Commentary

Civil Rights, Learning Disability, and Academic Standards

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I. INTRODUCTION

In 1996, students with learning disabilities enrolled at Boston University (BU) brought a class action lawsuit claiming they had been discriminated against on the basis of their disability in violation of the Americans with Disabilities Act (ADA) and other federal and state laws.[1] The class of students with learning disabilities—individuals with Attention Deficit Disorder (ADD) 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 learning disability, by not providing reasonable procedures for evaluating their requests for academic accommodations, and by instituting a blanket policy precluding course substitutions in foreign language and mathematics as academic accommodations.[2] In August of 1997, Federal

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1. Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997). Dr. Blanck served as an expert witness for the plaintiffs in this case. 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 opinion.

2. Dyslexia is a reading disability that makes language-based learning difficult, especially learning foreign languages. As described in the learning disabilities section of the American Psychiatric Association's *Diagnostic Statistical Manual IV*, ADD and ADHD involve behaviors of inattention, hyperactivity, and impulsivity. *See Guckenberger*, 974 F. Supp. at 131. The diagnoses of ADD and ADHD typically are made through clinical interviews and psychological testing. Professional guidelines exist for the documentation by post-secondary personnel of learning disabilities. These guidelines set forth recommendations for the currency of testing and evaluator qualifications. For a review, see generally Joan M. McGuire et al., *An Investigation of Documentation Submitted by University Students to Verify Their Learning Disabilities*, 29 J. LEARNING DISABILITIES 297 (1996) (showing that serious flaws exist in documentation programs and offering guidelines for documentation process). The court examined these guidelines in evaluating plaintiffs' claims that BU had discriminated against them in violation of the law. *Guckenberger*, 974 F. Supp. at 130-32 (discussing expert testimony on nature, diagnosis, and documentation of learning disabilities by post-secondary education personnel).

District Court Judge Patti B. Saris rendered her decision, finding that BU had violated the students' rights under the ADA and related laws.[3]

The BU case reflects the national debate over the rights of qualified students with learning disabilities to receive academic accommodations and the rights of colleges and universities to establish academic standards. Yet as Professor Rothstein articulates in her article, the circumstances surrounding the BU case do not exist only within ivory tower walls.[4] Rather, they are part of a growing ideology that, knowingly or unknowingly, perpetuates attitudinal barriers and unjustified prejudice toward many qualified individuals with learning disabilities in not only educational settings, but also work, housing, and daily life activities.[5]

The presentations by Professors Rothstein and Olivas provide important insights into the debate on topics related to civil rights, learning disability, and academic standards in institutions of higher education. In this commentary, I build on Rothstein's and Olivas' contributions, using as a discussion vehicle the class action lawsuit brought in federal district court by students with learning disabilities against Boston University. The commentary first explores the broader implications of the BU case for understanding attitudinal barriers facing qualified students with learning disabilities in post-secondary education. I address these implications particularly in the areas of academic accommodations, evaluation processes, and decisions regarding admission and retention. Next, the commentary describes the facts of the BU case. The third part examines the court's conclusions of law. The final part examines the significance of the BU case for future study on attitudes and behavior by academics, university officials, and others toward qualified students with learning disabilities.

II. THE BOSTON UNIVERSITY CASE

Boston University is a private university with more than 20,000 students. During the 1995-96 academic year, BU had approximately 480 enrolled students with learning disabilities. Prior to 1995, BU had an extensive program, managed through the university's Disability Services Office, to provide academic support and accommodations for its students with learning

3. *Guckenberger*, 974 F. Supp. at 154.

4. *See* Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law*, 2 J. GENDER RACE & JUST. 1, 3, 4 (1998). *See also* Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 119 (1997) (reviewing case law on learning disability in higher education); Robert W. Edwards, *The Rights of Students with Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans with Disabilities Act*, 2 J.L. & POL'Y 213 (1994) (same).

5. *See* PETER DAVID BLANCK, THE AMERICANS WITH DISABILITIES ACT AND THE EMERGING WORKFORCE OF THE NEXT CENTURY 3-10 (1998) (discussing attitudinal biases and myths toward persons with disabilities).

disabilities. Within the Disability Services Office, BU 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. Of the roughly forty requests made annually, BU granted approximately ten to fifteen course substitutions a year.[6]

Before 1995, the application process for an academic accommodation involved a submission by the student, supported by medical or psychological documentation, requesting the accommodation.[7] LDSS staff, in conjunction with the student and relevant health professionals, analyzed the request and either granted or denied the accommodation.[8] If the accommodation request was granted, LDSS wrote a letter to the student's faculty members explaining the need for the accommodation.[9]

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 students or faculty members. As determined at trial, Westling terminated the course substitution policy without input from any university body, faculty member, or expert on learning disabilities.[10]

During this time, Westling delivered several speeches, coinciding with changes in university policy toward students with learning disabilities, 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."[11] 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."[12] In one of these speeches, entitled *Disabling Education: The Culture*

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6. *Cf.* Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 KAN. L. REV. 567, 568-70 (1996) (studying prevalence of accommodation requests by law students finding an average of 15 requests per law school, approximately half requested by students with learning disabilities, and denial of request in only two percent of the cases).

7. *Guckenberger*, 974 F. Supp. at 117.

8. *Id.*

9. *Id.*

10. *Id.* at 118.

11. *Id.* (quoting Westling, who was elevated from Provost to President of BU in 1996).

12. *Id.* (quoting Westling).

Wars Go to School, Westling, as it was later determined at trial, fabricated the case of a freshman student named Samantha, whom he referred to as "Somnolent Samantha."[13] Based on anecdotal and uninformed accounts in the popular press,[14] the caricature of Samantha was intended to demonstrate that "students with learning disabilities were often fakers who undercut academic rigor."[15] He described how, on the first day of class, Samantha had presented an accommodation letter to him from the LDSS office:

> 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 room separate from other students; copies of my lecture notes; and a seat at the front of the class. Samantha, I was also informed, might fall asleep in my class, and I should be particularly concerned to fill her in on any material she missed while dozing.[16]

Judge Saris commented that: "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.'"[17]

Setting out his views toward students with learning disabilities, Westling further argued in his address that:

> 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."
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> "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

13. *Guckenberger*, 974 F. Supp. at 118.

14. *See generally* Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345 (1997); Peter David Blanck & Mollie Weighner Marti, *Genetic Discrimination and the Employment Provisions of the Americans with Disabilities Act: Emerging Legal, Empirical, and Policy Implications*, 14 BEHAV. SCI. & L. 411 (1996) (seeking to replace misconceptions about persons with disabilities with current information).

15. *Guckenberger*, 974 F. Supp. at 119 (quoting Westling).

16. *Id.* at 118 (Judge Saris quoting Westling).

