1-1-1999

Spoiling a Good Walk: Does the ADA Change the Rules of Sport?

Paul M. Anderson

Marquette University Law School, paul.anderson@marquette.edu

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

Part of the Law Commons

Publication Information

Repository Citation
http://scholarship.law.marquette.edu/facpub/548

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.
SPOILING A GOOD WALK: DOES THE ADA CHANGE THE RULES OF SPORT?

Paul M. Anderson, Esq.*

TABLE OF CONTENTS

INTRODUCTION............................................................................................................. 46
I. THE ADA: AN OVERVIEW ..................................................................................... 46
   A. Title I.................................................................................................................... 48
   B. Title II.................................................................................................................. 49
   C. Title III ................................................................................................................. 50
II. THE ADA AS APPLIED TO SPORTS ............................................................... 51
   A. Interscholastic Sports ...................................................................................... 51
      1. Pottgen v. Missouri State High School Activities Association ..................... 53
      2. Sandison v. Michigan High School Athletic Association, Inc. .................... 54

* B.A. Economics & Philosophy (cum laude), 1991, Marquette University; J.D. Marquette University Law School, 1995. Attorney Anderson is the Assistant Director of the National Sports Law Institute of Marquette University Law School, an Adjunct Assistant Professor of Law at Marquette University Law School, Chairman of the Institute’s Alumni Board, and Member of the Advisory Panel to the Marquette Sports Law Journal. Mr. Anderson is a member of the Heartland Institute, the American Bar Association’s Forum on the Sports and Entertainment Industries, the Sports Lawyers Association, and a Board Member of the Sports and Entertainment Law Section of the State Bar of Wisconsin. A former Editor-in-Chief of the Marquette Sports Law Journal, Mr. Anderson serves on the Editorial Board for the International Sports Journal and as a Reviewer for the Journal of the Legal Aspects of Sport. Mr. Anderson is also a Board member of the Wisconsin Tennis Association and a member of the United States Golf Association.

Special thanks to Marquette University Law School second year student Scott Jensen for his assistance collecting research for this article, to Attorney Ante Z. Udovicic and Marquette Sports Law Journal Editor-in-Chief April R. Anderson for their editorial assistance in the preparation of this article, and very special thanks to Kerri Kuligowski for her patience, assistance, and support during the preparation of this article.
3. Dennin v. Connecticut Interscholastic Athletic Conference, Inc. .................................................. 55
4. Johnson v. Florida High School Activities Association, Inc. .......................................................... 55
6. Conclusion .................................................................................................................................. 57
B. The NCAA ................................................................................................................................. 58
1. Ganden v. National Collegiate Athletic Association ................................................................. 60
4. The United States vs. The NCAA ............................................................................................... 65
5. Conclusion .................................................................................................................................. 68
C. Other Non-Professional Sports ................................................................................................. 69
1. USA Hockey .............................................................................................................................. 69
2. Little League & Pony League Baseball ....................................................................................... 70
3. Bicycle Racing ........................................................................................................................... 72
4. Conclusion .................................................................................................................................. 72
D. Professional Leagues .................................................................................................................. 73
1. Stoutenborough v. National Football League .......................................................................... 73
2. Cortez v. National Basketball Association .................................................................................. 74
3. Conclusion .................................................................................................................................. 74
E. Sports Facility Cases .................................................................................................................... 74
III. CASEY MARTIN AND THE RULES OF GOLF ......................................................................... 75
A. The PGA and Disabled Golfers ................................................................................................. 75
B. Casey Martin .............................................................................................................................. 77
1. The Motion ................................................................................................................................. 79
2. The Case ................................................................................................................................... 80
3. The Aftermath ........................................................................................................................... 82
4. The Appeal .................................................................................................................................. 83
C. Ford Olinger .................................................................................................................................. 84
IV. COMMON GROUND: THE ADA’S IMPACT ON THE SPORTS WORLD ....................................... 86
A. Levels of Sport ............................................................................................................................ 87
B. Eligibility Rules vs. Rules of Play .............................................................................................. 87
C. Participation vs. Attendance ........................................................................................................ 89
D. Reasonableness ............................................................................................................................ 89
E. Custom & Practice ....................................................................................................................... 90
V. CONCLUSION .............................................................................................................................. 90
INTRODUCTION

As a reflection of society itself, the sports world has become a battlefield where those who seek access to sports participation use laws of general application to make their inroad into sports. Title IX and the Civil Rights laws are particular examples of this phenomenon. However, possibly no area has provided more debate and litigation than the participation of disabled athletes in sports.

National attention has been focused on this area in 1998 through the example of Casey Martin. A friendly and talented young man, Martin needed an accommodation in order to participate in PGA Tour events and sued for the right to use a golf cart. His lawsuit demonstrated the power that the Americans With Disabilities Act ("ADA") possesses in changing the way that sports are played.

In reaction to this lawsuit, many in the sports world have assumed that all sports have now become open to similar attacks and that, therefore, the games we have all come to know and love will be forever changed. This article will assess this fear. It will attempt to reflect on the ADA’s impact at all levels of sport, and then use the Casey Martin case as an example of what can be expected from litigation in the future.

Part I will provide a brief description and history of the ADA. Part II will catalog the ADA’s impact at all levels of sport from interscholastic athletics, to the National Collegiate Athletic Association, to professional and other sports, and to its impact in the very facilities in which sports are played. Part III will discuss the Casey Martin case and subsequent litigation in response to that case. Part IV will then conclude with an analysis of the impact that the ADA really has on the sports arena in order to then answer the question “Does the ADA change the rules of sport?”

I. THE ADA: AN OVERVIEW

The Americans With Disabilities Act of 1990 was passed with the purpose of “providing a ‘clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’” While an in-depth
analysis of the ADA and its history are not necessary, it is important to note that the ADA is to be read in conjunction with the Rehabilitation Act of 1973 ("Rehabilitation Act") which prohibits discrimination against the disabled by government agencies who receive federal funds.

The first inquiry under the ADA is whether a person is "disabled" as defined in the statute. Under the ADA a person is disabled if he or she:

(A) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) has a record of such impairment; or
(C) is regarded as having such an impairment.

To understand this definition of disabled, two other particular definitions are also necessary. First, a "physical or mental impairment" is:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Second, a "major life activity" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." In determining whether an individual is substantially limited in a major life activity, the following factors should be taken into account:


8. Id. § 36.104(2).
account:
1. The nature and severity of the impairment;
2. The duration or expected duration of the impairment; and
3. The permanent or long term impact, or the expected permanent or long term impact, of or resulting from the impairment.\(^9\)

After a determination that a person is disabled under these definitions, the analysis then shifts to the particular Title of the ADA which will be found to apply.

\(A. \text{ Title I}^{10}\)

Title I of the ADA applies to employment situations. Basically, Title I applies to private employers, state and local governments, employment agencies, and labor unions with fifteen or more employees.\(^11\) Title I mandates that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”\(^12\) In order to hold an employer liable under Title I, an individual must first show that he is disabled, i.e. the individual “has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.”\(^13\)

Once the person is shown to be disabled, he must then demonstrate that he is a “qualified individual with a disability” and that he is “a person who meets legitimate skill, experience, education, or other requirements of an employment position that [he] holds or seeks, and who can perform the ‘essential functions’ of the position with or without reasonable accommodation.”\(^14\) Accommodations for “qualified individuals” are made after taking into consideration the “undue hardship” that an employer may suffer as measured by the administrative cost, financial burden, and nature of the accommodation, among other factors.\(^15\)

Such accommodations are only undertaken if they are “reasonable

---

13. Questions and Answers, supra note 11, at 1.
14. Id. at 2.
A "reasonable accommodation" is "any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions."

Because Title I applies only to employment situations, it has not yet been adjudicated in the context of interscholastic or intercollegiate athletic situations. It is clear that Title I could apply in the professional sports context, although at present, no case has been brought making this allegation.

B. Title II

Title II of the ADA provides that "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 entity, or be subjected to discrimination by any such entity." A "public entity" for purposes of Title II includes a State or local government or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." Title II covers actions of such a "public entity" which discriminates against "qualified individual[s] with a disability . . . who, with or without reasonable modifications to rules policies, or practices . . . meet[] the essential eligibility requirements for receipt of services or the participation in

17. Questions and Answers, supra note 11, at 5.
18. This could change in the future if scholarship student-athletes come to be considered employees of the universities they attend as discussed by several scholars. For example, see Charlotte M. Rasche, Note, Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes, 16 Rev. Litig. 219 (1997); Sean Alan Roberts, Symposium: The Lawyer's Duties and Liabilities to Third Parties: Comment, College Athletes, Universities, and Workers' Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees, 37 S. Tex. L. Rev. 1315 (1996); David W. Woodburn, Comment, College Athletes Should Be Entitled to Workers' Compensation For Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01, 28 Akron L. Rev. 611 (1995).
21. Id. § 12131(1)(A-B).
programs or activities provided by a public entity."22

As one commentator has noted, "[c]ourts have construed programs, like state athletic associations, as instrumentalities of the state, thus, a public entity under the ADA, because public schools delegate extensive authority to these athletic associations."23 Student-athletes are able to make claims under Title II by showing that (1) the association or school is a public entity, (2) the student is a "qualified individual with a disability," (3) the student has been excluded from participation in or denied the benefits of the activities of the public entity, and (4) "reasonable accommodations could be made which do not fundamentally alter the nature of [the association's] accommodations."24

The specific ways in which a court will analyze a claim by a student-athlete under Title II will become clearer in the cases described below.

C. Title III25

Soon after the passage of the ADA, commentators noted that Title III "created more conflicts in implementation than any other aspect of the ADA."26 Title III is the section of the ADA that is most often applicable in sports related cases. It provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."27

Title III specifically mentions twelve private entities that are considered public accommodations for purposes of the title.28 "A gymnasium . . . golf course, or other place of exercise or recreation,"29 as used by a sporting organization, are specifically included as places of public accommodation.

Title III prohibits various types of discrimination against disabled individuals based on their disability, including: denial of participation;30

22. Id. § 12131(2).
23. Burroughs, supra note 5, at 64 (referring to many of the cases which will be discussed herein).
24. Kasperski, supra note 2, at 182-184.
28. See id. § 12181(7)(A-L).
29. Id. § 12181(7)(L).
30. Id. § 12182(b)(1)(A)(i).
participation that is not equal to that afforded individuals without disabilities;\textsuperscript{31} participation in separate benefits;\textsuperscript{32} screening of individuals with disabilities from enjoyment of the goods and services of the place of public accommodation;\textsuperscript{33} a failure to make reasonable modifications unless such modifications would "fundamentally alter the nature" of the goods and services of the place of public accommodation;\textsuperscript{34} exclusion due to an absence of auxiliary aids and services for the disabled;\textsuperscript{35} and failure to remove structural and other facility barriers to disabled individuals.\textsuperscript{36}

II. THE ADA AS APPLIED TO SPORTS

It may come as a surprise to many sports fans that since its inception in 1990, the ADA has been applied to the sports world in many different areas. For purposes of organization, this analysis of the ADA's impact on the sports world will be separated into five distinct areas: (1) interscholastic sports; (2) intercollegiate sports (the National Collegiate Athletic Association ("NCAA")); (3) other non-professional sports; (4) professional sports; and (5) sports facility cases.

