



DISABILITY LAW CENTER

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To: Anchorage Assembly Member Meg Zaletel
From: Disability Law Center of Alaska
Date: 7/22/20
Re: Disability Law Center of Alaska analysis of Anchorage Intervention 2020 proposal

Dear Assembly Member Zaletel:

You have asked the Disability Law Center of Alaska to review the legality of the proposed Anchorage Intervention 2020, a plan to address issues regarding homelessness in Anchorage, Alaska. As applied to people with disabilities, the Anchorage Intervention 2020 proposal would be illegal, especially under the Americans with Disabilities Act.

Anchorage Intervention 2020's basic idea appears to be changing the way petty crimes by people who are homeless are handled. Specifically, Anchorage Intervention 2020 proposes to:

Arrest those engaged in lawless behaviors such as public intoxication, trespassing, harassment, petty theft, indecent exposure or other crimes being committed. Eliminate cash fines, replacing these with sentences that include individual intake assessments.

Then, the proposal would subject people in the criminal justice system to "sentencing diversion into inpatient lock down programs":

The assessment will determine if there are mental health issues including drug and/or alcohol abuse problems. These will be addressed with sentencing diversion into inpatient lock down programs: first offence for 30 days, second for 90 days, third for 180 days and thereafter until resolved at the discretion of the judge.

These inpatient lock down programs would be primarily at the Palmer Correctional Center, which the proposal contemplates would be purchased by the Alaska Mental Health Trust. As to what facility Anchorage Intervention 2020 proposes to obtain:

We need a facility that can house these individuals who everyday are contributing to the problems. The Palmer Correctional Facility was built by the State of Alaska and is designed for 900 people and it sits empty right now and has for several years. It was equipped with everything down to the dishes and sheets. The estimate of the homeless population in Anchorage is about 1100 to 1500. This would resolve the housing and program location issue.

Prior to it being abandoned it had one of the best programs in corrections for drug and alcohol addicts.

Anchorage Intervention 2020 proposes that the Alaska Mental Health Trust acquire this facility for the Municipality:

Alaska has the Mental Health Trust that was created in 1956 before statehood by the federal government to address mental health issues. It initially provided 1,000,000 acres of land including mineral rights, oil/gas rights, surface estate and all other rights that run with the land. From this endowment of public lands, the trust was charged with the responsibility to solve the problem. After statehood, the trust was looted by state and local governments through the reallocation of its trust lands to other purposes. A lawsuit was filed on behalf of the mentally ill and the Alaska Supreme Court ruled in favor of these individuals and required the state pay \$200,000,000 in damages and reestablish the majority of the land base. This initial cash settlement since the 1980s has grown to over \$500,000,000 that is managed by the Alaska Permanent Fund. Now with a half a billion dollars in the bank about \$50,000,000 a year in revenue and over 750,000,000 acres of land much could be done. It is time for the State to either outright transfer this facility to the trust in cooperation with the city of Anchorage or trade some trust land for this facility. This would create the space for the biggest rehabilitation center in Alaska.

The fact that most of the people at the “facility than can house these individuals who everyday are contributing to the problems” would be people with disabilities is shown by two things. First, only people who have “mental health issues including drug and/or alcohol problems” would be addressed “with sentencing diversion into inpatient lock down programs.” Second, by expecting that the Mental Health Trust would be buying or exchanging land for the Palmer Correctional Center, the proponents are anticipating that most of the people incarcerated there would be Trust beneficiaries, that is, people with disabilities.

This raises several significant legal problems.

Direct disability discrimination

Among other things, it would be direct discrimination, contrary to the Americans with Disabilities Act (ADA), against people who are disabled (with “mental health issues, including drug and/or alcohol abuse problems”), with respect to public services.

In 1990, Congress passed the ADA to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101 (b)(1). Congress found that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” *Id.* § 12101(a)(2). It specifically acknowledged that such discrimination “persists in such critical areas as . . . institutionalization” and “health services.” *Id.* § 12101 (a)(3). Congress then found that “individuals with disabilities continually encounter various forms of discrimination, including

outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . segregation, and relegation to lesser services.” *Id.* § 12101(a)(5).

