

**NCAA INITIAL ELIGIBILITY REQUIREMENTS:
THE CASE LAW BEHIND THE CHANGES**

*Doug Bakker*¹

INTRODUCTION

One aspect of the National Collegiate Athletic Association's ("NCAA") mission has been to raise student-athlete graduation rates, so these students are educated, not exploited, by the colleges and universities around the country. The NCAA has addressed this issue through the use of initial-eligibility rules and has attempted to change the bylaws to correspond with the changing needs of its member institutions and the student-athletes. However, another contention is that the NCAA has been affected by civil litigation and in accordance has changed the eligibility rules with the enactment of Proposition 16 and especially the new expansive bylaw changes that will become effective in August of 2005.

Before analyzing this issue, the core characteristics of the NCAA and the lawsuits that follow from them need to be examined. Initial eligibility requirements set by the NCAA for student-athletes are a hotly litigated area. There have been many claims filed in the courts since the enactment of Proposition 48 in 1995 seeking injunctive relief regarding the initial eligibility of many non-qualifiers or partial qualifiers.² The claims have varied throughout litigation and have rested on various statutes and widely used precedent for support, including Title VI of the Civil Rights Act of 1964, Title III of the Americans with Disabilities Act, and *Welsh v. Boy Scouts of America*.³

¹ J.D., DePaul University College of Law, 2005.

² Some of the cases that have been fully litigated since 1995 are *Cureton v. NCAA*, *Hall v. NCAA*, *Ganden v. NCAA*, *Tatum v. NCAA*, *Cole v. NCAA*, *Pryor v. NCAA*.

³ 42 U.S.C. § 200d (1964), 42 U.S.C. 12101 (1990), and *Welsh v. Boy Scouts of America*, 993 F.3d 1267 (1993).

Some claims are made by student-athletes with learning disabilities seeking initial eligibility despite falling well below the initial eligibility requirements.⁴ Others seek relief through Title VI of the Civil Rights Act of 1964, alleging discrimination by the NCAA regarding the eligibility bylaws. Also, some claims attempt to assert that there is a valid contract between the NCAA and the student-athlete with the signature of the National Letter of Intent and that the NCAA violates this contractual agreement by not granting them their eligibility.⁵ Each of these types of claims will be analyzed in further detail.

All of these claims rest on a few core characteristics of the NCAA that courts have established through a series of opinions. These characteristics are a common thread throughout many of the cases and are most often the deciding factors in the opinions. In order to fully understand the evolution of the litigation against the initial eligibility rules of the NCAA, these essential elements must be flushed out. From there, it is necessary to analyze the eligibility bylaws of the NCAA and the validity of the various claims that arose throughout the last four decades, dating back to the 1.600 rule, the eligibility requirement before the enactment of Proposition 48. The 1.600 rule involved a complex formula adopted by the NCAA that used standardized test scores and high school GPAs. The formula attempted to project whether the student-athlete would receive a 1.600 GPA in the student's first year in college. It was later replaced by Proposition 48, which required a minimum 2.00 GPA in 11 core high school classes and a minimum SAT score of 700 in order to be able to receive a scholarship in their first year of collegiate enrollment. This type of eligibility requirement became the basis of the rules we have today.

⁴ See *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997); *Ganden v. NCAA*, 1996 U.S. Dist. Lexis 17368 at 29 (1996); *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998).

⁵ See *Parish v. NCAA*, 361 F. Supp. 1220 (W.D. La. 1973); *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997).

II. CORE CHARACTERISTICS OF THE NCAA

The Court has addressed the following core characteristics numerous times in regard to the NCAA: whether the NCAA is a voluntary association of colleges and universities; whether the NCAA is a “state actor;” whether the NCAA is a place of public accommodation; whether a college education and interscholastic athletic competition are protected rights; and whether the NCAA performs a legitimate interest. At the basis of every lawsuit one or more of the above characteristics of the NCAA is being discussed and becomes the foundation of the rationale in the majority opinion.

A. Is the NCAA a Voluntary Association?

Many of us think of the NCAA as the end-all-be-all of the administration of college athletics. However, this is a misconception, as there are alternative intercollegiate associations, such as the National Association of Intercollegiate Athletics (“NAIA”) and the United States Collegiate Athletic Association (“USCAA”). It has been argued that the NCAA is not voluntary because for many schools there is no viable alternative for an expansive sports program that they are expected to maintain.⁶ Several cases have addressed the voluntary aspect of the NCAA. In *Shelton v. NCAA*, the Ninth Circuit Court of Appeals noted, “it is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules.”⁷ *Shelton* is the first decision in which the courts refer to the NCAA as a “voluntary association.”⁸ Over a decade later, the Supreme Court analyzed this same issue in *NCAA v. Tarkanian*.⁹ The Court determined that the University of Nevada-Las Vegas (“UNLV”) had options and could have retained their

⁶ *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988). Tarkanian argued that there was no reasonable alternative association in which a large university could be associated with in order to support a viable athletics program.

⁷ *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976). This case was a case involving a student who signed an invalid contract to play a professional sport (same one he would have played in college). He attempted to gain his eligibility back by citing a violation of the equal protection clause.

⁸ *Id.*

⁹ *Tarkanian*, 488 U.S. at 198.

head basketball coach, Jerry Tarkanian, and risked additional sanctions by the NCAA, or “it could have withdrawn voluntarily from the Association.”¹⁰ Tarkanian attempted to persuade the court that the power of the NCAA over collegiate athletics is too great and that there is no practical alternative. The Court addressed this argument and believed it was erroneous, but recognized in a footnote that “the university’s desire to remain a powerhouse among the nation’s men’s college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal.”¹¹ However, the Supreme Court also noted in the same footnote, “that UNLV’s options were unpalatable does not mean that they were nonexistent.”¹² Therefore, the Supreme Court has determined that the NCAA is a voluntary association even though other options may not be acceptable for certain programs. The Supreme Court has not addressed this issue since the Tarkanian case, but in an appellate court case in 1999, *Tarkanian* was followed. In *Cureton v. NCAA*, the Third Circuit Court of Appeals expressly referred to the language of the opinion and the footnote in *Tarkanian*.¹³ The Appellate Court stated in further support of the decision:

The ultimate decision as to which freshman an institution will permit to participate in varsity intercollegiate athletics and which applicants will be awarded athletic scholarships belongs to the member schools. The fact that the institutions make these decisions cognizant of NCAA sanctions does not mean that the NCAA controls them, because they have the option, albeit unpalatable, of risking sanctions or voluntarily withdrawing from the NCAA.¹⁴

¹⁰ *Id.* This case involved the UNLV coach and the sanctions administered by the NCAA for various violations and the threat of additional violations if Tarkanian was not fired. Tarkanian argued that his due process right was violated according §1983.

¹¹ *Id.* at 199.

¹² *Id.* at 199.

¹³ *Cureton v. NCAA*, 198 F.3d 107, 117 (3rd Cir. 1999). This case involves student-athletes who standardized test scores were too low to satisfy NCAA requirements and the plaintiffs allege that the regulations had a disparate impact on students of color, relying on Title VI of Civil Rights Act of 1964.

¹⁴ *Id.*

There is no Court of Appeals or Supreme Court case law holding that the NCAA is not a voluntary association in which the member institutions may not leave at any time.¹⁵ This strongly court-supported aspect of the NCAA is an important characteristic of eligibility litigation that the courts have presided over.