17. *Id.*

> denied, perhaps forever, access to a dimension of self-understanding."[18]

In contrast to Westling's assertions, the court found that there had not been 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.[19] Yet by the beginning of the 1995-96 academic year, Westling directed that all accommodation requests be reviewed by his office, despite the fact that neither he, nor any of his staff, had expertise in evaluating accommodation requests by students with learning disabilities.[20]

After review and denial of the majority of requests for accommodations, Westling identified the following "corrective actions" that would be instituted:

> (1) that students should "be required to provide *current* evaluations" in light of federal guidelines stating that evaluations more than three years old are unreliable;
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> (2) that the evaluations should provide actual test results that support the tester's conclusions;
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> (3) that "[i]ndividuals who provide evaluations of learning disabilities should be physicians, clinical psychologists or licensed psychologists and must have a record of reputable practice";
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> (4) that all requests for accommodation should contain an analysis by LDSS staff, an academic history of the student, and the student's academic status at BU; and
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> (5) that LDSS "should not misinform students that course substitutions for foreign language or mathematics requirements are available."[21]

When these directives were in place, Westling and his staff in the provost's office acted as 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."[22] A new Disability Services Office was established to manage accommodation requests. As before, recommendations regarding accommodation requests were forwarded to Westling's office for approval.

In early 1997, after students had instituted class litigation to enjoin BU's policies regarding accommodations for students with learning disabilities, a

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18. *Id.* (quoting Westling) (alteration in the original).

19. *Id.* at 119.

20. *Id.* at 118.

21. *Guckenberger*, 974 F. Supp. at 120 (quoting BU internal correspondence).

22. *Id.* at 121.

new clinical director for the Disability Services Office was hired. A new application form was developed which outlined the eligibility requirements for receiving academic accommodations. Analysis of the accommodation requests were made by the university's learning disability specialists or other health care professionals and forwarded to the provost's office for final review. There was no appeals process in place for review of accommodation requests that were denied.

III. CONCLUSIONS OF LAW

The federal court certified the group of BU students with learning disabilities as a class seeking declaratory and injunctive relief for the alleged violations of the ADA and the Rehabilitation Act of 1973. At the trial, numerous experts testified about the nature, diagnosis, and accommodation of learning disabilities.[23] The two major learning disabilities described as relevant to the plaintiff class were dyslexia and Attention Deficit Disorder (ADD)/Attention Deficit Hyperactivity Disorder (ADHD).[24]

The class of students claimed that BU had discriminated against them in violation of the ADA and Section 504 of the Rehabilitation Act of 1973. Title III of the ADA (with mirror provisions in Section 504) prohibits discrimination on the basis of disability by places of public accommodation, including undergraduate and graduate educational settings.[25]

Under both statutes, 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.[26] Persons with learning impairments may be deemed "disabled" for purposes of the ADA.[27] The students claimed that BU's policies discriminated against students with learning disabilities in three general areas: (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.

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23. *Id.* at 130-32 (discussing expert testimony).

24. *See supra* note 2 (discussing definition of dyslexia and ADD/ADHD).

25. Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12182(a), 12181(7)(J) (West Supp. 1995); 29 U.S.C.A. § 794(a) (West Supp. 1997) (Section 504), *amended by* Pub. L. No. 102-569, § 102, 106 Stat. 4424, 4425-27 (1992) (Section 504).

26. 42 U.S.C.A. § 12182(b)(2)(A).

27. 28 C.F.R. § 36.104 (1997) (regulations implementing the ADA). *See also infra* notes 127-37 and accompanying text (discussing definition of disability under the purview of the ADA).

A. The Retesting and Evaluator Qualification 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.[28] Subsequent to the filing of the litigation, BU modified its policy to allow for a waiver of the retesting requirement if it was shown to be not "medically necessary."[29] The court concluded that the university's initial blanket requirement for retesting all students with learning disabilities every three years (the testing "currency" requirement) illegally screened out, or tended to screen out, qualified students from disability support services and accommodations.[30] BU did not prove that the retesting policy was necessary to the provision of educational services.[31] Although the court concluded that BU's new policy would not likely screen out students with learning disabilities, it found that it did not have a sufficient factual record to determine the effect of the new policy's implementation.[32]

The court also determined that the eligibility criteria for the credentials of academic evaluators (BU's policy requiring evaluators to have doctorate degrees) illegally screened out students with learning disabilities by preventing them from receiving accommodations.[33] The court noted that BU's policy required students with learning disabilities to be retested if their initial evaluation had not been performed by an evaluator with credentials acceptable to the university.[34] As a result, the time, expense, and anxiety of having to be retested tended to discourage students with learning disabilities from seeking accommodations. Consistent with Olivas' illustration of the chilling effects of discrimination in the context of admissions to graduate school programs,[35] evidence presented at trial showed that the number of students who identified

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28. In contrast, some courts have determined that a university may properly request current medical or psychological documentation from a student requesting an accommodation. *E.g.*, Halasz v. University of New England, 816 F. Supp. 37, 46 (D. Me. 1993).

29. Guckenberger v. Boston Univ., 974 F. Supp. 106, 136 (D. Mass. 1997).

30. *Id.* at 135-36.

31. *Id.* at 136. *Cf.* McGuire et al., *supra* note 2, at 303 (suggesting in most cases documentation is current within the past three years).

32. *Guckenberger*, 974 F. Supp. at 136.

33. *Id.*

34. *Id.*

35. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COL. L. REV. 1065, 1067-69 (1997). Excerpts of this article were presented by Olivas at the *The Journal of Gender, Race & Justice* Symposium, *From Class to Community: Reading Our Rights, Writing the Wrongs*, held October 3-4, 1997, at the University of Iowa College of Law.

themselves as learning disabled dropped by forty percent during the 1994 to 1997 period when BU implemented its new policies.[36]

The court concluded, however, that the evaluator eligibility criteria did not screen out students who had not been 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.[37] Subsequent to the court's decision, BU contended that students with learning disabilities tested after matriculation "are or should be on notice of the University's requirements regarding evaluator credentials."[38]

BU's retesting and evaluator qualification criteria would not have violated the ADA if BU could have shown they were "necessary" components of the academic accommodation process.[39] At trial, expert testimony was provided to establish the degree to which the learning disorders at issue, primarily dyslexia and ADD/ADHD, change over time.[40] 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[41]—was "necessary" or justified as part of the accommodation process. The court determined that the retesting requirement was not justified for students diagnosed with dyslexia and related learning disorders.[42] 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 eighteen.[43] With respect to students with ADD/ADHD, the court found that reevaluation was necessary and justified, given that these disorders may change over time.[44]

With respect to its evaluator eligibility criteria, BU claimed that its policy was necessary and justified to prevent the inappropriate diagnosis of learning disabilities, and to thereby ensure appropriate documentation for the accommodation process.[45] Nonetheless, the court found that BU's initial policy of accepting only evaluations conducted by physicians and licensed clinical

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36. *Guckenberger*, 974 F. Supp. at 137.

