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GANDEN V. NCAA: HOW THE NCAA's EFFORTS TO CLEAN UP ITS IMAGE HAVE CREATED AN ETHICAL AND LEGAL DILEMMA

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I. INTRODUCTION

It has been estimated that approximately forty-three million Americans have one or more physical or mental disabilities which affect their everyday lives.[1] These disabilities can range from persons with relatively mild learning disabilities to those who are blind, deaf, or have permanently lost the use of a limb.[2]

The goal of these forty-three million disabled Americans[3] is quite simple: to achieve full participation in daily life by becoming educated,

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1. This is the finding of the United States Congress. 42 U.S.C. § 12101 (1990). Other estimates place the number of disabled Americans at between twenty-five to sixty-five million persons. Irving Kenneth Zola, *The Sleeping Giant in Our Midst: Redefining "Persons With Disabilities,"* *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT xvii (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

2. Physical impairments could include physiological disorders or conditions; cosmetic disfigurement; or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine. Mental impairments include mental or psychological disorders such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. U.S. DEPARTMENT OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL: COVERING PUBLIC ACCOMODATIONS AND COMMERCIAL FACILITIES 9 (1993).

3. The list of famous disabled Americans in history includes: Presidents Theodore Roosevelt, Franklin Roosevelt, Woodrow Wilson, John F. Kennedy & Dwight D. Eisenhower; Senators Bob Dole & Bob Kerrey; Inventor Thomas Edison; & historical figure Harriet Tub-

fully functioning members of society.[4] Thus, these Americans hope to achieve their full potential by being able to define themselves, develop their own identities and develop pride in themselves, just like any able-bodied American would.[5] In fact, American employers report that most disabled American workers, once employed, are just as safe on the job site and out-perform their able-bodied counterparts.[6]

Unfortunately, American society has not always allowed this to occur. For instance, of the twenty-two million disabled Americans who are of working age, roughly two-thirds of these persons are unemployed or out of the workforce.[7] In addition, some disabled Americans have felt the scorn of fellow able-bodied Americans when attempting to become regular members of society.[8]

In an attempt to remedy this situation, the United States Congress has passed eighteen pieces of legislation designed to help disabled Americans overcome the many prejudices that exist in the public sector.[9]

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man among many others. DONALD FERSH & PETER THOMAS, COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDEBOOK FOR MANAGEMENT AND PEOPLE WITH DISABILITIES 1, 20 & 21 (1993).

4. Justin W. Dart, *The ADA: A Promise To Be Kept*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT, *supra* note 1, at xxiv-xxv; Jane West, *The Evolution of Disability Rights*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT, *supra* note 1, at 3.

5. Dart, *supra* note 4, at xxiv-xxv.

6. BUREAU OF NATIONAL AFFAIRS, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 3 (1990); FERSH & THOMAS, *supra* note 3, at 32.

7. As Evan Kemp, Jr., former chairman of the Equal Employment Opportunity Commission, noted, "joblessness is the truly disabling condition." FERSH & THOMAS, *supra* note 3, at 11 & 29.

8. Published reports detailed the following episodes which are indicative of the battles that disabled Americans face: (1) an airline employee who resented having to help a sixty-six year old double amputee board a plane and, instead, threw him on a baggage dolly; (2) the refusal of a private zoo owner in New Jersey to admit children with Down's Syndrome because he claimed they upset his chimpanzees; and (3) the refusal of a taxi driver in Washington D.C. to pick up a woman in a wheelchair. Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 924 (1990).

9. The list includes: (1) The Smith-Sears Veterans Rehabilitation Act of 1918; (2) The Smith-Fess Act of 1920; (3) The Social Security Act of 1935; (4) Civil Rights Act of 1964; (5) Architectural Barriers Act of 1968; (6) The Rehabilitation Act of 1973; (7) Education for All Handicapped Children Act of 1975; (8) Developmental Disabilities Assistance and Bill of Rights Act of 1975; (9) The Civil Rights of Institutionalized Persons Act of 1980; (10) The Orphan Drug Act of 1983; (11) Protection and Advocacy for Mentally Ill Individuals Act of 1986; (12) Handicapped Children's Protection Act of 1986; (13) The Voting Accessibility for the Elderly and Handicapped Act; (14) The Air Carriers Access Act; (15) The Fair Housing Amendments Act; (16) The Technology-Related Assistance for Individuals With Disabilities Act of 1988; (17) The Americans With Disabilities Act of 1990; (18) The Civil Rights Act of 1991. FERSH & THOMAS, *supra* note 3, at 39; West, *supra* note 4, at 12; BUREAU OF NATIONAL AFFAIRS, *supra* note 6, at 15-26.

This legislation has benefitted some, but not all disabled Americans.[10] However, two pieces of comprehensive remedial legislation have had a tremendous impact on all disabled Americans.

