Leveling the Playing Field: A Commentary on the Impact of High School Athletic Eligibility Requirements on Students with Learning Disabilities

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LEVELING THE PLAYING FIELD: A COMMENTARY ON THE IMPACT OF HIGH SCHOOL ATHLETIC ELIGIBILITY REQUIREMENTS ON STUDENTS WITH LEARNING DISABILITIES

I. INTRODUCTION

Classroom performance has become a dominant influence in the development of all students' self-esteem. Unfortunately, for many students with learning disabilities, their performances in the classroom result in anything but a boost in self-esteem. It follows that schools should encourage students with learning disabilities to spend time achieving successes outside of the classroom environment in which they typically struggle. Schools should welcome the opportunity to inspire and challenge students with learning disabilities on playing fields, courts, tracks, and gymnasiums, especially now, as participation in interscholastic athletic competition has become a hallmark of the American high school experience. Sadly though, that experience is too often foreclosed to students, who by reason of their immutable learning disabilities, fail to meet athletic eligibility criteria.

Academic and age eligibility requirements are common prerequisites to interscholastic competition. Generally, students who have not achieved eligibility status are precluded from participation in high school athletic programs. Typical state high school athletic association regulations including the following: (i) eligible students may not reach the age of nineteen prior to the summer before school opens;1 (ii) eligible students may not have completed more than eight semesters of high school;2 (iii) eligible students have not changed schools without a corresponding move by their parents or person with whom they were living for at least 30 calendar days during the their last semester.3

Through a survey of prominent case law and empirical studies this note argues that interscholastic athletic associations must not only engage in individualized inquiries as to the essentiality of eligibility requirements as applied to student requesting the waiver, but also should consider the social and emotional benefits of interscholastic

1. Pottgen v. Missouri State High Sch. Athletic Ass'n, 40 F.3d 926, 928 (8th Cir. 1994).
competition for students with learning disabilities. Part one will discuss the nature of learning disabilities; part two will review the case law regarding the disparate impact such regulations have on students with learning disabilities; and part three will evaluate the reasonableness of eligibility requirement waivers.

II. The Nature of Learning Disabilities Explored

During the 2000-2001 school year, approximately 2.9 million students between the ages of six and twenty-one were identified as having one or more learning disabilities. This figure represents 50 percent of all students who received special education services that year, or roughly 5 percent of the entire school population.\(^4\)

A. Learning Disabilities Defined

The term learning disability was coined more than forty years ago, but considerable controversy surrounding its definition exists in the field today.\(^5\) Most scholars have agreed that learning disabilities: (i) encompass a heterogeneous group of disorders; (ii) have a neurological basis and are intrinsic to the individual; (iii) are characterized by a discrepancy between ability and achievement; and (iv) are not a result of other disorders or problems, however individuals with learning disabilities may require other special needs as well.\(^6\)

Without a more pithy description available, the definition of learning disability most often cited is the federal definition promulgated by the Department of Education, which defines “specific learning disability” as a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.\(^7\) Under the federal regulations, specific learning disabilities include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.\(^8\) However, the term does not in-

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\(^5\) Id. at 166.
\(^6\) Id.
\(^7\) 34 C.F.R. § 300.8(c)(10) (2006).
\(^8\) 34 C.F.R. § 300.8(c)(10). Today, dyslexia, which means developmental word blindness, is the commonly used term to describe students with any serious reading difficulty. Dyslexia causes students to have difficult developing phonemic awareness, which makes it difficult to link speech sounds to letters. This leads to slow labored reading characterized by frequent starts and stops, multiple mispronunciations, and problems with comprehension. FRIEND, supra note 4, at 174.
clude a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.9

B. Causes and Academic Indicia

The causes of learning disabilities are unknown, though some scientists have separated the possible causes into two categories, environmental and physiological.10 Physiological causes include brain injury, heredity, and chemical imbalance.11 Many researchers link learning disabilities to both prenatal and postnatal brain injury, one of the earliest proposed causes.12 While others believe that the physiological cause of learning disabilities is biochemical based on the successful use of medication, particularly in children with attention deficit disorder.13 Genetic research of twins and siblings supports the heritability of learning disabilities; though, not surprisingly, critics of the heredity theory note that parents and children with the same learning disabilities are often exposed to the same environmental factors.14

In the classroom, students with learning disabilities typically exhibit weakness in one or more areas of cognition, such as attention, perception, memory, or processing, despite the fact that they have average or above-average intelligence.15 Students with learning disabilities are most commonly recognized by their teachers as having significant academic difficulties in reading, language, and mathematics.16 These students may also experience behavior problems including excessive-out of seat behavior, talk-outs, and physical and verbal aggression, though it unclear whether such behaviors are related to the learning disability or the result of academic frustration.17 Moreover, it can be difficult to attribute the student’s behavior problems to the learning disability it-

