

# Washington University Journal of Law & Policy

---

Volume 62 *Celebrating 150 Years of Women at WashULaw*

---

2020

## Leveling the Playing Field: Disability, Title IX, and High School Sports

Johanna E. Christophel  
*Washington University in St. Louis*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/law_journal_law_policy)



Part of the [Disability and Equity in Education Commons](#), and the [Disability Law Commons](#)

---

### Recommended Citation

Johanna E. Christophel, *Leveling the Playing Field: Disability, Title IX, and High School Sports*, 62 WASH. U. J. L. & POLY 171 (2020),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol62/iss1/17](https://openscholarship.wustl.edu/law_journal_law_policy/vol62/iss1/17)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

## LEVELING THE PLAYING FIELD: DISABILITY, TITLE IX, AND HIGH SCHOOL SPORTS

Johanna E. Christophel\*

### INTRODUCTION

In the United States, sports have long been a significant agent for social change. Jackie Robinson advanced race relations when he broke baseball's color barrier in the mid-twentieth century.<sup>1</sup> Female tennis legend Billie Jean King similarly challenged sex stereotypes when she defeated Bobby Riggs during the 1973 Battle of the Sexes.<sup>2</sup> In addition to these popular cultural icons, various statutes and public policies have been implemented to prevent discrimination, level playing fields, and ensure inclusion. Legal protections have generated increased interest among young student athletes.<sup>3</sup> While race and gender discrimination have been challenged by advances in athletics, disability discrimination remains mostly untouched by this historic means of social change.

In 2017, A.H., a disabled high school student athlete in Illinois, sought to change this status quo.<sup>4</sup> Under the Americans with Disabilities Act (ADA) and Rehabilitation Act of 1973 (Rehabilitation Act), he sued the

---

\* J.D. Candidate (2020), Washington University in St. Louis. Thank you to my mom, Kathy Christophel, for first showing me the doors that meaningful opportunity can open—and always having the bravery to walk through them. And thank you to my dad, Mark Christophel, for embodying grace, kindness, and humility in walking through those doors with her.

1. See Chris Lamb, *I Never Want to Take Another Trip Like This One': Jackie Robinson's Journey to Integrate Baseball*, J. SPORT HIST. 177, 187 (1997) ("Robinson's campaign against baseball's color barrier captivated millions of white Americans who had thus far ignored the country's racial dilemma. It also inspired millions of black Americans.").

2. SUSAN WARE, *GAME, SET, MATCH: BILLIE JEAN KING AND THE REVOLUTION IN WOMEN'S SPORTS* 209 (2011) ("[B]y showing what women were capable of when given a sporting chance, she helped chip away at the old assumptions and barriers that had limited women's full participation in all aspects of American life. Few public figures, let alone athletes, can point to such a deep and far-reaching legacy.").

3. See *infra* text accompanying notes 34–35.

4. See discussion *infra* Section I.A.

Illinois High School Association (IHSA), seeking the creation of either a separate division or separate state championship qualifying standards for para-ambulatory students running track.<sup>5</sup> The IHSA denied his reasonable accommodation request, and the Northern District of Illinois and Seventh Circuit Court of Appeals affirmed the IHSA's decision.<sup>6</sup> At the Seventh Circuit, the majority subjected A.H.'s claim to a but-for test, requiring proof that *but for* his disability, A.H. would have qualified for the state championship.<sup>7</sup>

The dissent argued that this but-for test failed to adequately protect the spirit of the ADA.<sup>8</sup> The ADA requires that covered entities provide meaningful access to persons with disabilities.<sup>9</sup> "Meaningful access" means providing disabled persons a substantially equivalent experience to that of able-bodied persons.<sup>10</sup> In civil rights statutes, the concept of *meaningful* access has been most prominent in remedying disability- and sex-based discrimination. As the dissent in *A.H.* noted, Title IX granted female athletes separate competitive divisions because of physiological differences.<sup>11</sup> Disabled persons should receive similar accommodations, as they too have basic physiological differences that directly affect their ability to compete in athletic events. Without separate divisions or qualifying times, many disabled student athletes cannot have an experience—the *opportunity* to qualify for a state championship—that is substantially similar to the experience enjoyed by able-bodied student athletes.

This note argues that the Seventh Circuit should have used a two-part meaningful-access test to evaluate A.H.'s claim. This note further contends that Title IX, as civil rights legislation designed to remedy historic discrimination based on physiological differences, should inform our understanding of meaningful access. Under this analysis, federal courts should require high school athletic associations to create separate divisions or qualifying times for para-ambulatory student athletes. This separate classification would ensure that para-ambulatory student athletes have the

---

5. See *infra* text accompanying note 92. A "para-ambulatory" athlete is one who, in contrast to a wheelchair athlete, is physically disabled yet remains ambulatory. See also *infra* note 84.

6. See *infra* text accompanying notes 94, 100.

7. See *infra* text accompanying note 102.

8. See *infra* text accompanying note 110.

9. See *infra* text accompanying note 50.

10. See *infra* text accompanying notes 63–69.

11. See *infra* text accompanying notes 119–122.

opportunity to meaningfully access high school sports by competing against their similarly situated peers.

Part I of this note examines the history of Title IX, the Rehabilitation Act, and the ADA. It focuses primarily on Title IX's sports law application and the ADA's understanding of "meaningful access." Part II argues that the ADA, Rehabilitation Act, and surrounding precedent favor adoption of the two-part meaningful-access test. It further contends that when informed by Title IX, the need for separate divisions or qualifying times becomes even clearer. Part III recommends that ADA compliance should require the creation of separate divisions or qualifying times for para-ambulatory student athletes. This Note concludes that American civil rights law should follow the path of substantive equality for persons with disabilities.

## I. HISTORY

### *A. Title IX: Early Issues of Sports Inclusion*

Title IX of the Education Amendments Act of 1972 created a national mandate that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>12</sup> The implementing regulations drafted by the Department of Health, Education, and Welfare (HEW)<sup>13</sup> explicitly prohibited sex-based discrimination in "any interscholastic . . . athletics offered by a recipient" of federal funds.<sup>14</sup> While most federal antidiscrimination laws to date, like Title VII, pursued a principle of either racial or gender blindness, Title IX sparked a national debate about how to best achieve sex<sup>15</sup> equality in athletics: should the regulations pursue a sex-

---

12. 20 U.S.C. § 1681 (2018).

13. HEW was a forerunner to the Department of Health and Human Services and Department of Education. See *A Common Thread of Service: A History of the Department of Health, Education, and Welfare*, OFF. ASSISTANT SECRETARY FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/report/common-thread-service/history-department-health-education-and-welfare> [<https://perma.cc/3G9T-XXMY>].

14. 34 C.F.R. § 106.41(a) (2018).

15. Many commentaries and original sources use the terms "gender" and "sex" interchangeably when discussing Title IX and its surrounding regulations and policy implications. This note uses "sex" unless directly citing another source that uses "gender."

blind formal equality or a results-oriented substantive equality?<sup>16</sup> Substantive equality ultimately prevailed.<sup>17</sup>

Title IX's implementing regulations sought "more substantive measures of equal opportunity . . . . Title IX's allowance for sex separation has facilitated a legal approach that emphasize[d] results over process and actual opportunities for girls and women over a more formal gender neutrality."<sup>18</sup> In total, the implementing regulations reflected what many scholars describe as a "separate but equal" approach to antidiscrimination.<sup>19</sup>

The two key provisions of HEW's athletics-related implementing regulations are 34 C.F.R. § 106.41(a) and (b).<sup>20</sup> The regulations begin "with a strong statement endorsing gender integration in sports".<sup>21</sup>

(a) General. No persons shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, *and no recipient shall provide any such athletics separately on such basis.*<sup>22</sup>

Immediately following this section, however, is an "exception that swallows the rule".<sup>23</sup>

---

16. See, e.g., DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 19 (2010). "Lawyers at HEW quickly realized that the desegregation model for enforcing Title VI, which covers discrimination in federally funded schools, could not simply be replicated in Title IX. They recognized that competitive sport was a particularly thorny area for developing measures of gender equality." *Id.*

17. *Id.* at 17 ("Title IX has done a relatively good job of forging a pragmatic approach to structuring sports opportunities for girls and women. In forsaking gender blindness for a more gender-conscious, result-oriented model, Title IX has chosen substantive equality over formal equality. This choice has created the potential for expanding girls' and women's sports participation and inciting broad-based cultural transformation in society's response to female athletes and to women's roles more generally.")

