IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-B-3012

KEVIN W. WILLIAMS,

Plaintiff,

v.

THE UNIVERSITY OF DENVER,
a Colorado corporation,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT, OR TO STRIKE IMPERTINENT ALLEGATIONS FROM THE AMENDED COMPLAINT

Plaintiff Kevin W. Williams, by and through his attorneys, Fox & Robertson, P.C., submits this Brief in Opposition to Defendant's Motions to Dismiss, for Summary Judgment, or to Strike Impertinent Allegations from the Amended Complaint.

INTRODUCTION

Imagine a law school, recently integrated. Black students are admitted to the school, but parts of the school are still segregated and much intentional disparate treatment still goes on:

- Black students are permitted to attend classes, but must sit in the back of the classroom. They may speak with professors after class, but only after waiting for the professors to finish speaking with White students at the front of the class. Then, if the professor has enough time and the Black student is not late for his next class, they may speak at the back of the class as the professor leaves. When Black students give presentations, they

do so from the back of the class or have to make special arrangements to move the class to a smaller, integrated classroom.

- Black students may join student organizations, but the student organization offices are in a Whites-only part of campus. White students are generally willing to move any given meeting of any given organization to the integrated part of campus upon the special request of a Black student, but Black students cannot use the phones, files or meeting space of the various organizations' offices or casually explore the different organizations.

- Law school gatherings are often held in a large open area called the "Atrium." Black students are permitted to attend, but may not sit at the center near the guest or speaker. They must shout their questions from the periphery and, during the reception afterward, can only speak personally with the guest or speaker if the latter is willing to come over to the side.

- When a group of Black students tries to form a Black Law Students Association, they are told that they should learn to get along with the White students who have formed a Civil Rights Law Society -- whose office is in the Whites-only part of campus -- as the issues of interest to Black students will be addressed by those civil-rights-oriented Whites. Recognition of the Black Law Students Association is denied -- unlike any other student organization in recent memory.

- The law school holds its annual dinner to honor scholarship recipients in a private Whites-only club. A Black student has received a scholarship but rather than moving the event, the dean of students calls the Black student to tell him he cannot attend.
- The law school decides to hold graduation in a facility that has Whites-only bathrooms. While Black graduates and their families may attend, they must use an integrated bathroom facility across campus. When one Black student objects -- and asks that graduation be held in a fully integrated facility -- he is repeatedly asked to consent to the segregated location and when he does not, is publicly criticized by law school personnel.
- Black alumni and other Black lawyers, although invited to participate in events at the law school, may do so only under the segregated conditions described above.

It is beyond question that the situation described above would constitute intentional race discrimination, entitling the students in question to damages under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits race discrimination by recipients of federal funds. Substitute "disabled" for "Black," "non-disabled" for "White," and "inaccessible" for "Whites-only" and the description above is a precise if partial account of the experience of Kevin Williams at the University of Denver College of Law. Courts have consistently held that this type of conduct is actionable under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act" or "§ 504"), prohibiting discrimination on the basis of disability by recipients of federal funds. Furthermore, Congress has made clear that § 504 is to be read and interpreted together with Title VI, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (prohibiting sex discrimination by federal grantees),

and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 (prohibiting age discrimination by same), S. Rep. 100-64, 100th Cong., 1st Sess. 3, reprinted in, 1988 U.S.C.C.A.N. 3, 5 ("the same standards are to be used to interpret and enforce all four laws"). There can thus be no question that Defendant has discriminated against Mr. Williams and continues to discriminate against him as an alumnus and member of the Denver legal community.

The reader may object that the analogy is not complete because the race discrimination described above is remedied by the simple fiat that Black students be permitted to have access to all parts of the law school while various architectural changes may be necessary to give Mr. Williams access to the front of Defendant's classrooms or its student organization offices. While this is certainly true, it goes to the contours of the injunctive relief necessary to remedy the discrimination, an issue that was not raised in Defendant's motions and one that is, in any event, a fact-intense question inappropriate for resolution under Rule 12(b)(6) or Rule 56.

Defendant moves to dismiss or for summary judgment before a single discovery request has been served or a single deposition taken. Its motion for summary judgment appears to be limited to two questions:

- that Plaintiff is not entitled to compensatory damages because Defendant did not have the proper state of mind at the time the Lowell Thomas Law Building was built; and
- that Plaintiff has no standing because it is not likely that he will return to the campus in the future and face discrimination there.

Plaintiff demonstrates below and in the attached affidavits either that Defendant is wrong as a matter of law or that there are genuine issues of material fact that prevent summary judgment on those issues. As

to the remainder of the issues in this case, Plaintiff's Amended Complaint alleges discrimination actionable under § 504 and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., that entitles him to injunctive relief under both statutes and to compensatory and punitive damages under § 504. Plaintiff has standing to bring these claims and is not required to exhaust administrative remedies with respect to either statute. Defendant's motions should be denied in their entirety.

BACKGROUND

Kevin Williams is a recent graduate of the University of Denver College of Law. He is paralyzed from the chest down and uses a power wheelchair for mobility. He graduated on December 20, 1996, took the bar examination on February 26 and 27 and plans -- upon the receipt of a passing score -- to practice law in Denver.

The University of Denver College of Law is located in a series of buildings on the University's Park Hill campus. These buildings contain a number of architectural features -- and Defendant implements a number of policies -- that discriminate against people who use wheelchairs, including Mr. Williams. Many of these barriers and policies are set out in detail in the Amended Complaint. The principal building -- the Lowell Thomas Law Building ("LTLB") -- was constructed in 1982 through 1984. Hanley Aff. ¶ 5 (attached to Defendant's Brief in Support of Motions to Dismiss, for Summary Judgment, or to Strike Impertinent Allegations from the Amended Complaint ("Def. Br.")). It includes a number of architectural features that discriminate against people who use wheelchairs. The classrooms are all amphitheater-style, with the entrance at the top row, segregating people in wheelchairs -- including Mr. Williams -- to the back of the class. The Atrium -- a large open area used for College of Law gatherings -- consists of a peripheral area at grade and a carpeted and furnished central area that is

recessed three steps and therefore inaccessible to wheelchairs. The stage in the Davis Auditorium, also in LTLB, is inaccessible to wheelchairs and wheelchairs are segregated to a corner of the audience seating area, apart from the non-disabled audience. Amd. Cmplt. ¶¶ 25-35.

Most of the College of Law's student organizations are located in an inaccessible part of Foote Hall and for much of Mr. Williams's time at the College of Law, the school held events in other inaccessible parts of Foote Hall. Several of the buildings on campus have automatic doors that are shut off at times when the door itself is not locked, thereby denying access to wheelchairs at times when non-disabled people may still enter without a key. Defendant has repeatedly been informed of the discriminatory effects of these barriers and policies and has taken no action to remedy them. Amd. Cmplt. ¶¶ 36-43.

While he was a student at the College of Law, Mr. Williams experienced the discrimination of the barriers and policies described above and in the Amended Complaint: he was forced to sit in the back of the class; he sat apart from non-disabled students in Davis Auditorium; when others spoke from the stage of the auditorium, he spoke from the well in front of the stage; he sat at the periphery of many gatherings in the Atrium; he was denied access to student organization offices and many other College of Law events held in inaccessible portions of the campus; he often sat outside the building waiting for someone to open the door at times when non-disabled students could come and go. Amd. Cmplt. ¶¶ 25-45.

