United States District Court
For the Southern District of New York

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Jane Doe

Plaintiff

vs. **04 cv 6740 (SHS)**
ECF CASE

Hunter College of the City University of New York,
Jennifer Raab, and Eija Ayravainen,

Defendants

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PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO A MOTION TO DISMISS

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Table of Contents

Pages

Table of Authorities

CASES **Pages**

CONSTITITION **Pages**

STATUTES, CODES AND RULES **Pages**

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Plaintiff Jane Doe submits this memorandum opposition to Defendants' motion to dismiss her amended complaint.

Preliminary Statement

Plaintiff has sued Defendants Hunter College of the City of New York ("Hunter"), Jennifer Raab and Eija Ayvarainen (collectively "Defendants") under the Fair Housing Amendments Act of 1988 ("FHA"), Title II of the Americans with Disabilities Act ("ADA" or "Title II"), and Section 504 of the Rehabilitation Act of 1973 ("Rehab Act" or § 504) for illegally evicting her from dormitory housing because of her disability. Plaintiff seeks injunctive relief under all three statutes and money damages under the Rehab Act.

The Rehab Act, enacted pursuant to Congress' Article I Spending Power, explicitly states that States which accept federal funds waive their Eleventh Amendment sovereign immunity in suits for money damages. Every case in the Second Circuit has found that states that accepted federal funds since September 2001, have waived their sovereign immunity with regard to cases brought under § 504. Additionally, every

Circuit Court that has considered the issue has found that suits for monetary damages are allowed under the Rehab Act. Defendants cite no authority to the contrary. Nor can they.

Plaintiff also has standing to sue under the FHA since the statute is broadly construed and not limited to individuals who pay monthly rent or purchase property. Rather, the statute specifically prohibits acts which "otherwise make unavailable or deny" the right to use property because of a handicap. Thus, it applies to situations such as the instant case, where individuals pay no rent, or provide other types of consideration in lieu of rent.

Plaintiff has met her burden of making a prima facie case of discrimination under all three statutes. Plaintiff alleges, and Defendants do not challenge that Plaintiff is a person with a disability, Major Depressive Disorder and Attention Deficit Hyperactivity Disorder. Whether Plaintiff is "otherwise qualified" for housing in the residence dormitory despite her handicap is a question of fact, and is not properly resolved in a motion to dismiss, especially where Plaintiff has not had an opportunity to conduct discovery.

However, viewing the facts in the light most favorable to Plaintiff, Plaintiff is otherwise qualified for housing in the residence hall, which is provided as a benefit to all students of the Hunter College Honors Program. That Plaintiff be capable of "independent living" is not an essential requirement of eligibility for dormitory residence. Nor can it be, as any requirement that a resident be capable of "independent living" is inherently discriminatory and illegal. Nor is a student's ability to withstand the supposed stressors of dormitory life an essential requirement. The only essential requirement of

eligibility for dormitory residence, is gaining admission to and remaining a member of, the Hunter College Honors Program.

Defendants do not allege that they excluded Plaintiff from the residence hall as a "threat to others," as there exists no evidence that Plaintiff is such a threat. Any alleged threat to others would have to be real and imminent, based upon an individualized assessment of the precise nature and likelihood of the risk posed by the plaintiff, and supported by a reasonable medical judgment. Nor can Defendants exclude Plaintiff from the residence hall based upon her alleged suicide attempt and threat to herself, as harm to self is not a valid consideration under Title II, the FHA or the Rehab Act.

Defendants' blanket policy which evicts residents of the residence hall for acts of self harm and requires that persons who attempt suicide must be evaluated by a psychologist before returning to the residence hall is intentionally discriminatory. The law does not distinguish between discrimination on the basis of disability and disability-based conduct. Thus, Defendants' exclusion of Plaintiff because of her behavior, is tantamount to exclusion because of her disability. Further, because self-harm and suicidal ideation is generally the result of mental disability, the policy has a disparate impact on persons who suffer from mental illness.

Facts

Plaintiff relies on the facts as more fully set forth in her Amended Complaint.

Argument

Standard of review

In considering a motion to dismiss a complaint pursuant to Fed. R. Civ. P. §12(b)(6) the court takes all the plaintiff's factual allegations as true and should dismiss

the action only where no set of facts could support plaintiff's claim. *International Audiotext Network v. American Tel. & Tel. Co.*, 62 F.3d 69, 71-72 (2d Cir., 1995). The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. *Id.* Similarly on a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. § 12(b)(1) the court must accept as true all material factual allegations in the complaint, but it will not draw inferences from the complaint favorable to plaintiffs. It may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but it may not rely on conclusory or hearsay statements contained in the affidavits. *J.S. v. Attica Cent. Schs.*, 386 F.3d 107 (2d Cir. 2004).

Statutory Scheme

Section 504 of the Rehabilitation Act provides, in relevant part, that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794.

Title II of the ADA extends the prohibition of discrimination to all actions, services, programs or activities of state and local governments regardless of the receipt of federal financial assistance. 42 U.S.C. §12132. Thus, the prohibitions of Title II and § 504, have been considered co-extensive.

