The Disabled Student Athlete: Gaining a Place on the Playing Field

Kathleen De Santis
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By KATHLEEN DE SANTIS*

I
Introduction

The terms "athlete" and "handicapped" are not mutually exclusive. In the past, disabled students have demonstrated outstanding athletic abilities. One legally blind youngster played football and basketball, and was named to the all-star team. Another blind student, who was also missing a leg, won two varsity letters in wrestling.

While every student may not become a superstar, evidence from various sources strongly indicates that handicapped persons who participate in athletic activities experience better health, personal satisfaction and increased self-esteem. However, athletes with certain physical conditions such as diabetes, vision in only one eye, one kidney, epilepsy, impaired hearing or loss of one or more limbs have been disqualified from participation in sports.

The school or athletic association barring the students argue that these athletes should not participate for several reasons. They contend that, for those students missing an organ, the risk of injury to the remaining organ outweighs the benefits of participation, and further that those students with impaired sensory organs run the risk of injury to other body parts due to

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1. The terms "handicapped" and "disabled" are used interchangeably in this note. Both refer to individuals with the physical or mental impairments described as "handicaps" by section 504 of the Rehabilitation Act implementing regulations. See infra notes 136-39.

2. Buelland & Mortagrin, Blind Children Integrated into Physical Education Classes in New Jersey Schools, Up Date, Feb. 1976. A student is considered legally blind if he has central visual acuity of 20/200 or less in his better eye with the use of corrective lens. 42 U.S.C.A. § 1382c (1973).


decreased ability to perceive sound or judge distances. Moreover, the argument goes, other players are more likely to be injured due to the disabled athlete's impaired perception. And finally, that sports activities are only games and not worth the health, safety and future welfare of any student.  

Students with physical and mental impairments contend, along with their parents, that they are not "handicapped" if they are able to meet the physical performance criteria for an athletic team and should be able to assume the risks of participation. When barred from playing, these students have sued the school boards and athletic associations under several legal theories.

This note describes the state of the law relating to the disabled student athlete. First, it examines the administrative structure of school athletic programs and discusses the methods of challenging athletic rules and decisions. It then turns to possible constitutional challenges to athletic disqualification actions. Finally, the note describes the Rehabilitation Act of 1973 and examines the courts' response to suits brought by students under the statute. It concludes that the equal protection clause of the United States Constitution and section 504 of the Rehabilitation Act can be effective in combatting handicap discrimination in school athletics.

II

Athletic Rules and Decisions

Each school usually has an athletic department to supervise student sports. The school may also be a member of a local or regional athletic conference of similar schools. To avoid sanctions, each member school must conduct its athletic program in compliance with the provisions of the regional conference to the extent that they are lawful and enforceable.

Either the school or the athletic conference is responsible for establishing and enforcing athletic eligibility requirements. Generally, these rules are valid and enforceable as long as they

8. Id.
9. Id.
10. Id.
are reasonable, issued pursuant to proper procedure and do not exceed the authority granted to the school or athletic body. When a handicapped student believes that his interests have been unfairly affected by an athletic rule, he or she may appeal through administrative channels and if still unsatisfied, may seek judicial review of that school's or athletic conference's rule.

Traditionally, courts have given broad deference to the decisions of school officials and athletic associations. This "hands-off" attitude is based on the principle that the reviewing court has no authority to rewrite the rule because the legislature placed the rulemaking power with the agency, not with the court. Thus, the scope of judicial review is limited to determining whether the action is a reasonable exercise of the rulemaker's authority, or whether the action is constitutional.

An athletic rule or decision is a "reasonable exercise of the rulemaker's authority" if (1) the authority to make and enforce the rule has been properly delegated to the school or athletic conference; (2) the action taken is within the authority granted, and (3) the rule or decision is reasonable.

A. Authority Properly Delegated

In most states, the state legislature has the authority to make and enforce school athletic rules. However, the legislature usually delegates to the district school boards the power to make rules governing interscholastic and intercollegiate athletics. This delegation includes the authority to make rules regarding eligibility for participation in extra-curricular athletics.

The courts are split on whether a school board may redelegate its power to make athletic rules to an athletic conference.

15. K. Davis, supra note 11, § 29.01-1, at 654.
16. J. Weisart & C. Lowell, supra note 7, at 45.
17. Id.
18. Id.
19. Id. at 46.
20. Id.
In *Bunger v. Iowa High School Athletic Association*,\(^2\) the Iowa Supreme Court held that a public body could not redelegate matters of discretion or judgment. Because the promulgation of eligibility rules involved both judgment and discretion, the state board could not redelegate its rulemaking authority to an athletic association.\(^22\) In contrast, a California appellate court in *Cabrillo Community College District of Santa Cruz County v. California Junior College Association*,\(^23\) ruled that community colleges may delegate authority to athletic associations to regulate their athletic programs, but only as much power as the colleges were given by the legislature. Thus, in *Cabrillo Community College*, because the college did not have the authority to deny admission based solely on residency requirements, the athletic association could not restrict eligibility for athletic activities on residency standards.\(^24\)

B. Within the Scope of Authority Granted

Once rulemaking authority is established, the court determines whether the challenged rule or action is within the scope of legislatively granted authority. A school or athletic association rule is valid if it is directly related to a proper subject for the organization’s administration, and is written to achieve only that proper objective.\(^25\)

A recent case, *Doe v. Marshall*,\(^26\) considered the “proper objectives” or rulemaking authority in the context of a disabled athlete’s rights. In *Marshall*, a high school student was disqualified from the football team by an interscholastic league rule which forbade participation in varsity athletics when a student changed schools and did not thereafter reside in the school district of his parents’ residence.

The plaintiff had a history of mental illness coupled with violent behavior directed toward his parents. His therapist recommended that he live with his grandmother who resided in another school district. The therapist also recommended that

\(^2\) *Iowa High School Athletic Association*.
\(^22\) *Cabrillo Community College District of Santa Cruz County*.
\(^23\) *California Junior College Association*.
\(^24\) *Cabrillo Community College*.
\(^25\) *Doe v. Marshall*.
\(^26\) *Marshall*. 

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21. *197 N.W.2d 555* (Iowa 1972). The court found that eligibility rules do not relate merely to the internal operation of an athletic department but are an integral part of the program. Therefore, since the legislature had placed the rule making power with the schools, the schools could not redelegate that power to an athletic association.
22. *Id.* at 563.
24. *Id.* at 372, 118 Cal. Rptr. at 711.
he play football because he had excelled in that sport in the past and it had served as a positive channel for his aggressive behavior.

