93 F.3d 1124
Withdrawn for N.R.S. bound volume
United States Court of Appeals,
Third Circuit.

INMATES OF THE ALLEGHENY COUNTY JAIL, Thomas Price Bey, Arthur Goslee, Robert Maloney, and Calvin Milligan on their own behalf and on behalf of all others similarly situated, Appellants,
v.
Cyril H. WECHT, President of the Allegheny County Board of Prison Inspectors, and the other members of the Board; Thomas Foerster and William H. Hunt, Commissioners for Allegheny County; Frank J. Lucchino, Controller for Allegheny County; Eugene Coon, Sheriff for Allegheny County; the Honorable Patrick R. Tamilia; Michael J. O'Malley and Marion K. Finkelhor, Judges, Court of Common Pleas of Allegheny County; Richard S. Caliguiri, Mayor of the City of Pittsburgh; Harriet McCray; Msgr. Charles Owen Rice; and Charles Kozakiewicz, Warden of the Allegheny County Jail and William R. Robinson, Executive Director of Prison Inspectors; and Cyril Wecht, Thomas Foerster and William H. Hunt, as Commissioners of Allegheny County,
v.
The COMMONWEALTH OF PENNSYLVANIA; the Commonwealth of Pennsylvania, Department of Corrections; Davis S. Owens, Jr., Commissioner, Department of Corrections; and Erskind Deramus, Deputy Commissioner, Department of Corrections.

No. 95-3402. | Argued March 22, 1996. | Decided Aug. 22, 1996. | Order Granting Rehearing En Banc and Vacating Opinion and Judgment Sept. 20, 1996.

Editor's Note: The opinion of the United States Court of Appeals, Third Circuit, in Inmates of Allegheny County Jail v. Wecht, published in the advance sheet at this citation, 93 F.3d 1124, was withdrawn from the bound volume because rehearing en banc was granted and the opinion vacated September 20, 1996.

Attorneys and Law Firms

Donald Driscoll (argued), Neighborhood Legal Services Association, Pittsburgh, PA, for Appellants.

Dennis R. Biondo (argued), Timothy W. Pawol, Peter G. Nychis, Office of Allegheny County Law Department, Pittsburgh, PA, for Appellees.
Before BECKER and McKEE, Circuit Judges, and POLLAK, District Judge.[*]

Opinion

OPINION OF THE COURT

POLLAK, District Judge.

In this long-running litigation-aspects of which have been before this court before[1]-appellants, a class consisting of all past, present, and future inmates of the Allegheny County Jail, appeal from an order entered by the district court on May 26, 1995, which, after argument but without an evidentiary hearing, approved a modification of a portion of a consent decree entered in July 1989. Under the terms of the 1989 consent decree, appellees-Allegheny County, officials of Allegheny County, and officials of the Allegheny County Jail, all of whom we will refer to collectively as "the County"-were required to establish a facility to provide services to mentally ill inmates. The May 26, 1995 order vacated this directive, replacing it with a requirement that the County provide services to mentally ill inmates through community-based mental health programs. Under the terms of the May 26, 1995 order, only inmates who meet certain eligibility criteria could participate in the community-based programs. An inmate with a "past history of violence" or who faces charges more serious than a "minor, non-violent crime" would be ineligible for admission to any of these community-based mental health programs. Appellants

assert that this limitation violates the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. We find that resolving this question requires ascertaining certain facts, and we therefore vacate the May 26, 1995 order and remand for factfinding.

I.

The Allegheny County Jail holds both convicted criminals and pretrial detainees. In 1976, inmates of the jail filed this class action litigation, asserting, under 42 U.S.C. § 1983, that the conditions of confinement did not satisfy minimum constitutional requirements. In two opinions issued in 1978, the district court found that conditions at the jail were shockingly substandard in a wide variety of ways. *Owens-El v. Robinson,* 442 F.Supp. 1368 (W.D.Pa.1978); *Owens-El v. Robinson,* 457 F.Supp. 984 (W.D.Pa.1978). As this court later summarized certain of the district court's general findings:

> Living facilities were unhealthy and unsafe. The plumbing system was antiquated and in disrepair. As a result, leaks and overflows frequently occurred in the cells. The cells lacked adequate lighting; the efforts of inmate-electricians seeking to remedy that defect caused exposed electrical wires which presented fire and shock hazards. Prisoners were required to sleep on canvas cots, many of which were discolored by blood, vomit, feces, and urine. Vermin abounded. Cell temperatures fluctuated between extreme cold in the ***1127** winter and extreme heat in the summer. The shortage of guards reduced supervision of the inmates and permitted hoarding and vandalism of necessary supplies. This in turn contributed significantly to chronic shortages of necessary items such as blankets and bath towels.

. . . . .

> Some inmates were placed in solitary confinement for up to fourteen days without a mattress, toilet articles, or a change of clothing. Other inmates were confined in the nude in the isolation cell, an unfurnished, darkened, windowless room for up to fourteen consecutive hours, without any blanket or sheets.

Inmates of the Allegheny County Jail v. Pierce, 612 F.2d 754, 757 (3d Cir.1979).

The district court addressed in some detail the treatment accorded inmates who displayed mental disorders. The court noted that no psychiatrists or psychologists served on the jail staff. Further, the court described the "restraint room" in which were housed inmates who acted out, or who suffered from withdrawal, delirium tremens, epileptic seizures, or other mental conditions:

> In this bleak room the inmates are placed in a hospital gown or naked on a canvas cot with a hole cut in the middle. Their body wastes drop through the hole into a tub on the floor underneath the cot. The tub is emptied twice a day. These inmates are shackled by leather restraints to the canvas cots. Physical restraints may be either full, where the inmate's wrists and ankles are bound by the manacles to the cot, or partial, where only one or both ankles are manacled. The medical logs, introduced into evidence, revealed that inmates have been held in such restraints for as long as twenty-nine days.

Owens-El, 442 F.Supp. at 1380. The court decided, however, that addressing the treatment of mentally ill inmates would "go[ ] beyond the parameters of the case." *Id.* at 1382.

We reversed this latter ruling and concluded that the district court had authority to address the mental health conditions at the jail. *Inmates of the Allegheny County Jail v. Pierce,* 612 F.2d 754, 763 (3d Cir.1979). On remand, the district court held that the lack of services for mentally ill inmates violated the Constitution. The court found that "a significant proportion, perhaps as many as a quarter to a third," of the inmates at the jail could be considered seriously mentally ill. *Inmates of the Allegheny County Jail v. Peirce,* 487 F.Supp. 638, 641 (W.D.Pa.1980). And the court further found that, notwithstanding the high proportion of mentally ill inmates, there was

> no system for care of mentally ill inmates in the jail and ... the haphazard and inconsistent care and protection now being afforded is far below minimum standards. The deficiencies in immediate care result in physical danger to the ill inmates and to others, create security problems in the jail, aggravate-rather than alleviate-the conditions of many of the most seriously ill, and contribute to the chaotic environment in the jail.

Id. at 643. Accordingly, the court ordered the County (1) to create a separate mental health unit within the jail to house mentally ill inmates; (2) to establish a program for screening all incoming inmates for mental illness; (3) to hire an administrator to implement mental illness programs; and (4) to hire two psychiatrists and additional nurses. The court further ordered that the mental health unit be staffed with at least one guard and one nurse per shift, and that civil commitment proceedings should commence within 72 hours of a determination that an inmate should be transferred to a mental health institution.

In 1988, the district court, in the face of dramatic overcrowding in the jail and continuing constitutional violations, ordered that the jail be closed. *Inmates of the Allegheny County Jail v. Wecht,* 699 F.Supp. 1137 (W.D.Pa.1988). The court concluded that the 102-year old facility "cannot handle the demands required of a modern jail facility." *Id.* at 1146. Among the most grievous problems caused by overcrowding was the lack of space for adequate mental health care. The forty beds in the new mental health unit were regularly filled, and, as a result, mentally ill inmates were often housed among the ***1128** general inmate population, causing disruptions among both groups.

We affirmed the district court's order closing the jail. *Inmates of the Allegheny County Jail v. Wecht,* 874 F.2d 147, 155 (3d Cir.1989).

On July 7, 1989, subsequent to the affirmance of the jail-closing order, the parties to this litigation entered into a consent decree to remedy the many constitutional violations that had been found. Paragraph 7 of the consent decree addressed the provision of services for mentally ill inmates as follows:

> The Defendants commit themselves to the development of a treatment/work release facility for the mentally ill comparable to the presently planned drug treatment facility as set forth in Defendant's Exhibit 3, admitted at the June 12, 1989 court hearing. A specific plan for this project and a progress report on its implementation shall be included in the monthly progress reports required by the Court's Order of May 12, 1989.