In addition to this pervasive discrimination that he encountered day-to-day as a student, Mr. Williams also encountered a number of specific acts of discrimination described in the Amended Complaint and analogous to that described in the Introduction above: he was informed that a dinner

honoring scholarship recipients -- including Mr. Williams himself -- was to be held in an inaccessible private club and that he could not attend; he requested and was denied approval for an organization of disabled law students, in spite of the presence of approved organizations of women, Black, Hispanic, Jewish, Christian, Native American, Asian, and lesbian and gay law students; when he objected to plans to hold graduation in a location with an inaccessible restroom -- which would have required graduates, family and guests who used wheelchairs to travel across campus to use the facilities -- he was asked repeatedly to consent to the location and, when he refused, publicly criticized by College of Law personnel. Amd. Cmplt. ¶¶ 47-74.

Following his graduation, Mr. Williams attended a bar review class in the LTLB. He sat in segregated classrooms or in a segregated part of Davis Auditorium and at one point was locked out in below-freezing weather and had to wait for a non-disabled person to come along because the school had turned off the automatic doors before it had locked the manual doors. Amd. Cmplt. ¶ 43; Williams Aff. ¶¶ 9-10.

Mr. Williams plans to remain in the Denver area to practice law and to attend continuing legal education ("CLE") classes, alumni functions and other events open to the public that are held at the College of Law. Amd. Cmplt. ¶ 16, 20-23. This is, in fact, something that Defendant actively encourages. Soon after graduation, Mr. Williams received a letter welcoming him to the College of Law Alumni Association and expressing the hope that he would "become a member of the strong alumni network." The letter also informed Mr. Williams that, as a new graduate, he was automatically enrolled as a member of the Alumni Association and that the benefits included free library privileges for the first five years after graduation and use of the DU Career Service Office for as long as he practices.

Williams Aff. Ex. 2. Mr. Williams intends to return to the school to use the library and Career Service Office and will be attending the spring commencement to watch his friends graduate. Id. ¶ 11.

While he was a student, Mr. Williams complained to College of Law and University personnel in writing numerous times and had numerous meetings with these and other individuals concerning the discriminatory barriers and policies at the school. Williams Aff. ¶ 8 and Ex. 1. Most of the major discriminatory features of the College of Law remain unchanged. For example, there are still no classrooms with a seating capacity of over 30 to 35 people in which all seats and the podium are accessible and the Atrium and student organization offices remain inaccessible. Id. ¶ 16.

In an attempt to settle these issues without resort to litigation, Mr. Williams retained the undersigned to draft a demand letter, setting forth the architectural and programmatic discrimination as well as the discriminatory conduct to which Mr. Williams had been subjected -- and of which Mr. Williams had repeatedly informed Defendant. Robertson Aff. Ex. 1. In response, Defendant made several conclusory promises about its intent to comply with the law in the future, expressed the desire to mediate the remainder of the claims, and stated that it was going to hire an architect to evaluate certain of the claims. Lynch Aff. Ex. 1 (attached to Def. Br.). Mr. Williams agreed that mediation would be appropriate but made several requests, including that Defendant make specific its representations of future compliance and that it provide him with the information he would need to mediate. Robertson Aff. Ex. 2. Defendant rejected these requests, id. Ex. 3, and this lawsuit followed.

On or about January 9, 1997, the undersigned received a copy of the architect's report. It addressed seven architectural features, one of which was not part of Plaintiff's demand, and did not address others, including the Atrium. The architect gave the opinion that changes to three of the

features, including the student organization offices and the classrooms, should not be attempted. With respect to the other four, the architect proposed solutions and estimated costs. In response to this report, the undersigned wrote Defendant's counsel to ask whether Defendant intended to adopt any of the suggested solutions and, with respect to the student organization offices and classrooms, how it intended to address the discriminatory conditions. Robertson Aff. Exs. 4-5. The undersigned received no reply to this letter and only learned in the affidavit of Dean Dennis Lynch attached to the present motions that Defendant apparently plans to implement the changes recommended by the architect. Robertson Aff. ¶ 8. Defendant still has not made any of these changes, or addressed any of the other architectural and programmatic discrimination alleged in Plaintiff's Amended Complaint.

ARGUMENT

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). This is especially so where, as here, many of the operative facts turn on Defendant's state of mind. See Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994). The Court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Roman v. Cessna Aircraft Company, 55 F.3d 542, 543 (10th Cir. 1995) (citations omitted). Summary judgment should not be granted where there exist "genuine issues of material fact." Fed. R. Civ. P. 56.

1. Plaintiff has stated a claim against Defendant under the ADA and Section 504.

Both § 504 and the ADA prohibit discrimination against people with disabilities, including intentional disparate treatment, segregation, denial of benefits or services, provision of unequal benefits or services and failure to remedy architectural barriers that segregate or exclude people with disabilities.

All of the discriminatory barriers, conduct and policies that Mr. Williams encountered and continues to encounter violate these laws. Defendant's arguments that these laws are simply about architectural barriers -- and that the discriminatory treatment Mr. Williams encountered was simply a matter of "attitude" or a "social issue," see Def. Br. at 6, 30-31, not covered by these laws -- is wrong and reflects a failure to read the statutes, their implementing regulations and relevant case law.

1. Plaintiff has stated a claim under Section 504.

Section 504 states, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the 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. This statute is one of four statutes proscribing discrimination by recipients of federal funds. It is "patterned after, and is almost identical to, the antidiscrimination language of . . . [Title VI] . . . and [Title IX] . . . The Section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. 93-1297, 93d Cong., 2d Sess., reprinted in, 1974 U.S.C.C.A.N. 6373, 6390.

"[T]o state a claim under section 504, a plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the benefit sought, (3) that he was discriminated against solely by reason of his handicap, and (4) that the program or activity in question

receives federal financial assistance." Johnson v. Thompson, 971 F.2d 1487, 1492 (10th Cir. 1992) (citations omitted), cert. denied 507 U.S. 910 (1993). Defendant does not challenge the first, second or fourth of these elements, but appears to argue that the treatment Mr. Williams received did not constitute discrimination solely based on his handicap.

Discrimination prohibited under § 504 is described in detail in its implementing regulations. A recipient of federal funds is prohibited from denying a disabled person the opportunity to participate in or benefit from its services, providing a disabled person with benefits or services that are not equal to or as effective as those provided non-disabled people, providing different or separate benefits or services to disabled people, or otherwise limiting a disabled person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service. See 34 C.F.R. § 104.4(b)(1). "[T]hese regulations were drafted with the oversight of Congress; they provide 'an important source of guidance on the meaning of § 504.'" School Bd. of Nassau County v. Arline, 480 U.S. 273, 279-80 (1987) (quoting Alexander v. Choate, 469 U.S. 287, 304 n.24 (1985)); see also Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir.) (Congress has expressed approval of these regulations and they thus have the force of law), cert. denied 116 S.Ct. 64 (1995). While the regulations specify that one type of impermissible disability discrimination is discrimination through inaccessible facilities, see 34 C.F.R. § 104.21, the language of the statute itself and of 34 C.F.R. § 104.4(b)(1) is much broader, reaching provision of unequal services, segregation and harassment of the type encountered by Mr. Williams.

