

NOTES

Illegalizing the NCAA's Eligibility Rules: Did *Cureton v. NCAA* Go Too Far, or Not Far Enough?

I. Introduction

For almost thirty-five years, the National Collegiate Athletic Association (NCAA) has imposed academic eligibility requirements on incoming college freshmen who seek to participate in intercollegiate athletic competition.¹ These requirements represent the NCAA's continuing efforts at maintaining the delicate balance between athletics and academics at American colleges and universities.

However, it was not until 1986, with the implementation of an eligibility regime known as "Proposition 48,"² that the NCAA rules attracted national attention. In fact, Proposition 48 sparked a firestorm of controversy by reinstating – after a thirteen year hiatus – a minimum standardized test score requirement into the NCAA's eligibility equation. This test score element, which employed both the Scholastic Assessment Test (SAT) and the American College Test (ACT) as its measuring criteria, was added to the already existing minimum high school grade point average (GPA) requirement. Under Proposition 48, then, a high school athlete was required to attain both a minimum GPA and a minimum standardized test score to be eligible to compete in intercollegiate athletics.³

Of the two prerequisites, the test score requirement proved to be the more occlusive, and not surprisingly, the apex of the eligibility rules conflict. The controversy centered on whether this standardized test score requirement resulted in unequal treatment for, or had a disproportionately harsh impact on, African-American student-athletes.

Recently, in *Tai Kwan Cureton, et al. v. National Collegiate Athletic Ass'n*,⁴ the United States District Court for the Eastern District of Pennsylvania became the first judicial forum to consider the debate. On January 8, 1997, two African-American student-athletes filed a putative class action alleging unlawful discrimination under Title VI of the Civil Rights Act of 1964 (Title VI) through the operation of the NCAA's initial eligibility rules.⁵ Sitting for the court, Judge Buckwalter, in an unprecedented opinion, stretched the interpretive limits of Title VI and permanently enjoined the NCAA from implementing and operating its initial eligibility requirements.

This decision is the focus of this Note. Part II introduces the NCAA, examines its eligibility requirements, and frames the concomitant controversy leading up to the *Cureton* decision. Part III analyzes the court's attempt at placing the action within the

1. See KENNETH L. SHROPSHIRE, AGENTS OF OPPORTUNITY 59 (1990).

2. Proposition 48 became NCAA Bylaw 5-1-(j) and is now contained in NCAA Bylaw article 14.3. See NCAA, NCAA RESEARCH REPORT, REPORT 92-02 at 5 (Martin T. Benson ed., Aug. 1993).

3. See NCAA OPERATING BYLAWS arts. 14.3.1.1(a) & (b), reprinted in NCAA, 1993-94 NCAA MANUAL (Laura E. Bollig ed., 1993).

4. *Cureton v. National Collegiate Athletic Ass'n*, 37 F.Supp.2d 687 (E.D. Pa. 1999).

5. *Cureton v. National Collegiate Athletic Ass'n*, No. Civ.A.97-131, 1998 WL 961387, at *1 (E.D. Pa. Dec. 13, 1998).

statutory and jurisprudential confines of Title VI. First, it details the provisions of Title VI and highlights the Supreme Court caselaw necessary to understanding their operation. Second, it scrutinizes the court's endorsement of a private right of action under Title VI. Part III concludes by evaluating the court's determination that the NCAA is a "program or activity receiving Federal financial assistance," and thus, subject to suit under Title VI. Part IV reviews the merits of the *Cureton* decision by wading through the court's three-pronged Title VI analysis. Finally, Part V departs from the normative analysis of Parts II through IV and argues that the *Cureton* court unnecessarily limited the scope of its ruling, thereby falling short of eliminating the discriminatory effects of the NCAA's eligibility rules.

II. The NCAA and its Eligibility Rules: A Continuing Controversy

A. The NCAA

The NCAA serves as the rule-making body authorized with overseeing our nation's intercollegiate athletic programs.⁶ The NCAA is a private, voluntary, unincorporated association of approximately 1,200 member institutions, consisting of four-year colleges and universities located across the United States.⁷ The NCAA membership is divided, for purposes of bylaw legislation and intercollegiate competition, into Divisions I, II, and III.⁸ Its principal functions include establishing requirements concerning scholarships, recruiting, and academic eligibility. By joining the NCAA, each member agrees to abide by the NCAA's rules and policies as embodied in its bylaws.⁹

The primary goal of the NCAA, as reflected in its Constitution,¹⁰ is to protect the integrity of intercollegiate sports through maintaining an acceptable level of education for student-athletes and by promoting the concept of amateurism.¹¹

B. The NCAA's Eligibility Rules

Since 1965, minimum initial eligibility rules have been at the forefront of the NCAA's mission.¹² The NCAA Constitution provides that these rules are "designed to

6. See *Cureton*, 37 F.Supp.2d at 696 ("Plaintiffs have established on this record that the member colleges and universities have granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics . . .").

7. See *id.* at 690.

8. See *id.* *Cureton* deals with the promulgation of a bylaw affecting eligibility only in Division I, or what is commonly understood as "big-time" intercollegiate athletics.

9. See *id.* at 695 (citing *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988)).

10. Article 2.4 of the NCAA Constitution provides: "Intercollegiate athletic programs shall be maintained as a vital component of the educational program and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general." NCAA Const., art.2.4.

11. See NCAA, 1993-94 NCAA MANUAL arts. 1.1.3 (Laura E. Bollig ed., 1993) (establishes the primary purpose of the NCAA: "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.")

12. Friction between the roles of collegiate athletics and academics dates well before 1965. College sports during the early 1900s featured "mercenary" athletes, players who went from school to school over several seasons, taking the best offer to play various sports – one year at Yale and the next at Harvard. See PAUL LAWRENCE, UNSPORTSMANLIKE CONDUCT 22-23 (1987). Initial NCAA reforms sought to eliminate these "mercenaries", some of which had no academic record whatsoever, and restrict participation in intercollegiate sports to students actually pursuing a degree. See KENNETH L. SHROPSHIRE, AGENTS OF OPPORTUNITY 60 (1990). NCAA measures have often been draconian – under the 1947 "sanity code", athletic scholarships were actually eliminated and financial awards were strictly need-based. See LAWRENCE at 41. The sanity code

assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student athletes."¹³

The 1965 rule¹⁴ required incoming freshmen to have a high school GPA and standardized test score sufficient to "predict" a college GPA of 1.6 on a 4.0 scale.¹⁵ This forecast was made by using a formula combining high school grades with the student's SAT or ACT score. Students failing to meet the formula's benchmark were not eligible to compete in intercollegiate athletics in their first year.

In 1973, the NCAA dropped the standardized test element from its eligibility equation, and student-athletes were required only to attain a GPA of 2.0 to compete.¹⁶ However, regardless of eligibility for freshman-year competition, any student-athlete could receive an athletic scholarship. Once enrolled, students who fell below their university's requirements for good academic standing were ineligible until their grades reached the appropriate level.¹⁷

Notwithstanding the NCAA's efforts, by the early 1980s, it had become increasingly clear that the NCAA was failing its mission. Mounting and well-publicized examples of institutions exploiting student-athletes for their athletic talents,¹⁸ combined with low graduation rates for many student-athletes,¹⁹ forced the NCAA to re-evaluate its eligibility scheme.²⁰

had a short life, repealed once it became clear that under-the-table payments had replaced athletic scholarships, and thus the winning schools were those that could beat the system. *See id.* at 48-49. Athletic scholarships were reinstated shortly thereafter. *See id.*

13. NCAA Const., art.2, rule 2.12.

14. codified as NCAA Bylaw 4-6-(b)-(1). This rule represented a shift away from the NCAA's traditional "home-rule" policy which had allowed each institution to unilaterally determine an incoming freshman's eligibility.

15. *See id.*

16. *See* NCAA, 1983 NCAA CONVENTION PROCEEDINGS app. at 35 (1983).

17. *See* NCAA OPERATING BYLAWS arts. 14.01.1, 14.02.5, reprinted in NCAA, 1991-92 NCAA MANUAL (Laura E. Bollig ed., 1991).

