CASENOTE

Cureton v. NCAA: A Blow-by-Blow Account of the Landmark Title VI Challenges to the NCAA and Their Recent Implications[1]

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I. INTRODUCTION

"It's embarrassing," said Terrence Edwards,[2] an African-American student who was then attending Washington County High School.[3] "People in high school know you're not dumb, but people who don't know you pass judgment on you.[4] They read in the newspaper you didn't qualify, and people all over the country automatically think you're dumb."[5]

Edwards always dreamed of following in the footsteps of his big brother, Robert, by playing football for the Bulldogs of the University of Georgia.[6] However, despite maintaining a B average in high school Edwards struggled to meet the National Collegiate Athletic Association's (NCAA) Scholastic

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1. The authors wish to gratefully acknowledge Bing Simpson's tireless dedication and assistance, as well as Editor Paul Anderson's support and editorial guidance.

2. Edwards recently completed his eligibility at the University of Georgia. The official site of the University of Georgia Bulldogs, *Player Bio: Terence Edwards*, *at* http://georgiadogs.ocsn.com/sports/m-footbl/mtt/edwards_terrence00.html (last visited August 28, 2003). He finished his career with the Bulldogs as the school record holder in receiving yards, career receptions, touchdown receptions, and 100-yard receiving games. *Id.* After the 2003 National Football League Draft, Edwards signed a free agent contract with the Pittsburgh Steelers. *Id.*

3. Tony Barnhart, *Mixed Reaction to Ruling on Tests*, ATLANTA J. & ATLANTA CONST., Wed., Mar. 10, 1999, D 01.

4. *Id.*

5. *Id.*

6. *Id.*

Aptitude Test (SAT) cutoff score of 820.[7] When he finally scored an 840, he was forced to matriculate at Georgia an entire semester later than he had hoped.[8]

Edwards was one of the lucky ones—lucky because Georgia actually held his scholarship for him until he was able to pass the SAT and therefore qualify under Proposition 16.[9] Unfortunately, many other African-American student-athletes are not so fortunate. In fact, in 1996 alone, 26.6 percent of African-American student-athletes failed to qualify under Proposition 16, the NCAA's initial freshman eligibility standard.[10] In 1997, 21.4 percent did not qualify.[11] Shortly thereafter the fight over the legality of Proposition 16 began.

As the NCAA readily concedes, failure to meet the standardized test score requirement accounts primarily for the high percentage of ineligibility in African-American students.[12] The NCAA also admits that the percentage of scholarships allocated to African-American freshmen has dropped significantly since the passage of Proposition 16 and its predecessor, Proposition 48.[13]

Like Edwards, Tai Kwan Cureton struggled to meet the minimum SAT test score requirement to qualify for a Division I scholarship. Unlike Edwards, however, Cureton's Division I scholarship did not wait for him until he was able to pass the SAT.[14] Ultimately, Cureton was forced to abandon his dream of participating in Division I athletics and later enrolled instead in a Division III institution.[15]

Cureton's experience, along with other plaintiffs, became the basis of a landmark class action, *Cureton v. NCAA,* filed against the NCAA for racial discrimination. The suit alleged that the NCAA's use of the qualifying standards under Proposition 16 violated Title VI of the Civil Rights Act of 1964.[16] Title VI expressly prohibits use of race, color, or national origin as a basis for preventing participation in federally assisted programs.[17] This note

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7. *Id.*

8. *Player Bio: Terence Edwards*, *supra* note 2.

9. Barnhorst, *supra* note 3.

10. Cureton v. NCAA, 37 F. Supp. 2d 687, 698 (E.D. PA 1999).

11. *Id.*

12. *Id.*

13. Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 142 (1997).

14. *Cureton,* 37 F. Supp. 2d at 690.

15. *Id.*

16. Cureton v. NCAA, 198 F.3d 107, 110 (3rd Cir. 1999).

17. 42 U.S.C. §2000d (1996).

focuses on the lawsuit the *Cureton* plaintiffs filed against the NCAA. Discussion begins with a brief summary chronicling the history of the NCAA's development of Proposition 16. A detailed procedural history of the lawsuit follows to highlight the salient events leading up to the final judicial resolution of the dispute. Following the procedural history is a description and analysis of Judge Buckwalter's district court decision and his rationale for granting the plaintiffs' motion for summary judgment. The review continues with a summary of the United States Court of Appeals for the Third Circuit's decision overturning the district court's decision and remanding the matter for entry of summary judgment in favor of the NCAA. Additionally, the summary includes Judge McKee's dissenting opinion of the Third Circuit's decision. Finally, discussion concludes with a new lawsuit brought by the *Cureton* counsel as well as an unexpected decision by the NCAA to voluntarily change its initial eligibility requirements.

II. BACKGROUND

The NCAA is a non-profit, voluntary, unincorporated association composed of approximately 1,200 members.[18] Its members include more than 1,100 private and public colleges and universities and 100 athletic conferences.[19] The NCAA divides its active members into three primary sections: Division I, Division II, and Division III.[20]

The NCAA states that its basic purpose is "[t]o initiate and stimulate intercollegiate athletic programs by encouraging member organizations to adopt eligibility rules in compliance with satisfactory standards of scholarship, sportsmanship and amateurism."[21] To join the NCAA, potential members must agree to abide by its rules and policies adopted at annual conventions.[22]

Originally, NCAA rules prohibited freshmen from participating in varsity athletics.[23] In 1971, the ban was lifted and freshmen were allowed to

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18. National Collegiate Athletic Association, *What is the NCAA?, at* http://www.ncaa.org/about/what_is_the_ncaa.html (last visited August 28, 2003).

19. Dennis L. Martin, Note, *Cureton v. National Collegiate Athletic Association: Was the Federal District Court Out of Bounds When It Enjoined the NCAA From Continued Operation of Proposition 16?*, 22 CAMPBELL L. REV. 233, 234 (1999).

20. Laura Pentimone, Note, *The National Collegiate Athletic Association's Quest To Educate Student-Athletes: Are the Academic Eligibility Requirements An Attempt To Foster Academic Integrity or Merely To Promote Racism?* 14 N.Y.L. SCH. J. HUM. RTS. 471, 477 (1998) *See also What is the NCAA?, supra* note 18.

21. *What is the NCAA?, supra* note 18.

22. NCAA v. Tarkanian, 488 U.S. 179 (1988).

23. *Cureton,* 37 F. Supp. 2d at 690.

participate on the varsity level.[24] However, the NCAA was concerned about exploitation of student-athletes by member institutions.[25] Therefore, it adopted the 1.600 rule, which prohibited member institutions from granting athletic scholarships to athletes who were not projected to achieve a minimum 1.600 grade point average during their first year in college.[26] The 1.600 projections were based on the athlete's high school grade point average or class rank and their score on either the American College Test (ACT) or the SAT.[27]

The 1.600 rule stated that violation of the rule would result in the disqualification or ban of the student-athlete from NCAA championship events.[28] However, the NCAA interpreted the rule to impose the loss of one year of practice and varsity eligibility for each year the student-athlete competed improperly.[29] In 1973, the NCAA rescinded the 1.600 rule and replaced it with a standard requiring only that the student-athlete graduate high school with a 2.000 or higher grade point average.[30]

In the early 1980s, a few highly publicized cases of academic abuse came to light, damaging the image of the NCAA.[31] These cases lead to the adoption of a new freshmen academic eligibility standard in 1983 known as Proposition 48.[32] Proposition 48 mandated that student-athletes attain a 2.0 grade point average in an 11-course core curriculum.[33] The curriculum consisted of courses in English, mathematics, social sciences and natural sciences.[34] Further, student-athletes had to achieve a minimum combined score of 700 out of 1600 on the SAT or 15 out of 36 on the ACT.[35]

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24. *Id.*

25. Howard Univ. v. NCAA, 510 F.2d 213, 216 (U.S. App. D.C. 1975).

26. Kevin M. McKenna, *A Proposition With A Powerful Punch: The Legality And Constitutionality of NCAA Propostion 48*, 26 DUQ. L. REV. 43, 59 (1987).

27. *Id.*

28. *Howard*, 510 F.2d at 221.

