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Maintaining Athletics as an Important Part of a High School Education: The Seventh Circuit Gives Hope to Disabled Student-Athletes in Washington v. Indiana High School Athletic Association, Inc.

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MAINTAINING ATHLETICS AS AN IMPORTANT PART OF A HIGH SCHOOL EDUCATION: THE SEVENTH CIRCUIT GIVES HOPE TO DISABLED STUDENT-ATHLETES IN WASHINGTON \textit{v.} INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.

I. INTRODUCTION

"Although disabled [students] encounter difficult hurdles in their academic and social lives, evidence indicates that disabled persons who participate in athletic activities experience better health, personal satisfaction, and increased self-esteem."\(^1\) Unfortunately, many high school athletic associations have enacted maximum age and maximum semester requirements that disabled student-athletes cannot meet because, as a result of their learning disabilities, they have been in school longer than their other classmates.\(^2\) Therefore, Congress attempted to remedy discrimination against disabled student-athletes by passing section 504 of the Rehabilitation Act\(^3\) in 1973, which "prohibits discrimination against the disabled by governmental agencies receiving federal financial assistance."\(^4\) Congress broadened the protection of disabled individuals when it passed the Americans with Disabilities Act\(^5\) ("ADA") in 1990, which applied to both public and private entities operating


places of public accommodation. The courts are split on the issue of whether disabled student-athletes may use the Rehabilitation Act and the ADA to obtain waivers of the athletic eligibility requirements.

The Seventh Circuit addressed the issue of learning-disabled students’ rights to challenge maximum semester requirements in Washington v. Indiana High School Athletic Ass’n, Inc. In Washington, a learning disabled student-athlete was denied athletic eligibility during his senior year because he failed to meet the Indiana High School Athletic Association’s (“IHSAA”) eight semester requirement. The district court held that Washington should be granted a waiver of the eight semester eligibility requirement, and the Seventh Circuit affirmed this holding.

This Note focuses on the applicability of the ADA and the Rehabilitation Act to disabled student-athletes and their efforts to gain the same athletic opportunities that are available to non-disabled student-athletes. Part II of this Note states the relevant facts in Washington.

Part III explains the purposes of the Rehabilitation Act and the ADA as well as how the courts have applied these acts to athletic eligibility requirements. Parts IV and V analyze the

6. See Freitas, supra note 4, at 139-40 (explaining how ADA is broader than Rehabilitation Act).

7. Compare McPherson, 119 F.3d at 463 (holding that disabled student-athlete would not receive waiver of eight semester rule), with Bingham, 37 F. Supp. 2d at 1205 (holding that disabled student-athlete would receive waiver of eight semester rule). See also Christopher W. Lewis, Comment, Athletic Eligibility – Too High a Hurdle for the Learning Disabled, 15 T.M. COOLEY L. REV. 75, 113 (1998) (observing that courts must resolve conflict between laws that protect disabled students and purposes of athletic eligibility rules because “[l]earning disabled students who enjoy an equal opportunity in the classroom through special education curriculums [sic] are penalized for participating in these programs by athletic association eligibility rules”).

8. 181 F.3d 840, 842 (7th Cir. 1999). For a discussion of the facts in Washington, see infra notes 17-38 and accompanying text.

9. See Washington, 181 F.3d at 842-43 (indicating that student-athlete’s second semester of 1998-1999 academic year was his ninth semester because of delay caused by learning disability).

10. See id. at 854 (affirming district court’s decision to grant preliminary injunction enjoining IHSAA from denying Washington athletic eligibility).

11. For a discussion of the relevant facts in Washington, see infra notes 17-38 and accompanying text.

12. For a detailed discussion of the Rehabilitation Act, see infra notes 41-63 and accompanying text.

13. For a detailed discussion of the ADA, see infra notes 64-83 and accompanying text.

14. For a discussion of both maximum age and maximum semester eligibility requirements, see infra notes 84-102 and accompanying text.
Seventh Circuit's opinion in *Washington*. Finally, Part VI explores the effect of the *Washington* decision on disabled student-athletes' ability to prevent discrimination in athletic programs.

II. FACTS

In *Washington*, the Seventh Circuit addressed whether the refusal to waive a high school athletic association's eight semester rule for a student-athlete whose learning disability caused him to fail at school violated Title II of the Americans with Disabilities Act of 1990. In deciding the case, the court adopted a test balancing irreparable harm to the student-athlete against any threatened harm to the IHSAA or the public. The court found that the student-athlete would be harmed irreparably if he did not obtain the injunction allowing him to participate in athletics. The student-athlete's interest in participating in athletics outweighed IHSAA's interest in avoiding financial and administrative burdens. In addition, the student-athlete's interest outweighed the public's interest.

15. For a detailed analysis and critique of the Seventh Circuit's decision, see infra notes 103-45 and accompanying text.

16. For a discussion of the Seventh Circuit's effect on the state law in this area, see infra notes 146-55 and accompanying text.

17. *See Washington v. Ind. High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 845 (7th Cir. 1999) (basing preliminary injunction on ADA but also interpreting other courts' analysis of section 504 of Rehabilitation Act). For purposes of this case, the Seventh Circuit pointed out that the standards applicable to both section 504 of the Rehabilitation Act and Title II of the ADA are nearly identical because Title II was modeled after the Rehabilitation Act. *See id.* at 845 n.6. As the court stated, the "chief difference between the two statutes is that the Rehabilitation Act applies only to entities receiving federal funding, while Title II of the ADA contains no such limitation." *Id.* In addition, "the Rehabilitation Act requires that the discrimination be solely by reason of disability, while the ADA only requires that the discrimination be by reason of disability." *Id.*

18. *See id.* at 853-54 (determining that student-athlete's interests outweighed any financial and administrative burdens).

19. *See id.* at 853 (identifying testimony that denying student-athlete chance to play basketball would have devastating effects). The court discovered that the student had been frustrated academically and socially throughout his life, and that his grades had improved when he started participating in athletics. However, he lost that motivation when he found out that the IHSAA had declared him ineligible to participate in athletics. *See id.* at 853 (concluding that balancing in favor of student-athlete was not abuse of discretion by district court).

20. *See id.* (noting that waiver would not place undue financial or administrative burden on IHSAA because of its established waiver inquiry policy). Therefore, a few additional case inquiries for students with learning disabilities would not constitute an excessive burden on the IHSAA. The student in this case was the first to ask for a waiver in more than a decade, and the public's interest in fair competition would not be substantially affected. *See id.* at 852-53.
in not displacing another student-athlete and maintaining a level field of athletic competition.\textsuperscript{21}

\textit{Washington} arose out of a request by a student-athlete, Eric Washington, and his high school, Central Catholic High School ("Central Catholic"), for a preliminary injunction enjoining the IHSAA from denying Washington athletic eligibility for the second semester of the 1998-1999 school year.\textsuperscript{22} Washington alleged that the IHSAA discriminated against him under Title II of the ADA when it refused to grant his request for a waiver of its rule limiting a student's athletic eligibility to the first eight semesters after the student's commencement of the ninth grade ("eight semester rule").\textsuperscript{23}

Throughout elementary school, school officials allowed Washington to advance to the next grade despite his academic insufficiency.\textsuperscript{24} However, he was held back in the eighth grade for the 1994-1995 school year.\textsuperscript{25} Unfortunately, he continued to receive failing grades, but school officials decided to advance him to the ninth grade at Jefferson Lafayette High School at the beginning of the second semester of the 1994-1995 school year.\textsuperscript{26} Once again, Washington received failing grades for that semester and the following academic year.\textsuperscript{27} As a result, Washington dropped out of high school at the beginning of the 1996-1997 school year.\textsuperscript{28}

During the summer of 1997, Washington participated in a Central Catholic sponsored three-on-three basketball tournament.\textsuperscript{29} After speaking with the Central Catholic basketball coach, Chad Dunwoody, Washington decided to attend Central Catholic, subse-

\textsuperscript{21} See \textit{id.} (stating that no interest outweighed harm caused by denying student-athlete access to play basketball). Similarly, the court found that the displacement of another student trying out for athletics would not tip the scales against the clear evidence of irreparable harm to the learning disabled student who requested the waiver if he were denied eligibility. See \textit{id.}

\textsuperscript{22} See \textit{Washington}, 181 F.3d at 842-43 (requesting waiver of eight semester eligibility requirement).

