IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-00704-WJM-SKC

A.V., a child, through his mother and next friend, MICHELLE HANSON;

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1, *et al.*

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517[1] to address the application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. pt. 35, to arrests. Congress charged the Department of Justice with implementing Title II of the ADA by promulgating regulations, issuing technical assistance, and bringing suits in federal court to enforce the statute. 42 U.S.C. §§ 12133-12134, 12206. Of particular relevance to this case, the Department implements Title II as to "[a]ll programs, services, and regulatory activities relating to law enforcement." 28 C.F.R. § 35.190(b)(6). The United States therefore has a strong interest in the proper interpretation of Title II in the context of law enforcement activities, including arrests.

INTRODUCTION

Plaintiff A.V., an eleven-year-old child, alleges that school resource officers (SROs) of the Douglas County Sheriff's Office (DCSO) and Douglas County School District (District) violated Title II of the ADA during his arrest and post-arrest proceedings.[2] Compl. ¶¶ 18, 128-38, ECF No. 1. According to Plaintiff's complaint,[3] SROs in police uniform knew about A.V.'s disabilities—autism spectrum disorder and a serious emotional disorder—and yet aggressively

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[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.

[2] Plaintiff's complaint also alleges violations of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Compl. ¶¶ 139-49. Because the ADA and the Rehabilitation Act involve the same substantive standards and are generally subject to the same analysis, our discussion applies to both claims. *See Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1245 (10th Cir. 2009); *see also* 42 U.S.C. § 12201(a) (stating that the ADA should not be construed to provide less protection than the Rehabilitation Act).

[3] On a motion to dismiss, we "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotations and citation omitted).

handcuffed A.V. while he was sitting quietly and calmly with a school psychologist. *Id.* ¶¶ 1, 2, 35, 38, 59, 69-70. Earlier that morning, A.V., who is sensitive to touch due to his disabilities, poked another student with a pencil after the student wrote on him with markers. *Id.* ¶¶ 2, 19, 24-25. After A.V. left the classroom as requested and calmed down, the principal contacted law enforcement and two SROs responded. *Id.* ¶¶ 2, 29-34. Despite being told by the school psychologist that A.V. is not highly verbal and tends not to talk, the officers grabbed A.V. by his arms and neck and arrested him when he failed to adequately respond to their requests to come with them. *Id.* ¶¶ 1, 39-51. The officers then left A.V. in a patrol car for hours while he banged his head repeatedly against the plexiglass and cried. *Id.* ¶¶ 1, 56-65. During the course of the arrest and investigation, the officers ignored or denied several accommodations requested on A.V.'s behalf based on his disability, such as permitting the principal to move A.V. instead of the officers, *id.* ¶¶ 38-40; making sure A.V. was not in a position to harm himself (a manifestation of his disability), *id.* ¶¶ 59-61; and providing A.V. with medical care needed due to his disability, *id.* ¶¶ 69-71, 75-76. The SROs were not disciplined for their role in the incident. *Id.* ¶ 7.

In their motions to dismiss, the Sheriff's Office and the School District misinterpret Title II of the ADA. Specifically, Defendants misconstrue their obligation under Title II to make reasonable modifications during an arrest when necessary to avoid disability discrimination, suggesting that A.V.—despite his age, the school context, and known disability—was required to request a reasonable modification during the course of his arrest. DCSO Mot. 3, 6, ECF No. 23; District Mot. 8-9, ECF No. 28. Defendants' reading of the law cannot be squared with the plain text of the ADA, the ADA's implementing regulation, or the weight of circuit court authority. In addition, Defendants argue that they cannot be held liable for damages under Title II for the

actions of the SROs in this case. DCSO Mot. 8-12; District Mot. 4-10. But courts have repeatedly and correctly held public entities liable for the discriminatory actions (and deliberate indifference) of their employees and agents, including officers' actions, during arrest and post-arrest proceedings.[4]

DISCUSSION

I. Title II Applies to Arrests and Requires Officers to Make Reasonable Modifications to Policies, Practices, and Procedures

While Defendants attempt to cast doubt on the issue, *see* DCSO Def.'s Mot. 3; District Def.'s Mot. 8, it is clear, from the ADA's text, implementing regulations, and the weight of circuit court caselaw, that Title II applies to arrests.[5] Consistent with these holdings, the Department has repeatedly interpreted Title II to apply to arrests.[6]

Title II's application to arrests includes the obligation to make reasonable modifications.

