

UNITED STATES DISTRICT COURT

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

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

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

5 THE COURT: Good morning. Please be seated.

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

8 THE COURT: Good morning, Ms. Blanchette.

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

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

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

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

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

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

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

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

22 Defendants have moved to dismiss the complaint
23 pursuant to Fed. R. Civ. P. 12(b)(6). ~~FRCF 12(b)(6)~~.

24 Defendants' motion is denied because plaintiff has adequately
25 stated a claim for disability discrimination.

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

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

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

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

27

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

12 Following her eviction, Doe lived with her mother in
13 Queens while continuing to attend school. (Id. ¶ 11).
14 —————That living situation alleged exacerbated Doe's
15 mental illness. (Id.). On June 14, 2004, Doe wrote to
16 Burthwright ~~Brithwrite~~ and ~~Ira~~Eija Ayravainen insisting that
17 she had been discriminated against on the basis of her mental
18 disability. (Id. ¶ 12). A week later on June 21 ~~Ira~~Eija
19 Ayravainen informed Doe that she would continue to be excluded
20 from Brookdale, at least through the end of the fall 2004
21 semester. (Id. ¶ 13). ~~Ira~~Eija Ayravainen's letter cited the
22 2003-2004 housing contract and advised Doe that she could apply
23 to return to Brookdale for the spring semester of 2005 at which
24 time Hunter would review her request and notify her whether it
25 would readmit her to the dormitory or not. (Id. ¶ 14).

26 Doe's counsel, David Goldfarb, wrote Hunter on July
27 2, 2004 demanding that the college reverse its decision. (Id.
28 ¶ 15). He claimed that Hunter's policy constituted intentional

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

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

18 After Hunter refused to readmit Doe to Brookdale,
19 Goldfarb spoke with Linda Chin, special counsel to defendant
20 Rabb on July 26, 2004 requesting that the school make a
21 reasonable accommodation by considering the summer session to
22 be Doe's full semester of required absence from the dormitory
23 thereby allowing Doe to reapply for housing in the fall. (Id.
24 ¶¶ 17-18). Chin refused to accept that proposal and Doe was
25 not permitted to return to the dormitory for the fall 2004
26 semester. (Id. ¶¶ 18, 20).

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

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

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

8 Defendants have moved, as I said, for dismissal
9 pursuant to Fed. R. Civ. P. 12(b)(6)~~12(b)(6)~~. Everyone knows
10 the standard for review on a 12(b)(6) motion. I can only
11 dismiss plaintiff's claims if it appears beyond doubt that the
12 plaintiff can prove no set of facts in support of his claim
13 which would entitle him to relief. Drake v. Delta Air Lines,
14 Inc., 147 F.3d 169, 171 (2d Cir. 1998) (quoting Conley v.
15 Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80
16 (1957)) (quotation marks omitted). ~~Drake v. Delta Airlines~~
17 ~~quoting Connelly v. Gibson.~~ I must treat all factual
18 allegations in the complaint as true and draw all reasonable
19 inferences in plaintiff's favor. See Ganino v. Citizens Utils.
20 Co., 228 F.3d 154, 161 (2d Cir. 2000); Lee v. Bankers Trust
21 Co., 166 F.3d 540 (2d Cir. 1999)~~Anceno v. Citizen Utilities~~
22 ~~Co., Levy Bankers Trust.~~ A complaint need only give the
23 defendant fair notice of what the plaintiff's claim is and the
24 grounds upon which it rests. Phillip v. Univ. of Rochester,
25 316 F.3d 291, 293 (2d Cir. 2003) (quoting Conley, 355 U.S. at
26 47). ~~Phillip v. University of Rochester quoting Connelly.~~

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

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

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

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

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

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

3 "The ultimate guarantee of the Eleventh Amendment is
4 that non-consenting States may not be sued by private
5 individuals in federal court." That's Garcia v. S.U.N.Y., 280
6 F.3d at 107 (quoting Bd. of Trs. of Univ. of Ala. v. Garrett,
7 531 U.S. 356, 363, 121 S. Ct. 955, 148 L. Ed. 2d 866
8 (2001)) ~~Board of Trustees of University of Alabama v. Garrett~~.
9 That guarantee yields, however, to Congress' unequivocal
10 abrogation of a state sovereign immunity pursuant to a valid
11 grant of constitutional authority. See id. (citing Kimel v.
12 Florida Bd. of Regents, 528 U.S. 62, 73, 120 S. Ct. 631, 145 L.
13 Ed. 2d 522 (2000)) ~~Kimel v. Florida Board of Regents~~.—