\textsuperscript{23} See \textit{id.} at 843 (noting that IHSAA should grant waiver if strict enforcement would not accomplish purpose of rule, if spirit of rule would be violated and if showing of undue hardship exists).

\textsuperscript{24} See \textit{id.} at 842 (indicating that school officials desired to keep Washington with his classmates).

\textsuperscript{25} See \textit{id.} (noting that repeating eighth grade did not improve Washington's grades).

\textsuperscript{26} See \textit{id.} (determining that Washington entered ninth grade during second semester of 1994-1995 academic year).

\textsuperscript{27} See \textit{Washington}, 181 F.3d at 842 (noting that Washington's grades did not improve).

\textsuperscript{28} See \textit{id.} (following advice of high school counselor).

\textsuperscript{29} See \textit{id.} (indicating Washington's initial contact with Central Catholic).
quently entering the school and beginning to play basketball. Mr. Dunwoody, who was a teacher at Central Catholic as well as Washington's academic mentor, suggested that Washington be tested for learning disabilities. Testing in January 1998 revealed that Washington was indeed learning disabled.

According to the IHSAA's eight semester rule, Washington was no longer eligible to play basketball during the second semester of the 1998-1999 school year because this was his ninth semester since beginning ninth grade. Therefore, Central Catholic applied to the IHSAA for a waiver of the eight semester rule under IHSAA Rule C-12-3. In the alternative, Central Catholic also applied for a waiver for Washington under IHSAA Rule 17-8, known as "the hardship rule." Even though it had granted waivers for physical injuries to other students in the past, the IHSAA denied the school's application for Washington's waiver. Washington's appeal to the IHSAA's Executive Committee was also denied. When the IHSAA refused to grant him a waiver of the eight semester rule, Washington's return to school).

See id. at 842 (indicating that previous tests did not reveal any learning disabilities).

See Washington, 181 F.3d at 842 (reasoning disability as cause of poor academic performance).

See id. at 842 (relating purposes of rule). The court pointed out that because Washington had first entered the ninth grade during the second semester of the 1994-1995 school year, the second semester of the 1998-1999 school year would be his ninth semester since his commencement of high school. See id. at 842. The court later explained that the IHSAA's rule "creates ineligibility automatically eight semesters from the day of enrollment, even if the student was not enrolled for the full eight semesters." Id. at 852. According to the IHSAA, there are many purposes for the eight semester rule, including "discouraging red-shirting, promoting competitive equality, protecting students' safety, creating opportunities for younger students and promoting the idea that academics are more important than athletics." Id. at 842. For further discussion of these purposes, see infra note 78.

See Washington, 181 F.3d at 842-43 (explaining waiver request). Central Catholic requested "that the IHSAA not count the semesters that he was not enrolled in any high school for purposes of eligibility under the eight semester rule." Id. at 843. IHSAA Rule C-12-3 allows an exemption of the eight semester rule "if a student is injured which necessitates the student's complete withdrawal from the school or prohibits enrollment in the school for that semester, and the student does not receive any academic credit for that semester." Id.

See id. (proposing non-enforcement of rule in light of Washington's learning disability). IHSAA Rule 17-8 gives the IHSAA the authority "not to enforce a rule if strict enforcement in the particular case would not serve to accomplish the purpose of the rule, the spirit of the rule would not be violated, and there is a showing of undue hardship in the particular case." Id.

See id. at 843 (indicating that IHSAA refused to apply exception from Rule 17-8).

See id. (stating that Washington's appeal was unsuccessful).
ton brought suit against the IHSAA, claiming that the waiver refusal violated Title II of the Americans with Disabilities Act.38

III. BACKGROUND

A. Applicable Disability Acts

This Note focuses on two pieces of legislation as applied to disabled student-athletes. The first, the Rehabilitation Act of 1973, provides protection to disabled persons who have been discriminated against by programs receiving federal financial assistance.39 The second, the Americans with Disabilities Act, provides protection to disabled individuals from discrimination by public entities.40

1. Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 states, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . . "41 Thus, the elements necessary to prove a cause of action for discrimination under the Rehabilitation Act are: (1) the plaintiff is a "disabled person" under the Act; (2) the plaintiff is "otherwise qualified" to participate in the program; (3) the plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his or her handicap; and (4) the relevant program or activity is receiving federal financial assistance.42

The first element requires that the plaintiff be an "individual with a disability" under the Act.43 The Act defines an "individual

38. See id. (indicating basis for suit under ADA). The court also noted that Washington would be ineligible to participate in high school athletics during the 1999-2000 school year because his participation would violate another IHSAA eligibility rule which limits the maximum age at which a student can compete in athletics ("the age limit rule"). However, this rule was not challenged in this case, so the focus was exclusively on the eight semester rule. See id.


41. 29 U.S.C. § 794(a).


43. See 29 U.S.C. § 794(a) (stating that those with disabilities shall not be excluded from participation in federally-funded activities because of such disability).
with a disability” as “any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”

Major life activities include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”

For example, the court in Pahulu v. University of Kansas suggested that playing football could be a major life activity – the activity of learning.

The second element requires that the plaintiff be “otherwise qualified” to participate in the program. The Supreme Court in Southeastern Community College v. Davis defined an “otherwise qualified” individual as “one who is able to meet all of a program’s requirements in spite of his handicap.” Therefore, professional

44. Id. § 706(8)(B).
47. See id. at 1393 (finding that not being allowed to play football was not substantial limitation on opportunity to learn). In this case, the plaintiff suffered a hit to the head during a football scrimmage and, as a result, experienced an episode of transient quadriplegia. See id. at 1388. The team physician and a neurosurgeon determined that the plaintiff had a congenitally narrow cervical canal, and he would be at risk for severe injury if he continued to play football. However, the plaintiff emphasized his continuing desire to play football regardless of his physical condition. See id. As a result, they disqualified the plaintiff from playing intercollegiate football even though he offered to release the University of liability if he were injured. See id.

The court explored the question of whether playing football is a major life activity under the Rehabilitation Act. See id. at 1390-91. In making this determination, the court applied a subjective test to this particular plaintiff, rather than an objective test as to the public in general. See id. at 1392 (discussing how regulations promulgated pursuant to Rehabilitation Act do not clearly define major life activity). The plaintiff testified that playing football had taught him many things including: how to be a team player, discipline, concern for his appearance, concern for his grades, and the people on the team had inspired him to want a better life for himself. See id.

48. See 29 U.S.C. § 794(a) (stating that disabled individuals must be “qualified” to receive protection).
50. Id. at 406 (holding that modification of physical requirements was unreasonable because failure to meet these requirements posed danger to patients). In this case, a woman with a serious hearing disability applied for admission to an Associate’s Degree Nursing Program at Southeastern Community College (“Southeastern”) to be trained as a certified nurse. See id. at 400. An audiologist found that she could only understand speech directed at her if she was also able to lip-read. See id. at 403. The Executive Director of the North Carolina Board of Nursing determined that the woman’s hearing disability could interfere with her ability to care safely for her patients. See id. at 402. Therefore, the woman was not admitted to the program because she would be unable to perform certain physical requirements in order to be “otherwise qualified” under section 504 of the Rehabilitation Act. See id. at 406 (stating that “otherwise qualified” person could meet all requirements despite handicap).
schools may deny an applicant admission to their clinical training program if the applicant is unable to perform all the necessary physical requirements. The *Davis* court took this one step further, stating that the physical requirements for admission also had to be reasonable.51

The court in *Doherty v. Southern College of Optometry*52 further explained and refined the definition of "otherwise qualified."53 The court questioned whether some "reasonable accommodation"

The district court held that because the woman's hearing disability would prevent her from functioning sufficiently as a nurse, it was not discriminatory within the meaning of section 504 of the Rehabilitation Act for Southeastern to exclude her from the program. See *id.* at 403-04 (grounding its own holding in lower court's decision). According to the district court, "otherwise qualified" could be interpreted to mean "otherwise able to function sufficiently in the Position sought in spite of the handicap, if proper training and facilities are suitable and available." *Id.* at 405. Therefore, the district court held that a person did not have to meet legitimate physical requirements to be considered "otherwise qualified." *See id.* at 406.