37. *Id.*

38. Defendant's Opposition to Plaintiffs' Post Judgment Motion for Enforcement of Court Order and Clarification of Judgment at 6, Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

39. *Guckenberger*, 974 F. Supp. at 138 (citing 42 U.S.C.A. § 12182(b)(2)(i)).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 139-40.

45. *Guckenberger*, 974 F. Supp. at 139.

psychologists was not justified because it precluded evaluations from qualified professionals such as those with doctorates in education.[46]

Subsequent to the filing of the litigation, BU modified its eligibility criteria to include evaluators with doctorates relevant to the diagnosis of learning disabilities. The court concluded that the modified policy still violated the law by requiring students with dyslexia and related learning disorders to be retested if their prior evaluation had been conducted by an individual without a doctorate degree; for instance by a learning specialist with a masters degree.[47] In regard to students with ADD/ADHD, the court concluded that doctorate-level training was justified for evaluators under federal law, given the medical and psychological conditions often associated with these disorders.[48]

B. 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," non-interactive reviews that were driven by "false stereotypes about learning-disabled students," and did not provide for an appeals process when accommodation requests were denied.[49] As in other areas of policy, BU had modified the process for reviewing accommodation requests in response to the filing of the lawsuit.[50]

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, while "express[ing] certain biases about the learning disabilities movement and stereotypes about learning-disabled students."[51] These biases and misinformed stereotypes were reflected in statements made by BU administrators that students with learning disabilities were "fakers" and "lazy," and their evaluators "snake oil salesmen."[52] The initial evaluation policy, therefore, was held to violate the law. Subsequent to the filing of the litigation, BU hired a professional trained in learning disorders to review accommodation requests.[53] The court determined that this subsequent

46. *Id.*

47. *Id.* at 140.

48. *Id.*

49. *Id.* at 140-42.

50. *Id.* at 142.

51. *Guckenberger*, 974 F. Supp. at 141.

52. *Id.*

53. *Id.* at 141.

modification in policy removed the effect of discrimination toward class members.[54]

The court also found that BU's initial accommodation review process was not "interactive" in violation of the ADA.[55] The provost's office did not communicate with disability support staff or students, and students received inadequate information about accommodation request denials.[56] Again, in response to the litigation, BU modified the review process by staffing the disability services office with a professional reviewer.[57] The court found that this modification withstood attack under the ADA.[58]

Finally, the court determined that BU offered no meaningful appeals process for the denial of requested accommodations.[59] The provost's office made the initial decisions regarding accommodation requests, but that office was also the only reviewer of denials of those requests.[60] Even after subsequent modification of the appeals policy, which primarily involved the development of a student handbook describing academic accommodations, the court was not persuaded that a meaningful review process was in place.[61]

C. The Course Substitution Policy

As part of its 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 in violation of the law. In response, BU argued that a policy allowing course substitutions would result in a fundamental alteration to its degree program—presumably, by lowering its academic requirements—and therefore was consistent with the law.

The regulations interpreting Section 504 of the Rehabilitation Act include as reasonable modifications those involving the "substitution of specific courses required for the completion of degree requirements . . . ."[62] Nevertheless, as interpreted in cases before the U.S. Supreme Court and the federal Office of

54. *Id.*

55. *Id.*

56. *Id.* at 142.

57. *Guckenberger*, 974 F.Supp. at 142.

58. *Id.*

59. *Id.* at 142-43.

60. *Id.*

61. *Id.*

62. 34 C.F.R. § 104.44 (1997) (regulations implementing Section 504).

Civil Rights (OCR), academic requirements need not be modified under Section 504 if they are essential or fundamental to degree requirements.[63]

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.[64] 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."[65] The weight of the evidence, however, did not support the contention that a course substitution was a reasonable accommodation for math requirements.[66]

Because the court concluded that course substitution for foreign language requirements was reasonable, the evidentiary burden of proof 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 University School of Medicine*[67]—the court concluded that a university may refuse to modify its degree requirements for students with learning disabilities as long as it undertakes a rational review process before concluding that the modification would alter the essential nature of the academic program.[68] The court disagreed with the students' claim that a blanket policy denying course substitutions was a *per se* violation of the ADA and Section 504.

The students contended, however, that BU's refusal to grant course substitutions was motivated by a discriminatory animus not based on reasoned academic judgment. The court agreed with these claims:

> 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

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63. *Guckenberger*, 974 F. Supp. at 145 (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979), and opinions of the Office of Civil Rights); Adam A. Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J.C. & U.L. 989, 1015-43 (1996) (stating that Section 504 does not require the modification of academic requirements if fundamental to degree requirements).

64. *Guckenberger*, 974 F. Supp. at 147.

65. *Id.*

66. *See generally* Diane Pedrotty Rivera, *Mathematics Education and Students with Learning Disabilities: Introduction to the Special Series*, 30 J. LEARNING DISABILITIES 2 (1997) (discussing assessment of learning disabilities in the area of mathematics and reviewing studies).

67. 932 F.2d 19 (1st Cir. 1991) (en banc); 976 F.2d 791 (1st Cir. 1992) (considering case involving student with a learning disability who attempted to alter the medical school's testing policy).

68. *See* Rothstein, *The Affirmative Action Debate*, *supra* note 4, at 6-7, 29-30 (discussing *Wynne*); *See generally* James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27 (1996) (discussing *Wynne* standards of deference to pedagogical basis for academic standards).

> (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.[69]

BU's failure to develop an academic rationale for its course substitution policy, therefore, was held to violate the law. In its initial order, the court required 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 was to include the development of a faculty committee to examine the university's degree requirements. BU was required to report back to the court regarding its implementation plan.[70]

D. Subsequent Implementation of the Court's Order

In late 1997 and early 1998, the court held hearings to determine the extent to which BU had developed a "deliberative procedure" to address the question of whether a foreign language course substitution policy would fundamentally alter the nature of the university's liberal arts program. Plaintiffs argued that BU's proposed procedure was insufficient.[71] BU asserted that it had complied with the judgment of the court by proposing a faculty committee to study the course substitution issue.[72]

The First Circuit's decision in *Wynne* recognizes the legal obligation of an academic institution to consider ways of accommodating students with disabilities and "to produce a factual record documenting its scrupulous attention to this obligation."[73] Moreover, *Wynne* requires academic institutions to conduct a meaningful analysis of the foreign language requirement.

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69. *Guckenberger*, 974 F. Supp. at 149.

70. 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. *Guckenberger*, 974 F. Supp. at 150-52.

