IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-K-2077

MARK E. SHEPHERD, SR.,

Plaintiff,

v.

UNITED STATES OLYMPIC COMMITTEE,

Defendant.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE USOC'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SECOND AND THIRD CLAIMS FOR RELIEF

Plaintiff Mark E. Shepherd, Sr., by and through his counsel, hereby submits this Memorandum in Opposition to the USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief ("Defendant's Motion" or "Def. MSJ")

Defendant United States Olympic Committee ("USOC") seeks for itself a status not afforded even the sovereign states: the ability to discriminate on the basis of disability unfettered by our nation's civil rights laws. It has, however, presented no support for the proposition that in attempting to organize amateur sports, Congress placed amateur athletes outside the protection of these laws. The USOC argues, in the alternative, that even if it is subject to the Americans with Disabilities Act, 42 U.S.C. §§ 12181 - 12189 ("ADA"), and section 504 of the Rehabilitation Act 29 U.S.C. § 794 ("Section 504"), it is free to discriminate against Paralympic athletes on the implausible grounds that this classification has nothing to do with disability.

It is important to describe what is not at issue in this litigation. Plaintiff has sued under the ADA and Section 504, not the Amateur Sports Act, 36 U.S.C. §§ 220501 - 220529 ("ASA"). He does not seek to compel the USOC to modify the rules of basketball so that he can compete with the Olympic, rather than the Paralympic, team. He does not seek different, better or special benefits in comparison with the benefits provided Olympic athletes. He simply asks the USOC to cease discriminating against Paralympic athletes with respect to the same benefits they provide Olympic athletes.

The USOC has failed to excuse itself from compliance with the ADA and Section 504 or to justify its admitted discrimination. For the reasons set forth below, Defendant's Motion should be denied.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff incorporates by reference the "Background" section of his Memorandum in Support of his Motion for Partial Summary Adjudication ("Pl. MPSA" or "MPSA"). (See id. at 2-5.) In response to Defendant's Statement of Undisputed Material Fact, Plaintiff states:

1. Plaintiff requires additional discovery to address the broad assertion in Paragraph 1. (Second Declaration of Amy F. Robertson ("Second Robertson Decl.") ¶¶ 5-9 (filed Oct. 9, 2002).) Defendant concedes, however, that it does not make Basic Grants, Special Assistance Grants, Tuition Assistance Grants or Elite Athlete Health Insurance available to Paralympic athletes, nor does it provide equivalent programs for Paralympic athletes. (Stipulations ¶¶ 10, 12-14 (filed Sept. 18, 2002); Def. MSJ at 5:4-5.) It provides medal incentives to Paralympic athletes in amounts one-tenth the amounts provided Olympic athletes; and it provides first

priority access to training facilities for Olympic athletes but third priority for Paralympic athletes. (Stipulations ¶¶ 8-9.)

2. Paragraphs 2, 3, and 5 are definitions used in the Stipulations. (Id. ¶ 3.)

3. Plaintiff admits Paragraphs 4, 6, 7, 8, 9, and 10.

4. In response to Paragraph 11, Plaintiff states that he seeks to compel the USOC to cease discriminating on the basis of disability. In some cases, for example, the four programs at issue in his MPSA,[1] this will take the form of providing identical programming; in other cases, the formula may be more complex.

PROCEDURAL STATUS

As Plaintiff explained in support of his Motion for Partial Summary Adjudication, to obtain this Court's guidance on an issue central to the case, the parties have cross-moved based on a set of Stipulations. Plaintiff agrees that, as to the four issues raised in his MPSA -- which relate to discrete benefits provided to Olympic but not Paralympic athletes -- there are no disputed facts and the legal issues are ripe for adjudication. With respect to factually more complex issues -- for example, the amount of funding provided to the various organizations administering Olympic as opposed to Paralympic sports -- further discovery is required.