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[4] Aside from these issues, the United States takes no position on other issues before the Court.

[5] The overwhelming majority of circuit courts to address this issue, including the Tenth Circuit, have held or assumed without deciding that Title II applies to arrests or related law enforcement conduct. *See Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999); *Gray v. Cummings*, 917 F.3d 1, 16-17 (1st Cir. 2019); *Haberle v. Troxell*, 885 F.3d 171, 180 (3d Cir. 2018); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 339 (4th Cir. 2012); *King v. Hendricks Cnty. Comm'rs*, 954 F.3d 981, 988-89 (7th Cir. 2020); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013); *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds, cert. dismissed in part by* 575 U.S. 600 (2015); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085 (11th Cir. 2007). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2008) (the sole circuit court to hold that Title II applies to an officer's on-the-street responses to reported disturbances only after the officer has secured the scene and ensured that there is no threat to human life).

[6] A more fulsome discussion of Title II's applicability to arrests is available in the Department's past briefs on this subject. *See, e.g.*, Br. for the United States as Amicus Curiae at 9-17, *Sheehan v. City & Cnty. of San Francisco*, 575 U.S. 600 (2015) (No. 13-1412); Statement of Interest of the United States at 5-9, *Robinson v. Farley*, 264 F. Supp. 3d 154 (D.D.C. 2017) (No. 15-cv-00803), ECF No. 38.

Indeed, Defendants acknowledge, as they must, that courts have recognized an ADA claim for a failure to make reasonable modifications during arrests, but Defendants misconstrue when and how the obligation applies in that context. *See, e.g.*, DCSO Mot. 3. A public entity violates the ADA where its officers or agents fail to provide reasonable modifications to policies, practices, or procedures during an arrest when such modifications are necessary to avoid disability discrimination, unless doing so would fundamentally alter the nature of the service, program, or activity. *See* 28 C.F.R. 35.130(b)(7)(i); *see, e.g.*, *Gorman v. Bartch*, 152 F.3d 907, 913 (8th Cir. 1998). The reasonable modification obligation may include making changes to the usual ways of doing things to accommodate an arrestee's disability.

A. Officers Must Make Reasonable Modifications During Arrests When Officers Know, or It Is Obvious, that a Modification is Needed

Defendants suggest that their SROs had no obligation to make reasonable modifications during A.V.'s arrest because A.V. did not request a modification. DCSO Mot. 6; District Mot. 9. However, while reasonable modifications often follow a request from a person with a disability, nothing in the statute or regulation conditions the public entity's obligation on such a request. *See* 28 C.F.R. § 35.130(b)(7)(i) ("A public entity shall make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability . . . ."). And Defendants' narrow construction cannot be squared with the ADA's legal framework or with its commonsense application in this context.

Courts have repeatedly and properly held that a public entity's obligation to make reasonable modifications is triggered when the entity knows that someone has a disability and needs a modification, including when the need for a modification is obvious, regardless of whether a modification is requested. *See, e.g.*, *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 296 (5th Cir. 2012) (holding that a "failure to expressly 'request' an accommodation

is not fatal to an ADA claim where the defendant otherwise had knowledge of the individual's disability and needs but took no action"); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious . . .), the public entity is on notice that an accommodation is required. . . .").

