UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN GREENE; GIOVANNA SANCHEZ-ESQUIVEL; SARAH ARVIO; LISA COLLINS; ORITSEWEYIMI OMOANUKHE AYU; and NEIL AMITABH, individually and on behalf of all others similarly situated, and COMMUNITY ACCESS, INC.; NATIONAL ALLIANCE ON MENTAL ILLNESS OF NEW YORK CITY, INC.; CORRECT CRISIS INTERVENTION TODAY – NYC; and VOICES OF COMMUNITY ACTIVISTS AND LEADERS NEW YORK,

Plaintiffs,

- against -

CITY OF NEW YORK; ERIC ADAMS; BILL DE BLASIO; EDWARD A. CABAN; KEECHANT L. SEWELL; DERMOT F. SHEA; NYPD POLICE OFFICER MARTIN HABER; NYPD POLICE SERGEANT CARRKU GBAIN, NYPD POLICE OFFICER VIKRAM PRASAD; NYPD POLICE OFFICER ANDRE DAWKINS; NYPD POLICE OFFICER TYRONE FISHER; NYPD POLICE OFFICER DEVIENDRA RAMAYYA; NYPD POLICE OFFICER JULIAN TORRES; NYPD OFFICER APRIL SANCHEZ; NYPD POLICE OFFICER GABRIELE MORRONE; NYPD OFFICER JOHN FERRARA; NYPD POLICE OFFICER MARYCATHERINE NASHLENAS; and NYPD OFFICERS JOHN and JANE DOES # 1-40,

Defendants.

21-CV-05762 (LAP)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

This case involves claims that Defendant, the City of New York ("the City"), administers its emergency response program in a manner that discriminates against people with mental disabilities, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et. seq.* ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). *See* Pl.'s Third Am. Compl. ("TAC") ¶¶ 427-73, ECF No. 212.

As alleged, the City's unified emergency response program is operated via its 911 system and responds to requests for police, fire, or emergency medical services. *See Id.* ¶¶ 67, 70-71. Everyone in the City of New York is eligible to utilize the City's emergency response program. *See Id.* ¶ 69. Plaintiffs contend that, when the City receives a request for an emergency response for a physical health emergency, the City sends a health professional who is capable of providing a health response, including on-site health assessments and stabilization, as well as making critical determinations regarding the need for further treatment. *Id.* ¶¶ 440, 461. But for the vast majority of requests for an emergency response for a mental health emergency, the City sends the New York Police Department ("NYPD") as the first responders. *Id.* ¶¶ 441, 462. It does so even though NYPD officers are not qualified health professionals capable of providing on-site health assessments and stabilization or critical determinations regarding the need for further treatment. *Id.* ¶¶ 442, 463.

Plaintiffs suggest that the City could provide people with mental disabilities an equal opportunity to benefit from the City's emergency system, among others, by reasonably modifying its Behavioral Health Emergency Assistance Response Division ("B-HEARD")—which offers non-police response to mental health emergencies—to be more widely available. *See Id.* ¶¶ 100-101, 446-47, 467-68. Instead, Plaintiffs allege, the City continues to rely on NYPD officers who,

as demonstrated by the experiences of the individual named Plaintiffs often provide harmful and ineffective responses to mental health emergencies. *See e.g.*, *id.* ¶¶ 170-171 (Mr. Greene suffered bruising and abrasions to his chest, arms, and head), 190-191 (NYPD officers handcuffed and dragged Ms. Sanchez-Esquivel, resulting in severe bruises, back and shoulder pain, PTSD, and emotional distress), 222-225 (Ms. Arvio had to stay in bed for over two months after she suffered, among other physical and emotional harms, a traumatic leg wound that became infected). Plaintiffs contend that the City's reliance on police officers as the default responders to mental health emergencies denies people with mental disabilities an equal opportunity to benefit from the City's emergency response program, in violation of Title II of ADA and Section 504.[1]

