

CAN I PLAY?: THE DILEMMA OF THE DISABLED ATHLETE IN INTERSCHOLASTIC SPORTS

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Recently, courts and scholars have written extensively on whether high school and college athletic programs violate Title IX of the Education Amendments of 1972¹ when they fail to provide women the same opportunity to participate in interscholastic sports as they provide to men. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."² Plaintiffs, and the scholars supporting them, have argued that schools violate Title IX when they either drop women's teams or fail to provide enough varsity sports to accommodate the desires and abilities of their female students to participate to the same extent as male students. These arguments have been largely successful.³

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1. 20 U.S.C. § 1681 *et seq.* (1994).

2. 20 U.S.C. § 1681(a) (1994).

3. *See, e.g.,* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (school violated Title IX when women's gymnastics and volleyball teams demoted from university-funded varsity status to donor-funded varsity status), *cert. denied*, 117 S. Ct. 1469 (1997); Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994) (genuine issues of material fact as to whether Kentucky State Board for Elementary and Secondary Education and Kentucky High School Athletic Association discriminated against girls by providing fewer sports for girls than for boys and by refusing to approve girls interscholastic fast pitch softball); Favia v. Indiana Univ. of Pennsylvania, 7 F.3d 332 (3d Cir. 1993) (district court granted preliminary injunction requiring university to reinstate women's varsity field hockey and gymnastics; no abuse of discretion where district court refused modification of injunction to replace gymnastics with soccer, even though three of four class representatives were either no longer eligible or no longer desired to compete on gymnastics team), *aff'g*, 812 F. Supp.

The same cannot be said, however, of efforts to gain the right to participate in interscholastic sports by another group which has been historically discriminated against: persons with

578 (W.D. Pa. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.) (university violated Title IX when it discontinued women's varsity fast pitch softball team), *cert. denied*, 114 S. Ct. 580 (1993); *Beasley v. Alabama State Univ.*, 966 F. Supp. 1117 (M.D. Ala. 1997) (female athlete stated Title IX claim against university where she alleged a 32% disparity between athletic participation and enrollment levels for women, that university did not provide enough varsity intercollegiate sports to accommodate the desires and abilities to participate of its female students to the same extent as male students, and that, notwithstanding demonstrated desire of female students to participate in varsity intercollegiate athletic competition, the program included a disproportionate number of male students); *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892 (M.D. La. 1996) (university violated Title IX by not providing fast pitch softball team for women). *But see Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994) (court rejected Title IX claim by women's basketball coach who was paid less than the school's men's coach; it found that evidence of the male coach's greater responsibility in raising funds and other areas justified the disparity in salary; the men's team "generated greater attendance, more media interest, [and] larger donations" and the men's coach had fund raising duties not required of the women's coach; the university was not responsible for "societal discrimination in preferring to witness men's sports in greater numbers").

Men who have sued after their teams were dropped have not been as successful. *See Kelley v. Board of Trustees, Univ. of Illinois*, 35 F.3d 265 (7th Cir. 1994) (university's decision to terminate men's swimming program while retaining women's swimming program did not violate Title IX or Equal Protection Clause); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995) (university's decision to eliminate intercollegiate wrestling program did not violate Title IX or the Equal Protection Clause).

These cases have inspired several law review articles, most supporting the plaintiffs. For symposium issues on the subject see *Gender & Sports: Setting a Course for College Athletics*, 3 DUKE J. GENDER L. & POL'Y (1996); *Gender Equity in College Athletics: An Analysis of Title IX*, 2 VILL. SPORTS & ENT. L.F. (1995). *See also* Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039 (1996); James J. Whalen, *Gender Equity or Title IX?*, 5 KAN. J.L. & PUB. POL'Y 65 (1996); Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329 (1996); Jerry R. Parkinson, *Grappling with Gender Equity*, 5 WM. & MARY BILL RTS. J. 75 (1996); Jill Mulderink, *Par for the Female Course: Cohen v. Brown University Mandates an Equal Playing Field in Intercollegiate Athletics*, 22 J.C. & U.L. 111 (1995); Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57 (1994); Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the 'Equal Opportunity' Standard*, 1994 DET. C.L. REV. 953 (1994); Eugene G. Bernardo, II, Note and Comment, *Unsportsmanlike Conduct: Title IX and Cohen v. Brown University*, 2 ROGER WILLIAMS U. L. REV. 305 (1997); Deidre G. Duncan, Comment, *Gender Equity in Women's Athletics*, 64 U. CIN. L. REV. 1027 (1996).

disabilities. While some courts have ruled that schools must let student-athletes play, others have ruled that their interests in competing are not protected under either of two federal laws that prohibit schools from discriminating against individuals with disabilities.

The first such law is section 504 of the Rehabilitation Act of 1973 which echoes Title IX and applies to all schools, public or private, that receive federal funding in any form:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .⁴

The other arguably applicable federal law is the Americans with Disabilities Act,⁵ which was enacted in 1990 to extend the prohibition against disability discrimination beyond federal funds recipients. Title II of the ADA applies to public schools: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . ." Private schools are covered under Title III of the ADA which bars the disability-based denial of the benefits of the services, programs, or activities of "public accommodations."⁷

This Article will, with one exception, discuss the two laws together because the ADA is modeled after section 504, and

4. 29 U.S.C. § 794(a) (1994).

5. 42 U.S.C. § 12101 *et seq.* (1994).

6. 42 U.S.C. § 12132 (1994). A public entity is defined as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B). Public high schools and colleges, of course, fall under this definition.

7. 42 U.S.C. § 12182 (1994) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages or accommodations of any public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."). A public accommodation is a "private entity that owns, leases (or leases to), or operates a place of public accommodation." 28 C.F.R. § 36.104 (1997). A place of public accommodation is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories." *Id.* Included in those categories are "[a] nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education." *Id.* See also 42 U.S.C. § 12181(2)(J) (1994).

Congress intended for them to be consistent.⁸ Indeed, the enforcement remedies, procedures and rights under Title II are the same as under section 504,⁹ and, Congress mandated that regulations interpreting Title II be consistent with regulations promulgated for section 504.¹⁰ Consequently, courts have looked to case law construing section 504 in applying the ADA.¹¹

This includes courts that have addressed the two laws' applicability to interscholastic sports. These courts have identified several distinct elements which a student-athlete must show to win a disability discrimination action. To establish a section 504 claim, a student-athlete must prove:

8. See, e.g., H.R. REP. NO. 101-485, pt. 2, at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 332. ("It is the Committee's intent that the analysis of the term 'individual with handicaps' by the Department of Health, Education and Welfare [in] the regulation implementing section 504 . . . apply to the definition of the term 'disability' included in this legislation. The use of the term 'disability' instead of 'handicap' and the term 'individual with a disability' instead of 'individual with handicaps' represents an effort by the Committee to make use of up-to-date, currently accepted terminology"). The Committee later notes the definition of "qualified individual with a disability" is comparable to the definition found in the § 504 regulations. *Id.* at 55, 1990 U.S.C.C.A.N. at 337.

The regulations governing schools are identical under both § 504 and the ADA. The Department of Health, Education and Welfare promulgated administrative rules interpreting § 504 in 1977, 34 C.F.R. §§ 104.1-104.54, and they are now enforced by its successor the Department of Education (DOE) through its Office for Civil Rights (OCR). The Justice Department has overall responsibility for the enforcement of Titles II and III of the ADA, but has delegated responsibility for the enforcement of Title II as it relates to "[a]ll programs, services, and regulatory activities relating to the operation of . . . institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools)" to the DOE. 28 C.F.R. § 35.190(b)(2) (1997). OCR and the courts use the § 504 regulations in enforcing both statutes.

9. 42 U.S.C. § 12133 (1994).

10. 42 U.S.C. § 12134(b) (1994).

11. See, e.g., *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) ("[b]ecause the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other"); *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996) ("The analysis of claims under the Americans with Disabilities Act roughly parallels those brought under the Rehabilitation Act of 1973 . . ."); *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996) ("Title II of the ADA incorporates the 'nondiscrimination principles' of Section 504 and extends them to state and local government without regard to the receipt of federal financial assistance."); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

- (1) he has a disability as defined by the Act;
- (2) he is "otherwise qualified" to participate in interscholastic . . . athletics . . . or that he may be "otherwise qualified" via "reasonable accommodations";
- (3) he is being excluded from participating in . . . athletics solely because of his disability; and
- (4) the [defendant] receives federal financial assistance.¹²

Proving an ADA claim differs only in that instead of showing the defendant receives federal funds a plaintiff must show it falls under either Title II or III.¹³ A student-athlete must show: (1) he has a disability; (2) the defendant is subject to the ADA; and (3) that he was denied the opportunity to participate in or benefit from services or accommodations on the basis of his disability and that reasonable accommodations could be made that do not fundamentally alter the nature of the defendant's services or accommodations.¹⁴

There has been extensive litigation on all of these elements as they relate to interscholastic sports, but this Article will focus only on the issues where there is a split among the courts:¹⁵

12. *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996) (quoting *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 582 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997)). See also *Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030-31 (6th Cir. 1995). Masculine pronouns are used throughout the text of this article because, to date, all but two disability discrimination actions involving interscholastic sports have been brought by male student-athletes.

13. See *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997) (noting "the principal distinction between the two statutes is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance, while the ADA's reach extends to purely private entities").

14. *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483, 488 (E.D. Mich. 1994), *rev'd*, 64 F.3d 1026 (6th Cir. 1995); *Dennin*, 913 F. Supp. at 670. The tests differ slightly based on whether the action is brought under Title II or Title III. Under Title II, a plaintiff must show that "(1) the [defendant] is a 'public entity'; (2) he is a 'qualified individual with a disability'; and (3) he has been excluded from participation from or denied the benefits of the activities of the public entity"; *Johnson*, 899 F. Supp. at 582. For Title III, the plaintiff must prove "(1) he is disabled, (2) the [defendant] is a 'private entity' which operates a 'place of public accommodation'; and (3) he was denied the opportunity to 'participate in or benefit from the services or accommodations on the basis of his disability,' and that reasonable accommodations could be made which do not fundamentally alter the nature of [defendant's] accommodations." *Id.*

15. Several high school athletic associations have unsuccessfully argued that

they are not covered by § 504 because they do not receive federal funds and/or that they are not covered by the ADA because they are not "public entities" under Title II.

Courts directly addressing the § 504 issue have uniformly ruled that athletic associations are federal funds recipients. The court in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1995) stated:

It has been held that a program which indirectly receives federal funds may be subject to the requirements of the Rehabilitation Act. See *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1212 (9th Cir.), *cert. denied*, 471 U.S. 1062 (1985). The Court concludes that MSHSAA is a "federally-assisted program" within the meaning of the Rehabilitation Act, as it receives federal funds indirectly through its members, which delegate to it a portion of their responsibilities for regulation of interscholastic activities.

See also *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) (same), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483, 487 (E.D. Mich. 1994) (same), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271 (6th Cir. 1994) (state high school athletic association a federal funds recipient under Title IX).

Courts have similarly held that high school athletic associations are public entities subject to Title II of the ADA. See *Rhodes v. Ohio High School Athletic Ass'n*, 939 F. Supp. 584, 590 (N.D. Ohio 1996) (holding high school athletic association to be a public entity, and noting "that every available district court opinion which has addressed this very issue has found that a state athletic association is an instrumentality of the State"); *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 583 (M.D. Fla. 1996) (high school athletic association a "public entity" as defined by the ADA), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997); *Sandison*, 863 F. Supp. at 487 (same); *Pottgen*, 857 F. Supp. at 662 (same). *But see* *Hoot v. Milan Area Schools*, 853 F. Supp. 243, 250-51 (E.D. Mich. 1994) (genuine issue of material fact existed as to whether high school athletic association was public entity).

Courts have been less willing to find that high school athletic associations are covered under Title III, but this is because an entity can be subject to Title II or III, but not both. After ruling that the defendants were public entities under Title II, both the *Rhodes* and *Johnson* courts declined to address the issue of whether they were "public accommodations" under Title III, stating that public entity cannot also be a private entity. *Rhodes*, 939 F. Supp. at 591; *Johnson*, 899 F. Supp. at 584. See also *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995) (plaintiffs alleged state high school athletic association was covered by Title III because age eligibility rule prevented them from participating from competitions on public school grounds and public parks. The court found Title III inapplicable: "Public school grounds and public parks are of course operated by public entities, and thus cannot constitute public accommodations under Title III. Accordingly, we conclude that no 'place of public accommodation' is implicated here and title III does not apply."), *rev'g*, 863 F. Supp. 483, 486-87 (E.D. Mich. 1994) (holding that athletic association was a public accommodation because "through the management of interscholastic athletic activities and competition at virtually every public and private secondary school throughout the state, defendant operates a place of education," and that by sponsoring and receiving gate receipts at interscholastic

athletic competitions and tournaments open to the general public as well as students it "also operates a place of entertainment for purposes of the ADA").

The question of whether athletic associations which have no connection to the state—and thus are not subject to Title II—are covered under Title III has proved more problematic. Some courts have held that Title III does not apply to these associations because they are not a *place* of public accommodation. They adopt a literal reading of the regulations which define a "place of public accommodation" as a "facility, operated by a private entity, whose operations affect commerce . . ." and define "facility" as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104 (1997) (emphasis added). For example, in *Brown v. 1995 Tenet ParaAmerica Bicycle Challenge*, 959 F. Supp. 496 (N.D. Ill. 1997), a cyclist who was not allowed to participate in a cross-country bicycle tour for disabled and able-bodied riders because of his refusal to wear a bicycle helmet, filed suit alleging that sponsor and organizing committee violated ADA, Rehabilitation Act, and Illinois law. The court held the defendants were not "public accommodations" for ADA purposes because Brown did "not allege that he was denied access to a physical place. He alleges that he was denied a chance to participate in the ParaAmerica. That allegation does not meet the definition of public accommodation." *Brown*, 959 F. Supp. at 499. See also *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (national and local hockey organizations did not constitute "places of public accommodation" within meaning of ADA); *Johannesen v. NCAA*, No. Civ. 96-197 PHX ROS (D. Ariz. Apr. 30, 1996) (court held that Title III did not apply to a claim by a learning disabled student against the National Collegiate Athletic Association because plaintiff alleged that he was denied access to a "place" owned by a public entity, Arizona State University).

The most recent decisions on the issue, however, all hold that such associations are public accommodations. These courts examine the athletic associations' regulations and relationships with the public accommodations which host their events, and hold that through them the associations do operate "facilities." For example, in *Martin v. PGA Tour Inc.*, 984 F. Supp. 1320, 1327 (D. Or. 1998), the court held that a professional golfers association was a place of public accommodation. The PGA argued that while golf courses were specifically listed as a place of public accommodation, 42 U.S.C. § 12181(7)(L), this did not apply "between the ropes" during a tournament. *Martin*, 984 F. Supp. at 1327. The court stated:

What the PGA also overlooks is that people other than its own Tour members are indeed allowed within the boundary lines of play during its tournaments. What if a member-golfer opted to hire a disabled caddy? Once the caddy steps within the boundaries of the playing area of the golf course—a statutorily defined place of public accommodation—does he step outside the boundaries of the ADA simply because the public at large cannot join him there? If this were the law, how could such be reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodations?

Id. See also *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (NCAA was a place of public accommodation because of "the significant degree of control that the NCAA exerts over the athletic facilities of its member institutions" through its regulations); *Ganden v. NCAA*, 1996 WL 680000, *11 (N.D. Ill. Nov. 21, 1996) (holding that, "[a]lthough uncertain," plaintiff had a reasonable likelihood of demonstrat-

- 1) Do student-athletes, who are prohibited from playing interscholastic sports due to a physical or mental impairment, have a "disability" as defined by the statutes? More specifically, does barring a student-athlete from participating in interscholastic sports meet the definition's requirement of a "substantial limitation" of a "major life activity"; i.e., are interscholastic sports a "major life activity"?
- 2) Do "neutral" athletic association eligibility rules discriminate against individuals who do not meet them due to a physical or mental impairment "because of" the person's disability?
- 3) Do athletic associations have to waive eligibility rules as "reasonable accommodations" for student-athletes who are not "otherwise qualified" due to their learning disabilities?
- 4) Can a high school or college bar a student-athlete from interscholastic competition as not "otherwise qualified" where its doctors—but not the student-athlete's—state that there is a substantial risk of injury from playing?

This Article argues that all these questions should be answered in favor of the student-athlete.

I. DISABILITY DEFINED: DOES PLAYING INTERSCHOLASTIC SPORTS CONSTITUTE A "MAJOR LIFE ACTIVITY"?

The first step in actions brought under both the Rehabilitation Act and the ADA is to determine if the plaintiff has a "disability." Both statutes use the same definition: a person is "disabled" if he "has (i) a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having, such an impairment."¹⁶ Courts have construed this

ing that the NCAA was covered by Title III because it "both (1) 'operate[d]' the swimming facilities [at a state university] and other participating member institutions within the meaning of Title III, and (2) is 'closely connected' to those same particular facilities in such a manner as to function as a 'ticket' to the primary use of those facilities."); *Butler v. NCAA*, No. 96-1656 (W.D. Wa. Nov. 8, 1996) (noting that issue involves remedial legislation which should be construed broadly rather than narrowly); *Dennin*, 913 F. Supp. at 670 ("CIAC sponsors athletic competitions and tournaments. By managing and controlling the aforementioned, it 'operates' places of public accommodation.").

16. 29 U.S.C. § 706(8)(B) (1994); 42 U.S.C. § 12102(2) (1994). The ADA definition appears in the general definitions section in Title I of the statute which covers

definition to have two elements: "first, that one has, has a record of having or is regarded as having a physical or mental impairment; and second, that that impairment substantially limits one or more major life activities."¹⁷ Some schools have argued that section 504 and the ADA do not apply to student-athletes because they fail the second element of this test: barring them from playing interscholastic sports does not substantially limit a major life activity.¹⁸

"Major life activities" are defined as basic functions of life "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, *learning* and working."¹⁹ One court has stated that "[t]he 'major life activities' hurdle, rather than proof of a concrete disability is what screens out trivial claims under" the ADA.²⁰

The vast majority of courts applying section 504 and the ADA to interscholastic sports, however, have ignored this threshold issue of whether the plaintiff is "disabled." The few courts addressing it are split on whether such participation

employment discrimination, but the same definition has been adopted in the regulations for Titles II and III. 28 C.F.R. §§ 35.104(4), 36.104 (1996).

17. *Pahulu v. University of Kansas*, 897 F. Supp. 1387, 1390 (D. Kan. 1995) (quoting *Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992)); see also *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 545 (E.D. N.C. 1996); *Flasza v. TNT Holland Motor Express, Inc.* 159 F.R.D. 672, 678 (N.D. Ill. 1994). One court has split the test into three elements: "first, that she has a 'physical or mental impairment'; second, that this impairment adversely affects 'a major life activity'; and third, that it does so to a significant extent (or, put more precisely, that the impairment 'substantially limits' her ability to engage in the particular major life activity)." *Abbot v. Bragdon*, 107 F.3d 934, 939 (1st Cir.), *cert. granted*, 118 S. Ct. 554 (1997). This is consistent with the definition of disability found in the EEOC Compliance Manual: "a person must establish three elements: (1) that (s)he has a physical or mental impairment (2) that substantially limits (3) one or more major life activities." EEOC COMPLIANCE MANUAL § 902.1(b) (Mar. 1995), quoted in *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois*, 911 F. Supp. 316, 321 (N.D. Ill. 1995).

18. See notes 23-104 and accompanying text, *infra*.

19. 34 C.F.R. § 104.3(j)(2)(ii) (1996); 45 C.F.R. § 84.3(j)(2)(ii) (1996); 28 C.F.R. §§ 35.104, 36.104 (1996) (emphasis added). The § 504 regulations use the word "handicapped." The Rehabilitation Act was amended in 1992 to replace this term with the word "disability." Pub. L. No. 102-569, 106 Stat. 4360 (1992). The regulations have not caught up. See *Knapp v. Northwestern Univ.*, 101 F.3d 473, 483 n.7 (7th Cir. 1996).

20. *Johnson v. American Chamber of Commerce Publishers, Inc.*, 108 F.3d 818, 820 (7th Cir. 1997).

constitutes a "major life activity" and barring the student-athlete from playing is a "substantial limitation" of it. Two courts applying a "subjective" analysis have found that interscholastic sports may be a major life activity for particular student-athletes because of the impact on their learning, an activity specifically listed in the definition.²¹ These courts further hold that barring the student-athlete from participation constitutes a substantial limitation on that activity. Two other courts, however, have held that students barred from playing interscholastic sports because of physical impairments were not "disabled" because they were still able to participate in other school activities and, thus, there was no "substantial limitation" on their learning.²²

A. Courts Holding Participating in Interscholastic Sports Can Be a "Major Life Activity" and that Barring a Student-Athlete from Playing is a "Substantial Limitation"

The first court to hold that participation in interscholastic athletics was a major life activity was *Sandison v. Michigan High School Athletic Ass'n, Inc.*²³ The plaintiffs in *Sandison* were both nineteen-year-old high school seniors who were two years behind their age group in school due to their learning disabilities.²⁴ They were barred from participating in interscholastic track and cross-country by a state athletic association eligibility rule that stated that students who turned nineteen

21. *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995); *Knapp v. Northwestern Univ.*, 942 F. Supp. 1191 (N.D. Ill.), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

22. *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995); *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996); *cert. denied*, 117 S. Ct. 2454 (1997).

23. 863 F. Supp. 483, 489 (E.D. Mich. 1994), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995).

24. *Sandison*, 863 F. Supp. at 485. Sandison was diagnosed with an auditory import disability when he was three, and had difficulty speaking, reading, and writing. He spent several years in an ungraded classroom, and was still in kindergarten at the age of seven. After kindergarten, Sandison was placed in graded classrooms where he continued to receive special education support.

The other plaintiff, Stanley, was diagnosed with a learning disability in mathematics while he was in kindergarten. Like Sandison, he repeated kindergarten and later spent a number of years in an ungraded classroom.

before September 1 of the current school year were ineligible for interscholastic athletics.²⁵ They sued under section 504 and the ADA alleging the regulation discriminated against them on the basis of their disabilities, and the athletic association argued that they were not protected under the statutes because playing interscholastic sports was not a major life activity.²⁶

The court disagreed, stating that the athletic association's position "downgrade[d] the importance of interscholastic sports in plaintiffs' learning programs."²⁷ It noted that Sandison had maintained better grades due to his interaction with teammates "who encourage[d] him to study and to be disciplined."²⁸ And, the second plaintiff, Stanley, had improved his social skills through participation on sports teams.²⁹ Accordingly, the court concluded: "Because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, it is *as to them* a major life activity. Thus, plaintiffs' disabilities limit a major life activity as contemplated by ADA and the Rehabilitation Act."³⁰

The court in *Knapp v. Northwestern University*³¹ reached a similar decision, holding that intercollegiate basketball was a major life activity for the plaintiff because it was an important and integral part of his learning and educational experience.³² Knapp sued Northwestern under the Rehabilitation Act after he was prohibited from playing intercollegiate basketball due to a heart condition.³³ Noting a conflict among other courts, the dis-

25. *Id.* The plaintiffs challenge to this age rule is more fully discussed in the section on eligibility rules. See notes 130-232 and accompanying text, *infra*.

26. *Sandison*, 863 F. Supp. at 488.

27. *Id.* at 488-89.

28. *Id.* at 489.

29. *Id.*

30. *Id.* (emphasis added).

31. 942 F. Supp. 1191 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996); *cert. denied*, 117 S. Ct. 2454 (1997).

32. *Knapp*, 942 F. Supp. at 1195.

33. *Id.* at 1193. Knapp signed a National Letter of Intent to play basketball for Northwestern less than two months after his heart stopped following a pick-up basketball game in his high school gym. Paramedics revived him using cardiopulmonary resuscitation and electronic defibrillation. Knapp was later diagnosed as having suffered sudden cardiac death caused by primary ventricular fibrillation. He had an automatic cardioverter defibrillator implanted in his abdomen to restart his heart in the event of another cardiac arrest. After Knapp enrolled at Northwestern, the basketball team's head physician concluded that he was not medically eligible to partici-

strict court stated: "While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp."³⁴ The court pointed to Knapp's affidavit testimony that he had learned "confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism" through playing basketball, and concluded that it had played a "substantial role in Knapp's education and learning process as he has learned valuable life skills and character traits."³⁵

The court rejected Northwestern's argument that exclusion from basketball was not a substantial limitation on Knapp's learning because he could engage in other activities which would provide him with the same educational benefits such as playing an instrument in the school band or orchestra. It noted that such participation may give students who had trained on a particular instrument for years a valuable educational experience, but stated, "[t]he law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra instead and receive the same educational experience."³⁶ It found that such a position

pate. Knapp continued to be a member of the team and to receive his scholarship, but was not allowed to practice or compete. Knapp's physical condition is more fully discussed in the section on barring student-athletes from participating in interscholastic sports due to a risk of future injury. See notes 236-280, and accompanying text, *infra*.

