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Vermont Superior Court
Chittenden Unit
24-CV-00370

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

CATHY AUSTRIAN, on behalf of her minor child, J.A.,	*Plaintiff*,	Civil Action No. _____
v.		
CITY OF BURLINGTON,	*Defendant*.	

COMPLAINT

INTRODUCTION

1. This is a civil rights action pursuant to Article 11 of the Vermont Constitution and the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq*. (VFHPAA), seeking declaratory, injunctive, and monetary relief from Defendant City of Burlington for its employees' discriminatory and unconstitutional acts against J.A.

2. J.A. is a Black minor child with a well-documented history of behavioral and intellectual disabilities who was 14 years old at the time of the incident giving rise to this Complaint.

3. The City of Burlington, through its police department, is—and was at the time of the incident giving rise to this Complaint—aware of J.A.'s status as a person with a disability.

4. Nevertheless, officers of the Burlington Police Department (BPD) failed to accommodate J.A.'s disability during what should have been a routine interaction; needlessly escalated their encounter with J.A.; subjected J.A. to disproportionate and unnecessary force; and failed to treat J.A. with the dignity, respect, and sensitivity they would have afforded to a similarly situated white individual.

5. Specifically, on May 15, 2021, J.A.'s mother, Cathy Austrian, called BPD and welcomed two BPD officers—City employees—into her home following J.A.'s low-level retail theft of vape pens[1] from a local gas station.

6. As reflected in an affidavit from a BPD officer contained in the Department's incident call notes, Ms. Austrian told the officers that J.A. was recently placed on an increased dose of medication for his attention-deficit/hyperactivity disorder (ADHD) and had recently been acting strangely. She further advised them that J.A. was behaving in a manner somewhat disconnected from reality and had a recent MRI of his heart.

7. The officers followed Ms. Austrian upstairs, where she expected them to speak with J.A.

8. Almost immediately, the officers were—or at the very least should have been—aware that J.A. had some kind of mental, intellectual, or emotional disability based on Ms. Austrian's instruction, BPD's familiarity with J.A., and the officers' observations of J.A., who sat on his bed, largely non-communicative, for the first 10 minutes of their encounter.

9. After recovering all the stolen items except one, and despite having knowledge of J.A.'s status as a child with emotional and intellectual disabilities, the officers threatened J.A. with handcuffing and arrest if he did not produce the final item, which he held in his hand while remaining quietly seated, posing no risk to the officers.

10. At that point, the BPD officers could simply have ended the encounter and, if warranted, written a citation for shoplifting to 14-year-old J.A.—an unarmed child who posed no threat to himself or others, and who the BPD officers knew had a disability, was acting strangely, and did not want to be encroached upon or touched. Indeed, one officer even represented that was the full extent of what would happen—stating that if J.A. did not return the vape pens, "you're getting paperwork."

11. Yet, shortly thereafter, the two BPD officers needlessly accelerated and escalated the encounter by approaching J.A.—contrary to BPD Directives that dictate providing time and space (should BPD even deem it necessary to continue such an interaction).

12. Although the officers could have engaged J.A. verbally to try to obtain the single remaining item, called a supervisor to seek guidance, requested a clinician for support, or otherwise avoided escalation—the appropriate actions pursuant to BPD

[1] Vape pens are small electronic devices similar to "e-cigarettes."

policy—the officers needlessly chose physical force by grabbing J.A. from the bed he was on, wrenching his arms behind his back, and wresting the item from his hands.

13. As a result of J.A.'s disability, J.A. foreseeably exhibited a fear response, seeking to protect himself from the officers and keep the officers away from his body.

14. Although the officers had successfully recovered the stolen item and could have simply disengaged and left J.A. in his home with his mother, the officers instead chose physical escalation again; they pinned J.A. back to the bed, handcuffed him, and ultimately took him to the floor. Once restrained, J.A. predictably proceeded to panic—screaming and contorting himself in distress.

15. After witnessing several minutes of J.A. screaming and contorting his body in response to the officers' physical restraint, Ms. Austrian asked that medical assistance and EMS be contacted.

16. Despite learning from Ms. Austrian upon his arrival that J.A. had "developmental delays" and that being confined would only exacerbate his distress and the manifestations of his disability, a BPD sergeant requested paramedic City employees place an opaque mesh bag over J.A.'s head.

17. J.A. began to scream even more loudly, with his body remaining tense.

18. Rather than recognize J.A.'s response as a foreseeable reaction related to his disability and the result of BPD's unnecessary escalation, J.A. was labeled as experiencing "excited delirium"—a racialized and unsubstantiated condition rejected by the medical community and often attributed to the victims of police violence who are Black.

19. Despite knowing of J.A.'s heart problems and disabilities, Burlington Fire Department (BFD) paramedics sought to inject J.A. with ketamine, a highly potent fast-acting anesthetic used to induce loss of consciousness.

20. Upon receiving permission from an off-site doctor, the paramedics injected J.A. with ketamine against his expressed wishes.

21. The injection of ketamine rendered J.A. unconscious, and the paramedics removed J.A. in a stretcher bag, bringing him to the hospital, where he remained on a heartrate monitor for the night.

22. Understandably, this dehumanizing treatment profoundly affected J.A. As a result of City employees' actions, J.A. experienced physical bruising, unconsciousness, extreme fear, discrimination, and loss of dignity during and immediately after the encounter. The lasting effects of the trauma have also been severe, exacerbating J.A.'s behavioral disabilities at home and school.

23. After attempting in vain to engage the City of Burlington directly for some measure of accountability, Ms. Austrian and J.A. now turn to this Court to redress the violation of his statutory and constitutional rights.

JURISDICTION AND VENUE

24. Ms. Austrian brings this action on behalf of her minor child, J.A., under Article 11 of the Vermont Constitution and the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq*.

25. Jurisdiction is proper under 4 V.S.A. § 31.

26. Venue is proper in this territorial unit of the Court under 4 V.S.A. § 37 and 12 V.S.A. § 402(a) because Defendant City of Burlington is located in Chittenden County.

PARTIES

A. Plaintiff

27. J.A.—a minor—is a Black teenager living in Vermont and has been raised by his adoptive mother, Ms. Austrian. At the time of the events described here, he was 14 years old.

28. As described below, J.A. has a complex history of trauma and resultant disabilities.

29. Ms. Austrian has cared for J.A. since he was five months old and has been his adoptive mother since age two. She brings this action as J.A.'s next friend and guardian pursuant to 14 V.S.A. § 2657 and V.R.C.P. 17.

B. Defendant

30. Defendant City of Burlington is a municipality located in Chittenden County, in the State of Vermont, with administrative offices at 149 Church Street, Burlington, VT 05401.

31. At all times relevant to this suit, the City of Burlington did and does own, operate, manage, direct, and control the Burlington Police Department (BPD) and the Burlington Fire Department (BFD).

32. At all times relevant to this suit, BPD and BFD did and do offer municipal services to the general public.

33. The City is also responsible for the hiring, training, and supervision of BPD Officers Kelsey Johnson and Sergio Caldieri and Sergeant Michael Henry as well as the BFD paramedics who administered ketamine to J.A.

34. Under 24 V.S.A. § 901a, the City is the appropriate defendant with respect to claims concerning the actions of its employees acting in the scope of their employment.

FACTUAL ALLEGATIONS

A. J.A. is a Vermont teen with a history of trauma and documented disabilities.

35. In 2005, Ms. Austrian decided she wanted to become a mother. Soon after she applied to become a foster parent, the Vermont Department for Children and Families placed five-month-old J.A. with Ms. Austrian, and Ms. Austrian officially adopted J.A. at age two.

36. Ms. Austrian's new baby was a sensitive child with special needs. J.A.'s experience of trauma had begun in utero when his biological father beat his biological mother, herself a woman with developmental and intellectual disabilities, during her pregnancy.

37. The maltreatment continued after his birth: by the time Ms. Austrian became the foster mother to five-month-old J.A., he had already suffered homelessness and severe neglect from his biological mother, who was unable to meet his basic needs.

38. Even as an infant, the effects of this abuse had begun to manifest. Ms. Austrian noticed that J.A. displayed many developmental delays, such as difficulty holding up his head and delayed motor function. As he aged, J.A. continued to lag in reaching developmental milestones. He received physical therapy, occupational therapy, and speech and language support in school.