B. Is the NCAA a State Actor?

Another important characteristic evaluated by the courts is whether the NCAA is federally funded and therefore constitutes a state actor. Courts have universally held that the NCAA does not constitute a state actor.¹⁶ There are a few exceptions, which will be addressed below, that were reviewed by the courts when addressing a motion for summary judgment, where the evidence must be looked at in a light most favorable to the non-moving party.¹⁷ The determination that the NCAA is not a state actor is an important factor in Title VI cases of the Civil Rights Act of 1964 and §1983 violations, which will be discussed in depth later.

Once again, *Tarkanian v. NCAA* is the leading Supreme Court precedent on this issue. In state action cases, the plaintiff must prove that the State was sufficiently involved to treat the decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct¹⁸ or if it delegates its authority to a private actor.¹⁹ In his case, Tarkanian attempted to show that the NCAA was a state-actor when it imposed sanctions on UNLV for violating NCAA rules and told UNLV that it should suspend Tarkanian, or risk additional sanctions being imposed upon UNLV as a whole. The Court stated that “the source of the legislations adopted by the NCAA is not Nevada but the collective membership, speaking

¹⁵ *Cureton v. NCAA*, 37 F. Supp. 2d 687 (1999). In this district court case, the court ruled that the member institutions have a direct connection with the NCAA and therefore implied that the NCAA was not a voluntary association. This was overruled by the Court of Appeals on review.

¹⁶ *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988).

¹⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 255, 259 (1986).

¹⁸ *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

¹⁹ *West v. Atkins*, 487 U.S. 42 (1988).

through an organization that is independent of any particular State,” and therefore the State did not create the legal framework of the NCAA.²⁰ Tarkanian also argued that since UNLV, a state-actor, delegated authority to the NCAA it would thereby make the NCAA a state-actor.²¹ The Court rejected this argument and stated that UNLV did not delegate any power to the NCAA to terminate an employee, but rather the University agreed to adhere to the enforcement provisions of the Association in order to be a member.²² The Court went on to note that in most cases, the NCAA is antagonistic to the State and the university it supports in disputes, such as sanctions and eligibility, and therefore appropriately acts more like a private actor than a state actor.²³ This holding has been extended in subsequent NCAA cases. In *Hall v. NCAA*, the Northern Illinois Federal District Court cited *Tarkanian v. NCAA*, stating that the NCAA is not a state actor.²⁴ The *Hall* case goes beyond *Tarkanian* to explain why in their present case the argument that the NCAA is a state actor through a vague connection of a public university receiving state funding is even less of an issue. “If the NCAA’s relationship with UNLV, a public university, was insufficient to translate the NCAA’s actions into state action, then the NCAA is clearly not a state actor by virtue of its relationship with Bradley, a private university.”²⁵

With the formation of the National Youth Sports Program Fund (“NYSP”) in 1969 by the NCAA, the landscape of determining whether the NCAA is a state actor changed. The NYSP is an enrichment program for economically disadvantaged youths that provides summer education

²⁰ *Tarkanian*, 488 U.S. at 193.

²¹ *Id.* at 195.

²² *Id.* at 196.

²³ *Id.*

²⁴ *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997). This case involved a student-athlete who failed to satisfy the eligibility requirements of the NCAA in order to be a qualifier. The plaintiff accused the NCAA of a myriad of violations, including contractual claims, negligent misrepresentation, promissory estoppel, violation of § 1981 of Civil Rights Act of 1886, a violation of Title II of the Civil Rights Act of 1964, and a violation of §1983.

²⁵ *Id.*

and sports instruction on the campuses of NCAA member and non-member institutions.²⁶ The NYSP receives federal funds directly from the federal government and therefore is a state actor.²⁷ In *Cureton v. NCAA*, Cureton argued that because of the attachment of the NYSP to the NCAA, the NCAA should be considered a state actor for all legal claims against it, including §1983 and Title VI of the Civil Rights Act of 1964 claims.²⁸ The Eastern District of Pennsylvania accepted the argument and stated that since NYSP is ultimately controlled by the NCAA and, “the NCAA is deemed a recipient of federal funds under this theory, [and] all of its operations, including its promulgation of initial eligibility rules, are covered by Title VI,” thereby defining the NCAA as a state actor.²⁹ However, this ruling by the District Court was made at the summary judgment stage, where evidence must be viewed in a light most favorable to the non-moving party.³⁰ This ruling was overturned less than a year later in the Third Circuit Court of Appeals.³¹ The Court responded by stating that the regulations imposed by statutes regarding state action are program-specific.³² The Court then proceeded to formulate a bright-line rule that states: “it is obvious that a recipient of federal financial assistance need not give an assurance of nondiscrimination with respect to programs in no way affecting the federally assisted program.”³³ Therefore, once again the NCAA is deemed not to be a state actor in all of its operations, except in the administration of the NYSP. Despite this decision in favor of the NCAA regarding the connection of the NYSP, the NCAA recognized the potential harm that this connection could cause them if a court viewed the relationship differently. Therefore, in 2001, the NCAA separated the NYSP administratively and operationally, instead just providing

²⁶ National Youth Sports Corporation (2006), <http://www.nyscorp.org>.

²⁷ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 692 (E.D. Pa. 1999).

²⁸ *Id.*

²⁹ *Id.* at 695.

³⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 255 (1986).

³¹ *Cureton v. NCAA*, 198 F.3d 107 (3rd Cir. 1999).

³² *Id.* at 115.

³³ *Id.*

financial grant money and other forms of support, in order to adequately separate them from future litigation attempting to prove that the NCAA is a state actor.³⁴

In addition, plaintiffs have argued that the NCAA, by virtue of its receipt of membership dues from publicly financed universities, is a state actor.³⁵ The courts have consistently rejected this theory and have consistently held that the NCAA is a private actor subject to no federal funds.

C. Is the NCAA a Place of Public Accommodation?

While the NCAA is not considered a state actor by the courts, that does not necessarily mean that they may not constitute a place of public accommodation. This factor becomes an important one to resolve in Title III Americans with Disabilities Act (“ADA”) claims. In *Ganden v. NCAA*, the petitioner had a learning disability and was unable to meet the minimum eligibility requirements for his GPA in core classes and therefore was determined to be a partial-qualifier. He alleged discrimination based upon his disability and therefore needed to establish that the NCAA is a place of public accommodation in order to have a successful ADA claim. In *Ganden*, the Northern Illinois Federal District Court analyzed what constitutes a “place of public accommodation.”³⁶ The Court cited *Welsh v. Boy Scouts of America*, which stated that a membership organization must have “a close connection to a particular facility,” and that the connection exists if the organization is affiliated with a particular facility, and membership in the organization acts as a necessary predicate to use of that facility.³⁷ The plaintiff argued that the members of the NCAA primarily construct athletics facilities for the purpose of intercollegiate athletics and that the NCAA possesses a significant degree of control over the management of

³⁴ Gary T. Brown, *NYSP Walks Tall, Stands Tall*, NCAA NEWS, March 26, 2001.

³⁵ See *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988); *Cureton v. NCAA*, 37 F. Supp. 2d 687, 692 (E.D. Pa. 1999).

³⁶ *Ganden v. NCAA*, 1996 U.S. Dist. Lexis 17368 at 29 (1996).