Title VIII of the Civil Rights Act of 1968, known as the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA") provides that "it shall be unlawful to refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any person because of ...

disability." 42 U.S.C. § 3604(a). The FHA also prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... disability." 42 U.S.C. § 3604(b). Section 3604(f) of the FHA prohibits discrimination "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).

The 1988 amendments to the FHA were modeled on the Rehabilitation Act of 1973. The legislative history of the 1988 amendments provides that the act "uses the same definitions and concepts from [the Rehabilitation Act of 1973]. In the 1988 Fair Housing bill, Congress also included protections for individuals with handicaps." H.R.Rep. No. 711, 100th Cong., 2d Sess. 18, *reprinted in* 1988 *U.S. Code Cong. & Admin. News*, 2178.

> The Fair Housing Amendments Act, like § 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

Id. at 2179.

Point I

The Acceptance of Federal Funds By Hunter College After September 25, 2001 Constitutes a Waiver of Eleventh Amendment Immunity for Proceedings Brought under § 504 of The Rehabilitation Act

Defendants suggest that Plaintiff seeks damages under the ADA, the Rehab Act and FHA. Defendants have misapprehended Plaintiff's claims. Plaintiff is only seeking damages under the Rehab Act. While Plaintiff does not concede that damages are

unavailable under Title II of the ADA and the FHA, Plaintiff's damage claim is predicated on the Rehab Act. Thus, Plaintiffs have not responded to Defendants' arguments in their Points I.A. and I.C. In addition, Plaintiff is entitled to continue her claims for injunctive relief under the FHA, the ADA and the Rehab Act.

As interpreted by the Supreme Court, the Eleventh Amendment restricts the right of citizens of the United States to sue states for damages in federal courts. See e.g. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). However these restrictions are not absolute.

Congress has the right to abrogate Eleventh Amendment immunity of the states if it does so clearly and explicitly, and acts pursuant to a valid grant of constitutional authority. Congress can do this pursuant to the power it is granted under § 5 of the Fourteenth Amendment. *Tennessee v. Lane*, 124 S.Ct. 1978, 158 L. Ed. 2d 820 (2004) (Title II of the ADA constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment, in the context of access to the courts).

Pursuant to its power under the Spending Clause of Article I, Congress can also condition the receipt of federal funds by a state on a waiver by that state of its Eleventh Amendment immunity. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In order for such a waiver to be valid the waiver by the state must be a "knowing" waiver. *Barnes v. Gorman*, 536 U.S. 181, 187 (2002).

Congress has specifically stated that states which accept federal funds shall not be immune under the Eleventh Amendment from suit in federal court for a violation of §504 of the Rehabilitation Act. *See* 42 U.S.C. § 2000d-7. Other courts of appeals have held

the same with respect to the other statutes identified in § 2000d-7.[1] Eight Circuit Courts have held that by accepting federal funds, states have knowingly and voluntarily waived sovereign immunity under § 504.[2]

Defendants argue that "because § 504 of the Rehab Act and Title II of the ADA offer essentially the same protections, the Second Circuit has held that the statutes are subject to the same Eleventh Amendment analysis." Defendants' Memorandum in Support of Motion to Dismiss (hereafter Defendants' Memorandum) at 11. In other words Defendants argue that the Second Circuit has held that the Eleventh Amendment analysis of a statute such as Title II of the ADA, which abrogates Eleventh Amendment immunity of the states pursuant to the § 5 of the Fourteenth Amendment is the same as the Eleventh Amendment analysis of a statute such as § 504, which pursuant to the Spending Power of Article One requires states to waive Eleventh Amendment immunity as a condition of receiving federal funds. Defendants are incorrect.

The case that Defendants rely upon, but misconstrue, is *Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001). Seven District Courts in the Second Circuit have interpreted *Garcia* to hold that as of September 25, 2001, states are on notice that acceptance of federal funds after that date constitutes a "knowing waiver" of Eleventh Amendment immunity from litigation under §504. In *Garcia* the Second

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[1] See, *e.g.*, *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553-555 (7th Cir. 2001) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484 (11th Cir. 1999) (Title VI), rev'd in part on other grounds, 532 U.S. 275 (2001); *Litman* v. *GeorgeMason Univ.*, 186 F.3d 544 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000).

[2] *Garcia v. S.U.N.Y Health Sciences Center* 280 F. 3d 92 (2nd Cir. 2001); *Barbour v. Washington Metro Area Transit Authority* 374 F. 3d 1161 (D.C. Cir. 2004); *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), cert. denied, 123 S. Ct. 871 (2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), petition for cert. pending, No. 02-1314; *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000).