The Supreme Court agreed that Southeastern did not violate section 504 of the Rehabilitation Act when it refused to admit the woman to the nursing program. *See id.* at 414 (finding that woman might qualify for other related jobs). However, the Supreme Court altered the district court's "functioning sufficiently" language, choosing instead to define an "otherwise qualified person" as "one who is able to meet all of the program's requirements in spite of his handicap." *See id.* at 403, 406 (emphasis added). In this case, the woman was unable to perform all of the physical clinical requirements as a student in the nursing program because of her disability, and this could, in turn, pose a danger to her future patients. *See id.* at 413 n.12 (indicating that to admit plaintiff, Southeastern would need to lower standards).

51. *See id.* at 407 (expressing reasonableness of requirement of speech recognition without lip reading in clinical program). The Supreme Court further identified that there were many situations in which a hearing disability would make it impossible for a nurse to carry out properly her responsibilities. *See id.* at 403 (stating necessity of operating room nurse's ability to understand and follow physician's vocal instructions). For a registered nurse, a hearing disability would prevent her "from safely performing in both her training program and her proposed profession . . . [,]" potentially endangering her future patients. *Id.* Therefore, Southeastern's refusal to modify the physical requirements in this case was not unreasonable and discriminatory. *See id.* at 403-04.

52. 862 F.2d 570 (6th Cir. 1988).

53. *See id.* at 574-75 (stating that "otherwise qualified" element is interconnected with reasonable accommodation analysis). In this case, the plaintiff, a Southern College of Optometry ("SCO") student, suffered from a serious visual impairment and an associated neurological condition. *See id.* at 572. SCO required proficiency in a pathology clinic to qualify for participation in a mandatory externship program. *See id.* In order to pass, students had to perform various techniques with specific instruments and, after two attempts, plaintiff was unable to complete satisfactorily the techniques on four of the instruments. *See id.* at 572-73 (indicating that plaintiff's deteriorated motor skills and coordination prevented him from satisfying proficiency requirement). Therefore, SCO refused to graduate him from the program or to grant him a degree. *See id.* at 573. Plaintiff argued that he was an "otherwise qualified handicapped individual" under section 504 of the Rehabilitation Act, and that the four requirements should not be necessary for satisfactory completion of the program. *See id.*
could be made to satisfy the legitimate interests of both the institution and the handicapped person when the person’s handicap prevented him from completing all the physical requirements of the program. The Doherty court clarified that an educational institution “is not required to accommodate a handicapped individual by eliminating a course requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of study.”

The third element requires that the discrimination against the plaintiff be “solely by reason” of a disability. According to the court Sandison v. Michigan High School Athletic Ass’n, section 504 of the Rehabilitation Act prohibits the application of “facially neutral rules that disproportionately exclude members of the class of disabled persons as compared to members of the class of nondisabled persons.” In Sandison, the court held that students were not ex-

54. See id. at 575 (deciding that eliminating required courses would be substantial rather than reasonable accommodation). The Doherty court disagreed with the Davis court’s interpretation of an “otherwise qualified” person as anyone who can meet all the program’s requirements despite a handicap. See id. (explaining Davis holding). The court found this definition paradoxical because it required the handicapped person to meet all of the program’s requirements, which would mean that there could never be a reasonable requirement in violation of section 504 of the Rehabilitation Act. See id. (finding as part of “otherwise qualified” analysis, “reasonable accommodation” to be question of fact).

55. Id. (emphasis added). The court held that proficiency with instruments was necessary to avoid future injury not reasonable accommodation. See id. at 579. But see Buhai, supra note 1, at 178 (recognizing that “the essential functions of a position [do] not necessarily depend[ ] on the manner in which [they have] traditionally been performed . . . [rather] the determinative factor is whether, through reasonable accommodations, the individual is able to perform these functions”) (emphasis added).

56. See 29 U.S.C. § 794(a) (stating that disability must not be sole reason for exclusion from federally funded activity).

57. 64 F.3d 1026 (6th Cir. 1995).

58. Id. at 1032-33. In this case, two learning disabled students were forbidden to play interscholastic sports during their senior years of high school because both turned nineteen a few weeks before their senior year. The Michigan High School Athletic Association (“MHSAA”) had an “age limit rule” that only students under the age of nineteen at the start of their senior year of high school could compete in interscholastic sports. See id. at 1029.

The students challenged this rule, arguing that using it to exclude them from playing interscholastic sports constituted unlawful disability discrimination. See id. at 1028-29. The court addressed the question of whether these students were excluded “solely by reason” of their disabilities. See id. at 1031. The court decided that section 504 of the Rehabilitation Act was intended to eliminate discrimination, but it did not necessarily mandate using “affirmative efforts to overcome the disabilities caused by handicaps.” Id. at 1032 (quoting Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979)). The court further said that the age limit rule was neutral with respect to disability because it excluded the students “solely by reason of” their dates of birth, not “solely by reason of” [disability].” Id. at 1033. The students had not been excluded from playing sports during the first three years of
cluded solely on the basis of disability. Conversely, the court in Dennin v. Connecticut Interscholastic Athletic Conference held that the plaintiff had been excluded solely by reason of his disability because the "sole reason that Dennin is in school at nineteen is his disability." Therefore, section 504 of the Rehabilitation Act will be violated if a plaintiff is excluded solely on the basis of disability.

The fourth element is that the "relevant program or activity is receiving Federal financial assistance." Programs that receive direct, as well as indirect, federal financial assistance fall under section 504 of the Rehabilitation Act.

2. The Americans with Disabilities Act

Title II of the ADA prohibits discrimination by public entities against disabled individuals. The ADA states 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 ser-

high school; they were only excluded once they reached the maximum age of nineteen. Id. at 1032. (explaining that rule excluded students because of passage of time, not disability).

59. See id. at 1032-33 (holding that students' exclusion was not covered by section 504 of Rehabilitation Act).

60. 913 F. Supp. 663 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996).

61. Id. at 670. In Dennin, plaintiff had Down Syndrome and was enrolled in special needs classes in middle school. As a result he spent four, rather than three years in middle school, delaying the age at which he began high school. See id. at 666 (indicating that plaintiff entered high school at age sixteen). Plaintiff turned nineteen before his senior year of high school, making him ineligible to participate in athletics during his senior year under the age limit rule of the Connecticut Interscholastic Athletic Conference ("CIAC"). See id. (stating that purpose of rule was to prevent younger athletes from older athletes' competitive advantage).

The court rejected CIAC's argument that plaintiff was not being excluded solely because of his disability, but rather because of his age. See id. at 669 (reasoning that had it not been for disability delaying entrance to high school, plaintiff would have remained eligible). The court decided that the plaintiff was "otherwise qualified" because there existed a reasonable accommodation. See id. at 670 (stating that waiver was reasonable accommodation). The court therefore decided that the plaintiff should be granted a waiver of the age limit rule under section 504 of the Rehabilitation Act. See id.


63. See Dennin, 913 F. Supp. at 667 (indicating that indirect federal assistance was subject to section 504 of Rehabilitation Act); see also Reaves v. Mills, 904 F. Supp. 120, 123 (D.N.Y. 1995) (stating that section 504 of Rehabilitation Act was enacted to prevent discrimination against disabled individuals by entities receiving federal financial assistance).