1. Defendant's architectural barriers violate Section 504.

Facilities are "new construction" that are required to be "readily accessible to and usable by people with disabilities" if construction commenced after June 3, 1977. 34 C.F.R. § 104.23; McGregor v. La. State Univ. Bd. of Supervisors, 3 F.3d 850, 861 (5th Cir. 1993), cert. denied 510 U.S. 1131 (1994). Construction on the Lowell Thomas Law Building commenced in 1982. Hanley Aff. ¶ 5. Contrary to Defendant's unsupported declaration, see Def. Br. at 5, the new construction regulations were in place when the ground was broken on LTLB. See Robertson Aff. Ex. 6 (34 C.F.R. § 104.23 (1982)).[1] This regulation incorporated by reference a standard known as ANSI A117.1-1961(R1971), see § 104.23(c), which required at the time LTLB was built that "[f]loors on a given story shall be of a common level throughout or be connected by a ramp . . ." ANSI A117.1-

[1] Defendant quotes an excerpt from the operative regulation to give the impression that only part of each new facility need be accessible. See Def. Br. at 2. This is not the case. The regulation reads, in its entirety:

> Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

34 C.F.R. § 104.23(a) (1982) (Robertson Aff. Ex. 6). This language makes clear that every part of every new facility must comply and that, even if only part of a facility is new, it, too, must comply.

1961(R1971) ¶ 5.5.2 (see Robertson Aff. Ex. 7 (ANSI A117.1-1961)). Because the floors of the classrooms, auditorium and Atrium in LTLB are not on a common level or connected by a ramp, the building was built in violation of this standard.

Defendant does not contest that its buildings contain architectural barriers. Rather, it claims that the regulations are inapplicable to LTLB because that building was built with private funds. This argument ignores the language of § 504 and the holding of this Court. Section 504 explicitly provides that "the term 'program or activity' means all of the operations of . . . a college [or] university . . . any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b)(2)(A); see also Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 974 (D. Colo. 1992) (if any part of the entity receives federal financial assistance, the whole entity is deemed to be a program receiving federal financial assistance under § 504). The Civil Rights Restoration Act of 1987, which added § 794(b)(2)(A), was enacted specifically to overturn Grove City College v. Bell, 465 U.S. 555 (1984) -- which had limited Title IX (and, by analogy, § 504) to the programs actually receiving federal funding -- and to "restore . . . Section 504 . . . to the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the Grove City decision [in 1984]." S. Rep. No. 100-64, 100th Cong. 1st Sess. 4, reprinted in, 1988 U.S.C.C.A.N. 3, 6. This institution-wide application was thus the law at the time LTLB was built in 1982.[2]

[2] The regulation Defendant cites to support its position to the contrary is part of the guidelines for accessible design of parks, forests and public property, see 36 C.F.R. § 1190.2, cited in Def. Br. at 2, and is utterly irrelevant to the present case.

Existing facilities -- such as Foote Hall -- are not required to be entirely accessible if the school can demonstrate that it operates each program or activity that takes place in such existing facilities "so that the program or activity, when viewed in its entirety, is readily accessible to" persons with disabilities and that it "gives priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate." 34 C.F.R. § 104.22(a) & (b). The student organizations, a program or activity conducted almost exclusively in Foote Hall, is not, when viewed in its entirety, even remotely accessible to people with disabilities nor is it offered in an integrated setting. Amd. Cmplt. ¶ 40.

2. Defendant's conduct toward Mr. Williams violates Section 504.

Plaintiff alleges that he was subjected to segregation, harassment and other intentional disparate treatment on the basis of his disability. See Amd. Cmplt. ¶¶ 25-74. Defendant does not deny, for the purposes of these motions, that this conduct occurred. Rather, Defendant attempts to dismiss these allegations as "social issues." See Def. Br. at 30-31. However, conduct of the sort encountered by Mr. Williams has been held to constitute discrimination under § 504 and related statutes. It goes without saying that segregation, in and of itself, is a form of discrimination. See, e.g., Locascio v. City of St. Petersburg, 731 F. Supp. 1522, 1533-34 (M.D. Fla. 1990) (violation of §504 to construct stadium that had segregated wheelchair seats); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002, 1006 (S.D. Ill. 1988) (granting preliminary injunction under §504 to student with AIDS who had been segregated into separate classroom). The Supreme Court has held that provision of an entirely segregated legal education was illegal because, among other reasons, it denied Black law students access to faculty, administration and alumni. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

While Mr. Williams was not segregated to a separate campus, as the Black law students were in Sweatt, the segregation that existed at the College of Law provided him far less access to faculty, administration and alumni than non-disabled students received. The Supreme Court has also noted that forcing Black students to sit in the back of the class would constitute discrimination under the Equal Protection Clause. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 532 (1979).

Provision of unequal services has been at the center of many Title IX cases in which female student athletes complained of athletic programs inferior to those provided male athletes. See, e.g., Roberts v. Colo. State Bd. of Agriculture, 998 F.2d 824 (10th Cir.), cert. denied 510 U.S. 1004 (1993). If providing the women's team with lockers inferior to those of the men's team constitutes discrimination under Title IX, see, e.g., Cook v. Colgate, 802 F. Supp. 737, 745 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17 (2d Cir. 1993), Defendant cannot argue that Mr. Williams's legal education -- during which he was relegated to the back or the margins of many activities and excluded completely from others -- was "equal" to that of non-disabled law students.

Allegations of harassment of a law student based on disability by university personnel have been held to state a claim under § 504. See Rothman v. Emory Univ., 828 F. Supp. 537, 541-42 (N.D. Ill. 1993).[3] See also Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1355-56 (10th Cir. 1987) (harassment based on disability constitutes discrimination under, among other statutes, § 504). And of course sexual harassment -- far from being an extra-legal "social issue" -- has been a mainstay

[3] These claims were later dismissed because they were not substantiated. See Rothman v. Emory Univ., NO. 93 C 1240, 1996 WL 377049 at *1-2 (N.D. Ill. July 1, 1996). This does not undermine the holding that the plaintiff had originally pleaded a cause of action under § 504.

of Title IX jurisprudence. See, e.g., Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Bruneau v. South Kortright Central Sch. Dist., 935 F. Supp. 162, 175 (N.D.N.Y. 1996) (school district may be liable for student-on-student sexual harassment). In addition, it is a violation of § 504 to fail to provide a disabled student with a roommate, Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993), and a violation of Title IX to maintain a sex-segregated student organization on campus. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 555 (5th Cir.), vacated as moot 464 U.S. 67 (1983). Defendant's barriers and policies that isolated Mr. Williams from other students and discriminated against him in the approval of and access to student organizations all violate § 504.

2. Plaintiff has stated a claim under the Americans with Disabilities Act.

Title III of the Americans with Disabilities Act prohibits discrimination on the basis of disability by places of public accommodation, including private universities. 42 U.S.C. §§ 12181(7)(J) & 12182(a). Discrimination under this Title includes the denial of participation in a benefit or service and the provision of a benefit or service that is unequal to or separate from that provided non-disabled persons, § 12182(b)(1)(A)(i) - (iii), as well as failure to remove architectural barriers from existing facilities where such removal is readily achievable. § 12182(b)(2)(A)(iv). The "readily achievable" standard is a highly fact-specific one, requiring an analysis of the cost of the action needed and the financial resources of the defendant. § 12181(9). Defendant does not argue, in either its motion to dismiss or its motion for summary judgment, that the required renovations are not "readily achievable."

As is the case with § 504, the ADA covers far more than just architecture. Segregation on the basis of disability is, in and of itself, a violation of the ADA. Helen L., 46 F.3d at 333. See also

Williams v. Wasserman, 937 F. Supp. 524, 530 (D. Md. 1996) (same); Fiedler v. v. American Multi-Cinema, Inc., 871 F. Supp. 35, 38 (D.D.C. 1994) (violation of ADA to segregate wheelchair seats at rear of movie theater). And provision of unequal services, without regard to the location of those services, is a violation as well. See, e.g., Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 19-20 (1st Cir. 1994) (plaintiff stated a claim under Title III of the ADA for provision of unequal insurance benefits based on HIV status); Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1320-23 (C.D. Cal. 1996) (ADA Title III applies to claims for insurance discrimination based on HIV status of spouse). Plaintiff has stated a claim under the ADA.

