

# A Call for NCAA Adapted Sports Championships: Following the Eastern College Athletic Conference's Lead to Nationalize Collegiate Athletic Opportunities for Student-Athletes with Disabilities

Dayle Marie Comerford

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Disability Law Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

---

### Repository Citation

Dayle Marie Comerford, *A Call for NCAA Adapted Sports Championships: Following the Eastern College Athletic Conference's Lead to Nationalize Collegiate Athletic Opportunities for Student-Athletes with Disabilities*, 28 Marq. Sports L. Rev. 525 (2018)  
Available at: <https://scholarship.law.marquette.edu/sportslaw/vol28/iss2/10>

# **A CALL FOR NCAA ADAPTED SPORTS CHAMPIONSHIPS: FOLLOWING THE EASTERN COLLEGE ATHLETIC CONFERENCE'S LEAD TO NATIONALIZE COLLEGIATE ATHLETIC OPPORTUNITIES FOR STUDENT-ATHLETES WITH DISABILITIES**

DAYLE MARIE COMERFORD\*

## **I. INTRODUCTION**

In June 2010, the United States Government Accountability Office (GAO) released a study that revealed that students with disabilities were not being afforded equal opportunities to participate in extracurricular athletics.<sup>1</sup> In response to this study, the Department of Education's Office of Civil Rights published a Dear Colleague Letter in 2013 that: 1) provides a general overview of the obligations of public elementary and secondary schools under Section 504 of the Rehabilitation Act of 1973; 2) cautions schools against making athletic participation decisions based on presumptions and stereotypes; 3) details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular activities; and 4) discusses the provision of separate or different

---

\* Dayle Marie Comerford is a J.D. Candidate (2019) at the University of Notre Dame Law School. She received her B.A. from Haverford College in 2015. Comerford would like to thank Professor Emeritus of Law Ed Edmonds and Attorney Alan Goldstein for their guidance and support throughout the research and writing of this Comment. She would also like to thank Equip for Equality for not only inspiring this Comment, but also for the influential work that they do every day to advocate for, and defend, the rights of individuals with disabilities in Illinois.

1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-519, STUDENTS WITH DISABILITIES: MORE INFORMATION AND GUIDANCE COULD IMPROVE OPPORTUNITIES IN PHYSICAL EDUCATION AND ATHLETICS (2010), *available at* <http://www.gao.gov/assets/310/305770.pdf>.

athletic opportunities for students with disabilities.<sup>2</sup> As predicted,<sup>3</sup> participation of student-athletes with disabilities in adapted athletics at the high school level has steadily increased since the 2013 Dear Colleague Letter.<sup>4</sup> Additionally, these increasing numbers of student-athletes playing adapted sports do not include the similarly increasing number of states that are promoting participation in inclusion programs like Unified Sports, which pairs students with disabilities (“athletes”) on teams with peers without disabilities (“partners”) during the competition.<sup>5</sup> Finally, discrimination claims have been brought against high school athletic associations to allow students with disabilities to participate and contribute points in traditional state athletic competitions with reasonable accommodations but only with varying success.<sup>6</sup>

2. Seth M. Galanter, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. (Jan. 15, 2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>.

3. Timothy D. McPeters, *The Rehabilitation Act of 1973: Why the OCR’s Small Reminder Will Likely Spark Big Change for High School Athletics in 2014 and Beyond*, 25 MARQ. SPORTS L. REV. 413, 430 (2015) (“[T]he OCR’s letter will likely cause a growth in physically disabled students participating in separate or different athletics (e.g., Adapted Sports).”).

4. In the National Federation of State High School Associations’ (NFHS) 2012-13 High School Athletics Participation Survey, seven states reported having adapted sports teams for boys and five states reported having adapted sports teams for girls, which accommodated a total of 8747 student-athletes with disabilities. See NAT’L FED’N OF HIGH SCH. ASS’NS, 2012-13 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2013), available at [http://www.nfhs.org/ParticipationStatics/PDF/2013-14%20NFHS%20Handbook\\_pgs52-70.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2013-14%20NFHS%20Handbook_pgs52-70.pdf) [hereinafter 2012-13 NFHS Participation Survey]. In the 2016-17 NFHS High School Athletics Participation Survey, the number of states that reported adapted sports teams increased to thirteen teams for both boys and girls, accommodating a total number of 10,855 student-athletes with disabilities. See NAT’L FED’N OF HIGH SCH. ASS’NS, 2016-17 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2017), available at [http://www.nfhs.org/ParticipationStatistics/PDF/2016-17\\_Participation\\_Survey\\_Results.pdf](http://www.nfhs.org/ParticipationStatistics/PDF/2016-17_Participation_Survey_Results.pdf) [hereinafter 2016-17 NFHS Participation Survey]. The amount of states that reported adapted sports grew from 2012-13 through 2015-16, and the number of participating student-athletes in adapted athletics has grown each year since 2012-13. See generally NAT’L FED’N OF HIGH SCH. ASS’NS, 2012-17 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEYS (2012-13 – 2016-17), available at <https://www.nfhs.org/ParticipationStatistics/ParticipationStatistics/> [hereinafter 2012-2017 NFHS Participation Surveys].

5. Cody Porter, *Inclusion Programs Continue to Expand Participation Opportunities*, NAT’L FED’N OF ST. HIGH SCH. ASS’NS (Mar. 10, 2016), <https://www.nfhs.org/articles/inclusion-programs-continue-to-expand-participation-opportunities/>.

6. *Compare* Illinois *ex rel. Madigan v. Ill. High Sch. Ass’n*, No. 12-CV-3758, 2012 WL 3581174, at \*5–6 (N.D. Ill. Aug. 17, 2012) (denying IHSA’s motion to dismiss and holding that IHSA operates a place of public accommodation such that it could be subjected to liability in the event that it violates Title III, which ultimately resulted in a settlement that allowed M.K. to participate in swimming competitions), *with* A.H. *ex rel. Holzmueller v. Ill. High Sch. Ass’n*, No. 16-CV-1959, 2017 WL 2907840, at \*12 (N.D. Ill. July 7, 2017).

By lowering the skill level required to compete for victory and recognition in the IHSA’s track events, the requested accommodation [to lower running qualifying times for a student with cerebral palsy] would, indisputably, ‘fundamentally alter the character’ of the IHSA’s competition and would, in that sense, convey an unfair competitive advantage.

*Id.*; and *K.L. v. Mo. State High Sch. Activities Ass’n*, 178 F. Supp. 3d 792, 803 (E.D. Mo. 2016) (“Such scoring [allowing the student who races in a wheelchair against able-bodied athletes to score points for their

Although there is still work to be done to continue to promote the inclusion of student-athletes with disabilities at the high school level,<sup>7</sup> the increased participation numbers in adapted sports, increased initiatives like Unified Sports, and successful Rehabilitation Act claims allowing participation in traditional sports, reveal that high school athletic opportunities for students with disabilities has generally improved since the 2010 GAO study.

However, high school is not always the end of the line for student-athletes; many successful interscholastic athletes strive to play their sports at the intercollegiate level. Do these increasing numbers of athletes with disabilities now competing at the high school level have the same equal opportunities to participate in college sports? Do the same standards and guidance that have been applied at the elementary and high school level also apply to the NCAA, its conferences, and its institutions?

While the 2013 Dear Colleague Letter has had some impact at the high school level, it has been argued that it is unrealistic for colleges to add additional equivalent athletic programming for physically disabled students, and the issue to do so has received little enforcement or attention since 2013.<sup>8</sup> However, the Eastern College Athletic Conference (“ECAC”) would disagree. In response to the 2013 Dear Colleague Letter, the ECAC Board of Directors adopted an inclusive sport strategy, which included adaptive event demonstrations at the 2016 ECAC Swimming & Diving Championship and the 2016 ECAC/IC4A Division I Track & Field Championships. There was also an expectation that the adaptive events would eventually be added to the championships as new point-contributing events, “thus providing new and expanded opportunities for student-athletes with disabilities in intercollegiate varsity sports.”<sup>9</sup> The ECAC lived up to this expectation by hosting the 2017 Collegiate Para Track & Field Championship in May 2017.<sup>10</sup>

---

team] would ‘fundamentally alter the nature of the track and field events in the able-bodied divisions’...[which is] by definition ‘not reasonable.’” (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001)).

7. See Amy L. Boler, Comment, *Put Them in, Coach! They’re Ready to Play: Providing Students with Intellectual Disabilities the Right to Participate in School Sports*, 69 ARK. L. REV. 579 (2016) (discussing evidence that schools still provide limited sports opportunities to students with intellectual disabilities and proposing state legislation for adapted sports in Arkansas).

8. Laura F. Rothstein, *The Americans with Disabilities Act and High Education 25 Years Later: An Update on the History and Current Disability Issues for Higher Education*, 41 J.C. & U.L. 531, 580 (2016) (“It does not seem realistic to expect a college to provide an entire separate basketball or tennis program for wheelchair users. This issue has received little enforcement or other attention since 2013.”).

9. *ECAC Announces Forward Movement for Inclusive Sport Initiative*, E. COLL. ATHLETIC CONF. (Feb. 23, 2016), [http://www.ecacsports.com/news/2016/2/23/2\\_23\\_2016\\_36.aspx?](http://www.ecacsports.com/news/2016/2/23/2_23_2016_36.aspx?).

10. *ECAC to Host Collegiate Para Track & Field Championships at Princeton*, E. COLL. ATHLETIC CONF. (May 8, 2017), [http://www.ecacsports.com/news/2017/5/8/MOTW\\_0508174725.aspx](http://www.ecacsports.com/news/2017/5/8/MOTW_0508174725.aspx).

