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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL BOWERS	)	HON. STEPHEN M. ORLOFSKY
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 97-2600
	)	
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE

INTRODUCTION

On May 23, 1997, Michael Bowers, an individual with a learning disability, filed suit alleging that the National Collegiate Athletic Association (NCAA) violated title III of the Americans with Disabilities Act (ADA), and other statutes, when it declared him ineligible to participate in athletics during his first two semesters of college. Mr. Bowers sought a preliminary injunction, but the court denied the motion for a preliminary injunction on August 14, 1997. Bowers v. National Collegiate Athletic Association, et al., Civil Action No. 97-2600 (D.N.J., Aug. 14, 1997).

On September 29, 1997, the NCAA filed a pleading titled, "Defendant NCAA's Motion to Dismiss or, in the Alternative, for Summary Judgment."[1] The Motion to Dismiss argues that Mr. Bowers' complaint fails to state a claim under the ADA because the NCAA is not a public accommodation under title III and because the NCAA does not discriminate against student-athletes with learning disabilities in violation of title III.[2]

The United States has been granted leave to participate as amicus curiae on these two issues. The United States urges the Court to allow Mr. Bowers the opportunity to develop evidence that the NCAA operates places of public accommodation and that the NCAA's initial-

[1] Another defendant, ACT, Inc., filed a similar motion to dismiss. This Memorandum does not address the issues raised by ACT. As the Court is aware, the United States has been investigating complaints alleging that the NCAA's initial-eligibility requirements violate title III of the ADA. The United States' investigation has been limited to the policies and procedures of the NCAA, and not to the other entities which are defendants in this case.

[2] This Memorandum does not address the NCAA's arguments regarding the Rehabilitation Act, the New Jersey Law Against Discrimination, or the antitrust laws.

eligibility requirements discriminate against students with learning disabilities.

ARGUMENT

I. Legal standards applicable to the motion to dismiss or for summary judgment.

The NCAA filed its motion to dismiss under Federal Rule of Civil Procedure 12. The NCAA labels the motion in the alternative as a motion for summary judgment under Federal Rule of Civil Procedure 56, apparently because many of its arguments are premised on evidence outside the Complaint. Under both rules, the NCAA must meet a high standard of proof.

In ruling on the motion to dismiss, this Court should accept the factual allegations in the Complaint as true.[3] Hishon v. King & Spaulding, 467 U.S. 69, 73 (1983). The Court must then determine if those factual allegations, or any set of facts that are consistent with those allegations and might be developed during the discovery process, could justify a court granting relief. Id. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). At such an early stage in the proceedings, courts are reluctant to foreclose the possibility that a plaintiff could develop facts that would sustain a theory of liability. See, e.g., Carparts Distribution Center v. Automotive Wholesaler's Association of New England, 37 F.3d 12, 20 (1st Cir. 1994)("[w]e think at this stage it is unwise to go beyond the *possibility* that the plaintiff may be

[3] The Complaint referred to in this Memorandum is the Plaintiff's First Amended Complaint, filed September 8, 1997.

able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I").

Summary judgment is appropriate only when the evidence fails to demonstrate that there is a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c).[4] Mr. Bowers can establish that there is a genuine issue of material fact if he provides sufficient evidence that would allow a reasonable jury to find for him at trial. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-2. When evaluating the evidence presented by Mr. Bowers, the court must give him the benefit of all reasonable inferences. Bray v. Marriott Hotels, 110 F.3d 986, 989 (3rd Cir. 1997).

II. Mr. Bowers should be given the opportunity to develop evidence that the National Collegiate Athletic Association operates places of public accommodation.

A. Title III of the Americans with Disabilities Act should be interpreted broadly.

The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, is the most extensive civil rights legislation to pass Congress since the Civil Rights Act of 1964. Its purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is

[4] According to Local Rule 56.1, the moving party must submit a statement that sets forth material facts as to which there is no genuine issue. The NCAA did not submit such a statement; this failure alone is grounds for denial of its motion for summary judgment. See discussion infra Parts II.D and III.D.

accordingly broad, prohibiting discrimination on the basis of disability in employment, state and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses.

Under well-established canons of statutory construction, remedial legislation should not be given a narrow or limited construction but rather should be liberally construed. Butler v. National Collegiate Athletic Association, No. C96-1656, slip op. at 8 (W.D. Wash., Nov. 8, 1996), citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)(a copy is attached as Exhibit A). This principle of statutory construction is especially true of civil rights legislation, and has been applied repeatedly to the Americans with Disabilities Act. See, e.g., Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa.), aff'd 9 F.3d 1067 (3d Cir. 1993), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Niece v. Fitzner, 922 F. Supp. 1208, 1218-19 (E.D. Mich. 1996).

This action involves title III of the ADA, which prohibits disability-based discrimination by private entities who own, lease (or lease to), or operate a place of public accommodation. 42 U.S.C. § 12182(a); 28 C.F.R02. The Prea. § 36.2mble to the implementing regulation provides, "The coverage is quite extensive and would include . . . any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time." 28 C.F.R. Part 36, Appendix B at 593.[5]

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[5] Congress explicitly delegated to the Department of Justice the authority to promulgate regulations under title III. 42 U.S.C. § 12186. Accordingly, the Department's regulations are entitled to substantial deference. Butler v. National Collegiate Athletic Association, slip op. at 8. See also Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994)(Secretary of

B. Title III of the Americans with Disabilities Act covers private entities that own, lease (or lease to), or operate places of public accommodation.

Mr. Bowers argues that the NCAA is a private entity that operates places of public accommodation. This argument turns on the understanding of three terms. First is whether the NCAA is a "private entity." All parties concede that the NCAA meets this definition.

Second is the meaning of the word "operates." Neither the ADA nor the regulations define the word "operates." When a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." Smith v. United States, 113 S. Ct. 2050, 2054 (1993). In the context intended by the statute, "operates" means to control, manage, administer, or regulate.[6] A federal court in Connecticut defined "operate" in the context of title III of the ADA as "managing and controlling[.]" Dennin v. Connecticut Interscholastic

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Health and Human Services' regulation interpreting statutory language on reimbursable medical education expenses must be given controlling weight unless plainly erroneous); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); Petersen v. University of Wisc. Bd. of Regents, 818 F.Supp. 1276, 1279 (W.D. Wis. 1993)(applying Chevron to give controlling weight to the Department's interpretations of title II of the ADA); Fiedler v. American Multi-Cinema, Inc., 871 F.Supp. 35, 39 (D.D.C. 1994)(the Department, as author of the title III regulation, is the principle arbiter of its meaning, and Department interpretations are given substantial deference). The preamble or commentary accompanying a regulation is entitled to deference since both are part of a department's official interpretation of legislation. Stinson v. United States, 508 U.S. 36, 45 (1993), quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)(an agency's interpretation of its own regulations must be given controlling weight, unless the interpretation violates the Constitution or a federal statute, or is plainly erroneous).

