UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KAMI Z. BARKER and ACCESS NOW, INC.,	)	
Plaintiffs,	)	
v.	)	CASE NO.: 1 02-CV-2450-CC
EMORY UNIVERSITY, NILES BOLTON ASSOCIATES, INC., and TCR GA CONSTRUCTION LIMITED PARTNERSHIP,	)	
Defendants.	)	

UNITED STATES' SUR-REPLY BRIEF AS AMICUS CURIAE IN OPPOSITION TO EMORY UNIVERSITY'S MOTION TO DISMISS

In order to correct several fundamental misrepresentations and to address new arguments proffered by Defendant Emory University in its Reply brief, the United States, as amicus curiae, files this Sur-Reply.

Emory University is a public accommodation subject to the requirements of title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq., (the "ADA"). See 42 U.S.C. § 12181(7)(J) (identifying "undergraduate, or

postgraduate private school[s], or other place[s] of education" as public accommodations). As such, Emory is obligated to ensure that all admitted students have "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" that it provides. 42 U.S.C. § 12182(a). These include its residential housing program, which is only open to students who have been admitted to and enrolled at Emory (or their family members who live with them).

Rather than applying a straightforward analysis to the question at hand – whether student housing is a "good, service, facility, privilege, advantage, or accommodation" of attendance at the University – Emory attempts to carve out a variety of exceptions from the ADA's clear statutory provisions. Emory misrepresents the position of the Department of Justice (the "Department"), misconstrues applicable case law, and manufactures what it describes as a "room-by-room" application of the nondiscrimination requirements of title III.

On a motion to dismiss, the facts alleged in the complaint, and all reasonable inferences therefrom, must be construed in the light most favorable to the plaintiffs. See Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1276 n. 2 (11th Cir. 2002); Stephens v. Dep't of Health & Human Servs., 901 F.2d

1571, 1573 (11th Cir. 1990). The question of whether a particular building or facility on Emory University's campus is ultimately subject to the design standards imposed by title III requires a factual inquiry beyond the scope of a motion to dismiss. In this light, the United States respectfully requests that this Court deny Emory's motion to dismiss and hold that on-campus student housing may be a "good, service, facility, privilege, advantage, or accommodation" of the University.

ARGUMENT

Title III requires nondiscrimination in the provision of all the "goods, services, facilities, privileges, advantages, or accommodations" of a place of education. See 42 U.S.C. §§ 12182(a); 12181(7)(J). The category of a "place of education" "'should be construed liberally' to afford people with disabilities 'equalaccess' to the wide variety of establishments available to the non-disabled." PGA Tour, Inc. v. Martin, 532 U.S. 661, 676-77 (2001) (quoting S.Rep. No. 101-116, p. 59 (1989); H.R. Rep. No. 101-485, pt. 2, p. 100 (1990), U.S.C.C.A.N. 1990, pt. 2, at pp. 303, 382-83). As set forth in the United States' amicus brief and the exhibits attached thereto, Emory's own publications make clear that Emory

offers student housing as a facility, privilege, advantage, and accommodation of the University.

1. Emory contends that the Department's position is inconsistent with the statute and regulations because no formal educational process takes place inside a student's apartment. However, the ADA does not require that every facility, privilege, advantage, or accommodation of a place of education offer a "formal educational process" in order to be subject to the requirements of title III.[1] Cf. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) (finding that programs offered by state prisons that are not necessarily formally penal in

[1] Emory implies that this Court should disregard Emory's own publications advertising its student housing program, arguing that it is irrelevant that the housing offers an "educational experience" if the housing does not have an educational "use." The difference between "experience" and "use" is a matter of semantics; Emory's attempt to distinguish the two terms is illogical. The exhibits attached to the United States' amicus brief demonstrate that Emory itself describes its on-campus housing as being "used" for educational purposes. See, e.g., Emory University, "Undergraduate Housing at Emory," http://www.emory.edu/RES_LIFE/UNDERGRAD/ ("Learning that occurs outside of the classroom can often be as valuable as learning that takes place in an academic setting . . . . The campus housing program has been designed with these goals in mind."); Ex. A to the United States' Brief as Amicus Curiae (advertising that the graduate student housing complex "provides students with the opportunity to . . . interact in an academic environment"); id. (noting that the complex offers "[p]rograms that address cultural diversity, social, and informational needs, and help to reduce the stresses of student and family life").