Circuit discussed the congressionally mandated waiver of Eleventh Amendment immunity from suits brought under § 504 by states that receive federal funds in the context of the constitutional requirement that any waiver of Eleventh Amendment immunity must be "knowing." The Second Circuit held that from September 1993 until August 1995 the State of New York did not make a knowing waiver of its Eleventh Amendment immunity under § 504, even though it accepted federal funds during that time period, because at that time it believed that the ADA abrogated the state's sovereign immunity by congressional mandate. *Garcia*, 280 F.3d at 114. The Second Circuit held that since the proscriptions of the ADA and Section 504 are virtually identical, the state's reliance on its belief that there was a congressionally mandated waiver of immunity under the ADA meant that it had no cause to consider when it accepted federal funds that it was waiving Eleventh Amendment immunity to litigation brought under § 504. Therefore at the time it accepted these federal funds it did not make a knowing waiver of immunity to litigation brought under Section 504 . *Garcia*, 280 F.3d at 114.[3]

However, after August 1995 a number of cases were decided by the United States Supreme Court which brought into question the constitutionality of the congressionally imposed abrogation of Eleventh Amendment immunity in the ADA. See e.g. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996); *City of Boerne v. Flores*, 521 U.S. 507, 527-529 (1997); and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). *Garrett* was particularly significant in this respect. It held that the

[3] It should be noted that no other circuit that has considered that issue has agreed with the *Garcia* Court that a belief that the ADA abrogated Eleventh Amendment immunity meant that any waiver of immunity under § 504 was not knowing. *Barbour v. Washington Metro Area Transit Authority* 374 F. 3d 1161 (D.C. Cir., 2004); *Doe v. Nebraska* 345 F. 3d 593, 601-602 (8th Cir. 2003); *Garrett v. University of Alabama at Birmingham Board of Transfer* (11th Cir 2003); *M.A. v. State Operated School District 344 F. 3d 335, 349-351 (3rd Cir. 2003).* Cases in the Fifth Circuit have followed *Garcia* but the decisions have been vacated and are being heard en banc *Pace v. Bogalusa City School Board* 339 F. 3d 348 (5th Cir. 2003).

abrogation of Eleventh Amendment immunity in Title I of the ADA (employment cases) was unconstitutional and left open the possibility that the abrogation of Eleventh Amendment immunity in Title II was also unconstitutional. These cases are particularly relevant because the Second Circuit in *Garcia* stated the following in a footnote.

> We recognize that an argument could be made that if there is a colorable basis for the state to suspect that an express congressional abrogation is invalid, that the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity. This is because a state deciding to accept funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity.

280 F.3d at 114 n.4.

This footnote is significant because the Second Circuit indicated that at the point in time where states had a "colorable basis" to "suspect" that congressional abrogation of Eleventh Amendment immunity in the ADA was unconstitutional, the acceptance of federal funds might constitute a knowing waiver of Eleventh Amendment immunity for the purpose of litigation brought under § 504. Since the decision of the Second Circuit in *Garcia* seven District Court cases in the Second Circuit have explored the meaning of this footnote. All of these cases agree that no later than September 25, 2001, the date *Garcia* was decided, states had a "colorable basis" to "suspect" that the congressional abrogation of Eleventh Amendment immunity under the ADA was invalid. All of these cases therefore conclude that states which accept federal funds after September 25, 2001, have made a knowing waiver of their sovereign immunity with regard to cases brought under § 504 because of events which occurred after that date. In some of the cases District Courts in the Second Circuit determined that the waiver of Eleventh Amendment immunity from suit under § 504 occurred if a state accepted federal funds after

September 25, 2001, the date that *Garcia* was decided.[4] Other cases conclude that there is a waiver of sovereign immunity if a state accepted federal funds after February 21, 2001, which is the date that the United States Supreme Court decided *Garrett*.[5]

The Amended Complaint alleges that Hunter College accepted federal funds during the period of time when the events alleged in the complaint occurred. Since all of the events alleged in the complaint occurred after September 25, 2001, the complaint properly alleges that Hunter College has no Eleventh Amendment immunity for damage claims brought under § 504.

Point II
Plaintiff Has Standing Under the Fair Housing Amendments Act

Plaintiff has alleged "The Defendants' actions and practices … violate the Fair Housing Amendments Act … by discriminating in the rental or otherwise making unavailable or denying a room in the dormitory to Plaintiff [Doe] because of her handicapped status; and by discriminating in the terms, conditions or privileges of rental of a dwelling and in the provision of services or facilities in connection with such dwelling because of Plaintiff [Doe]'s handicapped status." Amended Complaint at ¶ 23. Defendants in their motion to dismiss claim that the FHA applies only to a sale or rental for consideration and since Plaintiff Doe does not "rent" her dormitory room, Plaintiff lacks standing under the FHA. Defendants' Memorandum at 13. Defendants rely on extrinsic evidence in Plaintiff's Affidavits on the Preliminary Injunction to argue that

[4] *Denmeade v. King*, 2002 U.S. Dist. LEXIS 17324 (W.D.N.Y. 2002); *Harris v. New York State Department of Health*, 202 F.Supp.2d 143 (S.D.N.Y. 2002); and *Johnson v. Southern Connecticut University*, 2004 U.S. Dist. LEXIS 21084 (D.C. Ct. 2004).
[5] *Cardew v. New York State Department of Correctional Services*, 2004 U.S. Dist. LEXIS 7670 (S.D.N.Y. 2004); *Kilcullen v. New York State Department of Labor*, 2003 U.S. Dist. LEXIS 3826 (N.D.N.Y. 2003); *Sacca v. Buffalo State College*, 2004 U.S. Dist. LEXIS 9134 (W.D.N.Y. 2004) (Magistrate decision).

dormitory housing is free of charge and thus she is not a "buyer or renter" within the meaning of the FHA.

