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DEBILITATING *ALEXANDER V. CHOATE*: "MEANINGFUL ACCESS" TO HEALTH CARE FOR PEOPLE WITH DISABILITIES

Leslie Pickering Francis & Anita Silvers***

INTRODUCTION

Since 1985, *Alexander v. Choate*[1] has stood for the proposition that financially-motivated limitations and cutbacks in state-provided health care services imposing significant negative impacts on people with disabilities are very difficult to challenge successfully under the Rehabilitation Act of 1973 ("Rehabilitation Act")[2] and, for similar reasons, under the Americans with Disabilities Act of 1990 ("ADA").[3] During the twenty years following the *Choate* decision, acquiescence in this proposition has largely prevailed.[4] This discouraging picture, however, reads *Choate* far too expansively. In this Article, we develop a strategy for addressing and, we hope ultimately, circumscribing *Choate*'s influence and debilitating its effects.

Part I of this Article analyzes in detail the Court's decision in *Choate.* Part II then establishes how a wide array of cases, both in and out of the health care area, have explained the meaningful access requirement under the ADA, which the *Choate* Court analyzed in terms of the equal opportunity to make use of or enjoy a benefit or service. Part III suggests, in light of several examples, that understanding meaningful access in terms of equality of opportunity may provide a blueprint for success despite *Choate.* Finally, this Article concludes that the meaningful access standard should be understood in terms of fair equality of opportunity. This

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1. Alexander v. Choate, 469 U.S. 287 (1985).
2. 29 U.S.C.A § 701 (West 2008).
3. 42 U.S.C.A § 12101 (West 2008).
4. *See, e.g.*, Mary Crossley, *Becoming Visible: The ADA's Impact on Health Care for Persons with Disabilities*, 52 ALA. L. REV. 51 (2000).

reading brings *Choate* in line with Congress's goal in passing the ADA to provide equal opportunity for people with disabilities.[5]

I. *ALEXANDER V. CHOATE*

In 1980, Tennessee was facing the all-too-familiar story of a state Medicaid program that was costing more than legislators wished to pay for it.[6] Tennessee therefore proposed a limit of fourteen hospital days per year for each Medicaid patient.[7] Although this limit would have affected all Medicaid recipients and thus was equal in this formal sense, it would have had significant deleterious consequences for a greater percentage of Medicaid recipients with disabilities.[8] The undisputed statistical evidence was that in the year before the proposed limit, 27.4% of all users of hospital services with disabilities who received Medicaid required more than fourteen days of care, while only 7.8% of non-disabled users required more than fourteen days of inpatient care—a three-fold difference.[9] Tennessee Medicaid recipients brought a class action suit and challenged the limit under section 504 of the Rehabilitation Act's prohibition of discrimination against people with disabilities in programs receiving federal funding.[10] The proposed fourteen-day limit was actually a reduction from an existing state limit of twenty days per-year per-Medicaid recipient, and the challengers also argued that any such flat limit violated section 504.[11] As part of their challenge, the plaintiffs proposed instead a per-episode-of-illness limit, fashioned along the lines of good medical care, as a distributive approach to reduce Tennessee Medicaid costs without unduly burdening people with disabilities.[12]

The Supreme Court, in a unanimous decision written by Justice Marshall, upheld the Tennessee plan to reduce Medicaid expenditures.[13] The decision, as we shall argue, both reaffirms the possibility that section 504 permits litigation challenging programs with disparate impact on people with disabilities and reaches the conclu-

5. For this reading of the ADA, see generally AMERICANS WITH DISABILITIES: IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS (Leslie P. Francis & Anita Silvers eds., 2000).

6. *Choate*, 469 U.S. at 289.

7. *Id.*

8. *Id.* at 290.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 291.

13. *Id.* at 288, 309.

sion that the *Choate* plaintiffs had not shown the type of disparate impact that would allow their lawsuit to succeed. Subsequently, commentators have paid less attention to the positive affirmation the Court expressed in *Choate.*[14]

The Court began its analysis in *Choate* by rejecting outright the idea that section 504 prohibits only intentional discrimination.[15] Thoughtlessness, indifference, and "benign neglect" were, in the view of the Court, critical causes of the wrongs against people with disabilities that Congress had sought to remedy with section 504.[16] Much of the conduct Congress sought to change with section 504—architectural barriers, mal-designed systems of public transport, and special educational and rehabilitation services—was not the product of intentional discrimination but of patterns of failure to see harms by effect as parallel to harms by design.[17] Thus, the Court determined that patterns of exclusion, even if unintentional, may violate section 504—holding open the door to disparate impact litigation under section 504 in health care and in other arenas.[18]

The Court, however, also rejected the contention that section 504 was intended to reach every case of disparate impact on people with disabilities in federally funded programs.[19] Section 504 was meant to be kept "within manageable bounds."[20] And so the difficulty for the *Choate* plaintiffs was that section 504 did not assure equal results for the disabled and the non-disabled alike.[21]

To sketch the parameters of those "manageable bounds," the Court turned to its previous decision in *Southeastern Community College v. Davis*,[22] which held that section 504 of the Rehabilitation Act did not require the college to compromise its program integrity by admitting a student who was not otherwise qualified for admission.[23] "Otherwise qualified" students must receive "reasonable accommodations" to afford them "meaningful access," but additional modifications in programs were not required.[24] Applying

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14. *See, e.g.*, Crossley, *supra* note 4.
15. *Choate*, 469 U.S. at 292-93.
16. *Id.* at 295.
17. *Id.* at 297.
18. *Id.* at 293-94.
19. *Id.* at 299.
20. *Id.*
21. *Id.* at 306-07.
22. 442 U.S. 397 (1979).
23. *Id.* at 414.
24. *Choate*, 469 U.S. at 301.

this reasoning to the circumstances in *Choate*, the Court concluded that the fourteen-day limit did not eliminate "meaningful access."[25]

It is important to note that there is dissimilarity between *Davis* and *Choate* that is not made explicit in the Court's reasoning here. In *Davis*, the analysis was about whether the student in question was otherwise qualified.[26] The plaintiff in *Davis* was a hearing impaired student at the College who sought admission to its nursing program.[27] The College refused her admission on the basis that she could not safely participate in its clinical training program and would not be able to practice as a registered nurse.[28] Modifications in the program to allow her to participate would prevent her from achieving the program's learning objectives because she still would not be qualified to practice as a nurse.[29] In *Choate*, there was no question about whether Tennessee Medicaid patients were "otherwise qualified" to receive health care services; the issue was whether, with the fourteen-day limit, they were provided meaningful access to the services they were given.[30] The challengers in *Choate*, of course, argued that limiting people with disabilities to fourteen days of hospitalization prevented them from having "meaningful access" to health care.[31]

To the claim that the fourteen-day limit would not provide meaningful access, the Court replied that both disabled and non-disabled Medicaid recipients would receive fourteen days of care: each, alike, had "meaningful" access to that benefit.[32] Tennessee's Medicaid, moreover, should not be regarded as providing adequate health care, or even adequate health, but as providing a "package of health care services," among which fourteen days of hospitalization were included.[33] The Court's reasoning here rested on a specific understanding of the benefit in question: Tennessee had chosen to provide a limited benefit—fourteen hospital days—and this benefit was available, in the same way, to both the disabled and the non-disabled alike.[34]

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25. *Id.* at 306-09.
26. *Davis*, 442 U.S. at 400.
27. *Id.* at 400.
28. *Id.* at 401-02.
29. *Id.* at 401.
30. *Choate*, 469 U.S. at 302.
31. *Id.*
32. *Id.*
33. *Id.* at 303.
34. *See id.* at 302 ("The new [fourteen-day] limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its

To the claim that fourteen days—or indeed any across the board—limit on hospital days fails to provide meaningful access because it resulted in a state Medicaid plan that disparately affected people with disabilities, the Court responded that in enacting section 504, Congress had not intended substantial changes in state Medicaid plans.[35] Although Congress had intended changes that would eliminate other barriers inherent in system design, the Court found that barriers implicit in state-funded health plans were not among them, stating that:

> Congress did focus on several substantive areas—employment, education, and the elimination of physical barriers to access—in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high. But nothing in the pre- or post-1973 legislative discussion of section 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid.[36]

Section 504 was not a guarantor of equal health or even equal access to health care; it was instead a prohibition on exclusion of people with disabilities from health care provided to others.[37] Congress's focus in the legislative history of section 504 on the areas of employment, education, and elimination of physical barriers is understandably relevant to the purpose of the Rehabilitation Act, which is to assist people with disabilities in qualifying for the workforce.[38] The ADA, by contrast a civil rights act, is much broader and more basic in purpose than legislation focused on rehabilitation services.

