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Program Access Under Disability Discrimination Law

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PROGRAM ACCESS UNDER DISABILITY DISCRIMINATION LAW

Mark C. Weber†

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ABSTRACT

State and local governments and all federal grantees must operate their programs, services, and activities so that they are readily accessible to persons with disabilities when the program, service, or activity is viewed in its entirety. This article submits that courts should adopt an expansive reading of this program access requirement, imposing an obligation on governments and grantees to offer something of benefit to everyone, no matter the nature of that someone's disability. The text of the federal regulations, relevant caselaw, and persuasive analogies

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require this reading. Moreover, this energetic interpretation of the Americans with Disabilities Act and section 504 regulations resolves some of the thornier problems of current disability discrimination law: limits on reasonable accommodation and the distinction between access and content for legally required accommodations. Applied to the recent case of *A.H. ex rel. Holzmueller v. Illinois High School Association*, the proper reading of the program access regulations requires the creation of a para-ambulatory long distance road race in the state high school competition.

INTRODUCTION

A.H. was a dedicated high school runner with spastic quadriplegia who was classified by the International Paralympic Committee as a T-36 disabled athlete.[1] He had elite status, having competed in the U.S. Paralympic trials in 2016.[2] But he could not compete in the state high school track meet because his times were not fast enough to qualify under the general standards, and the Illinois athletic association refused to create a separate division for para-ambulatory athletes, despite the fact that several other states do.[3] Invoking the Americans with Disabilities Act (ADA),[4] section 504 of the Rehabilitation Act,[5] and Fourteenth Amendment equal protection,[6] he asked for a court order that the association set realistic qualifying times for para-ambulatory athletes, and that it establish a para-ambulatory division in the open five-kilometer road race.[7] For reasons more fully explained below, he lost his case in both the district court and the Seventh Circuit Court of Appeals.[8]

This article explores whether claimants such as A.H. might invoke a theory under the ADA and section 504 that state and local governments and federal grantees have denied them rights to have public programs operated so that the program, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," as the federal

1. A.H. *ex rel*. Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018). A.H. was on the cross-country, swimming, and track and field teams at Evanston Township High School. *Id*. at 590.

2. *Id*.

3. *Id*. at 596 (Rovner, J., dissenting).

4. 42 U.S.C. §§ 12101–12213; 47 U.S.C. § 225 (2021).

5. 29 U.S.C. § 794 (2021).

6. U.S. CONST. amend. XIV, § 2.

7. A.H. v. Ill. High Sch. Ass'n, 263 F. Supp. 3d 705, 713 (N.D. Ill. 2017), *aff'd*, 881 F.3d 587, 596 (7th Cir. 2018).

8. A.H. *ex rel*. Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587, 596 (7th Cir. 2018); *see infra* Section IV (discussing *A.H.* case in context of this article's thesis).

regulations require.[9] It posits that the program accessibility regulations enforcing those statutes require covered entities to offer programs that provide a benefit for everyone, no matter how disabling an individual's condition might be. The covered entity has to provide something for everyone, at least up to a limit of fundamental alteration or undue financial and administrative burden.[10] Even when that limit is reached, the entity must take other actions that would not result in the burden but would nevertheless ensure that the person receive the benefits and services provided by the entity.[11] This constitutes an extensive obligation on the part of state and local government and federal grantees.

The ADA and section 504 program accessibility regulations are seldom invoked by courts, and when they are, they are typically cited for the regulations' additional terms stating that not every existing facility need be made accessible and that fundamental alterations need not be undertaken.[12] Whatever application the negative parts of the provisions may have, the striking fact is how little use has been made of the broad positive command in the regulations that every public program, viewed

9. 28 C.F.R. § 35.150(a) (2021); *see id.* § 42.521(a) ("A recipient [of federal funds] shall operate [its] program or activity . . . so that when each part is viewed in its entirety it is readily accessible to and usable by handicapped persons."). The section 504 regulation directly applicable in a case like *A.H.* would be the Department of Education regulation. Its regulation, the same as that of the Department of Justice just quoted, is found at 34 C.F.R. § 104.22(a) (2021). Nearly all state and local government entities are recipients of federal funds, so the ADA and section 504 coverage overlaps in many cases and the obligations are similar. *See* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1097–00 (1995) (also noting subtle differences in obligations imposed). In a case brought under section 504, the Third Circuit Court of Appeals has directed a judge to instruct a jury to use the standards set by the ADA regulations regarding service animals. Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 114 (3d Cir. 2018) (in section 504 damages action against operator of private school that denied student use of service dog for monitoring onset of seizures overturning jury decision in favor of defendant when trial judge refused to give jury instruction based on ADA regulations concerning service animals).

10. 28 C.F.R. § 35.150(a)(3) (2021). Protection of historical properties may also provide a defense. *Id.* § 35.150(a)(2), (b)(3). The section 504 regulation does not contain the undue burden-fundamental alteration language, though courts act as though it did. *See* Katie Eyer, Note, *Rehabilitation Act Redux*, 23 YALE L. & POL'Y REV. 271, 307–08 (2005) (pointing out lack of defense in section 504 regulation but noting courts' propensity to imply such a defense). The judicial implication Eyer describes emerged early in the life of section 504. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 288 (1985) (holding federal grantees do not have to make distributive decisions in a way most favorable to persons with disabilities); Se. Cmty. Coll. v. Davis, 442 U.S. 397, 414 (1979) (holding that a college's reasonable physical requirements for its nursing program were not barred by § 504).

11. 28 C.F.R. § 35.150(a)(3).

12. *Id.* § 35.150(a)(1), (3). *See generally infra* note 41 and accompanying text (collecting cases not requiring desired services and benefits).

in its entirety, must be readily accessible to and usable by people with disabilities.

Just as litigants and courts have neglected the program access provision, so too have most scholars. Although a lively debate recently emerged over the meaning of "meaningful access,"[13] a gloss on the anti-discrimination duties of public entities and federal grantees that the Supreme Court created in *Alexander v. Choate*,[14] writers have focused mostly on the specific duties that other ADA Title II and section 504 regulations impose[15] rather than the obligation of program access on the program in its entirety.[16] This article seeks to start a debate on the

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13. *See, e.g.*, Cheryl Anderson, *Making "Meaningful Access" Even Less Meaningful: Judicial Gatekeeping Under Title II of the Americans with Disabilities Act*, 49 U. MEMPHIS L. REV. 635 (2019); Mary Crossley, *Giving Meaning to "Meaningful Access" in Medicaid Managed Care*, 102 KY. L.J. 255 (2014); Leslie Francis & Anita Silvers, *Reading* Alexander v. Choate *Rightly: Now is the Time*, 6 LAWS. 17 (2017); Mark C. Weber, *Meaningful Access and Disability Discrimination: The Role of Social Science and Other Empirical Evidence*, 39 CARDOZO L. REV. 649 (2017). For earlier discussions of the meaningful access concept, see Mary R. Anderlik & Wendy J. Wilkinson, *The Americans with Disabilities Act and Managed Care,* 37 HOUS. L. REV. 1163, 1220–21 (2000); Leslie Pickering Francis & Anita Silvers, *Debilitating* Alexander v. Choate: *"Meaningful Access" to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447 (2008); Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719, 745 (2011); Alexander Abbe, Comment, *"Meaningful Access" to Health Care and Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act*, 147 U. PA. L. REV. 1161 (1999).