The court noted that the rule in question was designed to prevent recruiting abuses and students’ shopping around for a coach and school. But as applied in this case, the rule arbitrarily barred the student’s participation where the sport was important for his emotional stability. The court held that to make Doe ineligible because of the transfer was to make him ineligible because of his treatment for a handicapping condition in violation of section 504 of the Rehabilitation Act. In this case, the rule had not achieved its proper objective, the prevention of recruiting abuse. Therefore, the disabled student’s need to participate outweighed the school board’s desire to prevent recruiting abuse, and the school was enjoined from enforcing the rule.

C. The Rule Must Be Reasonable

Finally, to be enforceable, an athletic eligibility rule or decision must be “reasonable.” The rule must have a “rational basis” or the decision must be “based on a consideration of the relevant factors . . . [and not result from] a clear error of judgment.” When a court has a record of the school proceedings to review, it may apply the “substantial evidence” test as well. Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate” to validate the rule or decision.

Many schools base their decision to disqualify a disabled student on the guidelines set forth by the American Medical Association’s (AMA) *Disqualifying Conditions for Sports Par-

27. *Id.* at 1192. The Rehabilitation Act of 1973 is described in part IV of this note. See *infra* notes 123-30 and accompanying text.
28. See *supra* note 11.
30. *Id.* at § 706, subd. (2)(E). See also Davis, *supra* note 11, at 656-60.
The AMA guidelines divide athletic activities into four categories: collision, contact, non-contact and other, and

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<tr>
<th>Conditions</th>
<th>Collision&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Contact&lt;sup&gt;b&lt;/sup&gt;</th>
<th>Noncontact&lt;sup&gt;c&lt;/sup&gt;</th>
<th>Other&lt;sup&gt;d&lt;/sup&gt;</th>
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<tr>
<td><strong>GENERAL</strong></td>
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<td></td>
<td></td>
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<tr>
<td>Acute infections:</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Respiratory, genitourinary, infectious mononucleosis, hepatitis, active rheumatic fever, active tuberculosis</td>
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<td>Obvious physical immaturity in comparison with other competitors</td>
<td>X</td>
<td>X</td>
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<td>Hemorrhagic disease:</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Hemophilia, purpura, and other serious bleeding tendencies</td>
<td></td>
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<tr>
<td>Diabetes, inadequately controlled</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Diabetes, controlled</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>Jaundice</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td><strong>EYES</strong></td>
<td></td>
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<tr>
<td>Absence or loss of function of one eye</td>
<td>X</td>
<td>X</td>
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<td><strong>RESPIRATORY</strong></td>
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<tr>
<td>Tuberculosis (active or symptomatic)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td>Severe pulmonary insufficiency</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td><strong>CARDIOVASCULAR</strong></td>
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<tr>
<td>Mitral stenosis, aortic stenosis, aortic insufficiency, coarctation of aorta, cyanotic heart disease, recent carditis of any etiology</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Hypertension on organic basis</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Previous heart surgery for congenital or acquired heart disease*</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td><strong>LIVER</strong></td>
<td></td>
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<tr>
<td>Enlarged liver</td>
<td>X</td>
<td>X</td>
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<tr>
<td><strong>SKIN</strong></td>
<td></td>
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<tr>
<td>Boils, impetigo, and herpes simplex gladiatorum</td>
<td>X</td>
<td>X</td>
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recommend when a student with a particular physical condi-

<table>
<thead>
<tr>
<th>Conditions</th>
<th>Collisiona</th>
<th>Contac tb</th>
<th>Noncontactc</th>
<th>Otherd</th>
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<tbody>
<tr>
<td>SPLEEN</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Enlarged spleen</td>
<td>X</td>
<td>X</td>
<td></td>
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<tr>
<td>HERNIA</td>
<td></td>
<td></td>
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<tr>
<td>Inguinal or femoral hernia</td>
<td>X</td>
<td>X</td>
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<tr>
<td>MUSCULOSKELETAL</td>
<td></td>
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<tr>
<td>Symptomatic abnormalities or inflammations</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Functional inadequacy of the musculoskeletal system, congenital or acquired, incompatible with the contact or skill demands of the sport</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<tr>
<td>NEUROLOGICAL</td>
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<tr>
<td>History or symptoms of previous serious head trauma, or repeated concussions</td>
<td>X</td>
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<tr>
<td>Controlled convulsive disorder**</td>
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<td></td>
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<tr>
<td>Convulsive disorder not completely controlled by medication</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
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<tr>
<td>Previous surgery on head</td>
<td>X</td>
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<tr>
<td>RENAL</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Absence of one kidney</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
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<tr>
<td>Renal disease</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
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<tr>
<td>GENITALIA***</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Absence of one testicle</td>
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<tr>
<td>Undescended testicle</td>
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</table>

* Football, rugby, hockey, lacrosse, etc.

** Baseball, soccer, basketball, wrestling, etc.

*** Cross country, track, tennis, crew, swimming, etc.

* Bowling, golf, archery, field events, etc.

* Each patient should be judged on an individual basis in conjunction with his cardiologist and operating surgeon.

** Each patient should be judged on an individual basis. All things being equal, it is probably better to encourage a young boy or girl to participate in a non-contact sport rather than a contact sport. However, if a particular patient has a great desire to play a contact sport, and this is deemed a major ameliorating factor in his/her adjustment to school, associates and the seizure disorder, serious consideration should be given to letting him/her participate if the seizures are controlled.

*** The Committee approves the concept of contact sports participation for youths with only one testicle or with an undescended testicle(s), except in specific cases such as an inguinal canal undescended testicle(s), following appropriate medical
tion should be disqualified from any category.33 For example, an individual with a controlled seizure disorder (epilepsy) is not absolutely disqualified from any category. The AMA instead advises that each student be judged individually, stating that

[all things being equal, it is probably better to encourage a young boy or girl to participate in a non-contact sport . . . . However, if a [student] has a great desire to play a contact sport, and this is deemed to be a major ameliorating factor in his/her adjustment to school . . . serious consideration should be given to letting him/her participate if the seizures are controlled.34

The school or athletic association has the burden of proving that the disqualification rule or decision is reasonable.35 But given the courts' traditional "hands-off" attitude toward school and athletic association actions, a school's action on a decision, supported by medical testimony that the student could suffer severe injury if allowed to participate in a particular sport, will rarely be enjoined by a court even if the court does not agree with the school's decision.

The case of Spitaleri v. Nyquist36 illustrates the student's problem of proving that a rule is unreasonable when the school relies on the AMA guidelines. The student, Spitaleri, had almost complete loss of vision in one eye. He was barred from playing high school football by the school physician who relied on the AMA criteria that disqualified a student with limited vision from collision sports. The boy's father argued that the denial of the opportunity to play football was psychologically damaging to his son and agreed to waive the school's responsibility by personally assuming all risks involved. The school still prohibited Spitaleri from playing. The case was appealed to the New York Commissioner of Education who supported the judgment of the physician.

