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Medical Ineligibility for Athletic Participation:

Is it Exclusion Based on Disabling Conditions?

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Athletes with mental and physical impairments have been denied the right to participate in high school and collegiate athletics based on medical eligibility requirements that have excluded them because of their disabilities. In the 1970's and 1980's, athletes with physical disabilities, ranging from severe cardiac disorders to the absence of a paired organ such as a kidney, have been excluded from participation based on medical eligibility guidelines established by the American Medical Association (AMA).[1]

This paper will examine the avenues of redress for students denied the right to participate in athletics, the AMA's recommendations for participation in sports, statutory protection of the disabled, and the case law that has addressed the issue of exclusion of students from athletics based on disability.

ELIGIBILITY FOR ATHLETIC PARTICIPATION

Most state constitutions delegate authority to a Commissioner of Education or an educational governing body to establish administrative rules and regulations that are legally binding. Included in virtually all state regulations are medical eligibility requirements for athletic participation. Generally, administrative rules and regulations empower school districts to establish school policies and monitor adherence to rules such as eligibility requirements for participation in athletics or other school activities. In addition to school district eligibility standards, private athletic associations or leagues also may have eligibility standards that school districts must comply with in order to compete in the league.

AMA Medical Eligibility Recommendations

Most school districts have a designated school or team physician. The physician either volunteers or is paid to provide medical services such as attendance at home games and medical examinations for prospective athletes. The nature and extent of the medical exam for prospective athletes has not been standardized. However, the American Academy of Pediatrics, has developed guidelines to assist physicians in making medical eligibility decisions. These guidelines have been revised several times over the past three decades.[2] The guidelines were never intended to be absolute eligibility criteria. However, once published and without an alternative authority, most physicians have adhered closely to the prevailing recommended medical eligibility standards.

In each revision, the AMA guidelines have become more inclusive with regard to its recommendations for athletes with physical abnormalities. For example, in the 1972 guidelines, absence of a paired organ such as a kidney was listed as a disqualifying condition. In the 1988 guidelines, published by the American Academy of Pediatrics' Committee on Sports Medicine, "Recommendations for Participation in Competitive Sports," (see figure 1 and table 1) the absence of a paired was no longer listed as a condition that had sport participation restrictions. In addition, for some medical conditions the 1988 guidelines encouraged physicians to individually evaluate specific conditions such as decreased or loss of vision in one eye rather than categorizing the impairment as an absolute disqualifying condition.

Figure 1*

1988 American Academy of Pediatrics Committee on Sports Medicine Recommendations for Participation in Competitive Sports

Classification of Sports

Contact / Collision	Limited Contact/Impact	Noncontact Strenuous Strenuous	Noncontact Moderately	Noncontact Nonstrenuous
Boxing	Baseball	Aerobic Dancing	Badminton	Archery
Field hockey	Basketball	Crew	Curling	Golf
Football	Bicycling	Fencing	Table tennis	Riflery
Ice hockey	Diving	Field		
Lacrosse	Field	Discus		
Martial arts	High jump	Javelin		
Rodeo	Pole vault	Shot put		
Soccer	Gymnastics	Running		
Wrestling	Horseback riding	Swimming		
	Skating	Tennis		
	Ice	Track		
	Roller	Weight lifting		
	Skiing			
	cross-country			
	downhill			
	water			
	Softball			
	Squash Handball			
	Volleyball			

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As shown in figure one, participation for disabling conditions were recommended according to sport category: contact/collision; limited contact/impact; or noncontact. Within the noncontact category, sports are classified as strenuous, moderately strenuous, or nonstrenuous. These terms are not defined, nor is it immediately apparent what characteristics were used for sport classification. For example, field hockey and soccer have been placed in the "contact/collision" category with boxing, football, martial arts, and wrestling; while basketball, gymnastics, diving, and volleyball are in the "limited contact/impact" category. Similar inconsistencies occur in the noncontact categories for the degree of "strenuousness" of a sport. Badminton, for example, is categorized as moderately strenuous with table tennis, while tennis, discus, javelin, and shot put are listed as strenuous sport activities. It is unclear what criteria was used to define each of the categories, or how sport activities were evaluated for inclusion in these categories.

In contrast to the 1988 guidelines, the most current guideline (1994) revisions (see table 2) include separate categories for classifying the

