Has Time Run Out for the NCAA? An Analysis of the NCAA as a Place of Public Accomodation

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INTRODUCTION

Over the past half century the United States has taken tremendous strides in ensuring the equality of all citizens. Although our nation still has a long way to go until we live in a society that "neither knows nor tolerates classes among citizens," significant progress has been made.1

Just this past year, Major League Baseball, the "national pastime," celebrated the fiftieth anniversary of Jackie Robinson’s emergence as the first black baseball player in the league.2 In honor of Robinson’s legacy and contributions to both society and baseball, every Major League Baseball team retired the number 42, Robinson’s number during his playing days with the Brooklyn Dodgers.3

Much of the racial progress made in professional sports can be traced to the amount of publicity focused on accommodating racial minorities in professional athletics.4 While professional sports have slowly opened their doors to minorities, college athletics broke the color barrier decades before the professional ranks.5

3. Id.
5. Michael Oriard, College Athletics as a Vehicle for Social Reform, 22 J.C. & U.L. 77, 81-82 (Summer 1995). See also DUCKETT & ROBINSON, supra note 3, at 23. Robinson became the first four-letter star at UCLA. Despite this accomplishment, Robinson still believed he had no future after he exhausted his
Collegiate athletics, from race to gender has played an instrumental role in breaking down the barriers and stereotypes of minorities and their ability to compete athletically. In the past two decades, the National Collegiate Athletic Association ("NCAA") has largely focused on the accommodation of women in order to achieve compliance with Title IX.\(^6\) Passed under the Education Amendments of 1972,\(^7\) Title IX states that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."\(^8\) Although Title IX does not specifically address equality in athletics, a number of court decisions have interpreted the provisions of this Act to require compliance with Title IX in the athletic arena.\(^9\) Many believe that the birth of two successful women’s professional basketball leagues in the past year is attributable to the success of women’s college basketball, a beneficiary of Title IX.\(^10\)

While blacks and women have made strides in college athletics, individuals with disabilities have been left behind.\(^11\) This has a great deal to do with the relatively short life of the Americans with Disabilities Act of 1990 ("ADA").\(^12\) This legislation has been responsible for an increased awareness of the struggles and difficulties for disabled individuals in this country and has created much needed remedies for individuals with disabilities.\(^13\)

eligibility: “I could see no future in staying at college, no real future in athletics, and I wanted to do the next best thing - become an athletic director.”

\(^{11}\) W.S. Miller, Ganden v. NCAA: How the NCAA’s Efforts to Clean Up Its Image Have Created an Ethical and Legal Dilemma, 7 MARQ. SPORTS L.J. 465, 471 (Spring 1997).


\(^{13}\) Laura F. Rothstein, Higher Education and Disabilities: Trends and Developments, 27 STETSON L. REV. 119, 119-120 (Summer 1997).
One group of individuals with disabilities, those who are learning disabled, have had a particular problem participating in college athletics due to restrictive NCAA rules.\textsuperscript{14} Learning disabilities are protected under the ADA,\textsuperscript{15} but because learning disabilities are often misunderstood, even among post-secondary educators, there is much debate concerning the accommodation of students with this disability.\textsuperscript{16} Universities and colleges have become a battleground for this debate.\textsuperscript{17} In the past few years, the NCAA, with some prodding from the U.S. Department of Justice, has taken numerous steps to accommodate learning disabled individuals.\textsuperscript{18} While the NCAA has begun to show initiative, it has nevertheless been served with a number of lawsuits by student athletes who could not meet the academic eligibility requirements for participation in the NCAA.\textsuperscript{19}

In light of the numerous challenges to the NCAA’s policy, this comment will address whether the NCAA can be challenged under Title III of the Americans with Disabilities Act of 1990. If the NCAA is deemed a private entity operating a place of public accommodation, its actions could be challenged under Title III of the ADA. While this has not yet occurred, there is a movement in the courts to have this status imposed on the NCAA so it can be challenged under this legislation.\textsuperscript{20}

Part I of this comment will discuss the history and the guidelines of three important anti-discrimination statutes passed in the last half century. Part II will set forth the basic foundation of what constitutes a learning disability. Part III will describe the NCAA as an organization and discuss how the courts have construed the

\textsuperscript{15} 29 C.F.R. § 1630.2(h)(1)(2)(1993).
\textsuperscript{16} \textit{See generally} SUSAN A. VOGEL & PAMELA B. ADELMAN, \textit{SUCCESS FOR COLLEGE STUDENTS WITH LEARNING DISABILITIES} (1993).
\textsuperscript{18} Asher, supra note 14, at B05.
\textsuperscript{20} Id.
status of the NCAA in prior decisions. This section will also look at a number of the recent cases that have been decided between student-athletes and the NCAA. Part IV will address what has been found and what has not been found to be a public accommodation. Finally, Part V will analyze how the courts are likely to rule and how the courts should consider ruling on whether the NCAA is a private entity operating a place of public accommodation under Title III of the ADA.

I. ANTI-DISCRIMINATION STATUTES

Since the groundbreaking Civil Rights Act of 1964, Congress has enacted thirteen pieces of legislation designed to help the disabled.21 While each of these acts has benefited individuals with disabilities in different manners, the three most influential pieces of legislation have been the Civil Rights Act of 1964,22 the Rehabilitation Act of 197323 and the Americans with Disabilities Act of 1990.24

A. The Civil Rights Act of 1964

Judges from all ends of the judicial spectrum realize that the greatest sting of discrimination in our country has been felt by

blacks. Unfortunately, throughout history this mistreatment was fostered by our nation’s legal system.

In 1954, the Supreme Court took its most resounding step toward abolishing discrimination and the concept of “separate but equal” in the case of Brown v. Board of Education. Brown appeared overdue after a series of Supreme Court decisions that signaled the demise of the “separate but equal” doctrine. The implementation of this ruling, however, was not eagerly accepted by either the judicial, the legislative or the executive branches of government. In fact, it took another decade for the next major breakthrough in the Civil Rights movement. This time, however, the judiciary was not the initiator of the progress. Instead, it was President Lyndon B. Johnson, an unlikely hero from the deep south, who expanded upon the groundwork laid by both the Supreme Court and President John F. Kennedy.

President Johnson was unequivocally determined to enact this legislation, garnering enough political support to sign the Civil Rights Act of 1964 into law. Despite the momentum gained by Johnson from the outpouring of sentiment for the slain President Kennedy, the bill’s enactment was still an onerous task.