18. *Id.* at 15.

19. KELLY BELANGER, INVISIBLE SEASONS: TITLE IX AND THE FIGHT FOR EQUITY IN COLLEGE SPORTS 73 (2016); see also WELCH SUGGS, *Heroines as Well as Heroes*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 14, 19 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) ("Women's officials pressed the point that women needed sex-segregated sports programs. Thus, women created perhaps the only context in civil rights law where 'separate but equal' was tolerated and even endorsed.")

20. BRAKE, *supra* note 16, at 21–22.

21. *Id.*

22. 34 C.F.R. § 106.41(a) (2018) (emphasis added).

23. BRAKE, *supra* note 16, at 22.

(b) Separate Teams. Notwithstanding the requirements of paragraph (a) of this section, 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.<sup>24</sup>

Because “team selection is always based on competitive skill” at the varsity level, sex-separated teams became the general rule of Title IX’s regulatory framework.<sup>25</sup> The HEW determined that “gender neutrality in team tryouts is insufficient to provide real equality for women in sport.”<sup>26</sup> At the time, feminist advocates argued that “physiological sex differences in strength, height, and weight . . . would exclude large numbers of interested and skilled women in most sports if they were required to compete with men.”<sup>27</sup>

In practice, the HEW regulations created an affirmative mandate: “a school must do more than merely allow females to try out for males’ teams.”<sup>28</sup> “Effective accommodation” requires that institutions create sex-separate non-contact sports teams where:

- (1) The opportunities for members of the excluded sex have historically been limited;
- (2) There is sufficient interest and ability among members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and
- (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.<sup>29</sup>

---

24. 34 C.F.R. § 106.41(b) (2018).

25. BRAKE, *supra* note 16, at 22.

26. *Id.*

27. BELANGER, *supra* note 19, at 75–76.

28. LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 74 (2005).

29. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (Dec. 11, 1979). HEW intended these regulations to apply to interscholastic athletic programs—in addition to “intercollegiate competition[s]”: “This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.” *Id.* at 71,413–14.

These regulations were grounded in an understanding that “simply requiring a school to permit a tryout may in some cases be a sham and a hollow victory for the female interested in playing a particular sport.”<sup>30</sup>

Many at the time held this concern:

Some male athletics directors believed they could accommodate women in sports simply by opening tryouts to everyone, male and female: Women could go out for a team and get cut because they were too small, too slow, or lacked other skills, but the school would have protected its legal obligations. But that end run around the law never became popular. Women’s officials pressed the point that women needed sex-segregated sports programs.<sup>31</sup>

These female advocates believed that a “gender blind approach has often been a strategy for thwarting more substantive measures of equality.”<sup>32</sup> Justice Stevens later expressed similar concerns, noting that “[w]ithout a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.”<sup>33</sup>

Ultimately, the sex-conscious approach adopted by Title IX’s regulations—rather than a sex-blind, integrationist approach—produced the broad-based participatory results for which the statute is historically

---

30. CARPENTER & ACOSTA, *supra* note 28, at 75.

31. SUGGS, *supra* note 19.

32. BRAKE, *supra* note 16, at 26. Brake notes that scholars in the more liberal feminist tradition have criticized the “separate but equal” position:

Separating women from men in athletic competition sends the message that men are better athletes. After all, the judicial rationale for preserving sex-separation in sports . . . assumes that gender-blind selection would leave female athletes with fewer opportunities because they cannot hold their own against male athletes. This message . . . has led some supporters of gender equality to . . . argue[] that sex segregation in sports “fosters the myth of male supremacy” and “perpetuates the sex role stereotype of women as passive and weak.”

*Id.* at 29.

33. *See* O’Connor v. Bd. of Educ., 449 U.S. 1301, 1307 (Stevens, Circuit Justice 1980) (finding sex-based eligibility for athletic programs to be a legitimate criterion, despite a female student’s desire to try out for the high school boys’ basketball team).

famous.<sup>34</sup> Over time, “Title IX increased the supply of athletic opportunities which, in turn, created its own demand” among female students.<sup>35</sup>

*B. “Meaningful Access”: Disability Rights & Sports Inclusion*

In 1973, President Nixon signed into law the Rehabilitation Act, section 504 of which prohibits an “otherwise qualified individual with a disability” from being “excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any program or activity receiving Federal financial assistance” “solely by reason of her or his disability.”<sup>36</sup> These “program[s] or activit[ies]” include “all of the operations of . . . [an] instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.”<sup>37</sup> This legislation, while historically significant, was relatively limited in scope, as it only applied to entities receiving federal funds.<sup>38</sup> Thus, although the Rehabilitation Act covered schools receiving federal funds, it did not necessarily compel any action by high school athletic associations. But these private associations would later fall under the state-actor prong of the ADA.<sup>39</sup>

To expand the scope of federal disability-rights protections, the ADA was signed into law in 1990 with the stated goal of eliminating “discrimination against individuals with disabilities,”<sup>40</sup> which historically took the form of “intentional exclusion, . . . failure to make modifications

---

34. BRAKE, *supra* note 16, at 37 (“Title IX’s biggest success, and its most revolutionary impact in terms of producing cultural transformation, is the huge increase in the number of girls who grew up playing organized sports, with many of them continuing to do so into adulthood. This, much more than the accomplishments of a few elite athletes, has had the greatest impact on changing the place of women in society. Although celebrity athletes also have an important influence on the culture and provide role models for other female athletes, it is the advent of girls and women participating in sport in mass numbers that has been truly revolutionary.”).

35. ROGER I. ABRAMS, *SPORTS JUSTICE: THE LAW & THE BUSINESS OF SPORTS* 97 (2010).

36. 29 U.S.C. § 794(a) (2018).

37. 29 U.S.C. § 794(b) (2018).

38. Lisa A. Lavelle, Note, *The Duty to Accommodate: Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135, 1139 (1991) (noting that while the ADA applies to many private actors, the Rehabilitation Act was limited to entities receiving federal funding, such as schools and government contractors).

39. See *infra* note 48. However, the IHSA is covered by the Rehabilitation Act, as it does receive federal funds. Complaint at 7, *A.H. v. Illinois High School Ass’n*, 263 F. Supp. 3d 705 (N.D. Ill. 2017) (No. 1:16-cv-01959).

40. 42 U.S.C. § 12101(b)(1) (2018).

to existing . . . practices, [and] exclusionary qualification standards and criteria.”<sup>41</sup> The ADA defines “disability” as:

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>42</sup>

“Major life activities” include actions such as walking, standing, lifting, bending, and breathing.<sup>43</sup> As a national mandate, the ADA was designed to seek “equality of opportunity [and] full participation . . . for such individuals.”<sup>44</sup> Within this mandate, federal regulations gave additional clarification: covered entities were to offer these accommodations and services in the “most integrated setting appropriate.”<sup>45</sup> This integration must avoid paternalistic, “overprotective rules and policies.”<sup>46</sup> These inclusion objectives encompass sports.<sup>47</sup> Inclusion of persons with disabilities became sports law’s next civil rights frontier. These laws fully applied to interscholastic athletic associations, which are considered state actors because of their entwinement with other state entities.<sup>48</sup>

Over time, these two landmark pieces of disability-rights legislation have been interpreted jointly and consistently.<sup>49</sup> Both the Rehabilitation Act and the ADA have been interpreted as protecting the meaningful-access,

---

41. 42 U.S.C. § 12101(a)(5) (2018).

