

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

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KAMI Z. BARKER and  
ACCESS NOW, INC.,

Plaintiffs,

v.

EMORY UNIVERSITY, NILES  
BOLTON ASSOCIATES, INC.,  
and TCR GA CONSTRUCTION  
LIMITED PARTNERSHIP,

Defendants.

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CASE NO.: 1 02-CV-2450-CC

**UNITED STATES’ BRIEF AS AMICUS CURIAE**  
**IN OPPOSITION TO EMORY UNIVERSITY’S MOTION TO DISMISS**

Plaintiff Kami Barker, a student at the Emory University School of Law, and Plaintiff Access Now, Inc., allege that various facilities on the Emory University campus are inaccessible to disabled individuals in violation of title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 et seq. (the “ADA”) and the title III implementing regulations of the Department of Justice (the

“Department”), 28 C.F.R. pt. 36, including the Standards for Accessible Design, Appendix A (“the Standards”). Defendant Emory University has filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (12)(b)(6) that presents, inter alia, the legal question of whether dormitories and/or apartments owned and operated by a private university as student housing are covered by title III of the ADA.<sup>1</sup> The United States, as amicus curiae, requests that this Court deny Emory’s motion because student housing owned and operated by a private university is covered by title III of the ADA as a facility, privilege, advantage, and/or accommodation of a place of education.<sup>2</sup> Resolution of this question in

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<sup>1</sup> A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiff’s claims for relief. Fed.R.Civ.P. 12(b)(6); see Conley v. Gibson, 355 U.S. 41, 47 (1957); Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983). Generally, notice pleading is all that is required for a valid complaint. See Lombard’s, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir.1985). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff’s claim and the grounds upon which it rests. Id.

<sup>2</sup> The United States’ brief addresses only the issues raised in this case concerning coverage of student housing under title III of the ADA.

Plaintiffs' favor will help ensure that all aspects of the educational experience are accessible to students with disabilities.

### **ARGUMENT**

Congress enacted the Americans with Disabilities Act as a “national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1) (“Findings”). Title III provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .” 42 U.S.C. § 12182(a).

Congress specifically found that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, . . . and access to public services [.]” Id. § 12101(a)(3) (emphasis added). The statute prohibits discrimination by twelve types of private entities that are considered public accommodations; one of the listed categories of entities is “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education[.]” Id. § 12181(7)(J) (emphasis added). Thus undergraduate and postgraduate private schools, such as

Emory, are places of public accommodation. See 42 U.S.C. § 12181(7)(J); see also, e.g., Amir v. St. Louis Univ., 184 F.3d 1017, 1028 (8<sup>th</sup> Cir. 1999); Rothman v. Emory Univ., 828 F.Supp. 537, 541 (N.D. Ill. 1993).

The ADA’s categories of public accommodation, including places of education, “‘should be construed liberally’ to afford people with disabilities ‘equal access’ 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). In PGA Tour, the Supreme Court reiterated that title III requires that individuals with disabilities be afforded full and equal enjoyment of public accommodations. See 532 U.S. at 677 (requiring the PGA Tour to make its competitions accessible to a disabled golfer because “among the ‘privileges’ offered by [the PGA Tour] on the [golf] courses are those of competing in the [qualifying tournament] and playing in the tours”). Student housing – an integral part of the university experience – is one of the facilities, privileges, advantages, and accommodations of a place of education covered by title III of the ADA.<sup>3</sup>

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<sup>3</sup> Other examples of services, facilities, and privileges of a place of education that are covered by title III of the ADA include, but are not limited to, recreational

Plaintiffs have alleged in their complaint that Emory is a place of education that provides dormitory housing to its student body as part of the educational experience. See Complaint ¶¶ 6, 27. Emory University’s residential life system provides educational services in addition to housing facilities to students and others. The University promotes the residential life program as an important part of the educational experience:

Learning that occurs outside of the classroom can often be as valuable as learning that takes place in an academic setting. Experiences outside the classroom many times include developing close relationships with diverse individuals, enhancing leadership skills, assuming personal responsibility, enriching spiritual life, building character and discipline, and forming a better understanding and genuine acceptance of the many races, cultures, religions, and nationalities that comprise the academic community at Emory and beyond. The campus housing program has been designed with these goals in mind.

Emory University, “Undergraduate Housing at Emory,”

[http://www.emory.edu/RES\\_LIFE/UNDERGRAD/](http://www.emory.edu/RES_LIFE/UNDERGRAD/).<sup>4</sup>

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programs, counseling, food services, medical services, lectures for students or that are open to the public, student transportation services, stadiums, and performing arts centers.

<sup>4</sup> The United States requests that the Court take judicial notice of the information contained on Defendant Emory University’s website. See Pollstar v. Gigmania, Ltd., 170 F.Supp. 2d 974, 978 (E.D. Cal. 2000); see also Bryant v.