[6] Dictionaries define "operate" in its transitive form as "[t]o control or direct the functioning of." Webster's II: New Riverside University Dictionary (1988), p. 823 (core meaning). See also 7 The Oxford English Dictionary, p. 144 (1933) ("[t]o direct the working of; to manage, conduct, work (a railway, business, etc.")); 2 New Shorter Oxford English Dictionary, p. 2005 (1993) ("[m]anage, direct the operation of (a business, enterprise, etc.")).

Athletic Conf., 913 F.Supp. 663, 670 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996). A federal court in California held that the word "implies a requirement of control over the place providing services" subject to title III. Aikins v. St. Helena Hospital, 843 F.Supp. 1329, 1335 (N.D. Cal. 1994). A federal district court in Ohio held that "operate" means that the person or entity "is in a position of authority" to make decisions that are allegedly discriminatory under title III. Howe v. Hull, 873 F.Supp 72, 77 (N.D. Ohio 1994). In applying the ADA specifically to the NCAA, one federal court held that the NCAA "operates" athletic facilities because it "exercises control" over those facilities; another federal court held that the NCAA "operates" athletic facilities because it "regulates" their use. Ganden v. National Collegiate Athletic Association, No. 96C-6953, 1996 W.L. 680000 at *11 (N.D. Ill., Nov. 21, 1996); Butler v. National Collegiate Athletic Association, slip op. at 9. As the Preamble to the implementing regulation explains, a private entity may "operate" a facility even if its relationship to the place of public accommodation is for only a limited period of time. 28 C.F.R. Part 36, Appendix B at 593. See also Ganden v. National Collegiate Athletic Association, 1996 W.L. 680000 at *11.

Third, the phrase "places of public accommodation" is defined in title III through a list of illustrative facilities, including:

> * a ... stadium, or other place of exhibition of entertainment;
>
> * an auditorium, convention center . . . or other place of public gathering; and,
>
> * a gymnasium . . . or other place of exercise of recreation.

42 U.S.C. §§ 12181(7)(C), (D) and (L).

The statute's focus is not on whether the place of public accommodation at which the

individual with a disability is subject to discriminatory treatment is a facility that is owned by a private or public entity. The Preamble to the regulation provides, "It is the public accommodation, and not the place of public accommodation, that is subject to the regulation's nondiscrimination requirement." 28 C.F.R. Part 36, Appendix B at 587.

Even if a state or local government owns the facility at which a person with a disability experiences discrimination, title III nevertheless applies when a private entity operates that facility. See The Americans with Disabilities Act, Title III Technical Assistance Manual, "Covering Public Accommodations and Commercial Facilities," at 7-8 (Nov. 1993)(a copy of the relevant section is attached as Exhibit B).[7] The Technical Assistance Manual demonstrates

[7] More than one entity can "own, lease (or, lease to) or operate" a facility at one time. If a state or local government owns a facility, but a private entity operates within it, title II of the ADA applies to discriminatory actions by the governmental entity and title III applies to discriminatory actions by the private entity. The Technical Assistance Manual reads, "Public entities, by definition, can never be subject to title III of the ADA, which covers only private entities. Conversely, private entities cannot be covered by title II. There are many situations, however, in which public entities stand in very close relation to private entities that are covered by title III, with the result that certain activities may be affected, at least indirectly, by both titles." Title III Technical Assistance Manual at 7. Interpretive documents such as the Department of Justice's Technical Assistance Manual are entitled to deference. See Reno v. Koray, 115 S. Ct. 2021, 2027 (1995)(Bureau of Prisons internal agency guideline is entitled to deference); Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992)(holding that interpretive statements receive Chevron deference even if they do not arise out of rulemaking, and deferring to position taken by EPA in a "decision letter"). Many courts have deferred to the Department's Technical Assistance Manuals for both titles II and III of the ADA. See, e.g., Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. at 36 n.4; Ferguson v. City of Phoenix, 931 F. Supp. 688, 694 (D. Ariz. 1996). Cf. Pinnock v. International House of Pancakes, 844 F. Supp. 574 (S.D. Cal. 1993) (rejecting a constitutional challenge to title III of the ADA as void for vagueness in part by considering clarification of statute found in administrative regulations and the title III TA Manual).

this principle through several illustrative fact patterns. Id.[8] See also, Butler v. National Collegiate Athletic Association, slip op. at 7 ("the nature of the place is determined by who owns, leases, or operates the place"); Ganden v. National Collegiate Athletic Association, 1996 WL 680000 at * 11 ("Title III proscribes discrimination committed by private entities in their management of public accommodations.... Parties may not escape the requirements of the ADA through multiple ownership or management of a facility"); Dennin v. Connecticut Interscholastic Athletic Conf., 913 F.Supp. at 670 ("[t]he fact that some of these facilities might be owned by a public entity, i.e., a public school, does not affect the conclusion that CIAC 'operates' the facilities for purposes of athletic competition").

C. The factual allegations in the Complaint, if accepted as true, support the claim that the NCAA is a private entity that operates places of public accommodation.

The legal determination of whether the NCAA is a private entity that owns, leases, or operates places of public accommodation involves a factual inquiry into the relationship between the NCAA and various places of public accommodation. Butler v. National Collegiate Athletic Association, slip op. at 8-9. Mr. Bowers' Complaint contains the following

[8] The Manual provides four fact patterns to illustrate the point, including these two hypothetical cases: "The City of W owns a downtown office building occupied by W's Department of Human Resources. The first floor is leased as a commercial space to a restaurant, a newsstand, and a travel agency. The City of W, as a public entity, is subject to title II in its role as landlord of the office building. As a public entity, it cannot be subject to title III, even though its tenants are public accommodations that are covered by title III.... The City of W engages in a joint venture with T Corporation to build a new professional football stadium. The new stadium would have to be built in compliance with the accessibility guidelines of both titles II and III. In cases where the standards differ, the stadium would have to meet the standard that provides the highest degree of access to individuals with disabilities." Technical Assistance Manual at 7, 8.

factual allegations concerning the relationship of the NCAA to places of public accommodation such as stadiums, coliseums, arenas, gymnasiums, athletic training facilities, and educational institutions:

