CIVIL RIGHTS - COURTS SHOULD USE AN INDIVIDUALIZED ANALYSIS WHEN DETERMINING WHETHER TO GRANT A WAIVER OF AN ATHLETIC CONFERENCE AGE ELIGIBILITY RULE: *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (2d Cir. 1996).

I. INTRODUCTION

Modern state and federal statutes protect handicapped individuals from discrimination in a variety of areas.[1] In particular, both high school and college students have benefited from

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1. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993). Congress has recognized the special needs of the handicapped. Initial legislation was enacted to provide vocational assistance to the disabled veterans returning from service abroad. S. REP. NO. 318, 93d Cong., 1st Sess. 409, reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076, 2082. Initially, vocational assistance was limited to training, counseling and placement services. *Id.* Eventually, the scope of the legislation was extended in the hope of providing any services necessary to render a disabled individual fit to engage in a remunerative occupation. *Id.* at 2083. Congress eventually expanded the coverage of handicapped legislation to protect many other persons, regardless of the disability or cause. *Id.* at 2082-84. Congress also came to realize that the handicapped needed more than just vocational assistance because they faced substantial difficulties in virtually all aspects of life. *Id.*

The Rehabilitation Act of 1973 was one of the most significant expansions of handicap legislation. *Id.* Athletes excluded from school-sponsored sports because of physical abnormality have successfully asserted claims under the Rehabilitation Act of 1973. 29 U.S.C.A. 1794 (West Supp. 1991). The Act's intent is to provide handicapped persons with an opportunity to participate fully in activities they are physically capable of performing. *Id.* Qualified handicapped athletes must be given an "equal opportunity for participation" in interscholastic and intercollegiate athletics. 34 C.F.R. §§ 104.37(c) and 104.47(a)(1991); 45 C.F.R. §§ 84.37(c) and 84.47(a)(1991). Following the lead of the Rehabilitation Act, a number of states enacted their own handicap laws to further discourage discrimination against the handicapped. Many of these laws used terms which were similar to, if not duplicates of, those found in the Rehabilitation Act. *See* N.Y. EXEC. LAW § 292(21)(McKinney 1986); WASH. ADMIN. CODE R. 163-22-010 to -090 (1983); WIS. STAT. ANN. § 111.32(8)(West 1985); cf. CAL. GOV'T CODE § 12925(h) (West 1980)(defining a physical handicap 'as an impairment of sight, hearing or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services'). *Id.* In Oregon, for example, the definitional sections of the Act and the interpretive regulations of those definitions have been codified in state statutes. See ORS § 659.400 (1985). State statutes extended protection of the handicapped into many areas that were not necessarily covered by the Act, including employment, housing, participation in federal programs, membership in labor organizations, public accommodations, real property and advertising. *See, e.g.*, ORS 659.425 (1985); WASH.REV.CODE ANN. § 49.60.030 (West Supp. 1986).

the Individuals with Disabilities Education Act (IDEA),[2] formerly known as the Education for All Handicapped Children Act (EAHCA).[3] IDEA imposes upon the states a duty to provide handicapped students with a free and appropriate public edu-

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2. 20 U.S.C.A. § 1400 (West 1985) provides:

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C.A. § 1400.

3. Individuals with Disabilities Education Act, 20 U.S.C. 1 § 1400-1485 (West 1990) (amending Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1485 (1975)).

cation in the least restrictive yet most feasible environment.[4] Furthermore, Congress mandated that extracurricular activities such as athletic programs are intrinsic to this guaranteed education.[5]

The handicapped student-athlete is rarely the object of blatant discrimination predicated on his disability, and most of the exclusionary policies are justified on the basis that they protect the athlete and preserve a competitive balance.[6] The rules set forth by institutions regarding eligibility criteria often prevent handicapped students from full participation in competitive athletics.[7] These athletic eligibility rules range

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4. *See supra* note 2 and accompanying text.

5. *See* 34 C.F.R. § 300.306 (1990) which provides:

> (A) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
>
> (B) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

Id.

6. Robert E. Shepherd, Jr., Comment, *Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student Athletes*, 1 SETON HALL J. SPORT L. 163, (1991). *See also* Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981). In *Pushkin*, which involved the exclusion of a psychiatrist with multiple sclerosis from a university residency program, the court said:

> It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.

Id. at 1385.

7. *See, e.g.*, Reaves v. Mills, 904 F.Supp. 120 (W.D.N.Y. 1995). In *Reaves*, the plaintiff Doretha Reaves brought an action on behalf of her son Kelvin Reaves pursuant to Title II of the Americans with Disabilities Act ("ADA"), alleging that Kelvin had been discriminatorily denied eligibility to participate in interscholastic high school sports by reason of his alleged mild mental retardation disability. *Id.* at 120. Kelvin, who turned nineteen years of age on August 16, 1995, was found ineligible to participate in interscholastic sports pursuant to a New York State regulation which prohibits students who turn nineteen before September 1 from participating in those activities. *Id.* The plaintiff alleged that Kelvin was classified as "educable mentally retarded" at eight years of age and due to this disability he was forced to repeat the first grade. *Id.* at 121. As a result, he remained one year behind the grade level for students of his age and turned nineteen years of age prior to his senior year in high school. *Id.* The plaintiff sought a preliminary injunction directing the defendants, the New York State Education Department and the

from age/semester limitations on participation to transfer regulations and academic requirements, all of which have often been challenged by handicapped students who feel the discriminatory grip of such regulations.[8] This casenote will not only explore eligibility[9] regulations, as opposed to protective[10] regu-

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Education Department Commissioner, to waive the age requirement for Kelvin and allow him to play in a football game scheduled to take place on November 11, 1995, and to participate in interscholastic sports for the remainder of the academic year. *Id.* The Education Department and the Commissioner opposed the plaintiff's motion, arguing that her claim was not cognizable under the ADA and therefore injunctive relief was not appropriate. *Id.* at 123. After examining the plaintiff's application and the State's response thereto, the court found that the plaintiff failed to demonstrate the prerequisites for the issuance of injunctive relief. *Id. See also,* Doe v. Marshall, 459 F.Supp. 1190 (S.D.Tex. 1978).

In *Doe,* during the football season of 1977, John Doe qualified for the varsity football team at Friendswood High School and played the season. *Id.* at 1192. At that time John Doe was living with his parents within the Friendswood School District. *Id.* John Doe became emotionally ill and thereafter his grandparents were named his managing conservators. *Id.* at 1193. He then moved in with his grandparents in Alvin and began attending Alvin High School. *Id.* While attending Alvin High School, John Doe was denied participation on the school football team as a result of a rule which prohibited students from competing in interscholastic athletics for a school district other than that in which his parents reside. *Id.* at 1190. The District Court held that the student was entitled to a preliminary injunction restraining the regulatory body from barring him from interscholastic participation. *Id.* The court found that the student was a handicapped individual within the meaning of the Rehabilitation Act of 1973, and he had a legitimate, compelling necessity for living with his grandparents rather than his parents. *Id.* Because of his severe psychiatric difficulties, the student had a genuine, compelling need to participate in interscholastic football, and denying him that right might mean the difference between his growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life. *Id.*

8. *See* Cavallaro v. Ambach, 575 F.Supp. 171 (W.D.N.Y. 1983)(high school wrestler with a neurological handicap is not involved in a federally funded program and is not "otherwise qualified" for the purpose of an age qualification rule under § 504 of the Rehabilitation Act where an injunction is sought); Smith v. School Dist. No. 93, 425 F.Supp. 197 (D. Idaho 1977)(eight-semester rule valid against student-athlete who missed two semesters while ill).

9. Eligibility issues deal with age/semester limitations on participation, transfer regulations and academic requirements for athletic eligibility. *See,* SHEPHERD, *supra* note 9 at 172-180:

> Significant issues arise when an association's rules governing eligibility criteria prevent a handicapped student athlete from participating in competitive athletics. For example, a student with a serious illness may miss a semester or year from school and thereafter be declared ineligible to participate in athletics due to an age limit requirement or a cap on the number of semesters completed since starting high school; a transfer of a student from one school district to another based on health reasons may trigger the loss of the student's eligibility; and a youth with a learning disability or other educational problems may not meet the necessary grade point average or standardized test score level to maintain or secure eligibility to participate in athletics.

Id.

lations, in the realm of discrimination against disabled student-athletes, but will also illustrate why the overbroadness of these eligibility provisions often push eligible handicapped student-athletes into ineligible status.

The age/semester limitations restrict participation to students who are either under the age of nineteen and/or have completed more than eight semesters of schooling beyond eighth grade.[11] The shortcoming of this type of regulation is that handicapped students will often be denied the right to participate in athletics because of their noncompliance, which is predicated on legitimate academic or medical reasons.[12] Transfer regulations dictate that student-athletes may participate only in the athletic programs of the district in which his or her parents reside.[13] Courts are attuned to relaxing these requirements when the student-athlete is a handicapped individual.[14] Alternatively, some regulations demand that mini-

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10. Protection regulations disqualify disabled student athletes from participation in contact sports because of a medical judgment conveying that their involvement presents a risk of serious injury to themselves or other team members. *See, e.g.*, Spitaleri v. Nyquist, 74 Misc.2d 811, 245 N.Y.S.2d 878 (1973).

11. *See* infra note 13 at 173 (citing W. CHAMPION, FUNDAMENTALS OF SPORTS LAW § 16.8 (1990)).

12. *See, e.g.*, California Interscholastic Fed'n v. Jones, 197 Cal. App. 3d 751, 757-58, 243 Cal. Rptr. 271, 275 (1988)(student held back for academic reasons, but no discussion of handicap as causing difficulties); Mahan v. Agee, 652 P.2d 765 (Okla. 1982)(association age eligibility is valid as applied to a dyslexic track athlete, despite the absence of a "hardship" exception); Cavallaro v. Ambach, 575 F.Supp. 171 (W.D.N.Y. 1983)(high school wrestler with a neurological handicap is not involved in a federally funded program and is not "otherwise qualified" for the purpose of an age qualification rule under § 504 of the Rehabilitation Act of 1973 where an injunction is sought).