These standards apply equally to law enforcement entities. In *Robertson v. Las Animas County Sheriff's Department*, the Tenth Circuit reversed an award of summary judgment to a detention facility because there were questions of material fact about the facility's knowledge of plaintiff's hearing disability and need for accommodations. 500 F.3d 1185, 1196-98 (10th Cir. 2007). As the Tenth Circuit explained, "a public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individuals request an accommodation." *Id.* at 1197-98. Likewise, in *Sacchetti v. Gallaudet University*, where the defendant did not dispute that its officers knew of the arrestee's inability to communicate because he was deaf, the court held that no accommodation request was needed. 344 F. Supp. 3d 233, 272 (D.D.C. 2018). The court explained that requiring an arrestee with a communication-related disability to request an accommodation would be "'baffling as a matter of law and logic,' as it would render 'the protections of . . . Title II . . . unavailable . . . ." *Id.* (citation omitted).[7]

Importantly, and particularly in the case of a child with a disability, a request for

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[7] *See also Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001) (citing *Randolph v. Rodgers*, 170 F.3d 850, 858-59 (8th Cir. 1999) (Where a plaintiff with a hearing disability needed auxiliary aids and services from a correctional facility, a specific request by the plaintiff was not necessary where the correctional facility "had knowledge of [plaintiff's] hearing disability but failed to discuss related issues with him.")).

modifications need not come only from the child. *See Robertson*, 500 F.3d at 1196 (holding that an entity knows about a disability when it "is obvious or because the individual (or someone else) has informed the entity of the disability"). Especially if the child's disability impacts their ability to communicate, law enforcement entities cannot use the child's failure to make a specific request to avoid liability. Instead, the need could be obvious or the request could be made by a parent or another adult who knows the child and how the child's disability affects them, such as school staff.

The District also argues that the complaint does not support a "plausible inference that A.V. obviously needed an accommodation" and suggests that the fact that A.V. "was sitting calmly" when the SROs arrived means that he did not require modifications. District Mot. 9. But a law enforcement entity's obligation to make reasonable modifications exists throughout a law enforcement encounter. Thus, even if no modification is needed when SROs arrive on the scene, SROs may become aware of the need for reasonable modifications during their interactions with a child with a disability, based on information they directly learn from school staff or a child's parent or that becomes obvious to them over time.

B. A Range of Possible Modifications May Be Reasonable When SROs Arrest a Child with a Disability

Defendants seem to contend that there are no modifications that would have been reasonable here. *See* DCSO Mot. 6-7; District Mot. 9. To support that argument, they rely on cases about SRO arrests of children with disabilities that were decided on summary judgment, where the court had the benefit of a fully developed record. *See Scott v. City of Albuquerque*, 711 Fed. Appx. 871, 875 (10th Cir. 2017); *J.V. v. Albuquerque Pub. Schs.*, 813 F.3d 1289, 1294 (10th Cir. 2016); *J.H. ex rel. J.P. v. Bernalillo Cnty.*, 806 F.3d 1255, 1257 (10th Cir. 2015). In fact, determinations about reasonable modification claims are highly fact specific and often

require discovery. *See, e.g.*, *Gorman*, 152 F.3d at 914 ("The factual record will need to be further developed . . . before the remaining issues of potential liability [on the arrestee's ADA claim] and possible relief are determined.").

Beyond the different procedural postures, these cases' facts are materially different from those alleged by A.V., including the SROs' knowledge of the respective children's disabilities and the alleged requests for modifications. First, the Tenth Circuit found, in *J.H.*, that the plaintiff had not proffered admissible evidence showing that the SRO knew that the child had a disability. 806 F.3d at 1261. In *J.V.*, the SRO likewise was allegedly unaware of the child's disability. 813 F.3d at 1292. Here, Plaintiff's complaint alleges that the SROs were notified of A.V.'s disabilities by the principal upon their arrival at the school and several times thereafter by school staff and A.V.'s stepfather. Compl. ¶¶ 35, 43, 59-60, 69.