18. *See, e.g.,* Ross v. Creighton Univ., 957 F.2d 410, 411 (7th Cir. 1992) (Kevin Ross, a functional illiterate and college basketball player, filed suit against Creighton University for negligent admission and educational malpractice alleging that while he was recruited to play sports for the university, he was denied the opportunity to obtain a meaningful education. The Seventh Circuit denied Ross' claim on public policy grounds). Dexter Manley, an All-Pro lineman for the Washington Redskins, announced in U. S. News & World Report that he graduated from Oklahoma State University unable to read! *See* Tom Callahan, *Pro Football's Everyman*, Dec. 17, 1990, U.S. NEWS & WORLD REP., 78.

19. A 1981 survey unveiled that only fifty-two percent of male athletes who entered college in the fall of 1975 had graduated within 5 years. *See* Ron Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 94 (1982). Another study revealed that of the professional basketball players who had attended four-year colleges and universities, thirty percent had received a bachelor's degree. *Id.* at 93. When the test pool is narrowed to Division I or "big time" college athletics, the numbers are even more bleak. One out of six big-time football and basketball players ever graduate from college. *See* FRANCIS X. DEALY, JR., WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS 96 (1990). The University of Houston went twenty-five years without graduating a black basketball player, until Elvin Hayes, who returned to college in 1987 after finishing his NBA career, received his degree. *Id.* at 98. Memphis State University went twelve years without graduating a black basketball player. *Id.*

20. The NCAA was under heavy pressure from the media and university presidents who saw the then current system as allowing institutions to "recruit[] educationally ill-prepared, but physically talented, minority athletes, use them until they exhausted their athletic eligibility, then discard them . . . still without the ability to read at a fifth grade level." *See* Symposium, *College Athletics As a Vehicle for Social Reform*, 22 J.C. & U.L. 77, 83 (1995).

In an effort to stiffen its eligibility requirements, the NCAA enacted Proposition 48, which took effect in August, 1986.²¹ Proposition 48 required, first, that student-athletes attain a 2.0 GPA in an eleven-course core curriculum which included courses in English, math, natural sciences and social sciences. Second, Proposition 48 required a high school athlete to achieve a score of 700 out of 1600 on the SAT, or 15 out of 36 on the ACT. Failing to meet the conditions of Proposition 48 had the dual effect of rendering student-athletes ineligible to compete and ineligible for athletic scholarships.

Proposition 48, and in particular, the standardized test score requirement, has been sharply criticized from its inception for allegedly discriminating unfairly against African-American student-athletes.²² Critics of Proposition 48 allege that the standardized tests used by the NCAA exhibit inherent racial bias or, in the alternative, they at least result in the exclusion of an unacceptably disproportionate number of African-Americans from intercollegiate competition and scholarship consideration.²³ Moreover, given that many African-American student-athletes are wholly dependent upon athletic scholarships to finance their college educations, it is argued that Proposition 48 effectively deprived many African-American student-athletes of the opportunity to attend college.²⁴ Opponents of Proposition 48 have compelling statistics in their corner. According to a 1990 report by the Knight Commission, over eighty-six percent of the football and basketball players who fell victim to Proposition 48 were African-American.²⁵ Of those Proposition 48 casualties, an overwhelming percentage cleared the first hurdle, the GPA provision, yet faltered on the second, the standardized test criteria.²⁶

In response, the NCAA maintains that its test score requirements are necessary because while GPAs are vulnerable to leniency at the high school and collegiate levels, standardized test scores establish a uniform measure of academic capability.²⁷ The NCAA also points to the alleged success of its eligibility rules scheme by highlighting increased graduation rates since Proposition 48's implementation.

On January 7, 1992, the NCAA again voted to raise the academic bar for incoming athletes, and in 1995, the heightened initial eligibility requirements, known as Proposition 16, took effect.²⁸ Proposition 16 introduced a sliding scale system under which a high school student may use a higher GPA to offset a lower SAT or ACT score. Under this scheme, a high school athlete with a 2.0 GPA must have an SAT score of 900 to be eligible, while a student with a 2.5 GPA may have an SAT score of 700 to qualify.²⁹ While Proposition 16 arguably allays the concerns of some critics by placing less emphasis on test scores, it does little to mitigate against the argument that *any* use of the standardized tests is discriminatory.

21. See NCAA BYLAWS, *supra* note 3.

22. See generally Laura Pentimone, *The National Collegiate Athletic Association's Quest to Educate the Student-Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism*, 14 N.Y.L. SCH. J. HUM. RTS. 471, 494-99 (1998).

23. See *id.*

24. See *id.*

25. The Knight Commission, a special commission of the Knight Foundation, a philanthropic foundation, was issued the task of investigating the reform efforts in intercollegiate athletics. See Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 620 (1995).

26. In 1989, 85.4% of freshman ineligible due to Proposition 48 failed to attain the test-score requirement. See Michael R. Lufano, *The NCAA's Involvement in Setting Academic Standards*, 4 SETON HALL J. SPORT L. 97, 104 n.37 (1994).

27. See Pentimone, *supra* note 22.

28. See NCAA BYLAWS, *supra* note 3.

29. See *id.*

III. *Cureton v. NCAA*

On January 8, 1997, Tai Kwan Cureton and Leatrice Shaw, both individually and on behalf of others similarly situated, filed suit against the NCAA in the United States District Court for the Eastern District of Pennsylvania.³⁰ Cureton and Shaw were two Philadelphia student-athletes who graduated in the top of their respective high school classes and were recruited for track competition by numerous Division I schools.³¹ However, Cureton and Shaw failed to meet the standardized test cutoff score under Proposition 16, and consequently, were denied the opportunity to compete in intercollegiate athletics during their freshman year at Division I schools, denied athletic scholarships by Division I schools, and denied admission to Division I schools.³² Plaintiffs Cureton and Shaw alleged that the NCAA's operation of Proposition 16, and particularly, the practice of denying eligibility for failure to meet the Proposition's minimum standardized test score requirement, resulted in unlawful racial discrimination in violation of Title VI of the Civil Rights Act of 1964.³³ Plaintiffs sought a permanent injunction against the NCAA's continued implementation and operation of Proposition 16.³⁴

On October 9, 1997, Judge Ronald L. Buckwalter denied defendant NCAA's motion to dismiss, and in so ruling, endorsed plaintiffs' claim to an implied private right of action for disparate impact discrimination under Title VI and its implementing regulations.³⁵ On March 8, 1999, Judge Buckwalter, presented with cross-motions for summary judgment, held: (i) the NCAA is subject to suit under Title VI, and (ii) Proposition 16 has an unjustified disparate impact against African-Americans, thereby entitling plaintiffs to judgment as a matter of law on the merits of their Title VI claim.³⁶ Accordingly, plaintiffs' motion for summary judgment was granted and defendant's motion, denied.³⁷ The judge declared Proposition 16 illegal and granted the plaintiffs' request for permanent injunctive relief.³⁸ The court was careful to cabin the scope of its ruling to permanently enjoining the NCAA from denying eligibility based on failure to meet the standardized test score requirement of Proposition 16, and explicitly declined to address the propriety of the proposition's GPA or course requirements components.³⁹

30. See *Cureton*, 1998 WL 961387, at *1. On December 18, 1998, Judge Buckwalter of the District Court for the Eastern District of Pennsylvania granted Andrea Gardner and Alexander Wesby's Motion to be Recognized as Intervenors Aligned With the Named Plaintiffs. *Id.* at *3.

31. See *Race Discrimination Suit Over NCAA's Eligibility Rules to Go to Trial*, Oct. 1997, ANDREWS SPORTS & ENT. LIT. REP., 4.

32. See *Cureton*, 37 F.Supp.2d at 687.

33. See *Cureton*, 37 F.Supp.2d at 689.

34. Plaintiffs also prayed for (1) the entry of a declaratory judgment of Title VI liability, (2) a notification to Division I schools that student-athletes who satisfy the minimum GPA/core course requirement of Proposition 16 are immediately eligible to participate in freshman year athletics, and (3) the provision of a fourth year of eligibility under the NCAA rules for those student-athletes who have lost a year of freshman eligibility at Division I schools due to the minimum test score requirement of Proposition 16. *Id.*

35. *Cureton v. National Collegiate Athletic Ass'n*, No. CIV.A.97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997).

