The Journal of Law and Education

Volume 28 | Issue 2 Article 16

4-1999

Consistency & Cooperation: The Lessons of Guckenberger v. Boston University

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Consistency & Cooperation: The Lessons of *Guckenberger v. Boston University*

While the American with Disabilities Act (ADA) forbids discrimination on the basis of a learning disability, [1] institutions of higher learning must be able to establish standards for academic achievement. A recent case, *Guckenberger v. Boston Univ.*, [2] shows this conflict between the institutions of higher learning and students with learning disabilities. However, the case has far-reaching significance for higher education beyond disability law or the establishment of curriculum. This article will show that administrative "chaos," [3] in the words of the court, can present a larger problem than any of student's individual difficulties.

The article examines the *Guckenberger* case as it has progressed. Part I presents the complicated factual situation leading to the lawsuit. Part II discusses how the legal issues were handled by the court. Part III looks at what the case C not just the court's decision C means, including how it reflects certain presumptions about both higher education and the learning disabled in the United States. The article concludes by contemplating future implications.

I. Factual Background [4]

Prior to 1995, Boston University (BU) was well-known among guidance counselors for having a strong commitment to and actively recruiting students with learning disabilities. The Learning Disabled Support Services office (LDSS) would provide for such accommodations as extra time for exams, in-class notetakers and special adjustment programs upon proper documentation of a disability. Also, before 1995, LDSS, working with various academic department heads, would occasionally arrange for certain students to substitute courses in other areas for required courses in math or science. LDSS never got the approval of BU's central administration to make these substitutions.

In 1995 Jon Westling, BU's provost, learned of the substitutions. Westling sent his assistant, Craig Klafter, to find out if scientific proof existed that disabilities could prevent a student from learning foreign language. After confronting Loring Brinckerhoff, the director of LDSS, and reading a book Brinckerhoff

1. 42 U.S.C. § 12182 (1994).

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

3. *Id.* at 120.

4. The facts as presented here come from the court's opinion in Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997).

had co-authored, Klafter concluded no such scientific evidence existed. Without any further consultation or research, in June 1995, Westling ordered the substitutions stopped immediately. He further ordered LDSS to send all accommodation letters to his office for review.

Westling also began giving speeches that decried such policies for the learning disabled. "Although Westling's orations recognized a need to 'endorse the profoundly humane goal of addressing the specific needs of individuals with specific impairments,' his public addresses resonated with a dominant theme: that 'the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order.'" [5] In his speeches, Westling named a student, "Somnolent Samantha," who was narcoleptic and hard of hearing. Through a letter from LDSS, "Samantha" asserted she needed a number of demanding accommodations. Later, Westling testified that "Somnolent Samantha" was a fabrication, based on second-hand accounts and popular stories, of students who had faked learning disabilities to avoid effort. Westling, and, in fact, BU had never had a documented case of someone faking a learning disability to receive special accommodation. [6]

Until October 1995, Brinckerhoff continued to make accommodations and substitutions without following Westling's order that letters go through his office. Fifty-eight such letters went sent during that time. Westling then ordered that 28 accommodation letters at LDSS that were ready to be delivered to students and their corresponding files be delivered to his office instead. He reviewed the files with his staff and decided that the majority of accommodations were granted with inadequate documentation of a disability.

Westling expressed several feelings regarding the files. He felt the evaluations should be more current, because he believed evaluations over three years old are considered unreliable under federal guidelines. He was also concerned about the qualifications of the evaluators, urging that only physicians or licensed or clinical psychologists with experience be considered qualified evaluators.

Westling did not want the students denied accommodations; he wanted better documentation. However, Brinckerhoff sent letters to all twenty-eight students denying their accommodations and informing the student of a right to appeal to the Provost. LDSS staff members, on the other hand, told students to disregard the denial letter.

In December 1995, Brinckerhoff informed all BU students registered with LDSS that, to remain eligible, they would have to provide, before January 1996, a reevaluation if their documentation was more than three years old,

5. *Id.* at 118.
6. *Id.* at 119.

documentation of a disability by a psychologist or physician, and high school and college transcripts. These letters, without approval by the Provost, were sent to students just before the fall semester final exams. Three weeks later, another letter issued from the Provost's office, changing the deadline for the new documentation to August 1996 and saying no reevaluation was necessary to continue to receive LDSS' services.

Following these confusing times for students, BU had a considerable decline in attendance by learning disabled students. Brinckerhoff and several other key figures in the disability services offices resigned. Until a restructuring of the offices was complete, the Provost's office handled decisions relating to accommodation and the only avenue of appeal for a denial of accommodation was reconsideration by the Provost's office.