There is a strong incentive to use the momentum created by the ECAC's inclusive sports strategy to continue to expand collegiate athletic opportunities for students with disabilities, which could be the beginning of a "brand new era" for athletes with disabilities.<sup>11</sup> Certain steps would help this momentum—for example, the NCAA could sanction adaptive sports championships to expand these opportunities nationally—however, the costs and repercussions of this expansion should also be considered before the NCAA takes these steps.

This Comment analyzes the current state of accommodating the growing numbers of high school student-athletes with disabilities at the college level. Since the same legal standards and guidance for high school associations also apply to the NCAA and its institutions, similar growth in athletic opportunities for collegiate student-athletes with disabilities would be expected; however, this does not seem to be the case . . . yet. This Comment argues that the initiatives started by ECAC should be sanctioned and nationalized by the NCAA to broaden the opportunities available to those with disabilities, keeping in mind some of the considerations and costs that this step will bring.<sup>12</sup>

Part II of this Comment provides background information on the legal standards (e.g., the Americans with Disabilities Act and the Rehabilitation Act of 1973) and administrative guidance (e.g., the OCR's Dear Colleague Letter) that apply to the NCAA and its institutions to prohibit discrimination against individuals, specifically in athletics. Part III takes a closer look at the growth of student-athletes with disabilities at the high school level, and certain laws (e.g., Fitness and Athletic Equity for Students with Disabilities Act in Maryland) that assisted in this growth. Part IV discusses the ECAC's inclusive sport initiative and how the conference took the lead in hosting collegiate championship opportunities for student-athletes with disabilities. Finally, Part V proposes that the NCAA should become involved in the adapted sports movement to eventually sanction a NCAA-sponsored adapted sports championship, while also discussing the pros and cons of this step by the NCAA.

---

11. See Dave Roysse, *The Dawn of a New Era for College Athletes with Disabilities*, HERO SPORTS (June 1, 2016), <https://herosports.com/news/ncaa-track-field/the-dawn-of-a-new-era-for-college-athletes-with-disabilities>.

12. For example, for a sport to gain championship status, a female sport must be sponsored by at least forty institutions and a male sport must be sponsored by at least fifty institutions. See NCAA, 2017-18 NCAA DIVISION I MANUAL art. 18, 18.2.4 (Aug. 1, 2017) ("Minimum Sponsorship for Championships"), which is much larger than the current collegiate involvement in adapted sports.

## II. THE LEGAL LANDSCAPE

### *A. Legal Background: Statutory Protection for Student-Athletes with Disabilities*

Congress passed The Rehabilitation Act of 1973 (“Rehab Act”)<sup>13</sup> and The Americans with Disabilities Act of 1990 (“ADA”)<sup>14</sup> to protect the interests of individuals with disabilities including athletes with disabilities. “Both statutes prohibit the exclusion of qualified athletes on the basis of disability and require athletic programs to provide reasonable accommodations to ensure athletes with disabilities have access to athletic opportunities.”<sup>15</sup> Generally, when deciding on claims brought under the Rehab Act or the ADA, the court construes the ADA’s substantive provisions consistent with the judicial interpretation of the Rehab Act;<sup>16</sup> however, the scope of the ADA is broader, as it can be applied to private entities that do not receive federal funding.<sup>17</sup> The protections of these acts have been extended to protect athletes with disabilities at the interscholastic, intercollegiate, and professional levels, and the main applications these acts, as applied in sports, are discussed below.

#### 1. Application of the Rehabilitation Act of 1973 to Athletics

While the Supreme Court has observed that the overall purpose of the Rehab Act is to prevent discrimination based on an assumed “inability to function in a particular context,”<sup>18</sup> the Department of Education promulgated regulations that

---

13. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797 (2018). See MATTHEW J. MITTEN ET. AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 948 (4th ed. 2017) (“[The Rehab Act] is primarily intended to provide handicapped or impaired persons with an opportunity to participate fully in activities in which they have the physical capability and skill to perform.”).

14. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. See MITTEN ET. AL., *supra* note 13, at 954 (“[The ADA] is patterned after the Rehabilitation Act, has similar policy objectives, and extends the coverage of federal legal protection of the rights of handicapped and disabled persons.”).

15. Terri Lakowski, *Athletes with Disabilities in School Sports: A Critical Assessment of the State of Sport Opportunities for Students with Disabilities*, 27 B.U. INT’L L. J. 283, 289 (2009).

16. See *Bragdon v. Abbott*, 524 U.S. 624, 631–32 (1998).

17. The Rehabilitation Act is only applied to “any program or activity receiving Federal financial assistance . . .” 29 U.S.C. § 794(a). But, “the ADA’s scope of coverage is broader than that of the Rehabilitation Act because it covers private entities that do not receive federal funding, such as professional sports leagues and their member teams.” MITTEN ET. AL., *supra* note 13, at 954. For example, Title III of the ADA applies to entities that may not receive federal funding, like the NCAA. See *Bowers v. Nat’l Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460 (D.N.J. 1998) (finding that Title III applies to the NCAA because it is an operator of a place of public accommodation); *but cf.* *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 468–69 (1999) (finding that Title IX, a statute that also only applies if the entity receives federal funding, does not apply to the NCAA merely because the NCAA benefits from federal funding, but did not decide if the NCAA either directly or indirectly receives federal funding through the Youth Sports Program).

18. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1975).

specifically require that qualified handicapped athletes are to be provided with an “equal opportunity for participation” in scholastic and intercollegiate athletics.<sup>19</sup> Therefore, if an athlete does not receive an equal opportunity to play a sport for his or her school, the student-athlete could file a claim that the school is in violation of Section 504 of the Rehab Act. For an athlete to bring a successful claim under the Rehab Act, he or she would have to prove:

- 1) that he or she is a disabled under § 705(9)(A) of the Rehab Act;
- 2) he or she is an “otherwise qualified” individual, which means he or she meets all of the essential requirements of a program in spite of his or her disability with a reasonable accommodation (i.e., an accommodation that does not a) fundamentally alter the nature of the program or b) create undue financial or administrative burdens);
- 3) the defendant engaged in an act that resulted in the disabled student being excluded from participation in, being denied the benefits of, or being subject to discrimination in the interscholastic athletic program solely by reason of his or her disability;
- 4) the defendant receives federal funding.<sup>20</sup>

If a disabled athlete can prove these four elements, then he or she can bring a strong Section 504 claim. For example, Nick Knapp prevailed in the district court when the court determined that playing on the Northwestern basketball team was part of the major life activity of learning, and the university substantially limited him from such learning when they refused to let him play basketball due to his heart condition.<sup>21</sup> Although this decision was eventually reversed by the Seventh Circuit after the appellate court determined that basketball was not a major life activity,<sup>22</sup> it demonstrates the necessary components of a successful claim under Section 504 of the Rehab Act.

As described, the fourth element of the *prima facie* case precludes athletes from bringing Section 504 claims against any entity that does not receive federal funding. While this *may* exempt high school associations and the NCAA from

---

19. See 34 C.F.R. §§ 104.34, 104.37(c), and 104.47(a) (2018); 45 C.F.R. §§ 84.37(c) and 84.47(a) (2018).

20. See *McPeters*, *supra* note 3, at 422–23 (internal citations omitted); see also *Knapp v. Northwestern Univ.*, 101 F.3d 473, 478 (7th Cir. 1996) (citing *Bryne v. Bd. of Educ., Sch. of West Allis-West Milwaukee*, 979 F.2d 560, 563 (7th Cir. 1992).

21. *Knapp v. Northwestern Univ.*, 938 F. Supp. 508, 510 (N.D. Ill. 1996).

22. *Knapp*, 101 F.3d at 480–86.

Rehab Act claims,<sup>23</sup> the broader scope of the ADA helps protect the student-athletes even if the entities are not covered under the Rehab Act.

## 2. Application of the Americans with Disabilities Act to Athletics

When the ADA was enacted in 1990 “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,”<sup>24</sup> it may not have been obvious that “no area of American life [would be] more scrutinized by the strictures of the ADA than sports.”<sup>25</sup> However, consistent with its groundbreaking impact of enforcing the civil rights of individuals with disabilities in all areas of life,<sup>26</sup> the ADA has specifically been applied in the sports context at all levels of competition.<sup>27</sup>

Title I of the ADA protects against employment discrimination,<sup>28</sup> Title II applies to public entities,<sup>29</sup> and Title III applies to places (and operators of places of) public accommodation.<sup>30</sup> While all three titles of the ADA can be applicable in the sports context, Title II, which provides: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

---

23. The Supreme Court in *Smith*, Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999), only decided that the NCAA's receipt of payments from recipients of federal funds did not constitute as receiving federal funding to subject the Association to Title IX; however, it did not address Smith's additional arguments of receiving indirect federal funding from other sources (e.g., the Youth Sports Program). See *Smith*, 525 U.S. at 468–69. Furthermore, some courts have decided that high school athletic associations do not receive federal funding and therefore Section 504 of the Rehab Act does not apply. See, e.g., *Cruz v. Pa. Interscholastic Athletic Ass'n*, 157 F. Supp. 2d 485 (E.D. Pa. 2001). Other courts did not decide if the high school association received federal funding but still applied the standards of Section 504 to the high school athletic association's actions because “the standards applicable to one act are applicable to the other.” *Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 n.6 (7th Cir. 1999). Overall, whether an entity receives funding will be a fact-intensive case-by-case inquiry.

24. 42 U.S.C. § 12101(b)(1) (2012).

25. Paul M. Anderson, *A Cart that Accommodates: Using Case Law to Understand the ADA*, *Sports and Casey Martin*, 1 VA. SPORTS & ENTER. L. J. 211, 212 (2002).

