Reasonable accommodation for elderly housing decisions

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1. INTRODUCTION

Reasonable accommodation means any support, adjustment or customized assistance provided to persons at risk of exclusion so they can participate on an equal footing in "inclusive" or "friendly" environments. Reasonable accommodation is one of the key elements in the framework for the protection of persons with disabilities. This study examines the applicability of reasonable accommodation when it comes to protecting the elderly as required by Article 50 of the Spanish Constitution (*Constitución Española*, CE). And, more specifically, we focus on the protection of dependent older adults whose housing and living conditions sometimes depend on public authorities' decision-making. First, we will examine reasonable accommodation within its original context: the protection of persons with disabilities (section 2). Then, we discuss public education as provided by public authorities, since, in light of certain judgments and rulings, it seems like an interesting and fruitful context for the applicability of reasonable accommodation (section 3). We will rely on the conclusions of sections 2 and 3 to provide some insights into the application of reasonable accommodation solutions to actually implement and enforce the right of older adults to choose where they live and prevent their isolation (section 4).

2. REASONABLE ACCOMMODATION FOR THE PROTECTION OF PERSONS WITH DISABILITIES

2.1. The origins of the reasonable accommodation model

The Convention on the Rights of Persons with Disabilities (CRPD), which entered into force on 3 May 2008, is based on the 1990 Americans with Disabilities Act (ADA).[300] The ADA was the first piece of legislation to ever provide a systematic regulation of disability with a

[300] 42 U.S.C. sec. 12101 *et seq.* The ADA and the relevant implementing provisions are available at www.ada.gov.

national (federal) scope. The CRPD's regulatory approach relies on the ADA's rulemaking techniques.[301]

The ADA triggered the shift from the *medical* or *assistance-based model* (targeting those persons with disabilities qualifying as recipients of public benefits) to the *civil rights model*,[302] where persons with disabilities are entitled to a set of rights enforceable *erga omnes*.[303] Under this new civil rights approach, public authorities no longer bear sole responsibility for assisting a disabled senior at a nursing home or children with disabilities in special education schools. Under the civil rights model, these should no longer be separate contexts set apart from "normal" social life, and we should all−both public and private stakeholders−create an inclusive and friendly society removing any barriers preventing those older adults or children from sharing ordinary everyday life with everyone else. Note that this "friendly society" is not only a broad, cross-cutting notion. Rather, it should cover specific areas, such as urban development, education or transportation. We are ultimately *internalizing* or *incorporating* social issues into the context where they arise to solve them therein (e.g., the building where persons with disabilities live or the workplace). To do so, we need everyone's help and financial support, including homeowners, employers or urban development authorities. This entails that any social issues or challenges that may arise are no longer outsourced. In other words, the model no longer relies on special benefits or welfare for persons with disabilities. In fact, such benefits often exclude their recipients and do not achieve integration,[304] in addition to being a heavier burden on public spending.

The keys to ADA's success are (i) its comprehensive and all-embracing nature giving rise to universal access contexts in a myriad of fields: infrastructure and building; transportation; telecommunications and information society; or employment;[305] and (ii) the use of clear yet flexible and open-ended wordings, e.g., defining the notion of reasonable accommodation as a fair and proportionate measure to be taken by employers to achieve accessibility for persons

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[301] See, in this regard, Irene Bowen (2013), "The American Experience: What Makes the ADA Works, and What Are the Implications for Implementation of Germany's Accessibility Laws?," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 79 *et seq.* In particular, see p. 80-81. See also the ties between the ADA and the CRPD in Rafael de Asís, Ana Laura Aiello, Francisco Bariffi, Ignacio Campoy and Agustina Palacios (2007), *Sobre la accesibilidad universal en el Derecho*, Madrid, p. 73.

[302] Replicating a protection framework that had already been applied to groups previously considered as neglected minorities unable to access the "American way of life." The protection framework was thus designed "relying on previous legislation that precluded discrimination based on race, ethnicity and sex;" see Bowen (2013: 81).

[303] On both models, see Bowen (2013: 81); Felix Welti (2013), "Barrierefreiheit als Rechtsbegriff," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 23 *et seq.* Rafael de Asís *et alia* (2007: 23).

[304] See Welti (2013: 25).

[305] These are the so-called "accessibility spheres" or "accessibility domains;" see Rafael de Asís *et alia* (2007: 9). They are listed in Art. 5 of the Spanish Act on the Rights of Persons with Disabilities (TRLDPD).

with disabilities, providing for reasonable time periods or differentiating between public and private stakeholders.[306] The remaining keys to ADA's success relate to (iii) the close involvement in the lawmaking process of the groups concerned; and (iv) the remarkable outcomes in judicial proceedings (or, alternatively, of mediation and arbitration proceedings) involving individuals, associations and public bodies. Courts often sentenced defendants to take action and implement reasonable accommodation adjustments or to pay punitive damages and compensation. These rulings effectively deterred the parties from breaching disability-related legal standards.[307]

Both the CRPD and the Spanish Act on the Rights of Persons with Disabilities (TRLDPD) embraced this civil rights model. Under this new framework advocating the comprehensive, all-around protection of persons with disabilities, the underlying rationale is that everyone (including public and private stakeholders, i.e., public authorities, employers or homeowners) must "chip in" and do their part to set up a barrier-free society, covering cities and urban development, housing, the workplace, polling stations, schools or hospitals. Removing barriers to achieve true integration is thus a primary aim of welfare States. This aim should have a redistributive effect. It may undermine some actors in the short term, but it will benefit society as a whole in the long term, even if only because we all grow old and demand friendly and accessible environments.

The approach based on "design-for-all" (DfA) or "universal design" and "reasonable accommodation" techniques precludes maximalist stances, which sometimes lead welfare policies to fail. Neither persons with disabilities can require that the job be done "at all costs" (if something is unreasonable it should not be mandatory or compulsory), nor employers, homeowners or public authorities may refuse a request on the grounds that it was not "expressly stated." As long as the requested action solve a problem faced by persons with disabilities and be reasonable, it does not matter whether it had been expressly stated beforehand.

