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# ATHLETES WITH DISABILITIES IN SCHOOL SPORTS: A CRITICAL ASSESSMENT OF THE STATE OF SPORTS OPPORTUNITIES FOR STUDENTS WITH DISABILITIES

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## I. INTRODUCTION

*My son is now 16 years old and in 10th grade and attending a public high school and is blind. The school often did some unusual things to "include" him in activities. During soccer season, volleyball and other team sports, my son was made to stand out in the middle of the field so it would look like he was participating. Meanwhile, he was scared to death because he never knew when the ball was going to hit him. The school faculty truly could not comprehend why my son couldn't see the ball coming and get out of the way or kick it. This became more physically dangerous for him in middle school, as the other students grew larger and stronger, and I had to put a stop to it. Besides what is mentioned above, no accommodations were made for him that made it so he could actually participate.*

- Mother of high school student, Maryland

*I do not have a physical disability but I have a learning disability. While the effects of physical disabilities are much more severe, learning disabilities affect people greatly in the athletic arena. Some coaches will tell you to run a drill and because you cannot understand them very well, you get into trouble and it makes it look as though you're disobeying them. I have been publicly humiliated because of a disability I could not control. Sometimes you just want to give up because you cannot understand the drill and the coach keeps yelling at you and your teammates blame you for all the running they are doing. I have been called dumb, stupid, idiot, slow, and the list goes on. I just would like coaches out there to understand that there are athletes out there with learning disabilities and its not that we are not trying, its just that we have a hard time understanding. But please do not give up on us or call us names, we will get it! Learning disabilities will never leave a person even if they come up with ways to hide them. Please open your eyes to those athletes with learning disabilities and give them a chance.*

- High school student, Virginia

*All she wants to do is play for her school and be proud of being in that role. She does not want to be on the sidelines cheering. She wants to be in the game, sweating and making passes. So what that she cannot run as fast or dribble the ball very well. Why should that matter in school sports? Shouldn't it be about learning and shouldn't the learning include people of all abilities? Why don't more programs exist for students like my daughter to get involved in?*

- Mother of high school student with cerebral palsy, Maryland

The statements above represent real stories of parents and students with disabilities describing their experiences in trying to participate in school sports.<sup>1</sup> Their experiences did not occur in isolation, but represent a deep-rooted issue of discriminatory practices in our educational institutions, which keep students with disabilities on the sideline in school sports.

More than fifty million people in the United States (1 out of 6 people)<sup>2</sup> have documented disabilities,<sup>3</sup> yet individuals with disabilities are not getting the same amount of physical activity and athletic opportunities as individuals without disabilities. Individuals with disabilities are almost three times as likely to be sedentary as individuals without disabilities (29% vs. 10%).<sup>4</sup> In fact, 56% of people with disabilities do not engage in any physical activity,<sup>5</sup> and only 23% of people with disabilities are active for at least thirty minutes three or more times per week.<sup>6</sup>

The benefits of sports participation are significant for people with disabilities. Physical activity improves academic success, builds self-esteem, and prevents health problems. It reduces the risk of developing heart disease, helps control weight, builds lean muscle, reduces fat,<sup>7</sup> and prevents osteoporosis.<sup>8</sup> Additionally, sport is where people can develop skills like teamwork, goal-setting, the pursuit of excellence in performance, and other achievement-oriented behaviors necessary for success in the.

Despite these benefits, opportunities for students with disabilities to

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<sup>1</sup> The referenced stories were collected and compiled by the Women's Sports Foundation from 2007-2008. Women's Sports Foundation, Share Your Story, <http://www.womenssportsfoundation.org/Take-Action/Advocate-for-Change/Share-Your-Story.aspx> (last visited Feb. 28, 2009).

<sup>2</sup> See United States Census Bureau, Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006, <http://www.census.gov/popest/states/tables/NST-EST2006-01.xls> (last visited Feb 28, 2009) (estimating the population of the United States to be close to 300 million).

<sup>3</sup> Press Release, Am. Ass'n of People with Disabilities, Historic Presidential Forum Unites Thousands in Disability Cmty (July 10, 2008), available at <http://www.aapd.com/AAPDRedesign/Communications/2008DisabilitiesAct18thann.html>.

<sup>4</sup> Patricia E. Longmuir & Oded Bar-Or, *Physical Activity of Children and Adolescents with a Disability: Methodology and Effects of Age and Gender*, 6 PEDIATRIC EXERCISE SCI. 168 (1994).

<sup>5</sup> Department of Health and Human Services, *Healthy People with Disabilities*, [http://www.cdc.gov/ncbddd/factsheets/DH\\_hp2010.pdf](http://www.cdc.gov/ncbddd/factsheets/DH_hp2010.pdf) (last visited May 7, 2009).

<sup>6</sup> *Id.*

<sup>7</sup> NATIONAL CENTER FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *PHYSICAL ACTIVITY AND HEALTH: A REPORT OF THE SURGEON GENERAL* 29 (1996), available at <http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>.

<sup>8</sup> *Id.*; P. Kannus, *Preventing Osteoporosis, Falls, and Fractures Among Elderly People*, 318 BRIT. MED. J. 205, 205 (1999).

compete in intercollegiate and interscholastic sports are extremely limited. The National Collegiate Athletic Association (NCAA) and the National Federation of State High School Associations (NFSHSA) do not officially sanction any intercollegiate or interscholastic program, event or competition for individuals with disabilities. In the absence of standardized national or state competition for students with disabilities, some states, school districts, or individual schools have voluntarily accommodated students with disabilities into already existing programs (a process known as “mainstreaming”) or, in very limited instances, created adapted sports programs specifically for students with disabilities.

Some examples, organized by state, where students with disabilities have been mainstreamed with reasonable accommodations include:

- In Maryland, a student who was born without legs competed in wrestling for his school. A football player with diabetes who wore an insulin pump was permitted to play football, and a basketball player who was deaf was allowed the use of an interpreter so that he could participate in games for his school.<sup>9</sup>
- In Florida, at Godby High School in Tallahassee, a student who uses a wheelchair plays tennis for his school team and competes against players without disabilities. The player who uses a wheelchair gets two bounces to hit the ball.<sup>10</sup>
- In Carabus County, North Carolina, a middle school student who has spina bifida and uses a wheelchair competes on her middle school track team alongside runners without disabilities. She earns points for her team during competitions.<sup>11</sup>
- In Pennsylvania, a wrestler with an artificial limb competed in a competition for his school. Additionally, a football player with an artificial leg was permitted to compete in a high school athletic conference competition.<sup>12</sup>
- In Virginia, a high school permitted a student who had spina bifida to use a wheelchair to compete as a cheerleader.<sup>13</sup>

Some examples of schools that have created adapted programs include:

- In Maryland, athletes who use wheelchairs are eligible to race with their school track team at the state and regional track tournaments. Athletes who use wheelchairs are able to compete in the shot put and discus

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<sup>9</sup> WOMEN’S SPORTS FOUND., SCHOLASTIC AND COLLEGIATE SPORTS PROGRAMS FOR STUDENTS WITH DISABILITIES 3 (2008) (unpublished report, on file with the author).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

- events.<sup>14</sup>
- The Alabama High School Athletic Association offers wheelchair events in outdoor track and field at the State Championships, including discus and track.<sup>15</sup>
  - The Georgia High School Association has partnered with the American Association of Adapted Sports Programs (AAASP) to administer adapted sports for students with physical disabilities or visual impairments. The AAASP offers wheelchair soccer, wheelchair basketball, power wheelchair hockey, wheelchair football, and beep baseball (a form of baseball adapted for students with visual impairments).<sup>16</sup>
  - The Illinois High School Association offers wheelchair basketball at the state championships.<sup>17</sup>
  - The Iowa Association of Track Officials (which provides guidance to the Iowa High School Athletic Association) publishes procedures and rules for wheelchair track and field competitions.<sup>18</sup>
  - The Louisiana High School Athletic Association permits athletes who use wheelchairs to participate in various races in outdoor track and field, as well as shot put and discus.<sup>19</sup>
  - The Minnesota State High School League offers adaptive bowling, floor hockey, softball and soccer.<sup>20</sup>
  - New Jersey's Outdoor Track and Field State Championships include wheelchair races for girls and wheelchair shot put for boys and girls.<sup>21</sup>
  - Oregon allows athletes who use wheelchairs to participate in track and field events alongside athletes without disabilities in district meets. It also holds wheelchair races at the state track and field championships.<sup>22</sup>
  - The Pennsylvania Interscholastic Athletics Association (PIAA) allows students who use wheelchairs to participate in outdoor track and field events.<sup>23</sup>
  - There are currently twenty-one successful Unified Sports programs operating in Vermont. Unified Sports breaks down the barriers that exist between students with developmental disabilities and their peers without disabilities. It allows all students access to the same extra-curricular opportunities. There are almost 1,500 athletes and Unified Sports

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<sup>14</sup> *Id.* at 1.

