

An Investigation of NCAA Initial Eligibility Waiver Applications and Awards from 1999 to 2001

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INTRODUCTION

Toure Butler struggled in school. He had a problem understanding the material he read. Eventually, the school had him tested and realized Butler had a learning disability. Once his learning disability was defined, Butler began taking specially formatted courses. He graduated from high school, and based on his grades and test scores, was accepted by the University of Washington and offered a full athletic scholarship. Butler reported to football practice in August of 1996. However, after moving into the dorms and practicing for two weeks, the National Collegiate Athletic Association (NCAA) told Butler he could no longer play for the Huskies. His scholarship was pulled and he was forced off the football team. The NCAA determined that Butler had not met the required academic eligibility standards.

High school student-athletes who want to participate in college athletics must register with the NCAA and apply to have their eligibility certified. In certifying eligibility, the NCAA looks at four criteria. These are: (a) graduation from high school; (b) successful completion (grade D or better) of at least 13 core-curriculum academic courses; (c) a minimum grade point average (GPA) of 2.00 (higher, depending on SAT or ACT scores); and (d) a combined score on the SAT verbal and math sections, or a total score on the ACT, that meets a qualifier index (Hishinuma, 1999; NCAA, 2000-2001).

Butler had the necessary test scores and grade point average, but the NCAA did not accept some of his core courses because they had been modified to accommodate his learning disability. Butler is just one example of the many student-athletes whose lives have been impacted by NCAA eligibility rulings (U.S. Department of Justice: ADA Home Page, 2003).

Exactly how the NCAA determines eligibility, particularly with regard to students with learning disabilities, has been an area of concern. The NCAA may grant full or partial eligibility certification waivers, or deny eligibility certification to student-athletes with learning disabilities (NCAA Consent Decree, 1998). Of concern is the fact that the NCAA may exclude courses designed to accommodate students with learning disabilities from core course consideration, without regard to course content (NCAA Consent Decree).

All student-athletes who apply for NCAA eligibility waivers must have a documented learning disability (NCAA, 2002-2003). With this in mind, the purpose of this study was to investigate NCAA waiver applications and awards over a three-year period (1999-2001), and review: (a) the number of annual waiver applications and relative number of partial waiver, full waiver and denial responses from the NCAA; and (b) NCAA practice regarding the determination of core course designation.

LEARNING DISABILITIES AND THE NCAA

Learning disabilities are defined as "disorder[s] in one or more of the basic psychological processes involved in understanding or in using spoken or written language, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations" (National Information Center for Children and Youth with Disabilities, 2000, p. 1).

The legal rights of student-athletes with learning disabilities continue beyond high school, and the primary sources of these legal rights derive from the Individuals with Disabilities in Education Act (IDEA), the Rehabilitation Act (Rehab Act), and the Americans with Disabilities Act (ADA).

IDEA requires programs and courses in special education and other related services for children with disabilities. It also mandates Individualized Education Programs (IEPs) (IDEA, § 1414, 2002). The Rehabilitation Act, most notably Section 504, prohibits discrimination against children and adults with disabilities (Rehab Act, § 794, 2002). The Rehabilitation Act applies to public and private elementary and secondary schools. It also applies to colleges that receive federal funding (Rehab Act, § 794).

The ADA (2002), which embodies federal anti-discrimination legislation that protects the civil rights of individuals with disabilities, applies to agencies under one of three categories: Title I, "Employment Opportunity" (42 U.S.C. §§ 12111-12117); Title II, "State and Local Government Services" (42 U.S.C. §§ 12131-12165); or, Title III, "Public Accommodations and Commercial Facilities" (42 U.S.C. §§ 12181-12189).

Title III of the ADA is important because it covers public and commercial entities. Title III States:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation. (42 U.S.C. § 12182)

According to the ADA, an individual is considered disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities (42 U.S.C. § 12102). Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working (28 CFR 36.104, 2003). Therefore, a person with a learning disability is covered under the ADA.

