Northwestern University Law Review Vol. 116

UNLOCKING ACCOMMODATIONS FOR DISABLED STUDENTS IN PRIVATE RELIGIOUS SCHOOLS

Campbell Sode

ABSTRACT—Many disabled students exercise their First Amendment right to choose to attend a private religious school only to learn that the school will not provide reasonable accommodations crucial to their academic success. Because private religious schools are exempt from Title III of the Americans with Disabilities Act and its reasonable accommodation mandate, disabled students that choose such schools may be forced to find a more welcoming learning environment elsewhere. As a result, disabled students are currently unable to enjoy their Free Exercise Clause right to choose to enroll in their ideal private religious schools to the same extent as their nonhandicapped peers.

This inequality can be reduced by an expansive application of the Vocational Rehabilitation Act of 1973, which is known as the Rehab Act and covers entities that receive federal financial assistance. The Rehab Act is a key statute for disabled students in private religious schools since there is no religious exemption from its requirement that reasonable accommodations be made for the disabled. However, the Rehab Act will achieve maximum potency only if private religious schools that hold tax-exempt status, or indirectly benefit from federal programs via a parent entity, are classified as recipients of federal financial assistance for Rehab Act purposes. Also, a Rehab Act regulation that allows private religious schools to charge disabled students for reasonable accommodations should be limited so cost-shifting is only possible if the school genuinely cannot afford the accommodations at issue. And this approach to the problems disabled students face at private religious schools would not infringe upon these schools' First Amendment right to the free exercise of religion.

AUTHOR—University of Virginia School of Law J.D. 2018; Rutgers University B.A. 2015. I also want to specially thank the *Northwestern University Law Review Online* staff, especially HanByul Chang, Allison Clark, Olga Cosme Toledo, Tyler Dallas, Julia McCartney, Emily Starbuck, Leah Beukelman, Negassi Tesfamichael, and Samuel Young for their invaluable contributions to this Essay and their exemplary editorial assistance.

INTRODUCTION

Private religious schools are a popular educational option in the United States.[1] In 2015, almost four million Americans attended over 23,000 religious elementary or secondary schools,[2] while approximately two million students were enrolled in 883 religious colleges.[3] Parents and children select religious schools for many reasons,[4] and the right to choose a religious education is protected by the Free Exercise Clause of the First Amendment.[5] But the unwillingness of some private religious schools to provide reasonable accommodations deprives disabled students of opportunities to attend such schools.[6] Lobbying efforts by religious groups ensured that the

[1] *See* STEPHEN P. BROUGHMAN, ADAM RETTIG & JENNIFER PETERSON, U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2015–16 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2017), https://nces.ed.gov/pubs2017/2017073.pdf [https://perma.cc/PAJ7-9YA9] (reporting that sixty-seven percent of private schools had a "religious orientation or purpose").

[2] *Id.* at 6 tbl.1, 7 tbl.2 (showing that of the 4.9 million students who attended private schools in 2015, 1.07 million attended 11,304 nonsectarian schools, while 3.83 million attended 23,272 religious schools).

[3] NAT'L CTR. FOR EDUC. STAT., INST. OF EDUC. SCIS., DIGEST OF EDUCATION STATISTICS TABLE 303.90 (2016), https://nces.ed.gov/programs/digest/d16/tables/dt16_303.90.asp [https://perma.cc/Z9M5-W8Y4].

[4] These reasons may be academic, financial, social, or religious. *See Five Reasons Why Parents Choose a Catholic School Education*, MONTEREY BAY PARENT, https://www.montereybayparent.com/articles/education/five-reasons-why-parents-choose-a-catholic-school-education [https://perma.cc/2ZDM-RR5H].

[5] Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 49 (1st Cir. 2020) ("[T]here is no question that the Free Exercise Clause ensures that . . . all Americans[] are free to opt for a religious education for their children if they wish."); *see also* U.S. CONST. amend. I (restricting Congress from making any law prohibiting the free exercise of religion).

[6] *See*, *e.g.*, Doe *ex rel.* Doe v. Abington Friends Sch., No. Civ.A.04-4647, 2005 WL 289929, at *1 (E.D. Pa. Feb. 4, 2005), *vacated and remanded*, 480 F.3d 252, 253–54 (3d Cir. 2007) (indicating that a

reasonable accommodation requirement incorporated into Title III of the Americans with Disabilities Act (ADA)[7] does not apply to private religious schools.[8] As such, some disabled students are forced to find more welcoming educational settings elsewhere.[9] It is ironic that certain private religious schools—themselves protected under the First Amendment's Free Exercise Clause—effectively deprive disabled students of their First Amendment right to choose a religious education.

Two examples illustrate the ongoing issue of some private religious schools' refusal to make reasonable accommodations for disabled students.[10] First, in 2005, a former student sued the Abington Friends School, a private Quaker school located in suburban Philadelphia, Pennsylvania, for failing to reasonably accommodate his attention-deficit disorder and other learning disabilities.[11] The student also contended that Abington Friends School staff engaged in disability discrimination in the form of physical discipline, public humiliation, and an orchestrated campaign to force him to withdraw from the school.[12] The Third Circuit remanded the case to allow the student to conduct discovery to support his claim.[13] Second, in 2013, Michael Argenyi, a deaf medical student, sued Creighton University, a private Jesuit school in Omaha, Nebraska, when it refused to provide reasonable accommodations in the form of cued speech interpreters and real-time captioning of lectures—otherwise known as communication access real-time translation (CART).[14] Creighton's resistance forced Argenyi to take out about $114,000 in personal loans over two years to pay for the interpreting and CART services that he

private Quaker school's refusal to accommodate a student's disabilities contributed to the student leaving the school); *accord* Della Hasselle, *Family Sues New Orleans Catholic Schools, Says Child with Disability Denied Entry*, NOLA.COM (Dec. 5, 2020, 3:02 PM), https://www.nola.com/news/coronavirus/article_e74b6ec0-2f59-11eb-a9a2-77043325dbfa.html [https://perma.cc/6HPK-SGKB] (alleging that two private Roman Catholic schools in New Orleans, Louisiana discriminated against a wheelchair-bound student with cerebral palsy by refusing to allow her aide to accompany her during the school day); Tamara Le, *My Turn: Fighting 'Ableism' in Private and Religious Schools*, CONCORD MONITOR (Dec. 1, 2019, 6:15 AM), https://www.concordmonitor.com/Ableism-30839392 [https://perma.cc/M8J2-DYBL] ("Currently over 90% of New Hampshire's K-12 private and religious schools lack an anti-discrimination provision in their institution's admission policy for students who experience a disability. Any disability. Physical, medical, genetic, emotional, learning. Over 90%.").

[7] Americans with Disabilities Act (ADA), 42 U.S.C. § 12182.

[8] *See* Shannon Dingle, *Resisting Ableism in the American Church*, SOJOURNERS (Nov. 7, 2018), https://sojo.net/articles/resisting-ableism-american-church [https://perma.cc/6GNP-UDJ5].

[9] *See supra* note 6.

[10] *See, e.g.*, Hasselle, *supra* note 6 (discussing a student's lawsuit against two private schools in New Orleans, Louisiana, which alleged that the schools refused to reasonably accommodate her cerebral palsy and need for a wheelchair).

[11] *Abington Friends Sch.*, 480 F.3d at 253–54.

[12] *Id.*

[13] *Id.* at 259.

[14] Argenyi v. Creighton Univ., 703 F.3d 441, 444–45 (8th Cir. 2013).

needed.[15] The court concluded that there was "a genuine issue of material fact as to whether Creighton denied Argenyi an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations."[16]

This Essay addresses the fact that disabled students cannot always enjoy their First Amendment right to choose a religious education to the same extent as their nonhandicapped peers and argues that federal law may oblige such schools to provide reasonable accommodations. Part I sets out the legislation relevant to this issue. Part II explains that if a private religious school does not accommodate a disabled student, courts must first ask whether the school is truly religious. This is a crucial threshold question because if it is answered in the negative, the offending private school is a secular entity and thus subject to Title III of the ADA.[17] Part III lays out a possible legal solution for cases where a bona fide private religious school refuses to accommodate its disabled students. Although the ADA and Individuals with Disabilities Education Act (IDEA)[18] are ineffective in such situations,[19] an expansive application of the Vocational Rehabilitation Act (Rehab Act)[20] may be the best means of helping disabled students obtain reasonable accommodations while attending private religious schools as they progress from prekindergarten classrooms to higher education settings. Part IV concludes by proposing a series of amendments to the ADA and Rehab Act that would help protect disabled students' access to private religious schools by solidifying and filling the current gaps in these disability-focused civil rights laws.