71. *See generally* Plaintiffs' Memorandum in Opposition to Defendant's Submission Re Foreign Language Course Substitutions, Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

72. Defendant's Response to Plaintiffs' Memorandum in Opposition to Defendant's Submission Re Foreign Language Course Substitutions, Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997). In early September 1997, BU informed students with learning disabilities that it would not require the re-evaluation of students who had been granted accommodations during the spring 1996 semester, and that students scheduled to graduate in May 1998 may carry these accommodations. *See* Defendant's Opposition to Plaintiffs' Post Judgment Motion for Enforcement of Court Order and Clarification of Judgment at 13.

73. Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 796 (citing Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 26 (1st Cir. 1991)).

Academic institutions are expected to examine the composition and charge of the faculty committee, the assessment methodology and analysis employed, and the procedures used to arrive at and review decisions.[74]

Under the *Wynne* standard, BU was required to engage in a meaningful deliberative process for assessing whether its blanket foreign language requirement was essential to the purposes of a liberal arts degree program, and, moreover, whether a course substitution policy would fundamentally alter the nature of the program. Plaintiffs did not dispute that a foreign language requirement with no permissible course substitution might be appropriate and lawful for certain degree programs, for instance, in a foreign diplomacy program.[75] The crux of the dispute was whether a foreign language requirement was essential to every course of study within the liberal arts program, "even if the foreign language has no discernible relationship to a student's future profession or even graduate studies."[76]

During late 1997 and early 1998, the parties briefed and argued the issue of whether BU had engaged in a good-faith deliberative process in determining that "a course substitution in foreign languages would fundamentally alter the nature of the liberal arts program."[77] BU presented the conclusions of its Dean's Advisory Committee, a group of BU faculty members organized to address the court's concern regarding the course substitution policy. The Advisory Committee concluded that course substitutions for the College of Arts and Sciences foreign language requirement would constitute a fundamental alteration of BU's academic program.

Plaintiffs objected to the Committee's conclusions on several grounds. Plaintiffs argued that the Advisory Committee did not identify at BU, or any other college in the country, a single instance, case study, or university experience showing a diminution in academic standards as a result of a policy permitting foreign language course substitutions.[78] Plaintiffs also argued that BU's Advisory Committee had not performed a substantive analysis of whether course substitutions constituted a reasonable accommodation as required under the ADA.

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74. *See generally* Plaintiffs' Memorandum, *supra* note 71.

75. *See generally* Anna H. Gajar, *Foreign Language Learning Disabilities: The Identification of Predictive and Diagnostic Variables*, 20 J. LEARNING DISABILITIES 327 (1987) (reviewing literature that supports existence of learning disabilities related to study of a foreign language, and study showing that many university students with learning disabilities are likely to experience difficulty in learning a foreign language); L. Ganschow et al., *Foreign Language Policies and Procedures for Students with Specific Learning Disabilities*, 5 LEARNING DISABILITIES FOCUS 50 (1989).

76. Plaintiffs' Memorandum, *supra* note 71, at 12-13.

77. Guckenberger v. Boston Univ., 974 F. Supp. 106, 154 (D. Mass. 1997). *See also* Defendant's Response, *supra* note 72, at 2.

78. *See* Plaintiffs' Memorandum of Law in Opposition to Defendant's Submission Pursuant to this Court's Judgment; Hearing Requested, Dec. 11, 1997, at 2.

Plaintiffs highlighted a number of questions left unanswered by the Committee's analysis: (1) What are the underlying educational goals of BU's liberal arts degree and its foreign language requirement?; (2) Is the foreign language requirement essential to those educational goals?; and (3) Will a course substitution policy achieve similar goals or undermine those goals? In response, BU argued that under the *Wynne* standard, it was entitled to "great deference" with respect to its degree requirements.[79] BU urged the court to defer to its academic judgment on the foreign language course substitution issue because of the alleged integrity of the Advisory Committee's process in reaching its conclusions.

In the end, the court found that the ADA and *Wynne* did not authorize the court to question reasoned academic judgment in this area. The court concluded that BU had not violated its duty to provide reasonable accommodations to students with learning disabilities by refusing to provide course substitutions.[80]

IV. Civil Rights, Learning Disability, and Academic Standards

Federal civil rights laws like the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 are designed to address discrimination affecting millions of Americans. Their objectives have as much (or more) to do with battling attitudinal barriers and unjustified prejudice faced every day by qualified individuals with disabilities as they have to do with overcoming physical barriers to society.[81]

A. Attitudes

Soon after Judge Saris rendered her decision, Jon Westling, who is BU's current president, explained his views of the case in a *Wall Street Journal* editorial entitled "One University Defeats Disability Extremists":

> The broader significance of Judge Saris'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. .

79. Defendant's Memorandum in Opposition to Plaintiffs' Challenge to Defendant's Submission Regarding Course Substitutions, Dec. 19, 1997, at 5.

80. Guckenberger v. Boston Univ., 8 F.Supp.2d 82 (D. Mass. 1998) (Memorandum and Order on the Issue of Course Substitutions).

81. *See* Blanck & Marti, *Genetic Discrimination*, *supra* note 14, at 412, 431 (stating that individuals with genetic disabilities face attitudinal biases and misperceptions).

> . . "Samantha" and other learning-disabled students are victims of overblown and unscientific claims by some learning disability advocates.[82]

The significance of the BU case, however, is not that it is a "rebuff to learning-disabilities extremists,"[83] or a vindication of academic standards; there was no evidence at trial that BU's academic standards were ever altered in practice. Rather, the case highlights the underlying, often insidious, and always pervasive attitudinal biases toward many qualified persons with disabilities. These biases are not based in reality yet they continue to be held by some BU administrators. Indeed, one review of research studies on faculty attitudes toward academic accommodations found that between sixty-five and eighty-five percent report a willingness to provide extra time on exams to students with learning disabilities.[84]

Nevertheless, federal civil rights laws like the ADA have been the subject of intense discussion by courts, academics, policy-makers, and persons with and without learning disabilities, often in the absence of hard facts.[85] Proponents of these laws stress the overarching importance of their anti-discriminatory purpose and civil rights guarantees. Critics, on the other hand, cast the ADA as unnecessary, overly broad, difficult to interpret, and as a preferential treatment initiative.[86] Some academics (and university officials like Westling) cast laws such as the ADA as symptomatic of a "system of well-intentioned but sometimes misguided entitlements."[87] This dialogue has fueled a national debate (some argue a backlash) toward the ADA and related laws. BU's actions represent a small, but extremely visible part of the backlash experienced by people with disabilities in reaction to laws like the ADA.