Table 1*

1988 American Academy of Pediatrics Committee on Sports Medicine Recommendations for Participation in Competitive Sports

	Contact /Collision	Limited Contact/	Noncontact Strenuous Impact	Noncontact Moderately Strenuous	Noncontact Non-Strenuous
Atlantoaxial instability *Swimming: no butterfly, breast stroke, or diving starts	No	No	Yes*	Yes	Yes
Acute illnesses Needs individual assessment, e.g. contagiousness to others, risk of worsening illness	*	*	*	*	*
Cardiovascular					
Carditis	No	No	No	No	No
Hypertension	Yes	Yes	Yes	Yes	Yes
Mild	*	*	*	*	*
Moderate	*	*	*	*	*
Severe	+	+	+	+	+
Congenital heart disease * Needs individual assessment +Patients with mild forms can be allowed a range of physical activities; patients with moderate or severe forms, or who are postoperative, should be evaluated by a cardiologist before athletic participation.					
Eyes					
Absence or loss of function of one eye	*	*	*	*	*
Detached retina	+	+	+	+	+
* Availability of American Society for Testing and Materials (ASTM)- approved eye guards may allow competitor to participate in most sports, but this must be judged on an individual basis. + Consult ophthalmologist					
Inguinal hernia	Yes	Yes	Yes	Yes	Yes
Kidney: Absence of one	No	Yes	Yes	Yes	Yes
Liver: Enlarged	No	No	Yes	Yes	Yes
Musculoskeletal disorders * Needs individual assessment	*	*	*	*	*
Neurologic					
History of serious head or spine trauma, repeated concussions, or craniotomy	*	*	*	*	*
Convulsive disorder					
Well controlled	Yes	Yes	Yes	Yes	Yes
Poorly controlled	No	No	No	No	No
* Needs individual assessment + No swimming or weight lifting + No archery or riflery					
Ovary: absence of one	Yes	Yes	Yes	Yes	Yes
Respiratory					
Pulmonary insufficiency	*	*	*	*	*
Asthma	Yes	Yes	Yes	Yes	Yes
* May be allowed to compete if oxygenation remains satisfactory during a graded stress test.					
Sickle cell trait	Yes	Yes	Yes	Yes	Yes
Skin: Boils, herpes, impetigo, scabies *No gymnastics with mats, martial arts, wrestling, or contact sports until not contagious	*	*	Yes	Yes	Yes
Spleen: enlarged	No	No	No	Yes	Yes
Testicle: Absent or undescended * Certain sports may require protective cup.[3]	Yes*	Yes*	Yes	Yes	Yes

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degree of "strenuousness" and "contact" (compare figure 1 to figures 2 and 3) for each sport. These classifications appear rather general, which may make it difficult for physicians who are unfamiliar with certain sports to compare the physical demands of the sport in relation to the medical condition being evaluated. The 1994 guidelines give more in-depth information regarding risk factors for participation for each medical condition listed. Most medical conditions listed (except caridits, fever and diarrhea) are given "qualified yes" under "recommendation" with an emphasis on individual evaluation of athletes with the condition. Thus, it appears that physi-

Figure 2**

1994 American Academy of Pediatrics Committee on Sports Medicine and Fitness

Medical Conditions Affecting Sports Participation

Classification of Sports by Contact

Contact/Collision	Limited Contact	Noncontact
Basketball	Baseball	Archery
Boxing*	Bicycling	Badminton
Diving	Cheerleading	Body building
Field Hockey	Canoeing / kayaking (white water)	Bowling
Football	Fencing	Canoeing / kayaking (flat water)
Flag	Field	Crew / rowing
Tackle	High jump	Curling
Ice Hockey	Pole vault	Dancing
Lacrosse	Floor hockey	Field
Martial Arts	Gymnastics	Discus
Rodeo	Handball	Javelin
Rugby	Horseback riding	Shot put
Ski jumping	Racquetball	Golf
Soccer	Skating	Orienteering
Team handball	Ice	Power lifting
Water polo	Inline	Race walking
Wrestling	Roller	Riflery
	Skiing	Rope jumping
	Cross-country	Running
	Downhill	Sailing
	Water	Scuba diving
	Softball	Strength training
	Squash	Swimming
	Ultimate frisbee	Table tennis
	Volleyball	Tennis
	Windsurfing / surfing	Track
		Weight lifting

*Participation not recommended.

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cians have greater discretion in making their recommendation based on the 1994 guidelines. Furthermore, a physician's decision to allow participation would be less likely to be contraindicated by the guidelines, making them less vulnerable to a malpractice claim in the event of disability related injury.

AVENUES OF REDRESS FOR MEDICALLY DISQUALIFIED ATHLETES

Administrative Appeals

Athletes declared medically ineligible have several options for challenging their disqualification. The team physician's decision can be administratively appealed to the next level of authority such as the superintendent or the school board. In most instances, however, the physician's decision usually is not overturned by an administrative authority. Fear of liability in the event of injury to an athlete with a disability is often a determining factor in school district decisions to disallow participation, and for this reason, medical judgments made by physicians generally have not been administratively overruled.

In most states, administrative appeals up through the Commissioner of Education (or other designated governing body) must be exhausted before the courts will hear a case. Some states have several layers of appeal before a case reaches the final administrative level. In New York, for example, state law provides the Commissioner of Education with the final authority

Figure 3*

1994 American Academy of Pediatrics Committee on Sports Medicine and Fitness
Medical Conditions Affecting Sports Participation

Classification of Sports by Strenuousness

<——————— High to Moderate Intensity ———————> <——Low Intensity——>

High to Moderate Dynamic and Static Demands	High to Moderate Dynamic and Low Static Demands	High to Moderate Static and Low Demands	Low Dynamic and Low Static Demands
Boxing*	Badminton	Archery	Bowling
Crew / rowing	Baseball	Auto racing	Cricket
Cross-country skiing	Basketball	Diving	Curling
Cycling	Field Hockey	Equestrian	Golf
Downhill skiing	Lacrosse	Field events (jumping)	Riflery
Fencing	Orienteering	Field events (throwing)	
Football	Ping-pong	Gymnastics	
Ice Hockey	Race walking	Karate or judo	
Rugby	Racquetball	Motorcycling	
Running (sprint)	Soccer	Rodeoing	
Speed skating	Squash	Sailing	
Water polo	Swimming	Ski jumping	
Wrestling	Tennis	Water skiing	
	Volleyball	Weight lifting	

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TABLE 2**

1994 American Academy of Pediatrics Committee on Sports Medicine and Fitness

MEDICAL CONDITIONS AFFECTING SPORTS PARTICIPATION

This table is designed to be understood by medical and nonmedical personnel. In the "Explanation" section below, "needs evaluation means that a physician with appropriate knowledge and experience should assess the safety of a given sport for an athlete with the listed medical condition. Unless otherwise noted, this is because of the variability of the severity of the disease or of the risk of injury among the specific sports in figure 2 (classification of sports).