As the ADA has been found to apply in different ways at these different levels of sports participation, a true understanding of the ADA's impact on sports is best gained by analyzing the cases themselves.

A. Interscholastic Sports

Some of the first cases that applied the ADA to sports dealt with the right of a disabled individual to participate in sports at the high school or interscholastic level. This area has been thoroughly covered in the scholarly literature and any detailed analysis would thus be repetitious here.\textsuperscript{37} Still, the important cases

\textsuperscript{31} \textsuperscript{Id. \S 12182(b)(1)(A)(ii).}
\textsuperscript{32} \textsuperscript{42 U.S.C. \S 12182(b)(1)(A)(iii).}
\textsuperscript{33} \textsuperscript{Id. \S 12182(b)(2)(A)(i).}
\textsuperscript{34} \textsuperscript{Id. \S 12182(b)(2)(A)(ii).}
\textsuperscript{35} \textsuperscript{Id. \S 12182(b)(2)(A)(iii).}
\textsuperscript{36} \textsuperscript{Id. \S 12182(b)(2)(A)(iv).}
\textsuperscript{37} \textsuperscript{For example, see Adam A. Milani, Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports, 49 Ala. L. Rev. 817 (1998); Kasperski, supra note 2; Edmund J. Sikorski, Disability Litigation Leads to Appellate Rights For Athletic Associations in the Sixth Circuit Court of Appeals, 8(5) For The Record 6 (Oct./Nov. 1997); John T. Wolohan, The Americans With Disabilities Act and Its Effect on High School Athletic Associations' Age Restrictions, 106 Educ. Law Rep. 971 (1996); Jason L. Thomas, Casenote, Through the ADA and the Rehabilitation Act, High School Athletes Are Saying "Put Me In Coach;" Sandison v. Michigan High School Athletic Ass'n, 64 F.3d
must be discussed in order to have a basic understanding of the ADA’s application to interscholastic sports.\(^3\)

In general, cases at the interscholastic level have dealt with eligibility questions brought by a disabled athlete who was barred from participation by an age eligibility rule of some sort.\(^3\) The rationale behind these rules is that older athletes, by the nature of being more physically mature, could pose a safety hazard to other athletes who may be smaller and less physically mature. Since courts have consistently held that participation in interscholastic athletics is not a property right,\(^4\) claimants have argued that under the ADA they have a right to participate if barring them from such participation is discriminatory.

Disabled athletes are denied from participation in athletics by these rules because their disability has forced them to take longer in school to meet academic or other requirements. In essence, then, “[s]tudents who are excluded from interscholastic sports because of their age, and who are overage because of disabilities, may argue that they effectively have been discriminated against because of their disabilities, and they may seek injunctive relief to force sports associations or school officials to allow them to play.”\(^4\) Therefore, these student-athletes sue the rule-making body alleging that the rules used against them are in violation of the ADA.\(^4\)

It must also be noted that most of these interscholastic cases have not dealt with final decisions on the merits of the case brought. Instead, as one commentator has noted, “court decisions have generally addressed the question 1026 (6th Cir. 1995), 65 U. Cin. L. Rev. 727 (1997); John E. Theuman, Annotation, Validity, Under Rehabilitation Act or Americans With Disabilities Act, of Rules or Laws Limiting Participation in Interscholastic Sports to Those Below Specified Age, 143 A.L.R. Fed. 567 (1998).

The cases discussed in this section will be those decided at the appellate level as higher court decisions regarding these matters. For a thorough listing of cases decided at any judicial level, see Theuman, supra note 37. Examples of cases at lower levels are Rhodes v. Ohio High Sch. Athletic Ass’n, 939 F. Supp. 584 (N.D. Ohio 1996); Reaves v. Mills, 904 F. Supp. 120 (W.D.N.Y. 1995); Hoot v. Milan Area Schs., 853 F. Supp. 243 (E.D. Mich. 1994).

These rules come in many forms but typically can be categorized as eight-semester rules which limit participation in athletics for high school students to the eight semesters of their attendance of school or as age-limit rules which limit participation in high school sports to students who are eighteen or younger.


It must be noted at this point that many of these cases also involve claims under the Rehabilitation Act. However, since the ADA was modeled after and follows the Rehabilitation Act as already discussed, for purposes of this article the case discussions will focus only on claims brought under the ADA.
[of] whether the plaintiffs had shown a substantial likelihood of success on the merits and had met the other requirements for preliminary injunctive relief."

1. Pottgen v. Missouri State High School Activities Association

The first federal circuit court to make a decision concerning such eligibility rules was the Eighth Circuit Court of Appeals. Leo Pottgen was a baseball player at Hancock High School in Missouri. As a result of a learning disability, Pottgen was forced to repeat two grades in elementary school so that by the time he reached his senior year in high school he was nineteen years old. Due to his age, Pottgen was restricted from playing during his senior year by a Missouri State High School Activities Association ("MSHSAA") By-Law which restricted the participation in interscholastic athletics of students who had reached the age of nineteen "prior to July 1 preceding the opening of school." Pottgen appealed to the MSHSAA to waive the rule and allow him to participate, but his appeal was denied. Pottgen then sued the MSHSAA claiming that the rule's application to him was a violation of the Rehabilitation Act and the ADA. The district court granted Pottgen a preliminary injunction which enjoined the MSHSAA from preventing him from participating in baseball and from imposing any penalties on any schools for or against which he played.

On appeal, Pottgen did not have similar success. The Eighth Circuit found that Pottgen was not an "otherwise qualified individual" under either the ADA or the Rehabilitation Act. In analyzing Pottgen's claim under the ADA, the Eighth Circuit focused on Title II's definition of a "qualified individual with a disability." In deciding that Pottgen was not "otherwise qualified," the court first determined that the age limit rule was "an essential eligibility requirement of the interscholastic baseball program," basically due to health and safety concerns as already discussed.

The court then looked to the "reasonableness" of any modification to the eligibility rule, focusing on whether the modification would impose an "undue financial and administrative burden" or whether it would require a "fundamental alteration" in the nature of the program. In this case, because the court had

43. Theuman, supra note 37, at 575.
44. 40 F.3d 926 (8th Cir. 1994).
45. Id. at 928.
46. See Wolohan, supra note 37, at 975.
48. Pottgen, 40 F.3d at 929-30.
49. Id. at 930.
50. Id. at 931.
51. Id.
found that the rule was “essential,” modification of the rule was not a reasonable modification as required under the ADA. Thus, Pottgen’s claim could not succeed.


Ronald G. Sandison and Craig M. Stanley were senior student-athletes at Adams High School and Gross Pointe North High School, respectively, in Michigan. These two student-athletes were also learning disabled, causing each to be two years behind his class in high school so that each boy was nineteen years old during his senior year. Due to a Michigan High School Athletic Association ("MHSAA") regulation, both Sandison and Stanley were thus restricted from participating in athletics during their senior years.

The plaintiffs sued the MHSAA and the two school districts under the ADA (Title II and Title III) and the Rehabilitation Act (among other claims) claiming that the rule barring them from participation discriminated against them due to their disabilities. The district court granted the plaintiffs’ temporary restraining orders barring the defendants from interfering with their participation in athletics.

On appeal, the Sixth Circuit initially held that the MHSAA was not a “place of public accommodation” covered by Title III of the ADA. The Court reached this conclusion because the plaintiffs had alleged that they were being denied access to public school grounds and public parks which were not operated by private entities.

As to the plaintiffs’ claim under Title II, the Sixth Circuit, like the Eighth Circuit, focused on the “qualified individual with a disability” language. As the court discussed, a plaintiff suing under Title II must “prove that the exclusion from participation in the program was ‘solely by reason of [disability].’” In this case, “[a]bsent their respective learning disability [sic], the plaintiffs still would not meet the age restriction.” Therefore, “[r]equiring waiver of the age restriction . . . would fundamentally change the currently bright-line age

52. Id.
53. 64 F.3d 1026 (6th Cir. 1995).
55. Sandison, 64 F.3d at 1028.
56. Id. at 1029.
58. Sandison, 64 F.3d at 1036.
59. Id.
60. Id.
61. Id.
restriction," and would be an unreasonable modification that the court could not require.

In the end as the court stated, "[t]he plaintiffs' respective learning disability does not prevent the two students from meeting the age requirement; the passage of time does."63

3. Dennin v. Connecticut Interscholastic Athletic Conference, Inc.64

David Dennin was a mentally retarded student-athlete at Trumbull High School in Connecticut. Similar to the previous cases, David entered his senior year of high school at the age of nineteen because he was forced to enroll in four, rather than three, years of Middle School.65 Therefore, David was barred from full participation in the Trumbull swim team by the Connecticut Interscholastic Athletic Conference's ("CIAC") maximum age eligibility rule.66 David's parents sued the CIAC for a waiver of the rule.

In district court the Dennins won an injunction which prevented CIAC from denying David a waiver of the maximum-age eligibility rule because David was an otherwise qualified individual who was discriminated against solely by reason of his disability and who, with reasonable accommodation (a waiver) by the CIAC, could meet the essential requirements of the athletic program despite his disability.67 In essence Dennin was unable to meet the eligibility criteria directly because it discriminated against him due to his disability.68

Unfortunately, for purposes of further comparison to the other cases, the Second Circuit held that the CIAC's appeal was moot because David had participated under the injunction and subsequently graduated.69 As a result the appellate court did not reach the merits of Dennin's ADA claim.

4. Johnson v. Florida High School Activities Association, Inc.70

In a case surprisingly similar to the Dennin case, Dennis Johnson was barred from competition in his senior year due to an age requirement. Johnson entered his senior year at the age of nineteen and was barred by a Florida High School Activities Association ("FHSAA") By-Law that restricted participation above

---

62. Id. at 1037.
63. Id. at 1033.
64. 94 F.3d 96 (2nd Cir. 1996).
65. Id. at 99.
66. Id.
68. Dennin, 913 F. Supp. at 669.
69. Dennin, 94 F.3d at 101; Sikorski, supra note 37, at 6.
70. 102 F.3d 1172 (11th Cir. 1997).
the age of eighteen. Johnson then sued the FHSAA under the Rehabilitation Act and ADA claiming that the age limitation was discriminatory.

The district court initially found that the FHSAA was a “public entity” as regulated by the ADA and that Johnson was a “qualified individual with a disability.” According to the district court, the “dispositive issue . . . is whether waiving the age requirement constitutes a ‘fundamental alteration’ to the purposes of the rule.”

In deciding this issue, the district court specifically criticized the Potigen court, noting that it blindly accepted the MSHSAA’s assertion that its age regulation was essential and so a modification of the rule would consequently be a fundamental alteration. The court then followed the decision in Sandison and looked behind any blind assertion of the essential nature of the age rule to “the relationship between the age requirement and its purposes.” The district court held that “the purposes of the age requirement are not undermined by allowing [Johnson] to participate in interscholastic athletics.” As Johnson was not a star player, his participation would not be an unreasonable modification of the age rule aimed at keeping larger, more experienced players from playing in order to promote the safety of other participants.

On appeal, the Eleventh Circuit (similar to the Second Circuit) held that the issue was moot because Johnson had already participated under the injunction.


