CHAPTER 6 · AMATEUR ATHLETICS

Introduction

Americans generally characterize the law of amateur athletics as that body of law dealing with the legal rights of non-professional athletes. Our initial inquiry then centers on determining the traits that give one amateur status. Historically, it was simply a matter of asking if the party in question received compensation for their athletic endeavors. Of course societal evolution has caused us to review that simplified approach since athletes generally begin receiving some type of recompense from the very outset of their careers.[1] There is an Amateur Sports Act which addresses this issue though not in the neat tidy manner you might expect.[2] The Amateur Sports Act defines an amateur athlete as any athlete that meets the eligibility standards established by the governing organization for that athletes particular sport.[3] The impact of monetary considerations has been totally omitted from amateur status determination in the Act. However the national governing body for a particular sport may still use the acceptance of compensation as a way of qualifying status.[4]

Due to the great latitude given the various amateur sports organizations, the majority of cases involve whether these organizations are acting within the scope of their respective powers. Participants bringing challenges generally allege that the organization in question has infringed some protected right. The plaintiff's case is more persuasive if the right in question is founded on some constitutional grounds. Factors such as sex, race and marital status are common in this vein as they present an obvious vehicle for the introduction of equal protection issues. Conversely, cases dealing with moral behavior, academic performance and drug usage present a greater burden for the plaintiff as no constitutional right is implicated.

Plaintiffs are consistently claiming more rights based on circumstances which they say normally place

---

1 From the time an athlete is identified as having special talent he begins receiving special treatment. Initially it is subtle, items like tee-shirts and accessories. Usually it escalates to discounted athletic shoes and relaxed active wear. Special scheduling to make allowance for the requisites of practice and games follow and all the while the adoration of schoolmates and the public grows. The athletes believe that they deserve every item and more. Indeed some scholars also believe the sports system owes these individuals. *See, e.g.*, Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economic and Legal Reinterpretation,* 32 ANTITRUST BULL. 373 (1987), Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?* 65 NOTRE DAME L. REV. 206 (1990).

2 36 U.S.C. §§ 371 *et seq.* The historical and statutory interpretation of the Act indicate that it may be cited as "The Amateur Sports Act of 1978." The section's official moniker is "United States Olympic Committee," a change from "United States Olympic Association." While, as the name suggests, the statute regulates matters involving Olympic sports participation for domestic athletes, the scope of powers involved is not limited to Olympic determinations. *See, e.g., Burrows v. Ohio High School Athletic Ass'n*, 712 F. Supp. 620 (S.D. Ohio 1988).

3 *E.g.*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 1995-1996 MANUAL at General Regulation 12.1.1(a) which states that an individual loses amateur status if he or she uses their particular athletic skills for pay in any form. America is the only country with an established history of professional athleticism. Furthermore, "athletics" is defined internationally as only sports that involve "track and field" competition. "Football" to everyone else in the world means "soccer". Thus the American view of athletics is quite distinct from global interpretations.

4 The NCAA MANUAL contains a constitution, bylaws and a description of the administrative organization for those wishing to be part of the membership. Article 12 of the bylaws defines an amateur student-athlete as "one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation." This is to be compared to a professional which is one who receives direct or indirect payment for participation.

The NCAA MANUAL also expressly limits the remedial relief available to members of the association. It reserves to the NCAA the right to enforce disciplinary and corrective methods when parties fail to comply with the rules and principles of the organization. *See* PRINCIPLES FOR CONDUCT and Article 19 of the bylaws.

legal responsibilities on similarly situated prospective defendants outside the sports world. For instance, an individual signing purported documents dictating when and where he may work expects reciprocal obligations on behalf of his employer. However, in amateur athletics, courts have consistently rejected the idea that en employee/employer relationship is formed between the athlete and the organization's "sponsoring" his or her endeavors. This is so despite the fact that a typical college scholarship athlete signs a letter of intent dictating when and where he may play and subjects him or herself to penalties if a change of mind occurs. Likewise, amateur athletes have been consistently denied worker's compensation benefits due to the lack of any employee/employer relationship, although many professional athletes are covered by such benefits.

This chapter examines some of the issues most typically faced by amateur athletes and the various organizations with whom they interact. The most fundamental issue of course is the question of establishing whether a right to play even exists. Consider the following.

Section 1: Amateur Status — The Right to Play

OLDFIELD v. THE ATHLETIC CONGRESS

779 F.2d 505 (9th Cir. 1985).

I

Facts

Brian Oldfield is a world-class athlete in the shot put competition. Shortly after participating in the 1972 Olympics, Oldfield signed a professional performance contract with the International Track Association (ITA) — an act that resulted in the suspension of his amateur status. He competed with the ITA for four years, at which time he sought to re-establish his standing as an amateur.

Oldfield was only partially successful in this attempt. In accordance with a rule of the International Olympic Committee that bars from the Olympic Games athletes who have been "registered as professional ... in any sport," Bylaws to Rule 26 of the Olympic Charter, TAC sought to exclude Oldfield from the 1980 Olympic Trials on the ground that his ineligibility to compete in the Games ... rendered him ineligible to participate in the Trials.

Oldfield initiated an arbitration proceeding to challenge his exclusion, but the arbitrator agreed with TAC's stand on the issue. Oldfield took no further action to challenge the arbitrator's decision. Nonetheless, ultimately he was allowed to compete in the Trials. Presumably, this was because the USOC had withdrawn its entry in the 1980 Summer Games and the so-called "Trials" would not serve to select athletes for the Olympic Team.

In April 1984, Oldfield sent a telegram to TAC inquiring about his eligibility to compete in the 1984 Olympic tryouts. On April 24, 1984, TAC informed Oldfield that he was not eligible because he could not play in the Games under IOC rules. Two days before the Olympic tryouts, on June 13, 1984, Oldfield filed his complaint in this action. Among other things, he claimed that TAC and the USOC were arbitrarily denying him his right to compete, in violation of the Amateur Sports Act of 1978, 35 U.S.C. §§ 371-396 (1982).

On the eve of the competition, the district court denied Oldfield's motion for a temporary restraining order; Oldfield appealed, but this court denied his motion for an injunction pending resolution of the appeal. The parties subsequently stipulated to a dismissal of that appeal, but Oldfield retained his claim for damages. The USOC filed a motion for summary judgment on September 21, 1984, which TAC joined on September 28. The district court summarily granted the motion and Oldfield timely filed this appeal.

II

Standard of Review

The district court's judgment is reviewable de novo. The judgment should be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Poland*

v. Martin, 761 F.2d 546, 547 (9th Cir. 1985). The judgment below may be affirmed on any ground appearing in the record. *See Veit v. Heckler*, 746 F.2d 508, 510 (9th Cir. 1984).

III

Discussion

A. Private Right of Action

The Amateur Sports Act of 1978, 36 U.S.C. §§ 371-396 (1982), was enacted in response to years of rivalry, warfare, and confusion among amateur athletic organizations — a situation that, in Congress's estimation, was impairing the ability of American athletes to compete on the international level. *See* S. REP. NO. 770, 95th Cong., 2d Sess. 2-3 (1978) [hereinafter cited as SENATE REPORT]. The Act attacked the problem through structural revision: it created a hierarchial system headed by the USOC, in which the power is vested "to act as the coordinating body for amateur athletic activity." *Id.* at 4. Among its responsibilities under the act, the USOC is charged with "[providing] for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and [protecting] the opportunity of any amateur athlete ... to participate in amateur athletic competition." 36 U.S.C. § 374(8). It is primarily from this provision that Oldfield seeks to nourish his claim.

Although Oldfield concedes that no part of the Act explicitly affords athletes a private right of action to enforce this statutory directive, he argues that such a right may fairly be inferred.

In *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), the Supreme Court prescribed the four factors that are relevant in determining whether a statute contains an implied cause of action: (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted; (2) whether there is an indication of Congress's intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the statute's underlying purposes; and (4) whether the cause of action traditionally is relegated to state law. *Id.* at 78, 95 S. Ct. at 2087. As more recent Supreme Court cases have made clear, however, the factors enunciated in *Cort* are not entitled to equal weight. "The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S. Ct. 2479, 2488, 61 L. Ed. 2d 82 (1979); *accord Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78, 102 S. Ct. 1825, 1838-39, 72 L. Ed. 2d 182 (1982); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245-246, 62 L. Ed. 2d 146 (1979).

All too frequently the intent of Congress is quite obscure. It is seldom as apparent as it is in the present case. As originally proposed, the Act contained a substantive provision on athletes' rights that granted athletes the power to challenge in federal court the actions of any sports organization that threatened to deny them the right to compete. *See* S. 2036, 94th Cong., 1st Sess. § 304(a) (1977); *Michels v. United States Olympic Committee*, 741 F.2d 155, 157-58 (7th Cir. 1984). The Senate Report on the final version of the Act discloses, however, that "[t]his provision met with strong resistance by the high school and college communities. Ultimately, the compromise reached was that certain substantive provisions on athletes' rights would be included in the USOC Constitution and not in the bill." SENATE REPORT at 6. Should this compromise be construed to indicate Congress's intent to incorporate the USOC Constitution into federal law and thereby empower athletes to litigate in federal court any alleged deprivations of rights created by that document just as if the Senate had retained the provisions of the original bill? We think not. As Judge Posner recently observed, such an approach "would defeat the [legislative] compromise." *Michels*, 741 F.2d at 159 (POSNER, J., concurring).

Oldfield narrows his attack and contends that, because the section containing the private right of action was deleted in response to pressure from high school and college organizations, we should infer that Congress intended to eliminate only the private right of action of student athletes. Such a distinction finds no support in the statute: all the provisions in the Act concerning resolution of disputes and conflicts refer to amateur athletes in general. *See* 36 U.S.C. § 374(8) (1982) (charging the USOC with responsibility both for resolving disputes

and conflicts involving "amateur athletes" and for protecting the competitive opportunities of "any amateur athlete"); *Id.* § 375(a)(5) (granting the USOC the power to facilitate the resolution of conflicts that involve "any of its members and *any amateur athlete")* (emphasis added); *Id.* § 382b (directing the USOC to "establish and maintain provisions for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of *an amateur athlete*" to participate in certain protected competitions) (emphasis added).

Also unpersuasive are Oldfield's references to the legislative history. His quotations are from statements made by sponsors of the Act prior to its revision. Although the statements of a bill's sponsors are normally "to be accorded substantial weight in interpreting the statute," *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S. Ct. 2295, 2304, 49 L. Ed. 2d 49 (1976), they can carry but little force when flatly contradicted by subsequent legislative action. The same can be said of Oldfield's references to the Final Report of the President's Commission on Olympic Sports.

The absence of an implied private right of action is also suggested by Congress's explicit grant to the USOC of the right to proceed in federal court against infringers of Olympic-related symbols, emblems. trademarks, and names. *See* 36 U.S.C. § 380 (1982). When Congress wished to confer a right of action, it knew how to do so. The presence in the act of administrative mechanisms for the resolution of disputes over an athlete's right to compete still further betokens the absence of an implied private right. *See, e.g., Id.* § 382b (directing the USOC to promulgate procedures for resolving disputes between its members and athletes); *Id.* § 395 (prescribing procedures for challenging the actions of national governing bodies for particular sports). In view of these express enforcement provisions, "it is highly improbable that `Congress absentmindedly forgot to mention an intended private action.'" *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20, 100 S. Ct. 242, 247, 62 L. Ed. 2d 146 (1979) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 742, 99 S. Ct. 1946, 1981, 60 L. Ed. 2d 560 (1979) (POWELL, J., dissenting)).

We hold, therefore, that Oldfield lacks a private right of action under the Amateur Sports Act of 1978. Our conclusion is in accord with the result reached by the Seventh Circuit in *Michels v. United States Olympic Committee*, 741 F.2d 155 (7th Cir. 1984) — the only other court of appeals opinion to address this address.

Because Oldfield lacks a private right of action under federal law, the district court had no jurisdiction to entertain his claim. We therefore affirm the court's grant of summary judgment.

WALTON-FLOYD v. THE UNITED STATES OLYMPIC COMMITTEE

1998 Tex. App. LEXIS 1223 (1st Dist. 1998)

I. Factual Summary

The USOC serves as the coordinating body for amateur athletics in the United States for international amateur athletic competitions. It represents the United States concerning Olympic activity with the International Olympic Committee and the Pan-American Sports Organization. 36 U.S.C. § 375(1) & (2) (1988). It has the power to recognize amateur sports organizations as National Governing Bodies (NGB's) for any sport in the Olympics or Pan-American games. 36 U.S.C. § 375(4) (1988). The USOC is designed to resolve disputes among athletes and sports organizations or between competing sports organizations and provide uniformity in the area of amateur athletics, thus protecting the rights of amateur athletes to compete. Furthermore, it has the power to sue and be sued. 35 U.S.C. § 375(5), (6) (1988).

The USOC recognizes The Athletic Congress (TAC) as the NGB in the area of track and field. TAC coordinates and conducts track and field competitions to ensure these competitions are in compliance with the rules and regulations promulgated by the International Amateur Athletic Federation (IAAF). In order to ensure fair competition, the IAAF implemented rules that restrict athletes participating under its auspices from using certain performance enhancing drugs. The IAAF created a list of prohibited substances. An athlete who tests positive for one of the banned substances is subject to harsh penalties, including the suspension of an athlete from all IAAF events. The USOC issued a card listing many of the more common substances on the banned

list. A warning is included on this card stating:

> This list is not complete. It is the athlete's responsibility to check the status of all medications. CALL THE USOC HOTLINE 1-800-233-0393.

This warning is the gravamen of Walton-Floyd's complaint. In theory, the USOC established the drug hotline so athletes may discover whether the IAAF prohibits certain medications. The record is unclear whether the USOC reports directly from the IAAF's list, some other list, or a list of its own creation.

Walton-Floyd is a middle-distance runner whose specialty is the 800 meters. During the 1980's, she consistently ranked among the top 10 in the United States for the 800 meters. In 1988, she placed fifth in the Seoul Olympic Games. After the 1988 Olympics, Walton-Floyd took a year off from training and competing to have a child. Sometime after her pregnancy, she resumed training with her husband, Stanley Floyd, as her coach.

Once a track and field athlete, Mr. Floyd was familiar with the track circuit. From his years of traveling to track events and exposure to other athletes, he had become aware of a drug called Sydnocarb. Mr. Floyd wanted to find a carbohydrate supplement for his wife as he was concerned that such a high-carbohydrate diet might cause weight problems.

While in Germany in January 1991, Mr. Floyd met with a man known as Hans. Mr. Floyd traded some vitamin B12 to Hans for a box of Sydnocarb. Mr. Floyd testified the box contained the label "Sydnocarbi" and that below this word appeared some writing, which he believed to be Russian, along with the letters "CCCP." Mr. Floyd testified he could not read this writing and he did not have it translated. He also stated the box did not otherwise contain instructions on how to use the medication or a list of ingredients comprising each Sydnocarb pill. The box of Sydnocarb contained fifty white pills, each about the size of an Actifed, wrapped in plastic bubbles sealed by aluminum. The box contained five plastic sheets with ten pills per sheet. Mr. Floyd testified this was the only box of Sydnocarb he bought.

Mr. Floyd testified that at some point around the time he acquired the Sydnocarb, he called the USOC hotline to inquire about its status. He asserts that the USOC operator told him Sydnocarb was not on the banned list. The operator told him Sydnocarb was a carbohydrate supplement, thus confirming what he knew about the drug. The hotline operator, however, did not specifically tell Mr. Floyd that Sydnocarb was safe to use, nor did she give him any other assurances about it. Stanley recommended to his wife that she supplement her workout with Sydnocarb. She testified she also called the hotline. The USOC operator essentially repeated the same assurances communicated to Mr. Floyd -- that Sydnocarb was not on the banned list and represented a carbohydrate supplement. She did not receive any further assurances about Sydnocarb from the USOC. As a result of her husband's recommendation and this phone call to the hotline, Walton-Floyd began using Sydnocarb. She and her husband testified they called the hotline on other occasions during the spring and summer of 1991 to inquire about the status of Sydnocarb. Each time, the USOC operator told them the banned list did not contain Sydnocarb, confirming their previous inquiries. Once when Walton-Floyd was suffering from severe menstrual cramping, she called the hotline to inquire about Midol and also whether Sydnocarb could be the cause of her severe cramping. The hotline operator assured her that Sydnocarb was not producing her symptoms.

In 1991, Walton-Floyd won the national championship for the 800 meters, qualifying her for the 1992 Olympic trials in New Orleans. In August 1991, Walton-Floyd competed in the IAAF World Championships in Tokyo, Japan. After her semi-final heat in the 800 meters, she took a drug test. She provided the meet officials with a urine sample, which was divided into an A sample and a B sample. The A sample tested positive for amphetamines, a prohibited substance. IAAF officials informed Walton-Floyd of the test results and invited her to attend a second testing of the B sample. The B sample also resulted in a positive test for amphetamines. The IAAF conveyed the test results to TAC, which suspended Walton-Floyd from further competition. Though the TAC appeals board recommended her immediate reinstatement, the appeals board could not reinstate Walton-Floyd without ignoring the IAAF "contamination rule," which denies eligibility to any athlete who has used a prohibited substance. Consequently, TAC suspended Walton-Floyd from amateur

track and field for four years. Sometime after the drug test, she discovered not only that Sydnocarb was the apparent source of the amphetamines in her system but also that Sydnocarb was a type of antidepressant.

Walton-Floyd filed this lawsuit alleging negligence on the part of USOC. . . .

* * *

Furthermore, she alleged negligence on the part of USOC for breaching various duties prescribed by the Act. 36 U.S.C. § 392(a)(3), (5), (6), (8) & (9) (1988). Finally, she alleged that the USOC owed her a duty, because the USOC represented itself as an expert in the field of illegal substances, and it instructed athletes to use its hotline to obtain information on those substances, provide them with accurate information, and not intentionally or negligently mislead them in regard to the risk of taking a possible prohibited substance.

In response, the USOC moved for summary judgment. . . .

* * *

Discussion

In seven points of error, Floyd asserts: 1) the USOC owed her a duty pursuant to federal statutory law and Texas common law, 2) fact issues exist whether the USOC had breached those duties, 3) fact issues exist whether damages can be limited, and 4) fact issues exist whether the USOC was grossly negligent. Because we hold that the USOC did not owe Floyd a duty under any of the theories pled, we do not address her remaining points of error concerning the existence of factual issues.

Private Right of Action Under the Amateur Sports Act

In her first point of error, Walton-Floyd maintains the Act provides for an implied private cause of action that permits the recovery of monetary damages based upon the failure of the USOC to comply with the duties imposed upon it by Congress. Walton-Floyd contends the Act adopted and incorporated these duties and that Congress would not have supplied the Act with the specific provision that the USOC could be sued if it did not intend to create a private cause of action. 36 U.S.C. § 375(a)(6) (1988). The USOC argues the Act does not imply a private cause of action based on the Act's legislative history, underlying purposes, and caselaw.

To determine whether a statute contains an implied cause of action, the Supreme Court prescribes four factors: (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted, (2) whether there is an indication of Congress' intent to create or deny a private remedy, (3) whether a private remedy would be consistent with the statute's underlying purposes, and (4) whether the cause of action traditionally is relegated to state law. *Cort v. Ash*, 422 U.S. 66, 79, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975). The above factors do not require the same weight, and the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. (citations omitted)

* * *

No Texas court has considered this issue and we turn to federal caselaw on this subject. Federal courts that have interpreted the Act and its legislative history have held no private cause of action exists against the USOC. *Oldfield v. The Athletic Congress*, 779 f.2d 505, 506-08 (9th Cir. 1985); *Michaels v. United States Olympic Committee*, 741 F.2d 155, 157-58 (7th Cir. 1984); *DeFrantz v. United States Olympic Committee*, 429 F. Supp. 1181, 1190-92 (D.D.C. 1980); *Martinez v. United States Olympic Committee*, 802 F.2d 1275, 1281 (10th Cir. 1986).

* * *

In analyzing the legislative history of the Act, these courts have looked to the following four factors to determine that Congress did not intend to imply a private cause of action:

1) There is a strong preference that athletes resolve their disputes through the internal mechanisms provided by the USOC rather than the judicial system.

2) There are express provisions for causes of actions for certain violations set out

within the Act.

3) The right to a private cause of action against the USOC is set out in the USOC Constitution, which is not part of the Act and is not what Congress approved.

4) The original Act was designed to settle disputes between organizations seeking recognition as NGB's for a particular sport and shield amateur athletes from suffering harm because of these internal conflicts. When it was rechartered in 1978, the Act outlined internal grievance procedures for athletes.

In *Oldfield*, TAC denied an amateur shot put athlete, who signed a professional contract shortly after the 1992 Olympics with the International Track Association, the attempt to reestablish amateur status four years later. . . .

* * *

In *Michels*, the International Weightlifting Federation (IWF) suspended a weightlifter for two years because drug test results revealed an impermissible testosterone level. 741 F.2d at 156.

* * *

The court in *DeFrantz* considered the case of twenty-five athletes and one executive member of the USOC who filed a claim against the USOC for an injunction prohibiting the USOC from implementing a USOC House of Delegates resolution to decline an invitation to 1980 Moscow Summer Olympics. 492 F. Supp. at 1183. The Court held the Act did not confer an enforceable right to an amateur athlete to compete in Olympic competition as the Act confers the broad authority to the USOC to make all decisions regarding competitions and participation. *Id.* at 1188. . . .

* * *

Finally, in *Martinez*, a personal representative of the estate of an amateur boxer, who died from injuries sustained in a boxing tournament, filed a wrongful death action against the USOC and other various organizations responsible for the event. 802 F.2d at 1275. The Tenth Circuit, relying on the analysis of the Act's legislative history in *DeFrantz*, dismissed the suit for failure to state a federal cause of action. *Id.* at 1281. The Court found no indication in the Act that Congress intended the USOC to be liable to athletes injured while competing in events not fully controlled by the USOC. *Id.*

Walton-Floyd attempts to distinguish the above cases on the basis of the remedy sought by the plaintiff and scope of USOC control of the events. First, Walton-Floyd asserts that, with the exception of *Martinez*, all the cases cited by the USOC stand only for the proposition that Congress did not intend to create an implied right of action in favor of an athlete to enjoin the USOC or one of the NGBs from restricting that athlete's right to participate in amateur sporting events. In doing so, Walton-Floyd attempts to distinguish her situation, where she has brought suit for damages from those cases, where athletes seek to enjoin the USOC from denying their right to participate.

However, Walton-Floyd does not present any cases in support of her position; instead, she directs the Court's attention to certain alleged duties conferred upon the USOC by the Act and to the fact that the USOC may be sued. To permit Walton-Floyd to bring forth a private claim for damages would directly contravene Oldfield, where the Ninth Circuit expressly denied the plaintiff a cause of action for his damages claim. The legislative history of the Act indicates that Congress did not intend to provide individual athletes a private cause of action. If Congress had, then it would not have removed the bill of rights from the original version of the Act. Moreover, if Congress desired to differentiate between monetary claims and injunctions, then it could have so provided in the Act. Congress devised the statute, including its emphasis on internal dispute mechanisms, and thus it should have the authority to amend it. In fact, Congress expressly reserves itself this right. *See* 36 U.S.C. § 382 (1978).

* * *

Finding there is no implied private right of action against USOC, we overrule the appellant's first point of error.

Voluntary Assumption of a Duty Under State Law

In point of error two, Walton-Floyd argues the Act imposes a duty upon the USOC or a duty exists through voluntary assumption of the hotline service. Since we have held there is no private cause of action under the Act, we must determine whether the USOC assumed a duty under state tort law. Walton-Floyd maintains that even absent a statutory duty under the Act, the USOC voluntarily undertook an affirmative course of action for her benefit. Walton-Floyd asserts the USOC thereby concurrently assumed the obligation to exercise reasonable care. The USOC claims it does not owe the appellant any duty under Texas tort law, because: 1) statutory goals and objectives cannot form the basis of a common law negligence action, 2) the USOC did not voluntarily assume a duty to the appellant, and, 3) the Act pre-empts any common law negligence action.

In determining whether a private cause of action existed under state tort law, the Appellate Division of the New Jersey Superior Court felt bound to follow federal case law. *Dolan v. U.S. Equestrian Team, Inc.*, 257 N.J.Super. 314, 608 A.2d 434 (N.J.Super.A.D.1992). The New Jersey court noted:

> We believe the Act should be uniformly interpreted; that it would be inappropriate to attribute different or unique meanings to its provisions in New Jersey and thus create a jurisdictional sanctuary from the Congressional determination that these types of disputes should be resolved outside the judicial process. *Id.* at 437.

We agree with the court in *Dolan*. The interest of maintaining consistent interpretations among jurisdictions requires the Act to pre-empt claims asserted under state tort law. To hold a common law duty exists outside the scope of the Act, thereby enabling an individual athlete to bring suit, threatens to override the intent of Congress and open the door to inconsistent interpretations of the Act.

We hold Congress did not intend to create an implied right of action for damages in favor of an athlete in light of precedent and the Act's legislative history and underlying purposes. Since we conclude that Walton-Floyd does not maintain a right to a private cause of action and that the USOC does not owe Walton-Floyd a duty under the Act or Texas common law, we do not address Walton-Floyd's other points of error regarding the existence of factual issues. We therefore affirm the court's grant of summary judgment.

Questions and Notes

1. Would Oldfield have had a better chance of success if he brought suit in 1976 or 1977? What if the suit was brought today? Did Oldfield ever really have a "right to compete"? From where could such a right ever arise?

2. Most amateur athletics in this country involve students at a variety of educational levels. The college level athlete garnishes almost as much attention as the professional. Collegiate determinations of amateur eligibility are made in accordance with the regulations of the organization to which that school is a member. The most widely known organization is the National Collegiate Athletic Association (NCAA). NCAA rules define an amateur as one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sports is an avocation. 1995-96 NCAA MANUAL 12.02.1.

3. Does the Walton-Floyd case, and the others relied upon by the judge, indicate that the USOC and recognized NGB's operate with almost unfettered discretion?

4. What is the probable effect of a holding like this one or Oldfield on an athlete's career? Should that have any bearing on the decision? Shouldn't the athlete's positions in these matters be favored when formal preventative measures are weak or lacking? What would be the probable effect of such an athlete centered presumption on the sport?

5. Before suit can be brought in a formal judicial setting a complainant must normally show that they have exhausted all of their remedial options with the NGB in that particular sport. More often than not, matters are subject to mediation or arbitration. *See* e.g., *In the Matter of the Arbitration Between: Jessica K. Foschi and United States Swimming, Inc.* (1996) (another illegal drug case which the claimant ultimately won). For other cases involving track and field *see*, *Reynolds v. IAAF*, 23 F.3d 1110 (1994); *Martin v. IOC*, 740 F.2d 670 (1984).

6. Traditionally, cases involving disputes with associations were usually equitable in nature since the aggrieved party was trying to obtain either a mandatory prohibitive injunction against the association. At first, many courts refused to interfere at all in the dispute unless a property right was involved. MCCLINTOCK, PRINCIPLES OF EQUITY (1948) p. 436. Today this requirement has generally been abandoned. In reviewing association constitutions, by laws, rules and regulations, courts will usually uphold them unless they were adopted in contravention of the law, or applied in an illegal manner. For example, denying membership in an athletic association to a school which met all of its requirements just because the enrollment of the school was entirely black, *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968). Moreover, if the associations' rules are legal, they must not be applied in an illegal manner to exclude or prevent membership. *Tillman v. Wheaton-Hayden Recreation Ass's, Inc.*, 410 U.S. 431,35 L. Ed. 2d 403, 93 S. Ct. 1090 (1973). Finally, association decisions will be upheld unless fraud, collusion, illegality or arbitrariness can be shown. Relief in these cases is granted only if the proceedings did not conform to the associations' rules or were unfairly conducted so that upholding the action would be contrary to natural justice. For an excellent recent example of the application of this principle, *see Tonya Harding v. United State Figure Skating Association*, 851 F. Supp. 1476 (D. Or. 1994).

7. An interesting dispute has arisen regarding whether or not to allow recognized professionals to participate in the Olympics. Actually, the debate or eligibility for Olympic games has been a subject of controversy since Pierre de Coubertin introduced the idea of the modern Olympian in 1892. Currently, athletes who receive compensation for their sports are allowed to compete if they put their money in trust funds. However, the 92-member International Olympic Committee ultimately makes decisions on eligibility. In addition, various international sports associations determine eligibility rules for their particular sports. The United States is the most prominent of a handful of countries that have athletes involved in a number of different venues. However, most countries have no "professional" athletes or analogous concepts, and can only look forward to regional competition or the Olympics for international exposure.

The inclusion of recognized professionals in sports such as tennis, basketball and hockey have led opponents to label many of the Olympic athletes as "shamateurs." It is probably least confusing and most in line with the Olympic spirit to let anyone who can qualify for their country's team participate in the games.

8. Beyond the issue of monetary compensation are other volatile areas associated with the fundamental eligibility question. In the United States, one particularly coarse expanse involves the educational criteria necessary to become involved in "college" athletics. In 1993 the NCAA approved Proposition 16 which increased the admissions standards for the freshman class beginning in August 1995. The NCAA increased the core course requirements from 11 to 13 and raised the GPA requirement for those core courses to 2.5. In addition, the NCAA also imposed a sliding scale for the SAT or ACT. A student with the minimum 2.5 GPA still has to pass the 700 threshold. However, if the GPA falls below the 2.5 minimum, the student will have

to achieve a higher score on the SAT or ACT to achieve eligibility.

The new eligibility standard has rekindled the debate about how the NCAA's admission policy adversely affects black students. The NCAA has recognized the fact that there is a correlation between the quality of the student's education and the socially and economically depressed communities in which they live, but the new admission policy does not directly or indirectly attempt to address the long-term effect of the underlying causes of the disproportionate impact that policy has on black high school graduates. The NCAA quickly pointed out that although the relative percentage of blacks declined initially, the numbers have increased steadily since. What are the relative pros and cons having academic eligibility standards?

OKLAHOMA SECONDARY SCHOOL ACTIVITIES ASSOCIATION v. MIDGET

505 P.2d 175 (Okla. 1972)

Kenneth Williams, one of the football players used by the Booker T. Washington High School of Tulsa, during the current football season, was ineligible to play football for Booker T. Washington High School under the rules adopted by the Principals of the Tulsa Independent School District. Tulsa Washington is in the Tulsa Independent School District and is a member of the Oklahoma Secondary School Activities Association.

It is uncontroverted that the Principals of the Tulsa School District passed the following rule concerning eligibility: "Students may transfer from a school where his race is in the majority to a school where his race is in the minority and be eligible for athletics. A student who transfers from his home school to another school under the majority to minority (`M to M') regulation is eligible to participate in athletics in only the school to which he has been transferred. Should he return to his home school or transfer to another school, he must attend that school for two semesters to establish eligibility."