The core of the Court's approach in *Choate* was that the fourteen-day limit applied to the disabled and the non-disabled alike.[39] There were no barriers to this benefit as everyone could use it.[40] Therefore, everyone had "meaningful access" to the benefit provided, or so it might seem. There is, however, a gap in this reasoning. A fourteen-day hospital stay is "meaningful" for those whose conditions can be adequately treated within a fourteen-day period.

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face, does not distinguish . . . on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having.").

35. *Id.* at 304.

36. *Id.* at 306-07.

37. *Id.* at 303-04.

38. *Id.* at 306-07.

39. *Id.* at 309.

40. *Id.*

For those whose conditions require more, such as patients requiring high-dose chemotherapy plus stem cell rescue, fourteen days of hospitalization might as well be no benefit at all. Limiting hospitalization to fourteen days thus provides meaningful benefits to many, but benefits that are not meaningful at all to others. The question regarding people with disabilities, then, would be whether such people are significantly more likely to receive a meaningless benefit because of the limit than are people without disabilities. This question presented a difficult issue for the plaintiffs in *Choate*.

At trial, the plaintiffs in *Choate* brought forth two types of evidence in an attempt to show that the benefit received by people with disabilities was "meaningless." One type of evidence was statistical and involved a disparity between the lengths of hospital stays of people with and without disabilities, with a significantly higher percentage of the former than of the latter requiring more than fourteen days of hospitalization.[41] The other type of evidence was testimony from physicians that certain individual patients required more than fourteen hospital days for adequate treatment: patients with Guillain-Barre syndrome,[42] acute leukemia,[43] or chronic bronchitis, for example.[44]

Neither of these types of evidence, however, was particularly convincing as to whether the facially-neutral fourteen-day limit excluded people with disabilities from a meaningful benefit. Over seventy percent of people with disabilities requiring hospitalization were discharged within stays of fewer than fourteen days,[45] and there was no showing that those who were hospitalized for longer than fourteen days could not have received important beneficial treatment had the limit been shorter. The physicians testifying about their individual patients who required longer stays did not limit their analysis to patients with disabilities. The *Choate* plaintiffs, in short, did not argue convincingly that people with disabilities were excluded from a meaningful benefit within the limit. Thus, the Court was left with a record that suggested the plaintiffs were making a more general challenge to funding limits that would adversely affect care for all Medicaid recipients, rather than challenging the policy because people with disabilities were denied a

41. Joint Appendix at 189-95, Alexander v. Jennings, 467 U.S. 1248 (1984) (No. 83-727) (letter from William B. Shaw to Ben C. Crim).

42. *Id.* at 129 (deposition of George Montouris, M.D.)

43. *Id.* at 132 (deposition of Richard Stein, M.D.)

44. *Id.* at 140 (deposition of Joseph M. Stinson, M.D.).

45. *Id.* at 189-95 (letter from William B. Shaw to Ben C. Crim).

meaningful benefit of the kind that was available to people without disabilities.

Choate does not define "meaningful benefit." While it is clear from the decision that "no benefit" would fail the "meaningful" test and that equality of results is more than would be required, the decision did not go beyond these sketchy boundaries.[46] Instead, *Choate* leaves open a space in which "meaningful access" can be defined. Crystallizing a strategy for defining this space is, we argue here, the critical step for plaintiffs to undertake in seeking to debilitate the effects of *Choate.*

II. Understanding Meaningful Access as Equal Opportunity to Use

Both before and after *Choate*, court decisions have explained "meaningful access" in terms akin to the "equal opportunity" to make use of or enjoy a benefit or service.[47] Such a standard is far from requiring maximal benefit or equality of results, but it is not a negligible "any minimal access" standard either.[48] These cases that define "meaningful access" involve a wide spectrum of issues, ranging from education, to transportation, to governmental facilities, and to health care. They include a robust range of cases that read *Choate* as requiring plaintiffs to show that people with disabilities do not have an equal opportunity to use a benefit in the manner the state has provided it. These cases thus suggest a strategy of success for plaintiffs seeking to argue that access is not "meaningful."

A. The Non-health Care Cases

The understanding of "meaningful access" has been litigated in several areas of law outside of health care. We start with some of the most illuminating analogies in areas outside of health care—cases from education, transportation, and the use of public facili-

46. For an analysis of "meaningful access" that discerns a tripartite test of (1) no particularly exclusionary effect, (2) facial neutrality, and (3) no inability to benefit meaningfully, see Alexander Abbe, Comment, *"Meaningful Access" to Health Care and the Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act*, 147 U. Pa. L. Rev. 1161, 1187 (1999).

47. Abbe contends that "meaningful access" should be understood as "adequate access." *Id.* at 1198. His argument is based solely on the goals of the Rehabilitation Act and the ADA as bringing people with disabilities into the mainstream of American life, and, because "adequate access" is undefined, risks confusion with equality of results. *Id.*

48. *Id.* at 1188.

ties—and then turn to the health care cases themselves. In these other areas of law, courts have held that if public entities are required to provide services or choose to do so, they must provide them in a manner that allows meaningful access to recipients with disabilities. Put summarily, "meaningful access" requires access that enables recipients of services to benefit from them in a reasonable way—in a way comparable to the opportunities others have to use them—but not access that is of the kind recipients desire, of the kind that would be most beneficial to them, or even access that meets a determined set of minimal standards. "Meaningful access" is understood comparatively, and not in terms of the extent to which the access satisfies the desires of the person with disabilities. Even so, as we shall see, "meaningful access" in the sense of "equal opportunity to benefit" may be very important for helping to understand the contemporary significance of *Choate* for access to health care for people with disabilities.

1. *Preliminary Complications*

Current Supreme Court jurisprudence with respect to civil rights statutes has introduced several complications into cases in this area that are not relevant to the understanding of "meaningful access," but that must be addressed and then set aside at the outset of our analysis in order to avoid confusion with the main subject of our argument. First, the Court has distinguished "disparate treatment" from "disparate impact" cases under statutes that provide for nondiscrimination in federally funded programs. The first such statute was Title VI of the Civil Rights Act of 1964,[49] which prohibits discrimination on the basis of race, color, or national origin in federally funded programs or activities. Section 601 of Title VI prohibits discrimination in federally funded programs;[50] section 602 authorizes regulations implementing section 601.[51] The Supreme Court has concluded that section 601 of Title VI prohibits intentional discrimination only, and has (in sharply-worded dicta penned by Justice Scalia) suggested that the section 602 implementing regulations prohibiting programs with disparate impact go beyond what Congress authorized under Title VI.[52] Although section 504 of the Rehabilitation Act,[53] prohibiting discrimination on the basis

49. *Pub. L. No. 88-352, 78 Stat. 252 (1964).*
50. 42 U.S.C.A. § 2000d (West 2007).
51. *Id.* § 2000d-1.
52. Alexander v. Sandoval, 532 U.S. 275, 280, 288-89 (2001).
53. 29 U.S.C.A. § 794 (West 2006).

of disabilities in federally funded programs or activities, was in some respects modeled on Title VI,[54] section 504's prohibition extends to exclusions and benefits denials, as well as outright discrimination. Litigation under section 504, therefore, can allege "exclusions" or "denials" beyond what may now be the intentional disparate treatment limitation imposed by the Court on section 601 of Title VI.[55] This analysis of section 504 would also apply to Title II of the Americans with Disabilities Act's requirement that state and local governments not exclude people with disabilities from participating in or benefiting from their programs, services, and activities solely on the basis of disability.[56]

Second, the Court has held that private rights of action are limited in disparate impact cases.[57] Suits under Title VI alleging disparate impact may not be brought by private parties.[58] Suits under the Rehabilitation Act or Title II of the ADA alleging exclusion from or denial of benefits, however, are not disparate impact suits, although they do not allege intentional discrimination, either. Courts have continued to permit private rights of action under these statutes,[59] and the Court has not ruled definitively on this issue.