Condition		May Participate?
Atlantoaxial instability (instability of the joint between cervical vertebrae 1 and 2)		Qualified Yes
Explanation:	Athlete needs evaluation to assess risk of spinal cord injury during sports participation.	
Bleeding disorder		
Explanation:	Athlete needs evaluation.	Qualified Yes
Cardiovascular diseases		
Carditis (inflammation of the heart)		No
Explanation:	Carditis may result in sudden death with exertion.	
Hypertension (high blood pressure)		Qualified Yes
Explanation:	Those with significant essential (unexplained) hypertension should avoid weight and power lifting, body building, and strength training. Those with secondary hypertension (hypertension caused by a previously identified disease), or severe essential hypertension, need evaluation. Reference 4 defines significant and severe hypertension.	
Congenital heart disease (structural heart defects present at birth)		Qualified Yes
Explanation:	Those with mild forms may participate fully; those with moderate or severe forms, or who have undergone surgery, need evaluation. Reference 3 defines mild, moderate, and severe disease for the common cardiac lesions.	
Dysrhythmia (irregular heart rhythm)		Qualified Yes
Explanation:	evaluation because some types require therapy or make certain sports dangerous, or both.[3]	
Mitral valve prolapse (abnormal heart valve)		Qualified Yes
Explanation:	Those with symptoms (chest pain, symptoms of possible dysrhythmia) or evidence of mitral regurgitation (leaking) on physical examination need evaluation. All others may participate fully.[3]	
Heart murmur		Qualified Yes
Explanation:	If the murmur is innocent (does not indicate heart disease), full participation is permitted. Otherwise the athlete needs evaluation (see congenital heart disease and mitral valve prolapse above).	
Cerebral palsy		Qualified Yes
Explanation:	Athlete needs evaluation.	
Diabetes mellitus		Yes
Explanation:	All sports can be played with proper attention to diet, hydration, and insulin therapy. Particular attention is needed for activities that last 30 minutes or more.	

Diarrhea		Qualified No
Explanation:	Unless disease is mild, no participation is permitted, because diarrhea may increase the risk of dehydration and heat illness. See "Fever" below.	
Eating disorders		Qualified Yes
Anorexia nervosa		
Bulimia nervosa		
Explanation:	These patients need both medical and psychiatric assessment before participation.	
Eyes		Qualified Yes
Functionally one-eyed athlete		
Loss of an eye		
Detached retina		
Previous eye surgery or serious eye injury		
Explanation:	A functionally one-eyed athlete has a best corrected visual acuity of <20/40 in the worse eye. These athletes would suffer significant disability if the better eye was seriously injured as would those with loss of an eye. Some athletes who have previously undergone eye surgery or had a serious eye injury may have an increased risk of injury because of weakened eye tissue. Availability of eye guards approved by the American Society for Testing Materials (ASTM) and other protective equipment may allow participation in most sports, but this must be judged on an individual basis.[9,10]	
Fever		No
Explanation:	Fever can increase cardiopulmonary effort, reduce maximum exercise capacity, make heat illness more likely, and increase orthostatic hypotension during exercise. Fever may rarely accompany myocarditis or other infections that may make exercise dangerous.	
Heat illness, history of		Qualified Yes
Explanation:	Because of the increased likelihood of recurrence, the athlete needs individual assessment to determine the presence of predisposing conditions and to arrange a prevention strategy.	
HIV infection		Yes
Explanation:	Because of the apparent minimal risk to others, all sports may be played that the state of health allows. In all athletes, skin lesions should be properly covered, and athletic personnel should use universal precautions when handling blood fluids with visible blood.[6]	
Kidney, absence of one		Qualified Yes
Explanation:	Athlete needs individual assessment for contact/ collision and limited contact sports.	
Liver, enlarged		Qualified Yes
Explanation:	If the liver is acutely enlarged, participation should be avoided because of risk of rupture. If the liver is chronically enlarged, individual assessment is needed before collision/contact or limited contact sports are played.	
Malignancy		Qualified Yes
Explanation:	Athlete needs individual assessment.	
Musculoskeletal disorders		
Explanation:	Athlete needs individual assessment.	
Neurologic		Qualified Yes
History of serious head or spine trauma, severe or repeated concussions, or craniotomy.[5,11]		
Explanation:	Athlete needs individual assessment for collision/ contact or limited contact sports, and also for noncontact sports if there are deficits in judgment or cognition. Recent research supports a conservative approach to management of concussion.[11]	