Tulsa Washington, a school within the Tulsa School District, had apparently won all four games in its district, and was therefore entitled to play against Tulsa Hale in the State Four A Football Semi-Finals. It was then brought to the attention of the Tulsa Washington Principal, who relayed the information to the Association, that an ineligible player had been used. It is uncontroverted that Kenneth Williams played football at Tulsa Washington in the fall of 1971, then transferred to Tulsa McClain under the "M to M" policy in the spring of 1972, where he participated in tennis and track, and then returned to Tulsa Washington, here he again participated in football in the fall of 1972.

The Rules of Oklahoma Secondary School Activities Association (Rule 14, § 8) provide that any game in which an ineligible player is used shall be forfeited. If an ineligible player had not been used by Tulsa Washington, it would have entitled to participate in the District Four A Semi-Final Playoffs. Based upon a protest and finding than ineligible player had been used by Tulsa Washington would not be entitled to participate in the District Four A Semi-Final Playoffs. Thereafter, at a special meeting of the Board of Directors of the Association, after a review of the case, it was the Board's decision that "since it was clearly established during the hearing that Kenneth Williams did indeed violate the special transfer regulation adopted by the Principals of the Tulsa Independent District, that Kenneth should be declared ineligible and all games in which he participated shall be and are hereby declared forfeited."

On November 24, 1972, a proceeding was commenced in the District Court of Tulsa County, Oklahoma, Case No. C-72-3139, against certain named defendants seeking an order restraining the defendants and each of them from interfering in any manner with the scheduled football contest between Tulsa Hale and Tulsa Washington....

[O]n November 25, 1972, ... the District Court of Tulsa County ... entered its order permanently enjoining the defendants ... from interfering in any manner with the football contest between Tulsa Hale and Tulsa Washington. The Oklahoma Secondary School Activities Association and Leo Higbie, the Executive Secretary of the Association, and others, were defendants in that action.

In this proceeding, Appellants seek an order of this court vacating the permanent injunction ordered

by the District Court of Tulsa County on November 25, 1972. Where, as here, an action or decision of a voluntary associating forfeiting football games and declaring different winners among its membership is questioned, the courts do not interfere, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the association, whether or not the proceeding was in good faith, and whether or not there was anything in the proceedings in violation of the law of the land. *See Robinson v. Illinois High School Association*, 45 Ill. App. 2d 277, 195 N.E.2d 38, *cert. den.* 379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 2d 555, *reh. den.* 380 U.S. 946, 85 S. Ct. 1022, 13 L. Ed. 2d 966, and the authorities cited therein; 6 AM. JUR. 2D, *Associations and Clubs*, § 37.

Appellees, plaintiffs in the trial court, contend that the forfeiture proceeding was not pursuant to the rules and that the provision relied upon for forfeiture was in violation of the laws of the land. It is admitted by the appellants, defendants below, that they did not have a meeting of the Board, as required by their constitution, before its Executive Secretary, Leo Higbie, announced the forfeitures. However, it was admitted by the Appellees that the Principal of Tulsa Washington High School personally notified the Executive Secretary of the Association that Tulsa Washington had played an ineligible player in its football games. That said player was ineligible under the rules enacted by the Principals of the High Schools of Tulsa Independent School District Number One. On the strength of that information, by authority of Rule 14, § 8, *supra*, the said Secretary declared all of the games which Tulsa Washington played forfeited. When a question was raised about the lack of Board action, the Appellants' Board of Directors met and formally declared the forfeiture as outlined above. We do not believe that this procedure violated any of the Appellees' rights, particularly in view of the fact that the Principal of Tulsa Washington High School gave the initial information about the rule violation to Appellant's Executive Secretary. As previously stated, neither the ineligible player, Kenneth Williams, nor Tulsa Washington sought relief in the trial court and they are not parties to this appeal.

Appellees further contend that the spirit of the integration order of the Federal District Court was violated by the provision for a penalty if the majority to minority transferring student later decided to return to his home school. The order of the Federal District Court provided that said majority to minority transferring student shall have the opportunity to participate in all activities in the new school, including eligibility for competitive athletics. We are not here considering his athletic participation in the new school, but concerned with his eligibility on return to his home school. The Federal court did not refer to this contingency in any way. This clearly evidences the fact that the Federal Court did not intend to further extend athletic eligibility in the event of other transfers. Thus, not interfering unnecessarily with the Association's policy of maintaining stability among its student athletes. It is obvious that the Principals of the Tulsa High Schools who enacted the said rule felt that the rule was necessary in order to maintain the integrity of their athletic program. The good faith of the Principals in enacting this rule is not questioned.

We find that the Appellees (plaintiffs below) have not shown themselves to be entitled to an injunction and that their prayer for relief should have been denied by the trial court. We, therefore, vacate the order granting the permanent injunction.

On Rehearing

Appellees, Plaintiffs in the trial court, have filed their Petitions for Rehearing, seeking to have this court reconsider, vacate, and hold for naught this court's ruling entered November 30, 1972, which ruling dissolved an injunction entered by the trial court.

In denying this Petition for Rehearing, this court re-adopts its order previously entered herein, and, in addition, directs the attention of all interested parties to the fundamental issue of judicial interference with the inherent right of an unincorporated association to discipline the voluntary members of that association who have breached a rule of the association.

Looking first to general authority, we find the following language at 6 Am. Jur. 2d § 37, pages 466, 467:

> With regard to associations, societies, and clubs generally, the trial or hearing before

> the tribunal or officers of the organization is judicial or quasi-judicial in nature, and a court will not re-try the case upon the facts or determine, as a matter of its own judgment, whether the member should have been suspended or expelled, but will limit its interference to certain other grounds. In such cases the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the organization, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the law of the land. If it is found that the proceeding was had fairly, in good faith, and pursuant to the laws of the organization, and that there was nothing in it in violation of the law of the land, the decision is conclusive....

No case from this jurisdiction has been cited by any party construing this rule, nor has this court been able to find such a case in this jurisdiction. However, dealing directly with the issue of judicial interference with the rulings of an unincorporated association, such as The Oklahoma Secondary School Activities Association, to discipline or suspend its members we find the case of *State ex. rel. Ohio High School Athletic Ass'n, et al., v. Judges of Court of Common Pleas of Stark County*, 173 Ohio St. 239, 181 N.E.2d 261 (1962) Syllabus Number Three by the court, as follows:

> The Ohio High School Athletic Association is an unincorporated association, and the decisions of the tribunals of such association with respect to its internal affairs will, in the absence of mistake, fraud, collusion or arbitrariness, be accepted by the courts as conclusive.

Also, in the body of the opinion, we find the following language:

> In jurisdictions outside Ohio, several cases involving the same factual pattern and this same question of law as in the instant case have followed this rule. *State ex. rel. Indiana High School Athletic Ass'n, v. Lawrence County Circuit Court of Lawrence County, Indiana*, (1959) 240 Ind. 114, 162 N.E.2d 250, is a case on all fours. Other cases which follow this rule of law are *State ex rel. Givens v. Marion Superior Court* (1954), 233 Ind. 235, 117 N.E.2d 553; *Morrison v. Roberts* (1938), 183 Okla. 359, 82 P.2d 1023; *Sult v. Gilbert* (1941), 148 Fla. 31, 3 So.2d 729; *State of North Dakota by Langer v. North Central Ass'n of Colleges and Secondary Schools* (1938), D.C., 23 F. Supp. 694.

Also, in *Robinson v. Illinois High School Association*, 45 Ill. App. 2d 277, 195 N.E.2D 38, at page 43 (1963) we find this language:

> In the instant case there is no evidence of fraud, collusion, or that the defendants acted unreasonably, arbitrarily, or capriciously. A determination of the ineligibility of plaintiff to play interschool basketball was made by those in whom the constitution, by laws, and rules of the Illinois High School Association vested the power and duty to make that determination.
>
> In the absence of any evidence of fraud or collusion, or that the defendants acted unreasonably, arbitrarily, or capriciously, the Athletic Association must be, under the authorities cited permitted to enforce its rules and orders without interference by the courts.

There is absolutely nothing before this court to indicate fraud, collusion, or action by appellants that could be found to be unreasonable, arbitrary, or capricious.

This is especially true since neither the athlete found by the Appellant Association to be ineligible, under the rules adopted by the principles of Independent School District #1, nor Tulsa Washington High School, who has to forfeit their football wins gained during the 1972 season, have ever sought relief in the trial court nor are they before this court seeking relief.

It therefore follows the Petition for Rehearing must be and the same is, hereby denied.

Questions

1. Did the Association follow its own rules? What harm did the Association's action cause the plaintiffs? If there was a failure to follow the rules, did this failure cause the harm to the plaintiffs?

2. Did the court seem willing to review the reasonableness of the association's rule of transfers? How about the appropriateness of the severity of the penalty imposed?

3. Mark Neighbors resides in the Salina School District. Mark, however, had attended school in Locust Grove for the past nine years until he enrolled at Salina. Mark had participated in football at Locust Grove in his sophomore year. Mark is now in his senior year and desires to play football.

Rule 8 of the Oklahoma Secondary School Activities Association provides:

> Section 1(a). A student is eligible in the public high school of the district where the parents are *bona fide* residents ... subject to the following provisions:
>
> * * *
>
> (i) A student who participates in athletics at any school other than the public high school of the district where the parents reside, ... forfeits his eligibility at all other member schools of the Association....

Mark filed an application for an exception to Rule 8 under subsection 1(o) which provides:

> The Board of Directors is authorized to grant exceptions of the provisions of this rule and reinstate a student to eligibility when it finds the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship on the student.

Hearings for the exceptions for Mark were held by the Board and the Board declared him ineligible.

Mark's parents have consulted you concerning the possibility of bringing suit against the Association. What advice would you give them? Is there a chance of winning a suit? Would it be helpful to know the reasons for the transfer rule? What facts would have to be established? *See Mozingo v. Oklahoma Secondary School Activities Ass'n*, 575 P.2d 1379 (Okla. App. 1978).

CALIFORNIA STATE UNIVERSITY, HAYWARD v. NCAA
47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975)

BRAY, Associate Justice

Defendant National Collegiate Athletic Association appeals from the Order of the Alameda County Superior Court granting a preliminary injunction.

Issues Presented

1) The trial court had jurisdiction to intervene in the dispute between California State University, Hayward (hereinafter `CSUH') and the National Collegiate Athletic Association (hereinafter `NCAA').

2) There was no abuse of discretion in the issuance of the preliminary injunction.

* * *

Record

California State University at Hayward and Ellis McCune in his official capacity as President of CSUH, filed a complaint in the Alameda County Superior Court against the NCAA. The complaint sought injunctive relief enjoining the NCAA from enforcing its decision that the entire intercollegiate athletic program

at CSUH was indefinitely ineligible for post-season play.

The court issued a temporary restraining order against enforcement of the NCAA decision, and an order to show cause why a preliminary injunction should not be issued. Prior to the hearing on the order to show cause the NCAA filed a demurrer to the complaint. Following the hearing and an examination of he complaint, affidavits in support of and opposing the preliminary injunction, and the memoranda of points and authorities, the court granted a preliminary injunction enjoining the NCAA from enforcing its order declaring CSUH indefinitely ineligible from participating in NCAA championship athletic events, pending trial of the matter.

Facts

CSUH is a campus of the California State Colleges and University System. The NCAA is an unincorporated association organized to supervise and coordinate intercollegiate athletic programs and events among public and private colleges and universities. It is the largest voluntary association of intercollegiate athletics in the country. An "active" member of the NCAA is a four-year college or university. CSUH became an active member in 1962. An "allied" member is an athletic conference or association composed of active members. The Far Western Conference (hereinafter `FWC') is an unincorporated California association organized to sponsor and coordinate intercollegiate athletics on a regional basis. The FWC is an allied member of the NCAA. CSUH is also a member of the FWC.

Upon becoming an active member of the NCAA, CSUH agreed to comply with all the requirements of the NCAA constitution and bylaws. Upon becoming an allied member the FWC agreed to abide by and enforce the NCAA constitution and bylaws. And, under article 3, section 2, of the NCAA constitution, the FWC was charged with the responsibility and control of intercollegiate athletics in the conference.

In 1966 the NCAA adopted bylaw 4-6(b)(1), also known as the "1.6 rule" as follows: (b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: (1) Limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have a predicted minimum grade point average of at least 1.600 (based on a maximum of 4,000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables.... The rule caused confusion among NCAA members, and between 1966 and 1973 the NCAA issued several official interpretations in order to clarify the rule. In 1973 the rule was abolished but it was in effect during the period under consideration here. The FWC was responsible for interpreting the NCAA constitution and bylaws for conference members. It interpreted the 1.6 rule as follows in its constitution, article VI, section 3(e): "Entering freshman students who upon graduation from high school predict less than 1.600 grade point average at a member institution according to NCAA procedures, shall not be eligible to compete in intercollegiate athletics until after they have earned at least a 2.0 (C) average for at least 10 units for any term."

On or about October 30, 1969, Arthur J. Bergstrom, acting in his official capacity as Assistant Executive Director of the NCAA, sent a letter to the FWC explaining the difference between in-season conference and post-season championship eligibility requirements. This distinction would permit a conference to apply its own eligibility rules for in-season conference activity as long as athletes who were not in strict compliance with NCAA eligibility requirements were not eligible for post-conference championship competition. CSUH knew of this letter and relied on the interpretation of the NCAA requirements stated therein as approval of the FWC eligibility requirements set forth in article VI, section 3(e), of the FWC constitution. In the fall of 1969 one Ronald McFadden was admitted to CSUH under a special admittance program, the Equal Opportunity Program. In the fall of 1970 one Melvin Yearby was admitted under the same program. At the time of admission neither predicted a 1.6 grade point average according to NCAA procedures, and neither participated in intercollegiate athletics his first term at CSUH. At the end of their respective first terms, each had earned better than a 2.0 grade point average for more than 10 units of college work. Each was thereafter permitted to participate in intercollegiate athletics but was not considered by CSUH to be eligible for post-

season competition in the freshman year. Article VI, section 3(e) of the FWC constitution was in effect at the time of the admission of McFadden and Yearby to CSUH.

On or about November 27, 1972, the NCAA informed CSUH that McFadden and Yearby had been ineligible too compete in their freshman years because they had failed to comply with the 1.6 rule. The NCAA ordered CSUH to declare the two ineligible to participate in any intercollegiate athletics for a one-year period, 1972-1973. At that time McFadden was a senior and Yearby was a junior. CSUH did not declare the two ineligible and appealed the decision to the NCAA. The NCAA declared the entire intercollegiate program at CSUH to be indefinitely ineligible for post-season play. The CSUH appeal to the NCAA to reverse its decision was refused.

1) Jurisdiction

Defendant NCAA contends that the trial court erred in failing to follow the doctrine of judicial abstention from interference in the affairs of a private voluntary association. However, courts will intervene in the internal affairs of associations where the action by the association is in violation of its own bylaws or constitution. It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But if the decision of the tribunal is contrary to its laws or rules, it is not authorized by the by laws of the association, a court may review the ruling of the board and direct the reinstatement of the member....

And in *Smith v. Kern County Medical Assn.*, (1942) 19 Cal. 2d 263, 120 P.2d 874, concerning expulsion from an association, a situation which is analogous to suspension, the court stated: "In any proper case involving the expulsion of a member from a voluntary unincorporated association, the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land...."

In the instant case plaintiffs' complaint alleges that the NCAA decision, that the entire intercollegiate program at CSUH is indefinitely ineligible for post-season competition, is contrary to the NCAA constitution and bylaws, and that the decision is void as against public policy because it would force CSUH to violate constitutional rights of its students guaranteed by the Fourteenth Amendment. The trial court has not yet finally adjudicated these claims but plaintiffs are entitled to have the matter determined.

Defendant NCAA asserts that as a matter of law no interest of any member of the NCAA is sufficiently substantial to justify judicial intervention because the interest affected by the sanction in question is the school's potential participation in NCAA championship events, an interest which is a mere expectancy as it is contingent upon performance during the season. The NCAA claims that California courts have only intervened when a vital interest was affected, such as where a member was expelled from a union, where a professional or trade organization's actions threatened disastrous economic consequences to a member, where substantial property interests were threatened by expulsion from an association, or where someone was totally excluded from becoming a member of a group.

As to the latter point, the court took a position contrary to appellant's in *Bernstein v. Alameda etc., Med. Assn., supra*, 139 Cal. App. 2d 241 at p. 253, 293 P.2d at p. 869, when it found that the California Supreme Court had implied: "that in relation to this subject there is no fundamental distinction between a medical association, a labor union, and a fraternal or beneficial association. In each type of organization the relationship between the members and the group is determined by contract, the terms of which find expression in the constitution and by laws." Likewise, there can be no fundamental distinction between an athletic association and the above associations where, as here, the claim is that the association failed to abide by its own rules or the laws of the land.

As to the claim that CSUH's interest is not sufficiently substantial justify judicial intervention due to a mere expectancy of participation in championship events, it has already been discussed that a violation by an association of its own bylaws and constitution or of the laws of the land justifies judicial intervention. Further, the CSUH had, and has, more than a mere expectancy that some of its athletes would earn the opportunity to participate in NCAA championship events but for the suspension is evidenced by the fact that

at the time of both the hearing on the temporary restraining order and the hearing on the preliminary injunction, there were upcoming NCAA championship events in which CSUH students, without the imposed suspension, were eligible to compete. Additionally, the decision of the NCAA necessarily affects more than just the possibility of being precluded from championship events. The sanction of indefinite probation affects the reputation of CSUH and its entire athletic program, and thereby also affects CSUH's ability to recruit athletes. Judicial notice may be taken that state schools such as CSUH are deeply involved in fielding and promoting athletic teams with concurrent expenditures of time, energy and resources. The school provides and pays for the coaches, supplies and equipment. It finances, equips, trains and fields the teams. And, its funds pay the NCAA membership dues.... The contention that CSUH has no substantial interest to justify judicial intervention lacks merit.

* * *

The NCAA also claims that plaintiffs do not contend that the procedural process followed by the NCAA in imposing sanctions on CSUH was not full and fair, and asserts: "While insisting that voluntary non-profit associations follow their own procedures in disciplining their members, courts have refused to disturb the association's decision when there was no procedural unfairness and the proceedings conformed to the requirements established by the group."

As already discussed the courts will intervene where the action by the association is in violation of its own bylaws and constitution. That this rule applies to substantive as well as procedural questions is supported by cases which appellant itself cites. In *Smetherham v. Laundry Workers' Union, supra*, 44 Cal. App. 2d 131, 111, 91 P.2d 948, the court reviewed a bylaw which the petitioner had allegedly violated and found that there was no basis in that bylaw for petitioner's expulsion from the union. In *Smith v. Kern County Medical Assn., supra*, 19 Cal. 2d 263, 120 P.2d 874, the court reviewed whether the association had followed the procedure provided by the rules of the society in expelling the plaintiff, but also reviewed whether there had been sufficient showing to support a finding that the charge against plaintiff was one which constituted a violation of the rules of the society.

NCAA also asserts that judicial intervention in this type of case is undesirable and raises a number of policy arguments to that effect. Because it is clear that courts will intervene if an association violates its own rules or the laws of the land, these arguments have no weight.

* * *

Judgment affirmed.

Question

Was there any evidence that the NCAA violated its own rules? Should the trial court make the preliminary injunction permanent? On what basis? Can *California State University* be reconciled with *Oklahoma Secondary School Activities Ass'n*?

Section 2: Amateurism and the Constitution

A claim for the violation of a constitutional right usually takes the form of a civil rights action in which the plaintiffs claims that they have been deprived of some right guaranteed by the Fourteenth Amendment. Section 1 of this amendment provides that: "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws." This amendment limits only state action. Thus its protection does not extend to purely private misconduct no matter

how unfair or outrageous. In some amateur athletics cases state action is clearly present, as when a state funded university acts against a coach or player. Similarly, it is clearly absent when a private college disciplines a player or coach. Sometimes, however, state and private institutions join together to form athletic associations or leagues. In these cases the question of whether there is state action becomes more complicated.

Under the Fourteenth Amendment, an individual is entitled to "due process of law" and the "equal protection of the law." In due process cases, a person must be deprived or "life, liberty or property." While one initially thinks of procedural aspects there is also a substantive component of due process which requires that the government justify the infringement of a person's liberty or the taking of his property, and a procedural fairness. The term liberty is considered to include freedom of speech, association and religion. Property rights are established by state law.

Equal protection cases usually arise when state action has resulted in classifications. First it must be determined whether the classification falls into one of three categories: (1) suspect, (2) suspicious, (3) nonsuspect. If the case involves a suspect class the classification will be subjected to strict scrutiny, and the state action will only be permitted if it can be shown that there is a compelling governmental interest in drawing the distinctions. Suspect classes include racial, ethnic or alienage distinctions. If the classification is suspicious it will be subjected to heightened scrutiny. The state must show that there is a fair and substantial relationship between the classification and its objective in creating the distinction. Suspicious classes include gender. If the classification is nonsuspect, then the plaintiff will have the burden of proving that the classification has no rational relationship to a valid state purpose. Age, marital status, and personal grooming cases fall into this category.

The following cases examine the variety of contexts in which parties have attempted to raise their disputes to a constitutional level.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. TARKANIAN
488 U.S. 179 (1988)

STEVENS, Justice

When he became head basketball coach at University of Nevada, Las Vegas (UNLV) in 1973, Jerry Tarkanian inherited a team with a mediocre 14-14 record. Four years later the team won 29 out of 32 games and placed third in the championship tournament sponsored by the National Collegiate Athletic Association (NCAA), to which UNLV belongs.

Yet in September 1977 UNLV informed Tarkanian that it was going to suspend him. No dissatisfaction with Tarkanian, once described as "the `winningest' active basketball coach," motivated his suspension. Rather, the impetus was a report by the NCAA detailing 38 violations of NCAA rules by UNLV personnel, including 10 involving Tarkanian. The NCAA had placed the University's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian.

Facing demotion and a drastic cut in pay, Tarkanian brought suit in Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983. Ultimately Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA. NCAA's liability may be upheld only if its participation in the events that led to Tarkanian's suspension constituted "state action" prohibited by the Fourteenth-Amendment and were performed "under color of" state law within the meaning of § 1983. We granted *certiorari* to review the Nevada Supreme Court's holding that the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined. We now reverse.

I

In order to understand the four separate proceedings that gave rise to the question we must decide, it is useful to begin with a description of the relationship among the three parties — Tarkanian, UNLV, and the NCAA.

Tarkanian initially was employed on a year-to-year basis but became a tenured professor in 1977. He receives an annual salary with valuable fringe benefits, and his status as a highly successful coach enables him to earn substantial additional income from sports-related activities such as broadcasting and the sponsorship of products.

UNLV is a branch of the University of Nevada, a state-funded institution. The University is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations. In performing their official functions, the executives of UNLV unquestionably act under color of state law.

The NCAA is an unincorporated association of approximately 960 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. Basic policies of the NCAA are determined by the members at annual conventions. Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs.

One of the NCAA's fundamental policies "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports." It has therefore adopted rules, which it calls "legislation," governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

The NCAA's bylaws provide that its enforcement program shall be administered by a Committee on infractions. The Committee supervises an investigative staff, makes factual determinations concerning alleged rule violations, and is expressly authorized to "impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership." In particular, the Committee may order a member institution to show cause why that member should not suffer further penalties unless it imposes a prescribed discipline on an employee; it is not authorized, however to sanction a member institution's employees directly. The bylaws also provide that representatives of member institutions "are expected to cooperate fully" with the administration of the enforcement program. The bylaws do not purport to confer any subpoena power on the Committee or its investigators. They state:

> The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

During its investigation of UNLV, the Committee on Infractions included three law professors, a mathematics professor, and the dean of a graduate school. Four of them were on the faculties of state institutions; one represented a private university.

The NCAA Investigation of UNLV

On November 28, 1972, the Committee on Infractions notified UNLV's president that it was initiating a preliminary inquiry into alleged violations of NCAA requirements by UNLV. As a result of that preliminary inquiry, some three years later the Committee decided that an "Official Inquiry" was warranted and so advised the UNLV president on February 25, 1976. That advice included a series of detailed allegations concerning the recruitment of student athletes during the period between 1971 and 1975. Many of the allegations implicated Tarkanian. It requested UNLV to investigate and provide detailed information concerning each alleged incident.

With the assistance of the Attorney General of Nevada and private counsel, UNLV conducted a thorough investigation of the charges. On October 27, 1976, it filed a comprehensive response containing

voluminous exhibits and sworn affidavits. The response denied all of the allegations and specifically concluded that Tarkanian was completely innocent of wrongdoing. Thereafter, the Committee conducted four days of hearings at which counsel for UNLV and Tarkanian presented their views of the facts and challenged the credibility of the NCAA investigators and their informants. Ultimately the Committee decided that many of the charges could not be supported, but it did find 38 violations of NCAA rules, including 10 committed by Tarkanian. Most serious was the finding that Tarkanian had violated the University's obligation to provide full cooperation with the NCAA investigation.

The Committee proposed a series of sanctions against UNLV, including a two-year period of probation during which its basketball team could not participate in post-season games or appear on television. The Committee also requested UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period. UNLV appealed most of the Committee's findings and proposed sanctions to the NCAA Council. After hearing arguments from attorneys representing UNLV and Tarkanian, the Council on August 25, 1977 unanimously approved the Committee's investigation and hearing process and adopted all its recommendations.

UNLV's Discipline of Tarkanian

Promptly after receiving the NCAA report, the president of UNLV directed the University's vice president to schedule a hearing to determine whether the Committee's recommended sanctions should be applied. Tarkanian and UNLV were represented at that hearing; the NCAA was not. Although the vice president expressed doubt concerning the sufficiency of the evidence supporting the Committee's findings, he concluded that "given the terms of our adherence to the NCAA we cannot substitute — biased as we must be — our own judgment on the credibility of witnesses for that of the infractions committee and the Council." With respect to the proposed sanctions, he advised the president that he had three options:

> 1. Reject the sanctions requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e.g.*, possible extra years of probation.
>
> 2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position — through tenured and without adequate notice — even while believing that the NCAA was wrong.
>
> 3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

Pursuant to the vice president's recommendation, the president accepted the second option and notified Tarkanian that he was to "be completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation."

Tarkanian's Lawsuit Against UNLV

The day before his suspension was to become effective, Tarkanian filed an action in Nevada state court for declaratory and injunctive relief against UNLV and a number of its officers. He alleged that these defendants had, in violation of 42 U.S.C. § 1983, deprived him of property and liberty without the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. Based on a stipulation of facts and the testimony offered by Tarkanian, the trial court enjoined UNLV from suspending Tarkanian on the ground that he had been denied procedural and substantive due process of law. UNLV appealed.

The NCAA, which had not been joined as a party, filed an *amicus curiae* brief arguing that there was no actual controversy between Tarkanian and UNLV; thus, the suit should be dismissed. Alternatively, the NCAA contended that the trial court had exceeded its jurisdiction by effectively invalidating the enforcement proceedings of the NCAA, even though the Association was not a party to the suit. Should a controversy exist, the NCAA argued, it was a necessary party to litigate the scope of any relief. Finally, it contested the trial court's conclusion that Tarkanian had been denied due process. The Nevada Supreme Court concluded that

there was an actual controversy but agreed that the NCAA was a necessary party and therefore reversed and remanded to permit joinder of the NCAA.

The Lawsuit Against NCAA

Tarkanian consequently filed a second amended complaint adding the NCAA. The defendants promptly removed the suit to Federal District Court on the ground that joinder of the NCAA substantially had altered the nature of the litigation. The district court held, however, that the original defendants had waived their right to remove the suit when it was first filed, and therefore granted Tarkanian's motion to remand the case to the state court. After a four-year delay, the trial judge conducted a two-week bench trial and resolved the issues in Tarkanian's favor. The court concluded that NCAA's conduct constituted state action for jurisdictional and constitutional purposes, and that its decision was arbitrary and capricious. It reaffirmed its earlier injunction barring UNLV from disciplining Tarkanian or otherwise enforcing the Confidential Report. Additionally, it enjoined the NCAA from conducting "any further proceedings against the University," from enforcing its show-cause order, and from taking any other action against the University that had been recommended in the Confidential Report.

Two weeks after the trial court's opinion was entered, Tarkanian filed a petition for attorney's fees pursuant to 42 U.S.C. § 1988.... [T]he Nevada trial court ... awarded Tarkanian attorney's fees of almost $196,000, 90% of which was to be paid by the NCAA. The NCAA appealed both the injunction and the fee order. Not surprisingly, UNLV, which had scored a total victory except for its obligation to pay a fraction of Tarkanian's fees, did not appeal.

The Nevada Supreme Court agreed that Tarkanian had been deprived of both property and liberty protected by the Constitution and that he was not afforded due process before suspension. It thus affirmed the trial court's injunction insofar as it pertained to Tarkanian, but narrowed its scope "only to prohibit enforcement of the penalties imposed upon Tarkanian in Confidential Report No. 123(47) and UNLV's adoption of those penalties." The court also reduced the award of attorney's fees.

As a predicate for its disposition, the State Supreme Court held that the NCAA had engaged in state action. Several strands of argument supported this holding. First, the court assumed that it was reviewing "UNLV's and the NCAA's imposition of penalties against Tarkanian," rather than the NCAA's proposed sanctions against UNLV if it failed to discipline Tarkanian appropriately. Second, it regarded the NCAA's regulatory activities as state action because "many NCAA member institutions were either public or government-supported." Third, it stated that the right to discipline a public employee "is traditionally the exclusive prerogative of the state" and that UNLV could not escape its responsibility for such disciplinary action by delegating that duty to a private entity. The court next pointed to our opinion in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982), in which we held that the deprivation of a federal right may be attributed to the state if it resulted from a state-created rule and the party charged with the deprivation can fairly be said to a state actor. Summing up its holding that the NCAA's activities constituted state action, the Nevada Supreme Court stated:

> The first prong [of *Lugar*] is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

II

Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. *Shelley v. Kraemer*, 334 U.S. 1, 13,

68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948); *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 452, 42 L. Ed. 2d 477 (1974). As a general matter the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961).

* * *

In this case Tarkanian argues that the NCAA was a state actor because it misused power that it possessed by virtue of state law. He claims specifically that UNLV delegated its own functions to the NCAA, clothing the Association with authority both to adopt rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV. Similarly, the Nevada Supreme Court held that UNLV had delegated its authority over personnel decisions to the NCAA. Therefore, the court reasoned, the two entities acted jointly to deprive Tarkanian of liberty and property interests, making the NCAA as well as UNLV a state actor.