---

[15] *Id*. at 445. It is unclear why Creighton did not raise the religious exception to Title III of the ADA in this case, which may have been dispositive given Creighton's Jesuit character. The Jesuits, also called the Society of Jesus, are a Catholic religious order that operates private religious schools, which adhere to a fixed set of religious and moral values, around the world. *See What Is a Jesuit Education?*, CREIGHTON UNIV., https://www.creighton.edu/about/what-jesuit-education [https://perma.cc/K9T7-RJTF].

[16] *Argenyi*, 703 F.3d at 451.

[17] *See, e.g.*, Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 153 (1st Cir. 1998) ("The Baldwin School is a private college preparatory school. Like other private schools, it is covered by Title III of the ADA . . . ."); DOJ, ADA TITLE III TECHNICAL ASSISTANCE MANUAL § III-1.5000, https://www.ada.gov/taman3.html [https://perma.cc/982E-ZZ4F] (confining exceptions from Title III of the ADA to religious entities).

[18] Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482.

[19] As mentioned earlier in this Essay, the ADA's reasonable accommodation requirement does not apply to private religious schools. *See* 42 U.S.C. § 12187. In addition, IDEA is implemented by public school districts, which are not always required to ensure the availability of reasonable accommodations at private religious schools. 20 U.S.C. § 1412(a)(10)(C)(i).

[20] Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797b.

I. RELEVANT LEGISLATION

Three federal statutes—Title III of the ADA, the Rehab Act, and IDEA—apply to students with disabilities.[21] Although there are crucial differences between ADA's Title III and the Rehab Act, the statutes impose identical substantive duties.[22] Both statutes require schools—preschools through colleges—to offer reasonable accommodations if a student has a known disability.[23] Effectiveness is the hallmark of reasonable accommodations.[24] Accommodations do not need to be perfect or fit a student's preferences, but they must be effective[25] in the sense that they accommodate the limitations generally associated with a given disability.[26] The reasonableness of an accommodation is a fact-sensitive issue analyzed on a case-by-case basis.[27] IDEA, on the other hand, serves a different purpose, as it ensures all disabled students have access to a free appropriate public education in elementary and secondary school.[28] School districts in which disabled students reside must implement IDEA, and this obligation persists even if a student opts to enroll in a private school.[29]

II. IS IT ACTUALLY A RELIGIOUS SCHOOL?

In cases where disabled students sue their private religious schools for not implementing reasonable accommodations, the schools tend to highlight

---

[21] For a discussion of laws applicable to disabled students, see *A Comparison of ADA, IDEA, and Section 504*, MID-ATLANTIC ADA CTR., https://schoolnursing101.com/wp-content/uploads/2019/01/A-COMPARISON-of-ADA-IDEA-504.pdf [https://perma.cc/3D8Q-XKQC].

[22] Berardelli *ex rel.* M.B. v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 114–17 (3d Cir. 2018). As explained below, there are two key differences between Title III of the ADA and the Rehab Act. First, private religious schools are not exempt from the Rehab Act, while they are exempt from Title III of the ADA. Second, unlike Title III of the ADA, the Rehab Act is only applicable to entities that participate in a program or activity that receives federal funds; this definition covers some private religious schools, thus obligating them to provide reasonable accommodations to disabled students. *Infra* Part II, Section III.B.

[23] 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

[24] Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis., 804 F.3d 178, 189 (2d Cir. 2015).

[25] *Id.*

[26] Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 95–96 (2d Cir. 2015) (quoting U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002)) (explaining that "[a]n *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations," and "the law requires an effective accommodation, not the one that is most effective for each employee").

[27] *Dean*, 804 F.3d at 189.

[28] J.T. v. District of Columbia, 496 F. Supp. 3d 190, 199 (D.D.C. 2020) (citing 20 U.S.C. § 1400(d)(1)(A)).

[29] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3–4, 13–14 (1993) (holding that the Establishment Clause does not bar private religious schools from providing publicly funded accommodations because IDEA "creates a neutral government program dispensing aid . . . to individual handicapped children"); Bellflower Unified Sch. Dist. v. Lua *ex rel.* K.L., 832 F. App'x 493, 495–96 (9th Cir. 2020).

their religious character and seek dismissal or summary judgment on grounds that Title III of the ADA does not apply to them.[30] Some private religious schools have in fact avoided reasonably accommodating disabled students by arguing that the schools are religious in nature.[31] However, before granting such requests, courts should, as a preliminary matter, ask if the school is really religious in nature.[32] If the school is truly religious in character, Title III of the ADA is immaterial, and the school has "no obligations under the ADA."[33] If not, the school is a secular institution that must reasonably accommodate its disabled students under Title III of the ADA.[34]

To this point, "religious schools" must be defined for ADA purposes. Title III of the ADA exempts "religious organizations or entities controlled by religious organizations."[35] But neither of these terms are defined,[36] and the relevant ADA regulations simply say this exception is "very broad, encompassing a wide variety of situations."[37] For these reasons, one cannot identify what exactly constitutes a religious school solely by parsing the ADA and its regulations.

But federal courts have offered some guidance on this issue. Although all religious and secular characteristics are relevant to whether an entity is

---

[30] *See, e.g.*, Doe *ex rel.* Doe v. Abington Friends Sch., 480 F.3d 252, 254–55 (3d Cir. 2007) (explaining that a private religious school's motion to dismiss a lawsuit by a disabled student was based on its religious nature and association with the Quakers); Sky R. *ex rel.* Angela R. v. Haddonfield Friends Sch., No. 14-5730, 2016 WL 1260061, at *6–7 (D.N.J. Mar. 31, 2016) (highlighting that a private Quaker school moved for summary judgment in a case involving a disabled student on the grounds that it was exempt from the ADA); Spann *ex rel.* Hopkins v. Word of Faith Christian Ctr. Church, 589 F. Supp. 2d 759, 762–63 (S.D. Miss. 2008) ("Defendant has moved for summary judgment on the ground that it is exempt from coverage under Title III of the ADA as a religious private school that is controlled by a religious organization, Word of Faith Christian Center Church.").

[31] *See, e.g.*, *Sky R.*, 2016 WL 1260061, at *7 ("As a private school with a religious affiliation with the Religious Society of Friends ('Quakers') and under the control of the Haddonfield Monthly Meeting ('HMM'), [Haddonfield Friends School] is excluded from the ADA . . . .").

[32] *See Abington Friends Sch.*, 480 F.3d at 258 ("Whether Abington [Friends School] qualifies for the ADA's religious exemption is a mixed question of law and fact, the answer to which depends, of course, on the existence of a record sufficient to decide it.").

[33] White v. Denver Seminary, 157 F. Supp. 2d 1171, 1173 (D. Colo. 2001).

[34] *See, e.g.*, Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 153 (1st Cir. 1998) ("The Baldwin School is a private college preparatory school. Like other private schools, it is covered by Title III of the ADA . . . .").

[35] 42 U.S.C. § 12187.

[36] *See* 42 U.S.C. § 12181.