2.2. The impact of the CRPD protection framework on fundamental rights of persons with disabilities

The mandatory application of the CRPD as an interpretative standard for domestic fundamental rights (Art. 10(2) CE) has a major legal impact. On the one hand, regarding the *right to equality* (enshrined in Art. 14 CE). On the other, regarding the content of the so-called *substantive* rights (i.e., not formal as the right to equality under Art. 14), including freedom of expression (Art. 20(1) CE), the right to vote and to participate in public affairs

[306] See, for instance, the Third Additional Provision of the TRLDPD on the time periods applicable to enforce basic accessibility requirements.
[307] See Bowen (2013: 88-93).

(Art. 23(1) CE); or the right to education (Art. 27(1) CE). The CRPD states that a group of people is entitled to special protection: persons with disabilities (see Art. 1 CRPD). Using a wording that was acceptable back then, Art. 49 of the 1978 Spanish Constitution did the same, i.e., it provided that protecting "the physically, sensorially and mentally handicapped" was an aim or a public objective of a welfare-oriented Constitution, even if granting such protection entailed favoring certain groups or individuals at the expense of others.[308]

However, the effects that a specific group be granted special protection under Art. 49 CE on the right to equality or other fundamental rights remained unclear, and we could not come up with a meaningful response solely relying on constitutional interpretation.[309] For instance, the Spanish Constitutional Court had found that "*various Chapter III provisions* [guiding principles for social and economic policymaking] *were specifically aimed at defining particularly vulnerable groups entitled to special protection. These vulnerable groups comprised children and mothers (Art. 39 CE), the handicapped (Art. 49 CE) or the elderly (Art. 50). From the perspective of the equality principle, these specific constitutional references to groups of people allow for (and sometimes require) favoring those persons over others without considering that such differential treatment be a violation of Art. 14 CE. This Court has relied on the aforesaid guiding principles identifying groups entitled to special protection as follows: 'maternity, and thus pregnancy and birth, are distinct biological realities to be protected under Art. 39(2) CE. Thus, any advantages or exceptions for women do not qualify as a discrimination against men.' Also, along these lines, it is worth concluding that public employment quotas for persons with disabilities are not contrary to the equality principle of Art. 14 or the equal access to public employment requirements laid down in Art. 23(2)*." Surprisingly, these bold statements by the Spanish Constitutional Court did not quite settle the matter. On another note, obviously, finding that quotas for persons with disabilities are not a violation of the equality principle does not entail (although it currently seems so) that failing to provide for such quotas breaches the said equality principle.

The CRPD clearly defines (a lot more clearly than Art. 49 CE, in my opinion) the impact of its protection framework applied and extended through the right to equality established in Art. 14 CE. See below an overview of the content actually added by the CRPD to the requirements arising from the equality principle (i.e., the right to equality) of Art. 14 CE:

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[308] According to Luis Medina (2016), *Libertad y autoridad en el Derecho administrativo. Derecho subjetivo e interés legítimo: una revisión*, Madrid, p. 230, *passim*, the defining feature of a welfare state compared to a liberal state is that the very existence of government authorities is justified by their ability not only to secure individual freedom, but also to increase well-being according to public interests and policy objectives "even if that requires favoring individuals or groups."

[309] Rafael de Asís *et alia* (2007: 29) jointly interpreted Articles 23(1) and 49 CE concluding that persons with disabilities being unable to access a polling station due to architectural barriers qualifies as a violation of the persons with disabilities' right to vote.

(i) First, it bans any form of discrimination on grounds of disability (Art. 5(1) CRPD). States Parties undertake to abolish "existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" (Art. 4(1)(b) CRPD). Since 1994,[310] Art. 3(3) of the German *Grundgesetz* also expressly precludes disability-based discrimination, as well as Art. 21(1) of the Charter of Fundamental Rights of the European Union (CFREU).[311]

(ii) The CRPD (Art. 5(4)) goes even further by providing that affirmative action will not be considered discriminatory, e.g., employment quotas for persons with disabilities (Art. 42 TRLDPD).

(iii) Finally, pushing it to the limit with the aim of strengthening the protection of persons with disabilities, it can be inferred from the CRPD that failing to implement reasonable affirmative action measures in favor of specific groups is a discrimination (against the groups entitled to protection) contrary to Art. 14 CE. Failure to remodel in order to allow a person in a wheelchair to access the workplace; or to change working hours to meet persons with disabilities' demands; or to provide appropriate equipment for persons with sight impairments; or to install an elevator in a building for a disabled person qualify as actual forms of discrimination as long as the unfulfilled requirements constitute reasonable accommodation. See, in this regard, Art. 63 TRLDPD.

An in-depth analysis seems to show that a well-settled line of case law is somewhat reversed. According to the Spanish constitutional case law, the right to equality (Art. 14 CE) does not include a fundamental right "to the unequal treatment" of those that are unequal (see, e.g., Constitutional Court Judgments, SSTC, no. 198/2012, of 6 November, legal basis 13; no. 38/2014, of 11 March, legal basis 6; 183/2014, of 6 November 2014, legal basis 3; and no. 56/2016, of 17 March, legal basis 5). For the cases examined herein, the right approach is actually the opposite: failing to treat a disabled person differently qualifies as discrimination.[312]

(iv) The abovementioned examples, along with some others (non-discrimination against persons with disabilities regarding health and life insurance under Art. 25(e) CRPD) show that both public and private counterparties facing persons with disabilities and their fundamental-right-claims to equality are in a similar situation. One would expect public authorities to bear a heavier burden to achieve equality. For example, the time periods for fulfilling accessibility rules are longer−and thus less stringent−for private actors and private property. In any case, there is no doubt that the requirements arising from the right to equality apply vis-à-vis private parties subject to the *Drittwirkung* or horizontal/third-party effect of fundamental rights.

[310] See the constitutional amendment of 27 October 1994.

[311] Which differs from the active requirement that persons with disabilities be integrated under Art. 26 CFREU.

[312] In this vein, see Welti (2013: 27): "Equal treatment means appropriately weighing and assessing inequality."

The impact of the CRPD protection framework on the fundamental rights of persons with disabilities is not restricted to the right to equality. Under the interpretative clause of Art. 10(2) CE, the CRPD protection framework also affects the interpretation of other substantive fundamental rights. On the one hand, *the CRPD turns what had been traditionally considered as freedom rights into benefit-providing rights*. Unquestionably, under Art. 23(1) CE, read jointly with Art. 29(i) CRPD, we should consider that failure to have appropriate, accessible or user-friendly equipment or facilities at the polling stations amounts to a violation of the persons with disabilities' right to vote. Also, Art. 20(1) CE, together with Art. 21 CRPD, lead us to find a freedom of expression violation (a paramount example of a freedom right) if the relevant authorities fail to adopt organizational measures ensuring that benefits or services be provided in sign language, Braille and other accessible formats.