These contentions fundamentally misconstrue the facts of this case. In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, *e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975); if it delegates its authority to the private actor, *e.g., West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, *e.g., Burton v. Wilmington Parking Authority, supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

This case uniquely mirrors the traditional state action case. Here the final act challenged by Tarkanian — his suspension — was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.... Thus, when UNLV notified Tarkanian that he was being separated from all relations with the University's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983.

The mirror image presented in this case requires us to step through an analytical looking glass to resolve it. Clearly UNLV's conduct was influenced by the rules and recommendations of the NCAA, the private party. But it was UNLV, the state entity, that actually suspended Tarkanian. Thus the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.

We examine first the relationship between UNLV and the NCAA regarding the NCAA's rulemaking. UNLV is among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations. Yet the NCAA's several hundred other public and private member institutions each similarly affected those policies. Those institutions, the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State.[13]

State action nonetheless might lie if UNLV, by embracing the NCAA's rules, transformed them into a state actor. *See Lugar*, 457 U.S., at 937, 102 S. Ct., at 2753. UNLV engaged in state action when it adopted the NCAA's rules to govern its own behavior, but that would be true even if UNLV had taken no part in the

---

[13] The situation would, of course, be different if the membership consisted entirely of institutions located within the same state, many of them public institutions created by the same sovereign. *See Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationship with private universities, which constitute the bulk of its membership.

promulgation of those rules. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), we established that the State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action. Those rules had been adopted in toto from the AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY. *Id.*, at 360 n. 12, 97 S. Ct., at 2697 n. 12. It does not follow, however, that the ABA's formulation of those disciplinary rules was state action. The State Supreme Court retained plenary power to reexamine those standards and, if necessary, to reject them and promulgate its own. *See id.*, at 362, 97 S. Ct., at 2698. So here; UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy.[15] Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.

Tarkanian further asserts that the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state action because they resulted from a delegation of power by UNLV. UNLV, as an NCAA member, subscribed to the statement in the Association's bylaws that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." It is, of course, true that a state may delegate authority to a private party and thereby make that party a state actor. Thus, we recently held that a private physician who had contracted with a state prison to attend to the inmates' medical needs was a state actor. *West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). But UNLV delegated no power to the NCAA to take specific action against any University employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself.

Indeed, the notion that UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain University powers to the NCAA is belied by the history of this case. "It is quite obvious that UNLV used its best efforts to retain its winning coach — a goal diametrically opposed to the NCAA's interest in ascertaining the truth of its investigators' reports. During the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth." The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of NCAA's recruitment standards. Just as a state-compensated public defender acts in a private capacity when she represents a private client in a conflict against the State, ... the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.[16]

---

[15] Furthermore, NCAA's bylaws permit review of penalties, even after they are imposed, "upon a showing of newly discovered evidence which is directly related to the findings in the case, or that there was a prejudicial error in the procedure which was followed in the processing of the case by the Committee."... UNLV could have sought such a review, perhaps on the theory that the NCAA's investigator was biased against Tarkanian, as the Nevada trial court found in 1984.... The NCAA Committee on Infractions was authorized to "reduce or eliminate any penalty" if the University had prevailed....

[16] *Tarkanian* argues that UNLV and the NCAA were "joint participants" in state action. Brief for Respondent 42. He would draw support from *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961), in which a lease relationship between a private restaurant and a publicly owned parking structure entailed "an incidental variety of mutual benefits," *Id.*, at 724, 81 S. Ct. at 861: tax exemptions for the restaurant, rent payments for the parking authority, and increased business for both. Because of the interdependence, we held, the restaurant and parking authority jointly violated the Fourteenth Amendment when the restaurant discriminated on account of race....

(continued...)

The NCAA enjoyed no governmental powers to facilitate its investigation.[17] It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the University from membership. Contrary to the premise of the Nevada Supreme Court's opinion, the NCAA did not — indeed, could not — directly discipline Tarkanian or any other state university employee. The express terms of the Confidential Report did not demand the suspension unconditionally; rather, it requested "the University ... to show cause" why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian. Even the University's vice president acknowledged that the Report gave the University options other than suspension: UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have withdrawn voluntarily from the Association.

Finally, Tarkanian argues that the power of the NCAA is so great that the UNLV had no practical alternative to compliance with its demands. We are not at all sure this is true,[19] but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law....

In final analysis the question is whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." *Lugar*, 457 U.S., at 937, 102 S. Ct., at 2753. It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV — sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings — is fairly attributable to the State of Nevada. It would be more appropriate to conclude that UNLV had conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.

The judgment of the Nevada Supreme Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

---

[16](...continued)

In the case before us the state and private parties' relevant interest do not coincide, as they did in *Burton*; rather, they have clashed throughout the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may be deemed a state actor on this ground.

[17] In *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980), on which the dissent relies, the parties had entered into a corrupt agreement to perform a judicial act. As we explained: "[H]ere the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators. Indeed, his immunity is dependent on the challenged conduct being an official judicial act within his statutory jurisdiction, broadly construed. Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of law...." (footnote and citations omitted).

In this case there is no suggestion of any impropriety respecting the agreement between the NCAA and UNLV. Indeed the dissent seems to assume that NCAA's liability as a state actor depended not on its initial agreement with UNLV, but on whether UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian.... In contrast, the conspirators in *Dennis* became state actors when they formed the corrupt bargain with the judge, and remained so through completion of the conspiracy's objectives....

[19] The University's desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent.

Justice WHITE, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join, dissenting.

All agree that UNLV, a public university, is a state actor, and that the suspension of Jerry Tarkanian, a public employee, was state action. The question here is whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor. I would hold that it did.

I agree with the majority that this case is different on its facts from many of our prior state action cases. As the majority notes, in our "typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff." ... In this case, however, which in the majority's view "uniquely mirrors the traditional state action case," ... the final act that caused the harm to Tarkanian was committed, not by a private party, but by a party conceded to be a state actor. Because of the difference, the majority finds it necessary to "step through looking glass" to evaluate whether the NCAA was a state actor.

But the situation presented by this case is not unknown to us and certainly is not unique. In both *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), and *Dennis v. Sparks*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980), we faced the question of whether private parties could be held to be state actors, if they were "jointly engaged with state officials in the challenged action."...

The facts of *Dennis* are illustrative. In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. The injunction was later dissolved on appeal as having been issued illegally. The plaintiff then filed suit under 42 U.S.C. § 1983, alleging that the judge had conspired with the party seeking the original injunction — a private corporation — the sole owner of the corporation, and the two sureties on the injunction bond to deprive the plaintiff of due process by corruptly issuing the injunction. We held unanimously that under the facts as alleged the private parties were state actors because they were "willful participant[s] in joint action with the State or its agents." *See also Adickes, supra*, 398 U.S., at 152, 90 S. Ct. at 1605 (plaintiff entitled to relief under § 1983 against private party if she can prove that private party and police offer "reached an understanding" to cause her arrest on impermissible grounds).

On the facts of the present case, the NCAA acted jointly with UNLV in suspending Tarkanian. First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA. As the Nevada Supreme Court found in its first opinion in the case, *University of Nevada v. Tarkanian*, 95 Nev. 389, 391, 594 P.2d 1159, 1160 (1979), "[a]s a member of the NCAA, UNLV contractually agrees to administer it athletic program in accordance with NCAA legislation." Indeed, NCAA rules provide that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution."

Second, the NCAA and UNLV also agreed that the NCAA would conduct the hearings concerning violations of its rules. Although UNLV conducted it sown investigation into the recruiting violations alleged by the NCAA, and NCAA procedures provide that it is the NCAA Committee on Infractions that "determine[s] facts related to alleged violations," subject to an appeal to the NCAA Council. As a result of this agreement, the NCAA conducted the very hearings the Nevada Supreme Court held to have violated Tarkanian's right to procedural due process.

Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV. By becoming a member of the NCAA, UNLV did more than merely "promise to cooperate in the NCAA enforcement proceedings." It agreed, as the University Hearing Officer appointed to rule on Tarkanian's suspension expressly found, to accept the NCAA's "findings of fact as in some way superior to [its] own." By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body, and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong.

In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV]

officials in the challenged action," and therefore was a state actor.[2] *See Dennis, supra*, 449 U.S., at 27-28, 101 S. Ct., at 186-187.

The majority's objections to finding state action in this case were implicitly rejected by our decision in *Dennis*. Initially, the majority relies on the fact that the NCAA did not have any power to take action directly against Tarkanian as indicating that the NCAA was not a state actor. But the same was true in *Dennis*: The private parties did not have any power to issue an injunction against the plaintiff. Only the trial judge, using his authority granted under state law, could impose the injunction.

Next, the majority points out that UNLF was free to withdraw from the NCAA at any time. Indeed, it is true when considering UNLV's options, the University Hearing Officer noted that one of those options was to "[p]ull out of the NCAA completely." But of course the trail judge in *Dennis* could have withdrawn from his agreement at any time as well. That he had that option is simply irrelevant to finding that he had entered into an agreement. What mattered was not that he could have withdrawn, but rather that he did not do so.

Finally, the majority relies extensively on the fact that the NCAA and UNLV were adversaries throughout the proceedings before the NCAA. The majority provides a detailed description of UNLV's attempts to avoid the imposition of sanctions by the NCAA. But this opportunity for opposition, provided for by the terms of the membership agreement between UNLV and the NCAA, does not undercut the agreement itself. Surely our decision in *Dennis* would not have been different had the private parties permitted the trail judge to seek to persuade them that he should not grant the injunction before finally holding the judge to his agreement with them to do so. The key there, as with any conspiracy, is that ultimately the parties agreed to take the action.

The majority states in conclusion that "[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV — sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings — is fairly attributable to the State of Nevada." I agree. Had UNLV refused to suspend Tarkanian, the NCAA responded by imposing sanctions against UNLV, it would be hard indeed to find any state action that harmed Tarkanian. But that is not this case. Here, UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would. Under these facts, I would find that the NCAA acted jointly with UNLV and therefore is a state actor.

I respectfully dissent.

Questions and Notes

1. What is the test which the Court sets forth to determine if there is state action? Is it a workable one?

2. What if UNLV had cooperated with the NCAA in its investigation and completely endorsed the Committee's recommendation?

3. What if a majority of the NCAA's membership consisted of state funded universities from around the United States?

---

[2] The Court notes that the United States Court of Appeals have, since our decisions in *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982), *Lugar v. Edmondson Oil*, 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982), and *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), held unanimously that the NCAA is not a state actor. *Ante*, at 457, no. 5. *See McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

4. Before the Supreme Court decided *Tarkanian* the lower federal courts were split on the question of whether the NCAA could engage in "state action." Earlier cases tended to hold that the NCAA had engaged in state action. *Regents of University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974); *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D.C. Colo. 1976); *Jones v. NCAA*, 392 F. Supp. 295 (D.C. Mass. 1975); *Buckton v. NCAA*, 366 F. Supp. 1152 (D.C. Mass. 1973). Later, as Justice White points out in his dissent in *Tarkanian* this trend was reversed after the Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) with lower federal courts holding unanimously that the NCAA was not a state actor; *McCormick v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986); *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984).

5. The Supreme Court's decision in *Tarkanian* sparked a flurry of legislative activity. Nebraska enacted a NCAA due-process law (L.B. 397, Feb. 1990). This law served as a model for bills in South Carolina (S. 1494, April 5, 1990), Kentucky (H.R. 777, Feb. 27, 1990) and Florida (S. 2444, May 18, 1990).

LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION v. ST. AUGUSTINE HIGH SCHOOL
396 F.2d 224 (5th Cir. 1968)

GODBOLD, Circuit Judge

[A class action suit was brought by a private high school with an all-Negro student body and by Negro students attending public high schools, all in the State of Louisiana. The plaintiffs sought to enjoin the maintenance and operation of a racially segregated system of interscholastic high school athletics in Louisiana by the Louisiana High School Athletic Association (LHSAA) and the Louisiana State Board of Education. The crux of plaintiffs' claim was the State of Louisiana pursued a policy and practice of maintaining and operating a racially segregated athletic system through the means of allowing LHSAA to regulate and direct interscholastic athletics for white high schools and allowing the Louisiana Interscholastic Athletic and Literary Organization (LIALO) to do the same for Negro high schools.

The class action was ultimately precipitated by the repeated refusal of the LHSAA to admit St. Augustine High School to the association. The district court ordered that St. Augustine be immediately admitted to the LHSAA and enjoined it from refusing membership to any high school which met all of the express requirements for membership contained in its constitution based solely on an arbitrary vote of its membership.]

* * *

The Association appeals from the decree of the district court. The plaintiffs cross-appeal, seeking a broader form of order. The major contentions of the Association in this court are that is activities are not state action but are private in nature, that no injury to the plaintiffs was shown and that there was insufficient evidence that St. Augustine was excluded on racial grounds. We affirm the district court.

I

There can be no substantial doubt that conduct of the affairs of LHSAA is state action in the constitutional sense. The evidence is more than adequate to support the conclusion of the district court that the Association amounts to all agency and instrumentality of the State of Louisiana. Membership of the Association is relevant - 85 percent of the members are state public schools. The public school principals who nominally are members, are state officers, state paid and state supervised, and together are the heads of all the white public high schools in Louisiana that participate in interscholastic athletics.

Funds for support of the Association come partly from membership dues, largely from gate receipts from games between members, the great majority of which are held in state-owned and state-supplied facilities. The paid staff of LHSAA is covered in part by the Louisiana Teachers Retirement act and staff members are

legally defined as teachers.

The Association exercises wide control over scheduling, participation in and conduct of athletic events. Its bylaws (Art. X, 4) require principals be responsible to it alone in matters pertaining to interscholastic athletic activities. It prepares and enforces eligibility rules. It limits the number of football and basketball games a public school may play in one season (Art. VIII). Contracts for games must be made on official LHSAA forms (Art. X) Game officials must be selected from the official LHSAA list (Art. VII) and paid a fees fixed by the Association (Arts. XI & XII). Annually Association sponsors a basketball tournament conducted in public facilities (*See* Art. XII, 3). Participation in tournaments, post season games, and bowl games must receive Association approval (Art. V. 5), and the financial report thereon must be submitted with 21 days (Art. V. 6). It has the power to keep schools from competing against other schools.

The power of the Association reaches not only to the stadiums, the gymnasiums and the locker room but into the public classrooms, the public principals' offices and the public pocketbook. It exercises control over curricula — a coach must teach a designated minimum number of classes per week. Principals are required to submit certain reports to the Association. The Association has the power to investigate, discipline and punish member schools by fine and otherwise. If a public school principal does not comply with the mandate of the Association, or if a public school coach uses an athlete whose eligibility is questioned by the Association, or if the student body of a public school acts improperly in connection with an athletic event, the school — a state agency — is subject to Association discipline.

The state's schools are deeply involved in fielding and promoting athletic teams with expenditure of tremendous time, energy and resources. The state (including in that term schools and school systems to varying extents at various places as arms of the state) provides and pays the coaches, pays some coaches overtime for their after school work, supplies athletic equipment, at times makes cash grants for athletic purposes, carries insurance on players and facilities, supplies transportation to teams. The state finances, equips, trains and fields the teams. The Association assists, advises and aids in the effort, establishes standards and supervises and coordinates what the fielded teams do.

The factual context is not of the state's declining to act in the area which is then taken over by a private instrumentality. The state has not withdrawn from supervision and coordination of interscholastic activities as the Association contends. Instead, as the district court pointed out, interscholastic athletics is a program in which the state is actively and intensively involved, and "for the state to devote so much time, energy, and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the state in the total program."

* * *

IV

The result is not changed either by St. Augustine's being a private school seeking admission to an association composed predominantly of public schools or by the existence of private schools as members of the Association. Having elected to allow private schools to participate in this state activity, Louisiana must extend the benefit consistent with constitutional standards. And those private schools which choose to participate in this state program, to the extent of their role as members and participants, becomes amenable to Fourteenth Amendment requirements.

* * *

AFFIRMED

Questions and Notes

1. Using the test for state action enunciated by Justice Stevens in *Tarkanian*, is there state action in *Louisiana High School?* Why?

2. If a majority of the NCAA membership consisted of state funded universities from different states, would there be state action in *Tarkanian*? What if the membership was exclusively state universities from different states? In *Buckton v. NCAA*, 366 F. Supp. 1152, 1156 (D.C. Mass. 1973) a group of Canadian nationals brought suit to enjoin the NCAA from declaring them ineligible for inter-college competition because of their participation in Canadian major junior hockey. The district court cited *Louisiana High School* with approval, stating:

> The conduct of a private athletic association has been held to constitute state action where 85% of its members were state public schools; funds for support of the association came partly from membership dues from these schools and from gate receipts from games usually played in state-owned and state-supplied facilities; and the association exercised wide control over scheduling, participation in and conduct of athletic events.

The court then concluded that the NCAA was a state actor.

3. In *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir. 1982) the court found state action underlying a rule adopted by the association that precluded boys from playing on girls' interscholastic volleyball teams stating:

> Although the state action issue was not raised by the parties, we note that the AIA regulations in question meet the state action requirements of the fourteenth amendment. The stipulated facts indicate that the AIA is a voluntary association of all public and most private high schools in the state of Arizona. The members of public schools play a substantial role in determining and enforcing the policies and regulations of the AIA. School administrators and coaches represent the member schools on AIA advisory committees. The legislative authority of the AIA in all matters pertaining to interscholastic activities is vested in the legislative council. The legislative council consists of delegates elected by the member schools in addition to four members from the various state school boards. The AIA rule making procedure integrally involves the member schools and school districts in the decision making process. The rules and regulations promulgated by the AIA bind all public high schools in Arizona, although any school can voluntarily withdraw from the AIA at any time. The ultimate enforcement of the rules is the responsibility of the AIA, the member schools and the public officials of those schools and school districts. Furthermore, both athletic and nonathletic activities sanctioned by the AIA take place on public school grounds. Every court to consider the question has concluded that associations like the AIA are so intertwined with the state that their actions are considered state action....

Applying the *Tarkanian* test, do you agree that there was state action?

BRAND v. SHELDON COMMUNITY SCHOOL

671 F. Supp. 627 (N.D. Iowa 1987)

Donald E. O'BRIEN, Chief Judge

This matter comes to the Court on plaintiff's motions for a temporary restraining order or preliminary injunction.... For the reasons stated below, the Court declines to enter a ... preliminary injunction.

Findings of Fact

The plaintiff is a student at Sheldon Community High School. As a member of his school's wrestling team, he has amassed a nearly perfect record in four years of competition, and is a defending state champion.

His performance ... ha[s] attracted the attention of the state media and college coaches....

The events leading to this decision began on January 25, 1987. The plaintiff has been understandably reluctant to give his account of what took place at his home that day, but the Sheldon Community School Board ultimately concluded that the plaintiff "as well as three other male youths engaged in multiple acts of sexual intercourse with a sixteen year-old female student of the Sheldon Community School District...." The Court makes no judgment as to whether a preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt supports this finding.

As rumors about this incident spread throughout the Sheldon Community High School, Principal David Kapfer began an investigation and interviewed the plaintiff and other parties rumored to have been involved. On February 4, the plaintiff and his mother were sent letters from Kapfer declaring the plaintiff ineligible for the remainder of the wrestling season. These letters stated that he "committed a breach of discipline by engaging in conduct which interfered with the maintenance of school discipline and by engaging in behavior which was antagonistic to the rights of (name redacted) to attain her education." The letters further stated that he violated Section III of the Discipline Policy because his conduct on January 25 was "detrimental to the best interests of the Sheldon Community School District." In a section of the letter to the plaintiff, Kapfer stated that the plaintiff's conduct "was a breach of discipline in that you: 1) engaged in bullying behavior; 2) committed an assault on (same name) in that you took acts against her resulting in physical contract which as insulting and offensive and which caused her emotional injury; 3) willfully injured (same name) by doing an unjustified act causing her serious emotional and mental injury; and 4) participated in multiple acts of sexual intercourse involving (same name) which took place on January 25, 1987." The Court makes no judgment as to whether a preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt supports these charges.

The period of ineligibility declared by the principal included the dates of the sectional, district and state wrestling tournaments. Thus, any reinstatement which would preserve the plaintiff's chance to again become a state champion would have to occur before 8:30 a.m. on February 14, when weigh-ins would take place for the sectional tournament.

Following an appeal to Superintendent Jerry Peterson on February 5 (Exhibit 4), Peterson sent letters to the plaintiff and his mother affirming the principal's decision which were nearly identical to the February 4 letters. These letters were dated February 9. On February 10, the plaintiff and his mother requested a closed hearing before the School Board which began Thursday morning, February 12, and ended late that night. The Board deliberated for several hours on February 12 and 13 before reaching a decision which affirmed the administrations's decision. Extensive findings of fact were made by the Board. The complaint and motions presently before this Court were filed within three hours of the Board's decision.

It became clear at this Courts' February 13 hearing that the Court could not fairly consider all of the evidence admitted in time to fully resolve this matter prior to weigh-ins. This dilemma significantly increased the risk of irreparable harm, and for this reason, the Court entered a temporary restraining order which permitted the plaintiff to compete and advance in the sectional tournament. The TRO expired at the beginning of the February 16 hearing.

Conclusions of Law

* * *

The plaintiff asserts that he has been deprived of five constitutional rights — his Fourteenth Amendment rights to equal protection, substantive due process and procedural due process, his Eighth Amendment right to be free from cruel and unusual punishment, and his Sixth Amendment right to counsel.... If any rights were violated, they can only be substantive or procedural due process rights.

Procedural Due Process

The majority of the plaintiff's complaints — including those concerning the vagueness of the school's standard of conduct, the School Board's reliance upon hearsay, the timing of his hearing, and the sufficiency

of the evidence — are most relevant to his right to procedural due process. To consider those complaints, however, the Court must first find that the plaintiff is being deprived of liberty or property by the defendant. If not, no procedural protections were "due" to the plaintiff under the Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

The Supreme Court has consistently held that the existence of a protected liberty or property interest does not depend upon the seriousness of the loss of the plaintiff would suffer as a result of the government's action. "[T]o determine whether due process requirements apply in the first place, we must look not to the `weight' but to the nature of the interest at stake." *Smith v. Organization of Foster Families*, 431 U.S. 816, 841, 97 S. Ct. 2094, 2107, 53 L. Ed. 2d 14 (1977); *Roth*, 408 U.S. at 571, 92 S. Ct. at 2706. The critical question is whether the plaintiff has legitimate claim that he is entitled to participate and not a "mere expectation" that he will be permitted to do so. *Roth, id.*

A clear majority of courts addressing this question in the context of interscholastic or intercollegiate athletics have found that athletes have no legitimate entitlement to participate. *See, e.g., Colorado Seminary v. NCAA*, 570 F.2d 320 (10th Cir. 1978); *Hamilton v. Tennessee Secondary School Athletic Ass'n*, 552 F.2d 681 (6th Cir. 1976); *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970). In *In re U.S. Ex. rel. Missouri State High School Activities Association*, 682 F.2d 147 (8th Cir. 1982), the Eighth Circuit stated that "a student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement."

In *Boyd v. Bd. of Directors of McGehee School District*, 612 F. Supp. 86 (E.D. Ark. 1985), a court recognized a property interest where the plaintiff's interest "was something more than a desire to participate in a single season of interscholastic athletics without the belief and desire to realizing any tangential benefits accruing to him in the future." The court found that the plaintiff's "continued status as a member of the McGehee High School football team during his last year was very important to [his] development educationally and economically in the future." *Id.* Yet the fact that this plaintiff's performance in the tournament may help in receive a college scholarship does not change the nature of the interest at stake; it merely raises its value while leaving the degree of entitlement unchanged.

Once awarded, a college scholarship may give rise to a property interest in its continuation. *Hall v. University of Minnesota*, 530 F. Supp. 104 (D. Minn. 1982). "But there is not automatic entitlement to a college education." *Fluitt v. University of Nebraska*, 489 F. Supp. 1194, 1203 (D. Neb. 1980). When scholarships are awarded at the discretion of a college coach, and such discretion has not yet been exercised, no property interest in the receipt of a scholarship can exist, and the plaintiff cannot invoke his expectation that he would earn a scholarship at the state tournament in order to claim a property wrestling there.

If any property interest of the plaintiff is involved in this case, it is a property right created by the defendant's own Disciplinary Policy and Administrative Rules. When a government must follow mandatory laws or regulations which limit its discretion to make a decision in any way or for any reason, those laws or regulations which limit its discretion to make a decision in any way or for any reason, those laws or regulations can create a property right which is deprived if those regulations are not followed. *See Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S. Ct. 864, 871-72, 74 L. Ed. 2d 675 (1983). However, the plaintiff was not deprived of this right because (1) the basis for the defendant's action was a permissible basis for this sanction under Sections III and V(E) of the Disciplinary Policy, (2) the procedures in part IV of the Administrative Rules were followed, and (3) the sanction chosen was authorized in § 9.14(5) of Board Policy 503.6.

Even if this Court were to recognize a protected interest in participation, the Court is satisfied that the plaintiff received all process due to him. The Plaintiff and his mother were notified of the charges against him and were told of opportunities for appeal. The plaintiff was given an opportunity to explain his side of the story to the principal prior to the suspension. He was given five to six hour evidentiary hearing within ten days of the initial suspension, which was also early enough to permit the Board to reverse the administration's decision before the plaintiff would be precluded from participating in the state tournament. Evidence was presented on the administration's behalf by an independent attorney. The plaintiff was represented by legal counsel, who

called several witnesses and rigorously cross-examined the administration's witnesses. All witnesses were sworn prior to their testimony.

The plaintiff objects that the description of the incident presented to the Board was based upon hearsay, and that the administration did not present testimony from anyone who was present when it took place. This claim is supported in the hearing record. However, the Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, 60 S. Ct. 437, 441, 84 L. Ed. 656 (1940).

As long as a decision rests upon "some evidence," due process may have been satisfied. *Superintendent v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 2770, 86 L. Ed. 2d 356 (1985); *Thompson v. Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, 629, 4 L. Ed. 2d 654 (1960); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-247, 77 S. Ct. 752, 760-761, 1 L. Ed. 2d 796 (1957); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106, 47 S. Ct. 302, 304, 71 L. Ed. 560 (1927). Hearsay which has a "rational probative force" can constitute substantial evidence, which is a higher standard than "some evidence." *Mobile Consortium of CETA v. U.S. Department of Labor*, 745 F.2d 1416, 1419 n. 2 (11th Cir. 1984); *School Board of Broward County v. H.E.W.*, 525 F.2d 900, 906 (5th Cir. 1976). Absent direct contradictory evidence, hearsay could be relied upon. *Broward County*, 525 F.2d at 907; *Cohen v. Perales*, 416 F.2d 1250, 1251 (5th Cir. 1969), *rev'd on other grounds*, *Richardson v. Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 91971). These standards apply even though the School Board lacked subpoena power.

> The inability to procure direct testimony, although it does not increase the probative force of the hearsay introduced, does demand that we be more flexible by allowing an administrative determination to rest on the only available evidence. *Broward County,* 525 F.2d at 907.

In this case there appears to be little or no evidence in the hearing record directly contradicting the Board's hearsay-based finding that the plaintiff "as well as three other male youths engaged in multiple acts of sexual intercourse with a sixteen year old female student of the Sheldon Community School District on or about January 25, 1987." The factual disagreement primarily concerned the effect of that incident upon the school and the female. Reliable and credible evidence was presented by Instructor Patti Thayer about the disruptive effect upon the school, and expert testimony was presented concerning the potential effect of such acts upon the female involved and upon student attitudes concerning sexuality, women and rape. While the Board was required to speculate about whether the female involved would react in the same way as the hypothetical female in the expert's answer, that is not enough to prevent the testimony from constituting "some evidence". Further, it does not require experts to clearly demonstrate that such acts would, as it has in Sheldon, disrupt a good portion of the town and not just the school.

The plaintiff also claims the standard in Disciplinary Policy Section III is too vague. However, as Section III relates to this plaintiff's conduct, it does not appear to be significantly more vague than the standards upheld in *Parker v. Levy*, 417 U.S. 733, 752-61, 94 S. Ct. 2547, 2559-64, 41 L. Ed. 2d 439 (1974). While the Plaintiff states that the evidentiary hearing should have preceded the suspension eligibility, *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), suggests otherwise. The plaintiff also argues that the hearing was held too soon for him to properly prepare for it. The Court recognizes that the hearing was expedited at the request of the plaintiff's first counsel, and finds that a later hearing might have been a deprivation of due process under *Barry v. Barchi*, 433 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979). The Court finds that the remainder of the plaintiff's procedural complaints are either unsupported in the record or legally insignificant. For all of these reasons, the Court finds that the plaintiff's procedural due process rights were respected.

Substantive Due Process

The plaintiff can show that his right to substantive due process was denied if the Board's decision was arbitrary or capricious, *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986); or if it violated one of the substantive due process rights such as the right to privacy, which cannot be deprived no matter how much

procedural protection is used. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

The Court is persuaded that the Board's decision was not arbitrary or capricious. The Board's objectives were legitimate. The Iowa Supreme Court has described the set of permissible school board objectives in this area in broad, sweeping terms. *Bunger v. Iowa High School Athletic Association*, 197 N.W. 2d 555, 564-65 (Iowa 1972). "To some extent at least, school authorities may base disciplinary measures on immoral acts or acts definitely contrary to current mores." *Id.* at 565. The *Bunger* court also held that:

> The present case involves the advantages and enjoyment of a extracurricular activity provided by the school, a consideration which we believe extends the authority of a school board somewhat as to participation in that activity. The influence of the students involved is an additional consideration. Standout students, whether in athletics, forensics, dramatics, or other interscholastic activities, play a somewhat different role from the rank and file. Leadership brings additional responsibility. These student leaders are looked up to and emulated. They represent the school and depict its character. We cannot fault a school board for expecting somewhat more of them as to eligibility for their particular extracurricular activities.

The means chosen to achieve their objectives were not arbitrary or capricious. As the Nebraska Supreme Court found in [a] similar case involving alcohol use by athletes who were then suspended from a team:

> The rule involved in this case, even though the penalty of expulsion for the season might be deemed severe by some persons, clearly serves a legitimate rational interest and directly affects the discipline of student athletes. It cannot be said that the prescribed penalty was an arbitrary and unreasonable means to attain the legitimate end of deterrence of the use of alcoholic liquor by student athletes. *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842, 846 (1978).

The plaintiff argues that he should not have been given a penalty more severe than penalties allegedly given in the past to other students for conduct the plaintiff considers to be more serious than his own. The record adequately demonstrates that the school's treatment of those students involved to the same degree in this incident could hardly have been more consistent; even the female involved was suspended from extracurricular activities. To go further and evaluate the Board's "consistency" across different times and different factual settings would require the Court to substitute its judgment concerning the relative seriousness of different acts for that of the School Board; the "arbitrary or capricious" standard of review is too narrow to authorize this kind of analysis. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971).

