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Carol L. Alberts

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No otherwise qualified handicapped student may be discriminated against solely on the basis of the handicap when participating in school athletic programs.

Section 504 of the Rehabilitation Act and the Right to Participate in School Athletic Programs

by Carol L. Alberts

Section 504 states that "no otherwise qualified individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[1] Under the act, a handicapped person is defined as one who has, has a record of having, or is regarded as having a physical or mental impairment that substantially limits one or more major life activities. Examples of major life activities include seeing, speaking, breathing, walking, caring for oneself, and learning.[2]

In 1977, three years after the enactment of the Rehabilitation Act, the American Medical Association (AMA) published a revised set of medical eligibility guidelines for student athletes.[3] According to these guidelines, disorders such as uncontrolled diabetes, jaundice, active tuberculosis, enlarged liver, the absence of a paired organ, and sensory impairments were grounds for disqualification from athletic participation.[4] Although these eligibility guidelines were not legal mandates, they often were regarded as such by school district physicians and administrators. Based on these AMA recommendations, numerous handicapped athletes were denied the right to participate in school athletic programs and sought redress in the courts. The cases that emerged involved student athletes who were either absent a paired organ or had a visual or auditory impairment.

In general, students who wish to participate in school athletic programs are required to obtain medical eligibility clearance from school district physicians prior to participating. Handicapped students declared medically ineligible by school physicians have several avenues of redress. Although laws vary from state to state, decisions made by district phsyicians often can be appealed to higher administrative authorities, claims of violations of state education laws can be filed in state courts, and claims of violations of federal laws can be filed in federal courts.

The purpose of this article is to examine the court decisions regarding the participation rights of handicapped athletes, and develop policy guidelines for school districts based on judicial interpretation of state and federal laws.

State Cases

The case of **Spitaleri v. Nyquist**[5] in 1973 was the first and most widely publicized case dealing with a handicapped student's right to participate in school athletics. The plaintiff, a high school freshman who had lost vision in one eye, was denied the right to participate in the contact sport of football. The school district's decision to disallow participation relied heavily on the district physician's recommendation that was based on the AMA guidelines for medical evaluation of the prospective sport participants. The plaintiff administratively appealed the decision of the school district to the commissioner of education. Following the commissioner's upholding of the ruling, the plaintiff filed a complaint in a New York Supreme Court to reverse the decision.[6] According to judicial interpretation of New York Education Law section 310,[7] decisions made by the commissioner of education cannot be judicially overruled unless they are arbitrary, capricious, or illegal. Despite the fact that the plaintiff provided evidence that he was an outstanding athlete with a history of successful participation, and that his parents were willing to sign a waiver releasing the school board from liability, the court upheld the ruling of the commissioner. The court indicated that the decision was not arbitrary, capricious, or illegal and, as grounds for the commissioner's decision, cited both the **Regulations of the Commissioner of Education,**[8] which require a health examination by the school physician prior to strenuous activity, and the AMA guidelines for medical eligibility.

Two New York cases that immediately followed **Spitaleri** also were based on Education Law section 310. Ironically, both cases originated from the same school district, but resulted in different decisions. In the first case, **In the Matter of Pendergast v. Sewanhaka Central High School, District No. 2,**[9] the decision of the commissioner to bar a high school student absent a paired organ (testicle) from participation was reversed by the court. Although the court recognized that the AMA guidelines listed the absence of a paired organ as grounds for medical ineligibility, it distinguished the facts of this case because the remaining testicle could be effectively protected, it did not increase the risk of injury to other parts of the plaintiff's body or other participants, and the missing organ was not

Carol Alberts is an instructor, School of Education, Hofstra University and doctoral student, Legal Studies, School of Education, St. John's University, Jamaica, New York.

functionally necessary for sport participation.

