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DEBILITATING *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*: ACHIEVING THE PROMISE OF DISABILITY CIVIL RIGHTS

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ABSTRACT

Disability civil rights law today continues to be shaped by troubling precedent created in initial decisions of the Supreme Court under the Rehabilitation Act. This article explores the first of these decisions, *Southeastern Community College v. Davis*, demonstrates *Davis*' continuing impact, and analyzes how this impact may be addressed.

Davis was a suit brought by a hearing-impaired student who had been refused accommodations and denied admission to the College's nursing program. Critical litigation decisions on behalf of Davis at the trial court did not contest the College's failure to provide accommodations that are common today, such as sign interpretation, or the College's assessment that Davis could not function adequately with such accommodations. The Court thus assumed as given the College's refusal to provide Davis with accommodations and supposed that Davis could not participate safely in the clinical portion of the nursing program. The Court then concluded that her participation would require fundamental alterations in the nursing program that could not be justified as reasonable modifications.

This article contends that the *Davis* decision perpetuated a fundamental confusion between accommodations—adjustments or aids needed for an individual to perform capably—and modifications—changes in existing programs, policies, or structures. Further, confusing accommodations and modifications risks construing individuals as either demanding unjustified modifications in policies or requesting special accommodations that are personal privileges for themselves. Presenting evidence drawn from the analysis of subsequent reported district court and appellate court cases citing or relying on cases citing *Davis*, the article then shows how these confusions persist nearly thirty years after the enactment of the Americans with Disabilities Act (ADA). The result is that many courts fail to assess actual capabilities of people with disabilities.

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Instead, courts reject claims for accommodations as requests for unjustified modifications by people who are otherwise unqualified for jobs, public services, or public activities in which they seek to participate.

INTRODUCTION

Decided in 1979, *Southeastern Community College v. Davis*[1] was the first major case under the Rehabilitation Act (Rehab Act) to come before the U.S. Supreme Court. Litigation choices made in *Davis* about the issues to contest and the evidence to present, although perhaps not surprising for such a novel case, have resulted in devastating precedent that continues to shape Rehab Act and ADA law. This article unearths the significance of these litigation choices and demonstrates their continuing effects. It reveals how *Davis* rested on two fundamental and interrelated confusions, between accommodations and modifications and between affirmative relief and affirmative action. Debilitating *Davis* by disentangling these confusions brings needed clarity to the understanding of disability civil rights. In challenging the legacy of *Davis*, this article also complements my earlier work with the late Anita Silvers on the problematic legacy of a second formative Rehab Act decision, *Alexander v. Choate.*[2]

On the distinction elaborated in this article, accommodations are adjustments or aids needed for an individual to perform capably, whereas modifications are changes to existing programs, policies, or structures. Accommodations are particularized and specific to the individuals needing them. Accommodations are thus appropriate when an individual who functions differently can perform, participate, or enjoy a benefit that would not be available without the accommodation. Modifications change constructed or policy environments that exclude people with disabilities. In contrast to accommodations, modifications are thus appropriate when redesign can foster more general inclusion of people with disabilities to important opportunities. For example, curb cuts allow people to move through urban surroundings, elevators enable people to reach upper floors of buildings, flextime work schedules adjust to different rhythms of daily life, and home and community-based service programs provide people with services in intimate rather than institutional settings. Frequently, modifications also benefit other members of the public; for example, curb cuts and ramps are used by bicyclists, people pushing strollers, or people with roller bag suitcases.

When sought by people with disabilities, both accommodations and modifications may generate critique. For accommodations, which are individualized, the critique is special privileging: that someone who receives an accommodation gets a break or an advantage that others do not or imposes unfair burdens or risks on others who do not receive the accommodation. For purposes of disability anti-discrimination law, possible responses to this critique are that an accommodation is reasonable because it allows qualified individuals to perform or participate in ways that work for them and that imposition of undue hardship on others sets outside limits on the duty to accommodate. For modifications, which are general changes that may apply to everyone, the critique is that they are unreasonable, too expensive, or

[1] Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

[2] Leslie P. Francis & Anita Silvers, *Debilitating Alexander v. Choate: "Meaningful Access" to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447 (2008).

too difficult. For purposes of disability anti-discrimination law, possible responses take the form of outside limits. For example, program changes may not be required if they are fundamental alterations and building designs need not incorporate features that cannot readily be achieved.

Confusing accommodations and modifications, however, risks creating problematic perceptions of unfairness. Accommodations misperceived as modifications open the possible perception that the rules are being changed to benefit individuals in ways that cannot be justified. Modifications misperceived as accommodations open the possible perception that claimants are expecting the rules to be individually tailored to personal needs in ways that are unfair to others. This confusion between accommodations and modifications is just what happened in *Davis* and what continues to affect anti-discrimination law today, as described later in this article.[3] The result has been continuing failure on the part of some courts to assess actual capabilities of people with disabilities. Instead, courts reject their claims as requests for unjustified modifications by people who are otherwise unqualified for the jobs, public services, or public activities in which they seek to participate.[4]

This article begins by exploring how the Court's reasoning in *Davis* rests on a basic confusion between accommodations—adjustments or aids needed for an individual to perform capably—and modifications: changes in existing programs, policies, or structures. The article then demonstrates how this confusion led the Court to misconstrue what should have been analyzed as an accommodation request as a modification that could be condemned as "affirmative action" in the form of unwarranted special privileging. Presenting evidence drawn from the analysis of reported district court and appellate court cases citing *Davis*, or relying on cases citing *Davis*, the article then provides examples of the continuing impact of the confusion between modifications and accommodations to this day. Disentangling the legacy of *Davis*, I conclude below, addresses misperceptions that have led to criticisms of disability civil rights as a form of unfair privileging.

I. ACCOMMODATIONS AND MODIFICATION UNDER THE REHAB ACT

The Rehab Act of 1973 created a statutory basis for the Rehabilitation Services Administration and provided support for a variety of federal programs to expand opportunities and rehabilitation services for people with disabilities.[5] One major goal of the Rehab Act was to prohibit disability discrimination associated with federal funding. Section 504 of the Act provided: "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…"[6] This statutory anti-discrimination requirement was triggered by receipt of federal funding.[7] Thus under §504, a single non-discrimination standard governed employment, public services, and

[3] *See infra* PART V.
[4] *Id.*
[5] Public Law 93-112, 87 Stat. 355 (Sept. 26, 1973), § 2.
[6] Rehabilitation Act of 1973 § 504(a), *amended by* P.L. 114-95 (Dec. 10, 2015).
[7] *Id.*

public accommodations, so long as these were in programs or activities that received federal funding.

The regulations implementing § 504, issued in 1977, covered the primary areas in which federal funding was received, including employment and education.[8] These regulations distinguished accommodations from modifications and applied this distinction in a nuanced way to different funding areas.[9]

For employment by recipients of federal funds, the regulations used the language of accommodation and required "reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship…"[10] For postsecondary educational programs receiving federal funding, which could be in the form of either government-provided services (public services) or services open to the general public in interstate commerce (public accommodations), "modifications" was the primary term employed.[11] Programs were required to modify academic requirements as necessary "to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student."[12] Requirements "essential" to the program, however, did not require modification.[13] Under the regulations, non-discrimination in educational programs also required accommodations in the form of auxiliary aids and services: "such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination …because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills."[14] These aids specifically included interpreters and other methods of making oral materials available to students with hearing impairments.[15] Unlike with employment, the regulations contained no provision for consideration of expense as a defense to the requirement of these auxiliary aids.[16]

II. *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*: THE PROBLEMS BEGIN

This article argues that *Southeastern Community College v. Davis*,[17] the seminal case interpreting § 504, introduced the confusion between accommodation and modification in a particularly damaging way. Although *Davis* has shaped disability anti-discrimination law ever since it was decided, its litigation background and context have been insufficiently understood by

[8] *See infra* notes 10-16 and accompanying text.

[9] *Id.*

[10] 45 C.F.R. § 84.12(a) (1977). Accommodations could include acquisition or modification of equipment or devices and the provision of readers or interpreters. 45 C.F.R. §84.12(b) (1977).

[11] 45 C.F.R. §84.44(a) (1977).

[12] *Id.*

[13] *Id.*

[14] 45 C.F.R. §84.44(d)(1) (1977).

[15] 45 C.F.R. §84.44(d)(2) (1977).