Finally, state (but not local governmental) sovereign immunity is implicated in these cases as well. The Eleventh Amendment protects state sovereign immunity, but Section 5 of the Fourteenth Amendment limits this protection by giving Congress power to enforce its provisions.[60] The Court has understood this enforcement

54. Olmstead v. L.C. *ex rel* Zimring, 527 U.S. 581, 590 n.4 (1999).

55. *See, e.g.*, John D. Briggs, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 DUKE L.J. 197, 211 (1986) ("[T]he statutory scheme that Congress created acknowledges the modest role that intent plays in discrimination against the handicapped.").

56. *See* Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004) ("Title II does more then prohibit public entities from intentionally discriminating against disabled individuals."); Henrietta D. v. Bloomberg, 331 F.3d 261, 276-77 (2d Cir. 2003) ("A plaintiff can prevail either by a showing of 'discrimination' or by showing 'deni[al of] the public benfits' of public services.") (citing 42 U.S.C.A. § 12132 (West 2007)).

57. *Sandoval*, 532 U.S. at 285.

58. *See, e.g.*, *id.*

59. *See, e.g.*, *City of Sandusky*, 385 F.3d at 907 (concluding that "28 C.F.R. § 35.151 effectuates a mandate of Title II and is therefore enforceable through the private cause of action available under the statute").

60. U.S. CONST. amend. XIV, § 5.

power somewhat narrowly,[61] although the scope of its decisions in this area remains contested.[62]

Although these questions—the disparate impact regulations under Title VI, private rights of action, and the extent of abrogation of state sovereign immunity—are difficult ones for civil rights litigants, they are not germane to our question here: the meaning of "meaningful access." Understanding of "meaningful access" set out by courts in cases that have foundered on these other grounds—for example, cases that unsuccessfully claimed the availability of a private right of action—remain good law. We will use some of these cases in the analysis to follow, disentangling courts' understanding of "meaningful access" from their responses to these other issues where they occur.

2. *Meaningful Access to Education*

With respect to meaningful access, an initial leading case was *Lau v. Nichols*,[63] an education case decided by the Supreme Court in 1974, a full decade before *Choate*, and recognized by the Court in *Choate*. In *Lau*, the plaintiffs were a class of 1800 non-English speaking students of Chinese ancestry and the defendant was the San Francisco Unified School District.[64] The District received federal financial assistance and the suit was brought under Title VI of the Civil Rights Act.[65] The plaintiffs alleged that San Francisco's failure to do anything but instruct them in English violated Title VI.[66] Without urging a specific remedy on the District, the Court suggested that the District "apply its expertise to the problem"[67] because classroom experiences that were "in no way meaningful" and "incomprehensible" made "a mockery of public education" and were therefore in violation of Title VI's prohibition of discrimination in federally funded programs.[68] Chinese-speaking students,

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61. *See generally* Tennessee v. Lane, 541 U.S. 509 (2004).

62. *See generally* Anita Silvers & Leslie P. Francis, *A New Start on the Road Not Taken: Driving with* Lane *to Head Off Disability-based Denials of Rights*, 23 WASH. U. J.L. & POL'Y 33 (2007).

63. 414 U.S. 563 (1974).

64. *Id.* at 569-70 (Stewart, J., concurring).

65. 42 U.S.C.A. § 2000d (West 2007).

66. *Lau*, 414 U.S. at 565-67.

67. *Id.* at 565.

68. *Id.* at 566. *Lau* has been questioned for assuming that § 601 of Title VI, 42 U.S.C.A. § 2000d (West 2007), permits disparate impact challenges to federally funded programs, as well as for permitting private rights of action in such suits. Alexander v. Sandoval, 532 U.S. 275 (2001). *Sandoval* leaves open whether the regulations implementing Title VI, authorized by Title VI § 602, 42 U.S.C.A. § 2000d-1 (West

sitting in class without any comprehension whatsoever, could not gain from their education and thus lacked "meaningful access" to it.

Lau was cited three times in *Choate*. The first reference to *Lau* was in support of the claim that litigation under section 504 is not limited to intentional discrimination, but may also include policies with disparate impact on people with disabilities.[69] The second reference occurs in support of the claim that in some circumstances special adjustments may be necessary to provide meaningful access for people with disabilities; merely showing that a policy is neutral with respect to recipients of the benefit will not suffice to show that access is meaningful.[70] The third and last reference to *Lau* in *Choate* occurs when the Court concludes that budget cutbacks in state Medicaid programs that differentially impact people with disabilities are not the kind of exclusions that Congress meant to prohibit by section 504.[71] *Lau* was thus among the cases turned to by the Court in *Choate* in recognizing the boundaries of section 504 disparate impact litigation; while not defining "meaningful access" in *Choate*, the Court clearly left room for the "equal opportunity" approach set out in *Lau* and developed in other cases both before and after *Choate*.

Shortly after *Lau* and before *Choate* had been decided, the Ninth Circuit entertained another "meaningful access" case, in which Mexican-American and Yaqui Indian parents challenged an Arizona school district's unwillingness to provide bicultural education for their children.[72] In *Guadalupe Organization*, parents sought education that took into account their children's special educational needs and that reflected, even minimally, the historical and cultural contributions of their people. Because the remedial English-language instruction provided was sufficient for the students to benefit meaningfully from their education, the *Guadalupe*

2007), may extend to prohibit practices that have a disparate impact as a method of enforcing § 601; however, as we have indicated, Justice Scalia has suggested that they may not. *Sandoval*, 532 U.S. at 282. The *Sandoval* decision, however, does not question the basic contention in *Lau* that "meaningless" access would violate the disparate impact regulations.

69. Alexander v. Choate, 469 U.S. 287, 293 n.10 (1985).

70. *Id.* at 301 n.21.

71. *Id.* at 307 n.32. Here, the *Choate* Court cites *Lau* to assume, for the sake of argument, that federal agencies may prohibit certain disparate impacts to further the purpose of § 504. *Id.*

72. Guadalupe Org. v. Tempe Elementary Sch. Dist., 587 F.2d 1022 (9th Cir. 1978).

Organization court held that *Lau*'s requirement of meaningful access was met.[73]

Lau and *Guadalupe Organization* alleged racial and national origin discrimination under Title VI. Other education cases have been brought under the federal statutes providing for educational opportunities for people with disabilities, the Education of All Handicapped Children Act, and the subsequent Individuals with Disabilities Education Act. Still further education cases have been litigated under section 504 of the Rehabilitation Act and Title II of the ADA.

