

1-1-1992

Sports Participation by "Handicapped" Athletes

Matthew J. Mitten

Marquette University Law School, matt.mitten@marquette.edu

Follow this and additional works at: <http://scholarship.law.marquette.edu/facpub>



Part of the [Law Commons](#)

Publication Information

Matthew J. Mitten, Sports Participation by "Handicapped" Athletes, Ent. & Sports Law., Spring 1992, at 15. Copyright © 1992 American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Repository Citation

Mitten, Matthew J., "Sports Participation by "Handicapped" Athletes" (1992). *Faculty Publications*. Paper 304.
<http://scholarship.law.marquette.edu/facpub/304>

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

Sports Participation by "Handicapped" Athletes

MATTHEW J. MITTEN

Introduction

More than two years ago, Hank Gathers collapsed and died while playing with a known irregular heartbeat in a basketball game for Loyola Marymount University. Gathers' tragic death spawned two lawsuits against the university, several school athletic officials, and physicians that approved and encouraged Gathers' continuing participation in college basketball.¹ Ironically, Loyola Marymount's refusal to permit Gathers to continue playing basketball with his heart condition also could have resulted in litigation.

In 1988 Tony Penny threatened to sue Central Connecticut State University for following physician recommendations and excluding him from basketball with hypertrophic cardiomyopathy (HCM), a heart condition that is the most common cause of sudden death in young athletes.² Central Connecticut agreed to permit Penny to resume playing basketball provided his cardiologists approved his participation and he released the school from tort liability for any harm resulting from athletics participation. After completing his college career, Penny subsequently died of a heart attack while playing in a professional basketball game in England.³

After the foregoing tragic deaths during athletic activity, Stephen Larkin filed suit to play football at Cincinnati Moeller High School despite unanimous physician recommendations against playing with HCM.⁴ Other athletes have claimed a legal right to play contact sports or strenuous noncontact sports with a single paired organ such as a kidney or eye or a spine abnormality.

These cases illustrate the strong desire of some college and high school athletes to participate in competitive sports although their physical condition creates an increased risk or severity of injury (or death). Ideally, the decision to participate in school-sponsored sports should be the product of mutual agreement between the handicapped or physically impaired athlete and family, school officials, and physicians. Resolution of athletics participation disputes requires consideration of a handicapped athlete's right to participate in athletics activities within his or her physical capabilities, a physician's evaluation of the medically significant risks of participation, and a school's interest in establishing

appropriate physical qualifications to ensure its athletes' health and safety.

Medical Considerations

Athletics governing bodies such as the National Collegiate Athletic Association (NCAA) and National Association of Intercollegiate Athletics (NAIA) do not have any definitive standards concerning the exclusion of physically impaired athletes from college sports. These organizations permit their members to individually establish the physical qualifications and standards to participate in athletics.

The NCAA's *Sports Medicine Handbook* recommends joint approval by appropriate physicians and school officials before permitting an "impaired" athlete to participate in athletics.⁵ The *Handbook* broadly defines "impaired" as "any loss or abnormality of psychological, physiological or anatomical structure or function."⁶ The *Handbook* cautions that "impaired" athletes should be medically disqualified from participation only if there is an "unusual risk of further impairment or disability to the individual and/or other participants."⁷

Most high school athletics governing bodies require only a physician's approval based on a discretionary physical examination before school-sponsored athletics participation. Most states do not provide medical examiners with specific examination guidelines or provide recommendations for exclusion of handicapped athletes from sports participation.⁸

Medical organizations have established some general guidelines to assist physicians in making participation recommendations for handicapped or impaired athletes. For example, in 1988, the American Academy of Pediatrics Committee on Sports Medicine formulated recommendations for sports participation by young athletes with various medical conditions.⁹ The Committee's recommendations "do not indicate an exclusive course of treatment or procedure to be followed."¹⁰ Rather, "[a] physician's clinical judgment should remain the final arbiter in interpreting these recommendations for a specific patient."¹¹