Consent Decree ¶ 7, entered July 7, 1989. Under this provision, the County became obligated to establish a single, institutional facility for handling mentally ill inmates.

Three years later, the County sought a modification of the consent decree. Rather than create a separate facility for mentally ill inmates, the County sought to implement a plan under which mentally ill inmates would receive treatment in community-based mental health programs. Under the County's plan, case managers would link mentally ill inmates with services provided within the community. Applying *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)-in which the Supreme Court established a standard for assessing proposed modifications of consent decrees-the district court granted the County's requested modification. *Inmates of the Allegheny County Jail v. Wecht,* 797 F.Supp. 428, 434-35 (W.D.Pa.1992). Under *Rufo,* the party seeking modification must, among other things, "establish[ ] that a significant change in circumstances warrants revision of the decree." 502 U.S. at 383, 112 S.Ct. at 760. The district court concluded that mental health philosophy had shifted from an emphasis on institutionalized care to a belief in the efficacy of treatment in non-institutional settings, and that this change in philosophy constituted a change in circumstances sufficient to satisfy *Rufo.*

We reversed, concluding that the change in mental health philosophy predated the 1989 consent decree and therefore did not justify the modification. *Inmates of Allegheny County v. Wecht,* No. 92-3434, 17 F.3d 1430 (3d Cir. 1993). We noted, however, that both the inmates and the County no longer viewed the terms of the 1989 consent decree as the optimal remedy and that both parties supported community-based treatment. While the County viewed community-based services alone as the best approach, the inmates wanted such services to be supplemented by decentralized "structured residential" settings for those inmates who could not be accommodated through community-based programs. We remanded in order to allow the district court to make factual findings as to whether some other change of circumstance-e.g., an increased availability of community-based programs subsequent to 1989-might justify a modification of the consent decree.

In 1995, the County and the inmates undertook to negotiate a modification of the 1989 consent decree. Under the proposed modification, Paragraph 7 of the 1989 consent decree, mandating the creation of a separate facility for the mentally ill, was to be eliminated. In its place, the parties agreed to the creation of a Forensic Support Program, under which the County would provide community-based mental health services to a maximum of twenty-five inmates. The agreement contemplated that the Forensic Support Program would utilize the services of local hospitals, psychiatric institutions, and human service and release groups, and that judicial approval would be required before an inmate would be released into the program.[2]

***1129** The County and the inmates recognized that not all mentally ill inmates would be appropriate candidates for treatment in the community-based Forensic Support Program.[3] Based on this recognition, the parties developed eligibility criteria covering several categories of mentally ill inmates: The agreed eligibility criteria are as follows:

> [1] Persons must not pose an apparent risk of harm to themselves or others;
>
> [2] Persons must not be engaged in a calculated conspiracy;
>
> [3] Persons must not be charged with any sexual assault crimes, any crimes involving the victimization of minors, and crimes involving drug trafficking, including, but not limited to, the delivery or possession with the intent to deliver a controlled substance, or conspiracy to commit any of these crimes.
>
> [4] Persons must agree to comply with any conditions of release, if any, imposed by the holding authority, including participation in prescribed treatment.
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> Order of May 26, 1995 at ¶ 5. But the parties were not able to reach agreement on whether inmates who had a history of violence, or who were charged with violent crimes, should be categorically excluded from community-based programs or whether individualized assessments of such persons could adequately screen out those who posed a public safety risk. It is this disagreement that has precipitated this newest round of litigation.

In the district court, the County contended that an inmate "must be charged with a minor, non-violent crime and not have a past history of violence" in order to qualify for the community-based programs. Public safety, as well as public support for community-based programs, the County argued, require the exclusion from these programs of all inmates who may have had a history of violence. In contrast, the inmates contended that individual assessments of the threats posed by mentally ill inmates would adequately address the County's public safety concerns. On May 26, 1995, the district court approved the County's proposed modification and, accordingly, directed that only an inmate "charged with a minor, non-violent crime" and who did not have a "past history of violence" could be included in the community-based programs. The court's order contains no explication of the phrase "charged with a minor, non-violent crime" or the term "past history of violence." Since the order was not accompanied by an opinion, or by findings of fact and conclusions of law, the precise scope of the quoted language is unclear.[4]

After entry of the district court's order, the inmates moved for reconsideration or, alternatively, for findings of fact pursuant to Rule 52(b) of the Rules of Civil Procedure.[5] The motion was denied, and the inmates thereupon appealed from the district court's ***1130** May 26, 1995 order modifying the consent decree.[6]

II.

We review a modification of a consent decree for abuse of discretion. *Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania,* 674 F.2d 976, 978 (3d Cir.1982) ("Our scope of review on this appeal is narrow: whether, in its order modifying and refusing to modify the consent decree, the district court abused its discretion."). *See also Favia v. Indiana University of Pennsylvania,* 7 F.3d 332, 340-42 (3d Cir.1993). Abuse of discretion can be found when a district court's decision is "arbitrary, capricious or irrational or employs improper standards, criteria or procedures," *Favia,* 7 F.3d at 340 (quoting *Pennsylvania v. Local Union 542,* 807 F.2d 330 (3d Cir.1986)), such as when a district court does not "hold an evidentiary hearing before modifying a consent decree in such a manner as to remove requirements previously imposed." *Delaware Valley,* 674 F.2d at 981.

Appellants argue that under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA) the County cannot categorically exclude from community-based mental health services all inmates who are charged with minor, non-violent crimes or who have past histories of violence. According to the appellants, violent behavior is often a manifestation of mental illness. Thus, the appellants argue, categorical exclusion on the basis of such behavior, whether actual or alleged, constitutes disability-based discrimination. Acknowledging that persons who pose a threat to others are not "qualified" for community-based programs, the inmates assert that some mentally ill persons who have in the past committed acts of violence, or who are currently charged with violent crimes, do not pose a present threat to others, and that such persons are, indeed, "qualified" for community-based services. Providing individualized assessments, the inmates contend, would reasonably accommodate the needs of this group of mentally ill persons without unduly burdening County resources.

In response, the County first argues that the Rehabilitation Act and the ADA do not apply to correctional facilities. Second-assuming *arguendo* that these statutes do apply-the County maintains that differentiating among inmates on the basis of their violent behavior does not amount to disability-based discrimination. And even if exclusion of violent inmates from community-based mental health services is, in some cases, exclusion on the basis of disability, the County asserts that inmates who are charged with violent crimes or who have been violent in the past are categorically unqualified for community-based programs because they pose an unacceptable safety threat and because providing community-based services to potentially violent inmates would jeopardize public support for these services. The County further argues that individualized assessments could not reliably screen out those inmates with a violent past who pose a present safety threat. Moreover, the County argues, even if individual assessments could reliably identify those inmates who currently pose a safety threat, such individualized assessments would be a heavy drain on County resources and thus would not constitute a reasonable accommodation.

A.

The first question to be addressed is whether the Rehabilitation Act and the ADA apply to correctional facilities.

The Rehabilitation Act and the ADA have a common substantive core-prohibiting broad arrays of institutions that serve the public from discriminating against disabled individuals on the basis of disability.[7] Section ***1131** 504 of the Rehabilitation Act applies not only to any program conducted by an executive agency of the federal government but to "any program or activity receiving Federal financial assistance," 29 U.S.C. § 794(a); the term "program or activity" is defined as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b)(1)(A). Title II of the ADA applies to the "services, programs, or activities" of any "public entity," 42 U.S.C. § 12132, without regard to whether such services, programs, or activities are federally funded; a "public entity" includes "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). Thus, as a matter of syntax, the two statutes cover all aspects of state and local governance.[8] Accordingly, if it be the case that when Congress writes a statute in plain words those plain words are to be the paramount guides utilized by the courts in construing the statute-*see, e.g., United States v. Alvarez-Sanchez,* 511 U.S. 350, ----, 114 S.Ct. 1599, 1603, 128 L.Ed.2d 319 (1994) ("When interpreting a statute, we look first and foremost to its text."); *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475, 112 S.Ct. 2589, 2594, 120 L.Ed.2d 379 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.")-it would seem to follow that both the ADA and the Rehabilitation Act apply to state and local correctional facilities.