39. Educational evaluations also revealed intellectual delays.

40. As a result, J.A. has received special education services since starting school.

41. His fifth-grade evaluation in 2018 showed his cognitive abilities to be in the very low range and discussed challenges with inattention. As a result of "symptoms of inattention across multiple settings," educational administrators concluded that J.A. "met the disability criteria of Other Health Impairment."

42. Similarly, his 2021 Individualized Education Plan (IEP) states that he has below-average processing speed and "requires additional time to process information, to respond to questions verbally, and to complete tasks."

43. J.A.'s most recent intelligence quotient (IQ) score was 67, qualifying him as a person with an intellectual disability.

44. Throughout most of his education, J.A. received the support of a designated in-class aide to help with his inattention and poor executive functioning. His 2021 IEP states that "[J.A.'s] challenges with attention make it difficult for him to maintain

the necessary level of selective and/or sustained attention. This area of relative weakness impairs learning, task completion, and social functioning."

45. When assessed in eighth grade, J.A. was performing at a fourth-grade level or below in multiple subjects.

46. In addition to his developmental and cognitive disabilities, J.A. also has exhibited related longstanding emotional disabilities.

47. Psychoeducational evaluator reports describe his emotional dysregulation and poor emotional control when his routines are disrupted—a common response for individuals with J.A.'s trauma history and disability diagnosis.

48. As noted in his 2021 IEP, in the context of this "complex pattern of interaction between learning, attentional, emotional, and self-regulation challenges with a significant history of prenatal and developmental trauma," J.A. has received diagnoses of Intellectual Disability, Attention-Deficit/Hyperactivity Disorder – Inattentive Type, an uncategorized health impairment, Oppositional Defiant Disorder (ODD), anxiety, and complex trauma.

49. Beyond J.A.'s challenges, he is, in the words of his 2022 IEP, "a kind, loving, sensitive, thoughtful, generous, and curious teenager" and, "[w]hen regulated, [J.A.] can demonstrate empathy and perspective taking."

B. Anticipating a learning opportunity, Ms. Austrian invites BPD officers to have a simple conversation with J.A.

50. On May 15, 2021, J.A. and his mother had a squabble familiar to many parents and children: a disagreement over screen time. J.A. left their home to cool off.

51. He returned later that evening with a bag of vape pens. Ms. Austrian learned from J.A. that he had taken them from a nearby convenience store, Cumberland Farms, without paying.

52. Ms. Austrian explained to J.A. the inappropriateness of his actions. As a result, J.A. gave most of the vape pens to Ms. Austrian. He did not, however, return them all.

53. Seeking to use the moment as a learning opportunity to reinforce lessons of accountability for her child, Ms. Austrian called the police so J.A. would return the items. Her hope—and expectation based on J.A.'s prior experience with BPD—was that a conversation with BPD officers would emphasize to J.A. why he must return the merchandise.

54. BPD Officers Johnson and Caldieri responded to Ms. Austrian's call. They had been at Cumberland Farms, where witnesses told them that J.A. appeared to be 15 or 16 years old and described him as "awkward," "acting weird," "[not] talking back," and stated that "something was wrong with him."

55. Upon their arrival to Ms. Austrian's home and before the officers saw J.A., Ms. Austrian immediately made the officers aware of J.A.'s special needs and disability and attempted to set expectations for the encounter. Ms. Austrian advised the officers that J.A. was 14 years old.

56. She informed the officers that J.A. had been "acting really erratically this afternoon" and that J.A.'s recent behavior seemed "distant," "irritable," and "not really based in reality."

57. Ms. Austrian also referenced his medical issues—including an MRI of his heart three days prior and recent increase to his ADHD medication—that she suspected might be contributing to his behavior.

58. At no point in the encounter did the police indicate they believed (or had reason to believe) that J.A. had a weapon of any sort. Although a Cumberland Farms employee had stated that J.A. had some sort of weapon while inside the store, Ms. Austrian took pains to emphasize to the BPD officers that J.A. had no weapon by the time BPD officers reached Ms. Austrian's home.

59. Upon speaking to the officers, she confirmed that J.A. was upstairs without access to any weapons. Ms. Austrian also assured the officers that J.A. was a "sweet kid" and not a danger.

60. Although Ms. Austrian's explanation itself put Officers Johnson and Caldieri on notice regarding J.A.'s disability, BPD was already well aware of J.A.'s unique needs because officers had visited the Austrian home on past occasions.

61. For instance, in 2019, BPD officers and the then-Acting Chief of Police Jon Murad responded to a call that J.A. was playing with lighters and had stolen money from Ms. Austrian's wallet, which was resolved peaceably through discussions with J.A.

C. Despite having knowledge of J.A.'s special needs and the need to accommodate J.A.'s disability, BPD officers needlessly escalate the interaction, contrary to BPD policy.

62. The officers accompanied Ms. Austrian upstairs and immediately recognized that J.A. was not functioning in a typical manner. J.A. was sitting quietly on his bed, and as described in a use-of-force report, "staring off into the distance, [] barely acknowledg[ing] [the officers'] presence."

63. The officers also observed Ms. Austrian explaining basic points to J.A. that a 14-year-old may normally be expected to comprehend. For example, when J.A. asked why Cumberland Farms gave him the vape pens, Ms. Austrian explained how a commercial transaction works in a store—*i.e.*, that when the store clerk handed J.A. the vape pens, the store clerk presumed J.A. would in turn pay for them before leaving the store.

64. J.A. did not speak to or engage with the officers. However, he silently watched his mother search for, and then find, all but one vape pen with no meaningful protest, resistance, or objection.

65. Ms. Austrian and the officers tried to convince J.A. to hand over the last remaining vape pen. J.A. remained seated on the bed and holding the last vape pen in his hand.

66. After spending just ten minutes upstairs with J.A., and despite the fact that they had successfully recovered all but a single vape pen (and if necessary, they could have simply issued J.A. a written citation and left the home, which BPD routinely does), the officers decided to escalate the situation into a physical encounter.

67. Crossing to J.A., Officer Johnson muttered, "I'm not playing this game anymore." Officer Caldieri threatened, "hand it to me, or you're getting up and going in handcuffs," and joined Officer Johnson, who had needlessly encroached on any reasonable comfort zone J.A. may have had.

68. When J.A. did not respond to the threat, instead of accommodating J.A. by providing distance, time, and effective verbal communication, calling a supervisor for guidance, or requesting a clinician, as directed by BPD policies and as discussed below, the officers unnecessarily accelerated and escalated the situation by deciding to physically wrest the pen away from J.A.

69. The two officers, who had been looming over J.A., began pulling at the arms of the passively seated 14-year-old.

70. J.A. tried to disengage and dissociate from the officers' confrontation, slowly lying back across the bed while covering his face and eyes with his arm.

71. But instead of modifying their approach in light of J.A.'s evident disability and distress, the officers continued to grab at J.A.'s arms. When J.A. predictably responded by trying to get the officers off his person, they pushed him into a kneeling, facedown position against the bed.

72. Once J.A. had been forced against the bed with two officers pinning his arms behind his back, they wrested the vape pen from his grasp.

73. Contrary to BPD policy, as discussed below, the officers needlessly accelerated and escalated the situation by using force on a minor child with known disabilities, pushing J.A. into a state of distress.

D. Having caused J.A.'s foreseeable reaction by their failure to accommodate his disability, the officers respond to his distress with additional unnecessary force.

74. Having secured the final remaining vape pen, the officers had no further need to engage J.A. Indeed, they momentarily let go of his wrists and released their body

weight from J.A. The officers, however, did not attempt to give J.A. physical space, as required by BPD policy.

75. Terrified and dysregulated from being forcibly restrained by two police officers, the 14-year-old reflexively rose from the bed and flailed his arms haphazardly at the officers.

76. J.A.'s reflexive response is typical of individuals with his disability and trauma history who are placed in unnecessary physical restraints and denied space to re-establish a sense of grounding and safety. *See* Peter Kelly et al., *Trauma Informed Interventions to Reduce Seclusion, Restraint and Restrictive Practices Among Staff Caring for Children and Adolescents with Challenging Behaviours: A Systematic Review*, 16 J. Child & Adolescent Trauma 629, 629 (2023) ("Utilising coercive practices can traumatise and/or retraumatise a young person who may have experienced adversity in life previously, as many safety procedures designed to reduce unsafe behaviour can trigger a young person who has experienced trauma and can induce dysregulated states. This in turn can escalate rather than deescalate the behaviour, creating emotional and physical safety risks." (citation omitted)).

