UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Plaintiff, -against- HUNTER COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, JENNIFER RAAB, and EIJA AYRAVAINEN, Defendants.	:	04 Civ. 6740 (SHS)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE,	:	
Plaintiff,	:	
-against-	:	04 Civ. 6740 (SHS)
HUNTER COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, JENNIFER RAAB, and EIJA AYRAVAINEN,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Hunter College of the City University of New York ("Hunter College"), Jennifer Raab, and Eija Ayravainen ("Defendants") submit this memorandum of law in support of defendants' motion to dismiss the amended complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Preliminary Statement

The amended complaint purports to state causes of action under the Fair Housing Amendments Act of 1988 ("FHA"), Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 (the "Rehab Act"). However, plaintiff's claims are barred by the Eleventh Amendment, except insofar as plaintiff seeks prospective injunctive relief against the individual defendants. Plaintiff's claims under the FHA are also barred by her lack of standing under that statute, since the College's provision of free housing to plaintiff is not a sale or rental within the meaning of the Fair Housing Act, which applies only to transactions for "consideration."

The Amended Complaint also fails to state a claim upon which relief may be granted. Plaintiff is not "otherwise qualified" under the Rehab Act or Title II of the ADA, for residence within the Hunter College dormitory, because she engaged in conduct that violates the school's housing contract and demonstrates a lack of capacity for independent living. Moreover, the decision to remove plaintiff from College housing does not rest on her disability, which her doctor diagnoses as Major Depressive Disorder and Attention Deficit Hyperactivity Disorder. Rather, plaintiff's removal from housing was pursuant to the Hunter College Housing Contract, which was triggered by her attempted suicide. The policy applies equally to disabled and to nondisabled students who engage in such conduct. A suicide attempt may occur in an array of circumstances, such as intoxication or a romantic breakup, which have nothing to do with a mental disability. To the extent that plaintiff's claim rests on an allegation of discrimination on the basis of the severity of her disability, the courts have recognized that there is no cause of action for discrimination based on the severity of a disability. Finally, the ADA and the Rehab Act does not provide a right of action for punitive damages; accordingly, plaintiff's claim for punitive damages must be dismissed.

Statement of Facts

Defendant Hunter College is a senior college within the City University of New York ("CUNY"). Defendant Jennifer Raab is the President of Hunter College. Am. Compl. ¶ 7. Defendant Eija Ayravainen is the Acting Vice President of Student Affairs and Dean of Students for Hunter College. Am. Compl. ¶ 7.

Plaintiff is a full-time student in her sophomore year at Hunter College. Am. Compl. ¶ 5. During the 2003-2004 academic year, plaintiff was a resident of the Brookdale

Residence Hall, a Hunter College dormitory. Am. Compl. ¶¶ 5, 6, 9. Plaintiff has, since the commencement of her studies at Hunter College, been a student within the CUNY Honors Program. See Affidavit of plaintiff dated August 19, 2004 ("Plaintiff Aff.") at ¶ 2.[1] By virtue of her participation in the Honors Program, plaintiff receives free dormitory housing at the Brookdale Residence Hall. Plaintiff Aff. ¶ 4.

Plaintiff has been diagnosed as suffering from Major Depressive Disorder and Attention Deficit Hyperactivity Disorder. Am. Compl. ¶ 8. These disorders result in insomnia, decreased appetite and perceptual disturbances; they also interfere with her ability to socially interact with her peers, and cause suicidal ideation. Id. Plaintiff alleges that she is substantially limited in the activities of sleeping, eating, and interacting with others, and in taking care of herself. Am. Compl. ¶ 8. Plaintiff has suffered from these symptoms since at least the junior year of high school; she was on medical leave during the majority of her junior year of high school. Id. She was, prior to her matriculation at Hunter College, hospitalized for depression and self-harm treatment. Id. and Spann Decl. Ex. 1 (letter from plaintiff to Pamela Burthwright dated June 14, 2004); see Am. Compl. ¶ 12 (referencing letter).

