DISABILITY RIGHTS OREGON

DEPARTMENT OF JUSTICE AGEEMENTS TARGET POLICE USE OF FORCE AND MENTAL HEALTH SERVICES

In September 2004, then state Senator Avel Gordly sent a letter to the U.S. Department of Justice (USDOJ) asking it to open an investigation into possible civil rights violations of past and current patients at the Oregon State Hospital (OSH), including "serious overcrowding and understaffing." On June 14, 2006, the USDOJ informed Governor Kulongoski that it was initiating an investigation of conditions and practices at OSH, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 47 USC § 1997. CRIPA authorizes USDOJ to seek a remedy for a pattern and practice of conduct that violates the constitutional or federal statutory rights of residents of state facilities such as OSH.

While USDOJ was investigating, the state took a number of major steps to improve its mental health services including a legislative allocation of $9.3 million to improve the speed of discharge from OSH (and settle federal litigation brought on behalf of OSH patients by Disability Rights Oregon) as well as legislative approval of $458.1 million to replace OSH with two new state hospitals. The state also hired two nationally recognized consultants, a new OSH superintendent and a "special master" to oversee improvements at OSH.

In January 2008, USDOJ delivered its finding to the Governor. It found that Oregon was violating the civil rights of OSH residents because of:

- Inadequate protection from harm
- Failure to provide adequate mental health care
- Inappropriate use of seclusion and restraint
- Inadequate nursing care
- Inadequate discharge planning and placement in the most integrated setting

Subsequent negotiations have still not yielded a formal agreement. Oregon's position has been that it is undertaking good faith efforts to address the inadequate conditions at OSH and does not want federal court involvement. It also contended that USDOJ does not have authority to enforce a failure to place patients in the most integrated setting.

In 2009, on the tenth anniversary of the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), President Obama launched "The Year of Community Living" and directed federal agencies to vigorously enforce the civil rights of Americans with disabilities. The USDOJ responded by making enforcement of *Olmstead* a top priority. In 2010, it announced a national initiative to investigate ADA complaints and enforce the Olmstead "integration mandate" of the ADA.

In early 2011, USDOJ lawyers met with Oregon officials and community partners in a renewal of its investigation of whether Oregon was honoring the ADA right of OSH patients to a placement in the most integrated setting. In June, 2011, USDOJ also announced that it was opening an investigation into the use of force by the Portland Police Bureau (PPB) pursuant to 42 USC § 14141 which authorizes USDOJ to seek declaratory or equitable relief to remedy a pattern or practice of conduct by law enforcement that deprives individuals of their Constitutional or federal statutory rights. The latter investigation was to examine whether there was a pattern or practice of excessive force used by PPB officers, particularly against people living with mental illness.

The remainder of this article will summarize the terms of the settlement of the PPB excessive force investigation and the agreement arising from the *Olmstead* investigation. It should be noted that the final terms of the PPB settlement were presented to the public on November 8, 2012 and approved by the Portland City Council on November 14. The final terms of the *Olmstead* agreement were included in a letter to the state from USDOJ dated November 9, 2012. The contents of the agreements are certainly related in time but their terms also reveal a consistency in legal theory and policy objective.

City of Portland Settlement Agreement

The Settlement Agreement entered into between the USDOJ and the City of Portland and PPB spans 83 pages and contains over 100 individual points of agreement. Its stated purpose is "to ensure that encounters between police and persons with perceived or actual mental illness, or experiencing a mental health crisis, do not result in unnecessary or excessive force." It is divided into seven substantive areas of concern:

- Use of Force
- Training
- Community-Based Mental Health Services
- Crisis Intervention
- Officer Accountability
- Community Engagement and Oversight
- Enforcement

<u>Use of Force</u>

PPB has agreed to revise existing use of force policies in order to minimize the use of force against individuals in mental health crisis and direct such persons to appropriate mental health services if desired. This will include the increased use of disengagement and de-escalation techniques, used of specialized units and improved information-sharing. Use of tasers will be more limited. Use of force reporting and supervisory review of reports will be enhanced. Compliance audits related to use of force will be instituted.

Training

Within 180 days, PPB is to review data to determine if its training helps to effectively protect the constitutional rights of individuals perceived to have a mental illness and to assure public trust and safety. Training is to increase the use of role-playing scenarios and interactive exercises that illustrate the proper use of force, emphasize de-escalation techniques, include an officer's duty to procure medical care whenever a subject is injured during a force event, include alternatives to force such as disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, requesting specialized units, including officers and other professionals with mental health training, or delaying arrest, describe situations in which force could lead to potential civil or criminal liability, and encourage avoidance of profanity and insulting language. Supervisors are to receive training on appropriate oversight and planning.