During the February 16 hearing, the plaintiff sought to introduce a statement one member of the School Board made after the Board's hearing but before the end of the liberations which purported to show a predisposition to affirm the suspension. However probative this statement may be, the Court cannot consider it. When a board has made formal findings, a court may not look beyond those findings to question the integrity of decision-makers or the decision-making process without a "strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420, 91 S. Ct. at 825; *United States v. Morgan*, 313 U.S. 409, 422, 61 S. Ct. 999, 1004, 85 L. Ed. 1429 (1941). No such showing has been made here.

In his testimony before the School Board, the plaintiff would not admit or deny that the incident took place because he believed it was a private matter. A limited right to privacy is protected by the Due Process Clause. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). However, that right does not keep the state and its instrumentalities from regulating private sexual conduct. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); Note, *Fornication, Cohabitation and the Constitution*, 77 MICH. L. REV. 252 (1978). The Board's findings indicate that it was not merely trying to

impose its moral standard upon the plaintiff; the Board found that his acts injured another student and disrupted the school. These are legitimate school board concerns. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 513, 89 S. Ct. 733, 740, 21 L. Ed. 2d 731 (1969). Moreover, the school has not regulated the plaintiff as a student; by revoking his eligibility without suspending or expelling him, it has regulated him as a representative of the school, and has chosen a sanction which limits his ability to represent the school without limiting his basic rights as a student. For these reasons, the Court finds that whatever right the plaintiff has to sexual privacy after *Bowers* was not violated in this case, and the last possible ground for finding likelihood that his substantive due process rights were violated is rejected.

Conclusion

The Court finds that the likelihood the plaintiff can prove that his constitutional rights were violated is not great enough to warrant a temporary restraining order or preliminary injunction — nothing more and nothing less. The Court neither approves nor disapproves of the defendant's action, for that particular question has never been before it. However, it is the fervent hope of this judge that if or when this legal dispute is over, the parties and their respective supporters in the community have not burned so many bridges that a mutually beneficial reconciliation cannot be reached.

It is hereby ordered that the plaintiff's motion for a temporary restraining order or preliminary injunction are denied.

VERNONIA SCHOOL DISTRICT 47J v. ACTON

115 S. Ct 2386 (U.S. 1995)

Justice SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture. 796 F. Supp. 1354, 1357 (D.Ore.1992). This caused the District's administrators particular concern, since drug use increases the risk of sports- related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:

> "[T]he administration was at its wits end and ... a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture." *Ibid.*

At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

* * *

C

In the fall of 1991, respondent James Acton, then a seventh-grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. 796 F. Supp., at 1355. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution.

II

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ..." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. (citation omitted) In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989), we held that state-compelled collection and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a "search" subject to the demands of the Fourth Amendment. . . .

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. . . .' " A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." (citations omitted)

We have found such "special needs" to exist in the public-school context. There, the warrant

requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools. . . ."

III

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." T.L.O., 469 U.S., at 338, 105 S. Ct., at 741. What expectations are legitimate varies, of course, with context, *id.*, at 337, 105 S. Ct., at 740, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. . . . Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster. Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. *See* 59 Am. Jur. 2d § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 W. BLACKSTONE, Commentaries on the Laws of England 441 (1769). . ..

* * *

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991-1992 school year, all 50 States required public-school students to be vaccinated against diphtheria, measles, rubella, and polio. U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p. 1. Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." T.L.O., 469 U.S., at 348, 105 S. Ct., at 746 (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (1988).

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App. 17), they must acquire

adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

IV

Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in Skinner that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." *Skinner*, 489 U.S., at 626, 109 S. Ct., at 1418. We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. *Ibid.* Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible. . . .

* * *

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, see App. 29, 42, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner -- for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in Skinner: that the invasion of privacy was not significant.

V

Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as "compelling." (citations omitted) Relying on these cases, the District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." The Court of Appeals appears to have agreed with this view. *See* 23 F.3d, at 1526. It is a mistake, however, to think that the phrase " compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question:
Is there a compelling state interest here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

That the nature of the concern is important -- indeed, perhaps compelling -- can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in *Von Raab*,

supra, 489 U.S., at 668, 109 S. Ct., at 1392, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra,* at 628, 109 S. Ct., at 1419.

* * *

As for the immediacy of the District's concerns: We are not inclined to question -- indeed, we could not possibly find clearly erroneous -- the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,' " and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F. Supp., at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, where we upheld the Government's drug testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. *See Skinner*, 489 U.S., at 607, 109 S. Ct., at 1407-1408. And of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials. *See Von Raab*, 489 U.S., at 673, 109 S. Ct., at 1395; id., at 683, 109 S. Ct., at 1400 (SCALIA, J., dissenting).

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. . . .

* * *

VI

Taking into account all the factors we have considered above -- the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search -- we conclude Vernonia's Policy is reasonable and hence constitutional.

* * *

Questions and Notes

1. Drug testing programs have been scrutinized at every level of sports, *see, e.g., Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (NCAA drug testing program upheld as consistent with the privacy provisions of the California Constitution); Reynolds v. Athletics Congress of the U.S.A., 1991 U.S. Dist. LEXIS 21191 (U.S. Dist. 1991) (Plaintiff's fifth amendment due process claim against random drug testing procedure dismissed). There is also an impressive and ever growing body of law review literature in this area. *See, e.g.* Deanne L. Ayers, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 HOW. L.J. 93 (1987); Steven O. Ludd, *Drug Testing and the Right to Privacy: A Question of Balance*, 34 HOW. L.J. 599 (1991), Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care If Athletes Inhale*, 8 MAG. SPORTS L.J. 75 (1997).

2. For many years, football coach Bunker at Mythigan State University has had a coaching rule prohibiting players from participating in demonstrations and protests. A group of black athletes informed the coach that they intended to wear black armbands to protest the racially discriminatory policies of their next opponent, Big Church University. Upon hearing this news, Coach Bunker, with the blessing of the administration of MSU, dismissed the players from the team. The players brought suit, claiming that they have been denied their right of free speech. The District Court dismissed their action based on the following reasoning:

> Both plaintiffs and defendants rely on the principles stated in the *Tinker* case and similar decisions. The plaintiffs argue that they come within its bounds of freedom of expression recognized therein as applying to students in different places, including the playing field. 393 U.S. at 512, 513, 89 S. Ct. 733. On the other hand the defendants say that their actions were

within the exceptions stated in the opinion. I feel the controlling guidelines from the *Tinker* case are the following:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinion, even on controversial subjects Re the conflict in Vietnam, if he does so without `materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.... But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech....

The Constitution says that Congress (and the States) may not abridge the right to free speech. The provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But I do not confine the permissible exercise of First Amendment rights to a telephone booth or the four comers of a pamphlet, or to supervised and ordained discussion in a school classroom. 393 U.S. at 512, 513, 89 S. Ct. at 740.

I find that had the defendants, as governing officials of Mythigan State University, permitted display of the armbands, their actions would have been violative of the First Amendment establishment clause and its requirement of neutrality on expressions relating to religion, *School District of Abington v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844, and similar cases. The provisions of the Mythigan Constitution guaranteeing the free exercise and enjoyment of religion and worship without discrimination or preference further support this conclusion.

The government is neutral and, while protecting all (religious opinions and sects), it prefers none, and it disparages none. *Id.* at 215, 83 S. Ct. at 1567. Thus stemming from state and federal law there is strong support for a policy restricting hostile expressions against religious beliefs of others by representatives of a state or its agencies. I feel that the Trustees' decision was a proper means of respecting the rights of others in their beliefs, in accordance with this policy of religious neutrality.

The plaintiffs vigorously deny that there would have been state action or a violation of the First Amendment principles on religion by permitting the armband display. Without deciding whether approval of the armband display would have involved state action or a violation of the religion clauses, I am persuaded that the Trustees' decision was lawful within the limitations of the *Tinker* case itself. Their decision protected against invasion of the rights of others by avoiding a hostile expression to them by some members of the University team. It was in furtherance of the policy of religious neutrality by the State. It denied only the request for the armband display by some members of the team, on the field and during the game. In these limited circumstances we conclude that the Trustees' decision was in conformity with the Tinker case and did not violate the First Amendment right of expression of the plaintiffs.

I do not base my holding on the presence of any violence or disruption. There was no evidence presented to that effect. I find that the denial of the right to wear the armbands during the game was not predicated upon the likelihood of disruption, although such a demonstration might have tended to create disruption. My decision rests entirely on the

mandate of complete neutrality in religion and religious matters.

On Appeal should the district court be affirmed? Why? *See Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972). *See also Menora v. Illinois High School Assn.*, 683 F.2d 1030 (7th Cir. 1982) (upholding a ban on basketball players wearing hats during games as applied to Jewish players wearing yarmulkes); and *Marcum v. Dahl*, 658 F.2d 731 (10th Cir. 1981) (upholding the dismissal of two members of a woman's basketball team for making derogatory remarks about their coach).

3. Personal grooming habits are also entitled to constitutional protection. In *Long v. Zopp*, 476 F.2d 180 (4th Cir. 1973) the plaintiff was a football player who, by his participation, had earned the right to a "letter" in that sport. He had observed the hair code decreed by the coach during the football season, but had allowed his hair to grow longer than the prescribed length thereafter. Because of his non-compliance with the rule during the off-season, he was denied his football letter and an invitation to the Athletic Banquet by the coach. When the player brought suit, the court ruled that the hair code and its application were constitutionally impermissible.

Query: Would enforcement of the hair code during the playing season also be impermissible? What would a player have to show to prevail?

4. For an interesting twist on the issues of due process and equal protection under the Fourteenth Amendment, *see Richards v. United States Tennis Ass'n.*, 400 N.Y.S.2d 267 1977. In that case, a professional tennis player who had a relatively successful tennis career as a male, underwent a sex reassignment surgery "after many years of being a transsexual, a woman trapped inside the body of a man." The plaintiff then began playing in women's tournaments and ultimately sought injunctive relief against the defendants who established a test of sex discrimination for women seeking to play in their sanctioned events. The plaintiff was successful in securing a preliminary injunction against defendants for the violation of "her" human rights under the applicable state law. How would such an action fare today?

Section 3: The Great Gender Debate

The area of legal controversy currently receiving the greatest attention in amateur athletics is Title IX.[5] The changes in this area are developing so rapidly that one can scarcely write about developments without the same being outdated by the time of its print and distribution. At the time of this writing Congressional oversight hearings were being concluded on the issue of whether Title IX and its implementing regulations should be amended.[6]

In its simplest terms Title IX mandates that institutions receiving federal aid to treat men and women equitably.[7] While all agree that equitable does not mean equal, there is an ongoing bitter dispute between a

---

[5] Title IX - Prohibition of Sex Discrimination, Education Amendments of 1972 Public Law No. 92-318, 86 Stat. 901 (1972), currently codified at 20 U.S.C. § 1681 *et seq.* (1988), as amended by the Civil Rights Restoration Act of 1987.

[6] *See* Federal Document Clearing House Congressional Testimony, May 9, 1995, Margaret A. Jakobson, House Economic Postsecondary Education, Training and Lifelong Learning Gender Equity in Intercollegiate Athletics.

[7] Title IX clearly extends beyond concerns of intercollegiate athletics. Indeed, nothing in the language of the act mentions athletic endeavors. Some initial attempts to limit Title IX to athletics were actually struck down, *see, e.g.*,

(continued...)

number of diverse constituencies regarding the proper interpretation to be given to the law. Arguments regarding proportionality arise in the context of participatory opportunities for men and women and the support of student athletes at all institutional levels.[8] Often a comparative analysis of athletic achievement is necessary but the debate is just as likely to focus on the respective obligations of sports entities' governing bodies or an individual's right to participate on opposite sex teams.

Title IX has been in existence for more than twenty years and a number of cases have reached the Supreme Court.[9] However these cases are of limited value to today's combatants as they generally addressed procedural or remedial issues.[10] The latest Title IX cases which primarily focus on participatory opportunities for women, are consistently being decided in their favor. These victories mark a stark contrast to the past experiences of women attempting to enter athletics.

Brown's bare assertions to be unpersuasive, we decline the invitation to this court to "change its mind." The precedent established by the prior panel is not clearly erroneous; it is the law of this case and the law of this circuit.

IV

Brown contends that the district court misconstrued and misapplied the three-part test. Specifically, Brown argues that the district court's interpretation and application of the test is irreconcilable with the statute, the regulation, and the agency's interpretation of the law, and effectively renders Title IX an "affirmative action statute" that mandates preferential treatment for women by imposing quotas in excess of women's relative interests and abilities in athletics. Brown asserts, in the alternative, that if the district court properly construed the test, then the test itself violates Title IX and the United States Constitution.

We emphasize two points at the outset. First, notwithstanding Brown's persistent invocation of the inflammatory terms "affirmative action," "preference," and "quota," this is not an affirmative action case. Second, Brown's efforts to evade the controlling authority of *Cohen II* by recasting its core legal arguments as challenges to the "district court's interpretation" of the law are unavailing; the primary arguments raised here have already been litigated and decided adversely to Brown in the prior appeal.

A

Brown's talismanic incantation of "affirmative action" has no legal application to this case and is not helpful to Brown's cause. While "affirmative action" may have different connotations as a matter of politics, as a matter of law, its meaning is more circumscribed. True affirmative action cases have historically involved a voluntary undertaking to remedy discrimination (as in a program implemented by a governmental body, or by a private employer or institution), by means of specific group-based preferences or numerical goals, and a specific timetable for achieving those goals.

* * *

Title IX is not an affirmative action statute; it is an anti- discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI. No aspect of the Title IX regime at issue in this case-- inclusive of the statute, the relevant regulation, and the pertinent agency documents--mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.

Like other anti-discrimination statutory schemes, the Title IX regime permits affirmative action. In addition, Title IX, like other anti- discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement. (citations omitted) In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX.

Also consistent with the school desegregation cases, the substantial proportionality test of prong one is applied under the Title IX framework, not mechanically, but case-by-case, in a fact-specific manner. As with other anti-discrimination regimes, Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity, *see Cohen II*, 991 F.2d at 895, nor prohibits gender-conscious remedial measures.

* * *

Another important distinction between this case and affirmative action cases is that the district court's remedy requiring Brown to accommodate fully and effectively the athletics interests and abilities of its women students does not raise the concerns underlying the Supreme Court's requirement of a particularized factual predicate to justify voluntary affirmative action plans. In reviewing equal protection challenges to such plans, the Court is concerned that government bodies are reaching out to implement race-or gender-conscious remedial measures that are "ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant*, 476 U.S. at 276, 106 S. Ct. at 1848, on the basis of facts insufficient to support a prima facie

case of a constitutional or statutory violation, *Croson*, 488 U.S. at 500, 109 S. Ct. at 725, to the benefit of unidentified victims of past discrimination, *see id.* at 469, 109 S. Ct. at 706; *Wygant*, 476 U.S. at 276, 106 S. Ct. at 1848. Accordingly, the Court has taken the position that voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of "identified discrimination," *see Croson*, 488 U.S. at 500-06, 109 S. Ct. at 725-28, because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *Wygant*, 476 U.S. at 276, 106 S. Ct. at 1848.

From a constitutional standpoint, the case before us is altogether different. Here, gender-conscious relief was ordered by an Article III court, constitutionally compelled to have before it litigants with standing to raise the cause of action alleged; for the purpose of providing relief upon a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based upon findings of fact that were subject to the FEDERAL RULES OF EVIDENCE. The factual problem presented in affirmative action cases is, "Does the evidence support a finding of discrimination such that race- or gender-conscious remedial measures are appropriate?" We find these multiple indicia of reliability and specificity to be sufficient to answer that question in the affirmative.

From the mere fact that a remedy flowing from a judicial determination of discrimination is gender-conscious, it does not follow that the remedy constitutes "affirmative action." Nor does a "reverse discrimination" claim arise every time an anti-discrimination statute is enforced. While some gender-conscious relief may adversely impact one gender-- a fact that has not been demonstrated in this case--that alone would not make the relief "affirmative action" or the consequence of that relief "reverse discrimination." To the contrary, race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal anti-discrimination regime, although such remedial measures are still subject to equal protection review. (citations omitted)

* * *

E

Brown also claims error in the district court's failure to apply Title VII standards to its analysis of whether Brown's intercollegiate athletics program complies with Title IX. The district court rejected the analogy to Title VII, noting that, while Title VII "seeks to determine whether gender-neutral job openings have been filled without regard to gender[,] Title IX ... was designed to address the reality that sports teams, unlike the vast majority of jobs, do have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII." *Cohen III*, 879 F. Supp. at 205.

* * *

As *Cohen II* recognized, "[t]he scope and purpose of Title IX, which merely conditions government grants to educational institutions, are substantially different from those of Title VII, which sets basic employment standards." 991 F.2d at 902 (citation omitted). "[W]hereas Title VII is largely peremptory," Title IX is "largely aspirational," and thus, a "loosely laced buskin." (citations omitted)

It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence vel non of discrimination. While the Title IX regime permits institutions to maintain gender-segregated teams, the law does not require that student-athletes attending institutions receiving federal funds must compete on gender-segregated teams; nor does the law require that institutions provide completely gender-integrated athletics programs. To the extent that Title IX allows institutions to maintain single-sex teams and gender-segregated athletics programs, men and women do not compete against each other for places on team rosters. Accordingly, and notwithstanding Brown's protestations to the contrary, the Title VII concept of the "qualified pool" has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not "qualified" to compete for positions on men's teams, and vice-versa. In addition, the concept of "preference" does not have the same meaning, or raise the same equality concerns, as it does in the employment and admissions contexts.

* * *

In this unique context, Title IX operates to ensure that the gender- segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender- conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner. As the Seventh Circuit observed, "Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics." (citations omitted)

In contrast to the employment and admissions contexts, in the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders.

* * *

We find no error in the district court's refusal to apply Title VII standards in its inquiry into whether Brown's intercollegiate athletics program complies with Title IX. *See Cohen II*, 991 F.2d at 901 ("[T]here is no need to search for analogies where, as in the Title IX milieu, the controlling statutes and regulations are clear."). We conclude that the district court's application of the three-part test does not create a gender-based quota and is consistent with Title IX, 34 C.F.R. § 106.41, the Policy Interpretation, and the mandate of *Cohen II*.

* * *

VII

It does not follow from our statutory and constitutional analyses that we endorse the district court's remedial order. Although we decline Brown's invitation to find that the district court's remedy was an abuse of discretion, we do find that the district court erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved.

In *Cohen II* we stated that it is "established beyond peradventure that, where no contrary legislative directive appears, the federal judiciary possesses the power to grant any appropriate relief on a cause of action appropriately brought pursuant to a federal statute." (citations omitted) We also observed, however, that "[w]e are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations." (citations omitted) Nevertheless, we have recognized that academic freedom does not embrace the freedom to discriminate. (citations omitted)

The district court itself pointed out that Brown may achieve compliance with Title IX in a number of ways:

> It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes. I recognize the financial constraints Brown faces; however, its own priorities will necessarily determine the path to compliance it elects to take.

Cohen III, 879 F. Supp. at 214; *see also Cohen II*, 991 F.2d at 898 n. 15 (noting that a school may achieve compliance with Title IX by "reducing opportunities for the overrepresented gender").

With these precepts in mind, we first examine the compliance plan Brown submitted to the district court in response to its order. We then consider the district court's order rejecting Brown's plan and the specific relief ordered by the court in its place.

Brown's proposed compliance plan stated its goal as follows:

> The plan has one goal: to make the gender ratio among University-funded teams at Brown substantially proportionate to the gender ratio of the undergraduate student body. To do so, the University must disregard the expressed athletic interests of one gender while providing advantages for others. The plan focuses only on University-funded sports, ignoring the long history of successful donor-funded student teams.
> Brown's Plan at 1 (emphasis added).

* * *

The general provisions of the plan may be summarized as follows: (i) Maximum squad sizes for men's teams will be set and enforced. (ii) Head coaches of all teams must field squads that meet minimum size requirements. (iii) No additional discretionary funds will be used for athletics. (iv) Four new women's junior varsity teams--basketball, lacrosse, soccer, and tennis--will be university-funded. (v) Brown will make explicit a de facto junior varsity team for women's field hockey. *Id.* at 3-4.

* * *

The district court found Brown's plan to be "fatally flawed" for two reasons. First, despite the fact that 76 men and 30 women participated on donor-funded varsity teams, Brown's proposed plan disregarded donor-funded varsity teams. District Court Order at 5-6. Second, Brown's plan "artificially boosts women's varsity numbers by adding junior varsity positions on four women's teams." Id. at 6. As to the propriety of Brown's proposal to come into compliance by the addition of junior varsity positions, the district court held:

> Positions on distinct junior varsity squads do not qualify as "intercollegiate competition" opportunities under the Policy Interpretation and should not be included in defendants' plan. As noted in *Cohen*, 879 F. Supp. at 200, "intercollegiate" teams are those that "regularly participate in varsity competition." *See* 44 FED. REG. at 71,413 n. 1. Junior varsity squads, by definition, do not meet this criterion. Counting new women's junior varsity positions as equivalent to men's full varsity positions flagrantly violates the spirit and letter of Title IX; in no sense is an institution providing equal opportunity if it affords varsity positions to men but junior varsity positions to women.
> District Court Order at 6 (footnote omitted).

* * *

In criticizing another facet of Brown's plan, the district court pointed out that [a]n institution does not provide equal opportunity if it caps its men's teams after they are well-stocked with high-caliber recruits while requiring women's teams to boost numbers by accepting walk-ons. A university does not treat its men's and women's teams equally if it allows the coaches of men's teams to set their own maximum capacity limits but overrides the judgment of coaches of women's teams on the same matter.
Id. at 8-9.

After rejecting Brown's proposed plan, but bearing in mind Brown's stated objectives, the district court fashioned its own remedy:

> I have concluded that Brown's stated objectives will be best served if I design a remedy to meet the requirements of prong three rather than prong one. In order to bring Brown into compliance with prong one under defendants' Phase II, I would have to order Brown to cut enough men's teams to eradicate approximately 213 men's varsity positions. This extreme action is entirely unnecessary. The easy answer lies in ordering Brown to comply with prong three by upgrading the women's gymnastics, fencing, skiing, and water polo teams to university-funded varsity status. In this way, Brown could easily achieve prong three's standard of "full and effective accommodation of the underrepresented sex." This remedy would entail upgrading the positions of approximately 40 women. In order to finance the 40 additional women's positions, Brown certainly will not have to eliminate as many as

> the 213 men's positions that would be cut under Brown's Phase II proposal. Thus, Brown will fully comply with Title IX by meeting the standards of prong three, without approaching satisfaction of the standards of prong one.
>
> It is clearly in the best interest of both the male and the female athletes to have an increase in women's opportunities and a small decrease in men's opportunities, if necessary, rather than, as under Brown's plan, no increase in women's opportunities and a large decrease in men's opportunities. Expanding women's athletic opportunities in areas where there is proven ability and interest is the very purpose of Title IX and the simplest, least disruptive, route to Title IX compliance at Brown.
>
> *Id.* at 11-12.

* * *

We agree with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen II* and as applied by the district court on remand. Indeed, the plan is replete with argumentative statements more appropriate for an appellate brief. It is obvious that Brown's plan was addressed to this court, rather than to offering a workable solution to a difficult problem.

It is clear, nevertheless, that Brown's proposal to cut men's teams is a permissible means of effectuating compliance with the statute. Thus, although we understand the district court's reasons for substituting its own specific relief under the circumstances at the time, and although the district court's remedy is within the statutory margins and constitutional, we think that the district court was wrong to reject out-of-hand Brown's alternative plan to reduce the number of men's varsity teams. After all, the district court itself stated that one of the compliance options available to Brown under Title IX is to "demote or eliminate the requisite number of men's positions." *Cohen III*, 879 F. Supp. at 214. Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits. *Cohen II*, 991 F.2d at 906; *Villanueva*, 930 F.2d at 129.

Brown therefore should be afforded the opportunity to submit another plan for compliance with Title IX. The context of the case has changed in two significant respects since Brown presented its original plan. First, the substantive issues have been decided adversely to Brown. Brown is no longer an appellant seeking a favorable result in the Court of Appeals. Second, the district court is not under time constraints to consider a new plan and fashion a remedy so as to expedite appeal. Accordingly, we remand the case to the district court so that Brown can submit a further plan for its consideration. In all other respects the judgment of the district court is affirmed. The preliminary injunction issued by the district court in *Cohen I*, 809 F. Supp. at 1001, will remain in effect pending a final remedial order.

* * *

Affirmed in part, reversed in part, and remanded for further proceedings. No costs on appeal to either party.

TORRUELLA, Chief Judge (dissenting).

Because I am not persuaded that the majority's view represents the state of the law today, I respectfully dissent.

* * *

1. The Quota

I believe that the three prong test, as the district court interprets it, is a quota. I am in square disagreement with the majority, who believe that "[n]o aspect of the Title IX regime at issue in this case ... mandates gender- based preferences or quotas." Majority Opinion at 170. Put another way, I agree that "Title

IX is not an affirmative action statute," *id.*, but I believe that is exactly what the district court has made of it. As interpreted by the district court, the test constitutes an affirmative action, quota-based scheme.

I am less interested in the actual term "quota" than the legally cognizable characteristics that render a quota scheme impermissible. And those characteristics are present here in spades. I am not persuaded by the majority's argument that the three-part test does not constitute a quota because it does not permit an agency or court to find a violation solely on the basis of prong one of the test; instead, an institution must also fail prongs two and three. As Brown rightly argues, the district court's application of the three-prong test requires Brown to allocate its athletic resources to meet the as-yet-unmet interest of a member of the underrepresented sex, women in this case, while simultaneously neglecting any unmet interest among individuals of the overrepresented sex. To the extent that the rate of interest in athletics diverges between men and women at any institution, the district court's interpretation would require that such an institution treat an individual male student's athletic interest and an individual female student's athletic interest completely differently: one student's reasonable interest would have to be met, by law, while meeting the other student's interest would only aggravate the lack of proportionality giving rise to the legal duty. "The injury in cases of this kind is that a 'discriminatory classification prevent[s] ... competition on an equal footing.' " *Adarand*, --- U.S. at ----, 115 S. Ct. at 2104 (quoting *Northeastern Fla. Chapter, Assoc'd Gen'l Contractors of America v. Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L.Ed.2d 586 (1993)). As a result, individual male and female students would be precluded from competing against each other for scarce resources; they would instead compete only against members of their own gender. Cf. *Hopwood v. Texas*, 78 F.3d 932, 943-46 (5th Cir.) (concluding that not only would government action precluding competition between individuals of different races for law school admissions be unconstitutional, but in fact even partial consideration of race among other factors would be unconstitutional), cert. denied, --- U.S. ----, 116 S. Ct. 2581, 135 L. Ed. 2d 1095 (1996).

The majority claims that "neither the Policy Interpretation nor the district court's interpretation of it, mandates statistical balancing." Majority Opinion at 175. The logic of this position escapes me. A school can satisfy the test in three ways. The first prong is met if the school provides participation opportunities for male and female students in numbers substantially proportionate to their enrollments. This prong surely requires statistical balancing. The second prong is satisfied if an institution that cannot meet prong one can show a "continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex." 44 FED. REG. at 71,418. It can hardly be denied that this prong requires statistical balancing as it is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance. In other words, the second prong also requires balancing. Finally, the third prong, interpreted as the majority advocates, dispenses with statistical balancing only because it choose to accord zero weight to one side of the balance. Even a single person with a reasonable unmet interest defeats compliance. This standard, in fact, goes farther than the straightforward quota test of prong one. According to the district court, the unmet interests of the underrepresented sex must be completely accommodated before any of the interest of the overrepresented gender can be accommodated.[28]

A pragmatic overview of the effect of the three-prong test leads me to reject the majority's claim that the three-prong test does not amount to a quota because it involves multiple prongs. In my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists. Regardless

---

[28] The problem with the majority's argument can be illustrated with a hypothetical college admissions policy that would require proportionality between the gender ratio of the local student aged population and that of admitted students. This policy is comparable to prong one of the three prong test and is, without a doubt, a quota. It is no less a quota if an exception exists for schools whose gender ratio differs from that of the local population but which admit every applicant of the underrepresented gender. It remains a quota because the school is forced to admit every female applicant until it reaches the requisite proportion. Similarly, the district court's interpretation requires the school to accommodate the interests of every female student until proportionality is reached.

of how many steps are involved, the fact remains that the test requires proportionate participation opportunities for both sexes (prong one) unless one sex is simply not interested in participating (prong three). It seems to me that a quota with an exception for situations in which there are insufficient interested students to allow the school to meet it remains a quota. All of the negative effects of a quota remain, and the school can escape the quota under prong three only by offering preferential treatment to the group that has demonstrated less interest in athletics.

2. "Extremely Persuasive Justification" Test

In view of the quota scheme adopted by the district court, and Congress' specific disavowal of any intent to require quotas as part of Title IX, appellees have not met their burden of showing an "exceedingly persuasive justification" for this gender-conscious exercise of government authority. As recently set forth in Virginia, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Virginia, --- U.S. at ----, 116 S. Ct. at 2274. While the Supreme Court in Virginia acknowledged that "[p]hysical differences between men and women ... are enduring," id. at ----, 116 S. Ct. at 2276, it went on to state that such " '[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for ... artificial constraints on an individual's opportunity." *Id.*

* * *

I believe that the district court's interpretation of the Policy Interpretation's three-prong test poses serious constitutional difficulties. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [we] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507, 99 S. Ct. 1313, 1322, 59 L. Ed. 2d 533 (1979). To the extent that Congress expressed a specific intent germane to the district court's interpretation, Congress, if anything, expressed an aversion to quotas as a method to enforce Title IX. As a result, I opt for Brown's construction of prong three, which, as we have discussed, *infra*, is also a reasonable reading.

Accordingly, I would reverse and remand for further proceedings.

* * *

PEDERSON, v. LOUISIANA STATE UNIVERSITY

912 F. Supp. 892 (M.D. La. 1996)

Opinion by DOHERTY, District Judge.

Procedural History

Plaintiffs' initial complaint entitled "Complaint--Class Action" was filed in the Middle District of Louisiana on March 31, 1994, by Beth Pederson, Lisa Ollar and Samantha Clark, hereinafter referred to as ("Pederson" or "Pederson plaintiffs"), each individually and "on behalf of all others similarly situated," seeking "declaratory, injunctive and monetary relief" against Louisiana State University, William E. Davis, individually and in his official capacity as Chancellor of Louisiana State University. . . . The equitable relief requested in the complaint included an affirmative injunction by this Court ordering LSU to field an intercollegiate varsity women's fast pitch softball team in 1995 and a intercollegiate varsity women's soccer team in 1994. As the basis for their claim, plaintiffs specifically alleged interest and skill in soccer; however, none of the three asserted interest or ability in fast pitch softball or any other sport. Defendants answered on May 16, 1994, denying plaintiffs' allegations and contesting plaintiffs' standing to assert an action or class action requesting remedy as to women's fast pitch softball.