<sup>15</sup> WOMEN'S SPORTS FOUND., *supra* note 10, at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> WOMEN'S SPORTS FOUND., *supra* note 10, at 2.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

- partners throughout the state of Vermont.<sup>24</sup>
- The Washington Interscholastic Activities Association permits students who use wheelchairs to compete in track events at state tournaments.<sup>25</sup>
  - At the collegiate level, eleven universities offer intercollegiate wheelchair basketball programs: Edinboro University of Pennsylvania, Kennesaw State University, Ohio State University, Southwest Minnesota State University, University of Alabama at Tuscaloosa, University of Arizona, University of Illinois at Urbana-Champaign, University of Missouri, University of Texas at Arlington, University of West Georgia, and University of Wisconsin at Whitewater.<sup>26</sup>

The examples listed above demonstrate that some schools or programs are taking affirmative action to include students with disabilities in sports. However, this action is not unilateral. More often than not, the experiences of students with disabilities mirror the stories described at the beginning of this article: they are not provided with reasonable accommodations, they are included but ostracized because of the disability, or they are completely excluded from participation because of their disability.

This article provides insight into understanding the current state of athletic opportunities for students with disabilities and offers recommendations for what policy changes should be implemented to include students with disabilities fully in school athletic programs. Part II provides an overview of the legal protections for students with disabilities, specifically discussing how a student athlete can bring a discrimination claim under the Rehabilitation Act. Part III examines *PGA Tour, Inc. v. Casey Martin*,<sup>27</sup> a 2001 landmark lawsuit in which the Supreme Court created a standard for determining when athletes with disabilities must be mainstreamed in athletic competition. Part IV analyses the application of *Martin* to litigation involving the rights of athletes with disabilities to compete in school sports. Part V takes a critical look at the shortcomings of *Martin*. Finally, Part VI provides recommendations for the types of policies that must be adopted in order to level the playing field for student athletes with disabilities.

## II. LEGAL FRAMEWORK

Student athletes challenging discrimination on the basis of a disability must base their claims on The Rehabilitation Act of 1973 (Rehab Act)<sup>28</sup> or the

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

<sup>28</sup> 29 U.S.C. § 794.

Americans with Disabilities Act of 1990 (ADA)<sup>29</sup> because the Constitution and other federal statutes provide them with little protection. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that individuals with disabilities are not part of a suspect or quasi-suspect class entitled to heightened scrutiny against allegations of discrimination.<sup>30</sup> As a result, educational institutions can discriminate against athletes with disabilities under the Constitution, such as by excluding them from sport participation, provided that the exclusion is rationally related to a legitimate objective, like protecting the safety of other athletes or maintaining competitive equality.<sup>31</sup> The due process clause likewise does not provide additional constitutional safeguards to students with disabilities because courts have held that participation in sports is not a fundamental right.<sup>32</sup>

#### A. Statutory Protections

Unlike the Constitution, both the ADA and the Rehab Act provide additional protections for students with disabilities. Both statutes prohibit educational institutions from excluding qualified student athletes from their programs on the basis of disability and require schools to provide reasonable accommodations to ensure students with disabilities have access to educational programs. Specifically, the Rehab Act, which applies to both public and private schools that receive federal funding, provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .”<sup>33</sup> The ADA, which is modeled after the Rehab Act, provides similar protections for individuals with disabilities, both in programs that receive federal financial assistance and in programs that do not. Title II of the ADA applies to public schools and provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . .”<sup>34</sup> Title III of the ADA extends its protections to private schools, as it prohibits the denial of the benefits of the

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<sup>29</sup> Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2000)).

<sup>30</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

<sup>31</sup> Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137, 139 & n.2 (2005) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 446 (1985)).

<sup>32</sup> *Id.* at 139; *see also* M.H., Jr. v. Mont. High Sch. Ass’n, 280 Mont. 123, 136 (1996) (“[P]articipation in interscholastic sports is a privilege, not a right, except in extremely limited circumstances . . .”).

<sup>33</sup> 29 U.S.C. § 794 (2000).

<sup>34</sup> 42 U.S.C. § 12132 (2000).

services, programs, or activities of “public accommodations” on the basis of disability.<sup>35</sup>

For the purposes of this article, the ADA and the Rehab Act will be discussed together because the ADA is modeled after the Rehab Act, and both statutes contain similar enforcement schemes, as it applies to educational programs.<sup>36</sup>

### *B. Athletic Regulations*

The Department of Education (ED) issued regulations under the Rehab Act that specifically address interscholastic and intercollegiate sports.<sup>37</sup> The regulations require that students with disabilities be offered equal opportunities to participate in interscholastic and intercollegiate athletics:

In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors *interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.*<sup>38</sup>

While these regulations call for the provision of “equal opportunity,” ED provides no further guidance in the regulations as to what exactly constitutes “equal opportunity” in school sports. Does “equal” mean that students with disabilities can try out for teams, but schools do not have to provide any type of accommodation for their disability? Or, as in the case of the blind high school student from Maryland, should “equal” simply mean a chance to participate, but not as a fully integrated member of a team? Or, as this article will argue in Section VI, should “equal” mean providing students with disabilities access to similar opportunities for meaningful participation<sup>39</sup> as that provided for students without disabilities? The lack of specificity regarding the meaning of “equal opportunity” presents a constant source of conflict between students and school administrators.

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<sup>35</sup> 42 U.S.C. § 12182 (2000).

<sup>36</sup> See Adam A. Milani, *Can I Play?: The Dilemma of the Disabled Athlete in Interscholastic Sports*, 49 ALA. L. REV. 817, 819-820 (1998) (“[T]he ADA is modeled after section 504, and Congress intended for them to be consistent. Indeed, the enforcement remedies, procedures and rights under Title II are the same as under section 504 . . .”).

<sup>37</sup> 34 C.F.R. § 104.37(a) and (c) (2008).

<sup>38</sup> 34 C.F.R. § 104.37 (c)(1) (emphasis added); see also 34 C.F.R. § 104.47 (a)(1) (“A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.”).

<sup>39</sup> “Meaningful participation” should be defined as the opportunity to participate in, and have access to, all of the benefits that come from participation, such as quality facilities, equipment and uniforms, and trained coaches.

While the meaning of “equal opportunity” is unclear, the ED regulations are unequivocal about a school system’s duty to include all qualified students with disabilities in the athletic component of their program.<sup>40</sup> This means that schools have an obligation to mainstream students with disabilities in athletics to the maximum extent possible. Even where schools create separate teams for students with disabilities, the regulations specify that schools must still provide students with disabilities the opportunity to try out for the mainstream team:

A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34<sup>41</sup> and only if no qualified handicapped student is denied the opportunity to compete for teams or

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<sup>40</sup> See The Department of Education Commentary to Regulation 34 C.F.R. § 104.37 pt. 104, app. A (2008) (“Most handicapped students are able to participate in one or more regular physical education and athletic activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.”).

<sup>41</sup> This statute provides:

(a) Academic setting. A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person’s home.

(b) Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) Comparable facilities. If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

34 C.F.R. § 104.34 (emphasis added).

to participate in courses that are not separate or different.<sup>42</sup>

Schools can create separate programs for students with disabilities; however, the creation of separate teams for students with disabilities is permissive, not mandatory.<sup>43</sup> The regulations only mandate that where schools provide separate programs for students with disabilities, the schools must ensure that the “facilities” and “services” provided to the students with disabilities in these programs are comparable to the facilities and services provided in the athletic programs to the students without disabilities.<sup>44</sup>

### *C. Policy Interpretations*

The Office for Civil Rights (OCR) within ED has oversight responsibility for discrimination involving educational institutions that receive federal funds. This responsibility includes oversight of certain cases involving discrimination against students with disabilities in school settings. Recognizing their responsibility to provide technical assistance to educational institutions, OCR issues policy directives to clarify issues. One such policy directive includes specific guidance on the inclusion of students with disabilities in contact sports.

According to OCR, students who have lost an organ, limb or appendage may not be automatically excluded from contact sports, but may need to furnish approval for participation from a doctor familiar with their condition.<sup>45</sup> This policy reflects the theme repeated in the regulations that educational institutions must strive to incorporate students with disabilities into mainstream athletic programs to the “maximum extent appropriate”<sup>46</sup>

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<sup>42</sup> 34 C.F.R. § 104.37 (c)(2); *see also* 34 C.F.R. § 104.47 (a)(2) (“A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.”).

<sup>43</sup> Section VI will examine how the permissive nature of this regulation has contributed to the lack of athletic opportunities for students with disabilities.

<sup>44</sup> 34 C.F.R. § 104.34 (c).

<sup>45</sup> 43 Fed. Reg. 36034, 36035 (Aug. 14, 1978) (“Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition. If the school system provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.”).

<sup>46</sup> 34 C.F.R. § 104.34 (a) (“A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.”).

possible.