On June 5, 2004, plaintiff attempted suicide in her dormitory room, by taking approximately 20 Tylenol PM capsules. Am. Compl. ¶ 10. Earlier in the year, in January 2004,

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[1] When reviewing a motion to dismiss, a court may consider documents attached to the pleadings, as well as documents outside the pleadings "that are integral or relied upon by the plaintiff in preparing the pleadings." See Goldin-Feldman Co., Inc. v. Blum & Fink, Inc., 2000 WL 1182798, at *2 (S.D.N.Y. Aug.18, 2000) (citing Int'l Audiotext Network, Inc. v. American Tel. and Tel. Co., 62 F.3d 69, 72 (2d Cir.1995)). The Court may thus rely on the letters referenced in plaintiff's Amended Complaint. The Court may also take judicial notice of the affidavits filed simultaneously with plaintiff's complaint, and in support of her application for a temporary restraining order and preliminary injunction.

she had been taken by ambulance from the dormitory to Cabrini Hospital, after taking an overdose of pain medication. Plaintiff Aff. ¶ 7.

Following her June 2004 suicide attempt, Hunter College notified plaintiff that she would not be permitted to return to the dormitory for the fall 2004 semester, pursuant to the Hunter College Housing Contract, which provides 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.

Am. Compl. ¶¶ 10, 13. The school informed plaintiff that "the [June 5, 2004] incident raises compelling concerns about your safety and well-being in a dormitory setting." Spann Decl. Ex. 2 (June 21, 2004 letter from Eija Ayravainen to plaintiff); see Am. Compl. ¶ 13, referencing letter. Vice President Ayravainen continued, "We believe this decision is in your best interests and the best interests of the Residence Hall community. Our goal is to enable you to receive intensive mental health counseling in a setting with reduced pressures and distractions, which will in turn help you return to the Residence Hall better able to handle the challenges of academic and residence life." Spann Decl. Ex. 2. Vice President Ayravainen indicated that plaintiff would be required to "make an appointment to see Assistant Dean Madlyn Stokely in the Office of Student Services," who would "arrange for you to see a Student Services counselor on a regular basis throughout your hiatus from the Residence Hall," and that the counselor "will coordinate with other mental health professionals who may be assisting you, as appropriate." Spann Decl. Ex. 2. In response to a later letter from plaintiff's counsel, the College's attorney wrote that "in light of

the possible harm Ms. [Doe] may cause herself and others in the residence Hall, it is not possible to permit her to reside in the room of the Residence Hall." Spann Decl. Ex. 3 (July 14, 2004 letter from Linda Chin to David Goldfarb); see also Am. Compl. ¶ 17 (referencing letter). Ms. Chin continued: "We urge Ms. [Doe] to receive or to continue to receive intensive mental health counseling. She may request to return to college housing starting with the Spring, 2005 semester. [She] must also submit medical documentation regarding her emotional well-being[.]" Id.

On October 7, 2004, plaintiff filed an Amended Complaint, alleging the following causes of action: (1) intentional discrimination and disparate impact under the Fair Housing Act; (2) failure to provide a reasonable accommodation under the Fair Housing Act; (3) intentional discrimination and failure to provide a reasonable accommodation under Title II of the Americans with Disabilities Act; and (4) intentional discrimination under § 504 of the Rehabilitation Act.

ARGUMENT

Point I

The Eleventh Amendment Bars Plaintiff's Claims Alleged Pursuant to Title II of the ADA, § 504 of the Rehab Act, and the FHA Against CUNY, and Her Claims Under These Statutes for Monetary Relief Against the Individual Defendants

The Eleventh Amendment bars all federal suits for any kind of relief against the State of New York, its agencies and entities, in the absence of the State's consent. Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 97-100 (1984). CUNY[2] and its senior colleges, including Hunter

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[2] Although Hunter College is named as a defendant, CUNY is the sole correct (continued...)

College, are state entities entitled to Eleventh Amendment immunity, Clissuras v. City University of New York, 359 F.3d 79, 82 (2004), and have not consented to suit under the ADA, the Rehab Act or the FHA.

While "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority,'" Board of Trustees of Alabama v. Garrett, 531 U.S. 356, 363 (2001) (citations omitted), those circumstances are not present here, as detailed below in Points I.A through I.C.

With respect to the defendant State officials, the Eleventh Amendment also deprives the federal courts of jurisdiction over an action against a state official acting in his official capacity.[3] Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 105-06 (1984). Defendants Raab and Ayravainen are immune for actions in their official capacities, except where plaintiff seeks prospective injunctive relief against them for an alleged violation of federal law. Id.; see Ex Parte Young, 209 U.S. 123 (1908). However, to the extent that Plaintiff seeks such relief, she lacks standing to bring a FHA claim (see Point II below), and her complaint fails to state a claim under the ADA and Rehab Act (see Point III below). Therefore, she is not

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[2](...continued)
institutional defendant. See Educ. Law § 6203. Hunter College is a "senior college" within the CUNY system. See Educ. Law § 6203(5) and Weinbaum v. Cuomo, 219 A.D.2d 554, n.1 (1st Dept. 1995), appeal dismissed, 87 N.Y.2d 917 (1996) (Hunter College is a "senior college").