29. McKenna, *supra* note 26, at 60.

30. Shropshire, *supra* note 10, at 143.

31. Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986) (civil rights action against the University of Georgia alleging that plaintiff, an English professor, had been fired because she did not provide athletes with preferential treatment). *See also* Ross v. Creighton Univ., 740 F. Supp. 1319 (E.D. Ill. 1990) (former basketball athlete and student at Creighton who sued the school under negligence and breach of contract claims alleging that the university exploited his athletic ability, and did not provide him with a meaningful education).

32. *Cureton*, 37 F. Supp. 2d at 704.

33. Shropshire, *supra* note 13, at 143.

34. *Id.*

35. *Id.*

Failure to meet these requirements resulted in an athlete's ineligibility for an athletic scholarship and participation in Division I competition during the freshman year.[36] The non-qualifying student-athlete, was then limited to only three seasons of competition in Division I.[37] However, Proposition 48 created a partial qualifier status for students who satisfied the minimum grade point average requirement but failed the standardized test score requirement.[38] Partial qualifiers were allowed to receive athletic scholarships, but they could not compete as freshmen and, thereby, were limited to only three years of athletic eligibility.[39] To compete after their freshman year, partial qualifiers had to attain a 2.000 or better grade point average in twenty-four units of college course work.[40] Failure to qualify after the freshman year rendered the student-athlete a non-qualifier.[41]

In 1989, the NCAA enacted Proposition 42 eliminated partial qualifiers and required all high school graduates to meet both the minimum standardized test score and the minimum high school grade point average requirements to be eligible for athletic scholarships.[42] Proposition 42 was amended at the 1990 NCAA Convention to allow partial qualifiers to receive non-athletic financial aid based on need.[43]

In 1992, the NCAA voted to replace Proposition 48 with Proposition 16.[44] Proposition 16 stiffened eligibility requirements, but it also introduced a "sliding scale" that determined eligibility by comparing high school grade point averages with standardized test scores.[45] Proposition 16 permitted student-athletes to offset low standardized test scores with higher grade point averages or vice versa.[46] However, the lowest SAT score allowed by

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36. *Id.*at 151.

37. *Id.*

38. Micheal R. Lufrano, *The NCAA's Involvement In Setting Academic Standards: Legality And Desirability*, 4 SETON HALL J. SPORT L. 97, 102 (1994).

39. *Id.*

40. Pentimone, *supra* note 20, at 484.

41. *Id.*

42. Lufrano, *supra* note 38, at 102.

43. Shropshire, *supra* note 13, at 146.

44. *Id.*

45. Pentimone, *supra* note 20, at 486. *See also*, GLEN M. WONG, ESSENTIALS OF SPORTS LAW 290 (3rd ed. 2002).

46. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1999-00 NCAA DIVISION I MANUAL 146 (1999).

Proposition 16 was 820, and the lowest grade point average (GPA) allowed was 2.000.[47]

In October of 2002, the NCAA adopted new rules that require student-athletes to complete 14 rather than 13 core courses.[48] But most importantly, the new rules eliminate the minimum test score requirement and replace it with a sliding grade/test score cutoff allowing acceptance of students who score as low as a 400 on the SAT if they have a 3.55 GPA.[49] These rules will go into effect on August 1, 2003.[50]

III. PROCEDURAL HISTORY

Tai Kwan Cureton, an African-American, graduated from Simon Gratz High School in Philadelphia in June 1996.[51] Cureton was ranked twenty-seventh in a class of 305 students.[52] He also ran track for Gratz.[53] In fact, he earned both academic and athletic honors as a high school athlete.[54] However, Cureton's high school academic and athletic accomplishments were not enough to earn him a scholarship to an NCAA Division I institution.[55]

Cureton alleged that several Division I schools expressed interest in him, that is, until he received his SAT score.[56] Unfortunately, Cureton, like 26.6 percent of African-American college-bound student-athletes, did not achieve the minimum 820 SAT score as required by Proposition 16.[57] Therefore, he did not qualify for Division I athletic eligibility as a freshman, nor for athletically-related financial aid.[58] As a result, Cureton enrolled in a Division III school.[59]

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47. *Id.* (stating that a student with an SAT score of 820 must have a GPA of 2.500 or higher to qualify. A student with a 2.000 GPA must have an SAT score of 1010 to qualify).

48. Wallace I. Renfro & Laronica L. Conway, *NCAA Division I Board of Directors Gives Final Approval To New Academic Standards*, NCAA NEWS RELEASE, Oct. 31, 2002.

49. *Id.*.

50. *Id.*

51. *Cureton*, 198 F.3d at 109.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Cureton*, 198 F.3d at 109.

57. *Cureton*, 37 F. Supp. 2d at 698.

58. *Id.*

59. *Id.*

Like Cureton, Leatrice Shaw is an African-American who graduated from Simon Gratz High School, except Shaw finished ranked fifth in her class.[60] Similarly, she was on the track team and earned both academic and athletic honors.[61] She was even selected for membership in the National Honor Society.[62] Shaw also failed to achieve the minimum SAT score required by Proposition 16.[63] However, she was more fortunate than Cureton.[64] Shaw's GPA afforded her partial qualifying status, thus allowing her to receive athletic financial aid from a Division I institution.[65] As a partial qualifier, Shaw was prohibited from competing on the track team during her freshman year.[66]

Cureton and Shaw brought suit against the NCAA in the Eastern District Court of Pennsylvania on January 8, 1997.[67] The complaint alleged that the minimum standardized test score requirement of Proposition 16 had an unjustified disparate impact on African-American student-athletes, thus violating section Title VI of the Civil Rights Act of 1964.[68]

The NCAA moved for dismissal, or alternatively, for summary judgment, alleging that: (1) neither Title VI nor its accompanying regulations afforded the plaintiffs a private right of action for unintentional discrimination; (2) the NCAA is not a "program or activity" regulated by Title VI; and (3) the NCAA does not accept federal funds and is not subject to Title VI scrutiny.[69] The plaintiffs moved for partial summary judgment claiming that, as a matter of law, the NCAA was both a "program or activity" covered by Title VI and a recipient of federal funds and, thus, subject to Title VI action for unintentional discrimination.[70]

On October 9, 1997, the District Court issued an order denying the NCAA's motion, but granting in part and denying in part the plaintiffs' motion for summary judgment.[71] The court found that a private cause of action under

60. *Id.*
61. *Id.*.
62. *Cureton*, 98 F.3d at 110.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Cureton*, 98 F.3d at 111.
68. *Id.* at 110. 42 U.S.C. §2000d.
69. *Cureton,* 198 F.3d at 110.
70. *Id.*, at 111.
71. Cureton v. NCAA, 1997 WL 634376, *2 (E.D.PA 1997).

Title VI existed and that the NCAA was a program or activity under Title VI.[72] But the court held that it could not, based on the record, determine that the NCAA was a recipient of federal funds through its involvement with the National Youth Sports Program (NYSP).[73] For the plaintiffs to succeed at trial, they had to prove two issues: (1) that the NCAA receives federal financial assistance and (2) that its minimum test score requirement is in violation of Title VI because it has an unjustified disparate impact on African-American student-athletes.[74]

In December 1998, Andrea Gardner and Alexander Wesby intervened in the litigation pursuant to Rule 24 of the Federal Rules of Civil Procedure.[75] Both Gardner and Wesby were African-American student-athletes who exceeded the NCAA minimum GPA requirement but failed to achieve the minimum standardized test score.[76]

On March 8, 1999, the district court granted summary judgment in favor of the plaintiffs.[77] This decision enjoined the NCAA from using the minimum standardized test requirement of Proposition 16, although the court could only enjoin them from using the test in the eastern district of Pennsylvania.[78] The court also denied the NCAA's motion to stay the injunction pending appeal.[79]

IV. ROUND ONE: THE PLAINTIFFS PREVAIL IN THE DISTRICT COURT

In its decision to enjoin the NCAA from use of Proposition 16, the Eastern district court of Pennsylvania held that: (1) the NCAA received federal funds, subjecting it to Title VI prohibitions on racial discrimination;[80] (2) the plaintiffs' evidence of a reduction in the numbers of African-Americans receiving athletic scholarships established a prima facie case of disparate impact racial discrimination;[81] (3) the NCAA failed to rebut the presumption of discrimination by providing an independent basis for its selection of the 820 SAT cutoff score as the best way to further its legitimate interest in increasing

72. *Id.* Both Title VI and the Fund will be explained in detail further on in this Casenote.
73. *Id.*
74. *Id.*
75. *Cureton,* 198 F.3d at 110.
76. *Id.*
77. *Id.* at 112.
78. *Id.*
79. *Id.* at 113.
80. *Cureton,* 37 F. Supp. 2d at 687.
81. *Id.*

graduation rates of student-athletes;[82] and (4) even if the NCAA satisfied its burden of rebuttal, the plaintiffs would still prevail because they proffered equally effective alternative practices that would raise graduation rates and result in less racial disproportionality.[83]

The NCAA received federal funds, subjecting it to Title VI.

