Nebraska Law Review

Volume 71 | Issue 4 Article 2

1992

Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?

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TABLE OF CONTENTS

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I. INTRODUCTION

Athletes are risk takers by nature and accept some risk of injury merely by playing competitive sports. The possibility of bumps, bruises and even broken bones during the course of play is a known inherent risk willingly assumed by all athletes.[1] Despite improved athletics conditioning, equipment, and rules changes, deaths and serious head, neck, and spinal column injuries as well as thousands of lesser injuries annually occur in amateur team sports.[2]

In addition to assuming normal inherent risks of injury, athletes with a handicap or physical abnormality may expose themselves to increased risk or severity of injury by participating in competitive sports. Athletes physically capable of playing a sport despite a handicap sometimes are willing to accept an enhanced risk of injury or potential significant harm to themselves.

In many areas of sports medicine, there are no definite scientific or universally agreed upon answers to the question of whether athletes with a particular handicap or physical abnormality should participate in certain competitive sports. Based on their individual experience and professional judgment, competent physicians may reach different conclusions regarding the nature and severity of the medical risks of participation based on an athlete's unique physiological characteristics. A team physician, expressing concern for an athlete's health, will refuse to provide clearance to play if he or she deems the medical risks of participation in a particular sport to be unreasonable. Other examining physicians or specialists may disagree with the team physician's evaluation of the medical risks and clear the athlete to play, perhaps with medication, periodic monitoring or protective equipment.

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1. Gerald Secor Couzens, *Football: A Painful Legacy for Players?*, THE PHYSICIAN & SPORTSMEDICINE, Oct. 1992, at 146; Gerald Todaro, *Allocation of Risk Based on the Mechanics of Injury in Sports: A Proposed Presumption of Non-Fault*, 10 HASTINGS COMM/ENT L.J. 33, 41 n.37 (1987).

2. *See generally* NCAA, 1987 SPORTS MED. HANDBOOK at 22-23 (tables summarizing fatalities and catastrophic injuries occurring in college sports); 1991 Am. Trauma Soc. Sports Injury Fact Sheet; Marc Gunther, *Little League Safety Record, Injuries Decried on "20/20,"* DET. FREE PRESS, July 12, 1991, at 6F, col. 1. For the first time in sixty years, no player died from a football related injury in 1990. *Scorecard*, SPORTS ILLUSTRATED, Apr. 29, 1991, at 16. In 1991, Chucky Mullins, a University of Mississippi football player, died of a lung blood clot, a complication resulting from paralysis suffered from making a tackle in a 1990 football game. *Chucky Mullins Dies From Lung Clot*, HOUS. CHRON., May 7, 1991, at 5B. James Glenn, a Texas A&M placekicker, collapsed and died of a heart attack while loosening up before a practice. Jonathan Feigen, *A&M Kicker Dies*, HOUS. CHRON., Sept. 26, 1991, at 1C.

Expressing concern for the student's well being and fear of tort liability, a high school or university generally accepts the team physician's recommendation to disqualify a handicapped athlete from participation in a school-sponsored athletics activity. Motivated by a passion for sports and athletics success, an excluded handicapped student nevertheless may desire to participate in interscholastic or intercollegiate athletics if physically able to do so. All parties must resolve their conflicts considering the possible exposure of the handicapped athlete to serious injury or death from athletics participation or unnecessary exclusion of a gifted athlete from a chosen sport.

Many athletes have achieved notable athletics success without suffering serious injury despite a handicap or disability. For example, Pete Gray and Monty Stratton played professional baseball despite an amputated limb.[3] Despite their asthma, Jim Ryun achieved track and field stardom, and Jimmy Connors is a championship tennis player.[4] For the past several years, Terry Cummings has played professional basketball with a heart condition controlled by medication.[5] Kenny Walker, who currently plays for the Denver Broncos, achieved All-American status as a University of Nebraska football player despite being deaf.[6] Gail Devers won a gold medal in the women's 100 meter dash in the 1992 Summer Olympics although she has Graves disease.[7]

On the other hand, several athletes have died or suffered serious injury while playing with a physical abnormality. Hank Gathers recently died of a heart attack while playing a college basketball game. He suffered from a heart rhythm disorder.[8] Several other well known athletes with heart conditions have died during competitive sports events or strenuous athletics activity.[9] In addition, there are probably some unreported instances in which athletes have suffered serious

3. HERB APPENZELLER, THE RIGHT TO PARTICIPATE 29 (1983).

4. *Id.* at 30. MacKenzie Phillips played football for the Arkansas Razorbacks in 1991 despite severe asthma requiring daily medication. Jonathan Feigen, *Health Risk Can't Keep Phillips From Football*, HOUS. CHRON., Aug. 31, 1991, at 1B.

5. Gerald Eskenazi, *Athlete and Health: Many at Risk*, N.Y. TIMES, Mar. 11, 1990, § 8, at 1.

6. Bill Sullivan, *Broncos' Walker Proves Skeptics Wrong Again*, HOUS. CHRON., Oct. 5, 1991, at 6B.

7. John H. Lee, *Conquering Hero; Olympic Champion Gail Devers Makes Her Triumphant Return to National City*, L.A. TIMES, Oct. 20, 1992, at B3.

8. Shelley Smith, *Death on the Court*, SPORTS ILLUSTRATED, Mar. 12, 1990, at 16. An autopsy report listed Gathers' cause of death as idiopathic cardiomyopathy. *News Briefs*, THE PHYSICIAN & SPORTSMEDICINE, Mar. 1991, at 41.

9. Pete Maravich, a former NBA star, Flo Hyman, an Olympic volleyball player, and Chuck Hughes, a Detroit Lions' wide receiver, died from sudden cardiac death while playing sports. Collen M. Fay, M.D. & Joseph S. Torg, M.D., *Sudden Cardiac Death in the Athlete: A Review*, CONTEMP. ORTHOPAEDICS, June 1990, at 575. *See also* Elliott Almond, *Sudden Death For Athletes Is Not Uncommon*, L.A. TIMES, Mar. 5, 1990, at C13.

athletics injuries directly attributable to a handicap or physical impairment.

In light of the foregoing risks, the athletics participation decision ideally should represent the mutual agreement of the team physician and consulting specialists, school officials, and the handicapped athlete and family (if he or she is a minor). In most instances, handicapped athletes accept team physician recommendations not to participate in a particular sport. Some handicapped athletes, however, have claimed a legal right to participate in a given sport despite school officials' adherence to the team physician's recommendation against playing.

Relying on conflicting medical testimony regarding the nature and degree of enhanced risk created by a handicap, amateur athletes recently have claimed a legal right to play contact sports or strenuous non-contact sports with a single paired organ such as a kidney or eye,[10] a spine abnormality,[11] or a heart condition.[12] One high school athlete even asserted a legal right to play high school football with a serious heart condition despite unanimous recommendations of several physicians against playing.[13] Assuming the nature and extent of the athlete's handicapping condition has been properly diagnosed and there has been full disclosure of all material health risks of playing, who has the ultimate legal authority to decide whether a handicapped amateur athlete may participate in certain sports?[14]

This Article initially will note the lack of any definitive guidelines or standards from college and high school athletics' governing bodies regarding this issue. The conflicts among the handicapped athlete, sports medicine physicians, and schools as well as the internal conflicts within each of these groups then will be addressed.

The handicapped athlete's right to participate in interscholastic and intercollegiate athletics under the United States Constitution, the Rehabilitation Act of 1973, and state education laws will be analyzed.

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10. *See infra* notes 203-219 and accompanying text.
11. *See infra* notes 113-123 and accompanying text.
12. *See infra* notes 62-73 and accompanying text.
13. *See infra* notes 190-199 and accompanying text.
14. This article will not extensively address whether handicapped or disabled professional athletes have a legal right to play competitive sports. The Rehabilitation Act of 1973, which prohibits discrimination against handicapped athletes, does not cover professional sports teams unless they receive federal funds. 29 U.S.C.A. § 794(b)(West Supp. 1992). Professional teams and leagues are not subject to claims based on the U.S. Constitution or 28 U.S.C. § 1983 unless their conduct constitutes state action. Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977). Discrimination against handicapped professional athletes may violate state human rights laws. *Id.* The Americans with Disabilities Act of 1990, which is patterned after the Rehabilitation Act of 1973, appears to prohibit professional teams from discriminating against athletes with disabilities that are not "job-related and consistent with business necessity." 42 U.S.C. §§ 12111(4) and (5)(A), 12112, 12113(a)(West 1992).

Also addressed will be educational institutions' justifications for excluding handicapped athletes from certain athletics activities. The implications of court-ordered participation of the handicapped in certain athletics programs such as immunizing schools from tort liability and coaches' duties to play handicapped athletes will be considered.

This Article will propose a legal standard to be applied on a case by case basis in making the athletics participation decision when the concerned parties disagree. This standard requires a delicate balancing of a handicapped athlete's right to participate in athletics activities within his or her physical capabilities, a physician's evaluation of the medically significant risks of participation, and a school's interests in establishing appropriate physical qualifications to ensure its athletes' health and safety.

II. ATHLETICS GOVERNING BODIES' PERSPECTIVE

A. College and University

At the collegiate level, athletics governing bodies have not promulgated any definitive rules or regulations stipulating when a handicapped or physically impaired athlete may or may not participate in competitive athletics. The National Collegiate Athletics Association (NCAA), a private voluntary association of more than 1,000 member colleges and universities, was originally formed to promote safety in intercollegiate sports.[15]

The NCAA publishes a *Sports Medicine Handbook* containing the organization's recommendations regarding various sports medicine issues.[16] The *Handbook* recommends several sports medicine policies, but NCAA members are not obligated to follow these guidelines, nor are they subject to disciplinary sanctions for non-compliance.[17] Rather, each member school determines the minimum physical qualifications athletes must possess to participate in a particular sport.[18]

The *Handbook* recommends a pre-participation medical exam before the athlete engages in intercollegiate athletics and provides that the exam should include a comprehensive health history, immunization history and a physical examination, including an orthopedic

15. Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORTS L. 7, 7-8 (1991).

16. These recommendations are formulated by a committee composed of athletics administrators, coaches and experts in the field of physiology, medicine, athletics training and law. NCAA, 1992-93 SPORTS MED. HANDBOOK at 2 [hereinafter HANDBOOK].

17. Telephone Interview with Randy Dick, NCAA Division of Health Sciences (Jul. 26, 1991).

18. *Id.*; Lawrence K. Altman, *College Star's Death Puts Team Physicians Under New Scrutiny*, N.Y. TIMES, May 1, 1990, at C3.

evaluation.[19] The *Handbook* recommends joint approval from the physician most familiar with an impaired[20] athlete's condition, the team physician, an appropriate school official, and parental consent if the athlete is a minor before permitting an impaired athlete to participate in athletics.[21] The *Handbook* further provides that "impaired" athletes should be medically disqualified from participation only if the impairment presents an "unusual risk of further impairment or disability to the individual and/or other participants."[22]

The National Association of Intercollegiate Athletics (NAIA), a private organization that regulates intercollegiate athletics between approximately 500 member schools,[23] has no written standards, guidelines or recommendations regarding the disqualification of handicapped athletes from competition.[24] Like the NCAA, the NAIA leaves handicapped athlete participation decisions to the discretion of its member schools.[25]

B. High School

State high school athletics associations have varying physical examination requirements regarding participation in interscholastic athletics.[26] The vast majority of states authorize only physicians to conduct the examination, but a few states allow nurses or physicians' assistants to do so.[27] Most states do not provide examiners with specific guidelines for conducting the examination or provide recommendations for exclusion from athletics participation.[28]

Most high school athletics associations only require a physician's

19. NCAA Guideline 1B, HANDBOOK, *supra* note 16, at 8.
20. The *Handbook* defines "impaired" as "any loss or abnormality of psychological, physiological or anatomical structure or function." NCAA Guideline 3A, HANDBOOK, *supra* note 16, at 34.
21. *Id.* The *Handbook* provides that the "team physician has the final responsibility to determine when a student-athlete is removed or withheld from participation due to an injury or illness." NCAA Guideline 2A, HANDBOOK, *supra* note 16, at 14.
22. NCAA Guideline 3A, HANDBOOK, *supra* note 16, at 34.
23. G. SCHUBERT ET AL., SPORTS LAW 3-4 (1986).
24. Telephone Interview with Wallace Schwartz, NAIA Vice President of Administration (Jul. 29, 1991).
25. *Id.*
26. Ronald A. Feinstein et al., *A National Survey of Preparticipation Physician Examination Requirements*, THE PHYSICIAN & SPORTSMEDICINE, May 1980, at 51. Charles V. Russell, *Legal and Ethical Conflicts Arising From the Team Physician's Dual Obligations to the Athlete and Management*, 10 SETON HALL LEGIS. J. 299, 313 (1987).
27. Feinstein et al., *supra* note 26, at 54.
28. *Id.* at 54-55. Three states provide examiners with the American Medical Association's (AMA) Disqualifying Conditions for Sports Participation. *Id.* See *infra* notes 50-51 and accompanying text for a discussion of the AMA's Disqualifying Conditions.

approval based on a discretionary examination before school-sponsored athletics participation. The completeness of an examination and participation recommendation depends primarily on the sports medicine knowledge, interest, and time commitment of the examining physician.[29] Thus, at both high school and university levels, there are no bright line policies in the area of participation by impaired or handicapped athletes.

III. ATHLETE'S PERSPECTIVE

Athletes are one of the most revered groups in American society and are among its highest paid members. The strong public interest in competitive athletics as well as fame and substantial economic award bestowed upon top professional athletes has an alluring effect on young amateur athletes.

Athletes are motivated by the pursuit of excellence and potential economic gain. The star high school athlete seeks a college athletics scholarship; the top flight college athlete desires a lucrative professional career. High school and college athletics careers generally are limited to four years, respectively. To achieve desired athletics objectives, the athlete must have the current ability to perform and be willing to make the necessary sacrifices.