* * *

Facts

LSU has provided opportunity for its male students to participate in intercollegiate varsity athletics since the inception of football and men's baseball in 1893, and men's basketball in 1908. Intercollegiate varsity athletic opportunity for its women athletes was provided in 1977 with the initiation of a women's sports program. In 1979, women's fast pitch softball was added, but was dropped following the 1982-83 season with no credible reason given. No additional sports were added for either males or females until 1993 when the decision was made to add two intercollegiate varsity women's sports in the 1995 season, fast pitch softball and soccer. Implementation of that decision was delayed in accordance with an agreement of the Southeastern Conference schools and requests by the Senior Women's Administrators of the Southeastern Conference. The agreement called for commencing competitive conference play in soccer in the Fall of 1995 and to begin implementation of softball in the Fall of 1996 with competitive conference play in the Spring of 1997.

LSU hired a soccer coach, Miriam Hickey, in August of 1994 and began the process of obtaining facilities and athletes for play to begin in the Fall of 1995. Play at the intercollegiate varsity level began in 1995. LSU hired a softball coach, Cathy Compton, effective June 1, 1995 and began the process of recruiting athletes and obtaining a facility to initiate play in the Fall off- season of 1996 and intercollegiate competition in the spring of 1997. Play has not yet begun. Neither facilities nor recruiting for either the softball or soccer teams is complete.

A full complement of scholarships for both soccer and softball, i.e., eleven each, have been allocated. However, presently only two partial softball scholarships have been awarded to two potential team players. Also, less than the full complement of soccer scholarships has been awarded. How many scholarships to award, when to award them, and to whom the scholarships are awarded is within the discretion of the respective coaches. . . .

* * *

II. Analysis

As is discussed in detail infra, Title IX and its jurisprudence clearly distinguish between, on the one hand, claims for unequal treatment of athletes based on sex ["treatment claims"] and, on the other hand, claims for ineffective accommodation of demands of female and male athletes, i.e., equality of opportunity to participate in athletics.

This Court has had great difficulty identifying and, it seems, plaintiffs articulating the injury which forms the basis for plaintiffs' cause of action. Rather, allegations of a generalized grievance as to the manner in which "women at LSU were treated" have tended to predominate both the filings and the arguments made by plaintiffs. Such generalized allegations do not grant the requisite connexity and personal injury required for standing. This Court must examine the relationship of each plaintiff to LSU's actions, as well as the allegations and factual basis for the allegations made by each plaintiff, to determine if the requisite personal injury and connexity exists. Within this analysis, two separate and legally distinct factual scenarios exist.

A. Treatment

All five plaintiffs asserted a claim for unequal treatment of female varsity athletes, including unequal pay to coaches, lesser quality facilities, and other related grievances. An unequal treatment claim presupposes that the claimant was a varsity athlete who was treated unequally based upon her sex. The complaint fails to allege, however, that any plaintiff ever participated in any varsity sport at LSU. As plaintiffs have never participated in varsity athletics at LSU, they can never have suffered injury from any alleged discriminatory action by LSU in its treatment of female varsity athletes vis-a-vis male varsity athletes. Plaintiffs have not alleged any experience of the effect, impact or alleged injury resulting from any of the alleged discriminatory practices within LSU's existing women's varsity athletics.

Plaintiffs have personally suffered no injury or threatened injury due to LSU's alleged illegal treatment of its female varsity athletes and, as such, fail the initial prong of the standing inquiry as to their claims for

illegal treatment of female varsity athletes.

* * *

B. Accommodation

One must keep in mind that LSU is not required by Title IX to provide any athletic opportunity for any of its students. However, should LSU choose to provide athletic opportunities for certain of its students, it then must provide equal athletic opportunity for both sexes and not exclude either group from participation because of their sex. LSU has chosen to provide athletic opportunity for its male students. Consequently, LSU must provide equal athletic opportunity for the interests and abilities of its female students and cannot exclude its female students from participation because of their sex. One must never lose sight that the key concepts involved in this challenge are exclusion from participation and equal athletic opportunity. Exclusion, in this instance, requires the existence of an interest to participate and the existence of an ability to participate. Opportunity is the possibility of participation, not the guarantee of participation.

* * *

In accordance with this Court's continuing duty to monitor its jurisdictional basis, the question of whether the Pineda and Pederson plaintiffs have proven the merits of their standing claims is herein addressed.

i. Pinedas

At trial, Karla and Cindy Pineda were students at LSU and each had eligibility to participate in intercollegiate varsity athletics. They continue to seek to play intercollegiate varsity fast pitch softball and they meet the NCAA eligibility criteria. LSU does not presently field a intercollegiate varsity fast pitch softball team; although LSU has begun implementation of an intercollegiate fast pitch softball program by hiring Cathy Compton as its head softball coach effective July 1, 1995, the process is not complete. LSU asserts that Karla and Cindy Pineda will be given the opportunity to try out for the fast pitch softball team prior to its commencement of intercollegiate competition in the Fall of 1996 should such competition truly begin in the Fall of 1996.

The existence of one or two students with interest and ability to participate in sports likely would not constitute a basis for a claim of ineffective accommodation and thus, violation of Title IX. However, the Pinedas also established at trial the existence of sufficient interests and abilities on campus to field a intercollegiate varsity women's fast pitch softball team.

The Pinedas established that sufficient interest and ability existed on the LSU campus to field a successful Division I women's fast pitch softball team in 1979 and that interest and ability to participate in fast pitch softball has increased since 1979 nationally, regionally, locally and in the Louisiana high schools--the primary feeder schools for LSU. Therefore, this Court finds interest and ability to participate in fast pitch softball has not declined since 1979 when there was sufficient interest and ability to field a successful Division I team. Yet, LSU provided and provides no opportunity of any kind for its female students to participate in fast pitch softball on any level.

The Pinedas have established they individually have the interest and ability to participate in athletics on some level at LSU; they have established sufficient interest and ability exists at LSU to field a Division I fast pitch softball team. The Pinedas have proved the University is providing greater opportunity to participate in sports for males than females and, in particular, LSU is providing opportunity to participate in varsity baseball for males with interest and ability similar to the Pinedas. Finally, plaintiffs have presented evidence that such action has caused them personal injury.

In short, the Pinedas have presented evidence sufficient to establish individualized injury and standing to bring a private right of action against LSU pursuant to Title IX.

Defendants argue that the Pinedas cannot make the cut to participate in fast pitch softball at the Division I level and therefore, they lack standing. . . . Title IX's guarantee of equal opportunity is not granted only to the best athletes in the country; it is granted to all athletes who have an interest in participating in athletics as well as an ability to do so. The Pinedas have proven they have both. Whether LSU decides to

eventually offer them positions on a team is not determinative of the issue.

* * *

ii. Pederson Plaintiffs

As noted above, the Pederson plaintiffs, asserted claims that LSU was in violation of Title IX by ineffectively accommodating their interest in playing intercollegiate varsity soccer and requested particularized injunctive relief keyed to their particular sport of choice.

* * *

Ms. Pederson retains NCAA eligibility and was offered the opportunity to try out for the varsity soccer team in 1994, but was unable to do so because of knee surgery. She tried out in 1995, practiced with the team, was issued a uniform, and was included in the team picture. She never played with the team, rather, she quit due to financial problems and contemporaneously was cut as lacking the requisite skill.

The evidence at trial established LSU has no male varsity Division I soccer team. Further, LSU provides the same opportunity for soccer participation for its male and female students--albeit limited support and opportunity--at the club level. Evidence established LSU has in no way excluded members of either sex from the opportunity to participate in soccer at the club level. Further, this Court finds the Pederson plaintiffs did not establish the existence of the requisite ability to play soccer above the club level. Consequently, the Pederson plaintiffs did not establish they had been excluded from athletic participation at LSU because of their sex; rather the evidence proved they were included in the soccer participation offered at LSU in the same manner as male students. Further, the evidence established the Pederson plaintiffs had not been, as alleged by plaintiffs, excluded from intercollegiate varsity play as none had the requisite skill to play soccer at the intercollegiate varsity level.

* * *

As LSU's alleged violation of Title IX has not had the required personal impact on the Pederson plaintiffs, the Pederson plaintiffs do not have standing to bring claims for equitable or declaratory relief in this forum for violation of Title IX and as such their claims are DISMISSED WITH PREJUDICE.

TITLE IX

I. Law

In 1972 Congress enacted the prohibition against discrimination on the basis of sex by universities securing federal funds. Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving capitol federal financial assistance ...

20 U.S.C.A. § 1681(a) (1990).

* * *

The judicial branch. . . has had relatively little involvement with interpreting Title IX's statutory and regulatory provisions. At this point, neither Court to whom this Court looks for binding guidance has yet addressed the issues under Title IX arising herein. The only case in which the Supreme Court has addressed Title IX since 1984 held that the statute does imply a private right of action.[48] The Fifth Circuit has addressed Title IX only in the context of determining that it does not create an avenue separate from Title VII for asserting employment discrimination claims.[49]

Within the broader scope of federal jurisprudence throughout the country, only a handful of cases have

---

[48] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992).

[49] *See Chance v. Rice University*, 984 F.2d 151

interpreted Title IX, and each of them is factually distinguishable from the case at hand.[50]

This Court has found precious little guidance within the available jurisprudence to aid in understanding the analytical framework within which to address the claims in this case. As noted above, this case involves female students at Louisiana State University who have never participated in varsity athletics and who want LSU to create varsity athletic opportunity for them.

In review, the present state of the law of Title IX includes a statute containing very broad language and few specifics, regulations issued by several different agencies, a Policy Interpretation adopted by OCR but never approved by the President or Congress, and very little jurisprudence, none of which clarifies the proper analysis of claims brought thereunder.

II. Analysis

In the absence of binding jurisprudence or a standard of review provided within the statute, this Court must derive the proper analytical framework from the available sources. The statute itself contains a general prohibition against sex discrimination, which language does not further the analysis greatly. The regulations promulgated pursuant to 20 U.S.C. § 1681, et seq. do provide more guidance, with pertinent language mandating equal athletic opportunity for members of both sexes. More particularly, the regulations identify effective accommodation of interests and abilities of both sexes as the primary factor to be considered in evaluating whether an institution is granting equal opportunities to participate in athletics. The statute and the regulations, however, do not provide any additional aid in deriving an analytical framework under Title IX.

As noted above, OCR has also issued a Policy Interpretation. This interpretation is helpful in identifying issues which arise under Title IX and establishing an analytical framework for assessing claims arising under the Title. The Policy Interpretation has not been approved by either the President or Congress, however, and is also susceptible, in part, to an interpretation distinctly at odds with the statutory language. Despite these drawbacks, the Policy Interpretation definitely has a role to play in ascertaining the proper analysis of compliance with Title IX.

* * *

In addressing the question of whether LSU effectively accommodated women's interest and ability to participate in sports by providing equal levels of competition for men and women, both plaintiffs and defendants argue, primarily, that the first prong of the "opportunity" factor and the first prong of the "competition" factor--both of which require the Department to assess proportionality between the sexes--should be acknowledged as a "safe harbor" or determinative of the overall issue, for educational institutions. In other words, plaintiffs and defendants desire this Court to find that, so long as males and females are represented in athletics in the same proportion as found in the general student population and are given numerically proportionate opportunity to participate in advanced competition, the university should be found to be in compliance with Title IX and, if numerical proportionality is not found, the institute should be found to be in

---

50 *Horner v. Kentucky High School Athletic Ass'n.*, 43 F.3d 265 (6th Cir.1994) (12 female student athletes who participated in interscholastic girls' high school slow pitch softball sued for failure to field fast pitch softball and failure to support equal athletic opportunity for females); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir.1994), cert. denied, --- U.S. ----, 115 S. Ct. 938, 130 L. Ed. 2d 883 (1995) (members of the men's swimming team alleged violation of Title IX when the university terminated the swimming program); *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3rd Cir.1993) (members of the women's gymnastics and field hockey teams alleged violation of Title IX when the university terminated both programs); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, cert. denied, 510 U.S. 1004, 114 S. Ct. 580, 126 L. Ed. 2d 478 (1993) (students and members of the women's fast pitch softball team alleged violation of Title IX when the university terminated the program); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir.), cert. denied, 510 U.S. 1043, 114 S. Ct. 689, 126 L. Ed. 2d 656 (1994) (parents of a minor boy alleged violation of Title IX when he was excluded from a girls' field hockey team); *Cohen v. Brown University*, 991 F.2d 888 (1st Cir.1993) (members of the gymnastics and volleyball teams alleged violation of Title IX when teams were demoted from full varsity status to club varsity status); and *Cohen v. Brown University*, 879 F. Supp. 185 (D.R.I., 1995) (same).

violation of Title IX. This Court disagrees with either proposition and the analysis leading to such a result, and denies most emphatically so to hold.

In arguing that sufficient opportunity will be granted by achieving substantially similar numerical proportionality between the sexes among athletes as is found in the general student population, defendants rely upon specific language from jurisprudence which supports their position. This Court is not unaware of the *Roberts, Cohen* and *Horner* holdings and, in fact, the explicit language within *Roberts* and *Cohen*, that one "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." The Fifth Circuit has not spoken to this issue and this Court is not bound by *Roberts, Cohen* and *Horner*. (citations omitted)

Further, this Court finds those decisions erroneous in this regard. To accept the interpretation in *Roberts, Cohen* and *Horner*, and the argument made by defendants, one must assume that interest and ability to participate in sports is equal as between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the same competitive level. A review of *Roberts, Cohen* and *Horner* finds no evidence to prove or disprove this assumption; nor has LSU or the plaintiffs in this case presented any evidence to support this assumption.

Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.

The *Cohen, Roberts* and *Horner* decisions, in defining equal numerical percentages or "proportionality" as a "safe harbor," strongly rely on each other and on a stated administrative deference. This Court is not unaware of the necessity to grant great deference to an administrative agency and in particular an administrative agency that was specifically required by Congress to promulgate interpretative regulations. However, the jurisprudential emphasis on numerical "proportionality" is not found within the statute or the regulations; rather, it is inferred from language in the Policy Interpretation and ignores other language within the Policy Interpretation and the statute which argues against such an inference.

* * *

Section 1681(a) of Title IX specifically provides the mandate of Title IX shall not be interpreted to require preferential or disparate treatment to members of one sex based on proportionality. Rather, those percentages should be considered as "tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." Consequently, the clear language of the statute prohibits the interpretation of numerical proportionality argued by both defendants and plaintiffs. Therefore, to the extent that the Policy Interpretation operates to allow a "safe harbor" of numerical proportionality of competition, this Court rejects that reading as well as the concept of the "safe harbor." While the safe harbor concept has the virtue of being simplicity itself, this Court will not join in assuming that athletic directors in this country are incapable of meeting the burden of Title IX and its regulations which incorporates a knowledge regarding their student body, effective analysis of and meeting students' needs, and filling those needs in a non-discriminatory fashion. Rather, this Court finds the proper reading of the Policy Interpretation--and the proper analysis under effective accommodation--allows for consideration of all factors listed therein in determining whether the university has provided equal opportunity and levels of competition for males and females.

The Policy Interpretation, being crafted by an agency which has a great deal of knowledge and understanding of the particulars of assessing university athletics, provides a helpful guide to a thoughtful analysis of the mandate of Title IX. However, to the extent that the Policy Interpretation suggests by use of

the disjunctive "or" that a mere reliance upon substantial numerical proportionality between the sexes suffices, it is contrary to the explicit language in 20 U.S.C. § 1681(b) and will not be followed herein. With this exception, the bulk of the analysis of compliance described in the Policy Interpretation will be adopted in this context.

III. Application to the Instant Facts

The Pineda plaintiffs allege that LSU discriminated against them by not effectively accommodating their interest and ability to participate in intercollegiate varsity fast pitch softball. Under the statute, regulation, and Policy Interpretation, analysis of plaintiffs' claim proceeds as follows. In determining whether LSU has subjected its female students to discrimination based upon sex, this Court will look to whether its policies are discriminatory in language or effect, whether substantial and unjustified disparities exist within the program as a whole between opportunities afforded male and female students, or whether substantial disparities exist in individual segments between opportunities afforded male and female students such as to deny equal athletic opportunity. This determination will be based upon an evaluation of whether LSU has effectively accommodated its students' interests and abilities. As noted above, effective accommodation of interests and abilities requires the selection of sports appropriate to the student body's interests and that the level of competition reflect the ability of athletes available to participate.

Clearly, the pivotal element of the analysis in this case is the question of effective accommodation of interests and abilities. Of primary importance to the analysis is the requirement that LSU know what the interests and abilities of its female students are. Without that knowledge, neither LSU nor this Court can evaluate with true certainty whether LSU is effectively accommodating those interests and abilities in a sex-neutral way.

After hearing all the evidence presented, this Court finds LSU presented no credible evidence to establish what the interests and abilities of its student population are or have ever been. LSU has no method, discriminatory or otherwise, by which this determination can be made. LSU is and has been ignorant of the interests and abilities of its student population.[61]

Without any basis for determining whether LSU's athletics program is accommodating the actual interests and abilities found on campus, this Court is relegated to ruling on the question of discrimination based upon indirect evidence such as raw data regarding the student population and testimony of the athletic program's director and officers.

* * *

Plaintiffs established that intercollegiate play is provided for male students with similar interests and abilities by way of the varsity baseball team. The evidence is uncontroverted that, during the relevant time period, LSU provided absolutely no opportunities for women to compete in fast pitch softball at any level whatsoever.

By not fielding any women's fast pitch softball team for any level of competition, LSU has not been accommodating the interests and abilities of Plaintiffs individually and at least one segment of its female student athlete population. This finding, together with the large disproportionality between its male and female athlete populations compared to the general student body, and testimony presented by the LSU's Athletics Director, suggest that sex discrimination accounts for the discrepancies.

---

[61] LSU could have obtained this information in a variety of ways, including, but not limited to: (1) Requests by students that a sport be added; (2) Requests that an existing club sport be elevated; (3) Participation levels in club or intramural sports; (4) Interviews with students, admitted students, coaches, administrators or others regarding interest in a particular sport; (5) Results of questionnaires of students and admitted students regarding interest in particular sports; and (6) Participation levels in interscholastic sports by admitted students. Information also could be obtained through discussions with amateur athletic associations or community sports leagues or, perhaps the simplest solution, the inclusion of a "participation and interest" question on the admissions form to the university. However, there was no testimony to support that any credible attempt was made to gather such information.

Under the Policy Interpretation, an educational institution which is proved not to be effectively accommodating the interests and abilities of the underrepresented sex but is able to demonstrate a history and continuing practice of program expansion demonstrably responsive to the developing interests and abilities of the underrepresented sex may still be found to be in compliance with Title IX. Assuming -- without addressing the wisdom of allowing a university to avoid a finding of non-compliance when, as a matter of fact, non-compliance has been proved--that this element of the analysis properly is incorporated herein, this Court finds that LSU has not provided credible evidence of such a history and practice. Quite the contrary, this Court finds that historically LSU has demonstrated a practice not to expand women's athletics at the university before it became absolutely necessary to do so.

* * *

Under the Policy Interpretation an educational institution which is proved not to be effectively accommodating the interests and abilities of the underrepresented sex but is able to demonstrate an adequate plan to redress its violations can nonetheless be found to be in compliance with Title IX. Assuming -- without addressing the wisdom of allowing a university to avoid a finding of non-compliance when, as a matter of fact, non-compliance has been proved--that this element of the analysis properly is incorporated herein, this Court finds that LSU has not provided credible evidence of the existence of an adequate plan. Full discussion of and reasons for this finding are found under separate heading.

For the foregoing reasons, this Court finds that LSU has not been accommodating the interests and abilities of its female student athletes. Moreover, LSU has not demonstrated a history and continuing practice of expanding athletic opportunities for its female student athletes nor an adequate plan to redress its violations. Based upon these findings and conclusions, this Court hereby DECLARES THAT LSU IS IN VIOLATION OF TITLE IX WITH RESPECT TO WOMEN'S ATHLETICS.

IV. Remedy

In view of the finding that LSU is in violation of Title IX, the question then becomes: to what remedy is each plaintiff entitled? Plaintiffs have requested both monetary and equitable relief herein.

* * *

LSU is in violation of Title IX for failure effectively to accommodate the interests and abilities of its female students to participate in athletics. Based upon the testimony of LSU's Athletics Director and others familiar with the management of athletics at the university, and although the question is a very close one, this Court holds that the violations are not intentional. Rather, they are a result of arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the byproduct of resistance to change.

* * *

LSU is saved from the conclusion that it intended to discriminate in part by the fact that the jurisprudence and regulations regarding Title IX have been confused and unclear from the very beginning and Dean's contradictory actions.

* * *

This Court finds that the source of LSU's resistance to change in favor of compliance with Title IX is two-fold: LSU's assessment of its program as "wonderful"; and its archaic view of women and athletics. LSU's approach suggests ignorance of the changed social fabric in this country. LSU's outmoded approach to athletics includes antiquated assumptions about women's athletic interests and abilities and a failure to integrate the women's athletic program into the overall athletic framework at the university.

* * *

This Court finds that LSU, through the actions of its Athletic Director, Joe Dean, was negligent in not adapting to the changing social and athletic landscape. However, LSU's actions are the byproduct of arrogant ignorance, the adherence to outdated attitudes and assumptions, and the confusion surrounding Title IX and its true intent, rather than the result of intentional discrimination. As this Court finds no intent on the part of

LSU to discriminate on the basis of sex, there can be no damages awarded to the Pinedas. Consequently, there will be no Phase Two of the trial.

B. Equitable Relief: Reasonable and Adequate Plan

The Policy Interpretation issued by OCR includes enforcement provisions. With regard to enforcement, OCR has determined that, once a university has been found to be in violation of Title IX, it can avoid a finding of non-compliance by having in place an adequate plan for remedying the violations within a reasonable period of time. In the context of this suit, this Court is not at liberty to find the university in violation of Title IX then decline to take any action as a result of that finding. However, the question of whether LSU has a reasonable and adequate plan to remedy its violations of Title IX is relevant at this juncture.

* * *

This Court finds that, at this time, LSU has no adequate plan. LSU has only verbal commitments, supported by vague intentions, resulting in erratic, random action. No cohesive, structured plan designed to encompass the complexity of the problem exists. This lack has already cost LSU's athletics department: the NCAA Self-Study resulted in only provisional certification, rather than full certification.

* * *

This Court ORDERS William Davis, Joe Dean and the Louisiana Board of Supervisors immediately to effectively accommodate LSU's female population pursuant to Title IX or to submit an adequate plan for such compliance as expeditiously as possible but within twenty (20) days of receipt of this Order.

* * *

BOUCHER v. SYRACUSE UNIVERSITY

1996 U.S. Dist. Lexis 8392, (#95-CV-620, June 12, 1996)

Opinion by FREDERICK J. SCULLIN, JR.

Plaintiffs bring this Title IX action against defendants alleging three distinct claims. First, plaintiffs allege that the selection of sports and levels of competition at Syracuse do not effectively accommodate their interests and abilities. 34 C.F.R. § 106.41 (c)(1). Second, plaintiffs allege unequal athletic benefits for female athletes vis-a-vis male athletes. 34 C.F.R. § 106.41(c)(2)-(10). Finally, plaintiffs allege that defendants are in violation of Title IX due to defendants' failure to provide athletic scholarships to both varsity and club female team members in proportion to their athletic participation. 34C.F.R. § 106.37. Plaintiffs seek declaratory and injunctive relief, as well as costs and attorneys' fees.

Presently before the court is plaintiffs' motion for class certification pursuant to Rule 23 of the FEDERAL RULES OF CIVIL PROCEDURE and defendants' motion for partial summary judgement insofar as the complaint alleges a claim under Title IX for unequal athletic benefits as between male and female varsity athletes on the ground that plaintiffs lack standing to assert such a claim.

Plaintiffs are eight female undergraduate students at Syracuse University ("Syracuse"). Seven of the plaintiffs are past or current members of the women's club lacrosse team. The other is a member of the women's club softball team. None of the plaintiffs is, or has ever been, a varsity athlete at Syracuse.

Distinct men's and women's varsity, club, and intramural sports programs exist at Syracuse. The varsity athletic program at Syracuse is run by the University's Athletic Department which sponsors varsity teams for both men and women, all of which compete at the Division I level. Syracuse currently sponsors nine women's varsity teams and eleven men's varsity teams. Club teams like plaintiff's club lacrosse and softball teams are student-run organizations. The club teams elect their own officers and captains, and recruit their own members. The Office of Recreation Services, an office within the Division of Student Affairs, oversees these teams, as well as the intramural sports program at Syracuse.

6. The court in *Brown* lists ten factors to be considered when attempting to determine whether both genders have equal opportunities available to them. The court notes that the "treatment issues" relative to those listed factors had been settled to some degree. Providing that no opportunity for settlement exists in the normal situation, when and how does one use the ten factor list in evaluating a claim?

7. Settlement is common in many of these cases. *See, e.g., Haffer v. Temple University*, C.A. No. 80-1362 (E.D. Pa. 1988), 678 F. Supp. 517 (E.D. Pa. 1987), *Kiechel v. Auburn University*, C.A. No. 93-V-474-E (M.D. Ala. 1993), *Sanders v. University of Texas at Austin*, No. A-92-CA-405 (W.D. Tex. 1993).

8. The *Brown* decision is the latest judicial opinion in the Title IX controversy. Does it appear to set up a workable framework for the future? How valuable is it as precedent? Does the inclusion of percentages, dollar-figures, and other numbers indicate that each case must reflect ad-hoc decisionmaking?

9. How are schools with relatively equally proportioned student enrollments who may want to add or delete a sport based on viable financial considerations going to be affected by this decision?

How easy will it be for females to force a school to sponsor a varsity team that they show an interest in being members of?

10. The *Brown* case tangentially discusses the relationship between Title IX and Title VII. Though the court finds the attempt to use Title VII inappropriate in *Brown*, the interplay between these two sections has been previously argued in a more persuasive manner. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990). Even assuming an automatic resolution of the type of access issues raised by Title VII, compensation matters must still be addressed. Cases are starting to arise in major collegiate sports prefaced on female coaches' assertions that they should be paid an amount comparable to their male counterparts. The arguments have relied on a variety of sources for legal support including Title IX, the state and federal constitution, as well as common law sources. *See, e.g., Marianne Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994).

11. The Able, Baker, and Charlie families worked for a large steel mill outside of Chicago. The mill recently closed and these families were relocated along with others to a new factory town near Knoxville. Between the families there were seven girls of middle-school age, all of whom had participated on 16-inch, slow-pitch softball teams together. 16-inch, slow-pitch softball is a major pastime in and around Chicago with teams ranging from middle-school to senior citizens. Companies, factories, executives and all play through a well-organized park district system.

In the Knoxville area both 16-inch slow pitch and 12-inch fast pitch softball were played. The girls quickly adapted to the new faster game. At the high school level, the Knoxville school system has recently decided to no longer sanction or sponsor tournaments in 12-inch fast pitch softball. This has angered the girls because they were hoping to use their newfound talents as a way of gaining access to college. Over 200 collegiate schools sponsor 12-inch fast pitch softball teams for women while less than 50 — all of which are junior colleges — have slow pitch teams.

The school district has told the girls to play 16-inch slow pitch or try to play on the boys' high school baseball team if they want to sharpen the skills necessary to compete for a collegiate fast-pitch scholarship. However, the girls feel this to be an unrealistic offer as the competition is particularly stiff amongst the male athletes, and there is no guarantee that playing on the boys' team will impress a recruiter to consider their skills transferable.

Of the state's approximately 60,000 high school athletes, about 51% of the boys participate in some kind of sports while 43% of the girls are involved in competitive athletics. The Able, Baker, and Charlie girls

decide to bring suit for violation of their rights under Title IX. What result? *See Horner v. Kentucky High School Association*, 43 F.3d 265 (6th Cir. 1994); Joanne Korth, *Gators Pitch for Greatness*, ST. PETERSBURG TIMES, September 3, 1995, at 2C.

12. Suppose that you are general counsel at Midwest University which faces a $500,000 athletic budget deficit this year. This is the third consecutive year it has faced a shortfall and the athletic director says that cost reduction must take place immediately. She has in mind the elimination of the men's volleyball team as they traditionally turn up in the cellar of the conference standings. The school is also unable to compete for high quality athletes in the sport as most tend toward the western or southeastern schools where warm weather and year round beach tournaments are among the many incentives Midwest University cannot offer. The student body is 53% female with about 31% of that group comprising the school's total number of intercollegiate athletes. The athletic director is also contemplating termination of men's teams as well as the club sports of men's lacrosse and men's fencing. Seven representatives from these respective teams join together to file suit alleging a violation of Title IX. What result? *See Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994).

13. *Cohen* opened the proverbial floodgates of Title IX litigation in women's amateur athletics. Since the first *Cohen* decisions in the early 1990's, female plaintiffs have been successful nearly 100% of the time. Does the *Boucher* case give rise to any realistic substantive basis for curtailing plaintiff's success in the future? Does *Pederson*?

BLAIR et al. v. WASHINGTON STATE UNIVERSITY

740 P.2d 1379 (Wash. 1987)

OPINION: This is a sex discrimination action brought under the state Equal Rights Amendment, CONST. art. 31, § 1 (amend. 61), and the Law Against Discrimination, RCW 49.60. Appellants are female athletes and coaches of female athletes at Washington State University. Respondents are Washington State University, its President, Executive Vice-President, and Board of Regents.

The trial court concluded the University had discriminated against the plaintiffs on the basis of sex and awarded damages, injunctive relief, attorney fees, and costs. The plaintiffs now appeal (1) the exclusion of football from the court's calculations for sports participation and scholarships; (2) the trial court's decision to allow each sport to benefit from the revenue it generates; (3) the reduction of the attorney fee award; and (4) the trial court ruling requiring them to file a claim under the tort claims act, RCW 4.92.110, as a condition precedent to bringing this suit. The University in its cross appeal challenges portions of the trial court's award of attorney fees and costs. Subject to the discussion below, we reverse the trial court on issues (1) and (3), affirm on issues (2) and (4), and affirm on the issues raised by the University's cross appeal.