Later, the court held that the determination of the Commissioner could not be judicially set aside unless it was found to

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33. Id.
34. Id. at guidelines note **.
be "purely arbitrary." In this case, the examining officer cited the AMA guidelines as the basis for his decision to disqualify Spitaleri. The court stated, "Clearly, the concern of the AMA and of the school physician . . . is the always present danger of injury . . . which, if it should occur, would result in irreversible and permanent injury."38

Thus, in athletic eligibility cases, the student cannot expect the court to intrude into the discretionary rulings of athletic administrators. The New York state legislature recognized the difficulty in reversing an athletic eligibility decision and enacted Education Law section 4409, originally entitled the "Spitaleri Bill." The legislators explained their purpose:

Because the State Education Department has tied together the medical and legal issues, a student who has a disqualifying condition cannot expect to receive permission to play a contact sport, regardless of the fact that objectively he might be medically capable. In addition, such decisions are insulated by the procedure for appealing administrative determinations; this procedure does not afford to the petitioner the review of the merits of conflicting opinions. The concern of both the court and the Commissioner is with the possible arbitrariness of the determination. If the school physician's decision has some basis in reason, it will be upheld. The conflicting opinion from a private physician is not reviewed or considered even though it might be more reasonable.40

Education Law section 4409 provides:

Upon a school district's determination that a student shall not be permitted to participate in an athletic program by reason of a physical impairment . . . the student may commence a special proceeding . . . to enjoin the school district from prohibiting his participation . . . . The court shall grant such petition if it is satisfied that it is in the best interest of the student to participate in an athletic program and that it is reasonably safe for him to do so.41

The statute provides for meaningful judicial review in light of the handicapped student's "best interests" and safety. It also contains provisions which insulate the school district from liability "for any injury sustained by a student participating

37. ld. at 812, 345 N.Y.S.2d at 879.
38. ld.
40. H. APPENZELLER & T. APPENZELLER, supra note 3, at 40.
41. N.Y. EDUC. LAW § 4409, subds. 1, 3 (McKinney 1977).
pursuant to an order granted under this section . . . ."\footnote{42}

The statute’s usefulness is illustrated in \textit{Kampmeier v. Nyquist}.\footnote{43} Margaret Kampmeier had a congenital cataract in one eye but was one of the best athletes in her class. When the school disqualified her from participating in athletics, she first sued in the federal courts and lost.\footnote{44} She then sued in the New York state court under Education Law section \textit{4409}.\footnote{45} The trial court concluded that while it would be reasonably safe for Margaret to engage in contact sports while wearing protective glasses, it would not be in her best interests to participate because the school district would have “broad and lasting immunity” from liability for injuries that Margaret might suffer while playing pursuant to court order.\footnote{46} The New York Appellate Division, however, reversed.\footnote{47} It held that a school district’s statutory immunity from liability should not be a factor when considering the “best interest of the student,” and allowed Margaret to participate.\footnote{48}

Absent a statute similar to the New York law, the student athlete with a physical impairment cannot expect to succeed in overturning an athletic disqualification action unless he or she sues under additional legal theories.

\textbf{III}

\textbf{Constitutional Challenge of an Athletic Disqualification Decision}

A student can increase his or her chance of participating in a particular sport by challenging an unfavorable rule on equal protection\footnote{49} or due process\footnote{50} grounds.

\textbf{A. Equal Protection}

Application of the equal protection clause of the United States Constitution requires the court to determine whether a

\footnote{42. \textit{Id.} at subd. 4.}
\footnote{43. Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).}
\footnote{44. \textit{Id.}}
\footnote{45. Kampmeier v. Harris, 93 Misc. 2d 1032, 403 N.Y.S.2d 638 (N.Y. Sup. Ct. 1978).}
\footnote{46. \textit{Id.} at 1036, 403 N.Y.S.2d at 641.}
\footnote{48. \textit{Id.} at 1014, 411 N.Y.S.2d at 746.}
\footnote{49. “\textit{No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws}.” U.S. \textit{Const.} amend. XIV, § I.}
\footnote{50. “\textit{Nor shall any state deprive any person of life, liberty or property, without due process of law}.” U.S. \textit{Const.} amend XIV, § I.}
classification in a rule promulgated by "state action"\textsuperscript{51} constitutes arbitrary discrimination, or differentiates between classes of persons on constitutionally insufficient grounds.\textsuperscript{52} Traditionally, the Supreme Court has used two tiers of review to analyze equal protection claims: strict scrutiny and minimal scrutiny.\textsuperscript{53} The Burger Court has added a third tier, intermediate scrutiny.\textsuperscript{54}

Minimal scrutiny is usually applied to test the validity of a non-suspect classification that does not affect a fundamental interest.\textsuperscript{55} Under this standard, classifications are upheld if they are reasonably related to achieving a legitimate state interest.\textsuperscript{56} The court presumes that the rulemaker's purposes are proper and gives those devising the classifications wide discretion to accomplish their objectives.\textsuperscript{57} Thus, a valid classification may not affect all persons similarly situated if the purpose for "under-inclusion" is to effect a step-by-step approach to the problem.\textsuperscript{58} Or, a valid classification may cover additional persons not originally intended to be included as long as there is a legitimate purpose for the "overinclusive" classification.\textsuperscript{59} Under minimal scrutiny, the classifications are

\textsuperscript{51} See infra notes 107-09 and accompanying text.
\textsuperscript{52} J. Weisbitt & C. Lowell, supra note 7, at 49-50.
\textsuperscript{54} The most recent formulation of the intermediate scrutiny test is in Plyler v. Doe, — U.S. —, 102 S. Ct. 2382 (1982).
\textsuperscript{55} We have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State. Id. at 2395.
\textsuperscript{56} See, e.g., McLaughlin v. Fla., 379 U.S. 184, 191 (1964).
\textsuperscript{57} See generally Goesaert v. Cleary, 335 U.S. 464 (1944).
invalid only if they are "clearly wrong, a display of arbitrary power, not an exercise of judgment." Indeed as one writer has noted, "minimal scrutiny in theory is virtually none in fact."

The strict scrutiny review is applied to test the validity of a classification that touches on a "fundamental interest" or is based on "suspect criteria." Judicial strict scrutiny operates on the principle that certain actions must be subjected to close analysis by the court in order to preserve values of equality and liberty. This standard requires that a classification be precise and that it promote a "compelling interest" of the body promulgating the classification. The rulemaker is required to rebut the presumption that its interests could not be protected by a more narrowly drawn classification or by a less drastic alternative. Generally, "scrutiny that [is] strict in theory [is] fatal in fact."