Relying on the statute's plain language, the Ninth Circuit has held that the Rehabilitation Act protects state prison inmates from disability-based discrimination in the administration of programs for inmates of correctional facilities. In *Bonner v. Lewis,* 857 F.2d 559 (9th Cir.1988), a deaf inmate sued prison officials, asserting that the prison was obligated under the Rehabilitation Act to provide a qualified sign language interpreter in various prison settings, including counseling sessions and prison administrative hearings. Prison officials argued that the Rehabilitation Act did not protect inmates from disability discrimination because "inmates are hardly in need of help to live independently within their prisons." *Id.* at 562. The Ninth Circuit disagreed:

> First, ... the plain language of the Justice Department's implementing regulations, 28 C.F.R. § 42.503, and the Act itself, which states that it applies to "*any* program or activity receiving Federal financial assistance," 29 U.S.C. § 794 (emphasis added) belies [prison officials'] argument. Second, the Act's goals of independent living and vocational rehabilitation should in fact mirror the goals of prison officials as they attempt to rehabilitate prisoners and prepare them to lead productive lives once their sentences are complete. By ensuring that inmates have meaningful access to prison activities, such as disciplinary proceedings and counseling, the goals of both the institution and the Rehabilitation Act are served.

Id.

Notwithstanding the unambiguous language of the disability statutes, the Tenth Circuit has held that the Rehabilitation Act and the ADA do not apply to at least certain claims arising in the correctional context. The Tenth Circuit's starting point was

Williams v. Meese, 926 F.2d 994, 997 (10th Cir.1991). The court there held that the Rehabilitation Act does not apply to employment discrimination claims challenging certain aspects of programs involving the employment of federal prison inmates. The court stated, "The section of the Rehabilitation Act cited by the plaintiff [section 504], does not give plaintiff any substantive rights since the Federal Bureau of Prisons does not fit the definition of 'programs or activities' ***1132** governed by that section." In *White v. Colorado,* 82 F.3d 364, (10th Cir.1996), the holding in *Williams* was extended to an employment discrimination claim brought by a state prisoner pursuant to the ADA: "For the same reasoning relied upon in *Williams,* we hold that the ADA does not apply to prison employment situations either." *Id.* at 367.[9]

Two other circuit courts have voiced an opinion on the applicability of the ADA to prisons, albeit without expressly ruling on the question. In *Bryant v. Madigan,* 84 F.3d 246, 249 (7th Cir.1996), the Court of Appeals for the Seventh Circuit held that the ADA did not provide a cause of action to a disabled state prisoner to challenge the prison's failure to provide guardrails to his bed. The court concluded that no discrimination occurred because the inmate did not allege that he had been excluded from any prison "service," "program," or "activity." In so holding, the court expressed some doubt as to the applicability of the ADA to correctional facilities: "Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society?" Without pointing to any evidence of congressional intent which might indicate one way or another the answer to this question, the court opined that "[j]udge-made exceptions ... to laws of general applicability are justified to avoid absurdity." *Id.* at 248-49.

In *Torcasio v. Murray,* 57 F.3d 1340 (4th Cir.1995), *cert. denied,* 516 U.S. 1071, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996), the Court of Appeals for the Fourth Circuit strongly intimated that the Rehabilitation Act and the ADA do not apply to state prisons.[10] The actual holding in *Torcasio* was that, at the time of the alleged discrimination, it was not clearly established that the ADA and the Rehabilitation Act apply to state prisons, and, consequently, the defendant prison officials were entitled to qualified immunity under these statutes.[11] The *Torcasio* court's primary reason for doubting that the statutes cover prisons was that the statutes, although seeming to speak in comprehensive terms-"all the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government," 29 U.S.C. § 794(b)(1)(A) (Rehabilitation Act); "any department, agency, special purpose district, or other instrumentality of a State ... or local government," 42 U.S.C. § 12131(1)(ADA)-do not expressly recite that prisons are among the "all" or "any" entities covered. The Fourth Circuit stated: "Because the management of state prisons implicates 'decision [s] of the most fundamental sort for a sovereign entity,' Congress must speak unequivocally before we will conclude that it has 'clearly' subjected state prisons to its enactments." 57 F.3d at 1346 (citation omitted). In support of its view that the statutory provisions do not speak ***1133** sufficiently "clearly," the court quoted from *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989), in which the Supreme Court, quoting an earlier pronouncement in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985), observed that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' "

We of course acknowledge that the management of prisons is a governmental responsibility of great importance. But so too are the management of police and firefighting forces, the management of child protection services, and the management of the court system-state functions routinely understood to be covered by the Rehabilitation Act and the ADA notwithstanding that these functions are not expressly referred to in either of the statutes. *See Thomlison v. City of Omaha,* 63 F.3d 786 (8th Cir.1995) (affirming the denial of summary judgment in a Rehabilitation Act claim brought by a firefighter); *Doe v. Judicial Nominating Commission,* 906 F.Supp. 1534 (S.D.Fla.1995) (holding that the process for judicial nominations must comply with the ADA); *Clark v. Virginia Board of Bar Examiners,* 880 F.Supp. 430 (E.D.Va.1995) (holding that requiring state bar applicants to answer questions regarding psychotherapy violates the ADA); *Eric L. v. Bird,* 848 F.Supp. 303 (D.N.H.1994) (holding that the plaintiffs had stated an ADA claim in alleging that the state provided foster care services that discriminated on the basis of disability); *Ethridge v. Alabama,* 847 F.Supp. 903 (M.D.Ala.1993) (denying summary judgment in an ADA case brought by a disabled police officer); *Galloway v. Superior Court of the District of Columbia,* 816 F.Supp. 12 (D.D.C.1993) (holding that the categorical exclusion of blind people from juries violates the ADA).

More to the point, we are not persuaded that the so-called "clear-statement" cases, of which *Will* is a recent example, have been intended by the Supreme Court to provide a canon of statutory interpretation which can be of help in interpreting statutes whose over-all design indisputably contemplates both that the policies and practices of state (as well as local) governments are required to conform to norms established by Congress and that the remedies include the bringing of a lawsuit in the federal courts. On the contrary, the Court has made it plain that the clear-statement requirement is to be resorted to in those instances in which the text of a federal statute furnishes little real guidance as to whether Congress intended to subject state agencies to potential liability. For instance, in *EEOC v. Wyoming,* 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983), in which the Court examined amendments to the Age Discrimination in Employment Act (ADEA), the Court stated that the clear-statement rule was "a tool with which to divine the meaning of

otherwise ambiguous statutory intent." The Court found, however, that the rule offered no guidance on the question raised by the case because "there is no doubt what the intent of Congress was: to extend the application of the ADEA to the States." *Id.* In *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the Court examined whether a statutory exemption to the ADEA for "appointee[s] on the policymaking level" included state-court judges. Finding the language of the exemption ambiguous, the Court applied the clear-statement rule and held that, because Congress had not specifically excluded state-court judges from the exemption, state-court judges would be considered to be included in the exempted category. As it had stated in *EEOC v. Wyoming,* the Court in *Gregory v. Ashcroft* described the clear-statement rule as "a rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470, 111 S.Ct. at 2406.

We think that *Will* aptly illustrates the scope and limits of the "clear-statement" rule. In that case, which arose in a Michigan state court, Ray Will, a state employee, sued Michigan's Department of State Police and Director of State Police. The gravamen of Will's suit was that the defendants had denied the plaintiff a promotion because of his brother's radical political views, a denial alleged to contravene plaintiff's federal and state constitutional rights. In seeking vindication ***1134** of his federal constitutional claims, Will relied on 42 U.S.C. § 1983, the statute which underpins so much federal civil rights litigation, including the case at bar. Section 1983, which derives from the Civil Rights Act of 1871, provides that "[e]very person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects ... any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The Michigan Supreme Court concluded that Will's federal claims were not cognizable for the reason that neither a state nor a state official acting in an official capacity is a "person" within the meaning of section 1983. The United States Supreme Court affirmed. Prior to *Will,* which was decided in 1989, the Court had held, in 1978, in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a municipality is a suable "person" within the meaning of section 1983. But in *Will* the Court declined to read "person" so broadly as to include the several states. The Court noted that the construction of section 1983 contended for by Will would, in effect, rewrite the statute in the form "every person, including a State, who under color of any statute ... subjects," and that this "would be a decidedly awkward way of expressing an intent to subject the States to liability." 491 U.S. at 64, 109 S.Ct. at 2308. Cutting strongly against this "awkward" construction that would have made a state suable under section 1983 both in federal courts and in the state's own courts was the fact that in 1979, just a year after *Monell,* the Court had ruled, in *Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), that, by virtue of the Eleventh Amendment's grant to the states of immunity from suit in the federal courts, a federal district court was without jurisdiction to entertain a section 1983 suit seeking to recover money damages from a state. While recognizing that Congress has the authority, in the exercise of certain of its constitutional powers, to enact legislation overcoming the states' Eleventh Amendment immunity, the Court in *Quern* found that "§ 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." 440 U.S. at 345, 99 S.Ct. at 1147. In *Will,* the Court built upon *Quern v. Jordan.* Having held in *Quern v. Jordan* that Congress, in 1871, in enacting section 1983, "had not explicitly and by clear language" evidenced an intent to override the states' Eleventh Amendment immunity, the Court in *Will* held that, in utilizing the all-purpose but hardly self-defining word "person" in section 1983, Congress had not evidenced an intent to take the major step of bringing state governments as well as local governments within what was in 1871 an unprecedented federal supervisory regime.