Another case involving the MHSAA focused on the association’s eight semester rule. In *McPherson*, despite the Sixth Circuit’s ruling in *Sandison*, the district court issued a preliminary injunction which allowed McPherson to participate in athletics during his senior year even though such participation was during McPherson’s ninth and tenth semesters of enrollment in excess of the eight semesters normally allowed.

After the Rehearing En Banc, the Sixth Circuit made several important

71. Id. at 1173.
73. Johnson, 899 F. Supp. at 584.
74. Id. at 585.
75. Id.
76. Id.
77. Johnson, 102 F.3d at 1173.
78. 119 F.3d 453 (6th Cir. 1997).
rulings. Initially, the court determined that the eight semester rule itself was a "neutral rule" because, as the court had stated in Sandison, "[t]he plaintiff's respective learning disability does not prevent [him] from meeting the ... requirement; the passage of time does." Therefore, the court concluded that under the ADA it had to determine "whether requiring the MHSAA to grant a waiver would 'impose [ ] undue financial and administrative burdens ... or require[] a fundamental alteration in the nature of [the] program," because, as it had stated previously, "[w]aiver of a necessary requirement would [be] a substantial rather than merely a reasonable accommodation."

In its final analysis the court concluded that waiver of the eight-semester rule would "work a fundamental alteration in Michigan high school sports programs," because it would "impose an immense financial and administrative burden on the MHSAA."

6. Conclusion

The cases dealing with the ADA and sports participation in high school athletics do not provide consistent answers. According to the Eighth and Sixth Circuits, the ADA cannot change age limitation rules of high school athletic associations because that would constitute unreasonable modifications of essential rules. The Second and Eleventh Circuits, while hearing similar cases, made decisions based on mootness and not on the merits of the ADA claims.

Whether there are any general rules that can be gleaned from the previous cases is questionable at best. What seems most prominent is that "[n]either the ADA nor Section 504 of the Rehabilitation Act mandates that an eligibility rule be eliminated as an accommodation upon the assertion of disability on the part of an aspiring player."

It must be noted at this point that the cases dealing with interscholastic athletics have dealt with eligibility rules, and not with the actual playing of any

80. McPherson, 119 F.3d at 461 (quoting Sandison, 64 F.3d at 1033).
81. Id. (quoting Sandison, 64 F.3d at 1034 (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.17, (1987))).
82. Id. (quoting Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988)) (citation omitted).
83. Id. at 462.
84. Id. Soon after McPherson the Sixth Circuit followed its ruling in a similar case involving the eight-semester rule. See Frye v. Michigan High Sch. Athletic Ass'n, 1997 U.S. App. LEXIS 21071 (6th Cir. 1997). The Tenth Circuit has also dealt with a case involving a student who was declared ineligible. See Fischbach v. New Mexico Activities Ass'n, 38 F.3d 1159 (10th Cir. 1994). The only decision in this case was in regard to the mootness of the plaintiff's claim. Since no ADA claims were addressed by the court, that decision is not discussed in this article.
85. Sikorski, supra note 37, at 7.
particular sport, as in the Casey Martin case. However, these cases are important as they show that in high school athletics at least, if the rules are “fundamental” to the sports program itself, the ADA will not necessarily cause them to be modified.

B. The NCAA

Litigation by disabled student-athletes focusing on eligibility issues has also found its way to the collegiate level. As the main body that regulates collegiate athletics, the NCAA has found itself, and its eligibility requirements for athletic participation, under a series of attacks. Many commentators have discussed these attacks and the application of the disability rights law to the NCAA’s eligibility requirements. Therefore, all that is necessary here is a brief overview of the ADA’s application to NCAA student-athletes and the rules of the NCAA.


87. Again, the analysis will focus on the ADA and not the Rehabilitation Act. However, two cases still bear mentioning which were actually brought against the NCAA focusing on the Rehabilitation Act alone:

1) In Pahulu v. University of Kansas, 897 F. Supp. 1387 (D. Kan. 1995), a potential football player brought suit against the University of Kansas for barring him from participation even though he suffered from a condition which created a high risk that he would sustain a permanent and severe neurological injury if he participated. Pahulu sued the University claiming that its decision not to allow him to participate violated the Rehabilitation Act. Id. at 1389. In using the “otherwise qualified” language that was discussed earlier in this article, the court found that the University’s determination that Pahulu was not “otherwise qualified,” due to his failure to meet the requirement of gaining medical clearance to play was entirely reasonable and was not a violation of the Rehabilitation Act. Id. at 1394.

2) In another highly publicized case, Nicholas Knapp, a potential college basketball player, sued
As is obvious from the previous discussion focusing on interscholastic athletes, some disabled students are forced to take remedial or other special education courses in order to fulfill their requirements at the high school level. Enrollment in these courses can also add to the length of time that a disabled student-athlete takes to finish high school; therefore, these students are held out of participation due to the age-limitation rules already discussed.

The NCAA's eligibility requirements for freshman student-athletes are controlled by Section 14.3 of the NCAA Manual. In general terms, eligibility "depends upon a student's American College Testing ("ACT") or Scholastic Aptitude Test ("SAT") scores, along with his or her high school grade point average ("GPA")." The GPA itself is computed from "core courses" that are approved by the NCAA. "Special education and remedial courses are expressly excluded from the NCAA eligibility formula."

Disabled student-athletes are often unable to meet NCAA initial eligibility requirements because they were required to enroll in special education courses which are not counted toward the NCAA's core requirements. This is the genesis of the lawsuits that will be discussed. As these student-athletes could not meet NCAA initial eligibility requirements (i.e., they took courses that were necessitated by their disability although not recognized as fulfilling the core requirements of the NCAA), these student-athletes allege that the NCAA’s declaring them ineligible is a violation of the disability laws.

Northwestern University over its decision to bar him from participation. Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996). Prior to his senior year in high school, Knapp suffered a sudden cardiac death during a pick-up game and was given an internal heart defibrillator as a result. Id. at 476. Northwestern had offered Knapp a basketball scholarship and assured him and his family that it would be honored regardless of his medical condition. Id. Before Knapp could begin participation at Northwestern, he was declared ineligible. Id. at 476-77. Knapp then sued under the Rehabilitation Act to force Northwestern to allow him to participate. Id. at 477. Although the court's decision in this case has been criticized, see Rothstein, Higher Education, supra note 86, at 132-33 (criticizing the Knapp court for basing its holding on the fact that intercollegiate athletics are not a "major life activity" and therefore do not warrant protection under the Act), for purposes of this article it is important to note that in reversing the district court's decision, the Seventh Circuit held that "the university has the right to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act." Knapp, 101 F.3d at 484. Subsequently, the United States Supreme Court refused to review the case. See No Court Action For Basketball Case, U.P.I., June 16, 1997, BC Cycle.

89. Lewis, supra note 86, at 77 (citations omitted).
90. Id.
91. Id.
92. Id. at 78.
I. *Ganden v. National Collegiate Athletic Association* 93

The first case to really bring this issue into the forefront involved potential NCAA swimmer Chad Ganden. 94 Ganden has a learning disability that caused him to take several remedial classes in high school specifically adapted to his disability. 95 With this assistance and hard work, Ganden was able to reach a cumulative GPA of 2.09 through high school. 96 However, this GPA level required a compiled ACT score that Ganden was unable to achieve. 97 Ganden was also unable to reach the NCAA’s mandated “core course” requirement. 98 Regardless of this fact, Michigan State University and several other colleges recruited Ganden. 99

On behalf of Ganden, and with the support of the Justice Department, the University sought a waiver from the NCAA’s core course requirement. 100 The waiver was denied. 101 Ganden then sued the NCAA claiming that its eligibility criteria violated Title III of the ADA. 102

In assessing Ganden’s motion for a preliminary injunction to allow him to participate, the court began by noting that in order to be a “place of public accommodation,” a membership organization like the NCAA “must have a ‘close connection to a particular facility.’” 103 Such a connection will be found

---

96. Id. at *2-3.
97. Id. at *6.
98. Id.
99. Id. at *7.
100. Id. at *7-11. Another similar dispute involves Shawn Farestar, a kicker who attempted to enroll at Division II Edinboro. Farestar was granted “partial qualifier” status (as described in note 101) as he was unable to meet all of the core course requirements of the NCAA. Shelly Anderson, *Edinboro Freshman Frustrated by NCAA Rules on Learning Disabled*, Pittsburgh Post-Gazette, Nov. 17, 1996, at D12.
101. *Ganden* was given “partial qualifier” status; however, this status would not allow Ganden to compete during his first year of college enrollment, and as the Court described, “[a]t the elite level, the average competitive life of a swimmer is three to four years, with the peak years occurring between ages nineteen and twenty-one.” *Ganden*, 1996 U.S. Dist. LEXIS 17368, at *12-13. Therefore, his limited eligibility would hurt his future as a swimmer.
102. Id. at *13.
103. Id. at *29, (citing Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1270 (7th Cir. 1993)). This is important because many of the defendants in the cases cited in this article have argued that Title III regulates physical facilities or locations and not private membership organizations like the NCAA or USA Hockey. In making this argument, the defendants have often looked to the *Welsh* case, which dealt with membership in the Boy Scouts, finding that Title III did not regulate this type of
to exist if: "(1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility." After assessing Ganden’s argument demonstrating the NCAA’s control over eligibility in intercollegiate athletics, the Seventh Circuit initially determined that Ganden had a likelihood of success in proving that “the NCAA constitutes a ‘place of public accommodation’ within the meaning of Title III.” Moreover, according to the court, the NCAA “operates” facilities as required under Title III, and its eligibility requirements act as a “ticket” to actual use of those facilities.

Still, in order for Ganden to succeed on his Title III claim he had to prove that the NCAA’s eligibility requirements “screened” him from participation based on the fact that he was disabled and that the NCAA had refused to make reasonable modifications of its rules as required under the ADA to accommodate his disability. By showing that the NCAA was aware of his disability and knew that it affected his ability to meet the core requirements, Ganden demonstrated that there was the necessary link between his disabled status and the eligibility decision.

The court, however, determined that a modification of the NCAA’s eligibility standards as Ganden had requested would “fundamentally alter” the NCAA’s eligibility procedures and it would be “generally unreasonable to require the NCAA to lower this basic standard.” Ganden’s motion was denied because, as the court stated, “Title III does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them. The record reveals that the NCAA did precisely that.”

membership organization. Id.

104. Id. at *29-30 (citing Elitt v. USA Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996)).
105. Id. at *29-30.
106. See id. at *30-34.
107. Id. at *31-34.
108. Id. at *34-35.
109. Id. at *40.
110. Id. at *48.
111. Id. at *49-50. A year after this case was decided, the Ganden’s were again suing the NCAA, this time in order to force the Association to give back the year of eligibility that Ganden had lost. See Christie Hart, Justice Department Sides With Swimmer In NCAA Suit, Chicago Daily Herald, Nov. 5, 1997, at 5. The Justice Department sided with the Gandens at this time for several reasons. Initially, the Department found that remedial courses of the type that disabled athletes must often take “must be taught differently and rarely can cover the same amount of material as traditional classes.” Id. Therefore, the NCAA frequently rejects these courses, denying disabled students the same ability to tour schools and accept scholarship offers. Id. Then if a student were able to appeal such a determination and become a “partial qualifier” like Ganden, he would nevertheless lose a year of eligibility. Id. The Department found that “only students with learning disabilities” were in the same
2. Butler v. National Collegiate Athletic Association

In a similar case, Toure Butler, a learning disabled football player from the University of Washington was denied eligibility due to a lack of core courses and a low GPA as determined in Ganden. Butler also sued the NCAA and the United States District Court for the Western District of Washington issued a temporary restraining order allowing him to participate in football.

