Saint Louis University Law Journal

Volume 50
Number 1 *(Fall 2005)*

Article 8

2005

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Maureen A. Weston
Pepperdine University School of Law

THE INTERSECTION OF SPORTS AND DISABILITY: ANALYZING REASONABLE ACCOMMODATIONS FOR ATHLETES WITH DISABILITIES

MAUREEN A. WESTON*

I. INTRODUCTION[1]

When thinking about athletes participating in competitive or organized sports, typically the public rarely contemplates the inclusion of players with medical impairments or other physical, mental, and learning disabilities. Yet many athletes with disabilities, whether visible or hidden, have achieved success in both amateur and professional sports. Although deaf, Kenny Walker attained All-American status as a defensive tackle at the University of Nebraska and went on to play professionally with the Denver Broncos. Jim Abbot, who has only one arm as a result of a birth defect, successfully pitched in the professional baseball leagues. The sporting public has applauded the accomplishments of these athletes who are able to compete presumably "despite" their disabilities or by "overcoming" them. The awa turned to apprehension when Hank Gathers, who was medically cleared to play college basketball despite a heart rhythm disorder, died on the court, or when twelve-year old Michael Montalvo, who has AIDS, sought to enroll in karate classes, and even when Magic Johnson returned to professional basketball after revealing that he was HIV positive.

The rights of athletes with medical impairments or disabilities to participate in competitive sports are also increasingly controversial. Because of a medical impairment or disability, some athletes cannot satisfy certain eligibility requirements set by the governing sporting organizations or they need accommodation in order to participate. Recent national attention has

* Associate Professor, Pepperdine University School of Law. The Author would like to thank the Center for Health Law Studies and the *St. Louis University Law Journal* for their support and hosting of the Symposium on Sports Medicine, Doping, Disability and Health Quality, at which an early version of this paper was presented.

1. This introduction is reproduced with permission, from Chapter 14, originally authored by Maureen A. Weston, of RAY YASSER, JAMES R. MCCURDY, C. PETER GOPLERUD & MAUREEN A. WESTON, SPORTS LAW: CASES AND MATERIALS 817–18 (5th ed. Copyright 2003 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All Rights Reserved.).

focused on Casey Martin, who suffers from a severe congenital disability affecting his right leg, in his lawsuit seeking to compel the PGA Tour to permit Martin to ride a cart during competitions although all other players are required to walk.

Athletes who have been effectively excluded from sports participation because of a medical impairment or disability have invoked the stringent anti-discrimination standards of federal disability laws in asserting rights to participate and to reasonable modifications of eligibility standards in sports programs at the interscholastic, intercollegiate, and professional levels.

Federal disability legislation, primarily through the Rehabilitation Act of 1973, which applies to federally funded programs, and the Americans with Disabilities Act of 1990 (ADA), whose broader coverage reaches most private employers and private entities constituting places of public accommodations, prohibits discrimination on the basis of disability and further obligates these entities to provide reasonable accommodations, modifications, or auxiliary aids that will enable qualified individuals with disabilities to access and to participate in the program or activity. 29 U.S.C. § 794; 42 U.S.C. § 12101. In enacting the ADA, Congress found, *inter alia*, that individuals with disabilities continually encounter various forms of discrimination, including "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities, programs and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities." 42 U.S.C. § 12101(b). A goal of these laws, which apply to virtually all sports teams and organizations, is to assure the equality of opportunity and full participation for individuals with disabilities.

Federal disability laws have had and continue to have a significant impact in sports, raising complicated and controversial medico-legal questions surrounding the rights of individuals with disabilities to participate in athletics and the concomitant rights and obligations of the entities regulating athletic competition to set and enforce eligibility and safety rules. Many of the cases involving disability law in sports have garnered intense public attention, raising questions about the impact on the competitive nature of sports and the ability of sporting organizations to enforce rules of participation.

II. PROHIBITIONS ON DISABILITY-BASED DISCRIMINATION AND REQUIREMENTS FOR REASONABLE ACCOMMODATION

A. Historical Treatment of Athletes with Disabilities

Historically, athletes with medical impairments and disabilities had minimal legal recourse to assert rights to participate in competitive sports. No

such rights were recognized at common law, and Constitutional claims against exclusion met limited success. In *City of Cleburne v. Cleburne Living Center*,[2] the Supreme Court held that individuals with disabilities were not a quasi-suspect class.[3] As a result, public schools and institutions (as "state actors") could discriminate against or exclude disabled athletes from participation if rationally related to a legitimate objective, such as to guard the health and safety of athletes.[4] On a due process level, there is no fundamental or constitutional right to participate in competitive sports.[5]

B. Federal Laws Prohibiting Disability-Based Discrimination and Requiring Reasonable Accommodation

The need to recognize the rights of the disabled population began to emerge on a national scale in the early 1970s, motivating Congress to enact major federal legislation to recognize the civil rights of individuals with disabilities.[6]

1. The Rehabilitation Act and the ADA

Federal legislation, beginning with the Rehabilitation Act of 1973 and followed by the Americans with Disabilities Act of 1990, provides qualified disabled individuals with protection against discrimination on the basis of disability and requires covered entities to provide reasonable accommodations and to modify eligibility criteria that unfairly screen out persons with disabilities.[7] Recourse may also be available under state law disability-related discrimination statutes, but enforcement and remedies vary by state.[8] As a result, most disability discrimination claims are based on the federal statutes rather than on the U.S. Constitution.

2. Basic Non-discrimination Mandate

The general prohibition of discrimination provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

2. 473 U.S. 432 (1985).

3. *Id*. at 442.

4. *See id*. at 446 ("To withstand equal protection review, legislation that distinguishes between the [disabled] and others must be rationally related to a legitimate governmental purpose."); Matthew J. Mitten, *Sports Participation by "Handicapped" Athletes*, 10 ENT. & SPORTS LAW. 15, 17 (1992).

5. *See* Mitten, *supra* note 4, at 17.

6. *See* Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks that Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protection*, 26 HOFSTRA L. REV. 377, 397 & nn.100–01 (1997).

7. *See* 29 U.S.C. §§ 721, 794 (2000); 42 U.S.C. §§ 12101, 12112, 12182 (2000).

8. *See* Weston, *supra* note 6, at 400 & nn.123–25.

accommodations of any *place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation."[9]

Unlike other civil rights statutes that prohibit discrimination (for example, on the basis of race, age, or gender), federal disability laws also impose an affirmative obligation upon covered entities to comply with requests for reasonable accommodations, as well as for modification of non-essential eligibility criteria. For example, discrimination is defined by the statute to include, *inter alia*,

> the imposition or application of *eligibility criteria* that screen out or tend to screen out an individual with a disability . . . [and] 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.[10]

The ADA further requires that these "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."[11] Exceptions are warranted only where the entity can demonstrate that such criteria are necessary or that "making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations."[12]

3. Purposes

Participation in sports was not a specific focus of the federal legislation, whose primary intent was to address employment and physical access issues.[13] However, implementing regulations expressly require institutions to provide qualified individuals with disabilities an equal opportunity to participate in educational and nonacademic activities, including inter-collegiate athletics.[14] Moreover, the legislation's overarching purpose, to eradicate unfounded

9. 42 U.S.C. § 12182(a) (2000) (emphasis added). The same basic definitions, protections, and obligations apply under the ADA and the Rehabilitation Act. For ease of reading, references to the ADA herein encompass the Rehabilitation Act. *See* Weston, *supra* note 6, at 399 n.115.

10. 42 U.S.C. § 12182(b)(2)(A)(i)–(ii) (emphasis added).

11. *Id.* § 12182(b)(1)(B) (requiring integrated settings).

12. *Id.* § 12182(b)(2)(A)(ii) (emphasis added).