In addition to the expected opposition from those who had supported the suppression of minorities, this bill was further complicated by Representative Howard “Judge” Smith, the

25. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989)(Scalia, J., concurring) (“It is plainly true that in our society blacks have suffered racial discrimination immeasurably greater than any directed at other racial groups.”).
26. See Plessy, 163 U.S. at 539.
29. See Brown, 349 U.S. at 294. This case has been labeled the “all deliberate speed” case. This second ruling has been widely criticized because it allowed schools to take the appropriate time needed to desegregate, as opposed to accelerating the desegregation process. See id.
32. Id.
chairman of the House Rules Committee. Smith attempted to sabotage this bill by suggesting that Title VII of the Civil Rights Bill be amended to include "sex" among the long list of impermissible reasons for discriminating in the employment context. Smith's hope was to amend this bill to such an extreme that the changes would be too dramatic for Congress to accept, thereby defeating the legislation. The stiffest opposition came from northern liberals who were afraid that adding "sex" to the bill would lead to the demise of the Act. Smith's plan, however, did not succeed and the Smith Amendment adding sex to the Civil Rights Act passed 168-133. The Act was signed by President Johnson on July 2, 1964.

After the struggle in adding "sex" to the Civil Rights Amendment, it was not surprising that Congress was not ready to adopt legislation to prevent discrimination against individuals with disabilities. Nearly another decade would pass before any federal legislation would be enacted to protect the millions of disabled Americans.

B. The Rehabilitation Act of 1973

The most significant push for federal legislation to prevent discrimination against individuals with disabilities began in the early 1970s. The first attempt to pass this type of legislation was with the Rehabilitation Act of 1972. Congress perceived discrimination against individuals with disabilities to be "most

35. Id. at 187.
36. Id.
37. Id.
38. Id.
40. Rains, supra note 34, at 187.
41. 29 U.S.C. § 701-796.
42. Rains, supra note 34, at 188.
often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."  

Members of Congress harshly expressed their disappointment concerning the lack of legislation for disabled Americans. One representative deemed this mistreatment as one of our nation's "shameful oversights." Senator Hubert Humphrey emphasized similar sentiments toward this injustice when he offered legislation to protect the handicapped in 1972, proclaiming that "we can no longer tolerate the invisibility of the handicapped in America." Despite the adamant proclamations of Congress and the lack of debate in both houses over this act, there still was opposition to the Rehabilitation Act's passage. President Nixon vetoed the bill twice before finally signing the Rehabilitation Act of 1973 into law on September 26, 1973.

The stated purpose of the Rehabilitation Act was "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society...." Additionally, the Act emphasized the need for the Federal Government to play a leadership role in promoting these equal opportunities for the disabled, thereby ensuring the disabled the chance to earn meaningful and gainful employment as well as independent living.

For an individual with a disability to claim a violation of the Rehabilitation Act, a four prong test must be satisfied. The claimant needs to demonstrate: (1) a disability as defined by the

44. Id.
45. Id.
46. Id.
47. Id.
49. The heart of this legislation is 29 U.S.C. § 794(a): "No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency...."
50. Id. at § 701.
51. Id.
Rehabilitation Act, (2) that the claimant is "otherwise qualified" to meet "all of a program's requirements in spite of [his/her] handicap," (3) the individual was discriminated against "solely by reason" of the disability, and (4) the party being sued receives federal financial assistance (or is the beneficiary of a government program, including government contracts). 53

While the Rehabilitation Act was not a comprehensive piece of legislation establishing remedies for the disabled, its impact was still quite significant. 54 The passage of this Act was an important symbolic victory because the disabled were finally recognized as a group that had suffered from years of discrimination. 55 Most importantly, it laid the foundation for the revolution of the 1990's, when disabled Americans could point to proactive legislation that offered more than just a moral victory.

C. The Americans With Disabilities Act of 199056

1. The Applicability of the ADA

When President Bush signed the Americans with Disabilities Act of 1990 into law, it became the single most important piece of legislation for individuals with disabilities. 57 Most importantly, the ADA extended to elements of the private sector, thereby filling the holes of the Rehabilitation Act. 58 Because the ADA adopted the enforcement provisions of the Civil Rights Act, while still being

53. See generally id.
54. Rains, supra note 34, at 190-192 ("The Rehabilitation Act of 1973 only prohibits discrimination by federal executive agencies, federal grantees and federal contractors.").
55. Miller, supra note 11, at 467.
57. Senate Approves Bill Protecting Disabled, BATON ROUGE STATE TIMES, September 8, 1989, at 8D. Senator Edward M. Kennedy called the ADA "an Emancipation Proclamation for the disabled, and America will be a better, fairer and stronger nation because of it." Id. Senator Tom Harkin called the ADA "a landmark statement of basic human rights that will make the promise of equal opportunity a reality for 43 million Americans with disabilities." Id.
58. Rains, supra note 34, at 198.
interpreted "consistently with the Rehabilitation Act," 59 it provided the same comprehensive protection from discrimination that had been previously provided to other groups that had been victims of discrimination. 60

To state a claim of discrimination under Title II or Title III of the ADA, an individual must prove: (1) that he or she has a "disability" within the meaning of the ADA; (2) that the defendant is subject to the requirements of the Act; (3) that the plaintiff was denied the opportunity to participate or benefit from the services and accommodations of the defendant on the basis of the plaintiff's disability; and (4) reasonable accommodations could have been made which would not have fundamentally altered the nature of the goods, services or accommodations. 61

Titles II and III differ with respect to the second element of these requirements. 62 Title II is applicable when the defendant committing the violation is a public entity, and the remedy is injunctive relief and attorney's fees. 63 A public entity is broadly defined. 64 Title III is pertinent when the defendant is a private entity and it affects commerce while operating a place of public accommodation. 65 Congress created a comprehensive list of over

63. 42 U.S.C. § 12132. The code reads: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Id.
64. 42 U.S.C. § 12131. The code reads as follows: "Definitions as used in this subchapter:
   (1) Public entity: The term "public entity" means—
      (A) any State or local government;
      (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
      (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of Title 45).
fifty specific facilities that are subject to regulation as a public accommodation. The NCAA has been found to be a private entity. Accordingly, the only possible remedy for a case of discrimination under the ADA against the NCAA is through Title III.

2. The Policy Considerations Behind the ADA

Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." These astronomical numbers made it clear to Congress that it was imperative to pass legislation for individuals who had historically been subjected to isolation and segregation because of their disabilities. Congress stated:

"Individuals with disabilities are a discrete and insular minority who have been faced with restriction and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual"

66. 42 U.S.C. § 12181(7). The section reads as follows: "The following private entities are considered public accommodations for purposes of this subchapter, if the operation of such entities affect commerce—

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation."

