropriate residential mental health care for residents who need and would benefit from such care, and who are eligible for such placement, consistent with the court imposed conditions of their confinement. Defendants shall instruct UNMHSC to establish formal policies and procedures requiring the initiation of civil commitment proceedings whenever an individual diagnosed as having a mental or developmental disorder requests placement in a residential treatment or evaluation facility, assuming the court imposed conditions of confinement are consistent with such placement. Only a licensed and qualified psychiatrist may make a

> decision not to initiate civil commitment proceedings on behalf of any resident who requests placement in a psychiatric hospital or other residential treatment or evaluation facility.

Doc. 256 at 12-13, ¶ M.

In June 2001, to settle a contempt motion, the Defendants stipulated that they would:

> schedule a meeting or meetings concerning the provision of mental health services in Bernalillo County" to "plan how to implement an effective jail diversion program for persons with psychiatric or developmental disabilities" [addressing at least] "increase[ing] intensive mental health case management, crisis housing, and detox services, as well as a drop-in center for psycho-social rehabilitation.

Doc. 319 at 6 and 4.

In conjunction with that June 2001stipulated order, the Court filed, as Doc. 319-1, the *pro tem* judge's memorandum describing the 30 population management measures that were then underway. Subsequently, to settle another contempt motion, the Defendants stipulated in January 2002 that they would:

> *Employ all existing population management tools* and activate a population management review team [when the population reached a certain number].
>
> Provide a full-time benefits manager to assist in securing public benefits for inmates.

Doc. 361 at 2, ¶¶ 8, 10. (emphasis added)

To settle Plaintiff Intervenors' next contempt motion (Doc. 366), and to avoid a similar motion threatened by Plaintiffs, the Defendants again agreed in late 2004 to undertake the following measures to reduce the number of sub class members in jail:

> H. Community-based services for sub class members
> The Defendants will:
> 1. Continue participating in available technical assistance from the National Gains Center to improve jail diversion activities;
> 2. Continue to consult with the Forensic Intervention Consortium (FIC), the Metropolitan Criminal Justice coordinating Council (MCJCC), the University of New Mexico and the state Department of Health, and draft a written plan or plans to be presented to their governing bodies for adoption to improve the

> provision of community-based intensive case management services, crisis supports and housing, and for the provision of treatment for sub class members who have co-occurring disorders. The plan will describe how to establish services for at least two hundred individuals;
>
> 3. establish a system to assist sub class members who may be eligible for SSI benefits or Medicaid to apply for those benefits within ten days of their incarceration and to assist sub class members who previously received SSI benefits or Medicaid to apply for reinstatement of those benefits prior to their release; and
>
> 4. make their best efforts to fund for a two year period a full time position or contract person to work with the University of new Mexico, the MCJCC, the FIC, the state Department of Health and the Region 5 mental health authority to improve and co-ordinate jail diversion activities.

Doc. 514 at pages 7-8.

> .... the Defendants will employ their best efforts to manage the population of the Metropolitan Detention Center and *will use all available population management initiatives (such as the Community Custody Program, pre-arrest diversion programs, the Population Management Review Team, and the resources of the Pre-Trial Services Office)* to manage the population of the Metropolitan Detention Center.

Doc. 515 pages 3-4.[1] (emphasis added)

> In 2013, this Court entered an order requiring the County to:
>
> hire or contract for a full time person who has substantial experience in establishing community-based alternatives to incarceration to act as a "population coordinator" who will be responsible for spearheading and monitoring measures for the reduction of the inmate population at the MDC.

Doc. 1004, ¶ 3.

Most recently, the settlement agreement approved by this Court on June 27, 2016 (Doc. 1225) also requires population reduction activities to reduce incarceration of sub class members.

The case will be dismissed only after the Court's experts determine that the Defendants have:

> developed an adequate plan to implement an effective jail diversion program for persons with psychiatric or developmental disabilities.

Doc. 1222-3, p. 20.

[1] On March 31, 2009 the Court withdrew its approval of Docs. 514 and 515. Doc. 699

> provided direction to law enforcement officials to issue citations, where appropriate, and to use the "walk through procedures," rather than incarcerating individuals, where appropriate.
>
> participated in developing an adequate plan to expand the program for early resolution of criminal cases.
>
> *continue to use all appropriate population management tools in effect in 2002*.
>
> hired a full-time employee or contractor to monitor measures for the reduction of the inmate population at the MDC.