> ¶ 10: The NCAA identifies itself as an "arm or extension of its member universities;" it is the predominant governing body in college sports generating an annual income in the hundreds of millions dollars while maintaining a tax-free status as an educational institution.
>
> ¶ 12: The NCAA transacts business in the Federal District of New Jersey and has activities in New Jersey which are continuous and substantial. These include the determination of whether student-athletes in this District are eligible to participate in intercollegiate athletics and receive athletic scholarships, the sanctioning of intercollegiate athletic events, the collection of assessments from colleges and universities in this District and the execution of contracts.
>
> ¶ 18: The NCAA exercises substantial control over the operation of the sports facilities used in intercollegiate athletics. This operational control includes such matters as the selection of sites and dates for sports events, size of fields, ticket and seating arrangements, use of dining facilities; campus housing and room and board; use of athletic facilities; playing rules in athletic facilities; etc. (See NCAA Bylaws (1995-96) §§ 11.02.3.3; 11.3.4.4; 11.6.1.4; 13.7.5.2; 13.8.2.1; 13.8.2.2; 13.8.2.3; 13.8.2.4; 13.9.1; 15.2.2; 16.2; 16.5; Article 17; 21.5.1.5.2; 21.6.1.5; 30.2.1.4; 30.2.2; 30.9.11; 31.1.3; 31.1.6; 31.1.11; 31.3.1).
>
> ¶ 25: The NCAA establishes the initial eligibility standards for student athlete prospects for all NCAA member schools. The absence of initial eligibility status prevents students athletes from participating in intercollegiate sports programs and from receiving athletic scholarships at Division I and Division II schools.
>
> ¶ 97: Defendant NCAA requires that students be certified as a "qualifier" by ACT's NCAA Clearinghouse in order to participate fully in intercollegiate athletics at a Division I or Division II member school.
>
> ¶ 135: Under NCAA rules, Plaintiff as a "non-qualifier" is ineligible to compete in intercollegiate football, practice or condition with "qualifiers," or receive any athletic scholarship monies. (NCAA Bylaw § 14.3.2.2).
>
> ¶ 151: Temple University, University of Iowa and American are places of

> public accommodation within the meaning of Title III of the ADA, which reaches "secondary, undergraduate, or postgraduate private school[s]" and the "gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation" of such places of public accommodation. 42 USC §12181(7)(J) and (L).
>
> ¶ 153: Defendant NCAA "operates" and "leases" places of public accommodation and exercises control over the operations of the nation's colleges and universities such that it fulfills the "operates public accommodations" requirement of Title III.
>
> ¶ 155: Defendant NCAA enters into agreements with public entities and member institutions that would constitute "leasing" the facility, thus satisfying not only the "operates" but the "leases" provision of the "public accommodations" section of Title III.

These factual allegations, if proven and combined with a sound legal interpretation of the terms of the statute, would present a compelling case that the NCAA is a private entity that operates places of public accommodation under title III. Mr. Bowers alleges that the NCAA exercises control over several places of public accommodation, including sites such as "stadiums" and "auditoriums" where sporting events are held, and athletic training facilities such as "gymnasiums" and "other places of exercise or recreation." See 42 U.S.C. §§ 12181(7)(C), (D) and (L). Mr. Bowers also alleges that the NCAA leases sites where sporting events are held when it hosts various competitions. See 42 U.S.C. § 12182(a).

D. The limited evidence already available shows that there are genuine issues of material fact regarding whether the NCAA operates places of public accommodation.

The NCAA asks the Court to consider not only the factual allegations in the Complaint but also additional evidence. At this early stage of the proceedings, there is a limited amount of evidence to supplement the factual allegations in the Complaint. The facts currently available to Mr. Bowers are only a small subset of what will be available once discovery is

conducted. After Mr. Bowers has the opportunity to discover documents concerning the NCAA's relationship with various places of public accommodation, it is likely that his position will be significantly strengthened.

The motion for summary judgment is premature because as a general rule summary judgment is not appropriate until the party opposing the motion has been given an adequate opportunity to conduct discovery. Reflectone v. Farrand Optical Co., 862 F.2d 841, 843 (11th Cir. 1989)(however, a blanket prohibition of summary judgment motions prior to discovery would not be appropriate). See also Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (summary judgment can be denied if the nonmoving party has not had an opportunity to make full discovery).

The motion is also premature because the NCAA has not complied with Local Rule 56.1, which requires a party moving for summary judgment to submit a statement of material facts as to which there is no genuine issue. The NCAA did not submit such a statement with its motion, and therefore it is not entitled to summary judgment.

However, even based on the limited facts available, it is clear that there are genuine issues of material fact regarding whether the NCAA operates one or more places of public accommodation.

1. The available evidence suggests that the NCAA "operates" stadiums or other places or exhibition or entertainment, as well as auditoriums, convention centers or other places of public gathering.

The NCAA controls, manages and administers athletic events held in stadiums, auditoriums, convention centers and other places of entertainment and public gathering. These athletic events range from football "bowl games" to the NCAA basketball championship, from

women's gymnastics championships to men's swimming competitions. By setting eligibility standards, the association regulates who can compete in the stadiums, coliseums and other places of public gathering.

However, the NCAA controls more than just the people who are allowed to compete. The NCAA carefully manages the stadiums, auditoriums, convention centers, and other places of entertainment and public gathering. For example, it controls which stadiums and coliseums will be chosen for championship events. NCAA Executive Regulation 31.1.3.2, 1996-97 NCAA Manual at 490 (1996)(copies of all Executive Regulations and Bylaws cited are attached as Exhibit C). The NCAA regulates the ticket prices that the stadiums and coliseums may charge. NCAA Executive Regulation 31.1.11. The NCAA controls the types of beverages the arenas may sell. NCAA Executive Regulation 31.1.13 (prohibiting the sale of alcohol). The NCAA controls the types of goods which vendors at the coliseum may sell. NCAA Executive Regulation 31.6.2. It regulates the profits which are earned from sales at concession stands. NCAA Executive Regulation 31.4.2. The NCAA controls which members of the press will be allowed to set up broadcast facilities at the stadiums. NCAA Executive Regulation 31.6.4. On the most obvious level, the NCAA controls which institutions are allowed to play in the stadiums and coliseums. NCAA Executive Regulation 31.3.

NCAA Executive Regulation 31.1, "*Administration* of NCAA Championships," could be read, "*Operation* of NCAA Championships." The NCAA operates significant functions of these stadiums, coliseums, and arenas for a limited, specific period of time. During the athletic events sponsored by the NCAA, it exercises substantial control over the operations of the stadiums, from its ticket windows to its concession stands to its press passes.