Title VI of the Civil Rights Act of 1964 precludes exclusion or discrimination based on race, color or national origin by any program or activity receiving federal financial assistance.[84] Therefore, the plaintiffs in *Cureton* had the burden of proving that the NCAA was a "program or activity" that received federal financial assistance before the NCAA could be subject to the "strictures" of Title VI and its implementing regulations.[85]

The district court's decision in *Cureton* came only months after the Supreme Court decided in *NCAA v. Smith* [86] that the NCAA did not receive federal funds by receiving dues from member institutions that did receive federal funds.[87] The Supreme Court's decision in *Smith* overruled the Third Circuit's holding that the NCAA was subject to Title VI as an indirect recipient of federal funds through its relationship with its member institutions.[88] Conversely, the Supreme Court held that as long as the federal funds were not "earmarked" for NCAA dues, the NCAA merely benefited indirectly from federal assistance.[89] This case served as an obstacle for the plaintiffs in *Cureton*, who continued to rely on the overruled Third Circuit's decision in *NCAA v. Smith*.[90] However, the district court held that the plaintiffs were not precluded from using the argument rejected in *Smith* in combination with other facts to establish that the NCAA received federal financial assistance.[91] Supporting its determination that the plaintiffs could assert the indirect recipient argument, the district court placed emphasis on the Supreme Court's statement in *Smith* that, "[a]t most, the Association's receipt of dues demonstrates it indirectly benefits from the federal assistance afforded

82. *Id.*
83. *Id.* at 713.
84. 42 U.S.C. § 2000d.
85. *Cureton I*, at 692.
86. 119 S.Ct. 924, 926 (1999).
87. *Cureton I*, at 692.
88. *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998).
89. Martin, *supra* note 19, at 239.
90. *Cureton*, 37 F. Supp. 2d at 692.
91. *Id.* at 693.

its members. This showing, *without more*, is insufficient to trigger Title [VI] coverage."[92] The district court read the words "without more" to mean that the plaintiffs in *Cureton* were not precluded from asserting the indirect recipient claim as long as they established other facts to support their argument.[93] The district court found that the plaintiffs satisfied the "other facts" requirement using four additional theories. These theories were: (1) that the NCAA was a recipient of federal funds through its "alter ego," the National Youth Sports Program Fund (Fund);[94] (2) the NCAA's complete control over the Fund results in it indirectly receiving federal financial assistance;[95] (3) the NCAA was created by and is comprised of member institutions that directly receive federal financial assistance, and the NCAA governs those institutions through athletic rules;[96] and (4) that the NCAA has been given controlling authority over a federally funded program by recipients of federal financial assistance and is subject to Title VI regardless of whether the NCAA directly received federal funds.[97]

Judge Buckwalter relied on three of plaintiffs' theories in finding the NCAA subject to suit under Title VI. The three theories Judge Buckwalter used to establish liability under Title VI were: (1) the alter ego theory, (2) the indirect recipient theory, and (3) the controlling authority theory.[98] The first theory, the "alter ego" theory, was rejected.[99] Through the "alter ego" theory, the plaintiffs asserted the NCAA received federal funds by way of its relationship with the Fund.[100] The plaintiffs proposed that the Fund was in fact the NCAA's "alter ego."[101] However, the court relied on a ruling from October of 1997 that held that the "alter ego" argument could be "neither be made or refused based on the present record before the court."[102] Therefore, the plaintiffs failed to satisfy the "heavy burden" of proving that the Fund was the "alter ego" of the NCAA.[103]

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92. *Id.*, quoting *Smith*, 119 S.Ct. at 929 (emphasis added).

93. *Cureton*, 37 F. Supp. 2d at 693.

94. *Id.* at 694 (the Fund provides economically disadvantaged youths summer education and sports instruction at college and university campuses).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Cureton*, 37 F. Supp. 2d at 694.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*, citing, *Cureton*, 1997 WL 634376, at *2.

103. *Cureton*, 37 F. Supp. 2d 694.

The court determined that the plaintiffs satisfied their burden concerning the second theory, dubbed the "indirect recipient theory."[104] The court found that the NCAA exercised effective control and operation of the Community Block Grant given to the Fund by the United States Department of Health and Human Services (HHS).[105] The court found nothing wrong with the establishment of a separate corporation created to manage the NYSP.[106] Additionally, the court found nothing wrong with the fact that the corporation received the block grant.[107] However, the court stated that the record overwhelmingly supported the plaintiffs' theory that the NCAA ultimately controls the Fund.[108] Therefore, the Fund, as the named recipient, served merely as a conduit through which the NCAA made all decisions concerning the use of the federal funds.[109]

The NCAA argued that only an administrative contract existed between itself and the Fund.[110] The court dismissed this argument by noting that no copy of such contract had been presented as evidence, and even if the NCAA had proved the existence of a contract, the record revealed the true relationship and operation between the entities.[111] Thus, the court found that the NCAA was a recipient of federal funds through its control over the Fund, thereby subjecting it to Title VI restrictions.[112]

The court then addressed the plaintiff's third and fourth theories. It found these theories essentially identical, varying only in degree.[113] The court combined the theories and referred to them collectively as the "controlling authority" theory.[114] The court accepted this theory and found that the NCAA was the "controlling authority" over its member institutions.[115] The court found that the member institutions had delegated authority to the NCAA, allowing it to adopt and enforce rules that the member institutions had to

104. Martin, *supra* note 19, at 238.
105. *Cureton*, 37 F. Supp. 2d at 694.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Cureton*, 37 F. Supp. 2d at 694.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Cureton*, 37 F. Supp. 2d at 694.

follow.[116] Deviation from NCAA rules resulted in the member institutions facing "grave consequences." [117]

The court found that rules such as Proposition 16 evidenced the "delegation" or "assignment" of regulatory supervision given to the NCAA by the member institutions.[118] The member institutions had no real choice as to whether to abide by the NCAA legislation because non-compliance resulted in sanctions at the hands of the NCAA.[119] Further, renouncing its membership in the NCAA was hardly an option because of the "grave consequences" its athletic program would face.[120] Thus, the member institutions that directly received federal financial assistance had ceded controlling authority to the NCAA, subjecting it to Title VI restrictions.[121] Therefore, the court held that the NCAA was subject to Title VI for a challenge to Proposition 16 under either the "indirect recipient" or "controlling authority" theories.[122]

The reduction in the number of African-Americans receiving athletic scholarships because of Proposition 16 established a prima facie case of disparate impact racial discrimination.