The NCAA then filed a motion to dismiss the temporary restraining order. The court found the NCAA’s argument unpersuasive. Butler pointed to the Dennin case for the proposition that an athletic association was covered by Title III because it regulates athletics and sponsors events. In opposition the NCAA pointed to Sandison for the proposition that the “nature” of the place of accommodation is important and therefore, as the football facilities were operated by a public, and not a private entity, the NCAA was not covered by Title III.

The court disagreed with the NCAA and specifically with Sandison, stating that the important inquiry is not whether the place to which the plaintiff seeks access is public or private, but “rather, the nature of the place is determined by who owns, leases, or operates the place.” Therefore, “the determination rests on whether the NCAA can be said to operate facilities used in connection with the football program at the University of Washington.”

Because this issue presented a mixed question of law and fact, the court would not rule on the issue “in the context of a motion to dismiss,” but instead Butler was allowed to present evidence in court to support his claim. After denying the NCAA’s motion, the court moved to a decision as to whether to category as Ganden. Id. Therefore, in 1997, the Department began to move toward a settlement with the NCAA. That settlement will be discussed later in this article.

113. Id. at 2-3.
114. Id. at 3. See also Percy Allen, UW’s Butler Returns to Field, Court, The Seattle Times, October 24, 1996, at C3.
115. Butler Preliminary Injunction, supra note 112, at 3. At the same time the Justice Department filed a motion for leave to participate as amicus curiae and at oral argument which the court granted. Id. The Department joined the case in order to attempt to resolve the issues that had been brought up in Butler, Ganden, and other cases denying disabled students eligibility.
116. Id. at 5.
117. Id. at 5-6.
118. Id. at 7.
119. Id. at 8.
120. Id. at 8-9.
issue a preliminary injunction allowing Butler to participate in the football program. In this matter the court found that Butler had presented evidence which demonstrated that the “NCAA regulates who may use... facilities and when, how, and under what conditions they may be used.” Therefore, Butler had shown at least a probability of success, i.e. he could prove that the NCAA was an operator of a place of public accommodation as determined under Title III.

Finally, in balancing the harm to the parties, the court found that if Butler were denied eligibility he would lose his scholarship and possibly be forced to quit school, while the potential harm to the NCAA was “virtually nonexistent.” Even though Butler’s likelihood of success “may not be strong,” the court issued a preliminary injunction in his favor. Butler was the first student to win such an injunction against the NCAA.


A final important NCAA case deals with potential Temple University football player Michael Bowers. Bowers was another learning-disabled student-athlete who was forced to enroll in special education courses to meet requirements in high school. As a result of the courses he took, and some miscommunication with the NCAA, Bowers was declared a nonqualifier by the NCAA, meaning that he was ineligible to participate in athletics or receive financial aid during his freshman year in college.

Bowers subsequently sued the NCAA and asked for a preliminary injunction from the New Jersey District Court to force the NCAA to grant him the status necessary to participate in athletics and receive an athletic scholarship. The court first asked the NCAA to consider a waiver of the eligibility rules for Bowers, but such a waiver was denied.

In following largely the same reasoning as the courts have considered in the prior cases discussed, the district court determined that Bowers was really asking for a “virtual elimination of the ‘core course’ requirement, rather than merely the ‘modification’ or ‘accommodation’ required by the ADA, which the NCAA

121. Id. at 9.
122. Id.
123. Id. at 10-11.
124. Id. at 11.
126. Apparently some information that Bowers’ high school counselors sent to clarify the courses he took was either never received by, or never sent to, the NCAA. Id. at 462-63.
127. Id. at 463.
128. Id.
129. Id. at 463-64.
already provides," through its waiver process.\textsuperscript{130} As the court discussed, "the ADA 'does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them.'"\textsuperscript{131} The court then followed the ruling in \textit{Ganden} "finding that a complete abandonment of the 'core course' requirement would fundamentally alter the nature of the privilege of participation in the NCAA's intercollegiate athletic program."\textsuperscript{132} Therefore, the court, following \textit{Ganden}, denied Bowers motion for a preliminary injunction.

The Bowers case returned to district court in June of 1998.\textsuperscript{133} The second Bowers case dealt with the NCAA's\textsuperscript{134} motion to dismiss Bowers' First Amended Complaint.\textsuperscript{135} Even though Bowers mistakenly alleged that Title II of the ADA applied to the NCAA, in a groundbreaking decision the court initially held that Title III applies to the NCAA.\textsuperscript{136} Specifically the court stated that "Bowers has adequately alleged that the NCAA owns, leases (or leases to), or operates the place of public accommodation and that he was denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of that place of public accommodation."\textsuperscript{137}

After reviewing a significant amount of case law, the court stated that the issue boils down to whether the NCAA "manages, controls, or regulates the place or places of public accommodation" in such a way that it denied Bowers enjoyment of the accommodation in a discriminatory fashion.\textsuperscript{138} The court found that Bowers had provided sufficient facts to demonstrate the NCAA's "operation" under this test because the NCAA's enforcement power caused him to be declared ineligible and, therefore, to be denied access to intercollegiate athletics; the NCAA establishes the standards which caused his ineligibility, and as a result, he could not participate in practice or games, or receive scholarship money; and the NCAA leases and operates facilities which are places of public

\begin{itemize}
  \item \textsuperscript{130} Id. at 466.
  \item \textsuperscript{131} Id. (quoting \textit{Ganden}, 1998 U.S. Dist. LEXIS 17368, at *49).
  \item \textsuperscript{132} \textit{Bowers}, 974 F. Supp. at 467.
  \item \textsuperscript{133} \textit{Bowers v. NCAA}, 9 F. Supp. 2d 460 (D.N.J. 1998). In this second case, Bowers more explicitly alleged that due to his status as a nonqualifier, several universities, including Temple, stopped recruiting him and pulled their offers for athletic scholarships. See Student With LD May Proceed With Claims Against NCAA, Colleges, Disability Compliance For Higher Education, Vol. 4, No. 1, Aug. 1998.
  \item \textsuperscript{134} The NCAA was joined by a few other parties not pertinent to this discussion. Only the parts of this lengthy decision that discuss the NCAA's claims and defenses will be discussed herein.
  \item \textsuperscript{135} \textit{Bowers}, 9 F. Supp. 2d at 466.
  \item \textsuperscript{136} Id. at 474.
  \item \textsuperscript{137} Id. at 479-80.
  \item \textsuperscript{138} Id. at 486.
\end{itemize}
accommodation. Therefore, the NCAA’s motion for summary judgment, asking the court to determine that it was not an “operator” as defined under Title III, was denied.

In regards to the NCAA’s motion to dismiss the claim that it discriminates against the learning disabled through its eligibility rules, the court found that the NCAA’s waiver process and other accommodations still might not be enough to avoid a claim of discrimination. In his Amended Complaint, Bowers no longer sought a complete change in NCAA “core course” requirements. Instead, he restricted his claim to a modification more closely tied to his particular situation. The court found it inappropriate to determine the merits of this amended claim at the motion stage. Consequently, the case was allowed to proceed toward trial on the merits of these issues.

4. The United States vs. The NCAA

As a result of the above and other cases, the NCAA made some initial

139. Id. at 486-87.
140. Id. at 489-90.
141. Id. at 477-78. The court dismissed the NCAA’s claim pointing to the discussion and rulings it presented with regard to another of the Defendants, the University of Iowa. Id. at 490. Therefore, the arguments cited are from this earlier part of the opinion.
142. Id. at 477.
143. Id.
145. Three other cases have gained a lot of publicity although their precedential value is probably not as high:
1) Tatum v. NCAA, 922 F. Supp. 1114 (E.D. Mo. 1998), dealt with Justin Tatum, a potential basketball player at St. Louis University who has an anxiety disorder which necessitated his taking the ACT in an untimed and nonstandard fashion. See Court Will Decide if Student Can Play Basketball at SLU, St. Louis Post-Dispatch, Jan. 18, 1998, at C1. The NCAA determined that due to his failure to achieve an adequate standardized ACT score, Tatum should be a nonqualifier. Tatum, 922 F. Supp. at 1118-19. In following the case law already discussed, the court found that “the NCAA is governed by Title III of the ADA.” Id. at 1121. The court went on, however, to deny Tatum’s motion due to his lack of disabled status among other factors. Id. at 1123.
2) Another athlete who has sued the NCAA is Ginger Wortley, a softball player at Lynn University. Wortley suffers from a disorder known as “perceptual disability,” which is similar to dyslexia and which also impairs her ability to take standardized tests. As a result, her SAT score did not satisfy the NCAA’s eligibility requirements. See Joe Capozzi, Lynn Freshman Files Lawsuit For Right to Play Softball, The Palm Beach Post, Feb. 27, 1998, at 1C; Softball Player With Low SATs Knows Score That Counts Is in Court, The San Diego Union-Tribune, Mar. 2, 1998, at D2. After making the varsity softball team, Wortley applied for NCAA certification and was denied due to her SAT scores. See Jim Oliphant, Tagged Out by the NCAA, Miami Daily Bus. Rev., Mar. 13, 1998, at B1. A waiver backed by a recommendation from her school’s dean was also denied. Id.
changes in its rules in 1997. Among these changes were: (1) learning disabled students would be able to apply for waivers on their own without leaving an NCAA school as necessary in the past; (2) by March 1, 1997, high schools were to begin filling out forms designating classes for disabled student-athletes allowing the NCAA to have a list before any appeals were filed; (3) students would be certified as learning disabled before they graduated from high school; and (4) learning disabled student-athletes would be able to take summer courses after their senior year that would be counted toward their NCAA eligibility.

Even with these changes, by October of 1997, it was reported that the Justice Department had sent a letter to the NCAA stating that "several aspects" of the organization's initial eligibility requirements violate Title II of the ADA, and finding the NCAA's application of academic standards in regard to learning-disabled student-athletes "too rigid" while recommending remedies that could head off legal action. The Department pointed to the facts that the NCAA excludes many courses from the "core course" requirement that are designed to accommodate students with learning disabilities and that the waiver process is "fundamentally flawed," leaving learning disabled student-athletes at a disadvantage. The Department also noted that even in cases where disabled student-athletes are given "partial qualifier" status, the restrictions on these student-athletes (not being allowed to practice and losing a year of eligibility) are too great.

The Department concluded that "modifications in several NCAA policies are necessary, that reasonable modifications are available and that these modifications would not fundamentally alter the nature of the NCAA's program."

3) A final dispute concerns highly-touted basketball recruit Schea Cotton. In June of 1998, the NCAA denied Cotton's appeal upholding its original ruling that his qualifying SAT score was invalid. See Todd Taylor, NCAA Denies Cotton Appeal, News & Rec. (Greensboro, N.C.), June 6, 1998, at C1. According to the NCAA, part of the reason for the ruling was because inadequate documentation was provided regarding his learning disability which would have demonstrated that he deserved the non-standardized test taking accommodations that he received. A. Sherrod Blakely, The News & Observer (Raleigh, N.C.), June 11, 1998, at C1.