34. *Knapp*, 942 F. Supp. at 1195.

35. *Id.* Knapp's affidavit stated that

[m]y participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting.

Id.

36. *Id.*

undermined the purpose of the Rehabilitation Act by not allowing disabled individuals to pursue their chosen fields, especially when those fields were chosen before learning of the disability.³⁷

It also rejected Northwestern's argument that Knapp was not "substantially limited" because he continued to receive his scholarship, still had a role with the team, and was given access to all the benefits given other team members except the ability to play:

Northwestern misses the mark. It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer. The fact that Northwestern will not allow Knapp to play constitutes a substantial limitation on his ability to play intercollegiate basketball.³⁸

37. *Id.* The court also stated that allowing Knapp to play another sport would likely not provide the same educational experience as playing basketball. It noted that "there are relatively few, if any, activities that demand the same level of teamwork, precision and discipline as an intercollegiate sport to which a person can transfer particular skills. For this reason, it would probably not be enough for Northwestern to say that Knapp would be permitted to play baseball or golf." *Id.* at 1195-96.

38. *Id.* at 1196. See also *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (stating in *dicta* that involvement in contact sports was a major life activity for elementary student with AIDS).

Other courts have looked to more concrete proof of the importance of playing interscholastic sports to a student's education. Specifically, they have examined whether participation in a sport was part of a disabled student's individualized education plan (IEP) under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (1994) (IDEA). IDEA originally was enacted to address the failure of state education systems to recognize and meet the educational needs of children with disabilities. 20 U.S.C. § 1400 (1994). IDEA is much narrower than § 504 and the ADA with regard to the types of disabilities which are protected. Compare 20 U.S.C. § 1401(a) (1994), with 29 U.S.C. § 706(7)(B) (1998), and 34 C.F.R. § 104.3(j) (1998). For example, IDEA lists specific disabilities, such as mental retardation, blindness and deafness, which qualify a student for IDEA assistance. See 20 U.S.C. § 1401(a)(1)(I) (1994). Thus, all students who are qualified under IDEA also fall within the anti-discrimination protections of § 504; however, all § 504 students are not necessarily IDEA-qualified. IDEA focuses on the provision of special education and related services through the secondary school level. *Id.* Thus, it does not apply to college programs or programs run by other post-secondary institutions where only

§ 504 applies.

IDEA requires state and local education agencies to provide children who qualify as disabled with a free and appropriate public education which means, in part, special education and related services provided in conformity with an IEP. See 20 U.S.C. §§ 1400(c), 1415 (1994); 34 C.F.R. § 300.8(d) (1998). An IEP, as that term is used in IDEA, is a formal written statement developed for an IDEA-qualified disabled student; an IEP must specify the student's educational goals, objectives, curriculum and related services and be in effect before special education is provided to the child. See 20 U.S.C. § 1401(a)(20) (1994); 34 C.F.R. §§ 300.340, 300.342, 300.346 (1998).

The regulations require that "[e]ach public agency must provide special education and related services to a child with a disability in accordance with an IEP." 34 C.F.R. § 300.350 (1998) (emphasis added). "Related services" are defined as including recreational activities where such activities are required to assist an IDEA-qualified disabled student in benefitting from special education. 20 U.S.C. § 1401(a)(17) (1994). Thus, if an IEP contains a requirement for participation in interscholastic sports, such participation is encompassed in the student's guaranteed right to a free and appropriate public education. See 20 U.S.C. §§ 1400(c), 1401(a)(17), (18), (20) (1994); 34 C.F.R. §§ 300.1, 300.8, 300.16, 300.350 (1998).

Students with IEPs stating they should participate in interscholastic sports have successfully sued where they have been barred by eligibility rules like those discussed at notes 130-132 and accompanying text, *infra*. For example in *T.H. v. Montana High Sch. Ass'n*, No. CV-92-150-BLG-JFB, 1992 WL 672982 (D. Mont. Sept. 24, 1992), a nineteen-year-old high school student had an IEP pursuant to IDEA which expressly required continued participation in interscholastic sports as a motivational tool. He was declared ineligible to participate in interscholastic sports due to an athletic association age rule, and sued to enforce his rights under IDEA. *T.H.*, 1992 WL 672982, at *2-3.

The court recognized that students ordinarily do not have a constitutional right to participate in interscholastic sports; it is a privilege that may be withdrawn. *Id.* at *4. It determined, however, that an IDEA-qualified student's guaranteed right to a free and appropriate public education and related services included participation in interscholastic sports if such participation was included as a component of the student's IEP. *Id.* Specifically it concluded that T.H.'s privilege to participate in interscholastic sports had been transformed into a federally protected right by virtue of his IEP under IDEA and, further, that the athletic association denied T.H. due process of law in failing to conduct an appropriate inquiry before depriving T.H. of that right. *Id.* at *4-5. Accordingly, the court preliminarily enjoined the athletic association from enforcing its age rule against T.H. until an appropriate inquiry could be conducted. *Id.* at *5. See also *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (D. Conn. 1996) (following *T.H.* and holding inclusion of participation of interscholastic sports in an IEP transforms it into a federally protected right, and due process is required before student can be deprived of that right), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 735 F. Supp. 753 (M.D. Tenn. 1990) (student with learning disability who transferred from a private religious school to a public high school in order to secure a "free appropriate public education" under IDEA sought to participate in interscholastic athletics despite local athletic association's transfer rule which precluded athletic participation for twelve months after the transfer; IEP developed for student failed to provide for participation in interscholastic athletics but after appeal

B. Courts Holding that Barring a Student-Athlete from Playing is not a "Substantial Limitation" of a "Major Life Activity"

In reaching this decision, the *Knapp* court disagreed with *Pahulu v. University of Kansas*.³⁹ Pahulu was a scholarship football player at the University of Kansas (KU). After taking a hit to the head in a spring football scrimmage, he was briefly dazed and experienced numbness and tingling in his arms and

by his parents a hearing officer concluded student should "be allowed to participate in interscholastic extracurricular sports on the basis of the special hardship, his handicapping condition, which necessitated his transfer"; court ordered school district to implement the hearing officer's order and enjoined the athletic association from enforcing its transfer rules against student, his high school, or the school district), *aff'd mem.*, 908 F.2d 972 (6th Cir. 1990); *Hollenbeck v. Board of Educ. of Rochelle Township*, 699 F. Supp. 658 (N.D. Ill. 1988) (wheelchair athlete sought to compete with able-bodied athletes in track and field; IDEA due process hearing was held, and hearing officer concluded that student should be afforded the right to compete on track teams, or when safety required it, in a wheelchair division of any sport afforded to nonhandicapped students; local school board's failure to appeal this determination made it a final and binding decision and court ruled that it was required to implement it). *But see* *M.H. v. Montana High Sch. Ass'n*, 929 P.2d 239 (Mont. 1996) (high school student who did not have a formal IEP under IDEA, but only an informal one-page letter "IEP" under the Rehabilitation Act did not have a federally protected right to participate in interscholastic sports in high school after reaching age 19; court held that unlike IDEA, § 504 is an anti-discrimination statute that does not confer any special rights on disabled persons beyond the right to be free from discrimination based solely on disability); *J.M. v. Montana High Sch. Ass'n*, 875 P.2d 1026 (Mont. 1994) (student who exceeded athletic association length of enrollment rule did not have federally protected right to participate in high school sports where he had an "unwritten" IEP, but was not participating in a formal, written IEP under IDEA); *Mahan v. Agee*, 652 P.2d 765, 768 (Okla. 1982) (court found that neither § 504 nor the IDEA supported attack on age eligibility rule since the suit was not against the school system "for failure to provide an 'appropriate' education"; court found that the age disqualification rule was applied in a neutral fashion, and the school board did not base the disqualification on the student's disability).

The cases applying the IDEA to interscholastic sports show that it will help only a limited number of students: those who have participation in sports specifically written into their formal IEPs or have it mandated by a hearing officer. Further, it will not apply to college students at all. Given this, the author agrees with an earlier commentator who said that while IDEA does provide a possible remedy to disabled student-athletes, "especially with regard to initial access to participation pursuant to an individualized education program, the Act does not nearly effect as successful a result in combating discrimination against handicapped athletes as section 504." Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play?: The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163, 198 (1991).

39. 897 F. Supp. 1387 (D. Kan. 1995).

legs. Doctors described this episode as transient quadriplegia, and a team physician discovered that Pahulu had a congenitally narrow cervical canal. After consulting with a KU Medical Center neurosurgeon, the team physician concluded Pahulu was at an extremely high risk for a severe neurological injury including permanent quadriplegia and barred him from playing football.⁴⁰

Pahulu sued under both section 504 and the ADA. Citing "common sense" and EEOC regulations implementing the equal employment provisions of the ADA,⁴¹ the defendants argued that playing intercollegiate football was not a major life activity "because the general population cannot play intercollegiate football."⁴² Pahulu argued, however, that the question of whether intercollegiate football participation was a major life activity required a subjective determination. "In other words, the question is whether playing college football is a major life activity *for him*, not whether it is in general."⁴³

The court agreed with Pahulu. It noted that the Rehabilitation Act spoke "of *such person's* major life activities"⁴⁴ and found the EEOC regulations inapplicable because the case did not involve employment discrimination.⁴⁵ It also noted that while the definition of major life activities was identical under

40. *Pahulu*, 897 F. Supp. at 1388. Pahulu's physical condition is more fully discussed in the section on barring student-athletes from participating in interscholastic sports due to a risk of future injury. See notes 236-239 and accompanying text, *infra*.

41. The regulations provide:

(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. . . .

(3) With respect to the major life activity of *working*—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j) (1997).

42. *Pahulu*, 897 F. Supp. at 1392.

43. *Id.* (emphasis added).

44. *Id.* (citing 29 U.S.C. § 706(8)(B)).

45. *Id.*

both statutes, the regulations promulgated pursuant to the Rehabilitation Act did not define "substantial limitation."⁴⁶ The court stated that this was not an "oversight," citing commentary in which both the Department of Education and the Department of Health and Human Services acknowledged "the lack of any definition in the proposed regulation of the phrase 'substantially limits,'" and stated they "[did] not believe that a definition of this term is possible at this time."⁴⁷

46. *Id.*

47. *Pahulu*, 897 F. Supp. at 1392-93 (citing 34 C.F.R. § 104 app. A at 372; 84 C.F.R. § 84 app. A at 355 (1997)). The court stated that cases applying regulations promulgated pursuant to the Rehabilitation Act and the ADA interchangeably were limited to the employment discrimination context. *Id.* 897 F. Supp. at 1393 (citing *McGee v. Rice*, 21 F.3d 1121 (10th Cir. 1994) (unpublished)); *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994); *Farley v. Gibson Container, Inc.*, 891 F. Supp. 322, 325 n.1 (N.D. Miss. 1995). It then stated: "The court has cited no authority for the proposition that the Rehabilitation Act or regulations promulgated pursuant thereof authorize reliance upon ADA regulations in all Rehabilitation Act contexts." *Pahulu*, 897 F. Supp. at 1393.

The court also found that administrative interpretations of the Rehabilitation Act supported a subjective analysis. It pointed to regulations requiring schools to provide qualified disabled athletes with "an equal opportunity for participation" in interscholastic athletics, and to a policy interpretation issued in 1978 by the Office for Civil Rights of the Department of Health, Education and Welfare stating that students who had lost an organ, limb or appendage could not be automatically barred from playing contact sports. *Id.* at 1393. The regulation states:

(1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

34 C.F.R. § 104.47(a) (1997). The court rejected without explanation the defendant's argument that these regulations only apply after it is determined the individual is disabled and qualified. *Pahulu*, 897 F. Supp. at 1393.

The policy interpretation states in part that "[s]tudents who have lost an organ, limb, or appendage but who are otherwise qualified may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition." Policy Interpretation No.5, 43 Fed. Reg. 36035 (1978). The court noted that although the policy interpretation addressed minor students, it applied to all federal funds recipients. *Pahulu*, 897 F. Supp. at 1393 (citing *Cathy J. Jones, College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L.

Applying the subjective test to the facts before it, the court noted that Pahulu testified that playing football had helped him "learn[] to be a teamplayer; . . . learn[] discipline; . . . [meet] people and [be] inspired to want a better life for himself; . . . [and] learn[] to care about his appearance."⁴⁸ His grades also improved once he started playing football, and his father testified about educational and growth benefits Pahulu gained from playing sports, particularly football.⁴⁹ In addition, KU's athletic director and football coach both testified that athletics is an important component of learning.⁵⁰ Based on this testimony, the court found that "for Pahulu, intercollegiate football may be a major life activity, i.e., learning."⁵¹

In the next sentence, however, it found that barring him from playing was not a substantial limitation upon his opportunity to learn.⁵² It noted that Pahulu retained his athletic scholarship, giving him access to all academic services available before he was barred from playing. He also had the opportunity to participate in the football program in a role other than as a player and access to a "myriad" of other educational opportunities at KU.⁵³ Accordingly, the court concluded: "Pahulu is not disabled within the meaning of the Rehabilitation Act."⁵⁴

The Seventh Circuit reached a similar conclusion in reversing the lower court's decision in *Knapp v. Northwestern University*.⁵⁵ The court noted that—because intercollegiate athletics could be part of the major life activity of learning for some students—the parties had framed the major life activity analysis into a choice between a subjective test or an objective test: "whether we look at what constitutes learning for Nick Knapp or what constitutes learning in general for the average person."⁵⁶

REV. 113, 215 n. 312 (1992)).

48. *Pahulu*, 897 F. Supp. at 1393.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Pahulu*, 897 F. Supp. at 1393.

54. *Id.*

55. 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

56. *Knapp*, 101 F.3d at 480. The court also noted that the parties had separated "substantially limited" and "major life activities" into two independent criteria. It stated it did not believe "such a complete separation should be made, at least in

The court made it clear that Knapp would lose under an objective test, stating:

Playing intercollegiate basketball obviously is not in and of itself a major life activity, as it is not a basic function of life on the same level as walking, breathing, and speaking. Not everyone gets to go to college, let alone play intercollegiate sports. We acknowledge that intercollegiate sports can be an important part of the college learning experience for both athletes and many cheering students—especially at a Big Ten school. Knapp has indicated that such is the case for him. But not every student thinks so. Numerous college students graduate each year having neither participated in nor attended an intercollegiate sporting event. Their sheepskins are no less valuable because of the lack of intercollegiate sports in their lives. Not playing intercollegiate sports does not mean they have not learned. Playing or enjoying intercollegiate sports therefore cannot be held out as a *necessary* part of learning for *all* students.⁵⁷

regard to learning and working." *Id.* at 479.

The court in [citation omitted] treated "substantially limiting" and "major life activity" as distinct statutory qualifications. [Citation omitted.] However, at least with respect to the major life activity of "working", they constitute an inseparable whole. An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one.

Id. (quoting *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 n.3 (6th Cir. 1985)).

The court then stated that we think this same interrelationship applies regarding learning. If playing NCAA basketball reaches a major life activity, then it is likely that deprivation of that activity would, for the individual basketball player, be a substantial limitation. Likewise, if playing intercollegiate basketball does not reach the status of major life activity, then it is most likely that deprivation will not be a substantial limitation.

Id. at 480.

57. *Id.* The court later stated that it declined to define the major life activity of learning in such a way that the [Rehabilitation] Act applies whenever someone wants to play intercollegiate athletics. A 'major life activity,' as defined in the regulations, is a basic function of life 'such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii). These are basic functions, not more specific ones such as being an astronaut, working as a firefighter, driving a race car, or learning by playing Big Ten basketball.

Knapp, 101 F.3d at 481.

The *Knapp* court, however, ultimately focused on whether a decision to bar him from interscholastic competition "substantially limited" the major life activity of learning.⁵⁸ It held that it did not. The court noted that major life activities are "defined in a more individualized manner during the 'substantial limitation' analysis,"⁵⁹ but stated that not every impairment affecting a major life activity is a substantially limiting one. Instead,

"[t]he impairment must limit [learning] generally." Just as "[i]t is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap [in regard to working]," the inability to engage in a particular activity for a particular university is not sufficient to establish a disability in regard to education.⁶⁰

Applying this test, the court held that, even under a subjective standard, Knapp's ability to learn was not substantially limited because learning through playing intercollegiate basketball was only one part of the education available to him at Northwestern.⁶¹ It noted that he remained on scholarship with access to all the school's academic programs and non-academic programs, and stated that "[a]lthough perhaps not as great a learning experience as actually playing, it is even possible that Knapp may 'learn' through the basketball team in a role other than as a player."⁶² The court stated that the inability to play intercollegiate basketball foreclosed only a small portion of Knapp's educational opportunities at Northwestern, and said "[t]he fact that Knapp's goal of playing intercollegiate basketball

58. The court rejected Knapp's argument that because the § 504 regulations contained prohibitions against discrimination in postsecondary athletics it followed that such athletics constitute a major life activity. The court stated that the regulations had no effect on the phrase "otherwise qualified with a disability," but rather on the portion of § 504 discussing a "program or activity." *Id.* at 480 n.4 (citing 34 C.F.R. §§ 104.43(a), 104.47(a) and 45 C.F.R. §§ 84.43(a), 84.47(a)). It stated that the regulations applied "only after it is determined that the individual is disabled and qualified." *Id.*

59. *Id.* at 481 (citing *Byrne v. Board of Educ., School of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992)).

60. *Id.* (quoting *Byrne*, 979 F.2d at 565) (alterations in original) (citations omitted).

61. *Knapp*, 101 F.3d at 481.

62. *Id.* (footnote omitted).

is frustrated does not substantially limit his education. *The Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one.*⁶³ Accordingly, it held as a matter of law that Knapp was not disabled as defined under the Rehabilitation Act.⁶⁴

C. Discussion

Courts addressing the threshold issue of whether a student-athlete is "disabled" have linked their inquiry to the remedy sought: they state that he will only be considered disabled if the

63. *Id.* at 482 (emphasis added). The court also noted that Knapp had the option of transferring to a new school if he wanted to play basketball so badly. The court stated that "[t]hat thought assumes all colleges and universities are interchangeable, which we decline to believe is true. Outside of basketball, Knapp may very well feel that Northwestern provides for him the best setting academically, socially, geographically, and otherwise." *Id.* at 482 n.6. It then went on to state, however:

Nevertheless, Knapp has offered no evidence that there are no other schools to which he could transfer where he would be allowed to play. Northwestern is not the only place where Knapp may obtain an education, which confirms that denial of the right to play basketball at Northwestern is not a denial of his general ability to learn at the college level.

Id. (emphasis in original).

The court's discussion of Knapp's option to transfer proved prophetic. After it issued its decision, he transferred to Northeastern Illinois. Andrew Bagnato, *NU Player with Heart Trouble Headed to Northeastern Illinois*, CHI. TRIB., Apr. 18, 1997, at 10, available in 1997 WL 3540048. Knapp said he chose Northeastern because he wanted to stay in the Chicago area and "because Rees Johnson's coaching staff 'treated me like a human being, not the kid with the heart problem.'" *Id.* Knapp left Northwestern with warm feelings for coaches, teammates and classmates, saying, "It was just a few big-timers at the top (of the university administration) who didn't treat me like I was a person." *Id.*

64. *Knapp*, 101 F.3d at 482. A few courts have stated that participation in sports is not a major life activity in employment disability discrimination cases. The sports participation discussed, there, however, was purely recreational and no effort was made to tie it to one of the listed activities such as learning. See *Scharff v. Frank*, 791 F. Supp. 182, 184-85 (S.D. Ohio 1991) ("The plaintiff's inability to engage in competitive sporting events and other unusually demanding physical activities did not constitute a substantial impairment of the plaintiff's major life activities."). See also *Coker v. Tampa Port Auth*, 962 F. Supp. 1462, 1468 (M.D. Fla. 1997) (inability to play sports does not constitute impairment to a major life activity); *Weaver v. Florida Power & Light*, No. 95-8519-CIV-RYSKAMP, 1996 WL 479117, at *7 (S.D. Fla. July 16, 1996) (same); *Stone v. Entergy Serv., Inc.*, Civ. A. No. 94-2669, 1995 WL 368473 (E.D. La. June 20, 1995) (same); *Taylor v. United States Postal Serv.*, 771 F. Supp. 882, 889 (S.D. Ohio 1990) (same), *rev'd on other grounds*, 946 F.2d 1214 (6th Cir. 1991).

major life activity of learning is substantially limited by barring him from playing. The district courts in *Sandison* and *Knapp* applied a subjective test and found that it did, emphasizing that the student-athletes learned things from playing sports that they could not gain in other school activities. Conversely, the *Pahulu* court and the *Knapp* appellate court, held that, even if this were true, the student-athletes' learning was not "substantially limited" because they remained in school, could still participate in sports in a non-competitive role, and had access to other extracurricular activities.

1. The Determination of Disability Should Not Be Linked to the Student-Athlete's Participation in a Sport.—With all due respect to the courts, this focus is too narrow. There is nothing in either the Rehabilitation Act or the ADA which requires linking the decision on whether someone is disabled to the remedy sought; i.e., there is no need to connect the determination of whether someone is "substantially limited" in a "major life activity" to the specific activity in which he seeks to participate. Indeed, doing so in "program accessibility" cases like those brought by student-athletes would be inconsistent with both the language of the statutes and the policies behind them.

In the "finding and purposes" section of the ADA, Congress stated that "the Nation's proper goals . . . are to assure *equality of opportunity* . . . for . . . individuals [with disabilities]."⁶⁵ In the employment context courts have correctly found that such equality "does not necessarily mean working at the specific job of one's choice."⁶⁶ No able-bodied individual has this opportunity. Accordingly, a person with an impairment which bars them only from a specific job cannot necessarily be said to be "substantially limited" in the major life activity of working. Therefore, they are not "disabled" and subject to the protections of either section 504 or the ADA.

65. 42 U.S.C. § 12101(a)(8) (1994) (emphasis added).

66. *Bridges v. City of Bossier*, 92 F.3d 329, 335 (5th Cir. 1996) (interpreting ADA) (quoting *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994)), *cert. denied*, 117 S. Ct. 770 (1997); *Byrne v. Board of Educ., School of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992) (interpreting § 504); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (same).

Equal opportunity means something different in the "program accessibility" context, however. There, the person with an impairment is not seeking a specific job, but simply the opportunity to partake in services, programs, or activities made available to the public either by the government or "public accommodations" such as restaurants, bars, movie theaters, health spas, bowling alleys, golf courses "or other place[s] of exercise and recreation."⁶⁷

Requiring a link between such activities and a "major life activity," however, would mean a person excluded because of a physical or mental impairment would almost never prevail on a program accessibility claim. Being unable to see a game at a sports arena, see the screen at a movie theater or participate in the activities at a public park, certainly would not "substantially limit" any of the listed major life activities. This would mean that no one could complain about such treatment because they would not be considered "disabled." Courts faced with such program accessibility claims, however, have found ADA violations, with no suggestion that determining whether the plaintiffs are disabled must be linked to the activity at issue.⁶⁸

67. 42 U.S.C. §§ 12181(7)(B), (C), (L) (1994).

68. See, e.g., *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (upholding trial court's order enforcing Justice Department regulation that wheelchair seating in sports arena must have sightlines over standing spectators), *cert. denied, sub nom. Pollin v. Paralyzed Veterans of Am.*, 118 S. Ct. 1184 (1998); *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175 (S.D. Fla. 1997) (refusing to dismiss complaint by disabled minor, his father and another disabled minor that wheelchair seating in planned sports arena violated the ADA); *Fiedler v. American Multi-Cinema, Inc.*, 871 F. Supp. 35 (D.D.C. 1994) (holding that regulation permitting "cluster" wheelchair seating in theater areas "having sight lines that require slopes of greater than 5 percent" did not permit single level wheelchair seating); *Tyler v. City of Manhattan*, 857 F. Supp. 800 (D. Kan. 1994) (finding that city discriminated against wheelchair user where physical barriers prevented him from attending his daughter's baseball games at public parks); *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 846 F. Supp. 986 (S.D. Fla. 1994) (finding that elimination of city-sponsored recreational programs for disabled individuals had effect of denying them benefits of city's recreational programs in violation of ADA because even though none of city's recreational programs were closed to disabled individuals, there were no equivalent programs provided by county or any another neighboring municipal or private entities that could fill void left by elimination of city's programs and many of city's general recreational programs were unable to offer benefits of recreation to individuals with disabilities).