14. 496 U.S. at 301. Meaningful access and program access are distinct concepts. Program access as it is discussed here is a creature of section 35.150(a) and its surrounding regulations as an interpretation of the statutory disability discrimination law, whereas meaningful access derives from *Choate* and other case law that developed independent from the program access regulation. Providing meaningful access is a baseline requirement for compliance with anti-discrimination law, particularly for public entities. As *Choate* illustrates, sometimes, in certain contexts, courts appear to suggest that meaningful access is all that is needed to comply with the general obligations of anti-discrimination law. *See* sources cited *supra* note 13.

15. *E.g.*, Jonathan M. Lave & Mitchell P. Zeff, *When Access to the Benefits of Public Services Is Handicapped: An Analysis of the Seventh Circuit's Decision in* Wisconsin Community Service v. City of Milwaukee *and Its Implications for Disabled Americans*, 2 SETON HALL CIR. REV. 433, 455–56 (2006) (discussing reasonable accommodation obligation); Sara Rosenbaum et al., *Barriers to Access to Health Care:* Olmstead v. L.C.*: Implications for Medicaid and Other Publicly Funded Health Services*, 12 HEALTH MATRIX 93 (2002) (discussing integrated setting obligation); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 879–80 (2006) (discussing obligation to avoid practices with disparate impacts).

16. A helpful early discussion is Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 399 (2003), but even that treatment pivots quickly to the interpretation of meaningful access under *Choate* and its progeny, *id.* at 399–04. The article makes a major contribution by providing a comprehensive discussion of the fundamental alteration and undue burden defenses and takes up constitutional issues. *Id.* at 404–14. Also noteworthy is Jessica Roberts*, Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963, 1965 (2013), which points out that section 504 and ADA Title II have

meaning and use of the program access regulations. It contends that the regulations themselves, well-reasoned judicial interpretations, and persuasive analogies all support an expansive reading of program access. It also suggests that this reading can address some of the deficiencies in existing disability discrimination law as currently applied, in particular some of the limits of the reasonable accommodation idea and the distinction between access and content with regard to the modifications of program and policy that the law requires. The article concludes by applying its ideas to the *A.H.* case.

Part I of this article furnishes background on the ADA and section 504 and describes the all-important role of the regulations enforcing those laws. Part II discusses the program access regulations and marshals the support for an energetic interpretation of the regulations. Part III explores the implications of a proper reading of program access, focusing on the limits of accommodation as currently practiced and the access-content distinction. Part IV applies the proper reading of program access to the case of *A.H.*

I. ADA TITLE II: SECTION 504 & THE APPLICABLE REGULATIONS

Title II of the Americans with Disabilities Act bars discrimination by state and local government entities: the providers of Medicaid, public health, welfare, public safety, prisons, public housing programs, streets and sidewalks, water, garbage collection, public education, parks and recreation, and much more. The statutory obligation is not to discriminate on basis of disability,[17] but for present purposes the key part of the title is a delegation to the Attorney General to issue regulations. These regulations must be consistent with regulations originally issued by the

not been as effective as they might have been at eradicating health disparities faced by persons with disabilities. Sarah Jones, Note, *Walk This Way: Do Public Sidewalks Qualify as Services, Programs, or Activities Under Title II of the Americans with Disabilities Act?*, 79 FORDHAM L. REV. 2259, 2273 & n.97 (2011), focuses on a circuit split concerning applicability of the ADA to public sidewalks that has now been resolved but comments that specific duties imposed by the section 504 regulations are part of the more general obligation under the program access provision to make programs, services, and activities accessible to individuals with disabilities. A similar point is made by Chelsea Marx, Note, *Accommodations for All—The Importance of Meaningful Access to Courts for Pro Se Litigants with Mental Disabilities*, 95 DENV. L. REV. 152, 154 & n.16 (2018); *see also* Lisa Huggins, *You Can Get There from Here: Program Accessibility Requirements Under the Americans with Disabilities Act*, 56 ALA. LAW. 363, 363 (1995) ("Generally speaking, public entities are prohibited by title II from discriminating against disabled persons, either by denying equal access to or participation in government programs and services, or by affording inferior opportunities for participation and benefit to disabled individuals. In shorthand, the ADA requires 'program accessibility' of public entities.").

17. 42 U.S.C. § 12132 (2021).

U.S. Department of Health, Education, and Welfare (HEW) to interpret and enforce section 504 of the Rehabilitation Act of 1973.[18]

The current Title II regulations list a number of obligations on state and local government entities, including:

- No disadvantaging on the basis of disability,
- No unnecessary segregation,
- No across-the-board rules that have the effect of discriminating unless they are justified,
- A duty to make reasonable modifications (parallel to what in ADA Title I concerning employment is termed reasonable accommodation), though not to undertake fundamental alteration of nature of service, program, or activity (undue hardship in ADA title I);[19]
- And a duty to operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.[20]

Section 504 is similar to Title II in barring discrimination, as well as in leaving the details to the regulations.[21] The section 504 regulations impose a range of duties on federal grantees equally broad as those the Title II regulations impose on state and local governments.[22] The section 504 regulations currently in force with regard to recipients of funds from the Department of Education cover such matters as employment discrimination, accessibility in general, and educational programs of all sorts.[23] Like the Title II regulations, they ban disadvantage, unnecessary separation, and conduct with unjustified discriminatory impacts.[24] They require reasonable accommodation in employment,[25] free appropriate

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18. *Id.* § 12134. The ADA generally requires that the Title II regulations be consistent with the HEW regulations adopted to interpret section 504 as to federally funded programs; the program accessibility, existing facility, and communications regulations are to be consistent with the section 504 regulations applicable to activities of the federal government. *Id*. § 12134(b).

19. *See* 28 C.F.R. § 35.130 (2021). Obligations pertaining to retaliation, employment discrimination, and other issues are found in additional regulations. *See, e.g.*, 28 C.F.R. §§ 35.134, 35.140 (2021).

20. *See* 28 C.F.R. § 35.150 (2021).

21. 29 U.S.C. § 794(a) (2021).

22. *See* Weber, *supra* note 9, at 1097–1116.

23. 34 C.F.R. Part 104 (2021).

24. *Id.* § 104.4(b).

25. *Id.* § 104.12.

public education for children with disabilities,[26] academic adjustments,[27] and other many other modifications in the way grantees have to conduct their activities. They require program accessibility in each program or activity in its entirety.[28]

Title II and section 504 establish a variety of remedies for violations, including court orders and federal administrative actions.[29]

II. THE PROGRAM ACCESS REGULATIONS

This article submits that the program access regulations promulgated under section 504 and ADA Title II should have a broader interpretation and play a more robust role than they have done so far. The regulations should be interpreted so that state and local governments and federal grantees actually have to make their services, programs, and activities readily accessible to individuals with disabilities, no matter what disability the individual may have, when those services, programs, and activities are viewed in their entirety. Relevant to the discussion are the regulations themselves, typical cases that apply them, and the collective support for a more energetic interpretation of the regulations: the regulations' text and context, the directly applicable caselaw, indirectly applicable caselaw, and analogous civil rights provisions and programs.