The U.S. Supreme Court introduced the theory of disparate impact discrimination in *Griggs v. Duke Power Co.*[123] when it held that intentional discrimination does not need to be shown in order to establish that an employer has violated Title VII of the Civil Rights Act of 1964.[124] In *Cureton*, the court utilized a three-prong test developed in *Duke Power* to decide whether Proposition 16 resulted in disparate impact discrimination.[125] First, the plaintiffs had to establish a prima facie case by demonstrating that their exclusion from an educational opportunity resulted from the application of a specific facially neutral selection practice that had an adverse disproportionate affect on the plaintiffs and similarly situated applicants.[126] The burden would then shift to the NCAA to demonstrate that the selection

116. *Id.* at 695-96.
117. *Id.*
118. *Id.* at 695.
119. *Id.*
120. *Cureton*, 37 F. Supp. 2d at 695.
121. *Id.* at 695.
122. *Id.* at 696.
123. 401 U.S. 424 (1971).
124. *Cureton*, 37 F. Supp. 2d at 696, citing *Griggs*, 401 U.S. 424.
125. Martin, *supra* note 19, at 242.
126. *Cureton*, 37 F. Supp. 2d at 697.

practice was justified by an "educational necessity."[127] Finally, if the NCAA satisfied its burden, the plaintiffs could still prevail by discrediting the asserted justification.[128] The plaintiffs could also prevail by producing an effective alternative practice that would result in less disproportionality while still serving the educational necessity.[129]

Typically, a prima facie case of racially disproportionate impact is demonstrated through use of competent statistical evidence that compares the racial composition of candidates selected by the questioned practice and the racial composition of the qualified candidate pool.[130] The statistical evidence must establish causation by proving that the questioned practice resulted in the exclusion of the applicants because of their membership in a protected group.[131]

However, the court found that the plaintiffs established their prima facie case not through the use of competent statistical evidence, but through the production of two NCAA memorandums and a report prepared by the United States Department of Education.[132] In fact, the NCAA memorandum dated July 27, 1998, admitted that African-American and low income student-athletes had been disproportionately impacted by Proposition 16 standards.[133] The memorandum stated that 26.6 percent of African-American student-athletes who appeared on a Division I Institution Request List did not qualify under Proposition 16 in 1996, and 21.4 percent did not qualify in 1997.[134] This was compared with 6.4 percent of white student-athletes applying on the Request List in 1996 and 4.2 percent in 1997.[135]

The memorandum went on to state that for both African-American and low income student-athletes, the primary reason for those who did not meet Proposition 16 standards was a failure to meet the standardized test score requirement.[136] The memorandum also showed a drop in the proportion of

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1998).
132. *Cureton*, 37 F. Supp. 2d at 700.
133. *Id.* at 698.
134. *Id.*
135. *Id.*
136. *Id.*

African-American first-year scholarship athletes from 23.6 percent to 20.3 percent between 1993 and 1994.[137]

Similarly, the second NCAA memorandum discussed the NCAA's admission to finding "dramatic" evidence of the disparate impact of Proposition 16's effect on minority students.[138] This memorandum, dated July 29, 1994, was issued just prior to the adoption of Proposition 16.[139]

Finally, the plaintiffs presented a report from the United States Department of Education that stated that only 46.4 percent of African-American college-bound high school seniors satisfied Proposition 16's requirements in comparison to 67 percent of their white counterparts.[140] The report indicated that the standardized test cutoff score was the primary reason for the disparity between the races because only 67.4 percent of African-American college-bound student-athletes met this requirement, as compared to 91.1 percent of white college-bound student-athletes.[141]

The NCAA countered by arguing that the focus of the disparate impact analysis should not have been on the opportunity to participate in college athletics during the freshman year, but the educational opportunity to obtain a college degree.[142] The NCAA stated that Proposition 16 reduced the gap between African-American and white student-athlete graduation rates because more African-American student-athletes were graduating since the adoption of the test score requirement.[143]

The court was not impressed with the NCAA's attempt to "reframe the lawsuit."[144] The court held that freshman eligibility was the educational opportunity that the plaintiffs were challenging, not the opportunity to graduate.[145] The court stated that Proposition 16 may have resulted in African-American student-athletes graduating at higher rates; however, this did not compensate for the disproportionate adverse impact created by Proposition 16.[146] The court held that Title VI does not permit individuals to be wronged by a policy that is discriminatory in effect simply because other

137. *Cureton,* 37 F. Supp. 2d at 698.
138. *Id.* at 698.
139. *Id.*
140. *Id.* at 699.
141. *Id.*
142. *Cureton,* 37 F. Supp. 2d at 699.
143. *Id.*
144. *Id.*
145. *Id.* at 700.
146. *Id.*

members of the same race or sex have benefited.[147] Therefore, the plaintiffs had established a prima facie case of disparate impact racial discrimination, and the burden of rebuttal shifted to the NCAA.[148]

The NCAA failed to rebut the presumption of discrimination by providing an independent basis for its selection of the 820 SAT cutoff score as the best way to further its legitimate interest in increasing graduation rates of student-athletes.

To satisfy its burden of rebuttal, the NCAA had to show that Proposition 16 was justified by an educational necessity.[149] To establish an educational necessity, the NCAA had to demonstrate that Proposition 16 serves, in a significant way, legitimate and substantive educational goals.[150] The NCAA then had to establish a nexus between Proposition 16 and the educational goals it purports to serve.[151]

In its consideration as to whether the NCAA had satisfied its burden, the court first looked at the educational goals underlying the promulgation of Proposition 16 to determine whether they were legitimate.[152] The NCAA provided two educational goals that Proposition 16 was created to serve: raising student-athlete graduation rates and closing the gap between African-American and white student-athlete graduation rates.[153]

The court accepted the NCAA's stated objective of raising student-athlete graduation rates and found this to be a legitimate educational goal.[154] The court found that the primary purpose of NCAA member institutions is to educate their students so that they graduate and raising graduation rates is in line with that goal.[155] The court analyzed NCAA convention proceedings, NCAA research and summaries, and other documents, and discovered that there was overwhelming and abundant support for the idea that the member institutions were concerned about raising student-athlete graduation rates when they passed Proposition 16 and its predecessor, Proposition 48.[156]

147. *Cureton*, 37 F. Supp. 2d at 700.
148. *Id.* at 701.
149. *Id.* at 697.
150. *Id.* at 701.
151. *Id.*
152. *Cureton*, 37 F. Supp. 2d at 701.
153. *Id.* at 700.
154. *Id.*
155. *Id.*
156. *Id.* at 703.

The court acknowledged that evidence of graduation rates of student-athletes before Proposition 48 did not suggest an empirical need for improvement.[157] However, the court recognized the need based on cases of past academic abuse where student-athletes who were less academically prepared than the rest of the student body were exploited for their athletic ability by member institutions.[158] A few of these cases reached the media, and the negative attention resulted in the promulgation of Proposition 48.[159] Therefore, the court decided that the NCAA was justified in its efforts to curb such abuse through the establishment of academic standards with the view toward raising graduation rates.[160]

However, the court refused to accept as legitimate the NCAA's second stated objective of closing the gap between African-American and white student-athlete graduation rates.[161] The court found nothing in the record to suggest that the drafters of Propositions 16 or 48 were ever motivated by the purported objective.[162] NCAA documents evidenced that only two goals promulgated the adoption of Propositions 16 and 48: "(1) raising of graduation rates, and (2) allowing more individuals access to the finite number of athletic opportunities available."[163]

The court conceded that Proposition 16 did result in a closing of the gap between graduation rates, and this result was desirable.[164] However, the court found that this benefit was simply collateral to promulgating a rule setting heightened academic standards.[165] Additionally, the "back-end" balancing of graduation rates as an objective of Proposition 16 violated the Supreme Court's decision that "bottom-line" defenses are not allowed to defend pass/fail selection practices in disparate impact cases.[166] In other words, defendants in a disparate impact discrimination suit cannot use the end to justify the means. Further, the court found that the stated objective was expressly race-based and stood in "stark contrast" to Proposition 16's facially neutral characterization.[167]

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157. *Cureton*, 37 F. Supp. 2d at 704.
158. *Id.* at 704.
159. *Id.*
160. *Id.* at 704.
161. *Id.* at 705.
162. *Cureton*, 37 F. Supp. 2d at 705.
163. *Id.*
164. *Id.* at 705.
165. *Id.*
166. *Id.*
167. *Cureton*, 37 F. Supp. 2d at 705.

