IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-cv-2077-JLK

MARK E. SHEPHERD, SR.,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE, a corporation,

Defendant.

Civil Action No. 03-cv-1364-JLK

SCOT HOLLONBECK,
JOSE ANTONIO INIGUEZ,
JACOB WALTER JUNG HO HEILVEIL, and
VIE SPORTS MARKETING, INC., a Georgia corporation,

Plaintiffs,

v.

UNITED STATES OLYMPIC COMMITTEE, a federally-chartered corporation, and
U.S. PARALYMPICS, INC., f/k/a UNITED STATES PARALYMPIC CORPORATION, a Colorado non-profit corporation,

Defendants.

[PROPOSED] ORDER GRANTING PLAINTIFF SHEPHERD'S MOTION FOR SUMMARY ADJUDICATION AND DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

I. Introduction

This matter is before me on Plaintiff's Motion for Partial Summary Adjudication and memorandum in support of same (Docket Nos. 140 and 141) and The USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief (Docket No. 139), both in the matter of Shepherd v. United States Olympic Committee, and Defendants' Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 3) in the matter of Hollonbeck v. United States Olympic Committee.[1] I heard oral argument on these three motions on September 21, 2005 and, because they raise identical legal questions, rule on them together in this Order.

Plaintiff Mark E. Shepherd, Sr. (in the Shepherd matter) and Plaintiffs Scot Hollonbeck, Jose Antonio Iniguez and Jacob Walter Jung Ho Heilveil (in the Hollonbeck matter) have brought claims against Defendant United States Olympic Committee ("USOC")[2] under Title III of the Americans with Disabilities Act ("Title III" or "ADA"), 42 U.S.C. §§ 12181 - 12189, and section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"). 29 U.S.C. § 794. The pending motions raise the question whether the USOC's decision to exclude Paralympic athletes from certain types of funding and support that it provides to Olympic athletes, and to provide other types of funding and support to Paralympic athletes in types and amounts that are

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[1] A full list of the pleadings under consideration as well as other relevant pleadings to which reference is made herein is set forth in the Appendix to this Order.

[2] Plaintiffs Hollonbeck, Iniguez and Heilveil also name U.S. Paralympics, a division of the USOC. That entity and the USOC will collectively be referred to as "Defendants" or "the USOC."

systematically inferior to those offered Olympic athletes, constitutes illegal disability discrimination under the ADA and the Rehabilitation Act. I hold that it does.

For that reason, as explained in greater detail below, I will grant Plaintiff's Motion for Partial Summary Adjudication and deny Defendant USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief (in the Shepherd matter) and deny Defendants' Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6) (in the Hollonbeck matter).

II. Procedural Posture

On October 26, 1999, Mark Shepherd, a Paralympic basketball player, filed suit against the USOC under Title III of the ADA and the Rehabilitation Act challenging alleged discrimination in the USOC's provision of funding and support to Paralympic athletes. Mr. Shepherd also brought claims under Title I of the ADA, 42 U.S.C. §§ 12111 - 12117, based on events arising out of his employment with the USOC. That Title I claim is not addressed in this Order.

On May 29, 2002, Mr. Shepherd moved to compel certain discovery relating to his Title III and Rehabilitation Act claims. (Shepherd, Pl's. Mot. to Compel (Docket No. 114).) The parties agreed that the scope of discovery hinged crucially on the resolution of the legal questions addressed in this Order. They further agreed to stay discovery, to enter a series of factual stipulations, and to request from this Court a schedule to brief these legal questions on cross motions for summary judgment. (Id., Joint Mot. for Briefing Schedule and to Extend Disc. (Docket No. 137).) This Court granted this request and established a briefing schedule. (Id.,

Minute Order (Docket No. 138).) The Shepherd case is thus currently before this Court on Mr. Shepherd's Motion for Partial Summary Adjudication (Docket Nos. 140 and 141) and the USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief (Docket No. 139).

On July 28, 2003, Scot Hollonbeck, Jose Antonio Iniguez and Jacob Walter Jung Ho Heilveil, three Paralympic wheelchair racers, filed suit against the USOC and U.S. Paralympics, Inc. under Title III and the Rehabilitation Act challenging alleged discrimination in the USOC's provision of funding and support to Paralympic athletes. That lawsuit also included claims on behalf of Vie Sports Marketing, Inc. ("Vie") based on the ADA, the Rehabilitation Act, breach of contract and promissory estoppel. Vie's claims are not addressed in this Order.

On October 6, 2003, Defendants in the Hollonbeck matter moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the ADA and Rehabilitation Act claims of Plaintiffs Hollonbeck, Iniguez, and Heilveil (Docket No. 3). The Hollonbeck case is currently before this Court on that motion to dismiss.

The parties agree that the Title III and Rehabilitation Act claims of Plaintiffs Shepherd, Hollonbeck, Iniguez, and Heilveil (the "Athlete Plaintiffs") raise the same legal questions. The specific legal question currently before the Court in both cases is this: does the USOC violate Title III of the ADA and/or the Rehabilitation Act when it explicitly excludes Paralympic athletes from certain programs or provides such athletes with explicitly inferior benefits?

III. Factual Background

Congress created the USOC through the Ted Stevens Olympic and Amateur Sports Act ("ASA"). 36 U.S.C. §§ 220501 - 220529. The ASA grants the USOC jurisdiction over "all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games." Id. § 220503(3)(A). The USOC's purposes include "to obtain for the United States the most competent amateur representation possible in each event" in the Olympic, Pan-American and Paralympic Games, "to encourage and provide assistance to amateur athletic programs and competition for amateur athletes with disabilities," and "to establish national goals for amateur athletic activities." Id. § 220503(1), (4) & (13). "Amateur athlete" is defined as "an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes." Id. § 220501(b)(1).

The USOC's Constitution states that it has the power to "represent the United States as its . . . National Paralympic Committee in relations with the International Paralympic Committee." USOC Constitution art III, § 1(B).[3] Through its Constitution, the USOC has undertaken to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games, the Pan American Games and the Paralympic Games" and to "enter competitors who will represent the United States in the Olympic Games, the Pan American Games and the Paralympic Games." Id., art. III, § 1(C) & 5.

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[3] Shepherd, Decl. of Amy F. Robertson (Docket No. 143), Ex. 1.

The Paralympics are highly competitive elite athletic competitions for athletes with disabilities. The USOC's 2000 Annual Report explains that "[t]he Paralympics are the equivalent of the Olympic Games for the physically challenged."[4] "Participants in the Paralympic Games must meet eligibility standards established through the International Paralympic Committee. Disability groups represented include amputees, blind or visually impaired athletes, athletes with cerebral palsy, athletes with spinal cord injuries and athletes who are affected by a range of other disabilities that do not fall into the aforementioned categories, such as multiple sclerosis or dwarfism."[5]

The USOC provides a number of benefits and services to Olympic athletes that it does not provide to Paralympic athletes.[6] For example, the USOC provides grants to Olympic athletes -- including Basic Grants, Special Assistance Grants, and Tuition Assistance Grants -- that it does not make available to Paralympic athletes.[7] In addition, the USOC offers Elite Athlete Health Insurance to Olympic athletes but not to Paralympic athletes.[8] The USOC provides incentives to Olympic athletes by giving them cash payments for winning medals. This program is called "Operation Gold." Prior to 2002, the USOC did not provide any awards to Paralympic

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[4] Shepherd, Docket No. 143, Ex. 2 at 18; see also Hollonbeck, Am. Compl. (Docket No. 8) ¶ 18.

[5] Id.

[6] See, e.g., Shepherd, Stipulations (Docket No. 144) ¶ 7; Hollonbeck, Docket No. 8, ¶¶ 48-59.

[7] Shepherd, Docket No. 144, ¶¶ 10, 12 & 13; Hollonbeck, Docket No. 8, ¶¶ 55-56.

