ACADEMIC ACCOMMODATIONS FOR LEARNING-DISABLED COLLEGE AND UNIVERSITY STUDENTS: TEN YEARS AFTER *GUCKENBERGER*

MARIE-THÉRÈSE MANSFIELD*

I. MEET "SOMNOLENT SAMANTHA"

In 1995, at the beginning of a speech entitled "Disabling Education: The Culture Wars Go to School," Jon Westling, future president of Boston University, recounted the story of Samantha, a freshman at Boston University.[1] He stated that Samantha came to him on the first day of class and brought him a letter from the Disability Services office, explaining that she 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 [Westling's] lecture notes; and a seat at the front of the class. Samantha, [Westling] was also informed, might fall asleep in [his] class, and [he] should be particularly concerned to fill her in on any material she missed while dozing.[2]

---

* B.A., University of Notre Dame; M.S., Tulane University; J.D. candidate, Notre Dame Law School. The author is indebted to Professor L. Kent Hull who helped at many stages of the writing and editing process of this note. Without his encouragement, this note would never have been published. In addition, the author would like to thank Matthew Pepping, the Journal of College and University Law staff members, and the referees who facilitated the editing and publishing process for this note.

1. Guckenberger v. Boston Univ., 974 F. Supp. 106, 118 (D. Mass. 1997). *Guckenberger* was litigated entirely as a non-jury case before Judge Patti Sarris of the United States District Court for the District of Massachusetts. Neither plaintiffs nor defendants appealed any of the District Court's rulings. One can find the principal substantive rulings at 974 F. Supp. 106 (D. Mass. 1997) (findings and conclusion after a two-week bench trial) and at 8 F. Supp. 2d 82 (D. Mass. 1998) (reporting a post-trial decision that Boston University, in response to the lawsuit, had complied with federal and state law and was entitled to judicial deference in making some policy choices). In a pretrial ruling at 957 F. Supp. 306 (D. Mass. 1997), the court determined, *inter alia*, class certification issues, standing of individual and organizational plaintiffs, legal sufficiency of supplemental state law claims, and the liability of former Boston University president John Silber. A post-trial opinion at 8 F. Supp. 2d 91 (D. Mass. 1998) awarded more than $1.2 million in attorneys' fees to plaintiffs as prevailing parties, awarded total damages of $29,500 to plaintiffs, and terminated the litigation.

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

Westling went on in his speech to refer to the student as "Somnolent Samantha."[3] In fact, Westling later admitted that no such student ever existed and the description he gave was not even consistent with that of a typical learning-disabled student.[4] However, Westling did comment that "Samantha" symbolized real learning-disabled students and that he only "altered the details to preserve [his] students' privacy."[5]

Westling and Boston University made the news again in the late 1990s with the case *Guckenberger v. Boston University*.[6] *Guckenberger* is the seminal case highlighting the plight of learning-disabled students in colleges and universities following the enactment of the Rehabilitation Act and the Americans with Disabilities Act.[7] In that class action lawsuit, several students with various learning disabilities, including Attention Deficit Disorder ("ADD"),[8] Attention Deficit Hyperactivity Disorder ("ADHD"),[9] and dyslexia,[10] sued Boston University and its officers under the Americans with Disabilities Act of 1990 ("ADA")[11] and Section 504 of the Rehabilitation Act of 1973 ("Section 504").[12] The plaintiffs claimed that Boston University discriminated against them because of their learning disabilities.[13] Specifically, the plaintiff class alleged that Boston University: (1) established unreasonable eligibility criteria for qualifying as a disabled student, (2) failed to provide reasonable procedures for review of accommodation requests, and (3) initiated a policy to prevent all course substitutions for mathematics and foreign languages.[14] The plaintiff class sought injunctive and declaratory relief, as well as compensatory damages.[15] Ultimately, the court granted judgment for the plaintiffs, with a total of roughly $29,500 awarded in compensatory damages[16] and over $1.2 million in attorneys' fees.[17]

---

3. *Id.*

4. *Id.*

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

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

7. *See* Peter David Blanck, Commentary, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER RACE & JUST. 33, 47 (1998) (commenting on *Guckenberger* from the unique perspective of an expert witness for the plaintiffs in the case).

8. ADD is a subtype of ADHD and only involves a problem with attention, not with hyperactivity. *See Guckenberger*, 974 F. Supp. at 131 (noting that the Diagnostic and Statistical Manual, Volume IV describes ADD and ADHD as "a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development").

9. Individuals with ADHD have neurological problems that involve inattention, hyperactivity, and impulsivity. *Id.*

10. Dyslexia is a reading disability in which an individual has trouble breaking down words into their smaller linguistic units. *Id.* at 130–31.

11. 42 U.S.C. §§ 12101–12213 (2000).

12. 29 U.S.C § 794 (2000).

13. *Guckenberger*, 974 F. Supp. at 114.

14. *Id.*

15. *Id.*

16. *Id.* at 153–54.

17. *See* Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the*

Guckenberger highlights "the underlying, often insidious, and always pervasive attitudinal biases toward many qualified persons with disabilities."[18] The case is particularly important because it sheds light on the unfounded views of the President of Boston University—the very person who at one point had the power to deny academic accommodations for learning-disabled students and to change the university's policy regarding accommodations for students with learning disabilities.[19] Even though Westling admitted that there was no occurrence of "faking" by students with disabilities,[20] "academic policy and attitudes, such as those implemented by [Boston University] toward learning-disability screening and testing, were influenced in profound ways by negative stereotypes."[21]

This note examines the legal issues surrounding academic accommodations at colleges and universities for students with learning disabilities. In particular, this note illustrates the importance and complexity of learning-disability litigation in post-secondary education, as evidenced by *Guckenberger*. Part I introduced "Somnolent Samantha" and provided a glimpse of the significance of legislation regarding discrimination against individuals with learning disabilities. Part II offers a summary of the relevant federal statutes that prohibit discrimination in post-secondary schools on the basis of disability—Section 504 and Title III of the ADA.[22] Part III discusses the definition, diagnosis, and accommodations for students with learning disabilities. Part IV analyzes case law to determine whether learning disabilities are "disabilities" for purposes of Section 504 and the ADA. Part V presents policy considerations regarding whether academic accommodations for learning-disabled students are beneficial or harmful. Finally, Part VI offers a summary of the current state of academic accommodations and provides suggestions for future directions in this area.

Americans with Disabilities Act, 41 AM. BUS. L.J. 145, 183 (2003) (discussing the outcome of *Guckenberger* in the context of cases involving adequate documentation of learning disabilities).

18. *See* Blanck, *supra* note 7, at 47.

19. *See Guckenberger*, 974 F. Supp. at 120.

20. *See* Blanck, *supra* note 7, at 37.

21. *Id.* at 54.

22. A detailed analysis of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1485 (2000), and workplace accommodations under Title I of the ADA, 42 U.S.C. §§ 12111–12213 (2000), falls beyond the scope of this note.