149. Justice Department, supra note 147.
150. Id.
As a result of this letter and various other complaints, the Justice Department brought the NCAA to court in the District of Columbia. In its complaint the Department raised several allegations against the NCAA that the Department believed constituted violations of Title III of the ADA.\textsuperscript{152} First, the Department alleged that the NCAA's eligibility criteria for entering student-athletes "screen out or tend to screen out individuals with disabilities from fully and equally enjoying the goods, services, facilities, privileges, advantages or accommodations that it offers," in violation of Title III.\textsuperscript{153} Second, the Department alleged that the NCAA failed to make up for this behavior through reasonable modifications of its policies.\textsuperscript{154} Third, the Department alleged that the NCAA's policies deny students with learning disabilities an opportunity to benefit from the services it offers.\textsuperscript{155} And, fourth, the Department alleged that the services provided to these disabled individuals are not equal to, or are at least separate from, those afforded to students without disabilities.\textsuperscript{156} Throughout its allegations the Department stated that all of this conduct demonstrated a pattern and practice of discrimination against learning disabled student-athletes.\textsuperscript{157}

As a resolution to this dispute, and in order to avoid the delay and costs of a trial, the NCAA and the Department entered into a Consent Decree in May of 1998.\textsuperscript{158} Under the Decree the NCAA basically agreed to undertake five changes:

1) The NCAA will now certify classes designed for student-athletes with disabilities as "core courses" if they provide them with the same type of "knowledge and skills as other college-bound students,"\textsuperscript{159}

2) Learning disabled student-athletes can now earn back their lost year of eligibility if they can demonstrate that they have made substantial progress toward academic success.\textsuperscript{160}

\textsuperscript{153} Id. Count I, ¶¶ 45-51.
\textsuperscript{154} Id. Count II, ¶¶ 52-57.
\textsuperscript{155} Id. Count III, ¶¶ 58-62.
\textsuperscript{156} Id. Count IV, ¶¶ 63-68.
\textsuperscript{157} Id. ¶¶ 45-68.
\textsuperscript{159} NCAA Settlement With The Justice Department: Fact Sheet, (last revised May 27, 1998) <http://www.usdoj.gov/crt/ada/ncaafact.htm> [hereinafter Fact Sheet].
\textsuperscript{160} Id. These students can gain a fourth year of eligibility if they can show that they have completed at least 75% of their degree program by the time they reach a fifth year of college enrollment. NCAA and Federal Government Reach Agreement on Learning Disabilities Issue, The Sports Law., July/Aug. 1998, at 3 & 15.
3) The NCAA will include experts on disabilities when evaluating waiver requests and will review the student-athlete’s high school preparation and performance when making a decision.\textsuperscript{161}

4) The NCAA will designate an ADA Compliance Officer who will assist the staff and serve as a liaison to students,\textsuperscript{162} and

5) The NCAA will pay a total of $35,000.00 to four disabled student-athletes who had been adversely affected by the old rules.\textsuperscript{163}

The NCAA made clear that it voluntarily entered into this Decree and ensured that it did not “waive its position that it is not a place of public accommodation and therefore Title III of the ADA does not apply to it, nor does the NCAA admit liability under the ADA.”\textsuperscript{164}

5. \textit{Conclusion}

Several judges and the Department of Justice have stated that the NCAA is liable under the ADA. Unfortunately, no higher court decisions have been reached finding such liability. Moreover, even though the NCAA made changes through the Consent Decree, it steadfastly denied that it had any responsibility to act under the ADA.

As in the interscholastic cases, the issues disputed at the collegiate level have focused on the way in which eligibility standards and requirements may negatively impact disabled student-athletes. The disputes have had nothing to do with the actual participation of a disabled athlete that would then cause some sort of accommodation in the rules or in the way in which the sport is played. Although the interscholastic and intercollegiate cases have clearly dealt with rules implemented by the associations or regulatory bodies to regulate sports, these are not rules of athletic performance or performance on the field of play. The cases in these initial two areas only deal with eligibility rules for the right to

\textsuperscript{161} Fact Sheet, supra note 159.

\textsuperscript{162} Id.

\textsuperscript{163} Id. The other three students were: (1) Joel Douglas, a football player from the University of Toledo who suffers from a series of disabilities and was found ineligible because several courses he took did not meet the “core course” requirements, see Neil A. Lewis, N.C.A.A. Alters Learning Disabled Policy, N.Y. Times, May 27, 1998, at C2; (2) Shawn Farester, the football player mentioned supra note 99; and (3) a skier and baseball player who chose to remain anonymous. See Learning-Disabled Students Now Eligible For NCAA Participation, Disability Compliance Bulletin, Vol. 12, No. 4, June 4, 1998.

participate in the first instance.

In the end, it is unclear whether the NCAA can be held liable under the ADA. Moreover, even if it might be held liable, it is still uncertain how a higher court would deal with a case where an eligible athlete seeks some accommodation of the actual rules or conditions of play.

C. Other Non-Professional Sports

In order to present a description of the entire picture surrounding the ADA’s application to sports, it is necessary to also discuss cases dealing with other non-professional sporting organizations.

1. USA Hockey

USA Hockey is the organization which sponsors amateur hockey organizations throughout the United States with recognition by the United States Olympic Committee. One of USA Hockey’s functions is to provide insurance coverage for individual hockey clubs and to set age guidelines for these clubs.

Mark Elitt is a disabled athlete stricken with Attention Deficit Disorder ("ADD") and severe language impairments. As a result of his disabilities, Mark Elitt can only participate in hockey with a family member on the ice with him, otherwise he loses his focus and concentration. Elitt has participated at the lower level age groups at the Creve Coeur Hockey Club, presenting no safety hazards to himself or other participants. Elitt’s parents petitioned the Club to allow Mark to continue to participate at his current level instead of moving up to the next level of competition. The request was denied mainly due to insurance considerations that Mark would be a safety risk if he participated at the younger age level.

The Elitts sued USA Hockey and the Creve Coeur Hockey Club asking for a temporary restraining order and preliminary injunction to compel the Club to

---

165. This section will focus on cases where a party has sued a sporting organization that is not at the interscholastic or intercollegiate level and that is not within one of the major professional leagues either.
167. Id. at 218, 220.
168. Id. at 218.
169. Id. at 218-20.
170. Id. at 220.
171. Id.
172. Id.
allow Mark to participate in hockey as a reasonable accommodation under Title III of the ADA.\textsuperscript{173} As a threshold consideration the district court found that it lacked subject matter jurisdiction to address the Elitts claim under Title III because “plaintiffs must first show denial of access to a place of public accommodation. Plaintiffs make no such showing because they allege denial of participation in the youth hockey league instead of access to a place of public accommodation, i.e. the ice rink.”\textsuperscript{174}

Additionally, the Elitts could not show that USA Hockey or the Hockey Club owned, operated, or leased a place of public accommodation.\textsuperscript{175} The court found that since Title III focused on “places” and did not list membership organizations in its list of twelve categories\textsuperscript{176} of “places of public accommodation,”\textsuperscript{177} and since such organizations have generally been excluded from the definition of public accommodation under Title II,\textsuperscript{178} USA Hockey should also be excluded.

Moreover, the court found that “the requested modifications would not be reasonable,” as allowing Elitt’s family members onto the ice could cause serious disruptions of the games played, and because the age level rules “are important because they group players who are roughly the same skill and size.”\textsuperscript{179}

2. Little League & Pony League Baseball

Similar cases have been brought at the amateur baseball level although the results of these cases have been strikingly different. In Anderson v. Little League Baseball, Inc., a wheelchair bound first base coach sought a temporary restraining order to bar Little League Baseball from enforcing a rule specifically designed to keep him from coaching in the coaches box.\textsuperscript{180}

As one of the earliest cases dealing with the ADA in the sports context, the district court discussed the history behind the Act noting that “we must bring Americans with disabilities into the mainstream of society ‘in other words, full participation in and access to all aspects of society.’”\textsuperscript{181} Unlike the cases

\textsuperscript{173.} Id. at 218.
\textsuperscript{174.} Id. at 223.
\textsuperscript{175.} Id. In fact the court stated that “[p]laintiffs did not introduce any evidence during the evidentiary hearings to make the necessary connection between defendants ... and the ice rink.” Id. That conclusion is rather odd as this sort of “operation” of a facility is exactly the type of operation discussed in the NCAA cases.
\textsuperscript{176.} As set out in 42 U.S.C. § 12181(7) (1994).
\textsuperscript{177.} Elitt, 922 F. Supp. at 223.
\textsuperscript{178.} Id.
\textsuperscript{179.} Id. at 224-25.
\textsuperscript{181.} Id. (quoting H.R. Rep. No. 101-485(II), at 317).
discussed so far, Little League Baseball did not challenge Anderson’s allegation that it was covered by Title III.182

However, this case is helpful in that the court notes that an entity is not required under Title III to permit a person to participate if they are a “direct threat to the health or safety of others.” Unfortunately for Little League Baseball, it never conducted an individual assessment of: “(1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate the risk.” Therefore, the court decided that Anderson and the children he works with would suffer irreparable harm “if defendants are permitted to arguably discriminate against plaintiff based upon his disability.” As a result the restraining order was granted and Little League Baseball was prevented from implementing its rule.

Although this case is one of the few sports related cases allowing such an injunction, it must be noted that the court took specific notice of the fact that the rule was implemented “without public discourse” and almost specifically because of the plaintiff, and this weighed in favor of the plaintiff’s showing the harm. With a properly implemented rule supported by real safety concerns, however, the result may not have been the same.

In another baseball related case, Geoffrey Shultz, a baseball player with cerebral palsy, was barred from participation in a certain age division by Hemet Youth Pony League, Inc., of California, a member of PONY Baseball, Inc. As in the other cases mentioned, Shultz sued the Youth Pony League under Title III of the ADA.

The court found that the Baseball League was covered by Title III because (1) Shultz was disabled, (2) the League was an owner or operator of a place of public accommodation “irrespective of their link to any physical facilities,” and (3) the League discriminated against Shultz on the basis of his disability and “assumed [without substantiating] concerns of a possible risk of harm to Plaintiff and other players, and insurance ramifications.” And, as the League never considered “any modification to any of Pony’s Rules, policies or practices that might accommodate Plaintiff’s disability,” their conduct was “discriminatory

183. Id. at 345.
184. Id. (citing 28 C.F.R. § 36.208(c) (1998)).
185. Id.
188. Id. at 1225.
inaction against Plaintiff on the basis of [his] disability."\(^\text{190}\) Therefore, Shultz's motion was granted.

3. **Bicycle Racing**

A final case dealt with a cyclist whose disability caused him to ride a specially designed tricycle.\(^\text{191}\) The facts of the case are not as important to this analysis, yet some of the courts' language is particularly interesting. In analyzing whether the race organizer was covered under Title III of the ADA, the court stated that "[t]hey are not analogous to any of the public accommodations listed in the statute. The defendants are closer in identity to a youth hockey or professional football league, which have not been found to be public accommodations, in that they are umbrella groups that organized an event."\(^\text{192}\) The court also made specific reference to *Elitt* as it stated that "Mr. Brown does not allege that he was denied access to a physical place. He alleges that he was denied a chance to participate in the ParaAmerica. That allegation does not meet the definition of public accommodation."\(^\text{193}\) Therefore, the organizers were not liable under the ADA.