2. The available evidence suggests that the NCAA "operates" gymnasiums or other places of exercise or recreation.

The NCAA manages, administers and regulates the athletic training facilities -- gymnasiums and other places of exercise or recreation -- used by member institutions. If Mr. Bowers is allowed to conduct discovery, it is likely that he could produce evidence describing the training facilities that large universities set aside for the use of authorized athletes. See, e.g., NCAA Operating Bylaw 17.02.1.2(p)(permitting member institutions to reserve their athletics facilities only for student-athletes). These training facilities are likely to include weight rooms, practice fields, lap pools, batting cages, exercise facilities with equipment to build cardiovascular strength or recuperate from injuries, and facilities where athletic trainers provide massage and other therapy.

The NCAA's controls over these athletic training facilities are substantial. It regulates the conditions under which individuals who are not enrolled in the school may use the facilities. NCAA Operating Bylaw 17.02.1.2(p). It directs that student-athletes can voluntarily choose to work out in the gym or other place of exercise only under certain conditions. NCAA Operating Bylaw 17.02.1.2(m). It regulates the conditions under which members of the coaching staff can be in the exercise facility while an athlete engages in a voluntary workout. NCAA Operating Bylaw 17.02.1.2(q). It prohibits students from using tobacco products while working out in the gym or other place of exercise. NCAA Operating Bylaw 17.1.11. It regulates the number of days that student-athletes are allowed to practice in the athletic facilities. NCAA Operating Bylaws 17.02.13, 17.1.1 and 17.1.5. It regulates the types of equipment that they may use while working out in the athletic training facilities.

NCAA Operating Bylaw 17.11.6. It controls the conditions under which student-athletes may ask a coach for advice and instruction on athletic training not conducted during the playing season. NCAA Operating Bylaw 17.1.5.2.1. It establishes rules for the types of "conditioning activities" which athletes can use. NCAA Operating Bylaw 17.1.5.2.2.

The NCAA manages who can use the exercise facilities, how long they can use those facilities, and what they can do while in the facilities. Clearly, the evidence suggests that the NCAA "operates" the gymnasiums or other places of exercise or recreation of its member institutions.

E. Relevant authorities support the conclusion that the NCAA is subject to title III.

In Butler v. National Collegiate Athletic Association, No. C96-1656 (W.D. Wash., Nov. 8, 1996), a federal court held that a University of Washington athlete with a learning disability who had been declared academically ineligible had demonstrated "at least a reasonable probability of ultimate success" on the argument that the NCAA is a public accommodation under title III. The court entered a preliminary injunction prohibiting the NCAA from declaring the student ineligible. Id. at 10. The court also denied the NCAA's motion to dismiss, filed simultaneously with the motion for a preliminary injunction. Id. at 8-9.

In Ganden v. National Collegiate Athletic Association, No. 96C-6953, 1996 WL 680000 (N.D. Ill., Nov. 21, 1996), the court agreed with the reasoning in Butler on title III's

application to the NCAA.[9] The court held that Mr. Ganden's allegation that the NCAA is closely affiliated with the athletic training facilities of its member colleges was "a compelling argument." Id. at *10. The court further held that "it is clear" that the NCAA controls more than just gymnasiums and other training facilities; it also controls a student's access to scholarships that would enable the student-athlete to pay for a college education. Id. The court also held that it was "reasonably probable" that Mr. Ganden could establish that the NCAA has a "significant degree of control" over athletic competitions held in stadiums and other places of public gathering, as well as over athletic training facilities, and therefore "operates" places of public accommodation. Id. at *11.

Butler and Ganden are consistent with Dennin v. Connecticut Interscholastic Athletic Conf., 913 F. Supp 663 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (2d Cir. 1996). In Dennin, a student charged that the state's athletic association, the Connecticut Interscholastic Athletic Association ("CIAC"), violated the ADA when it declared him ineligible.[10] The court held that the CIAC had two major activities. First, "[m]ember schools delegate significant control and authority to CIAC in regulating this athletic component of education." Id. at 670

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[9] The court denied Mr. Ganden's motion for a preliminary injunction. The court held that NCAA eligibility criteria must be modified for students with learning disabilities, but the modifications Mr. Ganden suggested would fundamentally alter the nature of the NCAA's initial-eligibility standards. Ganden v. National Collegiate Athletic Association, 1996 WL 680000 at *15.

[10] The Second Circuit Court of Appeals did not reject the lower court's reasoning in Dennin. The Court of Appeals simply held that there was no longer a ripe controversy because the student had already completed the athletic season. The Court of Appeals, quoting other courts, explained, "Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." Dennin, 94 F.3d at 101 (citations omitted).

Like the NCAA, the CIAC set rules for the types of classes student-athletes should take, minimum grades they must receive, and other facets of the student's academic life. Second, "CIAC sponsors athletic competitions and tournaments." Id. The sponsorship of competitions and tournaments brought CIAC into a management role over coliseums where the events are staged. Therefore, the court held, "By managing and controlling the aforementioned, it 'operates' places of public accommodation, i.e., a place of education, entertainment and/or recreation." Id. While the parallels between the CIAC and the NCAA are obvious, the role of the NCAA is even more comprehensive than the state athletic association. The holdings in Butler, Ganden, and Dennin clearly suggest that, if discovery is allowed to proceed, Mr. Bowers could develop sufficient facts to establish that the NCAA is subject to title III.

Cases outside the context of athletic associations also support the proposition that the NCAA operates places of public accommodation. In Howe v. Hull, 873 F.Supp. 72 (N.D. Ohio 1994), the court held that a single physician "operated" a hospital. Although the physician was not an employee of the hospital, as the on-call admitting physician he had the authority and discretion to admit individuals seeking medical attention. The physician in this case refused to admit an individual infected with the HIV virus. The court held that the physician operated the public accommodation because he was "in a position of authority" to make decisions which are allegedly discriminatory under title III. Id. at 77. See also Aikins v. St. Helena Hospital, 843 F. Supp. 1329 (N.D. Cal. 1994)(a physician would operate a hospital if he had control over the provision of services, although in this case the physician had no

authority to arrange a sign language interpreter for the spouse of a patient).[11] Similarly, the NCAA is in a position of authority over a number of places of public accommodation -- it is in a position of authority to set the standards for admitting individuals into colleges and universities, into gymnasiums and training facilities, and into stadiums and coliseums.

F. Contrary authorities do not justify a motion to dismiss on the grounds that title III is inapplicable to the NCAA.

In addition to the Butler and Ganden courts, one other federal court has ruled on whether the NCAA is subject to title III of the ADA. A federal court in Arizona denied a motion for a preliminary injunction because the student could not establish a likelihood of success on the merits of the argument that the NCAA is covered by title III.[12] Johannesen v.