It is true that this link has been made in some employment cases, but in those cases the determination of whether the plaintiff was "disabled" hinged on

whether he or she was substantially limited in the specific major life activity of "working." The EEOC's regulations interpreting the ADA adopt Rehabilitation Act case law, and state that a person is substantially limited in working if he or she is: significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(I) (1997). See also the cases cited in 29 C.F.R. pt. 1630, App. § 1630.z (j) (1997); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980). These regulations now apply to employment cases brought solely under § 504. See 29 U.S.C. § 794(d) (1994).

A number of appellate courts have used this regulation in rejecting employment discrimination claims. See e.g. *Mackay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (carpal tunnel syndrome did not substantially limit employee's major life activity of working although she could no longer perform repetitive-motion assembly work, the condition did not restrict her ability to work in the broad class of manufacturing jobs); *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996) (former employee who was restricted to 25 pound lifting limitation failed to show as a matter of law that she was significantly restricted in her ability to lift, work or perform any major life activity under ADA), *cert. denied*, 117 S. Ct. 1844 (1997); *Weiler v. Household Finance Corp.*, 101 F.3d 519 (7th Cir. 1996) (major life activity of working not substantially limited where plaintiff merely cannot work under certain supervisor because of anxiety and stress related to supervisor's review of plaintiff's job performance); *Robinson v. Neodata Serv., Inc.*, 94 F.3d 499 (8th Cir. 1996) (employee who had an impairment to her right arm after a fall at work was not "disabled" under the ADA where medical evidence showed that she was not significantly restricted in her ability to work, but merely was unable to perform primary function of her previous position as a mail processing clerk); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996) (aircraft mechanic disallowed from taxiing aircraft due to impaired vision did not demonstrate that employer regarded him as being substantially limited in his ability to perform major life activity of working because taxiing aircraft was only single, particular job, not class of jobs or broad range of jobs in various classes, and was not necessary part of being aircraft mechanic); *Pritchard v. Southern Co. Serv.*, 92 F.3d 1130 (11th Cir. 1996) (depression which prevented trained electrical engineer from working in nuclear field did not substantially limit major life activity of working because he could work as engineer in nonnuclear fields), *cert. denied*, 117 S. Ct. 2453 (1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996) (grocery store manager who went on medical leave did not have impairment which substantially limited major life activity of work where he worked numerous hours pursuing two different occupations while on leave of absence, and did not contend that new occupations were of a different class than his store manager job and provided no evidence to support assertion that outside work was a form of treatment); *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (employee with limitation on his ability to lift 44 to 56-pound containers continuously all day but who could lift and reach as long as he avoided heavy lifting not protected under the ADA because his inability to perform a discrete task did not render him substantially limited in a major life activity); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995) (welder's arm

Claims brought by student-athletes should be treated the same way. The determination of whether they are "disabled" should be made independent of the activity in which they seek to participate. This will prevent the troubling result that a student-athlete could be considered "disabled" in one context but not another. For example, both plaintiffs in *Sandison* were clearly deemed disabled when their schools developed their learning programs, but the athletic association argued they were not in rejecting their request to waive the age rule.⁶⁹

injury did not substantially limit major life activity of working because it did not prevent her from performing an entire class of jobs, but adversely affected only her functioning in welding positions requiring substantial climbing); *but see* Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997) (evidence in ADA suit by truck driver alleging that employer failed to accommodate his impaired knee raised genuine issue of material fact whether driver's impaired knee substantially limited major life activity of working, or if it simply prevented him from performing one narrow job for one employer).

For criticism of courts' willingness to hold that plaintiffs are not disabled using the substantial limitation test see Thomas D'Agostino, *Defining "Disability" Under the ADA: 1997 Update*, NATIONAL DISABILITY LAW REPORTER-SPECIAL REPORT NO. 3 (1997) (surveying 110 judicial decisions from 1995-96 on whether a plaintiff had a "disability" and noting that only 6 resulted in a finding of disability, while 80 found no disability, and 24 held that the issue was a fact question not ripe for determination on a motion to dismiss or for summary judgment); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997) (arguing that the current prima facie test to determine whether someone is disabled under the ADA is inconsistent with the statute's purposes, creates an unreasonable burden for plaintiffs, and creates an unbalanced process favoring employers; the author suggests a different process for weighing evidence and analyzing claims to bring the procedure back into balance).

69. See discussion at Section I(A), *supra*. Linking the determination of disability to the sport's effect on the student-athlete's learning could also render the regulations requiring schools to provide "qualified" disabled student-athletes with "an equal opportunity for participation" in interscholastic athletics meaningless. See 34 C.F.R. § 104.47(a) (1997). Under the reasoning found in *Pahulu* and the *Knapp* appellate decision, no student-athlete would ever be considered "disabled" in a suit seeking to compel his participation in interscholastic sports: he could participate in other school activities, and, thus, would not be "substantially limited."

The analogizing of student-athletes to employees in *Pahulu* and *Knapp* is also troubling because most courts have refused to classify them as employees when it would benefit them. For example, several courts have held that a student-athlete attending a college or university on an athletic scholarship is not an "employee" of the institution for the purpose of entitlement to workers' compensation benefits for injury or death sustained during the course of the athletic activity. See *Graczyk v Workers' Comp. App. Bd.*, 229 Cal. Rptr. 494 (Ct. App. 1986); *Coleman v. Western Michigan Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983); *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983); *State Compensation Ins. Fund*

Courts faced with disability discrimination actions involving interscholastic sports should look first to whether the student-athlete's impairment is included in the examples of disabilities found in the regulations interpreting section 504 or the ADA. If it is, the inquiry should end there unless the defendant can provide some compelling reason why that regulation should not be followed. For example, in *Ganden v. NCAA*⁷⁰ the plaintiff had been diagnosed with learning disabilities in the second

v. Industrial Comm'n, 314 P.2d 288 (Colo. 1957). *But see* Van Horn v Industrial Accident Comm'n, 33 Cal. Rptr. 169 (Ct. App. 1963) (finding prima facie showing of an employment contract where there was evidence that the student had received "scholarship" money, as well as money directly from the football coach where record did not show any denial by the football coach that he had made a contract with the student); University of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953) (rejecting university's contention that student-athlete's campus job and meal plan were offered exclusively by reason of his being a student; court referred to testimony in the record, including that of the football coach, showing that the student's employment was dependent on his playing football).

More recently, a Texas jury ruled that a TCU football player was not employee when he was injured in 1974. Bill Minutaglio, *Former TCU Football Player Loses Bid for Workers' Comp: Waldrep Says He Was an Employee When Paralyzed in '74*, DALLAS MORNING NEWS, Oct. 21, 1997, at 24D, available in 1997 WL 11529554. The Texas Worker's Compensation Commission had ruled that Kent Waldrep was a TCU employee. *Id.* TCU's former insurance company, Texas Employers Insurance Association, was ordered to pay Waldrep \$70 a month for the rest of his life. *Id.* The firm refused, and Waldrep sued. *Id.* The jurors declined to comment on their ruling. *Id.* See also John Bacon et al., *Jury: Injured College Athlete Ineligible for Workers' Comp*, USA TODAY, Oct. 21, 1997, at 03A, available in 1997 WL 7017328.

Three cases from the United States Tax Court have also held that college athletes are not employees. These cases barred professional athletes from reducing their tax liability by "income averaging." The athletes argued the bonuses they had received upon signing their contracts were attributable to their toil and training in college to become better athletes, and that this constituted work for the purposes of income averaging. See *Frost v. Commissioner*, 61 T.C. 488, 496 n.6 (1974) (court held playing college baseball was not work, noting that he received a baseball scholarship while attending the University of California, but stated that "these payments cannot be treated as payments (in the employment sense) for playing baseball. While it is true that an athletic scholarship is based on ability and the promise to participate in the specified sport, the purpose of the funds is to defray the educational costs of attending college and not for playing in the specified sport."); *Heidel v. Commissioner*, 56 T.C. 95, 106 (1971) (court held that playing college football was not work). See also *Jolitz v. Commissioner*, 73 T.C. 732 (1980) (holding that college scholarships are included in computing support to determine whether a taxpayer was an eligible individual for income averaging but held that since scholarships amounted to more support than taxpayer furnished for himself in those years, he not eligible for income averaging).

70. No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996).

grade.⁷¹ The court looked to the regulations interpreting Title III and stated, "there is no serious dispute at this point in the proceedings that Ganden suffers from a disability within the meaning of Title III. See 28 C.F.R. § 36.104(1) (specific learning disability that substantially limits a major life activity constituted disability under Title III)."⁷²

If the impairment is not among the examples of disabilities listed in the regulations, the court should next look to evidence that it substantially limits one of the listed major life activities such as walking, seeing, hearing, speaking, breathing, learning, and working. If it does, the inquiry should end there. If, and only if, the student-athlete alleges that the sole major life activity that is affected is learning through playing sports should the court delve into the inquiry found in *Sandison*, *Pahulu*, and *Knapp*.

2. *Courts Should Use a "Subjective" Analysis on the Major Life Activity Question.*—If student-athletes or courts insist on linking the determination of disability with interscholastic sports' impact on the student-athlete's learning, the first question to address is whether to use an "objective" or "subjective" standard in making the decision. The defendants in *Pahulu* and *Knapp* both argued for an "objective" test on the major life activity question.⁷³ They contended that participation in interscholastic sports could not be a major life activity because it was not something the average person in the general public does on a regular basis.⁷⁴ The *Pahulu* court rejected this argument, but the *Knapp* appellate court indicated some interest in it before ultimately applying the subjective test.⁷⁵ The *Pahulu* decision is in line with better-reasoned precedent on this issue in another context discussed below, and future courts should adopt the subjective test in determining whether interscholastic sports are a "major life activity" for individual plaintiffs.

The other context where courts have applied "objective" and "subjective" tests to the major life activity question is on the

71. *Id.* at *1.

72. *Id.* at *7.

73. See *supra* notes 38-62 and accompanying text.

74. See *supra* notes 38-62 and accompanying text.

75. See *supra* notes 38-62 and accompanying text.

issue of whether reproductive problems are covered under section 504 and the ADA.⁷⁶ Courts finding they are not apparently apply an "objective" test by comparing reproduction to the major life activities listed in the regulations. For example the lower court in *Krauel v. Iowa Methodist Medical Center*.⁷⁷ differentiated reproduction from the listed major life activities because it is a "lifestyle choice" stating that, "[s]ome people choose not to have children, but all people care for themselves, perform manual tasks, walk, see, hear, speak, breathe, learn, and work, unless a handicap or illness prevents them from doing so."⁷⁸ The appellate court in that case also concluded that reproduction is unlike the activities listed in the regulation, and, therefore, not a major life activity, emphasizing that the plaintiff "ha[d] the ability to care for herself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work."⁷⁹

The court in *Zatarain v. WDSU-Television, Inc.*⁸⁰ distinguished reproduction from the listed major life activities based on frequency of performance: the court reasoned that reproduction is not an activity engaged in with the same degree of frequency as the listed activities of walking, seeing, speaking, breathing, learning, and working.⁸¹ "A person is required to walk, see, learn, speak, breath [sic], and work throughout the day, day in and day out. However, a person is not called upon to reproduce throughout the day, every day."⁸²

76. This issue has arisen in two distinct factual situations. The first is when a person with fertility problems challenges an employment or insurance policy which adversely impacts them as discriminatory. The second is when HIV-positive individuals who have no symptoms argue they are nonetheless covered by the disability statutes because of the limitations the disease places on reproduction. For a more complete discussion of these cases see Deborah K. Dallmann, Note, *The Lay View of What "Disability" Means Must Give Way to What Congress Says it Means: Infertility as "Disability" Under the Americans with Disabilities Act*, 38 WM. & MARY L. REV. 371 (1996); Sandra M. Tomkowicz, *The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans with Disabilities Act*, 46 SYRACUSE L. REV. 1051 (1996).

77. 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

78. *Krauel*, 915 F. Supp. at 106 n.1

79. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996).

80. 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

81. *Zatarain*, 881 F. Supp. at 243.

82. *Id.* at 243.

The majority of courts, however, have found reproduction to qualify as a major life activity.⁸³ In doing so, they have taken a more subjective approach to the major life activity question. They point to the use of the words "such as" in the definition of major life activities⁸⁴ and state this indicates an illustrative, not exclusive, list.⁸⁵ The court in *Abbott v. Bragdon*⁸⁶ rejected the *Krauel* and *Zatarian* decisions stating it saw "no reason why an activity must be performed either frequently or universally before it can be classified as a major life activity."⁸⁷ It said it found no evidence that Congress intended either frequency or universality to restrict the definition of "major life activities," and noted that "the activities explicitly enumerated in the regulation are not wholly characterized by frequency and universality; learning—even in a broad sense—is for many adults not a part of daily life, and work is certainly not universal (as the

83. See *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997), *affg*, 912 F. Supp. 580, 586 (D. Me. 1995), *cert. granted*, 118 S. Ct. 554 (1997); *Pacourek v. Inland Steel Co., Inc.*, 916 F. Supp. 797, 801-02 (N.D. Ill. 1996); *Erickson v. Board of Governors of State Colleges & Univ. for Northeastern Illinois Univ.*, 911 F. Supp. 316, 321 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320-21 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

84. See 28 C.F.R. §§ 35.104, 36.104 (1997); 34 C.F.R. § 104.3(j)(2)(ii) (1997); 45 C.F.R. § 84.3(j)(2)(ii) (1997).

85. *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995), *affd*, 107 F.3d 934 (1st Cir. 1997), *cert. granted*, 118 S. Ct. 554 (1997); *Kohn, Nast & Graf*, 862 F. Supp. at 1320. They also point out, that Congress chose to use the broad term "major life activities" rather than a more limited term, such as "major work activities." *Abbott*, 912 F. Supp. at 586; *Kohn, Nast & Graf*, 862 F. Supp. at 1320. The *Pahulu* court also cited this language in adopting a subjective test. *Pahulu*, 897 F. Supp. at 1392.

The courts also support their conclusion that reproduction is a major life activity by pointing to the fact that physiological disorders effecting the reproductive system are specifically listed as physical impairments in the ADA regulations. 28 C.F.R. § 36.104 (1997); 29 C.F.R. § 1630.2(h)(1) (1997). From this they deduce that its drafters considered reproduction to be a major life activity—otherwise, including reproductive disorders in the list of physical impairments would not have made much sense. See, e.g., *Pacourek*, 916 F. Supp. at 801-02. They also point to the importance the Supreme Court has placed on the ability to engage in intimate sexual activity, gestation, giving birth, child-rearing, and nurturing familial relations. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (terming the rights to conceive and raise children "essential," "basic civil rights," and rights that are "far more precious . . . than property rights") (citations and internal quotation marks omitted).

86. 107 F.3d 934 (1st Cir.), *cert. granted*, 118 S. Ct. 554 (1997).

87. *Abbott*, 107 F.3d at 941.

lives of some of the very rich and some of the very poor demonstrate).⁸⁸ Accordingly, the court rejected the defendant's contention that reproduction could not be a major life activity because it was not frequently and universally engaged in by the general public.⁸⁹

Courts faced with suits by student-athletes should similarly reject defense arguments that interscholastic sports are not covered under section 504 and the ADA because they are not a part of daily life and not universally engaged in by the general public. These facts do not mean that they cannot be part of the major life activity of learning for some student-athletes. Congress did not create an exclusive list of major life activities, and courts need to take a subjective look at the question of whether barring a student-athlete from playing affects the major life activity of learning on a case-by-case basis.⁹⁰

3. *Interscholastic Sports' Impact on Learning.*—The first part of this subjective inquiry will focus on whether playing interscholastic sports affects student-athletes' education. The debate over whether such participation has a measurable impact on students' learning while they are in school and in their lives afterwards is an ongoing one. Some scholars have advanced evidence and arguments that it does.⁹¹ Others have found both

88. *Id.*

89. *Id.*

90. The requirement of an individualized, case-by-case determination of whether a person is disabled is also supported by the EEOC regulations and case law applying it. The regulations note that a finding of disability

is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending upon the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. App. § 1630.2(j) (1990). See also *Homeyer v. Stanley Tulchin Assoc., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996) ("a determination of disability must be made on an individualized, case-by-case basis"); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59 (4th Cir. 1995) ("plain language of the [statute] requires that a finding of disability be made on an individually-individual [sic] basis"); *Abbott*, 107 F.3d at 941 (stating ADA required individualized inquiry into whether plaintiff is disabled).

91. See, e.g., RONALD M. JEZIORSKI, *THE IMPORTANCE OF SCHOOL SPORTS IN AMERICAN EDUCATION AND SOCIALIZATION* (1994). Jeziorski points to studies by the

the evidence and the arguments wanting.⁹² And still others acknowledge that many athletes are not "learning through playing," but argue that they can if given the proper support.⁹³ An

U.S. Department of Education, Women's Sports Foundation and National Federation of High School Associations that show athletes generally earn higher grades than non-athletes. *Id.* at 6-7 (citing National Ctr. for Educ. Statistics, *Extracurricular Activity Participants Outperform Other Students*, BULLETIN OF THE OFFICE OF EDUCATION RESEARCH AND IMPROVEMENT (Sept. 1986); NATIONAL CENTER FOR EDUCATION STATISTICS, NATIONAL EDUC. LONGITUDINAL STUDY OF 1988; FIRST FOLLOW-UP: STUDENT COMPONENT DATA FILE USER'S MANUAL VOLUME I (1992); Women's Sports Found., *The Effects of Varsity Sports Participation on the Social, Educational, and Career Mobility of Minority Students*, THE WOMEN'S SPORTS FOUNDATION REPORT: MINORITIES IN SPORTS (1989)). Others have studied not only the short term effect on GPA, but the long term effect on educational aspiration and attainment. *See, e.g.*, Luther B. Otto & Duane F. Alwin, *Athletics, Aspirations, and Attainments*, 50 SOCIOLOGY OF EDUC. 102 (1977) (finding that participation in athletics has a positive effect on future educational aspirations and actual attainments even after controlling for socioeconomic status, mental ability and academic performance); J. Steven Picou & Evans W. Curry, *Residence and the Athletic Participation—Educational Aspiration Hypothesis*, 55 SOC. SCI. Q. 768 (1974) (concluding that interscholastic athletics had a moderately positive effect on future educational aspirations).

92. *See, e.g.*, ANDREW M. MIRACLE, JR. & C. ROGER REES, LESSONS OF THE LOCKER ROOM: THE MYTH OF SCHOOL SPORTS (1994). The authors point to several notable examples where student-athletes have been functionally illiterate when they leave high school and even after college. They argue that merely showing high school athletes have a higher GPA than non-athletes oversimplifies the picture. *Id.* at 136-38 (citing Donald F. Stolz, *Athletics and Academic Achievement: What is the Relationship?*, 70 NAT'L ASS'N OF SECONDARY SCHOOL PERSONNEL BULL. 20 (Oct. 1986); Othello Harris, *Athletic and Academics: Contrary or Complementary Activities?* in SPORTS, RACISM, AND ETHNICITY 124-49 (Grant Jarvie ed. 1991)). They note that athletes may be graded more leniently than non-athletes, take easier courses and get extra help to compensate for class time missed because of their athletic participation. *Id.* at 136. Others have found that student-athletes were more likely to be youths with higher athletic and intellectual ability from the outset. L.B. Leuptow & B.D. Kayser, *Athletic Involvement, Academic Achievement, and Aspiration*, 7 SOCIOLOGICAL FOCUS 24 (1974). And that participation in sports may inflate educational aspirations such as attending college while not providing the skills required for later academic success. William C. Spady, *Lament for the Letterman: Effects of Peer Status and Extracurricular Activities on Goals and Achievement*, 75 AM. J. OF SOCIOLOGY 680 (1970).

93. *See, e.g.*, WYATT D. KIRK & SARAH V. KIRK (EDS.), STUDENT ATHLETES: SHATTERING THE MYTHS AND SHARING THE REALITIES (1993). The Kirks acknowledge the problems noted by Miracle and Rees and note that "[a]cademic and personal development of student athletes at the high school and especially at the college level is a growing concern among administrators, advisors, counselors and student affairs personnel." *Id.* at 163. Their book is an effort to assist these professionals in counseling student-athletes.

Richard E. Lapchick, the Director of the Northeastern University Center for the Study of Sport in Society, also reports on the academic problems of student-

evaluation of which position is correct is beyond the scope of this Article. But the fact that school administrators, athletic directors, and coaches say that playing sports has an impact on education is not. These statements can provide fodder for student-athletes alleging that playing sports is part of the major life activity of learning.

Some of the strongest statements in this regard come from athletic associations' own mission statements. For example, the Illinois High School Association states that "educators across the USA believe that participation in interscholastic activities offers students significant lifetime learning experiences that cannot be duplicated in any other instructional setting."⁹⁴ Similarly, the California Interscholastic Federation states:

There are athletic experiences elsewhere for the kids but only at the school site can the athletic experience be gained in conjunction with history, mathematics, language and all the other facets and disciplines which go into an education. We want athletics to encourage education so that our graduates are more productive members of society.⁹⁵

Prior to the enactment of Title IX, several courts pointed to similar language from athletic associations in holding that the exclusion of girls from boys' non-contact sport teams violated the Equal Protection Clause where schools did not field teams that gave girls the opportunity to participate. For example, in *Brenden v. Independent School District 742*⁹⁶ the court noted that the National Federation of State High School Athletic Associations' handbook stated that the organization was guided by the belief that:

athletes, but states that they are largely confined to the "revenue" sports of football and basketball. RICHARD E. LAPCHICK, *PASS TO PLAY: STUDENT ATHLETES AND ACADEMICS* 12 (1989). He calls for higher standards in the future, including "[e]ducational forums and assemblies for student athletes, students, coaches, teachers, and parents to sensitize them to issues faced by all those who might overemphasize any aspect of their lives." *Id.* at 33.

94. Illinois High School Ass'n, *Mission Statement* (visited Apr. 7, 1998) <<http://www.ihsa.org/org/mission.htm>>.

95. California Interscholastic Fed., *CIF History & Philosophy* (visited Apr. 7, 1998) <<http://www.cifstate.org/history.htm>>.

96. 477 F.2d 1292 (8th Cir. 1973).

Interscholastic athletics shall be an integral part of the total secondary school educational program that has as its purpose to provide educational experiences not otherwise provided in the curriculum, which will develop learning outcomes in the areas of knowledge, skills and emotional patterns and will contribute to the development of better citizens. Emphasis shall be upon teaching "through" athletics in addition to teaching the "skills" of athletics.⁹⁷

Pointing to this language, the court concluded: "Discrimination in high school interscholastic athletics constitutes discrimination in education."⁹⁸

97. *Brenden*, 477 F.2d at 1298 (quoting 1970-1971 National Federation of State High School Athletic Associations Official Handbook 9).

98. *Id.* The court noted that the Supreme Court of Minnesota had stated: "'* * * [I]nterscholastic activities * * * [are] today recognized * * * as an important and integral facet of the * * * education process, see, *Bunger v. Iowa High School Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972); *Kelley v. Metropolitan County Bd. of Ed. of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968) * * *.'" *Id.* (quoting *Thompson v. Barnes*, 200 N.W.2d 921, 926 n.11 (Minn. 1972)).

Similar reasoning is found in *Haas v. South Bend Community Sch. Corp.* 289 N.E.2d 495 (Ind. 1972). The court there noted that the president of the Indiana High School Athletic Association made the following statement in a "Message to Members of the IHSAA":

The efforts of all members should be directed toward athletic programs which promote the best interests of the youth of our state. In athletics our students have the opportunity into cultivate good habits, enjoy wholesome competition, and continue to develop mental and physical abilities. Security is one of the basic needs which society fails to provide for many young people. Athletics can, and should, provide the security which comes from knowing the rules of competition and playing within these rules. Athletics, like democracy, stresses the importance of self-discipline, and rules are made and applied only when proper self-discipline is not exercised.

Haas, 289 N.E.2d at 499.

The court stated that it was quite clear that the IHSAA is of the opinion that participation in interscholastic athletics should be encouraged as it provides students the opportunity to cultivate good habits and to develop their mental and physical abilities. This Court is aware of no reason why the opportunity to participate in interscholastic athletics is not equally beneficial to both male and female students

Id. at 499-500.

Brice Durbin, the then executive director of the National Federation of State High School Associations also discussed the connection between playing interscholastic sports and education. He spoke of "the firm conviction that activities participation is a valuable educational experience every bit as important to the student's development as the classroom experience." LAPCHICK, *supra* note 93 at 31 (quoting TENNES-

SEAN (Nashville) Aug. 25, 1985)). Durbin also said: "High school athletic and non-athletic activities are not only supportive of the academic mission of schools but are inherently educational and vital to the total development of students. *Activities are not extracurricular. They are the other half of education.*" *Id.* (emphasis added).

