

TRACK CHAMPS POINTLESS FOR WHEELCHAIRS

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In providing programs and services, the Americans with Disabilities Act (ADA) prohibits public entities and public accommodations from discriminating on the basis of disability. However, as illustrated by the *McFadden* decision described herein, the application of a neutral rule that applies equally to disabled and non-disabled individuals cannot be considered discrimination on the basis of disability and does not violate the ADA. On the other hand, the ADA would be violated if an otherwise neutral rule is applied in a manner which is a mere pretext for discrimination on the basis of disability.

INTEGRATION & SEPARATION

In the case of *McFadden v. Grasmick*, Civil No. AMD 07-719, 2007 U.S. Dist. LEXIS 34726 (Dist. Md. 2007), a wheelchair athlete claimed that she was illegally discriminated against when the rules for assigning team points in a statewide track and field competition precluded her from earning points for her team.

At the time of her lawsuit, plaintiff Tatyana McFadden was a junior and a member of the track team at Atholton High School ("AHS") in Howard County, Maryland. McFadden has spina bifida and has been paralyzed from below her waist since early childhood. McFadden uses a wheelchair for mobility and has developed into a highly skilled "world class" and Olympic wheelchair racer ("a wheeler") competing in several events.

In response to an earlier lawsuit against Howard County, McFadden had been permitted to race alongside non-disabled racers in so-called "mixed races" wherein wheelers and non-wheelers do not compete against each other. In addition, McFadden could also earn individual and team points based on her participation in races sanctioned by Howard County. McFadden, however, was unable to persuade state track and field officials to adopt the Howard County points system, or any other system, permitting her to earn points for her team. McFadden, therefore, sued officials responsible for operating the statewide system of track and field competition in Maryland claiming violations of the Americans with Disabilities Act (ADA).

In pertinent part, the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The issue before the federal district court was, therefore, "whether 'mixed racing' is required by disability rights laws, and whether wheelers must be awarded team points."

As noted by the court, since 2005, defendant Maryland Public Secondary Schools Athletic Association ("MPSSAA") had "moved somewhat fitfully toward full integration of wheelchair racers in interscholastic track and field competitions." MPSSAA sets standards for competition to which all public schools must adhere in order to engage in interscholastic athletics. AHS is a member of MPSSAA and competes in statewide track and field tournaments as a class 2A

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school. For some time, wheelchair athletes had been allowed to compete in, and to earn team points in, certain field events, i.e., discus and shot put.

In 2006, a wheelchair race was conducted for the first time in a Maryland state competition, a 400 meter event, to provide an opportunity for MPSSAA "to gain experience in wheelchair racing." In 2006, McFadden participated in four track events at regional and statewide track and field tournaments. McFadden, however, was not permitted to earn points for her team in any of these races. Moreover, unlike other competitors, McFadden's name was not announced as she crossed the finish line, and her name was not illuminated on the score board when she finished her races.

Following this 2006 "experiment" with wheelchair racing, the State Superintendent of Schools and the Secretary of the Department of Disabilities established a "Work Group to Review the Participation of Students with Disabilities in Athletics." After eight months, the Workgroup issued a comprehensive report, which included recommendations to the State Board of Education, designed to "move inclusion of all eligible and interested students with disabilities in athletics from a goal to a reality."

In conducting its review of practices and policies concerning wheelchair track events, the Workgroup reported the following results of a National Federation of High School survey:

- * 23 of 34 state high school associations reported having no wheelchair competition in track and field;
- * 4 of the 9 states reported having wheelchair athletes compete against one another at the state meet;
- * 2 states reported providing events for wheelchair athletes as exhibitions;
- * 1 state reported allowing athletes using wheelchairs to participate with non-disabled athletes in shorter events; such as the 100 and 200 and 400 meter events;
- * 1 state allows athletes in wheelchairs to compete with other students during the regular season, but none have met the qualifying times to enter the state meet.

Based in part on the report of the Workgroup, in February 2007, MPSSAA added 12 wheelchair racing events to the 2007 Spring Tournament, six races for boys and six for girls. Each wheeler could compete in up to four events, the same limit applicable to non-wheelers. Two male wheelchair racers were eligible to compete; McFadden was the lone competitor in the girls' races.