26. The ADA has been called “the most significant civil rights legislation since the Civil Rights Act of 1964.” Nancy Lee Jones, *Overview and Essential Requirements of The Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 471 (1991). In fact, President Bush, who signed the Act into law, commented on the importance of the ADA and described the act as “[T]he world's first comprehensive declaration of equality for people with disabilities.” Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. REV. 413, 413-14 (1991) (quoting President George Bush; Remarks by the President during Ceremony for the Signing of the Americans with Disabilities Act of 1990, 2 (July 26, 1990)).

27. See Anderson, *supra* note 25, at 214–15.

28. See 42 U.S.C. §§ 12111–17 (2012).

29. See *id.* §§ 12131–65.

30. See *id.* §§ 12181–89.

entity, or be subjected to discrimination by such entity,”<sup>31</sup> and Title III which provides: “[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 by any person who owns, leases (or leases to), or operates a place of public accommodation,”<sup>32</sup> have been the most relevant in the sports context.<sup>33</sup> Below are two critical and successful ADA cases that describe the applicability of the ADA to athletes.

*i. PGA Tour, Inc. v. Martin*

Casey Martin, a very talented professional golfer, has a disability called Klippel–Trenaunay–Weber Syndrome that makes it difficult for him to walk, and the PGA Tour requires all participants to walk during the golf tournament.<sup>34</sup> Martin asked if he could use a golf cart during the golf tournament because of his disability, and the PGA Tour denied the request because it thought the cart would give Martin an unfair advantage over the other competitors who get fatigued from walking the course.<sup>35</sup> The Court found that the walking rule is not an essential rule of the game of golf, and the use of a cart does not fundamentally alter the game.<sup>36</sup> The Court explained that there are two scenarios in which an accommodation fundamentally alters the nature of a sporting event: 1) when the accommodation changes an ‘essential aspect of the

---

31. *Id.* § 12131. Moreover, for an athlete to establish a prima facie claim under Title II of the ADA, the athlete must prove that: 1) they were injured by a “public entity”; 2) they are a “qualified individual with a disability”; and 3) that they have been excluded from participating in or benefiting from the activities of the public entity. See Jonathan R. Cook, *The Americans with Disabilities Act and its Application to High School, Collegiate and Professional Athletics*, 6 JEFFREY S. MOORAD SPORTS L. J. 243, 247 (1999) (citing Johnson v. Fla. High Sch. Activities Ass’n, Inc. 899 F. Supp. 579, 582 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1997) (setting forth elements plaintiff must prove to establish claim for discrimination under Title II of ADA)).

32. 42 U.S.C. § 1218. Moreover, for an athlete to establish a prima facie claim under Title III of the ADA, the athlete must prove that: 1) they are a “qualified individual with a disability,” which requires the same analysis as the Title II claim; 2) they were denied services or accommodations on the basis of the athlete’s disability; and, 3) the defendant owns, leases (or leases to), or operates a place of public accommodation. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 670, 675–78 (2001).

33. See Anderson, *supra* note 25, at 213 (“[I]n the sports context, Title II and Title III have been the provisions [of the ADA] found applicable. Title I, which applies only to employment situations, has not been the focus and will not be discussed herein.”); Cook, *supra* note 31, at 245 (“The majority of ADA claims involving disabled athletes have been brought under Titles II and III.”).

34. See *Martin*, 532 U.S. at 667–68.

35. *Id.* at 669.

36. See *id.* at 689–90.

game’; or 2) when an accommodation gives a disabled player an advantage that ‘fundamentally alters’ the character of the competition.<sup>37</sup>

The Court held that allowing Martin to use a golf cart would not “fundamentally alter the nature of [the PGA Tour’s] tournaments,” and the Court decided that the walking rule is not compromised by allowing him to use a golf cart since Martin would endure greater fatigue due to his disability.<sup>38</sup> Because Martin had the skill to compete against non-disabled golfers without any accommodation, the modification to a “peripheral tournament rule” without impairing its purpose cannot be said to “fundamentally alter” the tournament.<sup>39</sup> One of the most important aspects of this case in terms of its future application was the individualized approach that the Court took to Martin’s case.<sup>40</sup> *Martin* is a canonical ADA case for its framework for providing a reasonable accommodation in a sports setting,<sup>41</sup> and its analysis has been applied to many cases, at all levels of competition—youth sports,<sup>42</sup> interscholastic,<sup>43</sup> intercollegiate,<sup>44</sup> or Olympic.<sup>45</sup> *Matthews v. National Collegiate Athletic Association*,<sup>46</sup> discussed in more detail below, is a case that waited for the disposition of *Martin* to be decided; it subsequently applied the *Martin* individualized approach to permit a reasonable accommodation that waived NCAA eligibility requirements and allowed a student-athlete with a learning disability to play football.

#### *ii. Matthews v. National Collegiate Athletic Association*

In this case against the NCAA, Anthony Matthews, a student with a learning disability, was declared ineligible to play football for the 1999 season because

---

37. *Id.*

38. *Id.*

39. *Martin*, 532 U.S. at 689–90.

40. Anderson, *supra* note 25, at 253–54.

41. Unsurprisingly, a lot of hard work by not only Martin’s attorneys, but also several amici curiae contributors, helped create Martin’s successful argument for this ADA claim that reached the Supreme Court. For an interesting insight on the development of one of the amicus curiae briefs in *Martin*, written on behalf of the Disability Sport Organizations, see Anita M. Moorman & Lisa Pike Masteralexis, *Writing an Amicus Curiae Brief to the United States Supreme Court, PGA Tour, Inc. v. Martin: The Role of the Disability Sport Community in Interpreting the Americans with Disabilities Act*, 11 J. LEGAL ASPECTS OF SPORT 285, 310 (2001).

42. See, e.g., *Nathanson v. Spring Lake Park Panther Youth Football Ass’n*, 129 F. Supp. 3d 743 (D. Minn. 2015).

43. See, e.g., *A.H. ex rel. Holzmueller v. Ill. High Sch. Ass’n*, No. 16-CV-1959, 2017 WL 2907840 (N.D. Ill. July 7, 2017).

44. See, e.g., *Matthews v. Nat’l Collegiate Athletic Ass’n*, 179 F. Supp. 2d 1209 (E.D. Wash. 2001).

45. See, e.g., *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191 (10th Cir. 2008).

46. 179 F. Supp. 2d 1209 (E.D. Wash. 2001).

he took more credits in the summer than the NCAA's 75/25 rule<sup>47</sup> permitted despite receiving two academic waivers in the past to accommodate his learning disability.<sup>48</sup> The Eastern District of Washington decided to wait for the disposition of *PGA Tour v. Martin*, before it decided its case.<sup>49</sup> Since Matthews' learning impairment is considered a disability under the ADA, the court found that the ADA prohibited the NCAA from discriminating against him in determining that he was academically ineligible to play college football.<sup>50</sup> Specifically, the court found that Matthews' learning impairment substantially impaired his ability to learn, which was a major life activity, and the NCAA's determination that the athlete was ineligible was based on his learning disability (*not* on a physical disability affecting his ability to play football which is *not* a major life activity).<sup>51</sup> The court held that the modification/waiver of the 75/25 rule is a reasonable accommodation that does not fundamentally alter the NCAA's mission of promoting student-athlete academic achievement—the court admitted that it is “difficult particularly in light of the individualized inquiry required by *Martin*, to see how granting a third waiver to Plaintiff would fundamentally alter the NCAA's purpose, when the first two waivers did not.”<sup>52</sup>

---

47. The court in *Matthews* describes the NCAA's academic eligibility requirements, including the 75/25 rule as follows:

[T]he NCAA imposes certain academic requirements for its member institutions' student-athletes. A student-athlete's failure to meet the requirements can result in the NCAA declaring the athlete ineligible to participate in intercollegiate sports. For example, under NCAA eligibility rules, student-athletes must maintain a college grade point average of at least 1.8 and must attain 25 percent of the credit hours required for a degree by the completion of their second year of college enrollment. Another eligibility rule requires that student-athletes earn 75 percent of their annual required credit hours during the regular academic year. The NCAA defines the “regular academic year” as “the time beginning with the opening of the institutions' fall term and concluding with the institutions' spring commencement exercises.” The NCAA established this rule, called the “75/25 Rule,” in 1992 to ensure that student-athletes maintain a course load equivalent to the general student body during the normal school year. The NCAA promulgated the rule after various member institutions expressed concern about student-athletes' excessive use of summer school courses to maintain eligibility while taking reduced course loads during the normal school year. The NCAA bylaws permit waivers of certain academic eligibility requirements for a learning-disabled student-athlete when the university, to accommodate the student's disability, defines full-time enrollment for that student-athlete as fewer than 12 credit hours per semester.

*Matthews*, 179 F. Supp. 2d at 1215 (internal citations omitted).

48. *Id.* at 1216–17.

49. See Anderson, *supra* note 25, at 227.

50. See *Matthews*, 179 F. Supp. 2d at 1224.

51. *Id.*

52. *Id.* at 1226.

This case not only concluded that the NCAA is subject to Title III of the ADA,<sup>53</sup> but also took the individualized approach used in *Martin* to come to its conclusion that the waiver of the NCAA eligibility rule would not fundamentally alter the NCAA's purpose.<sup>54</sup> This case, like many others after it, reveals that after a court finds that the athletic entity is subject to Title III of the ADA,<sup>55</sup> the analysis of an athlete's request of a modification in a competition has been distilled to a fact-intensive inquiry of: 1) whether the requested modification is reasonable; 2) whether it is necessary for the disabled individual; and 3) whether it would fundamentally alter the nature of the competition.<sup>56</sup>

*Martin* and *Matthews* are only two of the many cases that athletes with disabilities have brought against professional, intercollegiate, interscholastic and Olympic athletic entities under the ADA,<sup>57</sup> but both cases exemplify the

---

53. *Id.* at 1223 (“[T]he Court finds that Title III of the ADA does apply to the NCAA, based upon the large degree of control the NCAA exerts over which students may access the arena of competitive college football.”).