[16] *Id.*

[17] Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979).

later courts or commentators.[18] Litigation choices made at the trial court level in *Davis* brought the confusions into play, perhaps understandably because the regulations implementing § 504 had not been issued when *Davis* went to trial.[19] When attorneys for the National Association for the Deaf joined the case at the appellate level, they recognized the problem, but it was too late to salvage the situation.[20]

Davis was a suit brought under the Rehab Act by a hearing-impaired licensed practical nurse who had been denied admission to Southeastern's nursing associate degree program.[21] As litigated at the trial court, the case was decided only on a legal question about how Davis' admission qualifications were to be assessed.[22] Davis contended that Southeastern should assess her academic qualifications for participation in the program apart from her disability.[23] Southeastern contended that the admission decision should be based on whether she could perform in the program in spite of her disability.[24] Focusing solely on this legal argument about how her qualifications should be assessed, Davis introduced no evidence about her actual performance capabilities with or without auxiliary aids, such as sign interpretation or speakers facing her so she could lip-read.[25] Nor did she introduce evidence of any modifications in the program that might be necessary for her to participate, if she were provided with these aids.[26] This litigation choice may have seemed reasonable at the time, as Davis had achieved academic success in Southeastern's year-long preparatory program for the associate degree and had been led to believe success in this program would suffice for admission to the associate degree program.[27] Before admission to the preparatory program, she had been evaluated as physically able to undertake the professional nursing program and advised that her progress to the associate degree program would be based on her academic evaluation at the end of the preparatory year.[28] Despite her satisfactory academic performance, Southeastern denied her admission to the associate degree program on the basis that her hearing impairment would make her unable to participate safely in the clinical portion of the program.[29] Davis then contended she had been erroneously denied admission based solely on her disability.[30]

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[18] One exception is Armen H. Merjian, *Bad Decisions Make Bad Decisions: Davis, Arline, and Improper Application of the Undue Financial Burden Defense Under the Rehabilitation Act and the Americans with Disabilities Act*, 65 BROOK. L. REV. 105 (1999). Merjian's article is a careful reconstruction of the mistakes in *Davis* that led to the Court's comment about hypothetical possibilities for aids that would not impose "undue financial and administrative burdens upon a State," Se. Cmty. Coll., 442 U.S. at 413. But Merjian characterized Davis' case as "a poor 'test case for advocates seeking an expansive reading of the Act," without recognizing the problematic litigation choices discussed here. Merijian at 125.

[19] *See infra* note 35 and accompanying text.

[20] *Disability Rights Movement's Legislative Impact Sprang from On-Campus Activism*, ABA JOURNAL, (Jan. 2018), http://www.abajournal.com/magazine/article/disability_rights_campus_activism_legislation/P2.

[21] Davis v. Se. Cmty. Coll., 424 F. Supp. 1341, 1344 (E.D.N.C. 1976).

[22] *Id.*

[23] *Id.* at 1345.

[24] Br. for Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213503 (U.S.) (Appellate Br.), at *5-6.

[25] *Davis*, 424 F. Supp. at 1342.

[26] *Id.*

[27] *Id.*

[28] Br. for Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213503 (U.S.) (Appellate Br.), at *5.

[29] Br. for Resp't, 1979 WL 19920 at *12.

[30] *Davis*, 424 F. Supp. at 1343.

The trial court rejected Davis' legal argument, concluding that "[o]therwise qualified ... can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available."[31] Further, because Davis had not put on relevant evidence, the court credited the testimony of the College that it could not provide the relevant auxiliary aids and that Davis could not participate safely in the program's required clinical training.[32] Importantly, these conclusions were based only on the uncontested evidence of the College[33] but they were to prove critical as the case developed further.

The Fourth Circuit reversed the trial court on the "rather narrow" legal basis that § 504 prohibited the College from taking disability into account in the admission decision.[34] By the time *Davis* reached the Fourth Circuit on appeal, however, the regulations interpreting § 504 of the Rehab Act had finally been issued.[35] In light of the regulations, the appellate court also opined, in language conflating accommodations and modifications, that "it would be appropriate, as guidance for the court below, to briefly discuss plaintiff's claim that the district court also erred by failing to consider that the College could be required to modify the nursing program to accommodate the plaintiff and her hearing disability."[36] In assessing the College's position that Davis could not participate in the clinical program, the district court on remand was to give adequate attention to the regulatory requirement that auxiliary aids should be provided "even when such modifications become expensive."[37] Here, too, the appellate court did not distinguish a request for auxiliary aids and services, such as sign interpretation, from a modification in the nursing program curriculum, such as exemption from certain clinical requirements. The proper guidance under the regulations, however, would have required the College first to consider any requests for auxiliary aids and services and then to analyze what program modifications Davis would have required with reasonable accommodations to participate in the program and receive its benefits.[38] On this two-step analysis, answering the first question would have required considering whether her accommodation requests were reasonable, and answering the second would have required considering whether any program modifications she would have needed with reasonable accommodations were fundamental alterations.

As *Davis* reached the Supreme Court, the College framed the relevant legal issues exactly in line with the trial judge's ruling:

> 1. Whether Section 504 of this Act precludes a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely

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[31] *Id.* at 1345.

[32] *Id*. at 1345-46.

[33] *Id.* at 1346.

[34] Davis v. Se. Cmty. Coll., 574 F.2d 1158, 1160 (4th Cir. 1978).

[35] *Id.* at 1161. Issuance of the regulations implementing § 504 had been significantly delayed and the delays occasioned increasing protests. The regulations were finally issued in 1977 after demonstrations and sit-ins across the country, including a month-long sit-in in a federal building in San Francisco. *See* 504 Sit-in 20th Anniversary, DREDF, https://dredf.org/504-sit-in-20th-anniversary/ (last visited Dec. 1, 2019).

[36] 574 F.2d at 1162.

[37] 574 F.2d at 1162.

[38] *See supra* notes 10 to 16 and accompanying text.

> upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.
> 2. Whether Section 504 of this Act impliedly imposes upon colleges and universities an affirmative obligation to provide affirmative and expensive accommodation for the seriously handicapped who seek admission to programs designed to train and educate them for professional employment involving a high degree of physical and mental dexterity.[39]

Arguing on behalf of Southeastern, Professor Eugene Gressman cemented this framing of the legal issues. During the oral argument, he referred frequently to the trial court's determination that Davis "could not effectively complete the training program because of her handicap."[40] Gressman also stated stereotyped characterizations of people with hearing impairments that they could not perform safely in many arenas.[41] Furthermore, Gressman left open the suggestion of an apparently sympathetic Justice that because § 504 did not authorize affirmative action, unlike several other sections of the Rehab Act, the regulation requiring auxiliary aids and services might have outstripped the agency's authority.[42] In so doing, he used the phrase "affirmative accommodation," a phrase in the language of affirmative action, rather than the auxiliary aids and services that are specifically required in § 504.[43]

Marc Charmatz, arguing in reply on behalf of the National Association for the Deaf, tried to rescue the facts about Davis' qualifications, but could only state to the Court: "We have also demonstrated in amici briefs that there are a number of areas where hearing impaired and handicapped citizens perform safely and effectively in the medical community, functioning in hospitals as hearing impaired people."[44] To this, a questioning Justice responded: "I thought the place you usually demonstrate something in a lawsuit is in the record before the trial court."[45] All Charmatz could offer was "[w]hat I meant to say was that it is obvious that hearing impaired people can perform in hospital situations," a reply that did not address Davis' potential in the circumstances she would encounter in the clinical training program or the College's outright refusal to provide her with auxiliary aids.[46]

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[39] Br. for Pet'r, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 199912 (U.S.) (Appellate Br.), at *3. Other issues briefed included whether § 504 gives rise to an implied private right of action and whether, if so, there is a requirement to exhaust administrative remedies before bringing suit.

[40] Tr. of Oral Arg., Se. Cmty. Coll. v. Davis, No. 78-711, 3, 4, 6, 10, 12 (Apr. 23, 1979), https://www.supremecourt.gov/pdfs/transcripts/1978/78-711_04-23-1979.pdf.

[41] *Id*. at 18. ("Now, we have in this situation a reflection of this concern by the District Court for the safety of the patients, and I think that a person who is unqualified to provide safe nursing care for the great mass of individuals who are ill and sick raises a serious question as to whether this 504 duty should be imposed indiscriminately upon that kind of program or activity.").

[42] *Id.* at 16.

[43] *Id*. ("But Your Honor is exactly right, there is not one word on the face of 504 that establishes any duty to make affirmative accommodation.").