[3] The complaint raises no action, implicitly or explicitly, against the individual defendants other than their official capacities. In any event, neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials. See Lane v. Maryhaven Ctr. of Hope, 944 F. Supp. 158, 160-62 and 164-65 (E.D.N.Y. 1996) (citing, inter alia, Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995)).

entitled to relief against the State officers named here as defendants.

A. Title II of the ADA Did Not Effectively Abrogate the States' Eleventh Amendment Immunity to Suit For Discrimination Based On Disability in the Provision of Dormitory Housing

Title II of the ADA contains a provision which purports to abrogate the States' Eleventh Amendment immunity. 42 U.S.C. § 12202. However, the Supreme Court's recent decision in Tennessee v. Lane, ___ U.S. ___, 124 S. Ct. 1978 (2004), compels the conclusion that this provision, as applied to the facts of this case, was not a valid exercise of Congress' abrogation power under § 5 of the Fourteenth Amendment.[4]

The Supreme Court has concluded that § 5 authorizes Congress to "remedy and deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000). However, such remedial and preventive measures "may not work a 'substantive change in the governing law." Lane, ___ U.S. ___, 124 S. Ct. at 1986. In determining whether Congress has acted within the scope of its § 5 authority to abrogate States' sovereign immunity, the Court has set out a three-part "congruence and proportionality" test. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997). A court must (1) identify with some precision the scope of any fundamental constitutional right at issue, (2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and (3) if so, analyze whether the statute is an appropriate, congruent and proportional response to that history and pattern of unconstitutional treatment. See Bd. of Trustees of Univ. of

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[4] The Fourteenth Amendment provides the only basis for Congress to abrogate the State's Eleventh Amendment immunity. Congress may not effect abrogation under its Article I commerce power. Board of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 364 (2001).

Alabama v. Garrett, 531 U.S. 356, 365 and 374 (2001), Boerne, 521 U.S. at 520.

In Garrett, the Court concluded that Title I of the ADA, prohibiting disability discrimination in public employment, was not a valid exercise of Congress' § 5 abrogation power, because Title I was unsupported by a relevant history and pattern of constitutional violations by the State. Garrett, 531 U.S. at 368. As the Court noted, neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of unconstitutional employment discrimination; rather, the focus was discrimination in employment in the private sector, while no mention was made of public employment. Garrett, 531 U.S. at 371-72.

In Lane, the Court observed that Title II sought, *inter alia*, to enforce a variety of basic constitutional guarantees, infringements of which are subject to more searching judicial review than is employment discrimination. ___ U.S. ___, 124 S. Ct. at 1988. At issue in Lane was the fundamental right of access to the courts, under the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment. Following the Boerne analysis, the Court then considered the question of whether there was a history of violations by the States of these specific constitutional guarantees, as reflected in the legislative history of the ADA. The Court noted numerous references in that legislative history regarding barriers to the access of the courts by disabled individuals. Lane, ___ U.S. ___, 124 S. Ct. at 1990-91.

The Court then turned to the third part of the Boerne test, the congruence and proportionality aspect. After observing that Title II "reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees," the Court declined to consider Title II as an "undifferentiated whole." Lane, 124 S. Ct. at 1992. Rather, the Court

concluded that the relevant enquiry was whether Congress had the power under § 5 to enforce a specific constitutional guarantee at issue in the case at hand – there, the right of access to the courts. 124 S. Ct. at 1993. Because the remedy imposed by Title II – a duty to provide reasonable accommodations – was consonant with remedies imposed in other contexts to ensure a right of access to the courts, the Supreme Court found Title II to be congruent and proportional as it applied to ensure a right of access to the courts. 124 S. Ct. at 1994. See also Miller v. King, 2004 WL 2035197 (11th Cir. Sept. 14, 2004) (discussing and applying Lane analysis).