*D. The Prima Facie Case*

Generally, to establish a prima facie case of discrimination under the Rehab Act, an individual with a disability must establish that: (1) She has a disability; (2) She is otherwise qualified for the benefit in question; (3) She was excluded from the benefit solely on the basis of the disability; and (4) This denial was discriminatory because she could not be accommodated with reasonable accommodations.

1. Athlete with a Disability

An individual meets the definition of having a disability under the Rehab Act if she has "(A) a physical or mental impairment<sup>47</sup> that substantially limits<sup>48</sup> one or more major life activities<sup>49</sup> of such individual; (B) a record of such an impairment; or (iii) being regarded as having such an impairment . . ." <sup>50</sup> The central inquiry under this framework is whether or not the impairment impacts a major life activity.

For the student athlete, the courts have generally held that participation in sports is not a major life activity as defined by the Rehab Act. For example, in

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<sup>47</sup> A physical or mental impairment may include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(j)(2)(i) (2008).

<sup>48</sup> The term "substantially limits" is defined in 29 C.F.R. § 1630.2:

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

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

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."

29 C.F.R. § 1630.2(j)(2)(i-iii).

<sup>49</sup> Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii).

<sup>50</sup> 42 U.S.C. § 12102 (2008), *referenced in* 29 U.S.C. § 705(20)(B) (2000).

*Knapp v. Northwestern University*, the Court of Appeals for the Seventh Circuit held that Northwestern University did not violate the Rehab Act when it prohibited a student with a heart condition from playing intercollegiate basketball.<sup>51</sup> The court held that the student did not meet the definition of disability under the Rehab Act because his heart condition only limited his eligibility to participate in intercollegiate athletics, which was not a major life activity.<sup>52</sup>

Therefore, in order for a student athlete to qualify as having a disability, the disabling condition must impact areas of his or her life beyond sports. For example, athletes with mobility impairments, like prostheses, or significant learning disabilities most likely would qualify as having a disability under the statute because their disabling condition impacts a major life function, (e.g. walking, learning, etc.) beyond participation in sports.

## 2. Otherwise Qualified

In addition to demonstrating the existence of a disability to establish a prima face case of discrimination under the Rehab Act, an athlete also must demonstrate that he or she is otherwise qualified to compete in sports. While the “mere possession of a handicap is not a permissible ground for assuming an inability to function,”<sup>53</sup> the Supreme Court has held that a school may require an individual with a disability to possess “reasonable physical qualifications” to participate in an educational program.<sup>54</sup> For the student athlete, this means that he or she must prove that, with or without reasonable accommodations, he or she meets the essential eligibility requirements for participation in school sports.<sup>55</sup>

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<sup>51</sup> *Knapp v. Northwestern Univ.*, 101 F.3d 473, 480-81 (7th Cir. 1996).

<sup>52</sup> *Id.* at 480.

Playing intercollegiate basketball obviously is not in and of itself a major life activity, as it is not a basic function of life on the same level as walking, breathing, and speaking. Not everyone gets to go to college, let alone play intercollegiate sports. We acknowledge that intercollegiate sports can be an important part of the college learning experience for both athletes and many cheering students—especially at a Big Ten school. *Knapp* has indicated that such is the case for him. But not every student thinks so. Numerous college students graduate each year having neither participated in nor attended an intercollegiate sporting event. Their sheepskins are no less valuable because of the lack of intercollegiate sports in their lives. Not playing intercollegiate sports does not mean they have not learned. Playing or enjoying intercollegiate sports therefore cannot be held out as a *necessary* part of learning for *all* students.

*Id.*

<sup>53</sup> *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

<sup>54</sup> *Id.* at 414.

<sup>55</sup> *See* 42 U.S.C. § 12131(2) (2000) (defining “qualified individual with a disability”).

### 3. Excluded Because of Disability

To demonstrate discrimination under the Rehab Act, an athlete must demonstrate that he or she is excluded from participation in a school's athletic programs on the basis of his or her disability. A coach ultimately determines the roster for her or his team, and thus legitimate non-discriminatory factors, such as insufficient skill level or bad team chemistry, could explain grounds for a denial. However, where the exclusion is made solely on the basis of disability, it could be grounds for a discrimination claim under the Rehab Act.

### 4. Discriminatory Exclusion

Finally, to establish a prima facie case of discrimination under the Rehab Act, student athlete must demonstrate that his or her exclusion from the school athletic program was discriminatory. Generally, exclusion is discriminatory when the student athlete could have been accommodated in a program with reasonable accommodations. The Supreme Court has established that schools are not required to make "fundamental" or "substantial" modifications to accommodate individuals with disabilities; however, they are required to make "reasonable ones."<sup>56</sup> Typically, courts have found that requested accommodations are unreasonable when they fundamentally alter a program, pose an undue burden on the implementing party,<sup>57</sup> or create a direct safety threat<sup>58</sup> to other participants. What constitutes a reasonable accommodation in the context of athletics has been the subject of much controversy, specifically in regard to the question of when the inclusion of an athlete with a disability would fundamentally alter the sport. The Supreme Court in *Martin* helped answer this question.

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<sup>56</sup> *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

<sup>57</sup> *See Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004) (holding that the reasonable accommodations standard does not require a public entity to "employ any and all means"). It only requires "reasonable modifications" that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden. *Id.* *See also* *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (stating that an accommodation under the Rehab Act "is not reasonable if it either imposes 'undue financial and administrative burdens' . . . or requires 'a fundamental alteration in the nature of [the] program'" (quoting *Davis*, 442 U.S. at 410, 412)).

<sup>58</sup> *See Arline*, 480 U.S. at 287-88 (holding that inclusion of individuals with disabilities is not reasonable where it exposes "others to significant health and safety risks"). The determination of the existence, or nonexistence, of a significant health risk must be based on "reasonable medical judgments given the state of medical knowledge." *Id.* at 288. Factors to be considered include the nature, duration, probability, and severity of harm likely to result from the individual with disability's participation, and whether it can be effectively reduced by reasonable accommodation. *Id.*

## III. CASEY MARTIN

Casey Martin, a professional golfer, sued the Professional Golf Association (PGA) when it did not allow him to use a golf cart while competing on the PGA Tour. Martin made the request on the grounds that he could not walk the course because of his disability, Klippel-Trenaunay-Weber Syndrome, “a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart” causing severe pain and fatigue.<sup>59</sup> Because of his disability, “[w]alking not only caused him pain, fatigue, and anxiety, but also created a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.”<sup>60</sup> The PGA denied Martin’s request to use a golf cart, contending that the rule prohibiting its use on the tour was a “substantive rule of competition,” and any waiver would “fundamentally alter the nature of the competition.”<sup>61</sup> Accordingly, Martin sued the PGA contending that the denial violated Title III of the ADA.

In determining whether the requested accommodation was reasonable under the ADA, the issue before the Court was whether the modification of the PGA’s rules and polices concerning the use of golf carts would fundamentally alter the PGA’s competition.<sup>62</sup> The Court found that the modification could be a fundamental alteration in two different ways: “It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally,”<sup>63</sup> (i.e. such as changing the diameter of the hole from three to six inches), or the change might only have a “peripheral impact on the game itself,” but it gives the player with a disability “an advantage over others.”<sup>64</sup> The Court concluded that allowing Martin the use of a golf cart would not constitute a fundamental alternation in either way.<sup>65</sup> In making this determination, the Court first defined the fundamental character of the game of golf.<sup>66</sup> The Court looked to the Rules of Golf<sup>67</sup> to make this determination and concluded that the essence of the game is “shot-making.”<sup>68</sup> Accordingly, the Court concluded that the walking rule is not “an

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<sup>59</sup> PGA Tour, Inc. v. Martin, 532 U.S. 661, 668 (2001).

<sup>60</sup> *Id.* at 668.

<sup>61</sup> *Id.* at 670.

<sup>62</sup> *Id.* at 665.

<sup>63</sup> *Id.* at 682.

<sup>64</sup> *Id.* at 682-83.

<sup>65</sup> *Martin*, 532 U.S. at 683.

<sup>66</sup> *Id.* at 683-84.

<sup>67</sup> The Rules of Golf are jointly written rules governing golf competition written by the United States Golf Association and the Royal and Ancient Golf Club of Scotland.

<sup>68</sup> *Martin*, 532 U.S. at 683-84.

essential attribute of the game itself”<sup>69</sup> and that nothing in the rules “either forbids the use of carts or penalizes a player from using a cart.”<sup>70</sup>

The PGA argued that the walking rule is essential to the game of golf because “its purpose is ‘to inject the element of fatigue into the skill of shot-making,’ and thus its effect may be the critical loss of a stroke.”<sup>71</sup> Therefore, the PGA said that changing this rule would be “outcome-affecting” because it no longer subjects competitors to “identical substantive rules” on which their skills and performance can be accurately evaluated.<sup>72</sup>

The Court rejected the PGA’s argument. First, it noted that there are many conditions, such as changes in the weather, harder greens, more winds, or a lucky bounce that can have as much of an impact on the outcome of the competition as fatigue resulting from walking the course.<sup>73</sup> Second, the Court found that the fatigue from walking during the PGA tournament cannot in itself be deemed significant.<sup>74</sup> In addition, the Court noted that “when given the option of using a cart, the majority of golfers in petitioner’s tournaments have chosen to walk, often to relieve stress or for other strategic reasons.”<sup>75</sup> Finally, the Court held that even if it accepted the PGA’s contentions that the walking rule was outcome affecting, the PGA’s denial of Martin’s request still violated the ADA because it failed to consider his personal circumstances in making this determination. Specifically, the Court noted that the ADA mandates that “an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.”<sup>76</sup>

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<sup>69</sup> *Id.* at 685.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 686.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 686-87.