Doc. 1222-4, p. 3. (emphasis added)

As the above account makes clear, the Court's stipulated orders have continuously addressed unnecessary incarceration of sub class members, not just jail conditions.

B. The City Defendants Have Not Complied With Docs. 319 And 361.

1. City Police Continue To Inappropriately Arrest Plaintiff Intervenors For "Citable" Offenses.

To settle a post-judgment motion regarding jail overcrowding, the Defendants stipulated to a September 25, 2000 order (Doc. 315) requiring them to take the necessary actions for the appointment of a *pro tem* judge in the local state district court to facilitate better jail population management. Thereafter, a contempt motion regarding overcrowding was filed and the *pro tem* judge provided the Court with a June 29**,** 2001 memorandum describing 30 population management activities that were being undertaken to reduce the number of people held in jail. Doc. 319-1. Several of those activities relate specifically to City police officials. The Court found, *inter alia*, "Issuing citations for . . . non-violent petty offenses and using the jail's 'walk through procedure' for persons charged with such offenses would likely reduce unnecessary incarceration at BCDC." Doc. 319, pp. 2-3, ¶ 5. The City Defendants stipulated in that *Supplemental Order* that they would, "Provide direction to law enforcement officials under the

control of the City and/or the County to issue citations where appropriate and to use the 'walk through procedures,' rather than incarcerating individuals, where appropriate." *Id*, p. 5. APD officers continue to make warrantless arrests of sub class members, in violation of New Mexico law and the ADA and the Rehabilitation Act; and, consequently, also in violation of the Court's 2001 stipulated order requiring that arrests must be "appropriate."[2]

2. The Defendants Have Repeatedly Agreed to Continue To Employ The "Population Management Tools" In Effect In 2002; But Have Not.

On January 31, 2002, the City Defendants entered into another stipulated order, titled *Stipulated Agreement* that requires, *inter alia*, that "Defendants will continue to employ all existing population management tools . . ." Doc. 361, p. 2. The "existing population management tools" had been set forth in Doc 319-1, which the Court had filed *sua sponte* in 2001. They include, *inter alia*, (1) "Pre-trial services walk-through for misdemeanor warrants . . ." (Doc. 319-1, p. 2); (2) "APD officers have been instructed to obtain every possible phone number from people they stop and arrest or cite and release, and to write the phone number(s) on the face of the arresting/citing document," (*Id.*, p. 10); and (3) "An APD sergeant assigned to BCDC has just started his duties . . . He will assist in familiarizing officers with the walk-through program and will make decisions, when necessary, on which cases are appropriate for walk-through as opposed to booking." *Id.* Despite this Court's stipulated order, City Defendants subsequently abandoned those measures, without notice to counsel for the sub class.

[2] After the sub class wrote to the City in April 2014, in an attempt to avoid having to file the instant motion, (Doc. 1191-1) the City stated in June of 2014 that it could not find a single document indicating that the City had ever notified City law enforcement officials of the existence of that federal court order, nor indicating that the City ever provided the required direction to City police officials. After the original motion was filed on August 17, 2015, the City Defendants found and filed with the Court, as Doc. 1195-1, a June 7, 2001 document issued *before* the June 27, 2001 Supplemental Order was entered in which the police chief advised city law enforcement personnel regarding arrest practices. The City Defendants have not asserted, however, that they did anything after the Supplemental Order was entered, to inform its officers of this Court's order or otherwise provided direction to its law enforcement personnel regarding the Supplemental Order.

At an evidentiary hearing on April 11, 2002, *pro tem* Judge Sitterly again described to the Court the actions then underway to reduce the jail census. *See* Doc. 364, Clerk's Minutes.[3]

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

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

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

Doc. 319, pp. 3-4.

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

II. Only This Court Can Order Injunctive Relief Regarding The City Defendants' Violations Of The Rights Of Plaintiff Intervenors Under The Constitution, The

[3] In 2004, the Defendants again agreed, in Doc. 515 to "use all available population management initiatives (such as the Community Custody Program, pre-arrest diversion programs, the Population Management Review Team, and the resources of the Pre-Trial Services Office) to manage the population of the Metropolitan Detention Center." Doc. 515 pages 3-4.