As demonstrated below, Plaintiff clearly satisfies the FHA definition of the term "to rent" in 42 U.S.C. §3602(e) because she has extended consideration for the right to occupy her dormitory room. 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. 42 U.S.C. § 3604 (f)(1), 42 U.S.C. § 3604 (f)(1)(B), 42 U.S.C. § 3604 (f)(2)(B). The Court in *Woods v. Foster*, 884 F. Supp. 1169, 1174-1175 (D. Ill., 1995), in dealing with a free homeless shelter states, "there is no reason to conclude that the scope of the FHA should be limited to those who pay for their own housing, rather than extended to all victims of the types of discrimination prohibited by the Act." *Woods*, 884 F. Supp at 1175.[6] The *Woods* Court states that the argument that "otherwise make unavailable or deny" is limited to "sale or rental" is "precluded by the plain language of the FHA…." *Id.* at 1175.

Clearly this well reasoned approach applies here. That Plaintiff didn't pay rent in conventional terms does not foreclose a claim that Hunter College has made housing unavailable.[7]

In addition the definition in the statute of the term "to rent" *includes* transactions "for consideration" but does not exclusively *mean* transactions for consideration. 42

[6] Contrary to Defendants' allegation that *Woods* can be distinguished because of a third party grant of funding, the court in *Woods* treats as a separate argument whether the "rent" definition requires that the consideration be paid by the occupant. Woods, 884 F. Supp at 1175.

[7] In other contexts, courts have found that "otherwise make unavailable" has reach beyond the sale or rental for consideration. *See* e.g. *N.A.A.C.P. v. American Family Mutual Insurance Co.*, 978 F.2d 287, 297-301 (7th Cir. 1992) (dealing with the provision of insurance), cert. denied, 124 L. Ed. 2d 247, 113 S. Ct. 2335 (1993).

U.S.C. 3602(e).[8] See *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 549 (D. Va., 1975)(finding that the FHA applies to a home for dependent, neglected or needy children that does not engage in commercial sale or rental of residential facilities; "the Act also reaches noncommercial activities, and that the [children's] Home is prohibited from discrimination even with respect to residents for whom no payment is made"); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324, 1328-1329 (D. Or. 1996)(the FHA applies to denial of cabins to migrant farm worker families who work for Defendant; "Thus, a dwelling need not be rented to fall under the purview of the FHA.").[9]

Furthermore, Defendants err when they argue that Plaintiff has not provided consideration, both within the meaning of New York law and 42 U.S.C. § 3604(e). If the Court agrees with Defendants and looks beyond the allegation in the Complaint to determine if Plaintiff was a renter, then it must look to the other allegations of Plaintiff's Declaration as to her consideration for her dormitory room.[10] There is no question that Plaintiff had a choice between a $1,000 annual stipend or a dormitory room. She chose the latter. Her legal detriment – the consideration – was the $1,000 per year cost to her of electing dormitory housing.

It is black letter New York law that parties to a transaction are permitted to make their bargain, even if the consideration in question exchanged is grossly unequal or of

[8] 42 U.S.C. § 3602(e) states "'To rent' *includes* to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." (emphasis added). It should be noted that some of the definitions in the statute use the term "means" [42 U.S.C. § 3602 (a), (b), (f), (g), (h), (j), (k), (l), (m) and (o)] while other definitions use the non-exclusive term "includes" [42 U.S.C. § 3602 (c), (d), (e) and (i)].

[9] See also *Turning Point v. City of Caldwell*, 74 F.3d 941, 1996 WL 29263 (9th Cir. 1996) (homeless shelters covered by the act); *City of Edmonds v. Oxford House*, Inc., 514 U.S. 725 (1995) (group homes for recovering alcoholics and drug addicts); *Baxter v. Belleville*, 720 F. Supp. 720, 735 (D. Ill. 1989)(a hospice for those suffering from Acquired Immune Deficiency Syndrome).

[10] Defendants argue that for purposes of standing the Court may consider extrinsic material. See Defendants' Memorandum at 13 fn. 9.

dubious value. *Apfel v. Prudential Bache Securities Inc.*, 81 N.Y. 2d 470; 616 N.E. 2d 1095; 600 N.Y.S.2d 433 (1993); *Weiner v. McGraw-Hill Inc.*, 57 N.Y. 2d 458, 443 N.E.2d 441, 457 N.Y. S. 2d 193 (1982); *Spaulding v. Benenati*, 57 N.Y. 2d 1244; 442 N.E.2d 1244; 456 N.Y.S.2d 733 (1982). Absent fraud or unconscionability, the adequacy of the consideration is not the proper subject of review under New York law. All that is required is that something of "real value in the eye of the law" be exchanged. *Apfel, supra*; *Weiner; supra*.