The American College of Cardiology's 1984 Bethesda Conference established recommendations for sports participation by athletes with cardiovascular

abnormalities.¹² The Committee's recommendations "are necessarily based largely on the practice of the 'art of medicine' " because "many decisions regarding disqualification from sports involve circumstances in which definite scientific answers are conspicuously lacking."¹³

Because of the lack of conclusive scientific data regarding athletics participation with a given physical abnormality and a handicapped athlete's unique physiology, the team physician¹⁴ must make an individualized evaluation of the medical risks of participation in the subject sport. A team physician's

Equally competent physicians
may disagree regarding the
nature and severity of the
medical risks of athletics
participation.

primary responsibility is to protect an athlete's health, and athletics participation recommendations should be consistent with this overriding obligation.¹⁵

Consistent with the foregoing responsibility, the team physician also attempts to avoid unduly restricting athletics participation by handicapped athletes. A handicapped athlete may be willing to take significant health risks to participate in athletics and attempt to influence a physician's medical judgment to obtain approval to do so.

Team physicians may be faced with the conflicting obligations of protecting the health of the handicapped athlete while attempting to enable the athlete to participate safely in a desired sport. Although some general participation guidelines exist, the team physician ultimately must exercise his or her medical judgment based on the athlete's handicap and physical characteristics as well as the nature and demands of the particular sport. The team physician should not allow pressure from a handicapped athlete to override his or her independent medical judgment in making a participation recommendation.

Although handicapped athletes and their families have significant input, the team physician's athletics participation recommendation often is controlling. Schools generally follow the recommendations of team physicians and their chosen consulting specialists in deciding whether an athlete should be permitted to play a particular sport.¹⁶

Although most athletes will accept the team physician's recommendation against playing a sport, some handicapped athletes may seek additional

medical opinions regarding the nature and severity of the risks of athletics participation. Psychological factors such as machismo, pride, the pursuit of excellence, and the joy of sports participation create a strong desire to play a competitive sport. These athletes also may be motivated by economic factors such as a future college athletics scholarship or lucrative professional career.

Other physicians may clear a handicapped athlete to participate in a sport. In many instances, there is no definite scientific answer or universal agreement that increased health risks created by certain physical abnormalities preclude participation in certain competitive sports. Although Hank Gathers died playing basketball with an irregular heartbeat, Terry Cummings has played professional basketball for several years with an irregular heartbeat.¹⁷

Based on their individual experience, training, and professional judgment, equally competent physicians may disagree regarding the nature and severity of the medical risks of athletics participation with a given handicap. For example, examining specialists conflicted in their recommendations regarding participation in contact sports by college athletes with a heart condition¹⁸ or spinal stenosis¹⁹ based on their differing evaluations of the increased medical risks created by the athlete's physical condition.

When faced with conflicting medical opinions regarding the propriety of athletics participation by a handicapped athlete, schools generally accept the team physician's recommendation. Schools fear potential tort liability for allowing an athlete to play contrary to the team physician's recommendation. Even if the handicapped athlete and his or her family are willing to waive any legal claims against the school, it may prohibit athletics participation because of concern for the athlete's health and welfare.

Legal Considerations

Exclusion of a handicapped person from participation appears permissible if all examining physicians agree that the medical risks of playing are unreasonable. A difficult question arises when competent physicians disagree regarding the medical risks of athletics participation with a particular physical abnormality and make conflicting participation recommendations. Under such circumstances, does the handicapped athlete or school have the legal right to make the participation decision?

Handicapped athletes have challenged their exclusion from interscholastic or intercollegiate sports primarily under the U.S. Constitution or the Rehabilitation Act of 1973.²⁰

Constitutional Claims

Handicapped persons are not a suspect or quasi-suspect class justifying a heightened scrutiny of challenged discrimination.²¹ Student athletes are not a suspect class,²² and there is no judicially recognized

fundamental right to play college or high school sports.²³

A school can justify the exclusion of certain handicapped athletes from its athletics program if its decision is rationally related to a legitimate objective.²⁴ A school's acceptance of its team physician's recommendation that a handicapped athlete not play rationally furthers its permissible objective of protecting the health and safety of its athletes.

