1999

The Americans with Disabilities Act and Its Application to High School, Collegiate and Professional Athletics

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I. Introduction

As the Professional Golfers Association Tour ("PGA") has recently found, the scope of the Americans with Disabilities Act ("ADA") is broad enough to alter one of the most traditional parts of the game of golf—walking eighteen holes.¹

On July 26, 1990, Congress reacted to segregation and discrimination against the 43,000,000 Americans with disabilities by enacting the ADA.² This landmark legislation was intended to protect mentally and physically disabled individuals from intentional discrimination and benign social neglect.³ Since its inception, this legislation has substantially affected most, if not all, professional teams, the National Collegiate Athletic Association ("NCAA"), and high school athletic associations. By declaring that "the NCAA operates..."
a place of public accommodation;"4 allowing a waiver of a high school athletic association's age-eligibility rule;5 or, most recently, by permitting injunction of the PGA Tour from enforcing its age old "no cart" rule in professional competitions;6 the ADA and the regulations implementing it have forced all private and public entities to reexamine the nature of their rules, procedures and traditions for possible violations of this law.7

This article provides an update on the current application of the ADA to high school, collegiate and professional sports. More specifically, it reviews the parameters of the ADA and outlines how an athlete can succeed on a claim under the ADA. This section includes recent case law addressing Title II and Title III claims in the sports context. In addition, this article analyzes Martin v. PGA Tour, Inc.,8 and explores possible ramifications that the ADA may have on high school, collegiate and professional athletics.

II. HISTORY OF THE AMERICANS WITH DISABILITIES ACT

The passage of the ADA in 1990 was not the first attempt by Congress to remedy historical discrimination against disabled individuals. Rather, in 1973, Congress passed the Rehabilitation Act.9 Although the Rehabilitation Act eradicated discrimination against disabled individuals by public entities that receive federal funding,10 it left the private sector largely, if not entirely, unregulated in the fight to abolish this discrimination.11

10. See id. (prohibiting discrimination based on qualified individual's disability under programs or activities receiving federal assistance).
Eventually, Congress recognized that new legislation was needed to further level the playing field for these 43,000,000 individuals who were still encountering various forms of discrimination in the private sector. Consequently, Congress enacted the ADA to build "upon the foundation laid by the Rehabilitation Act by both broadening the scope of the legislation and extending it to the private sector."  

### III. Bringing a Claim Under the ADA

To bring a claim under the ADA, an athlete must first demonstrate that he falls within the ADA's definition of "disabled." The ADA defines disability "as (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."

If a claimant demonstrates that he is "disabled," the next step is to determine under which title of the ADA the claim should be brought. One of the stated purposes of the ADA is to eliminate discrimination against disabled Americans in all areas of society. Accordingly, its drafters created separate titles to address and regulate discrimination in specific areas of society.

In the sports context, a disabled athlete can bring an ADA claim under three titles: (1) Title I, which provides relief for discrimination in the area of employment; (2) Title II, which provides relief for discrimination in public services; and (3) Title III, which provides relief for discrimination in public accommodations and services operated by private entities. The majority of ADA claims involving disabled athletes have been brought under Titles II and III. These two titles, while mutually exclusive, encompass

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15. See id.
nearly every public and private entity in the country.\textsuperscript{22} Accordingly, this article focuses only on these.

A. Sports-related Claims Under Title II of the ADA

Sports-related claims brought under Title II of the ADA generally involve athletic eligibility requirements imposed by high school or collegiate athletic associations.\textsuperscript{23} In a typical claim, an athlete who has been required to repeat one or more grades due to a disability, requests a waiver of the various eligibility requirements.\textsuperscript{24} These requirements usually prevent athletes from participating in interscholastic athletics when: (1) the athlete reaches his nineteenth birthday on or before September 1st of the current school year;\textsuperscript{25} (2) the athlete fails to meet the “eight-semester” rule;\textsuperscript{26} or (3) the athlete fails to maintain certain academic standards, including a minimum Grade Point Average and a base level of academic credits.\textsuperscript{27}

If the athletic association denies an athlete’s request for a waiver, the athlete typically files suit under either Title II or Title III of the ADA.\textsuperscript{28} The athlete then files a motion for a preliminary injunction seeking to force the athletic association or school officials to allow him to participate in athletics.\textsuperscript{29}

The primary issue in these lawsuits is whether the athlete is a “qualified individual with a disability.”\textsuperscript{30} If the athlete proves he is qualified and suffered discrimination because of his disability, the

\textsuperscript{22} See id.


\textsuperscript{24} See Julia V. Kasperski, Comment, Disabled High School Athletes and The Right to Participate: Are Age Waivers Reasonable Modifications Under The Rehabilitation Act and the Americans with Disabilities Act?, 49 BAYLOR L. REV. 175, 175-76 (1997) (discussing learning disabled student’s ADA claim).


\textsuperscript{26} See McPherson, 119 F.3d at 455 (holding that “eight-semester” rule prohibits student from participating in athletics if student has completed eight semesters of high school).


\textsuperscript{28} See Theuman, supra note 16, at 2a.

\textsuperscript{29} See Kasperski, supra note 24, at 176 (noting that disabled student sought temporary restraining order barring athletic association from prohibiting him from playing on team).

\textsuperscript{30} See Theuman, supra note 16, at 2.