Similar statements from a local school administrator led one court to declare interscholastic sports "a service of great importance to the public, which is often a matter of practical necessity for some members of the public." *Wagenblast v. Odessa School Dist. No. 105-157-166J*, 758 P.2d 968, 972 (Wash. 1988). It stated that

[a]s the testimony of then Seattle School Superintendent Robert Nelson and others amply demonstrate, interscholastic athletics is part and parcel of the overall educational scheme in Washington. . . . The importance of these programs to the public is substantive; they represent a significant tie of the public at large to our system of public education. Nor can the importance of these programs to certain students be denied; as Superintendent Nelson agreed, some students undoubtedly remain in school and maintain their academic standing only because they can participate in these programs. *Given this emphasis on sports by the public and the school system, it would be unrealistic to expect students to view athletics as an activity entirely separate and apart from the remainder of their schooling.*

Id. (emphasis added) (footnotes omitted).

The connection between sports and education is not limited to high schools. College coaches also emphasize the educational aspects of playing competitive sports. Jeziorski quotes Ara Parseghian, his football coach at Notre Dame, on three values student-athletes develop through participating in sports:

(1) the ability to reach out and "demand greater effort of himself," achieving much more than he previously believed he could and increasingly self-confidence as a result; (2) sacrifice, in which a student-athlete delays or gives up some other preferred action (or inaction, as the case may be) for the sake of another player or the team; (3) the ability to bounce back, to persist in times of difficulty and defeat, to keep trying in spite of pain, pressure or sorrow. . . . Loyalty . . . compassion . . . personal pride . . . enthusiasm . . . self-discipline . . . faith in one's self . . . surely these are qualities worthy of respect. They are not acquired through merely reading; these are achieved through living!

JEZIORSKI, *supra* note 91 at 85-86 (quoting ARA PARSEGHIAN & TOM PAGNA, PARSEGHIAN AND NOTRE DAME FOOTBALL 298 (1971)).

Perhaps the most striking statements regarding the importance of sports in a student-athlete's life were made by Tom Osborne, the head football coach at Nebraska, in justifying his decision to reinstate star running back Lawrence Phillips to the team six weeks after he had assaulted his ex-girlfriend. Osborne, who earned a doctorate in educational psychology, said that Phillips' return to football was the best thing for both him and the victim: "Football is important because it's a major organizing strength in his life." Eric Olson & Rick Ruggles, *Phillips To Return To Huskers; Osborne Says I-Back Will Suit Up for ISU*, OMAHA WORLD-HERALD, Oct. 24, 1995, at 1. "In a situation where there has been abuse, you don't take away the one thing that has given that person some sense of self-esteem," Osborne said. Lee Barfknecht, *Osborne: Return of Phillips Would Be Best for All*, OMAHA WORLD-HERALD, Oct. 24, 1995, at 1, available in 1995 WL 4091790. "To take away the one thing that has given Lawrence's life organization and meaning is probably not the right way to address the problem." *Id.* See also Lee Barfknecht & Eric Olson,

The Department of Justice has also recognized that participating in interscholastic sports can impact learning. Part of its proposed settlement of claims challenging the NCAA's initial eligibility standards would have required the NCAA to, "[r]ecognize that athletic competition often helps students with learning disabilities to succeed in academics because it provides a motivation to study and it provides a more regimented structure for the individual."⁹⁹

Student-athletes barred from participating by other organizations because of physical or mental impairments can make the same argument, and their counsel would be wise to search for statements from defendant athletic associations, school administrators and coaches on the connection between learning, life, and sports. They can then point to these statements and the *Sandison* and *Knapp* district court decisions to support their argument that *for them* playing sports is part of the major life activity of learning.

4. *Barring a Student from Participating in Interscholastic Sports Can Constitute a "Substantial Limitation" on a Major Life Activity.*—The success of such an argument will ultimately depend on whether courts view barring the student-athlete from playing as a substantial limitation on learning. The defendants in both *Pahulu* and *Knapp* argued that the definition of substan-

Osborne Says, 'I'll Take the Heat' NU Coach Ready for Criticism For Allowing Phillips to Return, OMAHA WORLD-HERALD Oct. 25, 1995, at 29SF, available in 1995 WL 11336163 ("It seemed to be the major strength and organizing factor in his life. . . . If you took football out of the equation, I think he probably would have ended up signing with an agent and leaving and been untreated.").

Phillips ultimately pled no contest to the assault, and helped the Cornhuskers to the national championship. Osborne's decision, though was subject to fierce criticism. See e.g. Marianne Means, *'Sadly, N.U. Has Sold Its Soul'*, OMAHA WORLD-HERALD, Dec. 29, 1995, at 23 available in 1995 WL 11343496; Editorial, *Was That a Line or a Lineup?*, CHI. TRIB., Jan. 4, 1996, at 20, available in 1996 WL 2630707; Editorial, *No Champs Off the Field*, SEATTLE TIMES, Jan. 4, 1996, at B4, available in 1996 WL 3641968; Editorial, *They're No. 1?*, ST. LOUIS POST-DISPATCH, Jan. 6, 1996, at 10B, available in 1996 WL 2744987; Editorial, *Dr. Tom's Fumble*, DAILY OKLAHOMAN, Jan. 7, 1996, at 8, available in 1996 WL 5299932; Editorial, *Nebraska Gets F in Values*, SALT LAKE TRIB., Jan. 9, 1996, at A6, available in 1996 WL 3010998.

99. Letter from Daniel W. Sutherland, Attorney, Disability Rights Section, Civil Rights Division, Department of Justice, to Kevin Lennon, Director of Membership Services, NCAA (Oct. 17, 1997) (on file with the author).

tial limitation found in the employment context should be transferred to the educational context. As noted above, doing so for "program accessibility" claims under section 504 and Titles II and III would be an error.¹⁰⁰ It would also make the interpretation of one civil rights statute (Title IX) inconsistent—as far as interscholastic athletics—with another that mirrors it (section 504), and the statute that, in turn is based on the second (the ADA).

Title III states that individuals with disabilities are entitled to the "full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodation of any place of public accommodation."¹⁰¹ Similarly, the Title II regulations state that public entities may not "[d]eny a qualified individual with a disability the opportunity to participate in or benefit from [an] aid, benefit or service."¹⁰²

Under these provisions, people with physical and mental impairments should have an equal opportunity to participate in *all* of a school's activities. The reasoning found in *Pahulu* and the *Knapp* appellate decision ignores this guarantee of equal opportunity. Denial of the right to participate in an activity in which they have invested considerable time and effort subjects student-athletes to unequal treatment based on their impairment. If that denial "reaches a major life activity, then it is likely that deprivation of that activity would, for the individual [student-athlete], be a substantial limitation."¹⁰³ Accordingly, they satisfy the definition of disability, and should be protected under section 504 and the ADA.

100. See footnotes 65-72 and accompanying text.

101. 42 U.S.C. § 12182(a) (1994) (emphasis supplied).

102. 28 C.F.R. § 35.130(b)(1)(i) (1987).

103. *Knapp*, 101 F.3d at 480. The *Knapp* court made this statement in discussing the "interrelationship" between the "major life activity" and "substantial limitation" prongs of the disability definition. Based on this interrelationship, the court said that "[i]f playing NCAA basketball reaches a major life activity, then it is likely that deprivation of that activity would, for the individual basketball player, be a substantial limitation. Likewise, if playing intercollegiate basketball does not reach the status of major life activity, then it is most likely that deprivation will not be a substantial limitation." *Id.* Given the discussion above of how playing interscholastic sports reaches the major life activity of learning, the former will be correct in most cases.

The reasoning in *Pahulu* and *Knapp* is also inconsistent with the growing body of Title IX case law. Title IX and section 504 use identical language: students cannot be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" from any program receiving federal funding.¹⁰⁴ Cases interpreting Title IX have found that the opportunity to participate in interscholastic sports is a valuable one regardless of sex. No court would dare suggest that women denied the opportunity to play are not protected under the statute because they can participate in a "non-competitive" role or take advantage of the "myriad" of other educational opportunities available at the school.¹⁰⁵ Yet, that is exactly what the *Pahulu* district court and *Knapp* appellate court said about students denied the opportunity to play because of their physical impairments.¹⁰⁶ Put simply, if women have a cause of action under Title IX when they are denied the opportunity to play because of their sex, persons who are barred from playing because of physical or mental impairments should be protected under section 504 and the ADA.

II. DO NEUTRAL ELIGIBILITY RULES DISCRIMINATE AGAINST DISABLED STUDENT-ATHLETES "BY REASON OF" THEIR DISABILITY?

Proving the student-athlete meets the statutory definition of "disability" is only the first step in bringing a successful claim under section 504 or the ADA. The next step is to prove that he has been discriminated against "because of" his disability. Several athletic associations—both high school and collegiate—have argued that student-athletes cannot do so where they have been

104. 20 U.S.C. § 1681(a) (1994); 29 U.S.C. § 794(a) (1987). In addition to sharing common language, the statutes also share common remedies. Section 505 of the Rehabilitation Act, 29 U.S.C. § 794(a)(2), states that the remedies available for violations of section 504 shall be the same as those set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), which prohibits federal funds recipients from discriminating based on race. Title IX has the same provision.

105. *Pahulu*, 897 F. Supp. at 1393; *Knapp*, 101 F.3d at 481.

106. One can only imagine the uproar if a court found that a school without a softball team did not discriminate against females because they could still participate in the athletic program by being cheerleaders for the boys' baseball team.

barred from participating by "neutral" eligibility rules. These arguments, however, ignore legislative history, regulations and case language interpreting both section 504 and the ADA which recognized that neutral rules can have a discriminatory impact on persons with disabilities and must be waived unless the defendant can show that the waiver would cause a fundamental alteration in or place an undue burden on its program.

The most commonly challenged eligibility rules are those issued by state high school athletic associations barring student-athletes who are over a certain age¹⁰⁷ or have been in high school for more than eight semesters.¹⁰⁸ Student-athletes who fail to meet these rules because they have repeated grades due to their disabilities have challenged them as being discriminatory. Some courts hold that such "neutral" rules are not discriminatory because the student-athlete is ineligible solely because of his failure to meet rule's requirements, not because of his disability. Other courts, however, look to *why* the student-athlete fails to satisfy the eligibility rule, and hold that he may proceed with his claim if he shows a "causal link"¹⁰⁹ between the failure to meet the rule and his disability.¹¹⁰

107. Age rules typically bar student-athletes who reach the age of nineteen before a specified date. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1028 (6th Cir. 1995) ("A student who competes in any interscholastic athletic contests must be under nineteen (19) years of age, except that a student whose nineteenth (19th) birthday occurs on or after September 1 of a current school year is eligible for the balance of that school year."); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1995) ("A student shall not have reached the age of nineteen prior to July 1 preceding the opening of school. If a student reaches the age of nineteen on or following July 1, the student may be considered eligible for [interscholastic sports during] the ensuing school year.").

108. Length of enrollment rules typically limit eligibility to eight semesters beyond the eighth grade. These eligibility rules are common throughout the country. *See* WALTER T. CHAMPION, *FUNDAMENTALS OF SPORTS LAW* §§ 16.1-16.7; JOHN WESTART & CYM LOWELL, *THE LAW OF SPORTS* § 1.19 (1979 & 1985 Supp.).

109. *See* *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000 at *13 (N.D. Ill. Nov. 21, 1996).

110. It should be noted that the ADA drops the "solely by reason of" disability language found in § 504 of the Rehabilitation Act. This change was intended to eliminate a problem experienced under the Rehabilitation Act regarding the degree of the "causal link" necessary to prove a disability discrimination claim. The House Education & Labor Committee Report explains the omission as follows:

The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is sup-

ported by the experience of the executive agencies charged with implementing section 504.

...

A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability. In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. . . . [I]t could be argued [, therefore,] that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation. The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the result described above. Court cases interpreting section 504 have also rejected such reasoning. As the Tenth Circuit explained in *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372 (10th Cir. (1981)), the fact that the covered entity lists a number of factors for the rejection, in addition to the disability, is not dispositive.

...

In sum, the existence of non-disability related factors in the rejection decision does not immunize employers. The entire selection procedure must be reviewed to determine if the disability was improperly considered.

H.R. REP. NO. 101-485, pt. 2, at 85-86 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303, 368.

Some courts have noted the significance of the change in the language from § 504 to the ADA and held that a plaintiff need only show that disability is a "but for" cause of the action and not the "sole" reason. See, e.g., *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996) ("When Congress enacted the ADA, it did so against the backdrop of recent Supreme Court employment discrimination case law that interpreted the phrase 'because of' not to mean 'solely because of.' We think Congress knew what it was doing, and we hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, i.e., when it is a 'but-for' cause."); *cert. denied*, 117 S. Ct. 1819 (1997); *Hendler v. Intelcom USA, Inc.*, 963 F. Supp. 200, 204 n.1 (E.D.N.Y. 1997); *Ganden*, 1996 WL 680000 at *13. In *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995), however, the court held that judgment for the employer was proper, because the alleged disability was not the sole cause of the demotion in question. The *McNely* court correctly criticized this ruling, noting that it contained "[n]o extended discussion or helpful rationale" to support the holding. *McNely*, 99 F.3d at 1077. It rejected the *Despears* court's holding, saying it was "contrary to the language of the statute, the will of Congress, and the Supreme Court's interpretation of substantially identical causal language in the Title VII context." *Id.*

*A. Courts Holding Neutral Rules
Non-Discriminatory*

The court in *Sandison* held that two nineteen-year-olds, who were two years behind their age group because of learning disabilities, were not discriminated against due to disability when they were barred from running cross country because of an age rule.¹¹¹ It stated that under a "natural reading" of section 504, the decision to disqualify the students because they had reached nineteen by a specified date could not "readily be characterized as a decision made" solely by reason of the students' learning disabilities.¹¹² The court found that the age rule was a "neutral rule"—neutral, that is, with respect to disability¹¹³ It noted that the rule did not bar the students from playing interscholastic sports during their first three years of high school, though they were learning disabled during those years.¹¹⁴ The court concluded:

The plaintiffs' respective learning disabilit[ies] [do] not prevent the two students from meeting the age requirement; the passage of time does. We hold that, under section 504, the plaintiffs cannot meet the age requirement "solely by reason of" their dates of birth, not "solely by reason of disability."¹¹⁵

111. *Sandison*, 64 F.3d at 1028.

112. *Id.* at 1032 (quoting *Wimberly v. Labor and Indus. Relations Comm'n of Missouri*, 479 U.S. 511, 517 (1987)).

113. *Id.*

114. *Id.*

115. *Id.* at 1033. See also *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 460-61 (6th Cir. 1997) (following *Sandison* and holding that an eight semester rule did not discriminate against a learning disabled student); *Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 984 (N.D. Ohio 1996) (same; "it is the passage of time, measured out in semesters, which precludes Plaintiff from competing, not the disability which allegedly caused him to repeat his freshman year"); *Reaves v. Mills*, 904 F. Supp. 120, 122 (W.D.N.Y. 1995) ("[T]he State's limitation for participation in interscholastic sports is based upon a student's age, not his or her mental abilities. Therefore, the rule is applied uniformly among the student population regardless of whether a student has a mental disability. It is undisputed that until he turned nineteen years of age, Kelvin fully participated in interscholastic sports at Edison, even while laboring under his alleged disability. Clearly, he was only barred from playing sports once he turned nineteen in August 1995."); *Cavallaro v. Ambach*, 575 F. Supp. 171, 175 (W.D.N.Y. 1983) (court denied challenge to age rule by student with learning disability holding that "Daniel was treated identically to other non-physically handicapped 19 year olds and plaintiffs' have not established any likelihood of success in proving a discrimination claim"); *Mahan v.*

*B. Courts Holding Neutral Rules
Discriminatory*

The court in *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*¹¹⁶ disagreed with this reasoning saying that it "ignore[d] the fact that the sole reason [the student] [was] in school at nineteen [was] due to his disability."¹¹⁷ Dennin was a nineteen-year old with Down Syndrome who spent four, rather than three, years in middle school, starting high school at age sixteen. He swam on the swim team in his first three years of high school, and, although his times were slow, his relay teams at times scored points.¹¹⁸ An athletic association denied his request for a waiver of its age eligibility rule.¹¹⁹ It argued that it was simply enforcing a neutral rule, and that Dennin was being excluded because of his age, not his disability.¹²⁰

The court noted, however, that "[b]ut for his disability, his fourth year of athletic participation . . . would not have been when he had become nineteen but at age eighteen."¹²¹ It further stated that "[t]o accept [the athletic association's] analysis would mean that any student who fails to meet [the athletic association's age] requirement as a result of a past handicap is not 'otherwise qualified,' and therefore is not protected by the

Agee, 652 P.2d 765, 768 (Okla. 1982) (court held that student had no § 504 claim because "there has been absolutely no showing that Peter Mahan was ruled ineligible because of his dyslexia. He was ineligible because of his age. The age eligibility rule applies to every secondary school student."); *Woods v. Ohio High School Athletic Ass'n*, No. 80 CA 30 1981 WL 6063, *3 (Ohio App. Nov. 9, 1981) ("Appellee argues that Rule 5 unconstitutionally discriminates against him on the basis of his handicap. We disagree. The Rule discriminates on the basis of age, not handicap."); *Maine Dep't of Educ. and Cultural Serv., OCR/Complaint LOSS No. 01-84-1061* (1985), reprinted in *Educ. for Handicapped L. Rep.* 352:31 (Feb. 1987) (Office of Civil Rights of the Department of Education declared an age eligibility rule to be "neutral on its face" and did not violate of § 504).

116. 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996).

117. *Dennin*, 913 F. Supp. at 669.

118. *Id.* at 666.

119. *Id.* It did allow him to swim as a non-scoring exhibition swimmer in all regular season meets, but ruled that he and his relay team could not earn points. *Id.*

120. *Id.* at 669.

121. *Id.*

Rehabilitation Act.¹²² Accepting the argument would "result in the rule insulating itself from scrutiny."¹²³

122. *Dennin*, 913 F. Supp. at 669. (quoting *Booth v. University Interscholastic League*, Civ. A-90-CA-764, 1990 WL 484414, at *3 (W.D. Tex. Oct. 4, 1990)).

123. *Id.* The court in *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000 at *13 (N.D. Ill. Nov. 21, 1996), reached a similar conclusion in rejecting the NCAA's argument that a student with a learning disability could not establish a "causal link" between his application for a waiver of an eligibility rule and his disability. *Ganden*, one of the fastest young swimmers in the country, was diagnosed with a learning disability in the second grade. *Ganden*, WL 680000 at *1. He was enrolled in a special curriculum to address his disability in high school, including five courses intended to address his weaknesses. *Id.* The NCAA held that some of these courses were not "core courses," leaving *Ganden* to have the requisite number of "core courses" to be eligible under NCAA rules. *Id.* at *2-5. *Ganden* sued alleging a violation of Title III of the ADA. *Id.* at *1. (A complete discussion of *Ganden's* course work and his effort to gain a waiver of NCAA rules is found below in the section on waiver of eligibility rules as a "reasonable accommodation" for a student-athlete's disability. See footnotes 164-84 and accompanying text, *infra*.)

The NCAA, citing *Sandison*, responded by asserting that it denied *Ganden's* waiver application because he failed to meet the eligibility requirements, not because of his disability. *Id.* at *13. The court disagreed with this analysis, stating that "in implementing civil rights legislation for the disabled, Congress recognized that discrimination on the basis of a disability is 'most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.'" *Ganden*, WL 680000 at *13 (quoting *Alexander v. Choate*, 469 U.S. 287, 297 & n.12 (1985)). Turning to the facts before it, the court found that:

the evidence strongly suggests that *Ganden* failed to take the requisite "core courses" or satisfy the remaining eligibility criteria because of his disability. See *Dennin*, 913 F. Supp. at 669. When they reviewed his waiver application, the NCAA Subcommittee was aware of this condition and how it affected his ability to meet their eligibility requirements. Consequently, *Ganden* has presented a strong prima facie case that there is a causal link between the NCAA refusal to certify *Ganden* a "qualifier" and his learning disability.

Id. See also *University Interscholastic League v. Buchanan*, 848 S.W.2d 298, 302-03 (Tex. App. 1993).

We agree that the UIL's enforcement of its over-19 rule as to these Students was not on the basis of a current handicap or because of a history of being handicapped. However, the record clearly demonstrates that both Students repeated grades in school because of learning disabilities. Had they not experienced difficulties in the classroom and progressed through school at a pace slower than most students, they would have turned nineteen after September 1 of their senior year and thus would have been age-eligible to participate in interscholastic athletics.

Booth v. University Interscholastic League, CIV. A-90-CA-764, 1990 WL 484414 at *3 (W.D. Tex. Oct. 4, 1990).

The Court agrees that the Plaintiff is not being excluded from interscholastic athletics because he is currently handicapped or because he has a history of being handicapped, but because he does not meet the 19 year-old eligibility rule. However, the evidence before the Court shows that the Plaintiff was forced to delay his education as a direct result of his childhood illness, and

*C. Discussion—Neutral Rules Can be
Discriminatory*

The split in the case law on whether "neutral" rules can be discriminatory towards student-athletes with disabilities hinges on how courts use "but for" analysis. Courts finding the rules non-discriminatory look solely at their face and say the student would be eligible "but for" his age. Other courts, however, focus on the students and say they are covered under the disability statutes because they would have satisfied the rule "but for" the fact their disabilities delayed the completion of their education. Accordingly, these courts find the rules discriminate on the basis of disability.

This second line of cases, best exemplified by *Dennin*, is better reasoned and more in line with the purposes of the ADA and section 504. Both acts prohibit rules which screen out or "tend to screen out" persons with disabilities.¹²⁴ The ADA's legislative history states that this second concept "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation."¹²⁵ Commentary on the

that he would have advanced in school along with the other students his age had he not become ill.

These decisions looking beyond the neutral face of the rule are in line with a 1979 policy memorandum issued by the Department of Education's Office of Standards, Policy and Research.

The rule of the State high school athletic association is neutral on its face and, therefore, is not per se discriminatory. Its effect in particular situations, however, may be. If the reason that a particular student is nineteen years old at the beginning of his or her senior year is that the school system has discriminated against that student on the basis of handicap, the rule may not be applied to that student. For example, it would be discriminatory for a high school to deny interscholastic athletic opportunities to a deaf person who is over the age limit, if the reason that person had passed this limit was that the school system required all deaf students to repeat the first and second grades.

OSPR Policy Memoranda Digests, reprinted in EDUC. FOR HANDICAPPED L. REP. 133:06 (Apr. 23, 1979), quoted in Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play?: The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163, 197 n.221 (1991).

124. 42 U.S.C. § 12182(A) (1994); 28 C.F.R. § 35.130(b)(8) (1998); 45 C.F.R. § 84.13 (1997).

125. H.R. REP. NO. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388.

section 504 regulations is more specific. It states that it "prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are *neutral on their face*, but deny handicapped persons an effective opportunity to participate."¹²⁶

Courts have also recognized that facially neutral rules may be discriminatory. For example, in *Crowder v. Kitagawa*¹²⁷ the court stated that in enacting the ADA Congress intended not only to prohibit outright discrimination but also "those forms of discrimination which deny disabled persons public services disproportionately due to their disability."¹²⁸ It noted that in 42 U.S.C. § 12101(a)(5) Congress declared its intent to address both "outright intentional exclusion" as well as "the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices."¹²⁹ According to the court, "[i]t is thus clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination, for the barriers to full participation listed above are almost all *facially neutral* but may work to effectuate discrimination against disabled persons."¹³⁰

126. 49 Fed. Reg. 35724, 35728 (Sept. 11, 1984) (emphasis added), reprinted in STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101st Cong., 2d Sess., *Legislative History of Public Law 101-336: Americans With Disabilities Act*, 648 (A&P ADA Comm. Print 1990).

127. 81 F.3d 1480 (9th Cir. 1996).

128. *Crowder*, 81 F.3d at 1483.

129. *Id.*

130. *Id.* (emphasis added). In *Crowder*, a class of visually impaired persons who used guide dogs brought suit seeking exemption from imposition of 120-day quarantine on carnivorous animals entering Hawaii on the ground that the program, which was designed to prevent importation of rabies, violated the ADA. The court held that without reasonable modification the quarantine requirement effectively prevented visually impaired persons from enjoying the benefits of state services and activities in violation of ADA, and a genuine dispute of material fact existed as to whether plaintiffs' proposed alternatives to Hawaii's quarantine were "reasonable modifications" under the terms of ADA.