In marked contrast with section 1983, the Rehabilitation Act and the ADA both speak expressly of state governments and "any" or "all" of the operations thereof. Also, in marked contrast with section 1983, both the Rehabilitation Act and the ADA expressly abrogate the Eleventh Amendment immunity of the states.[12] Against that background, we do not see it as our function to require Congress to specify each of the important components of state governments that comprise ***1135** Congress' use of the words "any" and "all."[13]

The Fourth Circuit, in *Torcasio,* supplemented its clear-statement analysis by finding that some of the statutory language did not lead comfortably to prison-based claims. Specifically, the court pointed to 42 U.S.C. § 12131(2), in which the ADA defines a "qualified individual with a disability" as a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." According to the Fourth Circuit, correctional facilities do not provide "services," "programs," or "activities," as those terms are ordinarily understood. Furthermore, the court concluded that "[t]he terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will." 57 F.3d at 1347. In the context of the case at bar, arguments of this sort do not seem compelling. Here, it is agreed that the jail is to make certain forms of treatment available to mentally ill inmates. It is appropriate to characterize such treatment as a "service," in that it confers a benefit on the inmates. And the different forms of treatment may be properly described as "programs" in that they are an organized series of events for the provision of the services. Indeed, the treatment regimen at issue is in fact called the "Forensic Support

Program." In order to be deemed "qualified" to receive the services offered through this program, one must fall within one or another restricted category of the inmate population-i.e., one must be shown to be "eligible" within certain specified criteria of eligibility: one must be mentally ill, not pose an apparent threat to oneself or others, and, of central importance to this appeal, must be charged with no more than a minor, non-violent crime and not have a history of violence. Inmates who meet these criteria "participate" in mental health services by undergoing the treatment protocol chosen by jail officials. The fact that the participation of the inmates may not be voluntary does not alter the conclusion that they do participate.[14]

B.

Having held that the Rehabilitation Act and the ADA apply to correctional facilities, we must now determine *how* they apply.

The Rehabilitation Act and the ADA prohibit public entities from discriminating on the basis of disability against qualified individuals with disabilities. As previously noted, *see supra* note 7, section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability ... shall, solely by reason of her ***1136** or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794(a). Moreover, as also previously noted, Title II of the ADA extends the Rehabilitation Act's coverage to all public entities, whether or not they receive federal funds:

> [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.

Although the language of the two statutes differs slightly-e.g., the Rehabilitation Act protects against discrimination "solely by reason of ... disability," whereas the ADA protects against discrimination "by reason of ... disability"-the standards under the two statutes are identical. *McDonald v. Pennsylvania Department of Public Welfare,* 62 F.3d 92, 94 (3d Cir.1995) ("Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same."). We have held that there are four elements for establishing a violation of section 504: (1) that the plaintiff is an "individual with a disability" as defined under the Act, (2) that the plaintiff is "otherwise qualified" for the program sought or that the plaintiff would be qualified if the defendant made reasonable modifications to the program, (3) that the plaintiff was excluded from the program "solely by reason of her or his disability," and (4) that the program receives federal funds. *Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002, 1009 (3d Cir.1995). With the exception of the fourth element, which is not pertinent to a claim brought under the ADA, the elements of a claim under Title II of the ADA are interchangeable with the elements of a claim under section 504. Thus, an ADA Title II claimant must show (1) that the plaintiff is "qualified" or that the plaintiff would be qualified if the defendant made reasonable modifications, (2) that the plaintiff has a "disability," and (3) that "by reason of such disability," the plaintiff was excluded from a service, program, or activity provided by a public entity.

In applying the disability statutes to prisons, courts must give considerable weight to the unique needs of prison administration and should, when appropriate, defer to the judgments of prison officials. As the Supreme Court stated in *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), "[J]udgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' " *Id.* at 86, 107 S.Ct. at 2260 (quoting *Pell v. Procunier,* 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974)). Thus, in determining whether a plaintiff is qualified for a particular program or service provided by the prison, a court should weigh the plaintiff's qualifications in light of the needs for prison security and other legitimate interests of the prison. Similarly, a court determining the reasonableness of a proposed modification to a program or service provided by a prison should take into account the prison's needs and should ordinarily defer to the views of prison officials.[15]

***1137** The issues to which we now turn are (1) whether discrimination against mentally ill inmates because they are charged

with violent crimes, or because they have a history of violence, constitutes discrimination "by reason of" disability; and (2) whether inmates who are charged with violent crimes or who have a history of violence are "qualified" for community-based services.[16]

C.

The challenged provision of the May 26, 1995 order is, on its face, neutral with regard to disability. Under this provision, inmates are excluded from community-based services because they are charged with violent crimes or because they have a history of violence; this provision does not by its terms exclude inmates due to disability.[17] Accordingly, the County argues that such exclusion is not "by reason of" disability: "[I]nmates are not excluded because they have mental [illnesses], but because they are prisoners who have committed violent crimes." Appellees' Brief at 27. In the County's view, exclusion on the basis of violence cannot amount to disability-based discrimination because such exclusion is facially neutral with regard to disability and does not evince discriminatory animus.[18] We conclude, however, that a facially neutral rule may amount to exclusion "by reason of" disability if such a rule causes a cognizable discriminatory impact.

***1138** In *NAACP v. Medical Center, Inc.,* 657 F.2d 1322, 1328 (3d Cir.1981), we held that proof of discriminatory intent was not required in a Rehabilitation Act case. Instead, "proof of disparate impact or effects is sufficient." In *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court, "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact," *id.* at 299, 105 S.Ct. at 719, and held that a Rehabilitation Act plaintiff need not show discriminatory intent: "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect." *Id.* at 295, 105 S.Ct. at 717. The Court reviewed statements by members of Congress that the Act sought to eliminate, *inter alia,* "architectural barriers," "discrimination in access to public transportation," "the discriminatory effect of job qualification ... procedures," and "[d]iscrimination because [disabled individuals] do not have the simplest forms of special educational and rehabilitation services." *Id.* at 297, 105 S.Ct. at 718. "These statements," the Court concluded, "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297, 105 S.Ct. at 718.[19]

In *Helen L. v. DiDario,* 46 F.3d 325, 335 (3d Cir.1995), we held that proof of discrimination under the ADA, as under the Rehabilitation Act, does not require a showing of discriminatory animus: "Because the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the 'invisibility' of the disabled, Congress could not have intended to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination." *See also Crowder v. Kitagawa,* 81 F.3d 1480, 1484 (9th Cir.1996) (holding that the ADA is intended "to cover both intentional discrimination and discrimination as a result of facially neutral laws").[20] Although in *Helen L.* we did not explicitly state that a disparate impact claim may be brought under the ADA, that result was implicit in our conclusion that proof of discriminatory intent is not required.[21] In addition, Department of Justice regulations implementing the ADA support the conclusion that the discrimination prohibited by Title II includes seemingly neutral governmental policies which nonetheless have a discriminatory effect on individuals with disabilities. Thus, one regulation provides:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.
> 28 C.F.R. § 35.130(b)(8) (1995). The explanatory comments show that, under this regulation, neutral rules may be actionable if they tend to exclude disabled persons because of some characteristic symptomatic of their disability:
>
> > ***1139** [R]equiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.
>
> 28 C.F.R. Pt. 35, App. A at 461 (1995). In this example, individuals with vision impairment are excluded from purchasing by check because of an incidental implication of their disability. *See also id.* at 460 (stating that the regulations "prohibit[ ] both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but

deny individuals with disabilities an effective opportunity to participate").[22]

Although we have not previously had occasion to discuss the proof structure of a disparate impact case brought under the disability statutes, the elements of disparate impact cases brought under Title VII are instructive. Under Title VII, the first element of a disparate impact claim is a showing that a facially neutral policy has a disproportionate impact on a protected group. *See* 42 U.S.C. § 2000e-2(k); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Under the Rehabilitation Act or the ADA, the equivalent showing is that the challenged policy has a disparate impact on individuals with disabilities.[23] To make such a showing is to establish discrimination "by reason of" disability. On the record before us, we cannot determine whether the challenged portion of the district court's order has a disparate impact on individuals with disabilities.

