Feature Article

Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Colleges and Universities to Establish and Enforce Academic Standards: Guckenberger v. Boston University

Peter David Blanck*

I. Introduction

In 1996, students with learning disabilities enrolled at Boston University (BU) brought a class action lawsuit in U.S. district court claiming discrimination under the Americans with Disabilities Act (ADA) and other federal and state laws. In August 1997, federal district court Judge Patti B. Saris found that, in a number of significant respects, BU had violated the students' rights under the ADA and related laws.

The class of students with learning disabilities—individuals with attention deficit disorder (ADD)/attention deficit hyperactivity disorder (ADHD) and other learning disorders such as dyslexia—alleged that BU had discriminated against them by establishing unreasonable eligibility criteria for qualifying as a student with a disability, not providing reasonable procedures for evaluating their requests for academic accommodations, and instituting a blanket policy precluding course substitutions in foreign language and mathematics as academic accommodations.

The BU case is illustrative of the national debate about the rights of qualified students with learning disabilities to receive academic accommodations and the rights of colleges and universities to establish academic standards. Yet the circumstances surrounding the BU case do not exist only within ivory tower walls. Rather, they are part of a growing ideology that, either knowingly or unknowingly, perpetuates attitudinal barriers and unjustified prejudice toward many qualified individuals with learning disabilities not only in the educational setting but also in work, housing, and daily life activities.

The first part of this article examines the BU case and the findings of fact determined by the federal district court in its August 1997 decision. The second part discusses the court's conclusions of law. The final part explores the implications of the BU case on future litigation and policy making in the area, as well as on the development of attitudes and behavior toward qualified students with learning disabilities.

II. Facts of the Case

BU is a private university with more than 20,000 students. Prior to 1995, BU had an extensive program to provide academic supports and accommodations for students with learning disabilities. During the 1995-1996 academic year, BU had approximately 480 enrolled students with learning disabilities.

Within BU's Disability Services Office, the university maintained a nationally-recognized Learning Disabilities Support Services (LDSS) program that provided students with academic accommodations, such as extended time on examinations, tape-recorded textbooks, note-taking services, and approved course substitutions for foreign language and mathematics courses. BU granted approximately 10 to 15 course substitutions a year, of the approximately 40 requests made annually.

Before 1995, a student requesting a needed accommodation had to submit the request to the LDSS staff with supporting medical or psychological documentation. LDSS staff, in conjunction with the student and relevant health professionals, analyzed the request and granted or denied the accommodation. If LDSS granted the request, it wrote a letter to the student's faculty members explaining the need for the accommodation.

In early 1995, BU Provost Jon Westling decided to end the university's practice of allowing course substitutions. Westling believed that there was a lack of compelling scientific evidence that a learning disability prevented the successful study of a foreign language or math. He directed LDSS to send all accommodation letters to his office for review and approval before submission to the students or faculty members. As determined at trial, Westling terminated the course substitution policy without the advice from any university body, faculty member, or expert on learning disabilities.[1]

---

*Peter Blanck is professor of law, of preventive medicine, and of psychology at University of Iowa, Iowa City, IA 52242-1113. Dr. Blanck is director of the Iowa Law, Health Policy, and Disability Center. He holds a Ph.D. from Harvard University and a J.D. from Stanford University, is a former member of the American Bar Association Commission on Mental and Physical Disability Law, and is a member of the President's Committee on Employment of People with Disabilities. Blanck served as an expert witness for the plaintiffs in the case of *Guckenberger v. Boston University,* Civ. A. No. 96-11426-PBS (D. Mass. Aug. 15, 1997). The description of the facts and conclusions of law in the BU case reflect the views of the author, as derived from the court's 112-page opinion in the case. The author thanks Heidi Berven, David Baldus, Bill Buss, Michael Olivas, and Michael Saks for their insightful comments on earlier drafts of this article.

The plaintiff students were represented by Disability Rights Advocates (DRA) of Oakland, Calif.; Clark, Hunt & Embry of Cambridge, M.A.; and Frank Laski, Esq. of Newton, M.A. BU was represented by its Office of the General Counsel; and Rose & Associates of Boston, M.A.

