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Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities

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COMMENTS

PLAYING THE GAME OF ACADEMIC INTEGRITY VS. ATHLETIC SUCCESS: THE AMERICANS WITH DISABILITIES ACT (ADA) AND INTERCOLLEGIATE STUDENT-ATHLETES WITH LEARNING DISABILITIES

INTRODUCTION

At some point in our lives, most of us can recall being told by a parent, friend, teacher, or coach, "It doesn't matter whether you win or lose, it's how you play the game." The process that is used to determine eligibility to participate in intercollegiate athletic programs under the Americans with Disabilities Act of 1990 (ADA)[1] and National Collegiate Athletic Association (NCAA)[2] guidelines makes this cliché take on a new meaning. The number of students reporting learning disabilities in colleges and universities has significantly increased in the last fifteen years.[3] In 1988, prior to the passage

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1. 42 U.S.C. §§ 12101-12213 (2000). President George H.W. Bush signed the ADA into law on July 26, 1990. Congress outlined the purpose of the Act as follows:

> (1) to provide a clear and comprehensive ... mandate for the elimination of discrimination against individuals with disabilities; (2) to provide ... consistent, enforceable standards addressing discrimination ... ; (3) to ensure that the Federal Government plays a central role in enforcing the standards established [under the] Act; and (4) to invoke the sweep of congressional authority ... in order to address the major areas of discrimination faced ... by people with disabilities.

§ 12101(b).

2. *See* Compl. ¶ 6, United States v. NCAA (D.D.C. 1998), *available at* http://www.usdoj.gov/crt/ada/ncaacomp.htm (last visited Apr. 9, 2005). Justice Department complaint defining the NCAA as follows :

> The National Collegiate Athletic Association (NCAA) is an unincorporated association whose members are over one thousand colleges and universities throughout the United States .... The NCAA sanctions, supervises and promotes athletic competition among its members. The NCAA's activities include determining whether student-athletes attending its member colleges and universities ... are eligible to participate in intercollegiate athletics; sanctioning intercollegiate athletic events ...; and executing contracts related to intercollegiate athletic events.

Id.

3. Katie M. Burroughs, *Learning Disabled Student Athletes: A Sporting Chance Under the*

of the ADA, the most common disability identified by college students was "partially sighted or blind"; by 2000, "learning disability" had moved into the top position.[4] This difference in the rankings equated to 16 percent of 1988 freshmen students with disabilities identifying a learning disability; by 2000, this biennial survey by the American Council on Education reported that of the 71,046 disabilities identified by entering freshmen at four-year colleges, 26,739 (over 40 percent) were learning disabilities.[5] During that twelve-year period and subsequent to it, disability discrimination litigation involving higher education has experienced steady activity in the courts and federal agencies with enforcement authority, such as the United States Department of Justice (DOJ).

"The area of greatest activity with respect to disability litigation in higher education involves learning disabilities."[6] The reason for the increase in litigation has been attributed in part to the greater number of students with diagnosed learning disabilities who are already enrolled or are seeking admission to colleges.[7] This is the result of better identification of disabled students due to special education mandates, heightened awareness of individual rights, and increased research and understanding about learning disabilities.[8]

A significant subset of the disability cases concerning higher education is lawsuits filed by student-athletes[9] with learning disabilities. The increased

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ADA?, 14 J. CONTEMP. HEALTH L. & POL'Y 57 (1997) (stating that learning disabilities are being diagnosed at a rate of 200,000 students per year).

4. CATHY HENDERSON, AM. COUNCIL ON EDUC., 2001 COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE 5 (2001), *available at* http://www.heath.gwu.edu/PDFs/collegefreshmen.pdf.

> Since 1966, a national survey of college students has been administered to a large sample of freshmen each year. This survey is conducted by the Cooperative Institutional Research Program (CIRP) and is cosponsored by the American Council on Education (ACE) and the Graduate School of Education and Information Studies at the University of California, Los Angeles (UCLA).

Id. at 1-2. The sample size consisted of 269,413 of the reported 1.1 million first-time, full-time freshmen entering four-year institutions in 2000. *Id.* at 2.

5. *Id.* at 7. The 71,046 disabilities were reported by 66,197 students. *Id.* The breakdown of the 26,739 reported disabilities by type of institution were: Public – 12,835; Independent – 13,369; Historically Black Colleges and Universities (HBCU) – 535. *Id.* The survey also identified 19 percent of students with learning disabilities as students of color. *Id.* at 10.

6. Laura F. Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241, 249 (2000).

7. *Id. See also* HENDERSON, *supra* note 4, at 22 (noting a survey that found that "[a]mong students with disabilities, those with learning disabilities were the least likely to have been offered financial assistance as an incentive to enroll").

8. Rothstein, *supra* note 6, at 249-50.

9. Jonathan L. H. Nygren, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to*

prevalence of these cases, coupled with discrimination claims regarding racial disparities in eligibility rates, led the NCAA to enter into a consent decree with the DOJ in May 1998 obligating the NCAA to modify its eligibility requirements for learning disabled student-athletes.[10] These cases frequently arise when the student-athlete's learning disability affects his or her eligibility for a scholarship under NCAA rules.[11]

Armed with the knowledge that the NCAA had chosen to enter into a consent decree rather than defend against litigation allegations of disability discrimination filed by the DOJ, this paper was initially launched under the premise that learning-disabled student-athletes were not given fair and equal access to collegiate athletic programs. Upon completing a review of court cases, print media, law reviews, and other sources, my position has shifted to a significant degree in the opposite direction. This paper will demonstrate that when high school teachers, college professors, coaches, administrators, the NCAA, and the courts follow the legislative spirit and mandates of the ADA, a student-athlete with a learning disability has a bona fide chance to successfully pursue his or her athletic and educational aspirations. Sadly, this paper will also show that athletic eligibility often times has not been counterbalanced with maintenance of academic integrity. There have been instances in which colleges and the NCAA have unfairly screened out qualified students with learning disabilities who were entitled to ADA accommodations. However, in the alternative, the ADA also has been used as a way of accessing talented student-athletes, with and without learning disabilities, who were not adequately prepared for the rigors of college work.

This paper will explore the legal and ethical obligations of collegiate institutions and the NCAA to accommodate student-athletes with learning disabilities, with a greater emphasis on the male athlete, and the courts' review of that process. Part I will define and provide an overview of the learning

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Bargain Collectively with Student-athletes, 2 VA. SPORTS & ENT. L.J. 359, 361 (2003) (noting that Walter Byers, the executive director of the NCAA from 1952-1987, was credited with inventing the term "student athlete" in the 1950s to emphasize that collegiate athletes are students first). The NCAA used the term to defend against litigation brought by injured athletes seeking to recover from NCAA member institutions under workers' compensation statutes. *Id.* *See also* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 68-69 (1995).

10. *See, e.g.*, Ganden v. NCAA, No. 96-C-6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996) (denying eligibility to a learning disabled swimmer who did not meet standardized test score and grade point average requirements); Cureton v. NCAA, No. Civ. A. 97-181, 1997 WL 634376, at *1 (E.D. Pa. Oct. 9, 1997) (alleging that race discrimination in the NCAA eligibility determination process led to the plaintiffs' lost recruiting opportunities and full NCAA Division I eligibility solely because of their low SAT scores).

11. *See, e.g.*, Tatum v. NCAA, 992 F. Supp. 1114 (E.D. Mo. 1998); Bowers v. NCAA, 974 F. Supp. 459 (D.N.J. 1997); Butler v. NCAA, No. C96-16560, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996).

disabilities frequently identified by student-athletes seeking accommodation. Part II will consist of an analysis of the ADA, defining "disability" under the ADA, and further addressing its application in the mental health context. Part III will analyze the impact of recent Supreme Court rulings in the *Sutton* trilogy,[12] considering the role of mitigating factors to accommodate physical disabilities in employment discrimination cases and its subsequent applicability to the mental disability arena in non-employment cases. Part IV will examine the past and present role of the NCAA, specifically addressing the current impact of eligibility standards on learning-disabled student-athletes. Part V will compare judicial responses to lawsuits brought against collegiate institutions and the NCAA before and after *Sutton*. Finally, the paper will conclude that the challenges associated with athletic success versus academic integrity for collegiate institutions, student-athletes, and the NCAA are not going away any time soon. However, the conclusion will explore how university presidents, athletic directors, coaches, faculty, parents, and students must accept more responsibility for ensuring that special entitlements are provided only to those qualified to receive them.

I. LEARNING DISABILITY AND THE STUDENT-ATHLETE

A. Learning Disabilities Generally

Learning disabilities as a diagnostic category for describing people with learning problems were first defined in 1962.[13] Prior to that time, low academic achievement was usually attributed to generalized cognitive limitations or a lack of motivation.[14] It is now commonly accepted that learning disabilities "cannot be attributed to poor intelligence, poor motivation, or inadequate teaching."[15] While mental health professionals in the private, government, and education sector have still failed to adopt a single consensus definition for learning disabilities, there is agreement that one common feature of learning disabled individuals is a significant "discrepancy

12. The following three disability employment discrimination cases were decided by the Supreme Court on June 22, 1999, and have generally subsequently been referred to as the "*Sutton* trilogy" in legal journals: Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Postal Service, Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

13. ACCOMMODATIONS IN HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) 131 (Michael Gordon & Shelby Kaiser, eds., 2000) [hereinafter ACCOMMODATIONS].

14. *Id.*

15. *See* United States Department of Justice, *What Is a Learning Disability?*, *at* http://www.usdoj.gov/crt/ada/learnfac.htm (last visited Apr. 9, 2005).

between . . . educationai aptitude and . . . actual educational achievement."[16]

The United States Office of Education has developed the definition that is the basis for determining learning disabilities in school-age children.[17] Another federal entity, the Interagency Committee on Learning Disabilities, developed a definition that was acceptable to all of the federal agencies on the committee except the U.S. Department of Education.[18] The Rehabilitation Services Administration, another government agency, formulated a definition that focused on work.[19] The Learning Disabilities Association of America,[20]

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16. Melissa Krueger, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments,* 48 U. KAN. L. REV. 607, 617 (2000) (quoting Lisa Eichhorn, *Reasonable Accommodations & Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context,* 26 J.L. & EDUC. 31, 33 (1997)). *See also* Samuel S. Heywood, *Without Lowering the Bar: Eligibility for Reasonable Accommodations on the Bar Exam for Learning Disabled Individuals Under the Americans with Disabilities Act,* 33 GA. L. REV. 603, 610 (1999).

17. National Institute for Literacy, *Important Definitions of Learning Disabilities, at* http://www.nifl.gov/nifl/ld/archive/insert.htm (last visited Apr. 11, 2005).

> The term 'specific learning disability' means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning disabilities which are primarily the result of visual, hearing, or motor handicaps; mental retardation; emotional disturbance, or of environmental, cultural, or economic disadvantage.

Id.

18. *Id.*

> Learning disabilities are defined as a generic term that refers to a heterogeneous group of disorders manifested by significant difficulties in acquisition and use of listening, speaking, reading, writing, reasoning, ormathematical abilities, or ofsocial skills. These disorders are intrinsic to the individual and presumed to be due to central nervous system dysfunction. Even though a learning disability may occur concomitantly with other handicapping conditions, (e.g., sensory impairment, mental retardation, social and emotional disturbance), with socioenvironmental influences (e.g., cultural differences, insufficient or inappropriate instruction, or psychogenic factors), and especially attention deficit disorder, all of which may cause learning problems, a learning disability is not the direct result of those conditions or influences.

Id.

The Department of Education is taking a more definitive position in excluding consideration of socioeconomic and environmental factors for diagnostic purposes. *Id.*

19. *Id.* The Rehabilitation Services Administration defines a specific learning disability as:

> a disorder in one or more of the central nervous system processes involved in perceiving, understanding, and/or using concepts through verbal (spoken or written) language or nonverbal means." This disorder manifests itself with a deficit in one or more of the following areas: attention, reasoning, processing, memory, communication, reading, writing, spelling, calculation, coordination, social competence, and emotional maturity.

Id.

one of the largest private advocacy groups for the learning disabled in the United States, has a different definition reflecting its view.[21]

The National Joint Committee on Learning Disabilities (NJCLD),[22] another private organization, has developed the definition that is acceptable to most advocacy and professional organizations. The NJCLD defines learning disabilities as follows:

> Learning disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant disorders in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical skills.
>
> These disorders are intrinsic to the individual and presumed to be due to a central nervous system dysfunction, and may occur across the life span. Problems in self-regulatory behaviors, social perception, and social interaction may exist with learning disabilities, but do not, by themselves, constitute a learning disability.
>
> Although learning disabilities may occur concomitantly with other disabilities (e.g., sensory impairment, mental retardation, serious emotional disturbance), or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.[23]

Learning disabilities lead to marked impairments in the development of

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20. The Learning Disabilities Association of America was formerly known as the Association for Children with Learning Disabilities.

21. National Institute for Literacy, *supra* note 17. The Association for Children with Learning Disabilities defines specific learning disabilities as

> a chronic condition of presumed neurological origin which selectively interferes with the development, integration, and/or demonstration of verbal and/or nonverbal abilities. [It] exist[s] as a distinct handicapping condition and varies in its manifestations and in degree of severity. Throughout life, the condition can affect self esteem, education, vocation, socialization, and/or daily living activities.

Id.

22. National Joint Committee on Learning Disabilities, *National Joint Committee on Learning Disabilities*, *at* http://www.ldonline.org/njcld/ (last visited Apr. 11, 2005). The NJCLD was founded in 1975 and is "a national committee of representatives of organizations committed to the education and welfare of individuals with learning disabilities." *Id.* "Over 350,000 individuals constitute the membership of the organizations represented by the NJCLD." *Id.* "A major purpose of the NJCLD is to provide an interdisciplinary forum to review issues for educational and governmental agencies." *Id.* "The NJCLD also prepares and disseminates statements to various organizations to clarify issues in the area of learning disabilities." *Id.*

23. National Joint Committee on Learning Disabilities, *Operationalizing the NJCLD Definition of Learning Disabilities for Ongoing Assessment in Schools*, *at* http://www.ldonline.org/njcld/operationalizing.html (Feb. 1, 1997).

specific skills, e.g., reading, relative to the level of proficiency expected based on the individual's age, education, and intelligence.[24] They are seldom diagnosed before kindergarten or first grade and tend to be identified on the basis of performance differences on achievement tests and other ability-oriented tests.[25]

B. Specific Learning Disabilities and Attention Disorders

The learning disabilities most frequently identified in disability discrimination claims fall in the categories of specific learning disabilities and attention disorders.[26] The current legal definition of a "specific learning disability" was adopted by Congress through the Individual with Disabilities Education Act (IDEA) Amendments for 1997[27] and its implementing regulations.[28] The IDEA definition differs from the NJCLD definition in that the former applies a "discrepancy model"[29] approach for determining a learning disability.[30] Critics of the discrepancy model approach believe that for diagnostic purposes, it focuses too heavily on test scores and not on underlying cognitive deficits that may be causing the learning difficulties.[31] The discussion of NCAA eligibility guidelines later in the paper will illustrate

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24. AM PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). Learning disabilities are referred to as "learning disorders" in the DSM-IV. *Id.* at 49.

25. Robert J. Sternberg & Elena L. Grigorenko, *Identity and Equality: Which Queue?*, 97 MICH. L. REV. 1928, 1930 (1999).

26. *See, e.g.*, Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997) (examining a class complaint filed by Elizabeth Guckenberger on behalf of all learning disabled students at Boston University); Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992) (requesting accommodation for a medical student with dyslexia who wanted the multiple choice format of a biochemistry test changed).

27. 20 U.S.C. § 1401(26) (2000). The IDEA was originally enacted in 1975 as the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1461 (1975), and was reauthorized by Congress as the IDEA, 20 U.S.C. §§ 1400-1487 (1997), to its current form.

28. 34 C.F.R. § 300.7(b)(10) (2004). The IDEA describes "specific learning disabilities" as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. . . . The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." *Id.*

29. The formulas used for determining an educational discrepancy varies among the states depending on local preferences and budgetary constraints; however, they all apply a requirement that there be a gap between ability and performance in order for a student to qualify for educational assistance.