In order to determine whether the challenged portion of the May 26, 1995 order has discriminatory effects, we must know whether the violence assertedly committed by members of the appellant class was caused by their disabilities. The district court made no factual findings addressing this question. Appellants rely upon a psychologist's affidavit, which states, "It is very common for mental illness to manifest itself through minor forms of physical or what may be viewed as aggressive expression. The acutely mentally ill are often unable to resolve problems they face verbally or with the aid of friends or family members." App. at 68A (Aff. of Lillian L. Meyers, Ph.D). While this affidavit may offer some help, it is extremely vague-for instance, it is unclear what types of mental illnesses are being discussed or what forms of violent behavior are being attributed to such illnesses. Given the absence of factual findings by the district court and with only this affidavit before us, we are not in a position to say how, or if, violence that may have been committed by members of the appellant class is symptomatic of their mental illnesses. As a result, we have no basis for deciding whether exclusion of these ***1140** class members on the basis of violence is exclusion "by reason of" disability.

D.

Assuming that the challenged criterion causes a disparate impact on members of the appellant class which can be attributed to their disabilities-and that such exclusion therefore constitutes discrimination "by reason of" disability-the district court's order of May 26, 1995 will nonetheless survive an ADA and Rehabilitation Act challenge if the excluded class members fail to show that they are qualified for community-based mental health services. We must therefore examine this element of the Rehabilitation Act and the ADA.

The ADA defines the term "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). Under this definition, an individual is "qualified" for the receipt of governmental services if the individual satisfies the "essential eligibility requirements" for receiving the services. A "qualified" individual need not satisfy *all* the eligibility requirements if "reasonable modifications" can be made to allow the individual to participate. *See Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002, 1009 (3d Cir.1995) ("[A]n individual may be otherwise qualified in some instances even though he cannot meet all of a program's requirements."). In order to determine whether an ADA plaintiff is "qualified," a court must (1) ascertain the eligibility criteria for the challenged activity, (2) determine which criteria are "essential," and (3) determine whether the plaintiff either satisfies the essential criteria or could satisfy these criteria if reasonable modifications were made. As discussed above, we think that as a general rule courts should defer to the judgments of prison officials as to what qualifications are essential and what modifications would be reasonable.

In this case, the eligibility criteria for community-based mental health services include: "Persons must be charged with a minor, non-violent crime and not have a past history of violence." Order of May 26, 1995 at ¶ 5. In this appeal, appellants argue that this is not an "essential" criterion for community-based services. Appellants further argue that the public safety concerns furthered by the challenged criterion can be addressed through individualized assessments of otherwise eligible inmates. Providing such assessments, appellants contend, would be a reasonable modification.

The ADA regulations provide some guidance on which eligibility requirements are "essential" and which are subject to "reasonable modifications":

> (7) 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.
>
> (8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

28 C.F.R. § 35.130(b) (1995). Under these provisions, the "essential eligibility requirements" of a public entity's program are those which are "necessary for the provision" of the program and which cannot be modified without "fundamentally alter[ing]" the nature of the program. *See Easley v. Snider,* 36 F.3d 297, 302 (3d Cir.1994) (stating, in a section 504 case, "[I]f there is no factual basis in the record demonstrating that accommodating the individual would require a fundamental modification or an undue burden, then the handicapped person *is* otherwise qualified and refusal to waive the requirement is discriminatory.") (emphasis in ***1141** original); *Pottgen v. Missouri State High School Activities Ass'n,* 40 F.3d 926, 932-33 (8th Cir.1994) (R. Arnold, J., dissenting) (stating, in an ADA case, "But if a rule can be modified without doing violence to its essential purposes ..., I do not believe that it can be 'essential' to the nature of the program or activity to refuse to modify the rule.").

The County argues that allowing violent inmates to participate in the community-based programs would destroy the viability of such programs:

> The County will not release violent offenders into the community, nor will the community or the providers accept them. Additionally, it is hard to imagine that a judge will approve their release. If given a choice to either open these programs to all prisoners including violent offenders or shut them down, then the County will be compelled to shut them down. The County will not risk a tragedy in the community which would jeopardize the existence of the other community-based programs. Sustaining the Inmates' argument and thus, accommodating the mental health inmates who are charged with a violent crime, convicted of a violent crime, or possess a past history of violence, with an individualized assessment, would be unreasonable because it would necessitate a modification of an essential nature of the program, as well as, place undue burdens on the County.

Appellees' Brief at 20-21. Although this passage does not precisely articulate what the County considers to be the fundamental purposes of the community-based programs or how these purposes would be jeopardized by providing individualized assessments of inmates charged with violent crimes or who have histories of violence, the statement can be construed as expressing the County's belief that allowing inmates charged with violent crimes or who have a history of violence to participate in community-based programs would threaten public safety; the County further argues that this threat to safety would undermine public confidence in community-based programs.[24] The County thus appears to assert that an "essential eligibility requirement" for the community-based programs is that an inmate not threaten public safety. We recognize that ensuring public safety is, indeed, essential if the prison is to provide community-based services to mentally ill inmates. The only question is whether the goal of protecting public safety can be accomplished without excluding all mentally ill inmates charged with violent crimes or who have a history of violence.

In *School Board of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987), a case arising under the Rehabilitation Act, the Court recognized that, in some circumstances, the interests of persons with disabilities must be balanced against public health and safety concerns.[25] The ***1142** ADA implements *Arline* 's conclusion that covered entities must balance the needs of public health and safety against the interests of individuals with disabilities.[26] Title II regulations explicitly adopt the standard articulated in *Arline* for determining whether providing services to a person with a disability poses an unacceptable risk:

> The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline.* Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks.

28 C.F.R. Pt. 35, App. A at 455-56 (1995).

The record on appeal does not contain any factual basis for determining whether, in light of the applicable standards, the threat to public safety posed by inmates charged with, or who have a history of, violence, makes them categorically unqualified for community-based services. There have been no factual findings regarding the risks that such inmates would pose if they were allowed to participate in community-based services. We do not know what types of mental illness the inmates are afflicted with, the nature of their past violence, and their propensity for violent behavior in the future. Additionally, the record does not reveal the details of the services provided under the rubric of community-based programs or the safety protections in place for these programs. Thus, as we noted above, *see supra* note 2, we do not know the extent of the interaction, if any, between members of the public and those inmates who participate; we similarly do not know what security measures are in place during any such interactions.

We further lack any factual basis for determining whether the modification appellants seek is reasonable. Rather than a blanket exclusion of all inmates who are charged with, or who have a history of, violence, appellants seek individualized assessments of the risks posed by each inmate who might otherwise be qualified for community-based programs. Under such a regime, inmates assessed as dangerous would be excluded, while those assessed as safe would be eligible. While *Arline* and the ADA regulations recognize a preference for individualized assessments of the qualifications of persons with disabilities, rather than excluding entire categories of disabled persons, the ADA does not require individualized assessments in every case. The comments to the regulations state:

> ***1143** A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' license, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

28 C.F.R. Pt. 35, App. A at 461 (1995). Requiring individualized assessments in every case might impose an undue hardship on a covered entity. *See Arline,* 480 U.S. at 287 n. 17, 107 S.Ct. at 1131 n. 17 ("Accommodation is not reasonable if it ... imposes 'undue financial and administrative burdens' " on a covered entity) (quoting *Southeastern Community College v. Davis,* 442 U.S. 397, 412, 99 S.Ct. 2361, 2370, 60 L.Ed.2d 980 (1979)); *Wagner v. Fair Acres Geriatric Center,* 49 F.3d 1002, 1009 (3d Cir.1995) ("[R]equiring accommodation is unreasonable if it would place undue burdens, such as extensive costs, on the recipient of federal funds."). In order to determine whether requiring individualized assessments would constitute a reasonable modification, a court must weigh the effectiveness of the assessments against the costs they would impose. Here, the record contains no findings on how effective individual assessments would be in screening out inmates who pose a threat to public safety. Nor are there findings on the burdens the County would incur if it were required to make such assessments.

