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April 26, 2021

Vermont Department of Public Safety
Via Email to policing.feedback@vermont.gov

Re: Disability Rights Vermont Suggestions for Guidelines for Law Enforcement Responding to People Experiencing (or Perceived to be Experiencing) Mental Impairment

Dear Vermont Department of Public Safety,

On behalf of Disability Rights Vermont, the federally authorized disability Protection and Advocacy System in Vermont pursuant to 42 U.S.C. 10801 et seq., and the Mental Health Care Ombudsman for the State of Vermont pursuant to 18 V.S.A. §7259, I thank you for the opportunity to comment on your draft Use of Force policy and specifically the section on guidelines for law enforcement working with people with known or perceived mental impairments. This is an important issue for people with disabilities as it is widely acknowledged that people experiencing mental health crisis, especially untreated mental illness, are disproportionately more likely to be killed by law enforcement. See:

https://www.clasp.org/sites/default/files/publications/2021/04/Youth%20Mobile%20Response%20Services_0.pdf

DRVT's comments are based both on the direct experience relayed to us from our clients/constituents who have themselves had interactions with law enforcement officers during episodes of mental health impairment as well as on our experience investigating, advocating and litigating related issues.

An initial concern with the current draft is that it is not clear that these guidelines for interacting with people with mental impairments are employed when an officer has reason to suspect a mental health or other medical condition is impacting an individual's behavior. The language of the current draft policy is not clear that these guidelines

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Email at info@DisabilityRightsVT.org,

On the web: www.disabilityrightsvt.org

should be used when an officer suspects mental health is at issue as opposed to just when the officer knows. It appears that the Department intends for the guidelines to apply in situations where officers are “responding to people experiencing (or perceived to be experiencing) mental impairment.” Karen Gennette email 4/13/21. DRVT suggests that having the policy and guidance apply to situations where an officer suspects mental impairment is a factor should be clear and the policy language should be augmented to emphasize that certainty about an individual’s mental health status is NOT the only triggering event to implement this important policy.

DRVT also suggests that more emphasis be made in the proposed *Use of Force Policy and the Appendix* on state and federal law requiring consideration and application of reasonable accommodations for people with disabilities when interacting with law enforcement officers, including uses of force. Both Title II of the Americans with Disabilities Act and the Vermont Fair Housing and Public Accommodations Act require government entities, including law enforcement, to provide reasonable accommodations to people with disabilities. 42 U.S.C. §§ 12131-34; 9 V.S.A. § 4502(5). Courts have interpreted this to apply to law enforcement interactions as well. See *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev’d in part, cert. dismissed in part sub nom. Sheehan*, 135 S.Ct. 1765 (2015) (applying the Americans with Disabilities Act to police use of force against a person with a psychiatric disability); See also *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) (“police officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee’s disability”); and See *Brunette v. City of Burlington, Vermont*, No. 2:15-CV-00061, 2018 WL 4146598, at *32 (D. Vt. Aug. 30, 2018) (holding that even though the deceased “charged” the officer with a four-foot long pointed shovel, the officers were still required “to reasonably accommodate the person’s disability in the course of investigation or arrest”); *Williams v. City of New York*, 121 F. Supp. 3d 354, 368 (S.D.N.Y. 2015) (“The only reasonable interpretation of Title II is that law enforcement officers who are acting in an investigative or custodial capacity are performing ‘services, programs, or activities’ within the scope of Title II”); *Felix v. City of New York*, No. 16-CV-5845 (AJN), 2020 WL 6048153, at *4 (S.D.N.Y. Oct. 13, 2020) (“The parties agree that the ADA requires police departments to make reasonable accommodations for disabled suspects.”).

Reasonable accommodations in the context of use of force are modifications to normal practices and procedures that take into account the potential to avoid or minimize the use of force if law enforcement officers respond to a person’s disability with knowledge of best practices and increased efforts to avoid harm to the individual

with the disability. “[T]he reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case.” *Williams v. City of NY*, 121 F. Supp. 3d at 365 (S.D.N.Y. 2015). What is reasonable in a given situation is based in large part on the circumstances. *Bahl v. Cty. of Ramsey*, 695 F.3d 778, 784-85 (8th Cir. 2012). Courts have found that reasonable accommodations could include respecting the individual’s need for personal space to be calm, i.e. a “comfort zone”, engaging in non-threatening communications, providing space and time to avoid uses of force, and collaborating with mental health professionals and peer supports. *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1233 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom. City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015) (denying summary judgement for the city because reasonable accommodations may have been available); *Brunette v. City of Burlington, Vermont*, No. 2:15-CV-00061, 2018 WL 4146598, at *34 (D. Vt. Aug. 30, 2018).

In light of the importance of emphasizing the need for reasonable accommodations in specific law enforcement interactions noted above, DRVT suggests the Guidelines should include specific elements and examples of reasonable accommodations relevant in use of force situations. These elements could include implementing and/or calling in other professionals to offer support and understanding, creating more personal space and allowing more time than usual to deescalate, prohibiting use of CEWs (Conducted Energy Weapon – e.g. Tasers), OC spray and metal handcuffs in favor of non-pain-compliance-based uses of force like those used in hospital settings, and soft restraints rather than hard restraints.