The public adulation of successful professional sports figures[30] may foster a willingness among young amateur athletes to take significant health risks to play competitive sports.[31] Even amateur athletes are lionized for overcoming a serious injury, illness, or disability to succeed in sports.[32] "Playing with pain" is perceived as a badge of honor

29. Feinstein et al., *supra* note 26, at 54-55.

30. *See generally* James H. Davis, *"Fixing" the Standard of Care: Motivated Athletes and Medical Malpractice*, 12 AM. J. TRIAL ADVOC. 215, 220-21 (1988). The Houston Chronicle recently published a feature article on Houston Oilers lineman Doug Dawson, who resumed playing professional football after a four-year absence because of a torn Achilles tendon. John McClain, *Oilers' Dawson: A Success Story*, HOUS. CHRON., Aug. 4, 1991, at B1.

31. "Boobie" Miles, a fullback for Permian High School in Odessa, Texas, tore ligaments and cartilage in his knee during a preseason scrimmage. An orthopedic surgeon recommended that he have immediate reconstructive surgery. Instead, Miles chose a rehabilitation program allowing him to play football with a knee brace. He was willing to risk further injury to his knee and future arthritis to pursue his dream of a professional career. H.G. Bissinger, *Friday Night Lights*, SPORTS ILLUSTRATED, Sept. 17, 1990, at 82.

32. For example, the NCAA awarded Kevin Singleton, a former University of Arizona football player, the Division I-A Athletics Directors Association Award of Courage. Singleton overcame acute leukemia to resume playing college football. Joe Rhett also was nominated for the same award. He continued to play basketball at the University of South Carolina after his irregular heartbeat was diagnosed and a pacemaker was installed. *Courage Award Goes to Arizona's Singleton*, THE NCAA NEWS, Sept. 23, 1991, at 2. Chris Rogers, a linebacker at Lock Haven University, was cleared to play football during the 1991 season while

and courage.[33]

Economic pressure such as the loss of a potential scholarship or professional career or the fear of losing a starting position provides strong incentive to any star athlete to play with a handicap or impairment. In addition, pressure from the athlete's fellow players and coaches along with psychological factors such as machismo, pride, and the joy of competitive sports participation may strongly influence an amateur athlete to take health risks.[34]

A recent empirical study concluded that athletes suffering injuries do not deny their pain, but suggests they would rather play with physical pain than suffer the emotional pain of not playing.[35] Handicapped athletes may risk future injury rather than experience emotional pain from exclusion from a particular sport. Young athletes also tend to believe they are immortal and do not always make thoughtful decisions consistent with their long-term best health.[36]

The willingness of some high school and college athletes to risk their lives to play competitive sports raises serious questions regarding their capacity to make a responsible decision regarding playing with a handicap or disability. Stephen Larkin's desire to play high school football with a serious heart condition against unanimous physicians' advice was so strong that he told his mother, "Mother, if I have to die,

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battling Hodgkin's Disease. Patrick A. Doughia, *Lock Haven Player Has Battles*, THE NCAA NEWS, Oct. 28, 1991, at 2.

33. G. Larry Sandefer, *College Athletic Injuries: Does the Buoniconti Case Create a Duty of an Athlete Not to Play?*, 63 FLA. B.J. 34, 35-36 (1989).

34. *See generally* Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 150-57 (1992); Davis, *supra* note 30, at 216; Joseph H. King, *The Duty and Standard of Care for Team Physicians*, 18 HOUS. L. REV. 657, 692-93, 703 (1981); Russell, *supra* note 26, at 318.

35. The results of the study by Aynsley M. Smith, a sports psychologist at the Mayo Clinic in Rochester, Minnesota, is discussed in James S. Thornton, *Playing in Pain: When Should an Athlete Stop?*, THE PHYSICIAN & SPORTSMEDICINE, Sept. 1990, at 138, 141.

36. Thornton, *supra* note 35, at 142; Thomas G. Allison, *Counseling Athletes at Risk For Sudden Death*, THE PHYSICIAN SPORTSMEDICINE, June 1992, at 140, 142, 145; *Athletes With Health Problems: Do They Play or Not?*, THE NCAA NEWS, Aug. 1, 1990, at 1. For example, a Temple University football player, who was temporarily paralyzed during a game, suddenly sprang up and desired to return to the game while being transported to the hospital in an ambulance. Angelo Cataldi & Glen Macnow, *The Pitfalls of Playing With Pain, Athletes Must Carry Much of the Blame*, PHILADELPHIA INQUIRER, June 20, 1989, at D01. Mark Tingstad, a college football player, initially chose to resume playing football with an abnormally narrow spinal canal, thereby risking the possibility of permanent paralysis. *See infra* notes 86-89 and accompanying text. Tingstad explained, "When you're an athlete and you're involved in sports with a physical activity, you think you're impervious, you're talented and you think nothing can happen to you." He later gave up college football after suffering temporary paralysis making a tackle. Gerald Eskenazi, *Athlete and Health: Many at Risk*, N.Y. TIMES, Mar. 11, 1990, § 8, at 1.

I'd rather die playing ball. That's what I love to do."[37] Five years ago, MacKenzie Phillips was resuscitated from clinical death after suffering cardiac arrest from exercise-induced asthma.[38] Nevertheless, Phillips played football for the University of Arkansas during the 1991 season even after doctors told him he would never live a normal life if he continued to play with severe asthma.[39]

In some instances, an athlete's decision to play with a handicap, even with physician approval, leads to tragedy. Hank Gathers[40] and Tony Penny[41] died of heart attacks during basketball games while playing with known heart conditions. Although some amateur athletes are willing to expose themselves to significant health risks by playing, most athletes will act reasonably in response to a trusted physician's recommendation regarding athletics participation.[42]

IV. TEAM PHYSICIAN'S PERSPECTIVE

Most patients seek a cure for an injury, illness, or disease when seeking medical treatment. Patients usually accept without question physician recommendations against participation in certain activities to protect their health and safety. Most patients' health interests are consistent with their overall life interests. Moreover, some athletes, motivated by concern for their health, voluntarily discontinue playing a sport after recovery from a serious injury even if medically cleared to play.[43]

On the other hand, for emotional and economic reasons, there may be a divergence between a handicapped athlete's health interests and athletics interests. A handicapped athlete may be willing to take sig-

37. Mike Dodd, *Who Decides Health Risk is Too High?*, U.S.A. TODAY, Oct. 5, 1990, at 1C. See also *infra* notes 99-101 and 190-199 and accompanying text regarding Stephen Larkin's lawsuit to continue playing high school football. To keep playing high school baseball, Jeff Banister, now a catcher for the Pittsburgh Pirates, refused his physician's recommendation that his cancerous leg be amputated. He told his father, "I'd rather die than not be able to play baseball." *Bucs Make Dream Reality For UH Ex*, HOUS. POST, July 24, 1991, at C-7.

38. Jonathan Feigen, *Health Risk Can't Keep Phillips From Football*, HOUS. CHRON., Aug. 31, 1991, at 1B.

39. *Id.*

40. *See infra* note 75 and accompanying text. A teammate of Hank Gathers stated, "Everybody knew that Hank would rather die than not be able to play the way he could play or not play at all. *"We Weren't Told": Loyola*, L.A. TIMES, Mar. 7, 1990, at P1.

41. *See infra* notes 62-73 and accompanying text.

42. Dr. Barry Goldberg, director of sports medicine at Yale University Health Services, states: "Athletes in general are very reasonable if you are, too. . . . You have to win their trust that your decisions won't be arbitrary." Thornton, *supra* note 35, at 138.

43. Bryan Wilcox, a UCLA football player, decided not to play in an upcoming season after suffering four or five concussions in recent years. Jerry Crowe, *Wilcox Won't Return to Bruins This Year*, L.A. TIMES, Oct. 20, 1989, at C5.

nificant health risks to participate in athletics and attempt to influence a physician's medical judgment to obtain approval to do so.

A team physician[44] may face pressure from school athletics officials[45] or the handicapped athlete to provide medical clearance to play. Some physicians will consider a handicapped athlete's playing skills and economic interests, not merely the medical risks, in deciding whether to clear an athlete to play. For many years, Dr. Richard Kehoe has given professional basketball player Terry Cummings medication to enable him to play with an irregular heartbeat.[46] Dr. Kehoe would not have prevented Hank Gathers from using his "one-in-a-million" basketball talent unless "there was absolutely overwhelming compelling evidence that you had to."[47]

A team physician's paramount responsibility is to protect the athlete's health.[48] Despite the pressures created by an obsession with winning games and the objective of not unduly restricting athletics participation, the team physician has "an even bigger obligation to keep athletes alive and free from further injury."[49]

To assist physicians in making participation recommendations for handicapped athletes, medical organizations have formulated some guidelines. The American Medical Association's (AMA) Disqualifying

44. A "team physician" has been defined as "a physician who undertakes to render professional medical services to athletics participants and whose services are either arranged for or paid for at least in part by an institution or entity other than the patient, the patient's family, or some surrogate." King, *supra* note 34, at 658.

45. In a recent court case, the Citadel's head trainer testified that the school's football coaches, in pursuit of athletics success, occasionally attempted to override medical staff decisions against participation by injured athletes. Angelo Cataldi & Glen Macnow, *Team Doctors: A Crisis In Ethics*, Philadelphia Inquirer, June 18, 1989, at A01. See *infra* notes 76-78 and accompanying text for a discussion of Marc Buoniconti's negligence suit against the Citadel's team physician for permitting him to play football with a neck injury.

46. Malcolm Ritter, *Gathers' Death Points Up Tough Medical Choices, Doctors Say*, AP, Mar. 6, 1990, *available in* LEXIS, Nexis Library, AP File.

47. *Id. But see* King, *supra* note 34, at 700 (arguing that sports physicians should not "abdicate professional responsibilities to promote health by condoning the taking of unnecessary risks").

48. AMERICAN MEDICAL ASSOCIATION PRINCIPLES OF MEDICAL ETHICS § 3.06 (1990); King, *supra* note 34, at 691.

49. Leland L. Fairbanks, *Return to Sports Participation*, THE PHYSICIAN & SPORTSMEDICINE, Aug. 1979, at 71. Dr. James A. Nicholas, founder of the Nicholas Institute for Sports Medicine and Athletic Trauma in New York City and orthopedist for several New York professional teams, has stated:

> There are times when you let players play with conditions that are not life-threatening, but they can be hurt. . . . But when you get into life-threatening situations—I don't think a person with arrhythmia [an irregular heartbeat] should be allowed to play. I don't believe you can justify a potentially lethal injury.

Gerald Eskenazi, *Athlete and Health: Many at Risk*, N.Y. TIMES, Mar. 11, 1990, § 8, at 1.

Conditions for Sports Participation were intended to serve as guidelines rather than blanket disqualification standards for athletes with certain diseases or medical conditions.[50] However, these guidelines, last revised in 1976, have become increasingly obsolete and are no longer distributed by the AMA.[51]

In 1988, the American Academy of Pediatrics Committee on Sports Medicine compiled a revised list of recommendations for sports participation by young athletes with certain medical conditions.[52] The Committee's recommendations "do not indicate an exclusive course of treatment or procedure to be followed."[53] The Committee also concluded that "[v]ariations, taking into account individual circumstances, may be appropriate."[54] "A physician's clinical judgment should remain the final arbiter in interpreting these recommendations for a specific patient."[55] The Committee concluded the physician and the athlete and parents must jointly weigh whether the advantages of athletics participation are worth the involved health risks.[56]

The American College of Cardiology's 1984 Bethesda Conference formulated recommendations for sports participation by athletes with cardiovascular abnormalities.[57] The Conference participants acknowledged that "many decisions regarding disqualification from sports in-

50. G.C. Myers & James G. Garrick, M.D., *The Preseason Examination of School and College Athletes, in* SPORTS MED. 247 (R. Strauss ed., 1984). Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play?, The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORTS L. 163, 165-68 (1991). A listing of these disqualifying conditions is reprinted in this article. *Id.* at 165-68 n.10. *See also* Douglas B. McKeag, *Preparticipation Screening of the Potential Athlete*, 1989 OFFICE PRACTICE OF SPORTS MED. 373 (proposing guidelines for clearance and disqualification of athletes).

51. Shepherd, *supra* note 50, at 165-68 n.10-11. Many 1976 AMA disqualifying conditions currently are considered overly restrictive. Paul G. Dyment, *New Guidelines for Sports Participation*, THE PHYSICIAN & SPORTSMEDICINE, May 1988, at 45.

52. Committee on Sports Medicine, *Recommendations for Participation in Competitive Sports*, 81 PEDIATRICS 737 (1988).

53. *Id.*

54. *Id.*

55. *Id.* at 739. Regarding the American Academy of Pediatrics' participation guidelines, one pediatrician has commented:

> Because of the variety of individual situations, problems will arise when generalized recommendations are proposed. . . . Deciding which preexisting medical conditions should preclude athletes from participating in sports depends mainly on an opinion that is based on both clinical experience and common sense. There is little scientific data to assist physicians in questionable cases.

Dyment, *supra* note 51, at 45.

56. Committee on Sports Medicine, *Recommendations for Participation in Competitive Sports*, 81 PEDIATRICS 737, 737 (1988).

57. Barry J. Maron et al., Introduction, 16th Bethesda Conference: *Cardiovascular Abnormalities in the Athlete: Recommendations Regarding Eligibility For Competition*, 6 J. AM. C. CARDIOLOGY 1189, 1189 (1985).

volve circumstances in which definite scientific answers are conspicuously lacking."[58] The Conference's recommendations thus "are necessarily based largely on the practice of the 'art of medicine.' "[59]

Recognizing that the athletics participation decision "involves complex medical and legal principles," the Conference participants concluded: "The physician's primary responsibility is to make *recommendations* to the athletes, and that the physician need not be solely responsible for the ultimate decision of whether an athlete is *permitted* to compete."[60]

Although a handicapped athlete and family have significant input, the team physician's participation recommendation may be determinative. Schools generally follow the recommendations of the team physician and consulting specialists in deciding whether athletes should be permitted to play a particular sport.[61]

Because of the lack of conclusive scientific data and a handicapped athlete's unique physiology, the team physician, often with the assistance of consulting specialists, must make an individualized evaluation of the medical risks of participation in a given sport. As expected, based upon the varying standards just noted, different physicians may reach conflicting conclusions based on their examination of the athlete.

