UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUSTIN TATUM	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:97CV2592-DJS
	)	
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and ST. LOUIS UNIVERSITY	)	
	)	
Defendants.	)	
_____	)	

UNITED STATES' MOTION FOR LEAVE TO PARTICIPATE AS AN AMICUS CURIAE AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Justin Tatum has filed suit alleging that the National Collegiate Athletic Association (NCAA) violated title III of the Americans with Disabilities Act (ADA) when it declared him ineligible to participate in athletics or receive an athletic scholarship during his first two semesters of college.

On January 2, 1998, the Court directed the parties to address several issues, including the issue of whether the complaint fails to state a claim under the ADA because the NCAA is not a public accommodation under title III.

The United States respectfully requests leave to participate as an amicus curiae on this issue, for the reasons given in the attached Memorandum of Law. The United States also seeks permission to participate in any oral argument held on this issue.

The United States' Memorandum of Law as Amicus Curiae is attached.

Respectfully submitted,

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January 9, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUSTIN TATUM	)	
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Plaintiff,	)	
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v.	)	No. 4:97CV2592-DJS
	)	
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, and ST. LOUIS UNIVERSITY	)	
	)	
Defendants.	)	
_____	)	

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO PARTICIPATE AS AN AMICUS CURIAE

INTRODUCTION

On December 30, 1997, Justin Tatum filed suit alleging that the National Collegiate Athletic Association (NCAA) violated title III of the Americans with Disabilities Act (ADA) when it declared him ineligible to participate in athletics or receive an athletic scholarship during his first two semesters of college.

In opposing Mr. Tatum's application for a temporary restraining order, the NCAA filed a brief arguing, in part, that the complaint fails to state a claim under the ADA because the NCAA is not a public accommodation under title III. The Court directed the parties to brief that issue, and others, in greater detail.

ARGUMENT

The United States has significant responsibilities for implementing and enforcing the ADA, including, pursuant to statutory directive, the promulgation of implementing regulations. Accordingly, the United States has a strong interest in ensuring that the case law is consistent with the United States' interpretation of the statute and the Department of Justice's regulation implementing title III of the ADA,

28 C.F.R. pt. 36.[1]

Therefore, the United States often participates as amicus curiae in litigation involving the ADA. See e.g., Helen L. v. DiDario, 46 F. 3d 325 (3rd Cir. 1995), cert. denied sub nom. Penn. Sec'y of Public Welfare v. Idell S., 116 S. Ct. (1995); Kinney v. Yerusalim, 9 F. 3d 1067 (3rd Cir. 1993), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Fiedler v. American Multi-Cinema, Inc., 871 F.Supp. 35 (D.D.C. 1994). Moreover, the United States has participated as amicus curiae in litigation involving the NCAA. See Butler v. National Collegiate Athletic Association, No. C96-1656 (W.D. Wash., Nov. 8, 1996)(a copy is attached as Exhibit A to the United States' Memorandum of Law as Amicus Curiae); Bowers v. National Collegiate Athletic Association, No. 97-2600 (D.N.J., Oct. 28, 1997)(a copy is attached).

This litigation presents critical issues under title III, the resolution of which is likely to have effects beyond just this litigation. The threshold issue argued by the NCAA relates to the interpretation of title III's requirement that discrimination on the basis of disability is prohibited "by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182. The specific question here is whether the substantive provisions of title III apply to an athletic association that imposes eligibility criteria on public and private schools, and sponsors athletic events at public and private coliseums and stadiums around the country. It is the United States's position that the substantive provisions of title III do apply to the NCAA. In addition, the proper interpretation of this provision of title III is important in a number of contexts other than that of athletic associations.

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[1] [1] Because the Department is the rule-making agency for title III, both its regulation and its interpretation of the regulation are entitled to deference. See 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."). See also Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA); Fiedler v. American Multi-Cinema, Inc., 871 F.Supp. 35, 39 (D.D.C. 1994) (stating that the Department, as author of the regulation, is the principle arbiter of its meaning, and according Department interpretations substantial deference) (citing Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994)).

The attached Memorandum of Law does not take a position on the other issues discussed in the Court's January 2, 1998 ruling, including, "whether standardized test-taking constitutes a major life activity for purposes of the ADA; whether plaintiff's disability results in a 'substantial limitation' on his test-taking ability; whether the NCAA has failed to reasonably accommodate plaintiff's disability and whether such accommodations would fundamentally alter the participation criteria in intercollegiate athletics." Tatum v. National Collegiate Athletic Association, slip op. at 10.

