The Honorable Carolyn R. Dimmick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

TOURE BUTLER, Plaintiff, v. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.	)	No. C 96-1656

THE UNITED STATES MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR CROSS SUMMARY JUDGMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Toure Butler, a student with a learning disability who is currently enrolled at the University of Washington, has filed suit alleging that the National Collegiate Athletic Association (NCAA) violated Title III of the American with Disabilities Act (ADA) when it reuled that he did not meet its initial-eligibility requirements. The NCAA is an organization of colleges and universities that, among other things, establishes and enforces academic standards for prospective college student-athletes. A student is not eligible to participate in practices for or

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competitions in any NCAA-sponsored sport, or to receive an athletic scholarship from a college that is a member of the NCAA, without NCAA's certification that he or she meets these requirements.

On November 8, 1996, this court issued a preliminary injunction prohibiting the NCAA from declaring Plaintiff ineligible to participate in the University of Washington's football program or to receive the benefits of an athletic scholarship. Butler v. National Collegiate Athletic Assn., No. C96-1656D (W.D. Wash., Nov. 8, 1996). On February 19, 1998, Counsel for Mr. Butler filed a Motion for Partial Summary Judgment seeking a ruling that the NCAA is subject to title III of the ADA. On March 9, 1998, the NCAA filed its response. The NCAA also seeks summary judgment on this issue, or in the alternative, seeks a ruling that material facts are in dispute and a decision must be reserved for trial.

Title III prohibits a public accommodation from discriminating on the basis of disability in the "full and equal enjoyment of the ...services, facilities, privileges, [or] advantages... 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. In this case, Mr. Butler alleges that the NCAA discriminatorily denied him the opportunity to participate in or benefit from its programs and services, and to participate in the activities held in the places of public accommodation that the NCAA owns, leases, or operates; and that it imposed eligibility criteria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying the organization's programs and services and those places of public accommodation. 42 U.S.C. §§ 12182 (b)(1)(A)(i) and (b)(2)(A)(i). In its November 8, 1996, ruling, this Court properly held that an entity is a public accommodation if it is a private entity that owns, leases (or leases to) or operates a place of public accommodation. The court found that the determination of title III's application to the NCAA in this case "rests on whether the NCAA can be said to operate the facilities used in connection with the football program at the University of Washington." Butler,

slip op. at 8.

After reviewing the undisputed facts that have been developed in the discovery process, the United States urges the Court to rule that the facts establish that the NCAA is a public accommodation for three reasons. First, NCAA "leases" -- directly or through its agents -- stadiums and other places of public gathering when it sponsors post-season athletic competitions. Second, the NCAA "operates" stadiums and other places of public gathering during the competitions by exercising nearly exclusive control over those facilities. Finally, the NCAA "operates" the gymnasiums and other athletic training facilities of its member colleges, which are places of education as well as places of exercise or recreation. It has issued a substantial body of regulations governing who can use the exercise facilities, how long they can use the facilities, and what they can do while they are in the facilities. For these reasons, the NCAA is a private entity that leases or operates numerous places of public accommodation. Its policies determine which student-athletes can participate in any NCAA-sanctioned college athletic programs carried out in these places of public accommodation. These decisions are therefore subject to title III.

FACTS

It is the United States' understanding that the parties have not agreed to a set of stipulated facts. The United States refers here to certain facts as undisputed because these facts are either contained in NCAA documents produced during discovery, or come from the testimony of its own officials.

I. Material Facts About Which There is No Genuine Dispute.

A. For postseason competitions in several sports, the NCAA secures stadiums, arenas, and other places of public gathering through leases that either the NCAA enters into directly or its agents enter into, with the NCAA's direction and approval.

1. The NCAA enters into an "Arena Lease Agreement" when necessary to secure a stadium to sponsor a competition. Deposition of Tricia Bork, NCAA Group Executive Director

for Championships at 28 (January 28, 1998)(relevant portions of the Bork deposition are included as Exhibit 1).

2. The NCAA has entered into lease agreements involving the postseason competitions in at least six to eight sports. Id.

3. In at least some of those sports, the NCAA has entered into lease agreements with a number of different stadiums, over a number of years. Bork Dep. at 31, 44-45.

4. The documents produced by the NCAA in this litigation contain a number of specific references to lease agreements that it enters into with various places of public accommodation. For example, documents relating to the men's ice hockey championships contains the following:

> f. Facility Rental. The NCAA will pay as rent and charges for all space and services specified herein, including all utilities, 10 percent of net revenues from the sale of tickets.

NCAA Division I Men's Ice Hockey Championship, Information for Prospective Hosts, 2000-2002 at 18 (a copy of this document is attached as Exhibit 2).

5. The "1998 Final Four Host Operations Manual," referring to the men's basketball championships, contains the following:

> 3.1 Contract, Responsibility. The "Arena Lease Agreement" shall be the contract between the facility and the NCAA.
>
> 4.7 Rental. For the 1998 Final Four, a nine percent rental fee (i.e., nine percent of the net revenue from the sale of tickets less any amounts due and payable to the Federal, state, county and city governments as admissions taxes), shall be paid to the facility.

Id. at 3-1, 4-1 (relevant portions of this manual are attached as Exhibit 3).