42. 42 U.S.C. § 12102(1) (2018).

43. 42 U.S.C. § 12102(2)(A) (2018).

44. 42 U.S.C. § 12101(a)(7) (2018).

45. 28 C.F.R. § 35.130 (2018).

46. 42 U.S.C. § 12101(a)(5) (2018); *see also* *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002) (“Congress had paternalism in its sights when it passed the ADA . . .”); *Knapp v. Nw. Univ.*, 101 F.3d 473, 485–86 (7th Cir. 1996) (finding that decisions related to persons with disabilities cannot rest on paternalistic concerns).

47. “[D]iscrimination against individuals with disabilities persists in such critical areas as . . . recreation . . .” 42 U.S.C. § 12101(a)(3).

48. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 290–91 (2001) (finding that statewide interscholastic athletic associations are state actors, particularly where their funds and leadership come primarily from public schools located within a state).

49. Federal courts construe and apply the ADA and section 504 of the Rehabilitation Act consistently with each other. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Allmond v. Akal Sec. Inc.*, 558 F.3d 1312, 1316 n.3 (11th Cir. 2009); *Enica v. Principi*, 544 F.3d 328, 338 n.11 (1st Cir. 2008); *Doe v. Salvation Army in the U.S.*, 531 F.3d 355, 357 (6th Cir. 2008). This is because “the relevant provisions and implementing regulations of the Rehabilitation Act and the ADA are ‘materially identical.’” *A.H. v. Ill. High Sch. Ass’n*, 881 F.3d 587, 592 (7th Cir. 2018) (quoting *Steimel v. Wernert*, 823 F.3d 902, 909 (7th Cir. 2016)).

opportunity, and participation rights of persons with disabilities.<sup>50</sup> As the Ninth Circuit noted in 2016, “A plaintiff may establish prohibited discrimination under section 504 and Title II [of the ADA] by showing that a public entity denied her a ‘reasonable accommodation’ necessary to achieve meaningful access to her education.”<sup>51</sup> Because of the generally limited amount of ADA precedent, defining “meaningful access” within the context of high school athletics requires understanding the term’s use in a broad variety of contexts.<sup>52</sup>

In an education context, federal courts have found that “meaningful access” requires “an opportunity to make use of [the provided benefit] that is roughly similar to that which is afforded other students. [Students with disabilities] need not succeed equally, but they must have an equivalent opportunity to succeed, or the benefit is not meaningful.”<sup>53</sup> Ultimately, “[a]n open door is not enough: the opportunities provided must be fair in light of the opportunities provided to people without disabilities.”<sup>54</sup> If a public entity’s policies even deter participation by a person with disabilities, meaningful access may have been denied because deterrence threatens “the ADA’s remedial goals of eliminating widespread discrimination against the disabled and integrating the disabled into the mainstream of American life.”<sup>55</sup> In *Celeste v. East Meadow Union Free School District*, the Second Circuit noted that architectural barriers can, like institutional policies, have

---

50. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (finding that section 504 of the Rehabilitation Act requires that “an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. . . . [T]o assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.”); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 291 (2d Cir. 2003) (holding that “injunctive relief to remedy a violation of the ADA or Rehabilitation Act is appropriate if it provides the injured plaintiff with ‘meaningful access’ to the programs or services to which the plaintiff is facially entitled”).

51. See *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1206 (9th Cir. 2016) (finding the district court had improperly dismissed the plaintiff’s claims and failed to provide access to education when it denied reasonable accommodations for art and musical educational opportunities).

52. See Leslie Pickering Francis & Anita Silvers, *Debilitating Alexander v. Choate: “Access” to Health Care for People with Disabilities*, 35 *FORDHAM URB. L.J.* 447, 453 (noting that “[t]hese cases that define ‘meaningful access’ involve a wide spectrum of issues, ranging from education, to transportation, to governmental facilities, and to health care”).

53. *Id.* at 460 (defining “meaningful access” in terms of the baseline experience that nondisabled persons enjoy).

54. *Id.* As a starting point, Francis and Silvers’s analysis centers not on the experience of the disabled person but on the experience of the nondisabled person. *Id.*

55. See *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 189 (2d Cir. 2013) (quoting *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008)). The court further noted that “deterrence constitutes an injury under the ADA.” *Id.* at 188.

a deterrent effect and therefore deny a person with disabilities meaningful access to programming.<sup>56</sup> There, a school's architectural barriers, which increased the plaintiff's walking time to practice by twenty minutes, detracted from his position as the football team manager, and reduced his physical education class time by half, thereby denying him meaningful access to the programs provided to all other students.<sup>57</sup>

Courts have similarly found that the meaningful-access mandate "requires just that—granting [prison] inmates *meaningful* participation in prison activities and programs."<sup>58</sup> Limited participation is insufficient if the limitation occurs because of a barrier to access.<sup>59</sup> Meaningful access requires the provision of "reasonable auxiliary aids and services to afford . . . an equal opportunity to gain the same benefit as [the plaintiff's] nondisabled peers."<sup>60</sup> Deterring participation is likewise a concern.<sup>61</sup> An accommodation attempt "is not plainly reasonable if it is so inadequate that it deters the plaintiff from attempting to access the services otherwise available to him."<sup>62</sup>

The Eighth, Ninth, and Eleventh Circuits have condensed meaningful-access analysis in an ADA and Rehabilitation Act context into a two-part evaluation. First, the allegedly offending entity must begin by "considering how their facilities [or benefits] are used by nondisabled guests."<sup>63</sup> Then, the allegedly offending entity must take "reasonable steps to provide disabled guests with a 'like experience.'"<sup>64</sup> Thus, access alone is

---

56. See *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 88 (2d Cir. 2010).

57. See *id.*

58. See *Wright v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 73 (2d Cir. 2016).

59. See *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (finding a failure to provide meaningful access when a deaf inmate had only limited participation in a prison's internal disciplinary process because the prison failed to provide an interpreter or other accommodation).

60. See *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013).

61. See *Wright*, 831 F.3d at 73.

62. See *id.* (finding that the New York Department of Corrections's blanket ban on motorized wheelchairs and provision of a manual wheelchair or rotating on-request mobility aids did not constitute a reasonable accommodation and thus failed to offer disabled prisoners the opportunity to have "meaningful participation" in prison activities, as required by the ADA and Rehabilitation Act).

63. *A.L. v. Walt Disney Parks & Resorts U.S., Inc.*, 900 F.3d 1270, 1296 (11th Cir. 2018) (applying the two-part meaningful-access test to Disney parks); see also *Argenyi*, 703 F.3d at 449 (applying the two-part meaningful-access test to educational programs); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (applying the two-part meaningful-access test to Disney parks).

64. See *Walt Disney Parks*, 900 F.3d at 1296.

insufficient; access must be meaningful.<sup>65</sup> For example, in *Kalani v. Starbucks Coffee Co.*, the Ninth Circuit applied this test when it affirmed the district court's finding of an ADA violation.<sup>66</sup> Although Starbucks had provided wall-facing accessible seating, it failed to provide interior-facing accessible seating.<sup>67</sup> This constituted a denial of a comparable experience because Starbucks "deprived its wheelchair-bound customers of the opportunity to participate, to the same extent as non-disabled patrons, in the social aspects of the 'full and rewarding coffee house experience' Starbucks Company consciously affords its able-bodied patrons."<sup>68</sup> Ultimately, "[a] facility, program, or piece of technology would not be accessible if it did not provide an experience for people with disabilities that is as close as reasonably possible to the experience of people without disabilities."<sup>69</sup>

### C. A.H. v. Illinois High School Association

In 2018, the Seventh Circuit was faced with the question of meaningful access in high school athletics.<sup>70</sup> A.H., a high school student athlete, filed suit against the IHSA, alleging the IHSA violated the ADA when it denied his requested disability accommodations.<sup>71</sup> A.H. has various physical disabilities, including spastic quadriplegia related to cerebral palsy.<sup>72</sup> A.H.'s disabilities limit the range of motion in his hip, knee, and ankle and cause an abnormal gait pattern and involuntary movements.<sup>73</sup> These disabilities directly affect his ability to run.<sup>74</sup> As an athlete, A.H. falls within the

---

65. See *Argenyi*, 703 F.3d at 448-49 (defining "meaningful access" as "an equal opportunity to gain the same benefit as [one's] nondisabled peers").