Place of public accommodation refers to a facility operated by a private entity, whose operations affect commerce and fall within at least one of the following categories: establishments serving food or drink; places of public gathering; service establishments; or, places of recreation, places of education and places of exercise (28 CFR 36.104; Equal Employment Opportunity Commission & the U.S. Department of Justice, 1991, pgs. III-26-III-29).

With the above in mind, it is arguable that the NCAA is an entity that falls under the purview of the ADA as a place of public accommodation, and therefore is subject to the requirements of Title III (Hishinuma & Fremstad, 1997). However, in the past, the NCAA has disagreed with this analysis.

In 1998 the Department of Justice filed a civil action to enforce Title III of the Americans with Disabilities Act of 1990 against the NCAA (NCAA Consent Decree, 1998). The Department alleged that the NCAA's initial eligibility requirements (i.e., high school graduation, core course completion, GPA and standardized test score) discriminated against student-athletes with learning disabilities.

GPA and test scores make up the NCAA qualifier index. The qualifier index specifies the cutoffs for GPA and student achievement on the SAT or ACT test (NCAA, 2002-2003, p. 141). The lower the student's GPA, the higher the test score cutoff required for qualification (p. 141). Nonqualifiers cannot receive athletic scholarships and cannot practice or compete during their freshman year (p. 141). In addition to the qualifier index and high school graduation, the NCAA requires student athletes to meet the following core course requirements:

(a) 4 years English; (b) 2 years (at the level of Algebra I or above) mathematics; (c) 2 years natural/physical science; (d) 1 year additional academic courses in English, math or natural physical science; (e) 2 years additional academic courses in any of the above areas or foreign language, computer science, philosophy or non doctrinal religion. (NCAA, 2002-2003, p. 167)

Relative to these core course requirements and the ADA, the Department of Justice received complaints from student-athletes, parents, and academic advisors citing specific instances in which the NCAA refused to accept core courses primarily because they were labeled as "remedial" or "special education" (NCAA Consent Decree: Allegations, 1998). Based on these complaints the Department of Justice concluded, "modifications in several NCAA policies were necessary, reasonable modifications were available, and that these modifications would not fundamentally alter the nature of the NCAA's program" (NCAA Consent Decree: Allegations). The NCAA disputed these allegations but "acknowledged shortcomings inherent in the evaluation of core courses primarily on the basis of course title" (NCAA Consent Decree: Allegations).

The Department of Justice's determination that the NCAA's policies, practices, and procedures discriminated against student-athletes with learning disabilities in violation of Title III of the ADA, was based on the following: (a) NCAA regulations relating to the certification of high school courses as "core courses" often excluded courses designed to accommodate student-athletes with learning disabilities, without regard for the content of the course; and (b) the process for considering exceptions for individual student-athletes placed student-athletes with learning disabilities at a significant disadvantage relative to their peers (NCAA Consent Decree: Allegations).

These allegations, along with a lack of agreement between the NCAA and U.S. Department of Justice as to whether or not the NCAA was a place of public accommodation and thereby subject to the ADA, prompted the NCAA and Department of Justice to enter into a voluntary Consent Decree that was filed Tuesday, May 26, 1998 in the U.S. District Court in Washington, D.C. As part of the Consent Decree, the NCAA modified its policies. Specifically, the NCAA revised its eligibility certification waiver policy, agreed to designate an ADA compliance coordinator, and revised the core course evaluation process (NCAA Consent Decree: Agreement). The NCAA also agreed to report on its work in this area each year for the next three years (NCAA Consent Decree: Agreement; Hishinuma, 1999, p. 365; United States Department of Justice, 1998).

With regard to the waiver policy, the NCAA designated an Initial Eligibility Waiver Committee empowered to make determinations as to whether or not a student-athlete is academically prepared to succeed in college while participating in athletics (NCAA Consent Decree: Agreement, 1998). In considering whether to grant a full or partial waiver, the committee takes into account the following criteria:

The extent to which the failure of the student to meet any criterion is attributable to a student-athlete's disability.