On the other hand, *benefit-providing fundamental rights*, such as the right to education (Art. 27(1) CE) or to an effective legal remedy (Art. 24(1)), *incorporate new contents* specifically applicable to persons with disabilities. Public authorities are not only required to find a place in a special education center for an autistic child. Rather, they must make their best efforts to ensure that the child receives an inclusive education (see Art. 74 of the Spanish Act on Education, LOE). The protection granted to persons with disabilities by the right to an effective legal remedy (Art. 24(1) CE) requires additional relief or redress.[313] This entails that persons with disabilities are entitled to compensation for moral damages even in the absence of financial damage (see Art. 75(2) TRLDPD).

Self-evidently, within the sphere of these substantive fundamental rights, non-performance of a reasonable accommodation affecting the exercise of the relevant fundamental right (a polling station with architectural barriers, for instance) would violate both (i) the right to equality; and (ii) the substantive right at stake.

2.3. Organizational and procedural provisions

As discussed above, the protection framework stemming from the 1990 Americans with Disabilities Act (ADA) has succeeded because the rights of persons with disabilities became subject to all-encompassing provisions with a broad scope as well as clear yet open-ended wordings. However, this is not the only reason. Additional keys to ADA's success relate to the close involvement in the lawmaking process of the groups concerned; and the remarkable outcomes in judicial proceedings (or, alternatively, of mediation and arbitration proceedings) involving individuals, associations and public bodies. Courts often sentenced defendants to

[313] On the notions of "additional relief" or "redress," which contrast with the so-called "primary compensation" or *tutela primaria*, see Silvia Díez Sastre (2012), *La tutela de los licitadores en la adjudicación de contratos públicos*, Madrid, p. 69 *et seq.*

take action and implement reasonable accommodation adjustments or to pay punitive damages and compensation.[314]

This extremely successful twofold approach, i.e., (i) regulating the substance of rights (whether fundamental or not) of persons with disabilities; whilst (ii) arranging and setting up friendly organizations, procedures and processes, has been incorporated into the CRPD and the Spanish legislation that implements CRPD requirements and standards. Below we focus on the organizational and procedural Spanish law provisions aimed at protecting persons with disabilities.

Remarkably, the following bodies became national State authorities: the National Disability Board (with an advisory role, under Art. 55 TRLDPD); the Disability Office (which is responsible for handling complaints under Art. 56 TRLDPD); and the National Disability Observatory (tasked with compiling and reporting duties subject to Art. 73 TRLDPD).

The associations representing persons with disabilities and their families play a major role in the making, enforcement, monitoring and evaluation of disability-related policies. This is because the applicable legislation provides that "civil dialogue" (as defined in Art. 2(n) TRLDPD) be the backbone in this field. "Civil dialogue" could be considered a due process requirement or, better said, a procedural standard, requiring that any disability organizations and representative associations be involved in the decision-making processes affecting persons with disabilities,[315] including draft statutory or regulatory provisions (Art. 54(2) TRLDPD) or even the issuance of technical construction reports assessing buildings' universal accessibility (see Art. 30(1) of the Spanish Act on Urban Planning and Remodeling). These participation requirements are already well-known as a means to render public decisions more acceptable by the addressees.[316] For instance, one can check online and see that the Spanish Committee of Representatives of Persons with Disabilities (CERMI) is extremely active. In practice, much of the progress for persons with disabilities is due to CERMI's engagement; it constantly monitors and reports universal accessibility violations in public and private facilities and services.

From a procedural or litigation perspective, the CRPD protection framework relies on instruments, arrangements or techniques that are usually aimed at "tilting the scales" in favor of persons with disabilities. This obviously has another effect for the counterparties: deterring them from violating accessibility requirements. Keep in mind that there are also arbitration proceedings available to persons with disabilities. Submission to their "jurisdiction" is

[314] See Bowen (2013: 88-93).

[315] The notion of "civil dialogue" enshrines in statutory provisions the motto of the Independent Living Movement in the United States: *nothing about us without us*. See Rafael de Asís *et alia* (2007: 72).

[316] See Markus Rebstock (2013), "Barrierefreiheit in der Planungspraxis," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 63 *et seq.*, particularly p. 69.

voluntary, but the awards are binding and enforceable when deciding on disability-related complaints (Art. 74 TRLDPD). Also, these arbitration proceedings have no "specific formal requirements."[317]

Under their right to an effective legal remedy, persons with disabilities are entitled to primary compensation as well as to additional relief, as explained above. There will be no cap on any compensation arising from the claim, and persons with disabilities may be awarded moral damages even in the absence of financial damage. Damages will be assessed having regard to the circumstances and seriousness of the violation (Art. 75 TRLDPD).

Furthermore, the TRLDPD sets aside the general standard of proof, i.e., the *preponderance of the evidence*,[318] and imposes on the defendant *a stricter or more stringent standard of proof*.[319] In other words, if the claimant provides evidence "reasonably leading to believe" that there was a discriminatory behavior, the defendant must show that it is highly probable or probably certain that there was no discrimination (Art. 77 TRLDPD). See Constitutional Court Judgments no. 144/2006, of 8 May, legal basis 4; and no. 31/2014, of 24 February, legal basis 3.

Finally, with regard to legal standing, persons with disabilities, their families and their representative associations should qualify as "parties concerned" in administrative penalty proceedings,[320] thus being entitled to appeal against any decisions dismissing their complaints (Art. 89 TRLDPD). Also, any entities legally empowered to protect the legitimate interests of the disabled, acting "in the name and on behalf of persons with disabilities," shall also have legal standing (Art. 76).[321]

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[317] See Art. 1(2) of Decree 1417/2006, of 1 December, implementing arbitration proceedings to settle any complaints related to equal opportunity, non-discrimination and accessibility involving persons with disabilities.

[318] See Michele Taruffo (2002), *La prueba de los hechos*, Madrid, p. 289-303.