66. See *Kalani v. Starbucks Coffee Co.*, 698 F. App'x 883, 886-87 (9th Cir. 2017).

67. See *Kalani v. Starbucks Corp.*, 117 F. Supp. 3d 1078, 1081 (N.D. Cal. 2015), *vacated as moot in part* by 698 F. App'x 883 (9th Cir. 2017).

68. See *Kalani*, 698 F. App'x at 887.

69. Tiffany Lee, *Biometrics and Disability Rights: Legal Compliance in Biometric Identification Programs*, 2016 U. ILL. J.L., TECH. & POL'Y 209, 228 (2016) (noting that the ADA imposes a "high standard of accessibility," which requires provision of "equal enjoyment," rather than "mere access"); see also *Dopico v. Goldschmidt*, 687 F.2d 644, 652 (2d Cir. 1982) ("It is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.").

70. *A.H. v. Ill. High Sch. Ass'n*, 881 F.3d 587 (7th Cir. 2018).

71. *A.H. v. Ill. High Sch. Ass'n*, 263 F. Supp. 3d 705, 713 (N.D. Ill. 2017).

72. *Id.* at 711.

73. *Id.*

74. *A.H. v. Ill. High Sch. Ass'n*, 881 F.3d 587, 590 (7th Cir. 2018). The district court offered additional detail: "These disabilities adversely affect the basic mechanics of running, which require an athlete to balance, flex, extend, and propel his body by coordinating the movements on all four limbs."

International Paralympic Committee's (IPC) T-36 classification, a category of athletes with mobility and coordination impairments.<sup>75</sup> The IPC maintains these classes so that athletes "can compete with other athletes of like ability."<sup>76</sup>

Despite his disabilities, A.H. competed on Evanston High School's track and cross-country teams for his entire high school career.<sup>77</sup> Throughout his time on the team, he received track leadership awards.<sup>78</sup> A.H. additionally competed locally and nationally in adaptive sports competitions, including the 2016 U.S. Paralympic Trials.<sup>79</sup> He was "seen as an 'elite' and 'up and coming' athlete who may well compete internationally in the future."<sup>80</sup> In 2017, A.H.'s coach selected him to represent Evanston High School in the spring sectional's 1600-meter race, an event that qualifies athletes to the state championship.<sup>81</sup> The IHSA, the state's interscholastic high school athletics regulatory and organizing body, allows runners who either place first or second or achieve a specific qualifying time to advance to the state championship.<sup>82</sup> While the IHSA has distinct qualifying times and divisions for boys, girls, wheelchair athletes, and small

---

For example, A.H. cannot push off on his toes in the way that an able-bodied runner would." *A.H.*, 263 F. Supp. 3d at 711.

75. *Id.*

76. Appellant's Brief at 3 n.2, *A.H. v. Ill. High Sch. Ass'n*, 881 F.3d 587 (7th Cir. 2018) (No. 17-02456).

77. *A.H.*, 263 F. Supp. 3d at 711.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 711–12.

82. *A.H. v. Ill. High Sch. Ass'n*, 881 F.3d 587, 590–91 (7th Cir. 2018).

schools,<sup>83</sup> para-ambulatory track athletes<sup>84</sup> are subject to the same qualifying time requirements as able-bodied track athletes of their sex and school classification.<sup>85</sup> This is despite the fact that Illinois has one of the highest concentrations of para-ambulatory cerebral palsy athletes in the United States.<sup>86</sup> At the sectional competition, A.H. was unable to meet the IHSA's qualifying times, which even world-record holding runners with A.H.'s disability classification could not achieve.<sup>87</sup> IHSA Class 3A—A.H.'s high school's classification<sup>88</sup>—has a 100-meter dash state qualifying time of 0:10.99.<sup>89</sup> Meanwhile, the International Paralympic men's world-record holder for all ages in A.H.'s disability class, T-36, ran the 100-meter dash

---

83. Complaint, *supra* note 39, at 10–11. A.H., in his complaint, explained:

For example, IHSA maintains a policy regarding the grouping and seeding of state championships based on geography. . . . Through the use of geographic-based sectionals, IHSA seeks to advance the “geographic principle” that “the State Series is designed to determine a State Champion. The State Series is not intended to necessarily advance the best teams in the state to the State Final.”

Additionally, this geographic principle results in competitors in individual sports, like track and field and swimming, advancing to the state championship even when they do not meet the qualifying times.

IHSA also provides different qualifying standards for state championship meets in some sports depending on the number of students enrolled at a high school. . . . Smaller high schools have lower qualifying standards than larger schools. . . . IHSA also provides different qualifying standards based on gender. Male and female student athletes have different qualifying standards for state championship meets in every sport and event.

*Id.* (citations omitted).

84. The IPC categorizes athletes as para-ambulatory if they possess disabilities that impede “the ability to control legs [or] trunks” but they nonetheless have sufficient leg and trunk function to compete standing. This class contrasts with disabled athletes who must compete while sitting in a wheelchair. INTERNATIONAL PARALYMPIC COMMITTEE, EXPLANATORY GUIDE TO PARALYMPIC CLASSIFICATION: PARALYMPIC SUMMER SPORTS 8-9 (2015), [https://www.paralympic.org/sites/default/files/document/150915170806821\\_2015\\_09\\_15%2BExplanatory%2Bguide%2BClassification\\_summer%2BFINAL%2B\\_5.pdf](https://www.paralympic.org/sites/default/files/document/150915170806821_2015_09_15%2BExplanatory%2Bguide%2BClassification_summer%2BFINAL%2B_5.pdf) [<https://perma.cc/DD24-A8H7>]. Per the Paralympic Classification rules, “[t]he presence of an eligible impairment must be proven by means of medical diagnostic information . . . .” *Id.* at 3.

85. See *A.H.*, 263 F. Supp. 3d at 712.

86. Complaint, *supra* note 39, at 109.

87. *A.H.*, 263 F. Supp. 3d at 712 (“It is undisputed that even the world record holders for runners with A.H.'s disability classification would not meet IHSA's qualifying times to compete at the state track meet.”).

88. Appellant's Brief, *supra* note 76, at 4.

89. 2017 *Boys Track & Field Qualifying Standards*, ILL. HIGH SCH. ASS'N, <https://www.ihsa.org/documents/trb/2016-17/2017%20TRB%20Qualifying%20Standards.pdf> [<https://perma.cc/4BNE-8LBM>].

in 0:11.87.<sup>90</sup> The 200-, 400-, and 800-meter races all have similar disparities between the T-36 world-record holder and the IHSA's Class 3A qualifying times.<sup>91</sup>

After the sectional competition, A.H. made a reasonable accommodation request to the IHSA, seeking (1) the creation of state finals qualifying time standards for para-ambulatory athletes and (2) a para-ambulatory division for an annual IHSA five-kilometer race.<sup>92</sup> As A.H. noted in his complaint, at least three other states—California, Louisiana, and Oregon—have “similar time standard accommodations for [para-ambulatory] students in track and field.”<sup>93</sup> The IHSA's Executive Director denied the reasonable accommodation request, and the IHSA Board affirmed his decision on appeal.<sup>94</sup> Board members indicated that they believed granting A.H.'s reasonable accommodation request would “give him an unfair competitive advantage compared to able-bodied students because he would have a greater opportunity to advance to state championships from the section competition given the much smaller number of competitors he would face.”<sup>95</sup>

A.H. brought claims under section 504(a) of the Rehabilitation Act,<sup>96</sup> Title II of the ADA,<sup>97</sup> and Title III of the ADA,<sup>98</sup> arguing that the IHSA's

---

90. IPC SPORT DATA MANAGEMENT SYSTEM, WORLD PARA ATHLETICS WORLD RECORDS, <https://db.ipc-services.org/sdms/web/record/at/pdf/type/WR/category/out/gender/M> [<https://perma.cc/6XLE-425M>].