In the second case a year later, **Colombo v. Sewanhaka Central High School District No. 2,**[10] a fifteen-year-old high school student who was totally deaf in one ear and had a 50 percent loss of hearing in the other ear was barred from participation in the contact sports of football, lacrosse and soccer. Affidavits were filed on behalf of the plaintiff by a private physician and two experts in education of the deaf indicating that it was appropriate for the plaintiff to participate. In addition, the plaintiff's parents testified that their son had never sustained an injury throughout his extensive participation in contact sports. Furthermore, the parents were willing to sign a waiver releasing the board from liability. The plaintiff indicated he had hopes of a college scholarship and that nonparticipation would have a devastating effect on his attitude toward school and his self-esteem. Nonetheless, the court upheld the commissioner's decision and indicated that the risk of total deafness, the possibility of other bodily injury due to a lack of perception of the source of sound, and the risk of injury to other participants was substantial enough to find that the commissioner's decision was not arbitrary or capricious.

It is apparent that the standard for judicial review, as defined by New York Education Law section 310, made it difficult for a student, initially declared medically ineligible to participate, to seek successful redress in the courts. The enactment of a federal statute, the Rehabilitation Act of 1973, however, may provide otherwise qualified handicapped athletes with an opportunity to acquire relief. As a result of the enactment of this statute along with the **Spitaleri** decision, New York Education Law section 4409 was passed by the New York Legislature. According to this law, the courts could judicially overrule the commissioner of education if they found that participation was in the best interest of the student and was reasonably safe. To meet these two criteria, plaintiffs were required to produce a verified petition from their parents and affidavits from two licensed physicians indicating that the student was medically qualified to participate. The law also released the school district from liability in the event of injury since, in effect, it was defining reasonable and prudent behavior.

In the case of **Swiderski v. Board of Education City School District of Albany,**[11] a first-year high school student with a congenital cataract restricting vision in one eye filed a claim under Education Law section 4409. The supreme court ruled that it was in the student's best interests for her to participate in the athletic program provided she wear protective eyewear. As defined by Education Law section 4409, the school district was released from liability in the event of injury.

In an almost identical 1978 case, **Kampmeier v. Harris,**[12] a junior high school student with defective vision filed a section 4409 claim. Although the lower court ruled in favor of the school board, the plaintiff was successful on appeal. The court indicated that school district immunity from liability was not a factor to be weighed in considering the best interests of the student, and that it was reasonably safe for the student to participate if she wore protective eyewear.[13]

Federal Cases

A number of students declared medically ineligible for athletic participation have filed claims in federal court alleging violations of section 504 of the Rehabilitation Act of 1973.[14] In the **Kampmeier** case discussed earlier, the plaintiff also filed suit against the commissioner of education in federal court. In **Kampmeier v. Nyquist,**[15] a preliminary injunction against the school district was sought to require the district to permit the plaintiff to participate in the athletic program. In order for the motion to be granted, the plaintiff needed to establish a **prima facie** case demonstrating a clear showing of probable success at the trial, and second, that irreparable injury would result if she were not allowed to participate before trial.

The federal district court denied the motion for the preliminary injunction, and the case was appealed to the federal court of appeals. The appeals court upheld the district court ruling. In rendering its decision, the court indicated that although federal law prohibits discrimination against otherwise qualified handicapped individuals solely on the basis of their handicap, it is not improper for a school district to bar participation if substantial justification exists for the school policy; and, plaintiffs had failed to provide any medical or statistical evidence that the school policy was not based on substantial justification. Thus, the court concluded that a clear showing of probable success had not been demonstrated by the plaintiffs. The court also indicated that under the doctrine of **parens patriae,** school officials have an interest in protecting the well-being of students within their district.

The only federal case that has rendered a full decision based on a section 504 violation involved a New Jersey high school student born with only one kidney. The plaintiff in **Poole v. South Plainfield Board of Education,**[16] brought suit against the board for refusal to allow him to participate in the interscholastic wrestling program. The court focused on three issues: (1) whether the board's refusal to allow the plaintiff to participate denied an otherwise qualified individual the right to participate solely on the basis of his handicap; (2) whether section 504 mandates apply to all programs within a school system that receives federal funds, or whether only those programs within the school system that receive the funds directly must comply; and (3) whether section 504 creates a private cause of action for compensatory damages.