Title II of the ADA prohibits discrimination by public entities. It establishes that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132

Here, Anchorage residents with disabilities would be sentenced to receiving public services in a place that is “lock[ed] down” and to which they have been sentenced for crimes, specifically because they are people with “mental health issues, including drug and/or alcohol abuse problems.”

This would be direct disability discrimination as it would segregate and institutionalize those with disabilities from the rest of the population.

Olmstead violation

It would also be contrary to the Disabilities Act’s integration mandate, 28 C.F.R. 35.130(d).¹ The Supreme Court interpreted Title II in the landmark case *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). It first noted that “Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a ‘form of discrimination.’” 527 U.S. at 600. The Court then reasoned that “unjustified institutional isolation of persons with disabilities is a form of discrimination [that] reflects two evident judgments.” First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. *Id.* at 600–01.

The decision finally addressed a long standing practice of segregating people with disabilities and legally established that that people with mental disabilities have the right to live in the community: “Unjustified isolation, we hold, is properly regarded as *discrimination based on disability*.”) (emphasis added). *Olmstead v. L.C.*, 527 U.S. at 597.

Sentencing people to treatment at Palmer Correctional Center would deny individuals treatment that ought to be available in Anchorage, available at a place which is not a jail, and, for that matter, available at a place that is closer to where they live than 10 miles beyond Palmer. Under the integration mandate, as interpreted in *Olmstead v. L.C.*, 527 U.S. at 592,

The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998).

Being confined to prison with your peers with disabilities as the place where you get treatment is impermissible under *Olmstead*.

Settings rule violation

For several years, Alaska has been trying to conform its systems of care for people served under a home-and-community-based services waiver to a federal “settings rule,” see 42 C.F.R. §§ 441.301(2) and (4). Under this rule, a person with disabilities should be able to choose the setting through which waiver services are provided, and the settings are to be integrated into the community, with an opportunity for individuals to engage in community life. An acceptable setting under this rule ensures an individual’s freedom from coercion and restraint.

Putting someone in prison so the person can get services would be a flagrant violation of the HCBS services settings rule.

A potential Medicaid violation

Even if the Trust purchased the Palmer Correctional Center and turned it over to the Municipality, there would still be questions about how services at the treatment center would be funded. Most health-related services for Alaskans, including many of the services currently provided for people in Anchorage who are homeless, are funded to some extent by Medicaid. But Medicaid services are not available for people who are in jails. See 7 AAC 100.068.

People not competent to stand trial

Beyond that, last week the Alaska Court of Appeals ruled that holding someone in jail who has been found not to be competent to stand trial, for months at a time, violates substantive due process. *J.K. v. State*, Op. No. 2670 (Alaska App., July 17, 2020). The reason Mr. J.K. could not get competency restoration services was that there was not sufficient capacity at API to treat him. It would be safe to predict that among the many people who would be charged with trespassing and other relatively small crimes under the Anchorage Intervention 2020 proposal would be people who cannot competently stand trial for these offenses. What happens to them? API does not have space for them. Jails, presumably including the Palmer Correctional Center under Anchorage Intervention 2020, are constitutionally barred under *J.K.* and other cases from holding them for prolonged periods.

Misuse of available mental health resources

We cannot speak for the Mental Health Trust, but supporting community mental health treatment, as opposed to “inpatient lock down programs,” would appear to be the Trust’s priority. The proponents do not claim to have received the Trust’s approval for purchasing the Palmer Correctional Center. Failure to receive that approval would be a fatal flaw in the proposal.

Contradiction of the idea of mental health court

The whole idea of mental health court, created for Anchorage in 1998, is to keep people out of jail and get them into community treatment. Putting people with mental health problems in jail, even as a matter of providing services there, is inconsistent with the pattern of providing services in the community that the courts have been promoting for many years.