[319] See Luis Medina (2016), "Los hechos en el Derecho administrativo. Una aproximación," *Revista Española de Derecho Administrativo*, no. 177, p. 103-158 and, more specifically, p. 115-116, *passim*; and José María Rodríguez de Santiago (2016), *Metodología del Derecho administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa*, Madrid, p. 38 *et seq.*

[320] As is well-known, the rule departs from a long-standing line of case law that used to be very restrictive regarding the claimant's procedural standing. See Alejandro Nieto (2005), *Derecho administrativo sancionador*, 4th ed., Madrid, p. 141; and Tomás Cano Campos (2011), *Las sanciones de tráfico*, Cizur Menor, p. 448-449.

[321] In contrast with Spanish and US law, the claims brought by official organizations in Germany only allow to seek the enforcement of obligations or requirements qualifying as "objective rights" or "objective entitlements" that cannot give rise to rulings ordering the defendant to take action but only to declaratory judgments. In this vein, see Sabine Schlake (2013), "Verbandsklagen im Umwelt- und Verwaltungsrecht," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, 2013, p. 99 *et seq.*

2.4. Universal accessibility, design-for-all and reasonable accommodation

It is worth defining some of the key concepts inherent to the CRPD protection framework: universal accessibility (or universal access); design-for-all (DfA) or universal design; and reasonable accommodation. *Universal accessibility* means the *end result or state aimed for* within the various real-life contexts governed by the protection framework, e.g., housing, urban development, transportation or education. What ultimately defines this universal accessibility is the absence of barriers to the greatest extent possible.

There is a requirement or, better said, an optimization command, to achieve universal accessibility. Thus, we are dealing with a means-ends relationship relying on two major techniques: DfA or universal design and reasonable accommodation.[322] *DfA* applies at the forefront of the relevant sphere (urban development, building a house, setting up an urban transportation route structure or marketing a new computer), obviously assuming that DfA or universal design requirements must be fulfilled. However, universal design is not aimed at tackling "any accessibility issue that could come to mind." Rather, universal design requirements seek to solve general, abstract problems, i.e., their scope should be "as many people as reasonably possible," covering "specific groups of persons with disabilities." The scope of DfA or universal design need not cover individual cases, which would fall within the scope of reasonable accommodation (see Articles 2 CRPD and 2(l) TRLDPD).

Reasonable accommodation (*ajuste razonable* in Spanish and *angemessene Vorkehrung* in German) thus qualifies as a default measure applicable in the absence of DfA or universal design, whether because DfA requirements were not implemented or because they failed to remove the relevant barriers due to the specificity of the concerned person's disability.[323] Reasonable accommodation requires any necessary, suitable and appropriate modifications and adjustments to ensure a person's access within the scope of the protection framework (installing an elevator in a residential building, allowing for flexible work schedules or giving a disabled student extra time to take a test if needed) as long as they do not entail disproportionate or unreasonable burdens (see Articles 2 CRPD and 2(m) TRLDPD).

Obviously, as the effectiveness of universal design decreases, reasonable accommodation becomes more necessary. At the early stages of applying universal design to a specific case,

[322] This means-ends relationship is aptly illustrated by the wording of Art. 3(k) TRLDPD: universal accessibility (as the end state required for environments, processes, goods, products and services...) "assumes that a DfA or universal design strategy be implemented without prejudice to any necessary reasonable accommodation adjustments."

[323] In this connection, see Rafael de Asís (2016), "El eje de la accesibilidad y sus límites," *Anales de Derecho y discapacidad*, no. 1, p. 51-67 and particularly p. 54. A comprehensive overview of reasonable accommodation and its role in German law can be found in Eberhard Eichenhofer (2018), *Angemessene Vorkehrungen als Diskriminierungsdimension im Recht. Menschenrechtliche Forderungen an das Allgemeine Gleichbehandlungsgesetz*, Berlin (available online).

achieving accessibility (i.e., the end result) will almost solely rely on reasonable accommodation. This is still the case regarding elevators in buildings that were not designed for all.

An in-depth analysis shows that reasonable accommodation is, *de facto*, an almost subversive legal institution. Indeed, it is a *counter majoritarian* construct aimed at protecting individuals that, at some point, could resemble the conscientious objection. Any carefully regulated legal relationship (within the scope of the protection framework) ends up being loosened or disrupted by the overriding requirement to secure accessibility for a disabled person through any "necessary, suitable and appropriate modifications and adjustments that do not entail disproportionate or unreasonable burdens." This really sounds like the "inherent risk of loosening legal requirements." The Spanish Constitutional Court warned about this risk and ruled that the right to freedom of thought and conscience (Art. 16 CE) did not suffice to release citizens from constitutional or statutory duties, i.e., that such freedom did not overweigh the said constitutional or statutory obligations (STC no. 160/1987, of 27 October, legal basis 3).[324] This is similar to a police applicant telling the Government "if you allow me to wear a turban instead of a cap, I can be a cop" or telling a company's managing director "if you build an access ramp for me, I can work at your office," assuming that neither claim is expressly regulated. Both examples have in common an underlying idea that could be summarized as follows: "If you move over just a little bit, there will be room for me." Interestingly enough, this loose, often disruptive and undetermined reasoning (which also brings flexibility) is both a risk and a key to success (as evidenced by the US experience) of the protection framework.

Let us think of a welfare system revolving around the care for persons with disabilities at nursing homes. Self-evidently, reasonable accommodation requirements could force to rearrange that welfare provision model as a whole. As discussed below, if we assume that a person with disabilities unwilling to live in a nursing home yet still forced (literally) to do so (because there is no elevator in his building, for instance) is being excluded from society, public authorities will be required to provide welfare services at home (which is where that person wants to live and feels included in the community). These notions are expressly stated in Art. 19 CRPD. Failure to arrange for these home assistance services–unless it be considered unreasonable–would constitute discrimination. Indeed, as shown above, failing to secure reasonable accommodation always qualifies as discriminatory, and it could also be contrary to the right to "living independently and being included in the community."[325] The

[324] Juan Antonio García Amado (2015) http://almacendederecho.org/objecion-de-conciencia-al-hilo-de-la-reciente-sentencia-del-tc-en-el-caso-de-la-pildora-del-dia-siguiente, hace referencia al "casuismo desorbitado y el caos;" Gabriel Doménech (2016) http://almacendederecho.org/las-razones-del-derecho-a-la-objecion-de-conciencia, argues in favor of the conscientious objection on "economic grounds."
[325] See Rafael de Asís (2016: 52).