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26. *Id.* § 104.33.
27. *Id.* § 104.44.
28. 34 C.F.R. § 104.22 (2021).
29. *See* 42 U.S.C. § 12133 (2021) (adopting remedies, procedures, and rights set out in 29 U.S.C. § 794(a)).

A. The Regulations Themselves

Section 35.150[30] and section 42.521[31] are, respectively, the ADA Title II and section 504 program access regulations. The key language is: "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[32] Notably, this obligation stands separate and apart from the provisions dealing with disadvantaging, segregating, general rules with negative impacts, even the provision on reasonable modifications. The unambiguous command is to provide something—at the very least something of benefit—for absolutely everyone, no matter what that person's disabling condition or need for accommodation, at least up to a limit of fundamental alteration or undue burden. Even then, the public agency needs to take steps to enable every person with a disability to receive the benefits of the public agency's services: "If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity."[33]

As for history, the program access regulations derive from rules promulgated by the old U.S. Department of Health, Education, and Welfare (HEW) to enforce the 1973 Rehabilitation Act's prohibition on disability discrimination in federally funded activities. In July 1976, HEW issued a Notice of Proposed Rulemaking (NPRM),[34] following a request for comments contained in a Notice of Intent to Issue Proposed

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30. The full text of 28 C.F.R. § 35.150(a) (2021) is:

> A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
> (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. . . . If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

31. 28 C.F.R. § 42.521(a) (2021) (Department of Justice regulation); *see also* 34 C.F.R. § 104.22(a) (Department of Education regulation).

32. 28 C.F.R. § 35.150(a); 28 C.F.R. § 42.521(a).

33. 28 C.F.R. § 35.150(a)(3).

34. Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. 29548 (July 16, 1976).

Rules earlier that year.[35] With regard to the program access provision, the NPRM declares, "This section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to handicapped persons" and goes on to say that not every facility need be made accessible if accessibility can be achieved by other means.[36] Beyond, that, however, the discussion of program access is somewhat vague about the extent of the obligations it imposes with respect to covered entities' programs. The inference that might be drawn from the NPRM is that the dominant preoccupation of commenters was the problem of making old buildings, particularly those of universities, physically accessible in a short period of time. It may well have been that university legal counsel offices were better informed and better equipped to make comments to the proposed rules than others covered by the rules, so HEW felt more need to respond to the issues they were most concerned about.[37] One passage that relates to accessibility of programs as programs is a statement that it would likely be discriminatory for universities to pool programs among the schools in a geographic area, denying students in need of accessibility the choice to pursue their programs at their own colleges.[38] The placement of the program access regulation under the heading "Existing Facilities" confirms the preoccupation with physical spaces,[39] but the fact that it follows immediately on a regulation stating that discrimination is prohibited "under any program or activity to which this part applies" confirms the breadth of the provision.[40]

35. Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. 20295 (May 17, 1976). The Notice acknowledges the need for different treatment for people with disabilities in the service of providing equal access: "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." *Id*. at 20296.

36. *See* Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. at 29554.

37. As a student in the mid-seventies, I can report that I and many of my classmates were surprised to see wooden ramps and electric lifts suddenly materialize on campus staircases. More extensive modifications to programs and structures were a much longer time coming. The May 17, 1976 notice has a specific section dedicated to concerns of colleges and universities. *See* Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. at 20297.

38. *See* Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. at 29554. The NPRM solicited more letters on this issue, but in the commentary to the final rules HEW confirmed its view that such a plan would be illegal, though a consortium arrangement used by all students, including those with disabilities, would be permissible. *See also* Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22676, 22689 (May 4, 1977).

39. 45 C.F.R. § 84.22 (1977). The heading persists in the current regulations. *Id*. § 84.22 (2021).

40. *Id*. § 84.21 (2021).

B. Typical Judicial Applications

Most often, courts have relied on the program access regulations for the negative parts: language in subsections (1) to (3) saying that there are some things that state and local governments need not do, such as make every building or service site physically accessible.[41] Judges have cited the positive command, however, in cases requiring curb cuts and removal of barriers for sidewalks,[42] accommodations for a mentally ill university student,[43] accessibility of bus stops,[44] and courtroom accessibility.[45]

What those instances have in common is that they require little more than forbidding disadvantage, segregation, and general rules with negative impacts, or requiring reasonable modifications. In other words, the regulations have been cited to support barring things already barred or mandating things already mandated by the other regulations. But the language of the program access provision is different, and quite clearly affirmative in its command: "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."[46] There has to be something more to that regulation than what is found in the other regulations, but only a few cases acknowledge that understanding and apply it. Several more leave hints that support the interpretation, however, and support comes from the text and context of the regulations standing alone.

C. Support for a More Expansive Interpretation

Support exists for a broad application of the program access regulations, from the text and context of the regulations, directly from caselaw invoking the regulations, indirectly from other caselaw, and from analogies to interpretation of other civil rights provisions.

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41. *See, e.g.*, Kirola v. City of San Francisco, 860 F.3d 1164, 1182–83 (9th Cir. 2017) (not requiring barrier removal in all city parks); Mason v. Corr. Med. Servs., Inc., 559 F.3d 880, 888 (8th Cir. 2009) (not requiring outside assistant for blind prisoner); Scalercio-Isenberg v. Port Auth. of N.Y. & N.J., 487 F. Supp. 3d 190, 205 (S.D.N.Y. 2020) (holding that Port Authority need not move bus lines to accessible gate), *appeal dismissed*, No. 20-3452 (2d Cir. Dec. 15, 2020); G.P. v. Claypool, 466 F. Supp. 3d 875, 885–86 (N.D. Ill. 2020) (holding that school system need not construct elevator in school building).

42. Barden v. City of Sacramento, 292 F.3d 1073, 1076–78 (9th Cir. 2002); Mich. Paralyzed Veterans of Am., Inc. v. Mich. Dep't of Transp., No. 15-CV-13046, 2017 U.S. Dist. LEXIS 183280, at *7 (E.D. Mich. Nov. 6, 2017).

43. Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006).

44. Falls v. Bd. of Comm'rs of the New Orleans Reg'l Transit Auth., No.16-2499, 2017 U.S. Dist. LEXIS 98071, at *13, *25 (E.D. La. June 26, 2017).

45. Shotz v. Cates, 256 F.3d 1077, 1080–81 (11th Cir. 2001).

46. 28 C.F.R. § 35.150(a).

1. Text and Context

The most important support comes from the language of the regulatory provisions itself. It demands that the program in its entirety be readily accessible to persons with disabilities. When the literal terms of a regulation call for a specific result, there is no basis to search for alternative understandings. Structure also calls for the same expansive reading as a literal interpretation does. The language of the regulations differs from that of the other Title II and section 504 regulations, and hence should be read to require something more than what the other regulations do. As with a statute, every clause of a regulation is to be given effect, and interpretations that create surplusage must be avoided.[47]

Internal context further supports an expansive interpretation of the general program access obligation, due to the command in subsection (a)(3) of the ADA regulation that if the public entity declines to take an action because that would be a fundamental alteration or undue burden, it must take another action that "would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity."[48] This expansion of the obligation confirms that a covered entity needs to go up to the very edge of fundamental alteration or undue burden in providing services for people with disabilities, and even if confronted by that barrier, must still do *something* to afford equal access.

