UNITED STATES DISTRICT COURT

JANE DOE,	:	
	:	04-CV-6740
Plaintiff,	:	
	:	August 25, 2005
v.	:	
	:	500 Pearl Street
HUNTER COLLEGE, et al.,	:	New York, New York
	:	
Defendants.	:	

TRANSCRIPT OF CIVIL CAUSE FOR DECISION
BEFORE THE HONORABLE SYDNEY H. STEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: DAVID GOLDFARB, ESQ.
IRA SALZMAN, ESQ.

For the Defendants: ANTOINETTE BLANCHETTE, ESQ.

Court Transcriber: SHARI RIEMER
TypeWrite Word Processing Service
356 Eltingville Boulevard
Staten Island, New York 10312

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MR. GOLDFARB: David Goldfarb from Goldfarb, Abrandt, Salzman & Kuzin for Jane Doe.

MR. SALZMAN: Ira Salzman also from Goldfarb, Abrandt, Salzman & Kuzin also for Jane Doe.

THE COURT: Good morning. Please be seated.

MS. BLANCHETTE: Antoinette Blanchette, Assistant Attorney General for the defendants, Your Honor.

THE COURT: Good morning, Ms. Blanchette.

We're going to tape this. Is the machine on? All right. Because what I'd like to do is read into the record my decision denying defendant's motion to dismiss on the ground that plaintiff has adequately stated a claim for disability discrimination. What I then will do is enter a minute order saying for the reasons set forth on the record today defendants' motion to dismiss is denied.

If anyone wants a transcript I'm going to ask whoever transcribes the tape to send the draft to my Chambers and I will fill in the specific cites. In other words, as I read my decision I'm not going to give detailed citations with -- I won't say 354 F.3d so forth. I'll just give the case cite and then when it comes up to me I'll fill in -- and also the record cites. I'll fill in the specific references to the complaint as well as the specific case citations. That's if anybody wants to have the transcript.

Then I want to talk with the parties about where we're going in the litigation. But first off tell me -- because I think what's most important here is Ms. Doe. Tell me what's happening with Ms. Doe. I take it she's back and by now

she's a junior in the college. Is that right and she's in the dorm?

MR. GOLDFARB: Your Honor, I was unable to contact her at the end of the summer when I get the message about the conference today. So I haven't got an update. When we last spoke to her at the beginning of the summer when she was back in the dorm under the agreement she was having some problems that it was -- we had not resolved what was going to happen next semester but I was assuming that she would continue in the dormitory under the agreement.

THE COURT: All right. I see that -- there is a mouse in front of you. I couldn't tell whether there was. So that should have been picked up. Fine.

Well, it sounds good. It sounds like she's back and continuing with her education which was obviously a significant part of this. All right.

My decision is as follows. Plaintiff brings this disability discrimination action after being evicted from her college dormitory room for attempting to commit suicide. She asserts claims pursuant to the Americans With Disabilities Act, the Rehabilitation Act and the Fair Housing Amendments Act.

Defendants have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). ~~FRCP 12(b)(6).~~ Defendants' motion is denied because plaintiff has adequately stated a claim for disability discrimination.

The facts are recounted as follows and are as alleged in the amended complaint. Hunter College of the City University of New York ("Hunter") is a federally funded

institution of higher education that owns and maintains Brookdale Residence Hall ("Brookdale") as a dormitory for its students. (Am. Compl. ¶ 6). Defendant Jennifer Rabb is Hunter's president and defendant ~~Ira~~Eija Ayravainen is its vice president. (Id. ¶ 1). Pseudonymous plaintiff Jane Doe was a 19 year old sophomore at Hunter when the action was commenced. (Id. ¶ 5).

As far as the parties know, Ms. Doe is currently living in Brookdale Residence Hall as a junior at Hunter. Doe, who suffers from major depressive disorder and attention deficit hyperactivity disorder, had to take medical leave during most of her junior year of high school and has previously been hospitalized for depression. (Id. ¶ 8). When it came time for her to choose among her options for college, Doe selected Hunter at least in part because its honors college program offered her free housing. (Id. ¶ 20).