There are two basic tests to identify a classification as "suspect." First, the class must be a "discrete and insular minority," a class that can be easily distinguished from the rest of society. Second, the class must be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from

60. Mathews v. De Castro, 429 U.S. 181, 185 (1976), upholding a Social Security Administration provision providing "wife's insurance benefits" to wives living with husbands, but not to divorced wives.


63. Suspect criteria have included race (McLaughlin v. Fla., 379 U.S. 184 (1964)), alienage (Yick Wo v. Hopkins, 118 U.S. 356 (1886)), wealth [when coupled with a fundamental interest] (McDonald v. Bd. of Election Comm'r's, 394 U.S. 802 (1969)).

64. L. Tribe, supra note 53, at 1000.


67. Gunther, supra note 61, at 8.

68. In United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), the Court states, "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

the majoritarian political process." In recent years it has been suggested that physical or mental handicap is a "suspect criteria" and that classifications based on a disability should be subject to strict scrutiny. Those advocating suspect class status for disabled individuals argue that, "[a]s a class repeatedly abused and neglected by society and its public officials and institutions, handicapped persons have a legitimate claim for special judicial solicitude under the equal protection clause." Others argue that while disabled persons may meet the "discrete and insular minority" test, only three subclasses of disabled persons meet both tests for suspect class: the mentally retarded, the epileptic and the multiply handicapped. However, the majority of courts have held that handicapped persons as a group do not constitute a suspect class and thus regulations and laws affecting them do not trigger strict scrutiny.

The Burger Court has introduced an intermediate level of

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71. See In re G.H., 218 N.W.2d 441, 446-47 (N.D. 1974):

While the Supreme Court of the United States, using the "traditional" equal protection analysis, held that the Texas system of educational financing, which relied largely upon property taxes, was constitutional, we are confident that the same court would have held that G.H.'s terrible handicaps [multiple birth defects] were just the sort of "immutable characteristic determined solely by the accident of birth" to which the "inherently suspect" classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has held unconstitutional in cases involving discrimination based on race and illegitimacy.

See also Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975) where the court stated that the Rodriguez test should certainly be read to include retarded children. "Retarded children are precluded from the political process and have been neglected by state legislatures. Moreover, the label 'retarded' might bear as great a stigma as any racial slur."


74. See Gurmankin v. Costanzo, 411 F. Supp. 982, 982 n.8 (E.D. Pa. 1976), blind persons are not members of a suspect class because classifications based on blindness can be justified by the different abilities of the blind and the sighted; In re Levy, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13, 15 (1976), handicapped children do not constitute a suspect classification; New York State Ass'n for Retarded Children Inc., v. Rockefeller, 357 F. Supp. 752, 762 (E.D. N.Y. 1973), retarded children are not a suspect class, no reason given.
But has yet to firmly establish when this level of judicial review is appropriate. Two circumstances seem to trigger intermediate scrutiny: a significant interference with an important, though not necessarily "fundamental," liberty or benefit "vital to the individual"; or use of "sensitive, although not necessarily suspect, criteria of classification."

One commentator believes that past discrimination against the handicapped as a class may make that group suitable for quasi-suspect treatment. Another author, reasoning that disabled persons as a group are not likely to receive suspect class status, also argues that handicapped persons constitute a quasi-suspect class. This second author contends that a Supreme Court opinion, Weber v. Aetna Casualty and Surety Co., describes two characteristics of a quasi-suspect class: (1) members of the class possess a common permanent trait, and (2) because of this trait, members of the class as a whole have been subjected to unjust and illogical discrimination. He argues that handicapped persons, as a class, meet both criteria. They possess disabilities that are permanent and they have suffered discrimination in education, transportation and employment. He concludes that under the Weber test, handicapped persons are a quasi-suspect class which should be af-

75. See supra note 54.
76. Blattner, supra note 55, at 779.

78. L. Tribe, supra note 53, at 1081 n.17.
79. Comment, supra note 73, at 1187.
80. 406 U.S. 164 (1972) (striking down a state workmen's compensation law which denied benefits to dependent illegitimate children on the death of their natural father).
81. Comment, supra note 73, at 1187.
82. As of 1978, approximately 13,370,000 persons with handicaps have difficulty using mass transit systems as presently designed. Over 2.2 million handicapped children receive schooling inadequate for their needs. Another 1.75 million receive no schooling at all. And, an estimated 19 million handicapped persons face employment discrimination. Comment, supra note 73, at 1177 n.45.
forshed protection under the intermediate scrutiny review.\footnote{Id. at 1187.} A federal court in \textit{Frederick L. v. Thomas},\footnote{408 F. Supp. 832 (E.D. Pa. 1976).} held that children with learning disabilities were members of a “quasi-suspect” class and were entitled to intermediate scrutiny. These children “exhibited the essential characteristics of suspect classes—minority status and powerlessness. [The court thought] that the Supreme Court, if presented with the plaintiffs’ equal protection claim, would apply the as yet hard to define middle test of equal protection, sometimes referred to as ‘strict rationality.’”\footnote{Id. at 836.} A second court, in \textit{Sterling v. Harris},\footnote{478 F. Supp. 1046 (N.D. Ill. 1979).} held that a classification based on mental health should receive intermediate scrutiny: “[T]he common indicia that mental health shares with suspect classifications are of sufficient importance to require the present statutory classification to pass an intermediate level of judicial scrutiny.”\footnote{Id. at 1053.}

Once the court determines that the class merits some form of heightened review, it employs various approaches to analyze the classification under intermediate scrutiny. The “important governmental objectives” approach requires that a classification be justified by more than governmental efficiency or “administrative ease and convenience.”\footnote{See \textit{Craig v. Boren}, 429 U.S. 190, 198 (1976).} The “close fit” technique requires that classifications be “substantially related to the rule’s purpose in order to justify the inequality.”\footnote{See, e.g., \textit{Craig v. Boren}, 429 U.S. at 201-02 where the court said that the protection of the public health and safety was clearly an important state and local interest, but the statistics—that .18% of females and 2% of males between the ages of 18 and 20 were arrested for drunk driving—provided “an unduly tenuous” fit “to justify a gender based rule regulating the sale of beer to 18 to 20 year olds.”} The third approach, “requiring current articulation,”\footnote{Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975).} allows the court to ignore any rationale not articulated in the classifications defense. This requirement becomes important when those responsible for enforcing a rule no longer share the ideology behind the rule as it was originally expressed. Under the “actual purpose” analysis,\footnote{See \textit{Griswold v. Conn.}, 381 U.S. 479 (1965) where the court struck down a state ban on the use of contraceptives without even a reference to an obvious reason for the ban—that sex without a childbearing purpose was immoral or that population expansion was desired. \textit{See also L. Tribe, supra} note 53, at 1085.} the court refuses to consider clas-
Classification rationales that are not supported by the rule’s language or history. The final approach, “permitting rebuttal,” requires that individuals disadvantaged by a classification be given an opportunity to rebut the presumption and become exceptions to the rule, that is, to convince the rulemakers that they ought to prevail despite the “rationality” of the rule.