77. No reasonable person could conclude that the unarmed J.A.'s reflexive reaction posed a bona fide threat of serious injury to either Ms. Austrian or the two police officers.

78. Instead of recognizing J.A.'s response for what it was and—as required by BPD policy—decelerating and disengaging from the encounter, the two officers again responded with disproportionate force, treating the 14-year-old as if he were an imminent and serious danger to their person.

79. The officers immediately re-engaged J.A., grabbing his arms, forcing him back onto the bed, and handcuffing him. J.A., terrified, began screaming and swearing at the officers.

80. The officers then attempted to drag him handcuffed out of the room. As they approached the steep stairs, J.A.'s struggling increased in fear that he would fall with no way to catch himself.

81. The officers returned J.A. to the bed and ultimately forced him down to the floor.

82. The officers then flipped him onto his stomach and pinned him down. J.A. continued to scream.

83. After escalating the situation and now having pinned the terrified child to the floor, the officers radioed for Sergeant Henry.

84. Upon Sergeant Henry's and another officer's arrival, Ms. Austrian informed Sergeant Henry that J.A. had "developmental delays" and "can't stand to be restrained," and warned that the handcuffs were making things worse.

85. By the time Sergeant Henry arrived upstairs, J.A. was being held to the floor by three officers: one holding each arm, and another restraining both his legs.

86. Sergeant Henry, like the other BPD officers, did not attempt to accommodate J.A.'s disability or condition by utilizing proven de-escalation techniques that were required by BPD policy. Despite the fact that J.A. could not self-regulate due to the officers' actions, Sergeant Henry simply ordered J.A., repeatedly, to "calm down."

87. A neighbor with a close relationship with J.A. arrived to try and de-escalate the situation, though he arrived after J.A. was already restrained. Away from the terrified 14-year-old prone and screaming upstairs, Sergeant Henry conceded to the neighbor that the encounter (and in effect the officers' physical engagement with J.A.) was entirely avoidable and unnecessary—stating, regarding the vape pens, "there [was] really no crime."

88. Sergeant Henry summoned BFD paramedics.

E. Unwilling to treat J.A.'s escalated trauma response as a legitimate and foreseeable reaction to BPD's actions, BFD decides he is exhibiting "excited delirium" and forcibly sedates him with ketamine.

89. When they arrived, the paramedics reacted without adequately discussing with Ms. Austrian J.A.'s disabilities or health needs.

90. Instead, paramedics proceeded to bind J.A.'s head with an opaque mesh bag, or a "spit hood," further frightening the 14-year-old.

91. With his vision obscured and mouth covered by the bag, and still held to the floor, J.A.'s distress increased, and his body's thrashing intensified.

92. Rather than evaluating how J.A.'s disabilities were contributing to his distress at being forcibly restrained, BFD decided that J.A. was experiencing "excited delirium"—a discredited diagnosis that is not recognized as a medical or mental health condition by either the American Medical Association or the American Psychological Association, and which police departments have used as a pretext for unnecessary force.

93. The Vermont Emergency Medical Services Protocols (EMS Protocols) authorize chemical restraint only for adults. Despite the EMS Protocols and without sufficiently inquiring into his heart condition, the paramedics proceeded to inject the 14-year-old J.A. with ketamine, a powerful drug associated with significant risks, including respiratory suppression.

94. Paramedics advised Ms. Austrian that J.A. would receive, essentially, something to help him calm down—but not that he would be injected with the potent tranquilizer ketamine.

95. Although J.A. was undeniably agitated by BPD's physical restraint and officers expressed concern that he might injure himself, no reasonable person could conclude that chemical sedation was a necessary response to J.A.'s distress.

96. After the paramedics injected J.A. with the chemical, he continued to scream for several minutes before losing consciousness. Ms. Austrian could only watch as he was carried from their home on a stretcher.

97. While BPD returned the vape pens to Cumberland Farms, Ms. Austrian accompanied her unconscious child to the emergency room, where he recovered from the ketamine injection and was treated for abrasions sustained from the handcuffs and restraint.

98. J.A. was kept overnight at the hospital for required heartrate monitoring and was discharged the next day—bruised, disoriented, and traumatized by his experience with the City employees.

F. Racial bias drove the officers' and paramedics' response to J.A.

99. As a young Black teen, J.A.'s terror and confusion at finding himself suddenly handcuffed and at the mercy of two white officers were apparent: during the incident, J.A.'s body continuously thrashed as he screamed, "I'm Black."

100. J.A. also made clear his fear—and expectation—of police brutality, expressing concern that the officers would "do to me what you did to George Floyd."

101. J.A.'s experience of racial mistreatment was not imagined: the speed and aggression of the officers' physical response to J.A.—and the exaggerated language used to describe J.A. in Officer Caldieri's Use of Force Report—show that racial stereotypes and implicit bias directly contributed to J.A.'s mistreatment and the City's refusal to accommodate his needs.

102. First, the speed and aggression with which the officers moved to control J.A.—a child with known disabilities—based on a fleeting and reflexive flailing of his arms suggests the officers viewed J.A. as a much greater threat to their safety than he actually was.

103. Second, Officer Caldieri's Use of Force Report describes J.A. and the encounter with him in an exaggerated manner—including that officers were forced to place him in a "hammerlock" "for our safety" and stating that J.A. "got to his feet and closed the distance to us" and "began punching and elbowing . . . erratically and with determination"—a hyperbolic mischaracterization of J.A.'s response.

104. These exaggerated fear responses from the officers are the direct result of stereotypes about J.A. rooted in his race, such as the "powerful racial stereotype . . . of Black men as 'violence prone.'" *Buck v. Davis*, 580 U.S. 100, 121 (2017). There is substantial literature on how young Black men are often wrongly

viewed as disproportionately threatening. *See, e.g.*, David S. March, Lowell Gaertner, & Michael A. Olson, *Danger or Dislike: Distinguishing Threat from Negative Valence as Sources of Automatic Anti-Black Bias*, 121(5) J. Personality & Soc. Psych. 984 (2021); Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psych. Sci. Rsch. Rep. 640 (2003).

105. This stereotype is particularly insidious for Black youth: research shows "that Black children are seen as more adult-like than White children, a phenomenon known as adultification, and thus, less innocent and more culpable." Alison N. Cooke & Amy G. Halberstadt, *Adultification, Anger Bias, and Adults' Different Perceptions of Black and White Children*, 35(7) Cognition & Emotion 1, 1 (2021). A consequence of adultification for Black youth is too often a pernicious default to "racialized anger bias, the phenomenon in which adults mis-label emotions of Black children as angry when they are *not* displaying anger, and at higher rates than White children." *Id*. Thus, Black boys like J.A. are too often misperceived as older, angrier, and more threatening than their behavior warrants. Officers thus reacted to a child's distress as if it were an adult's rage.

106. Indeed, BPD has deployed the same overreactive and escalatory tactics used on J.A. against other people of color. As the ACLU of Vermont made clear to BPD in a 2017 letter, BPD has a history of its officers responding to men and boys of color with violence in violation of their constitutional rights. *See* Letter from Jay Diaz, Staff Attorney, ACLU-VT (Aug. 23 2017), https://www.acluvt.org/sites/default/files/aclu_letter_to_bpd_re_first_amendment_retaliation_aug_2017.pdf.

107. The next year, in a particularly egregious example of racial bias infusing a police encounter, BPD officers shoved an unresisting Black man into a wall so hard that he sustained a traumatic brain injury—and then arrested that victim, along with his two distressed brothers, for disorderly conduct. *See Meli v. City of Burlington*, 585 F. Supp. 3d 615 (D. Vt. 2022). Here again, BPD officers erroneously assumed that a nonviolent Black community member presented a threat and responded with threats and violence themselves.

108. A 2021 assessment of BPD operations by an outside consultant revealed that these instances of racialized police violence are not outliers. *See* CNA, *Final Report: Functional and Operational Assessment of the Burlington Police Department* (Sept. 30, 2021) (hereinafter "CNA Report"). This assessment found that BPD uses force more often and at a higher level against Black community members on average than against white community members. *Id*. at 39–40.

109. Explicitly recognizing the role of racial bias in this disproportionate use of force, the assessment urged that "BPD should consider the possibility that these disparities are driven by bias (implicit or explicit) and proactively address potential bias in officers' behavior or department practices by implementing training and reviewing BPD practices." *Id*. at 40.