During early 1995, as university policy toward students with learning disabilities was changing, Westling delivered several speeches in which he noted the growing number of students beginning post-secondary education who were diagnosed with learning disorders. He accused "learning disability advocates of fashioning 'fugitive' impairments that [were] not supported in the scientific and medical literature."[2] Westling concluded that "the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order."[3]

In one speech delivered in mid-1995, entitled "Disabling Education: The Culture Wars Go to School," Westling fabricated (as it was later determined at trial), the case of a freshman student in one of his classes at BU named Samantha, whom he called "Somnolent Samantha." To Westling, Samantha represented that "students with learning disabilities were often fakers who undercut academic rigor."[4] Westling described how, on the first day of class, Samantha had presented an accommodation letter to him from LDSS:

> The letter explained that Samantha had a learning disability "in the area of auditory processing" and would need the following accommodations: "time and one-half on all quizzes, tests, and examinations;" double-time on any mid-term or final examination; examinations in a separate room from other students; copies of my lecture notes; and a seat in front of the class. Samantha, I was informed, might fall asleep in my class, and I should be particularly concerned to fill her in on any material she missed while dozing.[5]

The caricature of Samantha was based on anecdotal and uninformed accounts in the popular press.[6,7] In her decision, Judge Saris wrote: "To Westling, Samantha exemplified those students who, placated by the promise of accommodation rather than encouraged to work to achieve their fullest potential, had become 'sacrificial victims to the triumph of the therapeutic'."[8]

Westling's June 1995 address sets out his views toward students with learning disabilities:

> By seiz[ing] on the existence of some real disabilities and conjur[ing] up other alleged disabilities in order to promote a particular vision of human society, the learning disabilities movement cripples allegedly disabled students who could overcome their academic difficulties with concentrated effort, demoralizes non-disabled students who recognize hoaxes performed by their peers, and wreak[s] educational havoc.
>
> The policies that have grown out of learning disabilities ideology leach our sense of humanity. We are taught not that mathematics is difficult for us but worth pursuing, but that we are ill. Samantha, offered the pillow of learning disability on which to slumber, was denied, perhaps forever, access to a dimension of self-understanding.[9]

In contrast to Westling's assertions, the court found in reviewing the evidence that there had been not a single documented instance at BU in which a student had been found to have fabricated a learning disorder to support a request for an accommodation.[10]

By the beginning of the 1995-1996 academic year, Westling had directed that all accommodation requests be reviewed by his office, even though no staff member in the office had expertise in evaluating accommodation requests by students with learning disabilities. After reviewing and denying the majority of accommodation requests, Westling instituted the following "corrective actions:"

- Students must "provide *current* evaluations" in light of federal guidelines stating that evaluations that are more than three years old are unreliable;
- Evaluations must provide actual test results that support the tester's conclusions;
- Those who provide evaluations of learning disabilities should be physicians, clinical psychologists or licensed psychologists and must have a record of reputable practice;
- All requests for accommodation must contain an analysis by LDSS staff, an academic history of the student, and the student's academic status at BU; and
- LDSS "should not misinform students that course substitutions for foreign language or mathematics requirements are available."[11]

When these directives were in place, Westling and his staff in the provost's office became the decision-makers for academic accommodations for students with learning disabilities. In the interim, members of the LDSS office resigned in protest, leaving the office "virtually unstaffed."[12] A new office of Disability Services was established to manage accommodation requests. As before, recommendations regarding accommodation requests were forwarded to Westling's office for approval. There was no independent appeal process for reviewing accommodation denials.

In early 1997, currently enrolled BU students with learning disabilities moved to enjoin BU's accommodation policies. The university then hired a new clinical director for the Disability Services Office and developed a new application form, outlining the eligibility requirements for receiving academic accommodations. The university's learning disability specialists or other health care professionals analyzed the accommodation requests, but still forwarded them to the provost's office for final review. There still was no appeal process in place for review of denied accommodation requests.

The federal court certified the group of students as a class seeking declaratory and injunctive relief for the alleged viola-

tions of the ADA and the Rehabilitation Act of 1973, among other claims. At the trial, numerous experts testified about the nature, diagnosis, and accommodation of learning disabilities.[13] The two major learning disabilities described as relevant to the plaintiff class were dyslexia and ADD/ADHD.

