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Law Students and the Disorder of Written Expression

PHYLLIS G. COLEMAN, * ROBERT M. JARVIS, **
and RONALD A. SHELLOW ***

I Introduction

When the Whittier College School of Law dismissed a student with the Disorder of Written Expression (DWE), she filed a disability discrimination complaint with the United States Department of Education's Office of Civil Rights (OCR).¹ One year later, when the University of Minnesota Law School rejected an applicant with DWE, he filed a similar complaint with the OCR.² Although the OCR ultimately dismissed both grievances, it is clear that DWE claims must be taken seriously.

Unfortunately, neither the OCR nor the courts have provided much guidance with respect to how law schools should deal with applicants or students who have DWE. Thus, after first describing the disorder and discussing the applicability of federal discrimination legislation, this article offers various suggestions for doing so.

II Characteristics of DWE

"The essential feature of Disorder of Written Expression is writing skills . . . that fall substantially below those expected given the individual's chronological age, measured intelligence, and age-appropriate education."³

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1. Whittier College School of Law (CA), 4 Nat'l Disability L. Rep. (LRP) 183 (OCR 1993).

2. University of Minnesota, 6 Nat'l Disability L. Rep. (LRP) 295 (OCR 1995).

3. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) 315.2, at 51 (Washington, D.C., 4th ed. 1994). Criteria for making the diagnosis are:

A. Writing skills, as measured by individually administered standardized tests (or functional assessments of writing skills) are substantially below those expected given the person's chronological age, measured intelligence, and age-appropriate education.

Although the disparity can "significantly interfer[e] with academic achievement,"⁴ the disorder's actual severity and effect vary widely from individual to individual.⁵

Because psychiatrists did not recognize DWE as a separate disability until 1986,⁶ much remains unknown about the disorder, including its prevalence and exact etiology.⁷ It is generally thought, however, that DWE is caused by a defect of brain function, organization, or "wiring," and not by demonstrable anatomical brain pathology.⁸

People who have DWE regularly commit errors in spelling, punctuation, grammar, syntax, and paragraph organization. Because these problems first ap-

B. The disturbance in Criterion A significantly interferes with academic achievement or activities of daily living that require the composition of written tests (e.g., writing grammatically correct sentences and organized paragraphs).

C. If a sensory deficit is present, the difficulties in writing skills are in excess of those usually associated with it.

Id. For a further discussion, see *infra* note 15.

4. DSM-IV, *supra* note 3, at 51. Of course, some claim "learning disabilities interfere with all aspects of the individual's life." Larry B. Silver, Specific Developmental Disorders of Childhood, Introduction and Overview, in *Comprehensive Textbook of Psychiatry*, eds. Harold I. Kaplan & Benjamin J. Sadock, 1788 (Baltimore, 5th ed. 1989).

5. Lorian Baker & Dennis Cantwell, Specific Language and Learning Disabilities, in *Handbook of Child Psychopathology*, eds. Thomas H. Ollendick & Michel Hersen, 93, 97 (New York, 2d ed. 1989).

It should be pointed out that many people with DWE adjust to their disorder by seeking careers in which they either do not need to write or are expected to do so at only a very basic level. This type of adjustment is not unique to DWE. In a study of adult dyslexics with "an intellectual capacity above the population mean, two were cooks, one was a storeman, one a truck driver, one a night hall porter, and one a park cleaner." These findings demonstrated "the subjects preferred occupations where reading and writing were not needed, or that the choice of job was a result of poor self-confidence and the tendency towards resignation that has been reported in dyslexics." Katarina Michelsson & Pirjo Bjorkgren, Ten-Year Follow-Up of Adolescent Dyslexics, 6 *J. Adolescent Health Care* 31, 33 (1985).

6. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)* (Washington, D.C., 3d ed. rev. 1986). In DSM-III-R, DWE was referred to as "Developmental Expressive Writing Disorder." By the time DSM-IV was published in 1994, however, the disorder had taken on its current name.

7. Noel Gregg, Expressive Writing Disorders, in *Developmental Disorders: Diagnostic Criteria and Clinical Assessment*, eds. Stephen R. Hooper et al., 127, 127-28 (Hillsdale, N.J., 1992).