13. *See id.* § 12101; *cf.* Donald H. Stone, *The Same of Pleasant Diversion: Can We Level the Playing Field for the Disabled Athlete and Maintain the National Pastime, in the Aftermath of* PGA Tour, Inc. v. Martin: *An Empiral Study of the Disabled Athlete*, 79 ST. JOHN'S L. REV. 377, 381 (2005) ("It appears that Congress intended to protect athletes with disabilities from discrimination in various areas of sports."). Stone further notes the application of disability laws to athletics at all stages: professional sports leagues, public schools and universities, and athletic associations. *Id.*

14. Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1066 (1999) (citing 34 C.F.R. § 104.47 (2004)).

stereotypes and exclusion resulting from overprotective rules and exclusionary criteria, and to assert equal opportunity and full participation for persons with disabilities,[15] is equally applicable in the sports area.

C. Stating a Disability Rights Claim: An Athlete's Prima Facie Case

Athletes with disabilities may seek protection under, and athletic programs are required to comply with, either of the two primary federal laws that prohibit disability-based discrimination. To obtain such protection under either the ADA or Rehabilitation Act, an athlete must establish four elements. First, the program is a "covered entity" under the law.[16] Second, the athlete is "disabled" within the meaning of the statute.[17] Third, the athlete is "otherwise qualified" to participate, with or without reasonable accommodation.[18] Finally, the athlete was discriminated against (excluded from participation) because of disability.[19]

1. Athletic Programs, Leagues, and Organizations as "Covered Entities"

The initial element of an athlete's claim must establish that the defendant, school, program, or entity is a "covered entity" as defined under either the Rehabilitation Act or the ADA.[20] The Rehabilitation Act applies to recipients of federal funds, which generally include public programs, schools, colleges, or universities.[21] The ADA broadens the scope of coverage to private entities and places of public accommodation.[22] The ADA is codified under five titles. Title I applies to employment.[23] Title II applies to public programs and services, here governing entities that are publicly funded at the state or local

15. *See* 42 U.S.C. § 12101.

16. *See, e.g.*, *id*. § 12112(a) (prohibiting discrimination in employment).

17. *See, e.g.*, *id*.

18. *See, e.g.*, *id*.

19. *See, e.g.*, *id*.

20. *See supra* text accompanying note 16.

21. *See* 29 U.S.C. § 794(a) (2000) (requiring nondiscrimination under federal grants and programs and providing that "[n]o 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").

22. *See* 42 U.S.C. §§ 12112(a), 12132, 12182(a) (2000).

23. *Id*. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); *id*. § 12113(b) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.").

level.[24] Title III applies to private entities constituting places of public accommodation.[25] Public schools and universities are unquestionably covered under the mandates of Title II or of the Rehabilitation Act, and private universities are also covered under Title III as places of public accommodation.

A highly litigated issue has involved determining whether private sports leagues, associations, or athletic standard-setting or membership organizations are "places of public accommodation" subject to the ADA.[26] The ADA defines the term "public accommodation" by listing a host of "private entities" with operations that affect commerce.[27] The list of private entities includes twelve categories, which in turn contain over fifty examples of covered facilities, including "a gymnasium, health spa, bowling alley, golf course, or *other place of exercise or recreation*."[28]

Some courts strictly interpret the statutory language, holding that the terms "facility" and "place" in the ADA require a physical structure. For example, in *Elitt v. U.S.A. Hockey*,[29] a Missouri federal district court held that a youth hockey league and its national governing body did not constitute places of public accommodation.[30] In that case, the league refused to permit a child with Attention Deficit Disorder to play hockey.[31] In dismissing the claim, the court reasoned that the plaintiff had failed to show he was denied access to a *place* of public accommodation simply by alleging that he could not play in the league;

24. *See id.* § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); *id.* § 12131(2) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.").

25. *Id.* § 12182 (prohibiting discrimination by public accommodations).

26. *See, e.g.*, Matthews v. NCAA, 179 F. Supp. 2d 1209, 1218 (E.D. Wash. 2001) ("Federal courts have struggled with the issue of whether Title III applies to organizations and services not directly linked to a physical place or facility.").

27. 42 U.S.C. § 12181(7). The initial portion of the statute reads as follows: "Public Accommodation. The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—[Subparagraphs (A) through (L) list twelve categories of public accommodations]." *Id.*

28. *Id.* § 12181(7)(L) (emphasis added).

29. 922 F. Supp. 217 (E.D. Mo. 1996).

30. *Id.* at 223; *see also* Brown v. 1995 Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496, 498–99 (N.D. Ill. 1997) (holding that group sponsoring and organizing bike race was not a place of public accommodation subject to the ADA and upholding its refusal to permit disabled cyclist to participate for his failure to wear a bicycle helmet).

31. *Elitt*, 922 F. Supp. at 218.

that is, he had not shown that he was denied access to the ice rink itself.[32] The Sixth Circuit has reached a similar conclusion, holding that neither a state high school athletic association nor the National Football League ("NFL") were "places" of public accommodation, even though association and NFL events were held at "places" of public accommodations.[33]

Other courts take a broader view, holding that Title III is not limited to physical structures.[34] For example, in *Shultz v. Hemet Youth Pony League, Inc.*,[35] a California federal district court held that a youth baseball league and its organizing body were covered by the ADA.[36] In so doing, the court ruled that "Title III's definition of 'place of public accommodation' is not limited to actual physical structures with definite physical boundaries."[37] The court in *Bowers v. NCAA*[38] came to a similar conclusion. Although acknowledging that the NCAA is an unincorporated and voluntary membership organization of approximately 1,200 postsecondary educational institutions, and not a "place" of public accommodation, the *Bowers* court emphasized that the ADA

32. *Id*. at 223; *see also* Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding internet website not a place of public accommodation required to accommodate blind person and interpreting that a public accommodation must be a physical, concrete structure); *Brown*, 959 F. Supp. at 498 (noting that "place of public accommodation" is defined in the ADA regulations as a "facility" which falls within at least one of twelve listed categories and that "facility" is defined 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").

33. *See* Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1028, 1036–37 (6th Cir. 1995) (upholding refusal to modify age limit for athlete with learning disabilities); Stoutenborough v. Nat'l Football League, Inc., 59 F.3d 580, 583–84 (6th Cir. 1995) (holding the NFL and its member clubs do not fall within any of the twelve public accommodation categories and dismissing claims by hearing-impaired individuals challenging "blackout rule" barring live televised game broadcasts during non sold-out games).

In *Sandison*, the court held that Title III did not apply to high school athletic events which occurred at public parks and schools, stating that statutory language limiting places of public accommodations to private entities "compel[s] the conclusion that the applicability of [T]itle III turns not so much on *who* is covered: 'any person' leasing or operating a place of public accommodation is covered[.]" 64 F.3d at 1036. "The critical inquiry will typically be the nature of the *place* to which the disabled individual alleges unequal access." *Id*.

34. *See, e.g.*, Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 18–20 (1st Cir. 1994) (holding that "public accommodation" within meaning of Title III of the ADA includes more than physical structures, thus encompassing a trade association for a health benefit plan: "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.").

35. 943 F. Supp. 1222 (C.D. Cal. 1996).

36. *Id*. at 1223, 1225.

37. *Id*.

38. 9 F. Supp. 2d 460 (D.N.J. 1998).

prohibits more than just discrimination based on physical access.[39] As the chief entity responsible for governing intercollegiate athletics, the NCAA was found to control, manage, and regulate participation in intercollegiate sports through, *inter alia*, its eligibility rules.[40] Accordingly, the court found the NCAA subject to Title III by interpreting "operating" a place of public accommodations in terms of the entity's power to control, manage, or regulate the place and conditions causing the alleged discrimination.[41]

In *PGA Tour, Inc. v. Martin*,[42] the Supreme Court of the United States had the opportunity to clarify the issue. In that case, a disabled professional golfer sued the PGA, alleging that the PGA's rule banning the use of golf carts violated the ADA.[43] The Court held that this rule did, as applied to plaintiff Casey Martin, violate the ADA.[44] With respect to the coverage issue, the Court provided a cursory analysis, noting that the Tour occurred on a golf course, which is a type of public accommodation specifically listed in the relevant statute,[45] and that the PGA "leased" and "operated" golf courses.[46] The PGA admitted that its tournaments were conducted at places of public accommodation.[47] Even without squarely addressing the debate of whether a "place of public accommodation" requires a physical "place," the Court presumed that the ADA applied to the PGA because the Tour leased and operated golf courses to conduct its tournaments.[48]

Post-*Martin*, a federal district court held in *Matthews v. NCAA*[49] that the NCAA was a "public accommodation" and therefore subject to Title III of the ADA, due to the NCAA's close connection with stadiums and physical facilities.[50] The court concluded that the "NCAA's policies and eligibility criteria in fact have a direct link to a place: a football stadium, which provides

39. *Id*. at 467, 483, 488.