While the *Brown* case seems to have reached a logical result as the race took place over public streets which the race organizer could not have controlled as an owner, operator, or lessor, the language of the case does not add clarity to the overall impact of the ADA in sports. In fact, although the court recognizes cases where sporting organizations have not been found amenable to suit under the ADA, it neglects to recognize the baseball cases and some of the NCAA and interscholastic athletics cases wherein similar organizations were found liable under the ADA.

4. **Conclusion**

At this point it may seem that the analysis of the ADA's impact on the rules of sport has become increasingly confusing. However, the four cases just described seem to provide at least a modicum of guidance. From these cases it seems that the issue as to whether Title III applies to a specific sport governing body turns on the question of operation and control of the place of public accommodation. Therefore, the organizations with a higher degree of control (the baseball leagues) were amenable to suit under Title III, while the organization not as closely tied to the public accommodation (the race organizer)

\(^{190}\) Id. at 1225-26.


\(^{192}\) Id. at 499 (presumably referring to the *Elitt* case and the professional sports cases which will be discussed).

\(^{193}\) Id. (citing *Elitt*, 922 F. Supp. at 223).
was not.

The anomalous case was Elitt. The control and rule making authority exercised by USA Hockey and specifically by the Hockey Club that Elitt wanted to be a part of seems clearly as strong as, if not stronger than, that of the amateur baseball leagues. What must be assumed then is that the court really focused on the age limitation's health and safety rationale (as in the high school cases) and found this to be essential and fundamental. Therefore, any modification of these age rules would be unreasonable.

D. Professional Leagues

There have been only two cases which have dealt with the ADA's application to the professional sports leagues. Admittedly, these cases were brought by spectators or fans and not by participants in the sports themselves as in all the other cases described below; however, each courts' analysis of the ADA's application to these professional sports leagues is important.


In 1994, the National Football League's ("NFL") blackout policy (which prohibits the local broadcast of a home game when there is not a sell-out up to three days before the game) was attacked by several hearing impaired fans. The fans sued the NFL claiming that the rule discriminated against them in contravention of the ADA because they were prohibited from listening to the radio due to their impairment. In other words, when Browns games were blacked out, these disabled fans could not receive coverage of the games.

After quickly dismissing the plaintiff's claims under Title I and II of the ADA, the district court then considered Title III. Although the court admitted that a football stadium was a place of public accommodation, it determined that the service the plaintiffs claimed they were being denied access to (the game being televised) was not a service of the public accommodation itself and that, consequently, Title III did not apply. As the court stated, "[i]n order for the statute to apply, plaintiffs would have to argue that the Rule is denying them full and equal employment of services of the stadium." On appeal the Sixth Circuit again held that Title III did not apply to the NFL. As the court stated, "the hearing and the hearing-impaired populations

---

195. Id. at *2.
196. Id. at *3.
197. Id. (emphasis added).
attain equal footing as radio broadcasts become available to both,”199 and “the prohibitions of Title III are restricted to ‘places’ of public accommodation, disqualifying the National Football League . . . [and] its member clubs . . . .”200

2. Cortez v. National Basketball Association201

In a substantially similar case, the National Basketball Association ("NBA") was sued by several hearing-impaired individuals who claimed that the NBA had to accommodate them under the ADA by providing interpretive and captioning services for hearing-impaired individuals at NBA games.202 The plaintiffs relied on the NBA's Facility Standards as guidelines that showed the NBA exercised a significant amount of operational control over the Alamodome, a public accommodation.203 However, the court found that the guidelines did not relate to the plaintiff's accommodation requests and that "there is no evidence the NBA owns, leases (or leases to) or operates a place of public accommodation."204 Therefore, the ADA did not apply in this suit.

3. Conclusion

These two cases dealing with professional sports leagues do not change the analysis as presented so far. The courts in these cases found that Title III did not apply because of a lack of control or operation by the leagues, similar to the cases discussed above.

Moreover, these suits were brought by individuals that were not suing to participate in the sport itself and, thus, are probably not similar enough to the cases already presented to stand for any controlling proposition that the ADA in all cases would not apply to these leagues. If a player or potential player were to sue to have a league reasonably modify its rules to allow him to participate in the sport, it is unclear whether Title III would apply to these eligibility-type rules that barred the individual from participation. This issue has not been specifically addressed with respect to the professional leagues.

E. Sports Facility Cases

A final area where many lawsuits have been brought within the sports context is with regard to access to sports facilities themselves. Many cases have

199. Stoutenborough, 59 F.3d at 582.
200. Id. at 583.
202. Id. at 114.
203. Id.
204. Id. at 116.
been brought against the architects, designers, and owners of these facilities in order to force them to comply with the ADA’s special regulations regarding facility access.\textsuperscript{205}

These cases will not be discussed in depth\textsuperscript{206} because the issues resolved therein are only peripherally related to the participation of disabled athletes in particular sports. Facility-access cases have dealt with issues such as sightlines in the facility, mainly for wheelchair users, and whether Section 4.33.3 of the Justice Department’s Standards for Accessible Design as promulgated under Title III has been met.\textsuperscript{207} And as Title III specifically applies to sports stadiums and arenas as places of public accommodation, the Title III question was not difficult. The focus in these cases instead is on “reasonable” accommodations or modifications in these structures to accommodate the disabled as mandated by the Department’s Standards.

### III. CASEY MARTIN AND THE RULES OF GOLF

Perhaps no case involving the ADA’s affect on the sports world has grabbed the public’s attention as much as the Casey Martin case. Before analyzing the case itself, some background information is necessary.

#### A. The PGA and Disabled Golfers

The Professional Golfers’ Association (“PGA”) is the association which


\textsuperscript{207} Conrad, Disabled-Seat Pact, supra note 206.
regulates and administers events for professional golfers in the United States.\textsuperscript{208} The purpose of the PGA is to “regulate, promote, and improve the business of professional tournament golf.”\textsuperscript{209} A key to the success of the PGA has been “the ability of its players to set rules that ensure both healthy competition and the growth of the sport through the players’ organization . . . .”\textsuperscript{210} The PGA has seldom been swayed to bend its rules in matters dealing with personal safety and comfort.\textsuperscript{211} In fact, “[t]he underlying philosophy of all this is to create equity among players of contrasting abilities, thus, in theory at least, increasing the pleasure for everyone.”\textsuperscript{212}

The PGA sponsors three tours for professional golfers: the PGA Tour, the Senior PGA Tour, and the Nike Tour.\textsuperscript{213} The Nike Tour acts as a “minor league” or qualifying tour to reach the PGA Tour.\textsuperscript{214}

There are several methods by which a player can gain the privilege of playing on the PGA Tour. The main one is through a three-stage qualifying school tournament.\textsuperscript{215} The first stage consists of 72 holes, on which the lowest scoring individuals advance to the second stage of 72 holes.\textsuperscript{216} The top qualifiers then advance to the third and final stage which consists of 108 holes.\textsuperscript{217} The lowest thirty-five finishers plus ties win playing privileges on the PGA Tour, while players who do not win this privilege in the qualifying school may still make the PGA Tour by winning three Nike Tour events in a single year or by finishing in the top fifteen places on the Nike Tour’s money list.\textsuperscript{218} In the first two stages of qualifying, players can use a cart, although such use is prohibited on the PGA and Nike Tour.\textsuperscript{219}

The PGA has had some history dealing with disabled golfers in the past. In 1950, Ben Hogan won the U.S. Open only sixteen months after suffering a near-
fatal car accident. In 1954, Ed Furgol won the U.S. Open despite a withered left arm suffered in a childhood accident. And in 1964, Ken Venturi won the U.S. Open nearly collapsing from the heat by the end of the round.

By 1987, the cart debate had first become an issue for disabled players when Charlie Owens, who had been injured in a parachuting accident, petitioned the PGA for the use of a cart during a tournament. Similarly, in the same year Lee Elder asked for permission to use a cart after suffering a mild heart attack. Both golfers were denied the use of a cart.

Of course these requests were made before the passage of the ADA. "With the passage of [the ADA], it was anticipated that more disabled individuals would enter or re-enter the game. A review of the major golf organizations in 1992 clearly indicated that they were not prepared to accept or successfully deal with this population."

B. Casey Martin

Casey Martin was born with Klippel-Trenaunay-Weber Syndrome, a rare disorder which causes a progressively worsening muscle and bone condition in his right leg that results in pain when he walks. Martin started playing golf at age six, won junior championships in Oregon, and then went to Stanford University, where he was the captain of the 1994 team that won the NCAA

222. Charles & Sider, supra note 220. Comparison to Hogan and Venturi is at least questionable as both of these golfers were not disabled. Contrary to Martin, they had the opportunity to recover. John Garrity, Out On a Limb, Sports Illustrated, Feb. 9, 1998, at G10.
224. Id.
225. Id. The USGA does have rules which are specifically geared to "allow the disabled golfer to play equitably with an able-bodied individual or a golfer with another type of disability." The United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland, A Modification of the Rules of Golf for Golfers With Disabilities (visited June 30, 1998) <www.usga.com/rules/golfers_with_disabilities.html>. These rules do apply at the highest level of competition but do not contain a modification of the type sought by Casey Martin. Saul Keeton, Playing by the Rules (Disabled Golfers), Vol. 32, No. 6 Parks & Recreation, 1997 WL 9505016, June 1, 1997.
championship. After leaving Stanford, Martin walked for two years on the Hooters tour, though he also played on the Tommy Armour tour because it allowed carts. After this two-year period, Martin entered the PGA Tour qualifying school tournament in the hopes of making the PGA or Nike Tour. He made it through the first two stages of the tournament using a cart as allowed under the rules but was barred from using a cart in the third stage.

Martin sued the PGA Tour claiming that the "no cart" rule during this third stage failed to make tournaments accessible to the disabled in violation of the ADA. The Oregon District Court granted Martin a preliminary injunction allowing Martin to use a cart in the third stage. As a result, the PGA Tour lifted the "no-cart" rule for the third stage and up to twenty entrants used carts for this stage, including the first place finisher Scott Verplank. As part of the stipulation with the PGA, Martin was also allowed to use a cart in two tournaments on the Nike Tour. He won the first event, the Lakeland Classic. After the initial injunction was granted, the PGA moved for summary judgment contending that the ADA does not apply to the PGA Tour or its events.

229. Morfit, supra note 223.
231. Id.
232. Id.
233. Steve Harrison, Disabled Pro Golfer Fights No-Cart Rule, Wash. Post, Dec. 10, 1997, at A1. The PGA Tour argued that walking was an integral part of the game of golf and that Martin's suit "challenged the PGA Tour's right to determine the conditions of our competitions, including requiring all players to walk." Id. at A14. As Martin stated, "I don't take any great joy in wanting a cart . . . . I'd be thrilled to be able to walk the course like everyone else. I just can't." Harry Blauvelt, Pro Golfer Rides Out Storm, USA Today, Jan. 7, 1998, at 1C. As one attorney stated:

The walking in golf . . . is what I would call an aesthetic incidental. It is not a primary part of the game. Nobody goes to a golf match to say, 'Gee, I'm here because I like to see the way Palmer or Tiger Woods walks the course.' They go there to see them tee off, finesse the shots from the rough or the sand traps, or putt. They don't go there to see them storming up hills and dales. [On likening the case to a football quarterback] That's not this case. A primary part of your ability to be on the field is your ability to run to avoid tackles, to run out of the pocket. That is part of the game itself . . . . Or a better analogy is a baseball player who can play the game perfectly but has an endurance walking problem and needs a golf cart to take him from the dugout to the pitching mound or to home plate . . . . That would destroy the sport. It interferes with the basic essence of the offense and the defense of the game itself.