[8] Shepherd, Docket No. 144, ¶ 14; Hollonbeck, Docket No. 8, ¶ 57.

athletes who won medals. Starting in 2002, the USOC began providing cash payments to Paralympic medalists -- though in amounts one-tenth of the amounts provided to Olympic medalists for equivalent medals.[9] The USOC determines usage of its training facilities by prioritizing athletes by class. Olympic athletes are allocated an A (or first) priority level whereas Paralympic athletes are allocated a C (or third) priority level.[10] The USOC's Resource Allocation Policy states that, "[p]articipation in Athlete Support Programs is available only to athletes who are eligible to represent the United States and who intend to compete, if selected, in the next Olympic or Pan American Games."[11] The USOC provides Pan American athletes with many of the same grants and insurance it provides Olympic athletes but denies Paralympic athletes.[12]

The Athlete Plaintiffs all have disabilities that cause them to use wheelchairs for mobility.[13] All of the Athlete Plaintiffs are elite Paralympic athletes, and each has trained for, and competed in, Paralympic Games.[14]

Based on their accomplishments and training, the Athlete Plaintiffs are Paralympic-caliber athletes. Yet they are not eligible for grants, insurance, medal incentives and

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[9] Shepherd, Docket No. 144, ¶ 8; Hollonbeck, Docket No. 8, ¶¶ 51-53.

[10] Shepherd, Docket No. 144, ¶ 9; Hollonbeck, Docket No. 8, ¶ 54.

[11] Shepherd, Docket No. 139, Ex. B at 1.

[12] Id. at 3.

[13] Shepherd, Docket No. 144, ¶ 1; id., Docket No. 139 at 15; Hollonbeck, Docket No. 8, ¶¶ 9-11.

[14] Shepherd, Docket No. 144, at ¶ 2; id., Decl. of Mark E. Shepherd, Sr., (Docket No. 142), ¶¶ 2-5; Hollonbeck, Docket No. 8, ¶¶ 34-47.

training priorities for which similarly-situated Olympic athletes are eligible. That is, Olympic-caliber athletes and athletes training for the next Olympic Games in Olympic sports in non-Olympic years are eligible for the benefits of "Olympic programming" -- including the benefits described above -- while Paralympic-caliber athletes and athletes training for the next Paralympic Games in Paralympic sports in non-Paralympic years are not.[15]

IV. Standard of Review

In Shepherd, the USOC has moved for summary judgment on Mr. Shepherd's ADA and Rehabilitation Act claim; Mr. Shepherd has moved for partial summary adjudication on the question whether the USOC violates Title III of the ADA and/or the Rehabilitation Act when it explicitly excludes Paralympic athletes from certain programs or provides such athletes with explicitly inferior benefits.

Summary judgment is appropriate only where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Allstate Ins. Co. v. Brown, 920 F.2d 664, 668 (10th Cir. 1990).

> "[I]t is now well established that a court may 'grant' partial summary 'judgment' that establishes the existence or nonexistence of certain facts, even though no actual judgment is entered on a claim." . . . "A partial summary judgment ruling may dispose of only a single issue relevant to a claim. . . . In availing itself of the ability granted by Rule 56 to issue orders which resolve significant questions, a court can focus the litigation on the true matters in controversy."

Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 486 n.13 (D. Colo. 1998) (quoting 11 J. Moore, Moore's Federal Practice ¶ 56.40[2] at 56-279, 56-280 to 56-281 (3d ed. 1998)). In the Shepherd

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[15] Shepherd, Docket No. 144, ¶¶ 3, 7-15; see also Hollonbeck, Docket No. 8, ¶ 48.

case, the parties have stipulated to or do not contest the material facts; it is thus appropriate to rule as a matter of law on the question posed in the parties' motions.[16]

In Hollonbeck, Defendants have moved to dismiss the Athlete Plaintiffs' Title III and Rehabilitation Act claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dismissal under this rule is appropriate "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003) (internal quotes omitted). "An affirmative defense may be raised in a motion to dismiss only if the defense appears plainly on the face of the complaint." Guardian Title Agency, LLC v. Matrix Capital Bank, 141 F. Supp. 2d 1277, 1280 (D. Colo. 2001) (citing Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 n.3 (10th Cir. 1999)).

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[16] After having entered an agreement with Plaintiff Shepherd to stay discovery and brief the pending issue -- in consideration of which Plaintiff withdrew his motion to compel -- the USOC argued that the relief Mr. Shepherd requested -- partial summary adjudication -- was not permitted. (Shepherd, The USOC's Resp. in Opp'n to Pl.'s Mot. for Partial Summ. Adjudication (Docket No. 146) at 2-7.) As the cases cited in text make clear, I have the power to resolve a single legal issue especially where, as here, it will assist the parties in managing the remainder of the litigation. The USOC, in any event, waived this argument by signing the Joint Motion for Briefing Schedule and to Extend Discovery, which stated "the Parties have agreed . . . to submit cross-motions for summary judgment to the Court on the question whether these disparities [in funding and support between Olympic and Paralympic athletes] constitute illegal discrimination." (Id., Docket No. 137, ¶ 3.)

V. DISCUSSION

A. Subject Matter Jurisdiction

Defendants assert that the Athlete Plaintiffs' ADA and Rehabilitation Act claims are in fact claims under the ASA and that, because that latter statute does not have a private right of action, this Court thus does not have subject matter jurisdiction.

It is important to establish what this part of the dispute is not about.

Defendants and Plaintiffs agree that the ASA does not provide a private right of action. This is correct. See 36 U.S.C. § 220505(b)(9); Martinez v. United States Olympic Comm., 802 F.2d 1275, 1280-81 (10th Cir. 1986).

Plaintiffs do not assert claims under the ASA. (See Shepherd, Pl.'s Mem. in Opp'n to the USOC's Mot. for Summ. J on Pl.'s Second and Third Claims for Relief (Docket No. 145) at 5; Hollonbeck, Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss Pls.' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P 12(b)(6) (Docket No. 11) at 18, 22-24.)[17]

Defendants are not arguing that the ASA preempts the ADA or Rehabilitation Act. (Shepherd, The USOC's Reply in Supp. of Mot. for Summ. J. (Docket No. 149) at 2; Hollonbeck, Defs.' Reply in Supp. of Mot. to Dismiss Pls.' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6) (Docket No. 13) at 3.)[18]

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[17] See also generally Shepherd Third Am. Compl. (Docket No. 91); Hollonbeck, Docket No. 8.

[18] It is, in any event, clear that the ASA does not preempt either the ADA or the Rehabilitation Act. See Devlin ex rel. Devlin v. Ariz. Youth Soccer Ass'n, No. CIV 95-745

(continued...)

These latter two principles -- that the Athlete Plaintiffs do not bring claims under the ASA and that Defendants do not argue that the claims asserted by the Athlete Plaintiffs are preempted -- dispose of all of the cases cited by Defendants in their briefs, most of which establish that the ASA does not have a private right of action,[19] and one of which also holds that the ASA preempts state law claims relating to eligibility for competition.[20]

Defendants argue that the Athlete Plaintiffs' claims are, in reality, ASA claims "disguised as disability discrimination" claims. (Shepherd, Docket No. 139 at 10; see also Hollonbeck, Docket No. 3 at 6.) Defendants contend that this Court should construe them as ASA claims instead, and dismiss them because the ASA has no private right of action. Plaintiffs have not

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[18](...continued)
TUC ACM, 1996 WL 118445, at *2 (D. Ariz. Feb. 8, 1996) (holding that the ASA does not preempt the ADA). Several courts have considered on their merits federal civil rights claims against National Governing Bodies ("NGBs") of specific sports. See Akiyama v. United States Judo, Inc., 181 F. Supp. 2d 1179, 1182-83 (W.D. Wash. 2002) (considering on its merits a claim against the NGB of judo under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a)); Sternberg v. U.S.A. Nat'l Karate-do Fed'n, Inc., 123 F. Supp. 2d 659, 661-62 (E.D.N.Y. 2000) (holding that female athlete stated cause of action against the NGB of karate for gender discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681). These cases are significant because NGBs are subjects of the ASA's dispute resolution provision, 36 U.S.C. §§ 220504(b)(1) & 220509(a), which the USOC believes should govern the Athlete Plaintiffs' claims. (See Hollonbeck, Docket No. 3 at 7.)