40. *Id*. at 487–89.

41. *See id*. at 486; *see also* Weston, *supra* note 14, at 1090–91.

42. 532 U.S. 661 (2001).

43. *Id*. at 664–65.

44. *Id*. at 690; *see* discussion *infra* Part III.C.

45. *PGA*, 532 U.S. at 677 (citing Americans with Disabilities Act, 42 U.S.C. § 12181(7)(L) (2000)).

46. *Id*. (citing 42 U.S.C. § 12182(a)). By the time the case had reached the Supreme Court, the PGA had essentially abandoned its earlier argument that the tour was a private club and thus altogether exempt from Title III's coverage. *Id*. at 677–78; *see also* Martha Lee Walters & Suzanne Bradley Chanti, *When the Only Way to Equal Is to Acknowledge Difference:* PGA Tour, Inc. v. Martin, 40 BRANDEIS L.J. 727, 735–36 (2002) (noting that "with little plumbing, the Court determined that the PGA was indeed a place of public accommodation covered by Title III and Casey Martin was a person entitled to its benefits").

47. *PGA*, 532 U.S. at 677.

48. *Id*.

49. 179 F. Supp. 2d 1209 (E.D. Wash. 2001).

50. *Id*. at 1223.

a place of exercise and a public gathering—a public accommodation explicitly enumerated in the ADA's text."[51] Although the Supreme Court did not squarely address the application of Title III to non-physical, standard-setting athletic organizations or associations, the broad interpretation taken by courts in subsequent decisions indicates a trend to hold organizations that effectively "control" access to participation via participation and eligibility rules within the definition of place of public accommodation under the ADA.[52] Thus, a sports league or organization may be subject to Title III where it "operates" a place of public accommodation by controlling participation via league rules.[53]

2. The "Disabled" Athlete

Assuming an athlete overcomes the initial hurdle of establishing that the particular entity or organization is covered by federal law, the athlete seeking protection under the ADA must be "disabled" within the meaning of the statute.[54] This requires that the athlete has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[55] The ADA's regulations describe "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[56] This definition excludes individuals with temporary injuries, medical impairments, or disabilities that do not substantially limit a major life activity.[57]

With respect to athletes excluded from sports participation based on permanent medical ineligibility, a critical inquiry is whether sports participation is a "major life activity." An athlete may also argue that the list of major life activities is non-exhaustive, leading the parties to argue whether participation in sports is a major life activity or integral to learning. For example, the Seventh Circuit has held that although a student was medically ineligible to play college basketball because of a heart condition, he was not

51. *Id*.; *see also* Bowers v. NCAA, 9 F. Supp. 2d 460, 483–84 (D.N.J. 1998); Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (holding that youth baseball league and its organizing body were covered by the ADA: "Title III's definition of 'place of public accommodation' is not limited to actual physical structures with definite physical boundaries. . . . Defendants are a 'place of public accommodation' under the ADA irrespective of their link to any physical facilities.").

52. *See Matthews*, 179 F. Supp. 2d at 1218–20.

53. *See, e.g.*, Neff v. Am. Dairy Queen Corp., 58 F.3d 1063, 1066 (5th Cir. 1995) (interpreting "operate" with its "ordinary and natural meaning. . . . [which is to] control or direct the functioning of[;] . . . [t]o conduct the affairs of; manage") (citations omitted).

54. *See supra* text accompanying note 17.

55. Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A) (2000); *see also id*. § 12102 (2)(B)–(C) (including individuals with "a record of such impairment" or "being regarded as having such an impairment").

56. 34 C.F.R. § 104.3(j)(2)(ii) (2005).

57. *See id*. § 104.3(j)(1).

"disabled" because he was only limited in playing intercollegiate athletics, by itself not a major life activity.[58] Perhaps where the exclusion from athletics is framed as substantially limiting the major life activity of learning or working, the disability prong is more easily satisfied. For example, athletes with learning disabilities are covered because their impairments restrict the major life activity of learning.[59] A professional athlete excluded because of disability could also link the limitation to the life activity of working. However, exclusion from working at a particular job has not been considered a substantial limitation on working.[60]

A person is also "disabled" under the ADA where such individual has a "record of such impairment; or . . . [is] regarded as having such an impairment."[61] This definition may cover athletes excluded on the basis of a record of a medical impairment or genetic predisposition for a medical risk.

3. Who is "Otherwise Qualified with or Without Reasonable Accommodation"?

An apparent irony is that the athlete pursuing an ADA claim must not only be "disabled," but also "otherwise qualified" to participate in the athletic program.[62] Such an athlete is qualified if he or she can meet essential program eligibility requirements "with or without reasonable modifications to [the program's] rules, policies, or practices."[63]

4. Excluded Because of Disability

Finally, the athlete must prove that he or she was discriminated against or excluded from participation because of disability.[64] As mentioned previously, discrimination is defined to include

> the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any good, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be *necessary* . . . [and] a failure to make reasonable modifications in policies, practices, or procedures . . . to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such [programs].[65]

58. Knapp v. Northwestern Univ., 101 F.3d 473, 480–81 (7th Cir. 1996); *see also* discussion *infra* Part III.C.

59. *See* Bowers v. NCAA, 9 F. Supp. 2d 460, 475–76 (D.N.J. 1998).

60. *See, e.g.*, Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992) (explaining that major life activity does not necessarily mean working at a particular job such as firefighting).

61. 42 U.S.C. § 12102(2)(B)–(C) (2000).

62. *See id.* § 12132.

63. *Id.* § 12131(2) (defining "[q]ualified individual with a disability").

64. *See supra* text accompanying note 19.

65. 42 U.S.C. § 12182(b)(2)(A)(i)–(ii) (emphasis added).

D. In Defense, Legally Valid Justifications for Exclusion

In defense, exclusion is permissible where the requested accommodation or modification is unreasonable, requires the elimination of essential eligibility requirements, poses an undue hardship on the program, or fundamentally alters the nature of the sport or competition.[66] More recently, courts have ruled that an entity need not permit participation where such poses a direct threat to the player or others.[67] Whether participation would pose a risk of harm to the player or to others is a recurring issue facing many athletic programs when an athlete has an increased risk of injury.

III. TYPE OF LEGAL CHALLENGES BY ATHLETES WITH DISABILITIES

The disability rights issue arises primarily in three types of cases. The first occurs where athletes with high medical risk seek to participate. Liability and safety concerns prevail where such players obtain medical clearance and die or are injured while participating in the sports program, or where the players are denied medical clearance to play and sue claiming disability-based discrimination. The second category involves athletes who fail to meet a "neutral" eligibility requirement, such as age or academic standards and are denied participation in athletics. A third category involves athletes who need accommodation or modification to the rules of play in the particular sport.

A. Athletes with High Medical Risk Seek to Participate v. Protective Concerns

Athletic programs, as well as courts, have to consider the eligibility and participation rights of athletes with high medical risks balanced with the program's right to establish safety standards. A prerequisite to participating in nearly any competitive athletic program is obtaining medical clearance and signing medical release waivers. Challenges arise when athletes are willing to execute medical release and liability waivers, but are excluded from participation based on team assessments of medical ineligibility.

For example, in *Knapp v. Northwestern University*,[68] the university refused to allow Nick Knapp to play on the school's Division I basketball team based on the team physician's determination that Knapp was medically ineligible because of his increased risk of cardiac death, even while playing with an internal defibrillator.[69] Knapp sued Northwestern under the

66. *See id.*

67. *See* discussion *infra* Part III.C.