The first comprehensive piece of remedial legislation passed by Congress in the area of rights for disabled Americans was the Rehabilitation Act of 1973.[11] Inspired by the attempts of Senator Hubert Humphrey to add disabilities as a protected class under the Civil Rights Act of 1964, the Rehabilitation Act patterned itself after this legislation.[12] Thus, the Rehabilitation Act, like other civil rights legislation at that time, was only effective against federal agencies or businesses which contracted with the Federal Government for amounts over $2500.[13]

In spite of this problem, the Rehabilitation Act of 1973 was significant because, for the first time, Congress acknowledged that the diminished social and economic status of disabled Americans was caused by barriers imposed by the prejudices of an able-bodied society.[14] In addition, the Rehabilitation Act of 1973 was the first piece of legislation which treated disabled Americans as a whole, unified group, not merely separate groups based upon a person's particular disability.[15]

The second, and perhaps more important, comprehensive piece of legislation passed in the area of disabled rights was the Americans With Disabilities Act of 1990 (ADA).[16] The ADA built upon the foundation laid by the Rehabilitation Act by both broadening the scope of the legislation and extending it to the private sector.[17] The ADA required increased accessibility for disabled Americans in areas such as employment,[18] services offered by state and local governments,[19] public transportation,[20] public accommodations,[21] and telecommunications.[22]

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10. West, *supra* note 4, at 8; BUREAU OF NATIONAL AFFAIRS, *supra* note 6, at 15-26.

11. *See* 29 U.S.C. § 794 (1973).

12. FERSH & THOMAS, *supra* note 3, at 40-41.

13. West, *supra* note 4, at 11.

14. Arlene Mayerson, *The History of the ADA: A Movement Perspective, in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT, *supra* note 1, at 18-19.

15. *Id.*

16. 42 U.S.C. §§ 12101-12213 (1990).

17. [The ADA] is intended to provide protection to individuals with disabilities that is at least as great as that provided under Title V of the Rehabilitation Act. Title V of the Rehabilitation Act includes such provisions as section 504, which covers all the operations of Federal Executive agencies and programs receiving Federal financial assistance. [The ADA] may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under section 504. U.S. DEPT. OF JUSTICE, *supra* note 2, at 8.

18. 42 U.S.C. §§ 12111-12117 (1990).

19. *Id.* at §§ 12131-12134 (1990).

20. *Id.* at §§ 12141-12165 (1990).

In fact, because of its broad scope and remedial powers, many observers have dubbed the ADA "the Emancipation Proclamation of the Disabled."[23]

In hopes of furthering the discussion of the plight of learning disabled students, this article will examine the recent decision in the *Ganden v. National Collegiate Athletic Association*[24] case and other applicable law in this area. Part II will discuss the events leading up to the *Ganden* case. Part III will discuss recent NCAA regulations and their effect on the learning disabled. Parts IV and V of this article look at the legal remedies in this area by determining what title of the ADA is applicable to the *Ganden* scenario, looking at a sampling of NCAA rules to determine if such rules are indeed violative of the ADA. Part VI looks at the remedies available to learning disabled students under the ADA. Part VII looks at some of the newly passed rules from the NCAA to see if they satisfy the requirements of the ADA. Part VIII offers a modest proposal for this area of the law. Finally, Part IX concludes by offering one person's view on the future in this area of the law.

II. THE CHAD GANDEN STORY

By most accounts this remedial legislation,[25] especially the ADA, has been quite successful in assisting disabled Americans to achieve their goal of becoming members of mainstream American society.[26] Unfortunately, the fight of the disabled continues to exist in this country. Chad Ganden, along with hundreds of other students, was forced to take on another place of discrimination, the National Collegiate Athletic Association (NCAA).[27]

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21. *Id.* at §§ 12181-12189 (1990).

22. The ADA amended 47 U.S.C. 225 (1990).

23. This statement was uttered by Senator Edward M. Kennedy in regards to the ADA's passage. Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans With Disabilities*, 43 EMORY L.J. 245, 247 (1994).

24. No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996).

25. *See supra* notes 11 & 16.

26. *See* Janet Simons, *Disabled Making Inroads in the Workplace: Groups Tackle Issue Head-on*, ROCKY MTN. NEWS (Denver), Nov. 15, 1995, at 9E.

27. The Ganden family, led by the efforts of Chad's parents, Warren and Susan Ganden, has been at the forefront of this issue. Thus, his story is the one used for the focus of this article. But since the swirl of publicity generated by the Ganden's attempts to have the NCAA allow their son to receive a paid visit and possible scholarship, other athletes have stepped forward to tell of their unsuccessful attempts to gain these benefits. For instance, Michelle Huston, a former fellow student with Ganden at Naperville North High School and Illinois state champion gymnast, is an auditory learner due to a long-term memory disability. She has encountered similar problems with NCAA rules in her attempts to become eligible to

Chad Ganden is currently a freshman at Michigan State University.[28] During the 1995-96 school year, he was a seventeen year-old high school senior at Naperville North High School in Naperville, Illinois.[29] Ganden was an excellent swimmer at Naperville North, as evidenced by the fact that he was a two-time defending Illinois high school champion in the 100 yard free-style and part of an Illinois state champion swim relay team.[30]

In addition to his athletic excellence, Ganden achieved success in the academic realm at Naperville North. In spite of his learning disability, he had a 2.1 grade point average on a 4.0 scale.[31]

Ganden's learning disability, which was diagnosed in junior high, is called decoding. This means that he can read written material, but has difficulty translating written letters into spoken words.[32] Because of this disability, he took some of his tests orally and had his textbooks put onto audio tape so that he could understand the material more readily.[33]

Despite his decoding disability, Ganden completed the standard high school curriculum (including classes in Rhetoric, History, Science and all math courses through Advanced Algebra).[34] In fact, he also completed his standard high school freshman requirements in a learning disabled

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compete. A number of other athletes have also come forward from around the country raising the possibility, in some minds, of a class-action lawsuit being filed against the NCAA in this issue. Gary Reinmuth, *Taking on the NCAA: Gymnast Also Caught by Academic Rules*, CHI. TRIB., Jan. 28, 1996, at C22; Gary Reinmuth, *Taking on the NCAA: For Gandens, Fight Becomes a Full-Time Job*, CHI. TRIB., Jan. 28, 1996, at C22; Steve Marcus, *Need Change For Better*, NEWSDAY (N.Y.), Apr. 17, 1996, at A76.