Thus, on the record before us, we cannot determine whether inmates excluded from community-based mental health services on the basis of past violent behavior or on the basis of pending charges of violent conduct are otherwise qualified for these services or whether they could be qualified with reasonable modifications to the services. As a result, there is a factual dispute regarding whether the modification approved by the district court complies with the ADA. Accordingly, we hold that the district court abused its discretion in approving the modification of the consent decree without first holding a hearing and issuing factual findings. *See Delaware Valley Citizens' Council v. Pennsylvania,* 674 F.2d 976, 981 (3d Cir.1982). We will therefore vacate the order modifying the consent decree and remand to the district court. On remand, the plaintiffs will bear the burden of establishing that they are qualified for the programs at issue and that the proposed screening devices constitute reasonable accommodations to their disabilities. Given the degree of deference to which prison officials' policies are entitled, the plaintiffs' burden is not a light one. We believe that a remand is necessary, however, so that the parties may present evidence, and the district court may assess this evidence, in light of the applicable standards which, in this opinion, we have undertaken to clarify.[27]

Conclusion

We conclude that, contrary to appellees' contention, correctional facilities are within the scope of the Rehabilitation Act and the ***1144** ADA. However, the record developed in the district court and presented on this appeal does not provide enough

information to enable us to determine whether, as appellants contend, the exclusion of certain members of the appellant class from participation in the community-based mental health programs contravenes the Rehabilitation Act and the ADA. Accordingly, we vacate the order appealed from and remand the case for further consideration by the district court.[28] On an amplified evidentiary record, the district court will be in a position to prepare factual findings and conclusions of law directed to the following issues: (1) whether the exclusion from community-based mental health services of mentally ill inmates who are charged with violent crimes or who have past histories of violence constitutes discrimination by reason of disability; and (2) whether, with or without reasonable modifications of the services, such inmates are otherwise qualified to participate in community-based mental health services.

BECKER, Circuit Judge, concurring and dissenting.

Judge Pollak has explained convincingly why the Rehabilitation Act (RA) and the Americans with Disabilities Act (ADA) apply to the community-based forensic support program at issue in the case. I, therefore, join in Part II.A of the majority opinion. For the reasons set forth below, I cannot agree that the district court abused its discretion in modifying the consent decree to exclude violent offenders from the forensic program, or that this case should be remanded for a protracted set of hearings. To that extent, I respectfully dissent.

I.

As the majority aptly notes, a central issue in this appeal is whether mentally ill individuals who have been charged with or committed a violent offense are "qualified" for the forensic program. As the ADA makes clear, an individual with a disability can still be "qualified" (or "otherwise qualified" in the vernacular of the RA) if he or she can meet the "essential eligibility requirements" of that program with reasonable accommodation, which can include both "reasonable modifications to rules, policies, or practices" and the "provision of auxiliary aids and services." *See* 42 U.S.C. § 12131(2).

Obviously, mentally ill violent offenders cannot meet the eligibility requirements of the forensic program without both a modification of the program's existing requirements and an accommodation of their particular condition. Individuals who have committed or been charged with violent crimes in the past are specifically excluded from program participation, and, even if they receive an individualized assessment, many are not likely to satisfy the essential requirement of any such program-that they not pose a violent risk in the future-without treatment. Therefore, appellants seek the following accommodation: they propose that mentally ill violent offenders be offered individual psychiatric assessments and that those offenders diagnosed with "treatable" violent tendencies be allowed to take part in the forensic program.

We must determine whether this proposed accommodation is reasonable. An accommodation ***1145** is reasonable if it would not "necessitate modification of the essential nature of a program" or "place undue burdens such as extensive costs, on the recipient of federal funds." *Strathie v. Department of Transp.,* 716 F.2d 227, 230 (3d Cir.1983).

I do not believe that Judge Cohill abused his discretion when he concluded that Appellants' suggested accommodation was unreasonable.[1] To me, the issue is plain. Including violent offenders in a community-release program (like the forensic program at issue here) without doubt changes its "essential nature." Community-based programs are accepted by the public because they exclude individuals who have committed violent offenses. It is clear that letting individuals charged with or convicted of murder, rape, or kidnapping into the community-regardless of whether they can be "treated"-would cause a significant public outcry and lead to the elimination of the forensic program. Furthermore, it is undeniable that the enormous cost of requiring individualized psychiatric assessments of all potential releasees would place an unacceptable burden on the Appellees. In my view, Judge Cohill did not abuse his discretion by considering these realities. As Appellants are not "qualified" for the program, they need not be allowed to participate.

II.

I also cannot agree with the majority's decision to send this case back to the district court for more factfinding on matters such as the Appellants' "propensity for violent behavior in the future." Majority Opinion at 44. In my view, this is a

meaningless exercise. Notwithstanding the conclusory and undocumented affidavit of Lillian Meyers,[2] one the majority itself labels "vague," Majority Opinion at 37, it seems evident that this tremendous expenditure of judicial resources will uncover nothing, for the relevant psychology literature suggests that mental health professionals cannot reliably predict dangerousness, at least not yet.

Although mental health professionals once presumed that they were able to predict violent behavior accurately, beginning in the 1970s researchers began compiling data demonstrating that this assumption was incorrect. *See* Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature,* 18 LAW & PSYCHOL. REV. 43, 45 (1994) [hereinafter *Dangerousness Literature*]. Indeed, early researchers concluded that mental health professionals were "less accurate than the flip of a coin," *see* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping* ***1146** *Coins in the Courtroom,* 62 CAL. L. REV. 693, 737 (1974), and should be barred from offering testimony. *Id.* at 733-738; *see also* American Psychiatric Association, *Report of the American Psychiatric Association Task force on Clinical Aspects of the Violent Individual* 20 (1974) (concluding that "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness."). Charles Ewing, a psychologist and attorney, went so far as to conclude that psychiatrists or psychologists who attempt to predict dangerousness violate their ethical obligations "to render judgments that rested on a scientific basis." Charles P. Ewing, *"Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings,* 8 AM. J.L. & MED. 407, 418 (1983).

Professor Randy Otto-a leading researcher-concludes that although the pessimism of these "first generation" researchers may have been exaggerated, as of 1994, researchers have at best "some" ability to predict dangerousness. *Dangerousness Literature, supra* at 62-63. "Some" ability to predict dangerousness, of course, is patently insufficient when the safety of the public is at stake. And neither the literature nor the papers in this case reveal any discovery in the last two years that there is any reliable way to predict dangerousness without reference to prior conduct.

It seems to me, therefore, that the venture upon which the majority has set the district court has insufficient promise to justify interfering with its exercise of discretion.[3] I also believe that the cost of this enterprise would be frightful, itself an element of "reasonable accommodation."

III.

The majority's improvident decision is aggravated by the unusual posture of this case. Much like the "trouble with Harry" in the classic Hitchcock movie, the trouble with the forensic program is that it is dead. The program has expired. *See* Majority Opinion at 47, n.28. Although, as the majority explains, vacatur of the order allows the district court to meet its obligations under the 1989 decree, the 1989 decree provided for an in-house mental health facility, not a community-based program. Therefore, individualized assessments to determine whether violent offenders should be allowed in the community release program will be relevant only *if* a community release program is again established. If the parties do not again agree to a community release program-or if Judge Cohill does not approve it-the majority opinion will be a meaningless exercise. Thus, while the case may be technically justiciable, it seems a wiser exercise of judicial discretion to stay our hand.

I would affirm the order of the district court.

ORDER

Sept. 20, 1996.

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges, and POLLAK[*] , District Judge.

A majority of the active judges having voted for rehearing en banc in the above appeal, it is

ORDERED that the Clerk of this Court vacate the panel's opinion and judgment filed August 22, 1996 and list the above case for rehearing en banc at the convenience of the court.

Parallel Citations

5 A.D. Cases 1422, 8 NDLR P 305

Footnotes

[*] Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] *See Inmates of the Allegheny County Jail v. Wecht,* No. 92-3434, 17 F.3d 1430 (3d Cir. 1993); *Inmates of the Allegheny County Jail v. Wecht,* 874 F.2d 147 (3d Cir.), *cert. granted and judgment vacated,* 493 U.S. 948, 110 S.Ct. 355, 107 L.Ed.2d 343 (1989); *Inmates of the Allegheny County Jail v. Wecht,* 873 F.2d 55 (3d Cir.1989); *Inmates of the Allegheny County Jail v. Pierce,* 612 F.2d 754 (3d Cir.1979).

[2] Certain important operational details of the program remain unclear on the record before this court. For instance, we do not know the degree of interaction between inmates and members of the public; we also do not know the form and scope of security measures, if any, which are in place during the community-based services.

[3] The order approved by the district court makes no mention of what mental health services are to be provided to inmates who do not qualify for community release. This absence is troubling given the court's earlier finding that "a significant proportion, perhaps as many as a quarter to a third" of all inmates at the jail are seriously mentally ill; the twenty-five inmates served by the Forensic Support Program would appear to represent only a small fraction of all mentally ill inmates at the jail.