These are the sections of Title III where it has been argued the NCAA could be listed. Butler v. NCAA, No. 96 CV 1656D, slip op. at 4 (W.D. Wash. Nov. 8, 1996).

68. Id. See infra part IV
70. 42 U.S.C. § 12101.
ability of such individuals to participate in, and contribute to society.”

This finding is especially intriguing because the phrase “discrete and insular” is the language used by Justice Harlan F. Stone in his famous footnote four of *United States v. Carolene Products.* Since then, the phrase “discrete and insular” has been used as a threshold to describe a class of persons in constitutional adjudication for the levels of scrutiny that the Supreme Court should use in reviewing equal protection cases. A class of persons found to be discrete and insular by the Supreme Court will be entitled to a higher level of scrutiny. The most discrete and insular minorities in our nation’s history, earning strict scrutiny review, are the groups classified by race, alienage or national origin.

Individuals with disabilities, on the other hand, are not entitled to strict scrutiny review according to *City of Cleburne v. Cleburne Living Center.* In fact, individuals with disabilities are not even entitled to the intermediate review standard used by the Court for quasi-suspect classes. The Supreme Court found that the mentally disabled were neither discrete nor insular, thereby not deserving of more exacting judicial review. This is because the Federal Government has not allowed discrimination against the mentally disabled in federally funded programs, and the government has “provided the retarded with the right to receive ‘appropriate treatment, services, and habilitation’ in a setting that is ‘least restrictive of [their] personal liberty.’” This legislative response convinced the Court that individuals with disabilities

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72. 304 U.S. 144, 152 n.4 (1938).
74. *Croson,* 488 U.S. at 495.
75. *Id.*
77. *Id.* at 443.
78 *Id.*
79 *Id.*
have the support of the public and, therefore, cannot be deemed politically powerless.  

Since this decision is still good law, the language of Congress in the ADA is especially fascinating. By calling individuals with disabilities a “discrete and insular” minority in the ADA, Congress may have been emphasizing that the disabled should either be a quasi-suspect class deserving of intermediate review or a suspect class entitled to strict scrutiny. 81 Such a statement by Congress would be unprecedented if it had intended to create, by statute, a quasi-suspect or suspect classification. However, this issue has yet to be attacked head-on and is likely to be an issue that will eventually be resolved in the courts. 82  

As long as Cleburne is good law, individuals with disabilities will continue to be entitled to only rational basis review for equal protection cases. 83 Regardless of how the disabled are classified under equal protection review, the ADA is still an authoritative and vitally important piece of legislation that has and will continue to provide numerous remedies for Americans with disabilities.

II. LEARNING DISABILITIES

A. What is a learning disability?

The question “What is a learning disability?” has yet to be definitively answered because the field is still relatively new. 84 The 1980s saw the most significant increase in the awareness of learning disabilities, shattering a number of misconceptions about persons with these disabilities. 85 The term “learning disability” was first proposed as a compromise over the various definitions and descriptions given to children with average to above average

80. Id. at 445.
81. Rains, supra note 34, at 201.
82. Id. at 202.
84. DANIEL P. HALLAHAN & JAMES M. KAUFFMAN, EXCEPTIONAL LEARNERS 162 (7th ed. 1997).
85. VOGEL & ADELMAN, supra note 16, at 3.
intelligence but who had substantial problems in learning. The first formal definition of "learning disabilities" was drafted by the National Advisory Committee on Handicapped Children (1968) and was incorporated into the Education for All Handicapped Children Act of 1975.

Over a decade later, the National Joint Committee for Learning Disabilities ("NJCLD") revised this definition to increase the awareness that this disability does not apply only to children, and often does not disappear once these individuals reach adulthood. This definition was created to eliminate the phrase "basic psychological processes," which had been an integral part of the definition incorporated into the Education for All Handicapped Children Act of 1975. It was imperative to eliminate this phrase from the definition because these processes are not observable and, therefore, quite difficult to measure. Furthermore, the prior definition of learning disabilities did not mention "perceptual handicaps, dyslexia, or minimal brain dysfunction" which are equally hard to define. The most important distinction, however, is that the NJCLD emphasizes that a learning disability may be a lifelong condition.

86. HALLAHAN & KAUFFMAN, supra note 84, at 162. Other terms used to describe these children were "minimally brain injured," "a slow learner," "dyslexic," or "perceptually disabled." Id.
87. Id. The Federal Register, 1977, § 121a.5 states:
"Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage."(emphasis added)
89. Id.
90. HALLAHAN & KAUFFMAN, supra note 84, at 168.
91. Id. NJCLD, 1989, pg. 1, states:
"Learning disabilities is a generic term that refers to a heterogeneous group of disorders manifested by significant disabilities in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous dysfunction, and may occur across the life span. Problems in self-regulatory
The increased awareness of learning disabilities is directly responsible for the substantial rise in the number of students identified with a learning disability. Since the federal government first began to collect figures in 1976 and 1977, this number has doubled. With this increase has come substantial debate over whether students are over-identified or too quickly labeled as learning disabled. This controversy was recently addressed by the Federal District Court of Massachusetts in the case of *Guckenberger v. Boston University*.

**B. The Controversy Over Accommodation**

Although a learning disability is accepted as a legitimate disability there is a significant dispute as to who is qualified to make the assessment that an individual has such a disability. In *Guckenberger*, Boston University ("BU") was sued by ten university students with attention deficit hyperactivity disorder ("ADHD"), attention deficit disorder ("ADD") or other learning disabilities, alleging that the new policies created by President Jon Westling violated the ADA and the Rehabilitation Act.

Westling had purportedly formed these new policies to tighten BU's procedures for granting academic accommodations to students with learning disabilities, fearing that BU was compromising its academic standards to help students with behaviors, social perception and social interaction may exist with learning disabilities but do not by themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (for example, sensory impairment, mental retardation, serious emotional disturbance) or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.

92. *Id.* at 169.
93. *Id.* at 168. The federal government now estimates that slightly more than five percent of public school students between the ages of six and seventeen have a learning disability. *Id.*
94. *Id.*
95. *See supra* note 17.
learning disabilities. Westling claimed he was guided by his belief that while learning disabilities may exist, many of the students diagnosed as learning disabled are "victims of overblown and unscientific claims by some learning disability advocates."  

This case gained national significance as a result of Westling’s public statements. Westling’s most inflammatory act was to give speeches about a student he dubbed “Somnolent Samantha." Samantha, however, turned out to be a fictional character, infuriating learning disability advocates. This character was described as a student who often slept in class, but because she had a "learning disability" the lecturer not only had to tolerate the sleeping in class, but had to fill the student in on the material she missed. U.S. District Judge Patti Saris took exception to Westling’s creation of Samantha for the purpose of denouncing the zealous advocates of learning disabilities, as well as his "proclivity for making controversial comments about learning disabilities." The common sentiment is that the court took a harsher stance against BU because of Westling’s behavior. 