54. *Id.* at 1227 (“Applying the specific and individualized inquiry required by *Martin*, the Court finds that granting Plaintiff a waiver of the 75/25 Rule would not constitute a fundamental alteration of the NCAA's purpose.”).

55. Courts have repeatedly recognized that one of the most critical questions in an ADA case against an athletic association is whether the association owns, leases (or leases to) or operates a place of public accommodation. See *Bowers*, 9 F. Supp. 2d at 483 (“[T]he critical question for liability under § 12182 [i.e., Title III of the ADA] is whether the NCAA owns, leases (or leases to), or operates a place of public accommodation”); *Madigan*, 2012 WL 3581174, at \*5 (“Here, . . . the relevant question is whether the plaintiffs have sufficiently alleged that IHSA ‘owns, leases (or leases to), or operates a place of public accommodation.’” (citing *Bowers*, 9 F. Supp. 2d at 483–84)).

Despite (1) the Department of Justice clarifying that ‘operate’ in the statute should be construed very liberally and the ADA should provide broad coverage, Statement of Interest of the United States of America at 7–9, *Illinois ex rel. Madigan v. Ill. High Sch. Ass’n*, No. 12-CV-3758, 2012 WL 3581174 (N.D. Ill. Aug. 17, 2012); (2) some categories listed in the definition of “public accommodation” in the ADA are directly related to sports, see Jason Kroll, Note, *Second Class Athletes: The USOC's Treatment of its Paralympians*, 23 CARDOZO ARTS & ENT. L.J. 307, 325 (2005) (“Regarding athletics, the most pertinent section of Title III is 42 U.S.C. § 12181(L), which recognizes ‘gymnasium[s], health spa[s], bowling alley[s], golf course[s] or other places of recreation and exercise,’ as places of public accommodation.”); (3) recent amendments to the ADA that require “the protections afforded under the ADA . . . to be construed in favor of the broad coverage of individuals,” ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. § 12102(4)(a)); and (4) the Supreme Court specifically saying that “[t]he phrase public accommodation . . . should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled,” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001), courts have still found that certain athletic organizations, like the United States Olympic Committee, are not subject to Title III of the ADA. See *Shepherd v. U.S. Olympic Comm.*, 464 F. Supp. 2d 1072, 1082–86 (D. Colo. 2006), *aff’d*, 513 F.3d 1191 (10th Cir. 2008), *cert denied*, 555 U.S. 938 (2008).

56. See Anderson, *supra* note 25, at 253.

57. For a more exhaustive list of athletic ADA cases, see Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change the Rules of Sport?*, 1 VA. J. SPORTS & L. 44 (1999) (pre-*Martin* cases); Ted Fay, *Disability in Sport It's Our Time: From the Sidelines to the Frontlines (Title IX—B)*, 4 J. OF INTERCOLLEGIATE SPORT 63, 74–77 (2011); or the “Disability Law” section of the Recent Developments in Sports Law published by

arguably predictable,<sup>58</sup> individualized approach that courts will take in an athlete's case.

*B. Additional Guidance: The Office of Civil Rights' Dear Colleague Letter*

As discussed above, in 2013 the Office of Civil Rights (OCR), published a Dear Colleague Letter ("the Guidance") to clarify the obligations of schools to accommodate student-athletes with disabilities.<sup>59</sup> The Guidance says that qualified students with disabilities have the right, under Section 504 of the Rehab Act, to an equal opportunity to participate in their schools' extracurricular activities.<sup>60</sup> As the Department of Education further elaborated, "ensuring that students with disabilities are given the opportunity to play alongside their peers—both with and without disabilities—is at the heart of the Guidance."<sup>61</sup> Although the Guidance addresses K–12 activities specifically, the main principles of inclusion and equal access that it embodies apply to postsecondary schools,<sup>62</sup> and also to interscholastic athletic associations.<sup>63</sup>

---

the *Marquette Sports Law Review*, e.g., Katelyn Hill et. al., *Survey, 2015 & 2016 Annual Surveys: Recent Developments in Sports Law*, 27 MARQ. SPORTS L. REV. 543, 565–68 (2017).

Additionally, there have been ADA challenges against the United States Olympic Committee for not meeting the requirement of providing equal opportunities for athletes with disabilities under the Amateur Sports Act, Pub. L. No. 95-606, 92 Stat. 3045 (codified at 36 U.S.C. §§ 220501–220529 (2012)), specifically alleging discrimination against Paralympic athletes. *See Hollonbeck*, 513 F.3d 1191. However, this Comment will focus on the impact of these acts in increasing collegiate opportunities for student-athletes with disabilities. For a more detailed analysis on the Paralympic issues see Joshua L. Friedman & Gary C. Norman, *The Paralympics: Yet Another Missed Opportunity for Social Integration*, 27 B.U. INT'L L. J. 345 (2009), and Kroll, *supra* note 55.

58. Anderson, *supra* note 25, at 254 ("The cases that have followed *Martin* have simply refined the analysis that was already there.").

59. *See Galanter, supra* note 2, at 1.

60. *See id.* at 3.

61. *Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics: Background and Fast Facts*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. (Jan. 25, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.pdf>.

62. *See Galanter, supra* note 2 ("Nonetheless, students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics.").

63. *See Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics: Background and Fast Facts, supra* note 61.

At the end of the Guidance, the OCR originally sparked lots of attention (some positive,<sup>64</sup> some negative<sup>65</sup>) by stating, “[w]hen the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district’s existing extracurricular athletic program, the school district *should create additional opportunities* for those students with disabilities.”<sup>66</sup> Many started to insinuate that the Guidance should function like Title IX of the Education Amendments of 1972,<sup>67</sup> and the application of Title IX to sports “changed sports forever.”<sup>68</sup> In fact, scholars have argued that this is exactly how the regulations under Section 504 of the Rehab Act should be interpreted.<sup>69</sup>

However, the OCR released “guidance on the guidance”<sup>70</sup> that clarified that this language in the Dear Colleague Letter does not mean that schools need to create additional sports teams to accommodate students with disabilities.<sup>71</sup> Specifically, the OCR clarified that Section 504 does not require districts to develop activities such as wheelchair basketball to create additional opportunities for students with disabilities by saying, “[the Guidance] does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities

---

64. See Brad Lendon, *Schools Must Provide Sports for Students with Disabilities*, U.S. Ed Department Says, CNN: SCHOOLS OF THOUGHT (Jan. 25, 2013), <http://schoolsofthought.blogs.cnn.com/2013/01/25/schools-must-provide-sports-for-students-with-disabilities-u-s-department-of-education-says/> (reporting on the “far reaching positive effects” and the further advancement of the “vital work of making sure all kids who want to take part in school sports will have an opportunity to do so” of the Guidance).

65. See Simone Pathe, *Law Enables Students with Disabilities to Play Sports*, PBS: NEWSHOUR EXTRA (Feb. 18, 2013), <http://www.pbs.org/newshour/extra/2013/02/law-enables-students-with-disabilities-to-play-sports/> (reporting on the “critics” that, *inter alia*, accused the Obama administration of “invent[ing] a right to wheelchair basketball.”).

66. See Galanter, *supra* note 2, at 11 (emphasis added).

67. Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373 (codified at 20 U.S.C. § 1681–1688 (2012)); see Boler, *supra* note 7, at 594–95 (“These . . . substantive comparisons to Title IX created the impression that the Guidance would function like Title IX of the Education Amendments of 1972.”).

68. Boler, *supra* note 7, at 595. For a deeper analysis on the impact and significant rise of Title IX cases in the athletic context, see generally Paul M. Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS OF SPORT 127 (2008).

69. Lakowski, *supra* note 15, at 314 (“[A]dditional guidance is needed to clarify the meaning of ‘equal opportunity’ in the Rehab Act regulations . . . Title IX provides a solid model to address this issue.”); Fay, *supra* note 57, at 92 (“The time has come to move from an environment of endless recommendations to an era of new regulations that hold similar same elements of equity found in Title IX for athletes with a disability.”).

70. Boler, *supra* note 7, at 596.

71. See Letter from John K. DiPaolo, Deputy Assistant Secretary for Policy, *In re: Dear Colleague Letter of January 25, 2013*, OFF. FOR CIV. RTS., U.S. DEP’T EDUC. (Dec. 16, 2013), [http://chinniandmeuser.com/uploads/3/2/7/4/3274563/december\\_2013\\_ocr\\_clarification\\_re\\_separate\\_athletic\\_opportunities.pdf](http://chinniandmeuser.com/uploads/3/2/7/4/3274563/december_2013_ocr_clarification_re_separate_athletic_opportunities.pdf).

just for students with disabilities.”<sup>72</sup> Despite not having as large of an impact as scholars may have initially thought, there has still been an increase of opportunities for student-athletes with disabilities at the high school level since the 2013 Dear Colleague Letter. The letter also impacted the actions of at least one collegiate conference, and the momentum should promote continued growth for opportunities for student-athletes with disabilities at the college level.

### III. GROWTH OF STUDENT-ATHLETES WITH DISABILITIES AT THE HIGH SCHOOL LEVEL

Since the GAO released its 2010 study about students with disabilities not being provided equal opportunities to participate in sports, and perhaps in direct response to the 2013 Dear Colleague letter,<sup>73</sup> the number of student-athletes with disabilities who are competing at the high school level has increased. For example, there have been steadily increasing numbers in states that offer high school adapted sports,<sup>74</sup> in addition to large increases in high school student-athlete participation in adapted sports, as reported by the National Federation of State High School Associations (NFHS).<sup>75</sup> An increased

---

72. *Id.* at 2.