[19] Martinez, 802 F.2d at 1280-81; Michels v. United States Olympic Comm., 741 F.2d 155, 156 (7th Cir. 1984); Oldfield v. Athletic Cong., 779 F.2d 505, 506-08 (9th Cir. 1985); DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181, 1191-92 (D.D.C.), aff'd 701 F.2d 221 (D.C. Cir. 1980); Walton-Floyd v. United States Olympic Comm., 965 S.W.2d 35, 38-40 (Tex. App. 1998); Dolan v. United States Equestrian Team, Inc., 608 A.2d 434, 437 (N.J. Super. Ct. App. Div. 1992).

[20] Walton-Floyd, 965 S.W.2d at 40.

asserted a claim under the ASA,[21] however, and Defendants provide no support for the proposition that they may dictate to Plaintiffs how to denominate their claims. This Court will not rewrite the Athlete Plaintiffs' claims at Defendants' request, and then dismiss them based on the legal shortcomings of the rewritten claims.

Plaintiffs have elected to proceed under Title III and the Rehabilitation Act and this Court will evaluate those claims on their merits. Indeed, Defendants' ASA argument is ultimately an argument that the Athlete Plaintiffs' claims have no merit. Defendants assert, in making their ASA argument, that "[n]either the ADA nor [the Rehabilitation Act] are meant to provide a remedy to a class of athletes who are displeased by the USOC's financial allocations." (Shepherd, Docket No. 149 at 2.) This is simply the merits question whether the ADA or Rehabilitation Act provide a remedy for the facts alleged by the Athlete Plaintiffs.

Plaintiffs have made clear that they do not seek to force the USOC to provide athletes with benefits or services that it does not already provide, as an ASA claim would. Rather, they seek what the ADA and the Rehabilitation Act guarantee: freedom from discrimination in the delivery of whatever benefits and services the USOC may elect to provide. Defendants argue that "[t]he only obligation the USOC has at all with respect to Olympic, Paralympic or Pan

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[21] The fact that the Athlete Plaintiffs -- and this Court -- must refer to the ASA to describe the formation and purposes of the USOC does not transform Plaintiffs' claims into ASA claims any more than the repeated references to the Rules of Golf in PGA Tour, Inc. v. Martin, 532 U.S. 661, 666 (2001), transformed Mr. Martin's Title III claims into claims brought under the Rules of Golf. The ASA establishes the USOC much as the articles of incorporation of a corporation would. Reference to the ASA is necessary simply to understand what the USOC is and what it does.

American athletes is enumerated in the ASA." (Shepherd, Docket No. 139 at 10; Hollonbeck, Docket No. 3 at 6.) Defendants offer no support for the proposition that their discretion to allocate resources is unbounded, even by important civil rights laws whose very purpose is to prevent discrimination in the provision of benefits to protected classes. It cannot be the case, for example, that Defendants could provide benefits and services to white athletes but not black, or to Christian athletes but not Jewish, with no recourse to federal civil rights laws. Before this Court will find that the USOC is exempt from this nation's civil rights laws, there must be clear and compelling evidence that Congress intended such a result. Defendants have offered no such evidence.

Since Defendants are not arguing for preemption and the USOC is not immune from federal civil rights laws, the ultimate question is not one of subject matter jurisdiction, but simply the question -- going to the merits -- of whether the Athlete Plaintiffs have stated a claim under the statutes they have invoked. As discussed in greater detail below, the Athlete Plaintiffs have done this.

B. The Americans with Disabilities Act and the Rehabilitation Act

The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); see also PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (holding that the ADA provides a "broad mandate" to eliminate discrimination against people with disabilities). Title III of the ADA prohibits disability discrimination "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." 42 U.S.C. § 12182(a).

Under the Rehabilitation Act, a qualified individual with a disability may not -- solely by reason of his or her disability -- be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

The text of Title III describes prohibited discrimination in detail. See 42 U.S.C. §§ 12182 - 12189.[22] The Rehabilitation Act itself simply prohibits disability discrimination by entities receiving federal financial assistance, while delegating to each agency providing such assistance the task of crafting regulations implementing the statute. See 29 U.S.C. § 794(a). The Rehabilitation Act regulations relevant to this case are those of the Department of Defense ("DOD Regs"), 32 C.F.R. part 56 -- because the USOC has stated that it received federal financial assistance in the form of a grant of land from the Department of the Air Force[23] -- and the DOJ Coordination Regulations ("DOJ Coordination Regs"), 28 C.F.R. part 41, which apply "to each Federal department and agency that is empowered to extend Federal financial assistance." 28 C.F.R. § 41.2.

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[22] See also 28 C.F.R. pt. 36 (DOJ Title III regulations). The DOJ's Title III regulations are "entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 646 (1998).

[23] See Shepherd, Def.'s Resp. in Opp'n to Pl.'s Mots. for Sanctions Pursuant to 28 U.S.C. § 1927 and Rule 11 (Docket No. 119) at 15.

1. Elements of a Prima Facie Case

Under the Rehabilitation Act, the Athlete Plaintiffs are required to show that (1) they have a disability; (2) they are otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against them. See Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999).

Under Title III of the ADA, the Athlete Plaintiffs must show that (1) they have a disability; (2) Defendants own, operate, lease or lease to a place of public accommodation; and (3) they were denied full and equal treatment because of their disability. See Parr v. L & L Drive-Inn Restaurant, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001).

a. Disability, federal financial assistance, and place of public accommodation

In the Hollonbeck matter, the Athlete Plaintiffs have properly alleged that they are individuals with disabilities. (Docket No. 8, ¶¶ 9-11.) In the Shepherd matter, Defendant USOC has stated that, "[i]t is undisputed for the purposes of this brief that Plaintiff is disabled as defined by the ADA and [the Rehabilitation Act]." (Docket No. 139 at 15.)

In Hollonbeck, the Athlete Plaintiffs have properly alleged that Defendants receive federal financial assistance and are places of public accommodation. (Docket No. 8, ¶¶ 24-33; 149-150.)

In the Shepherd matter, Defendant USOC has withdrawn its defense that it does not receive federal financial assistance,[24] and the parties have agreed to reserve the question whether the USOC is a place of public accommodation as that term is used in Title III. (Shepherd, Third Decl. of Amy F. Robertson (Docket No. 150), Ex. 28 at 3 (Sept. 6, 2002 letter from V. Morgan to A. Robertson).)

b. Qualification

Congress gave the USOC -- and the USOC's Constitution assumes -- responsibility for Olympic and Paralympic athletes. Specifically, the USOC's purpose includes "obtain[ing] for the United States the most competent amateur representation possible in each event" in the Olympic, Pan-American and Paralympic Games, and "establish[ing] national goals for amateur athletic activities." 36 U.S.C. § 220503(1) & (4). "Amateur athlete" is defined as "an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes." Id. § 220501(b)(1). The Athlete Plaintiffs are qualified for the USOC's programs -- and thus satisfy that prong of their prima facie case -- because they are all Paralympic athletes and, as such, meet Paralympic eligibility standards.

Defendants argue that the Athlete Plaintiffs are not qualified to receive benefits that the USOC limits to Olympic athletes because they are not Olympic athletes. This is circular.

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[24] Shepherd, Stipulation re: (1) Pl.'s Mot. to Modify Case Management Order; (2) Def.'s Withdrawal of Affirmative Defense; (3) Pl.s' Mot. for Leave to File Am. Compl. (Docket No. 81) at 2.