The ruling in Guckenberger was both beneficial and detrimental to BU and the learning disabilities movement. The University benefited from the court’s finding that federal disability law does not require universities or colleges to compromise their admissions criteria in order to accommodate learning disabled students. Specifically, the court found that Boston University did not have to accept a learning disability diagnosis from an evaluator who was

99. Id.
100. NBC Nightly News (NBC television broadcast, May 9, 1997).
101. Id.
102. Id.
106. Id.
107. Id.
not qualified or reputable. The court also found that BU presented acceptable evidence to show that students with ADD and ADHD need to be reevaluated because the symptoms of these disorders can change in different environments, can be treated with medication and can remit from adolescence to adulthood.

While BU won some battles, the ten plaintiffs' victory was also quite significant. Judge Saris found that BU's rule requiring the diagnosis of a student's learning disability to be no more than three years old, in violation of the ADA and the Rehabilitation Act. The court ruled against BU, saying this requirement was so burdensome that it screened out students with learning disabilities. The ruling that most benefited the plaintiffs was that BU was ordered to cease and desist its policy of requiring learning disabled students who had been diagnosed by professionals with masters degrees and or sufficient experience to be re-diagnosed solely by professionals who have "medical degrees, or licensed clinical psychologists in order to be eligible for reasonable accommodations."

Despite its advances, the Guckenberger decision is not being hailed as precedential. Nevertheless, the decision was a victory for the learning disabled community. A number of individuals who work with students with learning disabilities feel that this case may facilitate the extinction of the prejudices and skepticism towards learning disabilities.

109. Guckenberger, 1997 WL 523931, at *28. The court found that it was not unreasonable or significantly burdensome to require a student who was requesting an accommodation, and had not yet been diagnosed with a learning disability to be tested by someone with a doctorate degree as opposed to a masters degree. Id.

110. Id. at *30.

111. DISABILITY COMPLIANCE, supra note 105, at 7.


113. Id.

114. Id. at *48.

115. DISABILITY COMPLIANCE, supra note 105, at 1.

116. Id. at 7.

117. Id. Judge Saris stated that these prejudices are not acceptable: "I find that BU's initial denial of any effective accommodation in October was based in part on an impermissible, discriminatory stereotype that many learning disabled students are lazy and can meet the degree requirements if they try hard enough without accommodation." 1997 WL 523931, at *47.
III. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

A. Who is the NCAA?

The NCAA is a voluntary, unincorporated association consisting of approximately 1200 public and private colleges and universities. The NCAA is the primary regulator of intercollegiate athletics in the United States and the sponsor of eighty-one national championships for a number of sports, ranging from the multi-million dollar men’s basketball tournament to considerably smaller tournaments, such as swimming, lacrosse and tennis championships.

The NCAA constitution proclaims that the basic fundamental policy for the Association is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” Upon entrance into the NCAA, each member school accepts the responsibility to control their institution and preserve the title “student-athlete” in compliance with this fundamental policy and enforce the rules and regulations of the Association. If an institution disobeys the NCAA regulations, the member school is subject to the enforcement procedures of the

119. NCAA Manual 1997-98, Operating Bylaws, Rule 18.3. Of the eighty-one national championships, there are 10 National Collegiate Championships, 24 Division I championships, 23 Division II championships and 24 Division III championships.
120. See Melissa Issacson, Pray There’s No Pay-For-Play, CHI. TRIB., February 23, 1997, § 4, at 1. In 1997, the NCAA signed a contract with CBS for $1.7 billion to televise the Men’s Division I Basketball Tournament until 2002. Although there is no tournament for Division I Men’s Football, the NCAA pays out $8.5 million per team for the eight schools selected to the College Football Bowl Alliance. Id.
121. NCAA CONST. art. I, § 1.3.1.
122. NCAA CONST. art. III, § 3.2.4.1.
NCAA Committee on Infractions. The penalties that the Infractions Committee can impose include forfeiture of contests, monetary fines, probation, loss of scholarships and ineligibility for post-season tournaments.

B. What is the NCAA?

The NCAA is a private organization. Many of the member schools, however, are public universities which receive federal funds. Prior to 1984, however, in the eyes of the law, the NCAA was a state actor. In Howard University v. NCAA, the court found the NCAA to be acting under the color of state law because of the large number of member schools that were funded by either state or federal governments. The court also found that since the NCAA regulated and supervised the intercollegiate athletics of publicly funded schools, the NCAA and “its public instrumentalities are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny.” The court realized that the governmental involvement was not “exclusive,” but still found that the NCAA’s actions were significantly “impregnated with a governmental character.” The ruling in Howard was followed in a number of other cases, and for the next decade the NCAA was treated as a governmental body.

In 1984, the Fourth Circuit in Arlosoroff v. NCAA took the first step toward restoring the NCAA to private entity status. The Fourth Circuit’s ruling was a result of two Supreme Court

125. Tarkanian, 488 U.S. at 179.
127. 510 F.2d 213 (D.C. Cir. 1975)
128. Id. at 214.
129. Id. at 220.
130. Id.
131. See Tarkanian, 488 U.S. at 182 n.5.
132. 746 F.2d 1019 (4th Cir. 1984).
decisions. These Supreme Court cases rejected the notion that the indirect involvement of state governments could convert private action into state action. Under the guidance of these rulings, the Fourth Circuit found that regulation of intercollegiate athletics is not a function that was "traditionally exclusively reserved to the state." Furthermore, the Fourth Circuit found that the NCAA's acceptance of membership funds from public institutions did not reconstruct the basic character of the NCAA. After the ruling in Arlosoroff, the road was paved for the Supreme Court's landmark decision for the NCAA.

C. NCAA v. Tarkanian

In Tarkanian, the plaintiff was the head coach of the men's basketball team at the University of Nevada Las Vegas ("UNLV"). Tarkanian took over as head coach of a mediocre UNLV team in 1973 and, within only a few years, he turned the program into a national powerhouse. In September of 1977, just months after a season in which Tarkanian led the Running Rebels to a 29-3 record and an appearance in the Final Four, UNLV informed Tarkanian that he was going to be suspended because the NCAA Infractions Committee found that the basketball team had committed thirty-eight violations of NCAA rules. Ten of these violations were directly linked to Tarkanian.