A seller does not even have to possess a property right in what is sold for an agreement to be supported by consideration. For example, relinquishment of a disputed claim provides consideration even if the claim was actually invalid. *Wahl v. Barnum*, 116 N.Y. 87; 22 N.E. 280 (1899). In other words, Plaintiff's expectancy of receiving a stipend rather than dormitory housing, even though she arguably had no property right in the stipend absent the offer of same by Defendant, does not affect the adequacy of the consideration.

Plaintiff's sacrifice of her stipend alone was sufficient consideration under New York law, and, therefore, under 42 U.S.C. § 3604(e). However, in addition, Defendants induced Plaintiff to forego other educational options in favor of attending Hunter College. Defendant benefited by these exchange of promises by obtaining as one of its students the Plaintiff, who Defendants coveted sufficiently for her academic achievements to offer her a package of benefits, including the stipend or free dormitory housing.

As is evidenced by Plaintiff Doe's declaration of September 23, 2004, Plaintiff was a highly sought-after student who turned down her admission to a number of

prestigious institutions of higher learning, because of the overall package of inducements that she was offered as part of the Hunter College Honors Program. Plaintiff's matriculation into Defendant institution in exchange for its promises, including dormitory housing, is a very real and substantial form of consideration.

Plaintiff's having foregone educational opportunities elsewhere in reliance on Defendant's offer of dormitory housing alone constitutes consideration under 42 U.S.C. § 3604(e).

Finally, the written terms of the contract that Plaintiff executed with Defendants also constitutes consideration. Among the promises that Plaintiff made to Defendant are for her to be enrolled in no fewer than 12 credits per semester while residing in dormitory housing (Section VII H. of the contract), to use the dormitory as her primary residence while classes are in session (Section V of the Contract), and to attend and sign in at monthly floor meetings (Section V of the Contract). By making these promises, Plaintiff loses her freedom regarding whether or not she maintains full-time student status, what she uses as her primary residence, and her ability to forego floor meetings. In turn, Defendants obtain what they desired from Plaintiff – namely her attendance as a full-time student at Hunter College, and her agreement to use the dormitory as her primary residence. This is a classic exchange of mutual promises and mutual legal detriment incurred by both promissor and promissee. In other words, these exchanged promises constitute further consideration for Defendant to provide dormitory housing to Plaintiff.

In short, Defendants' obligation to provide dormitory housing to Plaintiff is supported by legal consideration and subject to the protection of the Fair Housing Amendments Act.

Plaintiff has alleged that Hunter College and its programs and activities receive federal financial assistance. Amended Complaint at ¶ 6. The receipt by Defendants of federal funds constitutes "consideration for Plaintiff's housing" under the FHAA.[11]

Plaintiff has standing to sue under the FHA in that Plaintiff's contract with Hunter College is subject to the protection of the FHA.

Point III
Plaintiff States a Claim Under § 504 of the Rehab Act, Title II of the ADA and The Fair Housing Act

A. Plaintiff is "Otherwise Qualified" for Residence in the Hunter College Dormitory

Defendants correctly state the controlling standards for a *prima facie* case under §504 and the ADA. Defendants' Memorandum at 14-15. For purposes of their motion, however, they have waived reliance on claims that Plaintiff does not have a disability, that Hunter College is not a recipient of federal funds for purposes of §504, and that Hunter College is not a "public entity" for purposes of the ADA.

Defendants rely on the circular argument that Plaintiff is not "otherwise qualified" for residence in the dormitory under § 504 because the rules and policies established for the Hunter College dormitory program bar people whose depression may result in a suicide attempt. Further, Defendants suggest that the very conditions that qualify Plaintiff as a person with a disability disqualify her for readmission to the dormitory. Defendants' Memorandum at 18.

Under § 504, Plaintiff must demonstrate that she is "otherwise qualified [to participate in a] program or activity receiving Federal financial assistance." 29 U.S.C. §794. Under the ADA, she must show that she is a "qualified individual with a

[11] Defendants correctly state that the Court in *Anonymous v. Goddard Riverside Community Center, Inc.*, 1997 U.S. Dist. LEXIS 9724, assumed (but did not decide) for the purpose of the motion before it that this

disability." 42 U.S.C. §12131(2). The Second Circuit has held that "Section 504 of the Rehabilitation Act and the ADA impose identical requirements…." *Rodriguez v. City of New York,* 197 F.3d 611, 618 (2nd Cir. 1999). Therefore, this court should apply the same analysis to Plaintiff's claims under each statute.[12]

After Plaintiff makes out a *prima facie* case that she is "otherwise qualified," the "burden shifts to the institution…to rebut the inference that the handicap was improperly taken into account by going forward with evidence that the handicap is relevant to [The exclusions from the program]." *Doe v. New York University,* 666 F. 2d 761, 776 (2d Cir. 1981) There are clearly issues of fact with regard to the "otherwise qualified" status of Plaintiff, making it inappropriate to dismiss her claims as a matter of law. She has alleged sufficient facts to make out a prima facie case, and this case should be permitted to proceed through discovery to test those allegations. For purposes of the motion to dismiss, Plaintiff "will have [her] allegations taken as true, and will receive the benefit of the doubt when [her] assertions conflict with those of the movant." *Samuels v. Mockry,* 77 F.3d 34, 36 (2d Cir.1996) (internal quotation marks omitted).