The federal government "plays a central role . . . in enforcing" the ADA, and furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *See* 42 U.S.C. §§ 12101(b)(2), (3), 12133–12134. Congress charged the Department of Justice with implementing Title II of the ADA by promulgating regulations, issuing technical assistance, and bringing suits in federal court to enforce the statute. *See* 42 U.S.C. §§ 12206, 12133–12134. Pursuant to its authority, the Department conducts enforcement around the country to remedy violations of Title II of the ADA where people with disabilities are excluded from participation in, denied the benefits of, or subjected to discrimination in the services, programs, and activities of public entities. This includes ensuring that public entities' emergency response services do not discriminate against

[1] Before this Court is Defendants' Motion to Dismiss, which asserts in part that Plaintiffs fail to allege a violation of Title II and Section 504. *See* Defs.' Mot. Dismiss, 19-22, ECF No. 229. The United States files this statement to assist the Court in evaluating a narrow set of issues raised by Defendants involving the Title II and Section 504 claims and takes no position on any other issue before this Court. Because the Court considers the ADA and Rehabilitation Act claims together, this Statement focuses on Title II of the ADA but applies to both claims. Opinion & Order on Defs.' Mot. Dismiss, 28, ECF No. 193 (citing *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016)).

people with disabilities. *See Investigation of the City of Minneapolis and the Minneapolis Police Department*, U.S. DEP'T OF JUSTICE (June 16, 2023) https://perma.cc/STU8-HQ3J, at 57 (finding that people with behavioral health disabilities are deprived of an equal opportunity to benefit from a city's emergency response services in violation of the ADA where the city relies primarily on police to respond to behavioral health-related calls for emergency service even when they do not require a police response, and that those responses are often harmful and ineffective); *Investigation of the Louisville Metro Police Department and Louisville Metro Government*, U.S. DEP'T OF JUSTICE (March 8, 2023) https://perma.cc/W9CA-2BNR, at 59–60 (same); *Investigation of the City of Phoenix and the Phoenix Police Department*, U.S. Dep't of Justice (June 13, 2024) https://perma.cc/E7BJ-57RH, at 87-95 (same).

The United States therefore has a strong interest in the proper interpretation of Title II in this context. Accordingly, as the Court considers Defendants' dispositive motion and Plaintiffs' response thereto, the United States respectfully submits this Statement of Interest under the Attorney General's authority "to attend to the interests of the United States" in any case pending in federal court, 28 U.S.C. § 517, to explain the legal framework of the ADA as applied to emergency response services.

LEGAL BACKGROUND

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It found that "discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem" which persists in several critical areas, including access to public services. 42 U.S.C. § 12101(a)(2), (3). Such discrimination takes several forms, including "outright intentional exclusion," "overprotective rules and policies," failure to make

modifications to existing practices, and "relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a). To combat these varied forms of exclusion, Congress broadly prohibited discrimination against individuals with disabilities by public entities. Title II provides that:

> [N]o 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.

As directed by Congress, the Attorney General issued regulations implementing Title II that are based on regulations issued under Section 504. *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Exec. Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. Of particular relevance to this case, the Title II regulations prohibit public entities, in providing any aid, benefit, or service, from denying people with disabilities an equal opportunity to participate, "obtain the same result," or "gain the same benefit" as people without disabilities. 28 C.F.R. §§ 35.130(b)(1)(i)–(iii). In addition, public entities may not utilize "methods of administration that . . . defeat[] or substantially impair[] accomplishment" of the program's objectives with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(ii). Further, public entities have an affirmative obligation to make "reasonable modifications in policies, practices, or procedures" when 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). "Fundamental alteration" is an affirmative defense, which the defendant bears the burden of establishing. *See Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 657 (S.D.N.Y. 2013); *Am. Council of Blind of New York, Inc. v. City of New York*, 495 F. Supp. 3d 211, 233 (S.D.N.Y. 2020).

PROCEDURAL AND FACTUAL BACKGROUND

This case challenges the City's unified emergency response program, alleging that it almost exclusively deploys the NYPD to respond to mental health emergencies, thereby depriving people with mental disabilities of equal opportunity to benefit from the City's emergency response program. This claim and the alleged facts supporting it have been clarified in Plaintiffs' Third Amended Complaint ("TAC"), ECF No. 212, following the Court's Order & Opinion on Defendants' Motion to Dismiss ("Dismissal Order"), ECF No. 193.