When she arrived at Hunter in September of 2003, Doe signed a 2003-2004 housing contract and assumed residence at Brookdale. (Id. ¶ 9). The contract provided that "a student who attempts suicide or in any way attempts to harm him or herself will be asked to take a leave of absence for at least one semester from the Residence Hall and will be evaluated by the school psychologist or his/her designated counselor prior to returning to the Residence Hall. Additionally, students with psychological issues may be mandated by the Office of Residence Life to receive counseling." (Id. ¶ 13).

Toward the end of her first year on June 5, 2004, Doe swallowed twenty Tylenol PM pills and then called 911. (Id. ¶ 10). An ambulance transported her to Cabrini Medical Center where she received treatment. (Id.). Four days later on June 9 the hospital released Doe and she returned to Brookdale. (Id.). Upon arrival she discovered that the locks had been changed on the door to her dormitory room. (Id.). On the next day, June 10, in a meeting with Pamela Burrithwrightte [Ph.] of the Office of Residence Life, and defendant IraEija Ayravainen, Doe learned that Hunter was requiring her to vacate her room. (Id.).

Following her eviction, Doe lived with her mother in Queens while continuing to attend school. (Id. ¶ 11). ——————That living situation alleged exacerbated Doe's mental illness. (Id.). On June 14, 2004, Doe wrote to Burthwright Brithwrite and IraEija Ayravainen insisting that she had been discriminated against on the basis of her mental disability. (Id. ¶ 12). A week later on June 21 IraEija Ayravainen informed Doe that she would continue to be excluded from Brookdale, at least through the end of the fall 2004 semester. (Id. ¶ 13). IraEija Aygravaninen's letter cited the 2003-2004 housing contract and advised Doe that she could apply to return to Brookdale for the spring semester of 2005 at which time Hunter would review her request and notify her whether it would readmit her to the dormitory or not. (Id. ¶ 14).

Doe's counsel, David Goldfarb, wrote Hunter on July 2, 2004 demanding that the college reverse its decision. (Id. ¶ 15). He claimed that Hunter's policy constituted intentional

discrimination on the basis of mental disability and that Doe was entitled as a matter of reasonable accommodation to have her residency status immediately reassessed. (Id.). Goldfarb supplemented his letter with a statement from Doe's treating psychiatrist, Dr. David Grodberg, who set forth his diagnosis of major depressive disorder and attention deficit hyperactivity disorder and relayed that he had met with Doe on June 23, approximately two weeks after she had been released from the hospital. (Id. ¶ 16).

At that meeting, according to Grodberg, Doe did not exhibit suicidal ideation nor did she pose an imminent threat to herself or others. (Id. ¶ 16). Grodberg explained that the symptoms associated with her hospitalization seemed to have improved and were no longer interfering with her ordinary functioning. (Id.). In addition, Grodberg noted that isolation from the dormitory might be a complicating factor with respect to her illness. (Id.).

After Hunter refused to readmit Doe to Brookdale, Goldfarb spoke with Linda Chin, special counsel to defendant Rabb on July 26, 2004 requesting that the school make a reasonable accommodation by considering the summer session to be Doe's full semester of required absence from the dormitory thereby allowing Doe to reapply for housing in the fall. (Id. ¶¶ 17-18). Chin refused to accept that proposal and Doe was not permitted to return to the dormitory for the fall 2004 semester. (Id. ¶¶ 18, 20).

Doe initially moved for a temporary restraining order requiring Hunter to readmit her to the dorm. After that motion

was denied Doe moved for a preliminary injunction but later withdrew that motion.

I note that although it is not included in the complaint and therefore not considered for purposes of this motion, plaintiff was readmitted to residence in Brookdale beginning with the spring 2005 semester, and as I say as far as we know she's still there.