It is estimated that 10.5% of all graduate and professional students have some type of physical or mental disability. Laura F. Rothstein, Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities, 17 *J.C. & U.L.* 471, 471 (1991). It is further believed that 9% of all law students have a disability. Laura F. Rothstein, Introduction to Disability Issues in Legal Education: A Symposium, 41 *J. Legal. Educ.* 301, 305 (1991). Students with learning disabilities represent the majority of students identified as disabled law students. M. Kay Runyan & Joseph F. Smith, Jr., Identifying and Accommodating Learning Disabled Law School Students, 41 *J. Legal Educ.* 317, 317 (1991).

The foregoing figures are not surprising because up to 10% of the general population has a learning disability, and approximately 5% of public school students have learning disorders. DSM-IV, *supra* note 3, at 47.

8. Silver, *supra* note 4, at 1788.

pear when written work is called for in school, DWE, like other writing disorders, often does not surface until the fifth grade or later.⁹ Although DWE appears to be a lifelong disorder, remediation may decrease the severity of the impairment. In fact, most children with milder forms of the disorder learn to compensate for the disability; those who either do not or cannot remain functionally impaired throughout their lives.

III Applicability of the ADA to DWE

The Americans with Disabilities Act of 1990 (ADA)¹⁰ prohibits discrimination against disabled individuals who are "otherwise qualified,"¹¹ and defines "disability" as "a physical or mental impairment that substantially limits a major life activity."¹² To be an "otherwise qualified" individual under the ADA, a person with a disability must be able to meet an institution's "essential eligibility requirements" with only "reasonable modifications" to the institution's program.¹³ Thus, in deciding how to respond to students with DWE, law school administrators must resolve several issues.

9. *Id.* at 1799. See also Linda S. Siegel & William Feldman, Nondyslexic Children with Combined Writing and Arithmetic Disabilities, 22 *Clinical Pediatrics* 241 (1983).

10. 42 U.S.C. §§ 12101-12213. In addition to the ADA, protection from disability discrimination also may exist under § 504 of the Vocational Rehabilitation Act of 1973. The two statutes are quite similar and, as a result, are often interpreted in an analogous manner. See, e.g., *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1529 (11th Cir. 1996). For a discussion of the applicability and interaction of the acts, see Susan J. Adams, *Because They're Otherwise Qualified: Accommodating Disabled Law Student Writers*, 46 *J. Legal Educ.* 189, 194-96 (1996), and 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, 581-93 (1996).

11. 42 U.S.C. §§ 12132, 12182(1).

12. *Id.* at § 12102(2)(A).

13. *Id.* at § 12131(2).

Discussions concerning what is a reasonable modification to an educational program usually focus on *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *Southeastern Community College (SCC)* denied admission to an individual with a serious hearing disability. Although the applicant could lipread face-to-face instructions, she could not respond to directions given behind her back or at her side. Concluding that she would not be able to complete its normal course of instruction due to her disability, SCC rejected her request for admission to its nursing program. In upholding the school's decision, the Supreme Court recognized that SCC's program required students to possess the ability to understand speech without lipreading. The Court further recognized that if the school made the substantial curricular modifications she required—i.e., limiting her to only academic classes—she would not acquire "even the rough equivalent" of the normal nursing program. Forcing such a "fundamental alteration in the nature of a program," the Court reasoned, went far beyond the type of modification required by law. *Id.* at 410. See also *Ohio Civil Rights Comm'n v. Case Western Reserve University*, 666 N.E.2d 1376, 1386 (Ohio 1996) (holding that a school need not eliminate course requirements "reasonably necessary to the proper use of the degree. . ."). For a further discussion, see Adam A. Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 *J.C. & U.L.* 989 (1996), and Robert W. Edwards, Note, *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).