Applying these three levels of scrutiny to a handicap-based classification in an athletic eligibility rule, it is clear that the student’s chance of overturning a disqualification ruling will be greatly influenced by the level of scrutiny that the court employs. Under minimal scrutiny, an athletic eligibility rule disqualifying specific classes of physically or mentally impaired students is constitutional if the classification is reasonably related to a legitimate state interest, such as the students’ health and safety. Because the court presumes that the rule is rational, the student will almost always fail in an attempt to reverse the disqualification. Essentially, minimal scrutiny affords the same scope of review as the administrative proceeding “reasonableness” review provided in Spitaleri v. Nyquist. As long as the court finds any rational basis for disqualifying the athlete—for example, that he could injure his one functioning eye or that he might be hurt because of his decreased ability to perceive the actions of the sport around him—it will not disturb the decision even though it may not agree with the result.

Under strict scrutiny, the court would presume that an athletic eligibility rule barring certain classes of disabled students is unconstitutional and the rulemaker would have the burden of proving that its interests could not be protected by a more narrowly drawn classification, or by some less drastic alternative than disqualification. However, it is quite unlikely that the current Court will afford this heightened scrutiny to disabled students challenging athletic disqualification decisions.

94. Id.; and see Kampmeier v. Nyquist, 553 F.2d 296.
96. In numerous recent cases the Court has failed to enlarge the number of classifications entitled to strict scrutiny. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (sex-based classification); Mathews v. Lucas, 427 U.S. 495 (1976) (classification based on...
Finally, under the intermediate standard of review, the rulemaker would have to demonstrate that disqualification of a particular class is rationally related to an important governmental objective. Alternatively, the court could require the rule to closely fit the school’s purpose and also require the rule enforcers to acknowledge the value judgment behind the rule. Finally, the court could allow the individual athlete to rebut the presumption that someone with her disability cannot safely participate.

A disabled student may be disqualified from playing a particular sport because the school authorities assume that a deaf student cannot play football, a legally blind student cannot play basketball, a student with epilepsy should not participate on the track team (too strenuous) or a student who is missing a limb should not compete on the swim team (unfair disadvantage). Intermediate scrutiny would allow a more searching review of the disqualification decision in each case.

For example, a student could challenge the “important governmental objective” of promoting his health by arguing that disqualification is in fact psychologically damaging. He could contend that a disqualification rule should be drawn more narrowly—an interscholastic rule that originally barred anyone with an artificial hand, arm or leg from participating in football, wrestling or soccer should be revised to read, “artificial limbs, which in the judgment of the officials administering the rules, are no more dangerous to players than the corresponding human limb and do not place an opponent at a disadvantage, may be permitted.”

A student could also force the rulemakers to acknowledge the value judgment behind the classification—the segregative and paternalistic attitude that society has generally taken toward disabled persons. Finally, the student could rebut the general presumption that it is dangerous for her to participate with evidence that she can play safely. One student, John Colombo, employed this strategy. John had a fifty percent hearing loss in his left ear and was completely deaf in his right ear.

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7. Stein, supra note 4, at 30.
The New York State Department of Education barred him from participating in all contact sports in accordance with the AMA guidelines.\textsuperscript{99} At trial, the Assistant Director of Admissions at Gallaudet, a liberal arts college for the deaf, testified for the plaintiff. He reported that 1,200 to 1,800 deaf athletes competed in the Deaf Olympics, including 700 competing in contact sports. He testified that fifty-nine schools sponsored contact sports for the deaf and that his college competed against college teams with non-handicapped athletes. Further, he knew of no athletic injury attributed to a hearing impairment.\textsuperscript{100} The Chairman of the Committee on the Medical Aspects of Sports Association of New York, also testified that John should be allowed to play contact sports because he saw no danger to John or to any other participants because of John's hearing loss.

In spite of the expert's testimony, John was not allowed to play because the court found three risk factors that provided a rational basis for the administrative decision. First, injury to the ear with partial hearing could result in permanent deafness. Second, John stood a greater chance of injury because of his inability to perceive the direction of sound. And third, because of his inability to perceive sounds adequately, he was also a threat to other players' safety.

The \textit{Colombo} court, however, was reviewing an administrative decision that had to be upheld if the court found a reasonable basis for it. If John had been given intermediate scrutiny, the court would not have been forced to uphold the decision but could have allowed John to rebut the presumption that hearing-impaired athletes face significantly greater risks while playing contact sports than their non-hearing-impaired peers. Or, the court might have narrowed the rule to fit the safety objective by requiring that hearing-impaired students wear protective ear guards over their non-impaired ear while participating.

In summary, equal protection requires that the disabled student not be treated differently from his non-handicapped peers. Several lower courts have begun to examine classifications based on handicap under the more searching intermediate scrutiny review. It is hoped that this "toothier" review will

\textsuperscript{99} See \textit{supra} note 32.

\textsuperscript{100} 383 N.Y.S.2d at 520-21.
force schools and athletic associations to examine their disqualification decisions closely to insure that they are based on more than administrative convenience or outmoded paternalistic attitudes toward disabled youngsters.

Clearly, the disabled student-athlete stands a better chance of succeeding on the merits of an equal protection claim if the court can be persuaded to utilize intermediate scrutiny to examine the classification disqualifying him from participation.

B. Procedural Due Process

The due process clause of the United States Constitution also is available as a basis for challenging the validity of athletic rules that bar disabled students from participating in certain sports. Due process requires that an individual not be deprived of life, liberty or property without an adequate determination that the deprivation is justified.\textsuperscript{101} When analyzing a due process challenge, the court uses a three-step approach. It determines whether the plaintiff has a liberty or property interest; whether governmental action has impaired that interest; and, if impairment is found, it determines what procedures must be followed to satisfy due process under the circumstances.\textsuperscript{102}

The courts have differed on whether the right to participate in sports is entitled to due process protection as a liberty or a property right. Because the right to an education is clearly a due process property right,\textsuperscript{103} the key issue is whether athletic activities are an integral part of the educational program. Those who argue that participation in athletics is an integral part of education share the view that athletics perform the essential socializing function in the educational process, instilling an aspiration for excellence, building character, and teaching teamwork, cooperation and motivation.\textsuperscript{104} Those who argue for non-inclusion view athletics as the antithesis of education, as mere physical diversion,\textsuperscript{105} or as a privilege, not a right entitled to due process protection.\textsuperscript{106}

\textsuperscript{104} J. WEISTART & S. LOWELL, supra note 7, at 21-22.
\textsuperscript{105} Id. at 22.
\textsuperscript{106} See generally Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th
A second requirement for due process protection is state action. The term "state action" covers any person or organization associated with or performing the functions of governmental entities. The decisions of public school authorities—whether elementary, secondary or college-level—constitute state action. Athletic associations that govern statewide school athletic programs are also viewed as instrumentalities of the state. Therefore, if a decision to disqualify a student from athletic participation is made by or enforced by any principal or agent of the public school system, such action is state action for due process purposes.