6. In its plans for the 1999-2001 men's lacrosse championships, the NCAA also provides for leasing stadiums:

> 53. For off-campus facilities, this budget shall include the following:
>
> f. Facility rental. The NCAA will pay as rent and charges for all space and services specified herein, including all utilities, 10 percent of net revenue from the sale of tickets.

"Specifications for the 1999-2001 NCAA Divisions I and III Men's Lacrosse Championships," at 8 (a copy of this document is attached as Exhibit 4).

7. The NCAA also leases places of public accommodation in other sports, including women's and men's basketball regionals (relevant documents are attached as Exhibit 5).

8. All of the arena lease agreements "have the same components . . . [d]etailing what sort of expenses the NCAA will reimburse the facility for, regulations regarding the management of the event on [the NCAA's] behalf, that sort of thing. They incorporate some of the regulations that pertain to all championships, but they are the same general components in most of the -- in all of the lease agreements. Specifics may vary depending on the event." Bork Dep. at 39-40.

9. While the NCAA signs Arena Lease Agreements with various stadiums, in other situations the NCAA direct its agents -- host institutions or local organizing committees -- to lease places of public accommodation. In her deposition, Ms. Bork described the arrangement:

> Q. Okay. Well, are these arena lease agreements agreements that the NCAA has actually been a party to? In other words, there is an agreement between NCAA and someone about the use of the arena?
>
> A. In some cases, yes . . . . For example, the women's Final Four, the NCAA has entered into a lease agreement with the arena. In some other sport that arena lease agreement might be entered into by the Local Organizing Committee or perhaps by the host institution. It depends on the relationships in the city and with the university in any given year.

Bork Dep. at 29.

10. The NCAA directs the local organizing committees as it negotiates the lease. For example, the "Host Operations Manual" for the 1997 National Collegiate Men's Water Polo Championship includes an appendix titled, "Proposed Budget and Financial Report for NCAA Championship" (relevant portions of this manual are attached as Exhibit 6). The appendix gives guidance to groups that are interested in placing a bid to host the water polo championships: the prospective host institution's budget must be scrutinized and approved by the NCAA national office, the NCAA water polo committee, the "championships committee," and finally the NCAA

Executive Committee. Id. at 1.

11. The NCAA requires that the host provide detailed financial information in a variety of areas, including promotions for the tournament, ticket sales, and expenses for officials such as statisticians and timers. One item that the host committee must have preapproved, and ultimately file a report on, is the cost of "facility rental." Id. at 6.

12. The host institution or local organizing committee signs the lease agreement *on behalf of* the NCAA:

> Q. Was rent paid to the facility for the use of that facility [the 1998 women's volleyball championships in Spokane, Washington]?
>
> A. I believe that championship used a proposed budget system that we use when the host institution entered into an agreement *on our behalf*, and that would include expenses for rental of the facility.

Bork Dep. at 33 (emphasis added).

B. For athletic activities sanctioned by the NCAA, whether preseason, regular season or postseason, the NCAA determines who is eligible to practice in gymnasiums or other places of exercise, which are at places of education, and who is eligible to compete in the stadiums and other places of public gathering where competitions are held.

13. Every student-athlete who enrolls in an NCAA-member institution as an entering freshman (with no previous full-time college attendance), regardless of the sport(s) in which he or she wishes to participate, must receive a report documenting that he or she has been certified as meeting the NCAA's freshman academic requirements in order to be eligible for financial aid, practice and competition during his or her first academic year in residence. NCAA Operating Bylaw 14.3.1, 1997-98 NCAA Division I Manual at 125-171 (1997)(relevant portions of this Bylaw are attached as Exhibit 7).

14. A college that is a member of the NCAA may not permit a student-athlete to practice in its facilities or represent it in stadiums unless the student-athlete meets all NCAA eligibility standards, including but not limited to the freshman academic requirements. Id. at Bylaw 14.01

C. For postseason competitions sponsored by the NCAA, it not only determines who is eligible to compete in the stadiums, auditoriums, and arenas where the postseason competitions are held, some of which are at places of education, but it also has exclusive use of the facilities, controlling the concessions, regulating the ticket prices, and requiring that these facilities be physically accessible to people with disabilities.

15. In the words of the NCAA's Director of Membership Services,

> 12. The NCAA does conduct its own postseason championship events in a number of sports. The NCAA championships are intended to provide national championship competition among the best eligible student-athletes and teams at the end of the regular sport seasons (Bylaw 31.01.20). *In NCAA-sponsored championships, the concessions, sales, program sales, media rights, ticket sales and selection of participants are controlled by the NCAA, as these events are NCAA events.*

Affidavit of Kevin Lennon, Defendant NCAA's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment, Butler v. National Collegiate Athletic Association, No. C 96-1656 (filed March 9, 1998)(emphasis added)(hereinafter, "NCAA's Opposition Brief").

16. These regulations are in effect during competitions sponsored by the NCAA but not during "regular season" events organized by the schools themselves. Lennon affidavit, ¶ 11.[1]

17. The NCAA requires that the stadiums where NCAA-sponsored postseason events are held must comply with the ADA. The following language is included in the Division I Women's Soccer Championship manual:

> Americans with Disabilities Act. The Americans with Disabilities Act, which went into effect January 26, 1992, requires that public establishments offer equal access and services to people who are physically and mentally disabled. The NCAA will rely on host organizations to confirm compliance with the act by the host facilities. The host is responsible to check and see that its facility will be in compliance as of the dates of championship and to advise the NCAA national office if it will NOT be in compliance.