64. See 42 U.S.C. § 12131 (1997) (defining public entity within ADA to include "any department, agency, special purpose district, or other instrumentality or a State or States or local government"); see also Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 931 (8th Cir. 1994) (holding that because plaintiff was not "qualified individual" under ADA, age limit restriction could be enforced).
vices, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 65 It also 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, accommodations of any place of public accommodation by any person . . . operates a place of public accommodation." 66

Congress intended for the ADA to be consistent with the Rehabilitation Act. 67 Therefore, the analysis and standards under the two statutes "roughly parallel" one another. 68 However, the reach of the ADA is much broader because it covers discrimination by private individuals, "including private owners and operators of places of public accommodation." 69 The elements necessary to prove a cause of action under the ADA are: (1) the plaintiff has a disability; (2) the plaintiff was qualified; and (3) the plaintiff was denied a reasonable accommodation for the disability or was the object of an adverse decision made solely because of his or her disability. 70

The first element requires that plaintiff have a disability as defined under the ADA. 71 The ADA states that a "disability" means, "with respect to an individual – (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 an impairment; or (C) being regarded as having such an impairment." 72 Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 73 For example, the court in Bingham v. Oregon School Activities

66. See id. § 12182.
67. See Pottgen, 40 F.3d at 930 (stating correlation between ADA and section 504 of Rehabilitation Act).
68. See McPherson v. Mich. High Sch. Athletic Ass’n, Inc., 119 F.3d 453, 460 (6th Cir. 1997) (indicating that purpose and scope of section 504 of Rehabilitation Act and ADA are largely similar).
69. Id.
70. See id. (explaining elements of ADA claim).
71. See 42 U.S.C. § 12132 (stating that qualified persons must have disability).
72. See id. § 12102(2).
Ass'n held that plaintiff was "substantially limited in the major life activity of learning because of his learning disability."  

The second element requires that the plaintiff be a "qualified" individual under the ADA. The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." In order to decide if a modification is reasonable, the court must look to see if it imposes an undue financial or administrative burden on the institution making the modification or if it requires a fundamental alteration in the nature of the program.

75. See id. at 1196 (granting waiver of eight semester rule because plaintiff who repeated sophomore year of high school due to learning disability was disabled under ADA).
76. See 42 U.S.C. § 12132 (indicating that not all disabilities are covered by ADA).
77. Id. § 12131(2).

The beginning of his last year of high school was his ninth semester, which meant that his participation in athletics would violate the MHSAA's eight semester rule. See id. The MHSAA's eight semester rule provides that students are ineligible to participate in athletics after they have been "enrolled in grades nine to twelve, inclusive, for more than eight semesters." Id. at 455.

The MHSAA refused the plaintiff's request for a waiver of the eight semester rule because it would "work for a fundamental alteration in Michigan high school sports programs." Id. at 462. The court agreed with the MHSAA and found that the waiver of the eight semester rule would not be a reasonable accommodation because it would impose an undue burden on coaches to determine the competitive fairness of allowing the waiver for each individual case. See id. In addition, the waiver would threaten the fundamental purposes of the rule which include avoiding red-shirting and preserving the idea that students are in school primarily for education and only secondarily for athletics. See id. at 461. Therefore, the court held that the student could not be granted the waiver under the ADA because this would not be a reasonable accommodation. See id. at 463. But see Bingham, 37 F. Supp. 2d at 1202. In Bingham, the Oregon School Activities Association's ("OSAA") eight semester rule provided that a student could only participate in athletics for four consecutive years (eight semesters) after entering the ninth grade. See id. at 1198. The court found that waiver of the eight semester rule was a reasonable accommodation for a learning disabled student. The court further explained that barring a disabled student, who is disabled by no fault of his or her own, from participating in athletics is "fundamentally no different from barring him or her from auditioning for the school play, attending the prom, or taking a history class in the interest of giving everyone an equal opportunity of eight semesters to experience all the benefits of high school." Id. at 1202.
The third element requires that the plaintiff was denied a reasonable accommodation for the disability or was the object of an adverse employment decision made solely because of his disability. As the court in *Thomas v. Davidson Academy* held, an accommodation can be defined as "any change . . . in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities." According to *Rhodes v. Ohio High School Athletic Ass'n*, the court must make a factual determination on a case-by-case basis in deciding whether a reasonable modification is available to satisfy the legitimate interests of both the institution and the individual requesting the accommodation.

79. *See McPherson*, 119 F.3d at 460. For a discussion of what constitutes a reasonable modification and when one will be granted, see *supra* note 78 and accompanying text.


81. *Id.* (citing 29 C.F.R. § 1630.2(o) (1994)). In *Thomas*, the plaintiff, a student at Davidson Academy, was diagnosed with idiopathic thrombocytopenic purpura ("ITP"). *See id.* at 614. According to the court, a person with ITP is "susceptible to life-threatening bleeding or hemorrhaging and must take great care to avoid, and promptly attend to, even seemingly minor physical traumas that are a part of daily life." *Id.*

One particular day, plaintiff cut herself with an exacto knife during art class, causing her to become hysterical. *See id.* at 615. After this incident, the principal decided that plaintiff should withdraw from Davidson Academy. *See id.*

The court held that plaintiff's reaction to her injury was extreme but understandable considering her medical condition and her knowledge of its possible consequences. *See id.* at 618-19. The court went on to say that "blind adherence to policies and standards resulting in a failure to accommodate a person with a disability is precisely what the Americans with Disabilities Act of 1990 and [section 504 of] the Rehabilitation Act of 1973 are intended to prevent." *Id.* at 619. Therefore, it was a reasonable accommodation to allow the plaintiff to remain enrolled at Davidson Academy, and this would not substantially modify the school's existing standards or interfere with the school's goal of keeping order. *See id.* at 619.


83. *See id.* at 591 (D.C. Cir. 1996). In *Rhodes*, the plaintiff, who was diagnosed with Attention Deficit Disorder ("ADD") when he was in the fourth grade, spent one extra year in high school. *See id.* at 586.

When the plaintiff entered his fifth and senior year of high school, he was ineligible to participate in athletics because the Ohio High School Athletic Association ("OHSAA") had a rule that once a student "completes the eighth grade, the student shall be eligible [to compete in high school athletics] for a period not to exceed eight semesters taken in order of attendance, whether the student participates or not." *Id.* The plaintiff had only participated in seven semesters of athletics, but he had already been enrolled in high school for eight semesters; therefore, he was denied athletic eligibility. *See id.*

The court decided that it was necessary to make factual determinations about whether the eight semester requirement was essential and whether there was a reasonable accommodation that would satisfy the interests of all the parties. *See id.* at 591. The court held that the eight semester rule accomplishes three important purposes: it prevents red-shirting; it limits the athletic experience and skill of players to keep the playing field even; and it encourages athletes to graduate in four years. *See id.* at 591-92. In the end, the court decided that the plaintiff could not win his claim because he was not denied eligibility based solely on his disability, but
B. Athletic Eligibility Requirements

1. Eight Semester Rules

Many high school athletic associations have implemented a rule making students who have completed eight semesters of high school ineligible to participate in interscholastic athletics ("eight semester rule"). The court in McPherson v. Michigan High School Ass'n, Inc., explained that there are several rationales for implementing an eight semester rule, including creating a fair sense of competition, preventing red-shirting and preserving the idea that students are in school primarily for classroom education and only secondarily for athletic participation. Other purposes include ensuring students' safety and ensuring that all students have an equal opportunity to participate in interscholastic athletics.

Although the purposes of the eight semester rule are valuable, application of the rule to disabled students must be examined closely. In deciding whether to grant a waiver of the eight semester rule, courts have asked whether the rule is "an ‘essential’ eligibility requirement and/or whether a waiver of that rule is a reasonable modification as a way of accommodating... [a student's] disabil-

rather based only on the fact that he was enrolled in high school for more than eight semesters. See id. at 592.

84. See McPherson, 119 F. 3d at 455 (holding that student diagnosed with ADD would not be granted waiver of eight semester rule); see also Frye v. Mich. High Sch. Athletic Ass'n, Inc., 121 F. 3d at 708 (6th Cir. 1997) (holding that student diagnosed with ADD would not be granted waiver of eight semester rule); Bingham, 37 F. Supp. 2d at 1205 (granting waiver of the eight semester rule as reasonable accommodation).

85. 119 F.3d 453 (6th Cir. 1997).