In the Second Amended Complaint at issue in the Court's Dismissal Order, Plaintiffs appeared to challenge the City's services for involuntarily transporting people to hospitals during psychiatric emergencies pursuant to N.Y. Mental Hyg. Law ("MHL") § 9.41, as implemented by the NYPD's Emotionally Disturbed Person Policy and the City's Involuntary Removal Policy. *See* Dismissal Order 30. As such, the Court found that "Plaintiffs cannot claim they were denied a service, because the program they challenge provides a service—transport to a hospital for mental health care—exclusively to the mentally disabled." *Id.*

Plaintiffs' TAC clarifies that Plaintiffs' ADA and Section 504 claims do not challenge the City's mental health transport provided under MHL § 9.41—which constitutes one narrow function within the broader emergency response program—nor the NYPD's authority to take persons into custody as part of this service. *See* TAC ¶¶ 4, 8-9. Instead, Plaintiffs' claim is that the City denies people with mental disabilities an equal opportunity to benefit from its emergency response program by defaulting unnecessarily to a police-led response—which New York law does not require[2]—to the one type of health emergency predominantly experienced by people with

[2] While MHL § 9.41 specifies the authority granted to police when responding to mental health crises, it does not state police *must* respond, nor that they are the only ones who can respond. *See*

mental disabilities.[3] *Id*. In contrast, the general population generally receives a health-led response to all other health-related emergencies. *Id*. ¶¶ 2-3.

To support their claim, Plaintiffs allege facts regarding the purpose, organization, operation, and unified nature of the City's emergency response program, *see id.* ¶¶ 67, 71-74, 80, 82, 444, 465, as well as evidence of how it discriminates against people with mental disabilities, *see e.g.*, *id*. ¶¶ 176, 191, 290; *see also* ¶¶ 440-42, 460-63. According to the TAC, the purpose of the system is "providing timely, safe and effective emergency response services." TAC ¶¶ 444, 465. The City's unified emergency response program is operated via its 911 system and responds to requests for police, fire, or emergency medical services. *See Id*. ¶¶ 67, 70-71. Each 911 call is answered by one of the NYPD's Police Communication Technicians (or "police call-takers"). *Id.* ¶ 71. Depending on the type of emergency, police call-takers may dispatch Emergency Medical Services (EMS), other fire department staff, or NYPD police officers. *Id*. In limited instances, eligible 911 calls can be routed to B-HEARD, which provides a non-police response to mental health emergencies. *Id.* ¶ 100-3. As alleged, mental health emergencies typically arise from mental disabilities, including depression, anxiety, and PTSD, and typically do not present a danger to others. *Id.* ¶ 78. Calls regarding typical mental health emergencies often involve no allegations of criminal conduct, violence, use or possession of a weapon, or threat of harm to others. *Id*. But

MHL § 9.41; *see also* TAC ¶ 9. Evidence of this is B-HEARD, where non-police currently do respond to some mental health crises calls. *Id.* ¶ 100-1.

[3] Consistent with this claim, Plaintiffs' TAC does not seek to have mental health workers, rather than NYPD, carry out the services provided under MHL § 9.41. *See generally*, TAC. Instead, Plaintiffs ask that the City reasonably modify its emergency response program to expand the availability of health-led responses to mental health emergencies, such that people with mental disabilities have an equal opportunity to benefit from the emergency response available to the general population for a wide range of health-related emergencies. *See Id*. ¶¶ 1-4. Plaintiffs point to the B-HEARD program, which could be reasonably modified to be more widely available, as an example. *See Id*. ¶¶ 100-103, 446-47, 467-68.

when people in New York City experience mental health emergencies, requests for assistance almost exclusively result in the deployment of NYPD officers who are not equipped to handle these types of emergencies. *See Id.* ¶¶ 80-81, 85, 101, 441-42, 462-63.