If a physician recommends that a handicapped athlete not play, his competence may be questioned in a lawsuit by the athlete. In 1986, two cardiologists diagnosed Tony Penny, a Central Connecticut State University basketball player, as having hypertrophic cardiomyopathy,[62] the most common cause of sudden cardiac death in young athletes.[63] These physicians recommended that Penny discontinue playing competitive basketball.[64] Based on these medical recommendations, Central Connecticut refused to allow Penny to play on its basketball team for two seasons.[65]

Fearing the loss of a potentially lucrative professional basketball

58. *Id.* at 1190.
59. *Id.*
60. *Id.*
61. *See infra* note 83 and accompanying text.
62. Lawrence K. Altman, M.D., *The Doctor's World; An Athlete's Health and a Doctor's Warning*, N.Y. TIMES, Mar. 13, 1990, at 3C [hereinafter Altman]. Hypertrophic cardiomyopathy is an abnormal thickening of the heart of unknown cause. *Id.*
63. Fay & Torg, *supra* note 9, at 576. *See generally* Francis M. McCaffrey et al., *Sudden Cardiac Death In Young Athletes*, 145 AM. J. DISEASES CHILDREN 177 (1991)(providing recommendations for identifying asymptomatic young athletes at risk for sudden cardiac death).
64. Altman, *supra* note 62.
65. Complaint at 2-3, Penny v. Sands, No. H89-280 (D. Conn., filed May 3, 1989)[hereinafter Penny Complaint].

career more than the risks of playing with a serious heart condition, Penny was reluctant to accept those physicians' collective judgment.[66] He ultimately obtained opinions from other cardiologists that his heart condition should not prevent him from playing competitive basketball.[67]

Claiming a right to participate in college athletics, Penny threatened Central Connecticut with a lawsuit unless he was allowed to play basketball his senior year. Those parties executed an October 21, 1988 agreement permitting Penny to resume playing intercollegiate basketball.[68]

After completing his college basketball career, Penny filed a malpractice suit against Dr. Milton J. Sands, the cardiologist who initially diagnosed his heart condition and advised against further participation in competitive sports.[69] Penny alleged his heart condition had been misdiagnosed and that Dr. Sands negligently prevented him from playing college basketball for two years.[70] Penny claimed damages of $1,000,000.[71] Penny eventually dismissed his lawsuit against Dr. Sands.[72] Penny subsequently died of a heart attack in 1990 while playing in a professional basketball game in Manchester, England.[73]

In contrast to the *Penny* lawsuit, some team physicians have been sued for approving participation of athletes who subsequently suffer death or serious injury during athletics competition.[74] Hank Gathers' heirs sued the physicians who provided heart medication and cleared

66. Altman, *supra* note 62. *See also* Maron, *supra* note 57 (observing that the decision to disqualify elite professional or intercollegiate athletes with cardiovascular abnormalities may be complicated by the monetary value of athlete and extreme emphasis on competitive achievement).

67. Altman, *supra* note 62.

68. October 21, 1988 Release Agreement between Anthony Penny, Central Connecticut State University, and Board of Trustees of Central Connecticut State University (on file with author)[hereinafter Release]. Central Connecticut agreed to allow Penny to play basketball provided he reported for and submitted the results of specified physical exams and tests, and until two named physicians certified he was no longer physically able to participate in athletics at Central Connecticut. Penny agreed to release all claims against Central Connecticut arising out of his participation in athletics due solely to his cardiovascular system. *Id.*

69. Penny Complaint, *supra* note 65, at 4.

70. *Id.*

71. Penny's claimed damages were based on: 1) lost enjoyment of life as a result of the two-year restriction on playing college basketball; 2) lost future income from professional basketball; 3) costs of obtaining additional medical opinions regarding his heart condition; and 4) pain resulting from tests to diagnose his condition and prescribed medication. Penny Complaint, *supra* note 65, at 5.

72. Altman, *supra* note 62.

73. *Id.*

74. The topic raises issues such as the appropriate standards physicians should adhere to in clearing athletes to play. These important issues merit consideration but are outside the scope of this article. *See generally* Morley Ben Pitt, *Malpractice on the Sidelines: Developing a Standard of Care for Team Sports Physicians,*

him to play college basketball.[75]

Marc Buoniconti, a former linebacker for The Citadel, lost a negligence suit against the school's team physician.[76] Buoniconti was permanently paralyzed while making a tackle during an October 26, 1985 game with East Tennessee State University.[77] Buoniconti asserted that Dr. E. K. Wallace, Jr. wrongfully permitted him to play in the game with ill-conceived equipment, a spine abnormality and a serious neck injury.[78]

Team physicians often are faced with the conflicting obligations of protecting the health of the handicapped athlete while attempting to enable the athlete to participate safely in a desired sport. Although some participation guidelines exist, the team physician ultimately must rely on personal medical judgment based on the athlete's particular handicap and individual physical characteristics, as well as the nature of the particular sport. The team physician must not allow pressure from a handicapped athlete or third parties to override independent medical judgment in making a participation recommendation.

V. SCHOOL'S PERSPECTIVE

It is well established, and beyond the subject of this analysis, that colleges and high schools must use reasonable care in operating their

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2 COMM/ENT L.J. 579, 590 (1980); Davis, *supra* note 30; Russell, *supra* note 26; King, *supra* note 34.

75. Gathers' death resulted in the filing of multimillion dollar lawsuits by his mother, minor son and other heirs against Loyola Marymount and its coach and athletics trainer as well as several physicians participating in Gathers' care and treatment. Plaintiffs alleged that the defendants' physicians negligently diagnosed and treated Gathers. The lawsuits further contended that defendants conspired and fraudulently failed to inform Gathers of the seriousness of his heart condition and the danger of continuing to play competitive basketball. Plaintiffs further alleged that, at the urging of Loyola Marymount's coach, Gathers' heart medication was reduced below therapeutic levels to enable him to play at a higher level. In sum, plaintiffs contended that Gathers was "sacrificed on the altar of basketball" in Loyola Marymount's quest for basketball success, notoriety and economic gain. *See generally* Complaint, Gathers v. Loyola Marymount Univ., No. C759027 (Los Angeles, Cal. Super. Ct., filed Apr. 20, 1990); Shelley Smith, *A Bitter Legacy*, SPORTS ILLUSTRATED, Mar. 4, 1991, at 62; Marianne Lavelle, *From Court to Court*, NAT'L L.J., Mar. 4, 1991, at 1; Frances Munning, *The Death of Hank Gathers: A Legacy of Confusion*, THE PHYSICIAN & SPORTSMEDICINE, May 1990, at 97. All of plaintiffs' claims ultimately were settled or dismissed prior to trial. *Gathers Family Suit Dismissed by Judge*, HOUS. CHRON., Sept. 10, 1992, at 8C; *Gathers' Mother Settles Lawsuit With University*, THE NCAA NEWS, Apr. 1, 1992, at 2.

76. William Nack, *Was Justice Paralyzed?*, SPORTS ILLUSTRATED, July 25, 1988, at 32.

77. *Id.*

78. *Id.*

athletics programs.[79] Schools and athletics teams are required to fully inform athletes of the foreseeable risks of participating in competitive sports.[80] Schools may be held liable for negligently permitting or persuading injured athletes to play[81] or failing to inform a physically impaired athlete of the risks of continued sports participation.[82] A detailed discussion of potential liability for negligently failing to detect physical abnormalities before permitting an athlete to participate in athletics is outside the scope of this article.

For present purposes, it is assumed the existence of the athlete's handicap or abnormality is known and the material risks of participation in the subject sport have been fully disclosed to the athlete and family. The central issue addressed here is the school's right to prevent a handicapped athlete from participating in a particular sport under those circumstances.

Most colleges permit an athlete to play a sport only if the team physician has given medical clearance.[83] Schools fear possible tort liability for allowing an athlete to play contrary to the recommendation of the team physician. Even if the athlete and family are willing to waive all legal claims against the school for possible injury or death from athletics participation, schools may prohibit participation out of concern for the student's health and welfare.

Both colleges and high schools have asserted that the doctrine of *parens partriae* justifies denial of athletics participation in accordance

79. The NCAA's 1992-93 Sports Medicine Handbook states: "Student-athletes rightfully assume that those who are responsible for the conduct of sport have taken reasonable precautions to minimize the risk of significant injury." HANDBOOK, *supra* note 16, at 4. *See generally* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 8.05 (1979).

80. *See, e.g,* Lister v. Bill Kelly Athletic, Inc., 485 N.E.2d 483 (Ill. App. Ct. 1985); Vendrell v. School Dist. No. 26C, Malheur County, 376 P.2d 406, 413 (Or. 1962)(finding no negligent instruction under the facts of case). *See generally,* Melonie L. Davis, *Sports Liability of Coaches and School Districts,* 1989 F.I.C.C. Q. 307, 309-10.

81. Morris v. Union High School Dist. A, King County, 294 P. 998 (Wash. 1931).

82. *Accord* Krueger v. San Francisco Forty Niners, 234 Cal. Rptr. 579 (1987)(professional team and physician liable for fraudulent concealment of risks of continued play with knee injury).

83. A 1984 survey of NCAA and NAIA schools revealed that team physicians at approximately 58% of the respondents made the final decision regarding when an injured or ill athlete returns to intercollegiate football competition. G.D. Rovere, M.D. et al., *A Survey of Team Physician and Trainer Availability and Participation in Intercollegiate Football,* THE PHYSICIAN & SPORTSMEDICINE, Nov. 1984, at 91. The trainer decided when the athlete would return to competition at 14% of the schools; another physician, 5%; the coach, 1%; and a joint decision, 22%. *Id.* at 94. Although the survey did not address handicapped athletes, it is likely that most surveyed schools would rely primarily on the team physician's participation recommendation. *See also* Thornton, *supra* note 35, at 142 (reporting that most high schools and colleges "have mechanisms for medical clearance whereby a team physician can bar, or at least strongly discourage, at-risk athletes from playing").

with the team physician's recommendation.[84] One private high school claimed that permitting a handicapped athlete to play contrary to unanimous physician recommendations against participation would violate its basic religious tenets. Explaining the basis of Moeller High School's refusal to permit Stephen Larkin to play football with a heart condition despite his family's willingness to sign a waiver, Daniel Conlon, chancellor for the Archdiocese of Cincinnati, stated, "We stand for the preservation of human life . . . To put a student at risk against the advice of [medical] specialists creates a moral problem."[85]

Some universities may permit an adult athlete with a handicap or physical abnormality to decide whether to play if medical specialists disagree in their participation recommendations. For example, Mark Tingstad, a former Arizona State University football player, was diagnosed as having spinal stenosis, an abnormally narrow spinal canal.[86] Physicians disagreed whether his condition increased his risk of suffering permanent paralysis while playing football.[87] Because the physicians' opinions were divided, Arizona State officials allowed Tingstad to decide whether to continue playing football.[88] Tingstad chose to play football his senior year but quit after suffering temporary paralysis while making a tackle during a game.[89]

Schools may fear that participation by a handicapped athlete may increase the risk of injury to other participants in a sports event. For example, a deaf football player may not be able to hear a changed blocking assignment resulting in injury to a fellow team member. Necessary medication or protective equipment for the handicapped player also may expose participants to an increased risk of injury during competition.

Schools also may be concerned about adverse publicity if a handicapped athlete suffers a severe injury or dies during athletics competition. Major college athletics powers have been criticized for deviating from their educational mission by exploiting athletes in furtherance of an obsession with winning.[90] A tragedy on the playing field may cre-

84. *See infra* notes 249-50, 263-64 and accompanying text.

85. Mike Dodd, *Who Decides Health Risk Is Too High?*, U.S.A. TODAY, Oct. 5, 1990, at 1C. *See also infra* notes 99-101, 190-99 and accompanying text.

86. Richard Demak, *Was It Worth the Risk?*, SPORTS ILLUSTRATED, Dec. 18, 1989, at 76.

87. *Id.* at 79-89.

88. *Id.* at 81.

89. *Id.* at 86-87.

90. *See generally* MURRAY SPERBER, COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 297-306 (1990). *But see* Tom Witosky, *College Athletes Exploited? Not According to Recent Study*, U.S.A. TODAY, Jan. 3, 1991, at 8C (U.S. Education Department Study finding that student-athletes as successful as other students regarding academic progress and employment history).

ate the public perception that a school is willing to sacrifice its athletes' health to accomplish its athletics objectives.

VI. ATHLETE'S LEGAL RIGHT TO PLAY

In most instances, athletes with handicaps or physical abnormalities accept physician recommendations not to engage in competitive sports to avoid exposing themselves to significant health risks. As analyzed below, some athletes have claimed a legal right to play despite the team physician's recommendation against playing. Athletes' right to participation claims based on the federal Constitution pursuant to 42 U.S.C. § 1983[91] and state common law[92] generally have been unsuccessful. However, amateur athletes have obtained court orders allowing them to participate under Section 504 of the Rehabilitation Act of 1973[93] and state education statutes[94] prohibiting discrimination against the handicapped. Courts also have ordered schools to permit handicapped interscholastic athletes to participate in athletics under the Individuals with Disabilities Education Act.[95]

Professional athletes successfully have challenged professional sports league by-laws categorically prohibiting athletes with certain physical impairments from playing under state employment discrimination laws.[96] Courts have denied claims that such by-laws violate the

91. See *infra* notes 99-109 and accompanying text for a discussion of equal protection claims asserted by handicapped athletes. See *infra* notes 110-27 and accompanying text for a discussion of due process claims raised by handicapped athletes. In *Larkin v. Archdiocese of Cincinnati*, an unreported oral decision, a federal district court held that a private high school's refusal to permit an athlete to play football with a heart condition did not violate his First Amendment freedom of association rights. The court found that the athlete's desire to play was "an even balance" when weighed against the school's desire not to have the student on its team. Partial Transcript of Proceedings at 25-26, Larkin v. Archdiocese of Cincinnati, No. C-1-90-619 (S.D. Ohio, filed Aug. 31, 1990)(oral findings of fact and conclusions of law supporting denial of injunctive relief and dismissal of complaint)[hereinafter Partial Transcript]. *See also infra* notes 99-101, 190-99 and accompanying text.