28. Fred Girard, *Tougher NCAA Standards Under Scrutiny: Critics Claim Thousands of Prospective Athletes Prevented from Competing*, DET. NEWS, Dec. 15, 1996, at E1.

29. Courtenay Edelhart & Andrew Gottesman, *So Far, No Happy Ending: Success Story Runs Into an NCAA Obstacle*, CHI. TRIB., Nov. 29, 1995, at 1.

30. Dan Budinger, *Naperville North Wins First Title: Huskies Too Deep for Hinsdale Central at State Swim Finals*, CHI. SUN-TIMES, Feb. 25, 1996, at 27.

31. Edelhart & Gottesman, *supra* note 29.

32. Reinmuth, *supra* note 27; *Prepared Testimony of G. Reid Lyon, Ph.D. Human Learning and Behavior Branch Center for Research for Mothers and Children National Institute of Child Health and Human Development National Institutes of Health Committee on Labor and Human Resources Subcommittee on Disability Policy United States Senate*, 103rd Cong., 1st Sess. (1995); Mark Asher & J.A. Adande, *Justice Dept. Examining NCAA Standards: Parents of Learning-Disabled Swimmer File Complaint*, WASH. POST, Nov. 28, 1995, at E1.

33. Taylor Bell, *New NCAA Guidelines Hurt Learning-Disabled Athletes: Naperville North's Chad Ganden Has Met NCAA Requirements for College Admission, But Not For an Athletic Scholarship*, CHI. SUN-TIMES, Sept. 28, 1995, at 112.

34. *Id.*

environment, but completed the remainder of his time in high school in the standard classroom.[35]

Thus, by all accounts, Ganden was the ideal kid at Naperville North. He was a student with a dedicated passion to excel both on athletic and academic levels, in spite of his disability.

As with most talented young athletes,[36] colleges under the auspices of the NCAA began to recruit Ganden in hopes of having him attend their respective institutions.[37] Collegiate swimming powerhouses such as Arizona State University, Michigan State University, Ohio State University, the University of Kansas, and the University of Minnesota all wanted Ganden to visit their campus in hopes of having him become part of their institution.[38] Unfortunately, this is when Ganden's problems started.

III. NCAA REFORM EFFORTS AND THEIR IMPACT ON THE LEARNING DISABLED

In an attempt to change its image as an athletic factory rather than an academic institution,[39] the NCAA, an association of over 1,500 American public and private colleges and universities,[40] has passed numerous regulations over the past few years. Prospective student-athletes have to satisfy new requirements in order to make visits paid for by the member school or to receive a scholarship from a member institution.[41] Included

35. Ganden states, "In [my] (learning-disabled) courses, my teachers are more prepared to help me." Reinmuth, *supra* note 27, at C22. Also, the classes are taught at a slower pace. *Id.*

36. There were 295,174 student-athletes at NCAA member institutions for the 1993-94. *Prepared Statement of Wendy Hilliard President of the Women's Sports Foundation Before the House Committee on Economic and Educational Opportunities Subcommittee on Post Secondary Education, Training, and Life-Long Learning*, 103rd Cong., 1st Sess. (1995).

37. The recruiting efforts apparently began during Chad's sophomore year in high school. Reinmuth, *supra* note 27, at C22.

38. Michael Neill & Joni Blackman, *Kicking Back: A Learning-Disabled Swimmer Battles the NCAA*, PEOPLE, Apr. 15, 1996, at 89; Gary Reinmuth, *Small Victory for Naperville North Swimmer*, CHI. TRIB., Apr. 18, 1996, at 6.

39. *See* Bob Hill, *Uh, Guys: Why Is It That Women Can Both Play and Study?*, COURIER J. (Louisville), Apr. 25, 1996, at 1B; *Knight Commission Makes Comment on NCAA Action: Knight Leaders Hail NCAA For Backing Higher Initial-Eligibility Standards; Say Convention Vote Means Sports Reform is On Track*, PR NEWSWIRE, Jan. 10, 1995.

40. *NCAA Eyes Examination of 133 Proposals at Next Convention: Key Issues at Convention*, DALLAS MORNING NEWS, Jan. 2, 1996, at 16.

41. These rules are commonly referred to by their initial names such as Proposition 48, Proposition 42, & Proposition 16.

in these standards[42] is the attainment of a minimum grade point average,[43] and standardized test score,[44] and the successful completion of what the NCAA deems to be "core courses."[45]

While the ideas behind the new rules are noble and necessary, the success of the NCAA's efforts can be debated.[46] Since the passage of these new regulations it has become apparent that learning disabled students, such as Chad Ganden, have become the indirect victims of such reform efforts. As Michigan attorney Mike Gagleard notes, "The NCAA lost its initial focus . . . In its quest to stop what they considered to be cheating, they snared in that net thousands of innocent students—and that's not fair."[47]

Since Ganden had completed some of his core course requirements during his high school freshman year in a learning disabled setting,[48] the NCAA ruled that he did not meet the established core course requirements.[49] Thus, he was ineligible to take an early paid visit[50] to a NCAA member school or to receive an athletic scholarship from such an institution. The end result being that a learning disabled student who had dedicated himself or herself both athletically and academically seemed to be punished because of his or her learning disability.