II. SECTION 504 AND THE ADA—AN OVERVIEW

Section 504[23] and the ADA[24] are both legislative measures to protect against discrimination of individuals with disabilities. Both statutes prohibit colleges and universities from discrimination based on disability, including learning disabilities.[25] Section 504 applies to institutions receiving federal funding and requires post-secondary educational institutions to provide academic accommodations for qualified students with disabilities.[26] These academic accommodations may include "changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."[27]

Even though Section 504 had been in effect since 1973, Congress found that individuals with disabilities still faced discrimination in many situations, including education.[28] In an effort to eliminate the discrimination that individuals with disabilities continued to encounter[29] and to expand the protections of Section 504 to a broader section of society,[30] Congress passed the ADA in 1990. Although the ADA did not explicitly address academic accommodations, courts regularly merge the analysis for the ADA and Section 504 when reviewing claims for academic accommodations.[31] While some procedural differences do exist between Section 504 and the ADA,[32] courts generally read the two statutes together to grant the same substantive protections.[33]

Congress divided the ADA into several sections: Title I, prohibiting discrimination within the employment context;[34] Title II, prohibiting

---

23. 29 U.S.C § 794 (2000).

24. 42 U.S.C. §§ 12101–12213 (2000).

25. *See id.* § 12101(a)(3) (stating that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services").

26. 34 C.F.R. § 104.44(a) (2005).

27. *Id.*

28. *See* Bonnie Poitras Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1, 2 (1996).

29. *See id.*

30. *See* Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122, 133 (2004).

31. *See* 42 U.S.C. § 12201(a) (2000) (expressly providing for this congruence of construction). *See also Guckenberger*, 974 F. Supp. at 133 (noting that "the ADA and Section 504 . . . are frequently read in sync"); Melissa Krueger, Comment, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607, 614 (2000).

32. *See* Tucker, *supra* note 28, at 2 n.12 (explaining in greater detail the procedural differences between Section 504 and the ADA).

33. *See id.* at 2.

34. 42 U.S.C. § 12112 (2000).

discrimination in state and local public services;[35] Title III, prohibiting discrimination in public accommodations by private entities;[36] Title IV, prohibiting discrimination through telecommunication services;[37] and Title V, articulating miscellaneous provisions.[38] The purpose of the ADA as declared in the statute is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[39] As stated earlier, this note will only focus on Titles II and III of the ADA, which affect discrimination against individuals with disabilities by colleges and universities.[40]

When the ADA was passed in 1990, Congress reported that forty-three million Americans were disabled—meaning that forty-three million Americans had a physical or mental impairment that substantially limited one or more of their major life activities, had a record of such an impairment, or were regarded as having such an impairment.[41] Congress also reported that the number of disabled Americans was expected to rise.[42] Indeed, the number of disabled Americans has continued to rise over the last decade and a half. The most recent data from 2002 indicate that 51.2 million people (18.1% of the population) are disabled.[43] While information is not available regarding the total number of Americans who have learning disabilities, data indicate that nearly 26,500 college freshmen in the fall of 2000 reported having a learning disability.[44]

35. *Id.* § 12132 (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

36. *Id.* § 12182(a) (stating that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation").

37. 47 U.S.C. § 225 (2000).

38. 42 U.S.C. §§ 12201–13 (2000) (including sections explaining that certain behaviors, such as illegal drug use, are not considered disabilities for purposes of the ADA).

39. *Id.* § 12101(b)(1).

40. *See supra* Part I.

41. *See* 28 C.F.R. § 35.104 (2005).

42. *See* 42 U.S.C. § 12101(a)(1) (2000).

43. ERIKA STEINMETZ, AMERICANS WITH DISABILITIES: 2002 (2006), *available at* http://www.census.gov/prod/2006pubs/p70-107.pdf.

44. *See* CATHY HENDERSON, COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE (2001), *available at* http://www.heath.gwu.edu/files/active/0/college_freshmen_w_disabilities.pdf (reporting that 66,197 freshmen, about 6% of freshmen, at four-year institutions self-identified as being disabled in some way and that of those students, 40% identified as having a learning disability).

III. LEARNING DISABILITIES—BACKGROUND

A. Definition

Professionals and the public have used the term "learning disability" only for the past forty years.[45] This fact may help explain some of the difficulty in defining, diagnosing, and accommodating individuals with learning disabilities. Neither Section 504 nor the ADA defines the term "learning disability," but the Individuals with Disabilities Education Act ("IDEA"),[46] which applies only to public elementary and secondary schooling, defines "specific learning disability" as:

> [A] disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.[47]

Additionally, the Learning Disabilities Association of America defines learning disabilities as "neurologically-based processing problems . . . [that] can interfere with learning basic skills such as reading, writing, or math."[48] However, because Section 504 and the ADA do not define learning disabilities directly, determining whether certain learning disabilities qualify for protection under the law is difficult. For example, courts widely debate whether ADHD is considered a

---

45. *See* Craig S. Lerner, *"Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1055 n.52 (2004) (stating that professionals have observed the general phenomenon of learning difficulties for centuries, but only recently documented the phenomenon as a disability). *See also* Learning Disabilities Association of America, History of LDA, http://www.ldaamerica.org/about/history.asp (last visited Oct. 29, 2007) (describing the history of the Learning Disabilities Association).

46. 20 U.S.C. §§ 1400–1485 (2000).

47. *Id.* § 1401(30). The U.S. Department of Education uses almost the same language to define learning disabilities on its website for Vocational and Adult Education. *See* Learning Disabilities in Adult Education, Office of Vocational and Adult Education, http://www.ed.gov/about/offices/list/ovae/pi/AdultEd/dislearning.html (last visited Oct. 29, 2007) (defining learning disability as "[a] disorder in one or more of the central nervous system processes involved in perceiving, understanding, and/or using concepts through verbal (spoken or written) language or non-verbal means" which manifests itself "with a deficit in one or more of the following areas: attention, reasoning, processing, memory, communication, reading, writing, spelling, calculation, coordination, social competence, and emotional maturity"). *See also* 45 C.F.R. § 1308.14(b)(2) (2005) (defining learning disability as a "severe discrepancy between achievement of developmental milestones and intellectual ability in one or more of these areas: oral expression, listening comprehension, pre-reading, pre-writing, and pre-mathematics").

48. Learning Disabilities Association of America, Types of Learning Disabilities, http://www.ldaamerica.org/aboutld/parents/ld_basics/types.asp (last visited Oct. 29, 2007).

learning disability for purposes of Section 504 and the ADA.[49]

Some courts, such as the First Circuit in *Bercovitch v. Baldwin School, Inc.*,[50] have held that, while ADHD is not a disability *per se*, under certain circumstances ADHD can be a disability under the ADA.[51] In *Bercovitch*, the court noted that "[a]lthough the relevant regulations do not specifically list ADHD as an included physical or mental impairment, the list is not exhaustive," indicating that ADHD, under certain circumstances, could be considered a disability under the ADA.[52] Other courts, such as the Seventh Circuit in *Davidson v. Midelfort Clinic, Ltd.*,[53] have held that, under the facts specific to *Davidson*, ADHD is not a disability under the ADA.[54] *Davidson* was a case involving a woman with ADHD who was seeking accommodations at work, not in an educational context.[55] The court held that the woman's ADHD did not affect her major life activities of working, speaking, or learning.[56] In addition, some scholars have noted that although an individual may be labeled as learning-disabled, he or she may not be considered *legally* disabled for purposes of the ADA.[57] Many courts, however, tend to interpret "disability" broadly in the educational context.[58]

B. Diagnoses

Traditional diagnoses of learning disabilities involve identifying a discrepancy between mental aptitude, typically measured with an IQ test, and some form of academic achievement, usually measured by grades or standardized tests.[59] However, the medical community has yet to agree upon any specific reliable methods for validly diagnosing the majority of learning disabilities.[60] Even if one accepts learning disabilities as a legitimate handicap, discerning whether someone who works slowly has a learning disability and deserves protection under the ADA

---

49. *See* Ferrell v. Howard Univ., No. Civ.A.98-1009, 1999 WL 1581759, at *3 (D.D.C. Dec. 2, 1999), *aff'd*, 254 F.3d 315 (D.C. Cir. 2000).