91. The T-36 200-meter world record time is 0:24:09, while the IHSA's Class 3A qualifying time is 0:22:26. The T-36 400-meter world record time is 0:53.31, while the IHSA's Class 3A qualifying time is 0:50.10. The T-36 800-meter world record time is 2:02.39, while IHSA's Class 3A qualifying time is 1:57.31. *See id.*; *see also* ILL. HIGH SCH. ASS'N, *supra* note 89.

92. A.H. v. Ill. High Sch. Ass'n, 263 F. Supp. 3d 705, 712 (N.D. Ill. 2017).

93. Complaint, *supra* note 39, at 12.

94. A.H., 263 F. Supp. 3d at 712-13.

95. *Id.* at 713.

96. *Id.* “No otherwise qualified individual with a disability in the United States . . . 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 . . .” 29 U.S.C. § 794(a) (2018).

97. *See A.H.*, 263 F. Supp. 3d at 713. “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2018).

98. *See A.H.*, 263 F. Supp. 3d at 713. “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 by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (2018).

policies denied him a “meaningful opportunity” to qualify for state finals.<sup>99</sup> The district court granted IHSA’s motion for summary judgment, and the Seventh Circuit affirmed on two grounds.<sup>100</sup> First, the Seventh Circuit rejected A.H.’s framing of the desired benefit—“a meaningful *opportunity* to qualify for State,”<sup>101</sup>—holding that A.H. must prove that “‘but for’ his disability, he would have been able to access the services or benefits desired,” which the court defined as *actual qualification* for the state championship.<sup>102</sup> The court found that A.H. did not establish that “he would qualify for State if he were not disabled” because “the demanding qualifying times . . . exclude able-bodied and disabled runners alike, leaving 90% of all runners, many thousands, in fact, from participating at State every year. Simply put, the qualifying times ensure that the State championship meet is reserved for the best and fastest runners in Illinois.”<sup>103</sup> Ultimately, the court argued that “the odds are overwhelming that runners like A.H. would not meet the qualifying times even if they were not disabled.”<sup>104</sup>

Second, the Seventh Circuit found that A.H.’s reasonable accommodation request was unreasonable as a matter of law.<sup>105</sup> Creating a new division or lowering qualifying times would—according to the majority—“make it easier for certain runners to qualify for State or medal in the [5K],” thus “fundamentally alter[ing] the nature of the” competitions.<sup>106</sup> This would “undermine the competitiveness” of the races and thus fundamentally alter the nature of the program.<sup>107</sup> The court defined the “essential nature” of a race as “run[ning] a designated distance in the shortest time possible.”<sup>108</sup> The court argued that granting the reasonable accommodation request “gives a disabled athlete an advantage over others,” which would fundamentally—and unreasonably—alter the essential nature of the sport, thereby defeating the reasonable accommodation request.<sup>109</sup>

---

99. *A.H.*, 263 F. Supp. 3d at 721. A.H. also brought an Equal Protection claim, which is not relevant for the purposes of this discussion. *Id.* at 713.

100. *See A.H. v. Ill. High Sch. Ass’n*, 881 F.3d 587, 590 (7th Cir. 2018).

101. *Id.* at 593 (emphasis added).

102. *Id.* (quoting *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 849 (7th Cir. 1999)).

103. *A.H.*, 881 F.3d at 594.

104. *Id.* at 594.

105. *Id.*

106. *Id.* at 594–95.

107. *Id.* at 594.

108. *Id.* at 595.

109. *Id.*

*D. Judge Rovner's Dissent*

Critiquing the majority's but-for requirement, Judge Rovner dissented that such causal tests in the disability context are "absurd pursuit[s]" that are impossible to prove and that undermine the purpose of the ADA.<sup>110</sup> Indeed, "trying to imagine a world in which A.H. is not disabled[] is not a fruitful exercise."<sup>111</sup> Judge Rovner concluded that granting A.H.'s reasonable accommodation request would offer him the opportunity for meaningful participation in high school track competitions.<sup>112</sup> It would not "alter the fundamental nature of the program," as the majority claimed.<sup>113</sup> Rather, the ADA and Rehabilitation Act require the IHSA to create a new para-ambulatory division and qualifying times for the same reason the IHSA created separate divisions for female runners and wheelchair athletes: athletes should race against their peers who share similar immutable characteristics.<sup>114</sup>

The program's "fundamental nature" already included mechanisms to grant runners other than Illinois's "absolute fastest" greater access to finals: Schools may only send to sectionals their top two runners—even if they have Illinois' five best runners—so that other schools with less "qualified" athletes can send students, too.<sup>115</sup> And the IHSA has lower qualifying times for women, wheelchair athletes, and athletes from small schools.<sup>116</sup> As Rovner noted, these "accommodations" have not "undermined" track's competitiveness, and neither would A.H.'s reasonable accommodation request.<sup>117</sup> As she stated, granting this reasonable accommodation request

---

110. *Id.* at 597 (Rovner, J., dissenting).

111. *Id.* "Had A.H. been born in an entirely different body, one that did not have cerebral palsy, would he be in the top 10% of runners? How can we know what his body would have been like but for his disability. [sic] Would it have been more muscular? Would his heart have been stronger? Would he be taller, with longer legs?" *Id.*

112. *Id.* at 599.

113. *Id.* at 598.

114. *Id.*

115. *Id.* at 599.

116. *Id.* at 598.

117. *Id.* at 598. Judge Rovner continued:

I wholeheartedly reject the notion that allowing separate divisions for women and disabled persons somehow "undermines the competitiveness" of a sporting event or denigrates the accomplishments of elite male athletes. This is akin to saying that allowing women to run in Olympic track events, where the qualifying times are [higher], "undermines the competitiveness" of the men's Olympic track

would offer A.H. “the meaningful opportunity to compete against his peer group for a chance to qualify for the state finals.”<sup>118</sup>

Judge Rovner analogized the creation of a separate para-ambulatory athlete category to the creation of separate categories for female athletes,<sup>119</sup> which was prompted in large part by Title IX.<sup>120</sup> She argued that the “essential nature” of track events is to run “in the shortest period of time *as compared to one’s peer group*.”<sup>121</sup> Thus, A.H.—like women before Title IX—sought to have the same opportunity to participate as his peers.<sup>122</sup> As Judge Rovner noted, “a non-disabled runner who has the magic mix of drive, determination, ability to train, good coaching, resources, genetic make-up, and luck has the opportunity, albeit small, to make it to the state finals.”<sup>123</sup> However, because of A.H.’s physical disability, no amount of these features or opportunities would allow him to reach the state championship.<sup>124</sup> Thus, the “benefit” that A.H. sought—and should be given—was “the meaningful opportunity to try,” not guaranteed qualification.<sup>125</sup>

## II. ANALYSIS

In the ADA and Rehabilitation Act contexts, defining meaningful access in terms of the Seventh Circuit’s but-for test undermines the spirit of

---

events. As A.H. argued, “under IHSA’s theory, allowing Serena Williams to play tennis at Wimbledon or Katie [Ledecky] to swim at the Olympics would somehow ‘strip’ those competitions of their identity and prestige, devaluing the achievements of Roger Federer and Michael Phelps.”

*Id.* (quoting Appellant’s Brief, *supra* note 76, at 32).

118. *Id.* at 599.

119. It is nonetheless important to note that federal anti-discrimination law affords different degrees of protection to the suspect classifications of sex and disability. *Compare* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (finding sex-based classifications subject to a heightened intermediate scrutiny), with *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (finding disability-based classifications subject to rational basis review).