In brief, dyslexia is a reading disability that hinders learning involving language, particularly a foreign language. As described in the American Psychiatric Association's *Diagnostic Statistical Manual IV* section on learning disorders, ADD and ADHD involve behaviors of inattention, hyperactivity, and impulsivity.[14] The diagnoses of ADD and ADHD typically are made through clinical interviews and psychological testing. Professional guidelines recommend the documentation by post-secondary education personnel of learning disabilities, setting forth recommendations for the currency of testing and evaluator qualifications. The court examined these guidelines in evaluating plaintiffs' claims that BU had discriminated against them in violation of the law.[15]

III. The Court's Conclusions of Law

The class of students with learning disabilities claimed that the university had discriminated against them in violation of the ADA and section 504 of the Rehabilitation Act. Title III of the ADA (with mirror provisions in section 504) prohibits places of public accommodation, including undergraduate and graduate educational settings, from discriminating on the basis of disability.[16]

Discrimination includes the use of criteria that "screen out" or "tend to screen out" qualified individuals with disabilities from public accommodations, the failure to make "reasonable" academic accommodations, and the failure to reasonably prevent the unequal treatment of persons with disabilities.[17] Persons with learning impairments may be deemed "disabled" for purposes of the ADA.[18]

The students claimed that BU's policies discriminated against students with learning disabilities in three general areas related to: (1) the retesting of students and the required credentials of learning disability evaluators; (2) the accommodation request evaluation process and appeals procedure; and (3) the course substitution policy. The court examined BU's policies in these areas as they existed prior and subsequent to the initiation of the litigation.

The Retesting and Evaluator Qualifications Requirements

The plaintiffs argued that BU's retesting policy violated the law because it screened out or tended to screen out students from receiving learning disabilities services and academic accommodations. Some courts have determined that a university may properly request current medical or psychological documentation from a student requesting an accommodation.[19]

However, in the BU case, the court concluded that the university's initial blanket requirement for retesting all students with learning disabilities every three years (i.e., the testing "currency" requirement) illegally screened out or tended to screen out qualified students from disability support services and accommodations.[20] BU did not prove that the retesting policy was "necessary to the provision of educational services or reasonable accommodations."[21]

Subsequent to the filing of the litigation, BU modified its policy to allow for a waiver of the retesting requirement if it was shown not to be "medically necessary."[22] Although the court concluded that BU's new policy likely would not screen out students with learning disabilities, it found that it did not have a sufficient record to determine the effect of the new policy's implementation.[23]

The court determined that the eligibility criteria for the credentials of academic evaluators (i.e., BU's policy that evaluators must have doctorate degrees) illegally prevented students with learning disabilities from receiving accommodations.[24] The court concluded, however, that the evaluator eligibility criteria did not screen out students tested prior to their matriculation at the university, because there was no evidence that the conducting of this testing by evaluators with doctorate degrees was more burdensome than by those holding masters degrees.[25] Nevertheless, evidence presented at trial showed that the number of students who self-identified as learning disabled dropped by 40 percent from 1994 to 1996, the time period during which BU implemented its new policies.

BU's retesting and evaluator qualification criteria would not violate the law if they could be shown to be "necessary" components of the academic accommodation process.[26] At trial, expert testimony established the degree to which the learning disorders at issue—primarily dyslexia and ADD/ADHD—change over time. This analysis was required to assess whether the retesting requirement as initially written—a policy that was followed by no other college or university in the United States[27] —was a "necessary" or justified part of the accommodation process.

The court determined that the retesting requirement was not justified for students diagnosed with dyslexia and related learning disorders. This conclusion was based on scientific literature and expert testimony presented at trial indicating that there is no demonstrable change in these disorders after an individual reaches age 18.[27] The court found, however, that the reevaluation of students with ADD/ADHD was necessary and justified, given that these disorders may change over time.