73. See McPeters, *supra* note 3, at 434.

74. In 2012-13, seven states reported having high school level completion in adapted sports for boys, and five states offered adapted sports for girls. See 2012-13 NFHS Participation Survey, *supra* note 4. In 2013-14, nine states offered adapted sports for boys, and six states offered adapted sports for girls. NAT'L FED'N OF HIGH SCH. ASS'NS, 2013-14 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2014), available at [http://www.nfhs.org/ParticipationStatics/PDF/2013-14\\_Participation\\_Survey\\_PDF.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2013-14_Participation_Survey_PDF.pdf) [hereinafter 2013-14 NFHS Participation Survey]. In 2014-15, the numbers of states offering adapted sports both jumped into the double-digits (eleven states for boys and ten for girls). NAT'L FED'N OF HIGH SCH. ASS'NS, 2014-15 HIGH SCH. ATHLETICS PARTICIPATION SURVEY (2015), available at [http://www.nfhs.org/ParticipationStatics/PDF/2014-15\\_Participation\\_Survey\\_Results.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2014-15_Participation_Survey_Results.pdf) [hereinafter 2014-15 NFHS Participation Survey]. In 2015-16 and in 2016-17, thirteen states reported having adapted sports for both boys and girls. NAT'L FED'N OF HIGH SCH. ASS'NS, 2015-16 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2016), available at [http://www.nfhs.org/ParticipationStatistics/PDF/2015-16\\_Sports\\_Participation\\_Survey.pdf](http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf) [hereinafter 2015-16 NFHS Participation Survey]. See 2016-17 NFHS Participation Survey, *supra* note 4. In addition, in 2015-2016 and 2016-17, schools reported thirteen different adapted sports (Basketball, Bocce-Indoor, Bowling, Corn Toss, Floor Hockey, Golf, Soccer, Softball, Track, Strength Training, Tennis, and Volleyball), which almost doubled the total number of adapted sports offered in 2014-15. See 2014-15 NFHS Participation Survey, *supra*; 2015-16 NFHS Participation Survey, *supra*; 2016-17 NFHS Participation Survey *supra* note 4.

75. The total number of athletes participating in adapted sports, and the most popular sport, in the past four years are below:

2013-14: 6,437, most participants in bowling (1,479). 2013-14 NFHS Participation Survey, *supra* note 74; 2014-15: 8,483, most participants in bowling (1,698). 2014-15 NFHS Participation Survey, *supra* note 74; 2015-16: 9,491, most participants in bowling

participation rate in adapted sports reveals that more students with disabilities are participating in high school athletic opportunities, and “[n]ationwide, the inclusion of students with disabilities into education-based athletic programs is becoming a norm;”<sup>76</sup> however, there are other, and possibly more ideal, methods of opportunities for equal athletic participation of students with disabilities. Three methods of athletic participation for students with disabilities—A) adapted sports teams, B) community-sponsored sports teams, and C) integration into traditional sports teams—are discussed below to demonstrate the different ways that student-athletes with disabilities can now become involved in athletic opportunities while in high school. Finally, subsection D describes the impact of “a landmark state law” on the rights of student-athletes with disabilities<sup>77</sup> and the influence it had on the increased high school participation rates of students-athletes with disabilities in Maryland.

### *A. Adapted Sports*

Adapted sports are created specifically for students with disabilities,<sup>78</sup> and are therefore different than integrating student-athletes into the ‘mainstream sports’ that are customarily offered to an entire student body.<sup>79</sup> Some of the more popular adapted sports include wheelchair basketball, adapted soccer, indoor bocce, and adapted bowling.<sup>80</sup> Adapted sports provide opportunities for student-athletes with physical disabilities (e.g., those with disabilities that require the use of a wheelchair) to compete against other individuals in a similar-situated situation, where simultaneously playing the non-adapted sport would likely not work as well in the competition—for example, in a game like wheelchair basketball, it is more competitive, fairer, and possibly less dangerous to have all members in a wheelchair instead of some players playing with wheelchairs and some playing without at the same time. While this may be more advantageous or appealing to some student-athletes with disabilities, the Section 504 regulations say nothing about the need or requirement for schools to develop adapted sports programs for students who cannot participate in mainstream sports, contrary to how some originally might have thought the

---

(1,675). 2015-16 NFHS Participation Survey, *supra* note 74; 2016-17: 10,855, most participants in bowling (2,456). 2016-17 NFHS Participation Survey, *supra* note 4.

76. Porter, *supra* note 5.

77. Fay, *supra* note 57, at 74 (“This landmark state law requires that schools in the state of Maryland provide students with a disability a number of rights . . .”).

78. See McPeters, *supra* note 3, at 420 (“Adapted Sports target disabled students, especially ones who have difficulties participating on traditional sports teams.”).

79. See Boler, *supra* note 7, at 588.

80. See 2016–17 NFHS Participation Survey, *supra* note 4; Porter, *supra* note 5.

2013 Dear Colleague Letter should be read. In addition to some schools not providing these opportunities because the law does not require them to do so being a problem, there are a few additional possible problems with providing *solely* adapted sports for individuals with disabilities, two of which are discussed below.

First, when possible, athletes with disabilities should be integrated into traditional sports with their peers. The regulations provide that they must be provided an equal opportunity to participate in the traditional sports, and even the Guidance specifies that a school's additional efforts to include *more* student-athletes does not mean they do not need to still allow for them to participate in the 'traditional' sports. While separate opportunities may be a better option in some circumstances, simply having "separate but equal" opportunities did not work in *Brown v. Board of Education*,<sup>81</sup> and would similarly be against the law if those were the *only* opportunities offered to student-athletes with disabilities.<sup>82</sup>

Second, it might be difficult for some schools to generate enough players to have a full team for an adapted sport; for example, it would be difficult to yield a wheelchair basketball team if the school only has one or two students in wheelchairs. A possible solution to this problem is to have teams based on school districts (to provide a larger pool of possible student-athletes) as opposed to individual schools. Finally, if the school system is unable to provide these adapted sports opportunities, the student-athletes with disabilities may be able to participate in a broader community group in connection with their school.

### *B. Community-Sponsored Athletics*

Opportunities for student-athletes with disabilities are available not solely through the student's school, but also through a school's partnerships with other schools in the district or community programs.<sup>83</sup> A steadily growing and good example of this type of program is Unified Sports.<sup>84</sup> In Unified Sports, teams

---

81. 347 U.S. 483 (1954).

82. However, it is interesting to consider that there is still, in large measure, a "separate but equal" approach when it comes to opportunities in athletics based on gender. *See generally* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 39-45 (1992).

83. *See* McPeters, *supra* note 3, at 419. ("Participation opportunities [for student-athletes with disabilities] often grow when schools offer community-sponsored sports teams, programs often created through formal partnerships with schools, school districts, and state athletic associations.")

84. *See* Porter, *supra* note 5. Unified Sports were established by Special Olympics, which has an education and sports-based strategy known as Project UNIFY®. These programs pair students with disabilities to peers without disabilities, aiming to achieve a mission of providing students with intellectual disabilities an opportunity to develop physical fitness, demonstrate courage, and experience joy, all while developing friendships. *Id.*

are comprised of a minimum amount of “athletes” (students with disabilities) and their “partners” (those without disabilities who are not involved with other athletic interests). Usually, there are rule constraints on how much the partners can participate in the scoring of the competition.<sup>85</sup> The mixed participation of student-athletes with and without disabilities is a great opportunity for integration; moreover, in many instances, these opportunities do not only impact the lives of the students with disabilities but also those without disabilities.<sup>86</sup> Although it is only one of many states involved with Unified Sports,<sup>87</sup> Maryland is a leader in offering Unified Sports; in fact, since the enactment of Fitness and Athletic Equity for Students with Disabilities Act, described below, participation in Unified Sports has more than doubled in the state.<sup>88</sup>

There are two possible problems with these types of opportunities: 1) the schools that provide an ‘equal opportunity’ for student-athletes with disabilities to participate in athletics through community-sponsored sports program could be referring these student-athletes without providing transportation, coaching or funding,<sup>89</sup> and 2) the level of competition may not be as challenging as some of the most elite student-athletes with disabilities would prefer. Some of the athletes that want the ability to participate at the high school and collegiate level are athletes who will participate in the Paralympics<sup>90</sup>—in those athletes’ cases, the best scenario would be to have them compete in an adapted game (like wheelchair basketball) or become integrated into traditional school-based athletics with any reasonable accommodations.

### C. Integration into Traditional School-Based Athletics

“With regard to ‘mainstream [or traditional] sports,’ the regulations are clear that schools must include qualified students ‘to the maximum extent

---

85. *See id.*

86. *See id.* (noting that the “partners” that participate in these programs can be inspired to pursue futures in special education due to these experiences).

87. *See id.* (“According to the 2014–15 NFHS Inclusion Survey, 14 state associations offered Unified Sports . . . [and] 15 states were considering the addition of Unified programs.”).

88. Boler, *supra* note 7, at 604 (citing Molly Geary, *Unified Sports Drive Participation Increase in Maryland High Schools*, CAP. NEWS SERV. (Mar. 26, 2014), <http://cnsmaryland.org/2014/03/26/unified-sports-drive-participation-increase-in-maryland-high-schools/>)

89. *See* McPeters, *supra* note 3, at 419 (“[M]any schools offering community-sponsored opportunities are unlikely facilitating them to the same extent as their traditional sports.”).