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

121. *Id.* at 598. Judge Rovner continued to contest the majority’s framing of the essential nature of a track race as “running in the shortest period of time,” noting that “[n]o one would think it fair if Usain Bolt signed up to compete in the IHSA state finals despite the fact that he could surely run the designated course in the shortest period of time.” *Id.*

122. *Id.* at 597.

123. *Id.*

124. *See id.*

125. *Id.*

the anti-discrimination statutes. When viewed through the holistic body of American anti-discrimination law, *A.H. v. IHSA* was incorrectly decided because the court did not consider A.H.'s reasonable accommodation request under a meaningful-access standard. The ADA's preamble states that discrimination against persons with disabilities has often taken the form of exclusionary qualification standards.<sup>126</sup> When the Seventh Circuit rejected A.H.'s ADA and Rehabilitation Act claims, the court further entrenched the IHSA's exclusionary qualification standards. Rather than first considering how *nondisabled students* use the program,<sup>127</sup> the court instead focused on how *A.H.* uses the program. The court argued that A.H.'s claims failed because he had not proven that but for his disability,<sup>128</sup> he would have been able to access the services or benefits he desired: qualifying for the state track and field championship.<sup>129</sup> This but-for question cannot be effectively answered because—as Judge Rovner argued in her dissent—the court has no way to conclusively determine what an individual athlete's skill would have been without his disability.<sup>130</sup> Title IX's implementing regulations reject exactly this reasoning. Those regulations do not require women prove that *but for* their sex they would be able to effectively compete with men in order to merit access to a separate sports team.<sup>131</sup> The regulations instead correctly start with the premise that physiological differences matter in athletics in very tangible ways, and athletic divisions should account for these distinctions. These distinctions cannot always be crystallized or quantified. But, because they exist for a large swath of the population, they are presumed to be significant enough to merit protection. In female, wheeling, and other separate divisions, we do not consider the protected group as receiving an “unfair competitive advantage”<sup>132</sup> for their separate competitive category; nor should we for para-ambulatory athletes.

Rather than the but-for test, the Seventh Circuit should have applied the two-part Eighth, Ninth, and Eleventh Circuit analysis, which would have

---

126. See *supra* text accompanying note 41.

127. See *supra* text accompanying note 63.

128. See *supra* text accompanying notes 102–104.

129. A.H. argued that he only sought the opportunity to qualify, not qualification itself. See *supra* text accompanying note 101.

130. See *supra* text accompanying notes 110–111.

131. See *supra* text accompanying notes 18–19.

132. See *supra* text accompanying note 95.

used able-bodied student athletes as a baseline. In A.H.'s context, the IHSA track-and-field competitions are used by nondisabled students to race against their physiologically similar peers.<sup>133</sup> Boys and girls have separate qualifying times.<sup>134</sup> Small schools compete against small schools based on the assumption that there is less physiological diversity or are fewer resources in small schools.<sup>135</sup> A reasonable accommodation would ensure that A.H. has an experience "as close as reasonably possible to the experience" of his nondisabled peers.<sup>136</sup>

Analyzing A.H.'s case under the two-part analysis would have led to, as Judge Rovner argued in her dissent, truly *meaningful* access, upholding the original spirit of the ADA.<sup>137</sup> A.H. *was* denied a meaningful opportunity to qualify for Illinois state high school track and field finals. Other student athletes qualify against their peers; para-ambulatory student athletes are forced to race against fully ambulatory competitors. As Judge Rovner noted, A.H. did not seek guaranteed success.<sup>138</sup> He did not seek an "unfair competitive advantage."<sup>139</sup> He did not seek to fundamentally alter the nature of the program. The accommodation sought was merely the opportunity to compete against his peers, not a guarantee of victory.<sup>140</sup> Rather than considering the underlying purpose of the ADA, the Seventh Circuit instead opted for a narrow, blind, formalistic equality.

Even if the Seventh Circuit rejected the two-part test, other existing meaningful-access case law could have changed the outcome. The Second Circuit found that barriers that deter participation by persons with disabilities constitute a meaningful access violation.<sup>141</sup> To have truly *meaningful* access, persons with disabilities must have an "equal opportunity to gain the same benefit" as their nondisabled peers.<sup>142</sup>

---

133. See *supra* text accompanying note 121.

134. See *supra* text accompanying note 116.

135. See *supra* text accompanying note 116.

136. See *supra* text accompanying notes 63–69.

137. See *supra* text accompanying notes 110, 118.

138. See *supra* text accompanying note 125.

139. See *supra* text accompanying note 117.

140. See *supra* text accompanying notes 119–125. Further, had the Seventh Circuit granted A.H. a reasonable accommodation, even less-competitive para-ambulatory athletes would have benefitted, as they would have received the same accommodation. This is further evidence that A.H. was not attempting to change the fundamental nature of the program. Para-ambulatory athletes—regardless of ability—would have competed in this new category.

141. See *supra* text accompanying notes 56–62.

142. See *supra* text accompanying note 60.

Similarly, granting only *limited* participation to persons with disabilities denies them meaningful access.<sup>143</sup> While the Second Circuit has not explicitly adopted the two-part analysis other circuits have, it nonetheless upholds the spirit of the ADA: building a more inclusive American society. Even this less formal analysis would have required the Seventh Circuit to grant A.H.'s request. A.H.'s participation was limited because—no matter his skill, work ethic, or training—he could never access an able-bodied student's competitive opportunities. A.H., an elite, up-and-coming para-ambulatory athlete,<sup>144</sup> stood no chance in the face of fully able-bodied competitors.<sup>145</sup> For para-ambulatory athletes with less skill than A.H., the prospects are even more disheartening. Because of their disability, no level of individual skill would propel them over the finish line to success. The existing IHSA divisions and qualifying times thus deter para-ambulatory participation. The creation of a separate para-ambulatory division would ensure that it was individual talent and skill—not medical-ambulation categories—that determine athletic success.

Title IX's implementing regulations offer helpful legal and policy frameworks to further understand and interpret the ADA's meaningful-access mandate in a high school sports context. Like female athletes in the pre-Title IX era, disabled student athletes face challenges of low participation and limited opportunities to meaningfully compete against their peers. And like Title IX, the Rehabilitation Act and ADA place affirmative obligations on state actors in the high school sports context.<sup>146</sup> In Title IX's implementation, regulators explicitly rejected the opportunity to place a burden on women. Rather than require female student athletes to prove that but for their sex, they would have qualified for a men's team, regulators created a presumption in favor of separate opportunities. Thus, affirmative Title IX obligations are triggered when opportunities have been historically limited, there is sufficient interest, and true integration cannot achieve meaningful opportunity.<sup>147</sup> At the time of Title IX's passage, regulators and activists believed these protections were necessary to ensure that female student athletes—despite physiological differences—would

---

143. See *supra* text accompanying note 59.

144. See *supra* text accompanying notes 79–80.

145. See *supra* text accompanying notes 87–91.

146. See *supra* text accompanying notes 28–29, 45–48.

147. See *supra* text accompanying note 29.

have competitive opportunities equal to their male counterparts.<sup>148</sup> Because the ADA and Rehabilitation Act place “like experience” mandates on covered entities,<sup>149</sup> their application in the athletic context should look similar to that of Title IX.

Taken together, the Eighth, Ninth, and Eleventh Circuits’ two-part meaningful-access ADA test and Title IX’s implementing regulations both evaluate anti-discrimination requirements through the lens of substantive equality. In both Title IX and non-athletic ADA contexts, anti-discrimination is grounded in a substantive, rather than formal, understanding of equality.<sup>150</sup> Substantive equality seeks to ensure that historical inequities are *actually* removed. This philosophical framework is particularly important where discrimination is perpetuated by physiological differences between the protected class and the non-protected class. In those contexts, blind formal equality cannot fulfill the spirit of anti-discrimination civil rights legislation.<sup>151</sup> Rather, it will give the “hollow victory” that many women’s rights leaders feared would result during the earliest days of Title IX.<sup>152</sup>

The two-part meaningful-access test likewise ensures substantive equality. Under this test, covered entities must first ask how a program or facility is used by nondisabled persons.<sup>153</sup> Next, covered entities must take reasonable steps to ensure that disabled individuals have a like or comparable experience that is “as close as reasonably possible” to that enjoyed by nondisabled persons.<sup>154</sup> When applied to Starbucks coffee shops, the court required the company to provide the “full and rewarding . . . experience” it offered to nondisabled patrons.<sup>155</sup> This meant going beyond merely providing wheelchair-accessible seating, which would have satisfied demands for formal equality. Starbucks also had to provide wheelchair-accessible seating that tendered equivalent opportunities for socialization as those offered to nondisabled clientele.<sup>156</sup> Under the two-part test, equality is

---

148. *See supra* text accompanying notes 30–33.