110. BFD paramedics' response to J.A. was likewise rooted in racial stereotypes.

111. Rather than viewing J.A. as a child with a disability in need of accommodation or a community member experiencing a legitimate trauma response, BFD pathologized J.A.'s foreseeable distress as behavioral deviancy in the form of "excited delirium."

112. "Excited delirium" is not a legitimate medical diagnosis. It is not recognized as a valid medical condition in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) or the World Health Organization's International Classification of Diseases (ICD-10). Indeed, the American Psychological Association (APA) has urged that "'[e]xcited delirium' should not be used until a clear set of diagnostic criteria are validated." American Psychiatric Association, *APA Official Actions: Position Statement on Concerns About Use of the Term "Excited Delirium" and Appropriate Medical Management in Out-of-Hospital Contexts*, Dec. 2020 at 1, https://www.psychiatry.org/getattachment/7769e617-ee6a-4a89-829f-4fc71d831ce0/Position-Use-of-Term-Excited-Delirium.pdf.

113. The term "excited delirium" is a pseudoscientific creation "disproportionately diagnosed among young [B]lack men, highlighting the racist undertones of the reported clinical symptoms: having 'superhuman strength' and being 'impervious to pain,'" which "becomes a justification for police aggression that may be unwarranted." *See* Méabh O'Hare et al., *Police Keep Using 'Excited Delirium' to Justify Brutality. It's Junk Science.*, Wash. Post (July 17, 2020), https://www.washingtonpost.com/outlook/chokehold-police-excited-delirium/2020/07/17/fe907ec8-c6bc-11ea-b037-f9711f89ee46_story.html.

114. The American Medical Association (AMA) actively opposes the diagnosis of "excited delirium" precisely because it has been "misapplied and diagnosed disproportionately in law enforcement-related deaths of Black and Brown individuals, who are also more likely to experience excessive sedative intervention instead of behavioral de-escalation." American Medical Association, *New AMA Policy Opposes "Excited Delirium" Diagnosis*, June 14, 2021, https://www.ama-assn.org/press-center/press-releases/new-ama-policy-opposes-excited-delirium-diagnosis.

115. In an analysis of court cases from 2010 to 2020, "Black and Latinx people constitute[d] at least 56% of the deaths in [police] custody . . . attributed to excited delirium." Osagie K. Obasogie, *Excited Delirium and Police Use of Force*, 107 Va. L. Rev. 1545, 1595 (2021).

116. Beyond statistical trends, the dangerous consequences of mislabeling Black people's distress as "excited delirium" are well-known. In a highly publicized tragedy in 2020 in Rochester, New York, "excited delirium" was misdiagnosed to justify the brutal restraint and explain the death of Daniel Prude, a Black man who was experiencing a psychotic episode—a death later reclassified as a homicide.

117. Likewise, in Aurora, Colorado, in 2019, police and paramedics infamously dismissed as "excited delirium" the panicked pleas of Elijah McClain, a young Black man who described himself as "different" while being handcuffed and restrained. In response to McClain's distress, paramedics injected him with an overdose of ketamine that caused him to lose consciousness; he was pronounced dead a few days later.

118. BPD officially and expressly facilitated reliance on the racialized pseudo-diagnosis of "excited delirium." Despite the medical community largely condemning the "excited delirium" diagnosis, a section of a then-operant (but now-defunct) BPD use of force policy described excited delirium as a legitimate condition that justifies immediate restraint techniques. *BPD Department Directive DD05.02 Definitions, Factors in Choosing a Use-of-Force Option, Use-of-Force Options, Excited Delirium, Duty of Care, and Use of Force Reports* at 6–7.

119. Section V of this Directive, titled "EXCITED DELIRIUM," was flawed from the outset. Adopted in 2020—ironically in part in response to the killing of George Floyd, who was himself labeled with "excited delirium" to justify police's deadly restraint, *see* Edward Helmore, *'Excited Delirium' Emerges as Key Issue in Trial of Officers Accused Over George Floyd Death*, The Guardian (Feb. 14, 2022), https://www.theguardian.com/us-news/2022/feb/14/george-floyd-death-civil-trial-officers-minneapolis, and described by the Mayor as "progressive"—Section V included the new addition of "excited delirium" as a medical emergency justifying control and restraint as soon as possible, *see* Elizabeth Murray, *Burlington Police Department Wants to Pass a New Use of Force Policy. Here's What to Know*, Burlington Free Press (June 8, 2020), https://www.burlingtonfreepress.com/story/news/local/2020/06/08/burlington-police-department-protests-excessive-force-george-floyd-campaign/3164397001/.

120. But any medical premise for Section V soon eroded: even the group cited in the policy that supported medicalizing "excited delirium" has reversed its position, withdrawing its white paper and urging that "the term excited delirium should not be used among the wider medical and public health community [or] law enforcement organizations," in alignment with other medical groups' long-held opposition. American College of Emergency Physicians, *ACEP Reaffirms Positions on Hyperactive Delirium*, ACEP, Oct. 12, 2023, https://www.acep.org/news/acep-newsroom-articles/aceps-position-on-hyperactive-delirium; *see also* Erica Carbajal, *Emergency Physicians Group Rejects 'Excited Delirium,'* Becker's Hospital Rev., Oct. 16, 2023, https://www.beckershospitalreview.com/hospital-physician-relationships/emergency-physicians-group-rejects-excited-delirium.html.

121. Despite the insubstantial medical basis for "excited delirium," Section V effectively permitted officers to default to using force when approaching individuals of color in crisis, based on racial tropes embedded in the policy.

122. Rather than recognize a mental health crisis as a potential manifestation of disability for an individual in genuine distress, Section V claimed that "excited delirium" is usually caused by drug use and described the "subject" in hyperbolic and dehumanizing terms, with indicators including "violent," "bizarre," and "destructive behavior" and "'eight ball' eyes." *DD05.02* at 6.

123. Section V was a sharp contrast to the other Directives guiding interactions with people with disabilities, as explained below. Instead of encouraging time, space, and verbal de-escalation, Section V urged the opposite: Section V explicitly instructed officers encountering a subject with "excited delirium" "*to control and restrain the subject as soon as possible*." *Id.* at 7 (emphasis added).

124. Section V further warned that a subject experiencing "excited delirium" may exhibit "superhuman strength" and therefore advised total restraint of the subject, "control[ling] all of the extremities." *Id.*

125. Section V particularly placed at risk Black men and boys; as discussed above, the emotions of this demographic are more often mislabeled as dangerous, and they are disproportionately diagnosed with "excited delirium," despite its problematic connotations and scientifically suspect status.

126. During its time as an operant policy, Section V and BPD's "excited delirium" policy primed BPD officers to react disproportionately and aggressively to J.A.'s distress, even after J.A. was initially calm and became distressed only in response to BPD's unwarranted restraint.

G. BPD and BFP employees' actions during this encounter violated the City of Burlington's own policies and legal obligations surrounding individuals with disabilities.

i. BPD Policies and History Regarding Individuals with Disabilities

127. The BPD officers who unnecessarily used unreasonable force to subdue J.A. knew, or at least should have known, that their actions were wrong. BPD's own internal policies and directives dictate detailed and specific techniques for interacting with individuals with disabilities. No use of force policy—endorsing "excited delirium" or otherwise—permits officers to deviate from or disregard those policies.

128. BPD has several department directives to guide its officers in providing services in a manner that does not discriminate against individuals with disabilities. These directives emphasize the importance of making reasonable modifications (or "accommodations").

129. *BPD Department Directive DD13.02–Interacting with Persons with Disabilities* instructs officers to "take steps to protect persons with disabilities from inequitable treatment based on their disability and to avoid furthering any injury or disability

based on the police contact where such accommodation can occur without jeopardizing the safety of all persons involved in the event," and directs that "[o]fficers encountering a person with a disability that affects the individual's ability to communicate must take additional steps to ensure that the communication is effective." *DD13.02* at 1.

130. This Directive advises that the potential need for modifications should factor into officers' use-of-force decision-making, explaining "[i]n determining the appropriate level of force to be used to control a situation involving a person with a known disability, officers should consider whether the particular control or restraint tactic is more dangerous or unreasonable in light of the particular person's disability." *Id.* at 2.