2. Plaintiff is entitled to damages under Section 504.[4]

1. Plaintiff is entitled to compensatory damages under Section 504.

Defendant concedes, as it must, that compensatory damages are available under § 504 for intentional conduct. See Def. Br. at 11, see also Tanberg, 787 F. Supp. at 972-73 (relying on the Supreme Court's decision in Franklin v. Gwinnett County Pub. Sch,, 503 U.S. 60, 73 (1992), that damages were available under Title IX). Plaintiff has alleged that the conduct of Defendant and its agents was intentional, Amd. Cmplt. ¶ 47, and that Defendant was repeatedly put on notice of the architectural and programmatic violations but did not remedy them. Id. ¶ 75; see also Williams Aff. ¶ 8. These allegations state claims for compensatory damages under § 504.

[4] Plaintiff does not claim damages under Title III of the ADA.

Defendant argues that compensatory damages are inappropriate because this is solely an "architectural barrier case." Def. Br. at 11. This is clearly wrong in light of the allegations of paragraphs 47-74 of the Amended Complaint, which state claims for actionable intentional conduct under § 504 and which Defendant's affidavits do not contest. In addition, compensatory damages are available where an entity perpetuates discriminatory barriers with "at least deliberate indifference to the strong likelihood that a violation of federally protected rights will result." Ferguson v. City of Phoenix, 931 F. Supp. 688, 697 (D. Ariz. 1996). In Ferguson, the City of Phoenix used a "911" emergency system that violated § 504 -- a "communications barrier," id. at 693, analogous to Defendant's architectural barriers. The Ferguson plaintiffs alleged that the City's "knowing violations . . . over more than a year" constituted intentional discrimination. Id. at 697. The court agreed that the claim for compensatory damages should not be dismissed and that the plaintiffs should be permitted to take discovery on the question of the City's knowledge and belief. Id. The case of Tyler v. City of Manhattan, 849 F. Supp. 1442 (D. Kan. 1994) -- relied on by Defendant -- is not to the contrary, as the plaintiff there did not allege intentional conduct. Id. at 1444. Mr. Williams's allegations that he was subjected to intentional discriminatory conduct and that he and others repeatedly informed Defendant of its architectural and programmatic violations while these violations remain unremedied, Amd. Cmplt. ¶¶ 47-77, state a claim for compensatory damages under § 504. To the extent Defendant's affidavits attempt to claim that it did not have the requisite intent in building LTLB, Plaintiff has demonstrated a genuine issue of material fact concerning Defendant's intent in failing to correct LTLB's barriers in the meantime, precluding summary judgment.[5]

[5] Defendant's argument that it cannot have had the requisite intent because the Lowell

Thomas Law Building was built in 1984 and passed every applicable inspection is also irrelevant for the following reasons: Far more than one building is at issue in this litigation; far more than just architecture is at issue in this litigation; since its construction in 1984, Defendant has repeatedly been put on notice that LTLB, other buildings and other aspects of its program do not comply with § 504, Williams Aff. ¶ 8; in any event, LTLB was built in violation of § 504 and its implementing regulations as they read in 1984, see supra pp. 12-13; and the fact that Defendant's architect may have "agreed to deliver a building which complied with all the applicable codes and regulations," Def. Br. at 11-12, may be an issue between Defendant and its architect but is not relevant to Defendant's liability to Plaintiff.

Defendant further argues that compensatory damages are not necessary and cites to this Court's decision in Tanberg. In Tanberg an employee had been discharged because he had tested positive for HIV. This Court held that compensatory damages were necessary because injunctive relief might not have been as effective in that case. Id., 787 F. Supp. at 973. In the present case, however, while injunctive relief can provide equality and integration in the alumni, CLE and other future events Plaintiff attends and participates in, no injunctive relief can provide him with the equal and integrated law school education that was denied him. He is entitled to compensatory damages for this deprivation.

Defendant's response that Plaintiff should have no cause of action for intentional discrimination because he "has completed his educational program with great success," Def. Br. at 12-13, is simply specious. That the victim of discrimination has the intelligence and perseverence to make the most of the situation does not excuse the entity that established the discriminatory conditions or engaged in discriminatory conduct. Many fine lawyers and scholars were educated under racially segregated conditions. That they ultimately succeeded is a tribute to their own talents, not absolution for the system under which they were educated. In a more recent example, the Supreme Court in Franklin did not require the high-school-student plaintiff to prove that her coach's sexual harassment prevented her from enrolling or graduating. It was sufficient that his discrimination was intentional. See id., 503 U.S. at 63, 74.

2. Plaintiff is entitled to punitive damages under Section 504.

Under the reasoning of Franklin and Tanberg, Plaintiff is entitled to punitive damages under § 504. In Franklin, the Supreme Court held that there was a damages remedy under Title IX and based its holding on "[t]he general rule . . . that absent clear direction to the contrary by Congress, the federal

courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Id., 503 U.S. at 70-71. When this Court held, in Tanberg, that compensatory damages may be recovered under § 504, it did so explicitly based on Franklin:

> [B]ecause Tanberg has a right to sue under the [Rehabilitation] Act for the discrimination alleged, any appropriate remedy, including compensatory damages, is available to "make good the wrong done." Franklin, --- U.S. at ---, 112 S. Ct. at 1033. Furthermore, Congress has not expressly disallowed compensatory damages under the [Rehabilitation] Act. It is thus clear that compensatory damages are not prohibited here.

Tanberg, 787 F. Supp. at 972 (emphasis added). "Any appropriate remedy" is not limited to compensatory damages and Congress has not expressly disallowed punitive damages under § 504. Where, as here, a defendant has acted intentionally or with reckless or callous disregard for the plaintiff's civil rights, punitive damages may be appropriate.

A number of courts have held, based on Franklin, that punitive damages are available under § 504. See Ferguson, 931 F. Supp. at 698; Garrett v. Chicago Sch. Reform Bd. of Trustees, No. 95 C 7341, 1996 WL 411319 at *3-4 (N.D. Ill. July 19, 1996)(Attachment 1 hereto); DeLeo v. City of Stamford, 919 F. Supp. 70, 74 (D. Conn. 1995); Simenson v. Hoffman, No. 95 C 1401, 1995 WL 631804 at *7 (N.D. Ill. Oct. 24, 1995)(Attachment 2 hereto); Kedra v. Nazareth Hosp., 868 F. Supp. 733, 740 (E.D. Pa. 1994); Penney v. Town of Middleton, 888 F. Supp. 332, 342 (D. N.H. 1994).[6]

[6] Several courts have relied on Franklin in finding punitive damages an appropriate remedy for violation of other statutes that were silent as to remedy. See, e.g., Lebow v. Am. Trans Air, Inc., 86 F.3d 661, 670-71 (7th Cir. 1996) (punitive damages available under Railway Labor Act); Oldroyd v. Elmira Sav. Bank, F.S.B., No. 96-CV-6227L, --- F. Supp. ---, 1997 WL 37046 at *8 (W.D. N.Y. Jan 29, 1997) (punitive damages available under 12 U.S.C. §1831j, protecting depository institution employees from retaliatory discharge)(Attachment 3 hereto).