13. Robert E. Shepherd, Jr., Comment, *Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student Athletes*, 1 SETON HALL J. SPORT L. 163 (1991).

Other regulations governing eligibility prohibit a student-athlete from participating on sports teams in a school district other than the one in which his or her parents reside, and disqualify a student from participating for a period of one year after the athlete transfers schools. These rules are directed toward alleviating the problems associated with the recruitment of skilled student-athletes by other schools, and the practice of "shopping around" by student-athletes for more prestigious athletic programs. Because transfers under these circumstances are considered to be inconsistent with the rationale behind amateur athletics, the courts almost universally uphold transfer restrictions as valid on their face. Occasionally, however, courts will prohibit the application of transfer restrictions when a student-athlete switches schools for health reasons or, in the case of a handicapped student, to receive treatment or remediation.
Id. at 175.

14. *See, e.g.*, Crocker v. Tennessee Secondary School Athletic Ass'n, 735 F.Supp. 753 (M.D. Tenn. 1990), *aff'd mem.*, 908 F.2d 972 (6th Cir. 1990); Doe v. Marshall, 459 F.Supp. 1190 (S.D. Tex. 1978), *vacated* as moot, 622 F.2d 118 (5th Cir. 1980). In *Crocker*, the District Court found that the handicapped student was entitled to a preliminary injunc-

mum grades or test scores be obtained in order for a student to participate in the athletic programs.[15] As a result, although the various eligibility regulations are in fact facially neutral and have been designed with the purpose of preserving the integrity of competition, the handicapped student-athlete community is repeatedly denied participation in a considerable number of sporting competitions.[16]

Today, unlike the past, disabled student athletes are armed with state and federal safeguards designed to protect these individuals from discrimination in virtually all aspects of life.[17]

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tion precluding the TSSAA from interfering with the implementation of an administrative decision that TSSAA discriminated against student in prohibiting him from participating in interscholastic athletics by failing to grant special hardship exception to the transfer rule; the student demonstrated likelihood of success of the merits of his claim that he was deprived of a federal right by a state actor, that the student would suffer irreparable harm without the injunction in denial of his opportunity to participate in remaining football games, the preliminary injunction would not cause harm to the TSSAA, and there was no public interest in preventing the student from playing in football games because the TSSAA disagreed with implications of handicap certification. *Id.* at 753.

15. Athletic Associations sometimes utilize grades and test scores to determine athletic eligibility, which has spawned litigation concerning the disqualification of handicapped student athletes from participation in sports competition. *See, e.g.,* Winston County (AL) School District, OCR/Complaint LOFS No. 04-85-1226 (Oct. 17, 1985), reprinted in EDUC. FOR HANDICAPPED L. REP. 257:667 (Feb. 13, 1987). In *Winston County*, the Office for Civil Rights ("OCR") opined that a "student should not be excluded from participation in sports if it is determined that he could not attain the passing grades because of his individual handicap." *Id.* at 257:668. The OCR alleged that the local school district inappropriately applied the Alabama Athletic Association's policy, which required that a student pass three academic subjects for a given year to be eligible to participate in school sports during the following year, to a learning-disabled student. *Id.* at 352:71.

16. *See supra* notes 7, 8, 12 and 14 and accompanying texts.

17. *See supra* note 1 and accompanying text; *See also*, 29 U.S.C.A. § 794 (West Supp. 1991) which provides:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

The prime example of all handicap legislation is the Rehabilitation Act of 1973.[18] Under Section 504 of the Rehabilitation Act, "no otherwise qualified individual in the United States . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance . . . ."[19] The Act defines a handicapped individual to be "any person who (i) has a physical or mental impairment which substantially limits one or more of such per-

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For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8801 of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Id.

18. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993).

19. *See supra* note 17.

son's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[20] Under the Act, handicapped students are afforded the occasion to fully participate in activities they are physically able to perform.[21]

The Americans with Disabilities Act ("ADA"), made into law on July 26, 1990, is another piece of federal legislation which was calculated to protect persons with disabilities.[22] The ADA was enacted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[23] The ADA disallows disability based discrimination by state and local agencies under Title II[24] as well as by public accommodations under Title III.[25]

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20. *See supra* note 18. The 'handicapped individual' does not include "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B).

21. The Rehabilitation Act of 1973 affects the educational rights of the handicapped. *See* supra note 1 and accompanying text. Section 504 prohibits discrimination generally and covers not just educational institutions, nor simply public institutions, since it covers all handicapped and all programs or activities receiving federal financial assistance. *See supra* note 19 and accompanying text. The Rehabilitation Act guarantees disabled students athletes freedom from being discriminated from athletic participation because of their disability. *Id.*

22. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (West Supp. 1994).

23. *See,* 42 U.S.C. § 12101(b)(1) (Supp. V 1993) which provides:

> (b) Purpose
>
> It is the purpose of this chapter—
>
> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . .

Id.

24. *See supra* note 22. *See also,* 42 U.S.C. §§ 12131-12132 which provides:

> § 12131. Definitions
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> As used in this subchapter:
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> (1) Public entity
>
> The term "public entity" means—
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
>
> (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).
>
> (2) Qualified individual with a disability
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential

While the Rehabilitation Act of 1973 provides that otherwise qualified individuals with disabilities may not be discriminated against because of their disability in programs that receive federal financial assistance,[26] it is evident that the ADA reaches many significant areas that the Rehabilitation Act does not reach.[27] The ADA provides more expansive coverage because the Rehabilitation Act applies only to federal employers and private employers who receive federal funds, while the ADA applies to all employers with fifteen or more employees regardless of federal funding.[28] Despite these laws, disabled students may still find themselves shut out of sport participation due to both their disability and the overbroadness associated with the regulations.[29] In *Dennin v. Connecticut*

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eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Id.

25. 42 U.S.C. § 12182 provides:

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

No 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.

Id.

26. *See supra* note 18.

27. *Id.* For example, the ADA prohibits discrimination by private, state and local employers, employment agencies, joint labor management committees and entities which provide goods and services to the public. *See* 42 U.S.C. § 12111(2) which provides:

"(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee." *Id.*

28. *See supra* note 19; compare with 42 U.S.C. § 12111(5)(A) which provides:

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

Id.

29. *See, eg.,* Robinson v. Illinois High School Ass'n., 195 N.E.2d 38 (Ill. App. 1963),

Interscholastic Athletic Conference, Inc., the plaintiff, a disabled student-athlete, brought an action alleging that a facially neutral regulation concerning eligibility was violative of the Rehabilitation Act and the Americans with Disabilities Act.[30] This case is one illustration of how many association regulations are overbroad and effectively prevent many eligible athletes from participating because of the effects of a condition they have no control over.[31]

II. DENNIN V. CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, INC., 913 F. SUPP. 663 (2D CIR. 1996).

A. *Facts and Procedural History*

David Dennin is a nineteen-year-old student who has Down Syndrome.[32] As a result of his disability, Dennin spent four years, as opposed to three, in middle school.[33] Consequently, Dennin was nineteen instead of eighteen-years-old as a senior at Trumbull High School.[34] For the first three years of high school, Dennin competed on the swim team but was prevented from participating in his senior year because he was in violation of an age eligibility requirement.[35]

Defendant, The Connecticut Interscholastic Athletic Conference, Inc. ("CIAC"), set forth the age eligibility rule in question.[36] Under the CIAC's eligibility rule, an athlete is not

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cert. denied, 379 U.S. 960 (1965). In *Robinson*, the Appellate Court held that "the Illinois High School Association's determination of plaintiff's ineligibility to play interschool basketball under the association constitution, by-laws and rules was improperly interfered with by the trial court in absence of fraud, collusion, or unreasonable, arbitrary, or capricious acts by those making the determination." *Id.*

30. Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F.Supp 663, 666 (D.Conn. 1996).

31. *Id.*

32. *Id.* at 667. Down Syndrome is defined as "the abnormal condition of a child born with a wide, flattened skull, epicanthic folds at the eyelids, and usually a moderate to severe mental deficiency and other organic problems: caused by a chromosomal abnormality." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1992. Pursuant to the Individuals with Disabilities Education Act ("IDEA"), and the Connecticut General Statutes §10-76(a), Dennin accordingly qualifies for special education. *See supra* note 2 and accompanying text.

33. *Dennin*, 913 F.Supp at 666. Therefore, plaintiff entered high school at age sixteen as opposed to the average student who commences high school at age fifteen. *Id.*

34. *Id.*

35. *Id.* Dennin's Individualized Education Program ("IEP") dictates that he is entitled to be a competitive swimmer for the team. *Id.*

36. *Dennin*, 913 F.Supp. at 666. The Connecticut Interscholastic Athletic Confer-

entitled to compete at age nineteen unless his nineteenth birthday falls on or after September 1.[37] Since Dennin turned nineteen before September 1, 1995, he was not eligible for the 1995-96 competition swim season.[38] Dennin's eligibility was therefore contingent upon obtaining a waiver from the CIAC which was unceremoniously denied.[39] Dennin then moved for a preliminary injunction to preclude the CIAC from denying him a waiver of the age eligibility rule.[40]

Dennin contended that since the CIAC denied him the waiver of the age eligibility rule, his rights were therefore violated under the Rehabilitation Act and the Americans with Disabilities Act.[41] The United States District Court for the District of Connecticut granted Dennin's request for a prelimi-

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ence, Inc. ("CIAC"), is a non-profit organization designated as supervisor, director and regulator of interscholastic athletics of 175 public and private secondary schools. *Id.*

37. *Id.* Plaintiff turned nineteen before September 1, 1995 thereby violating the age eligibility rule and was denied competition participation as a result of such. *Id.* The main reason the CIAC promulgated this rule was to prevent older athletes from obtaining the competitive edge over the other participating athletes. *Id.* Plaintiff's High School is a CIAC member and therefore must abide by all rules set forth by the controlling institution. *Id.* Rules such as these are also designed to protect younger athletes from older athletes, to discourage students from delaying their education for athletic reasons, to prevent coaches from engaging in red-shirting to obtain the competitive edge and to avoid younger athletes from preemption by older athletes. Id.