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

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

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

3 A) Injunctive and declaratory relief pursuant to
4 Title II and the FHAA. As state entities, senior colleges of
5 the City University of New York, including Hunter, receive
6 protection of New York State sovereign immunity. See Clissuras
7 v. City of New York, 359 F.3d 79, 82 (2d Cir.), cert. denied, -
8 -- U.S. ----, 125 S. Ct. 498, 160 L. Ed. 2d 372
9 (2004). ~~Clissuras v. City of New York~~. When sued in their
10 official capacities officers of state entities such as Rabb and
11 ~~Ira~~Eija Aygravaminen are shielded from suit to the same extent
12 as the state entities themselves. See Garcia, 280 F.3d at
13 107~~See Garcia~~. There's no indication in here that plaintiff
14 intends to sue Rabb and ~~Ira~~Eija Aygravaminen as individuals
15 and indeed the caption lists the administrators with their
16 titles next to their names. (Am. Compl. at 1). So it clearly
17 appears that they're being sued in their official capacities
18 and therefore the protections of the Eleventh Amendment extend
19 to the individuals as well as to Hunter.

20 However, the well settled Ex parte Young, 209 U.S.
21 123, 29 S. Ct. 441, 52 L. Ed. 714 (1908), ~~ex parte Young~~
22 exception to the principle of sovereign immunity permits suits
23 for declaratory or injunctive relief against state officers to
24 prevent them from engaging in ongoing violations of federal
25 law. See Henrietta D. v. Bloomberg, 331 F.3d 261, 288 (2d Cir.
26 2003), cert. denied, 541 U.S. 936, 124 S. Ct. 1658, 158 L. Ed.
27 2d 356 (2004); see also W. Mohegan Tribe and Nation v. Orange
28 County, 395 F.3d 18, 21 (2d Cir. 2004). ~~See Henrietta Dee v.~~

1 ~~Bloomberg.~~ ~~See also~~ ~~W. Mohegan Tribe and Nation v. Orange~~
2 ~~County.~~ The Ex parte Young doctrine rests on an "obvious
3 fiction-"; ~~a~~Although the state is the actual party in
4 interest, the suit must be brought against the state official.
5 See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270,
6 117 S Ct. 2028, 138 L. Ed. 2d 438 (1997). ~~See Idaho v.~~
7 ~~Cordelen Tribe of Idaho.~~ The Ex parte Young doctrine allows
8 plaintiff to bring her claims for injunctive and declaratory
9 relief from alleged ongoing discriminatory practices insofar as
10 those claims are brought against the individual defendants.
11 The Ex parte Young doctrine does not apply, however, to
12 plaintiff's injunctive relief claims against Hunter.

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

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

1 Kimel, 528 U.S. at 80. ~~See Garcia and Kimmel.~~ Therefore, to
2 determine whether plaintiff may properly sue Hunter for
3 injunctive and declaratory relief pursuant to Title II and the
4 FHAA, I would have to ascertain whether those statutes
5 constitute valid Section 5 enforcement legislation for the
6 purposes of remedying the type of injury at issue here. See
7 Tennessee v. Lane, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d
8 820 (2004).

9 Before undertaking that constitutional inquiry,
10 however, I'm obligated first to evaluate whether the Court may
11 resolve the dispute without interpreting the Constitution
12 because if I can reach a conclusion without rendering a
13 constitutional interpretation that's the better path and the
14 more logical path. See Jean v. Nelson, 472 U.S. 846, 854, 105
15 S. Ct. 2992, 86 L. Ed. 2d 664 (1985) (quoting Spector Motor
16 Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89
17 L. Ed. 101 (1944)); see also United States v. Rumely, 345 U.S.
18 41, 45-46, 73 S. Ct. 543, 545-46, 97 L. Ed. 770 (1953); Horne
19 v. Coughlin, 191 F.3d 244, 246 (2d Cir. 1999). ~~Jean v. Nelson~~
20 ~~quoting Spector Motor Services, Inc. v. McLaughlin, United~~
21 ~~States v. Rumely, Horn v. Caughlin.~~ Here, resolving the
22 constitutional question of whether Title II and the FHAA
23 constitute valid Section 5 abrogation of state sovereign
24 immunity is absolutely unnecessary to afford plaintiff total
25 relief.