1997 NCAA Division I Women's Soccer Championship, Tournament Manual at 31 (relevant

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[1] To the United States' knowledge, no discovery has been conducted on these facts. However, for the purposes of this Motion for Partial Summary Judgment, Mr. Lennon's representation of these facts can be assumed to be accurate.

portions of this manual are included as Exhibit 8).

18. The provision cited in Material Fact No. 17 is included in the regulations governing many NCAA sports. For other sports, similar language is used. For the women's volleyball championships, the tournament manual states,

> 1.20. Access/seating for Disabled. The facility is expected to be in compliance with all applicable city, state or Federal regulations concerning access and seating for disabled persons.

1997 NCAA Division I Women's Volleyball Championship, Final Tournament Manual at 6 (portions of this manual are included as Exhibit 9). The NCAA Postseason Football Handbook requires that stadiums where a bowl game will be played must have a "handicapped policy." NCAA Postseason Football Handbook at 56 (relevant portions of this manual are included as Exhibit 10).

19. When it sponsors a competition, the NCAA requires that the owners of the facility allow the NCAA to have complete control of the facility throughout the duration of the competition. For example, the men's ice hockey championship manual includes the following provision:

> 3. The host and facility agrees that the facility shall be available for *the exclusive use* of the NCAA starting at 6 a.m. the Wednesday prior to competition and three hours after the conclusion of the championship game.

NCAA Division I Men's Ice Hockey Championship, Information for Prospective Hosts, 2000-2002 at 10 (emphasis added)(see Exhibit 2).

20. For the purposes of the men's golf championship, "The facility must be available from 6 a.m. the Monday preceding the competition through the conclusion of the final round for the purpose of preparing for, practicing for and conducting the competition." Specifications for NCAA Division I Men's Golf Championships at 1 (a copy is attached as Exhibit 11).

21. The women's gymnastics championship manual includes similar language: "The competitive facility used must be exclusively available for practice and competitive sessions

throughout the competition." 1997 NCAA Women's Gymnastics Championships, Tournament Director's Manual at 39 (relevant portions of this manual are included as Exhibit 12).

22. The NCAA sponsored a basketball tournament at Washington, D.C.'s MCI Center during the week of March 9, 1998. "On the Face of It, MCI Different for NCAA," Washington Post, March 11, 1998 at C6 (a copy is attached as Exhibit 13). Pursuant to the NCAA's regulations, beer could not be sold; signs relating to alcohol, the District's lottery, and companies that are not sponsors of the NCAA tournament were covered; the doors to a store attached to the MCI Center were closed because the store does not sell NCAA merchandise; the court upon which the teams played was replaced by another court with the authorized logos; and, the doors to a restaurant attached to the MCI Center were closed. Id.

23. The NCAA's control of the facilities at the MCI Center, as well as at other regional basketball tournaments, was extensive and specific. It specified the number of phone lines installed for the media to use for free (thirty), the number of chairs in the media interview room (a minimum of two hundred), the configuration of the chairs (set in schoolroom style), the size of the media interview room's dais (8 feet- by-24-feet), the color of the curtains hung in the media interview room (royal blue), and the size of the tables where the participants sat while they answered questions (thirty inches wide). Id. See also NCAA Championship, Division I Men's Basketball, First and Second Rounds Regionals, 1998 Host Operations Manual at §§ 12.11.1, 6.5.4, 6.5.4.4, 6.5.4.7.2 and 6.5.4.4.1 (portions of this manual are attached as Exhibit 14).

D. The NCAA controls and regulates gymnasiums and other places of exercise, which are at places of education, by establishing who can use the facilities, at what time, and for what activities; the types of equipment that can be used; and the conditions under which coaches and student-athletes can be present in the facilities at the same time.

24. The 1997-98 NCAA Division I Manual contains regulations concerning the gymnasiums and other places of exercise used by member institutions. NCAA Operating Bylaw 17, 1997-98 NCAA Division I Manual at 217-312 (relevant provisions are attached as

Exhibit 15). These athletic training facilities include gymnasiums and fields where teams practice, weight rooms, lap pools, ice rinks, batting cages, and exercise facilities.

25. The NCAA allows colleges to set aside athletic training facilities for the exclusive use of authorized athletes. See NCAA Operating Bylaw 17.02.1.1(l).

26. It regulates the conditions under which individuals who are not enrolled in the school may use certain facilities. NCAA Operating Bylaw 17.02.1.1(l).

27. It regulates the number of days that student-athletes are allowed to practice in the athletic facilities in official practices. NCAA Operating Bylaws 17.02.11, 17.1.1.

28. It directs that student-athletes can voluntarily choose to work out in the gym or other place of exercise in addition to official practices only under certain conditions. NCAA Operating Bylaw 17.02.1.

29. It prohibits student-athletes from voluntarily using an exercise facility if members of the coaching staff are also in the exercise facility. NCAA Operating Bylaw 17.02.1.1(a)(5), (c), (i).