Courts generally have rejected claims that exclusion of handicapped athletes from school-sponsored athletics denies equal protection of the law.²⁵ Because most courts hold there is no liberty or property interest in playing interscholastic or intercollegiate athletics,²⁶ the exclusion of handicapped athletes would not deny due process of law. Even assuming a property or liberty interest in playing sports, a school could rationally justify such exclusion based on concern for the athlete's health and well-being.

In *Clayton v. University of Wyoming*,²⁷ a college football player claimed the University of Wyoming's refusal to permit him to continue playing football with spinal stenosis denied him due process of law. The university's football coach accepted the team physician's recommendation, supported by the opinions of other specialists, that Steve Clayton discontinue playing football. Other examining physicians believed it "would not be unreasonable" to permit Clayton to continue playing.

Before the court ruled on Clayton's request for injunctive relief, the parties agreed to an administrative hearing before an *ad hoc* committee of university officials. The committee accepted the prevailing view of medical experts that Clayton's participation in football would create an "extra hazardous" risk of harm to him.²⁸ The committee concluded that the head football coach acted reasonably in accepting the team physician's recommendation to exclude Clayton from the football team.²⁹ After the university's president accepted the committee's findings, Clayton voluntarily dismissed his suit.

Rehabilitation Act of 1973 Claims

Athletes excluded from school-sponsored sports because of physical abnormality have successfully asserted claims under the Rehabilitation Act of 1973 (Act).³⁰ The Act's intent is to provide handicapped persons with an opportunity to participate fully in activities they are physically capable of performing. Qualified handicapped athletes must be given an "equal opportunity for participation" in interscholastic and intercollegiate athletics.³¹

To prevail under the Act, an athlete must establish that he or she is: (1) "handicapped"; (2) "otherwise qualified" to participate in the subject sport; and has been (3) excluded solely by reason of handicap; (4) from a program or activity receiving federal funds.³²

The athletics programs of most colleges and high schools are covered by the Act even if they do not

receive any direct federal funding. If any part of a college or high school receives federal financial assistance, all of its operations and programs are covered by the Act.³³

An athlete with a "physical impairment" that "substantially limit[s] one or more of such person's major life activities" is considered handicapped under the Act.³⁴ Numerous physical disorders, illnesses, abnormalities, or conditions that may form the basis of a school's exclusion of an athlete from sports are "physical impairments." For example, a heart condition,³⁵ a congenital back abnormality,³⁶ permanent osteoarthritis of a knee joint,³⁷ and loss of a paired organ³⁸ are "physical impairments." Athletics constitute a "major life activity" for many people.³⁹

In suits brought by handicapped athletes seeking to participate in competitive sports, the key issues generally are whether the athlete is "otherwise qualified" to participate in athletics and has been excluded "solely by reason of handicap."

In *Southeastern Community College v. Davis*,⁴⁰ the Supreme Court held that an educational institution may require a person to possess "reasonable physical qualifications" to participate in its programs and activities. Although "mere possession of a handicap is not a permissible ground for assuming an inability to function," a school need "not lower or substantially modify its standards to accommodate a handicapped person."⁴¹ An individual is "otherwise qualified" if "able to meet all of a program's requirements in spite of his handicap."⁴²

In *Alexander v. Choate*,⁴³ the Supreme Court subsequently held that a school need not "make 'fundamental' or 'substantial' modifications to

A school need "not lower or substantially modify its standards to accommodate a handicapped person."

accommodate the handicapped, but may be required to make 'reasonable' ones." An athlete is "otherwise qualified" if able to meet a school's requirements after reasonable accommodation in light of a handicap.

In *School Board of Nassau County, Fla. v. Arline*,⁴⁴ the Supreme Court held that exclusion of a handicapped person from an activity must be based on "reasonable medical judgments given the state of medical knowledge." The nature, duration, and severity of harm likely to result from the handicapped

individual's participation in athletics are factors to be considered.