9. 34 C.F.R. § 300.8(c)(10).
10. FRIEND, supra note 4, at 168.
11. Id.
12. Id.
13. Id. at 169.
14. Id. Some researchers who attribute learning disabilities to various environmental factors further suggest that children who live in economically disadvantaged neighborhoods can be placed at a greater risk of developing learning disabilities due to inadequate medical services, poor nutrition, lack of stimulation, and adverse emotional climates.
15. Id. at 171-73. Learning disabled students may often have trouble focusing on important stimuli in their environments, and they may have difficulty with long and short term memory. Learning disabilities can also affect a student’s metacognition, the student’s ability to think about thinking. As a result, students with learning disabilities may lack the ability to actively consider how newly learned information relates to previously stored information, or how to apply stored knowledge in a novel learning experience.
16. Id. at 173.
17. Id. at 178.
self, namely because a significant number of learning disabled students have comorbid learning disabilities (those occurring simultaneously) as well as attention deficit-hyperactivity disorder, ADHD.\textsuperscript{18}

\textbf{C. Social and Emotional Characteristics of Students with Learning Disabilities}

It is estimated that as many as 75 percent of students with learning disabilities manifest some type of social skill deficit that distinguishes them from their non-learning disabled peers.\textsuperscript{19} Some researchers have concluded that academic skill deficits, which are the major defining variable of learning disabilities, were a significant factor in the way social functioning was perceived.\textsuperscript{20} According to teachers and peers, learning disabled students’ own perceptions about their academic incompetence appeared to be associated with the student’s lower social status, greater rejection, reduced acceptance, and less interaction.\textsuperscript{21} Furthermore, students with learning disabilities perceived their social functioning to be adversely affected by a lack of competence in non-verbal communication and deficient social problem solving.\textsuperscript{22}

Not surprisingly, when evaluated by their peers, learning disabled students were generally defined by reduced acceptance and greater rejection.\textsuperscript{23} Such classifications appeared to result in less interaction and lower status for students with learning disabilities, which consequently, appeared relative to their being less popular, less often selected as friends, and viewed as less cooperative by their average achieving peers.\textsuperscript{24} Researchers also note that negative social evaluations can also be attributed to the learning disabled student’s perceived lack of communicative competence, both verbal and nonverbal, and her reduced ability to demonstrate empathic behavior.\textsuperscript{25} Sadly,

\begin{itemize}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} Kenneth A. Kavale & Stephen R. Fornes, \textit{Social Skill Deficits and Learning Disabilities: A Meta-Analysis}, 29 Journal of Learning Disabilities 226 (May 1996). Kavale and Fornes, using the methods of meta-analysis, surveyed 152 studies to explore the nature of social skill deficits among students with learning disabilities. Social competence is defined as the ability to perceive and interpret social situations, generate appropriate social responses, and initiate a strategic behavioral response.
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} Due in part to their poor self concept and lack of self esteem, researchers note that learning disabled students often harbor general feelings of inferiority, which contributes to their negative perception of social functioning.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\end{itemize}
the negative evaluations that learning disabled students received from their peers was greatly demonstrated through avoidance behaviors.²⁶

In addition to any deficits in social competence which learning disabled students exhibit, some researchers have found, though not wholly unexpectedly, that learning disabled students had less positive views about school, were more motivated to avoid work, and experienced greater feelings of alienation when compared to their non-learning disabled peers.²⁷ Interestingly, one study indicated that adolescent students with learning disabilities were more likely than non-learning disabled students to believe that the school's purpose is both to prepare them for jobs that result in wealth and luxuries and to teach them to persist "when things become difficult."²⁸ Based on those statements and the reported feelings of alienation, researchers note that one could rationally conclude that "school seriously fails to meet the expectations of students with learning disabilities."²⁹

Nevertheless, despite these internal struggles, many students with learning disabilities are quite well-adjusted and well-accepted by their peers.³⁰ Researchers explain these differences in social competences to the students' individual learning environments.³¹ Not surprisingly, students excel in classrooms where teachers emphasize abilities and create a supportive social environment; conversely, student perceive themselves in a negative light where teachers focus solely on students’ problems.³²

II. The Americans with Disabilities Act and Its Application to Interscholastic Athletics: A Survey of Prominent Case Law

Student athletes with disabilities, who have failed to meet eligibility requirements, may seek legal relief either under section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act ("ADA") as both prohibit discrimination on the basis of disa-

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²⁶. Id.
²⁷. Barbara M. Fulk et al., Motivation and Self-Regulation: A Comparison of Students with Learning and Behavior Problems, 19 Remedial and Special Education 300 (Sept.-Oct. 1998). This study investigated the motivational characteristics of students with learning disabilities, students with emotional or behavioral disorders, and students with average achievement. The learning disabled middle school students who participated in this study spent large portions of their school day mainstreamed in general education classes.
²⁸. Id.
²⁹. Id.
³⁰. Friend, supra note 4, at 177.
³¹. Id.
³². Id.
bility. Section 504 prohibits any programs receiving federal financial assistance from discriminating against individuals on the basis of disability; Title II of the Americans with Disabilities Act broadened the reach of section 504 to prohibit "public entities," which may or may not receive federal aid, from discriminating against individuals with disabilities. Because the courts have well established that the purpose, scope and governing standards of the acts are quite similar, the analysis of claims brought under the ADA "roughly parallels" those brought under the Rehabilitation Act.