German initiative *Daheim statt Heim* ("Home, not Nursing Home")[326] socially disseminates these organizational approaches to welfare provision.

It is worth discussing another example (very well-known in universities) of the loose yet flexible nature of reasonable accommodation: even if the college rulebook says nothing about this, reasonable accommodation requires that the professor give extra time on tests to disabled students (see Art. 20(c) TRLDPD). The specific boundaries of this requirement would only have to be defined in case of a dispute, which would only arise if one of the parties acts in bad faith.

There is no doubt that lawmakers may (and probably should to the extent possible) try to clarify any blurred boundaries and further define these loose reasonable accommodation requirements. However, keep in mind that, under Art. 96(1) CE, international treaties (the CRPD) may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law, so national lawmakers are not entitled to provide for unconvincing restrictions. Let us think of the reasonable accommodation requirement of installing elevators or ramps to secure accessibility in residential buildings. For applicability purposes, Art. 2(5) of the Spanish Act on Urban Planning and Remodeling has listed various criteria to guide the proportionality assessment of such reasonable accommodation: in order to determine whether a burden is reasonable, we should weigh the (i) costs of the measures; (ii) potential discrimination in case of non-fulfillment; (iii) circumstances of the person or entity subject to the reasonable accommodation requirement; and (iv) possibility of receiving some kind of aid. In particular, under Spanish legislation on apartment buildings and co-ownership, the burden will be deemed unreasonable if the yearly cost of the remodeling works−excluding any potential financial aid−exceeds 12 monthly installments of community fees or co-ownership costs.

3. REASONABLE ACCOMMODATION IN EDUCATION

3.1. Overview

Case law databases apparently indicate that there is little litigation arising from welfare benefits for the elderly,[327] some of which directly affect the decision on where older adults live. However, this is not the case with public education. As opposed to the previous benefits or services, public education is at the core of a fundamental right (see Art. 27 CE) subject to numerous rulings. Below we discuss a few Constitutional Court and Supreme Court judgments regarding the right to education of children with disabilities. These rulings'

[326] See http://www.bi-daheim.de/de/ (last accessed on 15 June 2020).

[327] See, on this matter, José María Rodríguez de Santiago (2007), *La administración del Estado social*, Madrid, p. 146-147, 160.

guiding rationale, i.e., that children with disabilities should be educated in ordinary or normal contexts, can have a bearing on elderly welfare benefits affecting older adults' place of residence.

Accordingly, education for students with disabilities−construed as a welfare service or benefit−intersects with a myriad of fundamental right requirements due to the very nature of the rules governing the provision of education for disabled children.[328] Since there is a constitutional requirement that fundamental rights be interpreted in accordance with international treaties (Art. 10(2) CE), the fundamental rights to education (Art. 27(1) CE) and equality (Art. 14 CE) include specific contents, governed by the CRPD, catering to children with disabilities. As for the (substantive) right to education, the approach of Art. 24 CRPD becomes embedded in the education to be provided by the Government to these children. As for the right to equality, the requirement to promote effective equality (Art. 9(2) CE) and ensure the integration of disabled children (Art. 49 CE) entail that failing to provide any support or adjustment not qualifying as unreasonable (see Art. 2 CRPD) will constitute undue discrimination and thus a violation of Article 14 CE.

Given this regulatory framework, one could argue that Art. 74 of the Spanish Act on Education (LOE) currently provides a fundamental right to receive a benefit. The core content of this fundamental right entails that all general education schools should implement any reasonable measures (i.e., reasonable accommodation) to cater to any students with special education needs. This guarantee also requires whoever decides on special education schooling to give extensive reasons as to why the necessary reasonable accommodation to be performed in the general school should be deemed unfair or disproportionate.[329]

3.2. Reasonable accommodation as part of the fundamental right to education: Supreme Court Judgments of 9 May 2011 and 14 December 2017

As can be inferred from the above, reasonable accommodation becomes (i) the defining concept of the fundamental right to education (construed as a right to receive a welfare benefit under Art. 27(1) CE; whilst (ii) providing interpretative guidance to find discriminatory actions or behaviors contrary to the equality principle (Art. 14 CE). Examining the case law,

[328] Regarding this "regulatory framework," see Constitutional Court Judgment (STC) no. 10/2014, of 27 January, legal basis 4; and Supreme Court Judgment (STS) of 14 December 2017 (Roj: 4521/2017, appeal no. 2965/2016), legal basis 3.

[329] The wording of Article 18 of the abovementioned Act on the Rights of Persons with Disabilities (TRLDPD) resembles Art. 74 LOE. In fact, this regulatory overlap gives rise to constitutional concerns. First, because the scope of a standard statutory provision cannot overlap with that of an organic provision (covering specific matters listed in the Constitution). See Art. 81 CE and Art. 28(2) of the Organic Act on the Constitutional Court, whose wording is questionable to say the least. Second, because the matters falling within the scope of organic acts cannot be recast by legislative decrees (see Art. 82(1) CE).

in my view, the Supreme Court case has discovered and defined the importance of reasonable accommodation more accurately than the Constitutional Court.

The Spanish Supreme Court (TS) first ruled on these matters in its judgment of 9 May 2011 (appeal no. 603/2010). The TS heard an appeal brought by the parents of an autistic child. The Valencia Regional Government had done nothing to solve the lack of resources to take care of the student in a public school. The TS upheld the appeal. Although the Supreme Court's reasoning was not very sophisticated yet, it revealed the main fundamental rights issue relying on a very intuitive argument: the aforesaid lack of resources (which was itself contrary to the applicable statutory provisions) fails to fulfill "a qualified constitutional requirement." Accordingly, the TS found "*a violation of the fundamental right to education because public authorities had failed to treat an autistic child as he was entitled to given his unequal point of departure*" (legal basis 8).