Athletes with severe handicaps or impairments often lack the minimum physical skills required for a competitive sport, or do not play well enough to compete successfully with nonhandicapped individuals. Under *Davis*, a handicapped athlete is not "otherwise qualified" if physically unable to perform or function effectively in a particular sport.⁴⁵

Exclusion for legitimate reasons
other than the athlete's
handicapping condition does
not violate the Act.

Even if physically capable of participating in a given sport, a handicapped athlete must prove exclusion "solely by reason of handicap." Exclusion for legitimate reasons other than the athlete's handicapping condition does not violate the Act.

Preventing harm to other participants is a valid ground for refusing to permit handicapped athletes to play a particular sport. The *Arline* Court held that exclusion of the handicapped necessary to avoid "exposing others to significant health and safety risks" does not violate the Act.⁴⁶

In *Doe v. Dolton Elementary School District No. 148*,⁴⁷ the court permitted a school to exclude a child with AIDS from participating in contact sports without any medical testimony concerning the risk of AIDS transmission during such activities. The court's decision appears to conflict with *Arline's* holding that such exclusion be based on reasonable medical judgments regarding the nature, duration, and severity of the risk of harm to others and probability of transmission.⁴⁸ However, exclusion of athletes with AIDS or other contagious diseases from contact sports supported by competent medical evidence appears permissible under the Act.

A school need not substantially modify its standards by changing the rules of play or reducing the quality of team play to enable a handicapped athlete to participate in a sport. For example, it is not necessary to require able-bodied athletes to use wheelchairs to enable paraplegics to play college basketball.

Neither the Act nor its implementing regulations directly address whether enhanced risk of injury to a handicapped athlete is a legally valid reason for exclusion from school-sponsored athletics. Courts require a "substantial justification" for exclusion from participation based solely on possible future injury to a handicapped athlete.

Most colleges and high schools require athletes to

pass a physical exam by the team physician before participating in competitive sports. Although unable to satisfy all requirements of a physical exam, an athlete may have the physical ability and skills to play a particular sport despite a handicap. The handicapped athlete may be able to play without increasing the risk of harm to other participants or adversely affecting the quality of team play.

In *Larkin v. Archdiocese of Cincinnati*,⁴⁹ Stephen Larkin, an exceptional athlete with the physical skills to play football despite having a serious heart condition, claimed Cincinnati Moeller High School's adherence to unanimous physician recommendations against playing violated the Act. The court rejected Larkin's contention. The court reasoned that Larkin's inability to satisfy an Ohio High School Athletics Association by-law requiring a "physician certification" before athletics participation was a "substantial justification" for the school's decision.⁵⁰

Requiring schools to permit handicapped athletes to participate in a sport contrary to all examining physicians' recommendations would violate the *Alexander* court's admonition that the Act does not require "fundamental or substantial" modifications to accommodate the handicapped.⁵¹ High schools and colleges may exclude handicapped athletes from sports participation under such circumstances because the Act, as judicially construed, does not provide an unqualified right to participate in athletics.

The *Larkin* court observed that Moeller's insistence that Larkin pass a physical exam by a particular physician would present an "entirely different fact situation."⁵² Most courts hold that exclusion of a handicapped athlete from sports participation if a competent physician has provided medical clearance violates the Act.⁵³

All reported cases involve athletes seeking to play contact sports despite a missing or impaired kidney or eye. The Act permits "otherwise qualified" athletes with a single paired organ to participate in sports if reasonable accommodation through the use of safety equipment will adequately protect the athlete from injury.⁵⁴ For example, safety goggles, flak jackets, or padding may protect athletes with one eye or kidney from injury during contact sports.