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[11] The NCAA relies on Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, 116 S.Ct. 704 (1996) and Cortez v. National Basketball Association, 960 F.Supp. 113 (W.D. Tex. 1997) for its argument that the NCAA does not "operate" athletic facilities or stadiums. The United States' position is that Neff was wrongly decided because the court too narrowly construed what it means to operate a place of public accommodation and therefore adopted a reading of the statute that cannot be reconciled with the statutory language. The court's reasoning is also contrary to the majority of the case law on this issue. Moreover, Neff is clearly inapplicable since it is a decision regarding whether a company is responsible under the ADA for the actions taken by another company to which it has granted a franchise. The franchisor-franchisee relationship is substantially different than the relationship between the NCAA and its member colleges and the NCAA and the stadiums where athletic competitions are held. Cortez also depends on an analysis of the franchisor-franchisee relationship. Moreover, the relationship between the NCAA and its member colleges is entirely different from the NBA's relationship with professional sports franchises. The NCAA's role in collegiate sports is much more extensive because it is concerned not only with the quality of the sporting event, but also with the integrity of college athletics, preserving both amateurism (leading to hundreds of regulations on benefits that can be provided to student-athletes) and academics (leading to hundreds of regulations on academic standards that students must meet to participate in athletics). The NBA is concerned with neither of these factors and therefore its regulation of its franchisees is much less extensive.

[12] The court did not dismiss the complaint, as the NCAA is asking this Court to do.

National Collegiate Athletic Association, No. Civ. 96-197 (D. Ariz., filed May 3, 1996)(a copy is attached as Exhibit D). The court held that, "The Johannesen's claims relate to access to facilities operated by [Arizona State University], which is a public, not private entity." Id. at 7. The court relied on Sandison v. Michigan High School Athletic Association, 64 F.3d 1026 (6th Cir. 1995), which held that a state association was not subject to title III because the facilities where its member institutions played games were on public school grounds and public parks.

Johannesen and Sandison should not be applied in this case. First, neither opinion gave title III the broad interpretation that sound principles of construction require. Second, the courts in both cases did not focus on the correct entity. It is not the place of public accommodation that is the focus; rather, the entity that "owns, leases (or leases to), or operates" the place of public accommodation is the focus. Butler v. National Collegiate Athletic Association, slip op. at 6. As the Department of Justice's Technical Assistance Manual makes clear, activity at a publicly-owned facility can be subject to title III if that facility is operated or leased by a private entity. Title III Technical Assistance Manual at 7-8.[13] The question is not where Mr. Bowers will participate in football practices or play in football games, but whether the private entity in operational control of the eligibility decision manages one or more places of public accommodation. As the court in Dennin put it, "[t]he fact that some of these facilities might be owned by a public entity, i.e., a public school, does not affect the conclusion that CIAC 'operates' the facilities for purposes of athletic competition." Dennin

[13] See discussion supra Part II.B.

v. Connecticut Interscholastic Athletic Conf., 913 F.Supp. at 670.[14]

Third, the distinction raised in Johannesen and Sandison is artificial. If title III does not apply solely because the place where Mr. Johannesen would usually practice and play is owned by a public school, title III would logically apply when Mr. Johannesen sought to play when the university had a game with a private school. Although most of the members of the league to which Arizona State University belongs are public schools, at least two are private entities: Stanford University and the University of Southern California. The NCAA's decision to deny Mr. Johannesen eligibility therefore prevented him from playing in stadiums that are owned by a variety of entities, both public and private. The court's distinction is obviously artificial; the NCAA applies the same allegedly discriminatory eligibility rules at all member institutions, public and private, and in a variety of stadiums, coliseums and arenas. As the court in Butler v. National Collegiate Athletic Association concluded, "Congress could not have intended such an arbitrary result." Butler v. National Collegiate Athletic Association, slip op. at 6, n.3.

In its motion to dismiss, the NCAA argues that several courts have held that "membership organizations" do not fall under the definition of "places of public accommodation" under the ADA and other civil rights statutes. The NCAA failed to note that

[14] Brown v. 1995 Tenet Paraamerica Bicycle Challenge, 959 F.Supp. 496 (N.D.Ill. 1997), cited in the NCAA's motion to dismiss, relied on Sandison and is therefore of limited usefulness to this Court. Even if that court had focused on the proper entity, the association that organized the cross country road race had no control or management over the public highways where the participants were riding their bicycles. It did not regulate the size of the roads, the surface used in making the roads, or any of the details in how the roads were designed. There was no close connection between the association and a place of public accommodation.

a number of courts have held the opposite: organizations that do not have an office or physical structure are covered by title III of the ADA. See, e.g., Carparts Distribution Center v. Automotive Wholesaler's Association of New England, 37 F.3d 12, 18-20 (1st Cir. 1994); Anderson v. Little League Baseball, 794 F. Supp. 342, 344 (D. Ar. 1992); Shultz v. Hemet Youth Pony League, No. 95-1650 (C.D. Cal., Aug. 22, 1996) (a copy is attached as Exhibit E). But see Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1013 (6th Cir. 1997) (rejecting the analysis in Carparts).

The NCAA relies heavily on Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993), cert. denied, 114 S.Ct. 602 (1993). Welsh, and other cases discussing whether "membership organizations" are public accommodations, are of limited assistance to this Court. First, Welsh is primarily concerned with whether the Boy Scouts are a public accommodation under title II of the 1964 Civil Rights Act, a statute with purposes and legislative history that are completely distinct from the Americans with Disabilities Act. Moreover, the primary issue in Welsh is whether a membership organization with no physical facility can be characterized as a public accommodation. The Boy Scouts are a neighborhood group whose leaders are parents donating a few hours of free time on a week night. The meetings are held in the home of one of the parents. While the NCAA is also a membership organization, the nature of its work could hardly be more different than that of a Boy Scout troop. The NCAA has extensive offices in Kansas, hundreds of employees, and an annual budget in the tens of millions of dollars. The NCAA is connected to a range of physical facilities: its offices, where eligibility decisions are made; the facilities of member institutions, where young people seek to study, train and compete; the facilities of colleges and universities

against whom the student-athletes compete; and the facilities of commercial enterprises which operate stadiums, sell NCAA-trademarked goods, and broadcast NCAA-controlled athletic events. The court in Ganden v. National Collegiate Athletic Association held,

> The court questions whether Welsh directly applies to Ganden's claim. . . . It is evident that the NCAA, in contrast to the Boy Scouts, has a connection to a number of public accommodations; the athletic facilities of its member institutions. Welsh found that the Boy Scouts only conducted meetings of small groups of young boys, primarily in private homes. NCAA events occur in stadiums or arenas, open to the public, with a significant number of competitors, support staff and fans.

Ganden v. National Collegiate Athletic Association, slip op. at *10 (citations omitted).