30. ACCOMMODATIONS, *supra* note 13, at 133.

31. *Id.*

how the heavy emphasis on the Scholastic Assessment (formerly "Aptitude") Test (SAT) or the American College Test (ACT) scores impact the learning disabled athlete under this model. Nevertheless, "[p]roponents of the discrepancy model [counter] that it serves the necessary purpose of separating learning-disabled students from other poor performers."[32] "There is wide disagreement [among the experts as to] how much of a [gap] between achievement and aptitude is required to diagnose a learning disorder."[33]

Specific learning disabilities are "characterized as a 'neurobiological condition' interfering with normal acquisition of language, speech, reading and other cognitive skills."[34] Within this category, "[d]yslexia (difficulty with reading) is the most common cognitive impairment that college students report," although dyscalculia (difficulty with math) and dysgraphia (difficulty with writing) are also reported.[35] Students affected by one of the specific learning disabilities may not have impaired "higher-level cognitive comprehension, such as understanding vocabulary, reasoning, forming concepts[,] and general intelligence"; however, their difficulty in acquiring basic information is often a source of confusion and distress.[36] This can result "in [their] need[ing] . . . longer periods of time to sort out and process information."[37] Diagnosis of a specific learning disability usually is triggered by the student's "performance on individually administered tests in reading, mathematics, or writing [being] substantially below [his or her] capabilities.[38]

Attention disorders, the most common being Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD), are marked by "a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and more severe than is typically observed in individuals at a comparable level of development."[39] "[N]either ADHD nor ADD causes deficits in an individual's ability to acquire information" although ADHD may

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32. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements,* 32 J.L. & EDUC. 217, 230 (2003).

33. *Id.* (citing Keith E. Stanovich, *The Sociopsychometrics of Learning Disabilities*, 32 J. LEARNING DISABILITIES 350, 354 (1999)).

34. Patricia L. Bors, *Academic Freedom Faces Learning Disabilities:* Guckenberger v Boston University, 25 J.C. & U.L. 581, 595-96 (1999).

35. Wilhelm, *supra* note 32, at 223.

36. Bors, *supra* note 34, at 596.

37. *Id.*

38. *Id.*

39. AM. PSYCHIATRIC ASS'N, *supra* note 24, at 51 The majority of mental health professionals rely on the DSM-IV in diagnosing mental impairments; however, the United States Supreme Court held in *Bragdon v. Abbott,* 524 U.S. 624 (1998), that an impairment need not appear in a list of disorders to constitute a disability under the ADA. *Id.* at 633.

indicate the person has a neurological problem.[40] Although the attention disorders are seen significantly more often in males,[41] a diagnosis requires clinical evaluation, psychological testing, as well as behavioral reports from parents, teachers, friends, and/or the individual being assessed.[42]

Since individuals with learning disabilities generally exhibit characteristics associated with normal age-specific behavior, health professionals and educational institutions face a challenge to ensure that students are not misrepresenting their impairments. "For example, the core symptoms of ADHD are inattention and impulsiveness, both of which are basic human characteristics."[43] Reading problems are frequently evidenced in students with learning disabilities; however, many people suffer from reading problems as a result of poor study skills or a lack of background knowledge. Thus, being a poor reader does not automatically mean a person is learning disabled.[44]

C. Challenges for the Student-Athlete with a Learning Disability

"[C]ritics have asserted that [learning disability] claims are . . . over-medicalized, over-diagnosed deficiencies that collapse the distinction between . . . truly 'disabled' students and those who are merely high-strung, lazy, or 'faking it,' but nonetheless are entitled to a 'lifelong buffet of accommodation perks.'"[45] With the student-athlete, there can be the added skepticism that the diagnosis is just a smokescreen to allow academically-inferior gifted athletes the opportunity to play sports in highly ranked colleges and universities. Recent allegations by current and former student athletes at high-profile institutions such as Ohio State University describing academic fraud and unwarranted learning disability accommodations reinforce the skepticism about the legitimacy of college athletic programs.[46]

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40. Bors, *supra* note 34, at 596.

41. *Pay Closer Attention: Boys Are Struggling Academically*, USA TODAY, Dec. 3, 2004, at 12A (noting that among school age children taking attention-deficit medication, boys constitute 80 percent of the cohort).

42. *Id.*

43. Wilhelm, *supra* note 32, at 223.

44. *Id.*

45. Note, *Toward Reasonable Equality: Accommodating Learning Disabilities Under the Americans with Disabilities Act,* 111 HARV. L. REV. 1560, 1563 (1998).

46. Tom Reed, *Ohio State Will Be Probed by NCAA*, ST. LOUIS POST-DISPATCH, Nov. 14, 2004, at F1 (noting former Ohio State University football player Maurice Clarett had accused the university and coaching staff of committing academic fraud, supplying loaner cars, funneling players to deep-pocket boosters, and aligning players with lucrative, no-show summer jobs). The article also reported allegations by another former football player, B.J. Barre, who told *ESPN Magazine* that "he made

These criticisms in some ways mirror the recent constitutional challenges launched under race-based equal protection arguments related to the use of affirmative action in the college admissions process.[47] As with affirmative action, some critics of learning disability accommodation have suggested that easing academic requirements merely rewards underachievers and weakens academic standards.[48] Recent trends showing a decline in the elementary and secondary school academic performance of male students generally[49] and minority students specifically[50] suggest an anti-affirmative action argument could soon begin to be seen in reference to student-athletes. Since school-age African-American male children are statistically over-represented as special education students compared to white students,[51] it thus follows that this

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good money for little work, had tutors write papers for him and was placed, without his knowledge, in a learning disabilities program that enabled him to take tests with assistance and under no time limit." *Id.*

47. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (striking down an affirmative action plan at the University of Texas law school and insisting that recent Supreme Court precedent shows that diversity interest will not satisfy strict scrutiny); Grutter v. Bollinger, 539 U.S. 982 (2003) (upholding the use of racial preferences for affirmative action on that ground that the practice was narrowly tailored to produce diversity under an equal protection challenge to the admissions process at the University of Michigan Law School); Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating the use of racial preferences for affirmative action on the ground that it involved too mechanical a procedure for race consideration under an equal protection challenge to the undergraduate admissions process at the University of Michigan).

48. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992). Ross attended the university for four years on a basketball scholarship. Although functionally illiterate, he maintained his eligibility for four basketball seasons. *Id. See also* Hall v. Univ. of Minn., 530 F. Supp. 104 (D. Minn. 1982). An athlete accumulated more than ninety credit hours over three years that did not count toward a degree. The athlete successfully sued when the university terminated his athletic eligibility by denying him admission into a degree program. *Id. See also* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 142-143 (1996) (discussing affirmative action compared to merit based principles).

49. *Pay Closer Attention: Boys Are Struggling Academically*, *supra* note 41, at 12A (noting that the percentage of boys with learning disabilities is 12.5 percent compared to 6.6 percent of girls andstating that an informal estimate from admissions directors indicates that three out of every four private colleges quietly practice affirmative action for boys, favoring them over girls in admissions to get near balance).

50. *Id.* (quoting Rod Paige, Secretary, U.S. Department of Education: "The good news is that girls have narrowed or completely erased the educational learning gap with boys. Unfortunately, boys now seem to be falling behind, and this is particularly a problem in minority communities. The key is early support and intervention.").

51. Rosa A. Smith, *Black Boys: The Litmus Test for "No Child Left Behind,"* EDUC. WEEK, Oct. 30, 2002, *available at* http://www.edweek.org/ew/articles/2002 (citing a national analysis conducted by the *Boston Globe* finding that 1.9 million girls compared to 3.8 million boys nationwide classified as special education students); Lisa Fine, *Disparate Measures,* EDUC. WEEK, June 19, 2002, *available at* http://www.edweek.org/ew/articles/2002 (noting that study after study has shown that black male students are overrepresented in special education). Although the distinction is small overall — 14 percent of black students compared to 12 percent of white children enrolled in special

cohort will subsequently be more greatly impacted by these negative perceptions due to their overrepresentation in the "big-time"[52] intercollegiate athletics.

The increased scrutiny and skepticism associated with college athletics from charges that it is driven by motives that exploit student-athletes have led several authors to question the legitimacy of accommodating learning-disabled students.[53] At least one author and one court have used the label "oxymoron" in describing the "student-athlete" in major college sports.[54] Since minority athletes receive the majority of scholarships in some of the major sports at

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education — the author indicated the disparity was much greater among students classified as having mental retardation, a learning disability, or a behavioral/emotional disability. *Id. See also* Lisa Fine, *Graduation Rates Up for Special Education Students, Report Says*, EDUC. WEEK, May 22, 2002, *available at* http://www.edweek.org/ew/articles/2002 (discussing the trends identified in the Department of Education's annual report to Congress on implementation of the IDEA identifying "specific learning disabilities" as continuing to be the most prevalent, representing half the students covered under the IDEA). The report also cited the continued overrepresentation of black students, relative to their proportion of enrollment. *Id. See also* Civil Rights Project – Harvard University, *Racial Disparities in Special Education: National Trends*, HARVARD.EDU, *at* http://www.civilrightsproject.harvard.edu/resources/specialed/racial_disparities.pdf (2002) (citing 1998 data from the Department of Education indicating that black students, when compared to white students, were 2.9 times more likely to be identified as having mental retardation; 1.9 times more likely to be identified with an emotional problem; and 1.3 times more likely to be identified with a specific learning disability).

52. Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595 (2002) (stating that Division I-A football and Division I men's basketball make up what is commonly referred to as "big time college sports"); *see also* Rodney K. Smith & Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-time Intercollegiate Student-athletes*, 1 NEV. L.J. 160, 161 (2001) (referring to the major revenue-producing sports of Division I-A football and Division I men's basketball as "big time" intercollegiate athletics); *see infra* notes 171-74 for a discussion of the differences between the NCAA divisions.

53. *See* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1998) (expressing skepticism of the preferential treatment given individuals with learning disabilities and questioning whether the accommodation system is just granting special legal privileges to those who have no unique moral, psychological, or educational claim to them); Lee J. Rosen, *Proposition 16 and the NCAA Initial-eligibility Standards: Putting the Student Back in Student Athlete*, 50 CATH. U. L. REV. 175, 176 (2000) (stating big-time college athletic programs are a "training ground" where the student athlete is heavily recruited to play sports and earn massive revenue for the school and alleging that athletes often receive compensation against NCAA rules in the way of gifts, cars, cash payments, and "no-show" jobs); Laura Pentimone, *The National Collegiate Athletic Association's Quest to Educate the Student-athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y.L. SCH. J. HUM. RTS. 471 (1998); Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141 (1997).

54. MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 220 (1990). *See also* Hall v. NCAA, 985 F. Supp. 782, 802 (N.D. Ill. 1997) (stating "[i]f the concept of a 'student athlete' is not to be an oxymoron, the NCAA's initial eligibility requirements must be more than an afterthought or an administrative inconvenience for students, teachers, coaches, and counselors").

Division I schools while being minimally represented in the overall student body, the scholarship award system becomes even more suspect.[55] In an effort to get the best athletes, colleges often admit at-risk students. Depending on a variety of factors, this either leads, in the best case scenario, to an opportunity for a young athlete to turn his or her life around or, in the worse case scenario, opens a Pandora's box for the college when the athlete has problems inside and outside of the classroom.[56] Sadly, it is the negative perceptions from recruiting scandals[57] and academic fraud[58] that can cause qualified learning

55. *JBHE Weekly Bulletin*, J. BLACKS HIGHER EDUC., Oct. 28, 2004 (on file with author) (citing U.S. Department of Education statistic that black athletes receive 53.5 percent of football scholarships at the 117 Division I colleges and universities); *See* NCAA, *NCAA Graduation Rates Report Data*, *at* http://www.ncaa.org/grad_rates/2004 (last visited Apr. 9, 2005) (reporting undergraduate enrollment data showing black males accounting for 2278 of the 3774 basketball and 8308 of the 15,659 football athletic aid awards at Division I schools during the 2002-2003 school year and white males accounting for 994 and 6135 athletic aid awards, respectively).

56. Vahe Gregorian, *Net Gains, Net Losses*, ST. LOUIS POST-DISPARCH, Nov. 7, 2004, at F1. (quoting Barry Hinson, Southwest Missouri State College coach, as stating, "If I'm a lawyer, all I have to do is say, 'Your honor, United States – Olympic Games—I rest my case'" in relation to some of the problems involving student athletes).

57. *See, e.g.*, NCAA, *Villanova University Placed on Probation for Violations in Men's Basketball, at* http://www.ncaa.org/releases/infractions/2004 (July 8, 2004) (reporting the basketball program being placed on two years probation for multiple recruiting and extra benefit violations over a two-year period from Fall 2001 to March 2003); NCAA, *University of Oregon Placed on Probation Through Summary Disposition for Violations in Football, at* http://www.ncaa.org/releases/infractions/2004 (June 23, 2004) (reporting that the football program was placed on two years probation after the assistant coach had impermissible contact and accepted a National Letter of Intent containing a forged parent's signature from a prospective student); NCAA, *Auburn University Placed on Probation for Violations in Men's Basketball, at* http://www.ncaa.org/releases/infractions/2004 (Apr. 27, 2004) (reporting that the basketball program was placed on two years probation following impermissible basketball staff contacts, which included attempts to develop a close relationship with the "team sponsor" of an amateur team and a "sports agent" who were associated with a prospective high school student-athlete).

58. Gregorian, *supra* note 56, at F1 (citing the scandals peaking in college basketball involving egregious academic fraud cases at the University of Georgia and St. Bonaventure College and a murder and attempted cover-up at Baylor University that led the National Association of Basketball Coaches to convene an emergency summit of Division I coaches); *see, e.g.*, NCAA, *University of Georgia Placed on Probation for Violations in Men's Basketball, at* http://www.ncaa.org/releases/infractions/2004 (Aug. 5, 2004) (reporting that the program was placed on four years probation after an assistant basketball coach taught a basketball coaching class in which all thirty-nine students enrolled were awarded a grade of "A"; three student-athletes enrolled in the class rarely attended and did not take the required final exam); NCAA, *California State University, Northridge Placed on Probation for Violations in Men's Basketball, at* http://www.ncaa.org/releases/infractions/2004 (Mar. 30, 2004) (reporting that the program was placed on three years probation after the former assistant basketball coach knowingly arranged or attempted to arrange for a former student-athlete to be enrolled in and receive course credit for two kinesiology courses, even though the student-athlete never attended class or otherwise completed the course requirements); NCAA, *St. Bonaventure Placed on Probation for Violations in Men's Basketball, at* http://www.ncaa.org/releases/infractions/2004 (Feb. 19, 2004) (reporting that the program was placed on three years probation after the institution changed a student-athlete's incomplete grade in a class to

disabled student-athletes to face ongoing challenges to their credibility when seeking a reasonable accommodation.

II. THE LEGAL FRAMEWORK OF THE ADA AND APPLICATION TO THE LEARNING DISABLED STUDENT-ATHLETE

A. Historical Overview and Purpose of the ADA

The disability rights movement is a relatively recent phenomenon in American law. The impetus for the movement followed the 1954 landmark decision in *Brown v. Board of Education.*[59] Echoing concerns similar to those identified in *Brown*, advocates related the rights of the disabled to those of minorities being protected under the constitutional equal protection of the Fourteenth Amendment.[60] As with *Brown,* the Fourteenth Amendment ultimately proved to be the vehicle through which legislative protection from disability discrimination, in addition to race-based discrimination, could be achieved.[61]

An individual with a learning disability is entitled to protection from discrimination by two federal statutes: the Rehabilitation Act of 1973[62] and the ADA.[63] The Rehabilitation Act was "[t]he first comprehensive piece of remedial legislation passed by Congress [addressing the] rights [of] disabled Americans."[64] It was "[i]nspired by the [unsuccessful] attempts of Senator Hubert Humphrey to add disabilities as a protected class under the Civil Rights Act of 1964,"[65] and the statutory language is patterned after that

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a withdrawal, kept the student-athlete from going into the university's academic restoration program, and instead enabled him to remain eligible to travel to away games under university policy in the spring semester of the 2002-2003 academic year).

59. 347 U.S. 483 (1954). This historic ruling commanded the racial desegregation of the nation's public schools. The decision reversed the longstanding separate but equal doctrine of *Plessy v. Ferguson,* 163 U.S. 537 (1896).

60. U.S. CONST. amend. XIV, § 1. The amendment states "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id. See* Frances M. Nicastro, *The Americans with Disabilities Act: Determining Which Learning Disabilities Qualify for Reasonable Accommodation,* 26 J. LEGIS. 355, 357 (2000).

61. 42 U.S.C. § 12101(a)(1)-(2) (2000). In passing the ADA, Congress recognized that physical or mental disabilities affect 43,000,000 Americans whom society had tended to isolate or segregate because of their disabilities. *Id.*

62. 29 U.S.C. § 794 (2000).

63. 42 U.S.C. §§ 12101-12117 (2000).