In *Grube v. Bethlehem Area School District*,⁵⁵ the court held a high school's decision to exclude an excellent athlete with one kidney from football based on its team physician's recommendation violated the Act. The court found no "substantial justification" for denying participation because plaintiff's physician concluded "there is no medical reason why [he] cannot play football."⁵⁶

In *Wright v. Columbia University*,⁵⁷ the court held that the Act required a university to permit an outstanding athlete with sight in only one eye to play football. Accepting the testimony of plaintiff's ophthalmologist that "no substantial risk of serious eye injury related to football exists," the court re-

jected the school's reliance on the team physician's contrary conclusion.⁵⁸ The court found that plaintiff was "otherwise qualified" to play and the university was not forced to "lower or . . . effect substantial modifications of its standards."⁵⁹

It is arguable that, even if a handicapped athlete has the skill to play the desired sport, requiring an athlete to pass the team physician's medical exam is a "reasonable physical qualification" consistent with the Act as interpreted by the *Davis* court.⁶⁰ In *Poole v. South Plainfield Board of Education*,⁶¹ the court, however, rejected a high school's argument that a handicapped athlete was not "otherwise qualified" to wrestle because he was unable to pass the team physician's exam with one kidney.

A school has a rational basis for excluding a handicapped athlete from participation consistent with the team physician's recommendation. Unlike the federal Constitution, the Act requires a "substantial justification" rather than merely a rational basis for discriminating against a handicapped athlete.

Strict adherence to their paramount obligation to protect the athlete's health and well-being should ensure that physicians formulate medically sound athletics participation recommendations for athletes with physical abnormalities. Fear of malpractice liability should deter physicians from providing participation recommendations enabling physically impaired athletes to take life-threatening or other unreasonable health risks.

A school has a substantial justification for excluding a handicapped person from athletics participation without a competent physician's approval, or if the athlete is not fully informed of the health risks of participation and capable of making a rational decision under the circumstances.⁶² A school should ensure that the athlete is given understandable information by competent medical personnel concerning the nature and severity of the risks of participation in a particular sport with his or her physical abnormality or illness.⁶³

The Act prohibits a school from substituting its judgment for a considered decision of a fully informed adult athlete (or minor athlete with parent or guardian approval) to participate in athletics supported by a credible medical opinion. A school may violate the Act's reasonable accommodation requirement if it excludes a handicapped person from athletics despite medical clearance to participate from a competent physician.

A school may claim that an opportunity to play on its athletics teams is based solely on a consensual relationship between the school and athlete.⁶⁴ A university also may fear receiving adverse publicity if a handicapped athlete suffers a serious injury or dies during competition.

These concerns are based on unjustified consideration of the athlete's handicapping condition prohibited by the Act. Consideration of these factors

conflicts with a handicapped athlete's statutory right to choose to participate based on competent medical clearance to play a given sport. By offering interscholastic or intercollegiate athletics, schools implicitly accept the possibility that serious injuries or death may occur even to able-bodied athletes during competition. The Act allows handicapped athletes to exercise their individual autonomy and accept reasonable enhanced risks of injury from athletics participation.

Handicapped athletes generally are willing to release a school from tort liability to participate in school-sponsored sports. Schools fear that such waivers may be legally unenforceable, particularly if the handicapped athlete is a minor.⁶⁵

Court-ordered athletics participation under the Act should create an implied immunity absolving a university of tort liability if an athlete suffers harm during competition resulting from a known physical handicap or disability.⁶⁶ Allowing a tort action against the school would inappropriately impose liability for the same conduct the Act requires (*i.e.*, equal opportunity for athletics participation by handicapped persons). Schools should be immune from legal liability for permitting participation by handicapped athletes supported by a credible medical opinion approving participation in a given sport and based on court orders or contractual releases.

Whether an agreement or court order permitting an athlete to "participate" requires a coach to actually play the athlete in games raises a difficult unresolved issue. Schools generally vest head coaches with the sole discretion to govern their teams and decide which athletes play.

It is arguable that a coach's refusal to play an exceptionally talented handicapped athlete solely because of concern for the athlete's health would

The Act allows handicapped athletes to exercise their autonomy and accept reasonable enhanced risks of injury from athletics participation.

violate court-ordered participation under the Act. In *Grube v. Bethlehem Area School District*,⁶⁷ the court ordered that a handicapped athlete be permitted to participate "on the same terms and conditions as apply to all other members" of the team. If athletics ability is the sole determining factor of playing time, a coaching decision to play a lesser skilled, physically unimpaired athlete rather than a more talented handicapped athlete may violate the court's order.