36. *Cureton*, 37 F.Supp.2d at 689.

37. *Id.*

38. See *id.* at 715.

39. *Id.* "Properly interpreted, the order only enjoins the NCAA from denying eligibility based on the minimum standardized test score cutoffs found in Bylaw 14.3 [or, Proposition 16]." *Id.*

A. Title VI

Plaintiffs brought their claim under Title VI of the Civil Rights Act of 1964.⁴⁰ Title VI contains two separate sections which provide different enforcement mechanisms. Section 601, the main provision of Title VI, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁴¹

Section 602 requires federal agencies to promulgate their own implementing regulations which delineate the procedures for ensuring that beneficiaries of federal funding are not pursuing policies having discriminatory impacts. Section 602 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.⁴²

Judge Buckwalter noted in his October 9, 1997 Memorandum: "[p]laintiffs' complaint is not clear as to whether it is alleging a violation of the act [Section 601] or its regulations [Section 602]."⁴³ However, the judge deciphered that "... what plaintiffs ... assert as their sole cause of action in paragraph 33 of the complaint is that defendant's proposition 16 violates the implementing regulations of Title VI."⁴⁴

The difference between an action under the Act, Section 601, and an action under its implementing regulations, Section 602, is significant. The Supreme Court has drawn a distinction between the two, in that an action under Section 601 requires a showing of *intentional discrimination*, whereas an action under Section 602 requires the lesser showing of *discriminatory impact*.⁴⁵ In 1974, in *Lau v. Nichols*,⁴⁶ the Supreme Court held that a plaintiff could prove a violation of Section 602 regulations upon a showing of disparate impact: "Discrimination is barred which has that *effect* even though no purposeful design is present."⁴⁷ In 1983, in *Guardians Association, et al. v. Civil Service Commission of the City of New York*,⁴⁸ the Supreme Court pronounced that Section 601 required proof of intentional discrimination, but under 602 regulations, a showing of disparate impact may be sufficient.⁴⁹ In *Cureton*, the court's characterization of the suit as a "602" claim was likely dispositive. Had the action been cast as a "601" claim, such

40. *Cureton*, 37 F.Supp.2d at 689.

41. 42 U.S.C. Sec. 2000d (1988).

42. *Id.* Sec. 2000d-1.

43. *Cureton*, 1997 WL 634376, at *1. Judge Buckwalter used "Title VI" referring only to Section 601, and used "regulations" referring only to Section 602. Unless otherwise indicated, the author will do the same.

44. *Id.*

45. See generally Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999). The author is indebted to this article for initial direction with respect to Title VI jurisprudence.

46. *Lau v. Nichols*, 414 U.S. 563 (1974).

47. See *id.* at 568.

48. *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983).

49. See *id.* at 584.

a label would have sounded the death knell for the plaintiffs. Indeed, the possibility of these plaintiffs successfully showing that the NCAA intentionally discriminated against them through the operation of Proposition 16 was remote. As such, a Section 602 claim permitted the plaintiffs to proceed with a significantly lighter evidentiary burden.

However, two preliminary questions needed to be answered before plaintiffs could proceed to the merits of their Title VI claim. First, is a private right of action implied under Title VI's implementing regulations? Stated another way, does Section 602 create an enforcement scheme which provides for any individual remedies or rights of participation? Second, is the NCAA subject to Title VI? This second inquiry has two components – first, whether the NCAA a “program or activity” within the purview of Title VI, and second, whether the NCAA receives “Federal financial assistance”. These threshold questions are cumulative, that is, a negative answer to any of them would have doomed the plaintiffs' claim. Taking the issues *seriatim*, we turn to the court's analysis.

B. Is a Private Right of Action Implied Under Title VI's Regulations?

Neither Section 601 nor 602 expressly creates a private right of action. The ensuing issue, then, is whether the court may *imply* such a right. The court begins its treatment of this paramount inquiry by confirming that a private right of action does exist under Section 601. Citing *Guardians*, the judge confirms that “[i]t is clear, and both sides agree, that the Supreme Court endorsed an implied private right of action under Title VI.”⁵⁰ Notwithstanding the judge's casual observation that “a review of the law would be superfluous,” at least for purposes of this Comment, the author must disagree. While a Section 602 private right of action may not necessarily be inferred from a Section 601 private right, the absence of a private right of action under Section 601 would speak strongly to a corresponding absence under Section 602.

In 1979, the Supreme Court recognized in *Cannon v. University of Chicago*⁵¹ a private right of action for plaintiffs bringing suit under Title IX of the 1972 Education Act Amendments.⁵² Title IX prohibits discrimination in educational institutions that receive federal funds.⁵³ The *Cannon* Court inferred an implied private right of action under Title IX by analogizing it to Title VI. Noting that Congress patterned Title IX after Title VI, including the use of almost identical statutory language, Justice Stevens' majority opinion reasoned: “In 1972 when Title IX was enacted, the critical language in [section 601 of] Title VI had already been construed as creating a private remedy.”⁵⁴ Thus, although *Cannon* did not explicitly acknowledge an implied right of action under Title VI, courts have interpreted *Cannon* as virtually inferring such a right under Title IX and Title VI.⁵⁵

Four years after *Cannon*, a class of African-American and Hispanic police officers filed suit under Title VI alleging that New York City Police Department written examinations – used to make hiring decisions and to determine layoffs among officers with equal seniority – had a discriminatory impact on minority candidates and officers in *Guardians Association, et al. v. Civil Service Commission of the City of New York*.⁵⁶ In ruling for the plaintiffs, the Supreme Court erased any remaining doubt as to the existence of a private right of action under Title VI.

50. *Cureton*, 1997 WL 634376, at *1.

51. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

52. *Id.* at 709.

53. 20 U.S.C. Secs. 1681-82 (1988).

54. 441 U.S. at 696.

55. See, e.g., *Chowdury v. Reading Hosp. & Med. Cntr.*, 677 F.2d 317, 319 n.2 (3d Cir. 1982) (noting that courts have consistently held the Title IX language of *Cannon* “to be applicable in discussions of Title VI”).

56. 463 U.S. at 584.

However, whether a private right of action can be implied under the implementing regulations of Title VI remained indeterminate. *Cannon* did not address the issue of whether there was also a private right of action under Title IX or Title VI's regulations. The *Cureton* court cites to *Guardians* in hastily concluding that a private right of action exists under Title VI regulations. Although a persuasive argument could be made that *Guardians* does create an implied private right of action under Title VI's regulations, it is a complex hybrid opinion, and thus warrants closer examination. Judge Buckwalter turned to Justice White's *Guardians* opinion in particular to support his conclusion that Title VI's regulations properly permit the implication of a private right of action:

The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964 . . . and administrative implementing regulations promulgated thereunder. *I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.*⁵⁷ [emphasis added]

Judge Buckwalter's sole reliance on Justice White's opinion may be misplaced. Specifically, Justice White's opinion, unlike Judge Buckwalter's,⁵⁸ recognized a private right of action for disparate impact under Section 601,⁵⁹ without clearly addressing the issue of whether a private right of action exists pursuant to Section 602. Therefore, Justice White's opinion supports Judge Buckwalter's conclusion only insofar as it can be inferred that by approving of a discriminatory impacts claim under Section 601, White also would recognize private actions alleging discriminatory impact under Section 602.

Justice Stevens' *Guardians* opinion, which was joined by Justices Blackmun and Brennan, resembled Judge Buckwalter's opinion and clashes with Justice White's finding that proof of intentional discrimination is necessary under Section 601, but that evidence of disparate impact is sufficient to carry a claim under the regulations.⁶⁰ Justice Stevens' opinion also stated that victims of disparate impact discrimination are entitled to *all* forms of relief, including, presumably, compensatory damages.⁶¹ Taking these two premises together -- that a disparate impact plaintiff must, under Stevens' opinion, pursue his or her claim under 602, and that such a plaintiff is entitled to all forms of relief -- strongly suggests that Stevens and the concurring justices inferred a private right of action under Title VI's implementing regulations.