86. See id. at 456. The fair sense of competition is created by limiting the players' level of experience and skill so that a more level playing field can be maintained. See id. at 456.

87. See id. According to the court in McPherson, without such an eligibility requirement, coaches might engage in red-shirting. See id. Red-shirting is the practice of holding an athlete back for a year to allow the student time to reach both physical and athletic maturity, so that he or she can increase athletic ability. See id.

88. See id. (stating goal that students will be encouraged to finish high school in four years); see also John P. Encarnacion, Note, When a Handicap May Be an Advantage: McPherson v. Michigan High School Athletic Association Evaluates the Relationship of the Rehabilitation Act and the ADA to Athletic Association Maximum Semester Rules, 5 Vill. Sports & Ent. L.J. 237, 328 (1998) (noting that schools maintain eligibility requirements because of alarming trend in many athletic programs to place more emphasis on competitiveness than on academics).

89. See Bingham, 27 F. Supp. 2d at 1201; see also Encarnacion, supra note 88, at 362 (suggesting that waivers of eight semester rule should be granted when student has legitimate disability and there is no threat of red-shirting).
ity." Some courts have held that it is not an essential eligibility requirement and that a reasonable modification is appropriate to accommodate a student whose disability was the reason for the ineligibility. However, other courts, such as McPherson and Frye v. Michigan High School Athletic Ass'n, Inc. have held that waiver of the eight semester rule alters sports programs, and the eight semester rule is "necessary" to the successful functioning of any high school sports program.

2. Maximum Age Requirements

Several high school athletic associations have also implemented a rule forbidding students over age nineteen from participating in high school athletics. As the court in Pottgen v. Missouri State High School Athletic Ass'n stated, the purposes of a maximum age requirement include reducing any competitive advantage of older athletes, protecting younger athletes from injury, discourag-

90. See Bingham, 37 F. Supp. 2d at 1197. In Bingham, the court compared the Oregon School Activities Association's ("OSAA") eight semester rule with its attendance-grade rule (which sets minimum attendance and grade requirements for athletic eligibility) and age rule (which limits athletic eligibility to students who turn nineteen on or after August 15 of any given year). See id. at 1197-98, 1201. Both the attendance-grade rule and the age rule provide for exceptions when learning disabled students are unable to meet the rules' requirements due to their handicapped condition. See id. at 1197-98.

The provision for exceptions to both of these rules do not frustrate the purposes of the eligibility requirements and do not constitute a risk to the safety and health of other students. See id. The OSAA does not, however, have a similar provision for exceptions under the eight semester rule. See id. at 1199. The court asserted that the purposes of the eight semester rule and the other eligibility rules are similar, including promoting safety and competitive fairness, encouraging students to complete high school in four years and granting equal opportunities to all students to participate in athletics without displacing otherwise eligible students by giving other students extra eligibility. See id. at 1201. Therefore, it would make no sense to grant a waiver to a student who repeated the seventh grade but not grant a waiver to a student who repeated the tenth grade because it would violate the eight semester rule. See id. Ultimately, the court held that waivers of the eight semester rule for disabled students unable to complete high school in eight semesters due to their disability are reasonable modification. See id. at 1202.

91. See id. at 1201 (allowing waiver of eligibility requirements).
92. 121 F.3d 708 (6th Cir. 1997).
95. 40 F.3d 926 (8th Cir. 1994).
ing athletes from delaying their educations to gain athletic maturity and preventing coaches from engaging in red-shirting.\textsuperscript{96}

Even though these objectives are favorable, courts have also scrutinized application of the maximum age requirement to disabled students. In deciding whether to grant a waiver of the maximum age requirement, courts have evaluated whether it is an essential eligibility requirement and whether a reasonable accommodation exists.\textsuperscript{97} Some courts, including the courts in \textit{Pottgen} and \textit{Reaves v. Mills}\textsuperscript{98} have held that the maximum age requirement is an essential eligibility requirement, and a waiver could fundamentally alter the nature of the athletic program, making the waiver unreasonable.\textsuperscript{99} However, the court in \textit{Dennin v. Connecticut Interscholastic Athletic Conference} took the view that the maximum age requirement is not essential if a reasonable modification can be made which does not undermine the purposes of the requirement.\textsuperscript{100} The \textit{Dennin} court, relying on \textit{Johnson v. Florida High School Activities Ass’n, Inc.},\textsuperscript{101} explained that an individualized analysis of the relationship between the requirement and its purposes could be used in deciding if a reasonable waiver could be made.\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{96} See id. at 927. For a definition of red-shirting, see supra note 87. In \textit{Pottgen}, plaintiff repeated two grades during elementary school because of an undiagnosed learning disability. \textit{See Pottgen}, 40 F.3d at 927. Therefore, when he reached his senior year of high school, the maximum age requirement of the Missouri State High School Athletic Association ("MSHSA") made him ineligible to play high school athletics. \textit{See id.} at 928. The court decided that plaintiff should not receive a waiver of the maximum age requirement. \textit{See id.} at 931.
\item \textsuperscript{97} See id. at 930.
\item \textsuperscript{98} 904 F. Supp. 120 (W.D.N.Y. 1995).
\item \textsuperscript{99} See \textit{Pottgen}, 40 F.3d at 931 (denying waiver of necessary maximum age requirement because waiver would alter nature of athletic program and impose undue financial and administrative burdens on school). \textit{See Reaves}, 904 F. Supp. at 120 (holding that student who had repeated first grade due to status as educable mentally retarded should not be granted waiver of maximum age requirement to play athletics during senior year of high school).
\item \textsuperscript{100} See \textit{Dennin} v. Conn. Interscholastic Athletic Conference, 913 F. Supp. 663, 668 (D. Conn. 1996), \textit{vacated as moot}, 94 F.3d 96 (2d Cir. 1996). For a discussion of \textit{Dennin}, see supra note 61 and accompanying text. In \textit{Dennin}, the court rejected the argument of the \textit{Pottgen} and \textit{Sandison} courts that the maximum age requirement was essential and no waiver could be reasonable because it would constitute a fundamental alteration in the nature of the program. \textit{See id.} at 668.
\item \textsuperscript{101} 899 F. Supp. 579 (11th Cir. 1995).
\item \textsuperscript{102} See \textit{Dennin}, 913 F. Supp. at 668 (citing \textit{Johnson} v. Fla. High Sch. Activities Ass’n, Inc., 899 F. Supp. 579, 585 (D. Fla. 1995), \textit{vacated as moot}, 102 F.3d 1172 (11th Cir. 1997) (holding that granting waiver of maximum age requirement to deaf student would not undermine purposes of requirement to promote safety and fairness because plaintiff was not largest player on football team and would participate in appropriate weight division for wrestling)); see also Univ. Interscholastic League v. Buchanan, 848 S.W.2d 298 (Tex. App. 1993) (holding that granting waiver of maximum age requirement to two learning disabled students was reason-
IV. NARRATIVE ANALYSIS

The Seventh Circuit in *Washington v. Indiana High School Athletic Ass'n, Inc.* considered whether refusal to grant a waiver of a high school athletic association's eight semester rule to a student-athlete whose learning disability caused him to fail at school violated Title II of the ADA. The court held that the IHSAA violated Title II of the ADA when it refused to make the reasonable accommodation of waiving the eight semester requirement for Washington. The court began its analysis by addressing the question of whether the issue was now moot because Washington's basketball season had already finished. The court explained that an "actual controversy still exist[ed] despite the end of the basketball season because Central Catholic [was] still a party to the litigation." Therefore, the court retained jurisdiction over the case.

103. See *Washington*, 181 F.3d at 843 (holding that eight semester rule violated student-athlete's rights under ADA). The district court had granted plaintiff's motion for a preliminary injunction enjoining the IHSAA from denying Washington athletic eligibility. See id. at 845.

104. See id. at 845. The court adopted a test balancing the interests of the parties. See id. at 853. Washington's participation in athletics gave him confidence and improved his academic performance. See id. The IHSAA argued that determining who is eligible for waivers would cause undue financial and administrative burdens to the IHSAA. See id. at 853. In addition, the IHSAA argued that another student-athlete would be unfairly displaced if Washington were granted the waiver and Washington's participation would unfairly change the level of competition. See id. at 844.

