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# Fair Play for Those Who Need it Most: Athletic Opportunities for High School Student Athletes with Disabilities

Ian Forster

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## FAIR PLAY FOR THOSE WHO NEED IT MOST: ATHLETIC OPPORTUNITIES FOR HIGH SCHOOL STUDENT ATHLETES WITH DISABILITIES

Often in the American public high school system, students with disabilities are not offered regular access to school-sponsored athletic opportunities.<sup>1</sup> Although the Rehabilitation Act of 1973 (Rehab Act),<sup>2</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>3</sup> and the Individuals with Disabilities Education Act (IDEA)<sup>4</sup> aim to prevent such public discrimination, traditional public high schools and school districts are not always properly equipped to provide adaptive education and athletic opportunities to students with disabilities.<sup>5</sup> This Comment focuses on the lack of athletic opportuni-

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1. See generally James P. Looby, *Reasonable Accommodations for High School Athletes with Disabilities: Preserving Sports While Providing Access for All*, 19 SPORTS L.J. 227 (2012) (noting that millions of American students with disabilities are prevented from participating in high school athletics, specifically in track and field); see also Terri Lakowski, *Athletes with Disabilities in School Sports: A Critical Assessment of the State of Sports Opportunities for Students with Disabilities*, 27 B.U. INT'L L.J. 283, 285 (2009) (explaining that National Federation of State High School Associations (NFHS) does not officially sanction any interscholastic program, event, or competition for students with disabilities).

2. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794 (2006)). The Rehab Act protects otherwise qualified individuals with a disability against exclusion from, participation in, denial of benefits of, and discrimination under federally assisted programs or activities. See 29 U.S.C. § 794(a) (prohibiting discrimination on basis of disability “under any program or activity receiving Federal financial assistance”).

3. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2000)). The ADA protects qualified individuals with a disability against exclusion from participation in, denial of benefits or, and discrimination under state and local government assisted services, programs, or activities. See 29 U.S.C. § 12132 (prohibiting discrimination on basis of disability regarding public services).

4. Individuals with Disabilities Education Act, Pub. L. No. 108-446, § 2, 124 Stat. 2643 (codified at 20 U.S.C. §§ 1400-1491 (2010)). IDEA ensures the federal government’s role in assisting state and local governments to provide all students with disabilities free and appropriate special education and related services. See 20 U.S.C. § 1400 (defining purpose of IDEA).

5. See generally Christina Hoag, *Students with Special Needs Staying in Traditional Public Schools*, HUFFINGTON POST (Aug. 20, 2012, 12:59 PM), [http://www.huffingtonpost.com/2012/08/20/special-needs-kids-stayin\\_0\\_n\\_1803753.html](http://www.huffingtonpost.com/2012/08/20/special-needs-kids-stayin_0_n_1803753.html) (noting charter schools do serve children with disabilities, but traditional district schools tend to serve majority of severely disabled children; Philadelphia district schools and charters have fourteen percent special needs enrollment, “but about half the district’s pupils with special needs have severe disabilities compared to about a third for charters.”).

ties provided to high school students with disabilities.<sup>6</sup> However, this denial is only a piece of the larger failure that states, school districts, and educational institutions and bodies perpetuate in failing to follow existing federal laws that seek to protect proper adaptive physical education opportunities to special needs students of all ages.<sup>7</sup>

This Comment discusses the legal framework that guides public high schools offering athletic opportunities to student athletes with disabilities and argues that those laws are not effective in providing school support to students. Part I addresses existing federal laws that outline procedures and requirements for schools offering adaptive physical education and competitive athletic opportunities to disabled student athletes.<sup>8</sup> Parts II and III discuss the Department of Education (DOE) regulations that support the federal laws and the motivations for and implications of those regulations.<sup>9</sup> The DOE requires schools to take reasonable steps to provide students with disabilities adaptive physical education and athletic opportunities in the least restrictive means possible, a goal known as “mainstreaming.”<sup>10</sup>

Part IV discusses the Supreme Court’s 2001 ruling in *PGA Tour, Inc. v. Martin*,<sup>11</sup> which established the general framework that courts use when faced with a disabled student athlete’s discrimination claim against a school, district, or state.<sup>12</sup> Although courts have room to interpret various aspects of a student athlete’s claim under the *Martin* framework, the Supreme Court ruling ensures that each claim involves an individualized investigation of the stu-

6. See, e.g., *McFadden v. Grasmick*, 485 F. Supp. 2d 642 (D. Md. 2007), *infra* notes 139-51; see, e.g., *Badgett v. Ala. High Sch. Athletic Ass’n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928 (N.D. Ala. May 3, 2007), *infra* notes 126-38.

7. See generally APENS, <http://www.apens.org/> (last visited Oct. 2, 2014) (outlining adaptive physical education standards and offering best practices for educators and parents); PALESTRA, <http://www.palaestra.com/> (last visited Oct. 2, 2014) (providing research and guidance for adaptive physical education).

8. For a discussion of existing federal laws addressing athletic opportunities for disabled students, see *infra* notes 18-45 and accompanying text.

9. For a discussion of DOE regulations and their implications for disabled student athletes, see *infra* notes 46-76 and accompanying text.

10. See *infra* notes 46-76 and accompanying text (discussing DOE requirements for providing athletic opportunities to disabled students).

11. 532 U.S. 661 (2001). For a full discussion of *PGA Tour, Inc. v. Martin*, see *infra* notes 77-93.

12. For a discussion of the legal framework stabled in *Martin*, see *infra* notes 77-93 and accompanying text.

dent athlete's disability and the potential impact of allowing the student's participation in the athletic opportunity.<sup>13</sup>

Part V identifies specific cases involving both mentally and physically disabled student athletes' claims and discusses how these cases reflect the *Martin* framework and the DOE mainstreaming goal.<sup>14</sup> Part VI discusses continued DOE and policy support for adaptive physical activity and competitive athletic opportunities for student athletes with disabilities.<sup>15</sup> Part VII notes specific states, districts, and schools across the country that have proven it is possible to support adaptive and inclusive athletic opportunities for students with disabilities.<sup>16</sup> This Comment concludes that it is possible for student athletes with disabilities to participate in appropriate athletic competition under the existing federal laws, the DOE's guidelines, and the Supreme Court's *Martin* ruling, but these opportunities require further support from individual states, districts, and schools, as well as federal laws and the DOE.<sup>17</sup>

## I. WRITING THE RULES: FEDERAL LAWS SUPPORT STUDENTS' WITH DISABILITIES RIGHT TO PLAY

Congress has promulgated the Rehab Act, the ADA, and IDEA as a way to provide legislative protections for individuals with disabilities; these protections extend to student athletes with disabilities.<sup>18</sup> Although athletic opportunity is not considered a fundamental individual right, it is clear that physical activity has a positive influence on students' academic performance and students' general health and wellbeing.<sup>19</sup> Although a school may legally discriminate against a student athlete with a disability as long

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13. See *infra* notes 77-93 (discussing broader implications of Supreme Court's holding in *Martin*).

14. For a discussion of cases applying the *Martin* framework to claims by student athletes, see *infra* notes 94-159 and accompanying text.

15. For a discussion of DOE support for disabled student athletes, see *infra* notes 160-182 and accompanying text.

16. For a discussion of successful efforts to support disabled student athletes, see *infra* notes 183-193 and accompanying text.

17. For an assessment of measures to improve athletic opportunities for disabled students, see *infra* notes 195-210 and accompanying text.

18. See, e.g., Rehab Act, 29 U.S.C. § 794; ADA, 42 U.S.C. §§ 12101-12213; IDEA, 20 U.S.C. §§ 1400-1491.

19. See, e.g., Gretchen Reynolds, *How Exercise Can Boost Young Brains*, N.Y. TIMES (Oct. 8, 2014, 12:01 AM), <http://well.blogs.nytimes.com/2014/10/08/how-exercise-can-boost-the-childs-brain/> (citing University of Illinois at Urbana-Champaign study published in *Pediatrics* that noted improvement in student-participant fitness and concluded increased access to fitness activities enhanced cognitive performance and brain function during tasks requiring greater executive control). Studies have demonstrated a causal effect of a physical activity program on execu-

as the discrimination is rationally based, student athletes with disabilities deserve the opportunity to benefit from physical activity and athletic competition.<sup>20</sup> It is the individual school's responsibility to provide access for students with the support of districts and states and under the processes and procedures outlined in the federal laws and the DOE regulations.<sup>21</sup>

The United States Supreme Court has held that public entities are not constitutionally barred from discriminating against individuals with disabilities as long as the entity can show a rational relationship between the discrimination and a legitimate objective.<sup>22</sup> Because the Supreme Court has not included individuals with disabilities as part of a suspect or quasi-suspect class entitled to heightened scrutiny in discrimination cases, it is not unlawful for schools and school districts to discriminate against a student athlete with a disability if the exclusion is rationally related to a legitimate objective.<sup>23</sup> Additionally, the Due Process Clause fails to provide constitutional safeguards to students with disabilities because the opportunity to participate in school-sponsored sports is not generally considered a fundamental right.<sup>24</sup>

Under federal law, schools are required to produce and follow and Individualized Education Program (IEP) for special needs students, though these IEPs are not required to, and often do not, include access to competitive athletic opportunities.<sup>25</sup> However, once a special needs student's IEP includes participation in interscholastic sports, that participation is a federally protected right

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tive control and provided support for physical activity improving childhood cognition and brain health. See *id.*

20. For a discussion of athletic activity's social, academic, and health benefits to students, see *infra* notes 64-76 and accompanying text.

21. See Lakowski, *supra* note 1, at 311-12 (claiming that schools, "when left to their own devices, have not and will not assumed responsibility for creating athletic programs for students with disabilities" and asserting that success calls for "legislative and regulatory" intervention as additional support).

22. See generally *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (holding that individuals with disabilities are not part of suspect or quasi-suspect class entitled to heightened scrutiny against allegations of discrimination). For a discussion of *Cleburne's* application to student athletes with disabilities, see *Badgett* discussion, *infra* notes 126-38 and accompanying text.

23. See Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J., 137, 139 (2005) (noting protecting safety of other athletes and maintaining competitive equality as legitimate objectives).

24. See Lakowski, *supra* note 1, at 289 n.32 ("[P]articipation in interscholastic sports is a privilege, not a right, except in extremely limited circumstances . . . ." (alteration in original) (quoting *M.H., Jr. v. Mont. High Sch. Ass'n*, 929 P.2d 239, 247 (Mont. 1996))).

