DEVELOPMENTS IN INTERNATIONAL DISABILITY SPORT LAW

FOREWORD

On January 23, 2009, the Boston University International Law Journal sponsored a symposium on international disability sport law, the first symposium ever held on this topic by a student-edited law journal. This symposium was based around the long term trend of integration and inclusion between disability sport and mainstream sport—not just among individual athletes on the playing field, but in sporting events, organizations, venues, and even the Olympics, and not just in competition but in funding, training, coaching, and media coverage.

The symposium had two panels. The first panel, moderated by Boston University Professor of Law Daniela Caruso, focused on athletics under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The panel members included Harvard University Professor of Law William Alford, BlueLaw International LLP Partner Janet Lord, who has also worked as an adjunct professor at several law schools, University of Louisville Professor of Sports Administration Mary Hums and Harvard Law School Research Fellow Fengming Cui. The second panel focused on the Oscar Pistorius case in the Court of Arbitration in Sport and the legal implications of technology in disability law. The panel was moderated by Boston University Professor of Law Michael Harper. The members of this panel were Massachusetts Institute of Technology Professor of Media Arts and Sciences Hugh Herr, University of Louisville Professor of Sport Administration Anita Moorman, and Women's Sport Foundation Public Policy Director Terri Lakowski.

These panels encapsulated developments in the field of international disability sport law in the last year and included a number of domestic-side developments under the Americans with Disabilities Act (ADA). A keynote address by Linda Mastandrea, the head of the Paralympic side of Chicago's 2016 Olympic and Paralympic bid, highlighted how the integration of disability athletes in able-bodied sport is occurring at a far higher level than just that of the individual athlete. Stephen Spinetto, the disability commissioner of the City of Boston, also offered remarks.

SUNY Cortland Professor of Sport Management Ted Fay and Eli Wolff, the manager of research and advocacy for the Northeastern University Center for Sport in Society, delivered the opening address of the symposium, and they have authored an article based on those remarks on the changes disability sport has encountered over the last several decades. The integration of disability sport and mainstream sport is occurring on much higher levels than just the individual athlete, changing the way sports are played, how teams are organized, how games are planned, and even how sporting venues and stadia are constructed. The CRPD went

into effect the first week of May 2008. In just eight months, the Convention has become binding on 3.7 billion persons worldwide, nearly sixty percent of the human population—remarkable progress for a human rights treaty. The CRPD contains the first binding international law promoting the integration of disabled athletes into mainstream sport, Article 30.5. The Convention's athletic provisions are the culmination of a long line of human rights protections in international sport descending from the 1970s and the global debate over South African sport participation, culminating in the revision of the Olympic Charter in 1982 recognizing sport as a human right. An article by Janet Lord and Michael Ashley Stein, the executive director of the Harvard Law School Project on Disability, will put the athletics provisions of the CRPD in the broader context of disability rights and social justice and a human right to sport, recreation, and cultural activities.

The ADA paints disability athletics with a broad brush, even though not all athletes with disabilities are equally situated on the playing field. Article 30.5 of the Convention sets up a more progressive disability sport legal regime because it makes two legal distinctions that the ADA does not make. The first legal distinction is between athletes with disabilities who compete in mainstream sport and disability athletes who compete in disability-specific sport since not all disability athletes can compete on an equal basis against able-bodied athletes. The Convention differentiates between Art. 30.5(a) athletes, who, like professional golfer Casey Martin, compete in able-bodied sport, and Art. 30.5(b) athletes, who compete in disability-specific sport like wheelchair basketball. Even between these two categories, however, some legal gray area exists. Two weeks after the Convention's implementation, the International Court of Arbitration in Sport handed down the Oscar Pistorius arbitration award, allowing a sprinter using two artificial leg prostheses to compete for South Africa's Olympic team. Patricia J. Zettler, Standard Law School class of 2009, has written an article on how international sporting regulations of Pistorius's Cheetah prostheses compare to regulations of mainstream sports technologies, using the new Fastskin swimsuits as an example. Dr. David McArdle, senior lecturer and deputy head of the University of Stirling School of Law, has written an article comparing the accessibility of sporting venues under Article 30.5 of the CRPD with accessibility under Title III of the ADA.

If the U.S. Court of Appeals for the Tenth Circuit had applied this Article 30.5 distinction instead of the ADA's broad mandate, they may have reached a different result this past year in the case of Scot Hollonbeck versus the U.S. Olympic Committee. The U.S. Olympic Committee gave a different and less favorable benefit package to Paralympic athletes than to Olympic athletes, and Hollonbeck and several other Paralympic athletes sued on the theory that distinguishing on the basis of Paralympic participation was a proxy for illegal disability discrimination. The Tenth Circuit held that because of the integration of disability ath-

letes in able-bodied sport, the category of "Paralympic" could no longer be considered a proxy for "disabled" (or, at least, that the category of "Olympic" was not a proxy for being able-bodied). Joshua Friedman, attorney advisor for the U.S. Social Security Adminstration, and Gary Norman, staff attorney at the Centers for Medicare & Medicaid Services at the U.S. Department of Health and Human Services, will look at both the positive and negative implications of this decision in their article. Under the Convention's parameters, the court might have realized that some disabled athletes will never be able to compete in able-bodied sport, and the instances of "integration" the court cited were exceptions rather than the rule. Should President Barack Obama sign and the Senate ratify the CRPD, setting up the Art. 30.5(a)-(b) distinction would reward disabled athletes competing in mainstream sport while protecting disabled athletes competing in disability-specific sport.

The second distinction that Art. 30.5 establishes that the ADA does not is the distinction between elite competitive sport and adolescent school sport. As Article 30.5 recognizes, different motives exist for integrating disabled athletes into mainstream adolescent school sport that do not exist in an elite competitive context. Two world-class Paralympians, Mallerie Badgett and Tatyana McFadden, attempted to change the status quo in high school athletics. Both of them, as the only athletes in their wheelchair divisions, competed on a circular track alone, more a spectacle in an exhibition than an athlete in competition. Both of the student-athletes filed suit against their school districts to allow them to compete on the track at the same time as able-bodied athletes, in the outer lane of the track. The District of Maryland ruled in favor of McFadden, but the Northern District of Alabama ruled against Badgett. The broad indiscriminate brush of the ADA is being challenged from above and below. The challenge from above comes from Article 30.5(d) of the CRPD, which specifically separates school sport from elite competition. The challenge is also coming from below: a groundbreaking Maryland law went into effect in 2008 that sets up a separate, and more progressive, legal regime for disability athletes specifically in the school context. Terri Lakowski's article makes a case for passing a nationwide equivalent of the new Maryland law, a Title IX of sorts for athletes with disabilities. This new law would recognize that integrating school sports helps to socialize adolescent athletes, educate able-bodied teammates, and create a more normal social environment for athletes with disabilities.

The symposium is sponsored by the N. Neal Pike Institute for Law and Disability at Boston University School of Law, in partnership with the Northeastern University Center for Sport in Society.

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