90. In fact, several of the athletes that participated in the ECAC Adapted Sports demonstration or championships participated in the 2016 Rio Paralympics. *See ECAC Student-Athletes Go for Gold in 2016 Rio Paralympics*, E. COLL. ATHLETIC CONF. (Sept. 14, 2016), [http://www.ecacsports.com/news/2016/9/14/gen\\_0914165540.aspx?path=wswwim](http://www.ecacsports.com/news/2016/9/14/gen_0914165540.aspx?path=wswwim); Paul Ackerman, Director, Paralympic Sport Development, USOC, Presentation at the 2017 NCAA Inclusion Forum: U.S. Paralympics Gateway to Gold Collegiate Sport Initiatives – Do You Know Your Paralympic Athletes? (April 22, 2017).

possible,' meaning they must have the opportunity to try out for and, if selected, participate on a mainstream team."<sup>91</sup> Therefore, equal participation opportunities for student-athletes with disabilities begin with opportunities to participate in traditional school-based athletics—the overall goal is to allow and promote student-athletes with disabilities to participate at the same events as able-bodied students.<sup>92</sup> In fact, this is exactly the opportunity M.K., a student-athlete with a disability in Illinois, wanted and was not provided until she sued the Illinois High School Association (“IHSA”).<sup>93</sup>

In 2012, M.K. was a sixteen-year old student at Fenwick High School in Illinois and on the school’s swimming and track teams.<sup>94</sup> Due to M.K.’s lower-limb paralysis, she requires a wheelchair and was unable to meet the state-qualifying standards that the IHSA sets for students without disabilities in both swimming and track.<sup>95</sup> M.K. was a dedicated member of both of her high school teams, and she wanted to be able to contribute points for her team in the state championships in her sports. M.K. tried to work with IHSA directly—she

---

91. Boler, *supra* note 7, at 588.

92. McPeters, *supra* note 3, at 418–19 (citing Juli Doshan, *NFHS Task Force Discusses Inclusion of Students with Disabilities*, NAT’L FED’N OF ST. HIGH SCH. ASS’NS (Jan. 12, 2015), <http://www.nfhs.org/articles/nfhs-task-force-discusses-inclusion-of-students-with-disabilities/>).

93. See *Illinois ex rel. Madigan v. Ill. High Sch. Ass’n*, 2012 WL 1862320 (N.D. Ill. May 16, 2012) (No. 12-CV-3758).

94. Facts from this case are derived from the case opinion, *see id.*, in addition to conversations with an attorney on the case, Attorney Alan Goldstein. For a summary of the case, see GLASASports, *Mary Kate Callahan at IHSA Swim Finals*, YOUTUBE (Dec. 15, 2012), <https://www.youtube.com/watch?v=HDUo9bXhgwo&t=1s>.

95. The complaint for this case provides more detail about the background including:

[M.K.] is a sixteen-year-old high school student with physical disabilities, including lower-limb paralysis related to the impairment of transverse myelitis. She is planning on graduating from high school in 2013. [M.K.] is a committed athlete who focuses primarily on swimming and track. She has been denied the opportunity to compete as part of her team in the high school state meet, interscholastic sectional meets, and local and qualifying meets for the sports of track and field and swimming. [M.K.] is unable to qualify for the state meet due to the lack of IHSA standards for student athletes with disabilities despite the wide use of such standards in other states and in disability sports programs, including the Paralympics; her disability prevents her from meeting the qualifying standards that IHSA has set for students without disabilities. [M.K.] is unable to earn points for her team in competitions against other schools (interscholastic competitions) due to the failure of IHSA to adopt a policy permitting athletes with disabilities to earn points in competitions against other schools. [M.K.] desires the opportunity to qualify for the state championship meets in swimming and track during the 2012-2013 sports season. She also desires an opportunity to earn points for her team in all interscholastic competitions in swimming and track during the 2012-2013 sports season. These goals will not be possible unless IHSA makes reasonable modifications to its rules, policies, and procedures. Swimming season will occur during the fall of 2012 and the track season will occur during the spring of 2013.

Complaint at 2-3, *Illinois ex rel. Madigan v. Ill. High Sch. Ass’n*, 2012 WL 1862320 (N.D. Ill. May 16, 2012) (No. 12-CV-3758).

contacted the association to inquire if they would be willing to include disabled swimming exhibition events in state meets, and the IHSA was unresponsive. When the Illinois Attorney General stepped in to assist with M.K.'s requests, the IHSA responded by suing the Office of the Illinois Attorney General in state court. After retaining the help of a team of lawyers at Equip for Equality in Chicago, M.K. and the Illinois Attorney General responded with a suit of their own against the IHSA in federal court.

M.K. argued that due to IHSA's actions and inactions, she and other student-athletes with disabilities were excluded from participation in interscholastic high school championships in violation of both the Rehab Act and the ADA.<sup>96</sup> The IHSA moved to dismiss M.K.'s case, but the motion was denied because she "plausibly allege[d] that the IHSA operates a place of public accommodation such that it could be subjected to liability in the event that it violates Title III."<sup>97</sup> After this decision was awarded in M.K.'s favor, the IHSA decided to settle.

This suit resulted in an encouraging settlement for both M.K. and student-athletes with disabilities participating in IHSA events,<sup>98</sup> and the IHSA currently hosts a combined championship in swimming & diving and track & field as a direct consequence of this case.<sup>99</sup> While other athletes have not been as successful in their suits against the IHSA,<sup>100</sup> it exemplifies that the efforts taken by one (and the fantastic team of lawyers at Equip for Equality and the Illinois Attorney General on her behalf) can help expand opportunities for all. Other high school athletic associations should follow the IHSA's lead in allowing integrated championships, if they are not doing so already, as the opportunities at the collegiate level continue to expand.

#### *D. Fitness and Athletic Equity for Students with Disabilities Act in Maryland*

Maryland's Fitness and Athletic Equity for Students with Disabilities Act (FAESDA),<sup>101</sup> was the first piece of legislation that lists the specific actions

---

96. *Ex rel. Madigan*, 2012 WL 1862320, at \*2.

97. *Id.* at \*6.

98. Equip for Equality & IHSA, *IHSA and Mary Kate Callahan Enter into Settlement Agreement for 2012 Season*, EQUIP FOR EQUALITY (Sept. 13, 2012), available at [https://www.equipforequality.org/wp-content/uploads/2014/01/callahan\\_joint\\_statement\\_09132012.pdf](https://www.equipforequality.org/wp-content/uploads/2014/01/callahan_joint_statement_09132012.pdf).

99. ILL. HIGH SCH. ASS'N, PROGRAMS FOR STUDENTS WITH DISABILITIES, <http://www.ihsa.org/documents/awd/WE%20WANT%20YOU!.pdf> (last visited July 30, 2018).

100. *A.H. v. Ill. High Sch. Ass'n*, 881 F.3d 587 (7th Cir. 2018) (affirming the District Court's decision to deny A.H. [a high school runner with cerebral palsy]'s request for the IHSA to establish realistic qualifying times for para-ambulatory athletes to compete in the state finals and establish a para-ambulatory division in its annual 5K 'Road Race' event due to the accommodation fundamentally altering the competition).

101. MD. CODE ANN., EDUC. § 7-4B (West 2018).

school systems must take to include students with disabilities in physical education and athletic programs.<sup>102</sup> Even more impressive, this statute was passed in 2008, before the GAO's 2010 study and five years before the 2013 Dear Colleague Letter encouraging schools to take similar measures that are required pursuant to this statute. Under FAESDA, schools:

[M]ust provide students with disabilities equal opportunities to participate in physical education and athletic programs, develop policies and procedures to promote and protect the inclusion of students with disabilities, provide reasonable accommodations to include students with disabilities in mainstream programs, *make adapted programs available to students with disabilities*, and provide annual reporting to the Maryland State Department of Education detailing their compliance with these requirements.<sup>103</sup>

Maryland is certainly considered a leader in providing athletic opportunities for student-athletes with disabilities.<sup>104</sup> New Jersey looked at this statute to pass similar legislation in their state,<sup>105</sup> and other states have been encouraged by scholars to also pass similar inclusive legislation.<sup>106</sup>

The legal standards and guidance discussed in Part II “The Legal Landscape” of this Comment apply to colleges and the NCAA, and with the above-described growth of athletes with disabilities at the high school level, one of the questions that naturally follows is: what if those athletes want to participate in the NCAA? Since the Rehabilitation Act and ADA still apply to colleges, and the OCR's guidance applies not only to K-12 athletics, but also to intercollegiate athletics, one would expect to see similar growth of student-athletes with disabilities at the college level; and, moreover, if such opportunities do not exist, it may be evidence of a problem of a lack of equal opportunities for those athletes, and a violation of these legal standards.

#### IV. EASTERN COLLEGE ATHLETIC CONFERENCE INCLUSIVE SPORT INITIATIVE

In January 2015, the Board of Directors of the Eastern College Athletic Conference (ECAC) made an impressive step in the right direction to expand

---

102. Lakowski, *supra* note 15, at 314–15.

103. *Id.* at 315 (emphasis added).

104. The NFHS Participation Surveys from 2012–2017 reveal that Maryland has offered the most amount of sports for student-athletes with disabilities and has repeatedly had the highest participation rate in those sports. *See* 2012–2017 NFHS Participation Surveys, *supra* note 4.