92. The *Larkin* court rejected an athlete's claimed contractual right to play high school football because the school exercised its retained right in its school handbook to determine eligibility for athletics participation in a reasonable and rational manner. Partial Transcript, *supra* note 91, at 3-4, 26-27. The *Larkin* court also dismissed without prejudice plaintiff's tortious interference with prospective contractual relations claim based on the athlete's concern he would not receive a college athletics scholarship if he was unable to play high school football. Partial Transcript, *supra* note 91, at 31-33.

93. *See infra* notes 212-19, 285-87 and accompanying text.

94. *See infra* notes 271-80 and accompanying text.

95. 20 U.S.C.A. §§ 1401-1461 (West Supp. 1992). *See generally* Shepherd, *supra* note 50, at 195-98.

96. In Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977), the court enjoined enforcement of a league by-law prohibiting one-eyed athletes from playing hockey. The court found that the by-law violated New York's Human Rights

federal antitrust laws.[97]

A. Federal Constitutional Claims[98]

1. Denial of Equal Protection

Some handicapped athletes have claimed that exclusion from school athletics denies them equal protection of the laws. In addition to a claim asserted under the Rehabilitation Act of 1973,[99] *Larkin v. Archdiocese of Cincinnati* raised an equal protection issue. In an unreported oral decision, the court upheld Cincinnati Moeller High School's refusal to permit an athlete to play football without a physician's certification it was medically safe to play.[100] The court found no equal protection violation because Moeller did not permit any athletes to play football without a physician's certificate.[101]

In a 1977 case, *Neeld v. American Hockey League*,[102] the court rejected plaintiff's claim that a professional hockey league's by-law excluding one-eyed players from member teams violated the equal protection clause. The court opined that the league's by-law resulted from private conduct, not state action subject to constitutional scrutiny.[103] In dicta the court noted, without explanation, that a visually impaired athlete has an enforceable constitutional right not to be denied participation in a college sports program because of a handicap if such program constitutes state action.[104]

It is unlikely an athlete excluded from athletics participation because of a handicap today could assert an equal protection claim successfully. The Supreme Court has ruled that handicapped persons are not a suspect or quasi-suspect class justifying a heightened scrutiny of alleged discrimination.[105] Student athletes are not a suspect class,[106]

Law prohibiting employees from discrimination based on disability unless the characteristic is a bona fide occupational qualification. *Id.* at 462. There was no evidence that blindness in one eye substantially detracted from plaintiff's ability to play hockey. *Id.*

97. In Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979), the Ninth Circuit rejected plaintiff's claim that a professional hockey league by-law that prevented him from playing for a member club violated the antitrust laws. The court concluded that the by-law's primary purpose of promoting safety outweighed any de minimis anticompetitive effect on excluded athletes. *Id.* at 1300.
98. For a discussion of state constitutional claims brought by handicapped athletes, see Shepherd, *supra* note 50, at 185-87.
99. *See infra* notes 190-99 and accompanying text.
100. Partial Transcript, *supra* note 91, at 16-17.
101. *Id.*
102. 439 F. Supp. 459 (W.D. N.Y. 1977).
103. *Id.* at 461-62.
104. *Id.* at 462. *But see* Grube v. Bethlehem Area School Dist., 550 F. Supp. 418, 423 (E.D. Pa. 1982)(expressing doubt that excluding handicapped students from high school athletics denies equal protection of the laws).
105. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1984). In Cleburne,

and apart from the *Neeld* dicta,[107] there is no judicially recognized fundamental right to play college or high school sports.[108]

A school can justify the exclusion of handicapped athletes from its athletics program if its decision is rationally related to a legitimate objective.[109] The school's reliance on its team physician's recommendation that a handicapped athlete not play rationally furthers the permissible purpose of ensuring the health and safety of its athletes.

2. Denial of Due Process

Most courts hold there is no liberty or property interest in playing interscholastic or intercollegiate athletics.[110] The receipt of a college athletics scholarship or possibility of a professional career generally is viewed as a "unilateral expectation of a benefit," not "a legitimate claim of entitlement."[111] College and high school athletes thus usually are not entitled to due process in the context of exclusion from athletics. However, depriving an athlete of an existing athletics scholarship may invoke the protections of due process.[112]

In *Clayton v. University of Wyoming*,[113] a college football player

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the court held that the mentally retarded were not a suspect class. The court invalidated a city zoning ordinance requiring a special use permit to operate a group home for the mentally retarded. The court found the ordinance did not rationally further any of the city's legitimate interests.

106. *See, e.g.*, Jones v. Wichita State Univ., 698 F.2d 1082, 1086-87 (10th Cir. 1983); Parish v. NCAA, 506 F.2d 1028, 1033 (5th Cir. 1975).

107. One commentator reports that Evans v. Looney, C.A. No. 77-6052-CV-SJ (W.D. Mo., Sept. 2, 1977) resulted in a consent judgment that partially-blind football players had been denied equal protection and due process by their exclusion from a college team. *See* Shepherd, *supra* note 50, at 184 n.119.

108. Jones v. Wichita State Univ., 698 F.2d 1082, 1086-87 (10th Cir. 1983); Rivas Tenorio v. Liga Athletica Interuniversitaria, 554 F.2d 492, 497 (1st Cir. 1977); Parish v. NCAA, 506 F.2d 1028, 1028 (5th Cir. 1975).

109. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1984).

110. Rutledge v. Ariz. Bd. of Regents, 660 F.2d 1345, 1352-53 (9th Cir. 1981); Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 945 (D. Kan. 1987); Hawkins v. NCAA, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987); Justice v. NCAA, 577 F. Supp. 356, 366 (D. Ariz. 1983); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Col. 1976). *But see* Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982). Some commentators argue that participation in athletics to obtain a college scholarship or pursue a potential professional career should be a constitutionally protected liberty interest. William G. Buss, *Due Process in the Enforcement of Amateur Sports Rules, in* LAW AND AMATEUR SPORTS 1, 11-12 (Ronald J. Waicukauski ed., 1982); Schubert, *supra* note 23, at 67.

111. Hawkins v. NCAA, 652 F. Supp. 602, 610-11 (C.D. Ill. 1987)(*quoting* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77 (1972)).

112. Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1353 (9th Cir. 1981); Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 944 (D. Kan. 1987); Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo. 1976).

113. Complaint, Clayton v. University of Wyo., No. 118-167 (Laramie County Dist. Ct., filed Oct. 17, 1988).

claimed the University of Wyoming's refusal to permit him to continue playing football with spinal stenosis denied him due process of law. The university's football coach accepted the team physician's recommendation, supported by the opinions of other specialists, that Steve Clayton discontinue playing football.[114] Other examining physicians believed it "would not be unreasonable" to permit Clayton to continue playing football.[115]

In his complaint Clayton asserted defendants' action deprived him of a potential professional football career.[116] He claimed full knowledge of his medical condition and a willingness to assume any enhanced risk of injury created by it.[117]

Before the court ruled on Clayton's request for injunctive relief, the parties agreed to an administrative hearing before an ad hoc committee of university officials.[118] The committee accepted the prevailing view of medical experts that Clayton's participation in football would create an "extra hazardous" risk of harm to him.[119]

The committee determined that university officials, namely the head football coach who also served as athletics director, have the sole discretion to determine a player's eligibility for the football team.[120] It found the university has the authority to exclude from sports an athlete whose physical condition exposes him to an increased risk of injury, even if the athlete is willing to assume such risks.[121] The committee concluded that the head football coach acted reasonably in accepting the team physician's recommendation to exclude Clayton from the football team.[122] After the university's president accepted the committee's findings, Clayton voluntarily dismissed his suit.[123]

Although Clayton received an administrative hearing from the university by agreement regarding his exclusion from the football team, it is doubtful that under procedural due process he was entitled to one. The university continued to honor his athletics scholarship.[124] The expectation of a professional athletics career is speculative and does

114. *Id.* at 2-3.
115. *Id.* at 2.
116. *Id.* at 3.
117. *Id.*
118. Telephone Interview with David L. Baker, University of Wyoming General Counsel (Aug. 7, 1991).
119. In re Clayton, University of Wyoming's Proposed Findings of Fact and Conclusions of Law at 6 (Dec. 22, 1988).
120. *Id.* at 5, 7.
121. *Id.* at 7.
122. *Id.*
123. Telephone Interview with David L. Baker, University of Wyoming General Counsel (Aug. 7, 1991).
124. Telephone Interview with Dan Viola, University of Wyoming Assistant Athletics Director (July 24, 1991).

not constitute a property right worthy of due process protection.[125] The Constitution does not require a high school or college to hold an administrative hearing before excluding an impaired or handicapped student from athletics competition based on the team physician's recommendation.[126]

Handicapped athletes probably could not successfully claim exclusion from interscholastic or intercollegiate sports violates substantive due process. As previously discussed, there is no fundamental right to participate in college or high school sports.[127] A school could rationally justify such exclusion based on concern for the athlete's health and well being.

B. Rehabilitation Act of 1973 Claims[128]

Section 504(a) of the Rehabilitation Act (Act) provides in relevant part:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, 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 . . . .[129]

The purpose of the Act is to provide a "guarantee of equal opportunity"[130] and "even handed treatment of qualified handicapped persons."[131] The Act is primarily intended to provide the handicapped with an opportunity to participate fully in activities in which they have the physical capability and skill to perform.[132]

Section 504 of the Act is patterned after similar federal statutes prohibiting racial and sexual discrimination.[133] The Act implements

125. *See supra* notes 110-11 and accompanying text.

126. One commentator suggests that, at a minimum, an injured or ill college student excluded from athletics competition is entitled to an explanation of the institution's decision and a summary of its supporting evidence. The athlete should be given an opportunity to present medical evidence supporting a request to participate in intercollegiate athletics. Jones, *supra* note 34, at 175.

127. *See supra* note 108 and accompanying text.

128. For a discussion of potential claims by handicapped athletes under the Americans with Disabilities Act of 1990, see Jones, *supra* note 34, at 189-97.

129. 29 U.S.C.A. § 794 (West Supp. 1992).

130. 29 U.S.C.A. § 701 (West Supp. 1992).

131. Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

132. The objective of the Act is to prevent discrimination based on an assumed "inability to function in a particular context." Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). For a discussion of the beneficial rehabilitative effects of athletics participation by handicapped persons, see generally Glen M. Davis et al., *Sports And Recreation For the Physically Disabled, in* SPORTS MED. 186 (R. Strauss ed., 1984).

133. S. REP. NO. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373. *Compare* Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 200 d-1 (1985), prohibiting race, color or national origin discrimination, and Section 901 of the

federal government policy prohibiting programs receiving federal financial assistance from discriminating on the basis of handicap.[134]

Regulations promulgated under the Act by the Department of Education[135] and the Department of Health and Human Services[136] prohibit colleges and high schools from discriminating against qualified handicapped athletes. Qualified handicapped athletes must be given an "equal opportunity for participation" in interscholastic and intercollegiate athletics.[137]

Entities in violation of the Act must take remedial action prescribed by the Director of the Office of Civil Rights for the Department of Health and Human Services or Assistant Secretary of Education.[138] If the entity refuses to take required remedial action, judicial sanctions or termination of federal funding may result.[139]

Private parties have a right of action under the Act and may obtain injunctive relief, damages, and attorney's fees.[140] Handicapped athletes have obtained judicial orders requiring schools to permit them to participate in competitive sports.[141] Courts have held that handicapped athletes may recover damages under the Act for unlawful exclusion from a sport.[142]

To prevail under the Act, a handicapped athlete must establish that he or she is: 1) an "individual with handicaps;" 2) "otherwise qualified" to participate; 3) who has been excluded solely by reason of handicap; 4) from a program or activity receiving federal funds.[143] The athletics programs of most colleges and high schools are covered

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Education Amendments of 1972, 42 U.S.C. § 1683 (1985), prohibiting sex discrimination, *with* Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1985), prohibiting discrimination against the handicapped. *See generally* School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 277-78 and n.2 (1987)(discussing purpose of Act and similarity to other federal antidiscrimination statutes).

134. S. REP. NO. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6373.

135. 34 C.F.R. §§ 104.37(c) and 104.47(a)(1992).

136. 45 C.F.R. §§ 84.37(c) and 84.47(a)(1992).

137. *See supra* notes 135, 136 and accompanying text. The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411-1420 (1988), and the Amateur Sports Act of 1978, 36 U.S.C. §§ 371 et seq. (1988), also ensure equal opportunities in athletics programs for handicapped persons. *See generally* G. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 261-66 (1988).

138. 34 C.F.R. § 104.6(a)(1992); 45 C.F.R. § 84.6(a)(1992).

139. 34 C.F.R. Pt. 104, App A. at 422 (1992); 45 C.F.R. Pt. 84, App. A at 380 (1992).

140. 29 U.S.C.A. § 794a (West 1985). *See, e.g.*, Doe v. United States Attorney Gen., 941 F.2d 780 (9th Cir. 1991).

141. *See, e.g.*, Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 425 (E.D. Pa. 1982); Wright v. Columbia Univ., 520 F. Supp. 789, 795 (E.D. Pa. 1981).

142. Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D. N.J. 1980).