Second, the court in *Scott* found that, even though the SRO knew of the plaintiff's disability diagnosis, no evidence showed that the SRO knew that he needed an accommodation. 711 Fed. Appx. at 885. The court in *J.H.* likewise found that the record neither demonstrated that an accommodation was requested nor what accommodations were needed, other than potentially not arresting the child. 806 F.3 at 1261-62. And in *J.V.*, the plaintiffs admitted that they did not request modifications and instead only asserted that the need for a modification was obvious because of the child's Behavioral Intervention Plan. 813 F.3d at 1299. In fact, the Tenth Circuit emphasized that the SROs had unsuccessfully tried the accommodations that plaintiffs asserted should have been used for J.V., which is not the case for A.V. *Id.* at 1299-1300. Finally, in *J.V.*, the child's mother allegedly consented to the child's restraint and the child was released 15 minutes later at the mother's request, *id.* at 1293-94. In stark contrast, A.V. alleges that multiple requests for modifications were made on his behalf and wholly denied

by the SROs, including that A.V. be unhandcuffed, Compl ¶ 55; that the officers intervene while A.V. was handcuffed alone in the patrol car and repeatedly banging his head, *id.* ¶¶ 57, 59-60, 72; that A.V.'s stepfather be permitted to see his son, *id.* ¶ 67; and that A.V. be provided medical care, *id.* ¶¶ 69-71. The facts and procedural posture of this case thus materially differ from the cases on which Defendants rely.

Of course, exigency and safety considerations are important factors in determining if a modification is reasonable, especially if the modification would interfere with an officer's ability to respond to a safety threat. *See, e.g.*, *Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) ("exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA"); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085 (11th Cir. 2007). But the analysis of exigencies and safety concerns must account for the specific circumstances to which officers are responding. For example, the Fifth Circuit declined to find exigent circumstances in the context of an SRO's response to an eight-year-old with autism and other disabilities, who had a behavioral incident at school that included waving a plastic jump rope that the child called "nunchucks." *Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019) (reversing a district court's award of summary judgment to defendants). The court emphasized that "[a] jump rope in the hands of an eight-year-old child is not a weapon and is not capable of inflicting the same injuries or damage as an actual weapon . . . in the hands of an adult," and further noted that "[a]t the very least, whether an 8-year-old twirling a child's jump rope created a danger of physical harm or a potentially life-threatening situation is a dispute of material fact." *Id.*

When exigencies and safety considerations permit, a range of modifications may be reasonable and available to law enforcement officers such as SROs, especially when interacting

with or arresting a child with a known disability. Modifications that may be reasonable for officers to implement, depending on the circumstances, include using de-escalation strategies; removing distractions and providing time and space to calm the situation when the child poses no significant safety threat; avoiding or minimizing touching a child whose disability makes them sensitive to touch; and waiting for a parent or guardian to arrive before making the arrest. If circumstances prevent the officer from waiting for the parent or guardian to arrive, a reasonable modification also could include having a trusted non-law enforcement school staff member, such as a school psychologist, principal, teacher, or paraprofessional, help to effectively communicate with the child and to de-escalate, if needed.[8]

II. A Public Entity Can Be Liable for Damages Under Title II of the ADA for Disability Discrimination by a School Resource Officer During an Arrest

In its motion to dismiss, the Sheriff's Office incorrectly argues that a public entity cannot be liable for damages in a private cause of action brought under Title II of the ADA when the alleged violation is based solely on the discriminatory actions and deliberate indifference of its