It must be noted here that the Court in *Alexander v. Choate*, 469 U.S. 287, 299 (1984), expressly refrained from deciding whether § 504 covers disparate impact claims and refused to resolve the "tension" between one of § 504's objectives—eliminating discrimination resulting from "neglect" of or "apathetic attitudes" toward the disabled—and "the desire to keep § 504 within manageable bounds." *Alexander*, 469 U.S. at 295. It stated that not all showings of disparate impact on the disabled constitute prima facie cases under § 504, but also said that proof of

The age and length of enrollment rules are neutral on their face, but if the only reason a student-athlete fails to meet them is because of his disability, he has shown the "causal link" necessary to be eligible for protection under section 504 and the ADA. The question then becomes whether the rules can be waived in order to allow the student-athlete to participate.

III. ARE STUDENTS WHO DO NOT MEET NEUTRAL ELIGIBILITY REQUIREMENTS "OTHERWISE QUALIFIED" TO PLAY?

A ruling that a student-athlete has been barred from participating "because of" his disability does not necessarily mean that he will win a section 504 or ADA case. The school will likely also argue that he is not "otherwise qualified" to play. This term was not defined in the Rehabilitation Act or its regulations, but the Supreme Court has stated it means "one who is able to meet all of a program's requirements in spite of his handicap."¹³¹

The *Davis* test is applied to a program's "necessary or essential" requirements, and a Rehabilitation Act analysis requires the court to determine both whether an individual meets all of a program's essential eligibility requirements and whether it is possible to make "reasonable modifications" to them.¹³² This

discriminatory intent was not necessary in every case. *Id.* Appellate courts have interpreted *Alexander* to stand for the proposition that plaintiffs need not establish an intent to discriminate in order to prevail on a disparate impact case under § 504. See *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1384 (3d Cir. 1991). Indeed, even the *Sandison* court stated that "the possibility remains that section 504 forbids recipients from applying facially neutral rules that disproportionately exclude members of the class of disabled persons as compared to members of the class of nondisabled persons." 64 F.3d at 1032-33.

131. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

132. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1995). See also *Dennin*, 913 F. Supp. at 668. In *Alexander v. Choate*, 469 U.S. 287 (1985), the Supreme Court recognized that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." *Alexander*, 469 U.S. at 299.

The Court's first attempt to balance these considerations occurred in *Davis* where a plaintiff with a major hearing disability sought admission to a college to be trained as a registered nurse. The college denied her admission, citing concerns that she would not be capable of safely performing as a registered nurse even with full-time personal supervision. The Court held that the college was not required to admit her because it appeared that she would not benefit from any modifications re-

same requirement is found in the text of the ADA. Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the . . . participation in programs or activities provided by a public entity."¹³³ Similarly, Title III defines discrimination as:

(ii) a failure to make *reasonable modifications* in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modification would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would *fundamentally alter* the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an *undue burden*.¹³⁴

quired under the relevant section 504 regulations. *Davis*, 442 U.S. at 409.

In doing so, it:

struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.

Alexander, 469 U.S. at 300.

133. 42 U.S.C. § 12131(2) (1994).

134. 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (1994) (emphasis added). An "undue burden" is one that results in "significant difficulty or expense," and the regulations cite numerous factors to be considered including the cost of the accommodation and the financial resources of the entity. 28 C.F.R. § 36.104 (1998).

The regulations for Title II include similar language:

This paragraph does not . . . [r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(c) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or

Courts have provided a three-step analysis for the "otherwise qualified" requirement under the Rehabilitation Act and the ADA.¹³⁵ First, the disabled individual must meet all of the essential eligibility requirements in spite of his disability.¹³⁶ Second, the rule has an "exception." If the disabled individual cannot meet all of the essential eligibility requirements because of his disability, it must be determined if "reasonable accommodations" can be made that allow the disabled individual to become "otherwise qualified."¹³⁷ Third, there is an "exception to the exception." "An 'accommodation' is not 'reasonable' if it 'fundamentally alters the nature of the program.'"¹³⁸ These steps are interrelated and tend to collapse into each other as courts apply the "otherwise qualified" standard, but each is addressed individually below.

A. Are Eligibility Requirements "Essential"?

Courts directly addressing the issue have split on whether age and length of enrollment rules are essential eligibility requirements. Those finding they are point to the rules' goals of reducing competitive advantage going to teams using older athletes, protecting younger athletes from injury, discouraging student-athletes from delaying their educations and preventing red-shirting. Those taking the opposite position argue that these rules can be waived in individual cases without harming any of these goals, and therefore, cannot be deemed essential.

her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

28 C.F.R. § 35.150 (1998).

135. See *Johnson v. Florida High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 584 (M.D. Fla. 1996) (citing *Pottgen*, 40 F.3d at 929-30), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997). See also *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000, at *14 n.13 (N.D. Ill. Nov. 21, 1996).

136. *Johnson*, 899 F. Supp. at 584.

137. *Id.*

138. *Id.*

1. *Courts Holding Eligibility Requirements to be Essential.*—Courts holding age and length of enrollment rules to be essential eligibility requirements have focused largely on the justifications given for them by high school athletic associations. For example, in *Pottgen v. Missouri State High School Activities Ass'n*¹³⁹ the plaintiff had a learning disability which caused him to repeat two grades in elementary school. He played interscholastic baseball during his first three years of high school, but was barred from playing his final season because he had turned nineteen before his senior year.¹⁴⁰ The court rejected his challenge to the age rule and found it was an essential eligibility requirement in a high school interscholastic program.¹⁴¹ It noted that:

An age limit helps reduce the competitive advantage flowing to teams using older athletes; protects younger athletes from harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. These purposes are of immense importance in any interscholastic sports program.¹⁴²

139. 40 F.3d 926 (8th Cir. 1995)

140. *Pottgen*, 40 F.3d at 929.

141. *Id.*

142. *Id.* See also *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1035 (6th Cir. 1995) (Defendant offered testimony from an expert in physical growth and development showing the age restriction advanced two purposes: (1) "safeguards against injury" to other players; and (2) "prevents any unfair competitive advantage that older and larger participants might provide." The court found that the "age restriction is a necessary requirement of the interscholastic sports program."); *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 461-62 (6th Cir. 1997) (The court followed *Sandison* and held that the eight-semester rule was "necessary." It stated it had not relied on the fact that the age requirement had been designated "non-waivable" by the MHSAA in order to conclude that the requirement was a necessary one, and that "[t]o do so would amount to an improper delegation to the MHSAA of this court's responsibility to independently determine whether the rule is, in fact, necessary." It ultimately found, however, that there was "no principled distinction between the nature and purpose of the age-limit rule and the eight-semester rule that could lead us to conclude that the former is 'necessary' while the latter is not." It relied on evidence that "the absence of an eight-semester rule could lead to widespread red-shirting abuses," and that the rule was "essential to preserving the philosophy that students attend school primarily for the classroom education and only secondarily to participate in interscholastic athletics.").

Courts denying due process and equal protection challenges to age and length of enrollment requirements have also pointed to these goals as justifying the rules.

Chief Judge Richard Arnold dissented from this conclusion and argued that the majority was simply reciting the justification for the rule offered by the athletic association and "mechanically appl[ying] it across the board."¹⁴³ He argued that courts are obligated to "look at plaintiffs as individuals before they decide whether someone can meet the essential requirements of an eligibility rule . . .", and that, as applied to Pottgen, the age rule was not essential to the athletics association's goals.¹⁴⁴ Judge Arnold noted that the district court had found "that any competitive advantage resulting from plaintiff's age [was] de minimis" and that Pottgen was not appreciably larger than the average eighteen-year-old and did not appear to be a safety threat to others.¹⁴⁵

2. Courts Holding Eligibility Requirements are Not Essential.—Others courts have followed Judge Arnold's dissent, and held that athletic associations must perform an individualized analysis to determine if the student-athlete's participation implicates the purposes behind the rule. For example, the court in *Johnson v. Florida High School Activities Ass'n*,¹⁴⁶ disagreed with the *Pottgen* majority stating that it "provided no analysis as to the relationship between the age requirement and the purposes behind the age requirement." It noted that "if a rule can be modified without doing violence to its essential purposes . . . it [cannot] be 'essential' to the nature of the program or activity to refuse to modify the rule."¹⁴⁷ "The fact that the [ath-

See *Nichols v. Farmington Public Sch.*, 389 N.W.2d 480 (Mich. App. 1986) (hearing impaired student "mainstreamed" into regular classes a grade lower and lost a year of athletic eligibility; rule and its application upheld as being neutral and not discriminatory); *Pratt v. New York State Pub. High Sch. Athletic Ass'n*, 507 N.Y.S.2d 793 (Sup. Ct. 1986) (student held out from athletic participation for one year by his parents on a voluntary basis for maturity reasons; although there is some discussion of a "psychological and emotional disturbance"); *Woods v. Ohio High Sch. Athletic Ass'n*, No. 80 CA 30 1981 WL 6063, *3 (Ohio App. Nov. 9, 1981) (age rule upheld as having a "rational basis").

143. *Pottgen*, 40 F.3d at 932 (Arnold, C.J., dissenting).

144. *Id.* at 931.

145. *Id.* at 932 (quoting 857 F. Supp. at 662 n.3).

146. 899 F. Supp. 579 (M.D. Fla. 1996), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997).

147. *Id.* at 585 (quoting *Pottgen*, 40 F.3d at 932-33 (Arnold, C.J., dissenting)); see

letic association] deems the age requirement essential does not make it so."¹⁴⁸

The plaintiff in *Johnson* was a nineteen-year-old senior who had lost all hearing in one ear and substantially all hearing in the other after contracting meningitis at nine months. His parents waited a year before enrolling him in kindergarten because he was not talking very well for his age. Johnson progressed adequately in kindergarten, but was held back in first grade because of his performance in reading and language. He was placed in special education classes in second grade and remained there until his sophomore year. Johnson lost all hearing in both ears just prior to entering eighth grade, and was provided an interpreter, notetaker and itinerant teacher.¹⁴⁹

Johnson, who did not start playing organized sports until he entered high school, played football and wrestled in each of his first three years. At the beginning of his senior year he stood five-foot nine inches and weighed 250 pounds. He played defensive tackle on the football team, and wrestled in the heavyweight division which limited competitors to a maximum of 275 pounds. Johnson's coach testified that he was not a "star" player and was not "larger" than the other players.¹⁵⁰

The court found that the purposes of the age rule were not undermined by allowing Johnson to play.¹⁵¹ It emphasized that he was not the largest football player playing his position, and found that allowing him to play did not "facilitate or exacerbate the potential for injury. Additionally, the weight divisions in wrestling eliminate any safety concern as to that sport."¹⁵² It

also *Dennin*, 913 F. Supp. at 668.

148. *Johnson*, 899 F. Supp. at 586.

149. *Id.* at 581.

150. *Id.* at 582. The court also reviewed the rosters from two of Johnson's team's opponents. It noted that one opponent listed a junior lineman as six-foot four inches and 260 pounds, and stated that "while [Johnson] is large, he is not the largest student to play defensive line." *Id.*

151. *Id.* at 585. The athletic association gave two purposes for the rule:

First, the rule promotes safety. By prohibiting players who turn age nineteen prior to September 1st of the current year from participating in interscholastic athletics, the rule liberally regulates the size and strength of the players. The second purpose is fairness, i.e. to create an even playing field. The rule prevents schools from "redshirting" their players so as to build a better program.

Id. at 584. The court stated that "[t]hese are admittedly salutary purposes." *Id.*

152. *Id.* at 585.

also found that his school did not gain an unfair advantage through his play because he was a "mid-level player and not a 'star'" and was less experienced than some other players because he had only played three years of organized football.¹⁵³ The court rejected the athletic association's argument that the age requirement was an "absolute, unwaivable rule," concluding:

The age requirement provides a means to an end. It serves as a simple threshold standard by which the FHSAA can achieve the desired goals of safety and fairness. Absent these purposes, the age requirement has no purpose. Thus, to assert that the age requirement is an absolute, unwaivable rule, is to place form over substance. If, as in the instant case, the age requirement can be waived while simultaneously preserving the purposes of the requirement, then the age requirement as applied to that case is not essential.¹⁵⁴

153. *Johnson*, 899 F. Supp. at 589.

154. *Id.* at 586 n.8. The *Dennin* court also held that the Rehabilitation Act and the ADA require an individualized analysis of the purposes behind the age requirement. *Dennin*, 913 F. Supp. at 668. It stated that "[i]t would be anathema to the goals" of the statutes to decline to do so. *Id.* According to the court: "[f]ailure to perform such an analysis would exalt the rule itself without regard to the essential purposes behind the rule." *Id.* at 668-69. Similar reasoning is found in *Buchanan*.

[T]o uphold the [UIL's] blanket policy against consideration of the Plaintiff's circumstances in this case would be to undermine the objectives of the Rehabilitation Act without advancing the policies behind the 19 year-old eligibility rule. There is no evidence before the Court to suggest that the [UIL] bases its decision to bar the Plaintiff from playing high school football on any particular harm that might result if he is allowed to play, or on anything other than a policy of strictly enforcing its rules. But the Rehabilitation Act requires that federally assisted programs do more for those who fall within its ambit. For these reasons, requiring the [UIL] to give special consideration to the Plaintiff based on his history of being handicapped is a reasonable accommodation.

848 S.W.2d 298, 302 (Tex. App. 1993) (quoting *Booth*, 1990 WL 484414 at *4).

Courts faced with abuse of discretion and other challenges to eligibility rules have also held they should be waived where doing so does not harm the purposes behind them. See *Clay v. Arizona Interscholastic Ass'n*, 779 P.2d 349 (Ariz. 1989) (association abused discretion in holding that drug and alcohol dependency was not a "disabling illness or injury" for purposes of hardship exception to eight semester-eligibility rule); *Tiffany v. Arizona Interscholastic Ass'n*, 726 P.2d 231 (Ariz. Ct. App. 1986) (association improperly failed to exercise its discretion in considering hardship waiver application for student who turned nineteen before his senior year in high school after being held back twice due to a learning disability); *Pennsylvania Interscholastic Athletic Ass'n v. Geisinger*, 474 A.2d 62 (Pa. Commw. 1984) (injunctive relief proper to secure relief from eight-semester rule for two students, one of whom repeated a grade because of mononucleosis and the other who failed a grade due to psychological problems and therapy); *Hamilton v. West Virginia Secondary Sch. Ac-*

3. *Discussion—Courts Must Make an Individualized Inquiry into Whether an Eligibility Rule is Essential.*—The disagreement concerning whether eligibility rules are “essential” rises largely from the weight courts give to the reasons proffered for them. Courts holding them essential find them to be an exact proxy for the safety and fairness concerns underlying them. Other courts, however, view the rules as means to an end and state that if they can be modified without doing harm to the purposes they are designed to serve, they cannot be essential.

This second line of cases, exemplified by *Johnson*, is more consistent with precedent interpreting section 504 and the ADA in an employment setting. The section 504 regulations provide that a person is qualified for a job if “with reasonable accommodation, [he or she] can perform the *essential functions* of the job in question.”¹⁵⁵ Similarly, the ADA states that a “qualified individual with a disability” is one who “with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires.”¹⁵⁶

tivities Comm’n, 386 S.E.2d 656 (W. Va. 1989) (regulatory scheme to prevent “red shirting” was applied unreasonably to prohibit football player from participation where the extra year in school was wholly due to academic problems); *Duffley v. New Hampshire Interscholastic Athletic Ass’n*, 446 A.2d 462 (N.H. 1982) (holding that an athlete who sought an exemption from the eight-semester disqualification rule where he had missed a semester of school due to illness was denied due process when the board of the association failed to make the required findings of fact).

Disabled students who move or transfer to other schools in an effort to address their disabilities have also been successful in challenging rules which prohibit students from participating on sports teams in school districts other than those in which their parents reside and/or disqualify them from participating for a year after transferring schools. *See, e.g., Crocker v. Tennessee Secondary Sch. Athletic Ass’n*, 735 F. Supp. 753, 755 (M.D. Tenn. 1990) (holding that “a student who transfer[s] from one school to another for the purpose of receiving a free appropriate education under the [Education of the Handicapped Act] can not be prohibited from participating in extracurricular activities since that prohibition would amount to discrimination based on handicap”), *aff’d mem.*, 908 F.2d 972 (6th Cir. 1990); *Doe v. Marshall*, 459 F. Supp. 1190 (S.D. Tex. 1978) (granting preliminary injunction barring enforcement of transfer rule where student moved from his parents’ house to live with his grandparents because of severe psychological and emotional problems), *vacated as moot*, 622 F.2d 118 (5th Cir. 1980).

155. 45 C.F.R. § 84.3(k)(1) (1997) (emphasis added).

156. 42 U.S.C. § 12112(8) (1994) (emphasis added). Congress did not specify which job functions are “essential” under the ADA, but the statute does state that whenever an employer gives written descriptions, those descriptions are evidence of

In *School Board of Nassau County v. Arline*,¹⁵⁷ the Supreme Court noted that a district court "will need to conduct an *individualized inquiry* and make appropriate findings of fact" in determining whether an individual with a disability can perform the essential functions of a position and, if not, whether a reasonable accommodation will enable him or her to do so.¹⁵⁸ Lower courts have similarly held that "[t]o avoid unfounded reliance on uninformed assumptions, the identification of the essential functions of a job requires a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice."¹⁵⁹

Decisions such as *Sandison* and *Pottgen* which simply accept the justifications for eligibility given by state associations are inconsistent with these rulings because they fail to make fact-specific, individual inquiries into the purposes of the rules and how they actually work in practice. Future courts should follow *Dennin* and *Johnson* in making such inquiries, and should hold that an eligibility rule is not essential if it can be waived while simultaneously preserving the purposes of the requirement.¹⁶⁰

the essential functions of the job. *Id.*

157. 480 U.S. 273 (1987).

158. *Arline*, 480 U.S. at 287 (emphasis added).

159. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995); see also *Hogue v. MQS Inspection, Inc.*, 875 F. Supp. 714, 721 (D. Colo. 1995) ("Deciding whether specific job duties are essential job functions requires courts to engage in fact-specific inquiries."); *Smith v. Kitterman, Inc.*, 897 F. Supp. 423, 429 (W.D. Mo. 1995) (same); *Champ v. Baltimore County*, 884 F. Supp. 991, 999 (D. Md. 1995) (same). One court applying this test held that it was a jury question as to whether a city violated the ADA and § 504 when it refused to waive a rule requiring that police officers have vision in both eyes. See *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997). Doane could see with both eyes when he began working as a policeman, but lost sight in one due to glaucoma. He worked for nine years as a regular officer after losing his sight but then was reassigned to work as a 911 operator and later a jailor. He sued after his request to return to regular duty was denied, and a jury awarded \$40,000.20 in back pay and \$10,874.77 in back pension benefits. *Doane*, 115 F.3d at 625-26.

The appellate court found that Doane had made the requisite showing that his disability did not prevent him from performing the essential functions of the job. *Id.* He had the necessary educational background, a valid motor vehicle license, remained physically fit, and his eyesight was correctable to 20/20. *Id.* Moreover, he had been a successful police officer for many years. *Id.*

160. See *Johnson*, 899 F. Supp. at 586 n.8.

B. Is Waiver of an Eligibility Rule a "Reasonable Accommodation"?

Even if a court finds that the high school age rule is an essential eligibility requirement, it still must address whether a "reasonable accommodation" can be made to that requirement.¹⁶¹ An accommodation is not "reasonable" if it imposes "undue financial or administrative burdens" or "fundamentally alters the nature of program."¹⁶² In cases where a student-athlete has been declared ineligible, the accommodation requested is a waiver of the eligibility rule. Courts have disagreed both over whether this would fundamentally alter a program and whether such accommodation would impose an undue burden.

1. Does a Waiver "Fundamentally Alter" the Nature of the Athletic Program?—

a. Courts Holding Any Waiver is a Fundamental Alteration

Some courts have found that any waiver of an eligibility rule would constitute a fundamental alteration in the nature of an athletic program. They have done so, however, with little or no analysis. For example, the *Pottgen* court simply stated "[w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. Other than waiving the age limit, no manner, method, or means is available which would permit Pottgen to satisfy the age limit. Consequently, no reasonable accommodations exist."¹⁶³

161. See *Pottgen*, 40 F.3d at 929 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987)); *Dennin*, 913 F. Supp. at 668; *Johnson*, 899 F. Supp. at 584.

162. *Pottgen*, 40 F.3d at 929 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987)); *Dennin*, 913 F. Supp. at 668.

163. *Pottgen*, 40 F.3d at 930. See also *Sandison*, 64 F.3d at 1035:

[W]e agree with the court in *Pottgen* that waiver of the age restriction fundamentally alters the sports program. Due to the usual ages of first-year high school students, high school sports programs generally involve competitors between fourteen and eighteen years of age. Removing the age restriction injects into competition students older than the vast majority of other stu-

b. Courts Holding that an Individualized Analysis Must be Done to Determine if a Waiver Constitutes a Fundamental Alteration

Other courts, however, have held that section 504 and the ADA require a case-by-case analysis on whether allowing the student-athlete to participate would frustrate the purposes behind the rule. If the plaintiff can show that it does not, then his participation will not fundamentally alter a program. For example, the *Ganden* court concluded that an individualized inquiry must be made to determine whether waiving the NCAA's eligibility rule would be a fundamental alteration.¹⁶⁴ It criticized the holdings in *Pottgen* and *Sandison* that "any alteration to [the] rules would fundamentally alter the program."¹⁶⁵

This analysis ignores the central issue under the ADA: Are reasonable accommodations possible in light of the disability. Reasonable accommodation is a fact bound inquiry looking to whether the modification required for the plaintiff would "do violence to the admittedly salutary purposes underlying the rule." Therefore, a court must look to the underlying purposes of an eligibility requirement to determine if the modification would undermine those purposes in the circumstances of the plaintiff. Otherwise, any modification of a rule rationally tailored to the denied privilege would be unreasonable.¹⁶⁶

The court ultimately concluded, however, that *Ganden* failed to show that his requested accommodation would not undermine the purposes of the NCAA eligibility rules.¹⁶⁷ Those rules established minimum academic eligibility requirements for incoming student-athletes to attain the status of a "qualifier": a person

dents, and the record shows that the older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration.

See also *McPherson*, 119 F.3d at 462 ("[T]he considerations we found dispositive in *Sandison* pertain here. Requiring a waiver of the eight-semester rule, under the circumstances present here, would work a fundamental alteration in Michigan high school sports programs.").

164. *Ganden*, 1996 WL 680000, at *14-15.

165. *Id.* at *14 (citing *Pottgen*, 40 F.3d at 930; *Sandison*, 64 F.3d at 1035).

166. *Id.* at *15 (citations omitted).

167. *Id.*

eligible to practice with intercollegiate teams, compete in intercollegiate events, and receive financial aid or scholarships.¹⁶⁸ The rules required students to (1) have taken at least thirteen high school "core courses," and (2) have attained a minimum GPA in those courses determined by a sliding scale tied to their standardized college entrance examination scores—the higher the test score, the lower the required GPA.¹⁶⁹ Student-athletes who did not meet these criteria could still attain "partial-qualifier" status where they were allowed to practice with the team and receive financial aid during the freshman year, but were ineligible to compete in intercollegiate events unless they satisfied further GPA requirements during the freshman year.¹⁷⁰

Ganden did not meet the requirements to be a qualifier, and sued for a preliminary injunction, alleging the NCAA's eligibility criteria violated Title III of the ADA because it discriminated against him due to his learning disability.¹⁷¹ He argued that

168. *Id.* at *2.

169. *Ganden*, 1996 WL 680000, at *2. "Core courses" were defined in the NCAA bylaws as recognized academic courses offering fundamental instructional components in a specified area of study such as English, mathematics, natural science and social science. The definition expressly excluded remedial, special education or compensatory courses and other courses taught below the high school's regular academic instructional level. *Id.* at *2.

170. *Id.*

171. *Ganden's* learning disability was first diagnosed in the second grade. His high school counselors designed a curriculum to address his specific disability and academic weaknesses including a special resource study hall, alternative test-taking procedures and books on tape, and five special courses intended to address his weaknesses—Basic Communication Skills, Basic Composition Skills, Basic World Cultures, LRC Typing and LRC Computers. *Id.* at *1. *Ganden's* cumulative grade point average (GPA) from his freshman through junior years was 2.09, but he achieved a 3.0 in his senior year. *Id.*

Ganden completed eleven "core courses" as counted by the NCAA before graduating from high school, failing to satisfy the minimum course requirement for "qualifier" status. *Ganden* also did not meet the NCAA's minimum GPA requirement. After taking the ACT three times under nonstandardized testing conditions to compensate for his disability, he had a compiled score of 76. NCAA bylaws required a student with a 76 ACT score to have a 2.275 GPA; *Ganden's* GPA from his eleven "core courses" was 2.136. *Ganden*, 1996 WL 680000, at *2.