If anything, the membership organization cases support the argument that the NCAA is a public accommodation. Welsh in fact cites eight cases holding that various membership organizations are public accommodations. Welsh v. Boy Scouts of America, 993 F.2d at 1272. According to Welsh, membership organizations have been found to be public accommodations under two circumstances. First, a membership organization with a connection to facilities is a public accommodation:

> In each of these [eight] cases, Title II [of the 1964 Civil Rights Act] was found applicable because the organization conducted public meetings in public facilities or operated *facilities* open to the public like swimming pools, gyms, sports fields and golf courses. In contrast, the trial court in the case before us found that the typical Boy Scout gathering involves five to eight young boys engaging in supervised interpersonal interaction in a private home.

Id. In contrast to the Boy Scouts, the NCAA establishes rules governing the operation of facilities for athletes who train and compete -- facilities such as swimming pools, gyms, sports fields and golf courses. The court in Butler v. National Collegiate Athletic Association held,

> However, both [Welsh and Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995), cert. denied, 116 S.Ct. 674 (1995)] dealt with

> member organizations as organizations, not as the operators of facilities that might, in turn, be considered places of public accommodation. . . . In the instant case, Plaintiff alleges that the NCAA does operate facilities open to the public, facilities that are listed in the ADA as places of public accommodation.

Butler v. National Collegiate Athletic Association, slip op. at 7.

According to Welsh, the second circumstance under which membership organizations are found to be public accommodations are "when the organization functions as a 'ticket' to admission to a facility or location." Welsh v. Boy Scouts of America, 993 F.2d at 1272. See also Elitt v. U.S.A. Hockey, 922 F.Supp. 217, 223 (E.D.Mo. 1996). In other words, when the organization serves as a gatekeeper, controlling who can use facilities, the organization is often found to be a public accommodation. The NCAA serves precisely this gatekeeper function, setting eligibility rules for students who wish to participate in athletic competitions. The court in Butler v. National Collegiate Athletic Association concluded, "Thus, if anything, Defendant's authorities work against its position." Butler v. National Collegiate Athletic Association, slip op. at 7.

III. Mr. Bowers should be given the opportunity to develop evidence that the National Collegiate Athletic Association discriminates against student-athletes with learning disabilities in violation of title III of the ADA.

In its motion to dismiss, the NCAA argues that it did not discriminate against Mr. Bowers when it refused to certify several of his classes as "core courses," and therefore determined that he did not meet the initial-eligibility requirements. Memorandum of Law in Support of Defendant NCAA's Motion to Dismiss or, in the Alternative, For Summary Judgment, Bowers v. National Collegiate Athletic Association, No. 97-2600 at 13 - 15 (filed September 29, 1997). Moreover, the NCAA argues that it does not discriminate against any

student with learning disabilities because its Bylaws provide a fair opportunity for these students to meet the initial-eligibility requirements, and because its waiver process provides students with learning disabilities individualized assessments of their academic records. Id. at 15. However, if the allegations in the Complaint are accepted as true, the motion to dismiss should be denied. If evidence outside the Complaint is considered, the limited facts currently available to Mr. Bowers and the United States demonstrate that there are genuine issues of material fact regarding whether the NCAA's policies and procedures discriminate against students with learning disabilities in general and Mr. Bowers in particular.

A. The NCAA's initial-eligibility process.

The NCAA requires that students who wish to participate in college athletics must complete 13 "core courses," including classes in English, mathematics, natural or physical science, and several other categories. NCAA Bylaw 14.3.1.1. In addition, students must have a grade point average and standardized test score that corresponds to the NCAA's "Initial-Eligibility Index." NCAA Bylaw 14.3.1.1.1. The NCAA Initial-Eligibility Clearinghouse is responsible for determining whether a student meets these academic requirements. NCAA Bylaw 14.3.1.

Because the course of study for students with learning disabilities is sometimes different from the typical curriculum, the NCAA Bylaws include a rule titled, "Courses for the Learning Disabled and Handicapped:"

> The NCAA Academic Requirements Committee may approve the use of high-school courses for the learning disabled and handicapped 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. The learning-disabled or handicapped student still must complete the required core courses and achieve the minimum grade-point average in this core curriculum.

NCAA Bylaw 14.3.1.3.4. If a high school seeks to have a class designed specifically for students with learning disabilities certified as a "core course," the NCAA requires that the high school first identify an equivalent course taught to students without disabilities. If the high school can identify a parallel course, it must then certify that the same quantity of material is covered in both classes, and that the quality of the two courses is identical (that the courses use the same textbooks and cover the same material). See NCAA Initial-Eligibility Clearinghouse Worksheet (a copy is attached as Exhibit F).

The NCAA's regulations, however, contain an additional restriction relating to classes designed for students with learning disabilities:

> Courses that are taught at a level below the high school's regular academic instructional level (e.g., remedial, special education or compensatory) shall not be considered core courses *regardless of course content.*

NCAA Bylaw 14.3.1.3 (emphasis added).

Students who fail the initial-eligibility standards may apply for a waiver of the requirements. The application is reviewed by the NCAA staff and then forwarded to a committee for consideration. Bowers v. National Collegiate Athletic Association, slip op. at 17.

B. Statutory provisions implicated by the NCAA's policies and procedures.

In his Complaint, Mr. Bowers alleges that the NCAA's policies and procedures violate at least two provisions of title III of the ADA. First, he alleges that the NCAA imposes eligibility criteria that screen out or tend to screen out individuals with disabilities from fully and equally

enjoying the goods, services, facilities, privileges, advantages, or accommodations offered by the NCAA. 42 U.S.C. § 12182(b)(2)(A)(i). See, e.g., Complaint, ¶ 159. The Preamble to the implementing regulations provides, "In addition, §36.301 prohibits the imposition of criteria that 'tend to' screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 C.F.R. 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate." Under the statute, Mr. Bowers must also prove that the eligibility criteria imposed by the NCAA are not necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations it offers.

Mr. Bowers also alleges that modifications in several NCAA policies are necessary in order for students with learning disabilities to be afforded the goods, services, facilities, privileges, advantages, or accommodations offered by the NCAA. 42 U.S.C. § 12182(b) (2) (A)(ii). See, e.g., Complaint ¶ 161. To successfully establish a violation under this provision, Mr. Bowers must prove that reasonable modifications are available, and that these modifications would not fundamentally alter the nature of the NCAA's initial-eligibility program.

C. The factual allegations in the Complaint, if accepted as true, support the claim that the NCAA's policies and procedures discriminate against students with learning disabilities in violation of the ADA.

1. The factual allegations related to the NCAA's initial-eligibility requirements are sufficient to survive a motion to dismiss.

