

An abstract painting featuring swirling, concentric patterns in shades of orange, brown, and yellow. The brushstrokes are visible, creating a textured, layered effect. The overall composition is dynamic and organic, with a sense of movement and depth.

# The Americans with Disabilities Act and Public Emergencies: Is There an “Exigent Circumstances” Exception to the Act?

By Steven E. Rau and Gregory G. Brooker

In a striking repudiation of the U.S. Supreme Court, Congress enacted the ADA Amendments Act (ADAAA) in 2008. The explicit findings and purpose of the ADAAA were to guarantee that the original promise of the ADA was fulfilled and not thwarted because of the Supreme Court's rulings in *Sutton v. United Airlines Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184 (2002). The ADAAA represented a legislative rejection of judicially created restrictions of the intended protections provided by the ADA. The amendments created hope for individuals with disabilities and their advocates that the ADA would fulfill the original promise it offered to more than 53 million Americans with disabilities. This reinvigoration of the intent and purpose of the ADA will affect the law governing discrimination on the basis of a person's disability.

One line of cases that Congress did not statutorily overrule in the ADAAA relates to whether there is an "exigent circumstances" exception to the ADA itself. In *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), the Fifth Circuit held that Title II of the ADA "does not apply" in emergency situations in which police officers must quickly identify, assess, and react to potentially life-threatening situations. Congress, the Fifth Circuit noted, could not have intended the ADA to prevent discrimination against people with disabilities at the expense of public safety. *Id.* at 800. Similarly, in *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009), the Fourth Circuit held that exigent circumstances necessarily affect the "reasonableness" of the ADA accommodation requested. Thus, accommodations "that might be expected when time is of no matter become unreasonable to expect when time is of the essence," the court stated. *Id.* The Eleventh Circuit, in *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085–88 (11th Cir. 2007), also treated exigent circumstances as an issue that is relevant to the reasonableness of the ADA accommodation request.

The Eighth Circuit, which is currently considering whether to recognize an exigent circumstances exception to the ADA in a case involving a late-night public health emergency, may soon jump on this bandwagon. See *Loye v. County of Dakota*, 647 F. Supp. 2d 1081, 1088–90 (D. Minn. 2009), *appeal docketed*, No. 09-3277 (8th Cir. Sept. 9, 2009). The *Loye* case illustrates the practical problems of providing individuals with disabilities meaningful access to a public entity's programs, activities, or services under Title II of the ADA. These problems are exacerbated in this age of limited government resources and will continue to require creativity and imagination, especially in emergency situations.

*Loye* involved the dangerous situation of children playing with mercury that had been found in an abandoned building and the ensuing efforts to contain and decontaminate the area. *Loye*, 647 F. Supp. 2d at 1084. On Labor Day, Sept. 6, 2004, two children broke into an abandoned building near Rosemount Woods, a mobile home park, and found two bottles containing mercury in the building. At about 6 p.m., a neighbor saw the children playing with the mercury in the nearby park and called the police. Upon arriving at the scene, the police recognized the

substance as mercury and initiated decontamination procedures based on an emergency response plan developed by the county, together with 11 of the county's municipalities, more than a year before this incident. The plan was designed to enable the public entities to collectively plan for and respond to large-scale disasters in the community.

During the initial investigation of the incident, the police interviewed Vikki Marshall, a deaf woman whose son had been playing with the mercury. Afterward, in accordance with the emergency response plan, police officers began knocking on people's doors in the mobile home park to find and quarantine people who may have been exposed to the mercury. Some of the people who were quarantined were deaf like Marshall; they included Kevin Loye, Gina Gist, Bruce Einarson, Stacy Rogers, and David Stiles (hereinafter the referred to as the plaintiffs). *Id.* at 1084–1085. The decontamination process began around 11 p.m., more than four hours after the police officers' initial response to the mercury that had been reported. The decontamination process included taking people into a tent, having them remove all their clothes and jewelry, washing and brushing the individuals, and then giving them a Tyvek® suit. During the entire process, a sign language interpreter was not provided to any of the individuals who were deaf. Lipreading and reading handwritten notes were not effective because of the dim lighting in the decontamination tent. The individuals who were deaf obtained information about the process by interpreting various hand gestures and observing what people in the front of the line were doing. After decontamination processes ended at about 2 a.m., the individuals were taken by bus to a local motel. *Id.* at 1085.