Plaintiffs allege that Emory exercises ongoing control over the dormitory housing. See Complaint ¶¶ 14-17. The University places students in rooms; removes students from units, possibly in the middle of the lease term, see Ex. C ¶ 9;<sup>5</sup> institutes disciplinary proceedings for violations of some terms of the lease, see id. (“Special Stipulations”); and collects rent through the university’s central Bursar’s Office. See id.

Brochures distributed by Emory emphasize that its student housing offers special privileges and advantages for students, designed to integrate them into other aspects of the university experience. According to Emory’s brochure, the Clairmont complex, where plaintiff Barker now lives:

- “provides students with the opportunity to live among their colleagues and interact in an academic environment . . .,” Ex. A (“Congratulations!”);

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Avado Brands, Inc., 187 F.3d 1271, 1277 (11<sup>th</sup> Cir. 1999) (approving the taking of judicial notice on a motion to dismiss).

<sup>5</sup> The exhibits attached to this brief were attached as exhibits to Plaintiffs’ oppositions to the motions to dismiss of Defendants TCR GA and Niles Bolton. Exhibit C was also attached as Exhibit B to Emory University’s motion to dismiss. The United States requests that the Court take judicial notice of the exhibits, as they are part of the record in this case and available to the public from Emory University.

- offers “[p]rograms that address cultural diversity, social, and informational needs, and help to reduce the stresses of student and family life,” id. (“Amenities”); and
- provides residential life staff, including some staff members who live on the premises. See id. (“Clairmont Campus Staff”).

Residents in the Clairmont complex are integrated into campus life by a free shuttle service to campus, ethernet connections to the University computer network, an on-site computer lab, and a roommate assignment system. See id. (“Amenities”).<sup>6</sup>

By establishing and maintaining a residential life program as part of its educational mission, Emory has an obligation to provide this program to people

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<sup>6</sup> Although the Clairmont apartment complex offers additional amenities, such as washers and dryers in the individual units, it is really nothing more than a student dormitory. The apartments, which are available only to enrolled students and their families, are available furnished or unfurnished; all utilities are included, including ethernet connections to the University’s computer network; and the University assigns roommates to students in multi-bedroom units. See Ex. A (“Amenities”); id. (“Eligibility”); id. (“Furniture”); id. (“Roommates”).

with disabilities on a nondiscriminatory basis.<sup>7</sup> Student housing, like all aspects of the educational experience, is encompassed in the place of public accommodation. Cf. Rothman, 828 F.Supp. at 541 (holding that law school recommendations to a state licensing board are covered by title III because they “are ‘services’ and ‘privileges’” offered by a law school that virtually all law students expect to receive).

It has been the Department’s consistent position that all aspects of a university’s student activities and of the educational experience (including, for example, research activities and fraternity housing) are covered by title III of the ADA.<sup>8</sup> For the same reasons, it is the Department’s position that student housing

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<sup>7</sup> Emory requests that Plaintiffs’ retaliation claim, Count III, be dismissed, solely on the basis of its argument that its dormitory apartments are not covered by title III of the ADA. Because, as set forth in this brief, student housing is covered as a place of education, Emory may not retaliate against individuals who engage in protected activity with regard to the student housing program. See 42 U.S.C. § 12203; see also Rothman, 828 F.Supp. at 541. Accordingly, the Court should not dismiss Plaintiff Barker’s retaliation claim on the grounds of lack of coverage of student housing.

<sup>8</sup> See United States Department of Justice, “Americans with Disabilities Act Technical Assistance Letters,” Doc. # 488, <http://www.usdoj.gov/crt/foia/talindex.htm> (May 2, 1994) (stating that fraternity houses, owned and operated by a university, “like all other aspects of a university



is covered by title III of the ADA. “As the agency directed by Congress . . . to render technical assistance explaining the responsibilities of covered individuals and institutions, [see 42 U.S.C.] § 12206(c), and to enforce title III in court, § 12188(b), the Department’s views are entitled to deference.” 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));<sup>9</sup> see also United States v. AMC Entertainment, Inc., No. CV 99-01034 FMC (SHx), 2002 WL 31649984, \*18-19 (C.D. Cal. Nov. 20, 2002) (order on parties’ motions for summary judgment) (“Courts must give deference to agency interpretations [in court filings] unless those positions are ‘plainly erroneous or inconsistent with’ the regulation.”).

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experience, are part of the place of education, and are covered by title III”); see also United States Department of Justice, “Americans with Disabilities Act Technical Assistance Letters,” Doc. # 128, <http://www.usdoj.gov/crt/foia/talindex.htm> (July 8, 1992) (stating that research activities conducted by a university, even if primarily for pharmaceutical research rather than education, are covered by title III as part of the university’s obligation to ensure “compliance with title III in all of the activities of the place of public accommodation that it owns or operates[ , a] provision . . . intended to be read broadly”).

<sup>9</sup> In Bragdon, the Supreme Court drew guidance from the Department’s Title III Technical Assistance Manual and several technical assistance letters. See 524 U.S. at 646.