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burden shifts to the athletic association to prove that: (1) the eligibility requirements are essential and neutral on their face and as applied; and (2) the only accommodation that would enable the athlete to participate in a sport requires a waiver of the eligibility requirements that would fundamentally alter the nature of the program.31

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."32 Thus, to establish a prima facie claim under Title II of the ADA, a plaintiff must prove that: (1) he was injured by a public entity; (2) he was a "qualified individual with a disability;" and (3) that he has been excluded from participating in or benefiting from the activities of the public entity.33

1. Public Entity

The plaintiff's first step in establishing a Title II claim is proving that he was injured by a "public entity."34 The ADA defines a "public entity" as any "department, agency . . . or other instrumentality of a State or States or local government."35

When determining whether an entity is "public" for purposes of the ADA, courts have focused on the amount of authority delegated to the entity from the state.36 Additionally, courts have considered whether athletic association members are public schools, whether members use public facilities, and whether an athletic association can sanction public schools for violations of its rules.37 Because athletic associations typically act as state actors or instrumentalities, courts consider them "public entities" subject to Title II of the ADA.38

31. See id.; see also Burroughs, supra note 11, at 89 (stating that student-athlete must show that discrimination is "by reason of disability").
33. See Johnson v. Fla. High Sch. Activities Ass'n, Inc., 899 F. Supp. 579, 582 (M.D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997) (setting forth elements plaintiff must prove to establish claim for discrimination under Title II of ADA).
37. See Rhodes, 939 F. Supp. at 591 (holding that OHSAA is public entity).
However, although state universities are also considered public entities under the ADA,49 the NCAA has been held to be a private entity, "despite its seemingly ‘public’ status,"40 and thus can only be sued under Title III of the ADA.41 Overall, the jurisprudence strongly supports the proposition that only high school athletic associations or state universities are public entities under Title II of the ADA.42

2. Qualified Individual With a Disability

The second step in proving a Title II claim is establishing that the individual is a "qualified individual with a disability."49 The ADA defines a "qualified individual with a disability" as one who meets the essential eligibility requirement of a service or program with or without reasonable modifications to rules, policies or practices.44 In other words, a disabled individual is "‘otherwise qualified’ if reasonable accommodations would enable him to meet [the essential requirements of the program]."45

As discussed earlier, if an individual fails to meet the necessary or essential requirements of the program or service, it must be determined whether a reasonable accommodation or modification would enable him to become otherwise qualified.46 An unreasonable accommodation or modification is one that imposes undue financial or administrative burdens or fundamentally alters the nature of the privilege or program.47

Milan Area Sch. 853 F. Supp. 243, 251 (E.D. Mich. 1994) (stating that court was unable to determine whether high school athletic associations are public entities).

39. See Petersen v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (holding that University of Wisconsin is public entity within meaning of ADA).

40. See Miller, supra note 13, at 473.

41. See Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 191-97 (1998) (holding that NCAA’s actions were not “state actions” performed “under color of” state law, and therefore, NCAA was not state actor).

42. Because courts have addressed professional sports leagues under Title III, it is unlikely that they would be considered “public entities” under Title II.


44. See 42 U.S.C. § 12131(2).

45. Pottgen v. Miss. State High Sch. Activities Ass’n, 40 F.3d 926, 929 (8th Cir. 1994).

46. See Johnson v. Fla. High Sch. Activities Ass’n, Inc., 899 F. Supp. 579, 584 (M.D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997); see also Alexander v. Choate, 469 U.S. 287, 301 (1985) (stating that otherwise qualified handicapped individual must be provided with meaningful access to benefit that grantee’s program offers). But see Pottgen, 40 F.3d at 930.

47. See id. (stating that reasonable accommodation does not require institution to make substantial modifications to its standards); see also Dennin v. Conn. Interscholastic Athletic Conference, Inc., 94 F.3d 96, 96 (2d Cir. 1996) (stating
While courts adjudicating sports-related claims have consistently applied the “qualified individual with a disability” requirement, their interpretations lack uniformity and vary depending on the facts of each case. The most common disagreement among the courts involves when a waiver of an age-eligibility requirement fundamentally alters or imposes undue burdens on the program.48

a. Courts Holding Waivers to be Unreasonable Accommodations

Some courts have held that the waiver of an age-eligibility requirement does not constitute a reasonable accommodation under Title II of the ADA. For example, in Sandison v. Michigan High School Athletic Association, Inc.,49 the Sixth Circuit upheld the Michigan High School Athletic Association’s age-eligibility rule under Title II of the ADA.50 The court determined that the waiver of the age restriction would fundamentally alter the sports program because it would place older students, who are generally larger, heavier and more experienced, into the competitive field.51 In addition, waiving the age-eligibility rule would cause an undue burden by forcing high school coaches or physicians to make a competitive unfairness determination regarding an athlete.52 Therefore, the court held that the waiver of the age requirement would be an unreasonable accommodation, and accordingly, the plaintiffs were not “qualified individuals” under Title II of the ADA.53

Similarly, in Pottgen v. Missouri State High School Activities Associations,54 the Eighth Circuit held that the waiver of an essential age-eligibility standard constituted a “fundamental alteration in the nature of the baseball program.”55 The court reasoned that the age requirement was essential to prevent competitive advantage, protect younger players from harm, discourage players from delaying

that waiver of requirement cannot fundamentally alter program or impose undue burden).

48. See Johnson, 899 F. Supp. at 584 (discussing split of authority on this issue).
49. 64 F.3d 1026 (6th Cir. 1995).
50. See id. at 1036-37 (holding that students would not meet age eligibility rule regardless of learning disability).
51. See id. at 1035 (discussing age requirement that prevents athletes from participating in interscholastic sports if they turn nineteen before September 1st of current school year).
52. See id. (finding that age requirements generally protect younger players against injury and prevent unfair competitive advantages through use of older players).
53. See id.
54. 40 F.3d 926 (8th Cir. 1994).
55. Id. at 930.
their education and prevent red-shirting.\textsuperscript{56} Additionally, the court held that “an individualized inquiry into the necessity of the age [requirement]...[regarding the athlete was] inappropriate.”\textsuperscript{57} Because no reasonable accommodation could be made, the athlete was not “otherwise qualified” under Title II of the ADA.\textsuperscript{58}