BU claimed that its evaluator eligibility criteria were necessary and justified to prevent the inappropriate diagnosis of learning disabilities and to ensure appropriate documentation for the accommodation process. The court found that BU's initial policy of accepting only evaluations conducted by physicians and licensed clinical psychologists was not justified because it precluded evaluations from other qualified professionals, such as those with doctorates in education.[28]

Subsequent to the filing of the litigation, BU modified its eligibility criteria to include evaluators with doctorates, particularly those with advanced degrees in education and related areas. The court concluded that this policy still violated the law in its blanket application of requiring students with dyslexia and related learning disorders to be retested if their prior evaluations had been conducted by an individual without a doctorate degree, for instance, by a learning specialist with a masters degree. In

regard to students with ADD/ADHD, the court concluded that doctorate level training for evaluators was justified under federal law, given the medical and psychological conditions often associated with these disorders.[29]

The Accommodation Request Evaluation Process and Appeals Procedure

The students contended that BU's accommodation evaluation process was discriminatory because reviewers in the provost's office lacked expertise in learning disabilities, conducted "closed-door" and noninteractive reviews that were driven by "false stereotypes about learning disabled students," and did not provide for an appeals process for denied accommodation requests.[30] As in other policy areas, BU modified the process for reviewing accommodation requests once the lawsuit was filed.

Based on analysis of the circumstances prior to the lawsuit, the court determined that the provost's office had reviewed accommodation requests without any expertise or training in the area, while "express[ing] certain biases about the learning disabilities movement and stereotypes about learning disabled students."[31] The biases and misinformed stereotypes were reflected in statements by BU administrators that students with learning disabilities were "fakers" and "lazy," and that their evaluators were "snake oil salesmen."[32] The initial evaluation policy, therefore, violated the law. Subsequent to the filing of the litigation, BU hired a professional trained in learning disorders to review accommodation requests. This subsequent policy modification was determined to remove the effect of discrimination toward class members.

The court also determined that because BU's initial accommodation review process was not "interactive," it violated the ADA. The provost's office did not communicate with disability support staff or students, and students received inadequate information about accommodation request denials. Again, in response to the litigation, BU modified the review process by staffing the disability services office with a professional reviewer. The court found that this modification withstood an attack under the ADA, at least for now.

Finally, the court determined that BU offered no meaningful appeal process for the denial of requested accommodations. The provost's office served as reviewer of both accommodation requests and denials. Even after modification of the appeals policy subsequent to the litigation—primarily involving the development of a student handbook describing academic accommodations—the court was not persuaded that a meaningful review process was in place.

The Course Substitution Policy

As part of its initial change in policy, BU refused to authorize all course substitutions as an academic accommodation for students with learning disabilities. The students claimed that such a blanket policy was discriminatory and violated the law. BU argued that a policy allowing course substitutions would result in a fundamental alteration to its degree program—presumably, by lowering its academic requirements—which was not required under the law.

The regulations interpreting section 504 include reasonable modifications involving the "substitution of specific courses required for the completion of degree requirements."[33] Nevertheless, as interpreted in cases before the U.S. Supreme Court and the U.S. Department of Education's Office of Civil Rights, academic requirements need not be modified under section 504 if they are essential or fundamental to degree requirements.[34,35]

The court determined that the students had met their initial burden of proving that the requested accommodation was reasonable in the case of course substitutions for foreign language requirements. The evidence, the court concluded, supported the contention that students with learning disabilities "have a significantly more difficult challenge in becoming proficient in a foreign language than students without such an impairment," and, therefore, that the requested course substitution for foreign language was reasonable.[36] The weight of the evidence, however, did not support the contention that a course substitution was a reasonable accommodation for math requirements.

The evidentiary burden of proof next shifted to BU to establish that a course substitution in foreign language resulted in a fundamental alteration of the degree program. In reviewing prior case law—in particular, the First Circuit's decision in *Wynne v. Tufts Univ. Sch. of Medicine*[37] —the court concluded that a university may refuse to modify its degree requirements affecting students with learning disabilities, as long as it undertakes a rational review process in reaching the conclusion that the modification would alter the essential nature of the academic program. Thus, the court disagreed with the students' claim that a blanket policy denying course substitutions *per se* violates the ADA and section 504.