Supreme Court Judgment (STS) of 14 December 2017 (appeal no. 2965/2016) further defines this line of case law. In this case, the Head of the Regional Board of Education had authorized that a child with autism spectrum disorder (ASD) be transferred from a general education school's integration program to a special education school against his parents' will. The judgment relies on the regulatory framework discussed above (i.e., Articles 27 and 14 CE; 10(2) CE; 2 and 24 CRPD; and 74 LOE) focusing on the notion of reasonable accommodation. The requirement to provide special education is twofold (legal basis 5). It has (i) a *substantive* dimension; and (ii) *procedural* implications. The substantive dimension requires that public schools use any specific, individualized and effective support, assistance or teaching aids needed to achieve integration within the general education system. The only limit to this dimension would be that such measures and adjustments be deemed an unreasonable burden.

The procedural implications entail that public authorities are required to give comprehensive explanations and arguments justifying their decisions and proving the facts of the case as a result of the protection granted to children with disabilities. This stringent duty to give reasons imposed on public authorities arises from the protective provision's intent to raise the general standard of proof, i.e., the *preponderance of the evidence*. Thus, the procedural dimension of the aforesaid requirement imposes on public authorities *a stricter or more stringent standard of proof* that will only be met if the evidence shows that it is highly probable or probably certain[330] that public authorities did implement any reasonable accommodation adjustments (other than those that were unreasonable or disproportionate) prior to transferring the student to a special education facility. Public authorities must carefully and thoroughly justify−relying on reports that take into account the specificities in

[330] See, again, Luis Medina (2016), "Los hechos en el Derecho administrativo. Una aproximación," *Revista Española de Derecho Administrativo*, no. 177, p. 103-158, particularly p. 115-116, *passim*.

each case–"why the support required by the student cannot be provided through diversity-based measures at general education schools."

Reasonable accommodation becomes so important within this line of reasoning that, in my view, this distinctive version of the right to education is actually the fundamental right to "reasonable accommodation" at general education schools. It follows that failing to deliver such reasonable accommodation qualifies as a discrimination contrary to the right to equality (Art. 14 CE).

Note that the point of the aforesaid duty to give reasons imposed on public authorities is not that they provide a convincing or persuasive justification of how hard it is to integrate autistic children in general classrooms, or how it is necessary that autistic kids enroll in special needs plans. Rather, the duty to (i) give reasons and (ii) provide a comprehensive reasoning should revolve around the concept of reasonable accommodation and its implications.

3.3. Reasonable accommodation becomes invisible in Constitutional Court Judgment no. 10/2014 of 27 January

Reasonable accommodation's prominent role is invisibilized in Constitutional Court Judgment (STC) no. 10/2014 of 27 January. The outline of the scholarly doctrine regarding the "constitutional package" governing the fundamental right to education of children with disabilities (legal basis 4) is flawless. However, the application thereof to the case at stake is off target.

The constitutional appeal is brought against the Head of the Regional Board of Education's decision to keep an autistic child in a special education school (against his parents' will) instead of transferring him to a general school. The Constitutional Court (TC) dismissed the appeal basically because the challenged decision "does provide an appropriate justification as to why (i) the student must remain in a special education school; and (ii) there is no need to assess whether the adjustments required by the student can be provided in a general education school" (legal basis 5).

As noted by the dissenting opinion issued against the ruling,[331] this Constitutional Court's decision is off target precisely because it downplays or invisibilizes the importance of reasonable accommodation. As pointed out by the Supreme Court's case law examined above, we should find a violation of these children's fundamental right to education and equality when there is no appropriate justification–duly relying on reports that take into account the specificities of the case–as to "why the support required by the student cannot be provided through diversity-based measures at general education schools."

[331] Issued by Justice Luis Ignacio Ortega Álvarez and endorsed by Justice Juan Antonio Xiol Ríos.

3.4. Reasonable accommodation becomes blurred in Supreme Court Judgment of 21 June 2019

The Supreme Court has neither abided by the scholarly approach to reasonable accommodation within the field of special education for children with disabilities. In Supreme Court Judgment of 21 June 2019 (appeal no. 4651/2018) the concept becomes so blurred and out of focus that it ends up being unrecognizable.

This is the first case ruled by the Supreme Court after the 2015 amendment to the so-called cassation appeal in the judicial administrative jurisdiction.[332] This amendment required that there be an "objective interest for the Supreme Court to review the case" in order for any cassation applicants to be granted leave to proceed. In this case, the Head of the Regional Board of Education decided to enroll a disabled child in the special education program at a general education school. His parents agreed that he should go to a special education program, but they preferred a different school, so they challenged the enrollment decision through the special procedure for fundamental rights protection (subject to Articles 114 *et seq*. of the Spanish Act on Judicial Administrative Review). The Judicial Administrative Chamber of the La Rioja High Court rejected the appeal (i.e., not even granting leave to proceed and thus not hearing the merits of the case) on the grounds that choosing one general education school or another−being both general education facilities−was not a constitutional matter but a statutory one, therefore outside the scope of the special appeal. The parents then filed an appeal before the Supreme Court against the High Court's decision. The Supreme Court granted them leave to proceed and heard the merits of the case, arguing that deciding on whether this was a constitutional or a statutory matter did have an "objective interest for the Supreme Court to review the case."

I side with the Supreme Court's case law doctrine in this case: "*We cannot generally consider that the choice of school in a case like the one at hand is a merely statutory matter falling outside the scope of the special procedure for fundamental rights protection*" (legal basis 6). In fact, assuming (as repeatedly stated by the Constitutional Court) that everyone's right to education entails that "*parents be free, on a prima facie basis, to choose a school for their children*,"[333] necessarily entails that a dispute in this regard be settled through the special procedure for fundamental rights protection.

However, the Supreme Court's decision on the merits after reversing the High Court's Judgment is out of focus. The Supreme Court's line of reasoning seems to turn the fundamental right to reasonable accommodation at a general education school into an

[332] See the Third Final Provision of Act 7/2015, of 21 July, amending Act 6/1985 on the Judiciary.

[333] See Constitutional Court Judgments no. 133/2010, of 2 December, legal basis 5 b); no. 10/2014, of 27 January, legal basis 3; no. 74/2018, of 5 July, legal basis 4 a).

undetermined fundamental right to *particularly sensitive* and *extremely responsive* public authorities regarding requests or applications from parents of children with disabilities, even if such requests do not relate to special education but to other preferences. Keep in mind that inclusive or special education should be provided in either general education school, the one picked by public authorities or the school requested by the parents. The judgment is *vague*, which is quite inappropriate when dealing with fundamental rights, and *vaguely* states that "the key is to assess the point of departure to determine whether there was a fundamental rights violation" (legal basis 8).