Perhaps the closest analogy to the situation of Chinese-language-only speakers in an English-only classroom is that of American Sign Language ("ASL") speaking people with hearing impairments in a classroom without sign interpretation. The leading case applying *Choate* to this circumstance occurred in 1990.[74] The University of Alabama at Birmingham had decided not to provide the "costly" assistance of sign interpretation to deaf students, but instead to give the students information about how to apply for aid to fund the services they require, thus leaving students who did not qualify for aid on their own to pay for interpretive services by themselves.[75] The University contended that, under *Choate*, it was not required to guarantee students equal results, but only to provide them with equal opportunity—an open door to the University.[76] In the University's view, it had done that—even though students with special hearing needs might find themselves paying more to succeed at that opportunity.[77] Rejecting this argument, the Eleventh Circuit distinguished the facts here from those in *Choate* by stating that the "lack of an auxiliary aid effectively denies a handicapped student equal access to his or her opportunity to learn."[78] In *Choate*, by contrast, everyone had the opportunity to benefit from the fourteen hospital days they were allotted. The University of Alabama at Birmingham's policy left deaf students with an open door, but not a door to opportunities to benefit from education that were at all similar to the opportunities available to those who were not hearing-impaired.

73. *Id.* at 1029.

74. United States v. Bd. of Trs. for the Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).

75. *Id.* at 745.

76. *Id.* at 748.

77. *Id.*

78. *Id.*

Recently, a California federal district court applied the "meaningful access" standard with regard to educational programs at a public college in a suit under Title II of the ADA.[79] A deaf student alleged that a public college had violated the ADA because of the inadequacy of its interpretive services. The lawsuit survived a motion from the defendants for summary judgment, with the court stating that the college must provide the student with "meaningful access" and must make reasonable modifications to that end.[80] As "reasonableness" requires an individualized, fact-specific inquiry about what auxiliary aids were necessary to afford the student an equal opportunity to enjoy the benefits of the program, the court determined that summary judgment was not appropriate in the case.[81]

A related problem to the student sitting in a classroom, unable to access the medium of instruction, is that of parents unable to participate in their children's school-initiated activities. In *Rothschild v. Grottenthaler*, hearing impaired ASL-communicating parents of children with normal hearing sued the school district for a failure to provide sign language interpretation at school-initiated activities such as parent-teacher conferences.[82] The district's view was that the parents were not "otherwise qualified," because schools are for children, not for their parents.[83] The trial court disagreed, and denied the district's motion to dismiss.[84]

The Second Circuit affirmed the trial court's determination that the Rothschilds were otherwise qualified for the services in question: they were parents of enrolled children, concerned about their children's education, and interested in meeting with teachers at scheduled conference times.[85] Failure to provide interpreters meant that they could not participate in activities such as parent-teacher conferences.[86] On the other hand, citing *Choate*, the Second Circuit also concluded that "meaningful access" required only reasonable modifications, not fundamental alterations; and that a decision to limit the requirement to provide sign-language interpretation to school-initiated activities such as parent-teacher con-

79. Hayden v. Redwoods Cmty. Coll. Dist., No. C-05-01785, 2007 U.S. Dist. LEXIS 835, at *24 (N.D. Cal. Jan. 8, 2007).

80. *Id.* at *2.

81. *Id.* at *30, *38.

82. 907 F.2d 286 (2d Cir. 1990).

83. *Rothschild*, 907 F.2d at 290.

84. Rothschild v. Grottenthaler, 716 F. Supp. 796 (S.D.N.Y. 1989).

85. *Rothschild*, 907 F.2d at 292-94.

86. *Id.* at 292.

ferences would be reasonable.[87] On the other hand, a district is not required to provide interpretation for parents attending extracurricular activities—and, notably, the Second Circuit included graduation ceremonies in the "voluntary" activities not immediately related to the children's academic progress and hence not requiring interpretation provided by the district.[88] The Second Circuit thus tied the parents' meaningful benefit to their ability to help their children receive an equal educational opportunity.

"Meaningful access" does not require, however, services sufficient for full performance up to the person's level of ability. The facts of *Rowley* serve as a contrast to the situation of deaf people whose access to a communication activity is so minimal that they cannot effectively participate.[89] *Rowley* involved the Education of All Handicapped Children's Act requirement of a "free appropriate public education" for all qualifying children. Amy Rowley was a deaf student with excellent lip reading skills who performed above grade level—but not to her full potential, because she understood less than half of what was said in the classroom, much less than she would have been able to understand with the aid of sign language interpretation.[90] The school district's refusal to fund sign language interpretation for Rowley was upheld by the Court, as the services she was provided did allow Rowley "to benefit" from her education, although they were insufficient to "maximize [her] potential."[91]

In sum, these education cases suggest that a benefit is not "meaningful" if students with disabilities do not have an opportunity to make use of it that is roughly similar to that which is afforded other students. They need not succeed equally, but they must have an equivalent opportunity to succeed, or the benefit is not meaningful. An open door is not enough: the opportunities provided must be fair in light of the opportunities provided to people without disabilities.

3. *Transportation and Other Access to the World*

In perhaps the most influential academic writing about disability law, Jacobus tenBroek defended the right of people with disabili-

87. *Id.* at 293.
88. *Id.*
89. *See generally* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).
90. *Id.* at 185.
91. *Id.* at 189.

ties "to live in the world."[92] Thus, it should come as no surprise that a number of transportation cases have interpreted "meaningful access" in terms of equality of opportunity to navigate or traverse the world. Such initial cases involved people with mobility impairments bringing suit against transportation systems that were usable only by climbing bus or trolley steps.

In *Lloyd v. Regional Transportation Authority*, a leading case that pre-dates *Choate*, mobility impaired individuals sued Chicago's transportation system, which the plaintiff's claimed was not mobility accessible.[93] Their suit was brought under the Rehabilitation Act and the Architectural Barriers Act, and also alleged a cause of action under the Equal Protection Clause of the Constitution.[94] The Seventh Circuit in *Lloyd* held that section 504 permits a private right of action to enforce affirmative rights of people with disabilities to services that are equally effective as those provided to others.[95] According to the court, public transportation systems' failure to equip buses with wheelchair lifts was a failure of equality of treatment.[96]

In developing its analysis, the Seventh Circuit relied on *Lau*'s understanding of Title VI of the Civil Rights Act as providing a private right of action and clearly saw the rights conferred in the Rehabilitation Act as paralleling those in Title VI.[97] The court quoted the federal Department of Health, Education, and Welfare's proposed regulations drawing this parallel:

> [T]he concept of equivalent as opposed to identical [] services [] acknowledges the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of non-handicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil

92. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).

93. 548 F.2d 1277 (7th Cir. 1977).

94. *Id.* at 1278.

95. *Id.* at 1283 (quoting proposed regulation 49 C.F.R. § 84.4(b)(1)(ii) and citing *Lau*).

96. *Id.* at 1284. However, not all courts have agreed with this position. *See, e.g.*, Mich. Paralyzed Veterans of Am. v. Coleman, 545 F. Supp. 245 (E.D. Mich. 1982).

97. *Lloyd*, 548 F.2d at 1280 (quoting 41 Fed. Reg. 29,551 (July 16, 1976)).

> Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English.[98]

Other courts reached similar conclusions, both before and after the *Choate* decision. The Tenth Circuit, for example, has held that policies designating certain routes as "inaccessible" and permitting drivers' discretion not to use wheelchair lifts on these routes failed to meet the standards of section 504.[99]

If services are effective in providing opportunity, however, transportation agencies retain a great deal of discretion in design. Such agencies may retrofit, provide paratransit, or provide mixed systems.[100] They may also make choices about the designation of "key" stations for accessibility purposes on subway or rail lines.[101] Finally, they may make choices about how to allocate funds in the effort to keep transit systems financially viable.[102]

Many other public decisions that make it significantly more difficult for people with disabilities to have the benefit of the opportunities afforded to others to enjoy public facilities have also been successfully challenged as failures of "meaningful access." *Crowder v. Kitagawa*, a case about Hawaii's quarantine of guide dogs is a particularly good illustration.[103] The state of Hawaii is rabies-free and would like to remain so. To that end, it requires all carnivorous animals entering the state to be quarantined for 120 days in a special quarantine station.[104] Under this requirement, all guide dogs were sequestered, although Hawaii also provided apartment or cottage accommodations for the 120-day period for disabled persons seeking to bring their dogs into the state.[105] After a ten-day observation period, Hawaii also permitted the dogs to train with their owners and to leave the quarantine station for limited

98. *Id.* at 1284 n.20. For a discussion of the parallels between *Lloyd* and *Lau*, see generally Robert Funk, *Disability Rights: From Caste to Class in the Context of Civil Rights*, *in* IMAGES OF THE DISABLED, DISABLING IMAGES 7-30 (Alan Gartner & Tom Joe eds., 1987).