A. Overview of the Americans with Disabilities Act

Prior to the ADA's enactment in 1990, the Congressional findings indicated that 43 million Americans have one or more physical or mental disability, and not surprisingly, this number is increasing at the population as a whole is growing older. Congress also found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and regulation to lesser services, programs, activities, benefits, jobs, or other opportunities."

In response to the invidious maltreatment and segregation of individuals with disabilities, Congress enacted the American with Disabilities Act, as one of the most comprehensive civil rights statutes in history. Further recognizing that the policies and practices of State and local governments were not immune from challenge, Congress drafted Title II of the ADA to provide that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, activities, benefits, jobs, or other opportunities."

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33. 29 U.S.C. 794 (2000); 42 U.S.C. § 12132 (2000). Enforcement remedies, procedures, and rights under Title II are the same as those under Section 504. 42 U.S.C. § 12133 (2000). Moreover, Title II's corresponding regulations promulgated by the Attorney General must be consistent with the regulations relating to Section 504. 42 U.S.C. § 12134(b) (2000).

34. See e.g. McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d at 460.


The legal definition of "disability" is a physical or mental impairment that substantially limits one or more of the major life activities, a record of such an impairment, or being regarded as having such an impairment. This federal definition expressly includes "specific learning disabilities" as an impairment and learning as a major life activity. Nevertheless, while an individual may have a bona fide disability, only qualified individuals with disabilities may seek relief under the ADA.

For purposes of receiving protection under the ADA, "a qualified individual with disability" refers to a person with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. Consequently, legal disputes regularly hinge on whether an individual meets essential eligibility requirements, and is thereby entitled to coverage. A public entity is not required to make modifications that fundamentally alter the nature of the service, program or activity, or pose an undue hardship on the operation of the program. Notably, a "qualified individual with a disability" may nevertheless be excluded from coverage if he poses a direct threat to the health and safety of others.

Quite significantly for student athletes with disabilities, Title II further prohibits public entities from imposing or applying eligibility cri-
teria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This provision is significant as it creates a claim based on a disparate impact theory. Eligibility requirements are inherently neutral rules, and students with disabilities often have difficulty establishing traditional discrimination on the basis of disability.

B. Essentiality of Eligibility Requirements: Pottgen and its Progeny

As previously noted, age eligibility requirements are heavily contested by student athletes with learning disabilities and, not surprisingly, courts vary in their treatment of such cases. Because federal law protects only those students who meet the essential eligibility requirements, with or without reasonable modifications, an inquiry into which eligibility criteria are in fact essential is required.

Nearly fifteen years ago, in the seminal case *Pottgen v. Missouri State Athletic Association*, the Eighth Circuit rejected the student athlete's argument that the application of the nineteen year old age limitation violated Section 504 and the ADA. The student, Ed Pottgen, repeated two grades in elementary school prior to being diagnosed with several learning disabilities. He participated in interscholastic baseball for three years in high school, and planned on playing his senior year as well. As a consequence of repeating two grades, Pottgen turned nineteen 35 days prior to July 1, the cut off date for eligibility. He petitioned the athletic association for a hardship exception to the eligibility requirement on the basis of his disability, but the association denied the waiver.

In finding that the age restriction constituted an essential eligibility requirement, the court listed the following purposes of the eligibility requirement: "[a]n age limit helps reduce the competitive advantage flowing to teams using other athletes; protects younger athletes from

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42. 28 C.F.R. § 35.130(b)(8) (2006).
43. See *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d. 1026, 1033-34 (concluding that the age limitation excludes student solely by reason of their dates of birth); *Reaves v. Mills*, 904 F. Supp. 120, 122 (W.D. N.Y. 1995) (holding that the maximum age requirement did not violate the ADA as it is based upon a student's age, not her mental abilities.); and *Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 584, 589 (N.D. Ohio 1996) (holding that the eight consecutive semester rule is similarly neutral to the maximum age rule, and therefore does not discriminate on the basis of disability, but rather on the basis of time, measured in semesters.)
44. *Pottgen v. Missouri State High Sch. Athletic Ass'n*, 40 F.3d at 931.
45. *Id.* at 929-31.
46. *Id.*
harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage." The court decided that such purposes were of "immense importance" to an interscholastic athletic program, and therefore considered the age limitation as an essential eligibility requirement. Because Ed Pottgen could not meet this essential requirement without a waiver, which the majority found to be an unreasonable modification, he was not a qualified individual with a disability, and his challenged failed.