Examining the underlying attitudes toward learning disabilities would complement study of the physical barriers to equal access in education, employment, and other areas experienced by persons with disabilities. Scholarship on the ADA and related laws has tended to focus on doctrinal

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82. Jon Westling, *One University Defeats Disability Extremists*, WALL ST. J., Sept. 3, 1997, at A21.

83. *Id.*

84. For a review of studies on attitudes by faculty and student peers on accommodations for college students with learning disabilities, see generally Elaine H. Alster, *The Effects of Extended Time on Algebra Test Scores for College Students with and Without Learning Disabilities*, 30 J. LEARNING DISABILITIES 222 (1997). *Cf.* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997).

85. *See, e.g.*, Loring C. Brinkerhoff et al., *Promoting Access, Accommodations, and Independence for College Students with Learning Disabilities*, 25 J. LEARNING DISABILITIES 417 (1992) (reviewing laws and cases involving students with learning disabilities).

86. *See* BLANCK, *supra* note 5, at 3-7 (discussing critiques of the ADA).

87. Robert J. Sternberg, *Extra Credit for Doing Poorly*, N.Y. TIMES, Aug. 25, 1997, at A15.

reviews of the law and their interpretation by the courts.[88] While these analyses are required for consistent enforcement of the civil rights guaranteed by the ADA, significantly less attention has been devoted to study of the individual, organizational, and societal attitudes toward qualified individuals with learning disabilities held by university administrators, employers, health professionals, and others involved in the evaluation and accommodation process.

Study of the underlying attitudes (stereotypes, prejudices, biases) and behaviors (compliance and discrimination patterns, provision of accommodations) associated with ADA implementation is needed. As Professor Rothstein suggests in her article, fundamental interpretive questions about disability-related laws remain.[89] These questions include:

- What is the statutory scope of the definition of a learning disability?[90]
- Who are "qualified" persons with learning disabilities for purposes of ADA coverage?[91]
- What medical inquiries and tests are acceptable measures of individual diagnoses, qualifications, and abilities?
- What responsibilities do entities covered by the law and individuals with learning disabilities have in the accommodation process?
- In what ways may certain accommodations alter the essential nature of educational or job-related standards?
- What are the essential educational purposes of particular academic standards?[92]

In his symposium presentation, Professor Olivas illuminated the need for answers to such questions in the debate over university admissions and

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88. *See generally* Peter David Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990-1993*, 79 IOWA L. REV. 853 (1994).

89. Rothstein, *The Affirmative Action Debate*, *supra* note 4, at 2.

90. *Compare* Bartlett v. New York State Bd. of Bar Exam'rs, No. 97-9162, 1998 WL 611730 (2d Cir. Sept. 14, 1998) (holding that plaintiff's learning disability—difficulty in reading words—was a substantial limitation on a major life activity necessitating accommodation), *with* Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419, 422 (S.D. W. Va. 1997) (holding that plaintiffs with ADD are not disabled for purposes of the ADA because of their history of academic achievement). *See also* Peter David Blanck & Heidi Berven, *ADA Evidence After Daubert*, PSYCHOL. PUB. POL'Y & L. (forthcoming 1998) (discussing implications of *Bartlett* decision).

91. *See also* Michael J. Sandel, *The Hard Questions: Honor and Resentment*, NEW REPUBLIC, Dec. 23, 1996, at 27 (discussing the nature of qualifications in the context of the educational program at issue).

92. *See* Rothstein, *The Affirmative Action Debate*, *supra* note 4, at 25-26 (discussing educational purposes).

affirmative action. 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.[93] Professor Robert Sternberg has pointed out that one reason people have 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 making diagnoses.[94]

But Sternberg, in the absence of supportive systematic study, argues further, in relation to the BU case, that "even students with genuine disabilities should not be able to use them as an excuse for not learning. . . . The 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."[95]

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, there was *not a single documented instance* at BU in which a student with a learning disability had fabricated a disorder to claim eligibility for academic accommodations. Thus, many attitudes toward the disability movement in general, and toward students with learning disabilities in particular, simply are not based in fact. Instead, it is alleged that many students or workers with hidden disabilities are "shirkers"—individuals looking for an unfair advantage —or that they "pose[ ] . . . [a] subversive challenge to the basic notions of fair play, professionalism and equal protection under the law."[96]

Opponents continue to hold these views despite emerging research to the contrary. To provide one illustration, Westling, and many academics like Sternberg, suggest that extra time on exams, as an accommodation for students with learning disabilities, provides these students with an unfair advantage, at least in comparison to students without such disabilities. Yet in a series of studies that examine the effects of extra time on reading comprehension and mathematics skills tests, researchers find that students with learning disabilities score significantly lower than students without such disabilities under timed conditions. Further, when given extra time, students with learning disabilities

93. Peter David Blanck, *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck and Co.*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 278, 278 (1996); Blanck, *Employment Integration*, *supra* note 88, at 855-56.

94. Sternberg, *supra* note 87, at A15; *See generally* Mark L. Wolraich et al., *Comparison of Diagnostic Criteria for Attention-Deficit Hyperactivity Disorder in a County-Wide Sample*, 35 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 319 (1996) (discussing difficulty in diagnosing ADHD, and prevalence of new sub-type of ADHD, ADHD-AD characterized by academic problems).

95. Sternberg, *supra* note 87, at A15.

96. Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Aug. 25, 1997, at 16.

score at comparable levels to students without disabilities.[97] But these studies also find that students *without* disabilities do not improve their scores significantly when given extra time.[98] In contrast, students with learning disabilities who are given extra time, although improving substantially from the regularly-timed exam condition, still score lower than students without disabilities given no extra time.[99]

Another illustration is found in the work of Professor Richard Sparks, who testified for BU as an expert witness. Over a two year period, Sparks and his colleagues studied students who were at risk for problems with learning a foreign language and who were taught using a structured language approach to Spanish. These students made significant gains on a foreign language aptitude test.[100] Nevertheless, despite gains during the training period, students with learning disabilities continued to score significantly lower than not-at-risk students on the foreign language aptitude test.[101] The assertion that extra time on exams is *per se* unfair to nondisabled students is not supported in the research literature.

B. Emerging Issues and the Need for Study

The BU case ignited a national discussion which highlights the need for study of the individual and collective attitudes and behavior surrounding the ADA rights of qualified individuals with learning disabilities. This study should place special focus on myths and stereotypes facing those with learning disabilities. The need to inform affected individuals and policy-makers is not unlike that faced after the landmark Supreme Court decision in *Brown v. Board of Education*,[102] where extensive study was conducted on attitudes and behavior toward school desegregation policies.[103] Many disciplines, including social psychology, political science, economics, and sociology, took up the challenge

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97. Alster, *supra* note 84, at 225 (studying algebra test results); M. Kay Runyan, *The Effect of Extra Time on Reading Comprehension Scores for University Students With and Without Learning Disabilities*, 24 J. LEARNING DISABILITIES 104, 108 (1991) (studying reading comprehension test results and arguing for the need for additional research on the topic).