Convulsive disorder, well controlled		Yes
Explanation:	Risk of convulsion during participation is minimal.	
Convulsive disorder, poorly controlled		
Explanation:	Athlete needs individual assessment for collision/contact or limited contact sports. Avoid the following noncontact sports: archery, riflery, swimming, weight or power lifting, strength training, or sports involving heights. In these sports, occurrence of a convulsion may be a risk to self or others.	
Obesity		Qualified Yes
Explanation:	Because of risk of heat illness, obese persons need careful acclimatization and hydration.	
Organ transplant recipient	Qualified Yes	
Explanation:	Athlete needs individual assessment.	
Ovary, absence of one		Yes
Explanation:	Risk of severe injury to the remaining ovary is minimal.	
Respiratory		
Pulmonary compromise including cystic fibrosis		Qualified Yes
Explanation:	Athlete needs individual assessment, but generally all sports may be played if oxygenation remains satisfactory during a graded exercise test. Patients with cystic fibrosis need acclimatization and good hydration to reduce the risk of heat illness.	
Asthma		Yes
Explanation:	With proper medication and education, only athletes with the most severe asthma will have to modify their participation.	
Acute upper respiratory infection		Qualified Yes
Explanation:	Upper respiratory obstruction may affect pulmonary function. Athlete needs individual assessment for all but mild disease. See "Fever" above.	
Sickle cell disease		Qualified Yes
Explanation:	Athlete needs individual assessment. In general, if status of the illness permits, all but high exertion, collision/contact sports may be played. Overheating, dehydration, and chilling must be avoided.	
Sickle cell trait		Yes
Explanation:	It is unlikely that individuals with sickle cell trait (AS) have an increased risk of sudden death or other medical problems during athletic participation except under the most extreme conditions of heat, humidity, and possibly increased altitude.[12] These individuals, like all athletes, should be carefully conditioned, acclimatized, and hydrated to reduce any possible risk.	
Skin: boils, herpes simplex, impetigo, scabies, molluscum contagiosum		Qualified Yes
Explanation:	While the patient is contagious, participation in gymnastics with mats, martial arts, wrestling, or other collision/contact or limited collision/contact sports is not allowed. Herpes simplex virus probably is not transmitted by mats.	
Spleen, enlarged		Qualified Yes
Explanation:	Patients with acutely enlarged spleens should avoid all sports because of risk of rupture. Those with chronically enlarged spleens need individual assessment before playing collision/contact or limited contact sports.	
Obesity		Qualified Yes
Explanation:	Because of risk of heat illness, obese persons need careful acclimatization and hydration.	
Testicle, absent or undescended		Yes
Explanation:	Certain sports may require a protective cup	

for decisions regarding administrative rules and regulations.[3] The Commissioner's decision will not be judicially overruled unless the decision is found to be arbitrary, capricious, or illegal.[4] Thus, even when school officials' decisions are controversial, or at the final level of administrative appeal it is upheld by the Commissioner, it is unlikely to be judicially overturned. From the perspective of a student who wishes to challenge an issue like athletic eligibility standards, the long administrative appeals process can often result in an issue being moot by the time the final appeal is heard, and there is little probability that the courts will rule in favor of the student.

Preliminary Injunctions

In an effort to get timely judgments, athletes who choose to challenge decisions in the courts, based on state or federal laws, can seek a preliminary injunction enjoining a school district from barring their participation while awaiting full judicial review of the case. Although this may result in a more timely judgment, from a legal perspective, there is a significant difference in the probability of success for the athlete. When seeking a preliminary injunction, the burden of proof is on the athlete to establish a *prima facie* case that the court will ultimately rule in his or her favor. In the case of disabled athletes, they must prove they are qualified individuals with a disability, have been excluded from an activity because of their disability, and that the case, on its merits, has a clear showing of probable success, or that they would suffer irreparable injury as a result of their exclusion. Thus, disabled athletes seeking preliminary injunctions may get more timely relief, however, the criteria for judicial review places a higher burden on the plaintiff than on the defendant.

FEDERAL STATUTORY PROTECTION

The Rehabilitation Act of 1973 (RA)[5] and the American with Disabilities Act of 1990 (ADA)[6] are federal statutes that provide disabled students with a direct appeal to the courts for discrimination claims. Although disabled students can choose to administratively appeal a decision, they are not legally required to do so. Although circumventing the administrative appeals process is helpful to disabled student seeking redress, legal proceedings can take years to complete. When students challenge an issue like athletic eligibility, even a small time delay can prevent them from participating for their four years of eligibility.

Section 504 of the Rehabilitation Act of 1973

Noting that disabled individuals in our society have been subjected to invidious intentional and unintentional discrimination, Congress expressly designed the RA to prohibit unjustified discrimination against disabled persons. Section 504 of the RA states:

> no otherwise qualified individual with handicaps. . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .[7]

"Individual with handicap" is defined as:

> any person who (I) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, (iii) is regarded as having such an impairment.[8]

The term "otherwise qualified" has been clarified since the RA's adoption. The Supreme Court in *Southwestern Community College v. Davis*,[9] ruled that a hearing disabled student was not *otherwise qualified* for a nursing program because she was unable to meet all program requirements *inspite of* her handicap. In its decision, the court acknowledged that the Act does not require educational institutions to disregard the impairments of disabled individuals, or to make "substantial modifications" in their programs in order to allow persons to participate. It only requires that students not be excluded or declared ineligible *because of* their disability. The court's interpretation of "substantial modification" was reasonable accommodation that would not place undue financial hardship on an institution or require substantial modification of a program. The court cautioned that an unwillingness to make reasonable accommodations

may be considered discriminatory.