38. *Id.*

39. *Id.* A waiver of the age eligibility rule would give Dennin permission to compete with the rest of his team. *Id.* Although the CIAC denied the request, they did authorize that Dennin could swim in a non-scoring setting. *Id.* at 666. He was thus entitled to swim in the competition meets but was denied the ability to earn competition points as his competing teammates were entitled to earn. *Id.*

40. *Id.* An injunction is defined as:

> An equitable remedy in which the court orders a party to perform or to desist from a particular act. 'Mandatory injunction' commands the defendant to take a positive action to accomplish a specific purpose; e.g., the court may order a school to admit a particular student. 'Restrictive injunction' forbids the defendant of his agents from attempting or continuing some activity that is injurious to the plaintiff; e.g., the court may prohibit a school from suspending or expelling a student. 'Interlocutory injunction' is any injunction issued prior to trial to prevent irreparable injury to the plaintiff while the court considers whether to grant permanent relief. Granted for only a limited time. Two types: (1) The 'preliminary injunction,' which is granted after the defendant has received notice and has had an opportunity to participate in a hearing on the issue, and (2) the 'temporary restraining order,' which is granted without notice to the defendant in situations where the plaintiff will suffer irreparably if immediate relief is not granted. A permanent or perpetual injunction is a final disposition in the suit and is indefinite in length of time.

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41. *Dennin*, 913 F.Supp at 666.

nary injunction to prevent the CIAC from denying him a waiver of the age eligibility rule.[42] Dorsey, Chief Judge, held that: "(1) the student would suffer irreparable harm if he were not granted a waiver of the rule; (2) the CIAC's failure to waive the rule violated the Rehabilitation Act; and (3) the CIAC's failure to waive the rule violated the ADA."[43]

B. Prior Law Spawned by Age Eligibility Regulations

Handicapped student athletes have often found themselves ineligible to participate in student athletic events due to standard age eligibility requirements.[44] In most cases, the regulation often caps the eligible age group at eighteen, thereby effectively preventing many willing participants from taking part in such activities.[45] Students that request a waiver to play predominately use the Rehabilitation Act and the ADA as a means to achieve this end.[46]

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42. *Id.* at 667. *See, e.g.,* Sperry Int'l Trade v. Government of Israel, 670 F.2d 8 (2d Cir 1982). See *also* Buffalo Forge Co. v. Ampco Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981); Union Carbide Agricultural Products Co. v. Costle, 632 F.2d 1014, 1017-18 (2d Cir. 1980), *cert. denied,* 450 U.S. 996, 101 S.Ct. 1698 (1981); KMW International v. Chase Manhattan Bank, N.A., 606 F.2d 10, 14 (2d Cir. 1979); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758-59 (2d Cir. 1979); Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 359-60 (2d Cir. 1979); Caulfield v. Board of Education, 583 F.2d 605, 610 (2d Cir. 1978). The rule thus recognizes two tests; as we have previously observed, however, "both require a showing of irreparable harm." *Union Carbide Agricultural Products*, 632 F.2d at 1017. Under the first test, the movant may succeed if he shows irreparable harm plus a likelihood of success on the merits. *Id.* Under the second test, the movant may succeed if he shows irreparable harm, plus sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the movant. *Id.*

43. *Dennin*, 913 F.Supp. at 667. The court determined that Dennin's level of self-esteem dramatically increased as a result of his ability to compete with the other student athletes. *Id.* The court reasoned that to deprive him of further participation would be a form of differential treatment and thus would result in a negative impact on Dennin's social goals. *Id.*

44. *See supra* note 16 and accompanying text.

45. *See, e.g.,* Nichols v. Farmington Public Schools, 150 Mich. App. 705, 389 N.W.2d 480 (1986), *reprinted in* EDUC. FOR HANDICAPPED L. REP. 558:106 (Dec. 1986-87)(hearing impaired student "mainstreamed" into regular classes a grade lower and lost a year of athletic eligibility; rule and its application upheld as being neutral and not discriminatory).

46. *See, e.g.,* Alexander v. Choate, 469 U.S. 287 (1985) (respondents alleged that the proposed regulation would have a disproportionate effect on handicapped individuals and therefore brought an action under the Rehabilitation Act); Johnson v. Florida High Schools Activities Ass'n, Inc., 899 F.Supp. 579 (M.D.Fla. 1995)(handicapped student-athlete brought an action under the Rehabilitation Act and the ADA against the FHSAA, who had enforced an age requirement that prohibited his athletic participation).

In order for these disabled students athletes to bring a successful cause of action under the Rehabilitation Act, they are required to prove that: (1) they are otherwise qualified to participate in interscholastic high school activities as regulated by the state authority, or that they may be "otherwise qualified" provided that reasonable accommodations are furnished; (2) they are being excluded from participation in athletics solely because of their disability; and, (3) that the state sport authority receives federal financial aid.[47]

To establish a claim under the ADA, based on the alleged refusal of the state high school sport authority to allow a disabled student to play, the student must establish: (1) that the state sport authority is a "public entity"[48]; (2) that the student is a qualified individual with a disability[49]; and, (3) that he/she has been excluded from participation or has been denied the benefits of activities by the public entity.[50]

Case law suggests that courts differ in their analysis of the "otherwise qualified" individual requirement (requirement (1) under the Rehabilitation Act and requirement (2) under the ADA), which subsequently plays a major role in the ultimate outcome of such litigation.[51] In addition, courts also differ in their analysis as to whether a "reasonable accommodation" has

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47. *See* Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988); Hoot by Hoot v. Milan Area Schs., 853 F.Supp. 243, 249 (E.D.Mich.1994).

48. *Id.* A "public entity" is defined as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government . . . . " 42 U.S.C.A. § 12131 (1).

49. Section 706(8) of Title 29 defines an individual with handicaps as: "any person who (I) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment . . . " 29 U.S.C. 706(8)(B) (1990 Supp.). A physical or mental impairment is defined in the Code of Federal Regulations as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotion or mental illness, and specific learning disabilities." 29 C.F.R. § 613.702(b)(2) at 303. Further, "major life activities" include "hearing, speaking, breathing, learning, and working." *Id.* at § 613.7028. Finally, having "a record" of such an impairment means "a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities." *Id.* § 613.702(d).

50. *See* Sandison v. Michigan High School Athletic Ass'n, Inc., 863 F.Supp. 483, 488 (E.D.Mich. 1994).

51. *Johnson,* 899 F.Supp at 584. In deciding whether the plaintiff has established a substantial likelihood of prevailing on the merits as to both the Rehabilitation Act claim and the Americans with Disabilities Act claim, the most important issue is the "otherwise qualified" requirement as supplemented by the "reasonable accommodation" requirement. *Id.* In brief, the dispositive issue before the court is whether waiving the age requirement constitutes a "fundamental alteration" to the purposes of the rule. *Id.* Reso-

been provided or could be provided to enable the student to abide by the regulation in question.[52] Case law prior to Dennin exemplifies how the courts analysis of the "otherwise qualified individual" requirement plays a crucial role in the plaintiff's ability to receive a waiver.[53]

In *Pottgen v. Missouri State High School Activities Association*[54], a student filed an action under the ADA, the Rehabilitation Act and § 1983 to challenge a Missouri State High School Activities Association's (MSHSAA) regulation restricting student-athletes from participation in athletic programs if they were over eighteen years of age.[55] In *Pottgen*, the Appellate Court reversed the United States District Court's issuance of a preliminary injunction[56] which restrained the association from enforcing the age limit for sports against the student.[57] The court posited that analysis under the Rehabilitation Act requires the court to determine both whether an individual

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lution of the issue requires an examination of the purposes of the age requirement as applied to the case in question. *Id.*

52. *Id.*

53. See *supra* section B.

54. Pottgen v. Missouri State High Sch. Activities Ass'n., 40 F.3d 926, 928 (8th Cir. 1994).

55. *Id.* The MSHSAA by-law states, in relevant part, A student shall not have reached the age of 19 prior to July 1st preceding the opening of school. *Id.* If a student reached the age of 19 on or following July 1st, the student may be considered eligible for inter-scholastic sports during the ensuing school year. *Id.*

56. *Id.* When considering a motion for a preliminary injunction, this court weighed the movant's probability of success on the merits, the threat if irreparable harm to the movant absent the injunction, the balance between this harm and the injunction's issuance would inflict on other interested parties, and the public interest. *Id.* (*citing* Dataphase Sys., Inc., v. CL Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)).