143. *See* Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991); Doe v. New York Univ., 666 F.2d 761, 774-75 (2d Cir. 1981); Sharon v. Larson, 650 F. Supp. 1396, 1400 (E.D. Pa. 1986); Bento v. I.T.O. Corp., 599 F. Supp. 731, 741 (D.R.I. 1984); Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Pa. 1981).

by the Act even if they do not receive any direct federal funding. If any part of a college or high school receives federal financial assistance, all of its operations and programs are covered by the Act.[144]

1. "Individual with Handicaps"

The Act prohibits discrimination against an "individual with handicaps" defined as any person who: "i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; ii) has a record of such an impairment, or iii) is regarded as having such an impairment."[145] The Act protects persons who are actually handicapped, labeled as handicapped after recovery from their former condition, or perceived as handicapped.[146]

The Act's regulations define "physical impairment" as: "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine . . ."[147] The regulations do not list specific diseases or conditions that constitute a "physical impairment," but courts have defined this term broadly.[148] Numerous physical disorders, illnesses, abnormalities, or conditions that may form the basis

144. 29 U.S.C.A. § 794(b)(West Supp. 1992). In 1988, the Act was amended to ensure "that when federal financial assistance is extended to any part of a college, university, other postsecondary institution, or public system of higher education, all of the operations of the institution or education system are covered." S. REP. NO. 64, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3, 18. This amendment was in response to the Supreme Court's 1984 holding that Section 504 prohibits discrimination only by an institution's specific programs that receive federal funds. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). Prior to *Darrone*, some courts held that intercollegiate and interscholastic athletics programs were covered by the Act although they did not receive direct federal funding. Wright v. Columbia Univ., 520 F. Supp. 789, 791-92 (E.D. Pa. 1981); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D. N.J. 1980).

145. 29 U.S.C.A. § 706(8)(B)(West Supp. 1992). *See also* 34 C.F.R. § 104.3(j)(1992); 45 C.F.R. § 84.3(j)(1992)(same definition for "handicapped person"). On Oct. 21, 1986, the Act was amended to substitute "individual with handicaps" for "handicapped individual," wherever appearing. Pub. L. 99-506, § 103(d)(2)(B)(1986).

146. S. REP. NO. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. News 6373, 6388-89.

147. 34 C.F.R. § 104.3(j)(2)(i)(A)(1992); 45 C.F.R. § 84.3(j)(2)(i)(A)(1992). See 34 C.F.R. § 104.3(j)(2)(i)(B)(1992) and 45 C.F.R. § 84.3(j)(2)(i)(B)(1992) for the definition of "mental impairment."

148. The Supreme Court recently adopted the regulation's broad definition of a "physical impairment" by holding that tuberculosis was a "physiological disorder or condition" affecting plaintiff's respiratory system. School Bd. of Nassau County Fla. v. Arline, 480 U.S. 273, 279 (1987). *See also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1098 (D. Haw. 1980)("impairment" means "any condition which weakens, diminishes, or restricts or otherwise damages an individual's health or physical or mental activity.").

of a school's refusal to permit an athlete to play competitive sports are "physical impairments" under the Act. For example, a heart condition,[149] a congenital back abnormality,[150] permanent osteoarthritis of a knee joint,[151] knee and back injuries,[152] hip and foot injuries,[153] and loss of a paired organ[154] are all judicially designated as "physical impairments" under the Act.

Courts have held that mere physical incapability of performing particular activities does not constitute an "impairment."[155] Being too weak to play football or too short to play basketball is not a "physical impairment" for purposes of the Act.[156]

A physical impairment must "substantially limit one or more of such person's major life activities."[157] The term "substantially limits" is not defined in the Act or its regulations. The regulations define "major life activities" to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[158] Athletics, which require the performance of strenuous manual tasks, constitute a "major life activity" for many people.[159]

2. *"Otherwise Qualified" and Excluded "Solely by Reason of Handicap"*

In suits brought by handicapped athletes seeking to participate in competitive sports, the key issues generally are whether the athlete is "otherwise qualified" to participate in athletics and has been excluded

149. Partial Transcript, *supra* note 91, at 3, 15 (hypertrophic cardiomyopathy); Bento v. I.T.O. Corp., 599 F. Supp. 731, 741 (D. R.I. 1984)(coronary bypass); Bey v. Bolger, 540 F. Supp. 910, 927 (E.D. Pa. 1982)(cardiovascular disease).

150. E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1091 (D. Haw. 1980).

151. Guinn v. Bolger, 598 F. Supp. 196, 198 (D.D.C. 1984).

152. Taylor v. United States Postal Service, 946 F.2d 1214 (6th Cir. 1991).

153. Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir. 1988).

154. For vision in only one eye see Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977) and Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981). For cases involving only one functioning kidney see Seay v. Trustees of the Cal. St. Univ. and Colleges, No. CV89-4971 (C.D. Cal., Oct. 5, 1989), Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (E.D. Pa. 1982), and Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980). *See generally* Note, *The Rehabilitation Act of 1973; Focusing on the Definition of a Handicapped Individual*, 30 WM. & MARY L. REV. 149, 150-51 (1988)(listing handicapping conditions under Act).

155. Jasany v. United States Postal Service, 755 F.2d 1244, 1249 (6th Cir. 1985).

156. *Id.* at 1249. *Cf.* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980)(5'5" individual incapable of playing center for the New York Knicks has physical impairment but is not "otherwise qualified" handicapped individual).

157. 29 U.S.C.A. § 706(8)(B)(West 1985); 34 C.F.R. § 104.3(j)(1992); 45 C.F.R. § 84.3(j)(1992).

158. 34 C.F.R. § 104.3(j)(2)(ii)(1992); 45 C.F.R. § 84.3(j)(2)(ii)(1992).

159. Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 445 (N.D. Ill. 1988)(involvement in contact sports is "major life activit[y]" for plaintiff elementary school student).

"solely by reason of handicap." In *Southeastern Community College v. Davis*,[160] the Supreme Court held that an educational institution may require a person to possess "reasonable physical qualifications" to participate in its programs and activities. Although "mere possession of a handicap is not a permissible ground for assuming an inability to function," a school need "not lower or substantially modify its standards to accommodate a handicapped person."[161] An individual is "otherwise qualified" if "able to meet all of a program's requirements *in spite of* his handicap."[162]

In *Alexander v. Choate*, the Supreme Court clarified *Davis* by stating:

> *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.[163]

It thus appears that an athlete is "otherwise qualified" if able to meet a school's requirements after reasonable accommodation in light of a handicap.[164]

In *School Board of Nassau County, Fla. v. Arline*,[165] the Supreme Court explained: "The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ." In determining

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160. 442 U.S. 397, 414 (1979). In *Davis*, the court held that the Act did not require a college's nursing program to admit an applicant with hearing problems. The court found that the applicant could not satisfy the school's legitimate physical qualifications necessary for patient safety during the program's clinical phase.

161. *Id.* at 405 and 413.

162. *Id.* at 406, 407 n.7 (emphasis added). Quoting Appendix A of the Act's regulations, the Supreme Court explained that "otherwise qualified" does not mean "qualified *except for* their handicap":

> Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable. 45 C.F.R. pt. 84, App. A., p. 405 (1978).

Id. at 407 n.7.

163. Alexander v. Choate, 469 U.S. 287, 300 (1985).

164. Jones, *supra* note 34, at 181-82.

165. 480 U.S. 273, 285 (1987). In *Arline*, the court held that a person with tuberculosis was a "handicapped individual under the Act." The court remanded the case to determine whether plaintiff was "otherwise qualified" for employment as a school teacher considering the risk of transmitting tuberculosis to others.

whether an individual is "otherwise qualified," she or he is entitled to an "opportunity to have [one's] condition evaluated in light of medical evidence."[166] The decision to exclude an individual from a particular program or activity must be based on "reasonable medical judgments given the state of medical knowledge."[167] The nature, duration, and severity of the harm likely to result from the handicapped individual's participation in an activity are factors to be considered.[168]

a. Physical Inability to Perform

In *Wolff v. South Colonie Central School District*,[169] the district court held a high school's refusal to permit a student with a severe congenital limb deficiency to participate in a trip to Spain did not violate the Act. The court found plaintiff unable to satisfy the physical requirements of the trip consisting of extensive walking and stair climbing.[170] The court concluded plaintiff was not "otherwise qualified" under the Act.[171]

The *Wolff* court's rationale may be applicable in many cases in which athletes seek to play on teams with non-handicapped individuals. Athletes with severe handicaps or impairments often do not have the minimum physical skills or abilities required for the sport or play well enough to compete successfully. A handicapped athlete is not "otherwise qualified" if physically unable to perform or function effectively in a particular sport. Such an individual would not satisfy the *Davis* requirement of physical capability of performing an activity in spite of a handicap.[172]

Even if physically capable of participating in a given sport, a handicapped athlete must present evidence tending to show exclusion "solely by reason of handicap."[173] Exclusion based on "misconceptions or unfounded factual conclusions" or reasons founded on "unjustified consideration of the handicap itself" is prohibited by the Act.[174] A school may justify exclusion only for legitimate reasons other than

166. *Id.* at 285. *See also* Harris v. Thigpen, 941 F.2d 1495, 1526 (11th Cir. 1991)("individualized inquiry and findings of fact" necessary to determine whether handicapped person is "otherwise qualified").
167. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 288 (1987).
168. *Id.*
169. 534 F. Supp. 758 (N.D. N.Y. 1982), *aff'd without opin.*, 714 F.2d 119 (2d Cir. 1982).
170. *Id.* at 761.
171. *Id.* at 762. *Accord* Gilbert v. Frank, 949 F.2d 637, 643 (2d Cir. 1991)(handicapped person not "otherwise qualified" if medical evidence shows physical inability to perform job's essential functions); Florence v. Frank, 774 F. Supp. 1054, 1061 (N.D. Tex. 1991)("If the plaintiff's handicap would prevent him from doing the job in question, he cannot be found to be 'otherwise qualified.' ").
172. *See supra* note 162 and accompanying text.
173. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).
174. *Id.*

the athlete's handicap to avoid liability under the Act.[175]

b. Harm to Other Participants

Consistent with *Davis* and *Arline*, preventing harm to other participants is a valid ground for refusing to permit handicapped athletes to play a particular sport.[176] Exclusion necessary to permit others' safe participation in a sporting event does not violate the Act.[177] A school need not substantially modify its standards by changing the rules of play or reducing the quality of team play merely to enable a handicapped athlete to participate in a sport.[178] These justifications do not constitute exclusion from participation "solely by reason of handicap."

Courts have held that Acquired Immune Deficiency Syndrome (AIDS) is a "physical impairment" under the Act.[179] In *Doe v. Dolton Elementary School District No. 148*,[180] the court enjoined a school from excluding a child with AIDS from regular classes. The court also permitted the child to participate in school extra-curricular activities except for contact sports.[181] The court found "no significant risk of transmission of AIDS in the classroom setting" based on medical testimony,[182] but made no finding regarding the risk of transmission during contact sports.

In *Arline*, the Supreme Court held the Act does not prohibit disparate treatment of the handicapped necessary to avoid "exposing others to significant health and safety risks."[183] Exclusion of persons with contagious diseases from certain activities must be based on "reasonable medical judgments" regarding the nature, duration and severity

175. *Id.*
176. See *supra* notes 160-68 and accompanying text.
177. *See* Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 419 (E.D. Pa. 1982). *See also* Cavallaro v. Ambach, 575 F. Supp. 171 (W.D.N. Y. 1983)(upholding rule prohibiting 19 year old with neurological handicap from wrestling because advantage in physical maturity may cause injury to younger wrestlers); Mahan v. Agee, 652 P.2d 765 (Okla. 1982)(same). *Accord* Harris v. Thigpen, 941 F.2d 1495, 1527 (11th Cir. 1991)(prison has legitimate interest in excluding prisoners with AIDS from certain activities to prevent exposure of others to significant health risks).
178. *See* Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 419 (E.D. Pa. 1982). Although a school is not required to make "fundamental or substantial" modifications to its athletics programs to accommodate handicapped athletes, it may be required to make "reasonable" ones. Alexander v. Choate, 469 U.S. 287, 300 (1985).
179. *See, e.g.*, Chalk v. United States Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Calif. 1987).
180. 694 F. Supp. 440 (N.D. Ill. 1988).
181. *Id.* at 449.
182. *Id.* at 445.
183. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 (1987).

of the risk of harm to others and the probability of transmission.[184] Therefore, the *Doe* court improperly excluded the child from participation in contact sports without any supporting medical testimony concerning the risk of AIDS transmission during such activities.[185]

c. Harm to Handicapped Athlete

Neither the Act nor its implementing regulations directly address whether enhanced risk of injury to a handicapped athlete is a legally valid reason for exclusion from school-sponsored athletics. Courts are divided on whether prevention of possible future injury to a handicapped athlete as the only justification for exclusion from competitive sports is permissible under the Act.[186] Schools fear tort liability for injury to handicapped or impaired athletes permitted to play contrary to the team physician's recommendation.[187] Schools also may assert a paternalistic duty to protect the athlete's health that extends beyond merely ensuring the athlete is fully informed of the risks of playing with a handicap.[188]

i. No physician participation approval

Most colleges and high schools require athletes to pass a physical exam by the team physician before participating in competitive sports.[189] Although unable to satisfy all requirements of a physical exam, an athlete may have the physical ability and skills to play a particular sport despite a physical abnormality or handicap. The athlete may be able to play without increasing the risk of harm to other participants or adversely affecting the quality of team play. Under these circumstances, some athletes have claimed a legal right to participate under the Act because they are "otherwise qualified" to play a given sport in spite of their handicap.

One athlete asserted a right to play high school football under the Act despite unanimous agreement by examining physicians that he should not play with a serious heart condition. In *Larkin v. Archdiocese of Cincinnati*,[190] Stephen Larkin, an exceptional athlete with the physical skills to play football despite having hypertrophic cardio-

184. *Id.* at 288. Even if a handicapped person's participation in an activity creates a significant risk of harm to others, exclusion is illegal if reasonable accommodation will eliminate the risk. *Id. See also* Chalk v. United States Dist. Ct. Cent. Dist. of Cal., 840 F.2d 701, 708 n.11 (9th Cir. 1988).

185. *See generally* Matthew J. Mitten, *AIDS and Athletics*, 2 Seton Hall J. Sports L. (1993) (in press).

186. *See infra* notes 190-99, 203-19 and accompanying text.

187. *See infra* notes 257-62, 266-70 and accompanying text.

188. *See infra* notes 249-51, 263-64 and accompanying text; *supra* notes 84-85 and accompanying text.

189. *See supra* notes 21, 26-29, 83 and accompanying text.