Finally, Justice Marshall's dissent also implied a private right of action under Section 602.⁶² What *Guardians* gives us, then, is five Supreme Court Justices, in three separate opinions, implicitly recognizing a private right of action for disparate impacts discrimination under the implementing regulations of Title VI. Yet, *Guardians* alone still provides a slender reed upon which to rest a *Cureton*-type claim because the High Court never expressly held that a private right of action exists under the regulations.

The *Cureton* court also cites to language in *Alexander v. Choate*⁶³ in which the Supreme Court suggested that *Guardians* did create an implied private right of action un-

57. *Cureton*, 1997 WL 634376, at *2 (quoting *Guardians*, 463 U.S. at 582) (citation omitted) (emphasis added).

58. Judge Buckwalter understood that "Title VI, on its face, seems to permit only actions based upon intentional discrimination." 1997 WL 634376, at *1.

59. See *Guardians*, 463 U.S. 582, 584, 589-93 (White, J., delivering judgment of the Court).

60. See *id.* at 583, 641-45 (Stevens, Brennan & Blackmun, JJ., dissenting).

61. See *id.* at 645 (Stevens, Brennan & Blackmun, JJ., dissenting).

62. See *id.* at 615, 625 (Marshall, J., dissenting).

63. *Alexander v. Choate*, 469 U.S. 287 (1985).

der the regulations.⁶⁴ However, the *Alexander* precedent suffers from the same infirmity as does *Guardians* in that it too never explicitly holds that there is a private claim of right under Title VI's implementing regulations. Nonetheless, *Cureton* finds comfort in several circuit courts of appeal which have also cited to *Guardians* and *Alexander* in support of their conclusions that a private individual may enforce the implementing regulations of Title VI.⁶⁵

Paradoxically, the best support for *Cureton*'s endorsement of a private right of action under Title VI's implementing regulations comes from a Third Circuit decision recently vacated as moot by the Supreme Court. In 1996, in *Chester Residents Concerned for Quality Living v. Seif*,⁶⁶ one of Judge Buckwalter's colleagues in the Eastern District of Pennsylvania declined to recognize a private right of action under Title VI's implementing regulations.⁶⁷ The plaintiffs, residents of Chester, Pennsylvania, alleged that the Pennsylvania Department of Environmental Protection, by approving a private company's request to build a waste treatment facility in an area already home to several waste processing plants, placed a disparate burden on the predominantly African-American population of Chester Township.⁶⁸ District Judge Dalzell found that the plaintiffs' complaint showed only disparate impact, thereby precluding an action under 601 which he ruled required proof of intentional discrimination.⁶⁹ The court then found a claim under 602 equally unavailing as it rejected a private right of action under Title VI's implementing regulations.⁷⁰ Significantly, the *Chester* court, in so ruling, found that the Supreme Court had not decided whether a private right of action exists under Title VI's regulations.⁷¹

On appeal, the Third Circuit reversed the District Court, holding that Title VI's implementing regulations do create a private right of action.⁷² The court arrived at its decision by invoking a three-part test for determining whether a private right of action exists:

- (1) whether the agency rule is properly within the scope of the enabling statute;
- (2) whether the enabling statute intended to create a private right of action; and
- (3) whether the implication of a private right of action under the regulation will further the purpose of the enabling statute.⁷³

64. See *Cureton*, 1997 WL 634376, at *2. (quoting *Alexander*, 469 U.S. at 294: "Guardians, therefore, does not support petitioner's blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of Sec. 504, *Guardians* suggests that the regulations implementing Sec. 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.")

65. See, e.g., *New York Urban League v. N.Y.*, 71 F.3d 1031, 1036 (2d Cir. 1995) (citing *Guardians* and *Alexander* and allowing plaintiffs' disparate impact claim under Title VI's regulations); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, 1407 & n. 14 (11th Cir. 1993) (citing *Guardians* and *Alexander*, the court found the district court's application of a disparate impact analysis to action under Title VI regulations to be proper); *Larry P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984) (citing *Guardians*, and finding proof of discriminatory impact sufficient when action brought to enforce regulations issued pursuant to the statute).

66. *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd* 132 F.3d 925 (3d Cir. 1997), *vacated*, 119 S. Ct. 22 (1998).

67. *Id.* at 417.

68. *Id.* at 414, n.1.

69. *Id.* at 417.

70. *Id.*

71. *Id.*, n.5.

72. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 119 S. Ct. 22 (1998).

73. *Id.* at 932 (quoting *Angelastoro v. Prudential-Bache Sec., Inc.*, 764 F. 2d 939, 947 (3d Cir. 1985)).

The Third Circuit concluded that Title VI's regulations met parts one and three.⁷⁴ With respect to part two, the court confirmed that Congress did intend to authorize a private right of action under Title VI's implementing regulations.⁷⁵ The Third Circuit found "some indication" and then "uncontroverted evidence" of congressional intent to create a private right of action under the regulations implementing Title VI.⁷⁶

On June 8, 1998, the Supreme Court granted the State of Pennsylvania's petition for writ of certiorari for review of the Third Circuit's holding that private rights of action exist under Title VI's implementing regulations.⁷⁷ However, on August 17, 1998, the Court dismissed the case as moot and vacated the Third Circuit's decision.⁷⁸ Although the Third Circuit's decision is no longer good law, it still has some value as an admittedly imperfect predictor of how the Third Circuit may review Judge Buckwalter's analysis on appeal. The forecast, at least for the *Cureton* plaintiffs, is optimistic.

In *Cureton*, Judge Buckwalter applied the same three-part test as invoked in *Chester*, and reached identical conclusions, with one analytical wrinkle.⁷⁹ Similar to the *Chester* panel, Judge Buckwalter found in *Cureton* that "[a]ffirmative answers to one and three seem obvious."⁸⁰ However, Judge Buckwalter's reasoning in his affirmative answer to part two does not rest on Congressional intent, but rather, on *Guardians* and *Alexander*.⁸¹ This may be a misread of part two of the Third Circuit's test. However, it is axiomatic that the Third Circuit can affirm Judge Buckwalter's conclusion without relying on his rationale, and thus any error is unlikely to be reversible.

Although not precedent, when taken together, the holdings in *Guardians*, *Alexander*, and *Chester* suggest the Third Circuit will approve of *Cureton*'s recognition of a private right of action under the implementing regulations of Title VI. Further, given the Supreme Court's interest in resolving the question, evinced by its granting certiorari in *Chester* and given the cleanness of the issue as presented in *Cureton*, it may prove to be the Supreme Court's second bite at the apple.

C. Is the NCAA Subject to Title VI?

Title VI and its implementing regulations prohibit discrimination "on the ground of race . . . under any program or activity receiving Federal financial assistance."⁸² Thus, the *Cureton* court considered whether the NCAA is a "program or activity" within the purview of Title VI, and whether the NCAA receives federal financial assistance.

74. *Id.* at 933, 936.

75. *Id.* at 933-34.

76. *Id.* at 934.

77. *Seif v. Chester Residents Concerned for Quality Living*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 2296, *vacated*, 119 S. Ct. 22 (1998).

78. *Id.*

79. *Cureton*, 1997 WL 634376, at *1 (citing *Angelastoro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985)).

80. *Id.*

81. *Id.* at *2.

82. 42 U.S.C. Sec. 2000d-1 201(d) (1994).

1. *Is the NCAA a Program or Activity Covered by Title VI?*

The *Cureton* court cites to Title VI's definition of "program or activity"⁸³ and summarily concludes that "the NCAA appears to be a program or activity covered by Title VI."⁸⁴ Presumably, the court fit the NCAA within either Section 3(a)(i) or Section 3(a)(ii), as it clearly does not fall within the other provisions. In any event, the court's brevity of analysis simply reflected the uncontroverted nature of the issue.

2. *Does the NCAA Receive Federal Financial Assistance?*

A plain reading of Title VI yields that its strictures, and those of its regulations, apply only to those institutions, programs, or organizations that receive federal financial assistance.⁸⁵ Consistent with this unambiguous language, the Supreme Court has interpreted "recipient" narrowly. Three Supreme Court decisions are instructive.