131. More specifically, the Directive cautions that "where handcuffing or other restraint may cause further injury of an existing disability and there is no imminent threat, officers should seek assistance from a supervisor to determine if there is an appropriate method of restraint that will accommodate the disability without jeopardizing safety." *Id.*

132. Importantly, for minor crimes, the Directive makes clear that arrest is not always the proper outcome; when the individual's misconduct may be connected to their disability, a medical or mental health referral may be more appropriate. *Id.*

133. Similarly, *BPD Department Directive DD13.3–Interacting with Persons with Diminished Capacities* provides policies for officers encountering individuals with intellectual limitations and mental illness.

134. Although this Directive details strategies for persons with diminished capacity who present a risk to themselves or others, its procedures stress the primary goal of achieving a safe resolution to connect the individual with appropriate resources. *DD13.3* at 1.

135. The Directive urges officers to "utilize all available tactics to de-escalate the situation," including using non-threatening communication, avoiding agitating the individual, and not rushing their response. *Id.* at 2–3.

136. It notes that officers should "devise a plan that separates the subject from other civilians" and "respect the [physical] comfort zone of the subject in order to reduce any unnecessary agitation," being careful not to "compress it, unless necessary." *Id.* at 2.

137. The Directive also provides that the "primary goal is, as much as possible, to deliver a clinician to non-violent events," and the "preference for first contact" is the clinician. *Id.* at 4. These clinicians are "employed by the Howard Center, [] embedded within the Department," and "available to respond to and assist with calls for service involving mental health, substance abuse, or other unmet social service needs." *Id.*

138. Additionally, two BPD Directives concerning use of force outline factors—including disability and age—to decide if force is necessary and, if so, the appropriate level.

139. The Department Directives maintain that "[e]very officer's goal is resolving situations without using force." *BPD Department Directive DD05.01–Use of Force Guidelines* at 1.

140. To achieve this goal, "[f]orce can often be avoided through the use of de-escalation techniques and other non-dynamic law-enforcement tools," *DD05.01* at 2, including "[p]hysical or verbal tactics designed to reduce a subject's heightened emotions or stabilize a situation," *DD05.02* at 2.

141. Officers should use such de-escalation techniques whenever feasible, and the Directives warn that an officer should not escalate a situation needlessly. *See DD05.01* at 2.

142. Specifically, the Directives emphasize the importance of providing space and time to avoid exacerbating a situation to the point where force becomes necessary. *Id.*

143. When safe, "officers should use distance and cover to create time" and "seek to *slow things down*." *Id.* (emphasis in original).

144. When determining if force may be nonetheless necessary despite an officer's use of de-escalation techniques, an individual's "physical, mental health, developmental, or intellectual disabilities" are important considerations in the analysis. *DD05.02* at 4.

145. In its Directives, BPD recognizes the prevalence of disability among the community it serves—and the consequent need to consider modifications. "Every officer," the Directives state, "can expect to encounter persons with diminished capacity," *DD13.3* at 1, and BPD is obligated "[t]o ensure that disabilities do no not exclude persons from receiving services from the Burlington Police Department." *DD13.02* at 1.

146. To that end, officers must make reasonable modifications where safe to avoid discrimination and comply with federal and state law. *Id.*

147. Despite its legal obligations to comply with the VFHPAA and federal anti-discrimination law, as of 2021, less than a quarter of the BPD force had participated in free state training on mental health. *See CNA Report* at 20.

148. Moreover, a consultant's assessment of BPD in 2021 reported that "BPD has significant deficiencies in training," particularly regarding interacting with people with disabilities. *Id.* at 19. The assessment revealed that key topics, "includ[ing] community policing and problem solving, bias awareness, situational decision-making, crisis intervention, procedural justice, impartial policing, mental health response, and cultural awareness" were "either not covered or covered

insufficiently during basic officer training, in-service training, or both." *Id*. De-escalation was another topic the assessment specifically flagged as receiving insufficient coverage "during BPD's basic new officer training and annual in-service training." *Id*. at iv.

149. This lack of training, along with contradictory directives like the "excited delirium" policy that improperly authorized aggressive use of force, essentially created an invitation for officers to ignore obligations concerning modifications and default to the use of force, potentially needlessly escalating encounters with individuals with disabilities—particularly individuals of color in distress.

150. Indeed, BPD has evidenced a pattern of officers responding to individuals with disabilities by abandoning de-escalation techniques and resorting to the use of force.

151. For example, in 2016, BPD officers forced their way into the apartment of a Burlington man with disabilities to find him holding a knife. Aidan Quigley, *Shooting Death of Burlington Man by Police Was Preventable, Report Finds*, VTDigger (Mar. 27, 2020), https://vtdigger.org/2020/03/27/shooting-death-of-burlington-man-by-police-was-preventable-report-finds/. Police ultimately shot the man with a taser and then with a gun, killing him. *Id*. The Vermont Mental Health Crisis Response Commission concluded that the man was likely suffering from psychosis at the time of his killing—and that his death was preventable. *Id*. The Commission further recommended that law enforcement develop protocols "that accommodate[] an individual's known mental illness during arrests and detentions" and train officers in those protocols and best practices in mental health crisis response. Vermont Mental Health Crisis Response Commission, *2019 Report to the Governor, General Assembly and Chief Justice, Vermont Supreme Court* (Dec. 31, 2019) at 10. The report advised that officers should, "[w]hen encountering individuals in a mental health crisis, make every effort to calm the atmosphere." *Id*. Two commissioners added that "unconscious bias against people with mental illnesses on the part of the City of Burlington, including the Burlington Police Department, was a root cause" of the man's death. *Id*. at 11. For BPD specifically, they recommended an audit to ensure BPD policies comply with the Americans with Disabilities Act and further training "in a wider array of options to avoid use of force involving people in mental or emotional crisis." *Id*. at 12.

152. In addition, in 2019, a BPD officer swore at a man with mental health issues and ordered him to leave a hospital; after the man swung at the officer, the officer repeatedly punched the man so violently that he later died from these injuries. Derek Brouwer, *AG Won't Charge Burlington Cop in Death That Ignited Political Firestorm*, Seven Days (Nov. 8, 2019), https://www.sevendaysvt.com/OffMessage/archives/2019/11/08/ag-wont-charge-burlington-cop-in-death-that-ignited-political-firestorm.

153. BPD's deadly response to people with disabilities has also spurred lawsuits: parents bringing a recent suit against the city, *Brunette v. City of Burlington*, No. 2:15-cv-

61, 2018 WL 4146598 (D. Vt. Aug. 30, 2018), proceeded past summary judgment (before the parties stipulated to dismissal) on a claim similar to the present complaint, alleging that BPD officers failed to make modifications for their adult son's disabilities in effecting an arrest. The parents had called BPD out of concern for their son's mental health; the responding officers shot and killed the son when he approached them with a shovel. *Id.*

154. BPD also has a record of failing to make modifications for Burlington children with disabilities in crisis. For example, in 2018, after a mere 10 minutes at the scene, BPD officers used pepper spray on a six-year-old girl with mental health issues holding a knife. Mark Johnson, *Burlington Police Say Use of Pepper Spray on 6-Year-Old Was Justified*, VTDigger (June 14, 2019), https://vtdigger.org/2019/06/14/burlington-police-say-use-of-pepper-spray-on-6-year-old-was-justified/.

155. As with J.A., BPD ignored these individuals' special needs and escalated to using force.

ii. BFD Policies Regarding Use of Ketamine

156. BFD's default to a diagnosis of "excited delirium" and administration of ketamine likewise violated internal policy.

157. As a public entity, BFD is also bound by anti-discrimination laws and is prohibited from discriminating on the basis of race and against individuals with disabilities in the provision of its services.

158. The Vermont Statewide Emergency Medical Services Protocols (EMS Protocols) define the scope of practice for emergency medical services, including services provided by BFD paramedics. *See* 2020 Vermont Statewide Emergency Medical Services Protocols ("EMS Protocols").

159. The EMS Protocols state that paramedics should "obtain [the] chief complaint, history of present illness, and prior medical history" as part of their patient assessment when performing routine patient care, even in the context of a behavioral emergency. *Id.* § 1.0. BFD obtained no such detailed medical history from J.A. or Ms. Austrian.

160. Furthermore, the EMS Protocols emphasize the importance of verbal de-escalation techniques and state that restraints, including sedatives like ketamine, should be "used only as a last resort." *Id.* § 6.9.