64. W.S. Miller, *Ganden v. NCAA: How the NCAA's Efforts to Clean Up It's Image Have Created an Ethical and Legal Dilemma,* 7 MARQ. SPORTS L.J. 465, 467 (1997).

65. *Id.*; 42 U.S.C. § 2000a-3a (1964).

legislation.[66] Thus, the Rehabilitation Act, like other civil rights legislation of that era, was only effective in prohibiting discrimination against persons with disabilities by government agencies or businesses with federal contracts over $2500.[67]

The second, and arguably more significant, piece of remedial legislation passed by Congress involving the rights of the disabled was the ADA in 1990.[68] The ADA was enacted by Congress "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[69] The ADA built upon the foundation laid by the Rehabilitation Act by both expanding the scope of the legislation and expanding the coverage to prohibit private sector discrimination, including private schools and universities.[70] Upon signing the ADA, President George H.W. Bush dismissed fears that the legislation would lead to "an explosion of litigation."[71] Contrary to his prediction, there has been a significant amount of litigation since its inception concerning the reach of the ADA in various sports settings. In the area of sports law alone, athletes have sought ADA protection for a variety of disabilities including drug and alcohol use,[72] mobility[73] and

66. Miller, *supra* note 64, at 467.

67. 29 U.S.C. § 794 (1994).

68. Miller, *supra* note 64, at 467.

69. 42 U.S.C. § 12101(b)(1) (1994). In addition to the purpose quoted, Congress identified three additional basic purposes for enacting the ADA:

> (2) to provide clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12101 (b)(2)-(4).

70. 42 U.S.C. §§ 12101-12213 (1994). The ADA prohibits discrimination in all segments of society, such as restaurants, museums, parks, sports facilities, theaters, shopping centers, telecommunication services, private employment, housing, and transportation services. *Id.*

71. Ann M. Kearney, *Not Like It Was in the Old Days: Is the Americans with Disabilities Act Changing the Face of Sports as We Know It?*, 10 VILL. SPORTS & ENT. L.J. 153 (2003).

72. *See, e.g.*, Associated Press, *ADA Claim*, cnnsi.com, *at* http://sportsillustrated.cnn.com/football/2002/playoffs/news/2002/01/30/glenn_lawsuit_ap/ (Jan. 30, 2002). Glenn claimed discrimination based on his disability of chronic depression when he was suspended for four games after missing a drug test in accordance with the NFL's substance abuse policy. *Id. See also* Stearns v. Bd. of Educ., No. 99C5818, 1999 U.S. Dist. LEXIS 17981 (N.D. Ill. Nov. 16, 1999) (holding high school student barred from participating in athletics after two alcohol-related incidents that violated his school's athletic code of conduct did not violate ADA even though the student was diagnosed as being an alcoholic following the incidents).

73. *See, e.g.*, Kuketz v. MDC Fitness Corp., No. CIV. 98-0114-A, 2001 WL 993565 (Mass. Super. Aug. 17, 2001) (rejecting a claim by a paraplegic racquetball player requesting to play against non-paralyzed competitors with an allowance for two bounces, as opposed to the one bounce

health impairments,[74] as well as learning disabilities.[75] There have also been several challenges under the ADA to sports related age[76] and semester limit restrictions,[77] usually involving high school athletics participation. Due to this paper's focus on college athletes and the NCAA, references and analysis will be made primarily to the ADA.

B. Definition of the ADA and Its Application to the Student-Athlete

A person is statutorily "disabled" under the ADA if the individual has, "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) [been] regarded as having such an impairment."[78] DOJ regulations further describe disability with respect to an individual as encompassing "[a]ny mental or psychological disorder such as . . . specific learning disabilities."[79] While a student-athlete diagnosed with a specific learning disability meets the requirement for a mental impairment, as previously noted, the legitimacy of

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traditionally allowed). The court held the two-bounce request was a fundamental alteration to the competitive nature of a racquetball competition and would give the plaintiff a competitive advantage against his opponents. *Id.* at *1.

74. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). The PGA denied Martin's request for disability accommodation to use a golf cart in the third round of a qualification tournament; finding for Martin, the Supreme Court held that allowing Martin to use a golf cart, as opposed to walking, would not "fundamentally alter the nature" of the PGA's Q-school and tournaments. *Id.* at 690. Martin suffers from a degenerative circulatory disorder, Klippel-Trenaunay-Weber Syndrome, which places him at great risk of hemorrhaging, developing blood clots, and fracturing his tibia if he tried to walk an entire eighteen-hole golf course. *Id.* at 668.

75. *See also* Paul M. Anderson, *A Cart That Accommodates: Using Case Law to Understand the ADA, Sports, and Casey Martin*, 1 VILL. SPORTS & ENT. L.J. 211 (2002).

76. *See, e.g.*, Dennin v. Conn. Interscholastic Athletic Ass'n., 913 F. Supp. 663, 671 (D. Conn. 1996) (holding that an age waiver allowing a nineteen-year-old high school student with Down's Syndrome to participate as a scoring member of his high school's swim team was a reasonable accommodation); *compare with* Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1033 (6th Cir. 1995) (holding age limit on athletic eligibility did not exclude two students, who had fallen behind the school grade for most students of their age group because of their learning disability, solely based on their disability).

77. *See, e.g.*, Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840 (1999) (ruling in favor of a learning disabled basketball player and holding that allowing his sports eligibility in violation of a strict interpretation of an eight-semester participation rule was a reasonable accommodation and would not fundamentally alter the rule); Cruz v. Pa. Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 (E.D. Pa. 2001) (holding that the athletic association had to implement process for an individualized inquiry for age waivers to consider nineteen-year-old plaintiff who wanted to participate in football and track); *compare with* McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459-63 (6th Cir. 1997) (holding state athletic association's eight-semester limitation for participation did not violate the ADA).

78. 42 U.S.C. § 12102(2) (2000).

79. 28 C.F.R. § 35.104(1)(i)(B) (2004).

the diagnosis can be suspect and has been abused. Since cases involving student-athletes are rarely filed under the second or third prong, only the first prong will be discussed in detail in this review.

The term "substantially limits" means the inability to perform a major life activity that the average person in the general population could perform or being significantly restricted related to a condition, manner, or duration of such performance when compared to the general population.[80] The regulations that interpret the ADA define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[81] Thus, a student-athlete diagnosed with a specific learning disability is likely to be "disabled" within the meaning of the ADA because a diagnosed learning disability limits one's ability to learn through its impact on mental processes such as thinking and concentrating, not because of any impact on his or her ability to participate in organized sports.[82] The impact in the learning disability context of the recent Supreme Court *Sutton* trilogy decisions related to the consideration of mitigating measures in a "substantial limitation" disability determination will be discussed in Part III of this paper.

An individual who meets the ADA definition of "disabled" has only crossed the first hurdle. To establish a prima facie ADA discrimination claim as a "qualified individual with a disability,"[83] a learning disabled student-athlete must prove that, (1) he or she has a disability within the current meaning of the statute; (2) he or she is "otherwise qualified" to obtain the benefits being sought, with or without reasonable accommodation; (3) an adverse action was taken against him or her solely because of his or her disability; and (4) the educational institution or other defendant falls under the auspices of the Rehabilitation Act[84] or the ADA[85] as a public entity (Title II

80. 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (2004).

81. 28 C.F.R. § 35.104(2) (2004); 28 C.F.R. § 36.104 (2004); 29 C.F.R. § 1630.2(i) (2004). The Equal Employment Opportunity Commission's regulations interpret Title I of the ADA; Department of Justice regulations interpret Titles II and III.

82. EEOC, ADA EEOC COMPLIANCE MANUAL 902 (2d ed.1995). *See, e.g.*, Knapp v. Northwestern Univ., 101 F.3d 473, 480 (7th Cir. 1996) (holding that playing intercollegiate basketball is not part of the major life activity of learning and, thus, plaintiff was not protected by the ADA).

83. 42 U.S.C. § 12131(2) (2000).

84. 29 U.S.C. § 794 (2000) (applying to educational institutions that have federal contracts or receive federal financial assistance).

85. The ADA is divided into five titles. Title I prohibits discrimination in employment. 42 U.S.C. § 12112(a) (2000). Title II prohibits discrimination with respect to public services. 42 U.S.C. § 12132 (2000). Title III deals with public accommodations and services operated by private entities. 42 U.S.C. § 12182 (2000). Title IV covers telecommunications and directs the Federal Communications Commission to ensure the availability of relay services to hearing and speech-

claim)[86] or is a private entity that owns, leases, or operates a place of public accommodation (Title III claim).[87]

C. Establishing Entitlement to Reasonable Accommodation Under the ADA

The ADA provides entitlement to the "otherwise qualified" disabled individual to protection against discrimination based on his or her disability. The Act states 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 accommodations of any place of public accommodation."[88] The Act further specifies that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford the services to individuals with disabilities."[89]

However, meeting the "otherwise qualified" test is usually the most difficult for a learning disabled student-athlete because the individual has to demonstrate that *with* or *without* accommodation, he or she can meet the essential eligibility requirements of the college or the NCAA.[90] While the student's disability must be taken into consideration for purposes of determining admission to a program, the college or the NCAA is not required to make modifications that lower academic standards or trigger fundamental changes to the program.[91] Allegations in athlete college admissions scandals reflect that colleges do not always adhere to this criterion.[92]

The only acceptable defense the ADA offers for failing to comply is if an "entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, or

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impaired individuals. 47 U.S.C. §§ 225, 711 (2000). Title V contains miscellaneous provisions. 42 U.S.C. §§ 12201-12213 (2000).

86. 42 U.S.C. §§ 12131-12132 (2000).

87. 42 U.S.C. §§ 12181(7), 12182 (2000).

88. 42 U.S.C. § 12182(a) (2000).

89. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

90. *See* 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, 149 (2003).

91. James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 29 (1996).

92. *See, e.g., Ross*, 957 F.2d at 411. Ross accepted a scholarship to play basketball at Creighton University despite scoring in the bottom fifth percentile on the ACT; the average freshman admitted to the university scored in the upper 27th percentile. Reed, *supra* note 46, at F1.

accommodations."[93] Colleges and the NCAA in student-athlete discrimination cases routinely offer this defense.

D. Enforcement of NCAA Initial Eligibility Rules as an Adverse Action

The majority of claims raised against the NCAA and its member colleges and universities are launched by highly talented high school athletes, oftentimes minority athletes in the revenue generating sports, who have been recruited heavily by some of the top-ranked Division I colleges and universities. In most instances, the rescission of a lucrative athletic scholarship offer due to the student-athlete's inability to meet NCAA initial eligibility criteria successfully triggers the adverse action prong of a *prima facie* case filed under the ADA. The failure to meet NCAA eligibility criteria is generally related to a low SAT or ACT score, an overall grade point average (GPA) that is not high enough to compensate for the standardized test score, and/or a high school academic transcript that reflects remedial coursework that does not meet NCAA core curriculum requirements.[94]

E. Public or Private: Title II vs. Title III Determinations in ADA Claims

Once a student-athlete has shown that he or she is disabled under the ADA and unable to meet the academic program participation requirements because of a learning disability, the student-athlete must also state whether under Title II or Title III, he or she could be "otherwise qualified" to participate in the educational or athletic program with or without a reasonable accommodation.[95] The learning disabled student-athlete must next show that he or she was excluded from participation in or denied the benefit of the activities of the public entity (Title II claim);[96] or denied the opportunity to participate in or benefit from services or accommodations on the basis of a disability and reasonable accommodations could be made that do not fundamentally alter the nature of the defendant's (usually a private college, university, or the NCAA) services or accommodations (Title III claim).[97] Since these two ADA titles are mutually exclusive, learning disabled student-athletes seeking access to a college or university athletic program under the ADA must declare whether the alleged offender is a public or private entity.

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93. 42 U.S.C. § 12182 (b)(2)(A)(ii) (2000).

94. Section IV provides a detailed discussion on NCAA eligibility criteria and the ADA.

95. 28 C.F.R. § 35.130 (2004) (Title II); 42 U.S.C. § 12182 (2000) (Title III); *see also* Leonard, *supra* note 91, at 29.

96. 28 C.F.R. § 35.130.

97. 42 U.S.C. § 12181 (2000).

Title II of the ADA specifically prohibits public entities, including state and local government-run institutions of higher education, from discriminating against otherwise qualified individuals with disabilities when providing benefits or services.[98] A public entity is defined as "(1) [a]ny State or local government; (2) [a]ny department, agency, special purpose district, or other instrumentality of a State or States or local government . . . ."[99] To determine if an entity falls under the ADA definition of a public entity, courts have focused on the amount of authority delegated to the entity from the state.[100] Additionally, courts have considered whether athletic association members are public schools, whether its members use public facilities, and whether an athletic association can sanction public schools for violations of its rules.[101] Under Title II, a "qualified individual with a disability" is a person who "with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or services provided by a public entity."[102]

Title III was established to prevent discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[103] The DOJ regulations implementing Title III define a "place of public accommodation" as a facility operated by a private entity whose operations affect commerce and come within at least one of twelve enumerated categories including nursery, elementary, secondary, undergraduate, and post-graduate private schools, or other places of education.[104] However, the plaintiff must prove that the private organization operates a place of public accommodation.[105]

In 1988, the United States Supreme Court held that the NCAA is not a state actor,[106] and lower courts have since rejected the assertion by the NCAA that it is not within the reach of Title III by holding that it is a private entity

98. 42 U.S.C. § 12131-12189 (2000).

99. 28 C.F.R. § 35.104.

100. Jonathan R. Cook, *The Americans with Disabilities Act and It's Application to High School, Collegiate, and Professional Athletics*, 6 VILL. SPORTS & ENT. L.J. 243, 247 (1999).

101. *Id.*

102. 42 U.S.C. § 12131(2) (1994).

103. 42 U.S.C. § 12182 (1994).

104. 42 U.S.C. § 12181(7)(j) (2000).

105. Christopher W. Lewis, *Athletic Eligibility-Too High a Hurdle for the Learning Disabled*, 15 T.M. COOLEY L. REV. 75, 82 (1998).

106. NCAA v. Tarkanian, 488 U.S. 179 (1988).

that operates a place of public accommodation.[107] Despite its seemingly public status, the NCAA is a private entity because it "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."[108] Although the NCAA has protested the designation, the DOJ and lower courts have held that the NCAA can be challenged under Title III of the ADA.[109]

III. IMPACT OF THE *SUTTON* TRILOGY ON MENTAL DISABILITY LAW: SUBSTANTIAL LIMITATION INTERPRETATIONS

When the Supreme Court decided the *Sutton v. United Airlines, Inc.*,[110] *Murphy v. United Parcel Service, Inc.*,[111] and *Albertsons, Inc. v. Kirkingburg*[112] cases on June 22, 1999, it refined the legislative answer to the question, "What is a disability?"[113] The decision resolved a circuit split as to whether mitigating measures, such as medication or self-accommodations, were to be taken into account in determining whether someone is currently "substantially limited" under the ADA.[114] A brief review of the trilogy is

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107. *Bowers*, 9 F. Supp. 2d at 467 (denying NCAA's motion for summary judgment to dismiss plaintiff's ADA claim); *Tatum*, 992 F. Supp at 1114 (finding that plaintiff has demonstrated that the NCAA operates a place of public accommodation for purposes of Title III of the ADA); *Butler*, 1996 WL 1058233, at *5 (denying defendant's motion to dismiss on issue of whether Title III was applicable); *Ganden*, 1996 WL 680000, at *10 (ruling on plaintiff's motion for a preliminary injunction, the court found there was reasonable likelihood that the NCAA constitutes "a place of public accommodation" within the meaning of Title III of the ADA).

108. Miller, *supra* note 64, at 474 (quoting *Tarkanian*, 488 U.S. at 197).

109. *See* United States v. NCAA (D.D.C. May 27, 1997), *available at* http://www.usdoj.gov/crt/ada/ncaa.htm. In May 1998, the DOJ filed a civil action to enforce Title III of the ADA against the NCAA; the NCAA entered into a Consent Decree with the DOJ but did not waive its position that it is not a place of public accommodation and therefore Title III does not apply to it. *Id. See supra* note 107.

110. 527 U.S. 471 (1999).

111. 527 U.S. 516 (1999).

112. 527 U.S. 555 (1999).

113. *See generally* Richard C. Dunn, *Determining the Intended Beneficiaries of the ADA in the Aftermath of Sutton: Limiting the Application of the Disabling Corrections Corollary*, 43 WM. & MARY L. REV. 1265 (2002); Randal I. Goldstein, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927 (2001); Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271 (2000); Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53 (2000).