57. *Pottgen,* 857 F.Supp at 666. The District Court's issuance of a preliminary injunction required the court to determine that Pottgen was a proper plaintiff under the Rehabilitation Act, the Americans With Disabilities Act, and § 1983. *Id.* at 657. The District Court granted a preliminary injunction enjoining the MSHSAA from (1) preventing Pottgen from competing in any Hancoch High School baseball games or district or state tournament games; and (2) imposing any penalty, discipline, or sanction on any school for which or against which Pottgen competes in these games. *Id.* at 666. The Appellate Court noted that it would reverse the preliminary injunction if the issuance was the product of an abuse of discretion or misplaced reliance on an erroneous legal premise. *Id.*(*citing* City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 556 (8th Cir. 1993), *cert. denied,* 114 S.Ct. 2741 (1994). The court reasoned that the student made sufficient showing of irreparable harm by enforcement of the rule, which could otherwise deprive him of his last opportunity to play high school baseball and reduce his chance of obtaining a junior college scholarship; the balance of hardships favored the student; the student showed a likelihood of prevailing on the merits of his claims that he should have been given individual consideration of the effect of his learning disability on his academic progress; and the public interest favored granting the injunction. *Id.* at 654.

meets all of the essential eligibility requirements and whether reasonable modifications exist.[58] The court recognized that the plaintiff could not meet all the of the MSHSAA's requirements in spite of his disability.[59] The court continued by stating that the failure to meet the age limit would not keep the plaintiff from being "otherwise qualified" unless the age limit was an essential or necessary eligibility requirement.[60] Taking into account the important purpose that age rules serve, the court concluded that the age limit was an essential eligibility requirement in the high school interscholastic program.[61]

Furthermore, the court stated that the plaintiff could still be considered as "otherwise qualified" if reasonable accommodations, that do not impose "undue financial and administrative burdens" or a "fundamental alteration in the nature of the program," could be provided.[62] With this reasoning, the court decided that the age limit waiver is not a reasonable accommodation based on Pottgen's disability.[63] The court noted that

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58. *Id.* The District Court found Pottgen to be an "otherwise qualified" individual because except for the age limit, Pottgen meets all the MSHSAA's eligibility requirements. *Id.* The court framed the issue as not whether Pottgen meets all of the eligibility requirements, but rather whether reasonable accommodations existed. *Id.*

59. *Id.* at 929. The plaintiff was nineteen and that was clearly too old to play as per the rules. *Id.*

60. *Id.* The *Pottgen* court essentially came up with a three step analysis as to the "otherwise qualified" requirement under the Rehabilitation Act. *Id.* at 929-30. First, the court articulated the general rule that the disabled individual must be "otherwise qualified." *Id.* at 929. In other words, the disabled individual must meet all of the essential eligibility requirements in spite of his disability. *Id.* Second, the court noted that the rule had an exception. *Id.* 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.* Third, the court noted that there was an exception to the exception. *Id.* at 930. An "accommodation is not reasonable" if it "fundamental alters the nature of the program." *Id.*

61. *Id.* The majority emphasized that the age limit helped reduce the competitive advantage of the usurpation of older athletes; it protected younger athletes from harm; it discouraged student-athletes from delaying their education to gain athletic maturity; and it prevents over-zealous coaches from engaging in red-shirting to gain a competitive advantage. *Id.* Based upon the importance of the foregoing purposes, the court found that the requirement was essential to the association. *Id.*

62. *Pottgen,* 40 F.3d at 930. *See* School Bd. Of Nassau County v. Arline, 480 U.S. 273, 287 (1987); *See also,* Kohl v. Woodhaven Learning Ctr., 865 F.2d 930, 936 (8th Cir. 1989), *cert. denied,* 493 U.S. 892 (1989).

63. *Pottgen, 40 F.3d* at 930. Since Pottgen is already older than the MSHSAA age limit, the only possible accommodation is to waive the essential requirement itself. *Id.* The court disagreed with Pottgen's contention that an age limit waiver was a reasonable accommodation based on his disability. *Id.*

waiving an essential eligibility standard would constitute a fundamental alteration in the nature of the baseball program.[64] Since the plaintiff could not meet the essential eligibility requirement, the court concluded that he was not an "otherwise qualified" individual and hence not protected under § 504 of the Rehabilitation Act.[65]

Similarly, in *Sandison v. Michigan High School Athletic Association*[66], the court followed and refined the reasoning of the Pottgen court.[67] In *Sandison*, two nineteen-year-old learning disabled high school seniors sued their respective high schools and the Michigan High School Athletic Association (MHSAA) under the ADA and the Rehabilitation Act of 1973.[68] The students commenced this action after being denied participation in track and cross-country events pursuant to a MHSAA regulation which declared ninteen-year-olds ineligible to participate in any high school sport.[69]

The court found that the plaintiffs failed to prove they were

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64. *Id.* The court additionally stated that other than waiving the age limit, no means of accommodation were available which would have permitted the plaintiff to qualify. *Id.*

65. *Id.* The Appellate Court pointed out that § 504 was designed only to extend protection to those potentially able to meet the essential eligibility requirements of a program or activity. *Id. (citing* Beauford v. Father Flannigan's Boy's Home, 831 F.2d 768 (8th Cir. 1987), *cert. denied,* 485 U.S. 938, 108 S.Ct. 1116 (1988)). As a result, the District Court erred by granting the injunction based on Pottgen's Rehabilitation Act claim. *Id.*

66. 64 F.3d 1026 (6th Cir. 1995).

67. *Id* at 1035. The *Sandison* court determined that waiving the age requirement for nineteen-year old disabled students fundamentally altered the nature of the track and cross-country program because more mature and competitive students would be competing. *Id.* It also determined that waiving the age requirement would constitute an undue burden, as a case-by-case analysis would be necessary to determine unfair competitive advantage. *Id.*

68. *Id.* at 1028. Ronald Sandison and Craig Stanley, two recent graduates of Michigan public high schools, filed an action against their respective high schools and the MHSAA alleging claims under, the Rehabilitation Act of 1963, 29 U.S.C. § 794, and Titles II and III of the Americans with Disabilities Act, 42 U.S.C. § 12132, 12182. *Id.* Each student suffered from a learning disability that caused them to fall behind one year of school before reaching high school. *Id.*

69. *Id.* Therefore, the plaintiffs started their senior year when they were nineteen years of age. *Id.* However, because they were nineteen they were in violation of the MHSAA's age guideline which prohibited students who turn nineteen by September 1 of the school year to compete in interscholastic high school sports. *Id.* at 1028. In the District Court the plaintiffs won the preliminary injunctive relief. *Id.* The court reasoned that the rule was a neutral law, which thereby applied to all students equally. *Id.* Members of the MHSAA agreed to adopt the MHSAA's rules governing interscholastic sports. *Id.* at 1029. The MHSAA, of which the plaintiffs' high schools are members, prohibits students who turn nineteen by September 1 of the school year to compete in interscholastic high school sports. *Id.*

being excluded solely by reason of their disability.[70] The court went on to say that it was not the plaintiffs' respective learning disabilities which prevented them from participation but rather from the passage of time.[71] Therefore, the court held that the plaintiffs failed to meet the age requirement "solely by reason of" their dates of birth, not by "reason of disability" itself.[72]

Moreover, the court decided that the plaintiffs were not "otherwise qualified individuals."[73] The court agreed with the reasoning of the *Pottgen* court and held that waiving the age requirement for nineteen-year-old disabled students fundamentally altered the nature of the track and cross-country program because more mature and competitive students would be permitted to compete.[74] The court also decided that waiving the rule might constitute an undue burden because a case-by-

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70. *Id.*

71. *Id.* at 1032. The court decided that the regulation was a neutral law with respect to the disability and was neutrally applied by the MHSAA. *Id.* The court reasoned that during the plaintiffs' first three years of high school the regulation did not bar them from sport participation and that they were in fact learning disabled. *Id.* It was not until they turned nineteen that the regulation disqualified them. *Id.* Therefore, the court concluded that the age regulation did not exclude the students from participation "solely by reason of" their disability. *Id.*

72. *Sandison,* 64 F.3d at 1032.

73. *Id.* at 1034. The Appellate Court found that the District Court erred by finding that the plaintiffs were likely to show that they were "otherwise qualified" to participate in interscholastic track and cross-country competition. *Id.* After the District Court found that the plaintiffs were not the star team players and were not an injury risk to other competitors, the court found that the MHSAA must waive the regulation as to the plaintiffs in order to reasonably accommodate them. *Id.* The Appellate Court disagreed. *Id.* The court stated that under § 504, a disabled individual is "otherwise qualified" to participate in a program if, with a "reasonable accommodation," the individual can meet the necessary requirements of the program. *Id. (citing* Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988), *cert. denied,* 493 U.S. 810, 110 S.Ct. 53 (1989)).

In *Doherty,* in determining whether the disabled plaintiff was otherwise qualified for an optometry program, the court first asked whether the instrument proficiency requirement was necessary to the program. *Id.* The court found that this requirement was necessary to the optometry program, noting the District Court's findings that there was a recent increase in the use of the instruments. *Id.* The court went on to consider whether some "reasonable accommodation" was available to satisfy the legitimate interests of both the grantee and the disabled individual. *Id.* Waiver of the instrument proficiency requirement was not found to be a reasonable accommodation. *Id.* "An educational institution is not required to accommodate a handicapped individual by eliminating a core requirement which is reasonably necessary to proper use of the degree conferred at the end of a course of study." *Id.* "Waiver of a necessary requirement would have been a substantial rather than merely a reasonable accommodation." *Doherty,* 862 F.2d at 575.