Defendants have moved, as I said, for dismissal pursuant to Fed. R. Civ. P. 12(b)(6)~~12(b)(6)~~. Everyone knows the standard for review on a 12(b)(6) motion. I can only dismiss plaintiff's claims if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Drake v. Delta Air Lines, Inc., 147 F.3d 169, 171 (2d Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (quotation marks omitted). ~~Drake v. Delta Airlines quoting Connelly v. Gibson~~. I must treat all factual allegations in the complaint as true and draw all reasonable inferences in plaintiff's favor. See Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000); Lee v. Bankers Trust Co., 166 F.3d 540 (2d Cir. 1999)~~Aneeno v. Citizen Utilities Co., Levy Bankers Trust~~. A complaint need only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Phillip v. Univ. of Rochester, 316 F.3d 291, 293 (2d Cir. 2003) (quoting Conley, 355 U.S. at 47). ~~Phillip v. University of Rochester quoting Connelly.~~

The forgiving notice pleading rules apply with particular stringency to complaints of civil rights violations.

See also, Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)~~Swierkiewicz v. Serema, N.A~~.

Defendants offer three arguments in support of dismissing the complaint. One, the Eleventh Amendment; two, a lack of standing to bring a claim pursuant to the Fair Housing Amendments Act ("FHAA"); and three, the complaint fails to state a claim for relief pursuant to Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794(a), and Section 202 of Title II of the Americans With Disabilities Act ("Title II"), 42 U.S.C. § 12132.

Now, I'm going to take each of those three arguments in turn, the Eleventh Amendment, lack of standing pursuant to the Fair Housing Amendment Act, and complaint fails to state a claim pursuant to Section 504 of the Rehabilitation Act and Section 202 of Title II of the ADA.

The first one, the Eleventh Amendment. The Eleventh Amendment provides in pertinent part that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by C~~c~~itizens of another S~~s~~tate." U.S. Const. amend. XI. For more than a century, see Hans v. Louisiana, 134 U.S. 1, 13, 10 S. Ct. 504, 33 L. Ed. 842 (1890)~~Hands v. Louisiana~~, the Supreme Court has interpreted the Eleventh Amendment to extend beyond the literal terms of the amendment to confirm what the Supreme Court calls the background principle of state sovereign immunity. See Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir. 2001) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.

Ct. 1114, 134 L. Ed. 2d 252 (1996))~~Garcia v. SUNY Health Sciences~~ quoting ~~Seminole Tribe of Florida v. Florida~~.

"The ultimate guarantee of the Eleventh Amendment is that non-consenting S~~s~~tates may not be sued by private individuals in federal court." That's Garcia v. S.U.N.Y., 280 F.3d at 107 (quoting Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001))~~Board of Trustees of University of Alabama v. Garrett~~. That guarantee yields, however, to Congress' unequivocal abrogation of a state sovereign immunity pursuant to a valid grant of constitutional authority. See i~~I~~d. (citing Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000))~~Kimmel v. Florida Board of Regents~~.

Defendants contend that the Eleventh Amendment bars all of plaintiff's claims against Hunter as well as her claims for monetary relief against the individual defendants, Rabb and Ayrava~~a~~inen. Plaintiff responds that the Eleventh Amendment is not a bar to any of her claims and insofar as she seeks money damages she seeks them only pursuant to Section 504 (Pl.'s Mem. in Opp. Mot. to Dismiss at 1, 6), and that with respect to that statute Hunter has waived its sovereign immunity regardless of whether the claim is for money damages or for injunctive relief.

Since plaintiff seeks damages only pursuant to Section 504 of the Rehabilitation Act, the Court must determine whether plaintiff may bring her claims for injunctive and declaratory relief pursuant to Title II and the FHAA. See Seminole Tribe, 517 U.S. at 44~~See Seminole Tribe~~. In addition,

with respect to plaintiff's Section 504 claim, I must determine whether plaintiff can sue for damages.