The Boerne/Lane analysis,[5] applied to the facts of this case, compels the conclusion that Title II of the ADA, in the context of dormitory housing, does not effectively abrogate the States' Eleventh Amendment immunity. As a threshold matter, dormitory housing is not a constitutionally protected fundamental right. In Lane, the Court provided exemplars of fundamental rights, such as voting, marrying, property interests implicated by zoning decisions, involuntary commitment, and jury service. ___ U.S. ___, 124 S. Ct. at 1989-1990 (listing cases). The Supreme Court has held that there is no fundamental right to housing. See Lindsey v. Normet, 405 U.S. 56 (1972).[6] In addition, and more specifically, the Second Circuit has held that

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[5] The Supreme Court's decision in Lane appears to require the abandonment of the analysis announced in Garcia v. S.U.N.Y. Health Center of Brooklyn, 280 F.3d 98, 109-111 (2d Cir. 2001). The Garcia court held that Title II in its entirety is neither congruent nor proportional with the requirements of the Fourteenth Amendment, and thus limited abrogation to those cases in which a plaintiff establishes that the violation at issue was motivated by discriminatory animus or ill will based on his or her disability. Under the analysis in Lane, discriminatory animus is irrelevant where no fundamental right is implicated. See Roe v. Johnson, 2004 WL 1944460 at *5 n.9 (S.D.N.Y. Sept. 1, 2004).

[6] See also Craig v. Boren, 429 U.S. 190, 216 (1976) (Burger, C.J., dissenting) ("[E]ven interests of such import in our society as public education and housing do not qualify as 'fundamental rights' for equal protection purposes.").

dormitory housing is not a fundamental right. See Bynes v. Toll, 512 F.2d 252, 255 (2d Cir. 1975) (considering challenge to SUNY dormitory policy barring children of dormitory residents from living in the dormitory; "it is well established that the right to housing is not a fundamental interest which would require the more stringent 'compelling state interest' test") (citing Lindsey v. Normet, 405 U.S. 56, 73-74 (1972)). Indeed, dormitory housing is not available for the vast majority of CUNY students.

Even if there were a fundamental right to dormitory housing, there can be no effective abrogation unless the legislative history reflects Congressional findings of a pattern of State discrimination in the provision of dormitory housing. In the absence of such Congressional findings, there can be no effective abrogation. See, e.g., Roe v. Johnson, 2004 WL 1944460 at *6 (S.D.N.Y. Sept. 1, 2004) (no abrogation found where "[t]he legislative record for the ADA [did] not include any findings documenting a pattern of state discrimination in the admission of attorneys to the bar, or more generally in the granting of licenses to professionals."). The legislative history of the ADA does not include any findings documenting a pattern of State discrimination in the provision of dormitory housing. See 42 U.S.C. § 12101; S. Rep. No. 101-116 (1989); H.R. Rep. No. 101-485 parts 1, 2, 3 and 4 (1990), reprinted in 1990 U.S.C.C.A.N. 267 (part 2 at page 311 contains a lone reference to physical accessibility of a dormitory, in which no State involvement is indicated); H.R. Conf. Rep. 101-558 (1990); H.R. Conf. Rep. No. 101-596 (1990), reprinted in 1990 U.S.C.C.A.N. 565. In fact, to the extent that the legislative history touches on the broader issue of housing (which it does in the context of Title III, the "public accommodations" provision which only governs private entities), see H.R. REP. 101-485(IV) at 55, 1990 U.S.C.C.A.N. 512, 544, it explicitly relies on Congress' Article I

commerce clause power, which cannot serve as a basis for abrogation. See Garrett, 531 U.S. at 364 ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.").

Because the application of Title II of the ADA to dormitory residents, like ADA Title I's general prohibition of employment discrimination, does not enforce a basic constitutional guarantee secured by § 5 whose violation would trigger a higher standard of review, and because there is no legislative history indicating Congressional findings sufficient to support abrogation, the congruence and proportionality enquiries are not implicated. Title II of the ADA did not effect a valid waiver of the States' Eleventh Amendment immunity in the context of dormitory housing. .

B. Section 504 of the Rehab Act Did Not Effectively Abrogate the States' Eleventh Amendment Immunity to Suit For Discrimination Based On Disability in the Provision of Dormitory Housing

The Rehab Act also contains a provision which purports to abrogate the States' Eleventh Amendment immunity. 42 U.S.C. § 2000d-7(a)(1). Because § 504 of the Rehab Act and Title II of the ADA offer essentially the same protections, the Second Circuit has held that these statutes are subject to the same Eleventh Amendment analysis. See Garcia v. S.U.N.Y. Health Center of Brooklyn, 280 F.3d 98, 113 (2d Cir. 2001) (superseded in other respects by Tennessee v. Lane, ___ U.S. ___, 124 S. Ct. 1978 (2004)).