30. It prohibits students from using tobacco products while working out in the gym or other place of exercise. NCAA Operating Bylaw 17.1.12.

31. It regulates the types of equipment that student-athletes may use while working out in the athletic training facilities. NCAA Operating Bylaw 17.10.6, 17.1.6.2.2, 17.02.1.1(a)(5).

32. It controls the conditions under which student-athletes may ask a coach for advice and instruction on athletic training not conducted during the playing season. NCAA Operating Bylaw 17.1.6.2.1.

33. It establishes rules for the types of "conditioning activities" that athletes can use. NCAA Operating Bylaw 17.1.6.2.2.

34. It has regulations concerning the physical education curriculum of colleges and

universities, including regulating the enrollment policies of the physical education department and the content of the courses. NCAA Operating Bylaw 17.02.1.1(d).

II. The NCAA's argument that there are material facts in dispute is unfounded.

The NCAA argues that three categories of facts are still in dispute. First, the NCAA argues that there are contested facts regarding its connections with stadiums where athletic events are held. NCAA's Opposition Brief at 6. There is, in fact, no dispute. The NCAA alleges that *for regular season events*, it does not control ticket prices, goods sold, press access, and a host of other aspects of an athletic event held at a stadium. This may or may not be true, but it is not material to the Motion for Partial Summary Judgment. The NCAA admits that it does exercise "control" over almost every substantial detail of a stadium's operation during athletic competitions *that it sponsors*. See Material Fact Nos. 15, 16. The undisputed facts are sufficient for the Court to rule on the Motion for Partial Summary Judgment.

Second, the NCAA argues that there are contested facts regarding its connections with the athletic training facilities of its member colleges. NCAA's Opposition Brief at 5, 7. It argues that it does not tell the colleges the hours to keep the local gym open; it does not have an NCAA employee on the staff of every college's gym; and it does not have a financial stake in those facilities. NCAA's Opposition Brief at 5. However, it acknowledges, "There is no question that the NCAA, at the instruction of its member institutions, has promulgated various of regulations concerning student athletes." NCAA's Opposition Brief at 6. There is no dispute that Material Facts Nos.13-14 and 24-34 are accurate; the NCAA simply argues that in certain other respects it is not connected with the gymnasiums and other athletic training facilities of its member colleges. Again, the undisputed facts are sufficient for the Court to rule on the Motion for Partial Summary Judgment.

Finally, it argues that its regulations concerning these athletic training facilities "apply only to the school-sponsored activities of the student athlete. . . . Again, the only limitation

imposed by NCAA rules is the degree to which the athlete can do so in an official capacity with coaches present." NCAA's Opposition Brief at 7. There is no dispute between the parties concerning the fact that non-athletes can at times make use of the gymnasiums and exercise facilities of their colleges.[2] However, there is also no dispute that when the NCAA determines that a particular student is ineligible to participate in athletics, it clearly limits the conditions under which he or she may use those facilities. See Material Facts Nos. 24-34.

There are no genuine issues of material fact relating to the Motion for Partial Summary Judgment; there is sufficient agreement between the parties concerning the NCAA's connections to places of public accommodation for the Court to rule.

ARGUMENT

I. The NCAA's Certification of Student-Athletes' Eligibility To Participate in Collegiate Sports Is Subject to Title III of the ADA.

A. The NCAA "leases" places of public accommodation.

The undisputed facts establish that the NCAA leases, directly or indirectly, many places of public accommodation when it sponsors an athletic competition. The NCAA directly leases stadiums to host competitions in six to eight sports, see Material Facts Nos. 1-8, and indirectly leases many more stadiums through its agents. See Material Facts Nos. 9-12. It therefore falls squarely within the terms of the statute: (1) it is a private entity, (2) that leases, (3) places of public accommodation. Its initial-eligibility determination is a ticket for those who wish to use the facilities the NCAA leases.

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[2]Again, to the United States' knowledge, no discovery has been conducted on these facts. For the purposes of this Motion for Partial Summary Judgment, this representation of these facts can be assumed to be accurate. However, NCAA Bylaws allow colleges to reserve an entire facility just for the use of scholarship athletes, although they do not require the colleges to take this step. Compare Material Fact No. 25 with NCAA's Opposition Brief at 7 ("Moreover, the NCAA has no rules about whether the general student body can enter, or use, the facilities"). Therefore, a college may have a weight room that during the academic year is only available for scholarship athletes; other students are not allowed to use the weight room at all.

B. The NCAA "operates" places of public accommodation.

1. This Court has established the legal framework for analyzing the question of whether an entity "operates" places of public accommodation under title III of the ADA.