Whether non-core courses taken by a student had been specified on the student's Individualized Education Plan and/or had been approved by a state or local government as satisfying graduation requirements for student-athletes with disabilities.

The student's overall academic record.

Weight of a standardized test. The subcommittee shall not place undue emphasis on a student's low test scores. The subcommittee also shall not place undue emphasis on a particular sub score when it is the area of a student's learning disability.

The assessments of a school principal, guidance counselors and teachers as to whether a student with a learning disability is likely to succeed academically in college while participating in athletics.

Written or oral comments by the student may reflect the level of knowledge that the student acquired in high school and could be helpful in predicting their preparedness to succeed in college.

The accommodations available at the high school for student-athletes with learning disabilities.

The accommodations for student-athletes with learning disabilities actually used by the student. (NCAA Consent Decree: Agreement)

With regard to compliance coordinators, the NCAA agreed to designate one or more employees as ADA compliance coordinators to serve as resources to other employees of the NCAA and the NCAA Clearing House regarding the ADA (NCAA Consent Decree: Agreement). These individuals also were to act as liaisons between student-athletes with learning disabilities, the NCAA, and the NCAA Clearing House.

With regard to the core course requirements, the NCAA guidelines were modified in response to the Consent Decree agreement. The revised NCAA manual states that core courses must meet the following criteria:

A course must be a recognized academic course and qualify for high-school graduation credit in one or a combination of the following areas: English, mathematics, natural/physical science, social science, foreign language, computer science or non doctrinal religion/philosophy;

A course must be considered college preparatory by the high school. College preparatory is defined for these purposes as any course that prepares a student academically to enter a four-year collegiate institution upon graduation from high school;

A mathematics course must be at the level of Algebra I or a higher level mathematics course;

A course must be taught by a qualified instructor as defined by the appropriate academic authority (e.g., high school, school district or state agency with authority on such matters); and

A course must be taught at or above the high school's regular academic level (i.e., remedial, special education or compensatory courses shall not be considered core courses). However, the prohibition against the use of remedial or compensatory courses is not applicable to courses designed for students with learning disabilities (see Bylaw 14.3.1.2). (NCAA, 2002-2003, p. 140)

The NCAA Manual goes on to state, in Bylaw 14.2.1.2.5, *Courses for Students with Disabilities*, that:

The Academics/Eligibility/Compliance Cabinet may approve the use of high school courses for students with disabilities to fulfill the core-curriculum requirements, even if such courses appear to be taught at a level below the high school's regular academic instructional level (e.g., special education courses), if the high school principal submits a written statement to the NCAA indicating that the courses are substantially comparable, quantitatively and qualitatively, to similar core course offerings in that academic discipline. Students with disabilities still must complete the required core courses and achieve the minimum required grade-point average in this core curriculum. The fact that the title of a course includes a designation such as "remedial," "special education," "special needs," or other similar titles used for courses designed for students with learning disabilities does not, in and of itself, disqualify a course from satisfying core-curriculum requirements. (NCAA, 2002-2003, p. 141)

In response to the Consent Decree the NCAA further agreed to mail an announcement of the new standards for courses designed for student-athletes with learning disabilities to all high schools (NCAA Consent Decree: Agreement, 1998; United States Department of Justice, 1998). The NCAA sent out a brochure titled: *NCAA Freshman Eligibility and Learning Disabilities – Putting Dreams into Action* (1998), which explained accommodations for, and efforts to support, student-athletes with learning disabilities. This information helped clarify and communicate the NCAA policy revisions.