50. 133 F.3d 141, 155 (1st Cir. 1998).

51. *Id.*

52. *Id.* at 155 n.18.

53. 133 F.3d 499, 505–06 (7th Cir. 1998).

54. *Id.* Although *Davidson* concerns Attention Deficit Hyperactivity Disorder, or ADHD, the court refers to Attention Deficit Hyperactivity Disorder as "ADD" in its opinion. This note uses the term "ADHD" in order to differentiate between Attention Deficit Hyperactivity Disorder and Attention Deficit Disorder.

55. *Id.* at 502.

56. *Id.* at 506–08. Notably, *Davidson* did not suggest that ADHD would never rise to the level of substantially limiting one's major life activities.

57. *See* Lerner, *supra* note 45, at 1076. *See also infra* Part IV (discussing the differences between merely being labeled as disabled and being considered *legally* disabled for purposes of the ADA).

58. *See* Lerner, *supra* note 45, at 1077 (commenting that interpretations of "disabilities" have differed in employment cases, which tend to construe "disability" narrowly, and education cases, which tend to interpret "disability" more broadly).

59. *See id.* at 1058.

60. *See* Linda Feldmeier White, *Learning Disability, Pedagogies, and Public Discourse*, 53 COLL. COMPOSITION AND COMM. 705, 708 (2002) (noting that a series of studies in the 1980s found that misdiagnosis for learning disabilities was widespread).

or whether that person is just a slow worker is extremely difficult.[61] Some cynics argue that so-called "learning disabilities" diagnosed in adolescents and pre-teens are really just an "ordinary mix of mind-wandering, exuberance, and boredom that is part and parcel of 'growing up.'"[62] Thus, according to some scholars, an explanation for the increase of students diagnosed with learning disabilities may be the fact that doctors'—and the public's—definitions of "learning disabilities" have expanded over the years to encompass a growing number of students.[63]

An additional problem concerns the credibility of those who diagnose students with learning disabilities.[64] Some skeptics, such as Jon Westling, the President of Boston University, have labeled such evaluators of learning disabilities as "self-proclaimed experts who fail to accept that behavioral and performance difficulties exist"[65] and "snake oil salesmen."[66] In *Guckenberger*, Boston University required that students' evaluators be medical doctors, licensed clinical psychologists, or individuals with doctorate degrees.[67] Many students in *Guckenberger* had documentation from evaluators that their elementary and secondary schools accepted, but which Boston University would not accept.[68] Judge Patti Sarris, in her ruling in *Guckenberger*, held that students with a history of professional evaluation by a person who did not meet the university's criteria would not have to find a new evaluator, but that students not yet diagnosed would need to be tested by a person who met the university's standards.[69] In other words, students who had never been evaluated for a learning disability could only be diagnosed as learning disabled if the evaluator met Boston University's standards.[70]

Another concern considered in *Guckenberger* involved retesting of learning-disabled students previously diagnosed with learning disabilities.[71] In addition to being evaluated by someone who met the university's credentials, students at Boston University also had to be retested if their initial diagnosis of a learning disability was more than three years old.[72] Some medical professionals assert that certain learning disabilities, like dyslexia, remain fairly stable over time; thus, there is no reason to require a student diagnosed with dyslexia to be retested every three years.[73] Other evidence exists, however, that "[a] learning disability is not static; its effects may change in relation to a number of student, environmental, and

---

61. *See* Tamar Lewin, *Ideas & Trends; Shaky Crutch for Learning-Disabled*, N.Y. TIMES, Sept. 20, 1998.

62. Lerner, *supra* note 45, at 1068.

63. *See id.* at 1072.

64. *See* Guckenberger v. Boston Univ., 974 F. Supp. 106, 120 (D. Mass. 1997).

65. *Id.* at 119.

66. *Id.* at 141.

67. *Id.* at 136.

68. *Id.*

69. *Id.* at 137.

70. *Id.*

71. *Id.* at 135 (referring to the need to retest for learning disabilities as the "currency requirement").

72. *Id.*

73. *Id.* at 138 (citing findings from a medical researcher who performed a comprehensive longitudinal study on a large population of dyslexic children).

curricular factors."[74] Judge Sarris ruled in *Guckenberger* that Boston University's initial plan regarding mandatory retesting discriminated against students with disabilities. Even though by the time of the trial the university had already modified its requirement to include a waiver of retesting where medically unnecessary, the retesting policy still "screened out" some learning disabled students.[75]

Diagnoses and retesting can be very expensive and time-consuming, especially if done by a highly-educated and credentialed provider.[76] Because of the high costs associated with diagnosing learning disabilities, some critics claim that learning disabilities are an "elite" disorder, implying that if one has enough money, then he or she can obtain a diagnosis of a learning disability.[77] Some scholars have also termed this effect as "affirmative action for the rich and sophisticated."[78] The idea is that parents who have the means will want to seek explanations for why their son or daughter may not be performing well in school. Some parents might seek a diagnosis of a learning disability as an explanation. In fact, one scholar has gone so far as asserting that "[a]n entire industry has arisen dedicated to the diagnosis and medication of any student falling short of Einsteinian mental prowess combined with Ghandian spiritual calmness."[79] Thus, some scholars have articulated the fear that eventually all individuals could be diagnosed with a learning disability merely because they have some academic shortcoming.[80]

Clearly, the diagnosis of learning disabilities is a very complex issue and one that has led to debate within both the medical and educational communities.[81] For educators, especially administrators at the college and university level, it is especially important to be able to identify students who have learning disabilities in order for their institutions to conform to the ADA by providing appropriate academic accommodations. Arguably, Jon Westling and other Boston University administrators and defendants in *Guckenberger* took the wrong approach to the issue of academic accommodations. Instead of making up stories about sleepy students and discrediting evaluators of learning disabilities,[82] Boston University could have responded to this important issue as overwhelmed administrators who were trying to "do the right thing" for their learning-disabled students but who

74. NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES, LEARNING DISABILITIES: ISSUES IN HIGHER EDUCATION (1999), *available at* http://www.ldonline.org/?module=uploads&func=download&fileId=590 (reporting that "[s]uch factors as the student's abilities, the classroom setting, methods of instruction, or task demand may entail the need to provide different academic adjustments").

75. *Guckenberger*, 974 F. Supp. at 136, 140.