³⁷ *Id* at 29. citing *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.1993).

the competitions and the use of the facilities.³⁸ The Court agreed with *Ganden* and went on to note that the NCAA most likely “operates” the facilities as well.³⁹ This use of the word “operates” is directly stated in the definition of “public accommodation” used by the ADA and therefore allowed the Court to arrive at the simple conclusion that the NCAA constitutes a place of public accommodation.⁴⁰ The *Ganden* opinion is not the only one supporting this belief. In *Tatum v. NCAA*, the Eastern District Court of Missouri cites to *Ganden v. NCAA*, laying out the rule expressed in *Welsh v. Boy Scouts of America* and follows precedent.⁴¹ In the *Tatum* case, the student-athlete was diagnosed with generalized anxiety disorder and took the ACT in a nonstandard format. The NCAA would not recognize the student’s scores and therefore declared him ineligible. The petitioner claimed discrimination under Title III of the ADA, but the Court determined that he did not have a significant amount of mental impairment to meet the required showing under the statute. However, the Court went on to hold that the significant degree of control that the NCAA exerts over the athletic facilities of its member institutions and other circumstances, including relevant case law, all support the fact that the NCAA is considered a place of public accommodation.⁴²

The two previous cases discussed that determined that the NCAA was a place of public accommodation were opinions of Federal District Courts; there has yet to be a strong Court of Appeals or Supreme Court opinion that addresses the NCAA’s status as a place of public accommodation. The two District Courts based their opinions on that of *Martin v. PGA Tour, Inc.*⁴³ In this case, Casey Martin suffers from a circulatory disorder in which he is unable to

³⁸ *Id.* at 32.

³⁹ *Id.*

⁴⁰ 42 U.S.C. §12181(7).

⁴¹ *Tatum v. NCAA*, 992 F. Supp. 1114, 1119 (E.D. Mo. 1998).

⁴² *Id.* at 1121.

⁴³ *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 998 (9th Cir. 2000).

walk the length of a golf course without possibly causing serious permanent harm to his leg and at times can not walk the golf course at all. He petitioned the court to order the PGA Tour to allow him to use a golf cart in all PGA events. He filed a Title III ADA claim stating that they discriminated against him based on his disability. Many similarities can be found between the NCAA and the PGA Tour as associations with a wide variety of members and activities that they administer, govern, and control. In the appellate opinion of *Martin v. PGA Tour, Inc.*, the Ninth Circuit Court of Appeals cited to *Ganden v. NCAA* and *Tatum v. NCAA* stating that in a Title III case, the definition of a “place of public accommodation” applies not only to the stands, but also to the playing field.⁴⁴ When the PGA tour appealed to the Supreme Court, the Court affirmed the Ninth Circuit and stated that “the definition of a ‘place of exhibition or entertainment’, as a public accommodation, covered participants ‘in some sport or activity’ as well as spectators or listeners.”⁴⁵ This recent opinion by the Supreme Court allows the first requirement of a valid ADA claim to be established by petitioners against the NCAA and sheds new light on how the courts view the NCAA and its actions.

D. Is Athletics a Property Interest?

The next two characteristics of intercollegiate athletics address the legitimacy of certain interests. Many claims have been anchored on the fact that participation in intercollegiate athletics, scholarship money, and the possibility of a future professional athletic career are property interests in which the Constitution, specifically the Fourteenth Amendment, provides protection.⁴⁶ However, courts have refused to accept this notion since *Parish v. NCAA*, in which

⁴⁴ *Id.*

⁴⁵ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). The Supreme Court referred to a previous case (*Daniel v. Paul*) that addressed a similar issue regarding a place of public accommodation. “Place of exhibition or entertainment” and “in some sport or activity” are directly stated in §12181(7), which defines a place of public accommodation in the ADA statute.

⁴⁶ U.S. Const. amend. XIV.

the Western District Court of Louisiana held that the Constitution does not protect the right to participate in interscholastic athletic competition.⁴⁷ This case involved a student-athlete who did not satisfy the 1.600 rule of eligibility in order to participate in athletics under the NCAA. The petitioner sought an injunction alleging no due process under the 14th amendment. The Court rejected the claim. The Court also outlined the characteristics of a property interest in a benefit.⁴⁸ “To have a property interest, a person must have more than an abstract need for it and must have more than a unilateral expectation of it, but rather the person must have a legitimate claim of entitlement to the interest.”⁴⁹ Though *Parish v. NCAA* set the precedent for other courts, in *Hawkins v. NCAA* the Central District Court of Illinois addressed the possibility of a property interest rooted in participation in intercollegiate athletics and the potential for a professional athletic career.⁵⁰ In this case, a group of student-athletes challenged a ruling by the NCAA that imposed sanctions on Bradley University because of infractions that resulted in the suspension of post-season play stating that they had a legitimate interest in those games because of the ramifications it may have on their professional careers. The court determined that the possibility of a professional career is far too speculative based upon performance and the possibility of an injury to establish a property interest.⁵¹ The court also agreed with the *Parish* opinion and reaffirmed that there is no established right to participate in interscholastic athletics.⁵²

Another question that remains is if there is a protected economic interest in an athletic scholarship to provide for education. *Hall v. NCAA* addresses this issue, holding that there is no

⁴⁷ *Parish v. NCAA*, 361 F. Supp. 1220 (W.D. La. 1973).

⁴⁸ *Id.* at 1228.

⁴⁹ *Id.*, citing *Board of Regents, etc v. Roth*, 408 U.S. 564, 569 (1972).

⁵⁰ *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987).

⁵¹ *Id.* at 610.

⁵² *Id.*

protected economic interest in an athletic scholarship.⁵³ The Northern Illinois Federal District Court explains its reasoning by referring to *Knapp v. Northwestern Univ.* stating, “while a college degree enhances one’s ability to earn a livelihood, the lack of a scholarship does not prohibit a person from pursuing a college degree.”⁵⁴ Therefore, the courts have clearly ruled that student-athletes do not have a property interest in intercollegiate athletic competitions and athletic scholarships when making due process claims under the Fourteenth Amendment.

E. Does the NCAA Perform a Legitimate Interest?

The final question regarding specific characteristics of the NCAA addressed by the courts is whether the NCAA has a legitimate purpose in setting up initial academic eligibility rules. Courts have agreed that the NCAA has good intentions with the rules that it adopts.⁵⁵ In *Hall v. NCAA*, the Court noted:

By fostering amateurism and competition within a framework of rules, which include academic standards, the NCAA’s eligibility requirements provide student athletes with a college experience which goes beyond merely being on a “farm team for the pros.” If the concept of a ‘student-athlete’ is not to be an oxymoron, the NCAA’s initial eligibility requirements must be more than an afterthought or an administrative inconvenience for students, teachers, coaches, and counselors.⁵⁶

The Eastern Pennsylvania Federal District Court in *Cureton v. NCAA* stated that the objective of raising student-athlete graduation rates is a legitimate goal and recognizes that the NCAA is “properly setting academic standards for student-athletes in hopes of improving the rate at which they graduate.”⁵⁷ In *Cole v. NCAA*, the prevailing view on the NCAA’s purpose is stated as:

The initial-eligibility requirement is also integral to the NCAA’s mission of maintaining amateurism in intercollegiate sports. The purpose of the NCAA’s

⁵³ *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997).

⁵⁴ *Id.* at 799, citing *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996).

⁵⁵ *See Hall*, 985 F. Supp. at 782; *Cureton*, 37 F. Supp. 2d at 687.

⁵⁶ *Hall*, 985 F. Supp. at 799.

