

HANDICAPPED ATHLETES' "QUALIFIED" RIGHT TO PARTICIPATE

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Section 504 of the Rehabilitation Act of 1973 (Public Law 93-112), codified at Title 29, section 794 of the United States Code (29 USC 794), reads: "No otherwise qualified individual in the United States shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Successful litigants under this section may receive reasonable attorney's fee (29 U.S.C. 794a). In addition, the court may fashion an appropriate and equitable remedy as provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000 e-5(f) to k and 2000 e-16). The court may grant injunctive relief, prohibiting the defendant from engaging in discriminatory practices, or perhaps award money damages to the aggrieved party. While there is some difference of opinion among courts whether money damages are an appropriate remedy under 29 U.S.C. 794, it is generally agreed that this section provides an individual with a private cause of action for alleged discrimination. In other words, the proper plaintiff in such cases is not necessarily limited to the federal government which provides assistance to a federal grant recipient.

Municipal officials may also be held personally liable for violations of rights guaranteed to handicapped individuals under 42 U.S.C. 1983, the Civil Rights Act of 1871 which provides:

Every person who, under color of any statute, ordinance, regulation, custom of usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 504 secures certain rights for handicapped individuals. Specifically, they will not be discriminated against in programs which benefit from federal assistance. As a result, the deprivation of these rights provides the individual with a private cause of action for money damages against the municipality and individual administrators. The discrimination, however, must be based upon some official regulation, policy, or custom rather than the arbitrary whim of an individual administrator. In many instances, plaintiffs will allege a cause of action based upon both section 504 and 42 U.S.C. 1983.

Title 45 of the Code of Federal Regulations Part 84 (45 CFR PART 84) provides the regulatory framework for defining and interpreting the legislative terms in Section 504. Although these regulations relate specifically to programs funded by the Department of Health and Human Services (HHS), they have served as a model for similar regulations in other federal agencies and act as a guide for courts to

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interpret the legislative intent of Section 504. The Department of Justice has drafted a second generation of model regulations. If approved these regulations can be expected to incorporate rather than significantly modify court interpretations of Section 504, based on earlier HHS regulations.

Similar regulations govern non-academic services such as athletic programs for preschool to secondary education (45 CFR 84.37) and postsecondary education (45 CFR 84.47). Under these regulations, recipients of federal assistance must provide handicapped students an equal opportunity for participation in athletic programs and recreational activities. To the maximum extent appropriate to the needs of handicapped individuals recipients of federal assistance must also ensure that handicapped persons are given an opportunity to participate with non-handicapped individuals in these activities (45 CFR 84.34(b)). Separate activities for the handicapped are acceptable "only if no qualified handicapped student is denied an opportunity to compete for teams or to participate in courses that are not separate. (45 CFR 84.47 (a)).

Recent reported court decisions involving handicapped student athletes have been decided on the interpretation of "otherwise qualified." This term contained in both the law and the regulations has determined the circumstances under which the handicapped individual could be excluded from athletic competition. The apparent confusion surrounding the definition of "otherwise qualified" was somewhat clarified by the U.S. Supreme Court in the case of *Southeastern Community College v. Davis*, 442 U.S. 367 (1979). Since 1979, courts have upheld the right to participate for those handicapped athletes who can compete on an equal basis with non-handicapped individuals in spite of their handicap. Prior to 1979, "otherwise qualified" oftentimes meant one's ability to meet institutional prerequisites for participation such as a doctor's permission or a physical not necessarily based upon one's functional capacity.

### KAMPMIER v. NYQUIST

In the case of *Kampmier v. Nyquist*, 553 F.2nd 296 (1977), two junior high athletes were prohibited from participating in any contact sports at school because they both lacked vision in one eye. Prior to their exclusion from such activities, both students had actively participated in contact sports.

Regulations promulgated by the New York State Commission of Education required the students to obtain the approval of the school medical officer before participating in interscholastic athletics. Also, the Commission listed blindness in one eye as a disqualifying condition for participating in contact sports, but not non-contact sports. The Commission list of disqualifications was merely advisory and not binding on the school medical officer. The medical officer in this case, however, based his recommendation solely on the listed handicap, lack of vision in one eye.

The students sought an injunction of the school board's action based upon an alleged violation of Section 504.

In reaching its decision, the court interpreted the law to prohibit only the exclusion of otherwise handicapped persons without justification. "As we read Section 504, however, exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy." While recognizing that "athletics play an important part in the life and growth of teenage children" the court said, "public school officials have (an) . . . interest in protecting the well-being of their students. Given such an interest, the school officials were properly "concerned about the injury to a child's one good eye." As a result, the court found the school officials correctly relied on medical opinion which found "children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury." In addition the court said, "the plaintiffs have presented little evidence—medical, statistical or otherwise—which could cast doubt on the substantiality of this rationale."