character – such as recreational activities, medical services, and educational and vocational programs – are nonetheless programs, services and activities provided by a public entity and covered by title II of the ADA, 42 U.S.C. §§ 12131-12132). Such a requirement would be inconsistent with the Supreme Court's mandate to read the categories of places of public accommodation broadly. All this Court need conclude on this Motion to Dismiss is that plaintiffs may be able to establish that Emory offers student housing as a facility, privilege, advantage, or accommodation of enrollment in the University. Because this is the only issue addressed by the United States, the remaining arguments set forth in Emory's Reply brief are irrelevant. The Court need not consider, for example, whether other buildings on the University campus or privately-owned apartment buildings would be covered by the ADA.

2. Emory also contends that the Department's position is inconsistent with title III of the ADA and its regulations, which, according to Emory, cover residential facilities only if they offer short-term stays. In support of its argument, Emory cites only case law addressing defendants who were alleged to own, lease, or operate "**places of lodging**," 42 U.S.C. § 12181(7)(A), not "places of

education."[2] The length of a student's stay in college housing is irrelevant because student housing is covered by the ADA under the broad category of a place of education. Cf. Lindgren v. Camphill Village Minn., Inc., No. Civ. 00-2771 RHK/RLE, 2002 WL 1332796, *6 (D. Minn. June 13, 2002) (attached as Exhibit 1). The defendant in Lindgren, the operator of a group home, took a similar position, arguing that, as a residential facility, the group home where the plaintiff had lived for four years was not a "place of lodging." The court, however, recognizing that the home offered classes and other services for persons with disabilities, held that the facility was a "social service center establishment," 42 U.S.C. § 12181(7)(K), covered by title III. See Lindgren, 2002 WL 1332796, *6. Similarly, as an advantage of enrollment at Emory University, student housing is covered as part of a "place of education"; the Court need not reach the question of

[2] See Radivojevic v. Granville Terrace Mutual Ownership Trust, No. 00 C 3090, 2001 WL 123796, *3 (N.D. Ill. Jan. 31, 2001) (holding that a cooperative apartment is not a "place of lodging"); Hanks v. Tilley, No. 1:98CV00789, 1999 WL 1068484, *2 (M.D. N.C. Feb. 2, 1999) (holding that the plaintiff's single-family home, consisting of a house, pasture, and a barn, leased from the defendant was not a "place of lodging"); Independent Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs., 840 F.Supp. 1328, 1344 (N.D. Cal. 1993) (holding that a privately owned housing project is not a "place of lodging").

whether Emory's dormitories could alternatively be covered as "places of lodging."[3]

Alternatively, Emory argues that dormitories are only covered by title III if they offer short-term stays, because dormitories are listed in the heading of section 9.1 of the Department's ADA accessibility standards: "Hotels, Motels, Inns, Boarding Houses, Dormitories, Resorts and Other Similar Places of Transient Lodging." 28 C.F.R. Pt. 36 App. A § 9. Emory's argument fails, however, because Emory has neglected to distinguish the issue of whether an entity is covered by title III from the subsequent inquiry about what standards apply to a particular covered entity. Claims for violations of the facilities-related requirements of title III require a multi-step analysis. The first step is to determine whether an entity is covered by title III. If the entity is covered, one applies the relevant parts of the ADA Standards for Accessible Design in order to determine whether a covered entity has violated title III. See id. § 1 ("This document sets

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[3] Emory blatantly misrepresents the United States' discussion of the significance of the coverage of student housing by the Fair Housing Act (the "FHA"). Emory incorrectly contends that the United States suggested that because the dormitories are covered by the FHA they must also be covered the ADA. Rather, the United States merely observed that "[s]tudent dormitories are both dwellings and an integral part of a place of education and are covered by both statutes." United States' Br. as Amicus Curiae at 11.

guidelines for accessibility to places of public accommodation and commercial facilities by individuals with disabilities."). The Department's position that dormitories are covered as places of education is not inconsistent with the fact that the standards mention dormitories as a type of transient lodging; to the contrary, the reference to dormitories in the standards is a clear indication that coverage of such facilities was anticipated by the drafters of the regulation.