In its November 8, 1996 order, the Court established the legal framework for analyzing the issue of whether the NCAA "operates" places of public accommodation under title III of the ADA. The Court held that "if there is any doubt as to whether the ADA should be read so that it might apply" in this case, the ADA "should be construed broadly rather than narrowly." Butler, slip op. at 8.[3] The Court ruled that a place of public accommodation can be owned by a public entity, but still be covered by title III if a private entity operates that place. Id.[4] The Court therefore ruled that two of the primary authorities cited by the NCAA -- Sandison v. Michigan High School Athletic Assn., 64 F.3d 1026 (6th cir. 1995) and Johannesen v. National Collegiate Athletic Assn., No. Civ. 96-197 (D. Ar., May 3, 1996) -- relied on a misunderstanding of the critical inquiry under title III. Butler, slip op. at 6. The Court endorsed instead the framework established in Dennin v. Connecticut Interscholastic Athletic Conf., 913 F.Supp. 663 (D. Conn. 1996), vacated as moot, 94 F.3d 96 (1996): the proper inquiry is whether the athletics association is a private entity that owns, leases or operates one or more places of public accommodation.[5]

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[3] See also United States'Memorandum of Law as Amicus Curiae in Opposition to Defendant's Motion to Dismiss, Butler v. National Collegiate Athletic Assn., No. C96-1656D at 2-3 (filed Nov. 5, 1996).

[4] The Court relied, in part, on the Department of Justice's regulations. Butler, slip op. at 8. The regulations, the Preamble and informal interpretive documents such as the Technical Assistance Manual, are entitled to deference. See Tatum v. National Collegiate Athletic Assn., _ F.Supp. _, 1998 WL 40477 at *7 (E.D. Mo. Jan. 23, 1998); United States' Memorandum of Law as Amicus Curiae in Opposition to Defendant's Motion to Dismiss at 3-5.

[5]The Second Circuit Court of Appeals did not reject the lower court's reasoning in Dennin. The Court of Appeals simply held that there was no longer a ripe controversy because the student had already completed the athletic season. The Court of Appeals, quoting other courts, explained, "Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand

Butler, slip op. at 6. The issue here is whether the NCAA leases or operates the following places of public accommodation: stadiums or other places of exhibition or entertainment; auditoriums or other places of public gathering; gymnasiums or other places of exercise; and, undergraduate institutions or other places of education. 42 U.S.C. § 12181(7)(C), (D), (L) and (J).

The Court also ruled that the membership organization cases cited by the NCAA -- Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993), and Stoutenborough v. National Football League, Inc., 59 F.3d 580 (6th Cir. 1995) -- are not on point. Butler, slip op. at 7. Those cases deal with membership organizations as organizations, not as entities that are connected to a place of public accommodation. If anything, the Court held, these cases work against the NCAA's position because they establish that if a membership organization has a close connection to a place of public accommodation, it is covered by title III. Id.

Subsequently, two other federal courts have agreed with this Court's analysis of the proper legal framework for analyzing the mixed question of law and fact of whether the NCAA is covered by title III. The court in Tatum v. National Collegiate Athletic Assn., _ F.Supp. _, 1998 WL 40477 (E.D. Mo. Jan. 23, 1998), agreed with this Court's analysis: "The significant degree of control that the NCAA exerts over the athletic facilities of its member institutions, the position of the Department of Justice, and the relevant case law all support plaintiff's argument that the NCAA is governed by Title III of the ADA." Id. at *7. In Ganden v. National Collegiate Athletic Association, No. 96C-6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996), the court held:

> [T]itle III applies if the defendant is (1) a private entity, and (2) owns, leases or operates the "place of public accommodation." Parties may not escape the requirements of the ADA through multiple ownership or management of a facility. The NCAA is a private entity. Regardless of whether MSU owns or operates its swimming facilities, the NCAA may also "operate" those facilities for purposes of Title III.

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the cause with directions to dismiss." Dennin, 94 F.3d at 101 (citations omitted).

Id.

The court also held that the reasoning in Welsh and Elitt v. U.S.A. Hockey, 922 F.Supp. 217 (E.D. Mo. 1996), runs contrary to the NCAA's position:

> [T]o constitute a "place of public accommodation," a membership organization must have a "close connection to a particular facility." Welsh, 993 F.2d at 1270. This connection exists if (1) the organization is affiliated with a particular facility, and (2) membership in (or certification by) that organization acts as a necessary predicate to use of the facility. Elitt, 922 F.Supp. at 223; see Welsh, 993 F.2d at 1272. It is evident that the NCAA, in contrast to the Boy Scouts, has a connection to a number of public accommodations; the athletic facilities of its member institutions.

Ganden, 1996 WL 680000 at *10.

The court therefore held that Mr. Ganden's allegation that the NCAA is closely affiliated with the athletic facilities of its member colleges was "a compelling argument." Id. The court further held that it was "reasonably probable" that Mr. Ganden could establish that the NCAA has a "significant degree of control" over athletic competitions held in stadiums and other places of public gathering, as well as over athletic training facilities, and therefore "operates" places of public accommodation. Id. at *11.

Neither the ADA nor the regulations define the word "operates." When a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." Smith v. United States, 113 S. Ct. 2050, 2054 (1993). In the context intended by the statute, "operates" means to control, manage, administer, or regulate.[6] This Court used the word "operates" as synonymous with "regulates." Butler, slip op. at 9. The federal court in Dennin defined "operate" in the context of title III of the ADA as "managing and controlling[.]" Dennin, 913 F.Supp. at 670. A federal court in California held that the word

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[6] Dictionaries define "operate" in its transitive form as "[t]o control or direct the functioning of." Webster's II: New Riverside University Dictionary (1988), p. 823 (core meaning). See also 7 The Oxford English Dictionary, p. 144 (1933) ("[t]o direct the working of; to manage, conduct, work (a railway, business, etc.")); 2 New Shorter Oxford English Dictionary, p. 2005 (1993) ("[m]anage, direct the operation of (a business, enterprise, etc.")).