[44] *Id.* at 27.

[45] *Id*.

[46] Tr. of Oral Arg., Se. Cmty. Coll. v. Davis, No. 78-711, 27 (Apr. 23, 1979), https://www.supremecourt.gov/pdfs/transcripts/1978/78-711_04-23-1979.pdf.

When pressed further on Davis' burden at the trial court, Charmatz conflated accommodation with modification: "the problem was that the college refused to make any modification."[47] He contended that § 504 reflected Congress's intent "that special education must be paid to the needs of those individuals who through no fault of their own have not received adequate education."[48] This contention would turn Davis' claim into a claim for remedial education, a claim she was not making, but courted the linkages to affirmative action drawn by the Court. Shortly thereafter in the argument, Charmatz retrieved the theme of accommodation. In response to whether he challenged the findings of the district court, he indicated instead that the trial court had asked the wrong question. The proper question, he said, should have been an accommodation[49]—which indeed it should have been, on the analysis presented here. But because Davis' capabilities with auxiliary aids and services had not been sufficiently explored at the trial court, Charmatz was forced to rely on the unsatisfactory general conclusion "that a college in this instance was blind to the ability of handicapped people to perform, such as Ms. Davis, and to contribute meaningfully to society."[50]

The Court ruled unanimously in favor of the College, taking the College's claims about Davis' abilities to be uncontested. The Court's analysis agreed with the College that the physical standards it demanded were necessary for participation in its nursing program:

> It is not open to dispute that, as Southeastern's associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lip-reading is necessary for patient safety during the clinical phase of the program [and] this ability also is indispensable for many of the functions that a registered nurse performs.[51]

In one sense, the statements the Court made here are true: because of the litigation strategy at the district court, the College's claims about the need to understand speech for patient safety and the functions of a registered nurse were undisputed. But much more should have been said at the trial court and was said too late in amicus briefs to the Court,[52] about the inaccurately stereotyping assumptions in the College's position about the availability of aids and possibilities for safe participation in most if not all aspects of the clinical program.

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[47] *Id.* at 29.

[48] *Id.* at 31.

[49] *Id*.

[50] *Id.* at 39. Later in the oral argument, a Justice observed, "[a]sked the wrong question, but you didn't tell it to ask any other questions, that is my problem." *Id.* at 42.

[51] *Davis*, 442 U.S. at 407.

[52] Br. for Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213503 (U.S.) (Appellate Br.) at *11 ("The College's erroneous assumption that a hearing-impaired person cannot safely and effectively complete the educational requirements to become a registered nurse is contradicted by the very existence of many hearing-impaired persons safely and effectively performing in society every day as nurses, dentists and doctors."). *See also* Br. of Amicus Curiae of the State of Cal. in Supp. of the Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213508 (U.S.) (Appellate Br.) at *8 ("The trial court found that the single major factor in the College's refusal to allow admission to Davis was '*their feelings* that she would be unable to serve as a Registered Nurse' . . It should be noted in passing that their feelings do not appear to be founded on objective data or even a fair evaluation of Ms. Davis' potential to function as a Registered Nurse.")

Next, the Court turned to the appellate court's instructions on remand about auxiliary aids. In a particularly damaging and unwarranted twist of language, the Court construed Davis as requesting "affirmative action" rather than relief in the form of action to be taken by the College: "[r]espondent contends nevertheless that § 504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication."[53] However, this analysis misconstrued Davis' position. Davis had disavowed any specific form of affirmative relief, noting, "this issue is not properly before this Court."[54] Davis' position before the Court was instead that, assuming *arguendo* that the appellate court's instructions to the trial court on remand were to be considered, the instructions were correct.[55] The trial court should give close attention on remand to affirmative relief in light of the Rehab Act regulations and the College's refusal to consider any auxiliary aids for Davis' hearing impairment.[56] Moreover, the dispute was about what affirmative relief would be appropriate, not a request for "affirmative action."[57] Unfortunately, the Court was never disabused of the connection to affirmative action because Davis' counsel stated in oral arguments that the College had refused modifications.[58] Construing Davis as requesting affirmative action, the Court claimed that allowing Davis to modify the nursing program to eliminate the clinical phase would be a "fundamental alteration in the nature" of the program—in the Court's judgment "far more than the 'modification' regulation requires."[59] Requiring the kind of close personal attention Davis would need to participate safely in the care of patients, the Court said, is more than an "auxiliary aid"; it is "affirmative action" in the form of services of a personal nature excluded by the regulation.[60]

This reasoning in *Davis* misconstrued both modifications and accommodations and confused affirmative relief with affirmative action. On this reasoning, modifications could only be the fundamental alteration in the program of excusing Davis from clinical training. Similarly, accommodations could only be requests for unjustified special treatment, "affirmative action" that would exceed "the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps" [61] that Congress intended in the Rehab Act.[62]

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[53] *Davis*, 442 U.S. at 407.

[54] Br. for Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213503 (U.S.) (Appellate Br.) at *33.

[55] *Id.*

[56] *Id.*

[57] The *only* time the phrase "affirmative action" appears in the brief filed for Davis before the Supreme Court is in a quotation from the Senate Report accompanying the 1974 amendments to § 504: "Where applicable, Section 504 is intended to include a requirement of affirmative action as well as a prohibition of discrimination." Br. for Resp't, Se. Cmty. Coll. v. Davis, No. 78-711, 1979 WL 213503 (U.S.) (Appellate Br.) at *34.

[58] Tr. of Oral Arg., *supra* note 39, at 44.

[59] *Davis*, 442 U.S. at 410.

[60] *Id.* at 409.

[61] *Id.* at 410. In this reasoning, the Court cited sections of the Rehab Act other than § 504 where Congress made an explicit reference to affirmative action. Moreover, Congress had only "encouraged" state agencies, in contrast to the requirements it had imposed on the federal government. For another case sounding the theme that the Rehab Act is not a requirement for affirmative efforts to overcome disadvantage, *see* Wimberly v. Labor and Indust. Relations Comm'n of Mo., 479 U.S. 511, 517-18 (1987).

[62] The Court thus reached the conclusions it did by confusing accommodations and modifications, and *Davis'* legacy rejecting "affirmative action" continues to this day. Had *Davis* arisen after 1990, Title II of the ADA

III. *ALEXANDER V. CHOATE*: THE PROBLEMS COMPOUND

This legacy of *Davis* confusing modifications and accommodations, and mischaracterizing the latter as affirmative action, was entrenched several years later in a second Rehab Act decision, *Alexander v. Choate.*[63] *Choate* is perhaps the most widely cited and influential decision interpreting what modifications might be required for non-discrimination in public services under the Rehab Act and, later, the ADA.[64]

Choate involved Medicaid cutbacks and whether their impact on people with disabilities was discriminatory. Beset by budgetary woes, the number of hospital days Tennessee would provide annually to Medicaid recipients was reduced from twenty to fourteen.[65] People with disabilities brought a class action suit contending that because the cutback had a differential impact on them—more of whom required stays that would put them over the 14-day annual limit—it violated the Rehab Act.[66] In an important victory for disability civil rights, the *Choate* Court interpreted the Rehab Act to allow claims of disparate impact discrimination.[67] However, the Court relied on *Davis* [68] in ruling that disparate impact must be kept "within manageable bounds."[69] The concept of "meaningful access" was introduced striking a balance between reasonable modifications and fundamental alterations to delineate these bounds.[70] Subsequent commentators have understood this balance in terms of a distinction between the benefit offered

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would also have covered Southeastern as a state institution. The "fundamental alteration" language of the ADA, however, appears in Title III rather than Title II, where the questions would have been what essential eligibility requirements would be for the nursing program and whether Davis could meet them with or without auxiliary aids and services. The idea of "affirmative action," moreover, appears nowhere in Title II (or in Title III for that matter). Yet as this article will demonstrate below, multiple decisions interpreting Title II of the ADA cite *Davis* to rely on the fundamental alteration standard. Affirmative action is a subtheme in these cases as well. *See e.g.*, A.H. by Holzmueller v. Ill. High School Ass'n, 881 F.3d 587 (7th Cir. 2018).