Finally, relative to reporting, the NCAA agreed to file a report with the U.S. Department of Justice each May for three years (beginning May 1999), documenting its efforts to voluntarily comply with Title III of the ADA (NCAA Consent Decree: Agreement, 1998). According to the Consent Decree, the report was to track statistics: (a) relative to the ability of student-athletes with learning disabilities to be certified by the NCAA Clearing house; (b) on the number of courses designed for student-athletes with learning disabilities certified by the NCAA as core courses; and (c) on the decisions by the NCAA eligibility committee regarding waiver applications filed by student-athletes with learning disabilities (NCAA Consent Decree: Agreement). This reporting procedure was a key element of the Consent Decree agreement as it allowed the Department of Justice, as well as the NCAA, to see in what ways learning-disabled student-athletes were, or were not, being accommodated.

NCAA-ADA CASE LAW EXAMPLES

As stated, the Department of Justice and the NCAA entered into the Consent Decree in response to allegations that the NCAA's eligibility policies, practices and procedures discriminated against student-athletes with learning disabilities. The following case law examples are representative of these allegations; and highlight the evolving legal question of whether or not the NCAA is a place of public accommodation, and thereby required to comply with the ADA.

Chad Ganden, a learning-disabled student-athlete, was accepted to Michigan State University. Michigan State was interested in offering Ganden a swimming scholarship. Ganden applied through the NCAA Initial Eligibility Clearinghouse and was denied eligibility. Michigan State appealed the Clearinghouse's ruling to the NCAA Academic Requirements Committee on Ganden's behalf. He was awarded a partial waiver allowing him to practice with Michigan State and to accept a scholarship, however, the NCAA would

not waive its eligibility criteria and he was not allowed to compete during his freshman year.

In response Ganden sued the NCAA claiming that its eligibility criteria violated Title III of the Americans with Disabilities Act (*Ganden v. NCAA*, 1996). Finding that the NCAA had made appropriate modifications of its eligibility rules as required under Title III, the district court held that a complete modification of these rules would be a fundamental alteration that is not mandated by the ADA (*Ganden v. NCAA*, p. *48). Therefore, although the court agreed that Ganden had some likelihood of showing that the NCAA was covered by Title III, the court determined that the NCAA had already accommodated for Ganden.

In *Tatum v. NCAA*, St. Louis University had offered Tatum a full athletic scholarship to play basketball with the contingency that Tatum attain qualifier status through the NCAA Initial Eligibility Clearinghouse (*Tatum v. NCAA*, 1998). The NCAA Clearinghouse did not certify Tatum as a qualifier because he did not achieve an adequate ACT score.

In contrast to the *Ganden* case, the district court in *Tatum* found that the NCAA did operate ". . . as a place of public accommodation for purposes of Title III of the ADA" (*Tatum v. NCAA*, 1998, p. 1121). However, the court ruled in favor of the NCAA because Tatum could not meet the ADA's standard and show that he was disabled and could not demonstrate the necessary harm to sustain his motion for summary judgment (*Tatum*, p. 1123).

In *Bowers v. NCAA* (2000), Michael Bowers, a learning-disabled student-athlete, was identified as a "non qualifier" by the NCAA Initial Eligibility Clearinghouse, and as a result was ineligible to participate in intercollegiate athletics as a college freshman. District court Judge Orlofsky found the NCAA to be an "operator of a place of public accommodation" (*Bowers v. NCAA*, p. 515), and therefore, under Title III, it would be required to comply with the ADA.

In February 2001 the NCAA's motion to reargue the ADA claim in the Bower's case was granted on the basis of changes in its eligibility rules (*Bowers v. NCAA*, 2001). Because the NCAA had changed its eligibility rules, allowing non-qualifiers (of which Bowers was one) an opportunity to regain a fourth year of eligibility pending satisfactory academic progress, the court held that Bowers no longer suffered from "continuing, present, adverse effects" and therefore lacked standing to bring a Title III claim (*Bowers v. NCAA*, p. 614).

In a more recent case, *Matthews v. NCAA* (1999), Anthony Matthews claimed the NCAA violated his rights under the ADA when it refused to grant him a third eligibility waiver. Matthews was a learning-disabled football player at Washington State University. The NCAA had granted Matthews two

successive eligibility waivers to its 75/25 eligibility rule (this rule requires that student-athletes must earn 75% of the credit hours required for full-time student status, not more than 25% of which can be earned during summer sessions/terms).