105. N.J. STAT ANN. § 18A:11-3.8 (West 2018).

106. *See* Fay, *supra* note 57; Lakowski, *supra* note 15; Boler, *supra* note 7.

collegiate athletic opportunities for student-athletes with disabilities.<sup>107</sup> ECAC decided to proactively respond to the 2013 Dear Colleague Letter and adopt an “Inclusive Sport Strategy” that would focus on expanding athletic opportunities for student-athletes with disabilities at the college level.<sup>108</sup> The first step of this strategy was to include “adapted sports demonstrations” at the 2016 ECAC Track & Field championships in addition to the Swimming & Diving championships.<sup>109</sup> The next step, which occurred in 2017, was to host and integrate para events as point-earning events in the existing track & field championships<sup>110</sup>—“that is, wheelchair races, for example, add[ed] points to the track team’s overall score at ECAC meets.”<sup>111</sup> Although accomplishing the vision of the integration of these student-athletes into these championship meets was a large piece of the puzzle, there is part of the ECAC’s vision and goals that still needs to be accomplished. For example, “the conference hopes that [in 2020], there will be as many as 1,000 disabled athletes competing in ECAC sports.”

Overall, this “new era” of college athletics for student-athletes with disabilities allows these student-athletes to participate in the existing able-bodied track & field meets and contribute points for their varsity teams, but also has the goal of adding “new ways for adaptive athletes to compete in wheelchair basketball, sled hockey, a sport for the blind called goal ball, and sitting volleyball.”<sup>112</sup> ECAC’s first move in expanding collegiate athletic opportunities for student-athletes with disabilities is impressive, but they will need some help if they want the movement to expand greater than it already has. One way for that to happen is for the NCAA to officially sponsor and sanction the development of adapted sports, and eventually, an NCAA Championship.

## V. NATIONALIZING ADAPTED SPORTS: THE PROS AND CONS

The NCAA should encourage more schools to become involved in the adapted sports movement to eventually sanction an NCAA-sponsored adapted sports championship. The ECAC started a great initiative, and there are reasons to support the NCAA sanctioning adapted sports championships, but there are also some concerns that should be considered before this change occurs.

---

107. *ECAC Announces Forward Movement for Inclusive Sport Initiative*, *supra* note 9.

108. *Id.*

109. *Id.*

110. *See ECAC to Host Collegiate Para Track & Field Championships at Princeton*, *supra* note 10 (listing the five athletes set to compete in the four para events from Westfield State University, Harvard University, University of Texas-Arlington, Lutheran University and Bridgewater Stater University).

111. Royse, *supra* note 11.

112. *Id.*

Section A will describe some of the many benefits of the NCAA becoming involved in the movement and eventually sanctioning an adapted championship, while Section B will discuss some of the considerations the NCAA should make before doing so. Finally, subsection C details the next steps for both the Department of Education and the NCAA to support the growth of student-athletes with disabilities and provide an avenue to continue their athletic careers.

### *A. Pros*

There are many benefits to the NCAA stepping in to help nationalize the movement to include adapted sports within collegiate athletic programs. The ultimate goal should be to get enough schools involved to be able to sanction an NCAA adapted sports championship, in addition to having adapted events integrated into major DI Track & Field and Swimming & Diving Meets across the nation. Two of the biggest benefits would be 1) to provide additional and novel opportunities across the nation for student-athletes with disabilities, and 2) to address potential ‘number of participants’ issues at the collegiate institutions and additionally trickle down into boosting the high school and grade school participation numbers.

#### 1. More (and new) Opportunities

The opportunities for student-athletes with disabilities at the high school level have been growing, but if the NCAA sanctions the sport it will aid in picking up the pace of growth through a domino effect. Beach volleyball, a sport that has grown rapidly in popularity after becoming an NCAA championship sport, is a good example of recent growth after creating a new championship. In 2015, fifty institutions sponsored Beach Volleyball,<sup>113</sup> which allowed for it to go from an ‘emerging sport’ to a National Collegiate sport and have an NCAA Championship; this number has grown to eighty-one teams in two years,<sup>114</sup> and it is expected to continue growing. Similarly, if the NCAA were to sanction Adapted Sports Championships, more schools would join the initiative and the numbers of institutions offering the sport would grow—this is a large benefit as it would diversify the options that student-athletes with disabilities can choose from and consider aspects they normally take into

---

113. Greg Johnson, *NCAA's Newest Championship Will Be Called Beach Volleyball*, NAT'L COLLEGIATE ATHLETIC ASS'N (Sept. 17, 2015), <http://www.ncaa.com/news/beach-volleyball/article/2015-06-30/ncaas-newest-championship-will-be-called-beach-volleyball>.

114. See *NCAA Varsity Beach Volleyball Programs*, AM. VOLLEYBALL COACHES ASS'N (June 27, 2017), <https://www.avca.org/res/uploads/media/Varsity-Beach-VB-Programs-7-06-17.pdf>.

consideration when they choose a college (e.g., cost, geography, legacy status, etc.). Additionally, the NCAA could look into sanctioning unique, new, and growing opportunities, like eSports,<sup>115</sup> that might appeal specifically to individuals with disabilities. The addition of these programs will allow institutions to truly comply with the ADA and Rehab Act by providing *equal* opportunity for student-athletes with disabilities to make a choice of college by providing the opportunity to continue (or start) playing their sport.

## 2. Increased Participation Numbers

Currently, and related to the increased opportunities and participating institutions described above, one of the problems with adapted sports is the number of interested and qualified participants—it can be difficult to get teams/conferences to participate, but if the NCAA steps in to nationalize the initiative, perhaps it would help with recruiting numbers to get enough student-athletes to make it competitive. This could be a gradual system. They could first have Conference v. Conference competition (e.g. a Big Ten team v. Big 12 v. Pac 12) and when enough students have been recruited, they can begin to have school events specifically adapted for students with disabilities that are

---

115. See Hannah Dwan, *What are eSports? | A Beginner's Guide*, TELEGRAPH, Oct. 18, 2017, <http://www.telegraph.co.uk/gaming/guides/esports-beginners-guide/>. eSports is defined below:

Generally, the easiest definition [of eSports] is competitive gaming at a professional level. It only includes video games, but pretty much any game with a winner and a loser can be played as an eSport, although the bigger the player base and the more support it has, the better the competition. How that exactly works differs from game to game. The majority of popular eSports are team-based games played in leagues or tournaments throughout the year, culminating in one final event . . . [s]ome games are a head-to-head, one-on-one format, though. Fighting games such as Street Fighter V, for example, or Hearthstone, a card game where each player has a custom deck of cards that are played to defeat the opponent, [are played] without any team alongside them.

*Id.* However, eSports are not only provided at a professional level, as there is a fast-growing number of colleges sponsoring eSports, and a National Association of Collegiate eSports (NACE). National Association of Collegiate eSports, *About – Collegiate Esports Governing Body*, NAT'L ASS'N OF COLLEGIATE ESPORTS, <https://nacesports.org/about/> (last visited July 30, 2018).

Schools are now giving out scholarships for collegiate eSports and “eSports is becoming one of the fastest-growing collegiate team activities in the nation.” *Indiana Tech to Offer eSports Scholarships in 2017*, IND. TECH. NEWS (Aug. 16, 2016), <https://www.indianatech.edu/news/indiana-tech-offer-esports-scholarships-2017/>. This may be an opportunity for individuals with disabilities who are more inclined to play eSports to also be provided with equal opportunities, as other students, without having to adapt the games in the same way that is necessary in adapted sports opportunities. Moreover, some eSports tournament organizers “believe eSports can aid in rehabilitation and improve the quality of life of disabled gamers, providing a social and physical outlet many may lack through traditional venues.” Samuel Lingle, *Korea to Host Tournament for Gamers with Disabilities*, DOT ESPORTS (July 24, 2014), <https://dotesports.com/league-of-legends/news/iesia-world-championships-disabled-gamers-461>.

counted toward the varsity team's score in the conference or national championship.

For a sport to gain championship status, a female sport must be sponsored by at least 40 institutions and a male sport must be sponsored by at least 50 institutions.<sup>116</sup> Only eleven institutions offered collegiate wheelchair basketball in 2009,<sup>117</sup> only nine men's teams and four women's teams participated in the 2017 National Intercollegiate Wheelchair Basketball Tournament,<sup>118</sup> and only five athletes from five different institutions were listed to compete in the 2017 Intercollegiate Para Track & Field Championship.<sup>119</sup> Therefore, the effort will need to see some real growth in interested institutions and participants to fulfill the goal of an NCAA-sanctioned championship.<sup>120</sup> The more support and encouragement of participation that the NCAA provides, the more likely that the student-athlete and institution participation will increase. Consequently, this would have a "domino" or "trickle down" effect to the lower levels of athletics to continue the growth of athletic opportunities of student-athletes with disabilities.

### *B. Considerations*

#### 1. Administration and Financial Costs

The first question the NCAA may have to answer is how do the individuals with disabilities qualify for the championships? Will there be separate events where only the two or three athletes in wheelchairs compete, and they are racing against the clock? This could add time to already long track and swimming meets, and the NCAA would likely argue that there would be an undue hardship to implement these measures in already-long events. These considerations should be contemplated when proposing a plan for integration of adapted events into meets.

---

116. NCAA, *supra* note 12, at 18.2.4.

117. At the collegiate level, eleven universities offer intercollegiate wheelchair basketball programs: Edinboro University of Pennsylvania, Kennesaw State University, Ohio State University, Southwest Minnesota State University, University of Alabama at Tuscaloosa, University of Arizona, University of Illinois at Urbana-Champaign, University of Missouri, University of Texas at Arlington, University of West Georgia, and University of Wisconsin at Whitewater. Lakowski, *supra* note 15, at 288.

118. *NIWBT 2017*, U. OF WIS.-WHITEWATER, <http://www.uww.edu/recsports/niwbt2017> (last visited July 30, 2018).

119. See *ECAC to Host Collegiate Para Track & Field Championships at Princeton*, *supra* note 10 (listing the five athletes set to compete in the four para events from Westfield State University, Harvard University, University of Texas-Arlington, Lutheran University and Bridgewater Stater University).

120. See Royse, *supra* note 11 ("Even with the ECAC's official effort, it will take time to find college-ready disabled athletes to fill teams.").