[63] Alexander v. Choate, 469 U.S. 287 (1985). Although beyond the scope of this article, it is also noteworthy that problematic choices were made in litigating the claims in *Choate.* The plaintiffs relied on statistical evidence of differential impact rather than on evidence of actual cases in which people with disabilities were unable to obtain access to hospital care on a par to the opportunities available to people without disabilities. It was thus possible for the Court to say that despite the statistical differences people with disabilities had "meaningful access" to the 14-day hospital benefit. See Leslie P. Francis & Anita Silvers, *Debilitating Alexander v. Choate: "Meaningful Access" to Health Care for People with Disabilities*, 35 FORDHAM URB. L. J. 447 (2008).

[64] In addition to *Choate*, the Court issued several other early and important Rehab Act decisions with additional implications for the ADA. In Bowen v. Am. Hosp. Ass'n, 476 U.S. 610 (1986), the Court held that the hospital had not discriminated when it followed the wishes of the parent who wished to decline treatment for a newborn with disabilities. In Sch. Bd. of Nassau Cty., Fl. v. Arline, 480 U.S. 273 (1987), the Court held that a person with an infectious disease (tuberculosis) could be a person with disabilities under the Rehab Act. Additionally, in Trayner v. Turnage, 485 U.S. 535, 536 (1988), the Court held that the Veterans' Administration definition of "willful misconduct" to include primary alcoholism for purposes of extending educational assistance benefits did not violate the Rehab Act.

[65] *Choate*, 469 U.S. at 287.

[66] *Id*. at 290.

[67] *Id.* at 299.

[68] *Id.* at 300.

[69] *Id.*

[70] *Id.* at 301 ("The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers.)."

and the access to it.[71] Although beyond the scope of this article, I have argued elsewhere with the late Anita Silvers that this understanding is mistaken[72] and that a number of courts have scrutinized the adequacy of the benefit at part of the meaningful access inquiry.[73]

Like the Court in *Davis*, the *Choate* Court criticized the claims made on behalf of the disabled as unwarranted affirmative action.[74] The Court put forth this characterization despite recognizing that the *Davis* Court had been sharply criticized for its confusion of "affirmative action" and "affirmative relief."[75] Instead, the *Choate* Court defended its continuing use of "affirmative action" as appropriate for claims that were judged to demand "fundamental alterations" in programs.[76] To reject the contention that, under the fourteen day benefit rule, people with disabilities would disproportionately lack meaningful access to healthcare, the Court construed their request for structuring the health care benefit for each disabled individual to "guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs."[77] Supporting the request would have entailed, in the judgment of the Court, agreeing that health care needs of the disabled are "more important than others and more worthy of cure through government subsidization."[78] Here, the Court's analysis can be viewed as seeing the *Choate* litigants' request as personal privileging, similar to Davis' requests for auxiliary aids as a request for personal services. If this point is stated in terms of the distinction between accommodation and modification, the Court here understands the *Choate* litigants as requesting accommodations for their individualized health care needs.

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[71] This view was developed by SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT, 69-72 (2009).

[72] Leslie Francis & Anita Silvers, *Reading Alexander v. Choate Rightly: Now is the Time*, 6 LAWS 17 (2017).

[73] *See, e.g.* Am. Council of the Blind v. Paulson, 525 F.3d 1256 (D.C. Cir. 2008) (failure to design currency readily distinguishable to visually impaired violated ADA); Fisher v. Okla. Health Care Auth., 335 F.3d 1175 (10th Cir. 2003) (question of fact whether state's decision to provide medically necessary prescription benefits only to Medicaid beneficiaries residing in institutions but not to beneficiaries receiving community based services violation of ADA); Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1994) (ADA violation to require receipt of attendant care services in a nursing home, when the recipient was capable of living at home and wished to do so).

[74] *Choate*, 469 U.S. at 303-04. This framing was pressed by the state in oral argument. Tr. of Oral Arg. in Alexander v. Choate at 4, https://www.supremecourt.gov/pdfs/transcripts/1984/83-727_10-01-1984.pdf. It was also pressed by the Solicitor General arguing for the federal government in support of the state: "the court of appeals' theory of discrimination simply dissolves all possible distinctions between nondiscrimination on the one hand and a major affirmative action program to aid the handicapped on the other." *Id.* at 13. Notably, the Solicitor General also characterized the goal of the Medicaid program as "not the satisfaction of health needs, but the provision of a given level of health services." *Id.* at 12-13.

[75] 469 U.S. at 300 n. 20.

[76] *Choate*, 469 U.S. at 300-01. The analysis here argues that the *Choate* Court re-introduced the confusions in concluding that the litigants were demanding individualized adjustments that required fundamental program alterations. However, note 20 has been used by some later courts to recognize the importance of the distinction between affirmative relief and affirmative action. E.g., A.P. ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 538 F. Supp. 2d 1125 (D. Minn. 2008).

[77] *Id.* at 303.

[78] *Id.* at 303-304.

However, the *Choate* litigants' contention was that Tennessee should make reasonable modifications to its Medicaid cutbacks to allow equitable access to the Medicaid benefit.[79] Here, the litigants can be seen as couching the Medicaid benefit differently from the state: as providing medical assistance to eligible recipients within practical limits, not as providing whatever benefit the state stipulates in the same way for everyone. The *Choate* litigants asserted that funding under the Medicaid statute enables "each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services…".[80] The litigants recognized that cutbacks in the program might be necessary; however, their concern was for the cutbacks not to be structured in "a manner which disproportionately imposes upon the handicapped or any other protected group a grossly—in this case grossly disproportionate burden of bearing the brunt of that cutback."[81]

G. Gordon Bonnyman, Jr., arguing on behalf of the disabled, was placed in the difficult position of trying to explain exactly what number of days in the hospital would be permissible under questioning that assumed the state could choose which benefit to provide.[82] Bonnyman tried to reframe the question in terms of a fair share of the burdens of the cutback[83] and the regulatory requirement that the state may not administer Medicaid in a way that has "the effect of substantially impairing accomplishment of the objectives of the recipients program with respect to handicapped persons."[84] However, he was never able to satisfy the questioning Justices that his position did not require equal results rather than an equal opportunity to enjoy the benefits of the Medicaid program. Even Bonnyman unsuccessfully used the language of accommodations in his argument, trying to distinguish *Choate* from *Davis* by contending that alternatives were available to the state that would not have been as burdensome to the disabled.[85]

To be sure, specifying the requirements for meaningful access is difficult.[86] On the one hand, "meaningful" access cannot mean no access, as would be the case if a person with disabilities who had exhausted her hospital days required an additional hospitalization in the same year. On the other hand, it cannot mean adjustments that give the optimal result to everyone, as this would require expenditures that the financially-strapped state could not sustain. In advocating for the disabled, Bonnyman tried to convince the Court to see that answers were not to be found in specifying a number of days that would comply with the Medicaid program.[87] Rather, the trial court on remand should consider whether there were feasible alternatives for the financially-strapped state that would not have required the disabled to bear an unfair share of the burden of retrenchment.[88] Framing modifications as individually tailored accommodations, however,

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[79] *Id.* at 291.
[80] 42 U.S.C. § 1396-1 (2019).
[81] Tr. of Oral Arg. in Alexander v. Choate, *supra* note 71, at 16.
[82] *Id.* at 23.
[83] *Id.* at 23.
[84] *Id.* at 38
[85] *Id.* at 43.
[86] Mary Crossley, *Giving Meaning to "Meaningful Access" in Medicaid Managed Care*, 102 KY. L.J. 1 (2014).
[87] Tr. of Oral Argument in Alexander v. Choate *supra* note 71, at 38.
[88] *Id.* at 31.

obscured this view of what non-discrimination required, because it individualized what should be seen as a question of policy.

IV. ACCOMMODATION AND MODIFICATION: THE LANGUAGE AND STRUCTURE OF THE ADA

The ADA, enacted in 1990, extended the Rehab Act beyond the federal government to employers, public services, public accommodations, transportation, and communication. It did not, however, alter the basic approach established by the Rehab Act and the regulations promulgated to implement it.

A. *The ADA*

The three major sections of the ADA addressing employment discrimination, public services, and public accommodations use different language and structures for delineating non-discrimination. Plaintiffs claiming that failure to accommodate is employment discrimination must sue their employers under ADA Title I and meet that section's requirements, even if their employer is a public entity covered by Title II for the services it provides or a public accommodation covered by Title III. The term for adjustments required by Title I is "accommodation" and the term for adjustments required by Titles II and III is "modification." There are other differences among the titles as well; all are outlined in the remainder of this subsection.