[4] On oral argument before this court, counsel for the County said that he understood the phrase "charged with a minor, non-violent crime" to refer only to current charges, but he proffered no definition of "violent crime" and stated it as his expectation that the range of excludable charges would develop as the eligibility criteria were applied. Further, counsel for the County represented that the term "past history of violence" refers to past criminal convictions. This representation is hard to harmonize with the County's appellate brief, which states that inmates should be excluded who are "charged with a violent crime, convicted of a violent crime, or possess a past history of violence." Appellees' Brief at 21. Further, counsel for the County could not state what types of criminal convictions would, as he read the order, result in an inmate's exclusion from community-based services.

[5] Rule 52(b) provides: "On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings-or make additional findings-and may amend the judgment accordingly."

[6] The May 26, 1995 order, modifying the 1989 consent decree, provides that the order will remain in effect for a year and thereafter judicial supervision of the prison's mental health programs is to come to an end. Order of May 26, 1995, at ¶ 8. *See infra* note 28.

[7] Section 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794(a).

Title II of the ADA provides:

> [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.

[8] The Rehabilitation Act applies, however, only to a "program or activity receiving Federal financial assistance."

[9] *Williams* may be read as holding that the Rehabilitation Act does not apply to prisons generally, or it may be limited to federal prisons; alternatively, it may be limited to employment discrimination claims brought by prisoners. Uncertainty as to the scope of the holding is due to the fact that the sentence from *Williams* quoted in the text is the only analysis in the opinion devoted to the question of the applicability of the Rehabilitation Act. Apart from the fact that *White* deals with a state prison rather than a federal prison, *White* does not clarify matters, as the sentence quoted above from that case is its only analysis of the applicability of the ADA.

[10] Subsequent to *Torcasio,* two district courts in the Fourth Circuit have held that the ADA does not apply to certain claims brought

by prisoners. Relying primarily on *Torcasio,* the court in *Pierce v. King,* 918 F.Supp. 932, 938 (E.D.N.C.1996) held "that the Americans with Disabilities Act does not create a cause of action for state inmates displeased with their prison work assignments." In addition, the court in *Pierce* also found that prison labor does not substantially affect interstate commerce and that, following *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), Congress lacks authority under the Commerce Clause to apply the ADA to prisons. Relying entirely on the rationale of *Torcasio,* the court in *Staples v. Virginia Dept. of Corrections,* 904 F.Supp. 487, 490 (E.D.Va.1995) held that "the ADA [is] inapplicable in the state prison context."

11 In reliance on *Torcasio,* one district court in this circuit has also held, in the context of qualified immunity, that it is not "clearly established" that the Rehabilitation Act applies to correctional facilities. *Little v. Lycoming County,* 912 F.Supp. 809, 819 (M.D.Pa.1996). *But see Austin v. Pennsylvania Dept. of Corrections,* 876 F.Supp. 1437, 1465 n. 17 (E.D.Pa.1995) ("[T]he Rehabilitation Act applies with the same force and effect in corrections institutions as it does in other federally-funded programs.").

12 In *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), in which a rejected applicant for employment with a state hospital sued the hospital for disability-based discrimination, the Court held that the Rehabilitation Act did not satisfy the clear-statement rule and therefore did not abrogate state sovereign immunity. In response, Congress enacted 42 U.S.C. § 2000d-7, providing: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act." In enacting the ADA, Congress similarly abrogated state sovereign immunity: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

13 Moreover, the focal inquiry of the clear-statement cases is whether Congress has intended to regulate the governments of the *states,* not the governments of municipalities, counties, or other local governmental instrumentalities. *See Hilton v. South Carolina Public Railways Comm.,* 502 U.S. 197, 206-07, 112 S.Ct. 560, 566, 116 L.Ed.2d 560 (1991) (concluding that the clear-statement rule applies when the issue to be resolved is the existence of a "congressional intent to impose monetary liability on the States"); *Gregory v. Ashcroft,* 501 U.S. 452, 469, 111 S.Ct. 2395, 2405-06, 115 L.Ed.2d 410 (1991) (concluding that the clear-statement rule applies when federal legislation "intrudes on traditional state authority") (quoting *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 16, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981)); *Will,* 491 U.S. at 65, 109 S.Ct. at 2309 ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' ") (quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985)). The balance-of-power concerns expressed by the clear-statement cases have considerably diminished pertinence when Congress directs its efforts against the activities of local governments. Accordingly, even if we were persuaded (and, with respect, we are not) that *state* correctional facilities fall outside the scope of the Rehabilitation Act and the ADA, such a holding would not offer support for an argument that *local* correctional facilities, such as the county jail whose programs are at issue in the case at bar, are not covered by the statute.

14 Indeed, it would be anomalous to follow the Fourth Circuit's suggestion in *Torcasio* that the Rehabilitation Act and the ADA are inapplicable to programs and services that are obligatory in nature. Such a limitation would appear to immunize disability-based discrimination in the provision of such compulsory services as public education, jury service, and mandatory inoculations. Nothing in the texts of the ADA and the Rehabilitation Act hints at such a result.

15 In *Gates v. Rowland,* 39 F.3d 1439 (9th Cir.1994), the Ninth Circuit similarly held that courts reviewing Rehabilitation Act challenges to prison regulations must balance the needs for effective prison administration against the degree of infringement on the inmates' statutory rights. In balancing these considerations, the Ninth Circuit concluded that it would employ by analogy the standard for reviewing the application of constitutional rights in prison settings. This standard was articulated by the Supreme Court in *Turner,* 482 U.S. at 89, 107 S.Ct. at 2261-62: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Apparently, the Ninth Circuit would use the *Turner* test as a threshold question before applying the ordinary Rehabilitation Act standard. Although we hold that a court can best express the degree of deference owed to prison officials within the ordinary framework for analyzing Rehabilitation Act and ADA claims, rather than through a separate inquiry, we believe that this difference in approach will likely make very little difference in practice.

16 In this case, appellants have apparently presented no evidence on whether federal funds support some aspects of the operation of the jail or of the community-based mental health programs. On the other hand, the County has not challenged the applicability of the Rehabilitation Act on the ground that the jail and the programs at issue do not receive federal funding. Accordingly, for the purposes of this appeal we will assume, albeit without deciding, that this element of the Rehabilitation Act is satisfied. In addition, the County does not dispute the contention that mental illness is a "disability" under the Rehabilitation Act and the ADA.

17 We note that the discrimination alleged by appellants is between two different categories of persons with disabilities-mentally ill inmates who are "charged with a minor, non-violent crime and [who do] not have a past history of violence," are eligible for community-based mental health services, while mentally ill inmates who are charged with violent crimes or who have a history of violence are categorically ineligible. Under the Rehabilitation Act and the ADA, disability-based discrimination includes both differential treatment between disabled and non-disabled persons and differential treatment between disabled persons. *See Helen L. v. DiDario,* 46 F.3d 325, 335-36 (3d Cir.) (rejecting the argument that "there can be no improper discrimination here because the

services at issue are only provided to persons with disabilities"), *cert. denied,* 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995); *Martin v. Voinovich,* 840 F.Supp. 1175, 1191-92 (S.D.Ohio 1993) (holding that, under the Rehabilitation Act and the ADA, discrimination between persons with different disabilities may be actionable).

18 With regard to the question of whether exclusion on the basis of violent behavior may amount to exclusion on the basis of disability, the parties discuss three employment discrimination cases addressing the question whether discrimination on the basis of behavior symptomatic of disability may amount to disability-based discrimination. In *Teahan v. Metro-North Commuter R.,* 951 F.2d 511 (2d Cir.1991), *cert. denied,* 506 U.S. 815, 113 S.Ct. 54, 121 L.Ed.2d 24 (1992), an employer fired an alcoholic employee because of the employee's unexcused absenteeism. The employee contended that his discharge violated the Rehabilitation Act because his absenteeism resulted from alcoholism. The Second Circuit held that summary judgment in favor of the employer was inappropriate. The court concluded that if the plaintiff's absenteeism was in fact caused by alcoholism, termination on the ground of absenteeism was indeed "by reason of" the plaintiff's disability. In contrast, the Sixth and Seventh Circuits have held that if an employee is fired on the basis of behavior symptomatic of disability, the employee must show that the employer knew that the plaintiff was disabled. *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928 (7th Cir.1995) (affirming summary judgment dismissing the claim of an employee fired for poor work performance; while the employee's poor performance may have been due to disability, the employer had no reason to know that this was the cause); *Landefeld v. Marion General Hospital,* 994 F.2d 1178 (6th Cir.1993) (affirming summary judgment dismissing the claim of an employee fired for stealing mail; while such behavior was apparently caused by a mental disorder, the employer had no knowledge of this disorder). However, these three cases arise in a context-employment discrimination claims for damages-sufficiently unlike the context of the case at bar as to be inapposite. Thus, courts may properly be reluctant to levy damages, rather than grant injunctive relief, against a defendant who did not know the plaintiff was disabled.