*Grove City College v. Bell*⁸⁶ involved the refusal of a private liberal arts college to execute Assurances of Compliance with federal civil rights laws. Because the college's students received tuition grants through the Department of Education, the Department demanded that the college execute an Assurance of Compliance pursuant to the implementing regulations of Title IX. After the college refused, the Department instituted proceedings to terminate the federal grants. The Supreme Court held that colleges are covered by Title IX by virtue of their students' receipt of federal tuition grants. That holding was based explicitly on "powerful evidence of Congress' intent" that colleges and universities are meant to be recipients of this aid.⁸⁷ *Grove City* teaches simply that an indirect recipient of federal funds may fall within Title IX, and by analogy, Title VI, when Congress clearly views that entity as an *intended* recipient.

This reading of *Grove City* was confirmed in *United States Dep't of Transp. v. Paralyzed Veterans of Am.*,⁸⁸ where the question was whether Section 504 of the Rehabilitation Act – prohibiting discrimination against disabled persons in any program or activity receiving federal financial assistance – applies to commercial airlines. Airlines do not receive federal aid.⁸⁹ Airports do.⁹⁰ Plaintiffs reasoned that "airlines are 'indirect recipients' of aid to the airports," because "airport operators convert the [aid] into

83. 42 U.S.C. Sec. 2000d-4a provides that the term "program or activity" means "all of the operations" of any of the following entities if "any part of" the entity in question is extended federal financial assistance:

1. certain State or local government agencies, departments, districts or instrumentalities;
2. a college, university, other postsecondary institution, public system of higher education, or localeducational agency, system of vocational education, or other school system;
3. (a) an entire corporation, partnership, or other private organization, or an entire sole proprietorship if: (i) assistance is extended to such an entity as a whole; or (ii) the entity is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation;" or (b) the "entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship;" and
4. "any other entity which is established by two or more of the entities described in paragraphs (1), (2) or (3)."

Cureton, 1997 WL 634376, at *1.

84. *Cureton*, 1997 WL 634376, at *2.

85. 42 U.S.C. Sec. 2000d (1988).

86. *Grove City College v. Bell*, 465 U.S. 555 (1984).

87. *Id.* at 569.

88. *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986).

89. *Id.* at 605.

90. *Id.* at 604.

Orunways and give the federal assistance — now in the form of a runway — to the airlines.”⁹¹ The Supreme Court disagreed. Finding no evidence that Congress *intended* the airlines to be recipients, the Court held that Section 504 “covers those who receive the aid, but does not extend as far as those who benefit from it.”⁹²

Finally, in *Smith v. NCAA*,⁹³ the Supreme Court held that the NCAA’s receipt of membership dues from its federally funded members does not subject it to Title IX. Once again, the Court focused on the intent of Congress: “There is no allegation that NCAA members paid their dues with federal funds *earmarked* for that purpose.”⁹⁴ The Supreme Court has thus repeatedly conditioned the legal conclusion that an entity is a “recipient” upon a finding that such entity’s receipt of federal funds was intended by Congress.

In *Cureton*, plaintiffs advanced no less than five theories in support of their argument that the NCAA either directly or indirectly receives federal financial assistance. First, plaintiffs submitted that since the NCAA receives dues from member institutions, and those institutions receive federal funds, it follows that the NCAA indirectly receives federal financial assistance.⁹⁵ Presented with an argument identical to the one rejected in *Smith v. NCAA*, the *Cureton* court held:

[p]laintiffs may no longer rely solely on this theory to establish that the NCAA receives federal funds sufficient to subject the NCAA to suit under Title VI because “[a]t most, the Association’s receipt of dues demonstrates it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title [VI] coverage.”⁹⁶

The court’s dismissal of plaintiffs’ first theory represented an effortless extension of the Supreme Court’s “intended recipient” jurisprudence.

Plaintiffs’ second theory, that the NCAA directly receives federal financing through the “Fund”⁹⁷ because the Fund is merely the NCAA’s alter ego, remains unresolved as the court concluded plaintiffs’ argument “can neither be made nor refuted based upon the present record before the court.”⁹⁸ Therefore, because the plaintiffs “failed to sustain their heavy burden of ‘piercing the corporate veil,’” their alter ego theory necessarily failed.⁹⁹

Having declined to adopt the plaintiffs’ first two theories, the court embraced their third theory, which reasoned that the NCAA indirectly receives federal financial assistance through the Fund by virtue of the NCAA’s complete control over the Fund. Impressed by the plaintiffs’ evidence that the NCAA exercises effective control over the block grant given to the Fund by the United States Department of Health and Human

91. *Id.* at 606.

92. *Id.* at 607.

93. *NCAA v. Smith*, 119 S.Ct. 924 (1999).

94. *Id.* at 929 (emphasis added).

95. See *Cureton*, 37 F.Supp.2d at 692 (“Plaintiffs attest that . . . the NCAA admitted that it receives dues from member schools who are recipients of federal funds. Accordingly, Plaintiffs conclude that the NCAA indirectly receives federal financial assistance because the NCAA acts as the member institutions’ agent with respect to the governance of intercollegiate athletics”) *Id.*

96. *Id.* at 693 (citing *Smith v. NCAA*, 119 S. Ct. 924 (1999)).

97. The “Fund” or National Youth Sports Program Fund is an enrichment program for economically disadvantaged youths that provides summer education and sports instruction on the campuses of NCAA member and non-member institutions of higher education, and is, indisputably, a recipient of federal funds. *Id.* at 692, 694.

98. *Id.* at 694.

99. *Id.*

Services, the court concluded that the Fund is "merely a conduit through which the NCAA makes all of the decisions about the Fund and the use of federal funds."¹⁰⁰ Accordingly, the court labeled the NCAA an "indirect recipient" of federal financial assistance, and consequently, subject to Title VI and its regulations.¹⁰¹

This conclusion is suspect in light of the Supreme Court's persistent focus on Congressional intent as the touchstone of determining who is an indirect recipient. The *Cureton* court failed to offer any basis to conclude that the NCAA is the Congressionally intended recipient of any moneys granted to the Fund. Absent such a finding, the relationship between the Fund and the NCAA, while relevant, should have been insufficient to carry the day. As the Supreme Court said in *Paralyzed Veterans*, entities that have not received federal funds may not be covered by Title VI even if "they are 'inextricably intertwined' with an [entity] that has."¹⁰²

The court collapsed Plaintiff's fourth and fifth theories into one, noting they were different only in degree and not in kind.¹⁰³ Plaintiffs' fourth and fifth theories argued, respectively, that member schools who receive federal funds have created and comprise the NCAA while the NCAA governs its members with respect to athletics rules and that recipients of federal financial assistance have ceded controlling authority over a federally funded program to the NCAA, which then becomes subject to Title VI regardless of whether it is itself a recipient. Quoting the language of plaintiffs' fifth theory, the court determined that "irrespective of whether it receives federal funds, directly or indirectly," the NCAA is subject to suit under Title VI because member institutions have delegated "controlling authority" over federally funded programs to the NCAA.¹⁰⁴ Judge Buckwalter does not cite one case in his ruling that the NCAA falls within the ambit of Title VI "irrespective of its receipt of federal funds." The omission is telling.

Title VI's regulations prohibit disparate impact discrimination only by a "recipient" of federal funds.¹⁰⁵ "Recipient" is defined as any entity or individual "to whom Federal financial assistance is extended, directly or through another recipient, for any program."¹⁰⁶ Under this definition, the NCAA is simply not a "recipient," and therefore not subject to the regulations. Thus, even if the "controlling authority" theory has some footing under the statutory language, which is itself a dubious proposition, the theory cannot be utilized for claims that arise solely under the regulations.¹⁰⁷

Moreover, any argument that the NCAA is subject to liability regardless of its status as a recipient has been implicitly rejected by the Supreme Court. In *Paralyzed Veterans*, the Court said that "[u]nder the program-specific statutes, Title VI, Title IX, and Sec. 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipients' acceptance of the funds triggers coverage under the non-discrimination provision."¹⁰⁸ That is a "*quid pro quo* for the receipt of federal funds."¹⁰⁹

100. *Id.*

101. *Id.*

102. 477 U.S. at 610.

103. *Cureton*, 37 F.Supp.2d at 694.