Defendants have defined qualification in terms of the precise category the Athlete Plaintiffs challenge as discriminatory: the limitation of certain benefits to Olympic athletes. See Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 441 (E.D. Va. 1995) (noting, in addressing mental health question on bar application, that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual' because she failed to answer [the mental health question], this argument begs the question of whether [the question] must be answered at all.").

In Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994), the defendant city originally funded a number of recreational programs for both disabled and nondisabled participants, but ultimately cut funding to several programs designed specifically for individuals with disabilities. Id. at 988-89. The court sua sponte considered the question whether children with physical disabilities were qualified to participate in, for example, the city's soccer program. The court concluded that that focus was too narrow:

> [I]t may be the case that there are wheelchair-bound children who cannot meet the "essential requirements" for a soccer team because they cannot run or cannot kick a ball. However, such an analysis would be persuasive only if the full and entire extent of the City's recreational program was one soccer team. An "essential eligibility requirement" of a soccer team may be the ability to run and kick, but the only "essential eligibility requirement" of the City's recreational program (which is the sum of a variety of individual recreational, social, and educational activities and programs) is the request for the benefits of such a program.

Id. at 990 (emphasis in original; citations omitted). Likewise, the "full and entire extent" of the USOC's program is not the Olympics; it is "the sum of a variety of individual . . . programs" -- including the Olympics, the Paralympics and the Pan American games -- for which Congress

gave the USOC responsibility. See, e.g., 36 U.S.C. § 220503(3)(A). Because they are Paralympic athletes, the Athlete Plaintiffs are qualified for the USOC's program.

c. Discrimination on the Basis of Disability

The provisions of the ADA, the DOD Regs and the DOJ Coordination Regs that govern Defendants' conduct in this case are largely consistent. They all provide that illegal disability discrimination may take the form of denial of participation to individuals with disabilities[25] or provision of unequal benefits to such individuals.[26] The ADA provides, in addition, that it is illegal to impose eligibility criteria that screen out or tend to screen out people with disabilities, unless such criteria are necessary for the provision of the goods or services at issue. 42 U.S.C. § 12182(b)(2)(A)(i).

(1) Denial of Participation and Provision of Unequal Benefits

The Athlete Plaintiffs allege (in Hollonbeck) and the USOC has stipulated (in Shepherd) that the USOC provides services, benefits, and supports to Olympic athletes that they deny to Paralympic athletes or systematically provide Paralympic athletes in inferior amounts. (See Hollonbeck Docket No. 8, ¶¶ 48-59; Shepherd Docket No. 144, ¶¶ 3, 7-15.) These policies facially discriminate against elite athletes with disabilities. This discrimination includes denial of participation in benefits and services, in violation of 42 U.S.C. § 12182(b)(1)(A)(i), 28 C.F.R.

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[25] 42 U.S.C. § 12182(b)(1)(A)(i) (Title III); 28 C.F.R. § 41.51(b)(1)(i) (DOJ Coordination Regs); 32 C.F.R. § 56.8(a)(2)(ii) (DOD Regs).

[26] 42 U.S.C. § 12182(b)(1)(A)(ii) (Title III), 28 C.F.R. § 41.51(b)(1)(ii) (DOJ Coordination Regulations); 32 C.F.R. § 56.8(a)(2)(iii) (DOD Regs).

§ 41.51(b)(1)(i), and 32 C.F.R. § 56.8(a)(2)(ii), and the provision of unequal benefits, in violation of 42 U.S.C. § 12182(b)(1)(A)(ii), 28 C.F.R. § 41.51(b)(1)(ii), and 32 C.F.R. § 56.8(a)(2)(iii). Plaintiffs have made out a prima facie case of intentional discrimination because they have demonstrated that "a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." See Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995).

Defendant argues that it is merely making distinctions among athlete classes rather than discriminating on the basis of disability. The fact that the favored and disfavored groups here are labeled "Olympic athletes" and "Paralympic athletes" rather than "elite athletes without disabilities" and "elite athletes with disabilities" is of no moment. Paralympic athletes constitute the one set of elite athletes for which the USOC has responsibility, all of whom are disabled. The USOC itself asserts that "all Paralympians are disabled," (Shepherd Docket No. 139 at 12; Hollonbeck, Docket NO. 3 at 7), and describe the Paralympics as "the equivalent of the Olympic Games for the physically challenged." (Shepherd, Docket No. 143, Ex. 2 at 18.) By systematically disfavoring these equivalent but physically challenged athletes, the USOC engages in facial disability discrimination.

Neither the denial of participation nor the unequal benefit provision contains any defense.[27] As the legislative history makes clear, "it is a violation of [Title III] to exclude persons

[27] The only defense that applies to either section is the general "direct threat" defense, which applies to all of Title III. 42 U.S.C. § 12182(b)(3). Defendants do not assert this defense.

with disabilities. For example, it would be a violation for a grocery store to impose a rule that no blind persons would be allowed in the store, or for a drugstore to refuse to serve deaf people." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388. Likewise, it is a violation of Title III -- and the Rehabilitation Act -- for the USOC to impose a rule that Paralympic athletes are ineligible to receive grants, insurance, medal incentives, and other benefits that Olympic athletes are eligible to receive.

(2) Proxy Discrimination

Even if the discrimination were technically between athlete classes, as Defendants argue, rather than between disabled and nondisabled athletes, it would still constitute illegal proxy discrimination. When a classification used to discriminate is closely aligned with a protected classification, it is illegal. See, e.g. McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (holding that a defendant "cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination. An example is using gray hair as a proxy for age: there are young people with gray hair (a few), but the 'fit' between age and gray hair is sufficiently close that they would form the same basis for invidious classification."); Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1070 (N.D. Ill. 1996) (holding that fire code provision that applied to "facilities that house four or more unrelated persons 'for the purpose of providing personal care services'" was a proxy for intentional disability discrimination); Horizon House Developmental Servs., Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992) (holding that an ordinance requiring 1000 feet between facilities in which "permanent care or professional supervision is present" was

facially discriminatory), aff'd, 995 F.2d 217 (3rd Cir. 1993). In the present case, even if "Paralympian" were not a synonym for "elite disabled athlete," it would, at the very least, be a proxy for that class of person. As noted above, the USOC itself commonly equates Paralympians with disabled athletes in its own publications.[28]

The USOC argues that Community Services, Inc. v. Wind Gap Municipal Authority, 421 F.3d 170 (3d Cir. 2005), undercuts this conclusion. In that case, however, the fit between the challenged classification and the protected class was too remote to sustain a holding of proxy discrimination. The Community Services plaintiff was a corporation that leased a house to provide caretaker services for three women with cognitive disabilities. Id. at 171. The defendant city determined that the plaintiff corporation owed higher fees because the facility was a "personal care home" and therefore "commercial." Id. at 173-74. The court noted that the term "personal care home" could include facilities such as those providing services for the elderly, juveniles, the homeless, battered women or ex-criminal offenders -- that is, it was in no way equated with "home for the disabled." Id. at 179. Even if it were so equated, there was no evidence that the classification "commercial" was based on the disabilities of the facility's residents, id.; rather, the facility shared that classification with, for example, hotels, nursing homes, boarding houses, restaurants, bars, taverns, fitness centers, offices, photo labs and car washes. Id. at 173. That is, the essential classification -- the one singled out for higher fees -- was one shared by a wide variety of entities in no way related to people with disabilities. This

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[28] See, e.g., Shepherd, Docket No. 143, Exs. 2-4.

lack of "fit" distinguished the case from "true 'proxy'" cases such as Horizon House, 804 F. Supp. 683, and Alliance for the Mentally Ill, 923 F. Supp. 1057, the cases on which the Athlete Plaintiffs rely. See Community Services, 421 F.3d at 180. Here, the "fit" between Paralympic athletes and elite disabled athletes is even closer than the zoning classifications in the Horizon House and Alliance cases; it is rather equivalent to the "fit" in the hypothetical proxy discrimination in McWright: between people with gray hair and elderly people.[29]