[37] 28 C.F.R. pt. 36 app. C § 36.104 (2020); *see, e.g.*, Rose v. Cahee, 727 F. Supp. 2d 728, 748 (E.D. Wis. 2010) (construing the ADA's religious organization exception as including a Catholic healthcare system).

primarily religious,[38] key factors include the school's "(1) ownership and affiliation, (2) purpose, (3) faculty, (4) student body, (5) student activities, and (6) curriculum."[39] Judges may also ask whether the school is a nonprofit and has a formal religious presence within its management ranks or on its board of trustees.[40]

The Ninth Circuit applied this test to the Kamehameha Schools, a group of private schools in Hawai'i.[41] Although the Kamehameha Schools held themselves out as Protestant, the court found that they were secular and therefore could not benefit from religious exemptions set out in federal law.[42] Here, the Ninth Circuit noted that the Kamehameha Schools: (1) were wholly owned by the secular Bishop Trust; (2) had gradually shifted from a religious purpose to a focus on secular principles; (3) enforced a Protestant-only rule for on-campus teachers but did not require church membership or scrutinize their religious beliefs, and of the 250 full-time faculty, only three had specific religious teaching duties; (4) did not consider the religious affiliation of their pupils, so only one-third of their 3,000 on-campus students were Protestant; (5) sponsored many student activities, only some of which had mild religious aspects; and (6) offered a largely secular curriculum that did not instruct their students in Protestant doctrine and only contained a limited comparative religious education requirement.[43] The Ninth Circuit found that "[i]n sum, the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects."[44] This was insufficient to establish a religious nature—the Ninth Circuit instead ruled that the Kamehameha Schools were a "secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not religious."[45]

This multifactor test can thus help ensure that private religious school defendants in "failure-to-accommodate" lawsuits are genuinely entitled to

---

[38] EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988) (illustrating that courts use a totality-of-the-circumstances test to determine whether an entity is genuinely religious and can thus benefit from religious exemptions).

[39] Spencer v. World Vision, Inc., 633 F.3d 723, 727 (9th Cir. 2011) (O'Scannlain, J., concurring) (citing EEOC v. Kamehameha Schs./Bishop Est., 990 F.2d 458, 461–63 (9th Cir. 1993)).

[40] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007); *Kamehameha*, 990 F.2d at 461; *Townley*, 859 F.2d at 618–19; EEOC v. Miss. Coll., 626 F.2d 477, 487 (5th Cir. 1980).

[41] *Kamehameha*, 990 F.2d at 461–64.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 463.

[45] *Id.* at 463–64.

the religious exemption enumerated in Title III of the ADA. A less exacting approach may give private schools that do not want to deal with perceived hassles associated with disabled students a "get-out-of-jail-free" card: Assert a religious purpose to avoid enrolling disabled students who initially appear difficult to integrate into the student body.

III. RELIGIOUS SCHOOLS AND DISABLED STUDENTS

As noted above, Title III of the ADA is ineffective because a private school that is truly religious in character is exempt from the requirement to reasonably accommodate a disabled student. But disabled students can use two other federal statutes to access the needed reasonable accommodations while attending such schools. This Part addresses these alternative federal statutes in four Sections. Section A argues that, although disabled K–12 students enrolled in private religious schools may be able to obtain services from their local school district through IDEA, that statute is fraught with shortcomings. Section B asserts that disabled students may instead be able to secure reasonable accommodations through the Rehab Act, which applies to all private schools that receive federal financial assistance.[46] Because the Rehab Act is broader than IDEA, an expansive application of the Rehab Act could better help disabled students exercise their First Amendment right to choose a religious education to the same extent as their nonhandicapped peers. Section C highlights several First Amendment justifications for such an application of the Rehab Act. Finally, Section D explores some policy considerations which are relevant to disabled students' access to reasonable accommodations at private religious schools.

A. IDEA Is Ineffective in Its Current Form

IDEA guarantees all disabled elementary- and secondary-school students access to a "free appropriate public education."[47] While IDEA can be helpful, its scope is narrow. First, "IDEA is limited to educational opportunities only through the academic level associated with completion of secondary school."[48] As a result, IDEA is inapplicable to disabled college and graduate students in its current form.

Second, IDEA allows public school districts to place disabled students in private schools, which may occur when the school district feels that, for some reason, the private school is better equipped to serve the student's

[46] 29 U.S.C. § 794(a); 34 C.F.R. §§ 104.39(a), 104.41 (2020).

[47] Z.B. v. District of Columbia, 888 F.3d 515, 518 (D.C. Cir. 2018) (citing 20 U.S.C. § 1412(a)(1)(A)).

[48] K.L. *ex rel.* L.L. v. R.I. Bd. of Educ., 907 F.3d 639, 643 (1st Cir. 2018).

disability-related needs.[49] But in such scenarios, the school district need only make sure that its disabled students get "some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services."[50] For example, in *Board of Education v. Rowley*, the Supreme Court held that IDEA did not require a school district to provide a deaf student a sign language interpreter because she was able to learn and perform at an "adequate" academic level without an interpreter.[51] When a school district places a disabled student into a private religious school, IDEA promises only basic opportunities, not necessarily the services that would fully unlock that student's academic potential.[52]

Third, school districts that offer a free, appropriate public education have no obligation to serve disabled students who independently decide to enroll in a private religious school.[53] Thus, only a narrow subset of students with disabilities are protected under IDEA. Specifically, it is only when a public school district itself places a student in a private religious school that IDEA is applicable. Even then, students must settle for merely "adequate" educational support. All other disabled students who are denied reasonable accommodations by a private religious school must rely on different statutes in order to access reasonable accommodations.

B. The Rehab Act May Be a Better Alternative

Although Title III of the ADA and IDEA are generally unhelpful to disabled students deprived of reasonable accommodations while attending private religious schools, the Rehab Act is a promising alternative. Section 504 of the Rehab Act forbids discrimination against disabled individuals by participants in "any program or activity receiving Federal financial assistance."[54] The Rehab Act lacks a religious exemption, so it covers all

---

[49] *See* J.T. v. District of Columbia, 496 F. Supp. 3d 190, 200 (D.D.C. 2020); *accord* Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1473–78 (9th Cir. 1993) (reversing summary judgment for a school district in an IDEA case because a state hearing officer correctly concluded that the school district could not provide a severely developmentally disabled student with a free appropriate public education as evidenced by his inability to communicate in any language whatsoever and lack of self-help skills). The court also ruled that the school district had to place the student in a specific private school recommended by the hearing officer as especially well-positioned to meet the student's needs. *Id.*

[50] M.L. *ex rel.* Leiman v. Smith, 867 F.3d 487, 495 (4th Cir. 2017).

[51] 458 U.S. 176, 209–10 (1982).

[52] In contrast, nondisabled students can easily access services needed to maximize their academic potential, such as after-school tutoring sessions with their teachers—they need only ask, and they receive. This point illustrates that formal educational policy strongly disfavors disabled students relative to their nondisabled peers, and IDEA jurisprudence is such that schools and courts settle for adequate academic achievement in the name of an "appropriate" education. *See id.*

[53] 20 U.S.C. § 1412(a)(10)(C)(i).

[54] Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1020 (9th Cir. 2002) (quoting 29 U.S.C. § 794(a)).

private sectarian schools that benefit from direct or indirect federal financial assistance.[55]

Federal financial assistance consists of direct subsidies and indirect support received via intermediaries.[56] Indirect federal financial assistance includes, among other things, childcare grants,[57] free or reduced-cost school lunches,[58] and college tuition payments subsidized by federal student loans.[59] Although there are some practical differences between direct and indirect federal financial assistance,[60] they are the same in the eyes of the law.[61] As a result, the type of federal financial assistance an entity receives has no impact on its substantive obligations pursuant to the Rehab Act.[62] The Rehab Act's applicability to religious entities, combined with the fact that "federal financial assistance" includes both direct and indirect government aid, can increase the availability of reasonable accommodations at private religious schools under the Act. This will help disabled students enjoy their First Amendment right to choose religious schooling.

The Rehab Act also provides concrete rights and remedies for disabled students. Under the Rehab Act, a student can set out a prima facie failure-to-accommodate claim against a private religious school by stating that (1) the student was disabled; (2) the school had notice of the student's disability; and (3) the school denied or ignored requests for reasonable accommodations.[63] Furthermore, under the Rehab Act, private religious schools cannot charge their disabled students for reasonable accommodations unless these modifications cause a "substantial increase in cost" for the school.[64]

But three things must happen for the Rehab Act to attain maximum potency when applied to private religious schools. First, the scope of federal

---

[55] John A. Liekweg, *The Americans with Disabilities Act, Section 504, and Church-Related Institutions*, 38 CATH. LAW. 87, 95–104 (1998); *see also* 34 C.F.R. §§ 104.39(a), 104.41 (2020) (describing the entities to which the Rehab Act applies).

[56] U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607 (1986).

[57] Zelman v. Simmons-Harris, 536 U.S. 639, 666–67 (2002) (O'Connor, J., concurring).

[58] *See* Liekweg, *supra* note 55, at 97.

[59] Grove City Coll. v. Bell, 465 U.S. 555, 558, 563 (1984).