104. *Id.*

105. *Id.*

106. 45 C.F.R. Sec. 80.3(b)(2); 34 C.F.R. Sec. 100.3(b)(2).

107. 45 C.F.R. Sec. 80.13(i); 34 C.F.R. Sec. 100.13(i).

108. *Paralyzed Veterans* makes plain that "Congress limited the scope of [the program-specific statutes] to those who actually 'receive' federal financial assistance because it sought to impose . . . coverage as a form of contractual cost of the recipient's agreement to accept federal funds." 477 U.S. at 605.

109. *Id.*

110. *Id.*

Judge Buckwalter disregards this contractual limitation on Title VI's reach and instead gives the statute "almost limitless coverage."¹¹⁰

In sum, under the first theory accepted by the court, the NCAA is an "indirect recipient" of federal funds. Under the second, the NCAA is not a recipient of federal funds, but nonetheless is subjected to Title VI by virtue of its relationship to member institutions. The court's analysis of this "controlling authority" theory is tenuous in the face of the clear mandate of the statute, namely, that the NCAA must be a recipient of federal funds and given the contractual nature of the relationship. If the Third Circuit declines to accept that the NCAA is an "indirect recipient," which remains an open question considering the incongruity of Judge Buckwalter's analysis, the judge's "controlling authority" analysis may prove to be the Achilles' heel of the *Cureton* decision.

IV. Does Proposition 16 Have an Unjustified Disparate Impact?

Having deputized the plaintiffs by recognizing a private right of action under Title VI's regulations, and having pulled the NCAA within the reach of Title VI, the *Cureton* court finally could turn to the merits of the plaintiffs' claim. Recalling that the court interpreted the suit to be a "602" claim, the operative question was whether Proposition 16 – which requires students to achieve a minimum score on either the SAT or ACT as a condition of eligibility to participate in intercollegiate athletics and/or receive athletically related financial aid during their freshman year – had an unjustified disparate impact against African-Americans.¹¹¹

The Supreme Court introduced the theory of disparate impact discrimination in *Griggs v. Duke Power Co.*¹¹² when it held that a plaintiff need not necessarily prove intentional discrimination to establish an employer's violation of Title VII of the Civil Rights Act.¹¹³ "Although the disparate impact theory was originally developed in cases involving employment discrimination, courts have subsequently applied the theory to claims brought pursuant to the regulations implementing Title VI."¹¹⁴ Title VI disparate-impact proof entails a three-step analysis. First, to state a claim for disparate-impact discrimination, plaintiffs must demonstrate that a facially neutral selection practice has caused a racially disproportionate impact.¹¹⁵ Second, upon a successful showing by plaintiff, the burden of rebuttal shifts to the defendant, who must show that the selection practice causing the disproportionate effect is justified by an "educational necessity."¹¹⁶ On rebuttal, the defendant only bears a burden of producing evidence to support its educational necessity.¹¹⁷ Finally, should the defendant meet their burden of production, plaintiff may nonetheless prevail by: (i) discrediting the asserted educational necessity, or (ii) proffering an equally effective alternative practice resulting in less disparate impact while still advancing the articulated educational necessity.¹¹⁸

111. *Id.* at 608.

112. *Cureton*, 37 F.Supp.2d at 689.

113. *Griggs v. Duke Power*, 401 U.S. 424 (1971).

114. *See Cureton*, 37 F.Supp. 2d at 696.

115. *See id.* at 696-97 (citing *NAACP v. Medical Ctr., Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Quarles v. Oxford Mun. Sep. Sch. Dist.*, 868 F.2d 750, 754 n. 3 (5th Cir. 1989); *Larry P. v. Riles*, 793 F.2d 969, 982 nn. 9-10 (9th Cir. 1984); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 & n. 14 (11th Cir. 1993)).

116. *See id.* at 697 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989)).

117. *See id.* (citing *Board of Educ. of the City Sch. Dist. of New York v. Harris*, 444 U.S. 130, 151 (1979)).

118. *See id.* (citing *Wards Cove*, 490 U.S. at 659-60).

119. *See id.* (citing *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 998 (1988) (O'Connor, J., plurality opinion)).

A. Do Plaintiffs Present a Prima Facie Case of Proposition 16's Racially Disproportionate Effects?

In addressing the *nature* of proof needed to show a disproportionate impact, *Cureton* established that statistical proof alone can make out a prima facie case.¹¹⁹ As to the *quality* of proof, *Cureton* required statistical evidence showing that a challenged practice has caused the exclusion of candidates from a *particular opportunity* because of their membership in a protected group.¹²⁰ The court also noted the Equal Employment Opportunity Commission's "80% rule" as a common basis for determining the sufficiency of statistical evidence.¹²¹ Under the EEOC rule, which the court confirms is "entitled to great deference,"¹²² a selection rate that is less than 80% of the rate for the group with the highest rate constitutes presumptive evidence of disparate impact.¹²³

Armed with a stacked quiver of statistical evidence, plaintiffs easily hit the mark set by the *Cureton* court. Plaintiffs' compelling submissions, the majority of which were plucked from the NCAA's own files, included: (1) of those African-American student-athletes appearing on a Division I Institution Request List submitted to the NCAA Initial Eligibility Clearinghouse, 26.6% did not meet Proposition 16 standards in 1996, and 21.4% did not qualify in 1997 (compared to 6.4% of white student-athletes in 1996 and 4.2% in 1997);¹²⁴ (2) preliminary enrollment data for 1994-1996 showed a drop in the proportion of African-Americans among first-year scholarship athletes in Division I from 23.6% to 20.3% (juxtaposed with a 2.0% increase in white student-athletes);¹²⁵ (3) Proposition 16's minimum standardized test score was the factor causing the greatest degree of disparate impact, as only 67.4% of African-American college-bound student-athletes cleared the test score hurdle, as compared to 91.1% of white college-bound student-athletes;¹²⁶ finally, (4) application of the EEOC's test showed, in most instances, that the selection rate of African-Americans is less than 80% that of the white selection rate.¹²⁷

Rather than challenge plaintiffs' onslaught of statistical evidence, the NCAA cleverly attempted to reframe the lawsuit. The NCAA advanced that "the educational opportunity at issue was not the opportunity to participate in college athletics during the freshman year, but rather, the opportunity to obtain a college degree."¹²⁸ Operating from this premise, the NCAA marshaled its own statistics showing that since the implementation of Proposition 16, African-American student-athletes were graduating at higher rates.¹²⁹ Following the NCAA's reasoning, if graduation, and not freshman-year eligibility, was the opportunity at stake, the plaintiffs failed to demonstrate the requisite disproportionate effect.¹³⁰ However, defendant's attempt at misdirecting the Court's inquiry rightly failed. The plaintiff is master of his claim, and as the court noted, "it is . . . this educational opportunity that Plaintiffs are challenging, and not the opportunity to gradu-

120. *Id.* (citing *Wards Cove*, 490 U.S. at 650).

121. *Id.* (citing *Watson*, 487 U.S. at 994).

122. *Id.* at 700. (citing 2 BARBARA LINDEMAN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1729 (3d ed. 1996)).

123. *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)).

124. *Id.* (citing 1978 Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 1607.4(D) (1999)).

125. *Id.* at 698 (citing a July 27, 1998 NCAA Memorandum to the Division I membership).

126. *Id.*

127. *Id.* at 699 (citing a United States Department of Education Report).

128. *Id.* at 700.

129. *Id.* at 699.

130. *Id.*

131. *Id.*

ate.”¹³¹ On the basis of plaintiffs’ bare statistics, and defendant’s admissions regarding their veracity, the court concluded that plaintiffs had established a *prima facie* showing of a racially disproportionate effect sufficient to shift the burden of rebuttal to the NCAA.¹³²

B. Is Proposition 16’s Use of Standardized Test Scores and its Resulting Disparate Impact Justified by an Educational Necessity?

Once the burden has shifted to defendant to defend the discriminatory practice, “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate [educational] goals of the [institution].”¹³³ The challenged practice must bear a demonstrable “manifest relationship” to a legitimate educational goal.¹³⁴ The defendant, therefore, must identify the particular educational goal, and then, present objective evidence of how the challenged practice significantly serves this identified goal.