A. Does the ADA Protect DWE Law Students?

Assuming a student documents ¹⁴ that he or she has DWE, ¹⁵ the student will qualify for ADA protection. Mental disorders ¹⁶ are disabilities if they “substantially limit a major life activity,” ¹⁷ including the ability to learn. ¹⁸ Mental impairments include “specific learning disabilities.” ¹⁹ A federal court recently recognized that DWE is such a disability, entitling the affected high school student to accommodations. ²⁰

B. Are DWE Law Students Otherwise Qualified?

An ability to express oneself in a form reducible to writing—without the assistance of the judgment of another person—is an essential eligibility re-

14. Both courts and commentators agree that documentation is particularly important for mental disorders, including learning disabilities, because they are not obvious. *See, e.g.*, *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996) (“Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations. . . .”); *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 859 n.11 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994) (the burden is on the student to “demonstrate that his requests are reasonable and do not sacrifice the integrity of the Law Center’s program”); Sara O. Sparboe, *Must Bar Examiners Accommodate the Disabled in the Administration of Bar Exams?*, 30 Wake Forest L. Rev. 391, 421 (1995) (“Appropriate verification is necessary to determine eligibility for accommodation and becomes even more necessary for learning disabilities which are not obvious.”); Michael K. McKinney, *The Impact of the Americans with Disabilities Act on the Bar Examination Process: The Applicability of Title II and Title III to the Learning Disabled*, 26 Cumb. L. Rev. 669, 678-79 (1996) (“Documentation is necessary to determine whether an applicant is eligible for the requested accommodations. The importance of the documentation becomes more necessary where the disability is less obvious—as with learning disability.”).

15. A DWE diagnosis requires:

(1) a reliable measure of intelligence, (2) a reliable measure of spelling skill, and (3) a careful examination of one or more written compositions. At the present time, good spelling tests are available, but good tests of written composition do not exist.

The diagnosis can be made with reasonable confidence if:

1. The I.Q. score is 90 or above.
2. The spelling score is below the 30th percentile for age or grade.
3. The written composition has these characteristics:
 - a. The message is clear but the text is short, has a simple structure, and ends abruptly.
 - b. Many words are misspelled, but the spellings represent the pronunciation of the word.
 - c. The text has syntactic, grammatical, and punctuation errors.
 - d. The text contains incomplete and run-on sentences.

Silver, *supra* note 4, at 1799.

16. DSM-IV classifies syndromes which produce distress or dysfunction as mental illnesses. DSM-IV, *supra* note 3, at xxi. Thus, although its etiology is unknown, DWE is a mental disease because it produces distress and dysfunction.

17. 42 U.S.C. § 12102(2)(A).

18. 28 C.F.R. 35.104(2); *Clark v. Virginia Bd. of Bar Examiners*, 861 F. Supp. 512 (E.D. Va. 1994).

19. 28 C.F.R. 35.104(1)(i)(B).

20. *Mather v. Hartford School Dist.*, 928 F. Supp. 437 (D. Vt. 1996).

quirement for any law student. Indeed, writing is integral to being both a law student and an attorney.²¹ Those who deal with the law must be wordsmiths, able to use precise language to persuade professors, partners, clients, adversaries, judges, and juries. Therefore, students must be able to reduce analytical ideas and concepts to a coherent written product.

For students with DWE, the issue is whether they can produce competent written work if granted accommodations which would not alter the basic law school program.²² If, with reasonable modifications, the student can produce an acceptable written product, law schools must provide such accommodations.

C. What are Reasonable Accommodations for DWE Law Students?

In a recent law review article, the author asked whether:

in the writing context, [it] would be a "reasonable accommodation" to provide [a student with a learning disability] with an editor who corrects all obvious errors (beyond the support that grammar-checking and spell-checking programs could provide) and rewrites faulty sentences? . . . In short, is there a point where accommodation defeats an important purpose of the curriculum?²³

21. As to the former, see, e.g., Lucia A. Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 Dick. L. Rev. 245, 249 n.14 (1996) ("Legal research and legal writing have traditionally been identified as the two most fundamental skills that a first year student should master."). As to the latter, see, e.g., Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. Tol. L. Rev. 1, 19 (1992) ("Most lawyers must write every day. . . ."); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333, 335 (1987) ("Lawyers need to be able to maintain clarity of expression, even in the face of complexity of thought. Lawyers need particularly to be able to write with precision and anti-precision: for some documents, they have to nail down particulars in order to avoid vagueness and ambiguity, while for others they will have to keep the letter free in order to protect the plasticity of the spirit in the advent of unforeseen circumstances.").