99. Tandy v. City of Wichita, 380 F.3d 1277, 1282-83 (10th Cir. 2004).

100. Am. Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184 (3d Cir. 1989) (en banc).

101. *See, e.g.*, Disabled in Action of Pa. v. Se. Pa. Transp. Auth., No. 03-CV-1577, 2006 U.S. Dist. LEXIS 84730, at *15 (E.D. Pa. Nov. 17, 2006).

102. *See, e.g.*, Comm. for a Better N. Phila. v. Se. Pa. Transp. Auth., No. CV 88-1275, 1990 U.S. Dist. LEXIS 10895, at *12, *15 (E.D. Pa. Aug. 9, 1990) (finding SEPTA's policy of allocating more of its federal subsidy funding to regional rail serving the suburbs rather than to city transit serving the inner city not to be racial discrimination under Title VI).

103. 81 F.3d 1480, 1481 (9th Cir. 1996).

104. *Id.*

105. *Id.* at 1482.

periods under the observation of a quarantine officer, as long as the dogs had no contact with other people or animals.[106] Visually impaired people who relied on assistive animals brought suit under Title II of the ADA, claiming that they were unable to make meaningful use of state services while their guide dogs were quarantined.[107]

The state's argument was that the quarantine requirement was not a public benefit, but was a public health requirement.[108] The Ninth Circuit, citing *Choate*, concluded that Title II prohibits policies that can effectively deny people with disabilities the benefits of state services.[109] Without their guide dogs, people with visual impairments were unable to use public transportation, visit tourist attractions, enjoy public parks, or navigate public buildings.[110] Therefore, the question for the district court to consider on remand was whether the plaintiffs' proposed modifications were reasonable in light of the legislature's public health purpose.[111]

A particularly noteworthy feature of *Crowder* is that it opens the possibility that state policies of one type—here, quarantine restrictions on guide dogs—could be discriminatory because they operate to deny people with disabilities meaningful access to public activities or services of another type—here, public buildings, tourist attractions, and the like. In such cases, policies of one type are problematic because of the impact on accessibility to state programs of a different type. An issue this Article explores below is whether state Medicaid policies sometimes function to discriminate in this way.

Like transportation, currency may be critical to the ability to navigate in the world. In *American Council of the Blind v. United States*, a case that is currently on appeal, the American Council of the Blind has challenged the United States government's failure to produce currency in a form that allows people with visual impairments to distinguish readily among different denominations.[112] The district court held that inability to distinguish denominations without relying on the assistance of others was not "meaningful

106. *Id.*
107. *Id.*
108. *Id.* at 1483.
109. *Id.* at 1484.
110. *Id.* at 1485.
111. *Id.* at 1486.
112. Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51 (D.D.C. 2006), *on appeal* Am. Council of the Blind v. Paulson, No. 06-8003, 2007 U.S. App. LEXIS 6680 (D.C. Cir. Feb. 27, 2007) (assigning the case to a merits panel).

access." Reliance on others to identify denominations, the court said, puts people with visual impairments "always at risk of being cheated."[113] While "equal results" are not required for "meaningful access" to be satisfied, to require that a plaintiff prove no effective access at all in order to prevail is far too burdensome.[114] Instead, the question in determining if a plaintiff has made out a valid discrimination claim is whether the ability to distinguish denominations of currency independently is an important conduit of access to the world, as required by the Rehabilitation Act.[115] The court concluded that it is, stating as follows:

> Like deaf students who can have real access to a lecture only with an interpreter or a real time transcript, blind or visually impaired people cannot make effective use of American currency without help. There was a time when disabled people had no choice but to ask for help—to rely on the "kindness of strangers." It was thought to be their lot. Blind people had to ask strangers to push elevator buttons for them. People in wheelchairs needed Boy Scouts to help them over curbs and up stairs. We have evolved, however, and Congress has made our evolution official, by enacting the Rehabilitation Act, whose stated purpose is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, *independence*, and inclusion and integration into society."[116]

In reaching this conclusion, the district court distinguished the case at hand on its facts from another "meaningful access" case, *Jones v. City of Monroe*, where the plaintiff challenged the location of downtown parking facilities.[117] In *Jones*, a plaintiff with multiple sclerosis claimed that Monroe, Michigan's parking policies violated Title II of the ADA by failing to provide her with a parking spot adjacent to where she worked.[118] Monroe had a one-hour parking lot adjacent to her building, but lots with long-term spaces were two blocks away.[119] In affirming the denial of her request for a preliminary injunction, and concluding that she did not have a reasonable likelihood of success on the merits, the Sixth Circuit opined that she did have the same opportunity to park downtown

113. *Id.* at 53.
114. *Id.* at 59.
115. *Id.*
116. *Id.* In reaching this conclusion, the court relied on *United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740 (11th Cir. 1990). *See supra* note 74 and accompanying text for a discussion of this case.
117. *See generally* 341 F.3d 474 (6th Cir. 2003).
118. *Id.* at 475.
119. *Id.*

that others did; there were disabled spots in the long term free parking lots, as well as in the short term lot.[120] Therefore, the court found that in this latter case, the plaintiff could park in spots that gave her effective opportunity, despite her disability, to access the downtown world. What she did not have was parking of the exact type she desired.[121]

As the *Jones* dissent pointed out, however, this reasoning left unexplored whether parking two blocks away gave to the disabled plaintiffs the same opportunity given to people without mobility impairments to access destinations of their choice.[122] The dissent compared Monroe's parking policy to a library's decision to shelve some books high up, where people with disabilities could not reach them, and then offer in defense the claim that they were simply failing to provide people with disabilities access to the books of their choice.[123] In a trenchant critique of the majority's reading of *Choate*, the dissent argued that the Supreme Court would have found Tennessee's fourteen-day limit in violation of the Rehabilitation Act if it had operated to provide people with disabilities with a service different in kind from that provided people without disabilities.[124] By providing parking too far away for her to use, the dissent contended, Monroe had done precisely that.

In contrast, in *American Council for the Blind*, the court concluded that the failure to design currency so that people with visual impairments can distinguish denominations was more like the failure to provide any access to library books or parking than like the failure to provide access to preferred volumes or parking spots.[125]

Architectural barriers have also been analyzed as a failure to provide "meaningful access." For example, the city of Sandusky, Ohio failed to install curb cuts during sidewalk and street renovations.[126] The Sixth Circuit concluded that removal of such barriers was an express mandate of Title II of the ADA's requirement that people with disabilities be provided meaningful access to public services.[127] The Kansas State Fair's failure to make restrooms

120. *Id.* at 480-81.

121. *Id.* at 479 (citing Alexander v. Choate, 969 U.S. 287 (1985)).

122. *Id.* at 485 (Cole, J., dissenting).

123. *Id.*

124. *Id.*

125. Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 59 (D.D.C. 2006).

126. Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004).