Based on the above, it is only if the Court agrees that the USOC is at liberty to

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[1] The four issues are: (1) the USOC's provision of grants to Olympic athletes for which Paralympic athletes are not eligible; (2) its provision of Elite Athlete Health Insurance to Olympic athletes for which Paralympic athletes are not eligible; (3) its provision of medal incentives to Olympic athletes that it (previously) did not provide to Paralympic athletes or (more recently) provides to Paralympic athletes in amounts one-tenth of the amounts provided Olympic athletes; and (4) its assignment of Olympic athletes first priority, and Paralympic athletes third priority, in obtaining access to USOC training facilities.

discriminate against Paralympic athletes that it would be appropriate to grant Defendant's Motion. Should this Court agree with Plaintiff that such discrimination is illegal disability discrimination, the appropriate disposition would be to grant partial summary adjudication to Plaintiff on the four areas in which Defendant concedes such discrimination is explicit and to deny Defendant's Motion pursuant to Rule 56(f) to permit the parties to conduct discovery on more complex questions of funding and support. (See Second Robertson Decl. ¶¶ 8, 9.)

ARGUMENT

I. The Amateur Sports Act Does Not Bar Plaintiff's Claim under the Americans with Disabilities Act or Section 504.

Defendant argues that Plaintiff's claims challenging discriminatory provision of benefits under the ADA and Section 504 are preempted by the ASA. Defendant does not, however, cite to any cases that support that argument. Instead, it cites a series of cases brought directly under the ASA or under state tort law involving athlete eligibility for, or participation in, competition[2] or injury in the course of competition.[3] The court in each of these cases held that the ASA did

[2] Michels v. United States Olympic Comm., 741 F.2d 155, 156 (7th Cir. 1984) (addressing ASA claims of athlete challenging disqualification following drug test); Oldfield v. Athletic Cong., 779 F.2d 505, 506 (9th Cir. 1985) (addressing ASA claims of athlete challenging suspension of amateur status and resulting disqualification from competition); DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181, 1186 (D.D.C. 1980) (addressing ASA claims of athletes challenging the USOC's decision not to send a team to the Moscow Olympics); Walton-Floyd v. United States Olympic Comm., 965 S.W.2d 35, 35-37, 40 (Tex. App. 1998) (addressing ASA and state tort claims of athlete challenging disqualification following drug test); Dolan v. United States Equestrian Team, Inc., 608 A.2d 434, 435 (N.J. Super. Ct. App. Div. 1992) (addressing ASA and state tort claims of athlete challenging selection of different athlete for world championship team), cited in Def. MSJ at 11-12.

[3] Martinez v. United States Olympic Comm., 802 F.2d 1275, 1277, 1280 (10th Cir. (continued...)

not create a private right of action.[4] The courts in the two state court cases also held that state tort claims were preempted by the ASA.[5] None of these cases is relevant to Mr. Shepherd's claims, which were not brought under the ASA or state tort law and do not relate to his eligibility to compete or an injury sustained in competition. Defendants do not cite any cases similar to the present one in which an athlete brought federal civil rights claims against the USOC.

At least one case has explicitly held that the ASA does not preempt the ADA. In Devlin ex rel. Devlin v. Arizona Youth Soccer Association, a child with a disability brought suit against the Arizona Youth Soccer Association under the ADA to be able to practice and play with a youth soccer team. No. CIV 95-745 TUC ACM, 1996 WL 118445, at *2-4 (D. Ariz. Feb. 8, 1996) (Second Robertson Decl. Ex. 1). The court rejected the defendant's argument that the plaintiff had to arbitrate pursuant to the ASA instead, holding that "the ADA . . . preempt[s] federal and state laws that provide less protection than the ADA and by precluding a judicial remedy, the Amateur Sports Act provides less protection for the rights of individuals with disabilities than does the ADA." Id. at *2 (citing 42 U.S.C. § 12201(b)). That is, it is the ADA that preempts the ASA, and not -- as the USOC argues -- the other way around.

In two other cases, courts considered on their merits federal civil rights claims against

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[3](...continued)
1986), cited in Def. MSJ at 11.

[4] Martinez, 802 F.2d at 1280-81; Oldfield, 779 F.2d at 508; Michels, 741 F.2d at 157-58; DeFrantz, 492 F. Supp. at 1192; Walton-Floyd, 965 S.W.2d at 37-40; Dolan 608 A.2d at 437.