In *School Board of Nassau County, Fla. v. Arline,*[10] the Supreme Court further clarified its position on exclusion based on medical qualifications in a case involving a teacher with tuberculosis. It held that the decision to exclude an individual from a program must be based on "reasonable medical judgments given the state of medical knowledge"[11] and the judgments must be based on the actual facts and circumstances regarding an individual's medical status and not unfounded perceptions of his/her status based on perceptions regarding his/her disability. It also held that the RA does not prohibit disparate treatment of disabled individuals, particularly when participation may impact the health and safety of others.

In order for the RA to apply to athletes who have been declared medically ineligible for participation, he/she must be legally defined as an "individual with a handicap" and athletics must be considered a "major life activity". Major life activities were defined in the statute as, "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[12] Although not on the initial list of major life activities, since the adoption of the Act, further clarification has been defined in the *Code of Regulations*[13] which explicitly includes participation in athletics as activities covered by the Act. In addition, The *Code of Regulations* also defines "qualified handicapped individual" as one who meets the academic and technical standards required for admission or participation."[14] Technical standards include all non-academic admissions criteria that are essential to participation.

Americans with Disabilities Act of 1990

The ADA was enacted by Congress to extend the safeguards provided by the RA. In framing the Act, Congress stated that, "individuals with disabilities continually encounter various forms of discrimination including. . . overprotective rules and policies and the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals".[15]

The ADA's public accommodations and public services subchapters require that all secular public and private schools as well as secular colleges and universities comply with its mandates. Public schools and state universities fall under the mandates of the public services provisions and are considered public entities. Private schools and organizations fall under the public accommodations mandates. The public accommodations provision states:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[16]

The ADA's definition of "disability" is identical to "individual with handicap" as defined by the RA. Congress updated its terminology, but did not change the substance of its definition. Regarding participation, the ADA also specifically prohibits:

> imposing eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying the goods, services,. . . unless it can be shown to necessary for the provisions of the goods, services, facilities, privileges, advantages, practices, and procedures.[17]

The statute requires "reasonable modification in policies, practices, and procedures" to accommodate disabled individuals unless the accommodation would result in a fundamental modification of the service or program, or provide an "undue burden" on the public entity. The ADA also requires individual evaluation of persons in order to make the determination that they are not a qualified individual in spite of their disability.[18]

An important distinction between the RA and ADA is that the RA defines "qualified handicapped individual" as one who with reasonable accommodation can perform the essential functions of the position in question without endangering the health and safety of the individual or others. The ADA defines "qualified individual with a disability" without reference to the safety

risk to one's self or others in the public services and public accommodations subchapters. The employment subchapter includes a threat to the health and safety to others as a defense against a discrimination claim. However, injury to self is not listed as grounds for a defense.[19]

Whether the harm to others defense against discrimination in the employment subchapter will be applied to the public services and public accommodations subchapters of the statute has not been addressed by the courts. This issue could be significant in the case of an athlete who has a physical disability that might impact the safety of others. For example, visually impaired athletes may put themselves or others at risk if they do not have the peripheral vision to see potentially dangerous play developing around them and someone is injured as a result.

RELEVANT CASE LAW

State Statutory Case Law

Twenty-three years ago, Joseph Spitaleri, a high school freshman, who had vision in only one eye was declared medically ineligible to play interscholastic football because of his visual impairment.[20] According to the *Regulations of the Commissioner of Education* (New York), students need to be medically cleared by the school physician prior to participating on an athletic team.[21] Basing his decision on the AMA guidelines for sport participation, which at that time, categorized the absence of a paired organ such as an eye or kidney as a disqualifying condition, the school physician found Spitaleri ineligible for participation.

Following statutory procedure, Following statutory procedure, Spitaleri appealed the district's decision to the Commissioner of Education. The Commissioner upheld the district's decision because it was based on "uncontradicted medical evidence that injury to the remaining organ would result in irreversible and permanent injury in his case, "total blindness".[22] Having exhausted his administrative appeals, Spitaleri filed for a preliminary injunction in state court to enjoin the school district from barring his participation while seeking judicial review of his claim. According to New York State Law, the Commissioner's decision cannot be judicially overruled unless it is arbitrary, capricious, or illegal. Spitaleri's request for a preliminary injunction was denied.

Two other medical eligibility cases followed *Spitaleri* in New York. Ironically, both were from the same school district, but resulted in different decisions. In *Pendergast v. Sewanhaka_Central High School District No. 2*,[23] the Commissioner's decision to bar the participation of a student with only one testicle was reversed by the courts. It distinguished Pendergast's disability from Spitaleri's because: (1) the remaining testicle could be effectively protected; (2) participation did not increase the risk of injury to other parts of his own body or other participants; and (3) the missing organ was not functionally necessary for sport participation.

A year later, in *Colombo v. Sewanhaka Central High School District No. 2*,[24] an athlete who was totally deaf in one ear and had fifty percent loss of hearing in the other ear was barred from the contact sports of football, lacrosse, and soccer. Two experts in the education of the deaf and a private physician testified that participation was appropriate, and the parents were willing to sign a waiver releasing the district from liability. The plaintiff testified that non-participation would deny him the opportunity for a scholarship and would negatively affect his attitude toward school as well as his self-esteem. Even with these persuasive arguments, the court upheld the Commissioner's decision to deny the student the right to participate. The court reasoned that the risk of total deafness, the possibility of other bodily injury due to the lack of perception of the source of sound, and the risk of injury to other participants was substantial enough to find that the Commissioner's decision was not arbitrary, capricious, or illegal.