⁵⁷ *Cureton*, 37 F. Supp. 2d at 703.

academic eligibility requirements is to ensure that students are not merely admitted to universities to participate in intercollegiate sports, but also are admitted to promote and develop educational leadership and scholarship.⁵⁸

The opinion goes on to note that eligibility requirements are deemed essential when such requirements are reasonably necessary to accomplish the purpose of a particular program.⁵⁹ The Court concluded that the NCAA's minimum academic requirements are an essential eligibility requirement.⁶⁰

F. Does the Loss of Participation Constitute an Irreparable Harm?

One factor that is brought up in many of the cases, because a preliminary injunction is sought, is the threat of irreparable harm.⁶¹ The courts have at times tackled this issue regarding the eligibility of student-athletes and at other times have not addressed it at all. In many preliminary injunction hearings regarding partial-qualifiers seeking their first year of eligibility, the courts held that the student-athlete suffered no irreparable harm because NCAA bylaw 14.3.3.1 allows a fifth year of schooling to facilitate four years of eligibility.⁶² However, in *Ganden v. NCAA*, the Northern Illinois Federal District Court decided in favor of the student-athlete on the basis that there was irreparable harm. The student, Ganden, was a world-class swimmer and without the continuous competition that he could receive as a collegiate swimmer in the peak time of his career, which in swimming is nineteen to twenty-one years of age, he would lose a significant portion of his swimming career and inhibit his development during a

⁵⁸ *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1071 (N.D. Ga. 2000). The petitioner claimed that he was discriminated against due to his learning disability when his standardized test scores and GPA did not meet the requirements of the NCAA eligibility rules. After resubmission of his application, the student-athlete was declared a partial-qualifier.

⁵⁹ *Id.* at 1070.

⁶⁰ *Id.* at 1071.

⁶¹ The requirements of a preliminary injunction is that the one seeking the injunction is suffering an irreparable harm and the party has a likelihood of success on the merits.

⁶² Some examples of cases involving partial qualifiers who were turned away from the court because of this bylaw are *Cole v. NCAA*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000) and *Pryor v. NCAA*, 153 F. Supp. 2d 710 (E.D. Pa. 2001).

critical time.⁶³ In the analogous case of *Tatum v. NCAA*, the Eastern Missouri Federal District Court determined that making the student-athlete spend five years in college in order to complete his four years of eligibility constituted a threat of irreparable harm.⁶⁴ However, the Court held that the threat of irreparable harm was outweighed by the fact that the student was already unable to maintain a sufficient grade point average (“GPA”) to remain in good standing academically at his college.⁶⁵ The courts view of the threat of irreparable harm seems to depend upon the facts of each individual case and therefore no bright-line rule can be laid down. However, as in *Cureton v. NCAA*, when the injunctions are appealed they are overturned.⁶⁶

III. EVOLUTION OF INITIAL ELIGIBILITY RULES

Now that the core characteristics of the NCAA have been established, a brief historical summary of the eligibility rules will lay a foundation for analyzing the various claims that have been made against the NCAA. Since the enactment of initial eligibility rules by the NCAA, there have been gradual changes that have evolved into the standards that the NCAA imposes now.

In 1986, Proposition 48 went into effect with the goal of raising the graduation rate of student-athletes.⁶⁷ The NCAA set the standard of requiring a 2.0 GPA in 11 core courses (in the subjects of english, mathematics, natural or physical science, social science, and additional academic courses approved by the NCAA), demanding a select amount of hours from each of the disciplines and a 700 Scholastic Aptitude Test (“SAT”) score, which was readjusted to 820 when the SAT altered their scoring scale. If a student-athlete meets both the GPA and the SAT

⁶³ *Ganden v. NCAA*, 1996 U.S. Dist. Lexis 17368 at 18 (1996).

⁶⁴ *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998).

⁶⁵ *Id.* at 1122.

⁶⁶ *Cureton v. NCAA*, 198 F.3d 107 (3rd Cir. 1999).

⁶⁷ Walter Byers, *Executive Director Assesses Status of Intercollegiate Athletics*, NCAA NEWS, September 22, 1986 at 3.

requirements, they are deemed “full qualifiers” and could receive athletics scholarships and participate fully in intercollegiate athletics.⁶⁸ Those student-athletes who could only meet the GPA but failed to meet the SAT requirements were deemed “partial qualifiers” and could practice and receive athletics scholarships but were not allowed to compete in their first year.⁶⁹ Student-athletes who did not satisfy either requirement were “non-qualifiers” who could not receive an athletics scholarship and could not participate (compete or practice) with the team on any level. Proposition 48 was successful in raising the graduation rates of student-athletes, but the NCAA wanted to see more improvement and therefore enacted a more stringent Proposition 16.⁷⁰

Proposition 16 became effective in 1996 and changed the face of the eligibility rules considerably. While the minimum required SAT score remained constant at 820, a student-athlete would need a 2.5 GPA in order to be a full qualifier.⁷¹ If a student only had a 2.0 GPA in their core courses then a SAT score of 1010 was required.⁷² Thus, the eligibility rules adopted a sliding scale of SAT scores versus GPA in core courses. The core course requirement was also raised from 11 to 13 courses.⁷³ The final change was the definition of a “partial qualifier.”⁷⁴ It was no longer merely just satisfying the 2.0 GPA requirement that allowed you to receive financial aid and the ability to practice with the team, but rather a new sliding scale was created that allowed for a low score of 720 on the SAT, but required a 2.75 GPA to match and therefore

⁶⁸ 2004-2005 NCAA Division I Manual § 14.3.1.1 at 141 (2004).

⁶⁹ 2001-2002 NCAA Division I Manual § 14.3.2 at 144 (2001).

⁷⁰ http://www.ncaa.org/databases/reports/1/199810bd/199810_di_bd_agenda_s04c_a.html.

⁷¹ 2004-2005 NCAA Division I Manual § 14.3.1.1.1 at 141 (2004).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 2001-2002 NCAA Division I Manual § 14.3.2 at 144 (2001).

acted as an extension of the full qualifier scale ranging from 810 (one score below the minimum full qualifier score) to a low of 720.⁷⁵

In 1999, in the face of a growing amount of litigation initiated by partial qualifiers against the NCAA, the association adopted an additional bylaw that specifically granted partial qualifiers five years to utilize their four years of athletics eligibility.⁷⁶ This new bylaw prevented a significant amount of litigation from proceeding past summary judgment or motions to dismiss. Courts often pointed to this bylaw stating that there was no relief to be granted through injunction because the petitioner will receive four years of athletics participation as well as full scholarship support.⁷⁷

Before proceeding to analyzing the nature of the claims against the NCAA, the core course/GPA and standardized test score requirements need to be examined in order to fully understand the process of eligibility as well as the nature of the litigation.

The NCAA, through the Clearinghouse, determines what courses are determined to be “core courses” for the purposes of initial eligibility. The NCAA Clearinghouse was created by the NCAA to provide a standardized procedure for analyzing the initial eligibility of all prospective student-athletes. High school students submit their transcripts and test scores to the Clearinghouse in order to be declared initially eligible for competition and an athletics scholarship. The procedure has changed many times throughout the years, but generally the Clearinghouse relies on high school administrators to document, through a specific form, which courses the school believes to satisfy the core course requirement.⁷⁸ At times, the Clearinghouse will contact the administrator of the school to discuss possible problems with some core courses

⁷⁵ *Id.*

⁷⁶ 2003-2004 NCAA Division I Manual § 14.3.3.1 at 148 (2003).