NYPD officers are not qualified health professionals capable of providing on-site health assessments and stabilization or critical determinations regarding the need for further treatment during a mental health crisis. *Id.* ¶¶ 442, 463. Their training "emphasizes command and control, law enforcement, and public safety protection." *Id.* ¶ 85. As a result, plaintiffs allege that NYPD officers tend to exacerbate the mental health crisis. *Id*. ¶¶ 443, 464.

As noted, the City operates B-HEARD, which sends mental and physical health professionals to a small number of mental health emergencies. *See Id*. ¶ 100-1; NYC Mayor's Office of Community Mental Health, *B-HEARD: Transforming NYC's Response to Mental Health Emergencies* (January 1, 2023 – June 30, 2023), https://perma.cc/2ZMQ-Z9QR. B-HEARD was launched in 2021 and specifically designed to respond to mental health emergencies. *See Id.* And, although call-takers can route 911 calls to B-HEARD, the vast majority of mental health emergencies are still handled by NYPD. *See Id.* ¶ 101.

ARGUMENT

Public entities must afford people with disabilities "an opportunity to participate in or benefit from" their services that is "equal to that afforded others" and is "as effective in affording equal opportunity to obtain the same result." 28 C.F.R. § 35.130(b)(1)(ii)–(iii). Failing to do so may constitute a denial of benefits or other discrimination in violation of the ADA and Section 504. "In order to establish a violation under the ADA, the plaintiffs must demonstrate that (1) they are 'qualified individuals' with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services,

programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

I. The City's Emergency Response Program Is a Service, Program, or Activity under Title II and Section 504

As alleged in the TAC, the City's all-encompassing emergency response program—which everyone in New York City is eligible to use—is properly defined as a single service, program, or activity. Title II applies broadly to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a). This language encompasses "virtually everything a public entity does." *Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015); *see also Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) ("it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") *superseded on other grounds, Zervos v. Verizon N.Y., Inc*., 252 F.3d 163, 171 n.7 (2d Cir. 2001). That includes emergency response programs.[4] *See Disability Rts. Oregon v. Washington Cnty*., No. 3:24-CV-00235-SB, 2024 WL 4046017, at *23 (D. Or. Aug. 30, 2024) (finding that Title II applies to the jurisdiction's emergency response program); *Bread for the City v. District of Columbia* Transcript of Oral Ruling on Motion to Dismiss ("*Bread* Tr."), 14:10-15 (same), ECF No. 236-2.

The term "services, programs, or activities" applies to expansive government systems encompassing multiple programs and operations *as well as* discrete subsidiary services within

[4] Some courts focus not on whether a public function can technically be categorized as a service, program, or activity, but whether it is "a normal function of a governmental entity." *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (maintaining public sidewalks is a normal government function); *Innovative Health Sys.*, 117 F.3d at 45 (zoning decisions are a normal government function), *superseded on other grounds, Zervos v. Verizon N.Y., Inc*., 252 F.3d 163, 171 n.7 (2d Cir. 2001). Here, emergency dispatch and response is "without a doubt something [the City] does." *Cf. Barden*, 292 F.3d at 1076 (internal quotation marks and citations omitted).

those systems. When analyzing the relevant scope of the service, program, or activity at issue—and its benefits—courts should begin by considering where the alleged discrimination occurs. When the alleged discrimination concerns the operation of a broad system, as it does here, an analysis of that system, rather than a single component of it, is necessary. For example, in *Cmntys. Actively Living Indep. & Free ("CALIF") v. City of Los Angeles*, Civ. A. No. 09-0298, 2011 WL 4595993, at *1 (C.D. Cal. Feb. 10, 2011), the plaintiffs alleged that the city's emergency preparedness program failed to address the needs of residents with disabilities, making them more vulnerable than other residents in the event of an emergency. The court cited to evidence, developed through discovery, about the essential components and purpose of the program, which a city official said was "designed to apply equally to all of its residents" to "save lives, protect property, and return the city to normal service levels" by "assist[ing] in the response and recovery efforts following a disaster." *Id.* at *1, 13. It explained that the "purpose" of the city program was "to anticipate the needs of its residents in the event of an emergency" and minimize last-minute requests for assistance. *Id.* at *14. Like the City's emergency response system in this case, emergency preparedness programs require coordination across multiple city departments to address a wide range of incidents. *See, e.g.*, *CALIF*, 2011 WL 4595993, at *2; TAC ¶¶ 70-76, 80-82. Nevertheless, when assessing ADA claims involving aspects of these expansive systems, courts have considered the entire system. *See id.; see also Brooklyn Ctr. for Indep. of Disabled*, 980 F. Supp. 2d at 641 (evaluating the entire emergency preparedness program).[5]