Plaintiff brings this action under § 504, the ADA and the FHA, all three of which use identical definitions of disability. *Compare* 29 U.S.C. §705(20)(§ 504) with 42 U.S.C. §12102(2)(ADA) and 42 U.S.C. §3602(h) (FHA). The amended complaint alleges that Plaintiff has a disability, that she has a record of having a disability, and that

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constituted consideration for Plaintiff's housing. *Id.* at n4.

[12] "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices … meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USCS § 12131

Defendants regard her as having a disability. Amended Complaint, ¶¶ 5, 8, 10, 21.[13] These are the three alternate grounds to establish disability under all three statutes.

Defendants suggest Plaintiff is not "otherwise qualified" because, they allege, she is incapable of performing "functions [that] are plainly integral to the independent living required in a dormitory." Defendants' Memorandum at 18. But, surely, the question of which "functions" are essential to qualification for dormitory living is one of fact that cannot be resolved on a motion to dismiss.

Defendants rely on an "independent living" criteria which, itself, discriminates on the basis of disability. Federal courts have routinely held that such "independent living" requirements are illegal under the Fair Housing Act, whose definition of disability and whose proscription of discrimination on the basis of disability are virtually identical to §504 and the ADA.[14]

Beginning in 1990 with *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002 (W.D.N.Y. 1990) a series of cases has interpreted the FHA's ban on handicap discrimination to prohibit housing providers from imposing a requirement that their tenants be capable of "independent living." In rejecting the defendant's argument that its "ability to live independently" requirement should be upheld because the Authority had only relied on it to turn down a small fraction of handicapped applicants (17 out of 276), the *Cason* opinion pointed out that this requirement still had a substantial discriminatory effect on handicapped persons because "no non-handicapped persons" were denied housing on this basis. *Id.* at 1007. See also *Niederhauser v. Independence Square*

[13] The amended complaint alleges that Plaintiff is substantially limited in the major life activities of sleeping, eating and interacting with others. The complaint does not allege, as Defendants suggest, that Plaintiff is actually limited in the ability to provide self-care. Rather, she alleges that Defendants regard her as being incapable in that area.

Housing, 4 Fair Hous. Fair Lending (Aspen L. & Bus.) 16,305, at 16,305.2, 16,305.6 (N.D. Cal. 1998), (strcking down an apartment complex s practice of requiring that tenants "be capable of tending to their needs independently" and "have a successful history of living independently") and *Jainniney v. Maximum Independent Living*, No. 00CV0879 (N.D. Ohio Feb. 9, 2001) (slip op), *at* http://www.bazelon.org/issues/housing/cases/janniney_v_maxindliv.pdf (a landlord s rejection of a disabled applicant on the ground that he was "not ready to live independently" violated FHA).

Plaintiff in the case at bar is "otherwise qualified" to live in the dormitory because she has met all the essential requirements of doing so. The primary qualification for dormitory residence is being in the CUNY Honors Program. The Honors Program operates to attract the best and the brightest students to the college by providing certain fringe benefits, including dormitory housing, which is not available to the vast majority of Hunter College students. In fact, as Plaintiff articulated in her Declaration of September 23, 2004, that she elected to attend Hunter precisely because of the dormitory benefit. Despite being displaced from her dormitory since June 2004, Plaintiff has continued to perform well academically, thereby making her "qualified" to live in the dormitory.

Defendants' argument that Plaintiff is not "otherwise qualified" for purposes of § 504 is premised almost exclusively on the holding of *Doe v. New York University*, 666 F.2d 761, 775 (2d Cir. 1981)(hereafter, "*NYU*"), but such reliance is misplaced because that case is distinguishable on its facts from the case at bar. *NYU* involved a young woman whose psychiatric history was directly relevant to her present and future ability to

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[14] *Compare* 29 U.S.C. §705(20)(Section 504) with 42 U.S.C. §12102(2)(ADA) and 42 U.S.C. §3602(h) (Fair Housing Act).

interact with patients and others in her role as a doctor; the Plaintiff in this case is an undergraduate with a humanities concentration. In *NYU*, the plaintiff lied about her psychiatric history in order to gain admission to medical school; Plaintiff in this case did not hide her psychiatric history and was still sought after by Hunter because of her academic credentials. The plaintiff in *NYU* had a long and uncontroverted history of behavior harmful to others and to self that resulted in her request for a voluntary leave of absence from the university. Here, Plaintiff was not asked to leave Hunter, and remains an honors student with superior academic performance. She did not voluntarily relinquish rights to her dormitory room; she returned to find that the locks had been changed and she had been denied access.