Finally, how will the schools pay for the new sports? The majority of college athletic programs spend more money than they make,<sup>121</sup> so adding a new program or additional athletes may be hard to financially achieve. Will the students with disabilities receive athletic scholarships—how many and for how much? There are lot of details that need to be solved before the NCAA jumps into this endeavor that will have administrative and financial consequences.

## 2. Not Applicable in all Sports or to all Athletes? Is the NCAA Best Suited for the Job?

While integrating adaptive events into the championship scoring is possible in sports like track and field and swimming, it is much more difficult to implement this system for team sports like basketball, softball, or baseball. There are some schools, like the University of Illinois, that offer wheelchair basketball as a sport; however, it is treated more like a club or intramural sport.<sup>122</sup> What else can be done to allow student-athletes with disabilities that want to play sports like basketball, softball, or even sled hockey at the collegiate level? It is another consideration that the NCAA may want to take into mind while supporting the integration of student-athletes in the individualized championship sports like track and swimming.

Moreover, individuals with intellectual disabilities also must be considered. There are reports that those with intellectual disabilities are still underrepresented in high school and are not provided with the same opportunities to play sports.<sup>123</sup> There are several cases that deal with the eligibility standards for the NCAA<sup>124</sup> and waivers are allowed,<sup>125</sup> but there may be a disparity in accommodations for those with physical disabilities as opposed to intellectual, and it is something that the NCAA would also have to consider.

---

121. See Brian Burnsed, *Athletics Departments That Make More Than They Spend Still a Minority*, NAT'L COLLEGIATE ATHLETIC ASS'N (Sept. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>. In fact, most Division I institutions had average net losses of more than ten million dollars in 2015. See National Collegiate Athletic Association, *Thirteen-Year Trends in Division I Athletics Finances*, NCAA RESEARCH (Jan. 25, 2018), [https://www.ncaa.org/sites/default/files/2017DIRES\\_Division\\_I\\_Financial\\_PPT\\_%20web\\_version\\_20180125.pdf](https://www.ncaa.org/sites/default/files/2017DIRES_Division_I_Financial_PPT_%20web_version_20180125.pdf).

122. See *Athletics*, DIVISION OF DISABILITY RESOURCES & EDUC. SERV. C. OF APPLIED HEALTH SCI. U. OF ILL. AT URBANA-CHAMPAGNE, <http://disability.illinois.edu/athletics> (last visited July 30, 2018).

123. Boler, *supra* note 7; Yuri Nicholas Walker, Comment, *Playing the Game of Academic Integrity vs. Athletic Success: The Americans with Disabilities Act (ADA) and Intercollegiate Student-Athletes with Learning Disabilities*, 15 MARQ. SPORTS L. REV. 601 (2005).

124. See, e.g., *Bowers*, 9 F. Supp. 2d 460.

125. See, e.g., *Matthews*, 179 F. Supp. 2d 1209.

Finally, the question should be posed: is the NCAA the best organization to promote these championships? Of course, when it comes to college sports, an NCAA championship is something to strive for—but would these athletes be better served through organizations partnered with the Paralympics or the Disability Sports Organizations who specialize in these sports and can help the most elite athletes reach Paralympic status? If the NCAA gets involved by sponsoring a championship, this would not allow the Paralympian-minded athletes to receive endorsements, which has been an issue in the past with other athletes who were both collegiate and Olympic athletes.<sup>126</sup> It is important to critically evaluate the role the NCAA should play, and if they do step in, it should be in the best interest of these student-athletes.

### *C. Next Steps*

Looking forward, the NFHS, state high school athletic associations and high schools should continue promoting athletic opportunities to high school students with disabilities, and this focus should also extend to the NCAA expanding upon athletic opportunities for student-athletes with disabilities at the collegiate level. While it is great to see the growth in numbers in student-athletes with disabilities in high school, it should not go without notice that the thirteen states that currently offer adapted sports are only about one quarter of the states that could be involved in the movement; further, while the 10,000+ athletes now participating in adapted sports may be higher than it ever has been before, it is nowhere near the massive numbers of high school athletes participating in a sport like football or basketball.<sup>127</sup> There is certainly work that can still be done at the high school level to properly provide equal opportunity for student-athletes with disabilities, and this Comment does not suggest that our work there should be done. Instead, this Comment argues that in addition to continuing to expand the opportunities for high school athletes, we should expand our focus to intercollegiate opportunities as well in order to promote the continual growth of student-athletes with disabilities.

The NCAA has not been silent on the adapted sports movement and the inclusion of student-athletes with disabilities. They have supported ECAC's initiative (they even promote it on their inclusion website),<sup>128</sup> and have included multiple presentations about efforts to increase the participation and

---

126. See *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004).

127. For example, in 2016-17, 1,059,399 student-athletes participated in football nationwide, and 980,673 student-athletes participated in basketball nationwide. See 2016-17 NFHS Participation Survey, *supra* note 4.

128. *Student-Athletes with Disabilities*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/inclusion/student-athletes-disabilities> (last visited July 30, 2018).

opportunities for student-athletes with disabilities at the Inclusion Forum for the past two years.<sup>129</sup> However, in most cases, actions often speak louder than words in a presentation, and the NCAA should proactively help institutions follow ECAC's lead and offer expanded opportunities for student-athletes with disabilities; but, the NCAA is not the only entity that needs to take action.

The Department of Education needs to develop additional regulations to expand the opportunities for students with disabilities beyond mainstream sports. These standards should be written in a way that are applied to organizations like the USOC and NCAA to truly promote equal opportunities for student-athletes with disabilities. It is a continuous problem that nothing in the Section 504 regulations or current case law discusses the *need* or *requirement* for schools to develop programs for student-athletes with disabilities. Although some states like Maryland<sup>130</sup> and New Jersey<sup>131</sup> have statutes that include this requirement, overall, "when left to their own devices, schools have not and will not assume the responsibility of creating athletic programs for students with disabilities."<sup>132</sup> Therefore, the Department of Education should promulgate federal regulations clarifying that equal opportunity for students with disabilities means that the overall benefits and treatment afforded to them, and student-athletes without disabilities, are comparable. This includes creating opportunities if they are not currently available,<sup>133</sup> and the NCAA taking active steps to comply with these new regulations. Specifically, the NCAA should take active measures to help schools promote adapted sports and when enough schools play an adapted sport, like wheelchair basketball, they should sanction a championship—why not continue

---

129. Ackerman, *supra* note 90; Kim Doran & Caitlyn McCandless, Ohio St. U., Presentation at the 2017 NCAA Inclusion Forum: Scoring Goals On and Off the Field – A Collaboration Between Disability Services and Student-Athlete Support Services (April 23, 2017); Amanda Kraus, U. of Ariz., & Marcia Ridpath, MAR Educ. Consulting, Presentation at the 2017 NCAA Inclusion Forum: Reframing Disability: Maximizing Inclusion for Student-Athletes with Disabilities (April 22, 2017); John Register, USOC, Assoc. Dir. of Community & Mil. Programs, Presentation at the 2016 NCAA Inclusion Forum: Creating New High Performance Opportunities for Inclusive Sport for Athletes with Paralympic-Eligible Disabilities (April 2016), *available at* [https://www.ncaa.org/sites/default/files/2016\\_Inclusion\\_Forum\\_Creating\\_New\\_Inclusive\\_20160426.pdf](https://www.ncaa.org/sites/default/files/2016_Inclusion_Forum_Creating_New_Inclusive_20160426.pdf).

130. MD. CODE ANN., EDUC. § 7-4B.

131. N.J. STAT ANN. § 18A:11-3.8.

132. Title IX provides a useful model for creating a structure to expand opportunities for students with disabilities (and the language of the Rehab Act and Title IX are very similar). Title IX has been so successful because it contains detailed regulations that clearly define schools' obligations to provide women and girls with athletic opportunities (with specific requirements that schools create teams for girls and women). *See Lakowski, supra* note 15, at 313. The Department of Education should promulgate the same regulations as the Title IX regulations, just for people with disabilities (that would *supplement* but not replace the existing regulations that require students with disabilities to always can try out for the mainstream team). *Id.*

133. *Id.*

the Madness of March with an additional championship basketball game with wheelchair basketball student-athletes? When the growing number of student-athletes with disabilities at the high school level can choose between many colleges that offer their sport and can compete all the way up to an NCAA championship, the movement for adapted sports will have made great strides in providing equal opportunities to these student-athletes.

## VI. CONCLUSION

This Comment examined the growing numbers of student-athletes with disabilities at the high school level in response to the 2013 Dear Colleague Letter and evaluated if there is, and if not if there should be, similar growth at the college level. Since the same legal standards (e.g., the ADA and Rehab Act) and guidance (e.g., 2013 Dear Colleague Letter) apply to the NCAA and its institutions, similar growth in athletic opportunities that have occurred at the high school level should also be occurring for collegiate student-athletes with disabilities. While there are limited opportunities for student-athletes with disabilities to play sports like wheelchair basketball in college or participate in the ECAC track & field championships, the same level of growth of athletic opportunities for athletes with disabilities has not been apparent at the college level. This Comment argues that the initiatives started by ECAC should be nationalized by the NCAA to broaden the opportunities to those with disabilities, keeping in mind some of the considerations this step will bring. While the creation of NCAA-sponsored adapted sports championships will certainly not be costless, this action could be a crucial step to achieve the ideal goal: students-athletes with disabilities participating in athletic competitions and contributing to the same championship as their non-disabled peers at the college level.<sup>134</sup>

---

134. See Royse, *supra* note 11 (“When big time D1 NCAA track and field meets allow teams to count scores earned by disabled athletes, adaptive athletes will truly be integrated.”).