26 In her claims against the individual defendants who
27 oversee Hunter and are subject to the Ex parte Young doctrine,
28 plaintiff may realize all injunctive and declaratory relief she

1 seeks. Therefore, no prejudice will inure to plaintiff by
2 virtue of the Court's refusal to engage in this constitutional
3 analysis at this time. See Lyng v. Northwest Indian Cemetery
4 Protective Ass'n, 485 U.S. 439, 446, 108 S. Ct. 1319, 99 L. Ed.
5 2d 534 (1988) ~~Lyng v. Northwest Indian Cemetery Protective~~
6 ~~Association~~.

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

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

21 Plaintiff's claim pursuant to Section 504 of the
22 Rehabilitation Act is brought for damages as well as injunctive
23 and declaratory relief. The doctrine of sovereign immunity
24 only permits suits for damages against states when Congress has
25 validly abrogated the state sovereign immunity or when the
26 state has consented to suit. See Idaho v. Coeur d'Alene Tribe
27 of Idaho, 521 U.S. 261, 267-68, 117 S Ct. 2028, 138 L. Ed. 2d
28 438 (1997); Will v. Mich. Dep't of State Police, 491 U.S. 58,

1 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) ~~Idaho v. Cordelen~~
2 ~~Tribe of Idaho, Will v. Michigan Department of State Police.~~

3 By accepting federal funds, Hunter has waived its
4 sovereign immunity to suit pursuant to Section 504. Congress
5 may induce consent to a waiver pursuant to its Article I
6 spending clause powers by conditioning the provision of federal
7 funds on relinquishment of sovereign immunity. See Garcia, 280
8 F.3d at 113. Congress enacted Section 504 pursuant to its
9 spending clause powers and has explicitly provided that receipt
10 of federal funds constitutes a waiver of sovereign immunity for
11 Section 504 enforcement purposes. See Garcia (citing 42 U.S.C.
12
13 § 2000d-7). That provides, in part, that a state "shall not
14 be immune under the Eleventh Amendment of the Constitution of
15 the United States from suit in Federal court for a violation
16 of Section 504 of the Rehabilitation Act." 42 U.S.C. § 2000d-
17 7(a)(1). So it's quite specific. See also Barbour v.
18 Washington Metro Area Transit Auth., 374 F.3d 1161, 1166 (D.C.
19 Cir. 2004), cert. denied, --- U.S. ----, 125 S. Ct. 1591, ---
20 L. Ed. 2d ---- (2005); Lovell v. Chandler, 303 F.3d 1039, 1051-
21 52 (9th Cir. 2002); Koslow v. Pennsylvania, 302 F.3d 161, 170-
22 71 (3d Cir. 2002); Robinson v. Kansas, 295 F.3d 1183, 1189-90
23 (10th Cir. 2002); Nihiser v. Ohio Env'tl. Prot. Agency, 269 F.3d
24 626, 628-29 (6th Cir. 2001); Jim C. v. United States, 235 F.3d
25 1079, 1081-82 (8th Cir. 2000); Stanley v. Litscher, 213 F.3d
26 340, 344 (7th Cir. 2000); Pederson v. La. St. Univ., 213 F.3d
27 858, 875-76 (5th Cir. 2000); Sandoval v. Hagan, 197 F.3d 484,
28 493-94 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275,

1 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); Litman v. George
2 Mason Univ., 186 F.3d 544, 554 (4th Cir. 1999) ~~See also Barbara~~
3 ~~v. Washington Metropolitan Area Transit Authority, Lovell v.~~
4 ~~Chandler, Koslow v. Pennsylvania, Robinson v. Kansas, Nihiser~~
5 ~~v. Ohio Environmental Protection Agency, Jim Cee v. United~~
6 ~~States, Stanley v. Litscher, Peterson v. Louisiana State~~
7 ~~University, Sandoval v. Haigen and Littman v. George Mason~~
8 ~~University.~~