Promulgated by the *Spitaleri* case, New York passed the "*Spitaleri Bill*"[25] which gave the courts the authority to override the Commissioner's athletic participation decisions when it found participation to be reasonably safe and in the best interests of the student. To meet these two criteria, students needed to produce affidavits from two physicians endorsing their safe participation and a verified petition from the par-

ents releasing the school district from liability in the case of a disability related injury. In two cases that followed the enactment of the Spitaleri Bill, two students who were seriously visually impaired and met the criteria set forth in the Bill were allowed to participate with the use of protective eyewear. In one of these cases, *Kampmeier v. Harris*,[26] the decision to allow the student to participate was made by a New York Appeals Court. In rendering its decision, the court stated that school district liability was not a factor to be weighed in determining the best interests of the student.

Rehabilitation Act Case Law

In the 1970's and 1980's, a number of students challenged medical eligibility guidelines based on the RA. In the case of *Kampmeier* discussed earlier, the plaintiff filed claims against the Commissioner of Education in state court based on the Spitaleri Bill, and in federal court based on the RA.[27] Although Margaret Kampmeier was successful in enjoining the school district from barring her participation in State Court, she was not granted a preliminary injunction in the Federal Court based on the RA. Kampmeier appealed the Federal District Court's decision. The Circuit court acknowledged that the plaintiffs (two similarly disabled students joined in their petition) were legally defined as handicapped and that the RA prohibits discrimination based solely on handicap. However, the court opined that the plaintiffs had not provided medical or statistical evidence that the school policy was not based on substantial justification, that under the doctrine of *parens patriae* school districts had an interest in protecting the well-being of the students. Thus, the plaintiffs' request for a preliminary injunction against the district to permit them to play was denied.

A New Jersey high school student with only one kidney challenged the school district's decision to disallow his participation in interscholastic wrestling based on an RA claim. In *Poole v. South Plainfield Board of Education*,[28] the court held that fear of liability was not substantial justification for barring a student's participation on the school's wrestling team. It stated further that the doctrine of *in loco parentis* did not permit the school district or its physician from substituting their decision for the decision of the parents. In response to the school district's claim that Poole was not otherwise qualified because he failed to meet the medical eligibility standards, the court concluded that the only reason he was unqualified was because he failed the medical exam that required two kidneys and the physician's fear of injury to his remaining kidney. The court found no other evidence that Richard Poole was not qualified to participate, and therefore, ruled in his favor allowing him to compete on the wrestling team.

In *Wright v. Columbia University*,[29] a freshman recruited to play football was subsequently declared medically ineligible to play because he had vision in only one eye. The court granted a preliminary injunction.. As in the *Poole* decision, the court indicated that since a qualified ophthalmologist determined that it was reasonably safe for Wright to play, the doctrine of *in loco parentis* was not intended to allow school officials to override the decisions of parents and students when they were aware of the risks and consequences of their decision. Accordingly, the court ruled Wright was "otherwise qualified" to participate, and indicated that disqualifying him would irreparably jeopardize his chances for a professional football career.

The *Spitaleri* decision in 1973, was based on the 1972 medical guidelines disseminated in an AMA pamphlet entitled, *A Guide for Medical Evaluation for Candidates for School Sports*, which included the absence of a paired organ as a disqualifying condition. Although the guidelines were revised in 1976, absence of a paired organ remained a disqualifying medical condition. In 1978, the Department of Health, Education and Welfare issued a Policy Interpretation of the RA that specifically prohibited disqualification based on the absence of some paired organs as an automatic disqualification for elementary and secondary school students.[30] The interpretation required individual review and approval of the athlete's condition by the physician most familiar with their condition and parental approval for participation. This policy interpretation does not address other injuries or illnesses such as cardiomyopathy or neurological disorders. The

1994 guidelines published by the Academy of Pediatrics are not as restrictive as the earlier guidelines. However, participation is contraindicated for some medical conditions.

Americans with Disabilities Act Case Law

Unlike the RA, the public accommodations subchapter of the ADA does not mention harm to self or others as a factor to be weighed in the determination of whether an individual is qualified in spite of his/her disability. The employment section of the ADA does include a "direct threat" clause as well as criteria for evaluating whether the threat is severe enough to render an individual unqualified because of his or her disability. Whether the courts will use the employment direct threat analysis for evaluating athletic eligibility cases is a question yet to be addressed by the courts. According to the ADA, there is no explicit language that would allow schools to use injury or risk of harm to others as a defense against discrimination based on disability.