[5] Dolan, 608 A.2d at 437-38; Walton-Floyd, 965 S.W.2d at 40.

national governing bodies of sport ("NGBs").[6] In Akiyama v. United States Judo, Inc., 181 F. Supp. 2d 1179 (W.D. Wash. 2002), for example, judo competitors brought claims of religious discrimination against the NGB of judo under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), as well as the under the ASA itself. The court ordered the plaintiffs to arbitrate their ASA claims and stayed the plaintiffs' civil rights claims. 181 F. Supp. 2d at 1181. On the defendants' motion to confirm the favorable arbitration decision on the ASA and for summary judgment on the remainder of the claims, the court rejected the argument that the plaintiffs' civil rights claims were precluded by the arbitration decision: "defendants have offered no reason to believe that the legal conclusion that defendant . . . did not violate the Amateur Sports Act compels a similar finding" under the Civil Rights Act or state law. Id. at 1182-83. The court then went on to consider the plaintiffs' Civil Rights Act claim on the merits, ultimately reaching the conclusion that forcing participants to bow did not constitute religious discrimination. Id. at 1188. See also Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc., 123 F. Supp. 2d 659, 661-62 (E.D.N.Y. 2000) (holding that female athlete stated cause of action against the NGB of karate gender discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, based on the NGB's decision to withdraw a women's team from world championship competition while permitting the equivalent men's team to participate).

The case of Slaney v. International Amateur Athletic Federation, 244 F.3d 580 (7th Cir.),

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[6] NGBs are subjects of the ASA's dispute resolution provision. See 36 U.S.C. §§ 220504(b)(1) (defining "member" to include NGBs) & 220509(a) (the USOC is to establish a dispute resolution system for members). It is thus significant that courts have considered civil rights claims against NGBs without holding those claims preempted by the ASA.

cert. denied 122 S. Ct. 69 (2001), clearly demonstrates that any preemption under the ASA is limited to state tort claims relating to athlete eligibility for competition. In Slaney, an athlete challenged her drug-related disqualification based on state tort law and the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). The court noted specifically that "[t]here is no disagreement that state-law causes of action can be brought against the USOC," but held that, because her state tort claims related to her eligibility for competition, they were preempted by the ASA. Id. at 595-96. Furthermore, following this narrow holding of preemption of state tort claims, the court went on to consider the plaintiff's federal RICO claim -- relating to the same competitive eligibility decisions -- on the merits. Id. at 596-601. In addition, two other cases have permitted athletes to proceed with state contract claims against the USOC. See Foschi ex. rel Foschi v. United States Swimming, Inc., 916 F. Supp. 232, 241 (E.D. N.Y. 1996); Harding v. United States Figure Skating Ass'n, 851 F. Supp. 1476, 1480 (D. Or. 1994).

The cases discussed above confirm that any ASA preemption is limited to state tort claims that address athlete eligibility for competition and does not apply to Plaintiff's federal civil rights claims challenging discrimination in the provision of benefits and services.

II. Defendant's Discrimination Against Paralympic Athletes Constitutes Disability Discrimination in Violation of the ADA and Section 504.

The second section of Defendant's brief makes a series of intriguing arguments -- for a different case entirely. Its arguments would be relevant if Mr. Shepherd had sought to modify the rules of basketball to permit him to compete with the Olympic team or if he had demanded specialized insurance, with greater coverage than that offered in the current Elite Athlete Health

Insurance. However, none of the USOC's arguments support the proposition that it may deny Paralympic athletes the very same benefits that it provides Olympic athletes.