<sup>74</sup> *Martin*, 532 U.S. at 687.

[T]he factual basis of petitioner’s argument is undermined by the District Court’s finding that the fatigue from walking during one of petitioner’s 4-day tournaments cannot be deemed significant. The District Court credited the testimony of a professor in physiology and expert on fatigue, who calculated the calories expended in walking a golf course (about five miles) to be approximately 500 calories—“nutritionally . . . less than a Big Mac.” What is more, that energy is expended over a 5-hour period, during which golfers have numerous intervals for rest and refreshment. In fact, the expert concluded, because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients. And even under conditions of severe heat and humidity, the critical factor in fatigue is fluid loss rather than exercise from walking.

*Id.* (internal citations removed).

<sup>75</sup> *Id.* at 687-88.

<sup>76</sup> *Id.* at 688.

After conducting an individualized assessment of Martin, the Court concluded that “we have no doubt” that allowing him to use a cart does not fundamentally alter the PGA tournaments.<sup>77</sup> According to the Court, while the purpose of the walking rule was to subject players to fatigue, it was “an uncontested finding of the District Court that Martin ‘easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.’”<sup>78</sup> Therefore, the Court concluded that the requested accommodation did not create a fundamental alteration because it did not impact an essential aspect of the game, nor did it provide Martin with an advantage over his competitors.<sup>79</sup> Instead, the Court noted that “[w]hat it can be said to do, on the other hand, is to allow Martin the chance to qualify for, and compete in, the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires.”<sup>80</sup>

With *Martin*, the Court established guidelines for assessing the reasonableness of accommodations for athletes with disabilities: (1) fundamental alterations exist where a requested accommodation alters an essential aspect of the game or creates a competitive advantage; (2) individualized assessments must be made to determine whether the specific modification for a particular athlete’s disability creates a fundamental alteration; and (3) some administrative burdens are acceptable to incur in making this determination.<sup>81</sup>

These guidelines have been applied not only in the professional sports context, but in school settings as well. The following section will discuss the application of *Martin* in cases involving student athletes with disabilities.

#### IV. POST-*MARTIN* CASE PRECEDENT: STUDENT ATHLETES WITH DISABILITIES

The Supreme Court’s holding in *Martin* helped define the limits to which schools are obligated to provide “equal opportunity for participation” for student athletes with disabilities and to include them in mainstream sports “to the maximum extent appropriate.”<sup>82</sup> As so few schools offer adapted programs for students with disabilities, legal challenges brought by these students most frequently arise in instances when students with disabilities seek access to mainstream teams. These students include those with intellectual disabilities as well as physical disabilities. The application of *Martin* to school-based litigation has varied based on the type of disability the

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<sup>77</sup> *Id.* at 690.

<sup>78</sup> *Id.*

<sup>79</sup> *Martin*, 532 U.S. at 683, 685.

<sup>80</sup> *Id.* at 690.

<sup>81</sup> *See id.* “Nowhere in [the ADA] does Congress limit the reasonable modification requirement only to requests that are easy to evaluate.” *Id.* at 690 n.53.

<sup>82</sup> 34 C.F.R. § 104.34 (a) (2008).

student has and the nature of the accommodation in question.

*A. Post Martin: Student Athletes with Intellectual Disabilities*

*Martin* helped resolve the question of whether accommodations to athletic eligibility rules for students with intellectual disabilities fundamentally alter athletic competition. Generally, in order to compete in interscholastic and intercollegiate competition, student athletes must show that they meet the eligibility criteria that their school or athletic governance organization establishes. The eligibility criteria are typically designed to ensure that student athletes meet minimum academic requirements and that their involvement does not create health or safety risks. Examples of eligibility requirements include age requirements and academic requirements. Age requirements at the high school level typically provide that student athletes who are over a certain age (generally eighteen years old), or who have been in school for more than eight semesters, are ineligible for competition. Academic requirements for athletic eligibility require student athletes to maintain a certain grade point average and take a required number of core academic courses. While athletic governance organizations contend that these eligibility criteria are neutral, conflicts arise when these criteria have the effect of precluding students with disabilities from competition who may have been held back in school or were unable to take certain core academic courses due to their learning disabilities.

1. Luiz Cruz

Prior to *Martin*, the courts were divided on the issue of whether or not a waiver of an age eligibility rule for a student with a learning disability would fundamentally alter the nature of interscholastic competition.<sup>83</sup> On one hand,

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<sup>83</sup> See *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 850 (7th Cir. 1999) (an individualized assessment must be made to determine if waiving the eight-semester rule fundamentally alters competition); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1037 (6th Cir. 1995) (holding that a failure to waive the age restriction rule did not violate the Rehab Act or ADA and that it was an undue burden on schools to conduct an individualized assessment to determine if a student's age posed an unfair competitive advantage); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (holding that the age limit rule was an essential eligibility requirement and that granting a waiver would fundamentally alter the nature of the baseball program); *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F. Supp. 663, 670 (D. Conn. 1996) (holding that the age restriction rule was discriminatory when applied to a student whose disability was the reason he was held back in school); *Johnson v. Fla. High Sch. Activities Ass'n*, 899 F. Supp. 579, 585-86 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172, 1173 (11th Cir. 1997) (the lower court held that the waiver was not a fundamental alteration where an individualized assessment for a student with a learning disability was conducted; appellate court vacated the decision as moot because the student had completed high school

courts upheld the rules on the grounds that it was essential to maintain a competitive balance and promote the health and safety of the student athletes.<sup>84</sup> These courts also found that an individualized assessment of the request of a particular student with a disability created an undue burden on state athletic associations.<sup>85</sup> In contrast, some courts precluded state associations from denying waiver requests to the age rule for students with disabilities, holding that an association must conduct an individualized assessment to determine if that student's participation would, in fact, present a competitive advantage or pose a safety risk.<sup>86</sup> *Martin* swung the pendulum back in favor of students with disabilities, as the case of Luis Cruz demonstrates.

Luis Cruz, a high school student with a learning disability (mental retardation), sued the Pennsylvania Interscholastic Athletic Association (PIAA) after it enforced its age limit rule, which barred him from participating in sports once he turned nineteen.<sup>87</sup> Cruz requested that the PIAA grant him a waiver to allow him to continue playing high school football, wrestling, and track.<sup>88</sup> He argued that his advanced age for his grade was due to his learning disability.<sup>89</sup>

The PIAA justified the denial of the waiver on the grounds that the Age Rule was an essential eligibility requirement for interscholastic competition because its purpose was to prevent athletes from having a competitive advantage, posing a safety risk to other students, or displacing athletes who meet the regular age requirements from teams.<sup>90</sup> Accordingly, the PIAA argued that waiving such an essential requirement would fundamentally alter

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competition).

<sup>84</sup> See *Sandison*, 64 F.3d at 1034-35; *Pottgen*, 40 F.3d at 929.

<sup>85</sup> See *Sandison*, 64 F.3d at 1037 (holding that a failure to waive the age restriction rule did not violate the Rehab Act or ADA and that it was an undue burden on schools to conduct an individualized assessment to determine if a student's age posed an unfair competitive advantage); *Pottgen*, 40 F.3d at 930 (holding that the age limit rule was an essential eligibility requirement and that granting a waiver would fundamentally alter the nature of the baseball program).

<sup>86</sup> See *Washington*, 181 F.3d at 850 (stating that an individualized assessment must be made to determine if waiving the eight-semester rule fundamentally altered competition); *Johnson*, 899 F. Supp. at 585 (noting that the lower court held that the waiver was not a fundamental alteration where an individualized assessment for a student with a learning disability was conducted; the appellate court vacated the decision as moot because the student had completed high school competition).

<sup>87</sup> *Cruz v. Pa. Interscholastic Athletic Ass'n*, 157 F. Supp. 2d 485, 488 (E.D. Pa., 2001).

<sup>88</sup> *Id.* at 489.

<sup>89</sup> *Id.* at 490.