As set forth in Point I.A. supra, dormitory housing is not a fundamental right. Even if it were, the legislative history of the Rehab Act is devoid of reference to dormitory housing, or even the broader category of housing. Still less does it reference any pattern of State discrimination in that arena.

Because the application of the Rehab Act to dormitory residents, like ADA Title I's general prohibition of employment discrimination, does not enforce a basic constitutional guarantee secured by § 5 whose violation would trigger a higher standard of review, and because there is no legislative history indicating Congressional findings sufficient to support abrogation, the congruence and proportionality enquiries are not implicated. The Rehab Act did not effect a valid waiver of the States' Eleventh Amendment immunity in the context of dormitory housing.

C. The FHA Contains No Abrogation of the States' Eleventh Amendment Immunity

The Fair Housing Act contains no provision unequivocally abrogating the States' Eleventh Amendment immunity.[7] Accordingly, the Eleventh Amendment bars plaintiff's FHA claim. See Welch v. Century 21 Chimes Real Estate Inc., 1999 WL 29950 at *1 (E.D.N.Y. Feb. 27, 1991) (noting absence of abrogation provision); see also De Jesus-Keolamphu v. Village of Pelham Manor, 999 F. Supp. 556, 564 (S.D.N.Y. 1998) (based on Eleventh Amendment, granting motion to dismiss claims against State defendants for monetary damages under, inter alia, Fair Housing Act).

Because Congress did not abrogate the States' Eleventh Amendment immunity for the claims set forth in the Amended Complaint, each of plaintiff's claims must be dismissed in

[7] In any event, the Fair Housing Amendments Act was passed pursuant to the Commerce Clause. See Groome Resources Ltd. v. Parish of Jefferson, 234 F.3d 192, 195 (5th Cir. 2000). The Congress does not, however, have the power to abrogate unilaterally the States' immunity under Article I; rather, it may only do so when its acts under § 5 of the Fourteenth Amendment. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59-73 (1996).

their entirety as against CUNY/Hunter College, and plaintiff's claims for damages[8] against the individual defendants require dismissal.

Point II

Plaintiff Lacks Standing to Sue Under the Fair Housing Act

The Fair Housing Act, 42 U.S.C. § 3601 et seq., prohibits discrimination "in the sale or rental" to a "buyer or renter" because of a handicap. 42 U.S.C. § 3604(f)(1). The Act defines "to rent" as "to lease, to sublease, to let or otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. § 3602(e) (emphasis added). The complaint is devoid of allegations to establish that Plaintiff is a "buyer or renter" within the meaning of the Fair Housing Act. Indeed, Plaintiff does not "rent" dormitory housing from Hunter College within the meaning of the Fair Housing Act, because Hunter College provides dormitory housing to Honors College participants such as Plaintiff free of charge. Plaintiff Aff. ¶ 4.[9]

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[8] Moreover, the Supreme Court has held that punitive damages may not be awarded in private suits brought pursuant to 42 U.S.C. § 12132 (Title II of the ADA) or 29 U.S.C. § 794(a) (§ 504 of the Rehab Act). Barnes v. Gorman, 536 U.S. 181, 189 (2002). Plaintiff's claims for punitive damages under these statutes must be dismissed.

[9] A court considering whether standing exists under Fed. R. Civ. P. 12(b)(1) may consider extrinsic material. United States v. Vasquez, 145 F.3d 74, 80 (2d Cir. 1998); Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1011 (2d Cir. 1986). A court considering a motion under Rule 12(b)(6) may consider the following materials: (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents "integral" to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, and (4) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence. In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003) (footnotes omitted).

Plaintiff has argued that "in addition to barring discrimination in the sale or rental of dwellings, the statute specifically and repeatedly makes it unlawful to 'otherwise make unavailable or deny' the right to use property because of a handicap." Pl. Reply Mem. on TRO at 2, citing 42 U.S.C. § 3604(f)(1) et al. This construction ignores the plain language of the very statute plaintiff cites, which bars discrimination "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . . ." 42 U.S.C. § 3604(f)(1) (emphasis added).[10] If one is not a "buyer" or "renter" as defined in the Act, the "otherwise make unavailable" language is inapplicable. Plaintiff's Fair Housing Act claim must be dismissed due to her lack of standing.