The NCAA placed UNLV on two years probation and requested that the school show cause why the Association should not compel

134. Id.
135. Arlosoroff, 746 F.2d at 1021.
136. Id. at 1022 ("It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action.").
137. Miller, supra note 126, at 879.
139. Id.
140. Id. at 180.
141. Id. at 180-81.
142. Id. at 181.
further sanctions against the school if Tarkanian was not suspended from his coaching duties during the probationary period.\textsuperscript{143} Tarkanian brought suit in Nevada state court alleging a violation of his due process rights under 42 U.S.C.\$ 1983.\textsuperscript{144} In order for Tarkanian to obtain relief, he had to establish his suspension as a "state action" prohibited under the Fourteenth Amendment.\textsuperscript{145} The Supreme Court concluded that "the source of the legislation adopted by the NCAA is not Nevada, but a collective membership, speaking through an organization that is independent of any particular state."\textsuperscript{146} Since UNLV had decided to suspend Tarkanian under the color of the NCAA, as opposed to the color of state law, the Court held that the NCAA was not a state actor and could not be held liable for a violation of Tarkanian's civil rights.\textsuperscript{147}

Almost a decade later this case continues to be the law of the land. The NCAA is not considered a governmental body.\textsuperscript{148} A new debate, however, has arisen regarding what type of classification the NCAA deserves. This new controversy focuses on whether the NCAA is a private entity operating a place of public accommodation under Title III of the ADA.\textsuperscript{149} Title III of the ADA allows a private entity operating a public accommodation to be sued under this Act if it discriminatorily denies access to an individual with a disability.\textsuperscript{150}

\textsuperscript{143} Tarkanian, 488 U.S. at 181.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 182.
\textsuperscript{146} Id. at 193.
\textsuperscript{147} Id.
\textsuperscript{148} Miller, supra note 125, at 881.
\textsuperscript{149} See Ganden, 1996 WL 680000, at *11.
\textsuperscript{150} 42 U.S.C. \$ 12181.
IV. PLACES OF PUBLIC ACCOMMODATION

A. Cases That Indicate the NCAA May Be A Place of Public Accommodation

Just recently a number of cases have begun to raise questions over how the NCAA should be categorized. Two of these cases, *Ganden v. NCAA*¹⁵¹ and *Butler v. NCAA*,¹⁵² have had success in establishing the NCAA as a place of public accommodation within the meaning of the ADA.

*Ganden* was a well-publicized and highly charged case. The plaintiff, a seventeen year old learning disabled swimmer from Naperville North High School,¹⁵³ had excelled on the swim team, and was the Illinois defending champion in the 100 yard free-style two years in a row.¹⁵⁴ While Ganden flourished at athletics, thereby earning him athletic scholarship offers from numerous schools, he struggled with academics.¹⁵⁵ Ganden suffers from a decoding learning disability that primarily affects his reading and writing skills.¹⁵⁶ Naperville North accommodated this disability by offering Ganden assistance through a number of counselors and teachers.¹⁵⁷ This team of helpers designed a specific curriculum, the individual Education Program ("IEP"), for Ganden, that addressed his particular disability and academic weaknesses.¹⁵⁸ Naperville North also offered Ganden five special courses that were intended to help address his weaknesses; two of these courses became the crux of the NCAA’s problem with Ganden.¹⁵⁹

¹⁵⁷. Id.
¹⁵⁸. Id.
¹⁵⁹. Id.
Under NCAA guidelines, an incoming freshman athlete must maintain a certain grade point average that varies based on the strength of student’s standardized test score. The student must also have completed 13 “core courses” in order to be eligible to compete during the freshman year. A core course is defined by NCAA bylaws as a recognized academic course that offers fundamental instructional components in a specified area of study. Special education courses can be accepted as core courses. The NCAA found that two of the courses offered to Ganden did not meet the requirements of a “core” course according to NCAA standards. In as much as Ganden did not satisfy the NCAA’s core courses requirement, he was ruled ineligible to compete during his freshman year at Michigan State.

In Butler v. NCAA, the plaintiff, Toure Butler, was a standout defensive back for Cascade High School in Snohomish County, Washington. Voted All-Western AAA Conference South Division in both his junior and senior seasons, Butler earned a scholarship from the University of Washington. Much like Ganden, Butler has a learning disability and was declared ineligible to compete for the University during his freshman year because one of his high school classes did not satisfy the core course requirement for incoming freshmen.

Ganden and Butler both sought preliminary injunctions against the NCAA under Title III of the ADA, claiming that the NCAA

161. NCAA Bylaws 14.3.1.3.
162. NCAA Bylaws 14.3.1.3.4 (“The Academics/Eligibility/Compliance Cabinet may approve the use of high-school courses for students with disabilities to fulfill the core-curriculum requirements if the high-school principal submits a written statement to the NCAA indicating that students in such classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in other core courses. Students with disabilities still must complete the required core courses and achieve the minimum required grade-point average in this core curriculum.”).
164. Id.
166. Id.
was not allowing them to compete because of their disabilities. Butler was granted a preliminary injunction and allowed to compete because U.S. District Court Judge Carolyn Dimmick focused on the irreparable harm that would have been done to Butler if he was not allowed to compete. Unlike Ganden, who received “partial qualifier status” (meaning he retained his scholarship and was able to participate in every aspect of the swim team except the competitions), Butler would most likely have lost his scholarship and would have had to quit school if not for the injunction.

Although Judge Blanche Manning of the U.S. District Court for the Northern District of Illinois did not grant Ganden a preliminary injunction which would enable him to compete in NCAA sanctioned events, the court found that “Ganden ha[d] a reasonable likelihood of demonstrating that the NCAA constitutes a ‘place of public accommodation’ within the meaning of Title III.” The Western District of Washington, on the other hand, did not explicitly rule that the NCAA was a place of public accommodation. Rather, the court denied the NCAA’s motion to dismiss by finding that the question was one of mixed fact and law and allowed Butler to develop his argument and present the issue before the court at a later date.

B. How the Ganden Court Found the NCAA To Be A Public Accommodation

1. Is the NCAA Closely Connected to the Facilities of Its Member Schools?

In Ganden, the plaintiff presented a twofold argument as to why the NCAA should be considered a public accommodation within the scope of Title III. The first argument was that the NCAA

169. Rothstein, supra note 13, at 131.
170. Id.
itself, as a membership organization, was a place of public accommodation because it was "closely connected" to the particular facilities of the member institutions that held the swimming meets. The second argument stated that the NCAA operates the facilities of its member schools, thereby making the NCAA a place of public accommodation.