<sup>90</sup> *Id.* at 492.

the nature of interscholastic competition as prohibited by *Martin*.<sup>91</sup>

In response, Cruz argued that the Age Rule was only an essential eligibility requirement when an individualized assessment demonstrates that a waiver would, in fact, present a safety risk, displace other athletes or present a competitive advantage.<sup>92</sup> He contended that, pursuant to *Martin*, the PIAA should conduct an individualized assessment to determine whether any of their concerns might exist in Cruz's specific case.<sup>93</sup> Cruz further argued that an assessment of this kind would show that his waiver would not fundamentally alter the program as: (1) he did not present a safety risk because he was five-foot three-inches tall and weighed 130 pounds, "which is by no means greater than the average height and weight of other, even younger, participants," (2) his participation did not give him a competitive advantage because he was "not a star player in any of his interscholastic sports," and (3) he was not displacing other athletes because there was a "no cut" policy in football and track and field.<sup>94</sup>

On review of the evidence presented in Cruz's individualized assessment, the court concluded that allowing him to participate in football and track would not fundamentally alter the nature of PIAA interscholastic competition.<sup>95</sup> In doing so, the court rejected the PIAA's arguments that undergoing such an individualized assessment would be unduly burdensome and held that such a process was precisely what *Martin* required.<sup>96</sup>

*Cruz* is an example of how courts should apply *Martin* in the context of interscholastic sport. Most importantly, the court recognized the importance of athletic participation for students with disabilities. Specifically, it noted that Cruz "will sustain irreparable harm if he is not permitted to participate in interscholastic competition in football and track . . ." <sup>97</sup> Accordingly, the court focused its analysis on inclusion, not exclusion, emphasizing that Cruz should be included unless the PIAA could demonstrate through an individualized assessment that inclusion fundamentally altered the program.

## 2. Anthony Matthews

In addition to age restrictions, academic requirements represent an additional eligibility criterion that has the effect of excluding students with disabilities from participation. Prior to *Martin*, these challenges most

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<sup>91</sup> *Id.* at 497.

<sup>92</sup> *See id.* at 493.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 499. Note that the court did not rule on the issue of whether Cruz had to be accommodated in wrestling as it was "not clear on the record" if his participation would fundamentally alter the competition. *Id.*

<sup>96</sup> *Id.* at 500.

<sup>97</sup> *Id.*

frequently arose at the collegiate level in the form of opposition to the NCAA's academic eligibility requirements, which include completing a certain number of core academic courses in high school, maintaining a certain grade point average in those core classes, and achieving a minimum score on standardized tests.<sup>98</sup>

Again, prior to *Martin*, the courts were split on whether a waiver of these eligibility requirements fundamentally altered intercollegiate competition.<sup>99</sup> *Martin* helped clarify these challenges in favor of the student athlete, as the case of Anthony Matthews demonstrates.

Anthony Matthews, a college student with a learning disability, sued the NCAA after it declared him academically ineligible to play football at Washington State University (WSU) during the 1999 season.<sup>100</sup> During the 1998 season, the NCAA granted Matthews a limited waiver due to his learning disability. It waived the minimum credit hour requirement and the 75/25 rule, which stipulates that student athletes cannot earn more than 25% of their credits for a school year during the summer.<sup>101</sup> During the 1999 season, Matthews sought an additional waiver of the 75/25 rule, which the NCAA denied, arguing that his failure to meet the rule for a second consecutive year was due to his "lack of effort, not to his learning disability."<sup>102</sup> Accordingly, the NCAA contended that granting such a waiver would fundamentally alter the NCAA's purpose of promoting academics and athleticism.<sup>103</sup> Matthews sued the NCAA contending that it had discriminated against him on the basis of his disability, in violation of Title III of the ADA.

Applying the individualized inquiry that *Martin* requires, the court held that granting Matthews the waiver of the 75/25 rule would not fundamentally alter the NCAA's purpose and policies.<sup>104</sup> First, the court noted that the 75/25 rule was not an essential aspect of the game of football or the NCAA athletic

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<sup>98</sup> NCAA ELIGIBILITY CENTER, GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 4 (2008), available at <http://www.ncaapublications.com/Uploads/PDF/2008-09%20CBSA9c29e699-00f6-48ba-98a9-6456c9b98957.pdf>.

<sup>99</sup> See *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1071 (N.D. Ga. 2000) (holding that a waiver of academic eligibility was not required where the waiver would have compromised the educational purpose of the NCAA and exceeded reasonable modifications); *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at \*17-18 (N.D. Ill. Nov. 21, 1996) (holding that the NCAA did not have to grant a waiver of the core course requirements to a swimmer with a learning disability where such a waiver would fundamentally alter its rules and programs).

<sup>100</sup> *Matthews v. Nat'l Collegiate Athletic Ass'n*, 179 F. Supp. 2d 1209, 1214 (E.D. Wash. 2001).

<sup>101</sup> *Id.* at 1216.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.* at 1225.

<sup>104</sup> *Id.*

program.<sup>105</sup> Second, the court found that granting a waiver to Matthews did not provide him with a competitive advantage, but “would merely provide a modification that would permit Plaintiff access to competitive college football at WSU while he pursues his degree in an academic program tailored to his learning disability.”<sup>106</sup> As a result, the court concluded that Matthew’s request for a waiver was reasonable because it would not fundamentally alter the NCAA or WSU athletic program.<sup>107</sup>

*B. Post Martin: Student Athletes with Physical Disabilities*

Like the cases involving student athletes with intellectual disabilities, the challenges involving student athletes with physical disabilities frequently arise when these students seek access to mainstream teams. However, *Martin* has not been as successful in protecting the rights of students with physical disabilities.

1. Tatyana McFadden

Tatyana McFadden, a female high school athlete with a disability, sued her school and her state athletic association in order to gain access to her high school track team.<sup>108</sup> McFadden was a Paralympic athlete in track and field who won medals in the 2004 Paralympic Summer Games, becoming one of the youngest Paralympians in history.<sup>109</sup> She had spina bifida, was paralyzed from the waist down, and used a wheelchair to compete in track and field.<sup>110</sup>

Due to her disability, McFadden’s school prohibited her from racing on the track at the same time as other athletes.<sup>111</sup> Instead, it forced her to race by herself at meets, as an “Exhibition.”<sup>112</sup> McFadden sued the Howard County Public Schools in Maryland District Court during her 2006 track season claiming that this exclusion violated the Rehab Act. She requested that the

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<sup>105</sup> See *id.* at 1226-27 (“[N]either the game of football nor a college course of study requires students’ completion of 75 percent of their coursework outside of summer school. . . . The NCAA’s mission to promote academics may be achieved through a number of policies and rules not implicated by granting Plaintiff one additional waiver of the 75/25 Rule.”).

<sup>106</sup> *Matthews*, 179 F. Supp. 2d at 1227.

<sup>107</sup> *Id.*

<sup>108</sup> *McFadden v. Grasmick*, 485 F. Supp. 2d 642, 643 (D. Md. 2007); Complaint at 3, *McFadden v. Cousin*, No. AMD 06-648 (D. Md. Mar. 10, 2006).

<sup>109</sup> Complaint, *supra* note 108, at 2.

<sup>110</sup> *Grasmick*, 485 F. Supp. 2d at 644.

<sup>111</sup> Complaint, *supra* note 108, at 3.

<sup>112</sup> See Memorandum of Law in Support of Tatyana’s Motion for Preliminary Injunction at 6, *McFadden v. Cousin*, AMD 06-648 (D.Md. Apr. 17, 2006). During the Exhibition race, McFadden did not race with other athletes on the track and was not able to score points for her team. *Id.*

court grant her a preliminary injunction to prohibit the school from excluding her from races involving athletes without disabilities at the interscholastic track and field events sponsored or held by Howard County Public Schools.<sup>113</sup>

The court granted the preliminary injunction, ordering Howard County to permit McFadden to race on the track alongside students without disabilities during all of its meets.<sup>114</sup> In the settlement agreement that followed, the parties also agreed that while McFadden would race alongside students without disabilities, she would only be scored against other female athletes using wheelchairs.<sup>115</sup> Under this scoring system, the number of points awarded would be determined by the number of wheelchair participants and the place of each participant.<sup>116</sup>

McFadden's struggle to compete in interscholastic athletics did not end with this settlement, however, as the state track and field officials did not adopt the point system agreed upon in the previous settlement. Instead, the Maryland Public Secondary Schools Athletic Association (MPSSAA), the governing body for interscholastic athletics in Maryland, established a scoring policy under which team points for wheelchair race events would not be awarded.<sup>117</sup>

McFadden sued the MPSSAA during the 2007 track season alleging that this policy violated the Rehab Act and the ADA by relegating her participation to that of a "non-scoring exhibition."<sup>118</sup> McFadden alleged that the MPSSAA's policy "reinforces the stigma of differentness" for McFadden by sending a "clear message that she is not a valued member of her team – she literally does not count."<sup>119</sup>

The defendants, on the other hand, argued that McFadden's requested accommodation was unreasonable under *Martin* because it would provide

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<sup>113</sup> Complaint, *supra* note 108, at 10-11.

<sup>114</sup> *McFadden v. Cousin*, No. AMD 06-648 (D. Md. Apr. 17, 2006) (order granting preliminary injunction).