The USOC further argues that the classification at issue here is "Olympic athlete," not "Paralympic athlete," that is, that "[e]ligibility for Olympic Programming turns not on whether someone is a Paralympic athlete, but rather whether someone is an Olympic athlete." (Shepherd, Def.'s Submission of Recently Decided Authority in Supp. of its Resp. in Opp'n to Pl.'s Mot. for Partial Summ. J. (Docket No. 177) at 3 (emphasis in original).) This is, at best, simply the other side of the same coin: "Olympic athlete" is proxy for "elite nondisabled athlete;" "Paralympic athlete" is proxy for "elite disabled athlete."[30] Either way, the nondisabled class receives benefits that the disabled class does not. Of the three elite athlete classes for which the USOC has been

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[29] Defendants also argue that Community Services requires "direct or circumstantial evidence of discriminatory animus" in order to hold a neutral classification illegal as facial discrimination. (Shepherd, Docket No. 177 at 2.) This is not so. While the Third Circuit noted that such animus was often present in proxy cases, Community Services, 421 F.3d at 180, it also acknowledged that, where a plaintiff demonstrated a facially discriminatory classification, "'a plaintiff need not prove the malice or discriminatory animus of a defendant." Id. at 177 (quoting Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995)).

[30] The USOC acknowledges the fact that "all Paralympians are disabled," (Shepherd Docket No. 139 at 12; Hollonbeck, Docket No. 3 at 7), and the "reality that very few disabled athletes are likely to compete in the Olympics." (Shepherd, Docket No. 149 at 6; Hollonbeck, Docket No. 13 at 9.)

given responsibility -- Olympic, Pan American, and Paralympic -- both of the former two receive benefits and support that the last -- the only category consisting entirely of disabled athletes -- is denied.[31] So it is in fact Paralympic athletes who are singled out to be denied benefits received by most other elite athletes.

It is irrelevant both that the occasional Olympic athlete with a disability may be entitled to the benefits at issue here and that Pan American athletes are denied some Olympic benefits. "That a law may not burden all members of the protected class does not remove its facially discriminatory character." Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997) (citing Asbury v. Brougham, 866 F.2d 1276, 1281-82 (10th Cir. 1989)).[32] "The flipside of this last point is also true: that an ordinance also discriminates against individuals unprotected by the [Fair Housing Act] does not eliminate a FHA violation." Id. The "fit" is sufficiently close between Paralympic athletes and elite athletes with disabilities to make facial discrimination against the former a proxy for facial discrimination against the latter.

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[31] Shepherd, Docket No. 139, Ex. B at 1, 3. Defendants argue that they do not discriminate against Paralympic athletes because Pan American athletes also receive lesser benefits than Olympic athletes. First, as noted in text, Pan American athletes do receive many of the same benefits Olympic athletes receive -- benefits that are denied Paralympic athletes. Furthermore, there is no evidence that Pan American athletes constitute a protected class, for example, that they largely consist of Latino athletes.

[32] See also Hargrave v. Vermont, 340 F.3d 27, 31, 36-37 (2d Cir. 2003) (holding that statute affecting individuals with mental illness who were civilly committed or in prison violated Title II of the ADA despite the fact that it only affected a subset of individuals with mental illness); Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002) (holding that the fact that some individuals with disabilities were eligible for certain government benefits did not excuse the exclusion of the plaintiffs on a discriminatory basis), cert. denied, 537 U.S. 1105 (2003).

(3) Imposition of Unnecessary Eligibility Criteria

The Athlete Plaintiffs argue, in the alternative, that even if the exclusion of and discrimination against Paralympic athletes is not facial disability discrimination, requiring an athlete to be an Olympic athlete to qualify for USOC benefits constitutes an unnecessary eligibility criterion. Under the ADA, imposition of eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities is a form of prohibited disability discrimination unless such criteria are necessary for the provision of the goods or services at issue. 42 U.S.C. § 12182(b)(2)(A)(i). This provision "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388; see also Hahn ex rel. Barta v. Linn County, 130 F. Supp. 2d 1036, 1055 (N.D. Iowa 2001) (same); Guckenberger v. Boston Univ., 974 F. Supp. 106, 134 (D. Mass. 1997) (same). Given that only Olympic -- but not Paralympic -- athletes are eligible for many of the services, benefits, and supports provided by Defendants, the chances of most elite disabled athletes qualifying for these benefits are next to zero. For this reason, and as a matter of common sense, excluding Paralympic athletes will tend to screen out "a class of individuals with disabilities," that is, elite disabled athletes. This is so even if Defendants are correct that excluding Paralympic athletes is not a "direct bar" to elite athletes with disabilities.

Defendants argue that their eligibility criterion -- that athletes must be Olympic athletes to qualify for most benefits -- is not in fact discriminatory because it "exclude[s] most of the human

population, irrespective of disability." (Shepherd, Docket No. 146 at 12; see also Hollonbeck, Docket No. 13 at 5.) This argument ignores the fact that the relevant population consists of those elite athletes for whom Congress gave the USOC responsibility. Among those athletes, the USOC may not -- in carrying out its duties -- impose a criterion that systematically favors those who are not disabled over those who are. Indeed, Defendants' argument would vitiate all discrimination claims: the USOC could provide benefits only to elite white athletes and refuse to provide them to elite African American athletes on the grounds that most of the white population at large would not qualify either. Defendants' eligibility criterion screens out or tends to screen out individuals with disabilities. The only defense to this provision -- that the criterion is necessary -- will be addressed below. See infra Section V(C)(2).

In sum, the Athlete Plaintiffs have properly alleged (in Hollonbeck) and the undisputed facts demonstrate (in Shepherd) that the Athlete Plaintiffs are qualified to receive benefits from the USOC and that Defendants discriminate against the Athlete Plaintiffs based on their disability in violation of the ADA and the Rehabilitation Act. The Athlete Plaintiffs have thus established a prima facie case of disability discrimination under the ADA and the Rehabilitation Act.

C. Defenses

Defendants assert three defenses. Defendants argue that they are free to provide different benefits to Olympic and Paralympic athletes because the programs are separate. In response to the Athlete Plaintiffs' eligibility criterion claim, Defendants argue that the criterion of being an Olympic athlete is necessary to their program. Finally, Defendants argue that, under the ADA,

they are not required to provide accessible or special goods that are designed for individuals with disabilities.

1. Separate Programs

Defendants argue that they are not discriminating against elite athletes with disabilities but merely making the administrative choice to fund two separate programs differently. Further, they argue, the Olympics are not actually closed to elite athletes with disabilities; those athletes are free to try out for Olympic competition just like nondisabled athletes. (See Shepherd, Docket No. 139 at 17.) These arguments were effectively rejected by the Ninth Circuit in the case of Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004), which endorsed the approach in Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994).

In Dreher Park, as explained above, the defendant city cut funding to several programs for individuals with disabilities. Id. at 988-89. The court held that this constituted illegal discrimination because "elimination of the [those] programs ha[d] the effect of denying persons with disabilities the benefits of the City's recreational programs," despite the fact that "none of the City's recreational programs [was] closed to individuals with disabilities." Id. at 991. That is, the fact that the programs were separate -- and that the nondisabled programs were technically open to all -- was not a defense to liability for disability discrimination.[33]

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[33] The Dreher Park case points out that separate programs may be required to provide effective services to people with disabilities: "[T]he ADA contemplates that different or separate benefits or services be provided if they are 'necessary to provide qualified individuals (continued...)