ADA And The Rehabilitation Act That Were Alleged In The 1995 Complaint In Intervention.

In the Tenth Circuit, it has long been established that claims that fall within the scope of the complaint that initiated a class action lawsuit are to be pursued within that class action, even if the consent decree that settled the complaint does not provide any injunctive relief with respect to the specific claim. In *Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986), Judge Juan Burciaga entered a preliminary injunction prohibiting the New Mexico Corrections Department from reducing staffing levels in the state's prisons. Defendants had argued that no provision of the consent decrees previously entered in the case mandated a specific staffing level and that, accordingly, the court could not grant additional relief that had not been awarded at the time judgment was entered. Judge Burciaga nevertheless entered an injunction, stating, "It is clear that plaintiffs' remedy at law, coercive sanctions obtained through a civil contempt proceeding, will be inadequate to protect their constitutional rights." *Id.* at 527.

Two years later, in *Facteau v. Sullivan*, 843 F.2d 1318 (10th Cir. N.M. 1988), the Tenth Circuit held that claims for injunctive relief that "fall within the scope" of a class action case may *only* be litigated within the pending class action. After a series of consent decrees were adopted in the early 1980s settling the class action complaint regarding New Mexico's prison system, the district court in the *Duran* class action routinely dismissed individual lawsuits seeking injunctive relief with respect to New Mexico's prison conditions. After one such dismissal of an individual lawsuit by a class member seeking an injunction prohibiting certain practices that the Corrections Department had recently adopted regarding body cavity searches, the Tenth Circuit affirmed the dismissal of the plaintiff's lawsuit with a referral of it to the *Duran* special master. The Tenth Circuit explained, "If plaintiff's allegations fall within the scope of the Duran litigation, he will have his claim decided by the Duran district court; if plaintiff's

allegations fall outside the parameters of Duran, he may be transferred back to the original transferor court for reinstatement of his suit [].” *Facteau,* 843 F.2d at 1319-20.[4]

Three years later, in the context of *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974), the long-running class action regarding the Oklahoma prison system, the Tenth Circuit similarly explained, in *McNeil v. Guthrie*, 945 F.2d 1163 (10th Cir. 1991), “Class members may bring individual law suits only under two sets of circumstances. First, class members may bring individual actions for equitable relief when their claims are not being litigated within the boundaries of the class action . . . Second, class members may bring individual actions when they seek money damages.” *McNeil*, 945 F.2d at 1166 n. 4 (internal citations omitted). The *McNeil* court further explained that,

> Individual suits for injunctive and equitable relief from alleged unconstitutional prison conditions cannot be brought where there is an existing class action. To permit them would allow interference with the ongoing class action. *Long v. Collins*, 917 F.2d 3, 4-5 (5th Cir. 1990); *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982). Claims for equitable relief must be made through the class representative until the class action is over or the consent decree is modified. *Long*, 917 F.2d at 4-5.

Id. at 1165-1166.

In *Johnson v. City of Tulsa,* 489 F.3d 1089, 1110 (10th Cir. 2007), the court cited *McNeil*, stating, “[o]rdinarily, all matters relating to the class action must be handled by class counsel.” [5]

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[4]Before *Facteau*, other circuits had already reached the same result. *See Herron v. Beck*, 693 F.2d 125 (11th Cir. Ga. 1982); *Kemp v. Birmingham News Co.*, 608 F.2d 1049 (5th Cir.1979); *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir.1979); *Cotton v. Hutto*, 577 F.2d 453 (8th Cir.1978); *Wren v. Smith*, 410 F.2d 390 (5th Cir.1969)

[5]The Tenth Circuit has consistently applied *McNeil’s* rule that, where there is a pending class action, there cannot be an individual suit on matters related to the class action. *See Sensabaugh v. United States Dist. Ct. for the Dist. of Colo.*, 389 Fed. Appx. 784, 786 (D. Colo. 2010) (“When confronted with the complaint of a class member seeking equitable relief based on issues relating to the class action, a district court may dismiss the complaint without prejudice and instruct the plaintiff to cooperate with class counsel or intervene in the class action.”); *Ewing v. Wyandotte Cnty. Det. Ctr.*, 1994 U.S. App. LEXIS 9485, ** 3, 5-6, No. 93-3052, (10th Cir. May 2, 1994) (affirming dismissal of pro se prisoner’s suit regarding conditions of confinement and explaining, the “allegations were adequately represented in the class action brought by the inmates of the detention center, which was still under judicial supervision at the time plaintiff claims these events occurred”); *Vantienderen v. Salt Lake Cnty.*, 1993 U.S.