In \textit{Reaves v. Mills},\textsuperscript{59} the court denied an athlete’s request for a temporary restraining order, finding that the athlete was unlikely to succeed on his ADA claim.\textsuperscript{60} In doing so, the court implicitly ruled that a waiver of the age-eligibility rule for a learning disabled athlete was not a reasonable accommodation under the ADA.\textsuperscript{61} Accordingly, the court denied the requested relief because the athlete failed to meet the basic age requirement.\textsuperscript{62}

Most recently, in \textit{McPherson v. Michigan High School Athletic Association, Inc.},\textsuperscript{63} the Sixth Circuit reaffirmed its position that waiver of the “eight-semester rule” was not a reasonable accommodation because it threatened one of the fundamental purposes of the rule – the avoidance of “red-shirting.”\textsuperscript{64} The court reasoned that the waiver would fundamentally alter the basketball program and would impose an immense financial and administrative burden on the athletic association.\textsuperscript{65} Further, the court warned that allowing the waiver in this case “would have the potential of opening floodgates for waivers” for all learning disabled students who remain at the school for longer than eight semesters.\textsuperscript{66} Accordingly, the court held that the athlete failed to establish a successful claim under Title II of the ADA.\textsuperscript{67}

\textsuperscript{56} See id. at 929 (stating that purposes are very important to any high school athletic program).
\textsuperscript{57} Id. at 930.
\textsuperscript{58} See id. at 931 (holding that age limit is essential eligibility requirement and modification was not reasonable).
\textsuperscript{59} 904 F. Supp. 120 (W.D.N.Y. 1995).
\textsuperscript{60} See id. at 123 (holding that age requirement did not violate ADA).
\textsuperscript{62} See \textit{Reaves}, 904 F. Supp. at 123 (holding that plaintiffs would not be granted injunctive relief).
\textsuperscript{63} 119 F.3d 453 (6th Cir. 1997).
\textsuperscript{64} See \textit{id}. at 462-63 (holding that requiring waivers would place immense burden on Michigan High School Athletic Association (“MHSAA”)).
\textsuperscript{65} See \textit{id}. (stating that administrative burden would be too great if MHSAA had to distinguish between legitimate claims and claims based on trying to gain unfair advantage).
\textsuperscript{66} See \textit{id}.
\textsuperscript{67} See \textit{id}. at 463 (ultimately holding that athlete’s ADA claim failed).
b. Courts Holding Waivers to be Reasonable Accommodations

Other courts have held that waiving the age-eligibility requirement is a reasonable accommodation under Title II of the ADA. In Johnson v. Florida High School Activities Association, the court held that waiving the age-eligibility requirement did not fundamentally alter the nature or purpose of the program. The court reasoned that allowing the athlete to participate in interscholastic athletics did not undermine the purposes of the age requirement. The court specifically noted that because the athlete was not the largest player on the field, his participation would not increase the potential for injury. Furthermore, the athlete was not a star athlete, nor was he more experienced than the other players. Because safety and fairness would not be compromised, the court concluded that waiving the age requirement constituted a "reasonable accommodation."

Likewise, in Dennin v. Connecticut Interscholastic Athletic Conference, Inc., the court held that waiving the age requirement would not undermine any of the purposes of the association’s rules. The court reasoned that the athlete posed no safety threat to himself or others, and that he lacked any competitive advantage because he consistently finished last in his swim meets. Additionally, the court reasoned that the waiver would not impose an undue burden on the athletic association because it could pass any costs onto the schools through fees. Because granting a waiver to an athlete

68. 899 F. Supp. 579, 586 (M.D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997).
69. See id. at 586 (holding that waiver of age requirement was reasonable accommodation).
70. See id. at 584-85 (stating that purposes of promoting safety and maintaining level playing field would not be undermined if waiver granted).
71. See id. at 585 (stating that athlete was not largest player on team playing his position).
72. See Johnson, 899 F. Supp. at 585 (stating athlete was actually less experienced, with only three years of organized football).
73. Id. at 584-85. The court also distinguished Pottgen by stating that the Pottgen court failed to provide any analysis as to the relationship between the age requirement and the purposes behind the age requirement. See id.
74. 913 F. Supp. 663, 668-69 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996).
75. See id. at 668-69 (holding that granting waiver would not alter nature of swimming program).
76. See id. at 669 (holding that athlete did not pose safety risk because swimming is not contact sport and his education was not delayed to gain competitive advantage).
77. See id. (noting that association routinely uses subjective case-by-case analysis in considering waivers from transfer students, thus doing this for disabled students would not be unduly burdensome).
would not alter the nature of the swimming program, the court deemed the athlete to be a qualified individual with a disability under Title II of the ADA.\(^7^8\)

In *University Interscholastic League v. Buchanan*,\(^7^9\) the court agreed with the *Dennin* court's reasoning that it was in the public interest to allow all students to play football.\(^8^0\) Similarly, the court in *Booth v. University Interscholastic League*\(^8^1\) held that a waiver of the age-eligibility requirement was a reasonable accommodation under the Rehabilitation Act.\(^8^2\) Noting that the waiver would subject the league to an increase in administrative costs, the court held that, absent a showing that the disabled athlete's participation would cause harm to the league or risk injury to other persons, the athlete should be allowed to participate.\(^8^3\)

Most recently, in *Bingham v. Oregon School Activities Ass'n*,\(^8^4\) the court concluded that a waiver of the eight semester rule was a reasonable modification to accommodate a student-athlete's learning disability.\(^8^5\) The court disagreed with the defendant's assertion that the waiver would impose an immense and undue burden on the activities association because it already considered a student's disability when granting waivers of its age and grade rules of eligibility.\(^8^6\)