In June 1996, Westling became university president. Six months later, BU hired a new clinical director, a professor and neuropsychologist, for LDSS. Around that time, ten students brought a lawsuit against BU. They not only sued because of their individual damages, but also on behalf of "all persons with learning disabilities and/or attention deficit disorder who have been, are, or will be denied their rights under the ADA, . . . the Rehabilitation Act, or . . . the Massachusetts' Constitution as a result of [BU's] policies and practices." [7]

II. Legal Issues

The students raised several arguments. While suing BU as an institution, they also sued Westling and two other university officials under both the ADA and Rehabilitation Act. The court, in this difficult and complex situation, was very concerned with who could be held responsible for the alleged acts of discrimination.

The ADA provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." [8] The court was required to determine whether the individual officials could be held liable under the ADA. In the court's determination, a person "operates" a place of public accommodation if he has a position of authority, this authority puts him in position to perform acts that may be discriminatory, and the discriminatory acts come from the discretion of the person, not from an institutional policy or from orders from superiors. [9] The

7. Guckenberger v. Boston Univ. (hereinafter Guckenberger I, 957 F. Supp. 306, 310 n.1 (1997).
8. 42 U.S.C. § 12182 (1994).
9. Guckenberger I, 957 F. Supp. at 322-323 (*citing* Howe v. Hull, 874 F. Supp. 779 (N.D. Ohio 1994)).

court determined that only Westling had that kind of authority. He could be sued individually under the ADA. [10]

Under the Rehabilitation Act, "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [11] The court determined that individuals may be liable under the Rehabilitation Act if they have authority to accept or reject federal funds and that John Silber, "alleged president-turned-Chancellor," had such authority. [12] Therefore, the suit against him under the Rehabilitation Act could proceed. [13]

Significantly, the court examined a claim for "hostile learning environment" under both the ADA and the Rehabilitation Act. The students claimed that Westling's derogatory speeches toward the learning disabled movement created a difficult atmosphere in which they could not learn, similar to a hostile work environment in sexual harassment cases. While the court agreed that these speeches, made by someone in a strong position to influence BU's procedures for accommodation, could be important to the students' ADA claim, no separate claim of "hostile learning environment" existed. [14] Further, the court expressed concern about First Amendment freedom of speech issues if students were able to sue the university president over an unpopular or politically incorrect speech. [15]

The students thus sued BU for discrimination under the ADA, the Rehabilitation Act, and for breaking their contract to provide services for the learning disabled. [16] The discrimination claim arose from the new policy for accommodations BU had implemented. The policy required students seeking accommodation to provide an evaluation by a physician, psychologist or an appropriate professional holding at least a doctorate degree, the evaluation to be performed no more than three years before the request, and IQ tests in addition to normal tests for learning disabilities. [17] However, under the new policy, course substitutions were not allowed under any circumstances. [18]

Under the ADA, while a place of public accommodation may establish eligibility criteria to determine a reasonable accommodation, it may not screen

10. *Id.*
11. 29 U.S.C. § 794(a) (1994).
12. Guckenberger I, 957 F. Supp. at 323.
13. *Id.*
14. *Id.* at 316.
15. *Id.*
16. Guckenberger v. Boston Univ., 974 F. Supp. 106 (D. Mass. 1997) (hereinafter Guckenberger II).
17. *Id.* at 135.
18. *Id.* at 144.

out students who are truly disabled. [19] The court then examined each of BU's new criteria for eligibility to see if any of them did indeed screen out disabled students. The court found that demanding testing to be "current," i.e., within three years, or demanding additional IQ tests did not screen out the disabled. [20] However, the court found BU's demanding credential criteria too restrictive, because of the expense, time, and anxiety of being reevaluated. [21] Also, the court found that BU was not truly requiring retesting, but allowing some students who had been tested by evaluators with less than the required credentials to have their test results reviewed by someone with the proper credentials. [22]

The court also had to determine whether course substitutions in math or foreign language could be considered reasonable accommodations under the ADA. The court looked closely at regulations for educational institutions regarding implementation of the ADA and the Rehabilitation Act. Under the ADA, a failure to provide a modification may be treated as discrimination "unless the [school] can demonstrate that making such modifications would fundamentally alter the nature of such . . . service facility." [23] For the Rehabilitation Act, "academic requirements that the [school] can demonstrate are essential to the program of instruction being pursued by such student . . . will not be regarded as discriminatory." [24] As a result of the testimony of experts, the court found no scientific evidence that a disability could completely prevent a student, provided other accommodations, from learning math and, thus, a course substitution for math is not a reasonable alternative. [25]

The court then turned to the issue of whether foreign language course substitutions would fundamentally change BU's liberal arts program. Westling's speeches and testimony alone were insufficient. [26] However, "[u]niversities have long been considered to have the freedom to determine 'what may be taught, how it shall be taught, and who may be admitted to study." [27] The *Guckenberger* court, though, tempered this sort of absolute discretion in the school's academic policy, ordering BU to "undertake a diligent assessment of the available options." [28] Then, BU was required to make "a professional, academic judgment that reasonable accommodation is simply not available." [29]

19. *Id.* at 135.
20. *Id.* at 136-137.
21. *Id.*
22. *Id.*
23. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).
24. 34 C.F.R. § 104.44 (1994).
25. Guckenberger II, 974 F. Supp. at 147.
26. *Id.* at 149.
27. *Id.* at 148 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).
28. *Id.* at 149 (citing Wynne v. Tufts Univ. Sch. Of Med., 976 F.2d 791, 795 (1st Cir. 1992)).
29. *Id.* (citing Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 119 (1st Cir. 1992)(en banc)).