<sup>115</sup> Settlement Agreement, *McFadden v. Cousin*, No. AMD 06-0648 (D. Md. Jan. 9, 2007) (on file with the author).

<sup>116</sup> *Id.* The settlement stipulates that if there is only one participant, and that participant finishes the race, the participant will score one point for her team. *Id.* ¶ 8. If there are two participants, the participant who finishes first shall earn two points and the participant who finishes second shall earn one point for her team. *Id.* If there are three participants, the participant who finishes first shall earn three points, the participant who finishes second shall earn two points, and the participant who finishes third shall earn one point. *Id.* The total number of points earned will thus be governed by the number of participants in the event. *Id.* Any points earned by Tatyana McFadden during a track meet shall count for her team in the same manner that points for students without disabilities are counted. *Id.*

<sup>117</sup> *Grasmick*, 485 F. Supp. 2d at 646.

<sup>118</sup> *Id.* at 643; Brief of Plaintiff at 13, *McFadden v. Grasmick*, No. AMD 07-CV-719 (D. Md. Mar. 21, 2007).

<sup>119</sup> Brief of Plaintiff, *supra* note 118, at 13.

McFadden's team with a competitive advantage that would fundamentally alter the state track and field competition.<sup>120</sup> Because McFadden was likely to be the only girl to compete in the wheelchair division for the state competition, MPSSAA argued this would automatically give her team extra points to the disadvantage of other schools.<sup>121</sup> MPSSAA claimed that awarding points when only one athlete participated in an event violated its point system policy, which provided that participants in "new team events" cannot earn team points in the state championship meets until high schools representing at least 40% of the high schools in the state participate in that event.<sup>122</sup> According to MPSSAA, allowing McFadden to earn points for her team when less than 40% of schools sponsored a wheelchair track division gives McFadden's team a competitive advantage over other schools in the state tournaments.<sup>123</sup>

The court found MPSSAA's argument persuasive and did not grant the injunction.<sup>124</sup> The court held that the "minimum percentage requirement embodied in the 40% Rule is neutral in intent and in effect" because it treats McFadden the same as other similarly situated athletes competing in new events.<sup>125</sup> Accordingly, the court denied McFadden's request for an injunction, concluding that it was not discriminatory to withhold team points when granting an exception to the 40% rule would provide McFadden's team with a competitive advantage<sup>126</sup> (and thus a fundamental alternation), which is prohibited under *Martin*.

This holding misconstrues the Court's standard in *Martin*. First, the *Martin* competitive advantage assessment is not applicable in this case, because the issue is whether or not the MPSSAA provided McFadden with an "equal opportunity" to participate in interscholastic athletics, as the Rehab Act regulations mandate. In *Martin*, the Court used a competitive advantage analysis in assessing the reasonableness of the requested accommodation (the golf cart). Here, however, McFadden is not asking for reasonable accommodation; she is "not asking to score wheelchair racers against athletes without disabilities."<sup>127</sup> Instead, McFadden is merely asking that she receive the same opportunity to participate as is afforded other competitors through the granting of points for her division. This scoring request is exactly the type of "equal opportunity" that schools must provide under the regulations.

Second, even if the *Martin* competitive advantage analysis were relevant, the points at issue in this case would not provide McFadden with an advantage

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<sup>120</sup> See *Grasmick*, 485 F. Supp. 2d at 646.

<sup>121</sup> *Id.* at 647.

<sup>122</sup> *Id.* at 646.

<sup>123</sup> *Id.* at 647.

<sup>124</sup> *Id.* at 648, 652.

<sup>125</sup> *Id.* at 650.

<sup>126</sup> See *Grasmick*, 485 F. Supp. 2d at 651-52.

<sup>127</sup> Brief of Plaintiff, *supra* note 118, at 20.

over others. In *Martin*, the Court noted that there are many conditions, such as changes in the weather, harder greens, more winds, or a lucky bounce, that can have as much of an impact on the outcome of the competition as fatigue resulting from walking the course.<sup>128</sup> Likewise, in track there are many conditions that can have as much of an impact on the outcome of a state meet as the addition of points from a wheelchair event, such as a team member becoming injured or sick and unable to compete; a team lacking an athlete who can compete in a certain team event, such as the pole vault; or a team having a gifted sprinter with Jackie Joyner-Kersey-like speed, or a jumper with a vertical like Michael Jordan.

In addition, just as the Court concluded in *Martin* that fatigue from walking the PGA course cannot in itself be deemed significant, the Plaintiffs here demonstrated that awarding points to McFadden would not have had a significant impact on the outcome of the state meet. Specifically, the Plaintiffs demonstrated that if MPSSAA had adopted the scoring model that Howard County used “none of the state team championships of last two years would have been affected by the inclusion of points for Ms. McFadden.”<sup>129</sup> Accordingly, the court should have directed MPSSAA to award McFadden points for the wheelchair division because not only would doing so fail to create a competitive advantage, but it also would have provided McFadden with the type of equal opportunity for participation that the Rehab Act regulations mandate.

## 2. Mallerie Badgett

Like McFadden, Mallerie Badgett sued her high school athletic association to gain access to her high school track team.<sup>130</sup> Badgett had cerebral palsy and, like McFadden, she used a wheelchair to compete in track and field.<sup>131</sup> Similar to McFadden, Badgett was also a “gifted athlete,” who held nine Junior National Records in track and field for girls with cerebral palsy.<sup>132</sup> During the 2007 track and field season, Badgett wanted to compete on her high school track team. To accommodate her, the Alabama High School Athletic Association (AHSAA) created a state wheelchair division where wheelchair athletes would compete in a wheelchair division separate from athletes without disabilities and earn individual points, which did not count toward their team’s total.<sup>133</sup>

As the only wheelchair racer in the state, Badgett did not want to compete

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<sup>128</sup> *Martin*, 532 U.S. at 687 (2001).

<sup>129</sup> Brief of Plaintiff, *supra* note 118, at 21.

<sup>130</sup> *Badgett v. Ala. High Sch. Athletic Ass’n*, No. 2:07-CV-00572-KOB, 2007 WL 2461928 (N.D. Ala. May 3, 2007).

<sup>131</sup> *Id.* at \*1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at \*2.

in a separate wheelchair division because she believed that competing alone made her an “exhibition” rather than a part of her team, and furthermore, that competing in a separate wheelchair division “would affect her ability to receive college scholarships and other benefits.”<sup>134</sup> Accordingly, she sued the AHSAA arguing that its refusal to include her in a mixed heat or count her points toward her team’s total violated the Rehab Act and ADA.<sup>135</sup>

The court found in favor of the AHSAA, holding that “to the extent Defendants were obligated to modify the track and field program, they have met that obligation by establishing a separate wheelchair division for track and field.”<sup>136</sup> This holding represents a flawed interpretation of *Martin* and the regulations under the Rehab Act.

First, the court incorrectly found that the AHSAA did not have an obligation to allow Badgett to compete in a mixed heat alongside athletes without disabilities.<sup>137</sup> The court noted that the Rehab Act regulations specifically allow schools to create “separate or different” programs for students with disabilities.<sup>138</sup> While the regulations do permit the creation of separate teams, the court failed to recognize that the regulations also specify that schools must still provide students with disabilities the opportunity to try out for the mainstream team even when separate teams exist.<sup>139</sup>

Furthermore, the court erred in finding that the AHSAA presented “substantial evidence” establishing that Badgett’s participation in a mixed heat “would raise legitimate safety concerns that are inherent” in races including wheelchair athletes and athletes without disabilities.<sup>140</sup> While Badgett provided evidence to support her contention that she can safely

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Badgett*, 2007 WL 2461928 at \*4.

<sup>137</sup> *Id.* at \*5.

<sup>138</sup> *Id.* at \*4 n.7.

<sup>139</sup> See 34 C.F.R. § 104.37(c)(2) (2008) (“A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to non-handicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.”).