If the court decides that state action has impaired a liberty or property interest, it then determines what procedures must be followed to satisfy due process under the circumstances. Several courts have held that athletic participation is entitled to the same protection as other educational rights. The holdings have been justified by various rationales, including the views that sports activities provide an important means of obtaining a college education through athletic scholarships and that athletic participation may be of economic importance because the resulting publicity and media exposure may facilitate future employment.

In Evans and Redding v. Looney, two outstanding college athletes at Missouri Western State college were disqualified by

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110. Wright v. Ark. Activities Ass'n, 501 F.2d 25 (8th Cir. 1974); Assoc'd, Students, Inc. v. National Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974); Mitchell v. La. High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970).
114. See Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); see also J. WEISTART & C. LOWELL, supra note 7, at 23.
the team physician because they were both blind in one eye. Both were highly regarded football prospects and Redding was reportedly on the prospect list of professional teams in the National Football League. The court found that refusal to let the plaintiffs play deprived them of equal protection of the law and denied them liberty without due process. They were allowed to play after signing a waiver releasing the college from liability.

In *Davis v. Meek*, a case involving a high school baseball star who married a fellow student in his senior year of high school, the court granted a preliminary injunction requiring the school to allow the student to play baseball despite a school rule that barred married students from participating in extra-curricular activities. The court noted:

> [P]art of the function of educating children is to provide them with the basic knowledge and training necessary to becoming productive adult citizens. However much one may share Thomas Jefferson's scorn for games that are played with a ball, professional baseball is nowadays . . . [an] important commercial activity. . . . Hence it is difficult to refute the argument that a secondary school system that deprives a student of the opportunity to develop his full potential for entering the field of professional baseball is not functioning as it should. When this deprivation [occurs] as a disciplinary measure in an attempt to attain objectives, however commendable, of doubtful legal validity, the problem becomes somewhat more sharply in focus.117

Therefore, due process demands that the student not be deprived of the right to an education without some procedural protections. These protections, however, have not yet been clearly spelled out in the area of physical education.

**IV**

**Challenging a Decision Under Section 504 of the Rehabilitation Act**

In the 1970's section 504 of the Rehabilitation Act specifically opened the locker room doors to disabled students. This legislation has become the main vehicle for suits by disabled athletes.

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117. Id. at 301.
A. Section 504 of the Rehabilitation Act of 1973

The Rehabilitation Act came about as a legislative response to long-standing discrimination against handicapped persons.\textsuperscript{119} Society has historically dealt with disabled individuals by segregating them from the mainstream of society and denying them access to the benefits and opportunities available to others.\textsuperscript{120} The following statute, valid until 1974, reveals a traditional legislative reaction to the handicapped:

No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.\textsuperscript{121}

For many years this segregation and inequality was endured without protest but, following the black civil rights movement of the 1960's, a legal advocacy movement for handicapped people emerged. Handicapped persons realized that they could use the courts to raise society's consciousness and to secure their constitutionally-guaranteed rights.\textsuperscript{122} The activity in the courts led to a significant reformation of legislative attitudes toward disabled persons. This attitudinal change culminated in the Rehabilitation Act of 1973.\textsuperscript{123} The Act was intended to eliminate discrimination against the handicapped in employment and education. Section 504 of the Act is patterned after title VI of the Civil Rights Act of 1964\textsuperscript{124} and title IX of the Education Amendments of 1972.\textsuperscript{125} Section 504 of the Act provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . . The head of each such agency shall

\textsuperscript{119} For a thorough description of the unequal treatment afforded handicapped persons, see Burgdorf & Burgdorf, \textit{supra} note 72, at 861-75.
\textsuperscript{120} Burgdorf, \textit{The Legal Rights of Handicapped Persons} 51 (1980).
\textsuperscript{121} Chicago, Ill., Municipal Code § 56-34 (repealed 1974), \textit{discussed in} Burgdorf & Burgdorf, \textit{supra} note 72, at 863.
\textsuperscript{122} Burgdorf, \textit{supra} note 120, at 52.
\textsuperscript{124} 42 U.S.C.A. § 2000d (1976) (prohibiting discrimination on the ground of race, color or national origin).
\textsuperscript{125} 20 U.S.C.A. § 1681(a) (1976) (prohibiting discrimination on the basis of sex).
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promulgate such regulations as may be necessary to carry out
the amendments to this section . . . . 126

In 1977, the Department of Health, Education and Welfare127 promulgated regulations to effectuate section 504.128 The regulations were designed to eliminate discrimination on the basis of handicap in any program receiving federal financial assistance. As direct recipients of federal financial aid, public schools are clearly subject to section 504. Therefore, schools must comply with the regulations or suffer termination of their federal monies.129 Any person who witnesses or suffers discrimination based on handicap may file a complaint with the Department of Health and Human Services.130

The Supreme Court has not ruled on whether section 504 creates a private right of action in favor of a person injured by its violation,131 but several circuit courts have held that it does.132 The Second Circuit reasoned that because the Rehabilitation Act is patterned after section 601 of the Civil Rights Act of 1964,133 and was clearly intended for the specific benefit of handicapped persons, a private right of action is consistent with the underlying purposes of the legislative scheme.134

1. Section 504 and the Disabled Athlete

The section 504 regulations specifically address the disabled student's right to participate in physical education and extracurricular athletic activities.

In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient . . . may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics, shall provide

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126. Id. The definition of "handicapped person" in the regulations conforms to the statutory definition in section 706(7). See infra notes 135-39 and accompanying text.

127. The Department of Health, Education and Welfare was renamed the Department of Health and Human Services in 1980.


132. Doe v. New York University, 666 F.2d 761 (2d Cir. 1981); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977).


134. Doe v. New York University, 666 F.2d at 774.
to qualified handicapped students an equal opportunity for participation in these activities.\textsuperscript{135}

Under the statute and the regulations, a student is "handicapped" if he or she has a physical or mental impairment\textsuperscript{136} which substantially limits one or more major life activities,\textsuperscript{137} "has a record of" such impairment,\textsuperscript{138} or is "regarded as having" such an impairment.\textsuperscript{139} Students with asthma, diabetes,
loss of vision in one eye, diminished hearing, epilepsy or those lacking a kidney or limb are therefore "handicapped" according to the statutory definition.