234. Morfit, supra note 223.
235. Id.
1. The Motion

The magistrate judge dealt with several claims under the ADA. Initially, the PGA argued that it was exempt from Title III of the ADA as a private non-profit establishment or club. However, in discussing this exemption, the court did not agree with the PGA. The court first noted that “[g]enerating revenue for members scarcely seems to qualify as the type of protectable interest Congress had in mind when it excluded private clubs . . . .” Furthermore, in assessing the factors used by courts that have evaluated such a claim of exempt status, the court also sided against the PGA.

Additionally, the PGA claimed that it was not a private entity operating a “place of public accommodation” as defined under the ADA. The court first noted that a golf course is specifically included as such an accommodation in the ADA.

The PGA then argued that “since the public gallery is not allowed inside the playing area, the fairways and greens of its golf courses are not places of public accommodation.” In answer to this, the court stated that “the statute and regulations do not support the concept that places of public accommodation have zones of ADA application.”

The PGA tried to make an analogy to a baseball stadium arguing that the bleacher area where the public is seated would be subject to the ADA, but the dugout where no public person can come is not. The court first pointed to the Independent Living Resources case noting that the court therein found that “the executive suites in the arena, even though not open to the general public, are subject to the ADA.” The court then noted that the PGA’s argument did not...

237. Id. at 1323. The exemption referred to is found at 42 U.S.C. § 12187 (1994).
238. Martin, 984 F. Supp. at 1324.
239. Id. at 1324-1325. The court looked at seven factors in making this determination, several of which are of particular interest. (1) “Genuine Selectivity” - The court found that the PGA was made up of the most skilled golfers and not made up specifically of select individuals who share the same philosophy based on some criteria dealing with free association. Id. (2) “Membership Control” - Unlike most private clubs, the PGA Tour is made up of members who play their way in; they are not voted in. Id. at 1325. (3) “Use of Facilities by Nonmembers” - The Tour actually relies very heavily on non-members to run and regulate events. Id. (4) “[A]dvertis[ing] for Members” - Although the PGA may not literally solicit members, it is covered so extensively by the media that it has little need to do so. Id. (5) “Nonprofit” - Although the PGA is a nonprofit organization, its main purpose is to enhance profits for its members. Id. All of these factors weighed against the PGA being treated as a private club.
242. Id.
243. Id. at 1327.
244. Id. at 1327 (citing Independent Living Resources, 982 F. Supp. at 758-59).
recognize that “people other than its own Tour members are indeed allowed within the boundary lines of play,” like caddies, and so its argument could not win. As the court asked, “[i]f this were the law, how could such be reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodation?” Therefore, the PGA’s motion was denied.

2. The Case

The case finally went to court in February of 1998. Before moving to the substantive claims of the case in its opinion, the court discussed the many sports related cases that have been discussed briefly below. Relying on these cases, the PGA had argued that the court should focus on whether the rule (here the “no-cart” rule) is “substantive”—i.e., a rule which defines who is eligible to compete or a rule which governs how the game is played. Therefore, according to the PGA, if a rule is “substantive,” it “cannot be modified without working a fundamental alteration of the competition, and the ADA consequently does not require any modification to such a rule to accommodate the disabled.”

The court responded by noting that the cases mentioned actually looked to the purpose for the rule to determine the reasonableness of the modification. For instance, in Sandison and McPherson the age requirements were “closely fitted with the purpose of high school athletics—to allow students of the same age group to compete against each other,” and eliminating these rules would have “clearly change[d] the fundamental nature of such competition.” Also, in Bowers, the “core course” requirements were academic requirements for participation, and waiving these requirements would “obviously alter the fundamental nature of the program,” especially when the NCAA allowed individual assessments and waivers. In tying together its discussion (and the cases discussed below), the court stated:

Although the PGA Tour is a professional sports organization and

246. Id.
247. Id. The issue as to whether the PGA was an employer as regulated under the ADA was deferred until trial. Id.
249. Id.
250. Id.
251. Id.
252. Id.
253. Id.

80
professional sports enjoys... a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. The ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. The disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life.254

In reaching the substantive claims, the magistrate court began by dismissing Martin’s Title I claim, stating “I reject... plaintiff’s claims that he is a PGA Tour employee and that the Nike Tour is a ‘course or examination’ under the Act.”255 As Martin was not an employee, Title I’s prohibition against discrimination aimed at disabled employees did not apply.

The court then noted that Martin had met his burden in showing that he was disabled, something the PGA did not contradict.256 The court next moved to a discussion of whether the requested use of a cart was a reasonable modification as required under the ADA. In assessing this reasonableness, the court noted that the Rules of Golf do not require walking, and the PGA Tour itself allows cart use in both the Senior Tour and the Qualifying Tournament.257 Furthermore, the court noted that the NCAA and the Pacific 10 Conference both permit the use of carts.258 All of this was compelling evidence of the reasonableness of the modification.

In answer to this, the PGA argued initially that the analysis should not focus on an individualized assessment of Casey Martin and the cart as a modification for him; instead it should focus on a change in the rule as fundamentally altering the sport.259 The court pointed out that in light of decisions in the Fifth and Ninth Circuits,260 the PGA Tour’s argument was wrong, and the actual issue in the case was “whether allowing plaintiff, given his individualized circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.”261

In analyzing whether the use of a cart would fundamentally alter the game of golf, the court began by analyzing the Rules themselves. As the court stated,
“[n]othing in the rules of golf requires or defines walking as part of the game.” Moreover, before Martin had requested the use of a cart, he had tried many other ways including artificial aids in order to allow him to walk a golf course, but every attempt proved futile. In the end “Casey Martin cannot walk the course, and only a cart will permit him to compete on the Nike Tour.”

Commentators and other golfers had also argued that allowing Martin to use a cart would be unfair due to the fatigue factor involved in walking during a round of golf. However, as the court explained, “the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances.” Most of the evidence showed that the actual fatigue in golf was from dehydration and heat exhaustion and not from walking itself. Furthermore, most other able-bodied golfers preferred walking for psychological reasons even when given the choice of using a cart. If a cart gave Martin such an advantage, why is it the case that all golfers did not use a cart when it was made available to them?

And, in fact, Martin still must walk from his cart to his shots and back again. The fatigue and pain he feels due to his disability is “undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot... [t]o perceive that the cart puts him... at a competitive advantage is a gross distortion of reality.”

Therefore, the PGA Tour’s arguments lost because “it does not fundamentally alter the nature of the PGA Tour’s game to accommodate [Martin] with a cart... [and t]he requested accommodation of a cart is eminently reasonable in light of Casey Martin’s disability.”

3. The Aftermath

The PGA immediately began an appeal of this decision. By April 1998,
reports surfaced that the PGA and Martin were unable to reach a settlement of the case as mandated by the Ninth Circuit.\textsuperscript{272}

In the midst of these negotiations, Martin and the PGA, however, did reach what have come to be known as the "Approved Casey Martin Cart Rules."\textsuperscript{273} Under this eleven-point agreement, Martin agreed that the cart he used would not be operated at a speed faster than as if he and his caddie were walking, that no advertising would be allowed on the cart, and that the cart would be of standard design powered by an electric motor.\textsuperscript{274}

By May of 1998, the USGA decided that the cart Martin would be required to ride would be a one-seat single-rider model which would cause less damage to turf and rough on the golf course.\textsuperscript{275} Soon after Martin was given the single-seater cart, he encountered problems when the cart broke down during a tournament in San Francisco,\textsuperscript{276} and the brakes froze during practice rounds at the U.S. Open.\textsuperscript{277} As a result of these continued problems, the USGA decided to allow Martin to use a normal two seat golf cart although the USGA cited safety reasons as their main concern.\textsuperscript{278}

4. The Appeal

As the appeal process began to take shape, the Justice Department filed a friend-of-the-court brief supporting Martin.\textsuperscript{279} The Department's brief noted that the official rule book of golf states that "[t]he Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules," and, therefore, as the district court found, "[allowing Martin to use a cart] does not fundamentally alter the competition, so it should be allowed to ensure access for the disabled."\textsuperscript{280}

Another Martin supporter is the Klippel-Trenaunay Syndrome ("KTS")
Support Group, which filed a brief as *amicus curiae* in support of Martin. As the KTS Brief argued, "[the ADA was not intended solely to increase access for persons with disabilities to attend places of public accommodation as spectators; it also speaks to participation in public accommodations by persons with disabilities."

This is important because the PGA has consistently argued that it does accommodate the disabled in the public areas of a course (those who attend), but it argues that the ADA should not apply on the playing area (where one could participate). The KTS Brief ends by stating that "Casey Martin's use of a golf cart in PGA events simply does not cause any fundamental alteration of the game."

As the appeal has not yet been heard, the Ninth Circuit's opinion on this issue still remains to be seen.

**C. Ford Olinger**

A few months after the initial *Martin* decision, another disabled golfer sued to be able to use a golf cart in a competition. On May 14, 1998, Ford Olinger, a golfer with bilateral avascular necrosis, which limits his ability to walk, filed a complaint against the USGA due to its failure to allow him to use a cart during qualifying stages of the USGA Open Championship in Indiana.

Olinger is a professional golfer who registered for the Local Qualifying rounds for the U.S. Open in April of 1998. At the same time, he also sent a request to the USGA to be allowed to use a cart in the qualifying stages as an

---

281. The Klippel-Trenaunay Syndrome Support Group is a private, non-profit association with its mission to provide support to Klippel-Trenaunay Syndrome patients and their families. Brief of The Klippel-Trenaunay Syndrome Support Group, as *Amicus Curiae* in Support of Appellee, Aug. 17, 1998 [hereinafter KTS Brief].
282. Id. at 3.
283. The KTS Brief also pointed out that other leagues have been more accommodating to the disabled. MLB allowed Jim Abbot (who was born without a right hand) to spin the ball in his hand before pitching, which is contrary to the rules of baseball. Id. at 11. Both baseball and the NFL have made accommodations for deaf players. Id. at 12. And, even the NFL allowed Tom Dempsey, who had a disabled foot, to wear special shoes as he kicked his record longest field goal. Id.

The KTS Brief also points out the NCAA cases already discussed for the proposition that the NCAA has been found to be an operator of a place of public accommodation under Title III of the ADA. Id. at 12 (citing *Tatum*, 992 F. Supp. at 1121; *Ganden*, 1996 U.S. Dist LEXIS 17368, at *25-34; *Bowers*, 1998 WL 300552, at *27-28).
284. Id. at 20.
accommodation for his disability. After his request was denied, Olinger filed a motion against the USGA in order to force the USGA to allow him to use a cart during qualifying.

Although the arguments on both sides of this case are very similar to that in the Casey Martin case, it is interesting to analyze them as they demonstrate how sports organizations, even after the cases discussed herein, are still loath to admit that the ADA does apply in the sports context.