The comprehensive findings of fact of the trial court demonstrate that, despite marked improvements since the early 1970's, the women's athletic programs have continued to receive inferior treatment in funding, fundraising efforts, publicity and promotions, scholarships, facilities, equipment, coaching, uniforms, practice clothing, awards, and administrative staff and support. During the 1980-81 school year, the year before the trial, the total funding available to the men's athletic programs was $3,017,692, and for the women's programs was $689,757, roughly 23 percent of the men's. The funds for the men's programs were derived largely from revenues, both gate admissions ($958,503) and media rights, conference revenues, and guaranties ($943,629). Most of these revenues were derived from football ($1,430,554). Of the funding available to the women's programs, most was derived from legislative appropriations ($451,082). Very little came from gate admissions ($10,535). Although the number of participation opportunities for men increased by 115 positions from 1973-74 to 1980-81, the opportunities made available for women decreased 9 positions during the same period. The budget for men's scholarships increased from $380,056 to $478,052 during that period; the budget for

women's scholarships in 1980-81 was $150,000. The trial court observed in its memorandum opinion:

The non-emphasis on the women's athletic program was demonstrated in many ways, some subtle, some not so subtle.... The message came through loud and clear, women's teams were low priority.... The net result was an entirely different sort of participation opportunity for the athletes.

On the basis of numerous findings of fact detailing the inferior treatment of the women's athletic program, the trial court concluded the University had "acted, or failed to act, in the operation of the University's intercollegiate athletics program in a manner that resulted in discriminatory treatment of females...." The athletes had "suffered unlawful sex discrimination violative of RCW 49.60 and the State Equal Rights Amendment."

The court entered a detailed injunction to remedy the violations. With respect to funding, the court ordered the women's program must receive 37.5 percent of the University's financial support given to intercollegiate athletics during the year 1982-83. The required minimum percentage for women increased each year by 2 percent until it corresponded to the percentage of women undergraduates at the University, 44 percent at the time of the injunction. The trial court provided, however, the level of support for women's athletics was not required to exceed by more than 3 percent the actual participation rate of women in intercollegiate athletics at the University, excluding football participation from the comparison. The injunction prohibited the total budget for women's athletics ever to be less than the base budget of $841,145 for 1981-82, unless the expenditures for men's athletics were correspondingly reduced.

The injunction also specified:

> In determining the level of University financial support of intercollegiate athletics for purposes of the above calculation, the term "University financial support" shall not include revenue generated by or attributable to any specific sport or program. Such excluded sources of revenue shall specifically include gate receipts, conference revenues, guarantees, sale of media rights, concession and novelty sales at games, coach and athlete work projects, and donations attributable to a sport or program.

The injunction apportioned the funding for athletic scholarships in a similar manner. The women received 37.5 percent of all money expended for scholarships, excluding funds expended for football scholarships. The percentage increased yearly until it equaled the percentage of women undergraduates. The allocation could not fall below $236,300, the amount allocated for 1982-83, unless matched by a reduction in male scholarships.

The court also ordered the University to allow for increased participation opportunities until female participation, again excluding football participation from the comparison, reached a level commensurate with the proportion of female undergraduate students. The court noted female participation had increased in recent years and stated in its memorandum opinion, "the change in the last ten years is dramatic, and it seems possible that parity will soon arrive."

The court further required the University to take affirmative steps to make opportunities to generate revenue equally available to men's and women's programs, stating:

> Because past sex discrimination has afforded women's teams and coaches less opportunity to generate revenue, the University should take affirmative action in providing additional personnel with such knowledge and experience.

The trial court required the University to appoint a committee to monitor the application of the funding formulas and other elements of the injunction. The sex equity committee, comprised of students, coaches, and administrators, was also given the mandate to develop recommendations for policies concerning matters affecting sex equity in athletics and recommendations for the promotion of women's athletics. After approval by the Provost, the committee's recommendations are to be implemented and administered in an equitable and timely manner.

In addition to the injunction, the court awarded the plaintiffs monetary damages for certain tangible losses caused by the University's discriminatory policies. The plaintiffs contest the trial court's reduction of the damages award. The trial court held RCW 4.92.110 required the plaintiffs to file a tort claim with the State before bringing a discrimination action under RCW 49.60. The parties had stipulated that if RCW 4.92.110 did apply, the complaint would be deemed filed on September 12, 1980, and any damage award would extend back 3 years from that date. The court, accordingly, calculated the award based only on injuries since 1977.

Finally, the court awarded the plaintiffs approximately $170,000 in attorney fees, expert witness fees, and costs. The court in calculating the attorney fee award concluded the plaintiffs had prevailed but reduced the award after finding the attorneys had duplicated some efforts and expended an excessive amount of time on some issues. The court also noted the plaintiffs' attorneys worked for a non-profit legal organization.

Appeal was made directly to this court. The University directed its notice of appeal from the award of costs and witness fees to the Court of Appeals, which sent the notice to this court.

I

The plaintiffs ask us to review two elements of the trial court's injunction. The standard review of an injunction is whether the trial court abused its discretion in fashioning the remedy. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A. Football Exclusion

The first issue raised by the plaintiffs is whether the trial court abused its discretion in creating an injunctive remedy which excluded football from its calculations for participation opportunities, scholarships, and distribution of non-revenue funds. We conclude the trial court did abuse its discretion and reverse on this issue. The Equal Rights Amendment and the Law Against Discrimination prohibit such an exclusion.

The Equal Rights Amendment states:

> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.
>
> The legislature shall have the power to enforce, by appropriate legislation, the provisions of this Article.

CONST. art. 31, §§ 1, 2 (amend. 61).

The Law Against Discrimination provides:

> The right to be free from discrimination because of race, creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized as and declared to be a civil right. This right shall include, but not limited to:
>
> * * *
>
> (b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement....

RCW 49.60.030(1)(b).

The recognized purpose of the Equal Rights Amendment is to end special treatment for or discrimination against either sex. *Marchioro v. Chaney*, 90 Wn. 2d 298, 305, 582 P.2d 487 (1978), *aff'd*, 442 U.S. 191 (1979); *see also Darrin v. Gould*, 85 Wn. 2d 859, 877, 540 P.2d 882 (1975). This absolute mandate of equality does not, however, bar affirmative governmental efforts to create equality in fact; governmental actions favoring one sex which are intended solely to ameliorate the effects of past discrimination do not implicate the Equal Rights Amendment. *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce Cy.*, 100 Wn. 2d 109, 667 P.2d 1092 (1983).

Neither party disputes the intercollegiate athletics program at Washington State University is subject to the Equal Rights Amendment and the Law Against Discrimination. The trial court found the operation of the program resulted in discriminatory treatment of women and the women's athletic program in violation of

these laws. Football is a large and essential part of intercollegiate athletics at the University. To exclude football, an all male program, from the scope of the Equal Rights Amendment would only serve to perpetuate the discriminatory policies and diminished opportunities for women.

The trial court attempted to explain the exclusion of football by stating football was a sport "unique in many respects, the combination of which distinguished it from all other collegiate sports...." The court identified such distinguishing characteristics as the number of participants, scholarships, and coaches, amount of equipment and facilities, income generated, media interest, spectator attendance, and publicity generated for the University as a whole. The court concluded:

> Because of the unique function performed by football, it should not be compared to any other sport at the University.
>
> Because football is operated for profit under business principles, ... football should not be included in determining whether sex equity exists....

We do not believe, however, these or any other characteristics of football justify its exclusion from the scope of the injunction remedying violations of the Equal Rights Amendment. It is stating the obvious to observe the Equal Rights Amendment contains no exception for football. *See Darrin v. Gould*, *supra*. The exclusion of football would prevent sex equity from ever being achieved since men would always be guaranteed many more participation opportunities than women, despite any efforts by the teams, the sex equity committee, or the program to promote women's athletics under the injunction.

B. Revenue Retention

The plaintiffs also challenge the portion of the injunction from the division of university financial support the revenue generated by any specific sport or program. The injunction allows each sport to reap the benefit of the revenues it generates. We hold the trial court did not abuse its discretion. Exclusion of sports-generated revenue from the calculations of university financial support is not prohibited under applicable state law and can be supported by several policy considerations. We affirm this portion of the trial court's injunction.

The plaintiffs cite no law or authority which would have required the trial court to include sports-generated revenues in its calculations. They cite RCW 28B.10.704 as an indication of legislative support for their position. RCW 28B.10.704 provides in relevant part:

> Funds used for purposes of providing scholarships or other forms of financial assistance to students in return for participation in intercollegiate athletics ... shall include but not be limited to moneys received as contributed or donated funds, or revenues derived from athletic events, including gate receipts and revenues obtained from the licensing of radio and television broadcasts.

The plaintiffs contend this statute indicates a legislative intent to pool sports-generated revenues to make them available for athletic scholarships.

The legislative history does not support reading such intent into this provision. The statute, was enacted following a request for an attorney general opinion regarding the constitutionality of using sports-generated revenues for athletic scholarships. The Attorney General had indicated the revenues were state funds and were subject to the provisions of article 8, section 5 of the constitution, regarding gifts of state funds. After the statute was enacted, the Attorney General concluded outside of the boundaries of constitutionally prohibited gifts.

> The legislative history supports the contention sports-generated revenues are in fact state funds. We believe it does not, however, support the plaintiffs' assertion this statute should be used to prohibit the trial court's decision, nor is plaintiffs' assertion a necessary inference from the language of the statute. The trial court chose an injunctive remedy neither required

> nor prohibited by applicable law and acted within its discretion in choosing to create a funding plan allowing each sport to benefit from the revenues it generates.

The trial court's funding plan provides incentive for all sports to develop revenue-generating capability of their own. As the trial court stated in its findings of face and conclusions of law:

> There is an incentive to coaches and to a lesser extent their athletes to produce as much income as possible from all sources because they are the persons who first benefit from such income.

The funding plan encourages the sports to fund their expenses through their own efforts, rather than depend upon direct legislative appropriations.

The injunction specifically requires the sex equity committee to recommend ways to encourage and promote women's sports to increase their own revenues; the funding plan would further promote such a goal. The plan thus requires the University to create equal opportunity to raise revenue for men's and women's sports.

The funding plan allows disproportionate expenses of any particular sports program to be derived from the program itself. The plan is also gender neutral. It provides a solution which does not violate the Equal Rights Amendment and encourages revenue development for all sports while accommodating the needs of the sports programs incurring the greatest expenses at this time.

Our decision upholding the trial court's conclusion regarding sports-generated revenues does not in any way modify the University's obligation to achieve sex equity under the Equal Rights Amendment. The trial court's minimum requirements for participation opportunities and scholarships, already discussed, must be achieved; the court's guidelines for distribution of nonrevenue funds must be followed, and the remaining portions of the injunction, including promotion and development of women's sports, must be observed.

In addition, our conclusion allowing each sport to use the revenues it generates does not, of course, require the sport to do so. The record reflects the football program was transferring $150,000 or more per year from its revenues to the women's program before the injunction was entered. We encourage such practices to continue, along with other efforts to foster cooperation within the department.

We therefore reverse the trial court's exclusion of football from its calculations for participation opportunities and scholarships and affirm the trial court's decision to exclude sports-generated revenues from its distribution of financial support. We emphasize the portion of the injunction requiring additional promotion of women's sports and development of their revenue-generating capability and encourage continued cooperation and efforts to bring the University's intercollegiate athletic program into compliance with the Equal Rights Amendment.

Questions and Notes

1. What is the major distinction between the court's analysis in *Blair* as compared to the *Cohen v. Brown University* case? Are you more likely to succeed in a gender dispute from a federal statutory perspective or a federal constitutional one? Explain your choice.

2. What is the policy behind the *Blair* court's decision? Is it sound? Does this kind of decision have any potential for ill effects on a school otherwise in compliance with Title IX?

3. Is it possible to be in compliance with a state Equal Rights Amendment and still remain out of step with Title IX?

4. Despite the level of "boo-rah" in the name of school spirit, it is still mean-green which drives the

athletic machines and, in that regard, men's sports are clearly economically more viable than women's. Consider the following data from MITCHELL H. RAIBORN, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETIC PROGRAMS: ANALYSIS OF FINANCIAL TRENDS AND RELATIONSHIPS, 1985-1989 (1990).

> 69 of 106 Division 1-A schools in 1987 reported surplus in the mens athletic programs while 16 reported a deficit.... Women's programs had 5 schools with a surplus while 78 reflected a deficit.

Should a school be forced to establish a varsity women's athletic sport that it knows will only lead to an increase in the liability side of its overall athletic budget sheet?

YELLOW SPRINGS EXEMPTED VILLAGE SCHOOL DISTRICT BOARD OF EDUCATION v. OHIO HIGH SCHOOL ATHLETIC ASSOCIATION

647 F.2d 651 (6th Cir. 1981)

Cornelia G. KENNEDY, Circuit Judge

Appellee Yellow Springs filed suit against appellants, Ohio State Board of Education, its members, and Ohio High School Athletic Association (OHSAA), asking that the District Court declare a rule of the OHSAA proscribing coeducational teams in contact sports a violation of Title IX of the Educational Amendments of 1972, 20 U.S.C. sec. 1681 *et seq.*, and unconstitutional and enjoin defendants from enforcing it. The District Court granted plaintiffs' motion for summary judgment, holding that the OSHAA's activities constituted state action; that the regulation, 45 C.F.R. § 86.41, on which the OHSAA asserted its rule was based was unconstitutional; and that the Ohio State Board of Education, the State Superintendent of Public Instruction and Robert Holland, Assistant Director of Health, Physical Education and Recreation at the Ohio Department of Education (hereinafter STATE DEFENDANTS) were liable for the actions of the OHSAA and properly enjoined. Appellants, state defendants and the OHSAA, urge this court to reject each of these conclusions of law and reverse the judgment of the District Court.

Yellow Springs is a very small school district composed of 950 students, 220 of whom were in the middle school, at the time suit was filed. The school district determined that at the middle school level mixed-sex athletic teams have educational advantages and thus tried to emphasize coeducational activities in general. This decision was based on the school district's observation that girls and boys at this level have essentially the same athletic skills. However, Yellow Springs was unable to offer a coed basketball team, because the rules of the rules of the OHSAA prohibit coed teams in interscholastic contact sports, and basketball is defined as a contact sport. This practice was called into question when in the fall of 1974 two Yellow Springs middle school girls tried out for and made the boys' basketball team. They were not permitted to participate since if Yellow Springs attempted to field girl team members it would be prohibited by the OHSAA from participating in interscholastic competition. The school district then attempted to set up a girls' team. Yellow Springs also attempted by a referendum of member schools of the OHSAA to change the rule to permit coed teams within an individual school's discretion but was unsuccessful. Fearing that compliance with the OHSAA rule violated federal law and might render it ineligible for federal funds, Yellow Springs filed this suit.

[The court found that although OHSAA was a voluntary unincorporated association its regulatory activities constituted stated action since virtually all senior high schools (defined as schools which have seventh grade students and above) in Ohio belonged to it, because of the semi-official nature of its activities and relationship to the state.]

* * *

The rules of the OHSAA apply to both senior high schools and junior high schools, with some special rules pertaining only to junior high students. On July 1, 1975, Part I of the rules, which applies to all students,

provided:

> Boys teams must be composed of boys only in all contact sports. (Football, wrestling, ice, hockey, soccer, basketball, and baseball.)

Rule I, § 2. A footnote to the rule stated that it was intended to comply with decisions of this Circuit. After it was brought to the Association's attention that its rules might also not comply with Title IX, they were redrafted and reissued on July 1, 1976, for the sole articulated purpose of complying with Title IX. The boys and girls sections were combined, and several other significant changes were made, including the following:

> In all contact sports (Football, Wrestling, Ice Hockey and Basketball) team members shall be boys only.
>
> Girls may play on a boys team in non-contact sports, if there is no girl's team or if the overall opportunities for interscholastic competition is [sic] limited for girls.

Rule I, § 6.

> Teams of the opposite sex shall not compete against each other in any interscholastic athletic contests.

Rule I, § 7.

The OHSAA argues that the changes brought their rules into compliance with Title IX and its regulations. The relevant regulation in 45 C.F.R. § 86.41:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.
>
> (c) Equal opportunity. A recipient which operates or sponsors interscholastic athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> > (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

A reading of the regulation discloses that Title IX requires measures to be taken which will provide equal athletic opportunity. Thus the entire regulation must be interpreted in light of that requirement. The first way this may be achieved is by providing coeducational sports. The regulation additionally permits separate teams in sports which require competitive selection but also requires measures to be taken to ensure equality for the excluded sex, including where necessary an opportunity to try out for the team. It also provides for separate teams in defined contact sports but does not clearly prohibit try-outs for a position on such a team by the excluded sex.

In its motion for summary judgment, Yellow Springs asked only that the District Court declare Rule I, § 6 of the OHSAA to be null and void and unenforceable. The motion did not request a declaration that the Title IX regulation was unconstitutional. Indeed the complaint and plaintiffs' reply to defendants' motion to

dismiss or for a more definite statement assert that the OHSAA rule violates the regulation. The plaintiffs argued that § 86.41 of Title IX's regulations offers an optional approach to recipients of aid, who may sponsor either coeducational or separate teams in contact sports as long as equal athletic opportunity is provided. It was the contention of Yellow Springs that § 86.41 should be read as saying:

> [M]embers of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport (in which instance they may be prohibited from participating provided the recipient makes available via other acceptable means equal athletic opportunities).

Yellow Springs argued that the OHSAA rule was mandatory and prohibitory, in that it prevents its member schools from adopting the many means Title IX offers for achieving compliance. The OHSAA replied in its motion for summary judgment: "Section 86.41(b) permits separate teams for contact sports, but that is not a requirement. It is strictly permissive because much more is considered in the question of "equal athletic opportunity for members of both sexes." The parties are thus in basic agreement that the regulations under Title IX do not proscribe girls' competing on the same team with boys in contact sports but instead provide for a permissive approach as long as the goal of equal athletic opportunity is achieved. The only issue then is whether the OHSAA may, without unlawful discrimination, frame its rules in a manner which limits recipients to providing only single-sex teams in contact sports and eliminates options which may be necessary for achieving the goal of equal educational opportunities. All the parties agree that the OHSAA rules must comply with 45 C.F.R. § 86.41(b), (c).

The trial judge assumed without examination that the OHSAA rule and the Title IX regulation were identical and proceeded immediately to consider the constitutionality of the regulation, ultimately holding it unconstitutional as a violation of substantive due process. However, they are not identical, and a careful inquiry discloses that the rules of the OHSAA do not comply with the regulation. Although the rules provide that girls may play on the boy's team in non-contact sports in language that tracks the regulation, the OHSAA rule for contact sports has been interpreted and applied to prohibit girls from participating on a boys' team in any contact sport at all levels under its jurisdiction. It conflicts in this regard with Title IX, which is purposely permissive and flexible on this point, rather than mandatory. *See* Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1269-72 (1979). The rule violates Title IX in that the recipient is provided no mechanism for achieving equal athletic opportunity. The rule thus operates to take away the discretion Title IX mandates be given recipient schools to determine how best to provide equal athletic opportunity and in some instances, such as here, may even prevent them from doing so. Insofar as the OHSAA rules are more restrictive than 45 C.F.R. sec. 86.41 and operate to prevent compliance with Title IX, they should be enjoined.

The OHSAA might ask why, if Title IX grants a measure of discretion to recipients, that discretion may not be further delegated to the OHSAA to determine how best to implement Title IX. The simple answer is that the focus of both Title IX and the regulations is on "recipients." It is federal aid to "recipients" that will be cut off if Title IX is not complied with. "Recipients" bear ultimate responsibility for providing an equal educational opportunity. The OHSAA is not a "recipient," and does not bear the burden of non-compliance, so may not adopt a rule which limits the ability of recipients to furnish girls the same athletic opportunities it provides for boys. The OHSAA has not claimed that it attempted to frame rules with an eye to achieving the goal of universally applicable equal athletic opportunity. Thus, based on this record, we conclude that the determination as to compliance with Title IX must be made by individual schools, not the OHSAA.

There was testimony in this case that at the middle school level students of both sexes are of approximately the same skill level and size, with much greater differences appearing within sexes than between them. *See National Organization for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (1974). In the case before the court, in which the girls were physically able to play as equals, in which the school sought to promote coed activities generally, and in which a girls' team had no opportunity for equal

competition for lack of girls' teams at other schools, coeducational teams can further the goals of Title IX. At other schools or at other levels where there are greater average physical differences between sexes this same goal may be better achieved with separate teams.

> Congress passed Title IX in the face of longstanding sexual stereotypes that led educational institutions to make arbitrary distinctions. Thus, an overriding purpose of the statute was to determine the nature of equality for men and women in contexts in which their differences are particularly relevant.

Note, *supra*, 88 YALE L.J. at 1263; *see Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977) (dealing with the physical differences between males and females). We merely observe that such differences may not be presumed to exist where they do not in fact exist to serve as a basis for a broad, gender-based difference in treatment. *Craig v. Boren*, 429 U.S. 190, 204, 97 S. Ct. 451, 460, 50 L. Ed. 2d 297 (1976).

To hold that a recipient of federal aid may let girls at the middle school level compete on the same team with boys, if this furthers the goal of equal athletic opportunity, is not to hold that all teams must be coeducational at all levels or to imply that Title IX's regulation must be held unconstitutional for expressly permitting separate teams. In Title IX, Congress struck a balance between the needs of the individual athlete and the group and determined that for purposes of the statute equality is to be measured by the opportunities offered to the group, Note, *supra*, 88 YALE L.J. at 1265, not by the makeup of any individual team. It may have once been that requiring the superior female athlete to play on the girls' or women's team was to remove all possibility of developing her skills to the highest level attainable. However, with the advent of Title IX, it may be that required participation on the female team is not always unequal treatment. Indeed, with more attention being paid to women's sports in general and with a nearer approach to equality as provided in 45 C.F.R. sec. 86.41(c), the opportunities for the outstanding female athlete to excel are enhanced. Separate teams may to a large extent aid in this equalization not only because they provide more opportunities but also because they make monitoring of the opportunities provided easier.

Our understanding of what constitutes unconstitutional discrimination on the basis of sex has become more sophisticated through the years as a result of repeated scrutiny by the courts. The Supreme Court has now clearly held that in most cases of alleged sex discrimination it is equal protection which provides the standard for judicial scrutiny, *Craig v. Boren*, 429 U.S. at 197, 97 S. Ct. at 456, not due process. A regulation that discriminates may not be upheld where sex is not a legitimate, accurate proxy for existing differences. *Id.* at 204, 97 S. Ct. at 460. Once a law is found to make a distinction on the basis of sex, the burden shifts to the defendants to prove the rule bears a fair and substantial relationship to an important state objective. *See, e.g., id.* at 197-204, 97 S. Ct. at 456-460. However, in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist. *See Caban v. Mohammed*, 441 U.S. 380, 398, 99 S. Ct. 1760, 1771, 60 L. Ed. 2d 297 (1979) (STEWART, J., dissenting). When considering the constitutionality of Title IX and its regulations, a blanket requirement of one team at each age level might result in male dominance of all teams and cause a return to pre-Title IX conditions, a result completely at variance with the statute's purpose. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193, 202, 99 S. Ct. 2721, 2727, 61 L. Ed. 2d 480 (1979). It is desirable to maximize the opportunities for individual women, but a requirement that boys play only on boys' teams while girls may compete either with the boys or in an all-girls' program (as they wish) might have a similar undesirable effect on the fledgling women's athletic programs; women's athletics may be significantly harmed if the best female competition is lost to the boys' program.

Although the District Judge held sec. 86.41 unconstitutional, no party urged that position and no evidence was offered on that issue. The appellees do not ask for such a declaration here. The Department of Health, Education, and Welfare, which promulgated the regulation, is not a party to this lawsuit. The District Court suggested some arguments for and against its constitutionality. However, that discussion was not

necessary to the question before it, and we believe it inappropriate for this court to make any ruling on the matter at this time on a motion for summary judgment. The issue can only be properly resolved upon a complete record and a full presentation of all views. As the dissent repeatedly makes clear, the present record is wholly inadequate to answer the difficult questions raised by the constitutional issue. Thus, even were we to agree with the dissent that it is necessary to reach the constitutional issue, we would not decide it with this case in its present posture. An abstract determination of whether unidentified students are denied equal athletic opportunity could cause a result repugnant to the statute's purpose and unnecessary under the Constitution. Permitting recipients to exercise their discretion to the extent permitted by the regulation is more likely to bring about the statute's goal of equal athletic opportunity. Title IX itself aids recipients in this through the regulations which interpret its purpose and set out a reasonable test for compliance with the law.

Accordingly, for the reasons stated above, we reverse the judgment of the District Court which held that 45 C.F.R. sec. 86.41 is unconstitutional. Appellees are entitled, however, to an injunction enjoining the OHSAA from enforcing Association Rule I sec. 6. We remand to the District Court for further proceedings consistent with this opinion and particularly for a determination of whether the state defendants are proper parties to be enjoined. Costs are awarded to plaintiffs-appellees against appellant the OHSAA.

R. JONES, Circuit Judge, concurring in part and dissenting in part.

In my view, the constitutionality of OHSAA Rule 1, sec. 6 denying the Yellow Springs school district the opportunity to allow its female middle school students to play on the presently all-male interscholastic basketball team is plainly raised and must be decided. All parties did raise and argue this constitutional issue in their summary judgment motions submitted to the district court. The case cannot be fully or satisfactorily resolved on the basis of Title IX, 20 U.S.C. sec. 1681 *et seq.*, or its implementing regulation, 45 C.F.R. § 86.41. I would hold that OHSAA Rule 1, sec. 6 violates the equal protection clause of the Fifth and Fourteenth Amendments.

C. Equal Protection

The constitutional question in this case has two parts. First, did the OHSAA rule violate the Fourteenth Amendment in the autumn of 1974 when it deprived Yellow Springs of the opportunity to allow two female middle school athletes to play on the interscholastic basketball team? Second, if so, did the creation of a separate but equal basketball team for the female athletes provide a sufficient remedy for the constitutional violation?

The OHSAA rule must foster an important government objective and be substantially related to that objective in order to withstand scrutiny under the equal protection clause. *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, L. Ed. 2d 397 (1976). The rule is presumed to be valid. *Robinson v. Board of Regents of Eastern Kentucky University*, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982, 94 S. Ct. 2382, 40 L. Ed. 2d 758 (1974). However, the rule may not be premised on archaic stereotypes or generalizations about the role of women. Defendants contend that the rule fulfills two important goals: protecting the safety of female athletes and promoting the full participation of females in sports.

This court has not yet addressed the issue of whether a rule providing for separate basketball teams violates the equal protection clause. In *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977) (*per curiam*), the court held that the equal protection clause did not prohibit different basketball rules for females than males. For the purpose of the case, the court assumed that separate basketball teams were constitutional. No evidence of intentional sex discrimination or of discrimination in services and facilities was found.

In *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973), this court affirmed a preliminary injunction which struck down a Michigan High School Athletic Association rule prohibiting female students from competing on the high school tennis team, a noncontact sport. Because the language of

the injunction could be read to enjoin the application of the rule to contact sports as well as noncontact sports, and because only a noncontact sport was in controversy, the injunction was modified to cover only noncontact sports. Hence, this court specifically reserved the question of separate teams in contact sports.

Despite the dearth of helpful precedent in our circuit, several other courts have confronted equal protection attacks on rules in contact sports. In *Fortin v. Darlington Little League*, 514 F.2d 344 (1st Cir. 1975), the court held narrowly that 8 to 12-year old girls must be allowed to play little league baseball. The defendants' justification of safety could not save the "boys-only" rule, because boys of all physical condition were permitted to play. Also, the evidence did not support a finding of material physical differences between boys and girls of that age.

Two district court in this Circuit have addressed the question of female participation on "male teams" in contact sports. In *Carnes v. Tennessee Secondary School Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976), a preliminary injunction issued against the enforcement of a rule prohibiting high school women from playing varsity baseball. The Association's rationale of safety was held to be insubstantial, as men highly prone to injury could play. A second justification of protecting female sports teams from male intrusion was found not applicable, because the high school did not have a women's baseball team. Questioning the reasonableness of classifying baseball as a contact sport, the district judge assumed that the sexes could be separate for contact sports.

In *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974), the district court granted a temporary restraining order against a rule of the Cleveland Brown's Muny Football League which prohibited girls from playing. The district judge emphasized that defendants had not presented any evidence showing that the plaintiff herself was physically incapable of playing football against boys.

Other district courts have considered the issue at hand in a very thoughtful fashion. In *Leffel v. Wisconsin Interscholastic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978), the district court held unconstitutional an Association rule prohibiting coed teams in high school. The high school did not have separate female teams in baseball and tennis. There was a separate female swimming team. The district court held that female athletes must be allowed to compete for positions on the varsity team where there is no separate female team. The district court declared that a school cannot absolutely deny females the opportunity to compete in contact sports when males have that opportunity. Finding that the plaintiffs did not allege that defendants intentionally imposed different levels of competition between male and female teams in the same sport, the district court also ruled that plaintiffs' claim did not raise the issue of different levels of competition. Further, the district court held that plaintiffs' demand for relief was satisfied by separate female programs providing comparable facilities. Therefore, it did not address the issue of whether the maintaining of separate female teams violates the equal protection clause.

In *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977), the district court struck down a Colorado High School Activities Association rule which prohibited high school women from participating in soccer, a contact sport. The state justification of safety was discredited because criteria for playing had not been established for men. The district court also noted that the range of different physical ability among individuals of both sexes was greater than the average difference between the sexes. The district court called the rule simply "patronizing protection" for women. However, the district court, in discussing a remedy, determined that a "separate but equal" female program in soccer would suffice. It distinguished *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), stating that confining the female athletes to separate programs would not stigmatize them. However, since both parties agreed that "separate but equal" teams were constitutionally sufficient and were the best remedy for the female athletes, the district court did not expressly decide the constitutional validity of "separate but equal" teams.

One other court has discussed extensively the equal protection question in the context of noncontact sports. In *Brenden v. Independent School District 742*, *supra*, the Eighth Circuit held unconstitutional a Minnesota State High School league rule barring female students from competing with male students in tennis, cross-country skiing, and cross-country running. The high school did not have female teams in these sports

and both plaintiffs were excellent athletes who were able to compete against males in these sports. The League argued that the rule served to ensure that persons with similar qualifications competed and that physical differences make it impossible for males and females to compete equally. The Eight Circuit found no basis in the record for the League's assumption and declared that generalizations would not suffice to deny qualified individuals the opportunity to compete. Also, any adverse effect on female opportunities in sports resulting from the invalidation of the rule was found too speculative to justify the rule.

As noted earlier, the defendants proffer two government objectives for the OHSAA rule: protecting the safety of female athletes and promoting the full participation of women in sports. I assume that these objectives are legitimate and important. However, the means chosen to implement these goals, the OHSAA rule, is not substantially related to them. As discussed above, the courts have strongly and uniformly rejected both justifications where a separate female team has not been provided. OHSAA has not offered any evidence in support of its justifications.