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[8] *See, e.g.*, Statement of Interest of the United States at 9, *Robinson v. Farley*, 264 F. Supp. 3d 154 (D.D.C. 2017) (No. 15-cv-00803), ECF No. 38 (providing examples of possible reasonable modifications during arrests); Statement of Interest of the United States at 30-34, *S.R. v. Kenton Cnty.*, 302 F. Supp. 3d 821 (E.D. Ky. 2015) (No. 2:15-cv-143), ECF No. 32 (same); U.S. Dep't of Justice, *Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act* (Jan. 2017), https://www.ada.gov/cjta.html (providing examples of how law enforcement entities comply with the ADA's reasonable modification obligation); The Arc National Center on Criminal Justice & Disability, *10 Facts Law Enforcement Needs to Know* (2015), http://thearc.org/wp-content/uploads/2019/07/NCCJDTipSheet_LE-FINAL.pdf ; The Arc National Center on Criminal Justice & Disability, *Pathways to Justice: Get the Facts: Autism Spectrum Disorder (ASD)* (2015), http://thearc.org/wp-content/uploads/2019/07/NCCJDFactSheet_Autism-Copyright--BJA.pdf. The Arc National Center on Criminal Justice & Disability, *Pathways to Justice: Get the Facts: Intellectual Disability (ID)* (2015), http://thearc.org/wp-content/uploads/2019/07/NCCJDFactSheet_ID-Copyrightd--BJA.pdf.

school resource officers during an arrest. DCSO Mot. 8-12. In fact, the Title II regulation and the weight of the caselaw prove Defendant wrong on the law.

A. General Framework for Liability Under Title II of the ADA

To recover compensatory damages under Title II of the ADA, courts generally require a showing of intentional discrimination. *See Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). In the Tenth Circuit, intentional discrimination can be inferred if the public entity was deliberately indifferent to the plaintiff's rights under the ADA. *See Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228-29 (10th Cir. 2009); *see also J.V. v. Albuquerque Pub. Schs.*, 813 F.3d 1289, 1298 (10th Cir. 2016). "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that . . . likelihood."[9] *Barber*, 562 F.3d at 1228-29 (quoting *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)). A plaintiff can establish intentional discrimination through various means, including direct or vicarious liability. As explained below, under either standard, Defendants may be liable for damages under Title II if the SROs intentionally violated A.V.'s rights, such as his right to reasonable modifications during the arrest process.

B. A Public Entity Is Liable Under Title II of the ADA for the Discriminatory Acts of Its Employees, Agents, Contractors, and Others

The Sheriff's Office is wrong when it argues that "neither Title II nor Section 504 can be construed to impose vicarious liability on a public entity based on the conduct of its employees."

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[9] As explained above, contrary to the Sheriff's Office's argument, the law at the time that A.V. was arrested was clear: Title II applies to arrests, including the requirement to provide reasonable modifications. *See* DCSO Mot. 12. Moreover, the first element of the deliberate indifference analysis—knowledge that a harm to a federally protected right is substantially likely—does not require a prior judicial finding that the challenged actions violate the law. *See id.* at 12-13. Defendants cannot point to any case including such a requirement.

DCSO Mot. 9. In fact, the plain text of the implementing regulation and the weight of the caselaw establish that Title II imposes liability on a public entity for the discriminatory conduct of its employees, agents, contractors, licensees, and others.

The Title II regulation specifies that Title II "applies to all services, programs, and activities provided or made available by public entities," and that a public entity may not discriminate, whether "directly or through contractual, licensing, or other arrangements." 28 C.F.R. §§ 35.102(a), 35.130(b)(1) & (b)(3). This regulatory language clarifies that a public entity's duty not to discriminate is nondelegable and that a public entity may be liable for disability discrimination by a contractor or other agent, beyond just employees. The regulation properly ensures that a public entity will remain liable for compensable harm in its programs, services, and activities, regardless of how it opts to structure or staff those services.

In support of its argument that vicarious liability does not apply to Title II, the Sheriff's Office cites to two non-binding district court cases outside of the Tenth Circuit, and to an Eleventh Circuit Rehabilitation Act case that declined to decide the issue. DCSO Def.'s Mot. Dismiss 9-10; *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 349 n.10 (11th Cir. 2012). The Sheriff's Office ignores, however, that all circuit courts to resolve this question have unanimously held that a state or local government employer is vicariously liable for the acts of its employees or agents who violate Title II. Namely, the Fourth, Fifth, and Ninth Circuits have made such holdings, while the First and Seventh Circuits have assumed the same, without deciding.[10] These holdings are based in part on the fact that "the historical justification for