105. See id. at 844. The court pointed out that there must be a controversy at every stage of the court's review. See id.; see also U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980).

106. *Id.* Pursuant to IHSAA Rule 17-6, penalties may retroactively be imposed on student-athletes and their schools if they are ineligible under the IHSAA's rules but are allowed to participate in athletics through the issuance of a restraining order of injunction from the court. According to this IHSAA rule, if the injunction is later reversed or vacated, the IHSAA has the authority to "strike individual and team records, require forfeit of victories won by the team, or require return of individual and team awards earned while the student participated." *Id.* at 844-45 (citing Crane v. Ind. High Sch. Athletic Ass'n, 975 F.2d 1315, 1318 (7th Cir. 1992)). Therefore, Central Catholic still had an interest in this case because the basketball team's victories and records might be forfeited if the injunction were vacated. See *Washington*, 181 F.3d at 845.

107. See id.
Next, the court addressed the question of what standard a district court should apply in deciding whether to grant a preliminary injunction. The court stated that a district court must: (1) determine whether the moving party demonstrated a likelihood of success on the merits and an inadequate remedy at law if preliminary relief is not granted; (2) weigh that irreparable harm to the nonmoving party; and (3) weigh the public interest by considering the effect on nonparties of granting or denying the injunction.

The court first looked to whether the district court had correctly determined that Washington and Central Catholic had demonstrated a "likelihood of success on the merits" by showing that they had a "better than negligible" chance of succeeding on the merits. Therefore, the Seventh Circuit looked to what a plaintiff must prove in order to fall under the protection of Title II of the ADA. The court stated that plaintiffs must show that the IHSAA deemed Washington ineligible to participate in athletics "by reason of" his disability. However, the Seventh Circuit pointed out that liability under the ADA need not be premised on intentional discrimination based on disability.

Relying on the analysis by the court in McPherson v. Michigan High School Athletic Ass'n, the Seventh Circuit decided that discrimination could be established by proving that: (1) defendant acted intentionally based on disability; (2) defendant refused to provide a

108. See Washington, 181 F.3d at 845.

109. See id. The Seventh Circuit explained that the decision whether to grant a preliminary injunction involves various issues. Some are non-discretionary, while others, such as weighing the respective harms, are highly discretionary and must be given substantial deference. See id. Therefore, the court first examined whether the plaintiff had demonstrated a likelihood of success on the merits. See id. at 845-46.

110. Id. at 846 (quoting Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc., 128 F.3d 1111, 1114 (7th Cir. 1997)).

111. See id. at 846.

112. Id. The court here pointed out that the district court addressed the "by reason of disability" and "qualified individual" requirements as one element. The court further pointed out that it agreed with the district court's characterization of the two requirements although they addressed the issues separately because the IHCAA raised separate conditions relating to the two requirements. See id. at 846.

113. See Washington, 181 F.3d at 848. The IHSAA argued that plaintiffs presented no evidence that the IHSAA discriminated against Washington intentionally. However, the Seventh Circuit explained that the Supreme Court had implied that requiring a plaintiff to prove discriminatory intent would be contradictory to Congress' intent. See id. at 846 (citing Alexander v. Choate, 469 U.S. 287 (1985)). "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference . . . ." Washington, 181 F.3d at 846 (quoting Choate, 469 U.S. at 296).
reasonable modification; or (3) defendant’s rule disproportionately impacted disabled individuals.\textsuperscript{114} The \textit{Washington} court held that the plaintiffs must prove that the IHSAA failed to provide a reasonable accommodation when it refused to grant Washington a waiver of the eight semester rule.\textsuperscript{115} The court then explored the question of whether there was a causal connection between Washington’s disability and his ineligibility.\textsuperscript{116} The court held that “[i]n the absence of his disability, the passage of time would not have made him ineligible” to participate in athletics.\textsuperscript{117}

Next, the Seventh Circuit explored whether Washington was a “qualified individual” under the ADA and, therefore, able to meet the eligibility requirement with a reasonable accommodation.\textsuperscript{118} Relying on the Supreme Court in \textit{School of Nassau County v. Arline},\textsuperscript{119} the court in \textit{Washington} determined that an individualized assessment was necessary to determine if a waiver of the eight semester rule would be a reasonable accommodation.\textsuperscript{120} In order to make this individualized assessment, the court must look to several factors including, “the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether

\textsuperscript{114} See id. at 847 (citing \textit{McPherson} v. Mich. High Sch. Athletic Ass’n, 119 F.3d 453, 460 (6th Cir. 1997)). The court in \textit{Washington} accepted the \textit{McPherson} court’s view that discriminatory intent was not necessary to establish a claim for discrimination under the ADA. See id. at 848. Therefore, “a facially neutral rule adopted for neutral purposes and applied on a neutral basis is not always insulated from review.” \textit{Id.} at 847 n.10.

\textsuperscript{115} See id. at 847. The court looked to the legislative history of Titles I and III of the ADA, explaining that the methods of proving discrimination under Titles I and III apply to Title II as well. See id. at 848. Therefore, the court decided that “Congress clearly intended the failure-to-accommodate method of proving discrimination to apply to Title II.” \textit{Id.}

\textsuperscript{116} See id. at 848-49. The IHSAA argued that Washington was not excluded from participating in athletics by reason of his disability, but rather by the passage of time. See \textit{id.} at 848. As the court stated, the IHSAA relied on the holding in \textit{Sandison v. Michigan High School Athletic Ass’n}, which stated that “the regulation [was] a ‘neutral rule’ – neutral, that is, with respect to disability . . . .” \textit{Id.} at 848 (quoting \textit{Sandison v. Mich. High Sch. Athletic Ass’n}, 64 F.3d 1026, 1029 (6th Cir. 1995)).

\textsuperscript{117} \textit{Id.} at 849. The court determined that Washington had proven causation because his disability had caused him to drop out of school which, in turn, made him unable to meet the eight semester requirement. See \textit{id.}

\textsuperscript{118} See \textit{Washington}, 181 F.3d at 849. As the court explained, under both Title II of the ADA and section 504 of the Rehabilitation Act, a “qualified individual” is an individual with a disability or handicap who is able to meet eligibility requirements with some kind of reasonable accommodation. See \textit{id.}

\textsuperscript{119} 480 U.S. 273 (1987).

\textsuperscript{120} See \textit{Washington}, 181 F.3d at 851 (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987)).
reasonable modifications of policies, practices, or procedures will mitigate the risk."  

The court distinguished between the eight semester rule discussed in the present case ("Indiana rule") with the eight semester rule discussed in McPherson ("Michigan rule").\(^{122}\) The court pointed out that the Michigan rule in McPherson restricted athletic eligibility to eight semesters of enrollment in high school, whereas the Indiana rule in the present case "creat[ed] ineligibility automatically eight semesters from the first day of enrollment, even if the student was not enrolled for the full eight semesters." \(^{123}\) Ultimately, the court in Washington held that the goals of the eight semester rule would not be frustrated by allowing Washington a waiver of the requirement.\(^{124}\)

Finally, the Seventh Circuit balanced the interests of the parties and held that the irreparable harm to Washington, if he were not allowed to participate in athletics, outweighed the interests of the IHSAA and the public.\(^{125}\) Therefore, the court affirmed the district court's issuance of the preliminary injunction granting