In three class actions, the Tenth Circuit has ruled that issues that (1) "fall within the scope" of a pending class action (*Facteau*), (2) "are . . . being litigated within the boundaries of the class action," (*McNeil)* and (3) "relating to the class action" (*Johnson)* may only be litigated by counsel for the class in the context of the on-going class action. The claims set out in Plaintiff Intervenors' instant motion meet all three of those standards. Therefore, *McClendon* is the only forum in which these claims can be heard.[6]

The City asserts that Plaintiff Intervenors' claims regarding the City's on-going violations of the ADA and § 504 of the Rehabilitation Act should be filed as a separate lawsuit. However, if a member of the sub class sued for injunctive relief regarding those issues, the assigned judge would be required to follow the procedure set out in *McNeil*, determining whether the issues were duplicative of *McClendon* and then, if duplicative, would have to forward the papers to class counsel. *See McNeil*, 945 F.2d at 1166.

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

App. LEXIS 29963, ** 2-3, No. 93-4054 (10th Cir. Nov. 17, 1993) (affirming dismissal of prisoner suit where plaintiff "sought to enforce relief in his favor comparable to that awarded to class members," and explaining "[h]e must first seek relief through class counsel" and that only after doing so, and if refused or determined to not be a member of the class, could he pursue his own claim and state an independent cause of action).

[6] In a class action against the Colorado prison system to remedy violations of the Fourteenth Amendment, the ADA and the Rehabilitation Act, the Colorado district court held in 2010 that *McNeil* governed the special master's handling of pro se petitions pursuant to a remedial plan. *Montez v. Ritter*, 2010 U.S. Dist. LEXIS 30055, ** 11-15, No. 92-cv-00870-JLK (D. Colo. March 23, 2010). There, many individual prisoners sought to either bring pro se motions for equitable remedies against the DOC, to enforce provisions that were part of an agreed upon remedial plan regarding violations of the ADA/§504, or to bring individual claims for violation of the ADA/§504. Under the remedial plan, and *McNeil*, the class members were barred from individually pursuing equitable or injunctive relief as it related to the remedial plan because they were represented by class counsel on those matters and so could only participate through class counsel. *Id.* *14. Claims for individual relief were limited by the terms of the remedial plan itself, and the court held that claims related to "compliance generally, or seeking to enforce equitable remedies and obligations owed under the Plan or Plan-related Stipulations . . . to the Montez class generally, *are for class counsel to pursue (or not) in accordance with counsel's legal and ethical obligations under the Plan and as officers of the Court.*"2010 U.S. Dist. LEXIS 30055, * 12 (emphasis added).

The City's current practices alleged herein violate *both* this Court's orders and the following provisions of the ADA and the Rehabilitation Act alleged in Plaintiff Intervenors' complaint in intervention: 1) unnecessarily subjecting Plaintiff Intervenors to arrest, incarceration and segregation from the community; 2) failing to reasonably accommodate sub class members with respect to the decisions made by law enforcement officials whether to issue citations to them or to arrest them and incarcerate them; 3) booking sub class members into jail even when it is apparent they need hospitalization; and 4) not making reasonable modifications to City policies and procedures to avoid discrimination against Plaintiff Intervenors on the basis of their disabilities. Specifically, Albuquerque police continue: a) targeting people with mental disabilities to be unlawfully stopped, searched, seized, and incarcerated in the absence of any reasonable suspicion that they are engaged in criminal activity; b) failing to reasonably accommodate the disabilities of sub class members in the course of what may be a lawful stop, search or seizure; and c) a pattern of discriminatory and unnecessary arrests and incarceration, causing sub class members to be institutionalized and segregated from the community due to their mental disabilities.