The significance of the Pottgen majority decision, and consequently, what sparked the dissenting opinion, is found in the majority's interpretation and application of the ADA's individualized inquiry requirement. The majority in Pottgen held that the individualized inquiry is inappropriate during the court's initial determination as to whether an eligibility requirement is "essential." The majority instead concluded that an individualized inquiry as to the "essential eligibility requirements" is not required under the ADA because "[a] public entity could never know the outer boundaries of its 'services, programs or activities; [a] requirement could be deemed essential for one person with a disability but immaterial for another similarly, but not identically, situated individual." The majority goes on to explain that if an individualized inquiry were applied in Pottgen's case, the athletic association would have to show the "essential nature of each allegedly offending program requirement as it applies to the complaining individual." In determining that the ADA imposes no such duty, the majority found that such an individualized approach at this stage "flies in the face of the [Supreme] Court's statement that 'accommodation is not reasonable if it either imposes undue financial and administrative burdens [on the public entity] or requires a fundamental alteration of [the] program.'"

Notably, the dissent in Pottgen took the opposite position, and concluded that the majority, by reciting the rule's general justifications and mechanically applying it across the board, erroneously failed to evaluate the eligibility requirement as it was applied to the individual

47. Id. at 929. The term "red-shirting" refers to a practice in which a player is deliberately held back a year for the purposes of allowing the student to gain physical and athletic maturity. See also McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d at 456.
48. Id.
49. Id. at 930.
50. Id. at 930-31.
51. Id. at 931.
52. Id.
athlete. The dissent contended that because the ADA requires courts to conduct an individualized inquiry as to whether the person is a "qualified" for statutory coverage, the proper analysis of essential eligibility requirements is one which evaluates the rule's operation in the individual case of each student. Accordingly, the dissent found that it was not unreasonable for the athletic association to waive the age eligibility requirements in Pottgen's case; namely because such a waiver would not fundamentally alter the high school baseball competition in Missouri. After conducting an individualized inquiry, the dissent concluded that there was "no contention whatever that Ed Pottgen deliberately repeated the first and third grades in order to make himself eligible to play baseball another year at age nineteen," and there was no evidence that Pottgen posed a threat to the health and safety of others, as he was not appreciably larger than the average eighteen year old boy. Therefore, in the dissent's opinion, the athletic association's goals of discouraging the delay of education to gain competitive advantage and protecting competition and safety were certainly not thwarted by waiving the age requirement in Pottgen's case: 

In sum, if the eligibility requirement is deemed essential, the student athlete with a learning disability may nevertheless qualify for coverage under the ADA if she can meet the requirement with a reasonable modification. Because the only modifications that would enable an athlete to meet such requirements are waiving the eligibility requirements themselves, courts are further pressed to determine if waivers fundamentally alter the nature of the athletic program, and thus, are unreasonable. When deciding whether a waiver is reasonable, courts consider the impact of the regulation on purposes and objectives of interscholastic competition. Consequently, because most courts agree that eligibility requirements advance legitimate goals of interscholastic competition, some courts have been reluctant to issue injunctions estopping associations from enforcing them. Though

53. Id. 931-32.
54. Id. at 932. With respect to the majority's contention that an individualized inquiry is not appropriate, the dissent responded by noting that it "find[s] no such principle in the words of the statute."
55. Id.
56. Id.
57. Id. at 932-33.
58. See Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 984, 593 (N.D. Ohio 1996); Reaves v. Mills, 904 F. Supp. 120, 122-23 (W.D. N.Y. 1995);
Eight Circuit majority in *Pottgen* glossed over the reasonableness of waivers inquiry, the Sixth Circuit has delved into the issue at length.

In *Sandison v. Michigan High School Athletic Association, Inc.*, the Sixth Circuit followed the *Pottgen* majority reasoning to find that a waiver of the age restriction fundamentally altered the nature of the athletic program for two reasons. First, athletic programs typically coordinate competition between students aged fourteen to eighteen, and a removal of the age restriction would inject older, more physically mature students into the program. Second, athletic associations and coaches were not in the position to determine whether an individual athlete’s age poses an unfair competitive advantage. The athletes in *Sandison* were nineteen-year-old twins with learning disabilities who, after three years of high school competition, were precluded from participating on the high school cross country team their senior year.

Responding to the students’ argument that introducing their average athletic skills into track and cross-country competition would not fundamentally alter the nature of the program, the Sixth Circuit said that requiring coaches and physicians to determine the competitive advantage of an over-age athlete is “near-impossible” and unquestionably poses an undue burden on the athletic department. The Michigan High School Athletic Association (MHSAA) expert explained that the following five factors should be considered when determining if an athlete poses an unfair competitive advantage due to age: chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. The court concluded that the competitive advantage determination is unreasonable as it must also be made “relative to the skill level of each participating member of the opposing teams and the team as a unit” and “relative to the skill level of the would-be athlete whom the older student displaced from the team.”