The safety rationale is not persuasive. Though not all females may have the skills, strength, and stamina to compete with males in contact sports, some females, like the two middle school girls in Yellow Springs, do have the physical ability. Their ability was proven on the basketball court when they competed for positions on the team. Since the physical ability of athletes to play on interscholastic teams is determined on the basis of individual tryouts, there is no reason to use sex as a proxy for physical ability. *Orr v. Orr*, 440 U.S. at 280-82, 99 S. Ct. at 1112-13. Testimony in the record shows that middle school students of both sexes are approximately the same size and have the same skills, with much greater differences showing within the sexes than between them. Furthermore, OHSAA apparently has not issued criteria governing the physical conditions of males to play basketball. Thus any male student, regardless of physical condition, is allowed to compete. In the complete absence of record evidence supporting the safety justification, I would not hold that the OHSAA rule is substantially related to that objective.

The second objective of promoting the full participation of women in sports is patently not served when female athletes are denied any opportunity to play basketball. In the context of an opportunity to play on a separate female team, this objective actually contains three arguments. The first argument is that allowing the top female athletes to play on the "male team" would significantly harm the female athletic program. The second contention is that, if females are permitted to play on male teams, then males must be allowed to play on female teams. The result it is argued, would be male dominance in female sports programs, denying women any opportunity to compete in interscholastic sports. The third argument is that schools will cut back on female athletic programs by fielding just one "open team" in each sport.

Defendants' arguments are not supported at all in the record. Their first argument rests on sheer speculation. Plaintiffs could as easily contend that the participation of top female athletes with men will enhance the reputation and glamour of female athletics and encourage more women to participate. Plaintiffs might say that, though a team may lose its top player, the overall effect on the program would be positive, by calling attention to the abilities of female athletes and consequently raising fan interest and funding. Of course, neither speculation is accepted as fact.

Similarly the record does not support a finding that enjoining enforcement of the OHSAA rule will result in male domination of female sports programs. No court has adopted the Association's reasoning. One district court has opined, relying on *Califano v. Webster*, 430 U.S. 313, 97 S. Ct. 1192, 51 L. Ed. 2d 360 (1977), that separate and exclusive female teams are constitutionally permissible, so that women would have the choice of competing on an "open team" or a single-sex female team. *Games v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I.), *vacated and dismissed as moot at the time of appeal*, 604 F.2d 733 (1st Cir. 1979).... It reasoned that the Constitution permits compensatory benefits to correct past discrimination, but does not permit the use of overbroad rules based on archaic stereotypes. *See* Note, *Sex Discrimination and Intercollegiate Athletes: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1274 (1979); T. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 55, 59 (1977). Of course, I did not express an opinion on the right of male athletes to play on female teams, since this issue is not in controversy. My

discussion is aimed only at illustrating the large extent to which the defendants' second justification rests on speculation.

The record indicates that Yellow Springs is fully committed to developing a sports program for its female athletes. Not a shred of evidence suggests that Yellow Springs would use a ruling permitting mixed sex teams to cut back on its program for female athletes. Moreover, Title IX, as implemented in 45 C.F.R. § 86.41(c), mandates each school to provide an equal opportunity for women to participate in sports. 44 Fed. Reg. 71413 (1979) (Policy Interpretation of § 86.41(c)). *See* Cox, *supra* at 44-45. *Cf.* 45 C.F.R. § 80.3(b) (Title VI regulations on affirmative action). OHSAA recognizes that an equal opportunity is not offered if one open team is organized in each sport and the female players are not capable of making the team.

I would hold that the defendants have not demonstrated that the OHSAA rule is substantially related to either proffered government objective. Therefore, the two female basketball players were entitled under the equal protection clause to play on the "male" interscholastic basketball team in November 1974, when Morgan Middle School did not have a female interscholastic basketball team. The OHSAA rule violated the Constitution by prohibiting Yellow Springs from affording these players that opportunity.

Yellow Springs formed a female interscholastic basketball team in January 1975. Consequently, the question of whether organizing this separate team was an adequate remedy for the constitutional violation arises. The cases discussed above settle that the equal protection clause requires at least an equal opportunity for female athletes to play any contact sport, once a school decides to offer that sport. No facts in the record provide a basis for determining the comparability of the female interscholastic basketball program at Morgan Middle School to the male program in, for example, coaching, facilities, uniforms, funding, or schedules. Ordinarily, defendants would bear the burden of proving that the separate programs were equal. Because plaintiffs request an order permitting them to put female players on the all-male interscholastic team, the equality of the male and female programs is inconsequential. I will assume that the two programs are equal. Therefore, the issue for resolution is plainly posed: does the equal protection clause prohibit an association from denying qualified female athletes the opportunity of playing on the varsity team in contact sports, when the school offers a "separate but equal" program for female athletes in those sports? I conclude that the equal protection clause requires schools to give qualified female competitors the opportunity to play on the "male" interscholastic varsity team.

The defendants' justifications for their rule requiring separate tams in contact sports are totally unsupported in the record. Therefore, to reach my conclusion that the "separate but equal" basketball program at Morgan Middle School contravenes the equal protection clause, I only need to find a constitutional harm in offering separate sports programs.

Two district courts have expressed in *dicta* or assumed the conclusion that "separate but equal" programs are constitutionally sufficient. In *Leffel v. Wisconsin Interscholastic Ass'n, see supra*, the district court held that plaintiffs must allege that defendants intentionally imposed different levels of competition on the male and female teams in order to state a claim. In *Hoover v. Meiklejohn, supra*, the district court distinguished *Brown v. Board of Education, supra*, and declared the female athletes would not suffer a stigma by being restricted to separate teams. I decline to follow the reasoning or assumed result of either district court.

In my view, the question is whether or not separate teams will provide female athletes with an equal opportunity to compete in sports. The focus must be placed on the quality of the competitive experience. The indisputable fact is the quality of competition among some male interscholastic teams is higher than among some female interscholastic teams. The two female basketball players at Morgan Middle School decided that they could best develop their skills by playing on the "boys team." By requiring separate male and female teams, the defendants have imposed a lower level of competition upon female athletes. Though many female athletes will gain a very beneficial experience in competing on a separate female team against other female teams, in our case the female athletes will not be sufficiently challenged by the lower level of competition. Top female athletes need to complete on the best interscholastic team in order to achieve their peak performance. When female athletes are denied this opportunity by being restricted to a lower level of competition, equal

opportunity is not provided. *See Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n*, 18 Pa. Commwealth 45, 334 A.2d 839, 842 (1975) (decided according to Pennsylvania Constitution). The equal protection clause demand that female athletes not be denied the opportunity to play on the best interscholastic team simply because of their sex. An individualized determination of a female athlete's ability is required.

Contrary to *Hoover*, I believe a stigma may attach when qualified female athletes are not allowed to compete on teams with male athletes solely because they are female. *See Brenden v. Independent School District* 742, 477 F.2d at 1296-97.... This characterization would be the sort of archaic and harmful stereotype which the equal protection clause forbids.

Sex, like, race, is an immutable characteristic which bears no relationship to the actual ability of individual female athletes to compete in sports. *Frontiero v. Richardson*, 411 U.S. 677, 686-87, 93 S. Ct. 1764, 1770, 36 L. Ed. 2d 583 (1973) (opinion of BRENNAN, J.). Also like black citizens, women have suffered from a long history of discrimination necessitating the enactment of the Nineteenth Amendment and a number of remedial statutes. *Id.* at 684-85, 93 S. Ct. at 1769. The discrimination against women has extended into the sports area.... Chapter I of a comprehensive history of sex discrimination in sports, which the United States Commission on Civil Rights recently published, is included as an Appendix to my opinion. UNITED STATES COMMISSION ON CIVIL RIGHTS, MORE HURDLES TO CLEAR (1980) (Clearinghouse Publication No. 63). The Supreme Court's reasoning in *Brown v. Board of Education, supra*, may prove to be equally applicable to the intentional separate of female athletes form competition with male athletes:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely never to be undone. 347 U.S. at 494, 74 S. Ct. at 691.

However, a decision on the sigma question must await a developed factual record and argument by the parties in another case.

Equal participation in sports by female athletes would be a major step in overcoming the outmoded notions of female roles still prevalent in our society. I cannot overlook the impact of education and athletics as "a principal instrument in awakening the child to cultural values, in preparing him(or her) for later professional training, and in helping him (or her) to adjust normally to his (or her) environment." *Id.* at 493, 74 S. Ct. at 691. Sex discrimination in sports is debilitating to the individual athlete whose development and career is stunted and to women as a whole who labor under the burden of traditional nations of their role in society.

Therefore, I would hold that restricting the female athletes to a "separate but equal" basketball program at Morgan Middle School transgresses their constitutional right to an equal opportunity to participate in sports. Further, I would hold that defendants have completely failed to demonstrate that the separation or classification required by the OHSAA rule is substantially related to an important government objective.

* * *

Questions and Notes

1. Does Title IX mandate mixed gender teams as a way of assuring female athletes equal opportunities?

2. Was Judge Kennedy unduly biased in her reasoning? Is the reasoning behind the opinion valuable as precedent?

3. If Yellow Springs has a female volleyball team but no male counterpart, does the Court's ruling mean that boys must be allowed to play on the team? What about females on the boys' wrestling team? What are the limitations on the Court's ruling if any?

4. There is now a female in what is known as amateur boxing in America. *See She Has A Fight On Her Hands*, BOSTON GLOBE, First Edition, Sports Section, Jan. 21, 1982. The women in these matches have all boxed men at some time. The Golden Gloves competition now has a division which only involves women. It would of course be a great financial boon if women could box men and have a realistic chance of winning. Should this be allowed? Would an action to compel such an event be successful if brought by a female plaintiff asserting Title IX in the amateur ranks? For a comprehensive connection to latest rage in ladies pugilism see http:www.femboxer.com/.

Section 4: Disability Issues - Should Amateur v. Professional Status Have A Significant Bearing On Decisions

A significant amount of recent litigation has focused on the right of the disabled to participate in certain competitive sports. While it is universally agreed upon that participation in sports is generally beneficial to the disabled, the more pointed question is whether that participation should be limited to special circumstances for those similarly challenged or whether they may have a right to play with non-disabled athletes. Most laymen are familiar with events like wheelchair basketball leagues and the Special Olympics. However, these competitions are generally deemed to be arranged for the sake of the severely disabled. For those with relatively mild, yet undeniable disabilities, questions arise as to where the line should be drawn in determining the athlete's eligibility to continue to participate in the mainstream. A common example is the paired organ deficiency. An athlete may have a problem with reduced or no usage of one ear, eye, finger, foot, etc. At what point should the athlete be prevented from playing?

A common place for lawyers to draw the line is at liability. More specifically, the more liability that can be foisted upon the shoulders of the prospective disabled participant, the more likely that athlete will be able to play. In accord with that divide is the natural separation between amateur and professional athletics. There have been a number of record setting athletes in both team and individual professional sports who suffered from noticeable physical handicaps. The record for the longest field goal in football is still held by a disabled athlete who kicked it with half a foot. A recent professional baseball pitcher played although he had only one arm. In football and hockey a number of players participate though they are color-blind, partially deaf or suffer from any number of internal maladies.

However, in high school and college sports there are few athletes participating in mainstream competitions who suffer from such an array of physical deficiencies. These institutions overtly express a primary concern for the well being of the athlete. While this may be true, there is an obvious concern with the heightened potential for tort liability that these institutions face should an athlete's condition become aggravated during play. The recent litigation in this area is a result of prospective athletes aggressive use of the statutes drafted to prohibit discrimination against the disabled. Primary amongst these statutes are the American with Disabilities Act and the Rehabilitation Act of 1973.

JOHNSON v. FLORIDA HIGH SCHOOL ACTIVITIES ASSOCIATION, INC.

899 F. Supp. 579 (M.D. FL 1995)

BUCKLEW, District Judge.

This Cause is before the Court on Plaintiff's Motion for Preliminary Injunction (Doc. No. 6, filed August 25, 1995). . . .

* * *

In order for the Plaintiff to prevail on his motion for preliminary injunction, the Plaintiff must establish: (1) a substantial likelihood of prevailing on the merits; (2) an irreparable injury if the injunction does not issue; (3) a threatened injury to him that is greater than any damage the preliminary injunction would cause to FHSAA; and (4) the absence of any adverse effect on the public interest if the injunction issues. (Citations omitted.)

Facts

The plaintiff, Dennis Johnson, is a nineteen year old senior at Boca Ciega High School in St. Petersburg, Florida. At approximately nine months, Dennis contracted meningitis, losing all hearing in one ear and substantially all hearing in the other. Because of this disability, Dennis' parents elected to wait a year before enrolling him in kindergarten. According to Dennis' mother, Gail M. Johnson, the decision to wait a year was made by her and her husband and was based upon their beliefs that Dennis was not "up to par" with the other children his age. . . .

Dennis progressed adequately in kindergarten. However, the school system decided to hold Dennis back in first grade because of his performance in reading and language. Once again, Dennis' deficiencies were attributed to his hearing impairment. Dennis was placed in special education classes in second grade and remained there until his sophomore year, when he entered Boca Ciega High School. He is provided an interpreter, notetaker and itinerant teacher at Boca Ciega. Additionally, just prior to entering eighth grade, Dennis lost all hearing in both ears.

Although a senior in high school, Dennis turned nineteen on June 29, 1995. According to the rules of the FHSAA, Dennis is ineligible to participate in high school athletics. FHSAA By-Law 19-4-1. Dennis has played football and wrestled for the last three years. Unlike most of the other athletes, however, Dennis did not start playing organized sports until he entered high school. Dennis contacted the FHSAA about receiving a "hardship" exception due to the fact that Dennis' "ineligible age" was a result of his disability. The FHSAA responded that the Executive Committee of the FHSAA "does not have the authority to waive the age eligibility rule." Doc. No. 1, Exhibit H. The Court notes, however, that the rules of the FHSAA do provide for "undue hardship" exceptions as to the FHSAA's other rules, but that the age requirement is "unwaivable" because it is deemed an essential eligibility requirement by the FHSAA. *Id.* Thus, Dennis is currently precluded from participating in high school athletics. Additionally, the Court notes that if Dennis did participate, the rules of the FHSAA would result in Boca Ciega High School forfeiting those games in which Dennis participated. FHSAA By-Law 19-1-2.

Dennis is five foot nine inches and weighs 250 pounds and plays defensive tackle. Last year he weighed approximately 230 pounds and played the same position. According to the affidavit of Dennis' coach, Dennis is not considered a "star" player and is not "larger" than the other players. Additionally, a review of the rosters from two of Boca Ciega's opponents reveals that while Dennis is large, he is not the largest student to play defensive line. The Court notes that one of Boca Ciega's opponents lists a junior lineman as six foot four inches and 260 pounds. Additionally, as a wrestler, Dennis wrestles in the heavy weight division. This division limits competitors to a maximum of 275 pounds.

Discussion

(A) Substantially Likelihood of Prevailing on the Merits

Dennis' claim is premised upon the Rehabilitation Act, 29 U.S.C. § 794 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq. In order to establish a claim under the Rehabilitation Act, the Plaintiff must prove: (1) he has a disability as defined by the Act; (2) he is "otherwise qualified" to participate in interscholastic high school athletics as regulated by the FHSAA or that he may be "otherwise qualified" via "reasonable accommodations;" (3) he is being excluded from participating in interscholastic high school athletics solely because of his disability; and (4) the FHSAA receives federal financial assistance. *Sandison v. Michigan High Sch. Athletic Ass'n*, 863 F. Supp. 483, 488 (E.D.Mich.1994).

In order to establish a claim under Title II of the ADA, 42 U.S.C. § 12132, the Plaintiff must prove: (1) the FHSAA is a "public entity;" (2) he is a "qualified individual with a disability;" and (3) he has been excluded from participation from or denied the benefits of the activities of the public entity. Alternatively, in order to establish a claim under Title III of the ADA, 42 U.S.C. § 12182, the Plaintiff must prove: (1) he is disabled; (2) the FHSAA is a "private entity" which operates a "place of public accommodation;" and (3) he was denied the opportunity to "participate in or benefit from services or accommodations on the basis of his disability," and that reasonable accommodations could be made which do not fundamentally alter the nature of FHSAA' accommodations. *Id.*

As for the requirements under the Rehabilitation Act, FHSAA concedes all elements except for the "otherwise qualified" requirement. Citing to the Eighth Circuit opinion in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir.1994), FHSAA contends that the Plaintiff is not "otherwise qualified" and that no "reasonable accommodations" can be made so as to make the Plaintiff "otherwise qualified." Specifically, FHSAA contends that the Plaintiff is too old and that the "reasonable accommodation" of waiving the age requirement fundamentally alters the purpose of the rule and is therefore an "unreasonable" accommodation. Accordingly, since waiving the age requirement is the only available "accommodation," and since this "accommodation" is unreasonable, the Plaintiff is not "otherwise qualified." Thus, he cannot participate in high school sports.

As for Plaintiff's Title II ADA claim, FHSAA argues that it is not a "public entity" as defined by section 12131(1) of the ADA and that the Plaintiff is not a "qualified individual with a disability" as defined by section 12131(2) of the ADA. Alternatively, FHSAA challenges Plaintiff's Title III claim, arguing that as a private entity, FHSAA does not operate a place of "public accommodation" as defined by section 12181(7) of the ADA. Additionally, FHSAA contends that no "reasonable accommodation" can be made because waiving the age requirement constitutes a "fundamental alteration." Once again, FHSAA cites to *Pottgen*.

In deciding whether the Plaintiff has established "a substantial likelihood of prevailing on the merits," the most important issue is the "otherwise qualified" requirement as supplemented by the "reasonable accommodation" requirement. The Court rejects FHSAA's argument that FHSAA is not subject to the ADA. The Court finds that the FHSAA is a "public entity" as defined by the ADA. The Court notes that section 12131(1)(B) of the ADA defines "public entity" as any "other instrumentality of the state ... or local government." The FHSAA is a non-profit corporation which regulates the interscholastic activities of Florida high school students. As the regulatory arm for Florida high schools, its actions have been deemed state actions. *The Florida High Sch. Activities Ass'n, Inc. v. Thomas*, 434 So.2d 306, 308 (Fla.1983). The *Thomas* court specifically noted that since the FHSAA has "exclusive authority and responsibility for controlling all aspects of interscholastic activities in both public and private high schools throughout Florida," its actions constitute state action. *Id.* Thus, since its actions are deemed state action, it follows that the FHSAA is an "instrumentality of the state" and is therefore a "public entity."

* * *

The Court also finds that the Plaintiff is a "qualified individual with a disability." Unlike the Rehabilitation Act, the ADA specifically limits the definition of a "qualified individual with a disability." Section 12131(2) provides that a "qualified individual with a disability" means:

> an individual with a disability who, with or without reasonable modifications to the rules, ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.
>
> * * *

As previously noted, in deciding whether the Plaintiff has established "a substantial likelihood of prevailing on the merits" as to both the Rehabilitation Act claim and the ADA claims, the most important issue is the "otherwise qualified" requirement as supplemented by the "reasonable accommodation" requirement. Boiled down, the dispositive issue before the Court is whether waiving the age requirement constitutes a "fundamental alteration" to the purposes of the rule. Resolution of this issue requires an examination of the purposes of the age requirement as applied to the instant case and as noted by the courts in *Pottgen* and in *Sandison*.

The purposes of the age requirement as promulgated by the FHSAA are two-hold. First, the rule promotes safety. By prohibiting players who turn age nineteen prior to September 1st of the current year from participating in interscholastic athletics, the rule liberally regulates the size and strength of the players. The second purpose is fairness, i.e. to create an even playing field. The rule prevents schools from "redshirting" their players so as to build a better program. These are admittedly salutary purposes.

In *Pottgen*, the Eighth Circuit provided a simple three step analysis as to the "otherwise qualified" requirement under the Rehabilitation Act. First, the court articulated the general rule that the disabled individual must be "otherwise qualified." In other words, the disabled individual must meet all of the essential eligibility requirements in spite of his disability. Translated to the instant case, Dennis must be under age nineteen on September 1, 1995. Second, the court noted that the rule had an exception. If the disabled individual cannot meet all the essential eligibility requirements because of his disability, then the Court must determine whether "reasonable accommodations" might be made thereby enabling the disabled individual to become "otherwise qualified." *Id.* As applied to Dennis, FHSAA must waive the age requirement. Third, the court noted that there was an exception to the exception. An "accommodation" is not "reasonable" if it "fundamentally alters the nature of the program." The Pottgen court went on to hold that the age requirement was a fundamental eligibility requirement which could not be waived. Id. Thus, since no other "reasonable accommodation" was available, Pottgen failed the "otherwise qualified" requirement. Accordingly, the Eighth Circuit reversed the district court, holding that it was error to grant the preliminary injunction.

A review of the *Pottgen* opinion, however, reveals that the Court provided no analysis as to the relationship between the age requirement and the purposes behind the age requirement. Rather, the court accepted the Missouri State High School Activities Association's assertion that the age requirement was an essential eligibility requirement. . . .

* * *

Unlike the *Pottgen* court, the district court in *Sandison* addressed the purposes of the age requirement and whether those purposes would be undermined if the age requirement was waived for the particular plaintiffs. In concluding that the age requirement could be waived, the court stressed that waiving the age requirement would not thwart those purposes. As in the instant case, the purposes of the age requirement were safety and fairness. The *Sandison* court specifically noted that the goal of safety was not thwarted because the plaintiffs sought to participate in two non-contact sports, cross-country and track. *Sandison*, 863 F. Supp. at 490. Additionally, since the plaintiffs were mid-level competitors and not "star" players, the court stated that their participation would not "provide any unfair competitive advantage to their respective teams." *Id.* Thus, the court concluded that waiving the age requirement constituted a "reasonable accommodation" by which the plaintiffs became "otherwise qualified."

The Court finds the analysis of the majority in *Sandison* and the dissent in *Pottgen* persuasive. The fact that the FHSAA deems the age requirement essential does not make it so. Rather, the relationship between the age requirement and its purposes must be such that waiving the age requirement in the instant case would necessarily undermine the purposes of the requirement. As the dissent in *Pottgen* stated, "if a rule can be

modified without doing violence to its essential purposes . . ., it [cannot] be 'essential' to the nature of the program or activity...." (Citations omitted.)

In the instant case, the Court finds that the purposes of the age requirement are not undermined by allowing Plaintiff to participate in interscholastic athletics. The Court emphasizes that while the Plaintiff is large, he is not the largest football player playing his position. There are individuals larger than him on the playing field. Thus, accepting the fact that football is a contact sport in which injuries do occasionally occur, the Court finds that allowing this individual to play does not facilitate or exacerbate the potential for injury. Additionally, the weight divisions in wrestling eliminate any safety concern as to that sport. Moreover, the Court finds that Boca Ciega High School does not gain an unfair advantage through the play of the Plaintiff. The Court notes that the Plaintiff is considered a mid- level player and not a "star." Furthermore, the Plaintiff is no more experienced than the other players. Rather, in comparison to some players he is less experienced. The Plaintiff has only played organized football for three years.

In conclusion, the Court finds that the Plaintiff has demonstrated a "likelihood of success on the merits." The Plaintiff has established the essential elements required to assert claims under the Rehabilitation Act and the ADA. Specifically, the Court finds that waiving the age requirement in the instant case does not fundamentally alter the nature of the program. Allowing Dennis Johnson to participate in interscholastic athletics in no way undermines the purposes of safety and fairness. The Court stresses that its holding is limited to the facts before it.

(B) Irreparable Injury if the Injunction Does Not Issue

The Court finds that irreparable injury will result to the Plaintiff if the injunction is not granted. There is no doubt that playing interscholastic athletics has changed the Plaintiff's life. As a direct result of his participation, the Plaintiff has gained friends and confidence. Prior to playing sports he had few hearing friends. Since playing he has become more social and has been recognized not as a deaf student, but as a student who participates in high school athletics. During the hearing, the Plaintiff specifically commented on how important athletics is to his life. He enjoys showing people that a deaf person can play sports. Given that this is the Plaintiff's senior year, to prohibit him from playing would undermine any gains he has made.

(C) A Threatened Injury to Him that is Greater than Any Damage the Preliminary Injunction Would Cause to FHSAA

There is no risk of harm to the FHSAA or others if the injunction is issued. As previously noted, allowing the Plaintiff to participate does not create an additional safety concern. His presence alone does not exacerbate the potential for injury. Additionally, granting the injunction does not subject the FHSAA to "numerous frivolous lawsuits" as it suggests. Rather, the Court's granting of the injunction is limited to the narrow case before it. . . Accordingly, the Court finds that the threatened injury to the Plaintiff is greater than any damage or injury the FHSAA might suffer as a result of the issuance of the injunction.

(D) The Absence of any Adverse Effect on the Public Interest if the Injunction Issues

The Court finds that the public interest is advanced by issuing the injunction and allowing the Plaintiff to participate in interscholastic athletics. Congress' concern to eliminate intentional and benign discrimination against disabled individuals is evident in the findings and purpose of the ADA. 42 U.S.C. § 12101. The purpose of the ADA and the Rehabilitation Act is "to include persons with disabilities in society equal to those without disabilities by addressing discrimination against persons with disabilities." *Sandison*, 863 F. Supp. at 491. Thus, there is a significant public interest in eliminating discrimination against individuals with disabilities and issuing the injunction advances this interest. The injunction enables the Plaintiff to enjoy high school fully and to show to his fellow classmates that deaf persons can play sports.

Conclusion

Plaintiff has established the four elements necessary in order for the Court to issue an injunction. . .

BOWERS v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

(Dist. Ct. New Jersey, 1997) 974 F. Supp. 459

ORLOFSKY, District Judge.

Plaintiff, Michael Bowers, has moved for a preliminary injunction pursuant to FED. R. CIV. P. 65. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331, 1343. The principal issue raised by Plaintiff's motion, an issue of first impression in this Circuit, is whether Plaintiff, who is "learning disabled," can show a reasonable likelihood that he will succeed on his claim that his classification by the National Collegiate Athletic Association ("NCAA") as a "nonqualifier" within the meaning of the NCAA bylaws, constitutes illegal disability-based discrimination in violation of the Americans with Disabilities Act. 42 U.S.C. §§ 12101, et seq.

* * *

I. Factual Background

A. The NCAA Bylaws and the Certification Process

The National Collegiate Athletic Association ("NCAA") is a private unincorporated association comprised of approximately 1200 colleges and universities. The general policies of the NCAA are established by its members at annual conventions. The NCAA Constitution, Bylaws and other governing legislation are set forth in the NCAA Manual, which is published annually and distributed to all member institutions.

The NCAA bylaws require, among other things, that all NCAA member institutions establish minimum academic eligibility standards for all prospective students who wish to participate in intercollegiate athletics at the institution and receive athletic scholarships from the institution during their freshman year. The eligibility requirements are designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student athletes. In furtherance of these goals, the NCAA requires that any prospective student who wishes to participate in intercollegiate athletics at a member institution and receive athletic scholarships from the member institution during his or her freshman year be certified as a "qualifier" by the NCAA Initial Eligibility Clearinghouse (the "Clearinghouse").

In order to be certified as a "qualifier," NCAA bylaws provide that a student must graduate from high school, pass at least thirteen classes in what the NCAA defines as a "core course," with a minimum grade-point average that varies based on the strength of the student's standardized test score. The NCAA bylaws define "core course" as a recognized academic course that offers fundamental instructional components in a specified area of study.

The definition of "core course" contained in the NCAA bylaws expressly excludes courses taught below the high school's regular academic instructional level, including remedial, special education or compensatory courses, regardless of the content of the course. The bylaws do provide, however, that special education courses for the learning disabled may fulfill the core-curriculum requirements if the student's high school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses. The same required core courses and grade point average must nevertheless be achieved by a learning disabled student.

A student seeking certification by the Clearinghouse must pay a fee and submit to the Clearinghouse an application along with a release form. Upon receiving a student's application and release form, the Clearinghouse applies the NCAA's initial eligibility requirements and certifies the status of a prospective freshman student-athlete on a form known as a "48-C". Although preliminary certifications may be made while a student is still in high school, the Clearinghouse does not make a final certification for a student until it receives the student's final high school transcript after graduation.

In determining whether a particular course constitutes a "core course" within the meaning of the NCAA bylaws, the Clearinghouse first looks to the high school's "48-H Renewal Form" on which each high school is asked to list all courses which school officials believe meet the NCAA "core course" requirements.

If a particular course is not listed on the school's "48-H Renewal Form," the Clearinghouse may nevertheless approve the course if the school has submitted sufficient documentation establishing that the course deserves "core" status.

In the event the Clearinghouse determines that a particular student should not be certified as a "qualifier," the bylaws further authorize the NCAA to grant a waiver of the academic eligibility requirements "based on objective evidence that demonstrate circumstances in which a student's overall academic record warrants the waiver of the normal application" of the requirements. Waiver requests are considered by the NCAA Council Subcommittee on Initial-Eligibility Waivers (the "Subcommittee"). Generally, the Subcommittee will review any materials that the student wishes to submit in support of his or her application for a waiver. In the case of a student seeking a waiver based on a learning disability, or a "LD Waiver," the Subcommittee will review, among other things, the student's Individual Education Program ("IEP"), as well as the content of the "non-core" courses taken by a student.

Although the bylaws preclude a student who neither obtains "qualifier" status, nor obtains a waiver of the initial eligibility requirements, from participating in intercollegiate athletics and receiving an athletic scholarship during the freshman year, the bylaws do not preclude such a student from receiving academic or need-based financial aid or from participating in athletics and receiving athletic scholarship funds from a member institution during his or her remaining college years.

B. Michael Bowers

Michael Bowers is presently a freshman at Temple University in Philadelphia, Pennsylvania. From the time Bowers was in second grade, until his graduation from Palmyra High School in Palmyra, New Jersey, in June 1996, he received special education and related services to accommodate a learning disability. Many of the courses that Bowers took while enrolled at Palmyra High School ("Palmyra") were special education courses, labeled as "SE."

Notwithstanding Bowers's learning disability, he is by all accounts a talented football player. Bowers was on the Palmyra High School football team during all four years that he was enrolled at Palmyra. As such, in September 1995, Bowers submitted an application and student release form to the Clearinghouse, seeking certification as a "qualifier" in order to participate in athletics and receive an athletic scholarship from an NCAA member institution during his freshman year of college.

* * *

In June 1996, based on the information that it had received from Palmyra, the Clearinghouse concluded that only three special education courses taken by Bowers qualified as "core courses." The Clearinghouse again advised Palmyra that many of the submitted courses "remained questioned" and that the Clearinghouse needed additional information about the courses in the form of tables of contents and syllabi for each course. In July 1996, without receiving any additional information, the Clearinghouse's Final Certification Report classified Bowers as a "nonqualifier," noting that Plaintiff had met only three of the requisite thirteen "core course" requirements.