190. *See supra* note 91.

myopathy (HCM), claimed Cincinnati Moeller High School's refusal to allow him to do so violated the Act. Individuals with HCM have an increased risk of sudden death, and all physicians, including Larkin's personal doctor, recommended against playing football.[191]

The Larkin family was fully aware of the risks of Stephen's participation and willing to waive any tort claims against the school if Stephen were permitted to play football.[192] They argued Stephen was not in the high risk category of those with HCM, and there was no evidence strenuous activity increased the risk of sudden death.[193] They also relied on statistics showing fatalities from physiological conditions were no more likely than from contact or collisions inherent in football.[194] In addition, they noted that, after being diagnosed as having HCM, Stephen regularly had run and lifted weights without any adverse effects.[195]

Judge Herman J. Weber found Stephen was an "individual with handicaps" under the Act.[196] The court held Moeller's acceptance of unanimous physician recommendations that Stephen not play football did not violate the Act.[197] The court reasoned that Stephen's inability to satisfy an Ohio High School Athletics Association by-law requiring "a physician certification" before participation in interscholastic athletics was a "substantial justification" for the school's decision.[198] The court also observed that, under Ohio law, Stephen's parents could not waive their minor son's legal rights.[199]

Larkin is consistent with the Supreme Court's *School Board of Nassau County, Fla. v. Arline* holding that decisions to exclude the

191. Partial Transcript, *supra* note 91, at 3, 6, 8.
192. *Id.* at 11-12.
193. *Id.* at 8-10.
194. *Id.* at 8-9. The court found that the low death rate due to physiological causes resulted from requiring competent physical exams and physician approval before permitting participation in athletics. *Id.*
195. *Id.* at 6-7.
196. *Id.* at 15-16.
197. *Id.* at 16. The plaintiffs filed an appeal with the U.S. Court of Appeals for the Sixth Circuit but subsequently voluntarily dismissed it. Telephone Interview with Kenneth S. Resnick, Counsel for the Archdiocese of Cincinnati (May 15, 1991).
198. *See* Partial Transcript, *supra* note 91, at 16. After graduating from high school, Stephen Larkin accepted a baseball scholarship from the University of Texas. In April 1992, university athletics officials refused to allow him to play in several games because of concerns about his heart condition. After Larkin and his parents signed a waiver, he was permitted to continue playing baseball. Physicians again cleared Larkin to play baseball after he underwent additional cardiovascular tests during the offseason. *Texas' Larkin Cleared For Baseball*, HOUS. CHRON., July 1, 1992, at 9C; *UT Says Larkin Can Play*, HOUS. CHRON., Apr. 25, 1992, at 4C; *Dodds: Concern is Larken's Health, Not Liability*, AUSTIN AMERICAN-STATESMAN, Apr. 22, 1992, at C1.
199. *Id.* at 11-12.

handicapped from programs or activities be based on "reasonable medical judgments."[200] Stephen Larkin was unable to obtain certification from *any* physician that he was physically fit to play football. Requiring schools to permit handicapped athletes to participate in a sport contrary to all examining physicians' recommendations would violate the *Alexander v. Choate* admonition that recipients of federal funds need not make "fundamental or substantial" modifications to accommodate the handicapped.[201] High schools and colleges may exclude handicapped athletes from participation in a given sport without physician approval because the Act, as judicially construed, does not provide an unqualified right to participate in athletics.

ii. Conflicting physician participation recommendations

Difficult issues arise if a handicapped athlete has the physical skill to play a given sport without increasing the risk of harm to other participants, but physicians differ in their participation recommendations. The *Larkin* court observed that Moeller's insistence that Stephen Larkin pass a physical exam by a particular physician would present an "entirely different fact situation."[202] Courts have divided on the question of whether a school's requirement that a handicapped athlete obtain participation approval from the team physician violates the Act if another competent physician approves participation.

Courts initially upheld a school's reliance on the team physician's recommendation against a handicapped athlete's participation in a particular sport. In a 1977 case, *Kampmeier v. Nyquist*,[203] the Second Circuit ruled that a high school's refusal to permit one-eyed athletes to play contact sports complied with the Act despite conflicting physician participation recommendations. The court held the team physician's recommendation against participation was a "substantial justification" for the school's decision.[204]

In 1978, the Office for Civil Rights (OCR) of the Department of Education issued a policy interpretation of regulations requiring that handicapped athletes be given "an equal opportunity for participation" in high school sports.[205] This policy interpretation prohibits schools from categorically excluding athletes that have lost an organ, limb or appendage from contact sports.[206] A school cannot "assume that such

200. *See supra* notes 165-68 and accompanying text.
201. *See supra* notes 163-64 and accompanying text.
202. Partial Transcript, *supra* note 91, at 31.
203. 553 F.2d 296 (2d Cir. 1977).
204. *Id.* at 299.
205. OCR Policy Interpretation No. 5, *Participation of Handicapped Students in Contact Sports, reprinted in* Shepherd, *supra* note 50, at 190-91 n.164 [hereinafter Policy Interpretation].
206. *Id.* Guideline 3A of the NCAA's 1992-93 Sports Medicine Handbook provides for "serious consideration of the risks and benefits of athletics participation" by ath-

a child is too great a risk for physical injury or illness if permitted to participate in contact sports."[207] The athlete "may be required to obtain parental consent and approval for participation from the doctor most familiar with his or her condition."[208]

The Act permits "otherwise qualified" athletes with a single paired organ to participate in sports if reasonable accommodation through the use of safety equipment will protect the athlete from future injury.[209] For example, safety goggles[210] or flak jackets[211] or other padding may protect athletes with one eye or kidney from injury during contact sports.

In recent years courts have expanded the right of handicapped athletes to participate in interscholastic and intercollegiate sports. Most reported cases involve athletes seeking to play contact sports despite a missing or impaired kidney or eye.

In *Poole v. South Plainfield Board of Education*,[212] the court refused to dismiss an athlete's complaint that his high school's refusal to permit him to wrestle with only one kidney violated the Act. The court rejected the school's argument that the athlete was not "otherwise qualified" because he was unable to pass the team physician's exam with one kidney.[213] The court found plaintiff qualified to wrestle because he was capable of meeting the sport's training requirements and another "respectable medical authority" cleared him for participation.[214]

Similarly, in *Grube v. Bethlehem Area School District*,[215] the court held a high school's decision to exclude an excellent athlete with one kidney from football based on its team physician's recommendation violated the Act. The court found no "substantial justification" for denying participation because plaintiff's physician concluded "there is

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letes with a missing or nonfunctioning paired organ and lists several factors to be considered by the athlete, team physician and school. HANDBOOK, *supra* note 16, at 34. For physician opinions regarding participation in contact sports with a single paired organ, see Peter J. Dorsen, *Should Athletes With One Eye, Kidney or Testicle Play Contact Sports?*, THE PHYSICIAN & SPORTSMEDICINE, July 1986, at 130, and James Mandell et al., *Sports-Related Genitourinary Injuries in Children*, CLINICAL SPORTS MED., Nov. 1982, at 483, 491-93.

207. Policy Interpretation, *supra* note 205.

208. *Id.*

209. Jones, *supra* note 34, at 206.

210. *See, e.g.*, Kampmeier v. Harris, 411 N.Y.S.2d 744, 746 (1978). Guideline 4B of the NCAA's 1992-93 Sports Medicine Handbook provides that all one-eyed athletes participating in collision or contact sports should wear eye protection. HANDBOOK, *supra* note 16, at 44-45.

211. Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 420-22 (E.D. Pa. 1982); *see infra* note 215 and accompanying text.

212. 490 F. Supp. 948 (D. N.J. 1980).

213. *Id.* at 953.

214. *Id.*

215. 550 F. Supp. 418 (E.D. Pa. 1982).

no medical reason why [he] cannot play football."[216]

In *Wright v. Columbia University*,[217] the court held that the Act required a university to permit an outstanding athlete with sight in only one eye to play football. Accepting the testimony of plaintiff's ophthalmologist that "no substantial risk of serious eye injury related to football exists," the court rejected the school's reliance on the team physician's contrary conclusion.[218] The court found that plaintiff was "otherwise qualified" to play and the university was not forced to "lower or . . . effect substantial modifications of its standards."[219]

It is arguable that, even if a handicapped athlete has the skill to play the desired sport, requiring an athlete to pass the team physician's medical exam is a "reasonable physical qualification" consistent with the Act as interpreted by *Southeastern Community College v. Davis*.[220] The school's participation decision is based on the "reasonable medical judgment" of the team physician based on an individualized examination of the athlete as required by *School Board of Nassau County, Fla. v. Arline*[221] and not on categorical exclusion because of the athlete's handicap.

On the other hand, the Act provides handicapped persons with a legal right to participate fully in activities in which they have the physical capability and skill to perform.[222] Neither the Act nor its regulations[223] expressly provide that a school's concern for a handi-

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216. *Id.* at 424. *Accord* Seay v. Trustees of the Cal. State Univ. and Colleges, No. CV-89-4971 (C.D. Cal. Oct. 5, 1990)(order denying preliminary injunction and supporting findings of fact and conclusions of law). In *Seay*, a federal district court refused to order Long Beach State University to permit an athlete with one kidney to play intercollegiate football. The plaintiff was a two-year starter on the school's football team and possessed "above average skills." *Id.* at 1. He lost a kidney when he was shot protecting his niece from a would-be killer. Medical evidence did not conclusively establish whether plaintiff's remaining kidney was functioning normally. The court found no violation of the Act because plaintiff was not excluded from football "solely by reason of his handicap." *Id.* at 2-3. In March 1990, Mark Seay settled his suit against Long Beach State. The school agreed to allow him to play football if he agreed to wear a flak jacket while playing and sign a waiver of any tort claims. *See generally*, Shelley Smith, *Not What The Doctor Ordered*, SPORTS ILLUSTRATED, June 11, 1990, Viewpoint; Scorecard, SPORTS ILLUSTRATED, May 7, 1990, at 14.

217. 520 F. Supp. 789 (E.D. Pa. 1981).

218. *Id.* at 793.

219. *Id.*

220. *See supra* notes 160-62 and accompanying text. It also may be argued that passing the team physician's physical examination is a "technical standard" required for participation in a nonacademic activity, which an athlete must satisfy to be a "qualified handicapped person" under the Department of Education and Health and Human Services regulations. 34 C.F.R. § 104.3(k)(3)(1992); 45 C.F.R. § 84.3(k)(3)(1992).

221. *See supra* notes 165-68 and accompanying text.

222. *See supra* notes 130-32 and accompanying text.

223. The Supreme Court repeatedly has characterized the federal regulations

capped athlete's health and safety justifies exclusion from interscholastic or intercollegiate sports. An OCR policy interpretation prohibits exclusion of athletes with a single paired organ if the physician most familiar with a handicapped athlete's condition approves participation in athletics.[224]

A school has a rational basis for excluding a handicapped athlete from participation consistent with the team physician's recommendation. Unlike the federal Constitution, the Act, however, requires more than merely a rational basis for discriminating against a handicapped athlete.[225] Courts have held that a school may exclude a handicapped athlete with the requisite physical ability and skills from participation in a particular sport only for a "substantial justification."[226] Moreover, a school has a legal obligation to make reasonable accommodations to enable a handicapped athlete to participate in athletics.[227]

iii. Handicapped adult athletes: Some recommendations

One commentator has proposed that the Act be construed to permit a college to exclude a handicapped person from athletics participation presenting a "substantial risk of life-threatening injury" to the athlete.[228] Athletics participation posing "a substantial risk of irreversible serious bodily injury or death" could be prohibited by a college.[229] This proposal is consistent with a similar judicial standard regarding permissible exclusion of handicapped persons from covered employment opportunities under the Rehabilitation Act.[230]

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designed to implement the Rehabilitation Act as "an important source of guidance on the meaning of § 504." *See* Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985)(quoted in School Bd. of Nassau County v. Arline, 480 U.S. 273, 279 (1987) and in Traynor v. Turnage, 485 U.S. 535, 549 n.10 (1988)).

224. *See supra* notes 206-08 and accompanying text.

225. Jacobson v. Delta Airlines, 742 F.2d 1202, 1206 (9th Cir. 1984), *cert. denied*, 471 U.S. 1062 (1985); Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1383 (10th Cir. 1981); Casey v. Lewis, 773 F. Supp. 1365, 1371 (D. Ariz. 1991).

226. *See, e.g.*, Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 423 (E.D. Pa. 1982); Wright v. Columbia Univ., 520 F. Supp. 789, 793 (E.D. Pa. 1981); Partial Transcript, *supra* note 91, at 16.

227. *See supra* notes 163-64 and accompanying text.

228. Jones, *supra* note 34, at 212.

229. *Id.* at 206.

230. *See, e.g.*, Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991)("genuine substantial risk that he or she could be injured"); Carter v. Casa Cent., 849 F.2d 1048, 1054 (7th Cir. 1988)("significant risk of harm to themselves"); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985)("reasonable probability of substantial injury"). These cases rely on an Equal Employment Opportunity Commission regulation that defines a "qualified handicapped person" as one who can perform the essential functions of a job "without endangering the health and safety of the individual." 29 C.F.R. § 1613.702(f)(1992).

The above proposal is appealing and workable in most instances. For example, the *Larkin* court upheld a high school's exclusion of a student with hypertrophic cardiomyopathy (HCM) from athletics participation based on unanimous physician agreement that such participation was life threatening.[231] However, it is an unsatisfactory standard when physicians reach differing conclusions regarding the nature and severity of the medical risks of athletics participation by a particular individual with a physical abnormality. For example, examining specialists conflicted in their recommendations regarding participation in contact sports by college athletes with HCM[232] or spinal stenosis[233] based on their differing evaluations of the medical risks and the individual athlete's physical condition.