The Ninth Circuit explicitly adopted this approach in Rodde. The plaintiffs in that case challenged, under Title II of the ADA,[34] the closure of a rehabilitation hospital that provided a unique range of services necessary for individuals with certain disabilities. Id., 357 F.3d at 990-91. The defendant argued that the disabled plaintiffs could use any one of several hospitals that remained open and did not have a right to the "specialized medical expertise" of the rehabilitation hospital. Id. at 995, 998. The Ninth Circuit disagreed, stating that it found the Dreher Park decision "persuasive":

> In both Dreher Park and this case, the government first consolidated services for the disabled at a single facility. Then, due to budget shortages, the government decided to close the single facility providing specialized programs for the disabled, while continuing to operate the facilities providing the same category of services to non-disabled individuals. While the disabled could theoretically seek service from the remaining facilities, the evidence suggested in Dreher Park, as it does here, that the services designed for the general population would not adequately serve the unique needs of the disabled, who therefore would be effectively denied services that the non-disabled continued to receive. In light of all these parallels, the district court did not abuse its discretion in adopting Dreher Park's conclusion that such action violates the ADA and warrants an injunction.

Rodde, 357 F.3d at 998. The USOC's policy of denying benefits to Paralympic athletes that it grants to Olympic athletes is analogous to the county's policy of closing the only hospital

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[33](...continued)
with disabilities with aids, benefits, or services that are as effective as those provided to others.' 28 C.F.R. 35.130(b)(1)(iv)." Id. at 991. Although the provision to which that cite refers appears in the regulations enforcing Title II of the ADA, governing public entities, a similar provision appears in Title III, 42 U.S.C. § 12182(b)(1)(A)(iii), the DOD Regs, 32 C.F.R. § 56.8(a)(2)(i), and the DOJ Coordinating Regs. 45 C.F.R. § 41.51(b)(1)(iv).

[34] 42 U.S.C. § 12131 - 12165 (prohibiting discrimination on the basis of disability by public entities).

uniquely situated to provide services to people with disabilities. While elite athletes with disabilities "could theoretically" compete in the Olympics, those games do not provide real opportunities for such athletes. The Olympics and Paralympics are not simply separate programs -- between which the USOC can discriminate at will -- they are one program that is effectively closed to elite athletes with disabilities, and a second that consists exclusively of such athletes. Providing funding and benefits to the former that are denied the latter violates the ADA and the Rehabilitation Act.

This is in accord with 20 years of case law under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, which prohibits education programs receiving federal financial assistance from discriminating on the basis of sex. Courts have widely interpreted this statute to require equitable treatment of male and female athletes participating in separate teams and programs. See, e.g., Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829-32 (10th Cir. 1993) (holding that university violated Title IX when it cut its women's softball team); Cohen v. Brown Univ., 991 F.2d 888, 903-04 (1st Cir. 1993) (holding that demoting two women's varsity teams to club status violated Title IX); Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc., 123 F. Supp. 2d 659, 661-62 (E.D.N.Y. 2000) (holding that female athlete stated cause of action against the NGB of karate for sex discrimination under Title IX based on the NGB's decision to withdraw a women's team from world championship competition while permitting the equivalent men's team to participate). In each of these cases, the men's and women's programs were separate -- as here, involving separate teams often playing different sports -- yet Title IX prohibited discrimination against the women's program.

These Title IX cases are especially relevant to this Court's analysis of the Athlete Plaintiffs' claims, as Congress has made clear that the Rehabilitation Act is to be read and interpreted together with Title IX. See S. Rep. No. 100-64, 100th Cong., 1st Sess. at 3, reprinted in 1988 U.S.C.C.A.N. 3, 5 ("the same standards are used to interpret and enforce [those] laws"); see also Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1379 (10th Cir. 1981) (holding that the Rehabilitation Act and Title IX were both patterned after Title VI of the Civil Rights Act, 42 U.S.C. § 2000d). Just as a college may not deny benefits to its female athletes that it provides to its male athletes simply on the grounds that it has chosen to administer those teams or programs separately, Defendants may not deny benefits to Paralympic athletes that it provides to Olympic athletes simply because it administers those programs separately.[35]

Defendants' separate-programs argument relies on John Does 1-5 v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996), and Castellano v. City of New York, 946 F. Supp. 249 (S.D. N.Y. 1996). In both cases, however, the favored program was in fact fully and effectively open to individuals with disabilities. In Chandler, the favored program provided benefits to needy families with dependent children. Because there are many families with dependent children one or more of whose members are disabled, this program was in no way closed to people with

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[35] Defendants distinguish these cases and Title IX by arguing that the ASA mandates parity among male and female athletes but not among disabled and nondisabled athletes. (See, e.g., Hollonbeck, Docket No. 13 at 13 (citing 36 U.S.C. § 220524(6)).) As noted above, the Athlete Plaintiffs are not proceeding under the ASA. In addition, the provision on which Defendants rely -- § 220524(6) -- governs NGBs, not the USOC.

disabilities. Id. at 1155.[36] Similarly, in Castellano, the City of New York provided more favorable retirement benefits to police officers who retired after 20 years of service than for those who retired with a disability. Id., 946 F. Supp. at 251-52. As the Second Circuit made clear in affirming the district court's decision, there was no discrimination because the more favorable retirement benefits were "available equally to persons with and without disabilities who retire after twenty years of service." Castellano v. City of New York, 142 F.3d 58, 70 (2d Cir. 1998). Both cases are distinguishable from the situation here, where the favored class -- Olympic athletes -- is not effectively available to elite athletes with disabilities.

USOC attempts to distinguish Rodde and Dreher Park on the grounds that they involved public entities. (See Shepherd, Def.'s Resp. to Pl.'s Supplemental Authority (Docket No. 170) at 2; Hollonbeck, Defs.' Resp. to Pls.' Supplemental Authority (Docket No. 21) at 2.) However, the operative provisions of Title II (which applies to public entities) on the one hand and Title III and the Rehabilitation Act (which are at issue here) on the other are virtually identical. Compare 28 C.F.R. § 35.130(b)(1)(i) & (ii) (DOJ Title II regulations prohibiting denial of participation and provision of unequal benefits) with 42 U.S.C. § 12182(b)(1)(A)(i) & (ii) (Title III; same); 28 C.F.R. § 41.51(b)(1)(i) & (ii) (DOJ Coordination Regs; same); and 32 C.F.R. § 56.8(a)(2)(ii) & (iii) (DOD Regs; same).

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[36] In Rodde, the Ninth Circuit has spoken more directly and recently on -- and answered in the affirmative -- the question whether disfavoring a separate program designed for people with disabilities can constitute illegal discrimination.

Defendants also attempt to distinguish Rodde and Dreher Park on the grounds that, in those cases, programs for people with disabilities were being eliminated completely, whereas here, the USOC provides some funding and support for Paralympic athletes. (See Shepherd, Docket No. 170 at 2; Hollonbeck, Docket No. 21 at 2.) This misconstrues the import of these two cases for Defendants' argument. Defendants argue that their Olympic and Paralympic programs are separate and that this fact insulates their disparate support for those programs from any analysis under anti-discrimination statutes such as the ADA and the Rehabilitation Act. Dreher Park, Rodde, and the Title IX cases all demonstrate that this argument has no merit.

Plaintiffs are not arguing -- and this Court does not hold -- that all disparities in support among Olympic and Paralympic athletes are per se discriminatory. Rather, the parties in Shepherd have submitted to this Court the question whether the USOC ever commits disability discrimination by favoring Olympic over Paralympic athletes, the same question that is raised in th USOC's motion to dismiss in Hollonbeck. The USOC argues that "disparate allocation of resources between Olympic and Paralympic athletes is not a cognizable claim under either the ADA or [the Rehabilitation Act]," (Shepherd, Docket No. 139 at 2; Hollonbeck, Docket No. 3 at 3), and appears to reserve for itself the right to eliminate Paralympic support entirely. (See Hollonbeck, Docket No. 3 at 19 ("In fact, neither the ADA nor the [Rehabilitation] Act requires the USOC to provide any services whatsoever to Paralympic athletes."); Shepherd, Docket No. 13 at 17 (same).) This Court disagrees. Rather, this Court holds that such disparities can constitute disability discrimination in violation of the ADA and Rehabilitation Act, and that

excluding Paralympic athletes completely from specific programs -- for example, health insurance or tuition grants -- violates those two statutes.