A. Discrimination Against Paralympians Is Disability Discrimination.

While considering Defendant's individual legal arguments, it is important to keep in mind that discrimination against Paralympians is disability discrimination. This is clear from the USOC's own statements, for example, that "all Paralympians are disabled," (Def. MSJ at 12), or that "[t]he Paralympics are the equivalent of the Olympic Games for the physically challenged."[7] It is underscored by the fact that the USOC can point to only one disabled Olympic athlete -- Marla Runyon, a blind runner in the 2000 summer Olympics -- out of the 602 American athletes the USOC sent to those Olympics.[8] As such, athletes with disabilities made up one out of 602 -- or approximately 0.16% -- of that group. The USOC sent 250 athletes to the 2000 summer Paralympics.[9] As such, only one out of 251 or 0.4% of elite disabled athletes -- that is, Ms. Runyon alone -- participated in the Olympics. Given that over 99% of Olympic athletes are non-disabled, "all Paralympians are disabled," and over 99% of elite disabled athletes participate in the Paralympics rather than the Olympics, discrimination against Paralympians is simply disability discrimination. It is, at the very least, an extremely close proxy for disability discrimination and, as such, constitutes intentional, facial discrimination. See, e.g. McWright v.

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[7] USOC 2000 Annual Report at 18 (DP767). (Declaration of Amy F. Robertson (filed Sept. 18, 2002) Ex.2.)

[8] USOC 2000 Annual Report at 4 (DP751). (Second Robertson Decl. Ex. 2.)

[9] Id.

Alexander, 982 F.2d 222, 228 (7th Cir. 1992); Alliance for the Mentally Ill v. City of Naperville, 923 F. Supp. 1057, 1070 (N.D. Ill. 1996).

The Paralympics are not the junior varsity or the practice squad or the minor leagues for the Olympics. They are world-class sporting events in which the competitors are elite amateur athletes with "agility, strength, speed, balance and other talents," qualities the USOC incorrectly believes are the sole province of Olympic athletes. (See Def. MSJ at 19.) Paralympic athletes, like Olympic athletes, "possess[ ] immense abilities;" they do not, as the USOC suggests, consider themselves "relegated" to the Paralympics. (Cf. id. at 16.) They are able, strong, talented and proud competitors in the Paralympic Games.

It is also inaccurate to suggest that the skills of Paralympic athletes are inferior to the skills of Olympic athletes. Rather, the amateur athletes who compete in each different sport of the Olympics and Paralympics possess different sets of elite skills. Mr. Shepherd may not be able to compete in Olympic basketball, but then an Olympic ice dancer could not compete in Olympic basketball, and an Olympic basketball player could not compete in Paralympic wheelchair basketball. There is no reason in law, logic or sport to value one set of elite athletic skills over another.

When Congress gave the USOC -- in exchange for very valuable trademark rights -- the responsibility for administering United States participation in both the Olympics and the Paralympics, that responsibility included both categories of athletes. See 36 U.S.C. §§ 220503 & 220506. Indeed, when Congress defined the term "amateur athlete" in the ASA, it explicitly included both Olympic and Paralympic athletes. Id. § 220501(b)(1). Olympic and Paralympic

athletes are all elite amateur athletes, each highly skilled in his or her individual sport. The USOC has elected, however, to provide grants, insurance, incentives and training priorities to one set of highly-skilled elite amateur athletes (the group 99% of whom are non-disabled) and to exclude another set of highly-skilled elite amateur athletes (all of whom are disabled). This discrimination -- on its face -- excludes elite disabled athletes and denies or provides unequal benefits to those athletes, in violation of the ADA and Section 504. 42 U.S.C. §§ 12182(b)(1)(A)(i) & (ii).[10] In the alternative, discrimination against Paralympic athletes screens out or tends to screen out elite disabled athletes but is not necessary to the provision of the benefits in question, making it illegal under § 12182(b)(2)(A)(i).

B. Plaintiff is Otherwise Qualified for Defendant's Benefits

Defendant provides benefits to Olympic athletes that it does not provide Paralympic athletes. (Stipulations ¶¶ 8-14.) The USOC labels these benefits "Olympic programming," makes being an Olympic athlete a prerequisite, and argues that Plaintiff is not otherwise qualified for the benefits because he is not an Olympic athlete. (Def. MSJ at 15.) Because it is precisely the USOC's discrimination between Olympic and Paralympic athletes that is at issue here, this argument is circular. See Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 441 (E.D. Va. 1995) (noting, in addressing mental health question on bar application, that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual' because she failed to answer [the mental health question], this argument begs the question of whether [the question]

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[10] See also 32 C.F.R. §§ 56.8(a)(2)(ii) & (iii); 28 C.F.R. §§ 41.51(b)(1)(i) & (ii); 45 C.F.R. §§ 84.4(b)(1)(i) & (ii). These regulations implement Section 504. See Pl. MPSA at 9 n.22 (explaining the relationship of the various sets of Section 504 regulations).

must be answered at all."). Discrimination against Paralympic athletes is disability discrimination which cannot be justified by declaring certain benefits available only to Olympic athletes, and then disqualifying Paralympic athletes because they are not Olympic athletes.