DRVT also suggests that the *Policy and Appendix* acknowledge that law enforcement is often not the optimal entity to respond to a situation involving a person perceived to be experiencing a mental health crisis. The capacity for law enforcement officers to avoid uses of force in large part depends on their ability to avoid unnecessary responses to people with disability-based needs. To respond effectively and appropriately to a person with disability-based behaviors or communication obstacles manifesting from a mental health condition, those officers must be able to rely on a system of community resources. These resources include mental health professionals, peer support specialists, healthcare professionals, and human services providers. Utilization of these resources involves understanding the system of care and the roles of different providers and the ability to effectively communicate and work with them. DRVT suggests that the *Policy or Appendix* should include requirements for officers to regularly meet with and learn from other service providers in their catchment areas who may be relevant when

responding to people with known or perceived mental health conditions. Those service providers should be specifically enumerated in the Guidelines, with room for additional resources/entities to be added.

DRVT notes that having a mental health professional embedded with officers, but without a robust alternative to law enforcement involvement, can result in missing the goals of increased community safety and protection for all. A recent report published by the Center for Law and Social Policy found that Mobile Response Units that do not include law enforcement officers are better able to serve people and the community in response to mental health crises than those with law enforcement officers or embedded in the 911 response system. https://www.clasp.org/sites/default/files/publications/2021/04/Youth%20Mobile%20Response%20Services_0.pdf. DRVT considers the *Policy and Appendix* an appropriate place, among many, to emphasize the critical need for Vermont to have a robust community mental health system.¹ DRVT encourages the Department to stress the need for developing appropriate emergency response systems for people experiencing a mental health crisis, such as mobile crisis units, as well as supports for prevention and care after a crisis. The primary role of law enforcement should be to understand the system of care and effectively collaborate with and utilize that system of care.

DRVT has investigated situations where mental health professionals were involved with law enforcement officers at a scene but, for various reasons, were not effectively utilized or consulted in order to avoid or mitigate uses of force. Providing the capacity for a therapeutic response to disability-related behaviors is crucial, as is training of officers on how to effectively obtain and rely on those services. For example, our experience demonstrates that when responding to non-exigent situations, such as welfare checks, reports of odd but not immediately threatening behavior, or executing non-emergency arrest warrants on individuals with mental health conditions, adequate planning before responding to a scene can be the difference between traumatizing, potentially deadly, uses of force and safe, effective interactions. Officers aware of possible mental health issues involved in a situation must have access to community resources to support a non-violent, therapeutic response, and plan accordingly so they can provide necessary accommodations to avoid uses of force when reasonable.

DRVT agrees that improved training on the many issues relevant to appropriate response to people with known or perceived mental health conditions is needed and will

¹ For an investigation into Vermont's current mental health system of care needs, see <https://disabilityrightsvt.org/wp-content/uploads/2020/06/DRVT-Olmstead-Report.pdf>
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have a positive impact on reaching the goals of protecting the public and avoiding unnecessary uses of force against persons with disabilities. Adequate training also protects the government from potential liability. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (discussing § 1983 claims for failure to train). Title II of the ADA also requires adequate training on how to work with people with disabilities. *See Gohier v. Enright*, 186 F.3d 1216, 1222 (10th Cir. 1999) (observing that plaintiff should have argued “that Title II required [the municipality] to better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability”); *Felix v. City of New York*, 344 F. Supp. 3d 644, 666 (S.D.N.Y. 2018) (“Plaintiffs have plausibly alleged that the City failed to train officers with respect to the treatment of individuals with mental illness, including but not limited to implementing Crisis Intervention Training, backup calls, and similar policies”); *Buben v. City of Lone Tree*, No. 08-CV-00127-WYD-MEH, 2010 WL 3894185, at *12 (D. Colo. Sept. 30, 2010) (denying the city's motion for summary judgment on failure-to-train because “the alleged non-compliance with the training requirements of the ADA ... occurred [] when the Defendant policymakers failed to institute policies to accommodate disabled individuals such as Plaintiff by giving the officers the tools and resources to handle the situation peacefully”).

Training that includes people with mental health conditions, and disabilities unrelated to mental health, who have experienced good and bad experiences with law enforcement officers, is key to successful training. Training that identifies when and how to put non-law enforcement resources first when responding to a community request for assistance, and provides confidence that those non-law enforcement officer responses will be available and effective, is also crucial. DRVT and others in Vermont’s community of people interested in the rights of people with disabilities can provide on-going support to DPS in both policy and training development, and we encourage DPS to actively seek that continuing collaboration as well as including this collaboration as a requirement in the Policy and/or Addendum.

Thank you for your consideration of these comments. Please contact me if you have any questions or would like additional information.

Sincerely,
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