Over the next few days and weeks, Dakota County conducted various meetings with the affected individuals. *Id.* at 1085–1086. A sign language interpreter was available at some of the meetings, but not all of them. In addition, a nurse was assigned to meet with various individual families, including those whose members were deaf. Whether an interpreter was present at each meeting for every individual was a disputed fact. By the end of September 2004, the families had returned to their homes, and the nurse's assistance ceased.

In September 2005, the plaintiffs filed charges with the Minnesota Department of Human Rights, asserting that their rights had been violated when Dakota County failed to provide interpreters during the decontamination process. The plaintiffs later filed an action against the county in federal court, asserting violations of Title II of the ADA; § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a); and the Minnesota Human Rights Act, Minn. Stat. § 363A, Subd. 1. *Id.* at 1086.

Under Title II of the ADA, a public entity discriminates against a disabled individual if the person does not receive "meaningful access" to the public entity's programs, services, or activities. To provide "meaningful access," Title II of the ADA requires the public entity to take the "appropriate steps to ensure that communications" with deaf individuals are "as effective as communications

with others.” 28 C.F.R. § 35.160(a). Such steps include, but are not limited to, the use of interpreters, written materials, closed-caption decoders, and written materials. Under Title II, a public entity must give “primary consideration” to individuals who are disabled when providing services or activities. This requirement, however, does not mean that the public entity must supply what the individual requests. *Peterson v. Hastings Public Schools*, 31 F.3d 705, 708–9 (8th Cir. 1994). In *Loye*, the issue before the district court was whether Dakota County provided effective communication to the plaintiffs during the decontamination process—communication that was similar to that provided to others—and, if the county did not, whether the request for an interpreter was reasonable under the circumstances.

The court began by examining the facts surrounding the initial decontamination. Of particular interest to the court was the fact that the decontamination process started late in the evening—11 p.m.—on a holiday weekend, and the containment and decontamination of the mercury constituted an “extreme environmental and personal health emergency.” *Id.* at 1088. Given the situation, the court found that exigent circumstances existed such that Dakota County was not required to provide a sign language interpreter.

In arriving at this conclusion, the court in *Loye* stated that exigent circumstances may require that regulations be set aside, *id.* at 1089, citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (finding exigent circumstances rendered warrantless entry into a home objectively reasonable under the Fourth Amendment); *United States v. Banks*, 540 U.S. 31, 37 (2003) (the same reasoning was applied for forcible entry on a “knock-and-announce” warrant). The court reasoned that an emergency responder must protect the public health and secure the area during an emergency, and any delay caused by the need to comply with the ADA could increase the risk to the responders and to the public. As such, it was not necessary for Dakota County to wait to begin decontamination procedures until an interpreter could be located and arrive at the scene.

The *Loye* court also determined that it was not logical to require Dakota County or any other member of the decontamination task force to keep an interpreter on staff “24 hours a day, 365 days a year, to guard against such a possibility” of needing one in an emergency. *Loye*, 647 F. Supp. 2d at 1089. Finally, the district court found that the responders were able to communicate effectively enough with the plaintiffs during this time period through hand gestures, pointing, and oral communications with family members who were not deaf.

The district court in *Loye* also examined whether Dakota County had provided “meaningful access” in making “reasonable modifications” by having an interpreter present at some of the follow-up meetings with the affected individuals. The court found that, under the precedent set by the Supreme Court, Dakota County was not required to have an interpreter at every meeting. *Id.* at 1090. Rather, it was a “reasonable modification” to allow the deaf residents to obtain the information presented at the meeting at a later time and to arrange for a private meeting some reasonable



time later to ask questions. In addition, the court noted that the plaintiffs were unable to identify specifically any information that they had not received or any harm they had experienced because of this procedure.

Because the plaintiffs were unable to provide any facts from which a reasonable jury could find that Dakota County had denied the plaintiffs the benefit of its services or discriminated against the plaintiffs, the court granted Dakota County’s motion for summary judgment. *Id.* at 1096. The plaintiffs appealed the decision to the Eighth Circuit, which, at the time this article was written, had heard oral arguments and taken the case under advisement.

The *Loye* case raises the following question: Under what circumstances do purported exigent circumstances excuse compliance with Title II of the ADA? The ADA and other similar laws prohibiting discrimination against individuals with disabilities do not contain any explicit exception for “exigent circumstances.” Nevertheless, courts seem willing to read such an exception into the statute. Therefore, the question becomes: when are conditions so changed that a public entity is excused from providing individuals with disabilities meaningful access to a public entity’s program, activities, or services?