Ultimately, the final judgment of the *Guckenberger* court ordered BU to do three things. First, BU had to stop requiring learning disabled students who already had evaluations by professionals with proper training and master's degrees to be retested by professionals who met BU's more rigorous standards. Second, BU had to establish a procedure for evaluating whether a course substitution for foreign language would fundamentally alter its liberal arts program. Third, BU had to pay damages to six individual students for, among other things, emotional distress, psychological counseling, and the costs of retesting. [30]

In May 1998, the court revisited the *Guckenberger* case on the issue of course substitution. [31] The Dean's Advisory Committee, which consisted of eleven faculty of BU, followed the court's order and carefully deliberated the issue, holding several meetings and including student input. The Committee, taking in such factors as alternatives, feasibility, cost and the impact on the program, finally determined that foreign language was fundamental to the program and course substitutions were not advisable. The court, after reviewing the Committee's recommendations, agreed, giving the university's decision to establish its own standards a great deal of deference. [32] "[W]hen judges are asked to review the substance of a general academic decision, . . . they should show great respect for the faculty's professional judgment." [33]

III. What *Guckenberger* Means

This case is easily read as a conflict between a university's ability to establish rigorous academic standards and the learning disabled to obtain a quality higher education with reasonable accommodations. [34] After the decision, despite the court orders against BU for payment of damages and to evaluate course substitutions, Jon Westling announced that the freedom of the university to establish academic standards had been preserved. [35] He, however, expressed his concern over the need to evaluate the course substitutions: "Our language requirement may prevail, but I am deeply disturbed that a federal court would consider intruding so deeply into a university's curriculum." [36]

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30. *Id.* at 154-55.

31. Guckenberger v. Boston Univ., 8 F. Supp.2d 82 (D. Mass. 1998). At the same time, the court reviewed the issue of attorney fees and costs under both the ADA and the Rehabilitation Act. Guckenberger v. Boston Univ., 8 F. Supp.2d 91 (D. Mass. 1998)(hereinafter Guckenberger IV).

32. *Id.* at 89.

33. *Id.*(quoting Wynne v. Boston Univ. Sch. of Med., 932 F.2d at 25).

34. Peter D. Blanck, *Students with Learning Disabilities, Reasonable Accommodations, and the Rights of Institutions of Higher Education to Establish and Enforce Academic Standards:* Guckenberger v. Boston University, 21 Mental & Physical Disability Law Reporter 679 (1997).

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

36. *Id.*

Westling, now the president of BU, misses the larger point of *Guckenberger*, a point that does not involve the court at all. The LDSS office was apparently acting unsupervised, answering only to itself, when it allowed certain students to substitute some of their more challenging courses. LDSS no doubt had good intentions, but they never received any authority or permission from the university administration to make such changes. The policy, though, went on for years.

When he learned of the policy, Westling abruptly discontinued the course substitution program. (It is important to note, however, that he was not interested in avoiding other necessary accommodations.) He never consulted experts and, beyond a very preliminary investigation and his own beliefs, he never sought more understanding. His misconceptions and stereotypes negatively affected the learning environment at the university. His intentions, though, were good as well; he wanted to preserve the integrity of both his institution and liberal education overall.

Students, of course, got hurt in this administrative debacle and students, through the legal system, ultimately settled it. The monetary damages issued in this case are fairly small. [37] The court here gave great deference to the university's academic decision, once BU took the time and fully considered the matter.

Unfortunately, the court had to step in and order BU to do what should have been done in the first place. LDSS, the administration and the faculty should have carefully considered and created a consistent policy toward learning disabled students. In the interim, students' academic careers were harmed through needless anxiety and distress.

The lesson then of *Guckenberger* is one of cooperation. The ADA was designed to make life easier for the disabled, but inconsistent policies like these, despite their good intentions, make life even more difficult. The lesson, though, applies to all of academia; consistency and cooperation in administration are essential to success for anyone in an academic environment.

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37. The total monetary awards are less than $30,000. Guckenberger II, 974 F. Supp. at 155. However, the sum of attorney fees ultimately awarded under the ADA and Rehabilitation Act were greater than $1,000,000. Guckenberger IV, 8 F. Supp.2d at 112.