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Legal Sidebar

The Americans with Disabilities Act (ADA) and On-the-Street Police Encounters

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Introduction

The Americans with Disabilities Act (ADA) mandates, as its core imperative, that both public and private sector entities offer "reasonable accommodations" in their policies and practices for those with disabilities. Courts have applied the ADA's Title II reasonable accommodation provision, which prohibits discrimination by "public entities," to a broad array of public programs and services, ranging from use of city streets to municipal contracting to access to public benefits. Although the courts have consistently held that police departments are "public entities" and that Title II applies to at least some state and local law enforcement functions, the courts are split on whether the ADA's reasonable accommodation requirement applies to on-the-street encounters with law enforcement officers, such as use-of-force situations or arrests. A 2015 Supreme Court case, *City of San Francisco v. Sheehan*, promised potential resolution of this issue, considering whether Title II required law enforcement officers to accommodate "an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." But that case was ultimately resolved on other grounds when the city dropped its appeal as to the ADA question.

Now, more than five years later, the lower courts are still in conflict about how police must handle encounters with individuals with disabilities. This issue has drawn attention again as some Members of Congress have pushed for alternative policing techniques, such as training in de-escalation tactics. This Legal Sidebar provides background on Title II of the ADA, reviews the case law applying the ADA to law enforcement activities, discusses the circuit split on the ADA's application to on-the-street police encounters, and surveys relevant legislation introduced in the 117th Congress.

Title II of the ADA

Congress enacted the ADA in 1990 as a "national mandate" to eliminate discrimination against individuals with disabilities and to "ensure that the Federal Government plays a central role" in protecting those individuals. The ADA prohibits discrimination in several areas of public life, including employment, public accommodations, and, as relevant here, public services. Title II prohibits *public entities* from discriminating against persons with disabilities. Specifically, 42 U.S.C. § 12132 provides

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that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

As relevant here, Title II defines "public entities" to mean "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]" Covered endeavors include the "services, programs, or activities" of that public entity, and the ADA does not define this phrase. The Department of Justice (DOJ), in its interpretive guidance, states that Title II applies to "all services, programs, and activities provided or made available by public entities." This reading comports with the ADA's legislative history, with one House report stating Title II would apply to "all activities of State and local governments." The federal courts have construed the ADA's broad language as reaching "virtually anything a public entity does."

To state a claim under Title II of the ADA, a plaintiff generally must show the following: (1) that he is a qualified individual with a disability; (2) that the public entity either excluded him from participation in (or denied him the benefits of) its services, programs, or activities or otherwise discriminated against him; and (3) that the exclusion, denial of benefits, or discrimination was by reason of his disability. Discrimination under Title II includes, among other things, a failure to reasonably accommodate a person's disability.

In Title II cases, the plaintiff (generally an individual with a disability) bears the initial burden of establishing the elements of the violation. This burden includes identifying a reasonable accommodation that would allow him to participate in the program, service, or activity at issue. The public entity may respond to such a claim by demonstrating that the requested accommodation would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." The courts have held that what is reasonable is a "question of fact requiring a fact-intensive inquiry" and "must be decided case-by-case based on numerous factors."

The ADA and Law Enforcement Activities

In the early days of ADA case law, courts struggled to define Title II's application to state and local law enforcement functions. The Supreme Court's only decision on this question, *Pennsylvania Department of Corrections v. Yeskey*, related only indirectly to police conduct, as it assessed Title II's coverage of state prisons. There, Ronald Yeskey was sentenced to serve 18-36 months in a Pennsylvania correctional facility. The sentencing court recommended that Yeskey be placed in a motivational boot camp for first-time offenders, which would have qualified him for parole in six months. However, because of his medical history of hypertension, officials denied his admission into the program, and he filed suit under the Title II of the ADA. The state argued that the language "benefits of the services, programs, or activities of a public entity" did not apply because prisons do not provide prisoners with "benefits" of "programs, services, or activities" as those terms are generally understood. The Court rejected this argument, unanimously holding that "state prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" "Modern prisons," the Court observed, "provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners." Justice Antonin Scalia noted that "in the context of an unambiguous statutory text," it is "irrelevant" whether Congress specifically envisioned that the ADA would benefit state prisoners. Finally, the Court rejected the state's argument that covered programs or services included only those engaged in "voluntarily" by noting that drug treatment programs, even mandatory ones, fall under the ADA.