Many people associated with the NCAA saw no problem with this course of action, saying that this decision was in the best interest of stu-

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42. These standards are constantly changing which adds to the ever-growing confusion. "For three years the NCAA Clearinghouse has been working, the NCAA has established a different set of standards for each year," stated Calvin Symons, director of the NCAA Clearinghouse. Bell, *supra* note 33.

43. NCAA rule 13.7.1.2.4 required a prospective student-athlete to have a minimum 2.00 grade point average in at least seven core courses in order to take a paid early visit. NCAA rule 14.3.1.1 required that a student-athlete achieve a minimum 2.00 grade point average in thirteen core courses in order to be eligible to receive an athletic scholarship. NCAA BYLAWS, art. 13.7.1.2.4, 14.3.1.1, *reprinted in* 1996-1997 NCAA MANUAL 128, 166 (1996)

44. NCAA rule 13.7.1.2.4 also required a prospective student-athlete to attain an ACT score of 17 or SAT score of 700 in order to take a paid visit. *Id.*

45. NCAA Rule 14.3.1.1. states that core courses include: English (four years), Mathematics (two years), Natural Science (two years), Social Science (two years). In addition, a student must complete an additional course in a Math, English or Natural Science along with two years of a Foreign Language, Computer class, or Religion course. *Id.*

46. *See infra* note 39.

47. Girard, *supra* note 28, at E1 (quoting Mike Gagleard, a Michigan attorney).

48. Reinmuth, *supra* note 27.

49. Neill & Blackman, *supra* note 38.

50. Due to the ever-inreasing pressures of the recruiting environment, early visits are quickly becoming a key in obtaining athletic scholarships. For instance, two high school juniors made oral commitments to the UW-Madison basketball program for the 1997-98 season. Tom Oate, *Early Arrival: Talented Junior Headed For UW*, WIS. ST. J., Apr. 15, 1996, at 1D.

dent-athletes around the country.[51] Jim Whalen, President of Ithaca College in New York and a charter member of the NCAA President's Commission, states that "I think the emphasis is on the wrong syllable here. I think the emphasis should be on getting a good education. I become concerned when the emphasis is on athletic and not academic life."[52]

Of course, what many people associated with the NCAA fail to realize, is that most learning disabled students understand the problems that their disabilities cause for them and work hard to overcome such problems.[53] In addition, academic and athletic successes drive disabled athletes to achieve at the same or higher success rate than their able-bodied counterparts.[54]

Unfortunately for the NCAA, in its quest to remedy its image as an athletic factory, the association has thrust itself square into the center of an ethical and legal debate. The United States Department of Justice, after much prodding from the Gandens, examined some initial eligibility

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51. Thus, continuing what some may call the relatively slow progress of the NCAA in moving forward with reforms in many areas. An example of the inertia facing proponents of change in this area is shown by the following quote from Jon Westling, President of Boston University, "Children are now reaching college having been swaddled for years in the comforting illusions of learning-disabled theory . . . Enormous numbers of students in grade school and high school have been diagnosed as 'learning disabled.' The national average is twelve percent. Are we in the midst of a silent genetic catastrophe?" Carol Innerst, *Provost Decries Disabling of Colleges*, WASH. TIMES, May 5, 1995, at A2. For other areas where critics have attacked lack of social progress by the NCAA, *see* Harold B. Hilborn, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U.L. REV. 741 (1995); T. Jesse Wilde, *Gender Equity in Athletics: Coming of Age in the 90's*, 4 MARQ. SPORTS L.J. 217 (1994); Russell Gough, *Higher Education's Calloused Conscience Toward Big-Time College Sports*, 6 FOR THE RECORD 4 (NAT'L SPORTS L. INST., Aug./Sept. 1995); *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993).

52. Tanya Bricking, *Bright Futures Clouded: Special-Needs Stars Just Seek a Second Look*, USA TODAY, Dec. 20, 1995, at 1C.

53. For example, former University of Michigan basketball star Rumeal Robinson, who would have been denied a paid visit and scholarship under the new rules, was diagnosed with a learning disability. In response, he began to tape lectures and break them down sentence-by-sentence in an effort to learn the material. Robinson went on to graduate and become a first-round draft choice in the National Basketball Association. Bob Ryan, *Rumeal Under Prop. 48, Rumeal Under Prop. 42: New Legislation Would Make Robinson a Non-Entity*, BOSTON GLOBE, Jan. 27, 1989, at 41.

54. *See* Jennifer Frey, *Disability is the NCAA's*, WASH. POST, Dec. 10, 1995, at D1; Mike Dame, *Dyslexia Puts Prep Star in A World of Jumble*, ORLANDO SENTINEL TRIB., June 15, 1990, at C1; Bell, *supra* note 33.

rules of the NCAA and issued a letter stating that some of these rules may violate the ADA.[55]

The NCAA initially took no official action in response to this letter, but its Academic Requirements Committee proposed legislation which was passed at the January 1997 convention.[56]

The new rules, effective January 1997, allow individual learning disabled students to apply for waivers, rather than waiting for member schools to take action.[57] The NCAA will also begin certifying learning disabled students before they graduate from high school.[58] To qualify, students will be required to submit proof of their disability after their junior year in high school.[59] The new legislation allows learning disabled students to take classes in the summer after their senior year to qualify.[60] Finally, students do not have to meet academic criteria in order to take official visits.[61]

Yet, for Chad Ganden and other learning disabled students, these NCAA rule changes are still not enough. In fact, Ganden was forced to file a lawsuit to attempt to rectify these wrongs. Unfortunately, in the case of *Ganden v. National Collegiate Athletic Association,*[62] Ganden failed to receive a preliminary injunction against these rules which would have allowed him to compete. However, Ganden's saga may eventually open the door for future learning disabled athletes to challenge the NCAA.