However, the court agreed with the students' contention that in the facts of this case, BU's refusal to grant course substitutions was motivated by a discriminatory animus not based on reasoned academic judgment:

> A substantial motivating factor in Westling's decision not to consider degree modifications was his unfounded belief that learning disabled students who could not meet degree requirements were unmotivated (like "Somnolent Samantha") or disingenuous. Although Westling was also inspired by a genuine concern for academic standards, his course substitution prohibition was founded, in part, on uninformed stereotypes. Relying only on popular press accounts that suggested learning disabilities were being unfairly exaggerated and misdiagnosed, Westling provided no concrete evidence that any BU student faked a learning disability to get out of a course requirement.[38]

In holding that BU's failure to develop an academic rationale for its course substitution policy violated the ADA and section 504, the court ordered BU to propose a procedure for determining whether foreign language course substitutions would fundamentally alter the nature of the university's degree program. The procedure must include the development of a faculty committee to examine the university's degree requirements. BU is required

to report back to the court during the fall 1997 semester regarding its implementation plan.[39]

On Oct. 6, 1997, the court held a hearing to determine the extent to which BU had developed a "deliberative procedure," as required, to address the question of whether foreign language course substitutions would fundamentally alter the nature of the university's liberal arts program.

IV. Implications: Attitudes, Stereotypes, and "Somnolent Samantha"

Laws like the ADA and the Rehabilitation Act are federal civil rights laws designed to address discrimination against millions of Americans. The goals of these laws have as much *or more* to do with battling attitudinal barriers and unjustified prejudice faced daily by qualified individuals with disabilities as they have to do with overcoming physical barriers to society.[6]

Soon after Judge Saris' decision, BU's now President Westling explained his views of the case in an op-ed in the *Wall Street Journal* entitled "One University Defeats Disability Extremists":

> The broader significance of Judge Saras's decision, however, lies in her rejection of most of the plaintiffs' attempts to extend the scope of federal disability law. ... These decisions are a crucial victory because universities now have a firm basis for saying no to the extremists' attempts to turn every intellectual deficit into a disability.
>
> "Samantha" symbolized real learning-disabled students. I altered details to preserve my students' privacy—as required by federal law and as any teacher concerned about his students would do anyway. ... "Samantha" and other learning-disabled students are victims of overblown and unscientific claims by some learning disability advocates.[4]

The significance of the BU case is not that it is a "rebuff to learning-disabilities extremists"[40] or that it is a vindication of academic standards. There was no evidence at trial that BU's academic standards ever were altered in practice. Rather, the case brings to the fore the underlying, often insidious, and always pervasive attitudinal biases toward many qualified persons with learning disabilities. These biases are not based in reality and are believed even in the absence of evidence to the contrary.

Since its passage, the ADA and other similar federal civil rights laws have been the subject of intense discussion by courts, academics, policy makers, and persons with and without disabilities—often in the absence of hard facts. Proponents of these laws stress the overarching importance of their antidiscrimination and civil rights guarantees. Critics cast the laws as unnecessary, overly broad and difficult to interpret, and as a preferential treatment initiative. Some academics, and university officials like Westling, cast laws such as the ADA as reflecting a "system of well-intentioned but sometimes misguided entitlements."[41]

The resulting dialogue has fueled a national debate, some argue a backlash, on attitudes toward the ADA and related laws. BU's actions represent an extremely visible, but small part, of the backlash that people with disabilities are experiencing in reaction to laws such as the ADA.

Of course, fundamental interpretive questions of disability-related laws remain. These questions include:

- What is the statutory scope of the definition of a learning disability?
- Who are "qualified" persons with learning disabilities for purposes of the ADA and section 504?
- What medical inquiries and tests are acceptable measures of individual diagnoses, qualifications, and abilities?
- What responsibilities do entities covered by the laws and individuals with learning disabilities have in the accommodation process?
- In what ways may certain accommodations alter the fundamental nature of educational or job-related standards?

It is becoming increasingly apparent that answers to these and other questions must be guided by systematic empirical study, rather than by anecdotal and misinformed accounts concocted by critics and reported in the popular press.[42,43] As Robert Sternberg, professor of psychology and education at Yale University, has pointed out, one reason for skepticism at best, and discriminatory animus at worst, toward students claiming a learning disability is that researchers and clinicians have not agreed on the criteria for diagnosing learning disabilities.[41,44]

But Sternberg argues further in relation to the BU case:

> Yet even students with genuine disabilities should not be able to use them as an excuse for not learning.... [T]he saddest aspect of the fixation with entitlements is that, while helping these students succeed in school, we are setting them up for possible failure later on.[41]