"implies a requirement of control over the place providing services" subject to title III. Aikins v. St. Helena Hospital, 843 F.Supp. 1329, 1335 (N.D. Cal. 1994). A federal district court in Ohio held that "operate" means that the person or entity "is in a position of authority" to make decisions that are allegedly discriminatory under title III. Howe v. Hull, 873 F.Supp 72, 77 (N.D. Ohio 1994). The court in Ganden equated "operates" with "exercis[ing] control" over facilities. Ganden, 1996 W.L. 680000 at *11. As the Preamble to the implementing regulation explains, a private entity may "operate" a facility even if its relationship to the place of public accommodation is for only a limited period of time. 28 C.F.R. Part 36, Appendix B at 593. See also Ganden, 1996 W.L. 680000 at *11. More than one entity can operate a place of public accommodation at a time. The Americans with Disabilities Act, Title III Technical Assistance Manual, "Covering Public Accommodations and Commercial Facilities," at 3 (Nov. 1993)(relevant portions of the Technical Assistance Manual are attached as Exhibit 16).

2. The NCAA "operates" stadiums and other places of public gathering.

When NCAA sponsors an athletic competition, the stadium "shall be available for the exclusive use of the NCAA." See Material Fact Nos. 18-20. During the time a stadium is under its "exclusive use," the NCAA "exerts significant control over the operation" of the stadium. Tatum, 1998 WL 40477 at *4. It controls everything from the stadium's ticket windows to its concession stands to its press passes. "[N]o detail is too small to be excluded" from the NCAA's regulations. "On the Face of It, MCI Different for NCAA," Washington Post, March 11, 1998 at C6 (Exhibit 13). The NCAA's own official declared in an affidavit filed in this case that many details of a stadium's operation are "controlled by the NCAA." Lennon affidavit, ¶ 12.

In Dennin, the court noted that "the [Connecticut Interscholastic Athletic Conference] sponsors athletic competitions and tournaments." Dennin, 913 F. Supp. at 670. The sponsorship of competitions and tournaments brought CIAC into a management role over coliseums where the events are staged. Therefore, "By managing and controlling the

aforementioned, it operates' places of public accommodation, i.e., a place of education, entertainment and/or recreation." Id. While the parallels between the CIAC and the NCAA are obvious, the role of the NCAA is even more comprehensive than the state athletic association. The NCAA operates significant functions of stadiums, coliseums, and arenas for a limited and specific period of time. Since the NCAA regulates, manages and controls nearly every detail of events taking place within stadiums and arenas, large and small, all across the country, in dozens of sports, there can be no doubt that it "operates" places of public accommodation under title III of the ADA.

In Howe v. Hull, the court held that a single physician "operated" a hospital. Although the physician was not an employee of the hospital, as the on-call admitting physician he had the authority and discretion to admit individuals seeking medical attention. The physician in this case refused to admit an individual infected with the HIV virus. The court held that the physician operated the public accommodation because he was "in a position of authority" to make decisions which are allegedly discriminatory under title III. Howe v. Hull, 873 F.Supp. at 77. See also Aikins v. St. Helena Hospital, 843 F. Supp. at 1335 (a physician would operate a hospital if he had control over the provision of services, although in this case the physician had no authority to arrange a sign language interpreter for the spouse of a patient). Similarly, the NCAA is in a position of authority to set the standards for admitting individuals into colleges and universities, into gymnasiums and training facilities, and into stadiums and coliseums. Accord Dennin, 913 F. Supp. at 670 (an athletic conference operates the athletic component of education because it determines which high school students are academically eligible to participate in sports).

3. The NCAA "operates" gymnasiums and other places of exercise, which are at places of education.

The NCAA also regulates the athletic training facilities -- gymnasiums and other places

of exercise -- of its member colleges. The NCAA's controls over these athletic training facilities are substantial. It regulates who can use the exercise facilities, how long they can use those facilities, and what they can do while in the facilities. See Material Fact Nos. 13-14, 24-33. The NCAA "operates" these gymnasiums or other places of exercise for the purposes of title III because it regulates how student-athletes, coaches, and others associated with the athletic department may use those facilities. See Ganden, 1996 WL 680000 at *10 (there is a substantial likelihood that the NCAA is subject to title III because its eligibility decision prevented the student both from participating in athletic competitions and from participating in training at the college's athletic training facilities); Butler, slip op. at 8, 9 (basing its holding on the NCAA's regulation of all the facilities related to a football program, including practice and training facilities as well as the stadiums where the games are played). Because these places of exercise are part of a university, the NCAA is operating not just a gymnasium but also a place of education. Moreover, the NCAA regulates the educational component of these places of exercise because it regulates the content of physical education courses offered by colleges and universities. See Material Fact No. 34.

C. The NCAA's decisions on eligibility of student-athletes determine whether those students can participate in the practices, competitions, and tournaments carried out in the places of public accommodation that the NCAA leases or operates.