IV. WHAT TITLE OF THE ADA IS APPLICABLE?

To process an ADA ("Act") claim, it is necessary to determine which title of the Act is applicable in order to meet each title's particular requirements. In spite of its seemingly "public" status, the NCAA was deemed to be a private entity by the United States Supreme Court in

55. Andrew Gottesman, *Justice Department Gives NCAA Another Chance*, CHI. TRIB., Mar. 1, 1996, at 10; *Justice Dept. Urges Flexibility*, USA TODAY, Mar. 1, 1996, at 9C.

56. *Council to Sponsor Learning-Disability Legislation*, NCAA NEWS, Apr. 29, 1996, at 1; Steve Wieberg, *NCAA To Ease Way for Disabled*, USA TODAY, Apr. 18, 1996, at 1A; Wendy Witherspoon, *NCAA Changes Aimed at Making Compliance Easier; Athletics: New Policies Come in Wake of Learning-Disabled Students' Troubles With the System*, L.A. TIMES, Feb. 11, 1997, at 3.

57. Witherspoon, *supra* note 56, at 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996).

NCAA v. Tarkanian.[63] "The NCAA enjoy[s] no governmental powers to facilitate its investigation. It ha[s] no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual."[64] As a private entity, the NCAA can be sued under Title III of the Act.

Title III of the Act, which covers public accommodations matters, states that a private entity may be sued provided the entity, (1) affects commerce and (2) is considered a public accommodation for the purposes of the Act.[65] The Act specifically provides that "a place of education" is considered a public accommodation under the Act.[66] Thus, it is apparent that the NCAA can be successfully challenged under Title III of the Act.[67]

The United States District Court in the Northern District of Illinois agreed in the *Ganden* case stating:

> [T]o constitute a 'place of public accomodation,' a membership organization must have 'a close connection to a particular facility.' . . . This connection exists if (1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility. It is evident that the NCAA . . . has a connection to a number of public accomodations; the athletic facilities of its member institutions.[68]

Therefore, Ganden succeeded on this principle and his case was allowed to continue.

V. Do NCAA Initial Eligibility Rules Violate the ADA?

To successfully establish a Title III claim under the Act, a plaintiff must prove that: (1) he or she is disabled; (2) the defendant is a private entity that operates a place of public accommodation; and (3) he or she was denied the opportunity to participate in or benefit from services or

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63. 488 U.S. 179 (1988).

64. *Id.* at 197.

65. 42 U.S.C. § 12181(7) (1988).

66. 42 U.S.C. § 12181(7)(J) (1990).

67. In *Boyle v. Brown University*, 881 F. Supp. 747 (1995), the defendant was able to successfully stave off an ADA claim because the acts in question took place before the implementation of the particular provision in the Act in 1992. The Court gave every indication that the time period of the questioned actions was the only reason for the dismissal. *See also* Robert W. Edwards, *The Rights of Students With Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans With Disabilities Act*, 2 J.L. & Pol'y 213 (1994).

68. Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000, at *10 (N.D. Ill. Nov. 21, 1996)(citations omitted).

accommodations on the basis of a disability and that reasonable accommodations could be made which do not fundamentally alter the nature of the accommodations.[69]

A. Is the Plaintiff Disabled?

Title III of the ADA and the courts define a disability as (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or (2) an individual with a record of such an impairment; or (3) an individual who is regarded as having such an impairment.[70]

To reduce the confusion caused by the patent ambiguities of the statutory definition of "disability" in the Act, Congress required the Equal Employment Opportunity Commission (EEOC) to issue regulations designed to elaborate upon the statutory definition, therefore, making the Act easier to understand.[71] The EEOC issued these regulations which courts throughout the country have used to flesh out the meaning of the Act.[72]

Under these regulations, "a physical or mental impairment" is any mental, psychological or physiological disorder or condition affecting a major body system.[73] "Substantially limits" is defined as being restricted or unable to perform a major life activity that a person in the general public can perform.[74] A "major life activity" is then defined as an activity that an average person can perform with little or no effort.[75] Such activities would include walking, breathing, sitting, standing, reading, working, or caring for oneself.[76]

For the second part of the statutory definition, the EEOC regulations define "having a record of such an impairment," as "meaning a person

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69. Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663, 670 (U.S. Dist. Conn. 1996), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); *Ganden*, 1996 WL 680000, at 7.

70. 42 U.S.C. § 12102(2) (1990); Oswalt v. Sara Lee Corp., 74 F.3d 91 (5th Cir. 1996).

71. 42 U.S.C. § 12116 (1990).

72. Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, 37 F.3d 12, 16 (1st Cir. 1994); Lyons v. Legal Aid Society, 68 F.3d 1512, 1515 (2nd Cir. 1995); Grenier v. Cynamid Plastics, 70 F.3d 667, 672 (1st Cir. 1995).

73. Major body systems include: neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine systems. 29 CFR § 1630.2(h) (1991); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995).