Point III

Plaintiff Fails to State a Claim Under § 504 of the Rehab Act, Title II of the ADA, or the Fair Housing Act

A. Plaintiff Is Not "Otherwise Qualified" for Residence in the Hunter College Dormitory, Within the Meaning of Title II of the ADA and § 504 of the Rehab Act

To state a claim for violation of § 504 of the Rehab Act, a plaintiff must show (1) that she is a "handicapped" or "disabled" person within the meaning of the statutes; (2) that she is "otherwise qualified" for the program at issue; (3) that she is being excluded from the program

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[10] The case cited by plaintiff for this proposition, Woods v. Foster, 884 F. Supp. 1169 (D. Ill. 1995), is from another jurisdiction and its reasoning does not appear to have been adopted elsewhere in the ten years since its issuance. In any event, Woods is distinguishable as the defendant program in essence received the "rental" sum from a third party pursuant to a contract for the housing of these residents (as opposed to a grant for funding general operations). Plaintiff's citation to Anonymous v. Goddard Riverside Community Ctr., Inc., 1997 WL 475165 (S.D.N.Y. July 18, 1997) is misplaced. Judge Scheindlin in fact dismissed that plaintiff's FHA claim, and only "assume[d]" "for purposes of this motion" that plaintiff's receipt of federal funds constituted consideration for plaintiff's housing. Id. at n.4.

solely by reason of her disability; and (4) that the program exists as part of a program or activity receiving Federal financial assistance. Doe v. New York University, 666 F.2d 761, 774 (2d Cir. 1981) (reversing mandatory preliminary injunction which had ordered NYU medical school to readmit medical student who was told to move out of her dormitory room and stop attending classes, based on her history of self-harm, suicide attempts, and threatening behavior to others). To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she is being excluded from participation in, or being denied the benefits of some service, program or activity by reason of her disability; and (3) the entity which provides the service, program or activity is a public entity. Atkins v. County of Orange, 251 F. Supp. 2d 1225, 1231 (S.D.N.Y. 2003).

Plaintiff bears the burden of establishing that she is "otherwise qualified" for residence in the Hunter College dormitory. Doe v. NYU, 666 F.2d at 777. This requirement "refers to a person who is qualified in spite of her handicap[;] an institution is not required to disregard the disabilities of a handicapped applicant, provided the handicap is relevant to reasonable qualifications for acceptance, or to make substantial modifications in its reasonable standards or program to accommodate handicapped individuals but may take an applicant's handicap into consideration, along with all other relevant factors, in determining whether she is qualified[.]" 666 F.2d at 775. Plaintiff does not plead, nor can she establish, that she is otherwise qualified for residence within the Hunter College dormitory, under the analysis set forth by the Second Circuit.

In Doe v. NYU, the Second Circuit considered at length the meaning of "otherwise qualified," in a strikingly parallel factual situation. The plaintiff in that case was

accepted to NYU's medical school after falsely representing in her application that she did not have any chronic or recurrent illnesses or emotional problems. Despite her academic gifts, she "had suffered for many years from serious psychiatric and mental disorders, which evidenced themselves in the form of numerous self-destructive acts and attacks upon others, followed by periodic treatments by psychologists and psychiatrists and admissions to various psychiatric hospitals for care and therapy." 666 F.2d at 766. She attempted suicide by a variety of methods, including ingesting sleeping pills and other substances, and she cut herself. She intermittently attended and then terminated therapy. Plaintiff started attending the NYU medical school in September 1975. 666 F.2d at 767. That fall, the school discovered her history of self-harm and suicide attempts. However, the school agreed to permit her to remain at the school on the condition that she undertake therapy and monitoring by the school, conditions to which she agreed. However, she did not continue this therapy, and bled herself. The school directed that she stop attending classes and vacate her dormitory room. She reapplied, and the school declined to admit her after concluding that she did not meet its policy, which required that a student seeking readmission "demonstrate that the problems that precipitated the leave are resolved, that the applicant must be able to handle all of the academic and emotional stress of attending medical school, and that the school must be satisfied that the applicant will be able to function properly after graduation as a physician," and specifically that "she does not pose a significant risk of reexhibiting her prior disorder." 666 F.2d at 767-69.

The plaintiff in that action filed suit under the Rehabilitation Act, seeking readmission to medical school; she also applied for a mandatory preliminary injunction requiring

the school to readmit her.[11] The Second Circuit, considering an appeal of the issuance of a preliminary injunction, concluded that she was not "otherwise qualified" for readmission, in light of her handicap. The Court noted that the mere fact of her initial admission to the program did not establish that she was "otherwise qualified," as she falsely represented that she did not suffer from any recurrent illnesses or emotional disorders. 666 F.2d at 777. The Court held, however, that

> NYU . . . was entitled, in determining whether she was qualified, to be advised of and to take into account her mental impairment, since it is directly relevant to her qualifications and bears upon her ability to function as a student and doctor, to get along with other persons, and to withstand stress of the type encountered in medical training and practice. NYU is of necessity concerned with the safety of other students, faculty and patients to whom Doe would be exposed, since this could adversely affect them as well as the success and reputation of its Medical School activities. Any harm done by her as a medical student to others, moreover, might expose it to legal liability for knowingly permitting such exposure.