A better approach is to avoid judicial scrutiny of a coach's discretionary decisions regarding who plays in games and how much playing time is received. A player's leadership qualities and attitude as well as numerous other intangibles may influence a coach's decision on playing time as much as or more than an athlete's raw physical skills. A coach may decide

A school's duty is to ensure that the athlete is fully informed of all medical risks of participation with a known handicap.

the team's needs are not best served by playing a handicapped athlete. Coaches, not courts, are in the best position to make this determination.

Conclusion

The Rehabilitation Act of 1973 prohibits the categorical exclusion of handicapped athletes with the physical ability and skills of playing a particular sport with reasonable accommodation such as protective equipment or medication. Physical inability to perform effectively, increased risk of injury to other participants, the need for fundamental or substantial alterations to enable a handicapped athlete to participate, or undisputed medical recommendations against playing should justify exclusion of a handicapped athlete from certain sports under the Act.

The Act limits a school's ability to exclude a handicapped athlete from athletics participation based solely on a concern for the student's own health and safety and prohibits substituting the school's judgment for a rational and fully informed decision by a handicapped athlete. A school's duty is to ensure that the athlete is fully informed of all medical risks of participation with a known handicap and that there is credible medical testimony allowing participation in the subject sport.

The Act does not provide a handicapped athlete with an unqualified right to participate in athletics at schools receiving federal funding. A handicapped athlete's decision to play school-sponsored sports must be supported by medically sound participation approval by a competent physician. A school has a substantial justification for excluding a handicapped athlete if no physician medically clears him or her to play. Physicians' adherence to their paramount duty to protect an athlete's health and to disapprove participation if health risks are medically unacceptable should ensure that an athlete's decision to par-

ticipate in sports is rational. If competent physicians differ regarding the nature and severity of the medical risks and advisability of athletics participation, the Act empowers the athlete and parents or guardian (if the athlete is a minor) to make the participation decision.

A handicapped athlete choosing to participate in athletics after full disclosure of all medically significant risks should be deemed to assume the risk of injury or death arising out of playing with a known handicap. A handicapped athlete should consider carefully whether the potential benefits of athletics participation outweigh the risks of permanent crippling injury or death such as happened to Hank Gathers or Tony Penny. □

Matthew J. Mitten is an Associate Professor, South Texas College of Law; B.A., 1981, The Ohio State University; J.D. 1984, University of Toledo. The author gratefully acknowledges the insightful critique of earlier drafts by colleagues Bruce Burton and Teresa Collett. The author also thanks Andy Tower and Chris Prine for their valuable research assistance and Helen Flores for her help in preparing this manuscript. A longer version of this article will appear in the Fall 1992 issue of the Nebraska Law Review.

Footnotes

1. See generally Shelley Smith, *A Bitter Legacy*, SPORTS ILLUSTRATED, March 4, 1991, at 2; Marianne Lavelle, *From Court to Court*, NAT'L L.J., March 4, 1991, at 1.
2. Lawrence K. Altman, M.D., *The Doctor's World, An Athlete's Health and a Doctor's Warning*, N.Y. TIMES, March 13, 1990, at 3C.
3. *Id.*
4. Mike Dodd, *Who Decides Health Risk Is Too High?*, U.S.A. TODAY, Oct. 5, 1990, at 1C.
5. NCAA Guideline 3A, 1991 NCAA SPORTS MED. HANDBOOK at 30.
6. *Id.*
7. *Id.*
8. Ronald A. Feinstein, et al., *A National Survey of Preparticipation Physician Examination Requirements*, THE PHYSICIAN & SPORTSMEDICINE, May 1980, at 51.
9. Committee on Sports Medicine, *Recommendations for Participation in Competitive Sports*, 81 PEDIATRICS 737 (May 1988).
10. *Id.* at 737.
11. *Id.* at 739.
12. Barry J. Maron, et al., Introduction, 16th Bethesda Conference: *Cardiovascular Abnormalities in the Athlete: Recommendations Regarding Eligibility For Competition*, 6 J. AM. C. CARDIOLOGY 1189 (1985).
13. *Id.* at 1990.
14. A "team physician" has been defined as "a physician who undertakes to render professional medical services to athletics participants and whose services are either arranged for or paid for at least in part, by an institution or entity other than the patient, the patient's family, or some surrogate." Joseph H. King, *The Duty and Standard*

of *Care For Team Physicians*, 18 HOUS. L. REV. 657, 658 (1981).