9 In Garcia v. S.U.N.Y. Health Sciences Center, the
10 Second Circuit explained that a state could not knowingly have
11 waived its sovereign immunity for Section 504 purposes by
12 accepting federal funds at a time when it mistakenly believed
13 as a result of the Second Circuit's decision in Kilcullen v.
14 New York State Dep't of Labor, 205 F.3d 77, 82 (2d Cir.
15 2000) ~~Culcohen v. New York State Department of Labor~~ that the
16 state sovereign immunity had already been abrogated pursuant to
17 the ADA. 280 F.3d at 114. Kilcullen ~~Culcohen~~ held that Title
18 I of the ADA was an effective abrogation of state sovereign
19 immunity pursuant to the Section 5 enforcement power of
20 Congress. See 205 F.3d at 78-81. The U.S. Supreme Court
21 implicitly overruled that holding in Board of Trustees of the
22 University of Alabama v. Garrett. See 531 U.S. at 368. The
23 Garcia court concluded that a state could not have deliberately
24 waived its right to sovereign immunity from Section 504 suits
25 when, in reliance on Kilcullen, ~~Culcohen~~ the state falsely
26 believed its sovereign immunity to have already been abrogated
27 with respect to the ADA. See 280 F.3d at 114.

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

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

16 Some courts have held that the operative date was
17 September 25, 2001 when Garcia was decided. See Killcullen v.
18 New York State Dep't of Labor, No. 97-CV-484, 2003 WL 1220875,
19 at *3 n.1 (N.D.N.Y. Mar. 13, 2003) ~~Culcohen~~. While others have
20 held that it was February 25, 2001 when Garrett was decided.
21 See Cardew v. New York State Dep't of Corr. Servs., No. 01 Civ.
22 3669, 2004 WL 943575, at *8 (S.D.N.Y. Apr. 30, 2004) ~~Cardo v.~~
23 ~~New York State Department of Correctional Services~~. One case
24 suggested in dictum the states may have knowingly waived
25 sovereign immunity as early as April 17, 2000 when the Supreme
26 Court granted the writ of certiorari in Garrett. See Wasser v.
27 New York State Office of Vocational and Educ. Servs. For
28 Individuals with Disabilities, No. 01-CV-6788, 2003 WL

1 22284576, at *10 (E.D.N.Y. Sept. 30, 2003). ~~See Wasser v. New~~
2 ~~York State Office of Vocational and Educational Services.~~ I do
3 not need to weigh in on that dispute regarding the date as of
4 which knowing waiver occurred. See Doe v. Goord, No. 04 CV
5 0570, 2004 WL 2829876, at *17 (S.D.N.Y. Dec. 10, 2004). ~~Doe v.~~
6 ~~Goord.~~ Regardless of which date is operative, the events
7 giving rise here occurred well after the state knowingly waived
8 its sovereign immunity because Doe was excluded from her dorm
9 room in the spring of 2004 and remained excluded until the
10 spring or the beginning of 2005.

11 To the extent plaintiff brings claims for injunctive
12 and declaratory relief pursuant to Title II and the FHAA, the
13 Ex parte Young doctrine permits her to maintain her suit
14 against the individual defendants. To the extent she seeks
15 damages pursuant to 504, Hunter has waived its sovereign
16 immunity and therefore the Eleventh Amendment does not preclude
17 plaintiff's action.

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

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

1 someone who "claims to have been injured by a discriminatory
2 housing practice." 42 U.S.C. § 3602(i)(1). A discriminatory
3 housing practice is any practice made unlawful by Sections
4 3604, 3605, 3606 or 3617 of Title 42. 42 U.S.C. § 3602(f).
5 This broad language leads courts to refrain from imposing
6 standing barriers beyond those required by Article III on
7 plaintiff's attempting to vindicate rights that have allegedly
8 been compromised by violations of the FHAA. See Smith v.
9 Pacific Props. & Dev. Corp., 358 F.3d 1097, 1102 (9th Cir.
10 2004), cert. denied sub nom. Pacific Props. & Dev. Corp. v.
11 Disabled Rights Action Comm., --- U.S. ----, 125 S. Ct. 106,
12 160 L. Ed. 2d 116; see also Transp. Workers Union of Am., Local
13 100, AFL-CIO v. New York City Transit Auth., 342 F. Supp. 2d
14 160, 165 (S.D.N.Y. 2004). ~~See Smith v. Pacific Properties &~~
15 ~~Development Corp., Transportation Workers Union of America v.~~
16 ~~New York City Transit Authority.~~