The Sixth Circuit in *Sandison* also observed what it called a “significant peculiarity” in characterizing a waiver of the maximum age limitation as a reasonable accommodation of the athlete learning disability. Noting that reasonable accommodations traditionally operate to overcome the disability so that an individual’s disability no longer prevents them from participation, the court failed to see how

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60. *Id.* at 1028.
61. *Id.* at 1035.
62. *Id.*
63. *Id.*
64. *Id.*
the waiver of the age restriction, which "merely removes the age ceiling as an obstacle," is directed at helping the student overcome his disability.65

C. Cases Calling for an Individualized Inquiry—a Welcomed Retreat from Pottgen

Two years after its decision in Sandison, the Sixth Circuit struck down a challenge to the eight semester cap on eligibility in McPherson v. Michigan Athletic Association.66 The requirement at issue in McPherson provided that a student who has been enrolled in grades nine through twelve, inclusive, for more than eight semesters may not compete in interscholastic athletics.67 As a threshold matter, the Court found that the eight semester rule was a essential requirement to the athletic program as it served largely the same purposes of the maximum age limitation rule: "both are intended to limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford players who observe the age-limit rule and the eight semester rule, presumably athletes of less maturity, a fair opportunity to compete for playing time."68

Notably, the principal difference between the facts in McPherson and those in Sandison was that the MHSAA regulations expressly provided for a waiver of the eight semester eligibility rule at issue in McPherson.69 Thus, the McPherson Court faced a novel argument on appeal: if the interscholastic athletic association is permitted to make waiver determinations in some situations, such a practice is not "near impossible" much less unduly burdensome, and therefore a reasona-

65. Id.
66. 119 F.3d at 456-57. The student athlete in McPherson originally entered the eleventh grade in 1992, but had to repeat that grade during the 1993-1994 school year. Consequently, the 1993-1994 school year represented McPherson's seventh and eighth semesters in high school. During 1993-1994 school year, McPherson first participated in varsity basketball; throughout previous grades in high school, McPherson failed to meet the grade point average requirements. In September 1994, his ninth semester in high school, McPherson was diagnosed with Attention Deficit Hyperactivity Disorder, and a seizure disorder. He was subsequently classified as having a specific learning disability. After being denied a waiver of the eight semester rule, the student filed suit in federal court alleging violations of the ADA and Section 504.
67. Id. at 455.
68. Id. at 460-61.
69. Id. at 455. The waiver provision stated: "[e]xcept for the eligibility rule with regard to age, the Executive Committee shall have the authority to set aside the effect of any regulation governing eligibility of students or the competition between schools when in its opinion the rule fails to accomplish the purpose for which it is intended, or when the rule works an undue hardship upon the student or school."
leveling the playing field under the ADA. The Court ultimately rejected this proposition, instead finding that that MHSAA's "determination that a rule may sometimes be waived under some circumstances does not mean that the rule, as a general matter, is not 'necessary' to the successful functioning of a sports program." The court did however find "superficial appeal" in the student's argument, and noted that it was "not insensible . . . to the plaintiff's contention that the existence of past waivers make it inherently reasonable to require the MHSAA to grant a waiver in this case." However, the court distinguished the student's situation in McPherson from the waiver cases contemplated by the MHSAA, and held that because the athlete's learning disability was diagnosed after his eight semester eligibility expired, a waiver of the eight semester cap, in the instant case, was unreasonable as it would "directly threaten one of the fundamentally purposes of the eight semester rule; namely the avoidance of red-shirting."

Perhaps the most significant aspect of the majority's decision in McPherson is that it contemplates the effect of the waiver as individually applied to the student with the learning disabilities. The court stated: "to allow a waiver under these circumstances would create a highly unfavorable precedent, in which a school district can have control over a player's eligibility, find that player to be ineligible, and then later, when he has physically and athletically matured, find him eligible." The Seventh Circuit aptly noted that upon close reading of McPherson it becomes apparent that the Sixth Circuit did in fact engage in an individualized assessment as to the reasonableness of a waiver: "[t]o characterize McPherson as espousing the rigid approach of the Eighth Circuit majority in Pottgen, it is necessary to ignore the court's individualized assessment of the risk of redshirting."

The shift away from the majority's decision in Pottgen further becomes evident in the Seventh Circuit's opinion in Washington v. Indiana High School Athletic Association. In that case, decided two years after McPherson, the Seventh Circuit addressed a similar challenge to the Indiana High School Athletic Association's (IHSAA) eight semester eligibility rule. Of significance is the fact that the

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70. Id. at 461.
71. Id.
72. Id. at 462-63.
73. Id. at 463.
74. Id.
76. Id.
77. Id. at 842-43.
MHSAA's rule at issue in McPherson prohibited students who have been enrolled in high school for more than eight semesters from participating in athletics, while the IHSAA rule at issue in Washington prohibited students from participating eight semesters after they commence ninth grade, regardless of whether the student was actually enrolled for the full eight semesters. In other words, under the Indiana rule, the student's eligibility period continues to run when a student drops out of school, and under the Michigan rule the eligibility period ceases to run for a student who has dropped out of school.