Therefore, the court held that improving student-athlete graduation rates was a legitimate goal for the promulgation of Proposition 16, but closing the gap between African-American and white student-athletes was not.[168]

The court then turned its attention to the issue of whether Proposition 16, through its use of a standardized cutoff score, "significantly served" its legitimate goal.[169] In other words, the court had to determine whether a nexus or "manifest relationship" existed between raising student-athlete graduation rates and the 820 SAT cutoff score.[170]

The NCAA claimed that its research demonstrated that the use of the standardized test scores played an instrumental role in achieving its educational goals.[171] The NCAA contended that the use of a cutoff score had been accepted as a legitimate selection practice even when it resulted in a disparate impact toward one racial group.[172] Additionally, the NCAA argued that high school GPAs and standardized test scores are predictors of college performance concerning first year grades and later, graduation.[173] The courts have validated the SAT and ACT for this reason.[174] Therefore, the NCAA argued that the 820 cutoff score was justified as a means to raise student-athlete graduation rates.[175]

In response, the plaintiffs did not attack the use of standardized testing.[176] Instead, the plaintiffs attacked the cutoff score, arguing that it was "arbitrary and irrational."[177] The court accepted this argument and stated that in order for the NCAA to satisfy its burden of rebuttal, it must provide objective evidence factually demonstrating a nexus between the use of the particular cutoff score and the goal of raising student-athlete graduation rates.[178] Basically, the NCAA had to produce an "independent basis" for selecting the 820 cutoff score.[179]

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168. *Id.*
169. *Id.* at 706.
170. *Id.*
171. *Id.*
172. *Cureton*, 37 F. Supp. 2d at 706.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Cureton*, 37 F. Supp. 2d at 706.
178. *Id.*
179. *Id.* at 708.

The court found that the NCAA offered no such basis for its selection of the 820 SAT cutoff score.[180] The NCAA failed to show that (1) its selection of a 820 SAT cutoff score was "reasonable and consistent with normal expectations" of the "acceptable proficiency" of student-athletes toward obtaining a college degree, (2) that 820 served as a logical "break-point," and (3) that the 820 SAT cutoff score was a "minimal ability" necessary to improve student-athlete graduation rates prior to Proposition 16.[181]

The court found that the NCAA merely chose a cutoff score that seemed acceptable after considering the "essential tension" between raising graduation rates and allowing more individuals access to the finite number of athletic opportunities available, the two conflicting goals behind the creation of Proposition 16.[182] Then the NCAA simply took a "wait and see" approach to determine if its predicted effects would result.[183]

The NCAA argued that its selection of the 820 cutoff score was based on the fact that it was roughly one standard deviation below the SAT national mean.[184] This was significant because the selection was statistically proven to result in a 68% probability that successive scores would fall within a range of one deviation from an actual score.[185] The court found that this demonstrated that the NCAA was only abstractly rational in its selection of the cutoff score.[186] The NCAA was abstract in its rational because it relied exclusively on the predictive ability of the SAT cutoff score on graduation rates of student athletes and failed to analyze the issue in terms of other factors that affect graduation rates.[187] The court found that the NCAA had a rational basis for its determination, however; "under *Wards Cove*, the defendant's burden of production involves something beyond mere articulation of a rational basis for the challenged practice."[188] Instead, the NCAA merely examined the projected increase in graduation rates to find a manifest relationship without any degree of certainty whether the increases were attributable to factors other than the 820 SAT cutoff score.[189]

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180. *Id.*

181. *Id.* at 710.

182. *Cureton*, 37 F. Supp. 2d at 708.

183. *Id.*

184. *Id.* at 709.

185. *Id.*

186. *Id.*

187. *Cureton*, 37 F. Supp. 2d at 709.

188. *Id.*, quoting Newark Branch, NAACP v. Town of Harrison, New Jersey, 940 F.2d 792, 802 (3rd Cir. 1991).

189. *Cureton*, 37 F. Supp. 2d at 709.

According to the court, the NCAA failed to articulate any meaningful decision-making rational for the selection of the 820 SAT cutoff score. Conversely, the court found that the NCAA relied on a "vague, unsupported" presumption that students who failed to achieve the cutoff score had serious reading problems.[190] Therefore, the court held that the NCAA did not produce any evidence demonstrating that the 820 cutoff score served, in any significant way, the goal of raising student-athlete graduation rates.[191] It also held that the NCAA provided no independent basis for the selection of the cutoff score. Thus, no legitimate educational necessity justified its selection.[192] In the end, the NCAA failed to satisfy its burden of rebuttal, and Proposition 16 was found to be in violation of Title VI.[193]

Even if the NCAA satisfied its burden of rebuttal, the plaintiffs would still prevail because they proffered equally effective alternative practices that would raise graduation rates and result in less racial disproportionality.

In *Wards Cove Packing Co., Inc. v. Atonio,*[194] the Supreme Court held that even if the defendant justified its selection practice with an educational necessity, the plaintiffs could still prevail by persuading the fact finder that alternatives without a similarly undesirable effect would also serve the educational necessity.[195] In *Cureton*, the plaintiffs proffered three alternatives contained in the NCAA's own memorandum.[196]

The first alternative allowed partial qualifiers to become full qualifiers by lowering the cutoff score to 720 on the SAT.[197] This model still required a standardized test score that was higher than the national norm; however, it reduced the "Black Ineligibility Rate" to 15.9 percent, as opposed to 19.4 percent under Proposition 16.[198] Also, the alternative model only resulted in a 1.1 percent decrease in the predicted overall student-athlete graduation rate when compared with the predicted rate under Proposition 16.[199]

190. *Id.* at 710.
191. *Id.* at 712.
192. *Id.*
193. *Id.*
194. 490 U.S. at 660, quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
195. Martin, *supra* note 19, at 248.
196. *Cureton,* 37 F. Supp. 2d at 713.
197. *Id.*
198. *Id.*
199. *Id.*

The second alternative extended the sliding scale index score to 600 on the SAT.[200] This model equalized the evaluation of high school grades and standardized test scores because both would be two standard deviations below the national mean.[201] This alternative lowered the "Black Ineligibility Rate" to 15.7 percent, a 13.7 percent decrease from Proposition 16's 19.4 percent, and resulted in only a 1.8 percent decrease in the overall student-athlete graduation rate from that predicted under Proposition 16.[202]

The final alternative eliminated the minimum core GPA and test score requirements, basing eligibility on a test-grades combination score.[203] This alternative reduced the predicted "Black Ineligibility Rate" to 15.6 percent, but also lowered the predicted overall student-athlete graduation rate to 59.8 percent.[204]

While all three models lowered the predicted overall student-athlete graduation rate from the 61.8 percent predicted under Proposition 16, the court found that the NCAA never demonstrated that there was "something special" about that particular graduation rate.[205] Instead, the court presumed that the NCAA simply sought to increase the graduation rates beyond what existed before Proposition 16.[206] According to the court, all three alternatives would have accomplished the NCAA's goal of improving graduation rates.[207] Further, the court found that all three alternatives would have done so with less racial disparate impact.[208] Therefore, the court held that the plaintiffs had satisfied their burden of persuasion.[209]

Accordingly, the court granted the plaintiffs' motion for summary judgment and denied the defendant's.[210] The court then declared Proposition 16's SAT and ACT test score requirements illegal under Title VI of the Civil Rights Act of 1964 and permanently enjoined the NCAA from continued

200. *Id.* at 713.
201. *Cureton*, 37 F. Supp. 2d at 713.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Cureton*, 37 F. Supp. 2d at 713.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 715.

operation and implementation of Proposition 16.[211] The court denied the NCAA's motion to stay the decision pending appeal.[212]

V. ROUND TWO: THE THIRD CIRCUIT DECISION

The plaintiffs won round one. However, the NCAA dusted itself off and struck the first blow in round two when the Third Circuit Court of Appeals granted its request to stay the District Court's decision pending appeal.[213] Upon appeal, the Third Circuit, in an opinion delivered by Judge Greenberg, reversed the District Court's decision and remanded the case to the District Court to enter summary judgment in favor of the NCAA.[214] In its opinion, the Third Circuit held that: (1) disparate impact regulations under Title VI are program specific; (2) the Fund's receipt of federal financial assistance did not subject the NCAA to Title VI action for disparate impact challenge, even if the NCAA directly received Federal assistance, because the programs and activities that benefited from such receipt were not at issue; and (3) the NCAA did not have "controlling authority" over its member institutions subjecting it to Title VI scrutiny.[215]

Disparate impact regulations under Title VI are program specific.