The Kedra court set forth several reasons why "punitive damages are appropriate for § 504 violations," including the fact that "the Rehabilitation Act of 1973 is a remedial statute designed to protect plaintiffs' civil rights, and the Supreme Court has charged us to interpret such statutes broadly to give effect to the purpose behind their enactment" and that § 504 claims have been compared to tort claims, in which punitive damages are traditionally available. Id. at 740. These reasons hold here as well.

With one exception, the cases relied on by plaintiff were either decided before Franklin, see Americans Disabled for Accessible Pub. Transp. v. Sky West Airlines, 762 F. Supp. 320 (D. Utah 1991), Gelman v. Dep't of Educ., 544 F. Supp. 651 (D. Colo. 1982), or did not involve a demand for punitive damages. Tafoya v. Bobroff, 865 F. Supp. 742, 744 (D. N.M. 1994) (plaintiff did not request punitive damages; court holds that requisite intent for compensatory damages not shown), aff'd on other grounds, 74 F.3d 1250 (10th Cir. 1996). These cases are irrelevant to the analysis, under Franklin, whether punitive damages are available under § 504.

The other case cited by Defendant, Moreno v. Consolidated Rail Corp., 99 F.3d 782 (6th Cir. 1996) is simply wrong. It flagrantly ignores both the holding and the reasoning in Franklin to hold that punitive damages are unavailable under § 504. First of all, as noted above, the Franklin Court held that federal courts may award any appropriate relief "absent clear direction to the contrary by Congress." Id., 503 U.S. at 70-71 (emphasis added). The Moreno court, far from finding "clear" direction against punitive damages, denied such damages based on legislative silence in amending § 504 during the pre-Franklin era.

Because at the time Congress amended § 504 in 1986, 1987 and 1991 no court had yet awarded punitive damages under that statute, the Moreno court concluded that Congress intended to

preserve this situation. Id., 99 F.3d at 790-91. Franklin teaches, however, that Moreno's focus is far too narrow. The proper backdrop is the common law and almost two hundred years of federal court practice:

> In the years before and after Congress enacted [Title IX], the Court "follow[ed] a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule." . . . [T]his has been the prevailing presumption in our federal courts since at least the early 19th century.

Franklin, 503 U.S. at 71-72 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 375 (1982)). Congress amended the statute in 1986 "with the prevailing traditional rule in mind," Franklin, 503 U.S. at 73, and in the 1987 amendments, "made no effort to . . . alter the traditional presumption in favor of any appropriate relief for violation of a federal right." Id. In Franklin, the Supreme Court provides explicit guidance on the analysis of damages remedies in the light of the 1986 and 1987 amendments -- which were identical with respect to Title IX and § 504; Moreno ignores them. The 1991 amendment to § 504 -- not considered by Franklin because it did not affect Title IX -- was part of the Civil Rights Act of 1991 which addressed only employment issues. P.L. 102-166, 105 Stat. 1071. As such, it is not surprising -- or significant for this analysis -- that it added punitive damages to the employment provision of the Rehabilitation Act (29 U.S.C. § 791) without explicitly adding them to § 504 (29 U.S.C. § 794) governing discrimination by recipients of federal funds. In fact, one court has held that the 1991 amendment argues expressly in favor of punitive damage under § 504, as it "reveals to us that Congress has decided, at least in the context of Title VII, that punitive

damages are an appropriate remedy for violations of a plaintiff's civil rights." Kedra, 868 F. Supp. at 740.[7] Moreno was wrongly decided and punitive damages are appropriate under § 504.

3. Plaintiff has standing to bring claims for injunctive relief and these claims are not moot or unripe.

The constitutional and prudential doctrines of standing, mootness and ripeness serve to ensure that federal courts do not offer advisory opinions but rather resolve live controversies brought by those actually injured at a point when the relief requested can affect the conduct or condition complained of. Plaintiff here was a law student and is an alumnus and a member of the Denver legal community who will use the facilities at the law school for a number of reasons over the months and years to come. The controversy is real and live -- when Plaintiff attends alumni events and other programs open to the public he will have to do so in segregated and inaccessible facilities. Granting plaintiff the injunctive relief he has requested -- an order forcing Defendant to bring its facilities into compliance with the ADA and § 504 -- will afford real relief.

[7] Although Defendant did not move on these grounds, it is clear that Plaintiff has stated a claim for punitive damages. The prevailing standard for an award of punitive damages in a civil rights case requires intentional conduct or callous or reckless disregard for plaintiff's rights. Smith v. Wade, 461 U.S. 30, 50 (1983). Plaintiff's allegations of intentional conduct satisfy this standard. Amd. Cmplt. ¶¶ 47-74.

Mr. Williams will attend CLE's and alumni events and hopes to teach -- either in a tenure-track position or one of the many visiting or adjunct positions -- and to speak on an occasional basis at the school. In fact, since his graduation, Mr. Williams has been invited to speak at an event at the College of Law which was eventually canceled. Williams Aff. ¶¶ 12-13.[8] All of these are career-enhancing opportunities that non-disabled lawyers in the Denver legal community may participate in. Yet when Mr. Williams returns to the College of Law in any of these capacities he will do so under segregated conditions. The only classrooms that are fully accessible seat at most approximately 30 to 35 people, Williams Aff. ¶ 7, so that when Mr. Williams attends or teaches a CLE or lecture with an enrolment greater than 30, he will do so in a segregated location. As such, Defendant's allegation that it would accommodate Plaintiff's disability in any future teaching job is impossible.

Defendant's assertion that "alumni activities are only held in accessible locations," Lynch Aff. ¶ 10, is simply untrue. Attached to the Robertson Affidavit are excerpts from the College of Law "Alumni Newsletter" showing pictures and schedules of alumni events held in the LTLB classrooms or Davis Auditorium. See Robertson Aff. Exs 8-10. As the records of events held and scheduled at the College of Law are in Defendant's possession, Plaintiff should have the opportunity to demonstrate that there are other such events. Even if Defendant's declaration can be read to be a promise that future alumni events will held in accessible locations, this is -- given the size of the available facilities -- impossible, Williams Aff. ¶ 7, and cannot in any event render Plaintiff's claims moot. See United States v. W.T.

[8] Defendant's statement Mr. Williams would not be eligible for the single tenure-track position at the College of Law is too narrow. There are many other opportunities to teach at the school besides those on the tenure track. See Williams Aff. ¶ 13.

Grant Co., 345 U.S. 629, 633 (1953); Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1355 (10th Cir. 1987).

Defendant argues that Plaintiff's claims as a law student are moot while his claims based on attendance at CLE's and alumni functions are too speculative. Plaintiff's claim for injunctive relief is, at the very least, capable of repetition yet evading review. Mr. Williams's attendance at the bar review course -- in January and February of this year -- is a good example of why this is so: he was enrolled at the time the suit was filed; attended the course throughout the time Defendant drafted and filed its motion to dismiss; and concluded a week and a half before the present Opposition is being filed. Yet during the course, he encountered discrimination based on his disability. Williams Aff. ¶¶ 9-10; Amd. Cmplt. ¶ 43. It is unclear when Defendant would have Plaintiff bring this suit: any time he files suit, the discriminatory conduct -- attending a CLE or lecture in segregated facilities -- will be over before Defendant can file its motion to dismiss. See, e.g., Jones v. Ill. Dep't of Rehabilitation Serv., 689 F.2d 724, 728 (7th Cir. 1982) (claims of deaf graduate against school capable of repetition yet evading review based on possibility he might return for graduate study). This Court should hear this case because there is at least a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." Murphy v. Hunt, 455 U.S. 478, 482 (1982); see also United States v. Fisher, 55 F.3d 481, 487 (10th Cir. 1995).