15. AMERICAN MED. ASS'N PRINCIPLES OF MED. ETHICS § 3.06 (1990); King, *supra* note 14, at 691.

16. G.D. Rovere, M.D., et al., *A Survey of Team Physician and Trainer Availability and Participation in Intercollegiate Football*, THE PHYSICIAN & SPORTSMEDICINE, November 1984, at 91.

17. Malcolm Ritter, *Gathers' Death Points Up Tough Medical Choices, Doctors Say*, March 6, 1990, available in LEXIS, NEXIS Library, AP File.

18. Altman, *supra* note 2 and accompanying text.

19. See *supra* notes 7-9 and accompanying text.

20. Some state education laws limit a school district's authority to exclude physically impaired students from their athletics program. See, e.g., N.Y. Educ. Law § 3208-a (McKinney Supp. 1991); *Kampmeier v. Harris*, 66 A.D.2d 1014, 411 N.Y.S.2d 744 (1978). For a discussion of potential claims by handicapped athletes under the Americans With Disabilities Act of 1990, see generally Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 189-97 (1992) [hereinafter Cathy J. Jones].

21. In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1984), the Supreme Court held that the mentally retarded were not a suspect class.

22. See, e.g., *Jones v. Wichita St. Univ.*, 698 F.2d 1082, 1086-87 (10th Cir. 1983); *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975).

23. *Jones v. Wichita St. Univ.*, 698 F.2d 1082, 1086-87 (10th Cir. 1983); *Rivas Tenorio v. Liga Athletica Interuniversitaria*, 554 F.2d 492, 497 (1st Cir. 1977); *Parish v. NCAA*, 506 F.2d 1028, 1028 (5th Cir. 1975).

24. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1984).

25. Partial Transcript of Proceedings, at 16-17, *Larkin v. Archdiocese of Cincinnati*, No. C-1-90-619 (S.D. Ohio filed Aug. 31, 1990) (oral findings of fact and conclusions of law supporting denial of injunctive relief and dismissal of complaint) [hereinafter Partial Transcript]; *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418, 423 (E.D. Pa. 1982) (expressing doubt that excluding handicapped students from high school athletics denies equal protection of the laws).

26. *Rutlege v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1352-53 (9th Cir. 1981); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 945 (D. Kan. 1987); *Hawkins v. NCAA*, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987); *Justice v. NCAA*, 577 F. Supp. 356, 366 (D. Ariz. 1983); *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976).

27. Complaint, *Clayton v. University of Wyoming*, No. 118-67 (Laramie County Dist. Ct., filed Oct. 17, 1988).

28. *In re Clayton, University of Wyoming's Proposed Findings of Fact and Conclusions of Law* (Dec. 22, 1988) at 6.

29. *Id.* at 7.

30. 29 U.S.C.A. § 794 (West Supp. 1991).

31. 34 C.F.R. §§ 104.37(c) and 104.47(a) (1991); 45 C.F.R. §§ 84.37(c) and 84.47(a) (1991).

32. See *Harris v. Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991); *Doe v. New York Univ.*, 666 F.2d 761, 774 (2d Cir. 1981); *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986); *Bento v. I.T.O. Corp.*, 599 F. Supp. 731 (D.R.I. 1984); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 793 (E.D. Pa. 1981).

33. 29 U.S.C.A. § 794(b) (West 1985).

34. 29 U.S.C.A. § 706(8)(B) West 1985).

35. Partial Transcript, *supra* note 25, at 7-10, 15 (hypertrophic cardiomyopathy); *Bento v. I.T.O. Corp.*, 599 F. Supp. 731, 741 (D. R.I. 1984) (coronary bypass); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (cardiovascular disease).