\(^{121}\) Id. at 851 n.14 (citing Arline, 480 U.S. at 274). According to the Washington court, this is the test established by the Supreme Court in Arline. See id. at 851. Essentially, some exceptions should be made to the general eight semester requirement in order to afford opportunities to disabled individuals. See id. at 851.  
\(^{122}\) See id. at 852.  
\(^{123}\) Id. The court explained that under the Indiana rule, the eligibility clock continued to "tick" even when Washington was not enrolled, but under the Michigan rule, the clock would stop when the student was not actually enrolled. See id. In this case, Washington was only asking that the IHSAA not count the time he was not enrolled in high school in deciding his eligibility under the eight semester rule. See id.  
\(^{124}\) See id. The goals of the eight semester rule included preventing redshirting, emphasizing that academics are more important than athletics and keeping larger, more experienced players from dominating the competition. See id. at 852. The court explained, however, that Washington clearly was not red-shirted because no one was interested in his athletic talent until after he dropped out of school. See id. Additionally, participation in athletics was actually promoting his education because he had gone back to high school and improved his grades partly due to the influence of his basketball coach. See id. The court rejected the IHSAA's argument that a waiver would result in a fundamental alteration of the eight semester rule because the IHSAA had granted similar waivers of the eight semester rule in the past. See id. Similarly, the court determined that there would be no undue financial or administrative burden on the IHSAA if it had to make a few case by case analyses of whether disabled students should be granted waivers. See id.  
\(^{125}\) See Washington, 181 F.3d at 853. The Seventh Circuit agreed with the district court that if Washington were not allowed to participate in athletics, he would not only lose his academic motivation but also the possibility of receiving a college scholarship. See id. The court pointed to a school psychologist's opinion that Washington's success in basketball improved his confidence in other areas of his life, including his education. See id.; see also Burroughs, supra note 4, at 62 (discussing how person's emotional and social development is affected by learning
Washington a waiver of the eight semester rule and allowing him to continue participating in athletics.\textsuperscript{126}

V. CRITICAL ANALYSIS

The Seventh Circuit held that the IHSAA’s refusal to accommodate reasonably Washington by granting him a waiver of the eight semester rule violated Title II of the ADA.\textsuperscript{127} This Note suggests that the Seventh Circuit broadened the protection available to disabled students who bring claims under the ADA and the Rehabilitation Act.\textsuperscript{128}

A. Reasonable Accommodations

Over the past few years, there have been many cases involving disabled student-athletes bringing discrimination claims under both the ADA and the Rehabilitation Act.\textsuperscript{129} The courts are split regarding whether waiver of the eligibility requirements should be granted.\textsuperscript{130} The \textit{Washington} court followed the developing trend of a minority of courts in finding that waiver of an eligibility require-

\textsuperscript{126}. See \textit{Washington}, 181 F.3d at 854. The court decided that the district court did not abuse its discretion in balancing the interests of the parties. See \textit{id}.

\textsuperscript{127}. See \textit{id} at 841.

\textsuperscript{128}. See Jason L. Thomas, \textit{Note, 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 1026 (6th Cir. 1995), 65 U. CIN. L. REV. 727, 762 (1997)} (criticizing Sandison court as effectively eliminating disabled student-athletes’ use of disability legislation to gain equal opportunities). There has been an increase in the number of individuals diagnosed with learning disabilities, causing them to fall behind academically. See \textit{id}. However, “[athletics] are an important part of life and maturation. Therefore, courts should be sensitive to the need to reasonably accommodate disabled student athletes into programs... to eliminate the neglect and discrimination of disabled individuals.” \textit{Id} (citing Johnson v. Fla. High Sch. Activities Ass’n, 899 F. Supp. 579, 586 (M.D. Fla. 1995)).

\textsuperscript{129}. See \textit{Washington}, 181 F.3d at 845; see also McPherson v. Mich. High Sch. Athletic Ass’n, 119 F.3d 453 (6th Cir. 1997); Bingham v. Or. Sch. Activities Ass’n, 37 F. Supp. 2d 1189 (D. Or. 1999). For purposes of this Note, claims under the ADA and the Rehabilitation Act can be evaluated using very similar standards so that one act is applicable to the other.

\textsuperscript{130}. See, e.g., McPherson, 119 F.3d at 453 (denying learning disabled student’s request for waiver of eight semester rule because waiver threatened purposes of rule); Doherty v. S. Coll. of Optometry, 862 F.2d 570, 574-75 (6th Cir. 1988) (holding that elimination of clinical efficiency requirement was not reasonable accommodation). \textit{But see Bingham}, 37 F. Supp. 2d at 1189 (granting waiver of eight semester rule as reasonable accommodation because plaintiff was disabled under ADA in major life activity of learning); Dennin v. Conn. Interscholastic Athletic Conference, 913 F. Supp. 663, 671 (D. Conn. 1996) (holding that student-athlete should be granted waiver of eligibility requirement).
ment was a reasonable accommodation.131 Consistent with these cases, the Washington court held that intentional discrimination was not necessary to establish a discrimination claim.132 Instead the court followed the view that requiring the plaintiff to prove discriminatory intent would be contrary to Congress’ intent in passing this legislation.133

Courts are also split on whether reasonable accommodations of athletic eligibility requirements should be granted in both ADA and Rehabilitation Act claims. The Washington court followed one line of cases which held that reasonable accommodations should be made to student-athletes who do not meet the maximum age eligibility requirements due to learning disabilities because waiver of the requirement does not alter the nature of the athletic programs.134 The Washington court followed these cases in their analysis of eligibility requirement, and the court held that “some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities.”135

131. See Washington, 181 F.3d at 849-51; see also Bingham, 37 F. Supp. 2d at 1202 (holding that waiver of eight semester rule was reasonable accommodation); Johnson v. Fla. High Sch. Activities Ass’n, 889 F. Supp. 579, 585 (D. Fla. 1995) (holding that waiver of age requirement would not fundamentally alter nature of program); Buhai, supra note 1, at 139 (noting that “[a]ccommodation of disabilities is critical to allow people with disabilities the chance to achieve their goals, and also to dispel the myth that they are inadequate in some way”).

132. See Washington, 181 F.3d at 848. The court found that “a facially neutral rule adopted for neutral purposes and applied on a neutral basis is not always insulated from review.” Id. at 847 n.10.

133. See id. at 846. The court here relied on the Supreme Court’s finding in Alexander v. Choate that Congress clearly did not intend the statutes to apply to only cases of intentional discrimination. If discriminatory intent were a necessary element of these claims, plaintiffs would not be able to recover for discriminatory actions against them that were intended to be prevented by this legislation. See id. (citing Alexander v. Choate, 469 U.S. 287, 295-97 (1985)); see also McPherson, 119 F.3d at 460 (holding that plaintiff possibly could have relied on disparate impact theory in bringing ADA discrimination claim).

134. See Dennin v. Conn. Interscholastic Athletic Conference, 913 F. Supp. 663, 670 (D. Conn. 1996) (holding that because plaintiff is otherwise qualified when offered some reasonable accommodation, he must be granted waiver of age requirement because waiver does not undermine its purposes); see also Johnson, 899 F. Supp. at 585 (holding that analysis of relationship between age requirement and its purposes indicates that granting waiver of requirement would not fundamentally alter nature of program); Univ. Interscholastic League v. Buchanan, 848 S.W.2d 298, 302 (Tex. App. 1999) (holding that special determinations for disabled students are reasonable accommodations that advance purposes of Rehabilitation Act and maximum age requirement); Booth v. Univ. Interscholastic League, No. A-90-CA-764, 1990 U.S. Dist. LEXIS 20835 (W.D. Tex. Oct. 4, 1990) (holding that requiring special consideration of disabled plaintiff was reasonable accommodation).