The Washington case involved a challenge to the IHSAA's eight semester eligibility rule by Washington, a student who entered high school at the beginning of the second semester of the 1994-95 academic year. Washington completed his first two years of high school with failing grades and without having been tested for learning disabilities. Early in 1996-97 school year, Washington's counselor advised him that he should drop out of high school, and consequently, Washington took that advice. In the summer of 1997 at a basketball tournament, Washington met the coach of his former high school's basketball team, and with the coach's encouragement, he reentered high school that fall. In January 1998, at the request of the coach, who was also a teacher at the school and Washington's academic mentor, Washington was tested for, and was subsequently identified as having a learning disability.

Under the IHSAA's rule, because Washington entered the ninth grade in the second semester of 1994-95, was ineligible for participation in interscholastic athletics during the second semester of the 1998-99 school year, as that marked his ninth semester in high school. Like most athletic associations regulations, the IHSAA provided for two exemptions to the eight semester rule: one pertaining to students who were injured and received no academic credit for the semester, and the other, a traditional "hardship waiver" which permitted the IHSAA not to enforce a rule if such enforcement in the particular case would not serve to accomplish the purpose of the rule, the spirit of the rule would not be violated, and there is a showing of un-

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78. Id. at 852.
79. Id.
80. Id. at 842.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
due hardship. The IHSAA denied Washington's request for a waiver of the eight semester rule, reasoning that permitting a waiver in Washington's case would open up the flood gates for eligibility exceptions.

In considering whether Washington was otherwise qualified, and in particular, whether a waiver of the eight semester rule was reasonable, the Seventh Circuit explicitly rejected the majority approach in *Pottgen*, and cited the analysis of Chief Justice Arnold in the dissent in *Pottgen* as well as the en banc majority in *McPherson* as being more compatible with congressional intent: "[T]he better view is to ask whether waiver of the rule in the particular case at hand would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." The Seventh Circuit found the majority's view in *Pottgen* unpersuasive and unworkable, noting that "[t]o require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions."

Significantly, several courts have followed the reasoning articulated by the *Pottgen* dissent, and consequently, have issued injunctions enjoining athletic associations from applying eligibility rules on student athletes with disabilities. Other courts have also applied an

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86. Id. at 842.
87. Id. at 843-44.
88. Id. at 850. The court also noted that commentators have overwhelmingly agreed that individualized inquiries are necessary under an ADA analysis.
89. See Denin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 668-69 (D. Conn.) judgment vacated and appeal dismissed as moots, 94 F.3d 96 (2d Cir. 1996) (granting a preliminary injunction enjoining association from applying maximum age rule because "it would be an anathema to the goals of the Rehabilitation Act to decline to require an individualized analysis of the purposes behind the age requirement as applied to the student); Johnson v. Florida High School Athletic Ass'n, 899 F. Supp. 579, 585-86 (M.D.Fla. 1995) judgment vacated on other grounds, 102 F.3d 1172 (11th Cir. 1997) (requiring an individual analysis of the requirement, its underlying purpose, and the manner in which allowing participation would affect those purposes and concluding that where the particular student was not a safety hazard, was an average player and had less experience than other players, a waiver of the age rule does not fundamentally alter the nature of the athletic program); Booth v. Univ. Interscholastic Athletic League, 1990 WL 484414 (W.D. Texas) (granting a preliminary injunction against enforcement of 19-year-old eligibility rule noting that the athletic association's blanket policy against individually evaluating the risk posed by 19-year-old athletes undermines the objectives of the Rehabilitation Act without advancing the policies behind the 19-year-old eligibility rule); Univ. Interscholastic Athletic League v. Buchanan, 848 S.W.2d 298 (Tex. App. 1993) (finding that waiver of 19-year-old maximum age rule was a reasonable accommodation); Hamilton v. West Virginia Secondary Sch. Activities Comm'n, 386 S.E.2d. 656, 658 (W. Va. 1989) (rejecting the association's blanket application of the eight semester rule enacted to prevent red-shirting for athletic advantage); Lambert v. West Virginia State Bd. of Educ., 447 S.E.2d 901, 906 (W. Va 1994) (holding that the Board of Education was required to provide a deaf high school basketball player signer during
individualized analysis in cases arising under state human rights laws.\textsuperscript{90}

III. \textbf{An Evaluation of the Reasonableness of Eligibility Waivers}

Recently, in \textit{Kanongata'a v. Washington Athletic Association}, the Court denied the athletic association's motion for summary judgment on the issue of whether the "hardship exception rule," as written, and as applied to the student athlete violated the ADA.\textsuperscript{91} The association's hardship exception to the four year limit on eligibility provides, in pertinent part, "[t]o grant additional eligibility based on a hardship, a student must demonstrate that normal progression towards graduation has been significantly interrupted as a result of either a long-confining illness, an injury, a family hardship, and that the interruption prevented the student from graduating in four (4) consecutive