1. Are the NCAA’s proffered goals legitimate educational aims of Proposition 16?

The NCAA submitted that “(1) raising student-athlete graduation rates, and (2) closing the gap between black and white student-athlete graduation rates” are the justifiable educational goals of Proposition 16.¹³⁵ The court implied a two-part test in ruling on the legitimacy of the NCAA’s goals. First, the court evaluated the facial validity of the goal and asked whether the proffered goal represented a proper pursuit of the NCAA.¹³⁶ Second, the court employed a legislative intent analysis and asked whether documented evidence revealed that the articulated goal was in fact the impetus behind the enactment of Proposition 16.¹³⁷

Applying the first prong of the test to the NCAA’s first articulated goal, the court premised that raising graduation rates is consistent with the primary mission of educational institutions, and concluded that the NCAA, as a surrogate of those institutions, is properly within its role when it pursues this same objective with respect to student-athletes.¹³⁸ As to the second step of the analysis, the court found “overwhelming” and abundant support for the proposition that the membership was concerned about raising student-athlete graduation rates.¹³⁹ Thus, the court concluded that the NCAA’s stated objective of raising student-athlete graduation rates was a legitimate educational goal.¹⁴⁰

The NCAA’s second stated objective – bridging the gap between black and white student-athlete graduation rates – did not fare as well. For the first part of its two-step analysis, the court explained that there is “no support for an educational institution (let alone its surrogate) to engage in such a goal.”¹⁴¹ The NCAA had argued that closing the black-white gap is “a subject of longstanding concern in the educational and civil rights communities.”¹⁴² However, the court has intimated that this reality does not empower

132. *Id.* at 700.

133. *Id.* at 699-701.

134. *Id.* at 701 (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989)).

135. *Id.* (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)).

136. *Id.*

137. *Id.* at 702-06.

138. *Id.*

139. *Id.* at 703.

140. *Id.* at 703-04.

141. *Id.* at 704.

142. *Id.*

143. *Id.* at 705 (quoting Def.’s Response at 15).

the NCAA to promulgate rules setting initial eligibility standards simply because it may have a desired lateral effect.¹⁴³ Desirability and legality are not coextensive concepts.

With respect to the legislative history of Proposition 16, the court found “[a]bsolutely nothing in the record – transcripts of convention proceedings, research results, or memoranda – even suggest[ing] that this was a goal that motivated the promulgation of Proposition 16 or 48.”¹⁴⁴ Moreover, the court believed that presenting such a “‘back-end’ balancing between graduation rates as an express objective” of Proposition 16 violated “the Supreme Court’s prohibition against using a ‘bottom-line’ defense to disparate impact cases involving pass/fail selection practices.”¹⁴⁵ Accordingly, the court did not tarry long in dismissing the stated goal of closing the gap between black and white student-athlete graduation rates as an unjustifiable aim of Proposition 16.

2. Is There A Manifest Relationship?

Having rejected the validity of the NCAA’s second proposed goal, the court turned to whether the challenged practice, viz., using a particular standardized test cutoff score, was manifestly related to achieving the surviving goal of raising student-athlete graduation rates.

Hinting at his uneasiness in such “uncharted territory,”¹⁴⁶ Judge Buckwalter heeded: “To the Court’s knowledge, no court in this Circuit has yet ruled on the propriety of using standardized test cutoff scores as a facially neutral selection practice.”¹⁴⁷ Setting out on his analysis, the judge established that the manifest relationship standard requires the NCAA to produce objective evidence showing a nexus, or manifest relationship, between the use of the particular Proposition 16 cutoff scores of SAT 820 and ACT 68, and the NCAA’s stated objective of raising student-athlete graduation rates.¹⁴⁸ Thus, a showing by the NCAA that the general use of standardized test scores serves its identified goal would be inadequate. In fact, the court expressly declined to rule on this wider issue of the general validity of using the SAT in initial eligibility rules.¹⁴⁹ Rather, the court confined its inquiry to the narrow issue of whether the NCAA could demonstrate that the particular cutoff score of SAT 820, serves, in a significant way, the goal of raising student-athlete graduation rates.

“As with all facially neutral practices challenged under the disparate impact theory, the use of a SAT cutoff score as a selection practice would be proper so long as it is

144. “The Court agrees that closing the black-white graduation gap is, as the NCAA states, ‘a subject of longstanding concern in the educational and civil rights communities.’ However, that desirable outcome of Proposition 16, actual or projected, is simply a collateral benefit of promulgating a rule that sets heightened academic standards.” *Id.*

145. *Id.* at 704-05.

146. *Id.* at 705 (citing *Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982)).

147. *Id.* at 707.

148. *Id.* at 706.

149. *Id.* (citing *Newark Branch, NAACP v. Town of Harrison, New Jersey*, 940 F.2d 792, 804 (3d Cir. 1991)). “[F]or ease of discussion, the Court will only refer to the SAT cutoff score of 820, although the analysis applies with equal force to the ACT cutoff score of 68.” *Id.* at 707. The author will do the same.

150. “[T]he Court stresses that this case does not preclude the use of the SAT, or any particular cutoff score of the SAT, in the NCAA’s adoption of an initial eligibility rule.” *Id.* at 712. But, the court cautions: “It may be ‘that no strong statistical basis exist[s] for the use of any particular single minimum test score,’ but that is for the NCAA to determine more definitively after undertaking an appropriate analysis justifying an independent basis for choosing a cutoff score.” (emphasis added) *Id.*

justified.”¹⁵⁰ “[T]here should be some independent basis for choosing the cutoff.”¹⁵¹ Simply put, the NCAA must show there is something special about an SAT score of 820.

The NCAA relied solely on the general predictive ability of the SAT on graduation rates of student-athletes in justifying the cutoff score.¹⁵² The court found that, in so doing, “[the NCAA] has failed to analyze the issue in terms of what factors affect the graduation rate in addition to Proposition 16, thereby concomitantly failing to control for those variables.”¹⁵³ The court continued,

... [the NCAA] cannot possibly know with any degree of certainty whether the predicted increases in graduation rates are attributable to numerous factors other than the 820 cutoff score. Merely examining the outcomes of the initial eligibility rules does not demonstrate that the choice of the particular cutoff score in question serves the goal in a significant way.¹⁵⁴

Thus, while the NCAA’s argument may be *literally* correct – accepting their position that the SAT does have some predictive ability of graduation rates – it is *legally* incorrect, for the NCAA could not show an independent basis for choosing SAT score 820. Were the court to accept the NCAA’s proposition that SAT scores predict graduation rates, and that therefore inferentially SAT score 820 significantly serves the goal, seemingly any score would be justifiable.¹⁵⁵

The court found not only the analytical substance of the NCAA’s arguments unconvincing, but also the NCAA’s deliberative process. “Significantly, the NCAA has failed to articulate in any meaningful manner the decision making process behind the selection of the 820 cutoff score.”¹⁵⁶ “[N]othing in the record supports the conclusion that the cutoff score was adopted by the entire membership after due consideration of this issue.”¹⁵⁷ The court concluded that without presenting an independent basis for choosing cutoff score 820, the NCAA failed to show how this score significantly served the goal of raising student-athlete graduation rates.¹⁵⁸

Thus, although the NCAA’s goal of raising graduation rates was deemed valid, its failure to prove a manifest relationship between Proposition 16’s cutoff score and its stated goal eventually crippled its defense.

151. *Id.* at 707 (citing *Groves v. Alabama State Bd. of Educ.*, 776 F.Supp. 1518, 1531 (M.D. Ala. 1991). A “particular cutoff score affecting student-athlete graduation rates ‘should normally be set so as to be reasonable and consistent with normal expectations of the acceptable proficiency’ of student-athletes towards attaining a college degree.” *Id.* at 707-08 (citing 1978 Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Sec. 1607.5(H) (1999)). See also *Guardians Ass’n of the N.Y. Police Dep’t v. Civil Serv. Comm’n*, 630 F.2d 79, 105 (2d Cir. 1980) (“No matter how valid the exam, it is the cutoff score that ultimately determines whether a person passes or fails. A cutoff score unrelated to job performance may well lead to the rejection of applicants who were fully capable of performing the job. When a cutoff score unrelated to job performance produces disparate results, Title VI is violated.”) *Id.*

152. *Id.* at 708 (citing *Guardians*, 630 F.2d at 105).