Defendant attempts to distract attention from this circularity by characterizing the requirement that participants be "Olympic caliber athletes" as a physical qualification. That is, Defendant's argument that Plaintiff is not otherwise qualified proceeds as if there were a single skills test for Olympic benefits that Mr. Shepherd had sought to modify:

> [a]thletic programs, such as the USOC's Olympic Programming, are by their very nature competitive, and impose eligibility criteria that may disqualify certain people with disabilities because such programs typically require agility, strength, speed, balance, and other talents not evenly distributed among the population. . . . The purpose of the USOC's Olympic Programming is to train and obtain the best Olympic athletes for the United States -- a purpose that clearly requires the eligibility criteria of being an Olympic caliber athlete.

(Def. MSJ at 19.) The USOC's "Olympic Programming" is not, however, a competitive athletic program; it is a series of insurance benefits, cash supports and incentives, and gym priorities. The USOC has made no showing that it is <u>necessary</u> to the provision of health insurance that the insureds be Olympic rather than Paralympic athletes or that it is <u>necessary</u> to be able to walk in order to enjoy cash grants in support of one's training. As pointed out above, supporting Paralympic athletes serves the goal of supporting athletes with "agility, strength, speed, balance, and other talents." The last sentence of the quote above neatly encapsulates the circularity of the USOC's argument: it attempts to enshrine the discrimination in the goal of the program (to train and obtain the best Olympic athletes) by ignoring the remainder of the USOC's congressionally-

mandated mission (to train and obtain the best Paralympic athletes[11]). Because Defendant's limitation of its benefits to Olympic caliber athletes is not "necessary for the provision of the [benefits] being offered," it violates the ADA. 42 U.S.C. § 12182(b)(2)(A)(i).

The cases on which the USOC relies make this distinction clear: in each, the qualification at issue was held to be necessary to the program in question. In Southeastern Community College v. Davis, for example, the Court held that a Deaf woman was not "otherwise qualified" to be a nursing student. 442 U.S. 397, 414 (1979). The qualification at issue in Davis -- the ability to hear -- was directly related to the benefit in question -- the ability to understand one's teachers. Id. at 407-08.[12] In contrast, Plaintiff does not have to have any particular physical qualification to enjoy the USOC's benefits; in most cases, the only physical skill required is the ability to cash a check. Davis would only be on point if the nursing school (1) had had training programs for both Deaf and hearing students; (2) offered Hearing Student Insurance, Hearing Student Grants, Hearing Student Grade Incentives, and priority time at the school gym for the Hearing Students Athletic Club; and then (3) argued that Deaf students were not otherwise qualified for those benefits simply by dint of those labels.

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[11] See 36 U.S.C. § 220503(4).

[12] See also Sandison v. Michigan High School Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995) (holding that rule prohibiting students over 19 from playing high school sports was necessary to safeguard other players against injury and prevent unfair advantages); Pottgen v. Missouri State High School Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994) (same); Rhodes v. Ohio High School Athletic Ass'n, 939 F. Supp. 584, 591-92 (N.D. Ohio 1996) (holding that rule disqualifying student from high school sports after eight consecutive semesters was necessary, among other things, to limit the level of skill of the players to create a more level playing field).