[10] *See Gray v. Cummings*, 917 F.3d 1, 17 (1st Cir. 2019) (assuming, without deciding, that Title II permits vicarious liability, while noting that it remains "an open question"); *Rosen v.*

exempting municipalities from *respondeat superior* liability does not apply" to the Rehabilitation Act or Title II, and that the doctrine is "entirely consistent with the policy of the statute[s]" to eliminate disability discrimination. *Duvall*, 260 F.3d at 1141. The Tenth Circuit has not explicitly addressed the issue of vicarious liability under Title II. Other circuits have either not addressed the issue or have raised it as an open question. *See, e.g., Silberman v. Miami-Dade Transit*, 927 F.3d 1123, 1134 n.6 (11th Cir. 2019) (declining to decide the question but noting in dicta that it "remains an open question"). Multiple district courts in the Tenth Circuit and elsewhere have also agreed that public entities can be vicariously liable for the actions of their agents or employees under Title II of the ADA.[11]

C. A Public Entity May Also Be Directly Liable for Damages Under Title II

Because a public entity is liable for the acts of its employees, agents, and contractors under Title II, the Court need not address the applicable standard for direct liability for

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Montgomery Cnty., 121 F.3d 154, 157 n.3 (4th Cir. 1997) (holding that under Title II, "liability may be imposed on a principal for the statutory violations of its agent"); *Delano-Pyle v. Victoria Cnty.*, 302 F.3d 567, 574–75 (5th Cir. 2002) (holding that a municipality "is liable for the vicarious acts of any of its employees" under Title II); *King v. Hendricks Cnty. Comm'srs*, 954 F.3d 981, 989 (7th Cir. 2020) (assuming without deciding that the County could be held vicariously liable under Title II for police officer's actions); *Duvall*, 260 F.3d at 1141 ("When a plaintiff brings a direct suit under . . . Title II of the ADA against a municipality (including a county), the public entity is liable for the vicarious acts of its employees."). This issue also came before the Supreme Court in *Sheehan*, but the Court declined to decide the issue because, notably, "the parties agree[d] that [a public] entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent conduct of its employees" under Title II. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015).

[11] *See, e.g., Amparo v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. 12-CV-00136, 2013 WL 12330000, at *3 (D.N.M. May 21, 2013) (applying vicarious liability to Title II claims); *Doe v. Bd. of Cnty. Comm'rs of Craig Cnty.*, No. 11-CV-0298, 2011 WL 6740285, at *2-4 (N.D. Okla. Dec. 22, 2011) (same); *Morales v. City of New York*, No. 13-cv-7667, 2016 WL 4718189, at *7 (S.D.N.Y. Sept. 7, 2016) ("[T]he law is clear that municipalities may be held vicariously liable for violations of Title II of the ADA and Section 504 of the Rehabilitation Act committed by their agents.").

intentional discrimination. If the Court were to consider direct liability, however, Defendants could still be found deliberately indifferent and thus liable for damages if (1) A.V. was injured as the result of a policy or practice that the sheriff's office or school district maintained, despite knowing that there was a strong likelihood that it would lead to a violation of the ADA, *see J.V.*, 813 F.3d at 1298; or (2) if an officer or other official who had the requisite authority to institute corrective measures had actual notice of discrimination (such as a failure to provide reasonable modifications) and failed to take such measures, *see, e.g.*, *Biondo v. Kaledia Health*, 935 F.3d 68, 75-76 (2d Cir. 2019). Defendants do not address the first theory of direct liability, which is well established, and we do not discuss it further here.