\textsuperscript{90} See J.R. Traylor, \textit{III v. West Virginia Bd. of Educ.}, 1997 WL 833266 (W. Va. Cir. Ct. 1997) and \textit{Baisden v. West Virginia Secondary Sch. Activities Comm'n}, 568 S.E.2d 32 (W. Va. 2002) (stating that an individualized approach to waiver determinations is consistent with the goals to the West Virginia Human Rights Act, which stated in pertinent part that "reasonable accommodations are reasonable modifications or adjustments to be determined on a case-by-case basis."

\textsuperscript{91} \textit{Kanongata'a v. Washington Interscholastic Activities Ass'n}, 2006 WL 1727891 (W.D. Wash.). Kanongata'a's academic career was disjointed, to say the least. He began attending high school in 2001, at John F. Kennedy High School in Burien, Washington for ninth grade (2001-02) and continued there for part of tenth grade (2002-03). At Kennedy, he played on the junior varsity football and basketball teams in 2001-02, and on the junior varsity football team in 2002-03. During his time at Kennedy, Kanongata'a experienced numerous personal and familial problems, including the death of his older brother in a car crash. Kanongata'a's grades gradually deteriorated and by January 2003, he was expelled from school due to fighting, truancy, and drinking at a school dance. Shortly thereafter, Kanongata'a was expelled from his family home due to family conflicts. He then moved to Utah to live with an uncle, however Kanongata'a never finished the remainder of his tenth grade year. He enrolled in school in Utah for 2003-04 school year, which should have been his junior year, but after the fall semester he dropped out. He returned to Washington and enrolled in Bellevue High School during the 2003-04 spring semester. In March 2004 he was suspended from Bellevue and placed at Robinswood, an alternative school in the Bellevue School District, and stayed there for the remainder of the 2003-04 school year. Kanongata'a again returned to Bellevue for the 2004-05 school year, which should have been his senior year of high school, and participated in junior varsity football. In December 2004, Kanongata'a was diagnosed with Attention Deficit Hyperactivity Disorder, and in May 2005 the school district identified him as having a specific learning disability which qualified him for an Individualized Education Plan. In January 2005, Kanongata'a was suspended from Bellevue for truancy and failing grades, and during the 2004-05 school year, Kanongata'a was allegedly caught cheating a total of three times. Kanongata'a was placed at Robinswood during the 2005-06 school year, and sought eligibility to play on Bellevue's varsity football team because Robinswood did not have one. *1-4.
The rule further states that a hardship waiver will not be granted “if the student has the opportunity for four consecutive years after entering or being eligible to enter the ninth grade to participate in interscholastic activities.” Though declining to making any findings until the record could fully be developed at trial, the court nevertheless agreed with the student that the rule, as written, violated the ADA: “Specifically, if a learning disability does not amount to an ‘long-confining illness’ or ‘injury’ there appears to be no room for a learning-disabled student to obtain a hardship waiver under the rule as drafted.” The court went on to find that even assuming the hardship exception as written does not violate the ADA, its application in the present case might have violated the ADA. Thus, the court determined that the student was entitled to present evidence, including expert testimony, to support his claim that his learning disability caused his poor academic performance, truancy, and behavioral problems to a degree sufficient to warrant a waiver.

Likewise, in Cruz v. Pennsylvania Interscholastic Athletic Association, Inc., the Court, in granting a permanent injunction, determined that a waiver of the nineteen year old age limitation rule was reasonable based on an individualized inquiry as to the essentiality of the age rule. The Court held that the eligibility requirement was not essential namely because permitting the nineteen year old student to play on the football team and the track team would not fundamentally al-

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92. Id. at *14.
93. Id. The present dispute arose out of the WIAA’s September 2005 eligibility hearing which determined that Kanongata’a was ineligible to play both varsity and junior varsity football because Kanongata’a had participated for four consecutive years (2001-02 and 2002-03 at Kennedy; 2003-04 in Utah; and 2004-05 at Bellevue). The WIAA stated that “regardless of his actual participation in football while in Utah in 2003-04, it was his opportunity to play that year that could count against him.” Not surprisingly, the WIAA also denied Kanongata’a petition for a hardship exception based on family circumstances, specific learning disability, and ADHD. On appeal the district court, in addition to reviewing the student’s ADA claims de novo, reviewed the WIAA’s eligibility determination under the “arbitrary and capricious, and contrary to law” standard, and held that the four season year rule was both misinterpreted and misapplied to such a degree that WIAA’s actions was arbitrary and capricious. The district court found that the WIAA erred in concluding that although Kanongata’a was ineligible for participation in Utah, he nevertheless had the opportunity to participate: “WIAA’s contention to the contrary is untenable, and application of such a hyper-hypothetical interpretation of the word ‘opportunity’ is arbitrary and capricious.” Moreover, the district court held that the WIAA’s determination that Kanongata’a did not qualify for a hardship waiver also was arbitrary and capricious.
94. Id. at *18. The court deferred a ruling on the validity of the waiver provision until other relevant issues, such as whether the student was “qualified” and whether the accommodation was “reasonable” had been decided.
95. Id.
96. Id.
ter the nature of the athletic association’s interscholastic competition.98 In rejecting the association’s argument that assessing the competitive advantage that a 19-year-old may have over opponents is unduly burdensome, the Court aptly noted that the association regularly considers such complex determinations when granting waivers to other eligibility requirements, such as the eight semester and transfer rules.99