Furthermore, the *Bingham* court dismissed the *McPherson* court's concern, that high school students may manipulate a learning disability claim for red-shirting purposes, as "flimsy."\(^8^7\) Because the student did not have a competitive advantage over other students, had not red-shirted, did not run afoul of the age-rule, and greatly benefited from participating in sports, the court found that allowing the student to play sports would not fundamentally alter the nature of high school athletics.\(^8^8\)

78. See id. at 668 (holding that athlete is "otherwise qualified" individual if he can meet requirements of program with reasonable accommodations).
79. 848 S.W.2d 298, 302-03 (Tex. App. 1993).
80. See id. (affirming district court's ruling allowing students to play football).
82. See id. at *4 (holding that giving special consideration to plaintiff based on disability is reasonable accommodation).
83. See id. (stating that Rehabilitation Act requires federally assisted programs to do more for disabled individuals under Act).
84. 87 F. Supp. 2d 1189 (D. Or. 1999).
85. See id. at 1205.
86. See id. at 1203.
87. Id. at 1205.
88. See id.
Due to the lack of uniformity between the courts regarding whether a waiver of the age-eligibility requirement constitutes a fundamental alteration to an athletic program, the athlete's fate currently depends on the jurisdiction in which suit is filed.

B. Sports-related Claims Brought Under Title III

Like Title II claims, sports-related Title III claims generally involve athletic eligibility requirements. As a result, the same analysis used to determine whether the plaintiff is a qualified individual with a disability. Unlike Title II, however, Title III affects private entities that own, lease or operate places of public accommodation. If the court determines that the defendant operates a place of public accommodation and that the defendant denied the plaintiff services or accommodations on the basis of the plaintiff's disability, the burden shifts to the defendant to establish that it could not make reasonable modifications without fundamentally altering the nature of the public accommodation.

1. Place of Public Accommodation, Generally

The ADA does not explicitly define a "place of public accommodation," but it does list twelve categories of private entities that it considers "public accommodations." In addition, these categories are limited to "places" of public accommodation. The regulations provide assistance by defining a "place of public accommodation"

92. See Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 669 (D. Conn.), vacated as moot, 94 F.3d 96 (2d Cir. 1996) (discussing differing analysis of courts and concluding individualized analysis is most appropriate); see also 42 U.S.C. § 12182(a), (b)(2)(A)(i) (stating general rule prohibiting discrimination in public accommodations and specifically noting failure to make reasonable modifications alleviating discrimination violates statute).
93. See 42 U.S.C. § 12181(7) (describing fifty examples of physical structures and facilities).
94. See Stroutenborough v. Nat'l Football League, 59 F.3d 580, 582 (6th Cir. 1995). In this case, hearing impaired plaintiffs sued the National Football League ("NFL") and various television stations, alleging that the NFL's "Blackout Rule" violated Title III of the ADA by discriminating against them in a disproportionate way. The plaintiffs argued that they had no other access to the games via the telecommunications technology.
as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve categories." Thus, the statutes, case law, and regulations taken together establish that a "place of public accommodation" must affect commerce and be operated by a private entity.

The courts have had numerous opportunities to review this issue in sports related claims. Specifically, courts have adjudicated ADA Title III claims involving membership organizations, including the National Football League ("NFL"), hockey organizations, bicycling organizations and the PGA tour. The NCAA, however, is the most frequently sued membership organization in Title III claims.

The court rejected the plaintiffs' claim because none of the defendants fell within any of the twelve "public accommodation" categories set forth in the ADA. Additionally, the court noted that although a game is played and can be viewed in a place of public accommodation, the television broadcast of a game does not involve a "place of public accommodation."

95. See 28 C.F.R. § 36.104 (1998). Facility is defined as "any portion of buildings, structures, sites, complexes, equipment . . . or other real or personal property." Id.

96. See Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 584, 591 (N.D. Ohio 1996) (noting statutory definitions of this act "have been [collectively interpreted] to mean that a place of public accommodation must be operated by a private entity"); Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1036 (6th Cir. 1995).

In Sandison, two high school students sued their respective high schools and the Michigan High School Athletic Association alleging that the association's age-eligibility requirement prevented them from equally participating in track events held on public school grounds, thereby violating Titles II and III of the ADA. See Sandison, 64 F.3d at 1036. In finding that Title III did not apply to the Michigan Athletic Association, the court noted that public school grounds, and presumably public parks, are operated by public rather than private entities. Thus, the defendants did not fall within the definition of "a place of public accommodation," which requires operation by a private entity. See id.

97. See Stroutenborough, 59 F.3d at 583 (finding that NFL, national, and local television networks do not fall under the definition of places of accommodation); Martin II, 994 F. Supp. 1242 (D. Or. 1998) (considering ADA suit alleging discrimination of disabled golfer participating on PGA Tour); Martin I, 984 F. Supp. 1320 (D. Or. 1998) (considering applicability of ADA to PGA Tour); Brown v. 1995 Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496, 499 (N.D. Ill. 1997) (holding that bicycle association was not analogous to place of public accommodation because tour took place on public roads that were not owned, leased or operated by private entity); Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (holding that membership organizations usually do not meet standard for places of public accommodations unless they are affiliated with "place open to the public" and membership is a "necessary predicate to [make] use of the facility") (quoting Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1995)).

In Clegg, a non-athletic and non-ADA case, an African-American member of the Church of Scientology argued that a national nonprofit organization discriminated against him in violation of Title II of the Civil Rights Act by failing to admit him as a member in the organization. The court rejected the plaintiff's claim, and noted that nothing in the record indicated that the defendant organization was closely connected to a place or facility that was open to the public or that its membership was a necessary predicate to use of the any specific facility. See Clegg at 755.
2. *The NCAA*

The NCAA requires that its member institutions "establish minimum academic eligibility standards for all prospective students" so that they can attain "qualifier" status through certification by the NCAA Initial Eligibility Clearinghouse. A student can attain "qualifier" status for Division I competition if he or she: (1) graduated from high school; (2) passed at least thirteen "core courses;" and (3) attained a minimum grade point average in those "core courses." The grade point average requirement is determined by a sliding scale based on the strength of the student's standardized test scores.