25. See 20 U.S.C. § 1414(d) (2010) (providing requirements regarding IEPs).

under anti-discrimination legislation.<sup>26</sup> Schools and school districts must offer students with disabilities athletic opportunities under those circumstances.<sup>27</sup> Therefore, a student athlete with a disability may be granted access to athletic opportunities in their IEP, but that athlete does not necessarily enjoy a constitutionally protected right to that participation under the Supreme Court precedent.<sup>28</sup>

### A. Rehab Act and ADA

Section 504 of the Rehab Act and Title II of the ADA protect students with disabilities in American public schools.<sup>29</sup> The Rehab Act, passed in 1976, generally applies to any public entity that receives federal funding, providing that “no 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 . . . .”<sup>30</sup> Similarly, the ADA, passed in 1990 to expand the protections afforded to disabled individuals, provides enforceable standards 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.”<sup>31</sup>

The ADA was passed in 1990 to expand the protections afforded to disabled individuals, provide enforceable standards that courts could employ, and establish the federal government’s role in ending discrimination.<sup>32</sup> The ADA is modeled on the Rehab Act, therefore, it contains similar procedures, enforcement schemes,

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26. See, e.g., *Dennin v. Conn. Interscholastic Athletic Conference, Inc.* 94 F.3d 96 (2d Cir. 1996) (holding schools must make reasonable accommodations for special needs student athletes if accommodations do not impose undue financial or administrative burdens or fundamentally alter nature of program).

27. See generally *Mont. High Sch. Ass’n*, 929 P.2d 239 (holding that under IDEA, participants in sports over the state’s age limit restriction must be permitted to participate where such participation is required by student’s IEP).

28. Compare *id.* at 242 (“[W]here an IEP contains a requirement for participation in . . . interscholastic sports such participation is encompassed in the student’s guaranteed right to free and appropriate public education.”), with *City of Cleburne*, 473 U.S. 432 (holding that mental retardation is not “a quasi-suspect classification” entitled to heightened scrutiny against allegations of discrimination).

29. See ADA, 42 U.S.C. §§ 12101-12113; see also Rehab Act, 29 U.S.C. § 794.

30. Rehab Act, 29 U.S.C. § 794 (2012).

31. ADA, 42 U.S.C. § 12132 (2012); see also 42 U.S.C. § 12182 (expanding denial of benefits of services, programs, activities of “public accommodations” on the basis of disability to private schools).

32. See ADA, 42 U.S.C. § 12101(b) (stating purpose of ADA).

and potential remedies.<sup>33</sup> The ADA, however, applies beyond federally assisted entities: as Title II provides, “[N]o qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity.”<sup>34</sup> Title III further broadens the protections to “any place of public accommodation.”<sup>35</sup> The ADA’s inclusive language embraces school districts, schools (public and potentially private), and state athletic associations.<sup>36</sup>

Despite the Rehab Act and ADA’s broad protections, procedures, and remedies that parents and students must follow when making claims, under those Acts can be time consuming and do not guarantee a student with disabilities’ success in gaining access to school-sponsored athletic competitions.<sup>37</sup> Furthermore, the acts provide procedural protections, compensatory damages, and attorneys’ fees; however, other remedies, such as orders for future conduct, records amendments, and tuition reimbursement, as well as additional equitable relief, have been advanced as potentially available remedies.<sup>38</sup>

## B. Individuals with Disabilities Education Act (IDEA)

Compared to the Rehab Act and the ADA, IDEA is more detailed in prescribed regulations and protections for students with disabilities, and requires a school district to provide each student

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33. See Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Inter-scholastic Sports*, 49 ALA. L. REV. 817, 819-820 (1998) (noting that “ADA is modeled after section 504 [of Rehab Act], and Congress intended for them to be consistent” and that “enforcement remedies, procedures and rights under Title II are the same as under 504 . . .”).

34. See 42 U.S.C. § 12132 (defining scope of unlawful discrimination under ADA).

35. See *id.* at § 12182(a) (prohibiting discrimination by public accommodations).

36. See Looby, *supra* note 1, at 234 n.46 (“Although the statutory definition of ‘public accommodation’ does not expressly mention private school dormitories, those facilities satisfy that definition under conventional principles of interpretation.” (citing *Regents of the Mercersburg Coll. v. Republic Franklin Ins. Co.*, 458 F.3d 159, 165 (3rd Cir. 2006))).

37. See generally *Badgett v. Ala. High Sch. Athletic Ass’n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928; *McFadden v. Grasmick*, 485 F. Supp. 2d. 642 (D. Md. 2007). For a discussion of limited remedies under the Rehab Act and the ADA in connection with the *Badgett* and *McFadden* cases, see *infra* notes 126-151.

38. See Mark C. Weber, *Procedure and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 611, 615-16 (2012) (concluding that “section 504 and the ADA require school districts to afford significant procedural protections to students with disabilities, and that hearing officers and courts may award a wide range of remedies in Section 504 and ADA cases”).

with a disability a developmentally appropriate IEP.<sup>39</sup> Generally, IDEA is a law that seeks to ensure access to education for children with disabilities in America's school systems.<sup>40</sup> Related to physical activity, IDEA requires schools and teachers to adapt, modify, or change a physical activity so that it is appropriate for the special needs student.<sup>41</sup> The goal is "mainstreaming," so that all students are able to fully participate in an appropriate physical education program under the least restrictive means possible.<sup>42</sup> The existing DOE regulations echo IDEA's focus on mainstreaming as the ultimate goal of adaptive physical education.<sup>43</sup>

IDEA includes the following categories of disability: developmental delay (only for children under the age of nine); intellectual disability; hearing impairments, including deafness; speech or language impairments; visual impairments, including blindness; emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; and specific learning disabilities.<sup>44</sup> These categories provide broad coverage for students with various disabilities to enjoy equal education opportunities.<sup>45</sup>

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39. 20 U.S.C. § 1414(A) (2010) (defining requirements regarding "[e]valuations, parental consent, and reevaluations"); see also Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J. L. & EDUC. 407, 411 (2011) ("IDEA legislation provides not only a definition but multiple pages of requirements for an individualized education program . . .").

40. See *Building the Legacy: IDEA 2004*, U.S. DEP'T OF EDUC., <http://idea.ed.gov/> (last visited Sept. 6, 2014) (governing "how states and public agencies provide early intervention, special education and related services to more than 6.5 million eligible infants, toddlers, children and young with disabilities").

41. 20 U.S.C. § 1414 (d) (3) (A) (providing requirements for developing IEP). "In developing each child's IEP, the IEP Team, subject to subparagraph (C) shall consider: (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation or most recent evaluation of the child; and (iv) the academic, development, and functional needs of the child." See *id.*

42. 20 U.S.C. § 1400 (d) (3) (noting purpose is to "ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support . . .").

43. See U.S. DEP'T OF EDUCATION, OFFICE OF SPECIAL EDUC. AND REHABILITATIVE SERVS., OFFICE OF SPECIAL EDUC. PROGRAMS, *CREATING EQUAL OPPORTUNITIES FOR CHILDREN AND YOUTH WITH DISABILITIES TO PARTICIPATE IN PHYSICAL EDUCATION AND EXTRA CURRICULAR ATHLETICS* (2011), available at <https://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf> (discussing goals for providing opportunities for students with disabilities to participate in athletic activities). For a further discussion of the DOE report on athletic opportunities for students with disabilities, see *infra* notes 163-167 and accompanying text.

44. See 20 U.S.C. § 1401(3) (defining "[c]hild with a disability").

45. See 20 U.S.C. § 1400 (describing Congressional findings and purpose regarding IDEA).



## II. PLAYING WITHIN THE RULES: DOE REGULATIONS AND STUDENT ATHLETES WITH DISABILITIES' CLAIMS

The United States Federal Education Code, bolstered by the ADA, Rehab Act, and IDEA, requires all public schools and education programs to provide every child a free and appropriate public education.<sup>46</sup> The Education Code specifically protects equal education for students with disabilities, stating that “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements.”<sup>47</sup> Therefore, a school must not deny a student with disabilities the opportunity to participate in school-sponsored athletics based on a discriminatory failure to provide the student with reasonable accommodations.<sup>48</sup>

The existing DOE regulations specifically addressing interscholastic sports under the Rehab Act, ADA, and IDEA require public entities to offer students with disabilities equal opportunities to participate in interscholastic opportunities.<sup>49</sup> These regulations require a school to mainstream a student with a disability in the least restrictive manner possible—in other words, to allow that student the opportunity to participate in activities designed for nonhandicapped students.<sup>50</sup>

When identifying a student athlete’s individual ability to be mainstreamed, the school should broadly interpret the regula-

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46. See 34 C.F.R. § 104.1 (2014) (“The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.”).

47. See 34 C.F.R. § 104.33(b)(1) (defining “[a]ppropriate education”).

48. See Lakowski, *supra* note 1, at 295 ((citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985)) (noting that Supreme Court has established that schools are only required to make “reasonable” accommodations for individuals with disabilities)).

49. See 34 C.F.R. § 104.37(c)(1) (providing requirements regarding physical education and athletic opportunities for disabled students). “In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap . . . [such recipient] shall provide to qualified handicapped students an equal opportunity for participation.” *Id.*

50. See 34 C.F.R. 104.37(c)(2) (providing that school “may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate of different”).

tions.<sup>51</sup> In 2002, the United States Supreme Court held in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, that an individual's impairments had to be evaluated in their mitigated state and that an individual had to be subject to a "permanent or long term" restriction to be prevented "from doing activities that are of central importance to most people's daily lives."<sup>52</sup> In 2008, Congress superseded that ruling through the ADA Amendments Act,<sup>53</sup> thus broadening the statute's coverage to mainstream students with disabilities who require supplemental devices, aids, or services.<sup>54</sup>

To establish a prima facie case of discrimination under the ADA, an individual with a disability generally must establish four factors: (1) the individual has a present disability; (2) the individual is otherwise qualified for the benefit being sought; (3) the individual was excluded from the benefit by an entity solely due to the individual's disability; (4) the entity's denial was discriminatory because the individual could be accommodated with reasonable adaptive measures that the entity would not take.<sup>55</sup> Under the Rehab Act and the ADA, "disability" is defined generally as a physical or mental impairment that substantially limits one or more of the major life activities of an individual.<sup>56</sup> Student athlete claims brought under the ADA typically require the court to determine whether or not the impairment impacts a major life activity.<sup>57</sup>

A disabled student athlete must also demonstrate their eligibility to participate in school-sponsored athletic activity in order to claim discrimination under the ADA.<sup>58</sup> The Supreme Court held in

51. For a discussion of the DOE's Office of Civil Rights 2013 Guidance Document see Galanter, *infra* note 168, and sources cited notes 169-180 and accompanying text.

52. See 534 U.S. 184, 198 (2002) (creating strict standard for individuals to qualify as disabled under applicable Acts).

53. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101).

54. See Employment Practices Guide, ADA Amendments Act of 2008, 2014 WL 2093344, Sec. 2 Findings and Purposes (a)(4) (noting Supreme Court "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect").

55. See Lakowski, *supra* note 1, at 292-93 (prefacing discussion of student athlete with disability's burden of proof under Rehab Act claim).

56. See 29 U.S.C. § 705(9), (A)-(B) (2014) (defining "disability" under Rehab Act); see 42 U.S.C. § 12102(2) (defining "disability" under ADA).