68. 101 F.3d 473 (7th Cir. 1996).

69. *Id.* at 476–77. Nick Knapp was rated one of the best high school players in Illinois. *Id.* at 476. At the end of his junior year, Northwestern offered him a basketball scholarship. *Id.* During a pick-up game his senior year, Knapp had a sudden cardiac arrest where his heart stopped. *Id.* Paramedics were able to revive him through electric shock. *Id.* Doctors thereafter

Rehabilitation Act, arguing that he was discriminated against because of his actual or perceived disability.[70] The case raised a variety of questions, such as: Was Knapp "disabled" by virtue of his increased risk of severe cardiac injury, i.e., was he substantially limited in a major life activity and when can a significant risk of future physical injury permissibly disqualify a person from sports participation? When the parties' medical experts disagree, who should decide on an acceptable level of risk? Is it sufficient that Knapp was willing to sign liability waivers and assume the personal risks (supported by his physicians)?

At trial, five medical experts testified, disagreeing only on the issue of whether, even with an internal defibrillator, the risk of cardiac death was acceptable.[71] The district court enjoined Northwestern from excluding Knapp from playing on the team due to his cardiac condition.[72] The district court found that intercollegiate sports are integral to a student's education and learning process, and at a minimum, constituted a major life activity for Knapp.[73] In concluding that Northwestern was in violation of the Rehabilitation Act, the district court stated the following:

> Hardly a year goes by that there is not at least one instance of tragic death of a healthy youth as a result of competitive sports activity. Life has risks. The purpose of [the law], however, is to permit handicapped individuals to live life as fully as they are able, without paternalist authorities deciding that certain activities are too risky for them.[74]

implanted a cardio defibrillator in his abdomen designed to detect heart arrhythmia and restart his heart in the event of a recurrence. *Id*. Northwestern agreed to honor the scholarship but refused to allow him to play, finding him medically ineligible per the instruction of the team physician. *Id*. at 476–77. Knapp and his parents were willing to sign liability releases and had his own team of experts testify that the level of risk was acceptable. *Id.* at 476, 478.

70. *Id*. at 477, 478.

71. *Id*. at 484.

72. *Id*. at 487.

73. Knapp v. Northwestern Univ., 942 F. Supp. 1191, 1195 (N.D. Ill. 1996). By affidavit, Knapp stated:

> My 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 . . . . 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.

Id.; *see also* Pahulu v. Univ. of Kan., 897 F. Supp. 1387, 1392–93 (D. Kan. 1995) (applying a subjective test, acknowledging that athletic participation could significantly contribute to a student's learning).

74. *Knapp*, 942 F. Supp. at 1197 (quoting Poole v. S. Plainfield Bd. of Ed., 490 F. Supp. 948, 953–54 (D.N.J. 1980)).

On appeal, the Seventh Circuit reversed.[75] First, the court held that Knapp, although disqualified on the basis of medical ineligibility, was not "disabled."[76] Although Knapp's medical condition potentially substantially limits him in "all" major life activities—if his heart stops—the court analyzed his protection under grounds argued by the parties, ultimately ruling that Knapp, although medically ineligible, was not "disabled" under federal disability law because he was not substantially limited in a major life activity (which the parties framed as learning).[77] Although the district court found that participation in sports was a major life activity integral to Knapp's education, the Seventh Circuit applied an objective, as opposed to subjective, standard of whether participation in sports is integral to one's learning.[78]

Even assuming Knapp were disabled, the court held that Knapp was not "qualified" because of the substantial risk of injury.[79] The parties implicitly agreed that a person is not "qualified" if the disability poses a substantial risk of injury to the student or to others.[80] The problem in *Knapp* was determining whose assessment of medical risk governs when the opinion of the team physician and the player's medical experts conflict—the player, the team, or the court?[81] Despite conflicting experts, the court concluded that the university has the right to determine a student's medical ineligibility, deferring to the team physician decision as long as supported by "reason and rationality and with full regard to possible and reasonable accommodations."[82]

It did not make a difference to the court that Knapp and his parents were willing to execute liability waivers or that the risk of injury was to Knapp himself, a risk he was willing to take, as opposed to a risk posed to his

75. Knapp v. Northwestern Univ., 101 F.3d 473, 486 (7th Cir. 1996).

76. *Id*. at 482.

77. *Id*. at 480–82.

78. *Id*. at 480–81 (noting that Knapp, like other students, was capable of "learning" without participation in intercollegiate sports). If Knapp were a professional athlete, perhaps his "disability" would differ, having a stronger interest in participation because his livelihood, and ability to work, would be at stake.

79. *Id*. at 482.

80. *Knapp*, 101 F.3d at 483.

81. *See* Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion from Athletics*, 8 MARQ. SPORTS L.J. 189, 215 (1998) (asserting that a model according deference to the team physician, if supported by a reasonable medical basis, appropriately balances an athlete's interest in participation and the team or sponsor's interest in protecting the health and safety of its participants); *cf.* Wright v. Columbia Univ., 520 F. Supp. 789, 793–95 (E.D. Pa. 1981) (ordering the university to allow a student with sight in one eye to play football, accepting the player's ophthalmologist's opinion that participation did not pose a substantial risk of serious eye injury and rejecting the team physician's contrary opinion). In *Wright*, the court held that the university's laudable concern for student safety cannot derogate from a student's rights under the Rehabilitation Act, "which prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person." *Id*. at 794.

82. *Knapp*, 101 F.3d at 484.

teammates.[83] Some schools have reluctantly allowed athletes with heart and other ailments to compete, but only after negotiating carefully drafted waivers of liability.[84]

The *Knapp* court justified exclusion based on this risk of harm that participation would pose to Knapp himself.[85] The ADA provides a defense when the disabled person poses a risk of harm to others, yet says nothing regarding when the risk of harm is to one's self.[86] The Supreme Court, however, has since clarified that the defense extends to a direct threat to self.[87] Thus, the university was justified in its determination, provided that the exclusion due to risk is based upon an individualized medical or scientific determination, and not based on fear or even good intentions.[88] The risk to self versus others issue ties into the question about the participation and privacy rights of athletes with contagious diseases, such as the AIDS virus. In *Montalvo v. Radcliffe*,[89] the court held it permissible to exclude a boy who was HIV positive from participation in full contact karate classes because of the significant risk to other participants' health and safety.[90] In ruling, the *Montalvo* court noted the risk factors included the likelihood of blood-to-blood contact; the unknown probability of HIV transmission; the severity of a fatal disease; and the view of public health authorities that universal precautions and/or eye coverings and gloves would not eliminate risk to an insignificant level.[91]

83. *See id*. at 476.

84. *Cf.* Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 969–70 (Wash. 1988) (holding exculpatory releases of the school district's negligence, signed as a condition of participation in interscholastic athletics, invalid as contrary to public policy); 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, 874–75 (1991) (asserting that waivers may inadequately protect schools from liability if an athlete later challenges on grounds of misrepresentation, fraud, incapacity, or contrary to public policy).

85. *Knapp*, 101 F.3d at 483.

86. 42 U.S.C. § 12113(b) (2000).

87. *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86–87 (2002) (holding that EEOC regulations authorizing the refusal to hire an individual whose performance on the job would endanger his own health, due to a disability, did not exceed the scope of permissible rulemaking under the ADA).

88. *See* Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Az. 1992) (finding an ADA violation because no proof that on-field coaching in a wheelchair poses a direct threat to others' health and safety).

89. 167 F.3d 873 (4th Cir. 1999).

90. *Id*. at 874. *See generally* John T. Wolohan, *An Ethical and Legal Dilemma: Participation in Sports by HIV Infected Athletes*, 7 MARQ. SPORTS L.J. 373 (1997); Anthony DiMaggio, Comment, *Suffering in Silence: Should They Be Cheered or Feared? (Mandatory HIV Testing of Athletes as a Health and Safety Issue)*, 8 SETON HALL J. SPORT L. 663 (1998).

91. *Montalvo*, 167 F.3d at 877–78.