The board refused to allow the student to participate, because the school district medical director deemed it inadvisable for a student with only one kidney to participate due to the severe consequences of injury to the remaining vital organ, and the board's legal counsel indicated that under the doctrine of **in loco parentis,** the board had a moral and legal responsibility, which was not abrogated by a release and waiver, in the event of injury to the plaintiff's kidney. However, the court indicated that the purpose of section 504 was "to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them."[17] Given this purported intent, the court ruled in favor of the plaintiff, concluding that barring a student absent a kidney from participation on an interscholastic wrestling team constituted a section 504 violation. The court also held that section 504 not only created a private cause of action, but that since injunctive relief was not possible (plaintiff had graduated from high school), remedies such as monetary relief were appropriate. Also, it made no difference to the court whether the athletic program received federal funding, assuming of course that the district in total was a recipient of such aid. In support of this position, the court ruled that Congress did not intend "to ban discrimination during school hours while per-

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mitting it in officially sponsored extracurricular activities."[19] In addition, the court clearly indicated that the doctrine of **in loco parentis** did not give the board the right or duty to impose its own rational decision over the rational decision of the plaintiff's parents. However, the board did have the duty to alert the plaintiff and his parents to the dangers involved and to deal with the matter rationally.

In a 1981 case, **Wright v. Columbia University,**[18] a college freshman filed a section 504 claim seeking a preliminary injunction against the university that had declared him medically ineligible to participate in intercollegiate football. The plaintiff, a student sighted in only the left eye, was actively recruited by Columbia University to play football, was given a scholarship, and subsequently was denied the right to participate due to his handicap. Columbia University maintained that since the football program, as a discrete entity from the rest of the university, did not receive federal funds, it fell outside the purview of the Rehabilitation Act. On this issue, the court reiterated the **Poole** rationale, that the athletic program was an integral part of the University which received federal funds, therefore, the University must comply with the mandates of section 504.

In granting the preliminary injunction, the court found that the plaintiff would suffer irreparable damage if he were denied the right to participate since it could jeopardize his chances for a professional football career. It also recognized that a qualified opthamologist indicated that it was reasonably safe for the student to participate, and that the plaintiff was aware of the risks as well as the consequences of injury to his good eye. As in the **Poole** decision, the court also indicated that the doctrine of **in loco parentis** was not intended to permit school officials to overrule the rational decision of students and parents when it was established that they were aware of the risks and consequences of their decision.[20]

In a recent case, a high school senior who was absent a kidney was granted a preliminary injunction to play interscholastic football. The federal district court in **Grube v. Bethlehem School Area District**[21] held that the plaintiff had provided enough medical and statistical evidence to indicate that his participation would not be harmful to himself or others. According to the court, this showing of evidence distinguished this case from **Kampmeier** where a preliminary injunction was denied. As in **Wright** the plaintiff also provided evidence that irreparable harm would result if he were not allowed to participate, since a football scholarship was necessary in order for him to attend college.

Discussion of Federal Case Decisions

The only federal case dealing with section 504 of the Rehabilitation Act which did not rule in favor of the handicapped student was **Kampmeier.** Interestingly, although the right to participate was denied on the grounds of section 504, the student was granted the right to participate according to the state court's interpretation of state law. Analysis of the case law indicates that the federal courts have not given all otherwise qualified handicapped athletes a "carte blanche" right to participate. Rather, the courts have required school districts to provide "substantial justification" for policies which render handicapped students ineligible; and handicapped athletes to provide medical and statistical evidence that the school district policies were not substantially justified. In the case of **Kampmeier,** the court ruled that the student's evidence was not substantial enough to find a section 504 violation. In the **Wright, Poole** and **Grube** decisions, however, the court ruled in favor of the students, indicating that the school policies barring participation were not sufficiently justified. In fact, in **Poole** the court indicated that numerous administrative rulings made by the Commissioner of Education in New Jersey that barred otherwise qualified handicapped students from participation were contrary to section 504 mandates as defined by the supremacy clause of the Constitution.[22] According to the supremacy clause all state laws must fall within the legal confines of federal laws where the statutes are applicable.