57. See Lakowski, *supra* note 1, at 294 (noting generally that individual student athlete must show disabling condition impacts areas of life beyond sports; athletes with mobility impairments and or including significant learning disabilities would qualify under statute because their disabling condition "impacts major life function, (e.g. walking, learning, etc.) beyond participation in sports").

58. See *id.* (citing 42 U.S.C. § 12131(2) (2000)) (defining "qualified individual with a disability").

*Community College v. Davis* that a school may properly require a disabled student seeking participation in an educational program to possess “reasonable physical qualifications.”<sup>59</sup> Therefore, if a student athlete with a disability seeks an ADA claim against a school, school district, or state, he or she must demonstrate his or her ability to otherwise qualify to compete in school-sponsored sports and present evidence that the exclusion is based purely on the basis of the his or her disability.<sup>60</sup>

Establishing a prima facie case of discrimination under the Rehab Act consists of essentially the same elements as an ADA claim, though a Rehab Act claim requires that the education body is a recipient of federal funds.<sup>61</sup> The Rehab Act requires the student athlete demonstrate that his or her exclusion was discriminatory, typically understood when an education body could have offered participation to the student with reasonable accommodations.<sup>62</sup> Generally, courts have held that requested accommodations are unreasonable when they threaten the integrity of a program, create an undue burden on the education body, or create a direct safety threat to the larger community.<sup>63</sup>

### III. WHY MOVEMENT AND COMPETITION MATTER: PHYSICAL ACTIVITY DATA AND MAINSTREAMING

Studies show that physical activity promotes students’ academic success, social behaviors, and increased self-esteem.<sup>64</sup> Physical activ-

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59. See *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979) (holding that student did not otherwise qualify for educational program and program was therefore not discriminatory in disallowing student’s participation on basis of handicap).

60. See Lakowski, *supra* note 1, at 293-5 (noting that when all factors are satisfied, student may properly establish prima facie case of discrimination under ADA).

61. See *Ellis v. England*, 432 F.3d 1321, 1326 (2005) (holding “standard for determining liability under the Rehabilitation Act is the same as that under the Americans with Disabilities Act”).

62. See Lakowski, *supra* note 1, at 295 (noting Supreme Court has established schools are only required to make “reasonable” accommodations to modify facilities and programs for students with disabilities (citing *Alexander v. Choate*, 469 U.S. 287, 300 (1985))).

63. See *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n.17 (1987) (finding accommodation under Rehab Act “is not reasonable if it either imposes ‘undue financial and administrative burdens’ . . . or requires ‘a fundamental alteration in the nature of [the] program’ . . . .” (citations omitted) (quoting *Davis*, 442 U.S. at 412 )); see also *id.* at 287-88 (finding accommodation is not reasonable when it exposes “others to significant health and safety risks”); see also *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004) (holding reasonable accommodations standard does require entity employing “any and all means”).

64. See NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP’T OF HEALTH & HUMAN SERVICES, *PHYSICAL ACTIVITY & HEALTH: A REPORT*

ity also helps to prevent or reduce health problems, such as the risk of developing heart disease, and supports healthy weight control, muscle development, and osteoporosis prevention.<sup>65</sup> Every year the number of high school students participating in school-sponsored athletics increases.<sup>66</sup> The National Federation of State High School Associations (NFHS) acknowledges the important impact that sports play in students' "academic achievement, good citizenship, and equitable opportunity," though the NFHS does not provide any official adaptive physical education guidelines or sanction any special needs student programs.<sup>67</sup> It is important to provide students with disabilities opportunities to be physically active, not only for the physical health benefits, but also to promote those students' social, emotional, and academic health.<sup>68</sup>

Encouragingly, some states have adopted a mainstreaming process for students with disabilities, providing voluntary accommodations not otherwise mandated or supported for these students to

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OF THE SURGEON GEN. (1996), available at <http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>. The first Surgeon General's report on physical activity and health, noting that all Americans can improve their health through regular and appropriate physical activity. See *id.*

65. See generally *id.*

66. See 2012-2013 Athletic Participation Data, National Federation of State High School Associations (2013), available at <http://www.nfhs.org/Participation-Statics/ParticipationStatics.aspx/> [hereinafter "2012-2013 Athletic Participation Data"] (finding participation in high school sports reached 7,713,577 student athletes during 2012-2013 school year); see also Bryan Toporek, *High School Sports Participation Reaches Record High . . . Again*, EDUCATION WEEK (Aug. 23, 2013, 16:45 EST), [http://blogs.edweek.org/edweek/schooled\\_in\\_sports/2013/08/high\\_school\\_sports\\_participation\\_reaches\\_record\\_high\\_again.html](http://blogs.edweek.org/edweek/schooled_in_sports/2013/08/high_school_sports_participation_reaches_record_high_again.html) (noting more than 55% of high school students participate in school athletics).

67. See *Mission Statement*, National Federation of State High School Associations, <http://www.nfhs.org/who-we-are/missionstatement> (last visited Sept. 6, 2014) [hereinafter "NFHS Mission Statement"] (including "promotes student academic achievement," "develops good citizenships and healthy lifestyles," and "enrich each student's educational experience" as benefits of interscholastic activity programs under Mission Statement's "We Believe" section).

68. See generally SCHOOL-BASED PHYSICAL EDUCATION: WORKING WITH SCHOOLS TO INCREASE PHYSICAL ACTIVITY AMONG CHILDREN AND ADOLESCENTS IN PHYSICAL EDUCATION CLASSES, AN ACTION GUIDE, CENTER FOR DISEASE CONTROL (CDC) (2009); See also, Gretchen Reynolds, *How Physical Fitness May Promote School Success*, WELL: N.Y. TIMES BLOGS (Sept. 18, 2013), [http://well.blogs.nytimes.com/2013/09/18/how-physical-fitness-may-promote-school-success/?\\_php=true&\\_type=blogs&\\_r=0](http://well.blogs.nytimes.com/2013/09/18/how-physical-fitness-may-promote-school-success/?_php=true&_type=blogs&_r=0) (noting link between physical activity and academic success); see also Rauner, Walters, Avery & Wanser, *Evidence that Aerobic Fitness is More Salient than Weight Status in Predicting Standardized Math and Reading Outcomes in Fourth Through Eighth Grade Students*, J. PEDIATR. (2013), available at <http://www.ncbi.nlm.nih.gov/pubmed/23465408> (concluding student aerobic fitness is better predictor of academic success than is student weight).

engage in physical activity with nondisabled students.<sup>69</sup> Furthermore, some states and school districts provide more expansive school athletic leagues and programs to students with disabilities.<sup>70</sup> Despite available resources for adaptive physical education in schools, these trends are not representative for the vast majority of students with disabilities in the United States.<sup>71</sup>

Available statistics indicate how limited the access to athletic competition is for students with special needs.<sup>72</sup> The United States Census Bureau's reported statistics suggest that over fifty million Americans have some type of disability, including almost three million between the ages of five and seventeen.<sup>73</sup> Over half of all high school students participate in some school-sponsored athletic opportunity.<sup>74</sup> Of the fifty-nine million students ages three and older enrolled in schools in America, more than five and a half million students between the ages of five and seventeen receive special education services under IDEA.<sup>75</sup> Based on these statistics, there are potentially millions of students with disabilities denied opportuni-

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69. See Lakowski, *supra* note 1, at 286-87 (detailing specific examples of schools' mainstreaming opportunities, including Maryland student born without legs competing in school wrestling and Virginia student with Spina Bifida permitted to use wheelchair to compete as cheerleader). For a more complete discussion of successful programs, see *infra* notes 182-193 and accompanying text.

70. See Lakowski, *supra* note 1, at 286-87 (noting state specific adaptive programs, including multiple states allowing students in wheelchairs to participate on school track teams, Georgia High School Association's partnership with American Association of Adapted Sports Programs (AAASP) to offer wheelchair soccer and basketball, power wheelchair hockey, wheelchair football, and beep baseball—form of baseball adapted for students with visual impairments—and twenty-one successful Unified Sports programs in Vermont, which give over 1,500 student athletes opportunity to access extra-curricular opportunities regardless of disabilities).

71. See Lakowski, *supra* note 1, at 288 (claiming students with disabilities are "not provided with reasonable accommodations, they are [not] included but ostracized because of the disability, or they are completely excluded from participation").

72. See Looby, *supra* note 1, at 231 (identifying citizens with disabilities, high school sports participation, and IDEA coverage statistics from 2010 Disability Compendium).

73. 2013 Annual Disability Statistics Compendium, at 10 (Nov. 2013), available at <http://disabilitycompendium.org/docs/default-source/2013-compendium/download-the-2013-compendium.pdf?sfvrsn=0> (last visited Sept. 6, 2014) (discussing prevalence of individuals with disabilities).

74. See 2012-2013 Athletic Participation Data, *supra* note 66.

75. See Jessica Davis & Kurt Bauman, *School Enrollment in the United States 2001: Population Characteristics* (Sept. 2013), available at <http://www.census.gov/prod/2013pubs/p20-571.pdf> (discussing population characteristics of those enrolled in school); see also 2013 Annual Disability Statistics Compendium, *supra* note 73, at 104 (listing statistics of special education students from ages 6-21).

ties to participate in school sponsored athletic events afforded to their non-disabled peers.<sup>76</sup>

#### IV. THE SUPREME COURT OFFERS ADDITIONAL RULES: *PGA Tour, Inc. v. Martin*

In *PGA Tour, Inc. v. Martin*, the United States Supreme Court established a highly individualized balancing test for accommodating special needs athletes within the established rules of competitive sports.<sup>77</sup> In 2001, professional golfer Casey Martin sued the Professional Golf Association (PGA), claiming the PGA discriminated against Martin based on his disability, Klippel-Trenaunay-Weber Syndrome, “a degenerative circulatory disorder that obstructs the flow of blood” and causes severe pain and fatigue.<sup>78</sup> The Court examined the ADA language as pertaining to athletic competition by addressing whether the PGA’s accommodation for Martin would fundamentally alter the game.<sup>79</sup> The Court held that allowing Martin to use a golf cart does not fundamentally alter the PGA’s rules; therefore, the PGA could not deny Martin a reasonable accommodation.<sup>80</sup>

The Court, using the ADA’s language as guidance, held that “an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental altera-

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76. See Looby, *supra* note 1, at 231 (concluding, based on similar statistics, that “it becomes apparent how many students with disabilities have more than likely been denied the opportunity to compete in athletic competitions”).

77. See Andrew I. Warden, *Driving the Green: The Impact of PGA Tour, Inc. v. Martin on Disabled Athletes and the Future of Competitive Sports*, 80 N.C. L. REV. 643, 647 (referring to Court’s holding as “focusing on Martin’s individual circumstances” which “provides qualified disabled athletes with the opportunity to participate in competitive sports while simultaneously minimizing the chance that the rules of competitive athletics will transform into a collection of individualized exceptions.”).

78. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 668 (2001) (discussing factual background).