In its initial ruling the district court held that the NCAA was not a place of public accommodation and therefore not regulated by the ADA (*Matthews v. NCAA*, 1999, p. 1205). The court further stated that even if the NCAA were regulated by the ADA, granting two prior eligibility waivers demonstrated "reasonable accommodations" for Matthews' learning disability (*Matthews v. NCAA*, 1999, p. 1206-1207; "NCAA is place," 2002).

In a later decision (*Matthews v. NCAA*, 2001) the court reconsidered its position. Leaning heavily on language in the Martin case (*PGA Tour, Inc. v. Casey Martin*, 2001) the court rejected the NCAA's argument that its' member institutions, ". . .and not the NCAA itself. . ." ("NCAA is a place," 2002, ¶3; *Matthews v. NCAA*, 2001, p. 1222) were places of public accommodation because they (the members and not the NCAA) controlled "facilities, admission prices, ticket sales, and public access to these facilities. . ." ("NCAA is a place," 2002, ¶3; *Matthews v. NCAA*, 2001, p. 1222). Instead, the court held that Title III of the ADA did apply to the NCAA based on its control of student access to "the arena of competitive college football" (*Matthews v. NCAA*, 2001, p. 1223). Again, using language similar to that in the *Martin* case, the court further determined that granting Matthews a third waiver would not fundamentally alter the NCAA's policies, nor would it result in an unfair advantage over other student-athletes (*Matthews*, p. 1226).

As these case examples show, although there has been some disagreement among district courts analyzing the issue at the motion level, the only final decision concerning a claim that the NCAA is amenable to Title III of the ADA held that the NCAA is a place of public accommodation and therefore it is required to comply with Title III of the ADA. Whether the reasoning of the *Matthews* (2001) case will be followed in other jurisdictions remains to be seen.

METHODOLOGY

Given the emerging pattern of concern regarding the NCAA's eligibility policy, practice and procedures, and the impact on student-athletes with learning disabilities; the purpose of this study was to investigate NCAA eligibility waiver applications and awards during the three-year Consent Decree time period. Specifically, this study examined the May 1999, 2000, and 2001 Consent Decree ADA progress reports as its major source of data.

The researchers reviewed the reports noting: (a) the number of total applications for waivers; (b) the number of applications that were awarded full waivers; (c) the number of applications that were awarded partial waivers; (d) the number of applications that were denied waivers; and (e) the number of high school courses designed for students with learning disabilities that were certified as core courses by the NCAA. Data analysis included frequencies and relative percentages.

Results

The researchers determined that the Consent Decree progress reports compiled by the NCAA contained the data needed to address the research purpose. Based on the information revealed in the literature, the researchers assumed the progress reports would be available from the NCAA. This assumption proved incorrect, and ultimately, after unsuccessfully attempting to access them from the Department of Justice, the researchers obtained the needed information through individuals involved in the *Ganden* case.

The questions posed by this study required a review of the number of annual waiver applications and relative number of full, partial and denial responses from the NCAA, as well as a review of the NCAA practice regarding which courses it allowed to satisfy core course requirements. Table 1 displays data that address the waiver question.

TABLE 1

Number of Annual Waiver Applications by Type and by Year

	1999	2000	2001
Full	111 (27.0%)	132 (37.6%)	145 (34.1%)
Partial	64 (15.6%)	42 (12.0%)	55 (12.9%)
Denied	154 (37.5%)	114 (32.5%)	152 (35.8%)
Total	411	351	425

These results indicate that from 1999 through 2001 the NCAA's waiver award pattern was somewhat inconsistent. Full waiver awards increased from 111 in 1999 to 145 in 2001. Partial waiver awards fluctuated in number from 64 in 1999, to 42 in 2000, to 55 in 2001. Waiver denials totaled 154 in 1999, dropped to 114 in 2000, and resurged to 152 in 2001.