The 188 secondary schools in Maryland were divided into four classes, 1A, 2A, 3A, and 4A, based on the number of students attending a school. Except in wheelchair race events, students and teams only competed against students and teams in their class. All of the wheelchair races, however, were contested on a statewide, rather than a class basis. As a result, the three wheelchair racers, including McFadden, competed as a separate "class" without earning points

for their team. MPSSAA had decided not to award team points for wheelchair races to "ensure competitive fairness and equity in team scoring,"

NEUTRAL RULE

In response to McFadden's lawsuit alleging discrimination on the basis of disability, MPSSAA claimed the decision not to award team points for wheelchair races was "fully consistent with MPSSAA's general policy regarding new team events," specifically the following "40% rule":

When a "new team event" is added to state-sanctioned tournaments, the results of such an event do not earn team points in the determination of team championships until high schools representing at least 40% of the jurisdictions in a particular class participate in that event during the regular and post season.

According to MPSSAA, the 40% Rule had been applied to diving and pole vaulting competitions. In the case of diving, only a "handful of high schools in one class of schools added diving events to their swimming team's repertoires" in the last few years. Since there were an insufficient number of schools with diving to satisfy the 40% Rule, "diving competitors at schools participating in the state swimming championships did not earn points for their teams." Instead, diving events were made a part of the statewide swimming competition as "exhibitions." After a "dramatic reduction" in the number of schools participating in pole vaulting, application of the 40% Rule resulted in similar changes in high school pole vault events.

McFadden, however, petitioned the federal district court to issue "a prohibitory injunction forbidding defendants from declining to award her 'one point' for the successful completion of her events at the up-coming state competitions." According to McFadden, as the "responsible state-level officials," the MPSSAA had failed to formulate a "point system that would permit her to do so [i.e., earn one point] in this Spring's state championships, arguably the most important part of the season."

While acknowledging the desirability of awarding team points to participants in wheelchair races, the MPSSAA claimed that they had "not yet figured out how to do it in a fair and equitable manner":

[M]any individual, non-disabled high school track and field athletes whose opportunities to experience the "thrill" of a team victory may be unfairly diminished if care is not taken to ensure that the few teams with wheelchair athletes are not given an unwarranted advantage in the quest for team championships.

According to MPSSAA, if McFadden was awarded even one point for her participation in the 2007 tournaments, "her school could be named team champion, or otherwise rank higher in team standings, on a basis that is unfair to non-disabled individuals at other schools." In making this argument, MPSSAA emphasized that fact that McFadden's high school was the only school with a "girl wheeler" and "only two schools in Maryland have wheelchair racers." In response, McFadden claimed that such disparities among schools were frequent because schools are

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oftentimes unable to furnish participants for particular events and, therefore, unable to score points in those events. According to McFadden, such disparity was inherent in “the nature of team events” because all teams have “strengths and weaknesses,” including weaknesses for “teams that do not have participants in particular events.”

In her lawsuit, McFadden alleged that she was an otherwise qualified individual with a disability who was discriminated against on the basis of her disability in violation of the ADA. Specifically, as an individual with a disability, McFadden claimed she was "qualified" because “she has met all of the conditions set forth by defendants for participation in its athletic programs, and she, in fact, participates.” Moreover, McFadden contended that she was denied "full and meaningful participation" in defendants' athletic program because she was “not allowed to earn points for her team.”

EQUAL TREATMENT

According to the federal district court, the issue was whether McFadden was “being treated *less favorably on account of her disability*.” (*Emphasis of court*) In other words, the court had to determine “whether the constraints on McFadden's ability to earn points for her team differ in any material, legally cognizable way from the constraints on the opportunity of similarly situated students.” In the opinion of the federal district court, under the 40% rule, McFadden was “treated no differently than is any student at any school who participates in an event with insufficient participation.”

Defendants award team points for track and field events only when schools representing 40% of the students in a particular class participate in an event...
[T]he minimum percentage requirement embodied in the 40% Rule is neutral in intent and in effect, and, as applied by defendants to withhold team points from McFadden's performances works no unlawful discrimination against her.