79. See *id.* at 670 (discussing factual background and analysis). The PGA denied Martin’s request to use a golf cart, contending that the rule prohibiting its use on the tour was a “substantive rule of competition,” and any waiver would “fundamentally alter the nature of the competition.” See *id.*

80. See *id.* at 685 (concluding that Martin’s requested accommodation did not affect fundamental element of game or provide Martin with competitive advantage); see *id.* at 690 (noting “what [granting accommodation] can be said to do . . . is to allow Martin the change to qualify for, and compete in, the athletic events [PGA] offers to those members of the public who have the skill and desire to enter.”).

tion.”<sup>81</sup> The *Martin* ruling established guidelines that lower courts have since extended to all athletes with disabilities, including high school student athletes, including: (1) fundamental alterations exist where a requested accommodation alters an essential aspect of the game or creates a competitive advantage; (2) individualized assessments must be made to determine whether the specific modification for a particular athlete’s disability creates a fundamental alteration; (3) some administrative burdens are acceptable to incur in making this determination.<sup>82</sup> These considerations have provided guidance to lower courts in interpreting student athletes’ ADA and Rehab Act claims under those statutes’ broad and potentially ambiguous language.<sup>83</sup>

*Martin* added a second layer of guidance in addition to Congress’s actions, which has yielded varying interpretations when applying Title II and Section 504 claims to high school athletes with disabilities.<sup>84</sup> In requesting access to school sponsored athletic opportunities, a student athlete with a disability must establish that he or she in fact has a “disability.”<sup>85</sup> The Supreme Court has also provided guidance here, suggesting a three-part test asking whether: (1) the individual physically or mentally impaired; (2) a major life activity implicated, and; (3) the impairment substantially limits the major life activity.<sup>86</sup> Generally, a student athlete making a Title II claim will argue school sponsored physical activity as a “major life

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81. See *Martin*, 532 U.S. at 688 (providing Court’s determination).

82. See *id.* at 690 (discussing effect of *Martin* decision).

83. See Looby, *supra* note 1, at 230. “*Martin* requires courts to undertake an individualized inquiry as to whether an accommodation is reasonable . . . blanket prohibitions regarding an accommodation are forbidden. An organization must look at the particular facts and circumstances surrounding the athlete requesting the accommodation.” See *id.* (emphasis added).

84. See Warden, *supra* note 77, at 658-59 (citing *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840, 853-54 (7th Cir. 1999)) (discussing high school athletic associations established as public entities and Title II claims involving mentally disabled students seeking waiver of age limit requirements). In *Washington*, the Seventh Circuit granted the waiver of Indiana’s eight semester rule for learning disabled student athlete claim under Title II. See also *Sandison v. Mich. High Sch. Athletic Ass’n, Inc.*, 863 F. Supp. 489 (E.D. Mich. 1994) (holding participation in school sponsored athletics was integral to high school student athlete with disability’s education and thus major life activity); *but see Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 930-31 (8th Cir. 1994) (denying learning disabled student athlete as “qualified individual with a disability” under Title II; since reasonable accommodation could not be made, student was not qualified).

85. See 42 U.S.C. § 12102(2)(A)-(C) (2009).

86. See generally *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that activity qualifying as major life activity and is subject to ADA standards and protection).

activity.”<sup>87</sup> The Court’s ruling in *Martin* established that each case must be determined by a subjective standard, focusing on the specific athlete’s needs, disability, and claim.<sup>88</sup> Although courts have differed in their subjective findings in response to Title II claims, there is precedent for holding athletic competition as a major life activity.<sup>89</sup> Courts have also applied the *Martin* requirement that an athlete’s request be reasonable given the surrounding circumstances and particular facts.<sup>90</sup>

The ruling in *Martin* upheld Congress’s inclusive intent standard for special needs athletes’ athletic participation, if still maintaining a required individualized and subjective standard for such requests.<sup>91</sup> The important balance between competitive sports’ integrity and inclusivity is especially important at the high school level; allowing students with disabilities access to school sponsored athletic opportunities is vital to those students’ overall development, but also cannot infringe on the rights of non-disabled student athletes to participate in those same activities.<sup>92</sup> *Martin*’s inclusive spirit, which aligns with the broad congressional intent under the ADA and Rehab Acts and emphasizes an appropriate balance, should be followed by public high schools and school districts around the country.<sup>93</sup>

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87. See Warden, *supra* note 77, at 662 (noting that courts have reached inconsistent results when faced with this issue due to uncertainty as to applied standard, as objective or subjective for athlete’s claim).

88. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (stating ADA requires individualized inquiry to determine whether specific modification for person’s disability would be reasonable and necessary under circumstances); see also Warden, *supra* note 77, at 664 (concluding Court’s individualized standard for determining person’s condition should also apply to threshold ADA questions, “such as whether the individual is substantially limited in a major life activity”).

89. See Warden, *supra* note 77, at 665 (discussing inconsistent results in *Knapp v. Nw. Univ.*, 101 F.3d 473, 480 (7th Cir. 1996), which denied college student athlete with disability ADA protection because participation in intercollegiate play was not major life activity).

90. See *Martin*, 532 U.S. at 688 (requiring reasonable modifications for disabled individuals “as necessary to afford access unless doing so would fundamentally alter what is offered”); see also *Washington v. Ind. High Sch. Athletic Ass’n, Inc.*, 181 F.3d 840 (7th Cir. 1999).

91. See Warden, *supra* note 77, at 674 (rejecting J. Scalia’s *Martin* dissent as “indicative of the exclusionary thinking that has plagued athletics for too long” and concluding ADA’s purpose of “elimination of discrimination against individuals with disabilities” is best met by inclusive policy choice on behalf of public entities).

92. See *id.* at 688 (concluding the *Martin* ruling has “broader effect” of protecting competitive athletics’ integrity and giving lower courts guidance on ADA claims).

93. See *id.* at 691 (“If sports are indeed an accurate reflection of society, then *Martin* represents a significant advancement towards a tangible illustration of this



V. INTERPRETING THE ADDITIONAL RULES: *MARTIN*'S IMPACT ON STUDENT ATHLETES WITH DISABILITIES

Prior to *Martin*, federal courts did not have substantial guidance to make decisions when student athletes with disabilities brought challenges under the Rehab Act and the ADA.<sup>94</sup> In addressing Title II and Section 504 claims, courts disagreed on whether allowing certain disabled students to participate would fundamentally alter the nature of the competitive, school-sponsored athletic opportunity.<sup>95</sup> Since *Martin* is the sole Supreme Court decision that considers athletic events and opportunities subject to ADA Title II and Title III reasonable accommodations standards, *Martin* provides guidelines for courts to apply to future student athlete claims.<sup>96</sup> However, despite *Martin*'s requirement that courts use an individualized inquiry when deciding a student athlete's discrimination claim or reasonable accommodation request, the Court's ruling left those individualized decisions—reasonable accommodations, unfair advantages, fundamental alterations, undue burden—to the lower courts' discretion.<sup>97</sup>

A. Students with Mental Disabilities

Courts have applied the *Martin* framework in undertaking their own investigations when faced with student Rehab Act and ADA discrimination claims based on mental disabilities.<sup>98</sup> *Martin*'s individualized inquiry requirement has resulted in courts reaching different conclusions when presented with similar claims based on

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ideal through the Supreme Court's recognition that the athletic playing field should be accessible to all athletes, whether able-bodied or disabled.”)

94. See *id.* at 241-44 (discussing 7th Circuit's waiver of state age limit in *Washington* and 6th Circuit's *McPherson* considering waiving age limit rule as unreasonable accommodation). For a further discussion on *McPherson*, see *infra* note 95.

95. See generally *Washington*, 181 F.3d 840 (holding waiver of state age requirement would not fundamentally alter high school basketball); but see *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 462 (6th Cir. 1997) (holding waiver of state age requirement would fundamentally alter high school athletics by allowing older and more physically aggressive students to compete against younger and less physically developed student athletes).

96. See Looby, *supra* note 1, at 250 (explaining that *Martin* created current framework used for analyzing student athletes' ADA claims).

97. See *id.* (suggesting that *Martin* framework correct but still requires courts to determine individual factors in given circumstance and whether accommodations constitute fundamental alteration of sport).

98. See *id.*, at 251-57 (discussing *Cruz ex. rel. Cruz v. Pa. Interscholastic Athletic Ass'n*, 157 F. Supp. 2d 485 (E.D. Pa. 2001) and *Baisden v. West Virginia Secondary Schools Activities Comm'n*, 568 S.E.2d 32 (W. Va. 2002)). For a discussion of *Cruz*, see *infra* notes 101-110. For a discussion of *Baisden*, see *infra* notes 111-122.

specific circumstances.<sup>99</sup> Two cases, one from a Pennsylvania District Court and the other from the West Virginia Supreme Court of Appeals, illustrate this potential.<sup>100</sup>

### 1. *Luis Cruz*

In *Cruz v. Pa. Interscholastic Athletic Ass'n, Inc.*, the United States District Court for the Eastern District of Pennsylvania used the *Martin* ruling to guide its holding.<sup>101</sup> The court unequivocally understood *Martin* to have created an understanding that “a basic requirement of the ADA is the evaluation of a disabled person on an individual basis.”<sup>102</sup>

The court was asked to determine whether Luis Cruz, a nineteen-year-old public school special education student, could participate on his high school’s football team despite his age, which restricted him from doing so under the Pennsylvania Interscholastic Athletic Association’s (P.I.A.A.) rules.<sup>103</sup> Under IDEA, Cruz had a right to be a “free and appropriate education” until he graduated in a manner consistent with IDEA, as long as he did so before he reached age twenty-one.<sup>104</sup> Because he was a disabled student, Cruz’s education was in accordance with an IEP, pursuant to

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99. See generally *Hamilton v. W. Va. Secondary Schools Activities Comm’n*, 386 S.E.2d 656 (W. Va. 1989) (rejecting Commission’s blanket application of “eight semester” rule, holding that rule preventing students from being held back in school for athletic purposes is “applied unreasonably when the Commission refuses to consider legitimate academic reasons for a student’s repeating a grade in junior high school”). See generally *Pottgen*, 40 F.3d 926 (holding student who had repeated two grades in elementary school due to learning disabilities could not circumvent age requirement, which was held as essential eligibility requirement); see also generally *Sandison*, 64 F.3d 489 (holding nineteen year old high school students who delayed finishing high school due to learning disabilities were not excluded from athletic participation solely by reason of disability; age rule was neutral and waiver would fundamentally alter nature of track and field events).

100. See generally *Cruz*, 157 F. Supp. 2d 485; *Baisden*, 568 S.E.2d 32. For a further discussion of *Cruz* and *Baisden*, see *infra* notes 101-122 and accompanying text.

101. See *Cruz ex. Rel. Cruz v. Pa. Interscholastic Athletic Ass’n*, 157 F. Supp. 2d 485, 499 (E.D. Pa. 2001) (applying *Martin* factors as: “(1) whether the requested modification is reasonable; (2) whether it is necessary for the disabled individual; and (3) whether it would fundamentally alter the nature of the competition.”).

102. See *id.* (applying precedent requiring individualized evaluation of individuals to student athletes with disabilities).