74. *Sandison,* 64 F.3d at 1035.

case analysis would be necessary to determine unfair competitive advantage.[75] Thus, the court found the accommodation unreasonable in light of the forgoing analysis.[76]

Conversely, in *Johnson v. Florida High School Activities Association, Inc.*[77], the court rejected the reasoning offered by the *Pottgen* and the *Sandison* courts.[78] In *Johnson*, a handicapped student-athlete brought an action against a state high school activities association which had enforced age requirements and thus prohibited the student's participation in high school sports.[79] The court, in determining whether the plaintiff is "otherwise qualified", questioned whether waiving the age requirement constitutes a "fundamental alteration" to the purposes of the rule.[80]

In reviewing the *Pottgen* opinion, the *Johnson* court noted that the *Pottgen* court offerred no analysis as to the relationship between the age requirement and the purposes behind the

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75. *Id.* The MHSAA's expert explained that five factors would be weighed in deciding whether an athlete had an unfair competitive advantage due to his age: chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. *Id.* The court determined that it would constitute an undue burden to require high school coaches and hired physicians to determine whether these factors render a student's age an unfair competitive advantage. *Id.* Determinations would have to be made relative to the skill level of each individual team member and opposing team member, and would-be athletes that the older student displaced from the team. *Id.* It would be unreasonable to call upon coaches and physicians to make these near impossible determinations, particularly because each team member and the team as a whole would present different skill levels. *Id.*

76. *Id.*

77. Johnson v. Florida High School Activities Ass'n, Inc., 899 F.Supp 579 (M.D. Fla 1995).

78. *Id.* The court disagreed with the *Pottgen* and *Sandison* court's finding that the requirement was essential. *Id.* at 585. Rather, the *Johnson* court undertook an individualized analysis of the requirement and its underlying purposes. *Id.*

79. *Id.* at 581. The Plaintiff, Dennis Johnson, contracted Meningitis at nine months of age, causing him to lose all hearing in one ear and partial hearing in the other. *Id.* Because of the disability, Johnson's parents waited an additional year before enrolling him in kindergarten. *Id.* Johnson was a nineteen year old senior at Boca Ciega High School in St. Petersburg, Florida, when he commenced this action. *Id.* According to the rules of the FHSAA, which prohibits anyone who turns age nineteen before September 1 of the current school year from participating in interscholastic sports, Johnson is ineligible to participate in high school athletics. *Id.* at 582.

80. *Id.* The court mentioned that 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*. *Id.* at 584. The FHSAA promulgated two purposes of the age requirement: to promote safety (the rule liberally regulates the size and the strength of the players) and to promote fairness (the rule prevents schools from redshirting players in hopes of building a better program for themselves). *Id.*

age requirement.[81] The *Johnson* court further noted that the age requirement could be modified for the plaintiff without undermining the admittedly salutary purposes underlying the rule.[82] Moreover, this court agreed with the persuasive dissent filed in the *Pottgen* opinion which 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 . . . ."[83] The majority found that allowing the plaintiffs to participate in interscholastic athletics would not undermine the purposes of safety and fairness.[84] Therefore, the age requirement in the instant case did not fundamentally alter the nature of the program.[85]

C. *Opinion of the Dennin Court*

Chief Judge Dorsey began the *Dennin* court's analysis by declaring that a plaintiff will be granted a preliminary injunction only if he shows "(a) irreparable harm and (b) either likelihood of success on the merits of his claim or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the movant."[86]

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81. *Id.* at 586. Judge Bucklew, writing for the court, stated that the *Pottgen* court simply accepted the Missouri State High School Activities Association's assertion that the age requirement was an essential eligibility requirement. *Id.* at 584. Judge Bucklew went on to say that *Pottgen* simply recited the rule's general justifications and mechanically applied them across the board. *Id.* at 585. Judge Bucklew felt the *Pottgen* court erred because the majority failed to look at the rule's operation in the individual case of the plaintiff. *Id.*

82. *Id.* at 585. Judge Bucklew focused instead on the effect that modification of the requirement for the plaintiff would have on the nature of the program. *Id.* Judge Bucklew felt if the issue was looked at from this point of view, it becomes clear that the FHSAA could accommodate the plaintiff without impairing anything essential. *Id.*

83. *Johnson,* 899 F.Supp at 585. *See also supra* note 53 at 932-33 and accompanying text.

84. *Johnson,* 899 F.Supp at 585.

85. *Id.* The court recognized that the plaintiff was not the largest football player for his position. *Id.* Since football is a contact sport in which injuries occasionally occur, the court found that permitting the plaintiff to play would not facilitate potential injury. *Id.* Concluding that the plaintiff's ability level was mediocre, coupled with the fact that he had relatively less playing experience than the other players, the court determined that the high school would not gain an unfair advantage if the plaintiff were allowed to play. *Id.*

86. *Dennin,* 913 F.Supp at 666; *See also,* Sperry Int'l Trade, Inc. v. Gov't of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

1. Irreparable Harm

The court regarded irreparable harm or injury to be a type of injury that is incapable of being fully remedied by the law.[87] The court emphasized that the finding of irreparable injury warrants the issuance of a preliminary injunction since this type of injury cannot be offset with a monetary damage award.[88] Although the CIAC did not flatly deny Dennin further participation on the school swim team, the court pointed out that he was denied the ability to earn competition points, which were essential for Dennin to earn his varsity letter.[89]

Chief Judge Dorsey stressed that Dennin's past participation on the swim team has remarkably increased his self-esteem and interactive skills.[90] The court maintained that the limitations on Dennin set forth by the CIAC divested him of essential badges and indicia of full team membership and participation.[91] The court reasoned that Dennin would lose his sense of parity with his teammates as a result of his inability to compete and earn points for the team and would deteriorate his self-esteem and thereby his IEP goals.[92] Based upon the foregoing analysis the court found that the harm to Dennin was both immediate and irreparable.[93]

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87. *Dennin,* 913 F.Supp. at 667.

88. *Id.*

89. *Id.* at 667. Allowing the plaintiff to be an exhibition swimmer is an insufficient accommodation for the plaintiff because he will ultimately be eliminated from participating during competitions due to his inability to earn points. *Id.* The team cannot either successfully or competitively compete if one of their participating swimmers is not a fully eligible team member capable of earning points. *Id.* The court deduced that in a close meet the coach would be placed in the position of having to choose between allowing Dennin to swim or losing the meet. *Id.* Ultimately, the coach would likely deny Dennin from participating. *Id.* In sum, the force which drove Dennin to participate in interscholastic sports was his desire to earn the varsity letter. *Id.*

90. Id. See also, T.H. v. Montana High School Ass'n No. CV 92-150-BLG-JFB, United States District Court, D. Montana (Sept. 24, 1992), whereby the court opined that the plaintiff experienced substantial improvement in his academic performance due to his increase in self-esteem which stemmed from his participation in interscholastic sports. Id.

91. *Dennin,* 913 F.Supp at 667. Since Dennin was able to understand he was being treated differently than the other swimmers, it would lead him to feel inferior to his teammates. *Id.* Dennin's membership on the swim team was not only a chance for him to fulfill his IEP goals, but it was also a social outlet for him. *Id.* The court felt that excluding him from full participation would have the reverse effect. *Id.*

92. *Id.*

93. *Id.* The *Dennin* court determined that immediacy was established because the swim season was in a state of continuance. *Id.* The swim season was progressing and the competitions would not be postponed until the plaintiff's situation was resolved. *Id.*

2. Probability of Success on the Merits

After determining that irreparable harm had been established, the court then needed to decipher whether Dennin could bring a vital claim that the defendant's refusal to grant him the waiver violated the Rehabilitation Act, the ADA and his constitutional rights.[94]

a. Rehabilitation Act

Chief Judge Dorsey first analyzed whether Dennin could succeed on the merits of his claim that the CIAC violated the Rehabilitation Act of 1973.[95] Chief Judge Dorsey noted that Dennin 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 CIAC 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) that the CIAC receives federal financial assistance.[96]

Therefore, the plaintiff's relief was of the moment. *Id.* In addition, the court found that the harm was irreparable because Dennin's diminished self-esteem was incapable of being neutralized with monetary principles. *Id.* A numerical value cannot be placed upon the plaintiff's self-esteem. *Id.* Therefore, monetary damages would not have been an appropriate remedy of Dennin's losses. *Id.* The issuance of an injunction would have been an appropriate remedy because it would actually resolve Dennin's problem. *Id.*

94. *Id.* To establish a cause of action 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 CIAC 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 CIAC receives federal financial assistance. Johnson v. Florida High Sch. Activities Ass'n, Inc., 899 F.Supp 579, 582 (M.D. Fla.1995). Additionally, To establish a claim under Title III of the ADA, the plaintiff must prove; (1) he is disabled; (2) the CIAC is a "private entity" which owns, leases (or leases to), or 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 CIAC accommodations. *Id.* To establish a claim under Title II of the ADA, the plaintiff must prove: (1) the CIAC 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 public entity. *Johnson,* 899 F.Supp at 582. Finally, to state a cause of action under § 1983 a plaintiff must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) such conduct deprived him of rights, privileges or immunities secured by the Constitution or laws of the United States. Parrat v. Taylor, 451 U.S. 527, 535.

95. *Dennin,* 913 F.Supp. at 667.

96. *Id.* (citing *Johnson,* 899 F.Supp. at 582; *Sandison,* 863 F.Supp. at 488).

i. Individual with a Disability

The court established that Dennin satisfied the first required element to bring an action under the Rehabilitation Act because he rightfully fell within the statutory definition of an individual with a disability.[97] The court reiterated that under Section 706 of the Act "an individual with a disability" is defined as "any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities."[98] Chief Judge Dorsey stated that Down Syndrome was such a disability, therefore, Dennin was covered by the statute.[99]

ii. "Otherwise qualified" individual

The *Dennin* court advanced that an "otherwise qualified" individual was an individual who meets all of the intrinsic requirements of the program in spite of his disability.[100] In the

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97. *Dennin*, 913 F.Supp at 667. *See* 29 U.S.C. § 706 provides in relevant part:
(8)(A) Except as otherwise provided in subparagraph (B), the term "individual with a disability" means any individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, VI, or VIII of this chapter.
(B) Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of Section 701, 713, and 714 of this title, and subchapters II, IV, V and VI of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.
(C)(I) For purposes of subchapter V of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use. (II) Nothing in clause (I) shall be construed to exclude as an individual with a disability an individual who (I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; (II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (III) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs . . . .
29 U.S.C.A. § 706.