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

> Defendants, in the administration of the Albuquerque Police Department ... have violated Plaintiff Intervenors' rights under the ADA by: ... failing to establish an adequate system for identifying mental, behavioral and developmental problems of people arrested ...
> failing to develop for and provide to Plaintiff Intervenors necessary therapeutic placements and services; ...
> failing to provide Plaintiff Intervenors with services that are as effective as those provided to non-handicapped people . . .
> denying Plaintiff Intervenors programs, activities and services in the most integrated setting appropriate to their needs . . .

> failing to make reasonable modifications in programs, policies and procedures when necessary to avoid discrimination against Plaintiff Intervenors on the basis of disability . . .
> using methods of administration that have the effect of defeating or substantially impairing accomplishment of the disability integration objectives of the ADA.

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

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

The *Amended Complaint in Intervention*, (Doc. 150), alleged that City Defendants and their agents did not reasonably accommodate sub class members with respect to decisions made by law enforcement officials whether to issue citations to them or to arrest and incarcerate them. That remains true today. *See* Section I, *supra* at pp. 3-9.

Now, City Defendants are not merely failing to reasonably accommodate sub class members, but they are also intentionally discriminating again Plaintiff Intervenors due to their disabilities. The root cause of many inappropriate detentions and arrests of sub class members is the City Defendants' *de facto* policy of "sweeping the streets" of people who appear to have a mental disability by: 1) unlawfully initiating interactions with people who have, or who appear to have, a mental disability without reasonable suspicion of a crime, and 2) arresting people with a mental disability and taking them to jail for petty offenses, instead of issuing a citation; which is what they do with people who do not have a disability. APD officers routinely stop and question people who appear to be what law enforcement officials commonly refer to as "homeless mentally ill," and order them to move when they are standing or sitting in public places,

particularly downtown Albuquerque and near certain business establishments. Upon information and belief, the Mayor of Albuquerque has told business owners that he will reduce the numbers of "homeless mentally ill" people in the downtown area. Media accounts reported that, in 2015, the City assigned undercover police to investigate a "tent city" in downtown Albuquerque, then evicted all the occupants. *See* Gabrielle Burkhart, *ABQ officials to clear out homeless from 'Tent City'* KRQE, January 23, 2015. http://krqe.com/2015/01/23/abq-officials-to-clear-out-homeless-from-tent-city/.

APD officers commonly stop a person who appears to be "homeless mentally ill" for no lawful reason, then demand identification from him/her and search his/her person and backpack. Those unlawful stops, searches and seizures of members of the sub class, without reasonable suspicion of a crime, frequently lead to resistance by the person and inappropriate arrests and segregation of the person from the community.

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

including [B. A.], have a history of substance abuse or mental health problems." Alex Goldsmith, *Litterbug's jailstay nearly a week,* KRQE, May 2, 2014. http://krqe.com/2014/05/01/litterbugs-jail-stay-nearly-a-week/.

APD officers also commonly arrest and subject sub class members to segregation and institutionalization in jail, because the sub class member, or someone they know, is trying to get mental health treatment for them. On April 10, 2014 the United States Department of Justice (DOJ) issued a 46 page Letter of Findings (Findings Letter) setting forth the results of a multi-year investigation of use of excessive force by APD officers. The DOJ Findings Letter states:

> *One area where we believe the department can immediately begin leveraging the skills and training of the [Crisis Intervention] Team is in what officers call "welfare checks"—where someone has called 911 to ask officers to check on a person who may be at risk of harming himself or who seems to be in crisis. In the use-of-force reports we reviewed, far too many encounters that began as welfare checks ended in violence, and far too often the officers' use of force was unreasonable.*

Findings Letter, *United States v. City of Albuquerque*, Civil No. 1:14-cv-1025 RB/KK Doc. 1-1, p.34-35 (emphasis added).