[60] Practically speaking, direct federal financial assistance consists of funds that flow from the government straight to recipients. In contrast, indirect federal financial assistance consists of funds that the federal government provides to a recipient through an intermediary. *See id.* at 564–65.

[61] *Id.* at 564.

[62] *Id.*; *accord* Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs, 41 F.3d 600, 604 (10th Cir. 1994) (quoting U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607 (1986)) (explaining that Rehab Act "coverage extends to Congress' intended recipient [of federal financial assistance], *whether receiving the aid directly or indirectly*").

[63] Chenari v. George Washington Univ., 847 F.3d 740, 746–47 (D.C. Cir. 2017).

[64] 34 C.F.R. § 104.39(b) (2020).

financial assistance for Rehab Act purposes should be expanded to include federal tax exemptions available to religious groups. Second, if one or more of a private religious school's parent entities benefits from federal financial assistance, that support should be imputed to the school in Rehab Act contexts. Third, in deciding if a "substantial increase in cost" exists by virtue of reasonable accommodations, courts should confirm a private religious school's inability to pay for such modifications before allowing the school to seek reimbursement from disabled students.

1. Tax-Exempt Status as Federal Financial Assistance

Students who bring Rehab Act failure-to-accommodate claims against private religious schools should first identify whether the school participates in any federal programs that provide financial assistance, perhaps by filing a Freedom of Information Act request with the Department of Education.[65] The Rehab Act and its reasonable accommodation mandate apply when a private religious school accepts childcare grants, offers free or reduced-cost lunches, or receives tuition payments subsidized by federal student loans.[66] But private religious schools may forgo participation in such programs to avoid unwelcome federal oversight.[67]

Nevertheless, tax-exempt status means that, for Rehab Act purposes, a private religious school itself participates in a "program or activity receiving Federal financial assistance." An entity is eligible to receive federal tax exemptions only if it undertakes specific charitable activities that serve a valuable public purpose.[68] Such a "tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."[69] Supreme Court dicta signal that if these schools hold tax-exempt status, they receive federal financial assistance and must reasonably accommodate disabled students under the Rehab Act.[70] For example, Justice Clarence Thomas echoed this principle in a case that involved tax-exempt religious entities. He emphasized that as "tax exemption in many cases is economically and functionally indistinguishable from a direct monetary

---

[65] 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability . . . shall . . . be excluded from the participation in . . . activity receiving Federal financial assistance . . . .").

[66] *Supra* notes 57–59.

[67] *See, e.g.*, Grove City Coll. v. Bell, 465 U.S. 555, 559 (describing Grove City College's decision to refuse state and federal financial assistance in order to avoid federal oversight).

[68] Bob Jones Univ. v. United States, 461 U.S. 574, 587–88, 591 (1983).

[69] Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983).

[70] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 666 (2002) (O'Connor, J., concurring) (quoting *Regan*, 461 U.S. at 544) (Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 859–60 & 859 n.4 (1995) (Thomas, J., concurring)) ("[T]ax exemptions . . . have 'much the same effect as [cash grants] . . . of the amount of tax [avoided].").

subsidy[,] . . . *the financial aid to religious groups is undeniable*."[71] Thus, the fact that a private religious school holds tax-exempt status indicates that it participates in activities receiving federal financial assistance. And because these private religious schools receive federal financial assistance, the Rehab Act compels them to reasonably accommodate their disabled students. This classification of tax-exempt private religious schools reflects the federal government's ability to use its taxing power to combat discrimination that contravenes established public policy.[72]

The above analysis meshes with judicial analysis of other civil rights laws. The U.S. District Courts for the District of Columbia and Southern District of New York have held that tax exemptions are federal financial assistance for purposes of Title VI of the Civil Rights Act of 1964.[73] The former court based its ruling on the premise that, as tax-exempt status is "available only to particular groups, it operates in fact as a subsidy in favor of the particular activities these groups are pursuing."[74] And the Eleventh Circuit has hinted that tax exemptions may be treated as federal financial assistance in Title IX lawsuits.[75] In so doing, this court noted that "exemption from federal taxes produces the same result as a direct federal grant."[76] Since Title VI,[77] Title IX,[78] and the Rehab Act[79] incorporate identical "federal financial assistance" clauses, analyses of the first two statutes should apply with equal force to the Rehab Act. A contrary approach would ignore this fact to the detriment of disabled students' First Amendment right to choose to pursue a religious education.[80]

---

[71] *Rosenberger*, 515 U.S. at 859–60 (Thomas, J., concurring) (emphasis added).

[72] *See, e.g.*, *Bob Jones Univ.*, 461 U.S. at 586, 604 (upholding the IRS's decision to strip a racially discriminatory private religious university of its tax-exempt status because such discrimination contravenes congressional intent that tax-exempt institutions "serve a public purpose and not be contrary to established public policy").

[73] Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988); McGlotten v. Connally, 338 F. Supp. 448, 461–62 (D.D.C. 1972).

[74] *McGlotten*, 338 F. Supp. at 462.

[75] M.H.D. v. Westminster Schs., 172 F.3d 797, 802 n.12 (11th Cir. 1999).

[76] *Id.*

[77] 42 U.S.C. § 2000d.

[78] 20 U.S.C. § 1681(a); *see M.H.D.*, 172 F.3d at 802 n.12 (noting that because Title VI served as a model for Title IX, the rationale behind regarding tax-exempt status as federal assistance should apply in both cases).

[79] 29 U.S.C. § 794(a).

[80] *But see* Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill., 134 F. Supp. 2d 965, 971–72 (N.D. Ill. 2001) (holding that tax exemptions are not federal financial assistance for Title IX purposes because the relevant regulation does not classify them as such); Bachman v. Am. Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1263–65 (D.N.J. 1983) (holding that tax exemptions are not federal financial assistance for Rehab Act purposes as they are comparable to "economic advantage[s]" afforded by FCC broadcast licenses and government procurement contracts and because Rehab Act regulations

In addition, treating tax-exempt status as federal financial assistance in Rehab Act cases will also reflect the federal government's license to use its taxing power to fight discrimination. The Supreme Court outlined this principle in its landmark *Bob Jones University* decision.[81] There, Justice Warren Burger said that "entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[82] The Supreme Court then upheld the IRS's revocation of Bob Jones University's federal tax exemption since it "would be wholly incompatible with the concepts underlying tax exemption to grant the benefit of tax-exempt status to racially discriminatory educational entities"[83] which contravene public policy.

Bob Jones University thus indicates that, by securing tax exemptions, private religious schools subject themselves to federal antidiscrimination policies.[84] This principle applies to schools receiving tax exemptions under the Rehab Act.[85] And such schools should therefore be required to reasonably accommodate disabled students. Otherwise, private religious schools will enjoy the benefits of federal tax exemptions while avoiding the associated antidiscrimination duties, such as reasonable accommodations for disabled students. And classifying tax exemptions as federal financial assistance for Rehab Act purposes is reasonable because private religious schools that truly do not want to comply with that statute have an easy way out—forfeiting their federal tax-exempt status. If a school is so inclined, it will free itself from any obligation to reasonably accommodate disabled students and may then turn away pupils who may be perceived as too difficult or expensive to welcome into the school community.

Defining tax exemptions as federal financial assistance for Rehab Act purposes is a key first step in securing disabled students' First Amendment right to choose to enroll in their preferred private religious schools. This

omit tax exemptions from the definition of federal financial assistance). Because the Supreme Court has indicated that "tax exemptions . . . have 'much the same effect as cash grants of the amount of tax avoided,'" these district court rulings may not accurately reflect how other courts will analyze the issue of whether tax exemptions are federal financial assistance for Rehab Act purposes in the future. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 666, 668 (2002) (O'Connor, J., concurring) (alterations omitted) (explaining that whether a tax-exempt status may qualify as federal assistance is nuanced); *accord* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 859–60 (1995) (Thomas, J., concurring).

[81] *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (affirming the IRS's decision to strip a racially discriminatory religious university of its federal tax-exempt status).

[82] *Id.* at 586.

[83] *Id.* at 595.

[84] *See id.* at 604–05.