The court began its analysis by noting that the plaintiffs initiated their disparate impact claim pursuant to section 601 of Title VI.[216] The Supreme Court has decided that section 601 of Title VI only prohibits intentional exclusion or discrimination based on race, color or national origin by any program or activity receiving federal financial assistance.[217] However, the plaintiffs did not allege intentional discrimination.[218] Instead, they based their claim on regulations enforcing section 601 adopted by HHS and the Department of Education pursuant to section 602.[219] These regulations

211. *Cureton*, 37 F. Supp. 2d at 715. *See also*, PAUL ANDERSON, SPORTS LAW: A DESKTOP HANDBOOK 29 (1999).

212. *Cureton*, 37 F. Supp. 2d at 715.

213. *Cureton*, 198 F.3d at 113.

214. *Id.* at 118.

215. *Id.* at 107.

216. *Id.* at 113.

217. *Id.* at 113. *See* Alexander v. Choate, 469 U.S. 287, 292-93 (1985); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Powell v. Ridge, 189 F. 3d 3887 (3d Cir. 1999).

218. *Cureton*, 198 F.3d at 113.

219. *Id.* (Section 602 is the enabling provision of Title VI that allows Federal departments and agencies to extend Federal financial assistance to programs and activities. Section 602 also

expanded section 601's reach to include racial disparate impact discrimination.[220]

However, section 601 and its regulations are only enforceable against recipients of federal financial assistance.[221] Unlike the district court, the Third Circuit did not find it necessary to decide whether the NCAA received federal financial assistance through its relationships with the Fund and the NYSP.[222] Instead, the court "assumed without deciding" that federal financial assistance to the Fund was assistance to the NCAA itself.[223] But Title VI was originally interpreted to be program specific in that it only prohibited discrimination involving the programs and activities that were the recipients of the federal financial assistance.[224] Further, the program specific limitation carried over to the authority given to the departments and agencies under section 602 to develop regulations effectuating section 601.[225]

The court found that the regulations themselves demonstrated that they were program specific in that they required assurances of nondiscrimination that could extend beyond the program to be federally assisted, but need not extend to the entire institution or the institution's participation in practices that in no way affected the program receiving federal assistance.[226] The court stated that it was obvious the provisions could not extend the regulations' application beyond the specific program receiving federal funding,[227] because a recipient of federal funding need not give assurance of nondiscrimination concerning activities not affecting the federally assisted program.[228]

The Supreme Court's strict interpretation of Title VI and Title IX motivated Congress to pass the Civil Rights Restoration Act of 1987.[229] The Act modified Title VI and Title XI to encompass a recipient's programs or

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authorizes the departments and agencies to effectuate the provisions of 601 by issuing rules and regulations that the programs and activities that receive Federal funding have to comply with. *See* 42 U.S.C. § 2000d-1.).

220. *Id.*

221. *Id.*

222. *Id.* at 114.

223. *Cureton*, 198 F.3d at 114.

224. *Id.* at 114 *See* Grove City Coll. v. Bell, 465 U.S. 555, 570-71(1984); Bd. of Pub. Instruction v. Finch, 414 F. 2d 1068 (5th Cir. 1969).

225. *Cureton*, 198 F.3d at 115. *See* N. Haven Bd. Of Educ. v. Bell, 456 U.S. 512, 538 (1982); *Grove City*, 465 U.S. at 570-71.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id. See* 42 U.S.C. § 2000d-4a (Title VI) & 20 U.S.C. § 1687 (Title IX); *See also*, *Smith*, 525 U.S. at 928 n.4.

activities on an institution-wide basis.[230] Thus, if one specific program within an institution received federal financial assistance, the entire institution was then subject to action under Title VI. However, HHS and the Department of Education did not modify 34 C.F.R. §100.13 and 45 C.F.R. §80.13 in accordance with the Restoration Act.[231] Therefore, the court found that these regulations remained program specific.[232]

In support of its finding, the court noted that neither Congress, HHS nor the Department of Education has ever formally considered the consequences of expanding the disparate impact regulations beyond their program specific limitations.[233] The court found that Congress might have never intended such expansion.[234] Thus, expansion required an opportunity for comment by interested parties.[235] Consequently, this decision led to a curious result. Regulations that were initially intended to broaden Title VI to cover disparate impact discrimination now had a shorter reach than the statutory prohibition they were intended to expand.[236]

The court did recognize that, arguably, the Civil Rights Restoration Act implicitly expanded the departments' regulations so that they were not limited to a specific activity.[237] The court refused to address that possibility claiming that the case did not involve any allegation of disparate treatment.[238] This failure to find a claim of disparate impact discrimination was in direct conflict with the district court decision.[239] However, the court held that 34 C.F.R. § 100.13 and 45 C.F.R. § 80.13 remained program specific despite the adoption of the Civil Rights Restoration Act of 1987.[240]

The Fund's receipt of federal financial assistance did not subject the NCAA to a Title VI claim for disparate-impact challenge, even if the NCAA directly

230. *Cureton,* 198 F.3d at 115.

231. *Id.* (these are the regulations concerning nondiscrimination for programs receiving funds through the Department of Education and the Department of Health and Human Services respectively).

232. *Id.*

233. *Id.*

234. *Id.* at 115.

235. *Cureton*, 198 F.3d at 115.

236. *Id.* at 120 (McKee, J., dissent).

237. *Id.* at 116.

238. *Id.*

239. *Cureton*, 37 F. Supp. 2d at 700 (holding that not only did a claim of disparate impact discrimination exist, but that plaintiffs had presented a prima facie case to support its claim).

240. *Cureton*, 198 F.3d at 115.

received federal assistance, because the programs and activities that benefited from such receipt were not at issue.

First, the court addressed the dissent's finding that the Fund may have been the alter ego of the NCAA.[241] The court found that the limited scope of HHS and the Department of Education's regulations rendered such discussion immaterial because it "inexorably" followed that, to the extent the action was based on the NCAA's receipt of financial assistance through the Fund, it must fail because the Fund's programs and activities were not at issue.[242] Additionally, the court restated that it found that the plaintiffs had not alleged a claim of disparate impact discrimination.[243] Thus, even if the NCAA directly received the federal financial assistance paid to the Fund, the result would remain unchanged.[244]

The NCAA did not have "controlling authority" over its member institutions, subjecting it to Title VI scrutiny.

To determine whether an entity is an indirect recipient of federal financial assistance subjecting it to Title VI, it must be determined from Congress' point of view whether that entity is the intended recipient of federal funds.[245] In fact, the Supreme Court had already held that just because the NCAA member institutions paid dues to the NCAA out of federal funds, this did not render the NCAA an indirect recipient of federal financial assistance.[246] The Supreme Court in *NCAA v. Smith* held that to find the NCAA an indirect recipient of federal funds through its receipt of dues, the Federal funds had to be specifically "earmarked" for that purpose.[247] Further, for the NCAA to be a "controlling authority" over its member institutions, and, thus, subject to Title VI action, the plaintiffs had to prove that the NCAA actually controlled, rather than merely had, some relationship with the institutions benefiting from federal financial assistance.[248]

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241. *Id.* at 116.

242. *Id.* at 115.

243. *Id.* at 116.

244. *Id.*

245. *Cureton*, 198 F.3d at 116. *See also, Grove City*, 465 U.S. at 563-65.

246. *Smith*, 525 U.S. at 466.

247. *Id.*

248. *Cureton*, 198 F.3d at 116. *See also*, United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605-07 (1986).

The court looked to several Title IX cases that addressed the liability of supervisors and agents of programs receiving federal funding,[249] but the court focused on *NCAA v. Tarkanian*[250] because it was "instructive" in its holding that the NCAA did not "control" its members.[251]

Jerry (the Shark) Tarkanian was the head basketball coach of the University of Nevada Las Vegas (UNLV) "Running" Rebels from 1973 to 1988.[252] Tarkanian was also a tenured professor at the university.[253] In 1976, the NCAA infractions committee began investigating Tarkanian and UNLV.[254] The search revealed thirty-eight allegations of infractions, ten of which were against Tarkanian personally.[255] The NCAA levied heavy sanctions against UNLV and threatened even greater sanctions if UNLV did not suspend Tarkanian.[256] UNLV complied with the NCAA mandate.[257] Tarkanian brought action, alleging that the suspension violated his due process rights under 42 U.S.C. §1983 and the Fourteenth Amendment.[258] Tarkanian claimed that the NCAA was a state actor for purposes of

249. Cureton, 198 F.3d at 117. Horner v. Kentucky High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994) (holding that both the Kentucky State Board for Elementary and Secondary Education and its agent, the Kentucky High School Athletic Association, were subject to Title IX action); Smith v. Metro. Sch. Dist., 128 F. 3d 1014, 1019-21 (7th Cir. 1997) (holding that individuals in supervisory capacity were not liable under Title IX because they are not recipients of Federal financial assistance notwithstanding their supervisory control over such funds); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, (1999) (court dismissed action against defendants in Title IX action for sexual harassment against a school board and individual officials).