98. Runyan, *supra* note 97, at 106.

99. *Id.* (indicating mean scores for this comparison are .76 for students with learning disabilities who were given extra time, and .82 for students without disabilities who tested under normal timed conditions).

100. Richard L. Sparks et al., *Foreign Language Proficiency of At-Risk and Not-At-Risk Learners Over 2 Years of Foreign Language Instruction: A Follow-Up Study*, 30 J. LEARNING DISABILITIES 92, 93 (1997) (defining "at risk" students to include individuals with learning disabilities, those exhibiting an inordinate struggle to learn a foreign language, and those with a history of language learning problems).

101. *Id.*

102. 347 U.S. 483 (1954).

103. *See generally* BLANCK, *supra* note 5, at 6-7 (discussing studies).

presented by *Brown*, examining the predictive links between underlying attitudes and behavior.[104]

General development of an analogous body of interdisciplinary research is also needed. Passage of laws like the ADA may change attitudes toward persons with learning disabilities in American society simply through the recognition of basic civil rights, or through the acknowledgment of the prejudice historically faced by many qualified individuals. Or it may be that exposure to effective accommodations in practice, whether in academic settings or the workplace, sensitizes non-disabled people to the true capabilities of qualified people with learning disabilities.[105] Beyond these effects, additional knowledge of disability-related laws in practice is needed.

In dramatic and unforeseen ways, individual and societal attitudes about the nature of learning disabilities impact the lives of millions of Americans on a daily basis.[106] The United States Supreme Court has recognized that discrimination against people with disabilities is "most often the product, not of invidious animus," but rather of thoughtless and indifferent attitudes.[107] Systematic examination of attitudes about learning disabilities is necessary to combat underlying prejudice in ways the law cannot.[108]

1. Studying a New Generation of Students Covered by the ADA

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 beginning to enter post-secondary educational programs and the workforce.[109] The Reauthorization of the Individuals with Disabilities Education Act (IDEA 1997), signed June 4, 1997, guarantees a "free and appropriate" education to millions of children with disabilities in the United States.[110] In making integrated education available to

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104. Blanck, *Employment Integration*, *supra* note 88, at 853, 857.

105. Blanck, *Transcending Title I*, *supra* note 93, at 278-83 (reviewing studies on workplace accommodations).

106. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

107. Alexander v. Choate, 469 U.S. 287, 295 (1985).

108. *See generally* Joan E. Durrant, *A Decade of Research on Learning Disabilities: A Report Card on the State of the Literature*, 27 J. LEARNING DISABILITIES 25 (1994) (reviewing research and suggesting need for additional study).

109. *See generally* DISABILITY RIGHTS ADVOCATES AND DISABILITY STATISTICS CENTER, STATUS REPORT ON DISABILITY IN THE UNITED STATES (1997) (finding most common health impairments associated with disability are "hidden" conditions; persons with "hidden disabilities," such as those with mental or learning impairments, encounter severe attitudinal bias in the workplace); Loring C. Brinkerhoff, *Making the Transition to Higher Education: Opportunities for Student Empowerment*, 29 J. LEARNING DISABILITIES 118 (1996) (examining the transition process to post-secondary education).

110. Pub. L. No. 105-17, 111 Stat. 37 (1997).

children with disabilities, IDEA 1997 includes improvements in educational policy that enable the transition of students with disabilities into higher educational programs. A central goal of the 1997 amendments to the law is to improve the educational links between special education and the regular curriculum.[111]

In 1991, more than 34,000 college freshman reported the presence of a learning disability.[112] A 1997 article in the *New York Times* stated that "[a]s the first wave of students with learning disabilities moves through graduate education, those students are charting a new frontier . . . ."[113] Professor Kenneth Kavale has argued that researchers have only recently realized that adults with learning disabilities entering post-secondary education constitute a distinct population different from children with these impairments.[114] Many of these individuals have been denied or "screened out" from equal opportunity to education, work, and daily life solely on the basis of myths, misconceptions, and prejudice about their impairments. Judge Saris' decision in the BU case is one of the most significant legal opinions to date describing the fine line between legitimate documentation and eligibility requirements in educational or employment contexts, and the extent to which those requirements sometimes unfairly and unlawfully tend to screen out qualified individuals with learning disabilities from equal participation in society.[115]

In addition, unfounded and unfair requirements discourage students with learning disabilities from asserting their own right to participate in society. In-depth examination of the development of self-advocacy by the growing number of post-secondary students with learning disabilities is needed. Self-advocacy, by definition, teaches people to advocate and make decisions for themselves so that they may become more independent, empowered, and understanding of their rights and responsibilities in society.[116] Increased self-perceptions of empowerment by persons with learning disabilities—and, as discussed below, the increased disclosure of learning disabilities in educational and employment

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111. *See* BLANCK, *supra* note 5, at 184-85.

112. *See generally* Kenneth A. Kavale, *Learning Disability Grows Up: Rehabilitation Issues for Individuals with Learning Disabilities*, 62 J. REHABILITATION 34 (1996) (reporting that this figure has doubled since 1985).

113. Tamar Levin, *Dyslexic Would-Be-Lawyer Sues Over Bar-Exam Timing*, N.Y. TIMES, Oct. 23, 1997, at A10.

114. *See generally* Kavale, *supra* note 112 (arguing that distinct issues emerge for adults with learning disabilities in the area of college admissions and academic accommodations). Professor Kavale was an expert witness for defendant Boston University in the BU case.

115. *See also* Brinkerhoff et al., *supra* note 85, at 422-27; Christine M. Durlak et al., *Preparing High School Students with Learning Disabilities for the Transition to Postsecondary Education: Teaching the Skills of Self-Determination*, 27 J. LEARNING DISABILITIES 51, 56-58 (1994) (describing study to develop a model for students with learning disabilities in areas of self-advocacy and self-determination).

116. *See* Blanck, *Employment Integration*, *supra* note 88, at 883 & n.144 (citing other sources).

settings—likely will lead to the increased use of the anti-discrimination provisions embodied in the ADA.[117]

2. Studying Prejudice and ADA Implementation

As mentioned, the study of attitudes toward persons with learning disabilities illuminates underlying societal prejudice and stereotypes.[118] Unlike race or gender discrimination, the protected characteristics associated with learning disabilities may not be immediately obvious. Conscious and unconscious attitudes may have led to the inaccurate perceptions by BU administrators toward qualified students with learning disabilities.[119] Attitudinal bias may be reflected in unconscious negative views of the ability to succeed in school or the ability to perform a job, even though a student with a learning disability may be qualified.