127. *Id.* Because the court concluded that the barriers violated an express statutory mandate, the court determined that a private right of action would lie.

wheelchair accessible and to restrict wheelchair users to inferior seating locations was also found to be a violation of meaningful access, even though the doors to the fairgrounds were fully open. The court said that it did

> not agree with Defendants that mere physical presence on the fairgrounds—at least when coupled with being effectively trapped in a handicapped section, unable to leave for food or to use the restroom, unable to view the stage, and subjected to being climbed over, stepped on, and bumped into by other attendees—amounts to anything other than a denial of the benefits of the fair.[128]

As in the cases involving education, in sum, the cases involving mobility and access to the world attempt to strike a balance between no access and ideal access in the effort to determine what constitutes "meaningful access." The judgment is often a comparative one: does the type of access offered the plaintiffs provide them with a benefit that is fair in comparison to that received by others or, in comparison to others, are the opportunities they have so limited as to be exclusionary or are those to which they aspire so rich as to be preferential?

B. Meaningful Access: Health Care Cases

A multitude of cases have considered "meaningful access" with respect to health care. These cases have included services provided, such as home health, eligibility limits, access to facilities, and facilities closures. Many of these "meaningful access" cases cite *Choate*, doing so to conclude that the services provided have not been meaningful. As with the "meaningful access" education and mobility cases, many of the health care cases involve an implicit comparison between the opportunities afforded people with disabilities and the opportunities afforded people without disabilities. In some cases, however, the failure to provide services was so significant that the court concluded that no comparison was necessary.

128. Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857 (10th Cir. 2003) (permitting a private right of action under the Rehabilitation Act and Title II of the ADA).

1. *Services Provided: Home Health Care*

Helen L. v. DiDario was a challenge to Pennsylvania's home care program under Title II of the ADA.[129] Pennsylvania was supposed to provide attendant care services to Medicaid patients in their homes if they qualified. Plaintiffs were qualified but were denied such benefits due to lack of funding; thus, the plaintiffs were forced to live and receive care in nursing homes and were therefore unable to live at home with their families or to have contact with people in the community.[130] Pennsylvania argued that this practice was not discriminatory under the Rehabilitation Act of Title II of the ADA because attendant care services were provided only to people with disabilities.[131] In a decision presaging *Olmstead*,[132] discussed below, the Third Circuit stated that the ADA was "intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them."[133] Rejecting Pennsylvania's argument that there could not be discrimination because the services were only provided to people with disabilities, the Third Circuit determined that the relevant comparison was whether the state's program exemplified the "benign neglect" and "unnecessary segregation" which the Rehabilitation Act and the ADA were meant to remedy.[134] Citing *Choate*, the Third Circuit stated explicitly that *Choate* does not limit federal remedies for disability discrimination to cases of discriminatory intent.[135]

The Third Circuit's decision in *Helen L.* was cited favorably by the Supreme Court in a decision a few years later, *Olmstead v. L.C. ex rel. Zimring.*[136] In *Olmstead*, the Court held that the ADA requires public services to be provided to otherwise qualified people with disabilities in the least restrictive manner, unless doing so would require a fundamental alteration of the state's program.[137] At least one other subsequent decision has followed *Olmstead* in concluding that a failure to provide home health services was a vio-

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129. 46 F.3d 325 (3d Cir. 1995), *reh'g en banc denied,* No. 94-1243, 1995 U.S. App. LEXIS 3896 (3d Cir. Feb. 24, 1995), *cert. denied sub nom.*, Pa. Sec'y of Pub. Welfare v. Idell S., 516 U.S. 813 (1995).

130. *Helen L.*, 46 F.3d at 329.

131. *Id.* at 335.

132. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).

133. *Helen L.*, 46 F.3d at 335.

134. *Id.*

135. *Id.*

136. 527 U.S. at 596, 598 n.9.

137. *Id.* at 607.

lation of the ADA, unless so doing would require a fundamental alteration of the state's program. In *Townsend v. Quasim*, the state of Washington provided both nursing home and community-based services to categorically needy people with disabilities under a Medicaid waiver.[138] For medically-needy Medicaid recipients, however, Washington provided nursing home services only.[139] Townsend was a categorically needy Washington resident receiving community-based services in an adult group home, until his income rose to the extent that he only qualified for Medicaid as "medically needy."[140] He challenged Washington's restriction of community-based services for the medically needy under the Medicaid program.[141] The district court granted summary judgment for the state, on the basis that the distinction was a permissible allocation of different types of benefits to the categorically needy and the medically needy.[142] The Ninth Circuit reversed the district court's decision, applying *Olmstead's* reasoning that services must be provided in the most integrated community setting appropriate; the court remanded for a determination of whether extending community-based services to the medically needy would be a fundamental alteration of the state program.[143]

There is thus a parallel between *Olmstead*'s requirement that services be provided in the most integrated community setting appropriate and *Choate*'s discussion of meaningful access to services. The *Olmstead* requirement applies *Choate*'s acknowledgment of "meaningful access" in pursuit of equality of opportunity: access to services delivered in community settings rather than in institutions is important because the community is the site and source of opportunity for non-disabled and for disabled people alike. People excluded from the community by institutionalization lack access to even the most ordinary forms of opportunity.

2. *Medicaid Eligibility Limits*

In *Lovell v. Chandler*,[144] the state of Hawaii had operated a State Health Insurance Program ("SHIP") health plan for people who could not fulfill the stringent income (below 100% of the federal poverty level) and asset limits ($2000) of Hawaii's fee-for-service

138. 328 F.3d 511, 514 (9th Cir. 2003).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 515.
143. *Id.* at 517.
144. 303 F.3d 1039 (9th Cir. 2002).

Medicaid plan but who had incomes below 300% of federal poverty levels.[145] Because of cost increases, Hawaii sought to replace both the fee-for-service plan and the SHIP plan with a single managed care plan ("QUEST") approved under a federal waiver.[146] All fee-for-service Medicaid plan participants were eligible for QUEST, as were SHIP members who were not aged, blind, or disabled.[147] Aged, blind, or disabled participants in the fee-for-service plan would continue to be served by that plan[148]—but aged, blind, and disabled recipients who were in the SHIP plan because they did not meet the income and asset limits of the fee-for-service plan would be left without coverage.[149] Hawaii's rationale for the exclusion was the fear that managed care plans would not participate in the new program if significant numbers of the aged, blind, and disabled were included—out of concerns that these plan members would be more expensive.[150] Hawaii argued that this choice was not discrimination against people with disabilities, but a decision to impose financial criteria for plan eligibility.[151] In ruling that Hawaii had violated the Rehabilitation Act and the ADA, the Ninth Circuit pointed out that Hawaii had excluded people with disabilities who could not meet the income and asset limits of the original fee-for-service plan, while including people without disabilities in the same plan.[152] Providing those who could qualify access to the original fee-for-service plan was not sufficient to provide "meaningful access" because it denied access to those who could not qualify.[153]

3. *Ability to Access Services*

In *Henrietta D. v. Bloomberg*,[154] plaintiffs were HIV-positive patients requiring home care services. New York City had consolidated its efforts to assist HIV-positive patients to access benefits in a single agency, the Division of AIDS Services and Income Support ("DASIS"). The district court concluded that DASIS proved dysfunctional and failed to provide people with HIV meaningful

145. *Id.* at 1045.
146. *See id.*; *see also* A. Gardner & D. Neubauer, *Hawaii's Health QUEST*, HEALTH AFF., Spring 1995, at 300-303.
147. Gardner, supra note 146, at 302.
148. *Id.*
149. *Lovell*, 303 F.3d at 1045.
150. *Id.* at 1046.
151. *Id.* at 1053.
152. *Id.* at 1053.
153. *Id.* at 1054.
154. 331 F.3d 261 (2d Cir. 2003).

access to benefits available to other similarly situated persons without HIV.[155] The district court did not, however, permit the defendants to introduce comparative evidence showing that non-disabled people had similar difficulties in accessing social services. The Second Circuit concluded that the comparative evidence was not necessary; the plaintiffs had demonstrated that they had special needs for the services DASIS was supposed to provide, but DASIS had failed in so doing "as a practical matter."[156] The failure was so significant that the comparative evidence was unnecessary.[157]