666 F.2d at 777. The Court continued,

> In our view she would not be qualified for readmission if there is a significant risk of such recurrence. It would be unreasonable to infer that Congress intended to force institutions to accept or readmit persons who pose a significant risk of harm to themselves or others, even if the chances of harm were less than 50%. Indeed, even if she presents any appreciable risk of such harm, this factor could properly be taken into account in deciding whether, among qualified applicants, it rendered her less qualified than others for the limited number of places available. In view of the seriousness of the harm inflicted in prior episodes, NYU is not required to

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[11] The district court granted the plaintiff's application for a preliminary injunction, finding that an additional year's delay in her medical studies would irreparably harm her, while he concluded that NYU would suffer no hardships. The Second Circuit reversed the grant of a preliminary injunction, finding *inter alia* that the plaintiff had not in fact demonstrated irreparable injury. "[T]he evidence indicates that there is a significant risk of recurrence of her self-destructive and harmful conduct, which NYU should not be required to bear pending trial and . . . a substantial basis exists for upholding NYU's decision to deny her readmission. Against this . . . plaintiff can only show the hardship of delay of another year in admission to medical school, which as indicated above, she has voluntarily chosen to do in the past. Thus, the balance of hardships tips in NYU's favor, not in Doe's." 666 F.2d at 778.

> give preference to her over other qualified applicants who do not pose any such appreciable risk at all.

Id. The Court further noted that "her history indicates that although there were no manifestations of disorder for seven years after the earlier episodes in 1963-64, they recurred during the period 1972-1977, indicating that despite a period of dormancy they may recur again." 666 F.2d at 778.

Plaintiff here cannot meet the standard that requires her to be "otherwise qualified" for readmission to the dormitory. By her allegations, she is substantially limited in the activities of sleeping, eating, and interacting with others, and in taking care of herself. Am. Compl. ¶ 8. These functions are plainly integral to the independent living required in a dormitory. Plaintiff was on medical leave during the majority of her junior year of high school. Id. She has previously been hospitalized for depression and self-harm treatment. Id. and Spann Decl. Ex. 1 (letter from Plaintiff to Pamela Burthwright dated June 14, 2004); see Am. Compl. ¶ 12 (referencing letter). On June 5, 2004, she attempted suicide in her dormitory room, by taking approximately 20 Tylenol PM capsules. Am. Compl. ¶ 10. Earlier in the year, in January 2004, she was taken by ambulance from the dormitory to Cabrini Hospital, after taking an overdose of pain medication, which she maintains was accidental. Plaintiff Aff. ¶ 7.

Plaintiff's June 5, 2004 suicide attempt directly contravened the housing contract that she signed, which provides 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.

Am. Compl. ¶ 13. The school declined to permit her to return to the dormitory, and notified her that "the [June 5, 2004] incident raises compelling concerns about your safety and well-being in a dormitory setting." Spann Decl. Ex. 2 (June 21, 2004 letter from Eija Ayravainen to Plaintiff); see Am. Compl. ¶ 13, referencing letter. Vice President Ayravainen continued, "We believe this decision is in your best interests and the best interests of the Residence Hall community. Our goal is to enable you to receive intensive mental health counseling in a setting with reduced pressures and distractions, which will in turn help you return to the Residence Hall better able to handle the challenges of academic and residence life." Spann Decl. Ex. 2. Vice President Ayravainen indicated that plaintiff would be required to "make an appointment to see Assistant Dean Madlyn Stokely in the Office of Student Services," who would "arrange for you to see a Student Services counselor on a regular basis throughout your hiatus from the Residence Hall," and that the counselor "will coordinate with other mental health professionals who may be assisting you, as appropriate." Spann Decl. Ex. 2. In response to a later letter from plaintiff's counsel, the College's attorney wrote that "in light of the possible harm Ms. [Doe] may cause herself and others in the residence Hall, it is not possible to permit her to reside in the room of the Residence Hall." Spann Decl. Ex. 3 (July 14, 2004 letter from Linda Chin to David Goldfarb); see also Am. Compl. ¶ 17 (referencing letter). Ms. Chin continued: "We urge Ms. [Doe] to receive or to continue to receive intensive mental health counseling. She may request to return to college housing starting with the Spring, 2004 semester. [She] must also submit medical documentation regarding her emotional well-being[.]" Id.