The lower courts have consistently held that state and local police departments are "public entities" for purposes of Title II, and they have identified some law enforcement activities that are considered

"services, programs, or activities" for purposes of the ADA. Case law shows that Title II applies to post-arrest activities such as transporting a suspect to the police station for booking or questioning a suspect following an arrest. For instance, *Bahl v. County of Ramsey* involved a plaintiff, Douglas Bahl, who was deaf and used American Sign Language (ASL) as his primary language. Bahl sued the local police department under Title II for, among other claims, failing to provide a proper custodial interrogation with an interpreter following his arrest. Tying his ADA claim to the constitutional right against self-incrimination, the district court held that custodial interrogation cannot be characterized as a "service" for purposes of the ADA because the Fifth Amendment only protects the "right not to communicate, not the right to testify." Reversing, the United States Court of Appeals for the Eighth Circuit observed that although the city need not conduct a post-arrest interview, the ADA applied once the officers began the process and advised the plaintiff of his *Miranda* rights. Because "a custodial interrogation with an interpreter would have afforded Bahl certain benefits, including the right to ask questions and tell his side of the story, which arguably could have affected the charging decision," the panel held that the post-arrest interview is a covered "service" or "activity" under Title II. Other courts have agreed that post-arrest interrogations must comply with the ADA.

The Eighth Circuit again held that certain police activities must comply with the ADA in *Gorman v. Bartch*. There, Jeffrey Gorman, who had paraplegia and used a wheelchair, brought suit under the ADA against local police officials for the injuries and indignity he suffered when the officers failed to properly secure him to the bench of a patrol wagon. Noting that police departments fall "squarely within the statutory definition of 'public entity,'" the Eighth Circuit then assessed whether transportation to the police station constituted a "program" or "activity" for purposes of Title II. Citing *Yeskey*, the court observed that just because Gorman did not "voluntarily" get arrested does not make him ineligible for safe transportation. Looking to the congressional findings of the ADA, the Eighth Circuit highlighted Congress's concern that people with disabilities have meaningful access to critical areas such as transportation, institutionalization, and to public services. Thus, the Eighth Circuit held that an arrestee's transportation to a station is a covered police service under Title II. At least one lower court has similarly held that police transportation is covered by the ADA.

Circuit Split on Application of ADA to Arrests

While courts agree that Title II applies to at least some law enforcement functions, they disagree on whether the ADA applies to on-the-street police encounters, such as use-of-force or arrests. Most circuit courts to have addressed this issue have held that the ADA applies to unsecured, on-the-street police encounters, and that courts should consider any exigent circumstances as part of the reasonable accommodation analysis. The Fifth Circuit, in contrast, has adopted a categorical rule that unsecured police encounters are exempt from the ADA, reasoning that requiring a police officer to make an accommodation before ensuring his own safety is per se unreasonable. However, even in the Fifth Circuit, once the scene is secured, the officers must afford suspects with disabilities reasonable accommodations.

Waller ex rel. Estate of Hunt v. Danville, VA, is an example of the majority approach. In *Waller*, the estate of Rennie Hunt sued the local police department for failing to reasonably accommodate Hunt's mental illness when he held a woman hostage in his apartment, leading to a violent confrontation with police that left Hunt dead. The department argued for an "exigent circumstances" exception to Title II for an on-the-street police confrontation. Accepting this argument, the district court observed that exigent circumstances "apply whenever the police, whether in the course of an arrest or investigation, reasonably believe that any officer or third party's life is in danger." The Fourth Circuit reversed, holding that exigency is relevant, but is just "one circumstance that bears materially on the inquiry into reasonableness under the ADA." "Accommodations that might be expected when time is of no matter," the court observed, "become unreasonable to expect when time is of the essence." Ultimately, the court found that the

plaintiff's suggested accommodations—summoning a mental health professional and family members and administering medications at the time of his arrest—were beyond what the ADA required.