Mr. Bowers' Complaint contains the following factual allegations concerning the NCAA's determination that he did not meet the initial-eligibility requirements:

> ¶ 3: Bowers was awarded a high school diploma from the Palmyra High School, a public school certified by the New Jersey Department of Education.... Bowers

also attained above the minimum grade point average required for "core courses" and exceeded the minimum test score on the Scholastic Aptitude Test as imposed by the NCAA.

¶ 4: Most of Bowers' high school academic courses were identified as "SE" (special education), and he was administered a non-standard, but professionally recognized, Scholastic Achievement Test (SAT). Defendants NCAA, ACT and NCAA Clearinghouse refused to credit any of Bowers' "SE" classes as "core courses" in spite of the high school's assurances to ACT's Initial-Eligibility Clearinghouse that these courses were quantitatively and qualitatively the same as courses taken by students who were not classified as having learning disabilities.

¶ 96: Plaintiff's high school transcript shows that from 9th through 12th grade, school years 1992-92 through 1995-96, his academic courses were primarily "SE" classes. Indeed, through high-school, plaintiff had only 3 academic courses which were non-"SE" classes.

¶ 101: Plaintiff graduated from Palmyra high school on June 17, 1996 with a grade point average of 2.613 and ranked 52nd among a class of 90 students. He took the SAT first in May 1995 and again in November 1995 and received composite scores of 790 and 840 respectively. Plaintiff received 145 high school credits, which, at a minimum, included 4 units of English, 3 units of Math, 2 units of Science, 3 units of Social Science and 1 unit of Spanish. Nonetheless, the Clearinghouse did not certify him because, it claimed, he did not meet the "core course" requirement[.]

¶ 127: In an April 25, 1996 letter to the Clearinghouse, Palmyra high school principal stated that "[s]tudents in SE classes are expected to acquire the same knowledge, both quantitatively and qualitatively, as students in comparable course(s). The same grading standards are employed in such classes as those utilized in this (these) course(s)."

¶ 132: From in or about January 1996 through June 7, 1996, the staff of Palmyra high school sent ACT's Clearinghouse information about all of Plaintiff's courses included Table of Contents and course descriptions, proficiencies, outlines and objectives. Further, the staff explained that under New Jersey Law, students with disabilities must attain the same competencies as all students in order to graduate.

¶ 159: Defendants NCAA, ACT and Clearinghouse imposed eligibility requirements on Plaintiff that screen out or tend to screen out individuals with disabilities who are otherwise qualified and excludes them from the advantages

of places of public accommodation solely on the basis of his disability and without reasonable accommodations.

¶ 160: Defendants NCAA, Act and Clearinghouse failed to give "core course" credit for courses that Plaintiff took consistent with his IEP team's recommendations and unreasonably credited only three of Plaintiff's high school courses in spite of the assurances by the Palmyra high school's administration and faculty to the Clearinghouse that Plaintiff's courses were qualitatively and quantitatively equivalent to those taken by students who did not have learning disabilities.

¶ 162: Defendants have failed to ensure that student athlete prospects with disabilities are not excluded or denied accommodations, unnecessarily segregated or otherwise treated differently than other individuals in setting initial eligibility requirements and in their administration and implementation of the eligibility requirements.

¶ 163: Defendants have violated the requirements of the ADA in, inter alia, the following ways:

(a) Setting initial eligibility requirements which discriminate against students with learning disabilities.
(b) Failing to consider the effects of the NCAA constitution and operating and administrative bylaws on students with disabilities who are otherwise eligible to participate fully in the programs of the member institutions.
(c) Failing to modify the initial eligibility criteria to accommodate the needs of students with disabilities who would be otherwise eligible to participate in programs of the member institutions.
(d) Failing to ensure that they have adequate and professionally trained staff who could apply the "reasonable accommodations" provisions of the ADA to assess the scholastic eligibility requirements of applicants with disabilities.
(e) Failing to provide any professional review of the eligibility criteria as applied to students with disabilities.
(f) Failing to take into consideration the resources and services which individual member institutions make available to students with learning disabilities.
(g) Administering eligibility standards so as to impose an undue burden on Plaintiff and other learning disabled students which screen out these persons from eligibility status.

These allegations, if proven and combined with supporting legal theories, would

present a compelling case that the NCAA violated title III of the ADA when it declared Mr. Bowers ineligible. First, Mr. Bowers alleges that he met all NCAA academic standards except for the "core course" requirement: that he graduated from high school, that he had an acceptable grade point average, and that he achieved an acceptable standardized test score. Second, Mr. Bowers alleges that he should have met the "core course" requirement because he took at least 13 courses in the subject areas prescribed by the NCAA. Third, Mr. Bowers alleges that his classes were rejected because they were taken within the school's "special education" department. He alleges that the Clearinghouse followed the NCAA's regulations and rejected those classes without regard for the content of each course. Fourth, Mr. Bowers alleges that school officials provided the NCAA with sufficient documentation to demonstrate that the disputed classes were substantive and meaningful academic offerings.

If these facts can be established, the evidence would demonstrate that the NCAA imposed eligibility criteria that screen out individuals with disabilities. Mr. Bowers would be able to argue that the classes he took met the NCAA's formula: that each class was a parallel of a class offered to students without disabilities, and that the two classes covered the same quantity and quality of material. In the alternative, he could argue that even if the classes did not meet the NCAA's mechanical formula, the classes provided him with the same knowledge and skills that other college-bound students receive in their curriculum. See Ganden v. National Collegiate Athletic Association, 1996 WL at *15 ("[T]itle III may require the NCAA to count courses as 'core' even if they are not substantively identical to approved 'core courses[.]'"). Therefore, he would be able to prove that the current NCAA policies and practices are not necessary to the initial-eligibility program because the classes he took, while

perhaps not meeting the NCAA's formula, did prepare him to succeed academically in college.

Moreover, if these facts can be established, Mr. Bowers can show that modifications to the rules were necessary for him to enjoy a service offered by the NCAA, specifically a determination of academic eligibility. Mr. Bowers would also be able to prove that reasonable modifications to the NCAA's current policies are available — classes designed for students with learning disabilities could be certified if they provide the same knowledge and skills that other college-bound students receive in their curriculum. Finally, Mr. Bowers would be able to prove that these modifications would not fundamentally alter the purpose of the initial-eligibility program because his curriculum gave him the knowledge and skills necessary to succeed academically in college while also participating in athletics.

If the Court looks only at the factual allegations contained in the Complaint, the motion to dismiss should be denied because the Complaint pleads a set of facts that could justify a court granting Mr. Bowers relief.