Most importantly, the *NYU* plaintiff had a history of assaultive behavior. As Defendants point out, given her conduct, the court was concerned for the safety of others. Here, there is no history of harm to others. Defendants do not even allege that she will harm others.

In short, the *NYU* court found that the plaintiff in that case was not "otherwise qualified" because her deceit underlying her original admission to medical school and her subsequent, highly disruptive behavior "rendered her less qualified than others for the limited number of places available." *Id.* at 777. It is not a matter of Plaintiff being less qualified than others; it is a matter of whether or not she remains qualified for dormitory housing. She has a right to live there by virtue of being and remaining an Honors Student.

In its reliance on *NYU*, Defendants assert that Plaintiff is not otherwise qualified under § 504 and the ADA because her conduct violates the housing contract, and

obliquely suggest that her conduct makes her a “direct threat” to the health and safety of others. Defendants' Memorandum at 17-20. When questions of safety are involved in determining whether an individual is "qualified" for purposes of the ADA, a person may be excluded from a program or activity or from housing only if he or she poses a “direct threat” to the health or safety of others. A “direct threat” is defined as “a significant risk to the health or safety of others . . . .” 28 C.F.R. Pt. 35, App. A, § 35.104 (definition of "qualified individual with a disability"); 24 C.F.R. §100.202(d). Direct threat to self is an invalid consideration under the FHA, Title II of the ADA, or §504. The ADA and the Fair Housing Act place the burden of proof on Defendants to demonstrate that Jane Doe poses a direct threat. *Hargrave v. Vermont*, 340 F. 3d 27, 35 (ADA); *Roe v. Housing Authority of Boulder*, 909 F.Supp. 814 (D.Colo. 1995)(FHA).

The allegations properly before the court do not support any claim that Plaintiff is a threat to any other person. Defendants miss the point of the “direct threat” provision of § 504 and the ADA. In *Hargrave* the Second Circuit said: “It is unclear whether the ‘direct threat’ defense applies outside of the employment context.” 340 F. 3d at 36. The Court went on to reject the argument that a danger to self is a direct threat which makes a person not “otherwise qualified” within the meaning of the ADA and § 504.

Finally, Defendants believe that its one semester ban from dormitory housing is an essential qualification because “dormitory residence poses inherent stressors, which a student must be emotionally able to withstand.” Defendants' Memorandum at 20. These are allegations outside the four corners of the Amended Complaint and are not appropriate for consideration by the Court. In any case, there is no uncontested evidence before the Court on this issue and it is at best a question of fact.

Plaintiff has raised a triable issue of material fact with respect to whether she is otherwise qualified to live in the dormitory by showing that, with the aid of reasonable accommodations she is able to meet the requirements of doing so. For that reason, the motion to dismiss should be denied.

B. Defendants Have Engaged in Discrimination on the Basis of Disability

Defendants argue that Plaintiff's claim of discrimination fails because Plaintiff was evicted for a suicide attempt (her conduct) and not because of discrimination based on her disability. Defendants' Memorandum at III. B. In essence Defendants' claim is that their policy is neutral. The sole case cited by Defendants for this proposition is *Atkins v. County of Orange*, 251 F. Supp. 2d 1225 (D.N.Y., 2003) where the complaint failed to "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." *Id* at 1232. *Atkins* further states that, "[w]ith no allegation of disparate treatment, no claim for discrimination under the ADA or Rehabilitation Act lies." *Id*.

In *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003), the Second Circuit stated, "[T]o establish discrimination under either the FHAA or the ADA, Plaintiff has three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." *Id* at 573. The Amended Complaint establishes a cause of action on each of these three grounds.

Plaintiff's Amended Complaint here alleges that Defendants actions constitute intentional discrimination (i.e. that their policy is not neutral) and in the alternative that

their policy has a disparate impact on people with disabilities.[15] Plaintiff specifically alleges that "Defendants' actions constitute intentional discriminatory treatment based on Plaintiff [Doe]'s disability. Defendants' actions also have a disparate impact on persons who suffer from mental illness." Amended Complaint at ¶ 23.

The Amended Complaint alleges that Defendants' housing policy of evicting people who attempt suicide has discriminatory intent; that Defendants' policy is not neutral; and that it in fact does take into account the mental handicap behind the suicide attempt. Amended Complaint at ¶¶ 23, 30, 33.The policy is not neutral because it requires that a person who attempts suicide be evaluated by a school psychologist or his or her designated counselor prior to returning to the Residence Hall.[16] Amended Complaint ¶ 13. This is clear evidence that Defendants discriminate against people with mental illnesses, or people they regard as having mental illnesses. In any case, the issue of Defendants' intent is a question of fact and not properly resolved by a motion to dismiss.