103. See *id.* at 488-89 (discussing factual background).

104. See *id.* at 489 (explaining that under Pennsylvania law, students are entitled to access to public education until graduation or reaching 21 years old).

IDEA.<sup>105</sup> Cruz's IEPs included school-sponsored athletic competition involvement as an important aspect of his education.<sup>106</sup>

The court held, given the specific nature of his disability and the surrounding circumstances, waiver of the P.I.A.A.'s age rule was necessary for Cruz's participation in school-sponsored athletics and would not alter the nature of the competition.<sup>107</sup> Additionally, the court held Cruz's waiver application was a reasonable modification under the ADA.<sup>108</sup> Finally, the court concluded that Cruz's IEP required participation in interscholastic sports and that Cruz's education would "sustain irreparable harm" if he were not provided that opportunity.<sup>109</sup> By applying the appropriate individualized inquiry, the *Cruz* ruling properly applied the *Martin* requirement for individual investigation to a student athlete's ADA claim.<sup>110</sup>

## 2. *Jarrett Baisden*

In *Baisden v. West Virginia Secondary Schools Activities Commission*, the West Virginia Supreme Court of Appeals reached a conclusion opposite to the Eastern District of Pennsylvania when faced with a similar issue.<sup>111</sup> Jarrett Baisden turned nineteen years old before the start of his senior year in high school, which prohibited him from competing in school-sponsored athletics under West Virginia Code of State Regulations section 127-2-4.1; however, Baisden wanted to play for the his high school's football team.<sup>112</sup> After the

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105. See *id.* at 490 (explaining Cruz's individual evaluation). For a further discussion of the use of IEPs in public schools, see *supra* note 25 and accompanying text.

106. See *Cruz*, 157 F. Supp. 2d at 490 (noting two IEPs which stated that Cruz enjoys and "require[s] extra-curricula activities, such as sports, as part of his need for socialization and educational outcomes provided in accordance with IDEA regulations").

107. See *id.* at 499 (elaborating upon conclusions).

108. See *id.* at 499-500 (finding waiver would neither alter nature of P.I.A.A. interscholastic competition nor place unreasonable burden upon P.I.A.A. to administer waiver rule in connection with age).

109. See *id.* at 500 (concluding "balancing of the interests here is clearly in favor of plaintiff" and that "[Cruz] is entitled to the benefits of the ADA").

110. See Looby, *supra* note 1, at 255 (citing *Martin*'s majority holding that reasonable accommodation decisions require individual inquires).

111. See 568 S.E.2d 32, 43 (W. Va. 2002) (holding student athlete was bigger, stronger, and faster than other high school athletes and thus, "[t]he safety of younger, smaller, more inexperienced students would be unreasonably compromised"). The *Baisden* court held that particular case concerned a fundamental alteration of the structure of the interscholastic athletic program, a result that is "not required by reasonable accommodation standards in anti-discrimination law." See *id.*

112. See *id.* at 36 (discussing factual background and procedural history). Mr. Barry Scragg, the principal of Spring Valley High School submitted the written

West Virginia Secondary Schools Activities Commission (WVSSAC) denied his application to waive the state's age limitation, Baisden successfully appealed to a West Virginia court, which granted a permanent injunction prohibiting the WVSSAC from enforcing the age rule.<sup>113</sup> The court concluded that Baisden's learning disability required him to repeat two years in school and the WVSSAC's denial of his age limit waiver request amounted to discrimination.<sup>114</sup>

The West Virginia Supreme Court of Appeals heard the WVSSAC's appeal, even though the technical claim was moot since Baisden played his senior season, protected by the lower court's ruling, and graduated from high school.<sup>115</sup> The court looked to Section 504 of the Rehab Act and Title II of the ADA as well as the Virginia Human Rights Act.<sup>116</sup> The court also examined other jurisdictions' rulings on similar issues, including the *Cruz* ruling.<sup>117</sup> Though agreeing that "individualized assessments are required in cases of this nature and that reasonable accommodations may be made through waiver of the age nineteen rule under circumstances," the court ultimately held such a waiver was not reasonable in Baisden's situation.<sup>118</sup> Baisden, at nineteen, was simply too big, strong, and fast to compete in a high school football league.<sup>119</sup> Competing against Baisden would inevitably compromise younger, smaller, and less skilled players' safety.<sup>120</sup> Therefore, the court held that waiving the WVSSAC's age limit in this instance would "fundamentally alter the structure of the interscholastic program, a result

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request to the West Virginia Secondary Schools Activities Committee on Baisden's behalf. *See id.*

113. *See id.* (discussing procedural history).

114. *See id.* (noting that age rule was discriminatory since delay in Baisden's education was "occasioned by his learning disability").

115. *See id.* at 37 (holding issue "may be repeatedly presented to the trial court, yet escape review at the appellate level because of [its] fleeting and determinate nature") (citing *Israel by Israel v. W. Va. Secondary Sch. Activities Comm'n*, 388 S.E.2d 480, 481 (W. Va. 1989)). The West Virginia Supreme Court of Appeals concluded that Baisden's case had wider social implications and therefore demanded an appropriate ruling, since "the circumstances of Mr. Baisden's request for a waiver from the age nineteen rule will certainly be encountered by other students." *See id.*

116. *See id.* at 38 ("West Virginia Code § 5-11-9 . . . governs unlawful discriminatory practices in [Virginia].").

117. *See id.* at 43 (noting *Cruz* court's holding student athlete claims "must be made on an individual basis").

118. *See id.* (reasoning that requested accommodation would interfere with other, non-disabled students' participation).

119. *See id.* (noting Baisden was six feet four inches tall, weighted 280 pounds, and ran forty-yard-dash in 5.3 seconds).

120. *See id.* (explaining impact of accommodation for Baisden on other high school athletes).

which is not required by reasonable accommodation standards in anti-discrimination law.”<sup>121</sup>

*Baisden’s* holding considered and reflected many jurisdictions’ understanding of mentally disabled student athlete’s claims under the ADA and Rehab Acts by evaluating the individual circumstances, as mandated by the *Martin* ruling.<sup>122</sup> The *Martin* decision seems to have prompted courts to examine the individual athlete’s condition and surrounding circumstances in each ADA and Rehab Act claim in order to provide access to school-sponsored athletics while also maintaining the competitive integrity and safety of those events.<sup>123</sup>

### B. Students with Physical Disabilities

There is no bright-line answer to when an accommodation will infringe on the integrity of athletic competition, because each claim requires an individualized inquiry.<sup>124</sup> When confronted with physically disabled student athletes’ claims, courts face a more complex reasonable accommodation question which has resulted in differing decisions and responses from legal commentators.<sup>125</sup> Tatyana McFadden and Mallerie Badgett, two physically disabled high school athletes who sued their respective state athletic associations for access to school-sponsored track and field teams, represent an ongoing debate over the *Martin* application as useful to positively impact athletic accessibility for disabled students.<sup>126</sup>

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121. See *id.* at 43 (explaining why allowing *Baisden* to participate at age of 19 is not considered reasonable accommodation).

122. See *id.* at 44 (considering “the age of the student; the athletic experience of the student; the degree to which the student presents a risk of harm to other competitors due to his or her strength, size, or speed; the nature of the sport; the degree to which fair competition among high school teams would be impacted by the student’s participation; and whether the student’s individualized education plan, if any, contains a provision requiring sports participation”).

123. See *PGA Tour v. Martin*, 532 U.S. 661, 687-90 (2001) (discussing requiring individualized inquiries).

124. See *Looby*, *supra* note 1, at 256 (declaring risk to other players should be primary factor in determining reasonable accommodations for student athletes with learning disabilities).

125. Compare *Lakowski*, *supra* note 1, at 303 (concluding *Martin* has not been successful in protecting rights of physically disabled students), with *Looby*, *supra* note 1, at 257-58 (concluding that *Lakowski’s* understanding of *Martin’s* protections is “incorrect and contrary to *Martin* case.”).

126. See, e.g., *McFadden v. Grasmick*, 485 F. Supp. 2d 642 (D. Md. 2007) (holding student in wheelchair not entitled to injunctive relief); *Badgett v. Ala. High Sch. Athletic Ass’n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928 (N.D. Ala. 2007) (denying motion of student with cerebral palsy).

## 1. *Mallerie Badgett*

Mallerie Badgett filed a suit against the Alabama High School Athletic Association (AHSAA), a private agency comprised of over 780 public and private schools and 100,000 student athletes throughout the State under section 504 of the Rehab Act and Title II of the ADA.<sup>127</sup> Badgett, a high school student, required a wheelchair for mobility due to Cerebral palsy.<sup>128</sup> Badgett was also an active member of her high school's track and field team, and was "by all accounts, a gifted athlete," holding nine Junior National Records for female student athletes with cerebral palsy.<sup>129</sup>

In 2006, AHSAA partnered with the American Association of Adapted Sports Programs (AAASP) to assist in implementing athletic programming for students with disabilities, specifically in response to Badgett's request for inclusion in track and field events.<sup>130</sup> During the 2007 season, Badgett was the only student athlete in the newly created wheelchair division.<sup>131</sup> Fearing competing in the wheelchair division alone would make her an "exhibition" rather than a member of the Oxford High School team, Badgett sought permission to compete in events against non-disabled student athletes.<sup>132</sup>

The court analyzed Badgett's requested accommodation according to the ADA, the Rehab Act, and the *Martin* ruling.<sup>133</sup> The court correctly noted that Badgett failed to qualify as an individual with a disability under the ADA since she did not meet the essential eligibility requirements of track and field activities based on her disability.<sup>134</sup> Based on the AHSAA's inclusion of a wheelchair division, the court found that the state had met its accommodation requirement under Section 504 and Title II.<sup>135</sup>

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127. *See id.* (discussing factual background and procedural history).

128. *See id.* (discussing plaintiff's disability).

129. *See id.* (discussing plaintiff's athletic involvement)

130. *See id.* at \*2 (attempting to make reasonable accommodation for Badgett under ADA and Rehab Act).

131. *See id.* (evidencing school's accommodation, which was claimed insufficient).

132. *See id.* at \*2 (claiming that accommodation was not reasonable, as Badgett was not actually participating with team).

133. *See generally id.* (applying individualized evaluation as required by *Martin*).

134. *See id.* at \*3 (citing *Doherty v. S. Coll. of Optometry*, 862 F. 2d 570, 575 (6th Cir. 1988) (holding "nothing in the language or history of section 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program"))).

135. *See id.* at \*4 (holding that school was not required to make any further accommodations to ensure Badgett's participation on track and field team).