Community-Based Mental Health Services

The Agreement makes reference to the USDOJ/State *Olmstead* agreement and Oregon's new Community Care Organizations (CCOs) that are tasked with administering the state's Medicaid funds for most public mental health services. The Agreement "expects" that local CCOs will establish "one or more drop-off center(s) for first responders and public walk-in centers for individuals with addictions and/or behavioral health service needs." Local CCOs are to immediately create addictions and mental health-focused subcommittees to pursue long-term improvements to the behavioral health system in seven specified areas, including the expansion of peer services.

Crisis Intervention

Within 60 days, PPB is to create an Addictions and Behavioral Health Unit (ABHU) which will oversee and coordinate a Crisis Intervention Team (C-I Team), Mobile Crisis Prevention Team (MCPT) and Service Coordination Team (SCT). PPB is to continue crisis intervention training for all officers but also create a C-I Team of 60-80 volunteer officers with enhanced training and responsibility for responding to crisis situations. The MCPT, which deploy cars with one officer and one mental health professional, shall be expanded from a single car for all of Portland to one car per precinct. The agreement also calls for changes in how calls to crisis lines are routed and triaged.

Officer Accountability

All administrative investigations of officer misconduct will need to be completed within 180 days. PPB is to revise its protocols for on-scene investigations following the use of lethal force. The City will retain its present Police Review Board with certain procedural and membership changes to enhance efficiency, transparency and effectiveness.

Community Engagement and Oversight

A new Community Oversight Advisory Board (COAB) shall be created which will independently assess the implementation of the Settlement Agreement, make recommendations and inform the public. It will have 15 members who are independent of the City or PPB and be chaired by a Compliance Officer and Community Liaison (COCL) who is to be "independent of PPB" and "responsive to the entire City Council, the public, and DOJ." The COCL is to conduct semi-annual outcome assessments of the City and PPB's implementation of the Settlement Agreement.

Enforcement

The Settlement Agreement is to be jointly filed with the US District Court. The parties will move the Court to conditionally dismiss the underlying Complaint with prejudice while retaining jurisdiction for enforcement purposes. It is anticipated that substantial compliance will be achieved by October 12, 2017.

State of Oregon Agreement

In *Olmstead v. L.C.*, the U.S. Supreme Court held that Title II of the ADA entitles individuals with disabilities the right to receive public services in the least segregated setting that is appropriate to their care needs as long as it does not require government to fundamentally alter its services. The USDOJ initiated an investigation of Oregon because of chronic overcrowding of its state hospitals and lack of capacity in community mental health services.

In an agreement that is as unique as Oregon's health care transformation process, USDOJ agreed to delay any legal enforcement action and work with the state "by embedding reform in the design of the State's health care system." The agreement calls for Oregon to collect statewide behavioral health data about services currently being provided in order to assess the nature of those services and the outcomes they achieve. A comprehensive list of "metrics" is attached to the agreement that spell out the data to be collected. Data collection requirements are to be placed in provider contracts, regulations and other guidances. The collected information shall be reviewed and evaluated by the parties to identify gaps in services and how those gaps can be filled. This process will continue through 2015. At that point, USDOJ will reassess whether Oregon is honoring the *Olmstead* rights of Oregonians.

Among the "Program Outcome Measures" to be quantified and assessed are 8 factors affecting the "ability to effectively manage behavioral health crises in a community setting" and the percentage of adults with severe and persistent mental illness who had a criminal justice event (jail, arrest, other interaction with law enforcement, etc.)" within the year. These factors demonstrate that the USDOJ will be assessing how well both Portland and

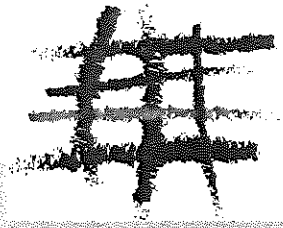
other Oregon communities address the interaction of law enforcement and individuals with behavioral health needs.

Although this agreement recognizes that USDOJ has not completed its investigation of conditions at OSH, it mentions that the parties are hopeful that the work set out in the Agreement will "aid Oregon in providing treatment in the setting that is most integrated and appropriate." Such an achievement will require not only an adequate array of mental health services, housing, employment opportunities and social supports, but also a safe and humane approach to community crisis management.