<sup>140</sup> *Badgett*, 2007 WL 2461928, at \*5. The court gave deference to the AHSAA’s conclusions regarding these issues. *Id.* (“The AHSAA’s conclusions regarding these legitimate safety issues should be respected if reasonable and supported by the available evidence.”). It cited Supreme Court precedent as support for this deferential standard, specifically *Olmstead v. L.C.*, in which the Court declared “the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual ‘meets the essential eligibility requirements’ for habilitation in a community-based program.” *Id.* (quoting *Olmstead v. L.C.*, 527 U.S. 581, 602 (1999))(internal quotations removed).

compete alongside athletes without disabilities, the court concluded that the AHSAA was not required to give such individualized consideration to each athlete's skill and ability to compete in mixed heats because to do so would be "administratively unworkable and unreasonable."<sup>141</sup>

According to the *Martin* Court, such an individualized assessment is exactly what is required under the ADA.<sup>142</sup> In *Martin*, the Court considered Martin's individual circumstances to determine whether the golf cart would give him a competitive advantage and concluded that it did not because of the nature of his disability.<sup>143</sup> Likewise, this court should have considered Badgett's individual situation to determine whether she in fact posed a real safety risk. Had the court made such an assessment, they would have found that the AHSAA's contentions were unfounded because Badgett is a skilled wheelchair athlete who knows how to control her wheelchair and who has competed safely on numerous occasions in mixed heat competitions.<sup>144</sup>

Second, similar to the court in *McFadden*, this court concluded that the AHSAA did not have an obligation under the Rehab Act or ADA to allow Badgett's individual points to count toward her team's total because it would fundamentally alter the track and field competition.<sup>145</sup> Relying on the *Martin* framework, the court found that Badgett's requested modification changed an essential aspect of the game and provided her team with a competitive advantage.<sup>146</sup> The court noted that a competitive advantage would exist because Badgett was the only wheelchair racer in the state that could earn additional points for her team.<sup>147</sup>

As in *McFadden*, the court here reached the wrong conclusion because the AHSAA has an obligation to provide equal opportunity for participation for students with disabilities, which should include making that participation meaningful, arguably by awarding points. Furthermore, like in *McFadden*, this court misconstrued *Martin* on the issue of competitive advantage. Awarding points to Badgett would have provided no more of a competitive advantage than the golf cart would have to Martin or points would have to *McFadden*. Additionally, this court misconstrued *Martin* when it held that Badgett's request changed an essential aspect of the game. The court reasoned that the

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<sup>141</sup> *Id.* at \*5.

<sup>142</sup> *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001) (holding that, under the ADA, "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration").

<sup>143</sup> *Id.* at 690.

<sup>144</sup> *See Badgett*, 2007 WL 2461928, at \*1, \*5.

<sup>145</sup> *Id.* at \*6.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

request required the court to first hold that running and jumping are not essential aspects of track and field.<sup>148</sup> In other words, the court held that requesting points in a wheelchair division (which does not require running and jumping) to count towards the point total in the non-wheelchair division (which does require running and jumping) was equivalent to Badgett “asking the court to equate wheeling with running and jumping despite the fact that wheeling is a distinct discipline.”<sup>149</sup>

The court’s comparison here is inaccurate. Wheelchair racing is a distinct event in track and field, just as is shot put or discus. Running and jumping are not “essential aspects” of discus or shot put, yet both of those events are included in track and field competitions and the athletes compete for points. The addition of wheelchair racing does not alter an essential aspect of track and field any more than the addition of discus and shot put does. Like discus and shot put, wheelchair racing merely expands the field of events in track and field competition in order to test a broader variety of skills: running, jumping, throwing, and now racing.

#### V. *MARTIN*: A CRITICAL LOOK

The previously discussed cases demonstrate that *Martin* has become the governing framework for resolving challenges involving the rights of student athletes with disabilities. For student athletes with intellectual disabilities, *Martin* has been particularly helpful in opening doors to mainstream sports that were otherwise closed. However, the application of *Martin* to cases involving student athletes with physical disabilities has produced mixed results, as demonstrated by the *Badgett* and *McFadden* cases. The outcomes in those cases beg the question of whether *Martin* provides the *proper* framework to address issues of inclusion for student athletes with disabilities. Two key aspects of *Martin* suggest that the answer to this question is “no.”

First, it is significant to note that the framework created in *Martin* was initially applied to a professional athlete competing in an elite competition for money. Imposing *Martin* in the context of school sports fails to recognize the drastic differences between professional and school-based sports. In professional sports, it is often “fame, winning, and the monetary aspect that drives the athlete.”<sup>150</sup> Conversely, in the school setting, athletics is regarded as part of a student’s educational experience.<sup>151</sup> Athletic programs are tax

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Donald H. Stone, *The Game of Pleasant Diversion: Can We Level the Playing Field for the Disabled Athlete and Maintain the National Pastime, in the Aftermath of PGA Tour, Inc. v. Martin: An Empirical Study of the Disabled Athlete*, 79 ST. JOHN’S L. REV. 377, 387 (2005).

<sup>151</sup> See *Boyd v. Bd. of Dirs.*, 612 F. Supp. 86, 93 (E.D. Ark. 1985) (stating that sports

exempt and receive nonprofit status because the courts and Congress view them as educational programs that are an integral part of a student's educational and social development. Unlike professional athletes, student athletes are prohibited from earning money for competing because they are considered students, not employees of a school, and their participation is part of their educational experience.<sup>152</sup> An educational model of sport does not mean that competitive stakes are not high. However, the objective in educational sport is to foster the student-athlete's individual development and maximize overall participation so as to permit the maximum number of students as possible to both participate in and derive important benefits from sports.<sup>153</sup>

Accordingly, in an educational model of sport, the emphasis should be on inclusion, not exclusion. Yet, the *Martin* framework creates a model of sport that focuses on exclusion. In *Martin*, the Court delineated the circumstances under which the PGA can exclude Martin from competition without violating the ADA. According to the Court, requested accommodations from athletes with disabilities become unreasonable, and therefore can be rejected, when they fundamentally alter the sport by changing the essential nature of the competition or creating a competitive advantage.<sup>154</sup> While it is uncertain whether, given the nature of professional competition, such a rigid structure and emphasis on exclusion is necessary to preserve the elite level of

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are critical to obtaining a college education by means of an athletic scholarship); Florida High Sch. Activities Ass'n v. Bryant, 313 So. 2d 57, 57 (Fla. Dist. Ct. App. 1975) (stating that sports are an important component of a student's scholastic and social development).

<sup>152</sup> See *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226 (Mich. Ct. App. 1983) (holding that the student-athletes was not an employee because, among other things, the "employer," in this case the educational institution, did not have a sufficient amount of control over the activities of the student-athlete, and because its right to discipline him was limited); *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692, 699 (Tex. App. 2000) (holding that if a contract for hire existed between the university and the athlete, it would be to attend school, remain in good standing, and participate in athletics).

<sup>153</sup> See generally DON SABO ET AL., *THE WOMEN'S SPORTS FOUNDATION REPORT: HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY, AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS* (2004), available at <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Download%20full%20report.pdf>. Regular participation in physical activity during childhood and adolescence promotes the development of positive body image, confidence, and self-esteem. *Id.* at 25-26. Girls who participate in sports and physical activity are academically more successful, more likely to graduate from high school, and had a greater interest in graduating from college. *Id.* at 30-31. Participation in sports and other physical activities can help reduce a girl's risk for obesity, diabetes, heart disease, osteoporosis, breast cancer, depression, unintended teen pregnancy, anxiety and lack of self-esteem, among others. *Id.* at 8.

<sup>154</sup> See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83 (2001).

competition, it is certainly not a model that should be transported to educational sport.

In fact, the exclusive model runs contrary to the regulations set forth in the Rehab Act, which emphasize inclusion “to the maximum extent appropriate.”<sup>155</sup> Consistent with the spirit of inclusion in the regulations, the legal framework used in school-based sports should foster the participation of student athletes like McFadden and Badgett, rather than erect barriers that discourage and limit their participation.

An ideal solution is to apply *Martin* with greater leniency and a greater focus on inclusion for educational sport than for professional sports; “As athletes progress from high school sporting events to the college level, moderate rules of compliance should be the norm. And, finally, strict rules of compliance should be required only for professional athletes engaging in competitive sports.”<sup>156</sup> While this solution might be ideal, it is certainly not realistic because courts currently have the discretion to interpret *Martin* as strictly or as leniently as they see fit. The different holdings in *Cruz*, *Matthews*, *Badgett*, and *McFadden* indicate that the courts have done just that. For this reason, a much more comprehensive and standardized solution is needed.

#### VI. POLICY RECOMMENDATIONS

It is imperative that all students, especially students with disabilities, have the opportunity to derive the important benefits from sports participation. This is particularly true at a time when childhood obesity is on the rise, with one in six children found to be obese and at risk of related health problems,<sup>157</sup> with one in three children found to be overweight,<sup>158</sup> and with \$117 billion being spent on a nationwide level for treating the direct and indirect costs associated with obesity.<sup>159</sup> Currently, opportunities for students with disabilities to compete in intercollegiate and interscholastic sports are extremely limited. While some states, school districts, or individual schools

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<sup>155</sup> See 34 C.F.R. § 104.37 (2008).

<sup>156</sup> Stone, *supra* note 150, at 386.

<sup>157</sup> Center for Disease Control and Prevention, U.S. Dep’t of Health and Human Services, *Obesity Prevalence*, <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/prevalence.htm> (last visited May 8, 2009).

<sup>158</sup> Nancy Hellmich, *One-Third of Kids Tip Scales Wrong Way*, USA TODAY, Apr. 4, 2006, at A1, available at [http://www.usatoday.com/news/health/2006-04-04-obesity\\_x.htm](http://www.usatoday.com/news/health/2006-04-04-obesity_x.htm).