Historical context is also significant. Though disability equality remains a contentious issue, the social movement in favor of disability rights was going strong as early as the 1960s and can be traced to agitation that began long before. The promulgation of the regulations was actually the product of a sit-in at the office of the Secretary of HEW, who had delayed in issuing them.[49] When the campaign for the ADA began, there

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47. *See* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 669 (2007) ("On the dissent's reading, [50 C.F.R.] § 402.03's reference to 'discretionary' federal involvement is mere surplusage, and we have cautioned against reading a text in a way that makes part of it redundant."). The treatment is the same as that afforded statutes. *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . We are thus reluctant to treat statutory terms as surplusage in any setting.") (internal quotations omitted).

48. 28 C.F.R. § 35.150(a)(3).

49. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 394 (1991) (describing sit-in at Secretary Joseph Califano's office in Washington); Ravi Malhotra, *The Politics of the Disability Rights Movement*, ZNET (July 1, 2001), https://zcomm.org/znetarticle/the-politics-of-the-disability-rights-movement-by-ravi-malhotra/ (describing demonstrations in 9 cities, including Washington, D.C., where 300 people, many in wheelchairs, sat in at Califano's office for 28 hours and San Francisco, where demonstrators occupied HEW offices for 25 days). *See generally* DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION 8–

was a strong disability rights movement and a great deal of optimism that laws against disability discrimination could transform society.[50] This movement has continued to have influence and caused the adoption of the ADA Amendments Act of 2008, which overturned adverse Supreme Court interpretations of the statute.[51] The movement also had a powerful role in initial and ongoing support for health care reform.[52] The strength of the emerging social movement and the optimism for widespread change suggests that Congress passing the disability discrimination laws and administrators writing the regulations had a demanding agenda concerning program access, an agenda to benefit all persons with disabilities.

2. Caselaw Directly Supporting an Expansive Interpretation of the Regulations

A recent case that uses the ADA program access regulation to require something more than what is called for on the face of the other regulations, and therefore demanding true accessibility for a public program in its entirety, is *People First of Alabama v. Merrill*.[53] In *People First*, plaintiffs, whose disabilities put them at heightened risk from

12 (2001) (describing organizational efforts during the 1950s and 1960s and resulting changes in social attitudes towards people with disabilities); OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF 125–59 (1st ed. 1990) (describing protests over failure to appoint deaf individual as president of Gallaudet University); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 41–53 (1st ed. 1993) (describing emergence of disability rights movement among polio survivors and others in the 1960s at the University of California); Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the Great Depression*, 87 J. AM. HIST. 888, 888–22 (2000), *reprinted in* WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 53, 65–85 (Paul K. Longmore ed., 2003) (recounting demonstrations by League of the Physically Handicapped against exclusion of workers with disabilities from New Deal employment initiatives).

50. As I have noted in other writing, the era that led up to the ADA was marked with overwhelming optimism about the prospects for technology improving the lives of people with disabilities, widespread recognition that the emphasis should be on fixing attitudinal and physical barriers rather than fixing people with disabilities, and that the social movement for disability rights was strong and here to stay. *See* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148–51 (2010) (collecting sources). The view concerning the importance of the social movement has been contested. *See id.* at 1147 (collecting sources).

51. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008).

52. *See* Roberts, *supra* note 16, at 2018–19 (describing efforts of coalition of disability rights groups in support of Affordable Care Act).

53. 491 F. Supp. 3d 1076 (N.D. Ala. 2020), *appeal filed*, No. 20-13695 (11th Cir. Oct. 1, 2020), No. 20-14066 (11th Cir. Oct. 29, 2020), *stay granted*, 2020 WL 6074333 (11th Cir. Oct. 13, 2020), *and* No. 20A67, 141 S. Ct. 25 (U.S. Oct. 21, 2020), *appeal dismissed in part*, No. 20-14066, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), *and* No. 20-13695, 2020 WL 7028611 (11th Cir. Nov. 16, 2020).

exposure to the COVID-19 virus if they voted in person, demanded changes in the Alabama state voting system.[54] Relying on ADA Title II, the court granted judgment enjoining a photo ID requirement for absentee ballots and a de facto ban on curbside voting.[55] Citing 28 C.F.R. § 35.150 as applied in an earlier Eleventh Circuit case, the court declared that "exclusions under Title II need not be absolute, and a public entity violates Title II when a disabled person cannot readily access the program, service, or benefit at issue."[56] The opinion summarized its ADA holding by using the language of section 35.150, noting first, "To establish an exclusion for purposes of Title II, the plaintiffs do not have to show that they are prohibited from voting in person, but only that voting in person is not 'readily accessible' to them."[57] and concluding, "Taken together, all of [the] evidence shows that voting in person on Election Day is not readily accessible to the plaintiffs or their members with disabilities during the COVID-19 pandemic."[58]

The court buttressed its position by holding that the system changes that the plaintiffs wanted were reasonable accommodations, and were not fundamental alterations that imposed undue burdens.[59] The point with regard to program access, however, was not that the defendants violated the obligation to offer reasonable accommodation. Indeed, the defendants argued that the changes required exceeded what is reasonable.[60] The point instead is that the changes had to be made to provide program access to the voting system in its entirety to people with disabilities at elevated risk of COVID-19 if they voted in person, so the program had to change.

A second case that employs an expansive reading of the ADA program access regulation is *Fortyune v. City of Lomita*, in which the Ninth Circuit required that a city offer accessible on-street parking for the benefit of a person with paraplegia who needed it.[61] The court acknowledged the defendant's argument that the ADA regulations did not specifically require accessible on-street parking but concluded that the section 35.150 compelled the city to provide it.[62] The court relied on the fact that public on-street parking is a service, program, or activity under the regulation, and that although the regulation affords public entities

54. *See id.* at 1091–92.
55. *See id.* at 1180.
56. *Id*. at 1155 (relying on Shotz v. Cates, 256 F.3d 1077, 1080 (11th Cir. 2001)).
57. *Id*. at 1159.
58. *People First*, 491 F. Supp. 3d at 1160.
59. *See id*. at 1166 (stating those terms as requirements).
60. *See id.* at 1161.
61. 766 F.3d 1098, 1100 (9th Cir. 2014)).
62. *Id.* at 1102–03. The court relied as well on 28 C.F.R. § 35.151 and on the ADA itself.

flexibility in dealing with existing inaccessible facilities, "at bottom, the regulation mandates program accessibility for all normal governmental functions, including the provision of on-street public parking."[63]

Disabled in Action v. Board of Elections in the City of New York also applies the ADA program access regulation in the manner envisioned by this article.[64] The plaintiff alleged that voting sites in New York were not accessible to blind and mobility impaired voters.[65] The city responded that there were no alternative accessible facilities to use as poll sites.[66] Citing section 35.150(a), the court declared that the city was "required to operate its voting program so that 'when viewed in its entirety, [the program] is readily accessible to . . . individuals with disabilities.'"[67] It needed to fulfill that requirement by taking affirmative steps it had not taken before: "providing accessibility equipment and ramps, assigning individuals to assist those with disabilities, and relocating services to accessible locations."[68]

3. Potential Support from Other Cases

Though they do not specifically rely on the program access provision, several other prominent cases lend support to a demanding interpretation of the program access requirement by ordering public entities to provide program modifications and adapted services greater than narrowly conceived reasonable accommodations demanded by the other ADA section 504 regulatory provisions. Instead, they exemplify the something-for-everyone approach even without citing the program access regulation. These decisions include *Rodde v. Bonta,*[69] *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,*[70] and *Henrietta D. v. Bloomberg*.[71]

In *Rodde v. Bonta*, the court affirmed a preliminary injunction forcing Los Angeles County to keep open a county facility, Rancho Los Amigos, dedicated to providing rehabilitative care to individuals with

63. 766 F.3d at 1103.