Another district court decision has also followed *Choate* in analyzing a state health plan's failure to monitor office accessibility of providers.[158] Pennsylvania had a mandatory managed care program, and did not ensure that all providers were accessible; indeed, all Pennsylvania required was that the managed care program provided participants with a directory indicating which providers served patients with special needs.[159] The court agreed with the state that it did not need to assure that each and every provider was accessible.[160] The court also determined, however, that merely assuring that some providers were accessible was insufficient; citing *Choate*, the court concluded that Pennsylvania had not provided the kind of equality of opportunity to access facilities that the Rehabilitation Act and the ADA demanded.[161] Instead, the court ordered Pennsylvania to make sure that every provider met federal regulatory standards, including updating accessibility with new construction or remodeling, making sure that offices with more than fifteen employees are accessible, and referring patients to providers who are accessible in other circumstances.[162]

Several cases have also concluded that meaningful access requires sign language interpretation or other forms of accessible communication methodologies. Such cases have dealt with the question of access to sign language interpretation by deaf patients or their surrogates who cannot communicate with providers.[163]

155. *Id.* at 269.
156. *Id.* at 283 n.11.
157. *Id.*
158. Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456 (E.D. Pa. 1998).
159. *Id.* at 459-60.
160. *Id.* at 463.
161. *Id.* at 465.
162. *Id.* at 463-64.
163. *See generally* Elizabeth Ellen Chilton, *Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients*, 47 HASTINGS L.J. 871 (1996). Cases have also been brought under Title VI of the Civil Rights Act by non-English speaking patients, which is analogous to the

These cases have been brought under the Rehabilitation Act and Title II against public providers[164] and under Title III against private providers.[165] In *Estate of Alcalde*, the patient was hospitalized with respiratory failure and was fully competent. She was unable to communicate without sign language interpretation, and the law suit alleged that no interpretation was provided for the eighty-nine days of her hospitalization.[166] As a result, she was confused by what was happening in her complex care, became depressed, and was unable to participate in critical care decisions. She died of suffocation after a shunt was removed, allegedly without her permission.[167] In concluding that, if the facts were as alleged, the Rehabilitation Act had been violated, the court applied the following standard: "The test is whether an interpreter was necessary to provide the hearing-impaired individual with an equal opportunity to benefit from the services provided by defendants to patients who do not suffer from a hearing impairment."[168] Additionally, programs must provide materials such as patient instructions that are accessible in order to ensure that communication is effective.[169]

4. *Facility Closures*

In *Rodde v. Bonta*, the plaintiffs challenged a decision by Los Angeles County to close a rehabilitation center providing inpatient and outpatient care to people with disabilities.[170] The district court granted a preliminary injunction that barred the county from carrying out its plans without providing the plaintiffs with necessary services elsewhere; the Ninth Circuit affirmed on appeal.[171] The county had consolidated its services for people with certain severe disabilities (such as ventilator dependency) at Rancho, but later

facts in *Lau v. Nichols*, 414 U.S. 563 (1974). *See generally* Siddharth Khanijou, *Rebalancing Healthcare Inequities: Language Service Reimbursement May Ensure Meanginful Access to Care for LEP Patients*, 9 DEPAUL J. HEALTH CARE L. 885 (2006); Barbara Plantiko, Comment, *Not-so-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239 (2002).

164. *See, e.g.*, Estate of Alcalde v. Deacon Specialty Home Hosp., 133 F. Supp. 2d 702 (D. Md. 2001).

165. *See, e.g.*, Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820 (D. Md. 1998) (patient); Aikins v. St. Helena Hosp., 843 F. Supp. 1329 (N.D. Cal. 1994) (surrogate); Mayberry v. Von Valtier, 843 F. Supp. 1160 (E.D. Mich. 1994).

166. *Estate of Alcalde*, 133 F. Supp. 2d at 706.

167. *Id.* at 706.

168. *Id.* at 707.

169. Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456, 466 (E.D. Pa. 1998).

170. Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004).

171. *Id.* at 1000.

proposed its closure as a means to save money.[172] In granting a preliminary injunction, the district court concluded that Rancho patients could not easily be served elsewhere and that the county had made no transition plans to accommodate them.[173] The Ninth Circuit distinguished *Choate* from the facts in *Rodde* on several grounds. In *Choate*, there was no showing that conditions appearing disproportionately among people with disabilities could not be treated effectively within the fourteen days of hospitalization available to them.[174] Moreover, the reductions in *Choate* applied across the board, but the County planned to close a facility where it had previously consolidated services for people with severe disabilities—and to do so without clear alternative plans.[175] On the other hand, the requirement of "meaningful access" could be met, despite decisions to close facilities, when similar services were available elsewhere.[176]

5. *Access & Location of Facilities*

In *Wisconsin Community Services, Inc. v. City of Milwaukee*, the challenge was to the denial of a special use permit to a mental health treatment center seeking to purchase a larger building in a new location.[177] The area was zoned commercial, but in a classification that required a special use permit for health facilities.[178] The permit was denied after significant protest from local residents, who were concerned about possible safety risks from patients at the facility (despite any evidence of such a risk at the facility's then existing location), many of whom had been in the corrections system at one point or another.[179] Interpreting *Choate*'s "meaningful access" discussion, the Seventh Circuit concluded that the Rehabilitation Act prohibited denial of equal ac-

172. *Id.* at 990-91.
173. *Id.*
174. *Id.* at 997.
175. *Id.*
176. *See generally* Wright v. Giuliana, 230 F.3d 543, 548 (2d Cir. 2000) (stating that "[the disability statutes] require only that covered entities make 'reasonable accomodations' to enable 'meaningful access' to such services as may be provided, whether such services are adequate or not"); Cercpac v. Health & Hosp. Corp., 147 F.3d 165, 167 (2d Cir. 1998) (upholding a decision to close a disabled children's facility despite the fact that the facility that its patients were referred to offered fewer services because "the disability statutes do not guarantee any particular level of medical care for disabled persons, nor [do they] assure maintenance of service previously provided").
177. 465 F.3d 737 (7th Cir. 2006).
178. *Id.* at 741.
179. *Id.* at 744.

cess on the basis of disability, with the "corollary" that the Act only prohibited policies that bore more heavily on people with disabilities because of their disability—but not policies that disadvantaged everyone alike.[180]

Thus, there is a range of health care cases that, like the education and mobility access cases, interprets the *Choate* parameters to mean that programs fail to provide "meaningful access" if the ways in which they offer services do not afford opportunities to people with disabilities that are roughly equal to opportunities provided to people without disabilities. These cases are not, however, exhaustive of the range of possibilities opened by an equal opportunity understanding of *Choate*'s discussion of meaningful access.

III. Applying Meaningful Access to Further Health Care Examples

It is clear from *Choate* that even if state activities do not rise to the level of intentional discrimination, they can be challenged successfully under the Rehabilitation Act and Title II.[181] As subsequent litigation has established, these include cases involving inaccessible facilities or services, locations or closures of service providers, and eligibility limits. It is also clear from *Choate* that challenges to funding cutbacks in public programs such as Medicaid will not succeed under these disability rights statutes if the challenges allege nothing more than that the cutbacks are problematic generally but may bear somewhat more heavily on people with disabilities. Instead, successful strategies will need to show much more: specifically, that a policy fails to provide people with disabilities with equality of opportunity in comparison to the opportunities provided people without disabilities.

In this Part, we take on two of the areas where it would seem that meaningful access challenges are the most difficult: service limitations and funding limitations. These are the types of cases in which the *Choate* Court's rejection of privileging disabled people in resource distribution seems most problematic because the disparate impact of such limitations may result from disabilities that cannot be reasonably accommodated—that is, require accommodation that can be achieved only through undue expense or substantial alteration of the programmatic purpose. Yet, we suggest in light of several examples, that even here, understanding meaningful access

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180. *Id.* at 748.