The court also distinguished between the modification sought by Badgett, or a student athlete in general under the Rehab Act and ADA, and the modification adopted by the state, school, or athletic association. The court explained that “[a]s a threshold matter, . . . neither the ADA nor the Rehabilitation Act requires a public entity to adopt the ‘best’ modification or the modification requested by a person with a disability;” instead, the statutes “require only a reasonable modification.”<sup>136</sup> Finally, the court agreed that adopting Badgett’s request would unfairly impose on other student athletes’ safety and potentially infringe on the sport’s integrity to the point of “fundamentally alter[ing] the nature of the service, program, or activity,” and that allowing Badgett’s point totals to contribute to the overall team score, even if she did compete alone in the wheelchair division, total would not be reasonable.<sup>137</sup>

The court noted *Martin*’s influence by examining the specific circumstances and finding that running and jumping were fundamental aspects of track and field, and thus properly refused to grant Badgett’s requested accommodation.<sup>138</sup> Although the court was careful to recognize and commend Badgett for “her dedication and accomplishments under difficult circumstances,” as well as acknowledging her parents’ and high school’s efforts as well as ASHAA’s steps to make high school track and field events more inclusive, the court found no violation of the Rehab Act or the ADA.<sup>139</sup>

## 2. *Tatyana McFadden*

Two weeks after Mallerie Badgett challenged the AHSAA, Tatyana McFadden filed a suit under Section 504 of the Rehab Act and Title II of the ADA against the Maryland educational officials overseeing state interscholastic track and field competition, seeking ac-

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136. See *id.* (citing *Knapp*, 101 F.3d at 484-85, holding “[W]e are not saying Northwestern’s decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act . . . [I]f substantial evidence supports the decision-maker . . . that decision must be respected.”).

137. See *id.* at \*5-6 (discussing plaintiff’s claim under reasonableness standard and ADA).

138. See *id.* at \*6 (explaining that reasonable accommodations undermine purpose of athletic competitions).

139. See *id.* at \*7 (“Miss Badgett continues to blaze a trail for other disabled student athletes to follow, and the court is confident that the AHSAA will move forward with its efforts to develop a comprehensive program for disabled student athletes.”).

cess to her school track and field team.<sup>140</sup> McFadden was a high school junior in Maryland.<sup>141</sup> Since childhood, McFadden had used a wheelchair and was paralyzed below the waist resulting from Spina Bifida.<sup>142</sup> However, she had developed into a “world class” and Olympic athlete in “wheeler” events and was a full member and academically eligible participant on Atholton High School’s track and field team.<sup>143</sup>

The Maryland Public Secondary Schools Athletic Association (MPSSAA) made attempts between 2005 and 2007 to eliminate barriers for students with disabilities, including an inclusion of wheelchair events at MPSSAA competitions.<sup>144</sup> However, in 2006, the MPSSAA refused to allow McFadden’s events and the points earned to contribute to the Atholton team’s overall points and standings.<sup>145</sup> The MPSSAA claimed that “new team events” added to state-sanction tournaments do not generally earn points until high schools in forty percent of the jurisdictions (the “forty-percent” rule) in a particular class participate in that event during the regular and post seasons.<sup>146</sup>

Following *Martin*’s guidance, the Maryland court evaluated four factors in determining McFadden’s claim within the totality of the circumstances: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if requested relief is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest.<sup>147</sup> The court focused particularly on the potential harm to the plaintiff and defendant.<sup>148</sup> Finding the balance “extraordina-

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140. See *McFadden v. Grasmick*, 485 F. Supp. 2d 642, 644-45 (claiming school failed to make reasonable accommodation for McFadden to participate in competitive athletics).

141. See *id.* at 644 (noting Plaintiff’s background).

142. See *id.* (noting Plaintiff’s medical condition).

143. See *id.* (discussing Plaintiff’s athletic prowess).

144. See *id.* at 643-45 (discussing policies regarding wheelchair bound track and field athlete participation).

145. See *McFadden*, 485 F. Supp. 2d. at 646 (“It is with this background that MPSSAA decided that in order to ‘ensure competitive fairness and equity in team scoring, team points for wheelchair race events will not be awarded.’”).

146. See *id.* (reasoning that once 40% of schools participated in event, there was sufficient participation to include events in team’s total score).

147. See *id.* (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 194-95 (4th Cir. 1977)) (applying *Martin* framework to create appropriate test).

148. See *id.* (citing *Rum Creek Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)) (holding “in applying the *Blackwelder* balancing test, ‘the irreparable harm to the plaintiff and the harm to the defendant are the two most important factors.’”).



rily close,” the court sided with non-disabled student athletes competing in team track and field events at schools other than McFadden’s.<sup>149</sup>

The court acknowledged McFadden’s disability and viable claim under the ADA and Rehab Acts, but concluded that her ability to earn points for her team did not differ in any material manner from other students, and her disability played no impact on the MPSSAA’s decision.<sup>150</sup> Furthermore, the court pointed out that there “are inherent and relevant differences between the class of wheelers and the class of non-wheelers that education officials are entitled to consider in operating a fair and equitable system of racing competition designed to identify team rankings.”<sup>151</sup> Noting that McFadden “is a remarkable young person for and in whom the entire community should feel boundless pride and admiration,” the court held that her claim blurred well-founded guidelines for state athletic associations conducting special needs athletic competitions.<sup>152</sup>

### 3. Badgett and McFadden Commentary and Controversy

While some commentators have argued that *McFadden* and *Badgett* interpret *Martin*’s framework as exclusive, others view the *Martin* individualized balancing test as properly allowing accommodation in one situation and prohibition in another.<sup>153</sup> Commentators have noted that Casey Martin’s motivation to participate in the PGA Tour was fundamentally different from Tatyana McFadden’s and Mallerie Badgett’s desire to compete with their high school

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149. See *McFadden*, 485 F. Supp. 2d. at 649-50 (noting established “forty percent” rule).

150. See *id.* at 649-50 (citing to non-discriminatory application of 40% rule).

151. See *id.* at 650-51 (citations omitted) (explaining that inclusion of “wheeler” events in total score in this case creates unfair disadvantage to opponents).

152. See *id.* at 651 (citing *Shepherd v. United States Olympic Committee*, 464 F. Supp. 2d 1072, 1087 (D. Colo. 2006)). The *Shepard* court held the following: [T]he USOC’s Paralympic program, with its attendant differences in perks and privileges compared to the USOC’s Olympic program, exists to provide disabled individuals with participation opportunities fundamentally premised on and defined by the disabilities Plaintiffs argue cannot lawfully form the basis for separate treatment. There is an unavoidable non sequitor to the assertion.

*Shepherd v. United States Olympic Committee*, 464 F. Supp. 2d 1072, 1087 (D. Colo. 2006).

153. See *Looby*, *supra* note 1, at 271-72 (concluding that courts appropriately applied *Martin* when analyzing high school athlete’s requested accommodation); *but see Lakowski*, *supra* note 1, at 310 (“[I]n an educational model of sport, the emphasis should be on inclusion, not exclusion. Yet the *Martin* framework creates a model of sport that focuses on exclusion.”).

teams, considering the role that athletic competition played in each claimant's life.<sup>154</sup> Generally, courts correctly applying the *Martin* holding have and will continue to properly undertake an individualized examination of each student athlete's claim, given the particular circumstances, which hopefully will result in equitable determinations of disabled student athlete participation.<sup>155</sup>

The *Martin* process is one that leaves necessary individualized investigation up to respective lower courts.<sup>156</sup> As in *Cruz*, courts consider factors such as reasonableness of the requested modification, necessity for the disabled student athlete's ability to participate in school-sponsored athletic competition, and the fundamental nature of the competition in addressing student athletes' ADA and Rehab Act claims.<sup>157</sup> Courts also apply the ADA and Rehab Act guidelines to balance accessibility to school sponsored athletics with reasonable accommodations and competitive integrity.<sup>158</sup> Following *Martin*, in addition to the statutory requirements in the Rehab Act, ADA, and IDEA, courts must uphold the NFHS's Mission Statement and accept that athletics play an important role in all students' academic, social, and emotional development.<sup>159</sup>

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154. See Lakowski, *supra* note 1, at 309 (suggesting fame, winning, and money as motivation in professional sports versus athletics as aspect of students' education in high school athletics).

155. See Looby, *supra* note 1, at 271 (reasoning courts properly follow *Martin* and Congress's intent). Looby notes, courts are correct when considering the following:

- (1) [W]hether the purposes for the given rule are undermined by granting the request, (2) the age and circumstances of the particular athlete with respect to the sport and his competitors, (3) whether the request involves a fundamental or essential element of the sport, (4) whether granting the request would impose an undue burden on the high school athletic association, and (5) whether the athlete will still have access to the sport if the request is denied.

See *id.* (referencing *Cruz*, 157 F. Supp. 2d 485).

156. See *Cruz*, 157 F. Supp. 2d at 498 (noting accommodations "must be made on individual basis").

157. See *id.* at 499 (considering factors impacting court's determination of accommodation's reasonableness).

158. See *Knapp v. Nw. Univ.*, 101 F.3d 473, 484 (7th Cir. 1996) ("The place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury . . .").

159. See Lakowski, *supra* note 1, at 309 (stating that sports are important component of student's scholastic and social development); see also NFHS Mission Statement, *supra* note 67.

## VI. FOR THE SUPPORT OF THE GAME: POLICY SUPPORT FOR ADAPTIVE PHYSICAL ACTIVITY

The DOE has taken steps in the right direction to support states' and school districts' adaptive physical activity offerings by promulgating regulations and guidelines in response to the existing federal laws and the proven importance of physical activity for students.<sup>160</sup> A June 2010 United States Government Accountability Office Report to Congressional Requesters focuses on students with disabilities.<sup>161</sup> The report concludes, "all students, including those with disabilities, benefit from the positive effects that physical activity and school athletics have on an individual's health, social well-being, and self-esteem."<sup>162</sup>

The DOE responded by creating "Creating Equal Opportunities for Children and Youth With Disabilities to Participate in Physical Education and Extracurricular Athletics."<sup>163</sup> This document gives schools and school districts information on providing necessary physical education and athletic opportunities to special needs students.<sup>164</sup> Specifically, the document suggests that states and school districts could increase opportunities for participation by "reducing and eliminating common barriers to participation."<sup>165</sup> The DOE addresses and offers suggestions for overcoming nine

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160. See, e.g., Arne Duncan, *We Must Provide Equal Opportunities for Students with Disabilities*, HOME ROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC., (Jan. 25, 2013), <http://www.ed.gov/blog/2013/01/we-must-provide-equal-opportunity-in-sports-to-students-with-disabilities/> (noting the importance of sports in education and schools' responsibility in offering opportunities to all students).

161. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-519, STUDENTS WITH DISABILITIES: MORE INFORMATION GUIDANCE COULD IMPROVE OPPORTUNITIES IN PHYSICAL EDUCATION AND ATHLETICS (June 2010), available at <http://www.gao.gov/assets/310/305770.pdf>. The GAO was asked to examine (1) what is known about the physical education opportunities that schools provide, and how do schools provide these; (2) what is known about the extracurricular athletic opportunities that schools provide, and how do schools provide these; and (3) how the DOE assists states and schools in these areas. GAO analyzed federal survey data, as well as reviewed relevant federal laws (IDEA, Rehab Act, ADA), and conducted interviews with state, district, and school officials, as well as parents and disability association officials, in various states. See *id.*

162. See *id.* at 31.

163. U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVICES, OFFICE OF SPECIAL EDUCATION PROGRAMS, CREATING EQUAL OPPORTUNITIES FOR CHILDREN AND YOUTH WITH DISABILITIES TO PARTICIPATE IN PHYSICAL EDUCATION AND EXTRA CURRICULAR ATHLETICS (Aug. 2011), available at <https://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf> [hereinafter "DOE CREATING EQUAL OPPORTUNITIES"].