74. 29 CFR § 1630.2(j) (1991); McDonald v. Pennsylvania, 62 F.3d 92, 95 (1995).

75. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT II-3 (1992).

76. 29 CFR § 1630.2(i) (1991).

has a history of, or has been misclassified as having a physical or mental impairment."[77] The EEOC also offers guidance for the final part of the Act's statutory definition, "being regarded as having an impairment." The EEOC states that this provision applies when an employer or another treats a person as if he or she has an impairment, even if he or she does not have an impairment that would otherwise qualify.[78] For instance, an employer who reassigns an employee who has controlled high blood pressure and is not substantially limited to less strenuous work, would be violating this provision of the Act.[79]

In *Ganden*, both parties acknowledged that Ganden clearly met both the first and second criteria of the Act. Thus, he was allowed to continue his civil lawsuit under Title III.[80]

B. Is the NCAA a Place of Public Accommodation?

Title III of the ADA states that places of education are considered public accommodations for the purposes of the Act.[81] The courts have already enforced this provision against the NCAA.[82] As such, the NCAA would clearly be considered a place of public accommodation under Title III of the Act for the purposes of any potential lawsuit filed by a disabled student such as Ganden. The *Ganden* court agreed stating, "Ganden has some reasonable likelihood of demonstrating that the NCAA constitutes a 'place of public accomodation' within the meaning of Title III."[83]

C. Is the Plaintiff Being Denied an Opportunity to Participate on the Basis of His/Her Disability?

1. The Law

Two different sets of discrimination prohibitions under Title III of the Act exist, general and specific. In all cases, if any specific prohibitions are violated they are considered to be controlling over any violations of general prohibitions.[84]

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77. 29 CFR § 1630.2(k) (1991); Best v. Shell Oil Co., 910 F. Supp. 405, 410 (N.D. Ill. 1995).

78. 29 CFR § 1630.2(l) (1991); Howard v. Navistar Int'l Transp. Group, 904 F. Supp. 922, 929 (E.D. Wis. 1995).

79. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 75 at B-15.

80. *Ganden*, 1996 WL 680000, at 7.

81. 42 U.S.C. § 12181(7)(J) (1990).

82. *Boyle*, 881 F. Supp. 747; *see also supra* text accompanying note 67.

83. *Ganden*, 1996 WL 680000, at 10; *see also infra* note 68.

84. U.S. DEPT. OF JUSTICE, *supra* note 2, at 14.

a. General Prohibitions

Section 302 of the ADA offers the following general prohibition against discrimination:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accomodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[85]

b. Applicable Specific Prohibitions

NCAA initial eligibility rules appear to violate two specific ADA prohibitions. The first applicable prohibition deals with the imposition of eligibility criteria that screen out or tend to screen out individuals with disabilities.[86] The second apparent specific provision violated by NCAA rules states that the failure to make reasonable accomodations in discriminatory policies is a violation of the Act.[87]

2. NCAA Rules

a. Paid Early Visits

NCAA rule 13.7.1.2.4 states that a Division I college or university may not offer an early paid visit to a prospective student-athlete who has not achieved a minimum standardized test score[88] and a minimum grade point average[89] in at least seven core courses.[90]

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85. 42 U.S.C. § 12182(a) (1990).

86. Discrimination includes:

> the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accomodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accomodations being offered.

42 U.S.C. § 12182(b)(2)(A)(i) (1990).

87. Discrimination includes:

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

42 U.S.C. § 12182(b)(2)(A)(ii) (1990).

88. A prospective student-athlete needs to achieve a minimum score of 700 on the SAT, or a score of seventy on the PSAT, or a score of 17 on the ACT to meet this requirement. NCAA rule 13.7.1.2.4. 1996-1997 NCAA MANUAL, *supra* note 43, at 128.

89. This minimum grade point average is a 2.00. *Id.* at 127.

The NCAA allows learning disabled high school courses to count for the core course requirement, but only if the student's high school principal submits a written statement indicating that the students in such courses acquire the same knowledge, both in terms of quantity and quality.[91] Such requirements are, of course, impossible to meet as the students in learning disabled classes learn at a slower pace than regular students.

b. Athletic Scholarships

The academic credential requirements to receive an athletic scholarship from an NCAA institution are exactly the same as those for a paid visit, with the exception that the completion of thirteen core courses is required.[92] The exception for learning disabled students also remains the same.[93]

3. Do These Rules Violate the ADA Prohibitions?

a. Specific Prohibitions

The NCAA initial eligibility rules for early paid visits and athletic scholarships clearly violate the Act. These rules violate the provision that prohibits the imposition of eligibility criteria that screen out disabled individuals, unless such criteria are necessary for the provision of goods.[94] In fact, interpretive guidance offered by the Department of Justice regarding a similar scenario was discussed and ruled to be a violation of the Act.[95] It is unlikely that the NCAA can show that such criteria

90. NCAA Rule 14.3.1.1. states that core courses include: English (four years), Mathematics (two years), Natural Science (two years), Social Science (two years). In addition, a student must complete an additional course in a Math, English or Natural Science along with two years of a Foreign Language, Computer class, or Religion course. *Id.* at 166.

91. The NCAA Academic Requirements Committee may approve the use of high-school courses for the learning disabled and handicapped to fulfill the core-curriculum requirements if the high school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses. The learning disabled or handicapped student still must complete the required core courses and achieve the minimum required grade-point average in this core curriculum. *Id.* at 169.