76. *See id.* at 136 (stating that Elizabeth Guckenberger testified that "her retesting process took four days and cost $800" and that other evaluations could cost up to $1,000 per visit and require multiple visits).

77. *See* Lerner, *supra* note 45, at 1045.

78. *See id.*

79. *Id.* (demonstrating the author's extreme cynicism regarding the legitimacy of learning disabilities).

80. *See id.* at 1045–46 (envisioning an America that may be on the road to "universal disability" where "virtually all Americans are diagnosed as learning disabled").

81. *See, e.g.*, White, *supra* note 60, at 708.

82. *See supra* Part I.

were honestly confused about how to implement the ADA regarding academic accommodations at the post-secondary level. While it is difficult to say whether or not this suggested approach would have made a difference in Judge Sarris' ruling in *Guckenberger*, it does seem that Boston University would have benefited from this strategy at least in terms of a more positive public perception.

C. Accommodations

Entities covered by Section 504 and the ADA must provide students with disabilities "*reasonable* accommodations or adjustments where required to meet the non-discrimination mandate, and must ensure that students with disabilities are informed about how to access appropriate services."[83] An academic accommodation for learning disabilities is not reasonable if it constitutes an undue burden or hardship to provide it, or if it would require a fundamental alteration to the institution's program.[84] Moreover, a duty to accommodate does not arise until a school receives sufficient documentation of a learning disability and the need for reasonable accommodations.[85] The ADA also requires an individualized inquiry about a student's learning disability, rather than one based merely on the diagnosis of an impairment and generalized conclusions about its effects.[86] Finally, the college or university, not the student, must pay the cost of the reasonable accommodations.[87]

In *Guckenberger*, Boston University refused to allow learning-disabled students to obtain course substitutions for foreign language and mathematics classes as an accommodation for the students' various learning disabilities.[88] Although Judge Sarris found for the plaintiff class, she instructed Boston University to form a committee to decide whether the requested course substitutions would fundamentally alter the nature of the university's program.[89] Boston University did convene such a group, and it decided that the course substitutions would indeed fundamentally alter the nature of the program.[90] Judge Sarris accepted the

83. *See* Tucker, *supra* note 28, at 4 (emphasis added).

84. *See id.* at 14–15.

85. *See* Tracey I. Levy, *Legal Obligations and Workplace Implications for Institutions of Higher Education Accommodating Learning Disabled Students*, 30 J.L. & EDUC. 85, 87 (2001) (commenting that "[t]he reported cases suggest that individuals with learning disabilities who received accommodations from institutions of higher education will not be entitled to similar accommodations when they enter the workforce").

86. *See* Mark C. Weber, *Disability Discrimination in Higher Education*, 27 J.C. & U.L. 417, 418 (2000).

87. *See* Tucker, *supra* note 28, at 25.

88. Guckenberger v. Boston Univ., 974 F. Supp. 106, 147 (D. Mass. 1997).

89. *Id.* at 154.

> [I]f the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternate means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternative would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Id. at 148 (quoting Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19 (1st Cir. 1991)).

90. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 87 (D. Mass. 1998).

university's decision on this matter, holding that the committee showed the requisite "reasoned deliberation" in reaching its conclusion.[91]

As with many hotly-debated cases, both sides of the *Guckenberger* case claimed victory.[92] The plaintiff class felt they "won" in receiving judgment in their favor regarding the award of damages, yet Boston University administrators felt they "won" in that they did not have to offer course substitutions as academic accommodations because substitutions would be a fundamental alteration of the degree programs at the university.[93] In the end, Judge Sarris was perhaps the real victor in this case. She was able to weigh each side's competing considerations carefully—with little guidance from ADA legislation, regulations, or cases decided by higher courts—and issue a series of rulings and a final opinion that were not appealed.

While *Guckenberger* involved academic accommodations in the form of course substitutions, other cases have raised different forms of academic accommodations, such as different formats for examinations. In *Wynne v. Tufts University School of Medicine*,[94] the court held that changing the format of a medical exam from multiple choice to essay would fundamentally alter the nature of the program.[95] In cases such as *Wynne*, courts have upheld the colleges' and universities' decisions that modifications would fundamentally alter the nature of the program.[96]

In other words, colleges and universities must strike a delicate balance between accommodating students and holding true to their academic reputations as high-caliber learning institutions.[97] The fact that individuals complete courses or

---

91. *Id.*

92. *See* Lawrence S. Elswit et al., *Between Passion and Policy: Litigating the* Guckenberger *Case*, 32 J. OF LEARNING DISABILITIES 292, 300 (1999) ("Although the plaintiffs may have won the war of passion, the university won the war of policy."). Notably, the authors of this article were the attorneys who litigated *Guckenberger* on behalf of Boston University. Thus, the article is partial to explaining the facts of *Guckenberger* in a light most favorable to Boston University.

93. *See* Westling, *supra* note 5 at A21 (maintaining that Boston University was the clear "winner" in the ruling that "disabilities law does not require universities to compromise essential academic standards").

94. 932 F.2d 19 (1st Cir. 1991).

95. *Id.* at 27. On April 30, 1990, a First Circuit panel of Judge Cyr, Senior Judge Coffin, and Senior Judge Bownes reversed the unreported summary judgment granted to Tufts University by District Judge Rya W. Zobel in Boston, holding that there were disputes of material fact requiring trial. Wynne v. Tufts Univ. Sch. of Med., No. 89-1670, 1990 WL 52715 (1st Cir. Apr. 30, 1990). However, on June 11, 1990, the First Circuit withheld the earlier opinion from publication and issued a new opinion, *en banc*, at 932 F.2d 19 (1st Cir. 1991) (*Wynne I*). Judge Coffin wrote the *en banc* opinion for a majority which included the other 1990 panel members, Judges Cyr and Bownes, and Judge Selya. Judge (now Justice) Breyer dissented in an opinion joined by Judges Campbell and Torruella. The majority opinion affirmed summary judgment on plaintiff's supplemental state law claim, but still reversed the summary judgment on the Section 504 claim, which the First Circuit panel—Judge (now Justice) Breyer, with Judges Torruella and Selya—affirmed and in which the Supreme Court denied certiorari. 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993) (*Wynne II*).

96. *See Wynne I*, 932 F.2d at 27.

97. *See* Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 410 (1998) (citing *Alexander v. Choate*, 469 U.S. 300 (1985), which stated that a disabled individual's "right must be balanced with the rights of institutions receiving

receive degrees from such institutions serves as an indication that those students have met the standards set by the institutions—that is, the graduates have "demonstrated sufficient knowledge, skill, or understanding" to earn those degrees.[98] Courts usually defer to determinations made by colleges and universities in deciding what constitutes a "fundamental alteration" of their programs.[99] Given this deference, a student's chance to appeal an institution's refusal to grant an accommodation would appear to be slim.[100]

IV. WHO IS "DISABLED" FOR STATUTORY PURPOSES?

In order to establish the prima facie elements for a Section 504 or an ADA case, individuals must show that (1) they have a disability within the meaning of the statute, (2) they are otherwise qualified to participate in the educational program, (3) an adverse action was taken as a result of the disability, and (4) the educational institution receives federal funding (for a Section 504 claim), is a public entity (for a Title II ADA claim), or is a private entity that has a public accommodation (for a Title III ADA claim).[101]

Several authors have commented that most learning-disabled students currently receiving academic accommodations probably do not meet the first prong of having a disability.[102] In other words, these students should not qualify as "disabled" for purposes of the ADA. One author has astutely pointed out that courts rarely question this prong, but rather assume an individual's learning disability falls under the scope of the ADA.[103] In order to satisfy the first prong, an individual must have a disability—a physical or mental impairment—that substantially limits one or more of the individual's major life activities, a record of

---

federal grants to preserve 'the integrity of their programs'"); *see also* 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, 29 (1996).