Title I of the ADA provides it is employment discrimination to "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose undue hardship on the operation of the business of such covered entity…"[89] Title I further defines "reasonable accommodation":

> The term 'reasonable accommodation' may include: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities…[90]

Several additional features of Title I are important for delineating the structural differences among the titles. First, Title I gives a non-exclusive list of accommodations that may be required. This list includes making facilities used by employees accessible to individuals with disabilities,

[89] 42 U.S.C. § 12112(b)(5)(A) (2018).
[90] 42 U.S.C. § 12111(9) (2018).

including break rooms, rest rooms, or workstations.[91] The list also includes changes in job requirements, schedules, or assignments, if with these changes the individual can perform the essential functions of the position[92]: for example, limiting lifting for an employee with a back injury, allowing an employee to work four rather than five shifts a week, or transferring an employee to a vacant position.[93] In addition, the list includes equipment, training, or readers or interpreters for employees who require them for communication.[94] Second, Title I only requires accommodations for employees who can demonstrate that they can perform the essential functions of the position with or without accommodations.[95] Third, Title I requires accommodations when the physical or mental limitations are "known" to the employer; the burden is on the employee to make known the need for accommodations.[96] Finally, undue hardship is a defense available to the employer.[97] Hardships are measured by the overall resources of the employer, among other factors.[98] Employers are especially likely to succeed in this defense when the requested accommodations would place burdens on other employees.[99]

Title II of the ADA applies to discrimination in public services. It provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity…"[100] In this section of the ADA, "[q]ualified individual with a disability" is defined as:

> [A]n 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

[91] Lee-Thomas v. Prince George's Cty. Pub. Sch., 2017 WL 2733802 (D. Md. 2017) (ergonomic chair; grab bars in rest rooms).

[92] *E.g.*, Singleton v. Pub. Health Trust of Miami-Dade Cty. (Jackson Mem'l Hosp.), 2017 WL 2712937 (S.D. Fla. 2017) (physician with ADD could not meet essential function of position to see a minimum number of patients per day); Miller v. United Parcel Service, Inc., 149 F. Supp. 3d 1262 (D. Ore. 2016) (ability to walk constantly for 4 hours not essential function of job of hub supervisor).

[93] *E.g.*, Harris v. Chao, 257 F. Supp. 3d 67 (D.D.C. 2017) (reasonable reassignment process required for employee with hearing impairment after current job responsibilities shifted increasingly to conference calls in which it was difficult for the employee to participate).

[94] Searls v. Johns Hopkins Hosp., 158 F. Supp. 3d 427 (D. Md. 2016) (ALS interpreter for deaf nurse).

[95] 42 U.S.C. § 12111(8) (2018).

[96] Stockton v. Christus Health Se. Tex., 2017 WL 1287550 (E.D. Tex. 2017) (employee has responsibility to inform employer of need for an accommodation).

[97] 42 U.S.C. § 12112(b)(5)(A) (2018).

[98] *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEOC, https://www.eeoc.gov/policy/docs/accommodation.html#undue (last visited Dec. 1, 2019).

[99] *E.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 39 (2002) (reassignment to light duty position for employee with back injury not reasonable when seniority system assigns position to someone else); Farha v. Cogent Healthcare of Mich., 164 F. Supp. 3d 974 (E.D. Mich. 2016) (night rotations essential function of hospitalist position).

[100] 42 U.S.C. § 12132 (2018).

essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.[101]

Here, instead of "accommodation," Title II uses the term "modification." Further explanation of the meaning of "modification" is provided by reference to "rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services…".[102] Modification is built into the definition of a qualified plaintiff as someone who with or without modifications can meet essential eligibility requirements.[103] Use of the term "modification" here would suggest that these are changes that might apply to others who are similarly situated; changes in rules, policies, or practices are not individualized. Title II, however, does not entirely ignore accommodations; they appear in the form of "auxiliary aids and services" that individuals might need for participation in or to benefit from public services, programs, or activities. Moreover, the legislative history indicates Congress intended the forms of discrimination prohibited by Title I and Title III also apply to Title II.[104] Notably, Title II does not state the counterparts to the Title I defense of undue hardship or the requirement that the plaintiff make his or her disability known before modifications might be required.

Title III, the public accommodations section of the ADA, presents still further differences in language and structure. Its basic provision reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . ."[105] "Full and equal enjoyment" is robust language—more robust language than the "exclusion or denial" language of Title II. Title III further specifies several ways in which this non-discrimination mandate is to be constructed. It is discrimination to deny the opportunity to participate in a benefit, to afford the opportunity to participate in a benefit that is "not equal to that afforded to other[s]," or to provide separate benefits unless necessary for the benefits to be equally effective as those provided to others.[106] Title III also specifies that the "goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate."[107] Even when there are separate programs, "an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different."[108] Specific prohibitions include:

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[101] 42 U.S.C. § 12131(2) (2018).

[102] *Id.*

[103] *E.g.*, Halpern v. Wake Forest University Health Sciences, 669 F.3d 454 (4th Cir. 2012) (medical student with ADHD had frequent lapses of professionalism and thus could not show he met essential eligibility requirements).

[104] Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 848 (7th Cir. 1999), quoting H.R. Rep No. 485(II), 101st Cong., 2d Sess. 84 (1990): "The Committee has chosen not to list all the types of actions that are included within the term "discrimination," as was done in titles I and III, because [Title II] essentially simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and III of this proposed legislation."

[105] 42 U.S.C. § 12182(a) (2018).

[106] 42 U.S.C. § 12182(b)(1)(A)(i), (ii), (iii) (2018).

[107] 42 U.S.C. § 12182(b)(1)(B) (2018).

[108] 42 U.S.C. § 12182(b)(1)(C) (2018).

> failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations…[109]

That a modification would be a "fundamental alteration" of what the public accommodation provides is thus a defense. For example, it is a "fundamental alteration" of a board certification examination for a physician to request that it be open book or essay format[110] but not to extend the deadline required to pass a qualifying exam in order to allow time for therapy or rehabilitation of the candidate to become effective.[111] An additional undue burden defense is allowed, but only to the requirement for a public accommodation to provide auxiliary aids and services.[112] Removal of architectural and structural communication barriers is required only if "readily achievable."[113]

B. *The Emergence of the ADA from the Rehab Act*

Legislative proposals that ultimately became the ADA were directly modeled on the Rehab Act, with a single overarching prohibition of discrimination on the basis of disability. The initial proposal, from the National Council on the Handicapped, would have prohibited discrimination in employment, housing, public accommodations, as defined in the Civil Rights Act, transportation, state agencies or subdivisions, or broadcasts or other telecommunications.[114] Fair housing was removed from this bill and became the Fair Housing Amendments of 1988.[115] In 1989, work on what became the ADA began in earnest.[116] This started with H.R. 2273, also structured with an overarching prohibition of disability discrimination, but with more specific provisions governing employment, public services, and public accommodations.[117] Among the miscellaneous provisions of H.R. 2273 was that its different titles should be construed as consistent with one another and that any apparent conflict should be resolved "by reference to the title that specifically covers the type of action in question," an initial recognition of differences among the arenas in which discrimination was to be prohibited.[118]

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[109] 42 U.S.C. § 12182(b)(2)(A)(ii) (2018).

[110] Rawdin v. Am. Bd. of Pediatrics, 582 Fed. Appx. 114 (3d Cir. 2014).

[111] Dean v. University of Buffalo School of Medicine and Biomedical Sciences, 804 F.3d 178 (2d Cir. 2015) (step one qualifying exam schedule).

[112] 42 U.S.C. § 12182(b)(2)(A)(iii) ((2018).

[113] 42 U.S.C. § 12182(b)(2)(A)(iv) (2018).

[114] S. 2345, Congressional Record 9379 (Apr. 28, 1988).

[115] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

[116] This section is based on the three-volume compiled legislative history of the ADA, prepared for the House Committee on Labor and Education and available online from Purdue University, https://babel.hathitrust.org/cgi/pt?id=pur1.32754061146019;view=1up;seq=3, last viewed Nov. 4, 2019. All page references in what follows are to this compilation.

[117] H.R. 2273, https://www.congress.gov/bill/101st-congress/house-bill/2273/text/ih.

[118] H.R. 2273 § 601.