⁷⁷ *Pryor v. NCAA*, 153 F. Supp. 710, 712 (E.D. Pa. 2001).

⁷⁸ Form used by the Clearinghouse is called Form 48-H Confirmation.

that they believe to be below the NCAA standards and request alternative information, such as course syllabi and teaching materials.⁷⁹ The NCAA, together with the Clearinghouse, have concrete standards for measuring what the course requirements are for a class to be determined a “core course.” In order for a course to be classified as a “core course” it must satisfy these three factors: be an academic course in one or a combination of these areas: english, mathematics, natural/physical science, social science, foreign language, non-doctrinal religion or philosophy; be four-year college preparatory course; and be at or above your high school’s regular academic level (no remedial, special education, or compensatory courses).⁸⁰ A large discrepancy has occurred in the area of computer science and whether basic word processing and typing skills suffice to satisfy the “core course” requirement.⁸¹ Instead of splitting hairs in this highly controversial area, the NCAA has decided to eliminate all computer science courses from the “core course” list in 2008.⁸² The core course GPA requirement has been acknowledged by the courts for its value as an initial eligibility requirement.⁸³ In *Ganden v. NCAA*, the Northern Illinois Federal District Court stated, “the ‘core course’ criteria further serves the dual interest of insuring the integrity of [the] GPA and independently insuring that the student has covered the minimum subject matter required for college.”⁸⁴

Standardized test score requirements have also been highly criticized by potential student-athletes through both litigation and the media at large. The new sliding scale seems at first glance to put more weight on the GPA of the student-athlete in core course requirements.

While the NCAA believes that the new changes puts more of an emphasis on success in the

⁷⁹ Much of the information in this paragraph is from a dispute in *Hall v. NCAA* in which a series of discrepancies between the high school and the Clearinghouse made it somewhat unclear on what the ultimate outcome would be and eventually the terminations of courses being deemed “core courses” at the high school.

⁸⁰ 2004-2005 Guide for the College Bound Student-Athlete, NCAA.

⁸¹ *Hall v. NCAA*, 985 F. Supp. 782, 785 (N.D. Ill. 1997).

⁸² 2003-2004 NCAA Division I Manual § 14.3.3.1 at 142-43 (2003).

⁸³ Cases include *Ganden v. NCAA*, *Pryor v. NCAA*, and *Cole v. NCAA*.

⁸⁴ *Ganden v. NCAA*, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368, at *46 (N.D. Ill. Nov. 21, 1996).

classroom versus the SAT or ACT, many courts have agreed with the arguments of petitioners, who in fact show evidence to the contrary. In *Cureton v. NCAA*, the Third Circuit Court of Appeals analyzed statistical data and demonstrated that the new changes of Proposition 16 actually resulted in a heavier weight being given to the standardized test score.⁸⁵ The Court stated that the GPA cutoff of 2.00 is set at two standard deviations below the national mean, while the standardized test cutoff score is only one standard deviation below the national mean.⁸⁶ In the recent *Pryor v. NCAA* decision, the Third Circuit Court of Appeals noted that, “Proposition 16 puts a greater emphasis on standardized test score than did its predecessor (Proposition 48).”⁸⁷ In a Fair Test article, written by the National Center for Fair and Open Testing, the author analyzed research regarding the difference between Proposition 48 and Proposition 16.⁸⁸ The research showed the lack of necessity for standardized testing to be used at all in administering eligibility requirements, noting that the service which administers the SAT has concerns over basing eligibility decisions on small differences in test scores.⁸⁹

The criticisms made above provide a basis for many of the claims made by student-athletes against the NCAA throughout the decades. Understanding the history of these claims and the rulings of the courts that control them may flush out the rationale for future modifications to the initial eligibility requirements.

⁸⁵ *Cureton v. NCAA*, 37 F. Supp. 2d at 691.

⁸⁶ *Id.*

⁸⁷ *Pryor v. NCAA*, 288 F.3d 548, 553 (3d Cir. 2002).

⁸⁸ <http://fairtest.org/facts/prop48.htm>. The National Center for Fair and Open Testing works to end the misuses and flaws of standardized testing and to ensure that evaluation of students, teachers, and schools is fair, open, valid and educationally beneficial.

⁸⁹ <http://www.fairtest.org/facts/prop48.htm> - throughout the website there are various articles analyzing the use of test scores and how they are biased towards minorities as well as low-income families.

IV. CLAIMS AGAINST THE NCAA

Early claims against the NCAA were based on the Fourteenth Amendment and alleged that student-athletes had an equal protection claim.⁹⁰ However, an equal protection claim requires the plaintiff to show that a particular law, regulation, or statute as applied to a group of people resulted in discrimination against the plaintiffs.⁹¹ In order to show this, the petitioner must show that the NCAA is a state actor.⁹² As discussed earlier, the courts have determined that the NCAA is not a state actor and therefore not bound by the Fourteenth Amendment.⁹³ Even if the petitioner could satisfy the court that the NCAA is a state actor, they would also have to prove that playing in intercollegiate athletics and athletics scholarships are fundamental rights under the Constitution. However, the decisions in *Hawkins v. NCAA* and *Parish v. NCAA* made clear that these actions are not deemed fundamental rights.⁹⁴ These same determinations apply with equal force to §1983 claims in which the same issues arise.⁹⁵

Another interesting claim that has arisen from litigation against the NCAA is based on a breach of contract between the student-athlete and the NCAA through the National Letter of Intent. The National Letter of Intent “is administered by the Collegiate Commissioners Association and utilized by all member institutions to establish the commitment of a prospect to attend a particular institution.”⁹⁶ In *Pryor v. NCAA*, the Eastern Pennsylvania Federal District Court determined that since the student-athlete knowingly entered into a contract with the NCAA and accepted their conditions and agreed to satisfy them, he cannot claim that they were invalid

⁹⁰ U.S. CONST. amend. XIV. Early cases included *Parish v. NCAA*, 361 F. Supp. 1220 (W.D. La. 1973) and *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987).

⁹¹ *Hawkins*, 652 F. Supp. at 606.

⁹² *Id.*

⁹³ *See supra* p. 6 and note 32.

⁹⁴ *See supra* p.8 and notes 46-48.

⁹⁵ *Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997). Examines the same state-actor legal analysis as well as an analysis of whether athletics and scholarships are fundamental rights according to the judicial systems. The Court follows strong precedent and comes to the same conclusions as previous cases.

⁹⁶ 2004-2005 NCAA Division I Manual § 13.02.8, at 88 (2004).

after refusing to comply with the contractual condition of initial eligibility requirements.⁹⁷ In short, since the student-athlete breached the contract first by not complying with the eligibility requirements of Proposition 16, the contract was invalid and therefore the student could not enforce any other provisions.⁹⁸

Some other claims that resulted in more substantive opinions by the courts include Title III of the American with Disabilities Act claims and Title VI of the Civil Rights Act of 1964 claims.

A. Americans with Disabilities Act Claims

While equal protection and contract claims have had no effect upon the eligibility rules and have resulted in judgments in favor of the NCAA, other claims have been successful; mostly these are brought by the learning disabled.