Because the NCAA is so clearly connected to several types of places of public accommodation, its initial-eligibility decisions are subject to the nondiscrimination principles of title III of the ADA. In Howe v. Hull, the court held that the admitting physician "operated" the hospital, and therefore he was a public accommodation under title III. The court held that because this doctor was a public accommodation, his decisions regarding whether to admit patients to the hospital must comply with title III. Howe v. Hull, 873 F.Supp. at 77. Similarly, by setting eligibility standards, the NCAA has veto power over who can compete in stadiums, coliseums and other places of public gathering. See Material Facts Nos. 13, 14. The NCAA

holds the ticket to athletic competition -- a college must have clearance from the NCAA before it can allow any student to be a participant in a sporting event held at one of these places of public accommodation. The NCAA's eligibility rulings give it a degree of control over who will be allowed to use these facilities, and the terms under which they will be allowed to use them.

II. The NCAA Is Not Entitled to Summary Judgment.

The NCAA apparently moves for summary judgment on two grounds. First, it argues that "Butler cannot show that the discrimination he alleges -- the NCAA's determination that he was ineligible to participate in intercollegiate athletics -- involved a place of public accommodation.'" NCAA's Opposition Brief at 3. Citing Elitt v. U.S.A. Hockey and Stoutenborough v. National Football League, the NCAA argues that Mr. Butler "was not denied access to any facility." NCAA's Opposition Brief at 4. This Court has already rejected this argument, and in doing so specifically distinguished Stoutenborough. As this Court noted, Stoutenborough did not deal with an entity that is connected to a specific place of public accommodation, and therefore it actually runs counter to the NCAA's position. Butler, slip op. at 7. See also Ganden, 1996 WL 680000 at * 10 (discussing Elitt).

The NCAA's second argument for summary judgment is that, "At most, the NCAA simply prevented Butler from using the UW's facilities, during his freshman year, to practice and play on the football team. The NCAA did not, however, preclude him from using those facilities in a non-student-athlete capacity." NCAA's Opposition Brief at 4. In other words, while the NCAA's eligibility ruling did not prevent him from entering the University of Washington weight room during hours open to the general student body, there could be no violation of title III because he was not completely denied access to the weight room.

Again, the courts have already considered and rejected this argument. In Ganden, the student had been granted "partial qualifier" status by the NCAA and therefore could practice with his swim team but could not participate during the actual competitions. He therefore had access

to the college's swimming pools and other training facilities at all times but during the actual competition. The court held, however, "Title III plainly regulates more than the denials of complete access to a facility;" the statute prohibits decisions that interfere with the "full and equal enjoyment" of places of public accommodation. Ganden, 1996 WL 680000 at *9. The fact that Mr. Butler could use his college's gym and other exercise facilities during some parts of the day does not deny that the NCAA's eligibility decision prevented him from the "enjoyment" of those facilities that was "full and equal" to eligible student-athletes. See Martin v. PGA Tour, _ F.Supp. _, 1998 WL 67529 (D. Or. Feb. 19, 1998) (the plaintiff could play golf under any conditions he chose, except during tournaments sponsored by the PGA; nonetheless, its refusal to allow him a reasonable modification in tournaments it sponsored was a violation of title III).

III. The NCAA's Arguments in Opposition to Mr. Butler's Motion for Partial Summary Judgment are Unfounded.

A. The NCAA's legal authorities have no bearing on the facts of this case.

The NCAA argues that in similar cases, courts have not found the entity to be an operator for the purposes of title III. NCAA's Opposition Brief at 7-9.[7] Significantly, the NCAA's argument ignores the fact that it is a public accommodation because it leases places of public accommodation. Moreover, in the most similar cases -- those involving the NCAA itself -- three federal courts have rejected the NCAA's legal arguments.

The NCAA cites Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, 116 S.Ct. 704 (1996) and Cortez v. National Basketball Association, 960 F.Supp. 113 (W.D. Tex. 1997). Neff is clearly inapplicable since it is a decision regarding whether a company is responsible under the ADA for the actions taken by another company to which it has granted a franchise. Neff, 58 F.3d at 1066 ("Neff's appeal thus presents a narrowly

[7] The NCAA also argues that there are genuine issues of material fact. This argument is unfounded. See discussion infra Part I.B.

defined issue of first impression[.]") The franchisor-franchisee contractual relationship is substantially different than the relationship between the NCAA and its member colleges. Even under Neff, the NCAA "operates" places of public accommodation because its control of facilities is much more extensive than the franchisor in Neff. The NCAA has "exclusive" use of stadiums, and it has veto power over who can participate in events held in places of public accommodation.[8]

Cortez is also limited to the narrow issue of how a franchisor relates contractually to a franchisee. The relationship between the NCAA and its member colleges is entirely different from the NBA's relationship with the stadiums where professional sports franchises play. The NCAA's role in collegiate sports is much more extensive because it is concerned not only with the quality of the sporting event, but also with the integrity of college athletics, preserving both amateurism (leading to dozens of regulations on benefits that can be provided to student-athletes) and academics (leading to dozens of regulations on academic standards that students must meet to participate in athletics). The NBA is concerned with neither of these factors and therefore its regulation of its franchisees is much less extensive. To illustrate, the NBA's connection to the "Alamodome," at issue in Cortez, was a thirty-five page book of guidelines; for the NCAA's upcoming basketball championship to be held in the same stadium, its book of regulations is approximately three hundred pages long. Cortez, 960 F.Supp. at 115.