114. Dunn, *supra* note 113, at 1273. Prior to the *Sutton* ruling, eight federal circuits had "adopted the EEOC position whereby an individual's disability status was evaluated in his or her unmedicated or uncorrected state"; only the Eighth and Tenth Circuits adopted the position that individuals should be evaluated in their mitigated or corrected state. The Fourth Circuit had not ruled on this issue prior

necessary before discussing the impact on individuals with learning disabilities.

In *Sutton,* twin sisters with severe myopia (nearsightedness) filed suit based on the airline's refusal to hire them as commercial pilots.[115] The airline required pilots to have uncorrected visual acuity of 20/100.[116] The Sutton twins' vision, while 20/20 or better with corrective lenses, was 20/200 and 20/400 uncorrected in their right and left eyes, respectively.[117] Despite legislative history[118] and interpretive guidance from the Equal Employment Opportunity Commission (EEOC)[119] and DOJ[120] to the contrary, the Supreme Court held that considering the availability of mitigating or corrective

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to *Sutton. Id.* at 1273.

115. *Sutton*, 527 U.S. at 471.

116. *Id.* at 476.

117. *Id.* at 475.

118. *Id.* at 500 (Stevens, J., dissenting (citing S. Rep. No. 101-116, at 89 (1989) as stating "[A]n important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions")). Stevens also cited a Report of the House Committee on the Judiciary, which stated when an individual's impairment substantially limits a major life activity, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, at 52 (1990). *See also* Sicard v. Sioux City, 950 F. Supp. 1420, 1437-38 (N.D. Iowa 1996) (setting out the legislative history of the ADA). The Supreme Court, however, refused to consider this legislative history because it found it contrary to the statutory language. *Id.*

119. *Sutton,* 527 U.S. at 502 (Stevens, J., dissenting (citing 29 C.F.R. 1630.2(j) (1998)). Title I Interpretive Guidance provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive prosthetic devices." *Id.* However, an individual who is unable to read because of dyslexia would be an individual with a disability, because dyslexia, a learning disability is an impairment. *Id. But compare Sutton,* 527 U.S. at 496 (Stevens, J., dissenting (referencing EEOC interpretive guidance).

120. 28 C.F.R. § 35.104 (2003). Title II interpretive guidance states "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." *Id. See also Sutton*, 527 U.S. at 479. In the Supreme Court majority's view, neither the EEOC nor the DOJ was given authority to issue regulations defining disability. *Id.* Justice O'Connor came to this controversial statutory interpretation and elected not to give deference to the EEOC and DOJ interpretive guidelines which expressly indicated that mitigating measures were *not* to be taken into consideration in determining the existence of a disability. *Id.* at 482. Reflecting a detailed statutory analysis, Justice O'Connor wrote "[n]o agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101 – 12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.'" *Id.* at 479 (citing § 12102(2)). The agencies only had been granted statutory authority to issue regulations related to specifically enumerated subchapters. *Id.* The majority elected to rely on that routinely overlooked distinction in holding that there was no need to decide whether to give deference to the agencies' interpretive guidelines. *Id.* at 479-80.

measures was required in determining whether certain impairments are "substantially limiting."[121] Therefore, because the use of corrective lenses mitigated their impairment under the major life activity of seeing, the Sutton twins were not substantially limited by their myopia, and thus, were not disabled under the ADA.

The Supreme Court relied on the *Sutton* rationale for its holdings in the other two cases. In *Murphy*, the question presented involved a mechanic/truck driver who was dismissed from his job with the United Postal Service because he had hypertension (high blood pressure).[122] At issue was a Department of Transportation (DOT) regulation requiring drivers of commercial vehicles to be free of high blood pressure.[123] The Court affirmed the Tenth Circuit's finding that the determination of whether an employee had a disability should be made *with* regard to his use of medication.[124] The Court held that the petitioner was not disabled under the ADA because, in its medicated state, Murphy's hypertension was controlled and he functioned normally in everyday activities.[125]

The Supreme Court reiterated the theme of *Sutton* and *Murphy* in the final ruling of the trilogy in *Albertson's*. The *Albertson's* case also involved a commercial truck driver, Kirkingburg, who could not meet DOT visual acuity standards due to monocular vision from amblyopia (an uncorrectable condition that left him with 20/200 vision in his left eye).[126] Finding for the employer, the Court used the Ninth Circuit's acknowledgment that Kirkingburg's "brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability" to reverse the lower court's findings in his favor.[127] The Court held that it saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems," and thus Kirkingburg was not disabled under the ADA.[128]

The central holding of the *Sutton* trilogy is that "the determination of whether an individual is disabled should be made with reference to measures

121. *Sutton*, 527 U.S. at 482.

122. *Murphy*, 527 U.S. at 516.

123. *Id.* (referencing 49 C.F.R. § 391.41(b)(6) (1997)). The DOT health certification requirement includes having "no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." 49 C.F.R. § 391.41(b)(6).

124. *Id.* at 525.

125. *Id.* at 523.

126. *Albertson's*, 527 U.S. at 559.

127. *Id.* at 565 (citing *Albertson's*, 143 F.3d at 1232).

128. *Id.* at 565-66.

that mitigate the individual's impairment."[129] Since there are no artificial aids that can assist the learning disabled, the critical question for learning disabled individuals is whether "the body's own systems"[130] include cognitive adaptations used by individuals to help them understand, read, and learn productively.[131] Two qualities differentiate learning disabilities from physical disabilities –namely, the difficulty in objectively defining exactly what a learning disability is and determining ways to gauge learning disabilities not treated, e.g., with medications or educational interventions, in an unmitigated state.[132] Because learning disabilities are inherently different from the physical disabilities in the *Sutton* trilogy cases, it may be inappropriate to transfer their application to the learning disabled student or student-athlete. The type of mitigating factors a court would have to consider in evaluating a learning disabled student-athlete would have to include measures the individual has taken to enhance his or her ability in spite of an impairment.[133] Such cognitive coping mechanisms should be viewed as accomplishments synthesized into the individual's learning ability rather than removing incentives for higher achievement by considering it a "mitigating self-accommodation."[134]

Recent actions by circuit courts and inactions by the Supreme Court around the period of the *Sutton* rulings suggest a default acceptance of self-accommodations, such as studying harder, as mitigating measures to preclude a finding of discrimination for college students with learning disabilities.[135] In two pre-*Sutton* cases, *Price v. National Board of Medical Examiners*[136] and

129. *Sutton*, 527 U.S. at 475. *See also* Brian East, *The Definition of Disability After* Sutton Vs. United Airlines, *available at* http://www.nls.org/conf2000/brineast.htm (2000) (summarizing the Court's holding as, (1) "the ADA's definition of disability as an impairment that 'substantially limits' a major life activity uses the 'present indicative verb form,' and does not speak in terms like 'might,' 'could,' or 'would;' [(2)] judging people in their uncorrected or unmitigated state would be contrary to the ADA's requirement of an individual assessment, because it would require speculation about a person's condition without the mitigating measures, and would thus have to be based on generalized information; [(3)] judging people in their uncorrected or unmitigated state could mean that negative side effects from mitigating measures may not be considered, leading to an unfair result; [and (4)] . . . Congress' finding that there are 'some 43,000,000 Americans' with disabilities was based on studies reflecting functional impairments of persons even when using special aids, and would have been a much larger number if corrected impairments were included").

130. *Albertson's*, 527 U.S. at 565-66.

131. Nicastro, *supra* note 60, at 369.

132. *Id.* at 370.

133. *Id.* at 371.

134. *Id.*

135. Krueger, *supra* note 16, at 630.

136. 966 F. Supp. 419 (S.D. W. Va. 1997).

McGuinness v. University of New Mexico School of Medicine,[137] the courts held that mitigating factors and self-accommodations precluded findings of disability. The *Price* court, using a "comparison to most people approach," held that three medical students with learning disabilities seeking additional time and a separate room to take the mandatory Step 1 of the United States Medical Licensing Examination (hereinafter "Step 1 Exam")[138] were not substantially limited in the major life activity of learning because they demonstrated a history of significant scholastic achievement.[139] In other words, because they had self-mitigated the effects of their impairment, they were not held to be disabled.

The *McGuinness* court cited the Tenth Circuit's ruling in *Sutton*[140] to hold that a medical student whose anxiety disorder affected his ability to take chemistry and mathematics exams was not substantially limited in the major life activity of "academic functioning" because he was able to mitigate the problem by altering his study habits.[141] The Supreme Court subsequently refused to review *McGuinness* after the *Sutton* trilogy rulings.[142] It is speculative at this point, but college students whose conditions are controlled by medication or mitigated through hard work and diligence could find themselves outside of the ADA's protection.[143] In an analogous ruling, at least two courts have rejected mentally ill individuals' claims after *Sutton* because their medications and counseling allow them to "function without limitation."[144]

In a post-*Sutton* case involving a medical student, *Gonzales v. National Board of Medical Examiners,*[145] the Sixth Circuit denied a request for double time to take the "Step 1 Exam" to accommodate a learning disability diagnosed as a reading disorder and disorder of written expression.[146]

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137. 170 F.3d 974 (10th Cir. 1998).

138. *Price,* 966 F. Supp. at 422 The examination is administered by the National Board of Medical Examiners, an organization subject to Title III of the ADA. The exam is given after completion of the second year of medical school and a passing grade is necessary to start the third year of the medical school curriculum.

139. *Id.* at 427-28.

140. Sutton v. United Air Lines, 130 F. 3d 893, 900 (10th Cir. 1997).

141. *McGuinness,* 170 F.3d at 978.

142. 170 F.3d 974 (10th Cir. 1998), *cert. denied,* 526 U.S. 1051 (1999).

143. Wilhelm, *supra* note 32, at 232.

144. Goldstein, *supra* note 113, at 950 (citing Spades v. City of Walnut Ridge, 186 F. 3d 897 (8th Cir. 1999) and Robb v. Horizon Credit Union, 66 F. Supp. 2d 913 (C.D. Ill. 1999), but noting that if the use of medication is only mildly effective or causes disabling side effects, the individual might still be considered substantially limited in a major life activity).

145. 60 F. Supp. 2d 703 (E.D. Mich. 1999).

146. *Id.* at 710.

Gonzales's psychologist testified that he "compared plaintiff's performance to fourth year college students and found that some of his scores were below average to impaired."[147] Citing *Sutton*[148] and *Price*,[149] the court held that Gonzales's impairment did not meet the "substantially limiting" definition because when compared with "most people,"[150] he was not disabled as his scores were in the average to superior range.[151]

Shortly after the *Sutton* trilogy was decided, the Supreme Court vacated the judgment and remanded back to the Second Circuit another learning disability case, *New York State Board of Law Examiners v. Bartlett*,[152] for reconsideration in light of *Sutton* and its progeny. Bartlett sought extra time on the bar examination to compensate for a learning disability that "significantly restrict[ed] her ability to identify timely and decode the written word."[153] Prior to the *Sutton* rulings, the Second Circuit had agreed with the plaintiff and the DOJ as *amicus curiae* that a person's ability to self-accommodate did not foreclose a finding of disability.[154] On subsequent review, the *Bartlett* court identified *Gonzales* as advancing the proposition that being limited in some areas may not be enough to justify a finding that a learning impairment is a disability.[155]

The early effects of interpretations from the *Sutton* rulings on litigation involving learning disabled student-athletes will be discussed in Section V of this paper.

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147. *Id.* at 707.

148. *Sutton*, 527 U.S. at 482-87.

149. *Price*, 966 F. Supp. at 425.

150. *Gonzales*, 60 F. Supp. 2d at 708 (citing *Price*, 966 F. Supp. at 425 as defining "most people" as "the average person in the general population").

151. *Id.* Defendant's expert testified Gonzales's "verbal IQ [was] 100, 'squarely in the average range'; [h]is performance IQ was 121, in the high average to superior range[;] and his Full Scale IQ [at] 109 [was] well within the average range." *Id.*

152. 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999) (ruling on June 24, 1999; two days after *Sutton*).

153. 156 F.3d at 329.

154. *Id.* at 329.

155. *See* Bartlett v. N. Y. State Bd.of Law Examiners, 226 F. 3d 69, 74-75 (2d Cir. 2000) On remand, the Second Circuit held that the plaintiff may be disabled if her reading skills were below average "to an extent that her ability to read is substantially limited." *Id.* at 74. Because the district court had initially held that Bartlett was not disabled based on her "roughly average reading skills (on some measures) when compared to the general population," the Second Circuit remanded the case for further consideration as to whether Bartlett's skills on other measures were below average to such an extent as to be substantially limiting when compared to most people. *Id.* at 77 (quoting Bartlett v. N.Y. State Bd. of Law Examiners, 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997)).

IV. THE DISSONANCE BETWEEN THE NCAA, INTERCOLLEGIATE INSTITUTIONS, AND STUDENT-ATHLETES

A. An Overview of the NCAA and the Learning Disabled Student-Athlete

The NCAA is a private, unincorporated association now comprised of over 1250 public and private colleges and universities[156] that serves as the rule-making body overseeing the nation's collegiate athletic programs.[157] Despite its voluntary nature, the NCAA is the leading regulatory body for intercollegiate athletics.[158] The NCAA establishes and regulates rules concerning, *inter alia*, recruiting of student-athletes, awarding of athletic scholarships, and determining eligibility of more than 350,000 student-athletes[159] who participate in intercollegiate athletics at member schools.[160] The NCAA's principle of institutional control requires university presidents to assume ultimate responsibility for athletics programs; however, this is usually delegated to the institution's athletics director.[161]

The NCAA identifies one of its primary purposes as being "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship, and amateurism."[162] This description reflects the two bedrock characteristics most recently reinforced by the Supreme Court's 1984 ruling in *NCAA v. Board of Regents*[163] that athletes must be amateurs

156. *See* NCAA, *Composition of the NCAA*, *at* http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Apr. 9, 2005).

157. NCAA, 2003-2004 NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I MANUAL § 4.02.1 (2003).

158. Lynch, *supra* note 52, at 599.

159. *See* NCAA, *supra* note 156. As of September 1, 2004, the NCAA identified the approximate number of student-athletes as 210,989 men and 150,186 women for a total of 361,175 participants. *Id.*

160. NCAA, *supra* note 157, § 3.01.

161. Lynch, *supra* note 52, at 598. The athletic director usually "reports to either the university president or a vice president. Coaches and administrative staff in the athletics department report to the athletics director whose daily responsibilities may include revenue generation, managing facilities, media relations, and academic affairs." *Id.*

162. NCAA, *supra* note 157, § 1.2(c); *See also id.* § 1.3.1 (stating a basic purpose of the NCAA being "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports").

163. 468 U.S. 85 (1984). In ruling against the NCAA in an antitrust case concerning a challenged plan related to televised intercollegiate football games, the majority stated "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. . . . the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act" *Id.* at 120.

and students.[164] These eligibility expectations are now explicitly set forth in the NCAA Bylaws stating, "[a]n institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements."[165] Despite its frequently articulated commitment to amateurism and education, the NCAA is often accused of allowing commercialism,[166] professionalism,[167] competitive pressure to win games,[168] and an "arms race"[169] of building and spending to

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164. *See also* NCAA, *supra* note 157, §§ 12 - 14: All eligibility rules in Articles 12 through 14 of the NCAA Bylaws relate exclusively to these two characteristics of student and amateur status. *Id.*

165. *Id.* § 14.01.1.

166. *See* Nygren, *supra* note 9, at 360. "In 1995, the NCAA began an eight-year $1.725 billion contract to televise the men's basketball tournament on CBS. The NCAA and CBS subsequently negotiated an eleven-year, $6 billion contract extension beginning in 2003." *Id. See also* Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure*, 6 MARQ. SPORTS L.J. 199, 214-15 (1996) (noting that several successful college athletic programs had entered into multi-million dollar deals with major apparel manufacturers such as Nike and Reebok; under the contract, the company logo will appear on team jerseys, shoes, wristbands, and gloves of football players, as well as on clothing and hats worn by coaching staff).

167. *See* Lynch, *supra* note 52, at 609 (noting that college athletics programs have become training grounds for professional sports careers and that some athletes attend college for that sole purpose); *see also* Harry Edwards, *The End of the "Golden Age" of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1019 (1997) (citing statistics that a black high school football player has only a 1 in 43 chance of playing for a Division I-A football team and his chances of playing in the NFL are only 1 in 6,318; a black male has a 1 in 130 chance of playing for a Division I basketball team and only a 1 in 10,345 chance of playing in the NBA). Robert M. Sellers, *Black Student Athletes: Reaping the Benefits or Recovering From the Exploitation*, *in* RACISM IN COLLEGE ATHLETICS (D. Brooks & R. Althouse, eds., 1993).