In summary, the Supreme Court in *Knapp* stated:

> Legitimate physical qualifications may in fact be essential to participation in particular programs. . . .
>
> . . . .
>
> A significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated. . . . But more than merely an elevated risk of injury is required before disqualification is appropriate. . . . Any physical qualification based on risk of future injury must be examined with special care if the [law] is not to be circumvented, since almost all disabled individuals are at a greater risk of injury.[92]

Courts tend to defer to the assessments of the team/athletic program to exclude from participation athletes with severe medical impairments or even those at high risk of medical impairments, provided the exclusion on the basis of direct threat to the student or others is based on an individualized and scientific determination, and not merely a subjective evaluation or good faith belief.[93]

92. Knapp v. Northwestern Univ., 101 F.3d 473, 482–83 (7th Cir. 1996) (citations omitted). *See generally* Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987 (1992) (addressing the conflicts faced by disabled athletes, sports medicine physicians, and schools in determining whether the athlete can participate in sports); Cathy J. Jones, *College Athletes: Illness of Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113 (1992) (discussing whether college athletes should be afforded the same rights as other adults in making decisions concerning their medical care and daily activities); Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817 (1998) (discussing the elements of the ADA and Rehabilitation Act and their application to student-athletes); Matthew J. Mitten, *Team Physicians & Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129 (1993) (discussing pressures, obligations, and conflicts facing team physicians); Robert E. Shepard, Jr., *Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163 (1991) (addressing the discriminatory and exclusionary practices faced by handicapped athletes in collegiate sports).

93. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 648–49 (1998); *see also* Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985). In *Mantolete*, the court addressed the standard to apply in determining if an individual is otherwise physically qualified to perform an activity when the possibility of future injury exists, stating that

> in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.
>
> . . . .
>
> In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.

B. Disabled Athletes Who Fail to Meet a "Neutral" Eligibility Requirement

In competitive sports, governing athletic organizations, teams, and schools generally establish eligibility criteria, which are intended to protect the health and safety of athletes and to maintain the integrity of the competition. When universally applied, however, the effect of "imposition" of these seemingly neutral eligibility criteria may be to screen out or exclude some athletes with disabilities from participation. Thus, for example, neutral requirements such as age limitations in interscholastic sports programs or academic eligibility standards for participation in interscholastic or intercollegiate athletics may have the effect of discriminating against students who were held back in school because of disability, or who could not meet the academic standards because of specialized education courses or learning disabilities. Do these athletes with disabilities excluded from participation on this basis have rights to participate, or can the programs strictly enforce their eligibility standards?

1. Age Restrictions

The federal courts are divided on whether interscholastic age eligibility rules violate the federal anti-discrimination laws when applied to students who exceed the age limits and were held back in school because of a disability. The Sixth and Eighth Circuits have upheld age limitation rules, reasoning in part that such rules are essential to promote the safety of younger athletes and to maintain a competitive balance in interscholastic athletics by precluding physically more mature students.[94] According to these courts, waiver of the rule would fundamentally alter the nature of interscholastic competition and pose an undue administrative burden on the associations to assess competitive fairness in individual cases.[95] The Second and Eleventh Circuits declined to address, on grounds of mootness,[96] the merits of two cases in which the district courts had enjoined enforcement of age rules.[97]

Id. at 1422–23.

94. *See* Sandison v. Mich. High Sch. Athletic Ass'n, Inc., 64 F.3d 1026, 1037 (6th Cir. 1995) (holding the age limit rule did not violate either the Rehabilitation Act or the ADA); Pottgen v. Mo. State High Sch. Activities Ass'n., 40 F.3d 926, 930 (8th Cir. 1994) (holding the age limit rule was an essential eligibility requirement supported by health and safety concerns and that modification would be unreasonable).

95. *Sandison*, 64 F.3d at 1035 ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether . . . a student's age [is] an unfair competitive advantage. . . . It is unreasonable to call upon coaches and physicians to make these near-impossible determinations."); *Pottgen*, 40 F.3d at 930 ("Waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program. . . . [N]o reasonable accommodations exist.").

96. Claims by student athletes seeking rights to participate are usually made in the context of a motion for preliminary injunction. Because of the short timing of the sports season, the plaintiffs' claims may quickly become moot whether injunctive relief is granted or not. Accordingly, the courts test whether the plaintiff can demonstrate irreparable harm and a

Sandison v. Michigan High School Athletic Ass'n, Inc.[98] emphasized that the age requirement was a neutral rule applicable to all students and that the plaintiffs were excluded from participation only in their senior years and "solely by reason of" their age, not disability.[99] The Court did not find it relevant that the plaintiffs were delayed in their schooling as a result of their learning disabilities.[100] *Johnson v. Florida High School Activities Ass'n, Inc.*[101] focused on whether waiving the requirement fundamentally alters the purposes of the rule.[102] The courts differ on whether an athletic association is obligated under federal law to conduct an individualized evaluation of whether waiver of the age limit rule is a reasonable accommodation to a particular student. *Johnson* conducted an individualized inquiry, analyzing whether granting a waiver in the plaintiff's individual case would undermine the legitimate purposes of the age limit rule.[103] A number of commentators analyzing this issue have argued that the individualized approach taken by

substantial likelihood of success on the merits of an ADA or Rehabilitation Act claim. *See Sandison*, 64 F.3d at 1030. The appeal in *Sandison* was not moot as to the penalty imposed on schools, such as forfeiture of season games, for allowing students who exceed the age limit to participate. *Id.*

97. *See* Dennin v. Conn. Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 670 (D. Ct. 1996), *vacated as moot*, 94 F.3d 96, 102 (2d Cir. 1996) (lower court recognizing that although the age requirement was facially neutral with regard to disabilities, the rule was discriminatory when applied to a particular student whose disability was the sole reason he was held back in school; appellate court reversing and vacating as moot because plaintiff had participated under the district court's injunction and graduated); Johnson v. Fla. High Sch. Activities Ass'n, Inc., 899 F. Supp. 579, 585–86 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d. 1172, 1173 (11th Cir. 1997) (lower court conducting an individualized assessment and holding that waiver of the age rule was a reasonable modification for the learning disabled student; appellate court vacating as moot because Johnson was finished competing in high school athletics).

98. 64 F.3d 1026 (6th Cir. 1995).

99. *Id*. at 1032.

100. *See id*. at 1028.

101. 899 F. Supp. 579 (M.D. Fla. 1995).

102. *Id*. at 584. The *Johnson* court acknowledged the salutary purposes served by the age limitation rule, but determined, based on an individualized assessment, that in Johnson's case, waiver of the age rule was a reasonable accommodation. *Id*. at 586. The court cited to factors such as that the plaintiff was of average size and ability and did not intentionally delay his education to get an athletic advantage. *Id*. at 585. The district court in *Dennin* used similar reasoning in ordering a waiver of the age restriction to allow a nineteen-year-old student with Down's Syndrome to participate in intercollegiate swimming. 913 F. Supp. at 666, 669, 671. The court ruled that a waiver would not undermine the purposes of the rule, given that the student was not a safety risk in competitive swimming, a noncontact sport, and did not have a competitive advantage, as one of the slowest swimmers on the team. *Id.* at 669; *cf. Sandison*, 64 F.3d at 1037 (holding that requiring individual competitive fairness determinations is an undue administrative burden). Arguably, this individualized assessment protects athletes who are not that good or strong anyway and perhaps penalizes student athletes with disabilities who are exceptionally skilled, strong, large, or talented.

103. 899 F. Supp. at 586.