153. *Id.* at 709.

154. *Id.*

155. *Id.* (emphasis added) (footnote omitted).

156. “Taken to its logical end, the NCAA’s proffered ‘manifest relationship’ is tantamount to a rationalization of any cutoff score, once the SAT’s predictive ability is presumed.” *Id.*

157. *Id.* at 710.

158. *Id.* at 711.

159. *Id.* at 712.

C. Are There Equally Effective Alternatives to Proposition 16?

Assuming, *arguendo*, that the court found the NCAA's justification for Proposition 16 convincing, such a finding still would not have been decisive. Under the third prong of Title VI disparate impact analysis, if a plaintiff submits an equally effective alternative practice that results in less disproportionality, the plaintiff will ultimately prevail.¹⁵⁹

The *Cureton* plaintiffs presented three such alternative practices resulting in less racial disparity while still serving the NCAA's goal of raising student-athlete graduation rates.¹⁶⁰ The NCAA's models accomplished this result either by enforcing a test cutoff score, but lower than Proposition 16's, or eliminating the test score as a strict cutoff, but retaining it as a "sliding scale" criteria to be used in conjunction with the student-athlete's GPA.¹⁶¹ The NCAA contested that the three models submitted do not predict graduation rates equal to those projected under Proposition 16.¹⁶² Echoing its treatment of Propositions 16's SAT score of 820, the court responded that it found nothing special about its projected 61.8% graduation rate either.¹⁶³ Rather, the court held, to be "equally effective" to Proposition 16, plaintiffs' models need only project graduation rates higher than those experienced prior to the adoption of Proposition 16.¹⁶⁴ Given that such rates hovered around 56%, all three of plaintiffs' models sufficiently advanced plaintiffs' articulated goal of raising graduation rates.¹⁶⁵ And "[t]hat is all the proof that Plaintiffs need[ed] to demonstrate under Title VI."¹⁶⁶

Thus, having found that plaintiffs presented a *prima facie* case of disparate impact, that the NCAA failed to respond with an educational justification for Proposition 16, and finally, that plaintiffs proffered three equally effective, yet less discriminatory, practices, the court granted plaintiffs' motion for summary judgment on the merits of their Title VI claim.¹⁶⁷

V. Did *Cureton* Go Too Far--or Not Far Enough?

The plaintiffs' claim in *Cureton* presented the court with several threshold issues that evoked largely unsettled points of law, at least in the Third Circuit. First, whether a private right of action may be implied under Title VI's implementing regulations remains an open question in light of the Supreme Court's Title VI jurisprudence. However, if *Chester* offers any indication, the Third Circuit will likely uphold Judge Buckwalter's endorsement of plaintiffs' right of action. Second, whether the NCAA falls

160. *Id.* at 713.

161. *Id.* at 713-14.

Alternative	Overall Student-Athlete Graduation Rate	Black Ineligibility Rate	Black False Negatives*
Proposition 16	61.8%	19.4%	15.7%
Model 2	60.7%	15.9%	13.6%
Model 3	60.0%	15.7%	13.2%
Model 4	59.8%	15.6%	13.1%

*"False negatives" are students who are initially ineligible as a result of Proposition 16, but who do eventually graduate.

See *id.* at 714.

162. *Id.*

163. *Id.*

164. *Id.* "Under Title VI, 'equally effective' means equivalent, comparable, or commensurate, rather than identical." *Id.* at 713 (citing *Alexander v. Choate*, 469 U.S. 287, 294 (1985)).

165. *Id.* at 714.

166. *Id.*

167. *Id.*

within the ambit of Title VI is no less indeterminate. In finding that the NCAA is subject to Title VI "irrespective of its receipt of federal funds,"¹⁶⁸ the court stretched the limits of Title VI beyond what a plain reading of the statute can yield. Recalling, however, that the court rested its conclusion on alternative and mutually exclusive theories, the Third Circuit may adopt plaintiffs' more colorable "indirect recipient" theory or advance its own theory in ruling that the NCAA is subject to Title VI. In any event, the court's Promethean interpretation will be heavily scrutinized.

While *Cureton* may have gone too far in its findings on the preliminary matters, it is submitted that, on the merits, the court may not have gone far enough. In enjoining the NCAA from denying eligibility based on Proposition 16, the court unnecessarily limited its ruling to illegalizing the use of the particular cutoff score of SAT 820.¹⁶⁹ The court did not preclude the use of any other cutoff score, and more significantly, it declined to pass on the ultimate question before it – whether a standardized test should be used in the eligibility equation at all.

The *Cureton* decision does not eliminate, but only temporarily ameliorates, the discriminatory effects of the NCAA's eligibility rules. By leaving the door open for the NCAA to simply adopt a more researched and less selective cutoff score, the deterrent effect of the court's ruling is suspect. Ironically, *Cureton*'s treatment of the issue, though spotty, supports a wider ruling illegalizing *any* use of the SAT. At one point, the court stated that "using a standardized test to achieve objectives for which it was neither intended nor validated would be improper";¹⁷⁰ later in the opinion, the court determined that "the NCAA has not validated the use of the SAT . . . as a predictor of student-athlete graduation rates";¹⁷¹ the court then confirmed that "[t]hese facts *place into question* the validity of the use of the SAT or any particular cutoff in order to raise student-athlete graduation rates at Division I schools when the SAT was not validated for that purpose."¹⁷² Unfortunately, despite being "place[d] into question," it was never answered.¹⁷³

The plaintiffs' success at presenting a *prima facie* case of disparate impact coupled with the NCAA's failure to justify any use of standardized tests – let alone a particular cutoff score – for its of raising graduation rates mandated a broader conclusion than that reached. Given that the average SAT score for African-American students remains about 200 points lower than those of white students,¹⁷⁴ seemingly any use of the SAT will result in disparate impact. Under Title VI analysis, this disparate impact may be justified by educational necessity. However, not only did the NCAA fail to show that the particular SAT score of 820 was justified, it could not show the use of *any* score was justified. This conclusion has, in addition to the plaintiffs, at least one unlikely supporter of notable significance: the test administrators themselves. The President of the College Board (administrators of the SAT), has stated the NCAA's use of the SAT is misguided:

Such use of the SAT in the process of selecting students for admission to college would be contrary to the guidelines for test use published by the College Board . . .

168. *Id.* at 696.

169. The court expressly declined to rule on the propriety of Proposition 16's GPA and course requirements components. This ruling was appropriate considering the plaintiffs never challenged the legality of these provisions. *See id.* at 716.

170. *Id.* at 707.

171. *Id.* at 708.

172. *Id.* (emphasis added).

173. *Id.*

174. *See* Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 145 (1997).

[T]est scores should never be used alone in determining admission to college. The NCAA's action violates that principle In summary, under the NCAA rule, the SAT would be used for a purpose which it was neither intended nor designed to serve – determining athletic eligibility rather than college admissions; and . . . the way SAT scores are being used in establishing athletic eligibility is contrary to the College Board's guidelines with respect to the use of test scores in making college admissions decisions.¹⁷⁵

Thus, by only enjoining the NCAA from its continued operation of an eligibility cutoff score of 820, and thereby inviting the NCAA to simply adopt a more researched, and therefore “justified” cutoff, *Cureton* implicitly validates the use of the SAT. This results in the inherent anomaly that notwithstanding its discriminatory effects and its undisputed lack of an empirical educational basis for its stated goal, standardized tests have survived the *Cureton* decision.

Despite its limitations, *Cureton* remains a victory for African-American student-athletes, and the civil rights community at large. By upholding the plaintiffs' disparate impact claim, *Cureton* amplifies the heretofore unheard voices of African-American student-athletes who have fallen victim to the NCAA's eligibility rules. In so doing, *Cureton* delivers an unmistakable message to the NCAA that it is no longer immune from federal civil rights laws, and has to defend its eligibility rules on their merits.

TYLER J. MURRAY*

175. See *id.* at 146 (quoting George Hanford, president of the College Board at the time of the implementation of Proposition 48).

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