Conscious attitudinal biases about the abilities of people with learning disabilities have been amplified in media portrayals, such as stories suggesting that persons with a history of learning impairments are prone toward inappropriate behavior in the workplace.[120] Federal courts and independent observers need to study the assumptions underlying academic programs such as BU's court-ordered implementation plan. The procedural and substantive fairness of the university's course substitution policy should be studied to help prevent future unjustified discrimination by BU and other institutions. It also may help to prevent continued litigation or new lawsuits.

The absence of research makes it difficult to articulate the nature of attitudes and behavior underlying interpretation of discretionary concepts in the ADA such as "discrimination," a "qualified" individual, or "reasonable" accommodation. Professor Perlin has argued that in order to lessen discrimination against persons with mental disabilities, society must address

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117. *See* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A CIVIL RIGHTS MOVEMENT 328-29 (1994) (suggesting that ADA rights are a license for people with disabilities to "get angry, instead of politely asking for help"). *See also* Blanck, *Employment Integration*, *supra* note 88, at 890-92 (citing study of over 5,000 persons with mental disabilities which found that the proportion of participants involved in self-advocacy activities more than doubled, from 18% in 1990 to 39% in 1995, and that participants involved in self-advocacy are more likely to attain competitive employment and have higher earned incomes). *See generally* Alison B. Miller & Christopher B. Keys, *Awareness, Action, and Collaboration: How the Self-Advocacy Movement is Empowering for Persons with Developmental Disabilities*, 34(5) MENTAL RETARDATION 312 (1996) (analyzing self-advocacy as weapon against discrimination).

118. *See generally* Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41 (1996) (discussing minority group model).

119. *See generally* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

120. Blanck & Marti, *Attitudes*, *supra* note 14, at 349-51 (discussing research on attitudes toward disability).

"sanist attitudes."[121] Sanism, like racism and sexism, is an irrational prejudice based on biased attitudes. Despite the non-occurrence of alleged "faking" by students with learning disabilities, academic policy and attitudes, such as those implemented by BU toward learning disability screening and testing, were influenced in profound ways by negative stereotypes.

3. Studying Individual Privacy and ADA Rights

Study also is required to assess the extent to which attitudes about learning disability relate to concepts of individual privacy and confidentiality. A young adult's decision to disclose a learning disability is complex. 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."[122] The BU case illustrates the need for open discussion and study of the process of disclosure, diagnosis, and accommodation involving individuals with learning and other disabilities, their families, and experts in the field.

Uninformed and nonconfidential uses of diagnoses or test results may reinforce attitudinal biases arising out of a "blame the victim" mindset, which condemns students with learning disabilities solely on the basis of their status.[123] Psychological studies have described this "defensive attribution" as a tendency to blame victims for their misfortune so that the accuser feels less likely to be victimized in a similar way.[124] Blaming students for their learning disabilities may result in a negative self-image that is often compounded by the skepticism of students and professors. People who have experienced such unjustified discrimination report a loss of self-esteem, alienation from family members and others, and alterations in family dynamics.[125]

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121. Michael L. Perlin, *Sanism and the ADA: Thinking About Attitudes*, 6 J. CAL. ALLIANCE FOR MENTALLY ILL 10 (1995); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 20 (1993); Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 373 (1992).

122. Sternberg, *supra* note 87, at A15.

123. *See* Blanck & Marti, *Genetic Discrimination*, *supra* note 14, at 426-27 (discussing this conclusion in the context of research on individuals with hidden mental disabilities).

124. Ruthbeth Finerman & Linda A. Bennett, *Overview: Guilt, Blame and Shame in Sickness*, 40 SOC. SCI. & MED. 1, 1 (1995); Simo Salminen, *Defensive Attribution Hypothesis and Serious Occupational Accidents*, 70 PSYCHOL. REP. 1195, 1196-98 (1992).

125. Blanck & Marti, *Genetic Discrimination*, *supra* note 14, at 424-27 (reviewing studies). *See also* Kenneth A. Kavale & Steven R. Forness, *Social Skills Deficits and Learning Disabilities: A Meta-Analysis*, 29 J. LEARNING DISABILITIES 226, 229 (1996) (citing a meta-analytic study showing that students with learning disabilities experience social skill deficits which are perceived by their teachers and peers). *See generally* Kily L. Dyson, *The Experiences of Families of Children with Learning Disabilities: Parental Stress, Family Functioning, and Sibling Self-Concept*, 29 J. LEARNING DISABILITIES 280 (1996) (finding parents of children with learning disabilities experience greater stress than parents of non-disabled children).

Failure to disclose a learning disability also may prevent a qualified student from receiving academic accommodations. In the absence of a study on this issue, it is difficult to predict how universities, professors, and peers will respond to individuals with learning disabilities who self-disclose. University officials and learning disability professionals have the opportunity to provide leadership and meaningful strategies to combat unjustified prejudice toward qualified students with learning disabilities.[126]

4. Studying the Evolving Definition of "Disability" under the ADA

The scope of the definition of "disability" in general, and of "learning disability" in particular, continues to be one of the most contentious aspects of ADA implementation.[127] The three categories of persons with disabilities covered by ADA encompass a wide range of individuals. A person with a disability covered by the law has: (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such a physical or mental impairment; or (3) is "regarded as" having an impairment.[128]

Many students with learning disabilities may be considered to have a substantial mental impairment that limits a major life activity, such as learning, thinking, or working.[129] Yet the diagnosis, or history, of a learning disability—or any impairment—may not *per se* qualify an individual as having a disability covered under the ADA, unless the impairment substantially limits a major life activity.

Courts are finding that even serious impairments or conditions are not necessarily disabilities for the purposes of ADA analysis. In 1997, the Ninth Circuit found that despite the serious side effects from treatment for cancer, an employee who was able to perform his job duties was not "disabled" for

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126. *See, e.g.*, Sally S. Scott, *Determining Reasonable Academic Adjustments for College Students with Learning Disabilities*, 27 J. LEARNING DISABILITIES 403, 407 (1994) (arguing for proactive leadership by university officials to combat discrimination).

127. The ADA's definition of disability is the same as the definition used in the Rehabilitation Act of 1973, 29 U.S.C. §§ 791-796 (1988). *See also* GAO REPORT, GAO/HEHS-96-126, PEOPLE WITH DISABILITIES: FEDERAL PROGRAMS COULD WORK TOGETHER MORE EFFICIENTLY TO PROMOTE EMPLOYMENT 4 (1996).