98. *See* Leonard, *supra* note 97, at 29.

99. *See* Tucker, *supra* note 28, at 23. *See also* Dupre, *supra* note 97, at 396 (commenting on the deference courts give to various levels of academic administrations by saying "while most courts are comfortable deferring to the academic judgments of educators in colleges and universities, many courts are less willing to defer to the professional judgment of educators in elementary school or high school").

100. *See* Tucker, *supra* note 28, at 23. *See also* Leonard, *supra* note 97, at 48 (noting that "[a]cademic institutions in the United States have enjoyed remarkable freedom from judicial scrutiny" because "courts have been reluctant to review decisions of universities in academic matters"). Because many colleges and universities now routinely provide accommodations in the form of extended time or note-taking services, students may likely be more successful in obtaining these types of accommodations as opposed to obtaining accommodations such as course substitutions or taking required examinations in a markedly different format. *See, e.g.*, *Wynne I*, 932 F.2d at 27.

101. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999). Zukle appealed the Eastern District of California's grant of summary judgment in favor of the Board of Regents for the medical school that had expelled Zukle for failing to meet its standards. The Ninth Circuit affirmed the ruling of the district court, noting that Zukle failed to establish that she could have met the medical school's academic standards even with reasonable accommodations.

102. *See* Levy, *supra* note 85, at 87.

103. *See* Lerner, *supra* note 45, at 1076.

such impairment; or be regarded as having such an impairment.[104] The following sections discuss the courts' interpretations of the terms "substantially limit" and "major life activity."

A. Substantially Limit

Toyota Motor Manufacturing of Kentucky, Inc. v. Williams[105] held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[106] While *Toyota* involved manual tasks in an automobile manufacturing plant, extrapolating its holding to the learning-disability context means that a learning disability would have to prevent a student from an activity that is of central importance to most people. In a student's case, the activity of "central importance"[107] is learning. The Court in *Toyota* continued by saying that "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."[108] Thus, in order to qualify as a disabled individual, a learning-disabled student must further show that the limitations on the major life activity are "substantial."[109]

If a student has a learning disability, how does that student demonstrate that the learning disability substantially impairs the major life activity of learning? In *Wong v. Regents of the University of California*, [110] a learning-disabled student in medical school was diagnosed with a limited ability to process and communicate information.[111] The student requested and was denied additional time to prepare for his clinical clerkship.[112] Because the medical school did not allow the learning-disabled student extra time, he failed his clinical clerkship and the medical school subsequently dismissed him from its program.[113]

When concluding that the student in *Wong* was not substantially limited in learning, the majority opinion considered the fact that the learning-disabled student

104. 28 C.F.R. § 35.104 (2005).

105. 534 U.S. 184 (2002).

106. *Id.* at 198.

107. *See id.*

108. *See id.* at 195.

109. *Id.*

110. 379 F.3d 1097 (9th Cir. 2004).

111. *Id.* at 1100.

112. *Id. Wong* first came before the Ninth Circuit when a panel consisting of Senior Circuit Judge Kravitch, sitting by designation from the Eleventh Circuit, and Ninth Circuit Judges Reinhardt and Nelson unanimously reversed the unreported summary judgment in favor of the university granted by United States District Judge Lawrence K. Karlton of the Eastern District of California. *See* Wong v. Regents of the Univ. of Cal., 192 F.3d 807 (9th Cir. 1999). The opinion by Judge Kravitch found reversible error in the district court's deference to the university's rationale for its decision to terminate Wong from the school and in its failure to recognize disputes of material fact which precluded summary judgment. Upon remand, District Judge Karlton again granted an unreported summary judgment to the university, which a Ninth Circuit panel of Circuit Judges Beezer, Thomas, and Clifton affirmed by a 2–1 vote, with Judge Thomas writing the dissent discussed herein and Judge Clifton writing for the majority.

113. *Wong*, 379 F.3d at 1101.

succeeded in graduating from high school and college and took standardized tests without accommodations.[114] However, as Judge Thomas pointed out in his dissent in *Wong*, the majority's opinion implied that one would have to fail before being considered to be learning-disabled under the scope of the ADA.[115] One scholar noted that "[a]lmost by definition, an individual who is enrolled at an institution of higher education has demonstrated greater skills in reading, writing, and learning than the average person in the general population."[116] This statement echoes Judge Thomas' concern that the majority's opinion in *Wong* has "effectively bar[red] the entire class of learning disabled students from receiving ADA accommodations in graduate school" because learning-disabled graduate students had "worked too hard and succeeded too well" in previous settings.[117]

In *Dixson v. University of Cincinnati*,[118] a graduate student alleged that the University of Cincinnati failed to provide reasonable accommodations for her learning disability and dismissed her from the program.[119] She claimed that she was substantially limited in the major life activity of learning.[120] The court, however, used the standard enunciated in *Toyota* that "having an impairment does not make one disabled."[121] The court granted summary judgment for the University of Cincinnati, stating that Dixson failed to demonstrate the effect her disabilities had on her ability to learn, and noting that she received a bachelor's degree and performed adequately on standardized tests.[122]

Dixson exemplifies the problem stated by Judge Thomas in his dissent in *Wong*: how does a learning-disabled student prove that he or she is substantially limited in learning? The logical conclusion is that a learning-disabled student has to fail in order to show that he or she has a substantial limitation in learning.[123] Judge Thomas noted that the majority's decision in *Wong* "places the ADA plaintiff in an untenable situation where 'success negates the existence of the disability, whereas failure justifies dismissal for incompetency.'"[124] In other words, a learning-disabled student must struggle just enough to demonstrate that he or she is "substantially limited" in learning, but not struggle so much that the college or university would claim that the individual is not otherwise qualified to participate in its educational program.

---

114. *Id.* at 1108 (noting that "[r]egarding the activity of learning, Wong's claim to be 'disabled' is fatally contradicted by his ability to achieve academic success, without special accommodations").

115. *Id.* at 1110 (Thomas, J., dissenting).

116. *See* Levy, *supra* note 85, at 94.

117. *Wong*, 379 F.3d at 1113–14 (Thomas, J., dissenting).

118. No. 1:04-CV-558, 2005 WL 2709628 (S.D. Ohio Oct. 21, 2005).

119. *Id.* at *1.

120. *Id.* at *2.

121. *Id.* at *3 (quoting Toyota Motor Mfg., of Ky., Inc. v. Williams, 534 U.S. 184, 195 (2002)).

122. *Id.*

123. *See* Wong v. Regents of the Univ. of Cal., 379 F.3d 1097, 1111 (9th Cir. 2004) (Thomas, J., dissenting).