B. The NCAA may not divide its initial-eligibility process into segments that are covered by title III and those that are not covered by title III.

Certain aspects of the NCAA's operations clearly come within title III of the ADA. First, where it directly leases stadiums, there can be no doubt that it is a private entity that leases places

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[8] Neff was wrongly decided because the court too narrowly construed what it means to operate a place of public accommodation and therefore adopted a reading of the statute that cannot be reconciled with the statutory language. See United States v. Days Inns of America, No. 96-2028 (C.D. Ill. March 16, 1998)(a copy is attached as Exhibit 17)(finding that Days Inns of America, the franchisor, is subject to title III).

of public accommodation. Second, where it sponsors an athletic competition, its voluminous regulations leave no doubt that the NCAA operates places of public accommodation. Third, the NCAA admits that the stadiums it leases must comply with the ADA, see Material Facts Nos.17, 18; this amounts to an argument that while the spectators at NCAA athletic events are covered by the ADA, the participants are not.

The NCAA argues that the ADA allows entities to divide their operations into those that are covered by the statute and those that are not. It argues that when an entity leases or operates a facility, its ADA obligations are limited to that facility, and the entity does not become subject to the ADA in all of its other business. Therefore, "[t]he fact that the NCAA leases facilities for championship events in various sports such as basketball or women's softball does not make it subject to the ADA in its other operations." NCAA's Opposition Brief at 10.

The NCAA's position appears to be that it must comply with the requirements of title III when making an initial-eligibility decision on a student-athlete who intends to enroll at a school that will play in facilities the NCAA leases, while it is free to free to act in any manner with regard to a student-athlete who seeks to participate in athletics at a school where the facilities are not leased. Its position seems to be that although it must comply with the requirements of title III regarding student-athletes who participate in tournaments it sponsors, it does not have to comply with regard to student-athletes whose schools do not enter those championship tournaments. According to the NCAA's position, spectators who attend an NCAA basketball or volleyball game can expect that the lessor of that facility is in compliance with the ADA, but the young men and women who want to play in those games cannot have the same expectation. The ADA was not intended to produce such absurd results. Cf. Butler, slip op. at 6, n. 3.

When the NCAA made its determination of Mr. Butler's eligibility, it did not address its determination specifically to whether Mr. Butler was eligible to participate in football at the University of Washington. See Material Facts Nos. 13 and 14. It determined that he is

ineligible to participate in any intercollegiate athletic competition at any college or university that is a member of the NCAA. Since its initial-eligibility decision prohibits Mr. Butler from participating in any sport at any college or university, the NCAA cannot artificially segregate its operations and argue that only some of its eligibility decisions are subject to title III of the ADA. These eligibility decisions are specific to an individual, but they apply across the board, to all member schools and for all sports.

The NCAA cites an illustration from the Department's Technical Assistance Manual regarding an oil processing company that is not a public accommodation, but operates service stations that are subject to the ADA. NCAA's Opposition Brief at 11. However, the illustration relates most directly to the distinction between the terms "public accommodation" and "commercial facility" (a "commercial facility" is subject only to the new construction and alterations provisions of title III and not to provisions concerning barrier removal, eligibility requirements, auxiliary aids, and others). Moreover, the illustrations cited by the NCAA relate to companies with operations that are clearly discreet and separate from the rest of the company -- an oil processing company's subsidiary that operates gas stations, and a farm that erects a stand by the road to sell produce.

The more relevant illustration concerns policies made in the administrative office of a medical provider as to decisions to treat or not to treat certain patients in other locations. The Technical Assistance Manual provides, "However, any policies or decisions made in the administrative offices that affect the treatment of patients would be subject to the requirements for public accommodations." Title III Technical Assistance Manual at 5. Similarly, when the NCAA makes an initial-eligibility determination in its administrative offices (which may or may not be a place of public accommodation), that decision affects student-athletes at other locations that are places of public accommodation, and therefore the NCAA must comply with title III.

An entity that is a public accommodation cannot carve out certain areas where it is

subject to the ADA and others where it is not. In Martin v. PGA Tour, the PGA argued that although the golf courses on which its tournaments are played are covered under the ADA, the fairways and greens of the golf courses are restricted to only the golfers and therefore are not places of public accommodation. The court rejected this argument: "[T]he statute and regulations do not support the concept that places of public accommodation have zones of ADA application . . . . [A]n operator of a place of public accommodation can[not] create private enclaves within the facility of public accommodation and thus relegate the ADA to hop-scotch areas." Martin v. PGA Tour, _ F. Supp. _, 1998 WL 54998 at *6 (D. Or. Jan. 30, 1998) . Similarly, the ADA cannot be found to apply to some initial-eligibility decisions made by the NCAA, according to which particular sport or facility is involved, but not to others.

CONCLUSION

For these reasons, the United States respectfully submits that the Court should grant Mr. Butler's Motion for Partial Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the United States' Amicus Curiae Memorandum was served on the attorneys listed below by overnight mail on March 19, 1998.

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