The NCAA bylaws allow member schools to submit waiver applications to its Subcommittee on Initial-Eligibility Waivers (the "Subcommittee") for those students who do not attain "qualifier" status. Michigan State University ("MSU") applied for one on *Ganden's* behalf arguing that he had failed to take the required number of "core courses" in part because he believed several of his compensatory courses would count toward the requirement. His remedial courses were identified as "core courses"

the "core course" criteria discriminated against him because it "screened" out students based on disability. He also contended that the NCAA was required to make reasonable modifications to accommodate his learning disability in its eligibility requirements. Specifically, he argued that the NCAA should

(1) modify its eligibility requirements by considering . . . courses [specifically designed to address his learning disability] as "core courses" in lieu of other "core courses," or (2) modify its GPA criteria in light of his learning disability, his improved academic record, and other external factors indicating that he will succeed in college.¹⁷²

The NCAA responded that it did not have to make these modifications because its rules were essential eligibility requirements and the modifications would "fundamentally" alter the nature of its intercollegiate athletic program.¹⁷³ It listed three purposes for the eligibility requirements: "(1) [to] insure that student-athletes are representative of the college community and not recruited solely for athletics (2) [to] insure that a student-athlete is academically prepared to succeed at college, and (3) [to] preserve amateurism in intercollegiate sports."¹⁷⁴

The court found that the GPA and "core course" requirements served these NCAA interests. It noted that despite "[w]hatever criticism one may level at GPA and the national

in his high school's documents. While no other body had accepted them as such, the NCAA had not explicitly told Ganden's high school this until he had either completed or registered for these courses. *Id.* at *3.

The Subcommittee deliberated for over one hour on Ganden's application, compared to the usual ten minutes, but ultimately was not persuaded by MSU's reliance argument. As an accommodation for Ganden's learning disability, however, it still counted four of his remedial courses as "core courses" because it found each had the same qualitative and quantitative content as an approved "core course." Ganden had the necessary thirteen "core" credits with these courses and they raised his GPA to 2.153. The Subcommittee refused, however to consider two of Ganden's remedial courses—LRC Typing and LRC Computers—as "core courses" in lieu of other "core courses" where he had received lower grades. Even computing these two courses into his total GPA as a mitigating factor, however, Ganden's GPA was about 2.21, still below the minimum 2.275 necessary for "qualifier" status. *Id.* at *4.

Ganden also did not meet the minimum GPA for "partial qualifier" status. The Subcommittee granted him this status, however, in recognition of his record indicating academic improvement. *Id.* at *5.

172. *Ganden*, 1996 WL 680000, at *5.

173. *Id.* at *6.

174. *Id.* at *14.

standardized tests," they provided significant objective predictors of the ability to succeed in college. And, the "core course" criteria helped ensure the integrity of that GPA and that the student had covered the minimum subject matter required for college.¹⁷⁵

The court found that Ganden could only satisfy the required GPA if the NCAA replaced "core course" grades with the grades from special courses which were designed to address his academic weaknesses.¹⁷⁶ It noted, however, that these courses were not "remotely similar to the subject areas of core courses."¹⁷⁷ It then held that while Title III may require the NCAA to count courses which were substantively identical to approved "core courses," it did not require it to count courses with little substantive similarity.¹⁷⁸ The skills taught in those courses could not be said to substitute for earlier "core courses," and the grades from them did not provide valid indications of the student's academic potential.¹⁷⁹ Accordingly, the court found that the requested modification would "fundamentally alter' the privilege of participation in intercollegiate swimming."¹⁸⁰

The court also found that lowering the minimum GPA would constitute a fundamental alteration because it would directly remove the primary objective tool the NCAA uses to determine students' academic capabilities.¹⁸¹ It noted that while there may be circumstances where such a modification was necessary, it was "generally unreasonable to require the NCAA to lower this basic standard."¹⁸²

The court ultimately held that "Title III does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them."¹⁸³ It found that it had done so by considering Ganden's efforts to overcome his disability and his academic gains in his final two years of high school,

175. *Id.* at *15.

176. *Id.*

177. *Ganden*, 1996 WL 680000, at *15.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at *16.

182. *Ganden*, 1996 WL 680000, at *16.

183. *Id.*

and granting him "partial qualifier" status even though he did not meet the minimum GPA.¹⁸⁴

The Justice Department, however, recently found that the NCAA's efforts were insufficient to meet the ADA's requirements.¹⁸⁵ While recognizing that the NCAA had taken some steps to modify its policies, DOJ found that its regulations relating to certifying "core courses" excluded many classes designed to accommodate students with learning disabilities.¹⁸⁶ It also found that "the current process of providing an individualized assessment of each student—the waiver process—is fundamentally flawed and places students with a learning disability at a significant disadvantage relative to their peers."¹⁸⁷

184. *Id.* The *Ganden* decision was followed in *Bowers v NCAA*, 974 F. Supp. 459 (D.N.J. 1997). *Bowers* was recruited to play football at Temple, but the NCAA refused to recognize several of his special education classes as core courses and he was declared a "nonqualifier." *Bowers*, 974 F. Supp. at 463. The court noted that "[w]hile NCAA bylaw 14.3.1.3.4, which expressly excludes special education courses from the definition of 'core course,' may, when viewed in isolation, appear to 'screen out or tend to screen out' persons on the basis of their disability, this one bylaw must be viewed in the context of the NCAA bylaws and procedures as a whole." *Id.* at 465. It noted that the NCAA bylaws provided for two alternate avenues which would allow learning disabled students who had taken special education courses which would not otherwise qualify as "core courses" to obtain the "qualifier" status: 1) the student's high school principal could demonstrate that students in such classes are expected "to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses," and 2) through the NCAA's waiver process. *Id.*

Bowers had failed to obtain qualifier status through either of those avenues, and sued to obtain that status. The court, however, stated that

[b]y filing this lawsuit, Plaintiff is essentially seeking a "second bite" at the waiver which the NCAA has already denied him. . . . Plaintiff asks this Court to order the NCAA to consider all of his special education courses, regardless of their level or content, as "core course" within the meaning of the bylaws. By doing so, Plaintiff seeks a virtual elimination of the "core course" requirement, rather than merely the "modification" or "accommodation" required by the ADA, which the NCAA already provides.

To count all of *Bowers's* special education courses as "core courses," without regard to their level or content would require the NCAA to abandon its eligibility requirements. While the ADA requires "evenhanded treatment" of individuals with disabilities, it does not require "affirmative action."

Id. at 466 (citing *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1031 (6th Cir. 1995)).

185. *Sutherland Letter*, *supra* note 99.

186. *Id.*

187. *Id.* at 2.

On the "core course" issue, DOJ held that the NCAA regulation requiring courses designed for students with disabilities to be "quantitatively and qualitatively" the same as other core courses in a school violated the ADA.¹⁸⁸ It criticized the "rigid approach" the NCAA had taken, and found that it did not consider how learning disabled students obtained knowledge and skills.¹⁸⁹ While acknowledging that the NCAA had modified its policies by creating a regulation specifically addressing classes for students with learning disabilities, DOJ stated that "almost all courses designed to accommodate these students are still excluded" in determining the core course requirement.¹⁹⁰

DOJ pointed to two specific problems with the regulation. First, it categorically rejected "remedial," "special education," and "compensatory" classes.¹⁹¹ DOJ noted that the *Ganden* court had held that "[b]ecause the NCAA's definition of 'core course' specifically excludes special education, compensatory and remedial courses, this definition provides at least a prima facie case of a disparate impact on learning disabled students."¹⁹²

DOJ also found that the "quantitative[]" and "qualitative[]" regulation as applied almost ensured that most classes for students with learning disabilities would not be certified.¹⁹³ The regulation required a school district submitting a class for a learning disabled student to identify an equivalent course in the mainstream curriculum which had already been certified as a core course. The NCAA refused to certify any course without a parallel course regardless of its content. If a parallel mainstream course could be identified, the regulation required the school to certify that the same quantity of material was covered in both classes and that their quality was identical—for example that the classes used the same textbook(s) and syllabus.¹⁹⁴

DOJ pointed to both anecdotal and statistical evidence of the difficulty in obtaining certification for such classes. It noted that of 19,400 school which had submitted core courses for certif-

188. *Id.* at 5.

189. *Id.* at 8.

190. *Sutherland Letter*, *supra* note 99, at 4-5.

191. *Id.* at 5.

192. *Id.* (quoting *Ganden*, 1996 WL 680000, at *13 n.10).

193. *Id.*

194. *Id.*

ication, only 200 had successfully submitted classes designed specifically for learning disabled students.¹⁹⁵ In fact, the NCAA had certified a total of only about 1000 classes for students with learning disabilities as core courses.¹⁹⁶

DOJ found that reasonable modifications could be made to the NCAA's policy without fundamentally altering the nature of the its program. Specifically, DOJ stated that the NCAA could certify some classes designed for students with disabilities as core courses even though they were not necessarily identical to classes already certified as core courses. According to DOJ, "the focus should not be on whether the class covers the same number of pages in a textbook as a comparable class, but whether the students are obtaining the knowledge and skills necessary to succeed in college."¹⁹⁷ The fact that the title of a course includes a designation such as "remedial," "special needs" or "basic," or falls within a school's "special education" curriculum, should not disqualify it from being certified.¹⁹⁸

DOJ also found the waiver process violated the ADA.¹⁹⁹ The NCAA had argued that even if elements of the initial eligibility criteria discriminated against students with learning disabilities, those students were provided an individualized assessment through the waiver process. DOJ disagreed. It stated that "by being funneled into the waiver process, students with learning disabilities are significantly disadvantaged relative to their peers," and concluded that the process was flawed in three respects.²⁰⁰

First, it was critical of the NCAA's practice of giving "partial qualifier" status only to students with learning disabilities. The NCAA argued that by doing so it was giving students with learning disabilities a benefit others were not eligible for. DOJ noted, however, that while partial qualifiers could receive scholarships and participate in practices they also had substantial restrictions. They could not compete for or travel with a team and had only three years of eligibility—instead of four—after the

195. *Sutherland Letter, supra note 99.*

196. *Id.* at 7-8.

197. *Id.* at 8.

198. *Id.* at 8-9.

199. *Id.*

200. *Sutherland Letter, supra note 99, at 9.*

first year in residence.²⁰¹ DOJ stated that the NCAA could remedy this situation by simply agreeing that any student granted partial qualifier status is entitled to four years of eligibility after the first year in residence.²⁰²

DOJ's second criticism of the waiver process was that its timing discouraged schools from recruiting athletes with learning disabilities. According to DOJ, "[s]tudents with learning disabilities are often injured because the individualized assessment of their academic record is not provided until too late in the process."²⁰³ The NCAA would not hear waiver applications until after issuing a final certification report. Those reports were not issued until the summer after high school graduation. The NCAA processes tens of thousands of final certification reports every summer, however, and it "often takes so long . . . that there is no point in the student-athlete filing a waiver application."²⁰⁴ Colleges recruiting students with learning disabilities often back off if the students think they will need a waiver before being allowed to play. And, many students become discouraged with the time required to obtain a waiver and decide to enroll either in a junior college or at a Division III school where the initial-eligibility rules do not apply.²⁰⁵ Division III schools, however, offer neither scholarships nor the highest level of athletic competition.

DOJ stated that many of the problems with the waiver process could be remedied if the NCAA made eligibility decisions earlier in the senior year.²⁰⁶ Specifically, it found that it would be a reasonable modification for the NCAA to issue eligibility decisions in the spring semester of the senior year.²⁰⁷ This would not fundamentally alter the NCAA's goal of determining whether a student is prepared for college because it would be made with essentially the same information colleges use when making admissions decisions.²⁰⁸

201. *Id.* at 10.

202. *Id.*

203. *Id.*

204. *Id.* at 11.

205. *Sutherland Letter, supra* note 99, at 11.

206. *Id.*

207. *Id.*

208. *Id.*

Finally, DOJ criticized the NCAA for placing too much weight on standardized tests.²⁰⁹ The NCAA received ninety-six waiver applications from students with learning disabilities in the 1996-97 academic year. Each of the twenty-eight applicants granted full eligibility had the minimum test score, as did thirty-three of the thirty-four granted partial qualifier status. A number of the students who met all other criteria but narrowly missed the minimum test score, however, were denied a waiver.²¹⁰ This led DOJ to state that the NCAA considered the remainder of an academic record "irrelevant" if a student did not have the minimum qualifying score.²¹¹

DOJ found that it would be a reasonable modification for the NCAA to "refrain from using the standardized test scores as the sole condition for eligibility."²¹² It stated that the NCAA had to agree not to view a minimum test score as an "absolute condition for a favorable decision," but would view test scores "simply as one aspect of the student's entire academic record that is relevant to predicting success in college."²¹³

209. *Id.* at 11-12.

210. *Sutherland Letter*, *supra* note 99, at 12.

211. *Id.*

212. *Id.*

213. *Id.* The court in *Martin v. PGA Tour Inc.*, No. 97-6309-TC, 1998 WL 67529, at *7 (D. Or. Feb. 19, 1998), also held that an athletic association must conduct an individualized assessment in determining whether to waive a rule. In *Martin*, a professional golfer whose right leg was severely atrophied and weakened due to a congenital deformity sought an injunction ordering the PGA to waive its rule requiring competitors to walk the course and let him ride a cart. He presented evidence that the simple act of walking created a significant risk of fracturing his tibia, hemorrhaging, and developing blood clots. His condition also caused severe pain and discomfort while playing golf, carrying on daily activities, and even while he was at rest. Martin had been able to walk a golf course (albeit with difficulty) when he was younger, but his leg had steadily worsened as he grew older and he could no longer do so. *Martin*, 1998 WL 67529, at *1.

Citing *Pottgen*, the PGA argued that there was no need to conduct an individualized inquiry into whether a waiver of the walking rule was a reasonable accommodation in Martin's case. *Id.* at *3-4. Indeed, prior to the trial, the PGA did not review Martin's medical records nor view a videotaped presentation of his condition. *Id.* at *2. It stated that the walking requirement was a substantive rule of its competitions and that waiving it would constitute a fundamental alteration. More specifically, it asserted that a court

should focus on whether an athletic rule is 'substantive'—i.e., a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is, according to the PGA's argument, the rule cannot be modified without working a fundamental alteration of the competition, and the ADA

consequently does not require any modification to accommodate the disabled. *Id.* at *3-4. "Essentially, then, the PGA Tour's contention [was] that it alone may set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments . . ." *Id.* at *4.

The court disagreed, and found support for requiring an individualized assessment in the Ninth Circuit: "[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry." *Martin*, 1998 WL 67529, at *7 (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996)). Thus, the court held that "the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions." *Id.*

It found that it would not. The court accepted the PGA's position that the purpose of the walking requirement was "to inject the element of fatigue into the skill of shot-making," but found that the "fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." *Id.* at *8-9. It cited the testimony of an expert on the physiological basis for fatigue who calculated that golfers expended only 500 calories of energy in walking a golf course, and noted that these calories were expended over a 5 hour period and that golfers could both rest and eat during a round. *Id.* at *9.

The expert dismissed the PGA's reliance on Ken Venturi's overcoming severe and near-fatal exhaustion to win the 1964 U.S. Open in high heat and humidity. He stated that Venturi's fatigue was due to heat exhaustion and fluid loss—not walking. According to the expert, heat and humidity do not significantly influence fatigue from exercise. Dehydration is the critical factor, and several spectators at the 1964 U.S. Open, who were not walking, were also treated for exhaustion. The expert testified that fatigue at lower intensity exercise was primarily a psychological phenomenon due to stress and motivation. The court found that "[e]very individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, . . . most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue." *Id.* It noted that when professional golfers were given the option of walking or riding a cart—such as on the Senior PGA Tour or PGA Tour Qualifying Tournament—most chose to walk. The court asked: "Why would this be if walking truly fatigued them so that they hit worse shots than if they ride? As the saying goes, 'the proof of the pudding is in the eating.'" *Martin*, 1998 WL 67529, at *7.

Turning to Martin's individual condition, the court asked, "If the majority of able-bodied elect to walk in 'carts optional' tournaments, how can anyone perceive that plaintiff has a competitive advantage by using a cart given his condition?" *Id.* It then found, "the fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." *Id.* at *10. It stated that while:

other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

Id.

c. *Discussion—Athletic Associations (and Courts) Must Conduct an Individualized Inquiry to Determine if Waiving a Rule Causes a Fundamental Alteration in an Athletic Program*

The split on the type of analysis to be used in determining whether waiver of a rule constitutes a fundamental alteration shows the difficulty some athletic associations—and some courts—have with accepting the “reasonable accommodation” mandate found in section 504 and the ADA. As far back as *Alexander v. Choate*,²¹⁴ the Supreme Court recognized that “[a]ny interpretation of section 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep section 504

The court then concluded: “As plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PEA [sic] Tour’s game to accommodate him with a cart. . . . The requested accommodation of a cart is eminently reasonable in light of Casey Martin’s disability.” *Id.* at *12. See also *Dennin*, 913 F. Supp. at 669 (court noted that there was no competitive advantage because Dennin was always the slowest swimmer in the pool; there was no safety risk because swimming is not a contact sport; and he was not a red-shirt threat because his education was delayed because of his disability, not to gain a competitive advantage; accordingly, it concluded: “Granting him a waiver would not alter the nature of the swimming program.”); *Johnson*, 899 F. Supp. at 586 (“[W]aiving the age requirement in the instant case does not fundamentally alter the nature of the program. Allowing Dennis Johnson to participate in interscholastic athletics in no way undermines the purposes of safety and fairness.”). Several commentators have also been critical of the *Pottgen* court’s finding that allowing older student-athletes to participate would automatically raise safety and fairness problems. See John T. Wolohan, *The Americans with Disabilities Act and Its Effect on High School Athletic Associations’ Age Restrictions*, 106 EDUC. LAW REP. 971, 979-80 (1996); J. Timothy Gorman, *Athletic Competition and Individuals with Disabilities: Statutory Safeguards for the “Otherwise Qualified” Athlete*, 3 SPORTS L.J. 103, 123 (1996); Katie M. Burroughs, Note, *Learning Disabled Student Athletes: A Sporting Chance Under the ADA?*, 14 J. CONTEMP. HEALTH L. & POL’Y 57 (1997); Patricia A. Solfaro, Note, *Civil Rights Courts Should Use an Individualized Analysis when Determining Whether to Grant a Waiver of an Athletic Conference Age Eligibility Rule: Dennin v. Connecticut Interscholastic Conference*, 913 F. Supp. 663 (2d Cir. 1996), 7 SETON HALL J. SPORT L. 185, 217-18 (1997); Jason L. Thomas, Comment, *Through the ADA and the Rehabilitation Act, High School Athletes Are Saying “Put Me in Coach”: Sandison v. Michigan High School Athletic Ass’n*, 64 F.3d 1026 (6th Cir. 1995), 65 U. CIN. L. REV. 727, 760-63 (1997); Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175, 193-94 (1997).

214. 469 U.S. 287 (1985).

within manageable bounds."²¹⁵ While DOJ has criticized the NCAA for not doing enough to meet statutory objectives, it has done far more than the athletic associations arguing—and courts holding—that *any* change in eligibility rules is a fundamental alteration. Those courts err by ignoring the statutory objectives and focusing exclusively on keeping section 504 and the ADA within manageable bounds.

Accordingly, courts faced with the question of whether an eligibility rule should be waived should follow *Ganden* and *Martin* and conduct an individualized inquiry to determine if the modification would undermine the rule's underlying purposes. More specifically:

The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the [athletic association] is appropriate under the law and in light of proposed alternatives. Otherwise, any [athletic association] could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the [athletic association] considered possible modifications and rejected them.²¹⁶

In the case of a student-athlete challenging an eligibility rule this means that athletic associations and courts must examine the proposed alternative of a waiver in light of the purposes underlying the rule. If he can show that allowing him to compete will not harm any of these purposes, the waiver does not constitute a fundamental alteration and he should be allowed to play.

To its credit, the NCAA has recognized its obligation to conduct such an individualized inquiry. It has not yet succeeded in fulfilling it, however, because of its inflexibility on granting core course status to classes designed for students with learning disabilities. Its regulations will be in compliance, however, if

215. *Alexander*, 469 U.S. at 299.

216. *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding that a genuine issue of material fact precluded summary judgment on claim that 120-day quarantine of dogs entering Hawaii violated rights of visually impaired persons traveling with guide dogs under ADA where it could not be determined as matter of law whether visually impaired persons' proposed modifications to quarantine amounted to reasonable modifications which should be implemented or fundamental alterations which Hawaii could reject).

they are amended to focus on whether the students in those courses are obtaining the knowledge and skills necessary to succeed in college, and to provide an expedited waiver process.²¹⁷

2. Does Requiring Individualized Evaluations on the Waiver of Eligibility Rules Place an "Undue Burden" on Athletic Associations?—

a. Courts Holding Individualized Evaluations are an Undue Burden

The *Pottgen*, *Sandison*, and *McPherson* courts also determined that waiving eligibility requirements would constitute an undue burden on the athletic associations because it would require a case-by-case analysis on whether the waiver would frustrate the purposes behind the rule. The *Sandison* court noted that a number of factors such as age, physical maturity, experi-

217. One week before this issue went to press, the NCAA and DOJ entered into a consent decree in which the NCAA agreed to remedy the problems identified in the Sutherland letter. United States Department of Justice, *Consent Decree* (visited May 27, 1998) <<http://www.usdoj.gov/crt/ada/ncaa.htm>>. The NCAA did not waive its position that it was not a place of public accommodation under the ADA or admit liability, but, in order to avoid litigation, agreed to, among other things:

- Propose amendments to its bylaws which would state that the prohibition on using "remedial and compensatory" courses as core courses did not apply to courses designed for students with learning disabilities, and that the fact that the title to a course included a designation such as "remedial," "special education," "special needs," or a similar title would not itself disqualify a course from being used as core course.

- Propose a rule to be added to its bylaws which would allow students with learning disabilities who did not meet the initial eligibility requirements to earn an additional year of eligibility if they have completed at least 75 percent of their degree program by the beginning of their fifth year in college or received a waiver for a lower percentage. This rule would be limited to students with learning disabilities which prevent them completing college by the beginning of their fifth year.

- Adopt a policy on waivers for students with learning disabilities which would be applied by special committee consisting of individuals with expertise on learning disabilities. This committee would be required to look at the student's overall academic record and not place any "undue emphasis" on standardized test scores.

The NCAA also agreed to make payments totaling \$35,000 to four individuals who had filed complaints with DOJ.

ence, skill level and ability to process sports strategy must be examined in order to determine if an athlete possessed a competitive advantage.²¹⁸ It then stated:

It is plainly an undue burden to require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage. The determination would have to be made relative to the skill level of each participating member of opposing teams and the team as a unit. And of course each team member and the team as a unit would present a different skill level.²¹⁹

b. Courts Holding Individualized Evaluations are Not an Undue Burden

The *Dennin* and *Johnson* courts rejected this analysis, holding that the Rehabilitation Act and ADA require an individualized analysis.²²⁰ *Dennin* found that this would not create an

218. *Sandison*, 64 F.3d at 1035.

219. *Id.* The *McPherson* court similarly found that "requiring a waiver under these circumstances would impose an immense financial and administrative burden on the MHSAA, by forcing it to make 'near-impossible determinations' about a particular student's physical and athletic maturity." 119 F.3d at 462. It acknowledged that "[o]ne could argue . . . that the fact that the MHSAA allows for waivers under some circumstances demonstrates its judgment that these determinations are not unduly burdensome, but stated that "[w]hile that point has a superficial appeal" it found an important distinction between the class of waiver cases contemplated by the MHSAA and disability-based waivers. *Id.*

The plaintiff would have us require waivers for all learning-disabled students who remain in school more than eight semesters. That, of course, would have the potential of opening floodgates for waivers, while until now, there have been only a handful of cases deemed appropriate for waivers. Assessing one or two students pales in comparison to the task of assessing a large number of students; an increase in number will both increase the cost of making the assessments, as well as increase the importance of doing so correctly. Having one student who is unfairly advantaged may be problematic, but having increasing numbers of such students obviously runs the risk of irrevocably altering the nature of high-school sports.

Id. at 462-63. See also *Pottgen*, 40 F.3d at 931 (stating that doing individualized inquiry on each student would require athletic associations "to establish a fact-finding mechanism for each individual seeking to attack a program requirement. At that time, MSHSAA would have to show the essential nature of each allegedly offending program requirement as it applies to the complaining individual. The dissent's approach requires thorough evidentiary hearings at each stage of the process. Clearly the ADA imposes no such duty.").