The Act's goal is to provide athletic activities in the most integrated setting appropriate. A school may offer separate or different physical education or athletic activities to disabled students only if no qualified disabled students are denied the opportunity to compete for teams or courses that are not separate.

A student is "qualified" for an athletic activity if he can meet the academic and technical requisites for admission or participation. However, construing the term "qualified" has posed problems for the students, the schools and the courts. The initial responsibility for determining whether a student is qualified is placed with the school's athletic director, team physician and/or physical education teacher. The director, physician and teacher must evaluate the handicapped athlete based on the student's own performance, proficiencies or functional abilities, in accordance with the mandated procedures before disqualifying the student from a regular sport. Those procedures require:

a system of procedural safeguards that include notice, and an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure.

Compliance with the procedural safeguards of section 615 of the Education for all Handicapped Children Act of 1975 is one means of meeting this requirement. Section 615 requires that parents or guardians of handicapped children be notified of any proposed change in the "identification, evaluation or educational placement" of their child and be permitted to bring a complaint about such evaluation or education. Complaints must be resolved at an "impartial due process hearing," and that decision may be appealed to the state educational agency

140. 45 C.F.R. § 84.37(b) (1977).
141. Id. at § 84.47(a).
142. Id. at § 84.3(k)(3).
143. Stein, supra note 4, at 30.
144. 45 C.F.R. § 84.36 (1977).
which shall make an “independent decision.” If the student fails to obtain relief at the state administrative hearing she has the right to bring a civil action in any state court or district court of the United States without regard to the amount in controversy.

In *Kampmeier v. Harris* a New York court addressed the section 504 procedural requirements. The court noted that a student could not be classified as handicapped and provided with special physical education against the wishes of her parents, at the sole discretion of the school physician. Moreover, the court required a “determination” that the student needed special education because of a physical handicap and found that the determination had to be scrutinized under something more than the “arbitrary and capricious” standard of review.

Therefore to comply with the Act, a school must give all interested disabled students the opportunity to try out for regular athletic activities and teams. Eligibility decisions cannot be based on stereotyped assumptions that a particular physical or mental impairment disqualifies a student; rather, decisions should be based on a realistic appraisal of the risks that a student with a particular handicap faces based on the nature of the sport involved and the likelihood of injury to the athlete himself or to other participants.

If the coach or school physician believes that a student should be disqualified from a particular activity because of a handicap, the school authorities must provide the student and his parents with notice of the pending decision and provide the opportunity for an impartial hearing on the matter. The student, the parents, the student’s personal physician and other appropriate persons whose presence the student requests, including legal counsel, must be given the opportunity to present evidence of the student’s ability to participate. When the initial decision is appealed through administrative channels, the state educational agency must conduct an impartial review of the previous hearing and may receive additional evidence from experts with respect to handicapped children. The agency

150. *Id.* at 1035, 403 N.Y.S.2d at 641.
then makes an independent decision. Finally, the student can appeal an unfavorable decision to the state or federal courts.

The procedural mandates of section 504 are potentially the disabled student's most potent weapon. Physically and mentally impaired athletes have been disqualified from participating because the school officials do not recognize nor appreciate the student's capabilities but rather focus solely on the disabilities. The procedural mandates, in essence, allow the students, her parents, doctors and disability experts to educate the athletic authorities: for example, the student may present evidence of a new safety device (for athletes needing to protect a particular body part), or medication (for those students with epilepsy, asthma, diabetes, heart disease or cancer) or an improved apparatus (for students missing a limb). This data will help school authorities make a more realistic appraisal of the risks involved and thus a more informed decision.

2. Suits Under Section 504

When a disabled student believes that an athletic eligibility rule or decision unfairly disqualifies him, he may challenge the school's action as violative of section 504. The Second Circuit Court has delineated four elements necessary to satisfy a section 504 action. A plaintiff must demonstrate that (1) he is a "handicapped person" under the Act, (2) he is "otherwise qualified" for the athletic activity, (3) he is being excluded from the activity solely because of his handicap and (4) the defendant school is receiving federal financial assistance.

Physically or mentally impaired students and school authorities have disagreed on the proper construction of the Act's "otherwise qualified" for the activity term. The Supreme Court interpreted section 504's provision in Southeastern Community College v. Davis. When Davis was denied admission to the college's nursing program because she had a hearing im-

154. 442 U.S. 397 (1979). The Court noted that the regulation uses the term "qualified handicapped person" instead of the statutory term "otherwise qualified handicapped person" because the Department believes that the omission is necessary in order to comport with the intent of the statute. Read literally, "otherwise qualified handicapped persons" include those who are qualified except for their handicap, rather than in spite of their handicap. Thus, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job. 45 C.F.R. § 84 app. A No. 5 (1977).
pairment she filed suit alleging a violation of section 504 of the Rehabilitation Act. The Court held that there had been no violation and explained the meaning of the Act's "otherwise qualified" terminology.

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.155

However, the Court then limited the term, explaining that this did not mean that a person need not meet legitimate physical requirements in order to be "otherwise qualified." "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."156

The Second Circuit further construed the term "qualified" in Doe v. New York University.157 In that case the court added that a school is not required to disregard the disability of the applicant if the impairment is relevant to reasonable admission qualifications. "The institution need not dispense with reasonable precautions or requirements which it would normally impose for safe participation by students . . . ."158

However, in Poole v. South Plainfield Board of Education,159 the court decided that increased risk of irreversible injury would not necessarily make a student "unqualified." The plaintiff, at the time of the suit, was a healthy high school student with one physical problem—he was born with only one kidney. He had participated in the school wrestling program in the eighth, ninth and tenth grades, but was barred from participating in the eleventh and twelfth grades when the school physician advised the school board that the plaintiff should not

155. 442 U.S. at 405.
156. Id. at 406.
157. 666 F.2d 761 (1981). Jane Doe was a medical student who filed an action seeking readmission to medical school under section 504. She had a long history of psychiatric problems that had forced her to take a leave of absence from New York University Medical School in 1976. In 1977, the school decided not to readmit her in light of her severe problems and because of the risk that she might suffer a recurrence under the stress of medical school.
158. Id. at 775.
play because of the possibility of injury to his single kidney. The plaintiff, Richard, his parents and two other physicians believed that Richard could safely wrestle, and brought suit under section 504.