98. *Id.* and accompanying text.

99. *Dennin*, 913 F.Supp. at 667

100. *Id.* at 668.

present case, since Dennin could not meet the essential age requirement because he was already nineteen, the court stressed that he would still meet the "otherwise qualified" individual definition if a "reasonable accommodation" would enable him to fulfill requirements of the program.[101]

Chief Judge Dorsey recognized that courts are in dispute over whether a waiver of the age eligibility requirement constitutes a reasonable accommodation.[102] In doing so, the court noted that the *Pottgen* court found the age eligibility requirement to be essential because it prevented unfair competitive advantage, protected the younger athletes from harm, discouraged athletes from delaying their education, and prevented red-shirting; therefore, a waiver of the rule would not be a rea-

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101. *Id.* at 668. (citing Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026, 1034 (6th Cir. 1995); Pottgen v. Missouri St. High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994)). Since Dennin could not meet the essential age requirement due to his disability, the court needed to answer the question of whether the CIAC's waiver of the age requirement would be considered a reasonable accommodation. *Id.* Courts have determined that accommodations which impose undue financial or administrative burdens, or those that fundamentally alter the nature of the program, do not qualify as reasonable accommodations. *Id.*

102. *Id.* at 668. For example, in *Pottgen* the plaintiff was handicapped and ineligible to play interscholastic sports because he was nineteen years old his senior year of high school. *Pottgen*, 40 F.3d. at 929. The age requirement was deemed essential by the court because it protected younger athletes from harm, it discouraged athletes from delaying their education, and it prevented red shirting. *Id.* The court held that waiving the age requirement would fundamentally alter the nature of the baseball program. *Id.* at 930. Since no reasonable accommodation could therefore be made, the plaintiff was not "otherwise qualified." *Id.*

The *Sandison* court also found that waiving the age requirement for nineteen year old disabled students fundamentally altered the nature of the track and cross country program since more mature and competitive students would be competing. *Sandison,* 64 F.3d. at 1035. Furthermore, the court found that waiving the age requirement would constitute an undue burden because a case by case analysis would be necessary to determine unfair competitive advantage. *Id.*

The *Johnson* court rejected the analysis of the *Pottgen* and the *Sandison* courts. *Johnson,* 899 F.Supp. at 585. The court in *Johnson* considered whether a disabled student could be excluded from football and wresting because he was not age eligible. *Id.* Instead of finding that the waiver was essential and that any accommodation would be unreasonable, the *Johnson* court did an individual analysis of the requirement and its underlying purposes. *Id.* The court reasoned that 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. *Id.* "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." *Id.* Since the plaintiff was only a mediocre player and was not a safety hazard, waiving the age requirement was found not to fundamentally alter the nature of the program. *Id.*

sonable accommodation.[103]

The *Dennin* court continued by acknowledging that the *Sandison* court followed the reasoning of the *Pottgen* court and determined that a waiver of the age requirement for a nineteen-year-old disabled student was not a "reasonable accommodation" because it would fundamentally alter the nature of the track and cross country program.[104] In light of this prior law, the *Dennin* court rejected the analysis set forth by both the *Pottgen* and the *Sandison* courts.[105] Chief Judge Dorsey found the reasoning of the *Johnson* court and the dissent in Pottgen thoroughly persuasive.[106]

In accord with the *Johnson* court's analysis, the *Dennin* court emphasized that "it would be an anathema to the goals of the Rehabilitation Act to decline to require an individualized analysis of the purposes behind the age requirement as applied to Dennin."[107] The *Dennin* Court rationalized that such an individualized analysis would reconcile the *Pottgen* and *Sandison* court's approach which "exalted the rule itself without regard for the essential purposes behind the rule."[108] The

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103. *Pottgen,* 40 F.3d at 930. The *Pottgen* Court reasoned that a waiver of an essential eligibility standard would constitute a fundamental alteration in the nature of the athletic program. *Id.* The *Pottgen* court went on to conclude that since no reasonable accommodation could be made, the plaintiff was not "otherwise qualified." *Id.*

104. *Dennin* 913 F.Supp at 668. Since more mature and competitive students would be competing, both of these courts applied a blanket holding that the age requirement was essential and therefore a waiver would be unreasonable. *Id.* Additionally, the *Sandison* court opined that a waiver of the age requirement would also constitute an undue burden since a case by case analysis would be necessary to determine unfair competitive advantage. *Id.*

105. *Id.* at 669. Chief Judge Dorsey agreed with *Johnson*, which stated: "Rather than a blanket holding that the requirement was essential, and that any waiver would be unreasonable, Johnson undertook an individualized analysis of the requirement and its underlying purposes." *Id.*(citing *Johnson* 899 F.Supp at 585.)

106. *Dennin,* 913 F.Supp. at 668. The *Johnson* court rebuffed the blanket holding applied by the *Pottgen* and the *Sandison* courts which found that any waiver of the age eligibility rule would be unreasonable and instead undertook an individualized analysis of the requirement and its purposes. *Johnson,* 889 F.Supp. at 585. The court articulated that "in analyzing the requirement, 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." *Id.* "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 . . . ." *Id.* Since the plaintiff in *Johnson* was not considered to be a safety hazard, he was an average player and not competitive advantage to the team, and had less experience than the other players, therefore, the court found that a waiver of the age requirement would not fundamentally alter the nature of the program. *Id.*

107. *Dennin,* 913 F.Supp. at 668

108. *Id.* The *Dennin* court mentioned that other courts have found that similar indi-

court continued by noting that a waiver of the age eligibility rule would not undermine any of the purposes of the CIAC regulation.[109]

In supporting this contention, Chief Judge Dorsey initially stated that Dennin was not a safety risk to himself or others since swimming was not a contact sport.[110] Second, the Judge mentioned that Dennin had no competitive advantage because he was repeatedly the slowest swimmer on the team.[111] Next, the court recognized that Dennin's education was delayed directly as a result of his disability, as opposed to a delay to gain a competitive edge.[112] Finally, the court noted that Dennin

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vidual analyses of an age requirement waiver are a reasonable accommodation. *See* Booth v. Univ. Interscholastic League, No. A90CA764, 1990 WL 484414 (W.D.Tex. Oct. 4, 1990).

In *Booth*, the plaintiff moved for a preliminary injunction alleging that the defendant violated § 504 of the Rehabilitation Act since it refused to allow the plaintiff to participate in interscholastic athletics because of an age eligibility rule which provided: "an individual is eligible to participate in a league varsity contest as a representative of a participant school if he is less than 19-years-old on September 1 preceding the contest." *Id.* The plaintiff turned nineteen on August 31, 1990, so he was ineligible to participate in high school football competition during his senior year. *Id.* However, the plaintiff's education was delayed because as a child he suffered from a debilitating illness which lead to both physical and mental impairment. *Id.*

In determining whether the plaintiff was an "otherwise qualified" handicapped individual who was excluded from sport participation solely because of his disability, the court agreed with the defendants contention that the plaintiff was not being excluded from interscholastic athletics because was handicapped. *Id.* at 3. The court went on to say that the plaintiff was excluded because he did not meet the nineteen year old eligibility rule. *Id.* The court then noted that the plaintiff was forced to delay his education because of his childhood illness and that he would have advanced in school along with the other children had he not become ill. *Id.* Because of these unfortunate events, the court found the plaintiff to be an "otherwise qualified" individual. *Id.* To flatly hold that the plaintiff failed to qualify because he was nineteen would mean that any student who failed to meet the requirement as a result of a past handicap would never be otherwise qualified and therefore undeserving of the Rehabilitation Act's protection. *Id.* "Not only does such a construction undermine the policies Congress sought to advance on behalf of the handicapped, but it also ignores the obligations of federal entities under the Rehabilitation Act, as interpreted by the U.S." *Id.* The court went on to cite Alexander v. Choate, 469 U.S. 287 (1985), stating that after *Alexander*, "it is clear that the phrase 'otherwise qualified' has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee, but on the other hand, it cannot refer only to those already capable of meeting all the requirements-or else no reasonable requirement could ever violate § 504 of the Rehabilitation Act, 29 U.S.C. § 794, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it . . . ." *Id.* (citing *Alexander*, 469 U.S. at 299).

109. *Dennin,* 913 F.Supp. at 669.

110. *Id.*

111. *Id.*

112. *Id.*

was not a red-shirt threat.[113] Based upon the preceding individualized analysis, the *Dennin* court concluded that granting Dennin a waiver would not alter the nature of the swimming program.[114]

Chief Judge Dorsey next addressed the question of whether the waiver would impose an undue hardship on the defendant.[115] The court refuted the defendant's argument, which contended that such a granting would spawn a floodgate of waiver applicants, by clarifying that the CIAC was in no way obligated to accept every student-athlete's waiver application regarding the age eligibility requirement.[116] The court reminded the CIAC that under the Rehabilitation Act they are only to address situations concerning *disabled* student-athletes that submit a waiver.[117] Further, Chief Judge Dorsey advocated that even if the number of applications from disabled students increased, the cost of such would be passed on to the schools through fees.[118] Accordingly, the court decided that the waiver would not impose an undue hardship on the defendant.[119]

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113. *Id.*

114. *Dennin,* 913 F.Supp. at 669. The court found that since the rule could be modified without conflicting with the rule's purposes, the rule was not essential to the nature of the program. *Id.*

115. *Id.* at 669. "Undue hardship" is defined as an action that creates significant difficulty or expense. 42 U.S.C.A. 12111(10). In determining whether "undue hardship" exists, the court should look to the nature and cost of the accommodation; the financial stability, number of employees, and the effect, expense and impact on the entity providing the accommodation; the financial resources, number, type, and location of the covered entity; and the type of operations undertaken by the covered entity. *Id.*

116. *Dennin,* 913 F.Supp at 669. The CIAC further argued that such a flood of waiver applications would be administratively impossible to manage. *Id.*

117. *Id.* Therefore, the holding in the *Dennin* case is limited in the sense that it only affects the CIAC's consideration of the disabled as opposed to the consideration of all students who fail to meet the age requirement. *Id.*

118. *Id.*

119. *Id.* The court stated that:

> . . . in Dennin's case the consideration would be relatively simple. In some cases, it would be more complex, depending on the sport in question, the size, agility, strength and endurance of the individual, and whether the quality of his/her athletic capacity/capability is enhanced by his/her age beyond eighteen. That it may prove difficult in some cases does not substantiate the claim that it would be unduly burdensome or destructive of the purpose of the rule . . . . There is no limitation on which rules are waivable. Subjective case-by-case analysis must have been foreseen for considering such waivers. In fact, transfer waivers are routinely granted. The presence of this mechanism weakens CIAC's argument that case-by-case consideration of waivers constitutes an undue burden. The ruling here does not mandate the granting of a waiver in any case but this one.