1. Plaintiff has standing to bring claims for injunctive relief.

Plaintiff has standing because: (1) he has suffered an injury in fact and faces a real threat of imminent -- not conjectural or hypothetical -- future harm; (2) the injuries of which Plaintiff complains were caused by Defendant; and (3) these injuries will be redressed by a favorable decision. See Lujan

v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). Mr. Williams's standing is like that of any plaintiff in a public accommodations case: he has patronized the facilities in the past and will patronize them in the future, both before and after this litigation is resolved. That he is not, at any given moment, on the campus of the College of Law does not deprive him of standing. Defendant's argument that Mr. Williams "will no longer need to use the University of Denver Law School facilities," Def. Br. at 21 (emphasis added), is equivalent to a segregated restaurant claiming that a prospective Black patron has no standing because he doesn't "need" to dine at the restaurant. In public accommodations cases, standing -- a jurisdictional issue which may be raised by the court sua sponte, Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1333 (N.D. Cal. 1994) -- is simply never addressed in the consideration of the merits. Plaintiffs are not required to prove that they intend to eat at the restaurants, watch a game in the stadium, or watch a movie in the theater before bringing a claim that such facilities are inaccessible.[9] This conclusion is reinforced in the ADA context by the provision of that law that states, "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. § 12188(a)(1).

[9] See, e.g., Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995) (restaurant patrons with lung conditions have ADA claims against restaurant that permitted smoking); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994) (movie theater patron stated ADA claim against movie theater that had all of its seats in one section of the auditorium); Pinnock v. Int'l House of Pancakes, 844 F. Supp. 574 (S.D. Cal. 1993) (restaurant patron had ADA claim against restaurant for lack of access); Locascio v. City of St. Petersburg, 731 F. Supp. 1522 (M.D. Fla. 1990) (disabled plaintiffs stated claim against city for building stadium with segregated seating).

Defendant's standing argument boils down to the assertion that it is not likely, under Defenders and Lyons, that Mr. Williams will use the facilities at the College of Law. These cases are readily distinguishable on their facts. In Defenders, the Supreme Court denied standing under the Endangered Species Act where, for example, one plaintiff could only say that she intended to return to Sri Lanka to observe such species but "had no current plans" to do so as "[t]here [was] a civil war going on. I don't know. Not next year, I will say. In the future." Id., 504 U.S. at 563. In Lyons, the plaintiff was held not to have standing to challenge the use of chokeholds by the Los Angeles police because he could not demonstrate that it was likely he would (a) be arrested again and (b) if arrested, be subjected to the chokehold. Id., 461 U.S. at 105-06.

The likelihood that Mr. Williams will return to the College of Law to attend alumni, CLE and other events and that he will face discrimination there is far greater than the likelihood that the Defenders plaintiff will get back to Sri Lanka or the Lyons plaintiff will be placed in a chokehold. Rather, it is comparable to, for example, that of the plaintiff in Colorado Envtl. Coalition v. Lujan, 803 F. Supp. 364 (D. Colo. 1992), who was held to have standing under the Defenders standard to challenge the administrative action concerning two wilderness areas where the plaintiff was "a long-standing, frequent and active user of two of the areas in dispute." Id. at 367. See also Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) (plaintiffs who alleged that they "have observed and wish to continue to observe owls" on the land at issue had standing to challenge logging on that land).

In view of the detailed allegations presenting a high likelihood that Mr. Williams will return to the College of Law and will encounter discrimination there, the remainder of Defendant's standing cases are inapposite. See O'Brien v. Werner Bus Lines, Inc., No. 94-6862, 1996 WL 82484 at *4 (E.D. Pa.

Feb. 27, 1996) (plaintiffs did not allege that they were likely to use the bus service in the future); Schroedel v. N.Y. Univ. Medical Center, 885 F. Supp. 594, 599 (S.D. N.Y. 1995) (plaintiff did not allege that she regularly used the services of the defendant hospital); Hoepfl v. Barlow, 906 F. Supp. 317, 320 (E.D. Va. 1995) (allegation of refusal to perform surgery based on HIV status; surgery was performed elsewhere and plaintiff had moved to another state); Atakpa v. Perimeter Ob-Gyn Associates, P.C., 912 F. Supp. 1566, 1574 (N.D. Ga. 1994) (plaintiff did not allege "that she will ever seek services from defendants in the future").

Defendant's final case, Aikins, 843 F. Supp. 1329, firmly supports Plaintiff's standing. The Aikins court initially denied the plaintiff's standing under the ADA and § 504 to challenge a hospital's failure to provide a sign language interpreter as the plaintiff had alleged only that she owned a mobile home seven miles from the hospital and resided at the home several days each year. Id. at 1334. Once the plaintiff amended her complaint to add the allegation that she "consider[ed] it reasonably possible that she might need to seek services from the hospital," the court held that her pleadings were sufficient to confer standing. Aikins v. St. Helena Hosp., No. C 93-3933, 1994 WL 794759 at *3 (N.D. Cal. Apr. 4, 1994)(Attachment 4 hereto). Plaintiff's allegations of future harm are far more detailed and far more likely than those in Aikins II.

2. Plaintiff's claims are not moot.

Defendant argues that Plaintiff's claims are mooted by the fact of his graduation but relies entirely on cases that do not involve continuing harm. All of the cases Defendant cites in which graduation served to moot a claim involved benefits that -- unlike those at issue here -- accrue only to students, not to alumni or other members of the public. For example, the plaintiff in DeFunis v.

Odegaard, 416 U.S. 312 (1974) was challenging the rejection of his application to law school. By the time the Supreme Court heard oral argument, he was in his final quarter at the defendant law school and the school promised not to obstruct his graduation. Id. at 317. See also Board of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975) (challenge to rules governing school newspaper mooted by plaintiffs' graduation); Doe v. Marshall, 622 F.2d 118, 119 (5th Cir. 1980) (challenge to denial of participation in high school football program mooted by plaintiffs' graduation), cert. denied 451 U.S. 993 (1981). Admission to school and participation in either student journalism or athletics are not benefits and services available to alumni or the public.

More relevant to the present case is the Sixth Circuit's decision in Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679 (6th Cir. 1994), cert. denied 115 S.Ct. 1822 (1995). The plaintiff in that Establishment Clause case brought suit to force his high school to remove a portrait of Jesus Christ from the hallway wall. The court held that the claims were not rendered moot by the plaintiff's graduation because "the portrait of Jesus affects students and non-students alike. Status as a student is not necessary for standing in such case. [Plaintiff] still visits the school and will confront the portrait whenever he is in the hall." Id. at 681. The plaintiff would be back to visit the school -- and would thus suffer injury -- because he would be attending sporting events, dances and other social functions at the school. Id. Similar events will bring Mr. Williams back to the College of Law where he will encounter discriminatory conditions. His claims are not mooted by his graduation.