220. *Dennin*, 913 F. Supp. at 668; *Johnson*, 899 F. Supp. at 585. See also *Booth*,

undue burden because the need to do such an analysis only applied to athletes with disabilities, not all athletes failing to meet the age requirement.²²¹ It acknowledged that individualized consideration could be complex (depending on the sport, the student's size, agility, strength and endurance, and whether his/her athletic capacity/capability was enhanced by his/her age beyond eighteen), but stated: "That it may prove difficult in some cases does not substantiate the claim that it would be unduly burdensome or destructive of the purpose of the rule."²²² It also found that even assuming that a waiver requirement increased the number of applications for disabled students it would not be an undue burden because the cost could be passed to member schools through fees.²²³

c. Discussion—Courts Must Conduct an Individualized Evaluation to Determine if Waiving a Rule Places an Undue Burden on Athletic Program

As with the fundamental alteration issue, the split in authority on the undue burden question reflects a difference among courts on the amount of effort that should be required by schools in addressing disability discrimination. Courts finding the burden of making an individualized analysis "undue" focus on the alleged difficulty of determining whether an older student-athlete has a competitive advantage or presents a risk to others. Those holding the burden is not too great, however, say that the mere fact the determination is not easy does not mean it exceeds the requirements of section 504 and the ADA. This second line of cases is more in accord with other appellate precedent on the "undue burden" issue, and, future courts should hold that conducting an individual analysis on whether a student-athlete's

1990 WL 484414, at *4.

221. *Dennin*, 913 F. Supp. at 669.

222. *Id.*

223. *Id.* See also *Booth*, 1990 WL 484414, at *4 (stating that while requiring athletic associations to evaluate risk posed by each 19 year-old before disqualifying them from interscholastic competition would be an undue administrative burden upholding blanket policy against waiver would undermine objectives of Rehabilitation Act which required federally assisted programs to do individualized analysis for those covered by its protections).

participation will undermine the purposes of the eligibility rules does not create an undue burden.

The section 504 regulations state that an "undue hardship"²²⁴ is "an action requiring significant difficulty or expense," when considered in light of "(1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed."²²⁵ Most courts interpreting the statutes have held that while a disabled individual bears the initial

224. The term "undue hardship" is used in the § 504 regulations and Title I of the ADA. Title III of the ADA uses the term "undue burden." The terms are synonymous.

225. 34 C.F.R. §§ 104.12(c)(1)-(3) (1997); 45 C.F.R. §§ 84.12(c)(1)-(3) (1997). These factors are expanded slightly in the ADA. For example the employment section of the statute lists these factors:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12111(10)(B) (1994). A similar set of factors is listed in determining the existence of an undue burden under Title III.

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action, the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation . . . ; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites to any parent corporation or corporate entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. § 36.104 (1997).

burden of proposing an accommodation and showing that the accommodation is objectively reasonable, the defendant has the burden of persuasion on whether an accommodation would impose an undue hardship.²²⁶

The weight of the defendant's burden of persuasion was emphasized in *Juvelis v. Snider* where the court stated that the defendant "misperceive[d] the burden of proof on this issue" when it argued in its brief "[t]here was nothing in the record to indicate that [plaintiff's] proposed accommodation would be an easily administered test."²²⁷ The court stated the plaintiff did not have a burden to show the accommodation could be "easily administered"; instead, the defendant has the burden of persuasion to demonstrate that adjusting its requirements would impose an undue hardship on it.²²⁸

226. See, e.g., *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1526 (11th Cir. 1997); *Willis v. Conopco, Inc.*, 108 F.3d 282 (11th Cir. 1997); *Shiring v. Runyon*, 90 F.3d 827 (3d Cir. 1996); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996); *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995). Defendants also have the burden of persuasion where they assert that an accommodation will fundamentally alter a program. See e.g., *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998); *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997); *Juvelis v. Snider* 68 F.3d 648, 653 (3d Cir. 1995). It should be noted, however, that there is some difference in the circuits on the burdens of proof and persuasion under § 504 on the reasonable accommodation and undue hardship question. For example, the D.C. Circuit places the burden of both production and persuasion on the reasonable accommodation question on the plaintiff. See *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994). If the employer raises an undue hardship defense, however, then the burden of proof falls on it. *Barth*, 2 F.3d at 1186-87.

The Fifth and Ninth Circuits have essentially placed the burden on the issue of reasonable accommodation, as well as on undue hardship, on the employer. The Fifth Circuit established a series of shifting burdens. The employer bears an initial burden of production, pursuant to which it must "present[] credible evidence that indicates accommodation of the plaintiff would not reasonably be possible." *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 308 (5th Cir. Unit A Nov. 1981). If the employer has done so, the burden of production shifts to the plaintiff, who must "com[e] forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence." *Prewitt*, 662 F.2d at 308. The burden of persuasion, however, remains always with the employer. *Id.* The Ninth Circuit adopted the Fifth Circuit's analysis in *Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985).

227. *Juvelis v. Snider*, 68 F.3d 648, 653 n.5 (3d Cir. 1995) (emphasis added).

228. *Id.*

In *Juvelis*, the parents of a profoundly retarded man who had lived in a Pennsylvania residential home for a number of years sought to change his legal domicile so that he would qualify for state-funded mental retardation services. The parents lived in Venezuela, and had placed their son in the home while he was a minor. They eventually paid several hundred thousand dollars for his care over a period of eighteen years, but were no longer able to afford it because of increasing costs.²²⁹

Pennsylvania's Department of Public Welfare (DPW) had a policy presuming that a minor retained his parents' domicile unless and until he established a new one. Proof of change of domicile had two components: physical presence plus an intent to remain. The patient in question had a physical presence in Pennsylvania but lacked the mental capacity to form an intent to remain. The parents sought an exception to this policy, but DPW refused. The parents sued, arguing the policy violated section 504 by discriminating against people with profound retardation. The court stated that it was up to DPW to show that the exception to its residency policy would constitute an undue burden or modify the essential nature of its program.²³⁰

It found that DPW had failed to make this showing.²³¹ The court noted that several other courts had allowed incompetents to change their domicile so long as they showed "substantial contacts" with the state and the evidence showed that the guardians were acting in good faith.²³²

DPW argued that the substantial contacts test would be susceptible to abuse, with, among other things, out-of-state parents presenting "sham residency claims on behalf of their incompetent children."²³³ The court was skeptical of these predictions, noting that DPW had offered no evidence the exception would likely lead to those results, and that the threshold good faith inquiry could forestall this kind of abuse.²³⁴ It also noted that it only required DPW to consider substantial contacts when traditional residency tests discriminatorily excluded retarded

229. *Id.* at 651.

230. *Id.* at 651-52.

231. *Id.* at 652.

232. *Juvelis*, 68 F.3d at 655-57.

233. *Id.* at 657.

234. *Id.*

individuals.²³⁵ Accordingly, it found that investigating whether the incompetent had sufficient contacts and the guardians were acting in good faith did not place an undue burden on the state.²³⁶

Courts should similarly find that investigating whether individual athletes will cause unfair competitive advantage or increased risk of injury does not place an undue burden on athletic associations. They should be skeptical of claims of the difficulty of doing such an investigation because several states already have established procedures for evaluating waiver requests. For example, the Montana High School Association has a by-law entitled "IDEA/SECTION 504 AGE RULE APPEALS" which provides that a "special education" student may appeal an MHSA ineligibility decision made under the age rule. Under the IDEA/Section 504 appeals rule, the appealing student has the burden of proof with regard to six enumerated requirements.²³⁷

Given the existence of these rules, athletic associations in other states which resist requests for waivers will be hard-pressed to present evidence that investigating whether they

235. *Id.*

236. *Id.*

237. *M.H. v. Montana High Sch. Ass'n*, 929 P.2d 239, 242 (Mont. 1996) (citing MONTANA HIGH SCH. ASS'N OFFICIAL HANDBOOK, By-Laws, Article VII, Subsection (B)(4), 31 (1995-1996)). *See also* University Interscholastic League v. Buchanan, 848 S.W.2d 298, 302 (Tex. App. 1993) (noting league already had a waiver procedure for some eligibility rules, including the four-year eligibility rule, but not the age rule, and stating that "instituting such a procedure for the over-19 rule might be a reasonable accommodation in the UIL program to ensure that handicapped persons achieve meaningful access to the competitions regulated by the UIL."); *Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 726 P.2d 231, 238 (Ariz. Ct. App. 1986) (holding that association whose bylaws specifically provided that its Executive Board exercise discretion in considering hardship waivers to its eligibility rules improperly failed to exercise such discretion in considering waiver application for student who turned nineteen before his senior year in high school after being held back twice due to a learning disability); *Duffley v. New Hampshire Interscholastic Athletic Ass'n, Inc.*, 446 A.2d 462, 467 (N.H. 1982) (holding that an athlete who sought an exemption from the eight-semester disqualification rule, where he had missed a semester of school due to illness, was denied due process when the board of an athletic association failed to make the required findings of fact; the court noted that the athletic association bylaws had a waiver procedure which required it to consider "1. The merits of the individual case. 2. Whether or not the granting of the deviation from the rule would be inconsistent with the purposes of the rule. 3. Whether or not the individual concerned caused or contributed to cause the existence of the factors which result in ineligibility.").

should be granted constitutes an undue burden. And, even if the waiver procedure were in some way burdensome, the procedure will apply only in narrow circumstances: when an athlete produces evidence that a physical or mental impairment caused the delay in his education. Accordingly, such a waiver procedure cannot be an undue burden because it will rarely occur.

IV. IS A STUDENT WHO HAS AN INCREASED RISK OF INJURY "OTHERWISE QUALIFIED" TO PLAY SPORTS?

Challenges to decisions barring students from participating in interscholastic athletics are not limited to those with learning disabilities. Students with physical impairments have also sued where schools have decided they are not "otherwise qualified" based on concerns they were subject to an increased risk of injury. Courts interpreting section 504 are split on the question of whether a student should be allowed to play where his doctors and the school's doctors disagree on the risk of injury. Some courts have held that, where the student and/or his family are fully informed of the risks, their decision that he play should be honored. Others have held that the school's decision barring the player because of an increased risk of injury should be upheld as long as it is reasonable and rational. The language and legislative history of the ADA, however, come down in favor of the former position and future courts should allow student-athletes to play so long as they make a decision informed by all the facts.

A. *Rehabilitation Act Cases on "Threat to Self"*

Courts applying section 504 have stated that although blanket exclusions are generally unacceptable, legitimate physical requirements are proper.²³⁸ A significant risk of physical injury can disqualify a person if the risk cannot be eliminated,²³⁹ but disqualification is inappropriate unless there is more than merely an elevated risk of injury.²⁴⁰ And, since almost all disabled

238. *Knapp*, 101 F.3d at 483 (citing *Davis*, 442 U.S. at 407).

239. *Id.* (citing *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991)).

240. *Id.* (citing *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985)).

individuals are at a greater risk of injury, physical qualifications based on risk of future injury must be examined with special care so that the purposes behind the Rehabilitation Act are not circumvented.²⁴¹ The question under section 504 is whose assessment of the risk of future injury controls?

1. Courts Holding that the Individual's Rational Decision to Take Risk Controls.—Most courts addressing this issue have held that it was up to the individual and not the school to decide if the risk is acceptable. In *Poole v. South Plainfield Board of Education*²⁴² the court held a school board violated the Rehabilitation Act when it refused to let a student with one kidney wrestle. The board based its decision on a fear of injury to the student's remaining kidney.²⁴³

Poole was born with only one kidney; the remaining one was healthy. The son of a former state champion wrestler, he wrestled in the eighth, ninth and tenth grades, but was barred from the team in his junior and senior years when the school system's medical director advised the board it should not allow Poole to participate because of his physical condition.²⁴⁴ Poole and his parents presented the testimony of two other doctors who stated that he could safely wrestle and offered to sign a waiver absolving the board of liability. The school board found this insufficient citing its obligation to protect children from injury.²⁴⁵

241. *Id.* (citing *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619, 622 (9th Cir. 1982)).

242. 490 F. Supp. 948 (D. N.J. 1980).

243. *Poole*, 490 F. Supp. at 952.

244. *Id.* at 951-52. The doctor wrote to the board that: "It is in the best interest of the students to bar them from contact sports despite the wrath from both students and parents. How can you justify and explain to the student who has one kidney and the other destroyed that his death or lifelong attachment to a kidney machine was worth the 'glory.'" *Id.* at 952.

245. *Id.* In an opinion letter the board's attorney advised:

Although, at first blush, a complete release and waiver would appear to resolve the problem at hand, such an approach side-steps the basic question of responsibility. In other words, in my opinion, the Board of Education cannot abrogate its responsibility towards the pupils in question by placing the entire burden of responsibility upon the pupils and parents. In this type of situation, the school board stands in loco parentis, which means literally "in place of the parents". As such, it is for the Board of Education to exercise its collective judgment in this matter and a waiver or release from the parents based upon their own judgments that their sons should be allowed to participate cannot,

The court, however, found that the school had failed to show that Poole was not "otherwise qualified." It noted that "[t]he Board ha[d] nowhere suggested that Richard was incapable of pinning his adversary to the mat or meeting the training requirements of a team sport," and "seem[ed] to have premised its decision on fear of injury to Richard's only kidney."²⁴⁶ The court acknowledged that injury to Poole's other kidney would have grave consequences, but stated the same was true of other injuries he or any other member of the wrestling team could suffer.

Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. *Life has risks. The purpose of section 504, however, is to permit the handicapped individual to live life fully as they are able without paternalistic authorities deciding that certain activities are too risky for them.*²⁴⁷

Turning to the evidence before it, the court noted that Poole and his parents had consulted two doctors and a college wrestling coach, all of whom felt that he could wrestle safely. The Board knew of these meetings, but still insisted on "imposing its own rational decision over the rational decision of the Pooles."²⁴⁸ The court held that "it had neither the duty nor the right under section 504 to do so. . . . Whatever duty the Board may have had towards [Poole] was satisfied once it became clear that the Pooles knew of the dangers involved and rationally reached a decision to encourage their son's participation in inter-scholastic wrestling."²⁴⁹

in my opinion, abrogate the Board's ultimate responsibility.

Id.

The court, however, held the board's decision "[stood] the doctrine of in loco parentis on its head," noting that the doctrine's purpose was to allow a school to act "in place of the parents" when they were absent. *Poole*, 490 F. Supp. at 592. Here, the school was going against the express wishes of parents, who with their son, had reached "a rational decision concerning the risk involved in wrestling." *Id.*

246. *Id.* at 953.

247. *Id.* at 953-54 (emphasis supplied).

248. *Poole*, 490 F. Supp. at 954.

249. *Id.* at 592. See also *Wright v. Columbia Univ.*, 520 F. Supp. 789, 794 (E.D. Pa. 1981) (stating that while the school's motives behind barring a student with only one eye from playing football because of the risk of injury were "laudabl[e]," they "derogate[d] from the rights secured to plaintiff under Section 504 which prohibits

'paternalistic authorities' from deciding that certain activities are 'too risky' for the handicapped person," and holding school violated Rehabilitation Act when it refused to respect the student's express wishes after he had "reached a rational decision concerning the risk involved"); *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 424 (E.D. Pa. 1982) (holding school could not bar student with one kidney from wrestling and playing football; the court did not discuss or question of the student's right to make the decision to play, but found instead that the school had not proven that the student's condition disqualified him from participation); *Knapp v. Northwestern Univ.*, 942 F. Supp. 1191, 1198 (N.D. Ill. 1996) (holding school's basis for declaring student with heart condition ineligible to play basketball insufficient and in violation of the Rehabilitation Act), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997).

Similar decisions have been reached under a New York statute which provides judicial oversight of school district determinations barring students from participating in interscholastic sports because of physical disabilities. N.Y. EDUC. LAW § 3208-a (McKinney 1990). This statute was passed in response to decisions barring students with limited eyesight and partial deafness from playing contact sports. See *Spitaleri v. Nyquist*, 345 N.Y.S.2d 878 (Sup. Ct. 1973) (student with diminished sight in left eye barred from playing high school football based on school physician's recommendation despite evidence he had played grade school football and other sports without injury, his psychological well-being would be ill-affected if he was not allowed to play, and his parents' willingness to sign a liability waiver); *Colombo v. Sewanhaka Cent. High Sch. Dist.*, 383 N.Y.S.2d 518 (Sup. Ct. 1976) (court deferred to school physician's judgment barring partially deaf student from playing high school football, lacrosse, or soccer since participation posed a risk of injury to the boy and to other team members because of his inability to accurately perceive the direction of sound.).

The statute is popularly referred to as the "Spitaleri Bill." See *Shepherd, supra* note 138, at 170 (a brief account of its enactment can be found in HERB APPENZELLER, *THE RIGHT TO PARTICIPATE: THE LAW AND INDIVIDUALS WITH HANDICAPPING CONDITIONS IN PHYSICAL EDUCATION AND SPORTS* 156-57 (1983)). It allows a student's parent or guardian to petition a court with affidavits from at least two licensed physicians expressing their opinion that the student is physically capable of participating in athletics, that such participation would be reasonably safe, and describing any special precautions necessary to protect the student. N.Y. EDUC. LAW § 3208-a(2) (McKinney 1990). The court is obligated to grant the petition "if it is satisfied that it is in the best interests of the student to participate in an athletic program and that it is reasonably safe for him to do so." *Id.* at § 3208-a(3). The statute also immunizes the school district from liability for any injury sustained by the student and holds it free from responsibility for the cost of any special measures or devices needed to protect the child. *Id.* at § 3208-a(4).

Three students have successfully used the "Spitaleri" bill to force schools to allow them to play. The first such suit was *Kampmeier v. Harris*, 411 N.Y.S.2d 744 (App. Div. 1978), *rev'g*, 403 N.Y.S.2d 638 (Sup. Ct. 1978). Margaret Kampmeier was visually impaired, and initially failed to obtain relief in the federal courts under § 504 of the Rehabilitation Act of 1973. See *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977) (holding "exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy"). Her parents then sued in state court using the Spitaleri bill. The trial court concluded that although it would be reasonably safe for Margaret to participate in athletics, it was not in her best interests to do so given the school district's immunity from

2. *Courts Holding that the School's Rational Decision Concerning the Risk Controls.*—The *Knapp* appellate court, however, held that the decision of whether it was too risky for a student to play should be made by the school, and that Northwestern had not violated the Rehabilitation Act when it refused to let a basketball player with a heart condition play.²⁵⁰ There was conflicting testimony on the risks presented by this condition,²⁵¹ and the district court had decided that in such circumstances it was up to the court to determine which side's experts were correct.²⁵² The Seventh Circuit disagreed, stating that

liability granted under the statute. *Kampmeier*, 403 N.Y.S.2d at 640-41. The appellate division reversed stating that the school board's immunity from liability was not a proper factor to be considered in weighing the student's best interests, and that the record supported a finding that it was reasonably safe for Margaret to participate in an athletic program provided she used her protective eyewear. *Kampmeier*, 411 N.Y.S.2d at 746. See also *Swiderski v. Board of Educ*, 408 N.Y.S.2d 744 (Sup. Ct. 1978) (court held it was in best interest of the student, who had defective vision in one eye, to participate in athletic program and that it was reasonably safe for her to do so, provided her eyes were protected at all times by protective eye shields prescribed by her doctor); *Pace on Behalf of Pace v. Dryden Cent. School Dist.*, 574 N.Y.S.2d 142, 144 (Sup. Ct. 1991) (school district enjoined from prohibiting 17-year-old student's participation in interscholastic athletic programs; one of student's kidneys had been removed, and school physician recommended that he be prohibited from participation in contact sports due to dire consequences of damage to remaining kidney, but urology specialist and student's family physicians provided affidavits concluding not only that student's participation in contact sports was "reasonably safe," but that health risks had been discussed with student and his parents).

Finally, a federal district court held in *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977), that a professional hockey player with sight in one eye was entitled to participate in the American Hockey League, despite a rule to the contrary, under the New York Human Rights Law forbidding discrimination on the basis of disability. This appears to be the only reported case involving a disabled athlete and professional sports. *Neeld*, however, was unsuccessful in a lawsuit based on § 1 of the Sherman Anti-Trust Act attacking a National Hockey League bylaw prohibiting participation by a player with sight in only one eye. See *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979).

250. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 485 (7th Cir. 1996); *cert. denied*, 117 S. Ct. 2454 (1997).

251. *Knapp* presented testimony from three doctors, including the Indiana University basketball team physician, that although he was at increased risk for sudden cardiac death, that risk was insubstantial or at least acceptable, especially with the internal defibrillator in place. *Knapp*, 101 F.3d at 478, 483.

252. *Knapp*, 942 F. Supp. at 1197. The court noted:

In this case, there are highly qualified experts in agreement on all the basic scientific principles and differing only in their medical judgment on the final question. . . . All the physicians who testified used commonly accepted scientific principles and proven data about the heart and its functioning. All pos-

“medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations.”²⁵³ If the school has examined all the medical evidence on the risk of injury it has the right “—regardless of whether conflicting medical opinions exist— . . . to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act.”²⁵⁴

The court acknowledged that a decision to bar an athlete from participating could not be based on paternalistic concerns, but stated that “here, where Northwestern acted rationally and reasonably rather than paternalistically, no Rehabilitation Act violation has occurred.”²⁵⁵ It also stated, however:

[W]e wish to make clear that we are *not* saying Northwestern’s decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act. On the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recom-

sess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. I find that there is nothing in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), or Federal Rule of Evidence 702, that precludes me from considering the views of all the physicians in this case. As such, I must consider the testimony of all the experts who testified and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts, and the random assignment of this case has left it here with me.

Id.

Weighing the testimony before it, the court decided that the risk Knapp would experience a second “cardiac death” while playing intercollegiate basketball was either low or unknown, and, if he did, the risk was slight that the implantable cardioverter defibrillator would not work to restore a normal heart beat. Accordingly, it concluded that Northwestern violated the Rehabilitation Act when it refused to let Knapp play intercollegiate basketball. *Id.* at 1197-98.

253. *Knapp*, 101 F.3d at 484. The court later stated that “[t]he place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is more persuasive.” *Id.* Citing *Poole*, but not addressing its reasoning, the court stated: “We reject those cases intimating that a school’s rational decision has no weight.” *Id.*

254. *Id.*

255. *Id.* at 486.

mendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team. Simply put, all universities need not evaluate risk the same way. What we say in this case is that if substantial evidence supports the decision-maker—here Northwestern—that decision must be respected.²⁵⁶

B. *The ADA Drops Language on "Threat to Self"*

The disagreement among the Rehabilitation Act cases involving claims of future injury appears to be resolved by the plain language of the ADA. It drops the language on "threat to self" found in the section 504 regulations which existed when it

256. *Knapp*, 101 F.3d at 485. See also *Pahulu*, 897 F. Supp. at 1394 (court found that decision of team physicians barring football player with spinal stenosis from playing "although conservative, is reasonable and rational. Thus, the defendants' decision regarding disqualification has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment."); *Kampmeier v. Nyquist*, 553 F.2d 296, 300 (2d Cir. 1977) (junior high school students with vision in only one eye were denied preliminary injunction where school officials relied on medical opinion that children with sight in only one eye were not qualified to play in contact sports because of the high risk of eye injury, and students presented little evidence—medical, statistical, or otherwise—which cast doubt on the substantiality of that rationale. The court held that school officials could use their *parens patriae* power over the students to "protect[] their well-being."); *Larkin v. Archdiocese of Cincinnati*, No. C-1-90-619 (S.D. Ohio Aug. 31, 1990) (In an unreported oral decision, the court held that a private school did not violate the Rehabilitation Act when it refused to let student with a heart condition play high school football. All physicians, including Larkin's personal doctor, recommended against his playing football, and the court found "substantial justification" for the school's decision.), *aff'd* No. 90-3893 (6th Cir. 1990). More complete discussions of *Larkin* can be found in Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987, 1014-15 (1992) [hereinafter *Participation Decision*], and Matthew J. Mitten, *Sports Participation by Handicapped Athletes*, 10 ENT. & SPORTS LAW. 15, 18 (1992).

After losing his suit against Northwestern, Knapp transferred to Northeastern Illinois in Chicago which cleared him to play. See Rick Telander, *Knapp Time at Last: Just Getting in Game Becomes Big Victory*, CHI. SUN-TIMES, Nov. 7, 1997, at 148. Less than a month into the season, however, Knapp's defibrillator went off during practice, knocking him to the floor. Gene Wojciechowski, *Shocker is Player Still Wants the Ball*, CHI. TRIB., Dec. 6, 1997, at 1. His doctors cleared the problem as a malfunction of his defibrillator, but the school would not let him play until his main doctor met with the team doctor, who had to give permission for him to play for Northeastern. Len Ziehm, *Knapp May Suit Up Thursday: But Likely Won't Play for Eagles*, CHI. SUN-TIMES, Jan. 7, 1998, at 99.

was passed, and both case law and commentary state that this eliminates such an argument as a defense to an ADA suit.