Many claims against the NCAA have been initiated by student-athletes who claim to have a learning disability and thus argue for a waiver of the eligibility requirements.⁹⁹ Any student-athlete may apply for a waiver of the eligibility requirements citing certain learning disabilities or other reasons that may have caused the ineligible test score or GPA. The NCAA refuses most of these waiver requests, but student-athletes with learning disabilities are often granted eligibility as partial qualifiers. In cases where the student-athlete claims a learning disability, they primarily rely upon Title III of the American with Disabilities Act as their legal basis.¹⁰⁰ Title III prohibits discrimination on the basis of disability in the full and fair enjoyment of any place of public accommodations owned, leased, or operated by private entities.¹⁰¹ In

⁹⁷ Pryor v. NCAA, 153 F. Supp. 2d at 718.

⁹⁸ *Id.*

⁹⁹ Some cases include: Ganden v. NCAA, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368, at *19 (N.D. Ill. 1996), Tatum v. NCAA and Cole v. NCAA.

¹⁰⁰ 42 U.S.C. § 12182(a) (2006).

¹⁰¹ *Id.*

Ganden v. NCAA, the Northern Illinois Federal District Court outlined what is needed for the plaintiff to succeed in a Title III claim:

A plaintiff must prove: (1) he is disabled; (2) that the defendant is a ‘private entity’ which owns, leases or operates a ‘place of public accommodation’; (3) the eligibility requirements ‘screened’ him out of NCAA certification on the basis of his disability and those requirements were not ‘necessary for the provision’ of the ‘accommodation’ or he was denied the opportunity to participate in or benefit from services or accommodations on the basis of his disability and the defendant failed to make reasonable modifications which would not fundamentally alter the nature of the public accommodation.¹⁰²

As noted before the courts have determined for the use of Title III claims that the NCAA operates a place of public accommodation.¹⁰³ The *Ganden v. NCAA* opinion also noted that Congress, when forming Title III of the ADA, recognized that discrimination on the basis of disability is often a product of thoughtlessness and indifference rather than direct discriminatory intent.¹⁰⁴ Consequently, the statute focuses more on the inquiry as to whether the defendant has provided a reasonable accommodation of the individual based upon knowledge of the plaintiff’s disability.¹⁰⁵

The next question is whether the NCAA made reasonable modifications to facilitate the student-athletes disability. The *Ganden* Court cited *Pottgen v. Missouri State High School Activities Ass’n*, which stated that “under each provision, a modification is unreasonable if it imposes an ‘undue financial and administrative burden’ or requires a ‘fundamental alteration’ in the nature of the privilege or program.”¹⁰⁶ The *Ganden* Court believed that the waiver application process instituted by the NCAA and the individualized consideration that is part of

¹⁰² *Ganden v. NCAA*, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368, at *19 (N.D. Ill. 1996).

¹⁰³ *See supra* p. 8.

¹⁰⁴ *Ganden v. NCAA*, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368, at *40 (N.D. Ill. 1996).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *42 (*citing* *Pottgen v. Missouri State High School Activities Ass’n*, 40 F.3d 926, 930 (8th Cir. 1994)).

that process satisfies a reasonable modification under Title III.¹⁰⁷ The Court went on to note that lowering the minimum GPA requirements for students with learning disabilities would remove the “NCAA’s primary objective tool to determine a student’s academic capabilities.”¹⁰⁸ By lowering the minimum GPA requirements, it would take a tool away from the NCAA in their attempts to raise student-athlete graduation rates. *Cole v. NCAA* further bolsters the Court’s opinion in *Ganden* when stating that “eligibility requirements are deemed ‘essential’ or ‘necessary’ when such requirements are reasonably necessary to accomplish the purposes of a particular program.”¹⁰⁹

Most learning disability cases have been considered a non-issue by the courts because of NCAA bylaw 14.3.3.1, which allow partial qualifiers to have five years of academic support to complete their fourth year of athletic eligibility.¹¹⁰ The NCAA through its waiver request process often granted these learning disabled student-athletes status as a partial qualifier. This grant of eligibility makes any case against the NCAA a non-issue because no injunctive relief can be granted by the judicial system and monetary damages are not a lawful form of relief in ADA claims.

A showing of learning disability is usually not an issue in cases against the NCAA because of the proper documentation, but the judicial system has encountered cases that raise learning disability as a significant issue. In *Tatum v. NCAA*, the student-athlete realized in the fall of his senior year that he was not going to achieve the required standardized test scores to satisfy the eligibility requirements and therefore sought out a psychologist to determine that he

¹⁰⁷ *Ganden v. NCAA*, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368, at *48 (N.D. Ill. 1996).

¹⁰⁸ *Id.*

¹⁰⁹ *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1070-71 (N.D. Ga. 2000). The *Ganden* opinion stated that the waiver process was a reasonable modification for the eligibility requirements and reaffirmed that the eligibility requirements were necessary to accomplish the goals of the NCAA. Therefore, the eligibility requirements are deemed essential by *Cole* because they are reasonable necessary to accomplish the purposes of the program.

¹¹⁰ 2004-2005 NCAA Division I Manual § 14.3.3.1, at 150 (2004).

had a learning disability, which would allow non-standard test scores to be accepted by the NCAA.¹¹¹ After one psychologist did not find the student-athlete to be learning disabled, he sought out another opinion, after which it was concluded that the student suffered from generalized anxiety disorder, which was not recognized by the NCAA as a learning disability.¹¹² As a prospective student-athlete, his application for an eligibility waiver was denied.¹¹³ The Eastern Missouri Federal District Court agreed with the NCAA and stated that there is evidence that the petitioner's poor performance in school and on the SAT was due to lack of motivation or preparation.¹¹⁴ *Tatum* makes it abundantly clear that the judicial system is not willing to merely skip to the other elements of the Title III claim by deferring to claims of student-athletes. This ruling stops frivolous disability claims from evolving by discouraging the possibility that student-athletes will seek out a learning disability when they in fact do not suffer from one.

B. Civil Rights Act of 1964 Claim

Another major claim in initial eligibility lawsuits is under Title VI of the Civil Rights Act of 1964.¹¹⁵ To establish a prima facie case for racial discrimination under Title VI a plaintiff must prove that the defendant is a recipient of federal funds that intentionally discriminated against the petitioner.¹¹⁶ The NCAA is determined not to be a recipient of federal funds for the purpose of establishing eligibility rules.¹¹⁷ An allegation will succeed if the petitioner can show that the defendant had a discriminatory motive for their actions. The standard for measuring discriminatory motive is that “the policy must be adopted ‘because of’ not merely ‘in spite of,’

¹¹¹ *Tatum v. NCAA*, 992 F. Supp. 1114, 1117 (E.D. Mo.1998).

¹¹² *Id.* at 1118

¹¹³ *Id.*

¹¹⁴ *Id.* at 1123.

¹¹⁵ 42 U.S.C. § 200d (1964).

¹¹⁶ *Pryor v. NCAA*, 153 F. Supp. 2d a710, 715-16 (E.D. Pa. 2001).