In many instances, there is no definite scientific answer or universal agreement that increased health risks created by certain handicaps or disabilities preclude participation in certain competitive sports.[234] Based on their individual experience and professional judgment, competent physicians may reach different credible conclusions regarding the nature and severity of the risks of participation based on a handicapped athlete's unique physiological characteristics.[235] Although Hank Gathers died while playing college basketball with an irregular heartbeat,[236] Terry Cummings has played professional basketball for several years with an irregular heartbeat.[237]

Strict adherence to their paramount obligation to protect the athlete's health and well being should ensure that physicians formulate medically sound athletics participation recommendations.[238] Fear of malpractice liability should deter physicians from providing participation recommendations enabling physically impaired athletes to take life-threatening or other unreasonable health risks.[239]

A university has a substantial justification for excluding from athletics participation a handicapped adult who has not obtained a competent physician's approval to play a given sport.[240] A school also has a

231. *See supra* notes 190-99 and accompanying text.
232. *See supra* notes 62-67 and accompanying text.
233. *See supra* notes 113-15 and accompanying text.
234. *See supra* notes 52-60 and accompanying text.
235. *See supra* notes 203-19 and accompanying text.
236. *See supra* note 75 and accompanying text.
237. *See supra* notes 5, 46-47 and accompanying text.
238. *See supra* notes 48-49 and accompanying text.
239. *See supra* notes 74-78 and accompanying text. A physician may require an athlete to waive contractually any legal rights against the physician as a condition for clearing a handicapped athlete to participate. A court, however, may refuse to enforce a waiver of legal claims arising out of physician negligence. *See, e.g.*, Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1979); Belshaw v. Feinstein, 65 Cal. Rptr. 788 (1968).
240. The *Larkin* court's holding that a high school's refusal to permit a minor to play school-sponsored sports consistent with unanimous physician recommendations

substantial justification to exclude an athlete who is not fully informed of the health risks of participation in a sport and capable of making a rational decision under the circumstances.[241] A university should ensure that the athlete is given understandable information by competent medical personnel concerning the nature and severity of the risk of participation in a particular sport with his or her physical abnormality or illness.[242]

An athlete should be encouraged to ask questions regarding his or her handicapping condition and to bring family members or friends to the disclosure sessions for support and assistance.[243] University officials should test an athlete's comprehension of the provided information, perhaps by requiring the athlete to write down her or his understanding of the pertinent risk of athletics participation.[244] The university also should create an atmosphere for informed decision-making that minimizes the pressures on the athlete to participate.[245]

A college has no substantial justification for excluding a handicapped adult from school-sponsored athletics if competent physicians reach conflicting participation recommendations based on an individualized physical examination and different evaluation of the medical risks. A university may violate the Act's reasonable accommodation requirement if it refuses to permit a handicapped athlete to participate in a sport in accordance with the team physician's recommendation but contrary to another competent physician's credible recommendation.

Both federal and state courts recently have held that college students are adults fully capable of, and responsible for, making their own decisions.[246] These courts declined to impose a duty on colleges to protect students from the consequences of their own voluntary decisions.

The Act prohibits a university from substituting its decision for a

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against playing also should apply to handicapped adults under similar circumstances. *See supra* notes 190-201 and accompanying text.

241. *Accord* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 953-54 (D. N.J. 1980)(high school officials have duty to alert athlete and parents to dangers of participation and "require them to deal with the matter rationally").

242. Jones, *supra* note 34, at 200; Thomas G. Allison, *Counseling Athletes at Risk for Sudden Death*, THE PHYSICIAN & SPORTSMEDICINE, June 1992, at 140.

243. Jones, *supra* note 34, at 200.

244. *Id.* at 145, 200-201. Guideline 3A of the NCAA's 1992-93 Sports Medicine Handbook provides that impaired athletes should sign a document of understanding and a release of claims acknowledging the risks of athletics participation with the subject impairment. HANDBOOK, *supra* note 16, at 35.

245. Jones, *supra* note 34, at 201-202. *See supra* notes 30-39 and accompanying text for a discussion of the pressures often faced by amateur athletes to participate in sports.

246. *See, e.g.*, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Beach v. University of Utah, 726 P.2d 413 (Utah 1986); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (1981).

considered decision of a fully-informed adult athlete to participate in athletics supported by a credible medical opinion.[247] Handicapped adult athletes capable of weighing the known risks and potential benefits have the right under the Act to choose to participate in competitive sports. This position is consistent with the principle that sound-minded adults have the legal right to accept or refuse medical treatment even if others disagree with their decision.[248]

Courts have rejected claims by universities that paternalistic concerns regarding a handicapped athlete's increased risk of injury justify exclusion from intercollegiate sports.[249] In *Wright v. Columbia University*, the court explained:

> Columbia has never asserted that it would be harmed by plaintiff's intercollegiate football career; rather, it has premised its decision to exclude him on the understandable belief that plaintiff should avoid contact sports which might render him sightless and that he should properly concentrate on obtaining an education while at Columbia. Such motives, while laudably evidencing Columbia's concern for its students' well-being, derogate from the rights secured to plaintiff under Section 504, which prohibits "paternalistic authorities" from deciding that certain activities are "too risky" for a handicapped person.[250]

A private university may assert that its basic religious tenets are violated if the Act enables a handicapped athlete to participate in athletics contrary to the opinion of the team physician that significant health risks justify exclusion. For example, Notre Dame University could contend that the Act requires deviation from its Catholic tradition of preserving human life if a handicapped athlete has a right to participate in a given sport under such circumstances.[251]

Either a public or private university may claim that an opportunity to play on its athletics teams is based solely on a consensual relationship between the school and athlete.[252] A university also may fear receiving adverse publicity if a handicapped athlete suffers a serious

247. Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 953-54 (D. N.J. 1980).

248. *See, e.g.*, Cruzan v. Director, Mo. Dept. of Health, 110 S.Ct. 2841 (1990); Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds*, Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).

249. *See, e.g.*, Kampmeier v. Nyquist, 553 F.2d 296, 300 n.9 (2d Cir. 1977)(handicapped college athlete "old enough to weigh risks and make [participation] decision for himself"); Wright v. Columbia Univ., 520 F. Supp. 789, 794 (E.D. Pa. 1981).

250. Wright v. Columbia Univ., 520 F. Supp. 789, 794 (E.D. Pa. 1981). *See also* Comment, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343 (1991)(arguing that college has no legal duty to prevent adults with known health conditions from participating in school-sponsored athletics).

251. The Archdiocese of Cincinnati made a similar argument in defending a high school athlete's claim that the Act gave him a right to play football with a serious heart condition despite unanimous physician recommendations against playing. *See supra* note 85 and accompanying text.

252. *See supra* note 110 and accompanying text for cases holding there is no constitutionally protected property right or liberty interest to participate in intercollegi-

injury or dies during competition.[253]

All of the foregoing concerns are based on unjustified consideration of the athlete's handicapping condition prohibited by the Act.[254] Such concerns contravene a handicapped adult athlete's statutory right to choose to participate if medical testimony is conflicting regarding the medically acceptable risks of playing a given sport. By offering interscholastic or intercollegiate athletics, schools implicitly accept the possibility that serious injuries or death may occur even to able bodied athletes during competition.[255] The Act allows handicapped athletes to exercise their individual autonomy and accept reasonable enhanced risks of injury free of the restraints of paternalism.

The Act's prohibition against unjustified exclusion of handicapped athletes does not infringe a university's First Amendment rights of religion or association. Congress may condition receipt of Federal Funds upon compliance with laws that limit the exercise of First Amendment rights.[256] The Act is expressly designed to avoid the use of federal funds to support unjustified discrimination against handicapped persons.

Court-ordered athletics participation under the Act should create an implied immunity absolving a university of tort liability if an athlete suffers injury during competition resulting from a known physical handicap or disability.[257] Allowing a tort action against the school for such an injury would inappropriately impose liability for the same conduct the Act requires (*e.g.*, equal opportunity for athletics participation by handicapped persons).

Handicapped athletes generally are willing to release a university from liability as a condition of participation in intercollegiate sports.[258] One court has held that a school's fear of tort liability does

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ate athletics. *Cf.* Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. 1972)(athletics scholarship is a contract between the university and athlete).

253. *See supra* note 90 and accompanying text.

254. *See supra* notes 173-75 and accompanying text.

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

256. Grove City College v. Bell, 465 U.S. 555, 576 (1984). *Cf.* Rust v. Sullivan, 111 S.Ct. 1759 (1991)(government refusal to fund program advocating abortion does not violate First Amendment free speech rights of health care organization).

257. *See, e.g.*, International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1208-09 (1991)(employer tort liability for compliance with Title VII ban against sex-specific fatal protection policies "remote at best"); Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959)(Federal Communications Act of 1934 bars libel action against broadcaster for defamatory statement by political candidate). *Cf.* N.Y. Education Law § a 3208-a(4)(McKinney Supp. 1991) discussed *infra* notes 271-75 and accompanying text.

258. For example, Anthony Penny released Central Connecticut State University from liability "as a result of his participation in [basketball] and due soley [sic] to his cardiovascular systems." *See supra* note 68 and accompanying text. Mark Seay agreed to waive any tort claims against Cal State-Long Beach for injury

not justify excluding a handicapped athlete from participation if the athlete and his family contractually waive any claims against the school.[259] The court implied, but did not expressly hold, that a fully informed waiver is valid and enforceable.[260]

Assuming no compulsion to participate, voluntary and knowing waivers and releases of liability by competent adult participants in sports activities generally are upheld.[261] If a handicapped adult athlete voluntarily participates in sports knowing his or her condition creates exposure to increased risk or severity of harm, the assumption of risk doctrine should bar tort claims against the school arising out of the handicapping condition.[262]

iv. Handicapped minor athletes: Some recommendations

High school athletes, most of whom are minors, may not have the maturity or judgment to weigh rationally the health risks and benefits of athletics competition with a known handicap or impairment. Minor athletes generally cannot participate in interscholastic sports without approval of a parent or guardian. Requiring participation approval of a competent adult such as a parent or guardian should prevent a handicapped minor from exposure to an unreasonable health risk to play a particular sport.

Regarding high school athletes, courts are divided regarding whether paternalism permits schools to deny sports participation against the desires of a handicapped athlete and his parents. In *Kampmeier v. Nyquist*, the court concluded: "[P]ublic school officials have a parens patriae interest in protecting the well-being of their students; defendants, relying on medical opinion, are concerned about the risk of injury to a child's one good eye."[263]

In contrast, the court in *Poole v. South Plainfield Board of Education* observed:

> [T]he Board of Education decided that it was part of its function to protect its

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resulting from playing football with a missing kidney. See *supra* note 216 and accompanying text.

259. Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 424 (E.D. Pa. 1982).

260. *Id.*

261. R. Berry & G. Wong, 2 LAW & BUS. OF THE SPORTS INDUSTRIES 392-404 (1986).

262. *See, e.g.*, Williams v. Cox Enterprises, Inc., 283 S.E.2d 367 (Ga. Ct. App. 1981). *Accord* Gehling v. St. George Univ. Sch. of Medicine, Ltd., 698 F. Supp. 419, 427 (E.D.N.Y. 1988)(voluntary entry in race in tropical climate with known heart condition constitutes assumption of risk of collapse during race). *But see* Comment, *A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools From Liability For Injuries to Athletes With High Medical Risks*, 79 KY. L.J. 867 (1991)(suggesting that waivers by physically impaired athletes may be unenforceable).

263. Kampmeier v. Nyquist, 553 F.2d 296, 300 (2d Cir. 1977). *See also* Wolff v. South Colonie Cent. Sch. Dist., 534 F. Supp. 758, 761-62 (N.D.N.Y.), *aff'd without opinion*, 714 F.2d 119 (2d Cir. 1982).

> students against rational judgments reached by themselves and their parents. In effect, the Board's decision stands the doctrine of *in loco parentis* on its head. Traditionally, this doctrine has meant that a school system must act "in place of the parents" when the parents are absent. Here, the South Plainfield Board has acted in a manner contrary to the express wishes of parents, who, together with their son, have reached a rational decision concerning the risk involved in wrestling.[264]

The *Poole* decision appears better reasoned because high school officials should not have the authority to override an informed decision by a handicapped minor athlete and parents to participate in competitive athletics if competent physicians differ in their participation recommendations. However, as the *Larkin* court held, refusing to permit a handicapped minor athlete to play without medical clearance from a physician does not violate the Act.[265] A high school has a substantial justification for excluding a handicapped athlete from certain athletics activities if no physician provides medical clearance for participation.

Tort liability waivers against the school for injury sustained during athletics participation executed by a minor handicapped athlete and his parents may not be enforceable. Some states do not permit parents or guardians to waive a minor's claims to recover for injuries arising out of participation in interscholastic sports.[266] Prior judicial approval or statutory authorization may be required for waiver of a minor athlete's tort claims against the school to be enforceable.[267] The *Larkin* court held that a school has a substantial justification for preventing a handicapped minor athlete from participating if the school is subject to potential tort liability for doing so.[268]

Refusing to permit a handicapped minor athlete to participate because of potential tort liability would not be exclusion "solely by reason of handicap." Such a concern can be removed only by judicial immunity from, or an effective legal waiver of, any claims against a high school for harm to a handicapped athlete from athletics participation. In *Grube v. Bethlehem Area School District*,[269] the court suggested that a high school's concern regarding tort liability is met if a handicapped minor athlete and parents waive any claims against the

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264. Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 952 (D. N.J. 1980)(citation omitted). *See also* Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 423 (E.D. Pa. 1982). *Accord* Hoover v. Meiklejohn, 430 F. Supp. 168 (D. Col. 1977)(high school athletics association rule banning all women from playing soccer on men's team based on paternalistic concerns invalidated on equal protection grounds).

265. *See supra* notes 190-99 and accompanying text.

266. Partial Transcript, *supra* note 91, at 11-12; Childress v. Madison County, 777 S.W.2d 1 (Tenn. App. 1989).

267. Childress v. Madison County, 777 S.W.2d 1, 4 (Tenn. App. 1989).

268. Partial Transcript, *supra* note 91, at 11-12. *But see* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 954 (D. N.J. 1980)(suggesting that minor's legal incapacity to waive claims against school not permissible justification for excluding handicapped athlete contrary to parents' approval to participate).

269. 550 F. Supp. 418, 424 (E.D. Pa. 1982).

school arising out of athletics participation. It is just and appropriate to immunize a school from tort liability arising out of court-ordered athletics participation by handicapped athletes.[270]

C. State Education Laws

The analysis in state cases provides an insight into the dilemma that must be addressed under the Act. At least one state has a statute limiting a school district's authority to exclude physically impaired students from their athletics programs.