At the time the ADA was passed, section 504 regulations defined a "qualified handicapped person" as one "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of *the individual or others*."²⁵⁷ The ADA, however, contains no mention of risk to anyone in its definition of "qualified individual with a disability." Instead, it makes a "direct threat to the health or safety of *other individuals* in the workplace" a defense to a charge of employment discrimination under the Act.²⁵⁸ There is no mention of persons who present a risk to *themselves*.²⁵⁹

An EEOC regulation interpreting this section, however, attempts to bring it in line with Rehabilitation Act case law by defining a direct threat as "a significant risk of substantial harm to the health or safety of *the individual or others* that cannot be eliminated or reduced by reasonable accommodation,"²⁶⁰ and states that "[a]n employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of *himself/herself or others*."²⁶¹ After discussing harm to others, the EEOC regulations state unequivocally:

An employer is also permitted to require that an individual not pose a direct threat of harm to *his or her own safety or health*. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.²⁶²

257. 29 C.F.R. § 1613.702(f) (1991) (emphasis added).

258. 42 U.S.C. § 12113(b) (emphasis added).

259. *Id.*

260. 29 C.F.R. § 1630.2(r) (1997) (emphasis added).

261. 29 C.F.R. § 1630, Appendix § 1630.2(r) (1997) (emphasis added).

262. *Id.* (emphasis added). There is no such language in the Department of Justice's regulations interpreting Titles II and III of the ADA. The Title III regulations state that the ADA does not require a covered entity to "permit an individual to participate in or benefit from, the goods, services, facilities, privileges, advantages and accommodations" . . . "when that individual poses a direct threat to the health or safety of *others*." 28 C.F.R. § 36.208(a) (1996). The regulation defines a direct threat as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of

There has not been much litigation on this issue, but at least one plaintiff apparently pointed to the ADA's narrow definition of direct threat and argued that it does not apply if a person with an increased risk of injury seeks to participate in competitive sports.²⁶³ In *Devlin*, the defendant asserted in its answer that "[p]laintiff's participation in competitive youth soccer will pose a substantial risk of harm to him."²⁶⁴ Devlin moved to strike the defense, arguing that the ADA "limit[s] the direct threat defense to threats to others."²⁶⁵ The court denied the motion to strike without any analysis, simply stating that there were questions of fact and law regarding the issue, and that it was "not inclined at this time to preclude the Defendant from asserting this defense."²⁶⁶

Another court, however, has held the EEOC's interpretation applying the ADA's "direct threat" language to harms to the individual with a disability is "untenable."²⁶⁷ It rejected the EEOC regulation because it "render[ed] certain words in the ADA meaningless."²⁶⁸ The court stated that the EEOC's interpretation would make sense if the ADA referred to "a direct

auxiliary aids or services." 28 C.F.R. § 36.208(b) (1996). In making this determination the entity must

make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

28 C.F.R. § 36.208(c) (1996). An interpretive guidance in the Title II regulations indicates that these regulations apply equally to public entities. 28 C.F.R. Pt. 35.100, subpt. A § 35.104 (1997) ("Where questions of safety are involved, the principles established in § 36.208 of the Department's regulation implementing Title III of the ADA, to be codified at 28 CFR, part 36, will be applicable.")

One commentator has stated that this regulation means a school has "no direct authority either under the ADA or its implementing regulations to refuse an athlete the opportunity to return to play based on a risk of future injury to himself or herself." Jones, *supra* note 47, at 197.

263. See *Devlin v. Arizona Youth Soccer Ass'n*, No. CIV 95-745 TUC ACM, 1996 WL 118445 (D. Ariz. Feb. 8, 1996).

264. *Devlin*, 1996 WL 118445, at *4.

265. *Id.*

266. *Id.*

267. *Kohnke v. Delta Airlines*, 932 F. Supp. 1110 (N.D. Ill. 1996).

268. *Kohnke*, 932 F. Supp. at 1111.

threat to health or safety in the workplace."²⁶⁹ But the ADA referred to "a direct threat to the health or safety of *other individuals* in the workplace," and the court held the EEOC's interpretation "would render entirely meaningless the phrase 'of other individuals.'"²⁷⁰

The *Kohnke* decision is in line with scholarly criticism of the EEOC's including "threat to self" as a defense to ADA claims. For example, Mary Anne Sedey saw two problems with the threat to self as a defense.

The first is the risk that employers will, perhaps out of misguided concern about the well-being of disabled individuals, set themselves up as paternalistic authorities who can decide what activities are "too risky" for a disabled individual to undertake. It is precisely this kind of paternalism which the Act is designed to avoid. Second, employers will almost always believe that the disabled are, at least theoretically, at greater risk from work-related injuries than non-disabled employees.²⁷¹

269. *Id.*

270. *Id.* at 1111-12. The court stated that its conclusion was further supported by the definitional section of the ADA, which states that "[t]he term 'direct threat' means a significant risk to the health or safety of *others* that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (1994) (emphasis added). It said the EEOC's interpretation had to be rejected because it would render the words "of others" meaningless.

The court also stated that because the "direct threat" language in the ADA is clear and unambiguous, there was no need to consult legislative history. *Id.* at 1112 (citing *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992)). It did so nonetheless, and concluded that it provided little support for the EEOC's view that a "direct threat" includes a threat to the plaintiff himself. *Id.* It noted that the Report of the House Judiciary committee explained that the "direct threat" language in the ADA codified the Supreme Court's holding in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987): a "person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." H.R. REP. NO. 101-485, pt. 3, at 45, reprinted in 1990 U.S.C.C.A.N. 267 at 468 (quoting *Arline*, 480 U.S. at 287 n.16). The Report noted that the ADA extended this standard "to all individuals with disabilities, and not simply to those with contagious diseases or infections," 1990 U.S.C.C.A.N. at 468, but did not say anything about a person with a disability harming himself as opposed to other individuals. Indeed, the *Kohnke* court noted that the Report mentioned threat or risk "to other individuals" or "to others" nine times, but never mentioned a threat or risk to the disabled person himself. *Kohnke*, 932 F. Supp. at 1112. This pattern is repeated in other committee reports on the ADA. *E.g.*, H.R. REP. NO. 101-485, pt. 2, at 56 (Report of House Committee on Education and Labor) (1990); S. REP. NO. 101-116, at 27 (Report of Senate Committee on Labor and Human Resources) (1990).

271. Mary Anne Sedey, *The Threat to Safety Defense Under the Americans with*

Concern for precisely these problems is evident in the ADA's language and legislative history. The "findings" listed in support of the statute state that discrimination against individuals with disabilities includes not only "outright intentional exclusion," but also "the discriminatory effects of . . . overprotective rules and policies. . . ." ²⁷² The House Labor report states: "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant." ²⁷³ It also states that "employment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of dis-

Disabilities Act, 39 FED. B. NEWS & J. 96, 98 (1992) (footnotes omitted). See also Ellen M. Saideman, *The ADA As a Tool for Advocacy: A Strategy for Fighting Employment Discrimination Against People with Disabilities*, 8 J.L. & HEALTH 47, 65 (1994) ("The inclusion of 'threat to self' may be attacked as contrary to the explicit language of the statute which only refers to the direct threat to 'others.' The use of 'threat to self' could allow employers to give reign to paternalism and benevolence."); John W. Parry, *Employment Under the ADA: A National Perspective*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 525, 531 (1991) (stating that regulation was "inconsistent with the statutory language" and "as a matter of policy, . . . runs counter to the notion of self-determination, by allowing someone else to determine what is or is not a threat to the employee"); Bryan P. Neal, Comment, *The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483, 486 (1992) ("[N]either the ADA nor its legislative history justifies allowing employers to use risk to self as a defense.").

Kohnke is also in line with the Supreme Court's interpretation of the "safety exception" in Title VII as amended by the Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k) (1994). In *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), the court struck down a "fetal protection policy" under which an employer barred fertile women from working in its battery manufacturing area because of fears that the lead could harm their unborn children if they became pregnant. The Court held that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." *Johnson Controls*, 499 U.S. at 204. It noted that in an earlier decision it had held that "danger to a woman herself does not justify discrimination." *Id.* at 202 (emphasis added) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)). "We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the 'individual woman's decision to weigh and accept the risks of employment.'" *Id.* (quoting *Dothard*, 433 U.S. at 335).

272. 42 U.S.C. § 12101(a)(5) (1994).

273. HOUSE COMM. ON EDUCATION AND LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485, pt. 2, at 73 (1990), reprinted in 1990 U.S.C.A.N. 267; see also S. REP. NO. 101-116, at 38 (Report of Senate Committee on Labor and Human Resources) (1990).

crimination for people with disabilities and has been a major barrier to such individuals.²⁷⁴

Given this legislative history, which echoes the concern in *Poole* and *Wright* about paternalistic school authorities, and the language of the ADA itself, there is no support for the EEOC regulations on risk to self or for a current court applying the ADA to rely on case law interpreting section 504 allowing such a defense. "Since Congress must have been aware of a conflict between the two standards and only placed one of those standards in the ADA, Congress could not have intended the other standard to be applicable."²⁷⁵ Thus, there can be no "risk to self" defense under the ADA.

*C. Discussion—The Individual Has the Right to Decide
Whether the Risk is Too Great*

The ADA marks a dramatic change in the viability of the "risk to self" defense. While the case law under section 504 was split on the issue, there is no support for it in either the plain

274. *Id.* at 74. Further support for the congressional opposition to a risk-to-self standard is found in the floor debates. Senator Kennedy, a cosponsor of the Senate bill, made it clear that the direct threat standard was limited to risks to others:

The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace—that is, to other coworkers or customers. A specific decision was made to state clearly in the statute that, as a defense, an employer could prove that an applicant or employee posed a significant risk to the health or safety of others, which could not be eliminated by reasonable accommodation. This is a restatement of the standard set forth by the Supreme Court in *School Board of Nassau County versus Arline*. *It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health.* For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply "protecting the individual" from opportunistic diseases to which the individual might be exposed. *That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.*

136 CONG. REC. S9,684-03 S9697 (July 13, 1990) (statement of Sen. Kennedy) (emphasis added). There are no statements to the contrary in the record either before or after Kennedy's statement.

275. Bryan P. Neal, *The Proper Standard for Risk of Future Injury Under the American with Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483, 502-03 (1992).

wording or legislative history of the ADA. Accordingly, student-athletes barred from participating because of concerns they will be injured should limit their complaints on that issue to the ADA.

Defendants can still try to use "risk to self" in another form, but such an argument is unlikely to be successful. For example, the *Kohnke* court stated that potential harm to a person with a disability himself may still be relevant to the broader language of the ADA even though it is not covered in definition of "direct threat."²⁷⁶ It stated that the fact that a person with a certain disability would injure himself on the job could provide evidence that an employer's qualification standards or selection criteria are "job related for the position in question and is consistent with business necessity."²⁷⁷

A school faced with a student who wants to play despite a high risk of injury could similarly argue that even if there is no direct threat defense its medical standards are covered by the ADA's regulations allowing safety requirements. The Title III regulations provide that public accommodations "may impose legitimate safety requirements that are necessary for safe operation."²⁷⁸ And, the Title II regulations allow eligibility requirements "necessary for the provision of the service, program, or activity being offered."²⁷⁹ An interpretive guidance issued for Title II states:

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.²⁸⁰

276. *Kohnke*, 932 F. Supp. at 1191.

277. *Id.* at 1191 (citing 42 U.S.C. § 12112(b)(6) (1994)).

278. 28 C.F.R. § 36.301(b) (1996).

279. 28 C.F.R. § 35.130(b)(8) (1996).

280. 28 C.F.R. pt. 35 app. § 35.130 (1996). See also H.R. REP. NO. 485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303, 388. ("A public accommodation

Given the language of the statute and the Title II and III regulations specifically limiting the direct threat defense to harms *to others*, however, such a defense is unlikely to be successful. Accordingly, it will be up to the student-athlete, his family and his doctors to decide whether it is too dangerous for him to play.²⁸¹ If the student-athlete can compete at the same

may, however, impose neutral rules and criteria that are necessary for the safe operation of its business. For example, a height limitation for certain rides in an amusement park will screen out certain adults of short stature, but may still be a legitimate safety criterion. Safety criteria must, however, be based on actual risks and not on speculation, stereotypes, or generalizations about persons with disability.”).

281. Other commentators have also concluded that the decision on whether or not to play should be left to the student-athlete. See Jones, *supra* note 47, at 203 (“the athlete, as a competent autonomous adult has the right to make [the] decision [to play with risk of injury]”).

Jones, however, would allow the school to bar the student athlete from playing in certain circumstances. She states that she

would incorporate into the definition of “qualified handicapped or disabled person” for purposes of participation in postsecondary athletic events the requirement that participation by the previously ill or injured athlete not pose a substantial risk of irreversible serious bodily injury or death to the athlete. I would also require that any criteria used to disqualify a student athlete from participation be related to the athlete’s expected performance and be consistent with skills necessary for safe performance. As part of the qualified handicapped or disabled person standard, I would enforce the reasonable accommodation requirement set forth in *Southeastern Community College v. Davis* and *Alexander v. Choate*. . . .

Bearing in mind that Section 504 and the ADA exist to provide disabled individuals with the widest array of opportunities possible, I would urge that my standard be strictly construed. I would not allow disqualification for any potential illness or injury which could be substantially prevented through “reasonable accommodation.” . . .

On the question of substantial likelihood of harm to the athlete, as the degree of seriousness of harm increases, the probability of occurrence could diminish and an athlete could still be found “unqualified” to compete.

Jones, *supra* note 47, at 206-07 (citations omitted).

Professor Mitten originally held a similar position but now differentiates between amateur and professional athletes. In his earlier piece he stated:

The [Rehabilitation] Act prohibits a university from substituting its decision for a considered decision of a fully-informed adult athlete to participate in athletics supported by a credible medical opinion. Handicapped adult athletes capable of weighing the known risks and potential benefits have the right under the Act to choose to participate in competitive sports. This position is consistent with the principle that sound-minded adults have the legal right to accept or refuse medical treatment even if others disagree with their decision.” (notes omitted).

Mitten, *Participation Decision*, *supra* note 256, at 1021-22

Mitten stated he would limit the application of Jones' proposal solely to cases where all the physicians who examine the student-athlete agree he cannot safely participate. Mitten, *Participation Decision*, *supra* note 256, at 1020. He also said he would allow the student-athlete to play if he were able to present medical testimony saying it was safe for him to play, even if the school's physicians disagreed.

A university has a substantial justification for excluding from athletics participation a handicapped adult who has not obtained a competent physician's approval to play a given sport. . . .

A college has no substantial justification for excluding a handicapped adult from school-sponsored athletics if competent physicians reach conflicting participation recommendations based on an individualized physical examination and different evaluation of the medical risks. A university may violate the [Rehabilitation] Act's reasonable accommodation requirement if it refuses to permit a handicapped athlete to participate in a sport in accordance with the team physician's recommendation but contrary to another competent physician's credible recommendation.

Id. at 1020-21 (citations omitted).

In a subsequent article, however, Professor Mitten, who filed an amicus brief supporting Northwestern in *Knapp* on behalf of the American Medical Society for Sports Medicine and the American Osteopathic Academy of Sports Medicine, has rethought his position.

Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L.J. 401 (1998) He states that the "primary weakness" of his former position was its

de-emphasis of the school's legitimate interest in protecting a physically impaired athlete's health and safety. . . . [The] view that an individual should not be prevented from engaging in activities that may endanger one's health . . . supports a physically impaired athlete's right to refuse medical treatment and to individually engage in athletic activities that threaten his or her health, but it does not justify requiring the sponsor of an athletics event to involuntarily provide a playing field for endangering one's personal health.

Id. at 426.

Accordingly, Professor Mitten advocates the adoption of a "team physician medical judgment" model for amateur athletes. This model would entitle a school to "rely on its team physician's reasonable opinion that the athlete's disability exposes him or her to significant risk, even if other physicians have provided medical clearance." *Id.* at 421-22. Professor Mitten states that this model

places legitimate communitarian health and safety concerns above an athlete's libertarian personal autonomy interests. If all concerned parties—the athlete, team physician, and school—cannot agree on the acceptability of assuming an enhanced but medically uncertain risk on the playing field, it is better to err on the side of caution.

Id. at 429.

Professor Mitten advocates a different model for professional athletes, however. The "athlete informed consent model" allows the athlete to decide whether to participate "if respectable medical authority provides clearance to play a sport." *Id.* at 421. Athletes could play even if they have been medically disqualified by the team physician so long as another doctor clears them and they are willing to waive any potential legal claims.

level as his peers, a school has "neither the duty nor the right" to bar a student from playing once it is satisfied that he and his family know of the dangers involved and rationally reach a decision to continue playing.²⁸²

According to Mitten, this model is more appropriate for professional athletes because they have a "greater interest in pursuing [their] livelihood with its potential multi-million dollar earning potential than an amateur athlete does in participating in sports as part of the educational process or for other personal objectives." *Id.* at 434. This greater interest is entitled to more weight than that of an amateur athlete and "[a] professional athlete [should] not be conclusively bound by the team physician's reasonable recommendation" of medical disqualification, but should be allowed to get second opinions. *Id.* at 434-45. As long as those second opinions were "individualized, reasonably made, and based on competent evidence," professional athletes could play if they chose to assume the risk. *Id.* at 435.

282. *Poole*, 490 F. Supp. at 954. Once it is determined that a school may not bar a student-athlete from playing because of the risk of injury, the question for schools becomes whether they can be held liable if the student is injured. Because of this article's focus on whether disabled students can force schools to allow them to participate at all, this will not be discussed in depth here.

Other commentators have stated that schools cannot be held liable so long as the student-athlete has been provided with sufficient information about his medical condition and the risks of playing. *See Jones, supra* note 47, at 209-10. This is consistent with *dicta* in *Johnson Controls*. Justice White's concurrence there expressed a concern that "it is far from clear that compliance with Title VII will pre-empt state tort liability. . . ." *Johnson Controls*, 499 U.S. at 213. The majority, however, stated it had previously held that "[w]hen it is impossible for an employer to comply with both state and federal requirements, . . . federal law pre-empts that of the States." *Id.* at 209 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)). It also noted that *Johnson Controls* had not raised this issue, and characterized Justice White's concern as "unfounded as well as premature." *Id.* at 210.

Schools might also consider asking student-athletes and/or their families to sign agreements releasing them from liability. Such agreements raise two separate issues: 1) whether schools can require the students and their parents to sign liability waivers before the student is allowed to play and 2) whether schools can enforce them if the student is injured. Again, because of this article's focus on the question of whether a school can bar an athlete at all, these issues will not be extensively discussed here. At least as it applies to high schools, these questions have been ably addressed in several recent articles. *See* Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7 (1996); Richard B. Malamud & John E. Karayan, *Contractual Waivers for Minors in Sports-Related Activities*, 2 MARQ. SPORTS L.J. 151 (1992); Joseph H. King, Jr., *Exculpatory Agreements for Volunteers In Youth Activities—The Alternative to "Nerf®" Tiddlywinks*, 53 OHIO ST. L.J. 683 (1992); Donald H. Henderson, Eugene L. Golanda, & Robert E. Lee, Comment, *The Use of Exculpatory Clauses and Consent Forms by Educational Institutions*, 67 ED. LAW REP. 13 (1991); Angeline Purdy, Note, *Scott v. Pacific Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 WASH. L. REV. 457 (1993); Andrew Manno, Note, *A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools From Liability for Injuries to Athletes with High Medical Risks*, 79

KY. L.J. 867 (Summer 1990/1991); Phoebe Carter, Annotation, *Validity, Construction and Effect of Provision Releasing School From Liability for Injuries to Students Caused by Interscholastic and Other Extracurricular Activities*, 85 A.L.R.4th 344 (1991).

Generally, schools face two hurdles in enforcing waivers: 1) the argument that such waivers are against "public policy," and 2) the rule that while parents may waive their own rights to sue, they cannot waive the child's right to sue once he reaches the age of majority. The seminal case on the first issue is *Wagenblast v. Odessa School Dist.*, 758 P.2d 968 (Wash. 1988), where the court held that requiring students and their parents to sign liability waivers in order to be allowed to participate in interscholastic sports was against public policy. See also *Dalury v. S-K-I, Ltd.*, 670 A.2d 795 (Vt. 1995) (voiding exculpatory agreements that required skiers to release ski areas from all liability resulting from negligence as contrary to public policy); *Kyriazis v. University of West Virginia*, 450 S.E.2d 649 (W. Va. 1994) (invalidating a release for state university-sponsored club rugby as against public policy). But see *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (holding that a waiver signed by mother of severely mentally retarded student releasing school from liability relating to his practicing for Special Olympics did not violate public policy); *Boyce v. West*, 862 P.2d 592 (Wash. App. 1993) (holding release of private college from liability to student in scuba diving course from ordinary negligence did not violate public policy).

On the second issue, see *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (Wash. 1992) (holding that an exculpatory clause in ski school application signed by parents was sufficiently clear to bar their claim rising out of child's injuries, but parent does not have legal authority to waive child's own future cause of action for personal injuries resulting from third party's negligence); *Childress v. Madison County*, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (holding that a waiver signed by mother of severely mentally retarded student releasing school from liability relating to his practicing for Special Olympics was valid against her but void as to son's rights); *Doyle v. Bowdoin College*, 403 A.2d 1206 (Me. 1979) (holding that releases signed by parent prior to son being injured playing hockey were void as a parent cannot release a child's cause of action); but see *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (App. 1990) (explaining that a parent can contract for a child). However, *Hohe* relies only on a case which allowed a parent to bind a child to the arbitration forum.

Schools also need to be concerned about the availability of adequate medical care if a student-athlete is injured. The court in *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993), recently held that there is a "special relationship" between the school and the student-athlete such that the school has a duty to establish preventive measures capable of providing treatment to student-athletes in a medical emergency. But see *Orr v. Brigham Young University*, 108 F.3d 1388 (10th Cir. 1997) (declining to follow *Kleinknecht*). For a thorough discussion of case law on a school's duty to exercise care with respect to student-athletes' safety see Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries to Student-Athletes*, 2 SPORTS L.J. 25 (1995); William H. Baker, *Injuries to College Athletes: Rights and Responsibilities*, 97 DICK. L. REV. 655 (1993); Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129 (1993); Andrew Rhim, Comment, *The Special Relationship Between Students and Colleges: An Analysis of a Heightened Duty of Care For Injuries to Student-Athletes*, 7 MARQ. SPORTS L.J. 329 (1996); Kerry

V. CONCLUSION

Courts interpreting Title IX have recognized the importance of interscholastic sports in the educational process and held that schools discriminate against women when they deny them equal opportunity to participate in athletics. A similar conclusion should be reached under section 504 and the ADA where student-athletes are denied the right to participate because of their mental or physical impairments. Schools and athletic associations, which emphasize the value of sports as a learning experience, should not be allowed to argue that student-athletes are not harmed when they are barred from playing simply because they may be able to participate in other activities. Section 504 and the ADA were passed to assure that people with physical and mental impairments be given the same opportunity to participate in *all* activities as people without them.

Neutral rules which have a discriminatory impact on disabled student-athletes should be evaluated on a case-by case basis. Courts must explore waiver requests in light of the purposes underlying the rule. If a student-athlete can show that allowing him to compete will not frustrate any of these purposes, a waiver is not a "fundamental alteration" and he should be allowed to play. Conducting an investigation on this question will not be an "undue burden" because the need to do such an analysis will only apply to athletes with disabilities, and the cost can be passed on to member schools.

Student-athletes with physical impairments that put them at a greater risk of injury should be allowed to make their own decisions on whether that risk is acceptable. The ADA dropped the "risk to self" language found in the Rehabilitation Act regulations and case law, and its legislative history evidences concerns about "paternalistic" authorities making decisions about what is best for persons with disabilities. If the student-athlete

L. Hollingsworth, Comment, *Kleinknecht v. Gettysburg College: What Duty Does a University Owe Its Recruited Student Athletes?*, 19 T. MARSHALL L. REV. 711 (1994); Barbara J. Jones, Comment, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343 (1991); J. Barton Goplerud, Note, *Liability of Schools and Coaches: The Current Status of Sovereign Immunity and Assumption of the Risk*, 39 DRAKE L. REV. 759 (1990).

can compete at the same level as his peers, a school has no right to bar him from playing.