181. *See supra* note 15 and accompanying text.

in terms of equality of opportunity may provide a blueprint for success.

A. Service Limitations

In *Choate*, Tennessee limited services in order to cut costs: a fourteen-day maximum of hospital days per year.[182] This limit was unfortunate for everyone in Tennessee who needed more than fourteen days for successful treatment, and plaintiffs with disabilities were unable to show that the impact on them was sufficiently different to violate the Rehabilitation Act.[183] Other service limitations, however, might be shown to impose special disadvantages on people with disabilities. Services for the chronically mentally ill are one example; limitations on durable medical equipment are another.

1. *Services for the Chronically Mentally Ill*

Some state health plans do not cover certain hospitalizations in a mental health facility for some patients under state Medicaid plans; Georgia, Pennsylvania, and Texas, for example, do not cover inpatient psychiatric and substance abuse treatment.[184] Medicaid serves a very high proportion of people with chronic mental illness.[185] Arguably, failure to cover such services could be demonstrated to affect people with disabilities in such unequal fashion as to fail to provide them with meaningful access to mental health services—since it is largely people with disabilities who would require such services.[186]

One case is suggestive of how this strategy might work. Under the Medicaid Act, *Katie A. v. L.A. County*[187]might help to illustrate this strategy in operation. In *Katie A.*, the Ninth Circuit considered whether California's refusal to provide wraparound mental health services and therapeutic care to foster children was a failure to pro-

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182. Alexander v. Choate, 469 U.S. 287, 289 (1985).

183. *Id.* at 308-09.

184. *See* Kaiser Family Foundation, Medicaid Benefits: Online Database, Benefits by Service: Rehabilitation Services: Mental Health and Substance Abuse (October 2006), http://www.kff.org/medicaid/benefits/service.jsp?gr=off&nt=on&so=0&tg=0&yr=3&cat=12&sv=36.

185. *See, e.g.*, Richard G. Frank et al., *Medicaid and Mental Health: Be Careful What You Ask For*, 22 HEALTH AFF. 101 (2003).

186. *See, e.g.*, Robert Rosenheck et al., *Improving Access to Disability Benefits Among Homeless Persons With Mental Illness: An Agency-Specific Approach to Services Integration*, 89 AM. J. PUB. HEALTH 524 (1999).

187. 481 F.3d 1150 (9th Cir. 2007).

vide meaningful access under the Medicaid program.[188] California's contention was that it had made a choice about the method of delivery of the medically necessary services. The district court concluded that there was undisputed evidence that the services were medically necessary and granted the preliminary injunction sought by plaintiffs.[189] The Ninth Circuit reversed, concluding that the district court had applied an erroneous standard of whether the services had been meaningfully provided by assuming that they had to be provided in an "unbundled manner."[190] The question for the district court now on remand is whether the required services had been provided in an effective manner—not whether they had been provided as a separate type of service.[191] If "effective manner" is understood in the comparative way we suggest, the question on remand would then be whether the organization of service providing to people with disabilities gave them the same opportunity to benefit from the services that were available to others.

2. *Durable Medical Equipment*

Utah Medicaid funds some durable medical equipment, such as medically necessary artificial limbs.[192] Wheelchairs are included under Utah Medicaid.[193] Utah Medicaid does not, however, fund wheelchairs for non-home use, nor does it fund repairs for home wheelchairs that have been damaged in out-of-home use.[194] Recipients of prosthetic limbs are not required to strip off their legs if they want to attend to business beyond their front doors, nor are recipients of casts and crutches made to stay home until their injuries heal, but recipients of wheelchairs do not have the same opportunity to make use of their medical benefit to go out into the world. Arguably, this policy fails to provide even a modicum of equality of opportunity for people with mobility impairments who are unable to be in the world without their wheelchairs. Yet, dura-

188. Although the plaintiffs also alleged claims under the Rehabilitation Act and the ADA, the case was decided only under the Medicaid Act. *Id.*

189. *Id.* at 1153.

190. *Id.* at 1162-63.

191. *Id.* at 1163.

192. UTAH ADMIN. CODE r.414-70-7 (2007).

193. UTAH ADMIN. CODE r.414-70-6 (2007).

194. UTAH ADMIN. CODE r.414-70-9 (2007). Truth in disclosure: one of the authors, Leslie P. Francis, is a member of the Board of Trustees of the Disability Law Center in Utah. The Center appeared at administrative hearings in opposition to this regulation.

ble medical equipment of many other types is funded without such home restriction.[195]

Moreover, this Utah policy might also be challenged for its impact on other fundamental rights. Consider someone with a mobility impairment who needs a wheelchair to get to the polls, to attend school, or even to get to the now-accessible courthouse after *Tennessee v. Lane*.[196] If ever there were a policy choice that adversely affects what tenBroek calls the "right to live in the world,"[197] this policy regarding durable medical equipment would be the one.

B. Funding Limitations

A second type of case at the apparent heart of *Choate* is state funding limits. Faced with rising health care costs, states have cut reimbursement rates in Medicaid programs. There are serious concerns that such cutbacks make it very difficult to entice providers to serve Medicaid patients. If such funding limitations affected an identifiable group of Medicaid patients with disabilities—for example, chronic psychiatric patients[198]—such limitations might be challenged as failing to provide people with disabilities with meaningful access to health care.

Conclusion

The problem with *Choate* having been cast as a case limiting the ability of people with disabilities to challenge the disparate impact of limits in state funding of health care is that it was really a case challenging Medicaid cutbacks generally. Neither the ADA nor the Rehabilitation Act prohibits states from being stingy. States can, if they so choose, provide programs that fail to give any of their citizens opportunity. They can refuse to participate in Medicaid. They can decide, if they do participate, only to provide ser-

195. In adopting its policy for durable medical equipment, Utah simply followed the Medicare benefit available under home health, where the restriction to medical equipment used in the home makes more sense. Personal communication from Rob Denton, Utah Disability Law Center, to Leslie Pickering Francis (on file with author).

196. 541 U.S. 509 (2004). For a reading of *Lane*, see generally Anita Silvers & Leslie Pickering Francis, *A New Start on the Road Not Taken: Driving With* Lane *To Head Off Disability-Based Denials of Rights*, 23 Wash. U. J.L. & Pol'y 33 (2007).

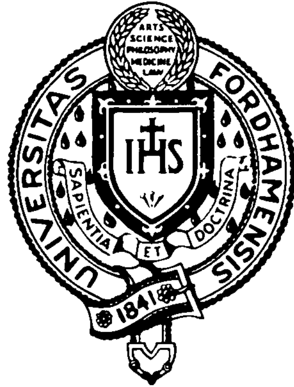
197. *See* tenBroek, *supra* note 92.

198. *See, e.g.*, Diane Rowland et al., *Accomplishments and Challenges in Medicaid Mental Health*, 22 Health Aff. 73, 80-82 (2003), *available at* http://content.healthaffairs.org/cgi/reprint/22/5/73.pdf (explaining how states' efforts to contain Medicaid costs may pose disproportionate risks to those with mental health needs).

vices to the categorically needy—although they must, of course, meet the standards of the Medicaid Act.[199]

What states cannot do, however, is decide to offer services and then offer them in such a way that they do not provide equality of opportunity to people with disabilities receiving those services, in comparison to people without disabilities receiving the same services. Equality of opportunity in this sense requires benefits of roughly equal serviceability for disabled and non-disabled alike. This is the possibility left open by *Choate* and developed in a range of cases understanding "meaningful access" in terms of equality of opportunity. It is a powerful possibility indeed for people with disabilities seeking to challenge state-provided health care programs on the grounds that they violate the Rehabilitation Act or Title II of the ADA.

199. *See, e.g.*, DeSario v. Thomas, 139 F.3d 80 (2d Cir. 1998).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