Regarding the latter theory, the Sheriff's Office argues that the standard for direct liability for damages in a private right of action under Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), articulated by the Supreme Court in *Gebser* should be applied to Title II of the ADA, and that A.V. has not pled facts sufficient to establish liability for damages under that test. *See* DCSO Mot. 9-12 (citing *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 277 (1998)). No court in the Tenth Circuit has found that the *Gebser* test applies to Title II cases. And only two circuits, the Fifth and Eleventh, have applied it in Title II cases, while noting that vicarious liability may also apply. *See, e.g.*, *Harrison v. Klein Indep. Sch. Dist.*, No. 20-20115, 2021 WL 1305871, at *3 & n.4 (5th Cir. Apr. 7, 2021); *Silberman*, 927 F.3d at 1134 & n.6. Even under the reasoning in those circuit court cases, an SRO may qualify as an "official" for which a public entity, such as the Sheriff's Office, can be directly liable if the SRO acted with deliberate indifference to a student's ADA rights during an arrest. Making this determination as to whether and which public entity is liable in a given case is a fact-specific and

fact-intensive inquiry that may need to be reserved until after discovery.[12]

In *Gebser*, the Supreme Court held that a plaintiff may not recover damages in an action alleging sexual harassment by a teacher, "unless an official of the school district who at minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Gebser*, 524 U.S. at 277. At least two circuit courts applying *Gebser* in Title II and Rehabilitation Act cases have concluded that a doctor, a nurse, a school principal, or even a teacher could qualify as "officials" under this test. The courts based their decisions on evidence that these individuals had sufficient authority within their organization to address the alleged discrimination and institute corrective measures, such as providing an ASL interpreter.[13]

Likewise, in a case factually analogous to this case, a court found that a police department could be liable if an officer had the responsibility to decide, for example, whether a reasonable modification was needed during an arrest and acted with deliberate indifference in denying it. In *Hooper v. City of St. Paul*, the plaintiff sued the police department under Title II for denial of effective communication during its investigation and arrest of the plaintiff. 2019 WL 4015443, at *5 (D. Minn. 2019). The court held that a police officer could qualify as an

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[12] *Compare Sunderland v. Bethesda Hosp., Inc.*, 686 F. App'x 807, 810, 816-18 (11th Cir. 2017) (finding nurses qualified as "officials" under *Gebser* given the particular facts of the case), *with Liese*, 701 F.3d at 349-51 (finding doctors, but not nurses, qualified as "officials" under *Gebser* in light of the facts in that case).

[13] *See, e.g.*, *Biondo*, 935 F.3d at 75-76 (finding both doctors and nurses of a hospital qualified as "officials" under *Gebser* in an effective communication case under the Rehabilitation Act); *J.S., III v. Hous. Cnty. Bd. of Educ.*, 877 F.3d 979, 988-91 (11th Cir. 2017) (finding a school principal and even teachers may be "officials" under Title II and the Rehabilitation Act, but the coaches could not under the facts alleged because they did not have the authority to take corrective actions to remedy or stop the discrimination).

"official" under *Gebser* because the police department had delegated to the officer the responsibility for effectively communicating with the plaintiff and determining whether she needed a certified ASL interpreter during the course of the police investigation, arrest, and post-arrest proceedings, and thus the police department "should be held liable if [the officer] acted with deliberate indifference in his assigned role." *Id.* at *19. The court found that, under the reasoning in *Gebser* and subsequent Eleventh Circuit decisions, an officer can satisfy the *Gebser* standard if "given complete discretion at a key decision point," such as whether to grant or deny a request for a particular auxiliary aid, "even when his decision is technically subject to review." *Id.* at *18 (internal quotations and citations omitted).

The same reasoning applies to actions taken by SROs during the course of an arrest, investigation, and post-arrest proceedings—if the officers have the responsibility for making decisions about who to arrest and what reasonable modifications are needed, they may qualify as "officials" under *Gebser*. The public entities that delegate this responsibility to the officers, whether through contractual or other arrangements, should be held liable if the officers act with deliberate indifference in their assigned roles. This approach is consistent with the caselaw discussed above, the text of the statute and regulation, and the purpose of the ADA to provide broad coverage and "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101 note(a)(1).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court consider this Statement of Interest in this litigation.

For the United States of America:

Date: June 24, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2021, a correct copy of the foregoing Statement of Interest of the United States of America was filed via CM/ECF and served on the following:

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