[85] Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 114–17 (3d Cir. 2018).

approach to tax exemptions will help expand the Rehab Act's scope to as many private religious schools as possible, especially those that largely avoid federal programs yet exploit tax exemptions. And these schools will be unable to avoid their charitable and nondiscrimination duties to reasonably accommodate disabled students, as any failure to do so could cost a school its federal tax-exempt status. This analysis makes sense because federal tax exemptions exist to facilitate essential public benefits including reasonable accommodations for disabled students.[86]

2. Federal Financial Assistance for Parent Entities

Tax exemptions are only one part of the Rehab Act puzzle because disabled students may attend private religious schools that avoid federal programs and do not themselves hold tax-exempt status. But such schools are not necessarily immune to the Rehab Act because they may possibly have parent entities that should be part of the Rehab Act analysis. For example, the Kamehameha Schools discussed earlier in this Essay are wholly owned and controlled by a separate entity called the Bishop Trust, which engages in a variety of activities throughout Hawai'i.[87] In these cases, courts should identify the school's entire corporate structure, then ask whether any of its parent entities obtain federal financial assistance via government programs or tax exemptions, as the Middle District of Florida did in *Schwarz v. The Villages Charter School*.[88] This approach would mirror the rule requiring parties seeking to establish diversity jurisdiction for LLCs to allege the citizenship of each member of every LLC implicated.[89] And such an inquiry is appropriate here because, much like LLC citizenship, the characteristics of schools controlled by parent entities may be best defined by reference to their parent entities. If a school's parent entities receive federal financial assistance, the school itself should be required to reasonably accommodate disabled students under the Rehab Act.[90]

This parent entity-centric inquiry makes intuitive sense. The financial assistance that a private religious school's parent entities derive from federal programs or tax-exempt status will naturally cascade down to the school,[91]

---

[86] *Bob Jones Univ.*, 461 U.S. at 591.

[87] EEOC v. Kamehameha Schs./Bishop Est., 990 F.2d 458, 461–63 (9th Cir. 1993).

[88] *See* Schwarz v. Villages Charter Sch., Inc., 165 F. Supp. 3d 1153, 1189, 1202 (M.D. Fla. 2016) (stating that a Rehab Act claim brought against a charter school survived summary judgment because although that school did not receive federal financial assistance, one of its parent entities did, and this support could be imputed to the charter school).

[89] *See* Smith v. Toyota Motor Corp., 978 F.3d 280, 282 (5th Cir. 2020).

[90] *See Schwarz*, 165 F. Supp. 3d at 1202.

[91] *See* IRS, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 2 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf [https://perma.cc/VBN9-N89H] (explaining that a parent religious entity's tax-exempt status automatically extends to all subsidiaries listed with the IRS).

thus making the school an indirect recipient of federal financial assistance subject to the Rehab Act.[92] Rehab Act jurisprudence should reflect this key aspect of multi-layered corporate structures. Otherwise, a private religious school could evade the Rehab Act by funneling federal financial assistance through a parent entity, thereby precluding disabled students from using the Rehab Act to secure reasonable accommodations.

Religious interest groups will likely oppose the use of this "piercing the corporate veil"-style test[93] when private religious schools do not reasonably accommodate a disabled student.[94] They will probably cite the rule that the Rehab Act does not extend to entities that do not directly or indirectly receive federal financial assistance but merely derive downstream economic benefits from such funds[95]—an example of such an entity could be a third-party cafeteria contractor hired by a private religious school that participates in the free or reduced-cost school lunch program. These religious interest groups may then argue that private religious schools that forego federal programs and tax exemptions—but have otherwise inclined parent entities—should benefit from this "mere economic beneficiary" limitation on the scope of the Rehab Act. But this reasoning is flawed, as the members of any parent-subsidiary relationship, regardless of the level of control involved, naturally pursue shared objectives and behave in a mutually beneficial manner, so their finances should be jointly assessed for Rehab Act purposes.[96] Accordingly, any federal financial assistance received by private religious schools' parent

---

[92] *See* Grove City Coll. v. Bell, 465 U.S. 555, 562–64 (1984) (explaining that schools that receive "indirect" federal financial assistance are nevertheless "recipients" thereof); U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607 (1986) (explaining that entities that receive federal aid via intermediaries are indirect federal financial assistance recipients).

[93] The "corporate veil" refers to the fact that formation of a corporation, LLC, or other like entity shields its shareholders or owners from liability for debts held, and wrongs committed, by the corporate entity. At any rate:

> [T]here is [a] . . . fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil [i.e., liability shield] may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.

United States. v. Bestfoods, 524 U.S. 51, 62 (1998).

[94] *See* Dingle, *supra* note 8.

[95] *See* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999).

[96] *Proceedings Fourth Annual International Business Law Symposium: Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing, and Successor Liability*, 10 FLA. J. INT'L L. 221, 256 (1995) ("The parent and the subsidiary collectively are the business; they collectively conduct the business under the control of the parent."); *accord* Ranza v. Nike, Inc., 793 F.3d 1059, 1074 (9th Cir. 2015) (internal quotation marks omitted) (quoting Doe v. Unocal Corp., 248 F.3d 915, 927 (9th Cir. 2001)) ("A parent corporation may be directly involved in financing and macro-management of its subsidiaries . . . .").

entities should be imputed to the schools themselves when courts ascertain the schools' Rehab Act obligations.[97]

3. The Problem of Unjust School Cost-Shifting to Families

The Rehab Act's effectiveness also turns on who pays for disabled students' reasonable accommodations. According to a Rehab Act regulation, all private religious schools can charge disabled students more if reasonable accommodations result in "substantial increases in cost" for the school.[98] By its terms, this regulation allows private religious schools that are so inclined to pass the cost of reasonable accommodations to disabled students. And lawyers for private religious schools have hinted at a preference that families bear at least some of the cost of reasonable disability accommodations.[99] Such an inclination toward cost-shifting risks placing the First Amendment right to choose a religious education beyond the financial reach of many disabled students. The $114,000 in loans that Michael Argenyi took out to subsidize reasonable accommodations for two years of medical school aptly illustrate this point.[100]

Since the cost of reasonable accommodations may cause sticker shock, private religious schools may insist the "substantial increases in cost" test turns on the raw dollar value of such accommodations. But, in the interest of maximizing disabled students' First Amendment right to choose a religious education, this narrow conceptualization of "substantial increases in cost" should be rejected in favor of a proposed proportionality test that evaluates the relative effect of reasonable accommodations on a private religious school's assets. The first step in this proposed test would be to examine a private religious school's latest publicly available IRS Form 990,[101] or the applicable equivalent, to ascertain its annual cash surplus, or the difference between revenue and expenses for that year.[102] The second step in this test would be to divide the raw dollar value of a disabled student's reasonable

---

[97] *Cf.* Cnty. of Genesee v. Greenstone Farm Credit Servs., ACA, 968 F. Supp. 2d 860, 863–67 (E.D. Mich. 2013) (explaining that any tax status held by a parent or subsidiary entity can be imputed to any relevant related entities for purposes of obligations under federal law).

[98] 34 C.F.R. § 104.39(b) (2020).

[99] *See* Liekweg, *supra* note 55, at 100. Here, a lawyer who represented the interests of private Catholic schools stated that the Rehab Act likely requires "accommodating *parentally-compensated* sign interpreters for students with hearing deficiencies." *Id.* (emphasis added). This remark aptly illustrates the fact that some private religious schools might seek reimbursement for reasonable accommodations.

[100] Argenyi v. Creighton Univ., 703 F.3d 441, 445 (8th Cir. 2013).

[101] *See generally Instructions for Form 990 Return of Organization Exempt from Income Tax (2020)*, IRS (2020), https://www.irs.gov/instructions/i990 [https://perma.cc/27E2-MW84] (explaining the purpose of Form 990).