Johnson is more consistent with the purpose of the ADA and legislative intent.[104] This approach has gained increased recognition, notably adopted by the Seventh Circuit in holding that waiver of a sports eligibility rule is a "reasonable accommodation" under the ADA if waiver in the particular case would not require a "fundamental and unreasonable change" in the rule.[105]

2. Academic Requirements for Athletic Eligibility

Another area in which student-athletes with disabilities may be excluded from participation is in the context of meeting academic requirements to attain eligibility to participate in interscholastic or intercollegiate athletics. For example, the NCAA has established and enforced minimum initial academic eligibility requirements that entering freshman must meet in order to participate in Division I and II intercollegiate athletics.[106] To qualify under NCAA standards, students must satisfy initial eligibility requirements including the completion of a certain number of high school "core" academic courses and attaining a minimum score based on an index of a grade point average in these courses on national standardized exams.[107] The stated purpose of these requirements is to protect the integrity of intercollegiate athletics and to ensure, by uniform standards, that student-athletes are academically prepared to succeed in college.[108]

Student-athletes with learning disabilities have claimed that imposition of academic standards discriminate against them in violation of federal disability

104. *See, e.g.*, Milani, *supra* note 92, at 907–08; John T. Wolohan, *Are Age Restrictions a Necessary Requirement for Participation in Interscholastic Athletic Programs?*, 66 UMKC L. REV. 345, 379–80 (1997); Katie M. Burroughs, *Learning Disabled Student Athletes: A Sporting Chance Under the ADA?*, 14 J. CONTEMP. HEALTH L. & POL'Y 57, 65 (1997); Colleen M. Evale, Sandison v. Michigan High School Athletic Association*: The Sixth Circuit Sets Up Age Restrictions as Insurmountable Hurdles for Learning Disabled High School Student-Athletes*, 5 SPORTS LAW. J. 109, 136–37 (1998).

105. *See* Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 842, 850 (7th Cir. 1999) (requiring individualized determination of waiver of eight-semester rule); *see also* Cruz v. Pa. Interscholastic Athletic Ass'n, Inc., 157 F. Supp. 2d 485, 499–500 (E.D. Pa. 2001) (concluding that waiver of the maximum age rule for a learning disabled student would not fundamentally alter high school sports program); *Dennin*, 913 F. Supp. at 670 (noting that age rule, although facially neutral with regard to disabilities, is discriminatory when applied to a particular student whose disability was the sole reason he was held back in school).

106. *See* Weston, *supra* note 14, at 1052.

107. *Id*. at 1052–53.

108. Cole v. NCAA, 120 F. Supp. 2d 1060, 1063 (N.D. Ga. 2000) (noting that NCAA "[e]ligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student-athletes").

discrimination laws.[109] Because of their learning disabilities, many students have a specialized high school curriculum that does not meet the NCAA's definition of "core" academic courses. Many of these students contend the NCAA's imposition of a minimum grade and testing score penalizes them due to their learning disabilities. The question raised in these cases is whether the ADA precludes organizations such as the NCAA from enforcing academic eligibility requirements as a condition for participating in intercollegiate athletics and requires modification of these standards for students with learning disabilities.[110]

The court in *Ganden v. NCAA*[111] determined that such a request was unreasonable, thereby rejecting the claim of a highly recruited swimmer diagnosed with a learning disability since second grade to compel the NCAA to modify its core course criteria to accept remedial courses taken as part of his special education curriculum and to modify its GPA criteria.[112] In its holding, the court stated:

> Whatever criticism one may level at GPA and the national standardized tests, these provide significant objective predictors of a student's ability to succeed at college. The "core course" criteria further serves the dual interest[s] of insuring the integrity of that GPA and independently insuring that the student has covered the minimum subject matter required for college.[113]

The court determined that although the ADA requires an individualized assessment of a learning-disabled student's case, the law does not require the NCAA to abandon its eligibility requirements, lower its standards, or make modifications that "fundamentally alter" its rules and programs.[114]

Similar claims by athletes with learning disabilities have met varied results in the courts. One possible explanation is that the courts or sporting authorities are suspicious of the diagnosis or cause of the failure to meet the requirements.[115] In *Tatum v. NCAA*,[116] after Justin Tatum failed to attain the minimum score on the ACT needed for NCAA eligibility, his guidance counselor, "[c]oncerned with the possible loss of [his] scholarship offer,"

109. *See, e.g.*, Tatum v. NCAA, 992 F. Supp. 1114, 1116 (E.D. Mo. 1998) (student-athlete sued NCAA alleging discrimination when NCAA denied him eligibility after refusing to recognize student's standardized test score earned while taking the exam untimed).

110. *See* Doe v. Haverford Sch., No. Civ. A. 03-3989, 2003 WL 22097782, at *4–5 (E.D. Pa. Aug. 5, 2003) (applying Title III of the ADA to a private school).

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

112. *Id*. at *1–5, *17.

113. *Id*. at *15.

114. *Id*. at *14–16.

115. In *Ganden*, the court agreed with the NCAA that Ganden's remedial typing and computer courses had little substantive similarity to the core course criteria. *Id.* at *15; *see also* Weston, *supra* note 14, at 1080.

116. 992 F. Supp. 1114 (E.D. Mo. 1998).

recommended that he be evaluated for learning disabilities.[117] The first evaluator concluded that Tatum did not have a learning disability and needed to spend more time on his studies; thereafter, a second evaluator diagnosed Tatum with generalized anxiety disorder and a test-taking phobia and recommended he retake the ACT with accommodations.[118] The testing agencies accepted the diagnosis and provided him nonstandard, untimed conditions for subsequent tests.[119] After three more attempts, Tatum finally made the qualifying score, which the NCAA refused to accept.[120] The NCAA required Tatum to undergo additional evaluation, in which the evaluator found Tatum had a problem with test-taking, but not a learning disability.[121] Although educational and psychiatric authorities recognized generalized anxiety disorder and test-taking phobias as "learning disabilities," the NCAA refused to recognize Tatum as disabled and to modify its requirements.[122] The court agreed, finding the timing of Tatum's diagnosis suspect and agreeing that he had not demonstrated a likelihood of success on the merits of an ADA claim.[123] Even where a student-athlete had a long-standing record of a learning disability, sporting authorities have been reluctant, absent litigation, to modify academic eligibility requirements.[124]

The NCAA has sought dismissal of ADA-related litigation on the grounds "that it is not a place of public accommodation and that it does not own, lease or operate a place of public accommodation," contending it was not subject to the ADA.[125] The court in *Bowers v. National Collegiate Athletic Ass'n* closely analyzed this issue, determining the NCAA is subject to the ADA because of its significant power to control, manage, or regulate places of public

117. *Id*. at 1117.

118. *Id*. at 1117–18.

119. *Id*. at 1118.

120. *Id*.

121. *Tatum*, 992 F. Supp. at 1118.

122. *See id*. at 1118.

123. *Id*. at 1123; *see also* Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996) (noting that student-athlete spent five hours a day swimming as reason for failure to meet academic requirements); Matthews v. NCAA, 179 F. Supp. 2d 1209, 1216 (E.D. Wash. 2001) (noting that the NCAA argued student with learning disability failed to meet requirement due to lack of effort).

124. For example, the NCAA refused to extend eligibility (absent litigation) to student-athletes, all of whom had received special education services to accommodate learning disabilities prior to high school, in the following cases: *Ganden*, 1996 WL 680000, at *1, *17 (upholding NCAA's refusal to extend eligibility where athlete's high school course work fell short of its eligibility requirements); Butler v. NCAA, No. C96-1656D, 1996 WL 1058233, at *1–3 (W.D. Wash. Nov. 8, 1996) (examining NCAA's refusal to accept athlete's high school special education courses, with the NCAA resisting on the grounds that it is not subject to Title III of the ADA); Bowers v. NCAA, 9 F. Supp. 2d 460, 467 (D.N.J. 1998).