124. *Id.* (quoting Andrew Weis, *Jumping to Conclusions in "Jumping the Queue"* (reviewing MARK & GILLIAN LESTER, JUMPING THE QUEUE (1997)), 51 STAN. L. REV. 183, 205 (1998)).

In addition to *Wong* and *Dixson*, several other cases since *Guckenberger* have involved students bringing claims against colleges and universities for failing to accommodate their learning disabilities.[125] Most of these cases, however, ended with summary judgment granted for the defendant colleges and universities.[126] Often, the plaintiffs could not show that they were disabled as a matter of law because they could not demonstrate that their learning disabilities substantially limited them in the major life activity of learning.[127]

B. Major Life Activity

As previously stated, in order to classify an individual as legally disabled, the impairment must affect a "major life activity."[128] According to the ADA, a major life activity includes "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[129] While "learning" is included in the list of major life activities, it is unclear whether it should be defined broadly as "learning" or narrowly as "learning at the doctoral level."[130] It seems clear that learning is of central importance to most people, while studying for a doctorate, for example, is not.[131] Another important consideration when assessing whether an individual is substantially limited in a major life activity is the presence of mitigating factors.[132] If the individual can use appliances or medications to mitigate the effect of the disability, the major life activity may not be substantially limited.[133] Hovering just beyond the horizon of the 1997 *Guckenberger* ruling was the "*Sutton* trilogy"—three Supreme Court cases decided in 1999 which discuss the role of mitigating measures, such as appliances and medication, in determining whether or not an individual is disabled under the ADA.[134]

1. *Sutton v. United Air Lines, Inc.*

Sutton[135] involved severely myopic twins who sought to become airline pilots, but who did not meet the airline's vision requirement.[136] The majority opinion held that the twins were not disabled within the scope of the ADA because when

125. *See, e.g.*, Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432 (6th Cir. 1998); Abdo v. Univ. of Vt., 263 F. Supp. 2d 772 (D. Vt. 2003); Hamilton v. City Coll. of the City Univ. of N.Y., 173 F. Supp. 2d 181 (S.D.N.Y. 2001).

126. *See, e.g.*, *Wong*, 379 F.3d at 1110; *Kaltenberger*, 162 F.3d at 437; *Dixson*, 2005 WL 270928, at *3; *Hamilton*, 173 F. Supp. 2d at 186.

127. *See* discussion of cases *infra* Part IV.B.

128. 28 C.F.R. § 35.104 (2005).

129. *Id.* at § 35.104(2) (2005).

130. *See Dixson*, 2005 WL 2709628, at *3.

131. *Id.*

132. *See generally* Weber, *supra* note 86.

133. *See id.*

134. *See id.* (discussing the cases of Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999), and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)).

135. 527 U.S. 471 (1999).

136. *Id.* at 475–76.

they wore their corrective contact lenses they could function as well as people without their impairment.[137] Although the ADA does not address whether mitigating measures should be taken into consideration when ascertaining if one is "disabled" for purposes of the statute, both the Equal Employment Opportunity Commission ("EEOC")[138] and the Department of Justice[139] had issued guidelines which recommended that mitigating measures *not* be taken into account. The interpretive guidelines did not persuade the majority; rather, the majority looked to the language of the ADA and the legislative intent for passing the statute.[140] Specifically, the majority opinion stated that the figure of forty-three million Americans with disabilities contained in the preamble of the ADA indicated that Congress meant for "disability" to be determined by taking mitigating measures into account.[141] As Justice Ginsburg noted in her concurrence, "the inclusion of correctable disabilities within the ADA's domain would extend the Act's coverage to far more than 43 million people."[142]

The dissenting opinion by Justice Stevens, however, provided an interesting perspective.[143] He stated that the threshold question for determining whether a person is disabled should focus on "past or present physical condition without regard to mitigation that [had] resulted from rehabilitation, self-improvement, prosthetic devices, or medication."[144] In addition, he noted that eight of the nine federal Courts of Appeals, as well as three governmental agencies, had all agreed that disability should be assessed without considering mitigating factors.[145] He illustrated his point by providing an example of a war veteran who had a prosthetic leg, but who had learned to use the prosthesis very effectively.[146] According to Justice Stevens, the Court should not deny ADA protection to this war veteran merely because he had succeeded in overcoming great adversity.[147]

2. *Murphy v. United Parcel Service, Inc.*

The second case in the *Sutton* trilogy is *Murphy v. United Parcel Service*,

137. *Id.* at 488.

138. *See* 29 C.F.R. Pt. 1630, App., § 1630.2(j) (1998) (stating that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigation measures such as medicines, or assistive or prosthetic devices"). However, 29 C.F.R. Pt. 1630, App., § 1630.2(j) (2005), an edition published after the *Sutton* case, does not include the clause about mitigating measures. Rather, it reads: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis." *Id.*

139. *See* 28 C.F.R. Pt. 35, App. A, § 35.104 (2005) (stating that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services").

140. *Sutton*, 527 U.S. at 484–85.

141. *Id.*

142. *Id.* at 494 (Ginsburg, J., concurring).

143. *Id.* at 495 (Stevens, J., dissenting).

144. *Id.*

145. *Id.* at 495–96.

146. *Id.* at 497.

147. *Id.* at 497–98.

Inc.[148] In *Murphy*, United Parcel Service ("UPS") fired a mechanic who had hypertension.[149] With medication, Murphy's blood pressure did not "significantly restrict his activities and . . . in general, he [could] function normally and [could] engage in activities that other persons normally [did]."[150] Although the Department of Transportation ("DOT") should not have granted Murphy certification because of his hypertension, he was erroneously granted the certification and thus allowed to work at UPS.[151] Once the mistake was discovered, UPS required Murphy's blood pressure to be retested.[152] Because Murphy's blood pressure exceeded the guidelines set forth by the DOT, he was fired.[153]

Murphy filed suit, claiming discrimination under Title I of the ADA.[154] The District Court granted summary judgment in favor of UPS, noting that Murphy's hypertension, viewed in its medicated state, did not qualify as a disability under the ADA.[155] The Court of Appeals affirmed this decision in an unpublished opinion.[156] The Supreme Court affirmed the lower courts' judgments and held that courts must take mitigating measures into consideration when determining whether a person has a disability for purposes of protection under the ADA.[157] Justice Stevens again dissented, reiterating his dissent in *Sutton*, stating that "[s]evere hypertension . . . easily falls within the ADA's nucleus of covered impairments."[158]

3. *Albertson's, Inc. v. Kirkingburg*

The third of the *Sutton* trilogy[159] is *Albertson's, Inc. v. Kirkingburg*, [160] a case where Albertson's, a grocery store chain, fired a truck driver for failing to meet certain vision standards as a result of his amblyopia, an uncorrectable eye condition.[161] Similar to the *Murphy* case, Kirkingburg did not meet the standard set out by the DOT, but the agency erroneously granted him certification.[162] When a doctor finally noticed that Kirkingburg's vision did not meet the DOT standards, he suggested that Kirkingburg apply for a waiver, given that he had been driving