#### SOUTHEASTERN v. DAVIS

In the case of *Southeastern Community College v. Davis*, 442 U.S. 367 (1979), the U.S. Supreme Court was asked to define the term "otherwise qualified" handicapped individual. The plaintiff in this case was denied admission to a college nursing program because of a serious hearing disability which necessitated direct lip reading despite the assistance of a hearing aid. Defendant argued that plaintiff's impairment made it impossible for her to participate safely in the normal clinician training program or to care safely for patients.

In determining whether she was "otherwise qualified" under Section 504, plaintiff argued that defendant must confine its inquiry to her *academic and technical qualifications without regard to her impairment*. The Court rejected this argument finding an "otherwise qualified" person is one who is *able to meet all of a program's requirements in spite of a handicap*. As a result, recipients of federal funds could properly require "reasonable physical qualifications" for admission to a program.

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

In other words, recipients must evaluate an individual's residual functional capacity rather than equating a given impairment with an inability to perform.

#### POOLE v. SOUTH PLAINFIELD

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In the case of *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948, a student born with one kidney was denied the right to participate in his school's interscholastic wrestling program because of his handicap. The plaintiff had wrestled in the eighth, ninth, and tenth grades but was denied the right to participate in the eleventh and twelfth grades based upon a recommendation by the board of education medical director.

According to the Court, the issue was "whether Richard Poole Jr. was able to meet all of South Plainfield's interscholastic wrestling program's requirements in spite of the fact that he was born with one kidney." While adopting the functional capacity standard of the U.S. Supreme Court in *Davis*, the court in this case appears to reject the *Kampmier* rationale that schools have a vested interest in protecting the well-being of the handicapped student. "The purpose of Section 504 is to permit handicapped individuals to live life as fully as they are able, *without paternalistic authorities deciding that certain activities are too risky for them.*" In applying this rule, the court focuses on the plaintiff's ability to function in a particular context (wrestling), rather than the nature of his handicap.

The Board has nowhere suggested that Richards was incapable of pinning his adversary to the mat or meeting the training requirements of a team sport. The board seems to have premised its decision on fear of injury to Richard's only kidney.

Whatever duty the Board may have had toward Richard was satisfied once it became clear that the Pooles knew of the dangers involved and rationally reached a decision to encourage their son's participation in interscholastic wrestling.

The Board in this case also argued that the school wrestling program was not subject to the provisions of Section 504 since it was not a direct recipient of federal funds. The court rejected this argument noting the fact that "federal aid to any program in a school system releases money for other uses, thereby benefitting those programs that are not direct beneficiaries of the federal aid." As a result, all of the functional entities of a governmental unit receiving federal assistance are likely to come within the scope of Section 504.

### WRIGHT v. COLUMBIA

The facts in the case of *Wright v. Columbia University*, 520 F. Supp 789 are quite similar to those in *Kampmier* except the plaintiff is in college rather than junior high. Plaintiff John Wright has been blind in his right eye since infancy. In spite of this handicap, plaintiff was an outstanding high school running back who was recruited by Columbia to play intercollegiate football. After examining the plaintiff, however, Columbia's surgeon recommended that Wright not be allowed to try out for the team because of the risk of injury to his one good eye. The doctor had reached this conclusion after discussions with the university's legal counsel and other school officials. Plaintiff and his parents were willing to release Columbia from any potential liability which it might incur as a result of his participation in the football

program.

Plaintiff in his complaint alleged deprivation of his rights secured by Section 504 of the Rehabilitation Act of 1973. Columbia unsuccessfully argued that Section 504 was inapplicable to its football program since it was not a direct recipient of federal assistance. The court reiterated the indirect benefit argument of the Poole court. "To the extent that the University receives federal funding, component entities thereof benefit indirectly through reallocation of funds received from other sources.

In granting Plaintiff's request for a temporary restraining order which would allow him to try out for Columbia's football team, the court specifically adopted the reasoning of the Poole decision. "Columbia's concern for its students' well-being degenerate from the rights secured plaintiff under Section 504 which prohibits 'paternalistic authorities' from deciding that certain activities are 'too risky' for a handicapped person. The court contrasted the facts of this case with *Kampmier* noting that plaintiff "seriously considered and appreciates the risks incident to playing football with impaired vision and willingly accepts them." The court also noted that, unlike the defendant in *Davis*, Columbia would not be forced to "lower or ... effect substantial modification of standards" in order to accommodate plaintiff. As a result, the court found plaintiff to be an "otherwise qualified" handicapped individual as contemplated by Section 504 who should be given an opportunity to participate if he had the functional capacity to perform in spite of his handicap. By guaranteeing such an opportunity the court concluded "the public interest is enhanced by plaintiff's dramatic example that hard work and dedication to purpose can overcome enormous odds."

As a postscript, plaintiff's attorney has advised "NRPA Law Review" that Mr. Wright made the team and is playing intercollegiate football for Columbia University.