Most interscholastic athletic associations today include waiver provisions in their bylaws. For example, the Ohio High School Athletic Association bylaws condition the age limitation waiver for qualified students under the ADA on the Commissioner’s sole determination that “(a) the student does not pose a safety risk to himself/herself or others; and (b) the student does not enjoy any advantages in terms of physical maturity, mental maturity or athletic maturity over other student-athletes; and (c) the student’s participation does not affect the principles of competitive equity; and (d) the student’s participation does not displace another student-athlete; and (e) there is no evidence of “red-shirting” or other indicia of academic dishonesty.”

The prevalence of these waiver provisions casts doubts on the “unreasonableness” of such a practice. Thus, any arguments proffered by school administrators that waiver determinations are unduly burdensome are tenuous today.

IV. Conclusion

Inclusion in interscholastic athletics can have positive impact on the social and emotional well-being of students with learning disabilities. It has been noted that students with learning disabilities tend to exhibit lower self esteem as compared to their typically developing peers, and consequently, may be generally less accepted by students without disabilities.100 Researchers suggest that this lower social status may be explained in two ways.101 First, students with learning disabilities who struggle academically may be characterized as being less desirable classmates by their non-disabled peers who value scholastic achievement.102 Second, students with learning disabilities often have problems developing self competence, the ability to accurately receive, interpret, and respond to the subtleties of interpersonal interac-

98. Id. at 499.
99. Id. at 500.
100. FRIFNJ, supra note 4, at 177.
101. Id.
102. Id.
As result of poor social skills, these students may often have difficulty initiating and maintaining relationships with their peers, and may experience feelings of isolation.\textsuperscript{104}

Participation in interscholastic athletics certainly should combat feeling of isolation and inferiority. As one commentator noted, "opportunities to develop leadership capabilities, teamwork, and work ethic need to be given to persons with disabilities through interaction in athletic programs. . . . Games and sports should be based on an athlete’s personal attributes rather than on unnecessary administrative rules, coaches’ attitudes, or other socially imposed barriers."\textsuperscript{105}

Moreover, researches suggest that where students exhibit salient indicators of disengagement from school, preventive measures should be implemented immediately to reduce the high risk for dropping out: “Practices that more fully involve students with high-incidence disabilities in decisions about their schooling may improve theses students’ feelings of belonging. Engagement should occur at various levels, including involvement in IEP [individualized education plan] planning, in extracurricular activities, and in relevant vocational training.”\textsuperscript{106}

Significantly, the Seventh Circuit in the \textit{Washington} case rejected the athletic association’s argument that the district court committed clear error in finding that the student would suffer irreparable harm from a loss of academic motivation if he were declared ineligible.\textsuperscript{107} The Seventh Circuit relied on the testimony of the school psychologist, who when asked what the consequence would be if the student were deemed ineligible replied: “I think it would be difficult.\textsuperscript{108} This is a child who has been thoroughly frustrated academically, socially, family problems from that, who now gets a taste of success, and then we’re going to pull that away from him? . . . I think it would be devastating.”\textsuperscript{109} The court found that the student’s lack of self confidence prevented him from achieving academic success and consequently,

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 177-78. Other researchers identify learning disabled students with inadequate social skills as having nonverbal learning disabilities. Students with nonverbal learning disabilities may read and speak fluently, but will nevertheless be ostracized in social situations because they have difficulty interpreting such nonverbal communications as eye contact, facial expressions, and posture.


\textsuperscript{106} Fulk, \textit{supra} note 27.

\textsuperscript{107} 181 F.3d at 853.

\textsuperscript{108} Id.

\textsuperscript{109} Id.
when he played basketball, an activity in which he excelled, his grades improved.\textsuperscript{110}

Participation in extra-curricular athletic programs not only improves the self-esteem and self-competence of students with disabilities, but participation also furthers a larger goal— inclusion and acceptance. Individuals with disabilities have historically been isolated from mainstream society and have been subjected to invidious discrimination. Offering all children positions on the same playing field will break down the barriers and stereotypes that have precluded individuals with disabilities from meaningful participation within the community and the school—this should be a welcomed opportunity for schools, not a burden.

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\textsuperscript{110} Id.

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