Defendant spends a great deal of time on PGA Tour, Inc. v. Martin, a case in which an elite disabled golfer was seeking to modify the tour rules to permit him to compete against non-disabled golfers. 532 U.S. 661, 669 (2001). Martin is not relevant to the present case for two reasons. First, Mr. Shepherd does not seek to compete in Olympic basketball against non-disabled basketball players. Second, Mr. Shepherd does not seek a reasonable modification of a neutral rule under 42 U.S.C. § 12182(b)(2)(A)(ii). Rather, he seeks the removal of a facially discriminatory provision that denies disabled athletes the ability to participate in the USOC's benefits and provides them with unequal benefits, in violation of §12182(b)(1)(A)(i) & (ii). Where a provision is facially discriminatory, a reasonable accommodation analysis is not appropriate; rather, the facially discriminatory provision constitutes a per se violation of the ADA. Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 735 (9th Cir. 1999) (analyzing the regulation under Title II of the ADA that is equivalent to the reasonable modification provision of § 12182(b)(2)(A)(ii)). Defendants' facially discriminatory rules excluding Paralympians from specific benefits are per se violations of the ADA.

In sum, because Plaintiff is an elite amateur athlete, fully able to enjoy the USOC's grants, insurance, incentives and training priorities without the use of his legs, he is otherwise qualified for these benefits.

C. Plaintiff Is Not Asking the USOC to Alter its Mix of Services in Order to Accommodate Him.

Plaintiff brought this suit to compel the USOC to provide Paralympic athletes with the same benefits as it provides Olympic athletes. Specifically, in his MPSA he asks this Court to

compel the USOC to make available to him the precise same Basic Grants, Tuition Assistance Grants, Elite Athlete Health Insurance, Project Gold medal incentives, and training facility priorities that the USOC makes available to Olympic athletes. In light of this, the USOC's argument that it should not have to alter its mix of goods or services is beside the point.

In making this argument, the USOC relies on a Department of Justice regulation which states that the ADA "does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). (See Def. MSJ at 20.) This provision was put in place to ensure, for example, that book stores would not be required to stock Braille books.[13] If a proprietor may refuse to sell goods to people with disabilities and then argue that forcing him to cease this discriminatory practice would turn the very same goods into "accessible or special" goods, this single exception would swallow Title III whole. Yet this is what the USOC argues: that by making its benefits available to Paralympic athletes, those same benefits would become "accessible or special." Under this reasoning, the USOC could declare that Paralympians were not allowed to purchase the goods for sale in the USOC gift shop and then argue that any attempt to alter that discriminatory rule would be forcing it to sell "accessible or special goods."

The cases cited by Defendant demonstrate that section 36.307(a) is not applicable here. Defendant relies on five insurance cases in which the plaintiffs were requesting insurance products with more advantageous coverage than the ones offered by the defendants. Although

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[13] Preamble to Regulation on Nondiscrimination on The Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36, app. B (2002) at 691.

the court in each case held that the ADA did not require the provider to change the content of the insurance policy, in each case the court made clear that the defendant had offered the same insurance product to all employees.[14] Plaintiff is asking that the USOC do the equivalent of what the defendants in each of its insurance cases had already done: make the same benefits available to all of the elite amateur athletes for which Congress has given it responsibility.

The USOC also argues that it is only required to provide "meaningful access" to its benefits and that it has done so. (See Def. MSJ at 22 (citing Alexander v. Choate, 469 U.S. 287, 301 (1985).)) It is not clear what the USOC means by this. If the USOC is referring to its "Olympic Programming," the USOC concedes that it provides no access whatsoever -- meaningful or otherwise -- to the four programs at issue in Plaintiff's MPSA.[15] If, instead, the USOC is suggesting that, by providing support to a single elite disabled athlete who qualified for the Olympics (see Def. MSJ at 17), it has provided meaningful access to elite disabled athletes in

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[14] See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1116 (9th Cir. 2000) (the defendant "gave [the plaintiff] the same opportunity that it gave all the rest of its employees"); McNeil v. Time Ins. Co., 205 F.3d 179, 188 (5th Cir. 2000) (defendant "offered the policy to [the plaintiff] on the same terms as it offered the policy to other members of the association."), cert. denied 531 U.S. 1191 (2001); Kimber v. Thiokol Corp., 196 F.3d 1092,1101 (10th Cir. 1999) ("Every [Thiokol] employee had the opportunity to join the same plan with the same schedule of coverage, meaning that every [Thiokol] employee received equal treatment."); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) ("Mutual of Omaha does not refuse to sell insurance policies to . . . persons [with the plaintiff's disability]."), cert. denied 528 U.S. 1106 (2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998) ("Every Schering employee had the opportunity to join the same plan with the same schedule of coverage"), cert. denied 525 U.S. 1093 (1999).