3. In its Reply, Emory argues, for the first time, that its student housing is not a place of public accommodation because it is not open for any member of the public to walk into off the street. This contention is contrary both to the broad purpose of the ADA – to remedy discrimination "in such critical areas as employment, housing, public accommodations, education, . . . and access to public services," 42 U.S.C. § 12182(a) – and to the holding of the Supreme Court in PGA Tour. There the Court held that a professional golf tour was a public accommodation, even though only highly skilled golfers who had won preliminary competitions were permitted to compete. See 532 U.S. at 677. In PGA Tour, the Court of Appeals rejected the defendant's similar argument, that title III exempts from coverage areas of public accommodations that are not open to any member of the public. The district court held, Martin v. PGA Tour, Inc., 984 F.Supp. 1320,

1326-27 (D. Or. 1998), and the Ninth Circuit agreed, that a public accommodation cannot be "compartmentalized" to exclude from coverage those areas into which only invitees may enter. See Martin v. PGA Tour, Inc., 204 F.3d 994, 997 (9th Cir. 2000), aff'd on other grounds by PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001). The PGA Tour argued that the golf course was not a public accommodation during a tournament because no member of the general public was allowed on the field of play. The Ninth Circuit disagreed, holding that a public accommodation retains its character, regardless of who is permitted entry. "It is true that the general public cannot enter the area 'inside the ropes,' but competitors, caddies, and certain other personnel can . . . . The statute does not restrict this definition [of a "place of exhibition or entertainment," 42 U.S.C. § 12181(7)(C),] to those portions of the place of exhibition that are open to the general public. The fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation." Martin, 204 F.3d at 997-98 (citing Independent Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 759 (D. Or. 1997) (arena's executive suites contracted by businesses are public accommodations)).

Innumerable public accommodations, including medical offices, hotels, day care centers, health spas, and even Emory's own classroom buildings, are open only to members of the public who have, like students, met eligibility requirements, been invited, or made appointments. In fact, the Ninth Circuit in PGA Tour specifically observed that universities are public accommodations even though members of the general public do not have access to their campuses. See Martin, 204 F.3d at 998 ("The competition to enter the most elite private universities is intense, and a relatively select few are admitted. That fact clearly does not remove the universities from the statute's definition as places of public accommodation. It is true that the rest of the public is then excluded from the schools, but the students who are admitted are nevertheless members of the public using the universities as places of public accommodation.").

4. Similarly, Emory's contention, presented for the first time in its Reply brief, that this Court should conduct a room-by-room analysis of its student housing is without merit. Emory suggests that even if some areas of its dormitories were covered by title III, individual student units would not be, partly because no student would want "[his] college bedroom open to the public." Defendant, Emory University's, Reply to Plaintiffs' Br. in Opp'n to Emory's Mot.

to Dismiss Complaint, or in the alternative, for Partial Summary Judgment at 32. However, a room-by-room analysis is not appropriate because the purpose of the dormitory facilities is to house Emory students, as a privilege, advantage, or accommodation of the University, a place of education.[4] There is no requirement that every space or room in a place of education be "option to the public," as explained in the PGA Tour decisions discussed above. Contrary to Emory's suggestion, no provision of the ADA or its regulations removes a space or area from coverage as a place of public accommodations because of individual privacy concerns. In fact, the statute explicitly lists hotels (where the same privacy concerns would apply to guest rooms) as places of public accommodation. Moreover, the University's extensive control over its housing program extends to all of the individual rooms.[5]

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[4] In addition to having no legal basis, Emory's argument would require a factual inquiry not appropriate for resolution on a motion to dismiss. Any number of educational activities could – and presumably do – take place in students' rooms, including studying, tutoring, counseling, and meetings of student groups.