Olinger argued that the USGA, as was the PGA Tour in Martin, is subject to regulation under Title III of the ADA. Due to his disability, Olinger argued that he would be at:

an especially pronounced competitive disadvantage in that [he] will not be able to judge distances, assess the size or extent of hazards, determine whether current ground conditions are favorable or not or evaluate the contour of the course, all of which are part of establishing the rhythm of the game required for competitive level of play, as well as the able-bodied participants who get to walk the course.

As Olinger noted, his harm from not being allowed to use a cart would equate to a denial of his participation in the event -- a serious and irreparable harm.

In opposition to Olinger’s arguments, the USGA argued in much the same way as the PGA Tour had, while recognizing that the PGA had lost in the Martin case. The USGA noted correctly that it was never a party to the Martin case and so its ruling did not apply to the USGA; however, the USGA may have underestimated the breadth of the arguments in the Martin case itself.

Although much of the USGA’s argument is repetitious in light of the Martin case, a few of the ways in which it tried to avoid liability under the ADA are interesting. Initially, the USGA argued that the “places of public accommodation” language in the ADA actually refers to “places which are open to the public at large, with no restrictions on access other than payment of a specified fee for admission or services.” This argument seems to mirror the
PGA’s argument attempting to create zones of access on a golf course where the
ADA does not apply. The USGA goes on to argue that “[w]hat makes the
U.S. Open Championship non-public is the presence of criteria which by their
very nature exclude all but a minuscule portion of the general public.” This
also mirrors the PGA’s argument with regard to its membership which was
dismissed at the motion stage by the district court in Oregon.

Ignoring the Martin case’s reasoning regarding fatigue and the essential
nature of golf, the USGA also repeated the argument that walking is a part of
the game of golf because “(i) [t]he use of the legs is a basic element in the proper
execution of a golf shot,” “(ii) [t]here is a specific leg fatigue factor that is
affected by walking,” “(iii) [t]here also is a more general fatigue factor that is
affected by walking,” and so in the end “[i]f you walk, you are more tired; if
you ride you are less tired.”

In possibly the weakest of its arguments, the USGA argued that “[i]f a rule is
changed for only one competitor, an essential aspect of the competition - - i.e.,
uniform rules for all - - has been lost... any accommodation in athletics
inevitably would produce some competitive advantage for a competitor.”

Perhaps not surprisingly, Olinger won his motion and was allowed to use a cart
in the competition. Unfortunately for Olinger, even with the use of a cart, he
did not qualify for the U.S. Open. As of the date of this writing, no further
decision had been rendered in this case. A more sensitive look at the sports cases
referred to below shows that accommodating the disabled, possibly by modifying
some rules can be exactly what the ADA calls for.

IV. COMMON GROUND: THE ADA’S IMPACT ON THE
SPORTS WORLD

After the Casey Martin case, national news broadcasts, papers, and
magazines have speculated that the sports world will never be the same because

292. See supra p. 41.
293. USGA’s Memorandum of Law, supra note 290, at 10.
294. See supra pp. 41-42.
295. USGA’s Memorandum of Law, supra note 290, at 20.
296. Id.
297. Id. at 21.
298. Id.
299. Id. at 23 (emphasis added).
300. Ford Olinger v. United States Golf Ass’n, Order, Case No. 3:98CV252RM, 3 (N.D. Ind., May
sporting organizations are not free to set their own rules of participation. Pictures have been painted of wheelchair bound athletes rounding first base or wheeling to the end zone.

This is most assuredly not the case. A careful reading of the cases discussed in this article shows that the Casey Martin case turned on factors delineated in the other sports cases and mandated by the ADA. Out of the Martin case and the other cases discussed, several conclusions can be made.

A. Levels of Sport

The PGA Tour seemed to argue that because it regulated the elite, professional level of golf, the cases dealing with lower levels of sport (interscholastic, intercollegiate and amateur) did not apply to it, and, somehow, the ADA should not apply to a membership organization at this high level. The PGA even argued that other professional leagues (i.e. the NFL and NBA) had been found not subject to the ADA, and so it also should be exempted from the ADA’s requirements.

Several clarifications show that the PGA’s argument here is misguided. Initially, the Stoutenborough and Cortez cases did not determine that the leagues themselves were always exempt from the requirements of the ADA. What was determined is that the NFL’s television broadcasts were not services of the public accommodation as regulated by the ADA and that the NBA did not own or operate the Alamodome as required under the ADA. Any further conclusion, then, that the leagues are always exempt from the ADA’s requirements is not warranted.

In reality, the PGA Tour may be lucky that the court did not determine that it was an employer of Casey Martin, because as an employer it, and any other professional sports organization, could face clear liability under Title I.

In the end, all sports organizations should pay heed to the Martin court when it says that “the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation.”302 The ADA deals with organizations that come under its requirements and discriminate against the disabled. As is obvious from this article, sports organizations receive no special protection from the strictures of the ADA.

B. Eligibility Rules vs. Rules of Play

The main distinction between sports cases and non-sports cases has to do

with the type of rule that is impacted in the particular situation. In all of the high school and college cases, the rules contested were eligibility rules for actual admittance to the particular sport or sporting organization. Such rules, if justified by proper health and safety or other reasons, were usually upheld as essential and fundamental to the nature of the athletic program. Therefore, they could only be modified "reasonably." And, clearly, a modification that would entirely defeat the rule would not be "reasonable."

The NCAA probably found itself in trouble because it already had procedures in place which allowed for exemptions from its eligibility rules. Moreover, even though the reasons for these rules are viable and reasonable, even though the rules might be essential to the NCAA's regulation of college athletics, and even though they denied eligibility to certain persons based on independent criteria that did not take into account the unique status of the disabled, these regulations could be modified. The eligibility rules themselves were not invalid, but they could simply be reasonably modified.

The rules contested in the Casey Martin and Ford Olinger cases did not deal with eligibility, even though the golf organizations attempted to frame them this way. Of particular importance is the fact that nowhere in the Rules of Golf was it written that a participant must walk. The rule against cart use seems more geared to the actual playing of golf once one has met the other requirements of eligibility. In these cases, however, two individuals alleged that they were not even allowed to reach eligibility for play at first because their disabled status was not accommodated. And as most golfers and the majority of golf courses themselves allow for the use of a cart, allowing its use in these situations does not seem "unreasonable."

The PGA and USGA are also incorrect in interpreting these decisions to mean that they do not have the power to set eligibility rules and to regulate the way in which golf is played within their organizations. If an eligibility rule (which is written down) is enforced for legitimate reasons (as in the high school cases), modifications of which would fundamentally alter the game, the rule should be allowed. What is not allowed is nonessential rules or traditions which bar a disabled individual from participating in golf if he or she meets the other criteria as established by the organization.

Clearly, if either disabled golfer wanted to use the cart while shooting, the game of golf would probably be changed significantly and fundamentally enough that this modification would be unreasonable. The ADA does not force such odd results; it merely forces organizations to accommodate the disabled in a reasonable manner.
C. Participation vs. Attendance

Fundamental to all of this analysis is the realization made in the KTS Brief that “[t]he ADA was not intended solely to increase access for persons with disabilities to attend places of public accommodation as spectators; it also speaks to participation in public accommodations by persons with disabilities.”

Both professional golf tours seem to have rested their arguments on the fact that the public did attain access to the golf courses (the public accommodation itself), even though the alleged “no-cart” rule they wanted enforced would not allow certain disabled individuals to participate.

As the KTS Brief points out, the ADA is not merely a device for allowing the disabled to enter the door and attain limited access to public facilities. The ADA sets up specific methods by which the disabled are allowed to participate in athletics (and in other areas) as long as their participation does not require more than a “reasonable modification” to the “public accommodation,” i.e. does not require a fundamental alteration in the nature of the accommodation itself. Thus, by focusing on the point of access, the tours, as other sporting organizations discussed, miss the point of the ADA in the first place.

D. Reasonableness

It should be clear by now then that the failing in many of the arguments by these sporting organizations in supporting their rules is in not understanding that the core issue under the ADA is “reasonableness.”

As mentioned by many of the courts, “[n]either the ADA nor... [the Rehabilitation] Act mandates that an eligibility rule be eliminated as an accommodation upon the assertion of disability on the part of an aspiring player.” Furthermore, “the ADA ‘does not require [the sporting organization] to simply abandon its eligibility requirements, but only to make reasonable modifications to them.’” A modification is then unreasonable, “if it imposes an ‘undue financial and administrative burden’ or requires a ‘fundamental alteration’ in the nature of the privilege or program.”

This is the same for alleged rules of play as in the Martin and Olinger cases. The courts did not merely force the PGA and USGA to abandon the “no-cart” rules because the plaintiffs were disabled or because the golf organizations were found to be amenable to the ADA; the courts actually forced the PGA and

303. KTS Brief, supra note 280, at 3.
304. Sikorski, supra note 37, at 7.
USGA to abandon the rules with respect to these individuals because the use of a cart was a “reasonable” modification in the particular situation.

If the PGA and USGA had not spent so much time dealing with the issue of fairness and a level playing field, never admitting that these individuals could not be on a level playing field as a result of the physical limitations caused by their disabilities, they could have focused more on the “reasonableness” of the accommodation and possibly attained a different result.

E. Custom & Practice

In dealing with cases in the sports context that actually concern rules of play, and not merely eligibility rules, potential defendants can also look for help in precedent dealing with sports torts.

In some sports tort cases, harmful actions outside of the rules of sport are nevertheless protected if it can be proven that the conduct was part of the natural “custom and practice” of playing the sport itself. Courts have given deference to litigants who have demonstrated that beyond the written rules there are rules of play that are just as powerful and just as essential and meaningful to the sport.

In their arguments, neither the PGA Tour nor the USGA could present actual rules (written or otherwise) that demonstrated that walking was a defined part of the game of golf. It is possible, however, that for the game of golf, walking is such an essential custom and practice that the PGA and USGA could have provided sufficient evidence of this tradition to convince their respective courts that allowing the use of a cart would cause a serious change in the fundamental nature of golf.

This argument would not support removing either organization from amenability under the ADA; instead, it would help support their arguments that the modifications sought by Martin and Olinger were unreasonable.

V. CONCLUSION

Does the ADA Change the Rules of Sport? There is no blanket answer to this question. The ADA usually will not modify eligibility rules which are legitimate and essential modification of which would fundamentally alter the nature of the sport. On the other hand, the ADA can alter the actual rules of play

of a sport, if the modification itself is found to be reasonable.

It is hard to imagine a sport other than golf, however, where a result similar to that of the Martin and Olinger cases would be appropriate. Many have concluded that the ultimate result of the ADA in sports will be to so change the way games are played that the sport itself will become unrecognizable. This is not the case.

The ADA merely acts to fulfill its purpose, the integration of the disabled into all aspects of American life. This purpose is then tempered at every step with the realization that certain modifications to sports as to other areas can only be undertaken if they are "reasonable."

If the sports world is to continue as a "reflection" of society, it must continue to take the foreground in accommodating the disabled. This will not pervert sports, and it will not change the games we love. It will instead present a sports world where qualified, talented, dedicated, hard-working individuals can participate with other similarly-skilled athletes. In the end, one can only hope that this is the world that those in sports envision and will continue to strive for.