The ADA prohibits discrimination "by reason of" disability. 42 U.S.C. § 12132. Discrimination by reason of disability includes not only discrimination based on an impairment itself but also discrimination based on the effects of an impairment, whether those include the effects on the person himself or the effects on others. *School Bd. of Nassau County v. Arline*, 480 U.S. 282 & n.7 (1987) (interpreting the ADA's predecessor, § 504 of the Rehabilitation Act). In *Arline*, the Court noted that the disability at issue, tuberculosis, "gave rise" not only to an impairment but also to

[15] Defendants did not raise reasonable accommodation in their Motion to Dismiss. Therefore, Plaintiff does not address it here. However, Plaintiff reserves argument that Defendants failed to accommodate her.
[16] Defendants hypothesize that suicidal behavior is an action which could have other origins (alcoholism, romantic relationships). Defendants' Memorandum at p. 20. However, Defendants' policy does not require

contagious effects, and § 504 prohibited discrimination based on the contagious effects of the disability. *Id*. at 282 n.7.

Defendants contend that they evicted Plaintiff because of her suicide attempt, not her disability, major depression. However, this is exactly the type of discrimination based on disability-caused conduct that is prohibited. See *Teahan v. Metro-North C. R. Co.,* 951 F.2d 511, 517 (2d Cir. 1991)("an employer "relies" on a handicap when it justifies termination based on conduct caused by the handicap.") See also *Humphrey v. Memorial Hosps. Ass'n,* 239 F.3d 1128, 1140 (9th Cir. 2001)("For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination."); *Laporta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 768-769 (D. Mich. 2001)(rejecting the conduct/disability dichotomy and the argument that Plaintiff was fired for her refusal to appear for work on November 10, not on account of a disability).

In *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995), the Second Circuit found that a teacher's discharge because of performance inadequacies was in fact discharge based on disability when the performance inadequacies resulted from the disability. See also, *McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001)(the denial of employment based on the Plaintiff's conduct, including cutting her wrists, was improper because Plaintiff was protected by the ADA from adverse employment action based on conduct related to her illness as long as she did not pose a direct threat);

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that students be screened for any other possible reasons that a person might engage in self-destructive behavior (i.e. political beliefs, religious beliefs, etc.).

Humphrey, 239 F.3d at 1140 (a jury could reasonably find a causal link between absenteeism and OCD disability).[17]

Even if this Court were to find that Defendants' policy on suicide attempts is neutral, as they contend, and does not reflect the intent to discriminate against students with the handicap of depression, the policy still has a disparate impact on people with depression. The disparate impact analysis focuses on facially neutral policies or practices that may have a discriminatory effect. *Tsombanidis,* 352 F.3d at 574. To show that a seemingly neutral policy has a discriminatory effect, the Plaintiff must prove the practice "actually or predictably results in ... discrimination." *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90 (2d Cir. 2000).

Plaintiff has alleged that Defendants' policy has a disparate impact on people with mental illnesses. This Court can take judicial notice that suicidal ideation and behavior are classic symptoms of depression and overwhelmingly occurs because of mental disability. "Congress has recognized that youth suicide is a public health tragedy linked to underlying mental health problems…." Garrett Lee Smith Memorial Act of 2004, Pub. L. No. 108-355, 118 Stat. 1404, §2 Findings, (8). See also articles cited in the Garrett Lee Smith Memorial Act of 2004 at §2 (9).[18]

Defendants argue that their actions are permissible because the law permits them to discriminate based on the severity of a disability. Defendants' Memorandum at 21 citing *Flight v. Gloeckler*, 68 F.3d 61 (2d Cir. 1995). *Flight* is completely inapposite. It

[17] Even disability-caused "misconduct" is protected. *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998) (the ADA's general anti-discrimination provision protects both disability and disability-caused misconduct rather than contemplating a "stark dichotomy" between them, except where the disability is related to alcoholism or illegal drug use).

[18] When determining the sufficiency of plaintiff's claim on a motion to dismiss, the court may consider, *inter alia*, matters of which judicial notice may be taken. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir., 1993).

stands for the proposition that the Rehabilitation Act generally does not prohibit government funded agencies from discriminating among handicapped people with regard to *services specifically designed for people with disabilities*. Likewise the cases cited in *Flight, -- P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. 1990) (regarding handicapped persons in special education programs) and *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999) *cert. denied* 531 U.S. 864 (2000) (regarding Medicaid home care services for the disabled) -- both deal with services specifically designed for people with disabilities. These cases stand for the proposition that in providing services *specifically for such a population*, "[t]he Act does not require all handicapped persons to be provided with identical benefits." *P.C. v. McLaughlin*, 913 F.2d 1033, 1041 (2d Cir. 1990). These cases are of no relevance to facilities such as a dormitory room that are not specifically designed solely for the handicapped.

The Amended Complaint therefore states a cause of action that Defendants had engaged in intentional discrimination and that their policies have a disparate impact on students with mental illnesses.

Conclusion

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint should be denied.

Date: New York, NY
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Respectfully submitted

__S/_____

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