128. 42 U.S.C.S. § 12102(2) (1994) (citing three-prong definition of disability); 29 C.F.R. § 1630.2(g) (1996) (same). Title III's public accommodation provisions protect individuals from discrimination "on the basis of disability." *See* BLANCK, *supra* note 5, at 175-76. Under the three-prong definition of disability, physical characteristics and temporary conditions are not covered disabilities, nor are an individual's economic, environmental, or cultural disadvantages. Negative but common personality traits—for instance, poor judgment or short temper—also are not considered ADA disabilities. *Id.*

129. *See* BLANCK, *supra* note 5, at 35-36 (discussing the contrasting definition of "disability" under the ADA and under Social Security regulations; noting that some courts have judicially prohibited or "estopped" a charging party from bringing an ADA claim if the person subsequently declares him or herself as totally disabled for purposes of receiving disability benefits).

purposes of ADA analysis.[130] Similarly, the Fourth Circuit has held that an employee with asymptomatic HIV disease was not "disabled" under the ADA.[131]

Other courts, however, have concluded that individuals with serious asymptomatic conditions, such as those with HIV disease, are disabled for purposes of ADA analysis. In *Abbott v. Bragdon*,[132] the First Circuit found that HIV disease, whether symptomatic or asymptomatic, constitutes a disability under the ADA. During its 1998 term, the United States Supreme Court resolved a conflict of interpretation among the lower courts in reviewing *Bragdon v. Abbott*,[133] the first ADA case to be reviewed by the Court. In *Bragdon*, the Court held that an individual's HIV infection, whether symptomatic or asymptomatic, is a physical impairment that substantially limits the major life activity of reproduction, as defined by the ADA.

Nonetheless, the overall trend in the case law reflects a narrowing of the definition of disability, making it increasingly difficult even for individuals with serious and life threatening impairments to be covered by the law.[134] Professor Locke has commented that, "what was once touted as 'the most comprehensive civil rights legislation passed by Congress since the 1964 Civil Rights Act has become increasingly narrowed to the point where it is in danger of becoming ineffective."[135]

Questions regarding interpretation of the definition of disability and learning disability under the ADA law are worthy of study. The more controversial issues include interpretation of:[136]

> 1. whether the definition of disability under the ADA applies to asymptomatic individuals (for instance, those with hidden mental impairments) or to those whose mental impairments are controlled by medication;

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130. Innes v. Mechatronics, Inc., No. CIV.A.96-35515, 1997 WL 409585, at *2 (9th Cir. July 14, 1997) (unpublished decision).

131. *See* Runnebaum v. Nationsbank of Md., 123 F.3d 156, 169-70 (4th Cir. 1997) (en banc).

132. 107 F.3d 934, 939 (1st Cir. 1997) (holding that HIV-positive status, whether asymptomatic or symptomatic, is *per se* a disability under the ADA).

133. 118 S. Ct. 2196 (1998).

134. *See* EEOC v. R.J. Gallagher Co., 959 F. Supp. 405, 409 (S.D. Tex. 1997) (holding that being critically ill with cancer is not necessarily an ADA "disability").

135. Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 107 (1997).

136. For discussion of these and other emerging questions of ADA interpretation, see BLANCK, *supra* note 5, at 190-91.

2. whether the "substantially limiting" phrase in the first prong of the ADA definition of disability applies to an individual's ability to perform a class of tasks or a single task;

3. whether the definition of disability under the "regarded as" prong requires proof of an underlying impairment that, if it existed, would qualify as substantially limiting under the first prong of the definition; and

4. whether the definition of disability under the "record of" prong results in an academic institution's or an employer's obligation to accommodate an individual based on a history of a substantially limiting impairment, even if that individual's current limitations are not substantial.[137]

V. CONCLUSION

Perhaps Jon Westling articulated what many university officials, employers, members of the press, and others consciously or unconsciously believe about individuals with learning disabilities, but are too "politically correct" to state publicly. Or perhaps Westling and others believe that the core of the debate goes well beyond academic accommodations for learning-disabled students. Could it be that an entire generation of individuals with disabilities is 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?

How might critics of laws like the ADA respond? 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 disabilities] to fail."[138] Others might claim that laws like the ADA pervert notions of fair play in our meritocracy.[139] Professor Olivas has referred to this concept as perverse "resourcefulness" in the context of the affirmative action debate surrounding admissions to colleges and universities.[140]

Despite such criticisms, BU students with learning disabilities decided to challenge their president's concocted and suspicious views about how their

137. *See* Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509-10 (7th Cir. 1998) (discussing whether the "record of" prong applies to those who may require some accommodation from their employer, despite their inability to demonstrate a present impairment that would qualify as a disability under the ADA). *Cf.* School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987) (suggesting that in the context of the Rehabilitation Act, a person with a recurring condition such as tuberculosis may be able to show that she is disabled under the ADA based on previous hospitalization for that disease, and therefore may be entitled to an accommodation related to the possibility of recurrence).

138. Sternberg, *supra* note 87, at A15.

139. Shalit, *supra* note 96.

140. Olivas, *supra* note 35, at 1075.

lives have been "set up for failure" by federal civil rights laws. As the First Circuit concluded in *Cohen v. Brown University*, "academic freedom does not embrace the freedom to discriminate."[141] The BU controversy is a landmark case because it will be analyzed for some time to come in a broader context of issues involving academic standards and freedom, employment,[142] and professional licensing and certification requirements.[143]

The stakes in the BU controversy are high—but not for the reasons vindicating academic standards articulated by Jon Westling in his recent *Wall Street Journal* Op-ed,[144] nor because of the economic costs incurred by all involved, including the court's judgment that BU pay more than $1.2 million in plaintiff's attorney fees.[145] Rather, the stakes affect the national awareness about the lives and capabilities of the next generation of qualified individuals with learning and other disabilities in education, work, and daily life. 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. This dialogue, furthered by Professors Olivas and Rothstein, is central to the goals of this conference and to the mission of *The Journal of Gender, Race & Justice.*

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141. 101 F.3d 155, 185 (1st Cir. 1996).

142. *See generally* Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877 (1997) (reviewing aspects of ADA implementation from an economic viewpoint); Hilary G. Fike, *Learning Disabilities in the Workplace: A Guide to ADA Compliance*, 20 SEATTLE U. L. REV. 489 (1997) (discussing diagnosis and accommodation of learning disability in the workplace); Peggy L. Anderson et al., *Learning Disabilities, Employment Discrimination, and the ADA*, 28 J. LEARNING DISABILITIES 196 (1995) (reviewing ADA employment provisions and impact on persons with learning disabilities).

143. *See generally* Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W. Va. 1997); Bartlett v. New York State Bd. of Law Exam'rs, 1998 WL 611730 (2d Cir.); *supra* note 90.

144. *See generally* Westling, *supra* note 82.

145. Guckenberger v. Boston Univ., 8 F.Supp.2d 82 (D. Mass. 1998) (Memorandum and Order on Assessment of Attorney's Fees and Costs).