2. The factual allegations related to the NCAA's waiver process are sufficient to survive a motion to dismiss.

Mr. Bowers' Complaint contains the following factual allegations concerning the sufficiency of the waiver process:

> ¶ 31: At all times relevant to this action, Defendant NCAA knew or should have known that its "waiver" procedures were inaccessible to and failed to ensure that students with learning disabilities were afforded due process and equal treatment.
>
> ¶ 61: After reviewing plaintiff's transcript and noting that plaintiff was a student with a learning disability who had taken "SE" courses primarily, Temple's recruiter for the football program determined that the NCAA Clearinghouse would not grant Michael Bowers the necessary "qualifier" status; consequently, Temple did not pursue him for its football program and/or an athletic

scholarship.

¶ 62: Although they were aware that Michael Bowers was a "non-qualifier," Temple never offered to apply and never applied for a waiver for Michael Bowers; nor, did it inform Plaintiff that a waiver process existed for students with learning disabilities.

¶ 74: Because Michael Bowers never received his "qualifier" status from Defendant NCAA Clearinghouse, the staff of Iowa's football program stopped calling and discontinued expressing any interest in his joining the school's football program.

¶ 75: Iowa never offered to apply and never applied for a waiver for Michael Bowers; nor, did it inform Plaintiff that a waiver process existed for students with learning disabilities.

¶ 84: Because Michael Bowers never received his "qualifier" status from Defendant NCAA Clearinghouse, American staff stopped calling and discontinued expressing any interest in his joining the school's football program.

¶ 85: American never offered to apply and never applied for a waiver for Michael Bowers; nor, did it inform Plaintiff that a waiver process existed for students with learning disabilities.

¶ 133: On July 30, 1996, the NCAA through its Clearinghouse sent Plaintiff his final certification informing him that he was a "non-qualifier" and not eligible to compete in Division I or II athletic competition.

¶ 140: Plaintiff was accepted to Temple for the school year beginning in September 1996. Because he was not accepted until two weeks into the first semester, Plaintiff made the decision to wait until the Spring semester to enroll.

These factual allegations, if proven and combined with supporting legal theories, would present a compelling case that the ADA requires the NCAA to modify its waiver procedures. First, Mr. Bowers alleges that the waiver hearing would have come too late in the recruiting process; by the time the NCAA Clearinghouse had issued a determination of his eligibility, enabling him to file an application for a waiver, many colleges had already stopped recruiting him. Second, he alleges that the final certification report came so late that a waiver application

was not feasible; the football training season was already beginning. Indeed, he alleges that the ineligibility decision came so late that he was not able to enroll in college until the middle of September, leading him to decide to wait to begin classes until the spring semester. Finally, he alleges that he was never informed that there was a waiver process; since he did not know of the option, he could not file the application. If these facts can be established, the waiver program would not constitute an adequate policy modification under title III of the ADA.

If the Court looks only at the factual allegations contained in the Complaint, the motion to dismiss should be denied because the Complaint pleads a set of facts that could justify a court granting Mr. Bowers relief.

D. The limited facts available suggest that there are genuine issues of material fact regarding whether the NCAA's policies and procedures discriminate against students with learning disabilities in general and Mr. Bowers in particular.

The NCAA asks the Court to consider not only the factual allegations in the Complaint, but also the testimony and documents already in the record. At this early stage of the proceedings, where there has been no discovery, there is a limited amount of evidence to supplement the factual allegations in the Complaint. The motion for summary judgment is premature because no discovery has been conducted and because the NCAA has not complied with Local Rule 56.1. See discussion supra Part II.D.

Moreover, summary judgment is not warranted because the NCAA's motion does not have an adequate factual foundation. In its arguments relating to the ADA, the NCAA relies primarily on the Court's opinion regarding the motion for a preliminary injunction. However,

the standards of proof applicable to the motion for summary judgment are substantially different from the standards of proof in effect when the court ruled on Mr. Bowers' motion for a preliminary injunction. The Seventh Circuit has held, "A court must be cautious in adopting findings and conclusions from the preliminary injunction stage in ruling on a motion for summary judgment." Communications Maintenance v. Motorola, 761 F.2d 1202, 1205 (7th Cir. 1985). The court cautioned that findings of fact and conclusions of law developed from evidence presented at the preliminary injunction hearing "are often based on incomplete evidence and a relatively hurried consideration of the issues." Id. at 1205. In addition, the question to be answered by a motion for a preliminary injunction is completely different from the question to be answered by a motion for summary judgment:

> In the former a court considers whether there is *a reasonable likelihood* that the *moving party* will prevail on the merits; in the latter a court considers whether there is any *issue of material fact* remaining after construing the facts in a *light most favorable* to the *non-moving party.*

Id. See also University of Texas v. Camenisch, 451 U.S. 390 (1980)(describing the differences between proceedings seeking a preliminary injunction as contrasted with a hearing on the merits).

The Seventh Circuit held in another case that there is no inconsistency in denying a motion for a preliminary injunction, and then later denying a motion for summary judgment filed by the defendant. Technical Pub. Co. v. Lebhar-Friedman, 729 F.2d 1136, 1139 (7th Cir. 1984).

Even though the Court denied Mr. Bowers' motion for a preliminary injunction, it would be inappropriate to foreclose the possibility that through discovery he could develop additional facts that would support his claim. Mr. Bowers should be allowed to conduct further discovery

regarding the factual issues presented during the hearing on the preliminary injunction, as well as on factual issues that are consistent with the pleadings in his Complaint but were not introduced at the hearing on the preliminary injunction. Only after the facts have been fully developed is a judgment on the merits appropriate. As the Second Circuit held:

> It would therefore be anomalous at least in most cases, and here, to regard the initial ruling as foreclosing the subsequent, more thorough consideration of the merits that the preliminary injunction expressly envisions.

Goodheart Clothing Company v. Laura Goodman Enterprises, 962 F.2d 268, 174 (2d Cir. 1992).

Summary judgment is also not warranted because there are many material issues of fact about which there are genuine disputes. For example, the parties cannot agree about the contents of the "special education" classes taken by Mr. Bowers. If discovery is allowed to proceed, Mr. Bowers would be able to develop further evidence from teachers and school officials about the content of these courses; about the knowledge and skills taught to students who take these courses; and, whether the NCAA could certify courses such as these without compromising its initial-eligibility program. These are only a few of perhaps a dozen or more material facts about which there are genuine disputes.

CONCLUSION

The United States respectfully requests that the Court not foreclose the possibility that Mr. Bowers could develop sufficient evidence to establish that the NCAA is subject to title III

of the ADA and that its policies toward students with learning disabilities violate title III of the ADA.

Respectfully submitted,

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November 4, 1997

CERTIFICATE OF SERVICE

I certify that the United States' Memorandum of Law as Amicus Curiae was served on the following attorneys by the methods indicated on November 4, 1997.

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