Due to the NCAA requirements, learning disabled student-athletes face a variety of eligibility problems when they want to participate in college sports. For example, learning-disabled students frequently take special education courses in high school. As a result, they are often unable to complete the thirteen "core-course" requirement. Because the NCAA does not treat special education courses taken by learning disabled students as core courses, it is extremely difficult for these athletes to participate in intercollegiate athletics unless they are specially granted "qualifier" status. Other eligibility problems can arise if the student-athlete has taken

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99. Bowers, 974 F. Supp. at 461 (noting minimum grade-point-average varies based on strength of student's standardized test scores); Ganden, 1996 WL 680000, at *2 (discussing that minimum grade-point-average is dependent upon standardized college entrance examination scores).

100. See Burroughs, supra note 11, at 58 (discussing background facts on learning disabled students and their participation in high school sports).

101. See id. at 85-86 (discussing NCAA eligibility requirements and their impact on learning disabled students).

102. See Bowers, 974 F. Supp. at 461 (noting that although special education courses are not considered "core," by-laws allow such courses to be considered "core" if sufficient support is granted).

103. See id.

104. See id. at 461-62. There are two exceptions to this rule: (1) the special education courses are counted as core courses if the student's high school principal demonstrates that students in special education classes are expected to acquire the same knowledge as students in the core courses; or (2) if the NCAA waives the academic eligibility requirements based on objective evidence demonstrating circumstances in which a student's academic record warrants the waiver of the requirements. See id. at 462.
a nonstandard, untimed ACT, or once in college, failed to earn 75% of semester hours during the academic year rather than during the summer session.

Strict enforcement of these eligibility requirements has frequently resulted in lawsuits against the NCAA, in which the athlete seeks injunctive relief usually in the form a temporary restraining order allowing him or her to participate in intercollegiate athletics.

a. The NCAA is Considered a Private Entity

In National Collegiate Athletic Ass'n v. Tarkanian, the Supreme Court ruled that the NCAA is a private entity. The Court reasoned that the NCAA lacks governmental powers to facilitate investigations. Specifically, "[the NCAA] has no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individuals." Since this decision, courts have followed suit in recognizing that the NCAA is a private entity.

Even though the NCAA is a private entity, the courts will not subject it to Title III scrutiny unless it operates a "place of public accommodation." In order to constitute a "place of public accommodation," courts have held the organization's purpose must

106. See Matthews v. Nat'l Collegiate Athletic Ass'n, 79 F. Supp. 1199, 1199 (E.D. Wash. 1999). In this case, a learning disabled student-athlete sought a preliminary injunction against the NCAA after it rejected his application for a waiver of the 75/25 rule, which he alleged was a violation of Title III of the ADA. Although the court denied the plaintiff's request on the grounds that the ADA did not apply to the NCAA, it stated that the continued waiver of this requirement would completely dispense with its essential eligibility requirement.
108. See id. at 196 (noting that NCAA is private entity when it represents interest of its entire membership).
109. See id. at 197 (noting factors supporting contention that NCAA is not public actor).
110. Id. (naming specific factors supporting statement that NCAA is private actor in this case).
111. See Tatum v. Nat'l Collegiate Athletic Ass'n, 992 F. Supp. 1114, 1120-21 (E.D. Mo.). In this case, a learning disabled student-athlete sued the NCAA after it refused to recognize a nonstandard, untimed ACT score relating to his status as a "qualifier" under NCAA rules. In applying Title III of the ADA to the NCAA, the court noted that the NCAA was "properly viewed as a private entity." See also Bowers v. Nat'l Collegiate Athletic Ass'n, 974 F. Supp. 459, 461 (D. N.J. 1997) (noting that NCAA is private unincorporated association).
112. 42 U.S.C. §§ 12181 (7), 12182 (1994) (listing twelve categories of public accommodations and noting that entity must fall within one of those twelve categories to be subject to ADA).
be closely connected to a particular facility.\textsuperscript{113} A close connection can be found when the membership organization functions as a "ticket to admission to a facility or location;"\textsuperscript{114} when membership to the organization "is a necessary predicate to [make] use of the facility;"\textsuperscript{115} or when the organization is affiliated with a particular facility.\textsuperscript{116}

Few courts have directly addressed whether the NCAA is or operates a "place of public accommodation" under Title III of the ADA.\textsuperscript{117} While earlier decisions found that the NCAA operates a place of public accommodation, the most recent decision on this issue has taken a contrary view. Because of this, whether courts considering a disabled athlete's Title III lawsuit against the NCAA will have proper subject matter jurisdiction will depend upon the court in which suit is filed.

1. \textit{Courts Holding That the NCAA Operates a Place of Public Accommodation}