In its consideration of the NCAA as a private entity closely connected to a particular facility, the court looked to the findings of other jurisdictions. In order to show that a close connection exists between a membership organization and a facility the court determined: (1) the organization must be affiliated with a particular facility; and (2) membership in or certification by that organization must act as a "ticket" to admission at the facility or location that is affiliated with the membership organization.

According to Ganden's attorneys, the athletic facilities used by member institutions were primarily constructed for NCAA competition and, because the NCAA was created to govern these competitions and relied on the use of these facilities, the organization was "inextricably tied" to these facilities. The court agreed and felt that Ganden had a reasonable probability of showing that the NCAA was both a membership organization with a close connection to a particular facility and that NCAA certification serves as a "ticket" to use the MSU facilities. The court reached this conclusion by distinguishing the Seventh Circuit's ruling in Welsh v. Boy Scouts of America, even though Welsh appears to control this case.

In Welsh, the plaintiff sued the Boy Scouts of America under Title II of the Civil Rights Act of 1964, claiming he was denied admittance to this membership group for refusing to affirm his belief in a supreme being. The plaintiff claimed the Boy Scouts

174. Id.
177. Id.
178. Id.
179. 993 F.2d 1267 (7th Cir. 1993).
180. Id. at 1268. The Boy Scout Oath states: "On my honor I will do my best to do my duty to God and my country and to obey the Scout law, to help
are a private entity operating a public accommodation.\textsuperscript{181} Although Welsh was a civil rights action, the Seventh Circuit found Title II of the Civil Rights Act to be similar to Title III of the ADA and analyzed these two Acts in conjunction with each other.\textsuperscript{182}

The court used the same two prong test later used in Ganden to establish that the Boy Scouts are not closely tied to any physical facility.\textsuperscript{183} This was because the Boy Scouts hold the majority of its meetings at the private residences of the Scout members.\textsuperscript{184} The Seventh Circuit emphasized that "although the Boy Scouts organization does own and/or rent buildings used mainly for administrative purposes, this alone falls far short of transforming the Boy Scouts of America into a public accommodation."\textsuperscript{185} The court also found that the Boy Scouts did not satisfy the second element of this test finding the Boy Scouts are not a "ticket" to a particular facility.\textsuperscript{186} The ticket to the Boy Scouts only functioned for purposes of participation in the inter-group activities of the membership organization, such as meeting and outings, the ticket did not prevent access to the Boy Scout facilities.\textsuperscript{187}

The court in Ganden felt that the NCAA was distinguishable from the Boy Scouts, since NCAA events occur in stadiums and arenas that were open to the public.\textsuperscript{188} The NCAA was closely affiliated to these public facilities by reason of the member institutions constructing these facilities to be used for training and holding intercollegiate competition, unlike the Boy Scouts who did not build its private residences solely to hold Scout meetings.\textsuperscript{189} Furthermore, the court reasoned NCAA certification was in fact a "ticket" to use the Michigan State facilities because Ganden could not compete in a NCAA sanctioned competition at these facilities without the NCAA's certification.\textsuperscript{190}

\begin{itemize}
\item other people at all times, to keep myself physically strong, mentally awake and morally straight." Id.
\item 181. Id.
\item 182. Id. at 1270.
\item 183. Id. at 1273.
\item 184. Welsh, 993 F.2d at 1274.
\item 185. Id.
\item 186. Id. at 1271.
\item 187. Id.
\item 188. Ganden, 1996 WL 680000, at *10.
\item 189. Id.
\item 190. Id.
\end{itemize}
This *Ganden* ruling appears to be misguided for a number of reasons. First, the NCAA should be analogous to the Boy Scouts because it does not either own, operate or lease any of these buildings, much like the Boy Scouts do not own the private residences where the meetings are held.\(^{191}\) The NCAA functions apart from any facility where competitions are held, especially in the *Ganden* case, since Michigan State University is the sole owner of the swimming facility where the NCAA meets are held.\(^{192}\)

Secondly, Michigan State University’s facilities were not solely used for competitions sponsored by the NCAA.\(^{193}\) MSU’s ownership of the physical structure allowed the school to use these facilities for unsanctioned competitions and for recreational use that had no relation to NCAA activities.\(^{194}\) The NCAA did not deny Ganden access to the physical MSU facility; it merely denied him the ability to compete within the membership organization.\(^{195}\) The Seventh Circuit has ruled that the “ticket” to a place of public accommodation is only applicable in regards to access for a physical location or facility, not for access to participate in a group’s activities irrespective of the facility.\(^{196}\) Therefore, by virtue of Title III not including activities as a place of public accommodation, as long as the NCAA only prohibited Ganden from participating in a sanctioned activity, not access to a physical facility, NCAA certification does not function as a “ticket” to access.\(^{197}\)

Although the NCAA does not satisfy the aforementioned two-prong test for finding membership organizations to be a place of public accommodation under Title III, there also is a question as to whether this test should exist. When the Seventh Circuit used this test, it acknowledged that several federal courts had applied this test to find a membership organization was closely connected to a particular facility and therefore it was compelled to use the test as well.\(^{198}\) The court, however, expressed reservations about using a

\(^{191}\) *Id.* at *8.*  
\(^{192}\) *Id.*  
\(^{193}\) *Ganden,* 1996 WL 680000, at *8.*  
\(^{194}\) *Id.*  
\(^{195}\) *Id.*  
\(^{196}\) *Welsh,* 993 F.2d at 1271.  
\(^{197}\) *Id.* at 1269.  
\(^{198}\) *Id* at 1272.
judicially created exception to find membership organizations as a place of public accommodation.\textsuperscript{199}

The Seventh Circuit disagreed with the plaintiff’s argument that if Title III of the ADA expanded the number of establishments that were listed as public accommodations in Title II of the Civil Rights Act, and thus, the ADA should be read by the courts as including membership organizations.\textsuperscript{200} Noting there was no proof that Congress ever intended to include membership organizations or activities under Title III, the court explained:

This argument fails to recognize that had Congress intended to include membership organizations lacking a close connection to a specific facility, it would have incorporated such a mandate in the disabilities act.... In the recently enacted Disabilities Act, Congress listed over fifty specific facilities subject to regulation, but did not include membership organizations lacking a close connection to a physical facility.\textsuperscript{201}

The court pointed out that, on two separate occasions, Congress had an opportunity to include membership organizations into this law, but chose otherwise.\textsuperscript{202} The Seventh Circuit felt this made Congress’ intent clear and thus refused to read language into the statute language that was obviously not in there.\textsuperscript{203} The court determined that Congress did not intend for voluntary membership organizations such as the NCAA to be places of public accommodation under Title III of the ADA.\textsuperscript{204}

\textsuperscript{199} Id. at 1271 (“Certainly, federal judges must not reach out and grasp at straw in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress.”).