¹¹⁷ *See supra* pp. 4-5.

its adverse effects upon an identifiable group.”¹¹⁸ The Eastern Pennsylvania District Court in *Pryor v. NCAA*, stated that the “defendant’s awareness or even acceptance of a particular effect does not raise its conduct to the level of purposeful discrimination.”¹¹⁹ The Court went on to note that Proposition 16 is a facially neutral policy that is purely motivated by the desire to improve the graduation rate of all student-athletes.¹²⁰ The Court, therefore, came to the conclusion that Proposition 16 occurred “in spite of” rather than “because of” an alleged disparate impact on African-Americans.¹²¹

Other plaintiffs have sought relief under the Civil Rights Act of 1964 alleging that the NCAA was deliberately indifferent to the disparate impact of Proposition 16.¹²² These claims have been rejected by the courts that cite the Supreme Court case *Alexander v. Sandoval*, which states, “where a federally funded entity knowingly adopts or implements regulations that create a racially or ethnically disparate impact, Title VI does not afford a remedy.”¹²³ There have been decisions that have viewed the facts strongly in favor of the plaintiff in light of summary judgment motions that have determined that the NCAA is a federally-funded entity and there is enough evidence of purposeful discrimination.¹²⁴ However, despite passing the trial court’s assessment during the NCAA’s summary judgment motion, these rulings and arguments have not stood up in the Court of Appeals or any other proceedings where the facts are not viewed in a light most favorable to the non-moving party.¹²⁵

¹¹⁸ *Pryor v. NCAA*, 153 F. Supp. 2d at 716 (quoting *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

¹¹⁹ *Id.* at 716-17.

¹²⁰ *Id.* at 717.

¹²¹ *Id.*

¹²² Such cases include *Cureton v. NCAA*, 198 F.3d 107, 117 (3rd Cir. 1999) and *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997).

¹²³ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹²⁴ Most notably in student-athlete eligibility cases: *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

¹²⁵ *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999). The appellate review of *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

One case that came down in favor of the petitioner when the plaintiff filed a cross-motion for summary judgment was *Cureton v. NCAA*.¹²⁶ This ruling briefly enjoined the implementation of Proposition 16 by the NCAA until the ruling was overturned in the Court of Appeals.¹²⁷ Even though this ruling was overturned and the injunction was lifted, *Cureton* may have left a more permanent impact on the initial eligibility rules because of its brief success.

In *Cureton*, the student-athletes brought a Title VI claim and successfully argued to the court that the NCAA was intentionally discriminating on the basis of race. The first issue that arose was whether the NCAA is a federally funded program and therefore covered under Title VI of the Civil Rights Act of 1964. The plaintiffs argued that the NYSP Fund was an “alter ego” of the NCAA and therefore made the NCAA a directly federally funded program.¹²⁸ The Court agreed with this argument but also went on to say that the NCAA is subject to suit under Title VI because its “member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA.”¹²⁹ This ruling by the District Court in *Cureton* overrules precedent set by the Supreme Court in *NCAA v. Tarkanian*, which, as discussed earlier, ruled that the NCAA acts more like a private actor than a state actor and that membership in the NCAA is strictly voluntary and there are other options for universities.¹³⁰ However, since the *Cureton* Court determined that the NCAA was a federally funded entity, the analysis continued to the alleged discrimination.

The Court also allowed an argument for disparate impact discrimination under *Griggs v. Duke Power Co.*, which held that a plaintiff does not necessarily need to prove intentional

¹²⁶ *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

¹²⁷ *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).

¹²⁸ *Cureton*, 37 F. Supp. 2d at 694.

¹²⁹ *Id.*

¹³⁰ See *supra* pp. 4-5.

discrimination in order to establish a violation of Title VII.¹³¹ The Court also cited *Wards Cove Packing Co. v. Atonio*, which held that a “plaintiff must initially demonstrate that the application of a specific facially neutral selection practice has caused an adverse disproportionate effect” excluding the plaintiff from an educational opportunity.¹³² The petitioners showed this discrimination through statistical proof, which “can alone make out a prima facie case.”¹³³ The Court persuaded by the statistical evidence, found that Proposition 16 excluded African-Americans at a rate that was disproportionate to the exclusion of whites.¹³⁴

Once the plaintiffs successfully proved discrimination, the burden shifted to the defendants to prove that the disproportionate effect is justified by an “educational necessity.”¹³⁵ The Court acknowledged that the raising of student-athlete graduation rates is a legitimate educational goal and the setting of academic standards is an appropriate method of doing so.¹³⁶ However, the Court required a showing from the NCAA of a “manifest relationship” between the use of particular cutoff scores of the standardized tests and its goal of raising graduation rates.¹³⁷ The NCAA failed to satisfy the *Cureton* Court’s inquiry. The opinion recognized that the scores accepted are only one standard deviation below the national mean while the GPA requirement is two standards below. The NCAA attempted to produce evidence that its decision to choose the 820 cutoff score was reasonably manifested to the goal. The Court rejected all of the NCAA’s arguments and stated that the 820 cutoff score must be shown to be reasonable and consistent with normal expectations of the acceptable proficiency of student-athletes towards attaining a

¹³¹ *Cureton*, 37 F. Supp. 2d at 696 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

¹³² *Cureton v. NCAA*, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989)).

¹³³ *Id.* (see 490 U.S. at 650-55).

¹³⁴ *Cureton*, 37 F. Supp. 2d at 699-700.

¹³⁵ *Id.* at 697.

¹³⁶ *Id.* at 703.

¹³⁷ *Id.* at 706.

college degree.¹³⁸ The NCAA failed this test and therefore the Court went on to address the final issue of whether there are equally effective alternative practices to Proposition 16.

V. ALTERNATIVES TO PROPOSITION 16

In order for a plaintiff to be successful in a Title VI Civil Rights claim, they have to prove that there are viable alternatives to Proposition 16.¹³⁹ The plaintiff in *Cureton* produced three viable alternatives, all of which were accepted as effective methods by the Court.¹⁴⁰ The plaintiff provided statistical data showing the anticipated graduation rate and the potential positive effect on the disproportionate impact on minorities.¹⁴¹ The first alternative was to eliminate the distinction of partial-qualifiers, thereby lowering the minimum score needed to be a full-qualifier.¹⁴² The second alternative included the elimination of partial qualifiers but also extended the sliding scale down to a 600 SAT score.¹⁴³ The third alternative, which would have the biggest impact on the discriminatory effect, adopted a full sliding scale that would eliminate a minimum standardized score and minimum GPA in favor of a system based solely on a test score/GPA combination score.¹⁴⁴ This would result in an equally weighted scale of grades and standardized test scores to determine eligibility.¹⁴⁵

Despite the plaintiff's success on their cross-motion for summary judgment, each of these conclusions was rejected in the Third Circuit Court of Appeals. The Court decided that the NCAA was not federally funded and therefore not subject to Title VI because "the regulations, like the statute, are program specific," in regards to the NYSP Fund.¹⁴⁶ When addressing the

¹³⁸ *Id.* at 709-10.

¹³⁹ 42 U.S.C. § 200d (1964).

¹⁴⁰ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 713 (E.D. Pa. 1999).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999).

funding through member schools of the NCAA, the Court noted that the critical inquiry in determining if an entity is an indirect recipient of federal funds is if the entity was the intended recipient of the federal funds according to Congress.¹⁴⁷ Clearly, when the government gives federal assistance to colleges and universities they have not “earmarked” an amount of funds to be paid to the NCAA for membership dues.¹⁴⁸ Since the student-athletes could no longer prove that the NCAA was federally funded, the rest of their argument was unnecessary to consider.

VI. IMPACT OF THE LAWSUITS ON THE NCAA ELIGIBILITY BYLAWS

Despite this apparent defeat for the plaintiffs, *Cureton* has had an impact on the upcoming changes in the initial eligibility requirements. In August of 2005, the NCAA will adopt a full-sliding scale that reaches a low SAT score of 400 and a corresponding high GPA of 3.550 and above while retaining the minimum GPA of 2.00 and a corresponding 1010 SAT score. This full sliding scale also eliminates partial-qualifier status.¹⁴⁹ However, the full-range sliding scale is accompanied by a requirement of 14 core courses, which will be raised in 2008 to 16 core courses.¹⁵⁰ These changes directly correspond to the alternatives suggested to in *Cureton v. NCAA*.¹⁵¹ This is a clear sign that the NCAA hopes to prevent further litigation on the matter and make disproportionate impact a non-issue. Further evidence that the *Cureton* opinion had a definite impact on the new initial eligibility rules is that they were created and voted upon by the members before the district court decision was overruled.