Argument that a grant of "exhibition status" to Dennin would be a "reasonable accommodation" was unacceptable to the court, which reiterated that it is the aim of the Rehabilitation Act to give disabled persons equal treatment and participation.[120] Chief Judge Dorsey attested that granting Dennin exhibition status placed Dennin in a position which was fundamentally different from his fellow teammates.[121] For these reasons, the court concluded that Dennin was to be granted a reasonable accommodation of full participation.[122] Dennin therby satisfied the "otherwise qualified" individual requirement because the accommodation of full participation would enable him to fulfill the requirements of the program.[123]

iii. "Solely because of" disability

Next, the defendant's argued that since the age requirement was a neutral law equally applied to all student-athletes, Dennin could not have been discriminated against "solely because of" his disability but rather as a result of his age.[124] In rejecting this argument, Chief Judge Dorsey found that Den-

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Id. at 669.

120. *Dennin,* 913 F.Supp at 669. The court highlighted that "the Rehabilitation Act seeks full participation and equality of the disabled to the extent reasonable accommodations can be made." *Id.* The court decided that requiring the defendant to give special consideration to the plaintiff based on his history of being handicapped was a reasonable accommodation. *Id.* As such, the court found a substantial likelihood that the plaintiff would prevail on the merits. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Dennin,* 913 F.Supp. at 669. Defendant's argument paralleled the reasoning of the *Sandison* court. In *Sandison,* the plaintiffs were not found to be excluded from interscholastic athletic participation solely because of their disability. *Sandison,* 64 F.3d. at 1032. The *Sandison* court relied on a few cases to explain the meaning of "solely by reason of" disability. *Id.* The court explained that in Southern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979), the Supreme Court considered § 504 of the Rehabilitation Act of 1973, which provides that an "otherwise qualified handicapped individual" shall not be excluded from a federally funded program "solely by reason of his handicap." *Id.* The Supreme Court concluded that the statutory language was only intended to "eliminate discrimination against otherwise qualified individuals," and generally did not mandate "affirmative efforts to overcome the disabilities caused by handicaps." *Id.* at 1032 (quoting *Davis,* 442 U.S. at 410, 99 S.Ct. at 2369). The *Sandison* court went on to argue that the age requirement was a neutral law that was neutrally applied. *Id.* The court observed that in the plaintiff's first three years of high school, the requirement did not bar the student from playing sports, yet the student was learning disabled at that time. *Id.* The court added it was not until the plaintiff turned nineteen that the regulation operated to disqualify him. *Id.* Based upon the foregoing, the court concluded that the age regulation did not excluded students from participating "solely by reason of"

nin was discriminated against solely because of his disability, as this was the very reason Dennin was nineteen and a senior in high school.[125] The court found the reasoning of the *Booth* court[126] persuasive and applicable to the case at hand.[127] In reaching this determination, the court paid close attention to *Booth* where the defendant argued against the plaintiff being discriminated against solely because of his disability— an argument parallel to the one raised by the CIAC in *Dennin*.[128] The *Dennin* court gave credence to the *Booth* court's response which stated that "to accept such an analysis would mean that *any* student who fails to meet defendant's requirement as a result of a past handicap is not 'otherwise qualified,' and therefore is not protected by the Rehabilitation Act."[129] The *Dennin* court opined that the defendant's argument would allow the age requirement rule to insulate itself from scrutiny.[130] In light of this determination, the court held that Dennin was discriminated against solely because of his disability.[131]

iv. Receipt of Federal Financial Assistance

The final factor the court addressed was whether or not the

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their disability. *Id.* The court found that the plain meaning of § 504's text did not cover the plaintiff's exclusion. *Id.*

125. *Dennin,* 913 F.Supp at 669. The *Dennin* court stated that it could not be ignored that the only reason *Dennin* was in school at age nineteen was due to his disability. *Id.* The court noted that but for his disability, Dennin's fourth year of athletic participation (provided in CIAC's rules) would not have been when he had become nineteen but at age eighteen. *Id.*

126. Booth v. University Interscholastic League, 1991 WL 484414 4, (W.D.Tex.)(Oct. 4, 1990).

127. *Id.*

128. *Id.* at 3.

129. *Dennin,* 913 F.Supp. at 669 (quoting *Booth,* 1990 WL 484414 at 3). The *Booth* court continued by holding that:

> [n]ot only does such a construction undermine the policies Congress sought to advance on behalf of the handicapped, but it also ignores the obligations of federal entities under the Rehabilitation Act, as interpreted by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). There the Supreme Court noted that the questions of whether an individual is "otherwise qualified" and whether he is a victim of "discrimination" under the intended meaning of the Rehabilitation Act are closely intertwined. Such determinations should be made by focusing on the "ultimate question," which is "the extent to which a grantee is required to make reasonable modifications in its program for the needs of the handicapped.

Booth, 1990 WL 484414 at 3.

130. *Dennin,* 913 F.Supp at 669.

131. *Id.*

CIAC receives federal financial assistance.[132] Initially, the court recognized that the CIAC receives federal financial assistance indirectly through the fees paid by the public schools which receive federal assistance, and in turn delegate to the CIAC a portion of their responsibilities for regulation of interscholastic activities.[133] Moreover, the court not only made mention of the fact that the CIAC holds competitions in facilities which receive federal financial assistance, but also of the fact that most of the coaches who participate in the competitions are employees of schools that receive federal assistance.[134] In light of these considerations, the *Dennin* court found that the CIAC rightfully qualified as an establishment that receives federal financial assistance and therefore is subject to the Rehabilitation Act.[135] As a result, the court assessed that Dennin satisfied the four elements required to pursue an action under the Rehabilitation Act, thereby rightfully establishing probability of success on the merits of his claim.[136]

b. Americans with Disabilities Act

Dennin's second allegation was that the CIAC's refusal to grant the waiver violates the Americans with Disabilities Act ("ADA").[137] The court stated that in order for the plaintiff to establish a claim under Title III of the ADA, the plaintiff must prove: (1) that he is disabled (which has already been found through the Rehabilitation Act analysis above); (2) that the CIAC is a "private entity" which owns, leases or operates a "place of public accommodation"; (3) that he was denied the opportunity to "participate in or benefit from services or accommodations on the basis of his disability (which also has already been found through the Rehabilitation Act analysis above)",

132. *Id.* at 667.

133. *Id.* With this finding, the court followed the example of many other courts which have stated that programs receiving indirect federal financial assistance are subject to the Rehabilitation Act. *Id.* at 913 F.Supp at 668 (citing Pottgen v. Missouri High Sch. Activities Ass'n, 857 F.Supp 654, 663 (E.D.MO. 1994), *rev'd in part on other grounds*, 40 F.3d 926 (8th Cir. 1994); Sandison v. Michigan High Sch. Athletic Ass'n, 863 F.Supp 483 (E.D.Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1212 (9th Cir.), *cert. denied*, 471 U.S. 1062, 105 S.Ct. 2129, (1985)).

134. *Dennin*, 913 F.Supp. at 667.

135. *Id.*

136. *Id.* at 667-670.

137. *Id.* at 670.

and (4) that reasonable accommodations could be made which do not fundamentally alter the nature of CIAC accommodations (once again, this element was also already found through the Rehabilitation Act analysis above).[138]

Initially, the court recognized that a private entity is defined as "any entity other than a public entity."[139] According to the court, examples of public accommodations which list private entities include: places of exhibition or entertainment; secondary, undergraduate, or postgraduate private schools or other places of education; or gymnasiums or other places of exercise or recreation.[140] The majority found that the CIAC's purposes included "to supervise, direct and control interscholastic athletics in Connecticut," and "to develop intelligent recognition of the proper place of interscholastic athletics in the education of [their] youth."[141] By managing and controlling the aforementioned, the court deduced that the CIAC was a private entity which operated places of public accommodation.[142] Therefore, since the plaintiff satisfied all of the requisite elements to bring an action under the ADA, the court found that Dennin had established probability of success on the merits of his claim.[143]

The court continued to say that even if there was dispute over whether or not the CIAC was a public versus private entity, Dennin still had a potentially valid claim under the ADA.[144] The court recognized that if the CIAC was not a pri-

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138. *Id.*

139. *Dennin,* 913 F.Supp at 670.

140. *Id.*

141. *Id.* (citing CIAC handbook, § 1.3).

142. *Id.* The court further articulated:

> Member schools delegate significant control and authority to CIAC in regulating this athletic component of education. Additionally, the CIAC sponsors athletic competitions and tournaments. By managing and controlling the aforementioned, it operates places of public accommodation, i.e., a place of education, entertainment and/or recreation. The fact that some of these facilities might be owned by a public entity, i.e., a public school, does not affect the conclusion that CIAC operates the facilities for purposes of athletic competition.