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

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

1 construed, the argument is unavailing. The FHAA makes it
2 unlawful "[t]o discriminate against any person in the terms,
3 conditions or privileges of sale or rental of a dwelling, or in
4 the provision of services or facilities in connection with such
5 dwelling, because of a handicap of that person." 42 U.S.C. §
6 3604(f) (2) (A). —Discrimination includes a refusal to make
7 reasonable accommodation and rules, policies, practices or
8 services when such accommodations may be necessary to afford
9 such person an equal opportunity to use and enjoy a dwelling.
10 That's a quote from Shapiro v. Cadman Towers, Inc., 51 F.3d
11 328, 333 (2d Cir. 1995) (quoting 42 U.S.C. §
12 3604(f) (3) (B)). ~~Shapiro v. Cadman Towers.~~

13 I cannot say at this early stage of the litigation
14 before there's been any discovery that the allegations as
15 contained in the complaint are entirely inconsistent with
16 plaintiff's potential recovery pursuant to the FHAA. See
17 Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 512, 122 S. Ct.
18 992, 152 L. Ed. 2d 1 (2002). ~~See Swierkiewicz.~~ Even assuming
19 that defendants are correct that a plaintiff who is not a
20 purchaser or a renter cannot state a claim pursuant to the
21 FHAA, the fact that plaintiff did not pay money for the right
22 to live in her dormitory room may not be dispositive. She may,
23 for example, have provided consideration in another form that
24 would qualify her as a renter. I cannot say that "it is clear
25 that no relief could be granted under any set of facts that
26 could be proved consistent with the allegations." That's from
27 Swierkiewicz—, at 514 (quoting Hishon v. King & Spalding, 467
28 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). ~~quoting~~

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

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

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

14 ~~In~~Title II of the ADA mandates that “no qualified
15 individual with a disability shall, by reason of such
16 disability, be excluded from participation in or be denied the
17 benefits of the services programs or activities of a public
18 entity or be subjected to discrimination by any such entity.”
19 42 U.S.C. § 12132. Although phrased differently, the standards
20 imposed by Title II and Section 504 are essentially the same
21 and the two statutes are ordinarily interpreted together. See
22 Powell v. Nat’l Bd. of Med. Exam’rs, 364 F.3d 79, 85 (2d Cir.
23 2004); Henrietta D., 331 F.3d at 272~~See PAL v. National Board~~
24 ~~of Medical Examiners Henrietta Dee.~~

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

1 CV-6547, 2004 WL 1570262, at *2 (W.D.N.Y. July 9, 2004); Sanzo
2 v. Uniondale Union Free Sch. Dist., 225 F. Supp. 2d 266, 270
3 (E.D.N.Y. 2002). ~~See Budde v. United Refining Company of~~
4 ~~Pennsylvania, Sanzo v. Uniondale Union Free School District.~~ A
5 complaint must provide the defendant simply with a short and
6 plain statement of the claim showing that the pleader is
7 entitled to relief pursuant to Rule 8A. Fed. R. Civ. P. 8(a).
8 From that short and plain statement, defendants have to have
9 "fair notice of what the plaintiff's claim is and the grounds
10 upon which it rests." That's from Swierkiewicz, 534 U.S. at
11 512 (citing Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2
12 L. Ed. 2d 80 (1957)) Swierkiewicz.

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

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

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

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

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

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

13 In sum, I cannot determine from the facts alleged in
 14 the amended complaint "that no relief could be granted under
 15 any set of facts that could be proved consistent with the
 16 allegations." Swierkiewicz, 534 U.S. at 514 (quoting Hishon,
 17 467 U.S. at 73). That's Swierkiewicz again which sets a low
 18 bar under 12(b)(6). I, therefore, am denying defendants'
 19 motion to dismiss the complaint.

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

23 Thank you.

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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