In a similar case, *Bircoll v. Miami-Dade County*, the plaintiff alleged that the city violated Title II when it failed to provide him an interpreter when officers questioned him about driving under the influence (DUI). Reviewing Title II case law, the Eleventh Circuit decided not "to enter the circuits' debate about whether police conduct during an arrest is a program, service, or activity covered by the ADA." Instead, the court relied on the final clause of Title II, the so-called "catch-all phrase," which provides that no covered individual shall "be subject to discrimination" by a public entity. The court interpreted that language as prohibiting "all discrimination by a public entity, regardless of the context." Instead of excluding on-the-street police encounters from Title II altogether, the panel observed that "the exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."

Taking a different course, in *Hainze v. Richards*, the Fifth Circuit categorically excluded unsecured police interactions as beyond the reach of the ADA. There, police officers responded to a request to take a mentally ill individual, Hainze, to a hospital. When they arrived at the scene, Hainze began to walk toward one of the officers with a knife in his hand. After surviving two gunshots by the police officer, Hainze sued under Title II, claiming that the county's policy of treating mental health calls the same as criminal calls resulted in discriminatory treatment. The Fifth Circuit rejected this argument, holding that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." The court reasoned that police "already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations." Requiring them "to factor in … compl[iance] with the ADA" before securing the scene "would pose an unnecessary risk to innocents." As part of its analysis, the Fifth Circuit determined that Congress could not have intended the ADA to prevent discrimination at "the expense of the safety of the general public." However, even under *Hainze*'s categorical rule, law enforcement activities are not exempt from the ADA altogether. Rather, once the crime scene is secure and there is no threat to human safety, officers in the Fifth Circuit are under a duty to reasonably accommodate a suspect's disability.

Which Accommodations Are Reasonable?

Given that on-the-street police encounters are subject to the ADA in the majority of circuits to have addressed the issue, what types of accommodations are reasonable in a given interaction? As noted above, determining reasonableness is a fact-intensive inquiry decided on a case-by-case basis. As such, it is challenging to articulate universal rules. For example, the Eleventh Circuit observed in *Bircoll* that accommodations deemed reasonable at the police station may not be reasonable in the street. In that case, the court deemed the demand for an interpreter at a DUI arrest unreasonable "given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity." However, the same request made at the police station, where "exigencies of the situation [are] greatly reduced," may be reasonable. Extending the analysis, not all police situations are created equal: what may be reasonable during a traffic stop could be highly unreasonable during a hostage situation.

Implications for Congress

The case law discussed above raises several opportunities for Congress to clarify, if desired, the scope of the ADA as it applies to law enforcement encounters. If Congress seeks uniformity, to settle the disagreement in the lower courts, Congress could define the scope of the terms "services, programs, or activities" to include specified law enforcement functions, such as on-the-street interactions with the public, or, alternatively, it could exempt these types of police-citizen encounters from the ADA until a crime scene is secured. Congress could define what accommodations would be considered reasonable in a given police-citizen encounter. Instead, Congress could instruct the DOJ to use its regulatory authority under Title II to establish what types of accommodations qualify as reasonable under Title II. Although the fact-specific nature of reasonability assessments may not lend itself to these legislative or regulatory efforts, as the foregoing discussion illustrates, the courts do not reach uniform conclusions on some questions.

Some legislative measures have not sought to amend the ADA, but instead to propose certain police training requirements that would improve interactions between law enforcement and individuals with disabilities. For instance, H.R. 1159, the Preventing Tragedies Between Police and Communities Act of 2021, would require that all individuals enrolled in a police academy of a law enforcement agency of a state or local government fulfill a training session on de-escalation techniques, including

- techniques that provide all officers with awareness and recognition of mental health and substance abuse issues with an emphasis on communication strategies; and
- training officers simultaneously in teams on de-escalation and use of force to improve group dynamics and diminish excessive use of force during critical incidents.

Any state or local government not in compliance with the act would lose 20% of its funding under the Edward Byrne Memorial Justice Assistance Grant program.

S. 515 and H.R. 1368, the Mental Health Justice Act of 2021, would create a grant program for state and local governments to train mental health professionals in law enforcement settings. These professionals would be sent in lieu of law enforcement officers to emergencies that involve people with a mental illness, intellectual or developmental disabilities, or substance abuse issues. Jurisdictions that can show notable reduction in incarceration, police use of force against, and death of persons with behavioral health issues could be awarded additional grants under this bill.

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