125. *See, e.g.*, *Bowers*, 9 F. Supp. 2d at 483.

accommodations, such as stadiums, and its control and regulation of participation through academic eligibility standards.[126]

As to whether modification of academic eligibility requirements constitutes a fundamental alteration, the NCAA has argued that its standards do not unfairly screen out students with disabilities and that a reduction in eligibility standards would constitute a fundamental alteration of its program.[127] The *Bowers* court initially determined that these standards were essential to "maintain intercollegiate athletes as an integral part of the educational program" and to assure that those representing an institution in intercollegiate athletics progress in their education.[128] Co-defendant University of Iowa, which allegedly stopped recruiting Bowers after it received his transcripts indicating special education courses, also asserted that Bowers was not a "qualified individual" with a disability.[129] As Northwestern successfully asserted in *Knapp*, Iowa argued that Bowers was not disabled simply because he could not participate in intercollegiate sports.[130] Iowa also argued that Bowers was not discriminated against "because of" his learning disability, but was instead denied eligibility due to his failure to fulfill the core course and GPA requirements.[131] In a later ruling on summary judgment, the same court rejected both arguments, holding that the defendants had not proved the eligibility requirements were essential to the maintenance of intercollegiate athletics, and requiring an individualized, rather than purely numerical, assessment of a student's ability to comport with program goals.[132]

In response to the foregoing discrimination complaints filed by student-athletes with learning disabilities, the United States Department of Justice

126. *Id*. at 489; *see also supra* Section II.C.1.

127. *See, e.g.*, *Bowers*, 9 F. Supp. 2d at 477, 500 (denying Bowers's request for a preliminary injunction); *see also* Weston, *supra* note 14, at 1086–88.

128. *See Bowers*, 9 F. Supp. 2d at 467.

129. *Id*. at 467, 475.

130. *Id*. at 476. Contrast *Knapp v. Northwestern University*, 101 F.3d 473, 478–82 (7th Cir. 1996), which held that a student's heart condition did not constitute a disability because the student was only limited in playing intercollegiate sports, which by itself is not a major life activity, with *Bowers*, 9 F. Supp. 2d at 475–76, involving a student who was "disabled" under the ADA not because of a limitation on his ability to play college sports but because of a limitation on his capacity to learn, and was denied the ability to participate in, among other things, intercollegiate football due to that disability. *See also* Weston, *supra* note 14, at 1087–88; Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 174–75 (2003) (noting that many schools fail to raise the "obvious" argument that participation in sports is not a substantial limitation that renders one disabled).

131. *Bowers*, 974 F. Supp. 2d at 476.

132. *Id*. at 478. The court acknowledged that although the NCAA has a "waiver procedure" that allows students to apply for an exception to the rules, the waiver decisions are made too late, only after students are enrolled in a college and have lost recruiting and scholarship opportunities. *Id.* at 476–77.

(DOJ), charged with enforcement of Title III of the ADA, investigated the NCAA's initial eligibility certification process.[133] The DOJ determined that several aspects of the NCAA's initial eligibility requirements violated Title III of the ADA, in particular the "core course" definition that explicitly excluded any remedial, special education, or compensatory courses.[134] On May 26, 1998, the NCAA entered into a Consent Decree with the DOJ agreeing to revise certain procedures and policies with respect to student-athletes with learning disabilities.[135] The NCAA entered the Consent Decree even though no court had yet ruled that a learning disabled student-athlete had a reasonable probability of succeeding on the merits of a disability discrimination claim against the NCAA.[136] Expressly in the Consent Decree, however, the NCAA maintains that it is not subject to Title III of the ADA and denies any liability under the ADA.[137] The Consent Decree expired by its own terms May 1, 2003.[138] The NCAA continues to provide a process for accommodating students with learning disabilities.[139]

In the few court decisions issued since the Consent Decree, the NCAA has continued to assert that it is not subject to the ADA, yet this argument has less force with the courts since the Consent Decree and the decision in *Martin v. PGA*.[140] Other researchers have noted that "[a] review of cases decided before and after the Consent Decree was signed illustrates that it has not yet

133. Consent Decree, United States v. NCAA (D.D.C. May 26, 1998) [hereinafter Decree], http://www.usdoj.gov/crt/ada/ncaa.htm.

134. *Id*.

135. *See id*. Under the Decree, the NCAA agreed to certify as "core courses" classes designed for students with disabilities that provide them with the same type of knowledge and skills as other college-bound students; permit ineligible learning disabled students to earn a fourth year of eligibility by making substantial progress towards an academic degree; include experts on learning disabilities in evaluating waiver applications; and pay $35,000 to four student athletes who had filed complaints with the DOJ. *Id.*

136. *See id*.

137. *Id*.

138. Decree, *supra* note 133.

> This Consent Decree shall remain in effect until May 1, 2003. At that time, this Consent Decree shall terminate unless the United States moves for cause for an extension. This Court [the District Court for the District of Columbia] retains jurisdiction over this case for the purpose of deciding any issue that may arise under this Consent Decree, and for purposes of enforcement of this Consent Decree. Any party may bring such issues before the Court by filing an appropriate motion.

Id.

139. *See generally* NCAA Student-Athlete Eligibility FAQ, http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/disabilities (last visited Nov. 16, 2005).

140. *See, e.g.*, Matthews v. NCAA, 179 F. Supp. 2d 1209, 1222–23 (E.D. Wash. 2001) (holding that Title III applied to the NCAA based on the NCAA's large degree of control over students' access to the arena of college athletics); *see also* Kelly M. Trainor, Note, *The NCAA's Initial Eligibility Requirements and the Americans with Disabilities Act in the Post*-PGA Tour, Inc. v. Martin *Era: An Argument in Favor of Deference to the NCAA*, 46 B.C. L. REV 423 (2005).

significantly improved a learning-disabled student's chances of successfully challenging an NCAA certification decision."[141] Because the law would require the NCAA to analyze waiver requests on an individualized basis, obviously not all requests need be granted. The court in *Matthews v. NCAA* required waiver for a learning disabled student from the NCAA rule requiring 75% credit hours be taken during the school year, so long as the student "maintains the minimum grade point average and progression toward his degree."[142] The court held that this was a necessary and reasonable modification of NCAA bylaws and not a fundamental alteration the NCAA's purpose.[143] By contrast, the court in *Cole v. NCAA*,[144] deferred to the NCAA and stated that Title III "does not require an institution to 'lower or to effect substantial modifications of standards to accommodate a handicapped person.'"[145]

C. Athletes Who Need Accommodation or Modification to Rules of Play

Under the questions previously explored, courts or sporting authorities determined eligibility to compete on the basis of medical or academic fitness standards but did not intervene in the actual rules of play and competition.[146] Application of the disability laws becomes more controversial and perhaps problematic when the laws appear to require modifications or accommodations to actual rules of play or competition for disabled athletes, particularly at the professional level. Should the law distinguish between rules defining who is eligible to compete from rules governing how the game is played, with any modification to the latter "substantive" rules as a per se fundamental alteration?[147] Most professional teams or organizations do not receive federal financial assistance and are not covered by the Rehabilitation Act. In the few disability discrimination cases brought by professional athletes, the athletes have invoked Title I (employment) and Title III (public accommodations) of the ADA to seek legal relief.

141. Denbo, *supra* note 130, at 193; *see* Jenny Blayden & Cynthia Pemberton, *An Investigation of NCAA Initial Eligibility Waiver Applications and Awards from 1999 to 2001*, 13 J. LEGAL ASPECTS SPORT 39, 50 (2003) (stating that "[d]espite voluntary agreement with the Justice Department as articulated by the Consent Decree, as well as evolving case law, the NCAA has consistently rejected the notion that it is a place of public accommodation and therefore legally compelled to comply with Title III of the ADA" and urging continued tracking and accountability of NCAA compliance).

142. *Matthews*, 179 F. Supp. 2d at 1231.

143. *Id*.

144. 120 F. Supp. 2d 1060 (N.D. Ga. 2000).

145. *Id*. at 1070 (quoting Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994)).

146. *See supra* discussion in Parts III.A–B.