[15] See Stipulations ¶¶ 8-14. If the USOC is arguing that other, more complex methods of support provide meaningful access for Paralympians, further discovery will be required to address those methods. (See Second Robertson Decl. ¶¶ 5-9.)

general, this argument has been recently been explicitly rejected. See Lovell v. Chandler, 303 F.3d 1093, 2002 WL 2022140, at *10 (9th Cir. Sept. 5, 2002) (Second Robertson Decl. Ex. 3) (holding that "appropriate treatment of some disabled persons does not permit [the defendant] to discriminate against other disabled people under any definition of 'meaningful access.'")

D. Disparate Funding and Unequal Benefits That Result from the Explicit Exclusion of Paralympic Athletes Violate the ADA and Section 504.

Defendant essentially argues that the Olympics and the Paralympics are two separate programs and that, because of this, it is free to support one and not the other. (Def. MSJ at 23.) Defendant relies primarily on the case of John Does 1-5 v. Chandler, which held that the state of Hawaii could place a durational limit on a program providing benefits to needy persons with disabilities, despite the fact that a program providing benefits to needy families with dependent children was not so limited. 83 F.3d 1150, 1155 (9th Cir. 1996). This decision was based in part on the court's holding that the programs were separate and should be analyzed separately, rather than as part of a unitary general assistance program. Id. This alone makes the case inapposite, as the benefits provided to Olympic athletes are not properly analyzed as a separate program from the benefits provided to Paralympic athletes.

Assuming for the moment that it were appropriate to analyze the benefits that the USOC provides to Olympic athletes as a separate program, the present case differs from Does 1-5 in one very central respect: the favored program in Does 1-5 -- the one for needy families with dependant children -- was in fact open to all. That is, the category "families with dependent children" is in no way tantamount to or a proxy for "non-disabled families," and the criterion of

having dependent children does not screen out or tend to screen out individuals with disabilities. The plaintiffs in Does 1-5 made no such argument and it is simply common sense that many families with dependent children will have one or more members who have disabilities. This was essential to the court's approval of the differing durational limitations. Id. at 1155 (holding that "a program would not violate the ADA as long as disabled people with children were not excluded from full participation in the program.") In contrast, the two programs the USOC asks this Court to analyze separately -- and to permit the USOC to treat differently -- are almost perfectly aligned with the classification protected by the ADA. It would be as if Hawaii offered one benefit program for "families all of whose members can walk" (which had no durational limit) and a separate benefit for "families one or more of whose members have a mobility impairment" (which was limited to one year).

Plaintiff also takes issue with Defendant's premise that it is appropriate to analyze the Olympics and Paralympics as separate programs for purposes of permitting more favorable treatment of the former. Separate analysis was only possible in Does 1-5 because "Hawaii [was] not required to have a [general assistance] program at all," and by law could have had "a benefit program aimed only at families with dependent children." Id. at 1155. In contrast, Congress has mandated that the USOC administer both the Olympics and the Paralympics; it does not have an option of administering neither or administering only the Olympics.

The approach taken by the court in Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994), is more on point. The defendant city originally funded a number of recreational programs but ultimately cut all of the programs

designed specifically for individuals with disabilities. The court held that this constituted illegal discrimination because "elimination of the [those] programs has the effect of denying persons with disabilities the benefits of the City's recreational programs," despite the fact that "none of the City's recreational programs [was] closed to individuals with disabilities." Id.[16] The court's analysis of whether city residents with disabilities were otherwise qualified for the city's recreational programs makes clear that it is unjust to focus the inquiry too narrowly:

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

Id. at 990 (emphasis in original; citations omitted). Likewise, the "full and entire extent" of the USOC's program is not the Olympics; it is "the sum of a variety of individual" programs -- including the Olympics, the Paralympics and the Pan American games -- for which Congress gave the USOC responsibility. See, e.g., 36 U.S.C. § 220503.