[5] Where the parties dispute the scope of the service at issue, this presents a mixed question of law and fact. *See Ashby v. Warrick Cnty. Sch. Corp*., 908 F.3d 225, 234 (7th Cir. 2018) (recognizing that the inquiry into whether a program involving private and public entities is a "service, program, activity" of the public entity is fact intensive); *King v. Marion Cir. Ct.*, Civ. A. No. 14-1092, 2016 WL 3365239, at *2 (S.D. Ind. June 17, 2016) (analyzing ADA claim required looking at relevant statutes and reviewing the record to understand the structure of the program "and then determine

Likewise, where the alleged discrimination involves a range of services or benefits, courts have considered them together. *See Henrietta D.*, 331 F.3d at 283 (plaintiffs alleged unequal access to "public assistance, Medicaid, Food Stamps, housing, and *other benefits and services available to qualifying members of the general public*") (emphasis in original); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (plaintiffs challenged Hawaii's quarantine policy, which effectively precludes visually-impaired people who rely on guide dogs from using a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions). This is similarly illustrated in cases involving the integration mandate, where plaintiffs challenge the discriminatory administration of complex long-term care systems with a range of community-based and institutional services, often operated by different departments. *See, e.g.*, *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 190-94, 314 (E.D.N.Y. 2009) (finding that the state had administered its mental health service system—which involved a range of services, various treatment settings, multiple agencies, and overseeing private providers—in a manner that discriminated against people with mental illness), *vacated on other grounds sub nom. Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012)); *Helen L. v. DiDario*, 46 F.3d 325, 338 (3d Cir.) (recognizing disability discrimination occurring across programs with different budget line items, Pennsylvania's nursing home program and its attendant care program). Courts across these cases

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whether the program fits the definition of a service, program, or activity under Title II of the ADA. . . these issues do not present pure questions of law"). Such questions should typically be resolved at a later stage. *See, e.g.*, *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 19 F.4th 145, 151 (2d Cir. 2021) (finding question of materiality was a mixed question of law and fact that would rarely be dispositive in a motion to dismiss); *Pradhan v. Maleen Banquet Hall*, No. 22-CV-3533, 2023 U.S. Dist. LEXIS 112695, at *5-6 (E.D.N.Y. June 29, 2023) (finding a mixed question of law and fact could not be decided on a motion to dismiss); *Trs. of Teamsters Local Union No. 443 Health Servs. & Ins. Plan v. Papero*, 485 F. Supp. 2d 67, 71 (D. Conn. 2007) (same).

recognized that the common benefit is "needed medical services" in the most integrated setting appropriate. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600–01 (1999).[6]

Further, the Supreme Court has made clear that the relevant benefit of the service, program, or activity "cannot be defined in a way that effectively denies otherwise qualified [] individuals the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Consistent with this prohibition, courts have focused on a subsidiary benefit of a larger program where the complaint alleges discrimination specific to the particular subsidiary benefit, out of concern that broader definition would obscure the denial of the subsidiary benefit. *See, e.g.*, *L.E. ex rel. Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1302 (11th Cir. 2022) (agreeing with students, on appeal, that the district court impermissibly broadened their claim and redefined the scope of the program at issue, misconstruing the students' argument as a denial of the benefits of education generally rather than the benefits of in-person classes); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016) (adopting the plaintiff's proposed focus on the state's absentee voting program, where defendants urged an analysis of the entire voting program and argued that access to other voting alternatives—including in-person voting—was sufficient under the ADA).