A) Injunctive and declaratory relief pursuant to Title II and the FHAA. As state entities~~y~~, senior colleges of the City University of New York, including Hunter, receive protection of New York State sovereign immunity. See Clissuras v. City of New York, 359 F.3d 79, 82 (2d Cir.), cert. denied, --- U.S. ----, 125 S. Ct. 498, 160 L. Ed. 2d 372 (2004).~~Clissuras v. City of New York.~~ When sued in their official capacities officers of state entities such as Rabb and ~~Ira~~Eija Ay~~g~~rava~~n~~inen are shielded from suit to the same extent as the state entities themselves. See Garcia, 280 F.3d at 107~~See Garcia~~. There's no indication in here that plaintiff intends to sue Rabb and ~~Ira~~ Eija Ay~~g~~rava~~n~~inen as individuals and indeed the caption lists the administrators with their titles next to their names. (Am. Compl. at 1). So it clearly appears that they're being sued in their official capacities and therefore the protections of the Eleventh Amendment extend to the individuals as well as to Hunter.

However, the well settled Ex parte Young, 209 U.S. 123, 29 S. Ct. 441, 52 L. Ed. 714 (1908), ~~ex parte Young~~ exception to the principle of sovereign immunity permits suits for declaratory or injunctive relief against state officers to prevent them from engaging in ongoing violations of federal law. See Henrietta D. v. Bloomberg, 331 F.3d 261, 288 (2d Cir. 2003), cert. denied, 541 U.S. 936, 124 S. Ct. 1658, 158 L. Ed. 2d 356 (2004); see also W. Mohegan Tribe and Nation v. Orange County, 395 F.3d 18, 21 (2d Cir. 2004).~~See Henrietta Dee v.~~

Bloomberg. See also W. Mohegan Tribe and Nation v. Orange County. The Eex parte Young doctrine rests on an "obvious fiction."; aAlthough the state is the actual party in interest, the suit must be brought against the state official. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270, 117 S Ct. 2028, 138 L. Ed. 2d 438 (1997). See Idaho v. Cordelen Tribe of Idaho. The Eex parte Young doctrine allows plaintiff to bring her claims for injunctive and declaratory relief from alleged ongoing discriminatory practices insofar as those claims are brought against the individual defendants. The Eex parte Young doctrine does not apply, however, to plaintiff's injunctive relief claims against Hunter.

Moreover, plaintiff does not contend that Hunter has consented to suit pursuant to the FHAA and Title II. Therefore, plaintiff's claims pursuant to those statutory provisions can only survive against Hunter if those provisions constitute effective abrogations of sovereign immunity. Nevertheless, because plaintiff may be afforded full relief by virtue of Eex parte Young claims against the individual defendants, I'm not going to engage in unnecessary constitutional interpretation to determine whether Title II and the FHAA were valid abrogations of state sovereign immunity.

Congress may not properly abrogate sovereign immunity pursuant to the powers granted it by Article I of the U.S. Constitution. See Garcia, 280 F.3d at 108; and SSeminole Tribe, 517 U.S. at 72-73. But Congress may abrogate state sovereign immunity pursuant to its power to enforce Section 5 of the Fourteenth Amendment. See Garcia, 280 F.3d at 108;

Kimel, 528 U.S. at 80. ~~See Garcia and Kimmel.~~ Therefore, to determine whether plaintiff may properly sue Hunter for injunctive and declaratory relief pursuant to Title II and the FHAA, I would have to ascertain whether those statutes constitute valid Section 5 enforcement legislation for the purposes of remedying the type of injury at issue here. See Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).~~.~~

Before undertaking that constitutional inquiry, however, I'm obligated first to evaluate whether the Court may resolve the dispute without interpreting the Constitution because if I can reach a conclusion without rendering a constitutional interpretation that's the better path and the more logical path. See Jean v. Nelson, 472 U.S. 846, 854, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944)); see also United States v. Rumely, 345 U.S. 41, 45-46, 73 S. Ct. 543, 545-46, 97 L. Ed. 770 (1953); Horne v. Coughlin, 191 F.3d 244, 246 (2d Cir. 1999).~~Jean v. Nelson quoting Specter Motor Services, Inc. v. McLaughlin, United States v. Rumely, Horn v. Caughlin.~~ Here, resolving the constitutional question of whether Title II and the FHAA constitute valid Section 5 abrogation of state sovereign immunity is absolutely unnecessary to afford plaintiff total relief.