149. *See supra* text accompanying notes 53–69.

150. *See supra* notes 16–17.

151. *See supra* notes 16–17.

152. *See supra* text accompanying note 30.

153. *See supra* text accompanying note 63.

154. *See supra* text accompanying note 69.

155. *See supra* text accompanying notes 66–69.

156. *See supra* text accompanying notes 68.

a holistic consideration. Title IX requires an analogous analysis. Covered entities consider how the program is—or was historically—used by male student athletes. For example, in track and field, male students raced against their physiologically similar peers. Next, the covered entities must take reasonable steps to ensure female students have a like experience: if there is interest in the sport, the covered entity must create a separate team.

The but-for test, a form of blind integration, fails to solve the inequities that the ADA and Rehabilitation Act sought to remedy because it ignores the group nature of the protected class. Before Title IX, blind integration—allowing female student athletes to try out for male teams—would not have solved pre-existing inequities.<sup>157</sup> The status quo of women's sports would have remained largely the same.<sup>158</sup> Substantive equality—the philosophical paradigm adopted by Title IX regulations—does not inquire about whether or not a particular female student athlete would have qualified for a team or won a state qualifying heat but for her sex. In that instance, it is quite possible that some would have. But such a but-for test would have ignored the need for female student athletes—as a group—to have the meaningful opportunity to compete against each other. The difference is even starker for para-ambulatory students, none of whom can qualify for the IHSA state championship.<sup>159</sup> Refusing to compare the *group* of nondisabled students with the *group* of para-ambulatory students falls short of the mandates of the ADA and Rehabilitation Act. Comparing opportunity by group—only one of which has the opportunity to qualify for the state championship—would have led the Seventh Circuit to conclude that IHSA was denying meaningful access. The individual focus of the but-for test ignores the group nature of Title IX, ADA, and Rehabilitation Act protections. As Title IX's implementing regulations demonstrated, accommodations for protected classes in the sports context must often come at the group level. High school athletic associations place similar group protections in other cases. There is generally an age limit on participation, preventing twenty-five-year-old men from racing against sixteen-year-old boys. Such an arrangement would deny the boys a meaningful opportunity to race against their peers.

Like the physiological differences between male and female athletes, the physiological differences between disabled and nondisabled student

---

157. See *supra* text accompanying notes 30–35.

158. See *supra* text accompanying notes 30–32.

159. See *supra* text accompanying notes 87–91.

athletes threaten meaningful athletic program access for para-ambulatory participants. In the 1970s, a but-for approach to women's sports equality would not have remedied the historic inequities that Title IX sought to solve.<sup>160</sup> A formal equality for female student athletes and a but-for test for disabled student athletes are effectively the same. They both start with the presumption that separate teams are not necessary. Meaningfully equivalent experiences are not the objective. Under these frameworks, female student athletes could try out for male teams, and para-ambulatory students could try out for able-bodied teams. These "opportunities" would fulfill the Title IX and ADA mandates, while boxing the two groups in from obtaining meaningful access or participation. Despite failing in large numbers to make male varsity teams or succeed in state competitions, female student athletes would be unable to complain: they would have achieved formal equality.<sup>161</sup> Similarly, under the but-for test, disabled student athletes face the impossible burden of convincing a judge of a non-existent, unknowable alternate reality in which they are fully able-bodied.<sup>162</sup> The but-for test takes the difference the ADA was designed to protect—disability—and uses it against para-ambulatory competitors. Rather than accepting a student's disability in its own right, the judge requires the student to prove an alternate universe, or he is penalized for not being "disabled enough."<sup>163</sup> Similarly, a formal equality for women under Title IX would have taken the statute's shield and used it as a sword. Women's physiological differences would have prevented them from *meaningfully* competing on men's teams, yet a formal equality approach to Title IX would have allowed this to pass anti-discrimination muster. If implemented through this structure, Title IX's goals would have likely been crippled by "sham" tryouts and hollow victories for women interested in playing sports.<sup>164</sup> Male athletic directors would likely have allowed women to try out against men—thus following the letter of the law—while ultimately cutting them for being too slow or

---

160. See *supra* text accompanying notes 25–27.

161. See *supra* text accompanying note 31.

162. See *supra* text accompanying note 110–111.

163. The IHSA offers a separate division for "wheelers," wheelchair-bound student athletes. See *supra* text accompanying note 83. But disabled athletes who nonetheless retain some degree of ambulation are effectively deemed "not disabled enough" to warrant protection and are forced to compete against fully able-bodied students, rather than their own physiologically similar peers. *Id.*

164. See *supra* text accompanying note 30.

too small to compete.<sup>165</sup> It would have been nearly impossible for women to definitively prove that *but for* some aspect of their sex, they would have made a team or won a tournament. Thus, for women's rights activists in the 1970s, a so-called "blind equality" was inadequate.

For both gender and disability, a blind equality approach improperly burdens the marginalized group. Blind equality would have burdened women by forcing them to consistently fail in tryouts against men. Conscious of the risks, regulators opted to create a sex-based classification to reduce the likelihood that "boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events."<sup>166</sup> By grounding the implementing regulations in substantive rather than formal equality, Title IX's regulators sought to level the playing field for women, granting them meaningful opportunity without promising equal outcomes. For female student athletes, a system of formal equality would have closely paralleled the sports regime A.H. faced. In that regime, female student athletes could have competed, but they would have had to compete against men and—thus—would not have had the meaningful opportunity to obtain similar benefits. The equality would have been very formal: male and female student athletes would have competed against each other for the same slots on the same teams. Recognizing that such a system would lead to little improvement in the life of women, regulators instead opted for the substantive equality that seeks to offer male and female student athletes the opportunity for equivalent experiences.<sup>167</sup> Similarly, discrimination against para-ambulatory student athletes such as A.H. has been historically based, at least in part, on substantive physiological differences that affect the protected class's ability to participate in a program or activity. At its core, the ADA was guided by this understanding: the physical differences between disabled and nondisabled persons affect how each group experiences life, interacts with society, and accesses programs and resources. Like Title IX, the ADA and Rehabilitation Act sought to reduce the severity of these effects—not by giving persons with disabilities a competitive advantage, but by leveling an inequitable playing field.<sup>168</sup> To

---

165. See *supra* text accompanying note 31.

166. See *supra* text accompanying note 33.

167. See discussion *supra* Section II.A.

168. See *supra* text accompanying notes 117–118.

fulfill the spirit of civil rights legislation, substantive—rather than formalistic—equality should be the legal and policy goal.