Other courts have held that waivers of the athletic eligibility requirements are not reasonable accommodations.\textsuperscript{136} The \textit{Washington} court’s rejection of this view effectively expanded the rights of disabled student-athletes to prevent high school athletic associations from refusing waivers of athletic eligibility requirements. The \textit{Washington} court refused to follow the reasoning of the court in \textit{McPherson v. Michigan High School Athletic Ass'n}, holding that granting a waiver to Washington would not alter the nature of the eight semester rule.\textsuperscript{137}

\textbf{B. The “By Reason of the Disability” Language}

The \textit{Washington} court held that to constitute a violation under the ADA there must be a causal connection between the disability and the ineligibility.\textsuperscript{138} Therefore, the \textit{Washington} court correctly rejected the holdings in both \textit{McPherson} and \textit{Sandison v. Michigan High School Athletic Ass'n} when it held that application of a seemingly neutral “passage of time” rule was inappropriate as applied to disabled student-athletes.\textsuperscript{139} The holding in \textit{Washington} increased the opportunities for disabled student-athletes to overcome athletic eligibility requirement barriers by rejecting the “passage of time” argument, which only veils the underlying discrimination.\textsuperscript{140}


\textsuperscript{137.} See \textit{McPherson}, 119 F.3d at 463 (holding that allowing waivers of eight semester rule would place undue administrative burdens on athletic associations to determine who should be granted waivers and that waivers would threaten fundamental purposes of eight semester rule); \textit{see also Washington}, 119 F.3d at 852. The court explained that Washington’s waiver request asked for a minimal rule modification and that the IHSAA had granted waivers in the past that did not cause any fundamental alterations of the rule. \textit{See id.}

\textsuperscript{138.} See \textit{Washington}, 119 F.3d at 848. The court looked to the holdings of the courts in both \textit{McPherson} and \textit{Sandison} when it held that but for Washington’s disability, he would not have dropped out of school and consequently, would not have been ineligible under the eight semester rule. \textit{See id. at 848-49.}

\textsuperscript{139.} \textit{Id.} at 849. The \textit{McPherson} and \textit{Sandison} courts held that the eligibility requirements did not exclude students by reason of their disabilities, but rather, by reason of the passage of time. \textit{See id. at 848-49.}

\textsuperscript{140.} \textit{See id. at 849}. The \textit{Washington} court recognized that the “passage of time” argument ignored the fact that the disability had something to do with the amount of time the students had been in school. \textit{See id. at 849 n.12}. In other words, if it had not been for his disability, Washington would not have needed to be in high school for more than eight semesters. \textit{See id. at 849.}

Similarly, the court in \textit{Bingham v. Oregon School Activities Ass’n} stated that the narrow “passage of time” rule “ignores the realities of the impact of the rule on
C. Balancing of the Interests

The *Washington* court held that an individualized assessment should be made of each student requesting a waiver, rather than requiring application of a blanket policy against waivers. The *Washington* court followed a growing trend allowing individualized assessments of student-athletes in deciding whether to grant waivers of the athletic eligibility requirements. Several courts, including the court in *Washington*, have balanced the student-athletes' interests in participating in athletics with the athletic associations' interests in upholding the purposes of the athletic eligibility requirements. The *Washington* court rejected arguments that granting a waiver to Washington would place undue financial and administrative burdens on the IHSAA. Rather, the court followed the view that the irreparable harm to Washington in being denied the opportunity to participate in athletics outweighed any burdens on the IHSAA. Ultimately, the court in *Washington* took a strong stance in protecting the rights of disabled student-athletes to gain the same advantages as their non-disabled classmates.

VI. Impact

The Seventh Circuit's broad holding regarding the protections of the Rehabilitation Act and the ADA will have a profound effect on those who, through no fault of their own, because they are disabled – find themselves still in high school for a 5th year.” *Bingham*, 37 F. Supp. 2d 1189, 1202 (D. Or. 1999).

141. See, e.g., *Booth v. Univ. Interscholastic League*, No. A-90-CA-764, 1990 U.S. Dist. LEXIS 20835 (W.D. Tex. Oct. 4, 1990) (holding that strict enforcement of eligibility requirements would undermine objectives of Rehabilitation Act without advancing policies of eligibility requirements). Several courts, including *Washington*, have recognized the importance of athletics in increasing students' self-esteem, motivation and desire to perform well academically. See *Washington*, 119 F.3d at 853. The *Washington* court noted that Washington's grades improved when he was playing basketball, but he had lost his academic motivation when the eight semester rule barred him from playing. See id.

142. See, e.g., *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996); *Johnson v. Fla. High Sch. Activities Ass'n, Inc.*, 899 F. Supp. 579, 584-85 (D. Fla. 1995), vacated as moot, 102 F.3d 1172 (11th Cir. 1997); *Bingham*, 37 F. Supp. 2d at 1189. For further discussion of these cases, see *supra* notes 61, 78, 131 and accompanying text.

143. See *Washington*, 119 F.3d at 851 (citing Sch. Bd. of Nassau County v. Airline, 480 U.S. 273 (1987)).

144. See *id.* at 852. The court rejected the IHSAA's argument that it would face financial and administrative burdens in determining who was eligible for a waiver of the eight semester rule. See *id*. Instead, the court explained that Washington was the first student-athlete to bring such a claim in over a decade. See *id*.

145. See *id.* at 853.
on the ability of disabled student-athletes to obtain waivers of athletic eligibility requirements. There are more than 200,000 students diagnosed with learning disabilities each year.\textsuperscript{146} Many of these students lack the self-confidence necessary to succeed academically, and participation in athletics can give them the self-confidence and motivation necessary to succeed.\textsuperscript{147}

Rather than applying a strict interpretation of the eight semester rule, the court in Washington recognized the importance of athletics to a high school education.\textsuperscript{148} Both the ADA and the Rehabilitation Act emphasize that the activity of learning is a major life activity.\textsuperscript{149} Participation in athletics truly is a part of that major life activity of learning. Through participation in athletics, student-athletes increase their self-esteem, improve their social skills and learn self-discipline.\textsuperscript{150}

Unfortunately, learning disabled student-athletes often experience feelings of inferiority and insecurity because they must struggle to compete academically with their non-disabled classmates.\textsuperscript{151} All students have the potential to accomplish great goals in their lives, and accomplishment of these goals begins with education.\textsuperscript{152} The Washington court realized that the strict application of athletic eligibility requirements will only hinder disabled students' ability to succeed.\textsuperscript{153} As one commentator asked, "Why must disabled ath-

\textsuperscript{146} See Freitas, supra note 4, at 139.

\textsuperscript{147} See, e.g., Washington, 119 F.3d at 853. The court pointed out that Washington had excelled in basketball, which improved his self-esteem in other areas of his life. When he found out that he would be ineligible to participate in athletics, he lost the motivation to do well academically. See id.

\textsuperscript{148} See Encarnacion, supra note 88, at 361 (stating that "mere existence of a mechanism for semester rule waivers . . . seems to imply that the rule is not a necessary requirement"). For a discussion of how athletics benefited Washington, see supra note 19 and accompanying text.

\textsuperscript{149} See 34 C.F.R. § 104.3(j)(2)(ii) (1999); see also 29 C.F.R. § 1630.2(i) (1991).

\textsuperscript{150} See Evale, supra note 1, at 136 (outlining benefits to student-athletes due to their participation in athletics).

\textsuperscript{151} See id.

\textsuperscript{152} See James A. Lovegren, Making the Grade: Learning Disabled Student-Athletes and the NCAA's Eligibility Requirements, 6 SPORTS LAW. J. 189, 214 (1999) (recognizing that there should be academic requirements to make student-athletes eligible to participate in athletics, but that "under a one-size-fits-all approach, some potential athletes who would have become better educated citizens, will undoubtedly fall through the cracks by not 'qualifying' for academic scholarships, thereby preventing them from attending college at all"). Therefore, a "happy medium" must be found when applying athletic and academic requirements to student-athletes, especially those with learning disabilities. See id.

\textsuperscript{153} See Washington, 119 F.3d at 853. Washington's self-esteem decreased, and he lost the desire to succeed academically when he was told that he could no longer participate in athletics. See id.
letes put in a request to be treated like others?"\textsuperscript{154} The Washington court's holding will remind other courts that "we are all on the same side in this game. We want to provide our young with all the opportunities they need to succeed."\textsuperscript{155}

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\textsuperscript{154} Patricia A. Solfaro, Note, \textit{Civil Rights - Courts Should Use an Individualized Analysis When Determining Whether to Grant a Waiver of an Athletic Conference Age Eligibility Rule: Dennin v. Connecticut Interscholastic Athletic Conference, Inc.,} 913 F. Supp. 663 (2d Cir. 1996), 7 SETON HALL J. SPORT L. 185, 218 (1997). This commentator questioned whether society has lost completely its ability to do what is "the moral, decent compassionate thing to do" by failing to accommodate disabled individuals who deserve to participate in athletics as equals with other players. \textit{Id.}