But while an expansive definition might obscure discrimination in some cases, a narrow definition will certainly have that effect in others. "Antidiscrimination legislation can obviously

[6] *See also, Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 450, 459 (6th Cir. 2020) (finding that plaintiffs plausibly stated a claim that they were at risk of institutionalization after being denied sufficient medically necessary services and supports); *Brown v. District of Columbia*, 928 F.3d 1070, 1075 (D.C. Cir. 2019) (reversing dismissal where plaintiffs alleging they were unnecessarily confined in nursing facilities sought transition services to access community based care); *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 489-90 (3d Cir. 2004) (vacating judgment that defendants had proved a fundamental alteration defense, where plaintiffs institutionalized in a state hospital sought community-based services).

be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit," *Alexander*, 469 U.S. at 301, n.21. For example, the ADA's requirement that students with disabilities have equal opportunity to participate in a school's program of instruction would be meaningless if the program or benefit was defined as "oral education in English" and found equally available to students who are deaf and communicate using American Sign Language. Just as public entities may not exclude people with disabilities from, or deny them the benefits of, their services, programs, or activities, 42 U.S.C. § 12132, they may not craft service, program, or activity definitions to have the same effect.

Here, a narrow interpretation of the service, program, or activity at issue, and its benefit, would do just that. Plaintiffs claim they are denied an equal opportunity to benefit from the City's all-encompassing emergency response program because all other health emergencies brought to the attention of the City's emergency response program, through 911 or otherwise, are typically met with health professionals who provide on-the-spot stabilization and basic health services and determine whether additional care and transfer to a specialized facility is needed. TAC ¶¶ 2, 74, 440. By contrast, the one type of emergency primarily experienced by people with mental disabilities is typically met with police officers who are not capable of performing these functions. *See* TAC ¶¶ 3, 441-42. A narrow framing focused solely on transport to a hospital for mental health care not only misses the point of Plaintiffs' claims concerning the type of response dispatched to emergency calls, regardless of any hospital transport; it would also inappropriately exclude allegations about the general population's experience from the court's analysis, thereby hiding the relevant comparison. This would obscure the unequal opportunity to benefit from the City's emergency response program that everyone in New York City is eligible to use—and "render meaningless the mandate that public entities may not 'afford [] persons with disabilities

services that are not equal to that afforded others.'" *Disabled in Action v. Bd. of Elections in City of N.Y.*, 752 F.3d 189, 199 (2d Cir. 2014) (internal citations omitted) (defining the relevant benefit as the opportunity to fully participate in a voting program).

Notably, courts in two recent cases involving claims nearly identical to Plaintiffs'—that a public entity is denying them an equal opportunity to benefit from its emergency response program by relying almost exclusively on police to respond to mental health emergencies—have defined the relevant service, program, or activity as the public entity's entire emergency response system. *See Disability Rts. Oregon*, 2024 WL 4046017, at *23 (finding "that the relevant service at issue here is the provision of consistent access to emergency medical service through the emergency communications system."); *Bread* Tr. at 14:10-15 (rejecting defendant's motion to dismiss and finding the plaintiff's framing of the service, program, or activity as "the District's emergency-response system" plausible), 15:22-25 (finding that while the sub-units of the defendant's emergency response program could qualify as a program for ADA purposes, it did not mean the broader emergency response program did not also qualify).

II. Plaintiffs' Complaint Does Not Call for Adequate Treatment, but an Equal Opportunity to Benefit from a Service Provided to People with and without Disabilities

In their Motion to Dismiss, Defendants restate this Court's Opinion & Order without meaningfully addressing Plaintiffs' TAC, which clarified the facts on which this Court relied and the claim the Court addressed. *See* Defs.' Mot. Dismiss at 20. In so doing, they rely on case law that is irrelevant to Plaintiffs' TAC. *Id*. (citing *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998) and *Tardif v. City of New York*, 991 F.3d 394, 405 (2d Cir. 2021)). *Pfrommer* involved vocational services exclusively for people with disabilities. *Pfrommer*, 148 F.3d at 82. In this context, the Second Circuit concluded that the changes the plaintiff sought involved the adequacy of the

services provided, and "would not serve the purpose of leveling the playing field with respect to the benefits . . . available to the non-handicapped." *Id.* at 82, 84. By contrast, Plaintiffs claim that people with mental disabilities are denied the equal opportunity to benefit from the City's unified emergency response program, which they have plausibly alleged is offered to everyone in the City of New York regardless of disability. TAC ¶¶ 1-4, 69.[7] Therefore, Defendants' reliance on *Pfrommer* is misplaced.