In her claims against the individual defendants who oversee Hunter and are subject to the E~~e~~x parte Young doctrine, plaintiff may realize all injunctive and declaratory relief she

seeks. Therefore, no prejudice will inure to plaintiff by virtue of the Court's refusal to engage in this constitutional analysis at this time. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 446, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)~~Ling v. Northwest Indian Cemetery Protective Association~~.

In CSX Transportation, Inc. v. Board of Public Works of State of West Virginia, the U.S. Court of Appeals for the Fourth Circuit declined to address the question of sovereign immunity when complete relief was available to a plaintiff as it is here by means of the E~~e~~x parte Young doctrine. See 138 F.3d 537, 540 (1998). Just as in CSX Transportation, plaintiff's claims for injunctive relief against Hunter for violation of Title II and the FHAA are —duplicative of her claims against the individual defendants in their official capacities. I decline to engage in the unnecessary constitutional analysis.

That takes care of the injunctive and declaratory relief pursuant to the Title II and the FHAA. Now we'll turn to the damages under Section 504.

Plaintiff's claim pursuant to Section 504 of the Rehabilitation Act is brought for damages as well as injunctive and declaratory relief. The doctrine of sovereign immunity only permits suits for damages against states when Congress has validly abrogated the state sovereign immunity or when the state has consented to suit. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-68, 117 S Ct. 2028, 138 L. Ed. 2d 438 (1997); Will v. Mich. Dep't of State Police, 491 U.S. 58,

71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)~~Idaho v. Cordelen Tribe of Idaho, Will v. Michigan Department of State Police~~.

By accepting federal funds, Hunter has waived its sovereign immunity to suit pursuant to Section 504. Congress may induce consent to a waiver pursuant to its Article I spending clause powers by conditioning the provision of federal funds on relinquishment of sovereign immunity. See Garcia, 280 F.3d at 113.~~.~~ Congress enacted Section 504 pursuant to its spending clause powers and has explicitly provided that receipt of federal funds constitutes a waiver of sovereign immunity for Section 504 enforcement purposes. See Garcia (citing 42 U.S.C. §§ ~~—~~2000~~Đ~~d-7). That provides, in part, that a state "shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in F~~f~~ederal court for a violation of Section 504 of the Rehabilitation Act." 42 U.S.C. § 2000d-7(a)(1). So it's quite specific. See also Barbour v. Washington Metro Area Transit Auth., 374 F.3d 1161, 1166 (D.C. Cir. 2004), cert. denied, --- U.S. ----, 125 S. Ct. 1591, --- L. Ed. 2d ---- (2005); Lovell v. Chandler, 303 F.3d 1039, 1051-52 (9th Cir. 2002); Koslow v. Pennsylvania, 302 F.3d 161, 170-71 (3d Cir. 2002); Robinson v. Kansas, 295 F.3d 1183, 1189-90 (10th Cir. 2002); Nihiser v. Ohio Envtl. Prot. Agency, 269 F.3d 626, 628-29 (6th Cir. 2001); Jim C. v. United States, 235 F.3d 1079, 1081-82 (8th Cir. 2000); Stanley v. Litscher, 213 F.3d 340, 344 (7th Cir. 2000); Pederson v. La. St. Univ., 213 F.3d 858, 875-76 (5th Cir. 2000); Sandoval v. Hagan, 197 F.3d 484, 493-94 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275,

121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554 (4th Cir. 1999)~~See also Barbara v. Washington Metropolitan Area Transit Authority, Lovell v. Chandler, Koslow v. Pennsylvania, Robinson v. Kansas, Nihiser v. Ohio Environmental Protection Agency, Jim Cee v. United States, Stanley v. Litscher, Peterson v. Louisiana State University, Sandoval v. Haigen and Littman v. George Mason University~~.