[5] Emory argues that the extent to which it controls the student housing on its campus does not support a determination that the housing is a place of education. But, as set forth in the United States' amicus brief, by reserving the right to add roommates, move students to other units at any time, or subject students to university disciplinary proceedings for violating their leases, Emory's control goes beyond that of a typical landlord.

5. The Department's position, expressed in its amicus brief, that student housing is covered as a place of education under title III is entitled to deference. See Bragdon v. Abbott, 524 U.S. 624, 646 (1998) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844 (1984)). Contrary to Emory's position, the Department's position is not unworthy of deference merely because it comes to the Court in the form of a legal brief. See Auer v. Robbins, 519 U.S. 452, 462 (1997); see also United States v. AMC Entertainment, Inc., – F.Supp.2d –, No. CV 99-1034 FMC (SHx), 2002 WL 31649984 *18 (C.D. Cal. Nov. 20, 2002). Rather, this Court must determine whether the Department's position represents a "fair and considered judgment" by inquiring into whether the position is consistent with the agency's previous statements and with the statute and regulation itself. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13; see also AMC Entertainment, 2002 WL 31649984, *18.

As demonstrated above, as well as in the United States' amicus brief, the Department's position that student dormitories are covered by title III is consistent with the statute and regulations. It is also consistent with the Department's prior statements interpreting the regulations, statements which are themselves entitled to

deference. See United States' Br. as Amicus Curiae at 8-9 & nn. 8-9. Accordingly, the Department's position is not a retroactive change to a rule.[6]

Contrary to Emory's contention, the Department's position is consistent with statements in the preamble to the regulations and in the technical assistance manual that a residential wing of a hotel and the production and processing facilities of a oil company are not covered by title III, even though the hotel and the oil company's service stations are covered public accommodations. See 28 C.F.R. Pt. 36, App. B p. 588; United States Department of Justice, The Americans with Disabilities Act Title III Technical Assistance Manual § III-1.2000 (1993). The Department does not assert that, merely because some part of a private entity is a place of public accommodation, all of the entity is a place of public accommodation. On the contrary, the obligations of a public accommodation only apply to those aspects of a private entity whose operations fall within one of the 12 categories. The residential wing of the hotel would be excluded from coverage

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[6] Emory's suggestion that the Department's position is a "post hoc rationalization," Bowen, 488 U.S. at 212, is incorrect and misplaced. In Auer, the Supreme Court subsequently explained that its discussion about "post hoc rationalizations" in Bowen was addressed to justifications "advanced by an agency seeking to defend past agency action against attack." Auer, 519 U.S. at 462 (citing Bowen, 488 U.S. at 212). Here, the Department has taken no previous action that is under attack in this lawsuit.

"because of the nature of the occupancy of that part of the facility." 28 C.F.R. Pt. 36, App. B p. 588. The Department's discussion goes on to point out, however, that if the residential facility provided social services to its guests, it "would be considered a 'social service center establishment' and thus covered by the ADA as a place of public accommodation, regardless of the length of stay of the occupants." Id. at p. 589. Similarly, here, housing provided by Emory University as an integral part of its educational program clearly falls within the category of place of education.

Also, even though a gas station is a place of public accommodation, the oil refining facility owned by the same corporation to produce gasoline is not a place of public accommodation because the Department has consistently stated that manufacturing facilities are not places of public accommodation. See Title III Technical Assistance Manual § III-1.3000. In contrast, the Department has explained that a residential facility will be covered as a place of public accommodation if it falls within one of the 12 categories, such as "social service center establishment" or, in this case, "place of education."

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CONCLUSION

For these reasons, as well as those set forth in the United States' amicus brief, the United States urges this Court to deny Emory's motion to dismiss the claims in Plaintiff Kami Barker's complaint regarding student housing facilities.

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman 14-point font in compliance with Local Rule 5.1B.

DATED: January ___, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of January 2003, true and correct copies of "United States's Motion for an Extension of Time to File its Amicus Brief in Opposition to Emory University's Motion to Dismiss" and Proposed Order were served by Federal Express, postage pre-paid, on the following parties:

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