161. According to the EMS Protocols, if using chemical restraint becomes unavoidable, the Protocols authorize ketamine for adult patients only. *Id.*

162. Additionally, the EMS Protocols provide that personnel should "obtain [the] informed consent [of the parent] to treat and transport the child," *id.* § 8.6, but

Ms. Austrian felt she had no way of refusing EMS's request to sedate J.A. given the situation BPD created and exacerbated, and the ongoing severe distress of her son caused by BPD. Ms. Austrian had requested EMS intervention to de-escalate the situation, not to inject her child with ketamine and hospitalize him. But paramedics presented sedation as the only option for J.A. and provided no information about their choice to use ketamine, including its side effects or risks. Fearing that officers would further harm her child if he were not sedated, Ms. Austrian felt she had no choice but to accede to BFD's decisions.

163. BFD is aware that its paramedics will encounter individuals with disabilities, as evidenced by the requirement that "disability" and "level of consciousness appropriate for age" be assessed, and there are special considerations for "developmental disabilities" noted throughout the EMS Protocols. *Id.* § 1.1.

164. Yet, based on the City of Burlington's own responses to public records requests, from at least 2018 to the time of the incident, BFD training for its paramedics regarding their responsibilities under applicable disability rights law and on interacting with individuals with disabilities has been insufficient.

H. Despite the lasting trauma and harm caused by its officers' actions, the City of Burlington continues to stonewall Ms. Austrian and J.A.

165. The City's unlawful actions have affected J.A. profoundly.

166. During and immediately after the encounter, J.A. experienced physical bruising, unconsciousness, extreme fear, discrimination, and loss of dignity.

167. Moreover, the trauma and harm caused by the City continue to impact J.A.'s wellbeing daily—at home, at school, and elsewhere.

168. The harms caused by the City's actions are numerous, ongoing, and profound.

169. Horrified at her child's mistreatment, Ms. Austrian submitted a complaint to BPD about the officers' use of force.

170. After reviewing the complaint, the body camera footage, and the confidential results of BPD's internal investigation, the Burlington Police Commission made several recommendations to Police Chief Jon Murad.

171. But Chief Murad did not accept the Commission's recommendations as presented. Instead, Chief Murad concluded that the BPD officers' actions in this case constituted an appropriate use of force and did not violate any Department rules.

172. Because those actions violated J.A.'s rights under Vermont statutes and the Vermont Constitution, Ms. Austrian brings this action on his behalf.

CAUSES OF ACTION

Count 1—Violation of Article 11 of the Vermont Constitution—BPD's unjustified and unreasonable use of force against J.A.

173. Ms. Austrian, on behalf of J.A., incorporates the foregoing paragraphs as though fully contained herein.

174. Article 11 of the Vermont Constitution provides that "the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure." Vt. Const. ch. 1, art. 11.

175. BPD's physical restraint of J.A. was a seizure. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Torres v. Madrid*, 592 U.S. 306, 317 (2021) ("A seizure requires the use of force with intent to restrain.").

176. BPD officers violated Article 11 of the Vermont Constitution by using excessive force during the encounter with J.A.

177. BPD officers needlessly physically engaged with J.A. to recover the final vape pen despite the fact that J.A. was passively sitting on the bed without access to any weapon and there were a variety of other options and resources readily available to the officers to accommodate J.A.'s disability and avoid physical confrontation.

178. In doing so, the officers needlessly accelerated and escalated the situation, failing to consider that their "particular control or restraint tactic [was] more dangerous or unreasonable in light of [J.A.'s] disability." *DD13.02* at 2.

179. The officers proceeded to engage in a physical struggle with J.A.—which they unnecessarily initiated—pinning him face-down onto the bed and removing the pen from his hand by force.

180. BPD officers then physically restrained J.A. again after retrieving the final vape pen and momentarily releasing him. Instead of modifying their response in light of J.A.'s evident disability and distress, the officers re-engaged J.A., grabbing his arms, forcing him to the bed and later to the ground, and handcuffing him.

181. Under the United States Constitution, claims that officers used excessive force during a seizure "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395 (1989).

182. Like the Fourth Amendment to the United States Constitution, Article 11 of the Vermont Constitution protects Vermonters against "unreasonable . . . seizures." *Lincoln v. Smith*, 27 Vt. 328, 346 (1855).

183. However, the Vermont Supreme Court has "consistently held that Article 11 provides greater protections than its federal analog, the Fourth Amendment." *State v. Cunningham*, 2008 VT 43, ¶ 16; *see also Zullo v. State*, 2019 VT 1, ¶ 40 ("[T]his Court has construed Article 11 to provide broader protections than the Fourth Amendment in several contexts.").

184. Under the more protective standards governed by Article 11, BPD's use of force against J.A. was unreasonable.

185. Specifically, Article 11 requires an inquiry into whether alternative means were available to the officers to achieve their goal. Article 11 mandates that "police intrusion proceed no further than necessary to effectuate the purpose of the [law enforcement action]." *State v. Sprague*, 2003 VT 20, ¶ 17; *cf. State v. Savva*, 159 Vt. 75, 88–89 (1991) (explaining "we have demanded that, when acting without a warrant, police operate 'in the least intrusive manner possible under the circumstances,'" and noting there "may be circumstances" when a seizure is more intrusive than a search (quoting *State v. Platt*, 154 Vt. 179, 188 (1990))).

186. Here, the officers' decision to forgo de-escalation techniques and physically engage J.A. violated his rights to be free from unreasonable seizure under Article 11. Examining the totality of the circumstances at each stage of the encounter, no reasonable person could conclude that the unarmed J.A. posed a threat to the officers or to himself or that he committed a crime serious enough to justify the officers' use of force in lieu of alternatives.

187. Moreover, even assuming *arguendo* that BPD's use of force was justified at some point during the encounter, Article 11 also requires an inquiry into whether and how the officers themselves escalated the interaction into a scenario requiring that use of force. Because their use of force was avoidable and unnecessary, it constituted an unreasonable seizure in violation of J.A.'s Article 11 rights.

188. J.A. is entitled to damages for that violation, since there is no meaningful alternative remedy in the context of this particular case and the officers either knew or should have known that they were violating clearly established law or were acting in bad faith. *Zullo*, 2019 VT 1, ¶ 55.

Count 2—Violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq*.—the City of Burlington's failure to make modifications for J.A.'s disability (two instances)

189. Ms. Austrian, on behalf of J.A., incorporates the foregoing paragraphs as though fully contained herein.

190. The VFHPAA operates as a broad anti-discrimination statute, protecting Vermonters' equal access to goods and services provided by public accommodations regardless of their race, gender, or disability status, among other protected categories.

191. The City of Burlington operates both BPD and BFD. Both BPD and BFD are places of public accommodation according to the VFHPAA. "[A]ll governmental entities [are] subject to the public accommodations law." *Dep't of Corr. v. Hum. Rts. Comm'n*, 2006 VT 134, ¶ 25. As providers of municipal services, BPD and BFD "offer[] to the general public" "services, facilities, goods, privileges, advantages, benefits, or accommodations" and are therefore covered by the Act. 9 V.S.A. § 4501(1).

192. The VFHPAA states that "[n]o individual with a disability shall be excluded from participation in or be denied the benefit of the services, facilities, goods, privileges, advantages, benefits, or accommodations or be subjected to discrimination by any place of public accommodation on the basis of his or her disability." *Id.* § 4502(c). The VFHPAA requires public accommodations to make reasonable modifications when necessary to accommodate disabilities. *Id.* § 4502(c)(5).

193. The VFHPAA defines "disability" as "(A) a physical or mental impairment that limits one or more major life activities; (B) a history or record of such an impairment; or (C) being regarded as having such an impairment." 9 V.S.A. § 4501(2).

194. With diagnoses of ADHD, an uncategorized health impairment, ODD, anxiety, and complex trauma—disorders that substantially limit several major life activities by impacting his thinking, learning, and communicating and interacting with others—J.A. is an individual with a disability for purposes of the VFHPAA.

195. The City of Burlington was aware—or at the very least, should have been aware—of J.A.'s disability. Not only had City employees interacted with J.A. previously, but Ms. Austrian also informed City employees when they arrived at her home that J.A. had medical issues, had ADHD, and had been acting erratically. The BPD officers themselves further noted J.A.'s disconnected affect immediately and otherwise observed it throughout their encounter with J.A.

196. The City of Burlington violated the VFHPAA's mandate to accommodate individuals with disabilities twice—first through BPD's actions, then through BFD's. The City of Burlington is liable to J.A. for both of these separate violations of the VFHPAA.