In Garcia v. S.U.N.Y. Health Sciences Center, the Second Circuit explained that a state could not knowingly have waived its sovereign immunity for Section 504 purposes by accepting federal funds at a time when it mistakenly believed as a result of the Second Circuit's decision in Kilcullen v. New York State Dep't of Labor, 205 F.3d 77, 82 (2d Cir. 2000)~~Culcohen v. New York State Department of Labor~~ that the state sovereign immunity had already been abrogated pursuant to the ADA. 280 F.3d at 114. Kilcullen ~~Culcohen~~ held that Title I of the ADA was an effective abrogation of state sovereign immunity pursuant to the Section 5 enforcement power of Congress. See 205 F.3d at 78-81. The U.S. Supreme Court implicitly overruled that holding in Board of Trustees of the University of Alabama v. Garrett. See 531 U.S. at 368. The Garcia court concluded that a state could not have deliberately waived its right to sovereign immunity from Section 504 suits when, in reliance on Kilcullen, ~~Culcohen~~ the state falsely believed its sovereign immunity to have already been abrogated with respect to the ADA. See 280 F.3d at 114.

——————Footnote 4 of Garcia indicated a state might knowingly waive its sovereign immunity by continuing to accept federal funds after it became clear that the Americans With Disabilities Act does not abrogate state sovereign immunity in certain circumstances. Id. n.4.

District courts within the Second Circuit that have addressed this issue since Garcia have agreed that at some point it became sufficiently clear that Title II might not have been an effective abrogation and that continued acceptance of federal funds thereafter was a meaningful waiver of sovereign immunity from Section 504 enforcement suits. Those courts have disagreed, however, over the specific date when the state should have been put on notice. For our purposes we don't have to be concerned with that dispute because we're talking about events here long after that issue.

Some courts have held that the operative date was September 25, 2001 when Garcia was decided. See Killcullen v. New York State Dep't of Labor, No. 97-CV-484, 2003 WL 1220875, at *3 n.1 (N.D.N.Y. Mar. 13, 2003)~~Culcohen~~. While others have held that it was February 25, 2001 when Garrett was decided. See Cardew v. New York State Dep't of Corr. Servs., No. 01 Civ. 3669, 2004 WL 943575, at *8 (S.D.N.Y. Apr. 30, 2004)~~Cardo v. New York State Department of Correctional Services~~. One case suggested in dictum the states may have knowingly waived sovereign immunity as early as April 17, 2000 when the Supreme Court granted the writ of certiorari in Garrett. See Wasser v. New York State Office of Vocational and Educ. Servs. For Individuals with Disabilities, No. 01-CV-6788, 2003 WL

22284576, at *10 (E.D.N.Y. Sept. 30, 2003). ~~See Wasser v. New York State Office of Vocational and Educational Services.~~ I do not need to weigh in on that dispute regarding the date as of which knowing waiver occurred. See Doe v. Goord, No. 04 CV 0570, 2004 WL 2829876, at *17 (S.D.N.Y. Dec. 10, 2004). ~~Doe v. Goord.~~ Regardless of which date is operative, the events giving rise here occurred well after the state knowingly waived its sovereign immunity because Doe was excluded from her dorm room in the spring of 2004 and remained excluded until the spring or the beginning of 2005.

To the extent plaintiff brings claims for injunctive and declaratory relief pursuant to Title II and the FHAA, the E~~e~~x parte Young doctrine permits her to maintain her suit against the individual defendants. To the extent she seeks damages pursuant to 504, Hunter has waived its sovereign immunity and therefore the Eleventh Amendment does not preclude plaintiff's action.