Defendant concludes with a discussion of its responsibilities under the ASA. To the extent it is arguing that the ASA does not prohibit discrimination, it is irrelevant because Plaintiff is not suing under the ASA. To the extent it is arguing that the ASA gives it carte

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[16] Defendant asserts that this case stands for the proposition that "disparate funding between different programs does not violate [the] ADA." (Def. MSJ at 24.) This is inaccurate. The Concerned Parents court notes that a showing of disparate funding will not per se require a finding of discrimination, but emphasizes that the ADA "require[s] that any benefits provided to non-disabled persons must be equally made available for disabled persons." Id. at 992 & n.14.

blanche to discriminate, it is incorrect. The USOC asserts that it "has complete discretion with respect to resource allocation and programmatic decisions" and that a decision requiring equivalent programming "would be an intrusion into the USOC's prerogatives." (Def. MSJ at 25-26.) Whatever the USOC's discretion or prerogatives, they must exercised in compliance with federal law. For example, the state of South Dakota attempted to control absentee land ownership by requiring that at least one of the owners of a farm reside on or be actively engaged in the labor and management of the farm, including "both daily or routine substantial physical exertion and administration." South Dakota Farm Bureau, Inc. v. Hazeltine, 202 F. Supp. 2d 1020, 1024 (D.S.D. 2002). The court held that this constituted illegal disability discrimination: "South Dakota may legislatively place certain restrictions on how property is used. The State may legislatively place certain restrictions on who may use property. The State may not, however, base those restrictions on impermissible categories such as religion, race, gender, and, under the ADA, disability." Id. at 1041. See also Bay Area, 179 F.3d at 735 (holding, in zoning context, "localities remain free to distinguish between land uses to effectuate the public interest -- they just must refrain from making distinctions based on what Congress has determined to be inappropriate considerations."); Ellen S. v. Fla. Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1492 (S.D. Fla. 1994) ("[T]he Board [of Bar Examiners] is authorized by state law to investigate an applicant's character and fitness. However, the Board is not permitted to conduct such investigation in violation of federal law."); Clark, 880 F. Supp. at 443 ("While the Board's broad authority to set licensing qualifications is well established, such authority is subject to the requirements of the ADA.").

The USOC provides no basis for elevating its discretion and prerogatives above those of states, municipalities and state bar associations. Indeed, the Supreme Court has recently made clear that -- although sovereign immunity protects states from paying money damages under the ADA -- they are subject to suit for injunctive relief to bring them into compliance with that law. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (holding that the ADA "prescribes standards applicable to the States. Those standards can be enforced . . . by private individuals in actions for injunctive relief under Ex parte Young, [209 U.S. 123 (1908)]."). It is hard to believe that Congress, through the ASA, imbued the USOC with sovereignty greater than that of the States of our Union.

CONCLUSION

For the reasons set forth above and in his Memorandum in Support of his Motion for Partial Summary Adjudication, Plaintiff respectfully requests that this Court deny The USOC's Motion for Summary Judgment on Plaintiff's Second and Third Claims for Relief and grant his Motion for Partial Summary Adjudication.

Respectfully submitted,

FOX & ROBERTSON, P.C.

Darold Killmer
Killmer & Lane, LLP
1543 Champa Street, Suite 400
The Odd Fellows Hall
Denver, CO 80202
303.571.1000

____
Amy F. Robertson
Timothy P. Fox
Fox & Robertson, P.C.
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

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Attorneys for Plaintiff

Certificate of Service

I hereby certify that on October 9, 2002, copies Plaintiffs' Memorandum in Opposition to The USOC's Motion For Summary Judgment on Plaintiff's Second And Third Claims For Relief, and Second Declaration of Amy F. Robertson, were served by first-class mail, postage prepaid, on:

John W. Cook, Esq.
Virginia S. Morgan, Esq.
Hogan & Hartson L.L.P.
2 N Cascade Ave., Suite 1300
Colorado Springs, CO 80903

Raymond M. Deeny, Esq.
N. Dawn Webber, Esq.
Sherman & Howard L.L.C.
90 S Cascade Ave., Suite 1500
Colorado Springs, CO 80903

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