64. 752 F.3d 189 (2d Cir. 2014).

65. *See id.* at 193.

66. *See id.* at 191.

67. *Id.* at 201 (quoting the program access regulation).

68. *Id.* (citing 28 C.F.R. § 35.150(b)). Also worth noting is *Guerra v. West Los Angeles College*, 812 F. App'x 612, 614 (9th Cir. 2020), which in a compact analysis that cited 28 C.F.R. § 35.150(a) reversed a judgment against students with disabilities who alleged that the termination of the school's on-campus shuttle service violated the Americans with Disabilities Act.

69. 357 F.3d 988 (9th Cir. 2004).

70. 846 F. Supp. 986 (S.D. Fla. 1994).

71. 331 F.3d 261, 273 (2d Cir. 2003).

disabilities, when comparable services were not readily available elsewhere.[72] The court found no abuse of discretion in the district court's determination that there was a likelihood of success on the ADA claim.[73] The court relied on the general prohibition on disability discrimination in Title II and the specific ban in unjustified disparate impacts.[74] It stressed the unique services that the facility offered, including specialized care for people with paralysis and severe diabetes.[75] The court did not approach the case as one requesting a reasonable program modification, and although it considered budget matters as part of the balance of hardships, it did not otherwise ask whether keeping the facility open was a fundamental alteration of the county's plans or an undue burden. Though the court did not cite section 35.150, what it was effectively doing was requiring that the county operate its medical program so that when viewed in its entirety, it was readily accessible to and usable by persons with disabilities, including those who needed unusual and intense care not otherwise provided by the county medical program.

The *Rodde* court cited with approval *Concerned Parents to Save Dreher Park Center v. City of West Palm Beach.*[76] In *Dreher Park*, the court granted a preliminary injunction forbidding the city from shutting down a recreational facility for people with disabilities that provided a range of leisure and enrichment activities keyed to the needs of those individuals.[77] In finding a substantial likelihood of success on the merits, the court relied on Title II's general ban on disability discrimination.[78] Like *Rodde*, the opinion noted the need to avoid unjustified disparate impacts.[79] It pointed out that the plaintiffs were qualified for recreational programs even if they lacked the qualifications for the particular recreational programs that the city continued to offer.[80] Though the court did not cite or rely on the program access regulation, it was effectively requiring the city to offer something—at least something—that can be used by someone with a disability, no matter that the person has a disability that makes the remaining part of the program not usable.

72. 357 F.3d at 990, 998, 1000.

73. *Id.* at 995.

74. *See id.* at 995, 998.

75. *Id*. at 997.

76. *Rodde*, 357 F.3d at 996–98 (citing Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994).

77. *Dreher Park*, 846 F. Supp. at 988.

78. *Id.* at 989–90 (citing 42 U.S.C. § 12132).

79. *Id*. at 991 (citing 28 C.F.R. §§ 35.130(b)(3)(i)–(ii)).

80. *Id*. at 990.

Henrietta D. v. Bloomberg[81] is a third example of a case that applies a program access principle without citing the specific readily-accessible-in-its-entirety language of section 35.150 and its section 504 parallel. The court relied on ADA Title II and section 504 and a number of implementing regulations in affirming an injunction that required improvements in the operation of a specialized program for people with HIV.[82] The program was supposed to offer intensive welfare case management, speedy provision of assistance, and various benefits uniquely offered to individuals with HIV, including emergency shelter allowances, enhanced rental assistance, transportation, and nutrition allowances.[83] It was designed to address the barriers to accessing the social safety net system in New York City experienced by many persons with HIV, such as limited ability to travel to welfare offices, wait in line, and meet appointments.[84] But the system broke down, and the services were not delivered as promised.[85] The city defended by saying that people with HIV were treated no worse than other beneficiaries of New York's public benefits system who also were ill served, but the court emphasized that the breakdown of the program for people with HIV prevented them from having access to the system that provided them with critical subsistence benefits.[86] The court referred to the specialized HIV initiative as a necessary reasonable accommodation,[87] but effectively the court required the city to change the operation of its public benefits program so that when viewed in its entirety, it was readily accessible to and usable by individuals with HIV. The decision required creation of a system that worked, unlike the remainder of the welfare program.[88]

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81. 331 F.3d 261 (2d Cir. 2003).

82. *Id.* at 291.

83. *Id.* at 267.

84. *Id.* at 267–68.

85. *Id.* at 268.

86. *Id.* at 268, 270.

87. Henrietta D. v. Bloomberg, 331 F.3d 261, 273, 282 (2d Cir. 2003).

88. Another case that might be thought of as applying a program access approach without citing the program access regulation is *Payan v. Los Angeles Community College District*, No. 2:17-cv-01697-SVW-SK, 2019 WL 2185138 (C.D. Cal. May 21, 2019), which found a violation of the duty to avoid disparate negative impacts when a college failed to provide materials in a format accessible to students with visual impairments. The relief in the case required the college to comply with an alternate media production policy and either discontinue use of inaccessible library databases and other resources or provide means of access to equivalent benefits, as well as to make its website accessible, among other remedies. *Id.*, 2019 WL 3298777 (C.D. Cal. July 22, 2019), This extensive relief was needed to make the college's program readily accessible when viewed in its entirety, although that was not the theory on which the court relied. On appeal, in an unpublished opinion the Ninth Circuit affirmed in part, vacated in part, and remanded, concluding with regard to the relief that the injucnction was overly broad in light of the trial judge's fact findings, notably with regard to

4. Analogies to Other Civil Rights Provisions & Programs

The disability discrimination law as interpreted by the program access regulations bears a comparison to the sex discrimination law as interpreted by the Title IX regulations.[89] Title IX of the Education Amendments of 1972 bars sex discrimination in federally funded educational programs.[90] Like the section 504 and ADA regulations, the Title IX regulations recognize that in some contexts funded or public programs need to treat people differently in order to treat them equally. Specifically with regard to athletics, the Title IX regulations provide that no person may be excluded from participation on the basis of sex, but also that a recipient "may operate or sponsor separate teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport."[91] To provide equality of opportunity, funded entities must create sex-separate sports programs in a variety of situations.[92]

This mandate to create separate teams and programs in order to ensure all students have equal opportunities is similar to the section 504 ADA requirement that funded or public programs need to be fully accessible, when viewed in their entirety, to all, whatever disabling condition the individual might have. The point has special applicability to athletics cases such as *A.H.*, described at the outset of this article.[93] But the analogy cuts more broadly and supports the requirement to serve all

the accessibility of the databases; the district court's injunction was vacated for reconsideration in light of the findings to be made on retrial, with a jury decision required on issues of liability. *Id*, Nos. 19-56111, 19-56146, 2021 WL 3743307 (9th Cir. Aug. 24, 2021). In a separate, published opinion, the court of appeals ruled that the district court erred in requiring the plaintiffs to present all their claims under a disparate impact theory when some claims should have been considered under a failure-to-accommodate theory, so the trial court decsion had to be reversed, vacated, and remanded on that basis. *Id*., 2021 WL 3730692, at *8-*9 (9th Cir. Aug. 24, 2021). The ultimate disposition of the case thus remains uncertain. At least so far, a program access theory has not been advanced.