Since public authorities were not as responsive as required by the situation (the "point of departure" was a disabled person) regarding the parents' choice of school, the parents' appeal was upheld. Note that reasonable accommodation does not have such a blurred or undetermined aim. In fact, the purpose of reasonable accommodation is a lot more accurate and carefully outlined: public authorities must use any available (and reasonable) resources to ensure that general education schools provide inclusive education prior to enrolling a disabled child in a special education facility.

This is why the judgment is wrong in concluding that public authorities should have provided evidence (when making the enrollment decision) that enrolling the child in the school chosen by the parents was unreasonable or disproportionate (legal basis 8). In my opinion, this argument is clearly wrong. We should not require public authorities to justify that enrolling the child at the school picked by the parents is disproportionate to decide otherwise. In fact, the proportionality assessment inherent to reasonable accommodation has nothing to do with this.

3.5. What if parents prefer a special education school?

In all of the judgments discussed above, the appellant parents wanted their disabled children to enroll in general education schools. The parents' choice for their children was in line with the inclusive education approach of Articles 24 CRPD and 74 of the Spanish Act on Education (LOE). This begs an obvious question: what if parents prefer a special education school because it is the best fit for their children? Can the aforesaid inclusive education approach be forced on parents even if they think it is not best for their children?

This question touches on various substantive and meaningful matters. Should we accept that children with disabilities' *fundamental right* to reasonable accommodation at a general education school also *requires* the parents of another disabled child to (i) request reasonable accommodation adjustments that they do not want (prior to enrolling their child in a special education facility); or (ii) be prevented from enrolling their child in the special education school of their choice if the general education school can be reasonably accommodated? Ultimately, the answer to this question should arise from a general analysis (taking a mostly

constitutional perspective) of how we should distribute education decision-making between public authorities and parents.

To solve this issue, we can rely on the constitutional judgments that have settled similar matters. In Judgment no. 133/2010, of 2 December, the Court found that the "compulsory education period during which homeschooling is not allowed" did not violate the freedom dimension of the right to education (i.e., that the parents be able to "freely determine the type of education received by their children") under Art. 27(1) CE. This is not the time or the place to examine this ruling. However, it is worth pointing out the ruling's fair balance struck between (i) the ultimate purpose of education in general as provided in Art. 27(2)−i.e., fully developing one's own personality abiding by democratic principles and fundamental rights and freedoms−and (ii) the aforesaid parents' right. In my view, the Court aptly justifies that such purpose is "more effectively" achieved "when going to school on a daily basis entails interacting with a pluralistic society."

This line of reasoning justifying that the parents' fundamental right be limited seems less powerful in the case at hand. That education's ultimate purposes under Art. 27(2), for children with disabilities, are better achieved at general education schools instead of special education facilities is not as clear as the fact that going to school is better than being homeschooled for citizens to able to live in a pluralistic society. A given disability could very well isolate a child in the most diverse general education school. There should be additional, more meaningful arguments for imposing an inclusive education approach on parents that do not want it having regard to their children's characteristics. To me, it is also obvious that although Art. 74 LOE says absolutely nothing about the parents' opinion (the draft amendment does, however[334]), they should most certainly have a say in this.

We can find a well-balanced response to this issue by relying on two different interpretations of Art. 74(1) LOE: "Children with special needs should only be enrolled in special education schools (...) if their needs cannot be cannot be fulfilled through diversity-based measures and programs at general education schools." If a child's parents seek an inclusive education program for their children, we should interpret the provision in line with Art. 24 CRPD, i.e., we must implement any reasonable accommodation prior to sending a disabled child to a special education school, requiring a stringent standard of evidence on the counterparties, reversing the burden of proof, etc.

[334] See the new wording proposed for Art. 74(4) LOE: "Children's educational needs should be identified and assessed as soon as reasonably possible, by duly qualified professionals and in the manner provided by public education authorities. *It will be mandatory that parents or legal guardians be heard and informed. Education authorities shall regulate any dispute settlement mechanisms taking into account the child's best interest.*" The italicized text indicates the draft amendment not yet included in the provision.

However, if parents consider (having the child's best interests at heart) that he or she would be better off attending a special education facility, the provision should be interpreted differently. The default rule will continue to be that children be enrolled in general education schools. However, this rule may be derogated if the facts preponderantly show that it is more likely than unlikely that the special education school be a better fit for the child. If reasonable accommodation appears as clearly unreasonable in the general education school, there is no need to push it to the limit before enrolling the child at a special education facility. This interpretation is in line with the one discussed above in STC no. 10/2014, although, there, it was wrongly applied to a case where the parents wanted their child to attend a general education school.

In my view, both interpretations are compatible with the wording of Art. 74(1) LOE. There is no doubt that the second interpretation is more of a stretch than the first, but they are both an appropriate reference to weigh the constitutional interests and rights at stake.

4. REASONABLE ACCOMMODATION TO EFFECTIVELY ENFORCE THE RIGHT OF THE ELDERLY TO DECIDE WHERE THEY LIVE AND PREVENT THEIR ISOLATION

4.1. The application of reasonable accommodation to protect the elderly by systematically interpreting Articles 14 and 50 CE

Let us review the aspects regarding the right to education of persons with disabilities that could be useful to examine the requirements applicable to public authorities when deciding where the elderly should live. Prior to excluding persons with disabilities from an inclusive and friendly environment, public authorities are required to explore all reasonable possibilities of achieving inclusion through any customized assistance or support (i.e., reasonable accommodation).

Within the field of education, this formal requirement is part of a substantive fundamental right: the right to education secured by Article 27(1) of the Spanish Constitution (CE). However, as shown above, misapplying reasonable accommodation measures could qualify as discriminatory and thus violate the right to equality under Art. 14 CE.

Nevertheless, this does not exactly apply to the right of persons with disabilities to an independent living and to not being excluded from the community (Art. 19 CRPD). This CRPD content is not part of any fundamental rights constitutional provision. And, still, a joint interpretation of Articles 14 and 49 CE (requiring that public authorities protect the elderly because they need development and promotion activities); 2 CRPD (under which rejecting reasonable accommodation constitutes discrimination); and 19 CRPD (older adults' right to home assistance to prevent isolation) leads to conclude right away that, failing to

provide (i) reasonable accommodation; and (ii) a careful reasoning as to why an older adult must live in a nursing home, qualify as discriminations contrary to the equality principle under Art. 14 CE.