3. Plaintiffs' claims are ripe for adjudication.

This issue is ripe for adjudication. Unlike the cases cited by Defendant in which the disputes did not involve current violations of law but rather possible actions in the future which might violate

applicable laws,[10] Plaintiff here concretely alleges that the Defendant currently is in violation of § 504 and ADA. Nor is there any speculation that Plaintiff is being, and will be, harmed by these violations. As set forth in the attached affidavits:

- CLE classes will be held at the law school, see Robertson Aff. Ex. 11;
- alumni activities will be held at the law school, see Williams Aff. Ex. 2;
- Plaintiff will use the library, the Career Service Office and will attend the spring commencement to watch his friends graduate, see Williams Aff. ¶ 11;
- Plaintiff does want to attend CLE classes and alumni events at the law school, see Williams Aff. ¶¶ 12-14;
- because the only wheelchair-accessible classrooms at the law school have a seating capacity of no more than 30 to 35 people, see Williams Aff. ¶ 7, CLE classes and

[10] See Sierra Club v. Yeutter, 911 F.2d 1405, 1415 (10th Cir. 1990) (dispute not ripe because the defendant had not yet taken actions that were "irreconcilable with the Act's mandate"); Western Oil and Gas Assoc. v. Sonoma County, 905 F.2d 1287, 1290-91 (9th Cir. 1990) (dispute concerning local ordinances not ripe because it was unclear whether the ordinances would ever be applied and thus whether they would ever violate applicable federal laws), cert. denied 498 U.S. 1067 (1991); Toilet Goods Assoc. v. Gardner, 387 U.S. 158, 163-64 (1967) (dispute concerning agency regulation not ripe because agency had not applied regulation and if agency applied regulation in future the regulation might not violate applicable law); International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954)(plaintiffs' claim that one possible interpretation of a statute was unconstitutional was not ripe because the statute had never been applied in the manner complained of by the plaintiffs).

alumni events involving more than 30 to 35 people will be held in inaccessible locations; and

- Plaintiff knows that CLE classes and alumni events involving more than 30 to 35 people cannot be held in accessible locations and his decisions as to which classes and events to sign up for are currently being affected by his desire not to attend classes and events held in segregated and inaccessible locations. See Williams Aff. ¶ 15.

Because Plaintiff's current actions are being affected by Defendant's violations of § 504 and ADA, this action is ripe. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967) (dispute concerning agency regulations was ripe because the regulations were affecting the current decisions and day-to-day business of the plaintiff); New York v. United States, 505 U.S. 144, 174 (1992) (dispute concerning statute was ripe even though statute would not take affect for three years because plaintiff had to take current actions to meet requirements of statute when it took affect).

Defendant's claim that it will hold all future events that Plaintiff wishes to attend in accessible locations does not make this action unripe. As the Supreme Court has stated, "[d]espite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the [issue contested in the litigation] still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203-04 (1968) (same). A defendant claiming that an action should be dismissed because it has voluntarily ceased the allegedly illegal conduct bears a "heavy burden" of demonstrating that there is no reasonable expectation that the conduct will be repeated. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953); Knutzen v. Eben Ezer Lutheran Housing Ctr., 815 F.2d 1343, 1355 (10th Cir. 1987). Defendant cannot meet this burden because its claim that it will hold all future classes and events in

accessible locations is patently false in light of the fact that there are no accessible locations for classes and events involving more than 30 to 35 people. Williams Aff. ¶ 7. In addition, Defendant has disregarded Plaintiff's repeated requests for modifications to Defendant's buildings, programs and policies and "voluntarily" agreed to make some of these changes only after a lawsuit was threatened. "[A] change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy." Armster v. United States Dist. Court, 806 F.2d 1347, 1357 (9th Cir.1986).

4. Plaintiff has no obligation to exhaust administrative remedies under either the ADA or Section 504.

Defendant's argument that Plaintiff's claims under the ADA and Rehabilitation Act should be dismissed for failure to exhaust administrative remedies must be rejected. First, the plain language of the ADA demonstrates that Congress expressly declined to require plaintiffs seeking relief under Title III to exhaust administrative remedies. Second, Defendant's assertion that Plaintiff must exhaust his administrative remedies under § 504 fails because that assertion is premised on the erroneous claim that there is an exhaustion requirement under Title III of the ADA, and in any event the Tenth Circuit has unambiguously held that there is no exhaustion requirement under § 504.

1. Title III of the Americans with Disabilities Act Does Not Require Plaintiffs to Exhaust Their Administrative Remedies Before Filing Suit.

The enforcement section of Title III of the ADA prescribes that "[t]he remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to

any person who is being subjected to discrimination on the basis of disability ...." 42 U.S.C. § 12188(a)(1). Because there is no requirement in subsection 2000a-3(a) that plaintiffs must exhaust administrative remedies, there is no such requirement in Title III either.[11] See Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 553 (7th Cir. 1996), cert. denied 117 S.Ct. 771 (1997); Devlin v. Arizona Youth Soccer Ass'n, No. CIV 95-745 TUC ACM, 1996 WL 118445, at *2 (D. Ariz. Feb. 8, 1996) (Attachment 5 hereto); Grubbs v. Medical Facilities of Am., Inc., No. 94-0029-D, 1994 WL 791708 at *2 (W.D. Va. Sept. 23, 1994) (Attachment 6 hereto). The Department of Justice, which is charged with enforcing and promulgating regulations under Title III, has made it exceedingly clear that there is no exhaustion requirement under Title III. See Letter from Department of Justice to Senator Orrin Hatch, 4 Nat'l Disability L. Rep. ¶ 360, at 1-2 (Apr. 27, 1993) (emphasis added) (Attachment 7 hereto); Memorandum of the United States as Amicus Curiae in Colorado Cross Disability Coalition v. Nine West Group, Inc., C.A. No. 96-WY-2492-AJ (D. Colo. filed Dec. 20, 1996) (Robertson Aff. Exh. 12).

---

[11] Subsection 2000a-3(a) of Title 42 provides:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

With all due respect, the courts in the two decisions cited by Defendant simply misread section 12188(a)(1) to incorporate all of section 2000a-3 rather than only subsection 2000a-3(a). Thus these courts incorrectly rely on subsection 2000a-3(c), which does contain an exhaustion requirement, to find an exhaustion requirement under Title III of the ADA. See Howard v. Cherry Hills Cutters, Inc., 935 F. Supp. 1148, 1149-50 (D. Colo. 1996); Bechtel v. East Penn Sch. Dist., No. 93-4898, 1994 WL 3396 at *2 (E.D. Pa. Jan. 4, 1994).

Defendant's claim that there is an exhaustion requirement under Title III would require this Court to ignore the plain language of section 12188(a)(1), and requires this Court to assume that Congress made a mistake -- that is, that Congress meant to refer to all of § 2000a-3 but "accidentally" referred only to § 2000a-3(a).[12] This interpretation ignores the rule of statutory interpretation that "[w]here a legislature models an act on another statute but does not include a specific provision in the original, a strong presumption exists that the legislature intended to omit that provision." Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-39 (10th Cir. 1993)(citations omitted). Defendant's interpretation must also be rejected because it is based on speculation that Congress erred in the words it used in the ADA. See, e.g., Russell v. Dep't of Air Force, 915 F. Supp. 1108, 1115 (D. Colo.

[12] Defendant also claims that a number of "policies" exist in support of creating an exhaustion requirement. Without addressing the questionable merits of these policy arguments, it is beyond dispute that this Court must be guided by the intent of the legislature -- as determined by rules of statutory construction -- rather than arguments about what the legislature "ought" to do. See United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285, 293 (1963) ("Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken it is our function to enforce their will." (Citations omitted.)); Public Service Co. of N.M. v. General Elec. Co., 315 F.2d 306, 311 (10th Cir.) ("Policy considerations are for Congress -- not the courts."), cert. denied 374 U.S. 809 (1963).