Table 2 displays data that address the question of how many learning-disabled courses the NCAA counted towards core course eligibility requirements over the three-year study period.

TABLE 2

Number of Learning-Disabled Courses Approved/Denied by Year

	1999	2000	2001
Approved	13,305 (80.0%)	1,581 (92.0%)	3,411 (30.1%)
Denied	3,416 (20.4%)	127 (7.4%)	7,914 (69.9%)
Total	16,721	1,708	11,325

As these results indicate, the number of courses submitted for approval varied over the three-year time period (1999= 16,721, 2000= 1,708, and 2001= 11,325). Similarly, the approval rate varied annually (1999= 13,305 (80%), 2000= 1,581 (92%) and 2001= 3,411 (30.1%)), increasing from 80% to 92% between 1999 and 2000, and then dropping dramatically to 30.1% in 2001.

Discussion & Conclusions

The number of annual waiver applications and relative number of full, partial and denial responses from the NCAA over 1999, 2000, and 2001 period varied. In 1999 and 2001, more full waiver requests were denied than granted; while in 2000 full waiver awards outnumbered denials.

It is interesting to consider the waiver award trends in conjunction with the case law examples cited. By 2000, the NCAA had defended its position in the *Ganden* (1996) and *Tatum* (1998) cases, and was embroiled in the *Bowers* (2000 & 2001) and *Matthews* (1999 & 2001) cases. It is reasonable to assume that the waiver approval fluctuations observed were a function of the reduced number of waiver applications during 2000. However, it may also be plausible to speculate that the pressure associated with evolving case law may have influenced NCAA practice during that time period.

The second part of the study reviewed the NCAA practice regarding which courses it allowed to satisfy core course requirements. In 1999, 80% of the courses submitted for core course consideration were approved. In 2000,

92% were approved. However, in 2001, only 30.1% were approved. Also, the absolute numbers of core courses submitted for consideration varied a great deal during the three-year time period.

There are a number of possible explanations and/or factors that may have influenced the core course designation trend observed. Overall, the number of courses submitted for core course approval dropped dramatically between 1999 (16,721) and 2000 (1,708). The number rebounded in 2001 (11,325); however the majority of the 2001 submissions (7,914 or 69.9%) were denied core course approval.

It seems reasonable to assume that after the broad based review of courses in 1999, high school course submissions declined in 2000 because course queries were addressed in 1999. High school curricula do not generally change dramatically from year to year. Therefore, it would be unlikely that another 13,000 new course submissions would be needed.

As with the waiver approval trends, it may be reasonable to speculate that the pressure generated from ADA related cases spurred a renewed surge of core course submissions requests. Which could lend explanation to the increased number of course consideration requests in 2001 (11,325). The high rate of denials during that same year may reflect a view by the NCAA that many of the 2001 course consideration requests were spurious.

Despite voluntary agreement with the Justice Department as articulated by the Consent Decree, as well as evolving case law, the NCAA has consistently rejected the notion that it is a place of public accommodation and therefore legally compelled to comply with Title III of the ADA. Given that: (a) The NCAA voluntarily entered into the Consent Decree agreement with the Department of Justice, without agreeing, or admitting, to being legally mandated to comply with the ADA; (b) the Consent Decree agreement required reporting only from 1999 to 2001; and (c) only recently has there been a clear directive from the courts that the NCAA is a place of public accommodation; the researchers believe that the trends revealed in these data indicate that an enduring accountability mandate, is essential to help ensure that intercollegiate learning disabled student-athletes are not unfairly impacted by NCAA eligibility requirements. At the least, such a mandate should require continued tracking and reporting as specified by the Consent Decree. Beyond that, the researchers believe that a "sunshine" policy, requiring public disclosure of the Consent Decree data, would serve to hold the NCAA accountable/answerable for its actions and inactions regarding intercollegiate eligibility and student-athletes with learning disabilities, and thereby help ensure their fair treatment.

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