Because the United States believes that its interests may be affected by the outcome of this case and, further, that its views will be of assistance to the Court, the United States requests that it be permitted to file a memorandum of law as an amicus curiae.

The United States further requests that if this Motion is granted, its amicus curiae status include the right to participate in any oral arguments involving the issues discussed in its amicus curiae brief.

Respectfully submitted,

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	)	
Defendants.	)	
_____	)	

O R D E R

This matter having been brought before the Court by the United States's Motion for Leave to Participate as Amicus Curiae and for Leave to Participate in Oral Argument, and the Court having read and considered the memoranda of counsel, and for good cause shown, it is hereby ORDERED, this ____ day of _____, 1998, as follows:

1. The motion is GRANTED, and the Court shall accept the United States' Memorandum of Law as Amicus Curiae, submitted simultaneously with the motion.

2. The United States' status as amicus curiae shall include the right to participate in any oral argument held concerning the issues raised in its amicus curiae brief.

IT IS SO ORDERED.

HON. DONALD J. STOHR
United States District Court
Eastern District of Missouri

January __, 1998

CERTIFICATE OF SERVICE

I certify that the United States' Motion for Leave to Participate as Amicus Curiae, Memorandum in Support, Proposed Order, and Memorandum of Law as Amicus Curiae was served on the following attorneys by overnight mail on January 8, 1998.

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Defendants.	)	
_____	)	

UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE

INTRODUCTION

On December 30, 1997, Justin Tatum filed suit alleging that the National Collegiate Athletic Association (NCAA) violated title III of the Americans with Disabilities Act (ADA) when it declared him ineligible to participate in athletics during his first two semesters of college. Mr. Tatum now seeks a preliminary injunction allowing him to accept an athletic scholarship and participate on St. Louis University's basketball team.

The Court directed the parties to address several issues, including whether the NCAA is a private entity that owns, leases or operates places of public accommodation under title III of the ADA. Tatum v. National Collegiate Athletic Association, No. 4:97CV2592, slip op. at 7-9 (E.D.Mo., Jan. 2, 1998). The NCAA argues that Mr. Tatum's complaint fails to state a claim under the ADA because the NCAA is not a public accommodation under title III [1].

[1] This Memorandum of Law does not take a position on the other issues discussed in the Court's January 2, 1998 ruling, including, "whether standardized test-taking constitutes a major life activity for purposes of the ADA; whether plaintiff's disability results in a 'substantial limitation' on his test-taking ability; whether the NCAA has failed to reasonably accommodate plaintiff's disability and whether such

The United States argues as amicus curiae that Mr. Tatum has a substantial likelihood of success on the merits of the argument that the NCAA is subject to title III.

ARGUMENT

I. Legal standards applicable to the motion for a preliminary injunction.

A preliminary injunction is warranted if Mr. Tatum can prove that there is a threat of a irreparable harm if he is not granted an injunction, that the harm he will suffer outweighs the injury the NCAA would suffer if an injunction is granted, that there is a probability that he will be successful on the merits, and that granting an injunction would be in the public interest. Dataphase Systems v. C L Systems, 640 F.2d 109, 113 (8th Cir. 1981). The United States' role as amicus curiae is to address the issue of whether Mr. Tatum has a probability of success on the merits of the threshold issue of whether the NCAA is subject to title III of the ADA.

The issue of whether the NCAA is a private entity that owns, leases or operates places of public accommodation is a mixed question of law and fact. Butler v. National Collegiate Athletic Association, No. C96-1656, slip op. at 8-9 (W.D. Wash., Nov. 8, 1996)(Exhibit A). The United States and Mr. Tatum are currently privy to only a small subset of the information that will eventually be developed in discovery regarding how the NCAA relates to a number of places of public accommodation. This mixed question of law and fact depends on the answers to questions such as,

> * When the NCAA sponsors a basketball tournament (or a gymnastics competition or a swimming championship or a tennis tournament), does it lease the stadium or arena?
>
> * How extensive is the NCAA's control over the stadium or arena during the tournament that it is sponsoring?
>
> * How extensively does the NCAA regulate the athletic training facilities (for example, gymnasiums, weight rooms or exercise facilities) of its member colleges and universities?

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accommodations would fundamentally alter the participation criteria in intercollegiate athletics." Tatum v. National Collegiate Athletic Association, slip op. at 10.