197. ***First***, BPD officers failed to make reasonable modifications as required by the VFHPAA when interacting with J.A. on May 15, 2021.

198. In the context of police officer interactions with individuals with disabilities, reasonable modifications to police policies, practices, and procedures have included respecting the individual's comfort zone, elongating the time of the encounter, creating a safe perimeter, avoiding unnecessary contact and agitation, seeking professional resources, employing non-threatening verbal communication, and using open-ended questions. *See supra* ¶¶ 127–46.

199. Despite J.A.'s disability—and rather than following BPD Directives and providing J.A. with space and time and engaging J.A. with non-threatening verbal communications—the officers unnecessarily escalated the situation by threatening the passive and unarmed J.A. with arrest and physically confronting and restraining the 14-year-old.

200. This decision to forgo de-escalation techniques contravenes BPD policies, caused J.A. injuries, failed to make modifications to account for J.A.'s disabilities, and constitutes discrimination under the VFHPAA.

201. ***Second***, BFD paramedics separately failed to make reasonable modifications as required by the VFHPAA when interacting with J.A. on May 15, 2021.

202. Instead of using de-escalation techniques or discussing J.A.'s disabilities with Ms. Austrian, who had informed City employees that J.A. cannot tolerate being restrained, the paramedics further injured J.A. by enclosing his head in an opaque mesh bag while he was already physically restrained on the floor, obscuring his vision and exacerbating his panic.

203. Moreover, the paramedics chose to forgo a meaningful evaluation, and BFD instead "diagnosed" J.A. with "excited delirium." Paramedics then further deviated from the controlling EMS Protocols by injecting J.A. with ketamine.

204. By refusing to meaningfully evaluate J.A.'s disability and defaulting to a racialized and unsubstantiated diagnosis—and proceeding to inject J.A. with a powerful chemical restraint contrary to their own EMS Protocols—the BFD paramedics failed to make reasonable modifications for J.A.'s disability and thus violated the VFHPAA.

205. For both BPD's and BFD's failures to make reasonable modifications, the violation of the City's duties under the VFHPAA was clearly established.

206. The City of Burlington is liable to J.A. for both these violations of the VFHPAA.

Count 3—Violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq*.—the City of Burlington's race-based denial of equal services (two instances)

207. Ms. Austrian, on behalf of J.A., incorporates the foregoing paragraphs as though fully contained herein.

208. In addition to its provisions addressing disability, the VFHPAA makes it unlawful for any "place of public accommodation" to "refuse, withhold from, or deny to that person any of the accommodations, advantages, facilities, and privileges" of the institution "because of the[ir] race." *Id.* § 4502(a).

209. The Vermont Supreme Court has recognized that "[o]ur Public Accommodations Act is a descendent of laws enacted by other jurisdictions beginning in the second

half of the nineteenth century to bolster the common law precluding innkeepers and common carriers from refusing to serve any member of the general public." *Dep't of Corr.*, 2006 VT 134, ¶ 20 n.1.

210. Vermont courts should therefore "consider cases construing the federal statute." *Hum. Rts. Comm'n v. LaBrie, Inc.*, 164 Vt. 237, 243 (1995). Under Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, an individual is entitled to relief if "he was deprived of equal use and enjoyment of a covered facility's services" and shows "facts which demonstrate discriminatory intent." *Coward v. Town & Vill. of Harrison*, 665 F. Supp. 2d 281, 307 (S.D.N.Y. 2009) (internal quotation marks omitted).

211. Acting on the basis of a stereotype, even if the actor does not intend to act with malice, constitutes intentional discrimination. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989) ("[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Knight v. Nassau Cnty. Civ. Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981) (explaining that employer's actions "based on a racial stereotype that blacks work better with blacks" constituted unlawful discrimination).

212. Similarly, an individual may act "because of . . . race," 9 V.S.A. § 4502(a), if they take action that is based on "unthinking stereotypes or bias," *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999), or "rooted in concepts which reflect such discriminatory attitudes, however subtly," *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981); *see also Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1450 (9th Cir. 1994) ("[R]acial stereotypes often infect our decision-making processes only subconsciously.").

213. The City of Burlington, through its employees, treated J.A. disparately because of racial stereotypes on two separate occasions.

214. ***First***, the totality of the circumstances reveals that Officers Caldieri and Johnson treated J.A. disparately because of racial stereotypes. Specifically, they perceived J.A.—an unarmed 14-year-old child—as a disproportionately aggressive physical threat because of his race.

215. These circumstances include, but are not limited to: the speed with which the officers moved to physically subdue J.A., treating him as if he posed an imminent danger; and Officer Caldieri's Use of Force Report, which describes J.A. in an exaggerated manner—including that they were forced to place him in a "hammerlock" "for our safety" and stating that J.A. "got to his feet and closed the distance to us" and "began punching and elbowing . . . erratically and with determination"—claims that greatly overstate J.A.'s fear response.

216. Officers Caldieri and Johnson were poised for that overreaction in part because of BPD's "excited delirium" policy, which warned officers about "subject[s]" exhibiting "violent," "bizarre," and "destructive behavior," experiencing "'eight ball' eyes," and

demonstrating "'superhuman strength' in resisting restraint." *DD05.02* at 6–7. These descriptions—which echo longstanding stereotypes mischaracterizing Black men and boys' distress as dangerous, *see supra* ¶¶ 104–05—primed the officers to disproportionately react to J.A.

217. ***Second***, and similarly, based on racial stereotypes, BFD pathologized J.A.'s distress as a medical condition rather than a response to pain and restraint. There is substantial literature on medicalized racism and assumptions about the inherent capacity of Black individuals—particularly Black men—to endure pain. *See, e.g.*, Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113(16) Proc. Nat'l Acad. Sci. 4269 (2016).

218. BFD engaged J.A. harboring racialized assumptions about the legitimacy of his distress, his capacity for pain, and his ability to self-regulate if given the opportunity to de-escalate.

219. BFD diagnosed J.A. with "excited delirium"—a pseudo-scientific condition frequently attributed to young Black men who are the victims of police violence. *See supra* ¶ 113. A BPD officer also described J.A. as being "in a[n] excited delirium mental state" while he was handcuffed with officers surrounding him.

220. The "diagnosis" of "excited delirium" is, standing alone, probative circumstantial evidence of racial discrimination. Indeed, the American Medical Association (AMA) actively opposes the label of "excited delirium" precisely because it has been "misapplied and diagnosed disproportionately in law enforcement-related deaths of Black and Brown individuals." *See* American Medical Association, *New AMA Policy Opposes "Excited Delirium" Diagnosis*, June 14, 2021, https://www.ama-assn.org/press-center/press-releases/new-ama-policy-opposes-excited-delirium-diagnosis. In denouncing "excited delirium," the AMA president-elect lambasted the use of ketamine as a treatment, stating, "[f]or far too long, sedatives like ketamine and misapplied diagnoses like 'excited delirium' have been misused during law enforcement interactions and outside of medical settings–a manifestation of systemic racism that has unnecessarily dangerous and deadly consequences for our Black and Brown patients." *Id*.

221. The decision to inject J.A.—a 14-year-old—with ketamine rather than verbally de-escalate was a form of race-based disparate treatment that would not have occurred had J.A. been white.

222. Both the acts of BPD and BFD violated the City's policies and procedures regarding interactions with individuals with disabilities and those in crisis. As explained above, the decision to forgo de-escalation techniques and physically subdue J.A. violated BPD policies and best practices as outlined in *DD13.02*. *See supra* ¶¶ 129–30. Similarly, the EMS Protocols emphasize the importance of verbal de-escalation techniques and state that restraint should be "used only as a last resort." EMS Protocols at § 6.9. The EMS Protocols further make clear that if using chemical

restraint becomes unavoidable, ketamine is authorized for restraining adult patients only. *Id.*

223. Even taking BPD's problematic "excited delirium" policy on its own terms, no reasonable person could believe J.A.—who was calm and subdued when BPD arrived, and experienced distress solely because of BPD's physical intervention—was experiencing a narcotic-induced mental health crisis.

224. The U.S. Supreme Court has made clear that these sorts of "[d]epartures from the normal procedur[e]" or "[s]ubstantive departures" from policies or practices may be evidence of covert discriminatory intent or attitudes. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

225. The City of Burlington knew, or should have known, that this mistreatment of J.A. based on racial stereotypes violated clearly established law. Upon information and belief, the City possesses records and documentation of City employees responding to similarly situated white individuals exhibiting similar behavior with more dignified and humane treatment than that perpetrated on J.A.