250. *Tarkanian*, 109 S.Ct. 454.

251. *Cureton*, 198 F.3d at 117.

252. A.D. Hopkins, *Tark the Shark*, LAS VEGAS REV. J., Sept. 12, 1999, at 50 AS.

253. *Cureton*, 198 F.3d at 117.

254. Michael G. Dawson, *National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under The Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217, 239 (1989). *See also*, Kevin M. McKenna, *The Tarkanian Decision: The State of College Athletics is Everything But State Action*, 40 DEPAUL L. REV. 459 (1990); Betty Chang, *Coercion Theory and State Action Doctrine as Applied In NCAA v. Tarkanian and NCAA v. Miller*, 22 J.C. & U.L. 133 (1995) & J.M. Schwartz, NCAA v. Tarkanian: *State Action In College Athletics*, 63 TUL. L. REV. 1703 (1989).

255. Dawson, *supra* note 254, at 239.

256. Jose Luis Patino, *Constitutional Carte Blanche For Quasi-Public Institutions ?*— National Collegiate Athletic Association v. Tarkanian *109 S.CT. 454 (1988)*, 24 HARV. C.R.-C.L.L. REV. 543, 545 (1989).

257. *Id.* (citing *Tarkanian*, 109 S. Ct at 460).

258. *Cureton*, 198 F.3d at 117.

§ 1983 action because UNLV had delegated controlling authority to the NCAA because the NCAA could adopt rules governing UNLV and enforce those rules on behalf of UNLV.[259]

The Supreme Court found that UNLV had based its decision to suspend Tarkanian on NCAA rules and recommendations, but it was UNLV that made the final decision to suspend Tarkanian, not the NCAA.[260] Further, the NCAA lacked the power to take specific action against Tarkanian, because its power was limited to enforcing sanctions against UNLV.[261] Additionally, UNLV did not have to comply with the NCAA's order because UNLV could have retained Tarkanian and risked increased sanctions, or withdrawn its membership from the NCAA.[262] While "unpalpable" as these options may have been, they were still available to UNLV.[263] Therefore, the Supreme Court held that the promulgation of rules directly affecting institutions that received federal financial assistance was not enough to render the NCAA a state actor within the meaning of the due process clause of the Fourteenth Amendment or for the purposes of 42 U.S.C. §1983.[264]

Similarly, in *Cureton*, the Third Circuit found that it was the member institutions, not the NCAA, that made the final decision as to which freshmen would be awarded scholarships and be allowed to participate in varsity intercollegiate athletics.[265] The court found that these decisions may be made under threat of possible NCAA sanctions, but that did not amount to a delegation of controlling authority to the NCAA.[266] The NCAA did not have the power to enforce eligibility rules directly against students, but could only sanction the member institutions.[267] Further, the member institutions retained the options of risking sanctions from the NCAA or voluntarily withdrawing their membership.[268] Therefore, the court held that the NCAA did not have "controlling authority" over its member institutions, subjecting it to Title VI scrutiny.[269]

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259. *Id.*
260. Dawson, *supra* note 254, at 245 (citing *Tarkanian*, 109 S.Ct. at 462).
261. *Tarkanian*, 109 S.Ct at 464.
262. *Cureton*, 198 F.3d at 117.
263. *Id.*
264. Patino, *supra* note 256, at 544.
265. *Cureton*, 198 F.3d at 117.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

The court then noted that application of disparate impact regulations to the NCAA would be inconsistent with section 601's contractual character.[270] In *United States Dep't of Transp. v. Paralyzed Veterans of Am.*,[271] the Supreme Court stated that Congress has limited the scope of the anti-discrimination provisions in section 504 of the Rehabilitation Act of 1973 to those who actually "receive" federal funding.[272] Congress did this because Section 504's regulations served as a form of contractual consideration for the recipient's agreement to accept the federal funds.[273] Thus, the cost of compliance would be borne by those that decided to accept rather than reject the federal offer.[274]

The Third Circuit found that the same contract policy that applied to the Rehabilitation Act in *Paralyzed Veterans* applied to Title VI as well.[275] The court found no privity of contract between HHS, the Department of Education, and the NCAA with respect to federal financial assistance.[276] Thus, the NCAA did not have the ability to accept or reject the federal funds paid to its member institutions.[277] The court stated that circumstances might exist where a controlling authority argument may be viable, noting that when an entity has controlling authority it may accept or reject federal financial assistance indirectly.[278] But the Third Circuit found that courts should exercise caution in enforcing Title VI absent a contractual relationship.

The court then addressed the dissent's argument that the NCAA constitution requires member institutions to cede authority over athletic programs to the NCAA.[279] The court answered this by stating that the constitution also expressly provided that control over individual athletic programs would remain with the institutions themselves.[280] Thus, the NCAA constitution required conformity with its rules and regulations but left with its members the ultimate decision of whether to comply.[281] Further, the court stated that it did not understand how the promulgation of rules concerning intercollegiate athletics somehow established that the NCAA had controlling

270. *Cureton*, 198 F.3d at 118.
271. 477 U.S. at 605-07.
272. *Cureton*, 198 F.3d at 118, citing *Paralyzed Veterans of Am.*, 477 U.S. at 605.
273. *Cureton*, 198 F.3d at 118.
274. *Id.*, citing *Paralyzed Veterans of Am.*, 477 U.S. at 606.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Cureton*, 198 F.3d at 118.
280. *Id.* at 118.
281. *Id.*

authority over its member institutions' programs or activities that received federal financial assistance.[282]

Therefore, the court held that the NCAA did not have "controlling authority" over its member institutions, subjecting it to Title VI scrutiny.[283] Consequently, the court reversed the district court's decision and remanded the case to the district court to enter summary judgment for the NCAA.[284]

VI. ROUND THREE: DISPARATE TIMES CALL FOR DESPERATE MEASURES

Round three began on February 18, 2000, but the battle did not take place in the United States Supreme Court. Instead, in hopes of correcting the "flaws" the Third Circuit found in their argument, the plaintiffs went back to the trial court and filed a motion under the Federal Rules of Civil Procedure 59(e) and 15 to amend their complaint.[285] In an attempt to circumvent the Third Circuit's holding requiring a showing of direct federal assistance for a claim of disparate impact discrimination, the plaintiffs retooled their complaint to allege intentional discrimination, rather than disparate impact discrimination, to allow for the lesser burden of establishing the NCAA as an indirect recipient of federal financial assistance.[286] Thus, the plaintiffs hoped to avert the programmatic dismissal issued by the Third Circuit.

Unfortunately for the plaintiffs, the round ended abruptly when Judge Buckwalter denied the post-judgment motion to amend on the grounds that it was untimely, prejudicial to the NCAA, and futile.[287] The court cited four reasons why the plaintiffs' motion was untimely: (1) the motion was filed three years after the filing of the original complaint, (2) the factual bases for the amendment had been known to the plaintiffs for almost two-and-a-half years before the filing of the motion, (3) judicial efficiency would not be served by allowing the plaintiffs to try claims individually, and (4) the interests of finality would be "ignored" if the plaintiffs were allowed to amend.[288]

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282. *Id.*

283. *Id.*

284. *Cureton*, 198 F.3d at 118.

285. *Athletes Amend Suit Against NCAA Plaintiffs Fine-Tune Argument Over Use of Standardized Tests (Athletes)*, ST. LOUIS POST-DISPATCH, Mar. 1, 2000, at D1; Cureton v. NCAA, 2000 WL 388722, *1 (E.D.Pa. 2000).

286. *Id.*

287. *Id.* at *2-5.