The pleadings and papers referenced therein demonstrate that Ms. Doe is not "otherwise qualified" for dormitory residence, in light of her history of recurrent self-harm and

suicide attempts. The College's maintenance of this qualification rests on reasons which parallel those in Doe v. NYU: a concern that dormitory residence poses inherent stressors, which a student must be emotionally able to withstand.[12] If a student is not able to withstand those stressors, the result can be self-harm or even death, with potential attendant negative effects on other students. Plaintiff has attempted suicide in the Hunter College dormitory at least once, and possibly twice, indicating difficulty in adjusting to those stressors. She is not "otherwise qualified" for dormitory residence.

B. The Suicide Provision of the Hunter College Housing Contract Does Not Discriminate on the Basis of Disability

Plaintiff relies upon the Fair Housing Act and the Americans with Disabilities Act, arguing that she has been discriminated against on the basis of a disability, based on the defendants' "blanket rule that anyone who attempts suicide must vacate a dormitory room for a semester." Pl. Mem. at 8. By its terms, the Housing Contract suicide provision does not discriminate against individuals on the basis of disability; the provision rests not on a diagnosis of mental illness, but on an action, regardless of the origin or cause of that act (as, for example, a suicide attempt by a student under the influence of alcohol, or in response to the end of a romantic relationship). A suicide attempt is not a disability; indeed, plaintiff does not claim that

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[12] Further, CUNY is entitled to be proactive and protect itself from a future lawsuit which could result from any further attempts by plaintiff to harm herself. A search reveals numerous examples of wrongful death lawsuits arising out of student suicides, particularly in the dormitory setting. See, e.g., Jain v. State, 617 N.W.2d 293 (Iowa 2000) (father of university student who committed suicide in his dorm room brought wrongful death action against university, claiming that university owed duty to inform student's parents of previous suicide attempt); Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993) (parents of college student who committed suicide in his dormitory room brought wrongful death action against college and its physician).

it is her disability. Rather, as plaintiff notes, her disability is Major Depressive Disorder and Attention Deficit Hyperactivity Disorder. Plaintiff was originally permitted to reside in the dormitory without regard to her disability (which, as plaintiff alleges, antedates her time at Hunter College, Am. Compl. ¶ 8), as is any other student with mental disorders.

Indeed, the policy pursuant to which plaintiff was suspended from the dormitory applies not only to her suicidal behavior, but to suicidal behavior by non-disabled individuals. Atkins v. County of Orange, 251 F. Supp. 2d 1225 (S.D.N.Y. 2003) (granting motion to dismiss claims by mentally ill county jail inmates under, inter alia, Title II and § 504; plaintiffs do not allege "that violent and self-destructive inmates who are disabled due to mental illness are treated any differently than violent, self-destructive inmates who are not disabled due to mental illness").

At best, plaintiff's argument is an assertion that she has been discriminated against based upon the severity of her disability, i.e., that mentally ill students who are not so ill as to attempt suicide are treated preferentially to her, by being permitted to remain in the dormitory. Neither the ADA nor the Rehab Act provides a right of action for alleged discrimination vis-a-vis other handicapped individuals. See Flight v. Gloeckler, 878 F. Supp. 424, 426 (N.D.N.Y) ("section 504 was not intended to be used to advance claims of discriminatory distribution of services to handicapped persons under the Rehabilitation Act"), aff'd, 68 F.3d 61, 63-64 (2d Cir. 1995) (the Rehab Act "does not clearly establish an obligation to meet [a disabled person's] particular needs vis-a-vis the needs of other handicapped individuals, but mandates only that services provided nonhandicapped individuals not be denied [to a disabled person] because he is handicapped.") (quoting P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990)); Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999) (reversing

injunction requiring City to provide safety monitoring services to Medicaid recipients who suffered from mental disabilities that caused them to require assistance with daily living tasks; "services that New York provides to the mentally disabled are no different from those provided to the physically disabled"), cert. denied 531 U.S. 864 (2000).

CONCLUSION

For the foregoing reasons, plaintiff's amended complaint requires dismissal.

Date: New York, New York
October 27, 2004

Respectfully submitted,

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