H.R. 2273 in the form in which it was introduced generated significant opposition from the business community.[119] In the summer of 1989, a compromise was negotiated that gained the support of the Bush administration and was enacted by the Senate as S. 933[120] in the form that ultimately became the ADA. S. 933 eliminated the overarching prohibition on disability discrimination in favor of the separate and substantively different titles governing employment, public services, and public accommodations. Among the most important changes were the elimination of a "most integrated setting" requirement and an equal participation or benefit requirement from the employment discrimination title; these remained, in somewhat altered form, in the public accommodation title.[121] Another was that a "small business exception" remained for employment discrimination—employers were not to be covered unless they had at least 15 full-time equivalent employees.[122] By contrast, the needs of smaller businesses providing public accommodations were met by a variety of more specific requirements such as that the removal of barriers should be "readily achievable"[123] or that the provision of auxiliary aids and services should not be an "undue burden."[124]

This legislative history reveals policy reasons that shaped how the titles were differentiated. Because employers ultimately bear the costs of adjustment for disability, whatever these costs turn out to be, employers were protected from excess costs through the undue hardship defense.[125] Smaller employers were exempted altogether.[126] The employment discrimination title of the ADA, Title I, allowed employers to set job qualifications (as long as they are nondiscriminatory), to protect themselves against employee misconduct, and to have an undue hardship defense for excessive costs.[127] To protect employees from intrusive inquiries, it may also seem reasonable to put the burden on the person with a disability to request any needed accommodations.[128] The debates in Congress about Title I paid particular attention to employers' concerns about testing employees for substance abuse and safety risks.[129] Congress was also explicit that employers should not be able to act on stereotypes such as fears of HIV.[130] Finally, employers are hiring individuals for jobs; anti-discrimination requires that capable individuals not be excluded from employment by the failure to make adjustments that would enable them to

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[119] *Equality of Opportunity: The Making of the Americans with Disabilities Act,* NAT'L COUNCIL ON DISABILITY https://ncd.gov/publications/2010/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act (last visited Dec. 1, 2019).

[120] S. 933, 101st Cong. (1989), https://www.congress.gov/bill/101st-congress/senate-bill/933.

[121] 42 U.S.C. § 12182(a) ("in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation"); § 12182(b)(1)(B) ("most integrated setting").

[122] 42 U.S.C. § 12111(5)(A).

[123] 42 U.S.C. § 12182(2)(A)(iv).

[124] 42 U.S.C. § 12182(2)(A)(iii).

[125] *E.g.* H.R. REP. NO. 101-485 (1990), pp. 479-482.

[126] *Id.* at 327.

[127] *Id.*

[128] H.R. REP. NO. 101-485, at 338 ("In the absence of a request, it would be inappropriate to provide an accommodation, especially where it could impact adversely on the individual.").

[129] *E.g.,* S. REP. NO. 101-116, at 70 (1990) (Conf. Rep.).

[130] *E.g.,* S. REP. NO. 101-116, at 66-68 (1990) (Conf. Rep.).

perform successfully, and so can reasonably be conceptualized in terms of individual accommodations.[131]

Public services arguably are different. One primary theme in Congress about public services was the inequity that many of these services were covered by the Rehabilitation Act through receipt of federal funding, while others, especially in rural areas, were not.[132] Much of the more substantive discussion of public services attended to specific provisions for transportation and telecommunications, where costs or feared cutbacks in service were an issue.[133] The legislative history contains no explanation of why "modification" is the chosen term in contrast to "accommodation" and is in my judgment surprisingly minimal about the general non-discrimination provision in Title II overall. Congress did state explicitly that interpretation of Title II was meant to follow the Rehabilitation Act as interpreted in *Alexander v. Choate*.[134] Congressional reports also stated that the prohibitions in Title II were intended to parallel those in Titles I and III, without saying more in light of the differences between these titles.[135] The House report does explain that the non-specificity of the Title II anti-discrimination provision was deliberate, again without more about how to flesh out the parallels with the other titles:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination," as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302 (b), should be incorporated in the regulations implementing this title.[136]

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[131] H.R. REP. NO. 101-485, at 338 (1990) ("The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment."); *See also id*. at 339 ("The Committee believes strongly that a reasonable accommodation should provide a meaningful equal employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities.")

[132] S. REP. NO. 101-116, at 110 (1990); H.R. REP. NO.101-485, at 310 (1990).

[133] *E.g.*, Additional Views of Senator Hatch, S. REP. NO. 101-116, at 201 (1990)

[134] S. REP. NO. 101-116, at 142 (1990) ("It is the Committee's intent that section 202 and other sections of the legislation be interpreted consistent with *Alexander v. Choate*…").

[135] *Id.* ("The forms of discrimination prohibited by section 202 [42 U.S.C. § 12132 (2018)] are comparable to those set out in the applicable provisions of titles I and III of this legislation.") The discussion of the public accommodation title makes clear that it does not cover establishments operated by federal, state, or local governments. *Id.* at 157. And it is quite specific about the nuanced requirements applicable to public accommodations.

[136] H.R. REP. NO. 101-485, at 357 (1990). The Report then notes that any additional requirements of the Rehabilitation Act should also be included in the implementation of Title II.

Congress said nothing more about what this incorporation might mean or whether, when the sections differ, the employment title or the public accommodations title is the appropriate model to use.

Public accommodations are different still. The House Report indicates that the purpose of public accommodations "is to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner."[137] The legislative history details the importance of access to public accommodations for addressing the devastating social isolation experienced by people with disabilities.[138] To the extent possible, people should be able to enjoy them together; this means, for example, that restaurants and places of entertainment should be structured to allow people with disabilities to enjoy them with their families or friends.[139] Unlike the small employer exemption, there is no exemption for small businesses providing public accommodations.[140] Providers of public accommodations can decide what they want to provide—they are not required to fundamentally alter their products and may impose legitimate safety protections—but they may not effectively close off their offerings to people with disabilities based on stereotypes about their capabilities.[141] This "fundamental alteration" defense is not the same as an undue hardship defense, however; it is a defense that permits the public accommodation to choose the kind of service that it is providing. The Title III undue burden defense—unlike the defense available to employers under Title I—applies only to the provision of auxiliary aids and services.[142] In addition, Congress made a variety of carefully fashioned concessions to smaller businesses or businesses in existing facilities that would be difficult to alter. These concessions include that barriers must be removed only as readily achievable; in new construction, by contrast, access must be provided to the maximum feasible extent.[143]

Although these three different ADA sections—for employment, public services, and public accommodations—are detached from the mooring of the Rehab Act in the receipt of federal funding that allows for a single standard to apply to multiple domains, they preserved the distinctions among the areas that had been developed in the Rehab Act regulations. Congress'

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[137] H.R. REP. NO. 101-485, at 372 (1990).

[138] S. REP. NO. 101-116, at 108-10 (1990).

[139] H.R. REP. NO. 101-485, at 375 (1990) ("Providing services in the most integrated setting is a fundamental principle of the ADA. Historically, persons with disabilities have been relegated to separate and often inferior services. For example, seating for persons using wheelchairs is often located in the back of auditoriums. In addition to providing inferior seating, the patron in a wheelchair is forced to separate from family or friends during the performance.")

[140] The only qualification in the definition of public accommodations is whether the entity "affects commerce," 42 U.S.C. § 12181(7).

[141] H.R. REP. NO. 101-485, at 498-99 (1990) ("A public accommodation may, however, impose neutral rules and criteria that are necessary for the safe operation of its business . . . discrimination includes a failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford such goods, services, facilities, privileges, advantages, or accommodations unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . ")

[142] *Id.* at 379 ("The phrase 'undue burden' is the limit applied under this title upon the duty of places of public accommodation to provide auxiliary aids and services.").

[143] 42 U.S.C. § 12183(a).

goal was harmony, not conflict, between the Rehab Act and the ADA.[144] This did not, however, mean the same standard for each domain. While it surely would be problematic for Rehab Act standards and ADA standards for employment to be out of harmony, or for Rehab Act and ADA standards for public services to be out of harmony, or for Rehab Act and ADA standards for public accommodations to be out of harmony, it does not follow as a matter of logic that the standards for employment, public services, and public accommodations should be the same. Indeed, pre-ADA Rehab Act cases recognized that public services and public accommodations may raise different problems for anti-discrimination law.[145] And the statute that became the ADA changed from the form in which it was originally introduced[146] to the creation of separate titles for employment, public services, and public accommodations.