89. The analysis in this section tracks that of Johanna E. Christophel, Note, *Leveling the Playing Field: Disability, Title IX, and High School Sports*, 62 WASH. U. J.L. & POL'Y 171, 172 (2020). Judge Rovner developed this argument in her dissent in A.H. *ex rel.* Holzmueller v. Illinois High School Association, 881 F.3d 587, 596–97 (7th Cir. 2018) (Rovner, J., dissenting). The note applies its reasoning to the *A.H.* case and collects supporting authority.

90. 20 U.S.C. §§ 1681–1688 (2021).

91. 34 C.F.R. § 106.41(b) (2021).

92. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979); *see also* Christophel, *supra* note 89, at 175–77. *See generally* Beidiger v. Quinnipiac Univ., 691 F.3d 85, 94 (2d Cir. 2012) (applying mandate).

93. *See A.H.*, 881 F.3d at 587. *See generally infra* Part IV (discussing Title IX analogy to *A.H.* case).

persons with disabilities even when that requires special efforts by funded and public entities.

Section 504 and Title II of the ADA also bear an analogy to the federal special education law, and the analogy supports an expansive reading of the program access regulations. What is now the Individuals with Disabilities Education Act (IDEA)[94] began its life as the Education for All Handicapped Children Act of 1975 (EAHCA).[95] Early in the operation of the EAHCA, some school districts refused to provide free, appropriate public education to some children because they deemed them so disabled that they were ineducable, or considered them in need of mental health or developmental disability services rather than education.[96] The courts made clear that the law requires education for everyone, even if the education takes an unusual form for some individuals with disabilities. In *Timothy W. v. Rochester School District*, the First Circuit ruled that a school district could not refuse to serve a child who had complex developmental disabilities, spastic quadriplegia, cerebral palsy, a seizure disorder, and cortical blindness.[97] The child responded only to light, his mother's voice, handling, bells, and loud noises, and his responses were restricted to smiles and cries.[98] His parents sought services from the school district consisting of stimulation and physical therapy, but the school district and the trial court said he was not educable, and so not entitled to education.[99] The First Circuit reversed, stressing that the law required the education of all children with disabilities.[100] The type of services might differ for a child with extensive disabilities, but that does not mean no services may be offered, even if a benefit from the services cannot be proven.[101] In another case, the Third Circuit held that a school district had to provide services to a fourteen-year-old with encephalopathy who had the capacities of a toddler, even though the needed services consisted essentially of physical therapy.[102] In yet another case, the Supreme Court emphasized the principle of zero

94. 20 U.S.C. §§ 1400–1482 (2021).

95. Pub. L. No. 94-142, 89 Stat. 773. The statement in the text is a slight exaggeration; there were federal legislative efforts to encourage appropriate public education of children with disabilities before 1975 that the later laws built on, but they did not carry an enforceable individual entitlement to services.

96. *See, e.g.*, Parks v. Pavkovic, 753 F.2d 1397, 1405 (7th Cir. 1985) (finding denial of free education for children with intellectual disabilities to violate special education statute).

97. 875 F.2d 954, 960 (1st Cir. 1989).

98. *Id*. at 957–58.

99. *Id*. at 959.

100. *Id*. at 973.

101. *Id*. at 972.

102. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 172 (3d Cir. 1988).

exclusion in ruling that the law forbids a school district from completely denying educational services for students with disabilities who would otherwise be expelled for misconduct.[103]

The theme of providing at least something for everyone runs through these cases. Although the title and text of the underlying law is different from that of the ADA and section 504, the program access regulations under those laws embody a similar individual entitlement to being served by public programs, even if the disability means that adaptations must be made in the services offered, and even if those adaptations are significant.

There is another way in which the analogy to the special education law might inform the interpretation of the program access regulation. The IDEA and its regulations require that children with disabilities, to the maximum extent appropriate, be educated with children who are not disabled, and that they not be removed from the regular education environment unless education in regular classes cannot be achieved with the use of supplementary aids and services.[104] This seemingly negative command—do not remove—establishes a positive entitlement to significant modifications and adaptations of regular education programs to enable children with disabling conditions to succeed in that environment.[105] Similarly, the negative command of avoiding disability discrimination, linked to the requirement of making state and local government and federally funded private programs beneficial to people with disabilities when the programs are viewed in their entirety, equates to a positive mandate to undertake significant modifications and adaptations. Like the special education law, the regulations permit separate programs, but only when necessary to provide benefits or services that are as effective as those provided to people without disabilities.

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103. Honig v. Doe, 484 U.S. 305, 323–24 (1988).

104. *See* 20 U.S.C. § 1412(a)(5)(A) (2021); 34 C.F.R. §§ 300.114–.120 (2021).

105. *See, e.g.*, Sacramento Unified Sch. Dist. v. Rachel H., 14 F.3d 1398, 1405 (9th Cir. 1994) (requiring consideration of aide services and other program alterations to permit child with intellectual disability to be educated in general education class); Oberti v. Bd. of Educ., 995 F.2d 1204, 1223 (3d Cir. 1993) (requiring extensive program modifications to permit child with severe intellectual disabilities in general education class); MARK C. WEBER, RALPH MAWDSLEY & SARAH REDFIELD, SPECIAL EDUCATION LAW: CASES AND MATERIALS 354–55 (4th ed. 2013) ("The obligation to provide services in the least restrictive environment is sometimes thought of as a 'negative' right, that is, the right to be free from unnecessary restraint. . . . *Oberti* and *Rachel H.* suggest that under IDEA, the right is more of a positive entitlement: a child must be given the services in a mainstreamed setting to permit her to succeed there . . .").

III. IMPLICATIONS OF A PROPER INTERPRETATION OF THE PROGRAM ACCESS REGULATIONS

The program access regulations could play a powerful role in the effort to combat disability discrimination and place people with disabilities on a plane of equality with others. Two things that a proper application of program access rights could achieve would be loosening the grip of the "reasonableness" requirement when it comes to modifications and accommodations, and escaping the access-content distinction that limits the duties of covered entities vis-à-vis persons with disabilities.

First, reasonableness. Various commentators have stressed the deficiency in current interpretations of the ADA in stopping at *reasonable* accommodations. Not only does the reasonable accommodation standard continue to rely on the nondisabled person as the reference point—what is required is a reasonable modification of programs and facilities designed for the typical nondisabled individual.[106] As important, what an adjudicator or administrator deems reasonable will necessarily fall far short of what is needed to achieve functional social equality for many people with disabilities.[107] What is needed is more than reasonable accommodation, but rather true access for all on a plane of equality.