148. 527 U.S. 516 (1999).
149. *Id.* at 518.
150. *Id.* at 519 (quoting Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 875 (D. Kan. 1996)).
151. *Id.* at 519–20.
152. *Id.*
153. *Id.*
154. *See Murphy*, 946 F. Supp. 872.
155. *Id.* at 881–82.
156. *See* Murphy v. United Parcel Serv., Inc., 141 F.3d 1185 (10th Cir. 1998) (unpublished table decision).
157. *Murphy*, 527 U.S. at 521 (referring to the Supreme Court's holding in *Sutton*, 527 U.S. 471).
158. *Id.* at 525 (Stevens, J., dissenting).
159. *See* Weber, *supra* note 86, at 420.
160. 527 U.S. 555 (1999).
161. *Id.* at 558–60.
162. *Id.* at 559.

without incident for several years, even with the eye condition.[163] Before Kirkingburg's waiver came through, however, Albertson's fired him.[164] Even after Kirkingburg received the DOT waiver, Albertson's refused to rehire him.[165]

Kirkingburg filed suit, claiming that his dismissal was a violation of the ADA.[166] The District Court granted summary judgment for Albertson's, holding that Kirkingburg was not qualified without an accommodation because he could not meet the DOT standards.[167] In addition, the District Court ruled that Albertson's was not required to wait for Kirkingburg to receive a waiver because the waiver program was "a flawed experiment that has not altered the DOT vision requirements."[168]

The Ninth Circuit Court of Appeals reversed the District Court's ruling, however.[169] The court held that Kirkingburg established a genuine issue of material fact regarding whether he was disabled, whether he was qualified to do the job, and whether Albertson's fired him because of his disability.[170] It specifically found that Kirkingburg did suffer from a disability and that he was protected under the ADA.[171] The Supreme Court held that when gauging whether a person has a disability, courts should take into account an individual's ability to compensate for the affect of the impairment.[172] So while *Sutton* considered the use of an "appliance"—corrective lenses—as mitigation and *Murphy* involved the use of "medication" as a mitigating factor, *Kirkingburg* involved an individual who had "learned to compensate for the disability by making subconscious adjustments to the *manner* in which he sensed depth and perceived peripheral objects."[173] The Supreme Court concluded that there was "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."[174]

4. Effects of the *Sutton* Trilogy

Although each case in the *Sutton* trilogy involves cases of discrimination against disabled individuals in the workplace, they are the only Supreme Court cases dealing with the issue of whether mitigating factors should be taken into account when assessing whether an individual is disabled for purposes of the ADA. Thus, for purposes of learning-disabled students, these decisions can be interpreted to mean that students who are on medication for ADD or who self-

163. *Id.* at 559–60.
164. *Id.*
165. *Id.*
166. *Id.* at 560.
167. *Id.* at 561 (discussing the District Court's rulings).
168. *Id.* (citation omitted).
169. *See* Kirkingburg v. Albertson's, Inc., 143 F.3d 1228, 1230 (9th Cir. 1998).
170. *See id.* at 1231.
171. *Id.* at 1237.
172. Kirkingburg v. Albertson's, Inc., 527 U.S. 555, 565–66 (1999).
173. *Id.* at 565 (quoting *Kirkingburg*, 143 F.3d at 1232).
174. *Id.* at 565–66.

compensate for a reading disability by spending twice as long on an assignment would not be considered disabled for the purposes of the ADA.[175] The holdings in the *Sutton* trilogy continue to evoke controversy in the realm of mitigating factors for those with disabilities.[176]

If courts continue to take mitigating circumstances into consideration, then it seems that almost no learning-disabled student would be considered "disabled" for the purposes of the ADA because no major life activity would be substantially limited. While a case involving mitigating measures for learning disabilities has not yet come before the Supreme Court, Justice Stevens would likely be one of the few justices to acknowledge that those students could still be labeled as disabled for purposes of the ADA by looking at their disabilities without considering mitigating factors.[177] In the context of learning disabilities, Justice Stevens' view seems to be the only way to remain true to the purpose of the ADA—to eliminate discrimination for those who are disabled.[178]

V. ACADEMIC ACCOMMODATIONS: HELPFUL OR HURTFUL IN THE LONG-RUN?

Statistics reveal a sharp increase in learning-disabled students seeking academic accommodations in colleges and universities.[179] One obvious reason for this increase is a natural outcome of special education statutes, such as the IDEA, which ensure that more learning-disabled students graduate from high school and are prepared to attend college.[180] Another reason is an increase in awareness of learning disabilities and disability discrimination brought to public attention by cases involving Section 504 and the ADA.[181] Still, some commentators claim that the increase "reflects inappropriate claims of learning disabilities by students hoping to gain a competitive advantage in the educational process."[182]

If reasonable academic accommodations are granted to students in undergraduate work and possibly even at the graduate school level, then when do

175. *See* Wong v. Regents of the Univ. of Cal., 379 F.3d 1097, 1113 (9th Cir. 2004) (Thomas, J., dissenting).

176. *See infra* text accompanying note 178.

177. *See Sutton*, 527 U.S. at 495 (Stevens, J., dissenting). One should note that considering that the definition of disability is the same for all titles of the ADA, *see* 42 U.S.C. § 12102 (2000), it is hard to see how courts could reach a different result regarding mitigation in a Title III case involving education, as opposed to a Title I case involving employment.

178. *See* 42 U.S.C. § 12101(b)(1) (2000). The National Council on Disability has been vocal about the result of the *Sutton* trilogy because it has undercut the congressional intent of providing protections under the ADA for individuals with disabilities. *See* Robert L. Burgdorf, Jr., *Policy Brief Series: Righting the ADA*, 11 NATIONAL COUNCIL ON DISABILITY 12 (Mar. 17, 2003), *available at* http://www.ncd.gov/newsroom/publications/pdf/mitigatingmeasures.pdf ("The result of the *Sutton*, *Murphy*, and *Kirkingburg* decisions is to turn the ADA's terminology into an instrument for slashing out large groups of potential beneficiaries instead of forcefully eliminating instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit.").

179. *See* Rothstein, *supra* note 30, at 123.

180. *Id.*

181. *Id.* at 123–24.

182. *See* Denbo, *supra* note 17, at 162–63 (providing a hypothetical example of a cynical point of view) (citation omitted).

the accommodations end?[183] Some professionals, especially those who work as accountants, lawyers, and doctors, "have begun to wonder . . . whether the increasing academic accommodation of those with learning disabilities will lead to career problems."[184] An example of one anticipated career problem might include learning-disabled individuals who are used to having extra time to complete a project now having to adjust to inflexible deadlines that cannot be extended.