Nevertheless, controversy exists about whether—assuming there are differences—an applicant must be able to meet the essential eligibility requirements of the profession or only those for a law student. In other words, is it appropriate for the school to consider whether the applicant will actually be able to practice law? However one feels about this question, it is quite clear that the courts permit schools to reject applicants who will not be able to perform the essential job functions of the profession associated with the degree sought. See, e.g., *Ohio Civil Rights Comm'n v. Case Western Reserve University*, 666 N.E.2d 1376 (Ohio 1996), concluding that because medical students receive an unrestricted license, medical schools can require students satisfy all essential program criteria. Presumably, the same is true for law school applicants because they too receive unrestricted licenses.

22. As explained *supra* note 13 and accompanying text, a "failure to make reasonable modifications" represents prohibited discrimination unless the changes "would fundamentally alter the nature" of the institution's program.

23. Adams, *supra* note 10, at 203-04 n.61.

The answer, of course, is that there clearly comes a point where accommodation does defeat the curriculum. In the case of students with DWE, the line should be drawn where the student, rather than exercising his or her own judgment, depends on a third person's opinions. Thus, it is appropriate to supply a law student with software which flags possible spelling or grammatical errors. Although the program offers choices, the student alone makes the selection. But an editor who uses his or her own discretion would not be reasonable because the final written product would not be the student's work. Permitting a DWE law student to have an editor would be analogous to allowing a blind medical student who wants to learn radiology to have another person read the X-ray. The "reader," rather than the medical student, would be making—or at least influencing—the diagnosis. Similarly, the editor, rather than the law student, would be producing—or at least modifying—the written document. Such an accommodation is not only not required, it is educationally inappropriate.

IV Suggestions for Dealing with DWE Individuals

A. Law School Applicants with DWE

Application materials generally include a statement that the law school does not discriminate on the basis of disability and complies with federal legislation in providing reasonable modifications which do not alter the basic program. Schools should also include the following or similar language:

Fundamental to a legal education is the ability to produce a coherent written product. Students must be able to express themselves in a form or manner reducible to writing without the editorial assistance of another person.

By adopting a policy statement that writing is fundamental to a legal education, schools alert DWE applicants to the problems that they are likely to face in coming to law school. A formal statement adopted in good faith after serious discussion about the school's mission should permit the institution to safely reject applicants who cannot—even with reasonable modifications—produce a coherent written product.²⁴

B. Enrolled Law Students with DWE

Even the best-crafted policy statement will not allow a law school to completely avoid having to deal with DWE, because at least some enrolled stu-

24. Courts consistently defer to a school's academic requirements imposed in good faith. See, e.g., *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 859-60 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994).

dents will be found to have the disorder.²⁵ For these students, administrators must create appropriate accommodations which do not alter their school's basic program of instruction.

1. Legal Research and Writing Classes

DWE law students face a daunting task in their legal research and writing courses because such courses "demand that students achieve a professional standard of writing that is consistently error-free, sophisticated, and reader sensitive. Such a high standard puts a premium on reliable self-correction."²⁶

Although students with various disabilities frequently receive extra time on exams and written assignments, this common accommodation may not be appropriate for a student with DWE. This is so because DWE students, unlike others with learning disabilities, neither read nor process information more slowly. Instead, DWE students have writing skills far below what they should be given their intelligence and age. Thus, additional time will rarely be responsive to the needs of a DWE student in legal research and writing classes.

Other accommodations, however, may be helpful. For example, DWE students should be permitted to use computer software that checks spelling, grammar, and citations.²⁷ For DWE students who cannot type, voice-activated software might be appropriate. Unfortunately, this technology is still developing and most available products are slow and require some adjustment.²⁸

25. Many individuals with DWE are not diagnosed as having the disorder until they are in law school. In part, this is because persons with DWE are often able to avoid dealing with the disorder while in college by selecting majors in which writing is not a critical skill and avoiding classes in which grades are based on papers. See further Runyan & Smith, *supra* note 7, at 323.

26. Adams, *supra* note 10, at 190. Professor Adams goes on to suggest the "task of analyzing and organizing increasingly complex bodies of information that require the deft incorporation of doctrinal, factual, and policy considerations—in addition to the careful attention to the persuasive or objective purpose of the document—is a scene from the weak writer's nightmare. And for the learning disabled writer, this combination of demands is potentially fatal to professional aspirations." *Id.*

27. Most schools probably already encourage students to spell and grammar check their written documents. However, in legal research and writing classes, some law schools may prohibit students from using citation checking programs. Yet whatever the policy for other students, permitting DWE students to use such programs (and providing them with such software if necessary) is both educationally and legally appropriate.