Properly construed, Plaintiffs' claims are similarly unaffected by *Tardif*. There, the Second Circuit recognized that in determining whether plaintiffs have established that a public entity denied them services "by reason of" their disabilities, the requirement is satisfied where the plaintiffs' disabilities were a substantial cause of their inability to obtain services, or their inability to obtain services was not so remotely or insignificantly related to their disabilities as not to be "by reason" of them. *Tardif*, 991 F.3d at 405 (2d Cir. 2021) (citing *Henrietta D.*, 331 F.3d at 278-279). The court in *Tardif* dismissed the plaintiff's claim because it found "no evidence demonstrating [defendant] delayed administering medication 'by reason of' [plaintiff's] disability." *Tardif*, 991 F.3d at 397. By contrast, here, Plaintiffs allege that people with mental disabilities are denied an equal opportunity to benefit because the one category of emergencies uniquely associated with people with these disabilities receives a different, less effective response. *See* TAC ¶¶ 2-4, 77-78, 444; *cf. Alexander*, 469 U.S. at 302 n.22 (denying respondents' claim where the challenged reduction in Medicaid coverage was neutral on its face and "[t]he record does not contain any suggestion that the illnesses uniquely associated with the handicapped . . . cannot be effectively treated . . ."). Such allegations, if taken as true, show that the unequal

[7] The existence of a subsidiary service for people with disabilities does not preclude challenges to the overarching service, program, or activity that contains it. *See supra* § I.

opportunity to benefit is by reason of disability. "Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation." *Henrietta D.*, 331 F.3d at 277.

Finally, the allegation that modifications are needed so that people with disabilities have an equal opportunity to benefit from the City's program does not transform Plaintiffs' claim into one about adequate treatment. The City has an affirmative obligation to modify its emergency response program when necessary to avoid discrimination on the basis of disability, unless it can demonstrate that the modifications would fundamentally alter its program. *See* 28 C.F.R. § 35.130(b)(7); *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (Public entities "may very well need to act affirmatively to modify, supplement, or tailor their programs and services to make them accessible to persons with disabilities."). In fact, "[r]equiring public entities to make changes to rules, policies, practices, or services is exactly what the ADA does." *Lamone*, 813 F.3d at 508. This may include dispatching a different type of response to an emergency call when necessary to avoid discrimination based on disability. For example, deploying mobile crisis teams staffed with behavioral health professionals may be a reasonable modification. *See Est. of LeRoux v. Montgomery County*, Civ. A. No. 22-0856, 2023 WL 2571518, at *12 (D. Md. Mar. 20, 2023) (reasonable accommodations by the County included dispatching a mobile crisis team).[8]

[8] *See also* Department of Justice and Department of Health & Human Services Guidance for Emergency Responses to People with Behavioral Health or Other Disabilities (May 2023), at 4, https://perma.cc/V6J2-R7BN. In other contexts, courts have similarly held that the ADA may require changes in personnel to ensure people with disabilities have an equal opportunity to benefit. *See, e.g., K.N. v. Gloucester City Bd. of Educ.*, 379 F. Supp. 3d 334 (D.N.J. 2019) (providing a one-to-one aide supported by a special education teacher to assist a student with autism was

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court consider this Statement of Interest with respect to Plaintiff's Title II and Section 504 claims.

Respectfully Submitted,

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reasonable and necessary under the ADA); *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (requiring qualified mental health counselors with sign language ability where the presence of an interpreter greatly inhibited the effectiveness of mental health services).