92. *Id.* at 166.

93. *See supra* note 91.

94. 42 U.S.C. § 12182(b)(2)(A)(i) (1990).

95. A committee reviews applications from physicians seeking admitting privileges at a privately owned hospital. The hospital requires all applicants, no matter their specialty, to meet certain physical and mental health qualifications, because the hospital believes they will promote the safe and efficient delivery of medical care. The hospital must be able to show that the specific qualifications imposed are necessary.

are necessary, considering most of its member schools are willing to admit such students and provide services to assist in their education. Thus, this specific prohibition under the Act is violated.

The NCAA initial eligibility rules also violate the provision stating the failure to make reasonable modifications, unless such changes would fundamentally alter the nature of the accomodations.[96] The failure of the NCAA to take any action in regard to its policies, which are in violation of the Act, would constitute another violation under the Act.[97]

Since the violation of the specific prohibitions has been established, combined with the satisfaction of the other requirements, a violation of Title III of the ADA would be found and remedies would have to be put into place.[98]

Unfortunately for Chad Ganden, the court did not rule in his favor in this area because the changes he required would have, in the court's opinion, fundamentally altered the nature of the accommodations.[99] Ganden could only satisfy the grade point average requirements if the NCAA counted two of his learning disabled courses as core courses.[100] However, these learning disabled courses did not serve the same subject areas as the required core courses.[101] As a result, the court stated, "[W]hile Title III may require the NCAA to count courses as 'core' even if they are not substantively identical to approved 'core courses,' it does not require the NCAA to count courses with little substantive similarity."[102]

While Ganden may have "lost" personally by failing to gain an injunction in order to swim, his case may serve as the basis for victory by other learning disabled students in the future. The court specifically noted, "[A]s an initial matter, the court does not believe that any alteration to the NCAA's eligibility requirements would 'fundamentally alter' the nature of the privilege offered."[103] The court went on to state that such accommodations are to be determined on a "fact-bound" basis.[104]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 75 at 22.

96. 42 U.S.C. § 12182(b)(2)(A)(ii) (1990).

97. *See infra* notes 105-11.

98. A finding of a specific prohibition, in effect, trumps a general prohibition. Thus, an examination of such is unnecessary.

99. *Ganden v. National Collegiate Athletic Association*, No. 96 C 6953, 1996 WL 680000, at 15-16 (N.D. Ill. Nov. 21, 1996).

100. *Id.* at 15.

101. *Id.*

102. *Id.*

103. *Id.* at 14.

104. *Id.* at 15.

In future cases, such fact-bound analysis may allow learning disabled students to succeed in a civil action against the NCAA.

VI. REMEDIES

The Act provides that the remedies and procedures in section 204 of the Civil Rights Act of 1964[105] are available to any person who is being discriminated against because of a disability.[106] Thus, the Act creates two avenues for plaintiffs to seek redress for their complaints.

Under the first method, private suits, a plaintiff can commence a civil action directly against the alleged offender.[107] The remedies allowed under such an action include the issuance of a permanent or temporary injunction, restraining order, or other similar order.[108] In addition, a court may require the allowance of an auxiliary aid or service or modification of a particular policy.[109] The drawback to the use of a private suit is that while a party may recover attorney's fees if it emerges victorious, compensatory or punitive money damages and civil penalties are unavailable.[110]

The second method, a suit instituted by the United States Attorney General, can be commenced by filing a complaint with the Civil Rights Division of the United States Department of Justice (DOJ).[111] If the DOJ believes it has reasonable cause discrimination is occurring, and that the matter is of general public importance, it can file a civil action on the behalf of the United States government against the alleged offender.[112] In addition to the remedies available in a private suit, monetary damages, including out of pocket damages and damages for pain and suffering, but not punitive damages are available.[113] In addition, civil penalties not exceeding $50,000 for a first violation or $100,000 for a second violation are also available.[114]

In the *Ganden* case, a letter was sent to the DOJ, who investigated the matter and sent the NCAA a letter of warning in regard to its initial

105. 42 U.S.C. § 2000a-3(a) (1964).
106. 42 U.S.C. § 12188 (1990).
107. U.S. DEPT. OF JUSTICE, *supra* note 2 at 68.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 68.
112. 42 U.S.C. § 12188(b)(1)(B) (1990).
113. 42 U.S.C. § 12188(b)(2)(B) (1990); U.S. DEPT. OF JUSTICE, *supra* note 2 at 69.
114. 42 U.S.C § 12188(b)(2)(C) (1990).

eligibility procedures.[115] Factors that the DOJ suggested the NCAA look at include:

> (1) the extent to which a failure to meet any criterion is attributable to a student-athlete's disability, (2) whether noncore courses that a student with a learning disability has taken have been specified in an Individual Education Plan and/or have been approved by a state or local government as satisfying graduation requirements for students with learning disabilities, (3) the likelihood that noncore courses that a student with a learning disability has taken will prepare the student to complete successfully a planned course of study at a particular institution, (4) the assessments of a high-school principal, guidance counselor or teacher as to whether a student with a learning disability who does not meet all additional eligibility criteria is likely to succeed academically in college while participating in an athletics program, (5) written or oral comments by the student that may reflect the level of knowledge that the student actually has acquired in high school and may be helpful in predicting the student's ability to succeed in college.[116]

VII. WOULD THE NEW CHANGES IN NCAA INITIAL ELIGIBILITY RULES SATISFY THE REQUIREMENTS OF THE ADA?

In response to the letter from the DOJ, the NCAA Academic Requirements Committee proposed a series of legislation in an attempt to rectify the problem.[117] This legislation was subsequently passed at the January 1997 NCAA Convention.[118] A quick look at two of the key provisions passed by the NCAA reveals that this remedial legislation may not offer much relief for learning disabled students.