V. CONFUSIONS IN THE ADA CASE LAW

This section describes selected aspects of the continuing impact of *Davis* on ADA case law. Quantitative analysis of the case law is difficult, however, for several reasons. First, *Davis* is frequently cited for the issue on which it was litigated at the trial court: that qualifications must be addressed in spite of, rather than apart from, disability. These citations do not implicate the confusions identified in this article. Second, ADA plaintiffs often lose on summary judgment on issues other than accommodation or modification claims. This was especially true in the years following enactment of the ADA, when the U.S. Supreme Court significantly tightened the interpretation of "disability" [147] to the extent that people were not considered disabled unless they were significantly restricted in performing tasks central to the daily lives of most people.[148] The majority of complaints of disability discrimination were resolved on motions to dismiss or motions for summary judgment by courts concluding that plaintiffs could not demonstrate that they were sufficiently disabled to claim the protections of the statute. This high dismissal rate complicates analysis of the case law on other issues, although some cases granting these motions on the determination of disability status also provided alternative analyses on which plaintiff's claim also failed. Third, the influence of *Davis* reaches beyond cases directly citing that decision. For example, in the Fifth Circuit, a much-cited case[149] relies on an earlier decision citing *Davis* for analyzing an accommodation request in terms of whether it would be a modification amounting to a fundamental alteration in the employee's job.[150]

Described in what follows are the impact of *Davis* in two types of cases, one involving employment discrimination claims and the other involving claims of discrimination in public services or accommodations. First, on the analysis presented below, there are employment discrimination cases in which the court shifts the frame from an accommodation analysis—where the defense would be undue hardship—to a modification analysis where the employer

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[144] S. REP. NO. 101-116, at 71 (1990) (Conf. Rep.).

[145] *E.g.*, Dep't of Transp. v. Paralyzed Veterans, 477 U.S. 597 (1986); Cmty. Television of S. Cal. v. Gottfried, 459 U.S. 498 (1983).

[146] S. 2345, Cong. Rec. 9379 (Apr. 28, 1988).

[147] Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999); Albertsons v. Kirkingburg, 527 U.S. 555 (1999).

[148] Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002).

[149] Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995).

[150] Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991).

claims a fundamental alteration. Second are cases involving high school athletes, some of which appropriately distinguish whether the request is for an accommodation or for a modification and others of which do not. These cases were selected because they are particularly good illustrations of how blurring accommodation and modification can lead courts to reject claims as preferential treatment rather than as non-discrimination.

A. *Employment: Transfers and New Positions*

When people with disabilities are unable to perform certain duties of their current jobs, potential strategies are to seek changes in their existing job responsibilities or transfers to different positions. These changes may be critical to the ability of some employees to continue working. Frequent examples are employees whose jobs involve some heavy lifting but who are given permanent weight restrictions after an on-the-job injury.[151] Courts divide on the analytic framework they apply to these requests and, correspondingly, on whether they understand these requests as reasonable accommodations. On the one hand, some courts cite *Davis* or other holdings that the ADA is not an "affirmative action" statute to conclude that the only required accommodation is to allow disabled employees seeking reassignment to compete on the same terms with other applicants for positions.[152] Other courts apply the framework delineated in Title I for reasonable accommodations, turning on the qualifications analysis of whether the employee could perform the position with the accommodation and the hardship analysis of whether the accommodation would impose undue costs on the employer in light of its resources.[153] An outer constraint is the Supreme Court's holding that it is an undue hardship to override rules of seniority systems that establish expectations for other employees, absent a showing of special circumstances.[154] The discussion that follows traces the influence of *Davis* in the federal appellate courts with the lowest percentages of plaintiffs surviving motions for summary judgment on disability accommodation issues, the Fifth and Eleventh Circuits.[155]

Fifth Circuit. A leading Rehabilitation Act decision in the Fifth Circuit involved a building inspector with Parkinson's disease who had difficulties with balance and had fallen at inspection sites.[156] The city determined, on medical recommendations, that allowing him to continue performing on-site inspections posed a safety risk to him.[157] He requested office-only duties as

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[151] One study indicates that the inability to obtain accommodations of these kinds may be a significant barrier to employee efforts to remain in the work force or to return to work. Katie Cox, *Understanding the Relationship and Fit between Workers' Needs as Reflected in SSI and SSDI Beneficiary Data and Court Decisions, Settlement Data, and EEOC Data with Regard to Reasonable Accommodations Across Industries*, ARDRAW (2019), https://ardraw.policyresearchinc.org/wp-content/uploads/2019/07/Cox-ARDRAW-Final-Report-Katie-Cox-final-2019-07-09.pdf.

[152] *See* n. 161 and accompanying text.

[153] *See* n. 160 and accompanying text.

[154] U.S. Airways v. Barnett, 535 U.S. 391 (2002). Justice Scalia, in dissent, would have only required accommodations of employer rules when the obstacle presented by the rule was directly related to the employee's disability, citing Smith v. Midland Brake, Inc., 138 F.3d 1304, 1309 (10th Cir. 1998), Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), and other decisions discussed below. 535 U.S. at 1529, 1531.

[155] Data from Katie Cox, Understanding the Relationship.

[156] Chiari v. City of League City, 920 F.2d 311, 313 (5th Cir. 1991).

[157] *Id.* at 313-14.

an accommodation.[158] In ruling for the employer, the court cited *Davis* both for assessing the employee's qualifications in light of his disabilities and for rejecting accommodation requests that are fundamental alterations.[159] The court, did, however, apply the Title I analysis of whether the employee was qualified and whether the accommodations he requested would be an undue hardship for the employer.[160] Later Fifth Circuit cases have recited the undue hardship analysis to conclude that because the ADA is not an "affirmative action" statute, all that is required for reassignment requests is to treat the employee with disabilities in the same way as all others.[161] In an influential decision cited by other circuits,[162] the Court wrote: "…we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals, no more and no less."[163]

Eleventh Circuit. The Eleventh Circuit has followed the lead of the Fifth Circuit in regarding the accommodation requirement as only requiring the same treatment given non-disabled employees. For example, in a case involving an airline reservation sales agent who developed carpal tunnel syndrome and had difficulty typing constantly, US Air originally allowed her to reduce her hours and gave her medical leave for her surgery.[164] When she returned to work, however, she was not allowed to work part time and encountered a delay of as much as three months in accessing the drop keyboard accommodation she had requested.[165] The Eleventh Circuit held, as a matter of law, that a request for a part time schedule when the employer does not have part time openings cannot be a reasonable accommodation.[166] The court reached that conclusion by relying on the Fifth Circuit's view that the ADA is not an affirmative action statute: "the ADA was never intended to turn nondiscrimination into discrimination."

B. *Public Services or Public Accommodations: High School Athletics*

Cases brought by aspiring high school athletes claiming disability discrimination are another area in which the confusions introduced by *Davis* are particularly apparent. Claims in these cases are typically brought under the Rehab Act against school systems that receive federal funding, against public schools under ADA Title II, and against non-profit state high school athletics associations under ADA Title III. Some of the claims are for individualized accommodations and recognized as such by litigants, schools, and the courts. Examples include altered starting blocks

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[158] Br. of Appellant, Chiari v. City of League City, 1990 WL 10082338 at *23.

[159] *Chiari,* 920 F.2d at 318.

[160] *Id.*

[161] Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995). For 5th Circuit cases citing *Daugherty*, *see, e.g.*, Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); Vitale v. Georgia Gulf Corp., 82 Fed. Appx. 873, 875 (5th Cir. 2003).

[162] For cases in other circuits citing *Daugherty*, see, e.g. Smith v. Midland Brake, Inc., 138 F.3d 1304, 1309 (10th Cir. 1998); E.E.O.C. v. Sara Lee Corp., 237 F.3d 349, 354 (4th Cir. 2001); Zimmer v. Sw. Bell Tel. Co., 108 Fed. Appx. 172, 174 (5th Cir. 2004).

[163] *Daugherty,* 56 F.3d at 700.

[164] Terrell v. U.S. Air, 132 F.3d 621, 627 (11th Cir. 1998).

[165] *Id.* at 628.