[102] All tax-exempt organizations must file annual Form 990 returns. *Annual Filing and Forms*, IRS (2020), https://www.irs.gov/charities-non-profits/annual-filing-and-forms [https://perma.cc/C9UL-X6XC].

accommodations by the private religious school's annual cash surplus. The resulting percentage would indicate whether the private religious school can afford the reasonable accommodations at issue.[103]

This proportionality test could also be easily adjusted in cases where a private religious school's latest IRS Form 990 is not reflective of its actual ability to afford reasonable accommodations for its disabled students. A school could bring in little to no revenue, or sustain losses, but hold substantial liquid assets, like cash and stock in publicly traded companies.[104] Courts could respond by basing the reasonable accommodation affordability calculation on the amount of liquid assets listed on the school's Form 990. A school could also incur an unusually high amount of expenses in a given year. Under such circumstances, courts could simply perform the reasonable accommodation affordability calculation for each year within a three-to-five-year range. This multi-year range would help draw a more accurate picture of a private religious school's finances and therefore make it more difficult to circumvent the proportionality test by manipulating one year of their finances. Courts could then aggregate the results to ascertain whether the school can actually afford to accommodate a disabled student. The inherent flexibility of this test will help prevent private religious schools that are so inclined from manipulating their finances in a way that enables them to avoid funding accommodations. And this test would also prevent affluent schools from unjustly shifting costs to students with disabilities while also protecting their less wealthy peers whose economic survival might be threatened by expenses related to reasonable accommodation.

In promulgating the regulation that allows private schools to charge disabled students for their reasonable accommodations, the Department of Education could have set a fixed cost threshold for reimbursement. It instead opted for flexible "substantial increase in cost" language.[105] This phrasing strongly implies that private religious schools' obligation to fund reasonable accommodations is a contextual inquiry in which the costs of any such accommodations are evaluated in light of the school's wealth and the money the government contributes to the school through tax exemptions. To this point, reasonable accommodations cause "substantial increases in cost" only if the potential expenditures, measured as a percentage of the private

---

[103] *See* Schwarz v. Villages Charter Sch., Inc., 165 F. Supp. 3d 1153, 1209 (M.D. Fla. 2016) (exploring the idea of weighing the relative cost of reasonable accommodations "in light of the overall financial position of the covered entity").

[104] Liquid assets consist of cash and property, such as shares in publicly traded companies, that can readily be converted to cash with little to no loss in value. *See* James Chen, *Liquid Asset*, INVESTOPEDIA (Mar. 29, 2021), https://www.investopedia.com/terms/l/liquidasset.asp [https://perma.cc/7ZVS-TYXH].

[105] 34 C.F.R. § 104.39(b) (2020).

religious school's cash surplus or its other relevant assets, are so high that the school might be willing to abandon its tax-exempt status to avoid paying for the accommodations at issue. And this proportionality test would strike the appropriate balance between disabled students' First Amendment right to choose a religious education and the economic health of private religious schools that offer such instruction.

Real-world application of the proportionality test is instructive. Michael Argenyi provides a useful test case as the approximate cost of his cued speech interpreter and CART services—$57,000 per year—is known.[106] This cost can be reconciled against the 2017 IRS Form 990s filed by four private religious schools in various financial situations. First, Covenant Academy in Cypress, Texas reported an annual loss of $108,391 in 2017.[107] As a result, $57,000 in reasonable accommodations could be a "substantial increase in cost" since these expenses would cause Covenant to lose even more money. Second, consider Legacy Preparatory Christian Academy in The Woodlands, Texas, which reported a $48,599 annual cash surplus in 2017.[108] Because $57,000 in reasonable accommodation costs would absorb Legacy Prep's entire 2017 annual cash surplus and cause it to lose some money that year, a "substantial increase in cost" could exist here. Third, the Providence Christian School of Texas in North Dallas reported an annual cash surplus of $926,113 in 2017.[109] Since $57,000 in reasonable accommodations would consume a mere 6.15% of Providence's 2017 annual cash surplus, leaving it $869,113 for other uses, it is likely that no "substantial increase in cost" to the school would result. Fourth, Creighton University in Omaha, Nebraska disclosed a $91,130,471 annual cash surplus in 2017.[110] The fact that $57,000 in reasonable accommodations would take up a tiny 0.06% of Creighton's 2017 annual cash surplus, leaving over $91 million intact, establishes that no "substantial increase in cost" would exist here.

The above discussion raises several points. Initially, funding reasonable accommodations is not necessarily an all-or-nothing proposition. Disabled

---

[106] Argenyi v. Creighton Univ., 703 F.3d 441, 445 (8th Cir. 2013).

[107] *See* Covenant Acad., *Form 990 Return of Organization Exempt from Income Tax*, IRS (2017), https://apps.irs.gov/pub/epostcard/cor/300152850_201806_990_2019060416376611.pdf [https://perma.cc/7PWS-SDAA].

[108] *See* Legacy Preparatory Christian Acad., *Form 990 Return of Organization Exempt from Income Tax*, IRS (2017), https://apps.irs.gov/pub/epostcard/cor/202693047_201806_990_2019051616309382.pdf [https://perma.cc/ZLA4-7XKY].

[109] *See* Providence Christian Sch. of Tex., *Form 990 Return of Organization Exempt from Income Tax*, IRS (2017), https://apps.irs.gov/pub/epostcard/cor/752247092_201805_990_2019030816158492.pdf [https://perma.cc/V4ES-RBZN].

[110] *See* Creighton Univ., *Form 990 Return of Organization Exempt from Income Tax*, IRS (2017), https://apps.irs.gov/pub/epostcard/cor/470376583_201806_990_2019060716394992.pdf [https://perma.cc/26WZ-SKRG].

students can execute cost-sharing agreements with their private religious schools, which should seek reimbursement only to the extent that a student's reasonable accommodations truly impose "substantial increases in cost" on the school. This is a contextual test that reconciles expenses for reasonable accommodations against the funds the federal government contributes to a private religious school through tax exemptions and the school's wealth,[111] which makes sense because tax exemptions are meant to facilitate essential public benefits[112] such as reasonable accommodations for disabled students. And that limitation on reimbursement for reasonable accommodations will protect disabled students' First Amendment right to choose to attend the private religious school of their choice by eliminating potential financial barriers to enrollment.

C. First Amendment Grounds for Extending the Rehab Act

Private religious schools will likely oppose defining tax-exempt status and the government aid received by their parent entities as "federal financial assistance" in Rehab Act contexts. The proportionality test for "substantial increases in cost" will probably face similar resistance. Here, private religious schools will likely recycle their arguments against the ADA and claim that the application of the Rehab Act infringes on their First Amendment right to freely exercise their religion.[113] But this reasoning is problematic for several reasons. First, subjecting tax-exempt private religious schools[114] to the Rehab Act's reasonable accommodation mandate is not a violation of the First Amendment. This is a neutral and generally applicable interpretation of the law that will not burden religion in advancing a vital government interest in the least restrictive way possible. Second, arguments based on the quasi-First Amendment academic freedom doctrine will fail as its relevant aspects deal with unrelated pedagogical concerns. Third, requiring tax-exempt private religious schools to adhere to the Rehab Act will protect disabled students' First Amendment right to choose a

---

[111] Whether accommodations are "undue hardships" under the Rehab Act is also a fact-specific question that turns on the circumstances of each case. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 139 (2d Cir. 1995) (explaining that "undue hardship" does not require that employers "be driven to the brink of insolvency" but calls for a cost–benefit analysis).

[112] *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (illustrating that tax exemptions can be used to further federal objectives such as elimination of racial discrimination).

[113] *See* Dingle, *supra* note 8; *accord* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186–90 (2012) (illustrating that the ministerial exception which allows private religious schools to sidestep the ADA's employment discrimination provisions is rooted in arguments centered on such schools' ability to freely exercise their religion).

[114] For purposes of this Section, the "tax-exempt private religious schools" term includes schools whose parent entities receive federal financial assistance, as this Essay argues that these funds should be imputed to the private religious school for Rehab Act purposes.

religious education by increasing access to accommodations at private religious schools. Fourth, the federal Religious Freedom Restoration Act (RFRA)[115] does not foreclose this expansive application of the Rehab Act.

1. Religious Schools and Their First Amendment Rights

Neutral and generally applicable interpretations of federal laws, such as subjecting tax-exempt private religious schools to the Rehab Act and its reasonable accommodation rule, do not offend the Free Exercise Clause. Statutes and related doctrines are neutral and generally applicable unless they restrict practices because they are driven by religion or otherwise treat sectarian groups worse than secular equivalents.[116] This issue requires both facial and as-applied analyses.[117] The Rehab Act is a facially neutral law as it does not contain any language that could be read as targeting religion.[118] And there is nothing inherently religious about requiring all recipients of federal financial assistance, including tax-exempt private religious schools, to reasonably accommodate disabled students. Also, it cannot be argued that extending the Rehab Act's reasonable accommodation mandate to tax-exempt private religious schools will treat sectarian schools worse than their secular counterparts. If anything, this use of the Rehab Act will impose upon private religious and secular schools an identical obligation to provide reasonable accommodations for their disabled students. Thus, the First Amendment permits extension of the neutral and generally applicable Rehab Act to tax-exempt private religious schools.