Defendants suggest that this result will lead to a parade of horribles: the National Football League, the Professional Golfers' Association and the like will be required to "provide separate but equal programming for any athlete who cannot qualify for their current programs." (See, e.g., Shepherd, Docket No. 146 at 14.) This Court has seen no evidence, however, that the NFL and the PGA were organized in such a way that they have responsibility for disabled as well as nondisabled athletes. In contrast, as explained above, Congress expressly delegated to the USOC responsibility for both Olympic and Paralympic athletes.

2. Necessity

As noted above, the ADA prohibits "the imposition or application of eligibility criteria that screen out or tend to screen out" individuals with disabilities. 42 U.S.C. § 12182(b)(2)(A)(i). The only exception to this provision is where "such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." Id. The USOC has the burden of proof on the defense of necessity. See Colorado Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1003 (10th Cir. 2001) (noting that "[s]everal district courts have placed the burden of showing that the eligibility criteria are necessary on the proponent of such criteria.").

The USOC argues that "[t]he purpose of the USOC's Olympic Programming is to train and obtain the best Olympic athletes for the United States -- a purpose that clearly requires the eligibility criteria of being an Olympic caliber athlete." (Shepherd, Docket No. 139 at 19; see

also Hollonbeck, Docket No. 3 at 15.) This improperly narrows the focus of the USOC's purpose. In fact, Congress and the USOC's Constitution have made clear that the USOC's duties include obtaining the best Olympic and Paralympic athletes to represent the United States and encouraging programs and competition for disabled athletes. See supra at 5-6. Thus, limiting certain benefits and supports to Olympic athletes -- far from being necessary to the USOC's purpose -- in fact undermines a significant part of it.

Defendants' argument for the necessity of their eligibility criteria is based on the incorrect premise that the Athlete Plaintiffs are challenging athletic criteria for participation in Olympic events rather than administrative criteria imposed by the USOC that limit receipt of certain benefits -- for example, health insurance and tuition grants -- to Olympic athletes. The cases on which Defendants rely hold that certain age or semester limits were necessary to the purposes of the athletic program in question. For example, in Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995), the court held that a rule prohibiting students over 19 years of age from playing high school sports was necessary to safeguard other players against injury and prevent unfair advantages, and rejected a challenge to that rule by a student who -- because he had learning disabilities -- was in high school past that cut-off age. Id. at 1035; see also Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994) (same); Rhodes v. Ohio High Sch. Athletic Ass'n, 939 F. Supp. 584, 591-92 (N.D. Ohio 1996) (holding that rule disqualifying student from high school sports after eight consecutive semesters was necessary, among other things, to limit the level of skill of the players to create a more level playing field).

Relying on those cases, the USOC stresses the superior physical qualities necessary for Olympic competition. (See, e.g., Shepherd, Docket No. 139 at 19 (Olympic "eligibility criteria . . . may disqualify certain people with disabilities because such programs typically require agility, strength, speed, balance, and other talents not evenly distributed among the population."); see also Hollonbeck, Docket No. 3 at 15.) Besides ignoring the immense agility, strength, speed, balance, and other talents of Paralympic athletes, this is simply irrelevant. Here, the Athlete Plaintiffs are not challenging criteria for athletic qualification. They are not asking to be able to play on teams of nondisabled players[37] or asking to qualify for teams or competitions for which their skills would not otherwise qualify them. Rather, they challenge administrative criteria for providing funding and support -- for example, health insurance and reward money for medals -- to participate in events for which they already qualify athletically.

Contrary to the USOC's assertion, today's ruling will not prohibit the National Collegiate Athletic Association ("NCAA") from imposing academic requirements on its participants. See,

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[37] Defendants rely heavily on PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001), in which elite disabled golfer Casey Martin requested a reasonable modification of the rules of the PGA Tour to permit him to use a golf cart in nondisabled competition. Defendants assert the obligation to make a reasonable modification is all the ADA and Rehabilitation Act, "at their broadest interpretation," would require the USOC to do. (Shepherd, Docket No. 139 at 16; Hollonbeck, Docket No. 3 at 12.) The reasonable modification requirement, 42 U.S.C. § 12182(b)(2)(A)(ii), is, however, only one among many obligations imposed by the ADA, including those relied on by Plaintiffs here. See supra notes 25 & 26 and accompanying text. Ultimately, because the Athlete Plaintiffs do not request a reasonable modification in the rules of their respective sport, this case is not relevant. Where, as here, a provision is facially discriminatory, a reasonable accommodation analysis is not appropriate; rather, the facially discriminatory provision constitutes a per se violation of the ADA. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 734-35 (9th Cir. 1999).

e.g., Cole v. Nat'l Collegiate Athletic Ass'n, 120 F. Supp. 2d 1060, 1064 (N.D. Ga. 2000); Bowers v. Collegiate Athletic Ass'n, 974 F. Supp. 459, 461 (D. N.J. 1997); Ganden v. Nat'l Collegiate Athletic Ass'n, No. 96 C 6953, 1996 WL 680000, at *2 (N.D. Ill. Nov. 21, 1996). Academic performance may be unrelated to athletic performance, as the USOC asserts (see Shepherd, Docket No. 149 at 10), but both are related to -- and necessary to achieve -- the NCAA's purpose: "maintain[ing] intercollegiate athletics as an integral part of the educational program and . . . assur[ing] that those individuals representing an institution in intercollegiate athletics competition maintain satisfactory progress in their education." Bowers, 974 F. Supp. at 466; see also Cole, 120 F. Supp. 2d at 1071. In contrast, Defendants have not provided any support for the proposition that it is necessary to their program -- properly understood as one intended to promote America's Olympic, Paralympic and Pan American athletes -- to exclude or provide a lower level of support for Paralympic athletes.

Ultimately, Defendants simply perpetuate the circularity of their qualification argument by defining the goal of the program in discriminatory terms. The racial and gender restrictions at issue in Brown v. Board of Education, 347 U.S. 483, 487 (1954), and United States v. Virginia, 518 U.S. 515, 519 (1996), might have been necessary if the purpose of the defendant schools were defined to be, respectively, the education of white or male students. Here, because the USOC is responsible for both Olympic and Paralympic athletes, see, e.g., 36 U.S.C. § 220503(3)(A), (4) & (13), and because supporting Paralympic athletes serves the USOC's goal of supporting athletes with "agility, strength, speed, balance, and other talents," (see Shepherd, Docket No. 139 at 19; Hollonbeck, Docket No. 3 at 15), Defendants' limitation of its benefits to

Olympic athletes is not "necessary for the provision of the [benefits] being offered." See 42 U.S.C. § 12182(b)(2)(A)(i). As such, it violates the ADA.

3. Different or Special Goods

Defendants also rely on a DOJ regulation implementing Title III -- 28 C.F.R. 36.307(a) -- to argue that it is not required to "alter the nature or mix of services it provides" to "add additional programs or services specially designed for disabled athletes." (Shepherd, Docket No. 139 at 20; Hollonbeck, Docket No. 3 at 17.)

Plaintiffs here are not asking for a different "mix of services" or "additional programs or services specially designed for disabled athletes." Rather, they are asking for access to the same benefits and services that the USOC provides to Olympic athletes. For example, they seek access to the USOC's Elite Athlete Health Insurance, not a different or better insurance product. As the USOC states, "Title III forbids denying the disabled full and equal enjoyment of whatever goods and service[s] are offered, but does not regulate the content of these goods and services." (Shepherd, Docket No. 139 at 22; Hollonbeck, Docket No. 3 at 18.) Here, the USOC denies elite athletes with disabilities full and equal enjoyment of the goods and services it offers elite nondisabled athletes. The Athlete Plaintiffs seek access to those very goods and services; they do not seek to change the nature or content of those goods or services.