Many of the ADA regulation provisions[108] forbid or mandate conduct with regard to a "qualified individual with a disability," defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities" that a state or local government provides.[109] The affirmative command of making each service, program, or activity, viewed in its entirely, readily accessible extends to all "individuals with disabilities" without the "qualified" restriction.[110] The command therefore applies even if the individual with a disability cannot meet the essential eligibility requirements with reasonable accommodations. Ready accessibility

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106. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE 19–48 (1990); Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 871–72 (1988); *see also* Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 148 (1998).

107. *See* Weber, *supra* note 106, at 138–41.

108. *E.g.*, 28 C.F.R. §§ 35.130, .140, .149 (2021).

109. *Id.* § 35.104.

110. *Id.* § 35.150(a).

applies all the way up to the limit of fundamental alteration or undue burden, and even if that point is reached, an alternative has to be offered to "nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity."[111]

Second, access-content. Program access, as distinct from reasonable accommodation, is needed to avoid the trap of the access-content distinction.[112] Program access, despite the "access" terminology, governs content: the service, program, or activity, when viewed in its entirety, must be usable by individuals with disabilities. A store whose activities fall under Title III of the ADA may be permitted to stock only goods usable by those without disabilities, but the program access regulation requires that public programs have something for everyone.

The "viewed in its entirety" language of the program access regulations[113] does not permit covered entities to provide services to limit the content of the programs so that they cannot benefit people with disabilities. As the Supreme Court has stated, "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit."[114] In *Lovell v. Chandler*, the Ninth Circuit rejected the defendant's claim that it satisfied section 35.150 when it eliminated eligibility for a health insurance program for near-impoverished disabled people while providing them for near-impoverished nondisabled people.[115] The defendant argued that other people with disabilities

111. *Id.* § 35.150(a)(3). In previous writing, I have argued that the reasonable accommodation and undue hardship terms that apply to the employment provisions of the ADA and might be considered analogous to the reasonable modification and fundamental alteration-undue burden terms applicable to public entities, should be read as two sides of the same coin; in other words, that reasonable accommodation must be afforded up to a limit of undue hardship. Weber, *supra* note 50, at 1148–50. However, this reading has not been adopted by the courts, at least as of the present; instead, a showing that the requested accommodation is reasonable is a burden on the claimant, albeit one that will be met fairly easily in many employment cases. *See* U.S. Airways v. Barnett, 535 U.S. 391, 401–02 (2002). Cases regarding Titles II and III of the ADA have not hewn closely to *Barnett* on the idea of a distinct and potentially troublesome burden of showing reasonableness, *see* Weber, *supra* note 50, at 1166–70, but *Barnett*'s interpretation of the ADA employment title stands as an invitation to impose burdens of showing the "reasonableness" of desired modifications on Title II and Title III claimants.

112. *Cf.* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 46–48 (2004).

113. 28 C.F.R. § 35.150(a).

114. Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985) (quoting Brief for the United States at n.36).

115. 303 F.3d 1039, 1057 (9th Cir. 2002). The replacement program was HMO-based, and the state government said it feared that private insurers would not participate if persons who were blind or disabled would be eligible. *Id.* at 1045.

benefited from other aspects of the government's medical assistance efforts.[116] But the court said that did not matter because people with disabilities were denied coverage under the new regime when, had they been nondisabled, they would have qualified.[117]

Universal design ideas could, of course, facilitate government's efforts to serve all comers.[118] If accessibility for persons with disabilities is built into programs and facilities from the start, serving all becomes much easier to achieve.

IV. AN APPLICATION: *A.H.*

In *A.H.*, the court of appeals affirmed a grant of summary judgment against the plaintiff on causation grounds, stating "in order to establish causation, A.H. had to prove that but-for his physical disability, the normal operation of the qualifying times would have allowed him to qualify for State. A.H. cannot meet this standard."[119] The court went on to hold that the requested accommodations were unreasonable as matter of law and would fundamentally alter the nature of state champion track competition.[120]

On the causation question, the court is clearly wrong under existing Supreme Court interpretations of the ADA, most notably *U.S. Airways v. Barnett*,[121] which established that reasonable accommodations are

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116. *Id.* at 1053.

117. *Id.*; *see also* Shotz v. Cates, 256 F.3d 1077, 1080–81 (11th Cir. 2001) ("A violation of Title II, however, does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. The regulations specifically require that services, programs, and activities be 'readily accessible.' 28 C.F.R. § 35.150. If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible,' regardless whether the disabled person manages in some fashion to attend the trial. We therefore conclude that the plaintiffs have alleged a set of facts that, if true, would constitute a violation of Title II. Accordingly, they have stated a claim under Title II.").

118. The Universal Design Amendment to the Higher Education Act, Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 § 103(24), 122 Stat. 3078, 3088 (2008), defines universal design as "a scientifically valid framework for guiding educational practice that (A) provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and (B) reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and students who are limited English proficient."

119. A.H. *ex rel.* Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587, 593–94 (7th Cir. 2018).

120. *Id.* at 594–96.

121. 535 U.S. 391, 397 (2002). EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000), which employs reasoning almost identical to the relevant portion of *A.H.*, was overruled in light of *Barnett* in *EEOC v. United Airlines*, 693 F.3d 760, 761 (7th Cir. 2012). *See generally* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67

effectively preferences for persons with disabilities over persons without disabilities, and *PGA Tour, Inc. v. Martin*[122] and *Olmstead v. L.C. ex rel. Zimring*,[123] which established that disability discrimination does not necessitate a showing that the claimant would be entitled to what he or she wants if he or she did not have a disability, or that there is a nondisabled comparator.[124] Thus, it did not matter that Mr. Barnett did not have the seniority to obtain the mailroom job he wanted as an accommodation and would not be able to obtain it if he had not been disabled. The point is that the seniority requirement needed to be waived to provide him an accommodation. Similarly, the Court did not consider whether Mr. Martin would be entitled to compete if he did not need and receive the use of a golf cart, or whether Ms. L.C. would be entitled to services in the community if she did not need long-term care. The discussion of causation in *A.H.* is nearly a word-for-word recapitulation of the dissenting opinion of Justice Scalia in *Barnett*, whose position was, needless to say, rejected.[125]

But passing the causation issue, and passing the demand for different qualifying times, which conceivably could be considered a fundamental alteration under the interpretation of that limit to accommodation in *Martin*,[126] the request to establish a para-ambulatory division is a step that

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(2013) (discussing impact of *Barnett*'s interpretation of reasonable accommodation on questions of causation); Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 49–53), https://ssrn.com/abstract=3689161 (criticizing inapt causation reasoning applied to disability discrimination claims).

122. 532 U.S. 661, 688 (2001).

123. 527 U.S. 581, 598 (1999) ("We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

124. *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 274 (2d Cir. 2003) ("[O]ur cases speak simply in terms of helping individuals with disabilities access public benefits to which both they and those without disabilities are legally entitled, and to which they would have difficulty obtaining access due to disabilities; the cases do not invite comparisons to the results obtained by individuals without disabilities.").

125. *See Barnett*, 535 U.S. at 412 (Scalia, J., dissenting); *see also Henrietta D.*, 331 F.3d at 278–80 (rejecting but-for causation in ADA section 504 claim involving failure to provide specialized services needed by persons with disabilities); Christophel, *supra* note 89, at 192–96 (refuting *A.H.* majority's causation analysis).