The court's findings in the BU case stand in contrast to Sternberg's assertions. The court found that, not only were the university's initial policies toward students with learning disabilities based on uninformed stereotypes, myths and misconceptions, *but they also were instituted despite even one documented instance at BU in which a student with a learning disability had been found to have fabricated a disorder to claim eligibility for academic accommodations.*[45]

Thus, many attitudes toward the disability movement in general, and toward students with learning disabilities in particular, simply are not based in fact. Common allegations include that many students or workers with learning disabilities are "shirkers," individuals looking for an unfair advantage, or "pos[ing] a subversive challenge to the basic notions of fair play, professionalism and equal protection under the law."[46]

The Need for Future Study

The national discussion ignited by the BU case highlights the need for study on individual and collective attitudes and behavior surrounding the rights of qualified individuals under the ADA, with a special focus on myths and stereotypes facing those with learning disabilities.[43] This need to inform affected individuals and policy makers is not unlike that faced after the landmark Supreme Court decision in *Brown v. The Board of Education*.[47] Many disciplines—including social psychology, political science, economics, and sociology—assumed the challenge of studying attitudes and behavior toward school desegregation policies and examining the predictive links between underlying attitudes and social behavior.[6]

It may be that laws like the ADA will change societal attitudes toward persons with learning disabilities simply by recognizing their basic civil rights or acknowledging the prejudice and segregation historically faced by many qualified individuals with learning disabilities. Or it may be that exposure to effective accommodations in practice—whether in academic settings or the workplace—sensitizes nondisabled people to the true capabilities of qualified people with learning disabilities.[42] However, only future study of the practical effects of disability-related laws like the ADA will provide some answers.

In dramatic and unforeseen ways, individual and societal attitudes about the nature of disability impact the lives of millions of Americans on a daily basis.[43, 48] The U.S. Supreme Court, in *Alexander v. Choate*,[49] recognized that discrimination against people with disabilities is "most often the product, not of invidious animus," but rather of thoughtless and indifferent attitudes.[50] Systematic examination of attitudes about learning disability therefore is necessary for several reasons.

First, increasing numbers of qualified individuals with learning disabilities, who have been in regular education classes as a result of the Individuals with Disabilities Education Act (IDEA) and other laws, are entering post-secondary education and the workforce.[51] Many of these individuals have been denied or "screened out" from equal opportunity to education, to work, and to daily life solely on the basis of myths, misconceptions and prejudice about their impairments. Judge Saris' decision reflects one of the most significant ADA-related legal opinions to date because it examines the fine line between legitimate documentation and eligibility requirements in educational or employment contexts, and the extent to which those requirements sometimes unfairly—and in violation of the law—tend to or do screen out qualified individuals with learning disabilities from equal participation in society.

Second, unlike race or gender discrimination or discrimination based on other disabilities, the protected characteristics associated with learning disabilities may not be immediately obvious and may be difficult to assess. However, conscious and unconscious[52,53] attitudes may have led to the inaccurate perceptions by BU administrators toward many qualified students with learning disabilities. Attitudinal bias may be reflected in unconscious, negative views of ability to succeed in school (or to perform a job), even though a student with a learning disability presently may be qualified.

Third, media portrayals—such as stories suggesting that persons with learning disabilities are prone to act inappropriately in educational settings and in the workplace—amplify conscious attitudinal biases about the abilities of people with learning disabilities.[6] Thus, the federal court or independent observers should monitor closely the development of and assumptions underlying BU's court-ordered implementation plan. Monitoring is needed of the procedural *and* substantive fairness of the university's course substitution policy. Such monitoring may be useful in preventing future unjustified discrimination both at BU and at other institutions. It also may help to prevent protracted litigation or new lawsuits against BU.

Fourth, research in this area may facilitate a greater understanding of the attitudes and behavior underlying interpretations of such discretionary legal concepts as "discrimination," "qualified" individual, or "reasonable" accommodation." Michael Perlin, a law professor at New York Law School, has argued that to lessen discrimination against persons with mental disabilities, society must address underlying "sanist attitudes."[54,55,56] Sanism, like racism and sexism, is an irrational prejudice based upon biased attitudes. In light of no documented incidents of faking by BU students with learning disabilities, BU's academic policy and attitudes toward learning disability screening and testing reflect these biased attitudes.