168. *See, e.g.*, Phil Taylor, *Irish Wake*, SPORTS ILLUSTRATED, Dec.13, 2004, at 20 (discussing the controversial firing of football coach, Tyrone Willingham, after just three seasons stating, ". . . the firing of Willingham sullied the school's image as an exemplary program with higher goals than just a major bowl game"); Press Release, Knight Foundation, Knight Commission on Intercollegiate Athletics Calls for Clearer Model of Division I-A Football Governance (May 24, 2004), *available at* http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F05%5F24%5Fkcia.html (discussing testimony to the Commission from former college football coaches lamenting that coaches are evaluated solely on wins and losses and that the current emphasis on winning is inconsistent with the role of athletics as an integral part of the educational process); *see infra* note 234 for a general description of the Knight Commission and its role in intercollegiate athletics.

169. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (2001), *available at* http://www.ncaa.org/databases/knight_commission/2001_report (noting in the seven years prior to their report, capital expenditures, such as construction or remodeling of athletic facilities and capital equipment, for stadiums and arenas to generate more money for colleges/universities had increased 250 percent). The report also cited the escalating salaries of "star" college football and men's basketball coaches (reporting thirty coaches being paid $1,000,000 a year or more) as further evidence of the arms race run amok. *Id.* By comparison, the report noted that the average salary of fully tenured professors at U.S. public research institutions barely exceeded $84,000. *Id.*

lead to the subordination of its educational mission.[170]

The NCAA has divided its member colleges into three primary sections; namely, Division I,[171] Division II,[172] and Division III[173] for purposes of ensuring equity in defining which schools will compete against one another.[174] Although each division must comply with NCAA rules and regulations, the rules governing the process for academic eligibility for entering freshmen at Division I and II schools are the most controversial, especially for student-athletes with a disability.[175]

"[A]pproximately 1500 student-athletes with learning disabilities seek certification of academic eligibility from the NCAA [every school year, and approximately] two-thirds receive it."[176] "By comparison, [out] of approximately 140,000 non-disabled student-athletes who petition the NCAA, six out of seven receive eligibility certification."[177] It is also estimated that of the roughly "20,500 high school students [who] fail to attain 'qualifier' status

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170. *Id.; see also* Lori Shontz, *Brand Addresses NCAA Challenges*, ST. LOUIS POST-DISPATCH, Jan. 9, 2005, at E5 Myles Brand, NCAA President, in his annual address at the NCAA Convention devoted his speech to debunking what he said were four myths about colleges sports; namely, 1) college sports is only about the money; 2) the demise of amateurism; 3) that college sports are "more about sports than college"; and 4) the idea that Brand, rather than the college and university presidents, was capable of making the needed changes. Lynch, *supra* note 52, at 600.

171. NCAA, *What's the Difference Between Divisions I, II, and III?*, *at* http://www.ncaa.org/about/div_criteria.html (last visited Apr. 9, 2005). There are 326 Division I programs; Division I is further subdivided into I-A and I-AA (Ivy League) for football. *Id.* Division I member institutions have to sponsor at least seven sports for men and seven sports for women (or six for men and eight for women) with two team sports for each gender. *Id.* Division I schools must meet minimum financial aid awards for their athletics program, and there are maximum financial aid awards for each sport that a Division I school cannot exceed. *Id.*

172. *Id.* Division II member institutions have to sponsor at least four sports for men and four for women, with two team sports for each gender, and each playing season represented by each gender. *Id.* There are maximum financial aid awards for each sport that a Division II school must not exceed. *Id.* Many Division II student-athletes pay for school through a combination of scholarship money, grants, student loans, and employment earnings. *Id.*

173. *Id.* Division III member institutions have to sponsor at least five sports for men and five for women, with two team sports for each gender, and each playing season represented by each gender. *Id.* Division III student-athletes receive no financial aid related to their athletic ability. *Id.*

174. NCAA, *supra* note 157, § 3.2.1.4. The divisions are based on, *inter alia*, "the scope of the athletic program, the level of competition, and the amount of financial aid distributed through its athletic program." *Id.*

175. *Id.* § 14.1.2.1. A student's initial eligibility status determines, *inter alia*, whether and when they may compete in intercollegiate athletics; whether, when, and with whom he or she may practice or engage in conditioning; and whether and from what sources of funds a student may receive institutional financial aid or an athletic scholarship. *Id.*

176. Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-disabled Student-athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN L. REV. 1049, 1059 (1999).

177. *Id.*

and are [thus] ineligible to participate in intercollegiate athletics, [only] 500 [of them] are learning disabled."[178] Freshmen students who meet eligibility criteria are required to enroll in a full-time course of study, maintain good academic standing, and make satisfactory progress toward a baccalaureate (or equivalent) degree.[179] Although these numbers reflect only a small percentage of student-athletes, the statutory power of the ADA has had a significant impact on NCAA operations over the last decade.

The NCAA rules view the term "student-athlete" as a substantive, rather than formalistic, one.[180] Prior to admission for a course of study, a student-athlete must be considered for initial eligibility. Initial eligibility consists of a determination of amateur status, as well as a review of the student-athlete's academic background to ensure that the student is capable of college work based on objective standards.[181] To maintain eligibility as a student-athlete, a student must "be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain satisfactory progress toward a baccalaureate or equivalent degree."[182] These requirements, while benign on their face, can be difficult to attain for athletes with and without learning disabilities who are trying to balance academic demands and athletic commitments.

NCAA rules allow athletic departments to exert substantial influence over the student-athlete's academic priorities based on the coach's power to control playing time in a sport and withdraw athletic scholarships.[183] Often, this forces the student-athlete to choose between athletic success and academic success.[184] NCAA rules limit an athlete's participation in "countable athletically related activities"[185] to four hours per day and twenty hours per week.[186] However, many student-athletes report that the "voluntary workout"

178. *Id.* at 1077 n. 157 (citing Naftali Bendavid & Bob Sakamoto, *Enabling Legislation for Learning-disabled Athletes,* CHI. TRIB., May 27, 1998, at N1).

179. NCAA, *supra* note 157, § 14.1.7.1, 14.1.8.2.2. Full-time status is considered not less than twelve semester or quarter hours, regardless of the institutions definition of a minimum full-time program of studies. *Id.*

180. Alfred Dennis Mathewson, *The Eligibility Paradox,* 7 VILL. SPORTS & ENT. L.J. 83, 103 (2000).

181. *Id.* at 104.

182. *Id.* at 103 (citing NCAA, *supra* note 157, § 14.01.2.).

183. Lynch, *supra* note 52, at 604.

184. *Id.*

185. NCAA, *supra* note 157, § 17.02.1. Countable athletic activities include any on-court activity, chalk talk, strategy discussions, watching game films, and weight training. *Id.*

186. *Id.* § 17.1.5.1.

exception[187] is a major loophole for that restriction.[188] Some athletes spend forty to sixty hours per week on their sport, which limits the amount of time left for studying and attending classes.[189] In addition, they are required to participate in athletically related social activities, such as booster functions, that divert even more time away from studying.[190] Although most colleges have comprehensive academic support and tutorial services available for student-athletes, many are designed solely to maintain eligibility rather than to assist the individual with a substandard academic preparation or a learning disability to compensate for his or her deficits.[191]

B. Before the NCAA: The Beginning of Collegiate Sports

A short discussion on the evolution of collegiate sports will place the current collision with student-athletes and the NCAA under the ADA in context. There have been concerns about athlete eligibility and commercialism since the beginning days of intercollegiate athletics. One of the earliest reported athletic events was a boat race between Harvard and Yale universities in the 1840s that was organized and sponsored by the then powerful Elkins Railroad Line.[192] It has been reported that this event "was characterized by commercialization, crowds of spectators, prize money, and an eligibility question" regarding one of the coxswains.[193]

By the end of the nineteenth century, the leading university presidents were already expressing concerns about the direction of intercollegiate sports. President Francis Walker, of the Massachusetts Institute of Technology,

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187. *Id.* § 17.02.1(h). Coaches may design general voluntary individual workout programs for student-athletes, and the workouts do not count as countable athletically related activities. *Id.* Strength and conditioning coaches may also conduct voluntary workout programs, and the workouts would not be considered countable athletically related activities. *Id.* § 17.02.1(l).

188. Lynch, *supra* note 52, at 604.

189. *Id.*

190. Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 93 (1992).

191. *See* KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 169 (noting NCAA case books clearly reveal multiple infractions stemming from "tutoring" involving completing athletes' assignments, writing their papers, and pressuring professors for higher grades).

192. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000) [hereinafter, *Regulating Intercollegiate Athletics*]; Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567 (1991) [hereinafter, *Little Ado*]; *see also* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1986) [hereinafter, *Death Penalty*].

193. *Little Ado*, *supra* note 192, at 569-70. It is reported that in its zeal to win its first intercollegiate event, Harvard University obtained the services of a coxswain who was not currently enrolled at the university. *Id.*

opined that "[i]f the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics."[194] In a scenario that seems incomprehensible today, "[i]n 1903, the registrar at the University of Nebraska refused to admit a talented young baseball player[;] two weeks later, the University Chancellor enrolled him in the law school."[195]

It was societal concerns about the safety and violence associated with collegiate sports, primarily football,[196] rather than academic integrity and commercialism issues that ultimately led to the formation of the NCAA. In 1905, after 18 young men died and 149 were injured playing sports, President Theodore Roosevelt was compelled to weigh in on this politically sensitive issue and met with representatives from several prestigious universities.[197] This solicitation ultimately led to a combined effort to reform intercollegiate football rules. In December of that year, the Intercollegiate Athletic Association of the United States was formed.[198] In 1910, it was officially renamed the NCAA.[199] Although the organization was initially only a rulemaking body, it was nevertheless organized to eliminate "unsavory violence" and "preserve amateurism."[200]

C. The NCAA: The First Fifty Years

Throughout its history, the NCAA has attempted to reverse the tendency of colleges and universities to recruit students with athletic skills but who do not have the skills to compete academically.[201] The NCAA's efforts to

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194. *Regulating Intercollegiate Athletics*, *supra* note 192, at 11 (noting that President Eliot of Harvard University held that "lofty gate receipts from college athletics had turned amateur contests into major commercial spectacles").

195. *Little Ado*, *supra* note 192, at 570-71.

196. JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 7 (2001) (describing how the game took on a brutal tone, driven by plays such as the Harvard-invented "flying wedge," in which what would be the equivalent of today's offensive line started twenty-five yards behind the line of scrimmage and ran en masse into (or over) one designated (and stationary) member of the opposing team).

197. *Id.*; *see also* Kay Hawes, *Roosevelt's Love of Sport Led to NCAA's Birth*, THE NCAA NEWS, Nov. 8, 1999, *available at* http://www.ncaa.org/news/1999/19991108/active/3623n28.html. In October 1905, President Roosevelt summoned the presidents and football coaches from Harvard, Yale, and Princeton to the White House to discuss making football less dangerous and, ultimately, saving the sport. *Id.*

198. *Regulating Intercollegiate Athletics*, *supra* note 192, at 12. The IAAUS was formed with sixty-two original members. *Id.*

199. *Id.*

200. *Id.*

201. Nathan Hunt, Cureton v. NCAA*: Fumble! The Flawed Use of Proposition 16 by the NCAA*,

increase academic performance initially targeted so-called "tramp" athletes in the early 1900s.[202] Although the NCAA tried to combat this problem by requiring evidence of student progress toward a degree, the requirement had a negligible impact because colleges and universities retained the authority to determine academic eligibility requirements for their athletes.[203]

The NCAA was not a major force in the governance of intercollegiate athletics in its early years because until after World War I, the running of intercollegiate athletic events was primarily the responsibility of the students at the college or university.[204] After World War II, college athletics faced a series of major gambling scandals.[205] The NCAA took advantage of this turmoil to implement policies that ultimately allowed it greater control over rapidly expanding collegiate athletic programs.[206]

In 1948, the NCAA enacted what has come to be known as the "Sanity Code," which was designed to "alleviate the proliferation of exploitive practices in the recruitment of student-athletes."[207] While one of the mandates of this rule was to ban all athletic scholarships, colleges and universities evaded the reforms by giving athletes secret scholarships or paying them directly.[208] After recognizing that its attempt to enforce the regulation was futile, the NCAA repealed the "Sanity Code" in 1951.[209]

The NCAA had two significant events occur during the 1950s that have had a lasting effect on the organization. In 1951, the NCAA began to function as a wholly separate organization and negotiated its first contract, valued at over one million dollars, to televise intercollegiate football.[210] The financial support provided by its share of the television contracts and its increasingly forceful role in infractions matters allowed the NCAA to begin to establish its place as the dominant entity in the governance of intercollegiate athletics that it maintains today.[211]

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31 U. TOL. L. REV. 273, 278 (2000)

202. *Id.* "Tramp" athletes would participate in athletic programs at several different schools during their collegiate career in exchange for financial compensation. *Id.*

203. *Id.*

204. *Death Penalty*, *supra* note 192, at 991.

205. *Id.* at 992.

206. *Id.*

207. *Regulating Intercollegiate Athletics*, *supra* note 192, at 14.

208. Hunt, *supra* note 201, at 278.

209. *Regulating Intercollegiate Athletics*, *supra* note 192, at 15.

210. *Death Penalty*, *supra* note 192, at 993.

211. *Id.*

D. The Contemporary Role of the NCAA (1965 – Present): The Entry of Standardized Tests, Academic Eligibility Requirements, and Legal Challenges

The NCAA has spent the last fifty years continuing to try to create a legitimate system of minimum academic eligibility entry standards for collegiate athletes. Well before the ADA was available as a legal forum, the NCAA had to address student and collegiate challenges related to eligibility rules. Following the failure of the "Sanity Code," the NCAA resumed a "home rule" method of regulating academic standards for incoming student-athletes. Under the "home rule" policy, the member schools enacted their own admission policies for college athletes and set their own eligibility standards.[212] In 1965, the NCAA attempted to rectify the failure of the "Sanity Code" with the passage of "1.600 Rule."[213] The 1.600 Rule required students to have a high school record and standardized test scores sufficient to "predict" a college grade point average of at least 1.6 (i.e., in the C-/D+ range).[214] Although the requirements under the 1.600 Rule were modest, it still led to controversy and litigation because of the consideration of standardized test scores. While not realized at the time, this was actually the first NCAA policy that would have impacted a student-athlete with a learning disability.

By the 1970s, the NCAA found itself caught in the crossfire of criticism from its member colleges and universities and American society.[215] On the one hand, the colleges criticized it for unfairly exercising regulatory authority.[216] This criticism peaked when the NCAA was given additional power beginning in 1976 to penalize schools directly and, therefore, administrators, coaches, and student-athletes indirectly for rule violations.[217] On the other hand, the issue of academic integrity in intercollegiate athletics resurfaced by assertions that it had been commercialized to the point that it was little more than a big business masquerading as an educational enterprise.[218]

The first lawsuits challenging NCAA academic eligibility requirements were filed in 1973.[219] In *Begley v. Corporation of Mercer University*,[220] a

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212. Shropshire, *supra* note 53, at 143.

213. Hunt, *supra* note 201, at 278.

214. Shropshire, *supra* note 53, at 143. The prediction was made using a formula considering high school grades or high school rank, along with the student's score on the SAT or ACT. *Id.*

215. *Regulating Intercollegiate Athletics*, *supra* note 192, at 16.

216. *Death Penalty*, *supra* note 192, at 994.

217. *Id.*

218. *Id.*

219. Hunt, *supra* note 201, at 283.

high school basketball star unable to meet the 1.600 rule requirements unsuccessfully filed suit under breach of contract when the university revoked his scholarship.[221] In the same year, a different court held that NCAA eligibility rules had a rational relationship to the legitimate state purpose of educating student athletes and therefore dismissed a Fourteenth Amendment constitutional challenge under the Equal Protection Clause[222] in *Parish v. NCAA*.[223] The *Parish* court also decided that, consistent with an analogous Supreme Court constitutional ruling,[224] there was not a fundamental right to participate in collegiate athletics.[225] Although the NCAA prevailed in these initial legal challenges, it dropped the 1.600 Rule in 1973 and replaced it with a "2.0" Rule. Under the 2.0 Rule, the standardized test score consideration was dropped, and a student-athlete's eligibility was conditioned upon attaining an overall grade point average of 2.0 or higher.[226]

Although the NCAA was under attack for allowing colleges and universities to permit athletes to allow academic life to be subordinate to athletic success, it was only after a highly publicized lawsuit by an English professor at the University of Georgia that the NCAA instituted eligibility reform known as "Proposition 48" in 1986.[227] Proposition 48 required that a high school student-athlete maintain at least a "C" average, or a 2.0 grade point average, in eleven high school core curriculum courses. [228] It also

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220. 367 F. Supp. 908 (E.D. Tenn. 1973).