\textsuperscript{200} Id.

\textsuperscript{201} Welsh, 993 F.2d at 1271.

\textsuperscript{202} Id. at 1270. The court also informed the plaintiffs that if they “wish to change the law, the proper forum is the Congress of the United States where all interested parties will be entitled to engage in the full panoply of hearings and arguments before the congressional and senatorial committees.” Id. at 1271.

\textsuperscript{203} Id.

\textsuperscript{204} Id.
Elitt v. U.S.A. Hockey supports the view that membership organizations are not a place of public accommodation under Title III. In Elitt, the plaintiff, a child with ADD, brought action under Title III of the ADA to compel the Creve Coeur Hockey Club to allow him to participate. The defendant, U.S.A. Hockey, was an umbrella organization that sponsored U.S. Amateur hockey clubs such as Creve Coeur.

The Eastern District of Missouri took a literal interpretation of Title III, similar to the Seventh Circuit in Welsh, finding that U.S.A. Hockey was not covered by the ADA because membership organizations “are not sufficiently similar to any of the listed private entities in § 12181(7).” Although the court felt that membership organizations are not places of public accommodation, it was still compelled to use the same two part test used in Welsh and Ganden for “instructive analysis.” Consequently, the court determined U.S.A. Hockey was: (1) not affiliated with the facility that was open to the public; (2) membership in U.S.A. Hockey was not a “ticket” to use the facilities; and (3) the plaintiff was not denied access to the facility—he was only denied the opportunity to participate in the intergroup activities.

2. Does the NCAA Operate the Facilities of Member Schools?

Ganden’s claimed that the NCAA was a place of public accommodation because the NCAA “operates” the athletic facilities where intercollegiate competitions are held. The court agreed with Ganden, saying that there was a reasonable probability that he could prove that the NCAA demonstrated more control over the facilities of a member institution than just determining whether a student could participate in sanctioned competitions.

206. Id. at 218.
207. Id.
208. Id. at 223.
209. Id.
212. Id.
In reaching this conclusion the court disagreed with the case of *Johannesen v. NCAA.*\(^{213}\) In this case, the plaintiff, an Arizona State University football recruit, sought to enjoin the NCAA from declaring him ineligible because he did not satisfy the core courses requirement.\(^{214}\) The plaintiff claimed he was discriminated on the basis of his learning disability and brought suit under Title III of the ADA.\(^{215}\) The *Johannesen* court relied on *Sandison v. Michigan High School Athletic Association* to rule that the NCAA was not operating a place of public accommodation and even if the NCAA was operating ASU’s facilities it could not be sued under Title III.\(^{216}\)

In *Sandison,* the court found that the Michigan High School Athletic Association was a public entity.\(^{217}\) Since the MHSAA was not a private entity it could not be sued under Title III of the ADA.\(^{218}\) The Sixth Circuit held that:

\[
\text{\textsection 12181(7) ... make[s] clear that public accommodations are operated by private entities, not public entities. The plaintiffs complain that the MHSAA age eligibility rule precludes them from equally participating in track events held on public school grounds or, presumably for cross-country events, in public parks. Public school grounds and public parks are of course operated by public entities, and thus cannot constitute public accommodations under Title III.}^{219}
\]

Applying this finding to *Ganden,* even if the NCAA was closely connected to the facilities at Michigan State and operated these facilities, because MSU is a public school, Ganden could not seek relief against the NCAA under Title III. The only remedy for Ganden would be through Title II, which is not possible as long as

\(^{214}\) Id. at 1.
\(^{215}\) Id. at 2.
\(^{216}\) See also 64 F.3d 1026, 1036 (6th Cir. 1995).
\(^{217}\) Id
\(^{218}\) Id
\(^{219}\) Id.
Tarkanian continues to be the law of the land.\textsuperscript{220} Therefore, even if Ganden could prove that the NCAA operated the facilities at MSU, there could be no possible redress under Title III of the ADA.

The court in Ganden, however, offered two arguments why Johannesen should not control.\textsuperscript{221} First, the court held that "parties may not escape the requirements of the ADA through multiple ownership or management of a facility."\textsuperscript{222} Although MSU may have owned and operated the swimming facilities, the NCAA could also operate and own the facility.\textsuperscript{223} The court also cited Welsh and mentioned that the Seventh Circuit had found that "precedent applied Title II of the CRA to organizations 'that conducted meetings in public facilities or operated facilities open to the public like swimming pools, gyms, sports fields and golf courses.'"\textsuperscript{224}

While Welsh did find that if a membership organization operates facilities open to the public it could be a place of public accommodation, the court reached this conclusion by asking the question, "what did the person join?"\textsuperscript{225} To answer this, the court must determine the purpose of the organization.\textsuperscript{226} In its analysis, the Seventh Circuit distinguished the YMCA, a membership organization that was found to be a place of public accommodation, from the Boy Scouts.\textsuperscript{227} The purpose of the YMCA was to operate facilities where people "sleep, reside or exercise" by owning gymnasiums and overnight accommodations.\textsuperscript{228} Without these facilities, the purpose of the YMCA would be thwarted.\textsuperscript{229}

When an individual would join the Boy Scouts it was for a reason completely on the other end of the spectrum from the reasons for joining the YMCA. An individual's goal in becoming a Boy Scout would be to join a group of young boys and "foster

\textsuperscript{220} Tarkanian, 488 U.S. at 179.
\textsuperscript{221} Ganden, 1996 WL 680000, at *11.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at *11 n.8; Welsh, 993 F.2d at 1272.
\textsuperscript{225} Welsh, 993 F.2d at 1275.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 1273. See also Hornick v. Noyes, 708 F.2d 321 (7th Cir. 1983).
\textsuperscript{228} Welsh, 993 F.2d at 1273-74.
\textsuperscript{229} Id. at 1274.
respect for God, their country and their fellow man" while under the guidance of adult leadership. Arguably, no one joins the Boy Scouts solely for the purpose of using its facilities.

The NCAA is also distinguishable from the YMCA. The purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the collegiate experience. The NCAA does this through its focus on allowing a student athlete to get a proper education while integrating with the student body. Furthermore, these goals should be achieved while the NCAA maintains the amateur status for its athletes. In order to carry out this function, the NCAA must obviously offer athletic competitions. However, even Ganden found that "merely operating the competitions themselves" does not constitute "operating" the entire facility.

The purpose of the NCAA is not to operate the individual facilities at each member school, rather the NCAA operates wholly apart from any of individual member school’s particular facilities.