In addition, some critics wonder if the accommodations are even effective in terms of learning-disabled students' final grades, noting that there is "little empirical evidence to confirm of [sic] refute the effectiveness of accommodations for postsecondary students with [learning disabilities] and/or [attention deficit disorder], highlighting the need for more statistical and comparative studies to clarify if [learning-disabled] students benefit from specific ADA-related academic accommodations."[185]

Commentators have also noted that "[a] poor achiever without [a learning disability] would profit just as much from the kinds of assistance students are given in special programs for the learning disabled, so the analogy with accommodations like Braille texts or wheelchair ramps is not apt."[186]

Another concern is a fairness issue for non-learning-disabled students, in that "granting accommodations to students who are not legally entitled to receive them creates an unfair system in which students who are earning their degrees by traditional means must compete with students having greater advantages, and greater likelihood of success."[187] There is also a concern with non-disabled students' perceptions of fairness, leading one scholar to comment that "non-disabled students will misperceive equal opportunity measures as affording an illegitimate advantage to their disabled peers."[188] While these are valid concerns, academic accommodations for learning-disabled students can also serve to further the purpose of Section 504 and the ADA—to *promote* fairness toward learning-disabled students treated unfairly and discriminated against on the basis of their disability.[189]

---

183. *See* Lerner, *supra* note 45, at 1047 (discussing the possible progression of a hypothetical 18-year-old being accommodated on the SATs, then as a 28-year-old being accommodated on the bar exam, and as a 38-year-old being accommodated in her legal practice).

184. Lewin, *supra* note 61, at 1.

185. Jack K. Trammell, *The Impact of Academic Accommodations on Final Grades in a Postsecondary Setting*, 34 J. COLL. READING AND LEARNING 76, 76 (2003).

186. White, *supra* note 60, at 723.

187. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 220 (2003).

188. GERARD QUINN, MAINTAINING ACADEMIC EXCELLENCE AND ACHIEVING EQUAL OPPORTUNITIES (1999), *available at* http://www.nuigalway.ie/law/Common%20Files/Disability%20Research%20Unit/GQ/Ahead%20and%20Dyslexia.pdf. *See also* Judith Warner, Op-Ed., *The Columbine Syndrome*, N.Y. TIMES, Aug. 4, 2007, at A13 (citing a study about parents' negative attitudes towards children with learning disabilities, stating "one in five parents [say] they would not want children with A.D.H.D. or depression as their neighbors, in their child's classroom, or as their child's friends").

189. *See supra* Part III.

VI. CONCLUSION

Some cynics, such as Boston University's president Jon Westling, may ask whether academic accommodations even the playing field for individuals with learning disabilities or whether they are merely creating an unfair system where those without diagnosed learning disabilities are disadvantaged.[190] Another question concerning academic accommodations is the policy concern of who is most qualified to make decisions about academic accommodations for learning-disabled students. Should doctors who are trained in evaluating and diagnosing learning disabilities provide more guidance as to the legitimacy of certain accommodations for particular learning disabilities? Should colleges and universities be solely responsible for determining whether academic accommodations fundamentally alter a learning program?[191] Perhaps one solution would be for colleges and universities to employ unbiased, outside input in making such determinations. However, problems would still exist when the outside source and the college or university officials differ in what they feel would "fundamentally alter" an educational program.

Clearly, negative stereotypes persist regarding learning-disabled students, their accommodations, and even the validity of the learning disability itself.[192] Some predict that in the future any and every person will be able to attain a diagnosis of learning disabled.[193] However, this is unlikely. With the advent of technological advances, especially in the medical field, it may be possible to gain more accurate diagnoses of learning disabilities through brain scans, for example. A better method of diagnosing learning disabilities would be beneficial to all involved in that it would provide legitimacy to those affected by learning disabilities, while differentiating among those students who may not be academically gifted, but who do not suffer from a learning disability.

What role should courts play in these decisions? Is the great deference that courts currently give colleges and universities helping to ensure academic freedom or actually helping to create greater discrimination against learning-disabled students? Some scholars suggest that "[a]llowing federal judges unfettered discretion in protecting both the interests of disabled students and the interests of educators in ensuring the integrity of the academic enterprise for all students disserves the interests of both."[194] Indeed, Judge Sarris understood the importance of this balancing act when she decided the *Guckenberger* case. Judge Sarris took an extremely complex and politically-charged issue and appeared to reach a balanced result, as evidenced by the absence of appeal from either the plaintiff

190. *See generally* Lerner, *supra* note 45.

191. *See* Westling, *supra* note 5 (writing less than a month after the *Guckenberger* ruling, "Who should establish academic standards? Colleges and universities? Congress? The courts?").

192. *See supra* Part I (recounting the negative stereotypes and misconceptions held by Jon Westling, President of Boston University).

193. *See* Lerner, *supra* note 45, at 1123 (predicting that more people will seek a learning disability diagnosis, which is "so malleable it can encompass virtually everyone").

194. Dupre, *supra* note 97, at 466 (noting that such unrestrained judicial discretion will lead to some disabled students not being protected enough and other disabled students receiving more protection than they should).

class or Boston University. While finding for the plaintiff class and awarding a small amount of damages,[195] she also upheld academic freedom for Boston University in allowing it to decide what courses were fundamental to its degree programs.[196]

Although *Guckenberger* is the landmark case with regard to academic accommodations for learning-disabled students, few Courts of Appeals have cited to the principal opinion.[197] In contrast, the *Guckenberger* case has generated many scholarly academic articles over the past ten years.[198] Possible explanations for this discrepancy include the fact that this issue is extremely sensitive for both sides and that the Supreme Court has yet to hear a case regarding academic accommodations and the ADA, so the lower courts do not have any precedent to follow. Perhaps, on one hand, no court wants to lean too far in favor of learning-disabled students, which would then inhibit the academic freedom of colleges and universities in structuring their own academic programs. On the other hand, courts do not want to lean too far in favor of educational institutions, which might then deny learning-disabled students the protections guaranteed by Section 504 and the ADA. This dilemma was precisely the struggle with which Judge Sarris grappled in the *Guckenberger* case.

Ideally, one day individuals with learning disabilities will be able to enjoy all the benefits of higher education that non-disabled students currently have without fear of a backlash of negative attitudes. Until then, Section 504 and the ADA offer protection to learning-disabled students who can prove that they are substantially limited in the major life activity of learning, have current documentation of their learning disability, and can show that a college or university denied them a reasonable accommodation that would not fundamentally alter the nature of the school program. With the relative ease in which colleges and universities can rebut a learning-disabled student's claims by showing that an accommodation would fundamentally alter the nature of a program and with the great deference that courts currently afford colleges and universities,[199] it continues to be extremely difficult for a student with a learning disability to win his or her case against a college or university.

---

195. *See* Guckenberger v. Boston Univ., 974 F. Supp. 106, 152–54 (D. Mass. 1997).

196. *See* Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 91 (D. Mass. 1998).

197. As of the writing of this note, the First Circuit Court of Appeals, which encompasses the District of Massachusetts, had not cited to the principal opinion of *Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass. 1997). Only two publishable opinions of Courts of Appeals have cited to the principal opinion in *Guckenberger*. *See* Stern v. Univ. Osteopathic Med. & Health Scis., 220 F.3d 906, 909 (8th Cir. 2000); Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship, 264 F.3d 999, 1003 (10th Cir. 2001).

198. *See, e.g.*, Elswit et al., *supra* note 92; Denbo, *supra* note 17.

199. *See Guckenberger*, 8 F. Supp. 2d at 87–88 (holding that the committee formed by Boston University used the requisite "reasoned deliberation" in its conclusion that allowing course substitutions to learning-disabled students would fundamentally alter the nature of the program).