A New York statute permits a physically impaired student to obtain an injunction prohibiting a school district from excluding him from its athletics program.[271] The athlete must obtain affidavits from

270. *See supra* note 257 and accompanying text for a discussion of implied tort immunity for a school required to permit a handicapped athlete to participate in athletics under the Act.

271. N.Y. Education Law § 3208-a (McKinney Supp. 1993). The Act provides:

> § 3208-a. Special proceeding to determine physical capacity of student to participate in athletics programs
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> 1. Upon a school district's determination that a student shall not be permitted to participate in an athletics program by reason of a physical impairment, based on a medical examination conducted by the school physician, the student may commence a special proceeding in the supreme court pursuant to the provision of article four of the civil practice law and rules to enjoin the school district from prohibiting his participation. Such special proceeding may be brought in the county in which the student resides or in the county in which the school district is located.
>
> 2. The petition in the proceeding shall be a verified petition of a parent or guardian of the student. The petition shall have annexed affidavits of at least two licensed physicians setting forth that in their opinion the student is physically capable of participating in an athletics program, that participation would be reasonably safe, and any special or preventive measures or devices needed to protect the student.
>
> 3. The court shall grant such petition if it is satisfied that it is in the best interest of the student to participate in an athletics program and that it is reasonably safe for him to do so.
>
> 4. No school district shall be held liable for an injury sustained by a student granted an order under this section provided such injury is incurred during such student's actual participation in an athletics program and, provided further, that such injury is attributable to the physical impairment for which such court order was obtained.
>
> 5. Unless specifically prohibited by the court, an order granted pursuant to the provisions of this section shall be considered valid and sufficient for subsequent years, provided that the student has not changed athletics programs and, further, that two licensed physicians set forth current affidavits that, in their opinion, the student's physical impairment has not changed since the time of the original court order.
>
> 6. In no event shall a successful petitioner be entitled to costs in any proceeding brought pursuant to this section.
>
> 7. The school district shall not be responsible for providing or bear the cost of, any special or preventive measures or devices needed to protect the student unless such special or preventive measures or devices are contained in a student's individual education plan recommended by

two licensed physicians certifying his physical capability to participate in an athletics program and that such participation would be reasonably safe.[272] The physicians may require the use of special or preventive measures or devices to protect the athlete as a condition of participation.[273]

The statute requires a court to order participation if it is in the best interest of the student and reasonably safe for him to participate in the school's athletics program.[274] The statute immunizes a school district from liability for injury sustained by a physically impaired student while participating in athletics pursuant to a court order under the Act.[275]

In *Kampmeier v. Harris*,[276] the New York Appellate Division held that a high school student with defective vision was entitled to play contact sports with protective eye wear under the statute's predecessor. The team physician and two other physicians disagreed in their participation recommendations.[277] The court found plaintiff's participation would be reasonably safe and in her best interests and ordered the school district to permit her participation in contact sports.[278]

Earlier New York cases decided prior to enactment of the statute upheld a school district's exclusion of physically impaired students from athletics unless its decision was arbitrary and capricious.[279] These courts held that, even if medical testimony was conflicting, the school's reliance on its own physician's recommendation that the student was medically disqualified from participation was rationally

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the school district committee on the handicapped and such student is a child with a handicapping condition, as defined in section forty-four hundred one of this chapter.

8. A physically impaired child eligible to commence a special proceeding as provided by this section shall be defined as any child determined by a school physician as ineligible for participation on the basis of the regulations of the state education department, the American Medical Association Guide for Medical Evaluation for Candidates for School Sports, or by any standard established by the school district involved.

9. An athletics program for the purpose of this section shall include intramural activities, inter-school activities, extramural activities, and organized practice as defined by section 135.1 by the commissioner of education's regulations.

Id.

272. *Id.* § 3208-a(2).

273. *Id.* § 3208-a(2).

274. *Id.* § 3208-a(3).

275. *Id.* § 3208-a(4).

276. 411 N.Y.S.2d 744 (1978).

277. *Id.* at 745.

278. *Id.* at 746. *See also*, Swiderski v. Board of Educ. City Sch. Dist. of Albany, 408 N.Y.S.2d 744 (Sup. Ct. 1978).

279. *See* Columbo v. Sewanhaka Cent. High Sch. Dist. No. 2, 383 N.Y.S.2d 518 (Sup. Ct. 1976); Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (Sup. Ct. 1973).

based.[280]

The New York statute and its application by the *Kampmeier* court are consistent with this author's proposed construction of the Rehabilitation Act of 1973.[281] Both acts require that a school have more than a mere rational basis (*e.g.*, the team physician's recommendation) for excluding a handicapped person from athletics participation. The federal act requires a "substantial justification,"[282] and the New York statute requires a showing that it is not "reasonably safe," before a school may legally justify exclusion from athletics participation. Under both laws, if competent physicians provide conflicting but credible participation recommendations, the athlete and his family should make the participation decision. The sole responsibility of the school and court is to ensure that the athlete's decision is rational and fully informed. This standard is satisfied if competent physicians reasonably differ regarding the propriety of the athlete's participation in a particular sport.

VII. PARTICIPATION BY COURT ORDER OR AGREEMENT

In some instances, courts have ordered high schools or colleges to permit handicapped athletes to participate in interscholastic or intercollegiate athletics.[283] These orders are based on judicial authority granted by the Rehabilitation Act of 1973[284] or state education statutes.[285]

In *Grube v. Bethlehem Area School District*,[286] the court ordered a high school to allow the plaintiff to participate in football "on the same terms and conditions as apply to all other members of the football team." In *Wright v. Columbia University*,[287] the court enjoined a university "from denying plaintiff the opportunity of participating in [its] intercollegiate football program because of his visual handicap."

To settle or avoid threatened litigation, two universities agreed to permit handicapped athletes to participate in intercollegiate athletics. Central Connecticut State University agreed to allow Anthony Penny "to participate in all athletics" at the school with a heart condition.[288] Long Beach State University agreed to permit Mark Seay to rejoin its

280. Colombo v. Sewanhaka Cent. High Sch. Dist. No. 2, 383 N.Y.S.2d 518, 522 (Sup. Ct. 1976); Spitaleri v. Nyquist, 345 N.Y.S.2d 878, 879 (Sup. Ct. 1973).
281. *See supra* notes 220-27 and accompanying text.
282. *See supra* note 226 and accompanying text.
283. *See, e.g.*, Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 425 (E.D. Pa. 1982); Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981); Kampmeier v. Harris, 411 N.Y.S.2d 744 (1978).
284. 29 U.S.C.A. § 794a(a)(1)(West 1985).
285. N.Y. Education Law § 3208-a(3)(McKinney Supp. 1993).
286. 550 F. Supp. 418, 425 (E.D. Pa. 1982).
287. 520 F. Supp. 789, 795 (E.D. Pa. 1981).
288. *See* Release, *supra* note 68, at 2.

football team after having a kidney surgically removed.[289]

Most of the handicapped athletes asserting a legal right to participate in a sport have exceptional or above average athletics skills.[290] By virtue of their superior athletics ability, they expect to play in games if permitted to be on the team. They usually desire to play because of their love of the game or pursuit of an athletics scholarship or professional sports career.[291]

Whether an agreement or court order permitting an athlete to "participate" requires a coach to actually play the athlete in games raises a difficult unresolved issue. Schools generally vest head coaches with the sole discretion to govern their teams and decide which athletes play.[292]

A coach may face an agonizing decision regarding whether to play a handicapped athlete who is the most skilled player at his position. A college coach's livelihood depends upon fielding winning teams,[293] and there is a strong incentive to play the team's best athletes. For example, Tony Penny played in basketball games at Central Connecticut State University during his senior year with a known heart condition.[294] Mark Tingstad was allowed to play in football games at Arizona State University with spinal stenosis.[295]

A coach may be understandably reluctant to play an athlete whose handicap places him at an increased risk of injury. Tony Penny subsequently died of a heart attack while playing professional basketball in England.[296] Mark Tingstad was temporarily paralyzed while making a tackle during a football game.[297]

It is arguable that a coach's refusal to play an exceptionally talented handicapped athlete solely because of concern for the athlete's health violates court ordered participation under the Act. In *Grube v. Bethlehem Area School District*, the court ordered that a handicapped athlete be permitted to participate "on the same terms and conditions

289. *See supra* note 216 and accompanying text.
290. *See supra* notes 190, 212-19 and accompanying text.
291. *See supra* notes 34-39 and accompanying text.
292. *See* Schaill by Kross v. Tippecanoe County Sch. Corp., 679 F. Supp. 833, 853 (N.D. Ill. 1988)(high school officials have "broad discretion" in administering sports programs). In re Clayton, University of Wyoming's Proposed Findings of Fact and Conclusions of Law (Dec. 22, 1988) at 5. *Cf.* Sorey v. Kellett, 849 F.2d 960 (5th Cir. 1988)(head football coach is public official charged with general discretionary authority over football program and protected by sovereign immunity). *See generally* Comment, *The Authority of a College Coach: A Legal Analysis*, 49 OR. L. REV. 442 (1970).
293. Gary R. Roberts, *Financial Incentives Wrong For College Athletics*, THE NCAA NEWS, Nov. 4, 1991, at 4.
294. *See* Altman, *supra* note 62.
295. *See* Demak, *supra* note 86.
296. *See* Altman, *supra* note 62.
297. *See* Demak, *supra* note 86.

as apply to all other members" of the team.[298] If athletics ability is the sole determining factor of playing time, a coaching decision to play a lesser skilled, physically unimpaired athlete rather than a more talented handicapped athlete may violate the court's order.

A better approach is to avoid judicial scrutiny of a coach's discretionary decisions regarding who plays in games and how much playing time is received. A player's leadership qualities and attitude as well as numerous other intangibles may influence a coach's decision on playing time as much as or more than an athlete's raw physical skills. A coach may decide the team's needs are not best served by playing a handicapped athlete. Coaches, not courts, are in the best position to make this subtle determination.[299]

VIII. CONCLUSION

Motivated by a passion for sports, dreams of stardom or economic factors, some handicapped high school and college athletes desire to participate in competitive sports even if their condition creates an enhanced risk or severity of injury. Team physicians, often after consultation with specialists, refuse to provide medical clearance to play if they deem the risks of athletics participation with a handicap or physical abnormality to create medically unacceptable risks. Other physicians, including specialists, may disagree with the team physician's evaluation of the nature and severity of medical risks of athletics participation and clear the athlete to play based on a belief that such risks are reasonable under the circumstances. Expressing concern for their students' health and well being and fearing potential tort liability and adverse publicity if serious harm results, schools generally accept the team physician's recommendation not to allow a handicapped athlete to participate in a given sport.

Ideally, the participation decision should be the product of mutual agreement between the team physician and consulting specialists, school officials and the athlete and family. Disagreements regarding the propriety of participation in a particular sport with a specific hand-

298. Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418, 425 (E.D.Pa. 1982).

299. Courts generally hold that there is no constitutionally protected property or liberty interest in playing intercollegiate or interscholastic athletics. *See supra* note 110 and accompanying text. An athletics scholarship creates a property interest only in the athlete's receipt of agreed upon funds—not playing, which is merely a "unilateral expectation." Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 944-45 (D. Kan. 1987). Many colleges will honor a previously granted athletics scholarship if an athlete discontinues playing after a handicapping condition or physical abnormality is discovered. Altman, *supra* note 62. The University of Wyoming continued to honor Steve Clayton's athletics scholarship although it refused to permit him to continue playing football with spinal stenosis. Telephone Interview with Dan Viola, University of Wyoming Assistant Athletics Director (Jul. 24, 1991).

icap or disability must be resolved on an individual basis under the Rehabilitation Act of 1973 or applicable federal or state statutes prohibiting discrimination against handicapped or physically impaired athletes.

The Act prohibits the categorical exclusion of athletes with the physical ability and skills of playing a particular sport despite a handicap with or without reasonable accommodation. A school must have a substantial justification to exclude a handicapped athlete from participation. Physical inability to perform, increased risk of injury to other participants, the need for fundamental or substantial alterations to enable a handicapped athlete to participate, or undisputed medical recommendations against playing should justify exclusion of a handicapped athlete from certain sports under the Act.

The Act limits a school's ability to exclude a handicapped athlete from athletics participation based solely on a concern for the student's own health and safety and prohibits substituting the school's judgment for a rational and fully informed decision by a handicapped athlete. A school's duty is to ensure that the athlete is fully informed of all medical risks of participation with a known handicap and that there is credible medical testimony recommending participation in the subject sport.

The Act does not provide a handicapped athlete with an unqualified right to participate in athletics at institutions receiving federal funding. A handicapped athlete's decision to play school-sponsored sports must be based on medically sound participation approval by a competent physician. A school has a substantial justification for excluding a handicapped athlete if no physician medically clears him or her to play. Physician adherence to their paramount duty to protect an athlete's health and to disapprove participation if health risks are medically unacceptable should ensure that an athlete's decision to participate in sports is rational. If competent physicians differ regarding the nature and severity of the medical risks and advisability of athletics participation based on their examination of the athlete and clinical judgment and experience, the Act empowers the athlete and parents (if the athlete is a minor) to make the participation decision.

A handicapped athlete choosing to participate in athletics after full disclosure of all medically significant risks should be deemed to assume the risk of injury or death arising out of playing with a known handicap. A handicapped athlete should consider carefully whether the potential benefits of athletics participation outweighs the risks of permanent crippling injury or death such as happened to Hank Gathers, Tony Penny, and others.

Schools should be absolved of legal liability for permitting participation by handicapped athletes supported by a credible medical opinion approving participation in a given sport and based on court orders

or contractual releases. Courts should not interfere with the discretionary decision of coaches regarding which athletes actually play during games. The Act establishes an amateur handicapped athlete's right to participate on equal terms with non-handicapped athletes, not an absolute right to a quantity of playing time or to pursue a speculative college athletics scholarship or professional career.

Construing the Act and similar state laws in the proposed manner will balance appropriately a handicapped athlete's right to participate in athletics activities within his or her physical abilities, physician evaluation of the medical risks of athletics participation, and a school's interests in conducting a safe athletics program.