Besides, subjecting tax-exempt private religious schools to the Rehab Act and its reasonable accommodation mandate will not burden religion in violation of the Free Exercise Clause. Religion is burdened when one must choose between following religious doctrine and securing federal benefits.[119] Under the Rehab Act, tax-exempt private religious schools will only need to decide whether to reasonably accommodate their disabled students or pay taxes, and these options do not endanger religious precepts in violation of

---

[115] Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4.

[116] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–33 (1993).

[117] *Id.* at 533–35; *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (granting injunctive relief to a church from COVID-19 regulations because they "single out houses of worship").

[118] 29 U.S.C. §§ 701–797b; *cf. Lukumi Babalu*, 508 U.S. at 533–35 (disapproving of an ordinance's use of words relevant to Santeria that targeted that particular religion).

[119] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021–24 (2017) (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978) (plurality opinion)) (alterations and emphasis in original) ("'To condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties.' . . . In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit. The rule is simple: No churches need apply.").

the First Amendment.[120] Large-print papers, sign language interpreters, and handicapped-accessible buildings for disabled students will not materially alter religious messaging or hamper rituals like Communion. In Rehab Act contexts, "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."[121] Since religion will not be burdened, requiring all tax-exempt private religious schools to reasonably accommodate disabled students under the Rehab Act will not offend these schools' Free Exercise Clause rights.[122]

In response, private religious schools might contend that using their tax-exempt status to subject them to the Rehab Act's reasonable accommodation requirement would "burden" religion by decreasing the cash available for religious activities. It is true that a tax-exempt private religious school might pay for reasonable accommodations under the Rehab Act. Yet every secular expenditure that is incurred by a tax-exempt private religious school, such as the payment of minimum wage in accordance with federal law,[123] necessarily reduces the funds that are available for its religious activities. Tax-exempt private religious schools' general obligation to pay for goods and services does not burden religion. For the same reason, private religious schools that relinquish their tax-exempt status to sidestep the Rehab Act will fare no better if they rely on the argument that general taxation burdens religion by shrinking the pot of money that the school can use for religious purposes. The Supreme Court has expressly held that, "to the extent that imposition of a generally applicable tax merely decreases the amount of money [which a private religious school] has to spend on its religious activities, any such burden is not constitutionally significant."[124]

Further, to the extent that requiring tax-exempt private religious schools to reasonably accommodate disabled students burdens religion, any such burden will help advance the federal government's compelling interest in ending ableism by the least restrictive means possible.[125] "[D]isabilities do

[120] Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 24–25 (D.D.C. 1999) (finding that a church's choice between lobbying or paying taxes did not burden religion as that choice was not inherently religious).

[121] Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983).

[122] *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (explaining that a law that burdens religion forces religious people to choose between their religion and something like employment).

[123] *See, e.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1401 (4th Cir. 1990) (holding that private church-operated schools are subject to the minimum wage requirements set out in the Fair Labor Standards Act and affirming an award of back pay).

[124] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990).

[125] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (explaining that any law that is not neutral or generally applicable must be justified by a "compelling governmental interest").

not diminish the right to full inclusion in American society."[126] The ADA and Rehab Act are congressional mandates to eliminate discrimination against individuals with a mental or physical disability.[127] Both statutes safeguard the fundamental right of disabled persons to fully participate in modern society, and "target the same 'critical areas' where discrimination persists, including education."[128] And the ADA and Rehab Act both address ableism in education by requiring schools to reasonably accommodate disabled students.[129] These statutes clarify that Congress views the prevention of discrimination against disabled students via reasonable accommodations as a compelling government interest.[130] In addition, the Supreme Court has ruled that tying tax exemptions for private religious schools to nonreligious federal civil rights initiatives is the least restrictive way to further the government interest in terminating discrimination that contravenes public policy.[131] Any burden that may be imposed by requiring private religious schools to provide reasonable accommodations to disabled students will therefore be justified by the federal government's compelling interest to eradicate ableism in educational contexts.

2. Religious Schools and Academic Freedom

The First Amendment also implicates academic freedom, which encompasses "'the four essential freedoms' of a [school]—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[132] Some tax-exempt private religious schools might take the position that the Rehab Act's reasonable accommodation rule will infringe upon their academic freedom by dictating how students are taught and altering the composition of their student body to include more disabled pupils.

A hypothetical "how it shall be taught" academic freedom argument against application of the Rehab Act and its reasonable accommodation requirement to tax-exempt private religious schools has its flaws. The "how it shall be taught" aspect of academic freedom encompasses a school's right

---

[126] Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 116 (3d Cir. 2018).

[127] *Id.* at 115.

[128] *Id.* at 116.

[129] *Id.* at 116–17.

[130] *Cf.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring) (emphasis in original) ("We can answer the compelling interest question simply by asking whether *Congress* has treated [the interest at stake] . . . as a compelling interest.").

[131] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (noting that denial of federal tax benefits was the least restrictive means of achieving the key government interest in erasing educational racism).

[132] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

to decide the substantive content of its instructional materials,[133] set uniform class grading policies,[134] and manage other curriculum-related matters.[135] These purely pedagogical concerns are unaffected by neutral and generally applicable laws, such as the Rehab Act, that do not impact school curricula. Besides, a private religious school's autonomy in academic curriculum matters would not be constrained by an independent obligation to reasonably accommodate disabled students.

Likewise, a possible "who may be admitted to study" academic freedom argument against extending the Rehab Act's reasonable accommodation requirement to all tax-exempt private religious schools is inapplicable in this case. This element of academic freedom is immaterial because it pertains to the admissions process, as opposed to postadmission responsibilities.[136] If anything, this "who may be admitted to study" academic freedom analysis is in tension with a Rehab Act regulation that bars private schools from denying students admission on the basis of a disability.[137]

To the above point, academic freedom is constrained by the Fourteenth Amendment. Academic freedom thus allows schools to admit students based on race to promote racial diversity[138] but does not operate in a manner that allows admissions preferences designed to achieve other objectives such as exclusion of disabled students based on the perceived cost of their reasonable accommodations. And no court has decided that schools can use academic-freedom doctrine to discriminate against their disabled applicants. For these reasons, tax-exempt private religious schools cannot use academic freedom to sidestep the Rehab Act's substantive requirements by disfavoring disabled

---

[133] Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla, 490 F.3d 1, 18–19 (1st Cir. 2007) (explaining that academic freedom precludes laws restricting a school's ability to choose its textbooks).

[134] Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught.").

[135] Evans-Marshall v. Bd. of Educ., 428 F.3d 223, 237 (6th Cir. 2005) (Sutton, J., concurring) (quoting Boring v. Buncombe Cty. Bd. of Educ., 136 F.3d 364, 371–72 (4th Cir. 1998) (en banc)) ("The curricular choices of the schools should be presumptively their own . . . ."); Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 595 (6th Cir. 2005) ("The freedom of a university to decide what may be taught and how it shall be taught would be meaningless" if lecturers could ignore such decrees).

[136] *See* Grutter v. Bollinger, 539 U.S. 306, 324–25 (2003); *see also id.* at 363 (Thomas, J., concurring) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)) (explaining that the "who may be admitted to study" part of academic freedom undergirds affirmative action programs that factor race into admissions).

[137] 34 C.F.R. § 104.39(a) (2020).

[138] *See Grutter*, 539 U.S. at 324–25; *accord* Sweatt v. Painter, 339 U.S. 629, 635–36 (1950) (holding that discrimination in the form of exclusionary educational practices that *reduce* racial diversity is an Equal Protection Clause violation); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950); Brown v. Trustees of Bos. Univ., 891 F.2d 337, 361 (1st Cir. 1989) (applying this logic to gender discrimination).

applicants (and their potentially expensive reasonable accommodations) in the admissions process.