Medical Malpractice Claims Against Physicians

There are few cases of athletes who have sued physicians for malpractice when they have been cleared to play and had a disability related injury. However, there have been incidents where the decision to play, inspite of physical disabilities, has led to tragic results. Hank Gathers, a star forward for the Loyola Marymount University's basketball team collapsed and died from a heart attack during a game. Gathers had been diagnosed as having cardiomyopathy, a serious cardiac arrhythmia disorder. Gather's family brought suit against several physicians for misdiagnosis, treatment, and failure to inform him of the seriousness of his condition and the high risks of his continued participation. It also claimed that the failure to inform was conspired and fraudulent. Although Gathers was on medication, it was further alleged that his heart medication dosage was reduced to improve his playing performance. Ultimately, the lawsuit was settled before trial.[31]

Marc Buoniconti, a linebacker for The Citadel, was permanently paralyzed while making a tackle in a football game. He later sued his physician for allowing him to play with a spine abnormality and a serious neck injury. Buoniconti lost his case at trial.[32] Anthony Penny, a professional basketball player, also collapsed and died during a game. Penny had a diagnosed heart disorder. Ironically, he had sued his cardiologist for barring his participation for two years because of his disability, although once cleared to play, he dropped the lawsuit.[33]

There is clear legal precedent establishing the physician's duty to inform patients of their medical status. Gallup, in her book, *Law and the Team Physician*[34] recommends careful documentation of the disclosure of an athlete's medical condition and the specific medical consequences in the event of a disability related injury. Courts have required physicians to fully inform patients of their medical status and insure that the patient has fully understood the disclosure.

The *Poole* decision was the only federal case to fully adjudicate a disabled athletes claim of discrimination on federal statutory grounds. Also based on alleged violation of the RA, the cases of *Kampmeier, Grube* and *Wright,* were requests for preliminary injunctions. In the case of *Kampeier,* the athlete was a junior high school student. Generally, the courts have allowed public school officials more latitude in invoking the *parens patriae* and *in loco parentis* doctrines in regard to decisions that affect young students. In *Wright,* the plaintiff was a college student who had been recruited to play football and given a scholarship. Given his age, the court was less inclined to allow school officials to override his decision which was supported by his parents.

Both Wright and Kampeier were visually impaired. Unlike Poole's disability (only one kidney), the lack of peripheral vision in a field sport could result in increased risk to other participants. According to the RA, exclusion may be substantially justified if participation could cause injury to self or others. Because Richard Poole's disability involved an organ which had no direct impact on his performance as a wrestler or the safety of other participants, it is difficult to say whether the court would have rendered him medically ineligible had his disability been more

performance related. In their review, the courts have consistently taken into consideration the nature of the disability and how it may affect performance in the particular sport in question. Although the court's rationale in *Poole* made it clear that the doctrine of *in loco parentis* does not give school administrators the authority to override parental decisions, this case did not address school administrators' authority when the decision involved potential injury to other participants.

CONCLUSION

In framing the ADA, seventeen years after the enactment of the RA, Congress' legislative intent was to further extend the rights of the disabled. It did not include injury to self or others as a substantial justification for excluding disabled individuals from participation in activities that are deemed too risky for them. According to the ADA, athletes who have performance related disabilities, who are qualified in spite of their disability, cannot be excluded from participating unless the court were to consider the medical exam a technical requirement that is so linked to participation that it renders them unqualified based on their inability to meet the prevailing medical eligibility standards. By virtue of the fact that students are selected for a team is strong evidence that they have met the physical requirements to play the sport.

The courts have recognized the AMA as a respected authority whose judgment it is reluctant to overrule. In 1994, the AMA revised its guidelines for sport participation guidelines for physicians. However, the fact that participation is recommended by medical condition and sport categorically, by design, disparately impacts individuals with disabilities. The 1994 guidelines give more in-depth explanations definitions of "strenuousness," and "amount of contact/collision" than the 1988 guidelines. However, it is difficult to understand what characteristics (such as player's position) was used to classify each sport into the degrees of "strenuousness" or "contact" categories. Within each sport, the physical demands placed on an individual athlete may vary considerably depending on factors such as position played and the level of competitiveness of the team. Physicians unfamiliar with specific sport demands, who rely only on the classifications provided by the guidelines, could be less than optimally informed to make an individualized recommendation for sport participation.

Although disparate impact is not proof of discrimination, the courts have made it clear that the medical evaluation process must be done on an individual basis and based on actual rather than perceived limitations.[35] It is physicians responsibility to diagnose, assess the risks of participation, and fully disclose this information to the patients. The pivotal question is, should the physician determine whether a patient should take a risk, or, does the physician's responsibility end when he or she has assessed the degree of risk and fully disclosed the information to the patient and parents?

Fear of liability is a realistic concern for physicians and school districts. However, it is not a defense against discrimination. There are few cases of athletes with disabilities who have won malpractice claims against their physicians or the authorities who have allowed them to play. However, the widely publicized tragic deaths of Gathers, Buoniconti, and Penny serve as a reminder of the high cost of taking a risk to play a game and the potential liability of those who endorse the participation of individuals with increased risk.

The legal doctrines of *parens patriae* and *in loco parentis* do not give school personnel the right to substitute their judgments for fully informed, rational decisions of students and their parents. Facially neutral eligibility criteria that are not rationally related to necessary qualifications for participation are discriminatory according to the ADA. As noted in the *Poole* decision:

> The Board has nowhere suggested that Richard was incapable of pinning his adversary to the mat or meeting the training requirements of a team sport. It is undoubtedly true that injury to Richard's kidney would have grave consequences, but so might other injuries that might befall him or any other member of the wrestling team. Hardly a year goes by that there is not one tragic death of a healthy youth as a result of competitive

sports activity. Life has risks. The purpose of section 504 is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.[36]

The legislative intent of the RA and ADA are explicitly clear: Congress intended to assure disabled individuals equal opportunity and full participation in all of life's major activities. In spite of strong legislative enactments that provide direct access for judicial review of discrimination claims, it appears as though disabled members of our society are still plagued by barriers. The ADA and RA have mandated the removal of many physical barriers that have denied them equal opportunity in the past. However, less tangible and more difficult to circumvent may be an underlying attitude of "paternalism" that prevents disabled individuals from making decisions regarding the risks they are willing to take to live their lives as fully as they are able.