Can this line of reasoning apply to the elderly? I believe it can. In my opinion, this interpretative approach to Art. 14 CE together with Art. 49 CE (persons with disabilities) could also apply to the systematic interpretation of Art. 14 CE in connection with Art. 50 CE (protection of senior citizens). As noted before, standard statutory provisions (e.g., Spanish legislation on apartment buildings and co-ownership) are actually equating the entitlement to reasonable accommodation of both vulnerable groups subject to public protection: persons with disabilities and seniors over 70. There are very good reasons for transferring this protection framework through Art. 14 CE particularly for dependent older adults. Indeed, dependent older adults are actually the ones subject to *national* authorities' decisions on their place of residence and living arrangement, whereas *regional* authorities are responsible for deciding on their welfare benefits under Act 39/2006, of 14 December, on the Promotion of Personal Autonomy and Care for dependent persons (*Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia*, LAPAD) and other regional welfare provisions.

The legal concept of "persons with disabilities" (see Articles 1 CRPD and 4 TRLDPD), which revolves around the barriers potentially preventing persons with disabilities' full and effective participation in society, does not fully match the legal notion of "dependent persons" (see Art. 2(2) LAPAD), which focuses on the need to take care of them for daily life activities. However, aside from the existing overlaps, there is no doubt that there are no grounds justifying that one group be less protected than the other under Art. 14 CE.

4.2. Living in a nursing home construed as a "particular living arrangement"

Living in a nursing home (a "particular living arrangement" in the words of Art. 19(a) CRPD) is essentially different from living "outside." Nursing homes' daily routine and operation bring together or bundle several aspects of daily life that are totally apart in "normal life." Persons living "outside" go to work, spend their free time and sleep at completely different places under completely different spheres of authority: the boss', the landlord's and that of the owner of the restaurant or the movie theater where persons go out in their spare time. Accordingly, persons "out on the street" move around, thereby having different companions and spheres of authority. Also, they somewhat freely decide on their schedule to fulfill their obligations and personal desires. In contrast, nursing home residents have all of these aspects

decided for them and scheduled by the nursing home authorities subject to a rational plan imposed on residents.[335]

It is not even necessary to focus on dependent persons requiring assisted living care to acknowledge the differences between living in nursing homes and elsewhere. Older adults in good health condition are also deprived of what probably was their last daily activity: arranging their own life. At nursing homes, this personal, day-to-day task is replaced by a well-designed and comprehensive system carefully arranged to meet all residents' needs.[336]

Self-evidently, nursing home residents become subject to a very intense relationship, based on the provision−and subsequent enjoyment−of welfare benefits and services that can severely affect the residents' spheres of personal self-determination covered by certain fundamental rights. Let us think, for instance, of freedom of movement under Art. 17(1) CE when there are entry/exit times at the relevant nursing homes; or of the impact that living in a nursing home can have on privacy (Art. 18(1) CE).

Broadly, one could argue that a resident's situation in a nursing home regarding the resident's sphere of self-determination (with a fundamental rights impact) is nothing but the fair balance struck between (i) fundamental right requirements; and (ii) the duty of care to be fulfilled by nursing homes and similar residential facilities. The result of this fair balance–defined in the abstract despite that it can only be implemented in practice or at a much less abstract level−is what actually allows to graphically speak of *a general state of well-balanced or weighed freedom*.[337]

4.3. Guidelines to interpret standard (i.e., non constitutional) statutory provisions governing dependency-related benefits affecting older adults' place of residence and integration in the community

According to the above, prior to making a decision on older adults' place of residence and way of life, taking them out of their living environment and forcing them into a "particular living arrangement," public authorities must (i) exhaust any possibilities of providing support and assistance within the older adult's environment; and (ii) duly justify why there is no room for the appropriate reasonable accommodation within the context of the remaining benefits.

[335] Peter Krause (1978), "Empfiehlt es sich, soziale Pflege- und Betreuungsverhältnisse gesetzlich zu regeln?," *Verhandlungen des zweiundfünfzigsten deutschen Juristentages*, Report E, volume 1, Munich, 1978, p. 11 *et seq.*, specifically p. 26.
[336] Krause (1978: p. 31).
[337] On this matter, see José María Rodríguez de Santiago (2012), "Derechos fundamentales en la residencia de mayores," *Revista Española de Derecho Constitucional*, no. 94, p. 117-152. On nursing home management approaches and their impact on nursing home residents, see Jorge Castillo Abella (2020), "Tipología y régimen jurídico de los sujetos gestores de residencias de mayores," *InDret* February 2020, p. 457-507.

Art. 50 CE expressly refers to the welfare service system to meet "specific housing problems" of older adults.

These interpretative guidelines could already be inferred from the LAPAD: dependency-related benefits should be aimed at (i) enabling dependent persons to live their live "as autonomously as possible" (Art. 3(h)); whilst (ii) allowing them, to the extent possible, to stay within their living environment where they can be involved in the community (see Articles 3(i) and 13(a) and (b) LAPAD). However, the driving force of the notion that failure to provide reasonable accommodation constitutes a discrimination contrary to the right to equality (Art. 14 CE) definitely requires a more extensive interpretation of any benefits that allow the elderly to stay within their living environments, e.g., financial support for relatives or non-professional caregivers (Art. 18), remote assistance (Art. 22), home care (Art. 23) or even day care or night care residential facilities (Art. 24).

The burden to justify a decision upholding a benefit that entails estranging an older adult from his or her living environment should focus on persuasively arguing why the decision-maker was unable to reasonably accommodate the relevant benefits in order to help the recipient to stay within his or her living environment avoiding the risk of exclusion. This duty to give reasons will apply to the decision mentioned in Art. 28(3) LAPAD (on eligibility) and to the customized care program governed by Art. 29 LAPAD.

It is questionable if the aforesaid burden to "provide a persuasive justification" or "duly give convincing reasons" is as stringent as the one arising from raising the preponderance of the evidence standard. Because, in my view, it remains unclear whether the rule on raising the general standard of proof in administrative procedures can be directly inferred from Art. 50 CE together with Art. 14 CE. Perhaps, it should be expressly provided as a statutory requirement.

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