Conclusion

The USDOJ settlements offer a rare opportunity to adjust Portland's relationship with its police, improve public safety, and reform our plainly inadequate mental health services. The Portland investigation, of course, responded to community concerns about incidents of violence involving police. But the USDOJ has also been engaged in a lengthy study and critique of public mental health services in all of Oregon. It started with unsafe conditions in OSH and determined that one cause of overcrowding was the lack of community resources for discharge. In Portland, lack of mental health resources means that police are left as the first responders to a mental health crisis which can only be handed off to either jail or an emergency room. With three investigations, a Settlement Agreement, an agreement to collect data and one new state hospital, Oregon is poised for a more humane future.

Bob Joondeph
Executive Director
Disability Rights Oregon



DISABILITY RIGHTS OREGON

Legal Standards for Commitment in Oregon

O'Connor v. Donaldson, (1975)

- A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement.
- There is no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

O'Connor v. Donaldson, (1975)

- The mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.
- Incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.
- Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Addington v. Texas (1979)

- *Held* : A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital.

Addington v. Texas (1979)

- The ***individual's liberty interest*** in the outcome of a civil commitment proceeding must be weighed against:
- The ***state's interests*** in
  - providing care to its citizens who are unable, because of emotional disorders, to care for themselves and in
  - protecting the community from the dangerous tendencies of some who are mentally ill,
- Due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

Addington v. Texas (1979)

- This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.
- It is indisputable that involuntary commitment to a mental hospital ... can engender adverse social consequences to the individual.

State of Oregon v. Olsen (2006)

- Civil commitment requires the state's evidence to show that a person's mental disorder would cause him or her to engage in behavior that is **likely to result** in physical harm to himself or herself **in the near term**.

State of Oregon v. Olsen (2006)

- Although the law does not require that a threat of harm be immediate, it does require that the threat be real and exist in the near future.
- The state is required to present "clear and convincing evidence that a person's mental disorder has resulted in harm or created situations likely to result in harm.

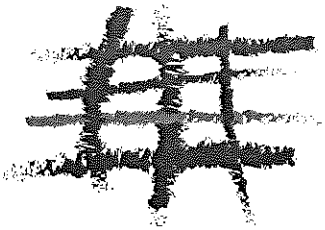
State of Oregon v. Olsen (2006)

A person can be deemed dangerous to self if he or she has established a pattern in the past of taking certain actions that lead to self-destructive conduct, and then he or she begins to follow the pattern again.

- Apprehensions, speculations and conjecture are not sufficient to prove a need for mental commitment.

State of Oregon v. Olsen (2006)

- Delusional or eccentric behavior--even behavior that may be inherently risky--is not necessarily sufficient to warrant commitment
- Civil commitment is not intended to be used as a "paternalistic vehicle" to "save people from themselves



DISABILITY RIGHTS OREGON

February 21, 2013

Rep. Jeff Barker, Chair
House Judiciary Committee

HB 2594

Disability Rights Oregon urges this committee not to pass HB 2594 in its present form.

Oregon's civil commitment laws have existed in essentially their present form since 1973. During the intervening 40 years, small changes have been made to the law including, in 1987, an outpatient commitment statute and, in 1993, a commitment diversion statute.

From a legal standpoint, civil commitment laws must balance individual liberty interests against the interests of government to protect and assist its citizens. Lawmakers must also consider how those laws affect the overall array of state services so that individuals are not forced into overly restrictive treatment environments.

From a treatment standpoint, civil commitment must balance the need and likely success of involuntary treatment against the trauma associated with forced interventions and the availability of ongoing treatment and supports.

From a financial standpoint, state and local officials must balance the use of limited resources for inpatient care, outpatient supports and preventative care.

Oregon stakeholders and policy makers have struggled with these various factors for years and their thinking is embodies in a series of task force and work group reports. It is worthy to note that none of those reports, in my review, recommend the changes to Oregon's civil commitment process that are set out in HB 2594.

One recent report that is available on the Addictions and Mental Health Division's website, entitled "Oregon's Olmstead Plan" sets out how the state plans to decrease it's use of state hospital resources. Outpatient commitment is not one of the options mentioned. See: http://www.oregon.gov/oha/amh/docs/olmstead-plan2011.pdf

There is no doubt that HB 2594 is an attempt to help individuals with severe and persistent mental illness. Years of recommendations and planning by Oregon policy makers, system stakeholders and legal advocates do not support that approach.

610 SW Broadway, Suite 200 / Portland, OR 97205
Voice: 503-243-2081 or 1-800-452-1694 / Fax: 503-243-1738 / **www.droregon.org**