147. The PGA set forth this argument, among others, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 670 (2001).

The case prompting national attention and debate on this question involved Casey Martin, a professional golfer, who due to a severe congenital disability affecting his right leg, sought to compel the PGA to waive its "no cart" rule and permit him to ride a cart during PGA competitions.[148] The PGA did not contest that Martin was disabled; however, it argued that the ADA does not apply to professional golf tournaments,[149] and moreover, that walking is an essential substantive rule of competition and any modification would fundamentally alter the nature of the competition.[150]

The Court's opinion focused on whether modification of the no-cart rule for Martin to participate in PGA professional golf competitions was reasonable or would fundamentally alter the nature of the game.[151] Thus, acknowledging that the ADA requires "reasonable accommodation" for qualified individuals with a disability, the debate centered on when accommodation to *rules of competitive play* is ever "reasonable"?[152] From the PGA's view, walking is integral to the spirit and conduct of the game of golf; riding in a cart is a decided advantage to a player; the PGA Tour is entitled to set its own rules of play without interference of the courts; and the no-cart rule was necessary to ensure competition fairness and a level playing field.[153] The PGA also argued that the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making and that changing the rule would fundamentally alter the competition.[154] Martin adduced evidence that riding in a cart is not necessarily an advantage, that in many ways it is a disadvantage, and that most players would not use a cart even if permitted.[155]

The Court framed the question as whether the walking rule could be modified to accommodate Martin without fundamentally altering the nature of the game being played at the PGA Tour's tournaments.[156] The Court noted

148. *Id*. at 668–69.

149. *See id*. at 678. The Court's ruling with respect to the application of the ADA to the PGA is discussed in Section II.C.1. *See also id.* at 678–80 (analyzing the PGA as a "public accommodation" subject to the ADA on (among other) grounds that, although Martin was a competitor, and not "clients or customers" of a public accommodation, "it would be entirely appropriate to classify the golfers who pay petitioner $3,000 for the chance to compete in the Q-School and, if successful, in the subsequent tour events, as petitioner's clients or customers").

150. *Id.* at 670.

151. *Id*. at 681–91.

152. *See PGA*, 532 U.S. at 681–91.

153. *Id*. at 670–671; *see also* W. Kent Davis, *Why is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1, 41–43 (1998) (citing the varied comments of the public and professional golfers responding to the *Martin* accommodation issue).

154. *PGA*, 532 U.S. at 686.

155. *Id*. at 687–88. In testimony at trial, professional golfer Eric Johnson indicated that walking might even be an advantage, as it helps keep him "in rhythm." *Id*. at 688.

156. *Id*. at 682.

that the Rules of Golf permitted cart use and otherwise said nothing requiring or defining walking as part of the game.[157] The Court treated the PGA's fatigue argument with slight sarcasm, noting "the factual basis of petitioner's argument is undermined by the District Court's finding that the fatigue from walking during one of petitioner's 4-day tournaments cannot be deemed significant."[158] Although acknowledging that fatigue was part of the game, the Court found "it is an uncontested finding of the District Court that Martin 'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.'"[159] In these cases, the central issue is whether allowing the plaintiff, given his individual circumstances, the requested modification of using a cart in tournament competition would fundamentally alter PGA golf competitions.[160] In holding the walking rule "at best peripheral" to the nature of the PGA competition and that waiver of the rule for Martin was reasonable, the Court considered this consistent with Congressional intent to require entities such as the PGA to give individualized attention to requests of disabled athletes for access to participation in competition.[161]

Even the members of the Court were divided. Was Martin getting an unfair advantage? Is walking integral to the game? What is a level playing field? Where do we draw the line?[162] Justice Scalia, joined by Justice Thomas, argued in dissent that sport is different from other enterprises which are subject to the ADA and that no court, "not even the Supreme Court of the United States," can pronounce one or another of the competitive rules of sport

157. *Id*. at 666.

158. *Id*. at 687 (citing evidence presented at trial showing that fatigue in golf was more attributable to dehydration and heat exhaustion and that one burns only 500 calories in a five-hour round of golf, "nutritionally . . . less than a Big Mac").

159. *PGA*, 532 U.S. at 690 (citing Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998)).

160. *Id*. at 682.

161. *Id*. at 689–91.

162. Based on *Martin*, the Supreme Court summarily vacated the Seventh Circuit ruling that denied the request by Ford Olinger, a professional golfer with a degenerative hip disorder, for injunctive relief to ride a cart in the U.S. Open. *See* Olinger v. USGA, 18 Fed. App'x. 409, 409 (7th Cir. 2001). The Seventh Circuit had affirmed the district court's ruling that "the nature of the competition would be fundamentally altered" if the walking rule were eliminated because it would "remove stamina (at least, a particular type of stamina) from the set of qualities designed to be tested in this competition." Olinger v. USGA, 55 F. Supp. 2d 926, 937 (N.D. Ind. 1999), *aff'd*, 205 F.3d 1001 (7th Cir. 2000), *vacated on other grounds*, 532 U.S. 1064 (2001). The Seventh Circuit had determined that the administrative burdens of evaluating requests to waive the walking rule were undue, in that the United States Golf Association (USGA) "would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete." *Olinger*, 205 F.3d at 1007 (stating that "the decision on whether the rules of the game should be adjusted to accommodate him is best left to those who hold the future of golf in trust").

nonessential if the rulemaker deems them otherwise.[163] As posed by Justice Scalia, why must the PGA play "classic 'essential' golf?"[164] How does a sporting entity or a court determine whether the rule or policy that a disabled athlete seeks to modify would alter a fundamental aspect of the competition? What is discrimination on the basis of disability when it comes to sports and athletic competition? Justice Scalia was concerned about "line drawing" problems and unwarranted judicial interference. He posed a seemingly absurd scenario where a Little League player with attention deficit disorder, whose disability "makes it at least 25% more difficult to hit a pitched ball," should receive the accommodation of four strikes absent "a judicial determination that, in baseball, three strikes are metaphysically necessary."[165]

Courts have not interpreted *Martin* to require an affirmative response to many accommodation requests. In *Kuketz v. Petronelli*,[166] a nationally ranked wheelchair racquetball player sued to be allowed to compete with footed players in the athletic club's "A" racquetball league and requested a rule modification to allow him two bounces before returning the ball, as was legal in wheelchair racquetball, rather than one bounce.[167] Relying on the analysis in *Martin*, the Massachusetts Supreme Court ruled that while the essence of golf was hitting a stationary ball with a club, the essence of racquetball was hitting a moving ball with a racquet before the second bounce.[168] Allowing a player two bounces would fundamentally change the nature of the game.[169] Implicit in wheelchair racquetball's official rules was the assumption that all players were in wheelchairs.[170]

IV. CONCLUSION

Recent media attention has focused on the tragedy of some perfectly healthy athletes, still not satisfied, who turn to purported performance-enhancing drugs in order to strive to become the best in their respective sports competitions. In many respects, athletes with disabilities are perhaps more

163. *PGA*, 532 U.S. at 700.
164. *Id*. at 699.
165. *Id*. at 702–03.
166. 821 N.E.2d 473 (Mass. 2005).
167. *Id*. at 474.
168. *Id*. at 479.
169. *Id*. at 479–80.
170. *See id*. at 480.

> Giving a wheelchair player two bounces and a footed player one bounce in head-to-head competition is a variation of the official rules that would "alter such an essential aspect of the game . . . that it would be unacceptable even if it affected all competitors equally." The modifications sought by Kuketz create a new game, with new strategies and new rules. The club is certainly free to establish or enter into a league that plays this variation of racquetball, but it is not required by the ADA to do so.

Id. at 479–80 (quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001)).

worthy of participation than non-disabled athletes—they have worked equally hard to develop their athletic skills—yet they may be denied the opportunity to participate because of a disability, medical impairment, or need for accommodation in either the rules of play or participation. An equally compelling consideration, however, is the obligation of athletic programs to ensure the health and safety of athletes, as well as to ensure fairness in competitive play.

The federal disability laws provide athletes with disabilities a vital mechanism to ensure that decisions regarding their rights to participate in athletics are thoughtfully considered, medically justified, and not disregarded simply upon notions of undue administrative burdens, false notions of competitive advantage, or paternalism. The common thread among *Martin* and cases involving challenges by athletes with disabilities illustrates that sporting organizations should be prepared to explain the purpose of their eligibility requirements and rules of competition, to articulate the connection between the requirements and purpose, and to evaluate on an individual basis whether modification of such rules can be made without undermining this legitimate purpose or fundamentally altering the nature of the game. The playing field becomes balanced when athletes with disabilities are also given an equal opportunity to participate.