As a result of his "nonqualifier" classification, Bowers is neither eligible to play intercollegiate football for an NCAA member institution during his freshman year, nor eligible to receive an athletic scholarship from a member institution in his freshman year. Nevertheless, Bowers enrolled at Temple University, an NCAA member institution, as a freshman in January, 1996.

On May 23, 1997, Plaintiff filed a complaint in this Court, alleging that his classification as a "nonqualifier" within the meaning of the NCAA bylaws constituted a violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and the Sherman Act, 15 U.S.C. § 1. Plaintiff seeks both injunctive and monetary relief in his complaint.

* * *

II. Discussion

Before a district court will grant preliminary injunctive relief in this Circuit, the court must weigh the

following four factors: (1) the likelihood of success on the merits; (2) whether the movant will be irreparably injured if relief is not granted; (3) whether the party to be enjoined will suffer irreparable injury if the preliminary relief is granted; and (4) whether the public interest will be served by the preliminary injunctive relief. (Citations omitted.)

A. Likelihood of Success on the Merits of Bowers's ADA Claim

* * *

Title III of the ADA provides in relevant part that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

The Act defines "discrimination" within the meaning of § 12182(a), to include:

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

42 U.S.C. § 12182(b)(2)(A)(i) and (ii).

Thus, a finding of illegal discrimination under either subpart (i) or (ii) of §12182(b)(2)(A) requires the employment of a two-part test. Essentially, a court must first determine whether a defendant either: (i) imposed eligibility criteria that tended to screen out an individual with a disability, or (ii) failed to make reasonable modifications in policies, practices, or procedures, which were necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. If a plaintiff establishes a prima facie case of discrimination by demonstrating either (i) or (ii), the burden then shifts to the defendant to show that, without the use of such eligibility criteria, or by making such modifications, the nature of the good, service, facility, privilege, advantage, or accommodation offered by the defendant would be fundamentally altered.

While NCAA bylaw 14.3.1.3.4, which expressly excludes special education courses from the definition of "core course," may, when viewed in isolation, appear to "screen out or tend to screen out" persons on the basis of their disability, this one bylaw must be viewed in the context of the NCAA bylaws and procedures as a whole. Indeed, the NCAA bylaws, themselves, provide for two alternate avenues by which a learning disabled student who has taken numerous special education courses, that would not otherwise qualify as "core courses," may obtain the status of a "qualifier."

First, the bylaws provide that courses for the learning disabled may fulfill the core-curriculum requirements if the student's high school principal demonstrates that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses.

Second, the bylaws also authorize the NCAA to grant a waiver of the initial academic eligibility requirements "based on objective evidence that demonstrate circumstances in which a student's overall academic record warrants the waiver of the normal application" of the requirements. . . .

In fact, Plaintiff has availed himself of both alternate avenues in hopes of attaining the status of "qualifier." After the Clearinghouse first noted that Bowers had taken several special education courses which would ordinarily not count as courses under Bylaw 14.3.1.3.4, the Clearinghouse requested additional

information from Palmyra on specific course designations that appeared on Plaintiff's transcript. After receiving some information about the courses from the school, the Clearinghouse again requested more specific course information and clarification from Palmyra.

In June 1996, Clearinghouse staff reviewed the additional course information that had been provided by Palmyra High School, and based on this additional information, qualified three courses completed by Plaintiff as "core courses." The Clearinghouse then advised Palmyra that many of the submitted courses "remained questioned" and the Clearinghouse needed additional information about the courses in the form of a table of contents and syllabus for each of the courses. Without receiving any additional information, the Clearinghouse's final Initial Eligibility Certification Report noted that Plaintiff had not met the "core course" requirements necessary to obtain the status of a "qualifier."

Prior to the preliminary injunction hearing in this matter, I instructed the NCAA to consider Bowers's application for a waiver of the initial eligibility requirements pursuant to NCAA Bylaw 14.3.1.7 on an expedited basis. Every waiver request, submitted by or on behalf of a learning disabled student is considered by the NCAA Council Subcommittee on Initial-Eligibility. In considering a waiver application, the Subcommittee evaluates each submission on a case-by-case basis, and looks at the student's overall record during his or her high school career to ascertain if it is sufficiently strong to predict the likelihood of the student's academic success in the first year of college.

In Bowers's case, the Subcommittee considered Bowers's "Clearinghouse file," affidavits from Michael Bowers and Dori Levy, and Bowers's transcript from his first semester at Temple University. The Subcommittee also reviewed his Individual Education Program ("IEP") to gain further information about Bowers's disability and to determine whether the courses in dispute were specifically listed by the student's high school IEP Team as courses necessary to address his disability.

* * *

By filing this lawsuit, Plaintiff is essentially seeking a "second bite" at the waiver which the NCAA has already denied him. In his complaint and accompanying motion for preliminary injunctive relief, Plaintiff asks this Court to order the NCAA to consider all of his special education courses, regardless of their level or content, as "core courses" within the meaning of the bylaws. By doing so, Plaintiff seeks a virtual elimination of the "core course" requirement, rather than merely the "modification" or "accommodation" required by the ADA, which the NCAA already provides.

To count all of Bowers's special education courses as "core courses," without regard to their level or content would require the NCAA to abandon its eligibility requirements. While the ADA requires "evenhanded treatment" of individuals with disabilities, it does not require "affirmative action." *Sandison v. Michigan High School Athletic Association,* 64 F.3d 1026, 1031 (6th Cir.1995).

Indeed, the ADA "does not require the NCAA to simply abandon its eligibility requirements, but only to make reasonable modifications to them." *Ganden v. NCAA,* No. 96-C-6953, 1996 WL 680000, (N.D.Ill. Nov. 21, 1996). Under the ADA, a requested modification is unreasonable if it "would 'fundamentally alter' the nature of the privilege or accommodation to which [a plaintiff] has been denied access." Simply requiring a reduction in the essential eligibility standards is not a reasonable modification. *Pottgen v. Missouri State High School Activities Ass'n,* 40 F.3d 926, 931 (8th Cir.1994).

Eligibility requirements are "essential" or "necessary" when they are reasonably necessary to accomplish the purposes of a program. *Sandison,* 64 F.3d at 1034-1035; *Pottgen,* 40 F.3d at 929. The basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and to assure that those individuals representing an institution in intercollegiate athletics competition maintain satisfactory progress in their education. (Bylaw 1.3). By enacting the initial eligibility requirements, the NCAA seeks to:

> (1) insure that student-athletes are representative of the college community and recruited solely for athletics; (2) insure that a student athlete is academically prepared to succeed at college; and 3) preserve amateurism in intercollegiate sports. (Citations omitted). Moreover,

> the core course requirement serves "the dual interest of insuring the integrity of [a student's] GPA and independently insuring that the student has covered the minimum subject matter required for college." Thus, the NCAA initial eligibility criteria are essentially minimum requirements which assure that freshman student-athletes are sufficiently able to handle college academic work, along with the demands of participating in intercollegiate athletics during their first year of college.
>
> * * *

Only seven of Bowers's high school courses qualified as core courses within the meaning of the NCAA bylaws. I find that Bowers failed to satisfy the initial eligibility requirements because he failed to meet the NCAA's core course requirement, not because of his learning disability. The ADA is meant to provide a remedy for those who have been victimized by illegal disability-based discrimination -- it is not meant to provide a remedy for every individual who has been screened out by eligibility criteria for whatever reason.

For the foregoing reasons, I find that Plaintiff has not shown a likelihood of success in establishing that the NCAA bylaws as a whole impose eligibility criteria that tend to screen out individuals with a learning disability. Thus, I find that Plaintiff has failed to establish a reasonable likelihood that he will succeed on his discrimination claim under the ADA. Accordingly, Plaintiff's motion for a preliminary injunction will be denied. . . .

Questions and Notes

1. Assuming Dennis Johnson took special high school classes to accommodate his disability, is he likely to be able to successfully pursue sports at an NCAA member institution? Are you more likely to be successful as a plaintiff if you have a physical handicap than a mental one?

2. Which statutes are available for a disabled plaintiff seeking to file suit. What elements must be proven under each? Is there any reason to prefer one over another?

3. Reggie Gathers has played basketball since he was four years old. Starting early served him well as he was an outstanding prep star, being named Mr. Basketball in the state of Calibosta and receiving literally hundreds of college scholarship offers. Reggie was recently diagnosed with arrhythmia of the heart. He received the diagnosis after going to the doctor last year when he passed out momentarily on the bench and in the locker room during basketball games. Reggie has never had a problem while he played. The University of Florida was the successful school in snaring Reggie as its next basketball savior; however, they have recently become aware of Reggie's medical history and now inform him that he will not be allowed to play. Reggie seeks your advise and services on this matter. What do you tell him? *See, Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996).

4. Should one be able to pursue an action based on a claim of discrimination due to obesity? *See, Clemons v. The Big Ten Conference*, 73 FAIR EMPL. PRAC. CAS. (BNA) 466 (1997).

5. A review of the cases throughout the country dealing with disabilities indicate a wide variety of attempts to accommodate disabled athletes. Some organizations have even established guidelines to permit the blind to participate in full contact sports such as Judo and Karate. Several state high school executives have promulgated guidelines for disabled students participation in mainstream sports with use of prosthetic devices. *See, e.g.* New Jersey High School Athletic Association.

MARTIN v. PGA TOUR, INC.
994 F. Supp. 1242 (Dist. Ct. Or, 1998)

COFFIN, Magistrate J.

This case presents profound questions regarding the application of the Americans with Disabilities Act (ADA). Does the ADA apply to athletic events or sports organizations? If so, are the most elite events and organizations, such as those at the professional level, somehow exempt from coverage? If the ADA is applicable, may a rule of competition be modified to accommodate a disabled competitor, or are the rules untouchable because any alteration of any rule would fundamentally alter the nature of the competitions?

Casey Martin is a disabled professional golfer. He can do everything well in the game of golf except walk to and from his shots. Because of a congenital deformity, his right leg is severely atrophied and weakened. He is placed at significant risk of fracturing his tibia by the simple act of walking, because of the increasing loss of bone stock and weakening of this bone that has occurred over the lifetime of this disorder. According to the medical testimony, walking also places Martin at significant risk of hemorrhaging as well, and creates an increased chance of developing deep venous thrombosis (blood clots).

The condition plaintiff suffers from causes him severe pain and discomfort. The slightest touching of his right leg at or below the knee is extremely painful. Beyond this, the condition causes him pain while playing golf, pain while carrying on daily activities and pain even while he is at rest.

* * *

The PGA's position in this case has been twofold:

First, it asserts that the ADA does not apply to its professional golf tournaments; and

Second, the PGA asserts that the requirement of walking is a substantive rule of its competition and that a waiver of the rule would, accordingly, result in a fundamental alteration of its competitions, which the ADA does not require.

The first defense raised by the PGA -- that the ADA is inapplicable to its tournaments -- has been extensively discussed in this court's order dated January 30, 1998, wherein I found that the PGA Tour was not exempt, as a "private club," from ADA coverage and also found that its tournaments were conducted at places -- i.e., golf courses -- that were specifically included within the definition of places of "public accommodation" subject to the ADA.

The second defense encompasses the concept that the ADA does not require a covered entity to work a fundamental alteration of the nature of its business or programs in order to accommodate the disabled, nor need the entity accommodate if to do so would result in an undue hardship to the entity.

A few examples suffice to illustrate this point: Suppose a bookstore normally does not stock books in braille. A blind customer demands the accommodation of a supply of such books. The bookstore need not comply with the request, as such an accommodation would fundamentally alter the nature of its business. *See* 28 C.F.R. Ch. 1 Pt. 36, App. B at p. 632 (July 1, 1997 edition). Or, to use another example cited by the PGA, a day care center normally does not provide individualized care (i.e., one attendant for each child) to its customers. A disabled child, in need of individualized attention, requests such an accommodation. The day care center need not comply because such would fundamentally alter the nature of the service the center provides.

* * *

There are few reported cases wherein the ADA has been applied to sports programs:. . . In *McPherson v. MHSAA,* 119 F.3d 453 (6th Cir.1997) the court considered whether the MHSAA's eight semester rule violated the ADA when applied to a student with a learning disability which prevented him from completing high school in eight semesters. The court initially noted that the simple fact that the MHSAA labeled the rule necessary did not make it so, but that the court had an independent responsibility to determine whether the rule is in fact necessary. *Id.* at 461. The court determined the rule was necessary. The court then found that

requiring the MHSAA to waive the rule would work a fundamental alteration in its sports programs and would impose an immense financial and administrative burden on the MHSAA by forcing it to make "near impossible determinations" about a particular student's physical and athletic maturity.

Two years prior the court similarly found that waiver of an age regulation in high school sports fundamentally altered the program. *See Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir.1995). The court noted, as it did in *McPherson*, that individually determining whether each older student possessed an unfair competitive advantage was not a reasonable accommodation. *Id.* at 1037.

The Eighth Circuit was confronted with a similar age eligibility rule of the Missouri State High School Athletic Association. *See Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir.1994). In *Pottgen* the court found that the age requirement was essential to the high school athletic program and that an individualized inquiry into the necessity of the requirement in the plaintiff's case was inappropriate. *Id.* at 930.

The District Court for the District of New Jersey found that complete abandonment of the "core course" requirement would fundamentally alter the nature of NCAA athletic programs. *Bowers v. National Collegiate Athletic Havoc.*, 974 F. Supp. 459 (D.N.J.1997). The *Bowers* court found the "core course" requirement essential because it was reasonably necessary to accomplish the purpose of the NCAA program. However, the court also noted that the rule authorized waiver of the requirement on a case-by-case basis for individualized consideration and as such was adequate to reasonably accommodate students with learning disabilities. *Id.* at 467.

From this rather limited background of athletic ADA case law, the PGA asserts that the court should focus on whether an athletic rule is "substantive" -- i.e., a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is, according to the PGA's argument, the rule cannot be modified without working a fundamental alteration of the competition, and the ADA consequently does not require any modification to accommodate the disabled.

I note, however, that even in those cases most heavily relied upon by the PGA the courts examined the purpose of each of the rules in question to determine if the requested modification was reasonable.

* * *

Essentially, then, the PGA Tour's contention that it alone may set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments, is simply another version of its argument that the PGA Tour is exempt from the provisions of the ADA. It is not. The court has the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule, and without altering the fundamental nature of PGA Tour competition.

Although the PGA Tour is a professional sports organization and professional sports enjoys certainly, a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. High school athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals. Put differently, if it is unreasonable to accommodate Casey Martin's disability with a cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled golfer at the high school level if the same rules were applicable.

It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a reasonable modification be made to accommodate a disabled individual?

* * *

First, I set forth (and perhaps restate to some extent), a general overview of the ADA. As I reject (without detailed elaboration) plaintiff's claims that he is a PGA Tour employee and that the Nike Tour is a

"course or examination" under the Act, I will discuss only his remaining claim, i.e., the "public accommodation claim" under Title III of the Act.

* * *

The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices. . . ." Congress intended to protect disabled persons not just from intentional discrimination but also from "thoughtlessness," "indifference," and "benign neglect." (Citations omitted.)

ADA defines disability with respect to an individual as:

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

42 U.S.C. § 12102(2).

The phrase physical or mental impairment means:

> (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
> (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104(1).

The phrase major life activity means:

> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. § 36.104(2).

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

> 1. the nature and severity of the impairment;
> 2. the duration or expected of the impairment; and
> 3. the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2 (j)(2)

* * *

Plaintiff has the burden of demonstrating that he is disabled and has done so. Plaintiff also has the burden of proving that a modification was requested and that the requested modification is reasonable. "Plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, in the general run of the cases." *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir.1997). With respect to this element, the use of a cart is certainly not unreasonable in the game of golf. As noted hereafter, the Rules of Golf do not require walking, and even the PGA Tour permits cart use at two of the four types of tournaments it stages. While the PGA Tour permits cart use at those two events, it imposes

no handicap system or stroke penalties on those who opt for carts as opposed to those who elect to walk. This is certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot- making. In addition, the NCAA and PAC 10 athletic conference permit the use of carts as an accommodation to disabled collegiate golfers. Under the Johnson analysis such evidence meets plaintiff's burden of demonstrating that a cart is a reasonable modification to accommodate his disability in the game of golf in the general sense, that is in the general run of cases.

Defendant then must make the requested modification unless it meets its burden of proving that the requested modification would fundamentally alter the nature of its public accommodation. "The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Id.* Defendant argues that an individualized inquiry into the necessity of the walking rule in Casey Martin's case is not appropriate. *See* e.g., *Pottgen*, 40 F.3d at 930-31. However, *Johnson* suggests otherwise. An individualized assessment finds support in the Ninth Circuit as well. *See Crowder*, 81 F.3d at 1486 ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *See also*, *Stillwell v. Kansas City, Missouri Bd. of Police Commissioners*, 872 F.Supp. 682, 687 (W.D.Mo.1995) (individualized assessment necessary to determine if plaintiff can meet the purpose of defendant's rule). Thus, the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.

The Rules of Golf

The general "Rules of Golf" are promulgated by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland (R & A).

Rule 1-1 provides as follows:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

Nothing in the Rules of Golf requires or defines walking as part of the game. In its reported Decisions on the Rules of Golf regarding the Rules of Golf, the USGA has expressed that it is permissible to ride a cart in golf unless such is prohibited by the local rules defining the conditions of competition for particular events. In Appendix I to the Rules of Golf we find:

> **Transportation**
>
> If it is desired to require players to walk in a competition, the following condition is suggested:
>
> Players shall walk at all times during a stipulated round.

The PGA Tour promulgates a pamphlet entitled "Conditions of Competition and Local Rules" which govern PGA Tour and Nike Tour tournaments. The preamble to this document provides, in pertinent part, as follows:

> The Rules of the United States Golf Association govern play, as modified by the PGA Tour.
>
> One of those modifications appears in Section A -- Conditions of Competition:
>
> ¶ 6 Transportation--Appendix I
>
> Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee.

No written policy has been cited by either party which governs the Rules Committee in its exercise of discretion regarding a waiver of the walking requirement. On the occasions when the walking rule has been waived, it has been waived for all competitors (e.g., to shuttle players from the 9th green to the 10th tee where considerable distance is involved). No waiver has ever been granted for individualized circumstances (such as disability).

* * *

According to the PGA Tour, the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making. I accept that assertion and expressly find from the evidence produced at trial that such is a cognizable purpose of the rule from the standpoint of the ADA.

The question thus is -- may the walking rule be modified to accommodate Casey Martin without fundamentally altering the nature of the game being played at the PEA Tour's tournaments?

In answering the question, as noted previously, I reject the defendant's contention that the plaintiff's individual circumstances are irrelevant to the inquiry. (Citations omitted.)

Furthermore, the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances. Dr. Gary Klug, a professor in physiology at the University of Oregon, and an expert on the physiological basis for fatigue, calculates that approximately 500 calories are expended in walking a course of golf (approximately 5 miles of walking in a 5 hour time period). He describes the energy expenditure as follows: "nutritionally it's less than a Big Mac." He further notes that these calories are expended over a 5 hour period, and that the golfers have numerous intervals of rest and opportunities for refreshment (or calorie replacement).

While the PGA Tour cited Ken Venturi's memorable 1964 U.S. Open win in which he overcame severe and near-fatal exhaustion as he finished the course in high heat and humidity, Dr. Klug indicates that Mr. Venturi's fatigue was induced by heat exhaustion and fluid loss -- not walking. According to Dr. Klug, tests have disclosed that fatigue from exercise -- as measured by oxygen consumption -- is not significantly influenced by heat or humidity. Rather, dehydration is the critical factor in such situations. Many spectators at the 1964 U.S. Open had to be treated for exhaustion as well, and they were not walking.

Furthermore, fatigue at lower intensity exercise is primarily a psychological phenomenon, according to Dr. Klug. Stress and motivation are the key ingredients here. Place an individual in the middle of the Los Angeles freeway at rush hour, and he will get fatigued in a hurry without moving a muscle. If someone pedals a bicycle for 30 minutes and says "I've had it," but is promised $1,000 if he goes another 5 minutes, his fatigue may well disappear.

Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue. When given the option of cart-riding or walking -- such as at the Senior PGA Tour or PGA Tour Qualifying Tournament -- the vast majority have opted to walk. Why would this be if walking truly fatigued them so that they hit worse shots than if they ride? As the saying goes, "the proof of the pudding is in the eating."

And then we come to Casey Martin's unique circumstances. If the majority of able-bodied elect to walk in "carts optional" tournaments, how can anyone perceive that plaintiff has a competitive advantage by using a cart given his condition?

The fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot. Walking at a slow pace -- to the able-bodied -- is a natural act, of little more difficulty than breathing. It is how we were designed to move from place to place.

Walking for Casey Martin is a different story.

In the first place, he does walk while on the course -- even with a cart, he must move from cart to shot and back to the cart. In essence, he still must walk approximately 25% of the course. On a course roughly five miles in length, Martin will walk 1 1/4 miles.

The plaintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at a risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him -- with his condition -- at a competitive advantage is a gross distortion of reality.

As plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

* * *

Interestingly, the USGA promulgates a pamphlet entitled A Modification of the Rules of Golf for Golfers with Disabilities. The Preface to the Pamphlet reads:

> This publication contains permissible modifications to the Rules of Golf for use by disabled golfers. This is not intended to be a revision of the Rules of Golf as they apply to able-bodied players. As is the case for the Rules of Golf themselves, these modifications, along with the philosophy expressed herein, have been agreed upon by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland.

* * *

Judy Bell, a former president of the USGA, testified that the Golfers with Disabilities pamphlet was not meant for the PGA Tour, but only for recreational golfers. While that may be, it begs the question of how the PGA Tour would handle the request of a blind pro golfer to have a coach in addition to a caddie. At oral argument, the attorney for the Tour was asked whether Rules 6-4 and 8-1 could be modified without fundamentally altering the nature of the PGA's competition. To quote from the colloquy:

> THE COURT: How about the caddie and the coach for the blind golfer, as the pamphlet describes?
>
> MR. MALEDON: Your Honor, my answer would be the same. As long as it does not fundamentally alter the nature of the competition, there's not a problem with it. But again, You Honor, you'd have know the facts. You'd have to look at the purpose for the rule. And I submit to you, Your Honor, that engaging in those kinds of analogies do not advance the ball in terms of what we are talking about here.
>
> THE COURT: If I look at whether the purpose of the walking rule is to enhance competition by injecting fatigue into the equation, do I look at what Mr. Martin's disability does to him specifically insofar as inducing fatigue?
>
> MR. MALEDON: No, Your Honor Absolutely not.

The paradox presented in the PGA Tour's position is readily apparent. A modification of the "one caddie only" rule to accommodate a blind golfer by providing him with a coach does not become the "reasonable" thing to do unless the PGA first conducts an individualized assessment of the golfer's disability -- i.e., the PGA Tour must first recognize that he is blind, and then consider whether providing him a coach under his circumstances would give him a competitive advantage over the other golfers who aren't blind and thus don't need a coach. Yet in Casey Martin's situation, the PGA Tour adamantly refuses to assess the requested modification in light of the specifics of his disability. Inconsistently, it insists in this case that any modification of any of its rules would fundamentally alter the nature of its competition.

The rules, as demonstrated, are not so sacrosanct. The requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability.

SO ORDERED

MARTIN v. PGA TOUR, INC.

984 F. Supp. 1320 (Dist. Ct. Or, 1998)

COFFIN, United States Magistrate Judge:

Plaintiff brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. On January 26, 1998, the court heard oral arguments on defendant PGA TOUR's motion for summary judgment and plaintiff Casey Martin's cross-motion for partial summary judgment. After argument, the court made oral findings and rulings, denying the Tour's motion in part and granting Martin's motion in part. This written order supplements and elaborates on the oral findings.

The PGA Tour is a non-profit association of professional golfers. The PGA sponsors and cosponsors professional golf events on three tours: the regular PGA Tour, with approximately 200 players at any given time; the Senior PGA Tour, with approximately 100 players; and the Nike Tour, with approximately 170 players.

There are various ways to gain playing privileges on the tours conducted by the PGA. Chief among them is a three-stage qualifying school tournament. The first stage consists of 72 holes. Those who score well enough in this stage advance to the second stage consisting of 72 holes. The top qualifiers, approximately 168 players, advance to the third and final stage consisting of 108 holes. The lowest 35 finishers plus ties are awarded playing privileges on the regular PGA Tour. The next 70 lowest scoring players obtain privileges to play on the Nike Tour. A player failing to qualify for the regular PGA Tour, but qualifying for the Nike Tour may obtain the privilege to play on the PGA Tour by winning three Nike Tour tournaments during a single season or by finishing in the top fifteen places on the Nike Tour money list.

To enter the qualifying school tournament, a prospective player must pay a $3,000 fee and submit two letters of reference. Plaintiff in this case entered the qualifying school tournament and made it through the first and second stages.

In the first two stages of the qualifying tournament, players are permitted to use golf carts. In the third stage, as well as on the regular PGA Tour and the Nike Tour, players are required to walk and are required to use caddies. Plaintiff contends he suffers from a debilitating disease known as Klippel-Trenaunay-Weber Syndrome, and for purposes of this motion the Tour does not contest this assertion. Klippel-Trenaunay-Weber Syndrome is a venous malformation which curtails blood circulation in plaintiff's right leg. This condition has resulted in significant atrophy in the lower leg and bone deterioration of the tibia. Plaintiff further contends that his physical impairment substantially limits his ability to walk. Plaintiff filed this action, pursuant to the ADA, seeking to enjoin defendant's "no cart" rule during the third stage of the qualifying school tournament, and on the PGA and Nike Tours. Plaintiff asserts that by failing to provide him with a cart, defendant fails to make its tournaments accessible to individuals with disabilities in violation of the ADA.

This court granted a preliminary injunction directing defendant to allow plaintiff to use a cart during the third stage of the qualifying school tournament. Defendant then lifted the no cart rule for all players during the third stage of the qualifying school tournament. Plaintiff scored well enough in the tournament to attain playing privileges on the Nike Tour. This court extended the injunction by stipulation of both parties to include the first two tournaments on the Nike Tour. Defendant now moves for summary judgment contending that the ADA does not apply to it or its tournaments.

* * *

Discussion

Plaintiff alleges in his first claim for relief that defendant is a private entity which is or operates a place of public accommodation. As a result, plaintiff contends that defendant is subject to the ADA's prohibition of discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. *See* 42 U.S.C. § 12182. Plaintiff alleges

in his second claim that defendant is a private entity that offers examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes. Plaintiff thus contends that defendant is subject to the ADA's requirement that any person offering examinations or courses related to applications, licensing, certification, or credentialing for professional or trade purposes shall do so in a place and manner accessible to persons with disabilities. *See* 42 U.S.C. § 12189. Plaintiff alleges in his third claim that defendant is an employer as defined in the ADA. *See* 42 U.S.C. § 12111(5). Thus, plaintiff contends that defendant is prohibited from discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Defendant PGA Tour contends that it is entitled to summary judgment on all three of plaintiff's claims because it is private non-profit establishment exempt from the ADA. *See 42 U.S.C. § 12187.* Defendant argues, in the alternative, that even if it is not a private club it is entitled to summary judgment on counts one and two of plaintiff's complaint because the PGA and Nike Tour competitions do not constitute "places of public accommodation," and that the Nike Tour is not an examination or course. In addition, defendant argues that it is entitled to summary judgment in count three of plaintiff's complaint because plaintiff is not an "employee" of the PGA Tour.

A. Defendant is not Exempt from the ADA

As noted, a private club or establishment is exempt from coverage under Title III of the ADA (as well as Title II of the Civil Rights Act of 1964, which prohibits discrimination on the grounds of race, color religion, or national origin). Because of the importance of these laws, exemptions are narrowly construed and the burden of proof rests on the party claiming the exemption. (Citations omitted.)

Before one can answer the question of whether the PGA Tour is entitled to the private club exemption, one must first define the nature of the entity:

Succinctly put, the Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors.

The Tour, in short, is a commercial enterprise. The success of the Tour in generating revenue for its members is in direct proportion to public participation as spectators and viewers of the Tour's tournaments. Without this public participation, the primary objective of the Tour could not be achieved.

* * *

An analysis of the set of variables most commonly weighed by the courts in determining whether an organization is a bona fide private club mitigates against such a finding here. Those factors, as set forth in *United States v. Lansdowne Swim Club,* 713 F. Supp. 785 (E.D.Pa.1989) are listed and discussed as follows:

1. Genuine Selectivity

The Tour contends that because only very few golfers possess the requisite skills to become members of the Tour and compete at its events, and because these golfers are selected through competition at qualifying tournaments, its members are chosen through an exceptionally selective process and this factor weighs heavily in its favor.

Defendant's eligibility requirements, however, measure skills. They are not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption.

2. Membership Control

Professional golfers who play in fifteen or more regular PGA Tour events in a year have voting rights. But -- which seems more to the point -- new members are not voted in by the current members -- they play their way in. *See Jordan, 302 F. Supp. at 375* (consideration is given to whether the existing members have any control over the admission of applicants for membership). The membership control of the organization does little to make it or keep it "private."

3. History of Organization

The organization has existed since 1968. It clearly was not formed to evade the Civil Rights Act or ADA. Of course, the fact that an organization is not a "sham" tells us it is "bona fide," but not that it is a "private club."

4. Use of Facilities by Nonmembers

Defendant contends that only its members participate as players in Tour Events. Plaintiff points to numerous nonmembers who participate in the tournaments as vendors, reporters, score keepers, volunteers, and members of the gallery.

The court finds this factor cuts against private club status. Of particular force is the heavy reliance by the Tour on public participation for the purpose of generating revenue for the tour. (Citations omitted.)

5. Club's Purpose

As discussed previously, the mercantile purpose of the PGA Tour weighs heavily against private club status.

6. Whether the Club Advertises for Members

Courts have held that organizations which advertise and solicit new members do not fall within the private club exemption. (Citations omitted.)

The PGA Tour is extensively covered by the media. Its existence is well known to even the most casual golfers and followers of sports. The Tour has no more need or incentive to advertise for golfers than do the Chicago Bulls for basketball players. The advertising factor carries little weight in the arena of professional sports.

7. Whether the Club is Nonprofit

The Tour is nonprofit, but yet its fundamental purpose is to enhance profits for its members. As in Quijano, the nonprofit status of a corporation that exists to further the commercial interests of its members does not weigh in favor of exempt status.

For the reasons stated, I reject the PGA Tour's argument that it is a private club and as such exempt from the ADA.

B. Defendant Operates a Place of Public Accommodation at the Golf Courses on Which it Conducts its Tournaments

Defendant further contends that, if it is not found to be an exempt private club, the courses it operates are not open to the "general public" between the boundaries of play during its tournaments, and thus the tournament events are not "places of public accommodation."

The term "public accommodation" is specifically defined to include the following places:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> * * *
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair