

THE NCAA'S INITIAL ELIGIBILITY REQUIREMENTS AND THE AMERICANS WITH DISABILITIES ACT IN THE POST-*PGA TOUR, INC. V. MARTIN* ERA: AN ARGUMENT IN FAVOR OF DEFERENCE TO THE NCAA

Abstract: In 1990, Congress enacted the Americans with Disabilities Act (the "ADA") to eradicate discrimination against individuals with disabilities. In 2001, in *PGA Tour, Inc. v. Martin*, the U.S. Supreme Court interpreted the ADA to prohibit a professional golf association from denying a golfer with a disability the use of a golf cart during competitions, despite a rule requiring all competitors to walk the course. The *Martin* decision has sparked questions regarding the application of the ADA, including its application to the initial academic eligibility requirements of the National Collegiate Athletic Association (the "NCAA"). This Note examines the impact of the *Martin* decision on future ADA claims challenging the validity of the NCAA's initial eligibility requirements. Specifically, after examining pre-*Martin* ADA claims against both the NCAA and academic institutions and comparing two courts' interpretations of *Martin*, this Note argues that in future cases challenging the NCAA's initial eligibility requirements, courts should interpret *Martin* to provide the NCAA as much deference as courts continuously have granted to academic institutions.

INTRODUCTION

For many Americans, college athletics conjure images of school pride, "March Madness" tournament pools, and New Year's Day bowl games.¹ Despite these positive images, however, college athletics often are marred by controversy, at the center of which is frequently the National Collegiate Athletic Association (the "NCAA"), the independent

¹ See JOE LUNARDI, ESPN.COM, BRACKETOLOGY, at <http://sports.espn.go.com/ncl/bracketology> (last visited Mar. 15, 2005); ESPN.COM, COLLEGE FOOTBALL BOWL SCHEDULE, at <http://sports.espn.go.com/ncl/schedules> (last visited Mar. 15, 2005); NATIONAL COLLEGIATE ATHLETIC ASS'N, THE OFFICIAL WEBSITE FOR NCAA SPORTS, at <http://www.ncaa.org/sports.com> (last visited Mar. 15, 2005).

authority that regulates intercollegiate athletics.² In fact, the NCAA continuously has faced criticism regarding the academic standards for student-athletes.³ On the one hand, some critics have argued that colleges and universities take advantage of student-athletes, exploiting them for entertainment without concern for their educations.⁴ On the other hand, some have charged that the NCAA's academic standards discriminate against certain student-athletes with learning disabilities.⁵ As a result, the criticism continues, the NCAA bars some student-athletes from attending the college of their choice and, consequently, may preclude them from earning a college degree or participating in intercollegiate sports.⁶

Although much litigation has arisen from this debate, the question of the role of academics in college athletics remains unclear, especially in light of a recent U.S. Supreme Court opinion applying the Americans with Disabilities Act (the "ADA") to a sport—golf.⁷ In 2001, in *PGA Tour, Inc. v. Martin*, the Supreme Court ruled in favor of a professional golfer with a disability, holding that the ADA required the Professional Golf Association (the "PGA") to allow the plaintiff to use a golf cart in its tournaments, despite a rule requiring all golfers to walk.⁸ That decision sparked controversy regarding the extent to which courts should involve themselves in the realm of professional sports.⁹ More importantly, however, *Martin* marks one of the most comprehensive treatments of Title III of the ADA.¹⁰ Although *Martin* is a land-

² See, e.g., Maureen A. Weston, *Academic Standards or Discriminatory Hoops? Learning-Disabled Student-Athletes and the NCAA Initial Academic Eligibility Requirements*, 66 TENN. L. REV. 1049, 1068–69 (1999); *Task Force to Examine Recruiting*, NCAA NEWS ONLINE, at <http://ncaa.org/news/2004/20040301/active/4105n01.html> (Mar. 1, 2004).

³ See Weston, *supra* note 2, at 1068–69.

⁴ *Id.*

⁵ *Id.* at 1123.

⁶ See *id.* at 1122–23.

⁷ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1071–72 (N.D. Ga. 2000); *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114, 1121–23 (E.D. Mo. 1998); see *Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213) (2000).

⁸ 532 U.S. at 690.

⁹ See, e.g., Martha Lee Walters & Suzanne Bradley Chanti, *When the Only Way to Equal Is to Acknowledge the Difference: PGA Tour, Inc. v. Martin*, 40 BRANDEIS L.J. 727, 727–31 (2002); Jeffrey Michael Cromer, Note, *Creating an Uncomfortable Fit in Applying the ADA to Professional Sports*, 36 IND. L. REV. 149, 149–52 (2003); Amy M. Kearney, Note, *Not Like It Was in the Old Days: Is the Americans with Disabilities Act Changing the Face of Sports as We Know It?*, 10 VILL. SPORTS & ENT. L.J. 153, 177–79 (2003).

¹⁰ See 532 U.S. at 664–65, 674, 680, 690.

mark case in ADA jurisprudence, the extent to which *Martin* will affect future ADA litigation remains unclear.¹¹ Most nebulous, perhaps, is the effect that *Martin* will have on the NCAA—particularly the impact of *Martin* on future ADA cases in which student-athletes with learning disabilities challenge the NCAA's academic requirements.¹²

Even prior to the *Martin* decision, a number of student-athletes with learning disabilities challenged the NCAA in actions involving Title III of the ADA.¹³ In those cases, the student-athletes alleged that some of the NCAA's academic standards discriminated against them in violation of Title III by denying them full athletic eligibility.¹⁴ Although the courts deciding those cases differed in parts of their analyses, most of the courts agreed that the ADA did not require the NCAA to modify its initial eligibility requirements.¹⁵ Since the Supreme Court announced its decision in *Martin*, however, no court has reached the issue of the application of *Martin* to claims involving ADA challenges to the NCAA's initial eligibility requirements, and thus the extent to which *Martin* will affect such cases remains unclear.¹⁶

This Note argues that in future litigation involving the NCAA's initial academic eligibility requirements, courts should follow the Title III analysis that the Supreme Court set out in *Martin*.¹⁷ In doing so, however, courts should provide the same deference to the NCAA's professional judgment as to whether a requested modification would fundamentally alter the nature of its privileges and services as they provide to other academic institutions.¹⁸ Courts should provide such deference because, unlike the walking rule at issue in *Martin*, the initial eligibility requirements are academic, and not athletic, in nature.¹⁹ Therefore, courts should defer to the NCAA's judgment as to

¹¹ See *id.*

¹² See *id.*

¹³ E.g., *Cole*, 120 F. Supp. 2d at 1066; *Tatum*, 992 F. Supp. at 1116; *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).

¹⁴ E.g., *Cole*, 120 F. Supp. 2d at 1066; *Tatum*, 992 F. Supp. at 1116; *Ganden*, 1996 WL 680000, at *1, *5.

¹⁵ See, e.g., *Cole*, 120 F. Supp. 2d at 1071–72; *Tatum*, 992 F. Supp. at 1123; *Ganden*, 1996 WL 680000, at *15–16.

¹⁶ See *supra* notes 7–15 and accompanying text. A Westlaw search conducted on March 7, 2005, revealed no case law on Title III claims pertaining to the NCAA's initial eligibility requirements.

¹⁷ See 532 U.S. at 688–89.

¹⁸ See *Doe v. Haverford Sch.*, No. Civ.A. 03–3989, 2003 WL 22097782, at *8 (E.D. Pa. Aug. 5, 2003) (unpublished opinion).

¹⁹ Compare *Martin*, 532 U.S. at 690 (discussing the relevance of the walking rule to the game of golf), with *Doe*, 2003 WL 22097782, at *8 (discussing academic requirements).

whether a requested modification would lower its academic standards in the same way that courts repeatedly have deferred to the judgments of other academic institutions in similar cases.²⁰

Part I of this Note provides background on the ADA.²¹ It first discusses the statute itself and then outlines the Supreme Court's interpretation of the ADA in *Martin*.²² Part II of this Note discusses the NCAA.²³ In addition to explaining the NCAA's goals as the regulatory body in charge of intercollegiate athletics, Part II explains the NCAA's initial eligibility requirements for incoming student-athletes.²⁴ Part II also describes Title III claims involving the NCAA's initial eligibility requirements that courts resolved before the Supreme Court announced the *Martin* decision.²⁵ Part III compares two courts' interpretations of the *Martin* decision.²⁶ One case discussed in Part III involves a Title III claim filed against the NCAA resulting from one of its academic requirements.²⁷ The other case, which involves a Title III claim filed against a private school, illustrates an application of *Martin* that called for some deference toward the school's professional judgment.²⁸ Part IV outlines additional cases in which courts have deferred to the professional judgment of academic institutions.²⁹ Part V provides an analysis of the application of *Martin* to future Title III claims involving the NCAA's initial eligibility requirements.³⁰ It concludes that Title III applies to the NCAA and suggests that in future cases, courts should provide the same deference to the NCAA that they afford to other academic institutions when applying the *Martin* standard to Title III claims.³¹

²⁰ See, e.g., *Doe*, 2003 WL 22097782, at *8.

²¹ See *infra* notes 32–84 and accompanying text.

²² See *infra* notes 32–84 and accompanying text.

²³ See *infra* notes 85–154 and accompanying text.

²⁴ See *infra* notes 87–129 and accompanying text.

²⁵ See *infra* notes 130–154 and accompanying text.

²⁶ See *infra* notes 155–207 and accompanying text.

²⁷ See *infra* notes 163–187 and accompanying text.

²⁸ See *infra* notes 188–207 and accompanying text.

²⁹ See *infra* notes 208–224 and accompanying text.

³⁰ See *infra* notes 225–304 and accompanying text.

³¹ See *infra* notes 248–304 and accompanying text.

I. THE AMERICANS WITH DISABILITIES ACT: THE STATUTE,
THE U.S. SUPREME COURT'S INTERPRETATION OF ITS
REQUIREMENTS IN *PGA TOUR, INC. v. MARTIN*, AND
THE DEBATE SURROUNDING THE DECISION

Aimed at eliminating discrimination against individuals with disabilities, the ADA has exerted its influence in many areas of American society, including athletics.³² In fact, athletes with disabilities at all levels, from interscholastic to professional, have used the ADA to request waivers of athletic rules that would otherwise prevent them from participating in sports.³³ The results of those cases have been mixed, depending mostly on the circumstances of the plaintiffs, the athletic programs, and the nature of the requested waivers.³⁴ One fact seems clear, however—athletic governing bodies can no longer unreasonably discriminate against athletes with disabilities.³⁵

A. *Summary of the ADA*

In 1990, Congress enacted the ADA to protect individuals with disabilities from discrimination.³⁶ Having found that individuals with disabilities continually had faced unnecessary discrimination, Congress stated that a purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."³⁷ To that end, Congress granted individuals with disabilities a private right of action against specified public and private entities that unfairly discriminate against them.³⁸ Additionally, Congress broadly defined "disability" for the purposes of the ADA as having, having "a record" of having, or "being regarded as

³² 42 U.S.C. § 12101(b) (2000); see, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 680, 690 (2001); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1071–72 (N.D. Ga. 2000); *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114, 1121–23 (E.D. Mo. 1998).

³³ See Jonathan R. Cook, *The Americans with Disabilities Act and Its Application to High School, Collegiate and Professional Athletics*, 6 VILL. SPORTS & ENT. L.J. 243, 249–63 (1999) (summarizing suits that athletes with disabilities brought against high school, collegiate, and professional sports governing bodies).

³⁴ See, e.g., *Cole*, 120 F. Supp. 2d at 1066–67, 1072; *Tatum*, 992 F. Supp. at 1116–19, 1123–24; *Butler v. Nat'l Collegiate Athletic Ass'n*, No. C96–1656D, 1996 WL 1058233, *1 (W.D. Wash. Nov. 8, 1996) (unpublished opinion).

³⁵ See *Martin*, 532 U.S. at 688–91.

³⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213).

³⁷ *Id.* § 12101(a)–(b)(1).

³⁸ *Id.* § 12188 (providing remedies available under 42 U.S.C. § 2000a-3(a)).

having" "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."³⁹

In addition to defining key terms and stating the statute's purpose, Title I of the ADA prohibits employers from discriminating against qualified employees with disabilities on the basis of their disabilities.⁴⁰ Similarly, Title II of the ADA prevents public entities—state and local governments and their agencies—from denying a qualified individual with a disability that entity's privileges or benefits or otherwise discriminating against that individual because of disability.⁴¹ Titles IV and V of the ADA pertain to telecommunications services and address other miscellaneous provisions.⁴²

Title III of the ADA is the section under which most plaintiffs bring claims against athletic governing bodies.⁴³ Title III prohibits places of public accommodation from discriminating against or providing unequal benefits to individuals with disabilities, including using eligibility requirements that "screen out or tend to screen out" individuals with disabilities.⁴⁴ Specifically, Title III states that "[n]o 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 person who owns, leases (or leases to), or operates a place of public accommodation."⁴⁵ Although private clubs and religious organizations are exempt from coverage under Title III, the ADA's definition of places of public accommodation includes private entities serving as places of public gathering and public recreation, such as parks, schools, and gymnasias.⁴⁶

Title III also requires places of public accommodation to make reasonable modifications to policies or procedures necessary for an

³⁹ *Id.* § 12102(2).

⁴⁰ *Id.* § 12112. A "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

⁴¹ 42 U.S.C. §§ 12131–12132. The U.S. Court of Appeals for the Sixth Circuit found Title II unconstitutional in particular circumstances but that decision is not relevant to this Note. See *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 810–11 (6th Cir.), *cert. denied*, 537 U.S. 812 (2002).

⁴² 47 U.S.C. § 225; 42 U.S.C. § 12201.

⁴³ 42 U.S.C. § 12182; see, e.g., *Cole*, 120 F. Supp. 2d at 1066; *Tatum*, 992 F. Supp. at 1116; *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).

⁴⁴ 42 U.S.C. § 12182(a)–(b) (2) (A).

⁴⁵ *Id.* § 12182(a).

⁴⁶ *Id.* § 12181.

individual with a disability to access the entity's goods or services, unless the entity can show that such an accommodation "would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."⁴⁷ Put differently, the plaintiff bears the burden of proving (1) that a requested modification would be necessary for the individual with a disability to access the place of public accommodation's goods or services and (2) that the requested modification would be reasonable under the circumstances.⁴⁸ After the plaintiff has provided prima facie evidence as to those two issues, the entity may assert the affirmative defense that the requested modification would not be reasonable, and therefore not required by Title III, because it would fundamentally alter the nature of its goods or services.⁴⁹

B. The ADA as Applied to Professional Golf: PGA Tour, Inc. v. Martin

In 2001, in *PGA Tour, Inc. v. Martin*, the U.S. Supreme Court applied the ADA to professional athletics and ruled that the ADA protected a qualified golfer with a disability's access to professional golf tournaments and that his use of a golf cart would not fundamentally alter the nature of the tournaments despite a rule requiring all golfers to walk the course.⁵⁰ At the heart of the case was Casey Martin, a talented golfer suffering from a degenerative circulatory disorder that caused atrophy in his right leg, extreme pain, and a risk of additional injury when he walked.⁵¹ Therefore, because Martin's disability "substantially limit[ed]" walking, a "major life activit[y]," he qualified as an individual with a disability protected by the ADA.⁵² Despite his disability, Martin had an accomplished golf career, winning amateur and collegiate tournaments and earning admission into the PGA's professional golf tournaments.⁵³

The PGA, defendant in the suit, is a nonprofit organization that sponsors professional golf tournaments conducted on annual tours.⁵⁴ The PGA holds its tournaments at golf courses that it leases and operates for the duration of the specific events.⁵⁵ The "hard card," the golf

⁴⁷ *Id.* § 12182(b)(2)(A)(ii).

⁴⁸ *See id.*

⁴⁹ *See* 42 U.S.C. § 12182(b)(2)(A)(ii).

⁵⁰ 532 U.S. at 664, 676-91.

⁵¹ *Id.* at 667-69.

⁵² *Id.* at 668 & n.7 (quoting 42 U.S.C. § 12102).

⁵³ *Id.* at 667-68.

⁵⁴ *Id.* at 665.

⁵⁵ *Martin*, 532 U.S. at 665.

rules that govern PGA tours, requires golfers to walk the courses during most tournaments.⁵⁶ Although Martin requested that the PGA waive that rule for him, the PGA refused, and thus Martin filed suit under Title III of the ADA, seeking a waiver of the PGA's walking rule.⁵⁷

In response to Martin's complaint, the district court granted him a preliminary injunction that allowed him to use a golf cart for certain competitions.⁵⁸ The U.S. Court of Appeals for the Ninth Circuit affirmed, finding that the golf courses were places of public accommodation and that providing Martin with the use of a cart would not fundamentally alter the nature of the tours, but rather would simply provide him access to a competition that his disability would otherwise have prevented him from entering.⁵⁹

Following the Ninth Circuit's decision, the Supreme Court granted certiorari in part to resolve a circuit split involving the application of Title III to professional golf.⁶⁰ Specifically, just one day after the Ninth Circuit ruled in Martin's favor in 2000, in *Olinger v. United States Golf Ass'n*, the U.S. Court of Appeals for the Seventh Circuit denied a golfer with a disability's request for a waiver of a professional golf association's walking rule.⁶¹ In *Olinger*, the court assumed, without deciding, that Title III applied to the U.S. Golf Association but denied the plaintiff's modification request because it would fundamentally alter the nature of the competition by removing stamina as a quality to be tested in the tournament.⁶²

The Supreme Court resolved the split first by holding that Title III applied to the PGA.⁶³ The Court noted that the PGA's tours occurred on golf courses—places of public accommodation specifically mentioned in Title III—and that the PGA leased and operated the golf courses during its competitions.⁶⁴ Therefore, the Court held that Title III prohibited the PGA as an operator of places of public ac-

⁵⁶ *Id.* at 666–67. Golfers are permitted to use golf carts during qualifying rounds and on the Senior PGA Tour, which is limited to players fifty years old or older, though most of the competitors prefer to walk. *Id.* at 667.

⁵⁷ *Id.* at 669.

⁵⁸ *Id.* at 672.

⁵⁹ *Id.* at 672–73.

⁶⁰ *Martin*, 532 U.S. at 674.

⁶¹ *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1007 (7th Cir. 2000); see *Martin*, 532 U.S. at 674.

⁶² 205 F.3d at 1005–07.

⁶³ *Martin*, 532 U.S. at 676–77.

⁶⁴ *Id.*

commodation from discriminating against an individual with a disability in the full enjoyment of its facilities and privileges.⁶⁵

Having found that Title III applied to the PGA, the Court next ruled that the PGA discriminated against Martin in a manner prohibited by Title III by not providing him with a reasonable and necessary modification—that is, by disallowing him to ride in a golf cart.⁶⁶ The Court explained that Title III requires an individual inquiry into the circumstances of the case to determine whether the requested modification would be necessary and reasonable under the circumstances without constituting a fundamental alteration.⁶⁷ The PGA did not contest that Martin's use of a golf cart would constitute a reasonable modification necessary for him to participate in its tournaments.⁶⁸ Rather, the PGA raised the affirmative defense that Title III did not require the requested modification to the walking rule because it would fundamentally alter the nature of the competition.⁶⁹

To analyze the PGA's fundamental alteration defense, the Court announced a two-pronged test.⁷⁰ The Court reasoned that the requested modification could constitute a fundamental alteration in two ways.⁷¹ First, the modification could alter an aspect of the game so essential that even if the modification applied to all participants, the result would be unacceptable.⁷² Second, a modification to a rule, even one peripheral to the game, could fundamentally alter a competition by providing to the golfer with a disability a competitive advantage

⁶⁵ *Id.* Responding to the PGA's argument that Title III did not apply to its tours because professional golfers were not members of the class of clients and customers that Title III protects, but rather more closely resembled the class of employees that Title I protects, the Court held that Title III applied to the PGA because it offered at least two "privileges" to the public—playing in and watching its competitions. *Id.* at 679–80. The Court thus reasoned that competitors in the PGA's tournaments were as much "clients or customers" of the PGA as spectators and thus protected by Title III because members of the public may enter the tournaments through open qualifying rounds and a qualifying tournament, admission to which required only letters of recommendation and a fee. *See id.*

⁶⁶ *Id.* at 682–91.

⁶⁷ *Id.*

⁶⁸ *Martin*, 532 U.S. at 682.

⁶⁹ *Id.*

⁷⁰ *Id.* at 682–83. If Martin's affliction simply made walking difficult or painful, using a golf cart would be a reasonable, but possibly unnecessary, accommodation. *See id.* at 682. Although the parties resolved that question by not contesting the reasonableness or necessity of the golf cart, that illustration shows that courts must conduct a factual inquiry into the nature of the disability, and presumably, the nature of the requested modification. *See id.*

⁷¹ *Id.*

⁷² *Id.*

over the other competitors.⁷³ Applying the facts of the *Martin* case to that test, the Court concluded that Martin's use of a cart would not fundamentally alter PGA tournaments in either of those ways, and thus would not be an unreasonable modification.⁷⁴

To reach that conclusion, the Court first held that the walking rule was peripheral to the rules of golf, explaining that walking was not such a fundamental aspect of golf that allowing Martin to ride in a cart would be unacceptable.⁷⁵ The Court reviewed various rules of golf—both modern and historic—and ultimately found that walking was not an indispensable feature of golf.⁷⁶ Specifically, the Court noted that the historic rules of golf did not mention a walking requirement, even after the advent of golf carts, and that the PGA's own rules permitted competitors in the PGA Senior Tour to ride in carts during PGA-sponsored competitions.⁷⁷

Second, the Court rejected the PGA's argument that because its tournaments represented the highest level of competitive golf in which most competitors were essentially of equal skill level, any advantage that one player received would provide that player with a competitive advantage.⁷⁸ Rather, the Court responded that guaranteeing equal conditions for all competitors would be impossible and that walking the course produced such a low level of fatigue that it had little impact on those conditions.⁷⁹ Most importantly, the Court stressed the specific facts related to Martin's situation.⁸⁰ Because of his disability, the Court reasoned, even with the cart, Martin endured more fatigue as a result of his disorder than the able-bodied competitors did walking.⁸¹ Therefore, permitting Martin to ride in a cart would not provide him with a competitive advantage.⁸² Rather, the Court held that that modification simply would remove the barrier to his competing in the PGA that his disability had created, precisely the outcome that the ADA envisioned.⁸³ Having found, therefore, that

⁷³ *Martin*, 532 U.S. at 682–83. This Note refers to these two alternative ways of finding a fundamental alteration as a single two-prong test, the "two-pronged fundamental alteration test." See *id.*

⁷⁴ *Id.* at 683.

⁷⁵ *Id.* at 683, 689.

⁷⁶ *Id.* at 683–86, 689.

⁷⁷ *Id.* at 683–86.

⁷⁸ See *Martin*, 532 U.S. at 686–88.

⁷⁹ *Id.* at 687.

⁸⁰ See *id.* at 688–90.

⁸¹ *Id.* at 690.

⁸² See *id.*

⁸³ *Martin*, 532 U.S. at 688–90.

Martin's use of a golf cart would not fundamentally alter the game of golf, the Supreme Court concluded that the ADA required the PGA to allow Martin to use a golf cart in its competitions.⁸⁴

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ITS ACADEMIC REQUIREMENTS, AND LITIGATION ARISING FROM THE REQUIREMENTS

The NCAA is the most prominent sports governing body that promulgates both athletic and academic requirements for student-athletes.⁸⁵ It has been subject to much ADA litigation in the past, and it likely will face additional Title III claims in light of the Supreme Court's decision in *PGA Tour, Inc. v. Martin*.⁸⁶

A. Background on the NCAA

The NCAA is a voluntary association composed of approximately 1200 colleges and universities divided among three divisions for the purpose of administering intercollegiate athletics.⁸⁷ The NCAA's main duties include establishing and enforcing rules that govern intercollegiate athletics and overseeing programs aimed at serving its purposes and goals.⁸⁸ The primary goal of the NCAA is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."⁸⁹ To that end, the NCAA strives to balance encouraging intercollegiate athletic competition and ensuring that student-athletes receive high-quality college educations.⁹⁰ Thus, the NCAA requires that student-athletes

⁸⁴ *Id.* at 674, 691.

⁸⁵ See NAT'L COLLEGIATE ATHLETIC ASS'N, PURPOSES AND GOALS, at <http://ncaa.org/about/purposes.html> (last visited Mar. 15, 2005).

⁸⁶ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690-91 (2001); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1062-66 (N.D. Ga. 2000); *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114, 1116 (E.D. Mo. 1998); *Matthews v. Nat'l Collegiate Athletic Ass'n*, 179 F. Supp. 2d 1209, 1213 (E.D. Wash. 2001).

⁸⁷ NAT'L COLLEGIATE ATHLETIC ASS'N, WHAT IS THE NCAA?, at http://ncaa.org/about/what_is_the_ncaa.html (last visited Mar. 15, 2005). This Note focuses on the rules for Division I members. NAT'L COLLEGIATE ATHLETIC ASS'N, WHAT'S THE DIFFERENCE BETWEEN DIVISIONS I, II AND III?, at http://www.ncaa.org/about/div_criteria.html (last visited Mar. 15, 2005) (discussing the differences between the three divisions).

⁸⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 85.

⁸⁹ *Id.*

⁹⁰ *Id.*

both maintain amateur status and remain in good academic standing at the member schools in which they are enrolled.⁹¹

The NCAA additionally requires that incoming student-athletes meet specific academic requirements to be eligible to participate in NCAA-sponsored sports.⁹² Originally, the NCAA prohibited its member institutions from providing athletic scholarships to those student-athletes that the schools predicted—based on high school grade point average (the “GPA”) or standardized test scores—would not achieve a minimum 1.6 GPA during their freshman years in college.⁹³ After several highly publicized cases of member-institution abuse of that standard, however, the NCAA implemented Proposition 48.⁹⁴ Proposition 48 stiffened the eligibility requirements to include a minimum high school GPA in core courses in conjunction with minimum standardized test scores.⁹⁵ Although the NCAA subsequently has amended the specific requirements, since implementing Proposition 48, the NCAA has continued to employ initial eligibility requirements consisting of a minimum high school GPA, a minimum number of core courses, and a minimum standardized test score.⁹⁶

1. Initial Eligibility Requirements

The initial eligibility requirements aid the NCAA in determining whether an incoming student-athlete will be able to succeed academically in college while handling the demands of participating in college athletics.⁹⁷ The NCAA Initial Eligibility Clearinghouse (“Clearinghouse”), with the approval of the Executive Committee, certifies whether student-athletes have met their initial eligibility requirements.⁹⁸ The initial eligibility requirements include high school

⁹¹ NAT'L COLLEGIATE ATHLETIC ASS'N, 2003–2004 NCAA DIVISION I MANUAL 125 (2003), available at http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf. While participating in a member school's athletic program, a student-athlete must be enrolled in a full-time program aimed at attaining a baccalaureate degree and must be in good academic standing while taking at least twelve semester or quarter hours of study to be eligible to compete in NCAA events. *Id.* at 130.

⁹² Thomas A. Baker, III & Daniel P. Connaughton, *Cureton v. NCAA: A Blow-by-Blow Account of the Landmark Title VI Challenges to the NCAA and Their Recent Implications*, 13 J. LEGAL ASPECTS SPORT 145, 147–48 (2003).

⁹³ *Id.* at 148.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 127; Baker & Connaughton, *supra* note 92, at 148–50.

⁹⁷ *Bowers v. Nat'l Collegiate Athletic Ass'n*, 974 F. Supp. 459, 466–67 (D.N.J. 1997).

⁹⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 138.

graduation, a minimum GPA in thirteen core courses, and a minimum standardized test score on either the American College Testing Assessment (the "ACT") or the Scholastic Aptitude Test (the "SAT").⁹⁹ The core courses cover various subjects and must be taught at or above a school's regular academic level.¹⁰⁰ Remedial and special education classes thus do not qualify as core courses, though the NCAA may exempt student-athletes with learning disabilities from this requirement.¹⁰¹ The Initial Eligibility Index, a sliding scale that pairs standardized test scores with GPAs, establishes the minimum GPA and test scores.¹⁰² The higher the GPA in core courses, the lower the minimum standardized test requirement and vice versa.¹⁰³

Depending on an incoming student-athlete's level of completion of the initial eligibility requirements, the NCAA grants the following three statuses: qualifier, partial-qualifier, and non-qualifier.¹⁰⁴ The highest status of eligibility is that of qualifier.¹⁰⁵ Student-athletes who meet the requirements of qualifier status are eligible for athletic-based financial aid and may practice and compete during their first year in college.¹⁰⁶ A partial-qualifier may receive athletic-based financial aid and may practice with the college team, but may not participate in NCAA competitions during their first year.¹⁰⁷ Non-qualifiers are not eligible to receive athletic financial aid and may not practice or compete during their first year.¹⁰⁸ Furthermore, neither non-qualifiers nor partial-qualifiers may participate in more than three seasons of any sport, unless by the beginning of their fifth year (fourth season), they have received baccalaureate degrees, or for stu-

⁹⁹ *Id.* at 138-39. The current initial eligibility requirements apply to student-athletes who will first enter college on or before August 1, 2005. *Id.* at 138. The NCAA also has published its revised initial eligibility criteria that will apply to student-athletes entering college after that date. *Id.* at 139-44. The NCAA provides details on what qualify as core courses, including specific subject areas and academic standards for the school and the specific course. *Id.* at 144.

¹⁰⁰ *Id.* at 144.

¹⁰¹ *Id.*

¹⁰² *Id.* at 139-44.

¹⁰³ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 139-44. For example, for students with a GPA of 2.5 and above, the minimum SAT score is 820, but for students with a minimum GPA of 2.0, the minimum SAT score is 1010. *Id.*

¹⁰⁴ *Id.* at 142-48.

¹⁰⁵ *See id.* at 138-48.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 147-48.

¹⁰⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 148.

dent-athletes with learning disabilities, they have completed eighty percent of the work required for their designated degree programs.¹⁰⁹

2. Modifications of the Initial Eligibility Requirements for Student-Athletes with Disabilities

Although all student-athletes must meet the same initial eligibility requirements, the NCAA may provide some accommodations to student-athletes with learning disabilities.¹¹⁰ To be eligible for such accommodations, student-athletes must present some proof of the disability.¹¹¹ Students who have done so may then use courses for students with disabilities that the Clearinghouse has designated as core courses, use approved core courses that the student-athlete has completed before enrolling in college (including courses the student takes the summer after high school graduation), and use SAT and ACT test scores earned during a nonstandard administration to satisfy the initial eligibility requirements.¹¹²

The NCAA's Academics/Eligibility/Compliance Cabinet determines whether the courses a student-athlete with a learning disability takes qualify as core courses on the basis of confirmation forms issued to the student-athlete's high school.¹¹³ Specifically, courses that appear to be taught below the regular academic level may count as core courses for students with disabilities if the student-athlete's high school principal submits a letter stating that the courses in question are substantially similar to Clearinghouse-approved core courses, both "qualitatively and quantitatively."¹¹⁴

If, despite those accommodations, the student-athlete does not meet qualifier status, the NCAA may grant an initial eligibility requirement waiver.¹¹⁵ The NCAA Subcommittee on Initial Eligibility Waivers considers waiver requests and may grant a waiver based on a student-athlete's overall academic record.¹¹⁶ To make that determination, the NCAA may consider such factors as the extent to which the

¹⁰⁹ *Id.*

¹¹⁰ NAT'L COLLEGIATE ATHLETIC ASS'N, FREQUENTLY ASKED QUESTIONS ON STUDENTS WITH DISABILITIES, at http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/disabilities (last updated Feb. 25, 2004).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 145.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 147.

¹¹⁶ *Id.*

student's disability contributed to the failure to meet the eligibility requirements, the student's individualized education plan, the student's overall academic record and standardized test performance, accommodations for the disability that were available and used by the student, and any other factor to help assess the student's preparedness to succeed in college.¹¹⁷ Based on that review, the Subcommittee may provide an initial eligibility requirement waiver granting the student-athlete partial-qualifier or qualifier status.¹¹⁸

3. Consent Decree Involving the Initial Eligibility Requirements and the Foundation of the NCAA's Policy Modifications for Student-Athletes with Learning Disabilities

The NCAA's initial eligibility requirement modifications for student-athletes with learning disabilities stem in part from a consent decree with the U.S. Department of Justice (the "DOJ").¹¹⁹ In response to several individuals' complaints that the NCAA's initial eligibility requirements violated Title III, the DOJ investigated the allegations.¹²⁰ The NCAA engaged in good faith negotiations with the DOJ to remedy the alleged violations, and in May 1998, without admitting any ADA violations or agreeing that it was subject to Title III, the NCAA entered into a consent decree with the DOJ.¹²¹ Although the consent decree self-terminated in May 2003, the NCAA's current policies regarding initial eligibility requirement modifications for student-athletes with learning disabilities continue to reflect the decree's terms.¹²²

During the negotiation process with the DOJ, the NCAA revised some of its policies for student-athletes with learning disabilities.¹²³ Specifically, the NCAA agreed to accept course work completed after high school graduation—but before college enrollment—to count towards core course credit, and it revised its policy to allow students to initiate the waiver request process themselves.¹²⁴

¹¹⁷ NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 110.

¹¹⁸ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 147.

¹¹⁹ See Consent Decree, *United States v. Nat'l Collegiate Athletic Ass'n* (D.D.C. May 1998), <http://www.usdoj.gov/crt/ada/ncaa.htm#anchor369197> (last revised Feb. 7, 2001). The consent decree expired on May 1, 2003. *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*; see, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 145.

¹²³ Consent Decree, *supra* note 119.

¹²⁴ *Id.* Previously, member institutions had to initiate the waiver process on behalf of the student-athlete. *Id.*

The consent decree also required the NCAA to implement additional changes.¹²⁵ First, the NCAA agreed to propose to its committees changes to its bylaws so that a designation of "special education" or "remedial" in a course title would not automatically disqualify that course from being a core course.¹²⁶ Second, the NCAA agreed to propose to its committees that student-athletes with learning disabilities, who are unable to meet the initial eligibility requirements, be able to earn an additional year of athletic eligibility under certain conditions.¹²⁷ Third, the NCAA agreed that its committees responsible for hearing initial eligibility requirement waiver requests for Divisions I and II would be composed of experts in the field of learning disabilities.¹²⁸ Fourth, the NCAA agreed to employ an ADA liaison, to publish its revised standards, and to report its progress to ensure continued compliance with the ADA.¹²⁹

B. *Pre-Martin Title III Cases Involving the NCAA's Initial Eligibility Requirements*

In addition to the complaints that led to the consent decree, several student-athletes who did not attain qualifier status sued the NCAA under Title III of the ADA.¹³⁰ The plaintiffs alleged that the initial eligibility requirements discriminated against student-athletes with learning disabilities because of their disabilities, and thus they requested injunctions allowing them to participate in intercollegiate athletics.¹³¹ Although the courts in those cases disagreed somewhat on whether and to what extent an initial eligibility requirement waiver would fundamentally alter the nature of the NCAA's privileges and services, they generally agreed that Title III applied to the NCAA and that some modifications to the NCAA would constitute fundamental alterations of its program.¹³²

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Consent Decree, *supra* note 119.

¹²⁹ *Id.*

¹³⁰ See, e.g., *Cole*, 120 F. Supp. 2d at 1067; *Tatum*, 992 F. Supp. at 1116; *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *1, *5 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).

¹³¹ See, e.g., *Cole*, 120 F. Supp. 2d at 1067; *Ganden*, 1996 WL 680000, at *1, 5.

¹³² See, e.g., *Tatum*, 992 F. Supp. at 1121; *Ganden*, 1996 WL 680000, at *10; see also Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 189-99 (2003) (discussing cases in which courts deferred to the NCAA).

First, the courts that reached the question whether Title III applied to the NCAA suggested that it could.¹³³ The courts reasoned that the NCAA operated a place of public accommodation, and thus was subject to Title III because it maintained significant control over its member institutions' athletic facilities.¹³⁴ Specifically, the courts reasoned that the NCAA controlled the facilities not only because the NCAA leased them for tournaments, but also because it regulated the way in which student-athletes could train, controlled ticket and concessions prices and broadcasting rights, and governed which teams could play in each facility.¹³⁵

Second, most of the courts concluded—or at least assumed without deciding—that the ADA does not and should not require the NCAA to abandon its initial eligibility requirements.¹³⁶ Rather, the courts granted the NCAA some deference, suggesting that the initial eligibility requirements assisted the NCAA in achieving its goal of fostering student athletics.¹³⁷ For example, in 2000, in *Cole v. National Collegiate Athletic Ass'n*, the U.S. District Court for the Northern District of Georgia stated that Title III “does not require an institution to ‘lower or to effect substantial modifications of standards to accommodate a handicapped person.’”¹³⁸ Furthermore, the court found that because the initial eligibility requirements were necessary to the

¹³³ See, e.g., *Tatum*, 992 F. Supp. at 1121; *Ganden*, 1996 WL 680000, at *10–11.

¹³⁴ See, e.g., *Tatum*, 992 F. Supp. at 1121; *Ganden*, 1996 WL 680000, at *10–11.

¹³⁵ See, e.g., *Tatum*, 992 F. Supp. at 1121; *Ganden*, 1996 WL 680000, at *10–11.

¹³⁶ *Cole*, 120 F. Supp. 2d at 1070 (assuming without deciding that Title III did not require the NCAA to abandon its initial eligibility requirements); *Bowers*, 974 F. Supp. at 466–67 (holding that abandonment of the initial eligibility requirements would constitute a fundamental alteration and that waiver process itself constituted a reasonable modification); *Ganden*, 1996 WL 680000, at *16 (holding that requested waiver would fundamentally alter the nature of the NCAA's programs and services). Other courts did not reach the question of whether the requested modification would constitute a fundamental alteration, but they nonetheless indicated that the modification would have been reasonable. *Tatum*, 992 F. Supp. at 1123 n.5 (stating in a footnote that requiring the NCAA to accept untimed standardized test scores would not fundamentally alter the nature of its programs, though not reaching the question directly because the plaintiff was found not to be disabled); *Butler v. Nat'l Collegiate Athletic Ass'n*, No. C96-1656D, 1996 WL 1058233, at *6 (W.D. Wash. Nov. 8, 1996) (unpublished opinion) (not reaching the question of whether the requested modification would constitute a fundamental alteration, but in conducting preliminary injunction analysis, finding that granting a waiver for the plaintiff would not harm the NCAA).

¹³⁷ See *Cole*, 120 F. Supp. 2d at 1070; *Bowers*, 974 F. Supp. at 466–67; *Ganden*, 1996 WL 680000, at *16.

¹³⁸ 120 F. Supp. 2d at 1070 (quoting *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994) (quoting *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 398–99 (1979)) (internal quotations omitted)).

accomplishment of the NCAA's interest of ensuring that student-athletes were prepared to succeed in their academics and did not simply attend college to play sports, granting a waiver to the plaintiff who did not meet the requirements would not constitute a reasonable accommodation under Title III.¹³⁹ The court also suggested that deference to the NCAA Waiver Subcommittee's decisions would be appropriate and stated that the ADA did not require the NCAA to abandon its academic requirements for any athlete because doing so would not be a reasonable accommodation.¹⁴⁰

Similarly, in 1996, the U.S. District Court for the Northern District of Illinois in *Ganden v. National Collegiate Athletic Ass'n*, found that the plaintiff's requested modification of the initial eligibility requirements would constitute a fundamental alteration.¹⁴¹ The court began the fundamental alteration analysis by noting that the eligibility requirements served an important interest for the NCAA, namely ensuring that student-athletes were prepared for the academic aspects of college.¹⁴² For student-athletes with learning disabilities, the initial eligibility requirements not only served that purpose, but they also ensured through the waiver process that the NCAA provided those student-athletes with individualized consideration, as Title III requires.¹⁴³ The court reasoned that removing the core course requirement for the plaintiff would fundamentally alter the nature of the NCAA requirements by requiring the NCAA to accept courses with little substantive similarity to accepted core classes and by denying the NCAA a mode of determining the student-athlete's academic potential.¹⁴⁴ Similarly, lowering the minimum GPA for the plaintiff would fundamentally alter the NCAA's requirements by removing "the NCAA's primary objective tool to determine a student's academic capabilities."¹⁴⁵ That, the court held, was not the result that Title III envisioned.¹⁴⁶ Rather, the court noted that although a situation may exist

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1071-72. Indeed, the court noted that "[a]bandoning the eligibility requirements altogether for this or any athlete is unreasonable as a matter of law and is not required by the ADA." *Id.* at 1071.

¹⁴¹ See 1996 WL 680000, at *15.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *16.

¹⁴⁶ *Ganden*, 1996 WL 680000, at *16.

that would warrant the NCAA's lowering of its GPA requirement, such a modification generally would be unreasonable.¹⁴⁷

Additionally, in 1997, in *Bowers v. National Collegiate Athletic Ass'n*, the U.S. District Court for the District of New Jersey denied a student-athlete with a learning disability a preliminary injunction requiring the NCAA to grant him qualifier status because he failed to demonstrate a likelihood of establishing that the NCAA's initial eligibility requirements discriminated against him in violation of the ADA by screening out student-athletes with learning disabilities.¹⁴⁸ The court first noted that the NCAA provided accommodations for student-athletes with learning disabilities through the waiver process and by allowing high school principals to demonstrate that special education courses qualitatively and quantitatively provided students with the same knowledge as accepted core courses.¹⁴⁹ The court then suggested that the plaintiff was attempting to remove the core course requirement instead of simply seeking a modification.¹⁵⁰ That result would be unreasonable under the ADA, the court reasoned, because the ADA required only that the NCAA modify its requirements, not abandon them altogether.¹⁵¹ Furthermore, the court added that the initial eligibility requirements were necessary to accomplish the NCAA's goals of maintaining intercollegiate athletics as an integral part of the collegiate program and ensuring that student-athletes progressed academically.¹⁵² The court also noted that the core course requirements allowed the NCAA to evaluate whether student-athletes would be able to handle the demands of both college academics and athletics.¹⁵³ Following that reasoning, the court held that a complete abandonment of the core course requirement would fundamentally alter the nature of the NCAA's program and that the NCAA's waiver process constituted a reasonable modification for student-athletes with learning disabilities in satisfaction of the ADA's requirements.¹⁵⁴

¹⁴⁷ *Id.* The court added, however, that not every waiver of the initial eligibility requirements would fundamentally alter the NCAA's purpose, and thus the NCAA was not completely insulated from claims that it violated Title III. *See id.* at *15.

¹⁴⁸ 974 F. Supp. at 467.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 466.

¹⁵¹ *Id.*

¹⁵² *Id.* at 466-67.

¹⁵³ *Bowers*, 974 F. Supp. at 466-67.

¹⁵⁴ *Id.* at 467.

III. APPLICATION OF THE MARTIN STANDARD: TWO DIFFERING APPROACHES

Although the courts that decided Title III cases involving the NCAA's initial eligibility requirements had begun to develop a pattern for analyzing those claims, it is unclear how courts will decide similar cases in light of the U.S. Supreme Court's 2001 decision in *PGA Tour, Inc. v. Martin*.¹⁵⁵ The confusion stems from the fact that the Supreme Court recited two versions of the correct analysis of Title III claims in the *Martin* decision.¹⁵⁶ In its analysis in *Martin*, the Supreme Court examined whether the requested modification was reasonable and necessary, and yet would not fundamentally alter the nature of the PGA's services.¹⁵⁷ The Court then announced the two-pronged fundamental alteration test, which asks whether the modification would alter the nature of the competition to the extent that it would be unacceptable even if provided to all competitors, or whether the modification would provide one competitor with an unfair advantage.¹⁵⁸

Later in the *Martin* opinion, however, the Supreme Court restated the analysis for Title III claims.¹⁵⁹ The second version of the analysis requires courts to ask only whether the requested modification is reasonable and necessary and would not constitute a fundamental alteration, but it does not require the two-pronged fundamental alteration test.¹⁶⁰ It is thus unclear whether the Court intended the two-pronged fundamental alteration test to be a required part of Title III analysis in future claims.¹⁶¹ Furthermore, in applying *Martin* to subsequent Title III claims, some courts have followed the two-pronged fundamental alteration test, but others have not.¹⁶²

¹⁵⁵ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83, 688 (2001); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *14-16 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).

¹⁵⁶ See 532 U.S. at 682-83, 688.

¹⁵⁷ *Id.* at 682.

¹⁵⁸ *Id.* at 682-83.

¹⁵⁹ *Id.* at 688.

¹⁶⁰ See *id.*

¹⁶¹ See *Martin*, 532 U.S. at 682, 688.

¹⁶² Compare *Doe v. Haverford Sch.*, No. Civ.A. 03-3989, 2003 WL 22097782, at *5, *8 (E.D. Pa. Aug. 5, 2003) (unpublished opinion) (not following two-pronged fundamental alteration test), with *Matthews v. Nat'l Collegiate Athletic Ass'n*, 179 F. Supp. 2d 1209, 1225-27 (E.D. Wash. 2001) (applying the two-pronged fundamental alteration test).

A. *Matthews v. National Collegiate Athletic Ass'n: One Court's Attempt at Applying Martin to the NCAA*

In 2001, in *Matthews v. National Collegiate Athletic Ass'n*, the U.S. District Court for the Eastern District of Washington followed the standards the U.S. Supreme Court set out in *Martin*, including the two-pronged fundamental alteration test.¹⁶³ In *Matthews*, the court granted, in part, the request of a student-athlete with a learning disability for summary judgment involving a waiver to one of the NCAA's academic requirements.¹⁶⁴ One of the NCAA's continuing eligibility requirements, the 75/25 rule, required all NCAA student-athletes to complete seventy-five percent of their annual required credit hours during the regular academic year.¹⁶⁵ Per the NCAA bylaws, however, student-athletes with learning disabilities could request waivers to that rule.¹⁶⁶ Although the NCAA previously had granted the plaintiff waivers to the 75/25 rule, the NCAA declined to grant an additional waiver.¹⁶⁷ Rather, the NCAA declared him academically ineligible, claiming that the student-athlete required the waiver not because of his learning disability, but because of his lack of effort.¹⁶⁸

To analyze the plaintiff's claim, the court first decided that the NCAA was subject to Title III of the ADA.¹⁶⁹ Discussing several courts' Title III analyses, the court in *Matthews* held that Title III applied to the NCAA based on the NCAA's large degree of control over students' access to the arena of college athletics.¹⁷⁰ Furthermore, the court indicated that the ADA generally protected the plaintiff in *Matthews* because he was disabled under the statute's definition and because the NCAA's disqualification of him was a result of his disability.¹⁷¹

¹⁶³ *Matthews*, 179 F. Supp. 2d at 1225-27 (citing *Martin*, 532 U.S. at 682-83).

¹⁶⁴ *Id.* at 1231. The court dismissed the claim with prejudice as moot because the plaintiff was completing his fourth and final year of eligibility during the pendency of the case. *Id.* at 1213, 1228.

¹⁶⁵ *Id.* at 1215. Put differently, the 75/25 rule prohibits student-athletes from completing more than twenty-five percent of their required annual credit hours during summer semesters. *Id.* The NCAA implemented the 75/25 rule in 1992 after some member institutions expressed concern that some student-athletes were taking reduced course loads during the school year and excessively using summer school courses to maintain their academic eligibility. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1216.

¹⁶⁸ *Matthews*, 179 F. Supp. 2d at 1216.

¹⁶⁹ *Id.* at 1223.

¹⁷⁰ *Id.* at 1219-22 (discussing *Martin*, *Cole*, *Tatum*, *Bowers*, and *Ganden*); see *supra* notes 133-135 and accompanying text.

¹⁷¹ *Matthews*, 179 F. Supp. 2d at 1224.

Having found Title III of the ADA applicable, the *Matthews* court next conducted a Title III analysis.¹⁷² The court first required the plaintiff to show the existence of a reasonable modification of a rule that would enable the plaintiff to participate in the specified activity.¹⁷³ After the plaintiff met that burden, the court continued, the defendant must then show that the requested modification would fundamentally alter the nature of its program or activity.¹⁷⁴ The court next cited *Martin* for the proposition that in evaluating what would constitute a reasonable modification, courts should focus on the individual circumstances of the case instead of simply determining whether a blanket waiver of the requirement would constitute a fundamental alteration.¹⁷⁵ Specifically, the *Matthews* court noted that *Martin* stated that a rule peripheral to the nature of a service or activity could be waived in certain instances without fundamentally altering the nature of that service or activity.¹⁷⁶ Finally, the court cited *Martin's* two-pronged fundamental alteration test—that a modification of certain rules may constitute a fundamental alteration if it would affect an essential aspect of the program such that it would be unacceptable even if applied to all participants or if the modification would provide an unfair advantage to one participant.¹⁷⁷

Applying that standard, the court held that a waiver of the 75/25 rule for the plaintiff would not constitute a fundamental alteration of the NCAA's programs.¹⁷⁸ First, the court noted that the NCAA previously had granted the plaintiff two academic waivers, including a waiver of the 75/25 rule.¹⁷⁹ The court highlighted the difference between *Matthews* and cases involving the initial eligibility requirements in which the NCAA had never granted waivers.¹⁸⁰ Second, the court added that the NCAA adopted the 75/25 rule long after it had established its purpose and had begun regulating college athletics.¹⁸¹ Third, because the plaintiff had exceeded some of the NCAA's other academic requirements, the court held that a waiver of the 75/25 rule

¹⁷² *Id.* at 1224-27.

¹⁷³ *Id.* at 1225.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (citing *Martin*, 532 U.S. at 682-83).

¹⁷⁶ *Matthews*, 179 F. Supp. 2d at 1225 (citing *Martin*, 532 U.S. at 682-83).

¹⁷⁷ *Id.* (citing *Martin*, 532 U.S. at 682-83).

¹⁷⁸ *Id.* at 1226.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Matthews*, 179 F. Supp. 2d at 1226.

would not have frustrated the NCAA's purpose of fostering academic achievement for student-athletes.¹⁸²

The court used those findings in applying the *Martin* two-pronged fundamental alteration test.¹⁸³ As for the first prong, the court held that although completely abandoning the NCAA's academic requirements would compromise the NCAA's purpose, a waiver of the 75/25 rule, even if provided to all athletes, would not alter an essential aspect of the NCAA's purpose.¹⁸⁴ The court based its decision on the facts that the NCAA had numerous other bylaws to ensure student-athletes' academic achievement and that neither football (the plaintiff's sport) nor college courses of study require students to complete seventy-five percent of their coursework during the regular school year.¹⁸⁵ Addressing the second prong, the court held that providing the plaintiff with a waiver would not result in him gaining any unfair advantage, but rather would simply permit him to participate in intercollegiate athletics.¹⁸⁶ Therefore, applying the individualized inquiry standard from *Martin*, the *Matthews* court found that granting the plaintiff a waiver to the 75/25 rule would not fundamentally alter the NCAA's purpose.¹⁸⁷

B. Doe v. Haverford School: A Differing Approach to Applying *Martin*

Although the *Matthews* court followed the two-pronged fundamental alteration test, another court followed the U.S. Supreme Court's alternate annunciation of the *Martin* standard, and thus did not follow the two-pronged test.¹⁸⁸ In 2003, the U.S. District Court for the Eastern District of Pennsylvania in *Doe v. Haverford School*, interpreted the Supreme Court's Title III standard from *Martin* in an ADA case involving a private school.¹⁸⁹ In *Doe*, a high school student with a learning disability at The Haverford School filed for a preliminary injunction requiring Haverford to modify its academic requirements pursuant to the ADA.¹⁹⁰ Despite repeated waivers of Haverford's aca-

¹⁸² *Id.*

¹⁸³ *Id.* at 1226-27 (citing *Martin*, 532 U.S. at 682-83).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Matthews*, 179 F. Supp. 2d at 1227.

¹⁸⁷ *Id.* at 1226-27 (citing *Martin*, 532 U.S. at 682-83).

¹⁸⁸ Compare *Doe*, 2003 WL 22097782, *5, *8 (not following the two-pronged fundamental alteration test), with *Matthews*, 179 F. Supp. 2d at 1225-27 (applying the two-pronged fundamental alteration test).

¹⁸⁹ *Doe*, 2003 WL 22097782, at *5-9 (citing *Martin*, 532 U.S. at 688).

¹⁹⁰ *Id.* at *1. Title III, and not Title II, applies to this case because Haverford is a private school. See *id.*

demic requirements, the plaintiff, who suffered from sleep disorders, failed to complete the required coursework to advance to the twelfth grade and thus requested additional modifications.¹⁹¹

To evaluate the Title III claim, the court interpreted the *Martin* standard to require an individualized inquiry into the circumstances of the case and noted that three requirements must be met before a court should obligate an entity to provide the requested modification.¹⁹² First, the modification must be reasonable.¹⁹³ Second, it must be necessary for the individual with a disability.¹⁹⁴ Third, the requested modification must not fundamentally alter the nature of the entity's services.¹⁹⁵ The school did not challenge the necessity of the requested modifications; therefore, the only questions before the court were whether the modifications were reasonable and whether they would not fundamentally alter the nature of the school's services.¹⁹⁶

Regarding reasonableness, the court found that the plaintiff did not demonstrate likely success on the merits.¹⁹⁷ The court noted that courts generally deferred to the decisions of academic institutions because those institutions were in the best position to evaluate a request in light of their academic standards.¹⁹⁸ Therefore, the court added, as long as a school rationally reached a justifiable conclusion that the modifications would not be reasonable, courts generally should defer to that decision.¹⁹⁹ In *Doe*, the court noted that Haverford already had accommodated the plaintiff with a series of modifications and that any rejections of additional modifications reasonably could be justified to preserve the school's academic standards.²⁰⁰

Although the court found the requested modifications unreasonable, even if the plaintiff could meet his burden of proving reasonableness, the court added that the requested modifications would

¹⁹¹ *Id.* at *1-3. The requested modifications included extra time to complete past-due coursework, a requirement that his teachers be available to him during the summer to answer any questions about his unfinished work, and a transcript that would not contain any failing grades for one school year. *Id.* at *5-6.

¹⁹² *Id.* at *5-6 (citing *Martin*, 532 U.S. at 688).

¹⁹³ *Id.* at *5.

¹⁹⁴ *Doe*, 2003 WL 22097782, at *5.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at *5-8.

¹⁹⁸ *Id.* at *8.

¹⁹⁹ *Doe*, 2003 WL 22097782, at *6.

²⁰⁰ *Id.* at *7.

fundamentally alter the nature of Haverford's services, and thus would not be required by Title III.²⁰¹ Again, the court deferred to the judgment of the school, noting that schools must consider the feasibility, cost, and possibility of alternative means of accommodating the student in reaching their decisions.²⁰² Using that standard, the court validated Haverford's determination that the requested modifications would fundamentally alter its academic programs.²⁰³

Furthermore, the court rejected the plaintiff's claim that the modifications would not fundamentally alter the nature of Haverford's services because the school previously had provided similar modifications.²⁰⁴ The court rejected the argument not only because of a change in the plaintiff's circumstances (namely, that he had an increased amount of outstanding work), but also because the statute did not convert prior modifications into required reasonable modifications in the future.²⁰⁵ That reasoning, the court explained, would provide a disincentive for entities covered by Title III to accommodate individuals with disabilities—even in situations not required by the ADA—for fear of having to continue such modifications indefinitely.²⁰⁶ As a result, the court concluded, the ADA's purpose of integrating individuals with disabilities into society would be hindered.²⁰⁷

IV. COURTS' TRADITIONAL DEFERENCE TO THE JUDGMENT OF ACADEMIC INSTITUTIONS

The U.S. District Court for the Eastern District of Pennsylvania, in 2003 in *Doe v. Haverford School*, was not the first court to defer to the professional judgment of an academic institution regarding the reasonableness of a requested modification.²⁰⁸ Rather, numerous other

²⁰¹ *Id.* at *8.

²⁰² *Id.*

²⁰³ *Id.* at *8–9.

²⁰⁴ *Doe*, 2003 WL 22097782, at *8–9.

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ *Doe v. Haverford Sch.*, No. Civ.A. 03-3989, 2003 WL 22097782, at *8 (E.D. Pa. Aug. 5, 2003) (unpublished opinion); *see, e.g.*, *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047–48 (9th Cir. 1999); *cf. D'Amico v. N.Y. State Bd. of Law Exam'rs*, 813 F. Supp. 217, 222 (W.D.N.Y. 1993) (declining to defer to Board's position regarding what constituted an appropriate accommodation for the plaintiff's visual disability).

courts, including the U.S. Supreme Court, have held that such deference is warranted.²⁰⁹

For example, in 1979, in *Southeastern Community College v. Davis*, the U.S. Supreme Court recognized the need to balance the rights of an individual with a disability with the rights of academic institutions to maintain their academic integrity.²¹⁰ In that case, the defendant school denied the plaintiff, who suffered from a hearing disability, admission into a nursing program because of her disability.²¹¹ The U.S. Supreme Court found that the defendant's refusal to modify its nursing program for the plaintiff was not unlawfully discriminatory.²¹² Rather, the Court accepted the college's statements that its purpose was to train nursing professionals and that the plaintiff could not participate in the school's program without lowering its standards.²¹³ Defering to the school, the Court thus held that there is "no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."²¹⁴

Similarly, in 1999, in *Zukle v. Regents of the University of California*, the U.S. Court of Appeals for the Ninth Circuit upheld a medical school's decision to dismiss a student with a disability who had not met several requirements.²¹⁵ Noting that academic institutions deserve courts' deference, the *Zukle* court pointed to precedent that noted that courts have a limited ability to evaluate academic standards.²¹⁶ In particular, contrasted to the experience of education experts, courts are ill-equipped to evaluate whether a student potentially could meet the standards of a particular school, and the *Zukle* court, therefore, adopted a standard for reviewing cases questioning the decisions of academic institutions.²¹⁷ The standard recognizes that the courts are final arbiters of those decisions but notes that courts should grant judicial deference to schools so long as schools' academic deci-

²⁰⁹ See, e.g., *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 412-14 (1979); *Zukle*, 166 F.3d at 1047-48; *Bercovitch v. Baldwin*, 133 F.3d 141, 152-53 (1st Cir. 1998).

²¹⁰ 442 U.S. at 412-14. *Davis* involved a claim arising from § 504 of the Rehabilitation Act. *Id.* at 400; see 29 U.S.C. § 794 (2000 & West Supp. 2002). Analysis of rights and obligations created by the ADA, however, are almost identical to those set forth in the Rehabilitation Act. *Zukle*, 166 F.3d at 1045 n.11.

²¹¹ *Davis*, 442 U.S. at 400-02.

²¹² *Id.* at 413.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ 166 F.3d at 1043-46, 1047-48. *Zukle* involved a Title II ADA claim because the defendant was a government agency. *Id.* at 1045.

²¹⁶ *Id.* at 1047.

²¹⁷ *Id.* at 1047-48.

sions are sound and not solely implemented for the purpose of denying an education to individuals with disabilities.²¹⁸ The court further held that such deference is equally warranted to an academic institution's determination that a reasonable accommodation would not be available.²¹⁹

Additionally, in 1998, the U.S. Court of Appeals for the First Circuit indicated that deference to the professional judgment of an academic institution that attempted to suspend a student with serious behavioral problems was warranted in *Bercovitch v. Baldwin School, Inc.*²²⁰ In that case, which involved a Title III claim filed against a private school, the court held that the district court had erred in not following the professional judgment of the academic institution as to the reasonableness of the requested modifications.²²¹ The *Bercovitch* court noted that the record did not indicate any evidence of intentional discrimination or stereotyping on the part of the school.²²² Thus, the court deferred to the school's decision that the requested modifications involving exemptions to the school's disciplinary code were unreasonable because they would fundamentally alter the nature of its programs.²²³ The court further urged future courts examining similar cases to exercise caution in substituting the judgment of the court for that of a school.²²⁴

V. ANALYSIS OF THE APPLICATION OF *PGA TOUR, INC. v. MARTIN* TO FUTURE LITIGATION INVOLVING THE NCAA'S INITIAL ELIGIBILITY REQUIREMENTS

The cases involving Title III of the ADA and the NCAA's initial eligibility requirements decided before the U.S. Supreme Court's 2001 decision in *PGA Tour, Inc. v. Martin* and the cases applying varied interpretations of the *Martin* standard indicate that courts should be careful in applying the *Martin* standard to the NCAA's initial eligibility requirements.²²⁵ Because a stringent interpretation of *Martin* may not be

²¹⁸ *Id.*

²¹⁹ *Id.* at 1048.

²²⁰ See 133 F.3d at 153.

²²¹ *Id.* (citing *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.3d 791, 795 (1st Cir. 1992)).

²²² *Id.*

²²³ See *id.* at 152-54.

²²⁴ See *id.* at 153.

²²⁵ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-83, 688 (2001); see, e.g., *Doc v. Haverford Sch.*, No. Civ.A. 03-3989, 2003 WL 22097782, at *4-9 (E.D. Pa. Aug. 5, 2003) (unpublished opinion); *Matthews v. Nat'l Collegiate Athletic Ass'n*, 135 F.3d 1209, 1210 (3d Cir. 1998).

required and because such an interpretation would drastically hinder the NCAA's ability to achieve its purpose of integrating college athletics and academics, courts should provide the NCAA the same level of deference in evaluating Title III requests for modifications to the NCAA's initial eligibility requirements that they provide to schools.²²⁶

A. Applying Title III of the ADA to the NCAA

The threshold question in determining the extent to which the *Martin* decision will impact the NCAA's initial eligibility requirements is whether Title III applies to the NCAA.²²⁷ Based on prior litigation involving ADA claims against the NCAA, the *Martin* decision, and the overall purpose of the ADA, the answer appears clear that the NCAA is subject to Title III because the NCAA maintains control over places of public accommodation—athletic facilities.²²⁸ Assuming Title III does apply to the NCAA, the more poignant question is how to apply the *Martin* standard to questions involving the NCAA's initial eligibility requirements.²²⁹

B. Differentiating *Matthews* from Future Initial Eligibility Requirement Cases

In 2001, in *Matthews v. National Collegiate Athletic Ass'n*, the only case involving an ADA claim against the NCAA's academic requirements decided since the U.S. Supreme Court released the *Martin* decision, the U.S. District Court for the Eastern District of Washington did not distinguish between athletic and academic rules, but rather directly applied the *Martin* standard, including the two-pronged fundamental alteration test.²³⁰ Using that standard, the court held that a

1218–23 (E.D. Wa. 2001); *Cole v. Nat'l Collegiate Athletic Ass'n*, 120 F. Supp. 2d 1060, 1071–72 (N.D. Ga. 2000).

²²⁶ See *Martin*, 532 U.S. at 682–83, 688; *Doe*, 2003 WL 22097782, at *4–9; *Matthews*, 179 F. Supp. 2d at 1218–23; *Cole*, 120 F. Supp. 2d at 1071–72.

²²⁷ See 532 U.S. at 675–76.

²²⁸ See, e.g., 42 U.S.C. § 12101(b) (2000) (including private entities in its liberal definition of public accommodation for the purposes of Title III); *Martin*, 532 U.S. at 675–80 (holding that Title III applied to the PGA because it operated places of public accommodation); *Matthews*, 179 F. Supp. 2d at 1219–23 (holding that Title III applies to the NCAA because the NCAA exercises control over the facilities); *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998) (holding that Title III applies to the NCAA because the NCAA maintains control over the facilities).

²²⁹ See *Martin*, 532 U.S. at 682–83, 688. Compare *Doe*, 2003 WL 22097782, *5, *8 (not following the two-pronged fundamental alteration test), with *Matthews*, 179 F. Supp. 2d at 1225–27 (applying the two-pronged fundamental alteration test).

²³⁰ See *Matthews*, 179 F. Supp. 2d at 1224–27 (citing *Martin*, 532 U.S. at 682–83).

waiver to a continuing academic eligibility requirement for a qualified student-athlete with a disability would not constitute a fundamental alteration of the NCAA's purpose and policies.²³¹

Although the *Matthews* court applied the *Martin* standard as the Supreme Court had articulated it, the *Martin* standard should not apply as directly to other NCAA academic rules, namely, its initial eligibility requirements, because the application of the two-pronged fundamental alteration test in the academic setting hinders the NCAA's ability to control its academic goals.²³² For example, assume a qualified student-athlete with a disability brings suit against the NCAA for failure to grant a waiver of its initial eligibility requirements and that the NCAA does not dispute that a waiver would be a reasonable and necessary modification for that student-athlete.²³³ Following the *Martin* two-pronged standard, once the NCAA asserts that the modification would fundamentally alter its nature, the court next would need to analyze whether such a modification would alter an aspect of the NCAA so fundamental that the modification would be unacceptable even if provided to all student-athletes or would provide the student-athlete with an unfair advantage.²³⁴

Regarding the first inquiry of whether a requested modification would be unacceptable even if applied to all student-athletes, the NCAA would always fail because the initial eligibility requirements would be deemed peripheral.²³⁵ Although the NCAA could differentiate the initial eligibility requirements from the peripheral 75/25 rule because they are the only way to evaluate incoming students (whereas the 75/25 rule is one of many continuing academic standards), given the Court's narrow reading of what is essential in *Martin* and the similarities between the initial eligibility requirements and the 75/25 rule that the *Matthews* court previously had found to be nonessential, that argument most likely would fail for several reasons.²³⁶

First, the NCAA regularly has provided student-athletes with initial eligibility requirement waivers.²³⁷ A waiver of initial eligibility requirements would no more constitute a fundamental alteration to the

²³¹ *Id.*

²³² See *Martin*, 532 U.S. at 682–83, 688; *Doe*, 2003 WL 22097782, at *4–9; *Matthews*, 179 F. Supp. 2d at 1218–23; *Cole*, 120 F. Supp. 2d at 1071–72.

²³³ See, e.g., *Cole*, 120 F. Supp. 2d at 1063–67.

²³⁴ See 532 U.S. at 682–83.

²³⁵ See *infra* notes 236–242 and accompanying text.

²³⁶ See *Martin*, 532 U.S. at 689; *Matthews*, 179 F. Supp. 2d at 1226–27.

²³⁷ Jenny Blayden & Cynthia Pemberton, *An Investigation of NCAA Initial Eligibility Waiver Applications and Awards from 1999 to 2001*, 13 J. LEGAL ASPECTS SPORT 39, 49–49 (2002).

NCAA than a waiver of the walking rule for the PGA because, like the rules of golf that do not always require walking, the NCAA does not always require student-athletes to meet the initial eligibility requirements.²³⁸ Second, as the *Matthews* decision noted, the NCAA had declared its mission to integrate academics and athletics long before it implemented certain aspects of its academic requirements.²³⁹ Again, in the same way that the official rules of golf did not specifically forbid the use of carts, the NCAA rules, at least at their inception, did not require the initial academic eligibility requirements, which themselves have changed several times.²⁴⁰ Finally, following the *Matthews* approach, because none of the rules of NCAA-sponsored sports requires any academic standards and because the NCAA member institutions may not necessarily require the same academic standards as the NCAA for admission, a waiver of the initial eligibility requirements would be no more offensive than a general waiver of the 75/25 requirement, which the *Matthews* court found acceptable.²⁴¹ Therefore, because the NCAA cannot differentiate its rules and waivers from those of the PGA and because the *Matthews* court concluded that a continuing eligibility requirement was not fundamental, the NCAA likely cannot prevail on the first prong of the *Martin* fundamental alteration test.²⁴²

Similarly, as for the second inquiry, assuming that the requested core course or test score/GPA modifications were reasonable and necessary, the modification would never provide the student-athlete with an unfair advantage.²⁴³ Rather, like the golf cart for Martin, an initial eligibility requirement waiver would simply mitigate whatever obstacles to meeting qualifier status the student-athlete's learning disability had caused.²⁴⁴

Therefore, the result of following the *Matthews* court's interpretation of the *Martin* decision as requiring the two-pronged fundamental alteration test for academic questions would be to deprive the NCAA of its affirmative defense to claims of reasonableness.²⁴⁵ Consequently, the NCAA would need to succeed in showing that a modification

²³⁸ See *Martin*, 532 U.S. at 686-88; Blayden & Pemberton, *supra* note 237, at 48.

²³⁹ *Matthews*, 179 F. Supp. 2d at 1226.

²⁴⁰ See *Martin*, 532 U.S. at 684-85; Baker & Connaughton, *supra* note 92, at 147-50.

²⁴¹ See *Matthews*, 179 F. Supp. 2d at 1226-27.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *Martin*, 532 U.S. at 690; *Matthews*, 179 F. Supp. 2d at 1227.

²⁴⁵ See *Matthews*, 179 F. Supp. 2d at 1226-27.

would be either unreasonable (for a reason other than that the modification would fundamentally alter its nature) or unnecessary for that student.²⁴⁶ Alternatively, the NCAA could simply honor every request for an initial eligibility requirement waiver from a student-athlete with a learning disability, regardless of whether the requested modification would be harmful to the NCAA's academic mission.²⁴⁷ In that way, following the *Martin* standard as stringently as the *Matthews* court would essentially remove the initial eligibility requirements for at least some students (namely those student-athletes with learning disabilities for whom a waiver would be reasonable and necessary), which is the precise outcome that several courts explicitly have denounced.²⁴⁸ Furthermore, such a limitation on the NCAA's ability to regulate incoming student-athletes would substantially impair its ability to achieve its goals of ensuring that student-athletes succeed academically, as well as athletically.²⁴⁹

C. Following the Doe Approach Allows the NCAA to Protect Its Mission

Rather than differentiating its initial eligibility requirements from its 75/25 rule, the NCAA should base future arguments on the 2003 U.S. District Court for the Eastern Division's decision, *Doe v. Haverford School*.²⁵⁰ In that case, the court interpreted the *Martin* standard to require the following three inquiries: (1) whether the modification is reasonable, (2) whether the modification is necessary for the individual, and (3) whether the modification would fundamentally alter the nature of the services provided by the entity.²⁵¹ The *Doe* court did not divide the requirement that the modification not fundamentally alter the nature of the services into the two-pronged fundamental alteration test that the *Martin* decision created.²⁵²

This interpretation of the *Martin* decision's standard has merit.²⁵³ Because the U.S. Supreme Court granted certiorari to reconcile a cir-

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See *id.*; see also *Cole*, 120 F. Supp. 2d at 1071-72 (stating that Title III does not require the NCAA to abandon its initial eligibility requirements); *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000, at *15, *16 (N.D. Ill. Nov. 21, 1996) (unpublished opinion).

²⁴⁹ See *Cole*, 120 F. Supp. 2d at 1071-72; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 85.

²⁵⁰ 2003 WL 22097782, at *8-10.

²⁵¹ *Id.* at *5.

²⁵² See *Doe*, 2003 WL 22097782, at *5; see also *Martin*, 532 U.S. at 682-83 (discussing two-pronged test).

²⁵³ See 532 U.S. at 682-83, 688.

cuit split involving the Title III claims of golfers with disabilities against golf associations, it is arguable that the Court intended the two-pronged fundamental alteration test to apply to only professional golf or similar competitions.²⁵⁴ Specifically, in announcing the two-pronged analysis, the Court used language specific to the PGA, although more neutral language was available—"[i]n theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways."²⁵⁵ In contrast, later in the decision, the Court restated its interpretation of Title III's requirement without any reference to sports or the two-pronged fundamental alteration test:

To comply with this command [that places of public accommodations make reasonable accommodations for individuals with disabilities], an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.²⁵⁶

Furthermore, the Court outlined the second version of the standard in a portion of the opinion discussing Title III generally, but it mentioned the two-pronged fundamental alteration standard only in the portion discussing Martin's claim against the PGA specifically.²⁵⁷

In *Doe*, the court did not apply the two-pronged test when considering whether the requested modifications would constitute a fundamental alteration.²⁵⁸ Rather, the *Doe* court cited pre-*Martin* cases involving ADA claims brought against academic institutions.²⁵⁹ *Doe* thus illustrates that *Martin* did not necessarily override all previous Title III precedent, but rather simply confirmed the three-part inquiry that courts had followed in conducting Title III analyses.²⁶⁰ At the most basic level, therefore, the NCAA should argue in future Title III actions involving its initial eligibility requirements that the stan-

²⁵⁴ See *id.* at 674.

²⁵⁵ *Id.* at 682. A more neutral way of introducing the standard would be to simply delete the words "of petitioner's golf tournaments." See *id.*

²⁵⁶ *Id.* at 688.

²⁵⁷ *Id.* at 682-83, 688.

²⁵⁸ 2003 WL 22097782, at *5.

²⁵⁹ *Id.*

²⁶⁰ See *id.*; *Cole*, 120 F. Supp. 2d at 1070-72; *Ganden*, 1996 WL 680000, at *1, *12.

dards used by the courts in the pre-*Martin* Title III cases involving the initial eligibility requirements continue to be valid.²⁶¹

Furthermore, if courts were to follow the *Doe* interpretation of the *Martin* standard in future cases involving the NCAA's initial eligibility requirements, the result would be comparable to the outcomes of pre-*Martin* initial eligibility cases, in which the NCAA succeeded with a defense of fundamental alteration.²⁶² Without having to adhere to the narrow inquiry of the two-pronged fundamental alteration test, courts would have more leeway in evaluating whether the modification would fundamentally alter the NCAA's academic purpose, and thus courts could ask questions more tailored to that purpose.²⁶³ Thus, courts could continue to provide some deference to the NCAA so that it could continue to maintain its academic standards.²⁶⁴

Even if courts follow the *Doe* interpretation of the *Martin* standard in future Title III claims involving the NCAA's initial eligibility requirements, the NCAA is not guaranteed victory.²⁶⁵ For example, during a preliminary injunction analysis, one pre-*Martin* court determined that the NCAA would lose little by granting a waiver to a student-athlete with a learning disability.²⁶⁶ Furthermore, cases in which the NCAA prevailed arose out of preliminary motions, and therefore future litigation that concludes in a trial may not dictate the same result.²⁶⁷ Therefore, in future litigation, the NCAA should request the same level of deference that courts continually afford to schools and other academic institutions, as recently outlined in *Doe*.²⁶⁸

²⁶¹ See *Doe*, 2003 WL 22097782, at *4-9; *Cole*, 120 F. Supp. 2d at 1070-72; *Ganden*, 1996 WL 680000, at *1, *12.

²⁶² See *Doe*, 2003 WL 22097782, at *4-9; *Cole*, 120 F. Supp. 2d at 1070-72; *Ganden*, 1996 WL 680000, at *1, *12.

²⁶³ See *Doe*, 2003 WL 22097782, at *4-9; *Cole*, 120 F. Supp. 2d at 1070-72; *Ganden*, 1996 WL 680000, at *1, *12.

²⁶⁴ See *Doe*, 2003 WL 22097782, at *4-9; *Cole*, 120 F. Supp. 2d at 1070-72; *Ganden*, 1996 WL 680000, at *1, *12; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 85.

²⁶⁵ See *Doe*, 2003 WL 22097782, at *4-9; *Butler v. Nat'l Collegiate Athletic Ass'n*, No. C96-1656D, 1996 WL 1058233, at *1, *6 (W.D. Wash. Nov. 8, 1996) (unpublished opinion).

²⁶⁶ *Butler*, 1996 WL 1058233, at *6.