126. The *Martin* opinion says that accommodations become fundamental alterations and are not required if they change an essential aspect of a sports event even if the accommodation affects all competitors equally, like four strikes in baseball or a bigger golf hole, or if they constitute a less significant change that has a peripheral impact on the game itself but gives the player with a disability an advantage in addition to access. 532 U.S. at 682–83; *cf.* K.L. v. Mo. State High Sch. Activities Ass'n, 178 F. Supp. 3d 792, 809 (E.D. Mo. 2016) (not requiring that wheelchair competition count in point scoring for track meet). Even if a change in the cutoff time could conceivably be a fundamental alteration under *Martin*'s standards, establishing a para-ambulatory division in an annual open five-kilometer road race event would not fall into either of the fundamental alteration categories set out by the Court.

is needed to ensure that the program, when viewed in its entirety, is readily accessible to, and usable by, people with disabilities.

That step is not a fundamental alteration. There may be some expenditure required in adding an event to an annual competition, but given the wide range of other events, the added cost is trivial. Moreover, increased costs are not, by themselves, a fundamental alteration.[127] Costs operate as a limit on section 504 (and hence ADA Title II) duties only when they become extremely high in comparison to the overall budget of the covered entity.[128] A federal district court recently found that New York City failed to sustain a fundamental alteration or undue burden defense to a section 504 ADA Title II case seeking the installation of accessible pedestrian crossing signals at 13,200 locations.[129] The fact that other states have para-ambulatory divisions shows that creating one is no undue burden.[130]

In her dissent in *A.H.*, Judge Rovner emphasized that other states have para-ambulatory divisions.[131] She noted that the International Paralympic Committee has already done the work of classifying which athletes, in light of their disabilities, would be appropriate competitors in such a division.[132] She concluded that these factors would make creation of the new division a reasonable accommodation.[133] But, following the conclusions adopted by this article, even if some might not consider it to be a reasonable accommodation, section 504 and the ADA still demand

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Moreover, even state meet cutoff times are not uniformly applied. Athletes' eligibility for the state meet varies based on size of school and a number of other considerations apart from absolute race times, as well, of course, on the basis of sex. *See* A.H. *ex rel.* Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587, 598–99 (7th Cir. 2018) (Rovner, J. dissenting). In any instance, the issue of the cutoff time would appear to be one of fact, rather than one that should be decided on summary judgment. *See* Morgan, *supra* note 121 (manuscript at 48) (discussing inappropriate application of summary judgment in accommodations cases).

127. Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182–83 (10th Cir. 2003).

128. *See* Nelson v. Thornburgh, 567 F. Supp. 369, 379–80 (E.D Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984). This case appears prominently in the legislative history of ADA Title II. *See* Mark C. Weber, *Home and Community-Based Services, Olmstead, and Positive Rights*, 39 WAKE FOREST L. REV. 269, 288 (2004).

129. *See* Am. Council of the Blind of N.Y., Inc. v. City of New York, No. 18 Civ. 5792 (PAE), 2020 U.S. Dist. LEXIS 194231, at *30 (S.D.N.Y. Oct. 20, 2020).

130. *See A.H.*, 881 F.3d at 596 (Rovner, J., dissenting).

131. *Id.* The Eastern College Athletic Conference also has a para track and field championship competition. Dayle Marie Comerford, Comment, *A Call for NCAA Adapted Sports Championships: Following the Eastern College Athletic Conference's Lead to Nationalize Collegiate Athletic Opportunities for Student-Athletes with Disabilities*, 28 MARQ. SPORTS L. REV. 525, 528–29 (2018).

132. *A.H.*, 881 F.3d at 596 (Rovner, J., dissenting).

133. *See id.* at 599. Or at least there is an issue of fact on the question. *See id.* at 596.

it.[134] The state association needs to provide separate divisions for an athlete who, with their disability, easily fit in the top ten percent of competitors in his category to compete at the state meet, whether that is called a "reasonable accommodation" or not. Under program access, the

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134. A guidance letter from the United States Department of Education in 2013 concerning section 504's application to athletics stated that:

> Students with disabilities who cannot participate in the school district's existing extracurricular athletics program—even with reasonable modifications or aids and services—should still have an equal opportunity to receive the benefits of extracurricular athletics. When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities. In those circumstances, a school district should offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities. These athletic opportunities provided by school districts should be supported equally, as with a school district's other athletic activities. School districts must be flexible as they develop programs that consider the unmet interests of students with disabilities. For example, an ever-increasing number of school districts across the country are creating disability-specific teams for sports such as wheelchair tennis or wheelchair basketball.

Dear Colleague Letter from Seth M. Galanter, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Jan. 15, 2013), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf. The Department subsequently backpedaled, stating in a background memo on the guidance that the guidance did not require that school districts create separate, parallel extracurricular athletic programs for students with disabilities, though the districts were urged to do so. Students with Disabilities in Extracurricular Athletics: Background and Fast Facts, Office for Civil Rights, U.S. Dep't of Educ. (Jan. 25, 2013), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.pdf. *See generally* Comerford, *supra* note 131, at 536–38 (discussing guidance and subsequent memo). The original guidance strongly supports the idea that separate programs to serve all are required. The persuasive value of the change in the original guidance is weak. A splintered Supreme Court recently reaffirmed the appropriateness of deferring to agencies' interpretations of their own rules under some circumstances, but at the same time it made clear that all other tools of construction of the regulation must be exhausted before turning to the agency's interpretation. Kisor v. Wilkie, 139 S. Ct. 2400, 2414–15 (2019). These include the plain meaning of the text, the regulation's history, and canons of construction, such as the rule against surplusage. *See id.* at 2414. The majority opinion emphasized that mid-level administrative officers' interpretations that overturn prior interpretations are particularly unworthy of deference. *See id.* at 2418. Moreover, four justices flatly rejected the practice of deferring to an agency's interpretation of its own regulations, *id.* at 2425 (Gorsuch, J., concurring), and the swing justice, Chief Justice Roberts, concurred in the majority opinion while noting that its insistence on restricting applications of deference was not much different from the position of the justices who would afford no deference, *id.* at 2424–25 (Roberts, C.J., concurring). As noted above, a plain textual reading of the program access provisions supports the expansive interpretation suggested here, as does the canon against finding surplusage, and the social context. The regulatory history is not of much help for any interpretation, so that leaves only the one memo to support a crabbed interpretation of the program access rules in the context of school athletic programs. Hence an understanding of the program access regulations that is based on the plain text ought to prevail, supported by the original guidance and notwithstanding what the later memo might say.

obligation is to offer something that is accessible and usable to everyone, certainly to an elite para-athlete.[135]

CONCLUSION

A demanding reading of the program access regulations holds promise for people with disabilities who for too long have been excluded from truly equal participation with others on a plane of equality. Public services matter not just to athletes with disabilities like A.H., but also to all individuals with disabilities whose condition is such that public programs on offer do not offer something of use for them.

135. It is striking that the district court and court of appeals were so confident that the adoption of a para-ambulatory division was not required by the law that they resolved the matter on summary judgment. At the very least, it would appear to be an issue of fact whether, taking the case on the courts' own terms, a para-ambulatory division is a reasonable accommodation. I have elsewhere criticized courts for taking determinations about reasonableness of accommodations away from juries and other triers of fact. *See* Weber, *supra* note 50, at 1173–75 (citing case examples).