The Board contended that Richard was not qualified because he failed to pass the physical exam necessary to participate on the wrestling team. The court rejected that contention finding that Richard had "failed" only because he was missing a kidney. No one had suggested that he was incapable of pinning his adversary to the mat or meeting the training requirements. Rather, the Board's decision resulted solely from fear that Richard would injure his single kidney. The court concluded that the Board was not entitled to summary judgment or a dismissal of the section 504 claim because there was evidence that Richard had been discriminated against solely because of his "handicap." The court noted that Richard did face the risk of grave injury but so did the other members of the wrestling team.

Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. Life has risks. The purpose of Section 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.160

The Second Circuit court in New York University also stated that in cases dealing with admission to a particular educational program, "considerable judicial deference" would be given to the school's evaluation of the applicant. Unless the student produced evidence that the admission standard served "no purpose other than to deny an education to handicapped persons," the disqualification decision would stand.161

However, the Tenth Circuit in Pushkin v. Regents of the University of Colorado,162 rejected the argument that an educational institution's decision not to admit a handicapped student should be reviewed under the equal protection "rational basis" test. The court found that the rational basis test was not applicable when the student alleged a violation of sec-

160. Id. at 953-54.
161. 666 F.2d at 776.
162. 658 F.2d 1372 (10th Cir. 1981). Joshua Pushkin, M.D., brought an action against the University alleging violation of section 504 when he was denied admission to the Psychiatric Residency Program because he had multiple sclerosis.
tion 504. "Rather, the statute provides that a recipient of federal financial assistance may not discriminate on the basis of handicap, regardless of whether there is a rational basis for so discriminating."\textsuperscript{163}

Therefore, while the courts will probably continue to give the traditional deference to decisions made by educational institutions when these decisions involve a disabled student, the court should conduct a more searching review of the school's reasons for disqualifying the handicapped applicant.

The Tenth Circuit in \textit{Pushkin} also held that a prima facie case under section 504 is established when (1) the plaintiff demonstrates that he was an otherwise qualified handicapped person \textit{apart from} his handicap, and that he was rejected under circumstances which lead to the inference that he was rejected solely because of his handicap; (2) when the plaintiff establishes his prima facie case, the defendant then has the burden of going forward and proving that the plaintiff was not an otherwise qualified handicapped person, or that his rejection was for reasons other than the handicap; (3) the plaintiff then has the burden of going forward with rebuttal evidence demonstrating that the defendant's reasons for rejecting him are "based on misconceptions or unfounded factual conclusions," and that the reasons given for his rejection entail unjustified consideration of the handicap itself.\textsuperscript{164}

The \textit{Pushkin} court's order of presentation of proof may help the disabled student in athletic disqualification actions. The following cases illustrate how burden of proof allocations can win or lose a student's case.

In \textit{Kampmeier v. Nyquist}\textsuperscript{165} two junior high school students, each with vision in only one eye, and their parents sought a preliminary injunction against school authorities who had refused to allow the students to participate in contact sports. The students contended that the school's decision violated section 504. The court, however, denied the motion stating:

As we read Section 504 . . . exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy . . . . Here, the defendants have relied on medical opinion that children with sight in only one eye are not qualified to play in contact sports because

\textsuperscript{163.} \textit{Id.} at 1383.
\textsuperscript{164.} 658 F.2d at 1387 (emphasis in original).
\textsuperscript{165.} 553 F.2d 296 (2d Cir. 1977).
of the high risk of eye injury. The plaintiffs have presented little evidence—medical, statistical, or otherwise—which would cast doubt on the substantiality of this rationale.\textsuperscript{166}

However, the appellate opinion includes evidence that both students were outstanding athletes, Margaret had special protective glasses, medical opinion as to the safety of participation in contact sports for the two athletes was divided, and Margaret’s parents had agreed to release the school from liability for any athletic injury to Margaret’s seeing eye.

Here, as in \textit{Poole},\textsuperscript{167} the school board’s decision seems to be based on fear that an athletic injury could result in blindness for the youngsters. In essence, the \textit{Kampmeier} court ruled that children with physical impairments should be sheltered from the risk of serious injury. The \textit{Pushkin} court very aptly described the proof problem.

It would be a rare case indeed in which a hostile discriminatory purpose . . . could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.\textsuperscript{168}

In a factually similar case, \textit{Wright v. Columbia University},\textsuperscript{169} the district court granted a temporary restraining order forbidding the University from barring a student with vision in only one eye from participating in its intercollegiate football program. The court concluded that the plaintiff had “a reasonable probability” of success on the merits because he offered proof from a qualified ophthalmologist that no substantial risk of serious eye injury related to football exists. In addition, the plaintiff testified that he had seriously considered the risks incident to playing football and willingly accepted them. Citing the \textit{Poole} decision, the court noted that while concern for its students’ well being was laudable, the University was prohibited by section 504 from deciding that some sports were “too risky” for a disabled student.\textsuperscript{170}

\textsuperscript{166} Id. at 299 (emphasis added). Note that this case was decided before the Health and Human Services implementing regulations were published in 1977.

\textsuperscript{167} See supra note 159.

\textsuperscript{168} 658 F.2d at 1385.


\textsuperscript{170} Id. at 794.
V

Conclusion

In the 1980's the courts began to shed their paternalistic attitudes toward physically and mentally impaired youngsters and allowed them to participate in athletic activities with their non-handicapped peers. While most would agree that no student should be allowed to encounter a patent risk of serious injury, it is common knowledge that sporting events result in injuries. Most injuries are minor, but a few are catastrophic. The basic issue in eligibility decisions, however, should be who decides whether the risk should be taken. Section 504 seems to mandate that the disabled student along with his parents should decide.

Section 504 requires that public schools provide handicapped students with an equal opportunity to participate in athletic activities. Many physically or mentally impaired youngsters are able to participate in regular physical education classes and extracurricular sports teams. The Health and Human Services implementing regulations address the desirability of enabling as many students as possible to play on regular teams and mandate specific procedural safeguards to insure that students are not disqualified from participating without notice and an opportunity to challenge that decision through the administrative channels and in the courts.

If a student challenges a disqualification action in court, his challenge will be most effective if brought under section 504 of the Rehabilitation Act and on equal protection grounds. For the latter, the student should argue that he is entitled to intermediate scrutiny judicial review because a classification based on handicap is "quasi-suspect."

Physical activity is a basic human need. Society has become more physically active in the last ten years, and disabled youngsters have sought to join the group of physically-fit Americans. Although these students have been able to overcome their physical impediment to participating, they face additional obstacles in the form of attitudinal barriers of school officials. The equal protection clause and section 504 of the Rehabilitation Act can be effective in combatting handicap discrimination in school athletic programs.