19 As the Court noted in *Alexander,* all six of the federal courts of appeals that had addressed the issue, as of January 1985, had ruled that, "at least under some circumstances," disparate impact analysis was available under section 504. *See id.* at 297 n. 17, 105 S.Ct. at 718 n. 17 (listing cases).

20 The conclusion that proof of discriminatory intent is not required under the ADA finds support in congressional findings included in the ADA, which describe a much wider range of discrimination than merely "intentional exclusion":

> [I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5).

21 Moreover, because we have held that the substantive standards applicable to the ADA and the Rehabilitation Act are identical, *see McDonald,* 62 F.3d at 94, our conclusion in *NAACP v. Medical Center, Inc.* that disparate-impact claims may be brought under the Rehabilitation Act leads to the conclusion that such claims may also be brought under the ADA.

22 As discussed above, in *Helen L.* we held that these regulations are entitled to "substantial deference": "Unless the regulations are 'arbitrary, capricious or manifestly contrary to the statute,' the agency's regulations are 'given controlling weight.' " 46 F.3d at 332 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984)). The regulations clearly implement congressional intent, as expressed in the ADA's findings section, that Title II is designed to eliminate public regulations that have a discriminatory effect.

23 The other elements of a disparate impact claim under Title VII may also be applied under the Rehabilitation Act or the ADA. Under Title VII, if the plaintiff can satisfy its burden of establishing a disparate impact, the defendant then bears the burden of proving that the policy is "job related" and is "consistent with business necessity." If the defendant satisfies this burden, the plaintiff may yet prevail by showing that an equally effective alternative policy would have a less severe discriminatory impact than the challenged policy. With slight alteration, these elements of the Title VII proof structure may fit comfortably within the context of claims brought pursuant to the disability statutes. The Title VII determination of whether the challenged policy is "job related" and is "consistent with business necessity" is essentially equivalent to the Rehabilitation Act and ADA determination whether the plaintiff is otherwise "qualified" for the program at issue. And the Title VII inquiry into the feasibility of alternative policies is essentially equivalent to the ADA inquiry into "reasonable modifications."

24 The County's position may also be read to mean that the public *perception* of a threat to public safety, even in the absence of any real safety threat, is sufficient to justify excluding inmates charged with violent crimes or who have histories of violence. As discussed below, however, a public entity cannot discriminate against individuals with disabilities based upon an unsubstantiated fear that they pose a threat to others. *See* 28 C.F.R. Pt. 35, App. A at 461 (1995) ("Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.").

25 *Arline* arose when a school teacher was fired because she was afflicted with tuberculosis. School officials believed that the contagious nature of tuberculosis made the teacher unqualified to teach. It was unclear, however, whether the teacher's condition in fact posed any significant risk to student health. Because the risks posed by the plaintiff's continued employment were unclear, the Supreme Court remanded for additional factfinding:

> The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety threats.

Id. at 287, 107 S.Ct. at 1130-31. In remanding the case, the Court held that, in balancing the interests of public health against the interests of the plaintiff, a court should examine the following factors:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288, 107 S.Ct. at 1131 (quoting the *amicus* brief of the American Medical Association).

[26] Titles I and III of the ADA allow defendants to assert that a plaintiff is unqualified because he or she poses a "direct threat" to the health or safety of others. *See* 42 U.S.C. § 12113(b) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."); 42 U.S.C. § 12111(3) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation"); 42 U.S.C. § 12182(b)(3) ("Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others."). Although Title II does not include a "direct threat" provision, the ADA regulations state that the principles established under Titles I and III addressing health and safety threats also apply under Title II. *See* 28 C.F.R. Pt. 25, App. A at 455 (1995) ("Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be 'qualified,' if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.").

[27] In his concurrence/dissent, Judge Becker argues that the district court did not abuse its discretion in "conclud[ing] that Appellants' suggested accommodation [individualized assessments to determine whether particular inmates charged with, or having a history of, violence could safely be included in the community-based program] was unreasonable." Implementation of such a process, Judge Becker says, "would cause a significant public outcry and lead to the elimination of the forensic program." Moreover, according to Judge Becker, individualized assessments would entail "enormous cost" that "would place an unacceptable burden on the Appellees."

> Judge Becker may well be right on one or both of these points. He generally is right. Or-just conceivably-he may be right on neither of them. The difficulty is that the district court received no evidence and made no findings on these points, so we have no record on the basis of which to assess-let alone sustain-the district court's exercise of discretion. The remedy is not affirmance on the basis of appellate *ipse dixit.* The remedy is a remand that enables the district court to determine, on a record, whether Judge Becker's intuitions are soundly rooted in fact.
>
> The same holds true for Judge Becker's statement that "the relevant psychology literature suggests that mental health professionals cannot reliably predict dangerousness, at least not yet." Here again, Judge Becker may well be right. His parade of what he terms "the relevant psychology literature" is impressive. But none of that literature, or any other literature, was appraised and made the subject of findings by the district court. Once more, the remedy is inquiry at the district court level. Just why Judge Becker supposes that "the cost of this [inquiry] would be frightful" is not readily apparent. Our colleague was able to canvass the literature in two paragraphs.

[28] As noted above (*see supra* note 6) paragraph 8 of the May 26, 1995 order, which is a modification of the 1989 consent decree, provides that the May 26, 1995 order will remain in effect for one year and that court supervision will thereafter cease. In vacating the May 26, 1995 order, we remand the case to the district court for its exercise of its continuing jurisdiction under the 1989 consent decree.

> Judge Becker argues that "while [this] case may be technically justiciable, it seems a wiser exercise of judicial discretion to stay our hand." This is so because, "[m]uch like the 'trouble with Harry' in the classic Hitchcock movie, the trouble with the forensic program is that it is dead." The death of the program, according to Judge Becker, is established by that provision of the May 26, 1995 order which specified that judicial supervision of the prison's mental health programs would terminate on May 25, 1996. The order did not specify, however, that the program was itself to end on that date. The current status of the program is for the district court to determine, not for us to conjecture about. Maybe the program shares Harry's trouble. But maybe-as with Mark Twain-the reports of its death are exaggerated.

[1] To the extent that Judge Cohill's exercise of discretion subsumed a conclusion of law, I do not think that he erred in his legal determination either.

[2] The affidavit of Dr. Meyers reads, in pertinent part:

> -The aggressive manifestation of mental illness is most treatable. With medications, medication monitoring and counseling, the mentally ill, who in the past have been moderately aggressive, are no more dangerous to themselves or others than law abiding citizens generally.
>
> -Individual assessments of the mentally ill brought into the criminal justice system, and follow-up treatment, which is or should be readily available, can, without difficulty, eliminate aggressive symptoms.
>
> -Any program, intended to provide treatment in the community in lieu of incarceration pending disposition of charges, must

include the individualized assessment by a mental health professional of whether the individual, given treatment and supervision, presents any degree of danger to him or herself or others. To leave out those mentally ill, who have been charged with or who have in the past engaged in some form of minor, violent behavior, unnecessarily leaves out of this program most mentally ill whose illness has led to their incarceration.

-A procedure whereby a security officer restricts access to individualized assessment for recommended release based on a review of charges leaves out the very individuals most in need of and most likely to succeed in a community release program. It is additionally unnecessary since the criminal division judge and prosecuting attorney must review any request for conditional bond or probation in any event before this may occur.

-In sum, behavior without treatment is in most cases not a predictor of behavior with treatment. To deny access to assessment for participation in a community release program based solely on stereotypical notions of past manifestation of illness, effectively prevents mental health professionals and the court from reviewing the appropriateness of community treatment in lieu of incarceration pending disposition of charges.

Appendix at 68a.

[3] It is quite interesting to note that the ballot in the upcoming Pennsylvania primary election contains a proposed amendment to the Pennsylvania Constitution which, among other things, would change the composition of the Board of Pardons. The Board originally included a doctor of medicine, psychiatrist and psychologist, *with expertise in the prediction of violent behavior.* The proposed amendment would strike this qualifier so that the Board would simply include a doctor of medicine, psychiatrist or psychologist. *See* PHILA. INQUIRER, Aug. 5, 1996, at F12 (containing advertisement of proposed amendment, which is sourced in Senate Bill No. 4, Special Session No. 1 of 1995 (Joint Resolution 1995-2) (Printer's No. 112)).

[*] Hon. Louis H. Pollak, United States Senior Judge for the United States District Court for the Eastern District of Pennsylvania, as to panel rehearing only.