288. *Id.* at *3.

Essentially, the court held, the plaintiff's actions amounted to nothing more than "a last gasp measure to have a second bite at the proverbial apple."[289]

Next, the court discussed the prejudicial effect on the NCAA should amendment be permitted. First, the new claim would require the Court to backtrack all the way to the initial class certification stage to redetermine who would even be eligible to bring the action at all.[290] Second, amendment would also lead to further discovery requests and significant new preparation.[291] In short, the court stated that amendment would "essentially force the NCAA to begin litigating this case again."[292]

The court then addressed the actual merits of the plaintiffs' claims by concluding that amendment, even if allowed, would be futile.[293] In doing so, the court looked to its own finding in *Cureton I* that there was no evidence in the record of intentional discrimination.[294] Accordingly, the court held that the plaintiffs' allegations "do not support a claim that the NCAA intended to treat black student-athletes differently from their white counterparts."[295]

VII. ROUND FOUR: THE PLAINTIFFS' SECOND VISIT TO THE THIRD CIRCUIT

After licking their wounds, the plaintiffs initiated round four by appealing the district court's denial of their motion to amend.[296] Once again, the matter was before the Third Circuit. The basis for this appeal centered on the plaintiffs' contention that *Adams v. Gould* warranted a reversal of the District Court's decision to deny leave to amend.[297] *Adams* concerned a claim where a district court accepted one of two legal theories proffered by the plaintiffs and denied the defendants' motion for summary judgment.[298] The district court did not address the alternative theory raised by the plaintiffs. The United States Court of Appeals for the Third Circuit reversed the district court's decision and directed that judgment be entered in favor of the defendants.[299]

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289. *Id.* *4.
290. *Cureton*, 2000 WL 388722, at *5.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. Cureton v. NCAA, 252 F.3d 267 (3rd Cir. 2001).
297. Adams v. Gould, Inc., 729 F.2d 858 (3rd Cir. 1984).
298. *Adams*, 729 F.2d at 861-863.
299. *Id.*

In doing so, the Third Circuit court declined to address the alternative legal theory.[300] On remand the plaintiffs advanced the alternative theory by moving to alter or amend the judgment pursuant to F.R.C.P. Rule 59(e) and 15(a).[301] On remand, the district court denied the motion request. Plaintiffs appealed, and the Third Circuit held that the district court abused its discretion in denying the motions to amend.[302]

The Third Circuit thought differently. Indeed, the Court recognized two points of distinction to distinguish *Adams* from the case at bar.[303] Namely, unlike the present case, the alternative theory ultimately pursued in *Adams* had been raised at earlier points in the litigation.[304, 305] Second, the *Adams* defendants suffered no prejudice from the amendment; whereas the NCAA would have been significantly prejudiced.[306]

Therefore, the Third Circuit held that the district court did not abuse "its considerable discretion" when it denied the plaintiffs' post-judgment motion to amend.[307] Consequently, with this holding, the Third Circuit effectively terminated the *Cureton* litigation. Though the plaintiffs had lost their day in court, the fight was not over.

VIII. EPILOGUE

After the demise of *Cureton*, the *Cureton* plaintiffs' counsel filed a new and separate class action on behalf of different plaintiffs but echoing the same allegations proffered in *Cureton III* and *IV* of intentional racial discrimination by the NCAA.[308] Judge Buckwalter granted the NCAA's motion to dismiss the plaintiffs' claims finding that the plaintiffs did not allege facts sufficient to establish a cause of action for intentional discrimination.[309] On appeal, the Third Circuit reversed and remanded the case for further proceedings finding

300. *Id.*

301. *Id.*

302. *Adams*, 729 F.2d at 869-870.

303. *Cureton*, 252 F.3d at 271.

304. *Id.* at 275.

305. Specifically, the Third Circuit recognized that "with the exception of a footnote in a motion for summary judgment on their disparate impact claim," the plaintiffs in Cureton did not advance an intentional discrimination claim until after their disparate impact claim had been rejected. *Id.* at 271.

306. *Id.*

307. *Id.* at 274.

308. David P. Bruton, *At the Busy Intersection: Title VI and NCAA Eligibility Standards*, 28 J.C. & U.L. 569, 584 (2002).

309. Pryor v. NCAA, 153 F.Supp.2d 710, 718 (E.D. Pa. 2001).

that the complaint sufficiently satisfied the liberal notice-pleading requirements of the Federal Rules of Civil Procedure.[310] Accordingly, this matter is still pending.

Not incidentally, the plaintiffs in *Pryor v. NCAA* allege intentional discrimination as opposed to disparate impact discrimination. Prior to the resolution of *Cureton,* the Supreme Court held that there is no private right of action to enforce disparate impact regulations pursuant to Title VI.[311] Therefore, any such Title VI claims of racial discrimination are limited to intentional discrimination.

The issues in *Pryor*, however, may all be mooted by the NCAA's voluntary decision to eliminate the minimum test score requirement in favor of a sliding scale.[312] This decision was made despite the fact that the plaintiffs in *Pryor* have the difficult burden of establishing that the NCAA intentionally discriminated base on race. These new requirements went into effect on August 1, 2003.[313] Effectively, the eligibility modifications redress the challenged behavior by removing the very basis of contention.

IX. CONCLUSION

Even though *Pryor* remains unresolved, the fight appears to be effectively over. *Cureton's* legacy, however, continues to reverberate with importance. *Cureton* arguably remains the most significant challenge to the NCAA's requirements for initial academic eligibility. First, this landmark case discussed the existing law in a comprehensive and detailed analysis outlining the legal barriers private litigants confront when bringing disparate impact challenges against the NCAA's rules for freshman eligibility.

Secondly, *Cureton* endures as the only case, to date, in which a court has actually reached the merits of a challenge to the NCAA's initial eligibility requirements.[314] Consequently, the district court's disparate impact analysis in *Cureton I* provides the only judicial evaluation of the NCAA's requirements governing initial eligibility.[315] Further, although the Third Circuit reversed the District Court decision, it did so only on the basis that the NCAA is not a state actor, the reversal did not reach the merit of the disparate impact

310. Pryor v. NCAA, 288 F.3d 548, 567 (3rd Cir. 2002).

311. Alexander v. Sandoval, 121 S.Ct. 1511 (2001).

312. Renfro & Conway, *supra* note 48.

313. *Id.*

314. Bruton, *supra* note 309, at 586-87.

315. *Id.*

determination.[316] Accordingly, Judge Buckwalter's disparate impact analysis in the District Court decision could provide strong persuasive authority for any future litigant challenging the NCAA's initial eligibility requirements.

The likelihood of any future, post-*Cureton* judicial analysis of Title VI, as applied to the NCAA's initial eligibility requirements, decreases in light of the increased legal impediments established by both *Cureton* itself and the Supreme Court's decision in *Alexander v. Sandoval* (wherein a private right of action to enforce disparate impact regulations was eliminated).[317] Furthermore, *Cureton's* definitive role will not likely be challenged by new litigation attacking the NCAA's initial eligibility requirements as such cases may now be unnecessary because of the NCAA's voluntary decision to change its eligibility requirements. Thus, *Cureton* could possibly remain as the only case in which a court discusses the legality of the NCAA's initial eligibility requirements.

Ultimately, *Cureton's* most compelling repercussion may have only a passing relationship to legal impediments or judicial analysis. Perhaps *Cureton's* true legacy materializes in the subsequent changes the NCAA voluntarily imposed on its initial eligibility requirements.

In the wide wake of *Cureton*, the NCAA's choice to implement a sliding scale that conspicuously mirrors the fourth alternative suggested by Judge Buckwalter and the plaintiffs in *Cureton I* is no small coincidence.[318] Indeed, the minimum test score requirement, previously the basis of such painful and prolonged contention, has now been removed. Doubtlessly, such a material, albeit voluntary, modification hints strongly of ramifications emanating from *Cureton's* influence. Thus, while legal precedence favors the NCAA, ultimately, it is the *Cureton* plaintiffs who have won.

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316. *Cureton*, 198 F.3d at 118.

317. *Alexander*, 121 S.Ct. at 1523.

318. *Cureton*, 37 F. Supp. 2d at 713.

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