APD's Standard Operating Procedure No. 3-12 is construed by police officers as mandating arrest when a person experiencing a mental health crisis clashes with a household member. For example, sub class member W. D.'s mother called APD and requested a Crisis Intervention Team ("CIT") officer to help take her son to the hospital, on the advice of mental health professionals. Rather than provide the requested assistance, APD sent a non-CIT officer who instead arrested the sub class member on a charge of "domestic violence."[7] The same

[7] Albuquerque's Independent Review Officer wrote an August 8, 2013 report regarding WD's mother's allegations that WD was mistreated by Albuquerque police. The report, which Plaintiff Intervenor's counsel has provided to the City's counsel and Judge Torgerson, included a finding that the arresting officer, "stated that [WD] did commit a criminal act and that he knew that if he booked [WD] on that criminal act he would be seen by a mental health professional in the jail and that some psychological evaluation or intervention could take place." Report at p. 5.

scenario happens with regularity, including on May 26, 2015, when another sub class member was jailed after her grandmother phoned APD for the same reasons. Upon information and belief, APD officers are actually trained to take people who appear to need mental health treatment to jail, because mental health care is likely to be provided to them while in jail, and because an arrest consumes less of a police officer's time than taking the person to the UNM mental health center, which might not admit them.

B. The City Defendants Subject Sub Class Members To Disparate Treatment And Their Failure To Reasonably Accommodate Sub class Members In The City's Policies And Practices Violates The ADA And The Rehabilitation Act.

Due to stigma and fear, law enforcement officers working for City Defendants subject Plaintiff Intervenors to disparate treatment. In 2003, a sub class member who had been jailed 50 times for minor offenses, D.P., shot and severely injured APD Sergeant Carol Oleksak. The mayor convened a Summit to "address the issues of mental illness and homelessness." *See* Doc. 1191-3, excerpts from PowerPoint presentation, "Coast to Coast" pp. 3-4.[8] Then, in 2005, two police officers were shot and killed when they went to the door of J.H., a man diagnosed with schizophrenia, in order to take him for a mental health evaluation. The shootings led many APD officers to have a very negative attitude toward people with mental disabilities. Since that time, City Defendants paid police officers to attend training provided by a private foundation reportedly financed by the family of another deceased police officer who was also shot. Officers recount that, during the events, they are cautioned about how "dangerous" people with mental disabilities can be to police officers.

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

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

> Officers frequently utilized excessive force against people with mental disabilities who were engaging in lawful activities or committing minor infractions, and training regarding interaction with persons with mental illness is deficient, Findings Letter, Civil No. 1:14-cv-1025 RB/KK Doc. 1-1, p. 2-3 and 15;
>
> Many encounters in which APD officers approached a person for the stated purpose of checking on their welfare ended in violence, and "far too often the officers' use of force was unreasonable", *Id.*, p. 34-35.

In the event that an Albuquerque police officer uses excessive force on a person, it is common for the person to be arrested and booked into the MDC on charges of "disorderly conduct," "assault on a police officer" and/or "resisting arrest." The DOJ's evidence not only shows that the City violates the Fourth Amendment, it also shows that the City Defendants violate Title II of the ADA and Section 504 of the Rehabilitation Act.

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

The ADA requires state and local governments and their agents to "administer services, progress, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. ' 35.130(d). The "most integrated setting," is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), 28 C.F.R. pt. 35 app. A. State and local governments and their agents are forbidden from "directly or through contractual or other arrangements utiliz[ing] ... methods of administration" that have the "effect" of subjecting individuals with disabilities to unnecessarily segregated services. 28 C.F.R. ' 35.130(b)(3).

In *L.C. by Zimring v. Olmstead*, 138 F.3d 893 (11th Cir. Ga. 1998), the Eleventh Circuit held that, "where, as here, the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate, the State has violated the core principle underlying the ADA's integration mandate." 138 F.3d at 897. The following year, the Supreme

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

Sub class members are being arrested by City police officers and segregated from the community for the purpose of coercing them into treatment; but the City is not offering those sub class members any community-based treatment. On June 1, 2016, Albuquerque's police chief wrote a letter to a City Councilor defending a City practice of police officers selling drugs to sub class members, then arresting them. The Chief wrote, "when subjects are arrested . . . they will be afforded both substance abuse and mental health treatment (if needed), which are both offered at the Metropolitan Detention Center." Exhibit 1, page 2. The City is not using its resources to pay for community-based mental health treatment for its residents. Instead, it pays police officers and COAST personnel to seek out people who appear to need treatment and then book

them into the MDC to receive needed treatment there. This explains why the overall census of the jail has declined by nearly 50% since 2014, but the number of people in MDC receiving mental health treatment has only declined by 15%. Nearly 50% of the people in the MDC today residents receive mental health treatment there. The unnecessary segregation of sub class members in the jail results from the City Defendants' political choices, including the choice to incarcerate Plaintiff Intervenors to get them treatment, instead of paying for community-based treatment.