28. Although many people have no experience dictating, learning disabled students are likely to be "skilled oral communicators from a lifetime of relying on the spoken work." John Marshall, *For the Dyslexic, Law Becomes A Never-Ending Battle with the Written Word*, 17 *Stud. Law.* 18, 19 (Feb. 1989). Thus, even if they are not used to dictating, learning this skill will actually benefit DWE students who go on to practice law.

2. Class Notes

Although commentators often suggest providing note-takers to primary school students with DWE,²⁹ this is not an appropriate accommodation in law school. Taking notes is more than simply writing everything the professor or other students say. Students exercise judgment in determining what is important enough to record. Nothing that is now known about DWE requires law schools to provide someone to highlight the important information presented in class. Indeed, it would be inappropriate because the student's judgment would be subordinated to a colleague's interpretation (recall the earlier example of the blind medical student and the X-ray).

Instead, if a student's disability makes it difficult for him or her to produce meaningful notes during a fast-paced law school class, the student should be permitted to audiotape the class. He or she can then listen to the tape and take notes at a later time, stopping and starting the tape as necessary. Because this will be time-consuming, another appropriate accommodation might be a reduced class load.³⁰ Students could also be encouraged to join study groups where they can compare their notes and discuss their understanding of the material with others.

3. Examinations

Accommodating DWE students on exams will normally prove fairly easy. Because theirs is a written disorder, DWE students are no worse off than other students when it comes to multiple choice exams. Computer assistance remains a reasonable accommodation for essay exams. DWE students should be provided with computer software that highlights possible spelling and grammar mistakes. Additional time on essay exams will also be necessary because it is more difficult for students with DWE to organize and write their answers.

29. Larry B. Silver, *Developmental Learning Disorders, in Child and Adolescent Psychiatry: A Comprehensive Textbook*, ed. Melvin Lewis, 525 (Baltimore, 1991).

30. One issue not yet decided is whether the accommodation of a reduced course load must also include reduced tuition. The test, however, will likely be whether providing reduced tuition would impose "an undue financial and administrative burden" on the institution.

The issue is not completely clear-cut, however, and arguments can be made for both sides. Absent a tuition adjustment, the student's education will cost more. If he or she takes a reduced course load throughout his or her entire law school career, the price of law school could soar by as much as one-third. As a result, especially at expensive private schools, the accommodation may actually preclude DWE students from obtaining a legal education. On the other hand, a reduced course load student takes a seat from a student who would pay full tuition. Schools would claim that—with increasing requests for such accommodations—reduced tuition imposes a financial burden on them. And if schools are compelled to absorb this deficit, they are likely to compensate by raising tuition for all students. For a further discussion, see Phyllis G. Coleman & Robert M. Jarvis, *Tuition Adjustment for Law School Students: A Necessary Accommodation Under the ADA?*, 23 J.C. & U.L. (forthcoming 1997).

In addition, they will have to run their answers through spell and grammar checks and make correction decisions. As technology improves, voice-activated software might be appropriate.

V Conclusion

Petitions for accommodating learning disabilities in general, and DWE in particular, are not going away. Indeed, requests are growing at a staggering pace.³¹ Law schools must therefore squarely face the issue, both in their admission policies and in their teaching and testing practices.³²

31. For many years, law students did not ask for accommodations and frequently even attempted to disguise their disabilities to "pass" as part of the 'normal' population." David M. Engel & Alfred S. Konefsky, *Law Students with Disabilities: Removing Barriers in the Law School Community*, 38 Buff. L. Rev. 551, 557 (1990). As a result, although simple accommodations—widely available to students in other disciplines—would have placed them on a more equal plane with their colleagues, they did not make the request. Today, however, just the opposite is true, and even students who do not have disabilities are demanding—and receiving—differential treatment. See Bonnie M. Rubin, *Learning Disabled: The 'New' Advantage*, Chi. Trib., Apr. 14, 1996, at C1.

32. For an interesting analysis of the desirability of adopting a comprehensive strategy, as opposed to dealing with disability issues on a case-by-case basis, see Michelle M. Ketchum, *Academic Decision-Making: Law Schools' Discretion Under the Americans with Disabilities Act*, 62 UMKC L. Rev. 209, 219-23 (1993).