A. Elimination of the Certification for Early Visits

The first rule passed by the NCAA eliminates the certification process, such as core course requirements, that all prospective student-athletes, not just disabled student-athletes, currently must complete to take any early visits.[119] In fact, the NCAA Council had previously issued waivers to this rule for all 1996-97 student-athletes because of the DOJ's

115. Marcus, *supra* note 27.
116. NCAA NEWS, *supra* note 56, at 3.
117. *Id.*
118. Witherspoon, *supra* note 56, at 1A.
119. *Id.*

letter.[120] This proposal not only seems to satisfy the requirements of the ADA, but in fact seems to exceed them.[121]

B. Allowing Learning Disabled Students to Count Post High-School Courses Towards Their Core Course Requirements For Receiving Athletic Scholarships

This NCAA proposal insufficiently addresses the five concerns raised by the DOJ in its letter of warning to the NCAA, and in fact may be more violative of the ADA's provisions.[122] If implemented, this proposal would continue to discriminate against learning disabled students by making them take additional classes or to retake classes over the summer at a quicker pace in order to meet the NCAA's arbitrary guidelines, which the DOJ has already deemed questionable.

VIII. A MODEST PROPOSAL

For initial eligibility rules for both paid early visits and athletic scholarships, the NCAA should revise Rule 14.3.1.3.5 to allow the NCAA's Initial Eligibility Clearinghouse to examine each individual athlete's transcript and determine if he or she should be eligible for a paid early visit or an athletic scholarship without seeking a waiver. The current rules requiring minimum grade point averages, test scores, and core courses would be kept in place for other student athletes, but the Clearinghouse could look at other factors for learning disabled student-athletes.

The Clearinghouse could examine the effect of the student's disability on his academic performance in meeting the eligibility criteria. In addition, the input of teachers, administrators, and the colleges themselves could be used to aid in the decision-making process.

An argument against this proposal is that potential students might falsely claim to have a disability in order to get the perceived "lesser standard" imposed upon learning disabled student-athletes. Also, high school administrators might be forced to lie in order to have their students receive athletic scholarships.

The obvious reply would be that if the students are truly that close to missing these initial eligibility standards and are tested for learning disabilities, we are better off in the long run if such disabilities are discovered

120. Wieberg, *supra* note 56.
121. For another remedy to the situation, *see infra* Part VIII.
122. *See supra* notes 86-87.

and treated. Also, high schools and student-athletes will always try to cheat the system, regardless of the safeguards put in place.[123] Hopefully, the use of the Clearinghouse will catch some of the fraudulent perpetrators while allowing the truly disabled to try and reach their true potential.

Such a system would be difficult to administer initially, but it would be no more difficult than the Proposition 48, 42 & 16 efforts over the past decade.[124] The NCAA would have to hire more personnel at the Clearinghouse to implement such a system, but such an imposition seems small in light of the benefits to learning disabled student-athletes that could be achieved.

IX. CONCLUSION

The problem of learning disabled student-athletes attempting to enter colleges and universities is one that clearly will not go away in the very near future.[125] The increased awareness of learning disabilities brought on by the ADA and the publicity of the *Ganden* case has helped reduce the stigma associated with being deemed a "learning disabled student-athlete." Thus, thankfully, such students are more and more willing to get the educational help they need in order to become functioning members of society. In the process, they are fulfilling the goals of both the disabled Americans and the ADA. As author Tony Wong notes:

> If you fail to see the person but only the disability, then who is blind?
> If you cannot hear your brother's cry for justice, who is deaf?
> If you do not communicate with your sister but separate her from you, who is disabled?
> If your heart and your mind do not reach out to your neighbor, who has the mental handicap?
> If you do not stand up for the rights of all persons, who is the cripple?
> Your attitude towards persons with disabilities may be our biggest handicap,

123. *See* Bob Sakamoto, *Cox Handed Ten-Day Suspension: King Coach Disciplined For Using Ineligible Player*, CHI. TRIB., Apr. 17, 1996, at 3.

124. *See supra* note 42.

125. Over ten million American children under the age of eighteen are thought to have a learning disability. Charles N. Oberg et al., *Ethics, Values, and Policy Decisions for Children With Disabilities; What Are the Costs of Political Correctness?*, J. SCH. HEALTH, Aug. 1994, at 6.

And yours too.[126]

The NCAA's "handicap" regarding initial eligibility criteria for student-athletes is one that can be overcome. The NCAA is clearly attempting to make strides in its treatment of learning disabled students. Unfortunately, there is still a great deal of progress that needs to be made. As Warren Ganden, Chad Ganden's father, stated upon the passage of the new NCAA rules, "[They are a] step in the right direction, . . . [but] they've got a long way to go."[127] For the sake of disabled student-athletes everywhere, one hopes that it is overcome soon. The unfortunate tale of Chad Ganden could help create such an opportunity.

126. Lisa A. Montanaro, *The American With Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons With Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621 (1995).

127. *NCAA: New Laws Make It Easier For Students With LD to be Eligible*, 2 DISABILITY COMPLIANCE FOR HIGHER EDUC. 7, Feb. 1997.