221. *Id.* at 910. The district court upheld the scholarship revocation because Begley did not meet the requirements of a signed agreement stating he would "maintain . . . a minimum [grade point] average of 1.6 [and] abide by [all] rules and regulations of the NCAA". *Id.*

222. *See* U.S. CONST. amend. XIV, § 1 (stating "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

223. 361 F. Supp. 1220, 1226-28 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975) (holding that although appellants lost the opportunity to play in NCAA-sponsored tournaments and televised games, they had not been deprived of a "property" or "liberty" interest because of the NCAA's enforcement of its 1.600 rule against Centenary College).

224. *Id.* at 1224-25 (citing San Antonio v. Rodriguez, 411 U.S. 1, 23 (1973), which held, in an equality of wealth challenge by a Texas school district, that education was not a fundamental right protected by the constitution).

225. *Id.*

226. Denbo, *supra* note 90, at 156.

227. *See* Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986) (challenging the University of Georgia's policies for giving preferential treatment to athletes in order to maintain their eligibility). Professor Kemp claimed she was demoted and later terminated for refusing to "coddle semi-illiterate athletes" by raising the failing grades of athletes in her remedial English class. *Id. See also* Pentimone, *supra* note 53, at 472 (quoting a sports writer as saying, "If you could walk and chew ice, you were eligible to play basketball" in the pre-Proposition 48 period).

228. NCAA, 2003-04 NCAA GUIDE FOR THE COLLEGE-BOUND STUDENT ATHLETE (2003), *available at* http://www.ncaa.org/library/general/cbsa/2003-04/2003-04_cbsa_main.pdf. To meet the

required that a student-athlete attain a score of 700 out of a possible 1600 on the SAT or a comparable score on the ACT in order to attain "qualifier" status.[229] While many educators denounced the 700 score as being "embarrassingly low," there were still reports of athletes who managed to attend competitive schools with low SAT scores.[230] Proposition 48 also initiated the concept of eligibility status known as a "partial qualifier."[231]

Significant debate about the fairness of the Proposition 48 was an immediate issue. Criticism came primarily in predicting discriminatory impact on minority and low-income athletes by inclusion of standardized testing requirements.[232] There was also a concern that "wealthier schools would 'stockpile' partial qualifiers by providing full [financial] aid."[233]

"core course" requirement: (1) The core course must be defined as a recognized academic course and qualify for high school graduation credit in one or a combination of the following areas: English, Mathematics (Algebra I or higher), Natural/physical science, Social science, Foreign language, Computer science (excluding keyboarding and Word processing), or non-doctrinal religion/philosophy, e.g. comparative religion classes; (2) The course must be considered college preparatory by the high school. College preparatory is defined for these purposes as any course that prepares a student academically to enter a four-year collegiate institution upon graduation from high school; and (3) The course must be taught by a qualified instructor defined by the appropriate academic authority, e.g., high school, school district or state agency with authority of such matters, and at or above the high school's regular academic level, i.e. remedial, special education or compensatory courses shall not be considered core courses. *Id.* at 4. *See also* NCAA, *supra* note 157, § 14.3.

229. Pentimone, *supra* note 53, at 482. If the SAT was taken after April 1, 1995, the high school athlete had to have a score of 820 instead of 700, due to a new scoring system imposed by the Educational Testing Service. *Id.*

230. *Id.* At Florida State University, two football players earned athletic scholarships scoring less than 450 on the SAT when the median score for incoming freshman was 1020; at Tulane University, a student-athlete was admitted with a SAT score of only 470 when the median score for incoming freshman was 1121. *Id.*

231. *Id.* at 483. A "partial qualifier" is a student-athlete who has the required grade point average but not the requisite SAT/ACT score or vice versa. *Id.* "Partial qualifiers" can receive an athletic scholarship but cannot compete athletically during their freshman year. *Id.* The NCAA is eliminating "partial qualifier" status in the fall of 2005. *Id.; see also* NCAA, *supra* note 157, § 14.02.9 (stating "[t]he following Bylaw 14.02.9.2, Partial Qualifier, was deleted at the October 31, 2002, NCAA Division I Board of Directors meeting, effective August 1, 2005).

232. Denbo, *supra* note 90, at 157; Shropshire, *supra* note 53, at 143; Rosen, *supra* note 53, at 198.

233. Weston, *supra* note 176, at 1070-71 The NCAA responded to this criticism by briefly ratifying another eligibility modification, Proposition 42, in 1989. *Id.* at 1071. Proposition 42 limited partial qualifiers to three years of competition with no athletic scholarship eligibility during their freshman year. *Id.*; *see also* Shropshire, *supra* note 53, at 145. Proposition 42 was revised a year later to allow partial qualifiers to receive non-athletic, need-based financial aid during their freshman year; however, non-qualifiers remained ineligible for financial aid. *Id.*

E. The Impact of Proposition 16 and the Americans with Disabilities Act

In 1990, the Knight Commission[234] released a report that recommended major reforms in intercollegiate athletics; specifically cited was the compromise of academic integrity.[235] Public officials joined the attack leading to federal legislation being enacted in 1990 requiring colleges to disclose graduation rates for student-athletes.[236] Congressional hearings followed in 1991 focusing on financial disclosure laws for college sports.[237] With public and government scrutiny mounting, in 1992, the NCAA voted to increase the already controversial academic requirements for incoming freshmen with even more stringent standards by the adoption of the equally controversial "Proposition 16." The rule touted a commendable NCAA goal of being driven by a desire to raise student-athlete graduation rates and close the "gap" between African-American and white student-athlete graduation rates; unfortunately, this current rule has not been a panacea for learning disabled student-athletes.[238] The public relations benefit for the NCAA is that the new rule lessened its increasingly negative image as being commercialized and not committed to education.

Even under the stricter Proposition 16 criteria, at many schools, the difference between the average SAT score and an athlete's SAT score exceeds 300 points.[239] Under the new (and current) system, which took effect in August 1996, the number of required core curriculum courses increased from eleven to thirteen and added an "Initial Eligibility Index"[240] – a sliding scale

234. KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS (1991), *available at* http://www.ncaa.org/databases/knight_commission/2001_report. The Knight Foundation Commission on Intercollegiate Athletics was formed by the John S. and James L. Knight Foundation in 1989 in response to more than a decade of highly visible scandals in college sports. *Id.* The goal of the Commission was to recommend a reform agenda that emphasized academic values in an arena where commercialization of college sports often overshadowed the underlying goals of higher education. *Id.* The Knight Commission has played an influential role in building momentum and mapping out a path to college sports reform.

235. Davis, *supra* note 190, at 57.

236. *Id.*; *see also* Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 104 Stat. 2381 (1990).

237. *Id.*

238. Denbo, *supra* note 90, at 158.

239. Rosen, *supra* note 53, at 210.

240. Weston, *supra* note 233, at 1072. "The Index correlates minimum acceptable core GPAs and standardized test scores, such that higher grades can offset lower standardized test scores." *Id.* Under the 2003-2004 guidelines, a student with a 2.5 GPA or higher requires a SAT score of 820 for eligibility whereas a student with a 2.0 GPA requires a SAT score of 1010. NCAA, *supra* note 228, at 2.

system designed to decrease the impact of standardized test scores. In order to obtain certification to participate in sports at the Division I and Division II level, prospective student-athletes must first submit an application and sign a release form with the NCAA Initial-Eligibility Clearinghouse (Clearinghouse).[241] The Clearinghouse applies the NCAA's initial eligibility requirements and certifies the status of a prospective student-athlete as either a "qualifier,"[242] "partial qualifier," (through July 2005)[243] or "nonqualifier."[244] Disputes between curriculum interpretation by local school districts and the Clearinghouse also have been the source of lawsuits.[245]

Despite efforts by the NCAA to legitimize the eligibility process, the rhetorical question critics of the collegiate athletics admissions process continue to raise is "Why should a student who meets minimum Proposition 16 criteria be admitted over a student with a 1400 SAT score and 3.75 GPA?" The answer, in this context, is not the compelling state interest in diversity used to justify affirmative action programs,[246] but that university administrators argue that successful big-time athletic programs, "1) attract attention to a school; 2) increase academic prestige; 3) boost student

241. NCAA, *supra* note 157, § 14.3.1; *see also Bowers*, 974 F. Supp. at 461. ("The Clearinghouse is a division of the American College Testing Service (ACT) which operates under a contract between the ACT and the NCAA to determine the eligibility of prospective athletes. The NCAA has delegated to the Clearinghouse the authority to determine the eligibility of students to participate in athletics at, and to receive athletic scholarships to member institutions during their freshman year." *Id.* at 461 n.2.

242. NCAA, *supra* note 157, § 14.02.9.1. To obtain qualifier status, a student must graduate from high school, meet core curriculum requirements, and meet minimum GPA and SAT or ACT score requirements. *Id.*

243. *Id.* § 14.02.9.2 (describing a high school graduate who failed to meet both the minimum core requirements GPA and SAT/ACT score requirements).

244. *Id.* A nonqualifier is a student who has not graduated from high school or who, at the time specified by the regulation, presented neither the core curriculum GPA nor the SAT/ACT score required for a qualifier. *Id.*

245. *See, e.g.*, Van Troba v. Mont. State Univ., 970 P.2d 1029 (Mont. 1998) (examining the case of a high school student who was advised that Journalism I was an acceptable core course; the NCAA rejected the course, causing the student to fall short of the thirteen course requirement by one-half core credit); *Hall,* 985 F. Supp. at 795 (examining the NCAA's decision to exclude the courses of Microsoft Office, Microsoft Works, Scripture, and Ethics/Morality; high school advised student computer classes would meet core requirements but conceded they had doubts as to whether religion courses "would get through or not"); Phillip v. NCAA, 960 F. Supp. 552 (D. Conn. 1997) (examining the case of a high school who was awarded 0.5 core credits for Sequential Math I course; The Clearinghouse valued the course at 0.33 core credits leading to the student's failure to qualify); *Ganden*, 1996 WL 680000, at *3 (examining Michigan State University's argument on behalf of the plaintiff that he had failed to take the requisite "core courses" in part because he had relied on his high school's belief that the remedial courses he was taking qualified as core courses).

246. *See Grutter*, 539 U.S. at 306.

enrollment; and 4) build school spirit."[247] A recent NCAA study, however, disputes this widely accepted belief.[248]

F. The Impact of the ADA: The NCAA and Reasonable Accommodations for Student-athletes with Learning Disabilities

Lawsuits involving learning disability claims filed by student-athletes seemed to flourish following the passage of the ADA. It is unfortunate that the ADA has at times been a convenient forum for some student-athletes with and without specific learning disabilities to try to circumvent the stricter NCAA eligibility standards that were being instituted. The discrimination claims generally sought to have the NCAA modify, alter, or waive its eligibility requirements in accordance with ADA mandates for individuals with learning disabilities.[249] The NCAA standards setting minimum standardized test scores and core course requirements were challenged as having a discriminatory impact on minorities and individuals with learning disabilities.[250]

The increasing number of complaints and lawsuits against the NCAA[251] led to the May 1998 filing of a civil action by the Civil Rights Division of the DOJ alleging violations under Title III of the ADA.[252] The complaint followed a two-year investigation of NCAA allegations beginning in 1995 and found that several of the NCAA's policies, practices, and procedures related to determining initial eligibility discriminated against student-athletes with learning disabilities.[253] The complaint cited as evidence the NCAA's refusal

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247. Pentimore, *supra* note 53, at 476. *See also id.* at 500 (quoting Marianne Jennings, former associate dean of business at Arizona State University, as having said, "There are certain truths in life. You don't spit in the wind, you don't tug on Superman's cape, and you don't mess around with star football players"). *See also* KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 169.

248. Robert H. Frank, *Challenging the Myth; A Review of the Links Among College Athletic Success, Student Quality, and Donations*, *at* http://www.knightfdn.org/efault.asp?story=athletics/reports/2004%5Ffrankreport/index.html (May 2004) (reviewing numerous empirical studies and finding that if success in athletics does generate indirect benefits such as greater contributions by donors and stimulate additional applications from prospective students, the effects are very small).

249. Weston, *supra* note 176, at 1059.

250. Rothstein, *supra* note 6, at 407.

251. *Bowers*, 974 F. Supp. at 459; *Ganden*, 1996 WL 680000, at *1; *Butler*, 1996 WL 1058233, at *1. *See also* Adam Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817, 875 (1998). In the 1996-1997 academic year, the NCAA rejected nearly every waiver request by learning disabled student-athletes who did not meet the standardized test score requirement. *Id.* at 879.

252. *See* Compl., *supra* note 2.

253. *Id.*; *see also* Press Release, FairTest, Justice Department Finds NCAA in Violation of ADA;

to certify as meeting the core curriculum requirement classes that were designed to accommodate students with learning disabilities as part of a school's special education curriculum or courses the NCAA considered "remedial."[254] The complaint also charged that the NCAA policies adversely affected student-athletes with learning disabilities by denying them the opportunity to participate in collegiate athletic programs and noted such a forum often provided motivation for academic success.[255]

In a concurrent filing with the civil complaint, the DOJ acknowledged that the NCAA had engaged in "good faith" negotiations to resolve the matter after being notified of preliminary findings in October 1997 and entered into a Consent Decree.[256] Under the agreement, the NCAA agreed to make modifications to its process for determining initial and continued eligibility, include experts in learning disabilities when reviewing applications for determination of granting a waiver, establish an "ADA Compliance Coordinator" position to serve as a liaison between NCAA staff and students, and pay a total of $35,000 in damages to four student-athletes.[257] The formal oversight by the DOJ ended on May 1, 2003.[258]

Since formally recognizing that learning-disabled students may have difficulty complying with initial eligibility requirements, the NCAA has instituted several changes specifically directed toward enabling these students to attain "qualifier" status. The twelve-hour requirement for full-time student status, as well as the progress toward college degree requirement, can now be waived if objective evidence demonstrates that less than twelve hours is needed to accommodate the student's learning disability.[259] With reference to the core curriculum, the presence of a high school course title that includes designations such as "remedial," "special education," "special needs," or other

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Criticizes Use of Standardized Test Scores (Oct. 30, 1997), *available at* http://www.fairtest.org/pr/ncaajust.htm (citing the Justice Department's October 17, 1997 letter to the NCAA as saying, "[t]here is a consensus that using a standardized test score as the sole criterion for determining the ability of students with learning disabilities succeed academically in college tends to screen out such students because of their disabilities").

254. *See* Compl., *supra* note 2.

255. *Id.*; *see Banishing the Stereotype of the "Dumb Black Jock,"* J. BLACKS HIGHER EDUC., Nov. 25, 2004 (on file with author) (citing NCAA data that only 34 percent of black males graduate from college within 6 years, but that 39 percent of black male scholarship athletes graduate from college within that same timeframe. For black female college students, the rates are 45 percent and 60 percent, respectively).

256. United States Department of Justice, *NCAA Settlement with the Justice Department – Fact Sheet*, *at* http://www.usdoj.gov/crt/ada/ncaafact.htm (last visited Apr. 9, 2005).

257. *Id.*

258. *Id.*

259. NCAA, *supra* note 157, § 14.1.8.2.2.1.3; *see also id.* § 14.4.3.8.

similar titles no longer automatically disqualifies a course from satisfying the requirements.[260] Students with disabilities may also use scores achieved during a nonstandard administration of the SAT or ACT, and the testing agencies no longer identify students who have been granted testing accommodation due to a documented disability.[261] In addition, students are now allowed a fourth season of eligibility for intercollegiate competition if they have completed at least 80 percent of the requirements for their degree program by the beginning of the fifth academic year.[262]

At the same time the NCAA seems to be going out of its way to "level the playing field" for students with learning disabilities, it is continuing to "raise the bar" to gradually make the general initial eligibility requirements more stringent through the 2008 academic year. Beginning with the fall 2003 academic year, the number of core curriculum courses required increased from thirteen to fourteen academic courses.[263] In the fall of 2005, students will be required to have one year of additional academic coursework.[264] In an apparent effort to place greater emphasis on performance in the classroom and deemphasize performance on standardized tests, under the 2005 guidelines, the inverse relationship on the sliding scale grade point average to SAT test score requirement will be expanded.[265]

Beginning in the fall 2008 academic year, incoming students will be required to have had three years (instead of the current two years) of mathematics (at the Algebra I level or above), and the number of core curriculum courses will increase from fourteen to sixteen academic courses.[266]

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260. *Id.* § 14.3.1.2.5. For special education courses, the high school principal must submit a written statement to the NCAA indicating that the courses are substantially comparable, quantitatively and qualitatively, to similar core course offerings in that academic discipline and the courses appear on the high school's list of approved core courses. *Id.*

261. *Id.* § 14.3.1.3.3. The student must still achieve the minimum required test score; however, the test does not have to be administered on a national testing date. *Id.*

262. *Id.* § 14.3.3.2.