In \textit{Ganden v. National Collegiate Athletic Ass'n, Inc.},\textsuperscript{118} the court found that the NCAA operated a place of public accommodation because it had a close connection to a number of public accommodations – namely the athletic facilities of its member institutions.\textsuperscript{119} Likewise, in \textit{Tatum v. National Collegiate Athletic Ass'n},\textsuperscript{120} the court

\begin{itemize}
\item \textsuperscript{113} See Welsh v. Boy Scouts of Amer., 993 F.2d 1267, 1269 (7th Cir. 1993). Although this case involved an alleged violation of Title II of the Civil Rights Act of 1964, it provides instructive analysis relating to Title III claims.
\item \textsuperscript{114} \textit{Id.} at 1272 (citing United States Jaycees v. Mass. Comm'n Against Discrimination, 391 Mass. 594, 594 (1984)). This case involved Title II of the Civil Rights Act of 1964.
\item \textsuperscript{115} Elitt v. U.S.A. Hockey, 922 F. Supp. 217, 223 (E.D. Mo. 1996) (quoting Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)). Because the \textit{Clegg} decision involved a Title II claim under the Civil Rights Act, it was cited only for purpose of analogy.
\item \textsuperscript{116} \textit{See} Ganden v. Nat'l Collegiate Athletic Ass'n, No. 96 C 6953, 1996 WL 680000, at *11 n.8 (N.D. Ill. 1996) ("If the NCAA 'operates' the swimming facilities, then this is at least compelling evidence that it is 'closely connected' with those facilities.").
\item \textsuperscript{117} \textit{See} Tatum v. Nat'l Collegiate Athletic Ass'n., 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); \textit{Ganden}, 1996 WL 680000 at *11; Bowers v. Nat'l Collegiate Athletic Ass'n, 974 F. Supp. 459, 461 (D. N.J. 1997). In this case, a learning disabled student-athlete sued the NCAA under Title III of the ADA after it declined his request for a waiver of the NCAA's "core course" eligibility requirement. Although the court rejected the plaintiff's Title III claim because he failed to show a likelihood of success, the court did not determine whether the NCAA operated a place of public accommodation.
\item \textsuperscript{118} 1996 WL 680000, at *11.
\item \textsuperscript{119} \textit{See id.} at *10 (noting that plaintiff must prove that NCAA "operates" facilities within meaning of Title III).
\item \textsuperscript{120} 992 F. Supp. 1114 (E.D. Mo. 1998).
\end{itemize}
found that the NCAA operated a public place of accommodation due to the significant degree of control that it exerted over the athletic facilities of its member institutions.

The NCAA frequently cites to Stroutenborough v. National Football League,\textsuperscript{121} Elitt v. U.S.A. Hockey,\textsuperscript{122} Brown v. 1995 Tenet ParaAmerica Bicycle Challenge,\textsuperscript{123} and Welsh v. Boy Scouts of America\textsuperscript{124} for the proposition that membership organizations are not "places of public accommodations."\textsuperscript{125} Courts have consistently distinguished these cases on the ground that they deal with "membership organizations as organizations, [and] not as the operators of facilities that can be considered places of public accommodation."\textsuperscript{126}

2. Courts Holding That the NCAA Does Not Operate a Place of Public Accommodation

Recently, in Matthews v. National Collegiate Athletic Association,\textsuperscript{127} the district court for the Eastern District of Washington became the first court to hold that the ADA did not apply to the NCAA because the Association did not operate a place of public accommodation.\textsuperscript{128} In doing so, the court reasoned that mere sanctioning of events that occur in places of public accommodation does not constitute the actual operation of those public places for purposes of the ADA.\textsuperscript{129} Specifically, the court noted that the NCAA does not regulate the hours of operation, specify staffing requirements, maintain on-site or off-site employees, obtain revenue from operation, or determine who may enter their members' facilities.\textsuperscript{130} Because of this lack of control over the facilities used by its member institutions, the court held that the NCAA does not operate any of the places of public accommodation that its member institutions use.\textsuperscript{131}

\begin{itemize}
  \item 121. 59 F.3d 580 (6th Cir. 1995).
  \item 122. 922 F. Supp. 217 (E.D. Mo. 1996).
  \item 123. 959 F. Supp. 496 (N.D. Ill. 1997).
  \item 124. 993 F.2d 1267 (7th Cir. 1993).
  \item 125. See Tatum, 992 F. Supp. at 1119.
  \item 127. 79 F. Supp. 1199 (E.D. Wash. 1999).
  \item 128. See id. at 5.
  \item 129. See id.
  \item 130. See id.
  \item 131. See id.
\end{itemize}
b. Substantive Analysis of Title III Claims Against the NCAA

Even though the courts have recently split on whether the NCAA operates a "place of public accommodation," the NCAA has fared well regarding the merits of Title III claims. As stated above, once subject matter jurisdiction is established, the crux of the claim becomes whether a disabled plaintiff is otherwise qualified to participate in the program.\textsuperscript{132} A plaintiff is an "otherwise qualified" individual if, with reasonable accommodations, he can meet the necessary or essential requirements of the program.\textsuperscript{133}

\textit{Ganden, Bowers, and Matthews} are three illustrative cases in which the courts have addressed the substantive issues regarding the eligibility requirement imposed by the NCAA.\textsuperscript{134} The courts in \textit{Ganden} and \textit{Bowers} concluded that "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{135} The \textit{Ganden} court reasoned, and the \textit{Bower} court agreed, that the "core course" requirements serve important interests of the NCAA.\textsuperscript{136}

Applying the ADA's "reasonable accommodation" standard to the NCAA, moreover, the \textit{Matthews} court held that ordering any further accommodation would require the NCAA to dispense with essential eligibility criteria, which would exceed the accommodation required by the ADA.\textsuperscript{137}