<sup>159</sup> OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 10 (2001), available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> (describing costs in 2000).

have voluntarily mainstreamed students with disabilities or created adapted programs, these models are far too rare. More often than not, the experience of students with disabilities mirrors the cases previously discussed: students with disabilities are excluded from sports participation and are forced to take legal action to enforce their right to compete. The current state of athletic opportunities for students with disabilities calls for legislative and regulatory intervention.

#### *A. Mainstream Programs*

First, a policy directive from the Department of Education (ED) is necessary to clarify that the exclusion-based standard developed in *Martin* does not apply in the context of school sports. Specifically, ED should issue a "Dear Colleague" letter to educational institutions that discusses the importance of including students with disabilities in athletic programs. This letter should specify that, in evaluating the question of whether a requested accommodation will fundamentally alter the sport, the answer must be construed in the light most favorable to the student and be consistent with the regulations under the Rehab Act, which mandates that students with disabilities be included to the "maximum extent appropriate."<sup>160</sup>

#### *B. Adapted Programs*

Second, ED must develop additional regulations to expand the opportunities for students with disabilities beyond mainstream sports. Clarifying *Martin* only cures part of the problem for the student athlete with a disability. *Martin* and the Rehab Act regulations only address the circumstances under which schools must include students with disabilities in mainstream programs. However, nothing in the regulations or current case law discusses the need for schools to develop programs for student athletes with disabilities. Over thirty-five years after the passage of the Rehab Act, high school athletic associations in less than ten states and fewer than fifteen colleges and universities offer adapted interscholastic or intercollegiate sports programs for students with disabilities.<sup>161</sup> These figures demonstrate that, when left to their own devices, schools have not and will not assume the responsibility for creating athletic programs for students with disabilities. Mandatory action is needed.

The success of Title IX, the landmark legislation that prohibits sex discrimination in schools, in expanding opportunities for women and girls in sports provides a useful model for creating a structure to expand opportunities for students with disabilities.<sup>162</sup> Prior to the passage of Title IX,

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<sup>160</sup> See 34 C.F.R. § 104.37 (2008).

<sup>161</sup> Women's Sports Found., *Scholastic and Collegiate Sports Programs for Students with Disabilities* (2008) (on file with the author).

<sup>162</sup> See generally 20 U.S.C. § 1681(a) (1976).

few schools offered interscholastic or intercollegiate athletic teams for girls. Since the passage of Title IX, female participation in athletics has expanded over 904% at the high school level (294,015 to 3,021,807)<sup>163</sup> and over 456% at the college level (29,977 to 166,728).<sup>164</sup>

The language of the Rehab Act is nearly identical to the language of Title IX. Title IX provides that: "No person in the United States shall, on the basis of *sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." <sup>165</sup> Similarly, the Rehab Act provides that: "No otherwise qualified individual with a *disability* . . . shall, solely by reason of her *disability*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." <sup>166</sup>

While the statutory language of Title IX and the Rehab Act mirror each other, the legislative acts differ in the level of specificity in the regulations pertaining specifically to athletics. Title IX has been so successful, unlike the Rehab Act, because it contains detailed regulations that clearly define schools' obligations to provide women and girls with athletic opportunities—including the specific requirement that schools create separate teams for girls and women. Specifically, Title IX requires that a school must offer a separate team for girls under the following conditions:

- (1) The opportunities for members of the excluded sex have historically been limited; and
- (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation for intercollegiate competition for that team. . . .
- (3) The members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or compete actively on such a team if selected.<sup>167</sup>

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<sup>163</sup> NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 2007 ATHLETIC PARTICIPATION DATA (2007); *see also* Donna A. Lopiano, Women's Sport Foundation, Status of Women's Sports 10 (June 2008), <http://www.womenssportsfoundation.org/Content/Presentations/Research/State-of-Womens-Sports.aspx>.

<sup>164</sup> DENISE M. DEHASS, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1981-82 – 2007-08 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 57, 203 (2009), available at <http://www.ncaapublications.com/Uploads/PDF/ParticipationRates2009c2f40573-60aa-4a08-874d-1aff4192c5e4.pdf>.

<sup>165</sup> 20 U.S.C. § 1681(a) (emphasis added).

<sup>166</sup> 29 U.S.C. § 794(a) (2000) (emphasis added).

<sup>167</sup> Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX

This regulatory framework translates to the disability context and should be implemented to ensure that sports opportunities for students with disabilities expand in the same manner as they have for women under Title IX. Specifically, under the Rehab Act, ED *should* promulgate regulations clarifying that schools must offer a separate team for students with disabilities under the following conditions: (1) the opportunities for students with disabilities have historically been limited; (2) there is sufficient interest and ability to sustain a viable team; (3) there is a reasonable expectation for competition for that team; and (4) the students with disabilities, even with reasonable accommodations, do not possess sufficient skill to be selected for a single integrated team or compete actively on such a team if selected.

The creation of these regulations would supplement, not replace, the existing regulations that require students with disabilities to always have the opportunity to try out for the mainstream team.<sup>168</sup> These new regulations would give students with disabilities the opportunity to compete on mainstream teams and to participate in adapted programs for students with disabilities.

### *C. Equal Opportunity*

Finally, additional guidance is needed to clarify the meaning of “equal opportunity” in the Rehab Act regulations. The regulations require that schools provide students with disabilities with equal opportunities for participation, but provide no further guidance on what constitutes equal opportunity in school sports.<sup>169</sup> For some schools and courts, “equal opportunity” means merely a slot on a team, but not the same access to the benefits and treatment other athletes receive in sport, like the ability to score points.

Title IX provides a solid model to address this issue as well. The Title IX regulations outline what “equal opportunity” means for men and women in sports, and specifically requires that the athletic benefits and resources afforded to both men’s and women’s programs be comparable.<sup>170</sup> The equivalence of overall treatment is measured on the basis of eleven criteria:

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and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979).

<sup>168</sup> See, e.g., 34 C.F.R. § 104.37(c)(2). The section states “[a] recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to non-handicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.” *Id.* (emphasis added).

<sup>169</sup> See, e.g., 34 C.F.R. § 104.37(c)(1) (“A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.”).

<sup>170</sup> See *id.* § 106.41.

locker room, practice and competitive facilities, equipment and supplies, scheduling of games and practice times, publicity, coaching, travel and daily allowance, academic tutoring, medical and training facilities and services, housing and dining facilities and services, recruitment of student athletes, and support services.<sup>171</sup> This same standard also must be articulated in the context of athletic opportunities for student athletes with disabilities.

ED should promulgate regulations clarifying that equal opportunity for students with disabilities means that the overall benefits and treatment afforded them and student athletes without disabilities are comparable. This includes: locker room, practice and competitive facilities, equipment and supplies, the scheduling of games and practice times, publicity services, coaching, the provision of travel and daily allowance, access to academic tutoring, medical and training facilities and services, housing and dining facilities and services, the recruitment of student athletes, and the provision of athletic support services.

#### *D. Fitness and Athletic Equity Act*

Maryland has taken a leadership role in promulgating additional guidance to clarify schools' obligations to provide athletic opportunities for students with disabilities. On May 13, 2007, Maryland enacted the Fitness and Athletics Equity for Students with Disabilities Act, a landmark piece of legislation regarding the inclusion of individuals with disabilities in physical education and athletic programs.<sup>172</sup> This Act is the first piece of legislation that specifies in detail the actions school systems must take to include students with disabilities in physical education and athletic programs.

The bill requires that schools provide students with disabilities with equal opportunities to participate in physical education and athletic programs, develop policies and procedures to promote and protect the inclusion of students with disabilities, provide reasonable accommodations to include students with disabilities in mainstream programs, make adapted programs available to students with disabilities, and provide annual reporting to the Maryland State Department of Education detailing their compliance with these requirements.<sup>173</sup>

### VII. CONCLUSION

While students with disabilities have won an important match in Maryland, the set is not yet complete. The lack of opportunities for students with disabilities in school sports programs is not isolated to Maryland. Thirty-five

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<sup>171</sup> See *id.* § 106.41(c); 44 Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, Fed. Reg. at 71415.

<sup>172</sup> MD. CODE ANN., [EDUC.] § 7-4B (WEST 2008).

<sup>173</sup> *Id.*

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years after the passage of the Rehab Act, students with disabilities continue to be denied meaningful access to school sports programs, as was the case in *McFadden* and *Badgett*, or are banned outright from competing, as was the case in *Cruz* and *Matthews*. The Supreme Court's decision in *Martin* helped clarify schools' obligations to include students with disabilities in athletics. However, it did not go far enough. To fully address this issue and ensure that individuals with disabilities experience the same growth in participation as female athletes did under Title IX, the federal government must follow Maryland's lead and promulgate additional regulations clarifying that schools must include students with disabilities to the maximum extent possible in athletic programs and that schools must create adapted sports programs for students with disabilities.

Sports are too potent a force in society and have too much of an impact on an individual's health, confidence, and self-esteem for us not to do everything we can to ensure that sports girls and boys with disabilities are treated as well, and have the same opportunities for participation, as sports girls and boys without disabilities.