References

[1] COMMITTEE ON THE MEDICAL ASPECTS OF SPORTS, AMERICAN MEDICAL ASSOCIATION. A GUIDE FOR MEDICAL EVALUATION FOR CANDIDATES FOR SCHOOL SPORTS (1972). These guidelines were subsequently revised, see *supra* note 2.

[2] In 1972 the AMA's Committee on the Medical Aspects of Sports disseminated a pamphlet ,entitled, A GUIDE FOR MEDICAL EVALUATION FOR CANDIDATES FOR SCHOOL SPORTS. New York State officially adopted these evaluation standards as guidelines for medical clearance for participation in school sports which was mandated prior to participation. According to the AMA, these guidelines are no longer used or available in print. It was based on these standards that several New York courts upheld the Commissioner of Education's decision to deny athletes absent a paired organ the right to participate in school sports. These guidelines have been revised several times. The AMA published MEDICAL EVALUATION OF THE ATHLETE: A GUIDE, in 1976. In 1988, the American Academy of Pediatrics Committee on Sports Medicine revised the guidelines and published RECOMMENDATIONS FOR PARTICIPATION IN COMPETITIVE SPORTS, 81 PEDIATRICS 737. See table 1 and figure 1. In 1994, the American Academy of Pediatrics again revised the guidelines and published MEDICAL CONDITIONS AFFECTING SPORTS PARTICIPATION, (94 PEDIATRICS 757). See table 2 and figures 2 and 3.

[3] N.Y. EDUC. LAW section 310 (McKinney 1980).

[4] *Id.*; C.P.L.R. section 7801.

[5] 29 U.S.C. 701-796 1988, (Supp. I 1989, Supp. II 1990, & Supp. III 1991).

[6] 42 U.S.C. 12101-12213 (Supp. II 1990 & Supp. III 1991).

[7] 29 U.S.C. section 706(8)(B)(West Supp. 1991).

[8] 29 U.S.C. section 706(8)(B) (West Supp. 1991). See also 34 C.F.R. section 104.3 (j)(l)(1990); 45 C.F.R. at 784.3(j)(l)(1990).

[9] 442 U.S. 397 (1979).

[10] 480 U.S. 273 (1987).

[11] *Id.* at 288.

[12] 34 C.F.R. at 104.47 (1990); 45 C.F.R. at 84.3(j)(2)(1990).

[13] 34 C.F.R. at 104.3(k)(3)(1990).

[14] 34 C.F.R. section 104.3(k)(3)(1990); 34 C.F.R. pt. 104, app. 403 (1990); 45 C.F.R. section 84.3(k)(3)(1990); 45 C.F.R. pt. 84 app. A section 362 (1990).

[15] 42 U.S.C. section 12182(a)(West Supp. 1991).

[16] 42 U.S.C. section 12132.

[17] 42 U.S.C. section 12182(b)(l)(A)(l)(West Supp. 1991).

[18] Harris v. Thigpen, 941 F.2d 1495 (11th cir. 1991).

[19] 42 U.S.C. section 12113(b).

[20] Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (N.Y.Sup.Ct.1973).

[21] 8 N.Y.C.R.R. section 135.4(c)(7)(l)(h).

[22] *Supra* note 20 at 880.

[23] (Supreme Court, Nassau County, 1975).

[24] 383 N.Y.S. 2d 518 (N.Y. Sup. Ct. 1976).

[25] N.Y. EDUC. LAW section 4409 (McKinney 1981) (repealed 1986).

[26] Kampmeier v. Harris, 403 N.Y.S.2d 638 (N.Y. Sup. Ct. 1978), rev'd, 411 N.Y.S. 744 (N.Y.App.Div. 1978).

[27] Kampeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977).

[28] 490 F. Supp. 948 (D.N.J. 1980). See also Grube v. Bethlehem Area Sch. Dist., 550 F. Supp. 418 (D. Penn. 1982) where a 17 year old athlete with only one kidney sought a preliminary injunction to play football. The court granted the injunction indicating that the case would most likely succeed on its merits under full judicial review.

[29] Wright v. Columbia University, 520 F. Supp. 789 (D. Penn. 1981).

[30] 43 Fed. Reg. section 36,035.

[31] See Shelley Smith, *A Bitter Legacy*, SPORTS ILLUSTRATED, Mar. 4, 1991; See also *Gathers Mother Settles Lawsuit with University*, The NCAA NEWS, Apr. 1, 1992 at 2.

[32] See Gerald Eskenazi, *Athletes and Health: Many at Risk*, N.Y. TIMES, Mar. 11, 1990 section 8 at 1.

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

[33] See Lawrence K. Altman, *An Athlete's Health and a Doctor's Warning*, N.Y.TIMES, Mar. 13, 1990, at C3.

[34] See ELIZABETH M. GALLUP, LAW AND THE TEAM PHYSICIAN, (Human Kinetics 1995) for a more in depth discussion of the role of the team physician from a medical and legal perspective.

[35] Arline, *supra* at note 10.

[36] Poole, *supra* at note 28 pp. 953-954.

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