While the 40% Rule might appear neutral on its face, as applied to her, McFadden claimed that “the 40% Rule would operate as a justification to forever exclude her and other wheelchair racers because they will always be minorities and are unlikely ever to reach the required minimum.” In response, the federal district court acknowledged that “one aim of the disability rights statutes at issue in this case is to protect those with that particular ‘minority’ status because they have been historically stigmatized and excluded.”

Despite the “stark and undeniable difference in treatment accorded McFadden, as contrasted with the ability of non-wheelers to earn points for their teams,” the federal district court found that only one or two more schools in three of the larger school systems needed to offer wheelchair racing in order to satisfy the 40% rule. At the time of McFadden’s lawsuit only two of Howard County’s twelve schools offered wheelchair racing during the regular season. However, as interpreted by the MPSSAA, all twelve Howard County Schools would count to satisfy the 75 minimum schools needed to elevate the event to the State championship competition.

Generally, new sports and events are added to the Regional and State Tournaments after a minimum of 40% MPSSAA member schools participate in

the sport event on the varsity level during the regular season and at district tournaments. This means that *when a sufficient number of local school systems adopt a new sport or event* at the varsity level that comprises the equivalent of 40% or 75 of the 186 member schools, the event can be elevated to the statewide tournament level.

[E]ven though Howard County is the only jurisdiction offering varsity wheelchair racing, and even though only two schools in Howard County have competitors in wheelchair racing, MPSSAA will count all of Howard County's 12 secondary schools toward the 40% minimum needed to "elevate" wheelchair racing to an event for which team points are awarded.

Accordingly, the federal district court rejected McFadden's argument that "the 40% Rule will require that fully 40% of all of the state's secondary schools have wheelchair racers before wheelers will be permitted to earn points for their teams."

ESSENTIAL DIFFERENCE

As described by the federal district court, "a proper analysis must bore down more deeply into the intent and effect of the 40% Rule" to determine whether the Rule was being applied to "exclude, stigmatize, or diminish the contributions of disabled students," or simply create "a fair and equitable system of racing competition designed to identify team rankings." In so doing, the court noted "inherent and relevant differences between the class of wheelers and the class of non-wheelers." Specifically, the court found that "wheelchair racers simply do not compete against non-wheelers" because "the 'essential nature' of racing a wheelchair is different from the 'essential nature' of running." Since wheelchair races are "distinctly different athletic activities" from other running and jumping events in a track and field competition, the federal district court rejected McFadden's contention that she was entitled to "treatment identical to non-wheelers in respect to the ability to earn team points."

As a result, the federal district court found McFadden had failed to establish that it was *discriminatory* under the disability rights statutes for MPSSAA to "maintain a difference in the opportunity of wheelchair racers, in contrast to non-wheelchair racers, to earn points for teams." The difference in opportunity was not on the basis of disability. Rather, the small number of teams with female wheelers (i.e. one participant, McFadden) precluded this "new team event" from earning points in state-sanctioned tournaments to determine team championships.

As noted by the federal district court, "the creation of the separate participation opportunity" is not in and of itself unlawful discrimination. On the contrary, the court acknowledged that "the question becomes one of the effectiveness or equality of the separate benefit." In this particular instance, the court found that the effectiveness or equality of the separate benefit afforded to wheelers no different than that provided by MPSSAA to other "exhibition" sports like diving and pole vaulting.

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McFadden is a remarkable young person for and in whom the entire community should feel boundless pride and admiration. Her diligence, determination, hard work, and yes, even her advocacy, are noble and inspiring...

While it is clearly in the public interest to provide for "full and meaningful" participation of persons with disabilities in secondary school athletic programs, it is equally true that the public interest is furthered when responsible educational officials, faced with a clash of interests among students, are afforded the time and opportunity to conduct a deliberate and comprehensive evaluation of how best to reconcile those conflicting interests.

As a result, the federal district court denied McFadden's motion for a preliminary injunction which would have prohibited MPSSAA from "declining to award her one point for the successful completion of her events at the up-coming state competitions."