263. NCAA, *supra* note 228, at 3. For a two-year period that will end beginning with the fall 2005 academic year, students have the option of being evaluated under the thirteen or fourteen core course standards. *Id.*

264. *Id. See also* NCAA, *supra* note 157, § 14.3.1.1. The qualifier applies to student-athletes first entering a collegiate institution on or after August 1, 2005. *Id.* With an increased focus on basic skills, computer science courses, unless they contain significant programming elements and meet graduation requirements under mathematics or natural/physical science, will no longer be accepted. *Id.*

265. *Id.* Under the current guidelines, students with a GPA of 2.500 and above are required to have a SAT score of 820; each ten point decrease in a student's SAT score or one point decrease on the ACT requires a corresponding increase of 0.025 in the student's GPA, e.g., a student with a GPA of 3.500 and above only has to attain a SAT score of 400 for academic eligibility. *Id.*

266. *Id.* This requirement applies to student-athletes first entering a collegiate institution on or

These requirements are to be applauded if they have the intended effect of enhancing the academic preparation of student-athletes generally. However, it is an open question as to whether the modifications, specifically those related to a sliding scale for standardized test score requirements,[267] will have the anticipated positive impact on increasing education and athletic opportunities for low-income minorities and students with specific learning disabilities. Realistically, it will probably be the infrequent case that a strong student (e.g., GPA 3.00 to 3.55) will be in the position to benefit from the lowered requirement of only requiring a SAT score of 620 decreasing to 400 to meet eligibility standards as opposed to the more likely scenario of the student with a GPA decreasing from the 2.30 to 2.00 range being in the untenable situation of needing a SAT score of 900 increasing to 1010 to qualify.[268]

Compliance with eligibility rules is complicated by the reality that successful collegiate athletic programs, directly and indirectly, generate significant revenue for the NCAA, colleges, and universities.[269] NCAA President, Myles Brand, was recently quoted in a speech lamenting that the vast money at stake in college athletics is "distorting the mission of higher education."[270] As previously noted, given the potential for significant financial gain, alumni support, and job security when their sports teams win championships, there is an enormous temptation to make ethical compromises such as admitting athletically gifted athletes who do not meet academic standards or accommodating a non-existent learning disability.[271] College coaches and advisors also have the ethical challenge of assembling a reasonably attainable course load and not tampering with academic

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after August 1, 2008. *Id.*

267. Note, *The Racial Scoring Gap on the SAT May Be Wider Than the Official Statistics Show,* 44 J. BLACKS HIGHER EDUC. 42 (2004) (stating that in 2003, the College Board reported that the mean combined SAT score for black students was 857, which was 206 points below the mean score for white students; the data was based on 1,050, 977 test takers who identified their race or ethnic background).

268. The example is based on NCAA Initial-eligibility index effective August 1, 2008.

269. *See, e.g.*, Nygren, *supra* note 9, at 360-61 (stating "Division I football and basketball players generate approximately $3.5 billion per year for the NCAA and its member institutions"; also estimating that "a top men's basketball player was estimated to generate more than $1 million of revenue for his university"). Nygren also cited specific examples of revenue generation at Stanford University where the men's basketball program generated $4.6 million against $2.2 million in expenditures during the 1999-2000 season, and the University of Minnesota, where men's basketball netted $6.3 million and men's hockey returned a profit of more than $4 million. *Id.* at 360.

270. Gregorian, *supra* note 56, at F1. President Brand added that "[t]his escalation of success demanding even more success has good people with noble intentions chasing both the carrot and their tails." *Id.*

271. *See supra* notes 166-70.

requirements while ensuring continued eligibility for the student-athlete.[272]

The NCAA tracks the academic success of student-athletes, as evidenced by graduation rates, division, race, gender, and sport. There is not a separate tracking of the progress of students who are being accommodated for learning disabilities. However, although national graduation rates of student-athletes are slightly higher than the general student body under Proposition 16, black males in the big-time, revenue-producing sports continue to graduate at a low rate.[273] It is possible that the demands of being a successful athlete contribute to diminished academic success for a greater percentage of this population or it may be an extension of the greater prevalence of learning disability diagnoses among black males in school age populations.[274]

V. JUDICIAL VIEWS ON ACCOMMODATING THE LEARNING DISABLED STUDENT-ATHLETE; MENTALLY VS. PHYSICALLY DISABLED ATHLETE COMPARISONS

A. The Impact of Sutton and the Justice Department Consent Decree on Learning Disabled Student-Athletes

As previously noted, since the first lawsuits were filed and in the wake of the Consent Decree, the NCAA has significantly changed its eligibility standards. The NCAA now allows for a more individualized assessment of prospective athletes, but the permissibility of these standards under disability discrimination law has not been fully addressed in the courts.[275] In order for a student-athlete with a learning disability to prevail in a discrimination claim, the student-athlete must establish all of the requisite elements described earlier for an ADA claim. There have been several cases on this issue, and as the discussion below will demonstrate, the court findings generally have been unfavorable to the student-athletes.

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272. *See, e.g.*, Rosen, *supra* note 53, at 194 (stating that schools that exploit student athletes are more inclined to overlook a student's 700 SAT score or 2.0 GPA and focus on his 28 point basketball game averages or 350 passing yards per football game because there is so much on the line).

273. NCAA, *NCAA Division I Graduation Rates Continue to Exceed Student Body, at* http://www2.ncaa.org/page_printer (Oct. 25, 2004). Division I football student-athletes entering institutions in 1997 completed the six-year cycle with a graduation rate as follows: white football players graduated at 65 percent, versus 60 percent for all white male students; black football players graduated at 48 percent, versus 36 percent for all Black male students. *Id.* The graduation rate for Division I basketball players was 48 percent for white males and 42 percent for black males. *Id.*

274. Refer to discussion, *supra* notes 49-51.

275. Laura F. Rothstein, *Don't Roll in my Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act,* 19 REV. LITIG. 399, 407 (2000).

In *Ganden v. NCAA*,[276] a pre-*Sutton* and pre-consent decree case, a nationally ranked swimmer with a learning disability (a decoding disability that primarily affected his reading and writing skills) sued the NCAA when he was only granted "partial qualifier" status.[277] He charged the NCAA's screen out procedures denied him the privilege to participate in swimming competitions for failing to meet the minimum GPA and core course requirements due to his disability.[278] Due to his learning disability, Ganden's application was automatically forwarded to the NCAA Subcommittee on Initial-Eligibility Waiver (hereinafter "Subcommittee") for review.[279] Although the NCAA was specifically asked by the DOJ to grant Ganden's waiver application,[280] the Subcommittee only provided Ganden with "partial qualifier" status.[281]

In its defense to Ganden's claim, the NCAA did not raise the issue of mitigating factors to challenge his disabled status even though he had achieved a 3.0 GPA during his senior year, in part due to the interventions of a team of school counselors who designed a curriculum to address his specific disability and academic weaknesses.[282] If a plaintiff similar to Ganden would present today, a *Sutton* analysis would consider the mitigating impact of the school's interventions and conceivably determine that the individual was not disabled because he was not "substantially limited" in a "major life activity" when the mitigating factors are considered. In ruling against Ganden, the court held he could not defeat the NCAA's contention that lowering the minimum GPA

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276. *Ganden*, 1996 WL 680000, at *1.

277. *Id* at *5. Ganden argued in order to qualify for an elite national swim team, he needed "to have as much elite competition and sanctioned swim times as possible." *Id.* He also noted that "[a]t the elite level, the average competitive life of a swimmer is only three to four years, with the peak years occurring between ages nineteen and twenty one." *Id.*

278. *Id.* at *4-*5. The NCAA Subcommittee refused to consider a LRC Typing and LRC Computers class as "core" course; also, based on Ganden's compiled ACT scores after taking the test three times under a nonstandardized testing condition, his GPA of 2.136 did not meet the minimum 2.275 requirement for "qualifier" status. *Id.* at *4.

279. *Id.* In reviewing the application, the Subcommittee looked at courses taken, the Individualized Education Plan (IEP), progression of grades and test scores, and other actions taken to compensate for a disability. *Id.*

280. *Id.* at *4. "During this time, the Department of Justice had been involved in an ongoing dialogue with the NCAA over its eligibility requirements and their impact on learning disabled students." *Id.*

281. *Id.* at *5. Ganden did not meet the minimum GPA for even "partial qualifier" status, but the Subcommittee considered his learning disabled status and record indicating academic improvement. *Id.*

282. *Id.* The school district developed an IEP which allowed a resource study hall each day, alternative test-taking procedures, and books on tape and enrolled him in five classes intended to address his weaknesses. *Id.* at *1.

requirement and acceptance of non-substantive courses as "core" would "fundamentally alter" the privilege of participation in intercollegiate swimming.[283] The court further held that the NCAA had met its requirement to provide an individual assessment to requests for modifications through its waiver provisions.[284]

In the case of *Hall v. NCAA,*[285] a non-disabled basketball player with aspirations to play professionally but who had an academic profile similar to Ganden unsuccessfully sued the NCAA when he was determined to be a "nonqualifier."[286] After taking the ACT four times, Hall had a sum score of 70 and a 2.346 GPA; the corresponding minimum GPA for "qualifier" status was 2.425. Hall's request for a waiver consideration was denied by the NCAA.[287] Demonstrating the limited situations in which using the waiver process is considered appropriate, the NCAA unapologetically countered that GPA deficit waivers where there are no extenuating circumstances related to the athlete's failure to meet the GPA requirement were granted zero percent of the time.[288] It is critical that the NCAA consistently take a somewhat rigid approach in situations such as these so that the legitimacy of the waiver process is not compromised.

In another pre-*Sutton* and pre-Consent Degree case, *Tatum v. NCAA,*[289] the question of how wide the reach of the learning disorders "net" should be cast was addressed. In *Tatum*, a basketball player with a history of marginal academic performance filed suit against the NCAA upon being notified that he would not be certified as "qualified" because he had failed to achieve an adequate standardized test score.[290] Tatum had been approved to take the ACT under nonstandard conditions (untimed tests were administered in May, August, and October 1997),[291] achieving a qualifying score of seventy-nine

283. *Id.* at *16-*17.

284. *Id.* at *16.

285. 985 F. Supp. 782 (N.D. Ill. 1997).

286. *Id.* at 791.

287. *Id.*

288. *Id.* The NCAA testified that even when there were extenuating circumstances, e.g., death of a family member, causing grades to drop significantly, waivers were only granted 10 percent of the time. *Id.*

289. 992 F. Supp. 1114 (E.D. Mo. 1998). Plaintiff included SLU as a defendant in the action to allow him to seek an order requiring the university to honor its commitment to provide him a full athletic scholarship once he was determined to be a qualifier. *Id.* at 1117. Plaintiff did not bring a separate cause of action against SLU.

290. *Id.* at 1119. Based on his GPA of 2.269, plaintiff needed an ACT score of 77 or higher for Division I intercollegiate eligibility. *Id.* at 1117.

291. *Tatum* had also taken the ACT under standard conditions during his junior year of high school. *Id.*

after being diagnosed as suffering from a "generalized anxiety disorder and a specific phobia related to test taking."[292]

When Tatum's scores were submitted to the NCAA, the NCAA's learning disability consultant concluded that he did not have a learning disability or physical disability as defined by the NCAA Bylaws, and the scores from the non-standard ACT administrations were not accepted.[293] The NCAA reported that it recognized and allowed accommodations for attention deficit disorder (ADD), but had never accepted nonstandard scores for a psychological disorder such as this.[294] The questionable circumstances surrounding Tatum's diagnosis appropriately led the NCAA to suspect its legitimacy.

Although Tatum had a lifelong history of performing better on daily assignments than major examinations and standardized tests, it was not until the middle of his junior year that he told a guidance counselor that he felt "distracted and nervous" when testing.[295] By the fall of his senior year, the counselor suggested Tatum be evaluated for potential disabilities when it became apparent that his athletic scholarship offer to Saint Louis University (SLU) might be in jeopardy.[296] A doctoral student, under the supervision of a licensed psychologist, at the SLU Psychological Services Center evaluated Tatum, and both concluded he did not have a learning disability and just needed to spend more time on his studies.[297] A month later, tests conducted by a different licensed psychologist identified the psychological disorder discussed above.[298] This case is a classic example of the professional inconsistencies in the mental health community discussed in section I that cause the legitimacy of diagnoses to become suspect.

The court was suspicious of the timing of Tatum's diagnosis and refused to grant him a preliminary injunction reasoning that he had not "demonstrated a substantial likelihood of establishing that he had a disability."[299] Even more indicting than the fact that the conflicting diagnoses were made within a very

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292. *Tatum*, 992 F. Supp. at 1118. The plaintiff's diagnosis is recognized in the American Psychiatric Association's *Diagnostic & Statistical Manual of Mental Disorders*. *See* AM. PSYCHIATRIC ASS'N, *supra* note 24, at 50.

293. *Id.*; *see* NCAA, *supra* note 157, § 14.3.1.4.3 .

294. *Tatum*, 992 F. Supp. at 1122. In 1996, the NCAA only rejected 5 of the 1498 requests for approval of nonstandard test scores. *Id.*

295. *Id.* at 1117. The guidance counselor subsequently got plaintiff's math, history, and Spanish teachers to allow him extra time to complete tests. *Id.*

296. *Id.*

297. *Id.* At plaintiff's mother's request, three additional psychological tests were conducted which concluded that plaintiff did not suffer from a learning disability or test anxiety. *Id.*

298. *Id.* at 1118.

299. *Id.* at 1123.

close time frame was that on cross-examination, the psychologist who diagnosed the learning disability conceded that Tatum's "poor performance on standardized tests could possibly be related to a lack of motivation or preparation."[300] It is critical to the spirit of the Consent Decree that cases such as this be given close scrutiny so that appropriate accommodation determinations are made. In terms of how this situation would fare under a *Sutton* analysis, if one accepts the diagnostic findings of the second psychologist as valid, it is conceivable that a plaintiff similarly situated to Tatum would meet "substantial limitation" criteria since attempts at self-mitigation were unsuccessful.

The court in another pre-*Sutton* but post-Consent Decree student-athlete case, *Bowers v. NCAA (Bowers II),*[301] held that a learning disabled football player who had been in special education classes in elementary and secondary school might be able to establish a disability claim under the ADA.[302] The NCAA and defendant college moved to dismiss (and moved for summary judgment as an alternative) by countering that the student was not disabled under the ADA.[303] In support of their position, they argued that he had successfully completed a significant amount of high school mathematics courses in a relatively short timeframe and was doing well in his classes at Temple University (where he ultimately enrolled).[304] Applying a pre-*Sutton* interpretation, the court held that the plaintiff's learning disability should be considered without regard to mitigating measures and that under that analysis, he met the criteria for being substantially limited in the major life activity of learning.[305]

On subsequent appeal, the post-*Sutton* court in *Bowers v. NCAA (Bowers III),*[306] responding to allegations that the NCAA eligibility criteria "tend to screen out" disabled individuals, refused to grant summary judgment to the NCAA because of its failure to demonstrate that its treatment of special

300. *Id.*

301. 9 F. Supp. 2d. 460 (D.N.J. 1998). The plaintiff filed a first amended complaint to an earlier case, *Bowers,* 974 F. Supp. 459 (D.N.J. 1997), in which a preliminary injunction against the NCAA was denied. *Bowers,* 9 F. Supp. 2d at 460. In the amended complaint, the plaintiff added as defendants, the ACT Program, Temple University, the University of Iowa, and American International College. *Id.*

302. *Bowers*, 9 F. Supp. 2d at 466. Bowers alleged that he had been denied a football scholarship to Temple University, the University of Iowa, and American International College because the NCAA had classified him as a "nonqualifier" based on his academic record in high school. *Id.* at 469-70.

303. *Id.* at 474-75.