Fifth, study would facilitate assessment of other issues, such as the extent to which attitudes about learning disability are related to concepts of individual privacy and confidentiality. A young adult's decision to disclose a learning disability is complex enough. There is no body of evidence to suggest, as Professor Sternberg and others have written, that many "parents have sought to have learning disabilities diagnosed in their children to make them eligible for [academic] benefits."[41] The BU case illustrates the need for open discussion and study of the process of disclosure, diagnosis, and accommodation involving individuals with learning disabilities, their families, and experts in the field.

Perhaps BU's Westling articulated what many university officials, employers, media representatives, and others consciously or unconsciously believe about individuals with learning disabilities, but are too timid or politically "correct" to state publicly. Or perhaps Westling and others believe that the core of the debate goes well beyond academic accommodations for students with learning disabilities. Could it be that an entire generation of individuals with learning disabilities are being raised under a regime of preferential civil rights as set forth in laws like the Civil Rights Act of 1991, the ADA, the IDEA, the Rehabilitation Act, and others?

Some critics might argue that preferential or special treatment sets up affected individuals for failure in life later on, by creating a "cult of self-esteem in which we make it hard for children [with learning disabilities] to fail."[41] Others might contend that laws like the ADA pervert notions of fair play in our meritocracy.[46]

BU students with learning disabilities set a precedent by confronting their university president for his concocted and suspicious views that their lives are "set up for failure" by federal civil rights laws. Their decision was an important one because, for

some time to come, this case will be analyzed in a broader context of issues involving academic freedom, employment,[57] and professional licensing and certification requirements.[58]

V. Conclusion

The stakes in the BU case are high. But not for reasons vindicating academic standards articulated by Westling in his recent *Wall Street Journal* op-ed. Rather, the stakes affect the national awareness about the lives and true capabilities of the next generation of qualified individuals with learning disabilities, in education, work, and daily life.[59] Constructive engagement in this dialogue, by all involved, will serve as a measure of our society's success in addressing the challenges posed by an increasingly diversified populace.