However, even reviewing only the evidence currently available, it is clear that there is a substantial likelihood that Mr. Tatum will be successful in showing that the NCAA is subject to title III.

II. Mr. Tatum is likely to succeed on the merits of his argument that the National Collegiate Athletic Association leases or 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 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, slip op. at 8, citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). 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 that own, lease (or lease to), or operate a place of public accommodation. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.202. The Preamble 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.[2]

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. Tatum argues that the NCAA is a private entity that leases or operates places of public accommodation. The NCAA, a private entity, clearly has contacts with several places of public accommodation, 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).

This Memorandum of Law addresses the issue of whether the NCAA "operates" these facilities. In the context intended by the statute, "operates" means to control, manage, administer, or regulate.[3] A

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[2] 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 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).

[3] 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

federal court in Connecticut defined “operate” in the context of title III of the ADA as "managing and controlling[.]" Dennin v. Connecticut Interscholastic 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.

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.

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the operation of (a business, enterprise, etc.")).

C. The evidence currently available suggests that the NCAA operates places of public accommodation.

While the United States is obviously not aware of the evidence that will be presented at the preliminary injunction hearing, two things are clear. First, at this early stage of the proceedings, the facts available to Mr. Tatum are only a small subset of what will be available once discovery is conducted. Second, a review of simply the NCAA's own operating procedures and by-laws makes it clear that there is a substantial probability of success on the merits of the argument that the NCAA operates one or more places of public accommodation.

1. The evidence currently available suggests that the NCAA operates stadiums or other places of 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 that vendors may sell. NCAA Executive Regulation 31.6.2. It regulates the profits that 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 the stadiums, coliseums, and arenas at which competitions are staged for at least a limited, specific period of time. During the athletic events sponsored by the NCAA, it exercises substantial control over the operations of the places of public gathering, from the ticket windows to the concession stands to the press passes.

2. The evidence currently available 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. It allows colleges and universities to set aside these facilities 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" that 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.

D. Relevant authorities support the conclusion that the NCAA operates places of public accommodation.

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. In Ganden v. National Collegiate Athletic Association, No. 96C-6953, 1996 WL 680000 (N.D. Ill., Nov. 21, 1996), 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.[4] The court further held that it was "reasonably probable" that Mr. Ganden could establish that the NCAA has a "significant degree of

[4] 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.

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.[5] 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. 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 that of the state athletic association.

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 the admitting physician, not an employee of the hospital, "operated" the hospital 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

[5] 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).

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).[6] 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.

E. Contrary authorities do not justify a conclusion that the NCAA does not operate places of public accommodation.

In addition to the Butler and Ganden courts, one other federal court has ruled on whether the NCAA operates places of public accommodation under 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. Johannesen v. National Collegiate Athletic Association, No. Civ. 96-197 (D. Ariz., filed May 3, 1996)(Exhibit C). The court held that, "The Johannesens' 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

[6] The NCAA cites 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. 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.

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. 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 D).[7] 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

[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. Title III Technical Assistance Manual at 7. Interpretive documents such as the Department of Justice's Technical Assistance Manual are entitled to deference. 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).

affect the conclusion that CIAC 'operates' the facilities for purposes of athletic competition"). The question is not where Mr. Tatum will participate in basketball practices or play in basketball 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 v. Connecticut Interscholastic Athletic Conf., 913 F.Supp. at 670.

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 courts' 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.

If Sandison and Johannsen are correct, then Mr. Tatum's claim should be successful because St. Louis University is a private entity, while Mr. Johannesen's should not be successful because Arizona State University is a state school. 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.[8]

[8] Brown v. 1995 Tenet Paraamerica Bicycle Challenge, 959 F.Supp. 496 (N.D.Ill. 1997) relied on Sandison and is therefore of limited usefulness to this Court.

In its Memorandum in Opposition to Mr. Tatum's application for a temporary restraining order, the NCAA notes 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 National Collegiate Athletic Association's Memorandum in Opposition to Plaintiff's Request for a Temporary Restraining Order, Tatum v. National Collegiate Athletic Association, No. 4:97CV2592, at 7-8 (Dec. 31, 1997). The NCAA failed to note that 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 leading case supporting the NCAA's position, Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993), cert. denied, 114 S.Ct. 602 (1993), 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, an annual budget in the tens of millions of dollars, and close connections with places of public gathering throughout the country.

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 is "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.

Respectfully submitted,

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