Now let's go on to the lack of standing to pursue an FHAA claim. Defendants claim that plaintiff lacks standing to bring a claim under the FHAA because she does not rent her dormitory room from Hunter College within the meaning of the Fair Housing Act according to defendants. I view that as an issue of a substantive element of a claim for relief and not a standing issue. So it's really to be determined later. There's enough here to get by on this pleading issue.

The provision creating a private right of action for violation of the FHAA entitles an aggrieved person to sue for relief. 42 U.S.C. § 3613(a). An aggrieved person includes

someone who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). A discriminatory housing practice is any practice made unlawful by Sections 3604, 3605, 3606 or 3617 of Title 42. 42 U.S.C. § 3602(f). This broad language leads courts to refrain from imposing standing barriers beyond those required by Article III on plaintiff's attempting to vindicate rights that have allegedly been compromised by violations of the FHAA. See Smith v. Pacific Props. & Dev. Corp., 358 F.3d 1097, 1102 (9th Cir. 2004), cert. denied sub nom. Pacific. Props. & Dev. Corp. v. Disabled Rights Action Comm., --- U.S. ----, 125 S. Ct. 106, 160 L. Ed. 2d 116; see also Transp. Workers Union of Am., Local 100, AFL-CIO v. New York City Transit Auth., 342 F. Supp. 2d 160, 165 (S.D.N.Y. 2004).~~See Smith v. Pacific Properties & Development Corp., Transportation Workers Union of America v. New York City Transit Authority.~~

In Regional Economic Community Action Program, Inc. v. City of Middletown, the Second Circuit held that an organization had standing to bring an FHAA claim on behalf of itself and a class of aggrieved persons when it was denied a special use permit to create halfway houses for recovering alcoholics. 294 F.3d 35, 46 n.2 (2d Cir. 2002). The court did not treat buyer or renter status as a standing prerequisite for the purpose of the plaintiff's FHAA claim. Id. Accordingly, I do not accept defendant's argument that plaintiffs lack standing to bring an FHAA claim.

Defendants' arguments properly addressed as one relating to failure to state a claim. However, even when so

construed, the argument is unavailing. The FHAA makes it unlawful "[t]o discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of that person." 42 U.S.C. § 3604(f)(2)(A). ~~—~~Discrimination includes a refusal to make reasonable accommodation and rules, policies, practices or services when such accommodations may be necessary to afford such person an equal opportunity to use and enjoy a dwelling. That's a quote from Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 333 (2d Cir. 1995) (quoting 42 U.S.C. § 3604(f)(3)(B)).~~Shapiro v. Cadman Towers.~~

I cannot say at this early stage of the litigation before there's been any discovery that the allegations as contained in the complaint are entirely inconsistent with plaintiff's potential recovery pursuant to the FHAA. See Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).~~See Swierkiewicz~~. Even assuming that defendants are correct that a plaintiff who is not a purchaser or a renter cannot state a claim pursuant to the FHAA, the fact that plaintiff did not pay money for the right to live in her dormitory room may not be dispositive. She may, for example, have~~d~~ provided consideration in another form that would qualify her as a renter. I cannot say that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." That's from Swierkiewicz~~—~~, at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). ~~quoting~~

Hyshon v. King & Spalding. Therefore, I'm not going to dismiss the FHAA claim.

Now let's turn to the alleged failure to state a Title II of the ADA and Section 504 of the Rehabilitation Act claim.

Defendants take the position that plaintiff has failed to state a claim under 504 of the Rehabilitation Act and Title II of the ADA. 504 provides that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of his or her disability, be excluded from participation in, and be denied the benefits of, or be subjected to discrimination under any program or activity receiving fFederal financial assistance. 29 U.S.C. § 794(a).

In Title II of the ADA mandates 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." 42 U.S.C. § 12132. Although phrased differently, the standards imposed by Title II and Section 504 are essentially the same and the two statutes are ordinarily interpreted together. See Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004); Henrietta D., 331 F.3d at 272See PAL v. National Board of Medical Examiners Henrietta Dee.