Conclusions and Implications

Recent judicial interpretation of state and federal laws regarding handicapped students' right to participate in athletic programs has focused on the legal definitions of handicapped and otherwise qualified. According to AMA guidelines, individuals who have sensory impairments or are absent a paired organ are medically ineligible for athletic participation. These same physical abnormalities fall within the purview of the legal definitions of handicapped as defined by section 504. Furthermore, no otherwise qualified handicapped student may be discriminated against solely on the basis of the handicap.

By virtue of selection of an interscholastic team, a handicapped student may demonstrate that he is otherwise qualified to participate in spite of his handicap. Although the courts historically have been reluctant to overrule school administrative decisions, federal courts will still intervene where clear statutory rights have been violated.

According to the **Poole** decision, the doctrine of **in loco parentis** does not give school administrators the right to overrule parental decisions. The duty of the school board is twofold: to make students and parents aware of the dangers involved; and to require all parties to deal with the matter in a rational manner. Furthermore, the question of future liability is not a factor to be weighed in the determination of a student's eligibility. Each case dealing with handicapped students must be reviewed individually as procedurally defined by Public Law 94-142.

Notes

1. 29 U.S.C. section 794.
2. Id.
3. **Disqualifying Conditions for Sport Participation, Medical Evaluation of the Athlete—A Guide** (Chicago, Illinois: American Medical Association, 1977).
4. Id.
5. Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (N.Y. Sup. Ct. 1973).
6. Id.
7. N.Y. Education **Law** section 310 (McKinney 1980).
8. Regulations of the Commissioner of Education, 8 N.Y.C.R.R. section 135.4(c) (i) (h) (1976).
9. Pendergast v. Sewanhaka Central High School, District No. 2, (Supreme Court, Nassau County, 1975).
10. Colombo v. Sewanhaka Central High School, District No. 2, 383 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976).
11. Swiderski v. Board of Education City School District of Albany, 408 N.Y.S.2d 744 (N.Y. Sup. Ct. 1978).

12. Kampmeier v. Harris, 403 N.Y.S.2d 638 (N.Y. Sup. Ct. 1978), **rev'd,** 411 N.Y.S. 744 (N.Y. App. Div. 1978).
13. Kampmeier v. Harris, 411 N.Y.S.2d at 746.
14. Prior to the enactment of section 504 of the Rehabilitation Act, several federal courts enjoined school districts from preventing handicapped students from participating in athletic programs. **See** Borden v. Rohr C75-844 (S.D. Ohio Dec. 30, 1975), where the court granted a preliminary injunction enjoining a school district from preventing a student with sight in only one eye from participating in the interscholastic basketball program. **See also** Suemnick v. Michigan High School Area Athletic Association No. 4-70592 (E.D. Mich. 1974) where the court enjoined a school district from disallowing a high school student with only one leg from participating in the varsity football program.
15. Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).
16. Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D. N.J. 1980).
17. Id. at 952.
18. Id.
19. Wright v. Columbia University 520 F. Supp. 789 (D. Penn. 1981).
20. Four years prior to the **Wright** decision, a federal district judge in Missouri allowed two college students sighted in only the left eye to play intercollegiate football after they signed a waiver releasing the college from liability. Interestingly, although the Rehabilitation Act was in force, it was not cited as grounds for the court's decision to allow participation. Evans & Redding v. Looney No. 77-6052 CV SJ U.S. District Court W.D. Missouri September 2, 1977.
21. Grube v. Bethlehem Area School District 550 F. Supp. 418 (D. Penn. 1982).
22. U.S. Const. art. VI, cl. 2.

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