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

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

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

28 C.F.R. § 35.130(b)(7).

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

In light of APD's custom and practice of arresting people in mental health crisis, and APD's pattern of using excessive force, including deadly force, against them, it is difficult to imagine a **less** reasonable accommodation of the needs of Plaintiff Intervenors than for the City to use APD employees as the City's sole system for responding to mental health crises. A behavioral health or health care organization, the City's Family and Community Services Department or the Albuquerque Fire Department could perform the "crisis response" or mental health "outreach" functions being performed by APD employees. But, irrationally, the City sends police to respond to mental health crises and to conduct "outreach" to connect to treatment programs people with mental disabilities who are not suspected of criminal activity.

Rather than paying for mental health professionals to respond to crises, or case managers to perform outreach, the City Defendants are choosing to continue to use the City's financial resources to operate within the APD a "Crisis Outreach and Support Team," called COAST. It is a unit of the City police department, not of a behavioral health services or social service agency. COAST's members are mental health professionals including a psychiatrist, who dress like, and work side by side with, police officers wearing firearms. See Doc. 1191-3, p 6. The mental health professionals are under the command of an APD lieutenant, and directed by APD, not a behavioral health or social service agency. COAST's activities are not law enforcement activities, but are essentially "case management" activities that are not usually performed by police. The crisis response, case management, and outreach functions performed by City police department employees are not police functions and the City's methods of administration discriminate against Plaintiff Intervenors. The City's choice to spend its funds to pay for police to respond to mental health crises, instead of paying for mental health professionals to provide services for sub class members, causes Plaintiff Intervenors to be subjected to unnecessary

incarceration, and segregation from the community, and other irreparable harms. The City's concomitant failure to finance community-based mental health services is a major reason why mental health crises often result in inappropriate arrests of members of the sub class by APD.

A media report stated that, in 2014, then-Defendant Ramon Rustin, the former jail administrator, agreed with his staff that the jail is the largest mental health provider in the state and that, if there were more community treatment programs, the jail population would decrease. http://kunm.org/post/county-jail-largest-mental-health-provider-nm#stream/0. Therefore, as in *Olmstead, supra,* the City should be ordered to modify its practices and develop a jail diversion plan of the sort they did not develop in 2001 and to redeploy some of its resources away from law enforcement and incarceration and into the provision of basic mental health services, such as a mobile crisis team that is not comprised of police department personnel and a crisis response facility that can receive sub class members in crisis, in lieu of the jail. Mental health professionals, not just APD, should be dispatched when people phone 911 due to a mental health crisis. The City Defendants do not reasonably accommodate Plaintiff Intervenors' disabilities.

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

City police discriminate against Plaintiff Intervenors when deciding whether, and how, to arrest them. Their policies, procedures and practices lead City employees to: 1) charge sub class members with crimes merely for manifesting symptoms of their mental disabilities, 2) arrest them under circumstances when people without disabilities would receive a citation; and 3) take them to jail, rather than to a hospital or mental health facility, when they obviously need treatment. Accordingly the Court should order the City Defendants to make modifications to APD's policies, procedures and training methods regarding investigations and arrests involving

people with mental disabilities in order to avoid unlawful discrimination against Plaintiff Intervenors on the basis of disability.

WHEREFORE, Plaintiff Intervenors respectfully request that this Court:

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

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

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

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

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

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

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

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

c. Prohibiting City law enforcement officers from seeking out people who have a mental

disability for the purposes of encouraging them to obtain treatment or for assessing their mental health status.

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

8. Order the Defendants to use mobile crisis teams comprised of mental health professionals, instead of police officers, to conduct "welfare checks" regarding people alleged to have a mental disability and to respond to mental health crises, including alleged threats of suicide or self-harm, and requiring the City to redistribute its funds to pay for a crisis response facility to reduce the unnecessary incarceration and segregation of sub class members.

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

10. Award the Plaintiff Intervenors their reasonable attorneys fees, expenses and costs for this motion and the necessary work related thereto.

Respectfully submitted,

/signed electronically
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CERTIFICATE OF SERVICE

I hereby certify that onAugust 2, 2015 I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Signed electronically
Peter Cubra