304. *Id.*

305. *Id.*

306. 118 F. Supp. 2d 494 (D.N.J. 2000).

education courses under the core course requirement was essential or necessary to its mission of ensuring that student-athletes will succeed academically in their freshman year.[307]

The NCAA went on to successfully defend against Bowers's reasonable accommodation allegations by pointing out he was afforded a waiver procedure consistent with the terms of the Consent Decree and that it had performed a substantive analysis of each of Bowers's special education courses.[308] The NCAA concluded that Bowers had indeed received a reasonable accommodation under the waiver procedure, but that the waiver procedure found him unqualified.[309] Bowers offered several reasons why the waiver procedure was not a reasonable accommodation;[310] however, the court was not persuaded by his arguments except for finding that the NCAA did not complete the waiver in a timeframe that would have allowed Bowers an opportunity to compete for a scholarship for his freshman year.[311] The *Bowers* case continues to work its way through the appeals process, but it is evident that the consent decree has not lived up to the NCAA's prediction that it "[r]emoves any dispute as to the [NCAA's] compliance with federal law in this matter."[312] Although there were no *Sutton* issues addressed in the appeal, this holding suggests the courts will be generally deferential to the NCAA if it is following the consent decree modifications, even if the system is still far from perfect.

Another post-*Sutton* and post-consent decree case further demonstrated NCAA deference by the court related to continued eligibility for enrolled collegiate athletes. In *Matthews v. NCAA*,[313] a learning-disabled Washington State University sophomore was denied a third NCAA waiver for the 1999

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307. *Id.* at 518.

308. *Id.* at 520.

309. *Id.*

310. *Id.* at 521-22. Bowers argued the waiver procedure did not provide reasonable accommodation because

> (1) the process occur[red] too late in the recruitment timetable to allow learning disabled students a meaningful opportunity for recruitment if a waiver is granted; (2) . . . the members of the subcommittee that evaluate[d] the waiver applications [were] unqualified; (3) . . . the NCAA [did] not publicize the availability of the waiver application; (4) . . . Bowers had no actual or constructive knowledge of the availability of the waiver process during his senior year of high school; (5) . . . the subcommittee did not have a complete record before it [when his waiver application was] considered; (6) . . . Bower's waiver process came too late in the recruitment process; and (7) . . . the subcommittee improperly treated Bower's application.

Id.

311. *Id.* at 525.

312. Denbo, *supra* note 90, at 199.

313. 79 F. Supp. 2d 1199 (E.D. Wash. 1999).

football season [314] for failing to make satisfactory progress toward his degree under the "75/25 Rule."[315] In defending its position, the NCAA did not raise any *Sutton* issues or dispute the existence of the plaintiff's learning disability that significantly impaired his ability to read and write, thereby interfering with his academic achievement.[316] In denying a preliminary injunction and vacating a temporary restraining order against the NCAA, the court held that the NCAA had made reasonable accommodations for Matthews.[317] Pointing out that one of the NCAA's "primary purposes [was] to ensure that student-athletes succeed in the 'student' as well as the 'athlete' portion of their college experience," the court held that requiring any further accommodation would require the NCAA to dispense with essential eligibility criteria beyond what is required by the ADA.[318]

The negative impact of NCAA eligibility on minority athletes was specifically raised in a post-*Sutton* and post-Consent Decree case, *Pryor v. NCAA,*[319] filed by a learning disabled African-American female athlete with an athletic scholarship to San Jose State University.[320] Although the NCAA granted her petition for partial qualifier status based on her learning disability, Pryor brought disability discrimination claims under the ADA and Rehabilitation Act.[321] An African-American male classmate joined her as a co-defendant[322] in a second claim of race discrimination related to athletic eligibility under Title VI of the Civil Rights Act of 1964.[323] *Pryor* alleged that the NCAA's Proposition 16 eligibility criteria caused increased numbers of

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314. *Id.* at 1202. "The NCAA [had] granted Plaintiff waivers from various academic requirements for both the 1997 and 1998 season. In October 1997, Plaintiff received a waiver that permitted him to take nine credit hours per semester instead of the required twelve credits. In August 1998, Plaintiff received a waiver of the 75/25 Rule." *Id.*

315. *Id.* (citing NCAA Bylaw § 14.4.3.1.3 which provides: "A student-athlete shall earn at least 75 percent of the minimum number of semester . . . hours required for satisfactory progress during the academic year. The student-athlete shall earn no more than 25 percent of the minimum number of semester hours required for satisfactory progress during the summer").

316. *Id.*

317. *Id.* at 1208.

318. *Id.* at 1206.

319. 288 F.3d 548 (3d Cir. 2002).

320. *Id.* at 554.

321. *Id.* at 555.

322. *Id.* The co-defendant, Warren Spivey, was a student-athlete who was unable to meet Proposition 16 eligibility requirements to play football at the University of Connecticut (UConn). *Id.* UConn petitioned for a NCAA waiver on Spivey's behalf; the university argued "that [his academic] record showed that he was prepared for the academic requirements of college." *Id.* The NCAA denied the petition preventing Spivey from receiving athletically related financial aid or participating in varsity athletics during his freshman year. *Id.*

323. 42 U.S.C. § 2000d (1994); 42 U.S.C. § 1981 (1994).

black student-athletes to lose athletic scholarship eligibility, as well as eligibility to participate in intercollegiate athletics during their freshman year, if only meeting "partial qualifier" status.[324]

The district and appellate court rulings on *Pryor* dismissed the ADA claim as inappropriate at the time of filing as a result of its failure to satisfy the Constitution's Article III "case or controversy" requirements due to "lack of ripeness" and "lack of redress."[325] The claim failed for ripeness because NCAA Bylaws allow learning-disabled athletes to "earn back" a fourth year of eligibility by completing seventy-five percent of their degree requirements by the end of their fourth year.[326] The "earn back" availability triggered the failure under lack of redress.[327] Pryor had not entered her fourth year of potential eligibility at the time the case was filed, and if she met the NCAA eligibility requirements at that time, her lost year of freshman eligibility would be restored, rendering her ADA and Rehabilitation Act claims for injunctive relief moot.[328] In ruling on the race discrimination claims, the court dismissed the disparate impact claim citing a Supreme Court holding that unintentional discrimination charges were not allowed by private individuals under Title VI.[329] However, the court remanded the discrimination claim filed under § 1981 back to the district court because the plaintiffs had sufficiently alleged purposeful discrimination.[330]

There is no consensus resolution on the legal validity of the NCAA standards.[331] The courts have definitively acknowledged, however, that it is legitimate for both collegiate institutions and the NCAA to establish rules that do not fundamentally alter their programs or substantially modify academic

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324. *Pryor*, 288 F.3d at 552.

325. *Id.* Constitutional standing requires pleadings that show (1) a legally recognized injury; (2) caused by the named defendant or at least "fairly traceable to the challenged action of the defendant"; and (3) that a favorable decision by the court would likely redress. Bennett v. Spear, 520 U.S. 154, 167 (1997); U.S. CONST. art. III, § 2.

326. *Pryor*, 288 F.3d at 557. *See* NCAA, *supra* note 157, § 14.3.3.2.

327. *Id.* at 561. Redress will "deprive a court of jurisdiction over cases in which the likelihood that the requested relief would remedy the plaintiff's injury is 'only speculative.'" In re Thornburgh, 869 F.2d 1503, 1511 (D.C. Cir. 1989).

328. *Id.*

329. *Id.* at 554. *See* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (holding "Title VI directly reach[es] only instances of intentional discrimination").

330. Anneliese Munczinski, *Interception! The Courts Get Another Pass at the NCAA and the Intentional Discrimination of Proposition 16 in* Pryor v. NCAA, 10 VILL. SPORTS & ENT. L.J. 389, 411-12 (2003) (describing three-prong analysis for § 1981 case as: (1) Plaintiff must "show that he[/]she is a member of a racial minority[; (2)] [T]he defendants intended to discriminate on the basis of race[; and (3)] [T]he discrimination concerned one of the activities covered in § 1981"). "In this case, the activity was the right to contract." *Id.* at 412.

331. Rothstein, *supra* note 275, at 407.

requirements in order to allow students, including student-athletes attending on college scholarships, to meet the rigorous demands of college-level academic work.[332] In fact, at least one court has emphatically stated that while the ADA requires "evenhanded treatment" of individuals with disabilities, it does not require "affirmative action."[333]

B. Contrasting Judicial Views Involving Physically Disabled Student-Athletes

While colleges and universities have been generally receptive to accommodating students with physical disabilities in the wake of the ADA,[334] student-athletes with physical disabilities have not been met with the same reception. Two disabled athlete cases, *Knapp v. Northwestern University*[335] and *Pahula v. University of Kansas*,[336] have illustrated that the courts will not require schools to accommodate student-athletes with physical disabilities even if the student is willing to accept the risk and/or release and indemnify the university from liability. In the *Knapp* case, the court sustained the university's decision to refuse to allow a student with an internal heart defibrillator to play basketball at the recommendation of the team physician and other consultants.[337] In a good faith gesture, the university did not rescind a previously awarded basketball scholarship, thus allowing him access to all the academic and non-academic services available to Northwestern students.[338] In its ruling, the court expressly stated that "[p]laying or enjoying intercollegiate sports cannot be held out as a necessary part of learning for *all* students."[339]

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332. *See, e.g.*, Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041 (9th Cir. 1999); Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999); Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998); *Philip*, 960 F. Supp. at 552; McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994); Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992); *Parish*, 506 F.2d at 1028.

333. Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1031 (6th Cir. 1995).

334. *See, e.g.*, Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 580 (1996) (describing the variety of academic accommodations being provided to law students to include access to parking, extension of time for degree completion, priority in course registration, authorization to tape record classes, readers and Braille teaching material for blind students, sign language interpreters for deaf students, and access to modified classroom equipment).

335. *Knapp*, 101 F. 3d at 473.

336. 897 F. Supp. 1387 (D. Kan. 1995).

337. *Knapp*, 101 F.3d at 476-77. The university relied *inter alia* on published findings in 24 J. AM. C. CARDIOLOGY 845, 894 (1994) stating "[f]or athletes with implantable defibrillators . . . all moderate and high intensity sports are contraindicated." *Id.* at 477.

338. *Id.* at 481.

339. *Id.* at 480 (emphasis in original).

In the *Pahula* case, a student was not allowed to participate in intercollegiate football at the University of Kansas (KU) following a hit to the head that resulted in transient quadriplegia during a football scrimmage.[340] Citing "common sense" and the ADA, the university argued that playing intercollegiate football was not a major life activity.[341] As in the *Knapp* case, the plaintiff's athletic scholarship was continued, and KU was able to successfully argue that its actions did not substantially limit his opportunity to learn.[342] The Supreme Court has recently held in the employment context that it is not a violation of the ADA under Title I to refuse to allow an employee to be a "threat to self."[343] It seems only logical that this case will more than likely be cited as applicable to Title III cases involving similarly situated student-athletes in the future. Colleges will need to continue to insure, however, that qualified physically disabled student-athletes are given fair consideration in the eligibility process as well.

VI. CONCLUSION

Students with learning disabilities, athletes and non-athletes, are continuing to be present at colleges and universities in increasing numbers. There is no evidence to suggest that the numbers will decline in the future. Although there are a multitude of definitions in the mental health community as to what constitutes the various types of learning disabilities, there is general agreement that students who present a valid diagnosis and seek accommodation cannot be dismissed as the result of low intelligence, lack of motivation, or a substandard educational system.

The ADA is appropriately within the statutory reach of learning disabled student-athletes. Although colleges have not routinely argued this point, attempts by the NCAA to defend that its activities did not come within the reach of the ADA have not been accepted by the lower courts or the DOJ. However, the recent Supreme Court rulings in the *Sutton* trilogy have provided another potential defense for colleges and the NCAA under a "substantial limitations" litmus test. To date, this defense has been successfully used in cases involving graduate professional programs seeking accommodation for standardized tests, but it has not been advanced in litigation involving undergraduate students and athletes. The NCAA has not used a *Sutton*

340. *Pahula,* 897 F. Supp. at 1388.

341. *Id.* at 1390.

342. *Id.* at 1393.

343. Chevron USA v. Echarzabal, 536 U.S. 73 (2002) (reversing a Ninth Circuit holding that defendant could not refuse to hire a Hepatitis C positive plaintiff on the ground that employment would pose a direct threat to the plaintiff's health and safety).

argument as a defense against a student-athlete seeking a waiver of initial or continued eligibility requirements.

The NCAA has made many changes to student-athlete eligibility rules over the last fifty years. The rule changes, including the current policy, generally have been controversial and considered suspect with reference to whether the intent was to have true "student-athletes" or just address image problems associated with academic scandals and diminished credibility as a commercial endeavor. The DOJ provided an additional challenge to the NCAA by insisting that athletic programs also comply with the ADA as part of the 1998 Consent Decree. The NCAA and collegiate institutions have a legal and moral obligation to ensure that the spirit of commitment toward student-athletes with learning disabilities expressed in the ADA and the Consent Decree are implemented ethically and in "good faith." While the NCAA's waiver review program will provide a default defense to most charges of disability discrimination, the NCAA must conscientiously exercise the discretion it provides and not use it as a way to "screen out" students with a realistic chance of collegiate success.

The courts should not penalize students, parents, elementary, and secondary school staff who work together to identify and develop individualized education plans that subsequently assist the student in developing cognitive coping mechanisms to mitigate his or her disability. Launching a "mitigating measures" defense to defeat discrimination claims would provide a disincentive for teachers and counselors to develop customized approaches with learning disabled but athletically gifted students. School districts need to evaluate their "special" education programs to insure that course content is of sufficient academic quality and complexity to meet NCAA core course requirements while not setting unrealistic achievement expectations for the student.

Although standardized criteria such as GPA and SAT and ACT scores have been, and will continue to be criticized for disparate impact against students and student-athletes who are poor, minority, reside in inner cities (or some rural areas), and/or learning disabled; the reality is that there is nothing on the immediate educational horizon that meets the scientific and objective criteria necessary to replace it.[344] In other words, the NCAA has an obligation

344. *How the Location and Type of School Affects the Racial Scoring Gap on the SAT Test,* J. BLACKS HIGHER EDUC., Nov. 18, 2004 (on file with author) (noting that whites attending high schools in large urban areas average 242 points, or 20 percent, above blacks who attend high school in large cities). In rural areas, the gap drops to 177 points, about a 15 percent gap. *Id.* There are also significant differences when comparing public, parochial, and private schools. *Id.* At public schools, the racial scoring gap is higher than the national average. *Id.* At parochial schools, the racial scoring gap drops to 165 points. *Id.* Blacks who attend private schools score perform the best, scoring only

to continue to encourage better academic preparation for college athletes. In order for this goal to be realistic and achievable, school officials also must provide qualified teachers and resources to place students in a position where the NCAA eligibility and college admission requirements do not "screen out" significant percentages of underrepresented groups.

The rewards associated with academic achievement need to be inculcated into the student's value system before their athletic prowess is even a factor. Earlier identification and educational intervention with students diagnosed with specific learning disabilities will assist this process. To silence the skeptics, the NCAA and colleges have to also ensure that "objective" eligibility and admission criteria are not implemented so rigidly that it has a disparate impact on qualified learning disabled students for whose athletic skills potentially provide an academic "ticket out of a urban or rural ghetto." This has to be balanced with continued efforts to shed the NCAA image as being a "minor league" for many sports. The *Hall* and *Tatum* cases clearly reflect the need to insure that gifted athletes do not manipulate the academic system, especially under the guise of being learning disabled. The continued academic scandals provide further evidence that the athletic eligibility process requires regular monitoring to insure academic integrity.

The NCAA and collegiate institutions that are actively working to improve the system should be commended rather than disparaged for efforts directed at enhancing academic integrity in the student-athlete population. The *Matthews* and *Pryor* cases reflect little sympathy by the courts when the NCAA has made an apparent "good faith" effort to accommodate a student's learning disability. Students, parents, college recruiters, mental health professionals, and especially coaches have to maintain an ethical approach toward athletic eligibility and subsequent academic success by not allowing potential financial rewards to compromise their integrity. In order to effectively dismiss the skeptics and allow student-athletes with and without learning disabilities to be given fair consideration in the college admissions process, as well as academic success after enrollment, all involved need to make a commitment to follow the rules when "playing the game."

Yuri Nicholas Walker

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138 points, or 11.5 percent, below their white classmates. *Id. See also* Rosen, *supra* note 53, at 204 (noting that the Educational Testing Service, the organization that develops the SAT, "has specifically requested that the NCAA abandon the SAT as a means to establish eligibility standards; however, the NCAA continues to use the controversial standard"); Shropshire, *supra* note 55, at 146 (quoting George Hanford, the then-president of the College Board, as stating "[t]he NCAA's use of a standardized exam to determine eligibility [was] misguided"). He added that "[t]he SAT was meant only . . . to predict how well students will do academically in their first year of college").