1996) ("The 'cardinal canon' on statutory construction is that 'courts must presume that the legislature says in the statute what it means and means in the statute what it says there.'" (citations omitted)); Southern Ute Indian Tribe v. Amoco Prod. Co., 874 F. Supp. 1142, 1152 (D. Colo. 1995) ("In determining congressional intent, I look first to the language of the statute and assume that its plain meaning accurately expresses legislative purpose.").[13]

Because section 12188(a)(1) unambiguously incorporates only subsection 2000a-3(a) and not section 2000a-3 in its entirety, the exhaustion requirement of subsection 2000a-3(c) is not a part of Title III of the ADA and Defendant's motion to dismiss plaintiffs' ADA claim should be denied.

2. There is No Exhaustion Requirement Under Section 504.

Defendant's argument that Plaintiff's claim under § 504 should be dismissed for failure to exhaust administrative remedies must also be rejected.

[13] In any event, other subsections within section 2000a-3 make it clear that Congress said precisely what it meant and did not make a mistake by incorporating only subsection 2000a-3(a) in the ADA. For example, subsection 2000a-3(b) provides that a court may award attorneys' fees to the prevailing party. The ADA also provides -- separately and explicitly -- for attorneys' fees. 42 U.S.C. § 12205. Congress must have intended to incorporate only subsection 2000a-3(a), otherwise the ADA's separate attorneys' fee provision would have been redundant.

It is important to note that Defendant does not assert that § 504 contains an exhaustion requirement -- most likely because it is absolutely clear that no such requirement exists. Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1380-82 (10th Cir. 1981) (under §504 "plaintiff is not required to exhaust remedies as a prerequisite to filing this suit.")[14] Courts around the country have reached the same result. See, e.g., Doe v. Garrett, 903 F.2d 1455, 1459 (11th Cir. 1990), cert. denied 499 U.S. 904 (1991); Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern Cal., 719 F.2d 1007, 1021 (9th Cir.), cert. denied 467 U.S. 1252 (1983); Miener v. State of Mo., 673 F.2d 969, 978 (8th Cir.), cert. denied, 459 U.S. 909 (1982); Camenisch v. Univ. of Texas, 616 F.2d 127, 134 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981).

Faced with this overwhelming precedent, Defendant is left arguing that Plaintiff should be required to exhaust his administrative remedies before bringing his § 504 claim not because that law requires such exhaustion but rather because Title III of the ADA does. Def. Br. at 27. This argument must be rejected because, as set forth above, Title III does not require plaintiff to exhaust his administrative remedies.[15]

---

[14] In addition, 29 U.S.C. § 794a(a)(2) provides that the remedies and procedures of Title VI of the Civil Rights Act of 1964 apply to actions brought under § 504, and there is no exhaustion requirement under Title VI. See, e.g., Subryan v. Regents of the University of Colorado, 813 F. Supp. 753, 760 (D. Colo. 1993) (holding that the plaintiff "was not required to exhaust his administrative remedies . . . before bringing his Title VI claim").

[15] In any event, Defendant's assertion that Plaintiff could have exhausted his administrative remedies by bringing his claim "before the Equal Employment Opportunity Commission ("EEOC") or the Colorado Civil Rights Division ("CCRD")," Def. Br. at 28, is absurd because neither the EEOC nor the CCRD has the authority to accept Plaintiff's claim. The EEOC does not have jurisdiction over the

5. Defendant's motion to strike should be denied.

"Motions to strike are not favored, . . . [and] usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one the parties." 5 Wright & Miller, Federal Practice and Procedure §1382 at 683-90 (1969 & 1996 supp.) ("Wright & Miller"), see also United States v. Shell Oil Co., 605 F. Supp. 1064, 1085 (D. Colo. 1985). Only allegations "so unrelated to plaintiff's claims as to be unworthy of any consideration" should be stricken. Id. (quoting EEOC v. Ford Motor Co., 529 F.Supp. 643, 644 (D. Colo.1982)). Defendant moves to strike the paragraphs that describe the architectural barriers at the College of Law and those that set forth the disparate treatment and harassment to which Mr. Williams was subjected while at the school. That these paragraphs state claims for relief under the relevant laws is demonstrated in sections I.A.2 and I.B above. Furthermore, Defendant's motion should be denied because it does not claim that any of these paragraphs are prejudicial to it. Rawson v. Sears Roebuck & Co., 585 F. Supp. 1393, 1397 (D. Colo. 1984).

Paragraphs describing the architectural barriers at the College of Law and their effect on people in wheelchairs. (Amd. Cmplt. ¶¶ 1, 17, 23, 24, 25, 30, 31, 34, 44 and 53, cited in Def. Br. at 30-31). Defendant complains that these paragraphs are "generalized allegations about persons other than

---

discrimination issues in the case at bar but instead is empowered only "to prevent any person from engaging in any unlawful employment practice . . ." 42 U.S.C. § 2000e-5 (emphasis added). And Colorado law expressly prohibits the CCRD from enforcing federal law such as § 504. See C.R.S. § 24-34-308.

Plaintiff." In fact, they describe the very features at issue in this litigation. And Paragraph 53, far from being "inflammatory," see Def. Br. at 31, describes a very specific instance in which Mr. Williams was harmed by Defendant's architectural barriers. These paragraphs are directly relevant to the architectural barriers at the College of Law and their effects on Plaintiff.

Paragraphs describing disparate treatment and harassment by Defendant and its agents. (Amd. Cmplt. ¶¶ 50, 54-56, 65-66, 70-71, cited in Def. Br. at 30-32). Defendants argue that these paragraphs allege only "social issues." Plaintiff has demonstrated above that the allegations of disparate treatment and harassment state claims under § 504 and the ADA. Defendant complains that some of the allegations -- those that cite to newspaper articles -- should be stricken as hearsay. It is, however, premature to raise a hearsay objection, especially as no discovery has occurred and there will be other ways of substantiating the allegations contained in those paragraphs. See Miller v. Group Voyagers, Inc., 912 F. Supp. 164, 169 (E.D. Pa. 1996) (hearsay objection premature on motion to strike); Hanley v. Volpe, 305 F. Supp. 977, 981 (E.D. Wis. 1969) (same).

Paragraphs necessary for context to understand other parts of the Amended Complaint. (Amd. Cmplt. ¶¶ 52, 67-69, cited in Def. Br. at 31-32). It is improper to strike allegations that "might serve to achieve a better understanding of the claim for relief." Wright & Miller § 1382 at 695. It would be difficult to understand, for example, much of the significance of Dean Mary Roberts-Bailey's disparate treatment of Mr. Williams in the wake of the publication of his article, see ¶ 55-56, without knowing the substance of that article, see ¶ 54, and it is difficult to understand the substance of that article without introducing Tim Potter and noting that he passed away over the past summer. See ¶ 52. Again, it is hard to see how these paragraphs are "inflammatory."

Because all of the paragraphs in the Amended Complaint are relevant to Mr. Williams's claims, Defendant's motion to strike should be denied.

CONCLUSION

For the reasons set forth above, Defendant's motions should be denied in their entirety.

Respectfully submitted.

FOX & ROBERTSON, P.C.

Amy F. Robertson
Timothy P. Fox
3773 Cherry Creek Drive North
Suite 575
Denver, CO 80209
(303) 331-4428

Dated: March 6, 1997

Attorneys for Plaintiff

I hereby certify that on March 6, 1997, a copy of **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT, OR TO STRIKE IMPERTINENT ALLEGATIONS FROM THE AMENDED COMPLAINT** was served by first-class mail, postage prepaid, on:

Bruce W. Sattler, Esq.
Natalie Hanlon-Leh
Faegre & Benson LLP
2500 Republic Plaza
370 17th Street
Denver, CO 80202