In its motion to dismiss, Emory contends that student housing is “strictly residential” and therefore not covered by the ADA. The cases cited by Defendant involved allegations that a residential facility was a “place of lodging,”<sup>10</sup> one of the twelve categories that the ADA covers as a public accommodation; none of these facilities had or was alleged to have any connection to a place of education, which is a separate category. A facility or service that is covered under one of the other categories of “public accommodation” is not removed from coverage because it is also “residential.”<sup>11</sup>

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<sup>10</sup> 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”).

<sup>11</sup> Title III of the ADA prohibits discrimination by places of public accommodation, see 42 U.S.C. § 12182, and imposes accessibility requirements for newly constructed places of public accommodation and commercial facilities. See 42 U.S.C. § 12183. Title III excludes residential facilities from coverage as “commercial facilities,” see 42 U.S.C. § 12181(2)(A), but not from coverage as places of “public accommodation.” See 42 U.S.C. § 12181(7).

Similarly, Emory argues that college housing would fall within the province of the Fair Housing Act (“FHA”) and not title III of the ADA. The FHA makes it unlawful to discriminate in the sale or rental of, or to otherwise make unavailable or deny, a dwelling because of a disability. 42 U.S.C. § 3604(f)(1). A “dwelling” is a building, or portions thereof, intended for occupancy as a residence.

Student dormitories are both dwellings and an integral part of a place of education and are covered by both statutes. As the Department has explained in both its published guidance and the preamble to its title III implementing regulations, “[t]he analysis for determining whether a facility is covered by title III is entirely separate and independent from the analysis used to determine coverage under the FHA. A facility can be a residential dwelling under the FHA and still fall in whole or in part under at least one of the 12 categories of places of public accommodation.” United States Department of Justice, Americans with Disabilities Act Technical Assistance Manual § III-1.2000; see also 28 C.F.R. pt. 36, app. B at 665 col. 2, 666 col. 1 (2002) (section-by-section analysis of § 36.104's definition of “facility”).

As a public accommodation, a private university must comply with title III with respect to all of its student activities. Requiring universities to eliminate

barriers to disabled individuals in their student housing best fulfills the statute's "broad mandate," PGA Tour, 532 U.S. at 675, to prohibit discrimination in all the services, facilities, privileges, advantages, or accommodations of public accommodations. See 42 U.S.C. § 12182(a).

As Emory's own publications show, the Clairmont apartment complex, as well as other student housing, offers particular privileges, advantages, and accommodations resulting from its integration into a place of education. Because of these privileges of living in student housing, which Emory offers at a variety of types of university-owned and/or -operated housing, see Emory University, "Life in the Residence Halls," [http://www.emory.edu/RES\\_LIFE/UNDERGRAD/](http://www.emory.edu/RES_LIFE/UNDERGRAD/), Plaintiffs' allegations, if true, establish coverage of the University's housing facilities and programs under title III of the ADA.

## 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: December \_\_\_\_, 2002

Respectfully submitted,

Ralph F. Boyd, Jr.  
Assistant Attorney General  
Civil Rights Division

John L. Wodatch, Chief  
Philip L. Breen, Special Legal Counsel  
L. Irene Bowen, Deputy Chief  
Disability Rights Section

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Alyse S. Bass  
Elizabeth T. Bangs  
Trial Attorneys  
Disability Rights Section  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
NYAV Building  
Washington, D.C. 20035  
(202) 616-9511  
(202) 353-7414  
(202) 307-1198 (fax)  
[alyse.bass@usdoj.gov]  
[elizabeth.bangs@usdoj.gov]

William S. Duffey, Jr.  
United States Attorney  
Laura Kennedy  
Assistant United States Attorney  
Northern District of Georgia  
Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Suite 600  
Atlanta, GA 30303-3309  
(404) 581-6000

Counsel for United States of America

## CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_ day of December 2002, 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:

Mitchell Benjamin  
Johnson & Benjamin, LLP  
One Securities Centre  
3490 Piedmont Rd., Suite 650  
Atlanta, GA 30305  
Attorney for Plaintiffs

Matthew W. Dietz  
Law Office of Matthew W. Dietz,  
P.L.  
1320 South Dixie Hwy.  
Penthouse  
Coral Gables, FL 33146  
Attorney for Plaintiffs

Ernest L. Greer  
Greenberg Taurig, LLP  
The Forum, Suite 400  
3290 Northside Pkwy.  
Atlanta, GA 30327  
Attorney for Defendant  
Emory University

George D. Wenick  
Smith, Currie & Hancock, LLP  
233 Peachtree Street NE, Suite 2600  
Atlanta, GA 30303  
Attorney for Defendant  
TCR GA Construction, LP

Kent T. Stair  
Carlock, Copeland, Semler & Stair, LLP  
2600 Marquis Two Tower  
285 Peachtree Center Ave.  
Atlanta, GA 30303-1235  
Attorney for Defendant Niles Bolton Assoc., Inc.

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Elizabeth T. Bangs