In Johannesen, the plaintiff claimed he was denied access to a "place." Ruling in favor of the defendant, the court found that Title III controlled private entities operating public accommodations, not "places." The Seventh Circuit disagreed with this interpretation of Title III, saying the term "place" in the legislation was not merely a term of convenience. Furthermore, the court felt it necessary to adhere to the rule of statutory construction because a court should not construe a statute in a way that makes "words or phrases meaningless, redundant or superfluous." However, it seems hard to believe that the term "place" was just a mere word to be added in the statute when Congress found it necessary to include such an extraordinary amount of facilities in the text.

The Seventh Circuit further took exception to the argument that the word "place" was only in the statute because it would have

230. Id. at 1269.
235. Welsh, 993 F.2d at 1267.
236. Id.
been too difficult for Congress to draft the statute without this word. The court stated,

> We fail to understand why the dissent claims that Congress was incapable of drafting the statute without the word ‘place’ Congress could have very easily have drafted the statute without using the word and instead written “each of the following, if it serves the public, is a public accommodation within the meaning of this title…,” but Congress made a considerate and deliberate choice not to do [this].

The court asserted that the clear language of Title III obviously intended for “places” of public accommodation to be listed. Since a membership organization is not a physical place, a membership organization should not be deemed a place of public accommodation.

There are a number of cases, however, that support the ruling that “place” of public accommodation applies only to physical places. In Stoutenborough v. NFL, the court found that the National Football League (“NFL”), the media networks and the local media affiliates do not fall under the definition of places of public accommodation under Title III of the ADA.

The plaintiff, an individual with a hearing impairment, sued the NFL over its blackout rule, which prohibited the televised broadcast of a game within the home territory of team on the day a game was hosted and the stadium was not sold out. The court found that even though the hearing impaired individual may view the game at a place of public accommodation and the game may be played at a place of accommodation, the broadcast of a game is not

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237. *Id.* at 1273.
238. *Id.*
239. *Id.*
240. *Welsh*, 993 F.2d at 1273.
241. *See Clegg v. Cult Awareness Network*, 18 F.3d 752 (9th Cir. 1994) (holding that nonprofit organization providing information to the public concerning cults and support to former cult members was not a “place” of public accommodation under Title II of the Civil Rights Act).
242. 59 F.3d 580 (6th Cir. 1995).
a public service. The court adopted a literal interpretation of Title III, finding that in order to be a “place” of public accommodation, the entity must be a place, thus a television broadcast was clearly not a “place.”

V. HOW WILL THE COURT RULE ABOUT “PUBLIC ACCOMMODATIONS” IN THE FUTURE?

The recent line of cases addressing this issue appear to be leaning in the direction of finding the NCAA to be a place of public accommodation. In addition to the decisions in *Ganden* and *Butler*, the U.S. Department of Justice has publicly stated that the NCAA is a place of public accommodation under Title III and was in violation of the ADA by prohibiting Ganden from competing during his freshman year. This issue, however, has yet to reach any court of appeals. In *Ganden*, the Seventh Circuit never had the opportunity to affirm or overturn Judge Manning’s ruling that the NCAA was likely to be found as a place of public accommodation, because Ganden had his motion for an injunction denied on a separate issue.

The only Seventh Circuit case to deal with a similar issue was *Welsh*, which was decided only four years prior to *Ganden*. The Seventh Circuit ruled strongly in this case that membership organizations were not a place of public accommodation. The Seventh Circuit adopted a literal interpretation of Title III and adamantly adhered to Congressional intent when it decided not to read a “membership organization” into the exhaustive list of private entities operating a place of public accommodation. Moreover, even though the Seventh Circuit accepted that there was

243. Id. at 583.
244. Id.
247. *Welsh*, 993 F.2d at 1278 (“It is interesting to note that the challenged Boy Scout Oath is strikingly similar to the one expressed by our Founding Fathers on July 4, 1776 in the Declaration of Independence....Certainly this Court must not upset such enduring principles by stretching beyond recognition a statute drafted to guide equal access to public facilities.”).
an exception that allowed a membership organization to be a place of public accommodation, the court expressed reservations about using this two part test. In light of the strong feelings that the Seventh Circuit expressed towards preventing the Boy Scouts from being deemed a place of public accommodation, it is more than likely that Judge Manning's findings in *Ganden* would have been overturned.

Accordingly, excluding policy consideration and looking only at the express language of the ADA, it is hard to see how the NCAA could be sued under Title III. The list of private entities operating a place of public accommodation under §12181(7) is quite exhaustive, making it hard to imagine a legitimate way of classifying the NCAA as a place of public accommodation. This statute lists over fifty entities ranging from zoos, to homeless shelters, to bakeries and nursery schools. Nowhere in this section is an entity listed that is not an actual, physical "place," making it difficult to accept a membership organization as a place of public accommodation, regardless of the two part test.

Although the language of the statute is plainly in favor of the NCAA there is still the possibility for individuals with disabilities to obtain redress under Title III. The fact that the Supreme Court has ruled that the NCAA is not a governmental body, thereby prohibiting the NCAA from being sued under Title II of the ADA may weigh against the NCAA in the future. Since the NCAA clearly does not fall under Title II, the only avenue for individuals with disabilities would have to be under Title III. It is hard to believe that the NCAA will be able to remain untouched by the provisions of the ADA, especially after the increased pressure that the Justice Department has begun to put on the NCAA.

The well-documented position of the Justice Department combined with public sentiment for student athletes with learning disabilities will continue to put this issue in the news. These two factors, however, cannot overcome the reality that it will be difficult to sue the NCAA under Title III as long as the language of the ADA is so explicit. As §12181(7) reads today, it is difficult to
find an exception under which the NCAA would fit. Obviously, if Title III of the ADA is amended to include private membership organizations, then the NCAA could be a “place” of public accommodation. Additionally, if the Supreme Court was to rule that the NCAA is a place of public accommodation, the NCAA would be open to lawsuits under Title III of the ADA.

Until that day, however, the law clearly favors the NCAA. Justice, however, has eyes of its own and often looks beyond the language of the law and looks to policy. It is hard not to feel for students such as Chad Ganden, Toure Butler and the thousands of other student athletes with learning disabilities that have overcome their academic hardships to excel at athletics. Policy may dictate a change in how the NCAA is defined under the law in order to help these student athletes.

While the tide may be turning against the NCAA time has not yet run out. As long as the language of the ADA remains unchanged, public policy and public sentiment should not rule the day and the NCAA should not be considered a private entity operating a place of public accommodation under Title III of the ADA.

Robert J. Adelman