226. Through the acts of its officers and paramedics, the City of Burlington is liable to J.A. for denying him equal treatment "because of [his] race." 9 V.S.A. § 4502(a).

Count 4—Violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq.*—Failure to train BPD officers

227. Ms. Austrian, on behalf of J.A., incorporates the foregoing paragraphs as though fully contained herein.

228. The VFHPAA requires public accommodations—including BPD—to make reasonable modifications when necessary to accommodate disabilities. 9 V.S.A. § 4502(c)(5).

229. The City was deliberately indifferent to the need to provide adequate training and supervision to its BPD officers on their responsibilities under the VFHPAA and their duty to accommodate individuals with disabilities.

230. As the City made clear in its policy, it knew that its employees would confront situations in which it would be necessary to make reasonable modifications. *See* DD13.3 at 1 ("Every officer can expect to encounter persons with diminished capacity."); *see also* DD13.02 at 1 (BPD is obligated "[t]o ensure that disabilities do not exclude persons from receiving services from the Burlington Police Department.").

231. Despite its awareness that all its officers providing police services would encounter individuals with a disability or diminished capacity, its creation of policies to address the specific considerations for interacting with these individuals, and its history of mishandling such encounters as outlined above—and the obvious unlawful consequences of failing to train its officers on these policies—the City has

provided its police officers with insufficient training and supervision on the VFHPAA, its own policies, and officers' obligations to accommodate individuals with disabilities.

232. Although BPD's policies on paper urged accommodation and de-escalation, based on the City's own responses to public records requests, from at least 2018 to May 2021, no BPD officer—including Officers Caldieri and Johnson and Sergeant Henry—appears to have received sufficient training on their responsibilities under applicable disability rights law nor on interacting with individuals with disabilities.

233. Nor did any officer receive sufficient training on how BPD's policies interacted with one another. As explained above, certain BPD policies urge time, space, and de-escalation when encountering an individual with diminished capacity or a disability. At the same time, BPD maintained policies urging aggressive use of force against individuals allegedly experiencing "excited delirium." BPD gave officers insufficient instruction on how the policies inform one another.

234. A consultant's assessment of BPD completed in September 2021 confirmed that "BPD has significant deficiencies in training," including for interacting with people with disabilities, and that key topics such as "mental health" were "either not covered or covered insufficiently." *CNA Report* at 19–21. To address this deficient training, the assessment recommended BPD develop and provide a comprehensive mental and behavioral health training course. *See id.* at 21.

235. The City sent BPD Officers Johnson and Caldieri and Sergeant Henry with inadequate training to respond to a situation involving a juvenile with a known disability, and the officers failed to make reasonable modifications in violation of J.A.'s rights under the VFHPAA.

236. The City's failure to train its officers on the VFHPAA obligations caused them to engage in the unlawful conduct described above.

Count 5—Violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq*.—Failure to train BFD paramedics

237. Ms. Austrian, on behalf of J.A., incorporates the foregoing paragraphs as though fully contained herein.

238. The VFHPAA requires public accommodations—including BFD—to make reasonable modifications when necessary to accommodate disabilities. 9 V.S.A. § 4502(c)(5).

239. The City was deliberately indifferent to the need to provide training and supervision to its BFD paramedics on their responsibilities under the VFHPAA.

240. As discussed, "excited delirium" is a controversial pseudo-diagnosis and ketamine a disfavored treatment. *See supra* ¶ 112. Both the American Medical Association and

the American Psychological Association (APA) refuse to recognize excited delirium as a medical or mental health condition.

241. Indeed, the APA has urged that "'[e]xcited delirium' should not be used until a clear set of diagnostic criteria are validated." American Psychiatric Association, *APA Official Actions: Position Statement on Concerns About Use of the Term "Excited Delirium" and Appropriate Medical Management in Out-of-Hospital Contexts*, Dec. 2020 at 1, https://www.psychiatry.org/getattachment/7769e617-ee6a-4a89-829f-4fc71d831ce0/Position-Use-of-Term-Excited-Delirium.pdf.

242. Regarding ketamine specifically, the APA has further requested that jurisdictions update protocols for administering the drug in emergency contexts outside of hospitals and ban ketamine's use to incapacitate solely for law enforcement purposes. *Id*. at 2.

243. Upon information and belief, BFD paramedics have often encountered situations in which a patient has a disability. Indeed, the EMS Protocols contemplate situations in which paramedics must consider "developmental disabilities and/or mental capacity," *see, e.g.*, EMS Protocols at 146, 188, and provide that "[v]erbal de-escalation is the safest method and should be delivered in an honest, straightforward, friendly tone avoiding direct eye contact and encroachment of personal space," *id*. at 144.

244. The City is also fully aware that its paramedics have a practice of sedating patients to control their behavior. The City's own data reveals that, from July 27, 2016 to July 17, 2021, its paramedics injected patients with ketamine 86 times. Courtney Lamdin, *Burlington Paramedics to Keep Race Data After Black Teen is Given Ketamine*, Seven Days (Aug. 30, 2021), https://www.sevendaysvt.com/OffMessage/archives/2021/08/30/burlington-paramedics-to-keep-race-data-after-black-teen-is-given-ketamine.

245. Nearly a quarter of those patients were chemically restrained in response to a mental health issue: in 21 incidents, the patient was sedated for some kind of behavioral problem or altered mental health presentation, including four incidents in which the patient was sedated for "excited delirium" specifically.

246. The City should also have known that the symptoms of so-called "excited delirium" may actually be a manifestation of an underlying disability, a misdiagnosis especially common for Black patients.

247. Consequently, training on obligations under the VFHPAA is necessary to avoid the obvious unlawful consequences of misdiagnosing distress.

248. Yet, despite its awareness that its paramedics providing emergency medical services would encounter individuals with a disability, the City has provided its paramedics with insufficient training and supervision on the VFHPAA.

249. Based on the City's responses to public records requests, from at least 2018 to May 2021, no BFD paramedic appears to have received sufficient training on their responsibilities under applicable disability rights law nor on interacting with individuals with disabilities.

250. The City sent BFD paramedics with inadequate training to respond to a situation involving a juvenile with a known disability. As a result, BFD covered J.A.'s face with a spit hood, decided J.A. was experiencing "excited delirium"—a disfavored, racialized "diagnosis"—and forcibly injected J.A., a minor, with a substantial amount of ketamine.

251. The City's failure to train its paramedics on their VFHPAA obligations caused them to engage in the unlawful conduct described above.

PRAYER FOR RELIEF

WHEREFORE, Ms. Austrian, on behalf of J.A., prays that the Court issue the following relief:

a. A declaratory judgment that, in these circumstances, BPD violated J.A.'s right to be free from unreasonable seizure under Article 11 of the Vermont Constitution.

b. A declaratory judgment that the City is a covered entity under the VFHPAA.

c. A declaratory judgment that, in these circumstances, BPD's and BFD's actions failed to accommodate J.A.'s disability and therefore denied him equal access to their services because of disability under the VFHPAA.

d. A declaratory judgment that, in these circumstances, BPD's and BFD's actions denied J.A. equal access to their services because of race under the VFHPAA.

e. A declaratory judgment that the City is directly liable for its failure to train and supervise BPD officers, resulting in harm to J.A.

f. A declaratory judgment that the City is directly liable for its failure to train and supervise BFD paramedics, resulting in harm to J.A.

g. An injunction ordering the City to: (i) accommodate individuals with disabilities in future policing interactions, including formulating and implementing ongoing training for its officers concerning BPD's and BFD's obligations under VFHPAA; (ii) take affirmative steps to address the stereotyping and biases that underlay BPD's and BFD's race-based disparate treatment; (iii) update its Department Directives to reflect BPD's obligations under these laws; and (iv) modify its policies to prohibit the use of ketamine to treat perceived altered mental states in the field.

h. Award J.A. damages adequate to compensate him for the violation of his statutory and constitutional rights, as well as his grievous emotional and physical pain and injuries.

i. Award J.A. punitive damages against the City for its unlawful acts that were the direct and proximate cause of J.A.'s pain and injuries.

j. Award J.A. costs, including reasonable attorneys' fees, pursuant to 9 V.S.A. § 4506.

k. Allow any further relief to which J.A. may be entitled.

Respectfully submitted,

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