[166] *Id.* at 626.

for a track athlete with cerebral palsy,[167] sign interpretation or vibration rather than auditory signals to indicate the start of play for deaf athletes,[168] insulin pumps and fanny packs for diabetic supplies, and guides for the visually impaired.[169]

Cases involving eligibility requirements, altered scoring systems, and changes in the categories of competition, however, illustrate how the problematic legacy of *Davis* may play out both for confusions of accommodation requests with modifications and with confusions of modification requests with accommodations. For example, some students with disabilities may take longer to complete school or need to stay out of school for lengthy periods of time. These athletes confront eligibility limits such as the requirement that they be under 19, that they only have eight semesters (or four years) of eligibility, or that they complete high school within a specified number of years. When their efforts to seek waivers of the eligibility limits fail, they may pursue claims of discrimination based on disability. Some courts reject these claims on the ground that they do not involve discrimination "on the basis of" disability, but the imposition of otherwise neutral eligibility rules.[170] This reasoning applies a "but for" approach to analyzing causation under the ADA, an approach on which courts divide.[171] Courts also analyze whether these requests are reasonable accommodations, reasonable modifications, or fundamental alterations in high school sports programs and here is where the *Davis* confusions emerge. On the analysis presented in this article, a request for a waiver is a request for an analysis of the individual's circumstances, addressing questions such as: was a disability the reason he or she has been unable to complete high school within the requisite time period for athletic eligibility? If the time or age limit were not imposed in this individual's case, would it impose an undue hardship or expense? Does the individual pose a safety risk, possibly because his or her body has become far more mature than the bodies of other competitors? Are there fairness issues, such as suggestions of redshirting or staying out of school to gain a competitive advantage?

The leading case in the area relied on *Davis* and treated an individualized waiver request as a request for major modifications in the structure of athletic eligibility.[172] Edward Pottgen repeated two grades in elementary school because of an undiagnosed learning disability; after he was tested and diagnosed, he progressed through school at a normal rate.[173] When he sought to play high school baseball his senior year, he was ruled ineligible because he had turned nineteen the summer before his senior year.[174] His request for a hardship waiver was denied and he claimed that the denial was disability discrimination. In reversing the district court, and ruling against Pottgen, the Eighth Circuit turned to *Davis* to agree with Missouri that age is an essential eligibility requirement "of immense importance in any interscholastic sports program" because it

[167] A.H. by Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018).

[168] Nathanson v. Spring Lake Park Panther Youth Football Ass'n, 129 F. Supp. 3d 743 (D. Minn. 2015).

[169] K.L. v. Missouri State High Sch. Activities Ass'n, 178 F. Supp. 792 (E.D. Mo. 2016), gives these as examples. I set this problem aside for purposes of this article.

[170] *E.g.*, Sandison v. Michigan High Sch. Athletic Association, 64 F.3d 1026 (6th Cir. 1995); Starego v. New Jersey State Interscholastic Athletic Ass'n, 970 F. Supp. 2d 303 (D.N.J. 2013); Pritchard v. Florida High Sch. Athletic Ass'n, Inc., 371 F. Supp. 1081 (M.D. Fla. 2019).

[171] *E.g.*, Murray v. Mayo Clinic, No. 17-16803 (9th Cir. 2019).

[172] Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994).

[173] *Id.* at 928.

[174] *Id.* at 927-28.

reduces the competitive advantage to teams using older athletes, protects younger athletes from harm, discourages student athletes from delaying their graduation to gain advantages, and prevents coaches from repeatedly red-shirting athletes.[175] The court then concluded that the only possible accommodation—waiving the age limit—would be unreasonable because it would fundamentally alter the athletic program.[176] This analysis treats Pottgen's request as a modification, changing the eligibility rules of the game, just as the *Davis* Court treated her request as for a change in the structure of the nursing program. While it might be true that changing eligibility rules to allow waivers without the kind of individualized assessment relevant to an accommodation determination would fundamentally alter the structure of high school competition, it does not follow that individualized accommodation decisions would do so. This accommodation analysis should have been considered by the Eighth Circuit but was not.

Some subsequent courts confronting waiver situations have followed the Eighth Circuit in mistakenly treating them as modifications rather than accommodations.[177] Others have not, however. For example, the Seventh Circuit upheld a waiver of the eight-semester rule for a learning disabled student who had dropped out of high school for a period before his disability was diagnosed,[178] specifically rejecting the Eighth Circuit's modification analysis in favor of an individualized assessment: "…the better view is to ask whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change."[179]

Cases also confuse modification requests with requests for accommodations, as in *Choate.* For example, Aaron Holzmueller, a high school runner with cerebral palsy, sought to have a division created for runners that applied the international Paralympic time standards to determine whether runners' times met the qualifications to participate in the state track meet.[180] Application of these time standards would introduce a change in how times were calculated for participation in state meets, a change that has been adopted by some high school athletic associations.[181] The

[175] *Id.* at 929.

[176] *Id.* at 930.

[177] Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995); Pritchard v. Florida High Sch. Athletic Ass'n, Inc., 371 F. Supp. 1081 (M.D. Fla. 2019).

[178] Washington v. Indiana High Sch. Athletic Ass'n, Inc., 181 F.3d 840 (7th Cir. 1999). Notably, Washington did not request a waiver of the age nineteen rule. The court suggests that this waiver might have raised safety concerns, 181 F.3d at 844, and is taken to task by the dissent for failing to apply an individualized analysis to the age nineteen limit: "…the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule. But instead of looking at the rule's operation in the individual case of Ed Pottgen, both the Activities Association and this Court simply recite the rule's general justifications (which are not in dispute) and mechanically apply it across the board." 181 F.3d at 932 (Arnold, C.J., dissenting).

[179] *Washington*,181 F.3d at 850. See also Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F. Supp. 5790 (M.D. Fla. 1995) (uses individualized accommodation assessment to conclude waiver of the age nineteen rule for a student who was held back because of hearing loss from meningitis as a baby would not raise safety or fairness concerns); Dennin v. Conn. Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (D. Conn. 1996) (individualized assessment of safety and fairness granting age nineteen waiver for a high school swimmer with Down syndrome who had been held back for a year); Cruz ex rel. Cruz v. Pa. Interscholastic Athletic Ass'n, Inc., 157 F. Supp. 485 (E.D. Pa. 2001) (individualized assessment of special education student).

[180] A.H. by Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587, 589 (7th Cir. 2018).

[181] *Id.* at 591.

application would not be an individualized assessment of a particular athlete; rather, it would adopt the international standards.[182] The analytic framework for the court should have been whether this change would fundamentally alter the nature of state track competition. Instead, the court, citing *Davis* as an unjustified request for lowering standards and guaranteeing results, considered whether introduction of the calculative method would "guarantee AH increased participation and success" and "undermine the competitiveness of the State championship meet."[183]

Other courts have confronted requests to introduce new competitive categories, such as a wheelchair division, and considered whether these requests follow the procedures for establishing new forms of competition or are fundamental alterations in high school athletics programs. Katie Ladlie, for example, a para athlete in Missouri, sought to have adaptive events introduced into state championships and points earned in these events counted towards school totals.[184] She did not argue that her times could be comparatively adjusted by any established set of standards, conceding that as a chair athlete she would have a disadvantage at shorter distances and an advantage at longer ones.[185] On the analysis presented here, the sole question for the court should have been whether the modifications she requested were reasonable. The court resolved this question in favor of the athletic association, a determination based on the association's claim that it was working diligently to introduce adaptive sports.[186] However, the court also introduced into this analysis as a reason for rejecting Ladlie's claim that it would lower standards to accommodate a person with disabilities.[187] Here, while the court began, appropriately, with a modification frame, it veered into an accommodation frame to dismiss Ladlie's claim as preferential treatment.

CONCLUSION

In drafting the ADA, Congress delineated analytic frames for accommodations and modifications in a nuanced way for different arenas in which protection against disability discrimination is important to human lives. Determining how a qualified individual can perform a job, participate in or receive the benefit of public services, or enjoy public accommodations in non-standard ways requires an individualized assessment of the individual's capacities and whether accommodations are reasonable or impose an undue hardship. General modifications in policies or in the built environment—enjoyable by all—may also be needed to address discrimination. The anti-discrimination mandate may become distorted, however, when requests for individualized adjustments are taken as wholesale changes, or when modifications are seen as individually targeted privilege. *Davis* and *Choate*, the most important early Rehab Act decisions, set anti-discrimination law on a troubled path from which it has yet to fully return.

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[182] For the standards, *see* Classification in Para Athletics, WORLD PARA ATHLETICS, https://www.paralympic.org/athletics/classification (last visited Oct. 8, 2019).

[183] 881 F.3d at 594.

[184] K.L. v. Missouri State High Sch. Activities Ass'n, 178 F. Supp. 3d 792 (E.D. Mo 2016).

[185] *Id.* at 794.

[186] *Id.* at 795.

[187] 178 F. Supp. at 802.