164. See *id.* at 14 (encouraging schools to make athletics more accessible to disabled students)

165. See *id.* at 14 (providing specific solutions for the most frequent barriers to disabled students' participation in athletics).

specific common barriers that states and school districts face in offering equal opportunity to physical activity: (1) accessibility, (2) equipment, (3) personal preparation, (5) teaching style, (6) management of behavior, (7) program options, (8) curriculum, and (9) assessment, progress, achievement, and grading.<sup>166</sup> The DOE supported its conclusions with research and professional opinions, including appendices noting references, examples, and resources for increased equal opportunities to athletic activity for disabled students.<sup>167</sup>

Recognizing a continued need for clarification and support, DOE's Office of Civil Rights (OCR) also released a guidance document in 2013 clarifying existing legal obligations of schools to provide student athletes with disabilities opportunities to participate in school-sponsored athletics.<sup>168</sup> These guidelines do not create new or innovative policies; the OCR's guidance document simply builds on the 2011 document and provides clarification to existing law and policy for schools and school districts.<sup>169</sup>

The OCR guidelines "clarify and communicate" state and district education systems' responsibilities under the Rehab Act to provide extracurricular activities for disabled student athletes.<sup>170</sup> The guidelines offer numerous "illustrative examples" of schools' han-

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166. See DOE CREATING EQUAL OPPORTUNITIES, *supra* note 163, at 7-13 (discussing barriers and offering suggestions in regard to such barriers). The DOE notes that availability includes everything from the general environment to the safety and security of the area. See *id.* at 7-8. It highlights that appropriate equipment can aid in disabled student athlete participation. See *id.* at 8. The DOE states that adults should become more knowledgeable and should have the skills to manage behavior so they can help the children. See *id.* at 8-10. Further, the DOE suggests that those who teach the children should be inclusive. See *id.* at 9. The DOE advances that there should be a wide range of options, academic and nonacademic, so that children with disabilities have the opportunity to participate. See *generally id.* at 10-12. Further, the DOE suggests that assessment in physical education and athletics should be appropriate to measure progress and achievement. See DOE CREATING EQUAL OPPORTUNITIES, *supra* note 163, at 12-13.

167. See *generally* DOE CREATING EQUAL OPPORTUNITIES, *supra* note 163.

168. See Letter from Seth M. Galanter, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Colleague, Dep't. of Educ. Office of Civil Rights (Jan. 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf> ("Extracurricular athletics—which include club, intramural, or interscholastic . . . athletics at all education levels—are an important component of an overall education program.").

169. See Andrew J. Rotherham, *Viewpoint: What Everyone's Getting Wrong About Special-Ed Sports*, TIME (Jan. 29, 2013), <http://ideas.time.com/2013/01/29/viewpoint-what-everyones-getting-wrong-about-special-ed-sports/> (arguing federal guidelines could lead to "more inclusive society.").

170. See Galanter, *supra* note 168, at 1 (supporting OCR guidelines).

dling of disabled student athletes.<sup>171</sup> The guidelines make several suggestions for schools, including: taking care not to generalize or stereotype student athletes with disabilities;<sup>172</sup> ensuring equal opportunities for participation;<sup>173</sup> and offering separate athletic opportunities where inclusion is not an appropriate goal.<sup>174</sup>

Implying the *Martin* analysis, the OCR requires school districts to make reasonable accommodations based on individual inquires where the modification will not fundamentally alter the nature of the competition.<sup>175</sup> Furthermore, the guidelines recognize the impracticality of offering all student athletes with disabilities completely mainstreamed athletic opportunities and, where such modifications are not reasonable, support school and school district created athletic activities separate from those offered to non-handicapped students.<sup>176</sup> Where school districts have sufficient numbers of student athletes and general interest, districts may: (1) develop district-wide adaptive leagues, (2) create co-ed teams for students with disabilities; or (3) offer “allied” or “unified” teams, which combine disabled students and nondisabled students.<sup>177</sup>

The OCR is clear in supporting states, districts, schools, students, families, and communities to develop athletic opportunities for all student athletes, both in adaptive physical education and extension into athletic competition.<sup>178</sup> The guidelines conclude,

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171. *See id.* at 2 (noting all levels are entitled to “equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics.”).

172. *See id.* at 6-7 (noting mandate that school districts may not operate or rely on “generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular.”).

173. *See id.* at 6-11 (noting schools must make “reasonable modifications . . . to ensure an equal opportunity to participate” unless it would be “a fundamental alteration to its program.”). *See also* 34 C.F.R. § 104.37(a), (c); *see also Alexander*, 469 U.S. at 300-01 (noting Section 504 may require reasonable modifications to program or benefit to assure meaningful access to qualified persons with disabilities).

174. *See Galanter*, *supra* note 168, at 11-12 (“The provision of *unnecessarily* separate or different services is discriminatory . . . OCR thus encourages school districts to work with their community and athletic associations to develop broad opportunities to include students with disabilities in all extracurricular athletic activities.”). *See also* 34 C.F.R. § 104.34(b); *see also* 34 C.F.R. 104.34 pt. 104, App. A § 104.4 at 367 (2012).

175. *See Galanter*, *supra* note 168, at 7 (noting that equal opportunity does not mean all disabled students must make teams).

176. *See id.* at 12 (noting “an ever-increasing” number of school districts are creating disability-specific teams for sports like tennis and basketball).

177. *See id.* (citing DOE CREATING EQUAL OPPORTUNITIES, *supra* note 163).

178. *See id.* (concluding document’s focus proactive, not retroactive). The guidelines include only one sentence that addresses individuals who have been subjected to discrimination interested in filing a complaint with the Office for Civil Rights or in court; the document’s focus is on proactivity, not reactivity. *See id.*

“[t]o avoid violating their Section 504 obligations in the context of extracurricular athletics, school districts should work with their athletic associations to ensure that students with disabilities are not denied an equal opportunity to participate in interscholastic athletics.”<sup>179</sup>

Legal commentators have responded positively to the DOE’s leadership, noting that the OCR guidelines do not infringe on the “competitive entrance activities” that are organized sports, but do require educational bodies to provide reasonable accommodations for special-needs athletes.<sup>180</sup> The DOE and OCR’s guidelines and suggestions mirror *Martin*.<sup>181</sup> Under these guidelines, individual educational bodies should work together to provide alternative opportunities to students where there is sufficient interest.<sup>182</sup>

## VII. FOR THE LOVE OF THE GAME: PROOF THAT STATES AND SCHOOLS CAN MAKE IT WORK

Under the DOE’s prescribed responsibilities, individual schools and states shoulder the responsibility of creating meaningful athletic opportunities for all student athletes.<sup>183</sup> Throughout the country, states, school districts, and schools have proven creation of these meaningful opportunities is possible.<sup>184</sup> For example, in Colorado, special education students at Grandview High School, through a partnership with the Special Olympics, participate on basketball and cheerleading squads and team up with general education students as “partner athletes.”<sup>185</sup>

The Special Olympics Unified Sports program is “an inclusive sports program that combines an approximately equal number of Special athletes (individuals with intellectual disabilities) and partners (individuals without intellectual disabilities) on teams for

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179. See *id.* at 5 (making goal of inclusiveness clear to school districts).

180. See Rotherham, *supra* note 169 (using example of flag in addition to starting pistol to make track meets more fair for hearing-impaired student).

181. See generally Galanter, *supra* note 168 (supporting OCR guidelines).

182. See Rotherham, *supra* note 169 (touting Maryland and Minnesota as systems with successfully operating special needs school leagues).

183. See Dan Frosch, *Unified Teams Take Special Olympics Approach to School Sports*, N.Y. TIMES (Feb. 12, 2012), [http://www.nytimes.com/2012/02/13/sports/unified-sports-teams-open-doors-for-special-education-students.html?\\_r=0](http://www.nytimes.com/2012/02/13/sports/unified-sports-teams-open-doors-for-special-education-students.html?_r=0) (lauding individual school efforts).

184. See Lakowski, *supra* note 1, at 286 (highlighting individual schools and programs).

185. See Frosch, *supra* note 183 (quoting Jon Hoerl, who helped start program at Grandview as Athletic Director: “The kids get to wear the same uniforms . . . . We announce the lineups. The whole idea is to get them the mainstream experience of a high school athlete. They just want to be included.”).

training and competition.”<sup>186</sup> More than 2,000 schools in forty-two states have unified athletic programs.<sup>187</sup> The Unified Sports model boasts research-study-supported positive impacts on both student athletes with disabilities and the greater communities as a whole.<sup>188</sup>

In 2008, Maryland passed the Fitness and Athletic Equity Act for Students with Disabilities.<sup>189</sup> In the United States, the law is unique in its detail; fully effective in July 2011, it requires local education boards to develop policies that include students with disabilities in all curricular and extracurricular physical education and athletic programs.<sup>190</sup> The Act requires that schools provide reasonable accommodations under the ADA, opportunities to try out for school teams, and access to alternative sports programs where available.<sup>191</sup> Generally, school systems in Maryland must: (1) ensure that students have the opportunity to participate in mainstreamed physical education and athletic opportunities, (2) make reasonable accommodations in order to provide those opportunities, and (3) ensure that alternative physical education and athletic opportunities are available for student athletes with disabilities.<sup>192</sup>

The Maryland State Department of Education also published a comprehensive guide for schools and teachers to consult in order

186. See *Unified Sports Overview*, SPECIAL OLYMPICS (Sept. 11, 2012), available at [http://resources.specialolympics.org/uploadedFiles/special-olympics-resources/Topics/Unified\\_Sports/Files/4.1-UnifSp%20Models-Overview\\_v26\\_09-20-12.pdf](http://resources.specialolympics.org/uploadedFiles/special-olympics-resources/Topics/Unified_Sports/Files/4.1-UnifSp%20Models-Overview_v26_09-20-12.pdf) (noting core goal of social inclusion). The program’s core goal is social inclusion for all athletes. See *id.*

187. See *id.* (discussing three models: competitive Unified Sports, unified Sports Player Development, and Unified Sports Recreation—which all provide opportunities for disabled athletes in basketball, football, volleyball, and other sports such as golf and tennis). Unified Sports has been a Special Olympics internationally sanctioned program since 1989. See *id.*

188. See *id.* (highlighting professional studies confirming Unified Sports is effective in “decreasing the problem behaviors of individuals with intellectual disabilities and improving attitudes without disabilities toward participants with disabilities”).