\footnotesize
\begin{itemize}
\item \textsuperscript{132} See \textit{Ganden}, 1996 WL 680000, at *13 (discussing whether plaintiff qualifies as otherwise qualified individual given circumstances).
\item \textsuperscript{133} See \textit{Pottgen v. Miss. State High Sch. Activities Ass'n}, 40 F.3d 926, 929 (8th Cir. 1994) ("A Rehabilitation Act analysis requires the court to determine both whether an individual meets all of the essential eligibility requirements and whether reasonable modifications exist.") (emphasis in original).
\item \textsuperscript{135} \textit{Bowers}, 974 F. Supp. at 467 (agreeing with \textit{Ganden} decision that abandonment of "core course" requirement would fundamentally alter participation privilege).
\item \textsuperscript{136} See id. (concurring with \textit{Ganden} assertion that inclusion of "core course" requirements kept intact NCAA aims); \textit{Ganden}, 1996 WL 680000, at *14 (noting removal of requirement would substantively change nature of program). These interests are to "(1) insure that student-athletes are representative of the college community and recruited solely for athletics; (2) insure that a student-athlete is academically prepared to succeed at college; and (3) preserve amateurism in intercollegiate sports." \textit{Id}.
\item \textsuperscript{137} See \textit{Matthews}, 1999 WL 1256262, at *7. In this case, a learning disabled plaintiff had requested and been denied a waiver from the NCAA relating to the "75/25 rule", which requires all student athletes to earn 75% of the minimum number of semester hours during the winter session and no more that 25% in the summer session. The NCAA had previously given the plaintiff two waivers of this
\end{itemize}

Published by Villanova University Charles Widger School of Law Digital Repository, 1999
1. Martin v. PGA Tour, Inc.

In Martin v. PGA Tour, Inc. ("Martin I"),138 Casey Martin, a twenty-five-year-old golfer with Klippel-Trenaunay-Weber Syndrome, sought a preliminary injunction that would force the PGA to allow him to use a cart during the third round of a qualifying school tournament.139 The Martin I court granted the preliminary injunction and extended the injunction to include the first two tournaments on the Nike Tour.140

The PGA Tour filed a motion for summary judgment asserting that it is exempt from the ADA because it is a private nonprofit establishment.141 In the alternative, the PGA Tour claimed that the "PGA and the Nike Tour competitions do not constitute 'places of public accommodation,' and that the Nike Tour is not an examination or course."142 Martin filed a cross motion for partial summary judgment claiming that (1) the PGA is a private entity "which is or operates a place of public accommodation;" (2) the PGA is a "private entity that offers examinations or courses related to applications . . . for professional or trade purposes;" and (3) the PGA is an employer as defined in the ADA.143

The Martin I court ruled in favor of Martin, holding that the PGA was not exempt as a "private club" from the ADA and that the PGA operated a place of public accommodation.144 The court reasoned that the PGA, like all professional sports organizations, is a commercial enterprise in existence to generate money for its members.145 Furthermore, the PGA is "part of the entertainment indus-

rule but argued that the current rejection was based on his lack of improvement in academics.

139. See id. (describing disability of plaintiff). Klippel-Trenaunay-Weber Syndrome is a congenital deformity that curtails the flow of blood circulation in the plaintiff's right leg, which in turn, prevents the plaintiff from walking through eighteen holes of golf. See id. The PGA Tour rules permit the use of carts in the first two rounds of the Qualifying School Tournament as well as in the Senior PGA Tour. See Martin II, 994 F. Supp. 1242, 1248 n.9 (D. Or. 1998).
140. See Martin I, 984 F. Supp. at 1322 (stating prior procedural history, noting current issue is resolution of summary judgment motions).
141. See id. at 1323 (discussing PGA's claim that it qualified as organization exempt from ADA).
142. Id. (commenting on defendant's arguments).
143. See id. (noting plaintiff's three contentions).
144. See id. at 1326 (stating golf course directly qualifies as place of public accommodation).
try,” and offers athletic events to the general public.\textsuperscript{146} Therefore, without the public’s participation at the competitions, the PGA could not be profitable.\textsuperscript{147}

The court distinguished \textit{Welsh}, a case cited by the PGA, stating that the PGA’s membership purpose of generating money for its members was unlike the membership purpose of the Boy Scouts, which is to guide youths in the path of maturity.\textsuperscript{148} Because the membership purposes were sufficiently disparate, the court held that it was clear that the Boy Scouts was not what Congress intended to protect when it excluded private clubs from the ADA.\textsuperscript{149} The court then analyzed the variables commonly used by the courts in determining whether an organization is a private entity and concluded that the PGA was not a private club.\textsuperscript{150}

Next, the \textit{Martin I} court addressed the PGA’s argument that the courses it operates were “not open to the ‘general public’ between the boundaries of play during its tournaments, and thus the tournament events were not places of ‘public accommodations.’”\textsuperscript{151} The \textit{Martin I} court summarily rejected this argument, noting that the PGA conducts its tournaments at golf courses, which are specifically considered “places of public accommodation” under the ADA.\textsuperscript{152} Accordingly, an operator of a “public place of accommodation,” in this case the PGA operating golf courses, cannot create private enclaves within the facility of public accommodation.\textsuperscript{153} The \textit{Martin I} court concluded that the PGA was not exempt “as a private club” from ADA coverage because its tournaments were con-

\textsuperscript{146} \textit{See id.} (offering support for assertion that without public participation, PGA Tour could not succeed in its purpose).

\textsuperscript{147} \textit{See id.} (noting that without public, revenue would not be generated and would not fulfill expectations of its members).

\textsuperscript{148} \textit{See id.} at 1324 (distinguishing holding of case cited by defendant, noting that case undermines appellee’s position).

\textsuperscript{149} \textit{See id.} (stating some factors used by courts in deciding whether organization is private entity, including genuine selectivity, membership control, history of organization and use by nonmembers).

\textsuperscript{150} \textit{See Martin I}, 984 F. Supp. 1320, 1324-26 (D. Or. 1998) (discussing various factors and court’s analysis of those factors). The nature of professional sports is to remove inferior players, but this “selectivity” does not confer “privacy” on these organizations. \textit{See id.} at 1325. Membership control depends on how well a golfer performs, not on votes. \textit{See id.} Individuals other than members use the PGA’s facilities during tournament and to disallow a disabled person access would run contrary to the purpose of the ADA. \textit{See id.}

\textsuperscript{151} \textit{Id.} at 1326.

\textsuperscript{152} \textit{See id.} (noting golf course is specifically mentioned under statute defining public accommodations).