Section 36.307(a) does not, in any event, address programs or services; rather, it provides that the ADA does not require "a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." (Emphasis added.) The commentary to that section explains that it was put in place

to ensure that, for example, book stores would not be required to stock Braille books. Preamble to Regulation on Nondiscrimination on The Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36, app. B (2005) at 708. This provision, by its plain language, is limited to "goods." This Court will not rewrite that regulation to extend it to accessible programs and services.

Defendants also rely on a series of cases in which the plaintiffs -- individuals with disabilities -- were requesting insurance products with more advantageous coverage than the ones offered by the defendants, for example, greater coverage for mental illness or HIV/AIDS. See, e.g., Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1107 (9th Cir. 2000) (challenging policy that provided more benefits for physical disabilities than for mental disabilities); McNeil v. Time Ins. Co., 205 F.3d 179, 182 (5th Cir. 2000) (challenging limitations on coverage for AIDS), cert. denied 531 U.S. 1191 (2001). Although the court in each case held that the ADA did not require the provider to change the content of the insurance policy, in each case the court made clear that the defendant had offered the same insurance product to all employees.[38] Plaintiffs are asking that the USOC do the equivalent of what the defendants in

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[38] See Weyer, 198 F.3d at 1116 (the defendant "gave [the plaintiff] the same opportunity that it gave all the rest of its employees"); McNeil, 205 F.3d at 188 (defendant "offered the policy to [the plaintiff] on the same terms as it offered the policy to other members of the association."); Kimber v. Thiokol Corp., 196 F.3d 1092,1101 (10th Cir. 1999) ("Every [Thiokol] employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every [Thiokol] employee received equal treatment."); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("Mutual of Omaha does not refuse to sell insurance policies to . . . persons [with the plaintiff's disability]."), cert. denied 528 U.S. 1106 (2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998) ("Every Schering

(continued...)

each of these insurance cases had already done: make the same benefits available to all, in this case, all of the elite amateur athletes for which Congress has given the USOC responsibility. Section 36.307(a) does not apply in this case.

4. Meaningful Access

The USOC also argues that it is only required to provide "meaningful access" to its benefits and that it has done so. (See Shepherd Docket No. 139 at 22 (citing Alexander v. Choate, 469 U.S. 287, 301 (1985)); Hollonbeck, Docket No. 13 at 18 (same).) The USOC has stipulated, however, that it provides no access for Paralympic athletes to many of its programs. (See, e.g., Shepherd, Docket No. 144, ¶¶ 3, 7-15; see also Hollonbeck, Docket No. 8, ¶¶ 48-59.) If the USOC is suggesting that, by providing support to the occasional disabled athlete who qualifies for the Olympics, it has provided meaningful access to elite disabled athletes in general, this argument has been explicitly rejected. See Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002) (holding that "appropriate treatment of some disabled persons does not permit [the defendant] to discriminate against other disabled people under any definition of 'meaningful access.'").

[38](...continued)
employee had the opportunity to join the same plan with the same schedule of coverage"), cert. denied 525 U.S. 1093 (1999).

VI. The USOC's Authority.

This Court has great respect for the USOC's important mission of nurturing elite athletes to represent this country in international competition. Like many other important institutions, it must exercise that authority in compliance with our nation's civil rights laws.

The USOC asserts that "the only obligation [it] has at all with respect to Olympic, Paralympic or Pan American athletes is enumerated in the ASA" and that "[t]o mandate either equivalent programming or a fixed percentage that the USOC must spend in any given area would be an intrusion into the USOC's prerogatives, and would endanger the flexibility necessary for any private organization to function efficiently and responsibly." (Hollonbeck, Docket No. 3 at 6, 9; Shepherd, Docket No. 139 at 26.) Whatever the USOC's discretion or prerogatives, they must be exercised in compliance with federal law. See, e.g., Bay Area, 179 F.3d at 735 (holding, in zoning context, "localities remain free to distinguish between land uses to effectuate the public interest -- they just must refrain from making distinctions based on what Congress has determined to be inappropriate considerations."); Clark, 880 F. Supp. at 443 (holding, in evaluating qualification for state bar admission,"[w]hile the Board's broad authority to set licensing qualifications is well established, such authority is subject to the requirements of the ADA."). The USOC provides no basis for elevating its discretion and prerogatives above those of municipalities and state bar governing bodies.

VII. Conclusion and Order

The USOC discriminates against elite disabled athletes, in violation of Title III of the ADA and the Rehabilitation Act, when it provides benefits and support to Olympic athletes that

it denies or provides in systematically inferior amounts or types to Paralympic athletes. This Court therefore GRANTS Plaintiff Mark Shepherd's Motion for Partial Summary Adjudication, DENIES Defendant USOC's Motion for Summary Judgment on Plaintiff [Shepherd's] Second and Third Claims for Relief, and DENIES the Defendants USOC's and U.S. Paralympics' Motion to Dismiss Plaintiffs [Hollonbeck's, Iniguez's and Heilveil's] ADA and Rehabilitation Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6).

This Court further ORDERS that a joint status conference will be convened on _____ at _____ in Courtroom A802, Eighth Floor, Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado. The Parties are directed to submit a joint proposed scheduling order on or before _____.

Dated this ___ day of _____, 2006, at Denver, Colorado.

BY THE COURT:

_____
John L. Kane
Senior United States District Judge

Appendix

Relevant Shepherd Pleadings		
Docket No.	**Date**	**Pleading**
81	10/5/2001	Stipulation re: Plaintiff's Motion to Modify Case Management Order; (2) Defendant's Withdrawal of Affirmative Defense; (3) Plaintiff's Motion for Leave to File Amended Complaint.
137	8/22/2002	Joint Motion for Briefing Schedule And to Extend Discovery.
139	9/18/2002	The USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief
140	9/18/2002	Plaintiff's Motion for Partial Summary Adjudication
141	9/18/2002	Plaintiff's Memorandum in Support of His Motion for Partial Summary Adjudication
142	9/18/2002	Declaration of Mark E. Shepherd, Sr.
143	9/18/2002	Declaration of Amy F. Robertson
144	9/18/2002	Stipulations
145	10/9/2002	Plaintiffs' Memorandum in Opposition to the USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief
146	10/9/2002	The USOC's Response in Opposition to Plaintiff's Motion for Partial Summary Adjudication Pursuant to Fed. R. Civ. P. 56(d)
147	10/9/2002	Second Declaration of Amy F. Robertson
148	10/16/2002	Plaintiff's Reply Memorandum in Support of His Motion for Partial Summary Adjudication
149	10/16/2002	The USOC's Reply in Support of Motion for Summary Judgment
150	10/16/2002	Third Declaration of Amy F. Robertson

Docket No.	Date	Pleading
168	2/10/2004	Plaintiff's Motion for Leave to Submit Recently-Decided Authority in Support of His Motion for Partial Summary Adjudication and in Opposition to Defendant's Motion for Summary Judgment
170	2/20/2004	Defendants' Response to Plaintiffs' Supplemental Authority.
177	9/19/2002	Defendant's Submission of Recently-Decided Authority in Support of its Response in Opposition to Plaintiff's Motion for Partial Summary Judgment.

Relevant Hollonbeck Pleadings		
Docket No.	**Date**	**Pleading**
3	10/6/2003	Defendants' Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6)
8	10/22/2003	Amended Complaint
11	11/14/2003	Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6)
13	12/2/2003	Defendants' Reply in Support of Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6)
19	2/10/2004	Plaintiffs' Motion for Leave to Submit Recently-Decided Authority in Opposition to Defendants' Motion to Dismiss Plaintiffs' ADA and Rehab Act Claims Pursuant to Fed. R. Civ. P. 12(b)(6)
21	2/20/2004	Defendants' Response to Plaintiffs' Supplemental Authority.