In the wake of the Supreme Court's decision in Swierkiewicz, a discrimination claim need not establish a prima facie case in order to survive a motion to dismiss. 534 U.S. at 512; see Budde v. United Ref. Co. of Pennsylvania, No. 03-

CV-6547, 2004 WL 1570262, at *2 (W.D.N.Y. July 9, 2004); Sanzo v. Uniondale Union Free Sch. Dist., 225 F. Supp. 2d 266, 270 (E.D.N.Y. 2002).~~See Budde v. United Refining Company of Pennsylvania, Sanzo v. Uniondale Union Free School District.~~ A complaint must provide the defendant simply with a short and plain statement of the claim showing that the pleader is entitled to relief pursuant to Rule 8A. Fed. R. Civ. P. 8(a). From that short and plain statement, defendants have to have "fair notice of what the plaintiff's claim is and the grounds upon which it rests." That's from Swierkiewicz, 534 U.S. at 512 (citing Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))~~Swierkiewicz~~.

The amended complaint, I find, complies with Swierkiewicz. As this litigation proceeds, facts may develop that are consistent with the allegations that would entitle her to relief. See id. at 514 (quoting Hishon, 467 U.S. at 73). Defendants argue that as a matter of law the facts alleged lead to the conclusion that plaintiff was unqualified to live in the housing. Defendants also maintain that plaintiff did not suffer any discriminatory treatment on account of her disability. The allegations in the amended complaint do not, however, demonstrate a patent lack of qualification or absence of discrimination.

Although plaintiff has alleged that she's "substantially limited in the major life activities of sleeping, eating, thinking and interacting with others" as well as that she has "a history of substantial limitation in caring for herself~~,~~" (Am. Compl. ¶ 8), those allegations do not

establish as a matter of law that she lacks "functions [that] are plainly integral to the independent living required in a dormitory." (Def.'s Mem. in Supp. of Mot. to Dismiss at 18).

Title II requires that individuals are qualified for particular services when they can "with or without reasonable modifications to rules, policies or practices … meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Her allegations do not foreclose the possibility that even with reasonable accommodation she would be unable to meet the requirements for residence in Brookdale. Indeed, to the extent her ability to live in the dorm without hurting herself may have been a legitimate qualification, she has alleged facts that indicate that she might have been able to reside at Brookdale safely before being permitted to return.

For example, the amended complaint includes a description of an opinion issued by her treating physician that by July of 2004 "she did not exhibit suicidal ideation and did not place herself or others in imminent danger;~~,~~ that the symptoms that were associated with her hospitalization appeared to have improved and currently do not disrupt her emotional, academic and social functioning." (See Am. Compl. ¶ 16). Plaintiff may have been qualified to reside in Brookdale at some point before she was readmitted or at least she may have been capable of becoming qualified if provided reasonable accommodation.

Defendants maintain that neither the terms of the housing contract nor its implementation constitute discrimination against plaintiff on account of her disability. Defendants characterize their policy as a neutral, conduct-based one that was administered in a non-discriminatory manner. (Defs.' Reply Mem. in Supp. of Mot. to Dismiss at 8). Even assuming that defendants are correct that the policy did not constitute disparate treatment or intentional discrimination, plaintiff may still have a viable claim for failure to make reasonable accommodation. See Reg'l Econ. Cmty. Action Prog., Inc., 294 F.3d at 48. ~~Regional Economy Committee Action Progress, Inc.~~

In sum, I cannot determine from the facts alleged in the amended complaint "that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz, 534 U.S. at 514 (quoting Hishon, 467 U.S. at 73). That's Swierkiewicz again which sets a low bar under 12(b)(6). I, therefore, am denying defendants' motion to dismiss the complaint.

In sum, the Eleventh Amendment does not bar plaintiff's claims and she has stated claims upon which relief can be granted. Defendants' motion is denied.

Thank you.

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~~I cer~~

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.

Shari Riemer

Dated: 9/7/05