\textsuperscript{153} \textit{See id.} at 1326-27 (discussing defendant’s faulty assertion that it is not public accommodation).
ducted at places - golf courses - that were specifically included within the definition of places of "public accommodation," and hence subject to the ADA.154

At trial (Martin II), the PGA argued that the court should focus on whether an athletic rule is substantive.155 The PGA claimed that, if a rule is substantive, it "cannot be modified without working a fundamental alteration of the competition."156 The court followed the holding of Johnson v. Florida High School Activities Association and concluded that an individualized inquiry into the necessity of the walking rule was required to determine whether the rule could be modified without fundamentally altering the game.157

In this inquiry, the court questioned the importance and significance of the walking rule.158 The court noted that the PGA allows the use of carts "at two of the four types of tournaments it stages."159 At those events, "no handicap system or stroke penalties were imposed upon players that chose to use carts."160 Furthermore, the walking requirement is not expressly required in the "Rules of Golf."161 In fact, this requirement is contained only in the Rules of Golf Appendix.162

154. See id. (noting that it still defers to trial issue of whether Martin is employee of Tour and whether Nike Tour constitutes examination or course under ADA).

155. See Martin II, 994 F. Supp. 1242, 1246 (D. Or. 1998). A substantive athletic rule is "a rule which defines who is eligible to compete or a rule which governs how the game is to be played." Id.

156. Id. (noting defendant's argument in support of assertion that court should follow "substantive" analysis in ruling upon athletic rules).

157. See id. (discussing whether modification of rule for plaintiff's benefit would fundamentally alter game); Johnson v. Fla. High Sch. Activities Ass'n Inc., 899 F. Supp. 579, 579 (M.D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997). In this case, a nineteen-year-old disabled high school student-athlete sought a waiver of the athletic association's age-eligibility rule. In holding that waiving the age-eligibility requirement did not fundamentally alter the nature of purpose of the program, the court stated that the most appropriate analysis in making this determination was through an individualized assessment.

158. See Martin II, 994 F. Supp. at 1250-51 (discussing purpose of "walking rule" in golf).

159. Id. at 1251 (commenting that two tours allow use of carts without penalty).

160. Id. at 1248 (noting no penalties were allotted to players who chose to use carts).

161. Id. "[T]he general 'Rules of Golf' are promulgated by the United States Golf Association and the Royal Ancient Golf Club of St. Andrews, Scotland." Id. at 1249. These rules govern the PGA and Nike Tour tournaments, subject to modifications by the PGA Tour. See Martin II, 994 F. Supp. at 1249.

162. See id. The appendix to a pamphlet entitled "Conditions of Competition and Local Rules" state that the PGA Tour Rules Committee can permit golfers to ride. See id. This Committee has never granted a waiver for individualized circumstances like a disability. See id.
Second, the *Martin II* court accepted the PGA’s assertion that the purpose of the walking rule is to inject the element of fatigue into the skill of shot making.\(^{163}\) However, the court explained that when the severity of Martin’s disability is taken into consideration, walking any amount of distance, even from a cart to the ball, causes him to endure greater fatigue than a normal person.\(^{164}\) Moreover, the court stated that the real fatigue that PGA golfers battle is not walking eighteen holes, but rather the mental aspect of playing the game of golf.\(^{165}\)

Finally, the court commented on the paradoxical nature of the PGA’s argument.\(^{166}\) On one hand, the PGA asserted that making an individualized assessment regarding Martin’s disability and the necessity of the walking rule was inappropriate.\(^{167}\) On the other hand, during oral argument, counsel for PGA conceded that an individualized assessment would be necessary when determining a coach’s appropriate role for a blind golfer during a tournament.\(^{168}\) Consequently, the court held that allowing Martin to use a cart was a reasonable modification in light of his disability.\(^{169}\)

III. CONCLUSION

While it is too early to evaluate the long-term effects that the *Martin* decisions will have on professional, collegiate and high school sports, the immediate effect has been to elevate awareness regarding the scope of the ADA’s reach. After this decision, it should be clear to the sports industry that the ADA applies, in some manner, to all sports. This observation is best illustrated in the *Martin II* opinion, when the court stated that the “ADA does not distinguish between sports organizations and other entities . . . . [T]he disabled have just as much interest in being free from discrimina-

\(^{163}\) *See Martin II*, 994 F. Supp. 1242, 1250-51 (D. Or. 1998) (agreeing with defendant that fatigue plays factor in game of golf).

\(^{164}\) *See id.* at 1251-52 (noting that in addition to greater fatigue plaintiff suffers, with every step plaintiff takes, there is risk of fracturing tibia and hemorrhaging).

\(^{165}\) *See id.* at 1251 (discussing evidence that walking is used to deal with “psychological factors of fatigue”).

\(^{166}\) *See id.* at 1253 (concluding that plaintiff’s use of cart is not unreasonable accommodation under ADA).

\(^{167}\) *See id.* (commenting on “paradox” of PGA’s position).

\(^{168}\) *See Martin II*, 994 F. Supp. 1242, 1249 (D. Or. 1998) (restating one aspect of PGA Tour’s argument).

\(^{169}\) *See id.* at 1253 (commenting on conflicting viewpoint in PGA counsel’s response to query).
tion in the athletic world as they do in other aspects of everyday life."^{170}

Although legal commentators have differed on the effect this case will have on the sports realm, some commentators opine that "the Martin case may serve as a Magna Carta for disabled athletes in professional sports," the ramifications are uncertain.^{171} What is certain is that, nine years after passage of the ADA, it is now possible for a professional golfer to walk the eighteenth green at Augusta with a disabled golfer, perhaps even Casey Martin, riding in a gas-motorized cart.

^{170} Id. at 1246 (summarizing court's holding).
^{171} See id.