²⁶⁷ See, e.g., *Cole*, 120 F. Supp. 2d at 1062, 1070-72; *Ganden*, 1996 WL 680000, at *1, *14-16.

²⁶⁸ See 2003 WL 22097782, at *4-9. Ruling in favor of The Haverford School, the *Doe* court held that courts should afford the same level of deference to schools as to what constitutes a fundamental alteration as they would in determining whether a modification would be reasonable. *Id.* at *8. Although schools are not without restraints in reaching that decision—namely, they must consider feasibility, cost, and alternative means to achieve the modification—the court noted that courts generally will not substitute their judgment for that of schools. *Id.* at *6, *8. The reason for such deference, the court stated, is that educa-

D. *The NCAA Deserves the Same Deference Courts Have Afforded to Other Academic Institutions*

Although the reasons for providing deference to academic institutions outlined in *Doe* should dictate similar deference towards the NCAA's decisions, in the past, courts have not afforded the NCAA the same level of deference that they have accorded to schools.²⁶⁹ At least one scholar espouses a lesser standard of deference towards the NCAA by categorizing the NCAA's purpose as regulating intercollegiate athletics and claiming that the NCAA may not have the expertise to determine whether a student-athlete with a learning disability can perform academically in college.²⁷⁰ Specifically, it is argued that even taking into account the experts participating in the individual inquiry during the waiver request process, because the NCAA assessments are measured against the standards that the NCAA created—and which may be more rigorous than those of a member institution—the NCAA has the sole discretion to prevent a student-athlete with a learning disability from receiving a college education.²⁷¹

Such criticism is misplaced, however.²⁷² First, characterizing the NCAA's purpose as regulating intercollegiate athletics diminishes the importance of academics in intercollegiate athletics.²⁷³ In doing so, this approach ignores that the NCAA's purpose is to integrate college academics and athletics.²⁷⁴ Indeed, the NCAA's emphasis on academics is what prevents collegiate athletics from becoming essentially an amateur league for professional sports.²⁷⁵ Furthermore, it is precisely because the member institutions, the same schools to which courts have afforded such deference, were not all upholding their own academic standards with regard to student-athletes that the NCAA intervened and implemented academic requirements.²⁷⁶ In fact, since the NCAA implemented its academic requirements, the NCAA has found that

tional institutions, and not courts, are in the best position to determine what modifications would fundamentally alter their programs. *Id.* at *8.

²⁶⁹ Compare *id.* at *4-9 (accorded deference to a school), with *Matthews*, 179 F. Supp. 2d at 1226-27 (demonstrating less deference to the NCAA).

²⁷⁰ See, e.g., Weston, *supra* note 2, at 1120-21.

²⁷¹ See *id.* at 1120-23.

²⁷² See *infra* notes 273-304 and accompanying text.

²⁷³ See Weston, *supra* note 2, at 1120.

²⁷⁴ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 85.

²⁷⁵ See *id.*

²⁷⁶ See Baker & Connaughton, *supra* note 92, at 147-50.

academic achievements of its student-athletes have improved.²⁷⁷ Furthermore, in the same way that a college's inclusion of moral and ethical values in its mission statement does not automatically diminish its stated academic purpose, the NCAA's simultaneous regulation of athletics does not automatically diminish its stated academic purpose.²⁷⁸ Therefore, to provide the NCAA with a lower level of deference than courts afford to academic institutions improperly ignores the fact that the NCAA, like schools, holds academics as central to its purpose.²⁷⁹

Additionally, courts should defer to the NCAA's judgment because, like schools, the NCAA has expertise in the area of academic requirements.²⁸⁰ Courts traditionally have deferred to the judgment of academic institutions because those institutions are in the best position to evaluate academic requirements.²⁸¹ In that regard, the NCAA is no different from schools.²⁸² The DOJ's consent decree required the NCAA to install a team of experts on learning disabilities trained to evaluate student-athletes' waiver applications.²⁸³ Furthermore, the NCAA has recorded an improvement in student-athlete academic performance after the implementation of the initial eligibility requirements.²⁸⁴ That improvement illustrates that the initial eligibility requirements, at least, have achieved their intended effect.²⁸⁵

Furthermore, it is irrelevant that the NCAA's initial eligibility requirements do not exactly match the admissions standards for all academic institutions.²⁸⁶ First, because participation in college athletics increases the number of responsibilities of student-athletes, the NCAA has determined that to succeed as a student while bearing the burdens of an athlete, most student-athletes must meet a minimum level

²⁷⁷ See NAT'L COLLEGIATE ATHLETIC ASS'N, THE NCAA AND ACADEMIC REFORM, at <http://www.ncaa.org/releases/currentTopics/academicReform.html> (last visited Mar. 15, 2005). The NCAA considers its initial eligibility requirements a success because "[t]he overall graduation rates of student-athletes have risen faster than those for the student body as a whole and the graduation rate for African-American males has dramatically increased over their counterparts in the student body." *Id.* The NCAA admits, however, that for some groups of student-athletes—namely, African-American male basketball players—the academic success levels continue to concern the NCAA. *Id.*

²⁷⁸ See, e.g., BOSTON COLL. LAW SCH., MISSION STATEMENT, <http://www.bc.edu/schools/law/about/history/mission> (last updated Nov. 20, 2003).

²⁷⁹ See Weston, *supra* note 2, at 1120–21.

²⁸⁰ See Consent Decree, *supra* note 119.

²⁸¹ See *Doe*, 2003 WL 22097782, at *6–8.

²⁸² See *id.* at *4–9.

²⁸³ See Consent Decree, *supra* note 119.

²⁸⁴ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 277.

²⁸⁵ See *id.*

²⁸⁶ See Weston, *supra* note 2, at 1120–21.

of academic aptitude, namely the minimum initial eligibility requirements.²⁸⁷ Second, predicting a student's academic progress, regardless of the specific standards, is difficult, and the NCAA, like colleges and universities, can evaluate student-athletes only on criteria such as their high school performance and accepted standardized test scores.²⁸⁸ Furthermore, because such calculations cannot always predict a student's potential achievement, the NCAA's experts conduct individual inquiries into a student-athlete's circumstances and, upon finding that the student-athlete could perform academically at the college level, may waive the initial eligibility requirements.²⁸⁹ Therefore, not only does the NCAA use the same criteria as most colleges and universities to judge a student-athlete's potential college academic performance, but it also goes beyond that evaluation to allow for individualized inquiries.²⁹⁰

Finally, assuming that the NCAA has the same level of expertise as most colleges in evaluating a student-athlete's potential academic performance, allegations that the NCAA may prevent a student from attending the college of the student's choice are both incorrect and misplaced.²⁹¹ The claim is incorrect because the NCAA does not prevent any student from attending college.²⁹² By deeming student-athletes non-qualifiers, it may prevent some student-athletes from participating in intercollegiate athletics and receiving athletic-based financial aid during their first years.²⁹³ Those restrictions, however, do not prevent those students from attending the college without participating in athletics.²⁹⁴ Nor do they prevent colleges or private sources from providing the same students with other forms of aid or scholarships that are distinct from athletic scholarships.²⁹⁵ Furthermore, students deemed non-qualifiers during their first years may qualify to compete in intercollegiate athletics during the remainder of their college careers—including a possible fifth year of college that

²⁸⁷ See *Bowers v. Nat'l Collegiate Athletic Ass'n*, 974 F. Supp. 459, 466 (D.N.J. 1997).

²⁸⁸ See *Gratz v. Bollinger*, 539 U.S. 244, 252–54 (2003) (discussing the University of Michigan's admission criteria for prospective students, including the use of high school performance and standardized test scores).

²⁸⁹ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 145.

²⁹⁰ See *id.*

²⁹¹ See *Weston*, *supra* note 2, at 1120–21.

²⁹² See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 148.

²⁹³ See *id.*; see also *Denbo*, *supra* note 132, at 202–03 (discussing the argument that student-athletes should not be allowed to participate in sports during their first years of college).

²⁹⁴ See *id.*

²⁹⁵ See *id.*

would provide a fourth year of athletic eligibility—if they show academic accomplishment.²⁹⁶

Additionally, the claim is misplaced because it criticizes the NCAA for actions in which colleges regularly engage.²⁹⁷ Specifically, the NCAA's classification of a student-athlete as a non-qualifier because of a lack of academic achievement is no different than a college denying a prospective student admission for the same reason.²⁹⁸ For example, assuming a student meets the NCAA's initial eligibility requirements, but fails to meet a college's admissions requirements, the college admissions office makes the final decision on whether the student may attend that college.²⁹⁹ Criticism has not centered on the admissions office's judgment simply because it makes the final decision on admissions.³⁰⁰ Therefore, as long as the NCAA makes its decision in an equally as reasoned way as a college admissions office, the fact that it has the last word on its initial eligibility requirements should not warrant any less judicial deference than would be afforded to a college.³⁰¹

Consequently, because the NCAA shares the same purpose as academic institutions—namely, maintaining academic integrity—and because the NCAA maintains a level of expertise in college academic performance commensurate with many colleges, courts should give the NCAA the same level of deference they afford to academic institutions when evaluating Title III claims.³⁰² Courts, thus, should use the *Doe* court's interpretation of the *Martin* standard, ignoring for the purposes of the evaluation the two-pronged fundamental alteration test.³⁰³ In that way, the NCAA can protect its mission to maintain both its academic and athletic standards while continuing to make reasonable and necessary modifications for individuals with disabilities.³⁰⁴

CONCLUSION

The ADA provides student-athletes with learning disabilities a right to demand reasonable modifications to the NCAA's initial eligi-

²⁹⁶ *Id.*

²⁹⁷ See Weston, *supra* note 2, at 1122–23.

²⁹⁸ See *id.*

²⁹⁹ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 129.

³⁰⁰ See Weston, *supra* note 2, at 1122–23.

³⁰¹ See *id.*

³⁰² See *Doe*, 2003 WL 22097782, at *4–9; *Cole*, 120 F. Supp. 2d at 1070–72; *Ganden*, 1996 WL 680000, at *1, *14–16.

³⁰³ See *Doe*, 2003 WL 22097782, at *4–9; see also *Martin*, 532 U.S. at 682–83, 688.

³⁰⁴ See NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 91, at 145; NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 85.

bility requirements. That right is not without limits, however. The ADA itself provides that places of public accommodation are not required to implement modifications that would fundamentally alter the nature of their services. Furthermore, courts, including the U.S. Supreme Court in *PGA Tour, Inc. v. Martin*, have repeatedly recognized the importance of that limitation on the scope of Title III. Most noticeably, perhaps, courts have allowed academic institutions to prevail with that defense, commenting that many modifications could undermine the scholastic integrity of such institutions. Because the NCAA, like most schools, maintains a goal of high academic achievement, courts should provide the NCAA with the same level of deference they provide to schools. Only then can the NCAA achieve its goal of integrating academics and athletics, and only then can the NCAA ensure that inter-collegiate athletics maintain their place in American culture.

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