Many of the decisions applying an exigent circumstances analysis to the ADA focus on the nature and scope of the emergency, and most involve incidents of police stopping a person who has a disability. *See Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) (holding that the ADA did not require police to contact a mentally ill suspect’s family or mental health professionals during two-hour hostage standoff); *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008) (holding that the ADA did not require police to obtain an interpreter before arresting a deaf person involved in an assault); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085–86 (11th Cir. 2007) (holding that the ADA did not require a sign language interpreter

for a deaf driver who was stopped for suspicion of driving under the influence); *cf. Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006) (finding no exigent circumstances in the case of medical responders who made a decision to transport a disabled persons to the hospital without evaluating the person's refusal of medical assistance). Each case seems to depend on the specific facts of the emergency. This uncertainty is not good for public entities nor those covered under the ADA.

One factor to consider when exigent circumstances exist is how quickly the public entity must act when responding to the situation. Clearly, a traffic stop or detainment of an individual caught in the commission of a crime would require immediate action such that strict compliance with the ADA would not be possible. The cases on which the court relied in *Loye* involved situations in which decisions had to be made quickly. Yet, none of these cases dealt with a situation in which the public entity had no time to contact other agencies in order to provide the necessary services to comply with the ADA. Given that it took four hours for Dakota County to coordinate the decontamination process with numerous state and local agencies, it does not seem that time was of such essence for it to be permissible to allow Dakota County to completely ignore the ADA.

If such excused noncompliance is acceptable, how much time is enough before a situation moves from having exigent circumstances such that federal protections may be ignored? Under the court's reasoning in *Loye*, it may be that any situation that poses a risk to public safety or health may be sufficient to allow public entities to ignore the ADA, because public officials need to be able to move swiftly and quickly in order to resolve the risk. This exception is broad and has no statutory textual support in the ADA. In *Loye*, the county knew that some of the affected individuals were deaf. The police interviewed Ms. Marshall when they first arrived on the scene. Dakota County knew that some of its officials would need an interpreter to communicate adequately with the deaf residents. This was not a situation in which the public entity did not discover the need for reasonable accommodations to be made until the entity started providing the services, as is the case in a police stop. Given the amount of time Dakota County had to contact numerous agencies, it should have been reasonable to expect the county to attempt to call in an interpreter. Moreover, the county had written an emergency plan that was implemented the night of the mercury contamination. Shouldn't the county have anticipated in its plan the need in some cases to provide accommodations for persons with disabilities? Requiring the county to have a list of local sign language interpreters to call in emergencies does not appear to be unreasonable, given the four hours it took to set up the decontamination tents.

In these economic times, uncertainty about whether an exigent circumstances exception applies is not good for any entity—public or private. These cases, however, demonstrate the difficulty that courts encounter in requiring compliance with federal laws that do not provide an explicit, or even implicit, exception to compliance based

on exigent circumstances. Did Congress intend that it is always necessary to comply with the ADA by not providing such an exception or stating in its findings and purposes that compliance is always required? By enacting the ADAAA in 2008, Congress was overturning judicially created limitations of the ADA intentionally and allowing more people access to the protection provided by the ADA. Any argument that Congress acquiesced to various court decisions that determined that ADA compliance was not required because of exigent circumstances appears contrary to the purpose of the ADAAA.

The ADAAA broadened the definition of a "qualified disability," and this legislative amendment compounds the concern mentioned above. In times of smaller government budgets, public entities require—and deserve—clarity about which situations will allow a public entity to forgo compliance with the ADA. It could be a costly error for a city that believes exigent circumstances exist in responding to an emergency to have a court use 20-20 hindsight to award damages against the city. *See, e.g., Green*, 465 F.3d at 65 (finding no exigent circumstances exception to the ADA in the case of medical responders who made a decision to transport a disabled patient to the hospital without evaluating the person's refusal of medical assistance). As such, it is necessary for Congress or the Supreme Court to provide clarity on this issue for the benefit of all.

Whether there is an exigent circumstances exception to the ADA continues to be a focus of a hot debate, because Congress did not address the issue in the ADAAA. Perhaps a better approach to the issue is to consider the nature of the emergency situation in determining whether a request for an accommodation or a modification is reasonable under the statute. This approach is closer to the language of the statute than writing a judicially created exception for "exigent circumstances"—a broad concept better suited for constitutional cases than statutory ones. Focusing on the reasonableness of the request given the emergency at hand will also provide the needed clarity in the thorny cases involving public emergencies and the Americans with Disabilities Act. **TFL**



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