Because Title IX's implementing regulations only require covered entities to create separate teams when there is sufficient demonstrated interest, the creation of a separate division or qualifying times for para-ambulatory student athletes would not create an unwieldy administrative or financial burden. The ADA places limits on its integration mandate. Covered entities must provide reasonable accommodations to persons with disabilities, but they are not required to offer accommodations that change the fundamental nature of the program.<sup>169</sup> Thus, any reasonable accommodation for para-ambulatory student athletes must fall within these bounds. As A.H. established in his complaint, the creation of separate para-ambulatory divisions or distinct qualifying times has been successfully implemented in other states without substantial administrative or financial burdens.<sup>170</sup> The IHSA itself has even created a separate wheelchair racing division without these burdens.<sup>171</sup> Further, it would not open the floodgates for an endless number of new divisions. Such an onslaught of new divisions might change the fundamental nature of the program, as each student would essentially be competing against him- or herself. However, to be classified as a para-ambulatory athlete, the student must undergo a medical diagnosis, based on specific criteria.<sup>172</sup> These criteria serve a limiting function.<sup>173</sup> Title IX's regulations create a functionally equivalent limit. Administrators are only required to create a separate female team when the three eligibility criteria are triggered.<sup>174</sup> In the Title IX context, this regulation opened doors for women, but it did not open floodgates for administrators. In practice, it has not required the creation of a corollary female team for every kind of

---

169. See *supra* text accompanying note 113.

170. See Complaint, *supra* note 39, at 12 (noting that at least three states—California, Louisiana, and Oregon—have created “time standard accommodations for [para-ambulatory] students in track and field” that are similar to those A.H. requested).

171. See *supra* text accompanying note 114–116.

172. See *supra* text accompanying note 84.

173. While this Note does not advocate specific mandatory policy lines, there are a variety of options that state high school sports associations could adopt to prevent a floodgates effect. For example, states could require a critical mass of eligible athletes before creating a division, similar to Title IX's requirements. They could require the sport—e.g., track—to be directly affected by the athlete's para-ambulation. Thus, this would not necessarily require states to create separate para-ambulatory divisions for shooting sports and other sports unaffected by ambulation.

174. See *supra* text accompanying note 29.

sport played at every school in the country. It has not undermined the competitiveness of high school athletics. Thus, in A.H.'s case, applying this interpretive framework would have only placed an affirmative mandate on IHSA to create a new track division or separate qualifying times.

Courts should begin to use Title IX as guidance in crafting meaningful access mandates in high school sports. This legal analysis would not have created an affirmative mandate to implement new divisions or state championship qualifying times for every athletic competition in the state. The creation of new divisions or qualifying times would be administratively manageable because of the limiting factors of Title IX, which include prerequisites like "a reasonable expectation of . . . competition for [the] team" and "sufficient interest and ability . . . to sustain a viable team." Additionally, A.H.'s case would have required only the creation of one new division: para-ambulatory students.<sup>175</sup>

### III. PROPOSAL

Where a para-ambulatory student athlete voluntarily<sup>176</sup> requests the opportunity, federal courts should find that high school athletic associations have an affirmative obligation to create a separate division or qualifying times for para-ambulatory athletes. When delineating the ADA's meaningful access mandate's applicability to covered entities, courts should look to the two-part test and Title IX's implementing regulations as guidance for what constitutes truly *meaningful* participation, rather than the but-for test. In A.H.'s case and others, this means adopting a broad definition of "program or activity." For A.H., the "program" in which he sought to participate was the opportunity to compete against his peers.<sup>177</sup>

To fulfill the ADA's integration and inclusion mandate,<sup>178</sup> this interpretation should be one that empowers rather than restricts persons with

---

175. A female para-ambulatory athlete would likely be able to also assert a right to compete in a female para-ambulatory athlete division or qualifying time. Because this Note's analysis is limited to sex- and disability-based physical distinctions, separate divisions for student athletes would likewise be limited to those based on sex and physical disability (i.e., para-ambulation and wheeling), all umbrellas that encompass vast swaths of student athletes.

176. This is to ensure that paternalistic approaches, the historical norm, are not re-entrenched. *See supra* text accompanying note 46.

177. *See supra* text accompanying notes 118–122.

178. *See supra* text accompanying note 45–47.

disabilities. As they do now, these athletes should still have the opportunity to try out for the fully able-bodied team or race in the fully able-bodied division. The ADA was intended to open doors, not close them. Thus, nothing in this proposal requires a para-ambulatory athlete to compete in that division or under those qualifying times. Such a requirement would violate the ADA's mandate that covered entities provide these services in the most integrated manner possible.<sup>179</sup> Similarly, Title IX requires schools to allow girls to try out for boys' teams, although that requirement does not apply to contact sports.<sup>180</sup> Thus, Title IX strikes a balance between the goals of integration and substantive equality, which should inform judges as they interpret the balancing act of the ADA.

Eligibility for participation in a para-ambulatory division or competing under distinct qualifying times should be based on medical evaluations and objective physical criteria.<sup>181</sup> As in other para-ambulatory athletics contexts, these criteria will ensure equity and fairness among competitors. They will also serve as objective criteria defining the "peer group" against whom para-ambulatory athletes would compete.<sup>182</sup>

Nothing in this proposal prevents persons with disabilities from seeking other, individualized reasonable accommodations—such as modified starting blocks—to be able to compete in the fully able-bodied division or qualifying time. These participatory decisions must be made autonomously by each individual para-ambulatory student athlete. While this paper analyzed the track-and-field context—through the lens of *A.H. v. IHSA*—the proposal can be applied to other individual athletic events in which ambulation is implicated, such as swimming, while other events, like shooting sports, would likely not be implicated. This proposal offers high school athletic associations a means to fulfill their ADA-based meaningful-access mandate.

#### CONCLUSION

In Illinois—and in every state without the protections A.H. sought—para-ambulatory high school student athletes are denied meaningful access

---

179. See *supra* text accompanying notes 45–47.

180. See *supra* text accompanying note 24.

181. See *supra* text accompanying note 84.

182. See *supra* text accompanying notes 118–122.

to an activity in which their able-bodied peers routinely participate. While able-bodied student athletes compete for slots in the state championship, para-ambulatory athletes like A.H. face a different reality. Regardless of effort, practice, or drive, their disabilities are an absolute bar to state championship qualification.<sup>183</sup> The Seventh Circuit's analysis improperly burdens these para-ambulatory students with a but-for test.<sup>184</sup> Instead of this analysis, para-ambulatory students should have the presumptive opportunity to compete against their peers, either in a separate division or with distinct qualifying times.

The right to compete against one's physiological peers is a right that has been enshrined for female student athletes through Title IX.<sup>185</sup> Prior to Title IX's passage, female athletes could either compete against male athletes or not compete at all. But with Title IX's implementing regulations, results-oriented equality—rather than “formal gender neutrality”—ensured that female student athletes would have opportunities meaningfully equivalent to their male counterparts.<sup>186</sup> Prior to Title IX, physiological differences between men and women prevented women from having a meaningful opportunity to compete. By creating separate teams and divisions, Title IX's implementing regulations ensured that women have an equal opportunity to compete—and win. Faced with similar historic disadvantages, disabled student athletes should be given similar protections. The holistic body of related civil rights law—from Title IX to the ADA and Rehabilitation Act to existing disability-rights case precedent—demands that disabled students be given *meaningful* access.<sup>187</sup> The meaningful-access standard ensures that civil rights enforcement is not merely an empty, formalistic shell. Rather, meaningful access demands courts and covered entities critically evaluate the experience of able-bodied persons and then work to offer disabled persons a like experience.<sup>188</sup>

American civil rights law stands at a crossroads. Federal courts shaping the future of meaningful access for persons with disabilities have two paths from which to choose. The Seventh Circuit chose the path of empty,

---

183. See *supra* text accompanying notes 86–90.

184. See *supra* text accompanying notes 102–104.

185. See *supra* text accompanying note 29.

186. See *supra* text accompanying note 18.

187. See discussion *supra* Sections II.A–B.

188. See *supra* text accompanying notes 63–64.

formalistic equality when it adopted the but-for test.<sup>189</sup> Substantive equality for persons with disabilities remains elusive within that jurisdiction, but the two-part analysis employed by other circuits offers hope that substantive equality may win the day. Ultimately, federal courts can do for disabled student athletes what federal regulators did for female student athletes: use the power of civil rights law to ensure meaningful opportunity. Over time, if substantive equality prevails, disabled students may have access to the revolutionary power of vast numbers of a historically marginalized group participating in sports.<sup>190</sup>

---

189. *See supra* text accompanying notes 102–104.

190. *See supra* text accompanying notes 34–35.