3. Disabled Students and Their First Amendment Rights

Applying the Rehab Act to tax-exempt private religious schools would help disabled students enjoy their First Amendment right to choose religious education. Disabilities do not limit constitutional rights, and handicapped individuals are thus entitled to complete inclusion in society.[139] This right to full participation in society encompasses the right to choose to attend private religious schools, which are the only realistic means of enjoying one's Free Exercise Clause right to sectarian instruction.[140] Extending the Rehab Act to tax-exempt private religious schools will make it easier for disabled students to exercise their First Amendment right to choose a sectarian education by improving the availability of reasonable accommodations at such schools. Disabled students will otherwise have less access to religious instruction than their nonhandicapped peers, thus perpetuating a state of affairs in which disabled students can exercise their First Amendment rights to a lesser extent than nondisabled pupils. And placing tax-exempt private religious schools beyond the reach of the Rehab Act's reasonable accommodation rule may improperly allow schools' economic interests to constrain disabled students' First Amendment rights.

4. Support from RFRA

Lastly, tax-exempt private religious schools may make an argument that RFRA shields them from the Rehab Act and its reasonable accommodation requirement. By its terms, RFRA applies to all federal statutory and common law, and the implementation of that law.[141] It implicates the First Amendment in the sense that it specifies that neutral and generally applicable federal laws may not burden religion unless doing so will advance some compelling governmental interest by the least restrictive means available.[142] Schools that seek protection under RFRA must establish that the federal law at issue materially interferes with the free exercise of religion.[143] If so, the opposing party, such as a disabled student seeking accommodations, must show that

---

[139] Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 116 (3d Cir. 2018).

[140] Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 42–44 (1st Cir. 2020) (illustrating that because the state of Maine requires its public schools to use a nonreligious curriculum, private schools are the only means through which students in that state may receive a religious education during elementary and secondary school).

[141] 42 U.S.C. § 2000bb-3(a); *see also* Tanzin v. Tanvir, 141 S. Ct. 486, 492 (2020) (clarifying that the federal government is subject to RFRA, which does not extend to the states).

[142] 42 U.S.C. § 2000bb-1.

[143] Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 24 (D.D.C. 1999) (citing Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997)).

the relevant burden on religion furthers a fundamental government interest by the least restrictive method possible.[144]

A RFRA challenge to an interpretation of the Rehab Act which obliges tax-exempt private religious schools to reasonably accommodate disabled students would initially posit that this application of the law materially burdens such schools' freedom to exercise their religion. But this reasoning has its flaws. The Supreme Court has held that religion is not burdened when tax-exempt status is conditioned on acceptance of nonsectarian civil rights initiatives.[145] As such, tax-exempt private religious schools that try to evade the civil rights initiatives built into the Rehab Act by invoking RFRA will most likely be unable to satisfy RFRA's threshold requirement[146] of material government interference with the free exercise of their religion. And even if the Rehab Act burdens religion, subjecting all tax-exempt private religious schools to the reasonable accommodation mandate would advance the compelling government interest in ending educational ableism in the least restrictive means possible. The government also has an "'interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"[147] Uniform application of the Rehab Act's reasonable accommodation rule to all tax-exempt private schools, including those that are religious in nature, is the least restrictive way of furthering this interest in an equitable and functional tax system.

D. Policy Considerations: Preventing Federal Entanglement in Disability Discrimination

Beyond the foregoing constitutional and statutory issues, a key policy consideration favors extending the Rehab Act to tax-exempt private religious schools: avoiding federal entanglement in discrimination that contravenes public policy. The federal government has a compelling interest in erasing ableism in education contexts.[148] And since tax exemptions cannot support discriminatory behavior,[149] private religious schools should not be excused from the Rehab Act's reasonable accommodation rule. Freeing tax-exempt private religious schools of the Rehab Act's reasonable accommodation rule

---

[144] *Id*. (citing Diaz v. Collins, 114 F.3d 69, 72 (5th Cir. 1997)).

[145] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

[146] 42 U.S.C. §§ 2000bb–2000bb-4.

[147] *Rossotti*, 40 F. Supp. 2d at 25–26 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989)).

[148] Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 115–17 (3d Cir. 2018) (analyzing the ADA and Rehab Act and stating that they address longstanding issues arising from open discrimination against disabled persons).

[149] *See Bob Jones Univ*., 461 U.S. at 595 (explaining that federal tax exemptions cannot support racially discriminatory schools or entities).

would turn the federal government into an indirect supporter, through tax exemptions, of the disability discrimination that Congress tried to reduce by enacting that statute.[150]

IV. AMENDING THE ADA AND THE REHAB ACT

If federal courts prove unwilling to extend the Rehab Act and its reasonable accommodation mandate to tax-exempt private religious schools, some small changes to the ADA and the Rehab Act will help ensure that such schools reasonably accommodate their disabled students. First, as discussed in this Essay, Congress should augment the Rehab Act by recognizing tax-exempt status as federal financial assistance, imputing federal financial assistance received by the parent entities of private religious schools to such schools, and adopting the proportionality ability-to-pay test for identification of "substantial increases in cost" that enable schools to seek reimbursement for reasonable accommodations from their disabled students. Second, Congress should pass another Americans with Disabilities Act Amendments Act-style bill that remedies gaps in current ADA jurisprudence.[151] This new amendment would repeal the religious exemption enumerated in Title III of the ADA on grounds that, as shown above, a legal obligation to reasonably accommodate disabled students will not burden religion. And Free Exercise Clause arguments against Title III of the ADA may indeed be motivated not by religious concerns but by sectarian schools' reluctance to fund reasonable accommodations for the disabled.[152] Such selective tightening of religious schools' purse strings is not a valid basis for immunity from ADA Title III and its reasonable accommodation mandate.

CONCLUSION

The religious exemption codified in Title III of the ADA gives some private religious schools the impression that they can refuse to reasonably accommodate their disabled students, and some of these schools do adopt

---

[150] *See Berardelli*, 900 F.3d at 115–17.

[151] ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553; *see also* Arlene S. Kanter, *Religious Freedom Is No Reason to Deny People with Disabilities the Right to Equality in the Workplace*, HILL (July 26, 2020, 5:00 PM), https://thehill.com/opinion/judiciary/509032-religious-freedom-is-no-reason-to-deny-people-with-disabilities-the-right [https://perma.cc/V8KE-HQSG] (arguing for legislative action by Congress to correct the *Biel* court's interpretation of Title I's religious ministerial exception).

[152] Dingle, *supra* note 8; Adam Emerson, *Religious Schools, the ADA, and the Justice Department*, THOMAS B. FORDHAM INST. (May 16, 2013), https://fordhaminstitute.org/ohio/commentary/religious-schools-ada-and-justice-department [https://perma.cc/7LFP-4BC9] (illustrating that the Association of Christian Schools International opposed the ADA in its original form because it would require churches to spend money on accessibility for the disabled).

such an approach to handicapped pupils.[153] Such unwillingness to provide reasonable accommodations may force disabled students to locate a more welcoming educational environment elsewhere.[154] Thus, disabled students cannot enjoy their Free Exercise Clause right to seek a religious education to the same extent as their nonhandicapped peers. This state of affairs must change; individuals do not lose their constitutional rights just because they happen to have a disability.

The solution to this problem may be fairly simple. Subjecting private religious schools that either hold tax-exempt status or have parent entities that receive federal financial assistance to the Rehab Act will substantially improve disabled students' access to reasonable accommodations at such schools.[155] Disabled students will gain further protection from discrimination if tax-exempt private religious schools' right to seek reimbursement for reasonable accommodations pursuant to the Rehab Act turns on the school's inability to afford such modifications. This expansive interpretation of the Rehab Act will substantially safeguard disabled students' constitutional right to choose to attend the private religious school of their choice without either infringing on these schools' First Amendment rights to freely exercise their religion or running afoul of RFRA.

---

[153] *See, e.g.*, Doe *ex rel.* Doe v. Abington Friends Sch., 480 F.3d 252, 253–54 (3d Cir. 2007) (indicating that a private Quaker school's refusal to accommodate a student's disabilities contributed to the student leaving the school).

[154] *See, e.g.*, Spann *ex rel.* Hopkins v. Word of Faith Christian Ctr. Church, 589 F. Supp. 2d 759, 762 (S.D. Miss. 2008) (outlining a scenario where an autistic student was not permitted to reenroll in the church preschool of his choice).

[155] Alexander v. Choate, 469 U.S. 287, 301 (1985).