Notes

1. *Guckenberger v. Boston University,* Civ. A. No. 96-11426-PBS (D. Mass. Aug. 15, 1997) (hereinafter "BU Opinion") at 12-13, 21 MPDLR 653.
2. BU Opinion at 12 (quoting Westling, who was elevated from Provost to President of BU in June 1996).
3. BU Opinion at 12-13 (quoting Westling).
4. BU Opinion at 13-14 (quoting Westling).
5. BU Opinion at 13 (quoting Westling).
6. Blanck PD & Marti MW. "Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act." *Villanova Law Review* 1997; 42: (301-362).
7. Blanck PD & Marti MW. "Genetic Discrimination and the Employment Provisions of the Americans with Disabilities Act: Emerging Legal, Empirical, and Policy Implications." *Behavioral Sciences & the Law* 1996; 14:411-432.
8. BU Opinion at 13 (quoting Westling).
9. BU Opinion at 13-14 (quoting Westling).
10. BU Opinion at 15.
11. BU Opinion at 17-18 (quoting BU internal correspondence).
12. BU Opinion at 21.
13. BU Opinion at 45-53 (discussing expert testimony).
14. BU Opinion at 47-48.
15. BU Opinion at 46-53 (discussing expert testimony on nature, diagnosis, and documentation of learning disabilities by post-secondary education personnel).
16. 42 U.S.C.A. §§12182(a) and 12181(7)(J) (West Supp. 1995) [ADA Title III]; 29 U.S.C.A. §794(a) (West Supp. 1997) (Rehabilitation Act §504), as amended by Pub. L. No. 102-569, §102(p)(32) (1992) [§504].
17. 42 U.S.C.A. §12182(b) (2).
18. 28 C.F.R. §36.104 (regulations implementing the ADA).
19. E.g., *Halasz v. University of New England,* 816 F. Supp. 37, 46 (D. Me. 1993), 17 MPDLR 219.
20. BU Opinion at 60.
21. BU Opinion at 3.
22. BU Opinion at 61.
23. BU Opinion at 61.
24. BU Opinion at 63.
25. BU Opinion at 63-64.
26. BU Opinion at 66 (citing 42 U.S.C.A. §12182(b) (2)).
27. BU Opinion at 66-67.
28. BU Opinion at 69-71.
29. BU Opinion at 71-72.
30. BU Opinion at 72-73.
31. BU Opinion at 73.
32. BU Opinion at 74.
33. 34 C.F.R. § 104.44 (regulations implementing the §504).
34. BU Opinion at 86-87 (citing *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), 3 MDLR 240, and opinions of the U.S. Department of Education's Office of Civil Rights).
35. Milani AA. "Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law." *Journal of College and University Law* 1996; 22: 989-1043.
36. BU Opinion at 90.
37. *Wynne v. Tufts Univ. Sch. of Med.,* 932 F.2d 19 (1st Cir. 1991), 15 MPDLR 500, (en); 976 F.2d 791 (1st Cir. 1992), 17 MPDLR 73, (case involving a student with a learning disability who attempted to alter the medical school's testing policy).
38. BU Opinion at 96.
39. The court also held that BU breached its contract with the named plaintiffs in failing to honor its representations about disability services at the university, and awarded damages to the named plaintiffs on the basis of BU's discriminatory actions and contract breach. BU Opinion at 97-112.
40. Westling J. "One University Defeats Disability Extremists" *Wall Street Journal*; Sept. 3, 1997, at A21.
41. Sternberg RJ. "Extra Credit for Doing Poorly." *The New York Times,* op-ed Monday, Aug. 25, 1997, at A15.
42. Blanck PD. "Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.," *Mental and Physical Disability Law Reporter* 1996; 20: 278-286.
43. Blanck PD. "Employment Integration, Economic Opportunity, and The Americans with Disabilities Act: Empirical Study from 1990-1993." *Iowa Law Review* 1994; 79:853-923.
44. Wolraich ML, Hannah JN, Pinnock TY, Baumgaertel A & Brown J. "Comparison of Diagnostic Criteria for Attention-Deficit Hyperactivity Disorder in a County-Wide Sample." *Journal of the American Academy of Child & Adolescent Psychiatry* 1996; 35: 319.
45. BU Opinion at 15.
46. Shalit R. "Defining Disability Down." *The New Republic*; Aug. 25, 1997: 16; *compare with* Runyon, MK. "The Effect of Extra Time on Reading Comprehension Scores for University Students with and without Learning Disabilities," *Journal of Learning Disabilities* 1991; 24: 104-108.
47. 347 U.S. 483 (1954).
48. Minow M. *Making All the Difference.* Cornell University Press (1990).
49. 469 U.S. 287, 295 (1985), 9 MPDLR 57.
50. Status Report on Disability in the United States, Disability Rights Advocates and Disability Statistics Center, draft report 8/27/96 (finding most common health impairments associated with disability are "hidden" conditions, and per-

sons with "hidden disabilities," such as those with mental impairments, encounter severe attitudinal bias in the workplace).

50. Hahn H. "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective," *Behavioral Sciences & the Law* 1996; 14: 41-59.
51. Rothstein LF. "Higher Education and Disabilities: Trends and Developments." Stetson Law Review; 27:119-139 (1997).
52. Lawrence CR. "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism." *Stanford Law Review* 1987; 39: 317 (1987).
53. Krieger LH. "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity 1995." *Stanford Law Review*; 47: 1161-1248.
54. Perlin ML. "Sanism and the ADA: Thinking about Attitudes." *The Journal of the California Alliance for the Mentally Ill* 1995; 6: 10-11.
55. Perlin ML. "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?" 1993. *Journal of Law & Health*: 8: 15, 20.
56. Perlin ML. "On 'Sanism,'" *Southern Methodist University Law Review* 1992; 46: 373.
57. Fike HG. "Learning Disabilities in the Workplace: A Guide to ADA Compliance," *Seattle University Law Review* 1997; 20: 489-541.
58. E.g., *Price v. National Bd. of Med. Exam'rs,* 966 F. Supp. 419 (S.D.W.Va. 1997), 21 MPDLR 666.
59. Blanck, PD. "Academic Freedom and Civil Rights," *Journal of Gender, Race & Justice,* 1998, forthcoming.