36. *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1091 (D. Haw. 1980).

37. *Guinn v. Bolger*, 598 F. Supp. 196, 198 (D.D.C. 1984).

38. Vision in only one eye—*Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Wright v. Columbia Univ.*, 50 F. Supp. 789 (E.D. Pa. 1981). Only one functioning kidney—*Seay v. Trustees of the Cal. St. Univ. and Colleges*, No. CV89-4971 (C.D. Cal., Oct. 5, 1989); *Grube v. Bethlehem Area School Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982); *Poole v. South Plainfield Bd. of Education*, 490 F. Supp. 948 (D.N.J. 1980).

39. *Doe v. Dolton Elementary School Dist. No. 148*, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (involvement in contact sports is "major life activit[y]" for plaintiff elementary school student).

40. 442 U.S. 397, 414 (1979).

41. *Id.* at 405 and 413.

42. *Id.* at 406, 407 n.7.

43. 469 U.S. 287, 300 (1985).

44. 480 U.S. 273, 288 (1987).

45. 442 U.S. at 406, 407 n.7.

46. 480 U.S. at 287.

47. 694 F. Supp. 440, 449 (N.D. Ill. 1988).

48. 480 U.S. at 288.

49. No. C-1-90-619 (S.D. Ohio filed Aug. 31, 1990).

50. Partial Transcript, *supra* note 25, at 16.

51. 469 U.S. at 300.

52. Partial Transcript, *supra* note 25, at 31.

53. See, e.g., *Grube v. Bethlehem Area School District*, 550 F. Supp. 418, 423 (E.D. Pa. 1982); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 793 (E.D. Pa. 1981); *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D.N.J. 1980); but see *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); (upholding high school's refusal to permit one-eyed athlete to play contact sports despite conflicting participation recommendations).

54. Cathy J. Jones, *supra* note 20, at 206.

55. 550 F. Supp. 418 (E.D. Pa. 1982).
56. *Id.* at 424.
57. 520 F. Supp. 789 (E.D. Pa. 1981).
58. *Id.* at 793.
59. *Id.*
60. 442 U.S. at 414.
61. 490 F. Supp. 948, 953 (D. N.J. 1980).
62. *Id.* at 953-54 (high school officials have a duty to alert athlete and parents to dangers of participation and "require them to deal with the matter rationally").
63. Cathy J. Jones, *supra* note 20, at 200.
64. See *supra* note 26 and accompanying text for cases holding there is no constitutionally protected property right or liberty interest to participate in college or high school athletics. Cf. Taylor v. Wake Forest University, 16 N.C. App. 117, 191 S.E.2d 379 (1972) (athletics scholarship is a contract between the university and athlete).
65. Some states do not permit parents or guardians to waive a minor's claims to recover for injuries arising out of participation in interscholastic sports. Partial Transcript, *supra* note 25, at 11-12; Childress v. Madison County, 777 S.W.2d 1 (Tenn. App. 1989). *But see* Poole v. South Plainfield Bd. of Education, 490 F. Supp. 948, 954 (D. N.J. 1980) (suggesting that minor's legal incapacity to waive claims against school not permissible justification for excluding handicapped athlete contrary to parents' approval to participate).
66. See, e.g., International Union, UAW v. Johnson Controls, Inc., _____ U.S. _____, _____, 111 S. Ct. 1196, 1208-09 (1991) (employer tort liability for compliance with Title VII ban against sex-specific fetal protection policies "remote at best"); Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959) (Federal Communications Act of 1934 bars libel action against broadcaster for defamatory statement by political candidate). Grube v. Bethlehem Area School Dist., 550 F. Supp. 418, 424 (E.D. Pa. 1982) (suggesting that fully informed waiver by handicapped athlete is valid and enforceable). Cf. N.Y. Educ. Laws § 3208-a(4) (McKinney Supp. 1991) (statutory immunity for injury to handicapped athlete occurring during court-ordered sports participation).
67. 550 F. Supp. 418, 425 (E.D. Pa. 1982).
-