Clearly, the NCAA adopted these new eligibility rules to fend off future litigation raising the same claims that *Cureton* made. However, this is not the first time that the NCAA has

¹⁴⁷ *Id.* at 116.

¹⁴⁸ The 3rd Circuit Court of Appeals in *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999) fell in line with the *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988) decision and stated that the NCAA is not a state actor.

¹⁴⁹ 2003-2004 NCAA Division I Manual § 14.3.3.1, at 141 (2003).

¹⁵⁰ 2003-2004 NCAA Division I Manual § 14.3.3.1 at 143 (2003).

¹⁵¹ *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

enacted legislation in reaction to judicial activity. The adoption of bylaw 14.3.3.1, allowing partial qualifiers a fifth academic year to complete their academic eligibility, was a reaction to a line of cases involving partial qualifiers seeking the status of a full-qualifier.¹⁵² This bylaw eliminated any relief that could be granted by injunction by allowing the full amount of athletic participation, just at a delayed rate.

VII. CONCLUSION

Despite the NCAA's success will the litigation from non-qualifying students will subside with the enactment of the full-sliding scale combining GPA and standardized test scores? Though the new eligibility requirements allow for greater flexibility and should allow more student-athletes to be deemed eligible, there will always be a student who does not meet the requirements and feel as if an injustice has been done, prompting arguments for a more lenient eligibility structure. The NCAA has shut off much of the litigation through the court's determination that they are not a federally funded program and therefore not covered under a myriad of federal statutes.¹⁵³ This protection can be eliminated by the ruling in one case or a change in the structure of the NCAA. Even though these new eligibility requirements will provide a narrower opportunity for litigation against the NCAA, there are still issues in dispute. Many people argue that standardized test scores should not be utilized at all because they are bias against low-income households, as well as minorities and women.¹⁵⁴ The new sliding scale combines specific GPAs and standardized test scores and a reworking of the corresponding values in each could be the basis for new litigation.

¹⁵² 2004-2005 NCAA Division I Manual § 14.3.3.1 at 150 (2004). Cases include: *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997), *Ganden v. NCAA*, 1996 U.S. Dist. Lexis 17368 (1996), and *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1071 (N.D. Ga. 2000).

¹⁵³ *NCAA v. Tarkanian*, 488 U.S. 179 (1988) and *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).

¹⁵⁴ <http://fairtest.org/facts>.

The NCAA's goal in regards to the administration of its initial-eligibility requirements is to raise the student-athlete graduation rate. It has succeeded with record highs. The first class to graduate under Proposition 16 had a 62% graduation rate, higher than any class before it.¹⁵⁵ The enactment of the full-sliding scale, effective in 2005, seems like a step back from the rigidity of Proposition 16. Though, the true impact will not be measured until many years from now, this step back seems to be a result of the litigation that the NCAA is fighting every year. This preventive measure against future litigation, will most likely not be successful. The United States is a litigious country and many believe that they are entitled to things that they have not earned.

The NCAA and its eligibility requirements are by no means perfect or thoroughly righteous and there are valid problematic issues that can be extracted out of the new changes, which rely on arguments of discrimination in the use of the SAT and the attempt of using a scale to balance out one's GPA with their test score. However, it can be argued that the changes allow for too much flexibility and put too much responsibility in the hands of high school teachers and administrators, who have shown through the adjustment of grades and other techniques, the willingness to cheat to get a student a scholarship instead of working with them from the start, so that the student-athlete is not only a star athlete for the school, but can also compete in the academic setting as well.

Instead of worrying so much about the NCAA initial eligibility rules, we should be more concerned about the way our secondary schools are operated. These schools are supposed to be adequately educating and preparing kids to move on to college or the working world. From the facts of the cases discussed in this paper, it is obvious that many of these schools are letting kids

¹⁵⁵ *NCAA Division I Graduation Rates Rise to 62 Percent; Increase Attributed to Increased Eligibility Standards*, <http://ncaa.org/releases/research/2003090201re.htm>.

slide by and the educational system, as a whole, needs a massive reform. The Manhattan Institute conducted a study that analyzed the percentage of students who received a high-school diploma and were academically prepared for college academics.¹⁵⁶ According to their calculations 71% of the class of 2002 graduated with a regular diploma, yet only 34% graduated with the abilities and qualifications to apply to a four-year college.¹⁵⁷ This study demonstrates that our current high school system is in need of desperate reform. While the performance of our elementary school students is strong compared with international averages, our high school students rank near the bottom.¹⁵⁸ The Manhattan Institute concluded that if America wants increased success and participation in college then the education received at the high school level must improve to facilitate that opportunity.¹⁵⁹ As revealed in the media often, this improvement must start with teachers, who can not allow a child to get a passing grade without truly learning the material. According to a 1998 National Assessment of Education Progress report, the average minority high school graduate performs at the same level as an 8th grade white student in reading and mathematics.¹⁶⁰ This type of discrepancy can not continue to exist. The NCAA and its member institutions attempt to provide opportunities for those who are unable financially to attend college through the use of athletics scholarships, but the NCAA can not be held accountable for the lack of performance by teachers and administrators in high schools throughout the country.

¹⁵⁶ Jay P. Greene and Marcus A. Winters, *Public High School Graduation and College Readiness Rate*, Manhattan Institute for Policy Research, http://manhattan-institute.org/html/ewp_08.htm The Manhattan Institute is a think tank whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

¹⁵⁷ *Id.* To calculate the college-readiness rate they used a graduation rate calculation, a minimum level of academic course work based upon four-year public colleges, and a nationally respected standardized reading assessment test.

¹⁵⁸ <http://ecs.org/html/issue.asp?issueID=108>. This article was published by the Education Commission of the States (ECS), which is an interstate compact created in 1965 to improve public education by facilitating the exchange of information, ideas, and experiences among state policymakers and education leasers.

¹⁵⁹ *Id.*

¹⁶⁰ *High School*, <http://ecs.org/html/issue.asp?issueID=108>.

The NCAA initial eligibility standards will never be full-proof in determining the success of student-athletes in the classroom. The NCAA can only hope to give eligible student-athletes the chance to succeed in the classroom. Continued litigation and therefore reactive changes in the initial eligibility requirements may lead to a downturn in graduation rates from the highs the NCAA experienced with the success of Proposition 16. The NCAA is trying to fight this trend with the enactment of the Academic Performance Program, which gives incentives to member institutions to recruit individuals who will remain academically eligible and graduate in five years.¹⁶¹ This program provides the NCAA with another tool it can use against a graduation rate drop and puts the onus on the member institutions to recruit student-athletes who will not only satisfy the initial eligibility requirements, but also students who will succeed in the college classroom. The NCAA has good intentions and the ultimate success of their student-athletes in the game of life in mind when creating these requirements. At times, this goodwill is forgotten by the student-athletes turned away and the public at-large.

¹⁶¹ Gary T. Brown, *APR 101: Implementation of Penalty Structure Triggers New Terminology, Consequences, Questions*, NCAA NEWS, February 14, 2005, at 1.