Id.

143. *Id.*

144. *Dennin,* 913 F.Supp at 670 (citing *Johnson*,899 F.Supp at 582). The court takes the position that the CIAC may be viewed as either a public or private accommodation to show that the plaintiff can probably succeed on the merits of either a claim under Title III of the ADA or Title II of the ADA. Thus establishing that the plaintiff has an ADA claim regardless. *Id.*

vate entity operating a place of public accommodation, the plaintiff could establish a claim under Title II of the ADA which required him to prove: (1) that the CIAC was a public entity (2) that he was a "qualified individual with a disability" (which has already been established in the Rehabilitation analysis above); and (3) that he has been excluded from participation from or denied the benefits of the public entity (which has also previously been established in the court's above analysis).[145]

According to the *Dennin* court, a public entity is defined as "(A) any state or local government; [or] (B) any department, agency, special purpose district, or other instrumentality of a state or states or local government . . . ."[146] Since public schools delegate authority to the CIAC to direct and control their athletic programs and since public schools play a substantial role in determining and enforcing CIAC policies, the court determined that the CIAC is an instrumentality of the state and therefore qualifies as a public entity.[147] By validating that the CIAC could be a public entity, the court decided that Dennin could probably succeed on the merits of a claim under Title II of the ADA.[148]

c. Constitutional Claim Under § 1983

Dennin finally argued that the CIAC's enforcement of the age requirement deprived him of his constitutional rights under § 1983.[149] The court advanced that to state a cause of action under § 1983 a plaintiff must show "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that such conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or

145. *Dennin*, 913 F.Supp at 670. Title II of the ADA regulates activities and services of state and local governmental entities. 42 U.S.C. §§ 12131-12134. Specifically, Title II prohibits qualified disabled individuals from being excluded from participating in, or receiving the benefits of, the services and programs of a public entity. 42 U.S.C. § 12132. Title II also compels public entities to take active steps to achieve compliance with the ADA. *Id.*

146. *Id.*

147. *Dennin*, 913 F.Supp. at 670.

148. *Id.* at 671. Since the court found that Dennin met all of the requirements under Title III and Title II of the ADA, Dennin has rightfully established probability of success on the merits of his ADA claim regardless of whether the CIAC was found to be a public or private entity. *Id.*

149. *Id.*

laws of the United States."[150] The court initially deduced that Dennin satisfied the first element required to bring an action because the actions of voluntary interscholastic athletic associations (of which public schools comprise part of their membership) constitute state action.[151]

Next, the court acknowledged that although the Constitution does not grant individuals a right to participate in interscholastic sports, it has been held that inclusion of such activity in an IEP transforms it into a federally protected right.[152] Therefore, the majority found that Dennin has a constitutional right to participate in interscholastic sports because such activity was included in the student's IEP.[153] The court went on to say that due process is required before Dennin may be deprived of his constitutional right.[154] The court clarified

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150. *Id.* (citing Parrat v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13 (1981)).

151. *Dennin,* 913 F.Supp. at 671 (citing Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir.1982), *cert denied,* 464 U.S. 818, 104 S.Ct. 79 (1983))

In *Clark,* the Appellants, were students in Arizona High Schools who participated in volleyball on national championship teams sponsored by the Amateur Athletic Union. *Id.* at 1127.

Although the state action issue was not raised by the parties, the court noted that the AIA regulations in question met the state action requirements of the Fourteenth Amendment. *Id.* The facts indicated that the AIA was a voluntary association of all public and most private high schools in Arizona. *Id.* The court went on to say that the member public schools played a substantial role in initiating and enforcing the AIA policies. *Id.* Additionally, the court noted that school administrators and coaches represented the member schools by their seating on AIA advisory committees. *Id.* Overall, the AIA was responsible to enforce the rules through the member schools and the public officials of those schools and school districts. *Id.* Furthermore, both AIA athletic and non-athletic occurred on public school grounds. *Id.*

More importantly, the court went on to comment that "every court to consider the question has concluded that associations similar to the AIA are so intertwined with the state that their actions are undoubtedly considered state action." *Id.* Thus, the court agreed that the activities of the AIA were so intertwined with the state that the AIA regulations must be considered state action. *Id.*

152. *Dennin,* 913 F.Supp. at 671; *See* T.H. v. Montana High School Ass'n, No. CV 92-150-BLG-JFB, 1992 WL 672982 at 4 (D.Mont. Sept. 24, 1992). In *T.H.* the court acknowledged that a student has no constitutional right to participate in interscholastic sports. *Id.* However, the court went on to say that 20 U.S.C. § 1400(c) guarantees T.H. the right to a free and appropriate public education, "provided in conformity with an individualized education program . . . . " *Id.* Therefore, when participation in interscholastic sports is included as a component of an IEP as a "related service", the "privilege" of competing in interscholastic sports is transformed into a federally protected right. *Id. See supra* note 2 at 20 U.S.C. § 1400(c).

153. *Dennin,* 913 F.Supp. at 671.

154. *Id.* The Due Process Clause provides that no person may be deprived of "life, liberty or property, without due process of law." See U.S. CONST. amend V and XIV. *Dennin* essentially alleged a procedural due process violation. *Dennin,* 913 F.Supp. at

that due process requires that Dennin be afforded a "meaningful, individualized inquiry into [his] request for a waiver."[155]

Chief Judge Dorsey mentioned that the CIAC failed to meaningfully consider whether Dennin's request for a waiver would undercut the purpose of the age eligibility rule.[156] The court added that the CIAC disregarded the waiver and failed to produce any reason why an individualized analysis would prohibit Dennin from receiving the waiver.[157] Since Dennin's participation would not undermine any of the stated purposes of the rule, in conjunction with the fact that the court could find no reason not to grant the waiver, the court decided that Dennin was entitled to the requested relief.[158]

Ultimately, the court found that Dennin established irreparable harm and probability of success on the merits in a variety of causes of action.[159] Chief Judge Dorsey endorsed that " . . . the record reflect[ed] no justification under the Rehabilitation Act, the ADA, and §1983 for the [CIAC] to refuse to waive the age requirement for Dennin."[160] Therefore, the court granted the motion for a preliminary injunction.[161]

III. Conclusion

In a fortunate turn of events for Dennin, the court applied an individualized analysis which entitled him to the waiver. The question however remains: what about those other handicapped athletes who will come before the courts in hopes of acquiring a waiver of an age eligibility rule? The outcome of future requests will depend on the view of the court hearing the case, following the reasoning employed in either the

671. In determining whether there has been a procedural due process violation, courts look to see if the individual interest was a protected liberty or a property interest, and if such interest was affected did the government follow proper procedure in order to fairly deprive the individual that interest. *Id.*

155. *Dennin,* 913 F.Supp. at 671 (citing T.H. v. Montana High School Ass'n, 1992 WL 672982 at 4 (D.Mont. Sept. 24, 1992). This included consideration of whether any of the stated purposes behind the rule were implicated by plaintiff's participation. *Id.*

156. *Dennin,* 913 F.Supp. at 671. The majority mentioned that the waiver was disregarded without further ado. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 671. *Dennin* established probability of success on the merits of a claim under the Rehabilitation Act, Title III of the ADA, Title II of the ADA and § 1983 of the U.S. Constitution. Id.

160. *Id.*

161. *Dennin,* 913 F.Supp at 671.

Pottgen or *Dennin* courts. The truth of the matter is, the fact that we even need to litigate this issue is evidence of a severe defect in society. Why must disabled athletes put in a request to be treated like others? In the absence of a safety hazard, isn't it apparent that the handicapped should be able to play and participate as equals with other players? As a society, have we completely turned our cheek to what is 'right' as opposed to what the age eligibility rules (or any rules, for that matter) strive to achieve?

In light of the fact that many regulations imposed on school athletic associations wind up preventing handicapped athletes from participating in interscholastic sports, the array of remedial statutes designed to put disabled individuals on equal ground with average persons serve an important objective. Where, then, is the harm in simply granting Dennin the waiver, absent the lengthy analysis? Based on the facts alone, one could persuasively argue that the waiver should have been granted swiftly. Isn't it clear that Dennin, and others like him, have suffered enough during the course of their lifetime? Why should they also have to endure the financial burdens of litigation to achieve a chance for a normal life that "human compassion" demands?

These disabled individuals have felt repeated occasions of pain, disappointment and inequality during the course of their lives. We should ask, when does this torment end? These are, ultimately, children like any other, who strive daily to 'fit in'. Not every technical issue in America today needs to be a litigious one. Isn't it so apparent on the surface that granting the waiver is the moral, decent, compassionate thing to do and ultimately, what is right? Why must such an analysis by the judiciary take place? Moreover, why should the courts resources be wasted on an issue that would not be an issue if society would learn how to care less about themselves and perhaps learn to extend themselves to others?

This may seem like favoritism towards the disabled athletes, and in the end unequal treatment of all the students who fail to qualify for the age requirement equally—*but why is this wrong*? There is nothing unjust about giving disabled students a little boost, a glimmering ray of hope to brighten their lives. Those of us that are fortunate enough to be healthy already have something that no special treatment, like receiving a

waiver, can even compare. For those individuals like Dennin, receiving a waiver is a stepping stone to living a fruitful, normal life. Those like Dennin need to work hard, everyday, to feel worthwhile and accepted while it just comes naturally for most others.

Ours is not a perfect world, as evidenced by the fact that litigation on this issue continues on indefinitely. The courts will hopefully look with favor on the *Dennin* court's decision and follow the individualized approach. For those who may disagree with the holding in Dennin, perhaps they should reevaluate their lives and good fortune by walking a mile in both Dennin's shoes and others in his situation. Only then will compassion shine in the place of the insensitivity and hypertechnicality of age eligibility rules.

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