189. Fitness and Athletic Equity for Students with Disabilities Act, MD. CODE ANN., EDUC. § 7-4B-02 (West 2008).

190. See *id.* § 7-4B-02(a); but see Interscholastic Adapted Athletic Programs, N.J. REV. STAT. § 18A:11-3.3 (2009) (directing New Jersey State Interscholastic Athletic Association to establish interscholastic adapted athletic opportunities for students with visual impairments or physical disabilities competing in state-created adaptive athletic programs and requiring adaptive physical education coaches to receive specific training).

191. See EDUC. § 7-4B-02(a)(1)-(3).

192. See *id.* (creating framework for schools to create accommodations as needed).

to comply with the Fitness and Athletic Equity Act for Students with Disabilities and promote adaptive physical education.<sup>193</sup>

### VIII. GOING FOR THE GOAL: CONTINUED SUPPORT AND DEVELOPMENT OF OPPORTUNITIES FOR ALL STUDENT ATHLETES

All student athletes deserve access to athletic participation. Generally, there is an increased national focus on children's physical activity.<sup>194</sup> The United States Department of Health and Human Services' 2008 Physical Activity Guidelines for Americans recommended that children participate in sixty minutes of moderate and vigorous intensity daily.<sup>195</sup> Those guidelines only briefly mention students with disabilities.<sup>196</sup> Of course, the amount of physical activity that a child with a disability should be entitled to is determined by that disability.<sup>197</sup> Children with disabilities should be entitled to equal opportunity to competitive athletics, in addition to adaptive physical education and specialized opportunities when necessitated.<sup>198</sup>

Courts continue to apply *Martin's* individualized inquiry when addressing the ADA and Rehab Act provisions in guiding schools and school districts to make reasonable accommodations for student athletes with disabilities.<sup>199</sup> For student athletes with disabilities to respect the integrity of athletic competition and take

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193. See MARYLAND STATE DEPARTMENT OF EDUCATION, A GUIDE FOR SERVING STUDENTS WITH DISABILITIES IN PHYSICAL EDUCATION (Feb. 2009), available at <http://www.marylandpublicschools.org/NR/rdonlyres/84C4C717-B8FF-486B-8659-79F297DF5B38/19715/Servingstudents2.pdf> (supporting state act).

194. See, e.g., LET'S MOVE!, available at <http://www.letsmove.gov/> (last visited Sept. 20, 2014) (supporting student movement and general health).

195. See generally U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 2008 PHYSICAL ACTIVITY GUIDELINES FOR AMERICANS, available at <http://www.health.gov/paguidelines/pdf/paguide.pdf> (last visited June 7, 2015).

196. See *id.* at 19 ("Children and adolescents with disabilities are more likely to be inactive than those without disabilities. When possible, children and adolescents with disabilities should meet the Guidelines."). When children with disabilities cannot meet the Guidelines, "they should be as active as possible and avoid being inactive." See *id.*

197. See *id.* (explaining that some disabilities generally inhibit physical activity).

198. See J. H. Rimmer, K. Yamaki, B. M. Davis Lowery, E. Wang & L. C. Vogel, *Obesity and Obesity-related Secondary Conditions in Adolescents with Intellectual/Developmental Disabilities*, 54 J. INTELLECT. DISABILITY RES. 787 (2010) (noting inactivity and obesity can be more problematic for children with disabilities, leading to and possibly exacerbating secondary conditions associated with certain disabilities).

199. See Looby, *supra* note 1, at 271 (noting *Martin's* balancing framework "can be utilized in such a way as to permit an accommodation in one situation and prohibit it in another.").



advantage of available adaptive programs, those programs first must exist.<sup>200</sup> However, state, school district, and school responsibility for providing physical education to all students cannot be severed when a disabled student is lawfully excluded from traditional school-sponsored athletic opportunities.<sup>201</sup>

The federal government must continue to regulate, incentivize, support, and mandate athletic opportunities for students with disabilities in America's schools, primarily through providing funding.<sup>202</sup> Where available, schools should allow students with disabilities to participate in school-sponsored athletic activities, under the least restrictive means possible in order to help student athletes develop meaningful peer relationships, feel accepted and respected within their community, and prepare for life.<sup>203</sup> Where mainstreaming is not appropriate, public entities should provide reasonable and appropriate adaptive programs for all students to participate in physical activity and school-sponsored athletics.<sup>204</sup> There are programs, non-profit organizations, and other groups that school districts and schools seeking guidance on making athletics accessible to disabled students can consult; however, these sources of guidance are not always widely available or accessible.<sup>205</sup>

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200. See generally *Badgett*, 2007 WL 2461928 (noting where state athletic association has created adaptive program, student athlete with disability may still challenge under Rehab Act and ADA, but that public entity's reasonable steps towards inclusion should be appreciated and taken advantage of by student athletes with disabilities). For a full discussion of *Badgett*, see *supra* notes 127-139.

201. For a further discussion of Maryland's Fitness and Athletic Equity for Students with Disabilities Act and New Jersey's State Interscholastic adapted athletic programs legislation, see *supra* notes 189-193 and accompanying text.

202. See Lakowski, *supra* note 1, at 315 (noting the existing model of Title IX, which encouraged and grew female sports programs and opportunities); see also 2012-2013 Athletic Participation Data, *supra* note 66.

203. See *Unified Sports Overview*, *supra* note 186 (providing "Unified Sports helps increase the skills necessary for individuals with intellectual disabilities to be accepted and fulfilled socially").

204. See, e.g., *Welcome, ADAPTED PHYSICAL EDUCATION NAT'L STANDARDS*, <http://www.apens.org/index.html> (last visited Sept. 28, 2014) ("The goal of APENS is to promote a nationally certified Adapted Physical Educator (CAPE) – the one qualified person who can make meaningful decisions for children with disabilities in physical education – within every school district in the country.").

205. See, e.g., *About, AM. ASS'N OF ADAPTED SPORTS PROGRAMS*, <http://www.adaptedsports.org/adaptedsports/about/about.html> (last visited Sept. 20, 2014); *About Us, DISABLED SPORTS USA*, <http://www.disabledsportsusa.org/about-us/> (last visited Sept. 20, 2014); *Home, SPORTS ABILITIES*, <http://www.sportsabilities.com/> (last visited Sept. 20, 2014); *Current Clubs, U.S. PARALYMPICS*, <http://www.teamusa.org/US-Paralympics/Community/Paralympic-Sport-Clubs/Current-Clubs> (last visited Sept. 20, 2014) (providing support for schools and school districts seeking to create more inclusive athletic programs).

Despite noted progress, many students with disabilities are not afforded fair and appropriate opportunities to participate in school-sponsored athletic competitions and events.<sup>206</sup> The June 2010 United States Government Accountability Office's Congressional report suggested that improved opportunities for students with disabilities in physical education ("PE") and athletics requires "the Secretary of Education [to] facilitate information sharing among states and schools on ways to provide opportunities and [clarity as to] schools' responsibilities under federal law."<sup>207</sup> In response to those suggestions, the DOE has increased support for states and schools across the country to improve their available athletic programs for student athletes with disabilities.<sup>208</sup>

Congress's suggestions of open communication and openness to accommodations are positive inclusive and adaptive measures, but the developmentally important playing field, let alone the finish line, is still out of sight for many disabled student athletes.<sup>209</sup> The shift in collective social consciousness and the adequate support from Congress, school districts, and individual schools, must con-

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206. See generally Rotherham, *supra* note 169 (supporting student athletic involvement under DOE issued guidelines).

207. See U.S. GOV. ACCOUNTABILITY OFFICE, STUDENTS WITH DISABILITIES: MORE INFORMATION AND GUIDANCE COULD IMPROVE OPPORTUNITIES IN PHYSICAL EDUCATION AND ATHLETICS at 32 (2010), available at <http://www.gao.gov/assets/310/305770.pdf> (noting GAO's recommendations); see also, NEW YORK CITY DEP'T OF EDUC. ADAPTIVE PHYSICAL EDUCATION FAQs FOR PRINCIPALS, OFFICE OF SCHOOL WELLNESS PROGRAMS, available at <http://schools.nyc.gov/NR/rdonlyres/4D6D250A-3F6E-42FC-8105-7317DE6C0F83/0/APEFAQ20132014.pdf> (last visited Sept. 28, 2014) (outlining adaptive physical education policies and providing support for all NYC public schools).

208. See generally Galanter, *supra* note 168 and accompanying text; see also Lakowski, *supra* note 1, at 286-88 (discussing state specific special education athletic programs).

209. See Lucy Rector Filppu, *The Benefits of Team Sports*, EDUCATION.COM (Aug. 19, 2013), available at [http://www.education.com/magazine/article/Ed\\_Benefits\\_Team\\_Sports/](http://www.education.com/magazine/article/Ed_Benefits_Team_Sports/) (discussing positive role of organized sports in students' overall success); see also Nancy A. Murphy et. al., *Promoting the Participation of Children with Disabilities in Sports, Recreation, and Physical Activities*, 121 PEDIATRICS 1057-1061 (2008) ("Pediatricians are urged to promote the participation of all children with disabilities in competitive and recreational sports and physical activities. The benefits are substantial.").

tinue to partner in pursuit of a truly inclusive school-sponsored athletic system for all student athletes.<sup>210</sup>

*Ian Forster\**

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210. See, e.g., Jeff Moiser, *Adapted Physical Education Teacher Brings Kids Together*, LAS VEGAS REV. J. (Nov. 29, 2011, 12:27 AM), available at <http://www.reviewjournal.com/news/education/adapted-physical-education-teacher-works-bring-kids-together> (profiling adaptive physical education teacher, quoted as making following statement: “Normally what I would do is teach [the special needs students] ways to modify and advocate for themselves so by the time they get to fifth or sixth grade . . . ideally, we want them to be able to function in PE independently.”); see also *Adapted Physical Education*, PE CENTRAL, <http://www.pecentral.org/adapted/adaptedmenu.html> (last visited Sept. 28, 2014) (providing policy guidelines, teaching resources, and community support to adaptive physical education teachers). PE Central’s Mission Statement states the following: “PE Central exists to assist teachers and other adults in helping children become physically active and healthy for a lifetime.” See *id.* See also, e.g., Block and Zeman, *Including Students with Disabilities in Regular Physical Education, Effects on Nondisabled Children*, 13 ADAPTED PHYSICAL ACTIVITY Q. 38-49 (1996) (concluding that to create successful inclusion physical education programs, schools need (1) resources and personnel to assist PE teacher with inclusion, (2) sufficient adaptive PE course preparation, (3) staff development adequate to prepare teachers to work on and with inclusion daily, and (4) better clinical preparation for adaptive PE teachers at undergraduate and graduate levels); Coreen Harada & Gary Siperstein, *The Sport Experience of Athletes with Intellectual Disabilities: A National Survey of Special Olympics Athletes and Their Families*, 26 ADAPTED PHYSICAL ACTIVITY Q. 68-85 (2009) (noting positive impact of physical activity and competition on student athletes with disabilities and their families).

\* J.D. Candidate, Villanova University School of Law, 2016; B.A., Gettysburg College, 2009.